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The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes

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Summary

The list of federally recognized Indian tribes is not a static one. The Department of the Interior's Bureau of Indian Affairs has an administrative process by which a group may establish itself as an Indian tribe and become eligible for the services and benefits accorded Indian tribes under federal law. The process requires extensive documentation, including verification of continuous existence as an Indian tribe since 1900, and generally takes considerable time. Final determinations are subject to judicial review. This report will be updated as warranted by legislative activity.

Federal Recognition or Acknowledgment of Indian Tribal Existence

The list of federally recognized Indian tribes is not static. Not only does Congress periodically pass legislation according federal recognition to individual tribes, but the Department of the Interior (DOI), through its Bureau of Indian Affairs (BIA) has a process, 25 C.F.R. Part 83, by which a group can establish itself as an Indian tribe and thereby become eligible for all the services and benefits accorded to Indian tribes under federal law.[1] Included among these are the ability to have land taken into trust under 25

[1] The federal courts have had a role in determining whether a group qualifies as an Indian tribe for a particular purpose. For example, in 1877, in *United States v. Joseph*, 94 U.S. 614, the Supreme Court determined that the Pueblos were not an Indian tribe for purposes of the Indian liquor laws. Later, their status was reconsidered, and the Pueblos were held to be an Indian tribe and their lands protected under a federal law that prohibited the sale or alienation of Indian land without federal approval. *United States v. Candelaria*, 231 U.S. 28 (1913). Groups have sought court orders to compel DOI to process their applications for acknowledgment in a more timely fashion. See, e.g., *Tribe v. Babbitt*, 233 F. Supp. 2d 30 (D.D.C. 2000). That approach may have been precluded by a ruling in *Mashpee Wapanoag Tribal Council, Inc. v. Norton*, 336 F. 3d 1094 (D.C. Cir. 2003), in favor of DOI. The court found that competing agency priorities and limited resources must be considered in claims that the length of time it takes to process an (continued...)

C.F.R. Part 151 and to conduct gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq*. As of November 16, 2001, there were approximately 212 groups petitioning under this process, including 186 that were not ready for evaluation.

The Administrative Recognition Process

DOI regulations, 25 C.F.R. § 83.7, include seven mandatory criteria. For each of these, the petitioning group must establish "a reasonable likelihood of the validity of the facts relating to that criterion." 25 C.F.R. § 83.6(d).

- Existence as an Indian tribe on a continuous basis since 1900. Evidence may include documents showing that governmental authorities — federal, state, or local — have identified it as an Indian group; identification by anthropologists and scholars; and evidence from newspapers and books.
- Existence predominantly as a community. This may be established by geographical residence of 50% of the group; marriage patterns; kinship and language patterns; cultural patterns; and social or religious patterns.
- Political influence or authority over members as an autonomous entity from historical times until the present. This may be established by showing evidence of leaders' ability to mobilize the group or settle disputes, inter-group communication links, and active political processes.
- Copies of its governing documents and membership criteria.
- Evidence that the membership descends from an historical tribe or tribes that combined and functioned together as a political entity. This may be established by tribal rolls, federal or state records, church or school records, affidavits of leaders and members, and other records.
- Unless unusual circumstances exist, evidence that most of the group's members do not belong to any other acknowledged North American tribe.
- Absence of federal legislation barring recognition.

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[1] (...continued)
acknowledgment petition is unreasonable within the meaning of the Administrative Procedure Act. 5 U.S.C. § 555(b). Other groups have tried the indirect approach of identifying a statute that requires that the plaintiff be an Indian tribe and suing under that statute in an attempt to force a court to determine whether that particular statute's definition of "Indian tribe" has been met. In *Golden Hill Paugusset Tribe of Indians v. Weicker*, 39 F. 3d 51 (2d Cir. 1994), involving a land claim by a group asserting that it is an Indian tribe and its land had been alienated without federal approval in violation of 25 U.S.C. § 177, the court remanded the case to the district court with instructions to enjoin the litigation for 18 months pending DOI resolution of the group's acknowledgment petition. In *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D. N.Y. 2003), the court temporarily enjoined a state-recognized tribe's construction of a gaming operation for 18 months pending DOI action on an acknowledgment petition. Both courts saw DOI's jurisdiction over the question as primary and their court's jurisdiction as secondary and seemed to have indicated that the court would take up the issue of tribal existence in the absence of a ruling by DOI.

Time Line for Handling Petitions by Groups Seeking Indian Tribal Status

- Group presents petition to BIA.
- BIA must acknowledge receipt of letter of intent or petition within 30 days. It must issue a *Federal Register* notice within 60 days. This acts as a notice to interested parties to submit factual or legal arguments in support of or opposing the petition. Notice is also to be supplied to the governor and attorney general of the state in which the group is located.
- BIA conducts a technical assistance review and informs the petitioner as to supplemental material needed. Petitioner may withdraw petition or supply needed material. No time frame is given for this stage of the process. If BIA finds that petition clearly does not meet certain mandatory criteria, it may deny petition and issue *Federal Register* notice.
- When the BIA determines that the petition is ready for active consideration, it informs the petitioner. No time frame is given.
- When active consideration begins, the petitioner and interested parties are notified of the names of researchers and their supervisors. No time frame specified for beginning active consideration.
- Proposed findings must be published in the *Federal Register* a year after active consideration has begun. But active consideration may be suspended for administrative reasons or petition problems.
- After proposed findings are published, supporters or opponents have 180 days to submit arguments in support or in opposition, with the possibility of a 180-day extension. During the period, the Assistant Secretary for Indian Affairs, upon request, may hold a formal meeting to inquire into the basis for the proposed finding.
- After the expiration of the comment period and any extension, the petitioner has a minimum of 60 days to respond, and time may be extended by the Assistant Secretary. Thereafter, the Assistant Secretary has the discretion to solicit comments from the petitioner or interested parties, but no unsolicited comments will be accepted. The petitioner and interested parties will be informed of any extension of the comment or response periods.
- When the comment period has expired, the Assistant Secretary will consult with the petitioner and interested parties to determine a time frame for considering evidence and arguments.
- A final determination must be published in the *Federal Register* within 60 days after consideration has begun unless there has been extension by the Assistant Secretary. The determination must be published in the *Federal Register*. Petitioner and interested parties must be notified of any extension of the 60 days.
- Determination is effective 90 days after publication unless the petitioner or an interested party files a request for reconsideration with the Interior Board of Indian Appeals (Board) under 25 C.F.R. § 83.11. To vacate the determination, the petitioner or interested party must prove by the preponderance of the evidence: (1) that there is new evidence that could affect the determination; (2) that a substantial part of the evidence relied

upon was unreliable; (3) that the petitioner's or the BIA's research was inadequate in a material respect; or (4) that reasonable alternative interpretations, not considered, would affect the determination. 25 C.F.R. § 83.11(d)(1)-(4).

- The Board may either affirm the determination or vacate it and remand it to the Assistant Secretary for reconsideration. Under certain circumstances, it may affirm the determination but send it to the Secretary for reconsideration.
- If the determination has been sent to the Secretary for reconsideration, the petitioner and interested parties have 30 days to submit comments. If an interested party opposing a petition submits comments, the petitioner shall have 15 days, after receipt of comments, to respond.
- The Secretary must make a determination within 60 days of receipt of all comments. If the Secretary decides against reconsideration, the decision becomes effective when all parties are notified.
- If the determination has been remanded to the Assistant Secretary, a reconsidered determination must be issued within 120 days of receipt of the Board's decision. The reconsidered determination is effective when notice is published in the *Federal Register*.
- Upon final agency action, a challenge may be raised in a federal district court under the judicial review provision of the Federal Administrative Procedure Act, 5 U.S.C. § 702.

Proposed Legislation

Congress has considered replacing the administrative recognition process by a statute to be administered outside of BIA. H.Rept. 105-737, 105th Cong, 2d Sess. (1998), saw the current administrative process as poorly funded, too protracted, and deficient in due process. Costs per tribe can run to $500,000; the average year sees the completion of only 1.3 petitions; and sometimes the very people who search out the facts of a case craft the decision. A GAO Report, *Indian Issues: Improvements Needed in Tribal Recognition Process* (November 2001), recommended that DOI improve its responsiveness and develop transparent guidelines for interpreting the main criteria under the recognition procedures. Three 107th Congress bills, S. 504, S. 1392, and H.R. 1175, would have provided a statutory recognition process. Another, S. 1393, would have authorized grants for petitioning groups and local government participation. Other bills recognize specific groups as Indian tribes.

In the 108th Congress, two bills would have established a statutory framework for an administrative acknowledgment process by which an Indian group or tribe could petition DOI for recognition as an Indian tribe: S. 462 and S. 297. Another, S. 463, would have authorized grants for petitioning groups and local government participation in the administrative acknowledgment process.

In the 109th Congress, there have been several bills, including:

H.R. 309 would establish a process by which a Native Hawaiian governmental entity may be recognized by the United States. Specifically excluded from any powers conferred is the right to conduct gaming under IGRA or be eligible for any BIA programs and services not otherwise available.

H.R. 464 would establish an independent Commission on Indian Recognition, which is to operate for eight years, to adjudicate petitions by groups seeking recognition as Indian tribes. The bill would withdraw existing BIA authority to recognize groups as Indian tribes and require it to transfer all pending petitions to the Commission. The legislation would set procedures, including deadlines, for the Commission's handling of petitions and for according recognition. Included are: identification by at least one specified governmental or other entity, as an Indian group; existence as a community from historical times to the present; political influence and autonomy; governing documents; and, membership rolls. There are provisions making available to petitioners certain procedural rights in any adjudicatory hearing and the authority to bring an enforcement action in federal court.

H.R. 512 would, if a group requested it, require the Secretary to meet an expedited schedule for issuing proposed findings and final determinations for groups that have made an initial application before October 17, 1988, and were listed as "Ready, Waiting for Active Consideration" on July 1, 2004. It also would provide petitioners a means of judicial adjudication should the Secretary fail to meet the established deadlines as well as judicial review of an adverse determination.

H.R. 852 would extend recognition to the Duwamish Tribe; establish its service area; and, require the Secretary to take into trust any fee land, in the service area or the Tribe's aboriginal homelands, which is transferred by the Tribe to the Secretary within 10 years of enactment.

H.R. 1354 would specify that federal acknowledgment is not to be granted to any group unless it has met all criteria in 25 C.F.R., Part 83, in effect on January 1, 2004. It would require the Secretary, in issuing any proposed findings, to publish in the *Federal Register* detailed findings on the application of each of the criteria.

S. 437 would set a date by which the Secretary must review the petition of the Grand River Band of Ottawa Indians and submit detailed findings with respect to certain questions relating to the history of the Band. Failure to submit such a report would require the Secretary to recognize the Band as an Indian tribe. There is also a provision reaffirming any rights of the Band that have previously been abrogated or diminished.

S. 480 would provide federal recognition to six tribes of Virginia, require the Secretary to take land in specified counties in trust as a reservation for each of the tribes should such land be transferred to the Secretary for that purpose; and specifies that some of the exceptions to the Indian Gaming Regulatory Act's (IGRA) prohibition on gaming on lands acquired after October 17, 1988, would not be available to the tribes. It does not eliminate the exception under 25 U.S.C. § 2719(b)(1)(A), which requires the Secretary to make a two-part determination that gaming on the land would be in the best interest of the tribe and not detrimental to the local community in which the governor of the state concurs. Nor does it eliminate the other requirements under IGRA, including a tribal-state compact for casino gaming.

S. 630 would establish a statutory framework for an administrative acknowledgment process by which an Indian group or tribe could petition DOI for recognition as an Indian tribe with a government-to-government relationship with the United States and members entitled to federal services to Indians. The bill sets standards for eligibility that generally

deny eligibility to: groups formed after December 31, 2002, for the purpose of seeking acknowledgment; groups separating from an existing federally recognized Indian tribe; terminated tribes; and groups whose petition for acknowledgment had previously been denied by DOI. Among the mandatory criteria for acknowledgment in this legislation are: identification as an Indian group on a substantially continuous basis since 1900; existence of a distinct community comprised of a predominant portion of the membership since 1900; maintenance of political influence as an autonomous authority over members since 1900; evidence of governing documents and membership criteria; list with addresses of current members; evidence that members are not members of other Indian tribes; and, evidence that there has been no federal termination of tribal existence or prohibition on acknowledging the group.