

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

**UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS  
NOVEMBER 4, 2009**

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 Frank Ettawageshik and I am a member of the Little Traverse Bay Bands of Odawa Indians. I have served as a leader in Indian Country for twenty years, including fourteen years as Chairman of my tribe. I am also the Co-Chairman of the NCAI Federal Acknowledgement Task Force.

It is widely known that the federal acknowledgement process is badly broken and needs reform. But to understand how the flaws in the acknowledgement process cause so much harm, we must be clear about why the federal acknowledgement is critically important. Put simply, federal acknowledgement empowers tribal governments to provide the services and stability that their people need in order to maintain tribal culture and identity. The federal acknowledgement process is about nothing less than the cultural survival of the indigenous Nations to whom the United States owes a trust responsibility. The federal government does not create the existence of an Indian tribe. Tribes exist and have existed since time immemorial. The federal 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. When this process fails, the denial bars tribes from accessing resources necessary for their continued survival. Thus, the failures of the federal acknowledgement process must be called what they are – if the federal government fails to acknowledge a historic tribe it is a failure of the federal trust responsibility and contributes to the destruction of a tribal culture.

**Experiences with the Acknowledgment Process**

When I began serving in my tribal government, we were not a federally recognized tribe. We began the acknowledgment process while I was in office. We collected thousands of pages of documentary evidence that my tribe had existed historically and had continued to function, culturally and politically, as an Indian tribe. By the time we finished providing documentation, we had provided more than thirty boxes of evidence from every era since European contact. Despite this mountain of evidence, there was still no guarantee that we had satisfied the requirements. Every time we believed we had satisfied the requests for evidence, a different request for new evidence would arrive.

We continued our efforts to move forward in the acknowledgement process, but it soon became clear that there was little hope that the process would conclude at any foreseeable point in the future. We then channeled our efforts into the legislative arena. After House

and Senate review, Congress passed and the President signed Public Law 103-324 reaffirming our status as a recognized tribe.

As a chairman of the NCAI Federal Acknowledgement Task Force, I have worked with recognized and unrecognized tribes on navigating the acknowledgment process. They have told me about the burdens the process places on their tribes and the constant uncertainty that they face throughout the process as the requirements for acknowledgement shift from year to year and from tribe to tribe. They have told me about how the goal posts keep moving; leaving them just short of proving to the federal government that the tribe does, in fact, exist. In short, a process that was intended to provide a path to federal recognition has instead been corrupted into a process that seems to be focused on denying the existence of tribes.

My experiences as a leader of my tribe and as a leader of the Task Force have shown me the great harms caused by the acknowledgment process. The process is broken, and it is an active cause of injustice in the relationship between the federal government and the sovereign tribes throughout the country.

### **History of the Acknowledgement Process**

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?<sup>1</sup>

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

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

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."<sup>2</sup>

As tribal applications increased during the 1970s, NCAI called a special convention of its members to discuss federal acknowledgement. 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 that convention developed into the current federal acknowledgement process that is codified at 25 C.F.R. Part 83.<sup>3</sup>

While the acknowledgement process began with a firm commitment to fairness and impartiality, the process has deteriorated over the decades since the regulations were adopted. The process now fails even the simplest metric: time. The process can take decades. As the Committee is aware, the Little Shell Tribe of Chippewa was recently denied acknowledgement based on a petition they submitted in 1978. Such delays are not uncommon, and they seriously undermine the legitimacy of the acknowledgement process.

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. And, rather than address meaningful questions of tribal history, they often focus on questions of tribal leadership that do little more than feed intra-tribal conflicts.

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.

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<sup>2</sup> Letter from Interior Solicitor Kent Frizell (Feb. 26, 1975).

<sup>3</sup> 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.

The profound importance of federal acknowledgement makes the problems throughout the acknowledgment process all the more pressing. We urge you to develop a fair and equitable acknowledgment process that ensures prompt action based on impartial criteria. NCAI has made its commitment to an impartial acknowledgment process clear for over thirty years, and my testimony will highlight the foundational principles that we believe should shape the legislation considered by the Committee.

### **NCAI and Federal Acknowledgement**

NCAI's position on federal acknowledgement remains virtually unchanged since its formative convention on the issue over thirty years ago. NCAI and its members are committed to a fair and equitable process free of political considerations that results in a timely determination on each application for federal acknowledgement. As a chairman of the NCAI Federal Acknowledgment Task Force, I can say that there are several core themes that have grown out of our work.

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 stretches of time.

NCAI and its members suggest that the Committee focus its oversight efforts on tailoring the decision making process around this inquiry. In doing so, the Committee should consider reforming the process to ensure timely, transparent, and fair consideration of each application. It should identify reasonable documentation requirements and allow tribes to address any gaps in the historical record. The process should include consideration of the historical and cultural realities informing each tribe's relationship with the federal government. Most importantly, NCAI encourages the Committee to take steps to ensure that the integrity of the process is restored.

We understand that the Committee is considering several different mechanisms for reforming the federal acknowledgement process. As a membership organization, we cannot take a position on any specific proposal without the formal approval of our members. We know that our members will want to examine any proposed standards for reforming the acknowledgement process to ensure that the content of the standards matches the core principles NCAI has articulated. While we believe any step towards these goals is laudable, the history of federal acknowledgment has taught our members that the content of even the most noble standards can have unanticipated and unwanted effects on the acknowledgement process.

## **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 hundreds of thousands of dollars of unnecessary costs every year.

Legislation addressing these concerns is both timely and appropriate. Given the unquestioned importance of federal acknowledgement, we emphasize that the legislation must be tailored to fix the problems in the process without imposing unnecessary hurdles to federal acknowledgement. It should focus on providing a fair, equitable and timely process that removes political considerations from the decision.

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 these and many other issues.