

**TESTIMONY OF
MICHAEL D. OLSEN
COUNSELOR TO THE ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
FOR THE HEARING
BEFORE THE
HOUSE COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ON H.R. 898**

April 1, 2004

Good morning, Mr. Chairman and Members of the Committee. My name is Michael Olsen, Counselor to the Assistant Secretary for Indian Affairs. I am here today to provide the Administration's testimony on H.R. 898, the "Lumbee Recognition Act."

The recognition of another sovereign is one of the most solemn and important responsibilities delegated to the Secretary of the Interior. Federal acknowledgment enables tribes to participate in federal programs and establishes a government-to-government relationship between the United States and the tribe. Acknowledgment carries with it certain immunities and privileges, including exemptions from state and local jurisdiction and the ability to undertake casino gaming. The Department believes that the Federal acknowledgment process set forth in 25 C.F.R. Part 83, "*Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*," allows for the uniform and rigorous review necessary to make an informed decision establishing this important government-to-government relationship.

Before the development of these regulations, the federal government and the Department made determinations as to which groups were tribes when negotiating treaties and determining which groups could reorganize under the Indian Reorganization Act (25 U.S.C. 461). Ultimately there was a backlog in the number of petitions from groups throughout the United States requesting that the Secretary officially acknowledge them as Indian tribes. Treaty rights litigation in the West and land claims litigation in the East, highlighted the importance of these tribal status decisions. Thus, the Department in 1978 recognized the need to end ad hoc decision-making and to adopt uniform regulations for federal acknowledgment.

Under the Department's regulations, petitioning groups must demonstrate that they meet each of seven mandatory criteria. The petitioner must:

- (1) demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900;

(2) show that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;

(3) demonstrate that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

(4) provide a copy of the group's present governing document including its membership criteria;

(5) demonstrate that its membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity and provide a current membership list;

(6) show that the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and

(7) demonstrate that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

A criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.

Under the Indian Commerce Clause, Congress has the authority to recognize a "distinctly Indian community" as a tribe. Because of its support for the deliberative regulatory acknowledgment process, however, the Department has traditionally opposed legislative recognition. Notwithstanding that preference, the Department recognizes that some legislation is needed given the unique status of certain Indians in North Carolina.

In 1956, Congress designated these certain Indians then "residing in Robeson and adjoining counties of North Carolina" as "Lumbee Indians of North Carolina" in the Act of June 7, 1956 (70 Stat. 254). Congress went on to note the following:

Nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians.

In 1989, the Department's Office of the Solicitor advised that the 1956 Act forbade the federal relationship within the meaning of 25 C.F.R. Part 83, and that Lumbee Indians were therefore precluded from consideration for federal acknowledgment under the administrative process. Because of the 1956 Act, we acknowledge that legislation is

necessary if Lumbee Indians are to be afforded the opportunity to petition the Department under 25 C.F.R. Part 83. The Department would welcome the opportunity to assist the Congress in drafting such legislation.

If Congress elects to bypass the regulatory acknowledgement process in favor of congressional recognition, it may only recognize Lumbee Indians as a tribe pursuant to its Commerce Clause authority if a court could decide that Congress had not acted arbitrarily in implicitly or explicitly finding that Lumbee Indians constitute a distinct Indian community. Among other factors, Congress would have to identify or be relying upon the historical continuity of a unified community under one leadership or government. If Congress made the proper express findings (or implicitly relied on sufficient evidence) and then granted Lumbee Indians federally recognized status, the Department believes that Congress should be cognizant of several important issues that federal recognition raises. As currently drafted, H.R. 898 leaves many questions to these issues unanswered.

Under the provisions of this bill, Lumbee Indians would be afforded all benefits, privileges and immunities of a federally recognized tribe. Thus, the “Lumbee Tribe of North Carolina,” as styled in H.R. 898, would be authorized to conduct gaming activities pursuant to the Indian Gaming Regulatory Act (IGRA). Prior to conducting Class III gaming, the Lumbee Tribe of North Carolina would need to negotiate a gaming compact with the State of North Carolina. In addition, the Lumbee Tribe of North Carolina must have lands taken into trust. Generally, if a tribe wants to game on land taken into trust after the passage of IGRA, it must go through the two-part determination described in 25 U.S.C. §2719(b)(1)(A). This process requires the Secretary to determine, after consultation with the tribe and the local community, that gaming is in the best interest of the tribe and its members and not detrimental to the local community. If the Secretary makes that determination in favor of allowing gaming, then the gaming still cannot occur without the Governor’s concurrence. The bill as drafted does not prohibit gaming.

The Department has devoted a great deal of time to trust reform discussions. The nature of the trust relationship is now often the subject of litigation. Both the Executive Branch and the Judicial Branch are faced with the question of what exactly did Congress intend when it established a trust relationship with individual tribes, and put land into trust status. What specific duties are required of the Secretary, administering the trust on behalf of the United States, with respect to trust lands? Tribes and individual Indians frequently argue that the duty is the same as that required of a private trustee. Yet, under a private trust, the trustee and the beneficiary have a legal relationship that is defined by private trust default principles and a trust instrument that defines the scope of the trust responsibility. Congress, when it establishes a trust relationship, should provide the guideposts for defining what that relationship means.

Much of the current controversy over trust stems from the failure to have clear guidance as to the parameters, roles and responsibilities of the trustee and the beneficiary. In this case, given that we would be taking land into trust in an area in which there has not previously been federal trust land, such issues as land use, zoning, and the scope of the Secretary’s trust responsibility to manage the land should be addressed with clarity and

precision. Congress should decide these issues, not the courts. Therefore, we recommend the Committee set forth in the bill the specific trust duties it wishes the United States to assume with respect to Lumbee Indians of North Carolina. Alternatively, the Committee should require a trust instrument before any land is taken into trust. This trust instrument would ideally be contained in regulations drafted after consultation with the tribe and local community, consistent with parameters set forth by Congress in this legislation. The benefits of either approach are that it would clearly establish the beneficiary's expectations, clearly define the roles and responsibilities of each party, and establish how certain services are provided to tribal members.

Another issue we have identified is requiring the Secretary to determine who would be eligible for services and benefits. Section 3 requires the Secretary to determine all Lumbee members eligible for all services and benefits provided to Indians because of their status as a member of a federally recognized tribe. However, each program has different criteria for eligibility and the Secretary cannot determine eligibility for such things as health care.

In addition, section 3 may raise a constitutional problem by purporting to require the President to submit annually to the Congress as part of his annual budget submission a budget that is recommended by the head of an executive department for programs, services and benefits to the Lumbee. Under the Recommendations Clause of the United States Constitution, the President submits for the consideration of Congress such measures as the President judges necessary and expedient.

We are also concerned with the provision requiring the Secretary, within one year, to verify tribal membership. In our experience this is an extremely involved process that has taken several years with much smaller tribes. Although, the bill states that, "The Secretary's verification shall be limited to confirming compliance with the membership criteria set out in the tribe's constitution adopted on November 11, 2000." We do not currently have access to the necessary tribal rolls and have no idea how expansive this verification process might be.

Should Congress choose not to enact H.R. 898, the Department feels that at a minimum, Congress should amend the 1956 Act to afford Lumbee Indians of North Carolina and other groups of "Robeson and adjoining counties" the opportunity to petition for Federal acknowledgment as an Indian tribe under the Department's Administrative process at 25 C.F.R. Part 83.

This concludes my prepared statement. I would be happy to answer any questions the Committee may have.