

October 1, 2002

Mr. R. Lee Fleming
Chief, Branch of Acknowledgment and Research
Bureau of Indian Affairs
MS 4660 MIB
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Re: Comments on Proposed Finding, Nipmuc Tribal Acknowledgment
Petitions (Petitioners 69A and 69B)

Dear Mr. Fleming:

On behalf of the Town of Sturbridge, Massachusetts, I am pleased to submit comments on the two requests for tribal acknowledgment filed with the Bureau of Indian Affairs (BIA) by divergent factions of the historical Nipmuc Nation. Sturbridge is an interested party in the proceeding based upon our familiarity with the history of the Nipmuc Nation and the effect tribal acknowledgment could have on our Town. If either or both petitioners are acknowledged, our Town could be seriously affected. Innocent landowners could have their property subjected to land claim lawsuits, and the petitioners' plans to develop major casinos in our region could have serious negative effects on our tax base, land use planning, environment, and quality of life. To protect these interests, Sturbridge is participating in this proceeding in an effort to ensure its fairness and objectivity.

In fulfilling our role as an interested party, the Town does not at this time take a position in opposition to, or support of, either petition. However, our review has indicated that serious questions remain as to whether either petitioner can meet the criteria for acknowledgment. The burden of proof rests with the petitioner. BIA's proposed findings demonstrate that sufficient information has not been developed to date to support a positive proposed finding for either group. Sturbridge reserves the right to take a final position after the

record is complete and in accordance with the acknowledgment regulations in 25 C.F.R. Part 83.

History of Petitions

On October 1, 2001, the Bureau of Indian Affairs (BIA) published its proposed findings that neither the Hassanamisco Band of the Nipmuc Nation petitioner group (Petitioner 69A) nor the Chaubunagungamaug Band (Dudley/Webster) (Petitioner 69B) qualify for acknowledgment as an Indian tribe under federal law. 66 Fed. Reg. 49967. 66 Fed. Reg. 49970. BIA issued this proposed finding rescinding an earlier determination made by the then Acting Assistant Secretary for Indian Affairs that Petitioner 69A met the acknowledgment criteria but that Petitioner 69B did not. As the record in this proceeding reflects, the BAR staff concluded that neither petitioner qualified, but this conclusion was reversed by the then Acting Assistant Secretary as to Petitioner 69A to result in a positive proposed finding. This decision was, in turn, reversed by the current Assistant Secretary to result in the two current negative proposed findings. A subsequent report by the Department of the Interior's Inspector General revealed the many problems with the previous Administration's processing of tribal acknowledgment requests, including the Nipmuc petitions. That report is incorporated by reference in these comments.

On January 23, 2002, BIA conducted a formal technical assistance meeting on the proposed finding in response to a request from Petitioner 69A. Representatives and Counsel for the Town of Sturbridge attended that meeting.

In response to requests from interested parties, BIA twice extended the deadline for comments on the proposed findings. The Town of Sturbridge requested these extensions by letters of August 1, 2001 and October 3, 2001. The final deadline for comment is October 1, 2002.

Administrative Issues

Prior to setting forth technical comments on the proposed finding, the Town of Sturbridge sets forth several threshold legal and policy issues.

First, by participating in this process, the Town does not concede that BIA has legal authority to acknowledge Indian tribes under federal law. While Congress has plenary authority over Indian affairs under Article I, sec. 8 of the U.S. Constitution, the power to grant acknowledgment has never been expressly granted to the Executive Branch. Indeed, in 1871 Congress passed a law which provided that no Indian tribe may be acknowledged as an independent nation. 25 U.S.C. § 71. Thus, unless Congress specifically delegated this power to the Secretary, it cannot be inferred or assumed. The general authority BIA relies upon for this power -- 25 U.S.C. §§ 2, 9, 1457 -- does not mention acknowledgment, nor does it grant this power. Indeed, the Department of the Interior has itself conceded this lack of power in the past. See Recognition of Certain Tribes: Hearings on S.2375 before Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. (1978) (statement of Deputy Solicitor David E. Lindgren).

In addition to having no source of delegated power, there are no "intelligible principles" articulated by Congress to guide agency decision-making. The absence of these principles, especially for so broad a grant of power as BIA seeks to assume, makes any delegation which may have occurred constitutionally invalid. See, e.g., *Whitman v. American Trucking Association*, ___ U.S. ___, 121 S.Ct. 903, 912-13 (2001); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 430 (1935). The Town reserves the right to raise these objections at subsequent stages of this proceeding.

Second, the Town objects to any action by BIA to proceed to a final determination without additional review if either petitioner attempts to redefine itself for purposes of addressing the deficiencies in the proposed finding. The Town is concerned, for example that, based upon the questions asked by Petitioner 69A at the January 23 technical assistance meeting, an effort will be made to reshape membership lists for purposes of avoiding the problems created by the Nipmuc's recent membership recruitment. Any such effort, in effect, creates a new petitioner and gives rise to a right for interested parties to review that evidence in the context of a renewed acknowledgment proceeding and a new proposed finding. Petitioner 69A has already defined itself in three separate ways. Unless this approach is followed, the comment periods defined under the BIA regulations will be of little value.

Our concern over these potential problems is heightened by the approach used by BIA in its final determination for the Eastern Pequot and Paucatuck Eastern Pequot petitions. In reaching a positive finding in those cases, BIA took the unprecedented step of combining two petitioners who were opposed to each other and doing so without allowing for comment or issuing a new proposed finding. As a result, interested parties never had an opportunity to comment on BIA's analysis on this newly formulated petitioner. Sturbridge objects to any such action by BIA in this proceeding, whether on the initiative of the Petitioners or through BIA's own attempt to merge the two Nipmuc groups into one. Indeed, we question whether BIA has the authority to combine unilaterally two petitioners into a single group (BIA's regulations only allow action in response to petitions submitted by the governing body of a petitioner group (25 C.F.R. § 83.4, 83.6) and then based upon a review of whether that specific "petitioner" qualifies under the criteria (25 C.F.R. §§ 3.7, 83.10(a), 83.10(m)). A substantially redefined petitioner group or merged group is tantamount as a new petition and must be treated as such.

The Town raises these concerns out of respect for the role of third parties in the process. As noted above, we do not yet take a position on whether either group qualifies. However, we believe the integrity of the process requires fair notice and opportunity to comment and a testing of the evidence and BIA's analysis through public review. We trust that BIA will adhere to these principles as it proceeds with its review of these two petitions.

Comments on the Proposed Findings

The proposed finding holds that: 1) Petitioner 69A fails to meet criteria (a) (identification as an American Indian entity since 1900), (b) (social community over time), (c) (political influence and authority over time), and (e) (descent of petitioner's membership from the historical tribe); and 2) Petitioner 69B fails to meet (a), (b), and (c). The Town has reviewed the record in this proceeding and conducted independent research. On the basis of this review, the Town has not seen evidence that refutes BIA's proposed finding. Additional evidence therefore would need to be developed by the Petitioners to meet their burden of proof under the criteria. Until such time as the Town has had the opportunity to review any new evidence, it is not in a position to draw a final conclusion about either petition. The Town summarizes its perspective on each petitioner below.

Petitioner 69A (Hassanamisco)

The Town notes that BIA has found that the Hassanamisco group fails to meet criterion (a), requiring external identification as a tribe since 1900. The Town, for its own purposes, has not in the past treated this group as an independent tribe. The current record reflects that no such external identification occurred on a consistent basis. Those identifications which do exist appear to be weak and speculative and focused largely on a single family, not a tribe. As a result, Petitioner 69A needs to address this issue through new evidence.

The Hassanamisco Band appears to have "self-defined" itself, at various times, in three different ways: 1) the historical Hassanamisco Band; 2) a combination of that Band with the Dudley/Webster group from 1978 to 1996; and 3) as the purported true tribe of all people of Nipmuc heritage. This wildly varying history makes it very difficult to trace the existence of a continuous tribal entity over time. The petitioner itself clearly struggles with the effort to do so, and the result is a record that does not, at this time, show the continuous community defined by BIA precedent as necessary to meet criterion (b). Whether additional evidence can be brought forward for this purpose remains to be seen.

In essence, the problem the Hassanamisco Band must come to grips with is that its history is, to a large degree, the history of the Cisco family. Interaction among these family members appears to be reasonably common, but BIA has clearly established that a "tribe" cannot consist of a single family. Muwekma Proposed Finding, at 24, affirmed Sept. 6, 2002; Letter from Assistant Secretary Deer to Senator Inouye, at 4 (Oct. 18, 1995). By definition, a tribe must consist of a larger community of individuals not related to each other. Petitioner 69A must find evidence that, as a Hassanamisco entity, it consisted of more than a single family.

The problem with Petitioner 69A's effort to link the Hassanamisco and Dudley/Webster groups is that there is no apparent historical antecedent for doing so. The record does not reveal that these two bands, to the extent they have existed since the point of first sustained contact in colonial times, dealt with each other. The evidence does not show these groups having any notable interaction until well into the 1900's, at which time such contacts

appear to have been infrequent and insufficient to sustain the level of continuity required under criterion (b). The only period of such interaction on a somewhat regular basis (1978-1996) fails by a great margin to prove historical continuity over time (i.e., since the colonial era and first sustained contact).

The petitioner has even greater problems when it tries to avoid the pitfalls described above by expanding itself to represent all Nipmuc descendants everywhere, including those individuals and families who lived off-reservation. This effort to meet criterion (b) manifested itself in the recruitment effort during the 1990's.

The Town does not believe the record shows the requisite degree of interaction among this larger, more widespread group of Nipmuc descendents. Moreover, as BIA notes, the recruitment of so many new members actually dilutes the group's ability to satisfy this test. So many new members have been brought in that the degree of interaction among claimed tribal members has been greatly diminished. In a smaller group, the percent of members interacting with each other would have been higher; this greatly expanded group with so many new members from off-reservation families who historically did not interact with the claimed "tribal core" essentially defines away the possible existence of the tribe. Instead, a mere amalgamation of individuals and families lacking patterns of historical interaction is presented.

Based upon the nature of the discussions of the January 23, 2002, technical assistance meeting, the Town is concerned that an effort will be made by this petitioner to redefine itself yet again by dropping members added during the recruitment drive of the 1990s to increase the percentage of members with historical relationships. As noted above, this would define a new petitioner, and require a new review. Moreover, it is questionable whether such a newly defined group could even be considered by BIA in this proceeding, especially in consideration of 25 C.F.R. § 83.3(c), which prohibits the acknowledgment of newly formed entities.

Criterion (c), which demands continuous political interaction, also does not appear to have been satisfied by the petitioner. As BIA precedent demonstrates and the Acknowledgment Guidelines confirm, a tribal petitioner

must have "leaders and followers" over time. See BIA Acknowledgment Guidelines, at 49. Like criterion (b), to the extent political interaction occurred over any period of time for this group, it does not appear to have been extensive enough or present enough of a longstanding basis to meet this test.

As with criterion (b), the Petitioner does not appear to have dealt with criterion (c)'s requirements in three ways: 1) as a Hassanamisco entity there is evidence of only one family, which does not, by definition, allow for political interaction; 2) for the two groups combined, any such activity occurred only for 1978-1996, and even then did not show evidence of true tribal political interaction but instead relied upon relationships among a small core group who did not interact with the supposed tribal body at large; and 3) the "all Nipmuc descendants" group is so large that the requisite degree of interaction cannot be shown. The problems presented by the over-recruitment of about ten years ago give rise to the same problems for dilution of political interaction as it does for social community under criterion (b).

With regard to the evidence provided by the petitions, a number of serious questions have not been answered. These include:

- 1) The Petitioner's Council does not appear to have been elected;
- 2) The Earle Report, a key historical document, does not reflect the presence of any consistent leaders;
- 3) The Council members only appear to have addressed issues they felt were important, not issues raised by the membership;
- 4) The appointment of Walter Vickers as "chief-for-life" shows no evidence of a political process or need for continued support from the membership; and
- 5) There is no evidence that the purported "governing document" was ever acted upon or approved by any kind of political process.

All of these issues, which appear to show the absence of political authority and continuity, would need to be answered to meet criterion (c).

Finally, for these two criteria, the Town makes two observations. The recent flawed BIA decision on the Eastern Pequot petitioners that made a positive

finding based on so-called State recognition is not applicable here. That is because, in addition to being a highly questionable interpretation of Connecticut history, that principle cannot apply in Massachusetts where State recognition was not continuous and ended in 1869.

Second, with regard to tribal interaction, it was suggested at the January 23 technical assistance meeting that a possible unifying theme among the Nipmuc was the involvement in shoemaking, on the theory that this activity was special and distinguishing to this Tribe. The Town has conducted independent research on this topic, which is set forth in Exhibit 1. This report demonstrates that shoemaking was a very common trade in southern Massachusetts at this time and cannot be considered a distinguishing feature of tribal interaction. Moreover, as demonstrated by the State of Connecticut in its comments, to the extent Nipmuc Indians were involved in this trade it was not common or a unifying practice. Instead, it is simply an example of a few members of this tribal group participating in one of the most prevalent occupations in the area.

The Town has not evaluated the evidence under criterion (e), much of which has been redacted from release. BIA's findings in this regard appear reasonable and would need to be shown to be incorrect by the Petitioner.

Petitioner 69B (Dudley/Webster)

The Dudley/Webster Band has essentially the same issues to address as the Hassanamisco group. As with Petitioner 69A, Petitioner 69B also must meet its burden of proof under the criteria. In particular, this group needs to address the deficiencies noted in the BIA proposed finding for criteria (a), (b), and (c). The Town has not identified additional evidence in its research that would allow the Dudley/Webster group to meet these standards, but we do not take a position at this time whether the criteria are met. The Town will review additional evidence submitted by the Petitioners and other parties in the future to further assess the acknowledgment claims.

With respect to criterion (a), the Town notes the relative scarcity of evidence of external identification of a tribal group. Certainly, Sturbridge has not viewed this Band as a tribal entity. The record does reflect external

identification of individual Indians asserting Nipmuc ties, but such a showing does not meet criterion (a).

The Town does not see sufficient evidence in the existing record to support positive findings under criteria (b) or (c), although we understand additional documents and data may be presented. The Dudley/Webster group has, to a large degree, the same problems as Hassanamisco. Much of the evidence of political and social interaction is from a single family, the extended Moore family. The activity over the last decade or so does not, by a wide margin, serve to satisfy this criterion's test for social and political continuity since colonial times. The Town will review any additional evidence submitted under these criteria in the future.

Conclusion

On the basis of the foregoing comments, the Town of Sturbridge believes that important questions must still be answered before it can be determined whether either petitioner group has met its burden of proof under 25 C.F.R. Part 83. The Town requests to be kept advised of all aspects of these proceedings and reserves the right to take a final position at a subsequent point in the review. Thank you for considering these comments.

Sincerely,

James J. Malloy

Town Administrator