TESTIMONY
OF
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FOR THE HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
297, THE "FEDERAL ACKNOWLEDGMENT PROCESS REFORM ACT OF 2003"

April 21, 2004

Good morning, Mr. Chairman and Members of the Committee. My name is Aurene Martin, Principal Deputy Assistant Secretary - Indian Affairs at the Department of the Interior. I am here today to provide the Administration's testimony on S. 297, the "Federal Acknowledgment Process Reform Act of 2003."

The stated purposes of S. 297 include ensuring that when the United States acknowledges a group as an Indian tribe, that it does so with a consistent legal, factual and historical basis, using clear and consistent standards. Another purpose is to provide clear and consistent standards for the review of documented petitions for acknowledgment. Finally it attempts to clarify evidentiary standards and expedite the administrative review process for petitions through establishing deadlines for decisions and providing adequate resources to process petitions.

While we agree with these goals, we do not believe S. 297 achieves them. The Department therefore, does not support S. 297. We are concerned that S. 297 would lower the standards for acknowledgment and not allow interested entities the opportunity to be involved in the process. We recognize the interest of the Congress in the acknowledgment process, and are willing to work with the Congress on legislative approaches to the Federal acknowledgment process. We believe that any legislation created should have standards at least as high as those currently in effect so that the process is open, transparent, timely, and equitable.

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. We believe these regulations provide a rigorous and thorough process.

The Department's regulations are intended to apply to groups that can establish a substantially continuous tribal existence and, which 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. We believe this standard as provided in 25 C.F.R. Part 83.3(a) needs to be maintained.

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;
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> (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;
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> (3) demonstrate that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
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> (4) provide a copy of the group's present governing document including its membership criteria;
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> (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.

S. 297 would reduce the standards for acknowledgment by requiring a showing of continued tribal existence only from 1900 to the present, rather than from first sustained contact with Europeans as provided for in 83.7(b) and (c). Other changes from the current regulatory standards would reduce the standard for demonstrating tribal existence even after 1900. This reduction in the standard deviates significantly from the position of the Department, as stated in the regulations, that the legal basis of Indian sovereignty is continuous political and social existence pre-dating European settlement of the territory that now constitutes the U.S. and extends without break to the present. The standard set out in S. 297 makes it more likely that

groups without demonstrated tribal ancestry or historical tribal connection may be acknowledged.

The bill also reduces the burden of producing evidence to demonstrate continuous existence by creating an extensive list of exceptions delineated in section 5(g) of S. 297. Section 5(g) would provide that if an Indian group demonstrates by a reasonable likelihood that the group was, or is a successor in interest to a party to one or more treaties, that group would only have to show their continual existence from when the government expressly denied them services, even if this notification occurred only in the recent past. Under the Department's regulations, the burden rests with the petitioning group to show continuous existence; the bill shifts that burden to the Department. For example, if a group requested services from the government in 2000 and was denied those services, under this scheme, the group would only have to submit documentation from 2000 to the present. The Department would then have to demonstrate the group did not exist as a tribe prior to 2000.

The Department supports a more timely decision making process, but does not believe that the factual basis of the decisions should be sacrificed to issue more decisions. The bill seeks to speed the process by narrowing the role of interested parties in the administrative process and by permitting only the petitioner to respond to proposed findings. These limits on outside party involvement, however, lessen the evidentiary basis of the decisions by not allowing interested parties the opportunity to submit arguments and evidence to rebut or support the proposed finding. Interested parties that believe that their views and concerns are not being given due consideration in the administrative process will likely challenge the decisions in court, which makes the process more costly and time consuming. The bill, however, appears to limit these challenges by permitting only petitioners to sue over the decisions. Specifically, the bill would provide for an appeal of the final determination by the petitioner within 60 days in the U.S. District Court for D.C.; however, it is unclear if this bill precludes an appeal by interested parties under the Administrative Procedure Act. Since Federal acknowledgment decisions impact the groups seeking tribal status, the local communities, states, and federally recognized tribes, the process must be equitable.

With respect to deadlines and time lines, the Department is interested in exploring some type of sunset provision. In fact, in response to a November 2001, General Accounting Office (GAO) report on the "effectiveness and consistency of the tribal recognition process", the Department stated that we would support a legislative sunset rule that would establish a clear timeframe in which petitioners must submit final documented petitions and supporting evidence.

The September 30, 2002, strategic plan and needs assessment of the Assistant Secretary in response to the GAO report outlined a number of changes that the Department is implementing, and changes that Congress can implement, to speed the process and to make it more equitable and transparent - without changing the standard of continuous tribal existence. The Secretary in April 2004 requested from the Assistant Secretary – Indian Affairs a report outlining the progress on the implementation of the strategic plan.

A number of changes have been made at the Department to implement the strategies identified in the Department's response to the GAO. First, previous acknowledgment decisions have been scanned on CD-ROM and are available to the public. Second, the use of Federal Acknowledgment Information Resource, or FAIR, has expanded. FAIR is a database system linking images of the documents in the record with the Department researchers' comments. It includes a chronology of events from the documents submitted and data extracts, and allows the tracking of persons involved in the group and their activities. FAIR has been praised by petitioners and interested parties alike for providing timely access to the record and researchers' analysis. The fact that this Administration has issued 14 decisions further documents the success of these efforts. The bill does not address the improvements that the Department has made.

Conclusion

The Department believes that the acknowledgment of the existence of an Indian tribe is a serious decision for the Federal Government. It is of the utmost importance that thorough and deliberate evaluations occur before the Department acknowledges a group's tribal status, which carries significant immunities and privileges, or denies a group Federal acknowledgment as an Indian tribe.

When the Department acknowledges an Indian tribe, it recognizes an inherent sovereign that has existed continuously from historic times to the present. These decisions have significant impacts on the petitioning group as well as on the surrounding community. Therefore, these decisions must 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, timely, and equitable.

Thank you for the opportunity to testify on S. 297 and the Federal acknowledgment process. I will be happy to answer any questions you may have.