# TOWN OF KENT

February 26, 2021

*Via E-Mail and First Class Mail*

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

Re: 25 C.F.R. §83.4(d) – Repetition ban

Dear Mr. Newland:

On behalf of the Town of Kent, Connecticut, I am submitting these comments concerning the tribal acknowledgment process and specifically concerning the immediate question of whether the Department of the Interior should reinstate the provisions of 25 C.F.R. Section 83.4(d). Section 83.4(d) provided that an entity that had been previously denied Federal acknowledgment as an Indian tribe would be denied federal acknowledgment under the 2015 revised acknowledgment regulations. This has been described as a ban on previously denied groups repetitioning for Federal acknowledgment.

The ban on repetitioning had existed in the 1994 acknowledgment regulations. Because of changes to the regulations in 2015 that eased the evidentiary burden for entities seeking to establish Federal acknowledgment and because the Department failed to adequately justify keeping the rule after initially proposing to eliminate it, the Department's decision to maintain the ban on repetitioning was found by two courts[1] to be "arbitrary and capricious". The courts have remanded the rule to the Department "to further consider its justification for the re-petition ban or [to] otherwise alter the regulation."

[1] *Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-05668, 2020 WL 128563 (W.D. Wash., Jan. 10, 2020) (slip op.); *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, No. 17-0038, 2020 WL 1451566 (D.D.C., March 25, 2020) (slip op.).

The Department has initiated a tribal consultation with respect to this regulation. The tribal consultation question is characterized as "whether [the Department] should reconsider its prior decision to ban re-petitioning under 25 CFR part 83".

By letter dated January 5, 2021 directed to Assistant Secretary Sweeney, the Town of Kent requested that the Department temporarily stay the review of tribal acknowledgment petitions under the 2015 acknowledgment regulations until the remands ordered by the courts had been completed. The authority for this request is 25 C.F.R. §83.31(a). The Town requested the temporary stay because the ban on repetitioning is an important and integral part of the 2015 acknowledgment regulations. We believe those regulations should not be applied until the Department has complied with the court remand orders.

In particular, the citizens of the Town of Kent will be adversely affected if the ban on repetitioning is not enforced or is otherwise eliminated. As an "interested party" in Petition #79, Schaghticoke Tribal Nation, and as one of many land claims defendants in Federal litigation instituted and pursued by the Schaghticoke Tribal Nation[2], the Town of Kent has been involved in decades of litigation with the Schaghticoke dealing with the question of whether the Schaghticoke Tribal Nation is legitimately eligible for recognition as an Indian tribe. The Town should be able to rely on past Department of the Interior decisions concerning tribal status, especially since those decisions were based on full consideration of an extensive evidentiary record and affirmed on appeal by the Federal courts.[3]

Indeed, the rule originally proposed in 2014 that would have allowed repetitioning in very limited circumstances recognized:

> the equitable interests of third parties that expended sometimes significant resources to participate in the adjudication and have since developed reliance interests in the outcome of such adjudication. Having weighed these equity considerations, the Department has determined that the proposed rule must acknowledge these third-party interests in adjudicated decisions.

79 Fed. Reg. at 30766.

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[2] A second group within the Town of Kent calling itself the Schaghticoke Indian Tribe (Petitioner #239) also claims Federal acknowledgment and has made, and continues to threaten, land claims similar to those made by the Schaghticoke Tribal Nation.

[3] *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.Supp.2d 389 (D.Conn. 2008), *aff'd* 587 F.3d 132 (2nd Cir. 2009); *United States v. 43.47 Acres of Land*, 896 F.Supp.2d 151 (D.Conn. 2012); *aff'd sub nom Schaghticoke Tribal Nation v. Kent School Corp. Inc.*, 595 Fed.Appx. 32 (2nd Cir. 2014)

Other communities, especially in eastern Connecticut, share similar histories with other entities claiming status as Indian tribes, thus making the problem one of statewide concern.

Simply put, the Town of Kent urges the Department of the Interior to repromulgate and defend the repetitioning ban with a stronger legal and policy justification. In addition, we urge the Department to consult more broadly with all affected stakeholders - including State and local governments, as well as the public - regarding not only the repetitioning ban but also on other necessary and important revisions to the Part 83 regulations. As it now stands, the Department's current tribal consultation is not only improperly limited in scope, but it also denies interested parties, including third parties with significant interests in adjudicated decisions, the opportunity to comment in a meaningful way.

It is important to note that despite the Department's contention that the 2015 acknowledgment regulations made only two substantive changes to the acknowledgment criteria, the courts have concluded otherwise. Both the *Chinook* and *Burt Lake* courts found that the 2015 acknowledgment regulations offered "significant revisions" that could be dispositive for some re-petitioners. The courts identified the new "baseline" evidentiary standard, the new evaluation start date and the allowance of evidence of self-identification as "lowered" standards for acknowledgment. The *Burt Lake* court also noted that the change in the methodology of counting tribal marriages (§83.11(b)(2)(ii)) was a significant change. Unrecognized by the courts, but especially significant to the Town of Kent and the State of Connecticut, are the new provisions permitting the mere existence of a state reservation to count as evidence of "community" and "political authority" (§83.11(b)(1)(ix) and §83.11(c)(1)(vii)). Both the new rule concerning tribal marriages and the new rule concerning state reservations represent significant, potentially dispositive departures from established Departmental precedent. [4,5]

For these reasons, the 2015 revisions to the acknowledgment regulations must be re-evaluated in their entirety as part of the *Chinook* and *Burt Lake* remand orders. It is not enough to simply reconsider the repetitioning ban. That provision had existed in the acknowledgment regulations since 1994 and remained an integral component of the 2015 amendments. The continuation of this ban was a basis for dismissing numerous concerns raised by commenters regarding the substance of the other provisions. It is unclear that the Department would have so significantly altered the criteria for acknowledgment had it known that the ban on repetitioning would be invalidated.

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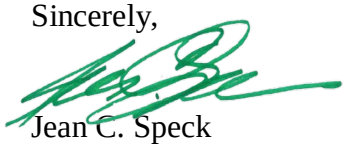
[4] The change in the method of evaluating tribal marriages was made without any reanalysis of the reasoning set forth in *Summary of the Criteria and Evidence: Reconsidered Final Determination Denying Federal Acknowledgment of the Petitioner Schaghticoke Tribal Nation*, pp 6-14, 36 which explained in detail why the use of the new methodology is inappropriate to use as a dispositive measure of community cohesion.

[5] See *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe,* 41 IBIA 1, 21-23 (2005) and *In re Federal Acknowledgment of the Schaghticoke Tribal Nation,* 41 IBIA 30, 34 (2005) for the rejection of the existence of a state reservation as evidence of community and political authority.

We urge a much broader evaluation of the regulations as a whole and a much broader opportunity for public comment on the ban on repetitioning than that contemplated by the very narrow question described in the tribal consultation notice.

Sincerely,



Jean C. Speck
First Selectman, Town of Kent

cc: R. Lee Fleming, Director, Office of Federal Acknowledgment, BIA
Senator Chris Murphy
Senator Richard Blumenthal
Jeff Sienkiewicz, Town of Kent counsel
Don Bauer