

**TESTIMONY
OF
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OFFICE OF THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
TO THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
OVERSIGHT HEARING ON FEDERAL ACKNOWLEDGEMENT: POLITICAL AND LEGAL
RELATIONSHIP BETWEEN GOVERNMENTS**

JULY 12, 2012

Good afternoon Chairman Akaka, Vice Chairman Barrasso, and members of the Committee. Thank you for the opportunity to provide the Department of the Interior's (Department) statement on Federal Acknowledgment: Political and Legal Relationship between Governments. My name is Bryan Newland, and I am the Senior Policy Advisor to the Assistant Secretary for Indian Affairs.

Implications of Federal Acknowledgment

The acknowledgment of the continued existence of another sovereign entity is one of the most solemn and important responsibilities delegated to the Secretary of the Interior. Federal acknowledgment confirms the existence of a nation-to-nation relationship between an Indian tribe and the United States, and permanently establishes a government-to-government relationship between the two.

The decision to acknowledge an Indian tribe has a significant impact on the petitioning group, other Indian tribes, surrounding communities, and federal, state, and local governments. Acknowledgment generally carries with it certain powers, privileges, and immunities, including the authority to establish a land-base over which to exercise jurisdiction, provide government services to tribal citizens, and sovereign immunity from lawsuits and taxation from other governments. In 1994, Congress confirmed that all federally-acknowledged tribes are entitled to the same privileges and immunities as one another.

Background of the Federal Acknowledgment Process

The Department's process for acknowledging an Indian tribe is set forth in its regulations at 25 C.F.R. Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." (Part 83 Process) This process allows the Assistant Secretary to make an informed decision on whether to acknowledge a petitioner's nation-to-nation relationship with the United States. These regulations include seven "mandatory" criteria, by which a petitioner must demonstrate that:

- (a) It has been identified as an American Indian entity on a substantially continuous basis since 1900;
- (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
- (c) It has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
- (d) It has provided a copy of the group's present governing document including its membership criteria;
- (e) Its membership consists of individuals who descend from an historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity, and provide a current membership list;
- (f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian Tribe; and,
- (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.

The Department considers a criterion satisfied if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. This does not mean that the Department applies a "preponderance of the evidence" standard to each petition. A petitioner must satisfy all seven of the mandatory criteria in order for the Department to acknowledge the continued tribal existence of a group as an Indian tribe.

The Federal acknowledgment process is implemented by the Office of Federal Acknowledgment (OFA). OFA is currently staffed with a Director, an administrative assistant, four anthropologists, four genealogists, and four historians. A team composed of one professional from each of these three disciplines reviews each petition.

Recent Actions Under the Acknowledgment Process

The Department has issued six final determinations on acknowledgment petitions since 2009. These include a June 13, 2010 determination acknowledging the Shinnecock Indian Nation in New York, and five final determinations declining to acknowledge petitioning tribes. Those negative determinations are:

- October 27, 2009 final determination not to acknowledge the Little Shell Tribe of Chippewa Indians of Montana.
- March 15, 2011 final determination not to acknowledge the Juaneno Band of Mission Indians, Acjachemen Nation (#84A).
- March 15, 2011 final determination not to acknowledge the Juaneno Band of Mission Indians (#84B).
- March 23, 2012 final determination not to acknowledge the Central Band of Cherokee.
- April 21, 2011 final determination not to acknowledge the Choctaw Nation of Florida.

Recent Actions outside the Acknowledgment Process

The Part 83 process is the exclusive regulatory process used by the Department to acknowledge Indian tribes that have yet to establish a government-to-government relationship with the United States, or where such a relationship has lapsed. Nevertheless, the Department may include additional tribes on the list of federally recognized tribes by rectifying previous administrative errors that resulted in the exclusion of a tribe from the list or resolving litigation for tribes that were wrongfully terminated.

Early in this Administration, the Assistant Secretary committed to consider requests for the reaffirmation of tribal status for those tribes that were not included on previous lists of federally recognized tribes due to administrative error. After a careful review of information submitted over a period of years, the Assistant Secretary reaffirmed the government-to-government relationship between the United States and the Tejon Indian Tribe in December 2011. The Tejon Indian Tribe had been omitted from the 1979 list of Indian tribes due to a unilateral administrative error on the part of the United States.

In 2009, the Department entered into an agreement as part of the settlement of litigation to restore the United States' government-to-government relationship with the Wilton Rancheria, in California. The Wilton Rancheria had been improperly terminated by the United States. The settlement agreement, and the corresponding court order, provides that the Wilton Rancheria is restored to the same status it enjoyed prior to the distribution of its trust assets, and that the Tribe is entitled to any of the benefits or services provided or performed by the United States for Indian tribes.

The Department does not consider these actions to constitute "acknowledgment" of an Indian tribe in the manner governed by the Part 83 process. Rather, these actions were undertaken in separate contexts, and were made after a rigorous review of the unique facts and circumstances of each tribe on a case-by-case basis.

Common Views of the Federal Acknowledgment Process

The Department is well-aware of common views expressed by federally-recognized tribes, petitioning groups, observers, and the general public regarding the acknowledgment process. Earlier this year, the Department participated in a roundtable discussion on this issue hosted by the Committee. I would like to thank the Committee for bringing together leadership from various Indian communities and members of the public to discuss this important issue.

That discussion highlighted a number of concerns with the acknowledgment process that have been expressed in previous congressional hearings in previous years. The most common concerns include:

- A general view that the process is expensive, burdensome, intrusive, less than transparent, and unpredictable;
- The Department needs to be more efficient in its review, including the expenditure of federal funds, and explore ways to integrate outside experts and other Department staff into the review process;
- Petitioners should be apprised of the Department's views on threshold legal questions before they invest precious time and resources into advancing their petition;
- The trajectory of the Department's review of a petition is unpredictable, due to the research schedule demanded by interested parties;
- Petitioning groups that were previously denied acknowledgment should be permitted to go through the process again, and present new or supplemental evidence;
- The Department's process does not give enough weight to findings made in judicial proceedings or by Congress; and,
- Collateral issues raised in a federally-acknowledged tribe's prior petition are now being resurrected in legal arguments concerning the governmental status of those tribes, especially in light of the 2009 *Carciari* decision.

These are only some of the common critiques of this process that emerged in the Committee's roundtable discussion and through other forums over the years.

Principles Guiding Improvements in the Federal Acknowledgment Process

As noted above, the Department is well-aware of critiques of the existing Part 83 Process for federal acknowledgment. We have previously indicated that we have been reviewing our existing regulations to consider ways to improve the process. Based upon our review, and the views expressed by tribes and interested parties, we believe that any efforts to improve the process should be undertaken pursuant to certain guiding principles:

- **Transparency** – Ensuring that the process is open, and is easily understood by petitioning groups and interested parties.
- **Timeliness** – Moving petitions through the process, responding to requests for information, and reaching decisions as soon as possible, while ensuring that the appropriate level of review has been conducted.
- **Efficiency** – Conducting our review of petitions to maximize federal resources, and to be mindful of the resources available to petitioning groups.
- **Flexibility** – Understanding the unique history of each tribal community, and avoiding the rigid application of standards that do not account for the unique histories of tribal communities.

To this end, the Department has considered a number of concepts that have been raised by the tribes that have gone through this process, petitioning groups, other interested parties, and staff within our Office of Federal Acknowledgment. These considerations include:

- Conducting an assessment of the standard of evidence required for the seven mandatory criteria under the Part 83 process.
- Pairing the resources within the Office of Federal Acknowledgment with outside research tools that will help the Department to be more flexible and responsive.
- Adopting a streamlined and transparent process for granting extensions of time or adopting changes in the schedule for a Proposed Finding or Final Determination.
- Adopting single criteria negative determinations and expedited review when a petitioning group can demonstrate continuous existence on a reservation since 1900.

We believe these principles and considerations have established a framework that can lead to improvements in the Part 83 process. Any efforts to improve the process must ensure that we are acknowledging the nation-to-nation relationships between the United States and Indian tribes in a manner that is both fair and defensible.

Conclusion

I would like to thank you for the opportunity to provide my statement on the Federal acknowledgment process. I will be happy to answer any questions the Committee may have.