TESTIMONY OF
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COMMITTEE ON INDIAN AFFAIRS

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**Introduction**

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

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

Reform of the federal acknowledgment process (See Attachment 2) must occur if valid decisions are to be made. Acknowledgment decisions that are not the result of an objective and respected process will not have the credibility required for tribal and community interests to interact without conflict. The legislation that is being reviewed today is a start, and I want to commend Senators Dodd and Lieberman for calling for these reforms. I also want to thank other elected officials in Connecticut who have fought for reforms to this process, including Congressman Simmons, Congressman Shays, Congresswoman Johnson, and our Attorney General, Richard Blumenthal. In particular, we want to commend Attorney General Blumenthal for his longstanding defense of the interests of the State in these matters. Recently, Governor Rowland has joined in

expressing strong concern over tribal acknowledgment and the spread of Indian gaming, and we commend him for this action. As the bipartisan nature of this political response demonstrates, the problems inherent in tribal acknowledgment and Indian gaming are serious and transcend political interests. Problems of this magnitude need to be addressed by Congress, and I ask for your Committee to support the efforts of our elected leaders to bring fairness, objectivity, and balance to the acknowledgment process.

**Acknowledgment and Indian Gaming**

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

The State of Connecticut has become fair game for Indian casinos, and the acknowledgment process has become the vehicle to advance this goal. For example, three other tribal groups (Golden Hill Paugussett, Nipmuc, Schaghticoke) with big financial backers have their eyes on Connecticut. Their petitions are under active acknowledgment review. As many as ten other groups are in line. While it is unfortunate that the acknowledgment process and the understandable desire of these groups to achieve acknowledgment for personal and cultural reasons has been distorted by the pursuit of gaming wealth by non-Indian financiers, the reality remains that tribal recognition now, in many cases, equates with casino development. This development, in turn, has devastating impacts on states and local communities. Thus, the stakes are raised for every one.

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

**The Eastern Pequot Acknowledgment Process**

The Towns of North Stonington, Ledyard, and Preston obtained interested party status in the BIA acknowledgment process. We participated in good faith to ensure that the Federal requirements are adhered to. Our involvement provides lessons that should inform federal reform initiatives.

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

disparity in resources between interested parties and petitioners with gaming backers skews the process and must be addressed.

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

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

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

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

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

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

With the recent actions of the BIA, it is questionable that this agency can be an advocate for Native Americans and also an impartial judge for recognition petitions. An example is the action by

Secretary McCaleb in his recent "private meeting" with representatives of the Eastern Pequot and Paucatuck Eastern Pequot petitioners to discuss the tribal merger BIA forced upon them. This *ex parte* meeting with the petitioners is highly inappropriate at a time when the 90-day regulatory period to file a request for reconsideration is still in effect. There is a substantial likelihood that such a request will be filed, and that Mr. McCaleb will rule on the appealed issues. Yet, he is actively meeting with the petitioners to assist them in smoothing over their differences and forming a unified government. How can BIA be expected to rule objectively on an appeal that contests the existence of a single tribe when the decisionmaker is actively promoting that very result?

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

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

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

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

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

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

## Principles for Reform

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

As an initial matter, it is clear that Congress needs to define BIA's role. Congress has plenary power over Indian affairs. Congress alone has the power to acknowledge tribes. That power has never been granted to BIA. The general authority BIA relies upon for this purpose is insufficient under our constitutional system. In addition, Congress has never articulated standards under which BIA can exercise acknowledgment power. Thus, BIA lacks the power to acknowledge tribes until Congress acts to delegate such authority properly and fully. Up until now,

no party has had the need to challenge the constitutional underpinnings of BIA's acknowledgment process, but we may be forced to do so because of the Eastern Pequot decisions.

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

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

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

Finally, because of all of these problems, it is clear that a moratorium on the review of acknowledgment petitions is needed. It makes no sense to allow such a defective procedure to continue to operate while major reform is underway. This is the principle underlying the amendment introduced on the floor of the Senate last week by Senators Dodd and Lieberman. This concept of that amendment is sound and needs to be enacted. No petitions should be processed during this moratorium. Although we approve of the moratorium concept while other problems of the acknowledgment process are being addressed, the Towns do not support this specific proposal

because it does not go far enough, and it ratifies elements of the system that need to be more carefully reviewed and substantially reformed.

If a process must exist whereby legitimate Indian tribes can be acknowledged. S. 1392 is a good place to start with reform. It contains excellent ideas for public debate and Congressional review, but ultimately more drastic reform is called for.

S.1393 also contains essential elements of a reformed system, by helping to level the playing field and providing assistance for local governments to participate in the acknowledgment process. We urge Congress to address promptly the problems that are the subject of S.1393.

## Conclusion

Our Towns respectfully request that this Committee make solving the problems with the acknowledgment process one of its top priorities. A moratorium on processing petitions should be imposed while you do so. In taking this action, we urge you to solicit the views of interested parties, such as our Towns and State, and to incorporate our concerns into your reform efforts. Tribal acknowledgment affects all citizens of this country; it is not just an issue for Indian interests.

We are confident that such a dialogue ultimately will result in a constitutionally valid, procedurally fair, objective, and substantively sound system for acknowledging the existence of Indian tribes under federal. With the stakes so high for petitioners, existing tribes, state and local governments, and non-Indian residents of surrounding communities, it is necessary for all parties with an interest in Indian policy to pursue this end result constructively. Ledyard, North Stonington, and Preston look forward to the opportunity to participate in such a process.

Thank you for considering this testimony.