RECOGNIZING A PROBLEM—A HEARING ON FEDERAL TRIBAL RECOGNITION

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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THURSDAY, FEBRUARY 7, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Doug Ose (chairman of the subcommittee) presiding.

Present: Representatives Ose, Otter, Shays, Cannon, Duncan, and Tierney.

Staff present: Dan Skopec, staff director; Barbara Kahlow, deputy staff director; Jonathan Tolman, professional staff member; Allison Freeman, clerk; Michelle Ash, minority counsel; and Jean Gosa, minority assistant clerk.

Mr. OSE. The hearing will come to order.

We are going to go ahead and do the opening statements. Hopefully, we will not have any votes for 10 or 12 minutes.

At last count, there are more than 550 federally recognized tribes in the United States. These tribes come in a variety of shapes and sizes, from large tribes, such as the Navajo and Cherokee nations with hundreds of thousands of members, to tiny tribes with a handful of members. One tribe in California, the Augustine Band of Cahuilla Mission Indians, consists of one adult and seven children. And each tribe has its own political and cultural history.

Faced with such a diverse array of existing tribes, the task of acknowledging a new group as a tribe is probably one of the most difficult and complicated tasks facing the Department of the Interior.

Today's hearing will look at the issues with Federal tribal recognition.

The Federal recognition of an Indian tribe can have a tremendous effect not only on the tribe, but also on the surrounding communities and the Federal Government. Recognition establishes a formal government-to-government relationship between the United States and a tribe. This special relationship also confers a unique type of sovereignty upon Indian tribes. This sovereign status exempts tribal land from many State and local laws, such as sales taxes and gambling regulations.

In 1978, the Department of Interior's Bureau of Indian Affairs [BIA] established a regulatory process intended to provide a uniform and objective approach to recognizing tribes. The regulations established seven criteria that groups must meet in order to be rec-

ognized. In 1994, BIA revised its regulations to clarify what evidence was needed to support the requirements for recognition. BIA further updated its guidelines an clarified its procedures in 1997, and again in 2000.

Despite these changes, criticism of the process has continued. Groups seeking recognition claim that the process takes too long. Third party groups claim that the process is opaque, with little opportunity for public input. Both sides argue that the current process produces inconsistent decisions.

I am particularly concerned about how the public perceives the recognition of tribes. Although this hearing is focused on the issue of tribal recognition, this hearing would be garnering far less attention were it not for gambling. Failure to mention this fact would be to ignore the proverbial "elephant," or should I say more accurately "elephants," in the room.

Fifteen years ago, Indian gaming was virtually unknown. In 1999, Indian gaming generated $9.8 billion in revenues, more than the casinos in Las Vegas. There is little doubt that such large amounts of money are changing both the nature and the content of the debate.

Regardless of one's opinions about gambling, it is fundamentally changing public perception of what it means to be a tribe. And public opinion invariably changes congressional attitudes.

While any reform of the process will involve discussion about criteria, documents, and levels of evidence, I am also concerned that, as reforms are discussed, we do not miss the forest for the trees. Any effort to reform the process, whether it be administrative or legislative, must focus on the underlying legal and policy principles. Fundamentally, the process of recognizing tribes is based on an acknowledgement of the existing political sovereignty of that community. Because tribal recognition is inextricably intertwined with this concept of tribal sovereignty, changes to the recognition process may have long-term consequences for the principles of tribal sovereignty.

Any changes to this process should ensure that they do not result in the erosion of tribal sovereignty, particularly for existing tribes. I think that it would be very unfortunate for future historians to look back on this period of Federal-tribal relations and conclude that tribal sovereignty was traded for casinos.

As Chief Bourland, Chairman of the Cheyenne River Sioux once said, "We must think about issues today, but we must also think about the issues as they will be seven generations from now. What you do today, the decisions you make, will affect them."

[The prepared statement of Hon. Doug Ose follows:]

Chairman Doug Ose
Opening Statement
Recognizing a Problem – A Hearing on Federal Tribal Recognition
February 7, 2002

At last count, there are more than 550 federally-recognized tribes in the United States. These tribes come in a variety of shapes and sizes, from large tribes, such as the Navajo and Cherokee nations with hundreds of thousands of members, to tiny tribes, with a handful of members. One tribe in California, the Augustine Band of Cahuilla Mission Indians, consists of one adult and seven children. And, each tribe has its own political and cultural history.

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I look forward to the testimony of our witnesses, including: Representative Rob Simmons (CT-02); Neal McCaleb, Assistant Secretary for Indian Affairs, DOI; Barry T. Hill, Director, Natural Resources and Environment Division, General Accounting Office; and Tracy Toulou, Director, Office of Tribal Justice, Department of Justice.

Mr. OSE. I would like to recognize the gentleman from Idaho, Mr. Otter, for the purposes of an opening statement.

Mr. OTTER. Thank you very much, Mr. Chairman. I would like to offer my apologies to you and to my colleague Mr. Shays, as well as to my colleague Mr. Simmons. I have another meeting that I have to run to. But I will submit an opening statement for the record. And I will also submit some questions for the record and for the Bureau of Indian Affairs that I would like to get the answers back to as soon as possible. And so with those apologies, Mr. Chairman, I take my leave. I yield back the balance of my time.

Thank you, Mr. Chairman.

[The prepared statement of Hon. C.L. "Butch" Otter follows:]

CONGRESSMAN OTTER: Mr. Chairman. I apologize for my short time at this important subcommittee hearing. I have a conflict with another committee that requires my attendance. The status of tribes and the recognition of tribes is a matter of great importance. I have some very grave concerns about actions taken by the Bureau of Indian Affairs in recent years as they pertain to recognition. I am sure many of my colleagues share my concern.

If the tribal recognition and land to trust process is to be a fair and impartial course of action, we in Congress have a duty to ensure that the Interior Department (and particularly the BIA) are insulated from outside influences. Some of us have read with particular concern the well-researched front-page reports published over the past year by the Boston Globe on this very subject.

The first story concerned a series of reversals of staff recommendations regarding tribal recognition that occurred in the final days of the Clinton Administration. Given these circumstances, it is understandable how some of our panelists today reviewed and reversed those tribal recognitions.

A more recent Globe expose has raised serious questions regarding the recognition of the St. Regis Mohawk government. This front-page story alleges that high level political influence was used in the prior administration on behalf of the world's largest gaming corporation, Park Place Entertainment Corporation. The Boston Globe published the story on October 30, 2001. I ask that a copy of this article be included in the record of this hearing.

The October 30th article reveals how these high-ranking BIA officials reversed years of support for the St. Regis Mohawk Constitutional Government (the very same government the BIA helped to create) after entry onto the scene by Arthur Goldberg, then CEO of Park Place. It is important to note that Michael Anderson and Kevin Gover, the same two former BIA officials who were an integral part of the 11th hour tribal recognitions, also played key roles in this matter.

After taking notice of the Globe stories, last month the US Court of Appeals for the Second Circuit asked the District Court for a full record concerning the circumstances and validity of a letter Mr. Anderson wrote --- which may have been written outside the boundaries of prior BIA practices. I believe that this committee should seek a similar explanation from the BIA.

Also, Mr. Chairman, the Mohawk Constitutional government has asked for an accounting of events in a letter that was sent to the BIA months ago. The letter has yet to be answered and I ask unanimous consent to enter this letter into the record and respectfully ask that our BIA panelists review and respond to the letter.

I ask unanimous consent that I be able to submit questions for the record.

Thank you for the time.

St. Regis Mohawk Tribe
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Philip H. Terbell
Vice Chief Executive Officer
Kenny J. Cole

Tribal Council Legislators
Glenn Hill Sr.
Herbert A. Lazore
Russell R. Lazore

Tribal Clerk
Carol T. Hane
Deputy Tribal Clerk
Lois A. Thomas

Irene White Moore
Charles T. Patterson

December 20, 2001

Honorable Gail Norton
Secretary of the Interior
Honorable Neal A. McCaleb
Assistant Secretary of Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Re: Saint Regis Mohawk Tribe

Dear Secretary Norton & Assistant Secretary McCaleb:

We are representatives of the Constitutional Government at the Saint Regis Mohawk Tribe at Akwesasne. We are writing to ask that the Bureau complete it's review of the record and once again recognize the Constitutional Government of the Saint Regis Mohawk Tribe.

As you may be aware, we have an unresolved leadership dispute at Akwesasne that has existed since the summer of 1996. The core of the issue is whether the Tribe had adopted a written Constitution and adopted the tripartite form of government under that Constitution in 1995. The constitution had been adopted by a majority vote of the community on June 3, 1995, had been sustained by our Tribal Court and was the recognized form of government at Akwesasne from 1995 through 1999. However, on September 30, 1999, the United States District Court for the District of Columbia found the Bureau's recognition of the Constitutional Government to be arbitrary and capricious.

We have been informed that upon an adverse ruling from a District Court on an administrative determination, the matter is to be remanded to the agency for additional investigation or explanation. The Bureau thus has the responsibility to review its original determination. We believe that a thorough review on the merits will allow the Bureau to support its original determination, the correct determination, that the people of Akwesasne had chosen to operate under the tripartite form of government under the Constitution.

Following the *Rasmussen* decision, BIA Field Representative Dean White issued a finding on February 4, 2000 that:

> "*Subject to the resolution of any appellate proceeding*... the BIA presently recognizes those individuals elected to the Tribe's three chief system of government on June 29, 1996." (Emphasis added)

By it's express terms, this was not a final determination on the merits. As an appeal of the *Ransom* decision was contemplated, the Bureau temporarily recognized the three chief faction of the Tribe (even though their elected terms of office had expired). As a result of the decision not to pursue the appeal of *Ransom*, the Bureau has continued it's temporary policy.

The three chief faction purports to represent the continuation of the government which existed prior to the adoption of the Constitution. In fact, it doesn't. Dispite a tradition of annual elections, they have canceled all elections since 2000. They have unilaterally acted upon important issues without any consultation with the community, which is not our tradition. They have summarily dismissed an elected Tribal Clerk, a Sub-Chief and several Tribal employees, simply because they did not agree with them. Land disputes are being settled based upon the political connections of the parties. All bringing undue hardship upon members of our Tribe.

Importantly, in a collateral appeal from the *Ransom* decision, Judge Henderson of the Court of Appeals for the District of Columbia stated in a concurrence that: "In my view, the court's order here was not merely 'ministerial', but rather left 'significant further proceedings' for the agency." *Smoke v. Norton 252 F.3d 468, 472 (D.C. Cir. 2001)*. Thus, the Court of Appeals in this case has indicated that the Bureau should examine the merits of the matter after the *Ransom* decision.

We are asking that the Bureau examine the merits of our situation. That the Bureau acknowledge that the Tribal Constitution passed. That the Bureau look into the questionable handling of the case by high level appointees of the prior administration. That the Bureau accept the existence of the Tribal Court. That the Bureau recognize, once again, the constitutional form of government, as chosen by the people of St. Regis.

The Bureau has the full administrative record before it. The record more than amply justifies the Bureau's prior recognition of the constitutional form of government at St. Regis.

Sincerely,

Phillip H. Tarbell
Chief Executive Officer

Barbara Lazore
Tribal Legislator

cc: Wayne Smith, Deputy assistant Secretary, Indian Affairs
Aurene Martin, Counsel to the Assistant Secretary, Indian Affairs
Franklin Keel, Eastern Area Director, Bureau of Indian Affairs

Mr. OSE. Without objection, we will accept the testimony and we will see that the questions get posed.

I recognize the gentleman from Connecticut for the purposes of an opening statement.

Mr. SHAYS. Thank you, Mr. Chairman. Mr. Ose, thank you as well for calling this hearing. I also want to thank all of this morning's panelists for being here, particularly one of my heroes, Rob Simmons. Rob, it took me about 4 years before I had the courage as a Member of Congress to address a committee. So I admire that as well.

Granting Federal recognition means creating sovereign nations within our Nation and must be done with utmost care. Because federally recognized tribes are eligible to automatically receive Federal benefits and, in many instances, are permitted to establish gaming operations, acknowledgement is a decision that should follow a well-defined, non-political process that is fair, objective, and transparent.

Our Nation has a responsibility to Native Americans. I think that is an understatement. Groups meeting the established and objective criteria should receive Federal recognition and absolutely all of its attendant benefits.

The bottom line is this process is suffering. The Bureau of Indian Affairs is desperately in need of help. It lacks the staff and resources to conduct thorough reviews of applications for recognition. It has reached the point where courts play an increased role in the process because of the delay. Moreover, it has created tension between towns and tribes throughout the Nation.

While the focus of today's hearing is not gambling, gambling must be recognized as a key component in creating deep skepticism about groups' motives for seeking recognition. And it has invited corruption into the very serious process of establishing these nations. The stakes are quite high. Outside forces cast their influence in hopes of amassing some of the extraordinary wealth gambling will ultimately provide, particularly in the Northeast.

I thank Assistant Secretary Neal McCaleb for being here today and for the work he has done to try and make this a better process. But his task is very difficult. Today's hearing is an important part of our efforts to improve the recognition process.

In September 2000, Congressman Frank Wolf and I, as well as a number of other Members, asked the Government Accounting Office [GAO] to review the Federal recognition process. I am encouraged by the report's finding of specific areas that present weakness, the Bureau of Indian Affairs proposals to address these problems, and today's hearing to discuss where we can be of assistance in making this a fairer process.

Again, Mr. Chairman, thank you for holding these hearings. And I again welcome all of the witnesses and, obviously, my colleague from Connecticut.

Mr. OSE. Thank you, Mr. Shays.

It is a pleasure now to recognize the gentleman from Connecticut for the purpose of giving testimony to this committee.

STATEMENT OF HON. ROB SIMMONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mr. SIMMONS. Thank you, Mr. Chairman, very much. And thanks to my distinguished colleague from the western part of the great State of Connecticut, Chris Shays.

My home State of Connecticut has been and continues to be affected by our Federal Indian recognition process. We are home to two federally recognized tribes at this point in time, both of whom were recognized within the last 20 years. And we have an additional 10 groups at least, there may be more than that now, that are seeking recognition. I have got a couple of maps from a local newspaper that might illustrate the point, if we could bring it to the dais.

My district is also host to two of the world's largest casinos, not largest Indian casinos, but largest casinos—the Foxwoods Resort Casino run by the Mashantucket Pequot Tribe and The Mohegan Sun run by the Mohegan Tribe. This past year, according to press reports, the two casinos generated $1.5 billion in slot revenues, that is slot revenues alone. So you can see that there is one good reason here, at least this is one of the reasons, why Indians living in or bordering Connecticut want to be federally recognized.

Federal recognition and Indian gaming have benefits and adverse effects for our community and, in fairness, we have to discuss both. They create jobs, and in Connecticut the jobs were created at a time when manufacturing was declining and when our defense sector was failing dramatically. These casinos pay upwards of $300 million a year into the State budget, directly into the State budget. And tribal members have been generous with their own personal wealth. They have supported community projects and charities over the years.

But there are also negative impacts, and that is what concerns me greatly. Recognition means the right to operate a casino and that places pressure on local municipalities who have no right to tax, zone, or plan for these facilities. And I will point out that this colored map of Connecticut, Mr. Chairman, shows you the 169 towns and municipalities. We do not have effective county government; we have towns and then we have the State, unlike many other States around the country. And so each of these little municipalities has to generate its own tax base, its own revenues, it has its own highway departments, emergency services, schools, etc. So a large casino, or let us say one of the largest casinos in the world placed in one of these municipalities creates dramatic burdens for these local governments.

One example of this is North Stonington. And I have invited the Mayor of North Stonington, Nick Mullane, to be here today. I believe he is seated in the row over there. He has lived with recognition and he has lived with the issues of taking land into trust for the past decade.

Nick, and the adjoining municipalities of Ledyard and Preston have had to seek the lonely and expensive process of obtaining interested party status to recognition petitions. And they have been placed in very difficult political, economic, and social positions within their communities because of this. Road construction, infra-

structure needs, police, fire, and emergency services all have increased due to Federal recognition and gaming.

Also with Federal recognition, you have the right to take land into trust. And for these tribes that have very profitable casino operations, they can acquire lands in the local community and petition to take those into trust. And this has kept these towns in the courts for many, many years. We have litigated these issues, we have tried to negotiate these issues, and now we would attempt to legislate these issues.

Mr. Chairman, I would request unanimous consent to introduce into the record the testimony of Nick Mullane and also of our Attorney General Blumenthal who has been very active on these measures. I would also like to request that the statement of Chief James Cunha of the Paucatuck Eastern Pequot Tribe be introduced into the record, a statement by Congresswoman Nancy Johnson, who has been extremely active, and also a statement by MaryBeth Gorke-Felice, who comes from the Woodstock area.

Mr. OSE. Without objection.

Mr. SIMMONS. Thank you, Mr. Chairman. Mr. Chairman, to sum up, Federal recognition policies are turning Connecticut, the Constitution State, into the casino State, and we do not like it. We want more control over the process. We want to close the loopholes. We want a level playing field. And the legislation that I have introduced I believe meets all those criteria.

There are seven points to this legislation that I have summarized in my statement. I can see my time has run out. If you extend me 1 minute, I can summarize those.

Mr. OSE. The gentleman has gone an extra minute.

Mr. SIMMONS. Thank you, Mr. Chairman. First of all, it requires the BIA to notify States when a tribe petitions.

Second, it requires the BIA to consider any testimony from municipalities that might be affected.

It requires that all recognition criteria be met. And if you look at the GAO report, they mention the seven criteria. But, as we know, these criteria can be waived in a decision. We feel that each of the criteria should be met. And we feel that findings relative to the criteria should be published so we all know what the BIA has done to meet those criteria.

To help the BIA with its difficult tasks, we recommend increasing the budget from $900,000 a year to $1.8 million, doubling their budget, and, in particular, to apply those to the Branch of Acknowledgement and Research which I believe is an over-burdened agency. Good people and talented people, but just too big a burden.

We recommend creating a grant program, $8 million per year, for local governments to assist them in participating in decisions related to recognition.

We recommend creating a $10 million grant program to be made available to federally impacted towns for infrastructure, public safety, social services, and other needs that are created as a direct consequence of recognition and taking land into trust.

And finally, we believe that we should close the revolving door, have a cooling off period of 1 year in which high level BIA officials who leave Government are restricted from appearing before the

agency or on behalf of tribes. This is a standard procedure for other Government agencies and we think it should be applied here.

I thank the chairman again, and my colleague Chris Shays and my colleague Nancy Johnson, who cannot be here today, for all of their work on these issues. And I am happy to answer any questions.

[The prepared statement of Hon. Rob Simmons follows:]

ROB SIMMONS
SECOND DISTRICT
CONNECTICUT

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

ARMED SERVICES COMMITTEE
MILITARY PROCUREMENT SUBCOMMITTEE
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VETERANS' AFFAIRS COMMITTEE
SUBCOMMITTEE ON HEALTH

TESTIMONY IN SUPPORT OF REFORMING THE FEDERAL INDIAN RECOGNITION PROCESS

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

COMMITTEE ON GOVERNMENT REFORM

HON. ROB SIMMONS (CT-2ND DISTRICT)

FEBRUARY 7, 2002

Mr. Chairman and members of the Subcommittee,

Thank you for allowing me to testify in support of reforming the federal Indian recognition process.

My home state of Connecticut has been and continues to be affected by our federal Indian recognition process. We are home to two federally recognized tribes both of whom were recognized within the last 20 years. About ten more groups are petitioning for federal status. Once federally acknowledged, tribes in Connecticut can negotiate gaming compacts with the state and open casinos.

My district is host to two of the world's largest casinos - Foxwoods Resort Casino run by the Mashantucket Pequot Tribe and The Mohegan Sun run by the Mohegan Tribe. The Hartford Courant reported that in December 2001, Foxwoods and The Mohegan Sun combined took in $1.5 billion in slot revenue. At Mohegan Sun, the total amount bet on slots grew by a third, compared with December 2000. At Foxwoods, slots revenue grew by almost 14 percent over the same period. Now you can see one good reason why Indians living in or bordering Connecticut want to be federally recognized.

Connecticut has seen both the benefits and the adverse effects of tribal recognition. One benefit is that Indian gaming has produced jobs at a time when defense contracting and manufacturing have been on the decline. Casinos purchase goods and services, and pay upwards of $300 million a year into the state budget. Tribal members have also been personally generous with their new wealth, and support numerous community projects and charities.

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But there are also negative impacts. In Connecticut, recognition means the right to operate a casino and that places pressure on local municipalities who have no right to tax, zone or plan for these facilities. Small rural roads are overburdened with traffic, and volunteer fire and ambulance services are overwhelmed with emergency calls.

One example of this is the town of North Stonington, Connecticut, where my guest, Nick Mullane, serves as First Selectman [or Mayor]. For more than a decade Nick and I have been working on the issues of tribal recognition and taking "land into trust" because of the burdens they place on Nick and the people he serves.

North Stonington, Ledyard and Preston have spent seven years in the courts struggling against the expansion of Mashantucket Pequot trust lands. As well, they are engaged in the lonely and expensive process of obtaining interested party status to the recognition of two additional North Stonington tribal groups looking for federal recognition and the right to open casinos. This struggle has had profound political, economic, social and environmental impacts on these towns. Road construction, infrastructure needs, police, fire and emergency services all have increased due to federal recognition and gaming.

Even more troublesome is the "land into trust" issue associated with recognition. The very real fear and uncertainty of reservation expansion has both delayed and increased municipal planning, caused property values to fall, increased the tax burden for uncompensated services and created friction within the local communities. What was once a relatively predictable situation in Eastern Connecticut is now very unpredictable because of a failed federal recognition process and fear of taking "land into trust". This is why leaders like Nick Mullane, Connecticut's State Attorney General Richard Blumenthal and others have dedicated so much time to the federal recognition issue – they want to bring clarity and certainty back into the process.

On this basis, Mr. Chairman, I respectfully request that you insert into the committee record materials provided by First Selectman Mullane and Attorney General Blumenthal.

Mr. Chairman, nearly 200 tribes, including 10 from Connecticut, are awaiting rulings from the Department of Interior on whether they should be federally recognized. Of the 561 tribes that have earned federal recognition, 198 engage in gambling. The casino benefit that accompanies federal recognition has changed the stakes in the process. It has caused non-Indian investors to turn the process into a high-stakes game. This is especially true in the densely populated East Coast where such a high concentration of customers reside only a few hours drives away.

Federal recognition policies are turning the "Constitution State" into the "casino state", and we do not like it. We want more control over the process. We want to close the loopholes. We want a level playing field.

Earlier this year I offered a plan that addresses all of these issues. As this committee looks at how the BIA is implementing its own regulations, it could be useful to keep in mind the following reforms outlined in my bill:

1. Require the Bureau of Indian Affairs (BIA) to notify states whenever a tribe within their borders files for federal recognition. The state must then ensure that notice is given to towns affected.

2. Require the BIA to accept and consider any testimony from municipalities and other interested parties that bears on whether or not the BIA recognizes a tribe.

3. Requires that the BIA must find affirmatively that all recognition criteria are met in order to confer federal recognition. Any decision conferring recognition must be accompanied by a written set of findings as to how all criteria have been satisfied.

4. Increase from $900,000 to $1.8 million resources for the BIA to upgrade its recognition process and strengthen the BIA's Branch of Acknowledgment and Research.

5. Provide $8 million in grants to local governments to assist in participating in decisions related to certain Indian groups and Indian tribes. These grants could be applied retroactively to any local government that has spent money on decisions related to certain Indian groups and/or tribes.

6. Provide for a grant program of $10 million to be made available to federally impacted towns for relevant infrastructure, public safety and social service needs directly related to tribal activities.

7. Institute a "cooling off period" of one year in which any high-level BIA official could not appear before the BIA.

Mr. Chairman and members of the committee, my legislation does not attempt to dictate an outcome, but instead it tries to ensure a recognition process that is fair, open and respectful to all parties involved. I thank the committee for an opportunity to testify and I will be happy to take any questions you may have.

Mr. OSE. I thank the gentleman for his testimony.

I am going to go ahead and recognize the gentleman from Connecticut for 5 minutes for questions. Mr. Shays.

Mr. SHAYS. I will follow you. Thanks.

Mr. OSE. All right. I would like to welcome Mr. Cannon from Utah. Appreciate it.

Mr. Simmons, I do have a couple of questions here. In terms of the experience that you are familiar with, how have your local communities worked in obtaining information from the BIA over tribal recognition? Has that been a smooth process or are there things that we can do to improve that?

Mr. SIMMONS. No. No, it has not. In fact, one of the first things that I did on this issue as a State Representative back in 1993 was request information relative to the issue of taking land into trust as a consequence of recognition. I was unsuccessful in my correspondence. So I had to submit a Freedom of Information Act request. In response to that request, I went to Washington, DC, spent 2 days in Washington attempting to get access to the files. It was an arduous and very unpleasant experience. It was somewhat productive in that we were able to get some of the information we needed. But, by and large, it was a very unpleasant and arduous experience, and it was an experience that I had as a sitting State Representative.

Since that time, on some of the other recognition petitions, and in particular on the ones that relate to North Stonington, I think Mr. Mullane has it in his testimony, these municipalities have had to submit Freedom of Information Act requests to get at information. They have had to spend upwards of $500,000 in legal fees to pay highly professional attorneys here in Washington, DC, to pursue these issues on a regular basis.

In the case of North Stonington, we are talking about a small, rural, agricultural town with virtually no industrial base, I think one hotel maybe—three, excuse me; they have built a couple more. Just 5,000 people. A very small municipality that is essentially having to deal with a very complicated legal issue that potentially has dramatic effects for the community. And yet, they have to do it by and large on their own because they are a separate municipality, a creature of the State. They do not have a county government or county resources or a group of resources to help them.

Mr. OSE. In terms of the seven criteria that are used in the recognition process, are the local communities able to have input on the decisions on those seven to adequate level?

Mr. SIMMONS. They will say that they do not think they do. And I will have to go on their testimony. Of course, Mr. Mullane is here if the chairman wishes him to respond to that question.

Mr. OSE. Hold on a minute. Mr. Mayor, would you like to come over and join us.

Mr. SIMMONS. The experience that we have had is that the Bureau of Indian Affairs may selectively weigh several, but not all, of these criteria, that it is discretionary at this point in time. And this makes it a moving target, if you will. It makes it very difficult for these municipalities to track the process and, in many cases, it is hard for them to respond to a decision within the agency if they

are not fully informed about that. And then that goes to the issue of keeping them informed.

Under the provisions of my legislation, we are setting up a system where States have to be notified, and States in turn have to notify their municipalities so that these little towns and interested parties will be kept in the loop.

Mr. OSE. Mr. Mullane, I think I have probably violated every protocol here in bringing you up here with a Member of Congress, and they are all laughing at me down there. But do you have any input? I have not read your testimony. We did enter it into the record, and I will read it. Do you have any observations or comments?

Mr. MULLANE. My testimony kind of speaks for itself. But if you would like, I would ad lib for a few minutes.

Mr. OSE. You could summarize, if you would.

Mr. MULLANE. In regard to your Freedom of Information request, we went through the normal channels. The first issue was to ask to be an interested party, we were finally granted that, and then we submitted Freedom of Information requests, we had probably fifteen different requests or more that went in, and it took us 2½ years to get the documents. It was a very disappointing process.

We did try to comment on the seven criteria during the process. We found it very burdensome. When they made the preliminary decision they admitted they had used only 40 percent of the documents or information that we had supplied. They said that they were going to recognize on a preliminary basis both the groups in the town, but they did not know if there was going to be one tribe, two tribes, or no tribe, and they had not considered any of the information from 1972 to present. So it made it virtually impossible for us to understand whether our comments were valid, how to approach the issue, or to even get involved in the process.

Mr. OSE. I see my time has expired. I recognize the gentleman from Connecticut.

Mr. SHAYS. Thank you. Again I would like to now recognize both our witnesses. I want to just ask you, Mr. Simmons, is it your belief that if an Indian tribe is recognized as a federally recognized tribe, that they have all the rights that accompany recognition?

Mr. SIMMONS. A very interesting question and a complicated question. The two tribes that are federally recognized in Connecticut, both in my district, one is the Mohegan Tribe, who were recognized after going through what I call the BIA process, a fairly long, arduous process of documenting their history and meeting all of the criteria in regulation, and they were recognized in that fashion. The other tribe is the Mashantucket Pequot Tribe and they were recognized by legislative act.

As I recall that process, the Bureau of Indian Affairs testified against their recognition at the time that congressional hearings were held. Initially, the legislative document was vetoed by the President. But in a following year, that language proceeded again through the Congress and passed. One of the great debates in Connecticut is whether that legislative act extended to the tribe all of the benefits and privileges, to include buying and petitioning to take into trust land outside the 2,000 acre settlement area or whether the legislative act limited that tribe.

Mr. SHAYS. Let me just be clear on this. Is that a right that exists to Indian tribes in general if they are recognized, to be able to access more land?

Mr. SIMMONS. It is my understanding, yes.

Mr. SHAYS. OK.

Mr. SIMMONS. That is my understanding. But I guess the point I was trying to make is if you have a legislative recognition, depending on how that legislation is crafted, the question could be raised are all benefits extended or are the benefits extended as described within that statute and does that take precedence over Federal statutes generally for a recognized tribe? It is a complicated issue. It has been in the courts for 7 years.

Mr. SHAYS. Excluding that comment, let's just take your point about a legislatively recognized tribe, but if it goes through the Bureau of Indian Affairs process, is it your belief that a tribe should be entitled to all the rights and privileges of a federally recognized tribe?

Mr. SIMMONS. I think they are under the law. And so that creates the situation where, in the State of Connecticut where you have at least 10 petitioning tribes that, if they are all recognized, theoretically, I would assume they would all benefit from the casino privilege.

Mr. SHAYS. Right. So there are going to be some more tribes in the second congressional district that may be recognized and it is not your contention that they would not deserve those rights and privileges of a federally recognized tribe?

Mr. SIMMONS. No, I think they do deserve those rights. That is why the recognition process is so important.

Mr. SHAYS. Right. Which is really the point that I would love our guest and the First Selectman to address. What is your concern about the recognition process in the BIA?

Mr. SIMMONS. Speaking for myself, I feel that the process is not sufficiently open, accessible to interested parties, such as municipalities or other groups. I feel that it is subject to political influence. And I think that if we have criteria for recognition, they should be uniformly engaged, they should perhaps even be statutory, and that the BIA be required to meet those criteria.

Speaking on behalf of some of the petitioning tribes, I think the process takes far too long. We have petitioning tribes that have begun as far back I think as 1988. It is not fair to them. I think the GAO report pointed out that the process, for whatever reason—and they give some reasons—is broken and in need of fixing. And I think if you look at the appendix of the GAO report and read Mr. McCaleb's comments, he concurs in some of the recommendations of the GAO report, which I find a very positive thing. The fundamental question is do we fix it within Interior or do we create a new agency, which has been recommended by some people? I tend to prefer to fix it within the system.

Mr. SHAYS. Would your colleague like to respond? And the question is, do you basically concur with Mr. Simmons in terms of the areas where there are challenges in the BIA, or is there any other suggestion that you would add in addition to what he has suggested?

Mr. MULLANE. I think there are a couple of areas, and I did put them in the last part of the testimony. One part is the submission of evidence. Basically the way the system works now, the tribes or the groups get the opportunity to submit the information at the end of the process. No one else is allowed to comment. That is really inappropriate, because the information on the petition should be made in a full and final basis, the majority of the material should be available so everybody can comment on it on an ongoing process and not have at the end of the procedure volumes of documents submitted so nobody else can comment or give the other side of that. That is one of the areas. OK?

Mr. SHAYS. I see my time is running out. Let me just again thank you, Mr. Chairman, for having this hearing. I know that one of the things that our staffs do well and the work of our committee is to recommend to the authorizing committees changes, and to the administration ways that they can change in terms of rules and regulations, and to the appropriators how they can allocate resources. I would hope that this committee would weigh in on suggesting to our appropriators they provide more resources for the BIA, because I think it is a system that is almost imploding, and the courts are then showing great impatience, and then there is tremendous pressure on the BIA to recognize without doing due diligence. I hope we can work together on that as well.

Mr. OSE. Thank you, Mr. Shays.

Mr. Simmons, thank you for joining us today. Mr. Mayor, appreciate it.

We are going to take a short break here. We have a vote on the floor agreeing to a rule and we have 9 minutes and 27 seconds. We will be back shortly.

Mr. SIMMONS. I thank you, Mr. Chairman, very much.

Mr. OSE. We are going to go ahead and release this panel. The second panel, if you would get yourself organized, when we get back we will go forward.

[Recess.]

Mr. OSE. We are going to reconvene here.

I have to apologize. I made a mistake earlier in terms of swearing in our non-member witnesses. I apologize to my colleagues for that. It will not happen again.

First, I want to welcome Mr. Hill, Mr. McCaleb, Mr. Toulou for joining us today. But in this committee we swear in our witnesses if they are not Members of Congress. So if you would all rise and raise your right hand.

[Witnesses sworn.]

Mr. OSE. Let the record show that the witnesses answered in the affirmative.

Our first witness in the second panel is Barry Hill. He is the director of the Natural Resources and Environment Division of the General Accounting Office. Mr. Hill, if you could provide us with 5 minutes maximum, we would appreciate a summary.

STATEMENTS OF BARRY T. HILL, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT DIVISION, GENERAL ACCOUNTING OFFICE; NEAL MCCALEB, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR; AND TRACY TOULOU, DIRECTOR, OFFICE OF TRIBAL JUSTICE, DEPARTMENT OF JUSTICE

Mr. HILL. Thank you, Mr. Chairman, and members of the subcommittee. It is a pleasure for me to appear before this subcommittee today and to have the opportunity to discuss our work on the Bureau of Indian Affairs' process for recognizing tribes.

In 1978, the BIA established a regulatory process intended to provide a uniform and objective approach to recognizing tribes. The process requires groups that are petitioning for the recognition to submit evidence that they meet certain criteria; basically that the group has continued to exist as a political and social community descended from a historic tribe.

This past November we issued a report that evaluated BIA's recognition process and, in summary, we found the following:

First, the basis for BIA's 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. For example, recent controversy has centered on the allowable gap in time for which there is little or no evidence that a petitioner existed.

In writing its regulations, the BIA intentionally left this point open to interpretation in order to accommodate the unique characteristics and historical circumstances of each petitioner. However, this strategy increases the risk that the criteria may be applied inconsistently. To mitigate this risk, BIA relies on precedents established in past decisions to provide guidance in making new ones. While this appears to be a reasonable approach, there are no guidelines on how and when precedents should be used, and there is no provisions to make this information available to the public.

Because recognition decisions will always rely on the judgment of decisionmakers, clear and transparent explanations of decisions are necessary to maintain confidence in the objectivity of the recognition process.

Second, we also found that the length of time needed to rule on petitions is substantial. Based on the historic rate at which BIA has resolved petitions, it could take 15 years to resolve all the petitions currently before BIA. This does not include the petitions that are in the pipeline but not yet ready to be evaluated. In contrast, the regulations outline a process for evaluating a petition that should take about 2 years.

This situations is a result of an increased workload coupled with limited resources and inefficient procedures. The BIA recently received a large influx of completed petitions. In a 5-year period during the mid-1990's, it received more than 40 percent of all the completed petitions it had received during the 23 years the program has been operational.

Despite this increased workload, however, the staff assigned to evaluate these petitions has dropped from its peak of 17 in 1993 to an average of less than 11 staff over the last 5 years. That is

a decrease of more than 35 percent. Moreover, during this time, the BIA's staff responsible for evaluating petitions was compelled to devote more and more of their time to responding to Freedom of Information Act requests, appeals, and lawsuits.

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 it is the only avenue to Federal recognition that has established criteria and a public process for determining whether groups meet those criteria. However, weakness in the process have created uncertainty about the basis for recognition decisions.

Without improvements, confidence in the recognition process as an objective and an efficient approach could erode and parties may look to the Congress and the courts to resolve recognition issues. The end result could be that the resolution of tribal recognition cases will have less to do with the attributes and qualities of a group and more to do with the resources that petitioners and third parties can marshal to develop a successful political and legal strategy.

Mr. Chairman, this concludes my statement. I would be happy to respond to any questions that you or other members of the subcommittee may have.

[The prepared statement of Mr. Hill follows:]

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives

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INDIAN ISSUES

More Consistent and Timely Tribal Recognition Process Needed

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

GAO-02-415T

Mr. Chairman and Members of the Subcommittee:

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 have a tremendous effect on the tribe, surrounding communities, and the nation as a whole. There are currently 562 recognized tribes[2] 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 2000, about $4 billion was appropriated for programs and funding almost exclusively for recognized tribes. Additionally, recognition 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 being held in trust.[3] The exemptions also include, where applicable, laws regulating gambling. The Indian Gaming Regulatory Act of 1988,[4] which regulates Indian gambling operations, permits a tribe to operate casinos on land in trust if the state in which it lies allows casino-like gambling and the tribe has entered into a compact with the state regulating its gambling businesses. In 1999, federally recognized tribes reported an estimated $10 billion in gambling revenue, surpassing the amounts that the Nevada casinos collected that year.

In 1978, the BIA, an agency within the Department of the Interior, established a regulatory process for recognizing tribes. The process requires tribes 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. Owing to the rights and benefits that accrue with recognition and the controversy surrounding

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

[2]This number includes three tribes that were notified by the Assistant Secretary-Indian Affairs on December 29, 2000, of the "reaffirmation" of their federal recognition.

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

[4]25 U.S.C. 2701

Indian gambling, BIA's regulatory process has been subjected to intense scrutiny. Critics of the process claim that it produces inconsistent decisions and takes too long. In light of the controversies surrounding the federal recognition process, we issued a report last November[5] evaluating the BIA's regulatory recognition process and recommending ways to improve the process.

In summary, we reported the following:

- First, 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 recommend that the BIA develop and use transparent guidelines for interpreting key aspects of its recognition decisions.

- Second, the recognition process is hampered by limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, such as local municipalities and other Indian tribes. As a result, there is a growing number of completed petitions waiting to be considered. BIA officials estimate that it may take up to 15 years before all currently completed petitions are resolved; BIA's regulations outline a process for evaluating a petition that was designed to take about 2 years. To correct these problems, we recommend that the BIA develop a strategy for improving the responsiveness of the recognition process, including an assessment of needed resources.

Background

Historically, tribes have been granted federal recognition through treaties, by the Congress, or through 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 criteria used by the department to assess whether a group should be recognized as a tribe. Specifically, the report stated that the criteria were

[5] *Indian Issues: Improvements Needed in Tribal Recognition Process* (GAO-02-49, Nov. 2, 2001)

not very clear and concluded that a large part of the department's tribal recognition policy depended on which official responded to the group's inquiries. Until the 1960s, the limited number of requests by groups to be federally recognized 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 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 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 officials within BIA. 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 as the proposed finding. Petitioners and others may file requests for reconsideration with the Interior Board of Indian Appeals.

Clearer Guidance Needed on Evidence Required for 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 the 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 staff had recommended against recognition. Much of the current controversy surrounding the regulatory process stems from these cases.

For example, 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 also 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.

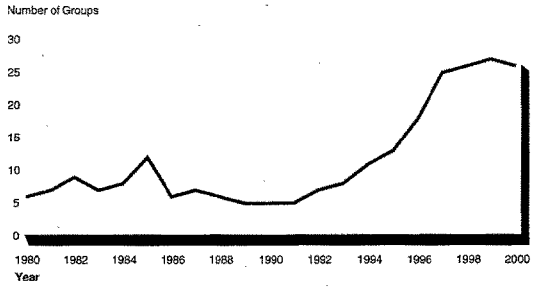
The department grappled with the issue of how much evidence is enough when it updated the regulations in 1994 and intentionally left key aspects of the criteria open to interpretation to accommodate the unique

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 in 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 the 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 report, we recommend that the Secretary of the Interior direct the 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. The department, in commenting on a draft of this report, generally agreed with this recommendation.

Recognition Process Ill-Equipped to Provide Timely Response

Because of limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, the length of time needed to rule on petitions is substantial. The workload of the BIA staff assigned to evaluate recognition decisions has increased while resources have declined. There was a large influx of completed petitions ready to be reviewed in the mid-1990s. Of the 55 completed petitions that BIA has received since the inception of the regulatory process in 1978, 23 (or 42 percent) were submitted between 1993 and 1997 (see fig. 1).

Figure 1: Number of Petitioning Groups in Regulatory Process



Note: Status as of the last day of each calendar year.

Source: BIA.

The chief of the branch responsible for evaluating petitions told us that, based solely on the historic rate at which BIA has issued final determinations, it could take 15 years to resolve all the currently completed petitions. In contrast, the regulations outline a process for evaluating a completed petition that should take about 2 years.

Compounding the backlog of petitions awaiting evaluation is the increased burden of related administrative responsibilities that reduce the time available for BIA's technical staff to evaluate petitions. Although they could not provide precise data, members of the staff told us that this burden has increased substantially over the years and estimate that they now spend up to 40 percent of their time fulfilling administrative responsibilities. In particular, there are substantial numbers of Freedom of Information Act (FOIA) requests related to petitions. Also, petitioners and third parties frequently file requests for reconsideration of recognition decisions that need to be reviewed by the Interior Board of Indian Appeals, requiring the staff to prepare the record and response to issues referred to the Board. Finally, the regulatory process has been subject to an increasing number of lawsuits from dissatisfied parties, filed by petitioners who have completed the process and been denied recognition, as well as current petitioners who are dissatisfied with the amount of time it is taking to process their petitions.

Staff represents the vast majority of resources used by BIA to evaluate petitions and perform related administrative duties. Despite the increased workload faced by the BIA's technical staff, the available staff resources to complete the workload have decreased. The number of BIA staff members assigned to evaluate petitions peaked in 1993 at 17. However, in the last 5 years, the number of staff members has averaged less than 11, a decrease of more than 35 percent.

In addition to the resources not keeping pace with workload, the recognition process also lacks effective procedures for addressing the workload in a timely manner. Although the regulations establish timelines for processing petitions that, if met, would result in a final decision in approximately 2 years, these timelines are routinely extended, either because of BIA resource constraints or at the request of petitioners and third parties (upon showing good cause). As a result, only 12 of the 32 petitions that BIA has finished reviewing were completed within 2 years or less, and all but 2 of the 13 petitions currently under review have already been under review for more than 2 years.

While BIA may extend timelines for many reasons, it has no mechanism that balances the need for a thorough review of a petition with the need to complete the decision process. The decision process lacks effective time frames that create a sense of urgency to offset the desire to consider all information from all interested parties in the process. BIA recently dropped one mechanism for creating a sense of urgency. In fiscal year 2000, BIA dropped its long-term goal of reducing the number of petitions actively being considered from its annual performance plan because the addition of new petitions would make this goal impossible to achieve. The BIA has not replaced it with another more realistic goal, such as reducing the number of petitions on ready status or reducing the average time needed to process a petition once it is placed on active status.

As third parties become more active in the recognition process—for example, initiating inquiries and providing information—the procedures for responding to their increased interest have not kept pace. Third parties told us that they wanted more detailed information earlier in the process so they could fully understand a petition and effectively comment on its merits. However, there are no procedures for regularly providing third parties with more detailed information. For example, while third parties are allowed to comment on the merits of a petition prior to a proposed finding, there is no mechanism to provide any information to third parties prior to the proposed finding. In contrast, petitioners are provided an opportunity to respond to any substantive comment received prior to the

proposed finding. As a result, third parties are making FOIA requests for information on petitions much earlier in the process and often more than once in an attempt to obtain the latest documentation submitted. Since BIA has no procedures for efficiently responding to FOIA requests, staff members hired as historians, genealogists, and anthropologists are pressed into service to copy the voluminous records needed to respond to FOIA requests.

In light of these problems, we recommended in our November report that the Secretary of the Interior direct the BIA to develop a strategy that identifies how to improve the responsiveness of the process for federal recognition. Such a strategy should include a systematic assessment of the resources available and needed that leads to development of a budget commensurate with workload. The department also generally agreed with this recommendation.

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 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. Additionally, the amount of time it takes to make those decisions continues to frustrate petitioners and third parties, who have a great deal at stake in resolving tribal recognition cases. Without improvements that focus on fixing these problems, parties involved in tribal recognition may 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 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.

Mr. OSE. Thank you, Mr. Hill.

Our next witness is the Honorable Neal McCaleb, who is the Assistant Secretary for Indian Affairs at the Department of the Interior. Mr. Secretary, for 5 minutes, if you could summarize, that would be great.

Mr. MCCALEB. Good morning, Mr. Chairman, Congressman Shays. Thank you very much for the opportunity and privilege of being with you today and discussing this important process of Federal recognition of Indian tribes.

As was stated earlier, the recognition process conducted by the Bureau of Indian Affairs Branch of Acknowledgement and Research is a very serious activity in that, once a petitioning group is granted recognition, the tribe enjoys the unique sovereign-to-sovereign status with the U.S. Government that actually supersedes its relationship with State and local governments, giving it a unique privilege and exemption from certain State and local laws. It carries with it these immunities and privileges. So, the Bureau of Indian Affairs and the BAR have been deliberate in the process. We have developed these seven criteria which, although subject to interpretation, really do appear to me to be fairly objective.

In my confirmation hearings, this issue was raised in the Senate about whether I thought it was appropriate to leave the recognition process with the BAR. My response at the time, having little knowledge of the process, but I still hold to that, is that, as imperfect as it may have been, it occurs to me that the personnel, the staff and the organization, plus the backup of the legal counsel and the Solicitor's Office with extensive experience and expertise in this area, probably ranks it as the most qualified group on the horizon to conduct the anthropological, genealogical, and historical research. The BAR makes recommendations to the Assistant Secretary for Indian Affairs, and that person renders a decision on the appropriateness in his judgment of the recognition process.

The GAO audit, as just indicated, raised the issues of the predictability and the timeliness of the recognition process. The predictability is one that we have discussed at great length. Any judgmental process is subject to criticism in this highly controversial area. This has been made clear. The gaming aspects that have influenced this have made it a very, very controversial issue.

We have responded to the GAO's recommendations and we have indicated that we are going to do three things: To provide a clear understanding of the basis used in the recognition process. In other words, make it more transparent for all. This has been suggested in the GAO report; to develop a strategy that identifies how to improve our responsiveness to the petitioners and the people that are interested in the petition; and third, to establish a new program of how to improve performance under the Government Performance and Results Act.

We expect to have these recommendations ready by the middle of April of this year, and to provide a strategic plan.

As indicated, there are a lot of petitions on the desk. There are 171 groups who have filed letters of intent. We actually have 14 petitions that are active, and 9 others that are ready for active consideration. There is a considerable backlog of work. We do need additional personnel. It is not just a matter of funding. We have va-

cancies within the BAR that we have not filled that we have not been able to attract personnel to, for the salaried levels which we offer. It is not just somebody off the street that we want to train, but the credentials for these professionals are extremely important and they are high credentials.

I think I will conclude my summary, Mr. Chairman, and answer any questions that you might have of me.

[The prepared statement of Mr. McCaleb follows:]

TESTIMONY OF NEAL A. MCCALEB
ASSISTANT SECRETARY FOR INDIAN AFFAIRS
U.S. DEPARTMENT OF THE INTERIOR
AT THE HEARING
BEFORE THE
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES
AND REGULATORY AFFAIRS OF THE COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
ON
THE GAO RECOMMENDATIONS
AND THE
FEDERAL ACKNOWLEDGMENT PROCESS

February 7, 2002

Good morning, Mr. Chairman and Members of the Committee. I am pleased to be here today to speak on behalf of the Department of the Interior (Department) about the findings and recommendations of the General Accounting Office (GAO) following its year long review of the Federal acknowledgment process. In November 2001, the GAO issued its report entitled "Indian Issues: Improvements Needed in [the] Tribal Recognition Process" (Report).

BACKGROUND

The Federal acknowledgment of an Indian tribe, which has inherent sovereignty and is entitled to a sovereign-to-sovereign relationship with the United States, is a serious decision for the Department and the Federal Government. It is important that a thorough and deliberate evaluation occur before we acknowledge a group's tribal status, which carries with it certain immunities and privileges. These decisions must be fact-based, equitable, and thus defensible. The existing criteria should not be diluted in an attempt to quicken the pace of the process.

The Branch of Acknowledgment and Research (BAR), as part of the Bureau of Indian Affairs Office of Tribal Services, implements 25 CFR Part 83, *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*. The acknowledgment process is the executive branch's administrative process by which groups are given Federal recognition as Indian tribes and which makes them eligible to receive services provided to Indians. The BAR makes recommendations to the Assistant Secretary - Indian Affairs who acknowledges tribal existence and establishes a sovereign-to-sovereign relationship.

By applying anthropological, genealogical and historical research methods, the BAR reviews and evaluates petitions for Federal acknowledgment of tribes. The BAR makes recommendations for proposed findings and final determinations to the Assistant Secretary - Indian Affairs, consults with petitioners and third parties, provides copies of the regulations and guidelines, prepares technical assistance review letters, maintains petitions and administrative correspondence files, and conducts special research projects for the Department. The BAR also performs other administrative duties which include maintaining lists of petitioners and responding to appeals, litigation, and Freedom of Information Act requests.

THE GAO RECOMMENDATIONS

In its Report, the GAO recommended that Federal acknowledgment decisions made in the regulatory process of the Department be more (1) predictable and (2) timely. We concurred with these two general recommendations. The GAO accepted the existence of an acknowledgment process within the Department, and suggested that improvements be made to that process. In our October 2001 response to the GAO draft recommendations, we provided a detailed response which outlined the steps the Bureau of Indian Affairs (BIA) will take in order to analyze the resources required for this

function and to develop strategic action plans for implementing specific improvements in this process. We stated that these plans would take six months to develop, so we have not yet completed the planning process.

More specifically, the Report recommended that the Department: (1) establish new Government Performance Results Act (GPRA) goals "to improve program performance;" (2) "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," and (3) "develop a strategy that identifies how to improve the responsiveness of the process for federal recognition."

COMMENTS

During my confirmation hearing, I was asked my opinion concerning the Federal acknowledgment process. I have been working within the Department and with the BIA since my confirmation in coming to some conclusions about the concerns that Tribal leadership, state governments, petitioning groups and others had shared with me about the process when I assumed the Assistant Secretary's position. These concerns included: (1) identifying the impediments to the acknowledgment process; (2) identifying ways to improve the process from within the Department; and 3) identifying and implementing solutions for improving the process which would be equitable to all petitioners and interested parties, while maintaining the integrity of the process.

The Report confirms that an important part of the solution is to increase the staff and resources devoted to reviewing acknowledgment requests. We all must look at the need for staffing and resources that certain bills have proposed for an alternative acknowledgment process. The workload

of the Branch of Acknowledgment and Research (BAR), including the number of petitions, FOIA requests, decisions, appeals, and litigation, has escalated in the past 10 years, cancelling out the improved efficiency of the process resulting from revisions to the regulations in 1994 and from internal changes in 2000.

ACTIONS TAKEN BY THE BIA

- *Develop a Strategy That Identifies How to Improve the Responsiveness of the Process for Federal Recognition*

By mid-April 2002, we will provide a strategic plan that includes an analysis of the acknowledgment workload, prepare a needs assessment, and develop a recommendation for staffing needs that will result in more timely decisions.

- *Increase the Human Resources within the BAR*

The Department has held several meetings to explore ways to increase the productivity of BAR and maintain the integrity of the Federal acknowledgment process. Our first concern is the lack of human resources and how it affects the speed of evaluating the petitions and the quality of the research. Currently, the BAR has seven researchers on their nine person staff who perform this function.

To maintain the confidence of the public in the acknowledgment decisions, petition documentation must be evaluated carefully under the regulations at 25 CFR Part 83. The BIA must maintain objectivity in the evaluation of petitions. It does not assume that the submissions and claims are accurate. An interdisciplinary approach is taken on each petition. A research team representing the disciplines of cultural anthropology, genealogy, and history is assigned to each petition.

I would also like to mention that the Department is reviewing a proposal from the BIA to restructure the Office of Tribal Services and make the BAR a separate and distinct division within that Office.

- *GPRA Goals*

The BIA has taken steps to revise GPRA goals for the acknowledgment process. In December, the BIA participated in the Departmental GPRA workgroup which will assist in establishing goals for the Department and its Bureaus, Offices, Divisions, and Branches. The BIA expects to establish these revised goals in late spring of 2002.

- *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*

We believe that prior acknowledgment decisions, technical assistance meetings, as well as earlier court findings and statutes provide guidance to petitioners, interested parties, the BIA staff, and the Department's decision makers. We agree that precedents can and should be made more readily available.

By mid-April 2002, we will have developed a plan to make these precedents more accessible and to provide clearer guidelines to the regulations; thus ensuring consistency and improving public understanding of acknowledgment decisions. We included a number of steps within the GAO response that we will consider in the development of this plan.

- *Other Avenues to Improve Responsiveness*

We are looking at alleviating other impacts on the process (1) by developing administrative changes; (2) by considering legislation establishing criteria, standards, and a sunset rule; (3) by proposing amendments legislative language to make petition materials publicly available; and (4) by addressing internal BIA management issues.

CONCLUSION

Thank you for the opportunity to testify on this issue. I will be happy to answer any questions you may have.

Mr. OSE. Thank you, Mr. Secretary. We appreciate your being here and spending time with us.

Our third witness today is the director of Office of tribal Justice, Mr. Tracy Toulou. We appreciate your coming out and visiting with us. If you could summarize in about 5 minutes, that would be great.

Mr. TOULOU. Good morning, Mr. Chairman, members of the committee. My name is Tracy Toulou and I am the Director of the Office of Tribal Justice in the U.S. Department of Justice. Thank you for the opportunity to appear before you today to testify on the basic principles of Indian tribal sovereignty and Indian law as they relate to the issue of the acknowledgement of Indian tribes by the Federal Government.

The overarching principle of Indian tribal sovereignty is that Indian tribes pre-existed the Federal Union and draw their powers from their original status as sovereigns before the European arrival. Indian tribal sovereignty is a retained sovereignty, and it includes all the powers of a sovereign that have not been divested by Congress or by the tribes' incorporation into the Federal Union. As a result, tribal sovereignty is conferred upon the tribes through Federal recognition. Rather, Federal recognition is a process by which the Federal Government acknowledges that particular Indian entities retain their sovereign status.

Indian tribal sovereignty, like sovereignty in general, has two main components—an external one and an internal one. The external component of Indian tribal sovereignty relates to the ability of a sovereign entity to engage in relationships as a government with other entities. Indeed, the U.S. Constitution contemplates that Indian tribes will engage in government-to-government relations with the United States as evidenced through the Treatymaking and Indian Commerce Clauses of the Constitution. Thus, one feature of Indian tribal sovereignty is that all tribes will relate to the United States as sovereign governments. For the Federal Government's part, recognition of an Indian tribe represents a determination that this type of bilateral relationship should exist between the Federal Government and a tribe.

The internal component of tribal sovereignty relates to the tribes' power and relation to their members and territory. As a matter of Federal law, Indian tribes have been deemed "unique aggregations possessing attributes of sovereignty over both their members and their territory."

I want to talk for a moment about the Federal acknowledgement process. Inherent in the Treatymaking and Commerce Clause powers is the authority of the Federal Government to determine which entities government-to-government relations will exist. Courts have recognized that both political branches of the Federal Government have authority to make these determinations.

For its part, Congress has the authority to determine appropriate subjects of the Indian Commerce Clause and Treatymaking powers. Courts give Congress broad deference in making these determinations, subject only to the requirement that they apply to distinctly Indian communities. It is worth noting that while the Supreme Court has expressly stated its ability to determine whether Con-

gress has over-stepped this bound, no court has ever overturned a congressional determination that an entity has tribal status.

As with congressional power to recognize tribes, the Supreme Court has stated that the Executive power to determine tribal status is entitled to deference. The Secretary of the Department of the Interior has, by regulation, set forth criteria that are aimed at identifying groups that are sovereign tribes. The regulatory criteria include factors which determine which entity is in fact sovereign. While the Executive power to determine tribal status is presumably subject to at last the same constitutional limits that are imposed on Congress, we are not aware of any court decision overturning a determination by the Secretary that a group should be recognized as a tribe.

Now I would like to turn to the effects of Federal recognition. When Interior makes a final determination to acknowledge an entity as a federally recognized Indian tribe, certain consequences follow. First, the tribe may exercise sovereign powers as a matter of Federal law. Second, the tribe has the same status as other federally recognized tribes unless limited by Federal law and becomes eligible to enter into bilateral government-to-government relations with the United States.

Briefly, turning to those sovereign powers, a federally acknowledged tribe has sovereign immunity, may exercise jurisdiction over its territories and establish tribal courts, may assert jurisdiction over Indians who commit criminal offenses in Indian Country, and may otherwise exercise their sovereign authority except as limited by Federal law.

Next, the relationship with the Federal Government. Federal acknowledgement entails the existence of a trust relation between the United States and the tribes. Congress has itself declared that the trust responsibility includes protection of the sovereignty of each tribal government. The United States provides assistance to the tribes and their members in a variety of forms. In many cases, the United States provides direct service to the Indian tribes and their members. In others, the United States provides assistance through grants and other funding mechanisms. Like nearly every Federal agency, Department of Justice participates in this relationship.

With respect to direct services, the Department of Justice investigates and prosecutes serious crimes in most areas of Indian Country. The Department also provides grants and other assistance to tribal law enforcement agencies and tribal justice systems. Additionally, the Department protects tribal sovereignty in the courts and does so in litigation by representing the Federal Government in suits and as amicus curiae in cases involving tribal regulatory, adjudicatory, and tax jurisdiction, and that includes a tribe's sovereignty to exercise jurisdiction in domestic relations cases involving tribal members.

In closing, the Department supports the tribal sovereignty and is committed to working with federally acknowledged tribes on a government-to-government basis. Again, I thank you for the opportunity to testify today. I would welcome any questions.

[The prepared statement of Mr. Toulou follows:]

Department of Justice

STATEMENT

OF

TRACY TOULOU
DIRECTOR
OFFICE OF TRIBAL JUSTICE

BEFORE THE

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND
REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

OVERSIGHT HEARING ON TRIBAL ACKNOWLEDGMENT PROCESS

PRESENTED ON

FEBRUARY 7, 2002

TESTIMONY OF
TRACY TOULOU, DIRECTOR, OFFICE OF TRIBAL JUSTICE
before the HOUSE SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS
Oversight Hearing on the Tribal Acknowledgment Process
February 7, 2002

Mr. Chairman, Mr. Vice-Chairman, members of the Committee, my name is Tracy Toulou and I am the Director of the Office of Tribal Justice in the United States Department of Justice. Thank you for the opportunity to appear before you today to testify on the basic principles of Indian tribal sovereignty and Indian law as they relate to the issue of the acknowledgment of Indian tribes by the Federal Government.

Legal Principles Behind Indian Tribal Sovereignty

The over-arching principle of Indian tribal sovereignty is that Indian tribes pre-existed the federal Union and draw their powers from their original status as sovereigns before European arrival. Indian tribal sovereignty is a retained sovereignty, and includes all the powers of a sovereign that have not been divested by Congress or by tribes' incorporation into the federal Union. As a result, tribal sovereignty is not "conferred" upon tribes through federal recognition. Rather, recognition is a process by which the Federal Government acknowledges that particular Indian entities retain this sovereign status.

Indian tribal sovereignty, like sovereignty in general, has two main components -- an external one and an internal one. The external component of Indian tribal sovereignty relates to the ability of the sovereign entity to engage in relations as a government with other entities. Indeed, the U.S.

Constitution contemplates that Indian tribes will engage in government-to-government relations with the United States as evidenced through the Treaty-making and Indian Commerce Clauses of the Constitution. Thus, one feature of Indian tribal sovereignty is that Indian tribes will relate to the United States as sovereign governments. For the Federal Government's part, recognition of an Indian tribe represents a determination that this type of bilateral relationship should exist between the Federal Government and a tribe.

The internal component of tribal sovereignty relates to the tribes' powers in relation to their members and territory. As a matter of federal law, Indian tribes have been deemed "unique aggregations possessing attributes of sovereignty over both their members and their territory." The sovereign powers of tribes include: (1) the power to determine their own form of government, (2) define the conditions of membership in the tribe, (3) regulate domestic relations among its members, (4) prescribe rules of inheritance, (5) levy taxes on members and persons doing business with members or on tribal lands, (6) control entry onto tribal lands, (7) regulate the use and distribution of tribal property, and (8) administer justice among members of the tribe, this latter power including the right to prescribe laws applicable to Indians within their jurisdiction and enforce those laws by criminal sanctions. The governmental, political character of Indian tribes has been found by the Supreme Court to provide the constitutional foundation for the many statutes which provide benefits to Indians.

Of course, a tribe may choose not to exercise any of these powers. An element of sovereignty is the ability to make choices about what powers to exercise. Tribes retain the sovereign prerogative to not exercise any of the powers I have described above without ceding their right to exercise them in the future. In addition, Congress has authority to expand or limit tribal authority.

The Federal Acknowledgment Process

Inherent in the Treaty-making and Commerce Clause powers is the authority of the Federal Government to determine with which entities these government-to-government relations will exist. Courts have recognized that both political branches of the Federal Government have authority to make these determinations.

For its part, Congress has the authority to determine appropriate subjects of the Indian Commerce Clause and Treaty-making powers. Courts give Congress broad deference in making these determinations, subject only to the requirement that they apply to "distinctly Indian communit[ies]." It is worth noting that although the Supreme Court has expressly stated its ability to determine whether Congress has over-stepped this bound, no court has ever overturned a congressional determination that an entity has tribal status.

As with congressional power to recognize tribes, the Supreme Court has stated that the Executive power to determine tribal status is entitled to deference. The Secretary of the Department of the Interior (the Secretary) has, by regulation, set forth criteria that are aimed at identifying groups that are sovereign tribes.[1] The regulatory criteria include factors which determine whether an entity is in fact

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[1] Congress has affirmed Interior's authority to determine which entities are federally recognized tribes and affirmed the Secretary's current list of federally recognized tribes in the Federally Recognized Indian Tribe List Act of 1994. Courts have consistently deferred to the Secretary's determinations under the List Act. At Congressional direction, DOI periodically updates this list in the Federal Register. The most current list was published in March 2000. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298 (March 13, 2000).

sovereign. While the Executive power to determine tribal status is presumably subject to at least the same limits that the Constitution would impose on Congress, we are not aware of any court decision overturning a determination by the Secretary of the Interior that a group should be recognized as a tribe. In fact, the three acknowledgment decisions challenged on the merits have been upheld by the courts.

Like other decisions that the Secretary of the Interior makes, the Secretary is bound to apply her own regulations. Her determinations are subject to challenge under the Administrative Procedures Act (APA) with regard to whether a group has properly been denied, or granted, acknowledgment. A decision may be overturned under the APA if it is "clearly erroneous," "arbitrary or capricious" or "contrary to law." In sum, the criteria set forth for reviewing decisions under the APA, in conjunction with the criteria set forth in the Secretary's regulations, form the primary basis for determining whether an acknowledgment decision is proper. Together, they provide for judicial scrutiny of the Secretary's acknowledgment decisions. It is not for the Department of Justice to speak to the strength of evidence needed under the regulations. The agency tasked with the acknowledgment process, the Department of the Interior, is in the best position to speak to the evidence needed to fulfill the criteria.

Effects of Federal Recognition

As the foregoing discussion makes clear when Interior makes a final determination to acknowledge an entity as a federally recognized Indian tribe, certain consequences follow. First, the tribe has the same status as other federally recognized tribes unless limited by federal law and becomes eligible to enter into bilateral government-to-government relations with the United States. Second, that

tribe may exercise sovereign powers as a matter of federal law.

Federal acknowledgment also entails the existence of a relationship of trust between the United States and the tribe. Congress has itself declared that the trust responsibility "includes the protection of the sovereignty of each tribal government." Indian Tribal Justice Support Act, 25 U.S.C. § 3601(2). The United States provides assistance to tribes and their members in a variety of forms as directed by Congress or by regulation, as well as in furtherance of responsibilities undertaken by the United States in treaties. In many cases, the United States provides direct services to Indian tribes and their members. In others, the United States provides assistance through grants and other funding mechanisms to the tribes to carry out tribal programs or exercise their own tribal authority.

A federally acknowledged tribe, thus, has sovereign immunity, may exercise jurisdiction over its territory and establish tribal courts, may assert jurisdiction over Indians who commit offenses in Indian country, may administer funds under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, may obtain other federal benefits and may exercise their sovereign authority except as limited by federal law. Like nearly every federal agency, the Department of Justice participates in this relationship. With respect to direct services, the Department of Justice investigates and prosecutes serious crimes by Indians in most areas of Indian country. In Indian country, the Department also has exclusive jurisdiction to prosecute crimes by non-Indians against Indians and shares jurisdiction with tribes to prosecute crimes by Indians against non-Indians in Indian country except where Congress has delegated that authority to states. The Department also provides grants and other assistance to tribal law enforcement agencies and tribal justice systems. Inn 2002, the Department of Justice will provide about $121 million in grant funding for Indian country criminal justice

programs. To be eligible for grants that the Department administers, an entity generally must be a federally recognized Indian tribe or sanctioned by one.

Additionally, the Department's operating bureaus are engaged in a range of activities benefitting tribal governments, such as the investigation, prosecution, and incarceration of serious offenders; and protecting tribal sovereignty in the courts by representing the Federal Government in suits or as amicus curiae in cases involving tribal regulatory, adjudicatory, and tax jurisdiction, including a tribe's sovereignty to exercise jurisdiction in domestic relations cases involving tribal members. Such activities will total approximately $116 million in 2002.

Conclusion

In closing, the Department supports tribal sovereignty and is committed to working with federally acknowledged Indian tribes on a government-to-government basis. Again, I thank you for the opportunity to testify today. I would be happy to answer any questions.

Mr. OSE. Thank you for joining us this morning.

We are going to go to questions. I know that some of the members have competing commitments. Mr. Shays, for 5 minutes.

Mr. SHAYS. Thank you. Mr. McCaleb, in February 2000, your predecessor, Kevin Gover, unilaterally issued a directive that made significant changes in the acknowledgement process. It is my understanding this directive affected the rights of petitioners and interested parties but no notice was given and no public comment was requested. By terminating the right of interested parties to comment prior to a proposed acknowledgement finding once the petitioner goes under active review, BIA is ultimately limited to independent research ultimately favoring petitioners with financial backing. Are you anticipating this directive to be withdrawn or for a public review process to take place?

Mr. MCCALEB. There has been no discussion about withdrawing that directive. I am certainly open to the review of the content of that directive.

Mr. SHAYS. Is it the practice of your department to issue directives without allowing for public comment?

Mr. MCCALEB. No, it is not.

Mr. SHAYS. OK. It may be a good directive, it may not be, but it would seem to me that you would want to have public comment on it and review. So I would request that you at least look at that issue, if you would.

Mr. MCCALEB. So noted.

Mr. SHAYS. During the Clinton administration, an Executive Order was issued to recognize the Duamish Indian tribe in the State of Washington—I hope I am pronouncing that right, D-U-W-A-M-I-S-H.

Mr. MCCALEB. Duwamish.

Mr. SHAYS. Duwamish tribe had made an application for recognition and followed all standard procedures. Shortly after the Bush administration came to power, a second Executive Order was issued rescinding recognition. Can you explain to me the factors that led to the decision to rescind the recognition order? On what grounds was the application for recognition denied, and what new evidence has come to light since the Clinton administration decision?

Mr. MCCALEB. The decision was a preliminary decision, I believe. On the review of the Bureau of Acknowledgement and Research, the case they made, I think there were three specific criteria which the tribe did not meet. And on that basis, I rendered the decision to——

Mr. SHAYS. Were there a number of Executive Orders issued like this one? Was this the only one, or were there others as well for recognition?

Mr. MCCALEB. I think there may have been two others issued that have been subsequently dealt with by this administration.

Mr. SHAYS. In the budget that the President has submitted to Congress, have you asked for more personnel?

Mr. MCCALEB. In this budget we have not asked for more personnel.

Mr. SHAYS. Did you make a request for more personnel?

Mr. MCCALEB. I did not.

Mr. SHAYS. Tell me why.

Mr. MCCALEB. It is a matter of priorities, Congressman. We have a very limited budget that has to extend and provide things, including education, law enforcement, welfare to individuals who are in need of that, and a variety of other services that we are currently inadequately supplying. It has been estimated by the tribal leadership, the tribal budget advisory board that our total budget right now is something less than a third of what the needs are. And it is just a matter of prioritization for us at this point. Plus, we have not been able to fill the vacancies that we have.

Mr. SHAYS. Why is that?

Mr. MCCALEB. Because we have not had qualified respondents.

Mr. SHAYS. Are you paying the amount of money that you need to be paying?

Mr. MCCALEB. Well, apparently not, Congressman. But we are paying what is allowable for us, the maximum allowable for us to pay under the provisions of the Office of Personnel Management.

Mr. SHAYS. I guess, though, that you let them off the hook, because if you do not tell them that you cannot fill these positions and they do not know why you cannot fill these positions, they are not going to be able to make the kind of decisions they need to make.

Mr. MCCALEB. Well, we are still trying to fill the positions, and we have some interested applicants now for two of the vacancies.

Mr. SHAYS. What concerns me is that you are basically making decisions to make—well, I can only relate it to my State because that is what I know. These are billion dollar operations profit. Recognition makes some not a millionaire, but makes them billionaires over time. And so they have tremendous incentive to use all the resources necessary to win approval and to hire the best and the brightest. And it would seem to me like a no-brainer for the administration to want to have some of the best and brightest be able to respond. And you do have some of the best and the brightest but you do not have enough of them.

Mr. MCCALEB. That is correct.

Mr. SHAYS. And what you just said, "that is correct," to me is almost astounding that you would not say that we need more people to do the job. Now, if you were a supervisor, who would you present your budget to?

Mr. MCCALEB. The Office of Management and Budget.

Mr. SHAYS. No. Does your budget go to the Secretary or does it——

Mr. MCCALEB. It goes to the Assistant Secretary for Policy Management and Budget within the Department of the Interior.

Mr. SHAYS. But what you are saying to me is that you have not asked the Assistant Secretary within the Department of the Interior for the people necessary to do the job. So how does that person know you need those people?

Mr. MCCALEB. She would not unless I made the request.

Mr. SHAYS. And so you told us you need it, and you told us you did not make the request because there were other things that had priorities. But I think you would at least put them on notice. This is going to blow up in your face.

Mr. MCCALEB. One of the responsibilities that I have is to allocate the probable anticipated resources that we are going to receive and prioritize how that money is going to be utilized.

Mr. SHAYS. See, I think that is a different issue. I think the issue is that you need to make the request necessary and then if you fail to get what you need, then you allocate what you are given.

Mr. MCCALEB. Congressman, I do not intend to be argumentative, but I can make that same case.

Mr. SHAYS. I do not mind arguing. I think it is a losing argument.

Mr. MCCALEB. I could make that same case, that same rationale for any one of a dozen areas that affect the safety, health, and welfare of Indian people.

Mr. SHAYS. Are you meaning to tell me that in the safety, health, and welfare that you need more people?

Mr. MCCALEB. Yes.

Mr. SHAYS. Well then you need to make that request. This is like basic. This is like really basic. If the person in the know does not make the request, then what is the point of our going to the appropriators to say you need the money? How do they know if you have not even made the request?

Mr. MCCALEB. We have made requests that are substantially higher than the amount of money that was approved by the Office of Management and Budget.

Mr. SHAYS. OK. Let me back up a second, and I will not dwell too much longer on this. I had a lot of other questions I wanted to ask, but this is kind of to me like basic 101 Management. You have a moral obligation to do your job. We have a moral obligation to do our job. It strikes me that one of your moral obligations is to make an argument to the people that work in your Department that you do not have the people necessary to do the job. Do you have the people necessary to do the job in a timely fashion on recognition?

Mr. MCCALEB. In consideration of the backlog, no, we do not.

Mr. SHAYS. Absolutely not. So it strikes me that you need to make that case. Then if someone else along the way says, you know what, you have given us a lot of priorities, I know you are asking for a lot, I understand why you are asking for all of this, but we simply cannot afford it. That is their decision. And then you make the best of what you have got of a pretty bad decision. But you have taken everyone else off the hook, including Congress, including us, because we can basically say the people running the Department did not ask for the money.

My time has passed. I will just come back.

Mr. OSE. We will have a second round if the Members choose.

Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I have only a minor disagreement with my colleague. I do not think Congress so much is on the hook as the American people on these kinds of issues. That is why the budgeting process is so significant.

I know, Mr. McCaleb, that you are aware of the tribe or a situation in southern California which involves a health clinic which was taken into trust for seven tribes but which was titled only to one tribe, that was the Cuyuah tribe. And now that tribe intends

to build a casino on the property, and that despite the objections of the other tribes that were involved that do not have title to that property and also all the local congressional delegation, in fact. Duncan Hunter, who is our colleague here, introduced a bill to prevent that transition in use from happening last year and the bill passed the House unanimously. Now I understand that your agency may be getting ready to approve the change in the land use despite all this opposition. That is not exactly the issue we are dealing with today, but I think it is related and speaks to many of the same points.

As you know, I think, Mr. McCaleb, I am not a fan of Indian gaming, which is about a $12 billion a year industry, and that is why some of these questions are so intense, but I do support the idea, as you know, of tribal sovereignty. As a member of the Resources Committee, I deal with these issues more than I think most Members in Congress. But when abuses like this one that I have just described happen, it makes it harder for those of us who set aside our distaste for gambling in the name of tribal sovereignty to continue. In this case, it seems to me that a tribe is taking advantage of what amounts to an administrative convenience to build a casino. It is on land that is 40 miles from the reservation and on land that was never intended for anything other than a health clinic.

Congressional support of tribal sovereignty is a tenuous thing. I would like to continue personally my support for it, but I am sure you can see how abuses like this make it harder for us to accept and defend the idea. I hope in this specific instance, and in any similar instance in the future, your agency will exercise restraint and discretion. To do otherwise may, I think, undermine congressional support for the whole entire idea of sovereignty.

What is the current thinking on that little piece of property?

Mr. MCCALEB. Congressman, as I understand it, there is considerable dissention within the seven tribes about the conversion of the use of the land from a clinic facility to a gaming facility. However, the issue before us is not the change in land use of that particular property; they have the authority to do it, as I understand it. What they have done, the tribe that is promoting the gaming facility wants to build a substitute clinic on an alternative site which they have bought in fee-simple and want us to take into trust. That is the issue that is really before us.

Mr. CANNON. I recognize the importance of that issue and hope you will be thoughtful in the process.

If I could move to another question that I think Congressman Otter was going to address, and I do not know that one as well, but apparently you have an issue regarding contacts by Park Place with the White House. Apparently, in June 2000, the CEO and general counsel of Park Place held a 1-hour private meeting with Vice President Gore at the Pierre Hotel. Are you familiar with this issue?

Mr. MCCALEB. I am not familiar with those circumstances, no, sir.

Mr. CANNON. This is the issue of the Mohawk tribal——

Mr. MCCALEB. I am familiar with the St. Regis Mohawk controversy involving Park Place, yes.

Mr. CANNON. Are you familiar with the article in the Boston Globe on October 30, 2001, that lays out a history of what they call improper contacts?

Mr. MCCALEB. No, sir. I have not read that.

Mr. CANNON. I will make that part of the record and get that to you.

Mr. OSE. Without objection.

Mr. CANNON. Thank you, Mr. Chairman.

[The information referred to follows:]

Submitted by Congressman Otter
and
Congressman Cannon

RELATED COVERAGE

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Nipmuc nation loses US status

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Trust benefits ex-BIA official

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Tribal gamble | The lure and peril of Indian gambling

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Contributions coincide with favorable decisions

By Sean P. Murphy, Globe Staff, 10/30/2001

MONTICELLO, N.Y. - Arthur Goldberg, owner of Caesars, Bally's, and other casinos in Atlantic City, knew a threat when he saw one: When an Indian tribe, the St. Regis Mohawks, announced plans last year to build a casino in Monticello - an hour closer to New York City than his casinos - Goldberg knew his business would suffer.

But Goldberg, a fund-raiser for the Democratic Party, had friends in high places. Pretty soon he was arranging meetings with President Bill Clinton and Vice President Al Gore. Then came a cascade of "soft money" contributions to the Democrats.

Over a five-month period following the April 2000 announcement of the Mohawk casino deal, Clinton's Bureau of Indian Affairs made several unusual decisions helpful to Goldberg. First, the bureau withdrew the federal government's longstanding support for the group of Mohawks who planned the casino in Monticello; instead, the bureau backed a group of tribal leaders allied with Goldberg; and finally, the bureau intervened to help prevent the enforcement of a Mohawk tribal court's $1.8 billion judgment against Goldberg for interfering in tribal affairs.

On the very day - Oct. 6, 2000 - that the Bureau of Indian Affairs

7/26/01
McCain grills officials on Mohegan deal

7/10/01
Nipmucs, company set plan on casino

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Mohegan tribe says contracts study finds no violations

6/8/01
Tribe is in debt $2m to backers

6/4/01
Tribe said to want land for casino

5/21/01
Regulating tribal casinos

5/14/01
Law skirted in Mohegan deal, former overseer says

4/18/01
Casino foes to remove disputed policy from court fight

4/14/01
Official took job after aid for casino

3/28/01
Probe of tribe designation sought

3/27/01
Decisions on status of tribe draw fire

3/25/01
Indians given a parting boost

3/20/01
Investor's linked to tribe's leaders

3/12/01

issued a letter declaring that the tribal court had no authority, Goldberg's company contributed $10,000 to the Democratic National Committee. It was the second time a Goldberg contribution was registered on the day of a decision favorable to him.

Now, 12 months after Goldberg's death and nine months after the end of the Clinton administration, the original Mohawk leaders are challenging the Bureau of Indian Affairs' actions in court. The outcome could determine the flow of potentially billions of dollars in gaming revenues.

In the fast-growing world of Indian gaming, with annual receipts now over $12 billion, decisions made by political appointees in the Bureau of Indian Affairs can clear the way for tribes to build casinos, or block them entirely.

In the Clinton administration, the Bureau of Indian Affairs was headed by Kevin Gover and his top deputy, Michael J. Anderson, both former Clinton-Gore fund-raisers. Their decisions spurning the recommendations of staff genealogists to approve tribes for gaming have come under sharp scrutiny by Congress and the Bush administration.

But no case has raised the issue of money and politics in Indian gaming more directly than that of the St. Regis Mohawks.

"Arthur Goldberg reached right into the government to protect his Atlantic City casinos by controlling gaming in New York state," said Robert Berman, a businessman who headed the group planning the Mohawk casino at the Monticello Raceway. "It's obvious that if you put a casino up here, Atlantic City has problems."

Declared Berman, "Goldberg bought access to the top political decision-makers and got the results he wanted."

But representatives of Park Place Entertainment, the casino company that Goldberg once headed, strongly object. They say the Bureau of Indian Affairs withdrew its support for the group of Mohawk leaders allied with Berman because of a lack of popular support for that tribal government.

Any suggestion the BIA switched sides "as a result of political contributions is utterly without factual foundation and is absurd," a lawyer for Park Place said.

Gover, the former BIA head, also insists his decision was not politically influenced.

The Mohawk have been recognized by the United States as a sovereign

Indian casinos spend to limit US oversight

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Mohegan Sun buyout deal remains mystery

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Congressmen seeking probe on Indian casinos

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The $800 million deal for outsiders at Mohegan Sun

Day Two, *12/11/00*
Few tribes share in casino windfall

Gaming success helps tribe gain community acceptance

California tribes hit the jackpot with gaming vote

Day Three, *12/12/00*
It's a war of genealogies

Lineage questions linger as gaming wealth grows

Tribes scramble to get into the game

Day Four, *12/13/00*
Tribes make easy

nation for over 200 years on their vast Akwesasne Reservation, which stretches from the northern Adirondack Mountains in New York into Quebec.

In the late 1980s, dire economic conditions on Indian reservations prompted Congress and the Supreme Court to give their blessings to Indian casinos.

By the mid '90s, New York state officials, who watched with frustration as New Yorkers crossed state lines to spend ever-increasing sums in Atlantic City and at the new Indian gaming palaces in Connecticut, recommended that tribes be invited to open casinos in the most economically distressed areas of New York, such as the Catskills, where once-magnificent resorts are now shuttered. The state could share as much as 25 percent of the gross, as Connecticut does from its Indian casinos.

An opportunity

for investors

Non-Indian investors such as Berman jumped at the chance to recruit a tribe into the Catskills. Tribes such as the Oneida, Cayuga, and Seneca were courted by investors like royalty.

Berman signed an agreement with the Mohawks, purchased the racetrack in Monticello, and set about wending his way through years of environmental reviews.

But not without catching the eye of casino magnates Donald Trump and Goldberg, each of whom controlled about one-third of the $4 billion Atlantic City market. Goldberg's friend, Senator Robert Torricelli, Democrat of New Jersey, came out publicly against Berman's deal.

Trump last year paid a $250,000 fine to the New York Lobbying Commission for failing to publicly disclose his role in trying to undercut public support for the Catskills deal by giving a negative portrayal of the Mohawks in advertisements.

On the Mohawk reservation, meanwhile, the Bureau of Indian Affairs worked to adopt a written constitution and an independent judiciary. Elected by a slim majority and recognized by the bureau, the new constitutional government faced an immediate challenge from the previous government, in which power was concentrated in the hands of three chiefs. The chiefs charged that a 51 percent majority was needed for passage of the constitution. Only 50.9 percent voted for it.

The Bureau of Indian Affairs stood firm with the constitutional

criminal targets

Trump plays both sides in casino bids

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government through several years of appeals, but eventually, in 1999, a federal judge ruled that 50.9 percent did not equal 51 percent, even in a practical sense, and cited the three chiefs' growing popular support.

The bureau began the process of appeal, and, in internal documents authored by federal prosecutors acting on behalf of the bureau, the judge's decision was called "erroneous." By then, Berman was within months of approval to convert the racetrack into a casino. Berman had agreed in writing to work with whichever tribal leaders prevailed in the legal wrangling.

Shift comes

suddenly

But then something unexpected happened. A week after the Berman group received final Bureau of Indian Affairs approval for the casino, the three chiefs' government, in power pending the appeal, abandoned Berman and signed with Goldberg's company, which promised a bigger casino on a different site, once he had received the necessary state and federal approvals.

Stunned, the tribe's constitutional government vowed to fight.

Gover, then the head of the Bureau of Indian Affairs, acknowledged last week that he felt pressure "by both sides" for and against the appeal - which now would determine whether Berman's or Goldberg's faction controlled the tribe. Gover said it was a close decision, but he decided the three chiefs had gained more popular support.

"We made the decision on the merits," he said. "There was nothing nefarious about it."

Gover, a lawyer/lobbyist who was appointed to the Bureau of Indian Affairs' top job after years of fund-raising for Clinton, is now representing gaming tribes for a Washington law firm. While in office, he said, he made it a point not to know who was making political contributions. Asked about Arthur Goldberg, he said he didn't know who he was.

But Berman and the Mohawks' constitutional government find that response isn't credible. Documents indicate that while Gover was weighing his decision on the appeal, Goldberg was reaching out to his many political contacts. In June 2000, Torricelli and Jon Corzine, then running for Senate in New Jersey and a recipient of campaign contributions from Goldberg, arranged meetings for Goldberg with Clinton and Gore, according to written phone logs kept by Goldberg's secretary and subpoenaed by the New York Lobbying Commission.

A series

of donations

On June 28, 2000, for example, Corzine left a message with Goldberg's secretary saying that he "does not mean to be pushy but he has to know before the meeting with the president if he can count on you for $16,000." In fact, Goldberg contributed $16,000 to the Democratic Senatorial Campaign Committee on Aug. 30, 2000, the day a court official accepted the Bureau of Indian Affairs' request to drop the appeal. The records of donations are listed by the Center for Responsive Politics, a nonpartisan Washington-based group that posts on its Web site political donations disclosed in Federal Election Commission records.

A Corzine spokesman said Corzine never discussed any casino business with Goldberg.

Earlier in the summer, a Goldberg company affiliate, the Hilton Flamingo, had given the Democratic Congressional Campaign Committee $25,000, and Hilton Hotels, from which Park Place originated and remains affiliated, contributed $10,000 each to the Democratic senatorial and congressional committees.

Meanwhile, Goldberg's company was trying to fight off a huge court judgment against it. A group of tribe members sued the company in Mohawk tribal court - a court set up with the help of the Bureau of Indian Affairs - saying the company had interfered with tribal business. The court agreed, setting a whopping damage figure of $1.8 billion in lost casino revenues.

The three chiefs, with Park Place's encouragement, passed a resolution repealing the tribal court, according to documents. Still, a federal court judge refused to accept the repeal and ruled in favor of the judgment.

On Sept. 22, 2000, the three chiefs met with Anderson, Gover's deputy, and asked for a letter stating that the tribal court had no authority in the eyes of the federal government.

Three days later, the wife of Goldberg's general counsel, Clive Cummis, contributed $5,000 to the Democratic Naional Committee; on Sept. 26, the three chiefs' lawyer, Bradley Waterman, contributed $500 to the DNC; and one day later, Cummis and his law firm each contributed $5,000 to the Democratic National Committee, and Hilton Hotels contributed $2,000 to the Democratic Congressional Campaign Committee.

On Oct. 6, Anderson sent his letter saying the tribal court had no authority, and Goldberg's company contributed $10,000 to the

Democratic National Committee.

Anderson's letter was immediately used by Goldberg's lawyers fighting to get the $1.8 billion judgment against the company dismissed. The case is now pending before a federal appeals court. Anderson has gone on to a job as a Washington-based lawyer/lobbyist, and in fact has worked closely with the three chiefs since leaving office.

Anderson did not return phone calls. Representatives of Clinton, Gore, and Torricelli did not respond to questions.

But in Monticello, where a casino was supposed to open in spring 2002, there is suspicion. Goldberg's plan for a casino in the Catskills still lacks the necessary approvals.

Unemployment is high. Times are hard. Many contend that Goldberg never intended to build a casino, so long as he could stop the one planned by Berman, thus assuring Atlantic City's rule over the New York gambling market.

"People wanted the casino for the jobs," said Valerie Caruso of Monticello. "We're an impoverished community. But somehow it got taken away, and I know politics had something to do with it, somehow."

Waterman, the lawyer for the three chiefs, said there was no connection between the soft money contributions by Park Place and its associates and a desire to affect Bureau of Indian Affairs policy. "I've never heard any suggestion of an attempt to influence the bureau," he said.

Asked about his own $500 contribution, Waterman said he did so because he supported Al Gore for president.

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Mr. CANNON. Would you please enumerate, and I suspect you cannot do that here, but you would look for and communicate back to the committee all the communications between the BIA and the White House, the Democratic National Committee, the Democratic Senatorial Committee, or the DCCC, the Congressional Committee, relating to the dismissal of the *Ransom* v. *Babbitt* appeal or issuance of the Anderson letter?

Mr. MCCALEB. Yes, sir, as directed.

Mr. CANNON. And would you also consider whether the content of the Anderson letter was subjected to the review practices and procedures of the BIA? What is the legal status of the Anderson letter at this time, do you happen to know?

Mr. MCCALEB. No, sir, I do not.

Mr. CANNON. OK. And then finally, if you could——

Mr. MCCALEB. I am advised that there is extensive litigation on this issue.

Mr. CANNON. Yes, there has been a great deal. Although I am not so much interested in litigation as in the BIA's practices, and not your practices under your direction, but its historic practices.

Mr. MCCALEB. I understand.

Mr. CANNON. And finally, does the BIA recognize the Mohawk tribal court created under the Judiciary Act of 1994 by the former three chief government? That may not be a question that you can answer here either. But if you would take a look at that, I would appreciate it.

Mr. MCCALEB. I would rather respond to that question in writing.

Mr. CANNON. OK. Thank you. I will get with Mr. Calvert and make sure he has copies of these questions. And we will make a copy of this article available for the record and get a copy of that article to Mr. Calvert also.

Mr. MCCALEB. Very well.

Mr. CANNON. Thank you, Mr. McCaleb. I appreciate your attention. You have got a very difficult job where lots of money is pushing lots of different ways and you have got the interests of real human beings who suffer or not depending upon decisions that you make. I do not begrudge you that job. I wish you the best and hope you feel our support here in difficult circumstances.

Mr. MCCALEB. Thank you, sir.

Mr. CANNON. Thank you, Mr. Chairman. I yield back.

Mr. OSE. Thank you, Mr. Cannon.

I want to ask a few more questions that are more basic to this issue. Mr. Toulou, I have looked at the statute conferring the tribal recognition process on the Assistant Secretary, or at least on the BIA, and I am still confused. What is the statutory basis on which Congress has conferred this authority to some other party?

Mr. TOULOU. I think the statutory basis would be 25 USC 2 and 9. And in shorthand, 25 USC conveys upon the Assistant Secretary the management of Indian affairs, and 25 USC 9, if I am not incorrect, would allow him to promulgate regulations in furtherance of that responsibility. There are a large number of statutes and regulations that require there be recognized tribes to carry out the duties, provide resources and services to the tribes. And so I think as

a necessary reaction to those statutory provisions, 2 and 9 allows the Secretary to promulgate the regulations.

Mr. OSE. The reason I asked the question is in your testimony you cited a 1994 law passed by Congress to have the Secretary of the Interior publish a list of federally recognized tribes. But the BIA's regulations were promulgated in 1978. I am trying to figure out how the 1994 List Act gives the authority to the Secretary.

Mr. TOULOU. I do not think the 1994 List Act does give the authority. It provides weight to that authority. But that authority obviously pre-exists and I think it pre-exists the regulations that were promulgated in 1978. It is just at that point in time the Department took it upon themselves to regularize and codify those procedures.

Mr. OSE. So it is not the List Act that you are relying on?

Mr. TOULOU. No. And if you would like, we certainly can provide more in-depth analysis in writing.

Mr. OSE. So you are saying that it is not a separate constitutional power vested in the administration to recognize these tribes; it is a statutory power given to them by Congress.

Mr. TOULOU. Certainly, the power is delegated by Congress. Mr. Chairman, I would appreciate the opportunity to respond to this more fully.

Mr. OSE. All right. You can understand I am trying to get to the heart of——

Mr. TOULOU. I do understand. I think there is definitely the delegation to do that. But let me respond more fully in writing.

Mr. OSE. All right. Mr. McCaleb, there is a statement in your testimony, "The existing criteria should not be diluted in an attempt to quicken the pace of the process," meaning the recognition process.

Mr. MCCALEB. Correct.

Mr. OSE. What do you mean when you say "diluted"?

Mr. MCCALEB. I do not think we should eliminate any of the seven mandatory criteria that are currently in place because they have been applied for some time and that is the basis on which tribes have been recognized. I think that they are objective criteria that can be fairly interpreted.

Mr. OSE. Do all of the criteria have to be met in the judgment of the administration, or a preponderance of them?

Mr. MCCALEB. All of them.

Mr. OSE. All of them.

Mr. MCCALEB. All seven.

Mr. OSE. Now has that been the history of this since 1978 that all of them have to be met?

Mr. MCCALEB. I do not know about since 1978, but in the last decade.

Mr. OSE. The reason I asked that question is I read the same articles in part cited by Mr. Cannon, and it appeared to me that in some instances the Assistant Secretary in the previous administration had waived certain requirements. Is that accurate?

Mr. MCCALEB. That is accurate. The Assistant Secretary has waived in the past some of these requirements. That has not been the case in this administration.

Mr. OSE. It would seem to me that, in effect, would be a new rule then in terms of tradition and practice, if not case law or standing, that instead of having to meet all of the criteria, you only had to meet a set number of them. Has the BIA looked at that in terms of complying with the due process requirements when you change a rule?

Mr. MCCALEB. Not to my knowledge.

Mr. OSE. I see my time has expired. We are joined by Mr. Duncan of Tennessee. Would you care to take a moment? No? Mr. Shays.

Mr. SHAYS. Thank you. Mr. McCaleb, I would like to just kind of conclude my concern and have you tell me if it is off-base and then what the solution is. And I state up front, I think you are running a Department that is woefully underfunded in so many different ways and I think you could almost fund any part of it more and deservedly so. So we are not going to have a debate about that. But I am going to just take one part, and that is the recognition part.

My understanding is there are about 550 recognized tribes in the United States right now, some really big ones and obviously some very small ones. And it is my understanding that there are over 200 groups in various stages of application within the BIA.

Mr. MCCALEB. There are 171 petitions, I think.

Mr. SHAYS. OK, 171. How many of those are at a point where you can review their application?

Mr. MCCALEB. There are 23.

Mr. SHAYS. Twenty-three that are kind of active.

Mr. MCCALEB. Yes.

Mr. SHAYS. OK. And of those 23, how long does it take and how many people have to get involved in reviewing this application? This is obviously not a 4-month process. It takes a year of totally dedicated time on the part of staff, or what?

Mr. MCCALEB. Well it takes about 2 years under optimum circumstances to process an application, and that means to gather the necessary evidence if that information is fairly available.

Mr. SHAYS. And how many people have to devote their time during that 2 years?

Mr. MCCALEB. We have two teams of three members and then we have some administrative staff.

Mr. SHAYS. So you have two teams. And how many reviews can a team do in the course of a year?

Mr. MCCALEB. It depends upon the application. The history has been somewhere between three and four are completed, because they are working on some of them concurrently.

Mr. SHAYS. Right. So, basically, each team can make a decision on about three a year.

Mr. MCCALEB. No. I probably misstated that.

Mr. SHAYS. I do not mind if you want to consult someone, because I realize there may be someone who would have more. Take your time.

Mr. MCCALEB. Mr. Fleming corrected me. He said one team will get about one decision a year, or the two teams we have will get two decisions per year.

Mr. SHAYS. How many new cases will be ready for disposition in the course of a year? You have lots of applications. How many more will be ready to go in the next year?

Mr. MCCALEB. Is the question over and above the 23, how many we anticipate?

Mr. SHAYS. Exactly. We are going to dispose of two, but how many more will be put in the in box?

Mr. MCCALEB. Mr. Fleming advises me that for the last year we have not had any petitioning group complete their applications.

Mr. SHAYS. How many are waiting for completion?

Mr. MCCALEB. There are 23.

Mr. SHAYS. No. There are 23 that are waiting for disposition.

Mr. MCCALEB. Yes.

Mr. SHAYS. How many are in the process looking to——

Mr. MCCALEB. We have 171, but maybe all they have done is sent a letter in that says, "We think we are a tribe."

Mr. SHAYS. No. I do not want that answer because that is not accurate. Not all 171 have sent in a letter. You have some that have been there for years with work in process, with folders that would fill cabinets.

Mr. MCCALEB. There are 65 partially documented.

Mr. SHAYS. So it is very likely that you are going to get at least two more in the next year. So we are going to lose ground, not gain ground, correct? That is pretty clear. People are nodding their head behind you. We are going to lose ground, not gain ground.

Mr. MCCALEB. I think that is a reasonable assumption, yes.

Mr. SHAYS. Now the problem I have is you have well-paid attorneys backing up these applications who are going to court and they are making the argument before the court that your agency is not properly disposing of these cases and denying them their rights. And you have got a lot of inpatient judges. For instance, in Connecticut we have the Golden Hill Paugusetts that have laid claim on practically half my district, the district I represent, and we have a judge who is beginning to believe that he may have to take unilateral action because the Bureau is not doing its job. What is the solution in a case like that?

Mr. MCCALEB. We will have to have additional personnel in order to dispose of these cases that are pending more rapidly.

Mr. SHAYS. I would like to make this request if I could through you, Mr. Chairman. I would like to know specifically how many cases are active; how many cases are potential—you have answered them but I would like it in writing; how many more we think will be added in the next few years and what we think the gain or loss in terms of cases will be; and how long it will take to do the potential number that exist out there. We have had others who have expressed those opinions. I would like to know what you all feel. And then I want to know what the Department intends to do about it. And it cannot be that we are not going to do anything.

Mr. MCCALEB. We will respond to that question in writing, Congressman.

Mr. SHAYS. All right. In my next round I would love to ask the other two witnesses to comment on these questions. Thank you.

Mr. OSE. Thank you, Mr. Shays. Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman. Mr. Shays has asked a lot of the questions that I was going to ask. But what I am wondering about is are you going to try to speed up this process any or is there any plan? I am not saying speed up approval. Sometimes some of these groups maybe should be turned down. But we have seen over the past several years a judge with one law clerk can look at this material and make decisions within weeks or months. And you have got all these bureaucrats down there working on this, supposedly, and they cannot make a decision in years. Something is wrong. Something is wrong with that.

So it looks to me like this whole process needs to be speeded up, and it could be. I bet if you were being paid like real estate agents and you would not be paid unless you made a sale, if you were being paid on the basis of getting this work done, these approvals and disapprovals would be coming out very, very quickly and they would not be sitting around for years.

Mr. OSE. Would the gentleman yield on that?

Mr. DUNCAN. Yes.

Mr. OSE. I do not think we want to pay on a commission basis here. [Laughter.]

Mr. DUNCAN. Well, I am just saying that if they were being paid on the amount of work that was being produced, these files would not be sitting around all this time. I think you should be very embarrassed to be up here and tell us. I am not saying all of these should be approved. People can rationalize or justify anything and if you do not have enough work, maybe that is the problem, maybe there is not enough work and so you are trying to drag out the work that you have. I have a hard time understanding when I am told that you have got some of these applications that have been sitting around for years and then you tell Congressman Shays, the impression I get, that you do not have any intention or plan to speed up this process at all. I think it is ridiculous.

Mr. MCCALEB. No, I did not mean to convey that. In fact, I said we would have a strategic plan by the middle of April that defines what the need is for total human resources and financial resources in order to expedite the plan.

Mr. DUNCAN. I see that there are 559 tribes. It seems to me like there are almost more tribes now than there were when we just had Native Americans here in this country. I guess some of these people would not even be applying if there were not a financial incentive to do so. But I am wondering, I see where a couple of the tribes are huge but then there is one tribe that is as small as like one family. Do you ever have any of these tribes that are de-listed or de-certified or that go out of existence?

Mr. MCCALEB. Yes. That has happened in the past. In fact, about 1978 I think is when the first list of federally recognized tribes was published and there were some tribes that were not listed at that point and have since made application to be acknowledged as a tribe. There were 220-odd tribes recognized at one time when the Alaskan villages were all federally recognized as tribes in the earlier part of the last decade.

Mr. DUNCAN. All right. Well we have got a couple of votes going on. Thank you, Mr. Chairman.

Mr. OSE. Thank you, Mr. Duncan.

We do have two votes that are scheduled. We have got 7 minutes left on this vote. One is for passage and I do not know what the other one is. We are going to recess and come back. I do not know what the status on the second vote is. Typically, it is a 5-minute vote. So this might be 10, 15 minutes. I have some questions also. So we are going to go ahead and recess. Appreciate your patience.

[Recess.]

Mr. OSE. We are going to reconvene here.

I have a number of questions here. I want to start with Mr. Hill. Mr. Hill, the same question I put to Mr. Toulou having to do with the manner in which these recognitions transpire in terms of the seven criteria. If the practice is that the applicant tribe has to meet the seven criteria and then the process changes so that you no longer have to meet the seven criteria but some can be waived, is that in effect a rule that has to go through due process?

Mr. HILL. Well, the process calls for meeting all seven criteria. Under the current process, the Assistant Secretary has the discretion of granting recognition even if the criteria are not met. That is just the way this process has been set up and has been carried out.

Mr. OSE. In effect, we have set up a system then that allows significant variability in how this or that band or tribe or group might seek recognition; is that what you are saying?

Mr. HILL. There appears to be variability not only outside the process, but even within the process there has been what appear to be a number of inconsistencies in terms of whether criteria have been met or not. Some of these criteria are very difficult to document and provide evidence over the many years that they have to basically show proof or evidence that they have met these criteria.

Mr. OSE. Well, as you might imagine, my concern is that the process not be arbitrary or capricious. Yet what you are describing for me is a system that offers ample opportunity, absent someone of extremely high moral standards, for an arbitrary or capricious decision. Am I missing something here?

Mr. HILL. I do not think you could ever devise a process that is going to be black or white, yes or no. There is a lot of judgment that has to be rendered on these petitions individually. And here again, most of the controversy, most of the concern focuses on is there sufficient evidence to demonstrate that the criteria has been met? In most of the cases the key factor here is proving or demonstrating continued existence over this entire period of time.

There has been a recent case where there was a gap in terms of the petitioner being able to prove existence over a 70 year period. When things like this occur, the BAR staff say they rely on precedence, they look back at precedence to determine whether or not prior decisions have rendered the recognition or not rendered it. In this particular case, the BAR felt that with this 70 year period, they proposed that the tribe not be recognized. The Assistant Secretary looked at the same evidence and basically concluded that there was sufficient evidence in his mind that the criteria had been met and he basically proposed that the recognition be given to the tribe. So there are a lot of judgments that are being exercised here.

Mr. OSE. So we had a factual, presumably factual, conclusion on staff's part that one of the seven criteria had not been met, and

then we had an over-rule as to whether or not that was an acceptable piece to this application?

Mr. HILL. That is correct. And the difference of opinion, if I could expand——

Mr. OSE. But before you leave that point——

Mr. HILL. Sure.

Mr. OSE. I am looking at a list of the criteria for tribal recognition, the seven items. And what you are suggesting is that some are more important than the others. But I do not see any delineation of priority within statute or regulation.

Mr. HILL. No. I did not say some are more important than others. All of them under the process need to be met. But there are a few of the criteria that it is just very difficult to demonstrate that the criteria has been met. And it all deals with the sufficiency of evidence.

Mr. OSE. Right. My time has expired. I am going to go to Mr. Shays for 5 minutes.

Mr. SHAYS. Thank you, Mr. Chairman. Mr. Hill, let me continue with you or Mr. Toulou, either one of you. I would like you to respond to the questions that I was asking Mr. McCaleb. I would like to know your sense of what you are hearing and what it means.

Mr. HILL. I am sorry, could you repeat the question.

Mr. SHAYS. Sure. I asked Mr. McCaleb a number of questions. You were sitting right next to him. I want to know, you were hearing these answers, you are head of the GAO, I want to know what that told you. What did you learn from the discussion that we had?

Mr. HILL. Well, if I may go first, I think Mr. McCaleb realizes he has got a problem here in terms of being able to effectively and efficiently implement this process. We are encouraged that he agreed with the findings we had in our report, which basically indicated that these problems focused on the need for guidance or guidelines to interpret various aspects of the criteria, as well as providing sufficient resources so that they can process these petitions more efficiently and effectively.

Mr. SHAYS. Speak to the last one. How will he have more resources if he does not ask for them?

Mr. HILL. Well, I would defer to Mr. McCaleb on that. I am encouraged from the standpoint——

Mr. SHAYS. No. No. I am sorry, that is just not going to hold. You have made a report about the Bureau of Indian Affairs and they commented on it, and your answer to me was really what he said to you in your report. Is it not meaningless to say they agree with the report if they are not going to ask for the people necessary to do the job? Does it not make it almost absurd? Can he do the job without the people?

Mr. HILL. He cannot do the job any better than they are doing it now unless there are more people added. That is right.

Mr. SHAYS. Right. Are things getting better or are they getting worse?

Mr. HILL. Things are getting worse.

Mr. SHAYS. OK. So it is really bad now and things are getting worse.

Mr. HILL. Correct.

Mr. SHAYS. And you have told me he agrees with your report. And you have just heard him say basically under oath that he did not request—it is not necessary it was under oath, that is disingenuous, I apologize—but you basically heard him respond to our questioning that basically said that he has other priorities and that he did not request any more personnel. How will he get the job done if he does not have more personnel?

Mr. HILL. He will have a difficult time getting the job done better. There are things that could be done to improve the efficiency, but he will need more resources. But with that said, I must defer from the standpoint we did not do an audit of the prioritization of resources for the entire BIA. Mr. McCaleb is dealing with a lot of significant Indian issues right now. I am encouraged by the fact——

Mr. SHAYS. How is that relevant to what we are talking about? Asking for something does not mean you get it. But how does his superior know you need it if you do not ask for it?

Mr. HILL. I would agree with you there. Hopefully, in the plan that they are coming out with in April, our understanding is that will be covered in this plan and they will identify what the resource needs are.

Mr. SHAYS. Let me ask you something. Based on your report, which they agreed with, did they have to wait till April to know they need more people?

Mr. HILL. No. They should have known that.

Mr. SHAYS. OK. And they in fact do know it. So there is nothing that prevented them from asking for more people. Now I might have to go up the chain of command to find out where it stopped, and, in the end, I might have to come up to the chain of command where it stopped in Congress because the administration did their job and asked for the resources necessary and Congress did not do its job in giving the resources it needs. But right now, if the person in charge is going not to ask for it, we are going to have a big problem. So, the bottom line to your testimony is that you believe they need more people. Correct?

Mr. HILL. That is correct.

Mr. SHAYS. OK. And without more people, things will get worse rather than better as it relates to the recognition process and the ability to bring down the numbers?

Mr. HILL. Yes. That is correct.

Mr. SHAYS. Mr. Toulou, I am getting you a little out of your territory here and you are another department, so I am not going to ask you quite the same question. You do not have oversight of this office, is that correct?

Mr. TOULOU. That is correct.

Mr. SHAYS. Tell me what your role is in terms of oversight. Basically, it is only those Indian tribes that are federally recognized?

Mr. TOULOU. That is correct.

Mr. SHAYS. Right. So all the applicants you basically have no contact with, right?

Mr. TOULOU. They might at one time. I have not had any contact with them.

Mr. SHAYS. No. I understand. OK.

Mr. TOULOU. Generally, no. Generally, our relationship is with federally recognized tribes pursuant to the government to government relationship.

Mr. SHAYS. Mr. McCaleb, what are we going to expect when you do this report that is coming out in April? Is this going to be a strategic plan for your entire office?

Mr. MCCALEB. No. It is the strategic plan as it relates to the Branch of Acknowledgement and Research.

Mr. SHAYS. So it is just the recognition side?

Mr. MCCALEB. Yes. It deals directly with the content of the GAO report.

Mr. SHAYS. OK. I want to compliment you for the fact that you have come into a traumatized agency and I understand that you have had to look at a lot of decisions that were made by the previous administration. What are you doing to ensure that the political process of who gave what contribution to whom will have no impact on the recognition process?

Mr. MCCALEB. First of all, I have tried to insulate myself from that information so that there can be no question about whether or not my office is influenced. If you do not know, then you obviously cannot be influenced.

Mr. SHAYS. Good enough.

Mr. MCCALEB. But much greater than that, I think we are developing a pretty high standard of objective evaluation of these criteria and are trying to adhere to that. I am personally not becoming involved with the petitioners so that I do not unduly have myself influenced or prejudiced before I get the report from the Branch of Acknowledgment and Research.

Mr. SHAYS. Mr. Chairman, my time has expired. I just have one 5 minute more segment. Should I——

Mr. OSE. That will be fine. We will come around again.

Mr. SHAYS. OK. Good.

Mr. OSE. Thank you, Mr. Shays.

I am going to ask a couple of questions regarding unfunded mandates. Mr. Hill, Mr. Simmons testified about significant frustration at the State and local level in terms of being able to participate in the process. In the GAO's review of the process, did you find any concerns about how the Bureau dealt with State or local government?

Mr. HILL. Well, the way the process currently works now, the public really does not have a lot of access to the process until after the BAR has a proposed finding and it is published in the Federal Register. Then the public has so many days in which to analyze the information that is put out and give their input to the process. Well, in a lot of cases, that timing is too late in the process. So the public wants to access the process earlier and the way they do that is through Freedom of Information Act requests.

Mr. OSE. What do you mean, "it is too late in the process"?

Mr. HILL. Well, with the amount of information that has to be considered, and with the difficulty of getting some of that information, it is not that readily available, you have to get it through the BIA, the people we spoke to, the State and local communities that we spoke to basically felt that they did not have sufficient time

that late in the process to really do the job they needed to do, do the analysis they needed to do and get their comments in.

So, to intervene earlier in the process, they basically go through the Freedom of Information Act process to request information from BIA. And this complicates the problem, because now you have got the BAR staff, that is already understaffed, over-worked, being pulled off and responding to these Freedom of Information Act requests on a case-by-case basis and having to deal with that process and get that information out to the public.

So it is a very inefficient process. And I could see where the State and local communities are being frustrated in terms of like they feel they are being shut out of the front end of this process.

Mr. OSE. Within the process itself, is there some prohibition on involving State or local government at an earlier stage?

Mr. HILL. I believe that was imposed by BIA as part of the——

Mr. MCCALEB. If that is the case, it happened prior to this administration.

Mr. KEEP. The regulations actually provide for giving notice to the State and the Attorney General when the petition is received. Connecticut has a particular problem in that they have counties and they may not get the information from the State.

Mr. MCCALEB. This is Mr. Scott Keep from the Solicitor's Office at the Department of the Interior.

Mr. OSE. I appreciate it. I am going to note for the record that you were sworn in also at the same time. Is that accurate?

Mr. KEEP. Yes, Mr. Chairman.

Mr. OSE. Many of these applications are received years before a decision is finally announced or published. I am trying to figure out what is the constraint here on State and local government participating? I mean, a FOIA is a pretty aggressive action. It is kind of like I have reached the end of my rope or I am pulling the last of my hair out, so to speak.

Mr. HILL. I think it is a question of what information from the petitioner is available when in the process. And I believe the bulk of the information from the petitioner is not available until the proposed finding has been published in the Federal Register.

Mr. OSE. Is that accurate, Mr. McCaleb or Mr. Keep? Mr. Keep, if you would like to join us up here at the table.

Mr. MCCALEB. That is not my impression. Scott.

Mr. KEEP. Mr. Chairman, no, I think the information is available, except the information with regard to genealogy, of course, is very private and is not available. Much of the other information is available; if they were to get a Freedom of Information Act request, as Mr. Hill has indicated, it would divert the staff from processing the petition.

Mr. OSE. Do the FOIA requests——

Mr. SHAYS. Excuse me, Mr. Chairman. I do not think he is getting picked up on the recorder. Maybe he will identify himself.

Mr. OSE. He has, it is Mr. Scott Keep.

Mr. SHAYS. The recorder is not picking it up. I am sorry to interrupt, but we are having a problem.

Mr. OSE. All right. Let's go through this again. Identify yourself, tell us you have been sworn, and then answer the question.

Mr. KEEP. Mr. Chairman, my name is Scott Keep. I am an attorney with the Department of the Interior and I have been sworn to tell the truth and the whole truth.

Mr. OSE. All right. Now the question is, what is the prohibition on having State and local participate? The feedback has been, your testimony has been that the genealogical information, in particular, is very private, that some of the information is received incrementally.

Mr. KEEP. Correct. There is no statutory or regulatory prohibition other than the constraints of the Freedom of Information Act on releasing information that would be an intrusion on an individual's privacy and the Privacy Act. But there are practical implications because the information being received by the Branch of Acknowledgement and Research comes in over a period of time and at different times, and the petitioners are not required to notify other people, and we are not required to notify potentially interested parties as each additional installment is received.

Mr. OSE. The only requirement for notification is the publication in the Federal Register.

Mr. KEEP. Correct. Prior to the issuance of the proposed finding.

Mr. OSE. Right. My time has expired. Mr. Shays.

Mr. SHAYS. Thank you. Hopefully, this can be my last round. I just want to say that I consider myself a real ally with the Bureau of Indian Affairs on this one regard. I believe that tribes should go through the recognition process of the Bureau and that the Bureau needs to do its job.

There are only two things that I fear. One is that we will by-pass the process through legislation on the floor of the House. So I have literally come to Washington on those days when that legislation comes up to oppose recognition on the floor and asking for a roll call vote. I want to make sure that whatever tribe is recognized goes through a fair process. Absolutely essential that be the case. And then if they are recognized, they deserve all the rights and privileges, whatever they may be.

The other thing I fear is that which happened under the previous administration. Campaign contributions started to be donated and then we were hearing from the professionals that recommendations they had made were getting changed, distorted, as the result of who the applicant was and how much they contribute. And I think that story is fully documented.

So, Mr. McCaleb, you impressed me that your interest was to make sure that the process be fair and that politics would stay out. What I want to ask you for the record is, have you been told by anyone of any contribution being donated by an applicant for recognition?

Mr. MCCALEB. No.

Mr. SHAYS. OK. And if that were to be said to you in a way that was suggesting that was important in terms of your recognition process, you had told me that you would go and tell the Secretary that you had been told this and thought it was inappropriate. I want to know if that is still your position.

Mr. MCCALEB. That is correct.

Mr. SHAYS. OK. And I have total confidence that is the case. Now the only other thing then that would concern me, I should have

said three things, and that is that the court may decide that your agency has not been able to do its job and they may arbitrarily recognize a tribe. My understanding is that basically the criteria can be ignored, you can ignore it. I am concerned that the court could order you to recognize a tribe based on a whole host of other factors. And that is why I am trying to put in context my concern about why I think this is so essential that you get the resources necessary so no court can say you just are not able to do the job and we are going to step in. I am trying to give you a little understanding of that concern.

It is my understanding that you, later than I want, will be reevaluating your needs. And is my understanding correct that whatever your needs are you will convey them to your superiors and document that in writing?

Mr. MCCALEB. That is correct. I did not intend to convey that we were not going to ask for additional personnel in the future. I think our April strategic report will have a work force element in it that will show a need for a substantial increase in personnel.

Mr. SHAYS. But you understand my concern. You have missed the budget year, so we are talking about not this October but you would be talking about the October a year from now.

Mr. MCCALEB. That is correct.

Mr. SHAYS. And that could be deadly. And that is why you see a concern on my part.

Mr. MCCALEB. Well, we will have this report and the number that is requested is an additional 22, more than doubling, more than tripling, it is almost tripling our staff.

Mr. SHAYS. And you may have to, it appears, if you are not getting the applicants, it may be that you are going to have to find ways to pay them more.

Mr. MCCALEB. Well, that is problematical because those jobs carry certain GS ratings, of course.

Mr. SHAYS. I know. And I am suggesting to you that you reevaluate the job rating. These are people that are basically determining who is going to be a billionaire, because it is going to be based on their research and work. You need people who are paid a wage that I think will be able to confront the lawyers who may in fact force them to come in and respond to their recommendations in court. They need to be very capable people.

Mr. MCCALEB. Another alternative that we have been evaluating is outsourcing some of this activity. But there are certain inherent risks in that and the duration that it takes does not lend itself very well to outsourcing. However, we are looking at outsourcing some segments of the work in order to magnify our capability.

Mr. SHAYS. I would just like to make one suggestion, ultimately. I think what Congress should basically be doing is that we should make a requirement that all potential applicants who are in the pipeline now or perceive that they may want to be an applicant in the years to come, that we set a deadline for all applicants and once that deadline is passed no more applicants can come. Then we look at whatever number we have, figure out what resources we need to plow through that, and then just do it. I know that is not your responsibility. But I am just telling you kind of where I am

coming from as someone who has watched this process for many, many years and is very concerned about it.

I thank the chairman for his graciousness in letting me have more time.

Mr. OSE. Thank you, Mr. Shays. Mr. Toulou, if I may, I understand Congress can recognize a group as a tribe, and I believe through the process BIA can recognize a group as a tribe. Can the courts do it also?

Mr. TOULOU. That is an interesting question. I was thinking through it as Mr. Shays asked it. I have serious reservations whether a court could unilaterally recognize a tribe. That being said, I think that overseeing an individual agency action or congressional action, the court might be able to drive certain portions, moving it along on a timetable or something of that sort. I think it would be very factually specific on a given case to say how much involvement the court could have in the recognition process.

Mr. OSE. All right. So we do not know the answer to that question. We do not know whether a court could or could not. I mean, in effect, you are saying a court could by driving the process.

Mr. TOULOU. Well I think the court could be involved in the process. I do not think a court could just pick a group unilaterally and say, OK, you group of allegedly indigenous people are now a tribe. That is reserved to the Congress and the Indian Commerce Clause. I do not think that is constitutionally a power of the courts, no. But they could be involved in the process, yes, I think so.

Mr. OSE. I do not know who to ask this question of. How many tribes were here prior to the white man?

Mr. MCCALEB. Well, in that there was no written historical record, that is a little difficult to estimate.

Mr. OSE. Well you can see where my question goes.

Mr. MCCALEB. Yes. I understand. What we have to do in this process though is determine if these tribes were an indigenous people that have existed for a long time and whether they had a continuous government influencing the membership of that tribe, not just a community of people who have decided that they probably had indigenous roots and claim sovereign status. Because the relationship, as I understand it, and I am not a lawyer, but the relationship is with the United States, by virtue of the Constitution Act and the Non-Intercourse Act which regulates transactions with Indians, the special relationship is with those sovereign tribes that existed at those early times of our Government. And to my knowledge, nobody has ever quantified precisely what that is. We do know the tribes that we had treaties with and arrangements with.

Mr. OSE. All right. And how many? Do we know what the number was there?

Mr. MCCALEB. I do not off the top of my head, no. I'm sorry.

Mr. OSE. Let me go on with my questions. Recognition of a tribe in a given geographic area confers status, any number of things. For the last year, Interior Secretary Norton has been advocating a philosophy at DOI focused on what she calls the "four Cs," which are consultation, cooperation, and communication, all in the service of conservation; those being the four Cs. Does this philosophy of consultation, cooperation, and communication extend beyond conservation to Indian affairs as well?

Mr. MCCALEB. Absolutely. Mr. Chairman. There is an Executive Order that mandates consultation with tribes on any Federal action that may impact the tribe or tribes.

Mr. OSE. What about local government?

Mr. MCCALEB. There is no mandate because there is not a government-to-government relationship and the Bureau of Indian Affairs' relationship is exclusively with federally recognized tribes.

Mr. OSE. What I hear loud and clear, both from Mr. Simmons and Mr. Shays, is that somehow or another we have got to get these lines of communication open so that we can have more local or State involvement in the process in addressing whatever might be coming up or coming down the pike on tribal recognition application. So that is why I asked about the consultation issue, in particular. I asked earlier is there a prohibition, is there a requirement for consultation?

Mr. MCCALEB. With local governments?

Mr. OSE. Yes. Local or State.

Mr. MCCALEB. No.

Mr. OSE. There is neither a prohibition nor a requirement?

Mr. MCCALEB. No.

Mr. OSE. So that might be one area——

Mr. MCCALEB. Just a moment. He is making the point that we have to give notice. That is not consultation.

Mr. OSE. But the notice is published in the Federal Register and what have you.

Mr. MCCALEB. Right. In a local newspaper also.

Mr. OSE. Well, in 1995 Congress passed the Unfunded Mandates Reform Act, and one of the principal goals of that Act was to ensure that the State and local governments are consulted before agencies issue mandates. Is recognition of a tribe a mandate? From a legal standpoint, Mr. Toulou, is recognition of a tribe a Government mandate?

Mr. TOULOU. I do not know for purposes of that particular bill whether it is a mandate. It certainly is a governmental action. I am just not familiar with the Unfunded Mandate Act. It is not an area of my expertise.

Mr. OSE. Well, the Act specifies that "before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agencies shall develop a plan to enable small governments to provide meaningful and timely input in the development of the regulatory proposal." So, if recognition of a tribe is mandated by a Federal agency action and has consequence in a local jurisdiction, how can the agency not comply with the Unfunded Mandates Act?

Mr. TOULOU. Without studying the Act further, it strikes me that act is designed to deal with legislation that deals specifically with that community. And while this may be an incidental impact, I am not sure how the Act and the judicial history of the Act afterwards balances incidental impacts. That would be my concern in answering that, whether or not this is a direct impact or an incidental impact and how much the bill is intended to deal with those incidental impacts.

Mr. OSE. Mr. McCaleb, has the agency had any deliberation on this as to whether or not Unfunded Mandates Act applies to the recognition of a tribe?

Mr. MCCALEB. Not to my knowledge.

Mr. OSE. All right. So in terms of recognition of a tribe, are you aware of any plan at BIA for providing what I would call meaningful and timely input prior to publication in the Federal Register on a regular basis from local or State governments into the process?

Mr. MCCALEB. In other areas, yes, there is. Under active consideration right now, and it is very controversial, it has to do with the other major step of creating the territory of the tribe or taking land into trust status. We withdrew a new Federal regulation on this and published our intent to include a provision for notification to local governments when land is taken into trust outside of the existing reservation boundaries. That regulation has not been promulgated nor reviewed or commented on, but we have published our intent to do that.

Mr. OSE. The publication says it is the intention of the agency to notice local and State governments at such time as land outside the historical——

Mr. MCCALEB. The intent was not that specific. It just said that if the land is proposed to be taken into trust outside of the reservation boundaries, it shall not adversely impact those communities. It does specify tests for evidence for both the tribe wishing to take land into trust and for the community who opposes it for whatever reason.

Mr. OSE. This is kind of the intersection of Federal, State, and local law.

Mr. MCCALEB. It is, absolutely.

Mr. OSE. This is the area I find most interesting. Because if either Congress or the agency confers tribal status on a group, then subsequent to that new tribe goes out and seeks to have land taken into trust on their behalf, that land may well be off the historical reservation but in the middle of an urban area, in which case a local government, depending on the State, may then be faced with a decision as to whether or not to allow the development of that property in whatever fashion. You can see my unfunded mandates issue.

Mr. MCCALEB. Absolutely. Yes.

Mr. OSE. It is just a very ticklish question between Federal, State, and local government as to who has got control over that land. So I am asking again, what means of consultation exists?

Mr. MCCALEB. Well, I think that is what I am trying to respond to you. I am saying that one of the reasons that rule was withdrawn was to try to provide that method of notification and consultation between the community and the tribe to create some level of consensus on how that land was to be utilized. That is very controversial in the Indian community, it is also controversial in the non-Indian community, and it will be a subject of considerable discussion as those rules are promulgated. But it is right on point of the issue that you are raising.

Mr. OSE. Do you have any idea on the schedule when that revised proposal will appear in the Federal Register?

Mr. MCCALEB. We had it scheduled before now, but we are involved in an extensive consultation schedule on the proposed reorganization of the trust asset management activities in the Bureau of Indian Affairs that has kept me on the road every week for the last 7 weeks. So it will probably be sometime later on this spring. I am sorry to be indefinite, but we do not have a specific date.

Mr. OSE. All right. Hold on a minute. As you might have noticed, a number of Members from across the country have very specific interests here on this issue of tribal recognition. Given the time, what I would like to do is I want to go ahead and complete the hearing. But we have a lot of questions that did not get asked. So we are going to leave the record open for a period of time, 10 days. We are going to send you some questions subsequent to that time period, we hope you would answer in a timely fashion, and they might be technical, they might be very specific in terms of individual Members' districts, but we would appreciate your cooperation. We look forward to your responses.

I do want to say I have learned an enormous amount. Normally, these things are somewhat dreary or dull. But I have learned an incredible amount today, and I appreciate you guys taking the time to come down and visit with us. This falls under the jurisdiction of this committee and we will be revisiting it. So, again, I thank you for testifying. I look forward to working with you in the future.

Mr. MCCALEB. Thank you, Mr. Chairman.

Mr. OSE. This hearing is adjourned.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[The prepared statement of Hon. John J. Duncan and additional information submitted for the hearing record follow:]

Hon. John J. Duncan, Jr.
Opening Statement
2/7/02

Mr. Chairman,

I want to thank you for holding this very important hearing on a process that has become far too bureaucratic for its own good.

This issue of federal recognition of Indian tribes, and particularly the timeliness and consistency of the administrative process is a very important one.

As we all know, this Nation was, at one time, all Indian country. And while there are no tribes in my State of Tennessee which are recognized by the Department of the Interior as having a government-to-government relationship with the federal government, the issue of federal recognition is one with which Tennessee has some experience.

In 1985, one petitioner from Tennessee, called the Red Clay Inter-tribal Indian Band, was denied acknowledgment by the Interior Department.

Currently, another group, the Cherokees of Lawrence County, TN, has submitted some documentation to the Branch of Acknowledgment and Research as evidence that they should be recognized as an Indian tribe.

The acknowledgment process appears to be possibly one of the most time-consuming decision-making processes of the federal government. I have often said that the least efficient, least economical way to do something is to let the federal government do it. This is an issue that needs addressed.

Some petitioners, I understand, have submitted volumes and volumes of documentation to the BAR, only to have to wait for years or even decades for staff to become available to review this evidence.

During this time, elders of the tribe, who carry the history and customs and other live evidence of a tribal community, may pass away, and that valuable information is lost.

Given this length of time, some petitioners have asked Congress to consider legislation to clarify or recognize their tribal status.

I don't know about other members, but I am not convinced that I have the skills to evaluate the kinds of genealogical, historical, political and anthropological documentation that form the basis of vast material submitted as part of the acknowledgment process.

Since there is an administrative process in place in the Department, I believe Congress should assist in making that process effective – providing it with staff and resources so that the Assistant Secretary

for Indian Affairs can carry out this responsibility delegated by the Secretary of the Interior.

Mr. Chairman, thank you again for holding this very important hearing. I look forward to the testimony to be given today.

U.S. Department of the Interior
Office of Inspector General

Investigative Report

Allegations Involving Irregularities in theTribal 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.*~~

Statement by U.S. Representative James H. Maloney (CT-5)
House Committee on Government Reform
Energy Policy, Natural Resources and Regulatory Affairs Subcommittee
Hearing on "Tribal Recognition: Problems with the Bureau of Indian Affairs' Regulations?"
February 7, 2002

Mr. Chairman,

I applaud you for holding a hearing regarding the Federal recognition process of Native-American groups nationwide. This is an important issue that requires the attention of Congress and the U.S. Department of Interior, under which falls the Bureau of Indian Affairs (BIA).

The Federal recognition process of Native-American groups is very complex. It is also severely flawed. It was made even more problematic because of enacted procedural changes within the BIA in 2000.

We must reform this process, and I have worked in Congress toward that end. Late last year, I joined as the lead Democratic co-sponsor of legislation (HR-3548) offered by my Connecticut colleague, Representative Simmons. Our legislation is made urgent by actions of the BIA.

On February 11, 2000, the BIA formally announced changes in the Internal Processing of Federal Acknowledgment Petitions. Since these February changes purportedly only related to internal processing, they did not need to go through the federal notice and comment requirement for regulatory changes. If, as the bureau intended, these internal processing changes expedited consideration of recognition petitions, then certain tribal petitions may receive a decision on recognition sooner rather than otherwise. But since, as a result of theses changes, the BIA will not be undertaking full independent research, those decisions may well also be made on a less than complete record. It is critical that the BIA continue to review petitions and the material provided it in a thorough and professional manner. To do otherwise would have very serious consequences on all petitions and the public impacted by them, including those pending in Connecticut.

Statements by BIA officials in 2000 reiterated that the bureau understood that the petition process of acknowledgment needed to be reformed. During testimony to the Senate Committee on Indian Affairs on May 24 of that year, the then Assistant Secretary of Interior for Indian Affairs, stated "We are committed to working with the Committee to improve the acknowledgment process." Indeed, the acknowledgment process should be strengthened; it should not be weakened as the BIA has done by its actions of February 11th, 2000.

As Connecticut Attorney General Blumenthal correctly stated in 2000, "Tribal recognition impacts profoundly on Indian tribes and on states, local communities and private citizens." He also said, "Federal recognition is also often accompanied by land claims brought against innocent property owners, creating understandable

anxiety in the affected communities." I strongly concurred with the Attorney General's concerns, and I communicated my views to the then Secretary of the Interior accordingly.

Since coming to office over a year ago, the Bush Administration has made no changes to date to the BIA Federal recognition process of Native American groups. It is my understanding that the Assistant Secretary of the Interior for Indian Affairs has taken a cautious approach about this recognition process regarding any potential structural and/or funding changes to the BIA. I also understand that the Assistant Secretary is taking a hard look at the BIA's functions, and will act according to any of his findings. In the meantime, the February 2000 changes in the Internal Processing of Federal Acknowledgment Petitions regrettably, and dangerously, remain in effect.

Steps need to be taken immediately to reform the Federal recognition process. I commend to your attention three specific recommendations of mine for such reform.

1. The appointment of a national commission, made up of individuals and groups affected by recognition decisions, to study the acknowledgment process and "devise a blueprint for reform." I have sought the support of the appropriate Congressional leaders on a non-partisan basis for such a commission.

2. Until such time as the BIA process is reformed, I urge all members of Congress to vigorously oppose any attempt by any party to circumvent the BIA by passing special-act legislation in the Congress. Until the Congress is certain that the BIA has in place a fair, judicious, and trusted recognition system, the Congress should not seek to take any other action in connection with recognition.

3. Until such time as the BIA process is fully reformed, the BIA should revoke its actions of February 11th, 2000, and return to its historic procedures which, although extremely time consuming and complex, did not raise the danger of imprudent or overly hasty actions presented by the February 11 changes.

Representative Simmons and I believe that our legislation (HR-3548) properly addresses the BIA recognition process. I will continue to work in Congress so that this legislation becomes law this year. Allow me to discuss the key components of the legislation as it pertains to the BIA process. The legislation does the following:

1. Requires the BIA to notify states whenever a Native-American group within those states files for Federal recognition. The state must in turn ensure that a notice is provided to towns adjacent to that Native-American group.

2. Requires the BIA to accept and consider any testimony, including from surrounding towns, that bears on whether or not BIA will recognize a Native-American group.

3. Requires that the BIA find affirmatively that all recognition criteria are met in order to confer Federal recognition. Any decision conferring recognition must be accompanied by a written set of findings as to how all criteria have been satisfied.

4. Doubles, from $900,000 to $1.8 million, the resources available to BIA's Branch of Acknowledgment and Research (BAR) Division to upgrade its recognition process of Native-American groups.

5. Provides $8 million in grants to local governments to assist in participating in decisions related to certain Native-American groups. These grants could be applied retroactively to any local government that has spent money on decisions related to certain Native-American groups. The legislation also provides for a grant program of $10 million to be made available to federally impacted towns for relevant infrastructure, public safety and social service needs directly related to Native-American activities.

6. Institutes a "cooling off period" of one year, in which any high-level BIA official could not appear before their former agency.

In concluding, allow me to reiterate that I am committed to a reformed BIA process that fully and properly protects the interests of all concerned, Native-Americans as well as the residents and property owners of my Congressional District whose interests and concerns are always foremost in everything I do.

TESTIMONY OF

NICHOLAS H. MULLANE, II

FIRST SELECTMAN, TOWN OF NORTH STONINGTON

BEFORE THE

SUBCOMMITTEE ON ENERGY POLICY,

NATURAL RESOURCES AND

REGULATORY AFFAIRS

HOUSE COMMITTEE ON GOVERNMENT REFORM

FEBRUARY 7, 2002

Mr. Chairman and Members of the Subcommittee, I am pleased to submit this testimony on H.R. 3548, a bill to reform the Federal Indian recognition process. As the First Selectman of North Stonington, a small town in Connecticut with a population of less than 5000, I have experienced first-hand the problems [1] presented by Federal Indian policy for local governments and communities. Although these problems arise under various issues, including trust land acquisition, Indian gaming, unbridled tribal sovereignty, and special privileges afforded Indians not accorded to other citizens, this testimony addresses only the tribal acknowledgment process.

Reforms of the federal acknowledgment process [2] must occur if its decisions are to be accorded the credibility and respect required for tribal and community interests to proceed without conflict. The legislation that is being reviewed today is a good start, and I want to commend Congressman Rob Simmons for introducing it. I ask for your Committee's support in forwarding this bill for Congressional approval.

Federal Indian recognition, in too many cases, has become merely a front for wealthy financial backers [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. My 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[4]. They have invested millions, if not 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. I must also comment about gambling's growing political influence and the need for campaign reform.[5]

The State of Connecticut has become fair game for Indian casinos, and the recognition process has become the vehicle to advance this goal. For example, three other tribal groups with big financial backers have their eyes on Connecticut and 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, the reality remains that tribal recognition now, in many cases, equates with casino development. 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 without detailed review of the merits of its claim. This law, combined with the 1988 Indian Gaming Regulatory Act, ultimately produced the largest casino in the world. Having experienced the adverse casino impacts and understanding the questionable 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 would comply with all the Federal requirements.

The Towns of North Stonington, Ledyard, and Preston therefore obtained interested party status in the BIA acknowledgment process. We have participated in good faith to ensure that the Federal requirements are adhered to. This role has cost our small rural Town $405,930, a small fraction of the millions of dollars invested by the backers of these groups but a large sum for a small local government.

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 ½ years. [6] Only through the filing of a federal lawsuit were we able to obtain the basic information from BIA. The lawsuit also included violations of the Administration Procedure Act, failure of BIA to provide the technical assistance guaranteed under the acknowledgment regulations, and claims regarding the procedural fairness of BIA's review. The Towns, joined by the State, prevailed in this litigation with respect to the release of documents and technical assistance. The other claims 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 citizens and local governments should not have to pay money and go to court simply to participate in a federal process.

During the review of the Pequot petitions, the BIA experts 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 1972 through the present. Under past BIA decisions;

this deficiency alone should have resulted in negative findings. In spite of this lack of evidence, the negative findings were simply overruled [7] by the then BIA Assistant Secretary Kevin Gover. This was part of a pattern under the last Administration of reversing BIA staff to approve tribal acknowledgment petitions. 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 even being considered for the critical proposed finding. 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.

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; Mr. Gover simply issued it as an edict.

Thus, rather than our Town's involvement being embraced by the federal Government, we were ignored and rebuffed. The petitioning groups attacked us and our researchers. We were called anti-Indian, racists, and accused of committing genocide, by the petitioning groups. I was publicly accused of "Naziism" [8] just because our Town was playing its legally-defined role as an interested party. At various times throughout the proceeding, 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. Obviously, however, the strategy of exclusion had the opposite effect – it only hardened our resolve to participate. The Paucatuck Eastern Pequots even tried to get Federal Recognition through an act of Congress attaching recognition to a Federal Spending Bill.[9]

An additional problem was the principle advanced in the Pequot proposed findings that would have devastating effects in Connecticut. At the behest of Mr. Gover, the petitioners were allowed 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 historic Pequots and provided welfare services. These acts by the State, Mr. Gover instructed BIA to rule, were sufficient to compensate for the lack of evidence on community and political authority. By this artifice, Mr. Gover 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. It simply demonstrated actions by the State in the form of a welfare function. If this principle is not rejected by BIA now, it will give an unfair advantage not only to the Pequot petitioners but possibly to other Connecticut petitioner groups as well.

With this background in mind, I strongly support H.R. 3548. This bill is an important step in the right direction. It would provide Towns with needed financial assistance to offset the unfair advantage bestowed upon petitioners by gaming and the Tribe's wealthy financial backers. It also recognizes the fundamental reality that local governments have a stake in tribal acknowledgment. As a result, it confirms their role in the process and helps to "level the playing field." It makes important changes to the acknowledgment process to ensure that local governments have a better opportunity to

participate. It also seeks to address the budgetary problems that make it so difficult for BIA to do its job. Tribal acknowledgment can no longer be the province of only tribal petitioners and BIA. Entire communities and states are affected, and the process needs to be reformed to reflect this reality.

With these thoughts in mind, I have two recommendations to strengthen the bill.

First, it should eliminate the unfair advantage petitioners have under BIA regulations of getting the "last word" in the comment process. All parties should be required to file comments at the same time. Petitioners are necessarily result-oriented and submit only evidence that helps their case. There is an unfair advantage under the BIA regulations that allows them the last word, and this must be eliminated.

Second, the definition of "acknowledged tribe" needs to be revised. The current definition only deals with tribes that are "eligible for services." This is too simplistic for a decision which conveys much much more than simply "eligibility." A second test is needed as well that requires the tribe to be recognized as a distinct political entity with powers of self-government. This would be similar to the definition in IGRA.

In conclusion, sweeping reforms as I have previously testified on [10] are called for in the acknowledgment process. We will submit for the record of this hearing detailed additional testimony on these needed reforms, as well as further commentary on the Eastern Pequot and Paucatuck Eastern Pequot petitions. In the meantime, this important bill should be moved forward to enactment. Thank you for considering this testimony.

ATTACHMENTS

1. **Perkins Coie Attorney Guy Martin's - May 5, 2000 letter**
2. **Connecticut AG letter to Secretary Babbit regarding moratorium**
3. **Newspaper article - Developer lobbyist on casinos and recognition**
4. **Newspaper articles (2) - Donald Trump named as developer partner**
5. **Campaign reform white sheet**

   Editorial - Gambling's growing political influence
6. **Selectmen's letter to Secretary Gover FOIA**
7. **Newspaper article - Gover overruled staff**
8. **Newspaper articles - Towns accused of Genocide**
9. **Newspaper articles (2) - Recognition by Federal Spending Bil**
10. **Town Testimony on HR 361**

PERKINS COIE LLP

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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 Lolita C. Baldor
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 issue of gaming makes such petitions in Connecticut more competitive.

Assistant Interior Secretary Kevin Gover, who until his appointment served as the lawyer for the Golden Hill Paugussett tribe's recognition petition, declined to talk about his former Connecticut clients' revived case.

But he said the only risk to 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 casino trade makes 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 that Pequot/Mohegan case people fight more fiercely. It also has theoretically increased the expense of the process, because what you will find sometimes is a tribe supported by gaming 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 gaining recognition.

"The Connecticut (tribes) have a great potential to create that kind of competition," he said, noting that the battle tends to dwell on 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 meetings Gover had with then-BIA head Ada Deer while the Paugussetts' petition was first being evaluated.

Please see Paugussetts, Page A6

Paugussetts push for tribal recognition

Continued from Page A3

Catherine Sattler, 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 in 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 Paugussetts' petition was the first to be considered — and denied — under this abbreviated process.

In fact, he said he is looking into ways to further speed up the review properties without lowering the standards.

"We don't want to over-research these things," he said. "This is not a scholarly thesis. We are seeking 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 — enjoy gaming gold. Both immediately built highly 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

cc: M. Frances Ayer, Esq.
The Honorable Bruce Babbitt
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

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

The Connecticut Post, April 28, 2000

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 SKAT-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

PAUGUSSETTS
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.

"If the BIA allows this to happen it could end the Schaghticokes' legitimate claim for federal recognition."

— Richard Velky, Schaghticoke chief

The BIA had no immediate response to the charges.

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 Paucatuck 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 330-6210.

RICHARD BLUMENTHAL
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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.[2] *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, 35025-26 (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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[2] 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)
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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)
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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
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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

Connecticut Congressional Delegation
The Honorable Ben Nighthorse Campbell
The Honorable Daniel Inouye
The Honorable Don Young
The Honorable George Miller

Best Wishes from Trughart

Tribe's backer starts lobb ing 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 2.5 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,

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

Developer launches lobbying effort to further Indian gaming

From A1

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.

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 right."

WEDNESDAY, SEPTEMBER 22, 1999, NEW LONDON SERVING EASTERN CONNECTICUT SINCE 1881 VOL. 119, No. 83 40 P' 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 Easterns 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 1995 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. Cunha 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, Cunha 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 criticized 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 373 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.

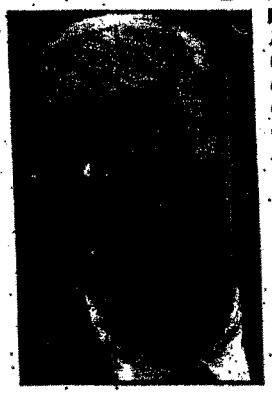
When it comes to influencing legislation, the casinos are not leaving anything to chance.

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 gamblers 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 Cecato 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.

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.

His 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 those 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 1855 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 60 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.

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 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.

STONINGTON

"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 Mae 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 still related to the "historic Pequot tribe."

Tribal Chairwoman Mary Sebastian said that the tribe had not responded to the reports earlier because they considered it preposterous. Sebastian also said that while her tribe sought a relationship with the towns based on respect, selectmen did not return the 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.

See **PAUCATUCK** *page* **A8**

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

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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.

Testimony of

Connecticut Local Government Coalition

On Tribal Recognition Policy

Before Resources Committee

House of Representatives

Hearing on H.R. 361

September 15, 1999

TESTIMONY ON H.R. 361
OF CONNECTICUT LOCAL GOVERNMENT COALITION
ON TRIBAL RECOGNITION POLICY

Dear Chairman Young, Mr. Miller and members of the Committee, this testimony is submitted on behalf of a coalition of local governments in Connecticut that have been, are, or may be, affected by federal tribal recognition policy.[1] We come before the Committee in a unified manner to express our strong and common concerns with respect to H.R. 361, the proposed "Indian Federal Recognition Administrative Procedures Act."

As discussed in greater detail in the following testimony, we consider this legislation to be seriously flawed and to present the risk of forcing tribal recognition policy in a direction that will result in increasing conflict between petitioning groups and local governments. We strongly encourage you to withdraw this legislation from further consideration. Instead, the Committee should undertake a more detailed and open review of the current recognition process. This effort should include soliciting the views of affected state and local governments, citizen groups, recognized tribes, insurers of land titles, and BIA officials (past and present) at the staff level who can offer viewpoints not filtered through the policy level. Through this review, the Committee should seek to obtain meaningful, balanced, and realistic appraisals of the existing tribal recognition program.. Although we have serious reservations about the concept of recognizing Indian tribes in the midst of developed and settled portions of local communities, we believe that an effort to tighten the standards applied under the existing regulations in 25 C.F.R. Part 83, combined with certain administrative measure to improve the efficiency and timeliness of the process, will result in more accurate and equitable tribal recognition decisions. Until this comprehensive analysis is undertaken, it is premature to consider this legislation.

Impacts On Local Governments

Before addressing specific concerns with H.R. 361, we will discuss how tribal recognition affects our interests. Local governments are impacted by tribal recognition reviews and decisions in a number of very important ways. Because the recognition of a new tribe has such serious consequences for a local government and the residents it represents, the mere pendency of petitions for acknowledgement creates considerable controversy and concern. In some cases, including two in

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[1] This testimony is submitted on behalf of the Towns of Colchester, Kent, Ledyard, North Stonington and Preston.

Connecticut to date, even before a tribe is acknowledged, the petitioning group files land claims litigation. If such challenges to the title of land ownership of residents in an affected community are not filed prior to recognition, they very often either follow or are threatened to follow such action. Needless to say, such litigation causes serious disruption to the lives of the affected landowners and the economy of the local community. This threat, in and of itself, is a sufficient reason to ensure that tribes are recognized only under unique factual circumstances and after an especially rigorous and painstaking review.

In addition to disputes over land title, the recognition of new Indian tribes often gives rise to the effort to establish new gaming facilities. Indeed, it will be of no surprise to the Committee that many of the tribal recognition petitions which members of this coalition are confronting are closely associated with anticipated gaming developments. The Indian Gaming Regulatory Act has created huge incentive for petitioning groups, as supported by their financial backers, to seek recognition. If they are successful, the newly recognized tribes are then in a position to reap the significant benefits that flow from gaming on tribal lands. Such gaming is often opposed by the communities in which the casinos are located. In other circumstances, even if gaming is not opposed in principle, the facilities developed by tribes on Indian land are subject to special privileges, such as tax exemption and exclusion from land use requirements, that are not accorded to other landowners and businesses. The result is an imbalance of economic opportunity that strongly favors the Indian gaming enterprises and related businesses. Indeed, this imbalance between tribal and nontribal commercial undertakings occurs even in the absence of gaming. The resulting favorable treatment of the recognized tribe, whatever its origin, is a source of considerable conflict between Indian and non-Indian communities.

New tribes almost always seek to obtain reservation or trust land. Land placed in this status becomes exempt from state and local taxation, land use controls, zoning requirements, and environmental and other restrictions. In many cases, our governmental burdens are increased as a result of the development of trust lands, and yet we are deprived of the revenues that would normally be associated with the tax revenue generated by such facilities. In addition, carefully planned land use programs within our communities can be disrupted, if not destroyed, when land is taken into trust, and tribes proceed to undertake whatever kind of development suits their interests. The end result, in many cases, is a seriously strained and conflictual relationship between newly recognized tribes and local governments and the residents of surrounding non-Indian communities. This conflict is an end result to be avoided whenever possible.

All of these factors demonstrate how important it is to ensure that tribal recognition is not accorded under anything other than the most rigorous, searching objective, professional and equitable procedural and substantive standards. One of our major concerns with H.R. 361 is that it would result in such a serious relaxation of the standards for recognition, that many unqualified and undeserving petitioning groups would be likely to achieve recognition, resulting in adverse effects on our communities.

Response to Arguments in Favor of H.R. 361

Before addressing our specific concerns with this bill, we wish to address some of the arguments that have been advanced by supporters of H.R. 361. In general, we consider the arguments advanced in favor of the bill to be incorrect and insufficient grounds for such a radical departure from existing recognition procedures.

It is argued that BIA's budget limitations have created bias against recognizing new tribes. While this may be an attractive statement to make, we have seen no evidence that it is in fact the case. We are aware of no negative recognition decisions in recent years that were not justified by the merits. In fact, we believe that there have been questionable decisions that have gone in favor of petitioners. Obviously, the solution to this problem – even if it is legitimate – is not to change the standards so as to open the floodgates to recognition, but to address instead whatever budget shortfalls BIA might have so that it can do an adequate job processing the requests.

Concern has also been raised over the expense of the recognition process for its participants. Certainly, we agree with this criticism. Those among us who have participated in the recognition process have had to bear these expenses. Although these costs have seriously strained our resources, the critical importance of recognition decisions makes it inevitable that a high level of scrutiny must be placed upon the evidence submitted. This requires the use of experts, consultants, and attorneys, and this costs money. Unfortunately, this is an inevitable consequence of a system that bestows a tribal status on previously unrecognized group of individuals. In any event, we see nothing in H.R. 361 that would significantly reduce costs of the process. Although this bill would relax some of the standards for recognition and create a procedural forum for review that is generally more favorable to petitioners, the costs will still be substantial. In particular, by creating a trial-type setting including live witnesses and cross-examination, H.R. 361 would establish a new, lucrative cottage industry for expert witnesses, consultants, and attorneys. This will not be a cost effective process.

It is important to recognize that federal funding is already available under present law to finance research by petitioners. It also appears that financial and legal

backing has been provided, directly or indirectly, by gambling interests which would benefit from casino operations that would be available for a federally recognized tribe.

It is argued that the BIA recognition process takes too long. This is true. Once again, however, H.R. 361 would not significantly reduce the time involved. To the extent time constraints are set, they are unrealistic and will be regularly avoided. Merely getting the new process up and running will be very time-consuming. The real solution to this problem is to provide sufficient resources and staff to conduct more thorough and expeditious reviews of pending petitions. We are concerned that in recent years there has been somewhat of an effort to put the Branch of Acknowledgement and Research in the position of having a "no-win" task. It has a small staff which must handle extremely complex issues. Neither BIA nor Congress has been forthcoming in providing additional resources to this office. A self-fulfilling prophecy has thus been established in which the review of pending petitions necessarily goes slowly and painfully forward. The way to correct this problem is to provide sufficient staff and resources and build in safeguards to ensure objectivity.

Proponents of H.R. 361 argue that the current tribal recognition process does not accord "due process" to petitioners. However, the present acknowledgment procedures provide petitioners with every right which can be reasonably be expected under the circumstances and a full and fair opportunity to make their case. We note that, under this system, adequate reciprocal opportunities for other interested parties are not provided. The opportunities extended to petitioners include:

1. The right to submit arguments and evidence in the form of a documented petition. See 25 C.F.R. § 83.10(a); see also id. § 83.6(a) and (c).

2. The right to a technical assistance review by the agency to provide the petitioner with an opportunity to supplement or revise the documented petition prior to active consideration and to submit additional information and/or clarification. Id. § 83.10(b)(1) and (2).

3. The right to submit arguments and evidence to rebut or support the Proposed Finding. Id. § 83.10(i).

4. The right to technical advice by the agency concerning the factual basis for the proposed finding, the reasoning used in preparing it, and suggestions regarding the preparation of materials in response to the proposed finding. The petitioner also has a right to the records used for the proposed finding not already held by it, to the extent allowed by Federal law. Id. § 83.10(i).

5. The right to a formal meeting with the agency, if requested by the petitioner, to inquire into the reasoning, analyses, and factual bases for the proposed finding. The proceedings of the meeting shall be on the record. Id. § 83.10(j)(2).

6. The right to respond to comments by any interested or informed parties during the response period after the proposed finding. Id. § 83.10(k).

7. The right to seek reconsideration of the final determination before the Interior Board of Indian Appeals based on the grounds provided for in the regulations through a process of independent review. Id. § 83.11.

While a number of these rights also apply to interested parties in addition to petitioners, we have found that in actual practice petitioners have more advantages under the present process than do state and local governments. Needless to say, this lack of balance calls into question the legitimacy of the recognition process itself.

Furthermore, state and local governments would be even more disadvantaged by H.R. 361, which gives them virtually no guaranteed rights of participation. The existing recognition process has multiple layers of procedural review built into it. We disagree with the proposition that, when this process has been fully exhausted, petitioners are not given a fair opportunity to make their case and refute arguments presented against them. Due process does not in all cases require the opportunity for cross-examination of witnesses or adjudicatory proceedings. This is an added procedural opportunity that may, at the margins, provide some value. We question, however, whether it is needed to any significant degree. Acknowledgment determination under present law depends largely on primary, documentary evidence based to a considerable extent on original records that can be verified by the agency and which should be available to all parties, without the need for formal hearings.

It should also be noted that the U.S. Court of Appeals for the Ninth Circuit has recognized the "[t]he new [1994] regulations grant the Interior Board of Indian Appeals the authority to order hearings in the event it finds genuine issues of material fact." Greene v. Babbitt, 64 F.3d 1266, 1275 (9th Cir. 1995). The Court cited 25 C.F.R. § 83.11(e)(4) of the 1994 regulations which are presently in effect. Overall we believe that the benefits of the formal hearing procedure provided for by the bill would be greatly outweighed by the cost, delay, and added complexity such a procedure would add. If it is determined that there is a role for cross-examination in acknowledgment review, then it is necessary to make it available to all affected parties.

Proponents of H.R. 361 frequently cite to the case of Greene v. Babbitt, 943 F.Supp. 1278 (W.D. Wash.) as evidence of a deficient recognition process that

harms petitioners. We do not believe that this single case serves as evidence of such a problem. Furthermore, some of the key problems found by the District Court in that case arose out of a process involving special formal hearings which had been ordered by the Court. See, e.g., Greene, 943 F.Supp. 1282-83 n.5 1285-86.

Supporters of H.R. 361 argue that petitioners who have had their claims of recognition rejected should have an opportunity to try again. Once again, the Greene case is cited as an example of the reason why it should be possible for all petitioners to have a second chance. We disagree. Clearly, the unique circumstances of this one case do not justify opening up the entire process for previously denied petitions. Would the Committee also support re-opening the process for tribes that were granted recognition? Would the Committee also be willing to open up the process for tribes that avoided the recognition process and achieved such a status through legislation to be reconsidered through reformed standards? And would the Committee be willing to require any petitioners provided with such an opportunity for reconsideration to reimburse the United States and other interested parties for their costs if they are forced to go through such a process again, especially if recognition is denied? We are aware of no evidence that suggests widespread abuse of the recognition process to deny petitioners valid claims to recognition, such that failed petitioners should be given a second shot at recognition.

H.R. 361 purports to fix these problems by creating a trial-type procedure before what allegedly would be an independent commission. We seriously question how adding the additional legal complexity attendant to this procedure will result in a more cost-effective, streamlined, and equitable decision making process. It has been our experience that when an expanded role is created for attorneys, jurists, and expert witnesses, the costs and time involved of achieving an end result – no matter what that result may be – only will increase. And, as noted above, we are deeply concerned that the rights accorded to petitioners in such a process would not be extended to those other parties who are affected by recognition review.

Finally, although the concept of this bill has apparently been around for many years, we must emphasize one obvious point. Throughout the prior consideration of this issue before Congress, we are aware of virtually no effort to reach out to affected parties other than petitioning groups and BIA to solicit views and input. This is a serious flaw in the legislative process that has been used to construct this bill to date. As a result, Congress should direct its effort at providing guidance to BIA on how to improve the existing process. To the extent this Committee desires to develop the content of such guidance, it needs to reach out to other affected parties to solicit their input and incorporate it into the message to be delivered. Many of us have participated in a constructive manner in tribal recognition petitions and have

experience that can be brought to bear. Our views and opinions should not be overlooked.

COMMENTS ON H.R. 361 PROVISIONS

Rather than respond on a section-by-section basis, our coalition will comment on the general themes presented by H.R. 361.

Weakening of Criteria

H.R. 361 would, without question, greatly "lower the bar" for tribal recognition. The standards currently administered by BIA, although clearly not without their problems, do require a more rigorous test for recognition. As we have explained, a careful and stringent test for recognition is absolutely necessary given the significant consequences of recognition for the federal government, state and local governments, non-Indian residents of affected communities, currently recognized tribes, and petitioners. H.R. 361 would so significantly diminish the threshold for recognition that it is difficult to conceive of any groups that would not qualify.

Absence of Valid Test of Historical Continuity. One of our major objections to the criteria in H.R. 361 is that they would eliminate most of the key elements of historical proof of tribal continuity. The fundamental premise of federal acknowledgement is that the purported tribe has maintained its existence over time – genealogically, culturally, socially, and politically. This principle cannot be questioned. If the tribe cannot trace its roots to the early years of the settlement of what is now the United States, then no true "tribe" exists. To depart from this principle is to allow the significant rights and benefits of tribal status to be conferred on groups that lack the requisite characteristics of historical Indian tribes.

The requirement of tribal continuity follows from key court decisions. The key elements of tribes are based on the premise that "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities." United States v. Wheeler, 435 U.S. 313, 322-23 (1978); Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408, 425 (1980). Because tribal leadership must be rooted in a "once sovereign Indian community," continuity of that leadership must be shown. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 583 (1st Cir. 1979). Tribal continuity is also required to ensure that the membership has not abandoned the tribe and that the tribe has not disappeared. Id. at 587. See also United States v. State of Washington, 641 F.2d 1368, 1373 (1st Cir. 1981) ("To warrant special treatment, tribes must survive as distinct communities."). The Supreme Court has emphasized that, among other things, "the tribal organization [must be] preserved intact." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985). The bill, by

completely eliminating the standard of historical tribal continuity (at least prior to 1934), disregards the lawful basis of tribal sovereignty as qualified and recognized in modern times. Nor are the prerequisites of tribal continuity, together with the other criteria for tribal recognition, too difficult to meet in deserving cases. Of those petitions which have been decided by the Department, twelve (12) have been granted acknowledgment, while thirteen (13) have been declined acknowledgment, according to the BIA's March 2, 1999 status report. Thus almost 50% of acknowledgment petitions have succeeded before the BIA, which indicates that the agency has no predisposition to decline such requests. Indeed, we are concerned that such treatment often is too favorable to petitioners.

This problem is readily apparent in the use of 1934 as the baseline for proof of a distinct community, political authority, and descent from an historical tribe. The current BIA criteria require proof of community and political community from historical times, and mandate proof of descent from an historical tribe, not simply some group that existed in 1934. See 25 C.F.R. § 83.7(b), (c) and (e). However, under 25 C.F.R. § 83.7(a), the petitioner must show identification as an Indian entity since 1900. In the past, tribes worthy of recognition have been able to meet the existing standards. Historical continuity over time makes great sense, as it shows that an original tribe did in fact exist. The arbitrary date of 1934 does nothing to prove this point. Indeed, the 1900 cut-off presents a similar problem.

As BIA properly recognized in its 1994 review to the recognition regulations, "[a] demonstration of tribal existence only since 1934 would provide no basis to assess continuous existence before that time. Further, the studies of unrecognized groups made by the government in the 1930's were often quite limited and inaccurate." 59 Fed. Reg. 9281 (1994). This concern remains valid today, and Congress should reject this extremely lenient standard of proof.

Virtual Elimination of Test for Distinct Community and Political Authority. H.R. 361 would make it extraordinarily easy for these essential criteria to be satisfied. It would require that only one of numerous tests be met. Some of these tests are so easy to satisfy that this criteria might as well be deemed irrelevant to the process. The weakest form of evidence cited in the bill, for example, "persistence of a named, collective Indian identity continuously over a period of 50 years, notwithstanding changes in name," (bill, § 5(b)(2)(A)(viii)), could very well suffice as proof of a distinct community, without the need to show additional evidence. Although a similar provision is contained in the present regulations, these regulations require that "some combination" of designated evidence, not simply just one factor, be demonstrated. See 25 C.F.R. § 83.7(b)(1).

H.R. 361 further weakens one of the tests for distinct community by requiring, in section 5(b)(2)(B)(i), that more than 50% of the petitioning group's members simply reside in a geographical area or areas within 50 miles of the petitioner's "historic land base(s) or sites." Again, this not only is an easy test to meet, but also offers little proof of tribal community. The bill does not require, as is the case under the current standards, that the geographical area in which more than 50% of the members reside be "exclusively or almost exclusively composed of members of the group." 25 C.F.R. § 83.7(b)(2)(i). Nor does the bill require that the balance of the group "maintains consistent interaction with some members of the community," as do the present regulations. That interaction, after all, is the essence of community, which is essential to the very concept of a group of individuals interacting as a tribe. No reason is apparent why a petitioner should not be able to meet this test if it is indeed a "tribe."

As to the political authority requirement, the bill again seriously dilutes the standards by requiring, in section 5(b)(3)(A), that proof need only be shown since 1934, and then allowing this criterion to be satisfied by only one factor, as is the case with the distinct community section. See 25 C.F.R. § 83.7(c)(1).

The bill also significantly undercuts the political authority requirement by stating in section 5(b)(3)(B)(i) that acknowledgment and acceptance of group leaders by state or local governments, etc. shall be considered sufficient evidence. Much of such "acknowledgement and acceptance" evolved on the basis of considerations such as sympathetic or symbolic gestures, which had nothing to do with the determination of actual political influence or authority. In many of these situations, to our knowledge, the state and local governments did not ascertain whether the purported leaders actually represented the group or were authorized to do so.

Lack of Burden of Proof on Descent from Historical Tribe. The bill dramatically departs from the accepted principle that the petitioner has the burden of proof. For example, under existing criteria the petitioner must prove descent from an historic tribe. H.R. 361, in section 5(b)(5)(A), would establish a presumption that this test is met upon proof that its members[2] descend from an Indian "entity" in 1934. Once again, this test would improperly ease the standards for acknowledgment and shift the burden to other parties to "disprove" the existence of a tribe. Such an approach turns the tribal recognition process on its head.

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[2] The bill uses the term "member" not members. We assume this is a typographical error. If not, the petitioner could satisfy the test merely based in the heritage of one of its members, a concept strongly rejected by BIA.

Allowance of Unreliable Evidence

Accepted methodology under existing standards requires the reliability of the evidence to be taken into account. Primary sources are entitled to the greatest weight. Secondary sources and mere opinion or conjecture by historians and the like are given less credence. This is, in fact, a fundamental principle of fact-finding in any kind of a proceeding.

H.R. 361 appears to eliminate this principle, at least for the purpose of descent from an historic Indian tribe. For example, in section 5(b)(5)(B)(v) it allows as a permissible category of proof, reports and research "based upon first hand experience of historians, anthropologists, and genealogists with established expertise on the petitioner on Indian entities in general." In addition to the fact that such analyses do not serve as primary evidence, an added problem is presented by the fact that such experts are very often hired by the petitioning group themselves or generally have a bias in favor of recognition.

Lack of Clarity on Key Points

Certain essential aspects of current recognition standards and procedures are not readily apparent in H.R. 361. Thus, it could be argued by petitioning groups that these concepts do not exist. These include:

1. The need to satisfy all of the criteria. This may be the intent of H.R. 361, but it is not clearly stated.

2. The reading of the "preponderence of the evidence" test is not defined. This test would be problematic if it merely refers to the quantity of evidence, without regard to its reliability. Petitioners often submit tens of thousand of pages of documentation, much of which is of marginal probative value. Clearly, the test must emphasize quality and reliability.

3. It is unclear how the maintenance of "tribal relations" by the petitioner group fits into the H.R. 361 test. This is a key aspect of the current standards and a fundamental characteristic of a functioning, continuing tribe. It must be spelled out as a key criterion.

The Commission on Indian Recognition

The proposal to establish a "Commission on Indian Recognition" ("CIR") has serious flaws. As a general rule, we favor insulating the review of recognition claims from the biases inherent in BIA. While petitioners claim these biases act against them, we believe that, to the extent they exist, the weigh in favor of petitioners. After

all, BIA serves in a trust relationship to Indians and often plays an advocacy role on their behalf. We are especially concerned that, at the policy level, there may be an indication and desire to achieve the recognition of more tribes. Thus, if it were possible to truly establish an independent, objective review body that would analyze evidence from all parties fairly and equitably, we could support such a concept. But we do not believe such a body should take the form of an adjudicatory panel.

The CIR described in H.R. 361 would not fit this description:

1. It is to report directly to the Assistant Secretary for Indian Affairs.

2 Its members are to be appointed by the Secretary, after considering recommendations from tribes, Indian groups, and persons with a background in Indian law, policy, anthropology, or history. Thus, the petitioning groups themselves, and their retained experts and counsel, would be given a strong say in who sits on the CIR.

3. Business can be conducted by only two members, eliminating any benefit from the requirement to have at least one member from another political party.

4. A Department of the Interior employee can serve, thereby weakening the independence of the Commission.

In addition to these problems, we believe the CIR would become hopelessly bogged down in its task. There is simply no way a three-member commission can fulfill the extensive evidentiary and decision-making burdens the bill would create, especially in the time frames allowed. Simply put, the bill is highly unrealistic in expecting the CIR to carry out these duties. In our opinion, creation of the CIR and transfer of the recognition process for all pending petitions, as well as those that might be reopened, will result in even bigger problems in efficiency, expense, and equity than exist under the current system.

Unfairness to Nonpetitioning Parties

H.R. 361 creates significant advantages for petitioners and does not give other interested parties, such as local governments, a fair opportunity to participate. These problems include the following:

1. Local governments do not receive notice of petitions.

2. Local governments are not specified as interested parties entitled to participate in the proceedings.

3. It is not provided that interested parties have a right to participate. (A "concerned party" may also provide evidence at the preliminary hearing, but the term "concerned party" is not defined. Moreover, even a "concerned Party" has no other rights under the bill.)

4. The preliminary hearing occurs 60 days after its submission. A petitioner can take years to prepare this case, but allowing only 60 days for other parties to review the evidence (if it even could be obtained) and prepare a response is wholly inadequate.

5. Records relied upon by the CIR must be provided to the petitioner, but not to other parties.

6. Other parties have no right to cross-examine witnesses, submit evidence, appeal a decision, obtain attorneys' fees, obtain advice from the CIR, or secure research grants from HHS. All of these rights are extended only to petitioners.

These are serious deficiencies that highlight the flaws in H.R. 361. Because H.R. 361 would provide such a serious imbalance in favor of petitioners, the procedure it envisions cannot serve as a reasonable approach to determining the validity of recognition claims.

CONCLUSION

For the reasons discussed in this testimony, our local governments oppose H.R. 361. This bill would significantly undermine the rights of non-Indian affected parties, resulting in an extremely complicated and costly recognition process, and make it far too easy for petitioners to achieve federal acknowledgement. While we do not endorse the existing recognition procedures, we see no basis for exacerbating the problems that currently exist. H.R. 361 would have that result, and we urge the Committee to decline further consideration of this bill.

5-14-2002

BIA chief: Tribes must end dispute

Easterns, Paucatucks hurt recognition by fighting, Gover says

By EILEEN McNAMARA
Day Staff Writer

Kevin Gover, U.S. director of Indian Affairs, says he has grown tired of the decades-old dispute between the Paucatuck Eastern Pequots and Eastern Pequots and questioned whether the Bureau of Indian Affairs can recognize them both.

"I've tried to make it clear to both sides that that sort of rhetoric really diminishes their credibility with me," Gover said Friday. "I think it's unfortunate. We don't see much to be gained from pointing fingers at each other and claiming they're not Indians."

Since the 1980s one group within the Eastern Pequot tribe has sought to oust another faction, claiming the other group has no Pequot heritage.

In the 1970s the schism erupted into a full-fledged political row before the Connecticut Indian Affairs Council. The rift created the faction known as the Paucatuck Easterns. The tribes share a Lantern Hill reservation.

The Paucatucks contend that the Eastern Pequots do not descend from the historic Eastern Pequots, and that the group's members have "stolen" parts of the Pequot and Paucatuck histories to bulwark their tribal claims. The Paucatucks have continued to press those allegations with the BIA while seeking recognition. The Easterns have steadfastly maintained that they and the Paucatucks are really one tribe and have tried several times to reconcile with the Paucatucks.

Gover, assistant secretary of the Department of the Interior, said the BIA determined that the members of both tribes descend from the historic Eastern Pequots.

The BIA in March issued preliminary recognition to both groups. Gover on Friday said the tribes' pe-

See BIA on A8

■ A 1998 letter suggests a business deal between the Eastern Pequots and the Mashantuckets. B2

From A1

titions were among the strongest he's ever seen during his tenure.

"These petitions did a real good job of presenting evidence as to each of the (BIA's) seven criteria," Gover said.

The BIA now must determine whether there are two tribes or just one, he said. The agency has indicated that the tribes' best chance of achieving recognition might be to merge. Gover said he's not sure if the BIA can recognize a tribe that may have just come into existence in recent history.

He said that although splinter groups of a tribe can and have been recognized by the BIA, most of those cases, such as the split in the Sioux Nation in the 1800s that created several Sioux tribes, happened long enough ago for the groups to establish themselves as separate and distinct political entities.

"Basically, we're confident that there is a tribal institution that exists here," Gover said of the Eastern Pequots and Paucatuck Easterns. "What we want to understand more clearly is at what point, if any, did the separation occur between the two groups and do we have the authority to recognize an Indian tribe that came into existence" in the 1970s?

Gover said the Paucatuck Easterns and Eastern Pequots have much to gain by ending their dispute and he said it is perplexing that they, like other Indian groups that have engaged in similar debates, would jeopardize their future over such an argument.

"They're right on the verge of all this federal assistance," and they continue to fight, he said. The situation is not unusual, though he finds it difficult to understand why "people who have been historically oppressed, that just at the moment their liberation is at hand, they turn and fight with each other."

He said he also finds it distasteful that the rift is along racial lines. The Paucatuck Easterns are the perceived "white" tribe and the Eastern Pequot tribe is made up largely of the extended Sebastian family, which is black and Portuguese.

"That part of the debate is unfortunate and unattractive to me," Gover said. "There obviously are no full-blooded Pequots anymore, but we don't care if they intermarried with whites, blacks, yellows or greens. From our perspective there was enough evidence in the record to satisfy us" that both groups were legitimate.

James A. Cunha Jr., tribal chief of the Paucatucks, declined to comment Friday on Gover's statements.

Richard Shenkman, spokesman for the Eastern Pequots, said tribal leaders continue to assert what they have believed all along.

"The Eastern Pequots have always said there is only one tribe," Shenkman said.

Even more Pequot tribes?

The three local towns challenging the tribes' efforts have questioned the BIA's right to recognize anymore Pequot tribes at all. Preston, Ledyard and North Stonington, through their attorneys, argue that the BIA's recognition rules state that tribes must show descent from the "historic" tribe. They claim the Easterns and Paucatucks descend from the original Pequot tribe, along with the Mashantucket Pequot tribe, which was recognized by an act of Congress in 1983.

Gover dismissed that argument, saying the colonial government itself established an Eastern Pequot and Western (Mashantucket) Pequot tribe after the Pequot War of 1637.

The colonial government in the late 1600s gave each tribe a reservation in what would later become Ledyard and North Stonington.

In fact, Gover said it is possible for several more Pequot groups in the region to become recognized, groups that claim descent from the historic Pequot tribe, if they meet the six other federal criteria. Besides the Mashantuckets, Eastern Pequots and Paucatuck Easterns, there are four other groups seeking federal recognition: the Southern Pequot Tribe of Waterford, the Mohegan Tribe and Nation of Norwich, the Pequot-Mohegan Tribe, Inc., of Middletown and the Poquonnock Pequot Tribe of Ledyard.

In addition, there is a Wisconsin group, called the Brothertown Indians, which is on the BIA's "ready" list. The Brothertown group is an amalgamated tribe comprised, in part, of Pequot descendants.

Gover refuted the towns' arguments that the current Eastern Pequot and Paucatuck Eastern Pequots do not descend from the historic tribe because they have no genealogical link to the original tribe. The towns have argued that the main descendants for both groups were likely Narragansett or possibly not Indian at all.

"It is dehumanizing to suggest that there is some magic amount of Indian blood that is sufficient or insufficient to make one an Indian," Gover said. He added that like many tribes whose numbers were decimated by European colonization, the Eastern Pequots intermarried with non-Pequots at some point.

North Stonington First Selectman Nicholas H. Mullane II disagreed. He said it makes no sense to recognize either tribe if it can't show that its members have genealogical ties to the original Pequots.

"If there is no genealogy that stems from the original group how can they meet the criteria?" Mullane said. "There wasn't a continuous continuity of the tribe."

Although town officials and some tribal leaders have said the BIA's proposed Pequot findings represent a change of philosophy at the BIA by giving more weigh to the concept of tribal community, Gover said the agency has never relied on strict genealogical data to determine tribal descent.

"Tribes were and always have been...dynamic organisms. They took in people from outside the tribe and by the time the government undertook its consideration of who this tribe was (those ancestors) were considered members of the tribe.

"We have determined at this point that these folks are descendants of Lantern Hill Pequot Indians," he added. "It does not necessarily disqualify them if the Pequots in the 1800s took in another family from another tribe."

For the next several months the BIA will focus on the Paucatucks' and Easterns' history from 1973 on to determine whether there is one tribe or two. During that time the towns and other "interested third parties" can submit evidence. Under the BIA rules the third parties have six months from when the two groups received their preliminary recognition to submit the material.

Gover, however, said he may extend that deadline if the towns or others raise convincing arguments that he should. He added that the BIA's failure to submit all of the documents the towns requested under a Freedom of Information request might be significant enough to delay the recognition process for the two tribes.

"If they raise that as an issue I will have to carefully consider that," he said.

He stressed, however, that th recognition process for the tw tribes is still ongoing. Though th BIA has determined that the grou meet all seven of the federal criteri the agency now has to review ev dence submitted by others whic could dispute the tribes' evidenc

"It's like the score at halftime," h said. "There's a whole second half c the process."

The BIA also is trying to respon to the towns' Freedom of Informa tion requests for both tribes' peti tions. The BIA last week sent the towns' lawyers 7,000 pages of materi al and Gover said the agency is preparing to make 4,000 more avail able next week.

He said he also would review, with the BIA's Bureau of Acknowledgment and Research and the agency's ethics office, whether his role in the two Pequot petitions represents a conflict of interest or a potential conflict. The towns last week sent letters to Gover and his boss, Bruce Babbitt, secretary of the Department of the Interior, raising that complaint.

The towns and their lawyers said in the letters that Gover should not take part in the Eastern Pequot and Paucatuck Eastern Pequot petitions because they are similar to the Golden Hill Paugussett petition for federal recognition.

Gover, an attorney, worked for the Golden Hills before he was appointed to the Interior Department by Clinton.

The Golden Hills three times have been denied federal recognition, but in 1996 the BIA granted its request for reconsideration. Gover has recused himself from participating in the Golden Hill petition. The towns say that is not enough. They say decisions Gover makes on the Pequot petitions could pave the way for the Golden Hills to win recognition.

"Obviously when an issue like this is raised about any decision we make we consider the matter and we have to respond," Gover said.

Whatever the BIA eventually determines on the Eastern Pequots and the Paucatucks, Gover will not likely be part of the decision. When a new president is elected in November he anticipates being out of a job.

"I expect the new president will want to appoint a new assistant secretary," he said.

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Office of The Attorney General
State of Connecticut

TESTIMONY OF
ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE THE ENERGY POLICY, NATURAL RESOURCES AND
REGULATORY AFFAIRS SUBCOMMITTEE
HOUSE COMMITTEE ON GOVERNMENT REFORM
FEBRUARY 7, 2002

Although regrettably I have not been invited to participate in your hearing today, I appreciate the opportunity to comment on an issue of critical importance to Indian tribes, States and local communities across the country: reforming the tribal recognition process. I commend the committee for its leadership and for providing this important public forum to address this issue of national importance and hope that additional hearings may be scheduled.

The present system for recognizing Indian tribes is fatally and fundamentally flawed and 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.

The central principle should be: Tribes that deserve recognition on the merits should receive it. Those that do not meet the seven criteria should be denied.

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 is too susceptible to improper influences of power, money and politics.

In theory, any tribal group seeking federal recognition must meet seven distinct statutorily based criteria -- continuous existence as a distinct community, rule by a formal government, and descendence from a historical tribe, among others.

In practice, the BIA's past 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 slots is not a lasting solution.

The impacts of recognizing an Indian tribe cannot be understated and underscores the need for reform. A decision to acknowledge an Indian tribe has profound and irreversible effects on tribes, states, local communities and the public. 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, 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 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 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. Two other Connecticut groups that have recently received proposed favorable findings, the Eastern Pequots and the Paucatuck Eastern Pequots, are contesting 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. Recently, 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 has completely evaporated.

The deficiencies in the recognition process are well-established. The Government Accounting Office (GAO) issued a report documenting significant flaws -- 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.

Connecticut's experience mirrors and confirms the GAO conclusions. 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 a directive 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. The experience and its effects are not unique to Connecticut.

Connecticut has also experienced intolerable delays obtaining critical information from the BIA necessary to respond to petitions. Connecticut has sued the BIA to obtain basic documents -- including petition documents -- that must be disclosed under FOIA.

The federal courts have intervened to compel 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. Imposing arbitrary court deadlines on an agency lacking adequate staff and resources makes mistakes and missteps more likely by elevating speed over substance.

Congress needs to 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 protecting Native American interests as trustee, and at the same time deciding among different tribes which ones merit recognition.

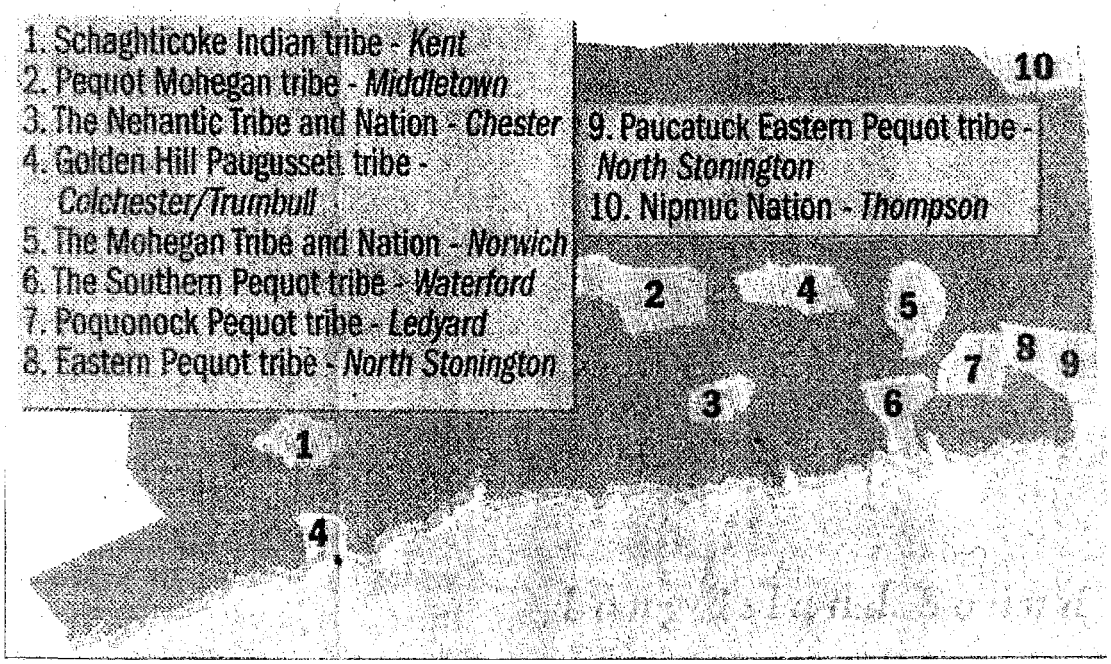
I wish to express my gratitude and strong support for the measures proposed by Representative Simmons and others that would provide additional resources and authority for towns and cities in their efforts to protect the public interest. Federal assistance is necessary and appropriate, in light of the burdens that towns and cities, as well as the state, must bear involving the expertise of archeologists, genealogists, historians and other scholars and experts -- all necessary to participate meaningfully in the recognition process.

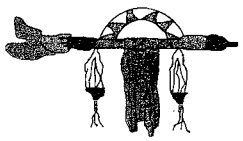
I also urge the committee's support for legislation that would require consistent application of the present seven mandatory criteria, provide adequate notice to states and local communities of pending petitions, provide states, towns and other interested parties full and timely access to petition documents, and provide adequate opportunities for states and interested parties to submit comments at a meaningful time and in a meaningful way.

Again, 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.

Tribes apply for recognition

These 10 American Indian tribes have applied to the U.S. government for federal acknowledgr





Paucatuck Eastern Pequot
Indian Tribal Nation

STATEMENT OF

CHIEF JAMES A. CUNHA, JR.

ON BEHALF OF

THE PAUCATUCK EASTERN PEQUOT TRIBAL NATION

ON THE GAO REPORT ON IMPROVEMENTS NEEDED

IN THE

TRIBAL ACKNOWLEDGMENT PROCESS

Submitted to the House Government Reform Committee,

Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

February 7, 2002

Introduction

Mr. Chairman and Members of the Subcommittee:

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 Subcommittee for holding this hearing to consider improvements that are needed in the federal acknowledgment process, including the recommendations made in the General Accounting Office's November, 2001, report. We also wish to express our appreciation to the members of the Connecticut congressional delegation who have offered their suggestions for ways to improve the recognition process, including Congressman Shays and Congressman Simmons, who is a witness before the Subcommittee today.

P.O. Box 370 • North Stonington, Connecticut 06359

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 Subcommittee 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.

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 are seeking 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 and he has retained jurisdiction over the processing of the Paucatuck petition and will do so until the process has been completed.

In addition to Judge Covello's order, the federal courts have directed that BAR and BIA comply with schedules for the processing of four other petitions (Muwekma, Schaghticoke, Mashpee and Golden Hill Paugussett). If these orders remain in place, the BIA will be required to issue four Proposed Findings and four Final Determinations in the period between July, 2002 and October, 2003. Since its inception in 1978, the BAR has issued about one Proposed Finding or Final Determination per year. We do not see how BAR will be able to issue the court ordered Proposed Findings and Final Determinations during that time period without a significant increase in staff and resources.

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."

-- Increased Funding: We strongly concur with the GAO report in its acknowledgment that the recognition process is hindered by limited resources. The 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. Specifically, 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).

The Tribe appreciates the efforts of members of Congress like Congressmen Simmons and Shays, and Senators Dodd and Lieberman, who have worked to provide increased funding for the BAR. We support the provision in Congressman Simmons' bill, H.R. 3548, that would double the funding for BAR by authorizing $1.8 million per year.

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 have raised this concern with the BAR, staff have 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 they are conducting in order to stand at the Xerox machine or 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 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 a 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.

-- 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 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.

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. I am including a copy of the Inspector General's letter with this statement.

-- 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.

Over the past several years, there has been considerable support for reform of the acknowledgment process. The Paucatuck Eastern Pequot Tribe supports legislation -- such as the Indian Federal Recognition Administrative Procedures Act, H.R. 1195, pending in the House of Representatives -- which would improve a process infamous for being long and slow and costly. We appreciate the intent of sponsors of that bill and other legislation, such as H.R. 3548, to establish a statutory, versus regulatory, basis by which the government-to-government relationship between a tribe and the federal government is recognized.

A number of proposals related to recognition reform would require that a petitioner must meet the seven mandatory criteria currently contained in the recognition regulations. We support the continued application of all of these criteria to all petitioners. The Paucatuck Eastern Pequot Tribe recognizes the seriousness of the government-to-government relationship and its accompanying rights, benefits and responsibilities.

Some public officials 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 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 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 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.

-- 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 the current regulations afford state and local governments and other third parties many opportunities for notice and comment on a petition. The current acknowledgment regulations provide significant opportunities for state 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 formal technical assistance in August, 2000, and again in July, 2001 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 we found 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 14 tribes and denied acknowledgment to 16 groups 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 Subcommittee 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. We don't know how much they have spent, but we do know that they have employed one of the largest law firms in the nation and have hired some of the most well known experts. It is fair to say that at least several hundred thousand dollars have been spent in opposition to our petition. The sources of funds to assist us 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.

Congressman Simmons' Legislation

On December 19, Representatives Simmons, Johnson, Green, Maloney and Shays introduced H.R. 3548, legislation to make changes to the process of federal recognition as an Indian tribe under federal law. We support any effort to improve the process and have previously testified in favor of bills in the House and Senate that call for the establishment of an independent commission to review petitions. We have the following comments on the provisions of H.R. 3548:

- Require the BIA to notify a state when a petitioner within that state submits a letter of intent to petition for acknowledgment. The affected state would notify adjacent municipalities.

  This provision is already included in the current regulations.

- Automatically designate that state and each municipality as an interested party.

  Under the current regulations, a state or local government may request to become an interested party.

- Require that a petitioner provide each interested party with all the documents in their petition.

  The current regulations make a petition available to the public. Preparation of a documented petition for distribution to interested parties would require the petitioner to redact material covered under the Privacy Act in order to protect the rights of its individual members. This essentially requires the petitioner to perform the duties of federal officials and will inevitably lead to confusion and litigation.

- Provide for public comment on a petition prior to issuance of a Proposed Finding.

  This provision is already included in the current regulations.

- Require the BIA to accept and consider any testimony, including from surrounding towns, that bears on whether the petitioner is recognized.

The current regulations already provide this, with the proviso that the Assistant Secretary may consider evidence submitted by interested or informed parties. This discretion is appropriate because it allows the Assistant Secretary to weigh the evidence.

• Require the BIA to find affirmatively that all recognition criteria are met in order to confer recognition, and require that any decision conferring recognition must be accompanied by a written set of findings as to how all the criteria have been satisfied.

This provision is already included in the current regulations. A petitioner must meet all seven criteria in order to be recognized. A lengthy "Summary Under the Criteria" is issued for each Proposed Finding, analyzing the evidence for each criteria. Similar detailed reports accompany Final Determinations.

• Doubles, from $900,000 to $1.8 million, funds for the BIA to upgrade the process.

We strongly support providing additional resources for the processing of petitions.

• Authorizes $8 million each year for grants to local governments to reimburse them for their participation in certain decisions related to Indian groups and federally-recognized tribes, including acknowledgment, the taking of lands into trust, and land claims. The grants could be applied retroactively to any local government that has spent money on decisions related to Indian groups or tribes. Also authorizes $10 million each year for grants to local governments for infrastructure, public safety and social service needs directly related to tribal activities.

We note that similar legislation introduced last August by Senators Dodd and Lieberman would also make tribal entities eligible for these grants. Needless to say, both unacknowledged and recognized tribes invest significant resources in the same decision making processes before the Department of the Interior that state and local governments participate in and they should be afforded access to these funds.

• Institute a cooling-off period of one year in which high-level BIA officials could not appear before their former agency.

It is our understanding that former political appointees of the Department are currently prohibited from appearing before the Department in the year following their employment if the appearance is related to a matter in which they exercised authority during their employment. In addition, we understand that former political appointees who are also attorneys are subject to a lifetime prohibition with regard to matters over which they exercised substantial authority.

If there are gaps in the laws in this area that need to be filled we support doing so. The acknowledgement process should be absolutely free from any impropriety or appearance of impropriety.

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 Subcommittee members as your consideration of this issue continues.

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, D.C. 20240

AUG 23 2000

Chief James Cunha
Paucatuck Eastern Pequot Indian Tribal Nation
P.O. Box 370
North Stonington, Connecticut 06359

Dear Chief Cunha:

This is in response to your letter of August 2, 2000 to Secretary Bruce Babbitt requesting the Office of Inspector General (OIG) to investigate allegations made by Perkins Coie, LLP. Specifically, you asked OIG to investigate allegations that: 1) the Petition for federal recognition submitted by the Paucatuck Eastern Pequot Indian Tribe (the Tribe) was subject to improper political influence by Kevin Gover, the Assistant Secretary – Indian Affairs; 2) the Bureau of Indian Affairs (BIA) has failed to release documents under the Freedom of Information Act (FOIA); and 3) the Assistant Secretary should recuse himself from the Tribe's recognition process.

The OIG reviewed Perkins Coie's allegations as set forth in its letter of July 27, 2000 to Secretary Babbitt. The first allegation concerning the Assistant Secretary's conduct does not amount to improper political influence. Under Departmental regulations, 25 C.F.R. Part 83, the Assistant Secretary is charged with making federal acknowledgment decisions. His involvement is inherent in the process. The Branch of Acknowledgment and Research in the BIA has delegated authority from the Assistant Secretary for certain functions, but the Assistant Secretary is the official charged with making the actual decisions. The Assistant Secretary's participation is, in fact mandated, under the regulations.

Moreover, it is premature to consider whether the Assistant Secretary acted improperly in making the federal acknowledgment determination for the Tribe because the Department has not issued a final decision. The Department has published proposed findings and is currently receiving comments from interested parties until September 27, 2000 unless an extension is granted. The administrative process is the appropriate forum to voice any opposition and to submit any evidence concerning the Petition. Additionally, interested parties can receive technical assistance from the BIA. Once a final determination on the Petition has been made, there are administrative avenues available for parties to challenge the decision.

Perkins Coie also alleges that the BIA has failed to release documents under FOIA. The letter alleges that the Tribe has failed to release documents, too. The Tribe is not subject to FOIA and the OIG has no jurisdiction to investigate this allegation as it relates to the Tribe. According to the Solicitor's Office, the BIA has released thousands of documents and is in the process of releasing more. There are administrative and judicial remedies available to parties who believe the BIA is not complying with FOIA. The OIG does not serve as an alternative to these established procedures.

Lastly, Perkins Coie states that the Assistant Secretary should recuse himself from the Tribe's federal recognition process because of a conflict of interest. However, the letter does not identify what the alleged conflict is. Without specific information, the OIG cannot make an assessment of this matter.

In conclusion, we have determined that an investigation into the allegations set forth by Perkins Coie, LLP, in its July 27, 2000, letter is not warranted at this time.

Sincerely,

Mary Kendall Adler
Deputy Inspector General

cc: Bruce Babbitt
Secretary, Department of the Interior

David Montoya
Assistant Inspector General for Investigations

Statement of the Honorable Nancy L. Johnson (R-CT)

Testimony before the Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

Hearing on Federal Tribal Recognition

February 7, 2002

Mr. Chairman, members of the Committee, thank you for holding this hearing today, and for your interest in this issue.

Last year I joined with my two of my colleagues from Connecticut, who are also here today, to request a Government Accounting Office (GAO) study of the tribal recognition process. The study confirmed that the process needs significant reforms and I applaud Mr. Shays and Mr. Simmons for their work on this issue.

Last spring I introduced legislation to ensure that America's small towns do not suffer undue financial strain as the result of Native American tribal acknowledgment and land claims cases. Mr. Simmons has incorporated my legislation into his bill, H.R. 3548.

The strain placed on small towns by tribal recognition and land claims issues was first brought to my attention by Dolores Schiesel, the First Selectman of the small town of Kent. In Kent, the Schaghticoke tribe, which currently has a 400-acre reservation, filed a lawsuit claiming nearly 2000 additional acres and seeking to bypass the tribal acknowledgment process by asking the judge to decide the recognition question.

In response to the legal claim, the town of 2880 residents voted last year to spend $200,000 to finance its legal defense. This figure represents an extreme financial hardship for such a small town. Kent should be able to use its hard-earned tax dollars on schools and roads, not on lawyers and genealogists.

In response to Ms. Schiesel's concerns, I introduced H.R. 992 to help offset the costs incurred by towns as part of tribal recognition and land claims cases. My bill allows the federal government to cover up to $500,000 in expenses incurred in land claims or tribal acknowledgment cases.

My legislation is not designed to stop tribes from receiving fair treatment under the tribal recognition process. Tribes with proper ancestry or legitimate land claims will not be affected, but towns will have the resources to fully participate in the process. I believe that towns and tribes need to be on equal footing, and I thank Mr. Simmons for incorporating my bill into his legislation.

Elias Child House
Bed & Breakfast
50 Perrin Road
Woodstock, CT 06281
860/974-9836
FAX 974-1541

February 6, 2002

To: **Todd Mitchell**

From: **MaryBeth Gorke-Felice**

Subject: **HR 3548**

Number of pages (including cover sheet) 1. If you do not receive the number of pages shown, please contact the sender at the number above.

Dear Mr. Mitchell:

I am writing to support Congressional Bill HR3548 concerning the Federal Indian Recognition Process.

As a resident of a small state with two of the largest casinos in the world, we find the negative impact on the infrastructure of the communities surrounding those casinos to be staggering.

I am not opposed to the recognition of Native American tribes as such. However, historically where there is recognition, next comes gaming, casinos and a downturn on the economies of the local areas. The severe impact felt by the residents of those communities is not offset by the alleged increase in local employment provided by gaming facilities. In addition the tax burden on the communities has been increased due to increased need for police, fire and emergency services.

Gaming interests which support "tribes" applying for federal recognition often execute piecemeal purchases of local properties without the true purpose of those purchases being revealed to local landowners. In most cases, the small communities affected do not have the resources to defend themselves against the "big money" interests supporting the "tribes."

HR3548 allows for town notification early in the process, plus the opportunity to testify with respect to the impact of tribal recognition and subsequent gaming on the local community. It also provides some financial assistance to local municipalities and the Bureau of Indian Affairs, which is critical, since the gaming supporters seem to have unlimited resources.

I urge Congress to give positive consideration to this bill concerning tribal recognition process.

Very truly yours,

MaryBeth Gorke-Felice
Woodstock, CT
Chair, NCVD Government Relations Committee
Chair, Northeast CT Quiet Corner B&B Group