

TESTIMONY
OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
TO THE SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
HEARING ON
THE FEDERAL ACKNOWLEDGMENT PROCESS
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“I think we can all agree that reforms to expedite the process and to upgrade fairness, consistency, and transparency are warranted.” Congressman Don Young (R-AK), H. Hrg No. 110-47 (10/03/07).

Good afternoon Chairman Young, Ranking Member Ruiz, and Members of the Subcommittee. My name is Kevin Washburn, and I am a member of the Chickasaw Nation of Oklahoma, and currently serve as the Assistant Secretary – Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide an overview of the Department’s efforts to improve the Department’s Federal acknowledgment process. We are endeavoring to provide reforms to accomplish the goals that Chairman Young has identified in the Department’s Federal acknowledgement process.

As the Committee is well aware, Congress possesses the plenary power and authority to grant (or terminate) the Federal recognition of Indian tribes. The work of Congress in this area is legitimate and important. Notwithstanding the plenary power of Congress in tribal recognition, the Department also plays a role in this area. Because the Department must provide programs and services to eligible Indian tribes in implementing its responsibilities under Federal law, the Department must routinely decide whether to acknowledge a group as an Indian tribe. As a practical matter, Congress and the Executive Branch have proceeded on simultaneous tracks to consider acknowledgement of Indian tribes.

When the Department, rather than Congress, acts to acknowledge a petitioning group as an Indian tribe, it is imperative that the Department’s work is trustworthy and that the ensuing decisions are perceived by the public as legitimate. The Department’s administrative process for acknowledging a petitioner as an Indian tribe is set forth at Part 83 of Title 25 of the *Code of Federal Regulations* (Part 83 Process), “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.” These regulations, first promulgated in 1978, provide a formal and rigorous process for establishing that an Indian group exists as an Indian tribe.

Since 1978, the Department has recognized 17 tribes and denied 34 groups through the Part 83 Process. The Indian tribes most recently recognized by Congress are the Federated Indians of Graton Rancheria and the Shawnee Tribe, both in 2000. The Indian tribes acknowledged most

recently through the Part 83 Process are the Mashpee Wampanoag Tribe in 2007 and the Shinnecock Indian Nation in 2010.

Over the course of resolving more than 50 petitions for Federal acknowledgment, the Part 83 Process has been controversial and frequently criticized. The good work and leadership of previous subcommittees and predecessor Natural Resources Committees produced a voluminous record of both perceived shortcomings of the Part 83 Process and potential solutions. In Congressional hearings, members of this chamber have repeatedly explained for the past two decades that the process is broken and in need of reform. These concerns have been identified on both sides of the aisle and in both chambers of Congress. Well over fifteen years ago, Chairman Don Young described the process as “slow, cumbersome, and enormously expensive[.]”¹ Congressman Tom Cole has made similar statements, explaining that the process is controversial, complex, bureaucratic, and “has not worked well.”² Congressman Eni Faleomavaega said that the process “needs reform” and described it as “cumbersome.”³ Congressman Dale Kildee also said that the “process is broken” and also expressed concern about the time it takes for decisions.⁴

Similar assertions have come from members of the other chamber, including, for example: Senate Indian Affairs Chairman John Barrasso (urging progress in fixing the acknowledgement system),⁵ Senate Indian Affairs Ranking Member Jon Tester (“the process is broken”),⁶ Senate Indian Affairs former Ranking Member Lisa Murkowski (“the process is one that just does not work”),⁷ then Senate Indian Affairs Chairman Byron Dorgan (“it is quite clear the process for acknowledgment is broken.”),⁸ Senator Tom Udall (discussing “the pitfalls and the long and complicated and even unclear process of Federal acknowledgment”),⁹ and Senator Bill Nelson (describing “a process that needs to be repaired and that needs to be improved”).¹⁰ The work of House and Senate leaders on legislation and oversight hearings over the years has been enormously helpful in charting a path forward.

To summarize all of the many comments we have heard over the years from Members of Congress, the process is slow, expensive, inefficient, burdensome, intrusive, non-transparent, inconsistent, and unpredictable.

Of course, we have heard similar concerns expressed by the National Congress of American Indians, which has wide representation across Indian country, as well as numerous individual Indian tribes, petitioning groups, states and local governments, and other members of the public. Because of these criticisms, the Department believed that it was sensible to develop a reform initiative. The Department has taken the criticisms to heart as it has considered steps toward reform.

¹ Cong. Rec. H9459 (10/05/98).

² H. Hrg. No. 110-47 (10/03/07).

³ H. Hrg. No. 110-47 (10/03/07).

⁴ H. Hrg. No. 110-47 (10/03/07).

⁵ S. Hrg. 112-684 (7/12/12).

⁶ S. Hrg. 111-470 (11/4/09).

⁷ S. Hrg. 111-470 (11/4/09).

⁸ S. Hrg. 110-686 (9/25/08).

⁹ S. Hrg. 111-470 (11/4/09).

¹⁰ S. Hrg. 111-470 (11/4/09).

I began working on this issue almost as soon as I undertook my position as Assistant Secretary. In March of 2013, I shared with this Committee the progress the Department had made to identify guiding principles of improvement: transparency, timeliness, efficiency, and flexibility. We also shared our path forward – issuance of a discussion draft of potential changes in the spring of 2013, consultation and public input on the discussion draft, preparation of a proposed rule, followed by another round of consultation and public input on the proposed rule.

Our efforts to obtain tribal and public input have been more robust than our process for any other rulemaking in the last six years. We have held 22 meetings (11 tribal consultations and 11 public meetings) and 4 nationwide teleconferences. Over the past two years, we have received thousands of comments on this regulatory initiative, including comments from States and local governments, federally recognized Indian tribes, inter-tribal organizations, non-federally recognized tribes, and members of the public. While this extensive public process has required us to move more slowly than we would have liked (and thus prevented us from issuing a final rule in 2014 as I had optimistically forecast), our goal is to issue a final rule this year.

Background of the Current Federal Acknowledgment Process

The day-to-day work of implementing the Part 83 Process regulations is performed by the Office of Federal Acknowledgment (OFA), which is located within the Office of the Assistant Secretary – Indian Affairs. OFA makes acknowledgment recommendations to the Assistant Secretary. OFA is currently staffed with a Director and a professional staff consisting of four anthropologists, four genealogists, four historians, and an administrative assistant. Generally, a team composed of one professional from each of these three disciplines is constructed to review each petition. It is difficult, detail-oriented work performed by experts.

The Part 83 Process regulations set forth seven mandatory criteria that a petitioner must satisfy. The Department considers a criterion satisfied if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion is not required and the Department does not apply a “preponderance of the evidence” standard to each criterion.

Although these criteria have remained largely unchanged since 1978, the Department in 1994 changed the criterion of external identification as an American Indian entity to require that it be demonstrated since 1900 rather than first sustained contact to avoid problems with historical records in earlier periods while retaining the requirement for substantially continuous identification as an American Indian entity. The Department also added a section relating to previous Federal acknowledgment for those petitioners that had evidence such as treaty relations with the United States or treatment by the Federal Government as having collective rights in tribal lands or funds.

Principles Guiding Improvements in the Federal Acknowledgment Process

Following years of criticism described, in part, above, the Department began an intensive internal review of the Part 83 Process regulations at the beginning of the Obama Administration in 2009, including obtaining input from the Office of the Assistant Secretary – Indian Affairs, OFA, and the Office of the Solicitor. From our review, it is clear that much of the time and expense of the Part 83 Process flows directly from an ever increasing documentary burden and

the lack of clarity of the process. We accepted the criticism in good faith and sought ways to address the criticism. By 2012, the Department developed consensus that improvements to Part 83 Process must address certain guiding principles:

- **Transparency** – ensuring that standards are objective, consistent and 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 results from expended 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.

Once the Department identified the principles for reform, we created an internal workgroup to develop options to improve the Part 83 Process under these guiding principles. As a result of extensive meetings of this core workgroup, the Department released a discussion draft on June 21, 2013, and announced public meetings and tribal consultation sessions. Throughout July and August 2013, the Department hosted tribal consultation sessions for representatives of federally recognized Indian tribes and separate public hearing sessions for interested individuals or entities at five locations across the country.

During these sessions, serious efforts were undertaken to capture meaningful comments on our discussion draft and other suggestions for reform. A professional court reporter transcribed each session. The Department made the transcripts available on its website and posted each written comment it received also on its website. At the request of States, Indian tribes, and others, the original comment deadline of August 16, 2013, was extended to September 30, 2013, to allow additional time to provide input. Tribal and public engagement at this stage of the reform initiative was incredibly robust. Commenters submitted more than 200 unique written comment submissions but, in total, more than 4,000 commenters provided input through form letters and signed petitions.

When the comment period on the discussion draft closed, the Department's internal workgroup began reviewing each written and oral comment on the discussion draft. During this review process, which also involved regular team meetings, it began to formulate a draft proposed rule. Prior to publication, the draft proposed rule was reviewed by OMB and Federal agencies.

On May 29, 2014, the Department published the proposed rule in the *Federal Register*. The publication also announced that the Department would be hosting additional tribal consultation sessions and public meetings at six locations across the country in July 2014. In response to requests for extension, the Department extended the original comment deadline of August 1, 2014, to September 30, 2014. In response to requests for additional meetings at additional locations, the Department announced the addition of two more tribal consultation sessions and two more public hearings to be held by teleconference in August and early September of 2014. The Department again made transcripts of all sessions available on its website and made all written comments available on www.regulations.gov. Tribal and public engagement was again

robust. Commenters provided more than 300 unique comment submissions on the proposed rule, and more than 3,000 commenters provided input through signatures on form letters or petitions.

Since September 30, 2014, when the comment period on the proposed rule closed, the Department's internal workgroup has been reviewing the comments and drafting a final rule. The internal workgroup has included representatives of the Office of the Assistant Secretary – Indian Affairs, OFA, the Office of the Solicitor, the Office of Hearings and Appeals, and the U.S. Department of Justice. The comments provided have been extraordinarily helpful to the Department as it moves forward drafting a final rule. Just as the proposed rule was the product of extensive comments on the discussion draft, we anticipate that the final rule will reflect additional changes following comments on the proposed rule. As I previously testified, the work of this Committee and the Senate Committee on Indian Affairs in previous Congresses has been extraordinarily helpful to inform our thinking as we move forward with a final rule.

Conclusion

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