Committee on Resources

Witness Statement

House Resources Committee Oversight Hearing

Testimony of Keller George

President of the United South and Eastern Tribes

This testimony is submitted to the United States House of Representatives, Committee on Resources, for inclusion in the record for the oversight hearing held on October 12, 1999 in room 1324 of the Longworth House Office Building in Washington, D.C.

My name is Keller George. I am President of the United South and Eastern Tribes ("USET"). USET is a confederation of twenty-three Indian nations which was formed thirty years ago. Among its members are some of the most prominent Indian nations in the eastern United States, including the Mashantucket Pequots, the Mohegan Tribe, the Seneca Nation of Indians, the Mississippi Band of Choctaw, the Seminole Tribe, the Cherokee Nation, and the Miccosukee Tribe. In addition to being president of USET, I am an enrolled member of the Oneida Indian Nation in New York where I serve as Assistant to the Nation Representative.

I would like to thank the Committee for affording USET the opportunity to offer testimony on the subject of tribal-state relations with respect to certain transaction taxes. Regrettably, the impetus for this hearing is the desire on the part of yet another special interest group to attack, and ultimately eliminate, the sovereignty of Indian nations. Ironically, this is occurring on October 12, exactly 507 years from the date when the Europeans first began to take our lands, destroy our heritage, and extinguish our governments.

We are here today because of allegations that have been made regarding the refusal of certain Indian-owned businesses to comply with state and local sales and excise tax rules. Curiously, those who have come to Washington to sound the alarm over lost tax revenues and alleged acts of tax avoidance are *not* state and local taxing authorities but a collection of convenience store owners and petroleum marketers. The conspicuous silence of state governments is easily understood, however, when the history of this issue is carefully examined.

Indian nations are sovereign governments with the acknowledged power to impose their own taxes, on both tribal members and non-members, within the boundaries of their reservations. Although the individual states are likewise sovereign governments with the inherent power to tax, they are precluded by federal law from imposing any tax payment or collection obligation on an Indian nation. Similarly, Indian tribes cannot require state governments to serve as tax collectors for tribal taxes.

The idea that an Indian nation can adopt and implement a tax system that differs from a neighboring state government is not foreign to a federalist system of government. The fifty states and the District of Columbia, for example, impose sales taxes at rates that vary tremendously. Some states have no transaction taxes at all and deliberately structure their tax systems in order to attract businesses and consumers. Thus,

the citizens of Vermont frequently venture into New Hampshire where there is no sales tax. On weekends, hundreds of residents of Manhattan cross the East River to New Jersey where clothing and other essential items are taxed at substantially reduced rates. And I am confident that virtually every representative of the petroleum and convenience store industry testifying today would readily admit to patronizing mail order companies that charge no sales taxes of any kind on the products they ship to any location in North America.

Yet the petroleum and convenience store interests do not level charges of unfair competition when confronted with the myriad differences in state taxation, although the magnitude of those disparities is many times greater. Free market forces and competition eventually determine the optimum location of businesses forced to operate in jurisdictions with differing tax rates. And in those instances where conflicts arise because of a state's exercise of its independent taxing powers, those disagreements are almost always resolved through negotiations and government-to-government agreements.

This model is just as valid when applied to relations between state and tribal governments, although there are some who would have you believe that conflicts over issues of taxation can only be resolved through federal intervention. They, however, are not telling you the truth.

Over a dozen state governments have resolved issues of taxation with scores of Indian nations through government-to-government negotiations and tax agreements. A report to the National Conference of State Legislatures, authored by the Arizona Legislative Council, describes these agreements as follows:

> A state-tribal tax agreement is an arrangement between two governments that addresses specific jurisdictional issues in taxation. State-tribal agreements require government-to-government discussion between tribal and state officials. Such discussions allow tribal and state leaders to talk directly and specifically about revenue needs, economic development objectives, and the practical, political, and economic concerns that arise from tax conflicts. This approach--unlike litigation--enables the tribe and the state, not a court, to decide whether results are satisfactory.[(1)]

In that report, Mr. Harley Duncan, Director of the Federation of Tax Administrators, is quoted as saying that a "tribal government must see a need for a stable source of revenue that a [tax] agreement can help provide." The state, on the other hand, according to Mr. Duncan, "should recognize that its best interests may lie in not collecting all the state tax due on sales to nontribal members." He concludes by noting that "states that examine the state-tribal tax issue as an economic question rather than a purely legal one could find their overall interests served by a tax-sharing arrangement, with a portion of the proceeds from sales to nontribal members shared with the tribal government."

As noted, many states and tribal governments share the views of the Arizona Legislative Council and the National Conference of State Legislators regarding the wisdom and merits of state-tribal tax compacts. Not surprisingly, the scope and substance of those agreements vary considerably from one state to the next. Each state and each Indian nation is unique. Some tribes have existing tax codes while others do not. Some states impose certain taxes but not others. Allowing state and tribal governments to craft their own tax agreements affords the parties the opportunity to take into account their special circumstances and structure an arrangement that meets their respective needs.

Not every state has chosen to negotiate tax compacts with tribal governments. In New York where my nation, the Oneida Indian Nation, is located, there are no tax agreements in effect because the governor has

elected a different approach. For the past seven years, the Oneida Nation has sought to conclude a tax compact with the State of New York with respect to the retail sale of cigarettes and automotive fuels. Its efforts in that regard are chronicled in Exhibit A attached to my testimony. In March 1997, the Oneida Nation and five other Indian nations, after months of negotiations with the State, were poised to sign a ten-year tax agreement. At the eleventh hour, however, the State abruptly walked away from the bargaining table and terminated all tax compact discussions. (*See* Governor Pataki's May 22, 1997 press release set forth in Exhibit B.)

At the time the governor announced his decision to abandon tax compact negotiations, he directed the Department of Taxation and Finance to repeal its cigarette and automotive fuel excise tax regulations insofar as they apply to reservation businesses. The governor's directive was formally carried out on April 29, 1998 when the Department published a Notice of Adoption in the New York Register. In that notice, the Department stated that its decision to repeal the regulations was "based on both the inability of the regulations to achieve the purposes of the Tax Law and also the State's respect for the Indian Nations' sovereignty."[(2)]

Some believe that New York's refusal to conclude tax compacts with the Indian nations requires federal intervention. Governor Pataki and the New York Department of Taxation and Finance, however, have made a conscious decision to respect the sovereignty of the Indian nations by not forcing them to act as tax collectors for the State. Some may question the wisdom of that policy, but neither the federal government nor any special interest group can prevent New York from pursuing it. Indeed, in July of this year, the Supreme Court for the Albany District ruled that the New York Department of Taxation and Finance had a rational legal basis for its decision to repeal the regulations and not to enforce its tax laws on Indian reservations. *New York Ass'n of Convenience Stores v. Commissioner*, (Sup. Ct. Albany Dist., July 9, 1999).

Notwithstanding the State's sudden reversal in May 1997, the Oneida Nation earlier this year submitted a proposed tax agreement to the State of New York. The Nation believes that such an agreement will eventually be concluded by the State and the various New York-based Indian tribes. We also believe that in those few jurisdictions where tax agreements have not yet been concluded, the various Indian nations and affected state governments will eventually resolve their differences on a government-to-government basis, as have virtually all other state and tribal governments.

Some convenience store and gas station owners are dissatisfied with the results of the tax compact process. They do not want this issue handled on a government-to-government basis at the state-tribe level. Instead, they wish to have the federal government strip Indian nations of their sovereignty and compel them to serve as tax collectors for the state governments. Their views are currently embodied in a short outline entitled "Concept Outline for Native American Tobacco and Motor Fuels Excise Tax Legislation." Their proposal, however, is based on numerous false premises and, if enacted, would threaten the integrity of all existing tax compacts, create a disincentive for states to negotiate future tax agreements, and would eviscerate existing tribal tax systems, causing severe economic harm.

The Concept Outline is based, in part, on a finding that the "U.S. Supreme Court has established that Native American tribes and their members have a duty to assist states in the collection of lawfully-imposed, non-discriminatory state excise and sales taxes on purchases of motor fuels and tobacco products by non-members of a tribe from a tribe or its members." This assertion is a gross misstatement of the law. The case most frequently cited by the convenience stores for this proposition is *Dep't of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 114 S. Ct. 2028 (1994). No Indian nation, however, was a party to that

litigation; rather, it solely involved a dispute between the State of New York and a tobacco wholesaler who supplied products to reservation businesses. Although the Court stated that New York could, in theory, require the wholesaler to pre-collect its retail taxes, tribal sovereignty and the treaty relationship between the United States and the various Indian nations were identified as potential limiting factors on New York's taxing authority. Because none of the tribes were parties to that litigation, however, the Court was not required to address the various sovereignty and treaty issues. *Dep't of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 114 S. Ct. 2028, n.11.

In another case--*Oklahoma Tax Comm'n v.Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)--the Court ruled that the State of Oklahoma cannot compel an Indian nation to function as its tax collector. The convenience store owners have complained that this case, along with the inherent sovereign immunity enjoyed by Indian nations, have hampered the efforts of state governments to collect their taxes. This assertion, however, is most difficult to reconcile with the silence of the vast majority of state governments on this issue. Further, these same convenience store owners would fight to the death to preserve the sovereign immunity of a state that refuses to negotiate a gaming compact with an Indian nation--as the State of Florida has done with the Seminole Tribe. Their message is loud and clear: "Sovereign immunity for the states is good; sovereign immunity for Indian nations is bad."

The advocates for federal intervention have also perpetuated the myth that Indian nations are causing countless acres of land to be placed in trust on which they intend to construct new gas stations and convenience stores. However, when these individuals are asked to cite actual examples of such trust land applications, they are at a loss for words. In reality, over the past several years, there has been a net *decrease* in the amount of lands held in trust for Indian nations. Moreover, the Interior Department recently promulgated regulations which will make it increasingly difficult to place new lands into trust. Representative Istook has made repeated attempts in recent years to link trust land status with the collection and payment of state taxes. Congress has perceived the false premises on which his proposals are based and for this reason has defeated each measure he has advanced on this issue.

The convenience store owners and petroleum marketers pay lip service to state-tribal tax compacts in their Concept Outline. In reality, their proposal, by compelling every tribe to collect and remit state taxes to the federal government unless it has an existing tax compact, will eliminate any incentive a state might have to conclude or renew a tax agreement with an Indian nation. Essentially these special interests don't want a level playing field; rather, they want to deprive Indian nations of their sovereign governmental status and make them subservient to state governments.

Although state and local governments are satisfied with the tax compacts they have negotiated with Indian nations, the convenience store owners and petroleum marketers are not. Recently, the State of New York invited the New York Association of Convenience Stores ("NYACS") to participate in tax discussions between the State and the Cayuga Nation in the context of settlement discussions surrounding the Cayuga land claim. NYACS declined, stating that it does not support tax compacts; instead, it anticipates that Congress will soon address this issue in their favor.

The National Association of Convenience Stores is of the opinion that many existing tax compacts are unfair, arguing that they were negotiated at a time when Indian nations enjoyed a superior bargaining position. Although no similar criticism has been directed at those agreements by the state governments, I would like the record to reflect that if this assertion true, it will mark the first time in over 200 years where an Indian nation has enjoyed a superior bargaining position *vis a vis* a state government.

In many instances, tribal governments, pursuant to their tax agreement with the state, tax the sale of cigarettes and automotive fuels at rates comparable to those imposed by the surrounding state and local governments. For many of those Indian nations, the tribal transaction taxes are their sole source of revenue. They use those revenues primarily to fund their government operations and provide essential social services to their members. If the convenience store owners have their way, all tribal sales and excise taxes will be displaced by state taxes collected by the federal government. This will literally bankrupt many Indian nations and force their members to turn to state and local governments for the services previously provided by their tribal governments. This is not only illogical, it is contrary to the oft-stated congressional objective of encouraging self-sufficiency on Indian reservations.

In addition to all of the apparent deficiencies in the Concept Outline, no thought has been given to the difficulties inherent in having the federal government serve as tax collector for every state where a tribal business enterprise can be found. The cost of administering such a system would undoubtedly exceed any net increase in state tax revenues and would only increase the size of the federal tax collection bureaucracy

In sum, differences in the tax policies and practices of Indian nations and the states on their borders have existed for years. Moreover, the current situation is identical to that faced by neighboring states and municipalities which impose transaction taxes at varying rates. Where those differences have given rise to conflicts, solutions have been negotiated on a government-to-government basis between the tribes and the state governments. This is a local problem that has been effectively managed for many years without federal government intervention. The case for displacing local tax agreements with a federal "one-size-fits all" solution is weak and is driven solely by the special interests of a few organizations who cannot abide tribal sovereignty.

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1. State-Tribal Approaches Regarding Taxation & Economic Development, Arizona State Legislative Council, p. 50.

2. New York Register, April 29, 1998, p. 23.

Exhibit A - Statement Regarding Excise Tax Dispute Between Indian Nations and the State of New York.

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