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Testimony of Brian Patterson, President, United South and Eastern Tribes, Inc.
Before the House Natural Resources
Subcommittee on Indian, Insular and Alaska Native Affairs

For the hearing of December 8, 2015 on H.R. 3764, The Tribal Recognition Act

Chairman Bishop, Ranking Member Grijalva, Chairman Young, Ranking Member Ruiz, members of the Subcommittee: thank you for providing me with the opportunity to testify on H.R. 3764, the Tribal Recognition Act. My name is Brian Patterson. In addition to serving as Bear Clan Representative to the Oneida Nation Men's Council, I am serving in my fifth term as President of United South and Eastern Tribes, a non-profit, inter-tribal organization representing 26 federally recognized Tribal Nations from Texas to Florida and up to Maine. USET is dedicated to enhancing the development of its Member Tribal Nations, to improving the capabilities of these governments, and assisting USET Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people. This includes ensuring each branch of the federal government works to fulfill solemn obligations to Tribal Nations.

As USET and others have previously noted, the Part 83 Federal Acknowledgement Process, as administered by the Bureau of Indian Affairs, is vital to fulfillment of the trust responsibility, as well as authorized and upheld by Congress, the judicial branch, and the Constitution. While there may be differences of opinion regarding the appropriate standards of review in the revised Part 83 Process, there is overwhelming agreement within Indian Country that the Secretary is well-positioned to recognize Tribes on behalf of the United States. As such, we urge this Subcommittee to consider whether the unique and sacred diplomatic relationship between our respective sovereign Nations is best served by the proposed wholesale elimination of Executive branch recognition via H.R. 3764.

I would like to note that many of USET's Member Tribal Nations' diplomatic relations with the United States were achieved through executive processes, including the Part 83 process. For those Tribes who have gone through executive processes, there is no doubt that they were "lawfully" recognized as a matter of constitutional and statutory authority; just as importantly, the process in USET's experience assured that those that were recognized were justifiably recognized as a matter of history and moral right.

The government-to-government relationship between Tribal Nations and the United States begins at the point where each recognizes the sovereignty of the other. For this reason it is important that the federal government have in place a credible, non-politicized process for determining which Tribal Nations it recognizes. Executive recognition provides an orderly process, administered by experts, such as ethno-historians, genealogists, anthropologists, and other technical staff, that is insulated from political considerations unrelated to the historic legitimacy of a Tribal Nation. USET is deeply concerned that placing sole authority for recognition in the hands of Congress will unduly inject unrelated political considerations into a process that is at the heart of the federal trust responsibility.

While federal recognition via Act of Congress is one way the federal government acknowledges Tribal Nations, it should not be the only way. As this body well knows, critical pieces of legislation, including those of a non-controversial nature, are sidelined or stymied, with increasing frequency, due to the mercurial nature of the political process. A common criticism of Part 83 is the length of time associated with receiving a decision. While H.R. 3764 does include deadlines for recommendations from the Secretary of the Interior, it places no deadline on

the introduction of corresponding legislation, should Congress agree with the Secretary's positive determination. Moreover, even if the legislation were to prescribe a timeline, there is virtually no way to assure that a federal recognition bill would not languish in Congress for months, years, or even indefinitely for reasons unrelated to the merits of a Tribe's request for federal recognition.

In addition to concerns related to the political process, it is essential to recognize that the United States Congress and numerous courts have repeatedly acknowledged the Secretary of the Interior's authority to extend recognition to Tribal Nations. This spring, USET, along with eight other Tribal Nations and Tribal Nation organizations, submitted testimony for the record of the hearing of April 22nd to this Subcommittee providing legal validation and support for the Secretary's authority to acknowledge Tribal Nations. As the testimony notes, Congress has properly delegated authority to the Executive Branch to recognize Tribal Nations through 25 U.S.C. § 2, 25 U.S.C. § 9, and 43 U.S.C. § 1457. Like Congress's constitutional grant of recognition authority through the Indian Commerce Clause, the statutes delegating recognition authority to the Executive Branch do so in broad terms. Many courts have recognized Congress's proper delegation of recognition authority through these broad statutes. Congress, when it enacted the 1994 Federally Recognized Indian Tribe List Act, reiterated its past delegation of recognition authority to the Executive Branch.

There are currently 566 federally recognized Tribal Nations included on the list the Department of the Interior maintains at the direction of Congress. Congress has authority to initiate a government-to-government relationship, but most Tribal Nations did not receive federal recognition in this manner. Instead, many Tribal Nations received federal recognition via the Executive Branch. The standards the Executive Branch uses for determining whether an entity possesses sovereign Tribal government status for purposes of federal law grew out of case law, drawing from cases that articulate where Tribal Nations' inherent sovereignty originated, how they maintained that sovereignty over time, and what their political governing structure must entail.

Although Congress has properly delegated authority to the Executive Branch to make a determination regarding the federal recognition of Tribal Nations, the Executive Branch also has independent recognition authority granted by the Constitution. The Constitution grants the Executive Branch authority to undertake diplomatic and administrative actions consistent with federal recognition. This authority is most clearly granted through the Constitution's Treaty Clause. The Constitution also grants the Executive Branch the authority to receive and provide ambassadors.

The Executive Branch has exercised its constitutionally-granted recognition authority in various ways. Long before Congress delegated recognition authority to the Executive Branch, the Executive Branch engaged in treaty negotiations with Tribal Nations. President George Washington entered into and then worked with the Senate to ratify the first treaties in 1789, thereby establishing that treaties with Tribal Nations would utilize the same process treaties with foreign nations must go through. Before the treaty-making era ended in 1871, most Tribal Nations had entered into a treaty with the United States. Although the Senate was involved in ratifying these treaties, the Executive Branch utilized its constitutional treaty-making authority and was therefore the governmental branch responsible for treaty-making with Tribal Nations.

Courts have found that the Executive Branch's treaty negotiations with Tribal Nations constitute federal recognition. The Department of the Interior in making determinations regarding whether a Tribal Nation is federally recognized has also treated treaty negotiations as indicative of federal recognition. Also evidencing federal recognition, and often resulting from treaties, is a federal reservation created for a Tribal Nation. In fact, in defining "tribe" in the Indian Reorganization Act, Congress acknowledged that "Indians residing on one reservation" possess sovereign Tribal government status.

Since the treaty-making era ended, the Executive Branch has legally federally recognized Tribal Nations through other means. For example, the Executive Branch replaced treaties with executive orders immediately after treaty-making ended. When Congress enacted the Indian Reorganization Act in 1934, the Department of the Interior conducted sovereign Tribal government status examinations to determine which Tribal entities were eligible for benefits under the Act, thus resulting in their recognition. In 1978, the Department of the Interior promulgated the federal recognition regulations in order to create a more consistent process for federal recognition, and it published its first comprehensive list of federally recognized Tribal Nations in 1979.

As USET has discussed in testimony submitted for the record of the October 28th hearing, if Congress now attempts to restrict the Executive Branch's recognition authority through H.R. 3764, that legislation would likely be deemed unconstitutional. We urge that you reconsider H.R. 3764 and instead work directly with Tribal Nations to address any changes that Congress might appropriately adopt to improve this important process. USET believes strongly that all branches of government share equally in the federal trust responsibility and opposes any effort that fails to fully recognize the obligations and authorities of each. We welcome the opportunity for Tribal Nations and Tribal Nation Organizations to work with this Subcommittee and Chairman Bishop to address and improve the Federal Acknowledgement Process so that it better reflects our country's commitment to a government-to-government relationship with Tribal Nations, including as they are recognized.

"Because there is strength in Unity"