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H.R. 2837*, The Indian Tribal Federal Recognition Administrative Procedures Act,*
Before the COMMITTEE ON NATURAL REOURCES
U.S. HOUSE OF REPRESENTATIVES
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Mr. Chairman and members of the Committee, I thank for inviting me to provide testimony today in regard to House Bill 2837, the Indian Tribal Federal Recognition Administrative Procedures Act. I am a historian and a senior associate with Morgan Angel & Associates, a public policy consulting firm here in Washington. I offer my comments today not as a representative of any organization or group, but rather as a professional researcher and consultant who has been deeply involved in issues regarding Federal tribal acknowledgment and recognition for more than 23 years. My background and experience has allowed me to gain a broad perspective on these issues. The academic training for my career included earning a Ph.D. in American history at The University of New Mexico, with a specialty in the history of Federal Indian policy. I subsequently worked as a historian for the Bureau of Indian Affairs (BIA) for 13 years. For nearly ten of those years, I served as a historian in the BIA's Branch of Acknowledgment and Research, where I helped to evaluate petitions and also participated in the process of revising the Federal Acknowledgment regulations that were published in 1994.

Since my retirement from the Federal Government in 1993, I have provided consultation and research for dozens of tribal groups to assist in their pursuit of Federal acknowledgment through the administrative process or Federal recognition from Congress. During this same period, I have also provided consultation and research to

interested parties in the acknowledgment process, including State and local governments and law firms.

There has long been a broad awareness that the Department of the Interior's current Federal acknowledgment process is essentially broken, if not fundamentally flawed. Many observers view the mandatory criteria as unjust and unfair because, at their core, the requirements demand that marginalized people who seldom kept good records extensively document their tribal and family histories and describe in detail their social and political relations since first sustained contact with Euro-Americans.

The most serious deficiencies of the Interior Department's current acknowledgment process are that:

1. It has not been able to provide due process to petitioners in a timely manner.

2. It has escalated the burden of evidentiary proof required of petitioners and interested parties.

3. It has failed to provide petitioners and interested parties with adequate guidelines and meaningful technical assistance, and

4. Despite its efforts to respond to a 2001 General Accounting Office report critical of its procedures, the Department has not succeeded in making the acknowledgment process more open and transparent for all partied involved.

Since at least the late 1980's, Congress has consistently considered legislation that might help fix the process and bring it under the authority of statutory law. The provisions of H.R. 2837 have the potential of vastly improving and streamlining the process, as well as bringing it to closure. However, this legislation can only reach this potential if Congress provides adequate appropriations to both the Commission on Indian Recognition and the Department of Health and Human Services

The provisions of H.R. 2837 that I think are best suited to revising the process include those

1. that reduce the evidentiary burden on petitioners by providing that they only need document their historical continuity since 1900 instead of from first sustained contact with Euro-Americans. However, in my opinion, the burden could be further reduced another 50 years to 1950. This further reduction of the evidentiary burden would hasten the process even more, in my view, without significantly changing the number of groups that could ultimately meet the historical continuity standard.

2. that recognize the critical need to provide greater funding to petitioners for the purpose of documenting their petitions through a expanded grant system of the Department of Health and Human Services.

3. that provide more direct interaction between decision makers and petitioners through the process of preliminary and adjudicatory hearings.

4. that give priority in the process to tribal groups that have had a previous Federal relationship.

The fundamental problem with the Interior Department's current process is a lack of resources. The task of fully documenting a petition for Federal acknowledgment is beyond both the physical and financial capability of the vast majority of unrecognized Indian tribes, which tend to be small groups with few resources. No petitioner has ever been successful in gaining acknowledgment without significant professional help from scholarly researchers, lawyers, and others. Yet, it has become increasingly difficult for petitioners to obtain the funding necessary to sustain professional help. The Administration for Native Americans (ANA) of the U.S. Department of Health and Human Services no longer provides the "status clarification" grants, which helped so many unrecognized groups launch their acknowledgment efforts.

Federal acknowledgment has gained wider public attention in recent years because newly acknowledged tribes have the potential of developing casino gaming facilities in accordance with the Indian Gaming Regulatory Act of 1988. There is a myth out there that gaming investors are providing financial backing to a large number of acknowledgment petitioners. However, in reality, only a small percentage of petitioners have received such backing and their numbers are dwindling.

Financial backers with gaming interests have become significantly less interested in funding unrecognized groups after witnessing the losses sustained by some major players that invested tens of millions of dollars in supporting petitioners that were ultimately unsuccessful in the process. Gaming interests quest for the big jackpot, but they also want favorable odds and a quick return on investment, neither of which is a realistic scenario in regard to the chances of unrecognized tribes gaining Federal acknowledgment. In my opinion, few, if any, financial backers will be drawn to petitioners in the future, unless they are far along in the process with a high likelihood of success. The rub is that few, if any, petitioners can make it to that stage without significant financial backing.

At the same time that resources are lacking on the tribal side, the Interior Department has not been provided sufficient resources to evaluate petitions in a timely manner. Since the Acknowledgment regulations were established in 1978, 324 petitioners have become part of the Acknowledgment process, submitting at least a letter of intent to petition (based on February 2007 data). Yet, during this period of nearly 30 years, only 60 groups have submitted sufficient documentation to be declared ready for active consideration and allowed to advance further through the process. In the

meantime, the Department has only managed to resolve 43 cases during this 29-year period, a historical average of a little less than 1.5 (1.48) cases per year.

Because of its lack of resources, the Department now faces an overwhelming backlog of 17 fully documented but not yet resolved cases. If the Department cannot increase its historical rate of resolution, a petition declared ready for active consideration today might have to wait more than 11 years for a final determination. If the resolution rate is not increased, it will also take the Department considerably more than 175 years to resolve the 260 cases of all of the present petitioners, assuming that each can somehow find the wherewithal to be able to document its petition. Factoring in new petitions received during this period might easily expand the workload of the present process out beyond two centuries.

I am not aware of any other administrative process in Government that takes so long to issue a decision. Pharmaceutical companies can get new medicines approved by the Food and Drug Administration, and broadcasters can get new stations licensed by the Federal Communications Commission in a fraction of this time.

The reason that the acknowledgment process is not timely is because unrecognized tribal groups do not represent a politically significant constituency. The Department is not eager to extend services to new tribes and most recognized tribes are not excited about splitting their share of the Federal budget with new groups. Some of the most aggressive opposition to the acknowledgment of groups has come from federally recognized tribes. If it becomes known that a petitioner is considering gaming in its future, the group is more often opposed than supported by State and local governments

and surrounding communities. It may also be opposed by nearby tribes that already have gaming or are planning casino development.

Whether or not the proposed Commission on Indian Recognition can succeed in streamlining the acknowledgment process also comes down to a question of resources. The Commission's ability to meet its ambitious agenda will be dependent on a generous appropriation, one that is exponentially higher than the Interior Department's present budget for acknowledgment purposes. It is impossible to predict what the Commission can accomplish and whether it will provide a better acknowledgment process without knowing how much it can spend. For that reason, I think that the proposed legislation should specify an initial budget for the Commission. In order to determine the amount needed, I would recommend that the Committee request the Government Accountability Office (GAO) to determine an estimate of startup costs.

Similarly, it is my view that the amount appropriated to the Department of Health and Human Services to aid acknowledgment petitioners should likewise be specified in the legislation and realistically based on a needs evaluation (perhaps also conducted by the GAO). The experience of most tribal groups that formerly received status clarification grants from the Department has proven that a grant cap of approximately $65,000 to $100,000 per year was not adequate to meet the needs of documenting a petition. I would recommend a grant system that is not fiercely competitive, but one that is fairly generous in providing limited seed money to a majority of petitioners. Those petitioners that make progress demonstrable to the Department with their initial grants should then be eligible for increased funding. In the past, Health and Human Services was not effective in measuring the progress of status clarification grantees. Many groups

that had not yet proven their Indian ancestry continued to receive substantial funding. Proving descent from a historical tribe should be the first priority for petitioners, as well as the Department's initial measurement of a petitioner's progress.

The proposed legislation should also specify that the Commission would have its own legal and research staff. To both keep continuity with the current process and to meet the demands of its ambitious schedule, the legislation should specify that this support staff shall consist of an office of general counsel with attorneys solidly experienced in Federal Indian law, and several teams of cultural anthropologists, genealogists, and historians that have extensive training and experience in the history and relations of Native American tribal communities and families.

The timelines set forth in this proposed legislation are overly ambitious and problematic. The majority of petitioners would not be able to produce a documented petition within 8 years unless they received substantial funding from the Department of Health and Human Services. Even if only half of the current 243 petitioners without fully documented petitions managed to submit a documented petition, the Commission would face a Herculean task in trying to resolve all of these cases within its 12-year lifespan. In this hypothetical scenario the Commission would have basically 11 years to resolve approximately 122 cases (assuming that the Commission would spend its first year resolving the Interior Department's backlog of documented petitions). This would require an average of 11 decisions per year or approximately one every five weeks.

The Interior Department received approximately 102 new letters of intent from petitioners during the last eight years. If the Commission received a similar amount of new petitioners during its 8-year lifespan, and half of those petitioners were able to fully

document their petitions, the demand on the Commission would further increase to almost 16 decisions per year or one every three weeks (total of 173 decisions over 11 years if half of the petitioners succeed in presenting a documented petition).

Under the most miraculous scenario, all of the 243 present undocumented petitioners and all of the approximately 102 potential petitioners would be able to fully document their petitions. In that case, the Commission would face the challenge of resolving 345 cases in 11 years or an average of approximately 31 per year or one every week and a half.

Add to this workload the challenge of resolving the Department's pending 17 documented petitions within the first 360 days of the Commission's existence. If you further consider the potential of having 24 groups that have been denied acknowledgment by the Department requesting adjudicatory hearings the Commission might face a potential docket of 386 cases in 12 years (which would require an average of 32 decisions a year or approximately one every eight working days).

Federal acknowledgment of a tribal group can have a significant impact on surrounding communities, including neighboring tribes, and State and local governments, Because of this potential impact, interested and informed third parties have played a key role in the acknowledgment process in supporting, monitoring, or opposing the Federal acknowledgment of tribal petitioners. H.R. 2837 gives the appearance of having reduced the role of interested parties in the acknowledgment process. For that reason, I would suggest that the Committee consider revising the language of the bill to give interested parties an opportunity to make recommendations to the President regarding fitting

candidates for the Commission, to submit evidence to and participate in all hearings, and have the right to appeal the Commission's final determinations.

I do not favor the provision for an appeal of the Commission's final determinations to the U.S. District Court for the District of Columbia. This is because litigation is expensive and could be beyond the means of most petitioners. In addition, this Court already a prodigious docket of cases and has limited experience, if any, on the subject of Federal tribal recognition. The current appeal process to the Interior Board of Indian Appeals (IBIA) allows petitioners to appeal without legal counsel and fees. The problem with the IBIA process is that the appeal criteria are limited and its decisions are not timely. For that reason, I recommend an appeal process to an independent panel of administrative law judges thoroughly experienced in Federal Indian law and dedicated to the purpose of hearing Federal acknowledgment appeals. This appeal board should have the power to deny the appeal, remand it back to the Commission, or recommend that the appeal be further pursued in a Federal court of the petitioner's preference.

Other Problems With the Existing Process

The Acknowledgment regulations are complex and convoluted and the Interior Department has been notoriously deficient in providing adequate technical assistance in explaining both the regulations and its acknowledgment decisions. The best way that anyone can begin to gain a realistic comprehension of how the Department interprets and applies the Acknowledgment procedures and requirements today is by thoroughly reviewing the findings and determinations it has issued since 2000, as well as the decisions issued by the IBIA since that time, and the procedural notices that the

Department published in the *Federal Register* in 2000 and in 2005. The questions that remain after such a review should then be directed to the Department.

The evidentiary burden for both petitioners and interested parties has increased over the years as the Department has established new precedents for analysis and evaluation in its decisions. One need only compare the size of early documented petitions, interested party submissions, and Departmental findings with those of recent years to measure the escalation of required evidence. For example, the Department's first summary of evidence and recommendations for a Proposed Finding (Grand Traverse Band of Ottawa and Chippewa, 1979) totaled 67 pages. Its summary of evidence and recommendations for a Proposed Finding for the Nipmuc Nation in 2001 ran to approximately 455 pages. Both of these documents were in single-spaced type. In response to this negative Proposed Finding, the Nipmuc petitioner submitted narrative reports that totaled approximately 900 pages (double-spaced) and a digital database containing in excess of 15,000 documents.

In addition to establishing a heavy evidentiary burden, the Acknowledgment regulations are complex, convoluted, and beyond the ability of most readers to fully grasp. Above all, they fail to communicate how the Department really interprets the mandatory criteria and the evidence necessary to meet the requirements. To this end, the Department issued Official Guidelines for the Acknowledgment process in September 1997. However, in its attempt to dummy down the regulations, these guidelines oversimplified the criteria and process to the point of being unrealistic. For example, the guidelines suggest that petitioners can easily document a petition through volunteer efforts of their members and that professional help is not necessary. Yet, no petitioner

has ever succeeded without professional help and if professional consultation is not necessary in the process, then why does the Department employ a staff of scholars and attorneys to evaluate petitions?

The Acknowledgment regulations establish that the Department must provide technical assistance to petitioners and interested and informed parties, and the Department encourages all parties to request such assistance. However, the reality is that the Department is notoriously unresponsive and unhelpful, and it is difficult to establish any meaningful dialogue on Acknowledgment issues. It is hard to schedule meetings or conference calls and it can take weeks or months for the Department to respond to a letter.

The OFA thinks that it is providing guidance in its Technical Assistance letters to petitioners, but most readers of these TA letters probably also need a weeklong seminar with the authors to understand what the OFA is trying to communicate. Much of the OFA's advice to petitioners and interested and informed parties is neither clear, cooperative, or realistic. The best opportunity that petitioners and interested parties have to obtain technical assistance from the Department regarding a particular petition is when they request a formal on-the-record meeting to inquire into a proposed finding.

For most of the history of the Acknowledgment process, the Department's research teams conducted independent research as part of their petition evaluation. This purpose of this research was to validate, support, rebut or modify evidence submitted by petitioners and interested and informed parties. The research routinely included field trips to the petitioner's locale to interview tribal officials and knowledgeable tribal and community members and review documents that were not included in the petition. The

team also conducted research in relevant libraries, repositories, and collections in the petitioner's region. In addition, the team looked for further information in some of the primary research facilities in Washington, D.C, such as the Library of Congress, the National Archives, the Smithsonian Institution's National Anthropological Archives, and the Library of the Daughters of the American Revolution (DAR), a good source for family history and genealogy. I would hope that a Commission on Indian Recognition would encourage its support staff to return to this more intensive and personally interactive model of evaluation.

I conclude my remarks by stating that I support H.R. 2837 in principle as a generally well-conceived plan to revise and hasten the Federal acknowledgment process. However, I think it could be improved along the lines I have recommended in my comments. This concludes my statement and I would be happy to answer any questions the Committee may have. I would also be willing to submit further written comments to the Committee upon request.