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Testimony
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United States Senate

On the process to recognize Indian tribes
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Mr. Chairman and members of the committee. I appreciate the opportunity to appear before you today on behalf of the Lumbee Tribe. The Lumbee recognition issue is pending before this committee once again and our people have high hopes that this Congress, after nearly 120 years of effort, we will finally achieve federal recognition of the Lumbee Tribe of North Carolina. I bring with me the deepest gratitude of our people for the efforts of Senator Burr and Senator Dole on behalf of our people for their support for our cause. Of course, I also bring with me our people's joy at the passage of the Lumbee recognition bill in the House of Representatives, HR 65, on June 7 of this year by a two to one margin – all due to the hard work of Congressman McIntyre.

The committee has asked the Tribe to comment on the process of federal recognition of Indian tribes. This is something with which the Lumbee Tribe has considerable experience: it has sought federal recognition since 1888. Since that time, the Tribe has sought federal recognition from the Department of the Interior through administrative processes and from Congress directly through the enactment of special recognition legislation. This experience is rooted deep in our history.

Our experience has not yet resulted in federal recognition for the Tribe. However, in 1956, Congress passed a peculiar statute dealing with the Lumbee Tribe – a statute that makes the Tribe ineligible for the administrative process for recognition of tribes. Some have proposed that the answer for the Lumbee Tribe is to repeal this act of Congress and send the Tribe to the current administrative recognition process. That is NOT the answer – this solution would be unfair, it is not necessary, and it will not work. The only fair solution is the enactment of special recognition legislation for the Tribe.

Federal recognition – the Lumbee experience

The Lumbee Tribe first sought federal recognition in 1888. That year, tribal leaders submitted to Congress a petition seeking federal Indian education assistance for the Lumbee Indian Normal School that had been created by the State of North Carolina the previous year. The school was established to train Indian teachers for the all Lumbee school system that had been established in 1885, but the State provided too little funding for the normal school. The Congress referred the Tribe's petition to the Department of the Interior and the Commissioner of Indian Affairs told the Tribe:

While I regret exceedingly that the provisions made by the State of North Carolina seem to be entirely inadequate, I find it quite impractical to render any assistance at this time. The Government is responsible for the education of something like 36,000 Indian children and has provision for less than half this number. So long as the immediate wards of the Government are so insufficiently provided for, I do not see how I can consistently render any assistance to the Croatans [as the Tribe was then denominated under state law] or any other civilized tribes.

In other words, the Department acknowledged that we were an Indian community but denied assistance because of the cost of services.

So the Tribe then turned directly to Congress. Between 1899 and 1956, approximately a dozen bills were introduced in Congress to recognize the Tribe. The Department of the Interior testified on these bills and consistently acknowledged that we constituted an Indian community that has been on the Lumber River, formerly known as Drowning Creek, since the time of sustained white contact. Yet the Department consistently opposed recognition of the Tribe, usually on the grounds of cost.

During this same period, the Department also undertook its own direct studies of the Lumbee Tribe and community, sometimes at the direction of Congress. Altogether, the Department produced 11 reports on the Lumbee Tribe between 1912 and 1956. The

1924 report prepared by James Henderson, Superintendent of the Cherokee agency in North Carolina, is representative. He found that, “There are many to be found among them who to all appearances are full blood Indian.” Henderson observed that the Lumbee were similar to other tribes and recommended that Lumbees be allowed to attend Haskell Institute, at a minimum. Once again, though, the Department testified against recognition of the Tribe.

The Lumbee Tribe also sought to avail itself of other administrative processes. After the passage of the Indian Reorganization Act in 1934, Commissioner Collier wrote to the Tribe and suggested we might organize under that act if some of our members were certified as one-half or more Indian blood. The Tribe requested that the BIA send a physical anthropologist to the community, but only about 200 members agreed to submit to the required physical examination. The BIA did certify 22 half-bloods out of those members it examined, but the BIA ultimately refused to take land into trust for these individuals so that they were not able to organize.

1956 Lumbee Act – Lumbee Tribe ineligible for administrative acknowledgment

Congress finally enacted one of the many Lumbee bills in 1956 at the height of the federal termination policy for Indians. Like the others before, the 1956 bill had been introduced as a recognition bill. The original bill tracked verbatim the language of the most recent state recognition legislation passed in 1953 that recognized the Tribe under the name Lumbee. However, the Department opposed enactment of the bill, once again because of its concern about providing federal Indian services to the Tribe:

We are therefore unable to recommend that the Congress take any action which might ultimately result in the imposition of additional obligations on the Federal

Government or in placing additional persons of Indian blood under the jurisdiction of this Department. The persons who constitute this group of Indians have been recognized and designated as Indians by the State legislature. If they are not completely satisfied with such recognition, they, as citizens of the State, may petition the legislature to amend or otherwise to change that recognition... If your committee should recommend the enactment of the bill, it should be amended to indicate clearly that it does not make these persons eligible for services provided through the Bureau of Indian Affairs to other Indians.

The Senate adopted the Department's recommendation and amended the bill to include classic termination language before enactment. Pub. L. 570, Act of June 7, 1956, 70 Stat. 254.

Since 1956, federal agencies and courts have reached different conclusions regarding the purpose and effect of the 1956 Lumbee Act. In 1970, the Joint Economic Committee of Congress described the Lumbees as having been officially recognized by the act, although not granted federal services. See "American Indians: Facts and Future," *Toward Economic Development for Native American Communities*, p. 34 (GPO 1970). Also in 1970, the Legislative Reference Service of the Library of Congress described the 1956 Lumbee Act as legislative recognition of an Indian people. See Memorandum, April 10, 1970, on Extending Federal Jurisdiction and Services to Hill 57 Indians, LRS, Library of Congress. And in 1979, the Comptroller General ruled that the 1956 act left the Lumbees' status unchanged, i.e., it neither recognized the Tribe nor terminated the Tribe's eligibility for services it might otherwise receive. The one court to construe the statute concluded that it was intended "to designate this group of Indians as 'Lumbee Indians' and recognize them as a specific group..." but not to take away any rights conferred on individuals by previous legislation. *Maynor v. Morton*, 510 F.2d 1254, 1257-1258 (D.C. Cir. 1970) [holding that the so-called half-bloods certified under

the Indian Reorganization Act were eligible to receive BIA services]; *see also* September 28, 1988 CRS Memorandum, reprinted at S.Rep.No. 100-579, 100th Cong., 2d Sess.

One thing is certain about the 1956 Lumbee Act – it makes the Lumbee Tribe ineligible for the administrative acknowledgment process. Under the acknowledgment regulations, the Secretary of the Interior cannot acknowledge tribes that are subject to legislation terminating or forbidding the federal relationship. 25 C.F.R. sec. 83.3(e). In a formal opinion issued on October 23, 1989, the Solicitor for the Department of the Interior concluded that the 1956 Lumbee Act is such federal legislation and, as a result, the Department is precluded from considering any application from the Lumbee Tribe for federal acknowledgment.

Sending the Lumbee Tribe to the administrative recognition process – unprecedented and unfair

Congress has very seldom done what it did to the Lumbee Tribe in 1956 – i.e., acknowledge the tribe as Indian but simultaneously prohibit the application of federal Indian statutes and services. And in no such case has Congress ever repealed the termination-type statute and then required the tribe to seek acknowledgment from the Department of the Interior. In every single other such case, the Congress has enacted special recognition legislation for the Tribe. It would be fundamentally unfair to treat the Lumbee Tribe any differently from any other tribe that Congress has placed in this peculiar position.

The most directly analogous situation is that of the Ysleta del Sur Pueblo of Texas. Like the Lumbee Tribe, this tribe had been long recognized by Texas before Congress passed special legislation acknowledging them as Indian. This special statute,

enacted in 1968 for the Tiwas of Texas (as Ysleta del Sur was then called) was modeled on the 1956 Lumbee Act. *See* S.Rep.No. 1070, 99th Cong. 2d Sess. The Department of the Interior concluded that the 1968 Tiwa Act made that tribe ineligible for the administrative process, the same determination it made regarding the 1956 Lumbee Act. And for that reason, Congress enacted special legislation to recognize the Ysleta del Sur Pueblo in 1987. Pub. L. 100-89, Act of August 18, 1987, 101 Stat. 667.

The Lumbee Tribe is the only tribe left in the country that was placed in this peculiar position by Congress. Congress should fix it the same way it has for every other tribe in this position. There is no fair or rationale basis for treating the Lumbee Tribe differently.

Sending the Lumbee Tribe to the administrative acknowledgment process - unnecessary

There is no good purpose to be served by requiring that the Lumbee Tribe go through the current administrative process. That process gives the Department an opportunity to examine a group's history and community to determine whether the group is, in fact, an Indian tribe. The Department of the Interior and Congress have already made that inquiry regarding the Lumbee Tribe. As noted above, there are numerous congressional reports and 11 BIA studies on the Lumbee history and community. All of these reports consistently conclude that Lumbee is an Indian community that has been in the same place – on the Lumber River – since the time of sustained white contact. Not a single congressional report or BIA study doubts these fundamental facts.

Recently, the committee received a letter on this from John Shapard, a retired BIA employee who wrote the acknowledgment regulations, set up the acknowledgment office,

and ran that office for its first 9 years. Mr. Shapard concludes that there is no need to send the Lumbee Tribe to the current administrative process for yet another study:

It must be clearly understood that the Lumbees are not “Johnnies-come-lately.” They have been actively seeking recognition for more than one hundred years. They have been studied by sociologists, anthropologists, and by historians. Their personal and tribal lineage has been anatomized by genealogists. Books have been written about the tribe and its plight. Bureaucrats and legislators have wrestled with the “Lumbee problem” since the 1890s. The Interior Department and the bureau’s files are packed full of reports, survey, studies, and miscellaneous documents relating to the Lumbees. The State of North Carolina, which recognizes the Lumbees as a tribe, is equally cumbered with documents about the tribe. The government does not need to waste more time or money for additional assurances of the Lumbees’ background and credentials.

Letter of Johan A. Shapard to Chairman Dorgan, dated September 5, 2007. Because of this record, no point is to be served by sending the Lumbee Tribe to the administrative acknowledgment process.

Sending the Tribe to the administrative acknowledgment process – it will not work

The administrative acknowledgment process is intended to verify the tribal status of Indian groups so that legitimate groups can be recognized. But the process depends completely upon documentary evidence generated by the dominant society to establish the seven mandatory criteria that define a tribe under those regulations. If a tribe fails to produce the necessary documents, the tribe is not recognized. Sometimes, though, documents are not available, even if the Indian group actually is an Indian tribe. There can be several reasons for this – suppression of Indian identity for periods of history due to particular state or federal policies, or avoidance of record keepers by the Indian groups for reasons of self-protection or even survival. When this happens, the administrative

acknowledgment process fails to identify or recognize all legitimate Indian tribes. The Lumbee Tribe may be such a tribe.

As noted above, the BIA testified repeatedly to Congress over a fifty year period that the Lumbee are an Indian people. In 1934, the BIA witness, relying on a report by the eminent John Swanton, explicitly advised Congress that the Lumbee descend from the historic Cheraw and related Siouan speaking tribes from coastal North Carolina. But those who administer the current acknowledgment process have recently testified that there may be too few documents proving Cheraw descent for the Lumbee Tribe under the acknowledgment regulations. In other words, the BIA may now change its mind about the ancestry of the Lumbee Tribe only because the current regulations require rigid reliance on a mass of documents that may not have been generated about a group.

Current scholars outside the BIA have noted this problem. Dr. Vine Deloria, for example, testified to Congress in 1988 in support of special legislation to recognize the Lumbee Tribe. He told Congress that the Lumbees may be in a difficult position on this issue under the regulations for a very good reason – in the early 18th century, the ancestors of the Lumbees took refuge in the swamps around Drowning Creek (now Lumber River) in order to minimize contact with nearby white settlements and protect themselves. Nonetheless, Dr. Deloria had no doubt that the Lumbees constitute an Indian tribe and urged Congress to recognize it as such.

If the Lumbee Tribe descended from the Cheraw and related Siouan speaking tribes in 1934, it still descends from the Cheraw and related Siouan speaking tribes. The BIA said so then and it is still the truth of Lumbee history. The Congress should not tolerate picking and choosing of processes and results only for the purpose of avoiding

recognition of the Lumbee Tribe. That is clearly the purpose of those who urge the Congress to “protect the integrity of the administrative process” by requiring the Lumbee Tribe to go to the BIA: it’s really about opposition to Lumbee recognition, not about preserving any process.

Recommendation regarding the administrative process

The Lumbee Tribe has no direct experience with the current administrative process. Eighteen months after the Tribe submitted a petition for acknowledgment under the regulations, the Solicitor’s Office concluded that the Tribe is precluded from that process because of the 1956 Lumbee Act. Soon thereafter, it became clear to us that the BIA was prepared to repudiate much of what it had said to Congress over the last fifty years about Lumbee history and ancestry. If the regulations require this, then the regulations cannot be relied upon to identify every legitimate tribe that should be recognized.

But the Lumbee Tribe has a long and unhappy history with the BIA on the recognition issue before the current regulations were adopted. Our history teaches us one truth: the BIA has an institutional bias against non-federally recognized Indian tribes and should not be the agency charged with processing petitions for acknowledgment from such tribes. This is not intended as a criticism of any particular Administration or BIA employee. Rather, it simply reflects the mission of the BIA to serve and protect the interests of federally recognized Indian tribes. As the Commissioner of Indian Affairs put it to us in 1890, his first obligation was to provide services to those tribes already recognized. This being so, it is not fair to either the BIA or non-federally recognized

tribes to expect the BIA to also pass on the status of other Indian groups. Based on this experience, we would urge the committee to consider transferring the tribal acknowledgment process to another agency or an independent commission, one without any ties or obligations to federally recognized tribes.

Conclusion

Since the early days of the Republic, the Congress has been in the business of recognizing Indian tribes. If the Alaskan native villages (which were acknowledged in modern times by the Department of the Interior) are excluded, then the overwhelming majority of tribes recognized today achieved that status directly from Congress. Neither has Congress passed an act or expressed its judgment that it should never again directly recognize an Indian tribe. The question, then, is under what circumstances should Congress exercise its authority, not whether Congress should ever recognize an Indian tribe.

If any tribe should appropriately be recognized by Congress, it is the Lumbee Tribe. The Lumbee Tribe is unique in all of Indian country – it is the only tribe left in the kind of legal limbo imposed by the 1956 Lumbee Act and it has surely been studied as often as any other tribe (and concluded to be an Indian community) by the BIA. There has been sufficient process. Instead of singling the Tribe out for unfair treatment unlike any other tribe, the Congress should simply recognize the Lumbee Tribe of North Carolina.