TESTIMONY OF

ARLINDA F. LOCKLEAR, OF COUNSEL, PATTON BOGGS, LLP

BEFORE THE HOUSE COMMITTEE ON RESOURCES

ON H.R.992

September 25, 2002

Mr. Chairman and committee members, I appreciate the opportunity to testify this morning on H.R.992, a bill to provide grants to assist local governments in participating in certain decisions relating to Indian groups and tribes. The bill authorizes the expenditure of $8 million dollars in the form of grants to local governments for the purposes of participating in actions relating to Indian affairs. The bill identifies three federal actions specifically -- federal acknowledgment of Indian groups, trust acquisition of land for an Indian tribe, and assertion of land claims under federal law -- as appropriate for such grants. In addition, the bill provides that such grants can be made available regarding any other action if the Secretary determines that the proposed action is likely to significantly affect the people represented by that local government. In other words, the bill appears to authorize grants for local governments as to any action, whether by the federal government or otherwise, so long as the action significantly impacts a local government. The bill is premised on a grossly inaccurate view of the relative resources of Indian tribes and local governments and, if enacted, would constitute a breach of faith by the United States with its supposed beneficiaries, i.e., Indian tribes.

Relative resources of Indian tribes and local governments

The proponents of this bill have argued, both in this body and the Senate, that there is an imbalance in resources that this bill would set right, an imbalance that arises largely from tribal gaming revenues or gaming backers of tribes. My twenty-five years' experience in representing Indian tribes convinces me that this imbalance is a myth. The reality is very different.

Gaming revenues are so recent in time as to be an insignificant factor on the issues for which local governments would be eligible for grants. Many of these issues have been matters of controversy for generations. In 1977, the American Indian Policy Review Commission documented the extent and long-standing nature of the discrimination suffered by the more than one hundred non-federally recognized Indian tribes. These tribes' quests for federal recognition long preceded the advent of Indian gaming and most go forward today without benefit of any gaming revenue or backer. The experience of my own tribe, the Lumbee Tribe of North Carolina, is typical in these regards. The Lumbee Tribe, which is the largest non-federally recognized tribe in the country, has sought federal recognition consistently since 1888, or one hundred years before the enactment of the Indian Gaming Regulatory Act. It took the Tribe nearly ten years to prepare its documented petition for acknowledgment at a cost of more than $500,000, none of which was fronted by gaming interests. The Tribe was told after it submitted its fully documented petition that it was not eligible for the acknowledgment process. Patton Boggs LLP now represents the Tribe pro bono in its on-going effort to obtain special federal recognition legislation. As with the Lumbee Tribe, gaming revenue is simply not a factor for most tribes seeking federal acknowledgment.

Further, gaming revenues are limited in reach in Indian country. The Government Accounting Office has documented that of the 561 recognized tribes, only 193 actually conduct gaming enterprises and only 27 of

those (or about 5% of all tribes) generate more than $100 million a year. These 27 tribes produce about two-thirds of all Indian gaming revenues. *Improvements Needed in Tribal Recognition Process* (GAO-02-49), November 2001, pp. 5-6. To be sure, these gaming revenues have dramatically affected the quality of life for these tribes, but these numbers demonstrate that gaming revenues do not support the majority of tribal claims for acknowledgment, trust land, land, or otherwise. This being so, the majority of local governments are not at a relative disadvantage because of the advent of gaming.

In fact, the reality is directly contrary to that suggested in H.R.992. There is no shortage of resources available to local governments and others to defend against tribal claims. The land claim cases, singled out for funding in H.R.992, are typical in this regard. Most land claims currently in litigation are located in New York State. By state statute, New York State is required to and does, indeed, pay the cost of defense for all defendants in those cases, whether or not the state is a party. This state funded defense is available to all defendants -- local counties, other local governments, and all private property owners. When the state is a defendant, the New York State Attorney General's office provides for the defense of the state and all other defendants. When the state is not a defendant, New York State makes available the services of White & Case, one of the largest law firms in Manhattan, at no cost to the defendants. Under no circumstance is a local government or private property owner required to pay for the defense of a land claim in New York State.

There is no shortage of deep pockets outside New York State to pay for the defense of local governments or private parties against Indian claims. In land claim cases elsewhere, title insurance companies typically underwrite the costs of defense. As has New York State, the title insurance companies hire large firms with substantial resources. Hale and Dorr and Goodwin, Proctor & Hoar, the first and second largest firms in Boston, Massachusetts, respectively, have developed an expertise in defending tribal land claims, having been hired by several title insurance companies to do so. These tribal claims defense firms are highly effective and their representation comes at no cost to the local governments or private defendants.

Finally, the Department of the Interior itself does not typically play an active role in support of tribes on the issues identified in H.R.992. More often than not, the United States is a neutral fact arbiter on those issues. In the acknowledgment process, the United States certainly does not advocate for the petitioning tribe. The petitioning tribe bears the burden of proof (itself a moving target) and gets no assistance from the Department of the Interior in the preparation of its petition. In the trust land acquisition process, the tribe again bears the burden of making out a satisfactory trust application, a particularly heavy burden in the case of trust acquisitions for gaming purposes. Even in the land claim cases, where the United States has appeared as co-plaintiff for the tribe in certain instances, the United States eschews all claims against local governments or private parties and only asserts claims against the state involved.

In the end, no factual case can be made that H.R.992 is necessary. In every manner of action contemplated by H.R.992, local governments are not at a relative disadvantage to Indian tribes. Local governments' litigation expenses against such claims are most often paid by others, the tribes are obliged to bear the burden of proof and their own expenses (with little impact from gaming revenues), and the United States is typically the decision-maker only providing little, if any, assistance to the tribes.

Breach of faith by the United States

The Bureau of Indian Affairs of the Department of the Interior has primary responsibility for providing the bulk of federal services and carrying out the federal trust responsibilities to Indian tribes. The earliest of these federal services was based on treaties as compensation, in part, for land cessions and other benefits

granted by the tribes to the United States. Other services were authorized initially by statute. Now, these services and responsibilities are consolidated in a variety of Bureau of Indian Affairs' programs. *See generally* F. Cohen's Federal Indian Law (1982 ed.), pp. 673-677.

Because of the *distinctive obligation of trust incumbent upon the Government in its dealings" with Indian tribes, the actions of federal administrative officials denying or limiting services receive close judicial scrutiny to insure that the trust responsibility has been fulfilled. *Morton v. Ruiz,* 415 U.S. 199, 236 (1973). Thus, the trust relationship includes an obligation to perform vigorously and effectively those services that Congress chooses to provide. *See Eric v. Secretary of U.S. Department of Housing & Urban Development,* 464 F. Supp. 44 (D. Alaska 1978).

Of course, Congress itself holds wide ranging authority in Indian affairs, so that it can authorize or direct the Secretary of the Interior to provide funds for purposes that the Secretary could not herself fund. However, even Congress' authority regarding Indian programs has limits. The Supreme Court has held federal Indian legislation must be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. *Morton v. Mancari,* 417 U.S. 535, 555 (1974). Where the circumstances of Indian legislation demonstrate such a rational connection, the courts will not disturb Congress' judgment. *Id.; Delaware Tribal Business Committee v. Weeks,* 450 U.S. 73, 86 (1977).

H.R.992 is clearly Indian legislation. It targets certain administrative decisions relating to Indian tribes and directs that the Secretary of the Interior, chief administrator for the trust responsibility to tribes, make grants available to local governments relating to those decisions. In addition, the expenditures authorized by H.R.992 are certain to come from Indian program funds. Given the lateness in the appropriations process and the absence of a declared emergency or other circumstance justifying departure from rules governing federal appropriations, the Interior expenditures directed by the bill must fit within the current caps on Indian program expenditures approved for the Department of the Interior. Simply stated, H.R.992 proposes a raid on Indian programs, which as always are funded well below the level of demonstrated need of Indian tribes, to fund grants to local governments for the purpose of opposing tribal claims.

Judged even by the rational basis standard applicable to federal Indian legislation, it is uncertain that H.R.992 would pass legal muster. There is no rational argument that the bill is intended to benefit Indian tribes or to fulfill the United States' trust responsibilities to Indian tribes. It is the precise opposite -- a redirection of federal appropriations for Indian programs to local governments for the purpose of opposing tribal claims. If enacted, this could be the first Indian statute struck down by a court as beyond Congress' admittedly broad authority over Indian affairs.

Even were there some federal Indian policy to be served by levelling the federal playing field or some other such justification to enhance the ability of local governments to oppose tribal claims, H.R.992 again falls short. By its terms, H.R.992 applies not to just the three types of federal actions identified in the bill, but also to *any other action or proposed action relating to an Indian group of acknowledged Indian tribe if the Secretary determines that the action or proposed action is likely to significantly affect the people represented by that local government." §(b)(4). In other words, whether or not tribes benefit from representation by the United States or any other federal involvement in a particular action, an action could trigger the local government's right to apply for funding to oppose the tribe. For example, if a tribal referendum might affect a local government, could it apply for federal funding to attempt to influence the referendum? It appears so from the face of the literal language of H.R.992. Surely this is a mischief the drafters did not intend and the Congress must avoid.

Conclusion

At the end of the day, Congress' responsibility to Indian tribes is a moral one, one informed more by a sense of justice than a sense of legal obligation. Judged by that higher standard, H.R.992 is not worthy of serious consideration by this Committee. It proposes to divert some portion of the limited and precious resources still available to Indian tribes, resources first promised in federal Indian treaties to Indian tribes, and make them available to local governments to oppose Indian tribes on claims that typically arise out of the same Indian treaties. We and our tribal clients urge members of this Committee to vote against H.R.992.

####