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FEDERAL RECOGNITION: POLITICS AND LEGAL RELATIONSHIP BETWEEN GOVERNMENTS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

JULY 12, 2012

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FEDERAL RECOGNITION: POLITICS AND LEGAL RELATIONSHIP BETWEEN GOVERNMENTS

THURSDAY, JULY 12, 2012

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

The CHAIRMAN. I call this hearing of the Committee on Indian Affairs to order.

Aloha and welcome to all of you. And welcome to this Committee's oversight hearing on Federal Recognition, the Political, and Legal Relationship Between Governments.

The people of the United States have long acknowledged that our Nation has a special relationship with and responsibility to our indigenous peoples, one that we first contemplated as we framed our Constitution and have struggled to fulfill ever since. We have long acknowledged that as we forge this new Nation, the United States, and continue our great experiment in democracy, we must ensure the survival of the many Native nations who have called these lands home long before Columbus first set sail.

The United States has recognized that the trust responsibility to Native nations means supporting and advancing their ability to be self-determining and self-sufficient. Fulfilling that trust responsibility has meant Federal action in three basic areas. First, providing support to address barriers to self-sufficiency. Second, enacting laws to protect the collective rights of all Native nations. And third, actively engaging Native nations in a government-to-government relationship.

Currently, the United States is taking action in all three areas of trust responsibility, with 566 federally-recognized Native nations. For my own people, the Native Hawaiian people, the United States has taken action on two out of three areas. The United States currently provides support for addressing barriers to self-sufficiency and protects the collective rights of the Native Hawaiian people in the same laws that protect the rights of other indigenous peoples.

My bill, the Native Hawaiian Government Reorganization Act, which is S. 675, takes action to fulfill the third trust responsibility to the Native Hawaiian people by engaging in a government-to-government relationship with them.

In the past, the Federal acknowledgment has come in a variety of ways. Federal recognition of the trust responsibility and status of these Native nations as sovereign governments has occurred through treaties, acts of Congress, court rulings, and administrative decisions. It wasn't until 1978 that a uniform process existed for Federal recognition. Unfortunately, that process, which was intended to streamline Federal recognition and make it consistent, has failed to accomplish that goal.

So the road to Federal recognition remains a difficult one. Because the administrative process is most often described as broken, and Congress has not recognized a Tribe through legislation, can you imagine, in over a decade.

Many Native nations wait sometimes decades for the Federal Government to acknowledge the trust responsibility and their status as sovereign governments. At the beginning of the hearing, the monitors displayed quotes from members of Congress and Administration officials related to the Federal recognition process. Those statements, as well as testimonies from the last 30 years, show that numerous Tribal leaders, interest groups, the GAO, and Senators from both sides of the aisle acknowledge the flaws in the recognition process.

The length of the process, interpretation of the criteria, and staffing needs have been raised countless times at Committee hearings. Sadly, little has changed with the process and many of the issues raised decades ago still remain unresolved.

Let me call on my colleague on the Committee, Senator Tester, for any opening statement he may have.

STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Mr. Chairman. I will make it quick.

First of all, I want to thank Senator Webb for being here today. I appreciate it, and look forward to your testimony.

Ken Gottschalk, attorney for the Native American Rights Fund, thank you very much for the work you have done on Little Shell Tribe, and thank you, Mr. Chairman, for holding this hearing.

I am going to make my comments very, very short. Basically, Tribal recognition should be based on history, culture and science, not politics. The process should be rigorous. But it is inefficient and time-consuming and costs a bunch of money. In fact, the Little Shell started their process in 1978. And the process continues on. They are in the appeals process right now in 2012, some 34 years later, $2 million in legal fees, and 70,000 pages of documents. From my perspective, they end up making the wrong decision.

So I think that there is a lot of work to be done here. I think you have a bill, Mr. Chairman, I have a bill, I am sitting here looking at the pending petitions by regional distribution that aren't there. Little Shell isn't on there, I assume that is because they are appealing the process right now.

But the bottom line is that we have to be more efficient, we have to be more timely and we have to get better information and leave the politics out. Thank you for having the hearing, Mr. Chairman.

The CHAIRMAN. Thank you, very much, Senator Tester.

Let me now call on our Vice Chairman, Senator Barrasso.

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman, for holding this hearing today on the Federal acknowledgment process. I am going to keep my opening statement brief as well, so we can proceed to our witnesses.

This Committee has held several hearings on this topic over the past few sessions of Congress. We have heard a lot of complaints. And they are essentially the same complaints each time we gather to discuss this issue. The process takes much too long, it costs far too much and the outcomes are not consistent. I want to be clear, Mr. Chairman, an administrative process for recognizing Indian tribes is preferable to a legislative process. The administrative process allows for thorough and fair analysis of Federal acknowledgment petitions. The Office of Federal Acknowledgment has experts who are historians, anthropologists, genealogists. These people are able to analyze and evaluate petitions against the exacting criteria in the acknowledgment regulations.

On the other hand, the legislative process is poorly suited to make these complex and highly fact-specific judgments. But if the administrative process takes over a decade to get through, then something is wrong. The efficiency, the consistency, the timeliness of this process should be improved if it is to serve any meaningful purpose. In previous committee hearings on this topic, the Department has acknowledged the need to improve the process.

So as we proceed today, I would like to know what headway, if any, the Department has made in addressing these issues. I just want to thank the witnesses for being with us and joining us today. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Barrasso.

Today we are hoping to hear good news from the Administration about their efforts to improve the recognition process. We will also hear from Tribal leaders about the need for Congress to exercise its plenary power to recognize Tribes.

Finally, we will hear thoughts and ideas on how to improve the Federal recognition process for our Native nations, those displayed on the charts as well as others.

As Chairman, it is my goal to ensure that we hear from all who want to contribute to the discussion. So the hearing record is open for two weeks from today. I encourage everyone to submit their comments to written testimony.

I want to remind witnesses to please limit your oral testimony to five minutes today. We will begin by hearing from our Senator, the Honorable Jim Webb, United States Senator from Virginia. Welcome, Senator Webb. It is good to have you here.

STATEMENT OF HON. JIM WEBB,
U.S. SENATOR FROM VIRGINIA

Senator WEBB. Thank you very much, Mr. Chairman, Senator Barrasso, Senator Tester, and others. I appreciate the Committee's willingness to hold this hearing.

I have a written statement that I would ask be submitted for the record and I would just like to make some brief oral remarks today.

I would like to thank Steve Adkins, Chief Adkins of the Chickahominy Tribe for being here today representing the Six Virginia Indian Tribes who are seeking Federal recognition. As the Committee knows, I am a sponsor of the Indian Tribes of Virginia Federal Recognition Act of 2011. This bill would give Federal recognition to six Indian Tribes from the Commonwealth of Virginia. This bill was passed out of this Committee in July of 2011.

This is not a new issue for your Committee. These six Tribes gained State recognition in the Commonwealth of Virginia between the years 1983 and 1989. I would like to emphasize to this Committee that they have received strong bipartisan support from the Virginia General Assembly for Federal recognition and importantly, seven former Virginia governors and Virginia's current governor all have expressed support for this legislation.

I understand the reluctance from Congress to grant any Native American Tribe Federal recognition through legislation rather than through the administrative process. However, I would like to emphasize my personal belief that this particular situation with respect to Virginia is historically unique. I say that as someone who studied and wrote about this well before I entered into the Senate.

The unique history of Virginia with respect to its Indian Tribes and the harsh policies of the past have created a gray area for Virginia's Native American Tribes to meet the criteria that we have been using in the administrative process. It is a fact that Virginia in the past had race laws which regulated the activity of Virginia Indians and laws which went so far as to eliminate an individual's identity as a Native American on many birth, death, and marriage certificates.

The elimination of racial identity records had a harmful impact on Virginia's Tribes when they began this process. In addition to this, five of the six courthouses that held the vast majority of the records that Virginia Tribes would need to document their history were destroyed in the Civil War. And lastly, Virginia Tribes, with respect to the treaties that you mentioned, Mr. Chairman, actually signed a treaty with England before our Country was politically formed. This predated the practice of most Tribes that signed a treaty with the Federal Government which have been relied on in the administrative process.

For these reasons, I strongly believe that recognition for these six Virginia Tribes is justified based on principles of dignity and fairness and historical necessity. Moreover, given the current structure and the requirements of the BIA administrative process, it is really doubtful that our Tribes could successfully complete the process.

So in conclusion, I would say this is an issue that has strong bipartisan support inside the Commonwealth of Virginia, at the State level and here at the Federal level. It has been in the works for a very long time and I would respectfully ask the Committee

to work with our office in order to bring the legislation to the Senate Floor. Thank you very much.

[The prepared statement of Senator Webb follows:]

PREPARED STATEMENT OF HON. JIM WEBB, U.S. SENATOR FROM VIRGINIA

Thank you, Mr. Chairman and members of the Committee. I appreciate the Committee's willingness to have this oversight hearing to discuss the current federal recognition process for Indian Tribes. I would like to thank Chief Stephen Adkins of the Chickahominy Indian Tribe for being here today and representing the six Virginia Indian Tribes' tireless efforts in seeking federal recognition. For the tribes in my state, the rigid nature of the administrative recognition process has been a source of delay, frustrate ion and a lingering sense of unfairness.

As the Committee knows, I am the sponsor of the "Indian Tribes of Virginia Federal Recognition Act of 2011" (S. 379). This bill would grant federal recognition to six Native American tribes from the Commonwealth of Virginia. Most recently, this bill was passed out of this Committee on July 28, 2011. In the past, it has also passed the U.S. House of Representatives—championed by Congressman Moran, who has been a staunch advocate for Virginia's Indian Tribes.

This is not a new issue for this Committee. Support for these six Virginia tribes has been voiced many times during the 15 years since they began seeking federal recognition. These six tribes are the Chickahominy, Chickahominy Indian Tribe Eastern Division, the Upper Mattaponi, the Rappahannock, the Monacan, and the Nansemond Indian Tribe.

The tribes covered by this bill gained state recognition in the Commonwealth of Virginia between 1983 and 1989. They have received strong bipartisan support from the Virginia General Assembly for federal recognition. I believe it is appropriate for them to finally receive the federal recognition that has been denied for far too long. Importantly, seven former Virginia governors and Virginia's current governor have expressed support for this legislation.

Mr. Chairman, I understand the reluctance from Congress to grant any Native American tribe federal recognition through legislation rather than through the BIA administrative process. I have not taken this issue lightly, and agree in principle that Congress generally should not have to determine whether or not Native American tribes deserve federal recognition.

However, the administrative process which is the specific topic of your hearing today, is subject to unreasonable delays, lacks clear guidance and is expensive. In many cases the administrative process has taken in excess of 20 years before a determination is reached. This has been well documented by repeated GAO studies. In 2008, the BIA's Office of Federal Acknowledgment came out with new guidelines on implementing the criteria to determine federal recognition. While I applaud improvements to the process, this still does not change the impact of racially hostile laws formerly in effect in Virginia on these tribes' ability to meet the BIA's seven established recognition criteria.

Virginia's unique history and its harsh policies of the past have created a barrier for Virginia's Native American Tribes to meet the BIA criteria. Many Western tribes experienced government neglect during the 20th century, but Virginia's story was different.

First, Virginia passed "race laws" in 1705, which regulated the activity of Virginia Indians. In 1924, Virginia passed the Racial Integrity Law, and the Virginia Bureau of Vital Statistics went so far as to eliminate an individual's identity as a Native American on many birth, death and marriage certificates. The elimination of racial identity records had a harmful impact on Virginia's tribes, when they began seeking Federal recognition. In addition to this burden, five of the six courthouses that held the vast majority of the records that Virginia Tribes would need to document their history were destroyed in the Civil War.

Last, Virginia tribes signed a treaty with England, predating the practices of most tribes that signed a treaty with the Federal Government.

For these reasons, I strongly believe that recognition for these six Virginia tribes is justified based on principles of dignity and fairness. Moreover, given the current structure and requirements of the BIA administrative process, it is doubtful that our six Virginia tribes could successfully complete the process. As I mentioned, I spent several months examining this issue in great detail, including the rich history and culture of Virginia's Tribes before deciding to advance this legislation. After thorough investigation, I concluded that legislative action is needed for recognition of Virginia's tribes due to the broken and burdensome administrative process we are

discussing here today. Congressional hearings and reports over the last several Congresses demonstrate the ancestry and status of these tribes.

Most notably, recognition would place these tribes on an equal footing with other tribes in the United States by acknowledging their heritage and their right to be treated with the same dignity and respect as other Indian tribes in this country.

In conclusion, Mr. Chairman and members of the Committee, this bill has been a long time in the works and these six Virginia Indian Tribes have been patiently waiting.

I respectfully ask the Committee to work with me to bring this legislation to the Senate floor.

Thank you Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Webb, for your statement. I want you to know that we look forward to working with you on this.

Senator WEBB. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I would like to invite our witness to the table who is the first panel. Serving on that panel is Mr. Bryan Newland, Senior Policy Advisor to the Assistant Secretary of Indian Affairs, Department of Interior, Washington, D.C. Welcome to the Committee, Mr. Newland. Please proceed with your statement.

STATEMENT OF BRYAN NEWLAND, SENIOR POLICY ADVISOR, OFFICE OF THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. NEWLAND. Good afternoon, Chairman Akaka. Thank you for having this hearing today.

My name is Bryan Newland. I am a citizen of the Bay Mills Indian Community of the Ojibwe Tribe in Northern Michigan. I currently serve as the Senior Policy Advisor to the Assistant Secretary for Indian Affairs at the Department of Interior.

I appreciate the opportunity to provide the Department's views on the Federal acknowledgment process. Acting Assistant Secretary Del Laverdure regrets that he can't be here today. He is traveling with the Secretary out west.

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. It permanently establishes a government-to-government relationship between the two.

The Department's process for acknowledging Indian Tribes is set forth in regulations that were first adopted in 1978. Those regulations contain seven mandatory criteria that a petitioning entity must satisfy in order for the Department to acknowledge the government-to-government relationship with the Tribe.

Since 2009, we have issued six final determinations on acknowledgment petitions, including a June 13th, 2010 determination to acknowledge the Shinnecock Indian Nation in the State of New York. These decisions were issued pursuant to our regulations, which set forth the exclusive process to acknowledge Indian Tribes that have yet to establish a government-to-government relationship with the United States, or where that relationship has lapsed.

The Department is well aware of the criticism expressed by many interested parties regarding the acknowledgment process. Earlier this year, we participated in a roundtable discussion hosted by your Committee, Mr. Chairman. I would like to thank you on behalf of the Department for bringing together leadership from various Indian communities and the public to discuss this issue at that roundtable discussion.

That roundtable highlighted a number of concerns with the acknowledgment process, including criticism that the process is expensive, burdensome, intrusive, less than transparent, and unpredictable. Others have expressed that the Department needs to be more efficient in its review, and others yet stated that our process does not give enough weight to findings made in judicial proceedings or by Congress.

We have been reviewing our existing regulations to consider ways to improve this 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, timeliness, efficiency, and flexibility.

We have also considered a number of concepts that have been raised by the Tribes that have gone through the process, petitioning groups and staff within our Office of Federal Acknowledgment. I would like, Mr. Chairman and Vice Chairman Barrasso, to acknowledge Lee Fleming, who is here with me today, the Director of the Office of Federal Acknowledgment at the Department.

These concepts include assessing the standards of evidence that the Department uses to review petitions, utilizing outside research tools and changing the schedule for proposed findings and final determinations. We believe that these principles and considerations have established a framework that can lead to improvements in our Part 83 acknowledgment process.

With that, I would like to thank you for your time, Mr. Chairman and Vice Chairman Barrasso. I would be happy to answer any questions that you have for me today.

[The prepared statement of Mr. Newland follows:]

PREPARED STATEMENT OF BRYAN NEWLAND, SENIOR POLICY ADVISOR, OFFICE OF THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

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 CFR 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 *Carcieri* 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 than 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.

The CHAIRMAN. We really appreciate your being here, Mr. Newland.

In your testimony, you outline principles raised through years of hearings as well as at our recent roundtable. Thanks for expressing your appreciation for the roundtable meetings.

My question is, how well did the Department implement these considerations to improve the administrative process and also ensure that they are fair and defensible?

Mr. NEWLAND. Thank you, Mr. Chairman.

I think as we move forward we have some broad agreement within the Department on a number of areas within our regulations that deal with process that we think can help make this more efficient, which is one of the principles that was in our prepared testimony.

With respect to the substantive provisions of the regulations, we would certainly engage in Tribal consultation and dialogue with interested parties and of course, work with members of the Committee and your staff and try to seek broad consensus and ideas that will really improve this process and make it work for everybody involved.

The CHAIRMAN. Thank you for that. Even here in the Committee we try to spend more time to include the Tribes as well, and hearing directly from them.

Mr. Newland, Congress has recognized 16 Tribes in the last 40 years. Is there a continued need for Congress to exercise its authority to acknowledge or reaffirm Tribes?

Mr. NEWLAND. Thank you, Mr. Chairman.

Coming from the State of Michigan, I am very familiar with Congressional enactments that have reaffirmed or restored the government-to-government relationship between the United States and

Indian Tribes. I have seen up close that there are certainly times where that is appropriate or warranted.

The Department, we have our process under Part 83, which was noted earlier by the Vice Chairman. It is supposed to bring some uniformity of review. But at times, Congress, in its authority over matters of Indian affairs, may be the appropriate route to examine, on a case by case basis, the needs of organizations that want to engage the United States in a nation-to-nation relationship.

The CHAIRMAN. Thank you.

Let me call on our Vice Chairman for any questions he may have.

Senator BARRASSO. Just a couple, Mr. Chairman.

Thanks so much for being here. During a Committee hearing on Federal recognition back in November of 2009, the Acting Principal Deputy Assistant Secretary for Indian Affairs at that time, George Skibine, identified specific issues in the current Federal recognition process. The issues included the need for clear time frames for decisions, qualifying some ambiguities and standards in the process. He testified that the Department intended to publish within a year proposed rules to address these issues.

I was just wondering if you could tell us what progress has been made to implement reforms on these sorts of issues.

Mr. NEWLAND. Thank you, Mr. Vice Chairman. Yes, I am well aware of the testimony in that hearing in 2009, where we had pledged to propose new rules within a year. In response to that, we didn't get that done. There is no sugar-coating that.

But that is not to say we haven't made progress. I think a lot of the progress was highlighted at the recent roundtable here hosted by this Committee. Again, it was a great opportunity to pull together petitioning groups, federally-recognized Tribes, members of Congress and staff, and key staff from the Department, where again, a lot of the issues were framed and a lot of good ideas were presented.

I think that out of that roundtable, we were able again to develop some guideposts or key principles that will inform a regulatory reform effort.

Senator BARRASSO. Obviously we hear, in a bipartisan way, Mr. Chairman, we hear concerns and complaints about how long it takes to get through the Federal acknowledgment process. Some Tribal groups have had their acknowledgment petitions on the "ready and waiting" list for over a dozen years. So I want to know what the principal reasons are for the slow pace of the process and what the Department is doing to address the problem.

Mr. NEWLAND. Thank you, Vice Chairman. The regulations themselves, as was highlighted in the 2009 hearing, contain a process time line that in a perfect world would take 25 months. But clearly, that is not how the process has been working. And we have to look at some of the other parts, the non-process parts of our regulations, and also take advantage of the flexibility that we do have under the existing regulations.

The important part to remember is that each group, each petitioning group and each federally-recognized Tribe has a unique nation-to-nation relationship with the United States. It is important that when we are reviewing petitions or considering reform that we

look at the standard of evidence, standard of proof that we applied and make sure that we retain and perhaps bolster the flexibility that we do have. We have all heard the stories of petitioners submitting tens of thousands of pages of documents. We can put time lines in the regulations. But when we have a burden of proof and a rigid application of mandatory criteria, that has a huge impact on the time line and the length of time it takes us to complete our review.

So really delving into the substantive parts of the regs is also something that we are going to have to look at going forward.

Senator BARRASSO. Well, we want to make sure it is not going to take the Department as long to fix the process as it takes a Tribe to get through the process.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Barrasso, for that question. Because I think we need to work toward what you mentioned, the perfect solution, as quickly as we can. I think we can work that out together here in Congress and with the Administration. But it is important that we try to improve the process.

Mr. Newland, similarly, at his confirmation hearing, former Assistant Secretary Echo Hawk discussed problems with the Federal acknowledgment process. Subsequently, there were assurances made that the Administration would seek, as we all are, to resolve those issues.

Can we expect to see improvements made to the process before the end of this Congress?

Mr. NEWLAND. Thank you, Mr. Chairman.

I can't, especially in light of our previous testimony, come up here and honestly answer that these reforms are going to be finished by then. What I can pledge is that this Administration, this Department of the Interior, are going to continue our work. Again, we have made, notwithstanding the fact that we did not publish proposed rules within a year as was indicated in the last hearing, that is not to say we haven't made progress. I think a lot of that progress, again, came out of really the roundtable that this Committee hosted. It was a collaborative effort, and I really think it was an important moment in this effort.

I think we have a good template, we have a good framework to move forward. We do have a commitment to move forward, and we are sensitive to, Mr. Vice Chairman, the concern that we don't want this effort to draw out longer than it takes to acknowledge Tribes under the existing process. It is important, it is a priority for us. We are going to continue our work.

The CHAIRMAN. Thank you. Any further questions?

Well, this is a challenge, not only for us here and for you, but for the Administration as well in many of the areas. We continue to work on it. And in our case, we want to try to move it along as best we can. This is the effort.

There being no further questions, I want to thank you very much, Mr. Newland, for being here, for your statement and your responses. I really appreciate it and look forward to working with you and the Administration on these challenges.

Mr. NEWLAND. Thank you, Mr. Chairman, Mr. Vice Chairman.

The CHAIRMAN. I would like to invite the second panel to the witness table. Serving on our second panel is the Honorable Stephen R. Adkins, Chief, Chickahominy Indian Tribe, Charles City, Virginia; the Honorable Paul Brooks, Chairman of the Lumbee Tribe, Pembroke, North Carolina; Mr. John Norwood, Co-Chair of the National Congress of American Indian Taskforce on Federal Acknowledgment, Washington, D.C.; Mr. K. Jerome Gottschalk, Staff Attorney, Native American Rights Fund, Boulder, Colorado; and Mr. Michael J. Anderson, Owner, Anderson Indian Law, Washington, D.C.

I want to welcome all of you here and ask Chief Adkins to please proceed with your testimony.

STATEMENT OF HON. STEPHEN R. ADKINS, CHIEF, CHICKAHOMINY INDIAN TRIBE

Mr. ADKINS. Thank you, Chairman Akaka and Ranking Member Senator Barrasso, for inviting me here today to speak on this very important subject in Indian Country.

Today I seek to provide a voice for those Tribes seeking Federal acknowledgment as sovereign nations, regardless of the process they are pursuing. However, in some specific areas, I am speaking to those six Tribes named in S. 379, the Indian Tribes of Virginia Federal Recognition Act of 2011. And when I think of S. 379, it is with some dismay. This bill was heard and passed out of Committee on July 28th, 2011, but no committee report has been issued since then. I find that distressing and I just want to register present with that observation.

Chairman Akaka, during the first decade of the 21st century, the Virginia Indian Tribes were honored to represent the very essence of democracy and freedom for this Country. We represented the Commonwealth of Virginia and we represented the United States, traveling extensively, talking about that first primitive English settlement, the fact that that was the cradle of democracy and the contributions the Native Indians made to the success of that first primitive English settlement. Sadly, somehow we got lost in the process and the first to greet the settlers have yet to be recognized.

Let me point out a few points regarding the history of Virginia Indian Tribes. A government-to-government relationship with the colonists and crown began in the early 17th century. A final treaty drawn in 1677 deemed us, the signatories, sovereign subjects of the crown. However, the sovereign status was neither honored nor recognized by the United States.

Some Virginia Indian Tribes were forcibly relocated from ancestral lands to other parts of Virginia. Some of these Tribes migrated back to their homeland and miraculously purchased land fee simple. In the late 19th century anthropologists applauded our efforts and our success in maintaining our respective identities and urged us to continue those efforts.

Indians were inducted into the armed forces as Indian people in World War I. The Racial Integrity Act of 1924 decreed that there were only two races in Virginia, White and Colored. So those folks that entered service in World War II had to take their chiefs with them to ensure they were registered as Indians.

During the Indian Reorganization Act of 1934, representatives from the United States government visited our Tribal communities,

verified who we were, and yet the State continued to say we did not exist. The State paid for teachers and supplies for Indian students attending Indian schools, even though the state did not officially recognize us.

In the 1940s, the State began paying tuition and transportation costs to send Virginia Indians out of State to attend high school. Lots of my folks went to Bacone College in Oklahoma. Students continued to attend boarding schools throughout the 1950s. These are just some of the things that happened to us during our history.

The Virginia Tribes deserve Federal acknowledgment as sovereign nations. We deserve and have vigorously pursued paths to achieve same. To achieve recognition, we were told we needed to go through the administrative process. We were told all we would have to do was present records substantiating our existence.

Well, our records were destroyed during the Civil War. They were also destroyed by action of the Commonwealth through the Racial Integrity Act of 1924. So we had the State saying we are not who we say we are, all this we had to be overcome in order to meet the rigors of the administrative process.

We began the administrative process in the 1990s. Our hopes were significantly diminished when the then Assistant Secretary for Indian Affairs told us that many of us would not live to see Federal acknowledgment through the administrative process. And I hate to say this, but several of our chiefs have been buried since then. That proved to be a prophecy that came to pass.

The Tribes are not carbon copies of each other across the United States. So a standardized mechanism to acknowledge Tribes clearly cannot work. The road to recognition is very costly. Some Tribes cannot afford the cost of pursuing that route.

Now, let's look at how we fared using the Congressional or legislative route. The fact that Congress has authority to recognize Tribes remains above dispute. Let's look at the Government Accountability Office numbers. As of April 2011, 564 Tribes had been acknowledged as sovereign Indian nations. Out of those 564 Tribes, 530 were acknowledged by Congress.

The bottom line is that Congress has authorized 92 percent of the Tribes that have been accorded recognition from the United States of America.

Out of the box, we made some concessions in our process that actually chipped away at our sovereignty. We have had no interest in gaming, so we readily agreed to insert language into our bill stipulating that we would not engage in gaming.

Many times our bills have passed out of one body of Congress. In the 111th Congress, for instance, our bill passed the House but failed to reach the Floor of the Senate. We continue to press our case and have been advised that we have a very compelling story and should be accorded recognition. But it still has not happened.

In conclusion, let me say that much conversation has occurred regarding when Indian Tribes should be recognized by the Federal Government. Let me summarize our feelings on this subject. Tribes who have been able to maintain their identity over hundreds of years, who have faced abuse and insults because of their heritage, who have continued to see their Tribal lands shrink, who have seen their ranks decimated to the point that Native American Indians

represent less than 1.4 percent of the United States population, who have lost more of their citizens per capita fighting for our Country in the armed services of the United States of America, and these folks who resolutely salute Old Glory and display pride and love for their Country, the answer to when to do the right thing must always be right now.

Mr. Chairman, the Virginia Indian Tribes urge you to seize the opportunity to stand and do the right thing now by ensuring the passage of S. 379, thus granting Federal acknowledgment as sovereign nations to these historic Virginia Indian Tribes.

Thank you, Chairman Akaka, for allowing me to address you today on this very important topic. And I will say, my written testimony goes into detail on these various subjects. Thank you for listening to me today.

[The prepared statement of Mr. Adkins follows:]

PREPARED STATEMENT OF HON. STEPHEN R. ADKINS, CHIEF, CHICKAHOMINY INDIAN TRIBE

Thank you Chairman Akaka and other distinguished members of the Senate Committee on Indian Affairs for inviting me here today to speak at the oversight hearing on "Federal Recognition: Political and Legal Relationship Between Governments". It is an honor to appear before this Committee today to speak to this very important subject which looms large all across Indian Country.

I seek to provide a voice for those tribes seeking federal acknowledgement as sovereign nations regardless of the process they are pursuing. However in some specific areas, I am speaking on behalf of the Eastern Chickahominy, the Monacan, the Nansemond, the Upper Mattaponi, the Rappahannock, and my Tribe the Chickahominy, the six Tribes named in S 379, The Indian Tribes of Virginia Federal Recognition Act of 2011. Hereinafter these six tribes will be referred to as the Virginia Indian Tribes.

Chairman Akaka, the Virginia Indian Tribes were honored to represent the very essence of democracy and freedom as we participated in events, both in the Commonwealth of Virginia and the United Kingdom, commemorating the 400th anniversary of the establishment of the first permanent English Settlement in America in May 1607.

We took pride in representing the Commonwealth of Virginia and the United States of America as descendant tribes of those Virginia woodland Indians who welcomed the first permanent English settlement to what is now called America. A culminating event to the commemoration occurred in May 2007 when President George W. Bush shared the podium with dignitaries from the United Kingdom, the Governor of Virginia, and leadership from Virginia Indian tribes. However, when the hoopla subsided and the festivities were over, we remained unrecognized as sovereign nations by the United States of America.

Virginia Indian Tribes lived under the Treaty of 1677, a treaty with the English Crown, until the formation of the United States. Signatories of this treaty were deemed "sovereign subjects of the crown". As recently as the first decade of the 21st century this treaty was applied to a court case involving Virginia Indians. And while we are now recognized by the Commonwealth of Virginia, federal recognition remains unfulfilled. While we continue to attempt to achieve recognition through the administrative tribal recognition process, it is our belief that this process is broken and unavailable to us.

Please allow me to cite a painful example of why the current administrative process falls short in embracing the reality Virginia's Indigenous people face. In 1912, a man named Walter Ashby Plecker became head of the first Bureau of Vital Statistics in Virginia. Plecker was a rabid white separatist; he supported and enforced the Virginia Racial Integrity Act, which became law in 1924. To give you an idea of the motives surrounding this legislation, a companion bill was the Sterilization Act, which called for the forced sterilization of "feeble-minded" inmates.

The Racial Integrity Act classified all persons in the Commonwealth of Virginia as either "white" or "colored." It enforced the "one-drop" rule, in which any person with even "one drop" of African or Native American blood was deemed to be "colored." From 1924, official records of the Commonwealth of Virginia did not allow Virginia's Native American Tribes to list Indian, Native American, or any other trib-

al affiliation as race. According to the Commonwealth of Virginia, we were all just "colored."

This act served as the official policy of Virginia for five decades, remaining in effect until 1967. The act caused my parents and other Virginia Indians to have to travel to Washington D.C. in order to be married as Indians. This vile law forced all segments of the population to be registered at birth in one of two categories, white or colored. Our anthropologist says there is no other state that attacked Indian identity as directly as the laws passed during that period of time in Virginia. No other ethnic community's heritage was denied in this way. Our State, by law, declared there were no Indians in the State in 1924, and if you dared to say differently, you went to jail or suffered other indignities. This state action distinguishes us from many other tribes in this country, tribes that were protected from this blatant denial of Indian heritage and identity.

However, there was one exemption to this rule. Many of the First Families of Virginia claimed to be descendants of Pocahontas. The law contained a "Pocahontas exemption," allowing the landed white families in Virginia to be listed as "white" despite the one-drop rule, while still claiming to be descendants of Pocahontas.

Plecker and the Virginia Bureau of Vital Statistics even went so far as to retroactively change the vital records of many of our ancestors so that only white or colored were listed. As part of the Indian Reorganization Act in 1934, United States government officials contacted the Commonwealth of Virginia regarding its Indian population. The state registrar, also one Mr. Walter A. Plecker, advised there were no Indian Tribes in Virginia. Despite Plecker's response, Federal Government officials visited Virginia tribes, conducted interviews, and photographed people, places and things substantiating our existence. But no action was taken, and we remain unrecognized.

To achieve recognition, we are now told that we should go through the administrative process in the Department of the Interior. All we have to do, we are told, is present records substantiating our claims to have been tribes. But because the Virginia Indian Tribes signed treaties with the English in 1677, our treaties aren't recognized by the United States of America, which had yet to be formed. Because courthouses containing our records were burned during the Civil War, our documentation isn't in order. And because Walter Plecker and the vile Racial Integrity Act claimed we didn't exist, it appears that the administrative process agrees.

The history of the Virginia Indian Tribes predates 1607, our first sustained English contact. In my discussion with the Bureau of Acknowledgement and Research (BAR) now the Office of Federal Acknowledgement (OFA), I was advised we needed to supply documentation of our existence for each decade since 1607. Even though this has been relaxed to reach back to 1790, problems still exist from several fronts: (1) tribes had no written language; (2) oral history was considered inadequate; (3) colonial leadership sought to annihilate Native people versus maintaining vital statistics on them.

Ironies at the state and federal level have supported the fact that Virginia Indian Tribes have endured over time. In the 20th century the Commonwealth of Virginia supplied transportation and tuition funding for Virginia Indian students to attend high school at Bacone Indian School in Muskogee, Oklahoma. In addition to Oklahoma, the Commonwealth of Virginia provided funding for students to attend high school in other States. On the other hand, the Federal Government supplied funds to send Virginia Indian Students to Federal Government Indian boarding schools located in several different states. The former being tantamount to the Commonwealth of Virginia recognizing Virginia Indian Tribes as Indian, and the latter, the Federal Government recognizing Virginia Indian Tribes as Indian by supplying federal funding for boarding school attendance.

Probably the most telling testimony to the current system is the fact that in 1999, the head of the BIA, the Assistant Secretary for Indian Affairs, advised a Virginia Indian tribal delegation that many of those people assembled on that day would not live long enough to see federal acknowledgement for their tribe(s) through the administrative process. This proved to be prophetic for several of the tribal chiefs and other tribal members who attended that meeting in 1999 have been buried since then.

This testimony would be incomplete if I did not cite a common thread that exists among Atlantic Coast Tribes and even some Gulf Coast Tribes. The thread I am speaking of is our respective tie to colonial governments. The success of these tribes in going through the administrative process has been very low. Several factors contribute to the low success rate:

1. Lack of resources needed by tribes to "ferret" out the requisite information to be compliant with a process geared more toward post-1790 tribal histories;

2. Perceived low value/regard for tribal oral history;
3. Failure of the administrative process to recognize that one size does not necessarily fit all;
4. Perceived lack of value/regard for treaties drawn between tribes and colonial governments.

Other compelling reasons to have this conversation today include:

1) Time—In many cases the administrative process has taken in excess of 20 years before a determination is reached. Even legislative recognition often takes several years before a bill reaches the floor of the House or Senate.
2) Cost—The road to recognition is very costly ranging from several hundred thousand to several million dollars. These costs include fees for attorneys, lobbyists, anthropologists, et al. Tribes generally are poor and can't afford these fees.
3) Application of administrative criteria—
   1. Criteria appear to be geared to those tribes encountered following formation of the United States without taking into account regional differences in tribal experiences;
   2. Criteria seem to be interpreted more strictly with time, especially with adoption of IGRA;
   3. State recognition or state reservations don't seem to be given much weight;
   4. Many petitioners perceive that racial bias seems more prevalent regarding tribes in the East & South

The fact that congress has the authority to recognize tribes remains above dispute. Let's look at the Government Accountability Office (GAO) numbers. As of April 2011, 564 tribes had been acknowledged as sovereign Indian Nations. Out of those 564 tribes, 530 tribes had been acknowledged by Congress; 17 tribes had been acknowledged by OFA; 10 tribes had been acknowledged through the administrative process pre-1978; 7 tribes had been recognized by the administrative process post-1978 but outside of OFA. The bottom line is that Congress has recognized 92 percent of tribes who have been accorded recognition from the United States government.

Much conversation has occurred regarding *when Indian tribes should be newly recognized by the Federal Government.* Let me summarize my feelings on this subject: Tribes who have been able to maintain their identity over hundreds of years, who have faced abuse and insults because of their heritage, who have witnessed continued shrinking and sometimes complete loss of their tribal lands, who have seen their ranks decimated to the point that Native American Indians represent less than 1.4 percent of the United States population, who have lost more of their citizens per capita fighting for their country in the Armed Forces of the United States of America than any other group in the Union, and who resolutely salute Old Glory and display pride and love for their county, the answer to "when?" is a resounding "NOW"!

Thank you for allowing me to address you today on this very important topic.

The CHAIRMAN. Thank you, Chief Adkins.

Chairman Brooks, will you please proceed with your statement?

STATEMENT OF HON. PAUL BROOKS, CHAIRMAN, LUMBEE TRIBE OF NORTH CAROLINA

Mr. BROOKS. Chairman Akaka, Tribal leaders and staff, thank you for the opportunity to address the Federal acknowledgment process from the perspective of my people.

Other panelists have specific complaints about how the process is inefficient and in some ways completely broken. On behalf of my people, I am here today to tell you that there is no administrative process for the people of the Lumbee Tribe of North Carolina.

Congress passed the Lumbee Act in 1956. This legislation acknowledged the Indians of Robeson County and surrounding counties, but the following clause was included to prevent Federal services to my people: "Nothing in this Act shall make Indians eligible

for any services performed by the United States because of their status as Indians."

In 1989, the Lumbee petitioned the Bureau of Indian Affairs for full Federal recognition. The Secretary of the Interior requested a review of the Lumbee Act of 1956. From the Office of the Solicitor, in light of the Lumbee petition, the Solicitor indicated that the acknowledgment regulation, 25 CFR Part 83, do not apply to groups which are the subject of Congressional legislation terminating or forbidding the Federal relationship.

Based on the language in the Lumbee Act, the Solicitor opined that the Lumbee Act terminated or forbade the Lumbee from relationships with the Federal Government. The Solicitor recommended to the Secretary that the Department had no authority to act on the extensive petition submitted by the Lumbee.

To support his opinion, the Solicitor concluded that the Department would be exposed to substantial risk of litigation if it provided services or acknowledgment and acknowledged the government-to-government relationship with the Lumbee Indians.

The Solicitor refused to acknowledge a well-established, and I want to repeat that, the Solicitor refused to acknowledge a well-established government-to-government relationship between the Lumbee and the United States. In 1887, the North Carolina General Assembly passed a bill to provide education assistance for the Lumbee people by financing the construction of an Indian Normal School. That Indian Normal School today is the University of North Carolina at Pembroke, and it was born in that Act that North Carolina did.

In 1900, Congressman Bellamy reported to the United States House Committee on Indian Affairs on the origin, history, and needs of the Indians of Robeson County. In 1910, the United States Government completed a special census of Indian population of Robeson and adjoining counties as part of the Decennial Census Survey. In 1913, the United States Congress held a hearing on the status and concerns of the Indians of Robeson County. In 1914, the United States Senate Resolution 410 directed the Secretary of the Interior to investigate the Indians of Robeson County and adjoining counties of North Carolina. In 1915, Indian Agent O.M. McPherson concluded that the Lumbees are of Cheraw descent.

In 1923, the Superintendent of the Cherokee Agency recommended the State's 1884 Indian rolls, listen to that, be revised and disputed Indians be granted access to training at Haskell University due to education disparities caused by the lack of funding in Robeson County. In 1933, Jon Swanton, a Smithsonian Institute anthropologist, studied the Tribe and declared the Lumbee to be of Cheraw Indian origin and other closely-related Siouan-speaking Tribes. These are just a few examples of the government-to-government relationship between the Lumbee Tribe of North Carolina and the United States.

For more than 100 years, my people have petitioned, applied, and appealed for recognition of our sovereignty. My people have served in every major conflict in which our United States military has engaged including, but not limited to, the Revolutionary War, the Civil War, World War I, and World War II. And we are still dying today because of that.

I respectfully offer today that the various means of Federal recognition have failed the Lumbee Tribe of North Carolina. The Constitution of these United States makes this Congress responsible for the well-being of indigenous people of the United States. There is no delineation or classification of Tribes in the United States Constitution. The United States Congress has a responsibility to my people to deal with them as they do with other Tribes across the Country, without regard to recognition status.

Never before has the government accorded the Tribe of Lumbees that are not eligible for the process to go through a process that everybody admits is broken. The Solicitor has also said that we are not eligible for the Federal acknowledgment process, so Congress should do what it has done for every other Tribe that has already been mentioned like that, and pass full recognition legislation.

Some might say that the recognition process has been delegated to the Department of the Interior. Respectfully, I suggest to you that the delegation of a responsibility by the United States Congress does not relieve Congress of the responsibility to uphold the Constitution. For over 100 years, my people have followed the processes of this government. We worked with the various Federal agencies as they studied us. We have testified numerous times before Congress. We have petitioned the Bureau of Indian Affairs. We have had legislation introduced almost every Congress since 1988.

I implore you to make way for the recognition of the Lumbee Tribe of North Carolina. Our elders are dying waiting for the benefits, and our children struggle to become educated while waiting for benefits that should be available to all Tribes under Federal statute.

I thank you for the opportunity to address the Committee. I look forward to the day when my people, the Lumbee Tribe, receive the same benefits accorded Indian people who have been recognized by these United States. Thank you very much.

[The prepared statement of Mr. Brooks follows:]

PREPARED STATEMENT OF HON. PAUL BROOKS, CHAIRMAN, LUMBEE TRIBE OF NORTH CAROLINA

Chairman Akaka, Committee Members, Tribal Leaders and Staff:

Thank you for the opportunity to address the Federal Acknowledgment process from the perspective of my people. Other panelists have specific complaints about how the process is inefficient and in some respects completely broken. On behalf of my people, *I am here today to tell you that there is no administrative process for the people of the Lumbee Tribe of North Carolina.*

Congress passed the Lumbee Act in 1956. This legislation acknowledged the Indians of Robeson County and surrounding Counties, but the following clause was included to prevent federal services to my people: "Nothing in this Act shall make Indians eligible for any services performed by the United States because of their status as Indians, . . ." In 1989, the Lumbee petitioned the Bureau of Indian Affairs for full federal recognition. The Secretary of the Interior requested a review of the Lumbee Act of 1956 from the Office of the Solicitor in light of the Lumbee petition. The Solicitor indicated that the acknowledgment regulations (25 CFR Part 83) do not apply to groups which are the subject of Congressional legislation terminating or forbidding the Federal relationship. Based on the language in the Lumbee Act, the Solicitor opined that the Lumbee Act terminated or forbade the Lumbee from a relationship with the Federal Government. The Solicitor recommended to the Secretary that the Department had no authority to act on the extensive petition submitted by the Lumbee. To support his opinion, the Solicitor concluded that the Department would be exposed to substantial risk of litigation if it provided services

or acknowledged a government-to-government relationship with the Lumbee Indians.

The Solicitor refused to acknowledge a well-established government-to-government relationship between the Lumbee and the United States. In 1887, the North Carolina General Assembly passed a bill to provide education assistance for the Lumbee people by financing the construction of an Indian Normal School and the present day University of North Carolina at Pembroke was born. In 1900, Congressman Bellamy reported to the United States House Committee on Indian Affairs on the origin, history and needs of the Indians of Robeson County. In 1910, the United States Government completed a special census of Indian population of Robeson and adjoining counties as part of the decennial Census survey. In 1913, the United States Congress held a hearing on the status and concerns of the Indians of Robeson County. In 1914, United States Senate Resolution 410 directed the Secretary of the Interior to investigate the Indians of Robeson and adjoining Counties of North Carolina. In 1915, Indian Agent O.M. McPherson concluded that the Lumbee are of Cheraw descent. In 1923, the Superintendent of the Cherokee Agency recommended the State's 1884 Indian rolls be revised and undisputed Indians be granted access to training at Haskell University due to education disparities caused by lack of funding in Robeson County. In 1933, Jon Swanton, a Smithsonian Institute anthropologist, studied the tribe and declared the Lumbee to be of Cheraw Indian origin and other closely related Siouan speaking tribes. These are just a few examples of the government-to-government relationship between the Lumbee Tribe of North Carolina and the United States.

For more than 100 years, my people have *petitioned, applied and appealed* for recognition of our sovereignty. My people have served in every major conflict in which our United States military has engaged including, but not limited to, the Revolutionary War, the Civil War, World War I, and World War II.

I respectfully offer today that the various means of federal recognition have failed the Lumbee Tribe of North Carolina. The Constitution of these United States makes this Congress responsible for the well-being of indigenous peoples of the United States. There is no delineation or classification of tribes in the United States Constitution. The United States Congress has a responsibility to my people to deal with them as they do with other tribes across this country without regard to recognition status. Never before has the government required a tribe like Lumbee that is not eligible for the process to go through a process that everybody admits is broken. The Solicitor's office has said that we are not eligible for the federal acknowledgment process so Congress should do what it has done for every other tribe like that and pass full federal recognition legislation. Some might say that the recognition process has been delegated to the Department of Interior. Respectfully, I suggest to you that delegation of a responsibility by the United States Congress does not relieve Congress of the responsibility to uphold the Constitution.

For over 100 years, my people have followed the processes of this Government. We worked with the various federal agents as they studied us, we have testified numerous times before Congress, we have petitioned the Bureau of Indian Affairs, and we have had legislation introduced almost every Congress since 1988. I implore you to make a way for the recognition of the Lumbee Tribe of North Carolina. Our elders are dying waiting for health benefits and our children struggle to become educated while waiting for benefits available to other tribes by federal statutes.

Mr. Chairman, I thank you for the opportunity to address this Committee, and I look forward to the day when my people, the Lumbee Tribe, receive the same benefits afforded Indian people who have been recognized by these United States.

The CHAIRMAN. Thank you for your statement, Chairman Brooks. Mr. Norwood, will you please proceed with your statement?

STATEMENT OF JOHN NORWOOD, CO–CHAIR, TASK FORCE ON FEDERAL ACKNOWLEDGMENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. NORWOOD. I would like to thank you, Senator Akaka, members of the Committee and staff for the invitation to testify at this hearing. I am appreciative of the manner in which you, sir, have served as a champion not only for the Hawaiian people, but also for the indigenous people here in the Continental United States.

I would like to acknowledge the fact that two of the chiefs of the Confederation of which I am part, the Confederated Nanticoke-

Lenape Tribes of the Delaware Bay are here. Chief Gould and Chief Coker, and I will have trouble at home if I don't acknowledge my lovely wife, Tanya, also.

The Congress obviously has jurisdiction over the interaction between the Federal Government and the American Indian Tribes. However, as codified in the federally-Recognized Indian Tribe List Act of 1994, not only Congress, but also the Bureau of Indian Affairs and even a decision of the Federal court can bring Federal acknowledgment. But for roughly the past 35 years, recognition has been either through Congress or primarily through the administrative process.

However, the process, the administrative process that was meant to be an objective method to correct the relationship between our Country and the historically verifiable American Indian nations, without Federal recognition, has broken down. That has been obvious in all the studies and the hearings that have come before this Committee, and even in the statement of the BIA earlier, in this very hearing.

In reviewing petitions for Federal recognition, the manner in which the criteria have been applied has become increasingly unreasonable, overwhelmingly expensive and unjustifiably unpredictable. So much so than an estimated 72 percent of currently recognized Tribes could not successfully navigate the process as the criteria are applied today. The process that was meant to aid legitimate Tribes has become a burdensome obstacle to their recognition. Tribes now enter this process with fewer rights than defendants in criminal proceedings. Criminal court defendants are at least presumed innocent until proven guilty. And that guilt must be proven beyond a reasonable doubt. But American Indian Tribes must now prove their existence beyond a shadow of any doubt.

Successful applications that were once only a couple of hundred pages of material now require tens of thousands of pages of evidence, costing upwards of millions of dollars and taking up to 35 years of delays to make final determinations. Then after pouring such resources into an intergenerational effort, many of those determinations are still unreasonable denials.

Adding insult to injury, and demonstrating the urgency of our concern, there is a new marginalization of non-federally recognized historically documented Tribes through Federal regulations that have begun to exclusively define Indian as members of federally-recognized Tribes only. This policy is becoming pervasive and influencing even non-governmental charitable organizations. It is an increasing problem for many American Indians who are now treated as though they are not Indian at all. And it is a denial of indigenous identity through administrative reclassification. It is a form of Tribal termination.

One of the many examples is there are citizens of non-Federal historically documented Tribes who attended Federal Indian boarding schools and colleges from the late 1800s straight through to 2001, which they are now prohibited from attending. It is a travesty that proud, non-federally recognized graduates of federally-funded American Indian colleges cannot return for additional study or have their children or grandchildren attend their own alma mater.

Additionally, and astoundingly, even after the Executive Branch affirmed its support, the United Nations declaration on the rights of indigenous people, a recent statement from the Department of Justice regarding the application of that declaration suggested that it only applied to federally-recognized Indians. The obvious implication being that citizens of non-federally recognized Tribes suddenly, for some reason, are no longer considered indigenous.

Increasingly, the words "indigenous" and "American Indian" are being redefined as "federally-recognized," even while the administrative process for recognition is known to be hostile, unreasonable, unfair, racially biased, and demeaning to all American Indians. This increasing denial of identity equates to a process of administrative genocide in which non-federally recognized Tribal citizens are being systematically wiped from the political landscape.

As I stated earlier, I am Nanticoke-Lenape, of the people of "first contact". My people were and are cited in historic records since the days of Captain John Smith and the Jamestown Colony. And like many of the Tribes on the east coast, we were also studied by arms of the Federal Government. Our children also went to Federal Indian schools. Yet we were peaceful and were not enumerated by the Department of War and moved onto Federal reservations. And I remain a citizen of a Tribe that is ignored by the Federal Government in many of its laws.

Federal acknowledgment is a correction of an error in the relationship between the Federal Government and historic Tribes. It improves the ability of the Tribe to assert its own rights, preserve and protect its culture, defend its identity, promote its heritage, and provide for its Tribal citizens. However, Federal recognition does not bestow sovereignty, it merely acknowledges a Tribe's inherent sovereignty.

Furthermore, while the trust responsibility is acknowledged by Federal recognition, case law has shown that it exists even without such recognition. The lack of acknowledgment for historically documented Tribes is an injustice that needs swift correction. Worthy Tribes should not be forced to wait any longer for justice. Studies and discussion and hearings should now give way to swift action. And the mere tweaking of the administrative process has proven not to be the answer. It is a fact, and should be assumed that our learned leaders are capable of taking swift action and making positive decisions.

Distinguishing and recognizing historically documented Tribes is a task that is not beyond the capability of Congress and the courts. It is not rocket science, it is not quantum physics. Congress can take action and has done so in the past. The United States Congress and the courts, as a matter of justice, should assume responsibility for correcting the injustice done to historic, non-federally recognized Tribes.

I have six quick suggestions for the Committee. First, Congress and the courts should no longer solely rely on the Office of Federal Acknowledgment to process applications. Instead, Congress and the courts should act in accordance with the expectation of the federally-Recognized Indian Tribe List Act of 1994, utilizing their authority and discretion to immediately acknowledge worthy Tribes

through legislative acts and court decisions and to provide methods for Tribes to access all means of acknowledgment under the Act.

Access to such relief should be simplified for Tribes. Action by Congress on acknowledgment should not be an insurmountable task fought with intrigue and only successful through expensive, herculean lobbying efforts. Also, a Tribe should be able to request a judgment from a Federal court without having to be a defendant, and the courts should act regardless of any pending application before the BIA, which has recently been used as a reason for the Federal courts to defer to the Bureau.

Congress should also ensure that listing in government reports, reports of agencies used as arms of the government or receiving of government services should be viewed as prior recognition. Tribes cited in records and studies between the 1880s and 1950s, or which were served through Federal Indian schools, should only have to demonstrate continuous community from the period of government citation or service. And, Tribes which prove to do so should be affirmed by Congress as having already been recognized.

Number three, as a matter of justice, legislative, and regulatory measures should immediately be taken to ensure that the criteria for acknowledgment be applied as it was prior to 1981. Congress should immediately act to rectify this injustice and resolve or replace the onerous Federal acknowledgment process, including possibly removing the process from the Bureau of Indian Affairs. And if not, replace the Office of Federal Acknowledgment management and staff at the Bureau of Indian Affairs to ensure a fresh look at the evidence and the issues.

Number four, regional considerations should be a part of any review for acknowledgment. The history of the area which may impact a Tribe's ability to provide certain types of information or influence how such information is reviewed should have weight in the final determination. Regional histories need to be considered when evaluating Tribes' Federal acknowledgment. And Congress should commission a study of the regional realities that have impacted Tribal histories, especially among the coastal Tribes of the colonial era.

Number five, being weak in a single criterion should not be reason enough for rejection, especially if there is overwhelming evidence in meeting other criteria of the process.

The CHAIRMAN. Mr. Norwood, will you please summarize?

Mr. NORWOOD. Yes, I will, sir. Interested third parties should not be able to derail the Federal acknowledgment of deserving Tribes.

I ask Congress to act swiftly, decisively, immediately. Thank you, sir.

[The prepared statement of Mr. Norwood follows:]

PREPARED STATEMENT OF JOHN NORWOOD, CO-CHAIR, TASK FORCE ON FEDERAL ACKNOWLEDGMENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Introduction

Kwankomeluhemo! Nteluwensi Kelekpethakomakw. Ni, hnakay, Wenetko ok Lenape, aweniki Scheyichbi ok Lenapei Poutaxat. *[I greet you all. My name is Smiling-Thunderbear. I am Nanticoke and Lenape, the people of the water's edge and the Lenape round water (New Jersey and the Delaware Bay)].*

I am Pastor John Norwood, a councilman of the Nanticoke Lenni-Lenape Tribal Nation, which is one of the three historically and genealogically interrelated con-

tinuing communities of Nanticoke and Lenape people remaining in the area of the Delaware Bay. My tribe is united with the Lenape Indian Tribe of Delaware and the Nanticoke Indian Tribe in the "Confederation of Sovereign Nanticoke-Lenape Tribes." I also serve as the co-chairman of the Task Force on Federal Acknowledgment of the National Congress of American Indians (NCAI), which is the nation's oldest and largest national organization of American Indian and Alaska Native tribal governments. The Task Force was established to address the interests of all tribes, both federally recognized and non-federally recognized, on any recommended changes to policies, procedures, or strategic plans in the federal recognition process.

I thank Senator Akaka, the Committee, and staff for the invitation to testify at this hearing. I am truly appreciative for the manner in which Senator Akaka has been a champion for not only Native Hawaiians but also for the critical issues confronting non-federally recognized American Indian Tribes.

Background on the Federal Acknowledgment of American Indian Tribes

Federal recognition is the acknowledgement of an American Indian Tribe by the Federal Government of the United States. It affirms a federal trust responsibility for a "government-to-government" relationship between the United States and the tribal government and establishes tribal eligibility for certain federal American Indian programs. Federal recognition is the correction of an error in the relationship between the United States and the tribal nation receiving the acknowledgement it was always due. Federal recognition does not *bestow* sovereignty, but acknowledges a tribe's *inherent* sovereignty. Federal Indian Policy holds that American Indian Tribes have a sovereignty that predates the United States and is not bestowed by any federal action.

> Neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity. . . . Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished." . . . The tribes began their relationship with the Federal Government with the sovereign powers of independent nations. (Newton 2005, 206)

Furthermore, while the trust responsibility is formally acknowledged by federal recognition, it exists even without such recognition. This fact was included in a 1977 congressional report citing the *Pasamaquoddy v. Morton* case:

> *Pasamaquoddy v. Morton* presented an important decision regarding the executive branch use of the distinction "recognized" and "non-recognized". The Department stipulated for the purpose of the case that the Passamaquoddy were an Indian tribe, but argued that it was not required as a trustee to prosecute the Passamaqoddy claim against the State of Maine, since the tribe was "unrecognized". The Court rejected the [Department of Interior's] position finding that that the United States has a trust obligation to the tribe. The case makes it clear that the executive branch cannot arbitrarily exclude Indian tribes from its trust relationship. (American Indian Policy Review Commission, 478)

While the action of the Federal Government does not make a tribe or bestow sovereignty, federal recognition extends access for inherently sovereign historic tribes and their citizens to certain rights, protections, benefits, and privileges reserved for federally recognized tribes.

An Indian Tribe is a political community whose origins pre-date the founding of the United States. When the United States opens government-to-government relations with a Tribe, that Tribe is said to be "recognized" or "acknowledged." An "unrecognized" or "non-federally recognized" tribe is one with which the United States does not formally conduct government-to-government relations. Many non-federally recognized tribes are historically well documented and have been cited in government reports for over a century. Some non-federally recognized Tribes are acknowledged by the States. State recognition, however, does not entitle the Tribe to the full breadth of critical federal protections, services or benefits that flow from a formally acknowledged government-to-government relationship with the United States.

The Congress of the United States has primary jurisdiction over the interaction between the Federal Government and American Indian Tribes. However, as codified in the "Federally Recognized Indian Tribe List Act of 1994," Public Law 103–454 of the 103rd Congress, the typical ways that American Indian Tribes become federally recognized are: (1) Through Congressional legislation; (2) Through the Bureau of Indian Affairs administrative process, conducted by the "Office of Federal Acknowledgement;" and, (3) By the ruling of a Federal Court. For roughly the past

35 years, federal recognition has usually either been through congressional action or through the administrative process.

The history of recognition is varied. Tribes that established treaties with the United States during the first 150 years of its history, were considered "recognized." The process for some federally recognized tribes was simplified due to their enumeration on federal rolls after forced relocation onto reservations.

> The earliest means by which the United States "recognized" a particular tribe was, of course, the making of a treaty with that tribe. This has been the usual method of establishing the "government to government" relationship which recognition really entails. Many tribes, however, never entered into a treaty with the United States. These tribes were too peaceful to present a military threat, too small or isolated to be noticed, or simply possessed nothing that the United States and its citizens desired to have. Other groups simply refused to conclude a treaty with the United States. (Anderson and Kickingbird 1978, 1)

In 1901, the United States Supreme Court determined that a legitimate tribe: (1) is made up of members who are of common historic American Indian descent; (2) is united in affirming some form of leadership or government; (3) has historically inhabited a particular, though sometimes ill-defined, territory. Within the federal court system, the characteristics of independence of action, continuity of existence, a common leadership, and concert of action have been asserted as criteria for identifying whether a group of American Indians are a tribe/nation/band under federal common law.

The 1934 Indian Reorganization Act created a listing of tribes considered to be "under federal jurisdiction," which eventually became known as "federally recognized tribes." This list was incomplete. Many historic tribes were left off of the list and, while there have been some subsequent corrections, many who should have been on the list still remain unrecognized.

In the latter 1970s, the Bureau of Indian Affairs administrative process was established to assist non-federally recognized American Indian Nations in petitioning for federal recognition. Part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe" provides an administrative process requiring that a petitioner meet seven criteria: (1) A statement of facts establishing that it has been identified as an Indian entity on a substantially continuous basis since 1900; (2) Evidence that a predominate portion of the group is a distinct community and has existed as a community from historical times to the present; (3) Evidence that it has maintained political authority or influence over its members as an autonomous entity from historical times until the present; (4) A copy of its governing document including membership criteria or, if it does not have a formal governing document, a statement describing its membership criteria and governing procedures; (5) An official membership list, all available former lists, and evidence that its current members descend from a historic tribe or tribes that combined into a single autonomous political entity; (6) Evidence that it consists mainly of people who are not members of a federally recognized tribe; and, (7) A statement that it is not the subject of congressional legislation that has terminated or forbidden the federal trust relationship.

From Opportunity to Obstacle

The administrative process was meant to be an objective method to correct the relationship between the United States and historically verifiable American Indian Nations without federal recognition. However, when reviewing petitions for federal recognition, the manner in which the seven criteria of the administrative process have been applied by the Office of Federal Acknowledgement has become increasingly unreasonable, overwhelmingly expensive, and unjustifiably unpredictable . . . so much so it is estimated that 72 percent of currently federally recognized tribes could not successfully navigate the FAP as the criteria are applied today. The GAO has reported, along with other independent studies and congressional hearings, that the current methodology of the administrative process has become a cumbersome, expensive, and time consuming barrier to the recognition of deserving tribes. The process meant to aid legitimate tribes has become a burdensome obstacle to their recognition. Successful applications once were only a couple of hundred pages of material. Now, tens of thousands of pages of evidence are required, costing upwards of millions of dollars and and taking up to thirty-five years of delays in making final acknowledgment determinations. After pouring such resources into an intergenerational effort, many worthy tribes are still unreasonably denied. Two of the most recent approvals of new recognition only occurred after the intervention of the federal courts. Confidence in the Federal Acknowledgment Process has eroded to the point of non-existence.

Tribes now enter the FAP with fewer rights than defendants in criminal proceedings. Criminal court defendants are at least presumed innocent until proven guilty. But, American Indian Tribes must prove their existence beyond any shadow of doubt. One such example is the experience of the Shinnocock Nation, which spent an estimated two million dollars to provide evidence required by the Office of Federal Acknowledgment (OFA) that the people of their community with the same surnames and in the same location, were the same people from one generation to the next generation. After this expense and effort they were then told by OFA that it should not have been necessary to do so. Another tribe was required to produce phone records to demonstrate the communication between tribal members. Such applications of the criteria are beyond what was originally in view when the FAP was initiated, and to require it of tribes today is discriminatory.

The NCAI Policy on Federal Recognition of Indian Tribes (Resolution # PHX–08–055) cites the inequities of the Federal Acknowledgment Process (FAP), claiming that it has "severely deteriorated since its beginning, with unreasonable decades-long delays in considering applications, irrational documentation requirements that defy historical and cultural realities, and [there are] legitimate questions about the fairness and integrity of the process" and that the FAP "has strayed from its original intentions, and has become a barrier to federal recognition, rather than a fair process for facilitating recognition of tribes who meet the criteria" and affirms that the NCAI "strongly supports federal recognition of all Indian tribes that have maintained tribal relations from historical times, their right to timely and fair consideration of their applications under the FAP process, and their right to seek alternative means for recognition of their status as Indian tribes."

Historic coastal area tribes of the colonial era (including the eastern, western, and southern coastlines) remaining in or near their traditional homelands are most affected by the inequities and deficiencies of the Federal Acknowledgment Process (FAP), which no longer reflects the original intent of the acknowledgment process as a vehicle for the correction of the relationship between the Federal Government and non-federally recognized historic tribes. Among the many tribes considered non-federally recognized are those which had colonial era treaties, reservations, identified Indian towns, had been identified in studies done by arms of the Federal Government, had received services from the Federal Government, and had reason to have been considered under federal jurisdiction at the time of the 1934 Indian Reorganization Act, but were not included in the Act due to apparent regional or racial biases of the era. These tribes tended to have been peaceful after the formation of the Federal Government, were not enumerated by the Department of War or placed on federal reservations. They became the "lost" and "overlooked" in Federal Indian Policy. Today, many of these tribes continue to languish in the political and legal limbo of being non-federally recognized. often due to the same biases that had resulted in them not being able to utilize the Indian Reorganization Act.

> The reasons that are usually presented to withhold recognition from tribes are (1) that they are racially tainted with the blood of African tribes-men or (2) greed, for newly recognized tribes will share in the appropriations for services given to the Bureau of Indian Affairs. The names of justice, mercy, sanity, common sense, fiscal responsibility, and rationality can be presented just as easily on the side of those advocating recognition. (Anderson and Kickingbird 1978, 17)

The Modern Era of Denied Identity and De-facto Termination

There is a new marginalization of non-federally recognized historically documented tribes through federal regulations that have begun to exclusively define "Indian" as a member of a federally recognized tribe. This policy is becoming pervasive and is influencing even nongovernmental charitable organizations. Many scholarships designated for American Indians are now restricted to those who are citizens of federally recognized tribes. This is an increasing problem for many American Indians who are now treated as though they are not American Indian at all. It is the denial of indigenous identity through administrative reclassification. It is a form of tribal termination.

There are citizens of "non-federal" historically documentable tribes who attended federal Indian boarding schools and colleges, from the late 1800s until as late as 2001, which they are now prohibited from attending. During the time of the initial involvement of these tribes at some of the federal Indian schools, a minimum of ¼ blood quantum was required; this was eventually changed to require membership in a federally recognized tribe receiving Bureau of Indian Education educational benefits, thus eliminating the attendance of those non-federal tribal citizens, which the BIA had long considered Indians and who had sent their family members away

from home to attend federal boarding schools and colleges. (H.E.L.P. Haskell). There is the case of a Haskell graduate who wanted to return for additional study, but was denied because in the years since her graduation, the policy at her alma mater was changed from requiring ¼ blood quantum to membership in a federally recognized tribe. It is a travesty that proud nonfederally recognized graduates of Haskell and other federally funded American Indian colleges cannot return for additional study or send their children or grandchildren to their alma mater.

Another example of redefining "American Indian" to mean a "citizen of a federally recognized tribe" is in the Department of Justice's review of the regulations regarding the possession of Eagle feathers. In her November 30, 2011, letter to Deputy Assistant Attorney General Ethan Shenkman of the Environmental & Natural Resources Division and Tracy Toulou, Director, Office of Tribal Justice at the Department of Justice (DOJ), NCAI Executive Director Jacqueline Johnson Pata summed up the critical concern of NCAI in regard to the impact of narrowing the definition of "Indian" to exclude non-federally recognized indigenous people and issued a critique of the FAP:

> NCAI believes that the DOJ should adopt a policy, consistent with the Morton Policy, which addresses tribal use of eagle feathers and other bird feathers and parts only if that policy is created and implemented in a manner that permits all Indigenous peoples in the United States to exercise their religious freedom and maintain their cultural practices. Barring that, NCAI fears that this policy could be more harmful than what currently stands . . .
>
> . . . What DOJ is proposing is a significant narrowing of the scope of applicability, which alone makes the proposed policy much more restrictive than the Morton Policy and conflicts with legal and legislative precedent that supports a definition of "Indian" that is more expansive than federally recognized tribes, especially where issues of cultural protection and religious freedom are involved . . .
>
> . . . DOJ's current proposal to limit any new policy to members of federally recognized tribes seems to be based on the assumption that the U.S. Government's process of federal acknowledgement is working as it should, when it is, in fact, a broken system that needs fixing. NCAI has several standing resolutions on the issue of federal recognition and has provided congressional testimony on the federal acknowledgement process and related issues numerous times. If there is one thing that these resolutions and testimony demonstrate, it is that the federal recognition process has severely deteriorated since its inception. The current system is fraught with unreasonable, decades-long delays in considering applications and irrational documentation requirements that defy historical and cultural realities. These problems raise legitimate questions about the fairness and integrity of the federal recognition process. If the DOJ moves forward with its policy as currently proposed, it would be making prosecutorial judgments about questions of religious freedom based on a wholly unreliable system of federal recognition for tribes . . .

Another concern that the NCAI Executive Director cites is the conflict between DOJ's proposal and the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP):

> Finally, the position that DOJ has taken on the applicability of its new policy to solely federally recognized tribal members is directly at odds with the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), which President Obama endorsed on December 16, 2011. Article 12 of the Declaration states that: "Indigenous peoples have the right to manifest, practi[c]e, develop and teach their spiritual and religious traditions, customs and ceremonies . . . [as well as] the right to the use and control of their ceremonial objects . . ." The Declaration applies to all Indigenous peoples within the United States; it is not limited by the bounds of the U.S. federal recognition process. NCAI believes that the formalization of this DOJ policy presents a unique opportunity for the Obama Administration to reaffirm its commitment to implement the Declaration by ensuring that the policy protects all Indigenous peoples' rights to possess eagle—and other bird—feathers and parts for cultural and religious use, not just the rights of members of federally recognized tribes.

Astoundingly, DOJ's response regarding the applicability of the UN DRIP, circulated at the NCAI 2012 Mid-Year Conference in Lincoln Nebraska on June 18th, stated that:

> . . . the "United States' existing recognition of, and relationship with, federally recognized tribes" is the "basis for the special legal and political

> relationship . . . pursuant to which the United States supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial affairs, including . . . culture and religion."

Increasingly, "indigenous" and "American Indian" are being redefined as "federally recognized" based upon a history and process that is known to be hostile, unreasonable, unfair, racially biased, and demeaning to non-federally recognized historically documented tribes. It has become the position of the Executive Branch to also exclude non-federally recognized tribes from formal government consultation even over matters that directly impact them. This was such an issue that NCAI Resolution #PSP–09–008 "Resolution of the National Congress of American Indians on President Barack Obama's First Annual Meeting with Tribal Leaders: Reaffirmation of the Nation-to-Nation Relationship" calls on the United States to "Extend consultation and the Nation to Nation relationship to include state recognized tribes as supported by federal statutes" and also calls on the United States to "Recognize that our Indian tribes are the original Native American nations endowed with inherent natural rights to self-government, self-determination and territorial integrity."

This increasing denial of identity equates to a process of administrative genocide, in which nonfederally recognized tribal citizens are being systematically wiped from the political landscape. It is unconscionable that in the thirty five years since the American Indian Policy Review Commission Report of 1977, little has changed . . .

> The results of "non-recognition" upon Indian communities and individuals have been devastating, and highly similar to the results of termination. The continued erosion of tribal lands with a complete loss thereof; the deterioration of, cohesive, effective tribal governments and social organizations; and the elimination of special federal services through the continued denial of such services which Indian communities in general appear to need desperately. Further, the Indians are uniformly perplexed by the current usage of "federal recognition" and cannot understand why the Federal Government has continually ignored their existence as Indians. Characteristically, Indians have reviewed their lack of recognition as Indians by the Federal Government in our disbelief and complete dismay and feel classification as non-federally recognized is both degrading and wholly unjustified. (American Indian Policy Review Commission 1977, 463)

A Call for Justice and the Application of Common Sense

As stated earlier, I am Nanticoke-Lenape, of the people of "first contact." My people were placed on colonial era reservations, had colonial era treaties, are cited in the historic record since the days of Captain John Smith and the Jamestown Colony. Since latter 1800's, agencies acting as "arms of the Federal Government" listed and studied us and academics published scholarly works about us. My relatives attended federal Indian boarding schools. Our specific families have been listed in numerous government reports. Yet, I remain a citizen of a non-federally recognized tribe. increasingly marginalized in a political and legal climate that is hostile to the continuance of my tribe and the confederation of which it is a part.

Federal acknowledgment is a correction of an error in the relationship between the Federal Government and a historic tribe, improving the ability of the tribal government to assert its rights, protect and preserve its culture, defend its identity, promote its heritage, and provide for its tribal citizens. The lack of such acknowledgment for historically documented tribes is an injustice in need of swift correction. The relationship between American Indian Tribes and the Federal Government is under the jurisdiction of Congress. The FAP is broken and worthy tribes are languishing without federal status, creating increasing undue hardship for the indigenous communities across the country. We should not be forced to wait any longer for justice. Studies, discussions, and hearings should now give way to action, and the mere "tweaking" of the administrative process has proven to not be the answer.

It should not be presumed that distinguishing and recognizing historically documented tribes is a task beyond the capability of Congress or the Courts. The manner in which the administrative process is currently being applied has made the task overly complicated for both deserving tribes and for the government. Summed up, the criteria need only demonstrate that a tribe applying for federal acknowledgment is "a continuing community of interrelated descendants of a historic American Indian Tribe or tribes which has maintained tribal identity in some manner that can be documented from at least the 19th century or earlier." It is not "rocket science" or "quantum physics." Congress can take action, and has in the past. According to a 2003 Congressional Research Service Report from the Library of Congress, from

1973 to 2003, thirty-two (32) tribes received federal status by congressional action. Twenty-five (25) of those were regarding federal recognition with the remaining seven (7) being some other form of status change. Eighteen (18) of the twenty-five received a restoration of their recognition and the remaining seven (7) of the twenty-five which received federal recognition were tribes that never had any previous federal acknowledgement. Tribes that received recognition by congressional legislation between 1980 to 2003 were: Houlton Band of Maliseet Indians (1980); Kickapoo Traditional Tribe of Texas (1983); Mashantucket Pequot Tribe (1983); Aroostook Band of Micmac Indians of Maine (1991); Pokagon Band of Potawatomi Indians of Michigan (1994). Additionally, two tribes' federal recognition was reaffirmed by federal legislation, the Little Traverse Bay Bands of Odawa Indians of Michigan (1994) and the Little River Band of Ottawa Indians of Michigan (1994).

The United States Congress and the United States courts, as a matter of justice, should assume responsibility for correcting the injustice done to historic non-federally recognized tribes. Congress and the Courts should no longer solely rely on the Office of Federal Acknowledgment to process applications. Instead Congress and the Courts should act in accordance with the expectations of the Federally Recognized Indian Tribe List Act of 1994, utilizing their authority and discretion to immediately acknowledge worthy tribes through legislative acts and court decisions and to provide methods for tribes to access all means to acknowledgment under the Federally Recognized Indian Tribe List Act of 1994. Access to such relief should be simplified for tribes. A tribe should be able to request a judgment from a federal court without having to be a defendant and the courts should act regardless of any pending application before the BIA . . . which has been recently used as reason for a federal court to defer to the FAP even though such inaction results in a breech of justice for most tribes. Also, action by Congress on acknowledgment should not be an insurmountable task fraught with political intrigue and only successful through expensive herculean lobbying efforts.

Congress should ensure that listing in government reports, reports of agencies used as arms of the government, or receiving of government services should be viewed as prior recognition so that a tribe must only show continuance from that period of historic federal identification or service, and that, as a matter of justice, tribes historically identified, but not included, in the Indian Reorganization Act of 1934 (IRA) should be immediately reviewed for acknowledgment due to the impact of regional and racial bias in the application of the IRA. Tribes cited in government records and studies between the 1880s and 1950s, or which were served through federal Indian schools, should only have to demonstrate continuous community from the period of the government citation or service. Those tribes which qualify under this criteria should receive immediate affirmation of recognition by Congressional legislation.

As a matter of justice, legislative and regulatory measures should immediately be taken by the United State Congress and the Executive Branch to ensure that the criteria for acknowledgment be applied as it was intended and that guidelines used to apply the criteria for the current review of applications for acknowledgment, and the burden of proof, be commensurate with what was utilized to acknowledge tribes prior to 1981. Congress can take immediate action to rectify this injustice and resolve or replace the onerous Federal Acknowledgment Process (FAP) including possibly removing the FAP from the Bureau of Indian Affairs, and if not, replacing the Office of Federal Acknowledgment management and staff at the Bureau of Indian Affairs to ensure a fresh look at the evidence and issues.

Regional considerations should be part of any review for acknowledgment. The history of the area, which may impact a tribe's ability to provide certain types of information or should influence how such information is reviewed, should have weight. Regional histories must be considered when evaluating a tribe for federal acknowledgement and, as a matter of justice, the Congress should commission a study of the regional realities that have impacted tribal histories, especially among coastal area tribes of the colonial era, which affect the manner in which tribes from a given region can meet the federal acknowledgment criteria and that the study be done in cooperation with such tribes to establish regional historical assumptions to be considered in evaluating applications for acknowledgment.

Being weak in a single criteria should not be reason enough for rejection, especially if there is overwhelming evidence meeting other criteria. Objectively reviewing documentation of the tribe's historic and continuing identity should not create the unreasonable evidentiary burden and bureaucratic backlog currently found in the FAP.

"Interested third parties," should not be able to derail the federal acknowledgment of a deserving tribe. Currently, the comments and political influence of third parties have delayed and denied justice for many historic tribes. This must be prevented.

Conclusion

The manner that Congress has abandoned historic tribes to an administrative process that is hostile to their very existence should weigh heavily on the national conscience. A cast system has been created and perpetuated in Indian Country by the Federal Government. Our past, our present, and our future is held hostage by the political and legal disregard of the Federal Government. My tribal confederation cannot protect the graves of our ancestors, we fight to protect and defend our culture and heritage, we struggle to access support for our elders and children's future.

Congress must act immediately and decisively, in the name of justice. Historically documented tribes identified in federal reports, that received federal services, or whose citizens attended federal boarding schools should be acknowledged by Congressional action. A simplified, fair, regionally sensitive, and objective process for acknowledgment should also be established under congressional direction with the guidance of tribal leaders and tribally endorsed historians and ethnologists representing the regions where non-federally recognized tribes are primarily clustered in the coastal regions of the east, south and west. The ability of tribes to petition the federal courts regarding federal acknowledgment should be provided.

The current degrading atmosphere of increasing denial of American Indian tribal identity and status for non-federally recognized tribes must be eradicated.

References

American Indian Policy Review Commission Final Report. Submitted to Congress May 17, 1977. U.S. Government Printing Office, Washington, DC 1977.

Anderson, Terry and Kirke Kickingbird. 1978. *An Historical Perspective on the Issue of Federal Recognition and Non-Recognition.* Washington, DC: Institute for the Development of Indian Law.

H.E.L.P. Haskell. Haskell Endangered Legacy Project. *http://www.HelpHaskell.com* (accessed October 24, 2011)

Newton, Nell Jessup. Editor-in-Chief. 2005. *Cohen's Handbook Of Federal Indian Law, 2005 Edition.* Newark, NJ and San Francisco, CA: LexisNexis Matthew Bender.

The CHAIRMAN. Thank you.

Mr. Gottschalk, please proceed with your testimony.

STATEMENT OF K. JEROME GOTTSCHALK, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Mr. GOTTSCHALK. Thank you, Chairman Akaka.

I am an attorney with the Native American Rights Fund. I have been involved with several recognition petitions over the years. I currently represent the Little Shell Tribe of Chippewa Indians in this process. I thank the Committee for the opportunity to offer some suggestions for improvement of that process.

I am going to skip over a lot of the preliminaries, which I think we are all in agreement about, that it is too costly, et cetera. Except I think one thing worth noting is, as Senator Tester said, that Little Shell Tribe has been in the process for all or parts of five different decades.

With that said, I would like in my oral testimony to make four specific suggestions for improving the process. First, Criterion A should be eliminated. That criterion requires recognition by outsiders of an Indian entity on a regular basis since 1900. As a practical matter, it requires sufficient interaction between outsiders and the Tribal community to produce a document identifying the Tribal community every 10 years.

The criterion may say little or nothing about whether a Tribe exists, but only whether outsiders recognized and recorded the fact that they were looking at an Indian entity and not just at individual Indians. In the case of Little Shell, the final determination against recognition recognizes that there were many references

from 1900 to 1935 to landless Indians, garbage dump Indians, half-breeds and other derogatory terms, but found that there were not references to Indian entities, and therefore, the criterion was not met. On that ground alone, the Tribe could be denied Federal recognition.

Little Shell ancestors avoided contact with the dominant society because that contact subjected them to open and blatant discrimination. They existed on the margins of society and by its nature, this lifestyle does not produce a paper trail required by Criterion A. The denial of Little Shell on this basis was a failure of the process, not a failure of Little Shell. This criterion is illegal, arbitrary, capricious and must be eliminated.

Second, Criterion B, community and Criterion C, political influence, must be greatly modified. At present they require proof of community and political influence from historic times to the present. The BIA requires proof of relationships. In the case of community, relationships among the Tribal members, and in the case of political influence, relationships between the Tribal members and their political leaders. Self-identification of leaders and oral traditions are not sufficient for a Tribe to carry its burden of proof. There must be documentary evidence; or alternatively, statistical evidence of such things as marriage rights, from which the BIA is willing to presume the existence of interaction.

The process requires too much paper over too long a period of time. It is unreasonable, for example, to expect a buffalo-hunting Tribe like Little Shell to have maintained minutes or organizational charts from historical times.

In 1934, the year of passage of the Indian Reorganization Act, when Congress and the Executive actively addressed issues of Tribal existence, is a much more reasonable time period and is consistent with Federal policy. The Little Shell Tribe's records since that time, for example, is quite full. And the Tribe would have been recognized in 1934, but for the lack of Federal funds to purchase Tribal lands.

Third, certain activity under the regulations violates due process and transparency, a word that Mr. Newland used before. In the case of Little Shell, interviews of 71 people occurred at the end of the process and the Tribe was not given a chance to review and comment on those interviews prior to the issuance of the final determination. The Tribe had to do a FOIA request and pay nearly $5,000 to get the documents for the appeal to the IBIA. It puts Tribes in a much different position to force them to get a decision overturned than to allow them to address issues before a final determination is made.

Fourth, under OFA's interpretation the regulations provide a somewhat streamlined process if a Tribe can show that its existence was previously established and that it previously had a government-to-government relationship with the U.S. Requiring proof of a previous government-to-government relationship is not necessary to the issue of Tribal existence and should not be required for the streamlined process to apply.

These changes would improve the process, but too late for Tribes like Little Shell. Recognition of Indian Tribes has always been a prerogative of Congress and the Tribe urges the Committee to act

favorably on S. 546, which extends Federal recognition to the Little Shell Tribe, and file the Committee report so that the bill can move forward on the Floor.

Thank you.

[The prepared statement of Mr. Gottschalk follows:]

PREPARED STATEMENT OF K. JEROME GOTTSCHALK, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Chairman Akaka, Vice Chairman Barrasso, Senator Tester, and honorable members of this Committee on Indian Affairs, on behalf of the Little Shell Tribe of Chippewa Indians of Montana, I thank you for the opportunity to testify before this Committee today on the important subject of Federal Recognition: Political and Legal Relationship between Governments. I would like to take this opportunity to provide some perspective on the long, expensive, and frustrating process experienced by the Little Shell Tribe in attempting to comply with the shifting administrative requirements for federal acknowledgment and to urge Congress to exercise its traditional role in Indian affairs and provide legislative recognition of the Tribe. I am an attorney at the Native American Rights Fund and we have assisted the Tribe in its efforts to achieve recognition for more than twenty years, expending more than one million dollars for consultant research , and well over a million dollars in attorney time. In addition to extensive administrative efforts, the Tribe has been seeking legislative recognition for several years.

The Little Shell Tribe first sent a letter to the Bureau of Indian Affairs petitioning for federal acknowledgment in 1978. After years of work and mountains of submissions, the Tribe was encouraged by a July 2000, Preliminary Finding in favor of recognition. The PF invited comment ". . . on these various matters, including the consistency of these proposed findings with the existing regulations." 65 Fed. Reg. 45394, 45395 (July 21, 2000). The Tribe had every reason to expect a final determination in favor of recognition, but continued working to ensure that it could respond to any negative evidence which might be presented. There were only two comments received during the comment period, neither one of which had any bearing on the final decision.

Thus, the PF was in favor of recognition and there was no new evidence against recognition. And yet, inexplicably, the decision was against recognition. This is despite the fact that on the question of descendancy from an historic tribe, the Office of Acknowledgment agreed that new evidence clearly established that the tribe met this criteria. Is it any wonder that the Tribe is frustrated? The FD has not become effective yet because of an appeal filed with the Interior Board of Indian Appeals which was filed February 1, 2010. That body may take years to rule. Its scope of review is limited and to my knowledge no tribe has ever improved its position on appeal. The best that has ever been done is to have a favorable decision affirmed.

While I insist that with the proper application of the regulations in light of the Little Shell Tribe's specific history, administrative recognition is warranted, nevertheless, the administrative process clearly has not served the Little Shell Tribe and is not designed for Tribes such as Little Shell. Without proper consideration of the evidence in the context of the historic circumstances of the Tribe, which the regulations purportedly require, but for some reason OFA chose not to do, the Tribe is held to an extraordinarily difficult standard of evidence. In some cases, as with Criterion a) which requires that outsiders identify petitioners not just as Indian individuals, but as an Indian entity, the criterion itself is inappropriate and almost surely illegal. Essentially, this criterion requires interaction between outsiders and the tribal community sufficient to produce a document identifying the tribal community every ten years. The FD recognizes that there were many references from 1900 to 1935 to landless Indians, breeds and other uncomplimentary names,but it says that there were not references to Indian entities and that therefore the criterion was not met. Historically, the Little Shell was a migratory band, following the buffalo herds between the United States and Canada. By the early 1880s, most of the herds had disappeared and Little Shell ancestors had settled in out of the way, rural places in Montana. Even then, Little Shell ancestors avoided contact with the dominant society because that contact subjected them to open and blatant discrimination, including federal and state efforts to deport tribal members to Canada. Thus, Little Shell survived as a migratory people off the official radar screen. By its nature, this life style does not produce the paper trail required by criterion a). Nor, if the substantive requirements of the regulations are met, should lack of identification by outsiders render a tribe a non-tribe.

As to criteria b (community) and c (political influence), the BIA requires proof of relationships—in the case of community, relationships among the tribal members, and in the case of political influence, relationships between the tribal members and their political leaders. Again, self-identification of leaders and oral tradition are not sufficient for a tribe to carry its burden of proof. There must be documentary evidence, or alternatively statistics (e.g., on marriage rates) from which the BIA is willing to presume the existence of interaction. Obviously, such documents are not likely to exist for a tribal community that survived historically in the traditional way and in modern times by avoiding dominant society. Combine this with the economic, social and political dislocation suffered by the Little Shell, as the BIA itself found, it becomes clear that Little Shell presents a unique circumstance in which a paper-driven process is simply inappropriate. As a result, failure by Little Shell on these criteria in the final determination does not mean that it does not exist as a tribe; it only means that the administrative process is not well-suited to judge the unique history and circumstances of Little Shell. As the Assistant Secretary noted in the Proposed Finding on Little Shell, the administrative process must be applied in a flexible manner, giving different weight to various kinds of evidence, to accommodate the unusual history of Little Shell. 65 Fed. Reg. No. 141, at 45395 (July 21, 2000) (". . . the evidence as a whole indicates that the Little Shell petitioner is a tribe."). Ultimately, though, the BIA decided to reverse its flexible approach and to apply the criteria in a mechanistic fashion not suitable to the complex historic situation of the Tribe.

Clearly, this is a failure of the administrative process as applied to Little Shell, not a failure on the part of Little Shell to exist as an Indian tribe. The appropriateness of legislation under these circumstances was noted even by the professional staff at the BIA, the same personnel who ultimately recommended that Little Shell be declined for federal acknowledgment. Writing in 2000, the chief of the Office of Federal Acknowledgment effectively admitted the unsuitability of the process for Little Shell. He noted the departure of the proposed Little Shell finding from past precedent and suggested that special legislation should be considered: "Another alternative would be to recommend legislation to acknowledge this petitioner. This recommendation would be based on a finding that because of the unique and complicated nature of its history, this petitioner is outside the scope envisioned by the regulations, but nonetheless merits tribal status."

Significantly, the United States continues to hold funds in trust, invested by the Secretary of the Interior, for the benefit of eligible members of the Little Shell Tribe of Chippewa Indians of Montana. Act of Dec. 31, 1982, Pub. L. 97–403, 96 STAT. 2023. All seven federally recognized Tribes in Montana support recognition of Little Shell as does its sister tribe in North Dakota—the Turtle Mountain Tribe.

The proposed legislation to recognize the Little Shell Tribe, S. 546, would extend full recognition to the Tribe and provide a four county area in which land could be taken into trust. The counties in which land would be taken into trust for the Tribe support federal recognition. The recognition of Indian Tribes has always been a prerogative of Congress, with an overwhelming majority of the 566 recognized Tribes having been recognized by some form of Congressional action. It is long past time for the Little Shell Tribe to be recognized by Congress as a Tribe with whom the Federal Government will carry on a government to government relationship. For all of these reasons, S. 546 should be enacted by Congress. The Tribe appreciates the Committee's continued attention to this issue and we urge you act favorably and file the Committee report so that the bill can move forward on the floor.

The CHAIRMAN. Thank you very much, Mr. Gottschalk.

Mr. Anderson, will you please proceed with your statement?

STATEMENT OF MICHAEL J. ANDERSON, OWNER, ANDERSON INDIAN LAW

Mr. ANDERSON. Mr. Chairman, aloha. Greetings and thank you for this hearing.

I wanted to focus on a few things in my written testimony dealing with different pathways to Federal recognition, both Congressional, administrative, and judicial. But based on Senator Webb's testimony and the exchange with the Vice Chair Barrasso, I wanted to focus on the Congressional prerogative to recognize Tribes,

and why I think it is absolutely essential that Congress, this session, exercise that authority.

Congress can say that this is the primary responsibility of the BIA. If you examine the histories of various Tribes, like the ones that were just discussed today and others, you will find that Congress has had a direct role in Tribes not being recognized. I will give you an example. In 1851, Federal commissioners went to California to negotiate treaties with Indian Tribes. They actually had a successful negotiation. They brought the treaties back to the United States.

And then the Senate, based on the recommendations of the California delegation at that time, decided that they didn't want to have hearings, they didn't want these implemented. So those treaties were sealed and hidden from public view for 50 years. They were not discovered as signed treaties until the early 1900s, when a Senate clerk discovered them.

So while the Tribes back then should have had homelands, including the Muwekma Tribe, which is not recognized today, they lost all the opportunities, 50 years of recognition like any other recognized Tribe.

How can Congress now say that we have no responsibility, when this body, this United States Senate, was directly culpable for those Tribes not being recognized? Or at least having a hearing? And at many times at the request of the President, those Tribes that had treaties were recognized.

That is but one example. In California, shortly before World War I, the Congress appropriated and authorized Indian agents to go find lands for Indians in California as Tribes, for home lands. But then they didn't appropriate the money for it. So those Tribes had no chance to get a homeland.

How can Congress now say, well, it is the responsibility of the BIA now to solve that problem, to recognize and rectify that historical tragedy, really, and that these homelands weren't discovered?

You heard from the Lumbee. Congress had a role there with them as well. They terminated this Tribe and said that there wasn't authority for them to get services. How can they now say, let's go to the BIA to remedy that problem, when Congress put Lumbee in the situation? Little Shell and Virginia have also faced the same issues. Virginia with the State government in their case, basically eliminating any possibility that they would have the records to show that they were recognized. How can it be fair to ask the Virginia Tribes to now go to the BIA for that justice?

So there is a direct role based on the history and based on the direct role of the Senate in contributing to this problem to fix today. And what has happened since 2000 as a whole in this body, nothing. It has been a frozen process here on the Senate side and the House side. Not this Committee, this Committee has been active. This Committee has marked out legislation. The House Resources Committee has done so.

But the Senate and the House together as a whole has not done so. Having represented Tribes in this process, when there is a threat of filibuster raised by Senators because they believe the primacy should be at the BIA, then the ability to get a Floor vote to

overcome the 60 votes needed to get some Floor time really renders these politically powerless Tribes in an impossible situation.

So one recommendation I would have is that maybe collectively, having heard the stories of Lumbee, Little Shell, the Virginia Tribes and others that perhaps maybe at least one afternoon, one day could be set aside this session for an up and down vote. I am very confident both on the Senate and the House side that in an up and down vote, these Tribes would prevail. Justice would be served, the deference to the Committees of jurisdiction yours and Mr. Young's on the House side who have all recommended that these Tribes go forward I think would be honored. There would be more than bipartisan support for that to happen.

So that is something this Congress could do now based on their historical culpability, but also with your constitutional authority to do so.

Now, in the remaining minute, I just wanted to talk about the Administration and their performance over the last four years. Without the favorable decisions of the *Shinnecock Tribe* and the *Tejon* Decision, I think they would get a big fat F. Because they have had no progress in terms of regulatory development or standards or decision-making. We could have the same hearing four years from now that we are having today that we had four years ago and four years before. So there is much work to be done on their end.

I would just conclude in terms of one favorable thing the Department did that they could apply to the Federal recognition. In the *Carcieri* analysis and the standards they have used there, they have actually been very, very progressive. I was actually delighted and thrilled when I read their *Cowlitz* decision. As you know, you have had them as a witness before here, the Department found that they were under Federal jurisdiction by looking at things like children attending Indian schools, attorney-approved contracts, all the things that showed the interaction.

But yet, a couple months later with the *Juaneno* decision, it is almost like a complete reversal. All of those good, solid areas of evidence were not used in the recognition area. So that is why I would say, if they were getting a C, that would be great. But it is probably even worse than that. That is something the Department could do today to harmonize what they have done in the *Carcieri* area with the Federal acknowledgment area. That is also spelled out in my testimony.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Anderson follows:]

PREPARED STATEMENT OF MICHAEL J. ANDERSON, OWNER, ANDERSON INDIAN LAW

Chairman Akaka, Vice Chairman Barrasso, and honorable members of the Senate Committee on Indian Affairs, good afternoon and thank you for the opportunity to testify on the federal recognition process. My name is Michael Anderson, and I am the owner of Anderson Indian Law and a member of the Muscogee (Creek) Nation. I have practiced law for twenty-eight years, and served for the past ten years as outside legal counsel to more than two dozen American Indian tribal governments. Before that, I served for eight years in the Clinton Administration at the United States Department of the Interior as Associate Solicitor for Indian Affairs and as Deputy Assistant Secretary for Indian Affairs.

I. Summary

My testimony will discuss the three routes to federal recognition of Indian tribes: legislative, administrative, and judicial. Congress, in the Federal List Act, has recognized that tribes can be recognized through legislation, administrative procedures, and by court decisions.[1] Each of these methods must continue to be utilized. I will also discuss the inconsistent approach in recent Department of Interior policy with respect to its progressive interpretation of the evidence for determining whether a tribe meets the standard for "under federal jurisdiction" in land into trust matters versus its regressive interpretation of whether a tribe meets recognition criteria.

A. Legislative

- Congress recognizes tribes based on its authority under the United States Constitution.
- The United States can and has enacted legislation to recognize tribes.
- Congressional recognition is difficult for tribes because it is a political process, and, in particular, on the Senate side subject to potential filibuster roadblocks. Indeed, without the filibuster problem, perhaps a half dozen tribes or more could be recognized by Congress this session.
- The last Tribe to be recognized by Congress was over 10 years ago in 2000, the Shawnee Tribe of Oklahoma (Loyal Shawnee).

B. Administrative

- The Department of Interior recognizes tribes through the Federal Acknowledgment Process in the federal regulations at 25 C.F.R. Part 83.
- This process is lengthy, inconsistent, and expensive for tribes.
- Tribes can also organize under the Indian Reorganization Act's half-blood provision.
- A limited number of tribes that were recognized and mistakenly omitted from the list of federally recognized tribes also have been reaffirmed through administrative error correction. This occurs when tribes whose government-to-government relationship was never severed, lapsed, or administratively terminated are administratively reaffirmed and placed on the list of recognized tribes.

C. Judicial

- The U.S. Supreme Court developed common law standards for federal recognition in the 1901 case *Montoya v. U.S.*[2]
- For example, the Shinnecock Nation was recognized by a federal court using the Montoya standards, although that decision was appealed.
- While courts have been reluctant to step in to matters of federal recognition, they have the authority to do so.
- For example, after the federal government failed to live up to its obligations under the California Rancheria Act, a group of California tribes were judicially restored in the *Tillie Hardwick* and *Scotts Valley* cases, among others.

D. Administrative Policy

- The Department of Interior lacks a consistent approach to federal recognition.
- The Department took a progressive view of tribal history and federal interaction with the Tribe in the Cowlitz Record of Decision (ROD), in contrast to a narrow view of tribal history in the Final Determination Against Acknowledgment of the Juaneno Band.
- The Department should follow the policies and approach outlined in the Cowlitz ROD and apply them to recognition cases.

II. Testimony

Congress has recognized that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court."[3]

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[1] FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT OF 1994, PL 103–454, November 2, 1994, 108 Stat 4791.

[2] *See Montoya v. United States,* 180 U.S. 261, 36 Ct.Cl. 577, 21 S.Ct. 358, 45 L.Ed. 521 (1901).

[3] FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT OF 1994, PL 103–454, November 2, 1994, 108 Stat 4791.

In addition, tribes can organize under the half-blood provision of the Indian Reorganization Act. Tribes that were mistakenly omitted from the list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs can also be reaffirmed as federally recognized tribes. All of these methods are valid ways to recognize or reaffirm tribes.

A. Congressional Recognition

Congress has the authority to recognize government-to-government relationships with Indian tribes under the U.S. Constitution, primarily based on the treaty clause and the Indian commerce clause. In a foundational case for Indian law, *Worcester v. Georgia,* the U.S. Supreme Court states "our existing constitution.confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with Indians."[4] Congress historically recognized tribes treaties and through legislation. Only Congress has the power to terminate the government-to-government relationship with a tribe. The last tribe to be recognized through congressional legislation was the Shawnee Tribe of Oklahoma in 2000 (Loyal Shawnee).[5] Regrettably, the United States Senate filibuster process has derailed the potential recognition of tribes in this session of Congress. Unfortunately, some Senators believe only the Department of Interior, and not Congress, should acknowledge tribes.

B. Administrative Recognition

The executive branch has historically and continues to be heavily involved in federal recognition. Some tribes were recognized through executive orders.[6] In addition, the President negotiated treaties, subject to ratification by the Senate.[7]

Authority for federal recognition was also implicitly delegated by Congress to the executive branch. This authority flows from the President to the Secretary of the Interior to the Bureau of Indian Affairs. The Department of Interior issued regulations, found at 25 C.F.R. Part 83, for the Federal Acknowledgment Process (FAP) in 1978 and revised them in 1994. While the procedural process is clearly stated, the implementation of the acknowledgment process is widely recognized as broken. The process is extremely lengthy and burdensome to the petitioners. Tribes have to wait years and even decades for decisions on their petitions. The process leaves the opportunity for inconsistent application of the criteria while also suffering from the problem of applying a one-size-fits-all standard to tribes with widely varying histories and circumstances. While a new federal commission on recognition could be desirable, little congressional support for such a program exists. Given the likelihood that the current Office of Federal Acknowledgment will continue, the best opportunity for qualified tribes to achieve recognition is through fair application of the criteria.

The Indian Reorganization Act also allows tribes to organize under what is known as the "half-blood provision." "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto."[8] This shall become effective when ratified by the Tribe and approved by the Secretary. "The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."[9]

Another way a small set of tribes has been acknowledged is by administrative error correction by the Department of Interior. This is for tribes whose government-to-government relationship was never severed, but through administrative error the tribes did not appear on the list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, periodically published in the Federal Register.[10] These tribes were never administratively terminated and their government-to-government relationship had not lapsed. Rather than a new recognition, this is a reaffirmation of the government-to-government relationship. Thus, a process similar to that under 25 CFR Part 83 is not required. The statuses of the Lower Lake Rancheria Koi Nation, the Ione Band of Miwok Indians,

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[4] *Worcester v. Georgia,* 31 U.S. 515, 559 (1832) (emphasis in original).
[5] P.L. 106–568 (Dec. 27, 2000).
[6] *California Valley Miwok Tribe v. United States,* 515 F. 3d 1262, 1263 (D.C. Cir. 2008).
[7] Felix S. Cohen, Cohen's Handbook of Federal Indian Law 2005 edition.
[8] 25 U.S.C.A. § 476
[9] 25 U.S.C.A. § 479
[10] First published at 44 Fed. Reg. 7,235 (Feb. 6, 1979).

the King Salmon Tribe, the Shoonaq' Tribe of Kodiak, and most recently the Tejon Indian Tribe were appropriately corrected this way.

In a unique situation involving Alaska Native Tribes, on October 21, 1993, the Department issued its list of tribes in the United States eligible for services from the Department. The list named the Alaska villages recognized under the Alaska Native Claims Settlement Act as tribes, and specifically stated that they have "all the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes."[11] The over 220 tribes acknowledged in that notice did not achieve recognition through the Office of Federal Acknowledgment, which would have taken decades, but rather through the Department's interpretation of congressional statutes, policies, and directives, which collectively affirm Alaska Native government sovereignty.

In another case, the Muwekma Tribe of California also sought to be reaffirmed to federal recognition for many years. The Verona Band (that the Muwekma Tribe directly descends from) was federally recognized and was not legally terminated, which the Department of Interior acknowledged. The Muwekma Tribe first informed the Department of Interior that it would petition for federal acknowledgment in 1989. The Tribe submitted a formal petition for acknowledgment in 1995, with thousands of pages of supplemental materials. The petition was evaluated under the modified federal acknowledgment regulations at 25 CFR § 83.8. The Department, notwithstanding a solid record of Muwekma's history as a tribe, found that Muwekma "failed to provide sufficient evidence to the Department that it 'has been identified as an American Indian entity on a substantially continuous basis since 1927, when the Verona band was last recognized by the Federal Government."[12]

Muwekma requested that the Department reaffirm its status through administrative error correction, as it had done with Lower Lake Rancheria Koi Nation and the Ione Band of Mission Indians. The Department refused to do so, and Muwekma sued the Department. As a result of that claim, the Court directed the Department to provide an explanation for why the Part 83 procedures were waived for Lower Lake and Ione but not for Muwekma. If the Tribes were similarly situated, they should have been granted the same waiver. Courts are granted limited review of agency decisions, so the Court could only direct the Department to justify the difference in treatment, rather than reviewing Muwekma's evidence submitted to the Department itself and making its own determination. The Department pointed to a pattern of federal dealings with Ione and Lower Lake, which the Department did not believe it similarly had with Muwekma or Verona band after 1927. The Court found the Department's explanation as to why Muwekma was treated differently sufficient. The important distinction, in the view of the Department, was that the federal government interacted with Lower Lake and Ione as tribes, and Muwekma's evidence only showed interaction with Indian individuals. Although Muwekma presented solid and verifiable evidence, the Department interpreted the evidence only as relevant to individuals rather than the tribe. The Court did, however, confirm the Department's authority to waive regulations under 25 CFR § 1.2, and spoke positively about the reaffirmation process.

C. Judicial Recognition

The courts have also been involved in federal recognition in different ways. In *Worcester v. Georgia,* the U.S. Supreme Court affirmed the Cherokee Nation's status as a federally recognized tribe, based on treaties and Acts of Congress, in the context of federal authority over Indian affairs as opposed to state authority: "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."[13]

There are also common law standards for recognition of Indian tribes. In *Montoya*[14] and *Golden Hill*,[15] the Supreme Court and Second Circuit, respectively, considered whether to recognize certain Indians as Tribes without waiting for recogni-

[11] 58 FR 54364–01 (Oct. 21, 1993).
[12] *Muwekma Ohlone Tribe v. Salazar,* No. 03–1231, at 5 n.3 (D.D.C. Sept. 28, 2011).
[13] *Worcester v. Georgia,* 31 U.S. 515, 561 (1832)
[14] *See Montoya v. United States,* 180 U.S. 261, 266, 36 Ct.Cl. 577, 21 S.Ct. 358, 359, 45 L.Ed. 521 (1901).
[15] *Golden Hill Paugusett Tribe of Indians v. Weicker,* 39 F.3d 51 (2d Cir. 1994).

tion by the United States.[16] The U.S. Supreme Court defined an Indian Tribe in *Montoya* as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[17] The Shinnecock Nation was a tribe recognized by a federal court using the Montoya standards: "The cases described above, beginning with Montoya and continuing to the present, establish a federal common law standard for determining tribal existence that the Shinnecock Indian Nation plainly satisfies."[18] Although the Court found that the Shinnecock Nation met the common law standards for federal recognition, the Nation later became engaged in an administrative recognition process under the Department of the Interior. The Department made a final determination on the Tribe's petition in 2010.[19]

A group of California tribes were also restored judicially in *Tillie Hardwick.*[20] Forty-one tribes were terminated by the California Rancheria Act in 1958.[21] The Act required that a distribution plan be made for each tribe and other actions be taken, including the construction of water delivery systems.. Upon compliance with these requirements, the tribes were to be terminated. In 1979, distributees from thirty-four of the tribes sued the United States for violation of the Rancheria Act for failing to satisfy the obligation of the Act and to inform the distributees that they would no longer have access to federal programs and protections.[22] The parties entered into a Stipulation for Entry of Judgment in 1983, restoring federal recognition to seventeen of the tribes. A similar court approved settlement, in *Scotts Valley Band of Pomo v. U.S.,* restored other tribes in 1992.[23] Since then, other tribes in California terminated by the Rancheria Act have also been restored by judicial stipulation.

D. Administrative Policy

The Department of Interior historically and currently lacks a consistent approach to matters of federal recognition and how evidence showing recognition or federal jurisdiction should be viewed. The Department has employed progressive standards in the Record of Decision ("Cowlitz ROD") for a trust acquisition and reservation proclamation for the Cowlitz Indian Tribe[24] and regressive standards in the Final Determination Against Acknowledgment of the Juaneno Band of Mission Indians ("Juaneno Determination").[25] These decisions show an inconsistent approach to how the government interprets federal/tribal interactions. In the Cowlitz ROD the Department of Interior dealt with the question of whether the Tribe was under federal jurisdiction, and in the Juaneno Determination, the Department evaluated whether the Juaneno Band met the standards for recognition in 25 C.F.R. Part 83, however, a comparison of the two is useful to show the Department's varying approach to similar evidence.

In Cowlitz, the Department evaluated the question of "under federal jurisdiction" in the context of the Indian Reorganization Act with the goal of taking land into trust. The Department interpreted the evidence needed for course of dealings and superintendence in a very broad fashion. Support for federal superintendence and sovereign status was found in treaty negotiations (even for unratified treaties) census records, BIA expenditures for tribe and individual Indians, placement of Indian children in BIA schools, hiring of attorneys to protect land rights of individual members of a tribe, supervision of allotment sales, funeral expenses for individual members, protection of water rights and other trust assets.[26] A federal attorney contract, according to the opinion, demonstrates the Tribe did not lose jurisdictional status at that point. The Cowlitz were federally acknowledged on February 14, 2000, and their acknowledgement was reaffirmed in 2002. So in the ROD, the Secretary assessed whether the Tribe was under federal jurisdiction in 1934 to determine if the

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[16] *New York v. Shinnecock Indian Nation,* No. 03–CV–3243 (D. N.Y. Nov. 7 2005).
[17] *Montoya,* 180 U.S. 261, 266 (1901).
[18] *New York v. Shinnecock Indian Nation,* No. 03–CV–3243 (D. N.Y. Nov. 7 2005).
[19] 75 Fed. Reg. 34760 (June 18, 2010).
[20] *Tillie Hardwick, et al. v. United States of America, et al.,* No. C–79–1710 (N.D.Cal.).
[21] Pub.L. 85–671 (72 Stat. 619)
[22] *Tillie Hardwick, et al. v. United States of America, et al.,* No. C–79–1710 (N.D.Cal.).
[23] *Scotts Valley v. United States* (Final Judgment), No. C–86–3660–VRW (N.D. Cal. April 17, 1992).
[24] United States Department of Interior, Record of Decision Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe (Dec. 2010) ("Cowlitz ROD").
[25] Larry Echo Hawk, Assistant Secretary—Indian Affairs, Final Determination Against Acknowledgment of the Juaneno Band of Mission Indians, Acjachemen Nation (Petitioner #84A) (March 15, 2011) ("Juaneno Final Determination").
[26] *See* Cowlitz ROD.

IRA would apply. The attorney contracts were viewed as robust evidence of federal jurisdiction in the Cowlitz ROD.

In Juaneno, the Department evaluated whether there were instances of third party acknowledgement of the tribe under 25 C.F.R. § 83.7 for the purposes of federal recognition. Juaneno, while claiming it also had attorney contracts, did not have a copy of the actual attorney contracts. The Tribe claimed a letter from the Commissioner could be construed as an approval of attorney contracts but that letter was not produced either. Notably, the Office of Federal Acknowledgment (OFA) did not produce this document either, even though this is a government record. OFA then dismissed this claim as self-identification. Although the Final Determination notes that the evidence of attorney contracts was not evaluated because the actual documents were not produced, it is further noted that "such correspondence merely repeats self-identifications and is not considered identifications under this criteria."[27] In stark contrast, the Cowlitz ROD states "This action to approve the Cowlitz Tribe's contract in 1932 supports a finding that it was considered a tribe subject to the statutory requirement for Department supervision of its attorney contracts, and thus 'under federal jurisdiction.'" This is supported by a 1948 Solicitor's Opinion construing the 1946 Claims Act as allowing only claims if "political recognition had been accorded to the particular Indian groups asserting them."[28]

In the Cowlitz ROD, the Department used BIA activities for both the tribe and for individual Indians to find "under federal jurisdiction" activity. Importantly, the Department also said the federal government must find probative/affirmative evidence that a tribe was terminated before it can conclude the tribe was not under federal jurisdiction. This correctly shifts the burden to the Department to find such evidence of termination rather than placing the burden on the tribe.

This confusion in the Department's approach leaves the Department open to challenges of its decisionmaking, which is detrimental both to the Department and the Tribe. For example, the Confederated Tribes of the Grand Ronde Community of Oregon sued the Department for its decision to take land into trust for the Cowlitz Tribe. Grand Ronde's motion for summary judgment attacks the Secretary of the Department of the Interior on his explanation that the term "recognized" has been used in various senses.[29] The Department has a variety of tools to recognize, reaffirm, or show that a tribe was under federal jurisdiction. The approach developed in the Cowlitz ROD show an approach to characterizing government-to-government relationships that better meets the evolving standards of federal/tribal interaction. This approach should be consistent for all tribes, including those seeking recognition.

The CHAIRMAN. Thank you very much, Mr. Anderson.

Chief Adkins, in your testimony, you listed several factors that contribute to the low success rate of Tribes going through the administrative process. If those factors are addressed, will there still be the need for Congressional recognition in certain cases?

Mr. ADKINS. Mr. Chairman, I believe yes, that there would be need for Congressional action in certain cases. I wish I could say I didn't think so. I have pointed out things that obviously need to be addressed. But in certain cases, it would still need action of Congress, and you have demonstrated that you can do that for certain Tribes.

The CHAIRMAN. Thank you.

Chairman Brooks, due to the 1956 Lumbee Act, the Tribe is ineligible to petition through the administrative process. Therefore, is Congressional recognition the only means for the Lumbee to obtain Federal recognition?

Mr. BROOKS. Mr. Chairman, as long as the Solicitor's opinion is stated as it is stated, and the way it has been implemented, the only way we are ever going to be federally-recognized is for this Congress to say, look, let's do it.

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[27] Juaneno Final Determination at 21.

[28] U.S. Dept. of the Interior, Sol. Op. No. M–35029 (Mar. 17, 1948).

[29] *The Confederated Tribes of the Grand Ronde Community of Oregon v. Ken Salazar,* No. 11–cv–00284, Plaintiff's Motion for Summary Judgment (June 20, 2012).

The CHAIRMAN. Yes, and as you mentioned about the long history of not being recognized. Thank you for that response.

Mr. Norwood, since 1977, there have been approximately 30 bills introduced in Congress to alter the Federal recognition process. Does the Task Force support any of the proposals already put forth? Or is there a need for new proposals?

Mr. NORWOOD. I think the answer is inherent in the question, sir. Because there have been so many proposals and so many hearings, I think we need a whole new process. And it needs to be done by Congress.

The CHAIRMAN. Thank you.

Mr. Gottschalk, having worked with numerous Tribes seeking Federal recognition over the past decades, please describe the evolution of the administrative process for Federal recognition.

Mr. GOTTSCHALK. Chairman Akaka, even though I have quite a bit of experience in the process, I am not sure I am totally qualified for that. But let me give it a try.

One of the first cases that I was involved in was the San Juan Southern Paiute Recognition in the 1980s. I believe the entire process took approximately six years for that Tribe. Now, I was involved with the Shinnecock process, which took over 30. As we have said, Little Shell has taken all or parts of five different decades. So I think there has been a tightening of a reading of the regulations, lack of flexibility.

I hate to pick on Mr. Newland too much, but when he was explaining why the perfect world of 25 months doesn't work under the regulations, he spoke of the thousands of pages of documents. I wrote this down, he said, when you have to rigidly apply mandatory criteria to all of these pages, it takes time. I think one of the problems is precisely that. It is not supposed to be rigid application. It is supposed to be according to the regulations themselves, a flexible application which takes into account the culture, history, and situation of each Tribe involved.

I think perhaps that is what has evolved, is a turning away from that flexibility, which seemed to be there in the 1980s with the San Juan Southern Paiute Tribe, and which I am not seeing now.

The CHAIRMAN. Thank you so much. It is good to draw from your experience in this respect.

Mr. Anderson, in your testimony you mentioned the Department's varying approach to similar evidence and recognition cases. What mechanisms can be put in place to ensure that all recognition cases are considered on equal and consistent basis? For instance, can a regional approach help?

Mr. ANDERSON. I think direction from the top, from the Secretary's office, for the Secretary to make these consistent, it could work. My example in my testimony showed that while there have been favorable standards used in this *Cowlitz* decision, where things like attendance at BIA schools was seen as valid evidence of Tribal citizenship, it has not been used in the recognition case.

So there has been a disconnect at the Interior Department between the team, which I think has been really first rate, working on the *Cowlitz* land into trust cases, and I think because the Solicitor herself has been involved in that, versus what has gone on at the staff level where unfortunately, the acknowledgment area is

kind of the stepchild of Indian law and policy at Interior. It is not something that a lot of people focus on, have a lot of attention to. As a result, sometimes precedents and policies are formed there at the staff level that really don't reflect what I think is a greater policy.

So directives, and then as you mentioned, regional standards, like the approval of attorney contracts, that is good evidence. If that was enunciated in a policy, I think you could go to a chart of all these Tribes, that if they can meet this threshold of these standards, at least we would know there is real potential that at least should be looked at as a priority matter.

The CHAIRMAN. Thank you very much.

Chief Adkins and Chairman Brooks, in your testimonies, you both summarized the many hardships faced throughout the history of your people and State, that the time for Congress to act is now. Please describe the impact of delaying action on your recognition legislation.

Mr. ADKINS. Mr. Chairman, I would like to say that access to education, that is of primary importance to us. If you look at statistics, they will show that only 3 percent of Natives who enroll in college graduate from college. Only 50 percent of Native students complete high school. Education is of paramount importance. And with Federal acknowledgment, we would have access to at least a grant process from which we are excluded today to gain funding for education.

Number two, the bones of my ancestors, a lot of those folks, a lot of those remains are in the Smithsonian. I am precluded from bringing my ancestors home for burial because as a non-federally recognized Tribe, I do not have access to their remains. I want to bring my people home.

And number three, it was stated in 1999, when we approached the Bureau of Indian Affairs, we were told by the Assistant Secretary of the Department of the Interior that many of us would die before we gained recognition through the administrative process. I want to do this for the chiefs who have passed away since then. I want to do that for the elders who clung tenaciously to the hope that the Congress of the United States of America, or that its arm, the Department of the Interior, would do the right thing by its people, by those people who fought, who died and bled initially to protect their own homeland, but then who helped the invaders establish a foothold in this place we call the United States, who now have the authority and the power to dictate our futures.

So I would like for the legacy of my forebears to include, to be reflected in the action this Congress might take to accord Federal acknowledgment to these Tribes who have worked so desperately hard, who have been true patriots to this Country. I want that legacy to arise and endure.

The CHAIRMAN. Thank you very much, Chief Adkins.

Chairman Brooks?

Mr. BROOKS. Mr. Chairman, when we consider, or when I consider the cost of just cancer itself, and I just went through that with my wife, and you are looking at $150,000-plus, and then when I look at the cost of diabetes, and I look at the cost of heart attacks, and I look at the cost of strokes, our graveyards are filling up. Be-

cause we don't have the proper care that needs to be out there for our elders. And I am seeing that every day. It is not just something that I realize is going to happen. It is happening now.

And the only way that I know we are going to be able to get out of this kind of thing is for Congress to say, look, let's go ahead and do the right thing. Let's go ahead and do the thing that will help us solve some of these problems that we have. Especially in the educational aspect of it. When you look at the cost of education today, just in my Tribe, there are thousands of kids today not able to go to college because of the cost of it.

So I implore, I implore you today, let's act quickly if we can. Thank you very much.

The CHAIRMAN. Thank you, Chairman.

Mr. Norwood, Mr. Gottschalk, and Mr. Anderson, the idea of an independent commission on Tribal recognition has been around for several years. In your opinion, is this a viable solution to the problems with the current administrative process? Mr. Norwood?

Mr. NORWOOD. I believe that it is, sir. I think that it would have to incorporate regional considerations, that there are different histories in different areas of the Country, different concerns. I think that the people that sit on the committee should be referred to or Congress should be guided to them by the Tribes who are going to be impacted by those decisions, and that they are familiar with the regional histories.

But I think that that is an alternative and a way that Congress can take action and establish justice for these Tribes.

The CHAIRMAN. Thank you.

Mr. Gottschalk?

Mr. GOTTSCHALK. Mr. Chairman, with your indulgence, I was remiss in my previous answer about the move from flexibility to rigidity in the process to not point out, of course, that the perfect example is Little Shell itself, which received a favorable preliminary determination because of the Assistant Secretary's flexible application of the criteria. And then the subsequent rigid application that resulted in a negative final determination. I just wanted to make that point.

As to your present question, it is a fact that in the IBIA appeals process, we have asked for the appointment of outside independent experts. It seems to me that each Tribe, when they go through this recognition process, you hire someone that spends years studying the particular situation of a given Tribe. I think it is extraordinarily difficult to expect that a small group of people appear, can just jump in and become that familiar with a given Tribe. The way that could happen, if you could seek out independent experts that had expertise, as Mr. Norwood said, in the Tribes of a given area.

So I think that is something that certainly should be considered.

The CHAIRMAN. Thank you. Mr. Anderson?

Mr. ANDERSON. Yes, Mr. Chairman, I think a commission is a good idea whose time will probably never come. The reluctance of Congress to form new commissions, the lead time to hire staff probably renders it a real good idea that won't be implemented. But that doesn't mean that the Department, within its own system, can't do something similar to that in terms of independence or outside panels. And frankly, just a more fair, and as Mr. Gottschalk

said, flexible application of the standards themselves today I think would expedite these processes.

The CHAIRMAN. Mr. Anderson, under the Clinton Administration, several Tribes received recognition both legislatively and Congressionally. Can you please discuss the approach taken by the Assistant Secretary regarding Tribal recognition during that time?

Mr. ANDERSON. Yes, I would be pleased to. Of course, at that time Assistant Secretary Kevin Gover was the Assistant Secretary, and prior to that, Ada Deer. I think with, particularly with Secretary Deer, initially we had the issue of the Alaska Native recognition. There was some thought that these Tribes, the 224 Tribes should all go through the recognition process through OFA.

Well, one can imagine how many decades and years that would take. Or should there be an innovative approach in seeing, as a group, could they be recognized based on Congressional statutes that are mentioned in the Alaska Native Settlement Claims Act. And that is what happened. So they didn't go through the BAR process at all, they were recognized in the Assistant Secretary's power.

So that was an innovation. I think it kind of opened people's eyes to thinking that, gee, we don't always have to go through the OFA, but let's look at other ways. Then when Mr. Gover was the Assistant Secretary, he thought, could we do things outside BAR in terms of where a Tribe is currently recognized, but through a mistake of the United States Government we have overlooked that recognition. And he found an innovative approach to recognize some Tribes in that manner.

So I think it is trying to get outside the box that particularly those in OFA have wanted to put Tribes in, that there is an exclusive, only one way to be recognized, that is through their office. It is broadening that to Congressional, judicial, and other means, like the error correction. I think that was the difference in thinking.

Until recently, that didn't occur during the Bush Administration. At the very end of Mr. Echo Hawk's tenure, with *Tejon*, he finally used that authority which is available. The Bureau in the past used to take the position in litigation that if one Tribe uses that, then all of them will want to. Well, of course, and maybe they should where they are qualified to use that error. But I think it was just an innovative approach that we hopefully maybe, with some of the testimony you have heard today from the Administration, that they would try to now follow.

The CHAIRMAN. Thank you very much. I want to tell you that your responses, your statements, too, have been very valuable to the Committee. What we try to do, of course, is understand what happened and to hear leaders like you and experts as well tell us some of your experiences. It will certainly help us in what we try to do, and we need to do this working together and do it as quickly as we can.

We cannot accept the fact that oh, it takes long, so we just have to be patient. Well, we want to see what we can do in reforming that and try to help the indigenous people as quickly as we can here.

As a nation, we must always remember our history and the circumstances from which our great democracy was born. Fulfilling

the Federal trust responsibility to America's first peoples or indigenous Nations isn't simply a matter of goodwill. It was in the beginning and it has been in our Constitution, it is a matter of justice, of promises kept and of remembering the debt owed to those whose sacrifices have helped to make this great Nation possible. All of you have mentioned that.

So it is important that as we contemplate policies that fulfill that responsibility, we strive to achieve what we call parity among Native Nations. The United States must ensure that we are meeting our trust responsibility to each Native Nation in all three areas, addressing barriers to self-sufficiency, protecting the collective rights of Native Nations and engaging in a government-to-government relationship. Congress sets the standard and direction of Indian policies, maintains oversight in the implementation, and must exercise its authority to correct situations. That is what we are attempting to do when implementation does not achieve the goals of this great Nation.

And without question, it will take a concerted effort of Tribal leaders, the Administration, and the Congress to fix the recognition process. And that is the whole attempt here.

So I look forward to continuing to work with all of you on this endeavor. I also want to, I notice that we have had good attendance today, including some very young people who are seated here in the front row. I want to thank the young people in the front row for staying here and listening to what has gone on. I hope you will be receiving the benefits of our discussion today as we move along here.

So again, thank you so much for your wisdom and your knowledge and we need to reach out to get all of this and try to do it as right as we can for our indigenous people.

So again, mahalo, thank you, and thank you so much for being here and helping us with your valuable statements and responses.

Mr. ADKINS. Mr. Chair, I would like to offer one little story. It won't take but a second. One of the local universities close to our ancestral land had exhumed, through archeological digs, many of the Indian remains of the Chickahominy people. We have met with the university and we are making provisions to bring those remains home.

But two crania were sent to a forensic sculptor, who created likenesses from those. She is a noted forensic sculptor. And I got to meet, face to face, the images of my forebears who had lived in the middle of the 14th century. And there are stories like that across Indian Country that ought to just resonate with this administrative process. We are who we say we are. And our community linkages, a lot of us went underground to survive. By design, we didn't want to be noticed by the ruling folks, because we knew what would happen. We would lose a lot of property that we had. So we went underground.

In retrospect, that probably hurt us. But in going underground, we strengthened our individual ties Tribe to Tribe. So that did cause us to get even stronger.

So there are factors that I think I wanted you to be aware of and that the administrative process ought to be able to look at to

render an informed decision regarding those Tribes who are in that process. So thank you for letting me make that statement.

The CHAIRMAN. Thank you so much. Therefore, I am going to extend that opportunity to each one of you here at the table. If you have any further comments to make before we adjourn. Chairman Brooks?

Mr. BROOKS. I just want to thank you, and I appreciate the fact that your heart is where it is, that we can be together in one unity as we sit around this table. From what I have heard today, we are one people. Thank you.

The CHAIRMAN. Mr. Norwood?

Mr. NORWOOD. I just want to thank you, sir, for allowing us to give testimony and also want to pledge my efforts to the task of making the correction and pray for our collective people, that one day both of us will perhaps be dancing together and celebrating Federal acknowledgment.

The CHAIRMAN. Thank you very much. Mr. Gottschalk?

Mr. GOTTSCHALK. Thank you, Chairman Akaka. I would just like to say that the Little Shell Tribe is a Tribe that has given the administrative process more than a fair chance, and it did not work, and it is not because of Little Shell Tribe. I would urge the Committee to report out S. 546 favorably so it can be moved on the Floor. Thank you.

The CHAIRMAN. Thank you.

Mr. Anderson?

Mr. ANDERSON. Mr. Chairman, as a Native Hawaiian, I appreciate your understanding of the American Indian issues and know that across the Country, American Indians support the Native Hawaiians as well. It has been a great partnership.

The CHAIRMAN. Thank you very much.

Again, mahalo, thank you to all. This hearing is adjourned.

[Whereupon, at 4:37 p.m., the Committee was adjourned.]

A P P E N D I X

Prepared Statement of the Knugank Tribe

The Knugank Tribe (Knugank) appreciates the opportunity to submit this written testimony to the Senate Committee on Indian Affairs, for the record of its July 12, 2012 Oversight Hearing on Federal Recognition.

Knugank is an Alaska Native community in South-central Alaska whose members share a common association and residence in our current location that goes back to 1894. Although the name of the community has changed over time (Kanakanak, Dillingham, Nelsonville, Old Dillingham, Olsonville, and Knugank), our location has been the same. Knugank, under our corporation name, Olsonville, was listed on the Department of the Interior's list of federally recognized tribes in 1988. In 1993, we were omitted from that list, an error that to this date has not been corrected.

Knugank members have long been acknowledged by the Federal Government as Alaska Natives, and have received federal services as such since well before the Alaska Native Claims Settlement Act (ANCSA) was passed into law. Our Tribe has continued serving its members through social programs; cultural heritage activities; and by maintaining dialogue with the federal government, other tribes in our region and with state and local authorities to advance our shared interests. Critical activities include our efforts to correct the BIA's erroneous termination of our federally-recognized tribal status and to protect our tribal cemetery from accelerating riverbank erosion and encroachment by the City of Dillingham.

This testimony concerns the frustrating lack of recourse our Tribe has experienced in seeking to remedy historical errors that revoked our tribe's federally recognized status. We respectfully ask the Committee to encourage the Department of the Interior to acknowledge and act on its authority to restore our federal recognition outside of the 25 C.F.R. Part 83 process, including authority to correct errors and omissions as well as its authority under the Alaska Amendment to the Indian Reorganization Act (Alaska IRA).

When Congress decided that Alaska Native land claims should be settled in the ANCSA, it provided that a community had to have 25 members in order to be considered an "Alaska Native Village". Native Villages were made eligible for an ANCSA village corporation and permitted select land in the area they had historically used. Unfortunately, The ANCSA enrollment process led to a great deal of confusion amongst the Native population. As a result of a miscount of our membership during ANCSA enrollment we were deemed to be only 24 members and thus too small to be a Native Village. The 1970 federal census listed only 33

Native residents in Olsonville (Knugank), but that was because some of our children were away at school and others were temporarily away from the village. The ANCSA enrollment failed to include all Native residents of the village and several members of our community were mistakenly enrolled in a different village corporation or simply enrolled as at-large members of the regional corporation and not associated with any village. With only 24 members enrolled, Olsonville was established as a "Native Group" under ANCSA and not a Native Village.

The miscount had serious consequences for our Tribe. As a Native Group, we were entitled to a much smaller land selection than Native Villages and had to wait longer to make our selection. By the time we were able to make a land selection under ANCSA, all the land around Knugank had already been selected, including the Knugank cemetery which is at the very heart of our village and our tribal identity.

Knugank has never been terminated by Congress and, therefore, continues to be a tribe. In 1993, the Assistant Secretary made a mistake by removing Knugank (Olsonville) from the list of federally recognized tribes. We have called on the Office of the Assistant Secretary to confirm and/or restore federal recognition of our Tribe by adding Knugank to the list of federally recognized tribes in the State of Alaska. In the alternative, we also submitted a petition in June 2012 to organize as a Tribe pursuant to the Alaska Amendment to the Indian Reorganization Act (Alaska IRA), 25 U.S.C. § 473a. In extending the IRA to Alaska, Congress stated:

> "That groups of Indians in Alaska not recognized prior to May 31, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title."

Former Assistant Secretary for Indian Affairs Larry Echo Hawk recently confirmed the continuing authority of the Alaska IRA in a January 31, 2012, letter to Senator Lisa Murkowski, which we append to this written testimony for inclusion in the record. Longstanding practice and precedent under the Alaska IRA provide for the Bureau of Indian Affairs (BIA) to authorize the organization of tribes in Alaska based on their showing of a "common bond of occupation, or association, or residence" that was established prior to 1936. Knugank

Restoring Knugank's federal recognition would enable us to preserve and maintain our community identity as well as allow us to offer our members, particularly our young people, the benefits of tribal membership that are due them as Alaska Native people without forcing them to forsake their heritage by joining another tribe. For instance, federal recognition means we could assist our members in improving their housing, and may make it possible for us to obtain resources to protect our village, particularly the cemetery, from further erosion. We attach our recent letter to the City of Dillingham, Alaska, which demonstrates the seriousness of the threats facing our Cemetery and the challenges we face in addressing them. The Alaska Federation of Natives (AFN), Bristol Bay Native Association (BBNA), Bristol Bay Area Health Corporation (BBAHC) and tribes in our region all recognize Knugank as a tribe and have been supporting our effort to restore federal recognition of our tribal status.

Knugank extends our appreciation to the Senate Committee on Indian Affairs for holding the oversight hearing. We respectfully urge the Committee to remind the Department of its authority, responsibility, and Congressional directive under the Alaska IRA to take action on tribal recognition outside the Part 83 process in cases like ours.

Hachments

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Honorable Lisa Murkowski
United States Senate
Washington, DC 20510

JAN 3 1 2012

Dear Senator Murkowski:

Thank you for your letter of June 23, 2011, posing two questions about the recognition process for Alaskan tribal entities. Your letter inquires about the Alaska Amendment to the Indian Reorganization Act, 25 U.S.C. § 473a (IRA), and the Department's acknowledgment regulations, 25 C.F.R. Part 83, as the means by which Alaskan tribal entities are recognized as tribes. I apologize for the delay in responding to your letter.

You note that there are currently 229 Alaska native entities listed in the October 1, 2010 *Federal Register* Notice "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." The acknowledgment process of Alaska Native tribes and villages has a long and unique history, as described below.

When the tribal entities list was first published in 1982, it was qualified as a "preliminary list." *See* 47 Fed. Reg. 53,130, 53,133 (Nov. 24, 1982). Efforts to clarify the list were unsuccessful and numerous Alaska Native villages appealed being left off the 1986 list, which resulted in the Department modifying the list significantly in 1988 to include Alaska Native villages and Alaska Native Claims Settlement Act (ANCSA) corporations and other tribal organizations that would not otherwise be considered tribes. *See* 53 Fed. Reg. 52,829, 52,832 (Dec. 29, 1988). Unfortunately, the revisions to the list did not resolve the questions related to tribal status of the Native villages and, indeed, may have made them more complicated. As a result, the Solicitor issued a comprehensive opinion on the "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers," M-36975 (Jan. 11, 1993, as supplemented Jan. 19, 1993). In response to the Solicitor's Opinion, the Department published a revised list of tribal entities for Alaska, the preamble to which recounts the significant history of the Alaska portion of the list. *See* 58 Fed. Reg. 54,364 (Oct. 21, 1993). The authoritativeness of the current list has most recently been confirmed by the Alaska Supreme Court in *McCray v Ivanof Bay Village*, No. S-13972, 2011 Alas. LEXIS 136 (Alaska Dec. 9, 2011).

Turning to your specific question as to the applicability of the IRA to Alaska, the IRA as originally enacted in 1934 applied to Alaska, but had limited effect because of the absence of reservations similar to those in the contiguous 48 states. Recognizing Alaska's unique circumstances, Congress amended the IRA in 1936 to account for those circumstances. For the contiguous 48 states, Section 16 of the IRA, 25 U.S.C. § 476, gave any tribe or tribes residing on one reservation the right to reorganize and adopt a constitution for self-government. Since there were few reservations in Alaska, Congress amended the IRA to provide in part:

> that groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district, *may organize* to adopt constitutions and bylaws and to receive charters of incorporation and federal loans under Sections 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984). (*emphasis added*)

49 Stat. 1250; 25 U.S.C. § 473a.

Thus, a group that can establish its existence in 1936 with "a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" could seek to be organized under the Alaska Amendment of the IRA.

If the Alaska Amendment of the IRA does not apply to the group because the group was not in existence in 1936, there are several alternatives. First, the group could seek special clarifying legislation similar to that passed for the United Keetoowah Band of Cherokee Indians (Act of August 10, 1946; 60 Stat. 976) or the Central Council of the Tlingit and Haida Tribes (Act of Nov. 2, 1994; 108 Stat. 4793). Second, in the alternative, the group could consider forming a "tribal organization" within the meaning of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(*l*), for purposes of managing Federal services and benefits available to Alaska Native people. A third possibility may be the acknowledgment process under the Department's regulations, 25 C.F.R. Part 83. One of the requirements of that process is the need to show a continuous existence as a community from historical times to the present. *See* 25 C.F.R. § 83.7(*b*).

We hope these comments have been helpful to you in understanding the Department's position. If you have any further questions please do not hesitate to contact us.

Sincerely,

Hilary Tompkins
Assistant Secretary-Indian Affairs

Olsonville, Inc.
P.O. Box 571
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Alice Ruby, Mayor
City of Dillingham
PO Box 121
Dillingham, AK 99576

May 8, 2012

Paul Liedberg, Chair
Planning Commission
City of Dillingham
PO Box 889
Dillingham, AK 99576

Dear Ms. Ruby and Mr. Liedberg:

I am writing to follow up on the issue of the Kanakanak Cemetery, which I discussed briefly at the May 3 Dillingham City Council Meeting. I appreciate having had the opportunity to share the Olsonville (Knugank) community's history with and current concerns about the Cemetery with you at the meeting. I hope that I was able to convey the deep significance the Cemetery has to our community and the sense of urgency we feel regarding these matters.

The Kanakanak Cemetery has been maintained and cared for by our community, and has remained the burial site of our ancestors, for over 100 years. Unfortunately, due to what we consider to be an egregious error in the implementation of the Alaska Native Claims Settlement Act (ANCSA), we were never able to acquire legal title to the Cemetery in our ANCSA Corporation. We believe this error was and continues to be a violation of the inherent right of the Knugank Tribe to maintain our role as caretakers for our traditional lands and cultural resources, a right acknowledged in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (Articles 25, 26). The UNDRIP specifically affirms the rights of indigenous communities "to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historic sites" (Article 11) and to "maintain, protect, and have access in privacy to their religious and cultural sites" (Article 12). The Kanakanak Cemetery is in fact a central historic, religious, and cultural site for the Knugank people.

Within the last several years, it came to our attention that Choggiung, Ltd. had transferred title to the Cemetery to the City of Dillingham. After receiving this information, we sent a letter to the Dillingham City Manager on April 26, 2010 expressing concern over the threat posed to the grave sites by riverbank erosion and explaining our position that, due to our historical relationship with the Cemetery, title should belong to the Knugank Tribe or the ANCSA Native

Corporation of Olsonville, Inc. At the May 3, 2012, meeting, I reiterated these concerns and indicated that I would follow up with this letter.

Since our last letter, our concerns regarding the Cemetery have substantially increased. Not only has the erosion continued unabated, threatening the grave sites of approximately 130 people, but the use of heavy machinery in burials of non-Knugank individuals (in violation of our traditional burial practices) has caused significant damage. Our old trail which we still use to access the Cemetery is not meant for heavy machinery and has been nearly destroyed. Several trees and even burial crosses have been knocked down by the machinery as well. With the City of Dillingham apparently considering opening the Cemetery up to the public at large, we are also worried about whether or not the grave sites of our ancestors will be properly cared for in accordance with our traditions and whether or not we will be able to preserve the site as the resting place for family members and descendants of past, present and future generations of Olsonville (Knugank) members. The Cemetery and our traditional role as caretakers of it constitute a central part of our community identity. Article 32 of the UNDRIP also requires that we be consulted in the development or use of these lands and cultural resources.

The Kanakanak Cemetery, which shares the same name as our Native community, has not historically been a public cemetery and should not be permitted to become one in the future. Rather, it is our deeply and sincerely held position that legal title should be transferred to the Knugank Tribe or our ANCSA Corporation, Olsonville, Inc., so that we may continue to care for the burial sites of our ancestors and future generations. At the very least, we would ask that the City of Dillingham enter into a co-management arrangement with us that would ensure that the Knugank community's concerns are addressed and that the Cemetery is protected as a Knugank historic, religious and cultural site.

I felt that our interactions following the May 3 meeting were positive and I thank you for listening to my presentation of our concerns. While we understand that the City of Dillingham is facing a shortage of space as well, we feel that the solution to this problem need not come at the expense of Knugank's cultural heritage and integrity. We hope to continue a respectful and productive dialogue with you on these matters and ask for a response as soon as possible. Should you have any questions, please do not hesitate to contact me, and I look forward to meeting with you again soon.

Sincerely,

Dennis Olsen, Sr.

PREPARED STATEMENT OF HON. FRAMON WEAVER, CHIEF, MOWA BAND OF CHOCTAW INDIANS

Thank you Mr. Chairman:

It is clear that our tribe the MOWA Band of Choctaw Indians are the literal poster child for the structural failures evident in the federal recognition process. As the only tribe in the nation to have exhausted all three remedies made available for the granting of federal status (OFA, federal lawsuit, Congressional Bills), we are well aware of the inherent bias, political corruption, and highly financed campaigns waged against legitimate, historic "non-federal" tribes. We are the second longest petitioning tribe in the nation. Only the Lumbee in North Carolina have petitioned longer. Our initial attempts at federal recognition began in the early 1900s with our mass community attempt to be admitted to the Miller Roll. With numerous appeals through BAR/OFA, twelve Congressional bills, and a federal lawsuit thrown out on a statute of limitations argument, we clearly understand that the current process is only open to those who ally themselves with gaming backers who can invest tens of millions of dollars in their petitions. We have chosen throughout our long, arduous journey in the process not to ally ourselves with numerous gaming suitors. Some may call this ignorant to the realities of the process. We choose to call it what it is; integrity. The need to align with gaming backers compromises every aspect of the process and makes it completely illegitimate.

The only avenue for defining the federal to federal relationship is via the United States Congress. OFA has no place in this process and the integrity of the leadership in this organization is not something that can be fixed. Lawsuits have no place in this process. Like the OFA process, they are economically prohibitive for most petitioning tribes. Congress must make determinations based on facts and facts only. No political influence. No backdoor letters from federal tribes attempting to defend gaming zones from perceived competition. Congress must act.

There exist numerous keys that define legitimate tribal communities, but due to extreme time constraints for presenters, we will discuss only a small number here.

1. Tribes who have attended Indian boarding schools and can clearly document this attendance should be placed on the federal register in immediacy. Attendance at Indian boarding schools is a clear indicator of continuous acknowledgement from governmental, political, and social sources. Boarding schools such as Haskell, Bacone, Carlisle, Hampton, Cherokee, Choctaw Central, Chilocco, and others, educated members of historic, "non-federal" tribes for many generations. These schools were exclusive to Indians and there exists historic "non-federal" tribes who have had numerous members of their tribes attending such institutions at times when most required blood quantum of ¼ or more Indian ancestry for attendance as a basic requirement. For copies of yearbook photos, campus newspaper articles, grade reports, contemporary interviews, etc. of these attendees and their tribes, please go to *www.helphaskell.com*

2. Tribes who live on long standing, historic colonial and/or state recognized Indian reservations should be placed on the federal register in immediacy. As Ojibwa academic and scholar David Treuer remarks in his book Rez Life, published in 2012 by Atlantic Monthly Press, "Some Indians don't have reservations, but all reservations have Indians . . ." The idea that Indians who have lived on their Indian reservations for generations, are suddenly to be considered as "non-Indians" is fundamentally absurd. The maintenance of tribal lands from the historic period to contemporary times is a simple, clear, and irrefutable identifier of Indian existence. The majority of the oldest Indian reservations in the United States are inhabited by historic "non-federal" tribes.

3. Language is irrefutable proof of tribal existence. If a tribal community has maintained their tribal language into the contemporary period and can document such, there is simply no need to go through any other form of recognition criteria. There does not exist a singular community of "non-Indians" in this country who speak an Indian language. This is a social impossibility. This requires no further explanation.

4. Unique regional history is highly important in determinations. There is no way to objectively determine the granting of federal recognition via one set of proposed regulations. The current seven criteria being used by OFA have never been used in any consistent form to this stage anyway, and so they are simply proof positive of the disaster of complete inconsistency and attempting to fit circular objects into square pegs.

5. Racial bias towards tribal communities in the East and South in particular must be abolished completely. Two examples are cited here:

In 1978 Terry Anderson and Kirke Kickingbird were hired by NCAI to research this issue of federal recognition and present a paper on their findings to the National Conference on Federal Recognition which was being held in Nashville, Tennessee. Their paper, "An Historical Perspective on the Issue of Federal Recognition and Non-recognition" closed with the following statement,

"The reasons that are usually presented to withhold recognition from tribes are (1) that they are racially tainted with the blood of African tribes-men or (2) greed, for newly recognized tribes will share in the appropriations for services given to the Bureau of Indian Affairs. The names of justice, mercy, sanity, common sense, fiscal responsibility, and rationality can be presented just as easily on the side of those advocating recognition."

Thirty-four years later there has been no change in these two factors being used as reasons to deny/work against federal recognition of petitioning tribes.

Professor Don Rankin from Samford University in Birmingham, Alabama has recounted by letter a disturbing incident occurring during a June 1995 Genealogy Seminar conducted by Sharon Scholars Brown at Samford University. His letter states,

"Someone brought up the MOWA Choctaw and their attempt at federal recognition. At this stage, several people had gathered around as we were talking. Ms. Brown responded in an even professional tone of voice that she felt that they would not be successful. When asked why, she responded that they had black ancestors and in her opinion were not Indian. Mr. Lee Flemming, who was at the time the

Tribal Registrar for the Western Band of Cherokees and one of the lecturers, agreed with her. I was shocked at their statements."

6. Genealogical "evidence" being used as the primary factor for recognition process review is absolute nonsense and must be dismissed as a primary factor in federal recognition decisions. Tribal communities are based on social realities including generational intermarriage, land tenure or relationships to land, identification as unique functioning communities, cultural communality, separate schooling, and other related factors. Census records, especially in Eastern and Southern states, are consistently inefficient as determiners of racial identity due to inherent bias from registrars in the past who viewed identity in a black and white racial binary. Indian identification on governmental records was expressly prohibited in many states.

7. Tribes who began petitioning prior to the gaming era should not have any gaming tribes being able to comment on their petition in any form. They should be barred from any testimonials or comment periods. USET (United South and Eastern Tribes), which has opposed tribes petitioning Congress as opposed to going through the OFA process, is composed of a majority of tribes who they themselves were recognized by the U.S. Congress. These petitioning tribes should never be viewed through the lense of "wanting to gain federal recognition for the purposes of gaming" as their petitions predate the advent of gaming.

8. The Congress needs to appoint an independent board of approximately ten to twenty individuals with an evenly distributed mix of predominantly federal and historic "non-federal" tribal members with expertise in various academic and research areas. These individuals must have shown clear records of unbiased research methodology, a strong knowledge of issues concerning Indian identity, history, and both social and political realities. Each member must independently review the petitions and make recommendations which result in a final group decision reached via consensus. Timeframes are not to exceed two years.

9. After a brief overview of petitioning tribes, the ones who meet one or more the following criteria should be moved to the "front of the line" for consideration. All tribes who were formerly denied recognition, but can show an association with any of these nine criteria should be re-evaluated.

There exist nine initial keys to federal recognition review that would expedite the process in an efficient and fair manner as per government regulations and burden of proof regarding separate status as Indian people. While we do not personally feel that these are the sole defining aspects of tribal identity, they are strong indicators which the Bureau of Indian Affairs and U.S. Congress cannot refute or downplay. The listing of them is not meant to create any division or place tribes above or below one another. It is meant to show the cohesive similarities between historic tribal communities, while giving reviewers peace of mind that they can proceed with more in-depth reviews of highly likely tribal communities. Unfortunately, it has become clear that our historic "non-federal" tribal communities must show our commonalities in opposition to newly created groups claiming Indian status and predominantly racially white descendant federally recognized tribes who have become along with regional gaming tribes, the primary groups lobbying against petitioning tribes.

NINE KEYS:

1.Indian boarding school attendance (automatic recognition)
2.Reservations/mission lands (automatic recognition)
3.Language retention (automatic recognition)
4.BIA/OIA funded school in community during any era (automatic recognition)
5.Pre-1970 state recognition
6.Prohibition from area white and black schools
7.Substantial intermarriage with federal tribes and other historic "non-federal" tribes
8.Long standing petitions for recognition which occurred at the beginning of the new process in 1978 and prior to this time period.
9.Have received ten or more letters of support for federal recognition from other federal tribes and national Indian organizations such as NCAI. A maximum of three letters towards the minimum ten letter total may have been received from professionals in the fields of anthropology, linguistics, ethnology, or genealogy.

The MOWA Band of Choctaw Indians meet criteria 1,2,3,4,6,7,8, and 9 (though we also feel that we meet criteria #5 as well, but received renewed state recognition in 1979) of the "nine keys", yet we have been denied federal recognition to this day. Former Assistant Secretary of Indian Affairs Kevin Gover (Pawnee Nation of Oklahoma), who denied our petition at the recommendation of Lee Fleming, clearly illustrates in his 2004 testimony that we and others were wronged in the process and should be reconsidered. "Testimony of Kevin Gover before the Committee on Indian

Affairs, United States Senate, concerning S. 297, April 21, 2004," *http://www.senate.gov/scia/2004hrgs/042104hrg/gover.pdf*.

Each time MOWA Choctaw came up for consideration the rules were changed by BAR/OFA. The genealogical expedited review was created as OFA knew our tribe would easily pass the other 6 criteria and so OFA would not be embarrassed, they said that genealogy "failure" (i.e. your people were listed as mulatto, etc. on records; while OFA conveniently dodged numerous federal documents such as military records which listed us as Indian) would make it so the other 6 criteria didn't need to be considered. Language tapes and Indian boarding school records were said to have been "received out of time" and not able to be considered in the final determination. Our federal lawsuit was said to have been filed beyond the statute of limitations by a conservative, white, Republican judge who was quickly ushered into position to hear the case, replacing a Democratic, minority judge.

An overview of previous case law shows that our tribe is the only "non-federal" tribe to be viewed as a federal tribe for the purposes of ICWA. Overview of Indian Child Welfare Act 68 FR 68180 (shows MOWA Choctaw are considered as a federal tribe).

Our twelve Congressional Bills, including 1994's Auburn Restoration Act, which passed both the House and Senate before we were stricken from the Bill, have been another level of continued futility in our quest for federal recognition.

The number of support letters our tribe has received over the years from the likes of the National Congress of American Indians, noted Indian academic scholars such as Vine Deloria, Jr., federal tribes, anthropologists, etc. fills many binders.

Our tribe has a complete research library dedicated specifically to the federal recognition process and issues related to lobbyists, gaming, identity policing, historical revisionism, etc. which have severely impacted our historic "non-federal" tribes. This library is available to all areas of government, as well as tribal leadership and academic inquiry in order to provide access to the history of the process. We have reviews of numerous federal petitions, as well as large numbers of books and articles published on these specific areas. There is also large sections of government correspondence and compact histories of historic "non-federal" tribes.

We are just one case example in an every growing narrative of legitimate tribal communities denied. We have no intention of resting until justice is served.

Chiyakokeli (I thank you),

PREPARED STATEMENT OF THE QUTEKCAK NATIVE TRIBE

The Qutekcak Native Tribe (QNT) appreciates this opportunity to submit written testimony to be included in the record for the Senate Committee on Indian Affairs' July 12, 2012 Oversight Hearing on Federal Recognition. QNT is a community of Alaska Natives in Seward, Alaska that has been active since 1886 and has had a formalized tribal government since 1972.

Like other tribes in Alaska, we serve our 298 members by providing health care and other community services, promoting economic self-sufficiency, and carrying out federal programs under the Indian Self-Determination Act. We also sponsor a renowned dance and drum program through which our Elders pass on our cultural values and practices to our youth. We have also established the Alaska Native Archive jointly with the Seward Municipal Library. Unfortunately, however, we carry out the responsibilities of a tribe without enjoying any of the benefits of federal recognition.

Tribes in Alaska have been recognized in a number of ways: pursuant to the statutory criteria set forth in the Alaska Amendment to the Indian Reorganization Act (the Alaska IRA), by being named in the Alaska Native Claims Settlement Act (ANCSA), through specific recognition by Congress, and through administrative confirmation by the Assistant Secretary for Indian Affairs. Not one of the 229 federal recognized tribes in Alaska has been recognized pursuant to the Part 83 regulatory process.

The members of Qutekcak share a common association and location that has lasted over a hundred years. Despite our eligibility for recognition and our efforts over several decades, as a result of historical circumstances and administrative errors and delays, QNT has not been afforded the federal recognized tribal status we deserve.

In 1971, the Alaska Native Claims Settlement Act (ANCSA) established Native Alaskan corporations for the purpose of administering land claims settlement funds. Many of those ANCSA-created entities have since been granted the benefits of recognized tribal status. One provision of the ANCSA enabled groups of Native people in primarily non-Native cities and towns to form urban corporations. Although Sew-

ard Natives expected to benefit from that provision, when ANCSA was finalized only four such urban corporations were created: Juneau, Kodiak, Sitka, and Kenai. Similarly-situated communities, including our Native community in Seward, were unfairly left out. QNT was also left off of the list of Federally Recognized Tribal Entities in Alaska when it was published in 1993, with no explanation.

Since 1993, QNT has expended significant time, energy, and resources seeking to have the federal government correct its error of not including QNT within ANCSA or on the 1993 and subsequent BIA lists of recognized tribes. In 1993, we submitted a petition to the Bureau of Indian Affairs (BIA) to adopt a tribal constitution under the Alaska IRA. The Alaska IRA provides statutory authority for the Department of the Interior (the Department) to organize Alaska Native tribes that have not otherwise been extended federal recognition. Under Section 1 of the Alaska IRA, Congress provided:

> That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.
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> 25 U.S.C.A. § 473a, May 1, 1936, c. 254, § 1, 49 Stat. 1250.

After submission of three formal requests to organize under the Alaska IRA and years of meetings, letters and legal briefings to address questions from the Department as to the scope of agency authority under the Alaska IRA , QNT was encouraged in January, 2012, when then Assistant Secretary for Indian Affairs Larry Echo Hawk responded to inquiries from Senator Lisa Murkowski with a letter reaffirming that "a group that can establish its existence in 1936 with 'a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district' could seek to be organized under the Alaska Amendment to the IRA." Assistant Secretary Echo Hawk's letter stated that the Part 83 process was available to Alaska Native tribes as an *alternative* means to obtain federal recognition, if the Alaska IRA criteria do not apply to the group. (We attach a copy of the Assistant Secretary's January 31, 2012, letter for the hearing record). *

Mr. Echo Hawk's letter affirmed the Department's long-espoused the view that meeting the eligibility criteria to organize under the Alaska IRA would provide a basis for recognition, and that Alaska tribes need not petition for consideration under the 25 CFR Part 83 process unless the group does not meet the Alaska IRA criteria. When the Federal Acknowledgment Procedures issued in 1978, the Department expressly stated that those regulations would not apply to Alaska IRA-eligible groups: "The [Part 83] regulations . . . are not intended to apply to groups, villages, or associations which are eligible to organize under the Alaska Amendment of the Indian Reorganization Act (25 U.S.C. 473a) or which did not exist prior to 1936." 43 Fed. Reg. 39361 (1978). In the 1988 Federal Register Notice announcing the Native Communities within Alaska that were recognized and eligible to receive services from the BIA, the Department stated that:

> "applying the criteria presently contained in Part 83 to Alaska may be unduly burdensome for the many small Alaska organizations. Alaska, with small pockets of Natives living in isolated locations scattered throughout the state, may not have extensive documentation on its history during the 1800's and early 1900s much less earlier periods commonly researched for groups in the lower-48 . . . insistence on [producing such documentation] for those Alaska groups might penalize them simply for being located in an area that was, until recently, extremely isolated."
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> 53 Fed. Reg. at 52833 (1988).

Mr. Echo Hawk's letter provides fresh confirmation of the established Department interpretation that Section 1 of the Alaska IRA has not been repealed and remains valid law. In 1993, the Solicitor of the Department of the Interior explained that while Section 19 of the ANCSA revoked Section 2 of the Alaska IRA authorizing the creation of reservations in Alaska, "ANCSA did not revoke the village IRA constitutions . . . [n]or did it repeal the authority in Section 1 of the Alaska amendment of the IRA for the Natives to reorganize and adopt constitutions." Governmental Jurisdiction of Alaska Villages Over Land and Nonmembers, Op. Sol., M–36975 at 39 (Jan. 11, 1993).

The Federally Recognized Tribes List Act ("List Act"), enacted in 1994, also did not affect the Alaska IRA. The List Act requires the Secretary to annually publish

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* A copy of the letter is printed on pg. 49 of this hearing.

a "list of all Indian tribes eligible for the special programs and services provided by the United States to Indians because of their status as Indians." It does not specifically mention the Alaska IRA, nor is the Alaska IRA mentioned in the List Act's legislative history. Overall, the legislative history evidences no intent for the List Act to limit the Secretary's authority to recognize tribes. In fact, the List Act's legislative history states that the Act is not intended to change the status of Alaska Native tribes, but requires that the "Secretary continue the current policy of including Alaska Native entities on the list of Federally recognized Indian tribes which are eligible to receive services." See H.R. Rep. No. 103–781 (1994).

In light of the statutory authority and recognition criteria set forth in the Alaska IRA and the Department's stated policy, QNT hopes its documented tribal history and request to organize under an IRA constitution will finally correct the government's past errors of omission in not listing QNT as a federally recognized tribe. When we first submitted an Alaska IRA petition in 1993, the BIA's technical assistance letters raised no concerns about QNT's eligibility under the statute. BIA correspondence, however, was sent to the wrong address and we did not receive file copies for several years. In light of a three year time lapse, the BIA advised that we should submit a new request. Unfortunately, when we resubmitted our petition, the BIA sent our documents to the Branch of Acknowledgment and Research even though our petition was submitted under the Alaska IRA and not 25 C.F.R. Part 83. We wrote to BIA objecting to its mishandling of our IRA petition by placing it with the BAR/OFA, but our small Tribe had limited resources to mount a renewed effort to pursue recognition. It was not until 2008 that we had sufficient resources to submit a third petition. At that time, we resubmitted a fully revised Alaska IRA petition, complete with an ethnohistorical report.

While Mr. Echo Hawk's January 2012 letter offers some encouragement that the Department will act upon QNT's request to organize under the IRA, we are concerned that the departure of the Assistant Secretary may stall our progress and add to the already extensive delays we have endured. The continuing delay adversely impacts our ability as a tribe to provide for the needs of our members, and maintaining the ongoing process is a constant and heavy strain on our limited resources.

Federal recognition would enable our Tribe to expand our services to our members and would enable us to utilize the other federal programs open only to federally recognized tribes. We have support for our recognition effort from the City of Seward; tribes and Native organizations in the Chugach region, including Chugach Alaska Corporation; Chugachmiut, and the Alaska Federation of Natives. Congress provided the Department with statutory authority to act on our petition to organize as a tribe, but the Agency has not done so.

In his January letter, Assistant Secretary Echo Hawk observed that Congress passed the Alaska IRA in order to account for "Alaska's unique circumstances." The Part 83 process does not account for these unique circumstances, as the Department has acknowledged in the past. Accordingly, the Department should exercise its clearly delegated authority under the Alaska IRA for the organization of groups of Alaska Natives not previously recognized, but "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district. The Qutekcak Native Tribe is simply seeking to be treated the same as other similarly situated tribes in Alaska. Thirty years is too long to wait.

We appreciate the opportunity to share our testimony with the Committee. We ask the Committee acting in its oversight capacity and through its Chairman to encourage the Department to review and act upon QNT's request to organize under the Alaska IRA consistent with statutory authority and Department precedent.

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