



Office of The Attorney General  
**State of Connecticut**

**TESTIMONY OF**  
**ATTORNEY GENERAL RICHARD BLUMENTHAL**  
**BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS**  
**MAY 11, 2005**

I appreciate the opportunity to submit testimony.

I urge Senators to seize this unique moment -- and match rhetoric with real reform totally overhauling a tribal recognition system that is lawless, leaderless, and out of control.

The present process is broken beyond fixing. It should be scrapped. Reform is long overdue. It must be systemic, not superficial. It must establish an independent system insulated against gambling money that now so perniciously drives the process.

Admiring the chairman as no-nonsense, straightforward and frank, I will try to be the same. My proposed reforms are as simple and specific as they are essential:

- Abolish the BIA tribal recognition authority;
- Establish an autonomous agency -- a Federal Tribal Recognition Commission (FTRC) -- with authority over recognition and trust land decisions;
- Enact recognition criteria into statute;
- Provide sufficient resources to fund the FTRC;
- Set strict, strong disclosure and ethics rules for the FTRC;
- Assist affected towns and cities in participating in the process;
- Impose a 6-month moratorium on all recognition decisions.

Whatever disagreements there may be about solutions, there seems to be a clear consensus on the central problem: the present tribal recognition process is irretrievably, irrefutably broken -- dysfunctional, a shambles. Scrapping and replacing it is an urgent necessity. Now is a historic moment -- indeed, the moment -- for action not just talk.

What makes this moment so uniquely promising is new leadership on this Committee, new-found awareness and alarm about the system's insidious flaws, and new evidence of the corrosive consequences. We can rid the recognition process of corrupt influences and regain public confidence and trust.

For twelve years, I have been fighting for fairness and accountability in the tribal recognition process. For many of those years, mine was seemingly a singular voice. Those times were lonesome -- made less so only by local officials and citizens from North Stonington,

Preston, Ledyard and other towns with the conviction and courage to stand up and speak out. I have fought to receive critical public documents from the Bureau of Indian Affairs (BIA) -- documents we were clearly entitled to receive under federal law. Protecting our state's interests, I have appealed arbitrary administrative decisions and challenged BIA findings lacking any basis in fact or law. I have also testified before congressional committees -- including this one -- urging oversight investigations and reform.

The current process demeans and discredits groups that legitimately deserve federal tribal recognition, delays expeditious review of petitions and hinders participation of affected parties in the process. Money, politics, and personal gain have transformed tribal recognition decisions into crude contests of influence instead of objective assessments of evidence. The BIA now is often arbitrary and capricious, ignoring or bending its own rules to reach illegal recognition decisions bought by powerful interests, and continuing this practice to enhance casino interests at the expense of local communities and citizens.

A recent example of this lawless conduct is the BIA's recent publication of a "checklist" for gaming related trust land acquisitions. The BIA has, once again, unilaterally imposed rules that have profound adverse impacts on local communities without permitting public scrutiny and input.

The effect of these rules is to make expansion of reservation land for gaming easier by eliminating the need for gubernatorial agreement and community input for annexation of land with gaming related purposes -- in violation of the Indian Gaming Regulatory Act (IGRA). I am attaching a copy of the checklist to this testimony.

The checklist purports to be an "internal agency guideline" on gaming related trust acquisitions -- one of the most controversial and intrusive aspects of federal Indian law. The BIA's decisions to take land into trust for Indians -- essentially turning private land into sovereign tribal land--- have significant impacts on States, local communities and the public, particularly when the land is used for gaming or gaming related purposes. Far from being simple internal guidelines, this co-called "checklist" in reality establishes new standards for making these critical trust decisions, standards that will result in less public scrutiny and severely limit the rights of local communities that will be directly affected.

These new rules will have a significant impact in Connecticut. Two Connecticut groups whose positive tribal recognition decisions are currently being appealed -- the Historic Eastern Pequots and the Schaghticokes -- have both already indicated that they will seek to locate casinos entirely on land outside their reservations. The new rules would severely restrict rights of towns and cities to resist tribal annexation of land -- impacting local economic and environmental interests. The rule change could also affect annexation of land by the two federally recognized tribes that operate two of the largest and most profitable casinos in the world. These tribes own property outside of their reservations, and one of the tribes has in the past sought to place such off-reservation land into trust to advance their gaming interests.

Good government and fundamental fairness require that the critical and controversial decisions and rule changes, like the BIA checklist, be subject to public scrutiny that takes account of all the competing interests.

As a first step toward reform, Congress must enact an immediate 6-month moratorium on all Bureau of Indian Affairs tribal acknowledgment decisions or appeals.

This proposal differs significantly from the one I advocated before this committee – years ago, and that Senators Dodd and Lieberman championed courageously, but unsuccessfully. This moratorium would be only temporary -- giving Congress sufficient time and strong impetus to act promptly. A moratorium of limited, defined duration would avoid harm to tribes truly deserving recognition, but it would protect against continued lawless, arbitrary BIA decisions and provide a powerful incentive for reform.

The need for a moratorium was demonstrated dramatically by an internal BIA memorandum -- discovered during review of documents for our administrative appeal in the Schaghticoke decision -- which provides a blueprint for BIA senior officials to disregard and distort the law. The BIA memorandum exposes a concealed world of rigged decisions -- that skirt and subvert the rule of law. This unconscionable pattern and practice cannot be permitted to continue.

The central principle of reform should be: Tribes that meet the seven legally established criteria deserve federal recognition and should receive it. Groups that do not meet the criteria should be denied this sovereign status.

In addition to a moratorium, Congress should take the following immediate steps.

First, Congress should demand immediate, complete and accurate disclosure of all lobbyists, lawyers, and others that seek to influence the process and amounts paid to them by petitioning tribal groups or by related financial interests and investors. Sunshine is a particularly powerful disinfectant in this morass of money, politics and personal agendas.

The public must fully understand the extent of gaming influence on recognition. We know some information through the media but complete disclosure is not required by law. The Schaghticoke petitioner is backed by Fred DeLuca, the founder of Subway sandwich shops. DeLuca has reportedly spent \$12 million to support the tribe's petition for recognition and related matters. The partnership agreement between DeLuca (Eastlander Group, LLC) and Schaghticoke reportedly provides that in return for his financial support, the Schaghticoke will compensate DeLuca 31.5% of revenues from a future casino, if one is ever built, up to a total of \$1 billion over a 15 year period.

Other Connecticut groups seeking federal recognition have similar arrangements. The Historic Eastern Pequot tribe is backed by William Koch, among one of America's wealthiest people. Donald Trump backed the Paucatauck Eastern Pequot group but was ousted after the two factions merged as a result of the Final Determination. Ronald Kaufman, who has close ties to the Bush White House, has reportedly received \$700,000 for his lobbying efforts on behalf of

the Eastern Pequots. Thomas Wilmot, a shopping mall developer from Rochester New York, is reportedly backing the Golden Hill Paugussetts, and a casino developer from Minnesota, who was formerly associated with Assistant Secretary - Indian Affairs Dave Anderson, Lyle Berman, supports the Nipmucs.

Present laws require full disclosure of lobbying efforts before Congress. We should require no less information about interests who bankroll groups seeking federal recognition and stand to profit handsomely.

Second, Congress should create a federal agency, the Federal Tribal Recognition Commission -- insulated from politics or lobbying -- to make tribal recognition and trust lands decisions. It must have nonpartisan, disinterested members with staggered terms, and ample resources. The Department of the Interior currently has an unavoidable conflict of interest -- a trustee responsible for advocating and protecting Native American interests but also a supposedly neutral judge determining the merits of recognition claims and resulting benefits.

There is compelling precedent for such an independent agency. The Securities and Exchange Commission, the Federal Communications Commission, and the Federal Trade Commission deal professionally and promptly with topics that require extraordinary expertise, impartiality, and fairness. The Commissioners have no personal stake in the outcome of decisions. Along with independence and authority, the agency must have sufficient resources in staff and other capabilities -- now lacking in the BIA. Without them, federal claims made by a tribal petitioner cannot be effectively and promptly evaluated.

Third, Congress should adopt the tribal recognition criteria in statute, reducing the likelihood that the BIA -- or a new, independent agency -- will stretch or disregard regulatory standards to recognize an undeserving petitioner. Formal enactment also provides a stronger standard on appeal to the courts, and makes a statement about congressional support. One of the most frustrating and startling consequences of the current BIA review process is the manipulation and disregard of the seven mandatory criteria for recognition -- abuses that the General Accounting Office (GAO) and Inspector General reports found have occurred in recent petitions.

Fourth, Congress should also enact measures to ensure meaningful participation by the entities and people directly impacted by a recognition decision -- including equal rights for the towns and cities to all information submitted by all parties.

Citizens and their public officials deserve a meaningful role and voice, beginning with access to relevant information.

Finally, Congress should provide additional, much-needed, well-deserved resources and authority for towns, cities and groups alike to reduce the increasing role of gaming money in the recognition process. Federal assistance is critical, in light of the increasing burdens of retaining experts in archeology, genealogy, history and other areas -- all necessary to participate meaningfully in the recognition process.

I submit the following examples of BIA lawlessness which qualify the agency for admission into the Governmental Hall of Shame:

**1. Deliberate decision to ignore mandatory tribal recognition criteria to grant recognition to the Schaghticoke despite clear lack of evidence supporting the petition.**

In a January, 2004 decision granting federal recognition to the Connecticut-based Schaghticoke, the BIA inexplicably reversed its preliminary denial and found that they met all seven mandatory criteria, despite the lack of any evidence establishing that the group met two of the seven mandatory criteria -- political autonomy and social community -- for long periods of history. The basis for this decision -- which directly conflicted with the preliminary negative decision and prior BIA precedent and regulatory requirements-- remained a mystery until several weeks later, when an internal staff briefing paper became available. The briefing paper created a road map -- as close to a smoking gun as we've seen -- for the agency to reverse its prior negative finding, despite the admitted lack of credible evidence of at least three of the seven mandatory criteria. I have attached that briefing paper to my testimony.

The criteria for federal recognition as an Indian Tribe have been carefully developed over 30 years, based primarily on Supreme Court precedent articulating the relationship of Indian tribes to the federal government. Present legal rules require any group seeking federal recognition to meet seven distinct criteria -- aimed at proving the petitioning group's continuous existence as a distinct community, ruled by a formal government, and descent from a sovereign, historical tribe. Distorting and defying these rules, as the BIA memorandum clearly demonstrates, the BIA's political leaders have disregarded these standards, misapplied evidence, and denied state and local governments a fair opportunity to be heard.

The briefing paper sets forth options to Acting Assistant Secretary Aurene Martin for addressing two issues staff acknowledged were potentially fatal to the Schaghticoke petition: (1) little or no evidence of the petitioner's political influence and authority for two substantial periods of time totaling over a century; and (2) serious problems associated with internal fighting among two factions of the group.

With respect to the lack of evidence, the memo demonstrates its disregard for the legal standards and precedents to arrive at a particular desired result. While acknowledging that Option 2-- declining to acknowledge the group -- would "maintain[] the current interpretation of the regulations and established precedents concerning how continuous tribal existence is demonstrated," the memo suggests a way to achieve a positive finding even though the petition lacks evidence of mandatory criteria for two historical periods: Option 1, which is to "[a]cknowledge the Schaghticoke under the regulations despite the two historical periods with little or no direct political evidence, based on the continual state relationship with a reservation and the continuity of a well defined community throughout its history."

Very simply, declining to acknowledge the group would flow from following the law and the agency's own precedent. Yet, the BIA chose Option 1, granting federal recognition by

substituting state recognition in lieu of evidence for large periods of time. The BIA chose this option despite its own concession that it would create a “lesser standard,” and despite the clear evidence in the record showing that the “continual state relationship” was not based on -- and could not satisfy -- federal recognition standards.

This BIA briefing paper confirms that recognition of the Schaghticoke petitioner resulted from the BIA purposefully disregarding its own regulations and long accepted precedents, ignoring substantial gaps in the evidence, and proceeding to “revise,” yet again, its recent pronouncements on the meaning and import of the State’s relationship with the group. In fact, the BIA has now “revised” the legal import of state recognition at least four times in only two years, each time adopting a view that would permit it to reach the result it wished, regardless of whether the group met the lawful standards.

## **2. Other examples of BIA’s willingness to ignore the law and its own regulations and precedents.**

In the Eastern Pequot and Paucatuck Eastern petitions, the former head of the BIA unilaterally overturned civil service staff expert findings that the two Indian groups failed to meet several of the seven mandatory regulatory criteria.

Not content to stop there, the BIA went even further in recognizing a single Eastern Pequot tribe in Connecticut comprised of two competing groups-- the Eastern Pequot and the Paucatuck Eastern Pequots-- despite the fact that these groups had filed separate, conflicting petitions for recognition, and despite substantial gaps in evidence in both tribal petitions. In their conflicting petitions, the Eastern Pequots and the Paucatuck Eastern Pequots claimed that the other was not entitled to recognition under the seven mandatory criteria for recognition. After a preliminary finding that neither group met the recognition criteria, the BIA -- in an unprecedented move -- created a third group which they named the “Historic Eastern Tribe” from both competing and conflicting petitions.

The BIA also distorted the state of Connecticut’s relationship with these groups to paper over huge gaps in the necessary evidence required to meet the seven recognition criteria.

In December 2004, the BIA admitted that in granting the Schaghticoke recognition it had contravened its own well-established precedents -- using an improper method to calculate the rates of marriage within the group, a critical basis for the recognition decision. Before it acknowledged this error, we had raised it on appeal. This admission was significant because the Final Determination relied on the marriage rates, as incorrectly calculated, to meet certain of the acknowledgment criteria.

## **3. The head of the BIA recused himself from virtually all major decisions.**

Shortly after the last Assistant Secretary – Indian Affairs (AS-IA), Dave Anderson, was appointed and confirmed by Congress, he recused himself from all recognition and gaming

decisions as a result of his former ties to Indian gaming (he was a partner in Lakes Gaming and was involved in establishing tribal casinos in the 1990s). Anderson delegated his responsibilities to his deputy, Aurene Martin, who was not confirmed by the Senate. Anderson later resigned and has yet to be replaced.

#### **4. Delay, reversal and indecision.**

The recognition process takes too long, leaving tribes, states, local communities and the public in limbo for decades. For example, the Golden Hill Paugussetts filed for tribal recognition almost 20 years ago. The BIA initially found that they did not merit recognition. The decision was reversed upon reconsideration. After more than 10 years, the BIA again found the group did not meet the mandatory criteria. Not until a couple of months ago, did the BIA issue its final decision denying federal recognition.

#### **5. Unfair and unequal treatment of states and towns in the recognition process.**

The BIA provides significant assistance to petitioning groups seeking federal tribal recognition -- even those financed by investors with far greater financial resources to devote to federal recognition than the state, towns and citizens affected by the application. However, the BIA fails to provide basic information to those who may be opposed to the application.

For example, the BIA refused to provide necessary petition documents to Connecticut and local interested parties in the Eastern Pequot/Paucatuck Eastern petitions, forcing the state and towns to sue the BIA in federal district court to compel the agency to produce the records in time for the state and local parties to have a meaningful opportunity to submit comments in the acknowledgment proceeding.

In addition, after the affected towns submitted comments to the BIA on the Eastern Pequots petition, the BIA unilaterally -- and without notice -- altered deadlines for the submission of comments by the towns so that the BIA could accept the petitioner's documents but exclude the towns' comments.

Connecticut's experience with the BIA is not unique. In 2002, the GAO issued a report documenting significant flaws in the present system, including uncertainty and inconsistency in recent BIA recognition decisions and lack of adherence to the seven mandatory criteria. The GAO report also cited lengthy delays in the recognition process -- including inexcusable delays in providing critical petition documents to interested parties such as the states and surrounding towns.

The United States Department of the Interior's Office of the Inspector General (OIG) also found numerous irregularities in how the BIA handled federal recognition decisions. The report documents that the then Assistant Secretary and Deputy Assistant Secretary either rewrote professional staff research reports or ordered the rewrite by the research staff, so that petitioners who hadn't met the standards would be approved. This Assistant Secretary himself admitted that

“acknowledgement decisions are political,” although he later expressed concern that the huge amount of gaming money behind groups seeking recognition would lead to petitions being approved that did not meet the standards.

The impact of federal tribal recognition cannot be understated -- underscoring the urgent need for reform. A decision to acknowledge an Indian tribe has profound and irreversible effects on tribes, states, local communities and the public. Federal recognition creates a government-to-government relationship between the tribe and the federal government and makes the tribe a quasi-sovereign nation. A federally recognized tribe is entitled to certain privileges and immunities under federal law: They are exempt from most state and local laws such as land use and environmental regulations. They enjoy immunity from suit. They may seek to expand their land base by pursuing land claims against private landowners, or placing land into trust under the Indian Reorganization Act. They are insulated from many worker protection statutes relating, for example, to the minimum wage or collective bargaining as well as health and safety codes.

Clearly, enactment of the Indian Gaming Regulatory Act (IGRA) more than a decade ago, permitting federally recognized tribes to operate commercial gaming operations, has vastly increased the financial stakes involved in federal recognition, providing an incentive for wealthy non-Indian backers to bankroll the petitions of groups in states where gaming is permitted on the promise of riches once recognition is achieved and casinos are built. Investors in the Schaghticoke and the Eastern Pequot petitions have sunk tens of millions of dollars into the quest for recognition and casinos with the expectation of receiving a substantial portion of future casino revenue. A number of other groups are seeking recognition, most with the avowed intention to own and operate commercial gaming establishments, if approved.

The enormity of interests and financial incentives at stake make even more essential public confidence in the integrity and efficacy of recognition decisions. Sadly, public respect and trust in the current process have been severely damaged. The current system is totally lacking in safeguards to protect the petitioning groups and the BIA from undue influence by monied interests. In addition, the process is shrouded in secrecy. State and local governments and private citizens directly impacted by a recognition application lack effective access to information submitted by the applicant or to the historical evidence and research by BIA staff.

I ask Congress to act swiftly and strongly to reform the system, remove the incentives for abuse, and restore credibility and public confidence in federal tribal recognition.