TESTIMONY OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON S. 420

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Good morning, Mr. Chairman and Members of the Committee. My name is Aurene Martin and I am the Principal Deputy Assistant Secretary – Indian Affairs at the Department of the Interior. I am here today to provide the Administration's testimony on S. 420, the "Lumbee Acknowledgment Act of 2003."

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 of the Interior made determinations as to which Indian 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 coast, such as *United States v. Washington* (384 F. Supp. 312, 279 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976)), and land claims litigation on the East coast, such as *Joint Tribal Council of Passamaquoddy v. Morton* (528 F.2d 370 (1st Cir. 1975)), 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 of the Interior has traditionally opposed legislative recognition. Notwithstanding that preference, the Department recognizes that some legislation is needed given the unique status of the Lumbee.

In 1956, Congress designated Indians then "residing in Robeson and adjoining counties of North Carolina" as the "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 or 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 the 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 the Lumbee Indians are to be afforded the opportunity to petition the Bureau of Indian Affairs' Office of Federal Acknowledgement 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 the Lumbee as a tribe pursuant to its Indian Commerce Clause authority if a court could decide that Congress had not acted arbitrarily in implicitly or explicitly finding that the Lumbee constitute a distinctly 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 the Lumbee Indians federally recognized status, the Department believes that Congress should be cognizant of several important issues that federal recognition raises. As currently drafted, S. 420 leaves many questions to these issues unanswered.

Under the provisions of this bill, the Lumbee Tribe would be afforded all benefits, privileges and immunities of a Federally-recognized tribe. Thus, the Lumbee Tribe would be authorized to conduct gaming activities pursuant to the Indian Gaming Regulatory Act (IGRA). Prior to conducting Class III gaming, the Tribe would need to negotiate a gaming compact with the State of North Carolina. In addition, the tribe 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 the Lumbee. 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 the 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 the designation of a reservation and a service area for the Tribe. S. 420 would designate Robeson County as the Tribe's reservation and names several other counties as its service area. Typically Congress has designated land held in trust by the Secretary as a tribe's reservation. Counties are then appropriately designated as service areas. Under the Act, all of Robeson County would be considered "Indian Country" under 18 U.S.C. 1151. By declaring the entire county as a reservation, the legislation raises law enforcement and other important jurisdictional, taxation, and land use issues for Robeson County. Criminal and civil jurisdictions are two areas that are required to be addressed under the Department's land-to-trust regulations under 25 CFR Pt. 151 precisely because of the potential impact on the local community and its potential impact upon the relationship between the tribe and local residents. Moreover, designating an area as reservation has implications for other groups in the area that might seek recognition.

We are also concerned with the provision requiring the Secretary, within 1 year, to verify tribal membership. In our experience this is an extremely involved process that has taken several years with much smaller tribes. We don't currently have access to these rolls and have no idea what would be involved to verify them. Moreover, S.420 is silent as to the meaning of verification. Section 5 also requires the Department to determine eligibility for services. However, each program has different criteria for eligibility and the Secretary of the Interior cannot determine eligibility for such things as health care. Finally, section 5 may raise a Recommendations Clause 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 tribe. Under the Recommendations Clause of the Constitution, the President submits for the consideration of Congress such measures as the President judges necessary and expedient.

Should Congress choose not to enact S. 420, the Department feels that at a minimum, Congress should amend the 1956 Act to afford the Lumbee Indians the opportunity to petition the Bureau of Indian Affairs' Office of Federal Acknowledgment under 25 C.F.R. Part 83.

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