TESTIMONY OF

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BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS

CONCERNING

"FEDERAL DECLINATIONS TO PROSECUTE CRIMES IN INDIAN COUNTRY" AND THE 2008 TRIBAL LAW AND ORDER ACT

PRESENTED

SEPTEMBER 18, 2008

Chairman Dorgan, Vice-Chairman Murkowski, and Members of the Committee:

My name is M. Brent Leonhard. I and the Confederated Tribes for the Umatilla Indian Reservation appreciate the opportunity to testify before the Committee regarding the 2008 Tribal Law and Order Act, and more specifically, federal declinations to prosecute crimes in Indian Country.

The first section of my testimony pertains directly to federal declinations to prosecute crimes in Indian Country. As has been repeatedly pointed out before this Committee, the rate at which federal prosecutions are declined in Indian Country is appallingly high. There may be many reasons for such high rates of declinations ranging from inadequate evidence to limited resources, from lack of jurisdiction to a lack of confidence in the ability to obtain a conviction at trial, and anything in between.

Regardless the rates are inordinately high, and in light of this fact it is important to do the two things that relevant portions of this bill seek to accomplish. First, the bill seeks to obtain accurate data on declination rates and the reasons for those declinations. And second, the bill seeks to ensure there is timely coordination and reasonable communication with tribal prosecutors to make certain they have sufficient details to proceed with the case in tribal court. While the Department of Justice has indicated that it is committed to improving Indian Country crime data, it has previously expressed concerns about the purported publication and disclosure of declination reports under the bill. My testimony on this issue addresses those concerns.

The second part of my testimony pertains to section 103 of the bill and its bolstering of the use of Special Assistant United States Attorneys (SAUSA) within Indian Country. While the head of the prosecution unit for the White Mountain Apache Tribe I was an SAUSA in Arizona. Unfortunately, my participation in that program was underutilized at the time. However, the program itself offers a significant opportunity for United States Attorney offices to leverage limited resources, increase federal prosecutions of Indian Country crime, and improve tribal-federal relations. All of which is desperately needed.

Finally, I want to encourage the Committee to amend the bill to expand tribal sentencing jurisdiction from 3 years to 5. As outlined in the last section of my testimony, the majority of states that define felonies in terms of maximum sentences define their *lowest* level felonies as carrying a maximum sentence of 5 years. It seems only fair that Tribes ought to at least have the same sentencing authority as states with respect to the state's lowest level felonies.

I. Declination Reports

The United States Department of Justice has expressed concerns about provisions of the 2008 Tribal Law and Order Act that pertain to declination reports. Those concerns turned on publicizing declination reports and creating potentially discoverable material outlining weaknesses in subsequent criminal cases. Presumably, these concerns specifically pertain to section 102 of the bill as presently drafted, as that is the section of the bill governing the declination of reports. The concerns previously expressed by the Department of Justice should be sufficiently dealt with by the language of the bill as presently drafted.

Section 102 of the bill essentially requires federal law enforcement officials, when declining to investigate a crime or upon terminating an investigation, to submit a report describing each reason why the case was not opened or an investigation was declined or terminated. This report is to go to two places. First, it goes to the appropriate tribal justice official so that they have a full understanding of the reasons for the termination or declination. Second, the report goes to the Office of Indian Country Crime, which will be a component of the Department of Justice itself. A "tribal justice official" is a defined term under the bill and means "a tribal prosecutor, a tribal law enforcement officer, or any other person responsible for investigating or prosecuting an alleged criminal offense in tribal court." In short, initial disclosure outside of the Department of Justice itself is only made to those tribal officials who are intimately involved in the criminal investigation. And in those situations where the tribal prosecutor is an SAUSA or the tribal law enforcement officer has authority to conduct federal investigations, the

disclosure still technically remains within the Department of Justice or at least within a federal law enforcement agency.

In those circumstances where the appropriate tribal justice official is not effectively an arm of the Department or federal government in a given criminal investigation, the information still is not subject to general public disclosure unless the tribal justice officials themselves make such a disclosure. The Freedom of Information Act (FOIA), at 5 U.S.C. 552(b)(7)(A), specifically exempts records or information compiled for law enforcement purposes to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings. With the specific FOIA exemption, and limited disclosure to critical tribal law enforcement officials, the concern that such reports could be subject to public disclosure is unwarranted.

Section 102 of the bill also requires United States Attorneys, when declining to prosecute a case or otherwise terminating a federal prosecution, to do two things. First, they are to coordinate and communicate with the appropriate tribal justice official with enough advanced notice to prevent the running of a tribal statute of limitations and provide them with reasonable details about the case to allow the tribal prosecutor to pursue the case in tribal court. Second, they must submit relevant information regarding a declination, including among other things the reason for the declination, to the Office of Indian Country Crime.

With regard to the requirement that they coordinate and communicate with appropriate tribal justice officials in a timely manner on declined federal cases, it should go without saying that this requirement is critical. Every state and the federal

government have a criminal statute of limitations. Tribes may, or may not. Even those that don't may look to state or federal laws for guidance in determining if a limitation period applies and what that period might be. Typical state statutes limit the time in which misdemeanor crimes can be prosecuted to one or two years. In Washington State it is two years for a gross misdemeanor (punishable by up to one year) and one year for misdemeanors (punishable by up to six months). Given that tribal courts are limited to sentencing an individual to one year in jail this can have serious consequences for very serious offenses. As reported in a 2007 Denver Post article, a prosecutor for the Crow tribe had a case dismissed for violation of a statue of limitations in a case alleging the sexual assault of a six year old girl that was eventually declined by federal prosecutors (http://www.denverpost.com/ci_7429560). Delays can have serious consequences. Furthermore, information obtained during the federal investigation of any case needs to be shared with tribal prosecutors to ensure they have all of the facts and evidence necessary to take a case forward, not to mention the need to ensure a defendant's discovery rights are being protected as the case proceeds through tribal court. Consequently, even if such a requirement may in some tenuous way potentially jeopardize a few federal cases that are initially decline but later pursued, absence of such a requirement will seriously undermine the ability for tribes to bring cases in tribal court.

Furthermore, there isn't a requirement in the bill that this coordination or communication be in writing, let alone subject to public disclosure or publication. There is no reason to assume such coordination with tribal prosecutors would result in the creation of federally discoverable material that will somehow undermine the investigation that would not otherwise be discoverable. I am not aware of any requirement that a

federal prosecutor must provide discovery to a potential federal defendant absent a pending federal case. If and when the matter is pursued in tribal court, certainly the defendant will have a right to all discoverable material, but that requirement isn't unique to any provision of the proposed bill - it is a matter of criminal procedure and due process requirements. Furthermore, there is no reason to assume that any work product from the Department of Justice would be subject to disclosure even after a case is filed in tribal court, as work product generally is not subject to disclosure.

The second thing United States Attorneys are to do under section 102 is to submit relevant information regarding a declination, including among other things the reason for the declination, to the Office of Indian Country Crime. Again, the Office of Indian Country Crime will be an office within the Department of Justice and sharing information within the department does not give rise to any unique problems concerning publicizing sensitive information.

In addition to the requirements imposed on federal law enforcement and United States Attorneys, section 102 of the bill requires that the Director of the Office of Indian Affairs establish and maintain a compilation of the information discussed above. This compilation is to be made available to Congress. However, release of information to Congress does not constitute a waiver of any exemption under FOIA. *Kanter v. Internal Revenue Service*, N.D.Ill.1977, 433 F.Supp. 812; 5 U.S.C. 552(d). Furthermore, a compilation report as contemplated under the bill (which, presumably, will be made public) will not contain information of such a detailed nature as to be capable of undermining the investigation or prosecution of a specific case. And such a report, in and

of itself, certainly would not make other more specific information about a particular case suddenly discoverable.

It may be that the Department of Justice fears that after having created a report detailing the reasons for declining to prosecute a case or terminating the prosecution of a case, they may subsequently decide to pursue prosecution after all. In that instance, they may be concerned that the previously created report which has only been shared internally and, potentially, with tribal law enforcement officials has become discoverable. This line of reasoning would presume the report would have lost its status as work product because of the disclosure to "outside" law enforcement. I'm not sure such a concern is warranted. Certainly, given the nature of federal Indian law and the necessary interaction between tribal and federal law enforcement in prosecuting crimes in Indian Country it is reasonable to assume communications between the two remain work product for both. In fact, the connection between the two is so intimate, given the present nature of federal criminal Indian law, that tribal law enforcement officers often have certification to exercise federal investigatory powers and tribal prosecutors are often designated as Special Assistant United States Attorneys. If, however, that assumption is erroneous, there appears to be no reason why the bill could not be amended to specifically declare that such reports are to be considered the work product of the Department of Justice and tribal law enforcement. Furthermore, the likelihood that the Department of Justice is going to pursue the prosecution of a case after having specifically declined to prosecute it, or after having terminated the prosecution of the case, as opposed to issuing a request to conduct further investigation pursuant to United States Attorney Criminal Resource Manual 9-27.200, is likely very low. On the other

hand, the need to coordinate and communicate with tribal law enforcement officials on the reasons for declinations is critically important.

II. Special Assistant United States Attorneys.

In an effort to expand the capacity of United States Attorney Offices, section 103 of the bill specifically amends 28 U.S.C. 543(a) to include the appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting federal offenses committed in Indian Country. The bill goes on to encourage the use of SAUSAs in Indian Country to enhance the prosecution of what might other wise be considered minor federal crimes. United States Attorney resources are limited. Consequently, they often have to pick and choose between cases they want to prosecute in federal court. The United States Attorney manual gives prosecutors wide discretion in determining whether to proceed with the prosecution of a case, as it should. However, discretion does not turn solely on the likelihood of conviction at trial. Exercise of discretion also turns on whether a substantial federal interest would be served. In making that determination federal prosecutors are to refer to federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, culpability, criminal history, and willingness to cooperate in other prosecutions (USAM 9-27.230). There is little doubt in my mind that this means a lot of federal crimes go un-prosecuted in Indian Country and often even serious crimes will be set aside to pursue other serious matters that have a greater likelihood of conviction.

Using qualified tribal prosecutors or other attorneys to pursue viable cases in federal court that might otherwise have been set aside to pursue other, more serious, cases can close this resource gap. SAUSAs in Indian Country are not paid out of United States

Attorney resources, have direct ties to the community where cases arise, and routinely deal with the law enforcement officials who will be handling the investigation of the crimes. Unfortunately, it is a program that is significantly underutilized in Indian Country.

My own experience as an SAUSA left me without having prosecuted a single case in federal court. But that doesn't have to be the case. Many tribal prosecutors are highly qualified trial lawyers. With appropriate encouragement and training they can be effective federal prosecutors on cases that would otherwise be set aside. Furthermore, training could involve second chairing a few cases with AUSAs which would certainly enhance the relationship between tribal and federal law enforcement. In addition, AUSAs could second chair a few of the SAUSA's initial cases. While this may require some additional devotion of resources upfront, the payoff could be significant in that United States Attorney offices would essentially be getting free prosecutors to handle cases that otherwise would not have been pursued. Furthermore, tribes would gain by having their prosecutors receive free training and experience in prosecuting crimes in multiple jurisdictions.

III. Expanding Tribal Court Sentencing Jurisdiction to 5 Years.

Finally, I want to address the need to make at least one more amendment to the bill as presently drafted. The Tribal Law and Order Act of 2008 is a significant step forward in curbing crime in Indian Country. Among its provisions is the expansion of tribal sentencing authority from a maximum of 1 year to a maximum of 3 years. While this is laudable, it may be more appropriate to permit tribes to sentence individuals who

commit serious crimes to a maximum of 5 years, and I encourage the Committee to consider amending the bill to expand sentencing authority from 3 to 5 years.

The 3 year timeframe was initially selected based on the 2002 report of the Committee to the U.S. Sentencing Commission, which showed that the most common federally prosecuted crime was assault, and that the most common sentence was 34 months. However, it may be more relevant to look at how states define their lowest level felonies to determine what tribal sentencing authority ought to be. Furthermore, the 3 year time frame fails to take into account that prisoners are often given good time, such that the actual sentence served may be significantly less than that imposed.

Most states define felonies by statute, just as this bill will do for Indian Country. Rather than basing tribal sentencing authority on a given federal sentence, it might be more appropriate to look at how states define their lowest level felonies as a guide to determine an appropriate expansion of tribal sentencing authority. Furthermore, it stands to reason and fairness that a tribe ought to at least have the same sentencing authority as a state does with respect to the state's lowest level felonies. This is particularly true given that a tribe's use of such enhanced sentencing authority will typically be for very serious crimes that have not been prosecuted through the federal system. Examples include rape, attempted homicide, serious child abuse, and aggravated assault. While it is unlikely that a state would include such crimes within their lowest level felonies given the serious nature of the offenses we are talking about, tribes ought to at least be able to sentence someone committing these crimes up to the maximum allowed by a typical state's *lowest* level felony.

As it turns out, according to a memo previously submitted into the Senate record by myself and Cisco Minthorn, of the states that define felonies, the majority define their lowest level felony as having a maximum sentence of 5 years. And most states that define low level felonies as less than 5 years categorize aggravated assault (presumably, the typical crime to be covered by expanded jurisdiction) as falling within a felony class that has at least a 5 year maximum sentence. 11 states were left out of the calculation because they don't define a felony and an equivalency was not found. Of the remaining 39 States we have found that 25 states define their lowest level felony as carrying a maximum sentence of 5 years in jail or more (18 of these define the lowest level felony at 5 years.) 4 states define the lowest level felony as 4 years, 3 States as 3 years, and 7 as 2 years or less. However, 6 of the 7 that have low level felonies defined as 2 years or less actually treat aggravated assaults (the typical type of offense to be covered by expanded jurisdiction) as 5 years or more. So, it might be more accurate to say, in regard to offenses of concern in Indian Country and the need to expand jurisdiction, at least 31 of 39 states define their lowest level felony as 5 years or more.

Consequently, 64% define a low level felony as 5 years or more, and if we include relevant felony crimes for Indian Country, it is more like 79%. In addition, of the 11 states that do not define felonies, 9 sentence aggravated assaults to more than 5 years. As for the other 2 states, 1 sentences aggravated assault up to 4 years and the other uses a complex sentencing grid for all offenses. Therefore, in regard to offenses of concern in Indian Country, 46 of the 50 states, or 92%, allow for a sentence of 5 years or more.

In conclusion I want to extend my gratitude and appreciation to Senator Gordon Smith, this Committee, and all those who support this very important bill. It has many significant provisions and seeks not only increased resources to combat crime in Indian Country, but most notably, systemic changes that are necessary to help fix a clearly broken system. It is easily one of the most important federal Indian Country crime bills in the last 30 years, and accordingly warrants the broad bi-partisan support it has received. Thank you for your efforts.