

SIENKIEWICZ & MCKENNA, P.C.  
ATTORNEYS AT LAW

18 ASPETUCK RIDGE ROAD, SUITE 100  
P.O. BOX 786  
NEW MILFORD, CT 06776-0786

NANCY R. SIENKIEWICZ  
JEFFREY B. SIENKIEWICZ  
MICHAEL S. MCKENNA

September 24, 2013

TELEPHONE (860) 354-1583  
FACSIMILE (860) 355-4439

**via e-mail to [consultation@bia.gov](mailto:consultation@bia.gov)**

Mr. Kevin K. Washburn  
Assistant Secretary - Indian Affairs  
c/o Ms. Elizabeth K. Appel, Acting Director  
Office of Regulatory Affairs & Collaborative Action - Indian Affairs  
1849 C. Street NW  
MS 4141-MIB  
Washington, DC 20240

Re: Preliminary Discussion Draft of Proposed Changes to 25 CFR, Part 83, Federal Tribal Acknowledgment Regulations - Comments of the Town of Kent, Connecticut

Dear Mr. Washburn,

On behalf of the Town of Kent, Connecticut, I am submitting these comments on the proposed changes to the acknowledgment regulations currently set forth in 25 CFR, Part 83.

The Town of Kent is home to a reservation set aside by the Colony of Connecticut for the Schaghticoke. For about thirty (30) years the Town, as well as its citizens and property owners, have been engaged in land claims litigation brought by groups claiming to qualify as Indian tribes under federal law, specifically the Schaghticoke Tribal Nation and the Schaghticoke Indian Tribe. Other groups have claimed tribal existence as a result of Schaghticoke descent.

The Town was also involved for many years as an interested party in Petition #79, Schaghticoke Tribal Nation; and it is currently involved as an interested party in Petition #239, Schaghticoke Indian Tribe. With respect to the Schaghticoke Tribal Nation, the Department concluded that the group did not satisfy criterion (c) "political influence or authority" for approximately 165 years of its history since 1800; and that it did not satisfy criterion (b) "community" from 1920 to 1967 and after 1996. See 70 *Fed. Reg.* 60101 (Oct. 14, 2005) and *Summary of the Criteria and Evidence: Reconsidered Final Determination Denying Federal Acknowledgment of the Petitioner Schaghticoke Tribal Nation* (Oct. 11, 2005) (hereafter "*STN RFD*").

It has never been the policy of the State of Connecticut to destroy its Indian communities or to thwart their political existence. The contrary is true. The State maintained the historical

reservations for the benefit of whatever population of Indians existed, even long after the Indian communities themselves lost their identity as distinct communities and as political entities. Moreover, whatever allotment and assimilation policies might have been practiced by the Federal Government towards the western tribes, no policy of allotment and assimilation was applied towards the Indians of Connecticut. Simply put, there are no historical wrongs committed upon the Connecticut tribes that need to be corrected through the adoption of the proposed acknowledgment regulations.

#### **A. Efficiency and transparency:**

Based upon its experience before the BIA, the Town believes that the current regulations, at least substantively, need not be changed. The regulations are clear, understandable, conform to the requirements of Federal law as to tribal existence and do not present insurmountable barriers to acknowledgment. When administered in an honest and fair manner by impartial staff and decision makers, the regulations do achieve their intended purpose. Moreover, the regulations do provide for review and correction of Departmental error through the IBIA process.

In the case of Petition #79, Schaghticoke Tribal Nation, citizens of the Town of Kent became highly critical of the acknowledgment process, not because of deficiencies in the acknowledgment regulations, but because they perceived a flagrant disregard of those regulations in the decision making process. Those matters were corrected through the IBIA appeal process and the Reconsidered Final Determination was ultimately affirmed on appeal.

Simply put, no legitimate reason exists for the BIA to gut the existing regulations in the name of increased efficiency and transparency as was suggested in the June 21st press release concerning the proposal. Many alternate means exist to achieve this goal. These include:

1) The FAIR database system used in Petition #79, Schaghticoke Tribal Nation, increased both efficiency and transparency. Once the database was created and made available to the petitioner and interested parties, the process moved forward on a timely schedule that allowed all parties to participate in a meaningful manner. Regulatory time frames were not extended except at the request of the petitioner. And by allowing the parties access to all of the documents connected with the petition, transparency was provided. Policy decisions that were not apparent on the face of the record were brought into the open and helped to explain to the petitioner, interested parties and the public at large what was occurring in the decision making process. Lowering the standards of evidence required to establish the core requirements of tribal existence, which are already construed in favor of the petitioner, is not a legitimate means of achieving efficiency and transparency.

2) Efficiency and transparency can be increased as well by requiring petitioners and interested parties to simultaneously exchange filings and communications with the OFA. This is not rocket science. It is done all of the time in the courts - presently by electronic means. With only minor exceptions, any petition document filed with the OFA can be simultaneously exchanged with other parties. The minor procedural change requiring petitioners and parties to copy their filings to each other would eliminate all of the time wasted by staff responding to Freedom of Information Requests; and would free them up for more productive activity,

including analysis of the evidence submitted. It would also assist the parties in the timely submission of evidence and argument supporting their positions.

Proposed Section 83.10(j)(2) requires interested and informed parties to submit copies of any evidence or argument to the petitioning group. A reciprocal provision should be added to affirmatively require the petitioning group to submit copies of its filings to the interested and informed parties.

Proposed Section 83.9 requires the OFA to give notice of where the documented petition may be examined. It should be amended to permit informed and interested parties to easily and promptly obtain copies of the documented petition and of all other filings as a matter of right.

3) Concerns over personal privacy can be handled procedurally as well. In Petition #79, Schaghticoke Tribal Nation, all participants agreed not to disclose information protected by privacy concerns. Alternatively, personal privacy information can be redacted from most filings, as is done in judicial matters.

#### **B. Tribal existence since 1934**

The reason that the United States government acknowledges Indian tribes is because when the country was founded, Indian tribes were considered to be separate, autonomous political entities with tribal sovereignty. A special government-to-government relationship with the Indian tribes was necessary if for no other reason than to maintain the peace and tranquility of the country. See *Leighton v. United States*, 29 Ct. Cl. 288, 1800 WL 1855 (1894), *aff'd* 161 U.S. 291 (1895). Indian tribes came to be considered “dependent domestic nations”; and managing affairs with these nations was for the Congress, not the states. *Montoya v. United States*, 180 U.S. 261 (1901) articulated the criteria for what constituted an Indian tribe, and for how an unrecognized tribe might be recognized under federal common law. “By a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, inhabiting a particular though sometimes ill-defined territory ...” *Id.*, at 266

The existing acknowledgment regulations are explicitly derived from and are to be interpreted in light of case law concerning tribal status. As the BIA has stated in describing the intent of the existing acknowledgment regulations:

The Federal government has an obligation to protect and preserve the inherent sovereign rights of all Indian tribes, whether a tribe has been recognized in the past or not. The regulations governing the Acknowledgment process (25 CFR 83) state the requirements that unrecognized groups must meet to be acknowledged as having a government-to-government relationship with the United States

The legal and policy precedents for acknowledgment are codified in the regulations. These precedents also provide the fundamental basis for interpreting the regulations. The acknowledgment criteria are based on and consistent with the past determinations of tribal existence by Congress, the courts, and the Executive Branch. These past

determinations have required that to be acknowledged as having tribal status *a group must have maintained social solidarity and distinctness and exercised political influence or authority throughout history until the present.* (Emphasis added.)

*Final Determination That the Miami Nation of Indians of the State of Indiana, Inc. Do Not Exist as an Indian Tribe*, at p. I.B.1.5 (June 9, 1992), <<http://www.bia.gov/idc/groups/xofa/documents/text/idc-001516.pdf>> accessed Feb. 2, 2012, , *aff'd*, *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 112 F.Supp.2d 742 (N.D. Ind. 2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

Thus, in terms of tribal existence, an Indian tribe under federal law has not just an ethnic existence, but more importantly, a legal or political existence. Persons who are ethnically descended from American Indians but who are now members of groups that have not maintained tribal (i.e., political and community) existence since the founding of our country are no more entitled to the special privileges afforded by Congress to Indian tribes than are the communities descended from other ethnic groups.

The proposed regulations, however, offer up a fundamental shift in the definition of an Indian tribe. Groups of Indian descendants that had little or no existence as a distinct and separate community, or that had little or no political existence prior to 1934 may now be deemed to be one of “the Indian Tribes” existing when the country was founded and referenced in Article 1, Section 8 of the United States Constitution.

The deficiency of the proposed regulations is that two core requirements for tribal existence, specifically political influence or authority (proposed criteria §83.7(c)) and community (proposed criteria §83.7(b)) will be based, *if at all*, on an evaluation of evidence from 1934 only. Whether or not the group survived as an Indian tribe within the meaning of existing law will be irrelevant. Tribal status will be granted so long as the group is of Indian descent, was formed prior to 1934 and continued thereafter. Stated differently, modern groups that are not “the Indian Tribes” referenced in Article 1, Section 8 of the United States Constitution - that did not exist historically - will be granted tribal status. This proposed dramatic shift in policy is not based on any past determinations of what constitutes tribal existence by Congress, the courts or the Department of the Interior. As such, it has no foundation in existing law.

### **C. Proposed sections 83.6(c) and 83.10(g) facilitate acknowledgment without any proof of political authority or community**

The Town of Kent specifically objects to Section 83.10(g) of the proposed regulations. That provision may result in the almost automatic acknowledgment of the Schaghticoke Indian Tribe. When the provisions of Section 83.10(r) of the proposed regulations are applied, the previously denied Schaghticoke Tribal Nation may also be entitled to a positive acknowledgment decision.

The BIA declined to acknowledge the Schaghticoke Tribal Nation in 2005 due to the fact that it did not satisfy criterion (c) “political influence or authority” for approximately 165 years since 1800, and due to the fact that it did not satisfy criterion (b) “community” from 1920 to

1967 and after 1996. The Schaghticoke Indian Tribe claims the same history as the Schaghticoke Tribal Nation until the late 1970s. See Petition #239, October 11, 2002 Petition for Federal Acknowledgment of the Schaghticoke Indian Tribe. Both groups “share” a reservation that was set aside by the state for the Schaghticoke Indians, not the Schaghticoke Indian Tribe nor the Schaghticoke Tribal Nation, but rather for the Indians that were originally recognized by the state as the Schaghticoke. *Schaghticoke Tribal Nation v. Rost*, 138 Conn.App. 204, 217-218, 50 A.3d 411 (2012).

Proposed Section 83.10(g)(3), however, provides that if a petitioner has maintained and holds a reservation recognized by a state, or if the United States has held land for the petitioner at any time since 1934, that petitioner is *entitled* to an expedited *favorable* finding provided that it satisfies criterion (e), “descent”<sup>1</sup>, criterion (f), “membership”, criterion (g), “congressional prohibition” and criterion (d) “governing document”. In other words, if the group has “maintained” and continues to “hold” a reservation (neither term being defined) recognized by a state, or if the Federal government at any time held land for the group, no evidence of “political influence or authority”, criterion (c), or “community”, criterion (b), is required.

The existence of state recognition with a reservation, however, is no evidence that a petitioner has maintained its political existence or its existence as a distinct community. This proposition was expressly rejected by the Interior Board of Indian Appeals in *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1 (2005) and *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30 (2005). Moreover, in subsequent proceedings involving the Schaghticoke Tribal Nation, the BIA determined that existence of a state reservation “did not provide evidence of social interaction or cohesion among the Schaghticoke” and that state recognition with a state reservation “was not predicated on a government-to government relationship with the group.” *STN RFD*, at p. 45, 50.

The proposal to acknowledge groups as Indian tribes simply because they have a state reservation or simply because the Federal government has held land for the group, and can satisfy some minimal requirements of descent, membership, governing document and congressional prohibition, is contrary to established law and is unwarranted. The mere existence of a state or federal reservation and even the continued occupancy of that reservation by persons of Indian descent are not probative of either a political existence or a distinct community.

**D. Section 83.10(r) of the proposed regulations improperly permits the BIA to disregard and reject its prior decisions concerning tribal acknowledgement.**

Proposed Section 83.10(r) would allow groups that have been previously denied acknowledgment, such as the Schaghticoke Tribal Nation, to submit a new petition for acknowledgment if they can establish that they might be acknowledged under the new regulations. In other words, the BIA will disregard all notions of finality with respect to its prior

---

<sup>1</sup> Proposed criterion (e) does not suggest any descent criterion. Whether it will be 5% or 95% or some different percentage is not specified. Selecting a percentage out of thin air without any documented support or rationale for a descent criterion supporting tribal existence is unwarranted. A presumption that a group maintains a political existence and a distinct community simply because a certain percentage of its members descend from a historical tribe should not be established without strong, documented support for that proposition.

decisions if a petitioner can demonstrate that a different result might be obtained under the new regulations. Groups that have been denied acknowledgement because they did not continue and function as political entities or as a distinct communities for long periods of their history will be able to re-petition and be reconsidered based solely on evidence of tribal existence since 1934.

*In the case of the Schaghticoke Tribal Nation, which the BIA found had not exercised political authority nor existed as a community for vast periods of its history, the proposed regulations would not even require evidence of political authority or community since 1934!* Given the provisions of proposed Section 83.10(g), the Schaghticoke Tribal Nation can be reconsidered and acknowledged based solely on the existence of the state reservation and satisfaction of criterion (e) “descent”, criterion (f) “membership”, criterion (g), “congressional prohibition” and criterion (d) “governing document”.

The Department’s treatment of precedent is cavalier. It offers no meaningful justification for rejecting its own findings and precedent respecting the acknowledgment of Indian tribes in general, and the Schaghticoke Tribal Nation in particular, as proposed with the new regulations. The proposed regulations would have a profoundly negative impact on the Town of Kent and the State of Connecticut by imposing “sovereignty” on Indian groups that are not otherwise entitled to such status.

This is not an insignificant matter. Groups that are not “Indian tribes” within the meaning of existing federal law due to their failure or inability to maintain their political and community existence over time should not now be acknowledged as Indian tribes based on ethnicity and a modern regrouping or resurgence. The Department is no less straitjacketed by precedent than a court is. While it can reject its own previous decisions concerning tribal acknowledgement, it must provide a rational explanation for why it is doing so. *Schurz Communications, Inc. v. F.C.C.*, 982 F.2d 1043, 1053 (7th Cir. 1992); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009). At this point, it has failed to provide any rational explanation for its proposed regulations.

Even if it can provide a rational explanation changing the acknowledgment regulations to allow previously denied groups to be acknowledged, it cannot so easily reject the extensive judicial precedent that requires acknowledgement to be based on a continuous political existence as well as a historical, continuous community of Indians. Participants in the prior acknowledgment proceedings, including the petitioners and interested parties, have a vested interest in the finality of the BIA’s decisions, especially when they are appealed and sustained in the courts. See *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008), *aff’d per curiam*, 587 F. 3d. 132 (2d Cir. 2009), *cert. den.* 131 U.S. 127 (2010).

A case may be made that a prior decision should be reconsidered when substantial, substantive new evidence is discovered that addresses some critical deficiency in the prior evidence supporting an acknowledgment petition. But allowing a decision to be reconsidered based solely upon the historical existence of a state or federal reservation lowers the standards and permits an unwarranted acknowledgment of modern groups as Indian tribes.

#### **E. Section 83.7(b)(2) evidence should not be diluted**

In its present form, Section 83.7(b)(2) identifies specific kinds of evidence that are presumed sufficient to establish community due to the fact that they reflect a membership with a dense network of social links and connection. By virtue of Section 83.7(c)(3), these same strong social links of community can be carried over to provide evidence of political influence and authority. In other words, evidence of a strong community under Section 83.7(b)(2) is alone sufficient to establish political authority under Section 83.7(c).

At present, evidence of community is established if the group can demonstrate close residency patterns for at least 50% of its members, or if it can demonstrate that 50% of marriages are within the group as opposed to marriage with outsiders, or if it can demonstrate that 50% of its members share distinct cultural patterns. If this level is established, political authority is presumed under the carryover provision of Section 83.7(c)(3).

The proposed regulations, however, contemplate a change in the strength of evidence of social ties that alone and conclusively establishes community and political authority under Section 83.7(b)(2) and 83.7(c)(3). The Department offers no justification for such action; and without some substantial justification for a change, no change should be made. Certainly, the strength of the social ties that bind a community and that are presumed to conclusively establish community and political authority should not be diminished.

Demonstrating strong social ties through residency patterns, marriages or distinct cultural practices is one thing. But when a group is no longer closely connected by residency, marriage or cultural patterns, it should not be presumed to constitute a distinct community or to maintain a political existence. The percentages for residency, marriage and cultural patterns contained in Section 83.7(c)(3) should not be reduced.

#### **F. Section 83.11 providing for review by the IBIA should not be eliminated**

The proposed regulations would delete Section 83.11 which provides for limited review of an acknowledgment decision through the Internal Board of Indian Appeals. This limited review is an important step in that it allows correction of error in administrative decision making. It should not be eliminated.

In Petition #79, Schaghticoke Tribal Nation, the Town of Kent and others appealed the Final Determination reached by the Assistant Secretary by submitting a request for reconsideration with the Interior Board of Indian Appeals. With *massive* gaps in the petitioner's evidence of community and political authority, the Final Determination filled the void, in part, through the improper reliance on "endogamy rates" instead of "marriage rates" as provided for by 25 C.F.R. §83.7(b)(2)(ii) and §83.7(c)(3); and by improperly calculating the percentage of "marriage rates" actually experienced by the Schaghticoke.

Since the Final Determination was based on marriage rate information submitted by the Schaghticoke Tribal Nation in its very last filing - information to which the interested parties did not have an opportunity to respond - the first opportunity to raise the issue was before the IBIA.

Once the issue was raised, however, OFA itself reviewed the claim and concluded, in a Supplemental Transmittal submitted to the IBIA on December 2, 2004, at pages 2-3:

The results of this review indicate that the Summary under the Criteria for the final determination in STN is not consistent with prior precedent in calculating the rates of marriages under 83.7(b)(2)(ii) and provides no explanation for the inconsistency. Further there is no evidence that the final determination intended to deviate from precedent. Finally, there is a material mathematical error in the calculation for 1841-1850, which when corrected lowers the calculation to less than 50%, whether or not the proper interpretation of the regulation is to calculate "marriages" or "members". The analysis under 83.7(b)(2)(ii) in the Summary and in the carryover under 83.7(c)(3), therefore, should not be affirmed on these grounds absent explanation or new evidence.

The proposal to eliminate IBIA review suggests an arrogance on the part of the Department. Will all of its future decisions be properly based on the regulations, the evidence and prior precedent? Will the Department's actions be so free from error or bias as to never require review or correction? The Town's experience with respect to Petition #79, Schaghticoke Tribal Nation, suggests otherwise. The Final Determination in that case fully justified IBIA review and could not be supported, even by the OFA, once the review process was initiated. The IBIA review process should be preserved.

#### **G. Section 83.10(m)**

Proposed Section 83.10(m) provides for the automatic acknowledgment of a petitioning group if the proposed finding is positive and if three types of entities fail to submit evidence *and* argument challenging the proposed finding. The three types of entities that may object to a proposed positive finding are 1) the State *where the petitioner's office is located*; 2) the local government *where the petitioner's office is located*; and 3) any federally recognized tribe within "the State". Parties that may otherwise qualify as "interested parties" under the regulations are precluded from further participation.

In the case of the Town of Kent, the Schaghticoke reservation is located within a few miles of the State of New York. The offices of the Schaghticoke Tribal Nation are located, not in Kent, but in Derby, Connecticut. It would be quite easy to relocate those offices into the State of New York. Under the proposed Section 83.10(m), the Town of Kent would have no right whatsoever to challenge a proposed positive finding even though it is home to the Schaghticoke reservation and would experience direct impact from a positive acknowledgment decision. It would be precluded from challenging the proposed positive determination simply because the Schaghticoke Tribal Nation chose to have its office in Derby. Had it chosen to have its office in the next town over in the State of New York, even the State of Connecticut would be precluded. Section 83.10(m) also precludes affected landowners and regional governmental entities with interested party status from challenging a proposed positive final determination.

Precluding affected local government and interested party participation as proposed by Section 83.10(m) is unwarranted. This aspect of the proposed regulation should be corrected.

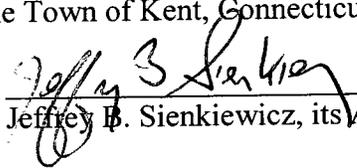
Moreover, a challenging party should not be required to submit both evidence *and* argument challenging the proposed finding. New evidence may not be relevant or may not exist. Argument pointing out the insufficiency of the existing evidence or pointing out the Department's departure from the regulations or case law may be all that the interested party wishes to submit. It should not be precluded from doing so.

#### H. Section 83.10(n)

Proposed Section 83.10(n) seems to deal with the situation where one or more of the parties enumerated in Section 83.10(m) has submitted evidence / argument challenging a proposed positive finding. In other words, Section 83.10(n) seems to apply after the comment period has expired and the OFA is preparing to make its final determination. Section 83.10(n)(2) requires a hearing if any petitioner or interested party requests it. At this point, however, the benefit of any hearing comes too late in the process. The hearing process should occur during the comment period following issuance of a proposed finding. It is while the comment period is still open that petitioners and interested parties will be able to benefit from the process.

#### I. Conclusion

The Town of Kent appreciates the opportunity to comment on the proposed regulations. Its position, however, is that the proposed regulations are deficient. The Department should not easily abandon the body of administrative and judicial precedent that has been established regarding the existing regulations. Instead, it should consider a different approach to achieve the stated goals of securing efficiency and transparency in the administrative process.

Sincerely,  
The Town of Kent, Connecticut  
by   
Jeffrey B. Sienkiewicz, its Attorney