Committee on Resources
Full Committee

Witness Statement

Hearing on H.R. 361 - The Indian Federal Recognition

Administrative Procedures Act of 1998

15 September 1999

Statement Submitted on Behalf of the Mashpee Wampanoag

Indian Tribal Council, the United Houma Nation, the

Shinnecock Indian Nation, the Pamunkey Tribe, and the

Miami Nation of Indiana by the

Native American Rights Fund

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The Native American Rights Fund represents the Mashpee Wampanoag Tribe, the United Houma Nation, the Shinnecock Indian Nation, the Pamunkey Tribe, and the Miami Nation of Indiana in recognition matters. We appreciate the opportunity to submit testimony on H.R. 361.

H.R. 361 is a response to the various problems that have been identified in the acknowledgment process established and presently used by the Bureau of Indian Affairs. We support the effort to deal with those problems.

RECOGNITION

When the United States establishes a government-to-government relationship with an Indian tribe, it is said to have recognized or acknowledged the tribe. Although the federal government recognized most of the presently federally-recognized tribes in historic times, it continues to acknowledge tribes to the present day. Under current law, both Congress and the Department of the Interior (Department or DOI) have authority to recognize tribes.

RECOGNITION PRACTICE

1. Congress

Congress recognizes tribes through special legislation. *See e.g.*, Act of October 10, 1980, 94 Stat. 1785 (Maliseet Tribe of Maine); Act of October 18, 1983, 97 Stat. 851 (Mashantucket Pequot Tribe of Connecticut), Act of November 26, 1991, 105 Stat. 1143 (Aroostook Band of Micmacs); Act of September 21, 1994, 108 Stat. 2156 (Little Traverse Bands of Odawa Indians and the Little River Band of Ottawa). Congress reviews and acts on requests for special recognition legislation on a case-by-case basis.

2. Department of the Interior

Before 1978, DOI made acknowledgment decisions on an ad hoc basis using the criteria "roughly summarized" by Assistant Solicitor Felix S. Cohen in his *Handbook of Federal Indian Law* (1942 ed.) at pp. 268-72. In 1978, the Department issued acknowledgment regulations in an attempt to "standardize" the process. Both the process and the criteria established in the regulations were different than those used before 1978.

A. The Acknowledgment Regulations

In the 1970's, various controversies involving nonrecognized tribes[(1)], including an increase in the number of requests for recognition[(2)], led the Department to review its acknowledgment practice. That in turn led to the promulgation of the 1978 acknowledgment regulations. 43 Fed. Reg. 39361 (Sept. 5, 1978) *presently codified at* 25 C.F.R. Part 83.[(3)] In publishing the regulations, the government explained that prior to 1978 requests for acknowledgment were decided on a "case-by-case basis at the discretion of the Secretary." 43 Fed. Reg. at 39361. The 1978 regulations were an attempt to develop "procedures to enable the Department to take a uniform approach" in the evaluation of the petitions. *Id.*

Under the 1978 regulations, groups submit petitions for recognition to the Assistant Secretary for Indian Affairs. 25 C.F.R. §83.4. The petition must demonstrate or provide all of the following "in order for tribal existence to be acknowledged": (a) identification of the petition as Indian from historical times; (b) community from historical times; (c) political influence from historical times; (d) petitioner's governing document; (e) a list of members; (f) that petitioner's membership is not composed principally of persons who are not members of any other North American Indian tribe; and (g) that petitioner was not terminated. 25 C.F.R. §83.7(a)-(g).

Upon receipt of a petition, the Assistant Secretary causes a "review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe." 25 C.F.R. §83.9(a). Most of the technical review is carried out by the Branch of Acknowledgment and Research (BAR). The initial review is for "obvious deficiencies". 25 C.F.R. §83.9(b). Where "obvious deficiencies" or "significant omissions" are found, petitioners are given the opportunity to respond. 25 C.F.R. § 83.9(b). The next step is active consideration of the petition by BAR. 25 C.F.R. §83.9(d). The Assistant Secretary then issues proposed findings for or against recognition. 25 C.F.R. §83.9(f). Petitioners have the opportunity to respond to the proposed findings. 25 C.F.R. §83.9(g). After consideration of responses to the proposed findings, the Assistant Secretary makes a final determination. 25 C.F.R. §83.9(h). The Assistant Secretary's final determination is final unless the Secretary of the Interior requests reconsideration. 25 C.F.R. §83.10(a).

B. Practice under the Acknowledgment Regulations

The process used to consider petitions under the 1978 regulations is not as simple as the regulations suggest. In response to discovery requests in *Miami Nation of Indiana v. Babbitt*, No. S92-586M (N.D.Ind. filed 1992), the Department described the actual process used in processing petitions for recognition under the regulations. Petitions are assigned for evaluation to the BAR. BAR reviews the petitions, writes technical reports, and makes recommendations to the Assistant Secretary.

Once a petition is placed on active consideration, a three person team is assigned to evaluate it. *Miami*

Discovery Responses. The team consists of an anthropologist, a genealogist, and a historian. *Id*. Each member of the team evaluates the petition under the 25 C.F.R. Part 83 criteria and prepares a draft technical report. *Id*. Evaluation of the petition consists of verifying the evidence submitted by the petitioner, supplementing the evidence submitted where necessary, and weighing the evidence as to its applicability to the criteria. *Id*. The individual reports are cross-reviewed by each team member. *Id*. Preparation of the reports includes comparing the petition to past determinations and interpretations of the regulations. *Id*.

Following completion of the draft technical reports, there is an "extensive internal review, termed peer review". *Id*. Peer reviewers are other BAR professional staff not assigned to the case. The technical reports are reworked "until the professional staff as a group concludes that the report provides an adequate basis for recommendation to the Assistant Secretary." *Id*.

After review and editing by the BAR chief, the acknowledgment recommendations and reports are subject to legal review by the Solicitor's Office and Bureau of Indian Affairs line officials up to the Assistant Secretary. *Id*. If those officials require more information or clarification, BAR typically provides the information through meetings. *Id*. (4)

C. The 1994 Revisions to the Acknowledgment Regulations

In 1991, the Department proposed revisions to the 1978 regulations. 56 Fed. Reg. 47320 (Sept. 18, 1991). The revisions were not finalized until February 25, 1994. 59 Fed. Reg. 9280 (February 25, 1994) codified in 25 C.F.R. Part 83 (1994 ed.). In promulgating the revisions, the government stated;

None of the changes made in these final regulations will result in the acknowledgment of petitioners which would not have been acknowledged under the previously effective acknowledgment regulations. Neither will the changes result in the denial of petitioners which would have been acknowledged under the previous regulations.

59 Fed. Reg. at 9280.

The main changes made in the 1994 revisions are the following. Specific types of evidence that will be accepted to establish the two most troublesome criteria, community and political influence, are listed in 25 C.F.R. §83.7(b) and (c). A special provision for determining whether a group was previously recognized and the effect of previous recognition was added. *See* 25 C.F.R. §83.8.

PROBLEMS TO BE ADDRESSED BY H.R. 361

Over the years, a number of concerns have been expressed concerning the Department's recognition practice under the acknowledgment regulations. Even before the present Departmental process was established in 1978, there was doubt that the Department and its Bureau of Indian Affairs could deal fairly with applicants for recognition. In addition, practice before the Department and BAR has shown a number of weaknesses in the procedures used to review and determine petitions. Those concerns, along with concerns about some of the provisions of H.R. 361, and proposed solutions are set out below.

1. Independent Decision-Making

One of the fundamental issues in this area is who should make recognition decisions. Congress has the ultimate authority but DOI has interpreted the general grant of rulemaking in 25 U.S.C. §§2 and 9 to allow it

to do so as well. It was under those general statutes that the Department issued the existing acknowledgment regulations. The numerous oversight hearings on those regulations and the legislative attempts to change the Department's acknowledgment process have all indicated that it is questionable that DOI's Bureau of Indian Affairs, which manages the government's relationship with federally recognized tribes, can make an impartial decision on the recognition of "new" tribes.

In the years 1975 to 1977, the American Indian Policy Review Commission (AIPRC) conducted a review of "the historical and legal developments underlying the Indians' relationship with the Federal Government and ... the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians." *Final Report American Indian Policy Review Commission*, Cover Letter (May 17, 1977). The review included a study of the status of nonrecognized tribes and resulted in reports and recommendations concerning recognition policy. *Id*; Chapter Eleven; *Report on Terminated and Nonfederally Recognized Indians*, Task Force Ten AIPRC (October 1976). The AIPRC described the posture of DOI in making recognition decisions and expressed concern about the ability of the Department to deal fairly with nonrecognized tribes.

The second reason for Interior's reluctance to recognize tribes is largely political. In some areas, recognition might remove land from State taxation, bringing reverberations on Capitol Hill. There also is the problem of funding programs for these tribes.

Interior has denied services to some tribes solely on the grounds that there was only enough money for already-recognized tribes. ... Already-recognized tribes have accepted this 'small pie' theory and have presented Interior with another political problem: The recognized tribes do not want additions to the list if it means they will have difficulty getting the funds they need.

Final Report AIPRC at 476.

That concern has echoed in the various hearings on recognition that have been held since 1977. There is widespread apprehension that the Department, the Bureau of Indian Affairs, and BAR are subject to inappropriate political influence in making recognition decisions. *See e.g*. the Statement of Raymond D. Fogelson, Dep't of Anthropology, University of Chicago on *S.611 a Bill to Establish Administrative Procedures to Determine the Status of Certain Indian Groups Before the Senate Select Committee on Indian Affairs*, 101st Cong., 1st Sess. 177 (May 5, 1989) ("While I respect the individual conscientiousness, competence, and integrity of members of B.A.R., I believe that an office separate from B.I.A. will be more immune to possible allegations of conflicts of interests or to the potential influence of Bureau policy and attitudes. ... It seems to me that the B.I.A. has enough to do in administering Federal Indian programs and serving the needs of the Indian clientele without also assuming the additional role of gatekeeper."); Deposition of John A. Shapard, Jr., former chief of BAR, in *Greene v. Babbitt*, No. 89-00645-TSZ (W.D.Wash.) At p.33 ("there's an general, all-persuasive attitude throughout the bureau that they don't want anymore tribes"); *see also* the Statement of Allogan Slagle in *Oversight Hearing on Federal Acknowledgment Process Before the Senate Select Committee on Indian Affairs*, 100th Cong., 2nd Sess. 198 (May 26, 1988) ("No matter how fair the BIA/BAR staff attempt to be, and no matter how they try to see that their decisions reflect a common standard, the perception of many tribes is that there are inequities in the way that the requirements are enforced.")

Those concerns persist to this day and taint the existing DOI recognition process. We therefore strongly support Section 4 of H.R. 361 which would create an independent Commission to review and decide

petitions for recognition. The willingness of Congress to attempt to deal with this problem is heartening to those who have been in the recognition process or who are considering entering the process.

2. Hearing Process

Under the process established in the acknowledgment regulations, it is technically the Department's Assistant Secretary - Indian Affairs that makes recognition decisions. The BAR staff, however, do all the work of reviewing petitions, conducting independent research, and decision writing. That work takes a number of years and is, in large part, hidden from petitioners.

H.R. 361 makes a needed change from the DOI process. Formal hearings are provided in Sections 8 and 9. Such hearings will open the decision-making process giving petitioners a much better idea of what their obligations are and more confidence in the ultimate decision. Such hearings will also focus the examination of the Commission and the staff in a manner that is completely lacking in the present process.

H.R. 361 makes clear that the Commission itself will preside at both the preliminary and adjudicatory hearings. Under the DOI acknowledgment regulations, it is the Assistant Secretary - Indian Affairs that makes recognition decisions. But the Assistant Secretary is not substantially involved in any of the work that leads to those decisions. The BAR staff reviews petitions, does additional research, and writes the recommended decisions. The Assistant Secretary signs off on those decisions. Although there is no doubt that staff will be necessary to aid the Commission in making decisions, the Commission should be much more involved in decision-making than the Assistant Secretary. One way to accomplish that is to make clear that it is the Commission that presides at all hearings.

H.R. 361 additionally makes clear that records relied upon by the Commission will be made available in a timely manner to petitioners. The present Departmental process includes preliminary decisions to which petitioners respond. Our experience with BAR indicates that it is imperative to make clear that the Commission and its staff provide petitioners with the documents and other records relied upon in making the preliminary decision. In one case, DOI issued proposed findings on the United Houma Nation (UHN) petition in mid-December 1994. Under the acknowledgment regulations, UHN had 180 days to respond to the proposed findings. BAR only began making records relating to the proposed findings available to the Houma Nation's researchers within the last month under the available 180-days.

H.R. 361 is strengthened by that part of Section 9 that allows the cross-examination of Commission staff. Section 9 provides for cross-examination of Commission staff and the Commission is required to call staff to testify. All staff that worked on a preliminary determination and that prepared for the adjudicatory hearing should be required to testify and thus be available for cross-examination. The historical and anthropological determinations made on petitions for recognition are detailed and complex. They will likely be set out in lengthy reports. The only valid way to test those determinations is to allow petitioners to cross-examine their authors. In addition to giving petitioners an effective way to completely understand what the Commission and its staff has done, it will force the Commission and its staff to focus its attention in the adjudicatory hearing. In testimony on H.R. 4462, Karen Cantrell, an anthropologist and attorney who as worked as a contract anthropologist for BAR, expressed her views of needed changes in the recognition process.

Decisions reached in the Federal Acknowledgment Project will be more consistent and objective when petitioning groups can cross-examine experts and witnesses and review all research materials relied upon by decisionmakers. Cross-examination and review of research materials allows evidentiary facts and statements

to be tested for reliability.

Written Testimony of Karen Cantrell on H.R. 4462 and H.R. 2549 at p.3 (July 22, 1994) (emphasis added).

H.R. 361 also explains the precedential value of prior DOI recognition decisions and to make the records of those decisions readily available to petitioners. BAR has stated that it views its prior decisions as providing guidance to petitioners. It is very difficult, however, to get access to or copies of the records relating to those decisions. With the transfer of petitions to the Commission, the precedential value of BAR, and earlier Departmental decisions, should be explained. If those prior decisions are considered precedent, the records of those decisions should be made available to petitioners.

Finally, H.R. 361 clarifies language in Section 9 referring to the APA.

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1. In 1972 the Passamaquoddy Tribe of Maine sued the federal government. The Tribe wanted the federal government to file a land claim on its behalf under the Indian Nonintercourse Act, 25 U.S.C. §177, even though it was not then federally-recognized. *See Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). In the mid-1970's, a number of nonrecognized tribes attempted to assert treaty fishing rights in the *United States v. Washington* litigation. *See United States v. Washington*, 476 F.Supp. 1101 (W.D.Wash. 1979), *aff'd* 641 F.2d 1368 (9th Cir. 1981), *cert. denied* 454 U.S. 1143 (1982).

2. For example, the Stilliguamish Tribe requested recognition in 1974. When the Department of the Interior refused to act on the request, the Tribe filed suit. The federal district court in Washington, D.C. ordered the Department to make a decision on the request. *Stilliguamish v. Kleppe*, No. 75-1718 (Sept. 24, 1976). The Department recognized the Stilliguamish Tribe in October 1976.

3. The proposed acknowledgment regulations were first published for comment on June 16, 1977. 42 Fed. Reg. 30647. They were redrafted and published for comment a second time on June 1, 1978. 43 Fed. Reg.

23743. They were published in final on September 5, 1978. 4. In the *Miami Nation v. Babbitt* case, the Miami Nation challenged the 1978 acknowledgment regulations on their face. The Court ruled that the Department did not act arbitrarily and capriciously in promulgating those regulations. *Miami Nation v. Babbitt*, No. 92-CV-586RM, Order on Cross Motions for Summary Judgment (April 24, 1995). The Court found that DOI relied upon its general rulemaking authority contained in 25 U.S.C. §§2 and 9 in issuing the 1978 regulations. Because those statutes did not explicitly involve recognition, the Court reviewed the regulations under the extremely deferential standard of review set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Unable to substitute its judgment for DOI's, the Court simply could not make critical assessments of the regulations on their face (not as applied to the Miami Nation which is still in litigation). That is a far cry from Congress' purpose in introducing H.R. 361 - addressing the many problems that have been identified in the Department's acknowledgment process.

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