Statement
of
Kevin Gover
Assistant Secretary - Indian Affairs
Department of the Interior
Before the
Committee on Indian Affairs
United States Senate
Hearing on S. 2899

September 13, 2000

Introduction

Good morning, Mr. Chairman and members of both Committees. It is my pleasure to be here today to present the Department's views on S. 2899 and the House companion bill, H.R. 4904.

Mr. Chairman, the Administration supports the purposes of S. 2899 and H.R. 4904 that are before both Committees. The Department believes that the Bills appropriately affirm and acknowledge the political relationship between the United States and Native Hawaiians. Our recommended change is set out below, along with our general comments.

Background

The Native Hawaiian people are the aboriginal, indigenous, native people of Hawaii. They have lived in Hawai'i for over 1,000 years, and their culture was based on a well developed system of agriculture and aquaculture. Native Hawaiians made remarkable artistic, cultural, and scientific advances, including amazing feats of navigation, prior to the first contact with Europeans in 1778. In 1810, King Kamehameha I established the unified Kingdom of Hawai'i to govern the Native Hawaiian people. Over the next 60 years, the United States entered into several treaties of peace, friendship and commerce with the Kingdom of Hawai'i, recognizing its status as an independent sovereign.

During the 1880s, western influence over the Kingdom of Hawai'i increased, and in 1893, as Queen Lili'uokalani sought to restore the full authority of the Native Hawaiian monarchy, the American and European plantation owners acting in concert with the U.S. Minister and military forces overthrew the Kingdom. The Provisional Republic of Hawaii, formed by the plantation owners, then seized the Crown and public lands of the Kingdom of Hawai'i, including one-third of Hawai'i that was impressed with a trust for the Native Hawaiian common people. Although President Cleveland initially opposed the overthrow, President McKinley supported the call of the Republic of Hawai'i for annexation. Congress annexed Hawai'i in 1898, without the consent of the Native Hawaiian people. As a result of the overthrow, laws suppressing Hawaiian culture and language, and displacement from the land, the Native Hawaiian people suffered mortality, disease, economic deprivation, social distress, and population decline.

The Territory of Hawai'i recognized that the conditions of the Native Hawaiian people continued to deteriorate, and members of the territorial legislature proposed that Congress enact a measure to rehabilitate the Native Hawaiian people by returning them to the land and promoting agriculture under Federal protections. In congressional hearings, the Secretary of the Interior acknowledged that the Native Hawaiian people were suffering a decline and that the Federal Government had a special responsibility to promote their welfare. In 1920, relying in part on the precedent of the General Allotment Act, which provided individual lands for American Indians under Federal protections, Congress enacted the Hawaiian Homes Commission Act to rehabilitate the Native Hawaiian people by setting aside for Native Hawaiian settlement and agriculture use 200,000 acres of the "ceded" lands, i.e., the former Crown and public lands of the Kingdom of Hawai'i. Later, in the State Admissions Act, Congress set aside the balance of the ceded lands, not reserved for Federal purposes, in a public trust to be held and administered by the State for five purposes, including the betterment of the Native Hawaiians.

The Hawaiian Homeland settlements throughout the Hawaiian Islands assisted the Native Hawaiian people in maintaining their historic ties to the land and distinctly native settlements. In addition, through Native Hawaiian social and political institutions, such as the Native Hawaiian civic clubs, the Kamehameha schools, and the Lili'uokalani Hawaiian Children's Foundation, the Native Hawaiian community has maintained its distinct character as an aboriginal, native people. In recent years, overcoming a legacy of cultural suppression, Native Hawaiians have revitalized their language, culture, traditions, and aspiration for self-determination through Native Hawaiian language immersion programs, cultural education programs, restoration of traditional agriculture and aquaculture, creation of new social institutions and quasi-governmental service providers and the Native Hawaiian sovereignty movement, among other things. Native Hawaiians have made clear their desire for self-determination, i.e., increased Native Hawaiian control of Native Hawaiian affairs, resources, and lands.

Nevertheless, the Native Hawaiian people, as a native community, continue to suffer from economic deprivation, low educational attainment, poor health status, substandard housing, and social dislocation. In response, since the early 1970s, Congress has enacted statutes that recognize these problems among Native Hawaiians and establish programs to address them. For example, the Native Hawaiian Education Act refers to studies that show that Native Hawaiian students face educational risk factors start before birth, stemming from substandard prenatal care and high rates of teen births, and continue to score below national averages at all grade levels (20 U.S.C. sec. 7902). This Act provides funding to Native Hawaiian schools and education councils to promote special education programs for Native Hawaiian students. The Native Hawaiian Health Care Act finds that "the unmet health needs of the Native Hawaiian people are severe and the health status of Native Hawaiians continues to be far below that of the general population of the United States." 42 U.S.C. sec. 11701. This Act provides funding to Native Hawaiian health care providers to provide preventative health care to the Native Hawaiian community. The Native Hawaiian Housing Bill, S. 225, finds that Native Hawaiians face the most severe housing shortage of any group in the Nation, and if enacted, would provide low income housing to Native Hawaiians on Hawaiian Home lands.

The Reconciliation Process under Public Law 103-150

Against this background in 1993, Congress enacted Public Law 103-150, the Native Hawaiian Apology Resolution, which acknowledged the role of United States' officers in the overthrow of the Kingdom of Hawai'i and called on the Executive Branch to undertake special efforts to promote reconciliation between the United States and the Native Hawaiian people. The passage of the Apology Resolution was the first step in this reconciliation process.

In March of 1999, Senator Daniel K. Akaka asked Secretary of the Interior Bruce Babbitt and Attorney General Janet Reno to designate officials to represent their respective Departments in efforts of reconciliation between the Federal Government and Native Hawaiians. Secretary Babbitt designated John Berry, Assistant Secretary, Policy Management and Budget, for the Department of the Interior, and Attorney General Reno designated Mark Van Norman, Director, Office of Tribal Justice, for the Department of Justice, to take the next steps in the reconciliation process.

Informal meetings were held on O'ahu in August 1999, and public consultations with Mr. Berry and Mr. Van Norman commenced in December 1999, when meetings with the Native Hawaiian community were held on Kaua'i, Maui, Moloka'i, and Lāna'i, and in Hilo, Waimea and Kona on Hawai'i. These public consultations ended in two days of formal hearings held on O'ahu. Over forty hours of public testimony was received. During their visit to Hawai'i, Mr. Berry and Mr. Van Norman also visited Native Hawaiian homestead communities, nā mahi'ai lo'i (taro farms), Hawaiian language immersion schools, and Native Hawaiian fish ponds in the process of being restored, and observed numerous programs designed to benefit Native Hawaiians. Throughout the meetings, Native Hawaiians repeatedly expressed the desire for increased self-determination concerning Native Hawaiian affairs, resources, and lands. As a result of the process, the Departments recently issued a report outlining recommendations with respect to the continuation of the reconciliation process, including federal recognition, self-determination, and self-governance, to help the Native Hawaiians provide a better future for their members and community. The Report will be finalized after the public has had an opportunity to comment.

Native Hawaiians also have called upon the United States to assist them in improving economic opportunities, educational attainment, health status, and housing. Specifically, the Native Hawaiian people requested that the Administration support and Congress enact S. 225, the Native Hawaiian Housing Act and reauthorize the Native Hawaiian Education Act and the Native Hawaiian Health Care Act.

Within the framework of Federal law, there are established precedents to accommodate the Native Hawaiian people's desire for increased self-determination. American Indian tribes and Alaska Native villages exercise self-determination over native institutions, such as schools and health care institutions; over native affairs, such as language and cultural preservation; and over native lands and resources. They do so through recognized tribal governments and federally chartered native corporations in the context of the Federal policy of recognizing the unique government-to-government and special relationships that exist between the United States and its native peoples.

American Indian and Alaska Native peoples value self-determination as an avenue for addressing their communities, economic, educational, health, and social needs. Indeed, American Indian and Alaska Native peoples view the Federal Indian self-determination policy as recognizing their legitimate aspiration to transmit their distinct native values, traditions, beliefs, and aboriginal lands to their future generations.

In furtherance of reconciliation process, the Native Hawaiian people seek to re-organize a native governing body. A Native Hawaiian governing body, organized against the background of established precedent, would serve as a representative voice for the Native Hawaiian people, focus community goals, provide governmental services to improve community welfare, and recognize the legitimate aspiration of the Native Hawaiian people to transmit their values, traditions, and beliefs to their future generations.

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties and under Federal common law, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.

Traditionally, most aspects of the trust responsibility were delegated by Congress to the Department of the Interior and the Department of Justice, the latter of which has litigated many court cases on behalf of Indian tribes and individuals. As Federal programs for Indians have proliferated in modern times, many other Federal agencies have become involved in Indian affairs and they, too, must comply with the duties imposed by the trust relationship.

In the Department of the Interior, the Bureau of Indian Affairs (BIA) is the principal bureau within the Federal Government responsible for the administration of Federal programs for Federally recognized Indian tribes, and for promoting Indian self-determination. In addition, the BIA, like all Federal agencies, has a trust responsibility emanating from treaties, statutes, judicial decisions and agreements with tribal governments. The mission of the BIA is to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and properly manage the trust assets of Indian tribes and Alaska Natives. The BIA provides resources and delivers services to support tribal government operations similar to those provided by state, city, and municipal governments. These services include, but are not limited to: law enforcement, social services, education, housing improvements, loan opportunities for Indian businesses, and leasing of land.

The BIA currently provides Federal services to approximately 1.2 million American Indians and Alaska Natives who are members of more than 550 Federally recognized Indian tribes in the 48 contiguous States and in Alaska. The BIA also has a trust responsibility for more than 43 million

acres of tribally-owned land and more than 10 million acres of individually-owned land. The BIA is headed by the Assistant Secretary - Indian Affairs, who is responsible for BIA policy.

Trust Responsibility

The courts consistently have upheld exercises of congressional power over Indian affairs, as specifically provided under the Indian Commerce Clause. U.S. Constitution, Article I, Section 8, clause 3. Pursuant to that authority, the Congress has enacted many statutes for the benefit of Native Hawaiians.

The concept of the Federal Indian trust responsibility was evident in the Trade and Intercourse Acts and other late 18th and early 19th-century Federal laws protecting Indian land transactions and regulating trade with the tribes. The doctrine was first announced in Chief Justice Marshall's opinion in Cherokee Nation v. Georgia (1831). The Cherokee Nation had filed suit in the United States Supreme Court to enjoin the state of Georgia from enforcing state laws on lands guaranteed to the tribe by treaties. The Court concluded that the tribe was neither a state nor a foreign nation under the Constitution and therefore was not entitled to bring the suit initially in the Supreme Court. Chief Justice Marshall, however, concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations" and that "[t]heir relation to the United States resembles that of a ward to his guardian." The courts consistently have upheld exercises of congressional power over Indian affairs, often relying on the trust relationship.

The Supreme Court's subsequent decision in Worcester v. Georgia (1832) reaffirmed the status of Indian tribes as self-governing entities. Chief Justice Marshall construed the treaties and the Indian Trade and Intercourse Acts as protecting the tribes' status as distinct political communities possessing self-government authority within their boundaries. Thus, Georgia state law could not be applied on Cherokee lands because, as a matter of Federal law, the United States had recognized tribal self-governing powers by entering into a treaty with the Cherokees. In spite of its governmental status, however, the Cherokee Nation was placed expressly by the treaties "under the protection of the United States."

Under the special relationship, Indian tribes receive some benefits not available to other citizens. For example, in the 1974 Morton v. Mancari decision, the Supreme Court upheld a BIA Indian hiring preference because, like special health and education benefits flowing from the trust relationship, the preference is not based on race; rather, Federal programs dealing with Indians derive from the government-to government relationship between the United States and Indian tribes. The same reasoning applies to off-reservation Indian hunting and fishing rights; they trace to treaties with specific tribal governments.

Federal Recognition

The rights, duties and obligations that make up the trust relationship as exercised through the Secretary of the Interior exist only between the United States and those Indian tribes "recognized" by the United States. Once Federal recognition is found to exist, it results in the establishment of a government-to-government relationship with the tribe.

An Indian group is a federally recognized tribe if: (1) Congress or the executive created a reservation for the group either by treaty, by statutorily expressed agreement, or by executive order or other valid administrative action; and (2) the United States has some continuing political relationship with the group, such as providing services through the BIA. Accordingly, Indian groups situated on Federally maintained reservations are considered tribes under virtually every statute that refers to Indian tribes. In addition, tribes have been recognized by the United States based on the existence of treaty relations or other continuous dealings with the Federal Government, despite the lack of a reservation.

In 1978, in order to resolve doubts about the status of those tribes lacking Federal recognition, the Department of the Interior issued regulations entitled "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," now codified at 25 C.F.R. 83. The regulations "establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist."

Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such acknowledgment also means that the tribe is entitled to the immunities and privileges available to other Federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes. Acknowledgment subjects the Indian tribe to the same authority of Congress and the United States to which other Federally acknowledged tribes are subjected." 25 CFR 83.2.

Under the procedures, groups not recognized as tribes by the Federal Government may apply for Federal acknowledgment. Tribes, bands, pueblos or communities already acknowledged as such and receiving services from the Bureau of Indian Affairs were not required to seek acknowledgment anew. 25 CFR 83.3 (a), (b). To assist groups in determining whether they were required to apply, the procedures provided for the publication within 90 days of a list of "all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs." 25 CFR 83.6(b). This list is to be updated annually. Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

Department Comments on S. 2899 and H.R. 4904

The Department has recommended a reconciliation process that would result in an official confirmation of a political, government-to-government relationship between Native Hawaiians and the Federal Government, similar to the relationship enjoyed by other native people in the United States. The Senate and House Bills would enable the Native Hawaiians to establish a representative governing body through a process that has precedent in the federal recognition of Indian tribes.

The Department has recommended the establishment of an office under the Assistant Secretary of Indian Affairs to address Native Hawaiian issues. The Bills, however, would establish a new Interior Office of Special Trustee for Native Hawaiian Affairs.

The Department has recommended the creation of a Native Hawaiian Advisory Commission to consult with Interior bureaus that manage land in Hawaii affecting Native Hawaiians. The Bills would also establish a Native Hawaiian Interagency Task Force for the government-wide coordination of federal policies affecting Native Hawaiians, including consultations with the Native Hawaiian governing body.

We have carefully reviewed the definition of "Native Hawaiians" in the Bills and consulted with the Department of Justice. We concur in the recommendations made by the Department of Justice with respect to that definition.

Conclusion

The Department of the Interior generally supports the legislation and is committed to working with the Native Hawaiian people and the Congress, upon enactment of this legislation, to address successfully the steps to Federal recognition, self-governance, and self-determination of the Native Hawaiian people. There are a number of prospective matters that the Federal Government may have to work out with the Native Hawaiian governing body and the State of Hawaii, through future legislation. These challenges may include:

- potential land claims that Native Hawaiians may assert against the United States, the State of Hawaii, or private landowners;
- the nature and extent of the rights, obligations and benefits in extending Federal recognition to Native Hawaiians under the Native American Indian statutes;
- the Federal Government's trust and fiduciary responsibilities for any federal lands that may be transferred to the Native Hawaiian community; and
- the relative responsibilities of Native Hawaiian community and the State of Hawaii and its local governments in providing schools, law enforcement, and other public services.

With the permission of the Committees, the Department intends to supplement this testimony with additional views on S. 2899 and H.R. 4904 before the record is closed. This concludes my prepared statement. I will be happy to answer any questions the Committee members may have.