

Testimony of Michele Mitchell,**Attorney****on behalf of the****Native American Rights Fund****September 25, 2002****House Resources Committee on Indian Affairs**

Good morning, I thank the Committee for inviting me here today. My name is Michele Mitchell. I am a staff attorney with the Native American Rights Fund. The Native American Rights Fund (NARF) is a non-profit organization that has been providing legal representation and technical assistance to Indian Tribes, organizations and individuals nationwide since 1970. I am here today to provide testimony on HR 992, a bill that would authorize the Secretary of Interior to provide grants to local governments to assist them in participating in certain decisions related to Indian groups and Indian Tribes.

NARF strenuously opposes this bill. The principle defect, which pervades every aspect of the bill, is that it ignores more than two centuries of history and law that govern the relationship between the federal government and Indian Tribes.

Since the beginning of the Republic the federal government has had a government-to-government, trust relationship with the Indian Tribes. While at once recognizing the Indian Tribes as "distinctive political" entities, or sovereign governments, the United States government has guaranteed to protect the rights, property and existence of Indian Tribes. Indeed, the trust relationship or trust responsibility, has been described as "one of the primary cornerstones of Indian law." Felix S. Cohen, Handbook on Federal Indian Law, 122 (1982 ed.).

As stated in the Indian Policy Review Commission Final Report submitted to Congress in 1977:

"The Federal trust responsibility emanates from the unique relationship between the United States and Indians in which the Federal government undertook the obligation to insure the survival of Indian Tribes. It has its genesis in International Law, colonial and United States treaties, agreements, federal statutes and federal judicial decisions."

This bill directly contravenes that trust relationship.

This bill would provide funding to "local governments" in order to finance their opposition to acknowledgment and recognition of Tribes, applications to put land into trust on behalf of Tribes, land claims to recover land lost in violation of federal law, and any other "action or proposed action . . . likely to significantly affect the people represented by that local government." The bill does not appear to include Tribes among the "local governments" to which grants may be provided. If this is the case, it is our interpretation that the purpose and effect of the bill will be nothing more than to provide funding to non-Indian governments to oppose tribal governments. Even if the bill were adjusted to address this inequity, it would still be at odds with the government's trust relationship with Indian Tribes. A trustee simply does not fund opposition to its beneficiary. To make matters even worse, this money would likely come from money

that would otherwise go to fund Indian programs. In short, such actions would be at odds with the government's trust relationship with the Indian Tribes and the bill should be rejected on that basis alone.

However, NARF has additional concerns with respect to the bill's effects as set forth below.

Concerns Regarding Acknowledgment and Recognition Decisions

Numerous Indian tribes have survived intact as identifiable Indian Tribes, but are not federally recognized. Lack of federal recognition deprives the Tribes of their rightful government-to-government relationship with the federal government and the benefits and services which accompany that relationship. Federal recognition does not create new Tribes. It acknowledges that Tribes that have always existed as Tribes are entitled to the same government-to-government relationship with the United States as other, similarly-situated Tribes. It is a rigorous process, designed to eliminate political pressures on the process and to eliminate unfounded claims. The process is designed to allow federal recognition decisions to be made by experts based upon objective criteria. To provide funding for the politicization of the process is not in anyone's best interest.

Concerns Regarding Land Issues

The bill would also fund opposition to the process of taking land into trust. The process of taking land into trust is a remedy to attempt to overcome at least some of the effects of long discredited federal policies which resulted in the loss of 90 million acres of reservation land prior to 1934. While we recognize that the taking of land into trust would impact local governments by removing lands from the tax rolls, the federal government, rather than supporting opposition to the action, should address the problem directly by providing funding to lessen the impact of its actions. In fact, the federal government already provides funding in the area of education for states that are impacted by the existence of federal trust land within the state. For the federal government to impose obstacles to an already inadequate remedy for past federal actions resulting in the loss of land violates the federal trust responsibility to Tribes.

The same is true as to funding the fighting of land claims. These claims are brought to recover land lost because of the failure of the federal trustee to perform its obligation to protect Indian lands. Land claims are a right of action created by the dispossession of Indian lands in violation of federal law. It is a legal remedy for a legal wrong. The federal government, as the trustee of Indian Tribes, is obligated to support a tribe's valid land claim. Providing resources to support opposition to a valid land claim clearly violates that trust responsibility.

Concerns Regarding the Potential Breadth of the Legislation

The bill also provides grants for opposing other actions if the "Secretary determines that the action or proposed action is likely to significantly affect the people represented by that local government." This catchall covers virtually all of the cases involving tribe's interests. Tribes in the West fight for the water rights upon which their prospects for economic self-sufficiency depend. Tribes fight to exercise their sovereign right to jurisdiction and constantly must fight with local governments over such exercise. In Section (4), "other actions," is defined in terms that are so broad as to potentially encompass the funding of non-Indians to oppose and interfere with decisions relating to these tribal trust resources. Not only would the funding of such opposition violate the trust relationship, but as decisions regarding tribal trust resources are decisions made jointly by the federal government and tribal governments, it would also contravene principles of tribal self-government. This bill is an effort to provide funds to fight Indian rights on all fronts - actions unworthy of any trustee.

General Concerns

The bill is fraught with ambiguity. It does not define "participation," "action," or "local government." Does participation mean lobbying the Department of Interior for a negative acknowledgment decision? Does it mean challenging federal government decisions through litigation? Is a local government a county, a municipality, a state? What does it mean in the context of a land claim? Can each local government affected by a particular action participate in receiving grants under the proposed bill? What happens if one "local government" supports a Tribe's recognition bid and another "local government" opposes it; are both sides funded equally in order to ensure fair "participation"?

In addition, the proposed bill would add to an already existing atmosphere of animosity between some Indian Tribes and the communities near which they are located or of which they may be actual members. In the latter case, it finances local governments to fight on behalf of some of its citizens against the rights of others-an approach of doubtful validity in law. Further, we are unaware of, and the proponents of this bill have not indicated, any other circumstance where the federal government provides funding to support opposition to federal agency action of this kind.

Conclusion

H.R. 992 would essentially be funding non-Indian interests to fight against Indian rights of every nature. Providing such funding to local governments violates the federal government's trust responsibility to Indian Tribes. In many instances, the federal government's actions in violation of its trust responsibilities or failures to fulfill its trust obligations are the cause of the loss of valuable rights. Now, in addition to causing the harm to the Tribes, the trustee is proposing to fund those who would oppose attempts by Tribes to rectify the situation. That hardly seems like appropriate action for a trustee. Adding injury to insult, the money will likely come out of monies that would otherwise go to fund Indian programs.

The Native American Rights fund strongly opposes HR 992, as a violation of the trust responsibility of the federal government toward Indian Tribes and as an attempt by special interest groups to use the guise of participating in processes intended for the benefit of Tribes, to instead, fund opposition to Tribe's exercise of their legal rights.

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