

Hon. Kevin K. Washburn
Assistant Secretary – Indian Affairs
United States Department of Interior
Bureau of Indian Affairs
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

July 1, 2014

RE: 1076-AF18

Dear Assistant Secretary Washburn:

The struggle for federal acknowledgment is a part of Native American peoples' ongoing history in Connecticut, just as it is for tribal nations in other regions of the United States. Equally important, acknowledgment of Native American tribal nations' inherent right to self-determination and self-governance has been, and continues to be, fundamental to ensuring that democratic principles—justice and fairness for all being among the most important—are in fact the defining principles of U.S. Indian law and policy. In a recent law review essay, Samuel E. Ennis reminds us that the canons of construction in U.S. Indian law include the imperative “that ambiguities in the interpretation of treaties, statutes, regulations and other tribal-federal agreements be construed in favor of the Indians” (2011: 624).¹ Ennis explains that the canons of construction “developed partly to further the federal policy of encouraging tribal sovereignty and self-determination, and partly due to the continued recognition that the drafting process for such documents was often ‘deaf to Indian input’” (625). The federal tribal acknowledgement process has sometimes appeared to deviate from the canons of construction, to generate ambiguities and even inaccuracies in its inconsistent interpretations of tribal nations' federal acknowledgment petitions, and in some instances, to simply be “deaf to Indian input.” Last year, however, when the Department of Interior (DOI) announced the Draft Rule Federal Acknowledgment of Indian Tribes 25 C.F.R. 83, it demonstrated its commitment to ensuring justice for tribal nations whose federal recognition had been wrongly overturned or unfairly denied. Indeed, in the Draft Rule, the Department of Interior rightly demonstrated its obligation to ensure that the canons of construction in U.S. Indian law and policy are reflected in the regulations on the federal recognition of Indian

¹ Samuel E. Ennis, “Implicit Divestiture and the Supreme Court’s (Re)Construction of the Indian Canons,” 35 *Vermont Law Review* 623 (2011).

tribes.² Unfortunately, the response by government officials in the state of Connecticut, where I live, has amounted to yet more deafness, along with an intensifying campaign to obfuscate the history and deny the rights of state-recognized tribal nations.

The state of Connecticut's opposition to the DOI's initial proposed changes to the federal regulations on tribal acknowledgment are particularly destructive with regard to the rights of the Eastern Pequot Tribal Nation of North Stonington, Connecticut, who were acknowledged by the Bureau of Indian Affairs in 2002 after rigorous review of their federal acknowledgment petition. In 2005, however, the Eastern Pequot Tribal Nation was subjected to the unprecedented overturning of their federal acknowledgment by the Interior Board of Indian Appeals (IBIA). Not until the DOI announced its Draft Rule in 2013 did it appear that the Eastern Pequot Tribal Nation would have a fair hearing on this unjust action, and the opportunity to once again present their successful federal acknowledgment petition to the Department of Interior—without having to contend with undue political interference by the state of Connecticut.

Connecticut government officials have made a number of claims regarding the proposed changes to the federal regulations on tribal acknowledgement that require closer scrutiny, among them the claim that: 1) the DOI's proposed revisions as detailed in the Draft Rule are not concerned with efficiency and fairness in the federal acknowledgment process, but rather that "they're really designed to achieve a dramatic change in policy"³ that would result in a "devastating impact in Connecticut"⁴; 2) the claim by U.S. Senator Richard Blumenthal, who is "determined to continue to fight against" changes in the federal acknowledgment regulations, that "If any of these groups [that is, the state-recognized tribal nations who have petitioned for federal acknowledgment] receives federal recognition, there would undoubtedly be another casino in Connecticut"⁵; and 3) the notion that the federal acknowledgment cases of Connecticut's state-recognized tribal nations can be lumped together, and that each is indistinguishable from the other. In that sense, state officials perpetuate the colonial myth that Indians are a monolithic entity, and

² See Kenneth A. Bamberger, "Normative Canons in the Review of Administrative Policymaking," 118 *Yale Law Journal* 64 (2008), who provides a detailed account of the formation and importance of normative canons in U.S. law, including those in U.S. Indian law, which he describes as reflecting "sui generis national responsibilities arising out of the historic relationship with the Native American tribes" (73). He also raises the important question concerning whether normative canons of construction—again, including those in U.S. Indian law—can be protected by federal agencies as well as the courts: "[m]ore specifically, do canons leave any place for administrative agencies in deciding about the reflection of canonic norms in regulation?" (89). On this point, Bamberger states that "[a]gencies have the capacity...to initiate deliberative and participatory processes, as well as accountability and oversight mechanisms, on their own," which can include "creat[ing] opportunities for...consultation with affected Native American parties, in an attempt both to elicit information and to reach an administrative result reflective of tribal concerns" (99). Indeed, he argues that agencies "may claim particular capacity to advance the type of constitutional and structural norms that may otherwise be underenforced and unreflected" (102).

³ "Bureau of Indian Affairs – Discussion Draft Concerning BIA Tribal Recognition Process" (http://www.governor.ct.gov/malloy/lib/malloy/2014.02.25_bureau_of_indian_affairs_%E2%80%93_discussion_draft_concerning_bia_tribal_recognition_process.pdf).

⁴ Gov. Molloy's letter to President Obama (http://www.governor.ct.gov/malloy/lib/malloy/2014.02.25_potus_bia.pdf).

⁵ Quoted in *The Hartford Courant*, May 22, 2014, "Obama Pushes Change that Could Pave Way for More Casinos."

that they are to be perceived as presenting, in effect, an “Indian problem.” This ancient, offensive notion—that Indians (and their refusal to “disappear”) constitute a “problem” that must be dispensed with—underpins the anti-recognition rhetoric in Connecticut, and has for some time. In their opposition to the Draft Rule, Connecticut officials imply that there is no need to know the specific histories and struggles of the Eastern Pequots, Schaghticoques, and Golden Hill Paugussetts as distinct Indian peoples. We are told that they are just “groups” who have all been “denied recognition”; but now, the proposed changes to the federal regulations on tribal acknowledgment might “give some of the tribal groups,” as Senator Blumenthal put it, “a second bite at the apple.”⁶ This is certainly trivializing, derogatory phrasing, and should not be taken lightly in terms of its political effect; indeed, the *Hartford Courant* article in which it is quoted (“Obama Pushes Change that Could Pave Way for More Casinos,” May 22, 2014) mischaracterizes the proposed changes to the federal acknowledgment regulations and their importance for upholding the rights of state-recognized tribal nations in Connecticut. As a life long resident of Connecticut, a voter, and a citizen who pays attention to the way politicians use rhetoric to attempt to sway an audience or obscure their view of reality, I am very troubled by the way Connecticut politicians characterize (and caricature) Native American tribal nations in their statements to local media, and how they seem to avoid talking about the issue of tribal nations’ civil and human rights. In addition, as an anthropologist who has been a researcher and oral history interviewer for the Eastern Pequot Tribal Nation’s federal acknowledgment project, I wish to emphasize that the existence of the Eastern Pequot Tribal Nation is not an “Indian problem”; nor was their federal acknowledgment by the Bureau of Indian Affairs in 2002 a “problem”; nor is the possibility that the Eastern Pequot Tribal Nation may receive a fair hearing on the unjust overturning of their federal acknowledgment a “problem.” This is not “biting” at an “apple”; this is a tribal nation’s pursuit of justice and its commitment to do so through legal means.

It is important to emphasize as well that the Draft Rule does not represent a dramatic change in the U.S. government’s Indian policy. In fostering the notion that it does, the state of Connecticut misrepresents the core principle of current United States Indian policy, which is well known to those who are familiar with the history of the federal government’s relationship with tribal nations. Connecticut officials’ opposition to the Draft Rule serves to obscure the fact that the official U.S. policy with regard to Native American peoples can be summed up in one term: self-determination. In his recent book *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples*, renowned attorney and legal scholar Walter R. Echo-Hawk seeks to educate a broad public audience about the rights of Native Americans, and thus he opens the book by pointing out that the inherent right to self-determination has been “the centerpiece of federal Indian policy in the United States since 1970” (2013: 4). It would be important, to say the least, if the broader public in Connecticut were aware of this fact: their knowledge of the federal government’s support of Native American tribal nations’ right to self-determination would allow them a more accurate understanding of the significance of the proposed changes to the regulations on

⁶ Quoted in *The Hartford Courant*, “Obama Pushes Change that Could Pave Way for More Casinos,” May 22, 2014.

tribal acknowledgment—changes which would mean that the regulations more closely adhere to the federal government’s official policy. The federal regulations on tribal acknowledgment were established in 1978 not to undermine Native American self-determination, but to recognize and endorse self-determination for tribal nations who had been wrongfully unacknowledged by the U.S. The proposed changes to the regulations must not be weakened or abandoned to appease any state government officials who wish to thwart certain federal acknowledgment petitions for their own political reasons.

In Connecticut, as I know from years of following local media coverage of opposition to federal recognition, politicians’ statements can incite controversy over federal acknowledgment and can appeal to anti-Indian sentiments that may exist in their voting constituencies, simply by equating federal recognition with the idea of “more Indian casinos.” A recent *Connecticut Post* editorial entitled “Some Indians Are Inconvenient” points out that Governor Malloy and Senator Blumenthal so vehemently oppose the proposed changes in the regulations because “they are driven the fear that a newly recognized tribe might try to open a casino” (ctpost.com, March 6, 2014). The editorial offers some sharp and much needed criticism of the anti-recognition/anti-casino rhetoric in the state. But, since the Governor has appealed directly to President Obama to claim the proposed changes to the regulations will be “devastating” to Connecticut, and Senator Blumenthal vows to continue his efforts to prevent the federal acknowledgment of state-recognized tribal nations, a more complete assessment of the equating of federal recognition with “more Indian casinos” is needed. First, this false equivalency serves to feed assumptions that the two existing Native American gaming operations in Connecticut—owned and operated by the Mashantucket Pequot Tribal Nation and the Mohegan Tribe—have had an entirely negative impact on the state. This of course is not the case, as indicated in the November 2013 Office of Legislative Research Report, “Tribal Casino Approval Process and the Effects of Tribal Gaming.” The report states that the gaming operations of these two tribal nations have had anything but a “devastating” impact on the state of Connecticut; rather:

[t]he casinos have had a major economic impact on southeast Connecticut and the state. They have, among other things, raised revenue, created jobs, and stimulated economic development. For example, since 1993, they have contributed over \$6.4 billion to the state’s General Fund, averaging over \$305 million yearly. Additionally, they have reportedly created 20,000 new service jobs in a 10-year period. . . . Before the casinos were built, Southeastern Connecticut was largely rural and had lost approximately 10,000 jobs in the 1990’s. . . . The casinos have also had a positive impact on tourism. Tourists who visit the casinos spend money on lodging, recreation, meals, shopping, fuel, and gaming. In addition, the casinos have become a major destination for meetings and conventions, as well as concerts and other entertainment events (OLR Research Report, Duke Chen, Legislative Analyst II, 2013-R-0373).⁷

⁷ If one wanted to play the politicians’ game, one might call the state’s federal recognition opponents “job killers.” In a sense, they are, if their political interference in federal acknowledgment cases obstructs the

Secondly, the false equivalency deflects the important historical and legal realities regarding the rights of sovereign Native American tribal nations and their relationship with the state of Connecticut. Like all peoples everywhere, Native American tribal nations in Connecticut have a right to sustain themselves economically; and those tribal nations who own and operate gaming facilities in Connecticut, like those in other regions of the U.S., do so in adherence to federal law and in cooperation with the state. To present to the non-Native public (one likely to be uneducated about Native American legal rights, as well as Native American history more generally) the notion that federal recognition is a process solely intended to facilitate the establishment of casinos—and suggesting as well that Native American sovereign nations’ operation of casinos is a form of legal and economic assault on the state of Connecticut—would appear to be a blatant political manipulation of public opinion. Those who would promote such a view surely know little, if anything, about what has been endured by Native American peoples, like the Eastern Pequot Tribal Nation, who have gone through the BIA federal acknowledgment process over a period of decades, seen the death of Elders who devoted much hard work to the arduous process of petitioning and defending their community, and who now continue to face hostile and fictitious claims about their history and their federal acknowledgment petition by a state government whose statutes have long acknowledged their existence as an Indian tribe. This is not just a recent, late 20th and early 21st century struggle for the Eastern Pequot Tribal Nation; but rather it is a centuries-long struggle to defend their rights as a Native American people.

Political distortions and denials of what the federal recognition process truly is about, and what the struggle for federal recognition truly means, for the Eastern Pequot people is an affront to the democratic principles of justice and fairness. We should not forget that aspect of the federal acknowledgment process—that, for Native American peoples it embodies decades of struggle to defend their rights—especially this year, as the United States commemorates the passage of the 1964 Civil Rights Act fifty years ago, and the many struggles and sacrifices of civil rights activists. Contemplation of the principles of justice that the Civil Rights Act represents also compels us to consider what the silencing of a tribal nation’s history and the deflection of their rights signifies, particularly at a time when we are confronted with the reality that the struggle for civil rights and human rights continues for peoples and populations in various regions of the U.S. who have long been subjected to multiple forms prejudice and discrimination. Does the anti-recognition rhetoric of Connecticut politicians and the efforts to thwart the Eastern Pequot Tribal Nation’s rightful federal acknowledgment also prevent the broader citizenry in the state from recognizing their civil and human rights as a Native American people, and deter that citizenry from learning about the history of the Eastern Pequot Tribal Nation, including the fact that the Eastern Pequots have existed as a tribal nation since well before Connecticut was established as state? What are the implications of obscuring their rights and their history?

possibility for the Eastern Pequot Tribal Nation to regain their federal acknowledgment and thus pursue economic development that would provide jobs for tribal members as well as non-members.

In a nation whose President has endorsed the United Nations Declaration on the Rights of Indigenous Peoples, it is a serious matter when the well-documented history and the ongoing existence of a Native American people is denied, and when their right to seek justice via legal means—in this case, re-petitioning for federal acknowledgment—may now be obstructed by a provision in the section of the Proposed Federal Acknowledgment Rule on re-petitioning that allows for a “third party” to withhold their consent, and therefore prevent a tribal nation from re-petitioning. This amounts to what has been referred to as a “third part veto” provision. It is very difficult to miss the caustic ironies of this, in light not only of President Obama’s endorsement the Declaration but also on this 50th anniversary of the Civil Rights Act. It is, again, a reminder that the Eastern Pequots’ struggle for justice is both a civil rights matter and a human rights matter. When a Native American people whose federal acknowledgment by the Bureau of Indian Affairs was overturned in such an unprecedented manner by the IBIA (an action taken under circumstances which lack transparency and which may suggest the possibility of political influence by parties possessing far more political power than the Eastern Pequot Tribal Nation does), U.S. citizens who care about the Civil Rights Act should take notice, and ask what the impact of the allowance of a “third party veto” may be on the rights of state-recognized tribal nations who seek to re-petition as a means of regaining their unjustly overturned federal acknowledgment. Would the inclusion of such a provision in the regulations allow powerful politicians to distort and undermine the federal acknowledgment process in cases where a tribal nation clearly has a right to re-petition? For over a decade now, the rhetoric of anti-recognition/anti-casino politicians in the state has smacked of political maneuvering and strategic historical denial, and of efforts to use official political power, and access to federal power, to further an anti-recognition political agenda. It is difficult to imagine that the allowance for a “third party veto” in the Eastern Pequot Tribal Nation’s federal acknowledgment case would not ultimately serve anti-Indian political interests in Connecticut.

In 2014, as we remember the struggles of the Freedom Riders, who represented the enormous power of peaceful resistance to racial injustice and cleared the path to the Civil Rights Act, we should also remember that opponents of the Civil Rights Movement asserted their own kind of “third party veto” in attempting to perpetuate segregation and obstruct federal civil rights legislation. This is an important moment to bring civil rights history to bear on the current discussions surrounding the proposed changes to the federal regulations on tribal acknowledgment. The civil rights of Native Americans have been too often ignored or trivialized; but the federal acknowledgment process has now reached a juncture of considerable significance in the history of Native American civil rights. The DOI’s efforts to revise the regulations reflect genuinely democratic principles and faithfulness to the canons of construction in U.S. federal law and policy regarding the rights of Native Americans. However, to permit a third party to withhold consent, and therefore deny, a tribal nation’s right to re-petition would be grossly prejudicial. This provision would allow for undue political interference in the federal acknowledgment process, and in the case of the Eastern Pequot Tribal Nation’s federal acknowledgment, it would be tantamount to the undermining of their civil rights. This, then, is an historical moment when the U.S. can demonstrate the true meaning of its endorsement of the UN Declaration on the Rights of Indigenous Peoples, and when the Department of Interior

can likewise demonstrate its continuing commitment to ensuring justice and due process for all Native American tribal nations in the U.S. The Eastern Pequot Tribal Nation, who seek fairness and transparency in the federal acknowledgment process and the just restoration of their federal recognition, have the right to be heard.

Sincerely,

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