

**TESTIMONY OF THE NATIONAL CONGRESS OF AMERICAN INDIANS
ON
FIXING THE FEDERAL ACKNOWLEDGMENT PROCESS**

**HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INDIAN, INSULAR & ALASKA NATIVE AFFAIRS
APRIL 22, 2015**

On behalf of the National Congress of American Indians, thank you for the opportunity to discuss this central issue in the relationship between tribes and the federal government. My name is Brian Cladoosby and I am President of the National Congress of American Indians. I have served as a leader in Indian Country for thirty years, including fifteen years as Chairman of my tribe.

NCAI has always had a balanced position on federal recognition. Indian tribes are protective of their status as sovereigns, and there have never been enough federal resources to meet the trust responsibilities to those tribes who are currently recognized. NCAI certainly does not support the creation of new Indian tribes, and does not believe that the proposed rule would allow for this.

But the leadership of NCAI has always known that Indian tribes exist who have never been recognized by the federal government and should be. That is the purpose of Interior's acknowledgement process originally created in 1978. This process has deteriorated over the decades since the regulations were adopted. It fails even the simplest metric: time. As the Committee is aware, the most recent federal acknowledgment decisions have been pending for thirty-five years. Such delays are the norm. NCAI strongly supports the revisions to the federal acknowledgment regulations because they address a basic need for efficiency, to quickly issue denials to applications that lack merit and to focus on legitimate applications.

In recent years significant concerns have also been raised when actions during the acknowledgment process created the appearance that political forces influenced the decisions. NCAI and its members are committed to a fair and equitable process that results in a timely determination. The proposed rule creates an avenue for appeal to an Administrative Law Judge that should help in addressing concerns about fairness.

While the proposed rule will improve the process, the fundamental standards remain the same. The acknowledgement process is intended to recognize those tribes that have existed since historic times as living political and cultural groups, and to deny recognition to groups that have not. The NCAI membership has supported the proposed changes through **NCAI Resolution TUL-13-002, Supporting the Bureau of Indian Affairs Proposed Reform of the Federal Recognition Process**, which I have attached to my testimony.

Historical Background on Federal Recognition of Indian Tribes

The first federal-tribal relations were created through treaties under the U.S. Constitution. Many tribes, however, never entered a treaty with the United States. These tribes were either too peaceful to be considered a military threat, too small or isolated to be noticed, or possessed nothing that the United States desired. Other tribes simply refused to enter into a treaty with the United States. By 1871 treaty-making was replaced by the making of agreements, and the making of agreements ceased in practice by 1913. These methods of establishing recognition were thus closed to many tribes. The Commissioner of Indian Affairs foresaw trouble when he wrote in 1872:

This action of Congress...presents questions of considerable interest and much difficulty, viz: What is to become of the rights of the Indians to the soil over portions of territory which had not been covered by treaties at the time Congress put an end to the treaty system? What substitute is to be provided for that system, with all its absurdities and abuses: How are Indians, never yet treated with, but having in every way as good and complete rights to portions of our territory as had the Cherokees, Creek, Choctaw and Chickasaws, for instance, to the soil of Georgia, Alabama and Mississippi, to establish their rights?¹

The process of federal recognition was altered by the passage of the Indian Reorganization Act in 1934. For almost fifty years after the Indian Reorganization Act (IRA), the Bureau of Indian Affairs (BIA) employed an informal acknowledgement process based on the ratification of tribal constitutions. A tribe would submit an IRA constitution to the Secretary of the Interior. If the Secretary approved the constitution, that approval constituted federal acknowledgement of the tribe. For years, the Secretary based the decision on criteria listed in Felix S. Cohen's *Handbook of Federal Indian Law*. However, the factors listed in the Handbook were not considered exhaustive. By the 1970s, the Interior Solicitor indicated he did not think the Handbook factors were adequate, and he was concerned that the "Department ha[d] no established procedures for making the recognition determination."²

NCAI and Federal Acknowledgement

As tribal applications increased during the 1970s, NCAI called a special convention of its members to discuss federal acknowledgement. It was a controversial issue, but the tribal leaders worked through it and came up with a united position. Our members expressed their support for the establishment of federal standards and an accountable decision making process. They believed that a tribe should demonstrate a continuous history of tribal relations in order to receive federal acknowledgement. The principles articulated at

¹ Annual Report of the Commissioner of Indian Affairs, 1872, quoted in the Final Report of the American Indian Policy Review Commission, p. 466.

² Letter from Interior Solicitor Kent Frizell (Feb. 26, 1975).

that convention developed into the current federal acknowledgement process that is codified at 25 C.F.R. Part 83.³

At the NCAI conference in 1978, the BIA indicated it would work quickly to resolve applications for federal acknowledgment. “We envision that we will have somewhere around 150 applicants and depending on the staff that's assigned to the project, we estimate about four years to do the bulk of the work...”⁴

Today it is 37 years later and the BIA has resolved only 51 applications. Thirty-four have been denied and only 17 granted. The most recent decisions have been on applications that were pending for more than thirty-five years.

The documentation required also adds to the delay and raises questions about the acknowledgement process. The number and scope of the documentation requirements place an untenable burden on tribes attempting to engage in good faith with the Secretary. These requests defy the historical and cultural realities of tribal existence over the last centuries. They appear to change with each passing year.

Most troublingly, there are significant questions about the fairness and integrity of the process. In recent years, significant concerns have been raised among our members and the public at large when actions during the acknowledgment process created the appearance that political forces shaped the nature of the process and influenced the outcome of acknowledgement decisions.

The profound importance of federal acknowledgement makes the problems throughout the acknowledgment process all the more pressing. We urge you to support a fair and equitable acknowledgment process that ensures prompt action based on impartial criteria.

NCAI's position on federal acknowledgement remains unchanged since its formative convention on the issue over thirty years ago. NCAI and its members are committed to high standards for federal acknowledgement, but also a fair and equitable process free of political considerations that results in a timely determination on each application for federal acknowledgement.

We continue to believe the central question in federal acknowledgement is whether the tribe has maintained tribal relations from historic times. All inquiries in the process should be targeted to answering this narrow question. The inquiry should not be so broad that the acknowledgement process functionally closes the door on deserving tribes by requiring an impossibly large amount of evidence of disparate activities over vast

³ For an in depth discussion, see “An Historical Perspective on the Issue of Federal Recognition and Non-Recognition,” Institute for the Development of Indian Law, Prepared for the National Congress of American Indians in conjunction with the NCAI Conference on Federal Recognition, March 28-30, 1978.

⁴ Quote from the Director of the Bureau of Acknowledgement and Recognition, Bud Shepard, in the transcript for the NCAI Conference on Federal Recognition, March 28, 1978.

stretches of time. The process should include consideration of the historical and cultural realities informing each tribe's relationship with the federal government.

NCAI urges the Committee to support reforming the process to ensure timely, transparent, and fair consideration of each application.

Reconsideration and Third Party Veto

The proposed regulation will allow those applicants who were previously denied to resubmit their applications under the revised rules. Because the standards in the rule are unchanged and only the procedures are improved, NCAI supports this change. Those tribes who were denied because of undue political influence should have another chance.

Notwithstanding the proposed change, the Department would also allow states and local governments to decide whether tribal nations can re-petition for recognition, and by doing so, the Department has given states and others a veto over federal decision-making. For example, the Eastern Pequot Tribal Nation would need to obtain the consent of the State of Connecticut and each of twenty-nine towns simply to be allowed to re-petition for recognition under the proposed regulations. Delegating such authority to states and others is an abdication of the Department's trust responsibility for tribal nations and creates a dangerous precedent which empowers third parties to interfere in the exercise of the Department's trust responsibility. NCAI opposes the third party veto pursuant to NCAI Resolution ATL-14-012.

Conclusion

The current federal acknowledgement process is broken. Despite the best intentions of those that created the process and those that currently administer it, the process simply does not work. It subjects tribes to unconscionably long delays and unreasonable documentary requests. It establishes a seemingly objective list of criteria but provides no guarantees of objectivity or fairness in their application. These problems cause incalculable harm. The length of the process leaves tribes suspended in limbo, unable to guarantee services to their members or to prove to state and local governments that the federal government recognizes the tribe's sovereignty. The lack of transparency casts doubt on the federal government's willingness to faithfully perform its trust responsibilities. And the increasing demands on tribes in the process inflict hundreds of thousands of dollars of unnecessary costs every year.

NCAI supports the procedural amendments to fix these problems, and supports the maintenance of very high standards for federal acknowledgment. We are grateful that you have devoted the time to consider this pressing issue, and we thank you for your diligent efforts on behalf of Indian country on this and so many other issues.



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #TUL-13-002

TITLE: Supporting the Bureau of Indian Affairs Proposed Reform of the Federal Recognition Process

EXECUTIVE COMMITTEE

PRESIDENT
Brian Cladoosby
Swinomish Tribe

FIRST VICE-PRESIDENT
Michael Finley
Colville Tribes

RECORDING SECRETARY
Robert Shepherd
Sisseton Wahpeton

TREASURER
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Colorado River Indian Tribes

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Native Village of Tanacross

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S. Joe Crittenden
Cherokee Nation

GREAT PLAINS
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Spirit Lake Nation

MIDWEST
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NORTHEAST
Randy Noka
Narragansett Tribe

NORTHWEST
Fawn Sharp
Quinault Indian Nation

PACIFIC
Rosemary Morillo
Soboba Band of Luiseno Indians

ROCKY MOUNTAIN
Ivan Posey
Shoshone Tribe

SOUTHEAST
Ron Richardson
Haliwa-Saponi Indian Tribe

SOUTHERN PLAINS
Steven Smith
Kiowa Tribe

SOUTHWEST
Manuel Heart
Ute Mountain Tribe

WESTERN
Arlan Melendez
Reno Sparks Indian Colony

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, during the 2012 Annual Conference of the NCAI in Sacramento, California, Assistant Secretary - Indian Affairs Kevin Washburn addressed both the NCAI General Assembly stating that a major priority for the BIA was the reform of the Federal Acknowledgment Process; and

WHEREAS, on March 19, 2013, Assistant Secretary - Indian Affairs Kevin Washburn testified before the Senate Committee on Indian Affairs, acknowledging the criticism that the Federal Acknowledgment Process has become “expensive, inefficient, burdensome, intrusive, less than transparent and unpredictable,” further indicating that the Bureau of Indian Affairs (BIA) was “reviewing our existing regulations to consider ways to improve the process to address these criticisms”... and to promote transparency, timeliness, efficiency, and flexibility; and

WHEREAS, on June 21, 2013, Assistant Secretary - Indian Affairs Kevin Washburn announced a discussion draft of potential changes to the Department of the Interior’s “Part 83” process for federal acknowledgment of tribes, with the BIA subsequently conducting a series of consultations and hearings, receiving both oral and written testimony regarding that draft; and

WHEREAS, the NCAI was founded to protect and advance Tribal Governance and Tribal Sovereignty in direct response to termination and assimilation policies that the United States had and continues to sponsor; and

WHEREAS, the NCAI recently reaffirmed and broadened the eligibility for membership of tribes not yet listed by the BIA as federally recognized, thereby affirming that NCAI 's mission implicitly includes advancing the interest of those member tribes; and

WHEREAS, while the FAP established a framework to document justification of tribal status, recent proceedings have raised the threshold for documented petitions beyond the few hundred pages initially required to approaching get 200,000 pages, and then only after federal court intervention following 30 years of administrative delay; and

WHEREAS, the United Nations Declaration on the Rights of Indigenous Peoples states that Indigenous peoples have the right (inter alia) of self-determination, self-government in matters relating to their internal and local affairs [Article 4], the right to “distinct political, legal, economic, social and cultural institutions” [Article 5], “the right to the recognition, observance, and enforcement of treaties, agreements and other constructive arrangements concluded with the States or their successors and to have States honour and respect such treaties agreements and other constructive arrangements” [Article 36] and that States shall “take the appropriate measures, including legislative measures, to achieve the ends of this Declaration” [Article 38]; and

WHEREAS, the August 30, 2012 addendum on the situation of indigenous peoples in the United States of America in the Report of the Special Rapporteur, James Anaya, on the rights of indigenous peoples to the United Nations General Assembly mentions the inequities of the federal acknowledgment process and how it has left many tribes “especially disadvantaged” and reports the opinion that “it is not a system that is working under any stretch of the imagination;” and

WHEREAS, the proposed reform is consistent with NCAI Resolution # PHX-08-055 “NCAI Policy on Federal Recognition of Indian Tribes,” which cited the inequities of the Federal Acknowledgment Process (FAP), asserting that the FAP has “severely deteriorated since its beginning, with unreasonable decades-long delays in considering applications, irrational documentation requirements that defy historical and cultural realities, and [there are] legitimate questions about the fairness and integrity of the process” and that the FAP “has strayed from its original intentions, and has become a barrier to federal recognition, rather than a fair process for facilitating recognition of tribes who meet the criteria” and that the NCAI “strongly urges the Department of Interior to repair the administration of the FAP process to ensure that applications are considered in a reasonable time, that the documentation requirements for the criteria are fair and allow applicants to address gaps in the historical record, and that the integrity of the process is restored.”

NOW THEREFORE BE IT RESOLVED, that the NCAI supports the current process of the BIA to reform the “Part 83” federal acknowledgment process and that the NCAI supports, as a matter of long overdue justice and fairness, the BIA’s efforts to review, address, and modify the particular areas of the regulations that have wrongfully become an obstacle to the recognition of legitimate tribes; and

BE IT FURTHER RESOLVED, that the NCAI calls on the BIA to ensure that the reform of the Part 83 regulations results in a fair and just process for the acknowledgment of Indian tribes unjustly left off of the list of federally recognized tribes; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2013 Annual Session of the National Congress of American Indians, held at the Cox Business Center from October 13 - 18, 2013 in Tulsa, Oklahoma with a quorum present.



President

ATTEST:



Recording Secretary



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #ATL-14-012

TITLE: Support for Continued Federal Recognition of the Eastern Pequot Nation and Removal of Third Party Veto from Proposed Final Recognition Process

EXECUTIVE COMMITTEE

PRESIDENT
Brian Cladoosby
Swinomish Indian Tribal Community

FIRST VICE-PRESIDENT
Randy Noka
Narragansett Tribe

RECORDING SECRETARY
Robert Shepherd
Sisseton Walpeton Oyate

TREASURER
Dennis Welsh
Colorado River Indian Tribes

REGIONAL VICE-PRESIDENTS

ALASKA
Jerry Isaac
Tanana Chiefs Conference

EASTERN OKLAHOMA
S. Joe Crittenden
Cherokee Nation

GREAT PLAINS
Leander McDonald
Spirit Lake Tribe

MIDWEST
Aaron Payment
Sault Ste. Marie Tribe of Chippewa Indians

NORTHEAST
Lance Gumbs
Shinnecock Indian Nation

NORTHWEST
Fawn Sharp
Quinault Indian Nation

PACIFIC
Rosemary Morillo
Soboba Band of Mission Indians

ROCKY MOUNTAIN
Ivan Posey
Eastern Shoshone Tribe

SOUTHEAST
Ron Richardson
Halula-Saponi Indian Tribe

SOUTHERN PLAINS
Stephen Smith
Kiowa Tribe of Oklahoma

SOUTHWEST
Manuel Heart
Ute Mountain Ute Tribe

WESTERN
Arlan Melendez
Reno Sparks Indian Colony

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the NCAI supports the federal recognition process and supports the efforts of the Department of the Interior to make much needed changes to the regulations governing such process; and

WHEREAS, the Department took the step in the initial draft to allow those who meet the changed regulations to renew their request for recognition. This was necessary; otherwise, tribal nation who had not yet petitioned could be recognized under the amended regulations while tribal nations who also meet the requirements of the changed regulations would not be recognized; and

WHEREAS, notwithstanding the proposed change, the Department would now also allow certain states and local governments to decide whether tribal nations can re-petition for recognition, and by doing so, the Department has given states and others a veto over federal decision-making; For example, the Eastern Pequot Tribal Nation would need to obtain the consent of the State of Connecticut and each of twenty-nine towns simply to be allowed to repetition for recognition under the proposed regulations; and

WHEREAS, delegating such authority to states and others is an abdication of the Department's trust responsibility for tribal nations and creates a dangerous precedent which empowers third parties to interfere in the exercise of the Department's trust responsibility; and

WHEREAS, the United Nations Declaration of the Rights of Indigenous Peoples and the World Conference on Indigenous Peoples Outcome Document recognize the obligation of the nation states of the world to maintain a relationship with its Indigenous Peoples; and

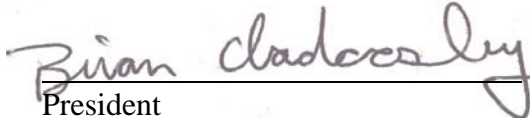
WHEREAS, NCAI further urges states and its representatives to recognize their legal, historical and political relations with the tribal nations whose tribal, social and political structures predate the creation of the United States and the establishment of the respective state governments and to engage in good faith dealings on issues of mutual concern and to refrain from using the Department's political and regulatory processes and the courts to delay legitimate federal recognition.

NOW THEREFORE BE IT RESOLVED, that NCAI urges the Department to protect tribal sovereignty, tribal governmental status, self-determination, health and welfare and therefore remove the third party veto provision and allow all tribal nations an equal opportunity to apply for recognition under reformed federal regulations; and

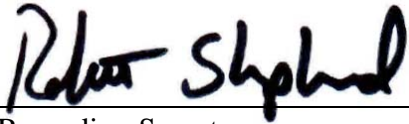
BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2014 Annual Session of the National Congress of American Indians, held at the Hyatt Regency Atlanta, October 26-31, 2014 in Atlanta, Georgia, with a quorum present.


President

ATTEST:


Recording Secretary



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #PHX-08-055

TITLE: NCAI Policy on Federal Recognition of Indian Tribes

EXECUTIVE COMMITTEE

PRESIDENT
Joe A. Garcia
*Ohkay Owingeh
(Pueblo of San Juan)*

FIRST VICE-PRESIDENT
Jefferson Keel
Chickasaw Nation

RECORDING SECRETARY
W. Ron Allen
Jamestown S'Klallam Tribe

TREASURER
gaiashkibos
*Lac Court Oreilles Band of Lake
Superior Chippewa Indians*

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Mike Williams
Yupiaq

EASTERN OKLAHOMA
Joe Grayson, Jr.
Cherokee Nation

GREAT PLAINS
Ron His Horse Is Thunder
Standing Rock Sioux Tribe

MIDWEST
Robert Chicks
Stockbridge-Munsee

NORTHEAST
Randy Noka
Narragansett

NORTHWEST
Ernie Stensgar
Coeur d'Alene Tribe

PACIFIC
Juana Majel
Pauma-Yuima Band of Mission Indians

ROCKY MOUNTAIN
Willie Sharp, Jr.
Blackfeet Tribe

SOUTHEAST
Archie Lynch
Haliwa-Saponi

SOUTHERN PLAINS
Darrell Flyingman
Cheyenne-Arapaho Tribes

SOUTHWEST
Derek Valdo
Pueblo of Acoma

WESTERN
Alvin Moyle
Fallon Paiute-Shoshone

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, federal recognition is of fundamental importance for tribes who are seeking recognition to protect and serve their people, and for the recognized tribes that depend on federal support of tribal sovereignty, treaty rights, and the trust responsibility; and

WHEREAS, NCAI has long supported federal recognition for all Indian tribes that have maintained tribal relations from historical times; and

WHEREAS, in the mid-1970's NCAI member tribes supported the establishment of federal standards and an accountable decision making process for official recognition of tribal governments, which developed into the current Federal Acknowledgement Process (FAP) that is codified at 25 C.F.R. Part 83; and

WHEREAS, the FAP process has severely deteriorated since its beginning, with unreasonable decades-long delays in considering applications, irrational documentation requirements that defy historical and cultural realities, and legitimate questions about the fairness and integrity of the process; and

WHEREAS, the FAP process has strayed from its original intentions, and has become a barrier to federal recognition, rather than a fair process for facilitating recognition of tribes who meet the criteria; and

WHEREAS, as a result of the FAP's failings, in recent years more and more unrecognized tribes have come to NCAI seeking resolutions to support their federal recognition; and

WHEREAS, NCAI strongly supports federal recognition of all Indian tribes that have maintained tribal relations from historical times, however the NCAI resolutions process is not equipped to investigate and make determinations on historical and genealogical questions of tribal status, and the consideration of these issues often leads to intra-tribal and inter-tribal conflicts; and

WHEREAS, NCAI needs a clear policy on federal recognition in order to advocate for improvements to the FAP process, to avoid intra-tribal and inter-tribal conflicts, to ensure thorough and respectful investigation of tribal status consistent with the importance of federal recognition, and to be able to communicate with Members of Congress about NCAI's position.

NOW THEREFORE BE IT RESOLVED, NCAI strongly urges the Department of Interior to repair the administration of the FAP process to ensure that applications are considered in a reasonable time, that the documentation requirements for the criteria are fair and allow applicants to address gaps in the historical record, and that the integrity of the process is restored; and

BE IT FURTHER RESOLVED, that the NCAI urges Congress to exercise oversight on the FAP process and to appropriate sufficient funds to carry out the objectives of this resolution; and

BE IT FURTHER RESOLVED, that the NCAI strongly supports federal recognition of all Indian tribes that have maintained tribal relations from historical times, their right to timely and fair consideration of their applications under the FAP process, and their right to seek alternative means for recognition of their status as Indian tribes; and

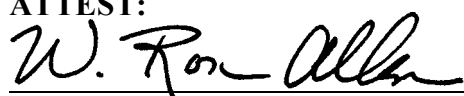
BE IT FINALLY RESOLVED, that the NCAI hereby amends the NCAI Standing Rules of Order Section XIII to include the following provision: "A resolution that supports the federal acknowledgement or recognition of an unrecognized tribe shall require one co-sponsoring NCAI member tribe *and must be presented at a prior NCAI Annual, Midyear, or Executive Council Session.*" Such resolutions are subject to all NCAI standing rules including rules governing conflicts.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2008 Annual Session of the National Congress of American Indians, held at the Phoenix Convention Center in Phoenix, Arizona on October 19-24, 2008, with a quorum present.



 President

ATTEST:


 Recording Secretary