

**TESTIMONY OF MICHAEL J. O'CONNOR
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CONVENIENCE AND GROCERY ASSOCIATION (VPCGA)
AT THE HEARING BEFORE THE COMMITTEE ON INDIAN AFFAIRS
ON S. 480, "THE THOMASINA E. JORDAN INDIAN TRIBES OF VIRGINIA
FEDERAL RECOGNITION ACT OF 2005"**

INTRODUCTION

Good morning Mr. Chairman and members of the Committee. My name is Mike O'Connor, and I am the President of the Virginia Petroleum, Convenience and Grocery Association (VPCGA). Thank you for allowing me the opportunity to testify today. The VPCGA is a non-profit, statewide trade association representing the petroleum and food industries. Our membership includes 450 Virginia-based independent small businesses that in turn own and operate over 4,000 gasoline/convenience outlets that employ in excess of 10,000 Virginians. Membership includes petroleum marketers, convenience stores, and chain and independent supermarkets.

OVERVIEW OF VPCGA's CONCERNS

All of our members stand to be affected by S. 480, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, should it be enacted. While honorable in its intentions, S. 480 poses a serious threat to small businesses across the Commonwealth of Virginia. If passed, S. 480 will create an anticompetitive marketplace for goods such as tobacco and gasoline and will strain the state budget by reducing excise tax revenues on these goods as well as property taxes.

I would like to address a misconception many folks have when they consider tribal recognition issues. Many people believe the only concern we should have when recognizing tribes is the potential for more gaming activity. That is not the reason for our concerns. There is another issue that, if ignored, can be a major problem for states with new tribes – that problem is tribes opening retail operations that do not collect and remit state taxes.

In fact, if passed, the impact of S. 480 will be multifaceted. The United States Government would recognize as sovereign the Chickahominy, the Chickahominy --Eastern Division, the Upper Mattaponi, the Rappahannock, the Monacan, and the Nansemond groups. As sovereign entities, these groups would no longer be subject to the police power or taxing power of the Commonwealth.

Pursuant S. 480, these groups would be permitted to purchase and take into trust land in some of the most populous counties in Virginia. In fact, it appears that one of the groups could acquire land anywhere in Virginia and turn it into a reservation. This will create havoc for state laws and law enforcement. For our members, the greatest concern is that these tribes will have the ability to establish retail businesses outside of the jurisdiction of traditional state powers to collect taxes. This means that any convenience store, truck stop, or smoke shop established by one of these tribes could sell gasoline and tobacco to the public free of state taxes. The type of tax evasion

we are talking about is not conceptual but is occurring as we speak in several states. The people whom I represent do not deserve to have their life's investment threatened by a marketer selling gasoline to non-tribal members at a steep price advantage that is achieved solely through tax evasion.

Tax evasion along these lines has led to high-profile disputes in many states including New York, Oklahoma, Kansas and New Mexico, among others. In these states, Native American tribes have used recognition to open convenience stores and truck stops that sell gasoline and tobacco products tax-free to non-Native Americans in spite of U.S. Supreme Court rulings saying that such sales can be subject to state taxes. For instance, in New York it is estimated that \$360 to \$400 million of revenue is lost due to cigarette excise tax evasion by tribes alone.¹ Some estimate that New York state has failed to recoup nearly \$4 billion in cigarette excise taxes on sales of cigarettes to non-reservation residents since 1995.² In Oklahoma it is estimated that the tobacco excise tax there is "under-collected by about \$4 million a month."³ And, in addition to excise and sales taxes, states lose income and property taxes on these tribal businesses.

Let me be clear about our position, we are not opposed to the recognition of any potential new tribes. We are concerned with the potential of such recognition to lead to tax evasion on sales of motor fuels and tobacco products and the competitive disadvantage it will levy upon our members. And, because this legislation is not just recognizing existing reservations but is pulling other areas of the state into new reservations, the incidence of excise tax evasion may be far reaching and competitively disadvantage a wide swath of convenience store and motor fuels retailers.

Any legislation of this kind must ensure that non-tribal members are required to pay the same taxes on sales by tribal retailers as they are on sales by other retailers. Accordingly, unless strong protections against excise and sales tax evasion are included the S. 480, VPCGA must oppose the bill.

EXCISE TAX EVASION

The United States Supreme Court has repeatedly held that states may require Native American tribes and enrolled members of those tribes operating businesses on the reservation to collect and remit to states sales, excise and use taxes properly imposed on non-Native Americans making purchases on the reservation. Enrolled members of those tribes making purchases on their reservations are, however, exempt from states sales, excise and use taxes.

¹ Representatives Alexander Grannis and William Magee, New York State Assembly, *Uphold Tax Law on Indian Reservations, Letter to the Editors*, The Times Union, Albany, New York (April 26, 2006).

² *Id.*

³ Tom Droege, *Henry: Tobacco Tax Loser is Likely*, Tulsa World, (April 15, 2006).

In some instances, tribes and tribal retailers are taking advantage of this limited tax exemption by refusing to fulfill their obligations to collect state taxes when they transact business with non-Native Americans. As Representative Ernest Istook put it when testifying before the Senate Indian Affairs Committee in 1998, “Unfortunately, some tribes have exploited this exemption [for sales to tribal members], leading to non-tribal purchasers to believe they do not owe the sales, fuel, or excise taxes on these transactions, since the tribes do not charge them.”

The failure of tribal retail enterprises to collect lawful state excise and sales taxes for sales to non-Native Americans is having a negative impact on these states. Plus, state revenue losses will be aggravated by the income and property taxes lost when off-reservation retailers go out of business. Many off-reservation retailers have been and will be forced out of business. State sales and excise taxes account for a large portion of each sale of motor fuel and tobacco products. The evasion of these taxes bestows an incredible market advantage on tribes that law abiding retailers cannot surmount.

State taxes account for a large portion of the price of gasoline and diesel fuel. The average for state gasoline and diesel excise taxes is 18.1 cents per gallon.⁴ In Virginia, it is 17.5 cents per gallon on gasoline and 18 cents per gallon on diesel fuel. By comparison, the average gross margin for a convenience store on its sales in 2005 was 15.1 cents per gallon of regular unleaded gasoline and only 15.5 cents per gallon for diesel fuel. And that is before taking out taxes and operating expenses. Retailers simply cannot compete with an automatic price advantage that is larger than their gross margin.

Moreover, State sales and excise taxes on cigarettes accounts for nearly 20% of the average purchase price of a pack of cigarettes nationally. Today, the average state excise tax on cigarettes is 91.7 cents per pack.⁵ Evasion of these taxes by tribal retailers not only hurts retailers, but causes states and localities tax dollars.

These advantages were never intended to convey with federal acknowledgement of tribal status. The Supreme Court stated in *Washington v. Confederated Tribes of Coleville Indian Reservation*, that nothing “authorize[s] Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.”⁶ Yet that is precisely what many of these tribes around the country are doing.

⁴ American Petroleum Institute, *Gasoline & Diesel Taxes*, <http://api-ec.api.org/filelibrary/2006-gasoline-diesel-taxes-summary.pdf> (April 2006).

⁵ Campaign for Tobacco-Free Kids, *State Excise Tax Rates and Rankings*, Katie McMahon, <http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf> (February 10, 2006).

⁶ *Id.*

S. 480 WILL CIRCUMVENT THE RECOGNITION PROCESS OF THE BUREAU OF INDIAN AFFAIRS

Established federal procedures exist to provide a uniform means to review and consider groups seeking federal acknowledgement of Indian tribes. Groups seeking federal acknowledgement must satisfy seven mandatory requirements. Admittedly, this process is a thorough one, and it should be. These requirements apply to all groups seeking federal recognition and allow the Secretary of the Interior to make an informed decision as to a group's status. The role of the Secretary of the Interior should not be underestimated. The decision to recognize a group as a tribe has significant impacts on both the group seeking federal acknowledgement and on the surrounding community. It is essential, then, that federal acknowledgement procedures be based on thorough, unbiased, and standard based processes for evaluation. S. 480 skirts this process and affords these groups beneficial treatment by evading the scrutiny other tribes and groups have undergone. Moreover, it ignores the impact on the surrounding community. The impact, as I've testified, is far reaching and must be taken into account.

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Because of the wide-ranging negative impacts on businesses and consumers in Virginia, the VPCGA opposes S. 480 in its current form. We would welcome the opportunity to work with the Committee and Senator Allen to try to address these concerns before the legislation is considered by the full Committee.