

TESTIMONY OF
NICHOLAS H. MULLANE, II
FIRST SELECTMAN,
TOWN OF NORTH STONINGTON
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM

REFORM OF THE TRIBAL ACKNOWLEDGMENT PROCESS

May 5, 2004

Introduction

Mr. Chairman and Members of the Committee, I am pleased to submit this testimony on reform of the federal tribal acknowledgment process. I am Nicholas Mullane, First Selectman of North Stonington, Connecticut. I testify today also on behalf of Susan Mendenhall, Mayor of Ledyard, and Robert Congdon, First Selectman of Preston.

As the First Selectman of North Stonington, a small town in Connecticut with a population of 5,000. I have experienced first-hand the problems 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.

Before providing my testimony, I want to thank this Committee, and Congressman Shays in particular, for convening this important and historic hearing. I also want to thank the Congressman for our District, Rob Simmons, for his leadership on the tribal acknowledgment reform issue.

The problems with Indian tribal acknowledgment and Indian gaming are endemic. They are deeply rooted and spreading quickly. The combination of a flawed acknowledgment process and poorly controlled Indian gaming system affects not only small towns such as ours, but also has serious adverse consequences for entire states, businesses, the general public, and even Indian tribes, especially those that do not have the benefit of being located in favorable locations for casinos that cannot attract wealthy financial backers or make huge amounts of money out of gambling operations.

Unfortunately, until this hearing, the federal government has not been prepared to ask the hard questions and confront this problem head on. For years, efforts to reform tribal acknowledgment and Indian gaming management have been stymied by the tribal lobbies and their supporters in Congress. The Administration has been unwilling to take the necessary actions. As a result, it is necessary to treat these problems as issues calling

for government reform and the oversight and the action of this Committee. I strongly encourage this Committee and the U.S. Congress to make this hearing just the starting point for a series of hard-hitting reform initiatives. Hopefully, there will be more hearings to come, investigations to follow, and reform legislation to be enacted.

I have testified before on the problems that Indian gaming and tribal acknowledgment have for small communities such as mine. Our towns serve as one of the host communities for the massive resort of the Mashantucket Pequot Tribe. We are located only a few miles from the equally massive Mohegan Sun Casino Resort, and we are confronted with the prospect of additional Indian lands, and if they have their way contrary to Connecticut state law, additional casinos from the Eastern Pequot/Paucatuck Eastern Pequot petitioner group.

Indian gaming operations are having a devastating impact on our community. Because they are tax exempt, they remove an important source of revenue. If Foxwoods were subject to the same taxes as other businesses in our area, it would generate huge payments every year to Ledyard alone. This annual tax payment could be in excess of \$20 million dollars a year. In addition, our land use planning process is disrupted by inconsistent Indian gaming and economic development activities. Crime increases, traffic increases, and environmental quality declines. The social fabric of our small rural community is changed for the worse. Our businesses are disadvantaged by the competitive advantage enjoyed by tribal enterprises based on Indian land. Our education system is overburdened by the wage earners and their families who are coming to our town to work at the casinos. There is insufficient housing. Our regional demographics are changing without adequate infrastructure or revenue sources.

These problems can be traced to the result of two significant failures of federal policy and law. First, the tribal acknowledgment process administered by BIA is biased, flawed and unfair. It results in the acknowledgment of petitioner groups that do not deserve federal tribal status. In doing so, it gives rise to all of the adverse consequences and problems have I just noted.

Second, Indian gaming is not adequately controlled. No limits are imposed upon what tribes can seek to develop, and there are no requirements that the adverse impacts of casino resort establishment and growth must be addressed based upon the needs of affected local communities. There is insufficient planning, and there are no checks and balances. We are headed for a regional, if not statewide, planning and growth nightmare in Connecticut, and it is because federal Indian law and policy stands apart from the reality of the consequences it is causing.

While Indian gaming itself requires serious reform, my testimony today will focus only on the tribal acknowledgment issue.

Tribal Acknowledgment Flaws

The Town of North Stonington has first-hand experience with the tribal acknowledgment process. Beginning in 1996, our town, later joined by Ledyard and Preston, began participation in the review of the Eastern Pequot and Paucatuck Eastern Pequot petitions. We did so after several years of opposing the Mashantucket Pequot Tribe and BIA in their efforts to expand the Tribe's land off-reservation. Ultimately, we prevailed in that situation. Much like the current tribal acknowledgment process, we had to deal with initial BIA decisions that went against us. By staying the course, we were able to win court victories and eventually force the Tribe to withdraw its request. In the process, we uncovered serious evidence of improper action by BIA and bias in favor of the Tribe. Based upon this experience, we went into the tribal acknowledgment process hoping for the best, but expecting the worst. Unfortunately, our concerns and fears were borne out.

At the outset, we decided to make a serious investment in this procedure. We did so to be sure that the record would be complete, that an objective analysis would be rendered on these petitions, and that the towns would themselves be able to take a fully informed position after our own research. We also knew, from past experience, that we had to establish a basis to pursue appeals and litigation in the event that BIA did not follow the rules and produce proper results.

Through this procedure, over a period of eight years, we spent a total of \$550,000. Obviously, this investment pales in comparison to the tens of millions of dollars invested by the two petitioner groups. Although the exact amount of money their financial backers have spent is unclear, it is probably safe to assume that we have been outspent on the order of anywhere from 30 to 50-1. Nonetheless, this amount of money is a significant investment for small communities such as ours. We do not regret making the investment, because we now have been able to establish an independent position, based on our own research, that neither petitioner group qualifies for tribal acknowledgment. We have protected the rights of our communities in the BIA review, and our towns are positioned to continue the fight. We also were fortunate to have strong support from the State of Connecticut through Attorney General Blumenthal, and, ultimately, the support of many other local governments in the State and our Governor, all of whom have backed our appeal of the positive and incorrect determination rendered by BIA on these petitions in 2002.

This disparity in funds and the extraordinarily uneven playing field in the tribal acknowledgment process demonstrate one of the foremost requirements for tribal acknowledgment reform. Congress must take the necessary actions to eliminate this imbalance. This can be done by imposing limits on the amount of investment by outside parties to support tribal petitioners and by providing federal funding to local governments such as ours seeking to ensure the objectivity and legitimacy of the review process.

Before describing the deficiencies in the tribal acknowledgment procedure that we discovered as a result of our participation in the two Pequot petitions, it is important to present the context of tribal acknowledgment in Connecticut. When the full picture is considered, it becomes clear what is happening here. Tribal petitioner groups can count on their wealthy financial backers, a pro-petitioner, and biased BIA staff, and political appointees seeking to curry favor from Indian gaming financial interests, to skew the process in favor of positive decisions. This is especially true in gaming markets as lucrative as Connecticut. The end result has been to make Connecticut open to Indian gaming in its most extreme and uncontrolled form and to lower the bar in tribal acknowledgment to a point where petitioner groups that are clearly unqualified for such status, such as the Schaghticoke Tribal Nation and the two Pequot groups, are able to achieve positive final results.

Tribal Acknowledgment in Connecticut

The starting point for considering the context of Indian gaming in Connecticut must be the 1983 congressional recognition of the Mashantucket Pequot Tribe. This legislation took place five years before the Indian Gaming Regulatory Act (IGRA). As a result, the potential consequences it would have for our communities, the State, and Indian gaming policy generally, could not be predicted. Certainly, no one in our area paid much attention to what appeared to be an effort to do nothing more than settle the Mashantucket Pequot land claim lawsuit.

In retrospect, considerable attention and scrutiny should have been given to the 1983 Settlement Act and the recognition of the Mashantucket Pequot Tribe by Congress. The general reaction today is that such legislation was a huge mistake. Congress should have taken a hard look at whether this group qualified for recognition. As discussed in important books such as Jeff Benedict's *Without Reservation* and Brett Fromson's *Hitting the Jackpot*, it is questionable whether the Mashantucket Pequot Tribe deserved recognition. Nonetheless, when the Congress took this action it lowered the bar for tribal acknowledgment in our State and took the first proverbial step to send the tribal acknowledgment "snowball rolling down the Connecticut mountainside."

Eleven years later, the Mohegan tribe received acknowledgment by action of BIA. This tribe went through the tribal acknowledgment procedure. They received a negative proposed finding from BIA. Defects were identified in that group's petition. Although I cannot take a firm position on the Mohegan Tribe's petition, it is clear that, to produce a positive result, BIA took new steps to formulate an approach to acknowledgment. For example, BIA utilized the conceptual approach that it termed a "contuuity braid" to measure the intertwined relationships of group members over time. BIA also developed a new demographic measurement of social and political interaction based on the concept of geographic and social core areas. Significantly, however, in rendering the Mohegan decision, BIA firmly pronounced that state recognition was not relevant.

Another eight years elapsed before BIA issued its final determination on the Eastern Pequot and Paucatuck Eastern Pequot petitions. At this point, I must respond to the complaint frequently raised by tribal petitioners over how long it takes to achieve a final decision and how much it costs. The time and cost of government procedures are legitimate concerns. Our towns share this concern. However, I must note that the problem is less that of the federal government, and more that of the petitioners themselves. These petitioner groups take years and years to develop their arguments. For example, the Eastern Pequots spent 17 years developing their case for acknowledgment. The Schaghticoke group spent 19 years. To a large extent, this appears to have been the result of the millions of dollars spent on researchers, attorneys, lobbyists, media consultants, etc. who were searching high and low for every available means to take deficient tribal acknowledgment claims and establish a basis for positive results. With this massive infusion of money and research from the petitioner's side, records are produced that are almost impossible for other parties to deal with. Although I am no defender of BIA and its approach to tribal acknowledgment, we must all recognize that a significant part of the problem comes from the petitioners themselves.

In the Eastern Pequot and the Paucatuck Eastern Pequots petition, once again a negative proposed finding was in order. That was the result requested by the BIA staff based upon the initial review. This was before the state recognition theory took hold. However, the script they like to follow by issuing negative proposed findings and, in doing so, laying out the roadmap for a petitioner to achieve success was disrupted in this case because of politically-motivated interference from the former Assistant Secretary for BIA, Kevin Gover. In an action well-documented in the media, Gover ordered the negative proposed finding to be turned into positive. He did so by injecting the concept of state recognition, which had been ruled irrelevant in the Mohegan petition. In doing so, he laid the foundation for what ultimately became a positive determination by BIA for these two groups, and later for the Schaghticoke group.

After completing its review of all of the evidence, and taking numerous steps to give every benefit of the doubt to petitioner groups, BIA issued a positive final determination in June 2002 by taking two extraordinary and illegal actions. First, it equated state recognition with the federal concept of a government-to-government relationship with Indian tribes. It then said that the mere existence of this state recognition in Connecticut was sufficient to bolster otherwise weak evidence during certain periods of time for these petitioner groups. In this manner, the petitioners were able to overcome clear deficiencies in their direct evidence.

But even that incorrect step was not enough. BIA still had to find a way to cover over the serious split between the two factions of the former Eastern Pequot Tribe. It did so by taking the incredible step of forcibly joining the two petitioner groups together on its own initiative. In other words, BIA took two factions who were bitterly opposed to each other and forced them to become a single tribe. BIA did so over the strenuous legal

objections of the Paucatuck Eastern Pequot group. While these groups are now holding out the public image of tribal harmony and unity, one must question whether such a message is more the result of the realities of the need to maintain a single tribal entity in order to sustain the tribal acknowledgment affirmation and ensure the continued support of financial backers.

The next chapter in the history of Connecticut tribal acknowledgment is Schaghticoke Tribal Nation. For this chapter, the story gets even worse. Here, the petitioner's own experts agreed that the group should fail under the acknowledgment criteria. Huge gaps in tribal continuity existed, as recognized by BIA in its negative proposed finding. However, in the final determination released last January, BIA did another about face. Following its pattern for other Connecticut groups, BIA again devised a new approach so that a positive finding could be achieved.

To be able to say "yes" to the Shaghticoke group, BIA did everything it could to give the benefit of the doubt to the petitioner. It looked at the evidence in a light most favorable to the Indians, even if doing so required ignoring or rejecting stronger evidence coming in from the State and other interested parties.

Even after taking this approach, BIA could not completely eliminate the serious deficiencies in the Shaghticoke petition. It therefore had to find some way around its own precedent and the acknowledgment regulations. It did this by playing a game with tribal marriage rates. It sought to invoke a seldom-used provision in the regulations that allows intermarriage among tribal members at a 50% rate or greater to be equated with the existence of political autonomy. This assumption is, of course, highly questionable. BIA compounded this problem, however, by playing mathematical games in calculating the rate. To do so, it had to abandon its own regulatory language and its own precedent from the previous acknowledgment petitioner where this approach was used. Even when it did this, BIA could not completely eliminate the gaps in the Schaghticoke's evidence. Consequently, BIA once again had to invoke state recognition. In this case, however, it went even further than it did for the Eastern Pequot and Paucatuck Eastern Pequot petitioners. Now BIA ruled that the petitioner could achieve a positive final determination based on the mere fact that Connecticut created and maintained a reservation and provided assistance to the individuals who lived there. This fact could be used as a complete substitute for the lack of any evidence from the petitioner. As BIA staff admitted in a memo to Aurene Martin, the decision-maker, taking this step is not allowed for under the regulations or BIA precedent. They did it anyway.

In addition, as in the Pequot petitions, BIA displayed the height of federal government arrogance by defining the tribe the way the bureaucrats wanted it to be defined. BIA automatically included many individuals and families who opposed the Schaghticoke group. BIA took this step even though it had told the State and other parties that such an action would not be taken without the consent of such individuals.

BIA is not even limiting its actions to the membership lists submitted by the petitioners; it is making its own decisions on what a tribe should be.

Unfortunately, this story is not yet over, there are other petitions either under active review or pending involving Connecticut groups. Decisions in the Golden Hill Paugussett petition and the Nipmuc petitions from Massachusetts, where the groups have indicated a strong interest in land in Connecticut, are expected soon. Other petitions are waiting in the wings.

These substantive results are evidence enough of how bankrupt the acknowledgment process has become. There are even more serious problems, and the Pequot petition is strong evidence of this. BIA consistently took action to frustrate interested party participation. It routinely withheld documents. It took successful litigation on our part to force the release of this information. BIA staff also set deadlines for submitting evidence that they communicated to the petitioners, but never advised us about it. As a result, we invested money and work in extensive research, only to find out it was not considered at the appropriate time, if at all. Former Assistant Secretary Gover, in February 2000, unilaterally issued an edict that changed the acknowledgment process to the disadvantage of interested parties. BIA failed to follow rulemaking procedures and accept public comment. As a result, BIA diminished our rights under the acknowledgment regulations. Along with the State, we are now in court to challenge that action.

At the same time BIA was taking actions to frustrate our ability to participate, the petitioner groups were on the attack against us, making efforts to intimidate our towns. The Eastern Pequot Group, for example, showed up at a North Stonington's Selectmen's meeting to stage a protest and accuse us of "Nazism" and committing "genocide." Both petitioner groups took steps designed to attack and discourage our researchers. At the same time, the financial backers refused our invitations to come and appear before public meetings to discuss their plans. All of these actions, of course, only hardened our resolve and attempts to participate.

While all of this was going on, the spectre of behind-the-scenes political influence remained a strong concern. The Eastern Pequots, for example, paid a well-connected Republican lobbyist in one year almost as much as we spent for our entire effort over eight years. What did he do? Recent newspaper articles have tied in the possibility of the political connections for lobbyists for the Paucatuck Eastern Pequots and the Schaghticokes. Is all of this coincidence? That is unlikely, and this Committee needs to investigate these connections fully.

Reform Recommendations

This long history demonstrates that serious reform of the tribal acknowledgment process is needed. Those efforts must start with this Committee.

We recommend the following reforms to the acknowledgment process:

1. Moratorium – Until the system is fixed, put a halt to recognizing new tribes. This is too important an issue to go forward in the face of possible corruption and incorrect decisions.
2. Congressional Delegation – BIA lacks delegated authority from Congress to acknowledge tribes. There are no standards to govern BIA's decision, as required by the U.S. Constitution. Congress needs to address this defect.
3. New Process – Because there is no delegation and there are no standards, Congress needs to start anew. A revised administrative process is needed, one that is objective, qualified and not part of BIA. Congress should create a new independent review body to make findings of fact. Those findings should then be forwarded to Congress for action, where all of the ramifications of acknowledgment of a group can be addressed in legislation. In Connecticut, for example, any new tribes – of which there should be none – would be required to abide by the State's prohibition on casino gaming. Also, profits from the two existing casinos should be shared with other tribes.
4. Disclosure of Investors – Petitioners should be required to disclose all investors, how much they are spending, and the details of the contracts. A cap should be imposed on how much can be spent.
5. Prohibit Lobbying – Any contact, direct or indirect, between any party involved in acknowledgment and the agency involved in reviewing the petition must be prohibited. Full disclosure of every such contact, at any level, should be made. This includes the White House.
6. New Standards – The existing BIA acknowledgment standards are too lenient. They need to be tightened. Efforts underway now in the Senate Indian Affairs Committee to make those standards even less rigorous must be opposed.
7. Funds for Local Governments – It is too expensive for States and interested parties to participate in this process. Federal funds are need for this purpose.

Conclusion

All parties agree the tribal acknowledgment process is broken. The problems come from BIA's result-oriented approach, the role of big money, political influence, and the absence of clear guidance from Congress. We support efforts by this Committee to take aggressive action to solve these problems. Thank you for considering this testimony.