Statement of Katherine A. Spilde, Ph.D.
Senior Research Associate
Harvard Project on American Indian Economic Development
Kennedy School of Government
Harvard University

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Mr. Chairman and distinguished members of the Committee, good morning. My name is Katherine Spilde and I am a Senior Research Associate with the Kennedy School of Government, Harvard University. Prior to my appointment at Harvard, I served in a number of research and policy positions here in Washington, D.C., including work with the Congress' National Gambling Impact Study Commission (NGISC) and the National Indian Gaming Association (NIGA). My background includes a Ph.D. in cultural anthropology, which frames my work on Indian affairs. I appear before the Committee today not as a representative of the Kennedy School of Government nor of Harvard University. Nor do I appear on behalf of any other person, corporation, or organization. I have no political, financial, organizational or other connections with anyone with any interest in the outcome of this hearing. I appear today at the unsolicited request of the Committee on Resources. I am honored to be here today to participate in this discussion of ways to improve the federal acknowledgment process.

I commend you on undertaking the very important task of finding a solution to the substantial delays facing Indian groups that are seeking federal recognition. In particular, I want to commend the Committee for showcasing the struggles endured by Indian groups who are petitioning for federal recognition. This is an important event because it highlights the frustrated attempts by---and impacts of these delays on--tribal groups to receive recognition decisions from the Office of Federal Acknowledgment (OFA) (formerly the Branch of Acknowledgment and Research (BAR)). Recently, we have heard a great deal about the system for federal recognition being 'broken.' However, some of the loudest voices for reform of the Federal Acknowledgment Process (FAP) have been those who are critical only of positive determinations and have called for a moratorium on all decision-making. I commend the Committee for holding a hearing that forwards the concerns of Indian groups seeking acknowledgment as Indian tribes, who have the most to lose if the process continues to stagnate. I am pleased that this hearing will focus on solutions, particularly on ideas for streamlining the process so that petitioning groups receive decisions in a timely manner.

The History of and Need for a Formal Recognition Process

In order for members of Indian tribes to be eligible for federal programs through the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS), the Indian tribal governments must have a formal government-to-government relationship with the United States. The names of all federally recognized tribes appear on a list that the Secretary of the Interior publishes annually, pursuant to the Federally Recognized Indian Tribes List Act of 1994. The latest list of tribes was published in the *Federal Register* on December 5, 2003 and includes 562 tribes.[1]

The United States government has recognized Indian tribes in various ways since its own inception. The earliest executive branch recognition of tribes occurred in the context of treaty-making and the establishment of executive order reservations.[2] In the twentieth century, the Department of the Interior determined which tribes were eligible for its administrative services. For example, after the 1934 Indian Reorganization Act (IRA), the Federal government's recognition activities focused exclusively on determining which Indian nations were eligible to organize under the Act and which were not. In 1934, the BIA compiled a list of 258 recognized tribes. In 1936, two Acts were passed that also allowed the Alaska and Oklahoma tribes to organize under the IRA. Between 1936 and 1978, Indian nations would generally get "on the list" through the Department of the Interior or Congress on a case-by-case basis.[3]

In 1978, the Bureau of Indian Affairs (BIA) established an administrative process for federal acknowledgment of unrecognized Indian tribes.[4] This process, called the Federal Acknowledgment Process, originated out of concern for Indian groups that were denied rightful recognition.[5] In addition, there were some concerns about tribes being administratively recognized at that time without any supporting standards.

The Process was Created to Address Considerable Delays

In undertaking a discussion of the critical importance of streamlining the processing of recognition petitions, it seems meaningful to point out that the current process was established in 1978 precisely to address the issue of long delays in making recognition decisions and concern about the absence of a formal process of recognition. One impetus for creating a formal process derived from the findings and

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[1] See also 25 C.F.R. § 83.5(a).

[2] "The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process." *Washington Law Review*. V. 66, January, 1991 at 210. See also, *The Great Father*, by Francis Prucha. (1984)

[3] "Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83." William W. Quinn, Jr. *American Indian Law Review*. V.17 No.1, 1992. According to Quinn, the so-called "Cohen criteria" were used as the standard.

[4] 25 C.F.R. § 83

[5] TASK FORCE TEN, AMERICAN INDIAN POLICY REVIEW COMMISSION, 94TH CONGRESS, 2ND SESSION, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS (1976). See also, "The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process." *Washington Law Review*. V. 66, January, 1991 at 210. There were many ways to be left off "the list." For example, many tribes in California remain unrecognized because of unratified treaties.

recommendations of Task Force No. 10 of the United States Congress' American Indian Policy Review Commission. Specifically, the work of the 1976 Policy Review Commission found that unrecognized tribes, because they were not being served by federal programs, were among the nation's poorest citizens. The Commission identified 133 unrecognized tribes, representing more than a hundred thousand people, and found that "the results of 'non-recognition' upon [those] Indian communities and individuals has been devastating."[6] The Commission's report essentially chastised various departments of the United States for their neglect of 'non-recognized' Indians and made six specific recommendations, including the establishment of a special office to determine tribal status by reviewing petitions submitted by unacknowledged Indian groups.[7]

Three court cases made the creation of a formal acknowledgment process even more urgent since the determination of tribal status stood as the threshold issue in each. The first, *United States v. Washington,* held that Indian tribes exercising treaty fishing rights were entitled to half the commercial fish catch in the State of Washington, but limited eligibility to treaty signatories and federally recognized tribes. In the second, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, two unacknowledged tribes claimed hundreds of thousands of acres of land in Maine which had been illegally ceded to the state. Following these two court cases, the Department of Interior (DOI) instituted an unofficial moratorium on acknowledging tribes until a system could be developed. Caught in the middle of this moratorium, the Stillaguamish Tribe's petition for federal acknowledgment awaited action by the Secretary until the Tribe sough equitable relief in federal court. In *Stillaguamish Tribe v. Kleppe,* the court described the moratorium as "arbitrary and capricious" and ordered the DOI to decide on the Stillaguamish petition within thirty days.[8]

Regulations governing the administrative process for Federal acknowledgment first became effective October 2, 1978. The regulations were designed to provide a uniform process to review acknowledgment claimants whose character and history varied widely, placing the burden of proof on the tribal groups themselves. This presumption results in rigorous research and documentation requirements and contributes to bureaucratic delays since OFA staff, who are tasked with evaluating petitions, are aware of the possibility of legal challenges to their recommendations and findings.[9]

Average Number of Decisions Per Year is Low

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[6] See "Lost Tribes: Native Americans and Government Anthropologists Feud over Indian Identity." *Lingua Franca*. May/June 1999, p. 36.

[7] AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 480-83. See also, "Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83." William W. Quinn, Jr. *American Indian Law Review*. V.17 No.1, 1992 at 51.

[8] See "Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83." William W. Quinn, Jr. *American Indian Law Review*. V.17 No.1, 1992, p. 41.

[9] See "The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process." Rachael Paschal. *Washington Law Review*. V. 66, January, 1991 at 210.

Today, we know that the system that was created in 1978 is not functioning as intended; that is, the process is not meeting the needs of the Indian groups still seeking formal recognition and therefore these groups continue to be denied the chance to prove they should be receiving critical services. BIA's regulations outline a process for evaluating a petition that was designed to take about two years.[10] The facts show that the process is inefficient and takes significantly longer than intended. In the 26 years since 1978, the OFA has made decisions on only 35 petitions (16 positive and 19 negative), which amounts to an average of 1.3 decisions per year. Since 1978, 294 Indian groups have submitted letters of intent; 9 are currently on the active list and 13 petitions are ready, waiting for active consideration. According to the BIA, under the current resources, it could take 15 years to resolve all of the currently completed petitions – those on the active and ready for active lists.[11] And of course a final determination is rarely the last word today, since lawsuits and appeals are common.

Reasons Why the Decisions are Slow

There are a host of reasons why the current process takes so long. For starters, the OFA is woefully under-funded. Significantly more funding is needed to ensure that the OFA is adequately staffed and provided with the resources required to address both the petitions themselves and the related work required by the contemporary political situation. Former Assistant Secretary for Indian Affairs Kevin Gover noted that one reason the OFA is consistently under-funded is because there are so many pressing Indian needs, such as police departments, schools and a solution to the trust system.[12] With so many competing priorities among existing federally recognized tribes, it is a difficult decision for the DOI to allocate scarce resources to this process.

The bigger problem is that there is no real constituency for unrecognized tribes. While the National Congress of American Indians (NCAI) does have a task force dedicated to the issues raised by the FAP, there is little incentive among federal agencies or Congress to address the needs of unrecognized Indian groups since they have no formal relationship with the federal government.

In addition to being seriously under-funded, the Bureau of Indian Affairs (BIA) has acknowledged the OFA staff is also overburdened. Currently, the OFA has only eleven full-time staff, who estimate that they spend between 40%-60% of their time fulfilling administrative responsibilities.[13] In addition, the process itself has become overly cumbersome, essentially drowning the staff in paperwork. For example, OFA staff

[10] "More Consistent and Timely Tribal Recognition Process Needed." United States General Accounting Office (GAO). February 7, 2002, p.2.
[11] Ibid. p.6.
[12] See Statement of Hon. Kevin Gover, Assistant Secretary, Indian Affairs, Department of the Interior, at the Hearing Before the Senate Committee on Indian Affairs on S. 611, The Indian Federal Recognition Administrative Procedures Act of 1999. May 24, 2000.
[13] "More Consistent and Timely Tribal Recognition Process Needed." United States General Accounting Office (GAO). February 7, 2002, p.6. See also "Strategic Plan: Department of the Interior Bureau of Indian Affairs, Office of Tribal Services, Brand of Acknowledgment and Research: Response to the November, 2001 General Accounting Office Report." September, 2002. p. 9.

is taxed with having to review and make recommendations on existing and incoming petitions, which is their task, while also undertaking many additional and distracting tasks, such as responding to information requests in connection with independent review and appeals of official determinations by the Interior Board of Indian Appeals (IBIA), with pending lawsuits and with responding to growing numbers of Freedom of Information Act (FOIA) requests. For example, both negative and positive findings now generate appeals and lawsuits, whether from the petitioners themselves or other interested parties. This growing burden also results from increased interest and participation in the process by local governments and states. Some of these parties have indicated that they view these FOIA requests as a means to deliberately slow down the process.

Suggestions for Improving the Process

Given the range of challenges involved in streamlining the process, my suggestions fall into three general categories: increased appropriations, supplemental human resources and changes in the current regulations to make it more efficient.

1) **Increased appropriations**

A recent report by the Bureau of Indian Affairs found that the OFA would need to triple the size of its current staff in order to meet the increased demands associated with petitions and follow-up requests.[14] As of September 2002, the BAR consists of eleven staff members ($1,100,000 FY2003 President's Budget.) The staff members include: one (1) branch chief, one (1) secretary, three (3) cultural anthropologists, three (3) genealogical researchers and three (3) historians. Meanwhile, the DOI's analysis and response to a November 2001 GAO Report recommends a total of 33 staff members ($3,184,000) to eliminate the current workload in three to four years.[15] As I mentioned, at current funding levels, it could take 15 years to resolve only those petitions on the active and ready for active lists.[16]

2) **More outside resources**

With adequate funding, OFA could hire additional staff to assist in responding to information requests, enabling OFA professional staff to focus on reviewing petitions. In short, professional staff with expertise on tribal history and genealogy should be focused exclusively on reviewing petitions, not spending their time making photocopies or preparing the administrative records for litigation in Federal Court. One additional alternative may be to contract with outside experts on particular petitions. Qualified historians, applied anthropologists and genealogists from academic institutions could be called upon as a resource, providing technical assistance and additional context for petitions, potentially saving time. OFA staff could be encouraged to utilize the expertise

[14] "Strategic Plan: Department of the Interior Bureau of Indian Affairs, Office of Tribal Services, Brand of Acknowledgment and Research: Response to the November, 2001 General Accounting Office Report." September, 2002. p. 9.
[15] Ibid. p., 10.
[16] Ibid. p., 6.

of scholars of the local region, which could be enormously helpful in providing critical historical context to the petitions themselves. In addition, BIA's Regional Offices could be encouraged to provide the OFA with access to critical information, both before and during field visits to petitioning Indian groups in that region.

3) Changes to current regulations

Reduce paper work Once funding and staffing needs are met, the process itself could be streamlined by reducing the paperwork associated with each petition. In some cases, the OFA staff is a victim of its own success. By turning out more final determinations annually (both positive and negative), they generate more FOIA requests and more appeals, resulting in additional administrative duties and generating more paperwork. There are a couple of ways to reduce the paperwork associated with each petition. First, the regulations could be adjusted to address when and how often interested parties could participate in the process. Currently, interested parties are allowed to comment on nearly each step of the petition process. The regulations were originally written to provide the maximum opportunity for comment in order to collect as much information as possible during the process and make the decisions defensible as possible. Under current political conditions, the comment and response process appears to be too involved and could be re-visited. By limiting the comment opportunities for outside parties, the paperwork and response times would both be reduced. It seems reasonable that interested parties would be notified when a letter of intent is filed, then allowed to comment only after OFA completes its work on the petition.

A second recommendation for reducing paperwork would be to re-visit and narrow the definition of who is eligible for "interested party" status. Following the 1994 regulations, some "interested parties" (i.e. scholars) were re-defined as "informed parties" with diminished rights of comment and response. Of course, this change was intended to streamline the process and reduce paperwork. It seems reasonable to consider narrowing the definition even further at this time by defining "interested parties" as those who have a legal or property interest in the final decision, such as other tribes or states.

Expedite Positive Findings Under the current regulations, the Assistant-Secretary, Indian Affairs (AS-IA) has the authority to expedite a proposed negative finding after the technical assistance review. What this means is that the AS-IA can issue a proposed negative finding before allowing the petition to enter the active consideration phase of the process. This expedited negative finding is based upon three of the required criteria (e-g.) I would recommend exploring a grant of authority to the AS-IA to expedite a proposed positive finding in the same way. If the AS-IA, after the technical assistance review, finds that the tribal group has an obviously strong case for recognition, then the DOI could recommend that Congress legislatively recognize the group based on the research and findings of the OFA and the AS-IA. This process would give Congress the opportunity of exercising its constitutional authority with regard to Indian tribes and while also reducing the challenges of litigation.

Thank you for the opportunity to present my ideas with you today.