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The Plight of New England Tribes Pursuing Federal Recognition

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Cover Page Footnote

Elizabeth Coronado is a 2016 J.D. Candidate at Suffolk University Law School and a member of the Picayune Rancheria of the Chukchansi Indians Tribe. She would like to thank Professor Lorie Graham and Professor Amy Den Ouden for their guidance and encouragement of this Article, and the staff of the AILJ for their assistance. Elizabeth would also like to acknowledge the Eastern Pequot Tribe and the Mashpee Wampanoag Tribe for inspiration of this Article. Mich gayis.

THE PLIGHT OF NEW ENGLAND TRIBES PURSUING FEDERAL RECOGNITION

Elizabeth Coronado

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INTRODUCTION

In 1978, the Bureau of Indian Affairs (BIA) established a formal process, known as 25 C.F.R. Part 83 *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*, which allows the federal government to recognize American Indian tribes via the Assistant Secretary of Indian Affairs. Through this process, termed the Federal Acknowledgment Process (FAP), the federal government assumed the task of defining community

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and culture for American Indians through the lens of Western civilization. This process has placed American Indian tribes under a microscope, as they constantly have to prove their identity to outsiders. Both Professor Amy Den Ouden¹ and Professor Jean M. O'Brien² define the struggle for recognition as the: "... struggles that remind us of the destructive power of the racial stereotypes and popular myths about Indians that persist today and that have obscured not only how native nations and communities see themselves but also what they have surmounted to sustain themselves as peoples."³ Additionally, the FAP is necessary for tribes to establish a government-to-government and trust relationship with the United States. This Article exposes the flaws of the previous FAP and analyze whether or not the reformed rules drafted by Assistant Secretary Kevin Washburn will remedy these flaws.

Today, there are 567 federally recognized tribes in the United States.⁴ Federal recognition is an important aspect of American Indian tribal governance because it establishes a unique trust relationship with the federal government, and establishes a government-to-government relationship with the United States. Because this trust relationship developed and expanded over time, the BIA expanded in turn to provide services to tribes; accordingly, the federal government began differentiating between federally recognized and non-recognized tribes. This trust relationship in

¹ AMY DEN OUDEN, *BEYOND CONQUEST: NATIVE PEOPLES AND THE STRUGGLE FOR HISTORY IN NEW ENGLAND* (2005) (outlining the resistance of Southern New England Natives against encroachment). Professor Ouden, of the University of Massachusetts-Boston, also did a significant amount of work on the Federal Acknowledgement Process project with the Eastern Pequot.

² Professor Jean M. O'Brien of the University of Minnesota has authored papers about federal recognition. *See, e.g.*, Jean M. O'Brien, *Recognition and Rebuilding*, in *THE WORLD OF INDIGENOUS NORTH AMERICA* (Robert Warrior ed., Routledge 2004); *RECOGNITION, SOVEREIGNTY STRUGGLES AND INDIGENOUS RIGHTS IN THE UNITED STATES: A SOURCEBOOK* (Jean M. O'Brien & Amy Den Ouden eds., University of North Carolina Press 2013).

³ *RECOGNITION, SOVEREIGNTY, AND INDIGENOUS RIGHTS IN THE UNITED STATES: A SOURCEBOOK 2* (Jean M. O'Brien & Amy Den Ouden eds., University of North Carolina Press 2013)2013) [hereinafter *RECOGNITION, SOVEREIGNTY, AND INDIGENOUS RIGHTS*].

⁴ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019 (Jan. 29, 2016).

federal law derives from the “Marshall Trilogy.”⁵ However, this special relationship originated prior to the formation of the union. In 2012, Professor Angela Riley of UCLA School of Law was invited by the United States Supreme Court’s Historical Society to give a presentation entitled *Native American Lands and the Supreme Court*.⁶ During the presentation, Professor Riley commented on how the trust relationship had roots in treaty-making between the tribes and early colonizers of the future United States:

The groundwork for the Court’s contemplation of such cases predates Supreme Court Jurisprudence and, in fact, predates the formation of the Court and of the United States itself . . . In the settlement of the continent, the colonial powers initially and the United States subsequently, treated with the Indian Nations to negotiate the transfer of lands often in exchange for peace and protection from Indians to Europeans.⁷

An important aspect of the trust relationship is the inherent right for the tribes to govern themselves and their land without outside interference.⁸ Tribal governance is rapidly expanding in many areas to exercise jurisdictional power within reservations.⁹

⁵ Chief Justice Marshall adopted a modified doctrine of discovery wherein the federal government could retain Indian land by purchase or conquest, but also emphasized a right to occupancy for Indian tribes. *See Johnson v. McIntosh*, 21 U.S. 543, 584 (1823); Justice Marshall further articulated the relationship of Tribes to the federal government as “domestic dependent nations,” and “ward to his guardian.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Tribes also have an inherent right to self-government, which is not handed from the federal government but retained from their existence prior to colonization and essentially the formation of the United States. *See Worcester v. Georgia*, 31 U.S. 515, 581 (1832). These three principles are the foundation to all federal Indian law policies and are commonly referred to as the Marshall Trilogy.

⁶ Angela Riley, *Native American Lands and the Supreme Court* (C-SPAN Nov. 14, 2012), <http://www.c-span.org/video/?309427-1/native-american-lands-supreme-court>.

⁷ *Id.*

⁸ DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. & MATTHEW L.M. FLETCHER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 3 (6th ed. 2011) [hereinafter GETCHES].

⁹ *Id.*

These areas include tribal courts, zoning ordinances, taxation bureaus, environmental controls, business and health regulation, and fisheries and water management codes.¹⁰

Despite this expanse of tribal governance, the modern trust doctrine still requires the executive branch and the legislative branch to uphold their responsibilities as trustees to the Indian tribes, or beneficiaries. Although Congress maintains plenary power over all Indian tribes, it is not absolute.¹¹ Congress wears “two hats” when drafting legislation that impacts Indian tribes. The first hat requires Congress to act as trustee, and decide what is in the best interests for the tribes. The second hat requires Congress to exercise its sovereign power of eminent domain, as limited by the Fifth Amendment.¹² Congress must also act “rationally” when drafting legislation for the tribes.¹³ Executive agencies, like the BIA, have a higher standard of trust responsibility towards the Indian tribes. *Pyramid Lake* outlines this higher standard of trust responsibility. In that case, the Pyramid Lake Paiute Tribe brought an action against the Secretary of the Interior who made an improper judgment call to divert water flowing from the nearby Truckee River into the Tribe’s reservation, and instead delivered more water to the nearby Truckee-Carson Irrigation District.¹⁴ The court concluded that the Secretary’s action failed to adequately uphold his fiduciary duty to the Tribe, given that, “the United States . . . ‘has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts . . . should therefore be judged by the most exacting fiduciary standards.’”¹⁵ Accordingly, *Pyramid Lake* opened the doors for a different type of relief for Indian tribes when their trust responsibility was violated—injunctions granted because of the failure of executive agencies to uphold their fiduciary responsibilities.¹⁶

¹⁰ *Id.*

¹¹ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980).

¹² *Id.*

¹³ *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

¹⁴ *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 254 (D.C. Cir. 1972).

¹⁵ *Id.*

¹⁶ GETCHES, *supra* note 8, at 354.

Another important part of the trust responsibility between the federal government and Indian tribes, is the disbursement of BIA provided grants for tribal services such as economic development, education, health, judicial development, and tribal governance.¹⁷ Although the BIA has been providing services for tribes since 1824, it was not until the era of self-determination (beginning in 1961 and currently in place today) that services were offered for their subsistence instead of for the destruction of tribalism.¹⁸ In light of these increased subsistence programs (such as increased grants for housing, education, child welfare, economic development, tribal governance, and law enforcement), the BIA began differentiating between “recognized” and “nonrecognized” tribes in the 1960s.¹⁹ Today, a tribe can be “recognized” or “acknowledged” by the federal government by a prior treaty, an act of Congress, or the FAP enacted in 1978. Part I addresses the various regulations of the FAP.

After discussion of the previous Federal Acknowledgement Process, this Article analyzes the problems of the past rules and then analyze whether or not the reformed rules will address these flaws utilizing the examples of the Eastern Pequot and Mashpee Wampanoag Tribes. Many times New England tribes are dismissed as not being “real” Indians because of false narratives of the “disappearing” Indian. In addition to the notion of the “disappearing” Indian, the fear of casinos have thwarted the ability of tribes to seek federal recognition in New England.²⁰

Fomenting in public reactions to the Mashantucket’s casino and in the context of rancorous debates that erupted over other tribal acknowledgement cases in Connecticut at the time, the racist stereotype of the “casino Indian” took hold in the region and has had an increasingly

¹⁷ *What We Do*, U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhatWeDo/index.htm> (outlining a more complete list of various services and programs the BIA offers to federally recognized tribes) (last visited May 17, 2016).

¹⁸ GETCHES, *supra* note 8, at 216–17.

¹⁹ *Id.*

²⁰ OUDEN, *supra* note 1.

negative impact on public attitudes toward federal recognition.²¹

Part II addresses the Eastern Pequot Tribe's quest towards federal recognition. This Part discusses the history of the Eastern Pequots and their attempt to debunk the false narrative of the "disappearing" Indian that the people and government of the State of Connecticut have attempted to propagate. Part III addresses the Mashpee Wampanoag Tribe's thirty-year journey to federal recognition in light of both the First Circuit's decision in *Mashpee Tribe v. New Seabury Corp.*, and a positive final determination for federal recognition in 2007. Parts II and III both analyze the federal recognition process, especially in regards to how shortcomings in the previous recognition rules affected the federal recognition processes of both the Eastern Pequots and Mashpee Wampanoag.

Part IV then compares the flaws with the reformed rules and whether or not these rules will fix the process. Because this process has been criticized for being capricious, inconsistent, and incompetent,²² Assistant Secretary Kevin Washburn has proposed changes to the current Federal Acknowledgement Process in order to remedy the flaws. This Article concludes with thoughts on how to mend the current rules in order to allow New England tribes a fair opportunity to assert their right for recognition.

I. FEDERAL ACKNOWLEDGEMENT RULES PRIOR TO JULY 31, 2015

The Federal Acknowledgement Process was formally enacted in 1978.²³ Since its enactment, there have been 356 letters of intent submitted by tribes seeking federal recognition.²⁴ Of these 356 tribes, only 87 of them have completed petitions, including the

²¹ RECOGNITION, SOVEREIGNTY, AND INDIGENOUS RIGHTS, *supra* note 3, at 2.

²² *Id.*

²³ See generally Racheal Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209 (1991) (discussing more information on the evolution of the Federal Acknowledgement Process).

²⁴ *Office of Federal Acknowledgement Brief Overview*, U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024417.pdf> (last visited May 17, 2016).

Eastern Pequot Tribe and Mashpee Wampanoag Tribe, which this Article later discusses in detail.²⁵ Of the 87 petitions, 55 have been resolved by the Office of Federal Acknowledgement (OFA). The OFA granted the Mashpee Wampanoag Tribe and 16 others with federal recognition and denied recognition of the Eastern Pequot Tribe and 33 others.²⁶ The result is that only three percent of all federally recognized tribes successfully underwent the FAP, and the remaining 97 percent were recognized by either a prior treaty or an act of congress.

The FAP requires that a tribe satisfy seven criteria before it is granted federal recognition:

Criterion (a): establishing tribal existence on a continual basis since 1900.²⁷

Criterion (b): proving the tribe existed as a distinct community from historical times until the present.²⁸

Criterion (c): maintaining political influence or authority over its members as an autonomous²⁹ group from historical times until the present.³⁰

Criterion (d): establishing membership rolls.³¹

Criterion (e): requiring that the members are descendants from a historical tribe.³²

Criterion (f): provides that members are not members of any other North American Indian tribe.³³

Criterion (g): requiring that the tribe was not terminated by a previous Congressional action.³⁴

²⁵ *Id.*

²⁶ *Id.*

²⁷ 25 C.F.R. § 83.7(a) (2015).

²⁸ 25 C.F.R. § 83.7(b) (2015).

²⁹ 25 C.F.R. § 83.1 (1994) (defining autonomous as “the exercise of political influence or authority independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the history, geography, culture, and social organization of the petitioning group.”).

³⁰ 25 C.F.R. § 83.7(c) (2015).

³¹ 25 C.F.R. § 83.7(d) (2015).

³² 25 C.F.R. § 83.7(e) (2015).

³³ 25 C.F.R. § 83.7(f) (2015).

³⁴ 25 C.F.R. § 83.7(g) (2015).

All of the above criteria place the burden on the petitioning Indian tribe to establish all seven criteria by submitting detailed reports on their history. Therefore, it becomes necessary for the tribes to hire anthropologists and historians to help trace the history.³⁵ Accordingly, New England tribes, who often have limited resources, must shoulder a substantial financial burden—especially when there are 400 years of history to research and compile.

There is an extensive amount of time between the moment the tribe sends its letter of intent and when the BIA makes a final determination on the tribe's recognition. After a letter of intent is submitted, the BIA's Assistant Secretary (AS) works with the tribe to make sure all required criteria are accounted for in the petition documents.³⁶ The AS places a petition on active consideration after it is found to be complete.³⁷ The Eastern Pequot Tribe and the Mashpee Wampanoag Tribe's attempts at federal recognition reveals the time involved for a tribe to be considered for acknowledgment under the previous regulations. After submitting its letter of intent, it took 20 years for the Eastern Pequot's petition to be placed on active consideration; similarly, it took 28 years for the Mashpee Wampanoag's petition to be placed on active consideration. One year after the tribe is finally placed on active consideration, the AS is required to draft a proposed finding.³⁸ The proposed finding is then open to public comment by third parties that may have evidence in regards to the finding.³⁹ Next, the petitioning tribe has a period of time to respond to the interested third parties who have submitted materials or comments. The AS then determines a consultation period to hear arguments that were articulated during the comment period.⁴⁰

After consultation, a final determination is published.⁴¹ The petitioning tribe or interested third parties may request a reconsideration, in which the Interior Board of Indian Appeals

³⁵ Paschal, *supra* note 23, at 216 (Paschal further examining this burden on petitioning tribes).

³⁶ 25 C.F.R. § 83.10 (2015).

³⁷ *Id.*

³⁸ 25 C.F.R. § 83.10(h) (2015).

³⁹ 25 C.F.R. § 83.10(i) (2015).

⁴⁰ 25 C.F.R. § 83.10(l) (2015).

⁴¹ 25 C.F.R. § 83.10(m) (2015).

(IBIA) will determine whether there are grounds for review.⁴² In addition to the third party comments, the reconsideration hearing also reveals the political influence of states (like Connecticut in the Eastern Pequots' process for federal recognition), which tends to demonstrate the substantial disparities between a state and a tribe. If the IBIA finds there are grounds for a review, a second hearing will be hosted.⁴³ After the hearing, the determination is sent to the AS who will then decide a Reconsidered Determination.⁴⁴

II. EASTERN PEQUOT TRIBE

In 1983, the State of Connecticut settled litigation with the Mashantucket Pequot Tribe over a tract of land in Ledyard, Connecticut, which created a permanent reservation and federal recognition of the Tribe.⁴⁵ This settlement became known as the Connecticut Indian Land Claims Settlement.⁴⁶ Then in 1994, a bill was enacted to settle another Indian land claim in Connecticut with the Mohegan Nation, which also established a permanent reservation and federal recognition.⁴⁷ After being federally recognized, the Mashantucket Pequot and the Mohegan Tribe opened casinos on their reservations, which cultivated a fear of a third casino in Connecticut opening if another tribe was granted recognition.⁴⁸ The Eastern Pequot Tribe faced this uphill battle against both the people and government of Connecticut as fear of a third casino intensified. Consequently, the FAP has been an arduous task for tribes with limited resources, who most often battle against adverse third parties with comparably extensive resources. This Part uncovers that arduous task, and details the Eastern Pequot Tribe of Connecticut's attempt to be granted federal recognition by the federal government.

⁴² 25 C.F.R. § 83.11 (2015).

⁴³ 25 C.F.R. § 83.11(e) (2015).

⁴⁴ 25 C.F.R. § 83.11(g) (2015).

⁴⁵ 25 U.S.C.A. § 1751 (West 1983).

⁴⁶ *Id.*

⁴⁷ H.R. 4653, 103d Cong. (1994).

⁴⁸ Lyn Bixby, *Eastern Pequots' Recognition May Mean Third Casino in State*, HARTFORD COURANT (May 5, 1997), http://articles.courant.com/1997-05-05/news/9705050018_1_federal-recognition-eastern-pequot-indian-tribe-golden-hill-paugussetts.

However, before addressing the issues of the Eastern Pequots' FAP, it is important to understand the Tribe's history and their interaction with settlers, colonists, people, and the government of Connecticut. Subsection A discusses the history of the Eastern Pequot Tribe and who they are as a people as well as a history of their contact with the people of Connecticut. Subsection B then expounds upon the Eastern Pequots' FAP. Finally, in Subsection C the FAP is scrutinized in light of the Eastern Pequots' petition.

A. History

In order to understand the detrimental effects of the current FAP, it is fundamental to have an idea of who the Eastern Pequots are as a people and the interaction they have had with colonists, the State of Connecticut, and eventually the United States government. Before the colonization of the Connecticut area, there were 26 villages along the Connecticut, Pequot, Mystic, and Paucatuck Rivers.⁴⁹ The natives of this area specialized in hunting as they had deer, beaver, fox, otter, duck, goose, rabbit, and seal readily available.⁵⁰ They also cultivated crops like corn, beans, squash, strawberries, and grapes.⁵¹ Like other New England tribes, the Connecticut natives (hereinafter referred to as "Pequots") were known for their production of Wampum,⁵² which is an important aspect of their spiritual and cultural well-being.⁵³

As early as the 17th century, colonists began embracing the "New World" and colonizing the area of Connecticut as it was seen as empty land. 1637 marked a devastating period for the Pequots.⁵⁴ The colonists attacked the Pequots resulting in the deaths of 300 to 700 Pequot children, adults, and elders who were burned alive in their wigwams or annihilated in other ways.⁵⁵ This

⁴⁹ *History*, EASTERN PEQUOT TRIBAL NATION [hereinafter EASTERN PEQUOT], <http://www.easternpequottribalnation.com/history.html> (last visited May 17, 2016).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (defining wampum as sewan, purple/back, or white beads made of various types of shell and created with a metal called Indian Gold to create bead work and jewelry).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

became known as the Pequot Massacre.⁵⁶ After the Pequot Massacre, a band of Pequots congregated together to create the tribe known today as the Eastern Pequot Nation.⁵⁷

After the Pequot Massacre, the Eastern Pequots were displaced by the colonists and were in search of un-encroached land. Eventually, the colonial government set aside land for the Eastern Pequots in present day North Stonington, Connecticut.⁵⁸ A deed formally established the parcel of land, which became known as the Lantern Hill Reservation, where the Tribe has continued to reside.⁵⁹

Despite this formal establishment, protection of the Eastern Pequot land has been an uphill battle since colonization. Continual encroachment on native land by Connecticut colonists resulted in the destruction of native crops and fences, the cutting of trees and the stealing of timber, and threats and acts of violence against reservation life, which were justified by natives failing to “improve” the land to colonists’ standards.⁶⁰

In order for the Eastern Pequot Tribal Nation to maintain their culture as a distinct people as required in criterion (b) of the FAP, land is required for their subsistence. However, since time immemorial, the colonial government had ignored the Eastern Pequots’ request for more land to support their population.⁶¹ Additionally, the colonists did not support the Pequots’ traditional, subsistence methods of farming (done by leaving plots of land uncultivated in order to return to the land to plant again).⁶² Furthermore, when land was finally granted to the Pequots, the

⁵⁶ *Id.*

⁵⁷ Another band of the Pequot Nation is the Mashantucket Pequot Tribe. Mashantucket Pequots, the State of Connecticut, and Congress reached a settlement to allow the tribe to purchase land and place it in trust as well as federal recognition. This settlement was signed by President Reagan in 1983 and became known as the Mashantucket Pequot Indian Land Claims Settlement Act. Today the Mashantucket has a reservation of 1,250 acres, and owns and operates Foxwoods Resort Casino. *Tribal History*, THE MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION [hereinafter MASHANTUCKET], <http://www.mashantucket.com/tribalhistory.aspx> (last visited Apr. 9, 2015).

⁵⁸ EASTERN PEQUOT, *supra* note 49.

⁵⁹ *Id.*

⁶⁰ OUDEN, *supra* note 1, at 68.

⁶¹ *Id.*

⁶² *Id.*

General Assembly placed limitations on ownership of the land, which is described in the following Massachusetts court order from 1662:

[T]he pequitt [sic] indians yt [sic] are placed [sic] under him Eight thousand accres [sic] of land in any place of the pequod [sic] county under our Jurisdiction not formerly granted for a township & plantation to said indians & their prosterity [sic] prvided [sic] they continue under subiction [sic], and shall not sell or alienate the said lands or any part theirot [sic] to any English man or men wth [sic] out this courts approbation[.]⁶³

In addition to the extreme limitations placed on tribal land use and ownership, colonization in New England also had substantial detrimental effects on the tribes in the area because it created an image of the “Indian” as a “fierce savage,” as exhibited in the following quoted opinion taken from a Supreme Court decision.

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.⁶⁴

Natives were also represented as “fierce savages” in *Johnson v. McIntosh*, a case which became the bedrock of federal Indian law.⁶⁵

Yet another deleterious effect of colonization was detribalization, defined as “the dismantling and destruction of reservation community.”⁶⁶ The Eastern Pequots faced a push for

⁶³ *Massachusetts General Court Orders Regarding Cashawashett and the Pequots under his Command* (May 7, 1662) Paul Grant-Costa and Tobias Glaza, eds., *The New England Indian Papers Series*, Yale University Library Digital Collections, <http://findit.library.yale.edu/yipp>.

⁶⁴ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289–90 (1955).

⁶⁵ *Johnson v. McIntosh*, 21 U.S. 543, 590 (1823).

⁶⁶ OUDEN, *supra* note 1, at 32.

detrribalization as early as the 17th century. During that time, Native identities were consistently undermined by a colonially-imposed blood quantum. To regulate the quantum, native populations were consistently surveilled: “[t]he most insidious forms of colonial surveillance was counting Indians living within reservations to evaluate the community’s social viability and assessing or undermining their rights to land.”⁶⁷ Additionally, the colonial government implemented systems of institutional racism. One way the colonial government of Connecticut enforced this racism was through laws that governed the movements of Indians, and penalized that movement with brutal consequences. “Colonists who killed any Indian enemy and produce[d] the scalp of such Indian enemy to the Governor and Council or to the said Committee of War shall immediately be paid out of the public treasury 50 pounds.” The act didn’t require the colonists to prove that their victims had violated any law.⁶⁸

Connecticut’s colonialists also promoted detrribalization through husbandry, the act of diminishing women’s economic power and political influence.⁶⁹ Many times the colonial government would determine a tribe’s population by counting how many men were present. However, the tribe’s men were often absent on account of taking on wage labor on colonial farms and within the whaling industry; additionally, disease and war had taken a toll on the male native populations.⁷⁰ Despite this decreased Native male population, the colonial government refused to recognize Native women as constituting the tribe, and would therefore not count them as part of the tribe’s population. Accordingly, Native women were often dismissed when attempting to request assistance in light of encroachers on behalf of the tribe.

However, this method of detrribalization did not stop Native women from asserting themselves to protect their tribes. For example, Mary Momoho, an Eastern Pequot sachem (chief), braved the task of petitioning for more land and to uphold the Tribe’s current land rights in light of encroachers; Professor Ouden

⁶⁷ *Id.* at 28.

⁶⁸ *Id.* at 79.

⁶⁹ *Id.*

⁷⁰ *Id.*

discussed Momoho's petition, made in front of the General Assembly:

Eastern Pequot petitioners argued that the General Assembly's investigatory committee had simply ignored the economic hardships endured by the reservation community, since their recommendation that "a small quantity of land would suffice for us" was made 'not considering what great disadvantages wee [sic] are under for want of Dung! When we have wore [sic] out our Planting land; wee [sic] must always be breaking up new land; so that a small quantity of land will starve us.⁷¹

After the colonial period, the State of Connecticut acquired the obligation of overseeing the tribes of Connecticut from the colony, and did so without any objection.⁷² Therefore, laws impacting the Eastern Pequots were continually amended by the State of Connecticut, and the State maintained a fiduciary responsibility including responsibility of their lands and funds. Despite this responsibility however, "the actions of the State indicate[d] that members of the State recognized tribes were not, at least under law, fully citizens of the State until legislation passed in 1973."⁷³ Thereafter, the Connecticut Indian Affairs Commission (CIAC) was established in order to continue oversight of Indian affairs.⁷⁴ The CIAC would be made up of representatives from the five tribes in Connecticut, and three non-Indian members appointed by the governor.⁷⁵ "In addition to its role as advisor, the council would be responsible for drawing up new programs for the reservations, recommending changes to regulations, and determining the qualifications of individuals to be designated as

⁷¹ *Id.* at 73.

⁷² U.S. DEP'T. OF THE INTERIOR, BUREAU INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION IN REGARD TO FEDERAL ACKNOWLEDGEMENT OF THE EASTERN PEQUOT INDIANS OF CONNECTICUT 77 (2002) [hereinafter *FEDERAL ACKNOWLEDGEMENT*].

⁷³ *Id.* at 78.

⁷⁴ *Id.* at 118.

⁷⁵ *Id.* at 160.

‘Indians’ for the administration.”⁷⁶ However, the council has not met since the early 1990s. Although, there was a proposed bill in 2007 to create a Native American Affairs Commission in Connecticut as a way to mend the relationship between the tribes of Connecticut and the State,⁷⁷ this bill died.⁷⁸

B. Federal Recognition Today

Today, the Eastern Pequots are not a federally recognized tribe. However, they have been a state recognized tribe with a state reservation since 1683.⁷⁹ The Eastern Pequot Tribal Nation submitted a letter of intent via the FAP on June 28, 1978 and formally became petitioner number 35.⁸⁰ Their petition was considered on active consideration in 1998, and a positive proposed finding for federal recognition was issued on March 24, 2000.⁸¹ However, the State of Connecticut and the towns of Ledyard, North Stonington, and Preston, as interested parties, opposed the recognition of the Eastern Pequots.⁸² Despite the opposition, the Tribe was granted federal recognition on June 24, 2002, after satisfying all seven mandatory criteria.⁸³ Nevertheless, the interested parties filed a request for reconsideration with the IBIA.⁸⁴ The State of Connecticut argued that its relationship and purported recognition of the Eastern Pequot could never be used as evidence to support criterion (b) “distinct community” and (c) “political influence or authority,” and reliance on the state’s

⁷⁶ *Id.*

⁷⁷ Gale Toensing, *Connecticut Native American Affairs Commission Garners Support*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Mar. 26, 2007), <http://indiancountrytodaymedianetwork.com/2007/03/26/connecticut-native-american-affairs-commission-garners-support-90543>.

⁷⁸ H.B. No. 7298 (Conn. 2007) (unenacted).

⁷⁹ FEDERAL ACKNOWLEDGEMENT, *supra* 72, at 29.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2.

⁸³ *Id.* at 13.

⁸⁴ OFFICE OF FED. ACKNOWLEDGEMENT, U.S. DEP’T. OF INTERIOR, BUREAU INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR RECONSIDERED FINAL DETERMINATION IN REGARD TO FEDERAL ACKNOWLEDGEMENT OF THE EASTERN PEQUOT INDIANS OF CONNECTICUT 2 (2005).

recognition of the Tribe offered little probative value.⁸⁵ As a result, on May 12, 2005, the IBIA vacated the determination and remanded it for further work and reconsideration in light of the ruling that greater weight should not be given to state recognition.⁸⁶ Subsequently, the Reconsidered Final Determination Denying Federal Acknowledgement to the Eastern Pequot Indians of Connecticut was filed October 11, 2005, which denied federal recognition of the Eastern Pequot Tribe.⁸⁷

Without federal recognition, the Eastern Pequots do not have the special government-to-government relationship with the federal government, or the special protections afforded to federally recognized tribes that would be helpful when the State of Connecticut encroaches on their sovereign rights.⁸⁸ The Tribe is currently concerned about losing their state reservation in light of the federal government denying them recognition.

C. Analysis

Because the Eastern Pequots were denied federal recognition, their experience with the FAP unearths the inadequacies of the current rules despite the well-established trust responsibility of the federal government toward the Indian tribes. The first flaw is that the federal government has not utilized the canons of construction⁸⁹ during the FAP,⁹⁰ “[t]he federal tribal

⁸⁵ See Federal Acknowledgement of the Historical Eastern Pequot Tribe, 41 IBIA 1 (IBIA 2005).

⁸⁶ *Id.* at 21.

⁸⁷ U.S. DEP’T. OF THE INTERIOR, BUREAU INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR RECONSIDERED FINAL DETERMINATION DENYING FEDERAL ACKNOWLEDGEMENT TO THE EASTERN PEQUOT INDIANS OF CONNECTICUT AND PAUCATUCK EASTERN PEQUOT 91, 139 (2005) [hereinafter RECONSIDERED FINAL DETERMINATION].

⁸⁸ See *supra* Part I for a discussion on the significance of federal recognition.

⁸⁹ The Indian canons of construction are as follows: treaties between tribes and the federal government must be interpreted as the Indians would have understood them; ambiguities in the interpretation of treaties, statutes, and regulations must be construed in favor of the tribe; and that absent express treaty, statute, or regulation to the contrary, Indians retain their rights. For purposes of this paper, the second canon of construction regarding ambiguities in the interpretation of statutes or regulations is relevant. Samuel E. Ennis, *Implicit Divestiture and the Supreme Court’s (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 625 (2011).

acknowledgement process has sometimes appeared to deviate from the canons of construction, to generate ambiguities and even inaccuracies in its inconsistent interpretations of tribal nations' federal acknowledgement petitions, and in some instances, to simply be 'deaf to Indian input.'"⁹¹ The canons of construction were developed in federal Indian law and policy as the trust relationship between the tribes and the federal government augmented.⁹² Because tribes are placed in an unequal bargaining position compared to the state and the federal government and statutes are often deaf to Indian input, legislation is typically interpreted in favor of the Indians.⁹³ One example of the Office of Federal Acknowledgement (OFA)'s failure to utilize the canons of construction in the Eastern Pequots' FAP was evidenced when the OFA did not construe the historical evidence liberally in favor of the Tribe.

During its recognition process, the OFA established that the Eastern Pequot Tribe existed as a distinct community from the colonial period until 1973.⁹⁴ However, the OFA also concluded that after 1973, there was missing evidence to prove their existence.⁹⁵ However, when it made that determination, the OFA failed to construe the historical evidence in favor of the Tribe when it did not take into account that tribes often go underground or relocate because of lack of resources and societal pressures. This is especially important given that the late 1970s and 1980s marked a period where New England tribes proactively sued landowners and states for the illegal sale of their land and the development of casinos on reservation land, and therefore may have been in an underground or relocation period.⁹⁶

⁹⁰ Letter from Amy Den Ouden to Kevin Washburn, Assistant Secretary, Bureau of Indian Affairs (July 1, 2014) [hereinafter Letter], *available at* <http://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc1-027317.pdf>.

⁹¹ *Id.*

⁹² GETCHES, *supra* note 8, at 130.

⁹³ Ennis, *supra* note 89, at 625.

⁹⁴ RECONSIDERED FINAL DETERMINATION, *supra* note 87, at 6.

⁹⁵ *Id.*

⁹⁶ MASHANTUCKET, *supra* note 57. (The Mashantucket Pequot Tribe in Connecticut went through a series of land suits after 1976 attempting to gain land back from neighboring landowners that was sold by the State of Connecticut. The Tribe then reached a settlement and passed legislation to give

Additionally, when construing the evidence regarding the Tribe's existence as a distinct community, the OFA was unresponsive to Native input. In light of the fact that the Tribe may have been in an underground or relocation period in the 70s and 80s (when the Tribe undertook its FAP), it would have been particularly important for the OFA to illicit input from tribal members regarding their community; however, the OFA ignored opportunities to interview various Eastern Pequot members.

The second, and major, flaw that impacted the Eastern Pequots' FAP was the undue political influence on the federal government's final determinations. The State of Connecticut and the towns of North Stonington, Ledyard, and Preston's involvement were clear throughout the process. During the FAP, the State of Connecticut and the towns furnished extensive documentation to evidence their adverse position to the Tribe's recognition.⁹⁷ The State of Connecticut and the towns of Ledyard, North Stonington, and Preston submitted various comments including, *State of Connecticut to United States Department of the Interior. . . In re Federal Acknowledgement Petition of the Eastern Pequot Indians of Connecticut . . . Comments of the State of Connecticut on the Proposed Findings*, with an appendix and a binder full of material; *Analysis of the Eastern Pequot and Paucatuck Eastern Pequot Tribal Acknowledgement Petitions under 25 C.F.R. Part 83*; and *Comments on the Proposed Findings*, with a narrative and ample exhibits.⁹⁸

[O]n January 19, 2001, the State of Connecticut and the Towns of North Stonington, Ledyard, and Preston filed suit *Connecticut v. Dept. of the*

them federal recognition and 1,250 acres of land. Then, in 1986 the Tribe opened a bingo hall and in 1992 the beginning stages of the Foxwoods Resort Casino started).

⁹⁷ While the OFA lists the titles of the documentation provided by the State of Connecticut in its final determination report, the contents of those documents are not specified. However, the extensive amount of adverse documentation is obvious, as well as the fact that a large amount of the documentation provided by the State and the towns were specific genealogy reports of tribal members. See FEDERAL ACKNOWLEDGEMENT, *supra* note 72, at 3–4.

⁹⁸ *Id.* at 2. The towns and Connecticut submitted a handful of genealogical records to disprove that the Eastern Pequots existed.

Interior, (D.Conn. 2001) (No. 3:01-CV-88-AVC) . .

. Negotiations for a time schedule to produce the remaining petition documents ensued, leading to a court ordered schedule for production of documents

⁹⁹

During the proceedings, the State of Connecticut hired a top law firm to litigate the case and enforce production of documents regarding the historical proof of the existence of the Eastern Pequot Tribe.¹⁰⁰ This is one example of the unjust economic disparity that existed between Connecticut and Eastern Pequot Tribe, who had limited funds to afford outrageous attorney fees. As a result, the Tribe had to use funds from private investors and now has \$80 million in debt,¹⁰¹ while the State of Connecticut was able to use taxpayer dollars to afford litigation expenses.¹⁰²

In contrast, the Massachusetts' state government was more hands-off during the FAP of the Mashpee Wampanoag Tribe, who gained federal recognition (the process is discussed in further detail in Part III). In comparison to the extensive adverse documentation furnished by the State of Connecticut, the Massachusetts Attorney General (AG) only submitted two brief letters during the comment period on the positive proposed finding for the Mashpee Wampanoag Tribe.¹⁰³ In those letters, the AG addressed the issue of whether or not the OFA adequately reviewed the trial record in *Mashpee Tribe v. New Seabury Corp.*, however, he failed to discuss the issue of recognition in letters.

Connecticut's extensive adverse involvement in the tribal recognition process has largely to do with the fact that the federal recognition of the Eastern Pequots could result in a third casino,

⁹⁹ *Id.*

¹⁰⁰ *Id.* at n.2; *Firm Overview*, PERKINS & COIE, LLP, <http://www.perkinscoie.com/en/about-us/firm/firm-overview/overview.html> (last visited on May 17, 2016).

¹⁰¹ James Mosher, *Eastern Pequot Tribe Fighting for Recognition*, THE BULLETIN (Feb. 7, 2012), <http://www.norwichbulletin.com/article/20120207/News/302079946>.

¹⁰² Sheri M. Jones & Katherine Sebastian Dring, *Testimony Before the Bureau of Indian Affairs*, BUREAU OF INDIAN AFFAIRS (July 31, 2013), available at <http://www.bia.gov/cs/groups/xraca/documents/text/idc1-022793.pdf>.

¹⁰³ U.S. DEP'T. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION OF THE MASHPEE WAMPANOAG INDIAN TRIBAL COUNCIL, INC. 5 (2007).

which the State did not want.¹⁰⁴ Comparatively, the State of Massachusetts did not share this reasoning, and therefore did not submit extensive adverse documentation. Massachusetts had not legalized gaming in the Commonwealth until 2011 through the Expanded Gaming Act; therefore, the fear of a casino was not relevant during the Mashpee Wampanoag's FAP.¹⁰⁵

The third flaw is the difficulties New England tribes face to prove the tribe existed as a distinct community and maintained political influence from historical times to the present, especially due to the time frame. This overall predicament is in addition to the particular difficulty regarding the 1970s and 1980s time frame discussed above. The Eastern Pequot Tribe faced colonial contact beginning in the early 17th century, as opposed to California tribes, who did not face encroachment of settlers until after the discovery of gold in 1848.¹⁰⁶ Not only does the Eastern Pequot Tribe have to prove its distinct community and political influence beginning 200 years prior to many other tribes, they have also faced detribalization and the push for the "disappearing Indian" at the hands of the government of Connecticut 200 years longer than many other tribes. The "disappearing Indian" refers to the colonial myth that Indians present a problem when they refuse to disappear, and this problem must be dealt with¹⁰⁷—resulting in land available for colonists. Accordingly, the constant encroachment of colonists, and eventually the State of Connecticut, made it exceedingly difficult for the Eastern Pequot Nation to prove its distinct community and maintain political influence in light of its 400 years of contact with the colonial and federal governments.

Because of the settlers' early contact with the Eastern Pequots, and the related responsibility of the Tribe to prove its distinct community and governance as early on as the 17th century, the FAP for the Eastern Pequots was substantially more involved than that of other tribes. This is evidenced by the fact that the

¹⁰⁴ Bixby, *supra* note 48.

¹⁰⁵ *Expanded Gaming Act*, MASSACHUSETTS GAMING COMM'N, <http://massgaming.com/about/expanded-gaming-act/> (last visited May 17, 2016).

¹⁰⁶ *Who We Are*, U.S. DEP'T. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/WeAre/> (last visited May 16, 2016).

¹⁰⁷ Letter, *supra* note 90.

investigation required the Tribe to hire anthropologists and historians to unearth oral histories and search through various petitions submitted to colonial governments and Britain. Notably, this caused a great financial burden for the Tribe, who had limited resources.

The fourth flaw in the FAP is the difficulty in defining a tribal community. The federal government, through the BIA, has decided what constitutes tribal tradition and culture according to their own discretion in order to define community. For example, one measure of distinct community used by the BIA is significant rates of marriage within the group, or marriages with other Indian populations that evidence a pattern.¹⁰⁸ The OFA looks at the rates of marriage within the tribe in order to show evidence of a community.¹⁰⁹ This measure is problematic since, even as a colony, the Connecticut government has continually taken the stance that once an Indian married a non-Indian, the children of that marriage were not to be considered Indian.

In southern New England, Native Americans who also have African American ancestry have been subjected to intensely racist scrutiny, and disparagements of their identity are informed by the ‘one-drop rule,’ a tenet of the white supremacist ideology that construes what is perniciously termed ‘black blood’ as a contaminant that negates Indian identity.¹¹⁰

In accordance with this logic, a tribe’s “distinct community” would be diluted or even destroyed were the tribal members to marry outside of the tribe. However, Native Americans today are a diverse population including all different types of heritages, including, but not limited to: the native blood that traces the members back to ancestors of their tribe. It is absurd to argue that because a member of the tribe decides to marry a non-Indian, or

¹⁰⁸ 25 C.F.R. § 83.7(b)(1) (2015).

¹⁰⁹ Federal Acknowledgement of American Indian Tribes, 80 Fed. Reg. 37861 (July 1, 2015).

¹¹⁰ OUDEN, *supra* note 1, at 30.

marry outside of his or her own tribe, that the tribe's sense of community is lost.

In the Final Determination for the Eastern Pequot Tribe, the distinct community requirement was broken down into various time periods.¹¹¹ The Reconsidered Final Determination upheld the Final Determination's evaluation that there was ample evidence that proved the Eastern Pequots existed as a distinct community from colonial period to 1973. In light of the IBIA decision that state recognition cannot be given substantial weight for criteria 83.7(b), which requires proving the tribe existed as a distinct community from historical times until the present,¹¹² and (c), which requires proving the tribe has political influence or authority over its members as an autonomous group from historical times until the present,¹¹³ the Assistant Secretary concluded that there was not enough evidence to prove that the Eastern Pequots existed as a distinct community from 1973–2002.

In the 1950s, Resolution 108, a detrimental termination policy, ended the special government-to-government relationship with the tribes.¹¹⁴ As a result, many tribal members lost their land and struggled to reconvene across the country.¹¹⁵ Without land, it is a substantial burden for tribes to prove a “distinct” community as required by the FAP. However, one of the main factors that make tribal nations distinct from other cultural groups is their special government-to-government relationship with the federal government; in other words, their sovereignty. Along these lines, the Eastern Pequots remained a distinct community via their state reservation and special status in Connecticut as a distinct group with unique services.

III. MASHPEE WAMPANOAG TRIBE

Another New England tribe that undertook the undue burden of the FAP is the Mashpee Wampanoag Tribe (“Mashpee” or

¹¹¹ Time periods: colonial period to 1873; 1873 to 1920; 1920 to 1940; 1940 to 1973; and 1973 to 2002. *See* RECONSIDERED FINAL DETERMINATION, *supra* note 86, at 84–91.

¹¹² 25 C.F.R. § 83.7(b) (2015).

¹¹³ 25 C.F.R. § 83.7(c) (2015).

¹¹⁴ GETCHES, *supra* note 8, at 201.

¹¹⁵ *Id.*

“Mashpee Wampanoag”). Unlike the Eastern Pequot Tribe, the Mashpee were successful in being granted federal recognition. However, it was not until 30 years after submitting the initial letter of intent for federal recognition that the Office of Federal Acknowledgment recognized them. This Part continues to discuss the four issues that the Eastern Pequot Tribe experienced in the FAP (lack of the use of the canons of construction in the process, the undue political influence on the final determinations, the extensive time frame to prove existence as a distinct community and political influence, and the difficulties in defining tribal community) from the perspective of the Mashpee Wampanoag Tribe.

Before examining the issues the Mashpee Wampanoag faced during their FAP, Subsection A discusses a brief history of the Tribe and their contact with colonists and governments. Subsection B then outlines the FAP of the Mashpee and where they stand today. Finally, Subsection C discusses the issues of the FAP.

A. History

The first man and woman were made out of stone. The Creator decided that the stone man and woman weren't going to work because they didn't love each other enough, and so the Creator started from scratch and made the first man and woman out of pine trees, because they did love each other enough, they were granted life year-long, which is why pine trees stay green year-round.¹¹⁶

The Mashpee Wampanoag, or the People of the First Light, are from land that is now called Cape Cod in Southeastern Massachusetts.¹¹⁷ They, like other New England tribes, have struggled with land loss and preserving their culture since colonization. Their struggle for land exposes the flaws in the current FAP for New England tribes.

The Pilgrims first arrived on the Wampanoag land in 1620 with the purpose of settling the area as the Massachusetts Bay and New

¹¹⁶ WE STILL LIVE HERE: ÂS NUTAYUNEÂN (Anne Makepeace, 2010) [hereinafter Makepeace].

¹¹⁷ DAWNLAND VOICES: AN ANTHOLOGY OF INDIGENOUS WRITING FROM NEW ENGLAND 429 (Siobhan Senier ed., 2014) [hereinafter Senier].

Plymouth Colonies.¹¹⁸ The colonists, similar to the colonists in Connecticut, noticed that the Wampanoag, or “Wôpanâak,” did not utilize their land in the same fashion as the English, and viewed the land as wilderness. Accordingly, the English determined that the land was open for settlement.¹¹⁹ Because of this determination, the Mayflower Compact, the first written law in the New World, established to control the Indigenous societies, proclaimed that the colonists had a natural right to the land.¹²⁰

After asserting this “right,” the English attempted to convert the Natives to Christianity through praying towns that served as Indian districts within the colonies.¹²¹ By 1647, in hopes of “civilizing” all of the Natives in the New England area, the towns were required to create schools and “keep watch and ward” over the Natives by making them teachers and ministers.¹²² One Puritan minister, Richard Bourne, created a praying town in 1665 by securing 25 square miles of land from two local Wampanoag sachems, Wequish and Tookenchosen.¹²³ The deed was confirmed by Sachem of Manomet (Plymouth), and allowed for more land to be added to the praying town (located in the present town of Mashpee).¹²⁴ This praying town became the largest one in Massachusetts, and allowed Bourne to successfully convert many Wampanoags to Christianity.¹²⁵ Relatedly, in 1665, the Massachusetts General Court passed a law that Natives could not worship their “false gods” or “the devil,” and if the law was violated, the religious leader would have to pay a fine of twenty shillings.¹²⁶

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² OFFICE OF FED. ACKNOWLEDGEMENT, U.S. DEP’T. OF INTERIOR, BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR THE PROPOSED FINDING ON THE MASHPEE WAMPANOAG INDIAN TRIBAL COUNCIL, INC. 13 (2006) [hereinafter SUMMARY].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

In 1698, there were 263 Mashpee in Bourne's praying town.¹²⁷ The Mashpee held title to the land within the praying town and were allowed to govern themselves according to a proprietary system developed by the English.¹²⁸ Within that system the Mashpee were allowed to sell land to other Mashpee or their descendants, but could not sell land to outsiders unless they had approval of all the Mashpee.¹²⁹

Land is an important part of the culture of the Mashpee. Not only is land vital for cultural preservation of the Tribe, but land that comprises "state reservations," or other land that tribes have maintained as their own, is reviewed by the BIA through the FAP before granting federal recognition. Specifically, in regards to the Mashpee, the Assistant Secretary examined the history of the plot of land presently called Mashpee and its connection to the Tribe.¹³⁰

Ramona Peters of the Mashpee Wampanoag Tribe explains the importance of land to her community:

We name ourselves after the land we live with. Because not only are we breathing in, we are also drinking from the water that is flavored by that very land. Whatever is deposited in the soil is in that water is in us. So we are all one thing, and we name ourselves after the place that is our nurturing. That sustains our life.¹³¹

Although land is vital to the Mashpee Wampanoag, the Tribe has faced constant hurdles in order to maintain control over its land. Over time, the colonial legislature limited the Mashpee's self-governance by appointing guardians to the Tribe.¹³² The Mashpee also faced non-Native squatters who attempted to illegally take their land. In response, the Mashpee continually petitioned the colony to protect their land rights and remove the non-Native guardians and squatters so that the Tribe could

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ SUMMARY, *supra* note 122.

¹³¹ Senier, *supra* note 117.

¹³² SUMMARY, *supra* note 122, at 14.

maintain its self-government.¹³³ The following is an excerpt of a petition from the Mashpee Wampanoag Tribe to the Massachusetts General Court in Barnstable, Massachusetts in 1752 requesting protection of their land:

O, our honorable gentlemen and kind gentlemen in Boston, in Massachusetts, here in New England. Now we beseech you what shall we do in regards to our land? We shall not give it away, nor shall it be sold, nor shall it be lent, but we shall use it as long as we live. We, together with our children, and our children's children. Against our will these Englishmen take away from us what was our land. We poor Indians soon shall not have any place to reside together with our children. Therefore now you kind gentlemen in Boston, we beseech you, defend us, and they will trouble us no more on our land.¹³⁴

Despite the Tribe's petitions and efforts, by 1870, the State of Massachusetts government incorporated the town of Mashpee against the Tribe's wishes. Soon after, settlers took land from the Mashpee, although the Tribe continued to maintain control of their government.¹³⁵

In the 1960s, the town of Mashpee began to change as more non-Natives than Wampanoag settled in the area.¹³⁶ "By 1970 the Town of Mashpee became the fastest-growing town in the United States, changing the political way of living for the Wampanoag. Mashpee's economy became dependent upon construction, tourism, educational services, and seasonal visitors, leaving the Native Americans in trepidation."¹³⁷ Shortly after, in 1974, the Mashpee lost control of the local government because the Tribe's population of between 450 and 500 had become a minority of the town's 2,500 residents.¹³⁸

¹³³ *Id.*

¹³⁴ Makepeace, *supra* note 116.

¹³⁵ SUMMARY, *supra* note 122, at 14.

¹³⁶ Senier, *supra* note 117

¹³⁷ *Id.*

¹³⁸ SUMMARY, *supra* note 122, at 15.

B. Federal Acknowledgement Process Today

Despite the eventual loss of their land, as well as persistent efforts by colonial and state government to detribalize the Mashpee Wampanoag, the Tribe was granted federal recognition in 2007.¹³⁹ Prior to filing for acknowledgement, the Tribe brought a suit against landowners for violating the Indian Nonintercourse Act¹⁴⁰ by taking land illegally without the consent of the federal government.¹⁴¹

In *Mashpee Tribe v. New Seabury Corp.*, the United States Court of Appeals attempted to define the term “tribe” and whether or not the Mashpee Wampanoag fit within that definition.¹⁴² The court relied significantly on the definition of a tribe set in *Montoya v. United States*, which emphasized a need for a government in order for a tribe to exist.¹⁴³ *Montoya* defined a “tribe” as having “four elements (a) ‘same or similar race’; (b) ‘united in a community’; (c) ‘under one leadership or government’; and (d) ‘inhabiting a particular . . . territory[.]’”¹⁴⁴ Considering the court’s instructions to the jury on the definition of a tribe, the jury found that the Mashpee Wampanoag existed as a tribe until 1842, but had “voluntarily abandoned tribal status” by 1869.

The Mashpee Wampanoag submitted a letter of intent outlining its request to become federally recognized, as well as its request

¹³⁹ *Id.* at 9.

¹⁴⁰ *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 232 (1985) (citing Nonintercourse Act of 1793, 1 Stat. 330 (1790)). The Nonintercourse Act of 1793 provided that “no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . [and] in the presence, and with the approbation of the commissioner or commissioners of the United States appointed to supervise such transactions.” *Id.*

¹⁴¹ *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1979).

¹⁴² *Id.*

¹⁴³ *Montoya v. United States*, 180 U.S. 261, 266 (1901) (deciding that the Victoria’s band of Apache Indians did not constitute a tribe for the Act of March 3, 1981 which allowed citizens of the United States to bring claims for property that was destroyed or taken by Indians and not returned or paid for. The Court established the following standard to define a tribe: part of a same or similar race, united in a community, under one leadership or government, and inhabiting a particular territory.).

¹⁴⁴ *Mashpee*, 592 F.2d at 582.

for the United States to enforce the Nonintercourse Act on its behalf as the Tribe's trustee.¹⁴⁵ The letter of intent was received on June 7, 1977, but the federal government did not intervene in the land case.¹⁴⁶ A positive proposed finding was approved on March 31, 2006.¹⁴⁷ Then, a final determination was approved on February 15, 2007. Because it took 30 years to achieve federal recognition, the Mashpee Wampanoag were unable to litigate land rights under the Nonintercourse Act as many other tribes had successfully accomplished. The Tribe was granted land in trust in Taunton and Mashpee, Massachusetts in accordance with a decision handed down by AS Kevin Washburn this past September.¹⁴⁸

However, in February, residents of Taunton filed a complaint in the United States District Court in Boston challenging the land that had been placed in trust, the complaint alleged that the Tribe had few historical ties to Taunton, and that the AS "illogically" construed the language of the Indian Reorganization Act of 1934¹⁴⁹ to expand its authority to grant land-into-trust.¹⁵⁰ In light of this recent complaint, the process of placing land into trust for the Tribe is not completely over. However, the Tribe is not a party to this action but the federal government must defend its land into trust determination. Although the Tribe is moving forward with the construction of the First Light Resort and Casino on their

¹⁴⁵ SUMMARY, *supra* note 122, at 6.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Sam Houghton, *Taunton Residents Challenge Land in Trust Decision*, THE MASHPEE ENTERPRISE (Feb. 12, 2016), http://www.cape-news.net/mashpee/news/taunton-residents-challenge-land-in-trust-decision/article_fd53abd3-6d64-5417-a7c1-b2bcc798f9bb.html.

¹⁴⁹ In 2009, the Supreme Court interpreted 25 U.S.C. § 479 that defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," as only those tribes that were under federal jurisdiction when the Indian Reorganization Act was enacted in 1934. *See Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). This has complicated the process of land into trust for the Mashpee Wampanoag Tribe who was recognized in 2007. However, in March 2015 the BIA Regional Director Stanley Speaks signed documents establishing a reservation for the Cowlitz Tribe in Oregon. The Cowlitz Tribe was not federally recognized until 2000 through the FAP. Richard Walker, *A Place to Call Home; Cowlitz Tribe Signs Land into Trust for Reservation*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Mar. 12, 2015), <http://indiancountrytodaymedianetwork.com/2015/03/12/place-call-home-cowlitz-tribe-signs-land-trust-reservation-159568>.

¹⁵⁰ Houghton, *supra* note 148.

reservation, Mashpee's fight for their right to land in the courts is still ongoing since *Mashpee Tribe v. New Seabury Corp.*¹⁵¹

C. Analysis

In light of the thirty-year journey of the Mashpee Wampanoag Tribe, there are many flaws in the Tribe's FAP. This subsection analyzes those flaws in comparison to the flaws in the Eastern Pequot's FAP discussed earlier in this Article.

The first flaw of the FAP for the Mashpee Wampanoag Tribe was the failure to utilize the canons of construction by failing to construe evidence in the Tribe's favor. Throughout the FAP, the Branch of Acknowledgement and Research (BAR) consistently asked for documentation that proved political authority and community. According to the BAR, this documentation was necessary to place the Mashpee Wampanoag petition on active consideration. For example, the BAR asked,

What direct evidence [wa]s there to support the conclusion that it [could have been] assumed, based on Zimmerman's study relating to the 1930's, that 'the tribe operated the town government for the benefit of its members and not the non-Indian residents and nonresident property owners of the town' [sic] after 1870 and, presumably, until control of the town was lost in 1974? [P]lease also provide a description of and citation to the data relating to that period for the statement that 'kin ties formed an integral part of the political process, with intermarriage locking the families together.'¹⁵²

Although the BAR requested and expected direct evidence, often times that type of evidence did not exist since tribal culture and history is often handed down orally from generation to generation. However, the OFA failed to take into account the oral

¹⁵¹ Sean P. Murphy, *Mashpee Tribe Breaks Ground on Casino in Taunton*, BOSTON GLOBE (Apr. 5, 2016), <https://www.bostonglobe.com/metro/2016/04/05/mashpee-tribe-break-ground-casino-taunton/d9qZ7h4VVmSTfpixYdPSM/story.html>.

¹⁵² OFFICE OF FED. ACKNOWLEDGEMENT, U. S. DEP'T OF THE INTERIOR, TECHNICAL ASSISTANCE LETTER MWT-V001-D003 (1991).

tradition involved in tribal culture. Also, similar to the Eastern Pequots and other tribes, the burden of conducting the extensive research regarding its tribal history, from first contact with colonists to present day, was solely on the Tribe. As discussed earlier (and is true for the Mashpee), the Tribe did not have the resources to hire the necessary anthropologists and historians to trace their history.

The second flaw of the FAP for the Mashpee Wampanoag's petition was the 30 years it took to prove the Tribe's existence in accordance with criterion (b)¹⁵³ and criterion (c)¹⁵⁴ of the rules. The Mashpee Wampanoag Tribe submitted over 10,100 documents, totaling about 54,000 pages, in their petition record to prove the existence of the Tribe.¹⁵⁵ Despite this expansive effort, the Tribe was not placed on active consideration until October 1, 2005, which was about 29 years after the Tribe first submitted its letter of intent in 1977.¹⁵⁶

The third flaw is that the rules failed to properly define a tribal community. 61 of 186 total pages in the proposed finding for the Mashpee Wampanoag Tribe served to establish whether or not the Tribe constituted a community under criterion (b) of the FAP. Criterion (b) is broken down into various time periods: Contact, Colonial, and Revolutionary Periods from 1620s to 1788¹⁵⁷; the Overseer Era from 1788 to 1834¹⁵⁸; the District Period from 1834 to 1870¹⁵⁹; the Early Town Period from 1870 to 1930¹⁶⁰; the Late Town Period from 1930 to 1974¹⁶¹; and the Mashpee Wampanoag Tribal Council Period from 1974 to the present.¹⁶² In the first three of these periods, from the 1620s to 1870, the proposed finding analyzed only residential patterns to prove a distinct community.¹⁶³ However, the analysis of residential patterns in "one distinct

¹⁵³ 25 C.F.R. § 83.7(b) (2015).

¹⁵⁴ 25 C.F.R. § 83.7(c) (2015).

¹⁵⁵ SUMMARY, *supra* note 122, at 14.

¹⁵⁶ *Id.*

¹⁵⁷ SUMMARY, *supra* note 122, at 32.

¹⁵⁸ *Id.* at 36.

¹⁵⁹ *Id.* at 41.

¹⁶⁰ *Id.* at 43.

¹⁶¹ *Id.* at 52.

¹⁶² *Id.* at 65.

¹⁶³ *Id.* at 36.

community” only, undermines the Tribe’s ability to migrate to other places and still maintain their culture. In addition, the Mashpee Wampanoag Tribe faced an array of racial hostilities as colonists encroached on their land; this is especially important given that the Tribe did not have the federal government’s assurance of a constant land base or a reservation. Therefore, in accordance with the FAP’s reasoning, if the Tribe was forced to disperse due to encroachment by hostile colonists and the Commonwealth of Massachusetts, the Tribe’s distinct community would be terminated under the criterion; however, the FAP would not account for the fact that the distinct community it requires was terminated forcefully and without the consent of the Tribe.

In addition to residential patterns, the OFA reviewed social hostilities and marriages as evidence of a distinct community. Defining community based on marriage and social hostilities in the FAP between Natives and non-Natives continues to place Natives in inferior positions in society. From 1870 to 1974, similar to the Eastern Pequots’ FAP, marriage patterns were examined to establish a distinct community.¹⁶⁴ The Tribe was required to submit evidence proving that it maintained a high-level of Mashpee marriages in order to constitute a distinct community.¹⁶⁵ However, inter-tribal marriages as evidence of community perpetuates the idea that once a member of the tribe leaves the community by marriage that cultural and community-based connection is lost. The FAP does not take into account the possibility of incorporating those outside marriages into the tribe’s community, nor does it account for incorporation of the children of those marriages into the tribe’s community.¹⁶⁶

Finally, from 1974 to the present, the social structure of the Tribe and hostilities between the Mashpee and non-members were reviewed to define a distinct community.¹⁶⁷

¹⁶⁴ *Id.* at 50.

¹⁶⁵ *Id.*

¹⁶⁶ Some tribes have incorporated adoption or naturalization procedures for non-members for spousal connection. Tommy Miller, *Beyond Blood Quantum the Legal Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323, 349 (2014) (citing THE FORT MCDERMITT PAIUTE AND SHOSHONE TRIBE CONST. art. II, § 2(b) (1936)).

¹⁶⁷ *Id.* at 65.

Early in May 1988, David Hendricks, a Mashpee member, was shot and killed by a town police officer following a high-speed chase in the town of Mashpee. Anger over the shooting and the investigation galvanized group members, who demanded the officer be fired. The controversy, and the group's response, drew wide coverage in local newspapers that described the existence of the 'Wampanoag Tribal Council' in the town of Mashpee.¹⁶⁸

The FAP used this event and other such events that evidenced hostility by the Tribe to show the existence of a distinct community who would band together around galvanizing events. However, using the murder of a tribal member to define a tribal community under criterion (b) is unscrupulous, even if it is one piece of evidence of a larger picture. Using such evidence perpetuates the idea that tribal members are more hostile than or inferior to others and necessitates that racism be incorporated into the FAP.

Despite all of these flaws in the FAP, the Mashpee Wampanoag Tribe was eventually federal recognized. One of the reasons the Mashpee were successful was that the Commonwealth of Massachusetts was not involved in the recognition process. In fact, the Massachusetts Attorney General was nearly absent in the process because gaming was not a factor (unlike in Connecticut). Another reason for the Tribe's success was that the Mashpee Wampanoag were able to maintain the self-governance of the Mashpee Indian District in the 19th century and continued to dominate the Town of Mashpee once it was incorporated by operating schools, supporting poor residents, maintaining roads, and passing laws for the members of the Tribe until 1974 when the electorate changed in the town.¹⁶⁹ Furthermore, despite pressures from outsiders to disperse or move to other locations, the Mashpee consistently resided in the area of Mashpee. However, this is not always the case for every tribe across the United States, a fact

¹⁶⁸ SUMMARY, *supra* note 122, at 29.

¹⁶⁹ *Id.* at 15.

obvious in the above analysis of the Eastern Pequots. Because of these differences, the Federal Acknowledgement Rules should address these inconsistencies amongst different tribes and their histories.

IV. REFORMED RULES ANALYSIS

As a result of the apparent flaws in the previous Federal Acknowledgement Process as discussed in Section II and III, Assistant Secretary Kevin Washburn has tackled a proposed reform to the FAP since his appointment to office in the fall of 2012.¹⁷⁰

This is one [topic] I heard about unanimously—from on the Hill, from tribal leaders, from people within the department. There's great dissatisfaction with . . . the acknowledgement-recognition process and, honestly, that dissatisfaction has been [building for] 20 years or more. [Reforming it is] something we really do hope to accomplish, and we will accomplish it only with extensive tribal consultation.¹⁷¹

The proposed regulations have been characterized as “the most dramatic, bold proposal made in the federal acknowledgement area in probably the last 20 years[.]”¹⁷² The BIA created a working group to develop a “discussion draft” for changes to the FAP. The working group included representatives from the Solicitor’s Office, the Office of Federal Acknowledgement, and the AS.¹⁷³ Once the discussion draft was developed, it was released for input by

¹⁷⁰ Gale Courey Toensing, *Washburn’s Bold Plan to Fix Interior’s Federal Recognition Process*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Jun. 28, 2013), <http://indiancountrytodaymedianetwork.com/2013/06/28/washburns-bold-plan-fix-interiors-federal-recognition-process-150151> (last visited May 17, 2016).

¹⁷¹ *Id.*

¹⁷² Attorney Michael Anderson, *Id.*

¹⁷³ *Frequently Asked Questions Proposed Rule: Federal Acknowledgement* (25 CFR 83), BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/cs/groups/xopa/documents/text/idc1-026773.pdf> (last visited May 17, 2016).

federally recognized tribes as well as the public.¹⁷⁴ Five tribal consultation sessions and five public meetings were conducted across the United States to discuss the draft.¹⁷⁵ After significant input from the public and federally recognized tribes on the discussion draft from June 21, 2013 to September 25, 2013, AS Washburn released the proposed rules to reform the FAP on May 29, 2014.¹⁷⁶ The BIA then conducted six tribal consultations and six public meetings throughout the United States to discuss the proposed rules.¹⁷⁷ The BIA addressed all of the comments regarding the proposed rules, and took them under consideration when creating the finalized rules.¹⁷⁸ After significant consultations with federally-recognized tribes and the public, on July 1, 2015, AS Washburn finalized the rules and reformed the FAP.¹⁷⁹ The finalized rules became effective on July 31, 2015, and now govern the FAP.¹⁸⁰

The proposed rules released in 2014 made significant changes to the FAP. In proposed criterion (a), the petitioning tribe has to describe its existence at a point in time during the historical period (1900 or prior to) instead of requiring petitioners to prove their existence as a tribe by external evidence.¹⁸¹ In proposed criterion (b), the tribe is required to prove its existence as a distinct community from 1934 until the present, instead of since first contact as was required by the old rules (which may date back to 400 years ago for some tribes).¹⁸² The proposed rules also changed the date in criterion (c) defining political authority starting in 1934 instead of since first contact.¹⁸³ Criterion (c) was updated in order to reflect changes made by the Indian Reorganization Act that was

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Federal Acknowledgement of American Indian Tribes, 79 Fed. Reg. 30766-01 (May 29, 2014).

¹⁷⁷ *Revisions to Regulations on Federal Acknowledgement of Indian Tribes*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/ORM/83revise/index.htm> (last visited on May 17, 2016).

¹⁷⁸ *Id.*

¹⁷⁹ Federal Acknowledgement of American Indian Tribes, 80 Fed. Reg. 37862-01 (July 1, 2015).

¹⁸⁰ *Id.*

¹⁸¹ Federal Acknowledgement of American Indian Tribes, 79 Fed. Reg. at 30769

¹⁸² *Id.*

¹⁸³ *Id.*

implemented in 1934, where the federal government attempted to bring tribal communities together again after the devastating effects of the General Allotment Act.¹⁸⁴ The descent requirement in criterion (e), which in the old rules used to require that all members descend from a historical tribe, as proposed, only requires 80 percent of the tribe's membership descend from a historical tribe.¹⁸⁵ Lastly, proposed criterion (f) requires that tribal membership must be principally composed of individuals who are not part of any other federally recognized tribe; however, if members of a group petitioning for federal acknowledgment joined another federally recognized tribe after 2010, that fact would not be held against the petitioning group.¹⁸⁶

Another important change in the proposed rules is that tribes will be able to use evidence of a state reservation to satisfy criterion (b)'s "distinct community" and criterion (c)'s "political influence" requirements.¹⁸⁷ Additionally, an important administrative change in the proposed rules is elimination of the IBIA review process.¹⁸⁸ Instead of petitioning for reconsideration to the IBIA, interested third parties or petitioning tribes would be able to challenge the decision in a United States District Court. Because of the major effects that may change the recognition status of tribes who have been handed a negative final determination, a re-petition process was created in the proposed rules.¹⁸⁹ However, in order to re-petition, tribes would have to obtain the permission of the third parties who opposed the process.¹⁹⁰ This is referred to as the third-party veto.¹⁹¹

Although the proposed rules contained many improvements, AS Washburn did not wholly incorporate the proposed rules into the final rules in 2015. However, the major changes that were included in the finalized rules were intended to create a fairer

¹⁸⁴ *Id.* at 30768.

¹⁸⁵ *Id.* at 30769.

¹⁸⁶ *Id.* at 30770.

¹⁸⁷ *Id.* at 30769.

¹⁸⁸ *Id.* at 30766.

¹⁸⁹ *Id.* at 30773.

¹⁹⁰ *Id.* at 30767.

¹⁹¹ Federal Acknowledgement of American Indian Tribes, 80 Fed. Reg. 37874 (July 1, 2015).

recognition process. The final rules incorporated a similar criterion (a) as in the proposed rules. The final rule allows a petitioning tribe to prove its existence starting at 1900 without being required to use external evidence.¹⁹² Tribes then have the option to incorporate external identifications in criterion (a) or they can self-identify.¹⁹³ Also, the final rules included utilizing a state reservation as evidence for criterion (b)'s distinct community and criterion (c)'s political influence, but it did not wholly adopt the proposed rule that a state reservation would completely satisfy (b) and (c).¹⁹⁴ Criterion (e), which requires that only 80 percent of the petitioning tribe's membership descend from a historical tribe and (f), which allows individuals of the petitioning tribe to join another federally recognized tribe after 2010 without hurting the petitioning tribe, were incorporated into the final rules. The removal of the IBIA review process, as well as review of possible challenges in the United States district court were also adopted into the final rules.¹⁹⁵

However, there were some substantive changes not incorporated into the final rules. For example, the 1934 start date to prove the tribe existed as a distinct community and maintained political authority was moved back to 1900.¹⁹⁶ This was largely due to opposition from commenters who argued that the 1934 date would weaken the criteria by allowing recently formed "groups" to seek acknowledgement.¹⁹⁷ Accordingly, 1900 was selected as the start date in order for the rules to be consistent throughout the criteria (criterion (a) utilizes 1900 as well).¹⁹⁸ Criterion (a) uses 1900, which has maintained the substantive rigor of the process. Using 1900 for criterion (b) and (c) can provide uniformity for these criteria regardless of their location.¹⁹⁹ However, one of the biggest changes from the proposed rules to the final rules was the removal of the re-petitioning process.²⁰⁰

¹⁹² *Id.* at 37866.

¹⁹³ *Id.* at 37889–90.

¹⁹⁴ *Id.* at 37890.

¹⁹⁵ *Id.* at 37863.

¹⁹⁶ *Id.* at 37862, 37863.

¹⁹⁷ *Id.* at 37875.

¹⁹⁸ *Id.* at 37862.

¹⁹⁹ *Id.* at 37868–69.

²⁰⁰ *Id.* at 37875.

Parts II and III concluded that the current FAP is lacking because it fails to utilize canons of construction, allows undue political influence in the acknowledgment decision, creates a lengthy process for New England tribes whose first contact began hundreds of years prior to other tribes, and utilizes a defective and institutionally racist definition of tribal community. The remainder of this section argues whether the reformed rules can remedy the flaws of this impalpable system. Subsection A discusses whether or not the reformed FAP utilizes the canons of construction. Subsection B then outlines whether or not undue political influence is still prevalent in the reformed FAP. Subsection C analyzes the reduction of the length of time to successfully navigate the FAP in the final rules. Lastly, subsection D discusses any new changes in the reformed FAP on the defective definition of tribal community.

A. Canons of Construction

First is the issue of utilization of the canons of construction. The proposed rules indicate an attempt to utilize the canons of construction in the FAP. For example, the proposed rules deleted the requirement of external identifications to prove the existence of a tribe since 1900 that was required in criterion (a).²⁰¹ Removing external identifications from the FAP allows the petitioning tribes to ascertain their own existence without the input of outsiders, and allows ambiguities regarding federal recognition to be construed in the tribe's favor.²⁰² The final rules do not completely adopt this approach, but they do allow petitioning tribes to self-identify as an Indian entity on a substantially continuous basis since 1900.²⁰³ Although this change is not as effective regarding the use of canons of construction as the proposed rule removing the requirement of external identifications altogether, it is still a start to incorporating the canons into the FAP.

The finalized rules do not allow tribes to re-petition after the significant changes in the rules, which indicates a failure to apply

²⁰¹ *Id.* at 37889.

²⁰² See generally Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011).

²⁰³ Federal Acknowledgement of American Indian Tribes, 80 Fed. Reg. 37889 (July 1, 2015).

the canons.²⁰⁴ For instance, there was an ambiguity in the Eastern Pequots case regarding whether or not the Tribe existed as a distinct community or maintained political influence from 1973 to 2002, and the state reservation or recognition was not allowed to be used as evidence.²⁰⁵ With the final rules incorporating the use of a state reservation as evidence, tribes within these “ambiguous” areas regarding their FAP should be allowed to re-petition in accordance with the canons of construction. Further, the final rules did not incorporate the proposed rule of a state reservation held continuously since 1934 satisfies criteria (b) and (c).²⁰⁶ But, the final rules do allow a state reservation coupled with another piece of evidence outlined in criterion (b) and (c) to satisfy these criterions.²⁰⁷ This substantive change may still impact the Eastern Pequots’ FAP, and its inability to re-petition shows the lack of the canons of construction within the FAP.

In the proposed rules, AS Washburn proposed a re-petitioning process that would have allowed states, towns, or other interested individuals to use their influence to opine whether or not a petitioning tribe should be federally recognized.²⁰⁸ Although this proposed rule would allow undue influence of the State of Connecticut and the towns in regards to the Eastern Pequots’ federal recognition, it would have given the Tribe another chance to seek federal recognition in light of the reformed FAP. However, AS Washburn removed the re-petitioning process, reasoning that “[a]llowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular.”²⁰⁹

²⁰⁴ *Id.* at 37875.

²⁰⁵ OFFICE OF FED. ACKNOWLEDGEMENT, U.S. DEP’T. OF INTERIOR, BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR RECONSIDERED FINAL DETERMINATION DENYING FEDERAL ACKNOWLEDGEMENT TO THE EASTERN PEQUOT INDIANS OF CONNECTICUT AND PAUCATUCK EASTERN PEQUOT 6 (2005) [hereinafter DENIAL].

²⁰⁶ Federal Acknowledgement of American Indian Tribes, 80 Fed. Reg. 37869 (July 1, 2015).

²⁰⁷ *Id.* at 37890.

²⁰⁸ *Id.* at 37874.

²⁰⁹ *Id.* at 37875.

Although AS Washburn is likely correct in that the workload may increase if more groups re-petitioned, the focus on equality should be on fair and equitable treatment of each individual petitioning group, *i.e.*, the Eastern Pequots rather than on the entire quantity of petitioning groups as a whole. Often times, the FAP is a tribe's last resort to gain federal recognition; therefore, because the finalized rules do not allow for re-petitioning, a tribe like the Eastern Pequots which was denied recognition under the old rules may never have a chance to be granted federal recognition, despite favorable changes that may make that recognition possible. The Eastern Pequots were denied recognition largely because the IBIA decided that state recognition or state reservation could not be used as evidence to satisfy criterion (b) and criterion (c) between 1973 to 2002.²¹⁰ However, the final rules now allow utilizing a state reservation as evidence for criterion (b) and (c).²¹¹ The Eastern Pequots have maintained their reservation since 1683,²¹² and if the tribe submitted their letter of intent today there would be ample evidence to prove their political influence and distinct community between 1973 and 2002. By disallowing the Eastern Pequots to re-petition for federal recognition, AS Washburn placed them in jeopardy of losing their state reservation. Without the United States recognizing the Tribe, the State of Connecticut is under no additional obligation (other than its own state laws) to maintain the Lantern Hill Reservation and recognize the sovereignty of the Tribe; an obligation that is clearly articulated in the laws of the United States since Chief Justice Marshall adopted the Doctrine of Discovery emphasizing Indian right to occupancy.²¹³ This is an example of a clear violation of the incorporation of the canons of construction into the FAP.

²¹⁰ See Federal Acknowledgement of the Historical Eastern Pequot Tribe, 41 IBIA 12 (2005).

²¹¹ Federal Acknowledgement of American Indian Tribes, 80 Fed. Reg. 37890 (July 1, 2015).

²¹² OFFICE OF FED. ACKNOWLEDGEMENT, U.S. DEP'T. OF INTERIOR, BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION IN REGARD TO FEDERAL ACKNOWLEDGEMENT OF THE EASTERN PEQUOT INDIANS OF CONNECTICUT 1 (2002).

²¹³ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

B. Undue Political Influence

Second is the issue that the proposed and final rules do not address the presence of undue political influence in the FAP. The final rules made significant changes that, if the Eastern Pequot Tribe were allowed to re-petition, could change the federal recognition status of the Tribe. Unfortunately, the final rules did not adopt the re-petition process originally articulated in the proposed rules. However, even if the re-petition process was included in the final rules, it required permission from all third parties involved in the petitioning process of tribes in order to move forward with the re-petition for federal acknowledgement.

Senator Blumenthal of Connecticut, one of the third parties that opposed the federal recognition of the Eastern Pequots, remains actively involved in the FAP. In regards to the proposed changes to the rules, he commented that, “[i]f any of these groups [that is, the state-recognized tribal nations who have petitioned for federal acknowledgement] receives federal recognition, there would undoubtedly be another casino in Connecticut[.]”²¹⁴ Because of Connecticut’s strong political involvement with (and objection to) the acknowledgment process, a third-party veto arose that requires all opposing parties to a tribe’s recognition to approve the re-petition of the tribe. In light of the far-reaching involvement of the State of Connecticut and surrounding towns in the current petitioning process, the Eastern Pequots will never be able to receive their fair and unbiased federal acknowledgement determination.

C. Lengthy FAP for New England Tribes

Third is the issue that New England tribes must trace their lineage back to an extensive amount of time. The finalized rules address the amount of time it takes to trace such a lineage and history from the 17th century. They do so by establishing the year 1900 as a starting date from which the tribe is required to prove that it existed as a distinct community and exerted political influence (as opposed to using the date of the tribe’s first contact as

²¹⁴ Letter, *supra* note 90.

a starting point).²¹⁵ Accordingly, the amount of research and resources needed for the federal recognition process will necessarily be reduced. In addition to saving the resources of, often financially disadvantaged tribes, setting the same date as a starting point for *all* tribes creates a more transparent process with less possibility for confusion.

Although the baseline year of 1900 is a good starting point, it does not reflect the fact that tribes may have gone underground during different time periods, and that these time periods are possibly post-1900. Therefore, tribes should have more control and should be allowed to select a time period that allows them to most adeptly evidence their history. The 1900 start date would help reduce the amount of time required to be researched in regards to both “tribal community” and “political influence” for both the Mashpee Wampanoag Tribe and Eastern Pequot; however, the Eastern Pequots would still have an impediment to recognition given that the AS decided that there was not ample evidence to prove their existence from 1973–2002.²¹⁶

D. Tribal Community Definition

Finally, the proposed and final rules fail to address the deficiencies in how “tribal community” is defined. Although the proposed rules do make significant changes by not requiring that a tribe evidence a “distinct community” until after 1900, and allowing the use of a state reservation as evidence for that community, the definition of a tribal community is still defined by the BIA with little Native input. Intra-tribal marriages and social hostilities are still used as evidence to prove a distinct community. From the Mashpee Wampanoag FAP, the BAR looked solely at intra-tribal marriages of the Tribe to define a distinct community.²¹⁷ Only referencing marriage patterns is a traditionally

²¹⁵ Federal Acknowledgement of American Indian Tribes, 80 Fed. Reg. 37862, 37862–63 (July 1, 2015).

²¹⁶ DENIAL, *supra* note 204, at 6.

²¹⁷ OFFICE OF FED. ACKNOWLEDGEMENT, U.S. DEPT. OF INTERIOR, INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR THE PROPOSED FINDING ON THE MASHPEE WAMPANOAG INDIAN TRIBAL COUNCIL, INC. 52 (2006).

Western way of examining a distinct community. It implies that once a tribal member marries outside of the tribe, the community and culture is lost. It also reinforces the notion that marrying outside of the tribe “taints” the children, and that cultural diversity diminishes Native blood and adds to the notion of the “disappearing” Indian. However, Native Americans are faced with such racial discrimination that marrying outside of the Native community seems the only way to improve one’s living conditions.²¹⁸ The idea that the existence of community can be proved solely by looking at marriage patterns is a form of institutional racism when often times Native Americans marrying outside of their community are attempting to escape racial discrimination.

In addition, the finalized rules fail to identify the deficiencies in the “distinct community” criterion that the Eastern Pequots’ FAP sheds light on. The Reconsidered Final Determination concluded that there was not ample evidence to support the Eastern Pequot’s being a distinct community from 1973–2002.²¹⁹ It is hard to imagine a tribe that has maintained its distinct community from first contact until 1973, and then voluntarily abandon that community almost 400 years later. This proves the lack of Native input in the definition of community and narrative of their history

Intermarriage Data extracted by OFA from the 1920 and 1930 Federal Censuses of Mashpee

1920

A total of 38 non-white couples enumerated in the town of Mashpee	
Marriages to other Earle Report Mashpee descendants	22
Marriages to other Indians	5
Marriages to all others	6
Marriages between others of unknown or Indian descent	5

1930

A total of 50 couples with at least one “Indian spouse living in Mashpee in 1930	
Marriages to other Earle Report Mashpee descendants	24
Marriages to other Indians	12
Marriages to all others	9
Marriages between unknown Indians and others	5

²¹⁸ Gary D. Sandefur & Trudy McKinnel, *Intermarriage Between American Indians and White Americans: Patterns and Implications*, (Univ. of Wisc.-Madison), <http://www.ssc.wisc.edu/cde/cdewp/85-26.pdf> (concluding that there is more inter-marriage between Indians and whites than between blacks and whites; there is a pattern of “marrying-up” in Indian and white marriages; that endogamous Indians are more isolated and poorer than endogamous blacks).

²¹⁹ DENIAL, *supra* note 204, at 6.

by failing to take into consideration the entire time period from first contact until 2002 and focusing specifically on a thirty-year time period out of 400 years of history for the Eastern Pequot Tribe.

CONCLUSION

The Federal Acknowledgement Process is not transparent and is an exceedingly difficult task for New England tribes to undertake. The Eastern Pequot Tribe and the Mashpee Wampanoag Tribe are two examples of New England Tribes who have been through this process. Acknowledgement Decision Compilation documents²²⁰ for the two tribes show that there are deficiencies in the process including: lack of utilizing the canons of construction, excessive undue political influence by towns and states, excessive amounts of time and resources required to compile historical documents from first contact to the present relating to the federal recognition criteria,²²¹ and the fallacious definition of a tribal community.

The final rules administered by Assistant Secretary Kevin Washburn have failed to deal with many deficiencies of the previous FAP. In order to allow tribes in the New England area a fair chance at federal recognition, especially in light of their 400-year history of maintaining their culture despite the intrusion onto and theft of their land, the final rules need to be analyzed more closely. An important first suggestion would be that the re-petitioning process, without the possibility of a third-party veto, be allowed as was suggested in the proposed rules. Such a process would grant the Eastern Pequot Tribe a fair and unbiased chance at federal recognition. A second recommendation would be that the OFA redefine tribal community as listed in Part 83 criterion (b); tribal community should be defined by the tribes themselves, which could be accomplished by taking a survey of tribes that are

²²⁰ Proposed Findings, Technical Assistance Letters, Final Determinations, Reconsidered Final Determination.

²²¹ (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. (b) A predominant portion of the petitioning group comprises a distinct community from historical times until the present. (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

both federally recognized and state recognized. From this survey, new parameters could be drafted regarding what it means to be a community as defined by these tribes.

Furthermore, the canons of construction could be introduced into the rules' formation by allowing tribes more access to resources to litigate their claim for federal recognition. To accomplish this, the BIA could set up funds accessible by indigent tribes for the purpose of litigating their federal recognition claims through the 25 C.F.R. Part 83 process. Access to additional funds would have helped the Eastern Pequot Tribe, who during their FAP, were forced to litigate against the State of Connecticut and the involved towns who had access to insurmountable resources compared to the Tribe. By allowing tribes similar access to funds for federal recognition through the FAP, ambiguities when interpreting the competing evidence would be diminished with appropriate funding for these costly projects. In addition, the canons of construction should be referenced in the rules when a determination is made about the existence of a tribe such as construing the evidence liberally in favor of the petitioning tribe when there is competing evidence or lack of evidence regarding its existence. Once the OFA considers the canons of construction in its analysis, then it could make a more proper determination regarding federal recognition.

As we are in the period of self-determination, it is vitally important to allow more Indian input in rules that impact our well-being and future:

Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.²²²

²²² PRESIDENT RICHARD NIXON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R.Doc. No. 91-363, 91st Cong. (2d Sess. 1970).