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Housatonic Valley Council of Elected Officials Oppose Indian Tribal Federal Recognition Legislation

HVCEO Submits Congressional Testimony Stating Proposed Legislation Would Negatively Affect Connecticut Tribal Recognition Decisions

Mayor Mark Boughton and Ridgefield First Selectman Rudy Marconi joined members of the Housatonic Valley Council of Elected Officials today and submitted written testimony to the United States House of Representatives Committee on Natural Resources, opposing H.R. 2837 – The Indian Tribal Federal Recognition Administrative Procedures Act. The testimony raises four major concerns with the legislation – weakened criteria for Tribal Recognition; a pro-petitioner bias in the composition of a new commission charged with the recognition process; insufficient procedural rights for interested parties; and reopening of final decisions.

“The solution to the Indian Tribal Federal Recognition process is not to create a new Federal bureaucracy that will negatively impact neighboring communities’ participation in the process. H.R. 2837 virtually shuts off participation from interested parties like HVCEO and the State of Connecticut in the Indian Tribal Recognition process,” Mayor Boughton said.

First Selectman Marconi, Chairman of HVCEO, added, **“The proposed legislation will likely allow groups like the Schaghticoke Tribal Nation denied acknowledgement in the past to reopen their petitions.”**

The City of Danbury and HVCEO participated as interested parties in the Schaghticoke Tribal Nation (STN) acknowledgement process beginning in 2002. The Bureau of Indian Affairs ultimately denied STN’s petition. The elected officials of HVCEO joined Mayor Boughton in opposition to the acknowledgement when it became clear wealthy investors were funding the application and intended to develop a tribal casino in the Danbury area.

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If you have questions regarding this press release, please call Michael McLachlan at 797-4511 or Rudy Marconi at 203-431-2774.

**TESTIMONY OF THE HOUSATONIC VALLEY COUNCIL
OF ELECTED OFFICIALS on H.R. 2837 the INDIAN TRIBAL
FEDERAL RECOGNITION ADMINISTRATIVE
PROCEDURES ACT**

Mr. Chairman and Members of the Committee, thank you for the opportunity to comment on H.R. 2837, the Indian Tribal Federal Recognition Administrative Procedures Act. This testimony is submitted on behalf of the Housatonic Valley Council of Elected Officials (HVCEO), representing 10 municipalities in southwestern Connecticut.¹ The local governments that comprise HVCEO have extensive experience with the tribal acknowledgement process, having participated for many years as an interested party in the review of acknowledgement petition of the Schaghticoke Tribal Nation (STN) petitioner group. Through that role, we have a strong understanding of what is good, and what is bad, about the existing acknowledgment process. We also understand the terms of the proposed legislation, and HVCEO offers this testimony for consideration by the Committee in an effort to improve the bill so that it results in effective and meaningful reforms to the acknowledgment process.

As a general matter, we can understand that the acknowledgment process is in need of some change, but the extent and nature of the needed change is often exaggerated. We agree, for example, that the current process takes too long and costs too much money for all parties involved. When left alone from political interference and adequately funded and staffed, however, the BIA-administered process applying the existing regulatory standards in 25 C.F.R. Part 83 should result in appropriate decisions. The solution to this problem is not to create a new bureaucracy that will give rise to entirely new coordination problems, demand new staff and administrative structure that lacks the necessary expertise, operate under a procedure that is biased in favor of petitioner groups, does not allow for full participation of interested parties, and applies more permissive substantive standards that will favor petitioner groups. Unfortunately, H.R. 2837 would lead these problems, and for that reason we are opposed to the bill as introduced.

Our concerns with the bill fall into four categories: weakened criteria; pro-petitioner bias in the composition and structure of the Commission; insufficient procedural rights for interested parties; and reopening of final decisions.

Weakened Criteria. The proposed bill would make the acknowledgment criteria far more permissive than the current standards. There is no reason to make any

¹ The HVCEO consists of Bethel, Bridgewater, Brookfield, Danbury, New Fairfield, New Milford, Newtown, Redding, Ridgefield, and Sherman, Connecticut.

changes to the current standards. They have been in effect in essentially the current form for nearly 30 years and have worked well. The standards and the precedents that have evolved under them have served as the basis for dozens of decisions, both positive and negative. Congress should not seek to substitute its judgment for that of the government experts and the multiple layers of public review that have defined these criteria over many, many years.

We are particularly concerned in this regard because some of the proposed changes appear to be directed specifically at decisions in Connecticut, for the purpose of reversing negative determinations. We note that some of the witnesses in the October 4 hearing have represented Connecticut petitioner groups and that, with the exception of Congressman Shays and Assistant Secretary Artman, all of the panelists represented a pro-petitioner perspective.

The 25 C.F.R. Part 83 acknowledgement criteria are detailed and complex. Small changes in these standards can open the floodgates to new applicant tribes who should not be awarded federal status, but may qualify under the substantially weakened standards. For example, the bill would allow any *one form* of evidence to suffice for satisfying the important social community and political authority criteria, as opposed to the existing regulations, which require a combination of factors. It is relatively easy to meet just one standard.

Even more troubling is the fact that some of the criteria would be made very weak. The current regulations, for example, require a 50 percent intermarriage rate. This is a tried and true criterion. It was one of the key factors in the Department's review of the STN petition. Because STN lacked any meaningful evidence of social community or political authority during many decades of the nineteenth century, the marriage rate test would have allowed the STN to offer evidence to the contrary, if the 50 percent test could be met. The petitioner, however, could not do so. This led to the proper negative BIA determination (after errors in the determination were identified by interested parties on appeal). H.R. 2837 would change the 50 percent test, by lowering it to just 33 percent, second-guessing the informed judgment of the experts who have developed that criterion, and positioning the STN to make another run at acknowledgement under more the more permissive test. In this regard, we note that H.R. 2837 appears to be closely based on previous bills, such as S. 611 from 2000. It is interesting to note, however, that of all the criteria in H.R. 2837, one of the few that has been changed in any way from predecessor bills is the marriage rate requirement, to make it easier to satisfy for groups like STN. Why was this specific criterion changed in preparing H.R. 2837?

For these reasons we object to *any* change to the existing criteria. If Congress is to act on the acknowledgment process, it should not legislate standards. Those

criteria should be left to BIA to establish, to be revised through the rulemaking process and public comment, as appropriate.

Lack of Objectivity in the Commission. Our second concern relates to the structure and composition of the Commission on Indian Recognition. As proposed, the Commission on Indian Recognition will not improve the administration of the tribal acknowledgement process. The current BIA system is far from perfect, but it at least has sufficient built-in checks and balances to make possible fair and objective decisions. Essential elements of the current process that must be retained include: full participation of interested parties; independent review of an administrative law judge entity; reasonable deadlines; and decision-making based on staff review of qualified experts, not political appointees. The proposed Commission fails on all of these fronts.

The Commission concept is flawed from the outset because its members would be selected based on recommendations from tribes and petitioning groups, with no role for interested parties like HVCEO. This selection process will certainly lead to the selection of Commissioners who have a pro-recognition bias. The Commission proposal in H.R. 2837 also fails to provide for a qualified staff of experts of sufficient size and adequate funding to allow for comprehensive research and analysis to advise the Commission, based on a full administrative record. In our experience, petitioner groups with financial backing from wealthy gaming interests attempt to overwhelm the review process with result-oriented analysis and evidence. The only way to ensure the final decision is not prejudiced by the tactic is to open the record to all interested parties and empower a qualified staff reach independent conclusions. H.R. 2837 makes no allowance for such a thorough review, vesting virtually all power in the hands of the pro-petitioner Commissioners and forcing them to make decisions under unrealistic timeframes and based on a record that will be skewed in favor of petitioners.

Finally, acknowledgement decisions will almost always present questions that are legal in nature and that benefit from administrative law judge review, such as through the Interior Board of Indian Appeals. Such a review enhances the objectivity and fairness of the final decision and reduces the potential for litigation.

Inadequate Involvement of Interested Parties. The recent spate of simultaneous acknowledgement petitions in Connecticut funded by gaming financial backers offers a classic case study of how important it is to provide for full participation by interested parties. In these petitions, from a total of six different groups, interested parties like HVCEO and the State played a significant role. The evidence and analysis submitted by interested parties was critical to making possible a complete and well-balanced record upon which BIA could make its final decision. Without

this participation, the record would have been one-sided and dominated by the pro-acknowledgement evidence from the petitions, funded by wealthy gaming interests.

Despite the clear importance of the role of interested parties, H.R. 2837 virtually shuts off such participation. Deficiencies in third party participation include:

- Local governments do not receive notice of petitions.
- Interested parties do not have a right to participate.
- The preliminary hearing occurs 60 days after submission of petition. A petitioner can take years to prepare this case, but allowing only 60 days for other parties to review the evidence (if it even could be obtained) and prepare a response is wholly inadequate.
- Records relied upon by the Commission must be provided to the petitioner, but not to other parties.
- Other parties have no right to cross-examine witnesses, submit evidence, appeal a decision, obtain attorneys' fees, obtain advice from the Commission, or secure research grants. All of these rights are extended only to petitioners.

We strongly encourage the Committee to make interested parties equal players in any revised acknowledgement process.

Reopening Past Decisions. H.R. 2837 compounds the problems presented by weakened criteria and an unfair and result-oriented process by allowing groups denied acknowledgement in the past to reopen their petitions. It can be expected that most, if not all, denied petitioners will seek to take advantage of this opportunity. They will undoubtedly do so as soon as possible, once the Commission is established. In the case of groups funded by gaming financial backers, the Commission will be overwhelmed by documentation and argument. The result will be an extraordinary administrative backlog that is likely to overwhelm the system and undermine the ability of the Commission to give appropriate review to all petitions under the tight and unrealistic time frames established in the bill.

The administrative complications that will arise from reconsidering past decisions are enhanced by the substantive defects in the proposed criteria and the failure to provide a role for interested parties. As noted above, the criteria to be established by H.R. 2837 will dramatically lower the bar for acknowledgment. Hence, a host of already resolved and denied petitions are likely to be reopened, even if settled

for decades and the subject of past court decisions. Once reopened, the Commission review process will make these already completed determinations subject to the same pro-petitioner process that applies to already pending decisions, giving rise to the likely result of a significant increase in the number of acknowledged tribes based not on the merits but as a result of a change in the rules of the game. This is a result that should be avoided at all costs.

In conclusion, the tribal acknowledgement process could certainly be improved. The primary problem that needs to be addressed is the lack of adequate funding and staff. HVCEO opposes H.R. 2837 as introduced. It will, for certain, create far more problems than it solves. HVCEO recommends that the Committee work with BIA to address the problems with the current procedures without establishing a new Commission, changing the criteria, or denying interested parties their essential rights to participate.

Thank you for considering this testimony.