TESTIMONY OF K. JEROME GOTTSCHALK
ON BEHALF OF
THE LITTLE SHELL TRIBE OF CHIPPEWA
INDIANS OF MONTANA

SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON S. 546
THE LITTLE SHELL TRIBE OF CHIPPEWA INDIANS RESORATION
ACT OF 2011

April 14, 2011

Chairman Akaka, Vice Chairman Barrasso, Senator Tester, and honorable members of this Committee on Indian Affairs, on behalf of the Little Shell Tribe of Montana, I thank you for the opportunity to testify before this Committee today in order to provide some perspective on the long, expensive, and frustrating process experienced by the Little Shell Tribe in attempting to comply with the administrative requirements for federal acknowledgment. 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. NARF's out of pocket expenses for consultant work have exceeded one million dollars and we have devoted four thousand hours of attorney time to this effort.

The Little Shell Tribe first sent a letter to the Bureau of Indian Affairs petitioning for federal acknowledgment in 1978. This petition was transferred to the administrative process of Federal acknowledgment which became effective on October, 2, 1978. The BIA received an initial partially documented petition in December of 1982 and issued an obvious deficiency letter in January of 1983. The Tribe submitted additional materials in 1983 and a revised documented petition in September of 1984. In April of 1985, the BIA sent a second, more detailed, technical assistance letter. The Tribe responded to this letter in November of 1987 and submitted additional materials in 1989. Subsequently, the Tribe, through NARF, hired new researchers who did more research and submitted more materials. The BIA determined that the petition was ready for active consideration on March, 23, 1995 but it was not put on active consideration until February, 1997, nearly two years later. Notwithstanding that the regulations provide in Section 83.10 (h) that proposed findings are to be issued within one year after notification that a petition has been put on active consideration, or February of 1998 in the case of Little Shell, the proposed findings (PF) were not issued until July 14, 2000, or nearly one and one half years beyond the prescribed time.

The PF was in favor of recognition and indicated that it departed from prior decisions in regard to four criteria, noting that prior precedent is not binding and that "…such departures from previous practice on these matters are permissible and within the scope of the existing acknowledgment regulations." 65 Fed. Reg. 45394, 45395 (July 21, 2000). The proposed finding explained the rationale behind the departures from precedent. As to criterion a) which requires identification as an Indian entity on a

substantially continuous basis since 1900, the Assistant Secretary accepted as a "reasonable likelihood that references to the petitioner's individual ancestors as residents of Indian settlements before the 1930's are consistent with the identification of these and other ancestors of the petitioner as Indian groups after 1935." The Assistant Secretary stated, "The Department believes that, absent strong proof to the contrary, it is fair to infer a continuity of identification from the evidence presented, particularly in light of the fact that an absence of formal organization can be attributed to the United States' pursuit of a discredited policy of treating 'full-blooded' Indians differently from those of mixed white and Indian ancestry….[T]o rigidly impose a mechanistic burden of proof on a people whose lack of formal organization is attributable to misguided Federal policy would be manifestly unjust and inconsistent with the regulations." Summary under the Criteria for the Proposed Finding for Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, (July 14, 2000) at pp. 6-7.

As to criteria b) community and c) political influence the Assistant Secretary accepted "…as a reasonable likelihood that patterns of social relationships and political influence among the Metis residents of settlements in North Dakota and Canada during the mid-19th century persisted among their descendants who migrated to Montana…Based on the entirety of the record, especially the history of the United States' dealings with the ancestors of the petitioner, the strong evidence of continuous internal social interaction, the consistent existence of the petitioner's ancestors as distinct social and cultural communities, and the understandable difficulty in completing research on a very large number of dispossessed Indians on the American frontier, the Department proposes to find that the criteria (b) and (c) are met in this case." Id. at p. 6.

Finally, as to criterion e) descent from a historic Tribe, based on the additional work done by the Tribe's researchers, the final determination acknowledges that at least 89% of the Tribe's members trace from the historic Pembina Band of Chippewa and that this criterion is met without any need for a departure from precedent. 74 Fed. Reg. 56861, 56865-6 (November 3, 2009).

The PF invited "… on these various matters, including the consistency of these proposed findings with the existing regulations." 65 Fed. Reg. 45394, 45395 (July 21, 2000). There were only two comments received during the comment period. In its final determination (FD), the OFA acknowledged that one of the comments was rendered moot by additional materials that the Tribe submitted, and that the second commenter offered no new documentation or citations to support her claims. Summary under the Criteria and Evidence for Final Determination Against the Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, October 27, 2009 at pp. 16-17. Thus, the PF was in favor of recognition, there was no new evidence against recognition, and "no direct comments on the issue of the PF's departure from precedent other than to ask 'why' such departures had occurred and request an explanation."

At this point, one wonders how the FD could overturn the PF, when no evidence against the PF was submitted during the comment period. The apparent answer is contained in the October, 27, 2009 summary in support of the FD which states that "The PF invited public comment from the petitioner and third parties on these 'departures from previous practice' and on the 'consistency' of the PF 'with the existing regulations.' It stated that such 'supplementary evidence' could create 'a different record and a more complete factual basis for the final determination,' and 'eliminate or reduce the scope of these *contemplated* departures from precedent' (65 FR 45395; Little Shell PF 200, Summary, 7; emphasis added). The emphasis added is by the Assistant Secretary in the FD. The apparent purpose is to suggest that the departures from precedent were always up for grabs.

This is disingenuous in two regards. First, the PF acknowledged that "This proposed finding is based on the available evidence, and, as such, does not preclude the submission of other evidence during the 180-day comment period….Such new evidence may result in a modification or reversal of the conclusions reached in the proposed finding." PF at 6. Thus, if negative evidence or comments were received, it might modify the conclusions. But no such evidence or comments were received. Second, the Tribe was encouraged to submit supplementary evidence and "Such supplementary evidence may create a different record and a more complete factual basis for the final determination, and thus eliminate or reduce the scope of these contemplated departures from precedent." Id. at 7. This is precisely what happened in regard to criterion e) descent from an historic tribe where the FD acknowledges that this criterion is met without the need for any departure from precedent.

The Tribe continued working in the good faith belief that it had met its burden, because the PF said that it had. It worked to ensure that it could respond to any negative evidence which might be presented – none was – and to help eliminate or reduce the scope of any departures from precedent – which it did as to criterion e). No reasonable interpretation of the word "contemplated" as used in the PF would include the possibility that without contrary evidence or persuasive argument, the Bureau might change its mind on a whim. And yet that is what happened. Is it any wonder that the Tribe is frustrated?

The administrative process clearly has not served the Little Shell Tribe and is not designed for Tribes such as Little Shell. It puts the Tribe to a virtually impossible standard of evidence. Criterion a) requires that outsiders identify petitioners not just as Indian individuals, but as an Indian entity. 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. The misfit of the criterion to Little Shell is breathtaking. Historically, the Little Shell was a migratory band, following the buffalo herds between the United States and Canada. By the early 1880's, most of the herds had disappeared and Little Shell ancestors began to settle 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. 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.

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 disclocation 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 simply will not work. 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 simply 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 found that the process did *not* allow for this flexibility and there was insufficient evidence of these three criteria for Little Shell.

The Little Shell is an admitted Indian people, as the finding as to criterion e) demonstrates conclusively. However, because the regulations require documentation of detailed, nuanced issues over a long period of time, Little Shell was declined. 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 Acknowledgement 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." Memorandum from Chief, Branch of Federal Acknowledgment and Research, to Acting Deputy Commissioner, on Proposed Finding on the Petition of the Little Shell Tribe of Chippewa Indians, May 5, 2000 (Attachment A). This is precisely why S. 546 should be enacted by Congress.

The FD has not become effective yet because of an appeal filed with the Interior Board of Indian Appeals. 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.

Only Congress can now establish the government to government relationship with the Tribe to which its status entitles it. The Department knows that the Little Shell deserve recognition, as shown by its references to Departmental action in the 1930s and Congressional action in 1982 that support Congressional recognition now.