

UNITED STATES DEPARTMENT OF THE INTERIOR

INTERIOR BOARD OF INDIAN APPEALS

In re : **Dkt. Nos. IBIA 02-165-A**
FEDERAL ACKNOWLEDGMENT OF THE : **IBIA 02-166-A**
HISTORICAL EASTERN PEQUOT TRIBE : **IBIA 02-169-A**
:
: **APRIL 10, 2003**

REPLY BRIEF OF THE STATE OF CONNECTICUT AND THE TOWNS
OF NORTH STONINGTON, PRESTON AND LEDYARD TO THE ANSWERING
BRIEF OF THE EASTERN PEQUOT TRIBAL NATION

STATE OF CONNECTICUT

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I. INTRODUCTION

The Bureau of Indian Affairs (BIA) has been unable to articulate a satisfactory justification for its use of state recognition in the acknowledgment process. At each critical decision point, it has shifted its rationale. This inability to articulate a consistent basis for the way it has used state recognition is quite revealing. Indeed, the BIA is legally adrift, unable to anchor its treatment of state recognition in either the acknowledgment regulations or its prior precedents. Its efforts to grab hold of a satisfactory rationale illustrates that, at bottom, the endeavor is an arbitrary and unlawful exercise.

The State of Connecticut (State) and the Towns of North Stonington, Preston and Ledyard (Towns) submit this brief in reply to the Answering Brief of the Eastern Pequot Tribal Nation (EPTN) and in support of the State's and the Towns' requests for reconsideration of the Final Determination on the federal acknowledgment petitions of the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut. This brief addresses the EPTN's reliance on the recently issued proposed findings on the petitions for federal acknowledgment of the Schaghticoke Tribal Nation (Schaghticoke) and the Golden Hill Paugussett Tribe (Golden Hill), particularly as to the issue of state recognition.

Central to the State's and the Towns' requests for reconsideration is the improper role the Final Determination assigned to the State's relationship with the Eastern Pequot. The State's and Towns' principal claim relating to the Final Determination's misuse of state recognition includes: (1) based on unreliable evidence and inadequate research, the Final Determination erroneously concludes that the State implicitly recognized the Eastern

Pequot as a distinct political body; (2) new evidence reveals that Indians in Connecticut were considered citizens long before 1973 as the Final Determination erroneously states;¹ (3) the Final Determination ignores critical evidence about the nature of the State relationship and erroneously interprets the State's relationship as one with a political entity, rather than with individuals of Indian descent; (4) the use of the State relationship as a substitute for otherwise insufficient evidence contravenes the acknowledgment regulations and other precedents; and (5) without the improper additional weight given the evidence and the erroneous interpretation of the State relationship, the evidence under the acknowledgment criteria to establish a distinct community and political authority is woefully inadequate.²

¹ The EPTN wrongly asserts that the State has not provided new evidence on the citizenship issue that was a central component of the Final Determination's conclusion that the State implicitly recognized a distinct political body. *See* EPTN Answering Brief, at 32-33. The new evidence, identified in the State's Request for Reconsideration, at 22-23, was obtained from the Connecticut Office of the Secretary of State and the records of the relevant towns. This evidence was **not** part of the record before the BIA and was **not** considered by the BIA in issuing the Final Determination. The EPTN cannot and does not show otherwise.

² The other issues raised in the State's request for reconsideration include: (a) the Final Determination fails to account for the lack of requisite tribal relations reflected in the recent massive enrollment drives increasing the membership with persons who had little or no prior contacts with the petitioner; (b) the Final Determination relies on unreliable interview evidence that seriously undermines its validity; (c) the Final Determination unlawfully contrives to recognize a single tribe that does not exist; (d) the basis for finding a single tribe – the supposed existence of a “unifying” parallel political process in each petitioner – is created out of whole cloth to justify recognition; (e) the unprecedented recognition of a single tribe comprised of two petitioners is not permitted under the acknowledgment regulations; (f) the process resulting in the Final Determination was seriously defective because of the lack of proposed findings regarding the post-1973 period, which deprived the State and the Towns of their rights as interested parties to comment on the BIA's analysis of that period; (g) the process was further fatally tainted by serious irregularities and bias demanding that the Final Determination be vacated; (h) the

The EPTN relies in particular on the Schaghticoke proposed finding apparently in an attempt to portray the Final Determination's use of state recognition to fill in the gaps in the evidence as not arbitrary. A review and comparison of these decisions, however, shows just how arbitrary the BIA's effort to justify state recognition has been.

II. THE BIA'S CONTINUALLY SHIFTING RATIONALES FOR USING STATE RECOGNITION DEMONSTRATES THAT ITS USE IS ARBITRARY AND CONTRARY TO THE ACKNOWLEDGMENT REGULATIONS.

In opposition to the State's and Towns' claims of the AS-IA's misuse and misapplication of the evidence of the State relationship with the Eastern Pequot, the EPTN rely on the recent Schaghticoke and Golden Hill proposed findings in an effort to depict the AS-IA as making reasonable distinctions between different petitioners as to the State's relations with those petitioners. *See* EPTN Answering Brief, at 30-31; 52-53; 68-69.

Ironically, what the EPTN fail to discuss is the actual basis the AS-IA gave in the Schaghticoke proposed finding for distinguishing the State's relationship with the Schaghticoke from that with the Eastern Pequot. A comparison of the varying versions of the rationale for the use of state recognition is therefore necessary.³

unprecedented nature of the Final Determination reflects the lack of congressional guidance in the delegation of acknowledgment authority to the BIA.

³ The Golden Hill proposed finding is of little assistance to the EPTN, as reflected by the fact that its discussion of that decision is quite limited. *See* EPTN Answering Brief, at 30. In the Golden Hill proposed finding, the BIA declined to use state recognition to fill in evidentiary gaps, as it had in the HEP Final Determination, apparently because the Golden Hill lacked a continuously existing reservation and the State's relationship "was sporadic and for a long time (ca. 1850 to ca. 1973) limited to a few individuals who were part of a small, single family." Golden Hill PF, at A1 (Ex. 1). However, the Golden Hill proposed finding has little discussion of the proper role of state recognition in the acknowledgment process such as that found in the HEP Final Determination and the Schaghticoke proposed

First, in the **EP Proposed Finding**, ignoring strong evidence to the contrary, the AS-IA described the State’s relationship with the Eastern Pequot as a “government-to-government relationship.” EP PF, at 64. After acknowledging that there were no precedents for doing so, the AS-IA concluded that the State’s relationship provided sufficiently “greater weight” to the petitioners’ evidence to overcome their burden than otherwise would be the case. *Id.* Because neither the acknowledgment regulations nor prior precedent provided a rationale for doing so, the AS-IA manufactured one.

Specifically, he stated that

[t]he greater weight is assigned for the following reasons in combination:

- ? The historical Eastern Pequot tribe has maintained a continuous historical government-to-government relationship with the State of Connecticut since colonial times;
- ? The historical Eastern Pequot tribe had a state reservation established in colonial times, and has retained its land area to the present;
- ? The historical Eastern Pequot tribe had members enumerated specifically as tribal members on the Federal Census, Special Indian Population Schedules, for 1900 and 1910.

Id.

Thus, the original rationale for using state recognition to make up for gaps in the evidence was based on three factors: (1) the purported “government-to-government” relationship; (2) the continuous existence of a reservation; and (3) the enumeration as tribal members in the 1900 and 1910 censuses. This would not remain the rationale for long.

finding. This brief, therefore, will focus primarily on the Schaghticoke proposed finding and its use by the EPTN.

In the **HEP Final Determination**, the AS-IA abandoned the rationale provided in the proposed finding and offered a different justification for the use of state recognition. First, the Final Determination recognized that the State’s relationship could not be characterized as a “government-to-government” relationship. EP FD, at 29, 76. Instead, the AS-IA concluded that “[t]here is implicit in this relationship a recognition of a distinct political body” *Id.* at 29. This “implicit” recognition of a “distinct political body” was supposedly based on “[s]everal major elements [that] existed throughout the relationship which define the distinct status of the historical Eastern Pequot tribe.” *Id.* The Final Determination identifies the following four elements of the State’s relationship that justified its use to fill the evidentiary gaps:

- ? Overseers or other authorities were appointed with fiduciary obligations to the tribe’s members. *Id.* at 30, 77.
- ? The State supposedly did not consider Indians who were members of the tribes with which the State had a relationship to be citizens of the State until 1973. *Id.* at 30, 78.
- ? The tribes with which the State had a relationship had a “distinct political status,” reflected in legislation that was specific to Indians. *Id.* at 30, 77-78.
- ? A separate land base (the reservation) was established during the colonial period and continues to the present. *Id.* at 30.

The only factor retained from the proposed finding was the continuing existence of the reservation. The AS-IA abandoned the description of the State’s relationship as a “government-to-government” one, and instead assumed an “implicit recognition” of a

“distinct political body.” What is notably absent from this discussion of the role for state recognition is the extent to which the State did or did not identify leaders or dealt with the group on important issues.

The BIA has now espoused a third version of the importance of state recognition. In the **Schaghticoke proposed finding**, the AS-IA described the salient characteristics of state recognition quite differently. Specifically, the Schaghticoke proposed finding concluded that:

there are substantial periods of time, from the early 1800’s until 1876 and from 1885 until the late 1960’s, when the State did not deal with or identify formal or informal leaders of the Schaghticoke, and did not consult with members concerning issues which concerned the entire group. In the 1930’s, the State declared affirmatively that there were no leaders recognized by the group.

The State’s relationship here thus differs materially from that with the historical Eastern Pequot tribe, where there were recognized leaders with whom the state or state-authorized officials dealt. By comparison, the Eastern Pequot post-1800 had named leaders with whom the State dealt during certain periods of time, consulting with them on issues of importance to the membership or responding to petitions which were the result of internal political processes.

Schaghticoke PF, at 10-11 (Ex. 2). Thus, according to the AS-IA in the Schaghticoke proposed finding, the key aspect of the State’s relationship with the Eastern Pequot was not the “implicit” recognition of a “distinct political body,” but rather the purported identification of leaders with whom the State dealt.

As discussed in detail in the State’s and Towns’ requests for reconsideration, the State has consistently maintained that the AS-IA misconceived and misused the State’s

relationship as evidence of community and political influence.⁴ What is particularly telling from the comparison of the various rationales the BIA has offered is the inability of the AS-IA even to articulate a consistent rationale for the treatment of state recognition, much less to find support for any of the rationales in the record.

The AS-IA began with the assertion that the State maintained a historically continuous government-to-government relationship with the Eastern Pequot that justified giving added weight to the petitioners' evidence. Realizing that the factual and historical record simply would not support that characterization of the relationship, the AS-IA shifted grounds. Instead, he concluded that there was an "implicit" recognition of a political entity, which supposedly justified the use of state recognition as "additional" evidence to fill in the gaps for those periods that the petitioners' evidence was lacking. In contrast, the AS-IA, apparently recognizing the flaws in this rationale, reconstituted it in the Schaghticoke proposed finding into an entirely different rationale: that the State had identified and dealt with leaders of the Eastern Pequot.

These twists and turns in the rationale are remarkable, illustrating the difficulty the AS-IA has had in attempting to find a legitimate basis for the BIA's decision in recognizing the "historical Eastern Pequot" tribe. The inability of the AS-IA to articulate a consistent rationale is quite revealing. It is a direct result of the lack of support in either

⁴ Indeed, the State contends that the AS-IA in fact misused state recognition in the Schaghticoke proposed finding even though the proposed finding would deny recognition to the Schaghticoke petitioner.

the acknowledgment regulations or prior precedent for this use of state recognition.⁵ If there were such a basis, the AS-IA would not have to continually scramble and rely on post-hoc rationalizations. The inability to fashion a rationale that fits within the framework of the regulations – and the need to continue searching for one – is a compelling demonstration that there is no rationale that comports with the regulations, either as a matter of historical fact or as a matter of law.

The EPTN’s reliance on the Schaghticoke proposed finding is misplaced. Far from demonstrating that the State’s and the Towns’ claims have been “put[] to rest,” EPTN Answering Brief, at 52, the Schaghticoke proposed finding supports the contention that the AS-IA’s use of state recognition to make up for evidentiary deficiencies in an application was improper and contrary to the acknowledgment regulations.

III. TO THE EXTENT THAT THE ISSUES RELATING TO THE MISUSE OF STATE RECOGNITION ARE BEYOND THE BOARD’S JURISDICTION, THEY MUST BE REFERRED TO THE SECRETARY.

If the Board concludes that any of the issues concerning state recognition are beyond its jurisdiction under 25 C.F.R. § 83.11(d), those issues must be referred to the Secretary for review pursuant to 25 C.F.R. § 83.11(f)(2). The EPTN strives to avoid the obvious need for the Secretary’s review by speciously suggesting that there would be nothing gained by the referral. EPTN Answering Brief, at 90. As illustrated by the BIA’s inability to articulate a consistent rationale on state recognition, nothing could be further

⁵ The State’s argument that the use of state recognition in the Final Determination is inconsistent with the regulations and prior precedent is discussed at detail in the State’s Request for Reconsideration, at 28-36.

from the truth. As the EPTN concedes, referral to the Secretary is called for when there are issues in need of clarifying. *Id.* The inconsistent and shifting rationale espoused by the BIA on state recognition is precisely the sort of important question – indeed, the recognition of the EPTN turns on it – that ought to be referred to the Secretary if it falls outside of the Board’s jurisdiction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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