Testimony before
the Committee on Natural Resources
of the United States House of Representatives
at a Hearing Held on October 3, 2007
regarding H.R. 2837, entitled:
"The Indian Tribal Federal Recognition Administrative Procedures Act"

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Greeting and Thanks to the Committee Members

Good morning. My name is Steven Lee Austin. I am an anthropologist, with a PhD in Anthropology from American University. I wish to thank the Honorable Members of the House Committee on Natural Resources for holding a hearing on this bill and allowing me to speak on this very important topic. I have some concerns about the creation of an "Indian Recognition Commission." However, I view several aspects of it as representing major steps forward, and even if this bill is not passed, there are several provisions in the bill that Congress could pass separately that, in concert, would dramatically help improve the current tribal acknowledgment process.

These provisions include:
1). legislating a sunset provision for the tribal acknowledgment process, to create a date certain by which all of the petitions currently on hand, and those submitted by the sunset date; will be resolved;

2). authorizing and appropriating more funding for the process in order to hire adequate staff to review petitions and provide technical assistance to petitioners;

3). authorizing and appropriating funds for status clarification grants to petitioners, so that they may conduct research and prepare their documented petitions; and,

4). implementing measures that would contribute to a reasonable interpretation of the seven mandatory criteria for tribal acknowledgment (25 CFR 83.7).

Overview

When the administrative process was first established, it was never envisioned that it would still be in operation 30 years into the future. Rather, the scholars and attorneys responsible for designing the process thought it would last a few years, and the issue of tribal recognition would, for the most part, be settled once and for all. The original regulations for the tribal acknowledgment process were finalized and published in 1978. In 2008, the process will reach its 30th anniversary; yet, from the point of view of many of the Indian groups seeking acknowledgment, there is little, if anything, to celebrate. Leaders from all of these groups who are here today could tell you painful stories about waiting for justice while a generation or two of their elders have passed on.

I have worked as an anthropologist for nearly 20 years, since 1988. Beginning in 1993, I accepted a job with the Bureau of Indian Affairs, evaluating petitions for Federal acknowledgment. From 1993 to 1999, I was part of several review teams, evaluating the petitions from the Ramapough Mountain Indians, the Mohegan Indian Tribe, the Chinook Indian Tribe, and the two Nipmuk petitioners. I also served on peer review teams for several other petitioners, including the Jena Band of Choctaw, Match-e-be-nash-she-wish

Pottowatomie, the Huron Band of Pottowatomie, the Duwamish Indian Tribe, and the Cowlitz Indian Tribe. In 1999, I left the Bureau of Indian Affairs to begin my own consulting business, which primarily focuses on developing documented petitions for unrecognized Indian tribes. From 1999 to the present, I have consulted with petitioning groups from Connecticut, Massachusetts, Louisiana, New Mexico, California, and Michigan. As I considered my testimony this morning, I reflected on my experience over the past 20 years and I tried to think of insights that I could share which would constitute a unique contribution to this hearing.

I keep two questions in mind as I work on matters related to tribal acknowledgment. The first question is: "What is best and most just for Indian Country as a whole?" I include tribes that are yet to be acknowledged as part of the legal construct "Indian Country." Based on that perspective, I believe that it is in the interest of Indian country to acknowledge Indian tribes that meet the seven mandatory criteria (as stated in the Code of Federal Regulations) based on a reasonable interpretation of the genealogical, historical, and anthropological evidence, and who currently have the strength and fortitude to maintain a bilateral, government-to-government relationship with the United States. Generally speaking, it would not be in the interest of Indian Country for the Federal government to acknowledge those Indian groups that cannot meet the criteria and are not in a position to employ the unique rights and fulfill the responsibilities that attend the government-to-government relationship. To do so would, from my point of view, be a disservice to Indian country, and undermine the status of federally recognized tribes.

The second question I keep in mind is: "Given the totality of the evidence and circumstances of each case, what is the just and proper action for the Government to take?" It should be remembered that there are going to be some very rare cases that will compel the Government, in the interest of fairness and justice, to acknowledge the existence of a tribe that can present a case with sufficient merit, even though the petitioner has not met all seven of the mandatory criteria as traditionally interpreted by the OFA. This is one of the areas that Congress can be of assistance in the process as it is currently designed. Particularly when the OFA or the Department of the Interior provides congressional testimony or otherwise indicates that it will support, or, at least, will not oppose, legislation to recognize a specific tribe, as it recently did at a hearing on a bill to recognize the Burt Lake Band of Ottawa and Chippewa Indians in Michigan.

The Office of Federal Acknowledgment (OFA) is often criticized for being too slow and tedious, as well as for being inconsistent in its interpretation of the seven mandatory criteria. It seems that everyone with a hand in the process, scholars, petitioners and interested parties, and some members of the Legislature and the Judiciary, whether generally pro or con regarding tribal acknowledgment, are in agreement that the process moves too slowly. The specific accusations of inconsistency depend on the political goals of the critics, with petitioners typically complaining that the criteria (or the OFA's interpretation of them) are too demanding, and those interested parties who are opposed to the Government acknowledging more tribes complaining that the criteria (or the OFA's interpretation of them) are too lenient. First, I would like to address some of the concerns about the pace of the tribal acknowledgment process. Second, I will discuss a

few examples of what I view as inconsistencies and unreasonableness in the OFA's interpretation of the regulations. Finally, I will make some additional comments on H.R. 2387.

The Current Tribal Acknowledgment Process and the Issue of Timely Resolution

The administrative process for acknowledging Indian tribes was set up to investigate the claims of Indian groups across the country that wanted their status, as tribes, affirmed by the United States government. In 1978, there already were 40 groups that had applied for that status, and it was anticipated that there might be a few more unrecognized tribes who had yet to make application. Altogether, they anticipated a relatively limited number of groups, and expected to review and decide those cases in a brief time period. Thirty years later, the Department of the Interior, through its Office of Federal Acknowledgment (OFA), has resolved about 40 cases, 9 petitions have been resolved by Congress, and 10 have been resolved "by other means" (mostly groups that withdrew from the process; statistics are based on the OFA's Status Summary of Acknowledgment Cases, dated February 15, 2007). However, having resolved 40 cases in 29 years (an average of 1.4 petitions resolved per year), the OFA now has a list of over 250 groups that have submitted a letter of intent to petition and whose cases **have not** yet been resolved. This is over **6 times** the number of petitions they started with in 1978. The end result is that the burden on the Federal government has not diminished, but grown over time.

These numbers are sobering. In their own defense, the representatives of the OFA usually point out that not all 250 groups have completed petitions that are ready for immediate evaluation; therefore, OFA cannot reasonably be held responsible for not having evaluated everyone on the list. They would say that there are only nine petitioners with completed petitions that are awaiting evaluation, and that is the only real "backlog." While that is true, it cannot be very comforting to these Government officials or their superiors to know that, at some point in time, all of those petitions must eventually be resolved in one fashion or another, at least as the process is now designed.

There are several personal insights I would like to share on the issue of the time required to evaluate all of those petitions, and why there might be some hope for the future.

First, there really are not another 250 petitioners with merit. When I was still working at the Branch of Acknowledgment and Research (as the OFA was then known), I was aware that there were a number of Indian groups who clearly would never meet the requirements of the tribal acknowledgment process. Without getting too specific, I can tell you about just a few of those cases. There is one petitioner in Connecticut that consists almost exclusively of non-Indians, individuals who were taken off the membership roll of a recognized tribe and subsequently reorganized as their own "Indian tribe." There was a petitioner in California whose petitioning group consisted of an elderly woman, quite probably Indian, along with her daughter and grandchildren. In Texas, there is another petitioner that consisted of a father and son. In California, there was another group of about 30 individuals who had no evidence of Indian ancestry, tribal

continuity, or any organic relationship to each other. Clearly these are petitioners that will never meet the standards for being acknowledged as an Indian tribe. Yet, as the regulations are now written, anyone can become a petitioner, simply by submitting a letter of intent to petition. A one-paragraph letter is all that is required; no substantiating evidence or additional information needs to be submitted.

However the Government chooses to deal with the issue of tribal acknowledgment in the future, whether through the current regulatory process or through a Presidential Commission like that proposed in the bill under consideration at today's hearing, it would seem to be in the best interest of Indian Country, the Government, and interested parties, to remove groups like those mentioned above from the acknowledgment process. In other words, a screening process should be established for making a first cut on whether or not the groups that are requesting petitioner status have any chance at all of meeting the standards as set forth in the seven criteria. This might involve requiring applicants for petitioner status to submit their membership list (as defined in the regulations), and/or some other information and evidence regarding the history of their group when they submit their initial request for petitioner status. To prevent an appearance of a conflict of interest for the OFA, perhaps these initial determinations should be made by an independent panel of experts.

A provision like this was made in the 1994 revised regulations, which allowed for petitioners to receive an expedited negative proposed finding, if it were determined that they had not provided acceptable evidence of Indian ancestry, and were unlikely to be able to do so. This provision in the 1994 revised regulations has largely been unused, but I believe the OFA, or the Commission, should reconsider its usefulness. Such an expedited review would cut down on the amount of time the OFA's researchers would need to spend evaluating the more spurious or weak petitions and allow them to focus their time and effort on the more substantial cases.

I view the problem of too many petitioners and not enough resources to evaluate them that has resulted from the current administrative process as a failure, not on the part of the researchers at OFA, but on the part of both the Legislative and Executive Branches. The Executive did not plan well or adjust to changing realities as the number of petitioners increased beyond its ability to respond to them, and the Legislative failed to appropriate enough resources (money and personnel) to get the job done. I remember how difficult it was for our Branch Chief to give testimony in Congress about the acknowledgment process, primarily to respond to concerns about why the process was moving so slowly. Her superiors at the BIA always told her that **she could not ask for, or even imply the need for, additional money for the acknowledgment program**. The one investment that could have made a difference in the speed with which petitions were resolved was more money to hire an adequate number of researchers and support staff, and to provide more technical assistance to petitioners and interested parties. Even when asked directly by Members of Congress if the BAR needed more funding **she was not allowed to reply in the affirmative**. I do not know if the OFA's Director is still under instructions not to be direct about the need for more resources, but it is something the Congress should be sensitive to as it determines what to do next.

Not only was the Branch Chief told she could not request more funding, but we were bucking a general trend in Government during the 1990s, under the banner of "Reinventing Government." When I first arrived at the BAR in 1993, it quickly became apparent to me that we were not making adequate headway with the cases that we were supposed to be resolving. On paper, we had three research teams (each with an anthropologist, historian, and genealogist), three support staff members, and a Branch Chief. In reality, we usually only had two teams, one support staff person, and a Branch Chief, with two or three positions going unfilled at any given time. The Executive Branch decided to downsize the Federal bureaucracy several times, and during that process, the first staff positions that we lost were those that were not actually filled. Then, through attrition, we lost other positions that were vacated through resignations, retirement, and transfers, etc. We were made to feel thankful that we did not suffer even greater reductions in force. In some ways we were thankful: the BIAs Central Office staff was cut by 50 percent, overall, while our office only lost 30 percent of its staff positions. After I left in 1999, the OFA spent the next several years trying to regain those downsized researcher and support staff positions, and I think they may now have four full research teams, and they have increased the number of support staff.

Given all of these ups and downs, it is amazing the OFA has accomplished as much as it has. One can point to a slight increase in productivity in regard to the number of cases resolved by the OFA during the first seven years of the new millennium (See Table I), when compared to the 1990s. Still, this is not enough. It is true that a journey of a thousand miles begins with one step. But that is no real consolation when each time one step is taken, another thousand mile stretch is added to the end of the journey. This would seem to be a good analogy for the OFA: running as fast as they can, they are not really making adequate progress in accomplishing their overall mission; and, in fact, they are losing ground as the mission continues to increase in scope, as new petitioners are regularly added tot he process.

All participants in the petition review process deserve a timely resolution of these petitions. I believe it would be in the best interest of Indian Country, the Government, and other participants in the Federal acknowledgment process to provide a sunset clause, bringing the process to a close after the passage of a specific term of years, and I am pleased that H.R. 2837 calls for one. As I understand the provisions of the bill, petitioners would be given a maximum of eight years to submit a documented petition, once the Commission begins to hold meetings. Then the Commission would have four years to complete its review and make decisions on all of the remaining, pending cases. Generally, I think that the time frames called for in the bill are unrealistically short. More than likely, it will take 20 years to complete reviewing and ruling on all of the petitions that have yet to be submitted.

As a matter of analysis, to help determine if this bill should be passed or if the current process should be revised, the Committee may use the Sunset Clause as a frame of reference for a cost-benefit analysis. Rather than explain what it has done to try and speed up the process, the OFA should be called on to provide a plan for what it needs to

complete its mission, fully and competently, in 20 years, including changes they view as necessary or desirable and the amount of money and personnel. It may be more cost-effective to carry on with the current process, with Congress instituting a sunset clause by a passing a law for that purpose. However, if the OFA responds that it cannot possibly complete its mission in 20 years, or if its estimate is cost prohibitive, then perhaps it is time to transfer the process to a commission or some other venue.

A sunset clause will generate the need for more resources, on several fronts. The OFA (or the Presidential Commission) will need additional personnel to become more proactive in providing more technical assistance to petitioners. Additionally, petitioners will need to have funds to help them complete their documented petitions. In spite of the propaganda of some opponents of the acknowledgment of more tribes, there are still some petitioners whose cases have merit, yet they do not have adequate funding to put together an adequate documented petition. For that reason, I am pleased to see that H.R. 2837 calls for the restoration of funding for status clarification grants through ANA. Like many of my scholarly colleagues, I have chosen to do the best I can to work for some of those petitioners whose cases have merit but are not in a position to pay for my services. I feel it would be a tragedy for an Indian group to have their petition declined simply because they lacked the resources to hire professional researchers and document an adequate petition. Yet, I know that working for them on a pro bono basis, they are not getting the attention and time from me that they rightfully deserve. In my opinion, it would be a great service to Indian Country for Congress to restore this funding whether or not the Indian Recognition Commission bill is passed. I do not know why the funding for those grants was discontinued, but if there were problems with the way the program was administered, the problems should be addressed in a constructive manner, rather than by punitively cutting off the funds completely.

The Reasonableness of OFA Decisions

Petitioners as well as interested parties to the acknowledgment process not only deserve timely decisions, but reasonable ones, as well. Some might object that what is reasonable to one scholar or attorney might be unreasonable to another. Still, there are some common sense standards that could strengthen the outcomes of acknowledgment cases through a process of independent peer review. Some of the common sense standards include the following:

1). applying the scholarly standards of the disciplines used to evaluate petitions;

2). ensuring the decisions are consistent, both internally and across cases;

3). adhering to the evidentiary standard called for in the current regulations, which is the "reasonable likelihood of the validity of the facts;" and,

4). taking into consideration historical circumstances of each petitioning group and the kinds of evidence available for each case for various historical time periods;

In my view each of these standards has been violated in recent OFA decisions, and I believe this could have been avoided had there been an independent peer review of the decisions, either during active consideration of the petitions or during IBIA appeals of OFA decisions, or both. Let me provide an example of each of these in turn:

1). The 1994 revised regulations for tribal acknowledgment provided for a "sufficient" level of evidence for demonstrating both criteria (b) and (c), by showing that the petitioner's members married each other at a rate of 50 percent or higher. While the OFA initially agreed with the method I used for calculating the marriage rate, it reversed itself upon appeal without a reasonable explanation and in spite of an overwhelming demonstration, in the form of an extensive literature review, that I had used the method advocated by every social scientist who ever wrote explicitly on the matter.

2). When discussing the issue of maintaining tribal relations as it relates to tribal membership, the OFA advised during a technical assistance meeting that their basic principle was that if a family, or part of a family, could not be demonstrated by evidence to have participated in tribal affairs for more than one generation, then that family, or portion of that family, would be considered to have left tribal relations and would not be eligible for membership in the modern tribe.

In another case, I used this principle, when calculating tribal residence and marriage patterns, to eliminate from consideration tribal descendants for whom there was no evidence that they had been involved in tribal affairs for more than one generation. Many of these individuals had married outside of the Tribe and there was no evidence that they had continued to live in tribal relations with the petitioning group. I saw no point in including them in the calculations, since the point of the research is to discuss the behavior of the petitioning group's members. However, the OFA decided that such individuals should be included in the calculations, even though there was no evidence they were still in tribal relations or that they continued to be members of the petitioning group.

The inner contradiction here, is that when trying to describe the breadth of an Indian community at various points in time, one cannot include as tribal members individuals for whom there is no evidence of tribal activity for more than one generation. Yet, when calculating residency or marriage rates, the OFA insists on including individual descendants who have moved away or married out of the Tribe (factors that can be counted against a petitioner), even when there is no evidence that they have continued to participate in tribal affairs for more than a generation.

3). In the research I did for one petitioner, I calculated the marriage rate for the Tribe's members from 1800 to 1900. The evidence showed that the petitioner's members married each other at a rate of 50 percent or more from 1800 to 1820, and from 1850 to 1870, which was sufficient evidence that the petitioner met criteria (b) and (c) for those decades. But the OFA concluded that the Tribe did not meet (b) and (c) based on this

evidence during the 1830s and 1840s. This indicates to me a failure to apply the stated, regulatory standard of the "reasonable likelihood of the validity of the facts." I would be happy to have an independent peer review team consider the following: Is it reasonably likely that the Tribe continued to exist as a tribal political entity during the 1830s and 1840s, or is it more reasonably likely that the Tribe ceased to exist for twenty years and then suddenly came back into existence from 1850 to 1870?

4). The OFA failed to accept Colonial/State recognition of tribes as an equivalent or reasonable substitute to Federal recognition, even though that recognition was shown to be continuous from first contact to the present, was substantive (it dealt with matters of significance, the same exact matters that the Federal government managed for federally recognized tribes); primary among the issues was the trust management by the State of the Tribe's Reservation, and the application of resources generated from the Reservation to the improvement of the lives of tribal members.

Neither the current OFA process and budget, nor the Indian Recognition Commission bill provide for independent peer review of decisions, and I think that is a serious shortcoming in both processes. An independent peer review team would best include a representative of each of the three fields used to evaluate petitions, as well as an attorney familiar with the basic issues involved in tribal recognition. Before it passes out of this Committee, H.R. 2837 should be revised to provide for independent peer review, somewhere between the final adjudication by the Commissioners and the appeal of the decision to Federal Court.

Additional Comments on H.R. 2837

It raises the possibility of increased politicization of acknowledgment decisions. Political pressure has always been present, and may have become more effective in recent years. These cases should be decided primarily on their merits. Acknowledgment should not be granted or denied based on a political favor or whim.

The bill does not call for a specific budget amount. The only amount specifically called for is the salaries of the Commissioners themselves. That makes it difficult to know if the bill is a reasonable or better alternative to the process that is already in place.

There seems to be no specific provision for professional staff to review the petitions. Is it the intention of the bill that the Commissioners themselves will read all of the materials in each petition, make a judgment on the same, and then write up their own opinion? That does not seem realistic to me. There should also be in-house counsel for the Commission, to advise the Commissioners on legal matters, including the legal sufficiency of the decisions rendered.

The qualifications of the Commissioners are not specified. Indian ancestry or tribal membership does not in and of itself provide a guarantee of impartiality. Some of the greatest opponents of the acknowledgment of more tribes can be found among federally

recognized tribes, even those recently recognized through the OFA process. Without some background in one of the professions currently employed in evaluating the petitions (anthropology, history, and genealogy), the Commissioners may lack the expertise to determine if the information they have been presented in a petition is valid, truthful, and accurate.

Criteria (b) and (c) should not only focus on 1900 to the present, for at least two reasons. First, it does not in any way address the issue of continuity with a historical tribe or tribes that have combined and functioned as a single autonomous entity. Second, the period from 1900 to 1930 is one of the most difficult periods for some petitioners to produce evidence of community and political authority. For them to begin with 1900 might be to put them in a position of discussing their history by starting with what may appear to be a weak evidentiary period. Stronger evidence may be found for some petitioners in the 1700s and 1800s, and could be used to compensate for weaker evidence for the brief period during the early 1900s (when evidence is sometimes weak or lacking).

Table I
Summary of the 40 Cases Resolved by the OFA
(by decade)

	Outcome		
Decade	Positive	Negative	Total
1980s	7	11	18
1990s	7	3	10
2000-2007*	2	10	12
Total	16	24	40

*The statistics for this decade are, as yet, incomplete, the data having been compiled by the OFA in February 2007.