OFFICE OF THE ATTORNEY GENERAL
CONNECTICUT

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By U.S. Mail

Bryan Newland
Principal Deputy Assistant Secretary for Indian Affairs
U.S. Department of the Interior
Bureau of Indian Affairs
1849 C Street, N.W., MS-3642-MIB
Washington, DC 20240

Re: *Prohibition on re-petitioning by previously denied petitioners for federal tribal acknowledgment.*

Dear Principal Deputy Assistant Secretary Newland:

The State of Connecticut (State) submits these comments regarding the prohibition on re-petitioning by previously denied petitioners for federal tribal acknowledgment under the tribal acknowledgment regulations in 25 C.F.R. Part 83. In two recent federal district court decisions, the prohibition on re-petitioning in 25 C.F.R. § 83.4 was held invalid because of the inadequate rationale provided by the Department in promulgating the revised regulations in 2015. *Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-05668, 2020 WL 128563 (W.D. Wash., Jan. 10, 2020) (*Chinook*); *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, No. 17-0038, 2020 WL 1451566 (D.D.C., March 25, 2020) (*Burt Lake*). The Department can, and should, repromulgate the re-petitioning prohibition on the sound basis of the interests of finality, reliance on settled expectations of interested parties and the avoidance of inconsistent decision making. Moreover, because the re-petitioning ban was integral to the broader revision of the regulations, the re-petitioning ban cannot be severed from the rest of the revised regulations, and the Department cannot act on any petitions by previously denied petitioners, or related entities, under the revised regulations.

Connecticut's Involvement in Tribal Acknowledgment and the Need for Broad Consultation

The State has had extensive involvement in several federal acknowledgment petitions. In particular, the Eastern Pequot, Schaghticoke Tribal Nation, and Golden Hill Paugussett petitioners had acknowledgment petitions denied after full and fair proceedings, including subsequent administrative and court review. *Reconsidered Final Determination Denying Federal Acknowledgment of the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut* (Oct. 11, 2005); *Reconsidered Final Determination Denying Federal Acknowledgment of the Schaghticoke Tribal Nation* (Oct. 11, 2005); *Final Determination Against Acknowledgment of the Golden Hill Paugussett Tribe* (June 14, 2004). The State was

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an active interested party in those proceedings, as were several Connecticut municipalities and other interested parties. The decision on these petitions were the outcome of lengthy proceedings in which petitioners and interested parties submitted thousands of pages of documents, exhaustive analyses, historical evidence and legal briefs. These decisions have been the subject of review before the Interior Board of Indian Appeals (IBIA) and the courts. *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008), *aff'd per curium*, 587 F.3d 132 (2d Cir. 2009), *cert. denied*, 131 U.S. 127 (2010); *Historic Eastern Pequot v. Salazar*, 934 F. Supp. 2d 272 (D.D.C. 2013); *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192 (D. Conn. 2006). After having expended significant resources in these proceedings and litigation, the interests of the State and other affected parties deserve protection.

Moreover, the State and other Connecticut parties submitted comments when the Department was considering revising the tribal acknowledgment regulations in the process that led to the 2015 revisions. *See Comments of State of Connecticut on the Proposed Rulemaking Revising the Regulations Governing Federal Tribal Acknowledgment in 25 C.F.R. Part 83* (Sept. 30, 2014). In particular, the State demonstrated that the prohibition on previously denied petitioners from re-petitioning, which had existed in the prior regulations, must be retained. As an integral part of the comprehensive 2015 revisions, the re-petitioning prohibition was adopted. Specifically, § 83.4 provides that the Department will not acknowledge "[a]n entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in Part 83 of this title (including reconstituted, splinter, spin-off, or component groups who were once part of previously denied petitioners)." 25 C.F.R. §83.4.

We understand that the Department is engaging in tribal consultations on the issue of the re-petitioning ban. We urge the Department to solicit comments more broadly from all stakeholders, including State and local governments. These stakeholders have relevant experience and interests that will inform the Department's consideration. The vacatur of the re-petitioning ban raises significant concerns for the State and other interested parties and will require the Department to reconsider comprehensively the 2015 regulations because the re-petitioning ban was an integral and necessary part of the adoption of those regulations.

The Department Must Engage in a New Rulemaking Process to Protect the Important Interests in the Re-Petitioning Prohibition and Cannot Proceed on Any Petitions by Previously Denied Petitioners Subject to the Re-Petitioning Prohibition.

The State strongly urges the Department to repromulgate the prohibition on re-petitioning with a stronger, better articulated legal and policy justification. The *Chinook* and *Burt Lake* courts found the Department's original justification wanting. This does not mean that the re-petitioning prohibition should be abandoned. The State and others in their comments offered justifications for the prohibition, but the Department did not adequately articulate those legal and policy interests when it

adopted the 2015 regulations. Now, the Department should act to support the prohibition with a properly articulated justification.

At a minimum, the Department must undertake a new rulemaking that demonstrates the robust justification that supports the re-petitioning ban. In particular, the prohibition protects and serves the interests of finality as well as the settled expectations and reliance interests of the State and other stakeholders who participated in the past acknowledgment proceedings. A complete rationale for the prohibition would also demonstrate that re-petitioning could result in decisions that are inconsistent with past acknowledgment decisions and will lead to inequitable results.

Moreover, the 2015 revised regulations were promulgated as an integrated whole that included the re-petitioning prohibition as a necessary and essential component. After the Department initially proposed revising the substantive criteria for tribal acknowledgment without retaining the prohibition on re-petitioning that had been part of the regulations, the State and others demonstrated that such a change would seriously prejudice the interests and finality and settled expectations. *See Comments of State of Connecticut on the Proposed Rulemaking Revising the Regulations Governing Federal Tribal Acknowledgment in 25 C.F.R. Part 83* (Sept. 30, 2014). The Department adopted the re-petitioning prohibition as the basis for dismissing concerns the State and others raised about changes to the substantive acknowledgment criteria. *See* 80 Fed. Reg. 37862, 37874-75 (July 1, 2015).

The re-petitioning prohibition is not severable from the rest of the revised regulations, and as such, full vacatur of the regulations is necessary where, as here, there is substantial doubt that the agency would have promulgated the regulations without the severed portion. Instead, where, as here, the agency intended the regulations to function as an integrated whole, then the entire set of regulations must fall in the absence of the vacated portion. *See, e.g., American Petroleum Inst. V. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017) *modified on other grounds*, 883 F.3d 918 (D.C. Cir. 2018); *New Jersey v. EPA*, 517 F.3d 574, 584 (D.C. Cir. 2008). Therefore, full vacatur of the 2015 regulations is the appropriate remedy if the re-petitioning prohibition is not repromulgated. If the re-petitioning ban is not reinstated, the Department cannot proceed to consider a petition from a petitioner that would have been subject to the prohibition. Actions by the Department otherwise will not withstand judicial review.

Finally, in addition to the need to provide the proper and fulsome justification for the re-petitioning prohibition, the Department should reconsider a number of the changes to the substantive criteria in the 2015 revisions. The Department has characterized those changes as minimal, but the *Chinook* and *Burt Lake* courts rejected that view. *Chinook*, 2020 WL 128563 at 15; *Burt Lake*, 2020 WL 1451566 at 18-19. Just by way of example, new provisions in the 2015 regulations permit the existence of a state reservation to demonstrate the existence of community and political authority. 25 C.F.R. § 83.11(b), (c). As the State and other interested parties had demonstrated in previous

acknowledgment proceedings, such evidence was of little probative value of the actual existence of community or political authority within that community for acknowledgment purposes. *In re Federal Tribal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1, 21-23 (2005); *In re Federal Tribal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 34 (2005). Furthermore, the regulations should include a mechanism for early screening of previously denied petitioners, and groups related to such petitioners, that attempt to re-petition. This will save the Department as well as other interested partiers the substantial expenditure of time and effort with regard to a petition that is subject to the re-petitioning prohibition.

Conclusion

In light of the recent *Chinook* and *Burt Lake* decisions invalidating the re-petitioning ban because of the inadequately articulated justifications for it, the Department must commence a new rulemaking that repromulgates the re-petitioning prohibition with a proper and appropriate justification based on the interests of finality, reliance on settled expectations and avoidance of inconsistent results. Moreover, the Department must broadly seek the views of all stakeholders in this process.

Very truly yours,

WILLIAM TONG

Cc: Governor Ned Lamont
Members of the Connecticut Congressional Delegation
Lee Fleming, Director, Office of Federal Acknowledgment