UNITED STATES DEPARTMENT OF THE INTERIOR

INTERIOR BOARD OF INDIAN APPEALS

In re FEDERAL ACKNOWLEDGMENT PETITION OF THE EASTERN PEQUOT INDIANS OF CONNECTICUT	**:**	
In re FEDERAL ACKNOWLEDGMENT PETITION OF THE PAUCATUCK EASTERN PEQUOT INDIANS OF CONNECTICUT	**:**	**SEPTEMBER 26, 2002**

REQUEST FOR RECONSIDERATION OF THE STATE OF CONNECTICUT AND THE TOWNS OF NORTH STONINGTON, PRESTON AND LEDYARD ON THE FINAL DETERMINATION OF THE ASSISTANT SECRETARY ON THE PETITIONS FOR TRIBAL ACKNOWLEDGMENT OF THE EASTERN PEQUOT INDIANS OF CONNECTICUT AND THE PAUCATUCK EASTERN PEQUOT INDIANS OF CONNECTICUT

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I. INTRODUCTION

Pursuant to 25 C.F.R. § 83.11, the State of Connecticut ("State") and the Towns of North Stonington, Ledyard and Preston ("Towns") respectfully request that the Interior Board of Indian Appeals reconsider the Final Determination Regarding the Acknowledgment of the Eastern Pequot Indians of Connecticut as a Portion of the Historical Eastern Pequot Tribe ("EP FD") and the Final Determination Regarding the Acknowledgment of the Paucatuck Eastern Pequot Tribe of Connecticut as a Portion of the Historical Eastern Pequot Tribe ("PEP FD") (collectively, the "Final Determination").[1] The Final Determination was issued by the Assistant Secretary – Indian Affairs ("AS-IA") on June 24, 2002 and published in the Federal Register on July 1, 2002. 67 Fed. Reg. 44234. The State and the Towns were interested parties in the underlying acknowledgement proceedings. Submitted with this request for reconsideration are supporting exhibits of documentary and other materials.[2]

The Final Determination represents an unprecedented deviation from the legal standards and procedures that govern the acknowledgment process. The petitioners faced numerous obstacles to obtaining federal recognition. First, the evidence of a continuous distinct community and of political influence and authority – the most fundamental attributes of tribal sovereignty – is weak at best and entirely absent for long periods especially in the

[1] Because the evidence of the two petitioners were combined and in fact the two petitioners were acknowledged as comprising two parts of a single tribe, the EP FD and the PEP FD are in many respects substantively identical. Therefore, for ease of discussion, the EP FD and the PEP FD will be referenced together as the Final Determination. Specific citations will be to the EP FD as referencing both determinations except where necessary to cite to a specific aspect of the PEP FD that is different from the EP FD.

[2] The Towns will also be filing a supplementary brief raising additional issues for reconsideration.

twentieth century. Second, a longstanding division between family lines erupted around 1973 into an outright, hostile schism, in which any pretense of a single community or unified political leadership was destroyed. As the Final Determination grudgingly concedes, the evidence is of two principal family lines – one dominated by the Sebastians and the other by the Gardners – that for most of the last 100 years have not existed as a social community under a unified political leadership. In response to these seemingly fatal obstacles, the AS-IA contrived to find a way to overlook the obvious and substantial evidentiary deficiencies and to ignore the factionalism endemic to the post-1973 period. To do so, he was required to distort the evidence, adopt unsupportable interpretations of the facts, and offer rationalizations for his conclusions that violate the BIA's own acknowledgment regulations and precedents.

To address the first obstacle – the lack of sufficient evidence of continuous community and political authority – the AS-IA attempted to use state recognition as a substitute. The Final Determination blithely disregards the absence of evidence of an Eastern Pequot community (under either petitioner's definition) having cross-family social connections and meaningful political activities and relationships – essential factors under the regulations. Instead, the AS-IA remakes the relationship that the State has had with the Eastern Pequot, asserting that the State's relationship can make up for this serious lack of evidence. Nothing in the acknowledgment regulations even hints at the permissible use of a state relationship to supplement – or as the AS-IA insists on describing it, to give "added weight" to – otherwise insufficient evidence of social community and political authority. Moreover, this novel approach to state recognition requires the AS-IA to twist the actual

nature of the State's relationship.

The AS-IA conjures up an "implicit" recognition by the State of a "distinct political body." The historical record demonstrates, however, that the State has not recognized, implicitly or otherwise, the Eastern Pequot group as a political entity. Historically, the State's relationship with the Eastern Pequot can only be characterized as one involving oversight and the provision of assistance as needed to individuals of Indian descent. This is, for purposes of tribal acknowledgment, a critical distinction. Federal acknowledgment, and the extraordinary attributes of tribal sovereignty that accompany it, require not just that a group can show Indian descent. Instead, federal recognition is predicated on the continuous existence of a political and social community in which tribal, and not merely familial, relationships are maintained. The State's relationship with the Eastern Pequot, on the other hand, has been based solely on Indian descent and has never been dependent on or recognized the existence or continuance of these fundamental attributes.

The crux of the problem in the AS-IA's misuse of state recognition is that evidence of one thing – a relationship between the State and an Indian group based only on Indian descent – is relied on to prove something very different – the continuous existence of a social and political entity. In making this leap, the AS-IA eviscerates the key mandatory requirements for tribal recognition and effectively makes state recognition the equivalent of federal recognition. This is both legally invalid and factually inaccurate.

The second overwhelming obstacle – the extreme and unresolved factionalism of the post-1973 period – is hurdled only through a similarly inappropriate, albeit creative, device. Inexplicably, in the evidence of the hostility and combativeness of this factionalism the AS-

IA somehow discovers a unifying force. Here are two groups that have for decades been unable to internally resolve their differences, with one denying the legitimacy of the other. The conflict has been so extreme that the PEP petitioner had indicated in no uncertain terms, prior to the Final Determination, its refusal to be combined with the EP petitioner.

However, because the two factions are locked in a struggle over the same prize – principally, access to and control over the reservation – the AS-IA concludes that they have "parallel" political processes. In other words, because these two wholly separate political processes have been preoccupied with a bitter conflict, their very antagonistic disunity has somehow transformed them into a single, unified entity. Aside from defying logic, this combining of the opposing factions contravenes the acknowledgment regulations. Why then did the AS-IA rely on such an obvious contrivance? The answer is equally obvious: On their own, neither petitioner could satisfy the acknowledgment criteria. The Final Determination's solution, however, cannot stand.

The irregularities inhering in the Final Determination are not limited to its unsupported and unlawful conclusions. The Final Determination is a product of improper and unfair procedures. As reflected in the reports from separate investigations by the General Accounting Office and the Interior Department's Inspector General, the BIA's process raises numerous concerns. In particular, with regard to these petitions, the State and the Towns were denied their right as interested parties under the regulations to comment on complete proposed findings. Indeed, the proposed findings for these petitions resulted from a process rife with impropriety and bias. Because the proposed findings created the groundwork for both the misuse of state recognition and the improper merger of the two

petitioners that is carried forward in the Final Determination, the entire proceedings on these petitions seriously undermine the validity of the Final Determination.

For these reasons, the State and the Towns request that the Board vacate the Final Determination and require its reconsideration by the AS-IA.

II. BACKGROUND

On June 28, 1978, the BIA received a letter of intent to petition for federal tribal acknowledgment from the Eastern Pequot Indians of Connecticut ("EP petitioner"). After the EP petitioner submitted a documented petition in 1989 and responses to the BIA's obvious deficiency letter in 1995, the BIA placed the EP on active consideration on January 1, 1998.

On June 20, 1989, the BIA received a letter of intent from the Paucatuck Eastern Pequot Indians of Connecticut ("PEP petitioner"). On April 21, 1994, the PEP petitioner filed its documented petition. At the request of the PEP Petitioner, the BIA waived the priority provisions of the regulations on April 21, 1998 so that the two petitions could be considered simultaneously.

On March 31, 2000, then AS-IA Kevin Gover issued Proposed Findings to acknowledge both petitioners. 65 Fed. Reg. 17294, 17299. Several aspects of the Proposed Findings were remarkably unusual: First, in issuing the Proposed Findings, AS-IA Gover overruled the recommendations of the Branch of Acknowledgment and Research ("BAR") that the petitioners should not be acknowledged. Second, the Proposed Findings were issued despite the express finding that the petitions lacked "sufficient information and analysis to determine" whether the petitioners satisfied the mandatory acknowledgment criteria for the

period from 1973 to the present. *Id*. at 17295, 17300. Third, despite serious gaps in evidence of distinct community and political authority, the Proposed Findings concluded that these evidentiary deficiencies could be overlooked and greater weight assigned the limited evidence because of the "longstanding relationship with the state based on being a distinct community." *Id.* at 17294, 17300. These aspects of the Proposed Findings were unprecedented and lacked any basis in the acknowledgment regulations or in prior acknowledgment decisions.

Following the issuance of the Proposed Findings, the State and the Towns of North Stonington, Ledyard and Preston (the "Towns") were compelled to initiate a lawsuit against the Department in federal district court to protect their rights as interested parties in the acknowledgment proceedings. *State of Connecticut ex rel. Richard Blumenthal v. Department of Interior,* No. 3:01CV88(AVC) (D. Conn.). A negotiated schedule was reached among the parties requiring the BIA to provide petition documents and technical assistance to the State and the Towns. The district court entered a scheduling order for the submission of comments on the Proposed Finding and issuance of final determinations.

The State and the Towns filed their comments on the Proposed Findings on August 1, 2001, to which the petitioners submitted reply comments. The EP and PEP petitioners also filed tens of thousands of pages of purportedly new documentary and other evidence, on which the State and the Towns never have had an opportunity to comment.

AS-IA Neal McCaleb issued the Final Determination on June 24, 2002. Astoundingly, the Final Determination was even more radical than the Proposed Findings. Over the express objection of the PEP petitioner, the Final Determination merged the two

petitioners and recognized a single tribe, calling it the "Historical Eastern Pequot Tribe." EP FD, at 13. The AS-IA apparently realized that neither petitioner could be recognized on its own under the acknowledgment criteria. Therefore, despite clear evidence that the two petitioners had hardened into two distinct groups and that the antecedents to the two petitioners had for most of the twentieth century lacked any meaningful social or political connections, the Final Determination concluded that this very same evidence of conflict somehow unified the two petitioners and justified acknowledgment of a single tribe comprising the members of both. *Id.* at 13-14.

Moreover, the Final Determination expanded upon the Proposed Findings' unprecedented approach to and reliance on state recognition. Finding an "implicit" recognition of a distinct political body by the State, the Final Determination ignores the requirements of the mandatory criteria by expressly using state recognition to make up for the lack of sufficient evidence of community and political authority during most of the twentieth century. In doing so, despite his protests to the contrary, the AS-IA improperly made state recognition the functional equivalent of federal recognition. Thus, the Final Determination suffers from numerous defects involving the reliance on nonprobative evidence, unsupported and erroneous analyses of the evidence, and misguided and improper application of the governing legal principles.

III. SUMMARY OF ISSUES

The Final Determination is based on unreliable and nonprobative evidence, dependent on unjustified interpretations and distortions of the evidence, contravened by new evidence not considered, undermined by incomplete and inadequate research and analysis, and violates

the acknowledgment regulations and prior BIA and judicial precedent. The principal issues addressed by this appeal are summarized as follows:

- The Final Determination erroneously concludes that there is an "implicit" recognition of a distinct political body throughout the history of the State's relationship with the Eastern Pequot.
- Based on unreliable evidence and inadequate research, the Final Determination erroneously concludes that the State treated the Eastern Pequot as a distinct political body because its members were supposedly denied state citizenship until 1973, an assumption that is belied by demonstrative evidence to the contrary.
- New evidence reveals that Indians in Connecticut were considered citizens long before 1973.
- The Final Determination ignores critical evidence about the nature of the State relationship and erroneously interprets the evidence concerning the State's relationship as one with a political entity, rather than with individuals of Indian descent in need of assistance.
- The unprecedented use of the State relationship as a substitute for otherwise insufficient evidence contravenes the acknowledgment regulations and BIA and judicial precedent regarding the nature of tribal sovereignty, resulting in the AS-IA's reliance on evidence having little probative value.
- 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.

- 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.
- Throughout its findings on community and political authority, the Final Determination relies on unreliable interview evidence that seriously undermines its validity.
- Faced with a conclusion that the two petitioners could not satisfy the acknowledgment criteria separately, the Final Determination unlawfully contrives to recognize a single tribe that does not exist.
- 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.
- The unprecedented recognition of a single tribe comprised of two petitioners is not permitted under the acknowledgment regulations.
- 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.
- The process was further fatally tainted by serious irregularities and bias demanding that the Final Determination be vacated.
- The unprecedented nature of the Final Determination reflects the lack of

congressional guidance in the delegation of acknowledgment authority to the BIA.

Pursuant to 25 U.S.C. § 83.11(f)(2), to the extent that the IBIA may conclude that this request for reconsideration contains "other grounds" for reconsideration that are not within the scope of § 83.11(d), those issues should be referred to the Secretary for consideration.

IV. STANDARD OF REVIEW

Pursuant to § 83.11 of the Department's regulations, any interested party may file a request for reconsideration of the Assistant Secretary's final determination on a petition for federal tribal acknowledgment with the IBIA within ninety days of publication of the final determination in the Federal Register. 25 C.F.R. § 83.11(a). The Board has jurisdiction to review requests for reconsideration that allege any of the following grounds:

- That there is new evidence that could affect the determination;
- That a substantial portion of the evidence relied on by the Assistant Secretary was unreliable or of little probative value;
- That the petitioner's or the Bureau's research appears inadequate or incomplete in some material aspect; or
- That there are reasonable alternative interpretations, not previously considered, of the evidence that would substantially affect the determination that the petitioner meets one or more of the mandatory acknowledgment criteria.

25 C.F.R. § 83.11(d).

The Board must vacate a final determination if it finds that an interested party has established, by a preponderance of the evidence, one or more of these four grounds. 25

C.F.R. § 83.11(e)(10). In addition, if the interested party has alleged other grounds for reconsideration, the Board is required to refer the request for reconsideration to the Secretary to reconsider the final determination on those grounds. 25 C.F.R. § 83.11(f)(2).

The standards governing acknowledgement petitions are set forth in the Department's regulations at 25 C.F.R. Part 83 and are predicated on longstanding principles relating to tribal status. The acknowledgment regulations are "intended to apply to groups that can establish a ***substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present***." *Id.*, § 83.3(a) (emphasis added). The standards of proof are high to ensure that a petitioner is in fact tribal in character and can demonstrate historic tribal existence. *See* 59 Fed. Reg. 9282 (1994). To begin with, the documented petition must contain "***detailed, specific*** evidence" in support of an acknowledgment request. 25 C.F.R. § 83.6(a) (emphasis added). The petition must also contain "***thorough explanations and supporting documentation*** in response to all of the criteria." *Id.*, § 83.6(c) (emphasis added).

A petition must be denied if the available evidence "demonstrates that it does not meet one or more of the criteria," or if there is "insufficient evidence that it meets one or more of the criteria." *Id.*, § 83.6(d). Although conclusive proof is not required, the available evidence must establish "a reasonable likelihood of the validity of the facts relating to that criterion" for that criterion to be met. *Id.* As the preamble to the regulations states, "the primary question is usually whether the level of evidence is high enough, ***even in the absence of negative evidence***, to demonstrate meeting a criterion." 59 Fed. Reg. 9280 (1994) (emphasis added). In many cases, "evidence is too fragmentary to reach a conclusion

or is absent entirely." *Id.* In addition, "a criterion is not met if the available evidence is too limited to establish it, even if there is no evidence contradicting facts asserted by the petitioner." *Id.*

The standards take into account situations and periods where the evidence is "demonstrably limited or not available." *Id.*, § 83.6(e). The requirements of community and political authority need not be met at every point in time, and fluctuations in tribal activity in various years shall not "in themselves" be cause for denial of acknowledgment. *Id.* Consideration of these limitations "does not mean, however, that a group can be acknowledged where continuous existence cannot be reasonably demonstrated, nor where an extant historical record does not record its presence." 59 Fed. Reg. 9281-82; *see* 25 C.F.R. §§ 83.3(a), 83.6(e).

The maintenance of tribal relations is fundamental to tribal existence. Tribes are entitled to their "semi-independent position when they preserved their tribal relations." *McClanahan v. State Tax Commission of Arizona*, 411 U. S. 164, 173 (1973). This requirement has its source in leading court decisions that constitute the judicial precedents that the regulations codify. *See, e.g., Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 559 (1832) ("The Indian nations had always been considered as ***distinct, independent political communities***" (emphasis added)); *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 16 (1831) (tribe found to be "a distinct political society separated from others"); *United States v. Antelope*, 430 U. S. 641, 647 (1977) (regulation of Indian affairs "is rooted in the unique status of Indians as 'a separate people' with their own political institutions"); *Conners v. United States*, 180 U.S. 271 (1901) (indicating that tribe must be "a separate political entity,

recognized as such."); *see also Miami Nation of Indians of Indiana v. Babbitt*, 255 F.3d 342, 350 (7th Cir. 2001); *Masayesva v. Zah*, 792 F. Supp. 1178, 1181, 1188 (D. Ariz. 1992). In sum, "[t]o warrant special treatment, tribes must survive as distinct communities." *United States v. Washington*, 641 F. 2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U. S. 1143 (1982).

It is therefore absolutely essential to federal tribal recognition that a group establish that it has existed as a distinct community from historical times to the present and that it has maintained political influence and authority over its members during that period. At the core of the notion of tribal sovereignty is the existence of a self-governing community that has maintained community and bilateral political relations on a substantially continuous basis from historical times to the present. The acknowledgment criteria set forth precise standards and the types of evidence necessary for demonstrating these essential elements.

Criterion 83.7(b) requires proof that ***"a predominant portion of the petitioning group 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). Community means ***"any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers."*** *Id.*, § 83.1 (emphasis added).

This standard "effectively requires a showing that substantial social relationships and/or social interaction are maintained widely within the membership, *i.e.*, that members are more than simply a collection of Indian descendants and that the membership is socially distinct from non-Indians." 59 Fed. Reg. 9286. Moreover, "[w]ithout evidence of broad

interaction among not only close and distant relatives but also ***non-related or distantly related*** individuals," a petitioner cannot meet criterion (b). *Muwekma* Prop. Finding, Sum. Crit. 24 (emphasis added). The activities of a relatively small group of closely related individuals will not suffice to demonstrate a distinct community. *Id*. at 24-25; *Miami* Final Determ. Sum. Crit. 5.

Criterion 83.7(c) requires proof that ***"[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present."*** 25 C.F.R. § 83.7(c) (emphasis added). The term "autonomous" means ***"the exercise of political influence or authority independent of the control of any other Indian governing entity."*** *Id*., § 83.1 (emphasis added). The BIA has stated that autonomous also means "self-governing." 56 Fed. Reg. 47320 (1991) (preamble to proposed acknowledgment regulations). The BIA further emphasizes: "This self-governing character of an Indian tribe is basic to the Federal Government's acknowledgment that a group maintains a government-to-government relationship with the United States." *Id.*

As to the nature of tribal political authority, the regulations specifically state:

> *Political influence or authority* means a tribal council, leadership, internal process or other mechanism which the group has used as a means of ***influencing or controlling the behavior of its members in significant respects, and/or making decisions for the group which substantially affect its members, and/or representing the group in dealing with outsiders in matters of consequence.***

25 C.F.R. § 83.1 (emphasis added). The intent of this definition is that "the self-governance reflected in the autonomous nature of a group is more than simply a process for group decision making." 56 Fed. Reg. 47321. Although criterion (c), like criterion (b), need not be met at "every point in time," and fluctuations in tribal activity during various years

will not "in themselves" be cause for denial of acknowledgment, 25 C.F.R. § 83.6(e), "[e]xistence of community and political influence or authority shall be demonstrated on a substantially continuous basis." *Id.*

Although coercive powers exercised by recognized tribes need not be shown, "[i]t is essential that more than a trivial degree of political influence be demonstrated. Petitioners should show that the leaders act in some matters of consequence to members or affect their behavior in more than a minimal way." 59 Fed. Reg. 9288. The regulations take into account the difficulties of unacknowledged groups in maintaining political influence; yet, the fact remains that the definition of political influence or authority "maintains the fundamental requirements of the regulations that political influence must not be so diminished as to be of no consequence or of minimal effect." *Id.*

As the BIA has emphasized:

> It must be shown that there is a political connection between the membership and leaders and thus that the members of a tribe maintain a bilateral political relationship with the tribe. This connection must exist broadly among the membership. If a small body of people carries out legal actions or makes agreements affecting the economic interests of a group, the membership may be significantly affected without political process going on or without even the awareness or consent of those affected.

Miami Final Determ. Sum. Crit. 15, *aff'd Miami Nation of Indians v. United States Dept. of Interior*, 255 F.3d 342 (7th Cir. 2001).

V. THE FINAL DETERMINATION DISTORTS BOTH THE FACTUAL NATURE AND LEGAL SIGNIFICANCE OF STATE RECOGNITION.

Under the guise of fact finding, but in reality an exercise of naked administrative fiat, the AS-IA made state recognition the effective equivalent of federal tribal acknowledgment. Not only does this treatment of Connecticut's relationship with the Eastern Pequot violate the

mandatory criteria and contravene both BIA and judicial precedent, it is built upon a fundamental mischaracterization of the evidence.

In the Final Determination, the AS-IA concedes that state recognition, on its own, "is not evidence sufficient in itself to meet the criteria" and that state recognition "is not a substitute for direct evidence at a given point in time or over a period of time." EP FD, at 14. The AS-IA first attempts to characterize the evidence relating to the State's relationship with the Eastern Pequot as merely "an additional form of evidence to be weighed." *Id.* This is belied, however, by the way in which state recognition was actually used in the Final Determination. Indeed, the AS-IA himself is forced to concede the obvious: that the use of state recognition in the Final Determination "is most important ***during specific periods where the other evidence in the record concerning community or political influence would be insufficient by itself.***" *Id.* (emphasis added). In other words, without the misuse of state recognition, as the AS-IA himself admits, the conclusion would have been that the petitioners failed to satisfy the mandatory criteria.

A. The Final Determination Mischaracterizes The State's Relationship With The Eastern Pequot.

The AS-IA's misuse of state recognition is predicated on an erroneous conception of Connecticut's relationship with the Eastern Pequot. It reflects a fundamental distortion of the evidence and is based on poorly researched conclusions about state citizenship. Indeed, evidence that was not considered by the AS-IA demonstrates that these conclusions about state citizenship are simply incorrect. In sum, the critical finding of an "implicit" recognition of a "distinct political body" lacks any credible basis in the record.

1. The AS-IA Wrongly Interprets The Evidence Relating To The State Relationship As Constituting An "Implicit" Recognition Of A Distinct Political Body.

In the Final Determination, the AS-IA notes that there is no documented or other evidence of an explicit rationale for the Colony's or the State's relationship with the Eastern Pequot. *Id.* at 29, 55. Rather than concluding the obvious -- that there never was a consistent rationale predicated on a governmental relationship with a tribal political group -- the AS-IA manufactures one that serves his purpose. Specifically, the AS-IA inexplicably finds "implicit" in the periodically changing nature of the relationship the State's "recognition of a distinct political body." *Id.* at 29.

The AS-IA's conclusion about state recognition is based on an unusual mode of analysis. He takes the two endpoints of the relationship's history -- the colonial period and the modern period (after 1973) -- during which the State's relationship is arguably the most defined, and connects them as if the character of the intervening two hundred years is irrelevant. *Id.* He purports to identify several elements of the relationship that were consistent throughout history. These include: (a) the continuous existence of a reservation; (b) the appointment of overseers and other government officials to protect and preserve the reservation and group funds for the benefit of members of the group; (c) a supposedly special legal status that applied only to group members and not to individual Indians; and (d) the purported lack of state citizenship for individual members until 1973. *Id*. at 29-30, 77. Although the AS-IA admits that "[t]hrough most of the intervening period from the American Revolution to 1973, the relationship was less explicitly based on the status of tribes as distinct political communities," he nonetheless maintains that throughout the

relationship was "based on a distinct status not shared by non-Indians. . . ." *Id.* at 30. As a review of the reliable and probative evidence, properly interpreted, along with new evidence not considered by the AS-IA, will reveal, this conclusion about the "implicit" basis of the State's relationship with the Eastern Pequot is simply wrong both factually and legally.

2. The Findings Regarding The Citizenship of Indians Are Based On Unreliable Evidence, Ignores More Probative Evidence, And Are Contrary To New Evidence Not Considered In The Final Determination.

A key component to the AS-IA's discovery of an "implicit" recognition of a distinct political body is his erroneous finding that the petitioner's members were not granted citizenship until 1973. *See id.* at 14, 77. Hinging on this finding of non-citizenship is the conclusion that the State treated the Eastern Pequot as a distinct group. In order to make this key finding, the AS-IA had to pick and choose between various pieces of evidence, selecting the least reliable and ignoring the most probative. Moreover, he fails to consider the obvious and most reasonable interpretation of legal enactments. Finally, new evidence not considered by the AS-IA reveals that he was simply incorrect in his assumptions about the citizenship of Indians in Connecticut.

The finding of non-citizenship is built on two assumptions: First, that the Eastern Pequot were not state citizens until the enactment of Public Act 73-660 in 1973, and second, that Public Act 73-660 was intended to grant citizenship rather than simply clarify an existing status. The Final Determination asserts that it is not clear whether the State viewed the extension of federal citizenship to all Indians by Congress in 1924 as extending state citizenship as well. *Id.* at 61. The basis for this statement is two highly unreliable pieces of evidence -- a statement made in a 1939 legislative hearing that the Indians were not ***town***

citizens, and proposed legislation in 1953 that was not enacted. As to the former, a representative of the Parks and Forest Commission, the state agency having oversight responsibilities at the time, stated at a 1939 legislative hearing that Indians "are not citizens of the town; they are state wards." *Id.* at 62 (quoting CT Hearing 1939 re HB No. 347). Obviously, this isolated statement addressed a wholly different question; specifically, whether Indians residing on reservation land were citizens of the town in which the reservation was located and therefore the town were obligated to care for them. It simply did not address whether such Indians were state citizens.[3]

The second piece of evidence used to show lack of state citizenship prior to 1973 is failed legislation proposed in 1953. *Id.* at 62-63. The proposed legislation was aimed at disestablishing the reservations, lifting the legal disabilities on Indians and ending State oversight responsibilities. Conn. Senate Bill 502 (1953) (Ex. 1). The proposed bill did include language extending all citizenship rights to Eastern Pequot members.[4] However, the AS-IA ignores the fact that at the legislative hearing a person representing the "Pequot Tribe" stated that the Pequots "are citizens now and that part about second class citizens does not apply." (Ex. 2). In any event, the legislation did not pass, and it is a bedrock principle that failed legislation is at best a dangerous source of evidence of the law. *E.g., Solid Waste Agency v. Army Corps of Engineers,* 121 S.Ct. 675, 681 (2001); *Conway v. Wilson,* 238 Conn. 653, 679-80 (1996).

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[3] The Final Determination also relied on evidence that in 1941 the State reimbursed the Town of North Stonington for expenses relating to support and care of certain Eastern Pequot members. *Id.* at 62. Again, this only reflects that the State, rather than the town, was responsible for such matters, a fact that no one disputes. It says nothing, however, about the Indians' state citizenship status.

[4] The bill appears to have been based on the Mohegan Act of 1872, which predates the 1924

Standing in stark contrast to this unreliable evidence are clear statements by State officials during the same time period. In 1956, an official from the Division of Welfare, which had taken over responsibilities for Indians from the Park and Forest Commission, declared: "Tribal members on the Reservations have all the rights of American Citizens and when not on the reservations are subject to the same laws as other citizens." EP FD, at 63 (quoting Letter of Barrell to Commissioner of Welfare (12/19/1956). Similarly, at a 1961 legislative hearing, the chairman of the General Assembly's Subcommittee of the Interim Committee on Public Welfare stated: "It should be remembered that Indians in Connecticut have full citizenship privileges and they reside on these reservations only by their own choice."[5] *Id.* (quoting Hearing Tr., at 24 (3/23/1961)). Although the AS-IA noted these clear statements of relevant State officials, he simply ignores their significance and instead relies on the earlier, at best ambiguous, erroneous or irrelevant statements. *Id.*

It is against this erroneous backdrop of State law that the AS-IA views the 1973 legislation and leaps to the assumption that it was only in that legislation that Indians were granted state citizenship. Public Act 660, enacted in 1973, provided that: "It is hereby declared the policy of the state of Connecticut to recognize that all resident Indians of qualified Connecticut tribes are considered to be full citizens of the state and they are hereby

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extension of citizenship.

[5] These statements are consistent with case law on state citizenship of Indians. As the Supreme Court has made clear, "a citizen of the United States, residing in any state of the union, is a citizen of that state." *Boyd v. Nebraska*, 143 U.S. 135, 161 (1892). Thus, as all Indians were granted Federal citizenship by Congress under the Citizenship Act of 1924, 8 U.S.C. § 1401, they were therefore citizens of the state in which they reside at least since that time. As several courts have held, Indians are citizens of the state in which they live, whether residing on a reservation or not. *White Eagle v. Dorgan*, 209 N.W.2d 621, 623 (N.D. 1973); *Wisconsin Potowatomies of Hannhaville Indian Community v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973).

granted all the rights and privileges afforded by the law, that all of Connecticut's citizens enjoy." Conn. Public Act No. 73-660, § 1 (Ex. 3). Interestingly, the AS-IA ignores a critical component of the legislative history. In response to a question about the citizenship status of Indians by Representative Pugliese at a legislative hearing, Deputy Welfare Commissioner Boyle replied: "I couldn't speak with intelligence to your answer (sic), I can only speak to our relationship as far as the Indians on the reservation are considered." Conn. Jt. Standing Committee Hearings, at 441 (1973) (Ex. 4); *see also id.* at 457 (statement of Sen. Smith). No other legislative investigation on the question is reflected in the legislative history. At best, then, Public Act 660 was based on a complete lack of familiarity with the citizenship status of Indians.

When properly viewed in light of the more probative evidence of prior pronouncements of relevant State officials, Public Act 73-660's declaration of citizenship was a ***clarification*** of the existing status of the law, not a change in the citizenship of Indians. The unequivocal evidence, the significance of which is simply ignored by the AS-IA, is that State officials, and Indians themselves, viewed Indians as state citizens long before the 1973 legislation. Given that evidence, and the legislature's apparent ignorance of those views when Public Act 73-660 was enacted, the AS-IA's critical conclusion that the petitioners' members were not citizens until 1973 and therefore were treated as a distinct political body is seriously undermined.

In an effort to bolster his weakly supported findings regarding citizenship, the AS-IA asserts, on the basis of isolated and misinterpreted evidence, that Eastern Pequot members were denied voting rights. EP FD, at 62, 78. The only evidence cited by the AS-IA of the

supposed denial of the right to vote is a single report by a State official stating that an Eastern Pequot member was not a voter, but that her husband, a non-Indian, was a voter. *Id.* at 62. From this exceptionally thin reed, the AS-IA concludes that the State treated the Eastern Pequot as non-citizens. This report does not establish, or even necessarily imply, that the member was ***denied*** the right to vote as a non-citizens, rather than the equally plausible inference that she simply was not registered.

More importantly, the AS-IA's interpretation is categorically negated by the substantial evidence in the public historic records, not considered or explored in the Final Determination, that Eastern Pequot members exercised the right to vote well before 1973, reflecting their citizenship status.[6] For example, the Connecticut Secretary of State, who serves as the Commissioner of Elections, stated unequivocally in 1966 that "Indians in Connecticut possess the voting privileges shared by all other citizens." Letter of Ella T. Grasso, Secretary of State dated Jan. 27, 1966 (Ex. 5). Furthermore, the Secretary of State instructed that Indians residing on a reservation were entitled to admission as an elector in the town in which the reservation is located. *Id.* Similarly, instructions concerning voter eligibility regularly published by the Secretary of State in the 1950s and 1960s contained no limitation on Indian voting rights. (Ex. 6); *see also* Affidavit of Mary Young (confirming position of Secretary of State that Indians were eligible to vote) (Ex. 7).

In fact, there is new evidence that Eastern Pequot members did in fact exercise the right to vote throughout the twentieth century.[7] A review of the voter registration rolls of the

[6] The question of voting rights was not addressed at all in the proposed findings, giving the State no notice that this would be an issue of concern for the final determination.

[7] Perhaps if BAR staff had been permitted to undertake independent research, this glaring error would have not been made. However, under an improperly promulgated "directive,"

Town of North Stonington and other area municipalities reveals that numerous Eastern Pequot members were admitted as electors. The following Eastern Pequot members, including several prominent members from both the Sebastian and Gardner family lines, have been identified to date as having been admitted as an elector in the Town of North Stonington (unless otherwise indicated):

Molbro [Marlboro] Gardner, admitted 3/27/1875
Atwood Isaac Williams, admitted 9/24/1904
Hazel E. Geer, admitted 9/17/1927
Byron A. Edwards, admitted 9/21/1935
Calvin V. Geer, admitted 9/17/1938
Angeline W. Geer, admitted 9/16/1939
Ruth Geer, admitted 9/21/1940
Raymond L. Geer, admitted 9/16/1950
Richard Albert Geer, admitted 9/9/1961
Helen E. LeGault, admitted 9/9/1967
Fred E. Sebastian, admitted 9/24/1904
Jessie Sebastian, admitted 9/24/1904
Eleanor Manson, admitted 10/18/1940 (City of New London)
Lillian A. Sebastian, admitted 10/16/1948 (Town of Groton)
Howard L. Sebastian, admitted 10/14/1950 (Town of Groton)
Calvin E. Sebastian, admitted 10/14/1950 (Town of Groton)
Margaret Wilson, admitted 10/18/1952 (Town of Groton)
Roy E. Sebastian, admitted 10/18/1952 (City of New London)
William O. Sebastian, admitted 3/11/1964 (City of New London)
Donald E. Sebastian, admitted 9/8/1964 (Town of Groton)
Louis Johnathon Sebastian, admitted 9/27/1972
John Louis Sebastian, admitted 10/6/1972

Voter Registration Records of Town of North Stonington, Town of Groton and City of New London (Ex. 8).[8] Because the AS-IA based his conclusion about the state's relationship with

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AS-IA Gover prohibited BAR staff from conducting independent research as contemplated by the acknowledgement regulations. 65 Fed. Reg. 7052 (Feb. 11, 200).

[8] This does not purport to be an exhaustive list. Towns are not required to maintain voter records by name or address beyond five years after the voter's name is removed from the registry list. Affidavit of Mary S. Young, ¶ 6 (Ex. 7). Thereafter, a town may retain only a "day book" containing a chronological list of voters by date of admission, making identification of specific individuals quite difficult. Nevertheless, it is obvious that numerous

the Eastern Pequot largely on this erroneous view of Indian citizenship in Connecticut, this new evidence substantially refutes the AS-IA's underlying findings and warrants the vacation of the Final Determination.

3. At No Time Was The State's Relationship Based On An Implicit Recognition Of A Distinct Political Body.

The Final Determination concludes that the State's appointment of overseers and later state agencies with oversight responsibilities combined with the continuous existence of a reservation indicate that the State dealt with the Eastern Pequot as a political entity rather than with individual Indians. The historical record in fact demonstrates the contrary.

As even the Final Determination recognizes, the reports of the overseers for the Eastern Pequot in the nineteenth century lack the "extended discussions" of tribal status issues that are typically found in the nineteenth century reports of the Federal Office of Indian Affairs. EP FD, at 55. This is not merely an interesting observation. Such questions were of little matter to the State overseers. As is reflected throughout the overseer reports, the principal concern for the overseers was to provide necessary support to a relatively few individual members residing on the reservation lands. *E.g., id.* at 144 & n.73, 190 & n.103 PEP FD, at 98 n.71, 126 n.103; Ex. 9. In direct contradiction of the AS-IA's conclusion, historical records demonstrate that benefits were provided to individuals directly, rather than to the group for tribal authorities to distribute. Indeed, there is ***no*** evidence whatsoever that the overseers dealt with the group collectively in any meaningful sense. The same is true of the twentieth century state agencies that replaced the individual overseers. The records of both the Park and Forest Commission and the Welfare Department reveal detailed accounts

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Eastern Pequot members were registered voters.

of expenditures to individuals on the basis of individual needs. Ex. 10 (Park & Forest Comm'n Reports); Ex. 11 (Welfare Dept. Reports).

In addition, the AS-IA erroneously assumes that the tax-exempt status of the Eastern Pequot reservation and the anti-alienation provisions of state law somehow afford the group special status as a distinct political entity. EP FD, at 30, 55-56, 78. This interpretation of the evidence is hardly an appropriate one. Although, as the Final Determination notes, the precise characterization of legal title to the reservation has varied at times, it is nonetheless clear that the State held title to the reservation for the benefit of the Eastern Pequot. *Id.* at 30, 74-75. Given that the reservation was a form of state-owned land, it is hardly remarkable that such land would be exempt from taxation. *See* Conn. Gen. Stat. § 12-81(2) (exempting state property from taxation).[9] Moreover, this is not, as the AS-IA attempts to characterize it, "a distinct status not shared by non-Indians." EP FD, at 29. The State grants tax exemptions to a wide variety of groups and individuals, including charitable, religious, educational, veteran and other organizations. *E.g.,* Conn. Gen. Stat. §§ 12-81(7), (12) through (21) (Ex. 17). The quite ordinary act of granting tax exemptions hardly constitutes recognition of such groups as "distinct political entities."

In sum, the significance of the oversight and land base components of the AS-IA's finding of an "implicit" recognition of a political entity are grossly misinterpreted. Indeed,

[9] For a brief period in the nineteenth century, the legislature had enacted a specific tax exemption for property and funds held for Indian tribes. Conn. Gen. Stat., tit. XXXIII, § 12 (1866) (Ex. 12). Because such property or funds were held by the State through the overseer, it is consistent with rationale exempting State-owned property. The language of the 1866 exemption was not subsequently reenacted. *See* Conn. Gen. Stat., tit. IV (1887 Rev.) (Ex. 13); Conn. Gen. Stat. ch. 242 (1902 Rev.) (Ex. 14); Conn. Gen. Stat. ch. 276 (1918 Rev.) (Ex. 15); Conn. Gen. Stat. ch. 272 (1930 Rev.) (Ex. 16).

the historical evidence demonstrates the absence of such an "implicit" designation.

4. The Reliable Evidence Demonstrates That State Recognition Was Based On Descent, Not On A Relationship With A Distinct Political Body.

The Final Determination depends significantly on its description of the State's relationship with the Eastern Pequot as affording it a status as a distinct group treated differently from individual, "non-tribal" Indians. EP FD, at 29. In other words, the Final Determination views State recognition as predicated not on Indian descent, but rather on the existence and capacities of a group of Indians constituting a unique political community. This conclusion is little more than wishful thinking. The evidence, however, is to the contrary.

The AS-IA notes the paucity of legal documentation regarding the rationale and nature of state recognition. *Id.* at 55. Ironically, he all but ignores the documentation that does exist but runs counter to his intended result. For example, the Final Determination quotes, but does not address in any fashion, an opinion of the Attorney General's Office issued in 1939. *Id.* at 70. The opinion, which addressed a question from the State Board of Fisheries and Game regarding the applicability of hunting and fishing licenses to Indians, goes right to the heart of the issue of the State's relationship with Indians:

> Whatever status of the Indian tribes may have been in the early days of this commonwealth by virtue of treaties or laws, it is apparent that ***we do not have at the present time any Indian tribal organizations.*** Their political and civil rights can be enforced only in the courts of this State, and they are completely subject to the laws of this State ***as any of the other inhabitants thereof.***

Id. (emphasis added). There is no basis in the evidence for rejecting this opinion as highly probative of the nature of the State relationship with Indians, at least for that period of time.

Similarly, the Final Determination does not even pretend to consider the significance of a 1955 Attorney General's opinion that stated the Connecticut Indians "had wholly lost their political organization and their political existence." (Ex. 18)

In his effort to discern the "implicit" basis of state recognition, the AS-IA made no effort to identify or evaluate the actual rules followed by State officials in fulfilling their oversight and welfare responsibilities. Prior to 1973, the statutory requirement for tribal membership was expressly based only on descent. The ***only*** requirement for reservation access and, for purposes of the State relationship, group membership was satisfying a one-eighth blood quantum. Conn. Pub. Act No. 61-304 (1961) (Ex. 19); *see also* Affidavit of Edward A. Danielczuk (Ex. 20).[10] As notes from the BIA's own research files aptly indicate, "[c]ertainly there is no evidence for political or community (sic) -- [the State] went entirely by descendancy. Connecticut paid no attention to anyone who didn't apply for reservation residency, and evaluated that simply on the basis of being able to show descent and 1/8 blood. . . ." (Ex. 21).

The AS-IA's "implicit" recognition of a distinct political body has no basis in the historical record. In carrying out its oversight role, the State did not treat the Eastern Pequot as a political community. It did not maintain or evaluate tribal membership in any way that

[10] The Danielczuk Affidavit was quoted in the Final Determination but was casually brushed aside by the AS-IA as "retrospective." EP FD, at 158-59. Edward Danielczuk was an official in the Welfare Department in the 1960s and 1970s having supervisory responsibility for the oversight of the four state reservations. He testified that the only requirement for the receipt of benefits or access to the reservation was satisfaction of the one-eighth blood requirement through genealogical evidence. Political or community ties were not relevant. Danielczuk Affidavit (Ex. 20). The AS-IA's curt dismissal of his testimony as "retrospective" is hardly justified, given the extensive reliance of the Final Determination on unsworn oral interview evidence regarding events and activities that occurred many decades ago, all equally "retrospective." *E.g.*, EP FD, at 81, 100-01, 103, 108-09.

connotes a relationship with a distinct political entity. Whether a person maintained any form of tribal relations with other group members was not a matter that was relevant to the State relationship or the purpose underlying its oversight responsibilities, which was to provide benefits to individual Indians in need. Reservation access or other benefits were available to any Indian satisfying the descent requirement. There simply is no reasonable interpretation that concludes that the basis for State recognition was anything other than descent established on an individualized basis.

B. The Final Determination Misapplies State Recognition In Evaluating the Mandatory Criteria.

The AS-IA begins by describing the use of state recognition as merely an "additional" form of evidence to be considered. It cannot be used, he concedes, as a substitute for appropriate evidence of community or political authority. Nor can it on its own satisfy the criteria for federal recognition, he admits. EP FD, at 14, 78. Unable to cite to any provision in the acknowledgment regulations for its use, the AS-IA nonetheless took the unprecedented step not only misinterpreting the nature of state recognition, but of using it to make up for the inadequacy of the petitioners' evidence. *Id.*

In the same breath that the AS-IA states that the "additional" evidence of state recognition is not a substitute for other evidence, he emphasizes that this "additional" evidence "***is most important during the specific periods where the other evidence in the record concerning community and political influence would be insufficient by itself***." *Id.* at 78 (emphasis added). This is a startling admission. After all, what is it about state recognition during those "specific periods" where the evidence is otherwise insufficient that makes it "most important?"

The Final Determination does not, indeed cannot, answer that critical question without exposing what is really at play. The simple reality is that the "additional" evidence of state recognition is "most important" during those periods of otherwise insufficient evidence because the AS-IA is indeed using state recognition as a substitute for the lack of evidence. In this way, there is no limiting principle to the use of state recognition to make up for periods of insufficient evidence of community and political authority. Taken to its logical conclusion, the Final Determination's approach to state recognition effectively equates federal recognition with state recognition. This would stand federal recognition on its head. If state recognition can give greater weight to otherwise insufficient evidence for one or another period of a group's history, what would prevent its use to give greater weight to insufficient evidence in all periods? Thus, the logical fallacy of the Final Determination's analysis – and its violation of the regulatory criteria – is exposed.

1. The Acknowledgment Regulations Do Not Permit State Recognition To Be Used To Give Greater Weight To Other Evidence.

Under the acknowledgment regulations, a state's relationship with a group of Indians living on a reservation is not evidence that the group acted as, or that the state treated the group as having, a distinct social community with political autonomy. Rather, evidence of relationships with state government is relevant evidence under the regulations ***only*** with regard to criteria (a), identification as an Indian entity. Such evidence is notably, and intentionally, absent from the list of relevant evidence of any of the other criteria. It therefore cannot be used either as a substitute for evidence of community or political authority under criteria (b) and (c), and cannot be used, as the AS-IA has done here, to give

"greater weight" or fill in the gaps for otherwise insufficient evidence.

Without supporting authority, the AS-IA asserts that, because the evidence identified as relevant for each criterion is not intended to be exclusive, *see* 25 C.F.R. § 83.6(g), he is free to manufacture new factors – in this case, using state recognition as "additional" evidence under criteria (b) and (c). EP FD, at 76. Although the regulations do not provide an exclusive enumeration of relevant evidence, they do not permit evidence of unlimited scope. Rather, other evidence for criteria (b) and (c) must demonstrate a distinct community or political influence and authority, respectively, in a similar way that the enumerated evidence would. That is, the other evidence must show in a direct fashion that group members had significant and sustained social contacts and that group leaders and members maintained meaningful bilateral political relationships. *Id.,* §§ 83.7(b)(1), 83.7(c)(1). The purpose, after all, of enumerating certain kinds of relevant evidence was to "clarify the kinds of evidence needed to demonstrate the criteria at § 83.7(b) and (c)." 59 Fed. Reg. 9286, 9288 (1944). There is nothing intrinsic to the state relationship, even a "continuous" state relationship, that reveals the sort of activities and relationships necessary to show that the petitioner maintained tribal community and bilateral political relations.

The BIA's rejection of state recognition as a factor when the original regulations were adopted demonstrates that state recognition is a particularly inappropriate form of evidence for satisfying criteria (b) and (c). When the BIA was first considering adopting acknowledgment regulations in 1977, it proposed to include evidence of treatment "by a State or by a Federal Government Agency as having collective rights in land, water, funds or other assets" and of "services from any Federal or state agency." 42 Fed. Reg. 30647, 30648

(1977) (proposed regulations §§ 54.7(c), 54.8(b), (c)). These provisions were rejected. The BIA's explanation for declining to adopt such provisions is telling. It emphasized that it "must be assured of the tribal character of the petitioner" and that acknowledgment be based on the maintenance of tribal political relations, and not merely Indian ancestry. 43 Fed. Reg. 39361-62 (1978). As demonstrated above, state recognition in Connecticut does not provide that assurance.

The AS-IA attempts to deflect this obvious deficiency in his analysis. The Final Determination states:

> It is true that giving state recognition greater weight was considered and rejected in the early process of formulation of the original, 1978 regulations. However, this rejection rested in part of (sic) the great diversity in character of state recognition, particularly the then-recent phenomenon of new state recognitions made on an uncertain basis.

EP FD, at 76. This attempt to distinguish the rejection of state recognition in the regulations other than with regard to criterion (a) is unconvincing. In fact, it actually supports the conclusion that Connecticut's relationship, based solely on descent, cannot provide a basis for satisfying criteria (b) and (c). First and most obviously, the BIA did not adopt the rule that the AS-IA purports to follow in this Final Determination: That state recognition is evidence for criteria (b) and (c) if it is continuous rather than merely recent. Instead, the regulations expressly identify state recognition as relevant evidence only to criterion (a). As the Final Determination itself emphasizes, the State's recognition of the Eastern Pequot has historically had an uncertain basis. *See* EP FD, at 55.

Moreover, there is no "carry-over" provision between criterion (a) and criteria (b) and (c). Both criterion (b) and (c) provide that strong evidence of one will be evidence of the

other. *See* 25 C.F.R. §§ 83.7(b)(1)(ix); 83.7(b)(2)(v); 83.7(c)(1)(v); 83/7(c)(3). Nowhere in the regulations is there the suggestion that proof under criterion (a) – identification as an American Indian entity – is proof of community or political authority under (b) or (c). If that had been the intent of the regulations, a similar "carry over" provision for criterion (a) would be been part of the regulatory framework. *See Muwekma* FD, at 45-46.

Similarly, the AS-IA ignores the BIA's own official guidelines. The BIA's acknowledgment guidelines expressly and unconditionally state:

> Some Indian groups have been recognized as tribes by their state governments since colonial times, while others have only been recognized recently. A few of those recognized for a long time have had state or occasionally county lands set aside for them as reserves. . . . ***State recognition is not necessary for Federal acknowledgment, and gaining state recognition has no effect on the Federal recognition process. A long standing relationship (not one recently established), with a state government, based on identification of the group as Indian is one form of evidence that may be used to satisfy criterion "83.7(a)" of the regulations. . . .***

BAR Guidelines (emphasis added) (Ex. 22). The Final Determination brushes this unequivocal language aside, asserting that "[t]his advice was meant to address the idea on the part of some petitioners that any kind of state recognition was in effect an initial step towards Federal recognition." EP FS, at 76. That is not what the guidelines say. Instead, they make a quite simple declarative statement that state recognition has no bearing on Federal recognition, except that long standing state relations is evidence under criterion (a) of identification as an Indian entity.

Further support for precluding the use of state recognition as giving greater weight to otherwise insufficient evidence is found elsewhere in the acknowledgment regulations. Specifically, the regulations reduce the burden of proof only when there was prior ***federal*** recognition of a tribe, not state recognition. 25 C.F.R. § 83.8. The rationale for permitting

the criteria to be satisfied in part by prior federal recognition is obvious. If the purpose of the acknowledgment criteria is to demonstrate the existence of a tribal political entity capable of government-to-government relations with the federal government, a prior relationship with the federal government is plainly sufficient evidence at least for the period in which that relationship continued. The same simply cannot be said of state recognition.

If the BIA intended that state recognition should or could have the same evidentiary role, the regulations would have expressly provided for such treatment. Instead, that approach was rejected, and the regulations limit the relevance of state recognition to criterion (a). The regulations' failure to provide for a similar treatment of state and prior federal recognition and its limitation of the relevance of state recognition to criterion (a) must be taken as demonstrating that state recognition is not to be given special weight as to the other criteria or as a surrogate for satisfying the other criteria. *See Hohn v. United States*, 524 U.S. 236, 258 (1998) (basic interpretive rule directs that the use of language in one section that is omitted in another shows intent to exclude in the latter).

2. The Use Of State Recognition Is Contrary To Both BIA And Judicial Precedent.

The Final Determination is unprecedented in its use of state recognition as "additional" evidence for criteria (b) and (c). Indeed, prior acknowledgment decisions only considered state recognition in the context of criterion (a). *E.g.*, *Wampanoag* FD, at 4; *Mohegan* FD, at 172. Of particular relevance are the BIA's decisions involving other Connecticut petitioners. For example, in *Mohegan*, the BIA rejected the use of state recognition to bolster federal acknowledgment:

[A]lthough the [Mohegan petitioner] argues that the recognition of the Mohegan as an

> Indian tribe by the State of Connecticut since the 1970's should be dispositive in favor of Federal recognition . . ., this is not the case. ***State recognition is one form of evidence that a group meets criterion a, but is not grounds for automatically considering a group to be entitled to Federal recognition.***

Mohegan FD, at 172 (emphasis added). State recognition of the Mohegan tribe was not used in any form with regard to criteria (b) and (c). *See id.* at 11, 19. Similarly, in *Golden Hill Paugussett*, the BIA stated unequivocally that the acknowledgment regulations "consider state recognition under criterion 83.7(a), but do not treat it as dispositive in Federal acknowledgment cases." *Golden Hill Paugussett* FD, at 97 (reconsidered on other grounds, May 24, 1999).

The AS-IA contends that these precedents "are not applicable, since it is both the State's actions and the continuity throughout history that provided the rationale for giving the greater weight to the evidence in the proposed finding." EP FD, at 76. The distinction on which the AS-IA rests this approach to state recognition is its historical continuity for the Eastern Pequot, a factor that was absent in both *Mohegan* and *Golden Hill Paugussett*. However, in neither of those decisions, nor in the regulations, is continuity, or the lack thereof, identified as a consideration for using state recognition in connection with any of the criteria other than (a). Its use here is entirely novel and is inconsistent with the heretofore accepted understanding of the relevance of state recognition.[11]

[11] The Final Determination correctly abandons the suggestion made in the Proposed Findings that *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), is precedent for using state recognition as affording greater weight to other evidence under criteria (b) and (c). EP FD, at 54. This concession reflects the lack of judicial precedent for its novel approach. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 839 F. Supp. 130, 133 (D. Conn. 1993), *rev'd on other grounds*, 39 F.3d 51 (2d Cir. 1994); *United States v. 43.47 Acres of Land*, 855 F. Supp. 549, 551-52 (D. Conn. 1994); *Miami Tribe of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1166 (N.D. Ind. 1995), *aff'd*, 255 F.3d 342 (7th Cir. 2001).

As the Supreme Court recognized long ago, there is a fundamental distinction between tribes in relation with the federal government and remnant groups in relations with the states. The latter, having lost their power of self-government, were placed under the control and protection of state law. *Elk v. Wilkins*, 108 U.S. 94, 107-08 (1884). (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580 (1832) (specifically referencing Connecticut as one of the states having jurisdiction over remnants of Indian tribes)); *see also Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480, 483-84, 487, 502 (1st Cir. 1987); *Report of Secretary of War on Indian Affairs* (1822) (Ex. 23); *Report of Secretary of War*, S. Doc. No. 21 (1825) (Ex. 24); *Historical and Statistical Information Respecting the History, Condition and Prospects of Indian Tribes of the United States* (1851) (Ex. 25); J. Blunt, *A Historical Sketch of the Formation of the Confederacy, Particularly with Reference to the Provincial Limits and the Jurisdiction of the General Government Over Indian Tribes and the Public Territory* 93, 103 (1825) (Ex. 26).

In other words, longstanding judicial precedent demonstrates that state recognition in states such as Connecticut stands for just the opposite proposition than that for which the Final Determination uses it: A group placed under state jurisdiction lacked the tribal relations and political autonomy necessary to federal acknowledgment. Thus, rather than being a basis for affording greater weight to otherwise insufficient evidence under criteria (b) and (c), the fact that a petitioner historically has been under state jurisdiction should require ***stronger*** evidence of community and political authority.

The Final Determination, of course, turns state recognition of the Eastern Pequot on its head. Instead of requiring direct and definitive evidence of community and bilateral

political relations that are the essence of federal tribal acknowledgment, the Final Determination excuses the petitioners' insufficient showing because of state recognition. There is neither a proper factual nor legal basis for this.

In sum, the State's relationship with the Eastern Pequot cannot and does not provide the evidentiary or legal support for satisfying criteria (b) and (c). The Final Determination wrongly implies continuous recognition of a distinct political body. The evidence, including new evidence that the AS-IA did not consider, demonstrates that the State relationship involved oversight and the provision of assistance to persons of Indian descent. Moreover, the acknowledgment regulations simply do not permit the use of the State's relationship to make up for concededly otherwise insufficient evidence of community and political authority. In light of the multiplicity of errors, both factual and legal concerning state recognition and the centrality of the misuse of the State relationship in the Final Determination, the Board must vacate and remand the Final Determination.

VI. THE FINAL DETERMINATION IMPROPERLY USES STATE RECOGNITION TO MASK SERIOUS DEFICIENCIES IN THE EVIDENCE OF COMMUNITY AND POLITICAL AUTHORITY.

A closer examination of the Final Determination, looking beyond its summary conclusions at the more detailed findings on community and political authority, reveals a strange disconnect. Repeatedly, the detailed findings under the criteria conclude that key evidence is lacking or deficient. Yet, somehow the conclusions are reached that the criteria are satisfied. It is impossible to tell how the AS-IA applied the "additional weight" of state recognition. Specifically, it is unclear whether the analysis of specific evidence was altered because of the AS-IA's notion that state recognition allows for greater weight to the

evidence. This latent ambiguity itself calls out for a remand for further clarification of the Final Determination. Nonetheless, a review of the findings for the critical periods in which the evidence is otherwise deficient, coupled with the AS-IA's own admission that his use of state recognition is most important for those periods of otherwise insufficient evidence, shows that, stripped of the false overlay of state recognition, the Final Determination grossly misstates the record and relies on fundamentally unreliable evidence to grant recognition.

A. The Evidence of Community For Most Of The Twentieth Century Reveals A Profound Lack Of Social Connections Between The Two Principal Family Lines.

The Final Determination concludes that much of the evidence submitted by the petitioners to demonstrate community had "significant deficiencies." EP FD, at 136. Curiously, the Final Determination dismissed these evidentiary weaknesses by stating that "deficiencies in the presentation of data do not necessarily lead to the conclusion that the petitioner does not meet criterion 83.7(b). Under the [acknowledgment] regulations, the task is to evaluate the nature of the petitioner, not the quality of the petition." *Id.* This opaque statement only raises new questions. After all, how does one evaluate the nature of a petitioner except on the basis of the quality of the evidence presented by the petitioner. The statement is but a weak attempt to cover the lack of reliability of the evidence and demonstrates that, without the improper "greater weight" given this otherwise insufficient evidence because of state recognition, acknowledgment would have been denied.

The Final Determination finds that the petitioners' effort to demonstrate community by indirect means -- for example, by showing geographic concentration of members or

enclaves[12] -- is some evidence, but is far from sufficient. *Id.* at 99, 115-16, 136. Accordingly, the petitioners must demonstrate community through more direct evidence of actual social activities. However, an analysis of the key purported community activities reveals that throughout the twentieth century the antecedents of the two petitioners were not part of a distinct social community within the meaning of the acknowledgment regulations. The limited evidence that purports to show otherwise is simply not probative.

The petitioners have offered evidence of a variety of gatherings. The AS-IA asserts that these gatherings and visiting patterns show social ties between the Sebastian family line and other family lines, the Jacksons and Fagan/Randalls. *Id.* at 17. Notably absent are social ties with the other principal family line, the Gardners.

The Fourth Sunday meetings, which took place in the 1920s to the 1940s, were "big social event[s]," primarily of a religious nature. *Id.* at 104. They were largely a Sebastian family activity, although others including Randalls and to a very limited extent Jacksons as well as some non-Eastern Pequot participated at times. Attendance was relatively small, numbering usually ten to twenty. Gardners did not attend. *Id.* at 17, 104-06.

Contemporaneous with the Fourth Sunday meetings were the so-called High Street meetings. These meetings are undocumented and were predominantly, if not exclusively Sebastian family gatherings of a religious nature. *Id.* at 106-07. Similarly, gatherings at Catherine Harris's place on the reservation during the middle of the century were limited Sebastian family gatherings and simply do not show community activity. *Id.* at 107-08.

The Alden Wilson picnics and gatherings of the 1940s to 1960s were also principally

[12] The Final Determination concludes that the geographic patterns "do not themselves show [social] interaction." EP FD, at 99; *see Snoqualamie* PF, at 14.

Sebastian family activities, although members of the Fagins/Randall line may have attended. *Id.* at 18. The Final Determination describes the evidence about the Alden Wilson gatherings as "imprecise" and based largely on interview evidence that is "limited and not very detailed." *Id.* at 109. These gatherings were purely social events with no political activity. *Id.* at 110. Again, no Gardners participated.

Meanwhile, the Gardner line had its own social activities. Atwood I. Williams, Sr. hosted gatherings, but these were limited family affairs and not anything approaching a tribal community or political activity. PEP FD, at 18, 106. The same can be said of gatherings held by Helen LeGault. *Id.* at 18, 107-08.

The Final Determination acknowledges that particular events did not "necessarily bridge the family line widely. . . ." EP FD, at 111. It strives to find that bridge in so-called "visiting patterns." *Id.* However, the evidence for these visiting patterns that purportedly tied the Sebastian family with others is largely unreliable interview summaries rather than interview transcripts so that actual questions and answers, and not merely the interviewer's restatement, can be evaluated. *See* EP 8/2/01 Comments (Burgess Reports IB, IIID) (cited at EP FD, at 111). Most of this evidence involved visiting patterns prior to 1960, after which the Final Determination describes the interview data as "much sparser." EP FD, at 111. Moreover, the interview data "never mentions any members of the Gardner/Edwards line." *Id.* at 123.

A stark picture is formed of the events that purport to be the main community activities even prior to 1973. There simply were not significant social ties between the two most important family lines. EP FD, at 118-24, 136; PEP FD, at 116. The lack of cross-

family ties that embrace these two principal families demonstrates conclusively that the AS-IA's efforts to craft a single tribe out of the two petitioners is simply wrong.

The Final Determination vainly tries to connect the two disconnected family lines by showing that the Jackson line served as the community link. PEP FD, at 109. The link simply cannot bear the tremendous weight that it must to serve the Final Determination's purpose. There is no evidence that the Jacksons served the social function that the Final Determination assumes they did. All that the evidence shows, and in fact all that the Final Determination finds, is that some Jackson members had contacts with both the Sebastians and the Gardners. Indeed, the AS-IA found that some Jackson family members denied the legitimacy of both the Sebastian and Gardner family antecedents. *Id.* at 96. What is critically missing is evidence that those contacts served some community function to create broader ties encompassing the Sebastians and Gardners. This evidentiary lacuna speaks volumes. Indeed, the continuity of the lack of Sebastian and Gardner community ties is indicative that the Jackson contacts did not serve a broader community purpose. The effort to base a community on the Jackson contacts is unconvincing to say the least and is supported by no reliable or probative evidence that the Jacksons served a broader community function.

B. Without The Improper Additional Weight Given To The Evidence Of Political Activity On The Basis Of State Recognition, Criterion (c) Cannot Be Satisfied.

A careful review of the Final Determination's findings reveals a profound lack of real political influence and authority extending to the Sebastians and Gardners, the antecedents of the EP and PEP petitioners respectively. As with criterion (b), the Final Determination, both

explicitly and implicitly, misuses state recognition to overcome significant gaps in the evidence under criterion (c).

The Final Determination identifies Calvin Williams, a reservation resident, as having performed a political and informal leadership role in the period from the 1880s until his death in 1913. EP FD, at 145. The evidence of his political activity is minimal, at best, and the exercise of political influence over the membership is based on inference. There is little, if any, evidence that the membership in fact viewed him as a leader and that any tribal political activity took place. The Final Determination cites two letters from the early twentieth century that purport to show that Calvin Williams "played a political role."[13] The letters, from 1905 and 1911, involved correspondence about or with the State overseer. *Id.* However, these two isolated examples say almost nothing about the extent to which Calvin Williams was anything more than a self-appointed leader or that the broader membership knew or cared about his activities. *See* BIA Guidelines, at 49. The only other evidence offered for his leadership role were his "position in the kinship networks" and that he "was a man of means. . . ." EP FD, at 145. Although these qualities might make it possible for someone to assume a leadership position, it hardly constitutes probative evidence that leadership was in fact exercised.

The most obvious and telling example of the absence of political activity is the gap in leadership between the death of Calvin Williams in 1913 and the appearance of Atwood I. Williams, Sr. around 1929. The AS-IA understatedly describes the documentary evidence for this period as "sparse." PEP FD, at 127. In the face of the lack of evidence, the Final

[13] Although the Final Determination references three letters, it discusses only two. EP FD, at 145. It is unclear whether this was an erroneous reference or if not, what the third letter was.

Determination expressly falls back on state recognition. It states: "the continuous State relationship with the Eastern Pequot as an Indian tribe provides additional evidence which, in combination with the limited direct evidence, demonstrates continuity of political processes throughout the period in which there is not sufficient positive evidence by itself, but in which positive evidence does exist." EP FD, at 22.

That "limited," but insufficient, direct evidence relates to Tamar Emeline (Sebastian) Williams, the widow of Calvin Williams. The Final Determination rejects the suggestion made in the Proposed Findings that she was an informal political leader. Instead, the Final Determination finds evidence that she was a social leader, particularly in connection with the Fourth Sunday meetings, but no evidence of political influence. *Id.* at 148, 150. Yet, somehow state recognition magically transforms this insufficient evidence into proof of political authority. There is nothing unique about the nature of the State relationship during that period that justifies this transmutation of the evidence.

Following this glaring gap in the evidence, the Final Determination relies on the role of Atwood I. Williams, Sr. as the leader of the Eastern Pequot in the 1930s and 1940s. The evidence of his political leadership is, to say the least, problematic. He was a member of the Gardner family line, and there is no evidence of how he obtained his purported leadership position, whether the Sebastian members viewed him as a legitimate leader or if he exercised any influence at all over the Sebastian members. In fact, the only basis for his purported tribal leadership is the fact that the State at times treated him as the Eastern Pequot leader. *Id.* at 23. State recognition of Atwood I. Williams, Sr. as a leader, however, does not demonstrate that he in fact exercised political authority over the broader group and

particularly the Sebastians. What evidence there is actually points to the opposite. Much of his activities were explicitly in opposition to the Sebastians, questioning their descent as Eastern Pequot. *Id.* at 23, 150-51; PEP FD, at 129, 130-31. Given the lack of broader community ties between the Sebastians and Gardners during the same period, the lack of political authority encompassing both is hardly surprising. The Final Determination's characterization that Atwood I. Williams, Sr. provided leadership to the whole Eastern Pequot group rests solely on the fact that the State had at times recognized him as chief, PEP FD, at 132, a fact that in itself proves very little about his actual authority and influence.

Evidence of leadership in the 1950s and 1960s is at best spotty and does not show any continuity of political authority or activity. In 1953, a group including Catherine Harris and other Sebastians and Jacksons went to Hartford to oppose certain proposed legislation regarding the reservation. However, as the Final Determination itself concludes, the evidence does not show that Harris organized the activity or that the activity included anyone from the Gardner family. EP FD, at 23, 153; PEP FD, at 136. Such isolated, crisis-oriented political activity does not demonstrate significant political processes. *Mashpee v. New Seabury Corp.*, 592 F.2d 575, 585 (1st Cir. 1979), *cert. denied*, 464 U.S. 866 (1983).

The only other claimed leadership for the 1950s and 1960s involved a number of purported informal leaders, including Roy Sebastian, Sr., Arthur Sebastian, Jr., Frank Sebastian, Jr., Alden Wilson, and Atwood Williams, Jr. In none of their cases did the evidence demonstrate that any of these individuals exercised any real political influence. EP FD, at 23, 153-57; PEP FD, at 136-37. In yet another analytical sleight-of-hand, the AS-IA nonetheless concludes that these individuals who singly did not exercise political authority

somehow, piled up together, provide "some" evidence of informal leadership. EP FD, at 23. How this can be the AS-IA fails to explain. The only rationale is that which the Final Determination continues to fall back upon – state recognition.

Helen LeGault, a purported PEP leader, was at most a representative of the Gardner family and focused her activities in the 1960s and 1970s almost exclusively on opposition to the Sebastian family. *Id.* at 157, 160. Her appointment to the CIAC was the spark that started the post-1973 factional conflagration. *Id.* at 160-63; PEP FD, at 145-49. Alton Smith, who opposed LeGault's representation on the CIAC, appeared to have consultations only with the Jacksons and not the Sebastians. EP FD, at 163. The lack of tribal political leadership could not be clearer.

In a last meager attempt at fashioning a display of political authority, the Final Determination uses a now familiar stratagem of implying that for which there is no evidence. Specifically, the Final Determination employs a tautological device in concluding that, because there was significant political activity in the heated factionalism in the post-1973 period, there must have been political activity in prior periods. *Id.* at 24. This finding-by-implication appears to be based on the notion that the political activity of the post-1973 period could not have just burst without some earlier forms, despite the lack of evidence in the prior periods. The logic of the implication is faulty. The catalyst for the post-1973 political activity was the contest for representation on the CIAC. This the Final Determination recognizes. *Id.* at 160; PEP FD, at 145, 165-67. The lack of social ties and political bonds between the Sebastian and Gardner family lines erupted into full-blown, hostile divisions in the post-1973 period. The Final Determination, of course, strives to turn

this factionalism on its head and use the long simmering nature of the ***lack*** of tribal connections between the two groups as evidence of some king of tribal unity. As demonstrated in section VII below above, that effort fails under the weight of its own illogic.

Without the mask of state recognition, the profound lack of political leadership that transcended the divide between the Sebastian and Gardner lines is all too apparent. The AS-IA's failure to accept these significant deficiencies and his effort to hide them behind the false logic of state recognition exposes an utter disregard for the evidence and the acknowledgment regulations and a largely unprincipled and result-oriented decision making process.

C. <u>The Final Determination Extensively Uses Unreliable Interview Evidence To Establish Community and Political Authority.</u>

The improper use of state recognition is most apparent in the Final Determination's use of patently unreliable interview evidence to establish community and political authority. Throughout the Final Determination, key findings on community and political authority depend on this unreliable evidence with little or no corroborating documentary evidence. In the absence of corroborating evidence, the AS-IA's substantial reliance on the interview data is highly suspect and demonstrates the invalidity of both the Final Determination itself as well as the decision making process that produced it.

Much of the interview evidence submitted by the EP petitioner was in the form of summaries or extracts, rather than full transcripts of complete interviews. Despite repeated requests by BAR staff for full texts of the interview materials, those requests went largely unsatisfied. EP FD, at 85. Specifically, BAR staff, both before and after the Proposed Findings, requested the full texts of interviews by Burgess and other EP researchers and for

field notes and the complete interview materials by EP researcher Bragdon. *Id.* The Final Determination's description of the petitioner's response is remarkable: "The materials submitted in response to these requests ***was not substantially more complete than the original submissions.***" *Id.* Inexplicably, in the face of this surprising failure to substantiate the interview data, the AS-IA proceeds to rely on the very evidence he cited as incomplete, concluding merely that "[t]here were no signs of deliberate tampering with or falsifying of information. . . ." *Id.* at 86.

The inherent problems with the reliability of even complete interview evidence are well known. Interview evidence must always be reviewed cautiously, taking into account the fallibilities of memory, the understandable desire to describe events in the best light possible for the interviewee, the tendency to provide answers on the basis of supposition rather than actual observation, and the difficulties in assessing answers responding to poorly crafted or leading questions. *See* H. Russell Bernard, *Research Methods in Anthropology* 223, 235-38 (2000) (Ex. 27); A. Vidich & J. Bensman, *The Validity of Field Data*, 13 Human Organization 20, 25 (1954) (Ex. 28). These problems are complicated when all that is provided are summaries and abstracts. Lacking full texts of interviews, the nature of the questions and the specific answers, as opposed to the interviewer's description of them, cannot be evaluated for the inherent problems of the evidence. *See* BIA Tech. Asst. 7/10/01 Tr., at 42-42 (Ex. 29); *id.*, 7/11/01, at 217-18 (Ex. 30). The unreliability of such evidence is patent.

Indeed, the Final Determination acknowledges these inherent weaknesses of interview evidence, but suggests that there are ways to compensate for these problems. EP

FD, at 82-83. In particular, the AS-IA refers to the technique of "triangulation," that is, a simple and sensible method of validating interview evidence by corroborating it with other, especially documentary, evidence. *Id.* at 83-84. However, after announcing the abstract principle that interview evidence can be validated, the Final Determination fails to do so.

Unreliable and largely uncorroborated interview evidence provides the basis for a number of critical findings on community and political authority. For example, the Final Determination accepts interview evidence about the Fourth Sunday meetings, despite noting that there is little documentary evidence to corroborate the interview data and that the interviewees were at the time children "and not well acquainted with what the adults were doing." *Id.* at 102-03. Similarly, there was no corroborating evidence for the High Street Meetings, *id.* at 106, and the interview evidence for the Catherine Harris and Alden Wilson gatherings lacked detail and were incomplete. *Id.* at 107-10. The Final Determination noted, but apparently ignored, the failure to provide requested interview material by EP researcher Starna on post-1973 political processes. Specifically, the Starna material was never provided and "[t]he substantial number of additional interviews submitted did not provide substantial useful information on contemporary political processes." *Id.* at 167. To a very large degree, even while decrying its unreliability, the Final Determination relies on uncorroborated interview evidence in its findings on the political activities of the post-1973 period. *Id.* at 171-77.

The use of unreliable interview evidence pervades the Final Determination. The AS-IA strives to justify the reliance on this inherently unreliable evidence by the "additional weight" of state recognition. However, what it really reveals is a lowering of the evidentiary

threshold and a disregard of the legal standards to justify a result-oriented decision.

D. The Massive Enrollment Drive Conducted By The EP Petitioner Demonstrates The Lack Of Continuity Of Tribal Relations.

The membership of the EP petitioner leapt from a mere 70 in 1976, to 647 in 1998 at the time of the Proposed Finding, and then to 1,004 currently. EP FD, at 193-94. In other recent decisions, the BIA has made clear that such massive recent membership recruitment reveals that the petitioner has not maintained tribal relations historically. *Nipmuc Nation* PF, at 130; *Muwekma* FD, at 52-53. Indeed, it is hard to fathom how a group could increase over fourteen-fold in a few years and yet be described as a community having sustained tribal relations throughout history. The very need to engage in membership recruitment of long-lost relatives illustrates that the overwhelming part of the current membership were not in tribal relations.

The Final Determination attempts to explain this away with assumptions unsupported by the evidence and with arguments that do not address the principal defect of absent tribal relations until the present. First, the AS-IA concludes that the recruitment process involved core members of the various Sebastian sublines and that most of the new membership were from those sublines. EP FD, at 132. The two new sublines added in 1998 – the Fagins/Randall line and the Albert Sebastian line – account for only, according to the Final Determination, an insubstantial minority of the increase. *Id.* at 133. This characterization as insubstantial deserves some scrutiny. The Fagins/Randall line constitutes 10 percent of the current membership and the Albert Sebastian line constitutes 14 percent. *Id.* Thus, approximately a quarter of the current membership was added only a few years ago. Moreover, the Final Determination concedes that the Albert Sebastian line had weak, if any,

ties to the petitioner prior to its addition to the membership. *Id.* at 133-34. Some, but not all, of the Fagins/Randall line had social contacts with the petitioner before enrollment. *Id.* This is hardly an insubstantial change in the character of the petitioner's membership. Rather, it illustrates quite starkly the lack of tribal relations among the current membership.

Second, the Final Determination tries to excuse the dramatic increase in the membership by supposing that the earlier membership lists were so relatively small because "[t]he EP organization ***may*** also have seen itself as an organization of actives at first, rather than a complete enrollment." *Id.* at 132-33 (emphasis added). This unsupported hypothesis is hardly a basis for reaching a conclusion about the wide disparity in membership numbers from 1976 to present. More importantly, it is largely beside the point. The petitioner has the burden of demonstrating continuous community ties historically. The lack of an evidentiary based explanation for the increase in membership that is supposedly to demonstrate maintenance of tribal relations is fatal.

Third, the Final Determination argues that a "major contribution" of the increase is due to current membership lists having included minors and not just adults. *Id.* at 133. No analysis of what portion of the increase this represents. In any event, this fact may reduce the magnitude of the increases to some degree, but it cannot answer the obvious problem that large numbers of members were recruited that previously had not maintained tribal relations.

The issue is not, as the Final Determination attempts to suggest, whether all the sublines were represented in the early membership lists. *Id.* at 132-33. The problem is that most of the current membership was not in tribal relations even a few short years ago. The AS-IA acknowledges the significant interview evidence that the recruitment process sought

out persons whom recruiters did not know or with whom they had had no real contact. *Id.* (quoting Larry Sebastian as remarking that "everybody and his brother comes out of the woodwork"). Yet, the Final Determination fails to come to grips with the difficulty – indeed the impossibility – of maintaining tribal relations with persons who are "in the woodwork." In short, it is apparent from the evidence of the recruitment drives that tribal relations did not matter and that the petitioner was a group connected only by descent. The Final Determination's contrary conclusion is clearly at odds with the requirements of the regulations. *Nipmuc Nation* PF, at 118, 188; *Muwekma* FD, at 52-53.

Without misusing state recognition to fill in the gaps, the petitioners' evidence under criteria (b) and (c) is woefully deficient. This evidence, which depends largely on unreliable and uncorroborated interview data, is insufficient to demonstrate a distinct social community in which political influence and authority was exercised on a continuous basis. The AS-IA's analysis of the evidence under these two key criteria reflects a purely result-oriented approach in which the standards are misapplied and the evidence is distorted. Accordingly, the Final Determination must be vacated.

VII. THE RECOGNITION OF A SINGLE TRIBE COMBINING THE TWO PETITIONERS IS SUPPORTED NEITHER BY THE EVIDENCE NOR THE ACKNOWLEDGMENT REGULATIONS.

Faced with two petitioners representing, at best, two factions locked in bitter and intransigent opposition with one another, neither of which could satisfy the mandatory criteria on its own, the AS-IA took an unprecedented and unjustified measure: He effectively created a new tribe where one does not exist. Despite unequivocal evidence of a split that the two petitioners lacked the political capacity to overcome, the Final Determination concludes

that there is one Historic Eastern Pequot tribe. This creation of a tribal entity is not supported by any reasonable interpretation of either the facts or the mandatory criteria.

In a momentous understatement, the Final Determination states that the two petitioners had "grown somewhat separate socially in recent decades. . . ." EP FD, at 13. This "partial separation," the AS-IA insists, is the result of political conflicts demonstrating that "the tribe as a whole continued to have significant political processes which concerned issues of great importance to the entire body of Eastern Pequots." *Id.* However, the record evidence, largely supplied by the petitioners themselves, paints a starkly different picture. The two petitioners were hardly "somewhat separate." The separation was complete and had solidified over a quarter-century period. It could be resolved, if ever, only by what has to be described as the federal government's coercive inducement of the acknowledgment of a combined group. In doing so, the Final Determination turns the mandatory criteria on their head. What is in fact overwhelming evidence of the lack of tribal political influence and authority has been transformed by the AS-IA into evidence of separate but parallel political processes that miraculously "unite" the two groups into one tribe. *Id.* at 20.

A. The AS-IA Was Forced To Manufacture Findings Of An Unifying, Overarching Political Process That Are Not Supported By Any Reliable Evidence.

The AS-IA asserts that "[t]he process of separation or division has been gradual, and is not as complete as may appear from the petitioners' present status. . . ." EP FD, at 45. The Final Determination concedes that "there was clearly social separation" between the two key family lines -- the Brushell/Sebastian and the Gardner/Edwards lines -- in 1973 and "to some extent" as early as the 1920s. *Id.* at 45-46. It further contends that other families

(Gardner/Williams, Hoxie/Jackson, and Fagins/Randall) provided links between the two adversarial key family groups into the 1980s. *Id.* at 46. From this, the AS-IA concludes that the split in the period from 1973 to the present was not "sudden" and that the two separate organizations represented by the two petitioners represents only "an internal division within one tribe" rather than a split into two tribes. *Id.*

The AS-IA's rationale underlying these conclusions is, to say the least, peculiar. To rationalize the conclusion that there is one tribe with internal divisions, the Final Determination seizes on a theory of "parallel" but separate political processes that serve to "unify" two groups that have displayed no capacity over the last thirty years to act as a single, unified tribal entity. The AS-IA notes that the regulations do not permit the acknowledgment of only part of a tribal group. *Id.* at 36. However, rather than reach the proper conclusion that because, at the very best, each of the two petitioners can represent only a part of a tribal entity, they cannot be acknowledged, the AS-IA instead builds a novel theoretical construct that ignores the fundamental nature of the split between the two petitioners.

Citing the general policy of not encouraging tribal factionalism, *id.* at 46, the Final Determination does its best to describe the separate activities within the two groups as a "bridge" between the two groups. *Id.* at 20. The only basis for finding a "bridge" between "two distinct segments" is that the focus for both groups was on controlling and maintaining access rights to the reservation. *Id.* at 20, 26. Despite finding that both groups had developed separate internal coherence with no significant ties in the post-1973 period, the Final Determination relies on the mere fact that both groups were essentially competing for

the same prize -- hardly a unifying activity.

Neither the evidence nor the Final Determination's reasoning support the conclusions that there is a single Eastern Pequot tribe. It is hard to understand the significance that the AS-IA places on the evidence that the factionalism between the two groups, and particularly the sometimes simmering, sometimes openly hostile conflict between the two principal family lines, has early roots. Emphasizing that the split was not sudden but rather was part of a long-term process, the AS-IA suggests that this is in fact evidence of political activity. *Id.* at 45. This might be so if the conflict had not erupted, and continued for nearly three decades, into two hostile groups having little to do with each other.

As the Final Determination itself finds, but apparently ignores in reaching its conclusions, "[t]here was little data to show ***any present community connection*** between the members of the two groups or to demonstrate that the dispute takes place within a framework in which there are relationships between the members and/or leaders of the two memberships." EP FD, at 177. This is a fatal finding that cannot be explained away by describing the two groups as having "parallel" processes. Even if there were "parallel" processes, parallel communities and political authorities is not what the regulations require, but a distinct cohesive community with effective political influence and authority over the entire community. The lack of a real, as opposed to a theoretical, overall framework in which the two groups could mediate their conflicts and disputes, demonstrates the fundamental lack of a single political community.

The AS-IA notes that the State has only recognized one Eastern Pequot group. *Id.* at 46. How this is significant to the characterization of the split between the two groups is

difficult to understand. The irony is that the final rupture between the two groups centered on the issue of who could represent the Eastern Pequot on the CIAC. *Id.* at 171. Indeed, the State has viewed the two groups as factions that rejected each other's legitimacy. *See Paucatuck Eastern Pequot Indians of Connecticut v. Connecticut Indian Affairs Council*, 18 Conn. App. 4, 6-8 & n.3 (1989) (Ex. 31). The fact that the State did not extend State recognition to both factions does not suggest that the State considered the two parts of one tribe, as the AS-IA seems to imply. As demonstrated above, *see* section V.A.4 *supra*, state recognition is not based, implicitly or otherwise, on the existence of political entities, but rather on Indian descent.

The Final Determination attempts to demonstrate factually that the split was not "complete" because of some purportedly enduring family line links, principally the Jacksons. EP FD, at 45. The key family groups that make up the "predominant" parts of the two petitioners -- the Sebastians for the EP petitioner and the Gardners for the PEP petitioner -- had no connections. *Id.* at 20, 24-26. At best, the Jacksons maintained some limited social contacts with the two estranged principal families in the 1970s. These contacts diminished just as the conflict hardened into a fundamental split. *Id.* at 118-24. The attempt to create some continuing connections between the two groups after 1973 simply fails.

Thus exposed, the factual basis for the Final Determination's finding of a single tribe is left only with a paradox. The AS-IA finds "unity" in the two groups' rivalry for representation on the CIAC and control over reservation access. *Id.* at 177. That the two groups severely contest each other's legitimacy does not reveal a unifying overall process, but the utter lack of such a process. In sum, no reasonable interpretation of the evidence can

support the Final Determination's odd conclusion that two adversarial groups can be unified because of their conflict. There simply is no factual reality to the purported "unifying" process.

The Final Determination's construct of separate but parallel political processes is nothing more than a rationalization. More importantly, it is at complete odds with the most basic principles of tribal recognition. Two groups having no internal capacity to resolve their conflicts but having entirely separate internal structures and coherence cannot possibly be described as "united in a community under one leadership or government," the touchstone of tribal existence. *Montoya v. United States*, 180 U.S. 261, 266 (1901). For nearly three decades, the two petitioners have lacked the most essential qualities of a tribe. There has not been a distinct social community, but if anything two separate social groupings. There have not been bilateral political relations involving both memberships. The Final Determination's effort to manufacture what does not exist is unsupportable and violates the fundamental requirements for recognizing a sovereign tribal entity.

B. The PEP Petitioner Denied The Historical Existence Of A Single Tribe Encompassing Both Petitioners.

Perhaps the best evidence that the two petitioners cannot be described as a unitary tribal entity comes from the petitioners' own submissions. The combination of the two petitioners into a single tribe is against the clear and repeated wishes of the PEP petitioner and its own understanding of its historical existence. In its comments on the Proposed Findings, the PEP petitioner complained that the Proposed Findings were based on the "misconception" of a single historical tribe. PEP 8/2/01 Comments, at 7-8. Fundamentally, the PEP petitioner rejects the descent of the Sebastian family and contends that the PEP

members never lived in tribal relations with them. *Id.* at 9-10. The combined consideration of the evidence of the two petitioners was accomplished over the explicit opposition of the PEP petitioner. *Id.* at 13.

The Final Determination's justification for considering the petition evidence of both petitioners together lies in purportedly continuing social contacts of the Jackson family line with the Sebastians and the Gardners. As the PEP petitioner described them, "[d]uring the first half of the 1900s, there were some social relationships between a few individuals in the [PEP] Jackson family and a few descendants of the Sebastian family who lived on the Reservation." *Id.* at 17 (footnote omitted). This was not, in the PEP petitioner's view, evidence of social community but rather was only evidence that "they occasionally interacted as neighbor's due to the proximity of a few of their houses." *Id.* at 17 n.8.

The PEP petitioner's rejection of a single tribe could not have been clearer. It insisted that "the Sebastians and the [PEP petitioner] have always inhabited separate social spheres, and cannot accurately be characterized as two factions of a single tribal entity." PEP Response to Comments, 9/4/01 (Cuhna Letter, at 2). The PEP petitioner emphasizes that the principal issue motivating group coherence and activity was the opposition to the Sebastians and the fight to maintain the reservation exclusively for the PEP members. *Id.* (Austin Political Authority Report, at 7).

The PEP petitioner's evidence and argument demonstrates that there is not a single tribe in any meaningful sense. The two groups lacked the internal means or desire to exist as a social and political tribal entity. The ability to overcome the fundamental rift had to come from an outside source -- the coercive effect of offering acknowledgment by the federal

government. In other words, the BIA has contrived to create a single tribe where one simply does not exist.

C. The Failure To Provide Proper Proposed Findings On The Post-1973 Period Violated The Regulations And The Rights Of The Interested Parties.

The Final Determination takes the unprecedented step of putting aside the petitioners' own chosen membership and group composition, combining the two petitions, and acknowledging not one or the other but a supposed umbrella tribe – the "Historic Eastern Pequot." The authority for this extraordinary measure is lacking and indeed is foreclosed in the acknowledgment regulations. Moreover, because the Proposed Findings failed to make any findings about the post-1973 period or the creation of a single combined tribe, the interested parties were denied the opportunity for notice and meaningful comment that is required by the acknowledgment regulations.

1. The Acknowledgment Regulations Do Not Permit The Recognition Of A Single Tribe Based On Two Separate Petitions.

The acknowledgment regulations are predicated on the pursuit of recognition by a petitioner and are directed at evaluating whether a petitioner should be recognized as an Indian tribe. The acknowledgment process is initiated by a petitioner, prosecuted by a petitioner, and decided on the basis of a documented petition prepared and filed by a petitioner. *See* 25 C.F.R. § 83.4, 83.6. The AS-IA is charged with determining whether the petitioner meets the mandatory criteria of § 83.7. Of and only if the petitioner satisfies the criteria, the AS-IA shall acknowledge the petitioner; if the petitioner fails to satisfy the criteria, the AS-IA shall deny acknowledgment of the petitioner. *Id.*, §§ 83.10.

In the Final Determination, the AS-IA departs from the process articulated in the acknowledgment regulations. He boldly asserts that the Department has "the authority to recognize a single tribe in the circumstances where the tribe is represented by more than one petitioner." EP FD, at 13. However, he does not, and cannot, offer any support in the regulations for this action.

The heretofore unrepresented combined "historical Eastern Pequot tribe" has never sought acknowledgment, has no governing body, no governing documents and no membership. It was not a "petitioner" within the meaning of the regulations as it never submitted a letter of intent or a documented petition. 25 C.F.R. § 83.1. Without a petitioner, there obviously can be no acknowledgment of the petitioner.

Indeed, a basic and fatal flaw exists in the Final Determination's approach: Because there exists no entity known as the "Historical Eastern Pequot Tribe" it cannot possibly satisfy mandatory criterion (d), which requires present governing documents or tribal constitution. *Id.*, § 83.7(d); *see* EP FD, at 27. Nor can this newly fashioned entity satisfy criterion (e)(2), which requires an official current membership list. *Id.*, § 83.7(e)(2). Such governing documents and membership list simply do not exist. The AS-IA attempts to circumvent this obvious defect by suggesting that the Department will "deal with both petitioners." 67 Fed. Reg. 44240. The lack of present governing documents and current membership lists reveals the simple truth that the single tribe that the AS-IA purports to recognize simply does not exist and would not exist but for the AS-IA's actions. This plainly and simply violates criteria (d) and (e).

This is not merely hypertechnical nitpicking. The regulations establish requirements

to be met by a particular petitioner to ensure that the acknowledgment is received only by those groups that have the requisite internal social and political cohesion. The AS-IA's approach does the opposite: It attempts to create a tribe through external force to overcome the conflicts that the two petitioners have not been able to resolve internally. This exceeds the AS-IA's authority under the regulations and is entirely contrary to the purpose of the regulations.

2. The Proposed Findings Unlawfully Failed To Include Findings For The Period Of 1973 To The Present, Denying Interested Parties Of Proper Notice And A Meaningful Opportunity to Comment In Violation Of The Regulations.

The Proposed Findings on the EP and PEP petitions made no finding about whether the two petitioners represented one tribe or two in light of the severe split erupting after 1973. Rather than issuing a proposed finding for the post-1973 period, the Proposed Findings merely requested comments on the Department's authority to recognize one or two tribes. EP PF, at 61-62. The Proposed Findings did not do what the regulations require them to have done -- to make a proposed finding about the nature of the potential tribe so that interested parties would have adequate notice and an opportunity to comment. A meaningful opportunity to comment was utterly lacking.

Although the interested parties in this case were able to submit comments on the two individual petitioners, the Proposed Findings indicated only that the AS-IA could not determine

"the nature of the potentially acknowledgeable entity" from the record before him. 65 Fed. Reg. 17301. In the Final Determination, the AS-IA concluded that he would acknowledge a group that, up to that point, did not exist. This was an outcome for which the interested

parties had no notice. Instead, the interested parties quite appropriately assumed that the focus of their comments should be the authority under the regulations that one, both or none of the petitioners could be acknowledged, not that a new combined entity could be acknowledged.

The acknowledgment regulations contemplate a process under which the participants are given full notice of the proposed findings as to all of the mandatory criteria, including the underlying evidence, reasoning and analyses that form the basis for the proposed findings. The purpose of providing such notice is to afford the participants a meaningful opportunity to review and comment on the proposed findings prior to the BIA's issuance of a final determination. Specifically, § 83.10(h) requires that

> the Assistant Secretary shall publish proposed findings in the Federal Register . . . . In addition to the proposed findings, the Assistant Secretary shall prepare a report summarizing the evidence, reasoning, and analyses that are the basis for the proposed decision.

25 C.F.R. § 83.10(h). The importance of providing the proposed findings and the report is evident in the requirements of § 83.10(i), which provides in relevant part:

> Upon publication of the proposed findings, the petitioner or any individual or organization wishing to challenge or support the proposed findings shall have 180 days to submit arguments and evidence to the Assistant Secretary to rebut or support the proposed finding.

Id., § 83.10(i). Moreover, the regulations afford parties the right to receive formal and informal technical assistance or advice concerning the factual and evidentiary basis for the proposed finding as well as the reasoning used in preparing it. *Id.*, § 83.10(j). All of these important rights -- to provide evidence or argument and to receive technical assistance on the proposed findings -- are empty gestures if there is no proposed finding, including the

analytical basis for the proposed finding, on which to comment or obtain assistance.

Despite this clear mandate, the Proposed Findings for the EP and PEP petitioners explicitly failed to include findings as to two of the mandatory criteria for the period of 1973 to the present. The missing findings are as to mandatory criteria (b), which requires a proposed finding whether "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times ***until the present***." *Id.*, § 83.7(b) (emphasis added); and mandatory criteria (c), which requires a proposed finding whether, "[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times ***until the present***." *Id.*, § 83.7(c) (emphasis added). The Proposed Findings simply and intentionally failed to fulfill this mandate.

As to this deficiency, the Proposed Findings stated that:

> [t]his notice is based on a determination that the historical Eastern Pequot tribe satisfies criteria 83(b) and 83(c) ***through 1973*** and that the petitioner satisfies the remainder of the criteria set forth in 25 C.F.R. § 83.7 and, therefore, meets the requirements for a government-to-government relationship with the United States. ***A specific finding concerning whether one tribe or two tribes, as successors to the historical Eastern Pequot tribe, have occupied the reservation since 1973 will be made as part of the final determination, after receipt of comment on this proposed finding.***

65 Fed. Reg. 17297, 17298 (emphasis added). The Proposed Findings further discussed the rationale for its failure to make findings for the post-1973 period:

> [F]or the period from 1973 to the present, with regard to criteria 83.7(b) and 83.7(c), the Department finds that the petitioners and third parties ***have not provided sufficient information and analysis*** to enable the Department to determine that there is only one tribe with political factions.

Id. at 17301 (emphasis added). Similarly, the Proposed Findings concluded:

> ***There is insufficient evidence in the record*** to enable the Department to determine that the petitioners formed a single tribe after 1973. The Department consequently makes no specific finding for the period 1973 to the present because there were not sufficient analysis and information provided by the petitioners or third parties to determine if there is only one tribe with political factions.

Id. at 17292 (emphasis added).

Thus, then-AS-IA Gover expressly and admittedly failed to make the requisite findings for this critical time period. Nowhere in the regulations is it even hinted that the BIA may issue a proposed finding that a petitioner should be acknowledged where it has concluded that there is an insufficient basis for determining that the petitioner has satisfied the criteria. Indeed, the opposite is mandated by the regulations. In language that could not be clearer, § 83.10(m) of the regulations provides:

> The Assistant Secretary shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that ***the group satisfies all of the criteria of § 83.7***. The Assistant Secretary shall decline to acknowledge that a petitioner is an Indian tribe if it ***fails to satisfy any one of the criteria in § 83.7.***

25 C.F.R. § 83.10(m) (emphasis added). Simply stated, under the regulations, a petitioner cannot be acknowledged if it fails to satisfy completely even a single one of the mandatory criteria. In effect, the Proposed Findings concluded that the petitioners could be acknowledged in the absence of sufficient evidence for criteria (b) and (c) for the post-1973 period.

There is no basis in the regulations to justify postponing the issue until the final determination on the basis of a lack of evidence. To make what is in essence a "nonfinding" deprived the interested parties of these rights that underlie the integrity and fairness of the acknowledgment process. Moreover, in addition to being flatly contrary to the acknowledgment regulations, such an approach made it effectively impossible for the

plaintiffs to provide meaningful comments on the Proposed Findings. The consequences of the Assistant Secretary's decision to ignore the regulatory requirements were not trivial, because the post-1973 period is a critical piece of the acknowledgment puzzle. It placed the interested parties at a substantial disadvantage in particular because they had no opportunity to comment on the Assistant Secretary's novel theory that the two factionalized petitioners were "unified" by separate but parallel political processes. This, as is plain in the Final Determination, was a key part of the reasoning to the decision to acknowledge.

The Final Determination suggests that "[t]he petitioners and interested parties had the same notice as to the issues and evidence before the Department and the same opportunity to comment and present their arguments and analysis on th[ese] petitioner[s] as in other proposed findings which proceed to a final determination under the regulations." EP FD, at 33. However, the Final Determination cites no previous petitions, and the State knows of no prior examples, in which the proposed findings simply failed to make findings as to a significant, if not critical period. The present AS-IA continues to flout the requirements of the acknowledgment process that are designed to ensure fairness and comprehensiveness.

The failure to make complete proposed findings short-circuited the acknowledgment process. It was unlawful, unfair and highly prejudicial. The only way this failure to provide the required meaningful opportunity to comment can be remedied is to require a remand for submission of comments by the interested parties.

VIII. AS REFLECTED IN INVESTIGATIONS CONDUCTED BY THE GAO AND INSPECTOR GENERAL, THE ACKNOWLEDGEMENT PROCEEDINGS ON THESE PETITIONS HAVE BEEN INFECTED WITH SERIOUS IRREGULARITIES.

In addition to having serious substantive defects, the Final Determination is the

product of a process marked by irregularities. These irregularities go to the very foundation of the acknowledgment process. Aside from the basic unfairness in the manner in which the proceedings unfolded, these irregularities undermine the public's confidence in the acknowledgment decision and demand a serious reevaluation of the Final Determination in particular and the Department's current approach to acknowledgement in general.

At the request of Representatives Rob Simmons, Christopher Shays and Nancy Johnson, among others, the General Accounting Office ("GAO") conducted a broad investigation of the BIA's tribal recognition process. Its report, entitled "Indian Issues: Improvements Needed in Tribal Recognition Process" and issued November 2001 ("GAO Report"; Ex. 32), found serious "weaknesses" in the recognition process. GAO Report, at 2. Substantively, the GAO Report criticized the lack of clear guidance on key aspects of the mandatory criteria and the evidence necessary to satisfy the criteria. *Id.* at 10-14. Procedurally, the GAO Report concluded that the BIA was impaired by limited resources, a lack of time frames and ineffective mechanisms for providing information to interested parties. *Id.* at 14-19.

The GAO Report highlighted the lack of consistent and clear guidance about the meaning and evidence under the mandatory criteria, especially what evidence is needed to demonstrate continuous existence -- the very issue that is at the center of the Final Determination. This lack of clear guidance has manifested itself in disagreements between technical staff and the AS-IA in which staff recommendations were rejected for unclear reasons, as was the case with the EP and PEP Proposed Findings. *Id.* at 11-12.

In addition to the GAO's investigation, the Department of Interior's Inspector

General conducted an investigation at the request of Secretary Norton and Congressman Wolf of Virginia. The resulting report, entitled " Allegations Involving Irregularities in the Tribal Recognition Process and Concerns Related to Indian Gaming" and issued February 2002 ("OIG Report"; Ex. 33), addressed significant problems with six recognition decisions made by the BIA, including the EP and PEP Proposed Findings.

The OIG Report found that then-Assistant Secretary Kevin Gover and his appointed subordinates, Michael Anderson and Loretta Tuell, "were determined to recognize the six tribes that BAR had concluded did not meet the regulatory criteria." *Id.* at 1. Gover rejected the recommendations of the BAR experts on the EP and PEP petitions. *Id.* at 4. The OIG Report found that Gover, having concluded that he could not gain an amendment of the acknowledgment regulations, "chose instead to interpret these regulations with a more relaxed and accommodating standard than BAR." *Id.* at 7. In particular, Gover believed that criteria (b) and (c) should be applied with less rigor than the BAR experts advised and than the BIA had previously used. It is in the EP and PEP Proposed Findings issued by Assistant Secretary Gover that the unprecedented notion that state recognition could provide "additional weight" to insufficient evidence of community and political authority first appears. It was also in Gover's Proposed Findings that the concept of merging the two petitioners had its origin.

Indeed, the role of former Assistant Secretary Gover, and its continuing impact on the recognition of the Eastern Pequot tribe, is so unusual that it deserves special scrutiny. Gover's rejection of the BAR staff's recommendation was, to say the least, exceptional. Subsequent evidence has established that Gover had originally directed BAR staff to prepare

proposed findings denying acknowledgment, but a short time thereafter, without any new evidence or analysis to justify the shift, he changed his instructions and ordered positive proposed findings for both petitioners. Tech. Asst. Mtg., 7/11/01, Tr. at 190. BAR staff had recommended that there were substantial evidentiary gaps regarding criteria (b) and (c) in both petitions. To overcome these gaps, Gover created the state recognition gap-filler.

Gover's role in these proceedings prompted the State to take the extraordinary step of requesting that he recuse himself from further involvement in the proceedings. Letter of Attorney General Blumenthal dated July 14, 2000 (Ex. 34). Among the bases for this request was Gover's unprecedented use of state recognition in order to fill the gaps in the petitioners' evidence, a concept that could be improperly used as precedent for the acknowledgment of Gover's former client, the Golden Hill Paugussett petitioner, which purports to represent another Indian group recognized by the State. Gover had previously recused himself from participating in the Golden Hill Paugussett due to his prior representation of that group, and on the advice of agency counsel had agreed not to participate in petitions that presented issues that could directly influence the outcome of the Golden Hill Paugussett petition. Incomprehensibly in light of the common questions relating to state recognition, Gover not only constructed the new state recognition theory but continued to participate in the EP and PEP proceedings.

The procedural defects inherent in these petition proceedings was made all the greater by the prohibition on independent research by BAR staff imposed unlawfully by AS-IA Gover. On February 11, 2000, without notice or opportunity to comment,[14] AS-IA Gover

[14] In issuing the directive, AS-IA Gover unlawfully failed to follow the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553(b), in significantly and

issued a directive in the Federal Register announcing significant changes in the acknowledgment process. 65 Fed. Reg. 7052. Among the many substantive changes to the process contemplated by the acknowledgment regulations,[15] the directive banned independent research by BAR staff that would otherwise be permitted under 25 C.F.R. § 83.10(a). The impact of the prohibition on independent research was most obvious on the question of state citizenship and the implications for state recognition. *See* section V.A.2 above. The Final Determination placed great significance on the purported lack of state citizenship until 1973 in finding an "implicit" recognition of a distinct political body – an issue not addressed in the Proposed Findings and therefore not responded to by the interested parties. The inability of the BAR staff to conduct any form of independent research contributed to the faulty findings on state citizenship discussed above that formed the basis for the misuse of state recognition as evidence under criteria (b) and (c).

The Final Determination declined to address the concerns arising out of Gover's highly questionable role. EP FD, at 29 n.6. However, given that the unprecedented use of state recognition and the issue of a single tribe from two petitioners arose in his Proposed Findings, Gover's role cannot be so easily dismissed. In the Proposed Findings, AS-IA

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prejudicially altering the acknowledgment process. *See National Whistleblower Center v. NRC,* 208 F.3d 256, 262 (D.C. Cir. 2000); *JEM Broadcasting Co., Inc. v. FCC,* 22 F.3d 320 (D.C. Cir. 1994).

[15] The February 11, 2000 directive also imposed an arbitrary cut-off date for the consideration of evidence prior to the issuance of proposed findings. It provided that no evidence submitted after a petition is placed on active consideration shall be considered. 65 Fed. Reg. 7053. The problem, of course, is that interested parties have no advance notice when the BIA will place a petition on active consideration, thus unfairly precluding interested parties from submitting evidence and comments in violation of 25 C.F.R. § 83.10(f).

Gover fashioned a new principle that state recognition can fill in the evidentiary gaps. This new rule could work to the benefit of the Golden Hill Paugussett petitioner, his former client, as spokesmen for the Golden Hill Paugussett have been quick and eager to point out. Despite the evidence of bias, the Final Determination made no effort to revisit the former AS-IA's role in creating this unprecedented rule. Lacking that examination, the Final Determination improperly carries forward the inherently unreliable and biased conclusions about the State's relationship with the Eastern Pequot.

The Final Determination is an edifice built upon an unsound foundation. It must be razed and rebuilt upon a fair, impartial and proper framework. The lack of guidance on the acknowledgment standards found in the GAO Report and the rejection of BAR's advice and lowered standards found in the OIG Report has obviously played a substantial role in the manipulation of the criteria and evidence in the Final Determination. The two principal and key elements of the Final Determination -- the use of state recognition to make up for otherwise insufficient evidence and the combination of two petitioners to justify the recognition of a single tribe -- have no foundation in the criteria or BIA precedent. Thus, because of the lack of clear guidance, the AS-IA has been able to create novel rules to enable the recognition of the Historic Eastern Pequot tribe although it has not satisfied the mandatory legal criteria. The concerns raised in the prior investigations must be taken into consideration in the Boards's evaluation of the AS-IA's approach to the evidence and rationale for issuing the Final Determination.

IX. THE UNPRECEDENTED AND UNSUPPORTED NATURE OF THE FINAL DETERMINATION IS A RESULT OF THE LACK OF A PROPER DELEGATION OF CONGRESSIONAL AUTHORITY TO RECOGNIZE INDIAN TRIBES TO THE BIA.[16]

Article I, section 8 of the Constitution grants plenary authority to Congress over Indian affairs, and in particular, the determination of which Native American groups are entitled to the benefits of the laws relating to Indian tribes and to the creation of a government-to-government relationship with the United States. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *United States v. Sandoval*, 231 U.S. 28 (1913). Congress has delegated to the Department of Interior the management over, and the authority to issue regulations relating to, "all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. §§ 2, 9; *see also* 43 U.S.C. § 1457. However, Congress has never actually delegated the authority to acknowledge Native American groups as a federally recognized Indian tribe. Moreover, Congress has failed to articulate any guidance to govern the Department's exercise of acknowledgment authority. This lack of guidance is the ultimate source of the AS-IA's unprincipled and result-oriented Final Determination regarding the Eastern Pequot.

Since 1871, Congress has clearly reserved the right to define which groups should be recognized as Indian tribes. 25 U.S.C. § 71. The absence of a congressional delegation of acknowledgement authority is reinforced by the refusal of Congress over the past twenty years to make such a delegation. *See, e.g.*, H.R. 4462, 103rd Cong., 2d Sess. (1994). No

[16] The State recognizes that the Board likely has no jurisdiction to consider the arguments in this section because the Board has no authority "to disregard a duly promulgated regulation or to declare such a regulation invalid." *Oklahoma Petroleum Marketers Ass'n v. Acting Muskogee Director*, 35 IBIA 285, 2000 I.D. Lexis 112, *6-8 (2000). The State nonetheless brings this matter to the Board's attention in order to ensure that the Board is aware that the issue has been raised, to allow for its presentation to the Secretary pursuant to 25 C.F.R. § 83.11(f)(2), and to exhaust all administrative remedies.

delegation of authority can be found in any statute or other congressional action since the Department issued its original acknowledgment regulations.[17]

Even if general delegation of authority over "Indian affairs" in 25 U.S.C. §§ 2, 9, can be deemed a delegation of acknowledgment authority, Congress failed to provide "intelligible principles" to guide the Department's exercise of such authority. *See Whitman v. American Trucking Ass'ns,* 121 S.Ct. 903, 912-13 (2001) (citing cases). Although the cases are rare in which the courts have found that Congress has impermissibly delegated authority to an administrative agency, a purported delegation of authority is unconstitutional if it provides "literally no guidance for the exercise of discretion." *Id*. at 913.

There is a complete lack of anything like guidance in any congressional enactment. The statutes delegating authority over "Indian affairs" are on their face as sweeping and as directionless as possible.[18] They simply grant to the Department authority over the "management of all Indian affairs, and of all matters arising out of Indian relations." 25 U.S.C. §§2, 9; *see also* 43 U.S.C. § 1457. Even the Seventh Circuit, while assuming that Congress had delegated authority to the Department, noted that it had done so "***without setting forth any criteria*** to guide the exercise of discretion." *Miami Nation of Indians of*

[17] The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, § 103(3) (codified at 25 U.S.C. §§ 479a to 479a-1), recognizes that Department has purported to acknowledge certain tribes, but goes no further, and certainly does not delegate authority to the Department. Two courts have assumed that Congress has delegated acknowledgment authority to the Department. *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of Interior,* 255 F.3d 342, 345-46 (7th Cir. 2001); *James v. U.S. Department of Health & Human Services,* 824 F.2d 1132, 1137 (D.C. Cir. 1987). Neither court appears to have directly addressed the issue of the constitutionality of any delegation of acknowledgment authority to the Department.

[18] Even the Seventh Circuit, while assuming that Congress had delegated authority to the Department, noted that it had done so "without setting forth any criteria to guide the exercise of discretion." *Miami Nation,* 255 F.3d at 345.

Indiana, Inc. v. U.S. Department of Interior, 255 F.3d 342, 345 (7th Cir. 2001). As the Supreme Court recently held, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *American Trucking*, 121 S.Ct. at 913. Thus, if the scope of the delegation is narrow, then Congress need not provide any direction. However, if the scope of the delegation is, as here, broad, Congress must "provide substantial guidance" to govern that discretion. *Id.* The delegation of authority over "all Indian affairs" could scarcely be broader. On tribal acknowledgment, Congress has not only failed to give "substantial guidance" to the Department, it has failed to give any.

The lack of congressional guidance is displayed in the Final Determination. In recognizing an "Historic Eastern Pequot" tribe, the AS-IA ignored the BIA's own regulations and precedents, relied on wholly novel and unsupported theories of "implicit" relations with a distinct political body and supposedly "unifying" but separate and antagonistic political processes, and created a single tribe from two petitioners. This remarkable and unusual exercise of unbridled administrative power demands the examination of the basic questions of the legitimacy of the Department's purportedly delegated authority. Such an examination reveals that to the extent Congress has in fact delegated acknowledgment authority to the Department, that delegation is unconstitutional.

X. CONCLUSION

In light of the serious defects in the Final Determination, including the dependence on unreliable and nonprobative evidence, the existence of compelling new evidence, the faulty interpretation of the evidence, the misapplication of governing legal principles and the outright violation of the acknowledgment regulations, the Final Determination should be vacated. To the extent that the Board concludes that any of the issues presented in this request for reconsideration are outside of its jurisdiction, such issues should be referred to the Secretary.

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