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108TH CONGRESS, *2d Session* | SENATE | REPORT 108–403

PROVIDING REFORMS AND RESOURCES TO THE BUREAU OF INDIAN AFFAIRS TO IMPROVE THE FEDERAL ACKNOWLEDGEMENT PROCESS, AND FOR OTHER PURPOSES.

NOVEMBER 10, 2004.—Ordered to be printed

Filed, under authority of the order of the Senate of OCTOBER 11, 2004

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

R E P O R T

[To accompany S. 297]

The Committee on Indian affairs to which was referred the bill (S. 297) to provide reforms and resources to the Bureau of Indian Affairs to improve the Federal acknowledgement process, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE

The primary purposes of S. 297, the Federal Acknowledgment Process Reform Act of 2004, are: to ensure that in any case in which the U.S. acknowledges an Indian tribe through an administrative process, it does so with a consistent legal, factual, and historical basis; to require the U.S. to use clear and consistent standards in its review of documented petitions for acknowledgment; and to clarify evidentiary standards and expedite the administrative review process for such petitions by establishing deadlines for decisions and authorizing sufficient resources to the U.S. to process petitions.

BACKGROUND

A. Federal Acknowledgment of Indian Tribes

By recognizing an Indian group as an Indian tribe, the U.S. acknowledges the tribe's sovereign status and the existence of a formal government-to-government relationship between itself and the tribe.

Once a group is acknowledged as a tribe, it may avail itself of Federal assistance, services and programs that are enacted for the benefit of Indian tribes and their members.

In addition, the tribe is entitled to the enjoyment of all the privileges and immunities that all Federally-recognized tribes enjoy.

Throughout its history and at various times, the U.S. has extended recognition to Indian tribes through treaties, by Federal statute, or through administrative decisions by the Executive branch.

The U.S. Department of the Interior has been granted broad authority pursuant to 25 U.S.C. § 2 to handle Indian affairs, including the function of tribal recognition, and it, in turn, has delegated the authority for the review of petitions submitted by tribal groups seeking Federally-recognized status to the Office of Federal Acknowledgment (OFA)[1] within the Bureau of Indian Affairs (BIA). The regulations for the Federal Acknowledgment Process (FAP) are contained at 25 C.F.R. Part 83.

B. Federal Acknowledgment Regulations

The regulations setting forth the criteria applicable to assess whether a tribe is entitled to Federal acknowledgment were first promulgated in 1978,[2] and have remained essentially unchanged since then, with the exception of certain revisions clarifying the evidence needed to support a recognition petition (1994),[3] updated guidelines on the process (1997), and notices articulating BIA's internal processing procedures (2000).[4]

The BIA regulations establish seven mandatory criteria—each of which must be met before a group can attain Federally-recognized status. These criteria are:

A. The petitioner 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. The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

D. The group must provide a copy of its present governing documents and membership criteria.

E. The petitioner's membership consists of individuals who descend from a historical Indian tribe or tribes, which combined and functioned as a single autonomous unit.

F. The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.

G. Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.

An Indian group seeking recognition must demonstrate that its members are related genealogically to one another and that they have existed as "a distinct community . . . [and that the tribe] has

[1] Formerly known as the Branch of Acknowledgment Research (BAR).
[2] 43 Fed. Reg. 39361 (Sept. 5, 1978).
[3] 59 Fed. Reg. 9280 (Feb. 25, 1994).
[4] 65 Fed. Reg. 7052 (Feb. 11, 2000).

maintained political influence or authority over its members . . . from historical times until the present."[5]

The technical staff within OFA consists of anthropologists, genealogists, and historians, and this staff reviews the petition and submitted documents, provides technical review and assistance to the petitioner, and, with concurrence of the petitioner, determines when the petition is ready for active consideration.

C. The General Accounting Office Report

The General Accounting Office ("GAO") prepared a report in November, 2001,[6] which found that as of 2001 the OFA has received 250 petitions for recognition but only 55 contain sufficient documentation to allow them to be considered and reviewed by OFA staff.

For these documented petitions, BIA has finalized 29 decisions, 14 resulting in the recognition of the petitioning tribe, and 15 denying recognition. The GAO report also indicates that it may take up to 15 years to resolve petitions currently awaiting active consideration based on the OFA's past record of issuing final determinations—even though the regulations establishing the process assume approximately two years from the point of active consideration to final decision.[7]

The GAO report chronicles the increase in the workload of the OFA while noting the decrease in resources available to address these issues. BIA staff have reported that the petitions which are under review are becoming more detailed and complex as petitioners and interested parties commit more resources to the process, often resulting in massive amounts of documentation submitted by the petitioner and interested parties.

D. Discussion During the 107th Congress

During the 107th Congress, several bills were introduced including S. 1392[8] and S. 1393[9] and referred to the Committee on Indian Affairs for further consideration.

These bills primarily sought to provide more resources for all participants in the FAP, particularly for local governments that have or may have an interest in a petition submitted to the OFA.

For instance, S. 1392 would have provided a significantly changed "burden of proof"—the "more likely than not" standard—and required that a petitioner meet this new standard—a standard against which the OFA's recommendations would be measured. This burden of proof is commonly required in civil adjudicatory proceedings. S. 1392 would have also provided formal, on-the-record administrative adjudicatory hearings, where that burden of proof would be tested.

At a hearing held on September 17, 2002, the BIA strongly opposed both S. 1392 and S. 1393.[10] The BIA also opposed any at-

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[5] See 25 C.F.R. 83.7.

[6] INDIAN ISSUES: Improvements Needed in Tribal Recognition Process, U.S. General Accounting Office, Nov. 2001.

[7] Id. at 15–16.

[8] See S. 1392, 107th Cong. (2002).

[9] See S. 1393, 107th Cong. (2002).

[10] See Hearing on S. 1392, to Establish Procedures for the Bureau of Indian Affairs of the Department of the Interior with respect to Tribal Recognition, and S. 1393, to Provide Grants to Ensure Full and Fair Participation in Certain Decisionmaking Processes at the Bureau of In-

Continued

tempts to alter the criteria used to analyze petitions, including significant changes to the types of evidence and burden of proof required.

E. Introduction of S. 297

For years, FAP reform has occupied significant time and attention of the Committee. S. 297 was drafted after careful analysis of the various bills and amendments offered and the hearings held during the 107th Congress and previous congresses. These proposals and discussions offered a number of different perspectives on what reforms to the FAP were necessary and proper. The common thread of these views was that the FAP needed greater transparency, consistency and integrity, as well as additional resources in the form of additional funding and technical expertise.

S. 297 was introduced to increase the transparency, consistency and integrity of the acknowledgment process, as well as augment resources available to the OFA. The bill provides:

1. A statutory basis for the acknowledgment criteria that have been used by the OFA since 1978;

2. Additional and independent resources to the Assistant Secretary-Indian Affairs for research, analysis, and peer review of petitions;

3. Additional resources into the process by inviting academic and research institutions to participate; and,

4. Much-needed discipline into the mechanics of the process by requiring more effective notice and information to interested parties to the process.

F. April 21, 2004, Legislative Hearing

A legislative hearing on S. 297 was held on April 21, 2004. In preparation for that hearing the Congressional Research Service prepared a memorandum indicating that as of 2004, the OFA has received 294 petitions for recognition but only 57 have sufficient documentation to enable them to be considered and reviewed by OFA staff.

For these completed petitions, BIA has finalized 35 decisions, 16 recognizing a tribe and 19 denying recognition, with 3 decisions under appeals to the Interior Board of Indian Appeals. Of the remaining 22 petitions, 9 decisions are under active consideration—of which 4 decisions are pending Final Determinations; and 13 decisions are ready awaiting active consideration.

At the April 21 hearing, the BIA testified that it was supportive of a more timely decision-making process, but expressed concern that the factual basis required to render a favorable decision should not be diluted. The BIA also indicated concern over narrowing the role of interested parties.

In addition to the current BIA officials, two former Assistant Secretaries-Indian Affairs (AS–IA) testified.[11] The overarching theme

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dian Affairs, Before the Senate Committee on Indian Affairs, S. Hrg. 107–775, 107th Cong. at p. 43 (2002) (Testimony of Aurene M. Martin, Deputy Assistant Secretary, Indian Affairs, Department of the Interior).

[11] See Hearing on S. 297, the Federal Acknowledgment Process Reform Act of 2003, Before the Senate Committee on Indian Affairs, S. Hrg. 108–534, 108th Cong. P. 52–56 (2004) (Testimony of Neal McCaleb, former Assistant Secretary, Indian Affairs, Department of the Interior (2001–3, Administration of President George W. Bush); and Testimony of Kevin Gover, former Assistant Secretary, Indian Affairs, Department of the Interior (1997–2000, Administration of President William J. Clinton)).

of their testimony pointed to three problems in the current administrative process:

1. The length of time and duplicative research required of petitioners to participate in the process has slowed the process considerably;

2. The exclusive reliance of the AS–IA on the OFA staff, due to the complexity and volume of research required of petitioners resulted in unnecessary friction and perceived irrationality in recognition decisions; and

3. The extent, frequency, and duplicative nature of FOIA requests to the BIA for documents submitted to or accumulated by the BIA pursuant to petitions resulted in a "churning" of document submissions and re-distributions by way of FOIA requests; this churning, in turn, has resulted in a diversion of key, technical staff from their intended roles as analysts.

Both former AS–IAs concurred that streamlining the process and using outside and independent resources as provided in S. 297 would greatly improve the timeliness and quality of the FAP decisions.

The final witness to appear at the April 21 hearing, a traditional New Mexico Pueblo that first petitioned for acknowledgment in 1971, testified that it had appeared before the Committee four years earlier. At that time the Pueblo's petition was seventh on the OFA's waiting list; and its petition is *still seventh* on the list four years later.[12]

STATEMENT OF POLICY

It is a long and well established principle of Federal Indian law, expressed in the U.S. Constitution, reflected in Federal statutes, and articulated by the Supreme Court in numerous decisions, that the U.S. has a special political relationship and a trust responsibility to Indian tribes. This special political relationship, or government-to-government relationship, and trust responsibility extends to recognition of Indian tribes that currently do not have, but are deserving of, the special government-to-government relationship between the Federal government and Indian tribes.

The government-to-government relationship has been extended by treaties, Federal statutes, and through administrative decisions by the Executive branch. When Indian tribes are acknowledged, fulfillment of the trust responsibility necessitates timely review of petitions, consistent and fair criteria, and a process that is transparent and fundamentally fair.

Fundamental fairness dictates that the long history of Federal-tribal relations and widely shifting Federal policies must be taken into account when petitions for acknowledgment are considered.

AN OVERVIEW OF THE PROVISIONS OF S. 297

S. 297, as approved by the Committee, provides a statutory framework for the United States to acknowledge Indian tribes through an administrative process with an informed and well-researched basis for making such decisions. It further provides that the administrative process have integrity and be conducted in a timely, fair, consistent and transparent manner.

[12] See id. at p. 51 (Testimony of Edward Roybal II, Governor, Piro Manso Tiwa Indian tribe).

A. Criteria for Recognition

The current FAP regulations listed above provide that each petitioner must meet mandatory criteria that, if proven, provide the basis for a decision by the BIA that such petitioner is an existing Indian tribe. S. 297 provides statutory codification to those regulatory criteria, and provides substantive guidelines to OFA, petitioners, and interested parties regarding probative evidence meeting the criteria.

Essentially, if proven, these criteria demonstrate that the members of a tribe are related genealogically to one another and that they, as a tribe, have existed as a distinct community and that the tribe has maintained political influence or authority over its members from historical times until the present.

The S. 297 Criteria. Section 5 of S. 297 requires that a petition for acknowledgment contain detailed, specific evidence of seven factors, or criteria. These criteria are practically identical to the criteria mandated in 25 C.F.R. Part 83.

The first criteria required by S. 297 is that the petitioner establish that it has been identified as an Indian entity in the United States on a "substantially continuous basis".[13] This corresponds to the existing FAP criteria "A" listed above.

The second criteria required by S. 297 is that the petitioner establish that it comprises a "community distinct from the communities surrounding that community" and has so existed throughout the historical period.[14] This corresponds to the existing FAP criteria "B" listed above.

The third criteria required by S. 297 is that the petitioner establish that it has maintained political influence or authority over its members throughout the historical period—essentially that the entity has been politically autonomous.[15] This corresponds to the existing FAP criteria "C" listed above.

The fourth criteria required by S. 297 is that the petitioner provide, with its petition, a copy of the group's governing document.[16] The governing document must include a description of the criteria for membership in the group and the governing procedures of the entity. This corresponds to the existing FAP criteria "D" listed above.

The fifth criteria required by S. 297 is that the petitioner provide, with its petition, a list of all members and a description of the methods used in preparing the list.[17] The entity's membership list must consist of descendants of an Indian group, or Indian groups that were combined and functioned as a single autonomous entity, that existed during the historical period. This corresponds to the existing FAP criteria "E" listed above.

In addition to the five specific criteria required by S. 297, certain groups or entities are ineligible to participate in the FAP.[18] These ineligible groups or entities include:

- Tribes already recognized;

[13] See S. 297 § 5(b) (1).
[14] See § 5(c)(1).
[15] See § 5(d)(1).
[16] See § 5(e)(1).
[17] See § 5(f)(1).
[18] See § 4(b)(2).

- Groups, political factions, or communities that separated from a recognized tribe, unless that group, faction or community has functioned autonomously throughout the historical period;
- Groups that, before enactment of this Act, petitioned for and were denied or refused acknowledgment based on the merits of the petition; and
- Any group whose relationship with the Federal government was expressly terminated.

The exclusion of these groups or entities substantively correspond directly to the existing FAP criteria "F" and "G" listed above.

B. The Acknowledgment Process

Letter of Intent. Pursuant to the framework established in S. 297, a petitioner initiates the acknowledgment process by submitting a letter of intent to the BIA that provides relevant, practical information about the petitioner. The letter of intent will provide the BIA and AS–IA with sufficient information to determine which persons or entities qualify as interested parties. Within 90 days of receipt of the letter the BIA must notify the petitioner and interested parties of the letter and whether the letter reasonably identifies the Indian group.

Requirements and Evidence. On or after the date that an Indian group seeking acknowledgment files its letter of intent, it must file a petition with evidence that demonstrates its existence as an Indian tribe. The evidence must show with a "reasonable likelihood" that each required criteria has been established by the petitioner.

It is the Committee's intent that the evidentiary standard "reasonable likelihood" be considered met if the AS–IA finds that it is more likely than not that evidence presented demonstrates the establishment of a particular criterion. This standard is the most commonly used civil adjudicatory evidentiary standard. The Committee finds that conclusive proof was never intended to be the evidentiary standard, and that the use of reasonable likelihood in this context is appropriate.

Documented Petitions and Scheduling. Not later than 30 days after a documented petition is submitted to the BIA, the AS–IA must publish in the Federal Register notice of the receipt of the petition. This notice will include pertinent information for the public, including the name, location, and identifying information for the petitioner; locations at which a copy of the petition and related submissions may be examined by the public; and procedures by which an interested party can submit its evidence or be kept informed of actions affecting the petition.

Not later than 60 days after publication in the Federal Register of the notice of petition, the AS–IA is to consult with the petitioner and interested parties on a schedule for submission of evidence and arguments and publication of the AS–IA's proposed findings with respect to the petition. The schedule should provide a reasonable time frame for all parties involved, including the AS–IA, to review the petition, submit evidence, and make arguments and counterarguments.

Not later than 360 days after receipt of the documented petition the AS–IA must publish in the Federal Register his proposed deter-

mination, and his proposed findings supporting that determination, as to whether the petitioner is entitled to acknowledgment. If the AS–IA finds good cause, the publication date may be extended for up to 180 days.

The Committee acknowledges that § 4(d) of S. 297 places responsibility for improved discipline on all parties, including the OFA and AS–IA, to establish a schedule and meet the deadlines imposed. It is, however, the considered opinion of the Committee that increasing discipline in this way ultimately insures a fairer and more timely review process. All parties have an incentive to avoid dilatory tactics and contribute to a more fact-based dialogue. In pursuit of this goal, the Committee strongly encourages the AS–IA to strictly enforce the time lines provided in S. 297.

The Committee also notes that § 6 of S. 297 provides significant new resources to the BIA through the Independent Review and Advisory Board and the Federal Acknowledgment Research Pilot Project. These new resources will significantly expand the capacity of the OFA to review petitions. The Committee strongly encourages the BIA to use these resources upon passage of this Act.

Lack of Evidence Caused by Past Official Federal or State Government Actions. S. 297 provides that, if the AS–IA determines that evidence necessary to prove or disprove a criterion is lacking due to any official or unofficial act of the Federal government or a state government, the AS–IA shall not make that lack of evidence the basis for a determination to not acknowledge a petitioner. It is the intent of the Committee that an Indian group should not be prevented from re-establishing its government-to-government relationship with the Federal government due to sanctioned or unsanctioned acts of government agents committed pursuant to ill-conceived and now repudiated policies.

Final Determination. After the proposed findings are published, the parties have ample opportunity to respond to the determination and proposed findings. The AS–IA has up to 360 days after publication to issue a final determination. The final determination is to include all supporting facts and conclusions of law.

If the final determination is made to acknowledge the petitioner, the AS–IA must notify the petitioner and interested parties, provide them a copy of the final determination, and, not later than 7 days after notifying the parties, publish a notice in the Federal Register of the final determination of acknowledgment.

Judicial Review. If the final determination is made to decline to acknowledge the petitioner, the petitioner may, not later than 60 days after publication of the notice of final determination, seek judicial review in the Federal District Court for the District of Columbia. This judicial review does not prejudice the rights of any person to make a challenge pursuant to the Administrative Procedures Act, or other applicable law.

It is the intent of the Committee that, in reviewing the actions and decisions of the BIA, consistent with longstanding Federal court precedent and Federal policy regarding interpretation of treaties and Acts of Congress, the Federal courts should construe this Act liberally in favor of the Indian group or tribe seeking judicial review.

C. Additional Resources

Independent Review and Advisory Board. A significant new resource provided to the AS–IA in § 6(a) of S. 297 is the Independent Review and Advisory Board (the "Board"). The Board, which is appointed by the AS–IA, is composed of individuals with the same scientific disciplinary expertise as the staff of the OFA—anthropology, genealogy, history and jurisprudence.

The Committee intends that the Board will provide the AS–IA assistance at two critical junctures in the petition review process. First, during the initial review process before issuance of proposed findings, the Board will be available to the AS–IA if:

- a petition or other evidentiary submission raises unique issues or matters of first impression; or
- the AS–IA is unable to determine whether sufficient evidence has been provided to establish one or more criteria.

In these instances, the AS–IA may request an opinion from the Board with respect to that petition.

After the issuance of proposed findings relative to a petition, but before the issuance of the final determination, the AS–IA is required to obtain a review by the Board of the proposed findings to determine whether a deficiency exists with respect to one or more criteria. The review need not address the entire petition, however, as the AS–IA has the discretion to limit the scope of that review. Additionally, the Board may also limit the scope of its review under this provision to the evidence submitted or the proposed findings. The Board may also extend the review to evidence submitted by all parties, request that the AS–IA request additional submissions, and even recommend that the AS–IA hold formal or informal administrative proceedings to allow the Board to directly question and obtain information from all parties, including interested parties.

It is the intent of the Committee that the Board provide the AS–IA with a useful, secondary peer review. It is also the considered opinion of the Committee that independent, secondary peer review will enhance the transparency, integrity and credibility of the FAP. The Committee also finds very persuasive the testimony provided by two former AS–IAs, praising the creation of an independent advisory panel and secondary peer review to assist the AS–IA.

Assistance to Petitioners and Interested Parties. During hearings on the Federal acknowledgment process held by the Committee over the past several years, several witnesses have expressed concern about the rapidly escalating costs of pursuing or opposing petitions and the need for economic assistance by petitioners and local governments.

Often the only option available to financially destitute petitioners is to find a business partner willing advance financial resources and take the risk that a petition may be unsuccessful. Many petitioners do not even have that option and are simply unable to marshal the resources necessary to present their petition in a cogent manner.

One solution to this problem is contained in S. 297, which authorizes the AS–IA to provide grants to petitioners or interested parties that demonstrate an economic need. To insure that they will be able to effectively participate in the FAP, at least one-half

of the amounts appropriated for these grants are reserved for petitioners.

Federal Acknowledgment Research Pilot Project. S. 297 also authorizes an additional new resource for the AS–IA to use in the FAP. The Federal Acknowledgment Research Pilot Project (the "Pilot Project") authorizes the AS–IA to access independent research institutions to assist in researching, reviewing and analyzing petitions. Within three years, the AS–IA will report to Congress on the effectiveness of the Pilot Project.

Under the Pilot Project, the AS–IA, in consultation with the Secretary of the Smithsonian Institution, will identify independent research institutions that have the academic and research capacity to efficiently and effectively assist in reviewing petitions. These institutions will be invited to submit proposals to participate in the Pilot Project, and if approved by the AS–IA, will receive a grant to assist the institution in participating in the Pilot Project.

Through the Pilot Project the institutions will provide the AS–IA with additional resources for review of petitions and conclusions and recommendations based on that review. The AS–IA may then take any or all of those conclusions and recommendations into consideration in making a determination.

The purpose of the Pilot Project is to access hitherto untapped academic and research resources and bring them to bear on the FAP. It is the intent of the Committee that the AS–IA have wide discretion in implementing and utilizing the Pilot Project, whether for additional petition review teams or for secondary opinions of internal agency review. It is also the considered opinion of the Committee that the Pilot Project will enhance the timeliness, consistency and credibility of the FAP.

D. Efficient Public Access to Petitions

Over the past several years, the Committee has received formal and informal comments regarding the impact that repeated requests for information on petitions, pursuant to the Freedom of Information Act ("FOIA"), have had on the OFA. At the April 21, 2004, hearing the BIA testified that nearly forty percent of the professional staff time was occupied with responding to FOIA requests, diverting their time away from reviewing petitions.[19] According to the same testimony, many of these requests are submitted even before a petitioner has submitted a complete petition.

It is the intent of the Committee that the public continue to have access to the non-confidential information submitted to the BIA, and thus be able to observe the agency's actions. Such transparency is critical to public confidence in the FAP and the BIA. The Committee strongly believes that such goals are advanced by having a more efficient method for accessing that information.

It is the considered opinion of the Committee that § 7 of S. 297 accomplishes the goal of more efficient and transparent information access, while at the same time affording the professional staff the necessary time to more efficiently and effectively review petitions and submissions.

[19] See infra. at p. 50 (Testimony of Aurene Martin, Principal Deputy Assistant Secretary, Indian Affairs, Department of the Interior).

E. Effects of Acknowledgment Decisions

It is the intent of the Committee in § 8 of S. 297, that each Indian tribe, acknowledged through the FAP, enter into its government-to-government relationship with the Federal government on an equal footing with all other Indian tribes. The Committee acknowledges, however, that the BIA and the Indian Health Service need adequate time to prepare their required programmatic and budgetary adjustments, including appropriations requests.

It is the further intent of the Committee that acknowledgment of an Indian tribe, in and of itself, does not reduce, eliminate, or in any way affect any legal or property right of another Indian tribe or tribes.

F. Regulations

Authority is given to the Secretary in § 9 of S. 297 to promulgate regulations needed to implement this Act. Authority is also given to the Secretary to maintain and continue the use of those regulations in 25 C.F.R., Part 83, that are not inconsistent with this Act. The Committee strongly encourages the Secretary to utilize the authority to maintain the current regulations where possible.

LEGISLATIVE HISTORY

S. 297 was introduced on February 4, 2003, by Senator Campbell, and was referred to the Committee on Indian Affairs.

On April 21, 2004, the Committee held a legislative hearing on S. 297. Witnesses at the hearing included Aurene Martin, Principal Deputy Assistant Secretary-Indian Affairs, Department of the Interior, Edward Roybal II, Governor of the Piro Manso Tiwa Tribe, Neal McCaleb, former Assistant Secretary-Indian Affairs, and Kevin Gover, former Assistant Secretary-Indian Affairs.

While each of the witnesses expressed either suggestions for different legislative language or concerns over particular provisions in the bill, all of the witnesses were supportive of the overall purposes and intent of S. 297. Many of those suggestions and concerns were addressed in the substitute amendment to the bill.

On June 16, 2004, at a business meeting duly noticed, the Committee adopted a substitute amendment to S. 297 and, as amended, favorably reported the bill for consideration by the full Senate, with a recommendation that the Senate pass the bill.

SECTION-BY-SECTION ANALYSIS OF THE "FEDERAL ACKNOWLEDGMENT PROCESS REFORM ACT OF 2003"

Sec. 1. Short Title

The Act may be cited as the "Federal Acknowledgment Process Reform Act of 2003."

Sec. 2. Findings and Purposes

The Findings and Purposes relay the history of Federal and Tribal relationships and explain that the Act is intended to provide consistency, clarity and greater efficiency in the Federal Acknowledgment Process.

Sec. 3. Definitions

The Act utilizes definitions that are already well accepted definitions in the existing FAP regulations or other Federal law dealing with Indian tribes.

Sec. 4. Acknowledgment Process

The Act provides a statutory basis for the procedures whereby Indian groups are acknowledged as Tribes by the United States. The procedures provided in the Act are very similar to the current FAP procedures and include the following:

Letter of Intent. Petitioning groups must submit a letter of intent. The required contents of this letter of intent are expanded under the Act to require more information to enable the Assistant Secretary-Indian Affairs (AS–IA) to provide a more comprehensive notice to interested parties about the petitioning group.

Petitions. A petitioning group must submit a petition that establishes with reasonable likelihood that *each* criteria in Section 5 is met. Some groups, such as splinter factions, already-denied groups and legislatively terminated tribes, are ineligible to submit petitions.

Notice of Receipt of Petition; Schedule. Within 30 days after receiving a documented petition, the AS–IA must publish notice of receipt of the petition in the Federal Register, with information about the petitioner, where the petition can be examined, and how interested parties can submit or obtain information. Also, within 60 days the AS–IA must, in consultation with the petitioner and interested parties, establish a schedule for the submission of evidence and arguments relating to the petition and when the proposed findings will be ready for publication.

Review of Petitions. Generally the AS–IA must review and consider the petition and other materials submitted by the petitioner and interested parties, which must be noted in the final determination. Within 360 days, the AS–IA must publish the proposed findings in the Federal Register. The AS–IA may extend, for good cause, the publication date for up to an additional 180 days. Evidence from interested parties must be considered and noted by the AS–IA in the proposed finding or Final Determination.

Final Determination. After review of the petition by the AS–IA, and after a petitioner and interested parties have had an opportunity to respond, the AS–IA must issue a final determination in writing with supporting facts and conclusions of law.

Judicial Review. After publication of a notice of a final determination, a petitioner has 60 days in which to seek review in the District Court for the District of Columbia. This judicial review does not prejudice the rights of any person to make a challenge pursuant to the Administrative Procedures Act, or other applicable law.

Sec. 5. Documented Petitions

Similar to current regulations, in its documented petition a petitioner must establish the following mandatory criteria: (1) an Indian identity; (2) that it comprises a distinct community; (3) that it has exerted political influence or authority over its members; (4) supply governing documents; and (5) a list of members, with re-

quirements showing descent. Exceptions are made for Tribes that had treaties or Federal law designating them as Tribes.

Sec. 6. Additional Resources

The Act contains several features not currently in the acknowledgment regulations. The Act would provide the AS–IA with an Independent Review and Advisory Board, to assist the AS–IA with unique evidentiary questions and provide independent peer review of acknowledgment determinations. The Act also authorizes grants to petitioners and interested parties that have a demonstrated need for assistance in participating in the acknowledgment process. The Act also contains a pilot project that draws upon the expertise of independent research institutions capable of assisting the AS–IA in the review of petitions. The pilot project authorizes grants to three institutions with established capabilities to do such research (typically academic or museum institutions).

Sec. 7. Inapplicability of FOIA

The Act would make the Freedom of Information Act inapplicable to the acknowledgment process until petitions are fully documented and the AS–IA has published a notice that the petition is ready for review. The Act would also authorize the Secretary of Interior to request assistance from the Attorney General in responding to FOIA requests.

Sec. 8. Effect and Implementation of Decisions

Generally, acknowledgment of a Tribe under this Act will not infringe on the rights of any other Tribes. Tribes acknowledged under this Act will have all of the responsibilities, obligations, privileges and immunities of other Indian Tribes, and be eligible for Federal programs.

Sec. 9. Regulations

The Secretary is authorized to promulgate such regulations as are necessary to carry out this Act. The Secretary may also maintain in effect any current regulations that do not conflict with the provisions of this Act.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On June 16, 2004, the Committee, in an open business session, considered S. 297 and approved a substitute amendment to the bill, and ordered S. 297, as amended, favorably reported to the full Senate with a recommendation that the bill do pass.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 297 as calculated by the Congressional Budget office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 30, 2004.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 297, the Federal Acknowledgment Process Reform Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mike Waters.

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

S. 297—Federal Acknowledgment Process Reform Act of 2004

Summary: S. 297 would authorize the Department of the Interior (DOI) to make various changes to the government's process for acknowledging Indian tribes. The bill would:

- Establish an Independent Review and Advisory Board to assist with acknowledgment determinations,
- Provide grants to petitioners and interested parties to offset costs of the acknowledgment process,
- Establish a Federal Acknowledgment Research Pilot Project to help review petitions for recognition, and
- Exempt acknowledgment petitions from Freedom of Information Act (FOIA) requests.

CBO estimates that implementing S. 297 would cost $44 million over the 2005–2009 period, subject to the appropriation of the necessary amounts. Enacting the bill would not affect direct spending or revenues.

S. 297 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no direct costs on state, local, or tribal governments.

Estimated cost to the Federal Government: CBO estimates that implementing the changes authorized by S. 297 would cost $44 million over the next five-year period, subject to appropriation of the necessary amounts. The estimated budget impact of this bill is shown in the following table. The costs of this bill fall within budget function 450 (community and regional development).

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Changes to Federal Tribal Acknowledgment Process:					
Authorization Level	5	5	5	5	5
Estimated Outlays	5	5	5	5	5
Grants for Petitioners & Interested Parties:					
Estimated Authorization Level	2	2	2	2	2
Estimated Outlays	1	2	2	2	2
Federal Acknowledgment Research Pilot Project:					
Authorization Level	3	3	0	0	0
Estimated Outlays	3	3	0	0	0
Reimbursement to Attorney General:					
Authorization Level	1	1	1	1	0

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
Estimated Outlays	1	1	1	1	0
Total Changes:					
Estimated Authorization Level	11	11	8	8	7
Estimated Outlays	10	11	8	8	7

Basis of estimate: For this estimate, CBO assumes that S. 297 will be enacted near the beginning of fiscal year 2005 and that outlays will follow historical patterns of similar programs.

Changes to Federal Tribal Acknowledgment Process

Section 4 would authorize the appropriation of $5 million for each fiscal year through 2013 to support DOI's tribal acknowledgment process. The agency currently spends about $1 million a year on this activity. Assuming appropriation of the specified amounts, CBO estimates this provision would cost $5 million annually and $25 million over the 2005–2009 period.

Grants for Petitioners and Interested Parties

Subsection 6(b) would authorize the appropriation of amounts necessary to provide grants to offset costs incurred by an Indian group or interested party in supporting or opposing a petition for tribal recognition. Based on information from the Bureau of Indian Affairs, CBO estimates that about 10 new petitions will be filed for tribal recognition each year. Assuming grants of approximately $200,000 per petition to petitioners and interested parties, CBO estimates a total cost of $1 million in 2005 and $2 million annually thereafter for an estimated cost of $9 million over the 2005–2009 period.

Federal Acknowledgment Research Pilot Project

Section 6(c) would authorize the appropriation of $3 million for each of fiscal years 2004 through 2006 to provide grants to institutions that participate in a pilot project designed to help DOI review tribal recognition petitions. CBO estimates that implementing this provision would cost $6 million over the 2005–2006 period, assuming appropriation of the specified amounts.

Reimbursement to Attorney General

Section 7(c) would authorize the appropriation of $1 million to the Department of Justice (DOJ) for each of fiscal years 2004 through 2008 for assistance with requests for information relating to tribal recognition petitions. This section would declare FOIA inapplicable to the recognition process until DOI completes its review. It also would allow DOI to request help from DOJ in responding to any FOIA requests concerning tribal recognition. CBO estimates that implementing this provision would cost $4 million over the 2005–2008 period, assuming appropriation of the authorized funds.

Intergovernmental and private-sector impact: S. 297 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no direct costs on state, local, or tribal governments. A decision by the federal government to acknowledge an Indian tribe may significantly affect neighboring communities, includ-

ing other tribes, but CBO cannot predict whether or how this legislation would affect the outcome of any particular case. It is likely, however, to shorten the process leading up to those decisions. The bill could benefit affected local governments as well as tribes by authorizing grants, which would be available both to tribes seeking acknowledgment and to other interested parties.

Estimate prepared by: Federal Costs: Mike Waters. Impact on State, Local, and Tribal Governments: Marjorie Miller. Impact on the Private Sector: Selena Caldera.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee has concluded that S. 297 will reduce regulatory or paperwork requirements and impacts.

EXECUTIVE COMMUNICATIONS

The Committee has received the following communication from the Executive Branch regarding S. 297.

TESTIMONY OF AURENE MARTIN, PRINCIPAL DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS

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

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

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

The Federal acknowledgment regulations, known as "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," 25 C.F.R. Part 83, govern the Department's administrative process for determining which groups are "Indian tribes" within the meaning of Federal law. We believe these regulations provide a rigorous and thorough process.

The Department's regulations are intended to apply to groups that can establish a substantially continuous tribal existence and, which have functioned as autonomous entities throughout history until the present. See 25 C.F.R. Sections 83.3(a) and 83.7. When the Department acknowledges an Indian tribe, it is acknowledging that an inherent sovereign continues to exist.

The Department is not "granting" sovereign status or powers to the group, nor creating a tribe made up of Indian descendants. We believe this standard as provided in 25 C.F.R. Part 83.3(a) needs to be maintained.

Under the Department's regulations, in order to meet this standard petitioning groups must demonstrate that they meet each of seven mandatory criteria. The petitioner must:

(1) demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900;

(2) show that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;

(3) demonstrate that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

(4) provide a copy of the group's present governing document including its membership criteria;

(5) demonstrate that its membership consists of individuals who descend from the historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity and provide a current membership list;

(6) show that the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and

(7) demonstrate that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

A criterion is considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.

S. 297 would reduce the standards for acknowledgment by requiring a showing of continued tribal existence only from 1900 to the present, rather than from first sustained contact with Europeans as provided for in 83.7(b) and (c). Other changes from the current regulatory standards

would reduce the standard for demonstrating tribal existence even after 1900. This reduction in the standard deviates significantly from the position of the Department, as stated in the regulations, that the legal basis of Indian sovereignty is continuous political and social existence predating European settlement of the territory that now constitutes the U.S. and extends without break to the present. The standard set out in S. 297 makes it more likely that groups without demonstrated tribal ancestry or historical tribal connection may be acknowledged.

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

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

With respect to deadlines and time lines, the Department is interested in exploring some type of sunset provision. In fact, in response to a November 2001, General Ac-

counting Office (GAO) report on the "effectiveness and consistency of the tribal recognition process", the Department stated that we would support a legislative sunset rule that would establish a clear timeframe in which petitioners must submit final documented petitions and supporting evidence.

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

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

CONCLUSION

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

When the Department acknowledges an Indian tribe, it recognizes an inherent sovereign that has existed continuously from historic times to the present. These decisions have significant impacts on the petitioning group as well as on the surrounding community. Therefore, these decisions must be based on a thorough evaluation of the evidence using standards generally accepted by the professional disciplines involved with the process. The process must be open, transparent, timely, and equitable.

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

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law are required to be made. The Committee has determined that there are no changes to existing law made by S. 297.

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