

**Hearing on S. 611 - *The Indian Federal Recognition  
Administrative Procedures Act of 1999***

**May 24, 2000**

**Statement Submitted on Behalf of the Mashpee Wampanoag  
Indian Tribal Council, the United Houma Nation, the  
Shinnecock Indian Nation, the Pamunkey Tribe, and the  
Miami Nation of Indiana by the  
Native American Rights Fund**

The Native American Rights Fund represents the Mashpee Wampanoag Indian Tribal Council, the United Houma Nation, the Shinnecock Indian Nation, the Pamunkey Tribe, and the Miami Nation of Indiana in federal recognition matters. We appreciate the opportunity to submit testimony on S. 611 - "*The Indian Federal Recognition Administrative Procedures Act of 1999*". This statement is, in large part, based on our experience in representing the above, and other, tribes seeking federal recognition.

S. 611 is a response to the various problems that have been identified in the acknowledgment process established and presently used by the Bureau of Indian Affairs (BIA). Nonfederally recognized tribes are mindful and appreciative of your dedication and earnestly hope that your efforts will bear fruit this Congress in the form of a fair and reasonable federal recognition process for Indian tribes to replace the present burdensome, expensive and unworkable administrative recognition process. Our experience with the process convinces us that the present administrative process is beyond repair. Nothing less than a comprehensive remaking of the process by Congress can restore fairness and reason to the recognition process. We support the effort to deal with those problems. The bill provides solutions to some of the problems. We have recommendations as to the others and as to some parts of the bill itself.

**RECOGNITION**

When the United States establishes a government-to-government relationship with an Indian tribe, it is said to have recognized or acknowledged the tribe. Although the government recognized most of the presently federally-recognized tribes in historic times, it continues to acknowledge tribes to the present day. Under current law, both Congress and the Department of the Interior (Department or DOI) have authority to recognize tribes.

## RECOGNITION PRACTICE

### 1. Congress

Congress recognizes tribes through special legislation. *See e.g.*, Act of October 10, 1980, 94 Stat. 1785 (Maliseet Tribe of Maine); Act of October 18, 1983, 97 Stat. 851 (Mashantucket Pequot Tribe of Connecticut), Act of November 26, 1991, 105 Stat. 1143 (Aroostook Band of Micmacs); Act of September 21, 1994, 108 Stat. 2156 (Little Traverse Bands of Ottawa Indians and the Little River Band of Ottawa). Congress reviews and acts on requests for special recognition legislation on a case-by-case basis.

### 2. Department of the Interior

Before 1978, DOI made acknowledgment decisions on an ad hoc basis using the criteria “roughly summarized” by Assistant Solicitor Felix S. Cohen in his *Handbook of Federal Indian Law* (1942 ed.) at pp. 268-72. In 1978, the Department issued acknowledgment regulations in an attempt to “standardize” the process. Both the process and the criteria established in the regulations were different than those used before 1978.

#### A. The Acknowledgment Regulations

In the 1970s various controversies involving nonrecognized tribes,<sup>1</sup> including an increase in the number of requests for recognition,<sup>2</sup> led the Department to review its acknowledgment practice. That in turn led to the promulgation of the 1978 acknowledgment regulations. 43 Fed. Reg. 39361 (Sept. 5, 1978) *presently codified* at 25 C.F.R. Part 83.<sup>3</sup> In publishing the regulations, the government explained that prior to 1978 requests for acknowledgment were decided on a “case-by-case basis at the discretion of the Secretary.” 43

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<sup>1</sup> In 1972, the Passamaquoddy Tribe of Maine sued the federal government. The Tribe wanted the government to file a land claim on its behalf under the Indian Nonintercourse Act, 25 U.S.C. § 177, even though it was not then federally-recognized. *See, Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). In the mid-1970s, a number of nonfederally recognized tribes attempted to assert treaty fishing rights in the *United States v. Washington* litigation. *See, United States v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

<sup>2</sup> For example, the Stillaguamish Tribe requested recognition in 1974. When the Department of the Interior refused to act on the request, the Tribe filed suit. The federal district court in Washington, D.C. ordered the Department to make a decision on the request. *Stillaguamish v. Kleppe*, No. 75-1718 (Sept. 24, 1976). The Department recognized the Stillaguamish Tribe in October 1976.

<sup>3</sup> The proposed acknowledgment regulations were first published for comment on June 16, 1977. 42 Fed. Reg. 30647. They were redrafted and published for comment a second time on June 1, 1978. 43 Fed. Reg. 23743. They were published in final on September 5, 1978.

Fed. Reg. at 39361. The 1978 regulations were an attempt to develop “procedures to enable the Department to take a uniform approach” in the evaluation of the petitions. *Id.*

Under the 1978 regulations, groups submit petitions for recognition to the Assistant Secretary for Indian Affairs. 25 C.F.R. § 83.4. The petition must demonstrate all of the following “in order for tribal existence to be acknowledged”: (a) identification of the petitioner as Indian from historical times; (b) community from historical times; (c) political influence from historical times; (d) petitioner's governing document; (e) a list of members; (f) that petitioner's membership is not composed principally of persons who are not members of any other North American Indian tribe; and (g) that petitioner was not terminated. 25 C.F.R. § 83.7(a)-(g).

Upon receipt of a petition, the Assistant Secretary causes a "review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe." 25 C.F.R. §83.9(a). Most of the technical review is carried out by the Branch of Acknowledgment and Research (BAR).<sup>4</sup>

The next step is active consideration by BAR. 25 C.F.R. § 83.9(d). The Assistant Secretary, through the BAR, then issues proposed findings for or against recognition. 25 C.F.R. § 83.9(f).<sup>5</sup> Petitioners have the opportunity to respond to the proposed findings. 25 C.F.R. § 83.9(g). After consideration of responses to the proposed findings, a final determination is made. 25 C.F.R. § 83.9(h). The Assistant Secretary's final determination is final unless the Secretary of the Interior requests reconsideration. 25 C.F.R. § 83.10(a).

## **B. Practice under the Acknowledgment Regulations**

The process used to consider petitions under the 1978 regulations is not as simple as the regulations suggest. In response to discovery requests in *Miami Nation of Indiana v. Babbitt*, No. S 92-586M (N.D. Ind. filed 1992), the Department described the actual process used in processing petitions for recognition under the regulations.

Once a petition is placed on active consideration, a three person team is assigned to evaluate it. *Miami* Discovery Responses. The team consists of an anthropologist, a genealogist, and a historian. *Id.* Each member of the team evaluates the petition under the 25 C.F.R. Part 83

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<sup>4</sup> Technically, recognition decisions are made by the Assistant Secretary - Indian Affairs. Review of petitions and recommended decisions are made by the BAR staff (formerly called the Federal Acknowledgment Project).

<sup>5</sup> In a recent notice in the federal register, 65 Fed Reg. 7052, February 11, 2000, the BAR now says it will not accept new materials between the time a petition is placed on active consideration and the issuance of the preliminary determination. If any materials are received during this time, they will be “held for review during preparation of the final determination.” 65 Fed. Reg. at 7053. Thus, even if the answer to an issue is in the materials submitted, it will be ignored until the preliminary determination has been made. This is inefficient and places petitioners at a serious disadvantage as they may be faced with trying to get an adverse finding reversed, a more difficult proposition than correcting a problem before a decision is made.

criteria and prepares a draft technical report.<sup>6</sup> *Id.* Evaluation of the petition consists of verifying the evidence submitted by the petitioners, supplementing the evidence submitted where necessary,<sup>7</sup> and weighing the evidence as to its applicability to the criteria. *Id.* The individual reports are cross-reviewed by each team member. *Id.* Preparation of the reports includes comparing the petition to past determinations and interpretations of the regulations. *Id.*

Following completion of the draft technical reports, there is an “extensive internal review, termed peer review”. *Id.* Peer reviewers are other BAR professional staff not assigned to the case. The technical reports are reworked “until the professional staff as a group concludes that the report provides an adequate basis for a recommendation to the Assistant Secretary.” *Id.*

After review and editing by the BAR chief, the acknowledgment recommendations and reports are subject to legal review by the Solicitor's Office and Bureau of Indian Affairs line officials up to the Assistant Secretary. *Id.* If those officials require more information or clarification, BAR typically provides the information through meetings. *Id.*

### **C. The 1994 Revisions to the Acknowledgment Regulations**

In 1991, DOI proposed revisions to the 1978 regulations. 56 Fed. Reg. 47320 (Sept. 18, 1991). The revisions were not finalized until February 25, 1994. 59 Fed. Reg. 9280 (February 25, 1994) codified in 25 C.F.R. Part 83 (1999 ed.). In promulgating the revisions, the federal government stated:

None of the changes made in these final regulations will result in the acknowledgment of petitioners which would not have been acknowledged under the previously effective acknowledgment regulations. Neither will the changes

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<sup>6</sup> Under the notice published in the federal register, these technical reports will no longer be prepared. “The AS-IA is directing that, except for current cases where the technical reports have already been drafted, technical reports such as have been prepared in the past shall no longer be prepared to accompany the summary under the criteria.” 65 Fed. Reg. at 7053. This places petitioners who have received a negative determination at a serious disadvantage because without the detailed technical reports, it becomes that much more difficult to know how and why the BAR arrived at its decision.

<sup>7</sup> Under the notice published in the federal register, the BAR is no longer allowed to conduct “substantial additional research” which often was done by BAR staff to supplement a petitioner’s research especially when deficiencies remained after BAR provided technical assistance to the petitioner. 65 Fed. Reg. At 7052. This places some petitioners at a serious disadvantage because the present federal recognition process is expensive, in our experience ranging from \$200,000 to over \$1 million dollars, and petitioners have little or no financial resources to research, assemble, and submit a documented petition. Thus, it becomes more important for the Congress to adequately fund the Commission and the Administration for Native Americans at sufficient levels to carry out the Act and to give petitioners an opportunity to fully present a documented petition. Otherwise, some tribes that should be federally recognized will be denied such recognition.

result in the denial of petitioners which would have been acknowledged under the previous regulations.

59 Fed. Reg. at 9280.

The 1994 revisions specify the types of evidence that will be accepted to establish the two most troublesome criteria, community and political influence. These are listed in 25 C.F.R. § 83.7(b) and (c). They also include a special provision for determining whether a group was previously recognized and the effect of previous recognition. 25 C.F.R. § 83.8.

## **PROBLEMS TO BE ADDRESSED BY S. 611**

There are a number of concerns with the Department's recognition practice under the acknowledgment regulations. Even before the present Departmental process was established in 1978, there was doubt that the Department and its Bureau of Indian Affairs could deal fairly with applicants for recognition. In addition, practice before the Department and BAR has shown a number of weaknesses in the procedures used to review and determine petitions. Those concerns, along with concerns about some of the provisions of S. 611 and proposed solutions are set out below.

### **1. Independent Decision-Making**

One of the fundamental issues is who should make recognition decisions. Congress has the ultimate authority, but DOI has interpreted the general grant of rulemaking in 25 U.S.C. §§ 2 and 9 to allow it to do so as well. It was under those general statutes that the Department issued the existing acknowledgment regulations. The numerous oversight hearings on those regulations and the legislative attempts to change the Department's acknowledgment process have all indicated that it is questionable that DOI's Bureau of Indian Affairs, which manages the government's relationship with federally recognized tribes, can make an impartial decision on the recognition of "new" tribes.

In the years 1975 to 1977, the American Indian Policy Review Commission (AIPRC) conducted a review of "the historical and legal developments underlying the Indians' relationship with the Federal Government and to determine the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians." Final Report American Indian Policy Review Commission, Cover Letter (May 17, 1977). The review included a study of the status of nonrecognized tribes and resulted in reports and recommendations concerning recognition policy. *Id.* Chapter Eleven; Report on Terminated and Nonfederally Recognized Indians, Task Force Ten, AIPRC (October 1976). The AIPRC described the posture of DOI in making recognition decisions and expressed concern about the ability of the Department to deal fairly with nonrecognized tribes.

The second reason for Interior's reluctance to recognize tribes is largely political. In some areas, recognition might remove land from State taxation,

bringing reverberations on Capitol Hill. There also is the problem of funding programs for these tribes.

Interior has denied services to some tribes solely on the grounds that there was only enough money for already-recognized tribes. . . . Already-recognized tribes have accepted this 'small pie' theory and have presented Interior with another political problem: The recognized tribes do not want additions to the list if it means they will have difficulty getting the funds they need.

Final Report AIPRC at 476.

Concern with impartiality has echoed in the various hearings on recognition that have been held since 1977. There is widespread apprehension that the Department, the Bureau of Indian Affairs, and BAR are subject to inappropriate political influence in making recognition decisions. *See e.g.* the Statement of Raymond D. Fogelson, Dept. of Anthropology, University of Chicago on S. 611 a Bill to Establish Administrative Procedures to Determine the Status of Certain Indian Groups Before the Senate Select Committee on Indian Affairs, 101st Cong., 1st Sess. 177 (May 5, 1989) (“While I respect the individual conscientiousness, competence, and integrity of members of B.A.R., I believe that an office separate from B.I.A. will be more immune to possible allegations of conflicts of interests or to the potential influence of Bureau policy and attitudes. It seems to me that the B.I.A. has enough to do in administering Federal Indian programs and serving the needs of the Indian clientele without also assuming the additional role of gatekeeper.”); Deposition of John A. Shapard, Jr., former chief of BAR, in *Greene v. Babbitt*, No. 89-00645-TSZ (W.D. Wash.) at p. 33 (“there's a general, all-persuasive attitude throughout the bureau that they don't want anymore tribes”); *see also*, the Statement of Allogan Slagle in *Oversight Hearing on Federal Acknowledgment Process Before the Senate Select Committee on Indian Affairs*, 100th Cong., 2nd Sess. 198 (May 26, 1988) (“No matter how fair the BIA/BAR staff attempt to be, and no matter how they try to see that their decisions reflect a common standard, the perception of many tribes is that there are inequities in the way that the requirements are enforced.”)

Those concerns persist to this day and taint the existing DOI recognition process. In 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 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.

We have two suggestions, however on this aspect of S. 611. Under Section 5(a)(3)(A) and (B), petitions that are under “active consideration” are retained and determined by the Department. If an independent Commission is warranted, it should apply to all petitions now

before DOI. An alternative is to give those petitioners who are under active consideration the option of remaining with DOI or transferring to the Commission.

We suggest that the Committee consider one additional change to the provisions creating the Commission, that of adding to the end of Section 4(e)(1)(A) the following proviso: “provided that no individual presently employed by the Branch of Acknowledgment and Research, Bureau of Indian Affairs, shall be employed by the Chairperson.” This limitation is not meant to imply bias or lack of qualifications on the part of any individual staff member at the Branch of Acknowledgment and Research. It is unreasonable, however, to expect that those individuals, many of whom have worked under the dictates of the present acknowledgment regulations for years, could quickly adapt to the dramatically different decision-making process to be used by the Commission (and perhaps applying different criteria such as those suggested below.) To insure a smooth and expeditious transition to the new way of doing business, the Commission should be required to employ fresh personnel.

**Proposed Changes to S. 611:** Subsections 5(a)(3)(A) and (B) should be amended to provide for the transfer of all pending petitions to the independent Commission or to give those petitioners under active consideration the option of remaining with DOI or transferring to the Commission. Add to the end of Section 4(e)(1)(A) the following proviso: “provided that no individual presently employed by the Branch of Acknowledgment and Research, Bureau of Indian Affairs, shall be employed by the Chairperson.”

## **2. Hearing Process**

Under the process established in the acknowledgment regulations, it is technically the Department's Assistant Secretary - Indian Affairs that makes recognition decisions. The BAR staff, however, do all the work of reviewing petitions, independent research, and decision writing. That work takes a number of years and is, in large part, hidden from petitioners.

S. 611 makes a needed change from the DOI process. Formal hearings are provided in Sections 8 and 9. Such hearings will open the decision-making process thereby giving petitioners a much better idea of their obligations and more confidence in the ultimate decision. Such hearings will also focus the examination of the Commission and the staff in a manner that is completely lacking in the present process.

There are five matters that should be made more specific in Sections 8 and 9 of S. 611.

1) It should be made clear that the Commission itself will preside at both the preliminary and adjudicatory hearings. Under the DOI acknowledgment regulations, it is the Assistant Secretary - Indian Affairs that makes recognition decisions. The Assistant Secretary, however, is not involved in most of the work that leads to those decisions. The BAR staff reviews petitions, does additional research, and writes the recommended decisions. The Assistant Secretary signs off on those decisions. Although there is no doubt that staff will be necessary to aid the Commission in making decisions, the Commission should be much more involved in

decision-making than the Assistant Secretary. One way to accomplish that is to make clear that it is the Commission that presides at all hearings.

2) It should be made clear that records relied upon by the Commission will be made available in a timely manner to petitioners. Both the present Departmental process and S. 611 include preliminary decisions to which petitioners respond. Our experience with BAR indicates that it is imperative to make clear that the Commission and its staff provide petitioners with the documents and other records relied upon in making the preliminary decision. In one case, DOI issued proposed findings on the United Houma Nation (UHN) petition in mid-December 1994. Under the acknowledgment regulations, UHN had 180 days to respond to the proposed findings. BAR only began making records relative to the proposed findings available to the Houma Nation's researchers in April of 1995 for a response due June 20, 1995. It was past the June 20, 1995 deadline before most documents were received.

3) Congress should strengthen that part of Section 9 that allows the cross-examination of Commission staff. Presently, Section 9 provides for cross-examination of Commission staff but the Commission is not required to call staff to testify. All staff that worked on a preliminary determination should be required to testify and to be available for cross-examination. The historical, anthropological and genealogical determinations made on petitions for recognition are detailed and complex. The only valid way to test those determinations is to allow petitioners to cross-examine their authors. In addition to giving petitioners an effective way to determine what the Commission and its staff has done, it will force the Commission and its staff to focus its attention in the adjudicatory hearing. In testimony on H.R. 4462 (a bill very similar to S. 611), Karen Cantrell, an anthropologist and attorney who has worked as a contract anthropologist for BAR, expressed her views of needed changes in the recognition process.

Decisions reached in the Federal Acknowledgment Project will be more consistent and objective when petitioning groups can cross-examine experts and witnesses and review all research materials relied upon by decisionmakers. Cross-examination and review of research materials allows evidentiary facts and statements to be tested for reliability.

Written Testimony of Karen Cantrell on H.R. 4462 and H.R. 2549 at p. 3 (July 22, 1994) (emphasis added).

4) The bill should explain the precedential value of prior DOI recognition decisions and should make the records of those decisions readily available to petitioners. BAR has stated that it views its prior decisions as providing guidance to petitioners. It is very difficult, however, to get access to or copies of the records relating to those decisions or to get guidance from BAR as to the specific decisions it intends to follow in a given case. In one particular instance, for example, the Shinnecock Indian Nation submitted its petition in September, 1998 and subsequently met with BAR staff on March 1, 1999 to obtain technical assistance to strengthen its petition. The BAR staff advised the Nation's representatives to review two specific recognition decisions and federal court opinions. The Nation's representatives requested copies of those

decisions and a list of those federal court opinions. BAR eventually provided the copies by March 2000 - a relatively simple task to begin with. It has yet, over a year later, to provide the list of federal court opinions. With the transfer of petitions to the Commission, the precedential value of BAR, and earlier Departmental decisions, should be explained with specificity. If those prior decisions are considered precedent, the records of those decisions should be promptly made available to petitioners.

5) The language in Section 9 referring to the APA should be clarified. The existing language is ambiguous.

**Proposed Changes to S. 611:** Section 8(c)(1)(A)(i) should be amended to state that all records relied upon by the Commission and its staff in making the preliminary determination shall be made available to petitioners including prior decisions relied upon and records relating to such prior decisions. Given the deadlines for hearings in the bill, those records must be available immediately. Section 9 (a) should be modified to provide that the adjudicatory hearing will be on the record pursuant to 5 U.S.C. §§ 554, 556, and 557. Section 9(b) should state that all Commission staff that worked on the preliminary determination and that assist the Commission in the final determination must be available for cross-examination.

### **3. The Criteria in S. 611**

The criteria in the DOI acknowledgment regulations and in S. 611 are almost exactly the same.<sup>8</sup> The creation of the Commission only solves half the problem with the present administrative process. Under Section 5 of S. 611, the Commission would apply the same criteria to the determination of tribal existence as those applied in the present administrative process. As written and applied, the criteria in the present regulations are so burdensome and heavily dependent upon primary documentation that many legitimate Indian tribes simply cannot meet them. If these same criteria are applied by the Commission, the Commission will become overwhelmed 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.

In 1995, this Committee heard testimony on S. 479 which was a bill almost identical to S. 611, including the criteria for federal recognition. Testimony by Arlinda Locklear, Esq. explained in detail the unreasonableness of the criteria. *See*, Statement of Arlinda Locklear, Esq. on S. 479, a Bill to Provide for Administrative Procedures to Extend Federal Recognition to Certain Indian Groups Before the Senate Committee on Indian Affairs, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 13, 1995). We supported that testimony.

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<sup>8</sup> In one respect, S. 611 is even more burdensome than the current acknowledgment regulations. Under criterion 25 C.F.R. § 83.7(a), the regulation requires the petitioner to demonstrate identification as an Indian entity since 1900. But S. 611, § 5(b)(1) would require such demonstration since 1871.

Today's testimony by Arlinda Locklear reiterates the unreasonableness of the current criteria and explains events that have since occurred. Those events have culminated in some of our concerns with the unreasonableness of the criteria being addressed in pending bill H.R. 361, a Bill to Provide for Administrative Procedures to Extend Federal Recognition to Certain Indian Groups, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (July 19, 1999). As such, we believe the criteria in H.R. 361 are more reasonable.

We ask the Committee to assume full responsibility in establishing reasonable criteria, rather than abdicating its responsibility by simply enacting into law the BIA's acknowledgment regulations, and to consider the criteria in H.R. 361. If the Committee does consider the criteria, then S. 611 will move towards becoming a complete and effective resolution to deal with non-federally recognized Indian tribes.

#### **4. The Exclusion of Indian Groups Under Section 5 of S. 611.**

Unfortunately, S. 611 would exclude Indian groups from the recognition process. That is unwarranted in the following respects.

##### **A. Groups Denied Under the BIA Recognition Process**

Section 5(a)(2)(C) excludes Indian groups that have been denied recognition under the Department's acknowledgment regulations.

S. 611, as presently written, is a significant change from the process under DOI's acknowledgment regulations. For that reason, it seems fair to let those groups denied under the regulations have at least one chance under the Commission.

**Proposed Changes to S. 611:** Section 5(a) should be amended to provide that groups that have been denied recognition under the acknowledgment regulations are allowed a hearing before the Commission. Section 5(a)(2)(C) should be deleted. Section 5(a)(2)(E) should be amended (if it is not deleted under another proposal we have made) to make clear that it does not apply to groups that have challenged BAR final determinations in court.

##### **B. Groups Involved in Litigation**

###### The Mashpee Example

Section 5(a)(2)(E) excludes some Indian groups that were involved in litigation raising tribal status issues in federal court. The situation of the Mashpee Wampanoag Tribe of Massachusetts illustrates the problems with this section. The exclusion of such groups cannot be justified.<sup>9</sup>

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<sup>9</sup> DOI's acknowledgment regulations explicitly state that a petitioner that meets the requirements for recognition "shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes". 25 C.F.R. 83.12

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(a).

During the time that the Department was promulgating the acknowledgment regulations, the Mashpee filed a land claim under the Indian Nonintercourse Act (NIA), 25 U.S.C. 177.<sup>10</sup> At that time, there was a moratorium within the Department of the Interior on the recognition of new tribes as DOI worked out its acknowledgment policy. Eventually, in June 1977, Interior published proposed recognition regulations. The Mashpee then requested a continuance of their land claim litigation based on the new regulations. The court declined but invited DOI to participate. The government chose not to do so. The land claim trial went forward and a jury found that the Mashpee Tribe was not a tribe for NIA purposes. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd* 592 F.2d 575, *cert. denied*, 444 U.S. 866 (1979).<sup>11</sup> However, because of the nature and circumstances of the Mashpee litigation, that decision should not bind the United States and prevent it from determining whether the Mashpee Tribe should be recognized.

As discussed above, the United States was not a party to the land claim litigation and, in fact, refused to take part in it. Thus, the Mashpee litigation and decision do not bind the United States. That is part of the reason that the United States has accepted and is reviewing Mashpee's petition based on a ruling by the Associate Solicitor for Indian Affairs.

In addition, the issue before the court in Mashpee was whether Mashpee met the requirements of the NIA. One of the requirements is that the plaintiff must show that it is a tribe under the common law standard of *Montoya v. United States*, 180 U.S. 261 (1901). “The formulation of this standard and its use by the federal courts occurred... without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior.” *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 59 (2nd Cir. 1994) (emphasis added); *Joint Tribal Council of the Passamaquoddy Tribe*, 388 F. Supp. 649 (D. Maine 1975) *aff'd* 528 F.2d 370, 377 (1st Cir. 1975). Federal recognition and tribal status for NIA purposes are different matters.

The criteria that must be proved to show tribal status for NIA purposes and the criteria for recognition in S. 611 are not the same. Contrast the Montoya standard with S.611, 5(b). *See also Golden Hill*, 39 F.3d at 59 (Application of the *Montoya/Candelaria* definition and the BIA criteria, which are the same criteria used in S. 611 [9], “might not always yield identical results.”).

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<sup>10</sup> Other recognized tribes also filed NIA land claims during this time. *See e.g. Narragansett Tribe of Indians v. Southern Rhode Island Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Main 1975) *aff'd* 528 F.2d 370 (1st Cir. 1975).

<sup>11</sup> Meanwhile, DOI finalized its recognition regulations establishing the Federal Acknowledgment Project (now called the Branch of Acknowledgment and Research) within the DOI. Mashpee talked to DOI about recognition and the Solicitor's office made a threshold determination that the Tribe was eligible for the process. Mashpee first prepared a documented petition in 1980. The petition was revised in 1990. The Tribe has spent over \$400,000 over the 20 years that it has worked on a petition for recognition.

An examination of the Mashpee decision shows the difference in the tribal status determination made in that case and the recognition determination to be made under S.611. In Mashpee, the district court relied on the *Montoya* standard in instructing the jury on tribal status. The jury focused on dates relevant to the NIA land claims. They found that Mashpee was not a tribe in 1790, 1869, 1870, and 1976 but was a tribe in 1834 and 1842. The district court did not attempt to explain those findings. On appeal, the Tribe questioned how the jury could find that the Tribe went out of existence between 1842 and 1869. The Court of Appeals affirmed the district court decision, finding that the Tribe had voluntarily assimilated into non-Indian society during those years. *Mashpee*, 592 F.2d 575.

The Court of Appeals justified that conclusion as follows. The Court stated that based on the creation of the District of Mashpee in 1834 and the authorization to divide common Tribal land in 1842 the jury “could infer that the tribal organization, having accomplished its purposes, became less important to the community.” *Id.*, 592 F.2d at 590 (emphasis added). The Court ruled that the jury could have found “the seeds of change to have been sown when division of the common land was authorized in 1842” and that “in and out migration” from 1834 to 1870 were “suggestive not so much of tribal cohesiveness and community as of individual aspirations and frustrations.” *Id.*, 592 F.2d at 590-91 (emphasis added). The Court also found support for the jury's verdict based on an 1869 legislative report that indicated a “split opinion” among members of the Tribe on whether to remove restrictions on alienation of Indian land and whether to seek citizenship. The desire of Mashpee residents to be able to alienate land, though not in itself inconsistent with tribal existence, could support the inference that the residents had begun to focus more on personal than communal advancement; more on the ability of individuals to compete as members of society than of the tribe to resist society's impositions. *Id.*, 592 F.2d at 591 (emphasis added). Finally, the Court stated that based on evidence that Tribal members worked in the local economy and that the town took over common land, the jury “could have inferred that Mashpee was voluntarily trying to carve a destiny like many another rural and coastal town; to change from an 'Indian community' to a community that happened to be made up largely of Indians.” *Id.*

The Court's analysis is flawed. In the first place, the division of communal/tribal land, the removal of restrictions on alienation of Indian land, and the grant of citizenship to Indians have been unfailingly held to be consistent with continued tribal status. *Winton v. Amos*, 255 U.S. 373, 392 (1921); *Williams v. Johnson*, 239 U.S. 414, 420 (1915); *United States v. Noble*, 237 U.S. 74, 79 (1915); *United States v. Sandoval*, above at 48; *Tiger v. Western Investment Co.*, 221 U.S. 286, 312 (1911); *Hallowell v. United States*, 221 U.S. 317, 324 (1911); *United States v. Celestine*, 215 U.S. 278, 291 (1909); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902). Thus the facts that Mashpee common lands were divided, and that some members of the Tribe favored the ability to alienate Indian land and the grant of citizenship could not, as a matter of law, have resulted in a loss of tribal status.

In order to affirm the jury's findings, the Court of Appeals was forced to find that the jury could have viewed the above facts as suggestive of a desire on the part of the Tribe to

assimilate. In other words, there was no evidence of assimilation. There were simply facts, legally insufficient to show a loss of tribal status, but through which the jury could infer that had occurred. It was on that slim and subjective basis that the federal courts ruled against the Mashpee Tribe on the tribal status issue.

### The Houma Example

The decision in *United Houma Nation v. Texaco et al.*, (Civ. No. 97-4006, E.D. La.) was a contract based lawsuit which did not involve the question of tribal status. As such, there was no indication that the Court was destined to rule on tribal status. But it did rule on tribal status and its decision was based on a highly questionable, unrebutted 10-page affidavit. On the other hand, the BAR staff has reviewed over 10,000 pages of documents, conducted field interviews, examined significant genealogy material and more. The Tribe has also submitted significant research and genealogy in response to the BIA's proposed findings. Under these circumstances, the United States through the present BIA/BAR process or the proposed independent commission process should have the opportunity to make its own final decision concerning the tribal status of the Houma Tribe.

### **CONCLUSION**

A decision like the Mashpee and Houma decision could not be made under the criteria proposed by S.611. Those criteria envision a completely objective determination of whether a petitioning group has shown that it meets the community and political leadership criteria. See S.611, 5(b)(2)(A) and (B), (3)(A) and (B). In fact, listed under each of those criteria are the types of specific evidence that can be used to establish the criteria over time and at "given point[s] in time". *Id.* Under S. 611, it would not be possible to conclude, as was done in *Mashpee*, that a group was a tribe but lost that status because it could be surmised that the group was "trying... to change from an 'Indian community' to a community that happened to be made up largely of Indians". *Mashpee* 592 F.2d at 591. And, it would not be possible to conclude, as was done in *Houma*, that a group was not a tribe based on a questionable, unrebutted 10 page affidavit.

The procedures used to make the tribal status decisions are entirely different. In the Mashpee litigation, a jury had to make its decision two days after the trial ended. In the Houma litigation a state court judge considered the affidavit. To the extent that the S.611 procedure is similar to that presently used by BAR, it would be very unlike the procedure in the litigation. A staff of professionals including, in all likelihood, genealogists, anthropologists, and historians would assist the commission in reviewing decisions. The review will be exhaustive. The qualitative differences between the way the tribal status issue was decided in Mashpee and Houma and the way recognition will be decided under S. 611 are enormous. ("That inquiry " whether a group of Indians constitutes a tribe" is extremely intricate and technical.") See, *Golden Hill Paugussett Tribe v. Weicker*, 839 F. Supp. 130, 135 (D.Conn. 1993), *aff'd*, 39 F.3d 51.

For all of the above reasons, prior litigation like the *Mashpee* or *Houma* litigation should not preclude the United States from making a decision whether to recognize a tribe or not.

Subsection 5(a)(2)(E) takes the decision from Congress and the Secretary and gives it to the courts. Congress should not abdicate its responsibilities under the Constitution especially when the courts treat recognition as a political question and tribal status as an issue that should be dealt with in the first instance by DOI under the primary jurisdiction doctrine. Although some restrictions on the ability to petition for recognition under S. 611 are appropriate, subsection (E) is the only part of (5)(a)(2) that could restrict access to the process based on events that did not involve the United States.

**Proposed Changes to S.611:** Section 5(a)(2)(E) should be deleted.

Respectfully Submitted,  
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