Statement
of
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before the October 3, 2007 Hearing of the
Committee on Natural Resources, U.S. House of Representatives
on H.R. 2837,
the Indian Tribal Federal Recognition Administrative Procedures Act

Chairman Rahall, Ranking Member Young, Delegate Faleomavaega, and Members of the Committee on Natural Resources, I thank you for inviting me to present testimony to the Committee today on H.R. 2837.

My testimony today is drawn from my prior work as the former Chief Counsel and Staff Director for the U.S. Senate Committee on Indian Affairs. In May of 2005, following almost 25 years of service on the Committee, I retired from the Senate and am now engaged in the private practice of law, working with American Indian tribes, Alaska Native entities, and Native Hawaiian organizations. Our law firm does not currently represent any tribal group that has a petition pending in the Office of Federal Acknowledgment.

I want to begin by expressing my appreciation to Congressman Faleomavaega for the fine and clearly thoughtful bill that he has introduced, and to the Chairman for scheduling a hearing on this most important issue.

In my last few years on the Senate Indian Affairs Committee, in an effort to develop a framework for possible legislative reform of the Federal Acknowledgment process, we spent a considerable amount of time with the Director of the Office of Federal Acknowledgment and his staff, as well as with the team from the General Accountability Office that had conducted so much research on the acknowledgment process over the years, and the team from the Interior Department's Inspector General's Office who also had reason to examine the Federal acknowledgment

process.

While we conducted those discussions with the understanding that none of the people with whom we consulted could make recommendations for legislative change, what we were able to discuss were some of the challenges that the Office of Federal Acknowledgment is faced with in trying to carry out its mandate.

For instance, we learned that a significant percentage of the Office's limited time and personnel resources was consumed in responding to requests made of the Office under the Freedom of Information Act (FOIA). Hours and hours were then being expended in locating the records that were the subject of a FOIA request and making photo copies for dissemination to those requesting the information.

Another significant amount of time was then being expended in the provision of technical assistance to those tribal groups that had petitions pending in the acknowledgment process. These two activities alone substantially diminished the amount of time that the small OFA staff could have otherwise expended on the processing of acknowledgment petitions.

Add to that the time consumed in preparing responses – when there are charges asserted that improper influence of one sort or another is being brought to bear on either the acknowledgment process, the OFA staff, or on Administration officials responsible for acknowledgment decision-making – and one begins to understand why the pace of action on petitions has slowed so dramatically in recent years.

Another dynamic arises out of frustration with the length of the process, as some tribal groups seek the involvement of the Federal courts and court-ordered time lines result in a petition having to be set aside so that work on another petition which is the subject of a court's order can be acted upon in compliance with those court-ordered time lines.

In recent times, we have also seen a marked increase in the number of so-called "interested parties" who want to intervene in the process – sometimes very late in the process –and who seek copies of all of the relevant documents associated with a petition. This unregulated intervention can and often does wreck havoc with an otherwise orderly acknowledgment process.

There have also been concerns expressed that the manner in which the process is administered puts the Office of Federal Acknowledgment staff in a position in which they must serve multiple roles – for instance, they often have to provide technical assistance to petitioning groups, sometimes over an extended period of time, and then later, they have to bring their independent judgment to bear on the merits of the same group's petition.

With these observations in mind, we developed a conceptual framework that the Committee may want to take into consideration as it reviews this legislation.

Separate the technical assistance function from the decision-making function: To address the potential for conflicts of interest as well as reduce the costs associated with documenting a petition, we thought that one possible approach to achieving this objective would be to establish the technical assistance function within the Cultural Resources Center of the National Museum of the American Indian – a place where the citizens of tribal nations already come to conduct research not only on objects with the Museum's collections but on documents that contain important information about a tribe's history, its culture and traditions, its interaction with other governments and private entities at specific points in time. This branch of the Center could be staffed with the same complement of expertise that currently is posited in the Office of Federal Acknowledgment, so that technical assistance could be provided to petitioning tribal groups.

Because some tribal groups, particularly those in California, have a

common history – there could be a substantive benefit to the collection of historical information that might be relevant to the petitions of more than one group. Given the increasingly-prohibitive expense associated with the development of a full acknowledgment application, if historical information gathered by a prior applicant can be used by another petitioning group to fill in gaps in that group's own records, there could be a meaningful savings of costs.

This Center could also serve as a useful alternative for a petitioning group that may have only the limited resources available through an Administration for Native Americans grant to hire private experts to assist the group in developing the historical, genealogical, anthropological and other documentation necessary to complete its petition.

Place responsibility for responding to Freedom of Information Act requests in a separate office or develop a data base in which both transparency and protection of proprietary information can be achieved : In the context of the proposed Commission, unless this time-consuming responsibility is delegated to another entity, responding to FOIA requests is going to take up as much of the Commission's time as it currently requires of OFA staff.

New software programs have been employed in the arena of environmental management and regulation that allow different users to have access to only that information that is appropriate to their role in environmental management and regulation. These programs are readily capable of being adapted to the Federal acknowledgment area – for instance, the petitioning group would have access to all documents that are submitted to the Commission , an interested party might have more limited access to documents – particularly no access to documents that contain proprietary information, and the Commission would have access to all documents. Rather than expending time duplicating paper copies of documentation requested under the Freedom of Information Act, the Commission could provide a point of limited access to information in the data base that the Commission deems appropriate to the FOIA request.

Divesting the Process of Assertions of Improper Influence, Limiting the Time in which Interested Parties may involve themselves in the process, Providing Certainty and Reliability for a Time Certain in which each petition will be fully processed: Filing of Acknowledgment Petitions in a Designated Federal Court: Several of those with whom we consulted felt that this would be a way to impose order on the process as well as address assertions of improper influence on decision-makers or the process itself. In the context of H.R. 2837, the Commission would file each petition with a designated Federal court – likely a court in the District of Columbia – then the court could establish: (1) a time frame in which interested parties may register and a date beyond which no further interested parties will be involved in the process; and (2) a series of negotiated deadlines for the processing of each petition that would be negotiated by the petitioning group and the Commission with the court's oversight.

Once a petition is in the court process, the Commission could not be pressured to set aside one petition for work on another petition – all petitions would be subject to a petition-specific time line that could only be altered by agreement of the petitioning group and the Commission with the court's supervision and entry of such changes. This would enable not only an orderly process but it would also provide the petitioning group with some certainty as to the period of time in which the group can predictably rely on a beginning and an end to the process.

Last, I would urge the Committee to consider providing authority for another member of the Commission to take official action on behalf of the Commission in circumstances when the Commission's Chairman is not able to do so.