STATEMENT OF DERRIL B. JORDAN
BEFORE THE HOUSE NATURAL
RESOURCES COMMITTEE
Concerning H.R. 2837

October 3, 2007

Mr Chairman and Members of the House Natural Resources Committee, thank you for this opportunity to offer testimony regarding the process for acknowledging that an American Indian group exists as an Indian tribe. My name is Derril Jordan, partner at AndersonTuell, LLP. Our firm represents a number of Indian groups seeking federal recognition, but I am not offering testimony on behalf of any particular client of our firm. As a former Associate Solicitor of Indian Affairs at the Department of Interior, as a long-time practitioner of federal Indian law, and as a member of a state recognized tribe, the Mattaponi of Virginia, I have a keen interest in this subject. It is my intent to offer testimony that will assist Congress in enacting legislation that ensures that all legitimate tribes have their sovereign status recognized by the United States.

This is an issue of great significance, and Congress' attention to this matter is much needed and greatly welcomed. Numerous reform bills have been introduced over the last two decades, and there has been much discussion of the issue in the recent past. I hope that the 110th Congress will be the Congress that finally enacts legislation that establishes a fair and efficient process for the federal recognition of legitimate Indian tribes. I am committed to working with Congress to help it understand what is needed to make this process both timely and fair.

REVIEW OF H.R. 2837

Much can be said about the current process employed by the Office of Federal Acknowledgment (OFA) within the Bureau of Indian Affairs (BIA). I believe that it is necessary to look and move forward, and not back, so I will focus my comments on H.R. 2837. I will also offer other suggestions about the issue of federal recognition generally.

A. The Creation of an Independent Commission.

Section 4 of the bill creates an independent commission to be responsible for determining which groups are eligible to be recognized by the United States. I agree with the creation of an independent commission outside of the Department of Interior. It addresses directly the phenomenon known as staff capture. There has also been much controversy surrounding the process lately, with complaints on both sides that the process is biased and unfair. The creation of an independent commission will help to give the recognition process a fresh start and provide a renewed sense of legitimacy to its decisions, whether they be to recognize a tribe or to decline to extend recognition.

There are other process-oriented reforms that I believe can go a long away toward improving the process, even if the creation of an independent commission proves to be beyond our grasp. For

example, the creation of a peer review process would go a long way toward ensuring fair decisions. Independent contractors could be hired by the Assistant Secretary for Indian Affairs to conduct an independent review of OFA's analysis and recommendations and determine whether OFA's recommendation should or should not be followed. By creating this independent panel that has the time and resources to examine the case in its entirety, you will be providing an antidote to the phenomenon of staff capture, and you will be more likely to get decisions that are fair. Perhaps a pilot project could be authorized whereby the next five petitions that are on the "Ready And Waiting List but not yet under active consideration to be evaluated would undergo this peer review process and the results evaluated to determine whether the peer review process should be continued, or whether other reforms should be considered.

B. The Elimination of Redundant Criteria.

Several of the criteria are redundant and unnecessary. The use of redundant criteria is costly to petitioners and slows the process down, adding to the backlog of petitions.

1. Criterion (a) – Identification as an American Indian Entity.

Like Section 83.7(a) of the current regulation, section 5 (b)(1) of H.R. 2837 requires that a petitioner demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence to be relied upon must show identification by entities other than the petitioner itself or its members. It is both unnecessary and inappropriate to require a petitioning group to show identification by outside entities. It is unnecessary because this criterion overlaps with the criteria of sections 5 (b)(2) and (b)(3) (§§83.7(b) and (c), respectively, of the current regulations) which require that a petitioning group demonstrate continuous existence as a community and continuing political influence or authority, respectively. Generally, the evidence relied upon by a group to meet the community and political authority criteria has been created by third parties such as the United States, state or local governments, newspapers, other Indian organizations, and scholars. These are virtually the same sources that are listed in section 5 (b)(1) of the bill and §83.7(a)(1)-(6) of the current regulations. Because a group must, at least in part, rely on records created by third parties to meet the community and political authority criteria, it is redundant to have identification by outsiders as an independent criteria.

Moreover, it is an inappropriate criterion because it ignores the effects of federal, state and local policies and actions upon tribes throughout history. During much of United States history, especially in the late nineteenth and early twentieth centuries, there were considerable incentives for Indian tribes and their members to remain unidentified as such. Threats of removal, racial and ethnic animus, as well as economic, educational, and religious discrimination were commonplace. Indian groups in many places had to maintain a low profile in order to survive. In essence, this criterion is Eurocentric. It asks the question: if an Indian takes a walk in the woods and a white man doesn't see him, is the Indian still an Indian? Most distressingly, it answers that question in the negative! Simply put, identification by third parties can provide evidence that a group is a tribe, but it should not in itself be a criterion for proving tribal existence.

2. The interrelationship between the community and political authority criteria.

Sections 5 (b)(2) and (3), like criteria 83.7 (b) and (c) of the current regulations, require a petitioning group to demonstrate that it has maintained a continuing community and continuing political authority or influence over its members. These criteria overlap considerably. It is hard to imagine a community without a political process, however informal and, in turn, a political process without a community. Moreover, sections 5 (b)(2) and (3), as well criteria 83.7 (b) and (c) of the current regulations, explicitly acknowledge the interrelationship of these criteria. For example, both H.R. 2837 and the existing regulations provide that if a group can demonstrate community by certain evidence, it will be deemed to have demonstrated political authority. See section 5 (b)(3)(C) and 25 C.F.R. §83.7(c)(3). Likewise, the bill and the existing regulations both provide that if political influence is demonstrated by certain evidence, the group will be deemed to have met the community requirement. See section 5 (b)(2)(C)(v) and 25 C.F.R. §83.7(b)(2)(v). These provisions demonstrate the interrelatedness, and redundancy, of these criteria. Furthermore, it should not matter what type or form of evidence a group has relied upon to establish community or political authority; if it can show that it meets one criterion by *any* evidence, it should be deemed to have met the other criterion. Thus, these two criteria should be combined to be but one: that a group show that it has maintained a continuous community, with political process or form of leadership being one type of evidence that can be used to show that it has met this criterion.

C. The Need for an Evidentiary Standard.

H.R. 2837 does not establish a standard of proof necessary to meet each of the criteria. One standard that is applicable to all criteria should be established, and that standard should require a petitioner to show that it meets each criterion by a reasonable likelihood.

The bill retains an element of the current regulations that is most problematic. In several instances, the bill requires that a petitioner meet the community and political authority criteria at "a given period of time," or "a given point in time." See sections 5 (b)(2)(C) and (b)(3)(C). First, the bill does not define what a "period of time" or a "point in time" means. Is it every year? Every ten years? Or every twenty years? What's more, any number of years is arbitrary. The events and forces of history and federal policy do not conform themselves to tidy time intervals. For example, the period of forced assimilation in Indians affairs lasted from the early 1880's to the mid 1930's, a period of over fifty years. A petitioner should not have to show that it meets a criterion for numerous artificial time periods. It should be enough that, considering all of the evidence, the petitioner has shown that it is reasonably likely that it has maintained a distinct community from 1900 to the present, or that it has exercised political influence over its members during that time.

In the alternative, if petitioners must meet each criterion at a given point or period in time, Congress should clearly place the burden on OFA or interested parties opposing acknowledgment to demonstrate by clear and convincing evidence that a petitioning group has voluntarily abandoned tribal relations before a petitioning group can be denied acknowledgment on the basis of a lack of evidence for a specific time period. If a Tribe meets a criteria during the 1920's, and meets that same criteria in the 1950's to the present, isn't it logical to assume that it has met that

same criteria for that intervening 30 years? Placing the burden on OFA or opposing parties recognizes that evidence to demonstrate community or political influence may not be available for certain time periods due to no fault of the petitioner. For example, some public records may have been lost or destroyed, as is the case in Virginia. Also, many Indian groups were forced to refrain from engaging in political activities and to otherwise keep a low profile in order to survive in an environment hostile to their existence. Placing the burden on OFA and opponents of recognition also introduces equity into the process by recognizing that the Unites States bears some responsibility for its failure to extend recognition to the group at an earlier time or because it illegally terminated the tribe.

D. The Significance of Prior Recognition.

Under our Constitution, only Congress has the authority to terminate a treaty relationship, but the BIA does not. If a tribe has a ratified treaty with the United States, and can demonstrate that the majority of its members are the descendants of the group which signed that Treaty, and that those families have continued to interact as a tribal community over time, the Tribe must be presumed to continue to exist as a federally recognized tribe in the absence of clear and convincing evidence that the entire tribe or band has ceased to exist.

With regard to other non-treaty forms of prior federal acknowledgment, I note that Section 5 (c) of H.R. 2837 provides that a group that can demonstrate prior recognition must meet the criteria set forth in section (5) only from the date of last recognition to the present. I suggest that the Committee refer to section 5 (c) of H.R. 361, which was introduced in the 106th Congress. That provision requires that a group demonstrate only the existence of current political authority from ten years prior to the submission of its petition to the present.

While I would urge changes to section 5 (c) of H.R. 361, I would recommend that provision over the provision in the current bill. Such a provision would introduce equity into the process that is necessary to account for the wrongful conduct of the United States. If a group was previously recognized but no longer appears on the list of federally recognized tribes, it is because Interior illegally terminated the federal-tribal relationship, either through neglect or by deliberate action unauthorized by Congress. The current regulatory standard and the provision in H.R. 2837 penalize a petitioning group for the United States' illegal conduct. Requiring that the group demonstrate political authority only for the ten years prior to filing its petition recognizes that the petitioning group has been disadvantaged by the United States' illegal conduct.

E. The Significance of State Recognition.

Many Indian tribes are recognized by the government of the State in which they reside. Some state recognitions are based on colonial era treaties and are characterized by well documented, centuries-long relations involving the appointment of trustees or overseers and the presence of well-defined land bases. Residence on a state-recognized reservation since 1900 should constitute conclusive proof that the group is entitled to federal acknowledgment as an Indian tribe.

F. **Additional Comments on H.R. 2837**

The definition of "continuous" or "continuously" in section 3 (6) should be amended to delete the words "throughout the history of the group," and the words "until the present" should be added in their place.

It should be made more clear that the types of evidence listed in subsection 5 (b)(2)(C) entitle a petitioner to a finding that it meets the continuing community criterion without the consideration of other evidence, but that showing one or more of these kinds of evidence is not required. Likewise, it should be made more clear that the types of evidence listed in section 5 (b)(3)(B) entitle a petitioner to a finding that it meets the political influence criterion without the consideration of other evidence, but that such types of proof are not required.

Section 5 (b)(3)(A) requires a petitioner to show that it has maintained political influence or authority over its members "from historical times until the time of the documented petition." The requirement that political authority be shown from "historical times" is inconsistent with the definition of "continuous" or "continuously," which mean "extending from 1900 to the present. It should be made clear that criteria (1)-(3) need only be met from 1900 to the present.

I have already commented on the exception for tribes that can show prior recognition, but there are other suggestions that can be made. First, the standard for demonstrating prior recognition should be the same for establishing that the petitioner meets the criteria for recognition: by a reasonable likelihood. Second, if a group was identified as Indian tribe or band by an Indian agent whose job it was to inventory Indian communities in a state or territory, that identification should be considered prior recognition even if no land was ever set aside or federal assistance provided to the group. This was a common occurrence in California, where Indian agents were sent out to identify Indian communities in need, and many of the communities identified never had land set aside for them or received assistance from the United States because there was no cheap land available, not because the United States did not recognize its fiduciary relationship.

The types of evidence necessary to show tribal membership listed in section 5 (b)(5)(C) should be more clearly stated to be in the alternative because no petitioner will be able to provide all such forms of evidence.

Section 7 (a)(4) requires the Library of Congress and the National Archives to allow petitioners access to their resources, records, and documents. Petitioners, as members of the general public, already have such access. Is the point of this provision to make such access free of charge to petitioners?

The publication of the list of federally recognized tribes eligible to receive services from the United States should remain the responsibility of the Department of Interior, especially given that the Commission will terminate after twelve years.

Finally, the provision of financial assistance to petitioners should be based on need, and Congress should provide sufficient funding to ensure that all deserving groups receive at least some assistance. I would also note that this financial assistance should be provided throughout the entire review of a group's petition. While the Administration for Native Americans once provided assistance to tribes in preparing their petitions, that assistance stopped once the BIA's review was initiated. This left the petitioning group with no funds to respond to the BIA's requests for additional information on a particular topic and no funds to respond to issues raised by third parties opposed to recognition. Decisions of this magnitude should be based on facts and a group should not be penalized because it does not have the resources to fully document its petition. This is particularly important if there is going to be a sunset provision on the recognition process.

THE SPECIAL CIRCUMSTANCES OF CALIFORNIA INDIAN GROUPS

The report of the Advisory Council on California Indian Policy (ACCIP) on the federal recognition process recommended the modification of the current federal recognition process due to the unique and brutal legacy of Indian policy in California. To this end, the ACCIP's recommendations included the enactment of legislation to establish a California-specific recognition process. The ACCIP, created by Public Law 102-416, reported that literally two-thirds of the Indian people in California are not members of recognized tribes, which fact is due to the haphazard methods through which tribes were recognized, which is attributable to the lack of a coherent federal Indian policy in California from the time of statehood till the present. If the entire process is not reformed, a California-specific process should be established.

PRESERVATION OF OTHER FORMS OF RECOGNITION.

Congressional action to reform the administrative process for recognizing Indian groups as sovereign tribes is much needed. Nevertheless, there are other legitimate means through which groups can be recognized. Congress, of course, retains the authority to recognize tribes, and it should not hesitate to do so in appropriate circumstances. There will always be cases where a legitimate group does not fit squarely into any given set of regulations because of its unique historical situation, and some tribes may be prohibited from going through the Part 83 process. In such instances the Congress has an obligation to examine the facts and render a fair and equitable decision.

A number of tribes have been, in effect, administratively terminated by the neglect or wrongful conduct of the Department of Interior. Congress has affirmed the recognition of some of these tribes in the past, and it should not hesitate to do so in the future. In 1958, Congress enacted the Rancheria Act, (72 Stat. 69), which provided for the termination of forty-one California rancherias. All but eight of those rancherias have been restored, either through litigation, or by Congress. In cases such as *Hardwick v. United States*, No. C-79-1710-SW (December 15, 1983), *Scotts Valley v. United States*, No. C-86-3660 WWS (March 16, 1991, N.D. California), *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Calif. 1977), and *Table Bluff v. Andrus*, 532 F. Supp. 255 (N.D. Calif. 1981), the courts decided, or the United States agreed through

stipulations, that it had not fulfilled the statutory pre-conditions to termination and that the termination of these rancherias was, therefore, unlawful. The Department of Interior should be directed to negotiate settlements with the last eight remaining terminated rancherias without the need for further litigation or the need for legislation.

As the *Hardwick*, *Scotts Valley*, *Duncan*, and *Table Bluff* cases demonstrate, judicial restorations and recognitions are also possible. The recent judicial recognition of the Shinnecock Tribe by a federal district court in New York is the most recent example of this. *State of New York v. The Shinnecock Indian Nation*, 400 F, Supp. 2d 486 (E.D.N.Y. 205). Any legislation enacted regarding federal recognition should direct the Department of Interior to add a tribe that is recognized by any of these means, including those recognized via litigation, to be added to the list of federally recognized tribes maintained pursuant to 25 U.S.C. §479a (the Tribal List Act).

I thank you for this opportunity to testify on this important issue. I look forward to answering questions and to providing further assistance to the Committee in its consideration of H.R. 3837 and the federal recognition process.