

Statement of
APESANAHKWAT, CHAIRMAN
MENOMINEE INDIAN TRIBE OF WISCONSIN
on S. 2097

"Indian Tribal Conflict Resolution, Tort Claims,
and Risk Management Act of 1998"

before the
SENATE COMMITTEE ON INDIAN AFFAIRS

July 15, 1998

Good morning Chairman Campbell and distinguished members of the Committee. I am Apesanahkwat, Chairman of the Menominee Indian Tribe of Wisconsin. It is an honor to be invited before the Senate Committee on Indian Affairs to present the views of the Menominee Tribe on S. 2097, legislation which would provide new methods for resolving conflicts between Indian tribal governments and others, and assure that there are adequate remedies for tort claims against a tribe.

I would like to begin by commending you, Mr. Chairman, for introducing this bill which, in our view, addresses the concerns that have been expressed about tribal sovereign immunity and the need for effective methods for resolving disputes between tribes and others in a manner that does not damage tribal interests. Unlike other proposals that have been made, your bill carefully avoids any invasion of tribal sovereignty and does not expose tribes to the dangers of unbridled litigation.

As you are well aware, Indian tribes have come under increasing attack for perceived "problems" resulting from tribal sovereign immunity.

In several hearings which the Committee conducted on tribal sovereign immunity, there has been testimony that Congress should subject tribes to suit on a variety of matters. These have included such matters as the collection and remittal of retail taxes on sales to non-Indians, remedies against tribes for tortious injuries, and jurisdictional matters related to law enforcement. It is inevitable that, as tribes exercise their rights under the Indian Self-Determination Act (25 U.S.C. § 450 et seq.) and strive to strengthen their self-government and economic determination, there will be more interactions with outside interests. Therefore, it, is not surprising that conflicts may occasionally occur, and that they must be dealt with. While the Menominee Tribe believes that the problems portrayed at these hearings are grossly exaggerated, we appreciate the approach taken in your bill that addresses any problems that do exist in a manner that does not overturn the long-established federal policy of promoting tribal self-government and self-determination.

I would like to begin my detailed testimony by commenting on Title II of S. 2097 which would provide a new remedy in situations where a tort had been committed by a tribal employee or agent. Your bill would provide a compulsory tribal insurance program, with the insurance to be obtained or provided by the Secretary of the Interior, and a limited waiver of tribal immunity as to tort liability. These provisions would come into play in situations where the matter is not covered by existing liability insurance purchased by the Tribe or covered under the Federal Tort Claims

Act, pursuant to the provisions of the Indian Self Determination Act.

While it is our understanding that most matters involving tribal tort liability are already covered by liability insurance purchased by the Tribe or covered under the Federal Tort Claims Act, there are some gaps in this coverage. The Menominee Tribe firmly believes, however, that any legislation that attempts to fill these gaps must give due deference to our sovereign status and the need for continuation of our basic immunity from suit. Thus, the Tribe supports Title II of S. 2097 as it provides relief for tortious acts committed by tribal employees or agents without endangering tribal governments by exposing them to unlimited liability in tort.

While S. 2097 incorporates many of the concepts the Menominee Tribe previously presented for establishing a compulsory tort claims remedy based on insurance, your bill contains a number of changes that we are pleased to support.

One such change' from the Menominee proposal, presented at the Committee's hearing on May 6, is that S. 2097 does not provide for exclusive jurisdiction over tort claims in federal district court. Because S. 2097 is silent on the jurisdictional issue, these claims could be brought in whatever court has jurisdiction under present law, thus preserving the existing jurisdiction of tribal courts in this area of law. We believe that this change is responsive to concerns expressed by a number of tribes on this

point and support it.

Another significant difference under S. 2097 is that the insurance coverage would go into effect no later than two years after enactment of the statute rather than in 180 days, as we had proposed. Before implementing the compulsory insurance provisions, the Secretary is required to conduct "a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes at the time of the study." The Secretary is also required to report to Congress not later than three years after the date of enactment the results of the study, along with recommendations as to any amendments that might be required to improve the insurance coverage mandated by the act. We think that these changes to our original proposal would provide important assurance that the new insurance program will provide necessary coverage in the most cost effective manner.

We respectfully request that the Committee consider a clarifying amendment to Section 202 (f) which gives the Secretary broad authority to establish a schedule of premiums that may be assessed against any tribe provided liability insurance under this title. While most tribes will be able to afford the premiums--since most tribes now carry such insurance on their own--some tribes will need to obtain federal subsidy in order to pay the premiums required. We suggest that the following language be added to the end of Section 202 (f) (2):

Provided that in establishing a schedule of premiums the Secretary shall provide for forgiveness of such premiums, in whole or in part, on the basis of need.

With respect to the provisions of Title I of S. 2097, the Menominee Tribe strongly supports the broad new federal authority for resolution of conflicts between tribes and states established under this Title. We hope and expect that enactment of these provisions would lead to local resolution of disputes through avenues other than litigation, particularly with regard to the collection of taxes. Proponents of legislation to provide a mechanism for enforcing the collection of state retail taxes have increasingly sought a federal remedy to be imposed on tribes but have not demonstrated that the situation is a nation-wide problem that requires a federal legislative solution. The deliberative process contained in S. 2097 not only allows for developing solutions at the local level between tribal-state-local governments but also provides an alternative when local solutions are not possible. Our specific comments on the various sections of this Title follow:

Section 101: Compacting Authority. Section 101(a) gives the consent of the United States for states and Indian tribes to enter into "compacts and agreements in accordance with this title." While no specific definition is provided, we interpret this language to mean that, with certain limitations listed in Section 101(d) precluding the use of this authority to

generally expand or diminish presently existing state or tribal civil and criminal jurisdiction, this compacting authority could be used to cover a wide variety of disputes. Section 101(b) gives specific authority to enter into agreements for the collection and payment of certain retail taxes pursuant to existing law. We believe that enactment of this provision could provide an important new impetus to the resolution of disputes between states and tribes on a variety of issues.

Section 102: Non-Binding Mediation. This section provides a system for either a state or a tribe to initiate a process of mediated negotiations for the purpose of "achieving an intergovernmental agreement or compact that meets the requirements of this title." (Section 102(a)) While this is not precisely defined, we interpret the language to mean that this process could involve any subject matter that is not specifically excluded in Section 101.

In the process established under this section, the Secretary of the Interior plays a key role, in selecting a mediator from a list provided by the Federal Mediation and Conciliation Service and in facilitating negotiations between the parties. While the language of the section is couched in mandatory terms, it is significant that there is no mechanism provided to actually make the negotiations mandatory: it is made clear in Section 102(c) that the process of negotiation provided is "non-binding."

In our view, the establishment of this "non-binding" process could lead to the resolution of many disputes without invading the sovereign immunity of tribes or states. We are pleased to support this concept.

Section 103: Intergovernmental Dispute Resolution Panel. The most sweeping part of this title is the establishment of an Intergovernmental Dispute Resolution Panel, comprised of one representative of each of the Interior, justice, and Treasury Departments, state governments, and tribal governments. The bill does not specify how these representatives are to be selected or what term of office they will serve. Upon referral by the Secretary, the Panel is given broad authority to decide any dispute that was the subject of mediated negotiation under Section 102. (The reference in the bill is to "negotiations conducted under section 103" but we believe that the correct reference is section 102.) We are willing to support the enactment of this broad authority because it is not made specifically enforceable in court and there is no procedure specified for implementing the decisions of the panel. In essence, this Panel will have the power to make non-binding decisions that, hopefully, would lead the states and the tribes involved in any dispute to a voluntary resolution of those disputes.

Section 104: Judicial Enforcement. Federal district courts are given jurisdiction to enforce agreements entered under the authority of the act, but not to enforce decisions of the Intergovernmental Dispute Resolution Panel. We think that this is an appropriate limitation of the role of the district courts.

Section 105: Joint Commission on Intergovernmental Affairs. A

special commission is set up with representatives of tribes, states, and the federal government. This commission would advise the Secretary of the Interior on a variety of topics of intergovernmental concern and would prepare periodic reports on the implementation of this title. We believe that the formation of a commission of this kind could be of great assistance in helping the Secretary to play a constructive role in the matters entrusted to the commission for study and report.

CONCLUSION

The Menominee Tribe firmly believes that the preservation of tribal sovereign immunity and the protection of the broader public interest are not inconsistent objectives. We offer to the Committee our assistance on further revisions to S. 2097 to address the concerns we have identified or others which may arise.

Thank you for the opportunity to provide our views on this legislation.