

PREPARED STATEMENT

Submitted by

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For the

HOUSE NATURAL RESOURCES COMMITTEE HEARING

**H.R. 2837, INDIAN TRIBAL FEDERAL RECOGNITION ADMINISTRATIVE
PROCEDURES ACT**

October 3, 2007

10 a.m., Room 1324, Longworth House Office Building

Good morning, Chairman Rahall, Ranking Member Young and distinguished members of the House Natural Resources Committee.

My name is James A. Keedy and I am honored to appear before you today to offer my thoughts and recommendations for reforming the process for recognition of American Indian groups as Tribes by the Bureau of Indian Affairs (BIA) at the Department of the Interior. I began working as a staff attorney in 1987 for Michigan Indian Legal Services (MILS), an agency based in Traverse City, Michigan. In 1988, I was appointed Executive Director and have held that position since then. During the past 20 years, I have either been involved in, or have a working familiarity with, all the recognition work for Indian Tribes in Michigan.

As a staff attorney and executive director of MILS, I have personally worked with two Tribes that are or were in the federal recognition process. In the late 1980s, I began working with the leadership of the Pokagon Band of Potawatomi Indians to prepare and file a petition for federal acknowledgment. In 1988, the fully documented petition was filed with the Branch of Acknowledgment and Research, now known as the Office of Federal Acknowledgment (OFA). The BIA had not acted on the petition six years later when Congress directly affirmed the Tribe's federal status in 1994 by enacting Pub.L. No. 103-323.

Since 1994, I have been working with the Grand River Bands of Ottawa Indians (GRBOI). The GRBOI filed a fully documented petition at the OFA on December 8, 2000, after traveling by automobile from Grand Rapids with 21 boxes of documents. The trip started at 2:00 p.m. on December 7 and we arrived in Washington, DC at 3:00 a.m. on the December 8, in time for a 9:00 a.m. appointment at the BIA. To date, the GRBOI petition is still awaiting the review that will precede a final decision. My understanding is that, at the present pace of review, the GRBOI petition will not receive that review for at least 15 to 20 years.

MILS also provided assistance to the Lac Vieux Desert Band of Lake Superior Chippewa Indians (LVD), the Little River Band of Ottawa Indians (LRB) and the Little Traverse Bay Bands of Odawa Indians (LTBB) on the federal recognition efforts of those Tribes. LVD received recognition by an Act of Congress in 1988, Pub.L. No. 100-420. Congress then recognized both LRB and LTBB in 1994 by enacting Pub.L. No. 103-324, a companion bill to the Pokagon Band bill mentioned earlier.

MILS represented the Grand Traverse Band of Ottawa and Chippewa Indians when that Tribe sought federal recognition in 1978. MILS filed the petition for federal recognition in December 1978 under the newly promulgated regulations. Just 10 months later, the BIA published in the *Federal Register* “Proposed Findings for Acknowledgment of the Grand Traverse Band,” 44 Fed.Reg. 60171, October 18, 1979. All the petition documents fit into a one-inch binder. Successful federal recognition decisions, therefore, can and have been made in much less time and with far less documentation than the current process requires. It is my hope that this hearing will result in a solution that will return the process to the pace and documentation requirements of this earlier time.

In Michigan, it has always been clear that whether a particular tribe is federally recognized is an accident of history. The Tribes of Michigan’s Upper Peninsula all organized in the 1930s under the Indian Reorganization Act, 25 U.S.C. 461 (IRA), except for the Sault Ste. Marie Tribe of Chippewa Indians who were recognized in 1972 after a series of meetings and a letter from an assistant solicitor in the Department of the Interior.

The Lower Peninsula tribes, on the other hand, were all denied the opportunity to organize under the IRA because a BIA official decided that, since the federal government lacked funds during the Great Depression to purchase land and provide services, the people would be better off being served as non-Indians by the State of Michigan’s public relief programs.

The Grand Traverse Band, the LRB, the LTBB and the GRBOI all share the same treaties and histories. Political power was derived from clans that, in structure, are more like extended

families than the organized governments that the current recognition regulations envision. All these Tribes were signatories to the same 1836 and 1855 Treaties. All petitioned for organization under the IRA in the 1930s, yet three tribes are recognized and one is not. And the one not yet recognized may not be recognized for another 15 years, if ever, more than 30 years after all the other Ottawa Tribes achieved federal status. This offends any observer's sense of justice.

At this point, I would like to say that I strongly believe the BIA itself will never be able to fix the broken federal acknowledgment process (FAP) internally. It is imperative that Congress step in as soon as possible to provide a statutory framework for the FAP... Whether the FAP stays within in the BIA or whether Congress creates an independent agency to complete the work that remains to be done is a decision only Congress can make. But Congress can no longer defer to the process within the BIA that is—by all accounts—not only broken but clearly devastating to thousands of America's first inhabitants. The relationship between Tribes and the United States is a political one. Congress has the authority and responsibility under the U.S. Constitution to maintain that relationship with all Indian tribal groups, including those that have survived together as Tribes for more than 200 years with little or no help from anyone, not even the federal government.

The tenacity and strength of the American Indians who are members and leaders of Tribes that are not yet—and may never be—federally recognized is a constant source of amazement... There are few, if any, resources available for them to survive as tribal governments to allow them and to maintain their Indian cultures, languages and traditions. If the

BIA's FAP is not fixed—and fixed soon—I believe that most of these tribal groups will literally disappear within the next 25 years. These Tribes simply cannot sustain themselves in this economy and political climate without the status and services that come with recognition by the federal government. This loss would be enormous, not only for the Indian people themselves, but also for the entire nation. It is certainly not a loss that we should accept before making a strong effort to ensure that it does not occur. It is difficult to express the importance of federal recognition to tribal members. A quotation from a member of the Grand Traverse Band in a Traverse City newspaper on the 20th anniversary of the Grand Traverse Band's recognition expresses it better than I could hope to do:

To many tribal members, recognition represented both a validation and a turning point for the region's Indian community.

“That day, I think the sun was shining for everybody,” said Bonnie Inman, a tribal member who has worked for the band since its formal start. “[T]he day we got recognized, we were suddenly a people. I was suddenly a person. There was a feeling that there was no end to what we could do.” *Tribe Remembers Humble Beginning*, Traverse City Record Eagle, May 21, 2000.

I have sat in countless meetings during the years discussing the progress of federal recognition efforts. Many times I have heard the plaintive cry from one of the members, “If only we can be recognized before my father dies, he has been waiting his whole life.” Other times it is a mother, aunt or uncle who has been waiting for federal recognition for decades. I have also

counseled many clients that the protections afforded by the Indian Child Welfare Act, 25 U.S.C. § 1901, do not apply to them or their families because the Act only applies to children with a parent who is a member of a federally recognized Indian tribe. I have had to advise the GRBOI that they could not join the State of Michigan when it sat down with the other 1836 Treaty Tribes to decide the rules for and allocation of fish and game pursuant to their treaty rights because the precedent of the federal court in Michigan declared that only federally recognized Indian Tribes could participate. These treaty rights were allocated among the recognized by the Tribes and the State of Michigan just last week.

It is apparent that the decision to grant or deny federal recognition is not only very important to the Tribes seeking acknowledgment, but it is also very important to the integrity of the United States. It is a solemn political decision made by the executive or legislative branches of government. It is not an academic exercise that can be exhaustively researched until someone is satisfied that all possible social interactions or cultural patterns have been described to their satisfaction. A child born to a GRBOI mother today may never have the protections of the Indian Child Welfare Act before the child reaches adulthood if Congress does not pass the GRBOI recognition bill pending in the Senate or does not pass full-scale recognition reform legislation such as H.R. 2837.

The FAP was created by the BIA when it first issued regulations in 1978. Those regulations were not intended to create the kind of burden that the researchers at the OFA now place on petitioners. Attached to my testimony is a petition that MILS helped to prepare in 1978 for the Grand Traverse Band of Ottawa and Chippewa Indians. Grand Traverse was the first

Tribe recognized under the new regulations. The Tribe's petition is 67 pages, and that number includes the Tribe's 24-page constitution. The entire process took about 10 months.

Compare that to the picture of the boxes of documents, also attached, that were submitted in 2005 by the GRBOI in response to a technical assistance letter from the OFA. These documents were provided in addition to the 21 boxes of documents that we delivered to the offices of the BIA in December 2000. The Tribe thought the 21 boxes (seven boxes of original documents and 14 boxes containing two copies of each of the originals) were the complete petition. Until the Tribe received the technical assistance letter in 2004, it did not realize how much more documentation was needed for a "complete" petition. The Tribe also provided all information in digital, electronic format.

The salient factors for the GRBOI are that:

- All of the members of the GRBOI have proof that they descend from the signatories of one of the three Treaties the GRBOI signed with the United States in 1821, 1836 and 1855;
- The Tribe petitioned for recognition in 1934, and BIA Commissioner John Collier stated that the Tribe should be allowed to organize under the 1934 Indian Reorganization Act;
- The Tribe won several land and accounting claims before the Indian Claims Commission, and Congress has passed several distribution acts to pay out the judgment funds from those claims to tribal members;

- The majority of the Tribe's members live where their ancestors have always lived;
- The State of Michigan has always recognized the GRBOI;
- Other recognized Tribes in the state also recognize the Tribe; and
- The Tribe's history is the same as the three Lower Peninsula Ottawa and one Upper Peninsula Chippewa Tribes that are federally recognized.

The GRBOI petition was moved to the Ready for Active list (of ten petitioners) in February 2007 but, despite all of this, it may take another 15 to 20 years for the BIA to process this petition. The first Tribe on the Ready for Act list (Brothertown Indian Nation of Wisconsin) was placed on the list by the BIA in 1996; over 11 years later, it has yet to move to the Active list.

And the chances for successfully going through the process diminish appreciably as the years go by. According to the BIA/OFA Status Summary of Petitioners, between 1980 and 2000, 14 Tribes were accorded federal status while 15 other groups were denied acknowledgment. Since 2000, only two Tribes have been acknowledged as federal tribes, while 10 other Indian groups have been denied—and four of these were denied after having originally been given final positive determinations.

From any objective view, the FAP is broken. There are many distressing and compelling stories to tell. The question before the Committee is, how do we fix the problem? Many observers, including me, would prefer to see the creation of an independent agency in which inherent bias is absent, where timelines are set by law and a quasi-judicial process is utilized.

H.R. 2837, introduced on June 22, 2007 by Rep. Faleomavaega, is a good bill and one that deserves the Committee's attention and consideration. The bill would create an independent commission to review petitions from American Indian groups and would include a sunset clause precluding the consideration of petitions filed after a date certain. Under the bill, Congress would delegate authority to the new commission the authority to recognize American Indian Tribes. The evidentiary standards would be clarified, and necessary resources would be provided to expedite the process.

These are all laudable and supportable goals, and I hope that members of this Committee will support this bill or a version of it. It is said that the devil is in the details. Thankfully, there are many competent people who have been part of this process for a long time who can help the Committee grapple with those details to come up with legislation that is both deserving of passage and deserving of the respect of all the American people but most especially the Native American people. My staff and I would be very happy to assist the Committee in this effort.

This year of 2007 marks the 30th anniversary of the submission of the Final Report of the American Indian Policy Review Commission (AIRPC). In 1975, Congress established the Commission to conduct a "comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the federal government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." Members of both houses of Congress served on the Commission. A summary of the Commission's recommendations on recognition (Task Force 10) is attached to

my testimony. The Committee will note that a major theme of the Commission's recommendations was that Congress should create a special office outside the BIA to establish by hearings and investigations that a group must meet any one of seven enumerated criteria.

For many years prior to the Commission's report the Department of the Interior recognized tribes under the "Cohen criteria". Beginning with the IRA, the question of which Tribes were to be recognized as Indian tribes became a frequent task. According to the "bible" of Indian law, Felix S. Cohen's *Handbook of Federal Indian Law* (1942), the Department of the Interior used a number of criteria to make that determination and, it should be noted, tribes were not required to meet every one of the criteria.

The considerations which, **singly or jointly**, have been particularly relied upon in reaching the conclusion that a group constitutes a "tribe" or "band" have been:

1. That the group has had treaty relations with the United States.
2. That the group has been denominated a tribe by act of Congress or Executive Order.

3. That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.

4. That the group has been treated as a tribe or band by other Indian tribes.

5. That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group. See: page 271, emphasis added.

It is unfortunate that nearly 30 years has elapsed since the regulations were first published and the situation at the BIA has gone from moderately bad to the virtually intolerable. In 2007, if Congress were to pass H.R. 2837, it would be a great commemorative gesture to all those who worked so hard to bring the AIPRC findings and recommendations on recognition issues to light and to all the Indian people who have waited so long for recognition of their status. Unrecognized but legitimate Indian Tribes deserve no less.

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