
UNITED STATES DEPARTMENT OF THE INTERIOR

INTERIOR BOARD OF INDIAN APPEALS

In re FEDERAL ACKNOWLEDGMENT :
PETITION OF THE :
SCHAGHTICOKE TRIBAL NATION : **MAY 3, 2004**

**REQUEST FOR RECONSIDERATION
OF THE STATE OF CONNECTICUT, TOWN OF KENT, KENT SCHOOL
CORPORATION, THE CONNECTICUT LIGHT AND POWER COMPANY,
CITY OF DANBURY, TOWN OF BETHEL, TOWN OF NEW FAIRFIELD,
TOWN OF NEWTOWN, TOWN OF RIDGEFIELD, HOUSATONIC VALLEY
COUNCIL OF ELECTED OFFICIALS, CITY OF STAMFORD, TOWN OF
GREENWICH, TOWN OF SHERMAN, TOWN OF WESTPORT, TOWN OF
WILTON, AND TOWN OF WESTON, OF THE FINAL DETERMINATION ON
THE PETITION FOR FEDERAL TRIBAL ACKNOWLEDGMENT
OF THE SCHAGHTICOKE TRIBAL NATION**

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I. INTRODUCTION

Pursuant to 25 C.F.R. § 83.11, the State of Connecticut (“State”), Town of Kent, Kent School Corporation, The Connecticut Light and Power Company (collectively, the “State Interested Parties”), City of Danbury, Town of Bethel, Town of Ridgefield, Town of New Fairfield, Town of Newtown, Housatonic Valley Council of Elected Officials (collectively, the “Housatonic Valley Municipalities”), City of Stamford, Town of Greenwich, Town of Sherman, Town of Westport, Town of Weston, and Town of Wilton respectfully submit this request for reconsideration of the Final Determination to Acknowledge the Schaghticoke Tribal Nation (“STN”). All of the parties to this request for reconsideration were interested parties in the proceedings before the Bureau of Indian Affairs (“BIA”) resulting in the STN Final Determination.¹

The Final Determination is based on a gross distortion of the evidentiary and historical record. It relies on evidence that is not probative of the criteria required to grant federal tribal recognition, in particular the continuing existence of a distinct community and the continuing exercise of political authority and influence within that community. Moreover, it uses faulty and manipulated analyses of the evidence to

¹ This request for reconsideration has been served on the designated representatives reflected in the “List of Interested Parties as of January 30, 2004,” prepared by the Office of Federal Acknowledgment, and on the Assistant Secretary – Indian Affairs (attention: Office of Federal Acknowledgment) and the Office of Solicitor (attention: Scott Keep and Barbara Coen). All references to documents that are indexed in the FAIR database are referenced by their short cite or image file ID in FAIR to the extent practicable. A copy of the Report and Joint Motion on Consent to Amend Scheduling Order in the U.S. District Court for the District of Connecticut, Nos. H-85-1078(PCD), 3:98CV1113(PCD, 3:00CV820(PCD), is submitted as Ex. 1. The individual interested parties participating in this joint request for reconsideration reserve the right to take separate actions in any future administrative or court proceedings relating to this petition.

manufacture evidence that otherwise fails to satisfy the regulatory criteria for acknowledgment.

Massive gaps exist in the petitioner's evidence for both community and political authority. By the Final Determination's own account, there is insufficient evidence of community for nearly seven decades, and insufficient or no evidence of political authority for well over a century. To fill these massive gaps, the Final Determination uses evidence of the State's relationship with the Schaghticoke. That evidence, however, is neither probative of the existence of a distinct community or political authority, nor is its use in this fashion permitted by the acknowledgment regulations or precedent. In fact, the manner in which it is used in this Final Determination – such that state recognition is used to satisfy the political authority criterion *even where there is absolutely no evidence of political authority for a lengthy period of time* – is directly contrary to the most recent decisions involving state recognition in Connecticut. Significantly, documents prepared by the Office of Federal Acknowledgment staff itself admit that, under prior precedent, the STN could not be recognized because it does not meet the criteria.

Similarly, to fill the void of direct evidence proving community and political influence for most of the nineteenth century, the Final Determination manipulates the evidence and analysis of marriage rates within the Schaghticoke group. This is a particularly serious failing in that the marriage rate evidence is used to satisfy both the community and political criteria for this extended period. The Final Determination's analysis, however, is based on nonprobative evidence and inadequate research and is contrary to the acknowledgment regulations.

Moreover, much of the direct evidence relied on in the Final Determination of community and political authority falls far short of the quality and quantity necessary to satisfy the acknowledgment criteria. For both community and political authority, the Final Determination relies on highly speculative, unreliable and insufficient evidence to satisfy both criteria for large parts of the nineteenth and all of the twentieth centuries.

Finally, the Final Determination creates a tribal membership that includes Schaghticoke individuals who have consistently declined to be members of the STN. The STN could not be recognized without including these unenrolled and unwilling individuals who represent key Schaghticoke families. Yet, contrary to the regulations and prior precedent, the Final Determination creates a tribe where none exists by forcing those who have chosen not to be STN members into the STN membership at least in name.

In sum, the Final Determination reflects a single-minded effort to grant recognition to the STN regardless of what the evidence demonstrated or what the acknowledgment regulations and law required. This arbitrary and lawless decision cannot be sustained. It lacks a probative or reliable evidentiary basis. It is based on inadequate and incomplete research and analysis. It is contrary to new evidence and interpretations not previously considered. Finally, it violates intentionally the acknowledgment regulations and precedent. This request for reconsideration must be granted, and the Final Determination must be vacated.

II. BACKGROUND

By letter dated December 14, 1981, a group that called itself the Schaghticoke Indian Tribe filed with the BIA a notice of intent to submit an acknowledgment petition.

STN FD, at 2-3. On December 12, 1994, the Schaghticoke Tribal Nation (“STN”) submitted its documented petition for federal tribal acknowledgment.² *Id.* at 3.

In the thirteen years between the filing of the notice of intent in 1981 and the filing of the documented petition in 1994, the petitioner prepared its acknowledgment petition and in the course of doing so engaged various experts. Initially, the STN relied on the services of the Native American Rights Fund (“NARF”) and one of the leading experts in the field of tribal acknowledgment, Dr. William A. Starna. As professor of anthropology at the State University of New York at Oneonta, Dr. Starna has been an aggressive proponent of tribal acknowledgment for several petitioners.³ The review by Starna and NARF in preparation for submission of a formal petition was detailed and comprehensive, taking into account the varied aspects of Schaghticoke history. Based upon his initial research, Starna concluded in a May 26, 1989 letter to NARF that the STN could not meet criteria (b) (distinct community) or (c) (political authority). CT-V003-D0004. Despite his strong conclusion in 1989 that the STN did not qualify for acknowledgment, Starna continued to review the evidence and to conduct research for four more years.

The continued effort culminated in a July 12, 1993 letter from Starna to Henry Sockbeson, the NARF attorney assigned to the project, indicating that the result of his

² What the Final Determination calls a name change to STN in the early 1990s is in fact a direct reflection of the persistent and ongoing irreconcilable conflict between Schaghticoke factions, one calling itself the STN and the other calling itself the Schaghticoke Indian Tribe (“SIT”). In fact, the SIT has since filed its own acknowledgment petition and challenges the legitimacy of the STN. The significance of this persistent conflict in terms of evaluating whether the STN petitioner satisfies the requirements of community and political authority is addressed in section VIII below.

³ Dr. Starna is a noted anthropologist at the State University of New York at Oneonta. He is widely published in the field and has worked for tribal petitioners Gay Head Wampanoag, Golden Hill Paugussett, and Eastern Pequot, as well as STN.

continued research confirmed his 1989 conclusions. CT-V003-D0005. In his 1993 letter, Starna advised NARF, in the clearest and strongest terms, that the STN petition was seriously deficient. His findings were that the STN could *not* satisfy criteria (b) or (c). The petitioner's response to this bad news was to terminate its relationship with NARF and Starna, and to engage other experts. SN-V001-D0009, at 29-30.

The STN submitted additional materials from 1994 through 1999. As part of its continuing efforts to improve its deficient petition, the petitioner retained Dr. Ann McMullen, an anthropologist at Brown University and an expert on tribal acknowledgment, to review its petition and evidence.⁴ As a result of her review, which was based on petition materials and her own "background in anthropology, ethnohistory, and the histories and cultures of New England Native people gained through my own research and work on tribal acknowledgment projects," McMullen stated in an October 12, 1999 report that "too much still rests on Schaghticoke as a piece of Indian land occasionally occupied by Indians and not the focal point for a larger dispersed tribe." CT-V003-D0008, at 3. She echoed the same conclusions that Starna reached in 1993, particularly stressing the lack of evidence of community and political leadership for the nineteenth and twentieth centuries. *Id.* at 4-18. Apparently in an effort to respond to McMullen's critique, the petitioner made an additional submission on October 21, 2001.

In connection with litigation pending in the U.S. District Court for the District of Connecticut that implicated the question of Schaghticoke tribal status, a negotiated, court-approved scheduling order with regard to the submission of evidence and

⁴ Dr. McMullen is also a noted proponent of tribal acknowledgment. Dr. McMullen has worked for tribal groups in the Mashpee and Paucatuck Eastern Pequot tribal acknowledgment petition proceedings.

comments and the issuance of a proposed finding and final determination was established.⁵ Pursuant to this scheduling order, the interested parties made initial submissions in December, 2001, and the State Interested Parties filed joint comments and evidence on April 16, 2002. The STN petition was placed on active consideration on June 5, 2002. STN FD, at 3.

On December 5, 2002, then-Assistant Secretary Neal McCaleb issued a proposed finding (“STN PF”) that the STN petitioner should be denied federal acknowledgment. (DD-V001-D004 & D005). The Proposed Finding concluded that the STN petitioner had failed to satisfy the requirements of criterion (b) – the continual existence of a distinct community – from 1940 to 1967 and from 1996 to the present, and of criterion (c) – the maintenance of political authority and influence – from 1801 to 1875, 1885 to 1967, and 1996 to the present. STN PF, at 21, 31. Even accepting the Proposed Finding’s view of the evidence for other periods, the gaps in the evidence as to these two key criteria were astounding: over 170 years for the political authority and over 40 years for community.

In fact, as demonstrated in the comments filed by the State Interested Parties, the evidence as to both community and political authority was insufficient throughout the last two centuries. CT-V005-D001. The Proposed Finding’s conclusion did not extend this far because it improperly used “state recognition”⁶ as a substitute for actual evidence of

⁵ The litigation involved two land claim actions brought by the STN, *Schaghticoke Tribal Nation v. Kent School Corp, et al.*, No. 3:98CV1113(PCD), and *Schaghticoke Tribal Nation v. United States, et al.*, No. 3:00CV820(PCD), and a federal condemnation action as to a part of the Schaghticoke reservation to be part of the Appalachian Trail, *United States v. 43.47 Acres of Land, et al.*, No. H-85-1078(PCD). These actions remain stayed pending the resolution of the acknowledgment process.

⁶ "State recognition" is a term of art that has emerged in the context of Connecticut-based tribal acknowledgment. The use of this terminology is a misnomer, however. To reach positive findings in both the Eastern Pequot/Paucatuck Eastern Pequot proceedings and

community and political authority during some periods. Thus, for periods where there was some, but insufficient evidence, state recognition was used to make up for the insufficiency for those periods. STN PF, at 10-11. Stripped of the improper supplement of state recognition, the petitioner's evidence on community and political authority was patently deficient for most if not all of the nineteenth and twentieth centuries.

The Proposed Finding also raised a serious problem with regard to the STN's current membership. As of the Proposed Finding, the petitioner's membership list excluded those important Schaghticoke individuals who (depending on your point of view) had been ousted from or refused to be part of the STN petitioner. These included the members of the rival Schaghticoke Indian Tribe ("SIT") petitioner, members of the Cogswell family, and former Chief Irving Harris. In addition, the current membership list included newly recruited Joseph D. Kilson descendents that had not had any connection with the Schaghticoke group for the last century. STN PF, at 30. The absence of the SIT and Cogswell members and the inclusion of the Joseph D. Kilson descendents was a direct result of the lack of continuous existence of a distinct Schaghticoke community, and this problem could not be corrected merely by rearranging the membership enrollment.

Pursuant to the court scheduling order, as amended, the STN petitioner and the interested parties on August 8, 2003, filed comments and evidence on the Proposed

the STN petition, the BIA erroneously equated the fact that the State had set aside tracts of land where individuals claiming descent from tribes that existed in colonial times could live with the act of recognizing a sovereign political entity as it is understood under federal law. As discussed in detail in this brief, there is no comparison between the establishment of State reservations and the recognition of a self-governing tribal entity. To avoid confusion, this brief uses the "state recognition" term, but does not do so under the theory that it is in any way equivalent to the kind of recognition accorded under federal law.

Finding, and on September 29, 2003, the STN petitioner filed its reply comments and additional evidence. An additional filing was made by the State and the STN pursuant to court orders dated December 11 and 19, 2003, regarding questions surrounding efforts by the STN to enroll certain members of the SIT group over their objection. STN FD, at 4-5.

On January 29, 2004, Principal Deputy Assistant Secretary – Indian Affairs Aurene Martin, as acting Assistant Secretary,⁷ issued the Final Determination. Notice of the Final Determination was published in the Federal Register on February 5, 2004. 69 Fed. Reg. 5570. In a complete about-face that simply cannot be justified on the basis of the record or the regulations, the Final Determination acknowledged the STN as a federal Indian tribe.

The Final Determination reached this result only through a gross manipulation of the evidence and the acknowledgment standards. First, using highly unreliable and nonprobative evidence, the Final Determination did everything it could to narrow the evidentiary gaps previously identified in the Proposed Finding. For example, the Final Determination relied on unsubstantiated and speculative evidence to conclude that the period in which there is a complete absence of evidence of political authority lasted only from 1892 to 1936, rather than 1885 to 1949. Second, the Final Determination relied on evidence in an arbitrary and highly selective fashion, accepting any scrap of positive interview evidence, for example, to demonstrate even the most minimal of cross-family contacts in an effort to prove community, while it ignored or rationalized away substantial negative evidence. Third, the Final Determination improperly used endogamy

⁷ Between the issuance of the Proposed Finding and the Final Determination, Assistant Secretary McCaleb had resigned and his successor had not yet taken office.

rates to show political authority over an extended period of time. The Final Determination was able to use this questionable approach only after it manipulated the data to exceed the 50 percent threshold for intermarriages required under the regulations.

Fourth, and perhaps most tellingly, in a clear result-oriented decision, the Final Determination “reevaluated” its use of state recognition to make up for the gaps in the evidence that could not otherwise be explained away. In direct contradiction to existing precedent, the Final Determination concluded that state recognition could be used to establish the existence of political authority even when there was no evidence of political authority. In other words, state recognition, without any political evidence, could fill gaps – by the Final Determination’s own (albeit incorrect) count – of over 60 years. This is in addition to the periods in which state recognition is used to supplement otherwise insufficient evidence of community for nearly 70 years and of political authority for over 50 years. Without this unexplained and unjustified rejection of prior precedent on the use of state recognition, the STN petitioner would not have achieved acknowledgment.

In the Final Determination, both criteria (b) and (c) are satisfied from 1800 to 1820 and 1840 to 1870 on the basis of an analysis that purports to show that Schaghticoke members intermarried at rates in excess of 50 percent. STN FD, at 26-39. The acknowledgment regulations permit the conclusive presumption that both community and political authority existed when marriage rates exceed a 50 percent threshold. 25 C.F.R. §§ 83.7(b)(2)(ii), 83.7(c)(3). Without this provision and the endogamy analysis conducted in the Final Determination, the petitioner clearly could not have satisfied criteria (b) or (c). The Final Determination reached this result only by manipulating the marriage rate data and calculations to achieve endogamy rates above 50

percent for the 1801 to 1820 and 1841 to 1870 periods. A proper analysis of the evidence shows that in-group marriage rates were below 50 percent for the period.

For the period 1900-1940, criterion (b) is not satisfied by direct evidence of community, but rather based on inferences from prior decades and the additional evidence of state recognition. The Final Determination presumes community existed for this period based on the existence of a very small number of reservation residents and social ties with off-reservation relatives. The existence of community is largely inferred from reservation residency and marriage patterns of the nineteenth century, even though such residency and marriage rates had declined to very low levels by the early twentieth century. STN FD, at 58-59. As in the Proposed Finding, the Final Determination depends on state recognition to satisfy criterion (b) for this period.

For the period of 1940 to 1967, community is demonstrated according to the Final Determination on the basis of selected interview evidence. This selective use of interview evidence purports to show that there was a very minimal level of cross-family visiting. STN FD, at 44-48. Again, state recognition is used to add weight to this otherwise insufficient evidence. *Id.* at 60.

The Proposed Finding had concluded that criterion (c) (political authority) was established for the short period from 1876 to 1884 on the basis of two isolated petitions requesting the appointment of an overseer, at least when coupled with state recognition. STN PF, at 25. The Final Determination extends this period to 1892 on the basis of a single court petition by a single Schaghticoke member, despite any evidence of actual political leadership or group political involvement. STN FD, at 87-88.

The lack of evidence is starkest for the period of 1892 to 1936. The Final Determination expressly rejected each and every argument and piece of evidence on political authority offered by the petitioner for this period. *Id.* at 91-107. In the face of this complete absence of evidence, the Final Determination turns to state recognition to fill the massive gap.

Despite having concluded in the Proposed Finding that the evidence regarding a council created and led by Franklin Bearce, a non-Schaghticoke, during the mid-twentieth century did not demonstrate sufficient broad-based political relations and activities among the Schaghticoke, STN PF, at 27-28, the Final Determination uses highly speculative evidence and analysis to both broaden the time period and substantiality of Bearce's purported political activities. STN FD, at 107-11. In particular, the Final Determination depends on Bearce-generated letters and documents regarding land claims and other activities, none of which on their own show that there was any significant Schaghticoke involvement in, knowledge of, or consent to his dealings. In addition, state recognition is relied on to satisfy criterion (c) for this period. *Id.* at 124.

The Final Determination continues the error made in the Proposed Finding that the unremitting factional conflicts and schism in the Schaghticoke membership from the 1970s to the present somehow demonstrates that there is a unified political community. STN FD, at 118. Moreover, the Final Determination concludes that the inability of the STN to include those Schaghticoke individuals that refuse STN membership because of these conflicts can be overlooked, STN FD, at 53-54, even though the Proposed Finding

had instructed that this inability precluded satisfaction of both criteria (b) and (c). STN PF, at 20, 30, 212-13.

The baldly result-oriented nature of the decision making process followed in the Final Determination is revealed in the “Schaghticoke Briefing Paper” prepared by the Office of Federal Acknowledgment (“OFA”) staff for Acting Assistant Secretary Martin. This Briefing Paper is included in the record. AC-V012-D0009; Ex. 2. It purports to seek guidance as to two critical questions for the Final Determination: (1) whether state recognition could be used to make up for the lack of any evidence of political authority for two significant periods; and (2) whether the STN should be recognized even though a substantial portion of the Schaghticoke community are not included in the STN membership as a result of continuing conflicts between factions.

As to the question of the gaps in political authority, OFA expressly advised that there was no evidence of political authority or influence to satisfy criterion (c) for the periods of 1820 to 1840 and 1892 to 1936. AC-V012-D0009, at 1. Moreover, it admitted that, if prior precedent as to the use of state recognition were followed, state recognition would not provide additional evidence sufficient to overcome the absence of political evidence. *Id.* at 1, 3. Thus, if controlling interpretations of the regulations and precedent were followed, the petitioner would have to be denied recognition. *Id.* at 3. To grant recognition, the interpretations would have to be changed, and precedent would have to be ignored. Despite this startlingly candid observation, OFA recommended acknowledgment.⁸

⁸ For a thorough discussion of the Final Determination’s treatment of state recognition, see section V below.

As to the membership question, OFA similarly departed from prior views. The Proposed Finding had concluded that the petitioner did not satisfy criteria (b) and (c) from 1996 to the present because its membership did not include key members of the Schaghticoke community, specifically members of the SIT and the Cogswell family. STN PF, at 20, 30. Despite apparent repeated efforts by the STN petitioner to obtain the voluntary enrollment of those remaining outside its membership (efforts that allegedly included fraud, *see* CT-V009-D0002), the membership situation remained largely unchanged. OFA nevertheless advised that the STN should be acknowledged with a membership that would include “individuals who have not specifically assented to or been accepted as members. . . .”⁹ AC-V012-D0009, at 5. It recommended that the Acting Assistant Secretary take the unprecedented step in the Final Determination of adding to the petitioner’s membership numerous individuals who had not consented to such membership and who, in certain cases, actively opposed the STN. This step directly violated the commitment OFA made in technical assistance meetings that such action could not be taken. Ex. 3; STN Tech. Asst. Letter (AC-V012-D0047, at 2-3); SIT Tech. Asst. Letter (AC-V012-D0048, at 2); State Tech. Asst. Letter (AC-V012-D0025, at 3).

The Final Determination followed OFA’s recommendations on both issues. The only justification that can be discerned for diverting from prior precedents and interpretations and OFA’s own statements during technical assistance is that it was necessary to achieve the desired result – the recognition of the STN.

This request for reconsideration is filed pursuant to 25 C.F.R. § 83.11 within ninety days of the date of the Federal Register notice of the Final Determination.

⁹ For a thorough discussion of the membership issue, see section IX below.

III. SUMMARY OF ISSUES

The Final Determination is based on unreliable and nonprobative evidence, is undermined by incomplete and inadequate research and analysis, and is inconsistent with the acknowledgment regulations and prior BIA and judicial precedent. In addition, new evidence is available that requires a negative determination. The principal issues addressed by this request for reconsideration, and their jurisdictional grounds, are summarized as follows:

- Based on unreliable and nonprobative evidence as well as inadequate research and analysis, the Final Determination erroneously concludes that the State's relationship with the Schaghticoke was based on an "implicit" recognition of a distinct political body rather than simply a relationship with individuals of Indian descent. (25 C.F.R. §§ 83.11(d)(2) &(3)).
- The use of the State relationship as a substitute for otherwise wholly absent or insufficient evidence of community and political authority directly contravenes prior precedent and the acknowledgment regulations, resulting in the Assistant Secretary's reliance on evidence having little or no probative value. (25 C.F.R. § 83.11(d)(2)).
- Without the improper additional weight of evidence of the State relationship, the evidence of community and political authority for extensive periods of time is seriously inadequate and unreliable. (25 C.F.R. § 83.11(d)(2)).
- The Final Determination's conclusion that criterion (b) (distinct community) is satisfied throughout the nineteenth and twentieth centuries is based on unreliable and nonprobative evidence. (25 C.F.R. § 83.11(d)(2)).

- The Final Determination's conclusion that criterion (c) (political authority or influence) is satisfied throughout the nineteenth and twentieth centuries is based on unreliable and nonprobative evidence. (25 C.F.R. § 83.11(d)(2)).
- The analysis of Schaghticoke endogamy rates relied on in the Final Determination to support the conclusion that criteria (b) and (c) are satisfied for a large part of the nineteenth century is based on inadequate or incomplete research. Reasonable alternative interpretations of the endogamy evidence, based on a proper application of the regulations and not previously considered, would substantially affect that conclusion. (25 C.F.R. § 83.11(d)(3) & (4)). New evidence is available to refute these findings. (25 C.F.R. § 83.11(d)(1)).
- The conclusion that criteria (b) and (c) are satisfied despite the inability of the STN petitioner to enroll a large number of significant Schaghticoke individuals is based on unlawful administrative fiat rather than probative and reliable evidence. (25 C.F.R. § 83.11(d)(2)).
- The finding that a Schaghticoke Tribe existed at the point of first sustained contact, as required by the regulations, is based on unreliable and nonprobative evidence, inadequate and incomplete research, and there are reasonable alternative interpretations of the evidence on this point that substantially affect the conclusion. (25 C.F.R. § 83.11(d)(2), (3), & (4)).

- The unprecedented nature of the Final Determination reflects the lack of congressional guidance in the delegation of acknowledgment authority to the Assistant Secretary.¹⁰

Pursuant to 25 U.S.C. § 83.11(f)(2), to the extent that the Board may conclude that this request for reconsideration contains “other grounds” for reconsideration that are not within the scope of § 83.11(d), those issues should be referred to the Secretary for consideration.

IV. STANDARDS OF REVIEW

Pursuant to § 83.11 of the Department’s regulations, any interested party may file a request for reconsideration of the Assistant Secretary’s final determination on a petition for federal tribal acknowledgment with the IBIA within ninety days of publication of the final determination in the Federal Register. 25 C.F.R. § 83.11(a). The Board has jurisdiction to review requests for reconsideration that allege any of the following grounds:

- That there is new evidence that could affect the determination;
- That a substantial portion of the evidence relied on by the Assistant Secretary was unreliable or of little probative value;
- That the research appears inadequate or incomplete in some material aspect; or

¹⁰ The Board likely has no jurisdiction to consider this issue because the Board has no authority “to disregard a duly promulgated regulation or to declare such a regulation invalid.” *Oklahoma Petroleum Marketers Ass’n v. Acting Muskogee Director*, 35 IBIA 285, 2000 I.D. Lexis 112, *6-8 (2000). This matter is nonetheless brought to the Board’s attention in order to ensure that the Board is aware that the issue has been raised, to allow for its presentation to the Secretary pursuant to 25 C.F.R. § 83.11(f)(2), and to exhaust all administrative remedies.

- That there are reasonable alternative interpretations, not previously considered, of the evidence that would substantially affect the determination that the petitioner meets one or more of the mandatory acknowledgment criteria.

25 C.F.R. § 83.11(d). Each of these grounds is present in this appeal.

The Board must vacate a final determination if it finds that an interested party has established, by a preponderance of the evidence, one or more of these four grounds. 25 C.F.R. § 83.11(e)(10). In addition, if the interested party has alleged other grounds for reconsideration, the Board is required to refer the request for reconsideration to the Secretary to reconsider the final determination on those grounds. 25 C.F.R. § 83.11(f)(2).

The standards governing acknowledgement petitions are set forth in the Department's regulations at 25 C.F.R. Part 83 and are predicated on longstanding principles relating to tribal status. The acknowledgment regulations are "intended to apply to groups that can establish a *substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.*" *Id.*, § 83.3(a) (emphasis added). The standards of proof are high to ensure that a petitioner is in fact tribal in character and can demonstrate historic tribal existence. *See* 59 Fed. Reg. 9282 (1994).

The burden of proof rests on the petitioner. 25 C.F.R. § 83.6. The petitioner must produce evidence that each of the seven criteria under the acknowledgment regulations is satisfied. To begin with, the documented petition must contain "*detailed, specific* evidence" in support of an acknowledgment request. 25 C.F.R. § 83.6(a) (emphasis added). The petition must also contain "*thorough explanations and supporting documentation* in response to all of the criteria." *Id.*, § 83.6(c) (emphasis added). A

petition must be denied if the available evidence "demonstrates that it does not meet one or more of the criteria," or if there is "insufficient evidence that it meets one or more of the criteria." *Id.*, § 83.6(d). Although conclusive proof is not required, the available evidence must establish "a reasonable likelihood of the validity of the facts relating to that criterion" for that criterion to be met. *Id.* As the preamble to the regulations states, "the primary question is usually whether the level of evidence is high enough, ***even in the absence of negative evidence***, to demonstrate meeting a criterion." 59 Fed. Reg. 9280 (1994) (emphasis added). In many cases, "evidence is too fragmentary to reach a conclusion or is absent entirely." *Id.* In addition, "a criterion is not met if the available evidence is too limited to establish it, even if there is no evidence contradicting facts asserted by the petitioner." *Id.*

The standards take into account situations and periods where the evidence is "demonstrably limited or not available." *Id.*, § 83.6(e). The requirements of community and political authority need not be met at every point in time, and fluctuations in tribal activity in various years shall not "in themselves" be cause for denial of acknowledgment. *Id.* Consideration of these limitations "does not mean, however, that a group can be acknowledged where continuous existence cannot be reasonably demonstrated, nor where an extant historical record does not record its presence." 59 Fed. Reg. 9281-82; *see* 25 C.F.R. §§ 83.3(a), 83.6(e).

The maintenance of tribal relations is fundamental to tribal existence. Tribes are entitled to their "semi-independent position when they preserved their tribal relations." *McClanahan v. State Tax Commission of Arizona*, 411 U. S. 164, 173 (1973). This requirement has its source in leading court decisions that constitute the judicial

precedents that the regulations codify. *See, e.g., Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 559 (1832) ("The Indian nations had always been considered as ***distinct, independent political communities***" (emphasis added)); *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 16 (1831) (tribe found to be "a distinct political society separated from others"); *United States v. Antelope*, 430 U. S. 641, 647 (1977) (regulation of Indian affairs "is rooted in the unique status of Indians as 'a separate people' with their own political institutions"); *Connors v. United States*, 180 U.S. 271 (1901) (indicating that tribe must be "a separate political entity, recognized as such."); *see also Miami Nation of Indians of Indiana v. Babbitt*, 255 F.3d 342, 350 (7th Cir. 2001); *Masayesva v. Zah*, 792 F. Supp. 1178, 1181, 1188 (D. Ariz. 1992). In sum, "[t]o warrant special treatment, tribes must survive as distinct communities." *United States v. Washington*, 641 F. 2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U. S. 1143 (1982).

It is therefore absolutely essential to federal tribal recognition that a group establish that it has existed as a distinct community from historical times to the present and that it has maintained political influence and authority over its members during that period. At the core of the notion of tribal sovereignty is the existence of a self-governing community that has maintained community and bilateral political relations on a substantially continuous basis from historical times to the present. The acknowledgment criteria set forth precise standards and the types of evidence necessary for demonstrating these essential elements.

Criterion 83.7(b) requires proof that "***a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.***" 25 C.F.R. § 83.7(b) (emphasis added). Community means

"any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers." *Id.*, § 83.1 (emphasis added).

This standard "effectively requires a showing that substantial social relationships and/or social interaction are maintained widely within the membership, *i.e.*, that members are more than simply a collection of Indian descendants and that the membership is socially distinct from non-Indians." 59 Fed. Reg. 9286. Moreover, "[w]ithout evidence of broad interaction among not only close and distant relatives but also ***non-related or distantly related*** individuals," a petitioner cannot meet criterion (b). *Muwekma PF, SC 24* (emphasis added) (Ex. 4).¹¹ The activities of a relatively small group of closely related individuals will not suffice to demonstrate a distinct community. *Id.* at 24-25; *Miami FD, SC 5* (Ex. 5), *aff'd Miami Nation of Indians v. United States Dept. of Interior*, 255 F.3d 342 (7th Cir. 2001).

Criterion 83.7(c) requires proof that ***"[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present."*** 25 C.F.R. § 83.7(c) (emphasis added). The BIA has further emphasized: "This self-governing character of an Indian tribe is basic to the Federal Government's acknowledgment that a group maintains a government-to-government relationship with the United States." 56 Fed. Reg. 47320 (1991) (preamble to proposed acknowledgment regulations).

¹¹ In citations to BIA acknowledgment decisions, the following conventions are used to refer to the various types of decisions and reports: PF, Proposed Finding; FD, Final Determination; SC, Summary Under the Criteria; SE, Summary of Evidence; AR, Anthropological Report; TR, Technical Report.

As to the nature of tribal political authority, the regulations specifically state:

Political influence or authority means a tribal council, leadership, internal process or other mechanism which the group has used as a means of influencing or controlling the behavior of its members in significant respects, and/or making decisions for the group which substantially affect its members, and/or representing the group in dealing with outsiders in matters of consequence.

25 C.F.R. § 83.1 (emphasis added). The intent of this definition is that "the self-governance reflected in the autonomous nature of a group is more than simply a process for group decision making." 56 Fed. Reg. 47321. Although criterion (c), like criterion (b), need not be met at "every point in time," and fluctuations in tribal activity during various years will not "in themselves" be cause for denial of acknowledgment, 25 C.F.R. § 83.6(e), "[e]xistence of community and political influence or authority shall be demonstrated on a substantially continuous basis." *Id.*

Although coercive powers exercised by recognized tribes need not be shown, "[i]t is essential that more than a trivial degree of political influence be demonstrated. Petitioners should show that the leaders act in some matters of consequence to members or affect their behavior in more than a minimal way." 59 Fed. Reg. 9288. The regulations take into account the difficulties of unacknowledged groups in maintaining political influence; yet, the fact remains that the definition of political influence or authority "maintains the fundamental requirements of the regulations that political influence must not be so diminished as to be of no consequence or of minimal effect." *Id.*

As the BIA has emphasized:

It must be shown that there is a political connection between the membership and leaders and thus that the members of a tribe maintain a bilateral political relationship with the tribe. This connection must exist broadly among the membership. If a small body of people carries out legal actions or makes agreements affecting the economic interests of a group, the membership may be significantly affected without political

process going on or without even the awareness or consent of those affected.

Miami FD, SC 15 (Ex. 5).

V. **THE FINAL DETERMINATION'S MISUSE OF STATE RECOGNITION TO COMPENSATE FOR THE LACK OF PROPER EVIDENCE OF COMMUNITY AND POLITICAL AUTHORITY IS FACTUALLY BASED ON NONPROBATIVE EVIDENCE AND IS LEGALLY CONTRARY TO THE ACKNOWLEDGMENT REGULATIONS AND PRIOR PRECEDENT.**

The STN petitioner would not have received a favorable acknowledgment decision without the Acting Assistant Secretary's improper use and understanding of state recognition. As the Final Determination and other BIA documents make absolutely clear, the petitioner's evidence alone was deficient. *STN* FD, at 118; OFA Briefing Mem., at 1-3 (AC-V012-D0009) (Ex. 2). Even taking at face value the Final Determination's view of the evidence for other periods,¹² there is over 60 years during which the STN petitioner's evidence of political authority under criterion (c) is not just insufficient but is entirely absent. Moreover, state recognition is also used for substantial periods for both criterion (b) and criterion (c) where the evidence would otherwise be insufficient. Specifically, there is a period of 67 years in which direct evidence of community must be augmented by state recognition, and there are periods totaling over 50 years in which state recognition must be added to the direct evidence of political authority. In sum, without state recognition, the petitioner fails to satisfy criterion (c) for over 110 years! This is not even a close case. Instead, it is a stark example of the Acting

¹² As demonstrated in sections VI, VII, and VIII below, a vast quantity of the evidence relied on in the Final Determination to satisfy criteria (b) and (c) for other periods is unreliable and lacks probative value.

Assistant Secretary using every means that could be devised to turn an obviously deficient petition into a positive final result.

In what can only be described as an utterly result-driven effort, the Acting Assistant Secretary defied prior acknowledgment precedent to use an erroneous and unsupported view of state recognition to fill these huge evidentiary gaps. To accomplish this result, the Acting Assistant Secretary had to manipulate and distort the evidence and the governing regulations. The evidence of the state's relationship with the Schaghticoke is not probative of community and political authority, yet the Acting Assistant Secretary uses it to prove both. The regulations do not permit the use of the state's relationship to make up for absent or deficient evidence, yet the Acting Assistant Secretary ignores controlling precedent to fill the gaps.¹³ This fundamental error and abuse of authority demands that the Final Determination be vacated.

A. The Final Determination Manufactured a “Reevaluated” Position on the Use of State Recognition in Direct Defiance of Precedent.

The Final Determination uses state recognition to satisfy criterion (c) (political authority) for the periods 1820-1840 and 1892-1936 despite the complete lack of direct evidence of political authority. It also uses state recognition as additional evidence to satisfy criterion (c) (community) for 1900 to 1967 to supplement otherwise insufficient

¹³ One of the contributing factors to the unprincipled and arbitrary use of state recognition in the Final Determination is the lack of properly delegated authority with regard to federal tribal acknowledgment. As discussed in detail in section XI below, the Constitution grants Congress plenary authority over Indian affairs. Congress, however, has never properly delegated its authority with regard to federal acknowledgment to the Department of the Interior. Specifically, Congress has never set forth any intelligible principle or criteria to guide the Department's exercise of delegated authority in recognizing Indian tribes. This lack of constitutionally required guidance is one of the sources for the Final Determination's rudderless and illegal approach to the use of state recognition.

direct evidence of community. STN FD, at 118. In what it calls its “reevaluated position,” the Final Determination asserts that continuous state recognition of an Indian group with a continuously existing state reservation is sufficient evidence of political authority and influence despite the complete absence of any direct evidence of political authority. *Id.* at 120. According to the Acting Assistant Secretary, this use of state recognition as sufficient political evidence on its own is justified because (1) the STN petitioner has demonstrated (in part through the misuse of state recognition to supplement other insufficient evidence) that it has existed as a distinct community continuously throughout history; (2) the state’s continuous relationship was purportedly based on the implicit recognition of a distinct political body; (3) political influence is, in the Final Determination’s view, demonstrated for substantial periods both before and after the periods in which such evidence is absent; and (4) there is no evidence that the Schaghticoke ceased to exist as a political entity during the periods lacking any evidence.¹⁴ *Id.*

This so-called “reevaluated position” is completely at odds with the other decisions dealing with the use of state recognition of Connecticut Indian groups. Specifically, the *Historical Eastern Pequot* Final Determination had concluded that state recognition could be used as additional evidence only for periods in which there was some, albeit insufficient, evidence. *Historical Eastern Pequot* FD, at 29-30 (Ex. 6); *see also* Ex. 7 (transcript of technical assistance on Nipmuc petitions discussing this formulation of how state recognition is to be used). The STN Final Determination expressly discards that limitation. STN FD, at 119. Although, as demonstrated below,

¹⁴ The factual and legal validity of each of these factors is challenged at length below.

even the *Historical Eastern Pequot* FD version of the use of state recognition was contrary to both the evidence and the acknowledgment regulations, the STN Final Determination's break with its recent precedent is astounding. There is no justification in the Final Determination, evidentiary or otherwise, offered for the need to undertake this reevaluation. The reason for having reevaluated the use of state recognition, however, is apparent: Without changing the rules of the game, the STN petitioner could not receive acknowledgment. Plain and simple, the Assistant Secretary chose to invent a new rule to achieve a desired result.

The degree to which the Acting Assistant Secretary has manipulated the acknowledgment process in the misuse of state recognition to compensate for the lack of required evidence is revealed starkly in a memorandum prepared by the Office of Federal Acknowledgment (OFA) staff in preparation for the Final Determination. This so-called "Schaghticoke Briefing Paper" dated January 12, 2004, sought "guidance" from the Acting Assistant Secretary on two issues "that must be resolved in order to complete the final determination" on the STN petition. AC-V012-D0009, at 1 (Ex. 2). OFA described the first issue thusly: "*Should the petitioner be acknowledged even though evidence of political influence and authority is absent or insufficient for two substantial historical periods, and if so, on what grounds?*" *Id.* (italics original).¹⁵

In discussing this issue, the OFA Briefing Paper stated:

The petitioner has *little or no* evidence to demonstrate that criterion 83.7(c) has been met between 1820 and 1840 and between approximately 1892 and 1936. The evidence for community during the 1820 to 1840 period, based on a high rate of intermarriage within the group, falls just short of the 50 percent necessary,

¹⁵ The second issue involved the continued failure of the petitioner to include within its membership important Schaghticoke descendents. This issue is discussed in section IX below.

under the regulations, to demonstrate political influence without further, direct evidence (83.7(b)(2)(ii)).

If applied as it was in the Schaghticoke PF, the weight of continuous state recognition with a reservation would not provide additional evidence to demonstrate that criterion 83.7(c) (political influence) has been met for this time period.

Id. (emphasis added).

After discussing its view of the nature of the state relationship – a view that is demonstrably wrong and is not based on reliable or probative evidence, as discussed in section V below – OFA offered the Acting Assistant Secretary four options:

1. Acknowledge the Schaghticoke under the regulations ***despite the two historical periods with little or no direct political evidence, based on the continual state relationship with a reservation*** and the continuity of a well defined community throughout its history.
2. Decline to acknowledge the Schaghticoke, ***based on the regulations and existing precedent.***
3. Acknowledge the STN ***outside of the regulations.***
4. Decline to acknowledge the STN, but support or not object to legislative recognition.

Id. at 2-3 (emphasis added). The OFA Briefing Paper then evaluates each of these four options:

Option 1 ***would require a change in how continuous state recognition with a reservation was treated as evidence*** in the STN PF and in the Historical Eastern Pequot (HEP) decisions. The STN PF stated that state recognition in the Schaghticoke case did not provide additional evidence for political influence in the periods in question in part because there were no known State dealings with Schaghticoke leaders. In addition, the position in the HEP decision and the STN PF was that the state relationship was not a substitute for direct evidence of political processes, and can add evidence only where there is some, though insufficient, direct evidence of political processes.

The revised view, under Option 1, would be that the overall historically continuous existence of a community recognized as a political community by the State (a conclusion denied by the State) and occupying a distinct territory set

aside by the State (the reservation), together with strong evidence of continuous community, provides sufficient evidence for political influence even though direct evidence of political influence is absent for some periods.

Recognition of STN under Option 1 would not affect past negative decisions because the clear continuity as a community together with the continuous historical state relationship and reservation are not duplicated in petitioners that have been rejected in the past. ***There are no more than six other historically state recognized tribes with a continuously existing state reservation which have not yet been considered for acknowledgment.***

Option 1 ***may be interpreted by petitioners as establishing a lesser standard which would be cited in future cases***, if the STN decision is interpreted as allowing substantial periods during which evidence is insufficient on one criterion. ***Its impact on future cases would be limited by the weight given the state relationship and the continuity in community.***

Option 2 ***maintains the current interpretations of the regulations and established precedents concerning how continuous tribal existence is demonstrated.***

Option 3, acknowledgment outside the regulations, would require an explicit waiver of at least part of the regulations, based on a finding that this would be in the best interests of the Indians. A waiver could be narrowly defined to distinguish this case from other potentially similar future cases.

Option 4 [congressional recognition] would probably be strongly opposed by the Connecticut delegation.

Id. at 3 (emphasis added). OFA then recommended Option 1 “on the grounds that it is most consonant with the overall intent of the regulations.” *Id.* Nowhere in the Briefing Paper or elsewhere in the record does OFA explain why such a result is “most consonant” with the regulations’ overall intent.

From the Final Determination and the OFA Briefing Paper, several aspects of the Acting Assistant Secretary’s brazen disregard for the acknowledgment regulations and precedent becomes apparent: First, it is plain that the Acting Assistant Secretary understood that the STN petitioner lacked the evidence to satisfy the criteria in the absence of state recognition. Second, a final determination that denied acknowledgment

was the only option consistent with prior precedents and the regulations. Third, to acknowledge the STN petitioner would require a departure from prior precedent and a change in how state recognition could be used. Fourth, no justification is available for the departure from precedent and the regulations except that it was necessary to accomplish the acknowledgement of this petitioner. It would be hard to conceive of a more transparent and arbitrary act.

B. The BIA's Inability to Articulate a Rationale for and Consistent Use of State Recognition Demonstrates That Its Use Is Arbitrary and Inconsistent with the Acknowledgment Regulations.

The Final Determination's "reevaluated" view of state recognition is just the most recent, and most extreme, example of the BIA's inability to articulate a satisfactory justification for the use of state recognition in the acknowledgment process. At each critical decision point, the rationale has shifted. This inability to articulate a consistent basis for the way it has used state recognition is quite revealing. Indeed, the BIA is legally adrift, unable to anchor the treatment of state recognition in either the acknowledgment regulations or prior precedents, let alone the evidence and the history of the State. The efforts to grab hold of a satisfactory rationale illustrates that, at bottom, the endeavor is an arbitrary and unlawful exercise.

The use of state recognition as a gap-filler first appeared in the *Eastern Pequot* Proposed Finding. In it, ignoring strong evidence to the contrary, the Assistant Secretary described the State's relationship with the Eastern Pequot as a "government-to-government relationship." *Eastern Pequot* PF, at 63 (Ex. 8). After acknowledging that there were no precedents for doing so, the Assistant Secretary concluded that the State's relationship provided sufficiently "greater weight" to the petitioners' evidence to

overcome their burden than otherwise would be the case. *Id.* Because neither the acknowledgment regulations nor prior precedent provided a rationale for doing so, the Assistant Secretary manufactured one. Specifically, the Assistant Secretary stated that

[t]he greater weight is assigned for the following reasons in combination:

- The historical Eastern Pequot tribe has maintained a continuous historical government-to-government relationship with the State of Connecticut since colonial times;
- The historical Eastern Pequot tribe had a state reservation established in colonial times, and has retained its land area to the present;
- The historical Eastern Pequot tribe had members enumerated specifically as tribal members on the Federal Census, Special Indian Population Schedules, for 1900 and 1910.

Id. Thus, the original rationale for using state recognition to make up for deficiencies in the evidence was based on three factors: (1) the purported “government-to-government” relationship, which in fact did not exist; (2) the continuous existence of a reservation; and (3) the enumeration as tribal members in the 1900 and 1910 censuses. This concocted theory would not remain the rationale for long.

In the *Historical Eastern Pequot* FD,¹⁶ the Assistant Secretary abandoned the rationale provided in the proposed finding and offered a different justification for the use of state recognition. First, the *Historical Eastern Pequot* FD recognized (and the STN Final Determination reconfirmed, STN FD, at 14) that the State’s relationship with the group could not be characterized as a “government-to-government” relationship.

Historical Eastern Pequot FD, at 29, 76 (Ex. 6). Instead, the Assistant Secretary

¹⁶ The State and others have challenged the *Historical Eastern Pequot* FD, particularly with regard to the AS-IA’s use of state recognition in that decision. The requests for reconsideration filed by the State and others are presently pending before the Interior Board of Indian Appeals. *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, Dkt. Nos. IBIA 02-165-A, IBIA 02-166-A, IBIA 02-169-A.

concluded that “[t]here is implicit in this relationship a recognition of a distinct political body.” *Id.* at 29. This “implicit” recognition of a “distinct political body” was supposedly based on “[s]everal major elements [that] existed throughout the relationship which define the distinct status of the historical Eastern Pequot tribe.” *Id.* The *Historical Eastern Pequot* FD identified the following four elements of the State’s relationship that justified its use to fill the evidentiary gaps:

- Overseers or other authorities were appointed with fiduciary obligations to the tribe’s members. *Id.* at 30, 77.
- The State supposedly did not consider Indians who were members of the tribes with which the State had a relationship to be citizens of the State until 1973. *Id.* at 30, 78.
- The tribes with which the State had a relationship had a “distinct political status,” reflected in legislation that was specific to Indians. *Id.* at 30, 77-78.
- A separate land base (the reservation) was established during the colonial period and continues to the present. *Id.* at 30.

The only factor retained from the *Eastern Pequot* Proposed Finding was the continuing existence of the reservation. The Assistant Secretary abandoned the description of the State’s relationship as a “government-to-government” one, and instead assumed an “implicit recognition” of a “distinct political body.”¹⁷

In the STN Proposed Finding, however, the Assistant Secretary espoused yet a third version of its view of the importance of state recognition for federal

¹⁷ As discussed further below, these conclusions are based on nonprobative evidence, a distortion of the factual and legal significance of the State’s relationship to these groups, and is contrary to the acknowledgment regulations and precedent.

acknowledgment decisions. Specifically, the STN Proposed Finding concluded that, because the State did not deal with or identify formal or informal leaders of the Schaghticoke, its relationship with the Schaghticoke differed “materially” from that with the Eastern Pequot. STN PF, at 10-11. Thus, according to the Assistant Secretary in the STN Proposed Finding, the key aspect of the State’s relationship with the Eastern Pequot was no longer the “implicit” recognition of a “distinct political body.” Instead, STN Proposed Finding emphasized the purported identification of leaders with whom the State allegedly had dealt. Therefore, “because of the narrower quality of the state relationship with the Schaghticoke petitioner, the state relationship provides a more limited amount of additional evidence than it did in the case of the historical Eastern Pequot.” *Id.* at 11. Although the Proposed Finding used state recognition in a purportedly more limited way than it did in the *Historical Eastern Pequot* FD, it still employed state recognition as “additional evidence” for certain periods for the STN petitioner.

As detailed above, the Proposed Finding’s rationale and application was tossed aside in the Final Determination. Instead, in complete disregard for any precedent, including the *Historical Eastern Pequot* FD from which the use of state recognition as additional evidence emanates, the STN Final Determination blithely concludes that state recognition can make up for a complete absence of evidence of political authority.

What is particularly telling from this comparison of the various rationales is the inability of the Assistant Secretary even to articulate a consistent rationale for the treatment of state recognition, much less to find support for any of the rationales in the record or the regulations. The Assistant Secretary began with the assertion that the State maintained a historically continuous government-to-government relationship that

justified giving added weight to the petitioners' evidence. Realizing that the factual and historical record simply would not support that characterization of the relationship, the Assistant Secretary shifted grounds. Instead, there was found to exist an "implicit" recognition of a political entity, which supposedly justified the use of state recognition as "additional" evidence to fill in the gaps for those periods where the petitioner had some, but insufficient evidence. Then, the Assistant Secretary, apparently recognizing the flaws in this rationale, reconstituted it in the STN Proposed Finding into an entirely different rationale: that the State had identified and dealt with leaders of the Eastern Pequot but not the Schaghticoke. Finally, because the STN could not be recognized in any other way, the Assistant Secretary simply announced that no evidence of political authority was necessary if there was continuous state recognition.

These twists and turns in the rationale are remarkable, illustrating the difficulty the BIA has had in attempting to find a legitimate basis for using state recognition. The inability of the BIA to articulate a consistent rationale is quite revealing. It is a direct result of the lack of support in either the acknowledgment regulations or prior precedent for this use of state recognition. If there were such a basis, the BIA would not have to continually scramble and rely on post-hoc rationalizations. The inability to fashion a rationale that fits within the framework of the regulations – and the need to continue searching for one – is a compelling demonstration that there is *no* rationale that comports with the regulations.

C. **The State’s Relationship Was Based on Descent, Not Recognition, Explicit or Implicit, of a Political Community and Is Therefore Not Probative of the Implied Recognition of a “Distinct Political Body.”**

In a recent speech in which she responded to public criticism of the STN Final Determination, Principal Deputy Assistant Secretary Martin reportedly asked rhetorically: “How do you treat a petition from a state that has basically *replicated the federal recognition at the state level*, a recognition which, at the federal level, is at its core a recognition of another sovereign entity?” *BIA Official Warns of Congressional Maneuvering*, <http://indianz.com/News/archive/001782.asp> (April 16, 2004) (emphasis added) (Ex. 9). If this is the true basis for her use of state recognition – that the state recognition was based on the same process as federal recognition resulting in a government-to-government relationship – it reflects a gross distortion and misunderstanding of the evidence about the State’s relationship. That the official who issued the Final Determination would publicly defend her decision on the assertion that state and federal recognition are essentially the same reflects, at best, a near complete lack of familiarity, not just with the evidence, but with the actual substance of the Final Determination.

The BIA itself concluded that state recognition in Connecticut did not entail a government-to-government relationship. In both the *Historical Eastern Pequot* and STN Final Determinations, the suggestion that the significance of state recognition could be equated to the federal recognition was rejected as completely without basis. *Historical Eastern Pequot* FD, at 29, 76 (Ex. 6); STN FD, at 14. In fact, the STN Final Determination expressly stated that state recognition “does not show the existence of a government-to-government relationship, which has a particular meaning in the Federal-

Indian relationship.” STN FD, at 14. Moreover, it specifically rejected the petitioner’s arguments that state and federal recognition were sufficiently parallel to conclude that state recognition replicates federal recognition. *Id.* at 16.

Martin’s public statements are indicative of a fundamental distortion and misunderstanding of the nature of state recognition. Federal recognition is predicated on the continuing existence of a political community – or in Martin’s words, “at its core a recognition of another sovereign entity.” There is no evidence that the State’s relationship was similarly dependent on the key component of political community; instead, the State’s continuing relationship with an Indian group was based on one factor, and one factor alone: Indian descent. As notes from the BIA’s own research files on the Eastern Pequot petitions aptly indicate, “[c]ertainly there is no evidence for political or community -- [the State] went *entirely by descendancy*. Connecticut paid no attention to anyone who didn’t apply for reservation residency, and evaluated that simply on the basis of being able to show descent and 1/8 blood.” BIA Researcher Notes (emphasis added) (CT-V007-D0005).¹⁸

As acknowledged in the *Historical Eastern Pequot* FD, Connecticut overseer reports of the nineteenth century lack the “extended discussions” of tribal status issues that are typically found in the nineteenth century reports of the Federal Office of Indian Affairs. *Historical Eastern Pequot* FD, at 55 (Ex. 6). This is not merely an interesting observation. Such questions were of little matter to the State overseers. As is reflected throughout the Schaghticoke overseer reports, the overseers’ concern was exclusively to

¹⁸ In fact, the Final Determination concludes that the State’s efforts at times at tracking descent were not entirely accurate. STN FD, at 41 (criticizing accuracy of genealogical charts prepared by Parks & Forest Commission in 1930s).

provide necessary support to individuals. *See* SN-V017-D0119, SN-V017-D0120; CT-V006-D003. Indeed, a critical distinction is that benefits were provided to individuals directly, rather than to the group for tribal authorities to distribute. *Id.*

This is shown in particular in the records of Abel Beach, the Schaghticoke overseer from 1801-1856. His month-by-month and in some instances day-by-day observations and actions demonstrate that Beach himself performed the functions one would expect of community or political leaders. Beach directed and supervised community actions such as garden plowing, repairing dwellings and other structures, and providing or arranging for building materials, foodstuffs, shoes and clothing, medical assistance, transportation, and assistance to off-reservation relatives. He also directed or arranged for employment of reservation residents as well as, most significantly, the burial and funerals of the deceased. SN-V017-D0119, SN-V017-D0120; CT-V006-D003. These efforts and assistance were all done on an individualized basis, and nothing in his reports for the fifty-plus years that he served as overseer hints at performing these tasks in coordination with any group leaders or through a community process.

Thus, there is *no* evidence whatsoever that the overseers dealt with group leaders or the group collectively in any meaningful sense, and the Final Determination does not suggest otherwise. The same is true of the twentieth century state agencies that replaced the individual overseers. The records of both the Park and Forest Commission and the Welfare Department reveal detailed accounts of expenditures to individuals on the basis of individual needs, rather than to a group. *See, e.g.,* CT-V001-D0006 to -D0042; SN-V019-D0095 to -D0097. Thus, in the 1940 Report of the State Legislative Council recommending that supervision of the state Indian reservations be transferred from the

Park and Forest Commission to the Welfare Commissioner, the nature of the state's relationship was described:

After receiving a communication from the State Park and Forest Commission recommending that the responsibility for overseeing the Indian tribes in Litchfield County be transferred to a welfare agency, those familiar with the status of Indians in the State of Connecticut were consulted. A review of the situation indicated that the supervision of Indian tribes was largely a welfare problem.

Report of the Legislative Council, at 51 (Dec. 1, 1940) (Ex. 10).

State documents consistently reflect that the State's relationship was based on descent only. A 1939 opinion of the Attorney General's Office, which addressed a question from the State Board of Fisheries and Game regarding the applicability of hunting and fishing licenses to Indians, goes right to the heart of the issue of the State's relationship with Indians:

Whatever status of the Indian tribes may have been in the early days of this commonwealth by virtue of treaties or laws, it is apparent that ***we do not have at the present time any Indian tribal organizations.*** Their political and civil rights can be enforced only in the courts of this State, and they are completely subject to the laws of this State ***as any of the other inhabitants thereof.***

CT-V004-D0076, at 2 (emphasis added). The STN Proposed Finding in fact quoted this language, but ignored its clear significance. STN PF, at 189. There is no basis in the evidence for rejecting this description as highly probative of the nature of the State relationship with Indians, at least for that period of time.

Similarly, in 1955 the Attorney General issued an opinion that described the Connecticut Indians as having "wholly lost their political organization and their political existence." Opinion of the Attorney General dated Nov. 4, 1955 (CT-V007-D0003). Finally, prior to 1973, the statutory and regulatory requirements for tribal membership were expressly based only on descent. The ***only*** requirement for reservation access and,

for purposes of the State relationship, group membership was satisfying a one-eighth blood quantum. Conn. Gen. Stat. § 47-63 (1961) (SN-V012-D0040); Conn. Welfare Dept. Regs. § 824 (SN-V012-D0019).

The Final Determination asserts that actions by the State, particularly during the periods of time in which direct evidence under criteria (b) and (c) is lacking or insufficient, shows that the State treated the Schaghticoke as a “distinct political entity.” STN FD, at 120. The Final Determination includes a chart listing legislative, judicial and overseer actions that purport to be the basis for this conclusion. *Id.*, Appendix IV. However, a review of that chart reveals that all these actions show is a continuing relationship between the State and the Schaghticoke descendents. For example, the actions listed for the nineteenth century all involve appointment, resignation or reports of the Schaghticoke overseers. *Id.* at 191-93. None of these actions suggests that the basis of the State’s relationship, and the need for the appointment of overseers, had anything to do with the existence of a political entity. Rather, as discussed above, the overseers’ reports demonstrate that the overseers’ relationship was with individuals of Indian descent, not with a political entity. *See* SN-V017-D0019, SN-V017-D0120; CT-V006-D003.

Similarly, the actions cited in the key periods of the early- and mid-twentieth centuries, when evidence of community was exceedingly limited and evidence of political authority was nonexistent to limited and the use of state recognition was critical, involve legislation regarding the transfer of oversight responsibility and appropriations for the Schaghticoke, as well as to various reports. STN FD, at 193-200. None of these support the conclusion that the State was treating the Schaghticoke as a political entity.

Again, as demonstrated above, the activities of the state agencies having oversight responsibility were with individuals of Schaghticoke descent, not with a political entity. *See, e.g.*, CT-V001-D0006 to -D0042; SN-V019-D0095 to -D0097. Indeed, statements by legislators quoted by the Final Determination refer to the Schaghticoke as a “remnant,” with individuals needing medical and other assistance. STN FD, at 195-96. Each of the state actions cited, particularly for the key periods in which state recognition is used to supplement or make up for direct evidence, are entirely consistent with and demonstrate a relationship between the State and individuals of Schaghticoke descent. The Final Determination points to no evidence that supports the notion that the State’s relationship was with a political entity, but instead relies solely on its own surmise that the actions were based on the implicit recognition of distinct political entity.

Historically, in carrying out its oversight role, it is clear that the State did not treat the Schaghticoke as a political community. It did not maintain or evaluate tribal membership in any way that connotes a relationship with a distinct political entity. Whether a person maintained any form of tribal relations with other group members was not a matter that was relevant to the State relationship or the purpose underlying its oversight responsibilities, which were to provide benefits to individual Indians in need. Reservation access or other benefits were available to any Indian satisfying the descent requirement. There simply is no reasonable interpretation that concludes that the basis for the State relationship was anything other than descent established on an individualized basis. The Final Determination’s conclusion that state recognition was based on anything other than descent alone is not based on probative or reliable evidence, but rather is based on a completely distorted view of the historical record.

D. The Conclusions About State Citizenship Drawn From The *Historical Eastern Pequot* Final Determination Are Based on Unreliable and Nonprobative Evidence and Inadequate and Incomplete Research.

A key component to the Assistant Secretary's supposed discovery of an "implicit" recognition of a distinct political body is the erroneous finding that Indians were not granted state citizenship until 1973. STN Fed. Reg. Notice, 69 Fed. Reg. 5572. This is drawn straight from the *Historical Eastern Pequot* FD, at 14, 77 (Ex. 6), on which the STN Final Determination expressly relies. STN FD, at 14, 16,. In making this finding of noncitizen status in the *Historical Eastern Pequot* FD, which was adopted wholesale and without any further analysis in the STN Final Determination, the Assistant Secretary relied on nonprobative evidence and ignored the most probative – indeed, conclusive – evidence on the issue.¹⁹

The finding of noncitizenship is built on two assumptions: First, that Connecticut Indians were not state citizens until the enactment of Public Act 73-660 in 1973, and second, that Public Act 73-660 was intended to grant citizenship rather than simply clarify an existing status. These two assumptions are incorrect and are contradicted by clear documentary evidence.

The *Historical Eastern Pequot* FD asserted that it is not clear whether the State viewed the extension of federal citizenship to all Indians by Congress in 1924 as extending state citizenship as well. *Historical Eastern Pequot* FD, at 61 (Ex. 6). The basis for this statement is two highly unreliable pieces of evidence -- a statement made in a 1939 legislative hearing that certain Indians were not *town* citizens, and proposed

¹⁹ The State has challenged these findings in its request for reconsideration presently pending before the Interior Board of Indian Appeals. See *In re Federal Acknowledgment of Historical Eastern Pequot Tribe*, Nos. IBIA 02-165-A, IBIA 02-166-A, IBIA 02-169-A.

legislation in 1953 that was not enacted. As to the former, a representative of the Parks and Forest Commission, the state agency having oversight responsibilities at the time, stated at a 1939 legislative hearing that Indians “are not citizens of the town; they are state wards.” *Id.* at 62 (quoting CT Hearing 1939 re HB No. 347). Obviously, this isolated statement addressed a wholly different question; specifically, whether Indians residing on reservation land were considered citizens of the town in which the reservation was located and therefore the town was obligated to care for them.²⁰ It simply did not address whether such Indians were state citizens.

The second piece of evidence used to show lack of state citizenship prior to 1973 is failed legislation proposed in 1953. *Id.* at 62-63. The proposed legislation was aimed at disestablishing the reservations, lifting the legal disabilities on Indians and ending State oversight responsibilities. Conn. Senate Bill 502 (1953) (CT-V007-D0007). The proposed bill did include language extending all citizenship rights to Eastern Pequot members. However, the AS-IA ignores the fact that at the legislative hearing a person representing the “Pequot Tribe” stated that the Pequots “are citizens now and that part about second class citizens does not apply.” Conn. Jt. Standing Judiciary Comm. Hearings, vol. II, at 423-27 (1953) (CT-V007-D0009). In any event, the legislation did not pass, and it is a bedrock principle that failed legislation is at best a dangerous source of evidence of the law. *E.g., Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001).

In contrast to these two pieces of highly unreliable evidence, other clear statements were ignored by the Assistant Secretary. For example, in 1956, an official

²⁰ To this day, Connecticut towns are obligated to pay for the support of indigent persons who are residents of the town. Conn. Gen. Stat. § 17b-116.

from the Division of Welfare, which had taken over responsibilities for Indians from the Park and Forest Commission, declared: “Tribal members on the Reservations have all the rights of American Citizens and when not on the reservations are subject to the same laws as other citizens.” *Historical Eastern Pequot* FD, at 63 (quoting Letter of Barrell to Commissioner of Welfare (12/19/1956)); Ex. 11. Similarly, at a 1961 legislative hearing, the chairman of the General Assembly’s Subcommittee of the Interim Committee on Public Welfare stated: “It should be remembered that Indians in Connecticut have full citizenship privileges and they reside on these reservations only by their own choice.”²¹ *Id.* (quoting Hearing Tr., at 24 (3/23/1961)). Although the Assistant Secretary noted these clear statements of relevant State officials, he simply ignored their significance and instead relied on the earlier, at best ambiguous, erroneous or irrelevant statements. *Id.*

Despite this evidence, the Assistant Secretary in the *Historical Eastern Pequot* FD leapt to the assumption that it was only in the 1973 legislation that Indians were granted state citizenship. Public Act 660, enacted in 1973, provided that: “It is hereby declared the policy of the state of Connecticut to recognize that all resident Indians of qualified Connecticut tribes are considered to be full citizens of the state and they are hereby granted all the rights and privileges afforded by the law, that all of Connecticut’s citizens enjoy.” Conn. Public Act No. 73-660, § 1 (CT-V007-D0011). The Assistant Secretary

²¹ These statements are consistent with case law on state citizenship of Indians. As the Supreme Court has made clear, “a citizen of the United States, residing in any state of the union, is a citizen of that state.” *Boyd v. Nebraska*, 143 U.S. 135, 161 (1892). Thus, as all Indians were granted Federal citizenship by Congress under the Citizenship Act of 1924, 8 U.S.C. § 1401, they were therefore citizens of the state in which they reside at least since that time. As several courts have held, Indians are citizens of the state in which they reside. *Deere v. State of New York*, 22 F.2d 851, 852 (2d Cir. 1927); *White Eagle v. Dorgan*, 209 N.W.2d 621, 623 (N.D. 1973); *Wisconsin Potowatomies of Hannherville Indian Community v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973).

ignored a critical component of the legislative history. In response to a question about the citizenship status of Indians by Representative Pugliese at a legislative hearing, Deputy Welfare Commissioner Boyle replied: “I couldn’t speak with intelligence to your answer (sic), I can only speak to our relationship as far as the Indians on the reservation are considered.” Conn. Jt. Standing Committee Hearings, at 441 (1973) (CT-V007-D0013); *see also id.* at 457 (statement of Sen. Smith). No other legislative investigation on the question is reflected in the legislative history. At best, then, Public Act 660 was based on a complete lack of familiarity with the citizenship status of Indians.

Several new documents from the period just prior to the enactment of Public Act 660 in 1973 reflect that the state officials viewed Indians as full citizens. Letter dated April 14, 1970 to Augustine Lapedata (Ex. 12); Letter dated March 26, 1971 to Irving Harris (Ex. 13). Moreover, a newly found document by Brendan S. Keleher of the Department of Environmental Protection, which then had supervision over Connecticut Indians, indicated that Public Act 660 was not intended to cause a change in the citizenship status of Indians in Connecticut, but rather confirmed their existing citizenship. Letter dated Oct. 11, 1973 to Frances J. Ainsworth (Ex. 14).

When properly viewed in light of the more probative evidence of prior pronouncements of relevant State officials, Public Act 660’s declaration of citizenship was a *clarification* of the existing status of the law, not a change in the citizenship of Indians. The unequivocal evidence is that State officials, and Indians themselves, viewed Indians as state citizens long before the 1973 legislation. Given that evidence, and the legislature’s apparent ignorance of those views when Public Act 73-660 was enacted, the

Assistant Secretary's conclusion that the petitioners' members were not citizens until 1973 and therefore were treated as a distinct political body is seriously undermined.

In an effort to bolster his weakly supported findings regarding citizenship, in the *Historical Eastern Pequot* FD, the Assistant Secretary asserted, on the basis of isolated and misinterpreted evidence, that Connecticut Indians were denied voting rights. *Historical Eastern Pequot* FD, at 62, 78 (Ex. 6). The only evidence cited by the Assistant Secretary of the supposed denial of the right to vote is a single report by a State official stating that an Eastern Pequot member was not a voter, but that her husband, a non-Indian, was a voter. *Id.* at 62. From this exceptionally thin reed and in the face of overwhelming contrary evidence, the Assistant Secretary concluded that the State treated Connecticut Indians as noncitizens. This report does not establish, or even imply, that the member was *denied* the right to vote as a noncitizen, rather than the equally plausible inference that she simply was not registered. The STN Final Determination identifies *no* evidence in the record that a Schaghticoke descendent was denied the right to vote.

More importantly, the Assistant Secretary's interpretation is categorically negated by the substantial evidence in the public records, not considered or explored in the *Historical Eastern Pequot* FD or the STN Final Determination, that Connecticut Indians exercised the right to vote well before 1973, reflecting their citizenship status.²² For example, the Connecticut Secretary of State, who serves as the Commissioner of Elections, stated unequivocally in 1966 that "Indians in Connecticut possess the voting privileges shared by all other citizens." Letter of Ella T. Grasso, Secretary of State dated

²² The following documents regarding voting were submitted for consideration for the Final Determination but were apparently completely ignored by the Acting Assistant Secretary. STN FD, at 119-20.

Jan. 27, 1966 (CT-V007-D015). Furthermore, the Secretary of State instructed that Indians residing on a reservation were entitled to admission as electors in the town in which the reservation was located. *Id.* Similarly, instructions concerning voter eligibility regularly published by the Secretary of State in the 1950s and 1960s contained no limitation on Indian voting rights. (CT-V007-D0017); *see also* Affidavit of Mary Young (confirming position of Secretary of State that Indians were eligible to vote) (CT-V007-D0019).

Significantly, there is definitive evidence that Schaghticoke members did in fact exercise the right to vote. A review of town voter registration rolls reveals that, at least from the latter nineteenth century, numerous prominent Schaghticoke members were admitted as electors, and were therefore considered citizens. These include:

Kent

Leonard Bradley	1920
Frank A. Cogswell	1935
George Cogswell	1900
William H. Cogswell	1896, 1916
Frank Harris	1952
Charles W. Kilson	1908
Earl S. Kilson	1932
Emma Kilson	1934
Robert L. Kilson	1916

Trumbull

Truman Bradley	1881, 1884
Joseph H. Bradley	1881, 1884

Selected Town Election Records (CT-V007-D021).

Because the Assistant Secretary in the *Historical Eastern Pequot* FD based his conclusions about the state's relationship – conclusions relied on expressly and without further analysis in the STN Final Determination – largely on this erroneous view of

Indian citizenship in Connecticut, the characterization of the state’s relationship as based on the implicit recognition of a distinct political body is not based on probative evidence, but instead is based on inadequate and incomplete research, and therefore must be rejected.

E. The Use of State Recognition as “Additional Evidence” Is Unjustified and Unlawful.

The Final Determination attempts to minimize the novelty of its use of state recognition by describing state recognition as merely an “additional” form of evidence to be considered. Unable to cite to any provision in the acknowledgment regulations for its use, and departing from the only precedent available – the *Historical Eastern Pequot* FD – the Final Determination improperly uses state recognition to make up for not just the inadequacy of the petitioner’s evidence, but for the complete absence of evidence for substantial periods.

1. The Acknowledgment Regulations Do Not Permit State Recognition To Be Used as “Additional” Evidence.

Under the acknowledgment regulations, a state’s relationship with a group of Indians living on a reservation is not evidence that the group acted as, or that the state treated the group as having, a distinct social community with political autonomy. Instead, evidence of relationships with state government is relevant evidence under the regulations *only* with regard to criterion (a), identification as an Indian entity. Evidence of the State’s relationship is notably, and intentionally, absent from the list of relevant evidence of any of the other criteria. It therefore cannot be used either as a substitute for evidence of community or political authority under criteria (b) and (c), and cannot be

used, as the Acting Assistant Secretary has done here, as evidence to fill in the gaps for periods wholly lacking evidence.

Without supporting authority, the Assistant Secretary has effectively manufactured new categories of evidence for establishing criteria (b) and (c). Although the regulations do not provide an exclusive enumeration of relevant evidence, *see* 25 C.F.R. § 83.6(g), they do not permit evidence of unlimited nature. Rather, other evidence for criteria (b) and (c) must demonstrate a distinct community or political influence and authority, respectively, in a similar way that the enumerated evidence would. That is, the other evidence must show in a direct fashion that group members had significant and sustained social contacts and that group leaders and members maintained meaningful bilateral political relationships. *Id.*, §§ 83.7(b)(1), 83.7(c)(1). The purpose, after all, of enumerating certain kinds of relevant evidence was to “clarify the kinds of evidence needed to demonstrate the criteria at § 83.7(b) and (c).” 59 Fed. Reg. 9286, 9288 (1994). There is nothing intrinsic to the state relationship, even a “continuous” state relationship, that reveals the sort of activities and relationships necessary to show that the petitioner maintained tribal community and bilateral political relations – especially where the State relationship consists primarily of an oversight and assistance relationship with individual members.

The BIA’s rejection of state recognition as a factor when the original regulations were adopted demonstrates that state recognition is a particularly inappropriate form of evidence for satisfying criteria (b) and (c). When the BIA was first considering adopting acknowledgment regulations in 1977, it proposed to include evidence of treatment “by a State or by a Federal Government Agency as having collective rights in land, water,

funds or other assets” and of “services from any Federal or state agency.” 42 Fed. Reg. 30647, 30648 (1977) (proposed regulations §§ 54.7(c), 54.8(b), (c)). These provisions were *rejected*. The BIA’s explanation for declining to adopt such provisions is telling. It emphasized that it “must be assured of the tribal character of the petitioner” and that acknowledgment must be based on the maintenance of tribal political relations, and not merely Indian ancestry. 43 Fed. Reg. 39361-62 (1978).

In the *Historical Eastern Pequot* FD, from which the STN Final Determination purports to draw guidance, the Assistant Secretary attempted to deflect this obvious deficiency in his analysis, stating:

It is true that giving state recognition greater weight was considered and rejected in the early process of formulation of the original, 1978 regulations. However, this rejection rested in part of (sic) the great diversity in character of state recognition, particularly the then-recent phenomenon of new state recognitions made on an uncertain basis.

Historical Eastern Pequot FD, at 76 (Ex. 6). This attempt to distinguish the rejection of state recognition in the regulations other than with regard to criterion (a) is unconvincing. In fact, it actually supports the conclusion that Connecticut’s relationship, based solely on descent, cannot provide a basis for satisfying criteria (b) and (c). First and most obviously, the BIA did not adopt the rule that the Assistant Secretary purports to follow in this Final Determination: That state recognition is evidence for criteria (b) and (c) if it is continuous rather than merely recent. Instead, the regulations expressly identify state recognition as relevant evidence only as to criterion (a).

Moreover, there is no “carry-over” provision between criterion (a) and criteria (b) and (c). Both criteria (b) and (c) provide that strong evidence of one will be evidence of the other. *See* 25 C.F.R. §§ 83.7(b)(1)(ix); 83.7(b)(2)(v); 83.7(c)(1)(v); 83.7(c)(3).

Nowhere in the regulations is there the suggestion that proof under criterion (a) – identification as an American Indian entity – is proof of community or political authority under (b) or (c). If that had been the intent of the regulations, a similar “carry over” provision for criterion (a) would have been part of the regulatory framework. *See Muwekma* FD, at 45-46 (Ex. 4).

Further support for precluding the use of state recognition to give greater weight to otherwise insufficient evidence is found elsewhere in the acknowledgment regulations. Specifically, the regulations reduce the burden of proof only when there was prior *federal* recognition of a tribe, not state recognition. 25 C.F.R. § 83.8. The rationale for permitting the criteria to be satisfied in part by prior federal recognition is obvious. If the purpose of the acknowledgment criteria is to demonstrate the existence of a tribal political entity capable of government-to-government relations with the federal government, a prior relationship with the federal government is plainly sufficient evidence at least for the period in which that relationship continued. The same simply cannot be said of state recognition.

If the BIA intended that state recognition should or could have the same evidentiary role, the regulations would have expressly provided for such treatment. Instead, that approach was rejected, and the regulations limit the relevance of state recognition to criterion (a). The regulations’ failure to provide for a similar treatment of state and prior federal recognition and its limitation of the relevance of state recognition to criterion (a) demonstrates that state recognition is not to be given special weight as to the other criteria or as a surrogate for satisfying the other criteria. *See Hohn v. United*

States, 524 U.S. 236, 258 (1998) (basic interpretive rule directs that the use of language in one section that is omitted in another shows intent to exclude in the latter).

2. The Use Of State Recognition Is Contrary To Both BIA And Judicial Precedent.

The STN Final Determination rejects the limitations on the use of state recognition established in the *Historical Eastern Pequot* FD. This departure from this precedent is justified only because that is what is necessary to grant federal acknowledgment to the STN petitioner. See OFA Briefing Paper (AC-V012-D0009).

Moreover, aside from the *Historical Eastern Pequot* FD, the use of state recognition as evidence for criterion (b) or (c) finds no support in other acknowledgment decisions. Indeed, prior acknowledgment decisions only considered state recognition in the context of criterion (a). *E.g.*, *Gay Head Wampanoag* FD, at 4 (Ex. 15); *Mohegan* FD, at 172 (Ex. 16). Of particular relevance are the BIA's decisions involving other Connecticut and New England petitioners. For example, in *Mohegan*, the BIA rejected the use of state recognition to bolster federal acknowledgment:

[A]lthough the [Mohegan petitioner] argues that the recognition of the Mohegan as an Indian tribe by the State of Connecticut since the 1970's should be dispositive in favor of Federal recognition . . . , this is not the case. ***State recognition is one form of evidence that a group meets criterion a, but is not grounds for automatically considering a group to be entitled to Federal recognition.***

Mohegan FD, at 172 (emphasis added) (Ex. 16). State recognition of the Mohegan tribe was not used in any form with regard to criteria (b) and (c). See *id.* at 11, 19. Instead, the BIA reversed itself from a negative Proposed Finding and acknowledged the Mohegan Tribe based on what it viewed to be strong direct evidence of community cohesiveness and political processes. *Id.* at 11-17.

In the *Narrangansett* final determination, the BIA noted the same factors – state-recognized tribe with a protected land base and noncitizen status – that it now cites as the basis for using state recognition as “additional evidence.” However, in *Narrangansett*, those factors were used, properly, only as evidence of identification under criterion (a) and not as “additional evidence” for criteria (b) and (c). *Narrangansett*, at 7 (Ex. 17). Instead, for assessing community and political influence, the BIA emphasized the strong evidence of social interactions, intermarriage, and sustained cultural, social and political institutions. *Id.* at 9-10, 12-13. Although the BIA noted aspects of the tribe’s relationship with the State of Rhode Island, that evidence was significant for criteria (b) and (c) not for what the State had done, or for the mere fact that the State identified or dealt with leaders, but because of what it demonstrated directly about the tribe’s activities. *Id.* at 9, 12.

In the *Gay Head Wampanoag* final determination, the BIA reversed its position from the Proposed Finding and concluded that the Gay Head Wampanoag petitioner had demonstrated both community and political authority. In doing so, it relied on additional direct evidence of social interactions and group cohesion as well as informal political structures and leadership. *Gay Head Wampanoag* FD, at 6-7, 9-12 (Ex. 15). It did not, however, rely on the group’s continuous relationship with the colony and the Commonwealth of Massachusetts.

Similarly, in the original *Golden Hill Paugussett (GHP)* final determination, the Assistant Secretary stated unequivocally that the acknowledgment regulations “consider state recognition under criterion 83.7(a), but do not treat it as dispositive in Federal acknowledgment cases.” *Golden Hill Paugussett* FD, at 97 (reconsidered on other

grounds, May 24, 1999) (Ex. 18). In fact, in the recent *GHP* Proposed Finding, the Assistant Secretary used state recognition only as evidence of identification as an American Indian entity under criterion (a). *GHP Reconsidered* PF, at 5-20 (Ex. 18).

As the Supreme Court recognized long ago, there is a fundamental distinction between tribes in relation with the federal government and remnant groups in relations with the states. The latter, having lost their power of self-government, were placed under the control and protection of state law. *Elk v. Wilkins*, 108 U.S. 94, 107-08 (1884) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580 (1832) (specifically referencing Connecticut as one of the states having jurisdiction over remnants of Indian tribes)); *see also Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480, 483-84, 487, 502 (1st Cir. 1987). In other words, longstanding judicial precedent demonstrates that state recognition in states such as Connecticut stands for just the opposite proposition than that for which the Final Determination uses it: A group placed under state jurisdiction generally lacked the tribal relations and political autonomy necessary to federal acknowledgment.

F. State Recognition Has a Very Limited Proper Role for Federal Acknowledgment.

State recognition is not completely irrelevant to federal acknowledgment. Obviously, state recognition can be evidence that the petitioner has been identified as an American Indian entity since 1900, as required by criterion (a). 25 C.F.R. § 83.7(a). However, what is missing from the regulations is any reference, even indirectly, to state recognition as appropriate evidence for the key criteria of distinct community and political authority. The reason for this should be clear: What is important is not what the

State did in its relationship with an Indian group, but rather what the *Indian group* did. The fact that the State may have continued to maintain a reservation or identified or dealt with persons it viewed as leaders, without further evidence that those leaders actually exercised leadership or influence over the broader community, ultimately says very little about the existence of a distinct political community. Because the State's relationship was principally based on and concerned with Indian descent, the State did not evaluate whether or not persons it may have dealt with actually exercised political authority. There could be an utter lack of community and a complete absence of political authority, yet so long as there continued to be Schaghticoke descendants, the State's relationship would continue, and the State would have dealt with some of those descendants.

The State may have dealt with Schaghticoke descendants not because they necessarily were leaders or persons with political influence, but because as descendants they may have had rights to access to the reservation or to a fund established for the group. Indeed, the State's interactions at various points even with purportedly key Schaghticoke members show this. The best example is in the contacts between the State and Howard Harris from the 1920s to the 1950s regarding a reservation residence. These were not based on a leadership role, nor did they concern group issues. Rather they involved issues personal to Harris. *See* STN PF, at 26, 147, 151. Such evidence cannot be used to prove community or political influence under any possible rationale.

In conclusion, the Final Determination both mischaracterizes and misuses the State's relationship with the Schaghticoke. As the state's relationship was based solely on Indian descent, rather than on a recognition, implied or otherwise, of a political community, it is not probative evidence for either criterion (b) or (c). The Final

Determination effectively and unlawfully eviscerates the standards required by the acknowledgment regulations and arbitrarily uses the State relationship to make up for the petitioner's critical evidentiary deficiencies. This is not permitted under the regulations, and this unlawful approach must once and for all be abandoned.

VI. THE FINAL DETERMINATION'S ASSESSMENT THAT CRITERION(c) (POLITICAL AUTHORITY AND INFLUENCE) IS SATISFIED IS BASED ON EVIDENCE LACKING PROBATIVE VALUE.

The STN petition suffers from a profound lack of probative evidence of political authority and influence throughout the nineteenth and twentieth centuries. The Final Determination's approach to filling the massive gaps in probative evidence is testament to the arbitrary and lawless nature of the decision. For periods exceeding 60 years, there is a complete absence of evidence of political authority. For an additional 50 years, there is, by the Final Determination's own account, insufficient evidence of political authority. These gaps totaling 110 years should have been more than sufficient to deny federal acknowledgment. Instead, the gaps are ignored, and state recognition is used to make up for the lack of requisite probative evidence.

The defects of the Final Determination go beyond the unlawful misuse of state recognition, however. The evidence relied on for those periods in which there is, in the Final Determination's view, some evidence of political authority is unreliable and not probative. The most significant error in this regard is the use of intermarriage rates, a factor relevant to criterion (b), to satisfy the requirements of criterion (c) for most of the nineteenth century. As discussed in detail in section VII below, the Acting Assistant Secretary used improper methods to calculate those rates, and as a result, produced a biased result designed to narrow the gaps in the petitioner's evidence of political

authority as much as possible. In addition, for the late nineteenth century, the Final Determination relies on isolated petitions that are not probative of tribal political leadership. Similarly, for the mid-twentieth century, the Final Determination relies on uncorroborated and speculative evidence of the purported political leadership of non-Schaghticoke Franklin Bearce and the council he created. Finally, the Final Determination depends on evidence of factional conflicts for the post-1967 period, when such evidence is only probative of the lack of a political community.

A. The Limited or Entirely Absent Evidence for the Periods 1820 to 1840 and 1870 to 1892 Is Not Probative of Tribal Political Authority.

The nineteenth century is marked, more than anything else, by the near complete lack of any direct evidence demonstrating political influence or authority by the Schaghticoke under criterion (c). As the Final Determination confirmed, there is no evidence of leaders, nor is there evidence that more prominent individuals, such as Eunice Mauwee or her granddaughter Lavinia Carter, exercised any sort of political influence over Schaghticoke members. STN FD, at 85.

Despite this lack of evidence, the Final Determination nonetheless concludes that the petitioner satisfied criterion (c) for the nineteenth century. It does so on the basis of three categories of evidence: First, for the periods 1801-1820 and 1841-1870, it finds that criterion (c) was satisfied not by any evidence of actual political activity but instead on the basis of the Final Determination's analysis of endogamy rates.²³ Second, the Final Determination relies on three isolated petitions in 1876, 1884, and 1892 – the last of

²³ Section 83.7(c)(3), the so-called “carry-over” provision, provides that political authority can be demonstrated if the community criterion (b) is satisfied by demonstrating, among other things, that at least 50 percent of the marriages in the group are between members of the group for a particular time period pursuant to § 83.7(b)(2)(ii). The marriage rate analysis is addressed in section VII below.

which involved only a single Schaghticoke member – as demonstrating some degree of political authority. Third, state recognition is used to make up for the complete lack of evidence for the period of 1821 to 1840 and to supplement the petition evidence for the period from 1871 to 1892. The Final Determination’s conclusions for these periods are not based on reliable or probative evidence.

The Final Determination concluded that there was not sufficient evidence of marriage or residency rates to take advantage of the carry-over provisions of § 83.7(c)(3) for the post-1870 period. STN FD, at 84. Therefore, actual evidence of political authority or influence was necessary to satisfy criterion (c).

The Proposed Finding had concluded that criterion (c) was satisfied only for the period of 1876 to 1884 based on two Schaghticoke petitions for the appointment of overseers in those years. The Proposed Finding explained, however, that the two petitions represented “very limited evidence” of political activity that on their own were not sufficient to satisfy criterion (c). STN PF, at 25. To make up for this deficiency, at least for this inter-petition period, the Proposed Finding combined the petitions with the existence of community during this period “at more than a minimal level” and state recognition to satisfy criterion (c) for the period of 1876 to 1884. *Id.*

The Final Determination suggests that there was evidence that provided “limited additional context” for the 1876 and 1884 petitions that strengthens the conclusion that these petitions demonstrate political authority. STN FD, at 87. This “limited additional context” is the enactment in 1876 and 1883 of legislation relating to state appointment of Indian overseers. The 1876 legislation transferred the power to appoint an Indian overseer to the Litchfield district court from the county court, which had such authority

since 1821. *Id.* at 87 n.62, 191. The 1883 legislation transferred the appointment power to the Litchfield court of common pleas. *Id.* at 87 n.63.

The two petitions, and the purported “additional context” of the 1876 and 1883 enactments, are not probative of political authority. First, these two isolated petitions both sought appointment of a new overseer after the resignation of the existing overseer. *Id.* at 192-93. They do not reflect a recurring or consistent interaction with the State; in fact, no petitions were made when overseers were appointed in 1861, 1865, 1870, or 1905. At most, these two petitions represent isolated responses to a moderate crisis – the lack of an overseer. Sporadic, crisis-oriented leadership does not qualify as evidence of the maintenance of political influence and authority. *Mashpee v. New Seabury Corp.*, 592 F.2d 575, 585 (1st Cir.), *cert. denied*, 464 U.S. 866 (1979). Indeed, there is no evidence that the petition was in fact prompted by the Schaghticoke themselves, as opposed to an action that was initiated by the individual seeking to be appointed as overseer. In each case, the overseer that was subsequently appointed was named in the petition. STN FD, at 192-93.

Moreover, the fact that the state legislature chose to make an administrative change as to which court would have appointing authority for Indian overseers is hardly probative of anything about the internal political activities of the Schaghticoke. There is no evidence, beyond a speculative inference regarding the coincidence of the timing of the legislation and the petitions, that the Schaghticoke members were motivated as a group because of the legislation, rather than the obvious fact that the existing overseer had resigned. The 1876 and 1883 legislation hardly strengthens the evidence of political authority represented by the two petitions, as the Final Determination asserts.

The Final Determination also attempts to stretch the period of purported political activity represented by these petitions to 1892, based on a court document regarding an additional Schaghticoke petition. The evidence relied on is a “partial typescript of the court docket entry” of a petition to the Litchfield Court of Common Pleas by Truman Bradley, a Schaghticoke living off the reservation, for an appraisal of the group’s real and personal property. STN FD, at 87; SN-V054-D010. As the Final Determination notes, the actual petition was not submitted to the record, and the other record evidence provides little context for this petition. STN FD, at 87-88. Although the court document refers only to Truman Bradley as the petitioner, the Final Determination nonetheless concludes that “it is clear from the phraseology of the court record that it was submitted upon behalf of the Schaghticoke as a body. . . .” *Id.* at 87. The only basis for this conclusion appears to be that the appraisal sought was related to the “group’s common property.” *Id.*

This inference is wholly without support and is not based on any reliable or probative evidence. The document that is relied on for this conclusion stated only the following:

Truman Bradley a Member of the Schaghticoke Tribe of Indians presented *his* petition to the August Term of this Court 1892 asking that Geo. R. Bull & Luther Eaton both of Kent in said County be appointed appraisers & appraise the real and personal property of said Tribe and also appraise the lands mortgaged to (next word looks like) sicme certain promissory notes belonging to said Tribe –

The Court appoints said Bull & Eaton such appraisers, and ordered them to make their report to this Court, which appraisal the said Bull and Eaton made and returned their report thereof to the present Term of this Court on the 24th day of October 1892 which report was accepted by the Court and is as follows –

State of Connecticut
Litchfield County September 20th 1892

SN-V054-D010 (emphasis added; parenthetical in original). There is nothing in this document that even hints that this was an action taken by or on behalf of a broader group. Indeed, the court record expressly states that this is Truman Bradley's petition. Moreover, there is no reason to assume that a single member would not have a reason to act on his own with regard to the question of the group's common property, particularly, as the lack of any other evidence of political activity strongly demonstrates, that the group as a whole was not actively interested in such matters. To leap to the conclusion on the basis of this document alone that there was political authority or influence among the broader Schaghticoke group is utterly unjustified. This evidence is not probative or reliable for the purpose of satisfying criterion (c). *Miami* FD, SC 15 (Ex. 5), *aff'd Miami Nation of Indians v. United States Dept. of Interior*, 255 F.3d 342 (7th Cir. 2001).

This leaves the evidence for the period post-1870 essentially as it was for the Proposed Finding. Yet, the Proposed Finding concluded that criterion (c) was satisfied for the period between the 1876 and 1884 petitions only because state recognition provided "additional evidence" of political authority. STN PF, at 25. As demonstrated in section V above, state recognition is not probative evidence of the group's political authority or influence. The two petitions on their own are insufficient. Stripped of the Acting Assistant Secretary's analytical machinations, all that is left for the post-1870 period are the two petitions. That is where the analysis should have ended.

The abuse of state recognition is even more apparent for the other period in the nineteenth century in which the endogamy analysis was not used under § 83.7(c)(3)'s carry-over provisions to establish criterion (c). As the Final Determination makes clear, the 50 percent threshold for endogamous marriages was not met for 1820-1840. STN

FD, at 84. Similarly, there was not evidence sufficient to establish residency rates above 50 percent for this period. *Id.* at 82. Most importantly, there was absolutely no direct evidence of political activity for this twenty year period. *Id.* at 84-85; STN PF, at 24, 90-92.

As discussed in section V above, this is one of the periods that the Acting Assistant Secretary was forced to alter arbitrarily the prior precedents with regard to the use of state recognition. Following the *Historical Eastern Pequot* FD, the Proposed Finding stated clearly that state recognition could not be used to make up for the complete lack of political evidence for the early nineteenth century. STN PF, at 25-26. The evidence of the State's relationship with the Schaghticoke is not probative of the group's political authority or influence for this period in which probative and reliable evidence is entirely lacking. The Acting Assistant Secretary's blatantly arbitrary misuse of state recognition fatally undermines the legality of the Final Determination.

B. The Petitioner Lacks Any Probative Evidence of Political Authority for the 1892 to 1936 Period.

An extraordinary deficiency in the petitioner's evidence is the lack of evidence of political authority during the first third of the twentieth century. Indeed, as both the Proposed Finding and the Final Determination concluded, the petition suffers not just from a mere paucity of evidence. There is a complete absence of any evidence of political influence or authority for the Schaghticoke during this period. STN FD, at 9; STN PF, at 26. Yet the Final Determination ignores this fatal deficiency and improperly uses state recognition, in direct contravention of prior precedent, to fill this void. The evidence of the state's relationship is not probative of political authority for this period, and its use in this fashion is both unwarranted and unlawful.

It bears emphasizing that contemporary observations of the Schaghticoke provide no evidence of any form of tribal political leadership or activity. Frank Speck, a noted ethnographer who had visited the Schaghticoke reservation in 1903, identified no leaders, despite his extensive contact with such purported leaders as James Harris. (CT-V004-D0035). Fred P.Lane, whose father was an overseer for the Schaghticoke from 1884 to 1905 and was himself overseer from 1905 to 1914, identified no tribal leaders. (AC-V002-D0003). In her 1935 report for the BIA regarding New England Indians, Gladys Tantaquidgeon, a student of Speck and a Mohegan tribe member, found that the Schaghticoke lacked political leadership and organization. (CT-V001-D0050). Similarly, the 1936 State Park and Forest Commission report concluded that there was no leader recognized by the group. (CT-V001-D0011).

Despite having submitted numerous reports and reams of exhibits addressing this period, the petitioner has been unable to provide any documentary evidence to refute these contemporary reports. Instead, the petitioner has sought to explain away this substantial evidence of the absence of political leadership by offering the supposition that, during this period in particular, the group's leadership was informal and hidden from outside observers. *See* SN-V055-D001 to D017. There is no evidence to substantiate this attempted explanation. The petitioner is unable to explain the silence of the historical record. The regulations, however, require actual evidence, and not merely supposition to explain away the lack of evidence.

Moreover, what evidence there is supports the opposite conclusion: that leadership was absent, and not merely informal. The petitioner has variously offered James Harris, George Cogswell, Frank Cogswell, and Howard Harris as at least informal

leaders during the late nineteenth and early twentieth centuries. The petitioner's own experts rejected these claims. Letter dated 7/12/93 by William Starna (SN-V026-D0178); Ann McMullen, Preliminary Report on Schaghticoke Tribal Nation Petition dated Oct. 12, 1999 (CT-V003-D008). As the Final Determination concludes, these individuals "were well known to non-Indians and are of some stature, but no contemporary evidence [exists] to demonstrate that they were identified as leaders by Schaghticoke or outsiders." STN FD, at 121

The Final Determination in fact methodically rejects all of the petitioner's evidence and arguments regarding political authority for this period:

- **Decision By Consensus-Building:** The petitioner had argued that one of the reasons there was no evidence of political authority was that decision making was by consensus and could be inferred under a "band society model." The Final Determination found that there was no evidence for this assertion or that the Schaghticoke group was a band society. STN FD, at 91.
- **Reservation Resident Leaders:** The petitioner had argued that leadership was exercised by reservation residents, who maintained contacts with off-reservation family members. The Final Determination concludes that the evidence did not show that such communications between leaders and followers on and off the reservation took place. *Id.* at 92.
- **Defense of Reservation:** The petitioner had argued that various Schaghticoke had taken actions, including in particular the mere act of residing on the reservation, to preserve the group's land base. The Final Determination concludes that the evidence does not show that such actions were political

acts, as opposed to merely economic need or attachment to the reservation.
Id. at 93.

- **Family Leaders George Cogswell and James Harris:** There was no contemporary evidence that demonstrated that George Cogswell or James Harris, both of whom were well known individuals, in fact exercised political authority or influence. *Id.* at 94-95.
- **Rattlesnake Club:** The petitioner contended that the Rattlesnake Club, although largely non-Indian in membership, nonetheless was a political activity on the part of the Schaghticoke. The Final Determination rejects the contention, concluding that the activities of the Rattlesnake Club were not tribal in nature and were not part of a strategy to protect or enhance the group's status. *Id.* at 96-99.
- **Culture Keepers:** The Final Determination concludes that there is no evidence to show that Schaghticoke individuals acted to maintain or pass down traditions or other cultural knowledge except possibly within family lines. The absence of such cross-family activities precluded a finding that there were individuals acting as tribal political leaders in the form of culture keepers. *Id.* at 100-02.
- **William and Frank Cogswell:** The Final Determination reevaluated the roles of William and Frank Cogswell, both sons of George Cogswell, and who were identified as chiefs and involved with Franklin Bearce beginning in the 1930s.²⁴ It concludes that the evidence shows no substantial leadership

²⁴ Activities relating to the Bearce period are discussed in section VI.C below.

role and that any role or office they held was ceremonial only, “which alone is not evidence of leadership.” *Id.* at 104-07.

Particularly when contrasted to other New England tribes that have obtained recognition – the Narrangansett, Gay Head Wampanoag, and Mohegan tribes – the petitioner’s utter lack of evidence under criterion (c) is telling. First, the comparison demonstrates that, particularly for this period, these other New England petitioners were able to provide evidence of significant political leadership and activity. Second, it illustrates the overwhelming extent to which the Schaghticoke group did not exercise political influence or authority.

The evidence supporting the Narrangansett petition could hardly be more different from that of the STN petition. In the case of the Narrangansett, a tribal council continued in existence from 1889 to 1901, meeting frequently and holding tribal elections. *Narrangansett* SE 4, 12 (Ex. 17). Moreover, from 1901 to 1934, there were several “clearly evident leaders who were recognized both by the community and by outsiders,” including a tribal chief and leaders of the Narrangansett church, a key tribal institution. *Id.* at 4-5, 13. Substantial political processes were evident in the 1920s, when a new generation of leaders began to assert themselves. A new tribal council was formed in 1934. Significant political activity and leadership existed, including the organization of an annual tribal meeting, which was a bedrock tribal institution for the Narrangansett, as well as tribal leadership interaction with the state. *Id.* at 13-14. Nothing like any of this existed for the Schaghticoke during the same period. It belies any assertion that the lack of evidence can or should be excused or that Indian leadership during this period was necessarily informal or invisible to outsiders.

In the case of the Gay Head Wampanoag, political authority were exercised through a variety of organizations and institutions, including in particular the town government. Tribal leadership and authority was exercised through these organizations or institutions that “functioned outside of and/or parallel to the town government and by leaders who have often functioned both outside and within the municipal structure.” *Gay Head Wampanoag* FD SE, at 8 (Ex. 15). In fact, the Gay Head Wampanoags “used their control of the town government to serve the best interests of tribal members.” *Id.* at 9. Obviously, nothing akin to this existed for the Schaghticoke.

Finally, the Mohegan petition was supported by far more extensive evidence of leaders, political activity, and issues of importance to the broader membership than anything offered by this petitioner. Although not always an elected or formal leadership as in the case of the Narragansett, the Mohegan had informal leadership by elders who, because of their recognized knowledge of customs and history and involvement in tribal matters, were turned to in times of group conflicts. *Mohegan* FD, at 97 (Ex. 16). At other times, there were formal leaders as well, including persons designated as chief and an elected council president. *Id.* at 97-98, 105-25. In addition, there were several tribal institutions through which political influence was exercised and resources were mobilized. These included the Mohegan Indian Association, the League of Descendants of the Mohegan Indians, and the Mohegan Sewing Society. *Id.* at 98-103. Land claims activity was a long-term issue of broad tribal interest; unlike the Schaghticoke,²⁵ it was a source of political controversy, entangled with other issues of tribal importance and

²⁵ As will be discussed further below in connection with the Bearce council claims activities, the evidence concerning Schaghticoke land claims did not involve the broad-scale, long-term interest and political activity that the land claims activities did in the history of the Mohegan tribe. *See* section VI.C.

involving both formal and informal political processes. *Id.* at 103-09. Again, nothing of this sort is reflected in the STN petition.

The petitioner's lack of evidence of political influence in this period is reflective of the earlier loss of cohesion of the group. It is not the result, as the petitioner has variously posited, of the informal nature of the leadership or the ignorance of outside observers. Other New England Indian groups that maintained their tribal cohesion have been able to demonstrate the continued exercise of political influence. The STN petitioner cannot offer such evidence, not because the evidence is somehow excusably unavailable to it, but because there simply was no exercise of political influence. There is a remarkable amount of documentary evidence about some of the activities of the persons the petitioner claims were the group's leaders at this time. None of that evidence, however, hints at tribal political leadership, formal or informal. The proper conclusion to be drawn is obvious: The petitioner cannot satisfy the requirements of criterion (c).

Yet that is not the conclusion reached by the Final Determination. Despite refuting each argument made by the petitioner and finding that there was no evidence of political activity for the 1892-1936 period, the Final Determination inexplicably concludes that criterion (c) is nevertheless satisfied. It does so by relying on state recognition, which as discussed in section V above, is neither probative evidence of political authority nor consistent with the acknowledgment regulations. Moreover, the groundwork that the Final Determination attempts to build for using state recognition to fill the gap during this period is equally faulty.

First, the Final Determination suggests that this lack of evidence might be excused by purported “demographic trends.” Specifically, it asserts that the leadership vacuum may have been the result of the deaths of certain individuals that could have taken on a leadership role, in particular Value Kilson, who died in 1907, Truman Bradley, who died in 1900, and James Harris, who died in 1910. STN FD, at 89. However, numerous Schaghticoke individuals that signed the 1876 and 1884 petitions – which appears to be the touchstone of potential leadership for the Final Determination – remained alive through the period: George Cogswell (d. 1923), Nancy M. Kilson (d. 1920), Mary Ett (Kilson) Jessen (d. 1915), Charles William Kilson (d. 1934), Frederick Kilson (d. c. 1920), Joseph Henry Bradley (d. 1936), and Lyman Charles Kilson (d. c. 1935). *Id.* In any event, the fact that there was a generational shift hardly excuses a forty year period in which evidence of political leadership is absent. If a real political community existed, at some point in that period one would have to expect that leadership and political authority would be evident.

Second, the Final Determination makes the specious assertion that it was not proven that political influence did not exist. *Id.* at 121. This, of course, stands the regulations on their head. The petitioner has the burden of proving that political authority or influence existed. *See* 25 C.F.R. § 83.6(c). It was not the burden of the interested parties to prove that political authority did not exist. The Final Determination’s approach is directly in contravention with the regulations. It is not enough to conclude that the existence of political authority is not disproven. Rather, the regulations place the burden of proof on the petitioner. *Id.* If that burden is not met, the petitioner cannot be recognized.

Finally, the Final Determination, in direct and explicit contravention of precedent, *see* OFA Briefing Memo (AC-V012-D0009), concludes that state recognition added to the evidence of community for the period satisfied criterion (c). STN FD, at 121. Aside from the illegitimacy of the use of state recognition generally, the way it is used for this period is particularly troubling. The Final Determination contends that, even though direct evidence of community for the period was limited, that limited evidence coupled with state recognition demonstrates that community existed at more than a minimal level.²⁶ *Id.* This evidence of community is then coupled with state recognition to conclude that there is sufficient evidence of political continuity to meet criterion (c). *Id.* at 124.

This approach “double counts” state recognition as evidence. The Final Determination’s conclusion that community is more than minimally met during this period is itself dependent on state recognition. STN FD, at 121. Thus, state recognition is used to make up for the otherwise insufficient evidence of community, and then this finding of community is combined a second time with state recognition to make up for the clearly insufficient evidence of political influence. This is simply nonsensical.

Instead of accepting the results of its own finding of the lack of political evidence, the Final Determination goes to absurd lengths and an unprecedented manipulation of the record and the regulations to reach its desired result. This result is neither based on probative evidence nor consistent with the acknowledgment regulations and precedent. This gross error on the part of the Acting Assistant Secretary demands that the Final Determination be vacated.

²⁶ The lack of probative evidence to support the finding of community for this period is discussed in section VII.A below.

C. **The Evidence Relating to the Expanded “Bearce Period” Is Unreliable and Is Not Probative of Tribal Political Authority.**

The Final Determination concludes that there is significant additional evidence of the political activities by non-Schaghticoke Franklin Bearce during the mid-twentieth century. The Proposed Finding had found Bearce’s activities limited to a period from 1949 through the 1950s, based on the creation of a council organized by Bearce for the initiation of land claims, and concluded that the Bearce-led activities were insufficient to show political authority. STN PF, at 27-28. The Final Determination uses wholly unreliable and nonprobative bits of evidence to expand the period of Bearce’s purported leadership to as early as 1936 and as late as the mid-1960s. Moreover, the Final Determination wrongly depends again on state recognition to sustain its conclusion that criterion (c) is met for this enlarged period.

All of the new evidence relied on by the Final Determination have one important characteristic in common: It comprises documents generated by Bearce himself. Not a single document is authored by a Schaghticoke individual. In fact, although some of the Bearce-authored documents refer to Schaghticoke members, none can show that any Schaghticoke individual consented to or even knew about the activities that Bearce purported to be undertaking on behalf of the Schaghticoke. It is a bedrock principle that the actions of one or a few purported leaders, without broadly based participation and support of the membership, does not reflect the presence of bilateral political relations that is essential for tribal acknowledgment. *Miami* Final Determ. SC 15 (Ex. 5), *aff’d Miami Nation of Indians v. United States Dept. of Interior*, 255 F.3d 342 (7th Cir. 2001). The additional evidence used by the Final Determination does not come close to satisfying this requirement.

The Final Determination dates the beginning of the so-called Bearce period at 1936. The basis for doing so is on the weakest of evidence. In land claim documents submitted to Indian Claims Commission in 1951, Bearce refers to an earlier version of the land claim filed in 1936 with the U.S. Court of Claims. SN-V055-D0024. The Final Determination accepts this assertion despite the fact that no documentation of such a land claim was ever submitted or could ever be located in court records. STN FD, at 107-08. More importantly, there is no evidence at all, including the references in the later document, that even hints that this undocumented land claim was an activity that resulted from broadly based Schaghticoke political processes, as opposed to non-Schaghticoke Bearce acting on his own. To conclude otherwise is nothing more than pure speculation. From the evidence that exists, there is no basis to conclude that this undocumented land claim, if it in fact happened, was anything more than an individual activity by Bearce himself.

Similarly, the Final Determination relies on various letters to federal and state officials from Bearce that refer to William or Frank Cogswell, Earl Kilson, and Howard Harris as holding various tribal leadership positions. STN FD, at 108-10. Again, there is no documentation, other than that authored by Bearce, to support these assertions. What is critical, however, is that there is no evidence to suggest that any of these positions were anything more than ceremonial or held in title only.

In fact, what evidence there is suggests just that – that the positions were titular only. Ironically, the Final Determination acknowledges this when discussing William and Frank Cogswell. It finds that the evidence does “not demonstrate that William Cogswell any substantial role as a leader of the Schaghticoke, except *possibly* in the

context of the organization and efforts from the mid-1930's on led by Franklin Bearce.” *Id.* at 105 (emphasis added). Similarly, as to Frank Cogswell, the Final Determination concludes that the “evidence does not substantiate that he had a significant role as a leader separate from the office he held in the organization established by Bearce and the activities of that organization.” *Id.* at 107. However, the only evidence that either William or Frank Cogswell held a leadership position in the Bearce “organization” is Bearce’s identification of them as sachem. *Id.* at 108-10. Nothing in the Bearce documents indicates what actions, if any, the purported leaders took as leaders. *See* SN-V055-D0030, -D0032, -D0057.

The Final Determination also relies on letters written in 1949 by Bearce to Clayton Squires, the State Commissioner of Welfare, in which Bearce refers to himself as the Schaghticoke chief. STN FD, at 110-11. Although Squires’ apparent replies have not been located and are not part of the record, the Final Determination leaps to the unwarranted conclusion that the State was dealing with Bearce as a Schaghticoke leader because there is no evidence to suggest that Squires questioned Bearce’s status as chief. *Id.* at 111. This inference, from evidence that is not even in the record, is neither reasonable nor probative of political authority. There simply is no basis for assuming that Squires acted or consulted with Bearce as a leader or that Squires even had any reason to evaluate Bearce’s claim he was chief. In any event, Bearce’s correspondence does not show that any of the subjects he raised were matters that had involved the Schaghticoke membership broadly, as opposed to initiatives taken by Bearce on his own. *See* SN-V055-D0026; SN-V055-D056.

Finally, the Final Determination attempts to stretch the period of Bearce-led activity until the mid-1960s on the basis of a 1963 land claim Bearce filed in the U.S. District Court. The filing identified only Cogswell-related individuals as officers. The Final Determination asserts that this indicates a continuity of political activity under Bearce right up to the period when Irving Harris sought to reorganize the group in 1967. STN FD, at 111. At best, the 1963 filing shows that Bearce still had some currency with the Cogswell members. It does not show that real political activity was occurring within the group or even that the Cogswells were actively involved in Bearce's last efforts.

All the Bearce-generated documents show is that Schaghticoke individuals at most were willing to lend their names to Bearce's cause. They are not probative of what the petitioner must establish to satisfy criterion (c) – that there was a leadership that exerted influence or authority over the membership broadly and that the membership was broadly interested and involved in the efforts of the leadership.

The Proposed Finding had properly concluded that the evidence concerning the council established by Bearce in the late 1940s and continuing for a short time into the 1950s to pursue land claims does not reflect the exercise of political authority or influence within the meaning of criterion (c). STN PF, at 27-28. The interview evidence, consistent with contemporary documents, shows that the Bearce council was largely ineffectual and inactive and lacked broad support or involvement of the Schaghticoke membership.

For all intents and purposes, the 1949 council was created by Bearce, a non-Schaghticoke. Although the Acting Assistant Secretary maintains that the fact that an outsider both initiated and led the activities of the council is not necessarily fatal, the lack

of broader involvement or interest and the lack of actual leadership activity by Schaghticoke members is. *See* STN PF, at 28. It is clear that, in the absence of Bearce's presence, there would not have been a council, there would not have been the limited amount of activity that Bearce prompted, and there would not have even been an individual with the title of chief or sachem. SN-V064-D0036, at 4 (interview of Irving Harris submitted by petitioner).

Bearce created the council principally, if not exclusively, to pursue land claims on behalf of the Schaghticoke.²⁷ As the BIA has previously indicated, “[i]n and of itself, claims activity is *not* evidence for the existence of cohesive community or political processes within a petitioning group. It is possible for extensive claims activity to be carried out by a small group of activists without the extensive participation or involvement – or even knowledge – of the majority of the group.” *Mohegan FD*, at 103 (emphasis added) (Ex. 16); *accord Chinook Reconsid. FD*, at 46 (Ex. 19). In the case of the Bearce council, the land claims activity was initiated and largely conducted by a Bearce himself and at most involved only a small group.

As the Proposed Finding concluded, “[t]here is no good evidence that those holding office in this time period, Howard Harris, as chief, and Theodore Cogswell, as ‘Sagamore,’ as well as several others, had a following or significant duties for any extended period of time.” STN PF, at 27. In fact, these positions were titles only, and these individuals did not exercise anything approximating political authority or influence over the broader membership. This is a point that is confirmed by Howard Harris’ own

²⁷ It is noteworthy that the United States had asserted as a defense to the claim that the Schaghticoke were not an Indian tribe under federal law. ICC Dkt. 112, Answer, First Defense (CT-V004-D0043).

children. His son, Irving Harris, stated that his father was chief in title only, that he never exercised any political authority or influence, and that membership involvement was minimal.²⁸ CT-V007-D0023 (Irving Harris Interview, at 3-4). A second son, Howard Charles Harris, also stated that “chief” was a title only. KS-V001-D0053, at 9.

The one instance of purported leadership activity by Howard Harris is William Russell’s inquiry in 1938 of Harris about moving into a then-vacant house on the reservation. SN-V016-D0127 (Catherine Velky). This, however, was not a request by a member to a tribal leader for permission to reside on the reservation. KS-V001-D0053, at 13 (Howard Charles Harris). Rather, Russell was asking Harris because Harris had been interested in moving on the reservation himself. The reason that Harris did not object is revealed in an interview of his son: Howard Harris wanted to live on the reservation, but his wife strongly opposed it. KS-V001-D0053, at 21-22 (Howard Charles Harris).

The activities of the Bearce council were quite limited. There were occasional meetings about Bearce’s efforts at pursuing Schaghticoke land claims before the Indian Claims Commission. However, the level of interest appeared to be thin and quickly waned. CT-V007-D0023 (Irving Harris Interview, at 3-5); KS-V001-D0045, at 51 (Doris Buckley); *see also* CT-V004-D0045 (1951 letter by Bearce complaining that he had not

²⁸ There is no basis to question the reliability of Irving Harris’ statements, despite his current estrangement from the petitioner’s present leadership. As the record reflects, many individuals of Schaghticoke descent are opposed to the current STN leadership. In any event, he was speaking about his own father. It seems highly unlikely that Irving Harris would malign the role his father had in Schaghticoke history. Additionally, there is no basis to question his knowledge of the period in that he was in the military service during part of the 1950s. He indicated that his father communicated regularly with him about Schaghticoke matters and that he often returned home for visits. CT-V007-D0023, at 4.

heard any comments from Schaghticoke members about filing of land claim). The Cogswells, and perhaps Bearce, faulted Harris. TC-V001-D0002, at 126-27 (Truman & Theodore Coggsell); STN PF, at 145. However, the problems were more fundamental. Whatever efforts Howard Harris made as chief – the evidence indicates there was little – he “just ran into a solid brick wall” with other Schaghticoke. SN-V037-D0080, at 4 (James Hennessey). Despite a large number of documents and letters from the period, as well as interviews of a number of the persons old enough to have some knowledge of the activities then, there simply is no evidence of sustained, broadly based political activity under the Bearce council.

In sum, the purported leadership of the so-called Bearce period existed in name only. Neither Bearce nor the Bearce-led council exercised meaningful influence or authority over the broader membership. The broader membership exhibited extremely limited interest or involvement in the land claims activities. This falls far short of what is required to demonstrate political leadership for criterion (c). The evidence, including state recognition, both as to the land claims council created in 1949 and as to the purported activities before and after that council, simply is not reliable or probative of political authority or influence.

D. The Evidence of Irreconcilable Conflicts and Continued Recourse to External Authorities During the Modern Period Is Not Probative of Political Authority and Influence Under Criterion (c), and Reliance on It Is Contrary to the Acknowledgment Regulations and Precedent.

The Schaghticoke petitioner has experienced unending and fundamental conflicts among its members over the last three-plus decades to the point that opposing factions

vow to have nothing to do with each other.²⁹ STN PF, at 151-180. This pattern of irreconcilable conflicts began during the early efforts of Irving Harris to reconstitute the Schaghticoke in the late 1960s and 1970s, and it has continued unabated to this very date. The need for the resort to external authorities to provide political influence is demonstrated over and over again. Indeed, remarkably, the petitioner is unable even to call a truce in the ever present battling during this critical juncture in its petition.³⁰ The evidence of conflict, on which the Final Determination relies to satisfy criterion (c) and in part criterion (b), is not probative and is contrary to the prior acknowledgment precedent.

The irreconcilable bitterness of the conflicts is the result of the personal enmity of several “polarizing figures” – particularly Irving Harris, Alan Russell, Trudi Lamb, and Richard Velky (STN PF, at 162) – rather than real political factionalism over important tribal issues. Moreover, each of the issues over which the Harris/Velky and Lamb/Russell groups fought – elections, council membership, changes in the constitution, reservation access and development, and even the ancestry of members – became the subject of challenges and litigation before external authorities because of the

²⁹ The details of the conflicts of the modern period are discussed at length in the Proposed Finding. *See* STN PF, at 151-80.

³⁰ The Connecticut Supreme Court recently heard the latest in the seemingly endless series of cases between the STN/Velky group and the SIT/Russell group. The case was an appeal from the dismissal of the STN’s action seeking to enjoin SIT member Ronald Harrison from clearing trees on the reservation. The issue before the supreme court was whether the trial court had jurisdiction to determine which of the competing factions had standing to sue on behalf of the state recognized tribe. The SIT sought to intervene to challenge the legitimacy of the STN. The supreme court held that the trial court had jurisdiction over the standing question under state law. *Schaghticoke Tribal Nation v. Harrison*, Nos. 16874, 16875 (Conn. July 29, 2003) (CT-V007-D0025). Also recently before the state supreme court was Richard Velky’s appeal from a criminal conviction of breach of the peace arising out of a confrontation with SIT leader Alan Russell when Velky and other STN members sought access to the reservation. One of the issues on appeal was Velky’s claim of tribal sovereign immunity, which was rejected by the court. *State v. Velky*, 263 Conn. 602, 821 A.2d 752 (2003) (CT-V007-D0027).

utter and complete inability of the Schaghticoke group to deal with them internally. *See* STN PF, at 158-64, 167-73. Both the Harris/Velky group and the Lamb/Russell group continuously challenged elections and other issues before the Connecticut Indian Affairs Council and the state courts. *Id.* at 167, 170, 179. Now, the conflicts have become so severe and so entrenched, and the groups' ability to deal with them so lacking and absent, that the factions no longer consider themselves part of the same community or even that the other is legitimate.

In light of this evidence, the STN petitioner cannot be characterized as a community in which political influence and authority are exercised. As the Supreme Court long ago stated, a tribe is a group "united in a community under one leadership or government." *Montoya v. United States*, 180 U.S. 261, 266 (1901). That is not a description that can be ascribed to the STN petitioner.

Despite reciting the lengthy and complicated history of the conflicts, the Acting Assistant Secretary ignores their significance. Although acknowledging that "conflict is not sufficient evidence in itself under the regulations," the Acting Assistant Secretary nevertheless has concluded that, despite the inability of the purported political system to manage the conflicts internally, that this period of endless fighting, culminating in a complete split, is evidence of political processes. STN PF, at 180. Specifically, the Proposed Finding stated:

The inability to resolve the conflicts is not evidence that political processes do not exist within the meaning of the regulations. That one or another party has sought to have external authorities intervene, or more precisely declare their side to be the legitimate leadership, does not preclude a finding of significant political processes exist within the petitioner. The regulations do not require that a petitioner's political processes be autonomous of external political authorities, with the exception that they must be autonomous of another Indian entity. The

regulations do not require an Indian political entity be autonomous of non-Indian governments.

STN PF, at 180 (footnote omitted). The Final Determination adds little new to this view, except to assert that “conflicts can be good evidence for political processes, where they involve valued group goals, policies, etc.” STN FD, at 118.

This misses the point. The argument is not that the petitioner must be autonomous from the external authority of State government; rather, the problem is that the recurring need to resort to external authorities to resolve what should be internal matters over an extended period of time demonstrates the lack of political authority and leadership. *See Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582-83 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979). This period of over three decades is punctuated not just by “one or another party” seeking to have external authorities intervene, but by the competing leaderships constantly challenging the other before state agencies and state courts. Every issue of significance for the group has again and again ended up before an external authority because of the lack of mediating processes or institutions capable of exercising internal political authority. The complete inability of the group to assert any sort of political influence and leadership in a way that is considered legitimate by the broader membership is compelling evidence.

By dismissing the evidence of the need to resort to external authorities, the Acting Assistant Secretary wrongly conflates “autonomy” with political authority. The point is not that recurring resort to external authority means that the group is not autonomous within the meaning of the regulations. Obviously, a group that is not federally recognized is likely to lack autonomy from a state government. However, the most basic premise of federal acknowledgment is that to be recognized as a tribal sovereignty, there

must be bilateral political relations. *Miami Nation of Indians of Indiana v. Babbitt*, 112 F. Supp. 2d 742, 746, 755-56 (N.D. Ill. 2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002). The persistent inability to resolve conflicts internally is strong evidence on the question whether the group exercises political influence and authority. The continuing resort to external authority demonstrates the inability of the group to make decisions that the membership respects.

Certainly, any political system can have periods in which it is racked by internal conflict. To have real legitimacy, however, it must have some capacity to influence members in the resolution of those internal conflicts. That simply has not been the case for the petitioner. The only resolution that the petitioner has been able to achieve, other than that imposed by external authorities, is to institutionalize the factions – that is, ousting the opposing faction from the group’s membership (a part of the group that is so significant that the Proposed Finding concluded that the petitioner cannot be recognized as a tribe without it). STN PF, at 30. That the group must persistently – not incidentally or sporadically – resort to external authority does not reflect merely that the group is not autonomous from those external authorities. Rather, it shows in a compelling fashion that the group lacks the capacity to exercise meaningful political authority.

The Acting Assistant Secretary asserts nonetheless that prior acknowledgment decisions have defined factionalism as “a conflict between two groups within a single political system,” and that there is no requirement that the single political system have a means for settling disputes because “systems termed factional are sometimes noted for the intractability of the conflicts.” *Id.* at 180. This characterization of factionalism, at least in the manner in which the Acting Assistant Secretary applies it to the petitioner,

effectively renders the requirement of bilateral political relations meaningless. In the view of the Acting Assistant Secretary, two groups could choose to have nothing to do with each other, except to fight endlessly over the right to land and each other's legitimacy, and still be considered to be a single political entity.

Conflicts can certainly be "intractable" within a single political system in the sense that they are groups at odds over a long period of time. But those conflicts must, as the Acting Assistant Secretary's own definition of factionalism requires, be contained within a single political system if the concept of a single political system is to have any sensible meaning. Therefore, there must be some kind of internal process or institution that serves as a means of, if not resolving, at least managing and mediating those conflicts even if those conflicts persist.

Moreover, the Acting Assistant Secretary's application of the notion of political factionalism is not supported by prior acknowledgment precedents. Contrary to the Acting Assistant Secretary's assertion that internal conflict resolution is unnecessary, a long line of decisions demonstrates that it is a critical component of tribal political authority. A careful examination of each of the BIA's precedents dealing with conflict and factionalism is therefore necessary.³¹

In *Grand Traverse Band of Ottawa and Chippewa Indians*, the Assistant Secretary granted recognition emphasizing that the petitioner has "consistently evidenced a decision-making process characteristic of a cohesive group which has and continues to effectively resolve internal problems." *Grand Traverse* SE, at 6 (Ex. 20). Even though

³¹ The Final Determination fails to address this line of precedent, except to say summarily that "[t]his argument is not new but is dealt with fully in the P[roposed] F[inding]." STN FD, at 118.

“there was plenty of conflict within the group,” the evidence was “very strong” that the group “was capable of achieving some consensus and able to marshal its resources.” *Id.* AR, at 10. Unlike the STN petitioner, which has repeatedly had to resort to external authorities to resolve leadership disputes, external entities played no role in designating leaders in *Grand Traverse*. *Id.* AR, at 21. Similarly, unlike the STN petitioner, for which the fault lines have developed largely on family lines (STN PF, at 171), the internal political conflicts in *Grand Traverse* did not follow the religious and geographic divisions of that community, which had been “adequately addressed by local political processes.” *Grand Traverse* AR, at 22.

Similarly, in *Narrangansett*, the Assistant Secretary relied on the existence of strong tribal institutions that were capable of creating community cohesion despite the presence at times of significant divisions along a number of lines. *Narrangansett* SE, at 6, 10-11 (Ex. 17). Quite unlike the STN petitioner, “[e]ven among members expressing dissatisfaction with tribal politics, withdrawal of membership is not considered a viable alternative.” *Id.* SE, at 10. Indeed, the Schaghticoke membership has suffered multiple ruptures. STN PF, at 20, 30.

Tunica-Biloxi Indian Tribe of Louisiana directly addressed the question of factionalism. Although the Proposed Finding cites *Tunica-Biloxi* for the proposition that conflict resolution is unnecessary (STN PF, at 180), a review of that decision reveals quite the opposite. In *Tunica-Biloxi*, the petitioner had “suffered severe factional division” largely on family lines in which one faction challenged the legitimacy of the leadership and its decisions. *Tunica-Biloxi* AR, at 3, 22-23 (Ex. 21). However, “[t]he conflict appears to be one within the political system of a community *rather than a break*

in the community.” *Id.* AR, at 3. Critical to this conclusion that the conflicts were “played out within the boundaries of a common system,” *id.* AR, at 23, was the finding that there were political institutions that existed to deal with the conflicts. In particular, the Assistant Secretary emphasized that “orderly transitions of chieftainship and also the appointment at times of a subchief, have been used to deal with the factional problem.” *Id.* AR, at 3. In sharp contrast to the STN petitioner, the Assistant Secretary concluded that “the chief’s office was strongly established and had a great deal of legitimacy in the community, even though a particular incumbent was strongly disliked by some and serious factional conflicts developed.” *Id.* AR, at 16.

Whether conflicts, particularly longstanding ones, could be considered factionalism that is “played out within the boundaries of a common system” depended on the existence of political institutions or processes that could deal with the conflicts internally. Thus, although the Proposed Finding is correct to cite *Tunica-Biloxi* for the proposition that factionalism, even intractable factionalism, can be evidence of political authority, the Proposed Finding conveniently neglects to consider the importance of effective internal political means for handling the conflicts that classifies whether the conflicts constitute factionalism within a single political system.

This interpretation of *Tunica-Biloxi* is confirmed in *Miami Nation of Indians*. Discussing the use of conflict evidence, the *Miami* decision characterized the *Tunica-Biloxi* decision as viewing factions “as evidence of conflict within a community and political system. They, therefore, provided evidence that a system existed, within which there was conflict, not evidence that community and political processes did not exist.” *Miami* FD TR, at 50 (emphasis original) (Ex. 5). However, it emphasized that the mere

presence of conflicts was not what mattered. “The Tunica decision was based on the *exercise of political functions*, such as apportioning land. The factional divisions, *and the political processes for resolving the conflicts between them*, were important supporting evidence.” *Id.* at 51 (emphasis added).³² This plainly does not conform to the Proposed Finding’s interpretation and application of the *Tunica-Biloxi* precedent.

Finally, in *Snoqualmie Tribal Organization*, which is cited, but not discussed, in the Proposed Finding (STN PF, at 20), conflict evidence played a significant role. Recurring conflicts, involving family-line groupings, existed as to a number of significant issues and involved communication with and mobilization of the broader membership on those issues. *Snoqualmie* FD SC, at 10 (Ex. 22). However, it was not enough that there were longstanding family-line groupings involved in the conflicts. Instead, the Assistant Secretary reaffirmed that a “prime conclusion” on the conflict evidence “was that the general council, the general meeting of the membership, had exercised major political influence since at least the 1960’s as the final arbiter of political questions. *It was the means by which political disputes were settled* and the actions of the tribal council reviewed and ratified. *Political conflicts were played out in these meetings.*” *Id.* at 11 (emphasis added).

Clearly, the only proper conclusion that can be drawn from these precedents is that conflicts are evidence of political authority in the sense that they exist within a single political system if there are political processes within the group to respond to and mediate the conflicts. *Id.* at 13 & TR 42-46. Evidence of conflicts along family sublines, even if

³² In *Miami*, subgroup conflict was rejected as evidence of political processes because there was no evidence that the conflicts were important to the broader membership. *Miami* FD TR, at 49-50, 58 (Ex. 5).

that evidence includes broad participation of family subline members, is not sufficient to demonstrate political authority for criterion (c). There must be evidence of political processes or institutions of some kind that can deal with the conflicts if the conflicts are to be considered as taking place within a single political system.

Such evidence is utterly lacking for the STN petitioner. There are no institutions or processes considered politically legitimate within the group. Instead, almost every leadership election has been disputed and challenged outside the group. Matters of importance, such as access to and use of the reservation, repeatedly end up in the state courts rather than being the subject of internal processes. Rather than participating in a single political system, the factions have split, with neither accepting the legitimacy of the other, and each operating within its own political institutions and processes. These divisions show no sign of abating instead, they may even be growing stronger. This is demonstrated by the fact that when a number of SIT members reported to have rejoined the STN learned about the misleading nature of the effort to recruit them, they immediately made it clear that they had no intent of joining the STN. CT-V009-D0002. The Cogswells also remain divorced from the STN, as evidenced by the filing of their own request for reconsideration, as does former Chief Irving Harris, who has testified against the STN. These rifts remain permanent and resistant to the aggressive campaign mounted by the STN to bring these groups into its membership.

For these reasons, the Final Determination's reliance on the conflict evidence must be rejected as nonprobative and contrary to the regulations and prior precedent.

VII. THE FINAL DETERMINATION INCORRECTLY APPLIED THE “MARRIAGE RATE” TEST OF SECTION 83.7(b)(2)(ii) TO SATISFY CRITERION (c) (POLITICAL AUTHORITY) FOR THE PERIODS 1801 TO 1819 AND 1841 TO 1875.

A. Background

The STN Proposed Finding concluded that direct evidence did not exist to establish that the Schaghticoke had existed as a tribal entity that maintained social or political interactions over time. Evidence of political authority was glaringly absent for the period from 1801 to 1875. The Proposed Finding concluded that, "[f]or the period from 1801 to 1860, there is *no evidence in the record* pertaining to political authority and influence." STN PF, at 24 (emphasis added).

For the period from 1861 to 1899, the Proposed Finding concluded that "[t]here is *very limited evidence* for political authority or influence. . . ." *Id.* at 25 (emphasis added). Based upon this minimal evidence of political authority toward the end of the 19th century, some evidence that social community existed during this period, and reliance on the invalid state recognition theory, the Proposed Finding found criterion (c) to be satisfied for the brief period between 1876 and 1884. *Id.* For the period from 1861 to 1899 and for the period from 1884 to 1899, however, the Proposed Finding concluded that "the evidence is not sufficient to demonstrate that the Schaghticoke meet criterion 83.7(c)." *Id.* at 26.

In the Final Determination, the Acting Assistant Secretary concluded that there was no substantial evidence of political authority from 1801 to 1875. In the Federal Register notice announcing the Final Determination, the Acting Assistant Secretary stated "[t]here remains little direct evidence concerning political authority or influence [for the

period from 1801 to 1875]." 69 Fed. Reg. 5572. The scant evidence submitted by the STN to address the deficiency consisted of nothing more than isolated references to Eunice Mauwee and the role she purportedly played as a tribal leader. STN FD, 84-86. This evidence was readily dismissed as: "provid[ing] little context"; not "attribut[ing] any specific leadership activities to her"; not "provid[ing] any indication of how Eunice Mauwee might have exercised leadership or had a place of authority"; being retrospective and unconfirmed by any "contemporary 19th century evidence in the record"; and constituting mere descriptions that "provide no specific information in regard to political authority or influence." *Id.* at 85-86. Thus, in the Final Determination, the Acting Assistant Secretary rejected in its entirety the shreds of "direct evidence" the STN offered of political authority and influence for the 1801 to 1875 period.³³

Confronted with the total absence of direct or documentary evidence to establish political authority from 1801 to 1875, the Acting Assistant Secretary resorted to an "endogamy rate" analysis purportedly provided for under its regulations to establish the

³³ When it came time to issue the decision document, the Acting Assistant Secretary nonetheless transformed this complete rejection of the STN's evidence into something more, calling it instead "little direct evidence." 69 Fed. Reg. 5572. In addition, the Acting Assistant Secretary cannot seem to make up its mind what constitutes "direct evidence." On the one hand, Acting Assistant Secretary appears to treat "direct evidence" as actual documentary proof that political leadership and activity occurred, without relying on the 50% residency or marriage rate assumptions of section 83.7(b)(2)(i)-(ii) and the carryover provision of section 83.7(c)(3). *Id.* ("political influence was demonstrated by direct evidence for very substantial periods before and after the two historical periods"), ("[t]here remains little direct evidence concerning political authority or influence among the Schaghticoke for this time period" (*i.e.*, 1801 to 1875)). Yet, the Final Determination also describes as "*direct evidence*" the use of the 50% endogamy rate assumption when it says that the period for which there is "insufficient direct evidence" had been reduced to 1820 to 1840, thereby implying the use of the 50% endogamy rate constituted "direct evidence" for the other periods. It must be questioned how Acting Assistant Secretary's analysis can be regarded as sound when it cannot even maintain a clear distinction between what constitutes "direct evidence" and what does not.

existence of political authority under criterion (c). The interested parties know of no other recognition decision in which "endogamy rates" have formed a basis for decision.

First, the Acting Assistant Secretary purported to rely upon 25 C.F.R. § 83.7(b)(2)(ii) to show social community for the 1801 to 1870 period.³⁴ Under 25 C.F.R. § 83.7(b)(2)(ii), a petitioner can satisfy criterion (b) "at a given point in time" when evidence is submitted to demonstrate that "[a]t least 50 percent of the marriages in the group are between members of the group. . . ." The Acting Assistant Secretary applied this regulation in an illegal manner. She improperly substituted an analysis of "endogamy rates" for the required analysis of the percentage of "marriages" in the group that were between members of the group.

Second, the Acting Assistant Secretary invoked 25 C.F.R. § 83.7(c)(3). Under this provision, a petitioner may "carry over" evidence of community under criterion (b) to establish political authority under criterion (c). Because the petitioner lacked any evidence of political authority during the 1801 to 1875 period, the Acting Assistant Secretary fell back upon evidence of community purportedly established through the endogamy rate analysis to establish political authority under the carry-over provision.³⁵

³⁴ The Final Determination relied upon a finding of reservation residency of 48% (a factor under criterion (b)) in 1870 to invoke the provision of section 83.7(c)(1)(iv) that allows social community evidence to be used in combination with some evidence of political authority. Presumably, the Final Determination relied upon this residency rate in 1870 to combine with the 1876 petition to narrow the gap of evidence to 1801 to 1870 instead of 1875. The 48% residency rate falls below the regulatory cut-off of 50% required under section 83.7(b)(2)(i). For purposes of this discussion, the gap will still be referred to as from 1801 to 1875, as in the Proposed Finding, because the 48% rate does not meet the regulatory threshold and could not be relied upon by BIA.

³⁵ The Final Determination did not use section 83.7(b)(2)(ii) for purposes of qualifying the STN under criterion (b). Instead, it found adequate direct evidence of social community throughout the 1800s. 69 Fed. Reg. 5571. Instead, it applied this social community factor solely for purposes of satisfying criterion (c).

Under the regulations, proof of a 50% rate of in-group marriages satisfies criterion (b) for a specific point in time. Furthermore, under the carryover provision, the same evidence that 50% of the marriages in the group were between members of the group can be used to establish political influence and authority. The two criteria therefore collapse into each other, and a petitioner may to prove that it was a social community *and* a functional political entity simply through a sufficiently high rate of in-group marriages. In the case of the Schaghticoke, however, the Acting Assistant Secretary did not conduct an analysis of the in-group marriages rates as required by 25 C.F.R. § 83.7(b)(2)(ii) for purposes of the carry over provisions of 25 C.F.R. § 83.7(c)(3). Instead, she found that the Schaghticoke had established political authority under criterion (c) on the basis, not of in-group marriage rates, but on the basis of the Schaghticoke endogamy rates. .

The acknowledgment regulations create an equation where matrimony = social community = tribal governmental autonomy. Such an assumption, of course, strains common sense. From the standpoint of what is a very questionable basis for satisfying the legal test of an independent and continuously viable tribal government, relying upon mere marriage rates in the absence of any other evidence to prove political authority over an extended period of time is far from adequate.

The conclusion that marriage rates alone should not suffice to prove political authority is demonstrated by BIA precedent. In the only previous instance where in-group marriage rates were used as the grounds for a proposed positive acknowledgment determination, those marriages did not serve alone as the grounds for satisfying criterion (c) during a specified period of time. In the 1994 *Jena Band of Choctaw Indians*

(*JBC*) Proposed Finding, Assistant Secretary Ada E. Deer found that the petitioner met the 50% in-group marriage test from 1820 until 1959. In addition, she found the existence of community under criterion (b) based on the close proximity of residences, as well as through the existence of distinct social institutions and practices. *JBC PF SC*, at 3-4. (Ex. 41). For purposes of criterion (c), she also supplemented the use of the findings under section 83.7(b)(2)(ii) with the finding of periodic evidence of internal leadership and political activity. *JBC PF, Historical Report*, at 30-31; *Anthropological Report*, at 3, 6-7. (Ex. 41). By contrast, during the 1801-1875 period for the STN, there is *no* whatsoever evidence of political activity or authority.

In the STN Final Determination, Acting Assistant Secretary Martin did not evaluate in-group marriage rates using the same analysis followed in *JBC*. Instead of evaluating in-group marriage rates, she evaluated "endogamy rates," an evaluation that was neither utilized nor considered in the *JBC* Proposed Finding. The Acting Assistant Secretary applied the unauthorized "endogamy rate" analysis and found political authority without any other indicia of political authority or social community under the regulations. Moreover, the "endogamy rates" that Acting Assistant Secretary relied upon are barely above a 50% threshold. The STN Final Determination was based upon the following "endogamy rates" for the period of 1800 to 1875:

- 1801 to 1810: 80%;
- 1811 to 1820: 61%;
- 1821 to 1830: 40%;
- 1831 to 1840: 45%;³⁶

³⁶ As noted below, the Final Determination uses different rates for this decade. The Federal Register notice uses 35% for this decade. 69 Fed. Reg. 5572. In fact, the Acting Assistant Secretary does not appear to know which endogamy rates she wants to use. Pages 26 through 28 of the Final Determination sets forth five calculated endogamy rates for each decade between 1800 and 1840. It sets forth alternative methods for looking at

- 1841 to 1850: 54%;
- 1851 to 1860: 53%; and
- 1861 to 1870: 50%.

STN FD, at 84. Thus, even using the Final Determination's invalid approach of calculating endogamy rates rather than evaluating in-group marriage rates, the STN barely achieved a 50% endogamy rate threshold for much of the 75-year period.

Moreover, the Final Determination's analysis shows that the STN failed to meet a 50% endogamy rate for two decades (1821 to 1830, 1831 to 1840); and barely satisfied this endogamy rate for three other decades (1841 to 1850, 1851 to 1860, and 1861 to 1870).

This hardly demonstrates what is described in OFA's decision-making memorandum as a

the rates, based upon either Acting Assistant Secretary's own approach or the STN approach. These rates are: a) endogamous marriages extant of the beginning of the decade that were terminated; b) the endogamy rate for new marriages during the decade; c) the STN's rate for the decade; d) the Final Determination's rate for the decade; and e) the endogamy rate at the end of the decade. There is considerable variability in these rates. For example, the endogamy rate for new marriages for 1821 to 1830 was 10%. The STN overall rate for that decade was 70%. The Final Determination's overall rate was 40%, and the Final Determination's 1830 endpoint rate was 42%.

The problem with these rates is that the Acting Assistant Secretary cannot seem to decide which rate to use. For example, on page 84, the Final Determination summarizes the rates on a decade-by-decade basis. For the period 1831 to 1840, the Final Determination used the 45% rate. STN FD, 84. This rate, it turns out, was the rate for extant endogamous marriages in the year 1840. STN FD, 28. Of the four Final Determination rates considered, this was the highest rate.

On the same page, for the period 1841 to 1850, the Final Determination chose 54%. STN FD, 84. This rate, however, is not comparable to the rate used for 1831-1840. For 1841-1850, the Final Determination used the overall rate for the decade, which was 54%. STN FD, 28. Had it used the corresponding rate relied upon for 1831-1840 (extant endogamous marriages in 1840), the rate would have been 47%. That rate would have fallen below the 50% threshold, presenting a third consecutive decade of sub-50% endogamy, and further disqualifying the petitioner from using the carryover provision. Similarly, had the Final Determination used the overall decade rate for 1831-1840, as it did for 1841-1850, that calculation was only 35%, much lower than the 45% it relied upon. It therefore appears that Final Determination selectively picked the endogamy rate that would make it most possible for the STN to use the 50% marriage rate qualifier under criterion (b) to carry over to meet criterion (c).

"well established" community "throughout the petitioner's entire history."

AC-V012-D0009, at 2.

By contrast, in the *JBC*, where actual evidence of political authority existed, the Choctaw married almost exclusively within the tribal community from 1820 to 1899, with only one union in 1862 that was between a Choctaw and a non-Indian. *JBC* PF, Genealogical Report, at 11. For the period from 1870 to 1900, 100 percent of the marriages consisted of "in-group marriages." *Id.* at 12. Thereafter, between 1919 and 1949, "over 75 percent of the marriages were between members of the group." *Id.* "[T]he high degree of *in-group marriages* was maintained until 1959" when for the first time the percentage of Choctaw marriages that were between Choctaw Indians dipped below 50%. *Id.* (emphasis added). It was based partially upon these findings, not an "endogamy rate analysis," that Assistant Secretary Deer determined that the Choctaw satisfied criterion (b), community. When compared to *JBC*, it is clear that the Acting Assistant Secretary's flawed calculation of STN endogamy provides an insufficient foundation upon which to find political authority.

Despite the obvious deficiencies in an approach that allows in-group marriage rates to serve as a proxy for, and as evidence of, political authority, the Acting Assistant Secretary chose to apply an even less rigorous endogamy rate analysis to establish STN political authority under the carryover regulation. For the period of 1820 to 1840, when the endogamy rates were insufficient to provide the sought for evidence of political authority at rates of 40% (1821-183) and 35% (1831-1840), she nonetheless determined that these rates, which fell 10% to 15% below the required marriage rate threshold,

constituted "strong evidence for the existence of community, and hence political authority." 69 Fed. Reg. 5572.

The final step to achieving a positive finding for criterion (c) for the period of 1820 to 1840 derives from the ostensible actions of the State. the Final Determination asserts that the State took actions pertaining to the Schaghticoke during this 1820 to 1840 period and concluded that, after "reevaluating" its own precedent, these state actions were sufficient to carry the STN through the period of the insufficient endogamy rate. In its revealing internal Briefing Memo, OFA admitted to Acting Assistant Secretary Martin that such a result is not allowed under the acknowledgment regulations. The OFA staff stated in that memo:

The petitioner has little or no direct evidence to demonstrate that criterion 83.7(c) has been met between 1820 and 1840 and between approximately 1892 and 1936.

* * *

If applied as it was in the Schaghticoke PF, the weight of continuous state recognition with a reservation would not provide additional evidence to demonstrate that criterion 83.7(c) (political influence) has been met for this time period.

AC-V012-D0009, at 1. OFA nonetheless recommended a final decision to "[a]cknowledge the Schaghticoke under the regulations, despite two historical periods with little or no direct political evidence by relying upon the state recognition theory."

*Id.*³⁷

This section describes the serious errors in the Final Determination's calculation of the in-group marriage rate. As demonstrated by this discussion, as a threshold matter the Acting Assistant Secretary incorrectly and illegally applied the acknowledgment

³⁷ For a discussion of the Assistant Secretary's improper reliance on state recognition, see section V above.

regulations. They impermissibly transformed the clear meaning of 25 C.F.R. § 83.7(b)(2)(ii) requiring a 50% in-group marriage rate into an entirely different test, requiring a 50% endogamy rate. These are two very different evaluations. Disregarding the prior precedent in *JBC*, the Acting Assistant Secretary opted for the new evaluation based on endogamy rates to achieve the desired result of awarding a positive determination to the STN, even though that approach is not authorized under the plain meaning of 25 C.F.R. § 83.7(b)(2)(ii). In addition, even if the use of endogamy rates rather than in-group marriage rates was allowed, the Final determination's analysis is still seriously flawed in numerous ways, compelling invalidation of the Final Determination.

B. The Final Determination Violates 25 C.F.R. 83.7(b)(2)(ii) and 25 C.F.R. 83.7(c)(3) in that it is Based on "Endogamy" Rates Rather Than on "Marriage" Rates.

1. BIA's Improper Use of Endogamy Rates

The acknowledgment regulations permit a conclusive presumption that both community (criterion b) and political authority (criterion c) have been satisfied when "at least 50 percent *of the marriages in the group* are between members of the group." 25 C.F.R. § 83.7(b)(2)(ii) (emphasis added); § 83.7(c)(3). There is nothing ambiguous or uncertain about the language of this provision. The term "marriages" does not have any special or unique meaning that is applicable to tribal acknowledgment. The regulations set forth specialized terms in 25 C.F.R. § 83.1, and there is no definition of "marriages". As such, the term "marriages" must be given its normal and customary meaning. The Acting Assistant Secretary may not interpret or apply the regulation so as to create a *de facto* new regulation solely for purposes of the STN petition. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

Given its most basic usage, "marriage" is the union of two individuals who are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family. For example, the definition of "marriage" in *Webster's Third New International Dictionary*, p. 1384 (1986) is as follows:

1. a) the state of being united to a person of the opposite sex as husband and wife; b) the mutual relation of husband and wife; c) the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family. . . . 3) an intimate or close union. . . .

The Final Determination itself recognizes the essential nature of "marriage" as a "union" of two individuals. In the discussion of community, the Final Determination states:

For the purpose of analyzing endogamy, OFA has followed its previous practice of categorizing all know relationships that endured long enough to produce children as "marriages," *whether or not there was evidence of a formalized union. Documented unions* (formal or informal) that did not produce children are also included in the analysis.

STN FD, at 23 n. 6 (emphasis added). Similarly, in the discussion of political authority, the Final Determination states:

The endogamy analysis included both on-reservation and off-reservation residents and included *all unions known to have existed*, whether or not they were legally formalized. (Emphasis added.)

STN FD, at 83.

Despite the recognition that "marriage" is the "union" of two individuals, when it came time to apply 25 C.F.R. § 83.7(b)(2)(ii), the Acting Assistant Secretary replaced the concept of marriage rates with the entirely different concept of endogamy rates. The term "endogamy" is not a synonym for the term "marriage". Instead "endogamy" is the "practice" of marrying within a social

group because social norms encourage or require it. *See Webster's Third New International Dictionary*, 749 (1986).

Marriage involves the *single union* of two individuals. Endogamy, however, involves *the practice of each party* to that union. Endogamy rates therefore always exceed the underlying rate of endogamous or in-group marriages, *i.e.*, marriages between members of the same group. This is because the endogamy calculation counts each partner whereas the marriage calculation counts only the union. As an example, if two marriages occur, one that is endogamous, *i.e.*, between members of the group, and one that is not, 50% of the marriages would qualify as being between members of the group; and the in-group marriage rate under the regulations would be 50%. The endogamy rate, however, is 66.6% because two of the three group members who have married have married within the group.

To benefit from the conclusive presumption of community and political authority afforded by 25 C.F.R §§ 83.7(b)(2)(ii) and 83.7(c)(3) at least 50% of the Schaghticoke "marriages" must be between members of the group, *i.e.*, at least 50% of the "marriages" had to be endogamous or in-group marriages.

The Final Determination actually uses different methods for analyzing "endogamy rates." For purposes of community, the Final Determination analyzes the endogamy rates based upon the marriages that were extant in the year at the beginning of each decade, *e.g.*, 1800, 1810, 1820, etc. It also analyses endogamy rates for each decade as a whole, *e.g.*, 1801-1810, 1811-1820, etc. STN FD, at 26-29, 36-39. For purposes of political authority, the Final Determination

analyzes the endogamy rates based on the marriages that existed for each decade as a whole, *e.g.*, 1801-1810, 1811-1820 etc. STN FD, at 83-84.

As demonstrated later in this section, Acting Assistant Secretary made serious errors in calculating the endogamy rates. However, even if Acting Assistant Secretary's methodology and findings are accepted, an evaluation of the difference between "marriage rates," as required by the regulations, and "endogamy rates" as improperly used by BIA, demonstrates the legal deficiencies in Acting Assistant Secretary's use of the carryover provision. Contrary to Final Determination's findings, the percentage of Schaghticoke marriages that were between members of the group generally did not approach, and certainly did not exceed, the 50% required by the regulations. To illustrate this problem, each decade after 1810 is considered separately. In order to simplify the discussion, it is convenient to use the Final Determination's findings concerning the number of endogamous marriages and the number of exogamous marriages or presumed exogamous marriages.

1811-1820

In the decade from 1811 to 1820, there were 18 marriages involving the Schaghticoke. Eight of these marriages (16 individuals) were in-group or endogamous marriages. The remaining 10 marriages (10 individuals) were either exogamous marriages (2) or presumed exogamous marriages (8). STN FD, at 27.

The Final Determination concluded that the "endogamy rate" for this decade was 61%. STN FD, at 27, 84. The rate of in-group marriages, however, was only 44.4% (8 endogamous marriages ÷ 18 total marriages = 44.4%). Because only 44.4% of the marriages in the group were between members of the group, the Schaghticoke failed to

satisfy the provisions of 25 C.F.R. § 83.7(b)(2)(ii) and 25 C.F.R. § 83.7(c)(3) for this period.

Similarly, for the year 1820, the Final Determination made a finding that a total of 15 marriages existed. Five of those marriages were considered to be in-group or endogamous marriages, while the remainder were considered to be exogamous (2) or presumed exogamous (8). The Final Determination erroneously concluded that the rate for in-group or endogamous marriages in 1820 was 50%. STN FD, at 27. In reality, the rate of in-group or endogamous marriages for 1820 was only 33.3% (5 endogamous marriages ÷ 15 total marriages = 33.3%). Since only 33.3% of the marriages in the group were between members of the group, the Schaghticoke failed to satisfy the provisions of 25 C.F.R. § 83.7(b)(2)(ii) and 25 C.F.R. § 83.7(c)(3) for the year 1820.

1821-1830

The Final Determination concluded that the Schaghticoke marriage patterns for the period from 1821 to 1840 failed to satisfy the requirements for community, criterion (b), and political authority, criterion (c), under 25 C.F.R. § 83.7(b)(2)(ii) and 25 C.F.R. § 83.7(c)(3). The Final Determination based this conclusion on a finding that the "endogamy rate" was only 40% for the period of 1821-1830 and 42% for 1830. STN FD, at 27, 84.

Despite this finding, the Acting Assistant Secretary concluded that these "endogamy rates" provided strong evidence that community existed. STN FD, at 27. In effect, the Acting Assistant Secretary determined that these rates were high enough, especially when combined with state recognition. As OFA advised the Acting Assistant Secretary, "[t]he evidence for community during the 1820 to 1840 period, *based on a*

high rate of intermarriage within the group falls just short of the 50% necessary under the regulations, to demonstrate political influence without further, direct evidence (83.7(b)(2)(ii))." AC-V012-D0009, at 1 (emphasis added).

OFA's characterization of the 40% and 42% rates as "high" and "just short" of 50% is, of course, a self-serving characterization that is at odds with section 83.7(b)(2)(ii).³⁸ In any event, when the marriage rate required by the regulations is calculated, the STN fall even further below the 50% threshold. For the period from 1821 to 1830, the percentage of Schaghticoke marriages that were between members of the group was only 25% (6 endogamous marriages ÷ 24 total marriages = 25%). For 1830, only 26% of the marriages were between Schaghticoke members (5 endogamous marriages ÷ 19 total marriages = 26%). These marriage rates hardly provide "strong evidence" that community existed for the decade of 1821 through 1830.

1831-1840

The Final Determination concluded that the Schaghticoke marriage patterns for the period from 1831 to 1840 failed to satisfy the requirements for community, criterion (b), and political authority, criterion (c), under 25 C.F.R. § 83.7(b)(2)(ii) and 25 C.F.R. § 83.7(c)(3). The Final Determination based this conclusion on a finding that the "endogamy rate" was only 35% for the period of 1831-1840 and 45% for 1840. STN FD, at 28, 84. For purposes of evaluating the existence of political authority, criterion (c), the Final Determination concluded that the endogamy rate for the decade of 1831-1840 was 45%. STN FD, at 84. These findings are inconsistent and irreconcilable.

³⁸ OFA also labeled this as an "intermarriage rate" when in fact it was an "endogamy rate."

Moreover, the Final Determination appears to contain an error concerning the endogamy rate for 1840. The determination of the 45% endogamy rate for 1840 is based on a total of 17 marriages, five of which are stated to be endogamous. STN FD, at 28. Table 3, STN FD, at 158-161, however, identifies only nine marriages existing in 1840, of which only two are identified as endogamous. Based upon Table 3, the OFA's "endogamy rate" for 1840 is 36.3%, not 45% as stated in the Final Determination.

Regardless of how the "endogamy rate" is calculated, however, and regardless of the correct "endogamy rate" for the period, these endogamy rates simply do not support a finding that political authority, criterion (c), existed for the period of 1831 to 1840. The conclusion for political authority is based on the assumption that "strong evidence" of community existed by virtue of a 45% endogamy rate for this period. STN FD, at 84, 119. The acknowledgment regulations, however, do not permit a presumption for community or political authority to arise by virtue of endogamy rates. Stated differently, endogamy rates are not evidence of community under the acknowledgment regulations; and no presumption for community arises based upon such rates. Instead, the presumption for community and political authority arises only when at least 50% of the marriages in the group are between members of the group. 25 C.F.R. § 83.7(b)(2)(ii); 25 C.F.R. § 83.7(c)(3).

In actuality, for the period from 1831 to 1840, the percentage of Schaghticoke marriages that were between members of the group was only 24% (6 endogamous marriages ÷ 25 total marriages = 24%). In 1840, depending on which data is utilized, the percentage of Schaghticoke marriages that were between members of the group totaled either 29.4% or 22.2%. The 29.4% calculation is based on the 17 marriages identified at

page 28 of the Final Determination. The 22.2% calculation is based on the nine marriages identified in Table 3 as existing in 1840. These in-group marriage rates do not support the conclusion that "strong evidence" for community existed during the decade. Moreover, since the record contains absolutely no evidence that otherwise establishes the existence of political authority, criterion (c), for the period, it was improper to use the endogamy rate(s) as a substitute for such evidence.

1841-1850

With respect to the decade from 1841 to 1850, the finding that 19 Schaghticoke lived in endogamous marriages at some point during the decade appears irreconcilable with the other findings. STN FD, at 28. It would appear from the other findings that this number is incorrect and that only 16 Schaghticoke lived in endogamous marriages during the decade.

The Final Determination finds that in 1840, a total of 17 marriages existed involving the Schaghticoke. Of these, the Final Determination found only five to be endogamous marriages. The remaining 12 marriages were found to be either exogamous (6) or presumed exogamous (6). STN FD, at 28. Although the "endogamy rate" was found to be 45% (STN FD, at 28, 84), only 29.4% of the marriages in the group as of 1840 were between members of the group (5 endogamous marriages ÷ 17 total marriages = 29.4%). The Final Determination also finds that during the period from 1841 to 1850, ten new marriages occurred. Three of these new marriages were found to be endogamous marriages, with the remaining seven new marriages found to be exogamous (2), presumed exogamous (4) or with an Indian outside of the group (1). STN FD, at 28.

The conclusion to be drawn from these findings is that during the period of 1841 to 1850, a total of 27 marriages existed (including the one exogamous marriage that terminated by reason of the death of one partner). Of these, only 8 marriages were found to be endogamous. As a result, only 16 Schaghticoke could have lived in an endogamous relationship, not 19, as stated in the Final Determination. STN FD, at 28.

This error reduces the "endogamy rate" from 54% to 45.7% ($16 \div 35 = 45.7\%$). More importantly, however, it reveals that only 29.6% of the marriages that existed at any time during the decade were between members of the group (8 endogamous marriages \div 27 total marriages = 29.6 %). Since only 29.6% of the marriages in the group were between members of the group, the Schaghticoke failed to satisfy the requirements of 25 C.F.R. § 83.7(b)(2)(ii) and 25 C.F.R. § 83.7(c)(3) for the period from 1841 to 1850 by a significant margin.

1851-1860

For the decade from 1851 through 1860, the Final Determination concluded that the Schaghticoke "endogamy rate" was 53%. STN FD, 37, 84. The actual percentage of Schaghticoke marriages that were between members of the group, however, was only 33.3%.

The Final Determination found that in 1850, a total of 26 marriages involving the Schaghticoke existed. Of these, it found that eight marriages were endogamous and the remaining 18 marriages to be either exogamous (7), presumed exogamous (10), or involving a non-Schaghticoke Indian (1). STN FD, at 28. Although the Final Determination concluded that the "endogamy rate" was 47% (STN FD, at 28), only

30.7% of the Schaghticoke marriages as of 1850 were between members of the group (8 endogamous marriages ÷ 26 total marriages = 30.7%).

From 1851 to 1860, the Schaghticoke experienced three new endogamous marriages and four new exogamous marriages. STN FD, at 37. Although the Final Decision found the "endogamy rate" for these new marriages to be 55% (STN FD, at 37), only 42.8% of the new Schaghticoke marriages were between members of the group (3 endogamous marriages ÷ 7 total marriages = 42.8%). Moreover, of the total of the 33 marriages that existed at any time between 1851 and 1860, only 11 marriages were found to be endogamous. STN FD, at 28, 37. As a result, only 33.3% of the Schaghticoke marriages in this decade were between members of the group (11 endogamous marriages ÷ 33 total marriages = 33.3%). Thus, contrary to Final Determination's conclusion, the Schaghticoke did not satisfy the requirements for community, criterion (b), or political authority, criterion (c), under 25 C.F.R. § 83.7(b)(2)(ii) and 25 C.F.R. § 83.7(c)(3) for the decade from 1851 to 1860.

1861-1870

For the decade from 1861 through 1870, the Final Determination concluded that the Schaghticoke "endogamy rate" was 50%. STN FD, at 37, 84. The percentage of Schaghticoke marriages that were between members of the group during this decade, however, was no greater than 29.4%.

The Final Determination contains the finding that in 1860 there existed a total of 30 marriages involving the Schaghticoke. Of these, it found only 9 marriages to be

endogamous.³⁹ Of the remaining 21 marriages, the Final Determination found 11 to be exogamous, 9 to be presumed exogamous, and one involving marriage with a non-Schaghticoke Indian. STN FD, at 37. Based upon these findings, at the beginning of the decade in 1860, only 30% of the marriages were between members of the group (9 endogamous marriages ÷ 30 total marriages = 30%). Despite the "endogamy rate" of 46%, only 30% of the Schaghticoke marriages that existed in 1860 were between members of the group.

For the period from 1861 through 1870, the Final Determination found that four new Schaghticoke marriages occurred. Of these, it found only one marriage to be an endogamous marriage.⁴⁰ Thus, of the new marriages, only 25% were between members of the group.⁴¹ STN FD, 37.

These findings indicate that a total of 34 marriages existed at some time between 1860 and 1870, of which only 10 marriages were endogamous. *See* STN FD, at 37. Based on these numbers, the percentage of Schaghticoke marriages that were between members of the group would have been 29.4% (10 endogamous marriages ÷ 34 total marriages = 29.4%).

Notwithstanding this conclusion, the Final Determination contains irreconcilable data for this period that result in an even lower in-group marriage rate. Table 4, Schaghticoke Endogamy/Exogamy Patterns, 1801-1850, identifies only 24 marriages for

³⁹ Table 4, Schaghticoke Endogamy/Exogamy Patterns, 1801-1850, STN FD, at 58-161, identifies only 20 marriages for this period, six of which are identified as endogamous marriages.

⁴⁰ Table 4, Schaghticoke Endogamy/Exogamy Patterns, 1801-1850 at STN FD, 161, identifies four new marriages for this period, one of which is identified as endogamous.

⁴¹ The Final Determination states that the endogamy rate for these new marriages was 25%. STN FD, 37. This is an obvious error since the "endogamy rate" calculates out to 40% based upon the methodology used in the Final Determination.

this entire period, six of which BIA identified as endogamous. STN FD, at 58-61. It is impossible to reconcile the marriages listed on this table with the other findings. If the marriages identified on Table 4 are used to calculate the marriage rate, however, only 25% of the marriages for the period are between Schaghticoke members (6 endogamous marriages \div 24 total marriages = 25%).

Finally, the Final Determination contains yet another irreconcilable discrepancy. The Final Determination states that "of the 47 Schaghticoke individuals known to have been married at some time during the decade 1861-1870, 24 lived in endogamous marriages." STN FD, at 37. If the data contained in Table 4 are ignored, than at best, only 20 individuals (10 marriages) out of 44 Schaghticoke (34 marriages) who were married during this period would have been living in endogamous marriages. The "endogamy rate" would have been only 45.4%, not 50% as stated in the Final Determination. Only 29.4% of the Schaghticoke marriages would have been between members of the group (10 endogamous marriages \div 34 total marriages = 29.4%).

No matter how the factual underpinnings for the Final Determination are evaluated for the period from 1861 to 1870, the percentage of marriages between Schaghticoke members failed to reach fifty percent (50%). As such, the Schaghticoke did not satisfy the requirements for community, criterion (b), or political authority, criterion (c), under 25 C.F.R. § 83.7(b)(2)(ii) and 25 C.F.R. § 83.7(c)(3) for the decade from 1861 to 1870.

This analysis demonstrates that the STN do not meet the requirements of 25 C.F.R. § 83.7(b)(2)(ii) under the marriage rate calculation required by the clear language of the regulation. Correct application of the BIA's own regulations demonstrates that the

STN fail to meet the 50% test for the entire 1811 to 1870 period. Moreover, they fail to do so by a wide margin. Consequently, the basis for OFA's recommendation to the Acting Assistant Secretary to rely upon 25 C.F.R. §83.7(b)(2)(ii) ("high rates" that fall below 50% for only a portion of the period of time) is invalid. The carryover provision of 25 C.F.R. § 83.7(c)(3) therefore cannot be used, and the petitioner fails to meet criterion (c). Even OFA does not suggest that mere state recognition alone could be used to compensate for such a significant gap in political authority over a 60-year period. On this basis alone, the Final Determination must be vacated.

2. BIA's Precedent for Using Marriage Rates Instead of Endogamy Rates

Any question regarding the need to rely upon in-group marriage rates, rather than endogamy rates, is answered by the only previous BIA determination to rely upon 25 C.F.R. § 83.7(b)(2)(ii) for a petitioner group to satisfy the acknowledgment criteria. In the 1994 *Jena Band of Choctaw Indians (JBC)* Proposed Finding (Ex. 41) reached shortly after the subject regulations were adopted, the Assistant Secretary applied this provision in evaluating both social community and political authority by means of the carryover provision. In doing so, Assistant Secretary evaluated the in-group marriage rate exactly as claimed by the interested parties in this appeal and exactly as called for under 83.7(b)(2)(ii), by looking at the actual number of marriages, not the number of tribal community members who participated in such marriages. In other words, BIA correctly used marriage rates instead of endogamy rates in evaluating that petition.

The *JBC* decision interpreted the regulations to mean that "if a petitioner demonstrates that ***at least 50% of the marriages*** of its members are to other members of the group, then it shall have provided sufficient evidence of the existence of a distinct

community at that point in time." *JBC PF, SC*, at 3 (emphasis added). (Ex. 41). It did not interpret or apply the regulation based upon "the rate of endogamy" of the group's members as did the Acting Assistant Secretary in the STN Final Determination. *See STN, FD* at 23, 25. Instead, the clear focus in *JBC* was the percent of in-group or endogamous marriages; and she never even considered or calculated an "endogamy rate" or "rate of endogamy". *JBC PF, Genealogical Report*, at 9-15. Using this principle, *JBC* determined that "85% of the marriages of members were with other members of the group from 1820 until 1950." *Id.* As late as 1949, "50% of the new marriages were to other members of the group." *Id.* It was not until 1959 that "the percent of marriages to Indians declined below 50 percent." *Id.* It was based partially upon these findings, not an "endogamy rate analysis," that the Assistant Secretary determined that the JBC satisfied criterion (b), community. by means of the carryover provision in 25 C.F.R § 83.7(c)(3) through 1959. *Id.* at 7. As noted above, however, the Assistant Secretary also relied upon other evidence during the pre-1959 era to find that both criteria (b) and (c) had been met during that period. *Id.* at 3-7

The manner by which the JBC marriage rates were calculated under section 83.7(b)(2)(ii) is revealed in the *JBC Genealogical Report*. In Table IV, percentages were calculated for intermarriages. In the STN Final Determination evaluation, the Acting Assistant Secretary calculated the percentage of total marriages. For example, in 1950 there were 11 marriages, seven of which were endogamous, for an in-group marriage rate of 64%. *JBC Genealogical Report*, at 15. (Ex. 28). In 1954, there were 12 marriages, seven of which were endogamous, for an in-group marriage rate of 58%. *Id.* In 1959, there were 12 marriages, six of which were endogamous, for a 50%

rate. By 1984, there were 31 marriages, only two of which were endogamous, for a rate of 6%. *Id.*

In *JBC*, the Assistant Secretary complied with the requirements of section 83.7(b)(2)(ii). It used the percentage of marriages. For the STN, however, the Acting Assistant Secretary disregarded the clear language of the regulations and the BIA's own precedent. The STN Final Determination applied a new and impermissible approach that has a significant upward bias that favored the STN. This methodology made a critical difference in the STN evaluation under section 83.7(b)(2)(ii) and caused rates that should have been well below the required 50% for the entire period to jump above the threshold. The Acting Assistant Secretary's manipulation of the rate calculation method therefore meant the difference between a negative and positive final determination because without satisfying section 83.7(b)(2)(ii), the STN would have failed criterion (c) for the entire period from 1810 to 1875.

C. The Final Determination's Errors in Calculating Endogamy Rates

The problems with Final Determination's evaluation under section 83.7(b)(2)(ii) do not stop with the use of endogamy rates instead of marriage rates. In addition, Final Determination's endogamy analysis is riddled with inconsistencies, internal errors, false assumptions, departures from precedent, and factual errors. When these errors are corrected, even Final Determination's endogamy rate calculations fall well below the required 50% level.

1. The Final Determination's Endogamy Rate Calculations Are Based Upon an Improper Expansion of The Schaghticoke Community

The starting point for endogamy calculations is to define the families whose history will be reviewed to determine if intermarriage occurred. The requirement to limit review to a defined group is confirmed by the acknowledgment regulations.

Criterion (b), for example, requires proof of interaction to meet the definition of "community." 25 C.F.R. § 83.7(b)(1). That term is defined as "any *group of people* which can demonstrate that *consistent interactions* and *significant social relationships* exist *within its membership* and that *its members* are differentiated from and identified as distinct *from nonmembers*." *Id.* § 83.1 (emphasis added). The intermarriage rate issue arises under criterion (b), and this definition therefore requires analysis based upon the class of individuals considered to be part of the group at the specified point in time. Indeed, section 83.7(b)(2)(ii) itself is limited to petitioner members ("[a]t least 50 percent of the marriages in *the group are between members of the group*" (emphasis added)).⁴²

In seeking to define the STN, the Final Determination abandoned any pretense of trying to identify the "group of people" who had "consistent interactions" and "significant social relationships . . . within its membership," as required by section 83.1. Instead, as will be shown below, the Final Determination seized upon even the most remote suggestion of a linkage to the Schaghticoke to qualify an individual as part of the community for endogamy rate purposes. Thus, a single reference in an overseer's report

⁴² Numerous other provisions of the regulations are limited by petitioner group membership. *See, e.g.*, 25 C.F.R. §§ 83.7(b)(1)(ii), (iii), (iv), (2)(i), (iii); (c)(1)(i), (ii), (iii), (2)(ii), (iii), (iv); (d) (membership list), (e) (membership can trace descent to historical tribe); (f) (members are not part of another tribe).

or even a land record, no matter the context or explanation, became the grounds for OFA staff to add individuals to the endogamy charts as being a Schaghticoke Indian.

The Final Determination could have readily applied a set of defining criteria for the STN to the community. For example, the best evidence of tribal membership to use as a starting point for defining Schaghticoke community is the 1789 Stiles Report. Stiles prepared his list based upon information provided by Peter Mauwee, who was considered chief at that time. SN-V026-D0187. The list originated very close in time to the critical 1800 time frame at which the gap in the STN's political authority emerges, according to the Final Determination. Consequently, the Stiles Report serves as an excellent starting point for defining the community to be used to analyze endogamy. It is objective, contemporaneous, and comprehensive. Had the Final Determination followed this common sense approach, one that relied upon the best available evidence for defining the Schaghticoke community, a very different result would have been arrived at for endogamy rates. As discussed below, however, the Final Determination added several key individuals into the endogamy rate calculation who were not listed on the Stiles Report or descendants of those families. Moreover, there is insufficient evidence to show that many of these individuals were in fact part of the tribal community. If they are deleted, along with their children, the endogamy rates are dramatically reduced. A chart presenting the summary of this approach, based upon a starting point defined by the Stiles Report and including other key findings discussed below, is presented in section VII.D below.

In its STN analysis, the Final Determination essentially discarded the requirement for proof of tribal relations. Instead of adopting meaningful, logical and verifiable

principles to show that individuals included in the marriage analysis were in fact part of the group, the Final Determination devised a set of *ad hoc* principles ill-suited to establish that fact. The Final Determination's approach appears to have been designed solely to add the people necessary to raise the endogamy rate.

The Final Determination identifies three principles used to determine whether to include individuals in the tribal community. The first principle is: "If a Schaghticoke parent participated in Schaghticoke activities (was named in overseer records, signed petitions, etc.) then the marriage of the children, whether endogamous or exogamous, and whether or not that child subsequently maintained tribal relations, are included in calculating [endogamy rates]." STN FD, at 24.

There are three problems with this principle. First, it sets a far too permissive standard for including the family parent. Mere mention of an individual on an overseer's report is not proof, or even reliable evidence, that the person was a Schaghticoke tribal member. Many individuals were listed on overseer reports as receiving services, sometimes only once. Reservations in Connecticut were not "tribally based," in the strict sense of that term. They were locations where non-resident, indigent individuals having Indian ancestry were allowed to reside by the State. The Colony/State overseer's responsibility was two-fold: the maintenance of State-owned lands, and the allocation of resources for the benefit of the occupants of that land. The overseer had no system of verifying the ethnic or tribal legitimacy of a claimant. The population flux that occurred constantly on state-owned reservations compounded this problem. Thus, simply listing individuals identified on an overseer report cannot be used to establish tribal membership or the maintenance of tribal relations.

One example of this problem is Tom Kelly. He is mentioned only once on the overseer records, in the April 1814 Abel Beech Account Book. BR-V009-D0005, at 17. Tom Kelly received payment for keeping and caring for Peter Hine for ten days. This payment was not in anyway due to Tom Kelly being an Indian or for his wife, Marianne, being an Indian. It was due to the fact that he cared for a Schaghticoke Indian (Peter Hine). It was common for members of the community to care for the sick, as well as to provide goods for Schaghticoke members and to be paid by the overseer. Tom Kelly is never mentioned again in the overseer records, yet the Final Determination assigns his wife, Marianne, Schaghticoke status and assumes they lived in tribal relations. STN FD, Endogamy Table 3, at 152. By including this marriage and ascribing a 1/0 (STN to unknown) stating that Marianne was Schaghticoke Indian, causes their child, Eliza, to be regarded as a Schaghticoke Indian. This, in turn, affects the endogamy rate when Eliza married Alexander Value Kilson. The Final Determination BIA lists their marriage is a 1/1 (STN to STN).

There are many other individuals who fall in this category of being assumed to be members of the group and living in tribal relations, even though they are mentioned only briefly or in a non-definitive way in an overseer's report or similar record. Examples of such individuals who figured prominently in raising the STN endogamy rate are:

Abraham Rice/Martha Chappel, (FD Endogamy Table 3, 151);
Dennis Mauwee/Polly, *id.* at 151;
Joseph Chuse Mauwee/Sarah, *id.* at 150;
Elihu Chuse Mauwee/Sarah, *id.* at 150;
Peter Sherman/Sibbil, *id.* at 150;
Rufus Bunker/Roxa, *id.* at 150;
Benjamin Chickens/Sarah, *id.* at 150;
Schaghticoke/Schaghticoke, *id.* at 152;
Job [Suckanuck?]/Eunice Job, *id.* at 153;
Alexander Kilson/Parmelia Mauwee, *id.* at 154;

Andonijah Cogswell/Unknown , *id.* at 155; and Elihu Mauwee/Alma Mauwee, *id.* at 155.

Most of these individuals are discussed in detail later in this section. *See* section VII.C.2 below.

The second problem with this principle is the inclusion of children of such a marriage, even if those children entered into exogamous marriages. The defect in this reasoning arises when the parents did not maintain contact with the group. In such a situation, the children most likely did not continue to have contact with the group, especially when the parents moved away from the reservation or the Indian parent died and the child did not acknowledge their Indian heritage. For example, Charlotte Mauwee married Timothy Vandore and their daughter, Lorraine is said to have had minimal contact with the group despite living in Kent. Her lack of tribal relations is evident in the fact that she never signed a petition despite living to 1900. STN FD Endogamy Table 4, at 158. If a person was not living in tribal relations and did not continue to maintain contact with the group, then that individual should not be included in the endogamy calculations. Nonetheless, the Final Determination did so based merely on descent from that person's parents, even without evidence of continued tribal relations.

The third problem is that such children, even if involved in an exogamous marriage, would still be included in the Final Determination's calculations regardless of whether they left the group and did not maintain tribal relations.

Joseph Kilson is an example of a member of the group moving away from the reservation. He married both Mary Jane and Nancy Kelly, who have not been verified to be members of the group. After his second marriage, to Nancy Kelly, they moved to Michigan and then to New York, remaining away about nine years before returning to the

Kent area. He died approximately six years after returning to the area. All of his children moved to other areas and did not maintain contact with the group. STN Family Tree Maker ("STN FTM"). Nonetheless, the Final Determination included these children on the endogamy charts. Despite doing so for purposes of endogamy rate calculation, the BIA had advised the petitioner that the same descendants of this family line had to be removed from the membership rolls because they did not maintain tribal relations. STN FD, at 24; *see* section IX below. Thus, the Acting Assistant Secretary has employed a double-standard, including Joseph Kilson descendants for endogamy purposes but then requiring the petitioner to delete them for absence of continual tribal relations reasons.

The Final Determination's second stated principle is: "If a Schaghticoke individual who entered into an exogamous marriage continued to participate in Schaghticoke activities (was named in overseers' records, signed petitions, etc.), then the marriages of his/her children, whether endogamous or exogamous, are included in calculating the ratios [of endogamy]." STN FD, at 24. This principle defies common sense. It posits that the *endogamous* marriage rate should be defined to include *children of an exogamous* marriage who *themselves entered an exogamous* marriage. This principle apparently would apply even if the children in the subsequent exogamous marriage were not in tribal relations. The problem with such an approach is even more pronounced if the parent involved was included in the STN community based upon questionable or minimal evidence, such as mere mention in an overseer report. Once again, the problem is the Final Determination's failure to articulate a meaningful approach to determining whether an individual, a married couple, or their children lived in tribal relations.

The Final Determination's third stated standard is: "If a Schaghticoke individual who entered in an exogamous marriage ceased to participate in Schaghticoke activities (was not named on overseers' records, did not sign petitions, etc.), then that individual is presumed to have abandoned tribal relations and the marriages of his/her children are not included in calculating the [endogamy rates]." STN FD, at 24. This standard is correct and would be a valid guiding principle for determining intermarriage rates. The problem is that the Final Determination did not follow it. There are numerous instances where individuals who are critical to the Final Determination 's calculation of endogamy appear minimally on the records. Despite the Final Determination 's statement of this standard, for example, individuals who did not appear on overseers' lists or petitions, or appeared only once and did not show other signs of continuous tribal relations, were included, along with their entire family lines, in the endogamy rates. For example, the Chappel family is not mentioned in any overseer report, tribal petition, the Stiles' Report, or any tribal membership list. Nonetheless, the Final Determination included them in the endogamy charts. Other individuals who present this problem are Rufus Bunker, Marianne Chappel, and Thomas Kelly.

As this discussion demonstrates, the Final Determination made key errors in establishing the principles that would guide its definition of community for purposes of calculating endogamy rates. The prejudicial effect of these flawed principles is clearly illustrated by the inclusion of the Chappel family in the endogamy charts. Including this family is critical. Without this family line, even under the Final Determination 's generous approach and the inclusion of other individuals who should not be counted, the endogamy rates (improperly used in the Final Determination) for the post-1810 period

fall well below the 50% level. This strained effort to add the Chappel line shows the "trickle down" effect of the overly-permissive endogamy principles and the corrupting effect they had on the Final Determination.

The problems with the Chappel family line are discussed in detail later in this section. *See* section VII.C.2 below. This family is not even mentioned in the Proposed Finding, and its inclusion hinges upon a single land document cited by the STN. The land document lists the wife of the late Aaron Chappel as being Hagar/Haner. The 1831 document describes the sale of land purchased by Aaron in 1805. The document also lists Aaron, Jr. (who can be assumed to be the son of Aaron); Isaac Rogers and Deborah, his wife, of Sheffield, Berkshire County, Massachusetts; Abraham Rice and Martha, his wife, of Kent in Litchfield County, Connecticut; and Miriam Kelly of Kent, Litchfield County. The document does not identify why these individuals are listed.

It is from this document that the STN and the Acting Assistant Secretary have assumed that Deborah, Martha and Miriam (Marianne) are the children of Aaron Chappel and Hagar/Haner, and allowed the Chappel name to be included in the endogamy charts. This was the only document that named Marianne Kelly and made a possible connection to individuals assumed to be her parent/parents. If there was no document that named Marianne's parents, the Final Determination could not state that one of her parents was Schaghticoke and therefore make it impossible to record her on the endogamy chart as being Schaghticoke and giving her marriage to Thomas Kelly a 1/0 designation, which made her children part of the Schaghticoke group.

This is the trickle down effect that allowed Marianne's daughter, Eliza to be considered a Schaghticoke and her marriage to Alexander Value Kilson designated as a

1/1 on the endogamy table. This assumption also allowed the marriages of Marianne's granddaughters, Mary Jane and Nancy, to each be considered a 1/1 marriage on the endogamy table when they married Joseph Kilson.

At the time of the Proposed Finding, there was no evidence to support the conclusion that Aaron or his wife were Schaghticoke, or even Indian. Nothing exists other than the mention of Hagar/Haner on the 1831 deed along with Marianne. Working backwards from Marianne's daughter Eliza, who was a Schaghticoke tribal member by virtue of her marriage to Alexander Value Kilson, the Final Determination assumed that Marianne was Schaghticoke, and if Marianne was Schaghticoke, then at least one of her parents must have been Schaghticoke. There are many possible explanations for that listing, however, that would not lead to the conclusion that Aaron or Hagar/Hanar were Schaghticoke. One of the reasons to suspect Aaron and Hagar/Hanar were not Indian was the fact that the land subject to 1831 document was transferred without petitioning the General Assembly for either the purchase or the sale of the land. During that period, Indians could only sell land through such a petition. It should also be noted that when Aaron Chappel purchased the land in Connecticut in 1805, he did so without an overseer and gave seven promissory notes to Ebenezer Preston Jr. to purchase the land. (Ex. 42). In addition, it is unlikely that a promissory note would have been given by an Indian to purchase the land. Another reason to suspect that Aaron and Hagar were not Schaghticoke Indians is the fact that neither of them were mentioned on Stiles Report. They are not mentioned on any overseer report during their lifetime.⁴³

⁴³ An overseer report notes Marianne, at the time of her burial in 1862, when her daughter Eliza was married to Alexander Value Kilson and living on the reservation. Many non-

The Final Determination nonetheless included Aaron and Hagar/Haner on the endogamy/exogamy chart. The Final Determination notes "there is insufficient evidence to determine which partner was Schaghticoke, nor is there evidence to exclude the possibility that both partners were Schaghticoke. This marriage has been included in the calculations as "presumed exogamous." STN FD, at 26. Under the notes on Table 3 of the endogamy chart, the Final Determination states "[e]ither Aaron Chappel or the mother of his children was probably Schaghticoke; STN analysis hypothesized that 'Haner/Hager' was the Indian. However, the data submitted does not indicate that Hagar was the mother of the children - only that she was his widow of 1831." STN FD, 151. Despite these statements, the Final Determination included the couple on the Table 3 as either 0/1 or 1/0 (1 being Schaghticoke and 0 being unknown). By including them in this way, the Final Determination set in motion a chain of cascading results under that caused children of that marriage to be included as endogamous.

Since issuance of the Proposed Finding new evidence has been found to confirm that Aaron Chapel was not an Indian. The 1982 *History of Dover Township* edited and issued by the Dover Historical Society, identifies Aaron Chappel as a non-Indian "who settled on the mountain during the Revolution." Ex. 43; *see also* Ex. 44. Thus, it is now clear that the husband of this marriage was not a Schaghticoke Indian, and there is no evidence to support the Final Determination's conclusion that the wife Hagar/Haner was a member of the group or an Indian.

New evidence shows that Aaron lived in the Kent area as early as 1771. This is shown by the fact that he registered his animal earmarks (the method used at that time to

Indians are buried there, as indicated on the STN's submission listing the individuals at the cemetery. *See* SN-V017-D119.

brand cattle as personal property) with the Town of Kent. Ex. 45. He was still there in 1777-78, as indicated the in tax records, as legal resident of the Town of Kent. Ex. 46. Aaron Chappel also bought land in Kent in 1805. Ex. 42. The property appears to abut land that he already owned or leased in Dover, New York. If he were part of the Schaghticoke he would have been included on Stiles Report. In addition, he would have been under the supervision of an overseer, and the overseer would have petitioned the General Assembly to approve the land purchase. The fact that none of these records exist further supports the conclusion that he was not an Indian.

With regard to Hagar/Haner, new evidence from the 1830 Census shows her listed under the household of Aaron. He is listed as non-Indian. She is listed as over age 55, which means she should have been listed on the Stiles Report (having been born at least by 1775). Ex. 47. New evidence from the 1840 Census shows her as a non-Indian as being over 55 years of age. Ex. 48. This evidence is significant because, in addition to showing her age and the fact that she was non-Indian, it demonstrates that Hagar was living in the Kent area. If she were a member of the Schaghticoke there should have some additional evidence of her as such in overseer reports or other documents pertaining to the group. As with Aaron, there is no evidence that supports the Final Determination's conclusion that she was a Schaghticoke or an Indian. In fact, all of the evidence is to the contrary, defeating the Final Determination's effort to assign Schaghticoke status to one of the Chappels. The Final Determination relied upon extremely weak circumstantial evidence to bootstrap the entire Chappel family line in to calculations under section 83.7(b)(2)(ii), and this new evidence confirms that doing so was in error.

As this example shows, the Final Determination eliminated virtually any requirement for proof of membership in the STN community for purposes of endogamy rate calculations. It is clear from this discussion that the very principles upon which the Final Determination based the endogamy calculations were seriously flawed and improperly applied. The Final Determination's standards for inclusion in the charts were so weak and unreliable as to render the resulting calculations of little or no value.

2. The Final Determination's Incorrect Analysis of Specific Individuals

The Final Determination's errors in including certain individuals in the endogamy rate calculation were not limited to the Chappel family line. All of the following individuals should not have been included for the reasons noted.

Roxana Mauwee. The Stiles Report lists Roxa Mauwee, who was three years old. SN-V026-D0187. The STN submission states that she married Rufus Bunker, thus allowing the Bunker children to be listed as Schaghticoke. STN FTM. Rufus Bunker and a "Roxanna" had a daughter named Sarah, who married a Van Rensselaar. Sarah was born circa 1796, according the 1880 Federal Census of Amenia, Dutchess County, New York. When she died in 1883, at age 87, her parents were listed as Rufus and Roxanna Bunker. *Id.*

The marriage for Rufus and Roxanna is listed on Table 3 of the Final Determination's endogamy chart as an STN to STN (1/1) marriage. Table 3 included this Roxanna as Roxanna Mauwee, supposedly listed on the Stiles Report. This would mean that Roxanna Mauwee was ten-years old when she had Sarah, which is highly unlikely. Both the death record and the 1880 census clearly indicate a birth year of 1796/7 for Sarah, and Stiles' report listed "Roxa" as three-years old in 1789. STN FTM.

These records, when analyzed, make it improbable that Roxa, Elihu's child, would be the same person as Roxanna Bunker. In addition, the History of Cornwall, by Edward Starr, printed in 1926, states that Rufus Bunker had a non-Indian wife named Roxa. *Id.*

Rufus Bunker. Evidence that requires deleting Roxanne from the endogamy charts are found in the probate record of Elisa Warrups Chickens, alias Mauwee. Recorded in 1837, this record states that "Oliver Burnham, Esq. of Cornwall was to sell the lands belonging to Jeremiah Coxel, Rufus Bunker and Peter Mawee, Indians, children and heirs at law of Elisa Warrups Chickens alias Mauwee then late of Cornwall . . . for support of Coxel." *Id.* The Stiles Report includes "Jer Cokshure," age three years, but it does not list his parents. One of the other children listed on the probate record of Elisa Warrups Chickens is Rufus Bunker, born c. 1779. He therefore should have been listed on Stile's Report, if he had been a member of the group. However, since Jeremiah Coxel and Rufus Bunker were children of Eliza, and Peter Mauwee was also her child, it would appear she had the children from different relationships other than Peter Mauwee, the Schaghticoke Chief at that time. Jeremiah appears to have been from a relationship with a member of the group, which enabled him to be included on Stile's Report. However, Rufus Bunker was not on Stiles' list. Therefore, he most likely was not a member of the group. This is due to the fact that his father was not Schaghticoke and Eliza, his mother, was only a member of the tribe due to her marriage to Peter Mauwee.

Although Rufus Bunker was an Indian, as he has the blood of his mother Eliza, whose family was Indian, it is unlikely he was a Schaghticoke. STN FTM. This would explain the absence of Rufus Bunker's name on the overseer reports, as well as the fact that he is not listed on the Stiles Report. During the period Rufus Bunker had children,

the overseer paid for schooling of Indian children whose parents belonged to the group. SN-V017-D0119; SN-V017-D0120. No overseer report shows a record of paying for the education of Rufus Bunker's children. The absence of Rufus Bunker's name on the Stiles Report, overseer reports, petitions, would indicate that he was not considered a member of the group. Therefore, Rufus Bunker and his marriage to Roxanna should be removed from the endogamy charts. Neither one of these individuals was Schaghticoke.

Sarah Chuse Mauwee. Another marriage in error on the Final Determination's endogamy charts is Joseph Chuse Mauwee and his wife, Sarah. Stiles listed Sarah as "having been born in the East Haven tribe." SN-V026-D0187. She would have been carried on the STN overseer reports, because she was the wife of Joseph Chuse, who was a Schaghticoke, but she certainly was not a Schaghticoke herself.⁴⁴ The East Haven tribe was not Schaghticoke. The Final Determination therefore erred in treating this as a 1/1 endogamy marriage. Instead, it should have been 1/2.

Benjamin Chickens. The Final Determination erred in listing Benjamin Chickens as a Schaghticoke. Benjamin is not listed on the Stiles Report, even though he was living in the area according to the 1810 Census. STN FTM. As noted above, his daughter, Eliza, who married Peter Mauwee, was not Schaghticoke either. There is no woman listed on the Stiles Report with the surname Chickens who could have been Eliza's mother or the wife of Benjamin. The reason Eliza is listed in the Stiles Report is because she was the wife of Peter Mauwaa (a.k.a. Sherman), the Schaghticoke chief. It therefore appears that the Chickens family started receiving services because of the marriage of

⁴⁴ The spouses of Schaghticoke Indians were listed on overseer reports, as they received services. This does not mean, however, that they should be considered Schaghticoke for purposes of endogamy.

their daughter into the Schaghticoke community. There is no indication of the identity of Eliza's mother, Sarah, listed on the Table 3 of the Final Determination's charts as the wife of Benjamin Chickens, or evidence that she was Schaghticoke. Thus, there is no evidence to support the conclusion that either of Eliza's parents were Schaghticoke. Consequently, she cannot be considered Schaghticoke. The chart should be corrected to show the union of Benjamin Chickens to Sarah as 0/0 instead of 0/1.

The Chappel/Kelly/Rice Line. As discussed above, one of the most grievous errors in the Final Determination's endogamy analysis is the inclusion of the Chappel family as being Schaghticoke. The Final Determination included them on the endogamy/exogamy chart, even though it is abundantly clear that there is insufficient evidence to support the conclusion that they were Schaghticoke, or even Indian. As the Final Determination itself stated, "there is insufficient evidence to determine which partner was Schaghticoke, nor is there evidence to exclude the possibility that both partners were Schaghticoke." STN FD, at 151.

According to the Final Determination's own directions as to how to chart the endogamy analysis, "[i]f a Schaghticoke individual who entered into an exogamous marriage continued to participate in Schaghticoke activities (was named in overseers' records, signed petitions, etc.), then the marriages of his/her children, whether endogamous or exogamous, are included in calculating the ratios below." STN FD, at 24. Under this instruction, the Chappel family line should *not* have been included, even if one of the parents was in fact Schaghticoke. Nowhere does the Chappel name appear in any Schaghticoke record. There is no vital record showing that they were Indian. Nor did the land transfer in the Chappel name take place by petitioning the General

Assembly, which had to be done at that time if the seller was Indian. Moreover, Aaron Chappel resided in Dover, Dutchess County, New York, not Kent, and he is listed in the Census as a non-Indian. Ex. 47. No one with the surname of Chappel/Chapel is on the Stiles Report, nor is anyone listed with the first names of Aaron or Hagar/Haner.

Even though the Final Determination stated this was a presumed exogamous entry, they coded it at 0/1 or 1/0, and gave one of the parents credit for being Schaghticoke. By the inclusion of this family on the chart, the Final Determination therefore also included the Chappel children and listed them as members of the group. the Final Determination therefore ascribed "1" to each of the children, meaning they were Schaghticoke. By doing so, the Final Determination dramatically skewed the entire endogamy chart by adding individuals who would later be identified as participants in endogamous marriage when they married person of known Schaghticoke descent.

Further evidence that the Chappels were not Schaghticoke is found in the Census records. Indians living on reservations were not listed until 1870, because before that time the Census was not supposed to enumerate Indians in tribal relations. Beginning in 1800, the Census records listed the Chappels. STN FTM. Thus, they obviously were not part of the Schaghticoke Indians living on the reservation. Indeed, if they were Indian, they should not have been listed on the Census at all. This adds to the doubts that the Chappel family, from whom the Kellys appear to descend, were Indian. In any event, they clearly were not Schaghticoke, as they did not descend from any individual mentioned on the Stiles Report. The Chappel marriage therefore should be changed on the charts as 0/0. In fact, the family should not be listed on the endogamy table at all, as neither parent could be shown to be Schaghticoke.

Another questionable designation of the Chappel line is found in the Final Determination's treatment of Abraham Rice and his wife, Martha Chappel. Although Abraham Rice appears to be Schaghticoke because he is listed as ten-years old according to the Stiles' Report, neither Martha nor her parents were included. The 1850 Federal Census listed Martha as age 71, and she therefore should have been listed on Stiles Report as age eight. There was no one listed as Martha, of any age, as a child on the Stiles Report. Thus, the Abraham Rice/Martha Chappel listed on Table 3 would be another exogamous (1/0) marriage rather than endogamous (1/1).⁴⁵

Deborah Chappel is identified as the other daughter of Aaron Chappel. She married Isaac Rogers of Sheffield, Berkshire County, Massachusetts. Deborah Chappel's name does not appear on any Schaghticoke record. Isaac Rogers is included on the 1810, 1820 and 1830 Sheffield, Berkshire County, Massachusetts Federal Census returns. Ex. 50. Based upon Census return research, it is clear that there were children living in the household, who probably were their children. *Id.*. The petitioner did not submit any further evidence regarding these other individuals in the household. Nonetheless, the Final Determination included them in the endogamous chart as being 1/0. They should be deleted from the charts due to Deborah Chappel's parents not being substantiated (see discussion under Aaron Chappel) as being Schaghticoke, and the fact that there is no evidence that Isaac Rogers was an Indian, much less a Schaghticoke.

As discussed previously, Marianne's lineage is important because the Final Determination considers her daughter, Eliza Ann Kelly, to be Schaghticoke. Prior to her

⁴⁵ There are no Rice descendants in today's STN membership. Thus, this marriage should not be included in the endogamy charts. The listing of a daughter, Sarah Rice to William Henry Fowler, appears to be in error as well, for they have no descendants in the modern community and could not be found in any census examination.

marriage to Alexander Value Kilson, she had two daughters, Mary Jane and Nancy, by an unknown relationship. She then married Alexander Value Kilson, a Schaghticoke, and the Final Determination assigned the marriage a 1/1 endogamy rating. There is no reliable evidence, however, that Marianne (her mother) was Schaghticoke. The 1850 Census lists a Miriam Kelly as 68-years old and did not identify her as Indian.⁴⁶ STN FTM. This very possibly could have been "Marianne," in which case she probably was not Schaghticoke, or even Indian. In addition, the only Thomas Kelly listed on the pertinent census rolls is found in New Haven in 1830. The Census lists him and his family as non-Indian.

Although Marianne was buried at Schaghticoke, this is probably because her daughter Eliza Ann Kelly was then married to one of the Schaghticoke, Alexander Value Kilson. Neither she nor her husband, Thomas Kelly, have been documented as Indian, nor were they listed in the Stiles Report. Their ages, as recorded both in STN submissions and on Federal Census returns, indicate that they were most likely born prior to 1789, and they should have been listed as Schaghticoke by Stiles. Since they were not on Stiles' list, their marriage should not be on the tables. The Final Determination erroneously listed this a 1/0 marriage, regarding Marianne as the Schaghticoke Indian, when it should have been a 0/0.

The Final Determination lists Alexander Kilson/Parmelia Mauwee on Table 3 as an STN to STN marriage. However, the 1830 Census lists Alexander as non-Indian, STN FTM, and there is no evidence that discounts this designation. Kilson reportedly was

⁴⁶ 1850 Kent, Litchfield, CT Federal Census, M432, Roll 43, household 1000/1054 of Nelson Potter, Miriam Kelly, 68, f, with no occupation or relationship listed, born Conn. Incidentally, on the same page in another household was a Luther Kelly, listed as non-Indian.

buried on the reservation. There is no documentation, however, that he lived on the reservation. As noted above, burials of non-Indians in the Indian cemetery was allowed at that time. Thus, his burial at Schaghticoke probably was because of his marriage to Parmelia Mauwee, a Schaghticoke. The available evidence therefore indicates he was not Indian. Thus, the endogamy rate of 1/1 should be changed to exogamous (0/1).

On Table 3, the Final Determination lists the marriage of Alexander Value Kilson to Eliza Ann Kelly as an STN to STN marriage. Eliza Ann Kelly is the daughter of Marianne Chappel and Thomas Kelly. The Final Determination lists daughters, Mary Jane and Nancy, as Kellys, with the father unknown.

Nearly nine years after the births of these two daughters, Eliza married Alexander Value Kilson. The daughter of Eliza and the unknown father, Mary Jane Kelly, married Joseph Kilson, a Schaghticoke (who later married her sister, Nancy). In addition, Mary Jane also married Truman Bradley, a Schaghticoke, in 1893. As discussed above, Eliza has not been documented to be Schaghticoke. Nor were her daughters, Mary Jane and Nancy, before Eliza married Alexander Value Kilson. These marriages, of mother and daughters, must be corrected on the charts accompanying this report, to show they were not Schaghticoke to Schaghticoke.

Dennis Mauwee. Another endogamy calculation error involves Dennis Mauwee, who is listed on Table 3 as being married to a "Polly." Nothing is known about Polly, and the Stiles Report does not list any person with that name. Since her children were born in 1802-1812, she should have been listed on Stiles' 1789 Report as a Schaghticoke Indian. Thus, the Dennis/Polly union as listed on page 151, also needs to be assigned a exogamy (1/0) designation instead of endogamous (1/1).

Henry Harris. On Table 3, the Final Determination lists Abigail Mauwee as married to Henry Harris. They did not marry until 1864, but their reported son, James Henry Harris, was born in 1849. STN FTM. According to their marriage record, Abigail Harris, 34, married Henry Stephen Toncas, 47. Both were born in Kent, and they were residing in Stratford. *Id.* It was the first marriage for each.

The Proposed Finding questioned whether Henry Harris was Schaghticoke, stating. that "Harris was Indian, although his exact tribal background has not been determined." STN PF, 97. The Proposed Finding advised the STN to further investigate the records of Roxbury concerning the Tocket, Pene and Kehore families, who were identified as Indians, to see if they were somehow connected to Henry Harris.

The Final Determination states that the STN did not follow this advice to investigate the records of Roxbury and that "no additional evidence was submitted to clarify Henry Harris' Indian heritage." Nonetheless, the Final Determination treated him as a Schaghticoke and designated this marriage as endogamous (1/1). STN FD, at 186-7. This marriage designation should be changed to exogamous, STN to unknown Indian descent (1/2).

Helen Lossing Skickett/Charles Henry Harris. The Final Determination records that Helen Lossing Skickett eloped with Charles Henry Harris and that both were Schaghticoke. STN FD, at 163. It should be noted, however, that at this time Helen was still married to Henry Wilmot. STN FD, at 164. This union appears to be documented only by a newspaper article describing Henry Wilmot's efforts to locate his wife. SN-V059-D0199. Thus, the one year union should be deleted from the Final Determination's

endogamy charts. Helen Lossing Skickett cannot be counted as having two marriages during the same period of time.

Truman Bradley. On Table 3 of the endogamy charts, the Final Determination lists the marriage of Truman Bradley and Julia Kilson as endogamous. They married in March of 1846. Their reported daughter, Sarah, who married in March of 1867, stated she was 21-years old at the time of her marriage. Thus, her birth would have preceded the marriage of Julia and Truman Bradley.

As a result of the information provided at the time of his fourth marriage (1893), one year after Julia died (1892), it also appears that Sarah was not the child of Julia, but of one of Truman's previous marriages. In addition to the age discrepancies of Sarah and the marriage date, the probate of Julia's property did not list Sarah as daughter or heir of Julia. It should be noted that the list was created by Truman. However, Sarah's children were listed as heirs of Truman on his probate record. STN FTM. Thus, another marriage of at least one year, of a Schaghticoke to unknown, should be included in Table 3 for Truman Bradley. This means there should be another marriage for Truman Bradley to an unknown that should be coded 1/0, thus further reducing the endogamy rate. Even though this information was in the record, the Final Determination did not use it.

There are many persons mentioned on the Final Determination's endogamy charts whose names appear minimally on overseer reports but for whom there is no further mention in the Schaghticoke records. Some of these individuals were simply mentioned on the overseer reports as having been buried, or given services in some other minor fashion, but they do not have descendants in today's STN, and little is known of a spouse or parent to them. Many of these individuals were not a part of the reservation

community through time. These individuals include, based on the page in the Final Determination's endogamy charts in the STN FD:

Page 152

- Ann
- Mim
- Schaghticoke
- Joseph Mauwee
- Jacob Mauwee

Page 153

- Pequot/Pan
- Pann/unknown
- Job Suckanuck/Eunice Jo
- Jermiah Tomuch/unknown
- Gideon Sherman/unknown
- Luman Taber Mauwee/Hannah
- Nehemiah/unknown
- Aaron Chappel, Jr./Unknown

Page 154

- Schaghticoke/Unknown
- Nancy Chickens/James Phillips
- Abraham Peters/Unknown
- Walter/Unknown
- Schaghticoke/Schaghticoke
- Luman Taber Mauwee/Sarah

Page 155

- Fear/Unknown
- Deborah Chappel/Isaac Rogers
- Nathan G. Cogswell/Melisa Price
- Adonijah Cogswell/Unknown
- Sarah Rice/William Henry Fowler
- Sarah Bunker/Van Rensselaer
- Lorainne Vandore/George Parrott
- Luman Bunker/Unknown
- Elihu Mauwee/Alma Mauwee

Page 156

- Eli Bunker/Fannie Maria Watson
- Melissa Vandore/Homer Harris
- Mary Ann Phillips/Riley Cogswell
- Emily Cogswell/Abner L. Rogers

Page 157

- Ann Cogswell/William Jenkins

Page 161

- Newton Cogswell/ Pauline Emma Hoffmann

Page 163

➤ Cornelia J. Bradley/James Fuller

Because there is insufficient information to show that these individuals were

Schaghticoke, they should not be listed on the endogamy charts.

D. An Accurate Endogamy Chart Shows that the STN Fail to Meet the 50% Threshold Throughout the 1810-1875 Period.

Based upon the foregoing analysis, revised endogamy tables can be developed. A corrected list that accounts for all of the foregoing problems would be presented as set forth in the following charts:

REVISED CHARTS

Names	Beginning Date	Ending Date	Type of Union	Notes
Joseph Chuse Mauwee/Sarah	Before 1789	1803	1/2	See discussion
Elihu Chuse Mauwee/Sarah	Before 1789	1809	1/0	See discussion
Peter Mauwee/ Eliza Warrups Chickens	Before 1789	1812	1/1	See discussion
Peter Sherman/ Sybbil	Before 1789	1802	1/1	
Rufus Bunker/Roxa	Not on Stiles List	Out	2/0	See discussion
Benjamin Chickens/ Sarah	Not on Stiles List	Out	2/0	See discussion
Aaron Chappel/ Haner or Hagar	Not on Stiles	Out	0/0	See discussion
Abraham Rice/ Martha	Abt 1800	1856	1/0	See discussion
Dennis Mauwee/ Polly	Before 1802	1812	1/1	
Peter Sherman/ Eunice Mauwee	1802	1812	1/1	
Jeremiah Cogswell/ Wealthy Gauson	1805	1848	1/3	
Charlotte Mauwee/ Timothy Vandore	1818	1835	1/3	
Alexander Kilson/ Pamela Mauwee	1820	1844	3/1	See discussion
Unknown/Lavenia	Bef 1824	Unknown	0/1	

Carter				
STN to STN	Abt 1830	1830	1/1	Birth of child only
Jabez Cogswell/ Marie Hamlin	Abt 1839	1850	1/3	
Eli Bunker/Fanny Maria Watson	1842	Before 1860	1/3	
Truman Bradley/ Unknown	1845	1846	1/0	Birth of Sarah See discussion
Truman Bradley/ Julia Kilson	1846	1892	1/1	
Ruben Rogers/ Delia J. Kilson	1846	Aft 1880	0/1	
Alexander Value Kilson/Eliza Ann Kelly	1848	1899	1/0	See discussion
John Skickett/Laura Carter	Abt 1848	1861-1867	2/1	
Albert Rylas/ Caroline Kilson	Abt 1849	1854	1/1	
Henry Harris/ Abigail Mauwee	1864	1895	1/ 2	See discussion
John Harris/Rachel Mauwee	1851	Aft 1870	2/1	
Jabez Cogswell/ Marcia Heddy	Abt 1851	1901	1/3	
Joseph D. Kilson/ Mary Jane Kelly	1852	Bef 1857	1/0	See discussion
Lazarus Frank/ Mary Ann Kilson	1855	1882	1/3	
Joseph D. Kilson/ Nancy M. Kelly	1857	1871	1/0	
Oliver Potter/ Caroline Kilson	Abt 1858	1860	3/1	
William Peters/ Rosetta Cogswell	1859	1891	3/1	
George H. Cogswell/ Sarah Lavinia Bradley	1867	Aft 1880	1/1	
Charles William Kilson/ Sarah Peters	Abt 1869	Aft 1875	1/3	
Theodore Abel/ Mary Jane Kelly	1872	1893	3/0	
Andrew Burr Phillips/Helen A. Bradley	1874	1892	3/1	
John Smith/Frances J. Bradley	1874	1911	3/1	

James Henry Harris/ Sarah Snyder	Abt 1875	1909	1/3	
George Wesley Bradley/Lillian J. Penfield	1877	1901	1/3	
Edward Watson/ Mary Ett Kilson	Bef 1879	Aft 1883	3/1	
Unknown/Harriet B. Frank	Bef 1879	1880	0/1	
Charles Lyman Kilson/Alice Estella Dwy	1880	Aft 1898	1/3	
William McGill/ Harriet B. Frank	1880	Unknown	3/1	
Charles Lane/Sarah Lavenia Bradley	Aft 1880	Bef 1909	3/1	
Henry E. Wilmont/ Helen Lossing Skickett	1881	1885	3/1	
Charles Henry Harris/Helen Lossing Skickett	1882	1882	Out	Still married to Wilmont, considered legally married to Wilmont
Walter Rylas/ Charlotte Jackson	1882	Unk	1/3	
Frank DuPrez/Ida Elizabeth Kilson	Abt 1883	Bef 1887	3/1	Birth of child
John Henry Bradley/Georgian V. DeCosta	1884	Unk	1/3	
Charles William Kilson/Mary Elizabeth Beers	Bef 1887	Unk	1/3	
David D. Thomas/ Ida E. Kilson	1887	Aft 1913	1/3	
John William Kilson/Ida Laura Staples	1889	1892/1898	1/3	
William Truman Cogswell/Gertrude G. Johnson	1890	1942	1/3	
Truman Bradley/ Mary J. Kelly	1893	1900	1/0	
George William Riley/Carey B.	1894	1935	3/1	

Phillips				
Frank White/Sarah E. Kilson	1895	Aft 1903	3/1	
Charles F. Hawley/Alice L. Bradley	Abt 1896	1902	3/1	
Peter Jessen/Mary Ett Kilson	1896	1915	3/1	
Hubert Johnson/Florence J. Smith	1896	1949	3/1	
Albert Bishop/Elsie Harris	1897	1898	3/1	
Charles Stevenson/Bertha Watson Kilson	Abt 1897	Bef 1903	3/1	
Erwin Dwy/Elsie Harris	Abt 1899	1900	3/1	
Alfred R. Storm/Grace E. Harris	Abt 1899	Bef 1920	3/1	See discussion
Herbert Williams/Grace E. Harris	1922	1958	3/1	See discussion
Louis Townsend/ Lois Harris	Abt 1900	Bef 1927	3/1	

By listing the number and duration of unions from the chart above, a far more accurate endogamy rate and intermarriage analysis can be arrived at on the same decade-by-decade approach used in the Final Determination.⁴⁷ Those revised and corrected rates are as follows:

Endogamous Marriages

1789	1800	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900
2	4	3	0	1	2	2	2	2	2	1	1
Total of endogamous marriages: 8											

Exogamous Marriages

1789	1800	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900
2	4	3	5	5	9	13	12	18	24	25	19
Total Exogamous Marriages: 51											

⁴⁷ Each column corresponds to a decade. Thus, the column for 1800 refers to the period 1801 to 1810, etc.

Endogamy Rate Percentage⁴⁸

1789	1800	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900
67%	67%	67%	0%	29%	31%	24%	25%	18%	14%	7%	10%

Intermarriage Rate Percentage⁴⁹

1789	1800	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900
50%	50%	50%	0%	17%	18%	13%	14%	10%	8%	4%	5%

⁴⁸ In calculating these percentages, the Final Determination’s practice of calculating each endogamous union twice (once for each partner) is used. If each such union is counted once, as a marriage as required by the regulations, the percentages would be even lower.

⁴⁹ This table uses the marriage rates as required by the terms of Section 83.(b)(2)(ii) and the approach used in *JBC*. This is the only valid calculation under the regulations.

As these tables indicate,⁵⁰ even using the Final Determination's flawed approach of

⁵⁰ The Final Determination offers no explanation as to why it is appropriate to look at endogamy by decade. If the Final Determination had looked at endogamy, even under its flawed approach, over the entire 1801-1875 period, the rate would have been only 40%, well below the carryover threshold. A result unfavorable to the petitioner also would have resulted if the Final Determination used quarter-century increments. The rate for marriages occurring in 1801-1825 would have been 33%, but including marriages that carried over from decade to decade during this period the rate would be 58%. The rate for endogamy occurring in 1826-1850 would have been 47%, and with carryover marriages the rate would be 49%. For 1851 to 1875 the rate of endogamy would have been 38%, and with carryover marriages the rate would be 47%. Under that approach, a full 50-year period (1825 to 1875) would not have qualified under the 50% carryover. This problem is shown by the following table:

1801 – 1875 – total of 65 marriages occurring during that period (did not include carryover marriages from 1789 to 1801).

16 endogamous – 49 out marriages	25%
doubling 32 – 49 out marriages	40%

1801 to 1825 - total of 20 marriages occurring during that period.

5 endogamous – 20 out marriages	20%
doubling 10 – 20 out marriages	33%

Figuring the marriages with the carryover from decade to decade

1800 to 1809	9 endogamous marriages – 1 out marriage	95%
1810 to 1819	8 endogamous marriages – 14 out marriages	53%
1820 to 1825	6 endogamous marriages – 18 out marriages	40%
Endogamous marriage rate for the period 1800-1825		58%

1826 – 1850 - total of 23 marriages occurring during this period

7 endogamous – 16 out marriages	35%
doubling 14 – 16 out marriages	47%

Figuring the marriages with the carryover from decade to decade

1826 to 1830	5 endogamous marriages – 11 out marriages	48%
1831 to 1840	6 endogamous marriages – 14 out marriages	46%
1841 to 1850	8 endogamous marriages – 15 out marriages	52%
Endogamous marriage rate for the period 1825 to 1850		49%

1851 – 1875 - total of marriages occurring during this period

4 endogamous – 13 out marriages	24%
doubling 8 – 13 out marriages	38%

1851 to 1860	9 endogamous marriages – 17 out marriages	53%
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calculating endogamy rates instead of intermarriage rates, the endogamous rates of 50% end in 1810. After that date, endogamy for the STN dropped dramatically. By the 1880's, when the overseer reported that the STN were scattered, the rate was 24/2 or 14%. This finding requires the Final Determination's analysis of endogamy to be rejected, even under its own terms. The rates are even lower when marriage rates are determined. Doing so, in turn, requires the final determination to be vacated because without a 50% rate throughout the 1800 to 1875 period, the carryover provision for political authority cannot be used, and the petitioner fails under criterion (c).

VIII. THE FINAL DETERMINATION'S CONCLUSION THAT CRITERION (b) (DISTINCT COMMUNITY) IS SATISFIED IS SUBSTANTIALLY BASED ON EVIDENCE LACKING PROBATIVE VALUE.

The Final Determination's conclusion that criterion (b) is satisfied is based on nonprobative and unreliable evidence and a manipulation of the evidence in violation of the regulations. For the nineteenth century, the existence of a distinct community is inferred from a defective and manipulated marriage rate analysis, as discussed in section VII above, and from declining rates of reservation residency that are not probative of the maintenance of a continuing community. For early the twentieth century, community is inexplicably found, contrary to the regulations, in extremely low residency rates combined with state recognition. For much of the rest of the twentieth century, the Final

1861 to 1870	6 endogamous marriages – 14 out marriages	46%
1871 to 1875	6 endogamous marriages – 17 out marriages	41%
Endogamous marriage rate for the period 1851 to 1875		47%

Determination relies on highly selective and unreliable excerpts from member interviews that are against the overwhelming weight of contrary evidence.

A. **The Conclusion That Distinct Community Existed From 1870 to 1900 Is Based on Inferences That Are Not Supported by Reliable or Probative Evidence and Is Contrary to the Acknowledgment Regulations.**

The Final Determination's conclusion that the petitioner satisfies criterion (b)'s community requirement from 1870 to 1900 is not based on any direct evidence of social and community activities. Instead, it is based on inferences drawn from marriage and residency rates that fall below the regulation's 50 percent threshold, coupled with state recognition. These determinations are not based on probative or reliable evidence and are contrary to the acknowledgment regulations.

By the Final Determination's calculations, both endogamy rates and residency rates fell sharply after 1870. Endogamy rates among Schaghticoke members, according to the Acting Assistant Secretary, were 42 percent for 1871-1880, 28 percent for 1881-1890, and a mere 7 percent for 1891-1900. STN FD, at 36-39. As discussed above, in-group marriage rates were significantly lower. Similarly, reservation residency rates, according to the Acting Assistant Secretary, were 48 percent in 1870, 40 percent in 1880, and substantially lower thereafter, although the evidence is insufficient to make a reliable calculation of the rate. *Id.* at 32-36.⁵¹

⁵¹ The State Interested Parties submitted evidence and analyses after the Proposed Finding demonstrating that residency rates were in fact significantly lower than those found in the Final Determination. For example, by 1880, only 34 percent of group members lived on the reservation, by 1900, the percentage had fallen to 30 percent, and in the first decades of the twentieth century, the percentage dipped below 10 percent. CT-V005-D0001, at 42; CT-V006-D0001. For a discussion of endogamy and marriage rates, see section VII above.

Despite the precipitous decline in both endogamy and residency rates, the Final Determination finds that these lower rates reflect a maintenance of strong kinship ties and contacts on and off the reservation. STN FD, at 36. The evidence of declining endogamy and residency rates, however, is not probative of the maintenance of community, particularly in the absence of any direct evidence of community for the period. Close kinship ties and contacts between on- and off-reservation relatives is not sufficient. Broadly based cross-family relationships are essential to demonstrating tribal community under the regulations. *Miami* FD, SC, at 5 (Ex. 5); *Nipmuc Nation* PF, at 122 (Ex. 23).

Lacking direct evidence for community for the last three decades of the nineteenth century, the Final Determination uses evidence that some portion of the group lived in relative proximity to one another as evidence inferring community. STN FD, at 36. The Final Determination's rationale is that, although this evidence does not satisfy the 50 percent requirement of § 83.7(b)(2)(i), it nonetheless is evidence from which one can infer the existence of a social community. *See* STN PF, at 15-18. This analysis fails for several reasons, not the least of which is that it is not supported by the acknowledgment regulations.

Section 83.7(b)(2)(i) provides that a petitioner shall be considered to have provided sufficient evidence of community for a particular period if it demonstrates that “[m]ore than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community.” 25 C.F.R. § 83.7(b)(2)(i). The rationale underlying this provision is plain: If a majority of the group

resides in close proximity in a largely exclusive area, the existence of community relations and activities can be presumed.

The Proposed Finding had suggested that, even when these factual predicates are not satisfied, community can still be presumed based on some undefined, lesser degree of geographic proximity, STN PF, at 15-18, and this view appears to have prevailed in the Final Determination. STN FD, at 36. Nothing in the regulations even implies that this approach can substitute for actual evidence of community. “As the Department employs it, geographic analysis gives rise to a presumption of interaction if half the petitioner’s members live in village-like settings that are predominantly Indian in character; ***otherwise the petitioner must demonstrate actual interaction, regardless of population concentration.***” *Miami Nation of Indians of Indiana v. Babbitt*, 112 F. Supp. 2d 742, 752 (N.D. Ind. 2000) (emphasis added), *aff’d*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002). That some smaller portion of the group lives in some lesser degree of geographic proximity cannot infer community under the regulations. Instead, the petitioner must offer actual evidence of community relations.

The Acting Assistant Secretary’s inferential analysis ignores significant documentary evidence that supports the opposite conclusion. In particular, the Schaghticoke overseer reports, as well as statements made by Schaghticoke members themselves, reference the disintegration of community ties. Repeatedly, the overseer reports refer to the difficulty in determining the number of Schaghticoke members, using phrases such as “so far as can be ascertained” and “so far as known.” *E.g.*, R. Fuller Report (1861) (SN-V001-D0162); Root Report (1865) (SN-V001-D0172); Spooner Report (1871) (SN-V043-D0126); Lane Report (1890) (SN-V047-D0019). For example,

in his 1882 report, Overseer Roberts stated: “As far as I can learn there are now 42 members, but *they are become so scattered, it is almost impossible to get the exact number.*” STN PF, at 96 (emphasis added). In his 1888 report, Overseer Martin Lane similarly used nearly identical language in reporting the difficulty in identifying the number of Schaghticoke members. STN FD, at 35.

The consistent inability, not just of one but of all the overseers, to determine with any degree of definitiveness their numbers speaks loudly about the lack of community relations. If there were the strong community relations that the Final Determination infers, then surely at least occasionally an overseer would be able to obtain clear information about the group’s membership.

Other contemporary observers confirm the lack of continuing ties because of the scattering of members particularly in the late nineteenth century and continuing into the twentieth. As discussed in the Proposed Finding, Speck and Dyer both provide a fairly detailed discussion of the Schaghticoke around 1900, but neither describe anything akin to the community activities that the Proposed Finding infers from some level of geographic proximity. STN PF, at 123. In fact, their descriptions support the picture reflected in the overseer reports that the Schaghticoke were a group in the process of dispersal, not one that was maintaining community ties. (CT-V004-D0035). Finally, even a central Schaghticoke figure, Lavinia Carter is quoted as saying circa 1881 that the members “were scattered like grasshoppers” and that she was not sure how many members there were. STN PF, at 102.

In sum, the Final Determination’s conclusion that community is demonstrated for the period of 1870 to 1900 reaches far beyond what the probative evidence allows.

B. There Is No Probative Evidence Supporting the Existence of Community from 1900 to 1940.

Lacking direct evidence of the existence of a distinct Schaghticoke community during the early twentieth century, the Final Determination contrives to infer that one must have existed. Following the inferential analysis created in the Proposed Finding and similarly used for the nineteenth century, the Final Determination's conclusions for the 1900 to 1940 period are not based on evidence that is probative of community. Moreover, the purported additional evidence identified for the Final Determination is singularly insubstantial and nonprobative.

The Proposed Finding infers the existence of a distinct community from 1900 to 1940 based on (1) some level of residential proximity far below 50 percent; (2) close kinship ties; and (3) state recognition. After close scrutiny, this inference of community cannot hold up. It flies in the face of the predominant evidence of dispersal and the absence of inter-family connections. Consistent with a recurring pattern of analysis, the Final Determination tries to turn this negative evidence into proof of community.

The documentary evidence is quite stark. Echoing the reports of individual overseers of the late nineteenth century, the State Park and Forest Commission reported in 1926: "There are, according to the best report that I can obtain, some fifty people who claim relationship to this tribe scattered through the state, but there are only three on the reservation." (CT-V001-D0006). Tantaquidgeon's report for the U.S. Indian Service in 1934 included similar findings of lack of community. (CT-V001-D0050).

Ironically, the Proposed Finding noted that, with each succeeding generation, more and more siblings from the various family lines moved away and lost contact with the group. STN PF, at 119. Yet, the Proposed Finding found in this constant dispersal of

group members a strong indicator of community. This process, which the Proposed Finding called “layering off,” somehow shows that the Schaghticoke group was based not on mere descendency but rather represented a socially cohesive group based on maintenance of tribal relations. *Id.* at 17-18, 121. How this could be, the Proposed Finding failed to explain. In fact, the Proposed Finding accepted the obvious fact that, even within the three main family lines, members of each generation lost contact and group identity. *Id.* at 121. This resulted in an increasingly narrow base.

This analysis is oddly circular. It assumes that because each family line narrowed generation after generation, social cohesion and tribal relations were maintained. It is extraordinarily weak evidence of community that an increasingly small core of a family line was able to maintain contacts within itself. In fact, just the opposite was happening in this “layering off” process. With each generation, a certain percentage of members were losing contact. The Proposed Finding stood this on its head, concluding that, because members were dispersing, the community core stayed together. What is significant, however, is not who remained behind, but that large numbers moved away. Stronger evidence of the breakdown of community is difficult to imagine.

The Proposed Finding nonetheless emphasized the purported strong kinship ties within each family line. Close kinship relations, of course, are not enough to demonstrate community for acknowledgment purposes. Instead, cross-family ties must be demonstrated. *Miami Nation of Indiana*, 112 F. Supp. 2d at 748; *Nipmuc Nation PF*, at 122 (Ex. 23). There is no evidence of significant inter-family connections. Indeed, members of different family lines that lived in the same places away from the reservation had no contacts of significance. There were Harris and Cogswell family members living

in both New Milford and Bridgeport in the early twentieth centuries, but the evidence shows that they had no community contacts or even knowledge of each other. STN PF, at 133.

The Final Determination built on the weak footings of the Proposed Finding, concluding that additional evidence supported the inferred existence of a community for this period. None of this purported additional evidence is reliable or probative of community existence. First, the Final Determination makes the wholly specious assertion that the residency and marriage patterns of the *nineteenth* century somehow proves that a community existed in the early twentieth century. STN FD, at 40. It makes no effort to explain how that could be so when the residency and marriage rates for this period were extremely low. At most, marriage and residency rates had fallen below 10 percent. CT-V005-D001, at 42; CT-V006-D001; STN FD, at 39. Moreover, given that the trend beginning several decades earlier was a dramatic decline in reservation residency and intermarriage, the fact that in the mid-nineteenth century rates were, at least in the Final Determination's view, substantial is not at all probative of the existence of community in the 1900 to 1940 period. This notion of community "drift" simply is not sufficient to satisfy criterion (b).

The Final Determination also suggests that a 1902 census of Schaghticoke members ordered by the Litchfield County court somehow demonstrates a connection between reservation residents and non-residents. STN FD, at 40. This is entirely speculative and unfounded. Nothing in this listing suggests anything about the maintenance of relationships between the reservation residents and others. Instead, it purports to be nothing more than a counting of Schaghticoke *descendants* throughout the

state, not Schaghticoke members who maintained tribal relations. *See* SN-V054-D0006, at 17. This is anything but probative of the existence of community.⁵²

In sum, the Final Determination's conclusions about community in the 1900 to 1940 period is based on the same faulty inference of community and remains dependent on state recognition to sustain it. The evidence that demonstrates the continuing trend of the dispersion of Schaghticoke members and the loss of community contacts is twisted somehow into proof of the maintenance of community. The evidence relied on is not probative of community, and the analysis employed is unsupportable. In the end, without the makeweight of state recognition, the evidence for criterion (b) is absent.

C. **The Final Determination's Conclusion That Criterion (c) Is Satisfied for the 1940 to 1967 Period Is Based on the Selective Reliance on Nonprobative Interview Evidence and Ignores the Overwhelming Weight of Consistent Interview Evidence Revealing the Lack of Requisite Cross-Family Relationships.**

The Final Determination bases its conclusion that a distinct community existed from 1940 to 1967 on interviews of Schaghticoke members that purport to show some level of interfamily contacts, coupled with state recognition. STN FD, at 60. The analysis of the interview evidence, however, is faulty at best and reflects a gross distortion of the record evidence. To sustain its conclusion that members of the three major family lines maintained social contacts, the Final Determination relied on very limited and isolated statements and ignored significant negative evidence demonstrating the lack of such contacts. Moreover, this is not merely a situation in which reasonable fact finders could draw different conclusions from the evidence; the limited interview

⁵² The Final Determination also suggests that there was some limited interview evidence about social contacts in the 1930s. STN FD, at 41. The interview evidence is discussed in detail in section VIII.C below.

evidence relied on by the Final Determination, viewed against the overwhelming contrary evidence, simply is not probative of the existence and maintenance of a distinct community during this period.⁵³

The Proposed Finding had concluded that there were serious contradictions and inconsistencies in the interview evidence such that criterion (b) was not satisfied. In particular, the Proposed Finding highlighted the extensive interviews of Catherine Velky, who, as the daughter of Howard Harris, sister of Irving Harris, mother of Richard Velky, and herself a council member, was extensively and intimately involved in Schaghticoke affairs. Her interviews, however, consistently exposed the lack of community connections, particularly across family lines, from 1940 to 1967. The Proposed Finding concluded that the petitioner had failed to address adequately her damaging interview statements. *See* STN PF, at 132.

The Final Determination asserts that “[a] review of the existing and new data” indicates that community existed from 1940 to 1967. STN FD, at 43. It explains away the contrary evidence from Catherine Velky’s interviews that was so central to the Proposed Finding as not an accurate description of Schaghticoke affairs when viewed in the broader context. *Id.* at 10-11, 45. Moreover, consistent with a mode of analysis that improperly relieves the petitioner of its burden proving the existence of community and political authority, the Final Determination discounts significant negative interview

⁵³ The Final Determination also relies on evidence regarding the political activities of the so-called Bearce period. STN FD, at 43-44. That evidence is addressed in section VI.C above. In particular, the Final Determination attempts to draw out from the Schaghticoke’s refusal to accept Bearce, a non-Schaghticoke, as a member an implied definition of community based on community, rather than descendency alone. *Id.* at 44. There is no evidence to suggest that the decision to reject his membership was based on anything other than his lack of Schaghticoke ancestry. *See* SN-V038-D0003, at 71.

evidence showing the lack of cross-family contacts by concluding that it does not *disprove* the existence of community. *Id.* at 47-48.

Prior to the Proposed Finding, the petition record included transcripts of four interviews of Catherine Velky conducted in 1976, 1996, 1997, and 1999.⁵⁴ CT-V004-D0030; SN-V016-D0127; SN-V037-D0102; KS-V0010D0053. As the Proposed Finding concluded, the interviews “are extensive and carefully done,” STN PF, at 132, and “are generally consistent with historical documentation, and fairly resistant to the interviewer’s sometimes leading questions.” *Id.* at 130. Indeed, her key statements about Schaghticoke community and political authority are strikingly consistent throughout the interviews. Given her central vantage point, the consistency, both internally and externally, of her statements, and the fact that the statements are largely contrary to the interests of the petitioner, the interviews ought to have been given heavy weight in the evaluation of criteria (b) and (c) for this period.

The Proposed Finding directed the petitioner to provide a new analysis of the interview evidence in an effort to explain the negative evidence in Catherine Velky’s interviews. STN PF, at 132. In a separate expert report, the petitioner attempted to depict Catherine Velky as especially reticent to talk about herself and that she was not involved broadly in Schaghticoke affairs because women were largely excluded in the 1950s to 1970s. SN-V071-D0030. Ironically, the Final Determination refuses to accept this explanation, noting that there were several women involved in the Bearce period and under Irving Harris. STN FD, at 10. Moreover, the Final Determination emphasizes that

⁵⁴ Two new interviews of Catherine Velky were done by the petitioner in 2003 and submitted for the Final Determination, but they contained little new information and are substantively consistent with the four prior interviews. SN-V066-D0041; SN-V066-V0045.

the petitioner failed to address substantively the interview statements, “which fairly consistently present descriptions of the STN activities as relatively limited.” *Id.* at 11.

Yet despite having rejected the petitioner’s explanation for Catherine Velky’s statements, the Final Determination concludes nonetheless that “her statements are not an accurate representation of community among the Schaghticoke between 1940 and 1967.” *Id.* at 45. This stands in sharp contrast with the Proposed Finding’s conclusion that her statements were consistent with documentary evidence. STN PF, at 130. The Final Determination asserts that her statements conflict with “a larger body of more reliable evidence” and that her statements should be minimized because of “the contentious relationships between major family lines that led to her downplaying the role and involvement of other families. . . .” STN FD, at 11.

The Final Determination’s turnabout on Catherine Velky’s significance is not based on probative evidence. First, the overwhelming body of reliable evidence from other nonresidents is entirely consistent with her interview statements. Second, there is no probative evidence to support the conclusion that she “downplayed” the role of non-Harrises because of the conflicts between family lines; rather, it was the lack of cross-family contacts that caused her view of the role of other family line members.

The significant statements in Catherine Velky’s interviews cover several important topics: (1) interfamily knowledge and contacts; (2) aid to other Schaghticoke families; (3) wedding and funeral attendance; and (4) care of the reservation cemetery. In each case, it is clear from her interviews that, prior to 1967, the contacts were almost exclusively within family lines and cannot be described as the sort of cross-family connections and relationships that are necessary for tribal recognition. *Duwamish* FD, at

38 (Ex. 24). The same conclusions are drawn from the interviews of others from each of the principal Schaghticoke family lines.

Catherine Velky's interviews repeatedly underscore the lack of interfamily contacts of any sort. She indicated that, during the time her father was purportedly chief, she did not know that there were any other families, other than her own, involved. KS-V001-D0053, at 29; CT-V004-D0030, at 30; SN-V066-D0045, at 16. She repeatedly emphasized that her family did not have contacts with Cogswell family members living in Bridgeport during the same time that her family lived there. KS-V001-D0053, at 41; SN-V037-D0102, at 12. Furthermore, she stated that they had only little contact with other Harrises (and did not even know her Storm family cousins – Grace Harris descendents), and none with non-Harrises, in New Milford. KS-V001-D0053, at 41; SN-V066-D0045, at 23.

The lack of cross-family contacts and knowledge is confirmed by representatives of the other main Schaghticoke family lines. For example, Truman and Theodore Cogswell stated that they never knew Howard Harris before the Bearce council of the 1950s and that their family never had any contacts with or even awareness of the Harris family living in Bridgeport. TC-V001-D0002, at 47-48. They also indicated they had no knowledge of the other Harris sublines. *Id.* at 81, 110, 116-17. This is completely consistent with Catherine Velky's statements. The Final Determination minimizes their statements by pointing to contacts that they had with Kilson reservation residents, Earl Kilson and Catherine Strever. STN FD, at 47. The distinction drawn by the Final Determination, however, underscores the problem of the interview evidence relied on by the Acting Assistant Secretary. Some off-reservation Schaghticoke may have visited

those on the reservation, but community relationships across family lines off the reservation were nonexistent to the point that Schaghticoke living in the same area did not have contact with or even knowledge of each other.

The same information is present in interview statements by Schaghticoke members from each family line or subline. Fred Parmalee, a Cogswell descendent, similarly expressed a near complete lack of knowledge of other Schaghticoke families. SN-V014-D0047, at 8, 13. In fact, in an interview conducted in 2003 after the Proposed Finding,⁵⁵ Fred Parmalee described visits with his grandmother Julia Cogswell Parmalee as involving Cogswell family members only. SN-V065-D0050, at 7-10. The Final Determination concludes that his interview statements “could not be *definitely* characterized as evidence against the existence of social contacts.” STN FD, at 46. This is an improper standard to judge evidence. In any event, the statements do plainly indicate that he was only aware of Cogswell family contacts and had little or no knowledge of other Schaghticoke families.

The same tale of the lack of cross-family knowledge was made by Doris Buckley, a Kilson family member. KS-V001-D0045, at 34. She and her mother would occasionally go to the reservation to clean up the cemetery, but had almost no knowledge of other Schaghticoke families. *Id.*; SN-V064-D0009, at 1. Grudgingly, the Final Determination notes that Doris Buckley, a former reservation resident, had “limited contacts even with other Kilsons.” STN FD, at 47. Yet, the Final Determination dismisses her as “not representative” of the Kilsons. *Id.* The point, however, is that the

⁵⁵ The State Interested Parties did not have the opportunity to review and comment on these 2003 interviews as they were submitted by the petitioner at the conclusion of the comment period after the Proposed Finding.

contacts that did exist were not broadly maintained but were limited to a very few. Here was a former reservation resident, who made efforts to maintain the reservation cemetery, but had no social contacts with a broader tribal community.

Two new interviews conducted in 2003 by the petitioner similarly describe a lack of cross-family knowledge by two Grace Harris descendents. Claude van Valkenburgh, whose mother was born on the reservation, indicated that he had little or no knowledge of the Cogswells and no contact with them before the 1970s. SN-V066-D0035, at 2, 6. Similarly, Mary Fradette stated that she knew Kilsons and Cogswells lived on the reservation but knew nothing about them. SN-V064-D0026, at 7-8, 12, 15. In portions of an interview not submitted by the petitioner prior to the Proposed Finding, James Hennessey, a Jessie Harris descendent, indicated he only had contacts with Harris relatives in the New Milford area, did not visit the Kilson or Cogswell families, and did not know reservation resident William Russell or the Cogswells generally. SN-V064-D0046, at 10-12, 22.

Nowhere is the lack of cross-family contacts more evident than in the statements most interviewees made about their surprise at how many others they had not known about when reorganization efforts were first begun in the late 1960s and early 1970s. Catherine Velky stated many times that there were many, particularly Cogswells and Kilsons, that she had never met before, and that the reorganization efforts were in fact hampered by the lack of preexisting relationships. SN-V016-D0127, at 18-20; CT-V004-D0030, at 23-24; 39, 51. In fact, these statements were repeated in a post-Proposed Finding interview conducted by the petitioner. SN-V066-D0045, at 16.

Strikingly similar statements were made by numerous others. In a new interview conducted after the Proposed Finding, Marjorie Pane, a granddaughter of Grace Harris, stated that the most important accomplishment of the 1960s was “just getting everybody together” because “a lot of people, a lot of us didn’t know, even know one another. . . .” SN-V065-D0043, at 12; *see also* SN-V013-D0094, at 26 (Maurice Lydem). Theodore and Truman Cogswell confirmed the lack of knowledge particularly of the Grace Harris subline. TC-V001-D0002, at 79-81, 110-16. The difficulty of reorganizing the group in the late 1960s, and the surprise so many of the members had in meeting others that they previously knew nothing of, speaks volumes about the nature of the Schaghticoke community, or lack thereof, during the preceding decades.

Catherine Velky’s interviews indicated that her immediate family would occasionally provide aid to their relatives, Mabel Birch and her daughters, living in New Milford. SN-V037-D0102, at 7; SN-V016-D0127, at 23-24. She specifically denied that such aid was anything other than helping relatives in need, and it was not organized as a tribal activity and did not extend beyond the Harris line. *Id.* Her description of limited intra-family aid is confirmed by other members of her family. SN-V037-D0086 (Louis Moynihan); SN-V037-D0077 (Howard Charles Harris). Moreover, there is no evidence in interviews from members of the other family lines that suggests organized tribal assistance or even informal aid that crossed family lines.

Catherine Velky also stated that her family did not attend funerals or weddings involving Cogswell or Kilson family members. SN-V016-D0127, at 31-32. As a rule, gatherings only involved her family and did not include non-Harris Schaghticoke. *Id.* at 24. Interviews from every family line confirm this. SN-V013-D0094, at 45 (Kay

Kayser, Grace Harris descendent); SN-V014-D0055, at 12 (Olivia Pennywell, Cogswell descendent); SN-V065-D0050, at 18 (Fred Parmalee, Cogswell descendent); SN-V065-D0039, at 21 (Louise Moynihan, Howard Harris descendent); SN-V065-D0018, at 4 (Earl A. Kilson); SN-V064-D0026, at 5-6 (Mary Fradette, Grace Harris descendent); SN-V013-D0068, at 18-19 (Gail Harrison, Elsie Harris descendent); SN-V064-D0046, at 10-11 (James Hennessey, Jessie Harris descendent).

Finally, the interview evidence reveals a stark aspect of the lack of a Schaghticoke community concerning what one would ordinarily expect to be a significant tribal community resource: the reservation cemetery. Various interviewees, from different family lines, tell a similar story about how they and perhaps one or two immediate family members would try to tend to the cemetery, which seemed to always be in a uncared-for state. Howard Harris family members occasionally went up to try to clean up the cemetery. SN-V037-D0086, at 16; SN-V065-D0039, at 13 (Louise Moynihan). Kilson family members, both on and off the reservation, stated that they would tend the cemetery. KS-V001-D0045, at 60; SN-V064-D0009, at 1 (Doris Buckley); SN-V065-D0022, at 10 (Russell Kilson). So too would Grace Harris descendents. SN-V064-D0026, at 7 (Mary Fradette); SN-V013-D0094, at 31 (Kay Kayser). However, what is completely consistent throughout all of these interview statements is that these were uncoordinated, individual efforts. Only immediate family members were involved. Indeed, there was a generalized sense among these interviewees that no one else other than themselves separately was doing any work on the cemetery. This is particularly compelling evidence of the lack of cross-family community relations.

The Final Determination acknowledges that “there was not good evidence of communal efforts” with regard to cemetery maintenance as well as that there was a lack of cross-family aid and attendance at weddings and funerals. STN FD, at 47-48. It dismisses the lack of evidence, however, because “[t]his specific form of social relationship is not required to demonstrating community” or does not necessarily disprove the existence of other forms of social relationships. *Id.* Community-based cemetery maintenance or cross-family assistance may not be absolute prerequisites to satisfying criterion (b). However, the lack of such evidence certainly is highly probative of the nonexistence of community connections, and has been cited as such in prior acknowledgment decisions. *Muwekma* FD, at 79-84, 91-92 (Ex. 4); *Miami* FD, at 61-62 (Ex. 5). In this case, the lack of such evidence, revealed in interviews from members of all family lines and sublines, demonstrates that the minimal contacts that may have existed in the form of reservation visiting simply did not translate into broader community relations that are the essence of what criterion (b) requires to show continuous tribal existence. To simply dismiss the lack of such significant relationships as not necessary to proving community is specious at best and shifts the burden under the regulations from proving positively the existence of community to proving the nonexistence of community.

The Final Determination appears to attempt to discredit Catherine Velky’s interview statements by linking her with her brother, former chief Irving Harris. The Final Determination notes that that both Irving Harris and Catherine Velky expressed a negative view of Schaghticoke community and political activity prior to Irving Harris’s efforts to reorganize the group in the 1960s. STN FD, at 9-10. However, the Final

Determination attempts to explain away Irving Harris's negative comments as based on stressing the achievements of his administration and downplaying the roles of others. *Id.* at 10. In interviews done by both the petitioner and the State Interested Parties, Irving Harris consistently indicated the lack of community connections and the extremely minimal levels of political activity before 1967. CT-V007-D0023; SN-V064-D0036. Whatever prism through which Irving Harris may now view the events, the statements are consistent with the greater body of interview evidence that community relationships did not exist.

Against the weight of this consistent interview evidence of the lack of cross-family connections in many forms, the Final Determination's conclusion about the existence of cross-family relationships is drawn from the interviews of three former reservation residents: Russell Kilson, Katherine Strever, and Gail Russell Harrison. *Id.* at 44-45. First, all of these interviews were available for the Proposed Finding.⁵⁶ STN PF, at 130, 135; SN-V013-D0068; SN-V013-D0104; SN-V016-D0030. Thus, this was not new evidence. More importantly, the purported statements about cross-family visiting is so limited that it simply is not probative of the existence of a distinct Schaghticoke community.

Russell Kilson, son of Earl Kilson, Sr., was a reservation resident until about 1960. The Final Determination found significant in his interview statements that Howard Harris was a frequent visitor to the reservation and that Kilson had some familiarity with other members of the Howard Harris subline and some of the Cogswells. STN FD, at 44. Katherine Strever, daughter of Bertha Kilson Watson, was a reservation resident most of

⁵⁶ Missing portions of a 1997 second interview of Russell Kilson were submitted after the Proposed Finding. SN-V065-D0022.

her life. The Final Determination relied on statements she made regarding Howard Harris's visits to the reservation as well as the close relationship between her mother (a Kilson) and Jessie Hennessey (a sister of Howard Harris). STN FD, at 44-45. Gail Harrison (b. 1948), daughter of reservation resident William Russell, is an Elsie Harris descendent and was a reservation resident most of her life. The Final Determination relied on her statements relating to visiting reservation residents Frank Cogswell and his sister Julia Cogswell Batie, as well as gatherings that involved other Cogswells such as the Parmalees. STN FD, at 45. The Final Determination notes that she knew Earl Kilson because he lived on the reservation at the same time she did. *Id.*

Some of the evidence relied should have been easily discounted as insubstantial. For example, the mere fact that as a child living on the reservation Gail Harrison visited fellow resident Julia Batie or that Katherine Stever's mother had a friendship with one Harris family member says next to nothing about the existence of a broader community. Moreover, the nature of the interview statements about visits and gatherings on the reservation are consistent in the sense that they are quite vague as to when they occurred, who participated, and what happened at them. SN-V013-D0104, at 14-18 (R. Kilson); SN-V037-D0084, at 2-5 (R. Kilson); SN-V065-D0022, at 2-3 (R. Kilson); SN-V016-D0030, at 14-16 (K. Strever); SN-V013-D0068, at 5-9 (G. Harrison).

At most, the reservation visiting evidenced in these interviews represents the most minimal form of community connections. During this period of time, there were Harris, Kilson, and Cogswell family members on the reservation. Most of the reservation visiting involved visits to relatives on the reservation, with visits to non-relative residents largely limited or coincidental. For example, Gail Harrison emphasized that the visits

and gatherings she was aware of were principally Cogswell family members visiting Frank Cogswell or Julia Cogswell Batie. SN-V013-D0068, at 5. This is confirmed in interviews of non-resident Cogswell descendants. SN-V014-D0055, at 17-18 (Olivia Pennywell); TC-V001-D0002, at 24 (Truman & Theodore Cogswell).

Howard Harris is the one individual that is demonstrated as having made more than incidental visits to all reservation residents. He represents the proverbial exception that proves the rule. His interest was more with the reservation itself, however, than with maintaining contacts with members of a tribal community. As his children stated, he would talk to whomever was there at the reservation. SN-V037-D0077, at 3 (Howard Charles Harris); SN-V037-D0086, at 14 (Louis Moynihan)); KS-V001-D0053, at 29; SN-V016-D0127, at 1-2 (Catherine Velky). The mere fact that Howard Harris stands out as the exception is revealing about the lack of breadth in community connections. No others can be identified engaging in making similar cross-family contacts.

Moreover, what is most compelling is the fact that these contacts did not carry over into relationships across family lines beyond the reservation. It is exceedingly odd that, if maintaining contact with Cogswell or Kilson reservation residents was important, that the Howard Harris family would not even be aware of the existence of Cogswell family members living in Bridgeport during the same time period, as attested to by both Catherine Velky, KS-V001-D053, at 41, SN-V037-D0102, at 12, and Truman and Theodore Cogswell. TC-V001-D002, at 47-48. The complete absence of community ties between the Harris and Cogswell families in Bridgeport demonstrates that the links evidenced by the reservation visits were not to a tribal community, but to a place that some relatives were or had lived. Similarly, the evidence is undisputed that contacts with

Schaghticoke members in New Milford were quite limited and did not cross family lines. STN FD, at 47; KS-V001-D0053, at 41; SN-V066-D0045, at 23. Contacts with Grace Harris descendents were particularly attenuated. SN-V066-D0035, at 2, 6; SN-V064-D0026, at 7-8, 12-15; SN-V013-D0094, at 31, 45.

In sum, although there was some small degree of reservation visiting, it did not represent a broader network of community connections necessary to prove the existence of a distinct community. Catherine Velky's interview statements are highly consistent with and supported by interview evidence from all the family lines. The Final Determination's efforts at undermining her statements is simply unavailing. Even assuming that there were some basis to conclude that she undervalued the roles of non-Harrises – and no such basis exists in any of the interview or other evidence – it cannot explain away the simple and straight forward statements of the absence of knowledge and contacts with others that is repeated by others. The Final Determination bases its conclusions on the existence of community on statements of reservation residents about visiting that simply are not probative of the existence of a broader Schaghticoke community. Even the purported additional weight of state recognition cannot rescue the Final Determination's conclusions.

IX. THE FINAL DETERMINATION RECOGNIZES THE STN DESPITE ITS FAILURE TO INCLUDE KEY SCHAGHTICOKE DESCENDENTS IN VIOLATION OF THE REGULATIONS.

In an arbitrary abuse of her perceived authority, the Acting Assistant Secretary created a wholly fictitious tribal membership for the STN. After coercing the elimination from the membership rolls of one-third of the STN's self-identified membership, the Acting Assistant Secretary ignored the fact that the STN was unable to include within its

membership key Schaghticoke descendents who unambiguously and consistently refused membership in the STN. Rather than conclude that the acknowledgment criteria were not satisfied, as required by the Proposed Finding, the Acting Assistant Secretary just lumped the “unenrolled” Schaghticoke together with the enrolled STN members because that is what had to be done to acknowledge this petitioner.

The Proposed Finding had determined that, as then configured, the petitioner satisfied neither criterion (b) nor criterion (c). The problem was depicted to be with the petitioner’s membership list. The STN petitioner has defined itself, at least as of 1996, as excluding a large number of individuals that represent important family lines or sublines from the group’s history. These included (1) certain Kilson, Russell, and Elsie V. Harris descendents, who were and apparently for the most part remain members of the SIT faction, (2) certain Cogswell family descendents, who have eschewed membership in either the STN or the SIT, and (3) former Chief Irving Harris and his family. STN PF, at 20, 30, 212-13. According to the Proposed Finding, the excluded SIT faction and the Cogswells represented “important segments of the group” without which the petitioner could not be considered as representing a tribal community. STN PF, at 20. The excluded individuals were, in the Proposed Finding’s understated description, “a significant part of the social and political relations within the group between 1967 to 1996.” *Id.* Indeed, they include key former council members and others involved in the Schaghticoke affairs over the past several decades as well as representatives of principal Schaghticoke families. *Id.* at 182-83.

In addition to excluding these key Schaghticoke family lines, the STN petitioner’s membership list included a substantial number – approximately one-third of the

membership – of new members, primarily Joseph D. Kilson descendents, for whom there was no evidence of any community connections with the rest of the Schaghticoke group for a century. *Id.* at 21, 30.

Thus, the petitioner faced a double-edged dilemma: On the one hand, because of the irreconcilable conflicts that have driven some members to form their own separate group (the SIT) or simply to renounce their membership (the Coggsells and Irving Harris), the STN membership was seriously under-inclusive. On the other hand, in an apparent effort to create the appearance of a tribal community, the petitioner had enrolled over a hundred new members lacking social ties with the rest of the group since the early 1900s, making it substantially over-inclusive. The Proposed Finding suggested that this is but a simple enrollment problem, to be fixed by merely eliminating the Joseph D. Kilson descendents and returning the SIT members, Coggsells, and Irving Harris back to the fold. This is a far too simplistic view of the underlying dynamics, and the problems for the petitioner run far too deep than to be masked by just submitting a new membership list.

In response to the Proposed Finding, the STN bowed to the BIA's dictate and struck the Joseph D. Kilson descendents from its membership rolls. STN FD, at 50-51; SN-V054-D0008. It also apparently made some efforts to have at least some of the SIT members, Coggsells, and Irving Harris join (or rejoin) its membership, but this effort was largely unsuccessful. SN-V063-D0004; SN-V072-D0022. The Final Determination concluded that between 42 and 54 persons, or approximately 20 percent, *see* AC-V012-D0009, at 4, from the other factions remained unenrolled. *Id.* at 52.

In fact, in a last gasp effort, the STN petitioner claimed that on September 27, 2004 (the day before the end of the petitioner's reply period) fifteen SIT members had applied for and were granted STN membership. *Id.* Nine of those fifteen signed a letter on September 29, 2004, stating that they were not members of the STN and had no intention of joining the STN. Moreover, they stated that the September 27, 2004 letters they had signed

were signed under mis-guided [sic] information for the Schaghticoke Tribal Nation. This information was used in an attempt to trick us from resigning from our family's true heritage, the Schaghticoke Tribe. ***Our signatures were obtained by fraud.*** Any documents with our signatures concerning membership to the Schaghticoke Tribal Nation should be nulled and voided.

We are here by [sic] rescinding our previous letter that was faxed and mailed to you.

CT-V009-D0002 (emphasis added).⁵⁷ Despite having been given evidence of fraudulent efforts by the STN to satisfy the Proposed Finding's requirement that the SIT members be enrolled, the Final Determination blandly concluded that "[t]hese conflicting requests, made within days of each other and made in the last days before the petitioner's response to the PF was to be filed, do not provide sufficient evidence of these individuals' actual status with the STN." STN FD, at 52.

In the face of the STN's inability to meet the Proposed Finding's clear instruction that the SIT members, Coggsells, and Irving Harris must return to the membership, the Final Determination concluded the obvious: "There remain substantial elements from the

⁵⁷ By motion dated November 7, 2003, the State requested that the court amend the scheduling order to permit the submission of evidence regarding the allegations of fraudulent enrollment of SIT members. The petitioner opposed the motion, but requested alternatively that if the State's evidence was accepted, that it be permitted to submit materials in response. The court granted the motion, permitting both the State's and the petitioner's materials on this issue to be submitted to the BIA. STN FD, at 5.

community and political system as it existed before 1996 that are not on the list, although clearly part of the STN community.” *Id.* at 53. Those remaining outside the membership, despite the plain threat of failing to achieve recognition, were key Schaghticoke individuals: former council chairman and reservation resident Alan Russell and numerous other Russell family members; former chief Irving Harris and his immediate family; children and grandchildren of recently deceased reservation resident Russell Kilson; Truman and Theodore Coggsell and their family; former council member Shelley Nadeau and her family; and former council member Gary Ritchie and his family. *Id.* at 53-54.

Yet with this substantial body of key Schaghticoke remaining unenrolled, the Acting Assistant Secretary did an about-face and concluded that the STN did not need to have these key individuals after all. Starting from the principle asserted in the Proposed Finding that the BIA lacks the authority to recognize only a part of a group, STN PF, at 21 (citing *Historic Eastern Pequot* FD, at 13), the Final Determination states that the Acting Assistant Secretary could not recognize the STN without the unenrolled members as part of the tribe. STN FD, at 56. In seeming defiance of this straightforward conclusion made by former Assistant Secretary McCaleb, Acting Assistant Secretary Martin then concludes that the STN’s membership includes those unenrolled members who, despite the STN’s repeated efforts to enroll them, had clearly demonstrated that they did not want to be part of and did not recognize the legitimacy of the STN. *Id.* at 57. The Final Determination makes a most peculiar announcement: The acknowledged STN tribe would include its enrolled membership and those unenrolled Schaghticoke “unless they knowingly relinquish their membership after this decision is final and effective.” *Id.*

at 57. In other words, the Final Determination, by administrative fiat, created a fictitious group, a substantial portion of which had already knowingly declined membership but yet would be considered members until they knowingly relinquish that membership.

Some insight on how the Acting Assistant Secretary reached this exceedingly odd and patently unlawful result can be found in OFA's briefing paper to the Acting Assistant Secretary. After describing the failure of the STN to enroll the 54 SIT members, the Coggsells, and Irving Harris, OFA expressed its concern that "the current status of a long-term pattern of factional conflict may either have the undesirable consequence of negatively determining Schaghticoke's tribal status, or of disenfranchising part of its actual membership if acknowledged." AC-V012-D0009, at 4 (Ex. 2). In other words, the STN's inability to maintain political and community relationships, as required by the acknowledgment regulations, would result either in their failure to achieve recognition or in the exclusion of a significant portion of the Schaghticoke.

OFA offered three options: (1) acknowledge the STN as defined by its membership list without the unenrolled individuals; (2) acknowledge the STN by combining the STN membership list with the unenrolled individuals; or (3) decline to acknowledge the STN as a complete group. *Id.* The last option is what the Proposed Finding had indicated would happen. STN PF, at 20. It is also what OFA staff had advised the petitioner and the interested parties in technical assistance meetings. *See* AC-V012-D00047, at 2 (summarizing STN technical assistance meeting); AC-V012-D0025, at 3-4 (summarizing interested parties' technical assistance meeting). Indeed, OFA staff specifically stated in response to an inquiry from the interested parties that it would not include members as part of the STN if they did not consent to membership. Ex. 3.

OFA, however, recommended the second option, and the Acting Assistant Secretary followed it. OFA explained that “[p]ast decisions, before the [Historical Eastern Pequot] FD, treated a petitioner’s membership list as the definition of the community to be acknowledged *or denied acknowledgment*. The [Historical Eastern Pequot] decision combined two membership lists into one. *This option would go farther, including in the group’s membership individuals who have not specifically assented to or been accepted as members, albeit appearing on past membership lists.*” AC-V-D012-D0009, at 5 (emphasis added).

The regulations do not permit the Acting Assistant Secretary to impose membership on those that do not consent to it or to create a membership that the petitioner itself cannot enroll. In fact, OFA has acknowledged it cannot decide the petitioner’s membership for it. AC-V012-D0011. Yet, that is exactly what the Final Determination does. The SIT members, the Coggsells, and Irving Harris are not enrolled members of the STN. By administrative fiat, they are made members over their objection. Moreover, the Final Determination in effect merges separate petitioning groups, again over their objection, without any authority for doing so in the regulations. The SIT has its own petition for acknowledgment pending. By coercing the SIT members onto the STN roll, effectively disposes of the SIT petition and merges the two petitioners.⁵⁸ The regulations require that petitioners be evaluated individually, *see* 25 C.F.R. §§ 83.4, 83.6, and do not permit the Acting Assistant Secretary to compel one

⁵⁸ Thus, the Acting Assistant Secretary did implicitly here what was done more explicitly in the *Historical Eastern Pequot* FD. The illegality of the merger of opposing petitioner groups is challenged in the pending requests for reconsideration of that decision. *See In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, Dkt. Nos. IBIA 02-165-A, IBIA 02-166-A, IBIA 02-169-A.

faction to join another when the unenrolled individuals have demonstrated in every way possible that they have no intention to be members of the petitioner.

The conclusion reached by the Final Determination is but another example of a decision driven by a single-minded effort to reach a preordained result. No matter what the obstacles thrown in front of the path to acknowledgment by the evidence and no matter how the regulations and prior precedent would have to be twisted and manipulated, the Acting Assistant Secretary would find a way to acknowledge the STN. As the OFA briefing paper reveals, the Acting Assistant Secretary acted in defiance of prior precedent. Rather than reaching the result indicated by the evidence – that the STN does not represent a political community – the Acting Assistant Secretary imposed her will upon the group and created a fictitious community. The only justification offered for this unlawful act was that the STN could not be recognized otherwise. AC-V012-D0009, at 5 (Ex. 2). That obviously is not a justification that can find any support in the acknowledgment regulations.

The Proposed Finding was correct in concluding that, without the unenrolled SIT members, the Coggsells, and Irving Harris, the petitioner could not be acknowledged. To suggest that the petitioner could be acknowledged without these excluded members consenting to be reenrolled is tantamount to acknowledging a portion of a tribe. That is a result that the BIA had consistently maintained that the regulations do not permit. STN PF, at 20-21 (citing *Historical Eastern Pequot* FD, at 13, 36); STN FD, at 56.

However, even the Proposed Finding's approach missed the more fundamental problem. It is not just that a new membership list, with the excluded members consenting to their inclusion in it, needed to be submitted, as if the petitioner merely made some

clerical oversight in submitting its latest membership list. Rather, it is a direct byproduct of the persistent, intractable conflict inflicting the group over the past three decades. *See* section VI.D below. Indeed, the Final Determination and the OFA briefing memo admit as much. STN FD, at 57; AC-V012-D0009, at 4-5. Even assuming that the STN petitioner could have produced a new membership list with the SIT members, the Coggsells, and Irving Harris, it does not alter the lack of community and political influence and authority that has pervaded the group.

The Acting Assistant Secretary assumes that, despite the deep chasm between the STN and SIT groups in particular, there still is a single political system. STN FD, at 57; STN PF, at 30. Thus, from this perspective, all the petitioner needed to do to remedy the problem was to submit a new membership list. However, there is no overarching political system of which the various disputants – the STN, SIT, and the Coggsells – are part. To suggest otherwise makes a mockery of the regulations’ requirement of political community.

As if to underscore this point, the Coggsells have challenged the Final Determination by filing their own request for reconsideration. Request for Reconsideration of Coggsell Group dated April 9, 2004. The Coggsell Group’s reconsideration request raises a number of issues that challenge the legitimacy of the STN and its current leadership, including presenting substantial new evidence questioning whether members of the Howard Harris subline are of Schaghticoke descent. Particularly pertinent to the membership issue is the contention of the Coggsell Group that bilateral political relations do not exist between the current STN leadership and key Schaghticoke families. *Id.* at 27-31. This is not, as the Final Determination treats it,

merely a matter of obtaining a better membership list, but rather it goes to the very foundation of the petitioner's lack of community and political relationships.

The Proposed Finding had made a not-so-veiled threat: The STN petitioner must reconcile with the SIT, the Coggsells, and Irving Harris, or risk not being recognized. In effect, the BIA employed the acknowledgment process as a coercive mechanism to accomplish what the petitioner could not itself do. Yet, when this coercive threat failed to produce the desired result, the Acting Assistant Secretary achieved her desired result by imposing a membership on the STN that includes individuals who have not voluntarily enrolled in the STN. The BIA, however, lacks the authority to create political community, or its appearance, where it does not exist. Riven by conflicts that the group lacks the community ties or political authority to overcome, the petitioner cannot be acknowledged as a tribal sovereignty. The reason, however, is not just the current status of the membership, but the reasons why the membership is the way it is: the lack of political community.

The other aspect of the petitioner's membership dilemma – the inclusion of the Joseph D. Kilson descendents until the BIA indicated they could not be included – remains problematic. These new members, enrolled after 1996 and comprising one-third of the petitioner's membership at the time of the Proposed Finding, have not “maintain[ed] significant social contact with *each other or with the rest of the present membership.*” STN PF, at 30 (emphasis added). But again, this cannot be solved merely by the new membership list excising the Joseph D. Kilson descendents.

The Joseph D. Kilson line represents a substantial number of Schaghticoke descendents. They were apparently important enough to the petitioner that it included

them in its membership. What authority does the Assistant Secretary have to compel the petitioner to exclude these Schaghticoke descendents? The obvious answer is that there is no such authority. Indeed, in response to complaints by Joseph D. Kilson descendents to the Assistant Secretary about their ouster, *see* AC-V012-D0012, OFA responded blithely “[t]he membership of a petitioning group *is determined by the group.*” AC-V012-D0011 (emphasis added). But imposing a membership upon the petitioner is precisely what the Final Determination did by first dictating that the unenrolled SIT members, the Coggsells, and Irving Harris are included and second by coercing the elimination of the Joseph D. Kilson descendents.

This is not to say that the petitioner could have been acknowledged with the Joseph D. Kilson descendents as members. This is not merely a Catch-22 for the petitioner. The problem goes much deeper, reflecting the lack of community throughout the twentieth century. As the Proposed Finding indicated, the Joseph D. Kilson line lost all social connections, even with other Kilsons, in the early 1900s. STN PF, at 21; *see* STN FD, at 50-51. Thus, for one-third of the petitioner’s self-identified membership prior to the Proposed Finding’s coercive dictate, there had been no community for a century, a result of the continuing process of diminishing social contacts that has characterized the Schaghticoke for at least two hundred years.

As the Assistant Secretary concluded in the *Nipmuc Nation* PF, radical, as opposed to incremental, changes in membership, in which new members comprising a substantial portion of the membership had not maintained community connections, strongly indicate a lack of community and political authority. *Nipmuc Nation* PF, at 118 (Ex. 23). Rather than just requiring the simple fix of striking these new members from

the rolls, the short-term membership of the Joseph D. Kilson line is strong evidence of the lack of community.

In sum, the petitioner's inability to secure the enrollment of the SIT, the Cogswells, and Irving Harris, without whom the petitioner ought not to have been acknowledged, proves the lack of community and political influence resulting from the persistent hostility and conflict over the last three decades. Similarly, the prior inclusion of the Joseph D. Kilson descendents, who were removed only because of the BIA's threat not to recognize the petitioner, proves the lack of community and political influence resulting from the attenuation of inter-family contacts throughout the twentieth century. The STN's prior membership list was an *effect*, not a *cause*, of the lack of community and political authority. These fundamental problems cannot be resolved by the Acting Assistant Secretary's imposition of a new membership.

X. **THE FINAL DETERMINATION IMPROPERLY DETERMINED THAT THE SCHAGHTICOKE TRIBE WAS AN AMALGAMATION OR CONTINUATION OF PREEXISTING TRIBAL ANTECEDENTS.**

The Acting Assistant Secretary concluded that, although the STN did not establish that they existed as an independent tribal entity at the time of first sustained contact in the relevant area, it was still able to meet the regulatory criteria by demonstrating their connection to two prior tribes that had existed at the time of first sustained contact. As the Acting Assistant Secretary found, those two earlier tribes, the Potatuck and Weantinock, "existed at the time of first sustained contact, whether as separate tribes, or as bands or villages of a larger tribe, and ... *the two subsequently coalesced at Schaghticoke, incorporating some individuals from other tribes.*" STN FD, at 65 (emphasis added).

This conclusion is seriously flawed as a matter of law and fact. In the Final Determination, the Acting Assistant Secretary improperly broadened the petitioner's ability to meet the requirement that it has existed as a distinct community and maintained political control or authority from historical times to the present. *See* 25 C.F.R. § 83.7(b) & (c). The Final Determination's conclusion was based on an inadequate examination of the range of sources available to the petitioner and to the Acting Assistant Secretary. The evidence that was relied upon was unreliable and of little probative value – particularly in placing substantial reliance on the questionable accuracy of a summary of primary sources generated by a researcher who admitted his bias in favor of, the Schaghticoke petition.⁵⁹ New evidence, presented for the first time below, further demonstrates the inadequacy of the petitioner's evidence and the Acting Assistant Secretary's review of the available record. Moreover, the new evidence shows the validity of far more plausible alternative interpretations of the evidence – alternative interpretations that would mandate rejection of the Schaghticoke petition. *See* 25 C.F.R. § 83.11(d).

As disturbing as the legal and factual errors reflected in the Final Determination, however, is that the Acting Assistant Secretary failed to address at all the evidence and arguments presented by the State Interested Parties in their comments on the Proposed Finding. Indeed, the record suggests that OFA staff deliberately chose to ignore the evidence that would have required an opposite result. OFA's refusal to do so appears to be the result of nothing other than excessive hubris and an adamant determination to reach a positive result in favor of the STN. The Acting Assistant Secretary fails to explain the utter lack of evidence supporting the conclusion that the Schaghticoke are (in

⁵⁹ Franz Wojciechowski, *Ethnohistory of the Paugussett Tribes: An Exercise in Research Methodology* (1992) (BR-V007-D0002).

the words of the report) an "amalgamation" of the Potatuck and Weantinock Tribes that allegedly predated the Schaghticoke in this area. Although the Acting Assistant Secretary reiterated the arguments from the Proposed Finding regarding some overlap in a single authority figure, as well as some limited family-based connections between the communities, no effort was made to demonstrate either a conscious or unconscious act of amalgamation of the two predecessor communities into the Schaghticoke, nor was there any showing that the Schaghticoke amounted to a "continuation" of preexisting authority and community. The State Interested Parties had demonstrated (and additional new evidence discussed below further shows) that the Potatuck and Weantinock were two villages making up a single tribal entity, that the Weantinock village (or, if the Final Determination is correct, the Weantinock tribe) had faded out of existence two to three decades before the first appearance of the Schaghticoke, and that the Potatuck continued to wield political authority for decades after the development of the Schaghticoke community. Thus, although there may be a loose relationship between the Potatuck and Weantinock on one hand, and the Schaghticoke on the other, it is no tighter than the relationship between the Schaghticoke and the many other tribes from which it drew its membership.⁶⁰

The evidence supporting the STN petition fails to demonstrate the continuous political authority and social community from historic times to the present that must support every petition for acknowledgment. Its failure is palpable in the record from the

⁶⁰ The Final Determination also fails to explain the decision to rely on the findings of a prior researcher. As the State Interested Parties had noted, that reliance was improper for procedural and substantive reasons. CT-V005-D001, at 104-114. The Final Determination also fails to explain the decision to violate BIA's own internal policies by conducting additional research into that researcher's work, particularly in light of extensive showings that his work was substantively flawed.

first recorded contact with the Schaghticoke as an independent entity. The loose coincidence of timing between the fading of the Potatuck and Weantinock, and the development of the Schaghticoke, is not sufficient to close the evidentiary gaps in the petitioner's case. The IBIA should reconsider the Final Determination, and reverse it in light of the substantial flaws in the petitioner's case and the Acting Assistant Secretary's findings regarding it.

A. **The Petitioner Must Prove That It Formed As A Continuation Of, Or As An Amalgamation Of, Tribes That Existed At the Time of First Sustained Contact.**

There is no reasonable dispute that the Schaghticoke did not emerge as an identifiable tribe until well after first sustained contact with European settlers in western Connecticut. While there is some evidence that a people known as the Schaghticoke were recognized as early as 1736 (when the Connecticut legislature permitted the Schaghticoke to reside on unoccupied Colony lands, *see* STN PF, at 53), even the petitioner conceded that it was only after first contact, in 1742, that it is "possible for the first time to identify Schaghticoke accurately as a distinct tribe " STN HR, at 24 (SN-V006-D0001, at 28).⁶¹

The relevant regulations, however, require that the petitioner existed as a political and social community at the time of first sustained contact. While the primary means of meeting this burden is for a given petitioner to demonstrate that it, as a particular named entity, existed at the time of first sustained contact, that is not the only means for

⁶¹ The STN petitioner's comments continued, noting that at this point in 1742 "most of the amalgamation of other groups has taken place." SN-V006-D0001, at 28. The petitioner also suggested that the clarity in 1742 included identification of baptized members and a distinct area for the alleged community. As noted below, and in the State Interested Parties' comments (CT-V005-D001, at 135-42), however, the "amalgamation" alleged by the petitioners had not occurred by this time (and, in fact, never occurred).

establishing this requirement. Under the regulations, as applied and interpreted in prior determinations, a petitioner may also meet this requirement by demonstrating that its political authority and social community is either a "continuation" of political authority and social community that existed at the time of first sustained contact, or, alternatively, that its political authority and social community is an "amalgamation" of tribes or groups "that have historically combined and functioned as a single autonomous political entity." *See* 25 C.F.R. § 83.6(f).

In acknowledging the STN, the Final Determination relied on these alternative routes to establishing the "existence" of the petitioner at the time of first sustained contact. In the Final Determination, the Acting Assistant Secretary concluded that although the Schaghticoke did not exist *per se* at the time of first sustained contact, the alleged antecedents of the Schaghticoke – the Potatuck and Weantinock -- did. *See, e.g.*, STN FD, at 68. The Final Determination concluded that "the Potatuck and Weantinock existed at the time of first sustained contact, whether as separate tribes, or as bands or villages of a larger tribe, and ... ***the two subsequently coalesced at Schaghticoke***, incorporating some individuals from other tribes." *Id.* at 65 (emphasis added). In other words, the Acting Assistant Secretary concluded that if the preexisting tribes were separate tribes, the Schaghticoke were an "amalgamation" of them. On the other hand, if they were deemed separate bands of a single tribe, the Acting Assistant Secretary concluded that the Schaghticoke were a "continuation" of the combined entity. In this fashion, the Final Determination seeks to cover all of its bases and, in doing so, compensate for the fact that there was no Schaghticoke Tribe when colonists settled the area.

Whether under the "amalgamation" theory or the "continuation" theory, the regulations still require a petitioner to demonstrate that it has an unbroken chain of political authority and social community tying the modern petitioner to the time of first sustained contact. Links in that chain can be established if the petitioner demonstrates a legitimate claim to the political authority and social community of an antecedent group or groups, but the links must still connect. If a petitioner claims to be a "continuation" of a prior tribe, but cannot demonstrate that its political and social associations are in fact a "continuation" of the political authority and social community that previously existed, then it may not lay claim to the antecedent tribe's history. Similarly, a petitioner cannot evade the need to prove that social community and political authority existed from the time of first sustained contact by relying on the provision in § 83.6(f); that provision merely permits a petitioner to demonstrate that even though it does not have an unbroken chain of authority and community to the time of first contact, it has a legitimate claim that the missing links, if any, should be provided by the historic authority and community found in the petitioner's antecedent tribes or groups. In either case, the petitioner must demonstrate that it has an historically supportable claim to being the continuation or amalgamation of the political authority.

Despite these regulatory requirements, the evidence presented by the petitioner and summarized in the Final Determination fails to describe how the Potatuck and Weantinock authorities and communities in fact continued to exist throughout the period leading up to the development of the Schaghticoke community, or how the antecedent authorities and communities specifically gave way to the Schaghticoke. The most that

the Final Determination can say is simply that the preexisting tribes "coalesced" to form the Schaghticoke. STN FD, at 65.

The term "coalescence" cannot be found in the regulations; apparently, the Acting Assistant Secretary uses it to stand in for the process of amalgamation or consolidation that resulted in the Schaghticoke being able, in the Acting Assistant Secretary's view, to lay claim to the Potatuck and Weantinock political authority and social community.

There is, however, no probative or reliable evidence to support such an approach.

As the State Interested Parties and the Housatonic Valley Municipalities demonstrated in comments filed both before and after the Proposed Finding, the best evidence regarding the Schaghticoke settlement in the 1740s is that it was a "refuge" for Native Americans who had, for various reasons, left their association with an historic tribe or other group. While the initial leader of this refugee community was himself previously associated with the Weantinock, and while some of the members of that community were previously associated with the Potatuck, there were many other individuals previously associated with other tribes that came together to form that community. There is no evidence demonstrating that the Schaghticoke community was a "combination" – whether conscious or unconscious – of the Potatuck and Weantinock political authority or social community. Other than the mere coincidence of timing that permitted some of the Potatuck and Weantinock to take refuge in the Schaghticoke community as their prior communities dissolved (and even then, the coincidence of timing is not particularly strong), there is no evidence demonstrating that the Schaghticoke community was a "continuation" or "amalgamation" of those preexisting tribes' political authority or social community.

This understanding of the Schaghticoke community as a group of refugees from diverse locations is wholly consistent with the petitioner's initial presentation of its own history (as demonstrated in a variety of reports noted in the Proposed Finding), as well as with the conclusions of a number of historians of the tribes of northwestern Connecticut. See STN PF, at 39-40. Tellingly, the STN petitioner's own web site *currently echoes* this well-accepted understanding, noting that the "Schaghticoke Tribe . . . became a refuge for Indians who were fleeing colonists," and that the community "consisted of 500-600 members, mostly of Mahican, but including those of Weantinock, Pequot, Pootatuck, and Tunxis descent." See <http://www.schaghticoke.com/index.php?page=history.historical>. (Ex. 25). As the STN's own statements concede, therefore, their historical tribe did not emerge as the Acting Assistant Secretary asserts in the Final Determination (from Potatuck and Weantinock) but instead as a "refuge" for Indians from around the region. In fact, the STN admit on their website that the majority of its members were Mahican, not Weantinock or Potatuck. In other words, the STN agree with the interested parties on this point. Rather than insist on evidence to support the petitioner's claim to the history of the Potatuck and Weantinock, the Acting Assistant Secretary offers up an unprecedented reinterpretation of the rules governing amalgamation and continuation. Rather than requiring a petitioner to demonstrate some continuation or consolidation of preexisting political authority and social community, the Final Determination concludes only that as long as there are "examples of representatives of two former groups acting together as one," there is evidence "sufficient to demonstrate amalgamation." STN FD, at 76.

The Final Determination appears to have concluded, in other words, that as long as political leaders of formerly existing tribes came together, and associated themselves with at least some members of their former tribes, the resulting entity was an "amalgamation" of prior tribes appropriate for acknowledgement. And this is so regardless of whether there is any evidence that the preexisting political authorities or social communities carried over into the new entity. This interpretation is not supported by the text of the regulations, by prior interpretations of them, or in any other manner.

B. The Petitioner Failed To Demonstrate That The Schaghticoke Was A Continuation Or Amalgamation Of The Potatuck Or Weantinock, And The Final Determination Failed to Address Substantial Evidentiary Gaps.

The State Interested Parties and the Housatonic Valley Municipalities offered timely and extensive commentary on the Proposed Finding. Many of these comments were focused on the question of whether, and how, the Schaghticoke could establish a connection with tribal entities whose communities existed, and which maintained political authority, at the time of first sustained contact. CT-V005-D0001, at 90-142. Almost without exception, the Acting Assistant Secretary failed to address these concerns in the Final Determination. The failure to respond to these overarching issues was intentional on the part of the OFA researchers. Internal OFA memoranda indicate a lack of willingness on the part of the OFA staff to consider the data that had been newly presented in the interested parties' comments. In one document, an OFA employee, Dr. Virginia DeMarce, mischaracterizes the substantial new evidence offered in the State Interested Parties' and Housatonic Valley Municipalities' comments by stating that "I can't find any new evidence that we didn't have for the PF." *See* BR-V009-D0024. The same writer later dismisses the first contact/historic tribe issues raised in both the State

and Town submissions: "no point by point . . . not replying to a brief." BR-V009-D0024.

These notes reflect either a remarkable failure to review the evidence submitted or an extraordinary degree of indifference, if not arrogance, on the part of Dr. DeMarce. The comments submitted by the State included 56 *new documents* not previously considered for the Proposed Finding. Those documents are listed in Exhibit 26. The State Interested Parties submitted this new evidence precisely because the Proposed Finding for the *first time* reached outside of the record to rely on the research of Franz Wojciechowski to support the amalgamation theory (an argument that not even the STN had offered). To the State Interested Parties' extensive body of new documentation, Dr. DeMarce responded only by advising her OFA colleagues that she found no new evidence. Apparently disliking the format of presentation, she noted that she would not analyze the evidence because she did not want to reply "to a brief." These admissions are by themselves a strong indictment of OFA's review of the evidence and compel reconsideration on the basis that OFA has itself admitted the "inadequacy" of its review and the fact that "new evidence" exists.

Despite Dr. DeMarce's characterization of the record, the evidence and arguments presented in the State Interested Parties' and Housatonic Valley Municipalities' comments on the Proposed Finding were both substantial and new to the record. They demonstrated that Proposed Finding's conclusion that the STN could fall within the scope of 25 C.F.R. 83.6(f) as an "amalgamation" of the Potatuck and the Weantinock was inconsistent with prior determinations regarding such amalgamations, and that such amalgamations could

be established only through the demonstration of conscious decisions to join two tribes into a single entity.

The State Interested Parties' comments also focused on the highly relevant discussion of the *Tunica-Biloxi* Final Determination. The Tunica-Biloxi had formed out of an association between various tribal entities that, prior to the development of the combined entity, had extensive contact with authorities *in the geographical location in which the Tunica-Biloxi tribe eventually emerged*. CT-V002-D0002, at 25-26. The Final Determination utterly fails to address this point, choosing to ignore the need for an association of community, politics, and location between the predecessor tribes and the petitioner. STN FD, at 75. As the State Interested Parties demonstrated, the Weantinock group had no political or social community to speak of after 1705, when the last of its historic lands were transferred to European settlers; the Potatuck, on the other hand, continued to exist as a community and political authority well *after* the Schaghticoke became identifiable in the late 1730s and early 1740s. CT-V005-D0002, at 121-42. While the Final Determination asserts that "amalgamation can occur over time," and cites the *Cowlitz* Final Determination in support, *see* STN FD, at 76, the *Cowlitz* Final Determination expressly recognized a long history of association between the communities and political authorities of the upper and lower Cowlitz that developed into a single tribal political entity. *See, e.g.*, 65 Fed. Reg. 8436, 8437 (2000).

Here, the lack of Weantinock activity after the very early 1700s and the continuation of the Potatuck political and social activity until well after the Schaghticoke were first identifiable around 1740 make such a showing impossible. In the critical period during which the Schaghticoke were coming together as a community, there is no

showing that the Potatuck and/or Weantinock *as political or social communities* were a part of that process.

The State Interested Parties and the Housatonic Valley Municipalities further demonstrated, in evidence further elucidated and supplemented below, that substantial, specific evidence existed to counteract the Proposed Finding's conclusion that the Schaghticoke were an amalgamation of the preexisting groups. Not only was there evidence to support the conclusion that the Weantinock and Potatuck were simply two villages within a single tribe, but that tribe – the Potatuck – continued to assert political authority and to maintain a social community until well after the petitioners allege that the Schaghticoke assembled in the early 1700s. In the Final Determination, the Acting Assistant Secretary did not respond to this specific evidence – much of it new – and instead simply reiterated the evidence in the Proposed Finding. That evidence was far too limited to serve as the proof necessary to establish the kind of "amalgamation" of authority and community that has previously been necessary in order for petitioners to win acknowledgement.

Rather than develop the record, the Acting Assistant Secretary simply eased the regulatory requirements on this issue, as she did on so many other issues for this petition. Despite having previously indicated that "amalgamation is essentially the decision of two groups to come together," *see* CT-V005-D0001, 96, the Acting Assistant Secretary brushed that requirement and prior representation aside. "Notwithstanding [sic] the formal meeting transcript" in which that statement was made, STN FD, at 76, the Final Determination concluded no decision is necessary, that no showing of simultaneous action of the predecessor groups is necessary (as in the case of the Cowlitz), and that no

showing of a geographical association on the part of the political and social communities is necessary (as with the Tunica-Biloxi). Rather, in Final Determination's revisionist approach, "examples of representatives of two former groups acting together as one is sufficient to demonstrate amalgamation." STN FD 2004, at 76. In other words, to reach a positive finding for the STN on this issue, the Acting Assistant Secretary simply elected once again to change its rules and previous interpretations to achieve a desired result.

To the degree that Final Determination's articulation of the amalgamation/coalescence theory is understandable, its breadth – and the degree of its divergence from the principles set forth in the regulations and prior determinations – is stunning. Under the Final Determination's approach, a subsequent entity can prove its entitlement to the historical authority and community of predecessor organizations simply by identifying leaders within its group that had previously been associated with the prior groups.⁶² There is no need to demonstrate any other type of continuation of political authority or community. Here, the only evidence was that (1) the Schaghticoke's first identifiable leader formerly had some associations with the Weantinock, and (2) there were familial ties between some of those at the Schaghticoke location, and some Potatuck families.

The evidence offered by the petitioner is not sufficient to meet the regulatory requirements for tribal existence. Indeed, when examined with the evidence presented by the interested parties – new evidence that was not considered in the Final Determination – as well as the evidence set forth below, the only reasonable interpretation of the evidence is the one that the petitioner initially relied upon and that many of its own initial

⁶² In fact, the Final Determination refused to even insist on evidence that the new leaders had any leadership role in the predecessor groups. STN FD, at 70.

researchers into this matter emphasized: the Schaghticoke were formed as a refugee group of Native Americans. Although some of them had prior associations with the Weantinock and Potatuck, those relationships demonstrate not an "amalgamation" of preexisting political authority and social communities, but a largely random assemblage that does not have a proper claim to that historical evidence of community and authority.

C. The Schaghticoke Were Not An Amalgamation of the Potatuck and Weantinock and Were Not A Continuation of a Preexisting Tribe.

The Final Determination repeatedly misconstrues the comments of the interested parties to challenge the existence of the Potatuck or Weantinock as tribal entities prior to the development of the Schaghticoke, or, alternatively, to challenge the existence of the Schaghticoke for at least a period following the early 1740s. For purposes of this discussion, there is no dispute that the Weantinock and Potatuck existed as a tribal entity or entities prior to the development of the Schaghticoke. Nor is there dispute that after the 1740s, for at least some period of time, the Schaghticoke demonstrated some form of political authority and social community. The critical issue, however, is whether the Schaghticoke, which indisputably cannot demonstrate political authority and social community at the time of first sustained contact, can nevertheless lay claim to the historic record of political authority and social community of the Potatuck and Weantinock entities. It is this issue on which the record was, and is, fatal to the petitioner's case, and it is on this issue that the Acting Assistant Secretary conducted an inadequate examination into the available evidence, relying instead on evidence both unreliable and of little probative value. In addition to evidence previously ignored, new evidence demonstrates the inadequacy of the petitioner's and the Acting Assistant Secretary's

review of the available record, and supports the validity of alternative interpretations that should have resulted in rejection of the STN petition.

1. The Weantinock and Potatuck Were Not Two Tribes, Making an "Amalgamation" Impossible.

As an initial matter, the Acting Assistant Secretary relied heavily on research conducted by Franz Wojciechowski in concluding that the Schaghticoke were an amalgamation of the Weantinock and Potatuck. Wojciechowski found (contrary to prior researchers) that the two groups were in fact separate tribes. His work was based on a review of land deeds in the areas controlled by these groups, and he concluded that deeds in the Weantinock area were signed by Weantinock leaders, while those in the Potatuck area were signed by Potatuck leaders, with no noticeable crossover.

As the State Interested Parties demonstrated, however, the reliance on Wojciechowski's work was improper. CT-V005-D0001, at 104-115. First, OFA conducted its own research into his work, contrary to recent policy statements regarding OFA's role in the acknowledgement process. *Id.* at 104-109. Second, Wojciechowski explicitly states that he is biased in favor of acknowledgement of the petitioner; using his summarization of primary research is therefore necessarily a highly questionable approach. *Id.* at 109-111. Finally, the evidence in fact did not support Wojciechowski's thesis as long as deeds were transferred on a village, rather than a tribal, level. *Id.* at 111-115. The Final Determination did not respond to any of these issues, continuing to rely on the flawed work of Wojciechowski. Had OFA bothered to review the new evidence, it would have readily seen that these comments and supporting documents lead inescapably to the rejection of Wojciechowski's work, and the failure of the petitioner to meet its burden of proof.

Further research indicates that Wojciechowski's thesis is, in fact, incorrect, for there are a number of deeds conveying lands that, under his interpretation, should have been under the control of one group, but that were, in fact signed by members of the "other" group. Wojciechowski misinterpreted or altogether missed the associations of many of these signatories and witnesses. The Acting Assistant Secretary, in turn, missed this evidence as well. It does so not because it was unavailable, but instead because Dr. DeMarce chose to ignore it.⁶³ In total, the evidence strongly suggests that the Weantinock and Potatuck were not separate tribes, but two villages operating under a single tribal political authority.

For instance, Wojciechowski cited the April 25, 1671 New Milford deed. *See* Stratford Land records mss. V.2, pt.2:466 (CT-V007-D0062). Contrary to his assertions, that deed contains subscribing and approbating signatures of Indians from both the villages of Potatuck and Weantinock. The subscribers or actual Indian grantors of the deed are Pocono, Ringo, and Quoconoco. While the latter two were connected with the Weantinock village, Pocono first appeared historically on a deed associated with the village of Potatuck. *See* *Derby Land Records, v.3:357.⁶⁴ (Ex. 27). Pocono was a signatory to both Potatuck and Weantinock related deeds, including a 1685 Shepaug (Potatuck) deed, *see* Woodbury Land Records, v.2:136 (signing as "Poqnanow") (CT-V007-D0064); a 1702 Goodyear Island confirmatory (Weantinock) deed, *see* Stratford

⁶³ The fact that OFA failed to review this evidence, apparently on the basis of DeMarce's comments, is confirmed by the Final Determination. Nowhere does the Final Determination discuss this evidence or the clear points it makes that the two villages were not separate tribal entities.

⁶⁴ Specific citations preceded by a * have not been previously cited to the BIA, although the source from which this evidence is derived may have been. This evidence therefore amounts to "new evidence" pointing toward a more plausible interpretation of the record that would call for rejection of the petition. *See* 25 C.F.R. § 83.11(d)(4).

Land Records mss, v.2, pt.2:497 (signing as "Pocono") (CT-V007-D0060); a 1705 New Milford (Weantinock) deed, *see* New Milford Land Records, v.2: 3-4 (signing as "Poquanow") (CT-V007-Doo43); and a 1720 Waramaug (Potatuck/Weantinock) deed, *see* Orcutt 1882:118-119 (signing as "Paconopeet") (CT-V007-D0076).

Approbating the April 25, 1871 tribal conveyance (which was, according to Wojciechowski, a Weantinock conveyance) for the Indians was "Coshushamack sachem," who was significantly described in the April 16, 1679 Woodbury, Kettletown/Quaker Farms purchase as "Coshusheougemy *Sachem*, the *sagamore of puttatuck....*" *See* *Cothorn 1871, v.1:24 (emphasis added) (Ex. 28). Also present were "Weepenes" (Weccompis or Wecuppemes), who witnessed the July 1, 1671 Potatuck 'Qunnupoge' purchase near the town of Derby and squarely in Potatuck territory, *see* *Stratford Land Records mss., v.1:492 (CT-V006-D025), along with Coshushamack's eldest son "Matayet" and grandson "Tomo" (Tomoseet). Another participant was "Wiscenco" who on July 10, 1682, *see* *Woodbury Land records, v.2:1 (Ex. 29), was one of two Potatuck village signatories to a Woodbury town consent agreement.

Thus, at least six Potatuck, including a Potatuck village sachem and the tribal sagamore (Cohushamack), were attestors to this conveyance (identified by Wojciechowski as a *Weantinock* conveyance). Other subsequent deeds demonstrate similar crossover between the Weantinock and Potatuck, and thoroughly undermine the factual premise underlying Wojciechowski's conclusion.⁶⁵ For instance, a March 17,

⁶⁵ These deeds include: (1) August 16, 1688, Great Neck conveyance: Atterosse the Potatuck tribal sagamore was the attestor. Kehore, sachem of Potatuck was a subscriber as was Pocono (Poquanot) a signatory to several deeds from both Potatuck and Weantinock. His son Papeto, became the sachem of Weantinock village. (CT-V007-D0037). (2) April 25, 1671, Tomlinson/Goodyear Island area conveyance: This

1685, Woodbury, Shepaug Purchase, *see* Woodbury Land Records, v.2:136 (CT-V007-D0064), is well within the Potatuck lands as postulated by Wojciechowski, but was attested to by Wereamaug, who Wojciechowski argues was a Weantinock tribal sagamore. This attestation makes no sense under Wojciechowski's theory; by contrast, if Wereamaug is properly recognized as successor to Coshushamack, and the sagamore of the combined Potatuck/Weantinock entity at that time, this role makes perfect sense.⁶⁶

conveyance of lands near to Weantinock was attested to by Coshushamack, sachem of Potatuck and tribal sagamore. (CT-V007-D0062). (3) March 17, 1685, Woodbury, Shepaug Purchase: The lands conveyed were east of the Shepaug River, the tribal boundary claimed by Wojciechowski. According to him the lands west of the River were Weantinock tribal territory. Wereamaug, the tribal sagamore was the attestor. Subscribers were from both villages. (CT-V007-D0053, -D0064). (4) February 18, 1687, Livingston Manor Council meeting: The three “Wawyachtenok” sachems were Wereamaug, the tribal sagamore, Pinawee of Potatuck, and Pocono, formerly of Potatuck, now of Weantinock. (Ex. 30). (5) October 30, 1687, Woodbury Quassapauge conveyance: Chusquunnoag, of Potatuck, the tribal sagamore was the attestor. Wereamaug who was to succeed him was the witness. (CT-V007-D0053). (6) February 8, 1703, New Milford conveyance (less Indian Field): Papetoppe (Pomkinseet) sachem of Weantinock and Rapiscooto were the attestors, also Nanhuto, (son of Kehore of Potatuck) Tomoseetee, Nonawak, and Chasqueneag, sachem of Potatuck were witnesses, The list of subscribers contained six persons affiliated with Weantinock and one Potatuck, Chasqueneag, the sachem of Potatuck. (CT-V007-D0041). (7) August 29, 1705, New Milford, Indian Field conveyance: This conveyance of the site of the village of Weantinock was attested to by Chesqueneaq of Potatuck. The subscribers were Papetopo, the last sachem of Weantinock and Whemut, also of Weantinock. (CT-V007-D0043). (8) March 2, 1715, Litchfield/Bantam conveyance: This Potatuck conveyance was attested to by Wereamaug. Chusquunnoag, the sachem of Potatuck along with ten other Potatuck were the subscribers. (CT-V007-D0049).

⁶⁶ In September of 1720 both the Governor and Council of Connecticut Colony noted the presence of a “principal of chief of the Potatuck and Wiantinuck Indians” (Weremauge). *See* *Connecticut Public Records, v.6:203-204 (Ex. 31). Additionally, historical documents reveal that in 1725 a settlement of 49 Potatuck resided at the former home of the deceased tribal sagamore Wereamaug at the Great Falls. The same document also notes that 50 Potatuck remained at their namesake village. *See* *Talcott Papers, Correspondence and Documents, v. II 1737-41 (Ex. 35). By 1742, the numbers had decreased to thirty at the Great Falls and 40 at Potatuck village, *see* *Connecticut Public Records, v.8:521 (Ex. 36), a net loss of 29 persons between the years 1725-1742.

This assessment of the relationship between the Potatuck and Weantinock is entirely consistent with the understanding of a leading historian on this area of Northwestern Connecticut. In his 1871 work, *History of Ancient Woodbury, Connecticut*, William Cothorn noted that the "Indians residing at these two places...have never been but two clans of the same tribe..." *Cothorn 1871:103 (Ex. 32). Cothorn further noted that "[i]t was not unusual among the small tribes of the State, for the son of a sachem to leave the 'old home' with a few followers, and form a subordinate clan under the former... The Pootatucks in this way had clans at Nonnewaug, Bantam, Wyantenuck, besides their principal seat on the Housatonick...." *Id.* at 85 (Ex. 33). He also noted that "the Indians of Woodbury, New Milford and Kent, have been treated as though they were one people, which is strictly correct, except in regard to the Kent Indians." *Id.* at 108 (Ex. 34).

Because the Potatuck and Weantinock functioned as a single political entity, the Schaghticoke obviously could not have been an "amalgamation" of the two. At the most, the Schaghticoke could have been a continuation of the combined Potatuck/Weantinock entity, but, as further discussed below, even that conclusion cannot be supported by the record.

2. The Record Does Not Support A Conclusion That The Schaghticoke Carried on the Political Authority Or the Social Community of Either the Potatuck Or the Weantinock.

Even if the evidence did not demonstrate that the Potatuck and Weantinock were in fact a single tribal entity, the evidence did not and does not support a conclusion that the Schaghticoke formed as a continuation or amalgamation of the Potatuck and/or Weantinock communities.

First, as noted above, the Weantinock village (or tribe) had largely abandoned its lands in the New Milford area by 1705. From that time until well into the 1730s, there was no indication of any kind of substantial activity (let alone the movement of entire tribal populations, or the development of a community) in the area in which the Schaghticoke eventually developed. The historical record indicates that there were no Indians from Weantinock settled in that vicinity prior 1736. These lands were part of Mahican tribal territory (CT-V005-D001, at 122-123), and contained at least two identifiable Mahican villages, Wequanach and Wetouge. *See* *Dunn, *The Mahican World 1680-1750*, 66 (2000) (Ex. 37); *Dunn, *The Mohicans and their Land 1609-1730*, 62 (1994) (Ex. 38). The first historically reported migration of non-Mahican Indians onto the lands that later became associated with the post-historic contact Schaghticoke occurred in 1736, some 31 years after the sale of Weantinock village lands. (CT-V005-D001, at 138 n.31).

Population records confirm that there was no substantial movement of Weantinock (or, for that matter, Potatuck) members to Schaghticoke, and certainly not a concerted movement on the part of an entire community or political authority. According to these records, as of the 1725 Talcott census, 99 Potatuck remained both at the Great Falls location and at Potatuck village. (CT-V008-D0040). In the 1742 memorial to the Colony – six years after the purported migration of the ‘Weantinock’ tribe to Schaghticoke, *see* STN FD, at 17 – a total population of 70 Indians was given at the two main village sites. That rendered a population loss of only 29 Potatuck over a 17-year period. At the same time, the Indian population at Schaghticoke in 1743 was 100. (CT-V005-D001, at 140). Even if all 29 of the missing Potatuck went to Schaghticoke in

1736,⁶⁷ in 1743 that number would have represented less than 30 percent of the total Schaghticoke population. Three years later, in 1746, the Moravian missionaries reported that in addition to their five converts (among them Mauwee, the purported political successor to Weramauge), there now resided 200 others. (CT-V008-D0042). That is more than double the total 1742 Potatuck population of 70. Clearly, the Schaghticoke population and community was made up of a number of refugees from other tribes. Even if there were any showing that the Potatuck or Weantinock communities or political authorities moved to Schaghticoke, they would have been overwhelmed by the other tribal members. An *entirely new* community was formed. The Schaghticoke were not a continuation or amalgamation of any other tribe.

3. The Potatuck Continued As a Community, and Continued to Wield Political Authority, Well After the Development of the Schaghticoke, Making it Impossible For the Schaghticoke to be a Successor to the Potatuck.

If the Schaghticoke were in fact an amalgamation or continuation of the Potatuck tribe, one would expect to see an end to Potatuck community and tribal authority once the Schaghticoke community established itself. The record demonstrates no such event. Rather, from 1734 forward, the primary source documentation supports the continued existence of the Potatuck. That existence continued through at least 1758, long after the establishment of an Indian community and political organization at Schaghticoke.

In their February 22-April 9, 1742 Journal, Moravian missionaries Gottlob and Buttner, noted that they sent one of their converts (John-Johannes, a Mahican) "to

⁶⁷ This seems quite unlikely. In 1743, at the Mohican village at Shecomeko (located in the Province of New York) there also resided eight expatriate Potatuck, by that time Moravian converts. At a second Mahican village at Wequanach, circa 1749, in present day Sharon, Connecticut, there resided 14 known Potatuck.

Potatick, to tell the Indians there something of our savior....” (CT-V008-D0042, Moravian Archives, Box 111, Folder 2, Item 3b). They also noted some “Indians came from Potatick....” *Id.* The Potatuck also asked that a Moravian missionary be sent to them. This document depicted a still-functioning Indian community at Potatuck circa 1742. It also represented a concerted community- based effort to obtain a Moravian missionary.

The May 1742 Memorial of the New Milford and Potatuck Indians (CT et al. 8/8/03:127), not only gave population numbers (“Seventy souls of us, poore natives...” 40 at Potatuck, 30 at the Great Falls)) of those still residing at the Falls and at Potatuck village, but it represented a concerted tribal-wide effort to obtain a teacher and a minister for the tribe from the Colony. (CT-V005-D001, at 127). Cherry (Chere) was the Potatuck sachem at this time.⁶⁸ He was also a signatory to the petition. The situation was the same in 1758, when Dr. Ezra Stiles, President of Yale University, made the note of “Cheerow, Sachem at Newtown or pudaduc between Newtown and Woodbury in 1758.”

⁶⁸ Chere became the sachem of the Potatuck after the circa 1734 death of his predecessor Quimp. He remained so until 1758/9. CT-V005-D0001, at 120. He was the son of the deceased tribal sagamore Weramauge. STN FD, at 72; STN PF, at 46 (referencing “Chere Werawmague”). He also had a son Sam Cherry. CT-V005-D0001, at 134. The Final Determination incorrectly stated that Chere had settled at Schaghticoke, which in their estimation “provid[ed] a thread of continuity between the Weantinock Indians and the Schaghticoke settlement.” STN FD, at 72. In actuality, Chere was not settled at Schaghticoke during this period. The Moravian mission records identify his son Sam Cherry as the Chere in residence at Schaghticoke. CT-V005-D001, at 134 n.34. It was his son Sam, not Chere sachem, that moved to Schaghticoke before the 1750s. A thin thread, indeed, with which to weave the fabric of continuity between the Potatuck and the Schaghticoke.

CT-V005-D001, at 141. In contrast, in February of 1750 Mauwee was depicted in a deed as "Maywehew Sachum Indian of Scaticook." *Id.* at 127.⁶⁹

The Journal of Myron Mack (June-February 1743) is the most significant primary source document for depicting the co-existence of the Potatuck and Schaghticoke as separate political entities during this time period. (CT-V008-D0094, Moravian Archives Box 11, Folder 3, Item 3). Besides supporting the presence of rival factions among the Potatuck, Mack at this time (1743) depicted separate political tribal leaders at both Potatuck and Schaghticoke. In his journal, he referred to "The Capt of Potatuck" (Chere) as opposed to "Our Captain in Pachgathgoch..." (Mauwee at Schaghticoke). *Id.* Mack had to obtain the permission of the sachem of Potatuck to visit his village, and at the same time had to gain the permission of the Captain at Schaghticoke to make the journey there. *Id.* As a postscript to this journal, Mack noted that on February 21, 1743 the Moravians were visited by 21 Potatuck Indians as an indicator of their desire to have a missionary among them. *Id.* This is clear evidence of a continued social community at Potatuck.

The Community at Potatuck continued to exist into the 1750s. The July 4, 1751 Moravian Pachgatgoch (Schaghticoke) mission diary, for example, noted that "Lea went to Wudbeery[Potatuck]...there old Kihur [Kehore] was extremely friendly..."

*Moravian Archives, Box 114, Folder 4 (Ex. 39). A similar entry in Bruninger's and

⁶⁹ While Wojciechowski and the Final Determination claim that the first leader of the Schaghticoke Maweho ("Mauwehu") "apparently took over the leadership of the Weantinock" after Wereamauge's death in 1722, *see* STN PF, 44, there can be no dispute that Quiump was the tribal signatory on most of the Potatuck deeds in the period following 1722. This included the August 7, 1723 Newtown Purchase, *Newtown Land Records, Deed File, and the June 18, 1734 Woodbury, South Purchase II conveyance, *Woodbury Land Records, v.4:212.

Rundt's diary of July 16, 1755 noted that "Old Erdmuthe went to Potatik to visit her brother...Christian [the brother of Chere, the sachem of Potatuck] and his family went back to Woodberry to join his company...." *Moravian Archives, Box 115, folder 3 (Ex. 40). Stiles noted the continued existence of a Potatuck community at Woodbury in 1758. (CT-V007-D0068).

In May of 1759 the last of the Potatuck lands in Woodbury were conveyed to a town committee. CT-V005-D0001, at 141. Thus, it was 54 years after the demise of the village at Weantinock, and 23 years after the first recorded movement of non-Mahican Indians to Schaghticoke, that the separate Potatuck political authority came to an end. There is no indication that this authority – let alone any substantial part of the population of Potatuck – transferred in any way to the Schaghticoke village.

The only statement in the Final Determination purporting to identify any evidence of the relationship between the Weantinock - Potatuck and the Schaghticoke as a political and social groups is a reference an analysis into the origins of certain families at Schaghticoke in the Proposed Finding. STN PF, 58-60. The referenced "analysis," however, simply amounts to a list of baptized individuals at Schaghticoke from 1751-58, and a suggestion that "the great majority" were identified by the Moravians as having been "Wampanosch" (i.e., from "east of the Mahican region"). STN PF, at 58. This evidence does not advance the petitioners' case; if anything, the Final Determination's reliance on it as evidence of a tie between the preexisting tribal groups and the Schaghticoke highlights the dearth of evidence connecting the Weantinock and Potatuck communities with the Schaghticoke. The Acting Assistant Secretary has failed to identify any evidence suggesting that the Schaghticoke assembled while maintaining or

(once the Potatuck political authority ended in the late 1750s) continuing the Potatuck community or tribal authority. Not only were the few Potatuck individuals at Schaghticoke only a small part of the Schaghticoke community, they never amounted to a substantial part of the Potatuck membership. Other than the coincidence of some individuals, there's no indication in terms of political or social influence that would suggest that the resulting community at Schaghticoke could be deemed a continuation of the Potatuck.

D. Conclusion

The requisite historical continuity is altogether missing for the STN petitioner. The coincidence between the Schaghticoke and its alleged antecedents of certain individuals or "representatives" is simply insufficient to demonstrate that a social and political tribal community existed from the time of first sustained contact. Without the necessary showing that the social and political relationships carried forward from the Weantinock and Potatuck to the Schaghticoke, there is no valid basis upon which to conclude that the Schaghticoke are entitled to lay claim to their historical associations. The Final Determination is based on an inadequate examination of the source material, and the evidence it used is unreliable and of little probative value. Finally, the new evidence – both that presented after the Proposed Finding and improperly ignored by BIA, and the new evidence presented above – further demonstrates that reconsideration is not just appropriate but necessary.

XI. THE UNPRECEDENTED AND UNSUPPORTED NATURE OF THE FINAL DETERMINATION IS A RESULT OF THE LACK OF A PROPER DELEGATION OF CONGRESSIONAL AUTHORITY TO RECOGNIZE INDIAN TRIBES TO THE BIA.

Article I, section 8 of the Constitution grants plenary authority to Congress over Indian affairs, and in particular, the determination of which Native American groups are entitled to the benefits of the laws relating to Indian tribes and to the creation of a government-to-government relationship with the United States. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *United States v. Sandoval*, 231 U.S. 28 (1913). Congress has delegated to the Department of Interior the management over, and the authority to issue regulations relating to, “all Indian affairs and of all matters arising out of Indian relations.” 25 U.S.C. §§ 2, 9; *see also* 43 U.S.C. § 1457. However, Congress has never actually delegated the authority to acknowledge Native American groups as a federally recognized Indian tribe. Moreover, Congress has failed to articulate any guidance to govern the Department’s exercise of acknowledgment authority. This lack of guidance is the ultimate source of the Acting Assistant Secretary’s unprincipled and result-oriented Final Determination regarding the Schaghticoke.⁷⁰

Since 1871, Congress has clearly reserved the right to define which groups should be recognized as Indian tribes. 25 U.S.C. § 71. The absence of a congressional delegation of acknowledgement authority is reinforced by the refusal of Congress over the past twenty years to make such a delegation. *See, e.g.*, H.R. 4462, 103rd Cong., 2d Sess. (1994). No delegation of authority can be found in any statute or other

⁷⁰ The Board likely has no jurisdiction to consider this issue because the Board has no authority “to disregard a duly promulgated regulation or to declare such a regulation invalid.” *Oklahoma Petroleum Marketers Ass’n v. Acting Muskogee Director*, 35 IBIA 285, 2000 I.D. Lexis 112, *6-8 (2000). This matter is nonetheless brought to the Board’s attention in order to ensure that the Board is aware that the issue has been raised, to allow for its presentation to the Secretary pursuant to 25 C.F.R. § 83.11(f)(2), and to exhaust all administrative remedies.

congressional action since the Department issued its original acknowledgment regulations.⁷¹

Even if general delegation of authority over “Indian affairs” in 25 U.S.C. §§ 2, 9, can be deemed a delegation of acknowledgment authority, Congress failed to provide “intelligible principles” to guide the Department’s exercise of such authority. *See Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 473-74 (2001) (citing cases). Although the cases are rare in which the courts have found that Congress has impermissibly delegated authority to an administrative agency, a purported delegation of authority is unconstitutional if it provides “literally no guidance for the exercise of discretion.” *Id.* at 474.

There is a complete lack of anything like guidance in any congressional enactment. The statutes delegating authority over “Indian affairs” are on their face as sweeping and as directionless as possible. They simply grant to the Department authority over the “management of all Indian affairs, and of all matters arising out of Indian relations.” 25 U.S.C. §§2, 9; *see also* 43 U.S.C. § 1457. Even the Seventh Circuit, while assuming that Congress had delegated authority to the Department, noted that it had done so “*without setting forth any criteria* to guide the exercise of discretion.” *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of Interior*, 255 F.3d 342, 345 (7th Cir.

⁷¹ The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, § 103(3) (codified at 25 U.S.C. §§ 479a to 479a-1), recognizes that Department has purported to acknowledge certain tribes, but goes no further, and certainly does not delegate authority to the Department. Two courts have assumed that Congress has delegated acknowledgment authority to the Department. *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of Interior*, 255 F.3d 342, 345-46 (7th Cir. 2001); *James v. U.S. Department of Health & Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987). Neither court appears to have directly addressed the issue of the constitutionality of any delegation of acknowledgment authority to the Department.

2001). As the Supreme Court recently held, “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” *American Trucking*, 531 U.S. at 475. Thus, if the scope of the delegation is narrow, then Congress need not provide any direction. However, if the scope of the delegation is, as here, broad, Congress must “provide substantial guidance” to govern that discretion. *Id.* The delegation of authority over “all Indian affairs” could scarcely be broader. On tribal acknowledgment, Congress has not only failed to give “substantial guidance” to the Department, it has failed to give any.

The lack of congressional guidance is displayed in the Final Determination. In recognizing the STN petitioner, the Acting Assistant Secretary ignored the BIA’s own regulations and precedents, relied on unsupported theories of “implicit” recognition with a distinct political body and supposedly “unifying” but separate and antagonistic political processes. This remarkable and unusual exercise of unbridled administrative power demands the examination of the basic questions of the legitimacy of the Department’s purportedly delegated authority. Such an examination reveals that to the extent Congress has in fact delegated acknowledgment authority to the Department, that delegation is unconstitutional.

XII. CONCLUSION

In light of the serious defects in the Final Determination, including the dependence on unreliable and nonprobative evidence, the existence of compelling new evidence, the faulty interpretation of the evidence, the misapplication of governing legal principles and the outright violation of the acknowledgment regulations, the Final Determination should be vacated with appropriate instructions including the requirement that Principal Deputy Assistant Secretary Martin have no further role with regard to this petition and that a new OFA research team be assigned to the petition. To the extent that the Board concludes that any of the issues presented in this request for reconsideration are outside of its jurisdiction, such issues should be referred to the Secretary.