State of Connecticut

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September 24, 2013

Hon. Kevin K. Washburn
Assistant Secretary - Indian Affairs
U.S. Department of Interior
Bureau of Indian Affairs
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Re: Comments of the State of Connecticut on Preliminary Discussion Draft of Proposed Changes to Part 83 Federal Tribal Acknowledgment Regulations (1076-AF18)

Dear Assistant Secretary Washburn:

On behalf of the State of Connecticut (State), George Jepsen, Attorney General of Connecticut, submits these written comments on the Preliminary Discussion Draft (Draft) of proposed changes to the regulations governing federal tribal acknowledgment in 25 C.F.R. Part 83 announced June 21, 2013.

The Draft purports to seek improvements in the timeliness and efficiency of the acknowledgment process without undermining the substantive standards that have long governed these important decisions. Having participated in several recent lengthy and difficult acknowledgment petition proceedings, the State fully supports that objective. However, the State cannot commend the Draft's proposed changes as an appropriate means to that laudable end. The proposed revisions are not just an easing of needless administrative burdens or a trimming of duplicative bureaucratic reviews and procedures. Instead, the Draft proposes to seriously weaken and undermine the core substantive criteria for acknowledgment. In particular, at least as it appears they would be applied to previously denied Connecticut petitioning groups, the proposed changes would have the effect of reversing prior acknowledgment decisions for reasons that were expressly rejected in those decisions. To effect such a dramatic result, under the guise of improving administrative efficiency, cannot be justified by the evidentiary record developed in the proceedings of the Connecticut petitioners and would be contrary to the principles that have long governed federal tribal acknowledgment.

Acknowledgment Petitions in Connecticut

Connecticut has had significant experience with federal tribal acknowledgment petitions. In particular, the Eastern Pequot,[1] Schaghticoke Tribal Nation (Schaghticoke), and Golden Hill Paugussett (GHP) groups each had acknowledgment petitions that were denied by the BIA after full and fair proceedings. *Reconsidered Final Determination Denying Federal Acknowledgment to the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut* (Oct. 11, 2005) (*EP RFD*); *Reconsidered Final Determination Denying Federal Acknowledgment to the Petitioner Schaghticoke Tribal Nation* (Oct. 11, 2005) (*STN RFD*); *Final Determination Against Federal Acknowledgment of the Golden Hill Paugussett Tribe* (June 14, 2004) (*GHP FD*). The State was an active interested party in each of the proceedings on these petitions, as were several Connecticut municipalities and private interested parties.

The three Connecticut petitioners failed to achieve acknowledgment principally because they could not satisfy the core acknowledgment criteria for very long periods of their history. For example, the Schaghticoke petitioner was denied acknowledgment, among other things, because it could not demonstrate it had continuously existed as a social community (criterion (b)) and it failed to show the continuous exercise of political influence or authority (criterion (c)) for nearly all of the twentieth century. *STN RFD*, at 45, 50-58. The Eastern Pequot petitions were denied primarily because of the lack of evidence of political influence or authority from 1913 to 1973 and because the two petitioning groups did not exist as a community and did not exercise political authority as a group from the 1980s to 2002. *EP RFD*, at 91, 131-35. The GHP petitioner was denied acknowledgment for failure to satisfy not only the community and political authority criteria for nearly its entire history, but also for failure to show that its members had descended from a historical tribe (criterion (e)). *GHP FD*, at 91-92, 102-03, 128-29.

Despite these clear deficiencies in the historical evidence, the BIA initially issued decisions that would have granted acknowledgment to the Eastern Pequot and Schaghticoke petitioners. *Final Determination in Regard to Federal Acknowledgment of the Eastern Pequot Indians of Connecticut as a Portion of the Historical Eastern Pequot Tribe* (June 24, 2002) (*HEP FD*); *Final Determination for Federal Acknowledgment of the Schaghticoke Tribal Nation* (Jan. 29, 2004) (*STN FD*). The BIA's basis for doing so in the face of the otherwise plainly insufficient facts was to assume that the State's historical relationship with these groups – principally comprised of the maintenance of state reservations – reflected an implicit recognition by the state of a political tribal entity. According to the BIA's rationale, it could fill the evidentiary gaps because the State had maintained state reservations as part of an ill-defined relationship with these groups. *HEP FD*, at 29-30, 77; *STN FD*, at 118-24. However, there simply was no factual or legal basis for doing so, and the State and other interested parties sought review before the Interior Board of Indian Appeals (IBIA).

The IBIA concluded that the use of the State's relationship was contrary to the acknowledgment regulations. *In re Federal Acknowledgment of the Historical Eastern Pequot*

[1] There were two separate Eastern Pequot petitions, one by the Eastern Pequot Indians and the other by the Paucatuck Eastern Pequot Indians, reflecting a longstanding factional split. The BIA effectively merged the two petitions and denied them together.

Tribe, 41 IBIA 1 (2005); *In re Federal Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 30 (2005). In particular, the IBIA concluded that the asserted "implicit" recognition by the State of the groups as political entities, by among other things maintaining state reservations, was not itself probative of the key criteria of community and political authority. 41 IBIA at 18. More than just the so-called "additional evidence" of a state reservation and other aspects of the State's historical relationship was needed for that relationship to prove anything relevant to community or political authority. *Id.* At 18-20. Instead, the IBIA concluded that the BIA "must articulate more specifically how the State's actions toward the group during the relevant time period(s) reflected or indicated the likelihood of community or political influence or authority within a single group." *Id.* at 21. The IBIA accordingly vacated the decisions and remanded them to the Assistant Secretary.

The reconsidered final determinations for both petitioners specifically addressed this issue. The original final determinations for both the Eastern Pequot and Schaghticoke petitioners had relied heavily on the existence of a state reservation since the colonial period to give more weight to the otherwise insufficient evidence of community and political authority. On reconsideration after the IBIA's corrective directions, the BIA properly determined that the maintenance of the state reservations offered no evidence of community or political authority. Specifically, as to the Eastern Pequot petitioners, the reconsidered final determination found:

> The Lantern Hill reservation was the focal point of the relationship with the Colony and later the State. Upon a reevaluation of the evidence, this reconsidered FD concludes that the maintenance of the reservation by the State was not predicated on a government-to-government relationship with the group or the existence within the group of bilateral political relations that provides evidence of political authority or influence. This aspect of the state relationship based on the maintenance of the Lantern Hill Reservation does not provide evidence for criterion 83.7(c).

EP RFD, at 75. The reconsidered final determination for the Schaghticoke petitioner reached an identical conclusion. *STN RFD,* at 50.

The IBIA review and reconsidered final determinations were the outcomes of lengthy proceedings in which the petitioners and interested parties submitted thousands upon thousands of pages of documents, expert analyses, historical evidence, and legal briefs. All parties, and in particular the petitioners, had a full and fair opportunity to present evidence and make their arguments. The decisions denying acknowledgment to the Connecticut petitioners have been upheld in the courts. *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); *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192 (D. Conn. 2006).[2]

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[2] The Eastern Pequot did not seek timely court review of the denial of acknowledgment. A group purporting to represent the Eastern Pequot filed an untimely court action, which was dismissed as beyond the six-year statute of limitations for such review. *Historical Eastern Pequot v. Salazar*, Civil No. 12-58(EGS) (D.D.C. Mar. 31, 2013).

This experience is especially relevant for purposes of the Draft's proposed changes to the regulations. At the very core of the many issues these petitions presented was a singular question: what is the significance, for federal tribal acknowledgment purposes, of the State's continuous maintenance of a state reservation for a petitioner that otherwise cannot satisfy the community and political authority criteria. The answer that was properly reached was that the maintenance of state reservations in Connecticut, both legally and factually, does not provide any evidence that a group existed as a social community or exercised political influence or authority within it.

Making the Proposed "Expedited Favorable Finding" Available to Previously Denied Petitioners, Where the Significance of the Maintenance of a State Reservation Was Specifically Determined in the Prior Denial, Is Unjustified and Contrary to Fundamental Acknowledgment Principles.

The revisions that are proposed to the acknowledgment regulations appear to have the virtually guaranteed result of overturning the reconsidered final determinations for both the Eastern Pequot and Schaghticoke petitioners by administrative fiat. At least in the context of petitioners that have been previously denied and that denial actually addressed the significance of state reservations, these changes are unwarranted and should not be adopted.

Two proposed changes, working in conjunction, pose serious concerns. First, the Draft proposes to change the present rule that previously denied petitioners may not re-petition for acknowledgment. 25 C.F.R. § 83.10(p). The proposed new rule would provide:

> A petitioner that has petitioned under this part or under the acknowledgment regulations previously effective and that has been denied Federal acknowledgment may not re-petition to OFA under this part unless its request for re-petitioning proves, by a preponderance of the evidence, that a change from the previous version of the regulations to the current version of the regulations warrants reversal of the final determination.

Proposed § 83.10(r).

Second, the Draft would create a novel "Expedited Favorable Finding" mechanism that would allow a petitioner to avoid having to satisfy the community and political authority criteria with actual evidence probative of community or political authority. Specifically, the Draft proposes:

> If the petitioner meets the mandatory criteria at paragraphs (e) [descent], (f) [members not of other acknowledged tribes], and (g) [no congressional termination] of § 83.7 and the petitioner asserts that it is eligible for an expedited favorable finding, OFA will next conduct an expedited favorable review. If the petitioner provides the information required by criterion (d) [tribal governing document] of § 83.7 and meets either of the criteria in paragraph (3) of this section, OFA will issue an expedited favorable proposed finding in the Federal Register summarizing its findings.

> . . .
> (3) The expedited favorable criteria are:
> (i) The petitioner has maintained ***since 1934 a reservation recognized by the State and continues to hold a reservation recognized by the State***....

Proposed § 83.10(g) (emphasis added). The Draft further proposes that a final determination acknowledging the petitioner shall issue if the group "meets the mandatory criteria in paragraphs (d), (e), (f), and (g) of § 83.7 and one of the expedited favorable criteria in § 83.7." Proposed § 83.10(o). In other words, a petitioner with a state reservation since 1934 is deemed to have satisfied the key criteria of community (criterion (b)) and political authority (criterion (c)).

The result of these two changes – the ability of a previously denied petitioner to re-petition and the Expedited Favorable Finding based on a state reservation – has obvious ramifications for the prior decisions denying acknowledgment to the Eastern Pequot and the Schaghticoke petitioners. Both have state reservations that have been maintained since before 1934.[3]

The continuous existence as a distinct community and the continuous exercise of political influence or authority within the group, required by criteria (b) and (c) respectively, are central to the decision to acknowledge an Indian tribe and to place them in a government-to-government relationship with the federal government. These two core criteria are derived from a long line of judicial precedent that emphasizes that both community and political authority as essential attributes to the existence of a tribal sovereign entity. *Montoya v. United States*, 180 U.S. 261, 266 (1901) (defining an Indian tribe as "united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory"); *United States v. Candelaria*, 271 U.S. 432, 439 (1926); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994). Moreover, the centrality of these criteria has been emphasized repeatedly by the BIA itself. *E.g.*, 43 Fed. Reg. 39,361-62 (Sept. 5, 1978) (preamble to original regulations); News Release of Office of AS-IA dated June 21, 2013 (referring to "core criteria").

Federal acknowledgment of an Indian tribe is an act that recognizes a political entity and cannot be based on Indian descent alone. *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Morton v. Mancari*, 417 U.S. 535, 553 (1974); *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215 (D.C. Cir. 2013); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278 (9th Cir. 2004). What distinguishes a tribe that is entitled to a government-to-government relationship and all the benefits of that federal tribal sovereign status entails is not just that it is a group with members

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[3] Although the exact origins of the present one-quarter acre state reservation in Trumbull, Connecticut for the GHP are uncertain, it may have been established shortly before 1934. *GHP FD*, at Appendix A3. However, the GHP petitioner failed to demonstrate not only community and political authority but also descent from a historical tribe, criterion (e). It would appear that the proposed change that would allow previously denied petitioners to be reevaluated under the revised regulations would therefore not be available to it. To the extent that the proposed changes would permit the GHP petitioner to reopen the question of descent, the concerns expressed here would apply to the GHP petitioner as well.

who descend from a historical Indian tribe. Rather, a tribe is a community in which political relations and activities exist and have been maintained continuously. *Miami Nation of Indians of Indiana, Inc. v. United States Dept. of Interior*, 255 F.3d 342, 350-51 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002); *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

The Draft assumes that the maintenance of a state reservation can serve as a proxy for actual evidence of community and political authority. As discussed below, this is an unjustified and unworkable irrebuttable presumption as a general proposition. But it is particularly egregious and inappropriate in the context of a previously denied petitioner where the very issue – the extent to which a state reservation is probative of community or political authority – was in fact determined.

As the IBIA's decisions and the reconsidered final determinations for both the Eastern Pequot and Schaghticoke petitioners reveal, the assumption that state reservations can be a proxy for community and political authority, at least in Connecticut, is simply wrong. Connecticut maintained reservations that were initially established by the Colony as long as there existed descendants of the original historical tribes for which they were established. All the maintenance of state reservations shows, therefore, is that there may have continued to exist descendants of the historical tribes, not that there continued to exist a distinct community or political authority within that community. In other words, using state reservations as a proxy for community and political authority effectively collapses the acknowledgment decision to one based entirely on descent, a result that is contrary to the fundamental principles of acknowledgment.

There is nothing implicit in Connecticut's maintenance of state reservations that excuses satisfying the core criteria of community and political authority with actual evidence of both. As a matter of factual findings, the BIA has already determined that the state reservations in Connecticut provide no basis for inferring the existence of community or political authority. *EP RFD*, at 75; *STN RFD,* at 50. To create a presumption that community and political authority has continually existed for the Connecticut petitioners solely because of state reservations would have the effect of reversing those determinations on the basis of an entirely false predicate.

The BIA should therefore limit the availability of the proposed Expedited Favorable Finding rule. If this state-reservation-proxy rule is to be adopted, it should not be available to previously denied petitioners.[4] To allow a re-petitioning group to avail itself of the Expedited Favorable Finding rule would be tantamount to reopening a factual determination that the state reservations were not probative of community or political authority and simply changing that factual finding by *ipse dixit*. Such an outcome would unjustified, arbitrary, and not only contrary to the facts but to the principles that have always guided acknowledge decisions by the federal government.

[4] The State has not been able to identify any other states that have maintained reservations since 1934 for petitioners who have been previously denied acknowledgment.

The Use of State Reservations as a Proxy for Evidence of Community and Political Authority and the Limitation That Community and Political Authority Need Only Be Established Since 1934 Both Create Irrebuttable Presumptions That Are Unwarranted and Arbitrary.

Ostensibly, the proposed revisions offered in the Draft are aimed at improving the process's "timeliness and efficiency by providing for a thorough review of a petitioner's community and political authority." News Release of Office of AS-IA dated June 21, 2013. One of the ways the changes purport to do so is by, for the first time, seriously truncating the timeframes by which community and political authority are evaluated. It also would obviate the need to offer proof of community and political authority altogether for petitioners with state reservations since 1934 through the new Expedited Favorable Finding. The Draft does not "maintain[] stringent standards for core criteria...." *Id.* Instead, it manifestly weakens them and does so in a way that is unfair and unnecessary.

The Draft's proposed relaxation of the substantive acknowledgment criteria is apparently based on a notion that satisfying the present community and political authority is overly burdensome and unnecessary. The current criteria are not the problem. Acknowledgment presents complex and obviously very important questions of governmental power with extraordinarily serious ramifications for all involved. The present criteria appropriately require significant substantive inquiries and expansive factual findings. The Draft offers a fix that is seriously misguided. In effect, it creates irrebuttable presumptions founded on factual predicates that, in many circumstances, not only deserve evidentiary testing but may be demonstrably wrong.

As shown above, the examples of the Connecticut petitioners reveal that the factual premise of the Expedited Favorable Finding mechanism – that the maintenance of a state reservation since 1934 is incontrovertible evidence of community and political authority – is false. The maintenance of a state reservation could be ***possible*** evidence in some cases of community and political authority for certain periods of history, if for example it revealed bilateral political relations within a group. But it also might not provide such evidence, as was found in the Eastern Pequot and Schaghticoke reconsidered final determinations. Plainly, an interested party ought to have the opportunity to contest the factual premise on which the Expedited Favorable Finding's presumption rests. To adopt the Draft's irrebuttable presumption would gut the core substantive criteria of community and political authority. It should be rejected outright. Alternatively, it should at least be modified to require petitioners to show how the maintenance of a state reservation demonstrates the existence of community and political authority and to permit interested parties to offer evidence and argument to rebut any presumption based on the maintenance of a state reservation.

Similarly, the Draft's truncation of the time period for which community and political authority must be demonstrated is seriously at odds with the fundamental principle that tribal existence must be historically continuous. This limited time period for proof is proposed "to align with the United States repudiation of allotment and assimilation policies...." News Release of Office of AS-IA dated June 21, 2013. Continuity is a basic concept in acknowledgment, and continuous existence as a community and continuous exercise of political influence and authority within the community cannot simply be presumed because such a community presently exists or

existed for some other period. *Miami Nation*, 255 F.3d at 350-51; *United States v. Washington*, 641 F.2d at 1372-74. The 1934 limitation is based on just such a presumption. Limiting the required proof rests on the factual assumption that if a petitioner can show tribal existence after 1934, the petitioner must have had continuous tribal existence before that period. That may be a reasonable presumption in some cases; but again, in others it might not.

Given its centrality to recognizing a tribal sovereign entity, the principle of continuity since historical times should not be abandoned or weakened. If the BIA nonetheless intends to go forward with the time period limitation, at a minimum, the presumption of continual existence as a community and continual exercise of political authority ought to be a rebuttable one. Interested parties should have a fair opportunity to present evidence and argument that, as to a particular petitioner, continuous existence cannot be presumed and in fact cannot be demonstrated.

Any Changes to the Acknowledgment Process Must Include Adequate Procedures to Ensure Fair Opportunities to Participate for State and Local Government and Other Interested Parties.

State and local governments, as well as private interested parties, justifiedly often play important roles in the acknowledgment process. This role is recognized in both the current acknowledgment regulations and the Draft's proposed revisions. *See* 25 C.F.R. § 83.1 (definition of "interested party"). Indeed, the Draft actually contemplates an even greater role in the process for state and local governments. Proposed § 83.10(m) would provide that if a petitioner has received a positive proposed finding and if no state or local government or federally acknowledged tribe within the state where the petitioner is located files comments in opposition to the proposed finding, a final determination acknowledging the petitioner will automatically issue. In light of the important role that state and local governments play, it is essential that adequate procedural provisions are in place to ensure a fair and full opportunity for such interested parties to participate.

Examples of procedural protections that ought to be part of any changes to the acknowledgment regulations include:

- Interested parties should be placed on an equal footing as petitioners with regard to any opportunity to submit evidence, comments or arguments or to invoke any review or similar procedure. For example, in the proposed revision providing for post-proposed finding hearings, the Draft would only allow the petitioner to "provide such evidence at the hearing as the petitioner considers appropriate." Proposed § 83.10(n)(2)(ii). It similarly would only allow petitioners to cross-examine OFA staff at such hearings. Proposed § 83.10(n)(2)(i). This unequal treatment of interested parties is patently unfair and violative of basic notions of due process. As a matter of simple fairness, these and any similar provisions ought to permit interested parties the same opportunities.

- Provisions must be made to ensure that interested parties are served with and receive any filings and submissions made by a petitioner or other party without having to rely on the cumbersome recourse of a Freedom of Information Act (FOIA) request. Indeed, it has

been the State's experience that the lack of service requirements forces BIA staff to deal with time consuming and inefficient FOIA requests for petitioner submissions so that interested parties can meaningfully participate. In particular, any request to re-petition under Proposed § 83.10(p) or any submission of comments, evidence or arguments in connection with a proposed finding or a hearing after a proposed finding ought to be served on all interested parties as a matter of fairness and to improve the efficiency of the proceedings.

- The Draft proposes to eliminate IBIA review of acknowledgment decisions. As demonstrated by the Connecticut experience detailed above, this is unwise. IBIA review cannot be discarded as an unhelpful or duplicative step in the process. Nor is it enough to say that parties retain the ability to seek review through the courts of an acknowledgment decision. The IBIA's standards of review are distinctly different from those a court would apply under the Administrative Procedure Act and provide for review of issues that would not ordinarily be available before a court. *Compare Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 399 (APA standard of review) *with* 25 C.F.R § 83.11 (describing grounds for reconsideration as (1) new evidence; (2) substantial portion of evidence relied on was unreliable or not probative; (3) petitioner's or BIA's research appears inadequate or incomplete; and (4) reasonable alternative interpretations exist). As in the Eastern Pequot and Schaghticoke petitions, IBIA review can correct a serious misapplication of the acknowledgment regulations. Moreover, IBIA review cannot be tarred as a mere delaying tactic of which every opponent to a positive acknowledgment decision can successfully take advantage. The IBIA decisions on the Eastern Pequot and Schaghticoke original determinations was the first, and to the State's knowledge, only time the IBIA has vacated an acknowledgment decision. *See HEP RFD*, at 17 n.4. This important administrative review process must be retained. Its elimination will not improve in any meaningful way the efficacy of acknowledgment decision making, but instead will serve only to deprive both petitioners and interested parties of an important procedural protection.

Conclusion

For the foregoing reasons, the State submits that the BIA should not initiate the formal rulemaking process until these concerns about the Draft's proposed revisions are addressed and a new discussion draft is developed that does not similarly undermine the principles of federal tribal acknowledgment or the fairness of the acknowledgment process to all parties.

Respectfully submitted,

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