S. HRG. 107–775

TRIBAL RECOGNITION

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

S. 1392

TO ESTABLISH PROCEDURES FOR THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF THE INTERIOR WITH RESPECT TO TRIBAL RECOGNITION

AND

S. 1393

TO PROVIDE GRANTS TO ENSURE FULL AND FAIR PARTICIPATION IN CERTAIN DECISIONMAKING PROCESSES AT THE BUREAU OF INDIAN AFFAIRS

SEPTEMBER 17, 2002
WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE
82–968 PDF WASHINGTON : 2003

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TRIBAL RECOGNITION

TUESDAY, SEPTEMBER 17, 2002

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 485, Senate Russell Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye and Campbell.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The Committee on Indian Affairs meets this morning to receive testimony on two measures, S. 1392, a bill to establish procedures for the Bureau of Indian Affairs of the Department of Interior with respect to tribal recognition and S. 1393, a bill to provide grants to ensure full and fair participation in certain decisionmaking processes at the Bureau of Indian Affairs.

[Text of S. 1392 and S. 1393 follow:]

II

107TH CONGRESS
1ST SESSION

S. 1392

To establish procedures for the Bureau of Indian Affairs of the Department of the Interior with respect to tribal recognition.

IN THE SENATE OF THE UNITED STATES

AUGUST 3, 2001

Mr. DODD (for himself and Mr. LIEBERMAN) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

A BILL

To establish procedures for the Bureau of Indian Affairs of the Department of the Interior with respect to tribal recognition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Tribal Recognition and Indian Bureau Enhancement Act of 2001''.

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) The United States has an obligation to recognize and respect the sovereignty of Native American peoples who have maintained their social, cultural, and political identity.

(2) All Native American tribal governments that represent tribes that have maintained their social, cultural, and political identity, to the extent possible within the context of history, are entitled to establish government-to-government relations with the United States and are entitled to the rights appertaining to sovereign governments.

(3) The Bureau of Indian Affairs of the Department of the Interior exercises responsibility for determining whether Native American groups constitute ''Federal Tribes'' and are therefore entitled

to be recognized by the United States as sovereign nations.

(4) In recent years, the decisionmaking process used by the Bureau of Indian Affairs to resolve claims of tribal sovereignty has been widely criticized.

(5) In order to ensure continued public confidence in the Federal Government's decisions pertaining to tribal recognition, it is necessary to reform the recognition process.

SEC. 3. PURPOSES.

The purposes of this Act are as follows:

(1) To establish administrative procedures to extend Federal recognition to certain Indian groups.

(2) To extend to Indian groups that are determined to be Indian tribes the protection, services, and benefits available from the Federal Government pursuant to the Federal trust responsibility with respect to Indian tribes.

(3) To extend to Indian groups that are determined to be Indian tribes the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.

(4) To ensure that when the Federal Government extends acknowledgment to an Indian group, the Federal Government does so based upon clear, factual evidence derived from an open and objective administrative process.

(5) To provide clear and consistent standards of administrative review of documented petitions for Federal acknowledgment.

(6) To clarify evidentiary standards and expedite the administrative review process by providing adequate resources to process petitions.

SEC. 4. DEFINITIONS.

In this Act:

(1) BUREAU.—The term ''Bureau'' means the Bureau of Indian Affairs of the Department of the Interior.

(2) DEPARTMENT.—The term ''Department'' means the Department of the Interior.

(3) DOCUMENTED PETITION.—The term ''documented petition'' means the detailed arguments made by a petitioner to substantiate the petitioner's claim to continuous existence as an Indian tribe, together with the factual exposition and all documentary evidence necessary to demonstrate that the ar-

guments address the mandatory criteria set forth in section 10.

(4) HISTORICALLY, HISTORICAL, OR HISTORY.—The term ''historically'', ''historical'', or ''history'' means dating from the first sustained contact with non-Indians.

(5) INDIAN GROUP OR GROUP.—The term ''Indian group'' or ''group'' means any Indian or Alaska Native aggregation within the continental United States that the Secretary does not acknowledge to be an Indian tribe.

(6) INDIAN TRIBE; TRIBE.—The terms ''Indian tribe'' and ''tribe'' mean any group that the Secretary determines to have met the mandatory criteria set forth in section 10.

(7) PETITIONER.—The term ''petitioner'' means any entity that has submitted a letter of intent to the Secretary requesting acknowledgment that the entity is an Indian tribe.

(8) SECRETARY.—The term ''Secretary'' means the Secretary of the Interior.

SEC. 5. EFFECT OF ACKNOWLEDGMENT OF TRIBAL EXISTENCE.

Acknowledgment of an Indian tribe under this Act—

(1) confers the protection, services, and benefits of the Federal Government available to Indian tribes by virtue of their status as tribes;

(2) means that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States;

(3) means that the United States recognizes that the tribe has the responsibilities, powers, limitations, and obligations of a federally acknowledged Indian tribe; and

(4) subjects the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

SEC. 6. SCOPE.

(a) IN GENERAL.—This Act applies only to those Native American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply only to groups that can present evidence of a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the date of the submission of the documented petition.

(b) EXCLUSIONS.—The procedures established under this Act shall not apply to any of the following:

(1) Any Indian tribe, organized band, pueblo, Alaska Native village, or community that, as of the date of enactment of this Act, has been acknowledged as such and is receiving services from the Bureau.

(2) An association, organization, corporation, or group of any character that has been formed after December 31, 2002.

(3) Splinter groups, political factions, communities, or groups of any character that separate from the main body of a currently acknowledged tribe, except that any such group that can establish clearly that the group has functioned throughout history until the date of the submission of the documented petition as an autonomous tribal entity may be acknowledged under this Act, even though the group has been regarded by some as part of or has been associated in some manner with an acknowledged North American Indian tribe.

(4) Any group which is, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship.

(5) Any group that previously petitioned and was denied Federal acknowledgment under part 83 of title 25 of the Code of Federal Regulations prior to the date of enactment of this Act, including reorganized or reconstituted petitioners previously denied, or splinter groups, spinoffs, or component groups of any type that were once part of petitioners previously denied.

(c) PENDING PETITIONS.—Any Indian group whose documented petition is under active consideration under the regulations referred to in subsection (b)(5) as of the date of enactment of this Act, and for which a determination is not final and effective as of such date, may opt to have their petitioning process completed in accordance with this Act. Any such group may request a suspension of consideration in accordance with the provisions of section 83.10(g) of title 25 of the Code of Federal Regulations, as in effect on the date of enactment of this Act, of not more than 180 days in order to provide additional information or argument.

SEC. 7. LETTER OF INTENT.

(a) IN GENERAL.—Any Indian group in the continental United States that desires to be acknowledged as an Indian tribe and that can satisfy the mandatory criteria set forth in section 10 may submit a letter of intent to

the Secretary. A letter of intent may be filed in advance of, or at the same time as, a group's documented petition.

(b) APPROVAL OF GOVERNING BODY.—A letter of intent must be produced, dated, and signed by the governing body of the Indian group submitting the letter.

SEC. 8. DUTIES OF THE DEPARTMENT.

(a) PUBLICATION OF LIST OF INDIAN TRIBES.—The Department shall publish in the Federal Register, no less frequently than every 3 years, a list of all Indian tribes entitled to receive services from the Bureau by virtue of their status as Indian tribes. The list may be published more frequently, if the Secretary deems it necessary.

(b) GUIDELINES FOR PREPARATION OF DOCUMENTED PETITIONS.—

(1) IN GENERAL.—The Secretary shall make available guidelines for the preparation of documented petitions. Such guidelines shall include the following:

(A) An explanation of the criteria and other provisions relevant to the Department's consideration of a documented petition.

(B) A discussion of the types of evidence which may be used to demonstrate satisfaction or particular criteria.

(C) General suggestions and guidelines on how and where to conduct research.

(D) An example of a documented petition format, except that such example shall not preclude the use of any other format.

(2) SUPPLEMENTATION AND REVISION.—The Secretary may supplement or update the guidelines as necessary.

(c) ASSISTANCE.—The Department shall, upon request, provide petitioners with suggestions and advice regarding preparation of the documented petition. The Department shall not be responsible for any actual research necessary to prepare such petition.

(d) NOTICE REGARDING CURRENT PETITIONS.—Any Indian group whose documented petition is under active consideration as of the date of enactment of this Act shall be notified of the opportunity under section 6(c) to choose whether to complete their petitioning process under the provisions of this Act or under the provisions of part 83 of title 25 of the Code of Federal Regulations, as in effect on the day before such date.

(e) NOTICE TO GROUPS WITH A LETTER OF INTENT.—Any group that has submitted a letter of intent to the Department as of the date of enactment of this Act shall be notified that any documented petition submitted

by the group shall be considered under the provisions of this Act.

SEC. 9. REQUIREMENTS FOR THE DOCUMENTED PETITION.

(a) IN GENERAL.—The documented petition may be in any readable form that contains detailed, specific evidence in support of a request to the Secretary to acknowledge tribal existence.

(b) APPROVAL OF GOVERNING BODY.—The documented petition must include a certification, signed and dated by members of the group's governing body, stating that it is the group's official documented petition.

(c) SATISFACTION OF MANDATORY CRITERIA.—A petitioner must satisfy all of the mandatory criteria set forth in section 10 in order for tribal existence to be acknowledged. The documented petition must include thorough explanations and supporting documentation in response to all of such criteria.

(d) STANDARDS FOR DENIAL.—

(1) IN GENERAL.—Subject to paragraphs (2) and (3), a petitioner shall not be acknowledged if the evidence presented by the petitioner or others is insufficient to demonstrate that the petitioner meets each of the mandatory criteria in section 10.

(2) REASONABLE LIKELIHOOD OF VALIDITY.—A criterion shall be considered met if the Secretary

finds that it is more likely than not that the evidence presented demonstrates the establishment of the criterion.

(3) CONCLUSIVE PROOF NOT REQUIRED.—Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.

(e) CONSIDERATION OF HISTORICAL SITUATIONS.—Evaluation of petitions shall take into account historical situations and time periods for which evidence is demonstrably limited or not available. The limitations inherent in demonstrating the historical existence of community and political influence or authority shall also be taken into account. Existence of community and political influence or authority shall be demonstrated on a substantially continuous basis, but such demonstration does not require meeting these criteria at every point in time. Fluctuations in tribal activity during various years shall not in themselves be a cause for denial of acknowledgment under these criteria.

SEC. 10. MANDATORY CRITERIA FOR FEDERAL ACKNOWLEDGMENT.

The mandatory criteria for Federal acknowledgment are the following:

(1) IDENTIFICATION ON A SUBSTANTIALLY CONTINUOUS BASIS.—The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may consist of any 1, or a combination, of the following, as well as other evidence of identification by other than the petitioner itself or its members:

(A) Identification as an Indian entity by Federal authorities.

(B) Relationships with State governments based on identification of the group as Indian.

(C) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(D) Identification as an Indian entity by anthropologists, historians, or other scholars.

(E) Identification as an Indian entity in newspapers and books.

(F) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or State Indian organizations.

(2) DISTINCT COMMUNITY.—

(A) IN GENERAL.—A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the date of the submission of the documented petition. This criterion may be demonstrated by some combination of the following evidence or other evidence:

(i) Significant rates of marriage within the group, or, as may be culturally required, patterned out-marriages with other Indian populations.

(ii) Significant social relationships connecting individual members.

(iii) Significant rates of informal social interaction which exist broadly among the members of a group.

(iv) A significant degree of shared or cooperative labor or other economic activity among the membership.

(v) Evidence of strong patterns of discrimination or other social distinctions by nonmembers.

(vi) Shared sacred or secular ritual activity encompassing most of the group.

(vii) Cultural patterns shared among a significant portion of the group that are different from those of the non-Indian populations with whom it interacts. Such patterns must function as more than a symbolic identification of the group as Indian, and may include language, kinship organization, or religious beliefs and practices.

(viii) The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name.

(ix) A demonstration of historical political influence under the criterion in paragraph (3) shall be evidence for demonstrating historical community.

(B) SUFFICIENT EVIDENCE.—A petitioner shall be considered to have provided sufficient evidence of community at a given point in time

if evidence is provided to demonstrate any 1 of the following:

(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community.

(ii) At least 50 percent of the marriages in the group are between members of the group.

(iii) At least 50 percent of the group members maintain distinct cultural patterns such as language, kinship organization, or religious beliefs and practices.

(iv) There are distinct community social institutions encompassing most of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations.

(v) The group has met the criterion in paragraph (3) using evidence described in paragraph (3)(A).

(3) POLITICAL INFLUENCE OR AUTHORITY.—

(A) IN GENERAL.—The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the date of the submission of the documented petition. This criterion may be demonstrated by some combination of the following evidence or by other evidence:

(i) The group is able to mobilize significant numbers of members and significant resources from its members for group purposes.

(ii) Most of the membership considers issues acted upon or actions taken by group leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication, and involvement in political processes by most of the group's members.

(iv) The group meets the criterion in paragraph (2) at more than a minimal level.

(v) There are internal conflicts which show controversy over valued group goals, properties, policies, processes, or decisions.

(B) SUFFICIENT EVIDENCE.—

(i) IN GENERAL.—A petitioning group shall be considered to have provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders or other mechanisms exist or existed that—

(I) allocate group resources such as land and residence rights on a consistent basis;

(II) settle disputes between members or subgroups by mediation or other means on a regular basis;

(III) exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior; or

(IV) organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(ii) PRESUMPTIVE EVIDENCE.—A group that has met the requirements in paragraph (2)(A) at a given point in time shall be considered to have provided sufficient evidence to meet this criterion at that point in time.

(4) GOVERNING DOCUMENT AND MEMBERSHIP CRITERIA.—Submission of a copy of the group's governing document and membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

(5) DESCENDANTS FROM A HISTORICAL INDIAN TRIBE.—

(A) IN GENERAL.—The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. Evidence acceptable to the Secretary which can be used for this purpose includes the following:

(i) Rolls prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, or other purposes.

(ii) Federal, State, or other official records or evidence identifying group members or ancestors of such members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iii) Church, school, and other similar enrollment records identifying group members or ancestors of such members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying group members or ancestors of such members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(v) Other records or evidence identifying members or ancestors of such members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(B) CERTIFIED MEMBERSHIP LIST.—The petitioner must provide an official membership list, separately certified by the group's governing body, of all known current members of the group. The list must include each member's full name (including maiden name), date of birth, and current residential address. The petitioner shall also provide a copy of each available former list of members based on the group's own defined criteria, as well as a statement describing the circumstances surrounding the preparation of the current list and, insofar as possible, the circumstances surrounding the preparation of former lists.

(6) MEMBERSHIP IS COMPOSED PRINCIPALLY OF INDIVIDUALS WHO ARE NOT MEMBERS OF AN ACKNOWLEDGED TRIBE.—

(A) IN GENERAL.—The membership of the petitioning group is composed principally of individuals who are not members of any acknowledged North American Indian tribe.

(B) EXCEPTION.—A petitioning group may be acknowledged even if its membership is composed principally of individuals whose names have appeared on rolls of, or who have been

otherwise associated with, an acknowledged Indian tribe, if the group establishes that it has functioned throughout history until the date of the submission of the documented petition as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.

(7) NO LEGISLATION TERMINATES OR PROHIBITS THE FEDERAL RELATIONSHIP.—Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

SEC. 11. PREVIOUS FEDERAL ACKNOWLEDGMENT.

The provisions of section 83.8 of title 25 of the Code of Federal Regulations, as in effect on the date of enactment of this Act, shall apply with respect to petitioners claiming previous Federal acknowledgment under this Act.

SEC. 12. NOTICE OF RECEIPT OF A LETTER OF INTENT OR DOCUMENTED PETITION.

(a) NOTICE AND PUBLICATION.—

(1) IN GENERAL.—Within 30 days after receiving a letter of intent, or a documented petition if a

letter of intent has not previously been received and noticed, the Secretary shall acknowledge such receipt in writing and shall have published within 60 days in the Federal Register a notice of such receipt.

(2) REQUIREMENTS.—The notice published in the Federal Register shall include the following:

(A) The name, location, and mailing address of the petitioner and such other information as will identify the entity submitting the letter of intent or documented petition.

(B) The date the letter or petition was received.

(C) Information regarding how interested and informed parties may submit factual or legal arguments in support of, or in opposition to, the petitioner's request for acknowledgment or to request to be kept informed of all general actions affecting the petition.

(D) Information regarding where a copy of the letter of intent and the documented petition may be examined.

(b) OTHER NOTIFICATION.—The Secretary shall notify, in writing, the chief executive officer, members of Congress, and attorney general of the State in which a petitioner is located and of each State in which the peti-

tioner historically has been located. The Secretary shall also notify any recognized tribe and any other petitioner which appears to have a relationship with the petitioner, including a historical relationship, or which may otherwise be considered to have a potential interest in the acknowledgment determination. The Secretary shall also notify the chief executive officers of the counties and municipalities located in the geographic area historically occupied by the petitioning group.

(c) OTHER PUBLICATION.—The Secretary shall also publish the notice of receipt of the letter of intent, or documented petition if a letter of intent has not been previously received, in a major newspaper or newspapers of general circulation in the town or city nearest to the petitioner. Such notice shall include the information required under subsection (a)(2).

SEC. 13. PROCESSING OF THE DOCUMENTED PETITION.

The provisions of section 83.10 of title 25 of the Code of Federal Regulations, as in effect on the date of enactment of this Act, shall apply with respect to the processing of a documented petition under this Act.

SEC. 14. TESTIMONY AND THE OPPORTUNITY TO BE HEARD.

(a) IN GENERAL.—The Secretary shall consider all relevant evidence from any interested party including

neighboring municipalities that possess information bearing on whether to recognize an Indian group or not.

(b) HEARING UPON REQUEST.—Upon an interested party's request, and for good cause shown, the Secretary shall conduct a formal hearing at which all interested parties may present evidence, call witnesses, cross-examine witnesses, or rebut evidence in the record or presented by other parties during the hearing.

(c) TRANSCRIPT REQUIRED.—A transcript of any hearing held under this section shall be made and shall become part of the administrative record upon which the Secretary is entitled to rely in determining whether to recognize an Indian group.

SEC. 15. WRITTEN SUBMISSIONS BY INTERESTED PARTIES.

The Secretary shall consider any written materials submitted to the Bureau from any interested party, including neighboring municipalities, that possess information bearing on whether to recognize an Indian group.

SEC. 16. PUBLICATION OF FINAL DETERMINATION.

The Secretary shall publish in the Federal Register a complete and detailed explanation of the Secretary's final decision regarding a documented petition under this Act, including express finding of facts and of law with regard to each of the critera listed in section 10.

SEC. 17. INDEPENDENT REVIEW, RECONSIDERATION, AND FINAL ACTION.

The provisions of section 83.11 of title 25 of the Code of Federal Regulations, as in effect on the date of enactment of this Act, shall apply with respect to the independent review, reconsideration, and final action of the Secretary on a documented petition under this Act.

SEC. 18. IMPLEMENTATION OF DECISION ACKNOWLEDGING STATUS AS AN INDIAN TRIBE.

The provisions of section 83.12 of title 25 of the Code of Federal Regulations, as in effect on the date of enactment of this Act, shall apply with respect to the implementation of a decision under this Act acknowledging a petitioner as an Indian tribe.

SEC. 19. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to carry out this Act, $10,000,000 for fiscal year 2002 and each fiscal year thereafter.

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II

107TH CONGRESS
1ST SESSION

S. 1393

To provide grants to ensure full and fair participation in certain decisionmaking processes at the Bureau of Indian Affairs.

IN THE SENATE OF THE UNITED STATES

AUGUST 3, 2001

Mr. DODD (for himself and Mr. LIEBERMAN) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

A BILL

To provide grants to ensure full and fair participation in certain decisionmaking processes at the Bureau of Indian Affairs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. GRANT PROGRAM.

(a) IN GENERAL.—To the extent that amounts are appropriated and acceptable requests are submitted, the Secretary shall award grants to eligible local governments and eligible Indian groups to promote the participation of such governments and groups in the decisionmaking process related to the actions described in subsection (b), if the Secretary determines that the assistance provided

under such a grant is necessary to protect the interests of the government or group and would otherwise promote the interests of just administration within the Bureau of Indian Affairs.

(b) ACTIONS FOR WHICH GRANTS MAY BE AVAILABLE.—The Secretary may award grants under this section for participation assistance related to the following actions:

(1) ACKNOWLEDGMENT.—An Indian group is seeking Federal acknowledgment or recognition, or a terminated Indian tribe is seeking to be restored to federally-recognized status.

(2) TRUST STATUS.—A federally-recognized Indian tribe has asserted trust status with respect to land within the boundaries of an area over which a local government currently exercises jurisdiction.

(3) TRUST LAND.—A federally-recognized Indian tribe has filed a petition with the Secretary of the Interior requesting that land within the boundaries of an area over which a local government is currently exercising jurisdiction be taken into trust.

(4) LAND CLAIMS.—An Indian group or a federally-recognized Indian tribe is asserting a claim to land based upon a treaty or a law specifically applicable to transfers of land or natural resources from,

by, or on behalf of any Indian, Indian tribe, or group, or band of Indians (including the Acts commonly known as the Trade and Intercourse Acts (1 Stat. 137; 2 Stat. 139; and 4 Stat. 729)).

(5) OTHER ACTIONS.—Any other action or proposed action relating to an Indian group or federally-recognized Indian tribe if the Secretary determines that the action or proposed action is likely to significantly affect the citizens represented by a local government.

(c) AMOUNT OF GRANTS.—Grants awarded under this section to a local government or eligible Indian group for any one action may not exceed $500,000 in any fiscal year.

(d) DEFINITIONS.—In this section:

(1) ACKNOWLEDGED INDIAN TRIBE.—The term ''acknowledged Indian tribe'' means any Indian tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(2) ELIGIBLE INDIAN GROUP.—The term ''eligible Indian group'' means a group that—

(A) is determined by the Secretary to be in need of financial assistance to facilitate fair participation in a pending action described in subsection (b);

(B) is an acknowledged Indian Tribe or has petitioned the Secretary to be acknowledged as a Indian Tribe; and

(C) petitions the Secretary for a grant under subsection (a).

(3) ELIGIBLE LOCAL GOVERNMENT.—The term ''eligible local government'' means a municipality or county that—

(A) is determined by the Secretary to be in need of financial assistance to facilitate fair participation in a pending action described in subsection (b); and

(B) petitions the Secretary for a grant under subsection (a).

(4) SECRETARY.—The term ''Secretary'' means the Secretary of the Interior.

(e) EFFECTIVE DATE.—Grants awarded under this section may only be applied to expenses incurred after the date of enactment of this Act.

(f) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section

$8,000,000 for each fiscal year that begins after the date of the enactment of this Act.

○

The CHAIRMAN. We are pleased to welcome the sponsors of these measures, Senators Dodd and Lieberman but before I call upon our distinguished witnesses, may I first call upon the vice chairman of the committee, Senator Ben Nighthorse Campbell.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator CAMPBELL. Welcome to our colleagues, Senators Dodd and Lieberman.

As we consider these bills, pending on the Senate floor, as you know, Mr. Chairman, is an amendment to the fiscal year 2003 Interior appropriations bill to add administrative procedures to the process that is already in place. Although I personally do not believe the appropriations bill is the right vehicle for this, I certainly understand the sponsor's concern and frustration with a process that should have been streamlined a long time ago.

This committee has held many hearings on the issue of recognition and recognition reform. We have also heard how for some people the process has taken years, even generations, to complete. I believe the process that governs how the United States recognizes tribes should be transparent, timely and afford due process to the petitioners. I also believe that the fundamental fairness requires that truly affected communities be given an opportunity to be heard. Sometimes in the past they have not been.

I do find it ironic, Mr. Chairman, and I think I have told you this before, about native people who have lived in North America for thousands of years who have to document who they are by a government set up by post-Columbian immigrants. The legislation before us certainly, in significant ways, makes some changes. We have a tongue and cheek comment we hear sometimes in the Indian community that we had bad immigration laws years ago.

These bills would remove the decisionmaking authority from the Assistant Secretary and give it to the Secretary; authorize interested parties to request the Secretary conduct formal hearings on a petition in addition to the hearings currently available; alter the standard of proof from a reasonable likelihood standard to a more likely than not standard; and increase the authorized funding for the recognition process to $10 million for each fiscal year after enactment.

Those, however, clamoring for reform, must recognize that the process in place is sometimes made worse by an avalanche of lawsuits filed by local communities, State attorneys general and suits from already-recognized tribes. The BAR is also flooded with requests under the Freedom of Information Act that keeps churning the system and churning the dialog, preventing the BAR from performing its core functions. If we are going to reform the recognition process, we should make sure we are providing reforms not just for States and attorneys general but for the petitioners themselves.

Thank you, Mr. Chairman. I am looking forward to hearing from our witnesses.

The CHAIRMAN. Thank you very much.

Our first witness is the distinguished Senator from Connecticut, Senator Dodd.

STATEMENT OF HON. CHRISTOPHER J. DODD, U.S. SENATOR FROM CONNECTICUT

Senator DODD. Thank you very much, Mr. Chairman.

I am pleased to be joined at the witness table by my colleague from Connecticut, Senator Lieberman. I want to thank you and Senator Campbell for agreeing to hold this hearing today. I appreciate it very, very much. This is an extraordinarily important issue to both the people of our State of Connecticut and we think people across the Nation as well.

I also want to thank both of you for your leadership on issues pertaining to Indian Affairs. No one has done more in the U.S. Senate or in the whole Congress, for that matter, to advance the cause of improving America's understanding of native peoples and native cultures than the two of you. Senator Inouye and Senator Campbell have worked to enable America to better understand itself, to see ourselves as one people who have grown out of many traditions. They have helped us to define and harness one of our greatest natural resources, the great diversity of America.

I know that everyone in this room and people all across the country would want to take this opportunity to express that sense of gratitude to both of you for your tremendous contributions.

The issue we are here to discuss today is the issue of how the Federal Government goes about the business of identifying which native American groups have maintained such cultural, social and political distinctiveness that they should be recognized as separate, sovereign nations. This is an issue that profoundly impacts the rights and obligations of the Federal Government, the States and the various Indian nations of North America.

I am not here in any way to criticize the civil servants of the Bureau of Indian Affairs [BIA]. In my view, they are doing their best under extremely difficult circumstances but the process is doing a grave disservice, in my view, to the cause of good government and the significance of tribal sovereignty.

As all of my colleagues know, Congress has the authority and a duty to respect, honor and protect the rights of sovereign native Indian nations that resided in the borders of the United States. The Federal Government has a unique legal relationship with each of the tribal governments that represent peoples whose ancestors were here long before people from the rest of the world joined them in calling America home.

The history of the relationship between the Federal Government and all native Americans is a long and complicated one. We don't have the time here today to detail many of the facts of that history but for the purpose of this hearing today, it is important I think to remember there have been several ways in which the Federal Government has acknowledged that a particular group of tribal people are so socially, culturally and politically distinct that they should be regarded as a separate, sovereign nation, entitled to immunity from the laws of the various States and entitled to a direct government-to-government relationship with the Government of the United States.

Initially, many groups were recognized as separate nations through treaties. Later, some Indian nations were recognized by acts of Congress. Most recently, it has become common for tribes

to be recognized through an administrative process conducted by the BIA within the Department of the Interior.

I suppose there is nothing inherently better or worse about any of these alternative ways of establishing the legal status of a tribal group. What is important, in my view, is that the public can have the confidence that the Federal Government has correctly determined that a group in fact is so historically, culturally and politically separate and distinct, that the group should be recognized as a nation.

For many years now, the recognition process administered by the BIA has been under scrutiny and it has become clear that the current process is inadequate to ensure that the decisions being made are factually correct and legally just. The chairman and vice chairman of this committee have held hearings on this matter and perhaps more than anyone else have documented many of the shortcomings in this process.

The General Accounting Office [GAO], in a highly critical study released last November, noted:

> The Assistant Secretary has rejected several recent recommendations made by the technical staff all resulting in either proposed or final decisions to recognize tribes when the staff had recommended against recognition.

The GAO concluded that:

> Because of the weakness in the recognition process, the basis for the BIA's tribal recognition decisions is not always clear and the length of time involved an be substantial.

These findings are reminiscent of the testimony offered by Kevin Gover who until January 2000 was the Assistant Secretary for Indian Affairs. In May 2000 before this committee, Secretary Gover stated:

> I am troubled by the money backing certain petitions and I do think it is time that Congress should consider an alternative to the existing process. Otherwise, we are more likely to recognize someone that might not deserve it.

Mr. Gover further stated:

> The more contentious and nasty things become, the less we feel we are able to do it. I know it is unusual for an agency to give up responsibility like this, but this one has outgrown us. It needs more expertise and resources than we have available.

Mr. Chairman, taken together, these statements amount to a startling admission. I would suggest anytime an Assistant Secretary says in effect that his or her agency is incapable of grappling with one of its fundamental responsibilities, that is a cry for help that should not and cannot be ignored, but that cry has been ignored by the agency despite near universal criticism of the process. Despite pleas for fundamental fairness, no fundamental change has been made.

As a member of the Duwamish Tribe has said:

> We have known and felt the effects of 20 years of administrative inaccuracies, delays and blase approach in handling and processing the Duwamish petitions.

Frankly, the BIA is just not doing its job as well as people in this country and the people in native American tribes deserve. Administrative irregularities, accusations of influence peddling and a process that is generally perceived as exceedingly arcane have given rise to profound and reasonable doubts about the validity of the decisions being rendered by the BIA. This is no way for the Federal Government to determine the legal status of tribal groups and set

the conditions for how those groups will interact with State governments, municipalities or Federal agencies.

The legislation Senator Lieberman and I have proposed is designed to ensure that the recognition process is a competent process and will yield decisions that are beyond the reproach of any reasonable person. The decisions the BIA is making are too far too important to be based on a flawed administrative procedure. Every recognition decision carries with it a legal significance that should endure forever. Each recognition decision made by the BIA is a foundation upon which relationships between tribes and States, tribes and towns, Indians and non–Indians will be built for generations and generations to come. We need to make sure that the foundation upon which these lasting decisions are built is sound and will withstand the test of time. We as a nation cannot afford to build relationships between sovereigns on the shifting sands of a broken bureaucratic procedure and system.

There are currently more than 200 petitions for Federal recognition pending before the BIA. That means there are more than 200 groups of people who believe they are entitled to be treated as nations unto themselves. There are petitions pending in 37 of our 50 States and each of these groups may be legally entitled to be recognized as a foreign nation. Our legislation is intended to ensure that the Federal Government issues final decisions about whether these groups should be recognized as separate government and we can be absolutely confident that the facts leading to the decision were properly found in accordance with commonly accepted and prudent administrative procedures.

I think we have an obligation to the people of the United States and to native Americans and their governments to ensure that the BIA gets its facts right in each and every case. I believe that every tribal government that is entitled to recognition should be recognized and should be recognized in an appropriately speedy process, but I am not willing to trade speed for accuracy.

Ultimately, I think the greatest threat to tribal sovereignty may be sloppiness in the recognition process. If the process is not impeccable, then there will be mistakes. There is a danger that groups that should be recognized will not be and that others who should not be recognized will be. If sovereignty and the right to self governance become the booby prizes for winning some bureaucratic game, then we will have failed both native Americans and the American public as a whole.

Mr. Chairman and Senator Campbell, this is a profoundly serious issue that cries out for some resolution. I did not like at all offering an amendment to an appropriations bill. That is not my style. I have been here 22 years and I generally believe that there are procedures and ways of doing things but we were left with no other alternative here given the timeliness of various events. So we are put in a situation of offering an amendment there. I would prefer not to go that way but we are faced with decisions that are going to be made very shortly and I would vehemently oppose, vehemently oppose any effort to undo a recognition once it has occurred. I think that would be a profoundly dangerous step to take but I am concerned that if we don't get this right, there will be moves made by this Congress or other Congresses in the future to

undo recognitions. Nothing could be more injurious or dangerous to the right of sovereignty than that process.

I am begging and pleading that we get this right as soon as we can so we don't build up the kind of resentments and hostility that could do great danger and damage. The process desperately needs to be fixed.

For those reasons, Mr. Chairman and Senator Campbell, we are here before you today to petition your support. We have an amendment pending. I appreciate the efforts made over the last several days to try and reach some accommodation here but this is a profoundly important issue in our State and a growing issue across the country. I thank you for listening.

The CHAIRMAN. Thank you very much, Senator Dodd.

Now, may I recognize Senator Lieberman.

STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM CONNECTICUT

Senator LIEBERMAN. Thank you, Mr. Chairman and Vice Chairman.

Let me first thank Senator Dodd for a very eloquent, comprehensive and fair statement of what motivated us both to put in the two bills you are considering today in this hearing, S. 1392 and S. 1393 but also to offer the amendment we have offered on the floor.

I thank you for convening this hearing. It comes at a very important time and I hope it sets the context in which all of us both in the Senate and outside who have competing points of view, different points of view, can find common ground to move forward.

These two pieces of legislation were introduced by Senator Dodd and myself last year. Our motivation was to create a more fair and open Federal-tribal recognition process. That process has taken on extraordinary importance in our State of Connecticut which experience is close to us and motivates us because of the probability that recognized tribes will open large casinos and that creates a concern among the citizenry about the impact on the State, and therefore, on the fairness of the recognition process.

I want to join Senator Dodd in saying very clearly probably what does not have to be said but we should say it, this is not an attempt to frustrate not just the statutory right that native Americans have to recognition and sovereign nation status when the claim can be made but the historic right, the right that comes from history and justice.

The goal here is to improve the recognition process so that no one can feel that whatever the decision in that process it was achieved without due process in a way that was unfair. In another sense, going back to something Senator Campbell said, to see if we can create a process which after a decision is made, minimizes, one might say hopefully eliminates, the appeals, the litigation that delays this for so long.

Senator Dodd quoted the GAO report of last November. Obviously GAO is independent and nonpartisan and it was a stinging I thought statement on the recognition process which then was seconded by the Interior Department's Inspector General and the past Assistant Secretary for Indian Affairs.

I must say that since the issuance of the GAO report, there has been, in our view, no significant effort to reform the recognition process from within to fix the problems GAO cited. The BIA has continued to move forward without apparent change, most recently and most troubling to us in Connecticut, in its decision regarding the Eastern Pequots that has ignited a genuine cauldron of controversy in Connecticut.

A review of the Eastern Pequot decision makes clear why people in our State have become extremely concerned about this issue and skeptical about the existing tribal recognition process. Faced with petitions for recognition from two tribes, both of which claim they were not the same tribe as the other, the BIA nonetheless created a new tribe out of the two petitioners. Thus, in the view of many people in Connecticut, the BIA affirmatively reached out and created a new tribe when no one was requesting that. In addition, the analysis contains several apparently unprecedented legal conclusions furthering the public distrust of the BIA process.

In particular, there was reliance on the State's recognition of the tribes to fill gaps for:

Specific periods of time where the other evidence in the record concerning community or political influence would be insufficient by itself.

From the decision. I am not an expert in these matters but I have been informed that this is unprecedented, that never before has a State recognition been sufficient to satisfy the criteria for Federal recognition.

Many observers were also troubled by the BIA's conclusion that the separate governing documents of the two tribes satisfied the statute's requirement that the recognized tribe have a single set of governing documents and membership criteria. This has brought public confidence, at least in our State, in the recognition process to an unprecedented low. It is in that context that Senator Dodd and I have gone forward both with our amendment and why we are so grateful that you have given a hearing this morning to the two pieces of legislation that we have introduced in an attempt to fix the problems. Rather than letting the process continue in its current manner, these legislative proposals would require the BIA to provide adequate procedures to ensure the fairness and credibility of its process, something, as Senator Dodd said, that will benefit both the tribes and the communities that surround them and provide the resources, the stakeholders of limited means required to meaningfully participate in the process.

As a whole, our two pieces of legislation we think move toward a stronger recognition system in which all interested parties are able to participate fully and the results therefore are more likely to be more broadly accepted as not only fair but as final. In particular, S. 1392 is intended to ensure that the recognition criteria are satisfied and that all affected parties, including affected towns, have a chance to fairly participate in the decision process. This proposal ensures that affected parties be given proper notice, that relevant evidence from petitioners and interested parties including neighboring towns is properly considered, that a formal hearing may be requested with an opportunity for witnesses to be called, and with other due process procedures in place, that a transcript

of the hearing is kept and that the evidence is sufficient to show that the petitioner meets the seven mandatory criteria in Federal regulations and that a complete and detailed explanation of the final decision and findings of fact are published in the Federal Register.

Let me stress what I think should be clear from this, that this legislation is not an attempt—in fact it does nothing to affect already-recognized Federal tribes or to hinder their economic development plans, nor does it change existing Federal tribal recognition laws. It is simply an attempt to build into the system the most fundamental aspects of due process.

Having created these new procedures in S. 1392, or proposed their creation, S. 1393 is intended to ensure that all stakeholders are able to benefit from them, to use them. It would provide grants to both native American tribes and local governments that can prove fiscal need to allow them to hire genealogists, lawyers and other professionals that will enable them to participate fully in these proceedings. Grants would be available to assist these eligible parties in BIA proceedings regarding the recognition of a tribe as well as proceedings whether to place land in trust for a tribe.

We view these two bills as working in tandem. We cannot make the recognition process stronger and more transparent without giving participants the appropriate resources to be involved and benefit from the due process that we are trying to create.

Because, as I have said, these bills do not affect already-recognized Federal tribes or hinder their economic development plans or change existing Federal tribal recognition laws in substance, it is our hope that these proposals might be the occasion for all of us, if I may speak directly, under the leadership of you, Mr. Chairman and Senator Campbell, to find common ground and move forward on that basis.

I thank you very much for the time you have given us. I hope you will view the efforts Senator Dodd and I are making here in the realistic, real life context from which they emerge in Connecticut and that you will take them also in the spirit in which we both have spoken which is this is an attempt not to scuttle a process of recognition but to improve it so it is not only more fair but ultimately more credible and more final.

I thank you both very much for your time.

The CHAIRMAN. Senator Lieberman, Senator Dodd, on behalf of the committee, we thank you and I can assure you that I take this matter very seriously and admittedly in a sense, personally because I had the great honor of serving with Senator Dodd's father. I think the record would show that my relationship with Connecticut has always been a positive one and hopefully helpful.

But I believe the record of the history of the recognition process, shows that the shortest time it took to get through the whole process was 4 years for a tribe in Michigan and the time entailed in processing the petition of the Eastern Pequot Tribe was one of the longest. They made their application 24 years ago and they have been in this process for 24 years.

In reading the record, I gather that in the investigation conducted by the Branch of Acknowledgment, they realized that Eastern Pequots and the Eastern Paucutuck Pequots were historically

one tribe so they recognized them as one group. Even at this stage, this determination is subject to appeal by any interested party by appealing to the Interior Department, so I cannot see where this has been forced down the throats of the people of Connecticut for that matter, is this a done deal. It is not a done deal. It is a matter that has been pending for 24 years and it has had public notice and notice in papers of vast circulation, so one cannot suggest that this was done in the still of the night.

I can assure you that we will look into this matter with very intense interest. I can assure you that.

Mr. Vice Chairman.

Senator CAMPBELL. I appreciate both of our witnesses and our personal friends, Senator Dodd and Senator Lieberman. I don't want to keep you and I don't want this to be a lesson on Indian history.

If you go back far enough in time, there are many groups that were one tribe. The Arapaho before 1800 were one tribe. Now they are the Wind River Arapaho in Wyoming and the Cheyenne-Arapaho, another tribe, in Oklahoma. Before about 1810, the Cheyenne were one tribe and then they divided. In those days, they divided because they got too many of them and the hunting grounds couldn't handle that big a group and they began to divide. The Shoshone I believe also did, the Wind River Shoshone divided years ago. The Sioux were a huge tribe, so they had different bands of the Sioux, and there are about nine western bands I believe now. So it is not uncommon in history for tribes to divide.

I think the real difference now is—I was here in 1988 as all four of us were and believe me after 1988, there was a huge change and I have to tell you that I think Kevin Gover was right when he said that money is driving some of the dialog that we are getting into now because that is when we passed IGRA and nobody had any idea in 1988 that money was going to be such a big thing with the Indian casinos. I am not opposed to them; in fact, I support them. They have brought jobs and economic development for people that need it and I have never been opposed to that at all. I helped to write it when I was on the House side and I am sure you were all involved with it too.

I think it has really made the problem worse. I know we hear all the time from local communities saying if this group is recognized as a tribe and they get land that is put in trust, they don't have to comply with local zoning codes, don't have to comply with the land use planning. I personally don't think that is right. It seems to me local communities should have a voice when their lives are going to be affected.

Four years ago, when Slade Gorton was here and we did a hearing in his State, we heard of one casino that was built but they didn't take into consideration the routes to get to the casino and went right through some residential areas where children were playing on the sidewalks and lawns right by the street where you can see the danger that could create. So it has created one big problem, the advent of the money. That was the down side of it. The up side as I mentioned was the jobs.

I understand there are about 250 cases now pending and I think that number is going to continue probably going up as groups ei-

ther want to be reinstated, and I think many have every legitimate right. If you were a member in the 1950's before any of us were here, perhaps with the exception of Senator Thurmond who was here in 1950 and maybe 1850—he has been here a long time—but in 1950 a number of tribes were terminated which has always confused me. That is like telling an African American he is no longer black. That is what I equate it to. Telling American Indians they are no longer Indians and they took their land. Some they paid to give up their land rights and basically said, you are assimilated, you are no longer an Indian. So there are a lot of people who are Indians who want to reverse that process and I understand that.

If you go back far enough in time, they were only designated as Indians and put on somebody's roll because the agreements under the treaties were that the Government would provide through trust responsibility something in terms of food or blankets in those days, or a land base they could call their own. That is how it all started.

Things have changed considerably over the years as both of my colleagues know and it has gotten a heck of a lot more complicated.

I just want to reassure both of you that I look forward to working with you. I know the BAR needs reforming too. The question isn't whether we need it reformed, we do. It is how we do it so that legitimate people don't get left out and maybe at the same time, the ones that should not be accepted as a tribe go through a criteria that is tough enough so that they are weeded out.

Money changes a lot of peoples' attitudes about things and I know that when you talked about—maybe it was Senator Inouye—groups that now want to divide into subgroups so they can have their own land base and whether that is the proper thing to do or not, there needs to be a very clear process to determine whether that is a legitimate concern or if they just want their own casino. There is a big difference to me, a moral difference we ought to be dealing with here.

I thank you both for appearing.

Senator DODD. Let me just say, first of all, I have often said, Mr. Chairman, both in your presence and in your absence, we often consider you the third Senator from Connecticut. You have been tremendously helpful to us on numerous occasions and the affection in which you are held by the people of our State is only exceeded I am sure by the affection held for you by the people of your own State. That only goes for my State but also for my family for all the reasons you and I have discussed on numerous occasions.

It is with a certain degree of pain to even come and talk about this issue. I have had a wonderful and continue to have a wonderful relationship with my native American community in Connecticut and am a strong supporter of them and maintain that relationship.

I certainly recognize that the history of what has happened in terms of how tribes have been recognized, how they have divided and come back together. Our concern is really over a process, not even the conclusion but how is it reached and is it reached with all the necessary information so it withstands the test of time.

Our suggestions here and the reason for calling for a moratorium has specifically to do with what Senator Campbell suggested, and that is to straighten this out because our fear is as the process goes

on and decisions get made and we look back, without the benefit of time to fix it, it could be fixed rather quickly in our view.

Again, I am terribly sympathetic. As I said, the process is so broken it has taken some groups 25 years. That is outrageous that anyone should have to wait that long for a decision about whether or not they deserve the status of a sovereign nation as the process allows at conclusion. I think everyone is being adversely affected by the present process and the sooner we fix it, the better off everyone will be.

Our proposal on the moratorium was merely to put things on hold and do what everyone recognizes needs to be done and that is the purpose and reason for the bill.

Senator LIEBERMAN. I join my colleague in thanking you. I was thinking, Mr. Chairman, in this Senate where overstatement tends to happen more often than understatement, your statement that you have been helpful to the State of Connecticut is surely one of the greatest understatements we have heard here in a long time. I agree with Senator Dodd that there is not a better friend of Connecticut in the Senate than you and no one has been more helpful to the State than you. So we thank you very much for that.

I do want to say with regard to the *Eastern Pequot* decision, you are absolutely right about the result and about the fact that it is appealable, it is not over. In fact, I know you are going to hear from our Attorney General, Richard Blumenthal in a while as a witness. Attorney General Blumenthal did announce last week that he is appealing the decision, so that will go forward. We cite that only in terms of our concern about the process and how that decision was arrived at.

The final point to build on what both you and Senator Campbell have said. Look, we all know the reality has changed since Indian gaming came into effect and the recognition process has not kept up with that change, not only in terms of the extent of due process but the funding for the BIA and the BAR is woefully inadequate.

I do want to point out that S. 1392, which is the first of the two measures that has a series of due process requirements, does authorize an additional $10 million a year for increased staff and resources to process these adjudications. Probably there is a need for a lot more than that just to make it come out right.

I appreciate what you both said and I do think it provides a context in which we can go ahead and try to make this right and try to protect everybody's rights, including particularly the rights of native Americans which is what the law is all about for tribal recognition, sovereign nation status as a result of a process that is fair.

Therefore, I thank you for your time and for the statements you have just made.

The CHAIRMAN. We thank you very much, Senator Lieberman and Senator Dodd, and we want to assure you that we will continue to work on this matter to the point of resolution. Thank you very much.

Our next witness is the Deputy Assistant Secretary for Indian Affairs of the United States Department of the Interior, Aurene Martin.

Madam Secretary, welcome to the committee. Before proceeding, will you introduce your associates?

STATEMENT OF AURENE MARTIN, DEPUTY ASSISTANT SECRETARY, INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Ms. MARTIN. My name is Aurene Martin. I am the deputy assistant secretary for Indian Affairs, Department of the Interior.

The CHAIRMAN. Will you recognize your colleagues?

Ms. MARTIN. I am sorry. Accompanying me are Lee Fleming from the Branch of Acknowledgement and Research, BIA and Barbara Cohen with the Solicitor's Office.

The CHAIRMAN. Thank you.

Ms. MARTIN. Good morning.

I would first like to take the opportunity to thank you today for allowing me to present testimony regarding S. 1392 and S. 1393.

S. 1392 would establish statutory procedures for the BIA with respect to Federal acknowledgement and S. 1393 authorizes grants to entities affected by the BIA decisionmaking process.

While we agree with Senator Dodd that the Federal acknowledgement process must be guided by fairness, openness, respect and a common interest in bettering the quality of life for all Americans, we must respectfully oppose these bills. I will first address our concerns with S. 1392 followed by our views regarding S. 1393. I would like to conclude with some remarks regarding our current efforts to improve our delivery of services through the Branch of Acknowledgement and Research.

It is generally the Department's view that S. 1392 is not necessary because substantially similar procedures for Federal acknowledgement are already provided for in Federal regulations which exist in 25 C.F.R. Part 83. Additionally, we have concerns regarding additions and omissions to those procedures that appear in the bill.

There are a number of items which have been dropped from the existing regulations in this legislation. The most significant of these is the exclusion of 15 of the 23 definitions currently provided in the regulations, including the definitions of interested party, political influence or authority, and sustained contact.

I also note that the proposed definition of Indian tribe is different from the definition that appears in our regulations and it is also different from other statutory meanings attached to the term Indian tribe. Because those terms include all tribes who have established relations with the Federal Government prior to the establishment of the acknowledgement process, the definition provided in S. 1392 would only apply to tribes recognized through the acknowledgement process.

Additionally, the substance of section 83.11 of our current regulation which sets out the review procedures for determinations made by the Assistant Secretary have likewise not been included in S. 1392 although section 17 of the bill attempts to apply the terms of the current regulation to reviews made under this bill's provision. The effect of this application is not clear because it is not clear whether the bill is intended to replace or supplement the current regulation or whether the purpose of that provision is to freeze our current review provision so that it cannot be changed.

There are also two additions to the bill which raise departmental concern. Section 12(b) of the bill creates a new requirement that the Department notice States and municipalities in every area historically occupied by a petitioner. This is difficult and burdensome in cases where a group has been moved or has moved across a number of States because it is not always immediately apparent exactly how many places the tribe has stopped.

Finally, the new requirement that the Secretary conduct a formal hearing at the request of a petitioner or interested party could be problematic unless the timing, scope and hearing of the hearing is more clearly defined.

Currently, it is not entirely clear when the hearing will be held. If requested, the hearing could be held prior to the proposed finding or after a final determination is made. If this is possible, the hearing could duplicate the procedures outlined in Section 17 of the bill for review of decisions after final determination.

With regard to S. 1393, the Administration has one major concern. The provisions of the bill authorize the Secretary to provide grants to parties affected by a decision which will be made by the Department or Congress. These decisions include fee to trust applications, acknowledgement determinations or restoration efforts of terminated tribes. The provisions of this bill could create a conflict of interest for the Secretary because it may later be claimed that the Secretary predetermined his or her decision through the choice of grantees. Also, this bill does not prohibit the use of funds for litigation, lobbying Congress or participation in actions against the Department.

Finally, I would like to briefly discuss current efforts within the Department to improve our ability to process acknowledgements in a more timely and efficient manner.

In November of last year, the GAO released its report regarding the tribal recognition process. The report identified weaknesses in the recognition process and recommended actions to improve that process. The Department of the Interior generally agreed with the report and we have taken actions to implement its recommendations.

The GAO made two recommendations with respect to the Department. First, it recommended that the Department provide a clearer understanding of the basis used for recognition decisions by developing and using transparent guidelines. Second, it recommended that the Department develop a strategy for improving the responsiveness of the process.

In response to these recommendations, the Department has completed a strategic plan which is currently in the departmental clearance process prior to public release. Generally speaking, we have identified actions that improve the process which include making documents produced by the BAR accessible to the general public. This includes digitizing documents and making them available on the Internet once we are able to access the Internet. Two, includes adopting clear guidelines to assist tribal petitioners develop their research and documentation. Three, is increasing resources to assist the BAR staff with a variety of tasks including looking into the possibility of contracting. Finally, we are reviewing

procedures which may be streamlined or changed to increase responsiveness and timeliness of the process.

We expect this plan to be released in the coming weeks and will provide you with a copy when it is available.

That concludes my testimony. The Department has additional technical comments regarding S. 1392 and S. 1393 and would be happy to share them with the committee. I also ask my written testimony be entered into the record.

Again, thank you for the opportunity to testify today. I am happy to answer any questions you might have.

[Prepared statement of Ms. Martin appears in appendix.]

The CHAIRMAN. Without objection, your full statement will be placed in the record.

I have read the testimony that will be presented by Connecticut Attorney General Blumenthal who has expressed concern that in certain cases involving acknowledgement of tribes within the State of Connecticut, political appointees within the Department have overturned staff findings that particular petitioners have not met the criteria for recognition.

Is the Secretary bound by the decisions of the staff?

Ms. MARTIN. The short answer is no. The recommendations are made by staff to the Secretary or Assistant Secretary and they have the discretion to not go along with the recommendations.

The CHAIRMAN. Is that decision by the Secretary appealable?

Ms. MARTIN. It is. A decision by the Assistant Secretary is appealable to the IBIA. I believe a decision of the Secretary is appealable in Federal District Court.

The CHAIRMAN. Does the Secretary or her senior subordinates outside the BIA ever overturn staff recommendations?

Ms. MARTIN. Not that I am aware of, no.

The CHAIRMAN. In your testimony, you have indicated that the Department does not support S. 1392 because the existing administrative regulations already provide for formal hearings in which the petitioner and interested parties are allowed to participate. To your knowledge, has this formal hearing process under the existing administrative rules been used by the State of Connecticut?

Ms. MARTIN. My understanding is that it has during the pendency of the Eastern Pequot and Paucatuck Eastern Pequot petitions, there was a formal technical assistance hearing held and the State of Connecticut participated in that formal technical assistance hearing.

The CHAIRMAN. So the State of Connecticut was aware of this petition pending and they had a hearing?

Ms. MARTIN. They had a formal meeting which was on the record. They were aware of the petition and they submitted voluminous documentation outlining their position.

The CHAIRMAN. Was this formal hearing requested under the provisions of our laws?

Ms. MARTIN. It was requested by the State. It is not an adversarial hearing but is a formal meeting on the record in which all parties participate.

The CHAIRMAN. You indicate that notification requirements set forth in S. 1392 would be unworkable because they require notification of all municipalities located in "geographical areas historically

occupied by a petitioning group." Can you tell me why this is unworkable?

Ms. MARTIN. Our understanding is that the notice is expected to go out shortly after the letter of intent is issued or sent to the Department. At that point in the process, it is virtually impossible to be able to tell in how many different places a tribe resided because the contents of the letter of intent only show the current address of the petitioner.

In the case of a tribe like the Oklahoma Cherokee, you would have to be able to go back and find where they started and all the places they traveled through and notify all those States, all of the counties and all the towns and cities through which they traveled. That is a very difficult process at early point in the proceedings and could be unworkable.

The CHAIRMAN. What you are saying is that let us suppose that the Oklahoma Cherokees applied for recognition—if a petition of this nature were filed under S. 1392, the Branch of Acknowledgment would have to extend its investigation into and provide notice in the Carolinas, and other Eastern States.

Ms. MARTIN. Yes; I think they would.

The CHAIRMAN. Would the scope of the notice be similarly extensive if the Oklahoma Choctaw's, would the Branch have to go to Mississippi also?

Ms. MARTIN. That is my understanding of how the bill is written.

The CHAIRMAN. In fact, that would be the case for most of the Indian nations in Oklahoma, wouldn't it?

Ms. MARTIN. Yes; it would.

The CHAIRMAN. The Seminoles, Apaches, and Cheyennes would present the same the challenges wouldn't they?

Ms. MARTIN. That is right.

The CHAIRMAN. You have testified that the grants available under S. 1393 could be used by grantees to lobby, to litigate against those activities required by law to be performed by the Department. Can you explain why such funding is objectionable?

Ms. MARTIN. I can explain in my detail in writing, but it is my understanding that there is a general disadvantage to funding tribes to lobby Congress. That is that when we provide funding to groups we want that to be used for developing a petition or other things like that but also, we don't want to create a conflict of interest for ourselves or additional burden on the Federal Government by providing funds to entities who are going to sue us and cause us extended, protracted litigation which uses more of our resources.

The CHAIRMAN. What you are saying is that it just doesn't sound right or logical to give someone money to lobby against you or to fight you in court?

Ms. MARTIN. In a nutshell, yes.

The CHAIRMAN. I suppose that is the American way.

I have before me a document I believe was prepared by your office called "Summary Status of Acknowledgment Cases."

Ms. MARTIN. Yes.

The CHAIRMAN. This document indicates that as of 1976 up this date, 276 petitions have been filed—letters of intent have been filed with your office?

Ms. MARTIN. That is right.

The CHAIRMAN. Of that 276, 8 petitions are ready and 56 have been acknowledged, is that correct?

Ms. MARTIN. Their petitions have been resolved. Not all of those petitioners have been acknowledged.

The CHAIRMAN. For those acknowledged, there are just 13?

Ms. MARTIN. I believe it is 17.

The CHAIRMAN. 17. In other words, you have not rushed through the letters of intent? Is that one of the major causes of concern in Indian country, that the BIA has been slow in responding to these letters of intent and not because the BIA is are rushing petitions through the process?

Ms. MARTIN. That is true. That is a major concern of Indian country but I would like to make a distinction between letters of intent and complete petitions. When a tribe files a letter of intent, that is simply putting us on notice they are going to complete a petition and it is once they complete the petition that we begin our active consideration process. We currently have 117 entities who have told us they are going to complete a petition but they have not done so.

The CHAIRMAN. The *Pequot* case has been in the acknowledgment process for 24 years now. Is it true that their letter of intent was filed 24 years ago?

Ms. MARTIN. My understanding is it was filed in 1979, yes.

The CHAIRMAN. And the Department's consideration of that petition still not closed?

Ms. MARTIN. No; the decision is not yet final. It will be final 90 days from the publication date or upon review by the IBIA or other pending litigation that might occur.

The CHAIRMAN. So it is still open for further consideration?

Ms. MARTIN. It is.

The CHAIRMAN. That being the case, how long do you think it might take?

Ms. MARTIN. I believe it could take years. I can't even speculate on how long.

Ms. COHEN. My name is Barbara Cohen.

Under the acknowledgment regulations, a request for reconsideration has to be filed within 90 days of when publication occurred in the Federal Register. At that point, there are timeframes set up within IBIA for purposes of the interested parties and the petitioners filing the briefs. At that point, the Department is neutral and does not take a position on the merits that are raised before IBIA. There is no set time period for IBIA to rule on a particular request for reconsideration. They have responded to some of them quite promptly within 1 month or 2; others they have taken perhaps about 1 year to respond.

If IBIA refers matters back to the Secretary, there are set timeframes in the regulations for the Assistant Secretary to act. I believe since things have been remanded to the Department, usually a decision occurs within a year after that.

The CHAIRMAN. So one would not describe this as a done deal?

Ms. COHEN. That is correct.

The CHAIRMAN. It may take over a year or more?

Ms. MARTIN. Correct. That doesn't take into account any possible litigation that might arise from an appeal of the IBIA's decision.

The CHAIRMAN. That would mean a decade or two?

Ms. COHEN. Yes; but if the Department's final decision is to recognize the historical Eastern Pequot Tribe, that would be a final and effective decision at that point. If the State went to the courts to litigate that, it would still be the Department's position that they are a recognized tribe.

The CHAIRMAN. So would you say that under the current laws, interested parties have had an opportunity and still continue to have the opportunity to stop it or make changes, is that correct?

Ms. COHEN. Clearly, that is correct.

The CHAIRMAN. Questions?

Senator CAMPBELL. I think you asked many that I had jotted down too, Mr. Chairman. Just a couple.

First of all, this is more of a statement than a question, but it doesn't sound right, as you said, Ms. Martin—by the way, congratulations on your new appointment. I think this is the first time you have appeared before the committee since you worked for the committee, if I am not mistaken?

Ms. MARTIN. That is right, sir.

Senator CAMPBELL. You mentioned it doesn't sound right for tribes to be using money they receive from the Federal Government to lobby the Federal Government but in fact, towns do that, cities do it, States do it. It is taxpayers' money at one point or another that they use to come back here and lobby for it. Frankly, I don't see why tribes can't do it just as well as any other government entity.

Why doesn't the Department require more details when getting a letter of intent rather than after they form the petition and the second part is, is the burden of proof mostly on the tribes when they make the petition or do you have to do a lot of the research to find out the legitimacy of it?

Ms. MARTIN. In regard to the letter of intent, I think we are looking into the possibility of amending the regulations to increase the amount of information that is available when the letter is submitted.

In regard to the responsibility of the petitioners, the burden is on them to provide evidence to us which is sufficient to support their documentation. Once we receive the petition, we go over that research to make sure it is legitimate and the genealogy to determine the persons are also members of the tribe.

Senator CAMPBELL. On the portion that you have to do, is any of that outsourced or done through private contractors for the BIA?

Ms. MARTIN. At this time, it is not but that is one of the options we are currently looking into to increase the efficiency of the process.

Senator CAMPBELL. Haven't done it yet though?

Ms. MARTIN. We have not.

Senator CAMPBELL. I understand that about 40 percent of the staff time now is used responding to Freedom of Information requests. Is that true?

Ms. MARTIN. Yes; I think it is true. It may be a little bit more time than that.

Senator CAMPBELL. It just goes to show in our system of government, nobody gives up and we appeal everything if we don't like

the outcome, and I guess that reflects on the amount of time you have to spend providing information for the Freedom of Information Act.

There are a number of court ordered deadlines that have been put in place in the past. Does that complicate the BAR system and how has that impacted you? For instance, does it require you get a court ordered decision. Does that inadvertently make it so that group can be a "line jumper" or move ahead of the ones that are trying to stay in the normal process?

Ms. MARTIN. It can. If we get a court order that directs us to come up with a decision by a date certain, it requires us to place that petition at a point in the process which will put them ahead of other petitions that have been waiting.

Senator CAMPBELL. Do you know offhand how many times that has happened?

Ms. MARTIN. Two times that we are aware of and then we have negotiated with parties to process their petitions earlier.

Senator CAMPBELL. Two times since when?

Ms. COHEN. It has only been an issue that has been litigated in the past perhaps 2 years. We have two courts that have ordered two petitioners to be placed on active consideration above their other priority. We have negotiated schedules for other petitioners that were already on active consideration to determine when information would be submitted, particularly by interested parties and petitioners. We came up with a negotiated settlement as far as their procedures in the Schaghticoke litigation in Connecticut where we had a lot of information submitted where we frontloaded the information submitted by both the interested parties and the petitioner before we issue a proposed finding.

I think one of the concerns that the Department has in the idea of the moratorium is how that moratorium is going to impact existing court ordered deadlines.

Senator CAMPBELL. What is your view? How would it impact court decisions?

Ms. COHEN. I do realize that Senator Inouye's amendment talks in the context of a moratorium only on final determinations which would allow us to handle the immediate deadlines dealing with proposed findings. However, there is a proposed deadline for final determination I think in 2003, so it would create a conflict between court ordering the Department.

Senator CAMPBELL. What I am getting at is if there was a moratorium, would that open a floodgate of more lawsuits in hopes the decision would circumvent the process and put them near the top of the line?

Ms. COHEN. It certainly would be an issue that would be litigated, yes.

The CHAIRMAN. Correction. It is not my bill; it is Senator Dodd's bill.

Ms. COHEN. But there as an amendment that was being proposed. I think it was an amendment to Senator Dodd's.

The CHAIRMAN. No.

Senator CAMPBELL. I have no further questions. Thank you, Mr. Chairman.

The CHAIRMAN. I would like to thank you, Secretary Martin, and your staff. I will keep the record open for 2 more days because we want action to come about as soon as possible. If you do have corrections you would like to make or addenda, please feel free to do so.

Ms. MARTIN. Thank you very much, sir.

The CHAIRMAN. Our next witness is the director of the Natural Resources and Environment, General Accounting Office of Washington, Barry Hill, accompanied by the assistant director, Jeffery Malcolm.

Mr. Hill, welcome, sir.

STATEMENT OF BARRY HILL, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY JEFFERY MALCOLM, ASSISTANT DIRECTOR, NATURAL RESOURCES AND THE ENVIRONMENT, GENERAL ACCOUNTING OFFICE

Mr. HILL. Thank you, Mr. Chairman. Thank you for the opportunity to discuss our work on the BIA regulatory process for federally recognizing tribes.

You introduced, Jeff Malcolm, our assistant director responsible for most of our Indian issues related work. Also accompanying me today is Mark Gaffigan who provided the leadership and the work that resulted in the report we issued last year.

If I may, I would like to briefly summarize my prepared statement and submit the full text for the record.

The CHAIRMAN. Your full statement will be made a part of the record.

Mr. HILL. As you know, the Federal recognition of an Indian tribe can have a tremendous effect on the tribe, the surrounding communities and the Nation as a whole. There are currently 562 recognized tribes and several hundred additional groups seeking recognition. Recognition establishes a formal government-to-government relationship between the United States and a tribe. It also entitles the tribe to participate in Federal assistance programs and in some instances, exempts tribal lands from State and local laws and regulations.

In 1978, BIA established a regulatory process intended to provide a uniform and objective approach to recognizing tribes. We issued a report last November evaluating this process and recommending ways to improve it.

In summary, we reported the basis for BIA's tribal recognition decisions is not always clear. While we found general agreement on the criteria that groups must meet to be granted recognition, there is no clear guidance that explains how to interpret key aspects of the criteria. In particular, guidance is lacking in instances when limited evidence is available to demonstrate petitioner compliance with criteria. The lack of guidance in this area creates controversy and uncertainty for all parties about the basis for decisions reached.

For example, recent controversy has centered on the allowable gap in time during which there is limited or no evidence that a petitioner has existed continuously as a tribe. The regulations state that lack of evidence is cause for denial but note that historical sit-

uations and inherent limitations in the availability of evidence must be considered.

In writing the regulations, the Department intentionally left key aspects of the criteria open to interpretation to accommodate the unique characteristics of individual petitions. For example, the regulations do not identify the permissible interval of time during which a group could be presumed to have continued to exist if the group could demonstrate existence before and after the interval. Leaving key aspects open to interpretation increases the risk that the criteria may be applied inconsistently to different petitioners.

To mitigate this risk, BIA's technical staff relies on precedence established in past decisions to provide guidance in interpreting key aspects in the criteria. While this appears to be a reasonable approach, there is no clear guidance on how precedent should be used in decisionmaking or the circumstances when it is appropriate to deviate from precedent. Nor is it clear how this information should be made available to petitioners, third parties and decisionmakers who would need this information to understand the basis for past decisions and to make reasoned judgments about pending decisions.

Ultimately, BIA and the Assistant Secretary will still have to make difficult decisions about petitions when it is unclear whether a precedent applies or even exists. Because these circumstances require the judgment of the decision-maker, acceptance of BIA and the Assistant Secretary as key decision-makers is extremely important. A lack of clear and transparent explanations of the decisions reached can cast doubt on the objectivity of decision-makers, making it difficult for parties on all sides to understand and accept decisions regardless of the merit or direction of the decisions reached.

In our November report, we recommended that BIA develop and use transparent guidelines to help interpret key aspects of the criteria and supporting evidence used in Federal recognition decisions.

In conclusion, the BIA's recognition process was never intended to be the only way groups could receive Federal recognition. Nevertheless, it was intended to provide a clear, uniform and objective approach and is the only avenue to Federal recognition that has established criteria and a public process for determining whether groups meet these criteria.

However, weaknesses in the process have created uncertainty about the basis for recognition decisions and may keep the process from fulfilling its promise to provide a uniform approach to tribal recognition. Without improvements, confidence in the recognition process as an objective and efficient approach will erode and parties may look to the Congress or the courts to resolve recognition issues. This has the potential to further undermine the BIA's recognition process.

This concludes my statement and we would be happy to respond to questions you or other members may have.

[Prepared statement of Mr. Hill appears in appendix.]

The CHAIRMAN. Mr. Hill, it has been suggested that the acknowledgment process is in need of reform. I gather you agree with that in part because interested parties are not able to affect the outcome of the determination. Based on your study, what is your opinion on

the ability of interested parties to be able to affect the outcome of the present acknowledgment process? Are they kept out of the process or are they involved?

Mr. HILL. When we did our work, we noted there was a problem in this area in that interested parties really only have access to the information that BIA has after the proposed decision has been put out there. They don't really have ready access to any of the information that is considered early in the process other than perhaps filing FOIA requests. The FOIA requests are really very time consuming from the staff's standpoint. They basically have to drop whatever work they are doing on the petition and start xeroxing copies of material and providing it to the interested parties.

I think what needs to be done is some process that up front will allow third parties and interested parties to have earlier access to the information and to have earlier input into the process so there can be a greater sharing of information up front to avoid some of the problems in the back end of the process.

The CHAIRMAN. Although it is slow, the information is available?

Mr. HILL. All the information is not available in the early part of the process. Yes, it is available eventually but there are timeframes once the proposed decision is made that interested parties can react to that information. That is slowing down the back end of the process and probably resulting in a lot of uncertainties and disagreements with final decisions that are made.

The CHAIRMAN. Is a reservation automatically established when a tribe is recognized through the BIA's administrative process?

Mr. HILL. No; it is not. New tribes must petition BIA to have land brought into trust just like any other tribe. Until they do that, there really is no land that is considered to be the reservation.

The CHAIRMAN. So this acknowledgment does not mean that land would automatically be placed into trust or that a tribe would be allowed to open a casino?

Mr. HILL. That is correct.

The CHAIRMAN. Once a newly recognized tribe acquires land, can it open a casino?

Mr. HILL. No; not necessarily. Here again, the first step is they must bring land into the trust. That is a separate process after they have been recognized, and then second, the next step would be to get that land brought into the trust consistent and under the Indian Gaming Regulatory Act provisions that would allow gaming on the reservation. So it is actually three separate processes, the recognition decision process, the land trust decision, and then a gaming decision.

The CHAIRMAN. Are the applications to place land in trust receiving automatic approval?

Mr. MALCOLM. No; they are not. There is also a different section in the Federal regulations dealing with land into trust decisions and that process also calls for the participation of State and local communities affected by that.

Probably the biggest difference in that decision in contrast to a recognition decision is in a recognition decision, the input of third parties really goes to the criteria, has the petitioner submitted information relevant to the criteria being met or not met. A lot of the parties comment on the impact it is going to have down the road

for land into trust decisions but under the land into trust regulations, how the local community is going to be impacted, that is, their tax base when the land is put into trust, it is in that process that those effects of the surrounding communities can and is taken into account in the decision to take land into trust.

The CHAIRMAN. It has been suggested that the only lands to be placed in trust should be lands that are the tribes ancestral lands. As you know, most Indian tribes are located in places where they were force to relocate such as the Cherokees were forced to leave the Carolinas to go to Oklahoma. What sort of result would that bring about? Say my tribe has been located in one area of the county but my tribe was originally from two States away four generations ago my tribe was forced to move. The same thing happened all over California, as you know.

Mr. MALCOLM. This is an issue the BIA is trying to address. They have been trying to update their regulations on land into trust decisions as well as issuing regulations dealing with acquiring land for gaming purposes within those proposed regulations that were issued earlier in final form that have since been withdrawn for further review and comment, but in those regulations, one of the factors is the establishment of a tribal acquisition area. So in negotiation with the Assistant Secretary a tribe would define a geographical area that it could have a targeted acquisition plan within. So in the cases you are mentioning, hopefully that will be addressed in the new regulations for land into trust.

The CHAIRMAN. In your studies of the acknowledgment process, is it correct that the average length of time taken for some sort of resolution of a pending petition is about 10 years. Is that correct estimate from the time a letter of intent is filed?

Mr. GAFFIGAN. A lot depends on whether you consider all the letters that first came in and what universe you choose but I think 10 years a good estimate. In fact it is probably on the low end, especially as you get to the later petitions that have become more and more contested.

The CHAIRMAN. So it could be higher?

Mr. GAFFIGAN. Absolutely, especially on an individual basis. Again, it depends on how controversial a particular case is. Some have been settled in a rather minimal time, and others in much more than 10 years.

The CHAIRMAN. The case in point, the Eastern Pequots' petition was filed about 24 years ago?

Mr. GAFFIGAN. The letter of intent was filed and when they actually got their petition in and that sort of thing, I would have to look at the different dates but that is the beginning of the process, this letter.

The CHAIRMAN. So they have been persistent?

Mr. GAFFIGAN. Very persistent.

The CHAIRMAN. Thank you.

Mr. Vice Chairman.

Senator CAMPBELL. Mr. Hill, you heard the BIA testify that they are considering putting some documents on the website. Do you support that? Would that help with transparency? Do you think that would be good?

Mr. HILL. We have not seen specifically what their proposal is but certainly in concept, anything you could make accessible to third parties and to the communities early on in the process and easy to access like that would be a step in the right direction, yes.

Senator CAMPBELL. If you had two groups of people and they had a 70-year gap in their existence and wanted to be reinstated as a tribe, one of the groups through no act of their own was forced to give up their language and all these things you have heard about over and over, put their kids in boarding school and beat them when they spoke the language, cut their hair, did all that, one was intentional discouragement of that tribe by the Federal Government, that is one group.

Then you have another group that simply let it die, didn't care, didn't keep up with it. Towns built around them and they sort of assimilated and went their own way, didn't keep track of anything.

With those two groups, it looks to me they are going to have obvious outcomes when they put in their petitions. One simply won't have a lot of the information but the other might because if it was government orchestrated, there were still records in the government. Isn't that a justifiable difference in the outcomes based on those historic situations?

Mr. HILL. Yes; I think you have pointed out the difficulty of this entire process. The seven criteria used are pretty clear-cut and well accepted by everyone. It is the interpretation of those criteria, the extent to which you need to document the evidence you need to provide that demonstrates you have met each of those seven criteria where it really gets to be a judgmental type of thing. There are circumstances like you mentioned that exist. That is where good judgment, good reason needs to come into play.

On the other hand, I guess what we are saying is when you make these interpretations, there is a legitimate interpretation needed here, and there needs to be some history of that, some explanation of that. That is where we say there needs to be some kind of guidance. When you make a decision or interpretation like that, you need to be more open about the reasons, the justification you are making to make that final decision so you can develop over the years a history or a case law almost of this process that other petitioners, other decisionmakers could use and say this situation is similar to this situation in the past and here is how the judgment was made and we are going to do this consistently with that precedent or if you are going to deviate from the precedent, be open about that as well, here is why we are deviating from what was a precedent in the past. That is not occurring right now and because of that, there is a lot of uncertainty, appears to be a lot of inconsistency and a lot of confusion out there on the part of not only petitioners but the communities and States as well.

Senator CAMPBELL. Senator Inouye asked you several questions dealing with recognition and putting land into trust and moving on to apply for some gaming provision. You might not have the answer to this but I am interested in that one, two, three scenario. People seek recognition, then the other shoe drops somewhere after that and they want a piece of land, historic land or not, and many then move to develop gaming.

How many or do you even have that information of people in the past who have sought recognition, how many have then gone on to seek land, to put land in trust and of those how many have gone on to try to establish a casino on that land? Do you have any information along that line at all? Would you say all, one or two, or what?

Mr. MALCOLM. We don't have any current information on that. We did provide information to the committee I believe in 1999 or 2000 that looked at the land that had been acquired since IGRA was passed in 1988 and how much land had been brought into trust. At that time, we identified roughly five or six tribes that had been recognized since IGRA that had brought land into trust.

Senator CAMPBELL. Five or six out of how many that were recognized?

Mr. MALCOLM. Under the regulatory process, currently it is about 15 but this is only land for gaming, not land generally into trust. This would be based on my experience, the majority would eventually seek to get land into trust. A much smaller number of those do go on to open casinos.

Senator CAMPBELL. Thank you. No further questions.

The CHAIRMAN. While listening to you I couldn't help but recall that my studies of our relationships with the native Americans would indicate that anthropologists estimate that there were about 30 to 50 million native people residing in the continental United States before the first Europeans come to these shores. However, there action untaken by the United States that we now refer to as the Indian wars. After those Indian wars, there were only 150,000 native people who survived those wars and they were scattered from here to there like the Cherokees were sent to Oklahoma, Apaches to Oklahoma, the Seminoles to Oklahoma.

One of the requirements of the acknowledgment process requires documentation of the tribe's existence and I have always wondered how a tribe can prove it's existence when you have been tossed around like this, your tepees burned, your homes burned, your leaders massacred and I am surprised that with that historical background, we have been able to resolve any of these cases. Do you have any comment to make?

Mr. HILL. I don't know if my colleagues want to weigh in on this but I will make a general comment that the point you are raising is a very, very legitimate point and it is an understandable problem where you have these seven criteria. It is not easy for these tribes and petitioners to provide the documentation for the reasons you cited and other reasons.

The CHAIRMAN. Who has the documentation?

Mr. HILL. In some cases, the documentation just doesn't exist, there was no documentation.

The CHAIRMAN. If you do, it is in the hands of non-Indians hands, isn't it?

Mr. HILL. It could be. It could be, or it would not exist at all but I think it is a legitimate problem and here again, I think that is where good judgment and reason needs to come into play and interpretations have to be made of these criteria in terms of whether a tribe satisfies any particular criteria.

Mr. GAFFIGAN. I would just add as Mr. Hill pointed out, the situations and the regulations have been written this way that there is a lot of leeway built in in terms of you don't necessarily have to have written evidence of all these things going back because that doesn't exist. It is a question of what kind of documentation is acceptable. That is where you get into controversy and concerns we had in terms of what are the precedents for what is acceptable to deal with the situation when records are not there or the situation Senator Campbell outlined where there was a 70-year gap and you had the two differences.

The CHAIRMAN. To put it mildly, it is confusing, isn't it?

Mr. HILL. It is challenging and it is of great concern in that there are a lot of interested tribes and groups that have submitted letters of intent, a lot of petitioners waiting for decisions and it is frustrating and challenging. It is something I think needs to be fixed, the process needs to be improved, these obvious weaknesses need to be corrected and good, fair, objective, and consistent and visible decisions need to be made.

The CHAIRMAN. We have taken your report very seriously, Mr. Hill.

Senator CAMPBELL. One more question before you excuse this panel. When you use the word documentation, you know as well as I that implies there is something written in black and white but that is not the way Indian history worked. They didn't have black and white, didn't do written documentation but most historians, at least those I have talked to, say verbal history qualifies as criteria for establishing what happened as well as the written word. What is your view on that?

Mr. HILL. I think that is correct. When we say documentation, we're saying if there is written documentation, that certainly needs to be provided, but where there is no written documentation, then you need to provide whatever evidence would support that particular criteria.

Senator CAMPBELL. Accepted knowledge within the Indian community or something like that would also qualify?

Mr. HILL. Again, we are not experts in terms of making these determinations but certainly those circumstances would exist and good reason and good judgment have to come into play here.

Mr. MALCOLM. That is correct. Oral testimony specifically regarding social and political interactions, you need to know who were the people involved in these social gatherings. The only way to really find that out is to talk to those involved as well as the political influence that either elders or other tribal people asserted in the community and oral testimony is certainly the best way to ascertain a lot of that information.

Mr. GAFFIGAN. I would just add that the BAR within the BIA has also indicated they do use oral history and suggested in their guidelines that is acceptable.

Senator CAMPBELL. Thank you.

The CHAIRMAN. Thank you very much. May I suggest if you do have addenda to make or corrections, the record will be kept open just for 48 hours because we have assured the delegation from Connecticut that we would act upon this as expeditiously as possible. Once again, thank you very much, you have been very helpful.

Our next witness is the Attorney General of the State of Connecticut, Richard Blumenthal and the First Selectman of the Town of North Stonington, CT, Nicholas Mullane, II, accompanied by the District Director of Congressman Simmons, Jane Dauphinais.

Attorney General Blumenthal, welcome, sir.

STATEMENT OF RICHARD BLUMENTHAL, ATTORNEY GENERAL, STATE OF CONNECTICUT

Mr. BLUMENTHAL. Thank you very much.

If I may join my two distinguished U.S. Senators in thanking you, Senator Inouye, for your constant and continuous help to our State over the years. I know you are indeed a friend of Connecticut and I don't anticipate any special treatment here as a result but I do want to express my thanks to you for this opportunity, especially to testify here which in a way I think marks a milestone. I will submit written testimony with your permission but briefly summarize what I have to say.

The CHAIRMAN. Your statement will be made a part of the record.

Mr. BLUMENTHAL. Today really marks a milestone because I think it recognizes that this system is indeed broken and needs to be fixed. I have said so for some years and that phrase, indeed the sentiment itself, now seems to have much more widespead force and momentum than ever before.

There is a consensus and I hear it from everyone in this room except the BIA itself that there needs to be fundamental and far reaching change. The question really is when and how, not whether.

I very much respect the sentiments that have been expressed by a you and Senator Campbell about some of the disadvantages of a moratorium at this point but I do believe the case has been made that these decisions should be held so the system can be given greater sanity and sensibility as Senator Dodd said on the floor of the Senate, greater clarity and transparency and fairness which are important now not just in the future.

What we will see in the absence of reform is growing numbers of Federal court takeovers. We have seen it in other areas where the political process failed to act promptly and fairly. In this instance, we see it already in the State of Connecticut where three of the petitioning groups, including the Eastern Pequots and also the Golden Hill Paugussets and the Schaghitcokes now are within the Federal court jurisdiction and the fact of Federal court takeovers is a very profound sign of the failure of the current system. Essentially this system now is lawless and that is the reason the courts have taken over.

We sued the BIA, we have never sued any tribe, because we were denied essential information when it was critical to our representing the people of the State of Connecticut, their interests and the public interest. Your point, Senator Inouye, about the information eventually being available is true. To be useful, it has to be provided before the decision is made. It cannot be afterward despite the availability of the appeal process which we are using in the Eastern Pequot situation.

The fact of overruling staff decisions is another sign that the system is broken and needs to be fixed. Again, it isn't only a single instance. The pattern is documented by the Department of the Interior itself in the Office of Inspector General report prepared in February 2002 that in its very first finding cites six instances, two of them almost leading to criminal prosecution where staff was overruled.

It isn't the fact of staff being overruled. I am an elected official. I overrule my staff on occasion when I disagree with them but it has to be for reasons that are based in law and fact, not simply arbitrary and capricious preferences, personal preferences on the part of the political official. That is the problem that has been found time and again in this process.

Again, the transparency and clarity of the entire process really needs to be improved so that public credibility and confidence will be sustained and continuing court takeovers can be avoided.

There has been no significant effort within the BIA to reform the process and testimony you have heard here today reaffirms its resistance to change. That is another reason that reform by the U.S. Congress is necessary, not only for the public interest but so that its powers will be reasserted.

As you have heard in the past, the question of delegation of that authority is very much at issue, has not been resolved, remains open and the authority of the BIA is subject to serious question and could be questioned in continuing litigation.

Let me summarize by saying that the current system does not provide the kinds of rights that the Dodd-Lieberman legislation, S. 1392 and S. 1393, provide. For example, there is no provision for a hearing. Yes, there are provisions for technical assistance meetings. There was one in connection with the *Eastern Pequot* decision but it does not provide the same kind of opportunity to establish a record and to be heard for the interested parties. Similarly, the standard of proof is vitally important as is the explanation in writing, meeting criteria with specific evidence, summarizing how the criteria are met.

I believe very strongly that there is a central principle here which is that tribes that meet those criteria ought to be recognized. I am not here to advocate that sovereignty, the status of sovereignty, be changed in any way. In fact, my respect for the sovereign status that comes with recognition is one of the reasons that reform is vital because tribes that meet those criteria should be accorded that sovereign status. Those groups that do not meet it, should not receive recognition.

I believe ultimately there ought to be an independent agency. These decisions are so profoundly important, so far reaching in their ramifications, wholly apart from casino gaming issues that they deserve an independent agency as we have established for the communications industry, the Federal Communications Commission or the Securities and Exchange Commission, or the Federal Trade Commission. All are very compelling precedents for a process insulated as much as possible from the improper influences of money and politics which too often have prevailed in Indian recognition decisions. There are also precedents for staggered terms, nonpartisan members and for rules that essentially provide fair-

ness, transparency, objectivity so that the credibility and integrity of the process is preserved.

Thank you very much.

[Prepared statement of Mr. Blumenthal appears in appendix.]

The CHAIRMAN. Thank you very much, sir.

May I now call upon the First Selectman, Mr. Mullane.

STATEMENT OF NICHOLAS MULLANE, II, FIRST SELECTMAN, TOWN OF NORTH STONINGTON, CT, ACCOMPANIED BY JANE DAUPHINAIS, DISTRICT DIRECTOR, CONGRESSMAN SIMMONS, NORWICH, CT

Mr. MULLANE. First, I want to thank you for holding this hearing. It is greatly appreciated.

My name is Nicholas Mullane, the First Selectman of the Town of North Stonington, CT. I testify today also on behalf of Wesley Johnson, Mayor of Ledyard, and Robert Congdon, First Selectman of Preston. They are here present today in the room.

Our three towns are the location of the giant Foxwood Casino of the Mashantucket Pequot Tribe and the immediate neighbor of the Mohegan Sun Casino. We have experienced firsthand the impacts and problems which follow tribal recognition and the development of Indian gaming. Our costs to our communities and the resulting conflicts have been significant and damaging to our towns.

I want to note specifically for the committee that at the beginning of our struggle some 10 years ago, we did not enjoy the interest or support of many of our elected officials. Today, years later, problems associated with Federal Indian policy threaten to overwhelm the State. As a result, the concerns I express today I believe are shared on a non-partisan basis by virtually our entire U.S. House delegation, the two Senators from Connecticut, the Attorney General, many communities, business organizations and now the Governor of Connecticut himself.

Our State is facing at least one and possibly several additional tribal acknowledgments. If casino development follows, the impacts would overtax our existing infrastructure and cause unacceptable impacts statewide.

Although there are many issues I would like to bring to your attention today, my testimony focuses on the acknowledgment process. We are now contending with BIA's determination to acknowledge the Eastern Pequot Tribe by combining the acknowledgment petitions of two groups both of whom are longstanding rivals of each other. This unprecedented and unwarranted acknowledgment will be appealed by our towns and the Attorney General of the State of Connecticut, the Governor also supports the appeal.

In a situation where serious community impacts have been caused by the new tribes and their gaming operations, it is essential that the tribal acknowledgment process not only be fair, open and also command respect. This is clearly not the case now and will not be the case in the absence of serious reform. True reform must be far more meaningful than streamlining.

This committee is considering a series of measures, some of which have been introduced by members of the Connecticut delegation to address the shortcomings of the process. Few doubt the need for reform but the details of the actual reform remain in

doubt. As a result, we offer the following five principles for reform of the acknowledgment process for your consideration.

First, it is the position that Congress alone has the power to acknowledge the tribe as never been delegated that power to the Executive branch, BIA, nor has it set the standards for BIA to apply. In carving out the power, Congress must decide who must make these decisions and set rigorous standards.

Second, the acknowledgment procedures which have been invented by the BIA do not provide an adequate role for interested parties, nor do they ensure objective results.

Third, the acknowledgment criteria must be rigorously applied.

Fourth, if Congress is to debate the power of the acknowledgment to the Executive branch, it should not delegate this authority to BIA. The BIA process has evolved into a result oriented system which at the minimum is subject to the bias inherent with having the same agency charged with advancing the interest of Indian tribes, also making the acknowledgment decisions.

The process is also subject to political manipulation. An independent commission created for the purpose would have the same shortcomings unless checks and balances are imposed to ensure objectivity, fairness, full participation by all interested parties and the absence of political manipulation.

Fifth, because of the foregoing problems, it is clear a moratorium on the review of the acknowledgment petitions is urgently needed. The purpose of reforming the acknowledgment process, S. 1392, is a good place to start, presently excellent ideas for further public debate and congressional review. We must say, however, that even more drastic reform is called for.

S. 1393 also contains essential elements of a reform system by helping to level the playing field and providing assistance for local governments to participate in the acknowledgment process. We believe the dialog which can result from the decisions of these two bills and the proposal for a moratorium can ultimately result in a fair objective and most important, a credible system.

Our towns look forward to working with you and your committee to achieve these goals and end results. I want to thank you for allowing me to testify today.

[Prepared statement of Mr. Mullane appears in appendix.]

The CHAIRMAN. Thank you.

Mr. Attorney General, has the State of Connecticut participated in the Federal acknowledgment process in the Pequot case?

Mr. BLUMENTHAL. We have, Senator.

The CHAIRMAN. You have I believe through the Selectman announced your intention to appeal the present decision, correct?

Mr. BLUMENTHAL. We announced our decision last week with the representatives, two of the selectmen and I believe a third has indicated his town may well join us. There are other towns around the State that may well support us.

The CHAIRMAN. In this case, as you indicated, you have been afforded the opportunity to participate in the pending cases?

Mr. BLUMENTHAL. Only after we went to court, Senator.

The CHAIRMAN. Were you aware that you were authorized to participate?

Mr. BLUMENTHAL. We not only were aware that we were authorized to participate, we did indeed seek to participate. We were denied documents that were essential to our participating, including the petition itself. In other words, we were participating in a process when we didn't have the basic application for acknowledgment from the tribe itself. We were excluded from interviews which were perfectly proper in and of themselves to establish oral history, we were denied other opportunities to participate in a meaningful way and in the meantime, there were private and secret sessions, meetings between representatives of the petitioning groups and the staff of the BIA, indeed, we believe the political appointees of the BIA. As recently as a number of weeks ago, an ex parte meeting occurred between the BIA and the petitioning groups.

So there are profound and serious irregularities that we believe tainted this process as you have heard from the GAO and as has been documented by the Inspector General's report of the Department of the Interior itself.

The CHAIRMAN. Do you believe this moratorium or the bills before us should apply to those petitions subject to court orders and ongoing adjudication?

Mr. BLUMENTHAL. Do I believe they would lead to additional court orders?

The CHAIRMAN. No; do you think that the proposed moratorium should be imposed upon those petitions that have reached the stage where a finding has be issued, or are in the appeal process? In one case they have been waiting for 24 years.

Mr. BLUMENTHAL. I appreciate your question. First, I agree with the critics who say that these decisions absolutely need to be more timely, the BIA needs and deserves more resources. There have actually been reductions, as you well know, in resources by about 35 percent over recent years when the numbers of petitions have increased. I think there needs to be an increase in resources to address the delays that have occurred in the past.

The moratorium, in my view, should be even-handed and equally applied to all petitions at whatever stage they are as long as they have not reached finality. That would include the petitions currently within the courts. I believe the courts would respect the will of Congress in that regard. Indeed the courts have sought guidance from the United States Congress and have intervened only because of the confusion, uncertainty, claims of partiality and prejudice by various parties.

The CHAIRMAN. What do you mean by finality?

Mr. BLUMENTHAL. By finality, I mean a decision that remains—that has reached the point where it is no longer contested, where it is no longer on appeal, where there have been findings, not proposed but final findings and a determination of recognition that is no longer contested.

The CHAIRMAN. In other words, the *Eastern Pequot* case would reach finality when the Supreme Court of the United States issued a judgment?

Mr. BLUMENTHAL. I hope it won't take that long or go that far, Senator, because I think that some of the errors in the findings will be readily apparent to the Interior Board of Indian Appeals or to the Secretary of the Interior.

The CHAIRMAN. So in this case, the moratorium may last for a long, long time then?

Mr. BLUMENTHAL. No; the moratorium, as I understand the bill, would last only as long as it takes for the Department of the Interior to accomplish those steps that are provided, for example, to codify the regulations.

I agree, by the way, with Senator Night Horse Campbell that parties, including tribes themselves, should be given an opportunity to comment before the codification. I read your comments on the floor of the Senate, Senator, and I strongly agree that in the past, neither they nor other interested parties perhaps had been given sufficient opportunity to comment, but I think that codification could be accomplished in a very timely way as well as the other provisions for notice and information, the standardization of the burden of proof, the requirement for explaining the final decision. It would be a time measurable in months, not years.

I strongly agree with the GAO that the lack of clarity in many of those criteria would be addressed through that process of codifying the criteria and would not be unduly burdensome in terms of time.

The CHAIRMAN. Mr. Attorney General, do the laws of Connecticut allow third party intervenors to demand trial type hearings of the kind contemplated in S. 1392, the bill before us, including the right to cross examine witnesses when they wish to oppose the granting of land use permits by State and local land use regulatory authorities?

Mr. BLUMENTHAL. Most land use authorities in Connecticut and elsewhere are local and there are very broad rights for third party intervention.

The CHAIRMAN. Can they demand trial type hearings, to cross examine witnesses?

Mr. BLUMENTHAL. In some instances, certainly they can.

The CHAIRMAN. Is that the law of Connecticut?

Mr. BLUMENTHAL. And indeed they can appeal those decisions in many instances to our State trial court, our Superior Court, and seek and be granted that kind of status. I guess what I am saying is there is nothing novel or original about the idea of hearings, especially in a matter of such importance where interested parties are already recognized. If I may respectfully add a suggestion, if you are leading to a concern that perhaps this process of hearings might be unduly burdensome in time or cost, perhaps one of the solutions would be to provide for better definition of the interested party status.

The CHAIRMAN. In your testimony, Mr. Mullane, you state that the Mashantucket Pequots have opened a casino and have not addressed the impacts of that operation on your community. Isn't it true that the Pequots and the Mohegans in the last decade or so have paid into the Treasury of the State over $2.2 billion and the State has the authority to distribute the monies to communities at their discretion without any Indian direction?

Mr. MULLANE. That is true, sir, there has been a substantial amount of money on a contract between the State of Connecticut and the Mashantucket Pequot Tribe where a franchise fee was established and the State of Connecticut has received a substantial

amount of money. Until this year, there was no consideration in regard to the local impacts on the communities, nor did the tribal nation give any consideration to that whatsoever. So there is a contract agreement between the State of Connecticut and the Mashantuckets and they do convey land for the slot machine franchise and that money is distributed by the State.

I am a small town of 5,000 people and have I would say one-third of a representative and my other gentlemen have the same. It is very difficult for us to advocate to the State the type of impacts we have. Recently, the State of Connecticut and the legislature who ultimately approves that money, has acknowledged that the towns, North Stonington, Preston, Ledyard, and others in the area, have endured significant impacts from the casinos and made some correction to that providing of funds for impact aid.

The CHAIRMAN. So your concern was not one that could be addressed by the Indian nations, it had to be addressed by the State, correct?

Mr. MULLANE. In actuality, in the early 1980's, Skip Hayward acknowledged that the development of a casino was going to cause significant impacts to the local communities with infrastructure, fire, ambulance and police and committed that they would provide some support. That was never forthcoming. I want to identify that there are small rural roads, the traffic in front of my town on the road to the casino went from 8,800 cars a day to 27,000 cars a day. I went from a full volunteer ambulance to a full paid ambulance. I had to implement incentive programs for the fire company. I went from one resident trooper to two resident troopers to three resident troopers and added $50,000 worth of overtime just for special events, active weekends and things like that. The town has been basically overwhelmed in areas of emergency service, fire and police, ambulance and other items. I could go on and provide you a list. The estimated cost to my town is somewhere around $500,000 to $600,000 a year for additional emergency services, impact, highway infrastructure and other things.

The CHAIRMAN. Have you received any funds from the State Impact Fund?

Mr. MULLANE. Yes; I have. They did last year through a grant program provide $250,000 and this year they identified I believe about $486,000. There is also a fund which disburses the impact, the Pequot Fund, throughout the State.

The CHAIRMAN. How much is the Pequot Fund?

Mr. MULLANE. I am going to guess. I believe it is $85 million that is distributed throughout the State. That is on a formula which identifies nothing really to do with impact. It has to do with the sharing of the funds to the municipalities from the income of the casinos.

The CHAIRMAN. These funds are insufficient to assist you in meeting the extra burden or the impact it has upon your community?

Mr. MULLANE. Let me read you a quick sheet. The traffic through town increased from 8,800 to 27,000 cars a day, increased not only on the primary roads but the secondary roads; the increased traffic brings traffic violations of everything from DWI to accidents. We had to pass an ordinance on 7 roads to bar tour

buses from roads that are basically 23 to 24 feet wide. I have closed two houses of prostitution, one with immigration violations. I closed one palm reading shop. I now have one pornographic superstore. Our ambulance is now full paid, manned by volunteers. Our troopers went from one to three plus added overtime. The DWI in southeastern Connecticut is the highest in the State. Gamblers Anonymous has the highest calls in the State. The embezzlement rates have increased from 2 to 3 percent in the areas. The 911 dispatching fees have increased significantly. We have had to implement the incentive programs for both volunteer fire and ambulance, the Highway Department has a loss of efficiency because of the use of our secondary roads because of all the patrons and employees and everybody else that is now using secondary roads.

We have empty businesses on Route 2. Although the traffic has improved and increased two or three times, we have empty restaurants. The people don't stop. I like to compare it to something like Fenway Park. You go to a ballgame, you have a hot dog, you have a hamburger, and you leave. So the town has gotten significant impacts and only this year has the State started to recognize that but there has been the past ten years that there has been absolutely no consideration whatsoever.

The CHAIRMAN. I presume your town is close to the Mashantucket Pequot Casino?

Mr. MULLANE. I beg your pardon?

The CHAIRMAN. I suppose your town is close to the casino?

Mr. MULLANE. It sits on our western boundary right in the corner of North Stonington, Preston, Ledyard. You could probably throw a rock from each town to their property.

The CHAIRMAN. Are any of your citizens or residents employed in the casino?

Mr. MULLANE. Yes; they are.

The CHAIRMAN. A small number?

Mr. MULLANE. Yes; it is a small number. We are a small town. We have basically 5,000 people. I would attempt to guess there is probably 3,000 of those who are employable. I don't know the exact numbers of which are employed at Foxwoods.

The CHAIRMAN. Can you guess?

Mr. MULLANE. The last time I saw a number, I think it was 200.

The CHAIRMAN. Thank you very much. Your testimony has been extremely helpful.

Mr. MULLANE. Could I make one comment? You asked several questions about the length of the Eastern Pequot petition. I want to call to your attention at the BIA formal hearing in I believe 2000. The BIA researchers made a comment to the Eastern and the Paucatuck Easterns and they said them, I can't quote exactly but I'll give you the intent, you have not responded for the additional information that was identified to you in approximately 1990 which was called the letters of deficiencies and it was my understanding at that time that they were basically telling the petitioners you haven't overcome your deficiencies, you have not provided the additional information.

The substantial information that was provided that the BIA researchers then said you have provided the additional information and then they ruled was not supplied until September I believe of

2001. There is a grave problem in BIA being the advocate for the native American and being sympathetic with an application and maybe not being very straightforward in telling them you haven't supplied the information, your petition really shouldn't be on active status. That is an injustice to somebody who is waiting in line, who does have a full, complete petition and should be reviewed.

This is why in my comments when I said it is very difficult for BIA to be an advocate and also be an impartial judge. The impartial judge would also be one that would say you don't have adequate information, you haven't provided it, you haven't done the research or you are just filibustering the issue. So although I am very sympathetic with somebody who has waited a long time, we must be realistic about whether or not they have submitted a complete application, a complete file for BIA to properly rule on.

The CHAIRMAN. Thank you very much.

Mr. Vice Chairman.

Senator CAMPBELL. Since Assistant Secretary Martin has not left, with your permission, if I could ask her a question. We are dealing with two things. One is the Dodd bill, one is the Dodd amendment we have on the floor in the Interior Appropriations bill. I know how slow things work around here and I would like to ask Ms. Martin if we passed either one of them, how long would it take to implement the thing? I have known some agencies taking 2 years to implement a bill when we passed it here.

Ms. MARTIN. We are not entirely sure but we believe both the amendment and the bill, if passed and signed into law, would require us to promulgate regulations and regulations can take a good deal of time, especially where they are in a controversial area like the recognition process. Regulations would require tribal consultation. I can't give you a definite timeframe but I do believe it would probably take well over 1 year.

Senator CAMPBELL. For either one if we passed the Dodd bill or if we passed the amendment to the Interior appropriations bill, it would take perhaps the same amount of time?

Ms. MARTIN. That would be for both, yes.

Senator CAMPBELL. I appreciate that because in all deference to our colleague, Senator Dodd, I thought time was of the essence and that is why the amendment was proposed to try to move this thing forward a bit faster than a bill would have.

I have to take exception with a couple of comments and I am sure Mr. Mullane didn't mean it this way but just for the record. When he talked of all the negative sides of the Pequots being in the business they are in, which is casino gambling, when you talk about the pawnshops that have sprung up, the increased crime, the prostitution, things of that nature, let me tell you, the Indians didn't cause those things, somebody else did and I think it is really a big mistake to imply that because the Indians set up a casino, those things have sprung up.

It seems to me there is a responsibility on other peoples' part too and we see that all the time. I happen to be enrolled with the Northern Cheyenne of Montana. It is a dry reservation which means you can't drink on the reservation, no liquor is allowed on the reservation but if you go to any gate around the reservation to get on or to get off, there is a shantytown bar built literally at

every area. You see that with some of the Sioux Reservations too. Not built by the Indians, built by the non-Indians to prey on somebody else. I want the record to reflect that a lot of these problems we face that are built around Indian reservations, Indians didn't have one damned thing to do with.

Mr. MULLANE. I agree with you 100 percent, sir. It was not the implication that the Indian community was condoning or encouraging that but I wanted to try to impress upon you that for a small community of 5,000 people with a basic annual budget, the general government and the school of $14 million, it has been very difficult. It does attract and that was the point I was trying to make.

If an Indian group is recognized, if a reservation is established, I tried to make the point that you must have concern for what is going to happen outside and give us the resources and the opportunity to comment on that and correct those. We want to work together as a team on that and resolve that problem so that the casinos won't have that appearance.

Senator CAMPBELL. I appreciate your understanding because I think it is important to reflect that Indians historically had no prostitution, no alcoholism, no crime, no pawnshops, nothing like that in their historic context. If they do at all now, it is learned behavior and they didn't learn it from other Indians.

Even at that, every tribe I know, every Indian I know would like to get rid of that from the whole society standpoint.

I think if you go to Atlantic City, Las Vegas, or any city where gaming is a major industry, you are not going to find all positive impact. You are going to find increased infrastructure needs, all kinds of things. You mentioned a number of those. It seems to me whether it is Indian casinos the size of the Pequots or the Mohegans, and I have seen and visited them, there is a positive side to it too. The positive side is the majority of the people that work in those casinos are not Indians. They provide a lot of jobs for non-Indians.

You mentioned the increased amount of traffic and cars. A lot of those cars are paid for by the salaries earned by the non-Indians working in the casinos as well as the taxes they pay on everything they buy and their income tax too to the local, State, and Federal Governments.

It seems to me when you talk of all the negative impacts, there is a lot of positive impacts too from having those large casinos just as there is in Las Vegas. I know there is some philosophical opposition to gaming. We have some of our own colleagues who simply do not believe in gaming and some think it is okay and there is every level in between.

From an industry standpoint, the places I have visited it seems to me the down side, the negative impacts have to be factored in somewhere with local government too, in this case maybe non–Indian. You mentioned the Pequot Fund was $486,000 and that was this year?

Mr. MULLANE. Yes.

Senator CAMPBELL. So they give about that much to local government. Is that what you get filtered down through the State?

Mr. MULLANE. No. That is the State of Connecticut distributing the proceeds.

Senator CAMPBELL. But there are not casinos all over Connecticut, so why hasn't your local government gone to the State and demanded a larger share of that Pequot Fund if it is impacting in a negative sense your community more than it is some community clear across the State that doesn't have Indian gaming?

Mr. MULLANE. That has been a campaign that Mr. Johnson, Mr. Condon and myself have gone to the State every year and advocated and many did not understand it. Basically it was not in their town, they were not familiar with it, they were not aware of it. We had a very difficult time persuading them of the impacts and then to understand it. It is only recently that they have been able to better understand it and the Governor has now supported it and has included it in the budget.

Senator CAMPBELL. You need a better lobbyist.

Mr. MULLANE. There is room for debate on the lobbyist.

Senator CAMPBELL. Is that formula changed by your legislature or is it done through some rule within the administrative branch?

Mr. MULLANE. This year the Governor proposed impact aid to the host communities and it was debated, it was modified a little bit but basically approved.

Senator CAMPBELL. My personal opinion and advice would be to get more of that money already in that pool somehow to offset any negative impacts in your community.

To your knowledge has any local town or interested party been denied the opportunity to submit materials in the consideration by the BAR process?

Mr. MULLANE. Would you repeat that?

Senator CAMPBELL. Has anyone in your local communities intentionally been denied an opportunity to submit material in the recognition process? You mentioned 1 minute ago that some might not know of the Pequot Fund, for instance. Is there a possibility some don't know they can submit testimony in this recognition process?

Mr. MULLANE. People have come to our annual town meetings, to our selectman meetings, council meetings and so forth and they have encouraged us, we have had individuals testify also but it has been mostly the chief elected officials who have announced in advance that we will go and they have left it upon us, and they have come to our local meetings and supported us and advocated for us to continue. It's been done in that manner.

Senator CAMPBELL. Attorney General Blumenthal, you mentioned irregularities and improprieties. In your testimony I think you used the word lawlessness. I think those are pretty strong words. I am not aware that the GAO concluded there were improprieties or certainly not lawlessness.

With respect to the Inspector General's report, I understand they sought to clarify some of those misunderstandings and mistakes, inaccuracies and so on contained in some correspondence to you. That included a corrected statement that the BAR staff did not issue a letter of non-concurrence about the final decision on the Eastern Pequot petition. Are you aware of that correction they said they sent you?

Mr. BLUMENTHAL. I am aware of that correction, Senator, and the strength of my language is based on our experience with the process as well as those reports, principally the Inspector General's

report, which includes a number of findings that I think support that experience as well as with other petitions.

I might just say in response to your fair and very good question to Nick Mullane about submitting information, one of our complaints is that in fact we have been denied the opportunity to submit information, highly relevant information, as a consequence of arbitrary deadlines that were established, in fact deadlines that worked only one way, against the State or the towns and not against the petitioning parties.

So I think there is a pattern that supports my contention and I would simply say you have said quite well that money is now driving this process and your questions as to how the State has compensated the towns that have borne the burden here I think raise the very fair question about whether the State has acted promptly and fairly in dealing with the burdens that localities have to endure.

The point here is that money shouldn't be driving these decisions, it shouldn't be a matter of let's make a deal and recognition shouldn't go to the highest bidder or the tribal group that is able to muster the most dollars in support of its petition so that it presents the most effective case. It ought to be a principled and objective and transparent decision.

Senator CAMPBELL. Were you aware that the Connecticut congressional delegation recently asked the GAO to investigate the positive final determination issued by Assistant Secretary McCaleb?

Mr. BLUMENTHAL. I am aware of that.

Senator CAMPBELL. What exactly are they asking him to do, in your view, must speed up the process or more transparency in the process?

Mr. BLUMENTHAL. Again, my understanding of the congressional delegation's purpose or intent is to elicit facts that further support the contentions we have made about the violations of internal standards, regulations, as well as ethical rules that ought to have been followed and perhaps were not.

Senator CAMPBELL. Maybe my last question. I think you mentioned you plan to appeal the positive final determination for the Eastern Pequots. I know we are off the bill a bit but it is still Senator Dodd's amendment to the Interior appropriations bill, how would the Dodd amendment to the bill, the Interior appropriations bill, be affected by your appeal or would it?

Mr. BLUMENTHAL. I don't think the bill would be affected, nor would our appeal.

Senator CAMPBELL. Would it affect your appeal?

Mr. BLUMENTHAL. It might not. In fact, I can't claim to have a final answer on this one but as I think Deputy Assistant Secretary Martin mentioned earlier, many of the internal aspects of the process could continue. For example, our appeal could continue and there would be a moratorium on final decisions. No final decision could be issued but there would be nothing to stop the BIA from continuing its work on pending petitions. There are 200 of them, indeed 9 from Connecticut, and the BIA staff could continue on those petitions, but it would send a very strong signal that the Congress will insist on compliance with the criteria, that it must

codify the criteria, establish a standard of proof, provide reasoned and complete explanations, assure that the criteria are met and in my judgment, would not necessarily require even the relatively short amount of time that the BIA has stated it would take. Regulations of equal complexity and importance are done in matters of months where they are required by Congress to do so. The Congress could well do so.

Senator CAMPBELL. I see. Thank you.

Mr. Chairman, I have no further questions. I would like to apologize to both of our witnesses about some of my disjointed questions. I have never been encumbered with a law degree, so sometimes I get scattered around a bit.

Mr. BLUMENTHAL. There are some of us who wish we hadn't been so encumbered at some point in our careers.

The CHAIRMAN. Gentlemen, I thank you very much.

Mr. MULLANE. I would like to make one more comment if I could. I want to read a paragraph I have looked at for many years.

> The serious significant of gaining Federal recognition also makes adherence to the Federal acknowledgment process a vital necessity. As we have stated previously in testimony before the Congress, Federal recognition establishes a perpetual government-to- government relationship between a tribe and the United States and has considerable social, political and economic implications for the petitioning group, its neighbors and Federal, State and local governments.

This is a letter written by the Department of the Interior, William Battersby and goes back to 1992. I hope as we leave these hearings we can go forward as a team to understand that on the highest level of the Federal Government, the State level that I have along side of me, the local level and those tribes that get recognition, that we can work out a system and be able to resolve the differences and have addressed those problems that develop or those issues and be able to come to an amicable solution.

If we resolve it now and spend the time, a year or two, maybe it won't take in somebody's eyes 24 years to recognize a tribe. Maybe it will be able to be done in an expeditious, professional, scholarly manner that the results can be accepted and that people will go away with the process and feel they have had fair involvement and have had their say, and that the process was equitable. If we are to have a process, that is what we should be looking to do.

Thank you very much, gentlemen.

The CHAIRMAN. Mr. Mullane, you can be assured that both of us are extremely serious and concerned about the issue before us. Mr. Attorney General, Mr. Selectman, we thank you very much for your testimony.

Now, if I may call upon the final panel, tribal chairwoman of the Eastern Pequot Indians of Connecticut, Marcia Flowers and the tribal chairperson of the Duwamish Tribe of Burien, Washington, Cecile Hansen.

Chairperson Flowers, welcome.

STATEMENT OF MARCIA FLOWERS, TRIBAL CHAIRWOMAN, EASTERN PEQUOT INDIANS OF CONNECTICUT

Ms. FLOWERS. Thank you for giving the Eastern Pequot Indians of Connecticut an opportunity to speak on these two pending bills.

My name is Marcia Jones Flowers. I am the chairwoman of the Eastern Pequot Indians of Connecticut. I also was the coordinator of the petition that was filed at the BIA.

The Eastern Pequot Indians have occupied the Lantern Hill Reservation in North Stonington, CT since 1683 following the Pequot war of 1638. This reservation has been held in trust by the colony and then the State of Connecticut. Our people were under an overseer system from early 1800's and before. We were then under the welfare system of the State of Connecticut and then the Parks and Forest and the Connecticut Indian Affairs Council. We have always been under a colonial or State of Connecticut branch of government.

Twenty-four years ago, the Eastern Pequot Indians submitted a letter of intent to the BIA for Federal recognition. This was before any Indian gaming was established. On June 24, 2002, the Assistant Secretary of the Department of the Interior issued a final decision to recognize the Eastern Pequot Indians of Connecticut as the historic Eastern Pequot Indians comprised of the members of the Eastern Pequot and the Paucatuck Eastern Pequot Tribes.

That decision is under attack by a number of people in this room today. It is being made as an example of why reform of the BIA acknowledgment process is required. The decision on the historic Eastern Pequot determination was a unique one but it was the correct one based on the facts and the regulations of the BIA. It was no surprise to the members of the Eastern Pequot Tribe that the decision was made.

Throughout history, the Eastern Pequot Tribe and the Paucatuck Eastern Pequot Tribe were one. Our petition reflected it, the Connecticut Indian Affairs always reflected it, those decisions reflected it. During that time in the 1970's when the Connecticut Indian Affairs Council existed, they saw one tribe.

The Attorney General of Connecticut in his comments on our petition stated when asked that the State of Connecticut recognized one tribe. All of the State statutes identify one Eastern Pequot Tribe.

When the proposed finding in favor of acknowledgement was issued for both petitioning groups, the interested parties criticized the preliminary decision, complaining that the Assistant Secretary ignored the recommendations of the professional BAR staff. For the final determination, our petition team took the BAR's recommendation seriously. They advised more research was needed for final and more analysis to strengthen our petition.

The final determination on the Eastern Pequots was prepared by the excellent professional staff at the Branch of Acknowledgment and Research and accepted by the Assistant Secretary of the Interior. Even with the BAR staff decision, the interested parties continued to criticize and challenge that decision. That decision was a thoughtful, well reasoned and detailed analysis of thousands upon thousands of pages of documents supported by evidence. Most of those documents were retrieved at the State library in Hartford, CT. Because we were under colonial and later State jurisdiction, those documents were held by the State of Connecticut to this day.

The bill, S. 1392, graphs onto the existing BIA acknowledgment process a formal hearing required if requested by interested par-

ties. It would turn the acknowledgment process into an adversarial proceeding and cause further delays in an already costly and time consuming process. We see the potential for great mischief if interested parties can call witnesses in an effort to only discredit them.

I thank you for your time and your attention to this serious matter.

[Prepared statement of Ms. Flowers appears in appendix.]

The CHAIRMAN. Thank you very much, Madam Chairperson.

Now may I call upon Cecile Hansen.

STATEMENT OF CECILE HANSEN, TRIBAL CHAIRPERSON, DUWAMISH TRIBE, BURIEN, WA

Ms. HANSEN. My name is Cecile Maxwell-Hansen. I am the great, great, great niece of Chief Si'ahl for whom the city of Seattle is named.

I appreciate the opportunity to submit testimony on S. 1392, a bill to establish procedures for the BIA, the BAR, with respect to tribal recognition and S. 1393, a bill to provide grants to eligible Indian groups and local governments to participate in certain decisionmaking processes of the BIA.

May I tell you 14 years ago I testified before this committee on Federal acknowledgment process. Now I am appearing before the committee on the same subject. It seems to me nothing has changed. Our experience with the Federal acknowledgment procedures have been bitterly disappointing and disheartening. The BAR should be embarrassed to testify time after time that the BAR process works.

The Duwamish people were the first indigenous people of Seattle, having lived there 1,000 years before the arrival of European Americans in 1851. In 1855, the Duwamish Tribe was the first signature of the Point Elliot Treaty which guaranteed fishing rights and reservations to all the signature tribes. The first one to sign our treaty was Chief Si'ahl. In 1859, the Point Elliot Treaty was ratified by the Congress but the promises made by the United States in the treaty was never fulfilled with my people.

Governor Stevens who was the agent for the U.S. Government at that time promised us two buckets of gold and a smaller reservation. We first submitted a petition for Federal acknowledgment in 1976 before the final regulations in 1978. In 1988, we submitted a complete petition to the Branch of Acknowledgment and Research; 8 years later, we received a decision against acknowledgment. The preliminary decision concluded that we met four of the seven mandatory criteria but there was some deficiency with respect to criteria 83.7(a), identification of the American Indian entity and the community and political authority or influence.

We worked diligently over the next 2 years to address this deficiency and believed we had succeeded when we were advised that the Acting Secretary of Indian Affairs had issued a final determination in favor of acknowledgment on January 19, 2001. One day later, our President issued an order imposing a moratorium on all substantial decisions made during the final days of the Clinton administration, including the Duwamish Tribe's positive final determination in favor of Federal acknowledgment.

On September 26, 2001, the new Assistant Secretary of Indian Affairs issued a new final determination declining to acknowledge the Duwamish Tribe. The administrative appeals have been unsuccessful. Nearly 150 years later, after the Duwamish Tribe signed the Point Elliot Treaty, my people are still struggling for recognition that was promised when the treaty was signed and ratified.

The Duwamish Tribe believes there are severe problems with the Federal acknowledgment process but not of the type stated by other witnesses. We are the Duwamish Tribe, we signed the Point Elliot Treaty, we gave up 54,000 acres which is now Seattle. From treaty times to the present, the Duwamish people have been maintaining independent entity as a tribe with elected leaders and preservation of our culture. Until 1970, we received Federal Indian Services and exercised our Indian treaty fishing rights. We have never been terminated by the Congress. Now the BIA is telling us that we are not federally recognized. This a grave injustice to the Duwamish people and other tribes like us.

We recommend that if changes are made to the Federal acknowledgment process that at a minimum, tribes who were signatory to a treaty and gave up lands and fishing rights should be presumed federally recognized and the burden should be put on the Secretary or the Federal Government to prove that we are not federally recognized, not the other way around.

The BIA also says there are breaks in our culture and continuity of our tribe and this is further proof that we should not be a federally acknowledged tribe. We believe undoubtedly starting out as commonsense, acknowledgment requirements are now turning on its head. It ignores the sweep of U.S. history and Federal policy that systematically destroys tribal governments. The Indian treaties were a part of this policy. The Indian Allotment Act also contributed to the weakening of tribal governments.

The forced assimilation of our children into Federal Indian schools, and my mother was in an Indian boarding school until she was 17, and the termination policies of 1950 also played with undermining Indian tribes. The hard edged implementation of tribal continuity requirements punishes tribes a second time because they might not have been able to understand the heavy hand of the Federal Government even after 150 years.

The Congress has passed legislation in the 103rd Congress and the 104th Congress, and introduced in the 105th Congress. S. 1392 essentially codifies the existing Federal acknowledgement regulations and 25 C.F.R. Part 83 including the seven mandatory criteria. The bill incorporates some but not all identifications found in existing acknowledgment regulations.

For example, the bill does not define community, political influence and sustained contained, interested party and informed party. These definitions are fundamentally important in understanding the criteria or identifying who may participate in the process.

Section 14 of the bill established a new hearing requirement in addition to the existing BIA process. If requested by an interested party and if the Secretary of the Interior determines there is good cause shown, the Secretary must conduct a formal hearing. The formal hearing should allow all interested parties to present evidence, call witnesses, cross examine witnesses and rebut evidence

in the record. The transcript of this hearing would be made part of the administrative record.

We are not convinced that a formal hearing is an appropriate or necessary addition to the process. The existing regulations allow interested parties to participate in the process by submitting their own evidence and comments on the proposed findings, requesting and receiving technical assistance from the BAR and appealing a decision they do not agree with. A formal hearing would only further cause delays in an overly long process.

Section 19 authorizes the appropriation of $10 million for Federal acknowledgment activities. This represents a significant increase in the BAR's existing budget. We support increased funding for Federal acknowledgement activities.

S. 1393 would provide grants to Indian tribes and Indian groups seeking Federal acknowledgment and local governments in order to participate in the Department of the Interior process concerning Federal acknowledgment, fee to trust land acquisition requests, land claims and other actions affecting local governments. We support a grant program for Indian tribes and groups who lack financial resources to pursue Federal acknowledgment and other actions.

We do not agree that Federal funds should be made available to local governments to essentially fight Indian groups seeking Federal acknowledgment and Indian tribes seeking to acquire trust lands. Under the bill, a local government could receive a Federal grant to challenge a decision of the Secretary of the Interior to acknowledge tribes or acquire land in trust. To us, this is unsound public policy.

For the record, I want to tell you that the Duwamish Tribe has spent three-fourths of a million dollars to get through this process since 1978. We are now broke. We have no appeal to Assistant Secretary McCaleb. I just wanted the committee to know this.

I am really happy to have the opportunity today to share our viewpoint and all the Duwamish people in the State of Washington. I would like to enter my statement in the record.

Thank you, Mr. Chairman.

[Prepared statement of Ms. Hansen appears in appendix.]

The CHAIRMAN. Thank you very much.

May I ask Ms. Flowers a few questions. You have been waiting for 24 years. What sort of hurdles have you had to overcome?

Ms. FLOWERS. Where do I begin? In the recognition process, hiring anthropologists over the years and researchers, going through the multiple steps of the process because the steps are written very understandably. It is just the steps don't take the time limit that they are set up to be, going to the State library, researching all of the documents, going to Washington to the National Archives, a lot of documentation. In the early years tribal members did that research. Many of those tribal members are gone without having seen Federal recognition. It was hard work. In the early days there weren't good copiers, hand cranked copiers, and it wasn't easy to come by the documentation.

The problem in recent years in pulling documentation out of a lot of historical places is there has been a lot of pilfering and stealing of Indian genealogy and documentation because there are so many

people that are looking for their heritage, and also a lot of people that don't want Indian tribes to find the documents. You may find razor cuts out of books in the town halls where you have to pull birth certificates, death certificates, marriage certificates. All of these things are required and were part of the research and people have defamed a lot of records in town halls which has made it more difficult.

The CHAIRMAN. You have submitted documents to the Branch of Acknowledgment. About how many documents have had to be submitted?

Ms. FLOWERS. Thousands upon thousands upon thousands. We are running out of space literally but those documents we cannot archive because it appears we are now going into appeals which means we will have to pull those documents as evidence so we have to keep them around still, at least over 40,000. We stopped counting there.

The CHAIRMAN. The interested parties in the process were municipalities near you plus the State of Connecticut?

Ms. FLOWERS. Right. It was the towns of North Stowington where our reservation is located, Ledyard which we border where Nashantucket is located and Preston, and also the State of Connecticut.

The CHAIRMAN. The State of Connecticut requested a formal hearing. Did you participate in that hearing?

Ms. FLOWERS. Yes; I did. It was 2 days and it was in Washington at the Daughters of American Revolution building. It was failed to be mentioned that there was a conference call technical meeting, called by the State and that was also 2 days and all parties were on conference call for that. So there were two formal technical meetings, one in person and the other everyone was on conference call.

The CHAIRMAN. Having asked you all these questions, what do you think about the passage or the adoption of S. 1392?

Ms. FLOWERS. I think it would be a huge mistake. I believe there is a hidden agenda behind passage of the amendment, that a moratorium on any Federal recognitions going forward, if the process is to be corrected, a moratorium is not the answer. I feel very uncomfortable when a process does need reform, and we all know that, but to say we want a moratorium on a process that has already taken so many years for most of us to achieve does not make sense to our tribe.

The CHAIRMAN. As you know, the Dodd amendment will be addressed tomorrow and will be debated and voted upon sometime tomorrow when we take up the Interior appropriations bill. So you can be assured that this matter will be discussed with the committee members in as great a detail as possible.

Ms. FLOWERS. Thank you.

The CHAIRMAN. We will do our best to bring justice to all peoples concerned.

For the Duwamish, may I say as I heard your statement, I became increasingly concerned because the legal counsel of the Department of Justice just issued a statement of a legal position that would have a terrible impact upon your people. The legal position

is that Indians who are not members of federally recognized tribes will not eligible for programs or laws enacted for native Americans.

As you know, we have educational programs, health programs and because of some technicality, if you are not recognized, the members of your tribe will be denied access to all of these programs you have been receiving to date because as the legal counsel has indicated, that would be race based and the Justice Department would recommend to the President that any bill that includes Indians who are not members of federally recognized tribes would be vetoed.

I can understand your concern. It is urgent and I can assure you that we will act upon this with great expedition.

Ms. HANSEN. May I say another that gives me great anguish is if you are not recognized by the Federal Government, you cannot secure artifacts, remains from museums, depositories and that really impacts the Duwamish people. We have artifacts in the Burt Museum at the University of Washington. They will loan them to us but if you are not recognized, you will not get those artifacts or remains back.

The CHAIRMAN. We will do our best.

I would like to thank all the witnesses. I announced earlier that the record will be kept open for 48 hours but I have been requested by the office of Senator Dodd that the record be kept open for 7 days and it is so ordered.

Furthermore, as I indicated, the Dodd amendment will be considered by the full Senate tomorrow sometime during the morning and I can assure you the Senate will one way or the other act upon it, for or against.

With that, may I thank all of you for your participation, thank all the witnesses for their testimony.

This hearing is recessed.

[Whereupon, at 12:47 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF DANNEL P. MALLOY, MAYOR, STAMFORD, CT

Mr. Chairman and members of the committee, I am pleased to submit this testimony on S. 1392 and S. 1393, bills to reform the Federal Indian tribal acknowledgement system. The city of Stamford and all the municipalities in Connecticut are directly affected by Federal Indian policy. I appreciate the opportunity to provide testimony to the committee and express my community's views on the need to bring greater fairness and objectivity to the procedure used to assess the merits of petitions for acknowledgment as Indian tribes under Federal law.

In recent years, Federal Indian policy has become a major issue in Connecticut. Beginning with the Congressional recognition of the Mashantucket Pequot Tribe in 1983, and the subsequent development of the Foxwoods Casino pursuant to the Indian Gaming and Regulatory Act of 1988, Connecticut has experienced the negative effects of Federal Indian law and policy on the State and local communities. Tribal development has occurred without regard to impacts on local communities. The land involved is removed from the State and municipal tax base. The land and resulting development also occurs without regard to State and local environmental laws and land use requirements. Local communities have difficulty keeping pace with the impacts and service sector demands created by tribal casino development, such as increased traffic, crime, adverse social impacts, negative economic consequences for non-Indian businesses, and a general decline in the quality of life for surrounding areas. All this is the direct result of actions at the Federal level, which have all too often been undertaken without regard to these consequences.

There are many aspects of Indian law and policy that need careful review, especially in light of the changed circumstances that have resulted from the dramatic growth of Indian gaming. No longer do decisions related to tribal acknowledgement and trust lands affect only Indian tribes. To the contrary, especially in the context of urban settings such as Connecticut, these decisions are being influenced by non-Indian financial backers of tribes and tribal petitioner groups who seek to reap windfall benefits from the development of Indian casinos. These developers associate themselves with Indian interests by means of contracts under which they underwrite tribal acknowledgement, casino development, and trust land acquisition, in exchange for profitable arrangements that produce huge financial gains for them once casino resorts are developed on Indian land. This is a suspect arrangement that calls for thorough investigation and Congressional reform. The future of our State should not be dictated by the "get rich quick" schemes of developers and gambling entrepreneurs who seek to capitalize on Indian gaming.

Currently, Connecticut is potentially affected by the acknowledgement petitions of several Indian groups under active review by BIA—the Eastern Pequots, Paucatuck Eastern Pequots, Golden Hill Paugussetts, and the Schaghticokes. All of these petitioners have announced plans to pursue major casino resort development if they are successful with their acknowledgement petitions. Those casinos would, in turn, have serious negative consequences for our region.

Closest to Stamford, the Golden Hill Paugussett group threatens to develop the world's largest casino in Bridgeport. This part of Connecticut is already suffering serious economic and quality-of-life consequences resulting from traffic congestion and an over-burdened transportation system. Studies have been conducted which show that adding a major casino in this region will produce traffic gridlock and serious associated environmental and economic consequences. As a result, the plans that these petitioner groups intend to pursue, and propose to undertake without reference to the needs and concerns of the region, will have devastating consequences on Connecticut.

Before the Pequot decisions, it was widely understood that none of the petitioning groups in Connecticut had developed evidence that would support positive tribal acknowledgment findings. Indeed, the two Eastern Pequot petitions had themselves been subject to negative proposed findings, until political interference resulted in positive proposed findings. The Golden Hill Paugussett petition has been rejected by BIA in the past for clear deficiencies, and the Scaghticoke petition has been noted by the experts retained by that group itself to be deficient and incapable of meeting the Federal criteria. Nevertheless, BIA has now fabricated a decision-making construct in Connecticut that bolsters these otherwise deficient petitions. It has done so by combining separate petitioners into a single tribe, as it did with the Eastern and Paucatuck Eastern Pequot groups, and by giving undue and improper weight to the manner in which the State of Connecticut has historically dealt with Indians. By departing from all past BIA precedent and giving artificial weight to the fact that the State has set aside land for Indians and provided oversight functions, BIA has allowed these petitioners to fill otherwise fatal gaps in their evidence. BIA arrived at this result based upon incorrect analysis of Connecticut law and history. In part, it did so because it has failed to undertake a thorough review of the record or to provide a full and complete role for interested parties.

To correct these problems, we believe that Congress must undertake sweeping reform of the acknowledgment process that begins with the most basic issues. Congress has never enacted a law that deals with the acknowledgment process. The acknowledgment of the existence of Indian tribes, who will claim sovereign status and exemptions from state and local law, is a very important power. We question why such a significant political act by the U.S. Government has never been addressed in a comprehensive Federal law that defines who exercises this power, under what standards, and pursuant to what procedures. The United States Code is silent on this subject, but nonetheless BIA is now in the process of changing the face of Connecticut by exercising the power it claims to have to acknowledge tribes.

This is the sort of issue that requires careful consideration by Congress, informed by the recommendations from the executive branch, the affected States, the affected local governments, and interested parties. If Congress intends to have this authority exercised by some other governmental entity, such as BIA, it should be done only through an express act of delegation, subject to rigorous procedural and substantive standards. That act of delegation should, in turn, be the result of a comprehensive public debate on the best way to ensure that only legitimate Indian tribes are acknowledged and that their powers are appropriately defined, and as necessary, constrained. It is time for Congress to speak on this issue. Until it has, BIA must be halted from applying the current flawed system.

I am deeply concerned that interested parties do not have a sufficient role in the process. The problems inherent in the review of the Eastern Pequot petitions are a perfect example. In that case, evidence was not made available on a timely basis. Deadlines for submission of evidence were set on an ad hoc basis and applied retroactively to interested parties. The previous Assistant Secretary for Indian Affairs unilaterally established new rules on the acknowledgment process which have made it more difficult for interested parties to participate. Those rules were not subject to any notice or comment procedures. The petitioners were not required to provide their evidence to interested parties, although interested parties had to do so for the petitioning group. Even more unfair was the fact that petitioning parties were allowed to have the last word in responding to evidence submitted to interested parties. The result was a procedure inherently skewed in favor of the petitioner.

In terms of substantive standards, the criteria currently administered under BIA's acknowledgment regulations. They have not been applied in a rigorous or even-handed manner. The Eastern Pequot decisions are a perfect example of this problem, where a results-oriented effort to acknowledge these groups as a tribe prevailed under the BIA criteria. This is a result of BIA's forcing, contrary to its regulations, two petitioning groups to come together into a single tribe. In addition, BIA gave undue and incorrect weight to Connecticut's historical relationship with Indians. BIA allowed that historical relationship, which was nothing more than a welfare function, to serve as evidence of the existence of internal political and social activity

within the petitioning groups. In doing so, it departed from all precedent and ignored important evidence to the contrary.

I question why tribal acknowledgment power should be invested in BIA at all. This agency is responsible for exercising the U. S. Government's trust responsibility to Indian tribes. As a result, there is an inherent bias in favor of tribal interests. An agency with such a mission cannot be expected to pass judgment on tribal acknowledgment petitions. The suggestion calling for creation of an independent commission can be subject to the same problems, if it is not established in a way that ensures objectivity, fairness, and absence of political influence. The problems inherent with the BIA review, and its susceptibility to political manipulation, are well-documented in the report from the Department of the Interior Inspector General's office, which revealed the abuses of decisionmaking power that occurred under the last Administration.

For all of these reasons, I believe that the acknowledgment process is fundamentally flawed and needs serious Congressional reform. While that reform initiative is underway, there should be a moratorium imposed on the processing on all petitions. It makes no sense to allow the process to proceed when it is so badly broken.

I am committed to supporting Congress in making these important changes. Please let me know what I can do to assist in the reform of the acknowledgment process. Thank you for considering this testimony.

PREPARED STATEMENT OF JAMES J. MALLOY, TOWN ADMINISTRATOR, STURBRIDGE, MA

Mr. Chairman and members of the committee, on behalf of the town of Sturbridge, MA, I am pleased to submit this testimony on S. 1392 and S. 1393, bills to reform the Federal Indian tribal acknowledgement system. I am James J. Malloy, Town Administrator, Sturbridge, MA. I appreciate the opportunity to testify before the committee and express our views on the need to bring greater fairness and objectivity to the procedure used to assess the merits of petitions for acknowledgment as Indian tribes under Federal law.

Our town is currently participating in the tribal acknowledgement process for the two Nipmuc petitioner groups. Although we have not taken a position on the merits of either petition, our town has witnessed the problems associated with tribal acknowledgment from the perspective of local communities. This experience has convinced us that reform of the process is necessary at this time.

Tribal acknowledgment has major effects on local governments. Once a tribe is acknowledged, land is removed from the local taxbase, often for purposes of major developments such as casinos that impose great burdens on small towns such as ours. This Indian land also becomes exempt from State and local regulation, including land use, environmental and public health and safety requirements. When Indian casinos are developed, a variety of problems such as traffic, crime, and social problems are visited upon local communities. These impacts point to the importance of ensuring that local governments are allowed to play a meaningful role in the acknowledgment process and that the results are fair and objective.

Unfortunately, tribal acknowledgment decisions are being influenced by non-Indian financial backers of tribal petitioner groups who seek to reap windfall benefits from the development of Indian casinos. These developers associate themselves with Indian interests by means of contracts under which they support tribal acknowledgement efforts, in return for profitable arrangements that produce huge financial gains for them once casino resorts are developed on Indian land. Such is the case for the Nipmuc petitioners, where substantial amounts of money are being invested to support the petitioners.

This involvement of gaming interests raises the stakes and costs of the process. In the face of the considerable investment made by financial backers of petitioner groups, it is very difficult for other interested parties, like our town, to participate in a meaningful way. It is simply too expensive to do so, and we commend the sponsors of this legislation for introducing proposals that would grant funding assistance to local governments.

We also believe that the process itself must be reformed. The Nipmuc petitions are an example of where a BIA recommendation for a negative proposed determination was overturned at the policy level. Fortunately, that decision never took effect. However, it demonstrates how the acknowledgment process is subject to political interference. A significant political act by the U.S. Government recognizing an Indian tribe should be subject to a comprehensive Federal law that defines who exercise this power, under what standards, and pursuant to what procedures. No such law exists.

We also are deeply concerned that interested parties do not have a sufficient role in the process. The problems inherent in the review of the Eastern Pequot petitions in Connecticut are a perfect example. In that case, evidence was not made available on a timely basis. Different rules were applied to interested parties. Procedures were changed in mid-course. BIA staff was, like in the Nipmuc matter, overturned by policy officials. And in the final determination, BIA unilaterally forced two competing groups to join together, even though the acknowledgment regulations do not allow for such a result. This is a practice that should not be repeated for the two Nipmuc petitioners.

For all of these reasons, we believe that the acknowledgment process needs serious Congressional reform. While that reform initiative is underway, there should be a moratorium imposed on the processing on all petitions. It makes no sense to allow the process to proceed when it is so badly broken.

Thank you for considering this testimony.

PREPARED STATEMENT OF SACIA, THE BUSINESS COUNCIL

SACIA, The Business Council, is pleased to submit this testimony on S. 1392 and S. 1393, bills to reform the Federal Indian tribal acknowledgment system. SACIA is a regional business association serving Fairfield County. Formed in 1970 by business leaders engaged in an effort to build more livable, workable communities, SACIA is committed to maintaining and improving the economic vitality of southwestern Connecticut. We advocate for a positive business environment, work to ensure a quality business structure, and seek to create opportunities for diverse businesses to grow, develop, and locate within the region. Because several tribal petitioner groups have expressed interest in opening major casinos in this region, SACIA has followed the issues associated with the acknowledgment process.

SACIA expresses its appreciation to Senators Dodd and Lieberman for introducing this legislation. Tribal acknowledgment is a matter of great concern in Connecticut, and SACIA is grateful for their leadership on this issue.

SACIA recognizes the importance of maintaining a procedure whereby Indian groups can petition to be acknowledged as tribes under Federal law. Groups that qualify for such treatment are entitled to important benefits, and they should be accorded the rights bestowed upon other acknowledged tribes. The process used for this purpose must be balanced, objective, fair, and efficient. Undue delay should be avoided, and tribal petitioners must be treated with respect and dignity.

Based upon the consequences tribal acknowledgment already has had in Connecticut, however, SACIA also recognizes that the decision to recognize Indian tribes under Federal law affects non-Indian parties as well. Acknowledged tribes can take land into trust, exercise sovereign powers, and open casinos. These manifestations of tribal status can, in turn, have major adverse impacts on the affected state, local governments, private landowners, and the business community. Recent experiences with tribal acknowledgment in Connecticut indicate that the interests of these parties are not always adequately taken into account. As a result, SACIA believes that the acknowledgment process must be revised, not only to address the needs and concerns of tribal petitioners, but also to ensure that other affected parties are able to play an equal role and to do as much as possible to bring about valid and credible decisions.

Federal Indian policy has become a major factor in the State of Connecticut. There are now two tribes in Connecticut, the Mashantucket Pequot, and the Mohegan. Both own and operate major casinos. While these enterprises have had some positive effects, such as the generation of revenues for the State, these benefits have been offset by many adverse consequences. Tribal development has occurred without regard to impacts on local communities. The land involved is removed from the State and municipal tax base. The land and resulting development also occurs without regard to State and local environmental laws and land use requirements. Local communities have difficulty dealing with the impacts and service sector demands created by tribal casino development, such as increased traffic, crime, and adverse social impacts. There also are serious negative economic consequences for non-Indian businesses, which cannot compete with enterprises located on tribal land that are exempt from state and local taxes and regulations. The creation of major casinos on Indian land can change the character and quality-of-life in surrounding communities overnight, and do so with no input from the affected local governments, citizens, or businesses.

Currently, Connecticut is potentially affected by the acknowledgement petitions of several Indian groups under active review by BIA—the Eastern Pequots, Paucatuck Eastern Pequots, Golden Hill Paugussetts, Schaghticokes, and Nipmucs. As many

as 10 other Connecticut-based petitioners have expressed the desire to pursue acknowledgment. All of the currently active petitioners have announced plans to pursue major casino resort development if they are acknowledged. Those casinos would, in turn, have serious negative consequences for our region. For example, the Golden Hill Paugussett group threatens to develop a massive casino in Bridgeport. It proposes to do so even though southwestern Connecticut is already suffering serious economic and quality-of-life consequences caused by traffic congestion and an overburdened transportation system. A detailed study prepared by the Southwest Region Planning Agency, shows that building a major casino in Bridgeport will produce traffic gridlock and serious environmental and economic consequences. Members of SACIA will be directly affected. Indeed, businesses in this region of Connecticut may be forced to leave the State if these events unfold.

These potential impacts underscore the need to develop the most effective and comprehensive process for tribal acknowledgment possible. Today, in Connecticut, there is great distrust of tribal acknowledgment decisions and the procedure used to render them. This is the result of the well-publicized politicization of the process, as documented by the recent Department of the Interior Inspector General's report. It also is the outcome of actions in Connecticut, such as the recent determination to acknowledge the Eastern Pequots by forcing two groups together (which the regulations do not allow) and by relying upon a questionable reading of Connecticut history that seeks to equate the State recognition of this tribe with the existence of internal tribal political and social structure. SACIA agrees with Attorney General Blumenthal and Governor Rowland that this result is incorrect; and we are concerned that the flawed acknowledgment process administered by BIA has lead to such a result.

To correct these problems, we believe that Congress must undertake sweeping reform of the acknowledgment process. First and foremost, Congress must enact a law that defines the acknowledgment process. Acknowledgment of the existence of Indian tribes, who will claim sovereign status and exemptions from State and local law, is a very important power. With the stakes so high for all parties, it is essential that Congress provide detailed guidance on how these decisions are to be made. This matter cannot be left to BIA alone. The principles established by Congress must be clear, specific, and pointed. They must leave no room for result-oriented decision-making or political interference.

In addition, interested parties must be guaranteed a sufficient role in the process. The problems that typified the review of the Eastern Pequot petitions must be avoided. In that case, evidence was not made available on a timely basis. Deadlines for submission of evidence were set on an ad hoc basis and applied retroactively to interested parties. Rules dictating the process were established without public input. The petitioners were not required to provide their evidence to interested parties. Problems of this nature must be avoided in the future, and Congress needs to define the procedures that govern this process.

The substantive standards that petitioners must meet to be acknowledged need to be as reliable and credible as the procedural rules. BIA's existing criteria have not been applied in a rigorous or even-handed manner. An example of this problem is found in the Eastern Pequot decisions, where BIA gave improper and incorrect weight to Connecticut's historical relationship with Indians. BIA allowed that historical relationship to serve as evidence of the existence of internal political and social activity within the petitioning groups. In doing so, it departed from all precedent and ignored important evidence to the contrary.

Congress should carefully assess the question of which governmental body should be responsible for making acknowledgment decisions. BIA may not be properly equipped to administer this function. An independent agency may be appropriate, but only if it is apolitical and objective. Indeed, a continuing role for Congress itself may be needed, given the considerable importance of acknowledgment these decisions.

Finally, a moratorium should be imposed now on the further processing of petitions until the deficiencies inherent in the acknowledgment process are eliminated. If the principles set forth in this testimony are followed, the end result will be a tribal acknowledgment system that is fair to all parties and achieves the confidence of petitioner groups and interested parties alike. Until those changes are made, however, it makes no sense to process additional petitions. Petitioner groups spend decades developing their proposals and evidence before initiating the review process. The short additional time necessary to reform the process is a small price to pay to ensure fair and objective decisions.

SACIA appreciates the opportunity to submit this testimony. We look forward to working with this committee to achieve the reforms discussed in this testimony. Thank you for considering these views.

PREPARED STATEMENT OF MARCIA FLOWERS, CHAIRWOMAN, EASTERN PEQUOT INDIANS OF CONNECTICUT

Mr. Chairman, Mr. Vice Chairman and members of the committee, thank you for the opportunity to submit testimony on S. 1392, a bill to establish procedures for the Bureau of Indian Affairs [BIA] with respect to tribal recognition and S. 1393, a bill to provide grants to eligible Indian groups and local governments to participate in certain decisionmaking processes of the BIA.

On June 24, 2002, some 24 years after filing our notice of intent to seek Federal acknowledgment, the Assistant Secretary-Indian Affairs [Assistant Secretary] issued a final determination acknowledging the historic Eastern Pequot Tribe whose membership is comprised of the Eastern Pequot and Paucatuck Eastern Pequot Indians of Connecticut. That decision is under attack by a number of people in this room today as an example of why reform of the BIA acknowledgment process is required. These attacks are unjustified and are simply wrong. The decision to recognize a single tribe comprised of two petitioning groups is unique, but it is the correct decision based on the facts and the regulations. The decision should come as no surprise. The proposed findings in favor of acknowledgment for both Eastern Pequot petitioners specifically stated that depending on the evidence and analysis developed during the comment period, the Department of the Interior could recognize a combined entity. Contrary to published reports, the Eastern Pequots have always considered the Paucatuck Eastern Pequots to be part of the historic Eastern Pequot Tribe.

When the proposed findings in favor of acknowledgment were issued for both petitioning groups, the interested parties criticized the preliminary decisions complaining that the Assistant Secretary ignored the recommendations of the Branch of Acknowledgment and Research [BAR] staff. They asserted that BAR staff should be allowed to make these decisions, not political appointees. Despite the positive proposed findings, our petition team took seriously the BAR's advice concerning the additional research and analysis we needed to undertake to strengthen our petition. We followed their advice and submitted new evidence and analysis during the comment and response periods.

That additional evidence and analysis paid off, and we were rewarded with a final determination in favor of acknowledgment. The final decision was prepared by the professional staff of the BAR and accepted by the Assistant Secretary. Notwithstanding the fact that this decision is the product of the career staff of the BAR, the interested parties continue to criticize and challenge the decision. The final determination is a thoughtful, well reasoned and detailed analysis of thousands of pages of documentation submitted by the petitioners and interested parties. It is supported by the facts and complies with the BIA acknowledgment regulations. We are confident that it will withstand any challenge or review, notwithstanding the efforts of the interested parties.

S. 1392 codifies the existing seven mandatory criteria for Federal acknowledgment found in 25 C.F.R. Part 83 and incorporates by reference much of the existing Federal acknowledgment regulations. Inexplicably, it leaves out many of the key definitions in the regulations, such as "community", "political influence" and "sustained contact", that are critically important to understanding the criteria. We note that, unlike the acknowledgment regulations, S. 1392 provides no definition for interested parties or informed parties.

Section 14 of the bill grafts on to the existing BIA acknowledgment process a formal hearing requirement if requested by an interested party and if the Secretary of the Interior [Secretary] determines that there is good cause shown for a hearing.

Under the bill, a formal hearing would allow all interested parties to present evidence, call witnesses, cross-examine witnesses and rebut evidence in the record. The transcript of the hearing would be made part of the administrative record.

A formal hearing with witnesses, cross-examination and rebuttal evidence would not improve the current acknowledgment process that already requires the Secretary to issue proposed findings for or against acknowledgment, provide formal, on the record technical assistance if requested by the petitioning group or interested parties, and consider comments and evidence from all parties on the proposed findings. It would turn the acknowledgment process into an adversarial proceeding and would only cause further delays in an already costly and time-consuming process. Such a formal hearing is inappropriate for a process that involves primarily documentary evidence, not witnesses. We see the potential for great mischief if interested parties can call as witnesses subject to cross-examination tribal members, the tribal historian, genealogist or anthropologist or even the staff of the BAR.

Section 19 authorizes the appropriation of $10 million per fiscal year to implement the bill. This represents an almost ten fold increase in the Branch of Acknowledgment and Research's current annual budget. The inadequacy of the current

budget for processing acknowledgment petitions is well documented in the General Accounting Office Report entitled "Improvements Needed in Tribal Recognition Process" issued November 2, 2001. The funding increase will go along way toward addressing the backlog of petitions awaiting evaluation.

S. 1393 would provide grants to Indian tribes, Indian groups seeking Federal acknowledgment and local governments in order to participate in Department of the Interior processes concerning Federal acknowledgment, fee to trust land acquisition requests, land claims and other actions affecting local governments. We understand and welcome a grant program for Indian tribes and groups who lack the financial resources to pursue Federal acknowledgment and other actions. We question, however, the wisdom of providing Federal funds to local governments so that they can oppose Indian groups seeking Federal acknowledgment and Indian tribes seeking to acquire trust land. Under the bill, the Secretary of the Interior could award a Federal grant to a local government so that it could challenge a decision of the Secretary of the Interior. That to us is not sound public policy. Sadly, it has been our experience that the participation of some of the interested parties in the acknowledgment process has not been to insure that a fair and impartial decision is made by the Assistant Secretary, but the rejection of our petition. They have expressly stated that their real concern is what they believe flows from Federal acknowledgment—land claims, the acquisition of land into trust and gaming. By defeating an Indian petitioner's acknowledgment petition, the interested parties real concerns are rendered moot.

I thank the committee for providing me with an opportunity to present the comments of the Eastern Pequot Indians of Connecticut.

PREPARED STATEMENT OF CECILE MAXWELL-HANSEN

Good morning, Mr. Chairman and distinguished members of the Committee. My name is Cecile Maxwell-Hansen. I am the great, great, great, niece of Chief Si'ahl, for whom the city of Seattle is named. I appreciate the opportunity to submit testimony on S. 1392, a bill to establish procedures for the Bureau of Indian Affairs [BIA] with respect to tribal recognition and S. 1393, a bill to provide grants to eligible Indian groups and local governments to participate in certain decisionmaking processes of the BIA.

Fourteen years ago I testified before this committee on the Federal acknowledgment process. Now I am appearing before the committee again on the same subject. It seems as if nothing has changed. Our experience with the Federal acknowledgment procedures has been bitterly disappointing and disheartening. The Duwamish people were the first indigenous people of the Seattle, WA area having lived there for more than 1,000 years before the arrival of the European-Americans in 1851. In 1855, the Duwamish Tribe was the first signatory on the Treaty of Point Elliot, which guaranteed fishing rights and reservations to all the signatory tribes. The Duwamish signatory to the 1855 Treaty was our chief, Chief Si'ahl. In 1859, the Treaty of Point Elliot was ratified by Congress, but the promises made by the United States in the Treaty were never fulfilled to my people.

We first submitted a petition for Federal acknowledgment in 1976 before the promulgation of the acknowledgment regulations in 1978. In 1988, we submitted a completed petition to the Branch of Acknowledgment and Research and 8 years later received a preliminary decision against acknowledgment. The preliminary decision concluded that we met four of the seven mandatory criteria, but there were some deficiencies with respect to criteria 83.7(a) (identification as an American Indian entity), and (b) (community) and (c) (political authority or influence).

We worked diligently over the next 2 years to address the deficiencies, and believed we had succeeded when we were advised that the Acting Assistant Secretary-Indian Affairs had issued a final determination in favor of acknowledgment on January 19, 2001. One day later, President Bush issued an order imposing a moratorium on all substantive decisions made during the final days of the Clinton administration, including the Duwamish Tribe's positive final determination in favor of Federal acknowledgment. On September 26, 2001, the new Assistant Secretary-Indian Affairs issued a new final determination declining to acknowledge the Duwamish Tribe. Our subsequent administrative appeals have been unsuccessful. Nearly 150 years after the Duwamish Tribe signed the Point Elliot Treaty, my people are still struggling for the recognition that was promised when that treaty was signed and ratified.

The Duwamish Tribe believes that there are severe problems with the Federal acknowledgment process, but not of the type stated by other witnesses. We're the Duwamish Tribe. We signed the Point Elliott Treaty and gave up our lands and

other rights. From treaty times to the present, the Duwamish people have maintained an independent identity as a tribe with elected leaders and the preservation of our culture. Until the 1970's, we were receiving Federal Indian services and exercising our Indian treaty fishing rights. We have never been terminated by Congress. Now the Bureau of Indian Affairs is telling us that we are not federally recognized. This is a grave injustice to the Duwamish people and other treaty tribes like us. We recommend that if changes are made to the Federal acknowledgment process, that at minimum, tribes that were signatories to treaties and gave up their land or other rights, should be presumptively federally recognized. In the acknowledgment process, the Secretary of Interior should bear the burden of proving that we are not a federally recognized tribe, not the other way around.

Now the BIA also says that there are breaks in the cultural and political continuity of our Tribe and this is further proof that we should not be a federally recognized tribe. We believe that what undoubtedly started out as a common-sense acknowledgment requirement is now turned on its head. It ignores the sweep of U.S. history and Federal policy that systematically destroyed tribal governments. The Indian treaties were part of this policy. The Indian allotment acts also contributed to weakening tribal governments. The force assimilation of our children in Federal Indian schools and the termination policies in the 1950's also played a role in undermining Indian tribes. The hard edged implementation of this tribal continuity requirement punishes tribes a second time because they may not have been able to withstand the heavy hand of the Federal Government every day for 150 years.

S. 1392 essential codifies the existing Federal acknowledgment regulations found in 25 C.F.R. Part 83, including the seven mandatory criteria. The bill incorporates some, but not all, of the definitions found in the existing acknowledgment regulations. For example, the bill does not define "community", "political influence" and "sustained contact", "interested party" and "informed party". These definitions are fundamentally important in understanding the criteria or identifying who may participate in the acknowledgment process.

Section 14 of the bill establishes a new hearing requirement in addition to the existing BIA acknowledgment process. If requested by an interested party and if the Secretary of the Interior [Secretary] determines that there is good cause shown, the Secretary must conduct a formal hearing. A formal hearing would allow all interested parties to present evidence, call witnesses, cross-examine witnesses and rebut evidence in the record. The transcript of the hearing would be made part of the administrative record.

We are not convinced that a formal hearing is an appropriate or necessary addition to the acknowledgment process. The existing regulations allow interested parties to participate in the process by submitting their own evidence and comments on the proposed findings, requesting and receiving technical assistance from the BAR and appealing a decision they do not agree with. A formal hearing would only cause further delays in an overly long process.

Section 19 authorizes the appropriation of $10 million for Federal acknowledgement activities. This represents a significant increase in the BAR's existing budget. We support increased funding for Federal acknowledgment activities.

S. 1393 would provide grants to Indian tribes, Indian groups seeking Federal acknowledgment and local governments in order to participate in Department of the Interior processes concerning Federal acknowledgment, fee to trust land acquisition requests, land claims and other actions affecting local governments. We support a grant program for Indian tribes and groups who lack the financial resources to pursue Federal acknowledgment and other actions. We do not agree that Federal funds should be made available to local governments to essential fight Indian groups seeking Federal acknowledgment and Indian tribes seeking to acquire trust land. Under the bill, a local government could receive a Federal grant to challenge decisions of the Secretary of the Interior to acknowledge a tribe or acquire land in trust. To us, this is unsound public policy.

I thank the committee for providing me with an opportunity to present the views of the Duwamish Tribe.

TESTIMONY OF AURENE M. MARTIN
DEPUTY ASSISTANT SECRETARY - INDIAN AFFAIRS
U.S. DEPARTMENT OF THE INTERIOR
AT THE HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
U.S. SENATE
ON
S. 1392 AND S. 1393

September 17, 2002

Good morning, Mr. Chairman and Members of the Committee. My name is Aurene Martin and I am the Deputy Assistant Secretary for Indian Affairs. I appreciate the opportunity to appear before you today on behalf of the Administration regarding S. 1392, a bill to establish procedures for the Bureau of Indian Affairs of the Department of the Interior with respect to tribal acknowledgment, and S. 1393, a bill to provide grants to ensure full and fair participation in certain decision-making processes at the Bureau of Indian Affairs. The Administration opposes these bills.

The Federal acknowledgment of an Indian tribe is a serious decision for the Federal Government. It is important that a thorough and deliberate evaluation occur before we decide whether to acknowledge a group as a tribe; a status which carries with it certain immunities and privileges. These decisions must be defensible, fact-based and equitable.

We agree with Senator Dodd that the Federal acknowledgment process "ought to be guided by several firm principles: fairness, openness, respect, and a common interest in bettering the quality of life of all Americans."

During Assistant Secretary Neal McCaleb's nomination hearing he stated that he would take a look

at the Federal acknowledgment process and make changes following this assessment. Not long into his tenure, the General Accounting Office (GAO) was asked to review the process and their final report, entitled *Indians: Improvements Needed in Tribal Recognition Process*, was issued in November 2001. GAO reviewed BIA's regulatory process, criteria and supporting evidence described in 25 CFR Part 83.

At the hearing in June of this year, we stated that we would provide a strategic plan in response to the GAO recommendations. I am happy to report that our draft Strategic Plan was completed this past week and is currently under Departmental review. We anticipate that a final response will be available to the Congress within the next few weeks.

The thrust of our response to the GAO Report is to make the regulatory process more predictable, timely and responsive consistent with the recommendations in that report. In our draft Strategic Plan, we are not recommending changes to the mandatory criteria, because they are founded in existing law and have been upheld by the courts. Further, these criteria have been used since 1978. All groups who have petitioned for Federal acknowledgment since 1978 have utilized these criteria in documenting their petitions and have been evaluated by them. We are committed to ensuring that groups have fair and equitable treatment under the regulatory process. To be fair, any change in the criteria must be brought about deliberately, ensuring that previous petitioners are considered in the process.

The BIA's Strategic Plan provides for more use of the World Wide Web and an increase in the Branch of Acknowledgment and Research (BAR) staff to address the backlog of petitions waiting for final decisions, which is an issue that is currently under litigation in several courts. The plan also

provides a framework to increase BAR administrative staff and contracting for support services. Contracting data entry and certain administrative tasks, particularly those imposed by public inquiries under the Freedom of Information Act, will further ease the burden on the BIA researchers, thereby permitting them to address the current backlog of petitions waiting for consideration.

Specific comments on the legislation follow:

S. 1392

We believe that S. 1392 is unnecessary since the procedures for Federal acknowledgment are already provided within 25 CFR Part 83.

Specifically, the Department questions two provisions of S. 1392. In addition to the formal meeting on the record where petitioners and interested parties question BIA researchers, the bill provides for an additional formal hearing with witnesses and cross examination. The timing, scope, purposes, and advantages of this additional hearing are unclear.

Second, the required notice of receipt of a letter of intent to petition or documented petition to all municipalities located in the geographical areas historically occupied by a petitioning group is not workable as it is unclear where these territories would be. Compliance with this provision would require a detailed evaluation of a petition, when the Department may have only received a letter of intent to petition.

We recommend that the terms "recognition" and "recognized" be replaced with "acknowledgment" and "acknowledged" throughout the bill to clarify that the process will acknowledge the existence of

tribes which have continued to exist and will not recognize or create new entities.

If the purpose of the bill is to codify the existing regulations, some of those sections have been omitted. Some of these omissions could have a significant impact on the evaluation of a petition.

S. 1393

S. 1393 provides the Secretary of the Interior authority to award grants, on the basis of need, to municipalities, recognized tribes, or petitioners for acknowledgment. We oppose S. 1393 because the language may create a conflict of interest by authorizing the Secretary to decide which groups receive grants and may influence her ability to make future decisions on petitioners. In addition, S. 1393 does not preclude the use of grants to litigate in court, to lobby Congress, or to participate in actions against the Department.

CONCLUSION

This concludes my prepared statement. Thank you for the opportunity to testify on this issue. I will be happy to answer any questions the Committee may have.

United States General Accounting Office

GAO

Testimony
Before the Committee on Indian Affairs, U.S. Senate

For Release on Delivery
Expected at 10:00 a.m.
Tuesday, September 17, 2002

INDIAN ISSUES

Basis for BIA's Tribal Recognition Decisions Is Not Always Clear

Statement of Barry T. Hill, Director
Natural Resources and Environment

GAO-02-936T

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to discuss our work on the Bureau of Indian Affairs' (BIA) regulatory process for federally recognizing Indian tribes.[1] As you know, federal recognition of an Indian tribe can dramatically affect economic and social conditions for the tribe and the surrounding communities. There are currently 562 recognized tribes with a total membership of about 1.7 million. In addition, several hundred groups are currently seeking recognition.

Federally recognized tribes are eligible to participate in federal assistance programs. In fiscal year 2002, the Congress appropriated about $5 billion for programs and funding almost exclusively for recognized tribes. Recognition also establishes a formal government-to-government relationship between the United States and a tribe. The quasi-sovereign status created by this relationship exempts certain tribal lands from most state and local laws and regulations. Such exemptions generally apply to lands that the federal government has taken in trust for a tribe or its members. Currently, about 54 million acres of land are held in trust.[2] The exemptions also include, where applicable, laws regulating gaming. The Indian Gaming Regulatory Act of 1988, which regulates Indian gaming operations, permits a tribe to operate casinos on land in trust if the state in which it lies allows casino-like gaming and the tribe has entered into a compact with the state regulating its gaming businesses.[3] In 1999, federally recognized tribes reported an estimated $10 billion in gaming revenue, surpassing the amounts that the Nevada casinos collected that year. In fiscal year 2001, Indian gaming revenues increased to $12.7 billion.

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[1]In this statement the term "Indian tribe" encompasses all Indian tribes, bands, villages, groups and pueblos as well as Eskimos and Aleuts.

[2]Tribal lands not in trust may also be exempt from state and local jurisdiction for certain purposes in some instances.

[3]25 U.S.C. 2701.

Owing to the rights and benefits that accrue with recognition and the controversy surrounding Indian gaming, BIA's regulatory process has been subject to intense scrutiny by groups seeking recognition and other interested parties—including already recognized tribes and affected state and local governments. The controversies surrounding the regulatory process for recognizing tribes continue with two highly anticipated decisions issued in July 2002. In the first decision, the Assistant Secretary-Indian Affairs determined that two petitioners, the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut, are derived from a single historical tribe and are therefore recognized as a single tribe.[4] In the second decision, the previous Assistant Secretary's January 2001 decision to recognize the Chinook Indian Tribe/Chinook Nation was reversed by the current Assistant Secretary after the decision was reconsidered at request of the Quinault Indian Nation.[5]

BIA's regulatory process for recognizing tribes was established in 1978. The process requires groups that are petitioning for recognition to submit evidence that they meet certain criteria—basically that the petitioner has continuously existed as an Indian tribe since historic times. Critics of the process claim that it produces inconsistent decisions and takes too long. In November 2001, we reported on BIA's regulatory recognition process, including the criteria for recognizing tribes, and recommended ways to improve it.[6] In particular, we recommended that BIA develop transparent guidelines to provide a clearer understanding of the basis for recognition decisions. We testified on this report in February 2002 before the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs.[7] Our testimony today is based on that report and focuses on the application of the criteria that Indian groups must meet under the regulatory process to be granted recognition.

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[4]67 *Fed. Reg.* 44234 (July 1, 2002).

[5]67 *Fed. Reg.* 46204 (July 12, 2002).

[6]U.S. General Accounting Office, *Indian Issues: Improvements Needed in Tribal Recognition Process*, GAO-02-49 (Washington, D.C.: Nov. 2, 2001).

[7]U.S. General Accounting Office, *Indian Issues: More Consistent and Timely Tribal Recognition Process Needed*, GAO-02-415T (Washington, D.C.: Feb. 7, 2002).

In summary, as we reported in November 2001, the basis for BIA's tribal recognition decisions is not always clear. While there are set criteria that petitioning tribes must meet to be granted recognition, there is no guidance that clearly explains how to interpret key aspects of the criteria. For example, it is not always clear what level of evidence is sufficient to demonstrate that a tribe has continued to exist over a period of time—a key aspect of the criteria. The lack of guidance in this area creates controversy and uncertainty for all parties about the basis for decisions reached. To correct this, we recommended that BIA develop and use transparent guidelines for interpreting key aspects of its recognition decisions. The BIA is completing a strategic plan to implement this recommendation.

Background

Historically, the U.S. government has granted federal recognition through treaties, congressional acts, or administrative decisions within the executive branch—principally by the Department of the Interior. In a 1977 report to the Congress, the American Indian Policy Review Commission criticized the department's tribal recognition policy. Specifically, the report stated that the department's criteria to assess whether a group should be recognized as a tribe were not clear and concluded that a large part of the department's policy depended on which official responded to the group's inquiries. Nevertheless, until the 1960s, the limited number of requests for federal recognition gave the department the flexibility to assess a group's status on a case-by-case basis without formal guidelines. However, in response to an increase in the number of requests for federal recognition, the department determined that it needed a uniform and objective approach to evaluate these requests. In 1978, it established a regulatory process for recognizing tribes whose relationship with the United States had either lapsed or never been established—although tribes may seek recognition through other avenues, such as legislation or Department of the Interior administrative decisions unconnected to the regulatory process. In addition, not all tribes are eligible for the regulatory process. For example, tribes whose political relationship with the United States has been terminated

by Congress, or tribes whose members are officially part of an already recognized tribe, are ineligible to be recognized through the regulatory process and must seek recognition through other avenues.

The regulations lay out seven criteria that a group must meet before it can become a federally recognized tribe. Essentially, these criteria require the petitioner to show that it is descended from a historic tribe and is a distinct community that has continuously existed as a political entity since a time when the federal government broadly acknowledged a political relationship with all Indian tribes. The following are the seven criteria for recognition under the regulatory process:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900,

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present,

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present,

(d) The group must provide a copy of its present governing documents and membership criteria,

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or tribes, which combined and functioned as a single autonomous political entity,

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe, and

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.

The burden of proof is on petitioners to provide documentation to satisfy the seven criteria. A technical staff within BIA, consisting of historians, anthropologists, and

genealogists, reviews the submitted documentation and makes its recommendations on a proposed finding either for or against recognition. Staff recommendations are subject to review by the department's Office of the Solicitor and senior BIA officials. The Assistant Secretary-Indian Affairs makes the final decision regarding the proposed finding, which is then published in the *Federal Register* and a period of public comment, document submission, and response is allowed. The technical staff reviews the comments, documentation, and responses and makes recommendations on a final determination that are subject to the same levels of review as a proposed finding. The process culminates in a final determination by the Assistant Secretary, who, depending on the nature of further evidence submitted, may or may not rule the same was as was ruled for the proposed finding. Petitioners and others may file requests for reconsideration with the Interior Board of Indian Appeals.

Clearer Guidance Needed on Criteria and Evidence Used in Recognition Decisions

While we found general agreement on the seven criteria that groups must meet to be granted recognition, there is great potential for disagreement when the question before BIA is whether the level of available evidence is high enough to demonstrate that a petitioner meets the criteria. The need for clearer guidance on criteria and evidence used in recognition decisions became evident in a number of recent cases when the previous Assistant Secretary approved either proposed or final decisions to recognize tribes when the technical staff had recommended against recognition. Most recently, the current Assistant Secretary has reversed a decision made by the previous Assistant Secretary. Much of the current controversy surrounding the regulatory process stems from these cases. At the heart of the uncertainties are different positions on what a petitioner must present to support two key aspects of the criteria. In particular, there are differences over (1) what is needed to demonstrate continuous existence and (2) what proportion of members of the petitioning group must demonstrate descent from a historic tribe.

Concerns over what constitutes continuous existence have centered on the allowable gap in time during which there is limited or no evidence that a petitioner has met one or more of the criteria. In one case, the technical staff recommended that a petitioner not be recognized because there was a 70-year period for which there was no evidence that the petitioner satisfied the criteria for continuous existence as a distinct community exhibiting political authority. The technical staff concluded that a 70-year evidentiary gap was too long to support a finding of continuous existence. The staff based its conclusion on precedent established through previous decisions in which the absence of evidence for shorter periods of time had served as grounds for finding that petitioners did not meet these criteria. However, in this case, the previous Assistant Secretary determined that the gap was not critical and issued a proposed finding to recognize the petitioner, concluding that continuous existence could be presumed despite the lack of specific evidence for a 70-year period.

The regulations state that lack of evidence is cause for denial but note that historical situations and inherent limitations in the availability of evidence must be considered. The regulations specifically decline to define a permissible interval during which a group could be presumed to have continued to exist if the group could demonstrate its existence before and after the interval. They further state that establishing a specific interval would be inappropriate because the significance of the interval must be considered in light of the character of the group, its history, and the nature of the available evidence. Finally, the regulations note that experience has shown that historical evidence of tribal existence is often not available in clear, unambiguous packets relating to particular points in time

Controversy and uncertainty also surround the proportion of a petitioner's membership that must demonstrate that it meets the criterion of descent from a historic Indian tribe. In one case, the technical staff recommended that a petitioner not be recognized because the petitioner could only demonstrate that 48 percent of its members were descendants. The technical staff concluded that finding that the petitioner had satisfied this criterion would have been a departure from precedent established through previous decisions in

which petitioners found to meet this criterion had demonstrated a higher percentage of membership descent from a historic tribe. However, in the proposed finding, the Assistant Secretary found that the petitioner satisfied the criterion. The Assistant Secretary told us that although this decision was not consistent with previous decisions by other Assistant Secretaries, he believed the decision to be fair because the standard used for previous decisions was unfairly high.

Again, the regulations intentionally left open key aspects of the criteria to interpretation. In this case they avoid establishing a specific percentage of members required to demonstrate descent because the significance of the percentage varies with the history and nature of the petitioner and the particular reasons why a portion of the membership may not meet the requirements of the criterion. The regulations state only that a petitioner's membership must consist of individuals who descend from historic tribes—no minimum percentage or quantifying term such as "most" or "some" is used. The only additional direction is found in 1997 guidelines, which note that petitioners need not demonstrate that 100 percent of their membership satisfies the criterion

In updating its regulations in 1994, the department grappled with both these issues and ultimately determined that key aspects of the criteria should be left open to interpretation to accommodate the unique characteristics of individual petitions. Leaving key aspects open to interpretation increases the risk that the criteria may be applied inconsistently to different petitioners. To mitigate this risk, BIA uses precedents established in past decisions to provide guidance in interpreting key aspects of the criteria. However, the regulations and accompanying guidelines are silent regarding the role of precedent in making decisions or the circumstances that may cause deviation from precedent. Thus, petitioners, third parties, and future decisionmakers, who may want to consider precedents in past decisions, have difficulty understanding the basis for some decisions. Ultimately, BIA and the Assistant Secretary will still have to make difficult decisions about petitions when it is unclear whether a precedent applies or even exists. Because these circumstances require judgment on the part of the decisionmaker, public confidence in BIA and the Assistant Secretary as key decisionmakers is extremely

important. A lack of clear and transparent explanations for their decisions could cast doubt on the objectivity of the decisionmakers, making it difficult for parties on all sides to understand and accept decisions, regardless of the merit or direction of the decisions reached. Accordingly, in our November 2001 report, we recommended that the Secretary of the Interior direct BIA to provide a clearer understanding of the basis used in recognition decisions by developing and using transparent guidelines that help interpret key aspects of the criteria and supporting evidence used in federal recognition decisions. In commenting on a draft of this report, the department generally agreed with this recommendation. To implement the recommendation, the department pledged to formulate a strategic action plan by May 2002. To date, this plan is still in draft form. Officials told us that they anticipate completing the plan soon.

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In conclusion, BIA's recognition process was never intended to be the only way groups could receive federal recognition. Nevertheless, it was intended to provide the Department of the Interior with an objective and uniform approach by establishing specific criteria and a process for evaluating groups seeking federal recognition. It is also the only avenue to federal recognition that has established criteria and a public process for determining whether groups meet the criteria. However, weaknesses in the process have created uncertainty about the basis for recognition decisions, calling into question the objectivity of the process. Without improvements that focus on fixing these and other problems on which we have reported, parties involved in tribal recognition may increasingly look outside of the regulatory process to the Congress or courts to resolve recognition issues, preventing the process from achieving its potential to provide a more uniform approach to tribal recognition. The result could be that the resolution of tribal recognition cases will have less to do with the attributes and qualities of a group as an independent political entity deserving a government-to-government relationship with the United States, and more to do with the resources that petitioners and third parties can marshal to develop successful political and legal strategies.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Committee may have at this time.

Contact and Acknowledgments

For further information, please contact Barry T. Hill on (202) 512-3841. Individuals making key contributions to this testimony and the report on which it was based are Robert Crystal, Charles Egan, Mark Gaffigan, Jeffery Malcolm, and John Yakaitis.

(360248)

TESTIMONY OF
ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
SEPTEMBER 17, 2002

I appreciate the opportunity to speak in support of S.1392, the Tribal Recognition and Indian Bureau Enhancement Act of 2001 and S.1393, which would provide grants to municipalities, Indian groups and other interested parties to ensure full and fair participation in tribal recognition and other procedures at the Bureau of Indian Affairs.

The present system for recognizing Indian tribes is fatally and fundamentally flawed. It is in serious need of reform to ensure that such decisions -- which have such profound ramifications -- are fair, objective and timely. After ten years of experience with tribal recognition issues, I strongly and firmly believe that fundamental, far-reaching reform is necessary and that the present system should be replaced by an independent agency insulated from the presently prevalent influences of money and politics. I support S.1392 and S.1393 as a clear, specific starting point to form an Indian recognition process that is both equitable and expeditious. Moreover, I support Senator Christopher Dodd and Senator Joseph Lieberman's proposed amendment to place a moratorium on tribal recognition decisions until fundamental reforms are made to the recognition process – ensuring meaningful participation by all interested parties and that all recognition criteria are properly and consistently applied.

The central principle should be: Tribes that meet the seven legally established criteria deserve federal recognition and should receive it. Groups that do not meet the criteria should not be accorded this sovereign status.

Fatally flawed and desperately in need of repair, the present recognition process has been ruled by too little law or objective, open fact-finding -- and has proven to be susceptible to improper influences of power, money and politics, as recent reports by both the GAO and the Department of Interior's Inspector General have documented.

In theory and under present legal rules, any tribal group seeking federal recognition must meet seven distinct criteria – aimed at proving the petitioning tribe's continuous existence as a distinct community, ruled by a formal government, and descent from a historical tribe, among others.

In practice, the BIA's political leaders have routinely distorted and disregarded these standards, misapplied evidence, and denied state and local governments a fair

opportunity to be heard. On behalf of Connecticut, my office has brought two major lawsuits against this federal agency for failing to follow federal law. The current Administration may bring different attitudes and approaches, but new people in the same position is not a lasting solution.

The impacts of federal recognition of an Indian tribe cannot be understated -- underscoring the urgent need for reform. A decision to acknowledge an Indian tribe has profound and irreversible effects on tribes, states, local communities and the public and in Connecticut's experience greatly affects the quality of life in those communities living in close proximity to Indian reservations. Federal recognition creates a government-to-government relationship between the tribe and the federal government and makes the tribe a quasi-sovereign nation. A federally recognized tribe is entitled to certain privileges and immunities under federal law. They are exempt from most state and local laws and land use and environmental regulations. They enjoy immunity from suit. They may seek to expand their land base by pursuing land claims against private landowners, or seeking to place land into trust under the Indian Reorganization Act. They are insulated from many worker protection statutes relating, for example, to the minimum wage or collective bargaining protections as well as health and safety codes.

Since the enactment of the Indian Gaming Regulatory Act (IGRA) more than a decade ago, federally recognized tribes may operate commercial gaming operations. This law has vastly increased the financial stakes involved in federal recognition. Several of the petitioning groups in Connecticut are reported to have been funded by gaming interests such as Lakes Gaming of Minnesota and Donald Trump. The law has pitted petitioning tribes against not only states and local governments, but also against each other. For example, two Connecticut groups with pending acknowledgment petitions, the Schaghticoke and the Golden Hill Paugussett tribes, are currently engaged in a heated public dispute, each accusing the other of theft of ancestral heritage. Contrary to the law and agency precedent, two other Connecticut groups that have recently received a single recognition finding, the Eastern Pequots and the Paucatuck Eastern Pequots, contested each other's claims to a common reservation and ancestry.

Connecticut has been particularly impacted by the federal recognition process. Although geographically one of the smallest states, Connecticut is home to two of the world's largest and most profitable casinos within 15 miles of each other. We also have 13 other groups seeking recognition as federally recognized Indian tribes, most of whom have already indicated their intention to own and operate commercial gaming establishments. The interest in reform however, extends beyond Connecticut. Last year, 20 state Attorneys General across the country signed a letter to the Assistant Secretary for Indian Affairs, Neal McCaleb, expressing serious concern about arbitrary and illegal changes to the tribal recognition process made by the prior administration without adequate public input.

The enormity of the interests at stake make public confidence in the integrity and efficacy of recognition decisions all the more essential. Unfortunately, public respect and trust in the current process have completely evaporated.

The deficiencies in the recognition process are well-established.

Recently, the Government Accounting Office (GAO) issued a report documenting significant flaws in the present system, including uncertainty and inconsistency in recent BIA recognition decisions and lack of adherence to the seven mandatory criteria. The GAO report also cited lengthy delays in the recognition process -- including inexcusable delays by the BIA in providing critical petition documents to interested parties like the states and surrounding towns. The GAO urged the BIA to address these deficiencies and included specific suggestions for improvement. To date, the BIA has not acted to cure these noted defects in the recognition process.

The United States Department of the Interior's Office of the Inspector General also found numerous irregularities with the way in which the Bureau of Indian Affairs handled federal recognition decisions involving six petitioners. The report documents that the Assistant Secretary and Deputy Assistant Secretary either rewrote civil servant research staff reports or ordered the rewrite by the research staff so that petitioners that were recommended to be denied would be approved. The former Assistant Secretary himself admitted that "acknowledgement decisions are political"and later expressed concern that the huge amount of gaming money that is financially backing some petitions would lead to petitions being approved that should not be approved. Interestingly, he also advocated for reform of the current system.

Connecticut's experience with this process mirrors and confirms the GAO and OIG findings and conclusions. In petitions involving the state of Connecticut, the former head of the BIA unilaterally overturned staff findings that two Indian groups failed to provide evidence sufficient to meet several of the seven mandatory regulatory criteria. He also issued an illegal directive barring staff from conducting necessary independent research and prohibiting the BIA from considering information submitted after an arbitrary date -- regardless of whether the BIA's review had begun -- without notice to interested parties in pending recognition cases.

In June, the BIA issued a Final Determination recognizing a single Eastern Pequot tribe in Connecticut comprised of the Eastern Pequot and the Paucatuck Eastern Pequot groups, despite the fact that these groups had filed separate conflicting petitions for recognition. The two petitions were pending for years and contradicted each other. In fact, in one of their last submissions, the Paucatuck Easterns argued vigorously that the Eastern Pequots did not submit adequate proof that they were an Indian Tribe. The Final Determination reflected substantial gaps in evidence in both tribal petitions, but the BIA distorted the relationship between the state of Connecticut and the Eastern Pequot group to bridge these gaps, contrary to the BIA's own regulations. I announced last week that the state and towns would appeal that decision.

To make matters worse, shortly after the recognition decision was released and before the appeal could even be filed, top BIA officials held a private (ex parte) meeting with representatives of the Paucatuck Eastern and Eastern Pequot groups – a secret session that seems improper under the rules. At the very least, the private meeting reinforces public perception that the recognition process is unfair and biased toward petitioning groups.

The BIA is admittedly overworked and understaffed, leading inevitably to lengthy delays in processing petitions and in providing essential documents to interested parties.

Connecticut was forced to sue the BIA to obtain critical information necessary to respond to petitions—information, including petition documents the state was clearly entitled to under the FOIA. In some cases, the documents have not been provided until after the BIA has issued proposed findings in favor of recognition.

The federal courts have also ordered the BIA to complete petitions in a timely manner. All four of Connecticut's active petitions, Eastern Pequot, Paucatuck Eastern Pequot, Schaghticoke and Golden Hill Paugussett, are presently proceeding under court ordered schedules. Federal courts have intervened and set schedules in the petitions of the Mashpee Tribe of Massachusetts and the Muwekma Tribe of California. It is obvious that the imposition of court deadlines on an agency lacking adequate staff and resources can lead to mistakes and missteps, by elevating speed over substance.

Congress must act swiftly and strongly to reform the system and restore its credibility and public confidence.

Long-term reform requires an independent agency -- insulated from politics or lobbying -- to make recognition decisions. It must have nonpartisan members, staggered terms, and ample resources. There is compelling precedent for such an independent agency -- the Securities and Exchange Commission, for example, or the Federal Communications Commission, and the Federal Trade Commission, which deal professionally and promptly with topics that require extraordinary expertise, impartiality, and fairness.

Such reform is critical to restoring the integrity and credibility of the present system. Even with the best of intentions, and better resources and personnel under a new Administration, the present flaws remain fatal. They are crippling to credibility and objectivity, because the protections against improper influences are inadequate, and are likely to remain so. Indeed, the argument may be made that the Department of Interior currently has an unavoidable conflict of interest -- responsible for advocating for and protecting Native American interests as trustee, and at the same time deciding objectively among different tribes which ones merit recognition.

S.1392 is a good step in the right direction. One of the most frustrating and startling consequences of the current review process is the potential for manipulation and disregard of the seven mandatory criteria for recognition—a potential that the GAO and Inspector General reports found has been realized in recent petitions. By adopting these criteria in statute, Congress will reduce the likelihood that the BIA will stretch or sandbag criteria in an effort to recognize an undeserving petitioner. The criteria in S.1392 should be amended slightly to conform with the burden of proof requirements for the distinct community or political authority criteria that is contained in the current BIA regulations. This proposal would also help to ensure meaningful participation by the entities and people directly impacted by a recognition decision.

S.1393 would provide additional much needed, well deserved resources and authority for towns, cities and Indian groups alike in an effort to reduce the increasing role of gaming money in the recognition process. Federal assistance is necessary and appropriate, in light of the burdens that towns, cities and Indian groups, as well as the state, must bear in retaining experts in archeology, genealogy, history and other areas -- all

necessary to participate meaningfully in the recognition process. Because recognition has such critical, irrevocable consequences, it is essential that all involved—petitioning groups, the public, local communities, states--- have confidence in the fairness and impartiality of the process. That confidence has been severely compromised in recent times. I urge the committee to approve these bills and begin the process of overhauling the system so that public faith can be restored.

I wish to thank the committee for allowing me this opportunity to address the committee with respect to this important issue and urge the committee's further consideration of these proposals.

TESTIMONY OF
NICHOLAS H. MULLANE, II
FIRST SELECTMAN,
TOWN OF NORTH STONINGTON
COMMITTEE ON INDIAN AFFAIRS

September 17, 2002

Introduction

Mr. Chairman and Members of the Committee, I am pleased to submit this testimony on S.1392 & S.1393, bills to reform the Federal tribal acknowledgment process. I am Nicholas Mullane, First Selectman of North Stonington, Connecticut. I testify today also on behalf of Wesley Johnson, Mayor of Ledyard, and Robert Congdon, First Selectman of Preston. These gentlemen are with me today.

As the First Selectman of North Stonington, a small town in Connecticut with a population of less than 5,000, I have experienced first-hand the problems (See Attachment 1) presented by Federal Indian policy for local governments and communities. Although these problems arise under various issues, including trust land acquisition and Indian gaming, this testimony addresses only the tribal acknowledgment process.

Reform of the federal acknowledgment process (See Attachment 2) must occur if valid decisions are to be made. Acknowledgment decisions that are not the result of an objective and respected process will not have the credibility required for tribal and community interests to interact without conflict. The legislation that is being reviewed today is a start, and I want to commend Senators Dodd and Lieberman for calling for these reforms. I also want to thank other elected officials in Connecticut who have fought for reforms to this process, including Congressman

Simmons, Congressman Shays, Congresswoman Johnson, and our Attorney General, Richard Blumenthal. In particular, we want to commend Attorney General Blumenthal for his longstanding defense of the interests of the State in these matters. Recently, Governor Rowland has joined in expressing strong concern over tribal acknowledgment and the spread of Indian gaming, and we commend him for this action. As the bipartisan nature of this political response demonstrates, the problems inherent in tribal acknowledgment and Indian gaming are serious and transcend political interests. Problems of this magnitude need to be addressed by Congress, and I ask for your Committee to support the efforts of our elected leaders to bring fairness, objectivity, and balance to the acknowledgment process.

Acknowledgment and Indian Gaming

Federal tribal acknowledgment, in too many cases, has become merely a front for wealthy financial backers (See Attachment 3) motivated by the desire to build massive casino resorts or undertake other development in a way that would not be possible under State and local law. Our Town is dealing with precisely this problem. Both of the petitioning groups in North Stonington -- the Eastern Pequots and the Paucatuck Eastern Pequots -- have backers who are interested in resort gaming. One of the backers is Donald Trump (See Attachment 4). These financiers have invested millions, actually tens of millions, of dollars in the effort to get these groups acknowledged so casinos can be opened, and they will stop at nothing to succeed (See Attachment 5).

The State of Connecticut has become fair game for Indian casinos, and the acknowledgment process has become the vehicle to advance this goal. For example, three other tribal groups (Golden Hill Paugussett, Nipmuc, Schaghticoke) with big financial backers have their eyes on Connecticut. Their petitions are under active

acknowledgment review. As many as ten other groups are in line. While it is unfortunate that the acknowledgment process and the understandable desire of these groups to achieve acknowledgment for personal and cultural reasons has been distorted by the pursuit of gaming wealth by non-Indian financiers, the reality remains that tribal recognition now, in many cases, equates with casino development. This development, in turn, has devastating impacts on states and local communities. Thus, the stakes are raised for every one.

North Stonington has first-hand experience with the problems that result. In 1983, the Mashantucket Pequot Tribe achieved recognition through an Act of Congress. This law, combined with the 1988 Indian Gaming Regulatory Act, ultimately produced the largest casino in the world. That casino has, in turn, caused serious negative impacts on our Towns, and the Tribe has not come forward to cooperate with us to address those problems. Having experienced the many adverse casino impacts, and understanding the debate over the legitimacy of the Mashantucket Pequot Tribe under the acknowledgment criteria, our Town wanted to assure ourselves that the recognition requests on behalf of the Eastern Pequot and Paucatuck Eastern Pequot groups were legitimate. As a result, we decided to conduct our own independent review of the petitions and participate in the acknowledgment process. It is worth noting that at no time has either petitioner come forward to present to Town leaders any constructive proposal on how they will deal with our concerns if acknowledgment is conferred. Thus, the concerns that motivated our participation have been validated.

The Eastern Pequot Acknowledgment Process

The Towns of North Stonington, Ledyard, and Preston obtained interested party status in the BIA acknowledgment process. We participated in good faith to

ensure that the Federal requirements are adhered to. Our involvement provides lessons that should inform federal reform initiatives.

The issue of cost for local governments needs to be addressed. Our role cost our small rural towns over $600,000 in total over a five-year period. This is a small fraction of the millions of dollars invested by the backers of these groups, but a large sum for small local governments. The amount would have been much higher if Town citizens, and our consultants and attorneys had not generously donated much of their time. It has been said that the Eastern Pequot group alone has spent millions on their recognition, and that they spent $500,000 (See Attachment 6) on one consultant for one year to provide them knowledge on "how Washington, D.C. operates." This disparity in resources between interested parties and petitioners with gaming backers skews the process and must be addressed.

The fairness of the process is another problem. We discovered that achieving interested party status was only the tip of the iceberg. One of our biggest problems in participating was simply getting the documents. Our Freedom of Information Act requests to BIA for the information necessary to comment on the petitions were not answered for 2 1/2 years (See Attachment 7). Only through the filing of a federal lawsuit were we able to obtain the basic information from BIA. The other claims in that lawsuit remain pending. Thus, it was necessary for us to spend even more money just to get the Federal government to meet its clear duties. I trust you will agree with me that taxpayers should not have to pay money and go to court simply to participate in a federal process.

We experienced many other problems with the process. A pervasive problem has been the failure of the process to ensure adequate public review of the evidence and BIA's findings.

During the review of the Pequot petitions, the BIA experts initially recommended negative proposed findings on both groups. One of the reasons for the negative finding was that no determination could be made regarding the groups' existence as tribes for the critical period of 1973 through the present. Under past BIA decisions, this deficiency alone should have resulted in negative findings. Despite this lack of evidence, the negative findings were simply overruled (See Attachment 8) by the then BIA Assistant Secretary, Kevin Gover. Because BIA did not rule on the post-1973 period, interested parties never had an opportunity to comment. This was part of a pattern under the last Administration of reversing BIA staff to approve tribal acknowledgment petitions and shortchanging the public and interested parties. Moreover, with no notice to us, or opportunity to respond, BIA arbitrarily set a cut-off date for evidence that excluded 60% of the documents we submitted from ever being considered for the critical proposed finding.

This problem occurred again with the final determination. In the final ruling, BIA concluded, in effect, that neither petitioner qualified under all of the seven criteria. Our independent analysis confirmed this conclusion.

Nevertheless, after combining the two petitioners (over the petitioners' own objections), considering new information submitted by the Eastern Pequot petitioning group, and improperly using State recognition to fill the gaps in the petitioners' political and social continuity, BIA decided to acknowledge a single "Historical Pequot Tribe." The Towns had no opportunity to comment on this "combined petitioner;" we had no opportunity to comment on the additional information provided by the Eastern Pequot petitioners; and we had no opportunity to comment on the critical post-1973 period. Thus, the key assumptions and findings that were the linchpin of the BIA finding never received critical review or comment. These types of calculated actions have left it virtually impossible for the Towns to be constructively

involved in these petitions, and they have caused great concern and distrust over the fairness and objectivity of the process.

Another problem is bias and political interference. Throughout the acknowledgment review, we have continually found that politically-motivated judgment was being injected into fact-based decisions, past precedents were being disregarded, and rules were being instituted and retroactively applied, all without the Towns and State being properly notified and without proper opportunity for comment. A perfect example is the so-called "directive" issued by Mr. Gover on February 11, 2000, that fundamentally changed the rules of the acknowledgment process, including the rights of interested parties. BIA never even solicited public input on this important rule; it simply issued it as an edict. Yet another example is Mr. Gover's overruling of BIA staff to issue positive proposed findings. The massive political interference in the acknowledgment process is discussed in the recent Department of the Interior Inspector General's report, which I submit for the record. (See Attachment 9).

With the recent actions of the BIA, it is questionable that this agency can be an advocate for Native Americans and also an impartial judge for recognition petitions. An example is the action by Secretary McCaleb in his recent "private meeting" with representatives of the Eastern Pequot and Paucatuck Eastern Pequot petitioners to discuss the tribal merger BIA forced upon them. This *ex parte* meeting with the petitioners is highly inappropriate at a time when the 90-day regulatory period to file a request for reconsideration is still in effect. There is a substantial likelihood that such a request will be filed, and that Mr. McCaleb will rule on the appealed issues. Yet, he is actively meeting with the petitioners to assist them in smoothing over their differences and forming a unified government. How

can BIA be expected to rule objectively on an appeal that contests the existence of a single tribe when the decisionmaker is actively promoting that very result?

Still another problem is the manner in which BIA addresses evidence and comment from interested parties. Simply put, BIA pays little attention to submissions from third parties. The Eastern Pequot findings are evidence of this. Rather than responding to comments from the State and the Towns, BIA just asserts that it disagrees without explanation.

Another example is the BIA cut-off date for evidence. BIA set this date for the proposed finding arbitrarily and told the petitioners. It never informed the Towns or the State. As a result, we continued to submit evidence and analyses, only to have it ignored because of this unannounced deadline. BIA said it would consider all of this evidence, but it did not. The final determination makes clear that important evidence submitted by the Towns never got considered for this reason.

Thus, rather than our Town's involvement being embraced by the federal government, we were rebuffed. The very fact of our involvement in the process, we feel, may have even prejudiced the final decision against us. The petitioning groups attacked us and sought to intimidate our researchers. The petitioning groups called us anti-Indian, racists, and accused us of committing genocide. The petitioners publicly accused me of "Nazism" (See Attachment 10) just because our Town was playing its legally defined role as an interested party. At various times throughout the process, the tribal groups withheld documents from us or encouraged BIA to do so. Obviously, part of this strategy was that the petitioners just wanted to make it more expensive to participate, to intimidate us, and to drive the Towns out of the process. They took this approach, even though our only purpose for being involved

was to ensure a fair and objective review, and to understand how a final decision was to be made (See Attachment 11).

Finally, I would like to address the substance of the BIA finding on the Eastern Pequot petitions. Based upon an incorrect understanding of Connecticut history, BIA allowed the petitioners to fill huge gaps in evidence of tribal community and political authority, prerequisites for acknowledgment, by relying on the fact that Connecticut had set aside land for the Pequots and provided welfare services. These acts by the State of Connecticut, according to BIA, were sufficient to compensate for the major lack of evidence on community and political authority. By this artifice, along with the forced combination of two petitioners, BIA transformed negative findings into positive, with no basis in fact or law.

Clearly, the past actions by Connecticut toward the later residents of the Pequot reservation did nothing to prove the existence of internal tribal community or political authority. These actions simply demonstrated actions by the State in the form of a welfare function. If BIA does not reject this principle now, it will give an unfair advantage not only to the Pequot petitioners but possibly to other Connecticut petitioning groups as well.

Principles for Reform

Based upon years of experience with the acknowledgment process, our Towns now have recommendations to make to Congress.

As an initial matter, it is clear that Congress needs to define BIA's role. Congress has plenary power over Indian affairs. Congress alone has the power to acknowledge tribes. That power has never been granted to BIA. The general authority BIA relies upon for this purpose is insufficient under our constitutional

system. In addition, Congress has never articulated standards under which BIA can exercise acknowledgment power. Thus, BIA lacks the power to acknowledge tribes until Congress acts to delegate such authority properly and fully. Up until now, no party has had the need to challenge the constitutional underpinnings of BIA's acknowledgment process, but we may be forced to do so because of the Eastern Pequot decisions.

Second, the acknowledgment procedures are defective. They do not allow for an adequate role for interested parties, nor do they do ensure objective results. The process is inherently biased in favor of petitioners, especially those with financial backers.

Third, the acknowledgment criteria are not rigorous enough. If the Eastern Pequot petitioner groups qualify for acknowledgment, then the criteria need to be strengthened. The bar has been set too low.

Fourth, acknowledgment decisions cannot be entrusted to BIA. The agency's actions are subject to political manipulation, as demonstrated by the report of the Department's Inspector General detailing the abuses of the last Administration. Also, BAR itself will, in close cases, lean to favor the petitioner. The result-oriented Eastern Pequot final determination is proof of this fact. For years we supported BAR and had faith in its integrity. Now that we have studied the Eastern Pequot decision, we have come to see the bias inherent in having an agency charged with advancing the interests of Indian tribes make acknowledgment decisions. Similar problems are likely to arise under an independent commission created for this purpose unless checks and balances are imposed that ensure objectivity, fairness, full participation by interested parties, and the absence of political manipulation.

Finally, because of all of these problems, it is clear that a moratorium on the review of acknowledgment petitions is needed. It makes no sense to allow such a defective procedure to continue to operate while major reform is underway. This is the principle underlying the amendment introduced on the floor of the Senate last week by Senators Dodd and Lieberman. This concept of that amendment is sound and needs to be enacted. No petitions should be processed during this moratorium. Although we approve of the moratorium concept while other problems of the acknowledgment process are being addressed, the Towns do not support this specific proposal because it does not go far enough, and it ratifies elements of the system that need to be more carefully reviewed and substantially reformed.

If a process must exist whereby legitimate Indian tribes can be acknowledged. S. 1392 is a good place to start with reform. It contains excellent ideas for public debate and Congressional review, but ultimately more drastic reform is called for.

S.1393 also contains essential elements of a reformed system, by helping to level the playing field and providing assistance for local governments to participate in the acknowledgment process. We urge Congress to address promptly the problems that are the subject of S.1393.

Conclusion

Our Towns respectfully request that this Committee make solving the problems with the acknowledgment process one of its top priorities. A moratorium on processing petitions should be imposed while you do so. In taking this action, we urge you to solicit the views of interested parties, such as our Towns and State, and to incorporate our concerns into your reform efforts. Tribal acknowledgment affects all citizens of this country; it is not just an issue for Indian interests.

We are confident that such a dialogue ultimately will result in a constitutionally valid, procedurally fair, objective, and substantively sound system for acknowledging the existence of Indian tribes under federal. With the stakes so high for petitioners, existing tribes, state and local governments, and non-Indian residents of surrounding communities, it is necessary for all parties with an interest in Indian policy to pursue this end result constructively. Ledyard, North Stonington, and Preston look forward to the opportunity to participate in such a process.

Thank you for considering this testimony.

Attachments

1. **Towns' May 5, 2000 letter to Secretary Babbitt expressing concerns over the tribal acknowledgment process**
2. **Connecticut AG letter to Secretary Babbit regarding moratorium**
3. **Newspaper article about lobbyist on casinos and recognition**
4. **Newspaper articles (2) – Donald Trump named as development partner**
5. **Campaign reform white sheet Editorial – Gambling's growing political influence**
6. **$500,000 Lobbyist fee**
7. **Selectmen's letter to Secretary Gover, FOIA**
8. **Newspaper article – Gover overruled staff**
9. **Inspector General's Report**
10. **Newspaper articles – Towns accused of Genocide**
11. **Newspaper articles (2) – Recognition by Federal Spending Bill**

Attachments by Request

PERKINS COIE LLP

607 FOURTEENTH STREET, N.W. · WASHINGTON, D.C. 20005-2011
TELEPHONE: 202 628-6600 · FACSIMILE: 202 434-1690

May 5, 2000

The Honorable Bruce Babbitt
Secretary of the Interior
Department of the Interior
1849 C Street, N.W., Room 6151
Washington, D.C. 20240

Re: Eastern Pequot/Paucatuck Eastern Pequot Tribal Acknowledgment Petitions

Dear Mr. Secretary:

I am writing on behalf of the Towns of Ledyard, North Stonington, and Preston, Connecticut. I am addressing you in connection with the above-referenced tribal acknowledgment petitions because recent actions of the Bureau of Indian Affairs (BIA) on those petitions raise significant issues of policy and law which suggest that the integrity of the acknowledgement process itself is being compromised. The irregularities and inequities being allowed or perpetuated by BIA on these petitions are viewed with especially strong concern by the Towns as a result of recent questions raised about the manner in which the Mashantucket Pequot Tribe achieved recognition from Congress in 1983. These deficiencies portray an acknowledgement process which, at the very time it is under high expectations and intense public scrutiny because of the relationship between the recognition of tribes and Indian gaming, is lacking credibility, integrity and objectivity.

The subject petitions, in other words, are only the current manifestation of this situation. Should you allow them to go forward under the circumstances outlined here, there is little question but that a badly flawed acknowledgement process which is evolving in the wrong direction will be institutionalized.

In considering the pending Pequot petitions, BIA has engaged in a number of procedural shortcuts that adversely affect interested parties like the Towns, and that are not authorized by the Administrative Procedure Act (APA) and other laws. In addition to procedural irregularities, it appears that the substantive standards for tribal acknowledgment are being relaxed in a fashion that demonstrably favors petitioners and disadvantages interested parties.

Procedurally, BIA has withheld from interested parties the documents necessary for meaningful participation by those parties in the process. This has been done by ignoring the agency's FOIA obligations and the general need to provide information sufficient to elicit meaningful comment. In addition, by adhering to arbitrary and unfair deadlines, BIA has

prevented interested parties from being able to participate fully in the petition review. As a consequence, the proposed findings do not fully assess several of the criteria required to be addressed by BIA regulations. In some cases, BIA even admits to this shortcoming. Moreover, these changes in procedure were not accomplished through notice and comment rulemaking, as required by the APA.

Apart from the procedural shortcuts that undermine the thoroughness and accuracy of the acknowledgment review, the proposed findings on the Pequot petitions are based on changes to the substantive standards for acknowledgment set forth in 25 C.F.R. Part 83. For example, the proposed findings appear to give unprecedented, if not determinative, weight to the existence of a State reservation, even if the State's recognition was little more than social assistance. The findings allow petitioners to satisfy the requirement of descent from the historical tribe even though they are unable to establish that their ancestors were in fact Pequots. In addition, the proposed findings allow the petitioners to show their connection to the historical tribe even though their ancestors were not demonstrated to have maintained tribal relations. All of these are serious departures from previous BIA acknowledgment decisions. Were such substantive changes put out for comment under the APA, they no doubt would have elicited extensive observations that such relaxed and easily satisfied standards run the risk of acknowledging tribes that cannot show evidence of tribal continuity.

Mr. Secretary, procedures that favor speed over accuracy and thoroughness, procedures that stack the deck in favor of petitioners while sacrificing the rights and participation of interested parties, and agency practices that inhibit the full and fair investigation of the facts all undermine the integrity of the BIA acknowledgment process and erode the public confidence in its fairness and objectivity. Indeed, as described in the enclosed issue paper, the Towns question the legal authority of BIA even to pass judgment on acknowledgment petitions. Shortened procedures, coupled with changes in substantive criteria that abandon the requirement to demonstrate genuine tribal descent, disserve the interests of all parties, Indian and non-Indian, who are affected by acknowledgment decisions.

One must presume that the goal of acknowledgment procedures is to assure that qualified descendents of historical tribes, and no one but qualified descendents of historical tribes, obtain the benefits of our country's Indian policies. The BIA acknowledgment process should enjoy a reputation of objectivity and integrity, dedication to a strong documentary record and an open process. Although surely I wish to protect the interests of the Towns, I am compelled to raise these issues with you at this juncture because I am persuaded that the very integrity of the acknowledgment process is imperiled if the procedural and substantive problems described in the enclosed issue paper are not checked by your intervention.

I ask that you review the attached analysis, and that you give the issues raised your immediate attention. In the event these issues cannot be corrected within the Department, you should know that the Towns have authorized us to take steps to challenge BIA's actions.

Very truly yours,

Guy R. Martin

GRM/mms

Enclosure

cc: M. Frances Ayer, Esq.
The Honorable Richard Blumenthal
Mrs. Agnes E. Cunha
The Honorable Christopher Dodd
The Honorable Samuel Gejdenson
The Honorable John D. Leshy
The Honorable Joseph Lieberman
Patricia A. Marks, Esq.
Mr. Kenneth Reels
The Honorable John G. Rowland
Mrs. Mary Sebastian

ISSUE PAPER

DEFICIENCIES IN THE REVIEW OF THE EASTERN PEQUOT AND PAUCATUCK EASTERN PEQUOT ACKNOWLEDGMENT PETITIONS

This paper addresses the serious deficiencies inherent in the review conducted by the Bureau of Indian Affairs (BIA) of the acknowledgment petitions filed by the Eastern Pequot and Paucatuck Eastern Pequot groups. It discusses BIA's review of those petitions in the context of the direction the acknowledgment process appears to be heading. The paper provides background on the petitions, and describes deficiencies in all of the following areas: failure to release documents; unlawful preclusion of evidence from the record supporting the proposed findings; improper promulgation of new acknowledgment procedures; failure to publish valid proposed findings; improper and inappropriate substantive changes to acknowledgment criteria; and improper participation by the Assistant Secretary. In addition, the paper raises questions regarding the authority of BIA to acknowledge Indian tribes. The actions necessary to correct these deficiencies are set forth at the end of this paper.

I. BACKGROUND

A. The Pequot Petitions

BIA has issued proposed findings to acknowledge the Eastern Pequot and Paucatuck Eastern Pequot petitioning groups as Indian tribes under federal law. The proposed findings are now undergoing public review pursuant to 25 C.F.R. § 83.10(i).

If these groups ultimately are recognized along the lines suggested in the proposed findings, several troubling precedents would be established. Two new Pequot Tribes would be acknowledged even though the ancestral lines through which they claim descent cannot be

shown to be of Pequot heritage. Two new Pequot Tribes would be acknowledged even though the ancestors through which descent is claimed did not maintain continuous tribal relations with the historical Pequot Tribe. And, two new Pequot Tribes would be acknowledged even though the purported tribal entities – the Eastern Pequot and the Paucatuck Eastern Pequot – did not even exist at the time of "first contact" with non-Indians (in this case, European colonists in the mid-1600s), as required by 25 C.F.R. § 83.7(b).

By overlooking these and other serious deficiencies with the petitions, the practical result of BIA's proposed findings would be to acknowledge the third and fourth federal Indian Tribes within a 20-square mile area of southeastern Connecticut. All four of these Tribes trace their origin to the same historical Pequot Tribe. Yet, each Tribe and petitioning group wants its own identity, its own reservation, its own sovereign authority, and its own casino resort. In addition, at least three more Connecticut groups apparently claiming descent from the original Pequot Tribe have filed acknowledgment notices with BIA, a potential total of seven tribal entities from a common historical base, and in a remarkably small area.

The prospect of having several additional federally-acknowledged Tribes in this region, particularly under these irregular circumstances, is of great concern to the Towns. Already, the Towns are dealing with the consequences of being the host communities for the Mashantucket Pequot Tribe. The legitimacy of this Tribe has itself been called into question by a recently published book entitled Without Reservation: The Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest Casino. One of the consequences of the Mashantucket Pequot recognition has been the Towns' eight-year legal battle with the Department of the Interior to prevent the Tribe from unlawfully expanding its trust lands

beyond the boundaries of its reservation. As a result of this experience, and the continuing problems the Towns confront due to the Tribe's development activities and attempts to expand its land base at the expense of local government powers, the Towns are concerned about the possibility that two more tribes might be acknowledged through a flawed procedure and based on the most questionable and uncertain of factual grounds. They also are concerned that BIA is in the process of so seriously relaxing the acknowledgment standards that still other petitioners would be recognized without cause in a process lacking objectivity. Such an action by the federal government creates the prospect for land claims litigation, loss of tax base, jurisdictional conflicts, diminution of State and local government control over land use and other regulatory matters, adverse environmental, social, and economic impacts associated with casino development, and other sources of conflict and controversy. The serious problems the Towns have encountered as a result of the recognition of the Mashantucket Pequot Tribe, and the continued deterioration and subjectivity of the process since then, have caused them to view all acknowledgement petitions with caution and skepticism.

The point of raising these concerns is not that requests for acknowledgment should not be considered. Instead, as a matter of federal policy, acknowledgment decisions should be made through fair and balanced procedures, under clearly defined and Congressionally mandated standards, and without the appearance of bias or favoritism.

B. Role of the Towns In the Petition Process

Based upon these concerns, the Towns reluctantly concluded it was necessary to participate in a review of these recognition petitions. Thus, for two years the Towns have participated in good faith as interested parties in the acknowledgment process. They have

done so not in opposition to the petitioners' claim to Indian heritage. Rather, they are acting out of concern that BIA is proceeding well beyond its legal authority without full and objective consideration of the facts and without respect for the interests of third parties.

As interested parties, the Towns have made a considerable investment in retaining experts on tribal acknowledgment to review the petitions and provide evidence that would be of assistance to BIA in the review process. The Towns have undertaken this analysis in an objective and impartial manner for the purpose of providing an independent assessment of whether the petitioners satisfy BIA's acknowledgment criteria in 25 C.F.R. Part 83. The Towns have taken this step even though they do not concede that BIA has legal authority to acknowledge Indian tribes under federal law.

Throughout the process of gathering and analyzing this information, the Towns have maintained an open mind as to whether the petitioners should be accorded federal acknowledgment. They have done so despite unfair and mean-spirited attacks by both petitioners, who have attempted to stifle the Towns' participation as interested parties.

To date, the Towns have not taken a formal position on whether the petitioners satisfy the acknowledgment criteria. This is because the Towns wish to review all of the relevant evidence and complete their own independent analysis before deciding whether to take a formal position. While the Towns' research to date suggests that neither petitioner qualifies under the applicable acknowledgment standards, if applied fully and objectively, these three local governments are reserving final judgment until all of the facts are before them.

Since obtaining formal interested party status on July 14, 1998, the Towns have made extensive and diligent efforts to assist in developing the record relative to these petitions. They have retained four technical experts in disciplines relevant to tribal acknowledgment. Through their work, the Towns have submitted nine technical reports consisting of over 300 pages of analysis and thousands of pages of evidentiary documents. The Towns have carefully reviewed documents made available by BIA. The Towns have also conducted their own research and document collection. In carrying out this role, the Towns have spent over $100,000 and invested countless hours. At every step of this effort, the Towns have made the results of this research and their communications with BIA available to the petitioners, a courtesy not returned by the Eastern Pequot or the Paucatuck Eastern Pequot groups. The resulting studies and data have been submitted for the record. We are aware of no other acknowledgment proceeding in which interested parties have made such a concerted and diligent effort to assist in the fact-finding process.

II. BIA'S IMPROPER ADMINISTRATION OF THE ACKNOWLEDGMENT PROCESS

Unfortunately, the Towns' ability to take advantage of the opportunity provided under the acknowledgment regulations to participate as interested parties has been frustrated and undermined by numerous BIA actions. These abuses of agency authority are so severe and compelling that they require Secretarial intervention at this time. These deficiencies fall into five categories, each of which is discussed below.

A. BIA's Unlawful Failure to Release Documents

For the entire time the Towns have participated as interested parties, BIA has repeatedly violated its duty to make documents pertaining to the petitions available. For

example, the Towns' and the State's request under the Freedom of Information Act ("FOIA") for the materials submitted by the petitioners themselves – the essential starting point for a review of the acknowledgment claims – has yet to be answered in its entirety, even though it was filed more than two years ago. Although the request involves a large number of documents, that material is readily accessible to BIA, and the Towns are entitled as parties to have it. There is no excuse for such unjustified violations of FOIA, the rights of the Towns as interested parties, and fundamental principles of fairness and due process. We understand that BIA is finally making many of these documents available, but that does not change the fact that the response will still be incomplete, and was delayed so seriously as to have fundamentally compromised the Towns' right to participate.

Even simple requests for documents have not been responded to in a timely manner. On February 16, 2000, for example, the Towns filed a FOIA request for only sixteen documents. Each document was clearly listed with date and title or other identifying information. Nearly three months later, that simple request had not been answered.

The Towns have even encountered resistance from BIA when trying to review the record of the petitions in BIA offices, a standard practice made available on a regular basis to parties involved in the acknowledgment process. For example, our efforts simply to schedule an opportunity to review BIA records on these petitions initiated last October was at first ignored, and then delayed, by BIA for months. We were not allowed access to the files until February, even though we made at least 10 telephone calls, several of which were unanswered, and sent three letters to arrange for this review. Similarly, many of the Towns' letters to BIA asking for responses to important questions have gone unanswered.

BIA's systematic and repeated failures to respond to the Towns' inquiries and requests for information are inexcusable and inexplicable on the merits. They appear to show a conscious effort by BIA to compromise the ability of the Towns to participate in the petition process – a right guaranteed to them "fully" by the BIA regulations. 59 Fed. Reg. 9280, 9283 (1994). As a result, BIA has abdicated its responsibilities, not just under FOIA and the other laws governing the fair and objective administration of agency responsibilities, but also under the very process it has established to ensure a searching and objective review of claims to tribal status. We appreciate the heavy workload BIA confronts on acknowledgment issues, but the problems the Towns have encountered cannot be excused on that basis.

B. Arbitrary and Capricious Selection of Deadline for Evidence on the Proposed Findings

BIA recently announced what appears to be a conscious decision to establish a retroactive cut-off deadline for evidence to be considered for the proposed findings on the petitions. For these petitions, BIA apparently decided in February of this year to set such a deadline as of April 5 of last year. The Towns were not notified of this deadline until March 2, 2000, when they received copies of letters to the petitioners. As a result, the Towns invested considerable expense and effort in preparing evidence for BIA to consider in connection with the proposed findings on these petitions, only to be told after-the-fact that it would not be considered for the crucial proposed findings.

We believe that this deadline was set after the Assistant Secretary for Indian Affairs issued a mandate on new procedures that would be followed in connection with acknowledgment petitions. The Assistant Secretary published a Federal Register notice of those changes on February 11, 2000, with no opportunity for public comment. 65 Fed. Reg.

7052. That notice establishes a procedure whereby no additional evidence will be considered after a petition comes under active consideration. It appears that BIA, sometime after the February 11 notice, established the April 5, 1999, cut-off date for evidence on these petitions. As a result, the record on the proposed findings does not include the majority of the evidence submitted by the Towns, much of which identifies serious deficiencies in the petitions.

The Towns have submitted three letters asking BIA to explain when it selected this cut-off date and on what basis. We have called and asked the same questions. Consistent with BIA's dismal record in responding to the Towns, these inquires have gone unanswered.

Even more troubling is the apparent basis upon which BIA selected the April 5, 1999, cut-off date. That is the very date on which the Paucatuck Eastern Pequot petitioner apparently submitted a purported critique of the only evidence filed by the Towns prior to that date. Thus, it appears that sometime in February of this year BIA looked back over the record, picked a date that suited its purpose to give the petitioners the last word on the proposed finding, and arbitrarily and retroactively set the cut-off date on that basis. Moreover, BIA made the back-dated decision even though the Towns had submitted a detailed rebuttal of the Paucatuck Eastern Pequot's response shortly after April 5, 1999, as well as a substantial amount of additional evidence and analysis.

We trust you would agree that such an approach is neither fair play nor consistent with BIA's duty, and the Towns' effort, to develop a comprehensive, sound, and objective record inclusive of all the facts. Without question, BIA has failed to allow the Towns to participate "fully" in the development of the proposed finding, as provided for in the acknowledgment regulations.

The Towns' concerns regarding the arbitrary and capricious selection of the cut-off date and the failure of BIA to provide the relevant documents go to the heart of the validity and fairness of the acknowledgment process. It is not enough to allow review of the documents in BIA's offices. The evidence relative to these two petitions is highly technical in nature and entails on the order of 20,000 pages. The detailed technical review by the Towns' experts necessary to relate this information to the acknowledgment criteria requires hands-on access to the documents. This cannot be completed effectively in BIA's offices.

It also is not sufficient to state that only proposed findings have been issued and that all of the Towns' evidence will be considered before a final decision. Certainly, in the public perception, a proposed finding carries significant weight. It puts parties concerned about the validity of the claims in the difficult position of having to prove BIA wrong. As has been demonstrated in this case already, the issuance of the proposed findings establishes expectations on the part of petitioners and their financial backers that acknowledgment will be granted. Already, plans for new casinos are being drawn up in the region, even though BIA has not even considered the critical evidence submitted by the Towns. Without question, the correct and legally sustainable way to proceed is by issuing objective and comprehensive proposed findings based on all the facts, not result-oriented determinations driven by artificial deadlines, as appears to have been done here.

C. Failure to Publish a Valid Proposed Finding

As noted above, the Assistant Secretary for Indian Affairs unilaterally decreed changes to the BIA acknowledgment regulations on February 11. Although his notice results in changes in the existing acknowledgment procedures, the Assistant Secretary provided no

opportunity for public comment. The avowed purpose of the changes was to expedite the acknowledgment process. The price for doing so, in addition to violating the Administrative Procedure Act ("APA") by failing to conduct a public review procedure, was to sacrifice thoroughness and detail in the name of expedited proceedings.

The Assistant Secretary signaled his intent to sacrifice accuracy for speed in his remarks published in the New Haven Register, where he is quoted as saying: The risk of speeding up the acknowledgment process "is we grant recognition to a tribe that maybe doesn't deserve it. And I would much rather take that risk than the risk that we do not grant recognition to a tribe that deserves it." See Attachment 1.

Needless to say, the Towns object strongly to the bias in favor of petitioners reflected in this statement. It is both bad policy, and inconsistent with the law, for such an approach to serve as the basis for the acknowledgment process. Clearly, the proposed findings reflect the problems inherent in this approach. At numerous points in the proposed findings, BIA admits that a more careful review was precluded by "time constraints" and "the new procedures" (i.e., the Assistant Secretary's February 11 notice). See, e.g., Eastern Pequot Proposed Finding, 79 para. 4, 133 para. 2, 135 para. 4, 141 para. 2, 154 para. 3; Paucatuck Eastern Pequot Proposed Finding, 79 para. 5, 80 para. 1, 92 para. 3, 127 para. 4, 129 para. 5, 134, para. 4, 135 para. 5, 139 para. 4, 142 para. 3. In the past, BIA would take the time necessary to ensure a reasonably thorough review. Now, BIA is placing a priority on getting through the paperwork at the expense of conducting careful and comprehensive analyses, and the Assistant Secretary endorses the new approach.

In the case of these petitions, however, the most serious casualty of BIA's fast-track approach is that the proposed findings are not substantively sufficient under its own regulations. To achieve acknowledgment, the petitioners must prove that they satisfy all seven criteria. Yet, in this proposed finding, BIA concedes that it has not even assessed fully whether two of these criteria have been met. For example, criterion (b) of the regulations requires BIA to make a finding that the petitioner "comprises a distinct community and has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b) (emphasis added). Criterion (c) requires a finding that the petitioner has "maintained political influence or authority over its members as an autonomous entity from historical times until the present." Id. at § 83.7(c) (emphasis added).

Despite these clearly stated regulatory requirements, BIA admits in the proposed findings that it has made "no specific finding for the period from 1973 to the present." See, e.g., Eastern Pequot Proposed Finding, 62 paras 5, 7, 100 para. 5, 120 para. 3; Paucatuck Eastern Proposed Finding, 63 para. 5, 7, 96 para. 5, 120 para. 3. BIA concedes that it has been derelict under its own rules by failing to review evidence related to an entire generation of the petitioners under two criteria. In past BIA decisions, failure of a petitioner to prove continuity over a generation has resulted in negative findings. This is especially true when those gaps occur in the twentieth century (see proposed findings for Gay Head Wampanoag, Mohegan, and Miami of Indiana petitions). Here, BIA proposes positive findings without even assessing information on this period for either petitioner.

Finally, under its "haste makes waste" approach, BIA has departed from past practice by failing to make available the technical reports upon which the proposed finding is based, as

well as the bibliography of documents relied upon. Again, this failure reflects an intent to avoid full and open review of the record and the rationale for the decision underlying BIA's actions. This failure violates 25 C.F.R. § 83.10(h), which requires that such information be provided to interested parties. We understand that BIA is now making this information available, but the Towns have already been denied the opportunity to review these documents for about one-fourth of the available review period.

In summary, BIA violated the APA by changing its acknowledgment process through the February 11 notice without public comment.[1] The changes wrought by that notice permeate the proposed findings and appear to have played a significant role in the defects inherent in them. The findings themselves are defective on their face and fail to meet the requirements of the acknowledgment regulations. These numerous and serious legal defects compel the withdrawal and republication of the February 11 notice and the proposed findings.

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[1] BIA may seek to argue that this notice merely announces changes to internal procedure. This is not the case. For example, the notice precludes any evidence after a petition goes under active consideration. 65 Fed. Reg. 7052, 7053. However, the existing regulations expressly provide for evidence to be submitted during the preparation of the proposed findings, including after the petition goes on active consideration. (See, e.g., 25 C.F.R. §§ 83.10(a) (BIA may consider "any evidence which may be submitted by interested parties"); 83.10(f)(2) (the petitioner "shall be notified of any substantive comment on its petition received prior to the beginning of active consideration or during the preparation of the proposed finding, and shall be provided an opportunity to respond to such comments"). (Emphasis added). Under APA case law, this change to the existing regulations without notice and comment violates the APA. See, e.g., Phillips Petroleum Co. v. Johnson, 22 F.3d 616 (5th Cir. 1994) (Minerals Management Service violated the APA in issuing a royalty-valuation procedure without notice and comment; the APA exemption for changes to agency procedures "does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated"), cert. denied, 514 U.S. 1092 (1995); Sequoia Orange Co. v. Yeutter, 973 F.2d 752 (9th Cir. 1992) (Secretary of Agriculture's action of changing procedure for approving amendments to marketing orders governing the sale and delivery of agricultural products subject to the APA); Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980) (Department of Labor violated APA by changing its methods of determining unemployment rates for purposes of implementing jobs program); Ruffin v. Kemp, No 90 C 2065, 1992 U.S. Dist. LEXIS 10320 (N.D. Ill. 1992) (Housing and Urban Development procedures for state due process determinations required to undergo notice and comment).

D. Unlawful Changes in Substantive Standards for Acknowledgment

In addition to these procedural concerns, the proposed findings are based upon a number of fundamental changes in the manner in which BIA applies the acknowledgment criteria in 25 C.F.R. Part 83. These dramatic changes in precedent include the following:

1) Giving unprecedented, if not determinative, weight under criteria (b) and (c) to the mere fact of State recognition and the existence of a State reservation, even through the State's function was little more than social assistance;

2) Allowing the petitioners to satisfy the requirement for descent from the historical tribe in the absence of being able to establish that their ancestors were in fact Pequots; and

3) Allowing the petitioners to show their connection to the historical tribe even though their ancestors cannot be shown to have maintained tribal relations.

These are all important issues that go to the very heart of the acknowledgment process. If established, these changes would fundamentally alter the acknowledgment criteria themselves, and require rulemaking. In any event, such sweeping changes should not be made in the course of a proceeding as significant and flawed as this one has been.

E. Improper Role of the Assistant Secretary

The proposed findings also may have been tainted by the personal involvement of the Assistant Secretary. As described in the attached letter from the Towns to Mr. Gover, it is readily apparent that these proposed findings, if finalized, will have a direct effect on the acknowledgment petition of his former client, the Golden Hill Paugussett group. See

Attachment 2. Mr. Gover has recused himself, however, only from the Golden Hill matter. The Solicitor's Office has determined that he should not participate in petitions that present issues which could affect the Golden Hill decision. Despite these constraints, and the obvious interrelationship of the Pequot and Golden Hill matters,[2] the Assistant Secretary presided over both Pequot petitions, producing new principles of tribal acknowledgment in the proposed findings that would appear to redound to the benefit of his former clients. These circumstances would appear to call for Mr. Gover's recusal from the Pequot petitions, as well as consideration of the need to withdraw the proposed findings for reconsideration subject to all of the evidence and review by an impartial decisionmaker.

III. LACK OF BIA AUTHORITY TO ACKNOWLEDGE TRIBES

Finally, we wish to note that in raising these issues the Towns do not concede that the Executive Branch has legal authority to acknowledge Indian tribes under federal law. It appears that Congress has never delegated such authority to the Executive Branch and that, even if it has, no legally sufficient standards to guide such action have been articulated.

This letter is not the place to present our detailed analysis of this issue, but suffice it to say that Congress has never delegated to the Executive Branch the very significant power to acknowledge the existence of a government-to-government relationship between the United States and a tribal petitioner. An explicit act of Congress would be necessary to do so, as the

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[2] As discussed in the attached letter, there are at least five issues in common among the three petitions. They relate to the weight accorded to state recognition, the proof petitioners must show of tribal descent and continuity, the need to maintain tribal relations, the applicability of the "one family" rule, and the relevance accorded to obituaries in proving tribal descent.

U.S. Supreme Court recently recognized on the related question of establishing Indian country in Alaska v. Native Village of Venetie Tribal Gov't., 522 U.S. 520, 531 n. 6 (1998).

Not only does such authority not appear to exist, Congress on several occasions over the last 20 years has expressly declined to grant such a delegation. The Department of the Interior's own officials have conceded this point. For example, in a 1976 legal opinion, Deputy Solicitor David E. Lindgen concluded: "While the law is admittedly very unclear on this subject, on balance we do not believe the Secretary today has the authority to recognize Indian Tribes." Recognition of Certain Tribes: Hearings on S. 2375 before Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. 64 (1978)(emphasis added). The opinion went on to note that legislation specifically conferring such authority would be developed and that tribes previously recognized administratively would retain that status "whether or not the Department had the authority to recognize" because the Congress would have subsequently ratified those actions "by appropriating monies for purposes of providing services to those tribes." Id.

Testifying before Congress on one such bill to delegate this authority to the Secretary, the Deputy Assistant Secretary of the Interior for Indian Affairs, George Goodwin, admitted in 1978 that no such express delegation had ever been granted. After an apparent reversal in the Department's legal analysis of the issue, Mr. Goodwin asserted that such authority was implicit in the Executive Branch's general responsibility for Indian affairs. He conceded, however, that "there is no specific legislative authority on the subject." See Recognition of Certain Indian Tribes: Hearings on S. 2375 before Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. 15 (1978). See also Federal Recognition of Indian Tribes: Hearings on

H.R. 13773 and Similar Bills before Subcomm. on Indian Affairs and Public Land of the House Comm. on Interior and Insular Affairs, 95th Cong., 2d Sess. 14 (1978).

A similar admission was made in 1982 by a representative of the then-unrecognized Mashantucket Pequot Tribe. In testifying why Congress should recognize the Mashantucket Pequot petitioner as a federal tribe and forego the factual analysis attendant upon such review conducted by BIA, Suzan Harjo of the Native American Rights Fund stated: "I would like to say a word about that and the Federal Acknowledgment Project, that recognition has been a function and prerogative of Congress, not the executive branch." Settlement of Indian Land Claims in the States of Connecticut and Louisiana: Hearings before the House Comm. on Interior and Insular Affairs, 97th Cong., 2d Sess. 46 (1982). As she further noted, Secretary of the Interior Morton "felt that they [tribal petitioners] could not be recognized administratively." Id. No intervening legislation has been enacted since the Department's 1976 legal opinion or this testimony in 1978 and 1982 to provide such an express delegation.

We are aware that BIA has attempted to rely upon several broad sources of legal authority to be the basis for this power (5 U.S.C. § 301; 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457). The plain meaning of these provisions, however, supported by the intent of Congress apparent in the relevant legislative histories, makes it clear that acknowledgment authority was not expressly covered by those provisions. The Supreme Court has emphasized that the text of a statute that an agency asserts is a delegation of power must reasonably demonstrate "that the grant of authority contemplates the regulations issued." Chrysler Corp. v. Brown, 441 U.S. 281, 308 (1979). Nothing in the provisions BIA relies upon confers authority for so sweeping and significant a grant of power as claimed in the federal acknowledgment regulations.

Nor can BIA rely upon section 103(3) of the Federally Recognized Indian Tribe List Act of 1994 as a source of this power. Pub.L. No. 103-454, 108 Stat. 4791 (1994) (codified in part at 25 U.S.C. §§ 479a - 479a-1). An early version of this law that would have delegated such power failed to pass. Rather than confer such power by delegation, Congress merely included in the bill that was subsequently enacted a finding that tribes may be recognized by Act of Congress, the courts, or by an administrative act under 25 C.F.R. Part 83. That finding appears to have been added somewhat as an afterthought, and without apparent debate or public input as to its meaning and potential consequences. In any event, such a mere "finding" does not confer power upon BIA. It is not an operative part of the statute, nor does it enlarge or confer powers on the Executive Branch. See, e.g., Association of Am. R.Rs v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977). BIA cannot rely upon this hortatory finding as a source of delegated power.

Moreover, any such delegation would be unconstitutional in that no meaningful standards have been articulated by Congress as to how this power should be exercised. Recently, the courts have expressed interest in revitalizing this long-standing principle and applying it in the context of administrative actions of the Executive Branch. See American Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999); South Dakota v. U.S. Dep't. of the Interior, 69 F.3d 878 (8th Cir. 1995), vacated, South Dakota v. U.S. Dep't. of the Interior, 106 F.3d 247 (8th Cir. 1996)

No court has ever addressed directly both these issues in deciding whether the Executive Branch has the authority to acknowledge tribes. The few cases to consider the

validity of BIA's acknowledgment regulations have not done so in the context of a direct challenge on these grounds.

There is no more persuasive example of problems created by this absence of a clear delegation and meaningful standards than the proposed findings set forth for these two petitions. They represent an example of BIA developing the rules as it goes along to accommodate the circumstances of particular petitions. This approach cannot be countenanced, and we ask for your personal involvement to remedy these serious deficiencies in BIA's administration of the tribal acknowledgment program.

IV. REQUEST FOR SECRETARIAL ACTION

The deficiencies in the BIA procedures and proposed findings discussed in this letter are serious and undermine the integrity and legality of the acknowledgment process. Fundamental questions of federal Indian policy are implicated.

Clearly, the Secretary possesses the power to intercede in the review of these petitions to address these problems. To allow the review in these matters to continue on its current course will only compound and magnify the existing defects. The Towns therefore call upon you to take the following steps:

1) Withdraw both proposed findings.

2) Consider the need for Assistant Secretary Gover to recuse himself from further involvement and to appoint an impartial official to oversee the processing of the petitions.

3) Direct BIA to release to the Towns immediately all requested documents.

4) Provide the Towns a reasonable opportunity, and time and access to BIA documents, to review those records and submit additional evidence and analysis relative to the proposed findings.

5) Direct BIA to develop new proposed findings that are based upon all evidence in the record.

6) Require BIA to address acknowledgment criteria (b) and (c) in their entirety in the new proposed findings so that legally sufficient proposed findings will be available for review.

7) Require BIA to make its technical reports and bibliography available at the same time as republication of the proposed findings.

8) Withdraw the February 11 notice of changes to the acknowledgment process and, if such changes are still considered appropriate, require republication subject to notice and comment procedures in compliance with the APA.

9) Reconsider the legal basis for the Department to grant acknowledgment to Indian Tribes and whether legally sufficient standards have been articulated by Congress, pursuant to which such authority could be exercised. Assuming the conclusion that such authority either does not exist or requires clarification, place the processing of these petitions on hold pending the initiation of comprehensive Congressional consideration of this issue and appropriate action.

Casinos raise the stakes for state tribes

By Leslie C. Snider
Register Washington Bureau

WASHINGTON — The head of the federal Bureau of Indian Affairs Wednesday said he is trying to speed up the tribal recognition process, and noted that the rise of gaming makes each petition in Connecticut more contentious.

Assistant Interior Secretary Kevin Gover, who said his appointment served as the lawyer for the Golden Hill Paugussetts in a recognition petition, declined to talk about his former Connecticut clients' revived case.

But he said the only risk in speeding the BIA process "is we grant recognition to a tribe that maybe doesn't deserve it. And I would much rather take that risk than the risk that we do not grant recognition to a tribe that deserves it."

And, while he wouldn't comment directly on the Bridgeport-based Paugussett's quest for federal recognition, he agreed that Connecticut's booming Indian casinos make federal tribal recognition a more expensive, competitive battle.

"It raises the stakes on these determinations," said Gover, who until 1997 worked for a New Mexico law firm that lobbied the BIA on recognition issues, including one Paugussetts-like nonreservation fight across the country. It also has dramatically increased the expense of the process because what you will find sometimes is a tribe supported by a casino developer doing very expensive historical research . . . spending literally millions of dollars."

As a result, he said, people who oppose the tribe's petition will also spend an enormous amount of money to prevent the tribe from getting recognition.

"The Connecticut (tribes) have a great potential to create that kind of competition," he said, noting that the battle tends to develop historical data and can slow the recognition process down.

Gover, himself, has become an issue in Connecticut, where state officials and legions of landowners from Orange to Trumbull oppose the Paugussett's petition. The tribe filed land claims in many area communities seeking the return of what they say are ancestral lands. Those claims could gain more weight if the tribe were federally recognized.

And officials worry that Gover's former work for the Paugussetts may unfairly influence the recognition process — or that it already has.

The Paugussett's petition for federal recognition was denied by the BIA in 1996, before Gover joined the agency, and that decision was later upheld by the Interior Board of Indian Appeals.

Earlier this year, however, the BIA decided to reconsider the petition based on new information and the tribe's legal objections to the expedited denial process. Because of his lobbying work on behalf of the tribe, Gover recused himself from the matter, and the reconsideration decision was made by his deputy assistant secretary, Michael Anderson.

State Attorney General Richard Blumenthal has repeatedly expressed concerns about Gover in letters to Interior Secretary Bruce Babbitt. Prior to Gover's BIA appointment, Blumenthal and others questioned certain

Pasture see Paugussetts, Page A6

Paugussetts push for tribal recognition

Continued from Page A1

ings Gover had with then-BIA head Ada Deer while the Paugussetts' petition was first being evaluated.

Catherine Sarasin, who worked with Gover and also met with Deer, denied any improper contact with the assistant secretary at the time. More recently, Blumenthal questioned Gover's influence at the ongoing Paugussett matter, and asked that he recuse himself — which Gover did.

On Wednesday, Gover said the BIA's decision to reverse itself on the Paugussett case does not reflect poorly on the agency's "expedited" review process. The Paugussett petition was the first to be considered — and denied — under that abbreviated process.

In fact, he said he is looking into ways to further speed up the review procedure without lowering the standards.

"We don't want to overresearch these things," he said. "This is not a scholarly thesis. We are making a determination on whether this group of people should enjoy a political relationship with the United States."

So far, the two Connecticut tribes that gained federal recognition — the Mashantucket Pequots and the Mohegans — struck gaming gold. Both immediately built hugely successful casinos in the eastern part of the state.

The Paugussetts have been linked to several major developers who are interested in the gaming possibilities if the tribe becomes recognized.

Towns of

Ledyard *North Stonington* *Preston*

May 5, 2000

The Honorable Kevin Gover
Assistant Secretary for Indian Affairs
Department of the Interior
1849 C Street, NW
MS-4140-MIB
Washington, DC 20240

Re: Request for Recusal – Eastern Pequot/Paucatuck Eastern Pequot Petitions

Dear Mr. Gover:

On behalf of the Towns of Ledyard, North Stonington, and Preston, Connecticut, we are writing to ask you to recuse yourself from participation in the review of the above-referenced petitions.

It is a matter of record that you have recused yourself from the Golden Hill Paugussett petition, based upon your prior legal representation of that group. See Attachment 1. It also is a matter of record that you agreed during your confirmation process to recuse yourself from particular matters involving specific parties that you worked on personally and substantially at your former law firm. In addition, it is a matter of record that the Solicitor's Office has determined that you ought not take part in the review of other petitions that could directly influence the Golden Hill decision. See Attachment 2. On that basis you agreed, for example, to not make a decision on the Yuchi petition until after resolution of Golden Hill, due to the existence of a common issue.

It is clear from the proposed findings you have issued for the Pequot petitions that the same principles and ethical constraints apply to your involvement in those matters. All three petitions – Eastern Pequot, Paucatuck Eastern Pequot, Golden Hill Paugussett -- arise in Connecticut and present several important issues in common. In

particular, the following positions taken by you in the two Pequot proposed findings are relevant to, and could have a direct effect, on the Golden Hill decision in much the same manner as was the issue of concern in the review of the Yuchi petition.

1) The proposed findings for the Pequot petitions assign considerable and unprecedented weight to recognition of petitioning groups under State law and the existence of a State reservation. See, e.g., Eastern Pequot Proposed Finding, 63; Paucatuck Eastern Pequot Proposed Finding, 64. This approach diverges from past BIA precedent. For example, as stated on page 97 of the technical report of the 1996 Golden Hill Paugussett final determination that has been withdrawn and reopened:

> The Federal government's regulations for Federal acknowledgment consider state recognition under criterion 83.7(a), but do not treat it as dispositive in Federal acknowledgment cases. The Federal government has a responsibility to acknowledge Indian tribes with continuous existence. Requirements for recognition of Indian tribes established by individual states at any given time vary widely and are not binding upon the Federal government.

Your proposed findings for the Pequot petitions depart from this precedent and arguably stand for the proposition that the State's mere providing of land to the petitioners and any actions it took in respect to the petitioning groups provide strong evidence that the petitioners qualify for acknowledgment. See, e.g., Eastern Pequot Proposed Finding, 64. This inflation of the evidentiary weight given to actions by the State occurs under the Pequot proposed findings, even though there is no evidence of tribal representation or actual political influence or authority, and little or no evidence of community on the part of the petitioners, over long periods of time. This inflation also would occur despite the fact that the State's role with respect to the Pequot groups was nothing more than a supervisory or welfare function for most, if not all, of the relevant period of time. Moreover, the State never treated either petitioner as sovereign. This is an issue that has obvious potential bearing on the Golden Hill petition, where the State of Connecticut took similar action with respect to that petitioning group.

2) The Pequot proposed findings seek to deemphasize, if not eliminate, the need for maintenance of tribal relations between the petitioners' ancestors and the

historical tribe. Such a principle, if validated, would allow these petitioners to reconstitute their membership to avoid troublesome descent issues without the necessity of proving historical tribal relations. As demonstrated in the Towns' evidence (which BIA has for the most part not considered), there is little indication that the petitioners' ancestors engaged in actual social, cultural, or political interactions with the historical tribe. Your proposed findings appear to hold that whether such actual relations occurred is not an important factor. See, e.g., Paucatuck Eastern Pequot Proposed Finding, 137 (referring to potential for membership expansion because neither petitioner is required to show maintenance of "tribal relations"). This approach departs from past acknowledgment precedent, and it has potential application in the Golden Hill matter. See, e.g., Golden Hill Reconsideration on Final Determination, App II, n.1.

3) The proposed findings, if adopted as final, would allow for proof of descent from an historical tribe merely because the petitioners' ancestors were at some point in time listed by State overseers as members of that tribe, even though their genealogical descent from the Pequots cannot be proven. In previous acknowledgment decisions, and in the regulations themselves, BIA has required petitioners to prove actual descent from the historical tribe, and not the mere association of their ancestors with that tribe at some point in time. The same issue is central to the Golden Hill matter.

4) The Golden Hill decision addresses the important issue of whether a tribe can descend from just one petitioner family and satisfy criterion (e). That, too, is an issue in the Pequot petitions, as most of the members of the Eastern Pequots may derive exclusively from the Brushel family and most of the members of the Paucatuck Eastern petition may derive exclusively from the Gardner family, neither of whom had continuous tribal relations with the historical tribe. Even if more than one ancestral family is involved, at best these petitioners rely upon no more than two or three families, which presents essentially the same issue as in Golden Hill regarding what level of proof is necessary to show that a tribe has survived over time. This issue is common and central to all three matters.

5) The proposed findings would give weight to the identification of Calvin Williams as a Pequot in his obituary. See, e.g., Eastern Pequot Proposed Finding, 78 n.96. Previously, obituaries have not been given weight for the purpose of

determining tribal descent. The probative value assigned to obituaries is an important issue in Golden Hill with respect to William Sherman. See Golden Hill Paugussett Reconsideration of Final Determination (May 24, 1999).

These are all important issues that are shared by the Eastern Pequot, Paucatuck Eastern Pequot, and Golden Hill Paugussett matters. We raise them here not to present them for a review on the merits (which we will address in our response to the proposed findings) nor to concede the Department's authority to acknowledge the existence of Indian tribes under federal law (which we do not admit) but to illustrate the clear relationship between the Pequot and Golden Hill petitions. A further indication of the manner in which the Pequot findings serve as precedent for Golden Hill is provided by recent statements of Quiet Hawk of the Paugussett petitioner, who is attributed as stating that the issue of the relationship between his petitioner group and the Schaghticoke petitioner is "much like what happened with the Eastern Pequots and Pawtucket [sic] Eastern Pequots." See Attachment 3.

We believe the circumstances presented here warrant your recusal from both Pequot matters. The standard for recusal is whether "the circumstances would cause a reasonable person with knowledge of the relevant facts to question [one's] impartiality." 5 C.F.R. § 2635.502. Thus, the appearance of compromised impartiality alone warrants recusal because that appearance undermines public faith in the fairness of the outcome. The standards of conduct of the Department of the Interior compel a similar result. See 43 C.F.R. § 20.501. We also adopt the arguments related to due process and fundamental fairness that were raised in the State of Connecticut's request that you recuse yourself from the Golden Hill matter. See Attachment 4.

Here, the fact that your determinations in the Pequot matters could directly impact a matter from which you have already recused yourself would cause a reasonable person to question the impartiality of the result. The issues described above are so closely linked among these petitions that there can be no question that the appearance of a lack of impartiality has been created. This is true individually for each identified issue. Taken together, the fact that so many major and precedent-setting issues are common to all three petitions creates a clear appearance of a conflict, if not an actual conflict. We can unequivocally state from our position as interested parties that the impartiality of the Eastern Pequot and Paucatuck Eastern

Pequot proposed findings is very much at doubt in our minds, and in the minds of the residents of our Towns, due to these common issues with the Golden Hill matter. Hence, recusal appears to be called for.

We therefore respectfully request that you recuse yourself from further involvement in the Pequot matters. We also question whether your extensive involvement to date has compromised the proposed findings. We therefore respectfully request that you ask the Department's ethics officials to assess whether the proposed findings have been impermissibly tainted by your involvement in them. Should that be the case, the necessary remedy would appear to be withdrawal of the proposed findings for reconsideration by an impartial decisionmaker.

We raise this issue with you reluctantly, being aware of the fact that these are important issues that fall under your responsibility. It is necessary to do so, however, in light of the great significance these matters present to our communities and the corresponding importance of eliminating any suggestion of a lack of objectivity in the decision process. Our concerns in this regard are only heightened by recent revelations about the possible lack of legitimacy of the Mashantucket Pequot Tribe and the questionable methods that may have been employed to achieve its recognition from Congress, as described in the recently released book Without Reservation: The Making of America's Most Powerful Indian Tribe and Foxwoods, The World's Largest Casino.

The integrity and validity of the tribal acknowledgment process is clearly a matter of great concern to our communities. We ask you to help avoid further questions over the fairness and objectivity of the manner in which acknowledgment decisions are made by recusing yourself from these matters. We appreciate your consideration of this request.

Sincerely,

Robert M. Congdon Wesley J. Johnson, Sr. Nicholas H. Mullane, II

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 13 1999

Honorable Richard Blumenthal
Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Re: Golden Hill Paugusett Petition

Dear Mr. Blumenthal:

This letter responds to your letter dated January 4, 1999 to Kevin Gover, Assistant Secretary–Indian Affairs of the Department of the Interior. As your letter points out, by memorandum dated December 22, 1998, the Secretary of the Interior requested Assistant Secretary Gover to address five specific issues in connection with a request for reconsideration of the final determination against Federal acknowledgment of the Golden Hill Paugussett. Your January 4, 1999 letter requests Assistant Secretary Gover to recuse himself from any involvement in the reconsideration process involving the Golden Hill Paugussett.

We wish to confirm that Assistant Secretary Gover is, in fact, recused from involvement in the acknowledgment petition submitted by the Golden Hill Paugussett. This recusal applies to the reconsideration process set out by the Secretary in his December 22, 1998 memorandum. The memorandum was addressed to Assistant Secretary Gover because the applicable regulations give the Secretary "discretion to request that the Assistant Secretary reconsider the final determination on [the] grounds identified by the Board." 25 C.F.R. §83.11 (f)(2). As a result of his recusal, however, Assistant Secretary Gover will not be involved in the review. The State of Connecticut and the other interested parties will be advised shortly of the decision maker in the reconsideration process.

In addition to addressing the issue raised in your January 4, 1994 letter, we wish to point out that the regulations provide, in relevant part, that the reconsidered determination is to be issued 120

days from the date of the Secretary's request for reconsideration. 25 C.F.R. §83.11 (g)(1). Thus the reconsidered determination is due 120 days after December 22, 1998, or April 23, 1999.

We appreciate your interest in this matter, and we trust that this letter will clarify the situation.

Sincerely,

John D. Leshy
Solicitor

cc: Assistant Secretary -- Indian Affairs
Interested Parties

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

Memorandum To File

APR 1 1999

From: Solicitor

Subject: Decisionmaking in Golden Hill Paugussett (Golden Hill) and Yuchi Acknowledgment Cases

Background:

1. Yuchi

The Yuchi group of Indians filed a petition with the Department to become a federally-acknowledged tribe. The petition has, in the regular course of events, reached the Office of the Assistant Secretary-Indian Affairs, where it awaits a final determination under 25 C.F.R. Part 83. The question presented by the Yuchi petition is whether the group is autonomous of the Creek Nation, of which Michael Anderson, the Deputy Assistant Secretary, is a member. He is, therefore, recused from participation in any decision that may directly and specifically impact the Creek Nation. As described below, an issue raised during the internal review of the draft final determination in Yuchi is also raised in the reconsideration of the Golden Hill matter.

2. Golden Hill

The Golden Hill is a group in Connecticut, similarly seeking federal acknowledgment. In 1996 then Assistant Secretary Deer issued a final determination that Golden Hill is not an Indian tribe within the meaning of the regulations. The group appealed to the Interior Board of Indian Appeals (IBIA), which in June and September 1998 upheld the decision, but referred five issues to the Secretary for possible further discretionary consideration. Following the IBIA decision, the Secretary requested the Office of the Assistant Secretary to address these five issues and issue a reconsidered decision.

One of the five issues, and the one in common with the Yuchi draft final determination, concerns when an evaluation under all the acknowledgment criteria will occur, following a proposed expedited negative finding on one of several criteria, pursuant to 25 C.F.R. §83.10. This issue is characterized by the petition as a "burden of proof" issue. The Golden Hill petitioner raises another "burden of proof" issue not raised by Yuchi; that is, whether the process leading to the "expedited negative" proposed finding was properly triggered.

Assistant Secretary Gover and his former law firm represented Golden Hill before his appointment as Assistant Secretary. During his confirmation process, he agreed to recuse himself from all particular matters involving specific parties that he worked on personally and substantially for his former law firm. He has recused himself from deciding this case. When the

Casino at stake in tribal battle over the family tree

SCHAGHTICOKES
Chief Richard Velky

They "are attempting to steal my people's culture and heritage

By BILL CUMMINGS
William.Cummings@Thomnews.com

With the riches of a possible Indian-run casino looming in the background, the Schaghticoke Indians are accusing the Golden Hill Paugussett Indians of stealing their ancestors.

In a letter to federal regulators, the Schaghticokes of Kent claim the Paugussetts have wrongly included an unspecified number of ancestors in their pending application for federal recognition. If approved, recognition would result in permission to operate a casino in Bridgeport.

The Schaghticokes, who also have casino plans, claim those ancestors are members of their tribe.

The Paugussetts denied the charge, calling it "sour grapes and bad feelings."

The chief of the Schaghticokes (pronounced SK AT-uh-cokes) also raised concerns about a Bureau of Indian Affairs official who once represented the Golden Hill Paugussetts being involved in the application process.

▶ Please see TRIBES on A8

PAUQUSSETTS
Chief Quiet Hawk

"They are wrong...It's sour grapes and bad feelings between tribes."

Tribes in a tug of war over ties to ancestors

Continued from A1

The problem, according to the Kent tribe's April 24 letter to the BIA, comes if the ancestors in question are accepted as part of the Paugussett family tree. That will leave holes in the Schaghticoke heritage and hurt the tribe's chance of also receiving federal recognition.

The Golden Hill Paugussetts "are attempting to steal my people's culture and heritage," said Schaghticoke Chief Richard Velky.

"If the BIA allows this to happen it could end the Schaghticokes' legitimate claim for federal recognition," Velky said.

The BIA had no immediate response to the charges.

"If the BIA allows this to happen it could end the Schaghticokes' legitimate claim for federal recognition."

— Richard Velky, Schaghticoke chief

The Schaghticokes are asking the bureau to consider their application for recognition at the same time as the Paugussetts, thus forcing regulators to determine who belongs in which tribe. Both tribes have fewer than 400 members.

"Simultaneous review is critical to ensure that [there is no] significant harm to the historic Schaghticoke Indian Tribe's legitimate descendants," Velky said in the letter to federal regulators.

The Kent-based Indians are considerably behind the Paugussetts in the federal recognition process, and are not expected to receive an answer from regulators for years.

The Paugussetts could receive a preliminary decision as soon as July.

Paugussett Chief Quiet Hawk, who wants to build a $1 billion-plus casino in Bridgeport, dismissed the allegations, saying Schaghticokes are jealous of his tribe's application.

"They are wrong," Quiet Hawk said of the Schaghticoke position. "It's a little sour grapes and bad feelings between tribes."

The chief said the Schaghticokes are essentially an "amalgam" of different tribes.

Quiet Hawk added the Kent tribe may be trying to link the two tribes, much like what happened with the Eastern Pequots and Pawtucket Eastern Pequots.

Although both Connecticut tribes recently received preliminary federal recognition, regulators are now determining if they are different tribes or branches of the same tribe.

"There was no split," Quiet Hawk said of the Paugussett and Schaghticoke tribes.

In his letter, Schaghticoke Chief Velky cites specific relatives he believes are part of his tribe, not the Paugussetts. For example, the Schaghticokes claim:

- "Significant names are misused throughout the Golden Hill" petition, including Bradley, Kilson and Cogswell. The Cogswell name, for example, can be traced to the Civil War and George H. Cogswell, who was a former Schaghticoke chief, Velky said.
- The Paugussetts cite an 1870 census that labeled "the entire Bradley" family as "Indians." The Schaghticokes point out that the census cited was for the Schaghticoke reservation, not the general population.
- Research into Connecticut Indian history finds no mention of the Paugussett Indians after 1720.

"The Golden Hill Paugussetts [are] attempting to show descendancy from a tribe that may not have existed past the 18th century. They do this in part by bootstrapping onto the history and genealogy of our ancestors," Velky said in his letter to regulators.

Velky said he's also concerned about the relationship between Assistant Secretary of Indian Affairs Kevin Grover and the Paugussetts. Prior to his appointment in 1996, Grover served as the Paugussetts' legal council for federal recognition.

A BIA spokesman did not return phone calls seeking comment.

Just who is related to whom is crucial in determining federal recognition, which in part is based on showing bloodlines dating back hundreds of years.

Recognition is also contingent on establishing continual tribal activity, and many believe that criteria is now more important than bloodlines.

Bill Cummings, who covers regional issues, can be reached at 330-6230.

RICHARD BLUMENTHAL
ATTORNEY GENERAL

55 Elm Street
P.O. Box 120
Hartford, CT 06141-012
(860) 808-5318
Tel: (860) 808-5020
Fax: (860) 808-5387

Office of the Attorney General
State of Connecticut

January 4, 1999

The Hon. Kevin Gover
Assistant Secretary—Indian Affairs
United States Department of the Interior
1849 "C" Street N. W.
Washington, D. C. 20240

RE: Golden Hill Paugussett Petition

Dear Assistant Secretary Gover:

As you know, the Secretary of the Interior, without in any way commenting on the merits, requested on December 22, 1998, that you address five specific issues in connection with a request for reconsideration of the Final Determination issued by your department against Federal acknowledgment of the Golden Hill Paugussett petitioner.

We assume that you will recuse yourself from any involvement in this petition, as a result of your prior representation of this same petitioner (please see Memorandum of Associate Solicitor, Division of Indian Affairs to Assistant Secretary—Indian Affairs of September 13, 1996), and we would support such an action. In the event that you have not decided to recuse yourself, we formally request that you do so.

As stated in our prior correspondence of December 15, 1998 concerning the Eastern Pequot and Paucatuck Eastern Pequot petitions, the State has significant interests at stake in petitions of this nature, which include potential land claims against its citizens and the State itself, the loss of primary jurisdiction over the areas affected, the impairment of the State's police power to protect the public interest, and the possible exposure to intensive gambling operations under IGRA. As the Department has also noted, Federal tribal recognition "has considerable social, political, and economic implications for the petitioning group, its neighbors, and Federal, state, and local governments."[1] For all these reasons, the Governor and Attorney General, who are interested parties under 21 C. F. R. § 83.1, are entitled to due process of law and the State of Connecticut has a right to fundamental fairness as a governmental agency, as we are sure that you

[1] Letter from Acting Assistant Secretary of the Interior William B. Bettenberg to the President of the United States Senate, January 17, 1992. Please see also our Memorandum to the Assistant Secretary—Indian Affairs, December 15, 1998, regarding the Eastern Pequot and Paucatuck Eastern Pequot petitions, pp. 1-4, for a more specific reference to the State's interests involved in a tribal acknowledgment petition.

recognize. *See, e. g., State of Arizona v. State of California*, 460 U. S. 605, 638 n. 28 (1983) and other authorities cited in our Memorandum of December 15, 1998, *supra*, p. 1.

As we are also sure that you appreciate, there is a "powerful and independent constitutional interest in fair adjudicative procedure," which applies to administrative proceedings.[v] *Marshall v. Jerrico, Inc.*, 446 U. S. 238, 243 & n. 2 (1980). *Accord, Withrow v. Larkin*, 421 U. S. 35, 46 (1974); *see also Greene v. Babbitt*, 64 F. 3d 1266, 1275 (9th Cir. 1995) (due process applies to tribal acknowledgment determinations). Accordingly, due process requires impartiality and neutrality in administrative adjudications. *Marshall*, 446 U. S. at 242; *Withrow*, 421 U. S. at 47; *see also Schweicker v. McClure*, 456 U. S. 188, 195 (1982); *Ventura v. Shalala*, 55 F. 3d 900, 902 (3d Cir. 1995) (impartial decisionmaker requirement applied more strictly in administrative proceedings than in judicial ones).

"'[M]ost of the law concerning disqualification because of interest applies with equal force to...administrative adjudicators.'" *Gibson v. Berryhill*, 411 U. S. 564, 579 (1973). Recusal is therefore appropriate under the circumstances of this case. Please see Code of Judicial Conduct, Canons 1, 2, and 3 (c) (1) (A) and (B). It is essential to "preserve[ ] both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall*, 446 U. S. at 242. *Accord, Greene v. Babbitt*, 943 F. Supp. 1278, 1285 (W. D. 1996). "In matters of ethics, appearance and reality often converge as one." *Liteky v. United States*, 510 U. S. 540, 565 (1994) (concurring opinion of Justices Kennedy, Blackmun, Stevens and Souter). It is the appearance of fairness, and not proof of actual partiality, which is the issue, as we are sure that you understand. *See, e. g., Hammond v. Baldwin*, 866 F. 2d 172, 176 (6th Cir. 1989).

The principles of fairness, the appearance of impartiality and related requirements are also emphasized by relevant statutes, Presidential Executive Orders, and regulations on ethical standards. *See* Act of July 3, 1980, 94 Stat. 855, Arts. I and V (codified at 5 U. S. C. S. § 7301 note); Executive Orders No. 12674 of April 12, 1989, 54 Fed. Reg. 15159 and No. 12731 of October 17, 1990, 55 Fed. Reg. 42547, § 101 (a), (h), and (n), at 5 U. S. C. S. § 7301 note; 5 C. F. R. §§ 2635.101, including (b) (8) and (14); § 2635.501 (a); 2635.502 (a) (2); (b), Example 4; (d), Example 2; 57 Fed. Reg. 35006, 35025-25 (1992); 43 C. F. R. § 20.501.

In light of this body of law, we respectfully suggest that your recusal is both appropriate and necessary because of your prior representation of the petitioner, as we trust you have already

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[v] There is no question that an acknowledgment proceeding involves administrative adjudication for this purpose, even though formal hearings are not automatically mandated by statute. *See* 5 U. S. C. § 551 (7) and (6), definitions of "adjudication" and "order," *Greene v. Babbitt*, 64 F. 3d 1266 at 1275; *see also Greene v. Babbitt*, 943 F. Supp. 1278, 1285 (W. D. Wash. 1996).

concluded. We make this request with full and complete respect for you, your prominent office, and your agency.

Thank you very much for your courtesy and kind consideration.

Very truly yours,

RICHARD BLUMENTHAL
Attorney General

Copies to: R. Lee Fleming, Acting Chief, Branch of Acknowledgment and Research (fax and mail)
John D. Leshy, Solicitor (fax and mail)
Attorney Sandra J. Ashton, Office of the Solicitor, Division of Indian Affairs (fax and mail)
Myles E. Flint, Esq., counsel for petitioner (fax and mail)
David G. Leitch, Esq., counsel for requester
Kenneth E. Lenz, Esq., counsel for Connecticut Home Owners-Held Hostage, an association of numerous private property owners in the Orange and Shelton, CT areas, an interested party
John H. Barton, Esq., counsel for City of Bridgeport, CT, interested party
James A. Trowbridge, Esq., counsel for Daniel Nyzio, et al., private property owners in the Town of Trumbull, CT, interested parties
Christopher J. Devine, Esq., counsel for Town of Trumbull, CT, interested party
David F. B. Smith, Esq., counsel for Connecticut Attorneys Title Insurance Co., interested party

(Original by fax and overnight mail; other copies by first-class mail and, where indicated, also by fax).

pc: The Honorable Kevin Gover, Assistant Secretary - Indian Affairs (fax and mail)
The Honorable Michael Anderson, Deputy Assistant Secretary - Indian Affairs (fax and mail)
R. Lee Fleming, Acting Chief, Branch of Acknowledgment and Research (fax and mail)
Ms. Loretta Tuell, Special Assistant to the Assistant Secretary - Indian Affairs (fax and mail)
John D. Leshy, Solicitor, U.S. Department of the Interior (fax and mail)
Attorney Scott Keep, Office of the Solicitor, Division of Indian Affairs (fax and mail)
Attorney Sandra J. Ashton, Office of the Solicitor, Division of Indian Affairs (fax and mail)
Myles E. Flint, Esq., counsel for petitioner (GHP) (fax and mail)
David G. Leitch, Esq., counsel for requester (GHP) (fax and mail)
Kenneth E. Lenz, Esq., counsel for Connecticut Home Owners Held Hostage, interested party
John H. Barton, Esq., counsel for City of Bridgeport, CT, interested party
James A. Trowbridge, Esq., counsel for Daniel Nyzio, et al., private property owners in the Town of Trumbull, CT, interested parties
Christopher J. Devine, Esq., counsel for Town of Trumbull, CT, interested party
David F.B. Smith, Esq., counsel for Connecticut attorneys Title Insurance Co., interested party
Yuchi Tribal Organization, Petitioner #121 c/o Melvin George
Interested parties in Yuchi Tribal Organization petition: Governor Frank Keating, Attorney General W.A. Drew Edmondson, Muscogee Creek Nation, c/o David A. Mullon, Jr., E.U.C.H.E.E.
(Original by fax and overnight mail; other copies by first-class mail and, where indicated, also by fax)

State of Connecticut

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Hartford
June 7, 2000

The Honorable Bruce Babbitt
Secretary
United States Department of Interior
1849 C Street, N.W.
Room 6151
Washington, D.C. 20240

Dear Mr. Secretary:

In light of dramatic recent events, including significant explicit changes in your Indian Affairs policies, I request that you impose an immediate moratorium on the issuance of tribal recognition decisions. A moratorium is vitally necessary, and supported by comments of your own Department's officials, until a new process is created to safeguard essential rights and restore public confidence.

Chief among recent developments is the reported testimony of the Assistant Secretary of Indian Affairs Kevin Gover to the Senate Indian Affairs Committee admitting that the Bureau of Indian Affairs (BIA) cannot properly administer the existing acknowledgment process. "I am troubled by the money backing certain petitions and I do think it is time that Congress should consider an alternative to the process," Assistant Secretary Gover said. See *Connecticut Post*, June 4, 2000. "I know it's unusual for an agency to give up responsibility like this," he said in an interview with the *Washington Post*, June 2, 2000. "But this one has outgrown us. It needs more experts and resources than we have available." In another discussion, Assistant Secretary Gover acknowledged that federal recognition may be granted to tribes failing to meet all of the government's criteria. "The price of speed is that you're more likely to make a mistake. We're more likely to recognize someone that might not deserve it. But I would rather recognize someone who should not be recognized than fail someone who should." See *New London Day*, May 20, 2000.

These admissions are historic -- for their candor as well as their profound importance. But they constitute only one of the significant developments exposing serious problems in the tribal

recognition process, calling into question the integrity of the current procedure and requiring a moratorium.

A moratorium is necessary as long as the present process is under review and revision, as clearly it now is by Congress, as well as your Department. Indeed, to develop a process that is fair to both petitioning groups and state and local governments and citizens, I call for a national commission, comprised of members of all affected groups, to devise a blueprint for reform -- a new approach that functions efficiently and fairly, devoid of bias and political influence.

As you know, tribal recognition impacts profoundly on Indian tribes and on states, local communities, and private citizens. The federal acknowledgment of an Indian tribe creates a government-to-government relationship between a tribe and the United States. It has the immediate effect of elevating the status of the tribe to a quasi-sovereign nation situated within a sovereign state. As a result, federally recognized Indian tribes enjoy an unique array of privileges and immunities from many state and local laws.

Federal recognition is also often accompanied by land claims brought against innocent property owners, creating understandable anxiety in the affected communities. Trust land is generally not subject to the state's civil and criminal laws, state and local taxation, or land use and zoning requirements. Federally recognized Indian tribes occupying Indian lands may conduct gaming there in accordance with the Indian Gaming Regulatory Act. In Connecticut, two federally recognized Indian tribes operate two of the largest and most profitable gaming enterprises in the nation within 15 miles of each other. While these tribal casino operations have brought some benefits to this state, they have also presented rural communities with all the highly challenging problems of busy commercial areas with all of the attendant traffic, congestion, and development. They have created law enforcement, labor rights, and environmental challenges for the state.

The huge financial stakes mean that recognition decisions now often pit tribes against not only states and local governments, but also against competing tribes seeking recognition. For example, two Connecticut groups with pending acknowledgment petitions, the Schaghticoke and the Golden Hill Paugusett tribes, are currently engaged in a public dispute, each accusing the other of theft of ancestral heritage. Two other Connecticut groups that have recently received proposed favorable findings, the Eastern Pequots and the Paucatuck Easterns, are contesting each other's claims to a common reservation and ancestry.

The enormity of the interests at stake make public confidence in the integrity and efficacy of recognition decisions all the more essential. Unfortunately, public respect and trust in the current process has completely evaporated.

The deficiencies and inequities of the present recognition process, now widely known, include the repeated failure to provide documents to interested parties, the arbitrary retroactive application of new internal procedures to pending petitions, and the relaxation of the mandatory criteria in contravention of the regulations and previous acknowledgment decisions. Whatever the merits of the BIA process when first adopted, it is completely and unacceptably inadequate now. Its flaws reflect such substantial questions of fairness, competence, and integrity that the present system simply cannot continue. My own experience with the current process supports such widespread complaints.

Most immediately and rightly troubling is the inability of the BIA -- candidly admitted by Assistant Secretary Gover -- to resolve adequately the approximately 200 acknowledgment petitions currently pending, as Assistant Secretary Gover discussed in his testimony. In fairness to all, a better method must be devised. Because the ramifications of tribal recognition are so great and affect so many groups and individuals in such profound ways, the goal of the recognition process must be to recognize those tribes, and only those tribes, that can prove their historic tribal existence as required by well-established and accepted criteria, supported by sound persuasive evidence, substantiated and submitted in accordance with a fair, effective procedure and assessed by neutral, objective decision makers, and to do so in a deliberate manner. To achieve this goal, and to regain public trust, the recognition process must be fair, impartial, and timely -- and consider the impact of these decisions on all who will be affected, including tribes, states, local governments and communities, and individual citizens.

In his testimony, Assistant Secretary Gover said that you agreed that the present system must be fundamentally reformed. I agree. I urge you to order an immediate moratorium on acknowledgment decisions until the system can be drastically revamped and reformed.[1] Please join me in seeking the establishment of a national commission, composed of representatives of all interested and affected individuals and groups, including Indian tribes, states, local communities,

[1] The Regulations grant the Secretary the power to issue a moratorium on future recognition decisions. Section 1.2 of title 25 of the Regulations provides: "The regulations in chapter I of title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.

and the federal government, to study the present acknowledgment process and make recommendations for meaningful change.

I would be happy to discuss this with you further.

Sincerely,

Richard Blumenthal

RICHARD BLUMENTHAL

c: Connecticut Congressional Delegation
The Honorable Ben Nighthorse Campbell
The Honorable Daniel Inouye
The Honorable Don Young
The Honorable George Miller

Tribe's backer starts lobbying group

Paugussett ally Wilmot to focus on gaming

By EILEEN McNAMARA
Day Staff Writer

In his efforts to win recognition for the Golden Hill Paugussetts and open a Bridgeport casino, Thomas C. Wilmot, the Golden Hills' financial backer, has created a new lobbying group aimed at convincing Congress to support tribes and Indian gaming.

Wilmot, a wealthy mall developer who also backs a tribe that wants to develop a casino in Illinois, has established a lobbying entity called the Logan Group, which will help an undisclosed number of tribes that want to develop casinos. The Logan Group will lobby Congress to support the land claims and recognition efforts of tribes and will make campaign donations to federal lawmakers who play a role in Indian affairs, Wilmot, of Rochester, N.Y., told The Associated Press this week.

"We're trying to make people aware that this isn't some kind of joke, this is a serious matter," said Wilmot, who chairs the board of Wilmorite Inc., a national mall developer.

Wilmot has an established history of lobbying lawmakers to help him in his business ventures with Indian groups. Two years ago, he tried to persuade U.S. Rep. Christopher Shays, R-4th District, to support the Golden Hills. Shays rebuffed Wilmot. He has since called on the government's General Accounting Office to conduct a probe into the Bureau of Indian Affairs and the role lobbyists and gaming interests may play in the decisions the agency makes.

Thomas C. Wilmot

The recognition petition filed by the Golden Hills, rejected several years ago by the BIA, is being reconsidered. A preliminary decision is expected soon. The tribe wants to build what its leaders said would be the world's largest casino on the waterfront in Bridgeport.

Wilmot is a major contributor to politicians, mostly Democrats, though more recently he has given money to Republicans who could play a role in tribal issues. He has ties to the Clinton administration and last year held a $1,000-a-plate fund-raising dinner for Hillary Clinton, who has since been elected to the U.S. Senate.

Wilmot also has donated to the campaigns of Bill Clinton and Al Gore, and last year tried to donate $2,000 to a Republican congressman from Illinois whose district falls within an area where the Miami Tribe of Oklahoma has filed land claims, according to an Associated Press report. Wilmot is backing the Miamis in their attempt to reclaim 1.5 million acres in east central Illinois that the tribe said was illegally taken. He has said his company wants to manage any casino the tribe develops.

The Logan Group, which Wilmot founded with his son, Thomas C. Wilmot Jr., will represent the Golden Hills, the Miamis and several other tribes that want to start casinos, he said. He would not disclose which other tribes the Logan Group will represent.

See DEVELOPERS on A8

THE DAY, SATURDAY, JANUARY 13, 2001

'I'm becoming more concerned about his political connections and his willingness to use them. We're seeing political connectedness becoming more important than what is right.'

Richard Porter, whose home is within a tribal land claim area in Illinois

A5

Developer launches lobbying effort to further Indian gaming

From A1

The increasing role that wealthy developers like Wilmot are playing in the tribal recognition and Indian gaming arena is the reason Connecticut Attorney General Richard Blumenthal has called for a moratorium on all tribal recognitions and reform of the BIA's acknowledgment process, Blumenthal said Friday.

He and the leaders of Preston, Ledyard and North Stonington have alleged that BIA Director Kevin Gover last year improperly issued preliminary recognition of the Paucatuck Eastern Pequots and Eastern Pequots of North Stonington to pave the way for the Golden Hills to win recognition.

"My general concern is that the credibility and integrity of the process is being compromised, which is inevitable when money and special interests and political lobbying are brought to bear," said Blumenthal.

Rowland rejects proposal

Blumenthal wants the state to establish a $1 million fund so that his office can hire experts in genealogy and anthropology to scrutinize recognition petitions filed by tribes. He also has asked the state's Office of Policy and Management to include in next year's budget funding for his office to hire two new lawyers and support staff to deal with tribal-related issues. He estimated the new hires would cost $280,000.

Gov. John G. Rowland will not include the funding request in his budget proposal, Dean Pagani, Rowland's spokesman, said Friday. Blumenthal, he said, should make do with the staff he has.

"The attorney general has hundreds of attorneys who work for him. He has to re-allocate the workload within his office," Pagani said.

Blumenthal said he will take his proposal to the legislature, where he believes there is more support for it.

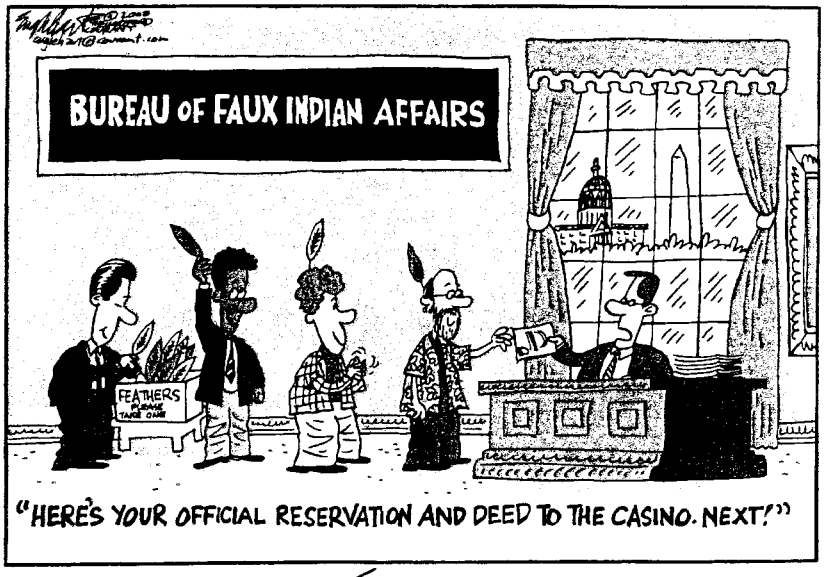
"The governor's decision not to include it in his budget will not deter me in any way," Blumenthal said.

In Illinois, a similar debate is being waged in the legislature over whether the state should develop a fund to help homeowners sued by the Miamis.

Richard Porter, whose home and small farm in Paxton, Ill., is within the Miami land claim area, has formed a grass-roots group to oppose the tribe. In November, he and several officials traveled to southeastern Connecticut to meet with local officials and discuss tribal issues and casino developments.

He said he is disturbed by Wilmot's influence and lobbying efforts on behalf of tribes and said it puts homeowners at a severe disadvantage.

"I'm becoming more concerned about his political connections and his willingness to use them," Porter said. "We're seeing political connectedness becoming more important than what is



Best Wishes from Englehart

WEDNESDAY, AUGUST 7, 2002, NEW LONDON SERVING EASTERN CONNECTICUT SINCE 1881 VOL. 122, No. 37 48 PAGES 50 CENTS

'We've spent a lot of money and time and effort and we've been loyal to the tribe. All of a sudden, when they're merged, the larger tribe seemingly wants to take it themselves. That will end up in a very large, huge litigation. It will be sad for everybody.'

DONALD TRUMP

Trump Threatens Suit Over Stake In Casino

■ *Donald Trump*

Gaming baron cites pact with Paucatucks, says he won't bow out for another developer

By KAREN FLORIN
Day Staff Writer

Casino mogul Donald Trump said Tuesday that he would meet any effort to exclude him from being part of an Eastern Pequot casino in Connecticut with a lawsuit that would tie up any development for years.

Trump has a seven-year contract with the Paucatuck Eastern Pequots, the smaller of two factions recognized by the Bureau of Indian Affairs in June as a single tribe along with the Eastern Pequots. The Easterns — the much larger faction with about 1,000 members — are backed by Southport developer David A. Rosow.

The Easterns and Paucatucks each had tribal councils and financial backers. After being recognized as one tribe, they have to form one tribal government and determine who will help them finance the state's third Indian-run casino.

In a phone interview from his Manhattan office Tuesday, Trump said that "nobody will get anything" if the Easterns try to oust him in favor of Rosow.

"We've spent a lot of money and time and effort and we've been loyal to the tribe," Trump said. "All of a sudden, when they're merged, the larger tribe seemingly wants to take it themselves. That will end up in a very large, huge litigation. It will be sad for everybody."

On the other hand, Trump said, if the parties could work out a joint venture, "it'll be a tremendous success."

Trump owns three casinos in Atlantic City and a riverboat casino on Lake Michigan. He recently took over the management of a casino opened by the 29 Palms Band of Mission Indians in southern California.

"It's a good market," he said of the Connecticut casino business. He said a casino with his name attached would outearn Foxwoods Resort Casino and Mohegan Sun.

"The Trump Taj Mahal is the number one casino in Atlantic City," he said. "Trump Tower is the highest price per square foot in New York. If we had a Trump Palace Casino or a Trump Casino (in Connecticut), we'd do more business than anybody."

Trump said he doesn't know Rosow, who has developed golf and ski resorts and signed on with the Eastern Pequots

See TRUMP page A4

Trump says Paucatucks should honor pact

From A1

in 2000.

After signing a contract with the Paucatucks in 1999, Trump reportedly tried to secure 40 acres off Route 2 in Stonington as a future casino site. Asked about a potential location and other details of an Eastern Pequot casino, Trump said the project is "moving along on all fronts."

"But I think before we go too far we really have to determine what's going to happen here," he said. "Will it be a merger of the two groups, or will it be litigation?"

Eastern Pequot Chairwoman Marcia Jones Flowers declined to comment. Rosow issued a statement through the tribe's spokeswoman.

"Eastern Capital Development has worked closely with the Eastern Pequots for a number of years and has been proud to be associated with them," he said. "The Eastern Pequots filed their petition for federal recognition in 1978 and 24 years later received acknowledgment by the federal government of their status as a federal tribe. They are in the process of combining the 150-member Paucatuck-Cunha family with the more than 1,000-member Eastern Pequot tribe and of course worrying about an appeal from various directions.

"At the appropriate time, the tribe and ECD will disclose their plans for the future, but now is neither the time nor the place for me to comment further on this subject."

James A. Cunha, chief of the Paucatucks, also issued a statement through his spokesman.

"Negotiations between the Paucatucks and Easterns continue," he said. "We have a very good working relationship with Donald Trump; we are loyal and stand beside him. Reasonable people can find amicable solutions to any issue."

Trump has not always been known as a champion of Indian gaming. Concerned about competition from the Mashantuckets and their Foxwoods Resort Casino, he said in 1993 that the Mashantuckets "don't look like Indians." He also told Congress that the Mashantucket reservation should not be a sovereign nation and that competition against his casinos was unfair because the tribes don't pay corporate taxes.

More recently, Trump tried to block Indian casinos in the Catskills by running a series of ads depicting the St. Regis Mohawk Tribe as smugglers and drug dealers. He later apologized for the ads, and last year the lobbyist who placed the ads paid a $10,000 fine.

Trump says he had a good relationship with the tribes he is a partner with. As for the Mashantuckets, he said, "What I said turned out to be true. There was a whole piece on 60 Minutes saying Donald Trump was right."

The Mashantuckets did not respond to a request for comment on Tuesday.

k.florin@theday.com

WEDNESDAY, SEPTEMBER 22, 1999, NEW LONDON SERVING EASTERN CONNECTICUT SINCE 1881 VOL. 119, No. 83 40 PAGES 50 CENTS

Paucatucks-Trump Deal Raises Possibility Of Third Casino In Area

Partnership leaves local officials wary

By DAVID TRANCHIDA
Day Staff Writer

North Stonington — The Paucatuck Eastern Pequots have formed a partnership with gaming mogul Donald Trump, an arrangement that could bring a third Indian casino to eastern Connecticut.

Chief James A. Cunha Jr. announced Tuesday that Trump will be the tribe's development partner. The tribe would have to receive federal recognition before it could open a casino, a project that is one of the options under consideration. The Paucatuck Eastern Pequots share a 224-acre reservation at Lantern Hill with the Eastern Pequots, who have filed a separate application for federal recognition.

Cunha said he expects a preliminary ruling on recognition anytime from next week to eight months from now. A final ruling likely would not come for another year after the preliminary ruling, he said.

North Stonington and Ledyard officials said their

See TRUMP page A2

■ *Developer Donald Trump*

Tycoon and tribe: Strange bedfellows?

By VIRGINIA GROARK
Day Staff Writer

The Paucatuck Eastern Pequots' choice of Donald Trump as a development partner was greeted with surprise by local tribal and casino officials who remember Trump's controversial remarks about the Mashantucket Pequots and Indian gaming.

Trump, who owns and operates three casinos in Atlantic City, made headlines in the early 1990s when he told Congress that the Mashantucket Pequots, who own Foxwoods Resort Casino, didn't look Indian to him. He also said they were unfairly stealing customers from his Atlantic City casinos because they don't pay corporate or property taxes.

"Things should be looked at carefully up there because they say they're a sovereign nation, but I don't believe that's a sovereign nation," Trump said in a December 1993 interview. "As far as I am concerned, certain people are getting away with murder."

See PAUCATUCKS page A2

From A1

towns are still trying to cope with the success of Foxwoods Resort Casino and wouldn't welcome another casino.

"So we're going to have a Trump Tower Connecticut, huh?" said Ledyard Mayor Wesley Johnson. "I don't think we need another casino in the area so it's not good news to me."

The deal with Trump was brokered by the tribe's business partner, J.D. DeMatteo, owner of Amalgamated Inc. Cunha said negotiations have been going on for months, but he could not recall which side made the first contact.

"We've had literally hundreds of development people who wanted to come in and promise us the world," Cunha said. "Mr. Trump didn't promise us anything. We discussed issues and he was very respectful of us and sensitive to our culture and heritage."

Part of DeMatteo's role was to sift through the offers made to the tribe, Cunha said.

"We've had offers from manufacturing bubble gum to spaghetti and hundreds of casino offers," Cunha said.

He declined to say that a casino was the only project the tribe is interested in.

"We're all working together as a team for the betterment of the tribe and community," he said. "We're taking a very long, hard look at a casino, but federal recognition has to come first and we don't know how long that will take."

Cunha said Trump is more than a casino owner.

"Mr. Trump is not only known for casinos, but he's also well known in the real estate development area in general," he said. "He's well known and well respected and he's done very well for himself."

Cunha said Trump will provide the tribe with funding but declined to be specific about whether he has already, or how much money is being discussed. Trump could not be reached for comment.

North Stonington First Selectman Nicholas H. Mullane II said he heard about the deal when reporters called for his reaction. The tribe's land is in North Stonington, Ledyard and Preston.

"You would assume his interest is gaming," Mullane said of Trump. Mullane said he has a copy of a 1983 resolution approved by the tribal council stating the tribe would, upon federal recognition, "take all steps to begin a venture into the gaming industry."

"That's certainly one of the things he has expertise in, but you really have to see the agreement. Is he consulting or managing or financing or is it a partnership?" Mullane said. "It could be a wide variety of things."

Mullane said it has been an overwhelming task to cope with development pressures brought on by Foxwoods and that this agreement could add to that pressure.

Johnson said he would reserve further comment until after the federal recognition process is completed, but he said his first thought is about annexation.

"I imagine they would be looking for more land, so what areas are they going to try to annex if they have the money in back of them to build a casino?" he asked.

From A1

But six years later Trump wants to be involved with the industry he once criticized. The Paucatucks announced Tuesday that they had signed a development agreement with Trump and a casino is one option under consideration.

"I expect he must have become a supporter of Indian gaming," said Mohegan Tribal Vice Chairwoman Jayne Fawcett.

Paucatuck Chief James A. Cuhna Jr. had little to say about Trump's past comments.

"I know what those articles are about, but I can only say again that he has always been sensitive to our culture and historical background," Cunha said.

The Mashantuckets would not comment on the Paucatucks' plans.

The Paucatucks' petition is under review by the federal Bureau of Indian Affairs and it will probably be several more months before a decision is issued, Cuhna said Thursday. If the tribe is recognized and decides to move ahead with casino plans, it must overcome several regulatory hurdles before it could open a casino.

If the tribe does build a casino, Trump would not only be in direct competition with the Mashantuckets but would be able to tap into a lucrative market that is competing with his three Atlantic City casinos — Trump Plaza Hotel and Casino, Trump Taj Mahal Casino Resort and Trump Marina Hotel Casino.

Part of Foxwoods' and Mohegan Sun's growth has been their ability to draw customers from the New York City metropolitan area. While gamblers who live in and around New York City used to go to Atlantic City, many are now being enticed to southeastern Connecticut by major marketing campaigns by Foxwoods and Mohegan Sun.

The phenomenon grabbed the attention of Atlantic City earlier this year when casinos there teamed up to do an Atlantic City marketing campaign in the New York area. Called "Only in Atlantic City," the advertisements tout various features of the boardwalk properties. "Not in Connecticut!" and "Not in New York!" appear in larger type throughout the advertisement. It ends with the words: "Atlantic City. Still your best bet."

As part of that same effort, the Trump properties have launched advertisements on New York radio in an attempt to attract people to its three casinos.

Mitchell Etess, senior vice president of marketing for Mohegan Sun and a former Trump Plaza employee, said he thinks Mohegan Sun can sustain a third casino even if it is one operated by Trump.

"We have known from the beginning that it was always possible that there would be more than two casinos in Connecticut, and that's why we have done what we have done as far as establishing ourselves and making ourselves such a unique and dynamic destination," he said.

"I think the market has demonstrated its ability to grow and there still is more potential."

G. Michael Brown, former chief executive officer of Foxwoods, said another casino could dilute the market but noted that the presence of two casinos in Connecticut has also drawn more gamblers here.

"I think if you combine the general Foxwoods/Mohegan Sun figures, they have expanded the pie," he said. "So the more concentration of gaming with different experiences within the same venue should have a beneficial effect. That's so long as you don't open up three in Rhode Island and three in Massachusetts and three in New York state.

"There's going to be a time when there will be a saturation of the New England market," he added. "I don't think we are anywhere near saturating the New England market yet."

By moving into Connecticut, Trump would further diversify his holdings. In addition to his three Atlantic City properties, he also has Trump Indiana Riverboat Casino at Buffington Harbor on Lake Michigan.

Recent plans to purchase the Flamingo Hilton Casino in Kansas City, however, appear to have faltered after the Missouri Gaming Commission reportedly became concerned with the company's high debt levels and previous bankruptcy.

"He's pretty smart and the first thing he wants to do, as any casino operator wants to do, is diversify their asset base, which means if you look at his casinos, certainly the lion's share of all his casino assets are in New Jersey," said gaming analyst Marvin Roffman of Roffman Miller Associates in Philadelphia. "And I think it's a good idea to diversify geographically."

But Roffman also cautioned that working with a tribe is different than what Trump has done in the past, because they are sovereign nations.

Paucatucks team up with Trump

Deal could lead to area's third casino

By Marrecca Delicato Fiore
The Sun

North Stonington – The Paucatuck Eastern Pequots have entered into a development agreement with real estate mogul and gaming developer Donald Trump. The deal could lead to construction of a third area casino.

It is a surprising partnership since Trump made headlines several years ago when he made controversial remarks about Indian gaming and in particular the Mashantucket Pequots – owners of the highly successful Foxwoods Casino.

During a congressional hearing on gaming in the early '90s, Trump said the Mashantuckets didn't look like Indians to him. He complained the tribe did not have to pay the same taxes as he did on his casino operations. He also questioned the Mashantucket claim that the tribe represents a sovereign nation.

"We are taking a hard look at casinos," Paucatuck Eastern Pequot Chief James A. Cunha Jr. said Tuesday. "We have been approached by many developers since Foxwoods opened about casino development. So, we took a serious look at them. But, it's only one among many opportunities we have discussed."

Trump owns Trump Hotels & Resorts Inc., which consists of four casino/hotels. Three of the resort properties are in Atlantic City. The fourth is in Gary, Indiana. Trump, who looked into developing a casino in Bridgeport, has been quoted as saying he would like to take on the successful casinos owned by the Mashantucket and Mohegan tribes.

When asked whether Trump would act as a financier, consultant or manager on the Paucatucks' development ventures, Cunha replied, "all of the above."

Trump, page 8

★Trump

(Continued from page 1)

Cunha said the "other" development opportunities run a "huge gamut" but could include manufacturing and/or real estate development. He said the tribe, which has petitioned for federal recognition, will not embark on any type of development with Trump until after the Bureau of Indian Affairs makes a decision on its acknowledgement application.

A preliminary decision on the tribe's federal recognition application was slated to be made last December, but was twice extended. Cunha acknowledges that, as far as he's been told, a decision could be made anytime between "tomorrow and eight months from now."

The tribe is currently recognized as an Indian community by the state of Connecticut.

The Trump organization, according to a press release, was one of many U.S. and international developers who have approached the tribe with development deals. The decision to work with Trump comes after an "extended period" of meetings, Cunha said.

"Obviously, we wanted a bright future for the tribe, but we also wanted a developer with strong experience," Cunha said. "Mr. Trump is an extraordinary individual. He is the premier real estate developer in the country. Most importantly, the tribe wanted a U.S. investor."

Although Cunha said the Paucatucks would like to limit their development to their "home base" of southeastern Connecticut, he said nothing is written in stone.

Whatever the future brings, Cunha said the Paucatucks would work closely with the elected officials of Ledyard, North Stonington and Preston when considering development.

"Our future and the towns' future are interwoven," he said. "When we prosper, the townspeople will benefit too, and we all are committed to southeastern Connecticut."

The towns have been researching the histories of the Paucatuck Eastern Pequots and Eastern Pequots. Both tribes occupy a 260-acre Lantern Hill reservation and have filed separate applications for federal recognition. Both have also sharply criticised the towns' research as biased. Eventually, the towns hope to take a position on whether to support, oppose or remain neutral on the tribes' bids.

First Selectman Nicholas H. Mullane II said Tuesday that the Paucatucks deal with Trump did not surprise him.

"With this subject, nothing surprises me anymore," Mullane said. "I would assume that because Trump is involved in gaming and has said that he wants to compete with the Mashantuckets and the Mohegans ... that this would involve casino development, but this isn't anything unexpected."

Mullane also referenced a proclamation, made years ago, in which the tribe said it was committed to gaming ventures. The proclamation was anonymously mailed to the press last spring.

But, Cunha insists that no matter what type of development the Paucatucks pursue, they will be sensitive to their neighbors needs.

However, the majority of the town's 4,000 residents and town officials have said they steadfastly oppose the construction of a third casino in southeastern Connecticut because of the impact Foxwoods Resort Casino has had on their rural community.

9-1-99

Gambling's growing political influence

Cal Thomas

The General Accounting Office (GAO) recently published a report that found soft-money contributions by gambling interests to both national political parties have increased by about 840 percent since 1992. The GAO report, which was requested by Rep. Frank Wolf (R-Va.) and conducted by the Center for Responsive Politics (CRP), an independent research organization, also found that hard-money contributions from individuals with gambling ties to federal candidates increased by 80 percent during the same period. The total number of candidates for federal office who received hard-money gifts from gambling interests was 146 in 1992, 239 in 1994 and 378 in 1996. The number declined slightly to 269 in 1998.

The GAO says the figures are conservative because state elections were not included and contributions under $200 are not required to be reported to the Federal Election Commission.

Turning U.S. into one big casino

Yes, the "gaming industry" (gaming sounds better than gambling, just as sexually active sounds better than slut) responds that gambling is legal and so are its contributions. True enough. But something does not have to be illegal to have a corrosive effect on society.

In the 1998 election, South Carolina governor David Beasley was defeated, largely because he opposed video poker, and the gambling industry killed his reelection efforts by tying the lost revenue" to a decline in education opportunities for the children of his state. He is not alone as more politicians feel the pressure to turn the United States into one huge casino and politicians into their wholly owned subsidiaries.

According to CRP's analysis, total contributions from gambling interests to federal candidates and national party committees rose from $1.1 million in 1992, a presidential election year, to $5.7 million in 1998, a midterm election year. During the same period, says the GAO, overall election campaign receipts in hard money to congressional candidates and in soft money to national party committees increased from $617 million to $851 million. In a CRP analysis of 1998 election contributions by 92 industry and interest groups, the contributions ranged from $56,000 to $59 million, and the gambling industry ranked as the 37th highest.

Is there any reason to believe, with so much at stake in the 2000 election, that gambling money won't be sought and given in even greater amounts?

Wolf, who authored the bill that led to the creation of the National Gambling Impact Study Commission, says that gambling is the nation's fastest-growing industry. Always searching for new sources of revenue, politicians have mostly looked the other way when it comes to gambling and ignored the corrosive influence gambling has on many people. Americans, he says, now wager $600 billion a year. In 1992 it was $329 billion. In 1974 it was $17 billion.

Gambling isn't harmless, as proponents claim. It can be addictive for many, causing pain and suffering not only to the gambler but to their families and communities. The gambling commission, which issued its report in June, found that gambling disproportionately affects the poor. Gamblers with household incomes under $10,000 wagered nearly three times more than those with household incomes over $50,000. Since gambling, by definition, makes money from losers, many people drop money they can't afford to lose. The working poor and many elderly people are customers of gambling interests, who contribute to politicians in a type of protection racket that helps insulate them from accountability.

Neither party is immune

Wolf has long advocated the banning of soft money from gambling interests to the Republican and Democratic national parties. Good luck. Former Republican National Committee Chairman Frank Fahrenkopf heads gambling's biggest lobby, the American Gaming Association. Apparently neither Republican nor Democrat incumbents care where the money comes from as long as they get reelected.

According to the gambling impact study, ever-younger people are starting to gamble, often beginning with lotteries and even playing games with age restrictions. Like going to the movies, kids can get around rules. Sports betting also remains a problem, risking the integrity of college athletics.

Wolf is right. The place to start reform is with the political parties. It's going to be tough because asking politicians to give up a source of money is like asking Dracula to forsake blood.

Cal Thomas is a syndicated columnist.

CAMPAIGN FINANCE REFORM FOR EVERY INTEREST EXCEPT ONE
ITEM #1: Now that that sponsors have gathered enough signatures on their petition to force a vote in the House of Representatives on Campaign Finance Reform, we need to ask you to please contact your congressional representative again, urging them to please fix the "tribal loophole."
Please write, fax, phone, or e-mail your Congressman or Congresswoman today!

Tell them there is only one special interest group in America who are exempted from the proposed ban on special interest donations and limits on campaign contributions under "Campaign Finance Reform:" Indian Tribes. The House version (HR 380) is sponsored by Rep. Christopher Shays of Connecticut and Rep. Marty Meehan of Massachusetts.
Under McCain-Feingold (S. 27) as it passed out of the Senate, "soft" money donations, which are currently unregulated and unlimited, would be banned. So why aren't Indian tribes worried about this, especially gaming tribes who run tax-free casinos, whose soft money donations have exploded in recent years?
Six of the top ten biggest soft money donors among special interest groups nationwide in the 1999-2000-election cycle were Indian tribes.
Unless we get the House version amended, deep-pocketed tribal gaming interests won't subject to the severe limitations on contributions by "individuals" to political campaigns because of an inexplicable Clinton Administration legal interpretation by the Federal Election Commission.
In Advisory Opinion No. 2000-05, issued May 15, 2000, the FEC ruled that although tribes are "persons" under Federal Election law, they are not "individuals" and are, therefore, not subject to the $25,000 limit on annual total of campaign contributions.
So while all other special interest groups and the rest of us would be limited to giving 25 $1,000 "hard" money donations to 25 candidates during an election, a tribe could use tribal government funds to give unlimited "individual" donations of $1,000 each to an unlimited number of candidates. Essentially turning soft money into hard money. (Remember, too, that non-Indian governments cannot contribute to political campaigns).
Every American citizen and federal elected official should be very concerned about giving Indian tribes such an enormous advantage over all other political donors.
If tribes aren't limited in their contributions like every other special interest group in America, we won't have Campaign Finance Reform at all. Remember we can't even vote in their elections. Shays-Meehan backers should, in the name of fairness, fix the tribal loophole. If it's not fixed, please

1/29/2002

urge President Bush to veto this legislation.
Whether or not you personally support campaign finance reform, Indian tribes should be included in campaign spending limits. Please will you help us by contacting your congressional representative as well as House Speaker Dennis Hastert of Illinois??
Here's how to contact Speaker Hastert, urging him to delay a vote on HR 380 until the tribal loophole is fixed: Honorable J. Dennis Hastert, in care of Mike Stokke, 2369 RHOB, Washington, DC 20515, Tele. (202) 225-2976, Fax # (202) 226-0337, E-mail: dhastert@mail.house.gov <mailto:dhastert@mail.house.gov> Speaker Hastert has told the press he expects this bill to pass, so amending it now is our best option. It is important that you act as soon as possible!
Write, phone, fax, or e-mail President George Bush, too, urging him to veto this legislation unless the tribal loophole is fixed. You can get a message through to President Bush in care of Terry Miller at the White House Office of Intergovernmental Affairs by E-mail: Keith_R._Brancato@who.eop.gov <mailto:Keith_R._Brancato@who.eop.gov> You should also express your views to Kristine Simmons, Special Assistant to the President for Domestic Policy: Fax # (202) 456-5557 E-mail: Kristine_Simmons@opd.eop.gov <mailto:Kristine_Simmons@opd.eop.gov> Faxed letters on your group, business, local government, or personal letterhead are especially helpful.
The President has warned Congress that they cannot count on him to veto this legislation, so we have to get a strong message through to him about this very dangerous loophole. Thanks again for your prompt action on this urgent issue. No matter what state you live in, your communication to Congress, Speaker Hastert, and President Bush are very important!!
The web site for House of Representatives is: www.house.gov <http://www.house.gov/> If you don't know your Congressional Representative's e-mail address, fax or telephone number, you can call the U.S. Capitol Switchboard at (202) 224-3121 to obtain this information. You can also get in touch with your Congressional Representative by dialing the toll-free number for the Congressional Switchboard:1-800-648-3516 Leave a message

Town of
North Stonington, Connecticut

September 26, 2001

Senator Christopher J. Dodd
100 Great Meadow Road
Wethersfield, Connecticut 06109

Senator Joseph I. Lieberman
1 State Street, Suite 1420
Hartford, Connecticut 06103

Representative Robert Simmons
2 Courthouse Square
Norwich, Connecticut 06360

Dear Gentlemen:

We are writing a follow up to our July 2, 2001, letter on campaign reform legislation with an example of the problem.

Recently the Connecticut State Ethics Commission imposed a fine of $40,000 on the Mashantucket Pequot Tribe for violations of exceeding limits on gifts of food and beverages. All we are asking is that towns have an equal playing field and that tribes are held to the same standards and reporting requirements as everyone else. These types of violation give us great concerns about the Tribe's lobbying practices.

We are also asking that you support draft legislation of **actions recognizing new Tribal Government and taking new Land into Trust Status** (attached) that we have heard is being submitted by Senator Dianne Feinstein of California.

Respectfully,

William N. Peterson Nicholas H. Mullane, II John M. Turner
NORTH STONINGTON BOARD OF SELECTMEN

40 Main Street, North Stonington, Connecticut 06359 Phone 860-535-2877/Fax 860-535-4554

Mashantuckets fined $40,000 for costly convention dinners

By **SUSAN HAIGH**
Day Staff Writer

The State Ethics Commission fined the Mashantucket Pequot Tribe $40,000 Friday after determining that a meal of quail, roast beef with grilled prawns, cheddar corn pudding and an almond basket filled with fresh berries cost more than $48 a plate.

That luxurious dinner at a downtown Philadelphia Hyatt was served last summer to Connecticut delegates at the Republican National Convention. The tribe also hosted the delegates to the Democratic National Convention in Los Angeles at an equally posh soiree at Le Merigot, an oceanside restaurant at the Santa Monica Beach Hotel.

In both cases, public officials, members of their staff or immediate families, and state employees also attended the events. And before each dinner, the tribe informed attendees that the meal and drinks cost $48 — $2 less than the $50 limit on gifts of food and drink allowed by law. Because the tribe's lobbyists are registered with the Ethics Commission, it is not allowed to give any state employee, public official or member of his or her staff or immediate family food and drink worth more than $50 or more in any calendar year.

But based on records from the Park Hyatt Hotel, the cost of the Philadelphia dinner was $116.16 per person. And at the sunset reception in Santa Monica, which included the sounds of steel drums, a buffet, sushi bar, desert table, cappuccino bar and an open bar, the tab came to $111.72 a plate.

"Just because an event is out of state and takes place at a convention, the law still applies," said Brenda M. Bergeron, the Ethics Commission principal attorney.

Friday's civil penalty was the result of a settlement reached between the tribe and the commission.

"The Mashantucket Tribal Nation voluntarily entered into this agreement of unintentional violation of the state ethics code," said Arthur Henick, a tribal spokesman. "Both events were receptions held for the Connecticut delegates, their families and visiting Connecticut citizens, to socialize with one another. Both events were reported in a timely fashion to the state Ethics Commission."

In the written stipulation and order released Friday, the tribe also emphasized that both events were widely attended and "focused primarily on the federal level."

The tribe is not the only group to pay a fine stemming from last summer's presidential conventions. ESPN was fined $30,000 for not reporting a posh dinner it hosted for the Connecticut delegation in Philadelphia. Three other companies, including Northeast Utilities, were fined a total of $9,000 for improperly reporting another event that attracted public officials.

Fifteen public officials, staff members, family members and state employees joined the delegates at the Philadelphia dinner. The elegant event, held in an atrium ballroom at the hotel, was held to honor Republican Gov. John G. Rowland and the state GOP delegates. State Republicans asked the tribe to sponsor the event for the delegates — a request the Mashantuckets gladly obliged.

"What we like to do is create events where we can either honor people who support us or educate people who can support us," Tribal Councilor Michael Thomas said last summer. Thomas was one of four Tribal Council members, including Chairman Kenneth M. Reels, who traveled to Philadelphia for the two-hour event. The tribe also attended other political events that week, including a get-together between GOP candidates from across the nation and potential Republican donors.

Nine public officials, members of their families, staff and state employees attended the event at the Democratic National Convention. In each case, the tribe used a per person cost that was based on an original estimated attendance and budget.

The tribe was then unable to substantiate that the per person cost of the events totaled less than $50, Bergeron said.

s.haigh@theday.com

Town of
North Stonington, Connecticut

July 2, 2001

Senator Christopher J. Dodd
100 Great Meadow Road
Wethersfield, Connecticut 06109

Senator Joseph I. Lieberman
1 State Street-Suite 1420
Hartford, Connecticut 06103

Representative Robert Simmons
United States Representative-2nd District
511 Cannon House Office Building
Washington, D. C. 20515

Dear Gentlemen:

We can not stress enough the importance of including the following specific language in any campaign reform legislation:

Please include a statement that Indian Tribes and Individual Tribal members are

a. held exactly to the same reporting requirements (regardless of the source of funds, i.e. Casinos, Lease Monies, etc.).

b. held to exactly the same reporting Campaign Contribution limitations.

Thank you for your attention to this request.

Respectfully,

Nicholas H. Mullane, II
First Selectman

John M. Turner
Selectman

William N. Peterson
Selectman

40 Main Street, North Stonington, Connecticut 06359 Phone 860-535-2877/Fax 860-535-4554

For casinos, donations to congressmen are no gamble

6-7-99

They hand over fat checks and expect their money's worth

By JONATHAN D. SALANT
Associated Press Writer

Washington — As a federal panel was wrapping up its study of the gambling industry, House Minority Leader Richard Gephardt flew to Las Vegas to pick up a $250,000 check from the chairman of Mirage casinos.

Other Democrats and Republicans have made similar fund-raising trips since Congress created the gambling commission in 1996. Many have taken behind-the-scenes tours of casinos on Las Vegas' famed Strip, chatting with blackjack dealers, learning how the security staff ferrets out cheaters, or watching how the industry trains its workers.

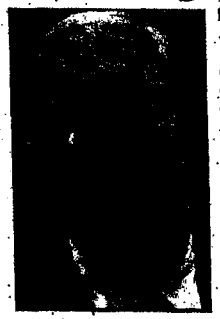
When it comes to influencing legislation, the casinos are not leaving anything to chance.

They have pursued a double strategy of on-location lobbying and campaign cash in hopes of solidifying support against some recommendations approved by the federal commission that studied the impact of gambling.

The National Gambling Impact Study Commission issues its recommendations to Congress, the president, Indian tribes and governors on June 18. Among the recommendations it has approved: a moratorium on new lotteries and casinos, and legislation to outlaw gambling on the Internet.

Experts say the industry has won over many friends.

"In Congress right now, it would be a struggle to get any anti-gaming thing passed," said William Thompson, a professor of public administration at the University of Nevada Las Vegas. "They've got the bucks and the opposition doesn't."



■ *Rep. Richard Gephardt collected a $250,000 payoff in Las Vegas.*

Thanks in part to gambling industry supporters on the panel, most of the report's dozens of recommendations will be aimed toward state government.

In addition to casinos, the commission studied gambling on Indian land, aboard riverboats and cruises, at pari-mutuel tracks and in state lotteries. Its recommendations include raising the betting age to 21, increasing help for addicted gambler and banning betting on college sports.

The casinos count on the Republican-controlled Congress to protect their interests at the federal level, even though religious conservatives are urging the party to crack down on gambling as a social ill.

Among the industry's champions are Senate Majority Leader Trent Lott, R-Miss., whose state is home to a growing casino industry, and top House Democrat Gephardt of Missouri, which allows riverboat gambling.

Lott led a group of Senate Republicans in 1997 to the MGM Grand in Las Vegas, where they toured an employee training center before mingling with donors.

In 1998, Gephardt and other top House Democrats toured the Mirage before joining donors over shrimp and lamb chops at a buffet.

Gephardt and the ranking Democrat on the House Ways and Means Committee, Charles Rangel of New York, returned last month to meet with the chairman of Mirage Resorts, Steve Wynn, and accept his $250,000 contribution for House Democrats.

"We're happy to have widespread support from individuals and groups who know how close we are to winning back the House," Democratic Congressional Campaign Committee spokesman John Del Cecate said.

Frank Fahrenkopf, the gambling industry's chief lobbyist and a former Republican Party chairman, said touring casinos and mingling with their executives help educate lawmakers so they will better understand the industry.

The American Gaming Association's lobbying expenses increased from $760,000 in 1997 to $860,000 in 1998. The group's other lobbyists include former Rep. Dennis Eckart, D-Ohio, and a former White House chief of staff, Kenneth Duberstein.

BIA calls process 'balanced'

■ Federal agency says the process of tribal recognition is fair and based on facts.

By Katie Haughey
The Sun Staff

WASHINGTON – Responding to allegations the federal Indian tribal recognition process is "broken," representatives from the federal Bureau of Indian Affairs say the process by which tribes are acknowledged relies on factual information and is fair and balanced.

Allegations the recent recognition of the historical Eastern Pequot tribe in North Stonington was improperly influenced prompted Connecticut lawmakers to call last week for a reform of the recognition system.

Charges have surfaced a highly paid lobbyist with close ties to President Bush and Gov. John G. Rowland may have influenced the recognition.

"It seems in this instance that the BIA first arrived at a conclusion and then set out to find a way to get there," U.S. Rep. Robert Simmons, R-2nd, said. "I believe a General Accounting Office investigation is definitely warranted." Simmons said he returned a $350 campaign donation from powerful Republican lobbyist Ronald Kaufman after learning the Eastern Pequots paid Kaufman $500,000 over three years to lobby for them.

However, the BIA says it does all it can to "insulate" the Interior Assistant Secretary – Indian Affairs Neal A. McCaleb – from subjective influences about tribal petitions.

"Once a petition goes into active consideration, we don't allow contact from tribal leaders or lobbyists," said Aurene M. Martin, deputy assistant secretary.

The BIA also issues a balanced amount of negative determinations along with positive decisions, which qualify tribes for casino gaming rights, health, social and educational benefits.

Martin said the recent

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★BIA

from page 1

reversal of the recognition of the Chinook tribe in Washington state is a case in point. The tribe was initially granted federal acknowledgement, but an appeal reversed the decision.

"There's no dispute these entities existed, but they didn't meet the criteria, so we had to turn it down," Martin said, adding that the bureau strictly adheres to its factual genealogical and historical requirements when making decisions.

Nevertheless, both congressional and local officials say the precedent-setting acknowledgement of the Eastern Pequots and Paucatuck Eastern Pequots as one tribe, the historical Eastern Pequots, is an incorrect and unfair decision which will "likely" be appealed.

The entire Connecticut congressional delegation met on Capitol Hill last week to discuss ways to reform the appeal process.

U.S. Sen. Christopher Dodd said Sen. Daniel Inouye, D-Hawaii, chairman of the Select Committee on Indian Affairs, agreed to hold hearings in September on the federal recognition reform bill he and fellow Democrat Lieberman are sponsoring. The bill would streamline the recognition process and permit more involvement from municipalities.

In addition, the duo will consider attaching an amendment to a Congressional spending bill which would slow down the recognition process, which they say is moving too quickly and could lead to a premature recognition of the Golden Hill Paugussett and Schaghticoke tribes, who are due for preliminary rulings this winter.

Martin said she can't see how an already slow process can get any slower.

"I don't know how you could slow it down anymore," Martin said. "Since I've been here, we've only issued one decision – that's pretty darn slow."

However, Martin said the bureau invites the congressional delegation to work with it to see if the process indeed needs changing.

The bureau currently has resources to process only three to four petitions per year, Martin said. The process, which requires proof of genealogy, sustained interaction with other governments and evidence of a governing body, can add up to thousands of documents.

The main factor that led to the joint recognition of the Paucatuck Eastern and Eastern Pequot tribes as one is the recognition by the state and the fact both were located on the same reservation. Martin said that, even though the group split in 1973, there were still members of both factions that interacted with each other.

While some officials maintain the BIA relied to heavily on state recognition when making the federal decision, Martin said she thinks they did not.

"(The state recognition showed a continuos relationship between two political bodies," Martin said, adding that is a main portion of the recognition criteria.

The BIA has received the same number of recognition petitions before and after the passage of the Indian Gaming Act.

While municipal officials say they are concerned about casino development, Martin said any new casino construction is years away.

"Recognition doesn't mean you're going to have a casino," Martin said, adding she expects the historical Eastern Pequot decision to be appealed, which could add years to a final acknowledgement.

If the new tribe withstands the appeal process, it could still take years, she said. Then land must be taken into trust and a gaming compact negated, which both can be appealed.

"There's at least five years before a casino (for the Easterns)," Martin said. "I understand local fears, but it's not an immediate p[problem."

Even though Connecticut's municipal, state and federal officials allege the BIA process is unfair, Martin maintains the decisions are fact-based.

"We have set up fair regulations for applicants, and they were revised in 1994 to streamline them and make them fair," Martin said.

The decision will go before the internal BIA should it be appealed. If the acknowledgement is upheld, the appeal could be taken into court, which would examine only the factual data used in rendering the initial decision. Any registered interested party can challenge the decision.

Town of
North Stonington, Connecticut

November 29, 1999

The Honorable Kevin Gover
Assistant Secretary
Bureau of Indian Affairs
1849 C Street, NW
MS-4140-MIB
Washington, D. C. 20240

Dear Mr. Gover:

On July 28, 1999, I wrote to you requesting the pending Tribal Recognition petitions. I have enclosed a copy of my previous letter outlining the details of that request. To date, no response has been received.

I would also ask that you look into a FOIA request that the towns of Ledyard, North Stonington, and Preston have made along with the State of Connecticut requesting a copy of the petition of the Paucautuck Eastern Pequot Indian Group with associated documents which is now well over one year old.

Your kind consideration in this matter would be greatly appreciated. If you require any further information or documentation please do not hesitate to contact my office.

Respectfully,

Nicholas H. Mullane, II
First Selectman

attachments

NHM/rdr

40 Main Street, North Stonington, Connecticut 06359 Phone 860-535-2877/Fax 860-535-4554

Chronology of BIA Failure to Respond to FOIA Requests for Tribal Recognition Petitions

March 19, 1998	Perkins Coie requests petition documents tabbed at review sessions held on February 18 and 25, and March 16, 1998. (Request satisfied July 16, 1998.)
March 23, 1998	Town of North Stonington requests interested party status and requests copies "of all documents that are filed with, or issued by, BIA regarding the petitions from the date of this letter."
April 9, 1998	State of Connecticut ("State") requests complete copies of both petition files.
August 7, 1998	BIA responds to April 9 letter saying documents will be released in installments and not according to usual FOIA timelines due to backlog.
August 24, 1998	State thanks BIA for first installment of documents and reiterates need for additional material.
September 17, 1998	Towns request extension of review period in light of not receiving adequate materials for review.
December 29, 1998	Towns transmit supporting documents to December 15 report; again request petition documents
February 12, 1999	Towns repeat need for immediate release of documents, agree to waive rights to obtain own set of documents, confirming, to aid BIA, that release to the State will suffice.
March 16, 1999	BIA responds partially to State's April 9 FOIA.
May 7, 1999	State again asks BIA for remainder of petition files.
May 20, 1999	Towns again ask for petition files.
August 19, 1999	Towns again ask for petition files.
August 20, 1999	State again asks BIA for remainder of petition files.
January 6, 2000	Towns reiterate need for documents in light of motion to issue a proposed finding filed with IBIA by petitioning group Paucatuck Eastern Pequot
January 11, 2000	State again asks BIA for remainder of petition files.

THIS IS NOT ALL THE FOI REQUESTS

VOLUME CLXII, NUMBER 190 COPYRIGHT 2000, THE HARTFORD COURANT CO. SATURDAY, JULY 8, 2000

Tribe-Status Recommendation Ignored

Official Approved 2 Groups Despite BIA Staff Advice

By LYN BIXBY
Courant Staff Writer

When Assistant U.S. Interior Secretary Kevin Gover issued preliminary approvals this spring for federal recognition of two eastern Connecticut Indian groups, he took an unprecedented step.

He rejected negative recommendations from staff of the Bureau of Indian Affairs who concluded the evidence submitted by the Eastern Pequots and the Paucatuck Eastern Pequots was deficient, according to sources and documents.

Gover's action marked the first time that recommendations from the BIA's Branch of Acknowledgement and Research were not followed since the recognition process was established in 1978, according to present and former staff.

Nedra Darling, a spokeswoman for the Bureau of Indian Affairs, which is headed by Gover, disputed the notion Friday that BAR staff had made negative recommendations on the Pequot petitions. But at the same time, she acknowledged that the staff had found evidence lacking for two key criteria, which are required for a tribe to be recognized.

Gover, she said, was not available for comment.

The preliminary approvals for the Easterns and the Paucatucks drew strong protests from officials in three towns that surround the North Stonington

Please see U.S., Page A4

FROM PAGE ONE

U.S. Official Ignored BIA Advice

Tribe-Status Recommendation Ignored

Continued from Page A1

reservation that is shared by the two groups. Town leaders accused Gover of relaxing the BIA's rigid standards to set the stage later this year for recognition of the Golden Hill Paugussetts, a tribe he once represented as a lawyer.

Gover, a Pawnee Indian who directs the BIA as the assistant secretary for Indian affairs, told his staff to issue proposed positive findings for the Easterns and Paucatucks in a March 16 memo obtained by The Courant.

"Thanks to you and your staffs for the lively and helpful discussions of these petitions," he wrote. "I read the summaries again last night, and here is what I want to do.

"As to both petitions, we should issue proposed positives. I understand the evidentiary gaps that appear in the historical record, but I believe the extraordinarily long period of documented history overcomes these problems; it is very reasonable, in my opinion, to infer from the existing documentation and the information [the BAR] developed that those communities have always been there as organized political and social entities, particularly in light of the state law recognition.

"We should point out these gaps in the proof, encourage the parties to submit further evidence, but conclude that on the entirety of the record we have considered so far, it is sufficient."

Leaders of Ledyard, Preston and North Stonington have faulted the findings for downplaying Pequot bloodlines and giving great weight to the fact that Connecticut's colonial and state governments recognized the Eastern Pequots by creating a reservation in 1685 that has lasted for centuries.

Perkins Coie, a Washington, D.C., law firm hired by the towns, has sent letters to the Interior Department contending that the handling of the Eastern and Paucatuck petitions has been so flawed that the process should be started over.

Donald Baur, a Perkins Coie lawyer, said a close examination of the BIA findings suggests that technical staff found both petitions deficient. Specifically, he said, BAR staff found insufficient evidence to satisfy two of seven mandatory criteria — maintenance of a continuous community since historical times and maintenance of continuous political authority. Recognition, he said, requires passing grades for all seven criteria.

"They're not particularly forthcoming [at BIA] in explaining what went on internally," he said. "We're still trying to figure that out ourselves."

Members of the BAR staff, experts in anthropology, genealogy and history, are well regarded by most people familiar with the highly technical and sluggish recognition process. A small team of BAR staff evaluated the Eastern and Paucatuck petitions and recommended against recognition, according to sources, and a peer review by other BAR staff supported the recommendations.

Kay Davis was a member of the technical staff in the early and mid-1990s. "Until Kevin Gover," she said, "nobody went against BAR." While questions were raised by high-level interior officials, she and another BAR staffer said no recommendations were ever reversed. She said she and others got the sense that Gover is uncomfortable with the idea of rejecting a recognition petition.

Two months ago Gover told a congressional committee that the BIA should get out of the business of tribal recognition. He testified in support of a proposal to create an independent committee to oversee the recognition process.

In his March memo on the Easterns and the Paucatucks, Gover raised an issue that he said was of greater concern to him than the lack of evidence in the petitions.

"More troublesome is the issue of whether there is one tribe or two," he wrote. "We should point out the common ancestry of the two groups and specifically invite comment on the issue of whether we can and/or should recognize both tribes or just one.

"We could even go so far as to say that the petitioners actually present a stronger case as one petitioner than two."

A week after Gover wrote his memo, his department issued the preliminary decisions, which said the BIA might ultimately decide that the two groups are factions of a single tribe.

A final determination on recognition for the Easterns and the Paucatucks is not expected until next year. The preliminary findings are followed by a 180-day comment period, an opportunity for local and state officials to raise questions or objections. Then the tribe has at least 90 days to respond before interior officials make a decision.

Attorney General Richard Blumenthal requested a formal meeting, which has been scheduled for July 28 in Washington, to ask BIA officials to justify their findings. Leaders of the three eastern Connecticut towns have said they will participate in the meeting, as will tribal officials.

The stakes are high. Federal recognition makes a tribe eligible for federal financial assistance and allows it to negotiate with state officials to open a casino. In addition, reservation land is exempt from state and local taxation and zoning laws.

U.S. Department of the Interior
Office of Inspector General

Investigative Report

Allegations Involving Irregularities in the Tribal Recognition Process and Concerns Related to Indian Gaming

A Report Initiated at the Request of Secretary Gale Norton and Congressman Frank Wolf

Report No. 01-I-00329 **February 2002**

Introduction

This investigation was initiated at the request of Secretary Gale Norton and Congressman Frank R. Wolf of Virginia who were concerned about a series of *Boston Globe* articles that covered allegations of misconduct by senior officials of the Bureau of Indian Affairs (BIA) during the final few months of the Clinton Administration. Specifically, the allegations involved irregularities in the tribal recognition process and concerns related to Indian gaming. The initial investigation was conducted between April 2001 and November 2001, in Washington, DC, Hammond, LA, and Albany, NY during which over fifty personal interviews were conducted. Several additional follow-up interviews took place during early January 2002.

At the outset, in a meeting between the Office of Inspector General (OIG) and Congressman Wolf's staff, five issues were identified for investigation:

1. **Issue:** Review the six tribal recognition decisions made by Clinton Administration BIA appointees that were contrary to the recommendations made by the career staff of the Branch of Acknowledgment and Research (BAR).

   - **Finding in Brief:** Using a consultant with questionable credentials to bolster their position, BIA officials Kevin Gover, Michael Anderson and Loretta Tuell were determined to recognize the six tribes that BAR had concluded did not meet the regulatory criteria. Gover issued four decisions contrary to BAR's recommendation. Anderson attempted to issue two decisions, which were also contrary to BAR's recommendation. In one instance, however, Anderson failed to sign the decision document prior to leaving office on January 19, 2001. With the knowledge of Deputy Commissioner M. Sharon Blackwell and other career Department of the Interior (the Department or DOI) employees, Anderson signed the decision document on January 22, 2001, subsequent to his leaving office, and therefore, without authority to do so. The Department of Justice declined prosecution against Anderson and Blackwell.

2. **Issue:** Review the legal provisions that allow former BIA employees to represent Federally recognized tribes immediately upon departure from the government, and determine the nature of certain contacts by former DOI/BIA employees with current DOI/BIA employees.

   - **Finding in Brief:** Generally, former officers and employees of the United States employed by Indian tribes may represent the tribes in any matter pending before any government entity, as authorized by 25 U.S.C. § 450i (j). However, Hilda Manuel, former Deputy Commissioner for BIA, contacted employees within the Department on a matter that would not fall under 25 U.S.C. § 450i (j). In that instance, the Department of Justice declined prosecution against Manuel.

3. **Issue:** Determine the effect of former Acting Assistant Secretary for Indian Affairs Michael Anderson's January 19, 2001 ruling approving an ordinance for "electronic pull-tab machine" gaming for the Seminole and Miccosukee Tribes.

- **Finding in Brief:** As Acting Assistant Secretary, Anderson affirmed the decision of the National Indian Gaming Commission (NIGC) that the proposed "electronic pull-tab machine" gaming activities of the Seminole tribes were Class II and gave his approval to engage in these activities. Nonetheless, Anderson's decision was rescinded to allow the present Solicitor and Assistant Secretary the opportunity to re-evaluate the decision.

4. **Issue:** Assess the oversight role of the NIGC and review the management contract between the Mohegan Tribe and Trading Cove Associates (TCA) to determine whether it exceeded the 30% cap established by Congress.

   - **Finding in Brief:** The Indian Gaming Regulatory Act (IGRA) conveys to the NIGC the authority to oversee and regulate contracts between Indian tribes and management companies. The IGRA does not, however, convey authority to the NIGC to regulate agreements between tribes and "consultants." Most tribes elect consulting agreements, and as such, are not subject to oversight by NIGC. Of the 332 gaming operations nationwide, 301 operate without management contracts and thus, do not fall under the regulatory and enforcement authority of the NIGC. The management contract between the Mohegan Tribe and Trading Cove Associates exceeded the 30% cap and was controversial within NIGC.

5. **Issue:** Determine the effect of former Deputy Assistant Secretary for Indian Affairs Michael Anderson's October 6, 2000 letter concerning the Constitutional Government of the St. Regis Mohawk Tribe.

   - **Finding in Brief**: The letter from former Acting Assistant Secretary Michael Anderson merely affirmed the results of a Federal District Court ruling which effectively terminated recognition of the Constitutional Government of the St. Regis Mohawk Tribe. The letter, however, appears to have been issued without going through the official clearance process.

Summary of Findings

1. **Tribal Recognition Decisions**

Six tribal recognition decisions were the subject of investigation:

- Eastern Pequot Petition
- Paucatuck Eastern Pequot Petition
- Little Shell Petition
- Chinook Petition
- Duwamish Petition
- Nipmuc 69A Petition

The tribal recognition process is a regulatory process by which Indian groups petition for Federal recognition as a tribe. BIA is responsible for reviewing such petitions and making a determination on these petitions for recognition. Federal recognition of a tribe conveys financial benefits and significant rights as a sovereign entity, including Federal assistance programs, exemptions from state and local jurisdictions, and the ability to establish casino gambling operations.

The Branch of Acknowledgement and Research (BAR) is the technical staff responsible for review of recognition petitions. BAR had recommended that each of these petitions be denied. BAR makes its determination using the mandatory criteria set forth in 25 C.F.R. §§ 83.7 (a)-(g) *Mandatory Criteria for Federal Acknowledgement.*

BAR consists of a Chief and seven researchers. The Chief of BAR reports to the Director of Tribal Services, who reports to the Deputy Commissioner for Indian Affairs. The Deputy Commissioner for Indian Affairs is a career position that reports directly to the Assistant Secretary for Indian Affairs. The BAR staff researches the petitioning group's genealogy, history and culture in a time-consuming process throughout which the BAR staff and petitioning group exchange information. The process was intended to take approximately two years. In practice, however, the process takes far longer, due to limited staff in BAR, lack of procedures to address increased workload, and lack of clear interpretative guidance pertaining to the mandatory criteria. *See* General Accounting Office (GAO) Report #GAO-02-49, *Indian Issues: Improvements Needed in Tribal Recognition Process,* November 2001.

At the conclusion of the review process, the BAR staff makes a recommendation to the Assistant Secretary for Indian Affairs. If the petitioner fails to meet any one of the seven regulatory criteria, BAR will issue a recommendation against acknowledgment. Prior to April 2000, only one determination had ever been issued by an Assistant Secretary that was contrary to the recommendation of BAR.

Between April 2000 and January 2001, however, BAR's recommendations against recognition for the six petitions at issue were reversed. Former Assistant Secretary Kevin Gover, who served as Assistant Secretary for the Bureau of Indian Affairs from January 1997 until January 3, 2001, reversed BAR's determination for the Eastern Pequot, the Paucatuck Eastern Pequot, the Little Shell, and the Chinook petitions, and issued decisions acknowledging these four tribes. Former acting Assistant Secretary Michael Anderson, who assumed his acting position on January 3, 2001, when Gover resigned, reversed BAR's determinations for the Duwamish and the Nipmuc.

The relationship between Gover and the BAR staff was strained from the beginning. Shortly after being appointed, Gover held a meeting with the BAR staff in which he stated, "acknowledgement decisions are political." BAR staff considered this to be an indication of how this Assistant Secretary would rule on their findings. BAR and the Solicitor who advises them were convinced that Gover did not like the regulatory process set forth in 25 C.F.R. Part 83 and, as a result, would base his acknowledgement decisions on his personal interpretation of the regulations.

When Gover did issue his decisions regarding the Eastern Pequot, the Paucatuck Eastern Pequot, Little Shell, and Chinook contrary to the recommendations of BAR, the BAR staff issued memoranda of non-concurrence for each of the four decisions. BAR had never before documented its disagreement with an Assistant Secretary.

The relationship between BAR and Anderson was even more troubled. The BAR staff collectively described the last seventeen days of the Clinton Administration as pure hell. BAR believed that Anderson and Acting Deputy Assistant Secretary Loretta Tuell viewed them as adversaries rather than subject matter experts. Tuell had pressured BAR for a positive outcome on the Nipmuc 69A and Duwamish proposed findings. BAR staff reported that Deputy Commissioner for Indian Affairs, M. Sharon Blackwell, had told them not to put their concerns on paper.

Unlike Gover who rewrote his own tribal recognition decisions, Anderson and Tuell directed BAR staff to incorporate edits that contradicted their own recommendation into their own findings. On January 18, 2001, BAR staff were told that the Nipmuc 69A and Duwamish decisions would have to be rewritten. Although they had started on the Duwamish rewrite, BAR staff did not receive edits and directions from Anderson and Tuell until 4:00 pm on January 19, 2001, after Anderson and Tuell returned from a party at Main Interior Building (MIB). The BAR staff stayed until 8:00 pm the evening of the 19th to complete the rewrite.

The troubled atmosphere was apparent to other BIA personnel as well. Then-Acting Deputy Assistant Secretary James McDivitt stated that on the morning of January 19, 2001, he spoke to a "very upset" BAR Chief who came to him seeking direction, since the BAR had not yet received the Nipmuc 69A edits. McDivitt stated that he knew little about the BAR process, but when he saw how upset the BAR Chief was, he advised the Chief not to do anything illegal. McDivitt was so concerned about the actions of Anderson and Tuell that he advised Deputy Commissioner Blackwell not to

return to MIB when he saw her leaving to attend a social function. McDivitt stated that he knew the actions taken by Anderson and Tuell on tribal acknowledgement would be subject to review by the incoming Administration and it was better not to witness any questionable actions by the Acting Assistant Secretary and his staff.

Deputy Commissioner Blackwell described her role throughout this process as somewhat of an intermediary, conveying the directives of Anderson and Tuell to the BAR staff, while attempting to protect BAR employees from any escalation. Blackwell stated that Tuell frequently said, "I'm counselor to the Assistant Secretary and the Assistant Secretary wants this done." Blackwell would then communicate the information to BAR, explaining, "This is where they want to go. They are intent on this."

Blackwell was specifically asked about the comment the BAR Chief attributed to her directing him not to put his concerns on paper. Blackwell initially denied making the comment, saying that it had become somewhat of an accepted practice for BAR to document its concerns on final determinations that were not in accordance with their initial findings. In a subsequent interview, Blackwell advised that she had given additional thought to the question and recalled a conversation with the BAR Chief. Blackwell stated that when the BAR Chief suggested documenting BAR's concerns, she said, "That will probably bring the house down." Blackwell said that she advised the BAR Chief to keep all his original drafts.

Blackwell acknowledged that on January 19, 2001, they were "trying to get [these decisions] out the door" prior to the change in Administration. BAR staff remained at work well into the evening, attempting to complete the requested changes. Blackwell stated that she also felt compelled to remain late for several reasons including the potential for conflict between BAR and Tuell. Blackwell stated that she considered physical confrontations a realistic possibility, expecting someone to "get slapped." Blackwell also expressed concern that if she had not been present, BAR staff could potentially end up with reprimands or disciplinary actions submitted to their personnel files. She said that any of these actions would have been unwarranted.

BAR staff eventually left the building around 8:00 pm after Tuell advised them that she would complete the changes. Tuell requested that Blackwell review the final determination in preparation for submission to the *Federal Register*. According to Blackwell, the final product was lacking some obvious analysis and in her opinion, would not pass judicial scrutiny.

On Monday January 22, 2001, the first working day of the Bush Administration, the BAR staff discovered that the *Summary Under the Criteria,* and two of the three *Federal Register* Notices for the Duwamish Tribe had not been signed by Anderson. All of the documents for Nipmuc 69A had been signed by Anderson and date stamped January 19, 2001. All of the documents for the Duwamish had not. The BAR Chief went to Deputy Commissioner Blackwell's office and spoke to [redacted] about the need to have Anderson sign the documents. The BAR Chief did not speak directly to Blackwell at that time about the unsigned documents.

Once it was brought to [redacted] attention, however, [redacted] contacted Anderson and told him that the documents had not been signed. Anderson agreed to drive to the Main Interior Building, where [redacted] left the building with the documents and presented them to Anderson. He signed them while sitting in his car outside of the building. [redacted] returned to the office and date-stamped the documents January 19, 2001. The documents were then returned to BAR.

Deputy Commissioner Blackwell was interviewed three times during the course of this inquiry. Initially, Blackwell stated that she had no knowledge of when the documents were signed.

In a second interview, requested by Blackwell, she recalled that the BAR Chief had advised her of the unsigned documents. Blackwell remembered telling the BAR Chief that Anderson had clearly intended to sign the documents and therefore, he would have to come over and sign them. Blackwell said that there was some discussion of how to date the documents and that she thought they should be dated when they were intended to have been signed. Blackwell said she was not actually involved in getting the documents signed, but that she was troubled by the fact that the documents were taken out of the building. Blackwell explained that she thought it would have been proper for Anderson to come to MIB, sign the documents, date them according to when they should have been signed and then make a note explaining the circumstances under which they were signed. Blackwell stated that since the "Assistant Secretary" (Anderson) had given clear instruction to issue the decision on the Nipmuc petition, she was acting on those instructions.

During a third interview, also requested by Blackwell, she said she had been reviewing the file involving the Nipmuc recognition petition and was troubled that there was no documentation concerning the manner in which the *Federal Register* Notices had been signed by Michael Anderson on January 22, 2001. Blackwell said that she now recalled analyzing the situation on January 22, 2001, when it was brought to her attention by the BAR Chief. In her analysis, Blackwell concluded that this was a *"nunc pro tunc"* condition (or "signing now for then") and that the documents could still be signed because it was clearly Anderson's intent that they should have been signed. When the BAR Chief inquired of Blackwell how they could get the file to Anderson, Blackwell replied that "Anderson needed to come in and sign the documents." Blackwell said that she did not direct the BAR Chief to get the documents signed, but agreed that it was clear that she had authorized it. Blackwell reiterated her concern that the documents had been taken out of the building to be signed.

On June 26, 2001, Michael Anderson was interviewed by the OIG at his law office, Monteau, Peebles and Crowell, L.L.P. Anderson stated that he was familiar with the series of critical *Boston Globe* newspaper articles related to tribal recognition, Indian gaming and partisan politics. He believed they did not accurately portray his actions while he was at BIA. Anderson stated that he was initially a proponent of BAR but came to dislike them as his dealings with them increased. Anderson considered the BAR staff

as merely "adequate civil servants constituting a mix of good and bad personnel." Anderson stated, "BAR would write books about tribal acknowledgement rather than produce just the meat of the regulations." He defined BAR's role as "an information gathering body that has overstepped its authority and needs to be put back in check." Anderson said that BAR was intrusive, too involved in the decision-making process, and showed little respect for the policy makers (he and Gover). He described the Solicitor's Office as intrusive. Anderson stated that he and Gover had both lost faith in the Solicitor's Office. Anderson readily admitted to returning to MIB and signing the *Summary Under the Criteria* for the Duwamish Tribe on January 22, 2001, although he stated that he did not backdate it to January 19, 2001, nor did he advise [redacted] to do so.

Former Assistant Secretary Gover was interviewed on October 11, 2001, at his law office at Steptoe & Johnson, in Washington, DC. He stated that he was very unhappy with two specific aspects of the BAR staff. He believed they took far too long to arrive at their conclusions and rather than making timely decisions, BAR's objective was academic excellence. He was convinced BAR's goal was to write decisions that could be defended in an academic environment rather than arriving at conclusions based upon evidence.

Gover never questioned the accuracy of BAR's findings, although he did question the necessity of the volume of information they produced. Gover maintains that the standard needed to grant an Indian group tribal status should be "the preponderance of evidence." Admittedly, he had problems with 25 C.F.R. §§ 83.7 (a)-(g) *Mandatory Criteria for Federal Acknowledgement.* Gover thought he could never secure sufficient backing to have the regulations amended. He chose instead to interpret these regulations with a more relaxed and accommodating standard than BAR. The two factors that Gover chose to interpret himself were 25 C.F.R. §§ 83.7 (b) and (c). These two factors deal specifically with an Indian group existing as a "distinct community" and "maintaining political influence or authority over its membership as an autonomous entity" from historical times to the present. Gover said, "From 1870 to 1930, the government did all they could to disrupt and disturb the American Indian." He said that because being an Indian during this time was not popular, most chose to keep a very low profile, making 25 C.F.R. §§ 83.7 (b) and (c) extremely hard to corroborate.

Gover's interpretation of 25 C.F.R. §§ 83.7 (b) and (c) appears to be the major area of disagreement between BAR and himself. Gover said, "Tribal recognition was not intended to be adversarial, but became so." Once it became adversarial, it was apparent to Gover that BAR and the Solicitor's Office (SOL) aligned themselves against his final decisions. Like Anderson, Gover had problems with the Solicitor's Office. Gover accused the SOL of attempting to usurp his decision-making authority.

Gover said that he had authorized the retention of a "recognition consultant" to review technical reports prepared by BAR and to ensure that BAR's findings were consistent with Title 25 C.F.R. Part 83. Loretta Tuell selected the consultant. Ms. Tuell

was the Director of the Office of American Indian Trust and worked closely with Gover and Anderson. The consultant traveled to Washington, DC from his home in Louisiana, doing the majority of his work from a hotel room in Arlington, Virginia.

The BAR and Solicitor's staff were troubled by the retention of the consultant. Although the consultant's position was never fully explained to BAR or SOL, they viewed him as a "hired gun" who was retained to offer legal advice and to assist the Assistant Secretary in rewriting his decisions that were contrary to BAR's recommendations. Review of the consultant's role determined that he did not provide legal counsel but he did critique BAR's findings for Gover & Anderson.

The BAR staff stated that they had little to no interaction with the consultant. They were never told what the consultant's responsibilities were. By his own admission, the consultant stated that he had very little interaction with the BAR staff or the Assistant Secretary. The consultant stated that he attended few meetings on tribal recognition and, instead, received his instructions from Loretta Tuell. The consultant provided Gover with two written proposals in October 2000 in support of a favorable determination of acknowledgement for the Duwamish and Chinook Tribes. Gover stated that he used the consultant's research as an "authoritarian basis from an expert on Indian law so that he would have a qualified opinion to oppose BAR's recommendations on petitions for Federal recognition."

An inspection of BIA personnel records revealed that the consultant was hired initially as a "Tribal Recognition Consultant." Although his appointment changed from a consultant to a contractor, his assignment remained the same. When the consultant/ contractor was interviewed, he stated that he "possesses an expertise in Indian law and he is thoroughly and uniquely qualified with the criteria set forth in 25 C.F.R. §§ 83.7 and 83.8." He supported his self-proclaimed expertise by saying that he successfully represented the Tunica-Biloxi Tribe of Louisiana when they petitioned BAR for Federal recognition in 1981.

The consultant worked for DOI from July 31 to September 30, 2000 as a "consultant;" he worked from November 20, 2000 to January 20, 2001 as a "contractor." The terms of his contract provided for payment of $387 per day plus per diem, not to exceed $22,500. On or about November 20, 2000, he was also awarded $8,500 for his "exemplary performance as a consultant."

Loretta Tuell declined a request for an interview related to this investigation.

The conduct of Michael Anderson and M. Sharon Blackwell concerning the signing of the Acknowledgment package on the Duwamish petition on January 22, 2001, was presented to the Department of Justice for prosecution under 18 U.S.C. § 912 (False Impersonation of an Officer or Employee of the United States and Conspiracy to Falsely Impersonate an Officer or Employee of the United States, respectively). The Department of Justice declined prosecution against Anderson and Blackwell. Because Blackwell is

still an employee of the Department, the matter against Blackwell was declined for prosecution in lieu of administrative action.

2. Contact with Bureau of Indian Affairs by former employees

18 U.S.C. § 207 sets forth the statutory restrictions on the conduct of former officers, employees, and elected officials of the Executive Branch. Depending upon the type of matter involved and the role of the former employee, the restrictions extend from one year to permanent. In every instance, however, the prohibited conduct involves the same criminal intent, by which the former employee "knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department [or] agency...in connection with a particular matter..."

A number of contacts involving former Federal (BIA or DOI) employees with BIA staff were at issue:

The first involved a draft of a proposed letter that was prepared by and faxed from the law firm of Steptoe & Johnson to Deputy Assistant Secretary for Indian Affairs Michael Anderson on May 22, 2000. The draft letter was to New York State Governor George Pataki from Assistant Secretary Gover. The letter outlined a plan to substitute the Cayuga Nation of Indians for the St. Regis Mohawks as partners with the Catskill Development Corporation. The letter was drafted approximately thirty-eight days after the St. Regis Mohawks had entered into an agreement with Park Place Entertainment Corporation, thus negating their contract with Catskill Development Corporation to build a casino at Monticello Raceway in Monticello, New York. Steptoe & Johnson represented the Cayuga Nation of Indians, and the attorney from whom the letter came was a former Department of the Interior official.

The second contact at issue was the telephonic contact made by former Acting Assistant Secretary Michael Anderson to a DOI Office of Indian Gaming Management (OIGM) Director on March 22, 2001, in which Anderson provided a "heads up" that he would be requesting a future meeting to discuss Mohawk gaming matters. The OIGM Director recalled that the phone call lasted less than one minute. He could not recall whether or not Anderson identified who he represented.

While these incidents of contact might otherwise be in violation of 18 U.S.C. § 207, the provisions of 25 U.S.C. § 450i(j) -- *Retention of federal employee coverage, rights and benefits by employees of tribal organizations* -- authorize a former officer or employee of a Federal agency to represent an Indian tribe, *notwithstanding any provisions of 18 U.S.C.§ 207 to the contrary* (emphasis added).

The third incident of contact occurred between Hilda Manuel and BAR employees. Manuel had been the Deputy Commissioner for Indian Affairs at BIA until April 2000, when she went to work for Steptoe & Johnson. On August 4, 2000, Manuel contacted a cultural anthropologist at BAR requesting copies of the acknowledgment petition for the Mashpee Wampanoag Indians. When Manuel first called, she did not

identify herself. The cultural anthropologist thought, by the tone of the conversation, that she was dealing with a BIA superior. The anthropologist said that Manuel demanded an immediate response and made it clear that any delay would not be accepted. Manuel later identified herself as "Hilda" and then asked, "Do you know who I am?"

Finally, on September 28, 2000, Manuel and another Steptoe & Johnson attorney, the former DOI official, met with Assistant Secretary Gover to propose a "pilot project" to outsource the review and analysis of material submitted by petitioning groups to support their claims for Federal acknowledgement. A contractor would replace BAR and would be selected and compensated by the petitioning group. Manuel made it clear that she wanted the Mashpee Wampanoag Indians to be the first pilot project group. The proposal was the subject of subsequent meetings, without Manuel being present, but was never implemented.

The Mashpee Wampanoag Indians are not a Federally acknowledged tribe and therefore, representation of these Indians does not fall under the exceptions of 25 U.S.C. § 450i(j). Therefore, this last matter was presented to the United States Attorney's Office, District of Columbia, for prosecution under 18 U.S.C. § 207. Prosecution was declined.

3. Anderson's ruling on video slot machines in Florida

On January 19, 2001, Acting Assistant Secretary for Indian Affairs Michael Anderson issued a letter to James Billie, former Chairman of the Seminole Indian Tribe and to Billy Cypress, Chairman of the Miccosukee Tribe (both tribes are located in Florida). Anderson's letters addressed the issue of Indian gaming in the State of Florida and affirmed the National Indian Gaming Commission Chairman's approval of the ordinance for "electronic pull-tab machines" in the Seminole casinos.

Three classes of gaming are defined in 25 U.S.C. § 2703 and 25 C.F.R. Part 502. Class I gaming is not regulated by the NIGC. Class II gaming requires the approval of the Chairman. Class III gaming must be approved by the Chairman, be permitted by the State in which it is located, and be conducted in conformance with a Tribal-State compact.

As Acting Assistant Secretary, Anderson confirmed the finding of the NIGC Chairman that "electronic pull-tab machines" were Class II gaming devices, permissible in the State of Florida, when he signed off on the ruling that had been prepared by career employees in the Office of Indian Gaming Management. Because Class II gaming requires only the approval of the Chairman, Anderson's decision served as authorization for the Seminole and Miccosukee Tribes to engage in "electronic pull-tab machines" gaming.

The Florida State Attorney General vehemently disagreed with this decision, claiming that "electronic pull-tab machines" are more similar to slot machines and should fall under Class III gaming restrictions. The State of Florida prohibits Class III gaming.

On June 29, 2001, however, Deputy Assistant Secretary for Indian Affairs McDivitt, issued letters to the Seminole and Miccosukee Tribes of Florida withdrawing the Anderson decision of January 19, 2001. The McDivitt letters were issued to allow the Solicitor and Assistant Secretary an opportunity to "evaluate the important issues" in dispute as a result of Anderson's January 19, 2001 letters.

4. Management Contract Review by NIGC

Management Contracts vs. Consulting Agreements

In 1988 the Indian Gaming Regulatory Act established the National Indian Gaming Commission to regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences, to ensure that Indian tribes are the primary beneficiaries of gaming revenue, and to assure that gaming is conducted fairly and honestly by both operators and players. Among other responsibilities, the NIGC is responsible for reviewing and approving management contracts between the Indian tribes and management companies to ensure that the statutory provisions of the IGRA are met.

The NIGC identified two ways in which an Indian tribe may enter into a business arrangement with a management company. The first is a "management contract" that calls for the contracting company to be responsible for the "operations and management" of a gaming activity. Management contracts are subject to review and approval by the NIGC Chairman pursuant to 25 U.S.C. § 2710 (d)(9) and 2711. The NIGC reviews the management company as well as the terms of the contract to ensure, among other things, that the fee does not exceed the 30% statutory cap, without justification. The Chairman of the NIGC has the authority to raise this cap to 40% if the financial projections and capital investments allow him to do so. The NIGC takes approximately two years to complete this process and authorize a management contract.

According to NIGC, the second way a tribe might enter into an agreement with a management company is by way of a "consulting agreement." In a consulting agreement, the tribe retains the responsibility for day-to-day operations, and the management company provides agreed-upon services. By its own interpretation, NIGC has determined that consulting agreements do not fall within its jurisdiction for approval. Consulting agreements are free from NIGC oversight, and thus are preferred by the tribes because they allow casinos to become operational without the two-year wait required by the management contract.

The NIGC stated that, as of June 2001, there were 332 Indian gaming operations in the United States which vary in size from local firehouse style bingo operations to full-scale Las Vegas-quality casinos. Of the 332 gaming operations, only 31 are operating under management contracts approved by NIGC since its creation in 1993. (Although the NIGC was established by statute in 1988, it did not become operational until its regulations were published in 1993.) The remainder operate with consulting

agreements or without outside entities, and thus, do not fall under the regulatory and enforcement provisions of the NIGC.

If the NIGC determines that a partnership between a tribe and management company is based upon a consulting agreement, NIGC relinquishes oversight to the Office of Indian Gaming Management. If the agreement exceeds seven years, the OIGM will review it only in order to determine whether or not it is in the best interest of the tribe. If the agreement is for less than seven years, OIGM does not review it at all.

Consulting agreements require neither background checks on the business partners nor compliance with the National Environmental Policy Act (NEPA). These agreements have proven to be more lucrative, allowing the business partners to be compensated at a rate greater than 40% and, at the same time, freeing them from NIGC oversight.

Management Contract with Fees Exceeding 30% Statutory Cap

The contract between the Mohegan Tribe of Indians of Connecticut and Trading Cove Associates had been highlighted in one of the *Boston Globe* articles. This September 1995 contract contained terms that called for 40% of net revenues to be paid to TCA over seven years. The terms of the contract had been approved by then-Chairman of NIGC, Harold Monteau.

Two NIGC Commissioners believed that the terms of this contract, which had been negotiated by the Chairman, were not in compliance with the Indian Gaming Regulatory Act. The two Commissioners felt so strongly about this issue that they documented their objections in a memorandum dated September 28, 1995, in which they alleged that "the Chairman made a premature determination on the terms of the agreement contrary to staff concerns and many of the contract terms were negotiated privately...without participation by staff or fellow Commissioners and therefore we believe that this management agreement should not be approved." In spite of the two Commissioner's objections, Monteau approved the contract on September 29, 1995.

In February 1998 the Mohegan Tribal Gaming Authority, representing the Mohegan Tribe of Indians of Connecticut, and TCA entered into a Relinquishment Agreement that terminated the prior Management Contract, as well as an existing Hotel Management Agreement. The Relinquishment Agreement provided that the Mohegan Tribal Gaming Authority would assume management of their casino and TCA would receive 5 % of gross revenues over fifteen years for termination of its rights under the previous agreements and for an expansion project TCA would develop under a separate Development Agreement. For this Development Agreement the Mohegan Tribal Gaming Authority agreed to pay TCA a $14 million fee. Both the Relinquishment and Development Services Agreements were submitted to NIGC for a determination.

On March 20, 1998, the NIGC Contract Division determined that both of these Agreements required NIGC approval. They considered the Relinquishment Agreement to be an amendment to the Management Contract with changes to the financial

compensation and term of contract to be awarded to TCA. Based on the Tribe's financial statements for the first fiscal year, when NIGC calculated the amount to be paid to TCA under the Relinquishment Agreement, it was found that it clearly exceeded the 40% cap. As a result, the Contract Division determined that the terms of the amended the Management Contract did not comply with IGRA and NIGC regulations.

Contrary to the Contract Division's determination, the NIGC Deputy General Counsel ruled on May 15, 1998 that the Relinquishment Agreement effectively eliminates all management controls by the contractor, and therefore, does not require approval by NIGC. Agreeing with the Contract Division on one issue, however, the Deputy General Counsel concluded that the "amount of money to be paid to TCA was egregious."

5. Anderson's letter on St. Regis Mohawk Tribal Court Authority

Since 1820, the St. Regis Mohawks had been governed by a three chief system of government. Elections were held in June 1995 and a new Constitutional Government was elected by the narrow margin of 50.9%. The Mohawk's Tribal Constitution requires a majority (51%) of the vote. A year later, the three chiefs attempted to have the newly elected Constitutional Government abolished. For several years, BIA continued to recognize the ruling Constitutional Government in spite of the protests from the three chiefs. The Constitutional Government remained the recognized governing body of the St. Regis Mohawks until September 1999 when U.S. District Court Judge Kotelly ruled that 50.9% did not meet the required 51% majority as set forth in the Tribal Constitution. The U.S. Government did not appeal the District Court's decision.

After the elections in 1995, while the St. Regis Mohawks sought to establish a solid representative government, they also negotiated to bring casino gaming to Monticello Raceway in the Catskill Region of New York. In July 1996, the Constitutional Government signed a contract with the Catskill Development Corporation (Catskill) to build a casino at Monticello Race Track. Catskill, aware that the Mohawks were re-establishing their government, entered into a Memorandum of Understanding with both tribal government factions in order to validate the existing contract.

Subsequent to the District Court's decision, the three chiefs regained control of the tribal government. A BIA field representative issued a letter on February 4, 2000, recognizing the three chief system of government. In April of 2000, the three chiefs government entered into a new casino development arrangement with Park Place Entertainment (Park Place), negating the existing contract with Catskill. Shortly after agreeing to partner with Park Place, the Mohawk leadership grew suspicious of what they believed were unnecessary delays. Park Place owns casinos in Atlantic City, New Jersey, and the tribal leaders suspected they were delaying their casino project in order to continue the profitability of their other operations. A $12 billion suit was filed by the Mohawks against Park Place charging fraudulent intent on the part of Park Place to develop a casino. The U.S. District Court returned it to the Tribal Court to be decided.

In March 2001, a $1.8 billion award was handed down to the plaintiffs. Park Place Entertainment appealed the award.

Following a September 2000 visit to the St. Regis Mohawk Akwesasne Reservation, Michael Anderson issued another letter recognizing the Chiefs elected under the Tribe's traditional government. Anderson went on to say: "Since you have determined the "constitutional faction" and its court system are without any legitimate authority, the Bureau of Indian Affairs shall disregard any issuance by that "court" of any summons, appearance notices, suits, etc." Although the letter was printed on official letterhead, and signed by Michael Anderson, a "surname" copy of the letter could not be found. The surname copy indicates who reviewed the letter prior to its issuance and confirms that the letter was issued using appropriate procedures.

This letter garnered the interest of the attorneys representing Park Place who have used it as a cornerstone in defense of their appeal. The basis for their appeal is that if BIA does not recognize the judicial system approving the $1.8 billion award, then it is invalid. The lawsuit has been transferred to the Second Circuit Court of Appeals.

Conclusion

1. While the circumstances surrounding the six tribal recognition petitions were highly unusual, each of the recognition decisions has been reconsidered by the current Administration before continuing with the regulatory decision-making process. The Department of Justice declined prosecution against Anderson and Blackwell. Because Blackwell is still an employee of the Department, administrative action should be considered against her and [redacted] for their respective roles in this matter.

2. While the statute clearly allows former BIA employees to represent Federally recognized tribes immediately upon departure from government, the Department should provide departing BIA employees with a standard briefing that clearly explains the exemption of 25 U.S.C. § 450i (j) and the departing employee's obligation to notify the Department of any personal and substantial involvement in any matter they might participate in post-employment.

3. Because Michael Anderson's decision concerning "electronic pull-tab machine" gaming activities of the Seminole tribes was rescinded to allow the present Administration the time to re-evaluate the decision, the issue has effectively been rendered moot.

4. The determination by the NIGC that it is without authority to review "consulting agreements" between tribes and gaming operation consultants precludes effective oversight by NIGC of the majority of Indian gaming operations. If the Department wishes to enhance this oversight function, or if Congress wishes to extend the oversight to all gaming operations, legislative action should be considered.

5. The letter from former Acting Assistant Secretary Michael Anderson affirmed the results of a Federal District Court ruling that effectively terminated recognition of the Constitutional Government of the St. Regis Mohawk Tribe. The legal significance of the letter will likely be determined in Federal court.

~~*This document contains personal privacy information. Do not release to the public.*~~

1-27-99

Easterns vow to survive 'genocide'

■ The tribe challenged the town's research on its roots and stance on its recognition.

By MATT SHELEY
Norwich Bulletin

Their message was clear Tuesday: The Eastern Pequot tribe will survive and prosper despite a researcher's claim to the contrary.

Arguing the town's leaders are out of touch with the wishes of their constituents by pursuing what tribal officials compared to a Nazi-like policy of genocide, more than 50 Easterns, young and old, urged the Board of Selectmen to stop hindering their right to become a federally recognized tribe.

"Even if you maintain that the intent was to protect the interest of the [redacted] towns, the effect of your policy is to carry out the demise of an American Indian tribe in order to find a final solution to the sometimes difficult issues between state and tribal governments," Eastern CEO Lawrence Wilson said, standing before selectmen.

"Such a policy seeks to facilitate the disappearance of the Eastern Pequot Nation as surely as did the Nazi policy regarding the ultimate 'disappearance' of the Jewish nation."

In response, selectmen held their ground, saying they are only looking out for the town's best interests by researching the history of the Easterns and the Paucatuck Eastern Pequots, who share a 232-acre reservation on Lantern Hill. The selectman said they have not taken a stance on either tribe's application for recognition.

"I'm very comfortable with what we're doing and what we've been doing," First Selectman Nicholas Mullane said after the Easterns filed out of the meeting hall. "It may be an awkward and delicate situation, but we feel it's our responsibility to stay informed on the process."

Five minutes before the start of the session, Easterns and their supporters jammed the Town Hall conference room, with the three selectmen sitting behind a long table, symbolic of the schism between the tribe and its supporters, and the town leaders.

In recent months, James Lynch, a historian hired by the town, has been researching the validity of the applications for federal recognition from both tribes.

Previously, Lynch researched the backgrounds of the Mashantucket Pequots, who operate Foxwoods Resort Casino, and the Golden Hill Paugussetts of West Haven. In 1994, he presented information against the Paugussetts' bid for federal tribal status.

In the past month and a half, the town sent a report and supplement to the Bureau of Indian Affairs, the federal agency charged with recognizing an American Indian group, that challenged portions of claims

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Easterns

FROM B1

made by the tribes. Both documents won the support of the neighboring towns of Ledyard and Preston.

There are seven criteria an American Indian tribe must satisfy to be recognized as an Indian tribe.

Lynch's report found the Easterns and Paucatucks cannot prove they originated from a single tribe, one of the necessary criteria.

The Easterns on Tuesday said that claim was unfounded and requested the selectmen apologize to their tribe and the Mashantucket Pequots.

Eastern officials said because of the "misinformation and outright lies" the report contains, it must be dismissed entirely.

"I don't understand why you are doing this," said Heather Clinton, Miss Eastern Pequot, challenging selectmen's stance.

Selectman Mac Turner said he disagreed with a number of things the tribe said, but it was better to hear the Easterns' complaints at a public meeting rather than second-hand. Selectman William Peterson concurred, and said he wished the Easterns were more specific with their complaints about Lynch's report.

The town has set aside approximately $52,000 for its historical and genealogical research.

1-27-99

Easterns: Policy similar to Nazis'

By **CHRISTOPHER ARELLANO**
Day Staff Writer

North Stonington — The Eastern Pequots on Tuesday night demanded the towns of Ledyard, Preston and North Stonington repudiate a historian's critical report about their tribe, saying the towns are following a policy aimed at destroying the tribe.

The tribe bases much of its ancestry on Tamer Brushel, who died in 1915. But the historian hired by the towns says there is no evidence that she is an Indian.

"It is the height of arrogance and deceitfulness for the town governments to pay so-called objective experts to undo history and hide your true intentions behind the doors of attorney-client secrecy while you attempt to complete the extinction of the Eastern Pequot Indians ...," said Tribal Councilor Lawrence E. Wilson III before an audience that included 40 tribal members.

"Even if you maintain that the intent was to protect the interests of the towns, the effect of your policy is to carry out the demise of an American Indian tribe in order to find a final solution to the sometimes difficult issues be-

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Easterns dispute historian's report

From **A1**

tween state and tribal governments. Such a policy seeks to facilitate the disappearance of the Eastern Pequot Nation as surely as the Nazi policy regarding the ultimate disappearance of the Jewish Nation. This cannot be acceptable to the people of Connecticut nor should it be acceptable policy in any state," Wilson said.

The comments by Wilson and Tribal Chairwoman Mary Sebastian and tribal member Heather Clinton marked the tribe's first response to James Lynch's reports. The Easterns and the Paucatuck Eastern Pequots have filed separate applications for federal recognition, which are being reviewed by the Bureau of Indian Affairs. If either tribe is recognized, they become eligible for federal benefits and the right to negotiate a state compact that could lead to a casino. The latter prospect alarms many town residents.

In his report, Lynch says the Easterns' rely only on Brushel for their link to the historic Pequots. Lynch has written that there is no evidence that Brushel was Indian and that she wasn't listed on tribal rolls for 78 years. He also wrote that Brushel did not have a continuous relationship with other people who lived on the reservation, something that a tribe must have to be federally recognized.

After the Easterns left the meeting, First Selectman Nicholas H. Mullane II said he is comfortable with the towns' policies, adding they have received sound legal advice and have yet to formally take a position on either tribes' applications. Selectman William Peterson wanted to know what specifically was wrong with Lynch's report, adding the BIA has not turned over recognition documents requested months ago by the towns.

Selectman Mac Turner said he was glad the tribe met in a public meeting with the board.

In his remarks, Wilson said he did not think that most of the region's taxpayers would support the policy followed by the three towns, saying the towns were able to mask their "true nature" by a legal exemption to open government laws. He also demanded that the towns apologize to his tribe, as well as the Mashantucket Pequots, for the "false and defamatory" statements made by Lynch. He said that Congress, as recently as 1984, recognized that there were some people who were stil related to the "historic Pequot tribe.

Tribal Chairwoman Mary Sebastia said that the tribe had not responded t the reports earlier because they consi ered it preposterous. Sebastian als said that while her tribe sought a rel tionship with the towns based on re spect, selectmen did not return th same respect to her tribe.

Paucatucks' bid to bypass BIA for recognition fails in Congress

10-22-98

Mashantuckets, who back rival Eastern Pequots, opposed effort

By CHRISTOPHER ARELLANO
and VIRGINIA GROARK
Day Staff Writers

North Stonington — The Paucatuck Eastern Pequots waged a monthlong campaign to win federal recognition from Congress before those plans collapsed Tuesday after being opposed by high-ranking federal officials and the Mashantucket Pequots.

The decision to seek congressional recognition of their tribal status was blocked before it was included in a 4,000-page spending plan being considered by the U.S. Senate. The tribe has applied to the Bureau of Indian Affairs for federal recognition, but that wouldn't have been needed if Congress had granted its approval.

The decision to seek congressional recognition was regarded as a "long shot," according to tribal spokesman Jim McCarthy. McCarthy emphasized that the Paucatucks believe in the BIA process.

The rival Eastern Pequots, who share a North Stonington reservation with the Paucatucks, have also applied for federal recognition with the BIA. The Easterns believe the Paucatucks are a splinter group that has left their tribe, but the Paucatucks deny any affiliation with the Easterns. McCarthy said the Easterns' petition has made it more difficult for the Paucatucks to be recognized by the BIA.

"When you have a group as brazen as the Sebastian family trying to co-opt your entire history, claim your heritage and muddy the waters as much as possible, of course it makes it more difficult," McCarthy said. "One thing it hasn't done. It hasn't eroded the tribe's confidence at all. The Paucatuck tribe is enormously confident, certainly about the validity and the merits of their petition."

Lawrence E. Wilson III, the Easterns' chief executive officer of tribal recognition, criticized the Paucatucks for attempting to "circumvent the acknowledgment process." Wilson said the Easterns want to assure the public that they will continue to work through the BIA in their quest for recognition.

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From **A1**

Wilson said the Mashantuckets and some federal officials were responsible for blocking the Paucatucks' bid in Congress. Wilson thanked the Connecticut delegation, the Senate Indian Affairs Committee, the House Natural Resources Committee, the House Indian Caucus, Senate Minority Leader Thomas A. Daschle and Assistant Secretary of the Interior Kevin Gover.

"We are very encouraged and appreciate the process works the way it is supposed to," Wilson said.

McCarthy also said the Mashantucket Pequots in 1983. McCarthy said that legislation originally would have recognized both the Mashantuckets and the Paucatucks.

"The Paucatucks were mysteriously omitted from the bill when it got to the final passage," he said. He said that the committee notes attached to that bill say that the Paucatucks were no longer in existence. Though that is not true, McCarthy said the reference shows that "there was an effort made to exclude the Paucatucks who were well known and existed right next door to the Mashantuckets."

An aide to U.S. Rep. Sam Gejdenson, D-2nd District, said Gejdenson doesn't recall the Paucatucks being part of the original bill.

Lobbying to pass legislation to recognize the Paucatucks began about a month ago when the tribe's representatives contacted U.S. Sen. John McCain, R-Ariz., a former chairman of the U.S. Senate Indian Affairs Committee. McCain was honored at a Paucatuck powwow last year, even though he did not attend the function.

McCarthy originally said McCain was the sponsor of the rider that would have been attached to the appropriations bill and that other senators also backed the idea. He later said that while the Paucatucks' representatives had the "impression" McCain backed their plan, he never officially did so. He didn't identify the other supporters.

A McCain aide said Thursday that McCain was first approached a year ago "by someone he trusted" on behalf of the Paucatucks. The lobbyist told McCain that the Paucatucks should have been recognized at the same time as the Mashantuckets. McCain was approached again last month and asked to support a Department of the Interior appropriation that would include recognition of the Paucatucks.

The aide said the senator was sympathetic but neutral on the issue. He did not agree to sponsor the rider, the aide said.

The aide said McCain had been told the Connecticut congressional delegation and other senators had backed the idea. In fact, the aide said the BIA and U.S. Sen. Ben Nighthorse Campbell both strongly opposed the matter and the Connecticut delegation was unaware of it.

A Gejdenson aide said the congressman's office became aware of the provision Monday after being told about it by the Mashantuckets. The aide described Gejdenson as favoring the BIA process.

Patricia Zell, chief counsel for the Democratic members of the U.S. Senate Committee on Indian Affairs, said tribes have been recognized through an act of Congress. However, the way the Paucatuck Eastern Pequots went about it was unusual, she said.

"I can't recall there ever having been a tribe recognized as part of an appropriations bill," she said. "It may have happened, but I have been here 17 years and I don't ever recall that happening."

Zell and Charles F. Bunnell, deputy chief of staff for the Mohegan Indians, said in recent years Congress has typically deferred to the BIA to determine what tribes should be recognized.

At North Stonington Town Hall, First Selectman Nicholas H. Mullane said the Board of Selectmen would discuss the matter Tuesday night. He withheld comment until then.

Town officials have been pleased by promises by both groups to keep them posted about the progress of their applications. McCarthy said he didn't think the promise was broken. He said the rush of a final Congressional vote before adjournment, as well as the tribe's participation in a national Indian conference, made it difficult to discuss the situation more openly.

10-22-98

Paucatuck bid ruffles feathers

■ An attempt to attach the tribe's federal recognition to the national spending bill is thwarted.

By MATT SHELEY
Norwich Bulletin

NORTH STONINGTON — The Paucatuck Eastern Pequot Indian tribe's bid to circumvent the federal recognition process this week and gain tribal status by sliding legislation through Congress raised more than a few eyebrows locally.

The move not only upset the Eastern Pequot Indians, who share a 224-acre reservation in town with the Paucatucks, it may have unsettled the tribe's relations with town leaders and the Bureau of Indian Affairs, the federal agency that typically determines a tribe's federal status.

"It was a kamikaze run that may have burned every bridge they ever had," said Patty Marks, a lawyer for the Eastern Pequots.

Not so, a Paucatuck spokesman said Thursday.

"It was a slim, slim chance, but the Paucatucks felt they would be remiss if they didn't look into it," said Jim McCarthy, Paucatuck spokesman. "An act of Congress has always been a route that's available and it doesn't undermine our commitment to the BIA. From what we hear, the BIA is not disgruntled."

Both tribes are waiting for the BIA to rule on their separate applications for federal recognition. If they are recognized, their tribal lands will be put into trust and exempt from taxation and zoning regulations. They could also negotiate a casino compact with the state government.

The petitions are being considered simultaneously, and a decision is expected within months.

The Eastern Pequots have 647

See PAUCATUCKS, A5

Paucatucks

FROM A1

members. The Paucatucks have 150 members.

The Paucatucks' lobbyists asked Sen. John McCain, R-Ariz. and other legislators about the possibility of attaching a rider, or amendment, to an immense $520 billion spending bill passed by the Senate on Wednesday that would grant their recognition.

McCain, the former chairman of the Senate Indian Affairs Committee, rebuffed the move, although he said he would not oppose the Paucatucks' effort.

As word of the Paucatucks' effort spread last week, it was rumored that the tribe was boasting McCain as their key supporter. McCain and his staff were annoyed, and BIA officials were said to be upset because the tribe tried to circumvent the normal recognition process.

Eastern Pequot leader Mary Sebastian said her tribe was appalled by the Paucatucks' attempt to bypass the BIA process.

"It's sad to see this last-gasp act of desperation," Sebastian said in a statement.

Town leaders in North Stonington were quiet on the issue, saying they knew little about the matter and wanted more time for research.

But Preston First Selectman Robert Congdon said he was under the impression the Paucatucks were going to stick with the BIA process, and not go through Congress.

"At the informational meeting they had several weeks ago, my recollection was that they were committed to the BIA process," Congdon said. "They even talked about some other tribes and their going through the legislative process."

While he said there are no plans in the works, McCarthy said the Paucatucks have not ruled out pursing an act of Congress for recognition in the future, if the opportunity is right. He said the blame for the failure resides with the Mashantucket Pequot tribe, operators of Foxwoods Resort Casino and one of the state's two federally recognized tribes.

"The Mashantuckets' lobbying efforts in Washington are high-powered," McCarthy said. "We're told they put up a very vigorous fight to try to deny the Paucatucks justice through legislation."

Recently, the Mashantuckets called for the unification of the two tribes in a letter to Secretary of the Department of the Interior Bruce Babbitt.

The Hartford Courant reported Thursday that the Mashantuckets not only opposed the Paucatuck effort but made their feelings known to the BIA, which was already aware of and angry about the matter.

North Stonington First Selectman Nicholas Mullane said the town has $52,000 in an account for their Washington, D.C. based attorneys to research the tribes' applications. When they come across a situation that might affect North Stonington, they contact town officials, who then decide how to progress.

STATEMENT OF

CHIEF JAMES A. CUNHA, JR.

ON BEHALF OF

THE PAUCATUCK EASTERN PEQUOT TRIBAL NATION

ON S. 1392, A BILL TO ESTABLISH PROCEDURES FOR THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF THE INTERIOR WITH RESPECT TO TRIBAL RECOGNITION

AND

S. 1393, A BILL TO PROVIDE GRANTS TO ENSURE FULL AND FAIR PARTICIPATION IN CERTAIN DECISION MAKING PROCESSES AT THE BUREAU OF INDIAN AFFAIRS

Submitted to the Senate Committee on Indian Affairs

September 19, 2002

Introduction

Mr. Chairman and Members of the Committee:

My name is James A. Cunha, Jr. I am a traditional Chief of our Tribe and the elected Treasurer of our Tribal Council.

I am submitting this statement on behalf of the Paucatuck Eastern Pequot Tribal Nation of North Stonington, CT. Our petition is #113 in the federal acknowledgment process before the Bureau of Indian Affairs, Branch of Acknowledgment and Research.

The Paucatuck Eastern Pequot Tribe wishes to thank the Committee for holding this hearing to consider improvements that are needed in the federal acknowledgment process. We appreciate the leadership and hard work of Chairman Inouye and Vice Chairman Campbell on these and other issues. With regard to the process for federal acknowledgement of an Indian tribe we are particularly mindful that this Committee has held hearings on this issue since 1986 and that legislation to reform the process has been before the Committee in every Congress since 1986.

The Paucatuck Eastern Pequot Tribe and Our Petition

The Paucatuck Eastern Pequot Tribal Nation has 150 members and a 224-acre reservation in North Stonington, CT. The reservation was established in 1683 and is known as the Lantern Hill Reservation. Historically, however, the Tribe occupied and controlled a much larger land area in what is now southeastern Connecticut. Our Tribe and our reservation have been continuously recognized by the Colony and the State of Connecticut. The Tribe has been known by a number of names over the years: Stonington Pequots, North Stonington Pequots, Eastern Pequots and Paucatuck Eastern Pequot. At all times, the Tribe's leaders have been recognized as chiefs by the State of Connecticut and by other New England tribes. All of the current members of the Paucatuck Eastern Pequot Tribe descend from the historic tribe through three individuals who were members of the Tribe and resided on the North Stonington Reservation in the 19th century.

As this Committee knows, in 1978, a formal administrative process was established within the Department of the Interior for tribes to petition the federal government to be acknowledged as an Indian tribe eligible for the benefits and services accorded all federally recognized tribes. Members of our Tribe have been working to achieve federal recognition since the 1970s, gathering information and documentation about our Tribe in order to present our case. As is required under the regulations, the Paucatuck Eastern Pequot Tribe sent a letter of intent to submit a petition to the Branch of Acknowledgment and Research (BAR) in 1989. The Tribe submitted an extensively documented petition in 1994, and submitted additional supplemental documentation in 1996. This material includes historical, anthropological and genealogical data and documents; newspaper and other articles written over many decades which talk about the Paucatuck Eastern Pequot; oral histories of tribal members; information about the Paucatuck Eastern Pequot's tribal council meetings, governing documents and membership criteria; and descriptions of tribal activities and events, and issues in which Paucatuck tribal leaders have been active both historically and to the present.

On April 2, 1998, the petition of the Paucatuck Eastern Pequot Tribe was placed on "active consideration." On March 24, 2000, Assistant Secretary for Indian Affairs Kevin Gover signed a positive Proposed Finding, recommending that the United States affirm that a government-to-government relationship exists between the federal government and the Tribe. The Proposed Finding noted several areas under criteria b and where the petition did not present sufficient evidence. It also said that our petition, along with that for Petitioner #35, the Eastern Pequot Tribe, met all of the criteria up to the year 1973. After that year, the evidence was not clear as to whether there was one tribe, two tribes or no tribe under the criteria. The Assistant Secretary specifically stated that the Department would make a decision on that issue in the Final Determination.

On January 19, 2001, the State of Connecticut and the Towns of North Stonington, Ledyard and Preston, filed suit against the Department of the Interior in the federal district court for Connecticut (*Connecticut vs. Interior*). Among other things, the plaintiffs sought the unprecedented remedy of having the federal court direct the Bureau of Indian Affairs to set aside the Proposed Finding, and of forcing the Paucatuck Eastern Pequot Tribe back to the start of the acknowledgment process.

The Tribe sought to intervene in the litigation. On March 27, 2001, Judge Covello issued an order acknowledging the right of the Paucatuck Eastern Pequot Tribe to intervene in the litigation as a matter of right based on the implications of the case for our rights and interests.

On March 30, 2001, Judge Covello entered a scheduling order in the case, which set out a schedule for the completion of the consideration of our petition. The scheduling order called on the BIA to comply with all FOIA requests filed under federal and state law by the parties to the litigation by May 4, 2001. This deadline was met. By August 2, 2001, all interested parties and the petitioners submitted to the BIA their comments on the March 24, 2000, Proposed Findings. By September 4, 2001, the petitioners submitted their responses to the comments on the Proposed Finding to the BIA. On October 4, 2001, the BIA commenced consideration of all of the evidence before it on the petitions, and on October 25, 2001, the BIA requested that Judge Covello extend the date for the issuance of a Final Determination from December 4, 2001 to June 4, 2002. The Paucatuck Eastern Pequot Tribe supported the BIA's request for additional time to review the evidence and prepare the Final Determination. Judge Covello granted the BIA's request. The BIA subsequently advised the court that it would need an additional 20 days for the completion of the Final Determination documents.

The Final Determinations were issued on June 24, 2002 and were published in the Federal Register on July 1, 2002. The Final Determinations concluded the evidence submitted by each petitioner was sufficient to show that one tribe, composed of both petitioners, met all of the criteria for recognition. Accordingly, the Assistant Secretary acknowledged the existence of the Historic Eastern Pequot Tribe. The Final Determinations will become effective on September 30, 2002 if no appeals are filed. However, Attorney General Blumenthal and the Towns of Ledyard and North Stonington have announced their intention to file an appeal prior to September 30th. The litigation in the Federal District Court for Connecticut is still pending.

S. 1392 and S. 1393

We commend Senator Dodd for his interest in improving the acknowledgment process. We support those provisions of S. 1392 that would authorize a significant increase in appropriations for the operations of the BAR. We also support the idea of codifying the regulations that govern the acknowledgment process. S. 1392 appears to include some of those regulations and to omit others. It also omits several definitions that are part of the regulations and that are essential to applying the seven mandatory criteria. It is not clear why the bill is written in this fashion, but we believe that it should not be enacted as introduced because doing so is very likely to cause confusion and delay in a process that is already too lengthy.

With regard to S. 1393, we agree with the Department of the Interior that the bill may very well lead to conflicts of interest for the Department as it is called upon to decide who will receive grant funds with respect to any particular petition at the same time that the Secretary will be called upon to make decisions on the merits of those petitions.

The GAO Report

We would like to address several issues which the General Accounting Office raised in their November, 2001, report entitled "Improvements Needed in Tribal Recognition Process," as well as their September 17, 2002 testimony before this Committee, which is based on that report.

-- Increased Funding: We strongly concur with the GAO in its acknowledgment that the recognition process is hindered by limited resources. The 2001 report noted that the workload of BAR staff in reviewing and evaluating petitions has increased, along with their responsibilities to handle administrative duties, but funding for and staffing of that office has decreased.

Last year, the Paucatuck Eastern Pequot Tribal Nation submitted testimony to the House and Senate Interior Appropriations Subcommittees, regarding FY 2002 appropriations for the Bureau of Indian Affairs. We urged Congress' favorable consideration of increased funding in FY 2002 for the Branch of Acknowledgment and Research. We asked that funding be increased from $900,000 in FY 2001 to a level sufficient to provide BAR with at least three full research teams (historian, genealogist and anthropologist).

We know firsthand how understaffed BAR is. One of our Tribe's great frustrations in the acknowledgment process, even when we were under "active consideration," was that there was no or minimal communication from the BAR. There is little or no opportunity for dialogue between the petitioner and the BAR, even to get a status report on where BAR is in the process of their review, or when certain materials we had requested under the Freedom of Information Act might be made available to us. When we raised this concern with the BAR, staff told us they are too shorthanded to respond to petitioner inquiries. We learned that when the BAR receives requests for documents under FOIA and similar inquiries, staff must stop the research and analysis they are conducting in order to make photocopies or to review and redact documents before they can be copied.

The lack of adequate resources directly affects the timeliness and quality of the decisions made by the BAR staff. We began to gather the documentation for our petition during the 1970's. The process was slow because we lacked the funds to hire the anthropologists, historians and genealogists who usually prepare documented petitions. We filed our letter of intent to file a petition in 1989 after being urged to do so by BAR staff. It took us until 1993 to gather all of the information necessary to submit our documented petition. At that time, the BAR was operating with three full research teams and they were able to provide us with a "technical assistance" letter in about six months. To our knowledge, that was the last year that the BAR was fully staffed by three research teams. In 1996 we filed the documentation called for in the technical assistance letter and were placed in the status of those petitioners who were ready and awaiting active consideration.

In April of 1998, we were placed on active status. We asked the BAR staff if they needed any additional documentation and were told not to file anything because they had all of the information needed. Under the regulations, the BAR staff and the Assistant Secretary had a year to issue a Proposed Finding. It took an additional year for the Proposed Finding to be issued. After the Proposed Finding was issued, Attorney General Blumenthal requested that the BAR staff conduct an on-the-record technical assistance meeting to explain the Proposed

Finding. At the technical assistance meeting in August of 2000 the BAR staff stated for the record that they had not been provided adequate time to review the documentation for our petition prior to recommending that the Assistant Secretary issue a negative Proposed Finding. They attributed the lack of time to the need to comply with then Assistant Secretary Gover's February 11, 2000 directive regarding the processing of petitions.

We note that the Attorney General and the Towns have made many allegations about the "unfairness" imposed on them as a result of the February 11 directive from Assistant Secretary Gover. The truth of the matter is that the directive had no effect on them. The effect of the directive was felt almost exclusively by the BAR staff and petitioners. The BAR staff was required to stop most independent research and to rely on the evidence submitted by petitioners. If the directive had been in effect at the time of the Mohegan Proposed Finding in 1989, it is quite likely that the Tribe would not have received a positive Final Determination five years later. During those years the BAR staff spent considerable time engaged in independent research in Connecticut and it was the evidence generated from that research that formed the basis for the Final Determination. We did not have the benefit of a similar effort by the BAR staff in the preparation of the Final Determination on our petition. The burden of addressing the issues raised in the Proposed Finding on our petition fell entirely on us.

-- Allegations of Improper Influence: The GAO report notes that with respect to several recent recognition decisions, the recommendation of the BAR staff for a Proposed Finding or Final Determination was not accepted by the Assistant Secretary for Indian Affairs, who is the ultimate decision-maker. The GAO found that "[m]uch of the current controversy surrounding the regulatory process stems from these cases."

In our case, while BAR staff initially recommended that a negative Proposed Finding be issued, based on their review of our documentation, the Assistant Secretary determined that the fact that we have lived on the Lantern Hill Reservation for over 300 years and have had an ongoing relationship with the Colony and State of Connecticut throughout this same time period should be given weight, consistent with prior actions of the Department in regard to state recognized tribes in Maine. The BAR staff accepted the conclusions of the Assistant Secretary as being within his authority and as consistent with the evidence. Attorney General Blumenthal and the Towns of Ledyard, Preston and North Stonington were officially, and repeatedly, made aware of this during a formal, on-the-record technical assistance meeting with the BAR staff in August, 2000. However they continue to misrepresent the facts and distort the record on this point.

During the Spring and Summer of 2000, the Towns of Ledyard, Preston and North Stonington and the Connecticut Attorney General alleged that the processing of the Paucatuck petition by the BIA had been subject to improper political influence and that the acknowledgment process was corrupt.

On behalf of the Paucatuck Tribe, I wrote to Secretary Babbitt and asked that he request the Department of Interior's Office of Inspector General to investigate to determine if there was any validity to these allegations. On August 23, 2000, the Inspector General expressly found no factual basis for the allegations of improper influence and corruption, and no factual basis to

conclude that Assistant Secretary Kevin Gover had a conflict of interest with respect to the Paucatuck petition, or was otherwise acting improperly.

Subsequently, Representative Frank Wolf (R-Va) requested that the Inspector General investigate the handling of the acknowledgement petitions for six tribes, including the Paucatuck Eastern Pequot Tribe. On March 4, 2002, the Inspector General issued a report that erroneously concluded that Assistant Secretary Gover had issued the Proposed Finding on our petition over the objections of the BAR staff. Our attorneys pointed out the error to the Inspector General and he promptly issued a correction. Attorney General Blumenthal was notified directly by the Inspector General of both the error and the correction. However, he continues to misrepresent the facts and distort the record on this point.

GAO's September 17 testimony, which is based on its November, 2001 report, did not correct the record on these points.

Finally, it should also be noted that former Assistant Secretary Gover has publicly informed Attorney General Blumenthal that the only time during the consideration of a petition for acknowledgement while he was Assistant Secretary that he felt any political pressure or influence was on our petition—and that pressure came from the Attorney General and the Towns of Ledyard, Preston and North Stonington.

-- Meeting the Criteria for Acknowledgment: GAO noted in its report that there is general agreement that petitioning groups must satisfactorily address the seven mandatory criteria set forth in the regulations in order to be recognized. It recommended, however, that clearer guidance be provided on what kinds and quantities of evidence are required to meet these criteria, and for the consideration of historical circumstances when evidence may be lacking. This may lead to results that appear to be inconsistent or arbitrary and a process that appears to be lacking in transparency in the judgment of GAO. We do not disagree.

We support the continued application of all of these criteria to all petitioners. And, we look forward to the forthcoming guidance the BIA has developed for ensuring that petitioners and interested parties understand the kind and quantity of evidence that is needed to meet the criteria. We hope that the new guidance will assist in making the process more consistent, predictable and transparent for everyone. One of our concerns with the manner in which the Attorney General and the Towns participated in the processing of our petition revolved around their refusal or failure to disclose the identity and the credentials of the experts who assisted them. The BAR staff and petitioners certainly have a sound basis for needing such information. The evaluation of the evidence and analysis developed by their consultants would be more reliable. The process would be markedly more transparent. We went to great lengths to openly identify our experts and to present their credentials to the BAR and all of the interested parties. It is regrettable that the Attorney General and the Towns did not do the same and still have not done so.

During the additional technical assistance meetings the BAR held for the Attorney General and the Towns in July, 2001, the BAR staff explained in great detail how they consider, analyze, evaluate and weigh the evidence under each of the criteria. Based on that description, it should have been possible for the Attorney General ant the Towns to effectively present evidence that might show that we did not meet the criteria if such evidence exists. The Final

Determination makes it clear that they failed to do so and that we met our burden of proving that we do meet each of the seven criteria.

Attorney General Blumenthal and First Selectman Mullane have criticized Assistant Secretary Gover's decision to issue a positive Proposed Finding on our petition at the same time that he raised questions about whether we had met our burden of proof on two of the mandatory criteria. This criticism appears to be the result of a willful misunderstanding of what a Proposed Finding is. When the BAR provides a petitioner with a "technical assistance" or "obvious deficiencies" evaluation of a documented petition, and when the Assistant Secretary issues a Proposed Finding, both actions are preliminary. Both are designed to highlight areas of weakness and inconclusive evidence or documentation in order to enable the petitioner and interested parties to better present their case. None of these actions constitutes final agency action. They are intended to guide petitioners and interested parties in the development of evidence and documentation so that when a final decision is made, it will be based on all of the available evidence. It is in the final stage of the acknowledgement process, the issuance of a Final Determination, where the Assistant Secretary must find that all seven criteria have been met by the petitioner. At that stage, the failure of a petitioner to meet any one of the criteria is sufficient to require the issuance of a negative Final Determination. Even a casual review of the Proposed Findings and Final Determinations that have been issued by the Department since the regulations were first issued in 1978 reveals these fundamental points about how the process works. The GAO did not address this point in its 2001 report.

-- Input from State and Local Governments: The GAO report notes repeatedly that decisions regarding tribal status of petitioning groups also affect surrounding non-Indian communities, and that procedures under the current regulations for providing information to interested parties and considering their views on a petition are ineffective. While GAO correctly notes that third parties have become increasingly active on recognition cases, the report failed to note that all parties have difficulty getting information from the BAR staff and that the current acknowledgment regulations provide significant opportunities for state and local governments and other interested parties to be kept informed of and comment on a petition, including the following:

- When a letter of intent to file a petition for recognition or a documented petition is submitted, the Assistant Secretary for Indian Affairs must notify the governor and attorney general of the state in which the petitioner is located and publish formal notice in the *Federal Register* within 60 days. Governors, attorneys general and all other interested parties are invited to "submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment and/or to request to be kept informed of all general actions affecting the petition" (25 CFR 83.9).

- Interested parties are notified when the documented petition is placed on "active consideration" and BAR begins its review of the documentation and analysis in preparation for the Proposed Finding; they are notified of any time extensions for the issuance of the Proposed Finding; and are provided with a copy of the report summarizing the evidence for each criteria which explains the Proposed Finding.

- These same interested parties have an opportunity to comment on the Proposed Finding after it is issued by the Assistant Secretary.

- In addition, interested parties may request or participate in a formal, on-the-record "technical assistance" meeting with BAR staff to discuss the reasoning behind the Proposed Finding. The State of Connecticut and the Towns of Ledyard, Preston and North Stonington exercised their prerogative to request technical assistance from the BAR, and in August, 2000, and again in July, 2001, the Department held on-the-record technical assistance meetings for them on our Proposed Finding.

- Interested parties are part of the discussions that the Assistant Secretary holds with the petitioner to decide on a timeframe for review of all the material and evidence submitted as comments on the Proposed Finding in the preparation of a Final Determination.

- Upon issuance of a Final Determination, an interested party may file a request for reconsideration of that decision with the Interior Board of Indian Appeals. Following that, an interested party can challenge a Final Determination in federal court.

Whether a local government chooses to participate in the many opportunities afforded it under the 25 CFR Part 83 regulations is another matter. In our case, the Towns of Ledyard, Preston and North Stonington and State of Connecticut were notified by BIA in 1989, when we submitted our letter of intent. It was only after our petition went on "active consideration" in 1998 that the Towns and Attorney General became active in opposing our petition.

-- The Scope of the GAO Report: The GAO report presented some new analysis and data which is quite helpful, such as the discussion of recognition under the Indian Reorganization Act and the accompanying chart showing when and how each of the 47 individually recognized tribes was recognized, and the timelines for the acknowledgment process under the current regulations.

However, we were troubled that the report also wandered to conclusions about other aspects of the federal-tribal relationship without fully analyzing their impact or explaining their connection to the federal acknowledgment process. This was true of the report's brief discussion of federal benefits and services to recognized tribes, exemption from the laws of state or local jurisdictions, the taking of lands into trust to establish, add to and consolidate tribal homelands, and the establishment of gaming facilities. The GAO report referred to the "controversies surrounding the federal recognition process," which are, as the report admits, tied to "events that can only occur after a tribe is recognized." It is unfortunate that a case of cart-before-the-horse negatively impacts petitioners who are in the recognition process.

We wish that GAO had given more consideration and weight to the thoughts offered by some petitioners in the process, along with those of BAR staff and interested parties. Surely other petitioners would agree with the criticisms that the recognition process is too lengthy and costly, and decisions may appear to be reached with a degree of subjectivity in analysis.

Petitioners might not have focused on gaming and federal services, but rather on other issues, such as the opportunities for third party input, concern that state and local governments want a veto right over a petition, the need to insure that sensitive material in a petition (such as membership information, information about traditional cultural practices, etc.) is adequately protected from release to the public, the required level of evidence to meet the mandatory criteria, and the question of whether the Department, which has recognized 15 tribes and denied acknowledgment to 19 petitioners since 1978, might be predisposed against adding more tribes to the family of Indian nations.

-- The Role of Gaming: The GAO report makes much of Indian gaming. The Paucatuck Eastern Pequot Tribe wishes to comment on remarks in the report and by some public officials which suggest that Indian tribes are being "invented" in order to be able to operate casino gaming, and that the only reason unacknowledged tribes are going through the recognition process is so they can take advantage of the Indian Gaming Regulatory Act.

Members of our Tribe have been working to achieve federal recognition since the 1970s, long before Congress enacted legislation to authorize Indian gaming in 1988. Living as our Tribe does in southeastern Connecticut, we want this Committee to know that our tribal leaders and elders were gathering information and documentation about our Tribe in order to present our case to the BAR long before anyone ever heard about the Foxwoods Casino or the Mohegan Sun Casino.

For some petitioners, because of the length and cost of the federal acknowledgment process, they find it necessary to agree to go into gaming so that they can bear the costs necessary to hire the experts and develop the evidence necessary to achieve federal recognition, not the other way around. In our case, even though we are recognized by the State of Connecticut, our efforts to become federally recognized have been opposed by Attorney General Blumenthal and the Towns of Ledyard, Preston and North Stonington. The Attorney General has opposed our petition even though as a member of the State Senate in 1989 he voted in favor of changes to state law that affirmed our existence as a tribe.

We don't know how much money the Attorney General and the Towns have spent opposing our petition, but we do know that they have employed one of the largest law firms in the nation and have hired many experts. It is fair to say that more than a million dollars of State tax revenues have been spent in opposition to our petition. Some of that funding has come from the portion of revenues the State of Connecticut receives from the Mohegan and Manshantucket Tribes and then distributes to the local communities. At the very least, it is ironic to hear First Selectman Mullane complain about the impacts of Mohegan Sun and Foxwoods and then learn that the funds he is provided to deal with those impacts are being spent to fight us. He conveniently neglects to mention that the largest employer and taxpayer in North Stonington is the Mashantucket Pequot Tribe.

The sources of funds available to assist petitioners are a small grant program in the Administration on Native Americans in the Department of Health and Human Services and prospective development partners in the private sector. In the private sector, virtually the only parties interested in providing funds to a petitioner are from the gaming industry. We did not create this system. It is the system imposed on us and in which we are required to prove our right

to exist. We certainly agree that the system can be improved and we are willing to assist in that effort.

The Attorney General and the Towns of Preston, Ledyard and North Stoningnton can't quite decide what they want. On one hand they tell us to follow the process. On the other hand they tell everyone that the process is broken and corrupt and that any decision they don't agree with is proof of that. We can only conclude that the only process they want is one that gives them the results they want.

We have lived in these communities for centuries. We will never leave. We know who we are. We also understand that the "rules of the game" require us—and only us—to prove our right to be there. We would like to have an open and cooperative relationship with our neighbors. We hope that one day they will be able to accept us for who we are and that they will honor the laws that have been written to define us and work with us to build a better community for everyone.

On behalf of the Paucatuck Eastern Pequot Tribal Nation, thank you for this opportunity to submit this statement. We would be pleased to assist the Committee members as your consideration of this issue continues.

THE BURT LAKE BAND OF
OTTAWA & CHIPPEWA INDIANS, INC.
6461 E. Brutus Road, P.O. Box 206 • Brutus, Michigan 49716 • (231) 529-6113

TESTIMONY OF CARL L. FRAZIER, CHAIRMAN OF THE
BURT LAKE BAND OF OTTAWA AND CHIPPEWA INDIANS, INC.
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON S. 1392 AND S. 1393

SEPTEMBER 17 2002

Good Morning Mr. Chairman:

My name is Carl Frazier. I am the Chairman of the Burt Lake Band of Ottawa and Chippewa Indians. On behalf of our tribal members, I thank you for allowing me to submit written testimony today.

Mr. Chairman, I am frustrated, troubled and angered by the proposed moratorium on tribal recognition as well as S. 1392 and S. 1393. From the point of view of the Burt Lake Band, these bills if enacted would place yet additional obstacles in our already-prolonged effort to have the Federal Government acknowledge that we are a recognized Tribe. From the point of view of Indian nations generally, S. 1392 appears to delegate the authority of Congress to terminate a Tribe to the Secretary of the Interior. Congress has never previously delegated that authority to the Secretary and it should not do so now.

The Burt Lake Band of Ottawa and Chippewa Indians--then known as the Cheboigan Band-- signed the 1836 Treaty of Washington and the 1855 Treaty of Detroit. The U.S. Senate ratified each of these treaties. Those ratifications established a government-to-government relationship between the Unites States and the Burt Lake Band.

The 1836 Treaty designated a 1,000 acre reservation for the Cheboigan

Band. However, through no fault of the Band, a series of errors contributed to the ultimate demise of this reservation.

1. Though ordered, the federal government failed to locate the actual reservation boundaries,

2. Even though these lands were identified (Sections 35 and 36 N. R3W), the federal government failed to remove these lands from public sale,

3. The federal government allowed individual members of the Band to purchase these very same lands that should have been their reservation lands to begin with,

4. We followed the advice of the local federal Indian Agent and placed federal trust lands into state trust status,

5. Local county officials then placed these same state trust lands on the county tax rolls. Believing that this trust land was not taxable, our people did not pay the real property taxes and a corrupt local timber baron named McGinn bought these "tribal lands" at a public tax sale.

Then armed with a writ of assistance, McGinn ordered the Band from its village site. Our people refused to move, so McGinn, aided by the local sheriff, burned our tribal village to the ground in October of 1900.

The Tribe then sought help from the U.S. Justice Department. In 1911, the United States sued McGinn in the United States Circuit Court for Eastern Michigan. The United States alleged that it sued on behalf of the "Cheboygan band of Indians [which] is now and was at all the times mentioned in this bill of complaint a tribe of indians[sic] under the care, control, and guardianship of the plaintiff and said band is now and was at all times mentioned in this bill of complaint recognized by the plaintiff through its chiefs or head men which it annually elects." In the litigation, the United States sought to have all the conveyances set aside and the lands restored to the Burt Lake Band. The court decided that, because the land in question had been patented in fee without any restraint on alienation, no trust had been created and the lands were in fact subject to state taxation.

The Tribe urged the United States to appeal that decision, but no appeal was taken.

Despite the loss of these lands, our people remained in the immediate area and continued to maintain our tribal community life. In 1934, we petitioned to reorganize our government under the Indian Reorganization Act (IRA). To our surprise, we were found ineligible for IRA assistance solely because we lacked communal lands and the United States would not allocate any IRA funds to purchase new lands for our tribe.

While we were disappointed and continued to lobby for tribal lands, no federal official ever told us that the U.S. had any thoughts of terminating our government-to-government relationship with the United States.

Certainly, Congress has known how to end the government-to-government relations between the United States and particular Indian tribes. In the 1950s, Acts of Congress terminated those relations for a number of tribes. But Congress has never taken any action to terminate our tribe.

Today, our tribe still is centered in the area where our original village was located, and it continues to correspond with U.S. government officials, yet our name is not included on the current list of federally recognized tribes. Unlike the members of most other non-recognized tribes, our members continue to receive U.S. Indian Health Service benefits and our students still qualify for the Michigan State Indian tuition waiver program. But we receive no tribal services from the BIA.

My frustration stems from this: No one in the United States Government can tell me or my tribal members when and under what legal authority the United States terminated its government-to-government relationship with our tribe. We have never been given any notice that the United States intended to terminate the relationship.

After years of fighting for an answer, the Burt Lake Band, seeing no alternative, filed a letter of intent to petition with the Branch of Acknowledgment and Research (BAR) in the mid 1980s. We waited more years until, finally with the support of Michigan Congressman Dale Kildee and of some this committee's excellent staff, our petition became number one on the active consideration list at the BAR. That was in November of 1998. Now, four years later, the BAR has still not assigned a team to or started to work on our petition.

First, the BAR needed to complete work on other tribal petitions. Then, the Muwekma Band and the Mashpee Tribe, who are equally deserving of consideration, but well behind us on the waiting list, filed lawsuits in the U.S. District Court. Each succeeded in having the Court order the BAR to complete work on its petition within a prescribed deadline.

While we wait, we continue to pose some very simple questions.

1. What law, gave the BIA the legal authority to terminate Burt Lake Band or any other federally recognized tribe?

2. If the BIA wants to terminate the Burt Lake Band, the Northern Cheyenne, the Navajo, Rosebud Sioux, or Oneida or any other tribe recognized by a treaty ratified by the Senate, can it do so simply by omitting that tribe from its list of federally recognized tribes and terminating BIA services to that tribe?

3. If the BIA omits the Northern Cheyenne, the Navajo, the Rosebud Sioux, the Oneida, or some other treaty tribe's name from the list of federally-recognized tribes and gives it no appropriations, is that tribe terminated the day the list is published, the day the services stop coming, a month later, a year later, five years later? I simply cannot find the answer to that question.

When I pose these questions to the BIA, they give me no answers, although one representative of the Solicitor's Office did say that our tribe could have chosen to dissolve itself. I then asked her how we managed to do that without knowing it. We still have 650 active enrolled members, many who are the sons, daughters, grand children and great grandchildren of those who were in our village when McGinn burned it to the ground. Many of these people are eligible for enrollment in other tribes, but they have chosen to remain with the Burt Lake Band. Our Tribal Council still meets at least once a month. We still have a tribal office, hold general membership meetings and elections, operate tribal programs, and hold cultural gatherings. Our people get together with each other on a regular basis and many of our elders still speak our language. We still hold our ghost suppers, teach our children our traditions and culture, attend local pow wows, hold traditional funerals together, and testify at hearings like this. Representatives of our tribe have visited the U.S. Congress on a regular basis since 1935. We have worked with the BIA on our tribal land claims. So I ask again, when and how did we choose to self destruct?

Receiving no answer from the BIA, we last year filed an action in the U.S. District Court for the District of Columbia and asked the Court to order the BIA to include our name on the list of federally recognized tribes. The U.S. moved to dismiss our case on the ground that we had not exhausted our administrative remedies by going through the BAR process. To our dismay, the Court granted that motion. So the Court has essentially told us that the Department of the Interior has the power to terminate our government-to-government relationship with the United States if it decides not to acknowledge us through its administrative procedures.

Although we have no money, our lawyers are staying with us and will appeal that decision, because we see no administrative remedies that we have failed to exhaust.

While the Burt Lake Band appreciates the sincere efforts of this committee and the interest Senators Dodd and Leiberman are showing by drafting S. 1392, we see no benefit in that legislation. While the bill does increase the authorization for the BAR, we have no reason to hope that those funds will actually be appropriated, and no assurance that our petition will be taken up even if those moneys are actually awarded. We are also deeply troubled by the new hearing provisions contained in S. 1392 and the grant proposals in S. 1393, because those moneys can be used by towns and local governments to make life even more difficult for tribes in our position.

In the past, Congress has never explicitly granted the Department of the Interior the authority to terminate an Indian tribe. In fact, whenever the subject has come up, Congress has explicitly reserved this authority for itself. I call to your attention the findings in the Tribal List Act and in Tlingit and Haida legislation contained in that same statute. Section 103(3) of the Tribal List Act states that "a tribe which has been recognized . . . may not be terminated except by an Act of Congress."

The Tlingit and Haida Status Clarification Act was part of the same public law that contained the Tribal List Act. The findings in that Act are even more explicit on the powers of the Secretary of the Interior: "the Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress" and "the Secretary may not administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress.

If Congress enacts S. 1392, codifying the BAR regulations and, specifically, part 83.8 of those regulations, it is implicitly delegating its authority to terminate a tribe to the Department of the Interior. We do not think it should delegate that authority.

I close by returning to my first and most important point. When this body ratified our treaty, it created a government-to-government relationship between the Burt Lake people and the United States. This body has never terminated that relationship. I respectfully call upon the members of this Committee and the other Members of this Congress to honor that commitment by helping us right this terrible wrong and injustice. We have no other place to go.

Thank you for the opportunity to express the tribe's concerns on these very important matters.

Respectfully submitted,

Carl L. Frazier
Burt Lake Band Tribal Chairman

TESTIMONY OF CHAIRMAN TEX G. HALL
OF THE MANDAN, HIDATSA AND ARIKARA NATION

PRESIDENT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

September 17, 2002

Chairman Inouye, Vice Chairman Campbell and Members of the Committee, I am honored to submit written testimony on behalf of the National Congress of American Indians, the nation's oldest and largest association of Indian tribal governments. We greatly appreciate the opportunity to participate in the legislative process of the United States Senate and to provide this Committee with our views on this critical issue. Attached to this testimony, please find a copy of NCAI Resolution MSH-01-069, "To Oppose a Moratorium on the Federal Recognition Process and in Support of a Fair and Efficient Acknowledgment Process."

On behalf of NCAI, I would urge the Senate to oppose any efforts to place an amendment on the Interior Appropriations bill that would create a moratorium on the right of tribes to petition the federal government for acknowledgment as a federally-recognized Indian tribe. As you know, Senator Christopher Dodd has offered such an amendment (No. 4522 to Amendment No. 4472) to the Interior bill, and our understanding is that such an amendment may come up for consideration this week.

Both the federal government and the NCAI have a longstanding position that legitimate Indian tribes, whose status has been historically omitted because of the vagaries of U.S. history and federal Indian policy, should have the right to petition for formal recognition by the federal government. Such recognition acknowledges the government-to-government relationship between the tribe and the federal government, as well as the tribe's eligibility to the benefits and services provided by the federal government to Indian tribes.

The current process for federal recognition, found in 25 C.F.R. 83, is a rigorous process requiring the petitioner to satisfy seven mandatory criteria, including historical and continuous American Indian identity in a distinct community. Each of the criteria demands exceptional anthropological, historical, and genealogical research and presentation of evidence. The Department proceeds with exceeding deliberation, and decides on average only one or two petitions per year. The vast majority of petitioners do not meet these strict standards, and far more petitions have been denied or withdrawn than have been accepted.

The process is also plagued by an enormous backlog. Some petitioners have been waiting over two decades since they submitted their initial petitions. Our understanding is that a petitioner who has a completed petition before the Department of Interior now has an estimated five to six year waiting period before the petition will receive consideration. This is an unjust period of delay for a federal government agency, and NCAI supports changes that will make this a more efficient and equitable process.

Senator Dodd's proposed amendment would create an indefinite moratorium until the Secretary of Interior certifies that certain new administrative procedures have been created for the recognition process. Such an amendment would only increase the delay for the petitioning tribes, of whom many have been waiting interminably for a decision. Also, because there is no incentive for the Secretary to actually create this new process, the petitioning tribes would be put in limbo for additional years, decades, or perhaps forever. This would be the ultimate Catch-22 for a tribal petitioner.

Inappropriate to Legislate on an Appropriations Bill

Consistent with Senate Rule 16, Indian tribes have consistently opposed legislating on important matters of Indian law and policy in appropriations bills. Such efforts have historically been undertaken by those who have stood in opposition to Indian country on matters that, if subjected to the full scrutiny of the legislative process, would not succeed. Proceeding in this fashion provides no opportunity for tribal consultation or thoughtful consideration of the impacts of the legislation on the diverse interests affected by such action. As is the case here, there has been no tribal consultation developed on the amendment.

The appropriate venue for the consideration of substantive changes in federal Indian law and policy is the Senate Committee on Indian Affairs, as with today's hearing on legislation introduced by Senator Dodd, S. 1392 "Tribal Recognition and Indian Bureau Enhancement Act of 2001," for this Tuesday, September 17, 2002.

In addition to the Dodd bill, Senator Campbell has also introduced reform legislation that was co-sponsored by Senators Inouye and Bingaman, S. 504. "Indian Tribal Federal Recognition Administrative Procedures Act 2001." While there is support from Indian country for many of the concepts in S. 504, even this more comprehensive piece of legislation is still in need of further consultation and refinement.

Specifically, there still needs to be further discussion about the need for an independent commission on federal recognition, the purpose and function of additional hearings and other procedures aimed at increasing the petitioners' and interested parties' participation in the process, the appropriate criteria, including the importance of state recognition, for

determining the existence of an Indian tribe, and the appropriate evidentiary standards for evaluating information submitted in the petitions.

Finally, in response to recommendations made by the General Accounting Office (GAO) in their November 2001 report on "Improvements Needed in Tribal Recognition Process," the Administration is expected to soon release their strategic plan for improving the process.

Clearly, the proponents of these measures should be afforded a meaningful opportunity to have their initiatives given full and fair consideration by the Senate through the normal legislative process. While it is true that there are problems with the process of federal recognition – delays, high costs and lack of staff, to name a few – these burdens most heavily fall on the tribes seeking recognition. NCAI is very much interested in participating in deliberate reform efforts that are intended to protect the fundamental right of tribes to petition for federal recognition.

Dodd Proposals One-Sided -- Do Not Address Tribal Concerns with the Process

Parties with divergent interests in the federal acknowledgement process have raised concerns with it, however, Senator Dodd's amendment, which embodies portions of S. 1392, only reflects the concerns of those opposed to federal recognition and completely ignores the concerns of Indian tribes and petitioning Indian groups.

The existing process is a stringent one that requires intensive historical documentation of seven mandatory factors. Despite testimony provided by the Native American Rights Fund during a Senate Committee on Indian Affairs hearing in May 2001 that, "the criteria in the present regulations are so burdensome and heavily dependent on primary documentation that many legitimate Indian tribes simply cannot meet them," Senator Dodd's amendment would appear to further raise the burden on petitioning groups by heightening the evidentiary standards. Such a fundamental change to the federal recognition process should not be enacted without careful consideration by the Committee on Indian Affairs and meaningful consultation with Indian tribes and affected petitioners.

As mentioned above, Senator Dodd's amendment also does nothing to address the concerns of Indian tribes and petitioning Indian groups related to the expense and time required to complete the process. To the contrary, it would place a moratorium on recognition decisions, further delaying the process. Moreover, one of the most critical problems with the federal acknowledgement process is the lack of resources at the Department for reviewing the submitted petitions and managing other administrative requirements associated with the process, such as responding to Freedom of Information Act requests and preparing for requests for reconsideration, judicial appeals, and lawsuits. While Senator Dodd's amendment would authorize additional funding for the

Department, it would not allow the Department to expend any of those funds until it certified to Congress that it had implemented new administrative procedures. Again, this moratorium would only further delay the Department's review of petitions and add to the administrative burden already paralyzing the Branch of Acknowledgement and Research.

Finally, the amendment also appears to do little to meaningfully improve the procedures for providing notice and opportunity to participate to interested third parties. The existing regulations already provide for notice to the state and the community, the consideration of relevant evidence, and formal meeting procedures. The provisions in the Senator's amendment would add little to the existing process.

Overall, the Senator's amendment makes no real effort to meaningfully reform the process and simply stands to further delay pending recognition decisions in the State of Connecticut, and elsewhere.

Conclusion

Senator Dodd's amendment is intended to obstruct the Department's consideration of certain petitioners from within the State of Connecticut. Its impact, however, would fall unfairly on all of the legitimate tribes throughout the country who have yet to receive the recognition they deserve. The Tribal Nations that make up NCAI are strongly opposed to this amendment, and we urge you to join with us in our opposition.

NATIONAL CONGRESS OF AMERICAN INDIANS

THE NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION #MSH-01-069

Title: To Oppose a Moratorium on the Federal Recognition of Tribes and in Support of a Fair and Efficient Federal Acknowledgment Process

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest, largest, and most representative national American Indian and Alaska Native tribal government organization; and

WHEREAS, the administrative process to federally recognize tribes is set forth in 25 C.F.R. Part 83, the Federal Acknowledgment Process (FAP), which is implemented by the Bureau of Acknowledgment and Research (BAR) of the Bureau of Indian Affairs (BIA) and gives the Assistant Secretary the decision-making authority to render positive or negative determinations on each petition for recognition; and

WHEREAS, the result of a positive determination on a recognition petition is of utmost significance and is not to be extended lightly because it acknowledges the government-to-government relationship between the federal government and the tribe and acknowledges the tribe's eligibility to receive federal services and enjoy other privileges of federally recognized tribes; and

WHEREAS, the FAP process, which was developed in 1978 and revised in 1994 with an unprecedented amount of consultation with interested parties, is a rigorous process requiring the petitioner to satisfy seven mandatory criteria each of which demands exceptional anthropological, historical, and genealogical research and presentation of evidence; and

WHEREAS, despite the stringent criteria of the FAP process and the ample opportunity for participation in the process by interested parties, efforts to reform the process have been proposed continuously since 1988 in the U.S. Congress in order to attempt to establish a more equitable, less costly and less time-consuming approach to federally acknowledging tribes, noting the lack of staff and resources at BAR and the inordinate amount of time petitioners must wait to reach active consideration by BAR; and

WHEREAS, some, including the State of Connecticut and certain Connecticut towns, have launched an outright attack on the FAP process in the federal courts and in Congress and have called for a moratorium on the federal recognition of tribes in a politically motivated effort to delay and obstruct the BAR's consideration of certain petitioners from within the State of Connecticut, fueling controversy over the recognition process as well as sovereign rights of all tribes.

NOW THEREFORE BE IT RESOLVED, that NCAI does hereby support the rights of unrecognized tribes to pursue federal recognition through a fair and efficient process, administrative or otherwise; and

BE IT FURTHER RESOLVED, that while NCAI acknowledges that the FAP process needs improvements to ensure timely consideration of petitions, it opposes a moratorium on recognition determinations while reform proposals are being offered, reviewed, or implemented as such a moratorium would be wholly unfair to petitioners who have waited far too long to be considered by BAR; and

BE IT FURTHER RESOLVED, that NCAI opposed politically motivated attacks on the FAP process brought by states and towns either in court or on Capital Hill as such attacks are fueled solely by efforts to deny a tribe's right to pursue federal recognition in accordance with the law; and

BE IT FINALLY RESOLVED, that NCAI does hereby support this resolution and agrees to work with Congress and the Administration to obtain necessary funding to permit the BAR to fulfill its function and to ensure an administrative recognition process that more promptly processes petitions while maintaining the integrity in the FAP process.

CERTIFICATION

The foregoing resolution was adopted at the 2001 Mid-Year Session of the National Congress of American Indians, held at Foxwoods Resort Casino in Mashantucket, Connecticut on May 13-16, 2001, with a quorum present.

Susan Masten, President

ATTEST:

Juana Majel, Recording Secretary

Adopted by the General Assembly during the 2001 Mid-Year Session of the National Congress of American Indians, held in Mashantucket, Connecticut on May 13-16, 2001.