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Hearing on H.R.2837, Indian Tribal Recognition Administrative Procedure Act
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Mr. Chairman and members of the committee, I appreciate the opportunity to present my views on H.R.2837, a bill to reform the process to extend recognition to Indian tribes. This is a vital issue to scores of Indian communities and your leadership on this issue, Mr. Chairman, is greatly appreciated by those communities. Those communities owe a particular debt of gratitude to Mr. Faleomavaega, not only for bringing this issue to the fore with the introduction of H.R.2837 but also for his faithfulness over many congresses to the cause of fairness and justice for non-federally recognized Indian communities.

I have been involved in the process to recognize Indian tribes for thirty years now, having worked on approximately 10 petitions, some formally and others informally, before the Office of Federal Acknowledgment [OFA] and its administrative predecessors. In addition, I have testified at several hearings held by Congress on the subject – hearings on various reform bills and oversight hearings. I should also add that I have a personal interest in the subject, since I am an enrolled member of the Lumbee Tribe of North Carolina, the largest non-federally recognized Indian tribe in the country. While I continue to work for a number of non-federally recognized tribes in various capacities, the views I express today are not offered on behalf of any particular tribe but are my personal views only.

It is important to place this issue at the outset in its proper historical and legal context. This context is offered for two purposes: first, to encourage the Congress to take an independent and fresh view on the appropriate process and criteria to be employed in the recognition of Indian tribes; and second, to emphasize Congress' historic and continuing role in

the recognition of tribes directly under certain circumstances. Next, I identify what in my view are the most important defects in the existing administrative acknowledgment process established by the Bureau of Indian Affairs in 1978. For legislative reform to succeed, we must learn from our experience under the existing administrative process. Finally, I express my support for H.R.2837 and propose amendments so that Congress can meet its presumptive goal of insuring the recognition of all legitimate Indian tribes.

Federal recognition of Indian tribes – an historical and legal context

Any discussion of federal recognition of Indian tribes must begin with the proposition that broad authority over the conduct of Indian affairs, including the recognition of Indian tribes, resides in the United States Congress. From the earliest days of the Republic, the Supreme Court has begun its analysis of any Indian question with this observation. *See, e.g., Worcester v. Georgia,* 31 U.S. 551 (1832). With regard to recognition of tribes, the Court has specifically observed that there are minimal limitations on Congress' authority:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

United States v. Sandoval, 231 U.S. 28, 46 (1913). This standard has been taken to mean that a group can be recognized by Congress if its members are indigenous people and its members are a people distinct from others. *Indian Issues: Improvements Needed in Tribal Recognition Process*, GAO-02-49, Nov. 2001, p. 23. It is noteworthy that Congress' determination to recognize a particular Indian tribe, by treaty or statute, has never been set aside by a court.

The Congress has exercised this constitutional authority time and time again. Of the

currently recognized tribes [565 on last published list], 222 are Alaskan tribes added to the list of recognized tribes administratively in 1993. *Id.* Of the remaining federally recognized tribes, the overwhelming majority were recognized specifically by Congress through treaty, statute, or other course of dealing. *Id.* at 21-22. Even after the Department of the Interior established its administrative acknowledgment process in 1978, Congress continued to exercise its constitutional prerogative to recognize particular tribes under appropriate circumstances. *Id.* At 23-24.

Finally, it should be noted that the Congress has never expressed its intention to defer to the present administrative acknowledgment process in all cases. As the GAO observed, "In conclusion, BIA's recognition process was never intended to be the only way groups could receive federal recognition." *Indian Issues: Basis for BIA's Tribal Recognition Decisions is Not Always Clear*, GAO-02-936T, p. 8. There was no act of Congress directing the Department to establish this process. Instead, the Department relied upon its general supervisory authority in creating the process. *See* 25 C.F.R. Part 83, Source. In other words, the Congress did not mandate the particular process or criteria used by the Department of the Interior in its acknowledgment process and Congress is plainly not limited to or otherwise bound by those criteria and that process.

For the reasons set out below, the present acknowledgment process does not provide for the acknowledgment of every legitimate Indian tribe. If Congress' goal, then, is to provide for recognition of every legitimate tribe, it can and must consider alternative processes and criteria. In any event, Congress retains the constitutional prerogative to specially recognize any given tribe, so long as that tribe is a distinct group of indigenous people, if Congress is satisfied that particular circumstances warrant direct congressional action.

Defects in the existing acknowledgment process

Other witnesses focus on the defects in the process used by the BIA in its review of tribes' requests for federal recognition. The statement of Mark Tilden, with the Native American Rights Fund, explains the need for the independent commission proposed in H.R.2837 and discusses procedural details to provide for the fair and smooth working of the commission. I endorse those comments. My comments here are limited to defects in the criteria used by the BIA to ascertain whether a group is an Indian tribe.

The administrative process requires that petitioning tribes demonstrate seven mandatory criteria. Criterion a (existence of an Indian entity) must be proved on a substantially continuous basis from 1900 to the present. Criteria b (community) and c (political authority) must be proved on a substantially continuous basis from the time of first sustained white contact to the present, or three hundred years or more in the case of many eastern tribes. Criteria d (governing document), f (membership not members of another recognized tribe) and g (Congress has neither forbidden nor terminated the federal relationship) are mechanical queries without any time depth. Finally, criterion e (descent from an historic tribe) has time depth since it requires a petitioning group to link itself genealogically to a tribe that existed at the time of first sustained white contact. Failure on any one of these criteria results in refusal to acknowledge the petitioner.

If the purpose of any process is to identify and recognize all legitimate Indian tribes, the present acknowledgment criteria fail to accomplish this goal for the following reasons.

1. **Extreme time depth**

With the exception of criterion a, the present regulations require that petitioning tribes establish the substantive criteria continuously since the time of sustained white contact. This is an extraordinarily long period for eastern tribes and requires all petitioners to document their existence by records maintained by the dominant society, even for those periods of time when the dominant society kept few records.

There is no legal or common sense rationale for beginning the inquiry at the time of sustained white contact. The ultimate question here is whether an indigenous group exists as a separate people, or community. Such groups hold limited, reserved sovereignty. This sovereignty does not derive from nor is it delegated by Europeans or the United States. Instead, it is an inherent sovereignty. *See United States v. Wheeler,* 435 U.S. 313, 322-323 (1978). As a result, the time of white contact is irrelevant to the inquiry of tribal existence. All that is required is sufficient time depth to demonstrate the actual existence of an indigenous people that has maintained its separate existence.

In my view, 1934 is a reasonable starting point for the inquiry. This year represents a significant change in federal Indian policy with the enactment of the Indian Reorganization Act – a policy intended to foster and support tribal self-governance and to repudiate earlier assimilationist policies. It seems only fair that non-federally recognized tribes should be able to take advantage of this major shift in federal Indian policy, particularly because there were no artificial incentives at the time (such as Indian gaming) that would have encouraged groups to falsely self-identify as Indian.

2. Highly subjective definitions for criteria b (community) and c (political authority)

These important criteria are defined by largely subjective factors: e.g., "significant social relationships connecting individual members"; "most of the membership considers issues acted upon or actions taken by the group leaders or governing bodies to be of importance…" §§83.7(b)(1)(ii), 83.7(c)(1)(ii). This necessarily produces idiosyncratic, arguably arbitrary results. For example, in the case of the Miami Nation of Indiana, the BIA refused to accept an annual tribal picnic, one held continuously by the Tribe since 1907, as proof of community, even though the BIA accepted proof of similar gatherings for other tribes as proof of community. It also requires microscopic examination of internal relations within non-federally recognized tribes. The Gay Head Tribe illustrates this point. In its proposed finding for Gay Head, the BIA proposed to decline acknowledgment largely because of insufficient proof of contemporary community. In its comments on the proposed finding, the Gay Head Tribe

actually submitted telephone records of its members to document the extent and number of contacts among them. For the first time, the BIA reversed itself and issued a favorable final determination based on the Tribe's comments on the proposed finding. This inward focused, detailed examination results in a failure to see the forest for focusing on the trees.

This requirement that petitioning tribes prove the quality of relationships among members also puts a disproportionate and unfair burden on larger tribes. The Miami Tribe of Indiana also exemplifies this problem. With approximately 4,700 members, it was the largest tribe processed by the BIA at the time of its final determination in 1992. The Tribe calculated that, to carry its burden of proving significant interaction among its members, it was expected to document approximately 4.5 million relationships. Not surprisingly, the Tribe failed because the BIA found too little evidence of community and political authority from WWII to the early 1970's – the BIA emphatically did not find that there was no evidence of community or political authority, only that the evidence failed to meet some unspecified level of sufficiency under the regulations.

This focus on the quality of relationships among members, as proved by documents maintained by the dominant society, further tends to disadvantage more traditional Indian communities. For example, if a community follows a traditional subsistence life style, it is far less likely to generate the necessary documents over time. The Little Shell Tribe of Montana continued its traditional nomadic life style well into the twentieth century, which produced few contacts with the dominant society and thus few documents to prove community. Interestingly, the BIA issued a proposed favorable finding for this tribe but, at the same time and for the first time, strongly urged the Tribe to submit more documentation of community. The same holds true for the political authority criterion. Because of its focus on proof of assent to leadership by the members, the inquiry heavily favors Anglo-type governments based on elections. More traditional governments, such as the Miami Nation of Indiana that relies on council members appointed by their traditional sub-groups, evidence of assent to leadership is more difficult to adduce.

Most importantly, there is no need for this myopic focus on internal relations among members to ascertain whether an Indian tribe exists. As the Supreme Court has implied, the mere continued presence of a separate group of indigenous people suggests the existence of a community and political authority over time. This should be sufficient. However, if those criteria are retained, there must be objective means for determining the existence of community and political authority. This would at least infuse predictability into the process and eliminate the obligation to demonstrate the number and quality of relationships among members.

3. Requirement that tribe prove a genealogical connection to an historic tribe

Criterion e of the present process requires that petitioning tribes demonstrate descent from an historical tribe, defined by the BIA as from the time of sustained white contact. While the regulations do not so require on their face, the BIA in practice accepts only genealogical proof of descent from an historic tribe. In other words, it is not enough that historians have identified a particular group as descended from a tribe shown on records at the time of white contact; the petitioning tribe must be able to connect its present members through a continuous line of birth, death, and marriage records to individual members of the historic tribe. Of course, this is impossible when the dominant society has failed to maintain such records on the petitioning group for any reason, even a good reason such as state policies for periods of history that no people in their borders would be identified as Indian in official records.

The problem with this criterion is related to the extreme time depth discussed above. If the beginning point for the tribal existence inquiry is moved forward in time from sustained white contact to 1934, the petitioning tribe would only be obliged to identify a tribe in existence at that point in history and demonstrate its descent from that tribe. Depending upon the beginning point that is selected, this may avoid many oppressive state policies or simple failures of the dominant society to maintain records. Whatever that beginning point may be, it would be helpful to specifically provide that evidence other than genealogical data can be used to establish descent from an historic tribe.

4. Absence of any expedited process for obvious cases, positive or negative

As others note in their statements, the generations long time delay that petitioners face in the process is a serious flaw. Modifications of the criteria suggested above would aid in speeding the process. After all, it takes considerable time and resources to establish and confirm thousands of individual relationships to prove community and political authority. Of course, the imposition of deadlines would also be helpful. In addition, there should be some expedited process for those petitioners that will presumptively fail and those that will presumptively succeed. These groups can receive final decisions based upon unrebutted proposed findings, thereby saving time and resources.

The BIA already appears to engage in a presumptive negative finding for groups that cannot demonstrate Indian ancestry, although this process is not set out or defined in the regulations. It makes sense that a petitioner which cannot demonstrate that 50% of its members are Indian should be denied in fairly short order without examination of the other criteria. This expedited negative should be specifically authorized and defined.

There should also be a presumptive positive finding for other groups. There are certain non-federally recognized tribes for whom detailed inquiry is unnecessary. These include:

- tribes for which a state has recognized a reservation since historic time (as redefined);
- tribes that can demonstrate 50% or more of their members descend from a treaty recognized tribe;
- tribes held to constitute an Indian tribe under federal law by a federal court.

There are a number of non-federally recognized tribes in these positions for whom it makes no sense to commit years and millions of dollars to examine in detail – tribes such as the Pamunkey Tribe of Virginia, the Mattaponi Tribe also of Virginia, the Shinnecock Tribe of New York, and the Little Shell Tribe of Montana. Once a tribe establishes one of these thresholds, the decision-maker should issue a proposed favorable finding without any further examination. This proposed finding should function as a presumption in favor of recognition, one that could

be rebutted by evidence from an interested party demonstrating that the particular tribes cannot meet one of the traditional criteria. In the absence of any negative evidence, the proposed favorable finding should become an automatic favorable final determination.

H.R.2837 is meaningful and needed reform.

The pending bill addresses and resolves many of the defects in the present administrative process identified above. First, it transfers the recognition process from the BIA to an independent commission. This is absolutely vital to meaningful reform. As others have discussed at more length, the proposed commission with the procedures outlined in the bill promises fair, timely, and transparent processing of petitions. Second, it changes the time depth on the inquiry from first sustained white contact to 1900 for all criteria. This is a reasonable and reliable time period for tribes to document their existence. It insures legitimacy with one hundred years' proof of existence from a time at which no incentives for false identification as Indian existed (such as Indian gaming.) This one change alone will dramatically improve and speed the process. Third, it adds one objective means of establishing political authority (although not community.) Fourth, it provides another opportunity for tribes already turned down by the BIA if the change in the criteria might affect the outcome on their petition. In all fairness, this is absolutely essential. It provides tribes that were subjected to an unfair process with an opportunity to prove their tribal existence in a fair process.

There are amendments to H.R.2837 that I urge the committee to consider in the interest of insuring that all legitimate tribes can be recognized as such:

- amend section 5(b)(2)(B)(x) to read "Not less than 50 percent of the tribal members exhibit collateral **as well as lateral** kinship ties through generations to the third degree" [addition in bold] – the goal here is to establish an objective means of proving community, but it must take all relationships into account, those across and through generations;
- add continuous state recognition since 1900 as an objective, alternative means of

- establish an expedited negative process for groups whose members cannot demonstrate Indian ancestry and an expedited favorable process for groups whose members descend from treaty recognized tribes, groups for whom a state has recognized a reservation since 1900, and groups found to constitute an Indian tribe under federal law by a federal court;
- amend section 5(c) to require that previously acknowledged tribes must prove only contemporary community and political authority. Presently this subsection requires previously acknowledged groups to prove their existence continuously from the time of last acknowledgment to the present. This may have the inadvertent effect of requiring more, not less, proof from these tribes since the beginning point for all petitions has been moved forward to 1900.

H.R.2837 is a good bill. With these modest changes, it establishes a fair process with reasonable criteria that could finally offer a real opportunity to non-federally recognized tribes for even handed and fair treatment.

Conclusion

Once again, Mr. Chairman, thank you for the opportunity to present my views on this important issue. I would be happy to assist the committee in any way as it moves forward in its continued deliberations on the subject.