

TESTIMONY OF K. JEROME GOTTSCHALK  
ON BEHALF OF  
THE LITTLE SHELL TRIBE OF CHIPPEWA  
INDIANS OF MONTANA

SENATE COMMITTEE ON INDIAN AFFAIRS  
HEARING ON FEDERAL RECOGNITION: POLITICAL AND LEGAL  
RELATIONSHIP BETWEEN GOVERNMENTS  
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Chairman Akaka, Vice Chairman Barrasso, Senator Tester, and honorable members of this Committee on Indian Affairs, on behalf of the Little Shell Tribe of Chippewa Indians of Montana, I thank you for the opportunity to testify before this Committee today on the important subject of Federal Recognition: Political and Legal Relationship between Governments. I would like to take this opportunity to provide some perspective on the long, expensive, and frustrating process experienced by the Little Shell Tribe in attempting to comply with the shifting administrative requirements for federal acknowledgment and to urge Congress to exercise its traditional role in Indian affairs and provide legislative recognition of the Tribe. I am an attorney at the Native American Rights Fund and we have assisted the Tribe in its efforts to achieve recognition for more than twenty years, expending more than one million dollars for consultant research, and well over a million dollars in attorney time. In addition to extensive administrative efforts, the Tribe has been seeking legislative recognition for several years.

The Little Shell Tribe first sent a letter to the Bureau of Indian Affairs petitioning for federal acknowledgment in 1978. After years of work and mountains of submissions, the Tribe was encouraged by a July 2000, Preliminary Finding in favor of recognition. The PF invited comment "... on these various matters, including the consistency of these proposed findings with the existing regulations." 65 Fed. Reg. 45394, 45395 (July 21, 2000). The Tribe had every reason to expect a final determination in favor of recognition, but continued working to ensure that it could respond to any negative evidence which might be presented. There were only two comments received during the comment period, neither one of which had any bearing on the final decision.

Thus, the PF was in favor of recognition and there was no new evidence against recognition. And yet, inexplicably, the decision was against recognition. This is despite the fact that on the question of descendance from an historic tribe, the Office of Acknowledgment agreed that new evidence clearly established that the tribe met this criteria. Is it any wonder that the Tribe is frustrated? The FD has not become effective yet because of an appeal filed with the Interior Board of Indian Appeals which was filed February 1, 2010. That body may take years to rule. Its scope of review is limited and to my knowledge no tribe has ever improved its position on appeal. The best that has ever been done is to have a favorable decision affirmed.

While I insist that with the proper application of the regulations in light of the Little Shell Tribe's specific history, administrative recognition is warranted, nevertheless, the administrative process clearly has not served the Little Shell Tribe and is not designed for Tribes such as Little Shell. Without proper consideration of the evidence in the context of the historic circumstances of the Tribe, which the regulations purportedly require, but for some reason OFA chose not to do, the Tribe is held to an extraordinarily difficult standard of evidence. In some cases, as with Criterion a) which requires that outsiders identify petitioners not just as Indian individuals, but as an Indian entity, the criterion itself is inappropriate and almost surely illegal. Essentially, this criterion requires interaction between outsiders and the tribal community sufficient to produce a document identifying the tribal community every ten years. The FD recognizes that there were many references from 1900 to 1935 to landless Indians, breeds and other uncomplimentary names, but it says that there were not references to Indian entities and that therefore the criterion was not met. Historically, the Little Shell was a migratory band, following the buffalo herds between the United States and Canada. By the early 1880s, most of the herds had disappeared and Little Shell ancestors had settled in out of the way, rural places in Montana. Even then, Little Shell ancestors avoided contact with the dominant society because that contact subjected them to open and blatant discrimination, including federal and state efforts to deport tribal members to Canada. Thus, Little Shell survived as a migratory people off the official radar screen. By its nature, this life style does not produce the paper trail required by criterion a). Nor, if the substantive requirements of the regulations are met, should lack of identification by outsiders render a tribe a non-tribe.

As to criteria b (community) and c (political influence), the BIA requires proof of relationships – in the case of community, relationships among the tribal members, and in the case of political influence, relationships between the tribal members and their political leaders. Again, self-identification of leaders and oral tradition are not sufficient for a tribe to carry its burden of proof. There must be documentary evidence, or alternatively statistics (e.g., on marriage rates) from which the BIA is willing to presume the existence of interaction. Obviously, such documents are not likely to exist for a tribal community that survived historically in the traditional way and in modern times by avoiding dominant society. Combine this with the economic, social and political dislocation suffered by the Little Shell, as the BIA itself found, it becomes clear that Little Shell presents a unique circumstance in which a paper-driven process is simply inappropriate. As a result, failure by Little Shell on these criteria in the final determination does not mean that it does not exist as a tribe; it only means that the administrative process is not well-suited to judge the unique history and circumstances of Little Shell. As the Assistant Secretary noted in the Proposed Finding on Little Shell, the administrative process must be applied in a flexible manner, giving different weight to various kinds of evidence, to accommodate the unusual history of Little Shell. 65 Fed. Reg. No. 141, at 45395 (July 21, 2000) (“...the evidence as a whole indicates that the Little Shell petitioner is a tribe.”). Ultimately, though, the BIA decided to reverse its flexible approach and to apply the criteria in a mechanistic fashion not suitable to the complex historic situation of the Tribe.

Clearly, this is a failure of the administrative process as applied to Little Shell, not a failure on the part of Little Shell to exist as an Indian tribe. The appropriateness of legislation under these circumstances was noted even by the professional staff at the BIA, the same personnel who ultimately recommended that Little Shell be declined for federal acknowledgment. Writing in 2000, the chief of the Office of Federal Acknowledgment effectively admitted the unsuitability of the process for Little Shell. He noted the departure of the proposed Little Shell finding from past precedent and suggested that special legislation should be considered: “Another alternative would be to recommend legislation to acknowledge this petitioner. This recommendation would be based on a finding that because of the unique and complicated nature of its history, this petitioner is outside the scope envisioned by the regulations, but nonetheless merits tribal status.”

Significantly, the United States continues to hold funds in trust, invested by the Secretary of the Interior, for the benefit of eligible members of the Little Shell Tribe of Chippewa Indians of Montana. Act of Dec. 31, 1982, Pub. L. 97-403, 96 STAT. 2023. All seven federally recognized Tribes in Montana support recognition of Little Shell as does its sister tribe in North Dakota – the Turtle Mountain Tribe.

The proposed legislation to recognize the Little Shell Tribe, S. 546, would extend full recognition to the Tribe and provide a four county area in which land could be taken into trust. The counties in which land would be taken into trust for the Tribe support federal recognition. The recognition of Indian Tribes has always been a prerogative of Congress, with an overwhelming majority of the 566 recognized Tribes having been recognized by some form of Congressional action. It is long past time for the Little Shell Tribe to be recognized by Congress as a Tribe with whom the federal government will carry on a government to government relationship. For all of these reasons, S. 546 should be enacted by Congress. The Tribe appreciates the Committee’s continued attention to this issue and we urge you act favorably and file the Committee report so that the bill can move forward on the floor.