TESTIMONY
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OFFICE OF THE ASSISTANT SECRETARY - INDIAN AFFAIRS
U.S. DEPARTMENT OF THE INTERIOR
AT THE HEARING
BEFORE THE
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ON H.R. 512

February 10, 2005

Mr. Chairman and members of the Committee, my name is Michael Olsen and I am the Acting Principal Deputy Assistant Secretary – Indian Affairs. I am pleased to be here today to discuss H.R. 512, a bill "[T]o require the prompt review by the Secretary of the Interior of the longstanding petitions for Federal recognition of certain Indian tribes, and for other purposes." We thank the Chairman for his interest in this important issue. We recognize Congress has plenary authority over this issue and look forward to working with this Committee on coming up with solutions on how to better streamline the Acknowledgment process.

The Federal acknowledgment regulations, known as "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," 25 C.F.R. Part 83, govern the Department's administrative process for determining which groups are "Indian tribes" within the meaning of Federal law. The Department's regulations are intended to apply to groups that can establish a substantially continuous tribal existence and that have functioned as autonomous entities throughout history until the present. See 25 C.F.R. Sections 83.3(a) and 83.7. When the Department acknowledges an Indian tribe, it is acknowledging that an inherent sovereign continues to exist. The Department is not "granting" sovereign status or powers to the group, nor creating a tribe made up of Indian descendants.

Under the Department's regulations, in order to meet this standard, petitioning groups must demonstrate that they meet each of seven mandatory criteria. The petitioner must:

(1) demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900;

(2) show that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the

present;

(3) demonstrate that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

(4) provide a copy of the group's present governing document including its membership criteria;

(5) demonstrate that its membership consists of individuals who descend from the historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity and provide a current membership list;

(6) show that the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and

(7) demonstrate that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

A criterion is considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.

Congress has considered several bills in the past to modify the criteria for groups seeking acknowledgment as Indian tribes or to remove the process altogether from the Department. While some parties seek to change the administrative process by speeding it up, others believe that doing so will undermine the factual basis for the decision. For example, 20 Attorneys General collectively stated their concern that quality in the review process should not be sacrificed in the name of expediency and that "all parties benefit from a careful and comprehensive review of the evidence on each petition." Although the Department supports the current Federal acknowledgment criteria, we do recognize that improvements could be made in the acknowledgment process to encourage more timeliness and increased transparency of both the Department and the applicant. While the Department does not support enactment of H.R. 512, the Department agrees that greater time sensitivity needs to be added to the principles of integrity and transparency in the federal recognition process.

The Department supports a more timely decision-making acknowledgment process, but does not believe that a thorough factual review should be forfeited merely to advance longstanding petitions. The Department is prepared to examine whether it has and should use regulatory authority to institute rules of timeliness and repose which could, for example, establish a deadline for a petitioner to submit a letter of intent for federal recognition as well as a deadline for submitting a fully documented petition. After a group files a letter of intent, and the Assistant Secretary acknowledges the receipt of that letter (usually within 30 days), it is often the case that the group does not come forward

with a documented petition for several years, some up to 20 years. Currently, there are 71 incomplete petitions where a group has only submitted partial documentation. In addition, there are 134 letters of intent to petition, some dating back to 1976, that have not submitted any documentation. An additional ten groups have filed letters of intent and are no longer in contact with OFA. Rules of timeliness and repose would provide a clear timeframe for petitioners' submissions of final documented petitions with supporting evidence as well as help the Department better manage and coordinate its available resources.

The recognition of another sovereign is one of the most solemn and important responsibilities delegated to the Secretary of the Interior. Federal acknowledgment enables tribes to participate in federal programs and establishes a government-to-government relationship between the United States and the tribe. Acknowledgment carries with it certain immunities and privileges, including exemptions from state and local jurisdiction and the ability to undertake casino gaming. The Department believes that the Federal acknowledgment process set forth in 25 C.F.R. Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," allows for the uniform and rigorous review necessary to make an informed decision establishing this important government-to-government relationship.

These decisions have significant impacts on the petitioning group as well as on the surrounding community. Federal acknowledgment must, therefore, be based on a thorough evaluation of the evidence using standards generally accepted by the professional disciplines involved with the process. The process must be open, transparent, and timely.

Next I would like to discuss some of the particular concerns the Department has with H.R. 512.

H.R. 512 would require the Secretary to publish in the Federal Register a proposed finding for each "eligible tribe" within six months of enactment of the bill. Eligible tribes are those that have made an initial application for recognition to the Department as of October 17, 1988 and are listed on the Ready, Waiting for Active Consideration list as of July 1, 2004. This may result in those on the Active Consideration list, which is a different list, being bypassed by these groups. It also requires the Secretary to publish a final determination with regard to each eligible Tribe within one year after enactment of the legislation. In addition, the Department would have to notify groups within 45 days that they may enter into this expedited process. The groups would have 90 days from the date of enactment to decide if they wanted to opt-in to this process. This timeframe could potentially leave the Department one and a half months to make a proposed finding and then perhaps only six months to make a final determination.

We are concerned that the timeframes established by the bill would not allow the Office of Federal Acknowledgment (OFA) adequate time to thoroughly review a petition and, thus, may result in the acknowledgment standards being lowered. The administrative record for an acknowledgment petition is voluminous. Some completed petitions have

been in excess of 30,000 pages. One year to review potentially 10 petitions (the approximate number of those qualifying under the bill) consisting of thousands of pages is simply unrealistic. We recognize that the acknowledgment process is time consuming. These vast applications, coupled with the staff having to respond to FOIA requests and litigation needs often lengthens the process considerably. We understand this is a frustration for many groups seeking acknowledgment, but OFA reviews petitions and responds to FOIA and litigation deadlines as expeditiously as it can.

We are also concerned that the timeframes established by the bill may limit the role of interested parties by not allowing them ample opportunity to review and comment on petitions. Acknowledgment decisions impact not only the groups seeking tribal status, but also the local communities, states, and federally recognized tribes. We recommend extending the deadlines to allow all potentially interested parties an opportunity to participate in the acknowledgment process.

Finally, we are concerned with acknowledgment decisions being made by the courts rather than by Congress or the Department. Under H.R. 512, if the Department does not make a finding within the timeframe set forth, a federal district court would assume that role and make the acknowledgment decision. The bill proposes to allow the court to make its own determination on the merits, based on the existing criteria, rather than review the Department's action. We are concerned that various courts reviewing petitions will result in a lack of uniformity across the nation and turn the process into an adversarial one. We believe it is more appropriate for the court to review the Department's determination that is based on an evaluation that is based on an evaluation by professional anthropologists, historians, and genealogists, rather than take on additional fact-finding responsibility. We are also concerned that a judicial proceeding would exclude public participation in the acknowledgment process.

Thank you for the opportunity to testify. While we cannot support H.R. 512, we look forward to working with the Committee on ways we can improve the Acknowledgment process. I will be happy to answer any questions you may have.