Committee on Resources
Full Committee

Witness Statement

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TESTIMONY OF JOSEPH C. SAULQUE

Advisory Council on California Indian Policy

on H.R. 361

Good morning, Mr. Chairman, and distinguished members of the Committee. My name is Joseph Saulque. I am the Chairman of the Advisory Council on California Indian Policy (hereinafter "Advisory Council"), a statewide Indian council created by Congress in 1992 to provide advice and recommendations on the special status problems of the California Indians. I am appearing here today on behalf of the Advisory Council and its Recognition Task Force to testify in support of H.R. 361.

I. Introduction: The Advisory Council on California Indian Policy's Mandate from Congress.

The Advisory Council includes representatives of California's federally recognized, terminated, and unacknowledged tribes and was created pursuant to the Advisory Council on California Indian Policy Act of 1992, Public Law 102-416, 106 Stat. 2131 (October 14, 1992). In creating the Advisory Council, Congress authorized and directed it to "identify the special problems confronting [California's] unacknowledged and terminated Indian tribes and propose reasonable mechanisms to provide for the orderly and fair consideration of requests by such tribes for Federal acknowledgment." Id. at Sec. 5(2). The Advisory Council submitted its report and recommendations to Congress in September 1997, including proposed California-specific legislation to revise and streamline the existing federal acknowledgment process (the California Tribal Status Act). More recently, in November 1998, Congress extended the term of the Advisory Council "to allow the Advisory Council . . . to advise Congress on the implementation of such proposals and recommendations." See Advisory Council on California Indian Policy Extension Act of 1998, Section 2(b), P.L. 105-294 (October 27, 1998). Congress also expanded the Advisory Council's mandate to include "presenting draft legislation to Congress for implementation of the recommendations requiring legislative changes." Id. at Section 3(a). In light of the Advisory Council's mandate from Congress, I am here today not only to support this important legislation introduced by Representative Faleomavaega, but to comment on the particular needs of California's unacknowledged tribes with respect to the process for achieving Federal acknowledgment and how H.R. 361 addresses these needs.

II. H.R. 361 Provides a Necessary, Viable, and Long-Awaited Legislative Alternative to the Existing Federal Acknowledgment Process.

Recently, the Advisory Council and its legal counsel, California Indian Legal Services, conducted a comparative analysis of H.R. 361 and the draft California Tribal Status Act and determined that, with relatively minor exceptions, H.R. 361 addressed the major concerns of the Advisory Council regarding the existing Federal acknowledgment process. I am submitting a copy of that comparative analysis for the Committee's consideration in its review of H.R. 361.

The Advisory Council adheres to its position, as stated in its report to Congress, that the status problems of California's unacknowledged tribes are unique within the United States due to the complex and tragic history of Federal-State-Tribal relations in California, and the genocide practiced against California's native peoples during and immediately after the California Gold Rush. Nevertheless, the Advisory Council also appreciates the need for a uniform national process and standards for the Federal acknowledgment of Indian groups. The Advisory Council decided at its August 14, 1999, meeting that it would support Federal acknowledgment legislation that was national in scope as long as it included a process and criteria that were flexible enough to address the unique historical circumstances and resulting status problems of California's unacknowledged tribes. This decision was not an easy one given the longstanding concern of California's unacknowledged tribes that without a California-specific Federal acknowledgment bill, the unique status problems of these tribes would not be fairly addressed in a national bill. However, having reviewed H.R. 361, the Advisory Council is of the view that its procedures and criteria incorporate in either specific language or principle the key elements of the Advisory Council's proposed California Tribal Status Act (CTSA) and is worthy of its support. As to those areas where the CTSA and H.R. 361 differ, the differences are not major and can be addressed through relatively minor amendments.

The Advisory Council appreciates Representative Faleomavaega's leadership over the years in pressing for legislation to reform the process for review and resolution of petitions for Federal acknowledgment and this Committee's willingness to hear and respond to the calls of the many deserving unacknowledged tribes for a fairer, more just process than that which exists under 25 CFR Part 83. The existing process has proven to be ineffective, time-consuming and unduly burdensome for petitioning tribes. For example, there have been 36 California tribes involved in the Federal acknowledgment process since 1978. Of those 36 tribes, only one has been acknowledged through the process, one has been acknowledged outside of the process, and one denied acknowledgment. H.R. 361 provides a necessary, viable, and long-awaited legislative alternative to an administrative process that had proven ineffective over the past two decades and can best be characterized by the well-known axiom that "justice delayed is justice denied."

III. Congress Determined in the Advisory Council on California Indian Policy Act that the Unique Problems of California's Unacknowledged Tribes Should Be Resolved in a Comprehensive Manner Based on a Dialogue with the California Indians.

When Congress passed the Advisory Council on California Indian Policy Act of 1992, it recognized that the unique status problems of California's unacknowledged tribes. It also recognized that the California tribes themselves should have a direct say in the development of the procedures for Federal acknowledgment and that those procedures should take into account the historical circumstances of the California tribes. The reasons for this are related to the history of the relationship between California tribes and the Federal and State governments. California's indigenous peoples, comprised of tribes that tended to be smaller and, to a certain extent, less formally structured than those in the Plains or the East, were subjected to a more concentrated and devastating influx of Euro-Americans into their homelands than any other native population of the United States. Post statehood non-Indian settlement of California occurred much more rapidly and with less control than elsewhere. As a result, many tribes were disrupted or destroyed before their structures could be documented or studied.

Because of these events, the Federal government's dealings with California tribes have a more convoluted and tragic history than elsewhere. More than one hundred individual California tribes were recognized when the Federal Government negotiated treaties with them in 1851-1852, and then refused to ratify those same treaties. These treaties, had they been ratified by the Senate, would have created reservations totaling approximately 8.5 million acres instead of the approximately 400,000 acres now held in tribal trust status in California. In 1867, with the passage of the Four Reservations Act and, later, in 1890, with the passage of the Mission Indian Relief Act, Congress recognized groups of California tribes, created a number of reservations and, in some instances, consolidated different tribes on the same reservation. At the time of the Allotment Act in 1887, the vast majority of California tribes still remained landless. While individual Indians who had never abandoned tribal relations qualified for public domain trust allotments, their tribes remained landless and tribal institutions were discouraged or prohibited. At the turn of the century, those California Indian groups that had survived a half-century of genocide and neglect were, for the most part, landless and living in the most deplorable conditions, poverty-stricken, suffering from illness and disease, and isolated from the non-Indian population. Pursuant to the Homeless California Indian Acts of the early 1900s, the Bureau of Indian Affairs recognized some of these landless groups by purchasing small parcels of lands for their benefit and placing them in trust status.

The Indian Reorganization Act period, which commenced in 1934, was short-lived in California. By the mid-1940s the Bureau of Indian Affairs was already planning the withdrawal of Federal programs and services to the California Indians. The 1950s brought the anticipated shift in Federal policy when Congress, in 1958, authorized the termination of 41 Indian groups residing on lands ("rancherias") acquired under the Homeless California Indian Acts. Today, in the era of Indian self-determination, the Federal government recognizes a government-to-government relationship with more than 100 California tribes, including 29 of the previously terminated tribes which have been restored through litigation and legislation. Although it has been 30 years since the advent of the Self-Determination Policy, the tribal status problems engendered by the Federal policies and actions of the preceding 120 years have not been addressed in California. H.R. 361 offers the opportunity to comprehensively and fairly address these unresolved status issues in California consistent with the intent and purposes of the Advisory Council on California Indian Policy Act of 1992.

Rather than further recount the complex history of the California Indians here, I refer the Committee to the Advisory Council's Recognition Report: "Equal Justice for California." Appendix A to the report is the draft California Tribal Status Act, the Advisory Council's California-specific legislative alternative to the existing Federal acknowledgment process to which I make frequent reference in my testimony. This report was filed with this Committee in September 1997 as part of the Advisory Council's comprehensive report to Congress. I am submitting additional copies of the report for the Committee's reference in considering H.R. 361 and my comments today.

IV. H.R. 361 Addresses the Major Concerns and Recommendations Stated in the Advisory Council's Report to Congress.

In my remaining comments, I will highlight those aspects of H.R. 361 that address the major concerns of California's unacknowledged tribes, as expressed in the Advisory Council's report and recommendations to Congress.

A. H.R. 361 Eliminates the Structural Unfairness of the Existing Federal Acknowledgment Process by Establishing A Relevant Time Period for Proof of Acknowledgment Criteria, by Fairly Allocating Evidentiary Burdens, and by Establishing Definite Time Frames and Procedures for Resolution of

Petitions.

Any legislative process established for the Federal acknowledgment of Indian groups in California and elsewhere should have three fundamental goals: (1) it must be fair and essentially non-adversarial; (2) it must establish a proper balance between the need for a detailed and reasonably complete historical record of tribal existence and the fact that there may be major gaps in this record, especially in California, caused by Federal and State policies and actions intended to undermine or destroy tribal institutions and culture and to dispossess and remove the Indians from their aboriginal homelands; and (3) it must establish reasonable and definite time frames for the review and resolution of all petitions. The Advisory Council believes that H.R. 361 achieves each of these goals.

By establishing a more relevant time frame for application of the basic acknowledgment criteria and by appropriately allocating the evidentiary burdens, H.R. 361 eliminates some of the fundamental unfairness of the existing process and, over time, will expedite the review and determination of petitions. Its use of the time period of 1934 until present for evaluation of individual petitions - instead of 1900 or from "historical times" until the present - takes into account the fact that during earlier periods the Federal government's policies had operated to undermine and destroy tribal culture and institutions of tribal self-government. Wide swings in federal Indian policy that occurred prior to 1934 had a devastating impact on Indian groups nationwide, especially in California. H.R. 361's use of the commencement of the Indian Reorganization Period (1934) as the time-relevant base for evaluating petitions, coupled with the use of rebuttable presumptions upon the petitioner's submission of proof establishing certain fundamental facts (e.g., that the group is descended from an historical Indian group, Sec. 5(b)(5)(A); or has been previously acknowledged by the federal government, Sec. 5(c)(1)(A)-(C)), strikes a fair balance between the need for supporting evidence of tribal existence and continuity over time and the fact that much of this evidence either may not exist or has been lost because the tribe and its institutions were under physical or political assault at the hands of Federal and/or State authorities.

H.R. 361 also balances the interest in cooperative resolution of tribal status issues and the fact that resolution of some petitions may require an adversarial-type evidentiary heating. The Federal Acknowledgment Process (FAP), as initially conceived, was not intended to be adversarial. Rather, it was intended to avoid unnecessary litigation over tribal status issues and create a process whereby unacknowledged tribes could document their cases for acknowledgment and present them in a non-adversarial forum for review and consideration. While many unacknowledged tribes that have been involved in the FAP would disagree with a characterization of the process as non-adversarial, the concept is important.

Because the Federal government set in motion many of the factors that contributed to the destruction of tribal institutions and culture, it would be most appropriate if the Federal government would engage in a cooperative effort with the unacknowledged tribes, aided by an independent commission, to address through the Federal acknowledgment process some of the injustices created by earlier Federal actions and policies. Unfortunately, the experience of the last two decades with the FAP has demonstrated that the Bureau of Indian Affairs is not committed to such an approach, nor is it the appropriate entity to pass judgment on the petitions. H.R. 361 addresses these problems by incorporating both cooperative and adversarial procedures in the review of Federal acknowledgment petitions, and by establishing an independent Commission on Indian Recognition. It provides for both technical and financial support for petitioners in the preparation of petitions, but also recognizes that the process is fact-intensive. Invariably, there will be disagreement over the characterization of facts or events thereby requiring resolution through an adversarial-type procedure. H.R. 361 balances these cooperative and adversarial interests in the review of petitions by providing for a

preliminary hearing that is non-adversarial in nature (Sec. 8) in which the Commission can either determine, based on the evidence submitted by the petitioner or other interested parties, that Federal acknowledgment be extended to the petitioner, or that the petitioner should proceed to an adjudicatory hearing (Sec. 8(b)). Only after the latter determination is made does the process become truly adversarial. Although the Advisory Council is concerned that the adversarial element of the process will increase the expense for petitioners, it also realizes that it may be the most expeditious and fair method of resolving disputed issues of fact.

B. H.R. 361's Formulation and Application of the Basic Acknowledgment Criteria Incorporates the Major Elements of the Advisory Council's Recommendations to Congress.

H.R. 361 posits six basic criteria that must be met by a petitioning Indian group. These criteria can be paraphrased as follows: (1) identification as a Indian group over an extended period of time; (2) existence as a distinct community; (3) exercise of political influence or authority as an autonomous entity; (4) a governing document that includes membership criteria (or, in the absence of a written document, an statement describing the criteria); (5) a list of members and proof of descendancy from an Indian group that existed historically or from historical Indian groups that combined and functioned as a single autonomous entity; and (6) a membership composed principally of persons who are not members of any acknowledged North American Indian tribe. As my following comments will demonstrate, H.R. 361 incorporates the major elements of the Advisory Council's recommendations to Congress for improving the FAP and making it more responsive to the needs of California's unacknowledged tribes.

- **Identification as an Indian group over an extended period of time - Sec. 5(b)(1)**

H.R. 361 establishes the following time frame for proving identification as an Indian group: "substantially continuous" since 1934.

The Advisory Council's draft CTSA provides for a longer time frame -- "historical times until present" -- but allows for interruptions for up to 40 years and includes a rebuttable presumption that changes in the community interaction, organization or political influence of a California Indian group, which occurred during the period from 1852 to 1934, did not constitute either abandonment or cessation of tribal relations. The reason for the allowance for interruptions and this presumption is that the Federal government should not be allowed to benefit from its own policies and laws, and those of the State of California, that prohibited or discouraged essential elements of tribal authority and culture during this period. In effect, the Federal and State governments created conditions in California during this period that made it impossible, or extremely dangerous or difficult, for most California Indian tribes, especially those who were not "protected" by the Missions, to freely or publicly engage in tribal relations or to identify themselves as Indians. It would be unconscionable to force California Indian groups to provide evidence that, for the most part, does not exist because of the actions or neglect of the Federal and State governments. If there has been voluntary abandonment or cessation of tribal relations during this period, it is properly the Federal government's burden to prove it.

H.R. 361 addresses the cooncerns underlying the Advisory Council's recommendations by requiring proof of identification as an Indian group from 1934, the date of the Indian Reorganization Act (IRA), to the present. This approach is appropriate and was recommended as an alternative by the Advisory Council in its reports to Congress. The advent of a new Indian reorganization policy in 1934 represented the first time since the pre-treaty era that California tribes were encouraged to function openly and publicly. Using 1934 as the base date eliminates the need to include those provisions mentioned above governing presumptions and

allowance for interruptions in the continuity of tribal identity. Under H.R. 361, petitioners would have to demonstrate existence as a distinct community from 1934 to the present. H.R. 361, however, like the Advisory Council's approach, makes allowance for gaps in evidence of identification as an Indian entity if the gap "corresponds in time with official acts of the Federal or relevant State government which prohibited or penalized the expression of Indian identity." Sec. 5(b)(1)(B). The Advisory Council supports this approach, which is consistent with the Council's recommendations to Congress.

With respect to the kinds of evidence allowed to establish Indian identity, the Advisory Council recommends that Sec. 5(b)(1)(A) be amended to include "identification as an Indian entity by a foreign government." Because of the Spanish and Mexican periods in California, there is considerable information documenting the interaction between these governments and the aboriginal tribes of California.

- **Existence as a distinct community - Sec. 5(b)(2)**

H.R. 361 and the Advisory Council's draft CTSA differ in their formulation of this criterion. H.R. 361 requires that a "predominant" portion of the petitioning group comprise a distinct community, while the CTSA requires evidence of a "substantial" portion. The Advisory Council and its Recognition Task Force felt strongly that the "substantial portion" standard was necessary to account for the wide geographic dispersal of members of California tribes that occurred as a result of State-sponsored genocide against, and discriminatory State laws that indentured, California Indians during the latter half of the 19th century. This dislocation of tribal communities from their traditional homelands also resulted in the breakdown of traditional networks of social interaction within and between these communities. H.R. 361 mitigates to some extent the difference between the two standards by requiring evidence of community only from 1934 onward, long after these destructive State policies and actions had ceased and official Federal policy had shifted to support the reconstitution of tribal communities. However, the Federal policy was directed towards reservation-based Indians and tribal communities and none of California's unacknowledged tribes were, in 1934, residing on established reservations. At best, individual members of some of California's unacknowledged tribes had received trust allotments on the public domain. Thus, the incentives and opportunities for reconstitution of tribal communities offered under the Indian Reorganization Act did not extend to the unacknowledged California tribes to the same extent as those tribes residing on established reservations. Although the Advisory Council supports H.R. 361's overall approach to this criterion, it recommends that Section 5(b)(2) be amended to adopt the less restrictive standard of "substantial portion" of the petitioning group so as to reflect the unique problems created by the wide geographic dispersal and dislocation of California Indian groups that occurred prior to 1934.

- **Exercise of political influence or authority as an autonomous entity -Sec. 5(b)(3)**

The Advisory Council agrees with H.R. 361's treatment of this criterion. By using the time period from 1934 to the present, H.R. 361 eliminates the need to create exceptions for evidentiary gaps as the CTSA does. This simplifies application of the criterion while also addressing the Advisory Council's concerns about the ability of California's unacknowledged tribes to prove the exercise of political influence on a substantially continuous basis during a period in California when Federal and State policies either discouraged or actively undermined the exercise of such influence. Generally, this period extended from the Senate's refusal in 1852 to ratify the California Indian treaties until 1934. H.R. 361 is also specific as to the kinds of evidence on which the Commission on Indian Recognition may rely in determining whether this criterion has been met at a given point in time. Sec. 5(b)(3)(B)(i)-(v). Overall, H.R. 361 addresses and improves on the draft CTSA included in the Advisory Council's report to Congress.

- **Governing document, including criteria for tribal membership - Sec. 5(b)(4)**

This criterion is essentially the same in H.R. 361 and the CTSA.

- **List of members and proof of descent from an Indian group that existed historically or from historical Indian groups that combined and functioned as a single autonomous entity - Sec. 5(b)(5)**

H.R. 361, consistent with its use of the 1934 benchmark in applying other recognition criteria, creates a presumption of such descent if the petitioner demonstrates that its members "descend from an Indian entity in existence in 1934." Sec. 5(b)(5)(A). However, this presumption is not conclusive and can be rebutted "by affirmative evidence offered by any interested party that the Indian entity in existence in 1934 does not descend from a historical Indian tribe or combined tribes." Id. This approach fairly allocates the burden of proof, however the use of the phrase "historical Indian tribe or combined tribes" throughout the section is problematic. H.R. 361 defines the terms "Indian tribe" or "tribe" by reference to the Secretary's annual list of acknowledged tribes. Sec. 3(10). If the Indian entity through which a petitioner claims descent was itself descended from a historical tribe as defined in H.R. 361, it would be extraordinary if the entity in existence in 1934 was not itself recognized by the Secretary. The Advisory Council recommends that this provision be amended by replacing the phrase "historical Indian tribe or combined tribes" in Sec. 5(b)(5)(A) with the phrase "historical Indian entity or combined entities." This seems to be the underlying intent of this section since Sec. 5(b)(5)(B) uses the term "historical Indian entity" in delineating the kinds of evidence that would be deemed to prove descent.

- **Membership composed principally of persons who are not members of any acknowledged North American Indian tribe - Sec. 5(b)(6)**

The Advisory Council concurs in this criterion and its treatment in H.R. 361. The CTSA did not include a specific criterion on this issue, however it provided by separate provision that no more than 15 percent of the petitioner's members shall be members of any other Indian tribe. The Advisory Council is satisfied with the language of Sec. 5(b)(6), which provides for an exception, subject to certain stated conditions, wherein a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe." Id.

- **H.R. 361 Provides a Fair and Workable Approach to the Issue of Previous Federal Acknowledgment**.

H.R. 361 takes a somewhat different approach to the issue of previous federal acknowledgment than the Advisory Council did in the CTSA. Nevertheless, H.R. 361 incorporates the essential elements of the Advisory Council's approach by creating a presumption of previous federal acknowledgment upon proof of certain facts which can only be rebutted "by a preponderance of evidence that the previously recognized group has abandoned tribal relations. . ." Sec. 5(c)(2). In addition, H.R. 361 appropriately reduces the time depth for proof of "the existence of current political authority" to 10 years preceding the date of the petition. Id. In short, the Advisory Council believes that Sec. 5(c) of H.R. 361 provides a fair and workable approach

to the issue of previous federal acknowledgment and is superior to the provision originally recommended by the Advisory Council in the CTSA.

- **The Procedures and Time Frames Provided in H.R. 361 for Processing Petitions for Federal Acknowledgment Are Reasonable and Provide Needed Certainty and Finality to the Process.**

In the CTSA, the Advisory Council originally proposed a three-track review process, with different time frames for each. One track was for unacknowledged tribes that could not establish a claim of previous Federal acknowledgment (approximately 33 months); the second was for tribes that could (approximately 21 months); and the third was for those tribes that had received and responded to one (or more) obvious deficiency letters and wished to have their petitions reviewed by the Assistant Secretary under new statutory criteria (approximately 24 months). Upon further reflection, and having had the benefit of discussions over the three years since the CTSA was drafted, including the opportunity to review the more recent House and Senate bills on the federal acknowledgment process, the Advisory Council believes that one uniform review process with clearly established time frames is preferable and therefore supports the review process and time frames established in H.R. 361.

One of the most persistent criticisms of the existing FAP is that it has no definite time frames for the review of petitions and thus petitioners have no assurance or expectation that their petitions will be resolved within any reasonable time period. The experience with the FAP over the past two decades confirms this criticism. H.R. 361 provides such assurances by specifying definite time periods in which key determinations will be made. This adds needed certainty and finality to the process.

V. Conclusion

The Advisory Council's comments proceed from the basic assumption that legislation to address the Federal acknowledgment problem must, in large part, have a remedial purpose. In California, tribal status problems are the product of more than a century of inconsistent Federal policies and actions, State-sponsored genocide against the Indian population, and general neglect. If a fair and just remedy to these problems is to be fashioned, it must be one that provides both technical assistance and funding to the petitioning Indian groups; establishes reasonable, relevant criteria and fairly allocates evidentiary burdens; and places greater emphasis on cooperative fact-finding than adversarial proceedings. This does not imply that every petitioner must succeed, but only that the independent commission created by Congress will work cooperatively within specifically defined timeframes and statutory directives to assist the unacknowledged tribes in presenting fully documented petitions on which informed decisions can be made.

The Advisory Council appreciates the opportunity to present its views on this important legislation and urges the Committee to expedite its review and mark-up of H.R. 361. We also request that the Committee amend the bill as recommended in these comments. In summary, the Advisory Council believes that H.R. 361 is a sound and reasonable approach to the difficult issue of Federal acknowledgment and provides a long-awaited and necessary alternative to the existing FAP. It should be accorded the full support of this Committee.

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