**UNITED STATES**

**DEPARTMENT OF THE INTERIOR**

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**BUREAU OF INDIAN AFFAIRS**
**BRANCH OF ACKNOWLEDGMENT AND RESEARCH**

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In re FEDERAL ACKNOWLEDGMENT
PETITION OF THE SCHAGHTICOKE
TRIBAL NATION PETITIONER GROUP

APRIL 16, 2002

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# COMMENTS OF THE STATE OF CONNECTICUT, THE CONNECTICUT LIGHT & POWER COMPANY, KENT SCHOOL CORPORATION, AND TOWN OF KENT REGARDING THE PETITION FOR FEDERAL TRIBAL ACKNOWLEDGMENT OF THE SCHAGHTICOKE TRIBAL NATION PETITIONER GROUP

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STATE OF CONNECTICUT
RICHARD BLUMENTHAL
Attorney General

MARK F. KOHLER
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06106
(860) 808-5020

THE CONNECTICUT LIGHT & POWER COMPANY
JAMES K. ROBERTSON
RICHARD L. STREET
Carmody & Torrance
50 Leavenworth Street
P.O. Box 1110
Waterbury, CT 06721
203-573-1200

KENT SCHOOL CORPORATION
DAVID J. ELLIOTT
ALLAN B. TAYLOR
ERIC L. SUSSMAN
Day, Berry & Howard LLP
CityPlace I
185 Asylum Street
Hartford, CT 06103-3499
(860) 275-0196

DONALD C. BAUR
Perkins Coie LLP
607 Fourteenth Street, NW
Washington, DC 20005
(202) 434-1621

TOWN OF KENT
JEFFREY SIENKEIWICZ
Sienkiewicz & McKenna, P.C.
9 South Main Street
P.O. Box 786
New Milford, CT 06776-0786
860-354-1583

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## I. INTRODUCTION

The State of Connecticut ("State"), the Town of Kent ("Town"), Kent School Corporation ("Kent School"), and The Connecticut Light & Power Company ("CL&P") (collectively, "Respondents") respectfully submit these comments in response to the submissions of the petitioner Schaghticoke Tribal Nation ("STN"). Pursuant to 25 C.F.R. § 83.10(f)(2) and the Orders dated May 8, 2001 and February 14, 2002, of the United States District Court in *Schaghticoke Tribal Nation v. Kent School Corporation*, 3:98CV-0113 (D. Conn.) (Dorsey, J.), these comments should be considered by the Department prior to the issuance of a proposed finding on the petition. Submitted with these comments is an appendix containing exhibits referenced herein.[1]

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[1] The following abbreviations will be used in these comments:

STN Pet.: STN Federal Acknowledgment Petition submitted in 1994.
STN SE: Summary of the Evidence Supplementing the STN Petition, dated April 1997, by Michael Lawson, Ph.D.
STN AR: Anthropological Report Supplementing the STN Petition, dated April 1997, by Lucianne Lavin, Ph.D.
STN HR: Historical Report Supplementing the STN Petition, dated April 1997, by Michael Lawson, Ph.D.
STN TCA: Twentieth Century Addendum to the April 1997 Supplement, dated March 20, 1998.
STN CR: Community Report on the STN, 1890-1950, dated March 19, 2001, by Steven L. Austin, Ph.D.
STN TL: STN Tribal Leadership Report dated February 15, 2002.
STN FTM: STN Family Treemaker
CT Ex.: Initial Submission of Exhibits by the State of Connecticut, December 2001.
KS Ex.: Initial Submission of Exhibits by Kent School, Inc., December 2001.
Town Ex.: Initial Submission of Exhibits by the Town of Kent, December 2001.

## A. Background

By letter dated December 14, 1981, a group that called itself the Schaghticoke Indian Tribe served on the BIA its notice of intent to submit an acknowledgment petition. This letter at once highlights one of the troubling aspects to the Schaghticoke petition. There are two groups claiming legitimacy as the Schaghticoke tribe: one calling itself the Schaghticoke Indian Tribe ("SIT"), and one calling itself the Schaghticoke Tribal Nation ("STN). These groups are bitter rivals of each other. Ironically, they cannot even agree as to whose petition this is. Even as the STN group moves through this advanced stage of the acknowledgment process, the SIT alleges that it is the true petitioner whose notice of intent was, in effect, "stolen" by the STN.[2] As discussed in detail in section III.B.6 below, this continued factional strife is evidence of the lack of a distinct, self-governing political community. However, it is the STN group that submitted the documented petition and supplements to it. For purposes of these comments, therefore, the STN group will be treated in these comments as the acknowledgment petitioner.

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JT Ex.: Exhibits submitted jointly by the Respondents with these comments.

When available, references will be made to the STN Petition Record CD.

[2] The SIT filed its own notice of intent to petition for acknowledgment with the BIA on May 11, 2001. 66 Fed. Reg. 66,916 (Dec. 27, 2001). The SIT continues to maintain, however, that it is the group responsible for the initial notice of intent. Yet another purported Schaghticoke group has filed a notice of intent to seek acknowledgment, the so-called "Schaghticoke tribe" located in Bridgeport. This group filed its notice of intent on September 27, 2001. *Id.*

Following the submission of its notice of intent, the petitioner undertook a lengthy process for preparing its acknowledgment claim. The STN did not file its formal documented petition until December 7, 1994, some thirteen years after the notice of intent.

Prior to filing its petition, 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 the 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). JT Ex. 1. 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. That effort culminated in a July 12, 1993 letter from Starna to Henry Sockbeson, the NARF attorney assigned to the project,

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[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. He is associated with another noted expert in tribal acknowledgment, Dr. Jack Campisi, through Research Associates, Inc.

indicating that the result of his continued research confirmed his 1989 conclusions. JT Ex. 2.

In his 1993 letter, Starna advised NARF, in the clearest and strongest terms, that the STN petition was seriously deficient. His findings, which are discussed in greater detail in these comments below, were that the STN could ***not*** satisfy criteria (a) (identification of the tribe by external sources as an American Indian entity), (b) or (c).[4] He also expressed doubts about the ability to meet criterion (e) (tribal descent). Starna concluded that "it is my expert opinion that without substantial additional documentation, the [STN] ***cannot possibly meet*** three criteria: 83.7(b); 83.7(c); and 83.7(e). ***Thus, the Schaghticoke tribe will fail to be acknowledged***." *Id.* (emphasis added).

The petitioner's response to this bad news was to terminate its relationship with NARF and Starna. STN Pet., at 104-05. The STN engaged other experts and went forward with its petition. After submission of the initial documented petition on December 7, 1994, the BIA conducted a preliminary review of the petition and sent

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[4] Since the Starna Report, the BIA has revised its acknowledgment criteria. Prior to 1994, petitioners had to offer evidence satisfying criterion (a) from historical times. The 1994 regulations require such proof only since 1900. The Respondents do not challenge the petition under criterion (a). However, as discussed later in this brief, the reason Starna concluded criterion (a) could not be met – the alienation of the Cogswell family from the Harris family – raises serious questions under the other criteria.

the STN a technical assistance letter on June 5, 1995 (BIA TA Letter). In this letter, the BIA advised the STN of the following obvious deficiencies:

- "The petition as it is currently written reads like a history of a piece of land, rather than a group of people."
- "The petition particularly needs to strengthen the discussion and documentation to show that the petitioning group has existed as a community within which political influence has been exercised since the beginning of the twentieth century."
- "Your petition identifies leaders. However, the petition does not present evidence to show that those identified were actual leaders in the sense required by the acknowledgment regulations."
- "In the 1991 constitution provided to the BAR with the Schaghticoke petition, membership in the group is dependent on descendency from a Gideon Mauwee. This may present a problem in the acknowledgment process, since Federal acknowledgment as an Indian tribe is dependent on descendency from a tribal unit – not upon descent from a single individual."

BIA TA Letter, at 2, 7-8.

The STN submitted supplemental petition materials in April, 1997. On the basis of these submissions, the BIA determined that the petition was ready for review and placed it on the waiting list for active consideration as of June 2, 1997.

An initial lawsuit, captioned *Schaghticoke Tribe of Indians, et al. v. Kent School Corporation, et al.*, was filed in 1975 asserting an aboriginal claim to hundreds of acres of land abutting the Schaghticoke Reservation in Kent, Connecticut. In 1993, however, the United States District Court in Hartford, Connecticut dismissed the case

without prejudice on the ground that the Schaghticokes had not been granted recognized tribal status by the BIA.[5]

On June 12, 1998, the STN refiled the land claim lawsuit, entitled *Schaghticoke Tribal Nation v. Kent School Corporation*, (the "land claim"). Shortly thereafter, it moved for separate trial on tribal status. On March 31, 1999, the Court denied both the motions. Instead, the Court entered an order staying the action pending a determination by the BIA on the issue of tribal acknowledgment.

Upon the STN's motion, the Court lifted the stay on September 11, 2000.[6] Thereafter, the parties negotiated deadlines for a Proposed Scheduling Order, which the Court ultimately entered on May 8, 2001. The Order provides that, between December 17, 2001 and February 15, 2002, the parties and *amici* shall submit information and documents to the BIA that are relevant to the issue of tribal acknowledgment. The Order further provides that the BIA will issue a proposed finding within six months after serving on the parties and *amici* notice of the BIA's

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[5] In the interim, the United States filed *United States v. 43.47 Acres of Land* ("the condemnation case") in 1985 for the purpose of securing various tracts of land for the continued development of the Appalachian Trail. The STN is among the parties claiming ownership interests in the land at issue in that litigation as well, but the defendants in the land claim actions are not parties to the condemnation case. The condemnation case has been stayed at various times since its inception.

[6] In the interim, in May 2000, the STN filed *Schaghticoke Tribal Nation v. The Connecticut Light & Power Company*, which contains additional land claims by the STN against the United States and CL&P for a parcel of land adjacent to and south of the Schaghticoke Reservation.

entry of all data into its database. By Order of February 14, 2002, the Court extended these deadlines by two months.

At the time of the renewal of the land claim litigation, the STN petition was still sixth on the BIA waiting list, several years away from active consideration. By obtaining a court-ordered schedule for the consideration of its petition through the land claim litigation, the STN vaulted ahead of other groups on the list of petitioners awaiting active consideration.

In the meantime, the STN continued to seek ways to bolster its petition. In furtherance of this goal, the petitioner retained Dr. Ann McMullen, an anthropologist at Brown University and an expert on tribal acknowledgment, to review its petition and evidence. Dr. McMullen is also a noted proponent of tribal acknowledgment.[7] 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 Report, at 1 (JT Ex. 3), 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." *Id*. at 3. She echoed the same conclusions that Starna reached in 1993 and

[7] Dr. McMullen has worked for tribal groups in the Mashpee and Paucatuck Eastern Pequot tribal acknowledgment petition proceedings.

those reflected in the BIA's TA Letter in 1995, 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 accordance with the Court order, the Respondents made an initial supplement to the BIA record for this petition on December 17, 2001. The comments set forth herein constitute the Respondents' preliminary comments on the petition pursuant to the Court Orders.

**B. Summary of Position**

The petitioner's evidence falls far short of that necessary under the mandatory criteria for federal acknowledgment as an Indian tribe. In particular, there are extraordinarily lengthy periods of time – encompassing almost the entire nineteenth century and a large portion of the twentieth century – in which evidence of tribal community and political authority is absent. Moreover, this conclusion has been confirmed by the petitioner's own experts. This historical disjunction is so extreme that, for purposes of federal acknowledgment, the modern petitioner is a wholly new and separate entity from the historic Schaghticoke group.

The petitioner is required to produce evidence establishing that it has existed, since the time of first sustained contact with non-Indians, as a distinct community and that bilateral political relationships continuously existed between group leaders and

the membership. In the early nineteenth century, the Schaghticoke group began to experience a process of dispersal, significantly diminishing their membership. With the reduction in numbers and movement away from the reservation came a concomitant fragmentation of the community and absence of bilateral leadership. As community and political ties were lost, only family connections remained. With the exception of two isolated examples in the latter part of the 1800s, which on their own are insufficient, the record is devoid of any real evidence of a distinct Schaghticoke community or political leadership. The petitioner's evidence shows only kinship ties, and that evidence fails to demonstrate tribal existence under the acknowledgment criteria.

This lack of community and bilateral political relations continued, and is even better documented, in the early twentieth century. Relations between members on the reservation and others living away from the reservation were minimal to nonexistent. They almost never crossed family lines. Group leadership, to the extent it existed at all, was at best ambiguous and did not transcend the divide between those on and off the reservation or between family lines. Activities that the petitioner cites as demonstrating community and leadership – particularly a rattlesnake hunt club and pow-wows – were largely oriented towards and dominated by non-Schaghticoke members, thus depriving such evidence of any value in demonstrating existence of a distinct Schaghticoke community. Similarly, later activities of the group revolving around the pursuit of land claims in the 1950s were prompted and directed by a non-

Schaghticoke leader. The absence of internal leadership is evidenced by the return to inactivity when his efforts ended.

Finally, the lack of a unified leadership displayed in the earlier part of the 1900s erupted into full-blown, irreconcilable factionalism in the last two decades. In particular, serious disputes over control of the group's leadership and the reservation have persisted in the modern period. The inability of the petitioner's internal political processes to resolve core group issues – as evidenced by the repeated need to turn to external authorities to resolve the disputes – reflects a fundamental lack of political authority.

Despite the petitioner's efforts to show that the State has recognized the petitioner as a sovereign tribal entity, the record reflects otherwise. Even the petitioner's own description of the relationship between the State and the Schaghticoke group – whether the overseers of the nineteenth century or the State agencies of the twentieth century – depicts not a recognition of a political community but an individualized relationship with persons requiring State assistance. Thus, as both a matter of historical fact and of the legal requirements for acknowledgment, evidence of State recognition cannot make up for the overwhelming lack of community and political evidence.

The absence of continuous social community and political influence and authority are not the only deficiencies in the petition. The petitioner also has the

burden of proof to show that its members descend from the historical tribe. However, the petitioner has not provided essential documents, such as vital records for key individuals, and has not answered important questions about the history of key families and individuals. In particular, the petitioner has been unable to show that its membership descends from other than the Mauwee family. Under BIA precedent, a group cannot be acknowledged as a tribe if it descends from only one family because, by definition, a tribe requires a community that extends beyond single families. Even the petitioner's connection with the Mauwee family leaves unanswered questions.

Finally, all of the preceding standards require proof that the group involved existed as a tribe at the time of first sustained contact between Indians and non-Indians in the local area. Tribal sovereignty must have existed prior to European settlement. Therefore, the acknowledgment criteria require tribal existence to be shown before the point of first sustained presence of non-Indians in the area. In western Connecticut, such contact occurred in the mid-1600s, yet the Schaghticoke tribe did not even claim tribal existence until about 100 years later. In fact, the formation of the Schaghticoke group was directly influenced by Europeans. As a result, the petitioner fails this threshold test for acknowledgment.

## II. ACKNOWLEDGMENT STANDARDS

The petitioner must satisfy each of the seven mandatory criteria for acknowledgment.[8] The burden of proof is on the petitioner. 25 C.F.R. § 83.6. 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). 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 may 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

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[8] The mandatory criteria are (a) the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900; (b) a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present; (c) the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present; (d) the petitioner has a governing document including membership criteria; (e) the petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity; (f) the petitioner's membership is composed principally of persons who are not members of any acknowledged tribe; and (g) the petitioner's prior tribal status has not been terminated by Congress. 25 C.F.R. § 83.7.

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 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. A petitioner must still establish existence on a substantially continuous basis. 25 C.F.R. §§ 83.3(a), 83.6(e). It follows from the requirements of substantially continuous community and political authority that even petitioners with common tribal ancestry, "but whose families have not been associated with the tribe or each other for many generations" are ineligible for acknowledgment.

59 Fed. Reg. 9282 (stated in the context of prior Federal acknowledgment, but applicable with even greater force here).

Tribal relations are 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); *see also United States v. Antelope*, 430 U. S. 641, 646 n. 7 (1977); *Miami Nation of Indians of Indiana v. Babbitt*, 255 F.3d 342, 350 (7th Cir. 2001). In a 1987 Solicitor's Office opinion, expressly relied on by the court in *Masayesva v. Zah*, 792 F. Supp. 1178, 1181 (D. Ariz. 1992), Assistant Solicitor Scott Keep advised:

> [M]embership in an Indian tribe is a bilateral, political relationship. *See*, F. Cohen, *Handbook of Federal Indian Law* 135-36 (1942 ed.); *see also*, Solicitor's Opinion, 55 I. D. 14, 1 Op. Sol. on Indian Affairs 445, at 459 (U.S.D.I. 1979).
>
> The fundamental importance of the <u>bilateral</u> nature of membership cannot be underestimated. (emphasis added).

Memorandum BIA.IA.0779, April 3, 1987, from Assistant Solicitor, pertaining to acknowledgment of San Juan Southern Paiutes, at 4; *see also* Memorandum BIA.IA.0259, March 2, 1988, from Assistant Solicitor regarding the Citizen Band of Potawatomi Indians, at 2, 6, 7.

These requirements have been expressly incorporated in the acknowledgment process. Under the 1978 regulations, the Department "would acknowledge only those Indian tribes whose members and their ancestors existed in tribal relations since

aboriginal times and have retained some aspects of their aboriginal sovereignty." 43 Fed. Reg. 23,744 (1978). "Maintenance of tribal relations – a political relationship – is indispensable." 43 Fed. Reg. 39,361-62 (1978). The present regulations also indicate that "recently formed associations of individuals who have common tribal ancestry but whose families have not been associated with the tribe or each other for many generations" are ineligible for acknowledgment. 59 Fed. Reg. 9282.

Under federal law and the acknowledgment regulations, a tribe must have historically existed and must continue to exist as separate and distinct from other Indian tribes in order to be recognized. Indeed, the overall intent of the acknowledgment process is to recognize tribes "which have existed since first contact with non-Indians." *Id.* at 9281. The 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." 25 C.F.R. § 83.3(a) (emphasis added). "Continuous" for this purpose means "extending from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption." *Id.*, § 83.1. The term "autonomous" means "the exercise of political influence or authority ***independent of the control of any other Indian governing entity***." *Id.*, § 83.1 (emphasis added). The regulations, therefore, require substantially continuous tribal status for an organization that has been separate and independent from any other Indian group from first sustained contact.

The requirement of distinct tribal status is also supported by the 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) (Cherokees 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"); *Conners v. United States*, 180 U. S. 271 (1901) (indicating that tribe must be "a separate political entity, recognized as such."). 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).

As demonstrated below, the petitioner has failed to meet these standards, and thus requires negative proposed findings.

## III. DISCUSSION

### A. The Absence of a Distinct and Autonomous Schaghticoke Tribe at the Point of First Sustained Contact

No Indian group can be acknowledged as a tribe under federal law unless the petitioner demonstrates that it existed as a tribe at the time of "first sustained contact" between non-Indians and Indians in the affected local area. In this regard, the Schaghticoke present a rather unique situation. The Schaghticoke is not an historic

tribe, within the meaning of the acknowledgment criteria, in that it did not exist, and therefore cannot assert a claim to tribal sovereignty, prior to first sustained contact with European settlers in the area in which the Schaghticoke came to be located. Instead, the group coalesced in the mid-eighteenth century, long after there was a sustained presence of Europeans in western Connecticut. Moreover, it was formed from individuals and families – not preexisting tribes – that had found themselves dispersed and dislocated in the face of European settlement. Significantly, the formation of a Schaghticoke community was greatly influenced by Europeans. Specifically, Moravian missionaries played a principal role in transforming the group of individual Indians – that before the influence of the missionaries had not existed in tribal relations – into a community.

The circumstances of these individual Native Americans evoke a strong sense of sympathy. Members of a variety of other tribal groups, separated and dispersed by forces both internal and external, were brought together at the place called Schaghticoke through adversity and the well-intentioned work of settler missionaries. The missionaries could provide assistance and a new common identity. But neither the Moravian missionaries nor the Indians themselves could restore or create lost tribal identities.

The undisputed fact of the Schaghticoke group's formation is that it did not preexist first sustained contact in the area – a fact critical to whether the petitioner is entitled to recognition as federal tribe. Underlying federal tribal recognition – and the

concomitant government-to-government relationship it establishes – is the concept that tribal sovereignty has its roots in an autonomous political existence prior to and separate from European contact. As demonstrated below, both in the acknowledgment criteria and in the judicial precedents on which they are based, tribal sovereignty must have its origin not merely from the existence of an Indian community. Rather, sovereignty arises out of an extant autonomous community before European settlement. In other words, tribal sovereignty cannot be created after the point at which Europeans had a sustained presence in an area; it must have existed before that point in time.

The present regulations bar recognition under the circumstances here. A change to the regulations would be necessary to make an exception for Indians individually coalescing into a tribe after the point of sustained contact. But the only exception now is for tribes that themselves combine. Hence, under the present criteria and in the absence of a change in the regulations and any controlling precedent,[9] the petitioner cannot satisfy this threshold requirement for acknowledgment.

**1. The Legal Test**

As provided in the BIA regulations, 25 C.F.R. § 83.3(a), to be acknowledged**,** a petitioner must prove "substantially ***continuous*** Tribal existence" as a functional or

autonomous entity "***throughout history*** until the present" (emphasis added). This requirement of proving continuous existence is also reflected in the substantive criteria of 25 C.F.R. Part 83. Criterion (b) requires proof of the existence of a continuous social community from "historical" times to present. *Id.,* § 83.7(b). Criterion (c) demands proof of political leadership and authority of a bilateral character over that same "historical" period. *Id.,* § 83.7(c). As discussed above, "historical" is defined with reference to first sustained contact between Indians and non-Indians in the local area of the petitioner group. *Id.,* § 83.1. Under these provisions of the acknowledgment regulations, the question of whether the Schaghticoke were a separate and distinct tribe at the time of earliest sustained contact therefore is a threshold issue. If they were not, the petition is invalid on its face and cannot satisfy the criteria.

This legal prerequisite to acknowledgment has three key components: (1) continuous existence; (2) of an autonomous tribe; (3) throughout its history. Taken together, these three concepts establish the threshold test of tribal existence at the point of first sustained contact. Each element of the test must be satisfied, as discussed below.

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[9] A change in the recognition criteria would require compliance with the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553.

First, the term "continuous" is defined as "extending ***from the first sustained contact with non-Indians*** throughout the group's history to the present substantially without interruption." *Id.,* § 83.1 (emphasis added). This definition is not linked to the ***petitioner's*** first sustained contact, but instead refers to such contact as an event occurring ***between any Indians and non-Indians*** in the affected area. This interpretation is confirmed by the acknowledgment regulations, which define "sustained contact" as "the period of earliest sustained non-Indian settlement and/or governmental presence ***in the local area*** in which the historical tribe or tribes from which the petitioner descends was located historically." *Id.,* § 83.1 (emphasis added). Thus, to determine this point of time, the frame of reference must be the "local area" in which the Schaghticoke historically were located.

For purposes of these comments, that local area will be defined as western Connecticut, (roughly modern Litchfield County), including the Danbury area, western New York and southwestern Massachusetts. This is the “local area” of the petitioning group.

Second, the term "autonomous" is defined to mean a group that has engaged in "the exercise of political influence and authority independent of the control of any other Indian governing entity." *Id.* § 83.1. As discussed above, this principle is fundamental in federal Indian law. *See, e.g., Worcester v. Georgia*, 31 U.S. at 559 (describing "Indian nations" as "distinct, independent political communities"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 16 (recognizing the Cherokee Nation

"as a distinct political society, separated from others, capable of managing its own affairs and governing itself"); *United States v. Washington*, 641 F.2d at 1373 (affirming the finding that "appellants had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communities'").

For purposes of first sustained contact, the petitioner must be able to trace its existence to ***a tribe*** that was an independent, fully functioning entity at the time of first sustained contact with non-Indians. This requirement for existence prior to contact with non-Indians also finds its basis in the case law. As stated in *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), the inherent sovereignty of Indian tribes is ultimately based on the fact that "***[b]efore the coming of the Europeans***, the tribes were self-governing political communities." (Emphasis added). *See also Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408, 425 (1989) (tribes retain elements of sovereignty from when, "[p]rior to the European settlement of the New World, Indian tribes were 'self-governing sovereign political communities' . . . ."). The self-governing power of an Indian tribe, which is the basis for acknowledgment under the BIA regulations, arises from a petitioner's "inherent sovereignty as the aboriginal people of this continent." *Montana v. King*, 191 F.3d 1108, 1112 (9th Cir. 1999). *See also Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998) ("[T]ribes retain whatever inherent sovereignty they had as the original inhabitants of this continent to the extent that sovereignty has not been removed by

Congress or is inconsistent with the overriding interest of the Federal Government . . . ." (citations omitted)).

The federal government agrees with this interpretation. As recently as February 7, 2002, the Director of the Office of Tribal Justice at the Department of Justice, Mr. Tracy Toulou, testified before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the House Committee on Government Reform regarding the origin of tribal sovereignty and the relationship of that issue to the acknowledgment process. Mr. Toulou stated: "The over-arching principle of Indian tribal sovereignty is that Indian tribes pre-existed the federal Union and draw their powers from their original status as sovereigns before European arrival." Statement of Tracy Toulou, Director, Office of Tribal Justice, Before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, Concerning Oversight Hearing on Tribal Acknowledgment Process February 7, 2002 at 1 (JT. Ex. 4).

Third, the petitioner must prove that it functioned as a tribe throughout history. This test also must be determined with reference to the point of first sustained contact. "Historical," for the purposes of tribal acknowledgment, means "dating from first sustained contact with non-Indians." 25 C.F.R. § 83.1. And, as noted above, the term "sustained contact," is defined as beginning at "the period of ***earliest*** sustained non-Indian settlement and/or governmental presence in the local area in which the

historical tribe or tribes from which the petitioner descends was located historically." *Id.,* § 83.1 (emphasis added). Thus, the Schaghticoke petitioner must show first, that it existed from the time of earliest sustained contact forward, and second, that it has maintained ongoing tribal functions and autonomy since then.

There is only one exception to the condition precedent that the tribe itself existed at the point of first sustained contact. Under sections 83.6(g) and 83.7(e), a petitioner can qualify if its membership consists of individuals who descend from an historical Indian ***tribe*** or from ***tribes which combined and functioned as a single autonomous entity***. *Id.,* § 83.7(e) (emphasis added). BIA confirms this test in its Acknowledgment Guidelines, where it states that only the following "types of petitioner may be acknowledged under the 25 C.F.R. Part 83 regulations: Historic tribes which have continued to exist; Amalgamated historic tribes such as the Tunica-Biloxi; and groups that represent a continuing portion of a historic tribe, such as the Jena Choctaw, the Huron Potawatomi and Snowqualmie." BIA, Acknowledgment Guidelines, at 36. Thus, if the Schaghticoke did not exist as a tribe, or continuing portion of a historic tribe, they can meet this threshold test only by showing that their group is an amalgamation of groups from ***tribes*** that did exist at first sustained contact – groups that ***combined to form a new entity*** that has an unbroken record of autonomous political and social existence from the moment of amalgamation to the present.

The emergence of the Schaghticoke tribe departs from all previous BIA decisions where acknowledgment has been granted on the basis of splinter groups from historical tribes or tribes consolidating together into a new entity. In each of these previous determinations, situations existed where pre-existing tribal entities came together through deliberate acts of amalgamation or where offshoots of tribes that existed at first sustained contact went on to establish separate identity and maintain social and political community over time. These situations can be distinguished from Schaghticoke, where the tribe relied upon by the petitioners as its historic antecedent came together as a result of isolated individuals and family remnants from various other tribes uniting together around the Christian Moravian mission movement. Indians from at least five tribes were involved in the emergence of this entirely new tribe, one that can find no predecessor that existed at the time of first contact (Potatuck, Wompanach, Mahican, Esopus, Minising, *see* n. 13, infra). This new tribal entity cannot lay claim to the social or political heritage of any previously existing tribe. It truly was a new Indian community that emerged in the mid-1700s.

The BIA guidelines identify the Tunica-Biloxi Tribe as a model of how groups of Indians from previously existing tribes come together to form a new tribe in a manner that satisfies the acknowledgment criteria. Tunica-Biloxi demonstrates why the STN does not qualify as an amalgamated tribe.

The Tunica-Biloxi Tribe received federal acknowledgment in 1981. 46 Fed. Reg. 38, 411. As stated in the Federal Register notice of the final determination:

> The contemporary Tunica-Biloxi Indian Tribe is the successor of the historical Tunica, Ofo, and Avoyel tribes, part of the Biloxi Tribe. There is a documented existence back to 1698. The component tribes were allied in the 18th century and became amalgamated into one in the 19th century through common interests and outside pressure from non-Indian cultures.

*Id.* (emphasis added). Inherent in this determination are circumstances that do not exist for the Schaghticoke petitioner: a successor tribe to tribes that existed at first sustained contact; the conscious alliance of the component tribes; and the amalgamation of the component tribes into a new entity.

Reference to the December 4, 1980 BIA recommendation and summary of the evidence for the final Tunica-Biloxi determination and the technical reports illustrates the difference between amalgamated tribes, on the one hand, and the consolidation of individual and family remnants from other tribes into a new entity, on the other. As stated in the December 4 Tunica-Biloxi memorandum:

> All four tribes which are now fused into the group had extensive documented contact with French and Spanish authorities throughout the 1700's. A Tunica community has been maintained as the Marksville site since the Tunica first migrated into the area in the 1700's. The Ofo and Biloxi migrated to the area around the same time. The Avoyel were located in this area at the time of the earliest non-Indian contact. They all were located in the area before the Louisiana Purchase of 1803.

Memorandum to Assistant Secretary of Indian Affairs from Commissioner of Indian Affairs 2 (Dec. 4, 1980). Thus, in Tunica-Biloxi there was a pattern of tribal movement into a common area, to contrast with the Schaghticoke situation, where there was only the migration of individuals and families to the same territory in Kent.

The process of amalgamation for the Tunica-Biloxi is described in greater detail in the technical reports. The anthropological report, for example, describes first contact between the Tunica and Europeans as early as the 1680s. Anthropological Report, at 4. By the early 1700s, the Tunica had "allied" with the Ofo, through a deliberate act of assimilation. *Id.* As noted by BIA, the Tunica were "anxious to seek allies," thereby again undertaking a deliberate and affirmative act of tribal consolidation by a tribe. *Id.*

By the 1760s the Tunica, already allied with the Ofo, entered into an "alliance" with the Avoyels. *Id.* at 5. Again, a deliberate process of achieving a tribal alliance and merger is evident.

The Biloxi, according the BIA report, first encountered Europeans in 1699. In 1763, they settled in Mississippi, across the river from the Tunica. Like the other tribes, they achieved a tribal "alliance" with the Tunica at that time. *Id.* at 6. This process of conscious and assertive acts by the four tribes to merge together and form alliance is discussed throughout the technical reports. *See, e.g.* Anthropological Report, at 7 (Tunicas purchase land from the Avoyel); 8 (at some point in the early 1800s, the Avoyels "joined the Tunicas at Marksville"), 17; (factionalism described,

but without reference to Tunica or Biloxi affiliation), Historical Report, at 3; (Tunicas, Ofos, and Avoyelles united in attack on the British in 1774).

The tribal unification procedure apparent in Tunica-Biloxi case is very different than the history of the Schaghticoke petitioner. Whereas in Tunica-Biloxi four distinct groups with independent histories of contact with Europeans made deliberate decisions, at various times, to consolidate into a larger tribal unit, no such fact pattern is apparent in the Schaghticoke situation. Only individuals came together in a new group for reasons (primarily religion) that had no bearing on the political or social affairs of their previous tribes.

The pattern of tribal offshoot or splinter groups evolving into distinct tribes also is distinguishable from the history of this petitioner. One such example is presented by the Jena Choctaw Tribe, acknowledged by BIA in 1995. 60 Fed. Reg. 28,480 (May 31, 1995). As explained in the historical technical report for this Tribe, the Jena Choctaw emerged as a discrete component of the overall historical Choctaw Tribe, having migrated together and maintaining continuous and discrete political and social continuity.

First sustained contact between Choctaw Indian and European colonizers occurred from 1699 to 1718. Historical Report, at 2. Choctaw territory expanded to the area of modern Jena, Louisiana after about 1730, and Choctaw movements throughout the area were noted repeatedly during the ensuing years. *Id.* at 2-3. These

eventually lead to Choctaw settlement throughout the region, during the 1700s, including on west side of the Mississippi River. *Id.* at 5-7.

Beginning around 1830, portions of the Choctaw Tribe began to emigrate and seek new settlements. *Id.* at 10. During this period, there is evidence of Choctaw movement through the Jena area. *Id.* at 13. By 1880, there was evidence of a Choctaw settlement at Catahoula Parish, Louisiana. *Id.* at 14. The settlement consisted of 26 Indians of Choctaw descent. All referenced accounts of the origin of this tribe trace to the historical Choctaw tribe. *Id.* at 14-16. They were part of a self-contained and "very notable community." *Id.* at 19. Thus, Jena Choctaw is an example of a splinter tribe that emerged from a larger historical tribe and, in the process of doing so, developed a separate, autonomous, and continuous identity.

Another example of a splinter group that emerged from an historical tribe is Huron Potawatomi, acknowledged by the federal government in 1995. 60 Fed. Reg. 66,315-16 (Dec. 21, 1995). BIA's historical report documents the existence of the Potawatomi Tribe as early as 1704, when first contact occurred. Potawatomi Historical Report, at 12. A distinct band of Potawatomis at Huron emerged over time, and were clearly recognized as such by the Treaty of 1807. *Id.* at 16-17. This treaty resulted in the establishment of four small reservations. *Id.* Eventually, the Huron Potawatomi were subjected to the removal policy of the 1830s and 1840s. *Id.* at 52-54. However, some members of the Huron Potawatomi were able to avoid removal, eventually developing a settlement at Pine Creek, Michigan. *Id.* at 56-70. The group

of “evaders and returnees” of removal who settled there were regarded as “remnants” of the historical Huron Potawatomi. *Id.*, at 3. They maintained social community and political leadership and authority on a continuous basis, and thus were entitled to acknowledgment.

As with the model of amalgamated tribes, like Tunica-Biloxi, the prototype under BIA precedent for an offshoot from an historical tribe does not fit the Schaghticoke situation. Unlike Jena Choctaw and Huron Potawatomi, the Schaghticoke petitioner cannot be portrayed as an outgrowth from another tribe. Its membership came from diverse tribes, and its formation was not the result of movement of a group of members to a new location or as part of a unified migration effort. As described above, the group of Indians from whom this petitioner claims descent initially were from many different tribes, and they came together by happenstance as a result of their common interest in Moravian doctrine. This is not a basis upon which federal acknowledgement should be established.

A closer pattern to the circumstances associated with the Schaghticoke petitioner is found in BIA precedent where the petition failed to achieve acknowledgement. For example, the United Houma petitioner could not achieve acknowledgement because its ancestors consisted of mostly non-Indians and three Indians. 59 Fed. Reg. 66118, (Dec. 22, 1994). BIA found that the Indian ancestors "moved independently of each other" and that there was no evidence that "they were related to each other politically, or genealogically before settling together." *id.* To a

large degree, the same can be said for the progenitor of the Schaghticoke petitioner; the Indians who formed this historical group appear to have come together as a result of random and independent movements that were lacking in any tribal context. Certainly, there is no evidence offered by the petitioner to meet its burden of proof to show how the historical tribe they claim to represent came together, or from which tribes they emerged.

The Steilacoom Tribe of Indians ("STI") decision is another example analogous to Schaghticoke. The BIA issued a proposed finding against recognizing the STI in February 2000. 65 Fed. Reg. 5880 (Feb. 7, 2000). The STI claimed to be the continuation of the Steilacoom band that signed the Treaty of Medicine Creek in 1854, but the group could not establish that it descended from that band. The STI could not satisfy 83.7(a), (b), (c), or (e). The facts surrounding STI's failure to satisfy 83.7(e) are relevant to the Schaghticoke issue.

The evidence showed that the STI is comprised of members with ancestors from a number of Indian tribes/groups. The BIA found that "[t]he petitioner's ancestors in the 19th century consisted of several different categories of unconnected people . . . ." 65 Fed. Reg. 5881. BIA also concluded that the "evidence did not demonstrate that persons from any one of these different categories regularly interacted with persons from other categories or with persons identified in the historical record as Steilacoom Indians." *Id.*

Only three of the STI members were able to document their descent from Steilacoom Indians of the 19th and early 20th centuries. The other STI members descended from "two other categories of Indian ancestors." *Id.* at 5882. First, two-thirds descend from Indian women who were identified by their children and grandchildren as Nisqually, Puyallup, Cowlitz, Clallam, Chimacum, Quinalt, Duwamish, Skokobish, Yakima, and Snohomish (i.e., *not* Steilacoom). Second, the remaining STI members "trace their lineage to Canadian Indian tribes through Red River metis families from Manitoba." *Id.*

Furthermore, "family lines adopted into the STI in the 1950s included families whose Indian ancestry was Cowlitz, Cowlitz/Quinault, Lummi, Red River, and Colville, and who were previously unconnected with one another. *Id.* Thus, although the petitioner's membership consists of Indian descendants, it does not consist of 'individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous entity.'"

This STI decision suggests that where a group traces its ancestors to a number of different Indian groups that were unrelated and unconnected during historic times, BIA will find that the group cannot achieve acknowledgement. As discussed in this report, such a conclusion must be reached for this petitioner. The Schaghticoke petitioner, in effect, emerged out of whole cloth with no continuity to an existing tribe, as an offshoot, or deliberate act of amalgamation by preexisting tribes.

The burden of proof is for the petitioner to show a precursor tribe that existed at first contact and a relationship to that tribe either as an offshoot or by amalgamation with groups from other tribes through deliberate acts of consolidation. The petitioner has failed to offer this evidence, seeking instead to blur the facts of its origins so as to avoid the need to confront its tribal nonexistence at the point of first sustained contact. The acknowledgment process does not allow for such imprecision by a petitioner, and the STN's failure to meet its burden of proof on this point is fatal to its quest for acknowledgment.

It is not enough for a petitioner to consist of Indians, or even families, who came from different tribes and eventually coalesced into a new tribe. Instead, it is necessary that there was an actual unification of tribes or tribal groups into a new tribal entity. The new tribe cannot be simply an amalgamation of individuals from diverse, pre-existing tribes. Tribal continuity itself must be present in the form of a combination of distinct tribes, or groups from tribes – tribes that existed at the moment of initial European contact – into a new entity. Additionally, as Dr. Virginia DeMarce of BIA stated in the January 23, 2002, formal technical assistance meeting for the Nipmuc petitioner: "[A]malgamation is essentially the decision of two groups to come together." Nipmuc Transcript, at 21.

The Schaghticoke group cannot meet this test. As demonstrated below, non-Indian contact in the local area occurred as early as the mid-1600s with the

establishment of English trading posts and settlements in western Connecticut. At this time, there were several Indian tribes in the region, but no Schaghticoke tribe. The Schaghticoke Indian community did not come together until the mid-1700's, about 100 years after the point of first sustained contact between Indians and the colonists. When the Schaghticoke did come together as a community and political entity, it was not as a result of the "conscious act" of other historic tribes that previously existed and maintained sustained contact with non-Indians, but instead through the movement and association of families and individuals who previously had belonged to, and separated from, other historic tribes. There was no "continuing portion of a historic tribe," only an affiliation of individuals and families from diverse backgrounds.

The STN itself admits to this factual problem in its petition, stating:

> With the establishment of a Moravian missionary presence at Schaghticoke in 1742, *it is possible for the first time to identify Schaghticoke accurately as a distinct tribe . . . .*"

STN HR, at 24. (emphasis added). Thus, even under the petitioner's own analysis, the Schaghticoke tribe did not exist at first sustained contact.

**2. The Settlement of Western Connecticut**

The initial inquiry regarding a petitioner's ability to satisfy the first sustained contact test is to determine when non-Indians had their first consistent interaction with Indian tribes. Thus, it must be established when the local area was first settled by non-Indians.

In 1662, Charles II granted the Charter for the Connecticut Colony that included the relevant local region. English settlers in Connecticut had explored this northwest quadrangle of the Colony earlier than 1662. Indeed, they bought land from Indians there as early as 1659. (Cothren 1854, *History of Ancient Woodbury, Connecticut*: 21-31, JT Ex. 5). They had developed trade with Indians around what became Albany, N.Y., and western Connecticut, which brought Indians and Englishmen into constant and lively commercial relations. (*Papers, New Haven Colony Historical Society*, v. IV: 380, JT Ex. 6). In fact, traders, travelers, and militia men had been crisscrossing the area since at least King Phillip's War in 1675-76.

In the mid-1680s, in response to a threatened assertion of royal claims to lands possessed by the Colony, the General Court devised all lands not in private hands to the proprietors of the towns and also transferred to Hartford and Windsor the unlocated and unsurveyed tracts in northwestern Connecticut. (Bushman 1967, *From Puritan to Yankee*, 42, JT Ex. 7). Under the Anglo-American jurisprudential system, Connecticut settlers and their government then came into *de jure* possession of the very lands now claimed by the STN.

Deeds signed as early as 1659 transferred title of large tracts of what became Litchfield County from Indians to Englishmen. (Cothren 1854, at 21-31, JT Ex. 5). The General Assembly dealt with numerous incursions by settlers into the area throughout the last quarter of the seventeenth century. (Orcutt, 1882, *History of New Milford and Bridgewater, Connecticut*; 1703-1882, Ch.1, JT Ex. 8) (orders respecting

military actions; meetings with friendly Indians; trips between Hartford and Albany during King Philips war).

Efforts to establish towns in northwestern Connecticut yielded Woodbury in 1673 (Connecticut Public Records v. 2:227, JT Ex. 9) and New Milford in 1703. (CPR v.4:446, JT Ex. 10). By 1673, at least seventeen households – about 100 people – had been established in Woodbury (Cothren 1854, 1:41, JT Ex. 11). By 1683, there were about 300 people (*id.* at 65, JT Ex. 12). And, by the early 1700s, there were more than 450 people at Woodbury (*id.* at 77, JT Ex. 13). By the date of the first full census in 1756, 2,911 people resided in Woodbury. This large population of colonial settlers in the Schaghticoke local area is further evidence of contact with Indians.

New Milford was first noticed by the General Court in 1670 (Orcutt, 1882:5, JT Ex. 14). The settlement appears as "Wiantonock" in 1696 (CPR 4:191, JT Ex. 15). It was named in 1703 (CPR 4:446, JT Ex. 10) and made a town in 1712 (CPR 5:356, JT Ex. 16). By 1756, it had a population of 1,136. Land transfers from Indians to Englishmen in this area were recorded as early as 1657 (White, 1920, *The History of the Town of Litchfield, Connecticut; 1720-1920*, 8-9, JT Ex. 17). All of these places had supported significant Indian populations in the seventeenth and early eighteenth centuries, as documents attesting to land transfers readily reveal by the many Indian names attached to them. (*See* Orcutt, at 6-7, 10-11, JT Ex. 8). Thus, with such substantial and growing colonial settlements and towns in this area, it is certain that contact and interaction occurred.

The northwest quadrant of colonial Connecticut was the location of the so-called "auction" townships, owned by the colony and the towns of Windsor and Hartford and sold in lots at auction in the 1730s. Because of poor soils and rugged topography, five of the fourteen towns (Colebrook, Hartland, Winchester, Barkhamsted and Norfolk) surveyed in the area developed very slowly. The other nine, (Simsbury, Sharon, Cornwall, Canaan, Kent, Goshen, Torrington, New Hartford and New Fairfield), however, were quickly settled and populated by colonists between 1737 and 1741. (Daniels, *The Connecticut Town: Growth and Development 1635-1790*, 30 JT Ex. 18). Among these was Kent, which originally included Warren.

The first European pioneer families moved into Kent in 1738. (Grant, *Democracy in the Connecticut Frontier Town of Kent*, 1, JT Ex. 19). Fourteen years after that, land was set aside in Kent for an Indian reservation. By that time, the local Indians had been out-numbered by English pioneers who constituted at their initial settlement, some 210 people. In 1752, the year when the reservation was set aside for an estimated 300 Indians, there were in Kent 125 adult males (*Id.* at 69, JT Ex. 20), translating into about 625 people.[10]

A glance at the 1756 census of the non-Indian inhabitants of the towns surrounding Kent and the reservation reveals the following populations: Sharon,

1,205; Cornwall, 500; New Milford, 1,137; Woodbury, 2,911; New Fairfield, 713. Litchfield County carried a population density in 1756 of 15.11 people per square mile. (Daniels, 1979:52, JT Ex. 21). As these populations demonstrate, about the time the Schaghticoke tribe emerged there was a significant non-Indian population, resulting from a pattern of settlement and expansion throughout the region that had occurred over the preceding 100 years.

While this colonial expansion was occurring, the Indian populations of Connecticut were diminishing, but remained large enough to ensure extensive contact with the settlers. The estimated Indian population in Connecticut was perhaps 35,000 people in the 1600s. (Collier, 1978, *Long Island Sound and the Arrival of Western Man*, JT Ex. 22). In the area that comprised Litchfield County, the expansion of the European population was even more striking; from zero in 1660 to approximately 11,800 in 1756. Thus, merely based on population dynamics, there is abundant evidence that contact occurred between Indians and non-Indians throughout the local area well before a Schaghticoke tribe came into being.

### 3. Indian Tribes at the Time of Settlement

During the period from the mid-seventeenth to the mid-eighteenth centuries, at least four tribes existed within the local area. These tribes were the Potatuck in

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[10] The convention among historical demographers calls for five residents for each adult male

northwestern Connecticut; the Mahican in northwestern Connecticut, eastern New York, and southwestern Massachusetts; the Housatonic in southwestern Massachusetts; and Tachkanik in eastern New York.

Each of these tribes came into contact with the colonial authorities and settlers throughout the 100 years before the emergence of the Schaghticoke Indian community at Kent. During this period, a gradual process of dispersal of these tribes was underway. As a result of external pressures caused by displacement from colonial settlers, as well as internal factors (including fur trade-related conflicts, loss of leadership, intratribal disputes, and increased interest in non-Indian religions), individual members and families began to leave their historic tribes. These individuals and family groups often ended up joining other tribes, associating with non-Indian missions, or simply fending for themselves. This pattern was evident in most of the principal tribes of this region of Connecticut, Massachusetts, and New York, including the Mahican, Tachkanik, Potatuck, Pequannock, Paugussett, and others.

One example of this trend is the Potatuck Tribe, which occupied land located on the east side of the Housatonic River near present day Southbury and New

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in the 18th century.

Milford.[11] This event occurred with the establishment of the plantation of Woodbury by the Colony of Connecticut. The grant boundaries given to the plantation's proprietors encompassed the Indian village of Potatuck, located at the confluence of the Pomperaug and Housatonic Rivers. The effect of the colonial presence at Woodbury on the Potatuck Tribe became apparent in 1687, when their tribal leaders sought the permission of New York authorities to remove to the New York Tachkanik tribal lands. (JT Ex. 26). The process of dispersal and displacement of the Potatuck Tribe continued in the following years as more and more colonists came into the region.

While this process of displacement, dispersal and tribal disintegration was occurring throughout the region, there also was emerging in this area a significant missionary movement associated with the Moravians. In 1740, the Moravians established a major mission at the Mahican village of Shecomeko in New York. At

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[11] There is additional evidence that the authorities at Fort Orange, New York were aware of the Potatuck's existence at an even earlier date. In 1663, the New York records show that the authorities at Fort Orange noted the gathering of a multitribal war group east of the Dutch settlement of Claverick. These records indicated that this multitribal group consisted of "Machianders, Catskills, Wappingers, those of the Esopus, ***those of another tribe of Indians that dwell halfway between Fort Orange and Hartford***" (*Documents Relating to the Colonial History of New York*, ("New York Colonial Documents"), v.13:345. (JT Ex. 23) (emphasis added). In 1675, the Housatonic Tribe, in response to trade wars growing out of relations with the English at Albany, confederated themselves with the Mahican against the Mohawk. (Brasser, *Riding on the Frontiers Crest: Mahican Indian Culture and Culture Change 1974*: 23. (JT Ex. 24). The following year, the Potatuck (Wayattno), fearing the effects of King Phillip's War, asked the New York authorities to take the Tribe under their protection (New York Colonial Documents, v.13:494-496. (JT Ex. 25). By 1687, the Potatuck also became members of the same confederation that the Housatonic Tribe had joined in 1675 (Brasser, 23, JT Ex. 24). That same year, the Potatuck (Leder 1956, *The Livingston Indian Records*: 94-95, JT Ex.

the time of their arrival, the Mahican village had an Indian population that included members from tribes to the east (which the Moravians referred to as Wompanach) and from upland territories (referred to as Hooglanders).

This process of assimilating refugees from other tribes at Shecomeko continued to intensify during this period, such that by 1748, the mission had become a true "melting pot." Moravian records demonstrate that, by 1748, there were at Shecomeko 41 Mahicans, 33 Wompanach/Potatuck, 10 Esopus, 12 Delaware, 1 Minising, and 2 Hooglanders. (Moravian Archives, B.313, f.1, i.1 (JT Ex.27)). The evidence of these Indians abandoning their old tribal ways is demonstrated by the fact that many of the former Wompanach/Potatuck tribal members married Mahican spouses and rejected their patrilineal-based kinship group system in favor of the Mahican matrilineal-based system. This process of abandoning ways associated with former tribes was occurring on a widespread basis in other tribes as well.

It was this same kind of dispersal that was occurring throughout the region to such an extent that, by the beginning of the eighteenth century, the principal tribes of the Housatonic Valley had dispersed. The Potatuck and Wompanach tribes, in the upper valley, effectively ceased to exist. In the lower valley, the Pequannock and

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26) asked the colonial magistrates at Albany for permission to move up and live among their "brethren", the Tachkanik.

Paugussett tribes had largely dispersed except for small remnant groups. Other tribes, such as the Mahican and Tachkanik, were breaking up as well.

This process accounts for the emergence of a relatively large Indian settlement on the west bank of the Housatonic River near Kent. Indians who had left behind their own tribes gathered at this location, not as part of any tribal movement or affiliation, but merely as a result of largely independent movement and activity of individual Indians. Just as Indians from various tribes ended up at Shecomeko, so too did they gather at the diverse community that was developing at Schaghticoke.

As this discussion demonstrates, there was a substantial Indian presence throughout the Schaghticoke "local area" during the time when colonists first visited and occupied the area and then over the subsequent decades when the settlers established permanent communities. Gradually, these interactions contributed to the disintegration and displacement of these tribes. As part of that process, however, there was no evolution of pre-existing tribes, or groups from tribes, into a new Schaghticoke tribe. Indians who previously belonged to other tribes eventually came together, not as merging tribes, but as individuals and families some of whom later coalesced for a brief period of time under the direction of Moravian missionaries, into a Schaghticoke community.

This process of individuals and families leaving their existing tribes and coming together in new communities was occurring elsewhere throughout the region.

This scenario was evident, for example, at Schaghticoke, New York, where in 1677, Governor Andros purchased lands, to establish a village to accommodate displaced tribal groups, especially those from central Massachusetts who had been uprooted by King Phillip's War. Frazier, *The Mohegans of Stockbridge*, 5 (1992) (JT Ex. 28). This community accommodated members of the Pennacook Tribe, Ruttenber, *History of the Indian Tribes of Hudson's River*, 186 (1872) (JT Ex. 29), as well as from the Pocumtuc and Narragansett Tribes. Dunn, *The Mohicans and Their Land 1604-1730*, at 219 (1994) (JT Ex. 30). Gradually, this community itself dissolved, with the Indians who had resided there migrating to Maine, where they joined the Penobscot and Micmac Tribes (Frazier 1992, at 32 (JT Ex. 31)), Fort Dummer in Vermont (*id.* at 32; JT Ex. 32)), and to Canada (Dunn 1994, at 160, 162 (JT Ex. 33)). As a result of this movement away, caused largely by land sales to, and displacement by, neighboring colonists, the Indian community at Schaghticoke, New York ceased to exist by the 1750s.

Another example of this process of individual Indians displaced from various tribes and coming together for a period of time in a new community is presented by Shecomeko, New York. As discussed previously, at the time the Moravians established their mission at Shecomeko in 1744, the village already consisted of Indians from many different tribes. They had assembled there after being "overwhelmed and outnumbered after a century of colonial settlement . . . discouraged and poor . . . ." Dunn 2000, at 227-28 (JT Ex. 34). The Moravian missionaries

described these Indians as destitute, representing "the worst in all this part of the Country." *Id.* (JT Ex. 34).

With the arrival of the missionaries, this community split into two groups, one attracted to the Moravian doctrine, the other involving largely traditional Indian beliefs. Frazier 1992, at 63 (JT Ex. 35). The community rapidly dispersed, however. In 1746, about one-half the Moravian convert population left for Bethlehem, Pennsylvania. *id.* at 77 (JT Ex. 36). The Moravian mission itself closed in 1746, due to disputes with the Colony of New York. *Id.* at 77 (JT Ex. 37). This caused additional movement away from Shecomeko. Only a few of the non-Moravian Indians remained in the area, often intermarrying with local colonists. Dunn 2000, at 257 (JT Ex. 38).

The Mahican community at Wequadnach (Sharon, Connecticut) followed a similar pattern of disintegration. Moravian missionaries arrived in 1743, and converted some, but not all, of the Mahican residents. *Id.* at 65, 89 (JT Ex. 39). During the ensuing years, this Indian community also began to feel the pressure of colonial encroachment. Some of the residents moved to the Christian Indian community in Stockbridge, Massachusetts. (Frazier 1992 at 98 (JT Ex. 40)). By 1753, Wequadnach had dissolved, with its former residents dispersing to other locations such as Bethlehem, Pennsylvania, Oneida-Iroquois country, and Schaghticoke at Kent. *Id.* at 102 (JT Ex. 41).

The Indian community at Stockbridge, Massachusetts experienced the same pattern. This community began as a Christian mission in 1736 when the Colony of Massachusetts granted a township to two missionaries and their Indian following, primarily Housatonic Indians. *Id.* at 40-41 (JT Ex. 42). By 1740, there were about 120 Indians at Stockbridge, including Mahicans from New York and former residents of Shecomeko and Wequadnach communities. Frazier 1992 at 52 (JT Ex. 43). The same pressure of colonial encroachment occurred here, beginning in the late 1740s. Seizures of land from the Indians for debt along with sales to colonists lead to the gradual loss of Indian control of the community. By 1783, the Stockbridge Indians had left Massachusetts, principally to join the Oneida-Iroquois in New York State. Frazier 1992 at 237-238 (JT. Ex. 44).

These examples are indicative of the pattern throughout this region of New York and Connecticut. Traditional tribes were breaking up. New Indian communities were being formed by individuals and families from the pre-existing tribes. These new communities did not last long, however, and did not coalesce into new or persevering tribes. They were only associations of Indians who were looking for new homes. As discussed below, this same pattern repeated itself at Schaghticoke, Connecticut. At Schaghticoke in Connecticut, there emerged for a brief time a small group of Indians who banded together in the mid-1700s around the Moravian missionaries. This group, relied upon as the historical Schaghticoke Tribe by the STN petitioner, did not persist over time, as described in this report.

### 4. The Emergence of the Schaghticoke

The Schaghticoke tribe formed by the coming together of individuals from different tribes. They joined not as tribal groups seeking a new common political and community identity, but as individual Indians unified by a common interest in the teachings of the Moravian mission. There was no conscious act of consolidation from other tribes, only the decisions by individual Indians to join together based on their common interest in a Christian religious system. By definition under the regulations, a tribe that emerges in this manner, after first sustained contact, does not qualify for acknowledgment.

#### a. Schaghticoke, the Place vs. Schaghticoke, the Tribe

The core problem the STN face in proving that they existed at the point of first sustained contact arises out of their failure to acknowledge the dichotomy between "a place" and "a people." Time and again throughout the evolution of its petition, the STN received the same criticism: its acknowledgement claim focused too much on the history of a geographical location and not enough on the history of a tribe.

As BIA told the Schaghticoke in 1995: "[t]he petition as it currently stands reads like a history of a piece of land, rather than a history of a group of people. . . . The petition focuses too narrowly on the reservation itself, rather than the history of the group itself. . . ." (BIA TA Letter, at 22). Even after the STN submitted extensive supplemental evidence and analysis to BIA, the petitioner's own expert, Dr.

McMullen, concluded in 1999, "too much still rests on Schaghticoke as a piece of land occasionally occupied by Indians. . . ." (McMullen Report, at 3; JT Ex. 3).

These criticisms go to the heart of the fundamental and fatal defect of the Schaghticoke acknowledgment claim – until well after sustained contact began, there was no Schaghticoke tribe, only a place by that name which served as the home of many Indians of numerous tribal lineages. Eventually, a core group of Indians came together to form a community on the land located on the west side of the Housatonic River near the current town of Kent, and hence secured the name of that place for their newly formed group – Schaghticoke. But this community did not exist historically as a tribe nor was it, as BIA specified in the 1995 technical assistance letter, "a separate group which moved onto the reservation and joined other Indians already living there." (BIA TA Letter, at 2).

The record of this petition, as well as the available evidence, demonstrates the absence of an historical Schaghticoke tribe. As the petitioner admits, there is considerable disagreement in the historical record as to exactly when Indians began to occupy the Schaghticoke site, varying from 1699/1700 (letter from Robert Trent to Governor Winthrop) to 1710 (Orcutt) to 1730 (DeForest). According to the petitioner's former expert, during the seventeenth century, "interior western Connecticut and the Housatonic drainage, ***where the Schaghticoke are found today***, were home to a large number of Indian populations . . . . The resident population consisted of an unknown number of distinct sociopolitical groupings, all of whom

spoke Quiripi-Unquachog, a southern New England language." Undated Petition drafted by William Starna, at 2 (KS Ex. Bates No. BIA00003) (emphasis added). The petitioner has asserted that "Schaghticoke [the place] was known to be inhabited by Native Americans in 1736." STN HR, at 23. Elsewhere, the petitioner attempts to place Indians in the locale earlier than this time, but significantly is unable to provide evidence that such Indians were the historic tribe from which it claims descent. STN AR, at 31, 34.

The STN petitioner attempts to extend the group's historical existence to 1699. To do so, it relies on a letter from Robert Treat to Connecticut Governor Winthrop dated 1699/1700 that includes a reference to "ye Scattacook Indians." (SN-V026-D0222). The petition suggests that this reference must have referred to a Schaghticoke tribe in western Connecticut, rather than other existing communities in New York or Massachusetts using the same name. STN HR, at 15-16. A closer examination of the letter and its context reveals that this assumption to be wrong.

Governor Winthrop, having received a report from New York's colonial Governor Bellomont about potential Indian hostilities, wrote to Treat to investigate. The report, which originated with a Dutchman from Albany, was found to be false by Treat. In his letter, Treat identified John Minor, the justice of the peace at Woodbury, Connecticut, who would have been quite familiar with the area's Indians, as one of his sources in his investigation. Noticeably absent from Treat's letter is any mention of a "Scattacook" village on the Housatonic River in northwestern Connecticut.

As the petitioner acknowledges, in 1677 New York Governor Edmund Andros had established a village known as Schaghticoke at the confluence of the Hudson and Hoosic Rivers north of Albany. The village was a settlement for Indian refugees from Massachusetts, Connecticut and Rhode Island. STN HR, at 16. In 1698, New York Governor Bellomont, who sent the report to Governor Winthrop, was well acquainted with the "Scattacook" at this New York settlement. Ruttenber, *History of the Indian Tribes of Hudson's River*, 166 n.1 (1872) (JT Ex. 45). Given that the initial report investigated by Treat originated from Albany and given that the investigation of potentially hostile Indians was of immediate concern to the New York Governor, it is far more likely that the reference was to the New York settlement.

While there is confusion as to when this location became occupied by Indians, there is agreement that the Indians located at this place came from diverse other tribes and had no recognized leader until Gideon Mauwee emerged as the chief, according to the petitioner, some time after 1736. *Id*. Indeed, the petitioner itself states that it was not until the Moravian missionaries arrived in 1742 that a distinct Schaghticoke tribe can be identified. STN HR, at 24. The Moravians identified the Indians at Schaghticoke as including Wompanach and Potatuck. STN HR, at 5. Scholars and the petitioner conclude that there were also Pequots, Mahicans, Niantics and others. STN Pet., at 40-46; STN HR, at 3, 9; STN AR, at 5. Similarly, reflective of the confusing nature of the broader group, Gideon Mauwee's origins are uncertain. Scholars and the petitioner alike have identified him variously as Pequot, Mahican or

Potatuck. STN HR, at 40-46; STN AR, at 26-27. The petitioner notes the arrival of Chickens, a Mohawk, and his family at Schaghticoke in 1748. STN HR, at 20. That report also refers to the presence of Indians from "present Stratford, at the mouth of the Housatonic." *Id.* at 22. Thus, these records, all of which are relied upon by the STN, demonstrate the existence of a "melting pot" Indian community at Schaghticoke, rather than an historic tribe.

The confusing and ill-defined origins of the group of Indians who occupied the Schaghticoke site is significant. The petitioner has not been able, through its extensive documentation to date, to create a clear picture of a cohesive Indian community at Schaghticoke. Instead, what emerges from their report is a hodge-podge history of various Indian groups and individuals coming together at various times in this location.

Significantly, the petitioner has provided no evidence of any amalgamation of discrete tribal groups into a new Indian community at Schaghticoke. Instead, the occupation of the lands at Kent was, quite clearly, the product of the helter-skelter arrival over time of disparate individuals or families from diverse tribes who happened to end up in the same location. Whenever this Indian settlement first became established, it was not until the middle of the 1700's that anything resembling a tribe emerged, long after first sustained contact in this local area.

### b. The Moravian Movement and the Emergence of a Schaghticoke Tribe

The emergence of the Schaghticoke group is closely linked with the Moravian missionary movement. Their profound influence on the Schaghticoke is significant for purposes of acknowledgment. The Moravian influence played a substantial, if not predominant, role in the formation of a Schaghticoke community, undermining any claim of preexisting tribal sovereignty. As the Schaghticoke group was in effect the product of European contact, it can hardly be said that a Schaghticoke tribe existed prior to first sustained contact with non-Indians.

The first Moravian mission established within the local area occurred at Shecomoko, New York around 1740. As the petitioner states, "Shecomeko was another composite Indian community, consisting of about 100 residents, primarily Mahagan but also including tribal members from the Hudson Highlands, Schaghticoke, and tribal refugees from the eastern war." (STN HR, at 26) (emphasis added).[12] Shekomeko was only 20 miles west of the Schaghticoke. The Moravians were reasonably successful at Shekomeko, and gradually began to expand their missionary activities to other nearby locations, including western Connecticut and Massachusetts.

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[12] As conceded in this quotation, the Schaghticoke considered Shekomeko, like Schaghticoke, to represent a "composite Indian community," not a tribe.

The early Moravian missionaries from Shekomeko referred to an unnamed seasonal "winter village." This village is believed to have been Schaghticoke. (Moravian Archives B.111,f.3,i.3, JT Ex. 46). When the Moravians first visited the village at Schaghticoke in 1743, they encountered a Mahican named Mauwee and also some members of his immediate family. Mauwee ("old captain Mawessman") and his son, Josua (Job), and daughter, Maria, as well as three other Indians, were baptized by the missionaries on this trip. (Moravian Archives B.111,f.2,i.3, JT Ex. 47).

According to the Moravian documents, the initial Indian convert population at Schaghticoke was a family of six led by their family patriarch (Mauwee). The missionary Martin Mack referred to them as “[t]his little flock of Indians”. (Moravian Archives B.111,f.3,i.3, JT. Ex. 48). By 1750, the convert community numbered thirteen, and a year later it had swelled to forty-nine. It appears that it was from this initial base group of six that the alleged Schaghticoke tribe emerged.

The Moravians were a major force for accommodation to the rapidly disintegrating cultural environment of the Indian tribes in this area. As tribes came into sustained contact with European culture and dispersed or disintegrated, the missionaries provided their Indian converts with an ideology that produced a new identity, new social and symbolic norms and rituals, and a new stability to their lives. The Indian converts came to the Schaghticoke mission as individuals and single families, having left behind their former tribal lineage structures. Indicative of this

process of transformation, the Moravians bestowed Old Testament names for the Indian converts.[13]

Mauwee's prominence in part was due to his selection as a community steward by the Moravian missionaries. They considered him to be their steward of the Schaghticoke mission community. (Moravian Archives, B.115, f.4, JT Ex. 49). However, from the time of Mauwee's baptism by the Moravians in 1743 until his death in 1760, the data strongly suggest that Mauwee was not the leader of all the Indians residing at Schaghticoke, but only a steward to those of the Moravian Indian community residing there. For example, expounding his new found beliefs, Mauwee was harassed by the non-converted Indian community, then living at Schaghticoke. In one case a non-Christian Indian put a gun to Mauwee's head and threatened to kill him if he continued to speak of Jesus. (Loskiel 1839, pt. II: 44, JT Ex. 50).

In 1751, the Moravian Indian community at Schaghticoke totaled forty-seven adults and approximately forty children. (Moravian Archives B.115, f.14, JT Ex. 51). Ezra Stiles gave a 1745 total Indian population estimate at Schaghticoke of 600, of whom 161 were men. (Stiles, *Itineraries*, v.5:160, JT Ex. 52). Thus, the Moravian converts led by Mauwee at Schaghticoke were only a small portion of the overall

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[13] For example, the document (Moravian Archives B.111, f.2, i.3, JT Ex. 46) which recorded the baptism and conversion of Mauwee and the others in 1743 shows this usage. The list was divided into two columns. The first was titled: "names were" the second "and are now." Thus, Marveseman (Mauwee) became Gideon.

Indian population. This small group of converts became its own self-contained community within a larger group of non-Christianized Indians. They constructed their own separate dwellings at what was termed "lower Schaghticoke" (Moravian Archives B.115, f.12, JT Ex. 53). Their stated desire, according to Mack was that ". . . they wish also to have order & make Shekomeko always their model." (Moravian Archives, B.111, f.3, i.3, JT Ex. 46)

A constant concern of the missionaries was to prevent "backsliding" by the Indians they had converted away from the Moravian tenets and beliefs. The Indian converts themselves were equally concerned, as Gideon Mauwee stated; ". . . that they are now baptized and know about the savior, but don't know how to continue without a teacher to guide them towards the proper path . . . ." (Moravian Archives, B.111,f.2, JT Ex. 54). The Moravians also strove to learn and preach to their converts in their native tongue. The converts acquired new ritual practices and symbols, as witnessed by their holding twice daily prayer meetings ("quarter-hours") morning and evening, and periodic community "love feasts" *id.* The Moravians educated the children of their Indian converts (Moravian Archives B.313,f.1,i.1, JT Ex. 27). Some of these converts could speak both German and English (Josua, Gideon's son, was so conversant in German he acted as the community interpreter). They preached self-sufficiency, rather than dependency.

These practices became apparent at Schaghticoke with the emergence of the Christian group as a self-contained entity separate from the other Indians there and

divorced from their previous tribal connections and heritage. They had emerged as a new entity, channeled through the practices and beliefs of the Moravian mission. The Christian Indians at Schaghticoke grew and harvested their own corn (Moravian Archives, B.114, f.6, JT Ex. 55), cooperatively enclosed their fields with fences (Moravian Archives B.115, f.11, JT Ex. 56), established an apple orchard and harvested blueberries for marketing, *id.*, gathered their own firewood as a group, and collectively hunted and built summerhouses and winter-houses (Moravian Archives B.114, f.4, JT Ex. 57; JT. Ex. 56). They also maintained their own distinct community-based economic activities such as canoe building, basket and broom manufacturing, the produce of which they marketed in Kent and New Milford (Moravian Archives, B.114, f.6, JT Ex. 55). The Moravian converts even buried their own deceased adults and children: "The child's grandfather had to carry the child himself to the grave because no baptized Indian brothers were at home." (Moravian Archives B.115, f.2, JT Ex. 58). In fact, the Moravian Indian community at Schaghticoke maintained its own cemetery, which was referred to as "God's Acre" (Moravian Archives, B.115, f.12, JT Ex. 53). Again, this attests to the degree of separateness between the two Indian communities at Schaghticoke.

Thus, it was through this process of conversion by the Moravian missionaries and banding together of the converted Indians that a distinct tribal community emerged at Schaghticoke. As the petitioner itself states:

> ***With the establishment of a Moravian missionary presence at Schaghticoke in 1742, it is possible for the first time to identify Schaghticoke accurately as a distinct tribe*** (most of the amalgamation of other groups has taken place, knowing at least who its baptized members were, with a distinct leader, Gideon Mauwee, and occupying a distinct area) (as recognized by the Kent population in 1738).

(STN HR, at 24) (emphasis added).

This admission is fatal to the STN petition. It concedes the absence of a pre-existing tribe, the absence of a leader before that time, and the need for action by the already established Town of Kent to recognize a distinct location occupied by the group. Clearly, there was no tribe before this time, even though European settlement had long since occurred in the local area. The emergence of the Schaghticoke as a tribe – if, indeed it ever was one – and the appointment of its first leader, the STN's own documents acknowledge, did not come about until long after Europeans had settled and became well-established in the same locale.

Any questions remaining about the absence of a tribe at the point of first sustained contact are dismissed by the 1752 petition by the Schaghticoke Indians to the Connecticut General Assembly. As the Schaghticoke mission population grew to forty-seven adults in 1751, (Moravian Archives, B.115, f.14, i.1, JT Ex. 51) land issues came to the forefront, fostering an historically pivotal event in the emergence of the Schaghticoke. In 1752, a community meeting occurred among the Moravians (who had abandoned their mission at Shecomoko in favor of Schaghticoke) where land issues were discussed.

The resulting petition to the General Assembly was presented at the May 1752 session of the Assembly. (JT Ex. 59). All thirteen Indian petitioners cited on the document were Moravian converts and family leaders belonging to the Schaghticoke mission community. None were drawn from the general non-Christian Indian population. The signatories represented three families, and it is from these families that the STN members claim their descent from an historical tribe. The signatories were as follows: Gideon, Josua, Samuel, Martin, Simon, Jeremias, Petrus, Gottlob, Christian, Lucas, Gottlieb, Isaaous, Tsherry.[14]

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[14] The personal background of the above signatories is representative of the disintegration and fragmentation of the area's historic tribes. The data here cited was extrapolated from Moravian Archives, B.313, f.2 (JT Ex. 60) and Loskiel 1794, History of the Moravian Mission Among the Indians of North America, (JT Ex. 61 at 43). It shows the following description of each petition signatory, including each individual's tribal heritage:

> *Gideon* (#33): the son of the Mahican Abraham (#1) came to Schaghticoke circa February of 1743. His first wife Lazara (#60), a Wompanach was baptized at Shekomeko in September of 1743. She died in Shecomeko shortly after her baptism. She was a Wompanach.
>
> *Josua* (#34): (Wanawahek, Job), Gideon's son was also baptized with his father at Schaghticoke in 1743. He was married to Elisabeth (#41) of Shekomeko (New York) (she was baptized there in 1743). Elisabeth was the daughter of the Mahican Petrus (#31) and Christiana (#82) of Shecomeko.
>
> *Samuel* (#35): (Kiop), of Potatik, was married to Lucia (#155), a second Mahican daughter of Petrus (#31) of Shecomeko (New York).
>
> *Martin* (# 156): (Wanawahek), a son of Gideon, came from Wequanach (Sharon) in 1749.
>
> *Simon* (#42): (Guttagos, formerly Zacharius (#19)/James) was a Wompanach baptized at Schaghticoke. He was married to a Mahican woman of Shecomeko (New York) named Magdalena (#96).

These individuals came from diverse tribal backgrounds. They were bound together not by a tribal affiliation. Instead, they were brought together by a common interest in the preaching and practices of the Moravian missionaries. They were separate and distinct from the other Indians at Schaghticoke. While it is fair to say that they had, by 1751/52, begun to act together as a tribe, that tribe was, quite simply, the assemblage of a diversity of families and individuals who came together for religious reasons and became known by the name of the place they occupied, "Schaghticoke." This was not the amalgamation of tribes or Indian groups, as

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*Jeremias* (#40): the son of a Potatik woman (Rachel (#154) and brother of Samuel (#35). His father is unknown. Jeremias came from Shecomeko (New York) circa 1743.

*Petrus* (#31) (Naacksapamuth), a Mahican, came from Shecomeko (New York). Baptized at around the same time as Gideon. He was married to a Mahican/Esopus woman named Christianna (#82). His daughter Elisabeth (#41) married Josua (#34) the son of Gideon (#33).

*Gottlob* (#89): (Wawapam), a son of the Mahican sachem Wasampaa (Josua (#12) a Mahican, and Salome (#28), a Wompanach, both originally from Shekomeko (New York), came from Wequanach (Sharon) in 1749.

*Christian* (#166): (Pentawam), a brother of Petrus Sherman (#165), a Potatuck. He also came from Wequanach (Sharon) in 1749.

*Lucas* (#39): (Quawatchonit) a Wompanach, came from Shecomeko (New York) in 1743. He was married to a Wompanach named Pricilla (#56) who was also from Shecomeko.

*Gottlieb* (#149): (Nasskasehak, Sokonok) a Wompanach, was baptized at Schaghticoke in 1749. He was married to Magdalena (#150) a Mahican from Wequanach (Sharon).

*Isaaous* (#2): a Wompanach came from Shecomeko (New York) in 1743. He was married to Rebecca (#9), a Mahican/ Minising Indian.

required by the acknowledgment regulations. As a consequence, the purported historical tribe to which the petitioner ties its acknowledgment claim did not exist at the time of first sustained contact, and its petition cannot pass muster under the federal criteria.

### B. The Petitioner's Evidence of Distinct Community Under Criterion (b) and Political Authority Under Criterion (c) Includes Gaps Stretching Nearly 150 Years

The existence a distinct tribal community with bilateral political relations from historical times to the present underlies the very notion of tribal sovereignty and federal acknowledgment that is required under criteria (b) and (c) of the mandatory acknowledgment criteria. The petitioner's evidence of these criteria is seriously deficient. Indeed, for the entire nineteenth century, with two isolated exceptions, and for most of the first half of the twentieth century, the petitioner exhibited a distinct lack of community and political activities of the sort necessary to be federally recognized as a tribe. What is even more astounding is that these gaps were recognized by the petitioner's own experts.

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*Tsherry* (#382): (Solomon), a Wompanach, brother of Petrus Sherman (#165) of Potaik.

### 1. Standards for Establishing Distinct Community Under Criterion (b) and Political Influence and Authority Under Criterion (c)

It is absolutely fundamental 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. Community

"must be demonstrated historically as well as presently." *Id.* at 9287. The "[d]emonstration of continuity of a historical community is necessary to meet the intent of the regulations that continuity of tribal existence is *the* essential requirement for acknowledgment." *Id.* (emphasis added).

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* Prop. Finding, Sum. Crit. 24 (emphasis added). The activities of a relatively small group of closely related individuals will not suffice to demonstrate a distinct community. *Id*. at 24-25; *Miami* Final Determ. Sum. Crit. 5.

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 term "autonomous" means ***"the exercise of political influence or authority independent of the control of any other Indian governing entity."*** *Id*., § 83.1 (emphasis added). The BIA has stated that autonomous also means "self-governing." 56 Fed. Reg. 47320 (1991) (preamble to proposed acknowledgment regulations). The BIA further emphasizes: "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." *Id.*

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 (1991).

Although political influence or authority "is to be understood in the context of the history, culture and social organization of the group," *id.*, it still must be genuine and must exist historically to the present. As with the other criteria, it must be shown by specific, documented evidence. *Id.*, § 83.6(a), (c), (d). "[T]he primary question is usually whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion, for example, showing that political authority has been exercised." 59 Fed. Reg. 9280. It is true that criterion (c), like criterion (b), need not be met at "every point in time," and that fluctuations in tribal activity during various years will not "in themselves" be cause for denial of acknowledgment. 25 C.F.R. § 83.6(e). Nevertheless, "[e]xistence of community and political influence or authority shall be demonstrated on a substantially continuous basis." *Id.*; *see also* 25 C.F.R. § 83.3(a) (acknowledgment regulations "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").

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.*

The political dimension to tribal recognition is fundamental. "The concept of a bilateral political relationship is a strong one throughout Indian law." *Masayesva v. Zah*, 792 F. Supp. 1178, 1188 (D. Ariz. 1992) (quoting F. Cohen, *Handbook of Federal Indian Law* (1982)). 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* Final Determ. Sum. Crit. 15, *aff'd Miami Nation of Indians v. United States Dept. of Interior*, 255 F.3d 342 (7th Cir. 2001). The petitioner must show that any

interest in petitioner's alleged leaders and their issues and activities "were and still are distributed broadly across the membership." *Id.* at 18-19.

> This requirement means that these issues and activities must not simply be pursued by a very narrow core of individuals for whom they might be quite important but also are considered important among the membership as a whole.
>
> *  *  *  *
>
> Secondly, it is equally necessary to provide evidence that the issues addressed by leaders and organizations were of clear significance to members rather than of nominal or minor interest.

*Id*. at 19. In particular, the evidence under criterion (c) must demonstrate broad interaction extending beyond family groups. *Muwekma* Prop. Finding, Sum. Crit. 30, 34.

### 2. Overview of the Petitioner's Evidence of Community and Political Authority: The Unsuccessful Efforts to Fill the Gaps

The STN petition for acknowledgment suffers from an extraordinary lack of evidence of community and political authority for almost all of the nineteenth and much of the twentieth centuries. These exceptionally lengthy gaps in the proof required under criteria (b) and (c) are fatal defects in the petition. Ironically, perhaps the best exposition of these gaps, and the petitioner's unsuccessful, albeit repeated, efforts to fill them, comes from the petition documents themselves.

#### a. The Starna Findings

The petitioner initially engaged William A. Starna, a professor of anthropology at the State University of New York at Oneonta and a leading expert in tribal

acknowledgment, to prepare a petition for federal acknowledgment. In a letter dated July 12, 1993 to Henry Sockbeson of the NARF, then an attorney representing the petitioner, Professor Starna detailed the difficulties encountered in preparing a strong petition and his expert opinion as to the likelihood of success in obtaining acknowledgment. Starna 7/12/93 Letter (JT Ex. 2; SN-V026-D0178). With regard to criterion (b) – evidence that a substantial portion of the petitioning group constitute a distinct community – Professor Starna concluded that "[t]here is little evidence – whether documentary records, anthropological sources, or oral histories – that confirms the existence of a Schaghticoke Indian community from the early 1800s to about the 1930s." *Id*. at 3. Moreover, with regard to evidence of a modern community, he emphasized that:

> Individuals interviewed were notably unfamiliar with the names of other Schaghticoke families or individual members of the tribe. They were unable to offer descriptions of kin networks or social gatherings of the tribe. They were able to offer little on tribal social activities over the past 30 years. Other than knowing whether or not they were on the tribal roll, there was no indication that they constituted part of a functioning American Indian tribe. There is strong evidence, however, that the virtual absence of tribal participatory activities stems from the deep divisions and personal animosities prevalent among tribal members . . . .

*Id*. at 4. Citing the lack of "consistent or regular social gatherings of meaningful numbers," the absence of "evidence of social networks operating in the Schaghticoke tribe," infrequent and poorly attended tribal meetings, and the "insufficient

documentary evidence to support the existence of a contemporary Schaghticoke community," Professor Starna concluded:

> Although it can be demonstrated through state and historical records that an entity called the Schaghticoke tribe existed and exists, ***there is insufficient evidence to demonstrate a viable, functioning community***. This is especially the case for the contemporary period. In my expert opinion, the Schaghticoke tribe cannot meet 83.7(b) of the federal regulations.

*Id*. at 4-5 (emphasis added).

Professor Starna reached a similar determination as to criterion (c) – evidence of political leadership and authority. He noted:

> The principal flaw in attempting to meet this criterion is ***a near complete lack of documentation on leadership or political influence from about 1800 to 1925***. Insofar as I was able to determine, all that exists in support of the succession of chiefs or other leaders in the tribe is oral tradition, and this is ***contradictory***.

*Id*. at 5 (emphasis added). He further discusses the absence of political authority evidence, concluding that:

> Tribal leadership does not become visible until the 1940s when an individual named Swimming Eel organized tribal members to bring a land claim before the Indian Claims Commission.
>
> Excepting the years of 1876 and 1884, there is ***a complete lack of data on political activity or political influence for the 1800 to 1925 time period***. That is, no evidence could be found that describes or characterizes the kinds of activities leaders either initiated or directed on behalf of tribal members.
>
> The few examples of political activities or political influence I discovered in the contemporary community were narrow in

> scope, rarely involved significant numbers of tribal members, and because of the deep and hostile divisions in the tribe, had only limited support among the tribal membership.
>
> ***Thus, the Schaghticoke petition presents several gaps in political activity that are so extensive that meeting criterion 83.7(c) is probably impossible. The gaps are from about 1800 to 1876, 1876 to 1884, and 1884 to about the 1940s.***

*Id*. at 6 (emphasis added).

In sum, Professor Starna stated quite succinctly: "The Schaghticoke tribe is a tribe in name only. It cannot be represented as a functioning social unit." *Id*. at 4. Not surprisingly, "disappointed" by Professor Starna's conclusions, the petitioner terminated its relationship with him and now seeks to discredit his credentials and the quality of his research. STN Pet., at 104-05; STN SE, at 2; STN HR, at 157.

**b. The BIA Technical Assistance Letter**

After engaging a new team of experts led by anthropologists Lucianne Lavin and John Pfeiffer, STN Pet., at 104-06, the petitioner submitted a documented petition in 1994. On June 5, 1995, the BIA sent the petitioner a letter summarizing the results of the BIA's Technical Assistance review of the documented petition. The BIA's TA Letter indicated a number of deficiencies and omissions and suggested areas the petitioner needed to address. In particular, the TA Letter highlighted the significant evidentiary gaps regarding criteria (b) and (c).

Specifically, the TA Letter highlighted the lack of evidence showing how social community was maintained with members not living on the reservation. TA

Letter, at 5. The BIA questioned whether there had been community events, informal meetings or gatherings that could demonstrate significant social interactions and relationships. Moreover, the BIA emphasized that such interactions had to cut across family lines to demonstrate tribal community. *Id*. at 5-6.

Similarly, the TA Letter found the petition evidence for criterion (c) lacking. Specifically, the BIA expressed concern about the lack of evidence that those persons who had been identified as leaders in fact exercised political influence over members as required under the criteria. Also, it emphasized that, although evidence of conflict can be evidence under criterion (c), there had to be evidence that the issues resulting in leadership disputes were also of concern to the larger membership. Additional evidence was needed to make clear how the political processes worked. *Id*. at 7.

**c. The 1997 and 1998 Supplements**

In response to the TA Letter's discussion of deficiencies, the petitioner hired yet another research team, Morgan, Angel and Associates, led by historian Dr. Michael Lawson. STN SE, at 3. In 1997 and 1998, the petitioner submitted several new supplemental reports and voluminous documents that sought to resolve the lack of evidence. However, even in these submissions, the ***petitioner conceded*** that there were serious gaps in the evidence. In particular, Lawson acknowledged "the paucity of information about the internal workings of the Tribe for many historical periods…." STN SE, at 40.

The inadequacy of the petition evidence, even as supplemented by the 1997 and 1998 materials, is best demonstrated in a report prepared for the petitioner by Ann McMullen, Ph.D. A. McMullen, Preliminary Report on Schaghticoke Tribal Nation Petition for Federal Acknowledgment, dated Oct. 12, 1999 ("McMullen Report"; JT Ex. 3).[15] Referring back to Starna's critique, McMullen stated:

> It is with some regret that I must echo Bill Starna's early conclusion (during research for NARF) ***that evidence for community and leadership for parts of the nineteenth and twentieth century is lacking***. Unlike Starna, I feel that some of this can be rectified, but we must admit that some of the narrative explanation for this period may be more inferential than evidentiary and work toward making it as strong as possible.

*Id*. at 5 (emphasis added).

McMullen identified numerous areas of weakness in the petition. With regard to political leadership, in particular, she made the following observations:

> The equivalence of "informal political authority" and elders is without anthropological basis and relies too much on a Mohegan model of such leadership which I feel is inappropriate to the Schaghticoke. Under the modern Schaghticoke system, elders would appear to have political authority only when they act as council members and there is some evidence to suggest that some elders (specifically the Kilson men) were almost totally divorced from anything political.

[15] The McMullen Report was not submitted to the BIA by the petitioner, but was produced to the Kent School through discovery.

*Id*. at 8. Similarly, she concluded that "the suggestion that Eunice Mauwee was an individual leader is weak. ***There is no evidence that she played a true leadership role or that any other single individual played such a role during the early nineteenth century***." *Id*. at 9 (emphasis added). McMullen also finds that the assertion of Abigail Mauwee's "matriarchal authority is anthropologically naïve and internally contradictory . . . ." *Id*. at 15.

McMullen was particularly critical of the STN Anthropological Report by Lucianne Lavin. *Id*. at 12 ("Unfortunately, the Anthropological Report is the weakest part of the Petition and it is weak in a variety of ways."). This is significant given that the purpose of the Anthropological Report was to present evidence to fill the gaps for criteria (b) and (c) that persisted in the petition materials. Among the weaknesses of the Anthropological Report, McMullen cited the following:

- Interview evidence relied on revealed that the interviewer was "blatantly prompting" the interviewee, suggesting "***that the interviews were done with a specific agenda and not to collect as much valuable personal information as possible***." *Id*. at 13 (emphasis added). This admission seriously undermines the petitioner's substantial reliance on interview evidence in its efforts to make up for the lack of more reliable evidence of community and political authority.

- The Report makes illogical inferences, including the suggestion "that the repetition of surnames on petitions and memorials to the State illustrates continuity of leadership while this only proves continuity of population." *Id*.

- The Report suffers from a basic misapprehension of what is required to show community. McMullen states: "Misunderstanding of the nature of community within anthropological contexts also leads to simple statements which list tribal residents as inferring community: if living in proximity to one another were all there were necessary for [c]ommunity under BAR guidelines, many more tribes would be recognized by now, and much needs to be done in illustrating the cohesion of the Schaghticoke community." *Id*.

- The evidence offered regarding political leadership is seriously deficient. "An equation between culture-keepers and leaders is flawed: this situation is not like Mohegan or Pequot because ***no overt political action is apparent or demonstrated***." Moreover, McMullen finds that "[t]he suggestion that there is a dual leadership on and off the reservation is anthropologically unfounded and potentially dangerous to proofs needed for political authority. In particular, it suggests that the Harrises were political leaders without real power on the reservation

(with that invested instead in the Kilsons or Cogswells)." *Id*. (emphasis added).

- McMullen notes that the Report is devoid of evidence of either community or leadership throughout the nineteenth century. *Id*. at 15 (on a decade-by-decade analysis, repeating the phrase "nothing speaks to community or leadership").

- McMullen is highly critical of the lack of evidence of communications and participation in gatherings across family lines in the twentieth century. "Transmission of cultural knowledge appears to be largely ***within*** families and not ***between*** families and this needs to be shown to be clearly otherwise, especially in terms of core elders teaching various children cultural skills and content." *Id*. at 16 (emphasis original). References to informal gatherings in the mid-twentieth century did not demonstrate that these were inter-family or multigenerational; particularly since non-Schaghticokes participated, "this is not community . . . ., it might just be a Kilson party." *Id*.

McMullen recommends that the petition be improved by incorporating "spin," apparently by attempting to fit the evidence, which she contends is lacking under the acknowledgment regulations, to a different model so that the evidentiary gaps can be explained away. *Id*. at 12, 8-9 (for example, she suggests that "a model of sachemship

alternating with leadership by a group of individuals in the absence of a sachem is better for the available data").

**d. The 2001 Supplement**

In a final effort to fill the gaps in its petition, and apparently to respond to the serious deficiencies identified by McMullen, the petitioner sought out yet another expert to prepare yet another report. Anthropologist Steven L. Austin, Ph.D., prepared a Community Report dated March 19, 2001, supplementing the petition. The scope of the report was limited to community for the period of 1890 to 1950. In an understatement, Austin concedes that the evidence for community during this period "is more sparse that it is for other periods of time," STN CR, at 1, and that the prior petition evidence was lacking. *Id*. at 3.

Austin's attempts to shore up the petition fall short. First, he only addresses a portion of the gaps identified by Starna and MacMullen. He expressly does not address the period prior to 1890, and he is largely limited to a criterion (b) community analysis and does little to address the shortcomings in criterion (c) political authority evidence. Second, as will be discussed in detail below, the actual direct evidence of community relied on remains essentially unchanged. Little new is added to the petition evidence. Instead, Austin's principal contribution to the efforts to fill the gap is a mathematical analysis that attempts to show, largely through assumptions and inferences, that a distinct tribal community existed during the 1890 to 1950 period.

Austin's analysis is dependent on two sets of assumptions. First, he attempts to demonstrate that all three of the main Schaghticoke families – Mauwee/Kilson, Mauwee/Harris, and Cogswell/Kilson – had members that were residing on the reservation. For those residing on the reservation, he assumes that they were involved in community relationships given their proximity. Second, he attempts to demonstrate that each member of the three family lines had primary relatives living off the reservation. Because the BAR has accepted the assumption that persons related by primary kinship ties are maintaining social relations with each other, he therefore assumes such relations between primary relatives living on and off the reservation. STN CR, at 14. He then makes the inferential leap that all persons are in community relations by combining the two assumptions: (a) the family members living in close proximity on the reservation must have social relations merely on the basis of such proximity; (b) primary relatives both on and off the reservation must have social relations on the basis of primary kinship; (c) therefore, community relations exist among all through the assumed conduits of primary kinship and proximity. *E.g.*, STN CR, at 25, 46.

The flaws in this inferential analysis are apparent on their face. Factually, Austin admits that there is significant evidence that relations were not maintained with members living off the reservation. STN CR, at 19, 53 (evidence of tribal relations having been broken for certain lines). Given the lack of direct evidence of

maintaining community relations with family members living off the reservation, Austin's assumptions based on proximity and kinship are insupportable.

Moreover, as Austin nearly concedes on more than one occasion, his inferential analysis is at odds with the requirements of the acknowledgment regulations. The regulations permit the assumption of community relations if more than 50 percent of the members reside in an area exclusively or almost exclusively inhabited by group members. 25 C.F.R. § 83.7(b)(2)(i); *Muwekma* Prop. Find., SC 21; *Snoqualmie* Prop. Find., SC 14-15. As Austin admits, the percentages of members living on the reservation fall far below that level. STN CR, at 32, 46. His inferential analysis attempts to circumvent this requirement.

Finally, and most tellingly, the inferential analysis does not answer the most significant question and the most substantial defect in the petitioner's evidence: to what extent was there community activity across family lines. As the BIA has indicated, assumptions about primary kin contacts are not sufficient to demonstrate the necessary level of cross-family community. *Duwamish* Final Determ., SC 27-28. Even if his assumptions are accepted, he does not even offer indirect inter-family evidence of community among those living off the reservation. Therein lies the ultimate flaw in the effort. Perhaps the compiling of assumptions in this manner might be sufficient to plug a small gap of a few years. But here the petitioner is attempting to overcome ***decades*** in which there is virtually ***no*** evidence of community

or political authority. The petition record cannot support this wholesale use of inferences, and the acknowledgment regulations do not permit it.

The significant gaps first identified by Starna, and reaffirmed by McMullen, remain. It is not merely a matter, as McMullen suggested, of a lack of "spin" or the appropriate model in which to plug the evidence. Nor is it a lack of an inferential analysis from which to view the otherwise limited evidence, as Austin suggests. The most obvious answer is the correct one: The petitioner has failed to produce evidence that satisfies the key criteria of community and political authority.

### 3. The Petitioner Fails to Offer Evidence of Distinct Community or Political Authority in the Nineteenth Century

The petitioner also failed to meet its burden of producing evidence of distinct community and political authority for the nineteenth century. The petitioner devotes substantial attention to the activities of the Schaghticoke group in the mid- and late-1700s. However, when the petitioner turns to the 1800s, there is little offered. The evidence of community is nearly nonexistent. Indeed, despite overseer records for the century, the petitioner is only able to offer elliptical references to purported community activities, such as basket making. What is notably missing from this evidence is any demonstration that even this limited evidence involved cooperative or communal enterprise, shared responsibilities, or the transmission of culture across family lines. Similarly, the petitioner identifies persons denominated as leaders, but in no instance is the petitioner able to offer evidence that real political influence, in

the form of bilateral relations, was ever maintained over any significant period of time in the nineteenth century. Instead, the evidence reflects that there was a serious lack of political authority and influence. In sum, throughout the 1800s the Schaghticoke group continued to disperse, and tribal relations and community virtually disappeared.

Once again, the best evidence of the lack of community and political authority during the nineteenth century can be found in the petitioner's own discussion of the evidence, or lack thereof. Indeed, at times, the silence speaks loudest. The petition materials for the nineteenth century offer conclusory and highly generalized statements about cooperative work groups and maintaining herbal lore and basket making crafts. *E.g.*, STN Pet., at 47-48; STN SE, at 29-30. However, none of these general conclusions is supported by evidence of actual community activity of the sort necessary under criterion (b). In the place of evidence of community – and in particular, evidence that such cultural and craft lore was broadly communicated and transmitted across family lines as opposed to maintained within family groups – are discussions of the activities of individuals and individual families. *See* STN HR, at 73-81 (detailing individual occupations and other activities and about cultural lore maintained within various Schaghticoke families).

Moreover, in the only decade-by-decade analysis of community evidence, as opposed to the repeated broad generalizations that are not tied to any specific periods, the petitioner's own evidence is largely silent for long stretches of time. As noted by Professor McMullen, the Anthropological Report has no meaningful discussion of

evidence of community or political leadership for decade after decade in the 1800s. McMullen Report, at 15. Rather than being able to discuss activities of a community, it only offers details about disbursements for individuals by the overseers. STN AR, at 53-75. This evidence hardly speaks to a distinct, active community, but instead reflects individuals that were dependent on the assistance of the State. *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 105; *Nipmuck (Webster/Dudley Band)*, Prop. Find., SC 95. Finally, as McMullen properly concludes, the mere generalized references to culture are not evidence of community, particularly given the lack of evidence that cultural transmission was accomplished on a community or cross-family basis. McMullen Report, at 15.

#### a. The Diminishment and Dispersal of the Schaghticoke Group

The petitioner's inability to produce evidence of community or political authority during the 1800s is not merely a matter of the difficulties many petitioners face in obtaining documentary or other reliable evidence for that historical period. The explanation for the lack of evidence is fairly simple: The Schaghticoke group, beginning very early in the nineteenth century, declined significantly in numbers and sustained a reduction and scattering of members. Through the combination of reduced numbers and dispersal, community and political relations became so attenuated as to become, for acknowledgment purposes, nonexistent.

Contemporary observers noted the decline of the Schaghticoke group during the nineteenth century. Prominent and respected authorities such as William Cothren[16] and Samuel Church[17] commented on the degree to which the Schaghticoke Indians had diminished to just a few individuals and families by the mid-nineteenth century. William Cothren, *History of Ancient Woodbury, Connecticut*, 84, 86, 106-08 (1854, 1977 reprint) (JT Ex. 65); Samuel Church, *Litchfield County Centennial Celebration Address*, 26 (1851) (JT Ex. 66). Other contemporary commentators made the same observations. G. H. Hollister, *The History of Connecticut*, II:19 (1891) (JT Ex. 63); John Warner Barber, *Connecticut Historical Collections*, 476-71 (2d ed. 1836) (JT Ex. 67); John E. DeForest, *History of the Indians of Connecticut*, 411 (1851, 1964 reprint) (JT Ex. 68). The petitioner has itself documented the reduction and movement off the reservation of its members. *E.g.*, STN AR, at 54, 58.

The pattern of diminishment and dispersal continued in the second-half of the nineteenth century. The reduced numbers are repeatedly shown in the overseer reports. For example, by 1868, the number of identifiable Schaghticoke members had fallen to 56; by 1870, to 50; and by 1882 to 42. In fact, in 1882, the overseer stated

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[16] William Cothren's three volume history of Woodbury was described as a significant work given its completeness. J.A. Spaulding, *Illustrated Popular Biography of Connecticut* 99 (1891) (JT Ex. 62); G.H. Hollister, *The History of Connecticut*, I:260n (1891) (JT Ex. 63).

[17] Samuel Church served as State's Attorney for Litchfield County, as well as a Justice and Chief Justice of the Connecticut Supreme Court, and was undoubtedly familiar with the details of the Litchfield court and community. *See* 23 Conn. 666-67 (1854) (memorial to Church) (JT Ex. 64).

that group members had become so "scattered" that it was almost "impossible to get the exact number." (Overseer Rpts., SN-V001-D0150, p. 3; SN-V001-D0151, p. 3; SN-V001-D0153, p.2.) Again in 1884, the overseer reported that he had "made an effort to find them out: but having become so scattered it is almost impossible to learn their number." He estimated that there were about sixty-five Schaghticoke Indians in the State, with approximately twenty to twenty-five on the reservation. (SN- V001-D0155, p.2). Although the petitioner acknowledges the reduction of numbers and the movement off the reservation, it offers little in the way of evidence, beyond mere inference and surmise, that community and political relations were maintained in the face of these sustained demographic trends.

**b. The Absence of Community Evidence**

One must search the petitioner's submissions for any evidence of a distinct Schaghticoke community within the meaning of criterion (b). The one place one would have thought that detailed evidence would have been provided – the petitioner's Anthropological Report – is most notable for the utter lack of community evidence for almost every decade of the nineteenth century. This is confirmed by the petitioner's own expert. McMullen Report, at 12-15 (JT Ex. 3).

The snippets of purported community evidence are either of such a generalized and conclusory nature to be of little value or, when less generalized, pertain only to individual, not community, activity. For example, the petition materials on several occasions suggest that the craft of basketry was a significant component of the

Schaghticoke community. STN Pet. at 47; STN HR, at 85; STN AR, at 79. However, beyond this generalized conclusion lies only evidence of individualized economic activity. In particular, the only specific evidence pertains to the non-Schaghticoke Henry Harris, and there is no evidence that the craft was shared except among family members. STN HR, at 85-86; STN AR, at 79-80. Even this limited evidence only appears relevant to the latter part of the nineteenth century. STN HR, at 85.

In the face of the absence of community evidence, the petitioner attempts to twist in its favor what would otherwise be evidence of the ***lack*** of community. In particular, the petitioner tries to portray the overseer's role in providing care for Schaghticoke individuals as evidence of a Schaghticoke community. *See* STN AR, at 58-72. For instance, the petitioner contends that the settlement of accounts in 1851 for Jeremiah Cogswell, who did not live on the reservation but in the town of Cornwall, demonstrates community. The opposite conclusion is demonstrated by the evidence. Jeremiah Cogswell had received medical treatment from Edward Smith, M.D., in Cornwall prior to his death. The doctor was referred to the overseer to settle accounts. *Id.* at 62-63. Somehow, the petitioner would like to use this event as evidence that there was a Schaghticoke community. Instead, what this evidence demonstrates is that individuals were provided support and assistance by the State through the overseers. It says absolutely nothing about the existence of community relations among Schaghticoke members generally or even about the nature of Jeremiah Cogswell's contacts with the rest of the purported community. *Nipmuc*

*(Hassanamisco Band)*, Prop. Find., SC 105; *Nipmuck (Webster/Dudley Band)*, Prop. Find., SC 95. The same result follows from the petitioner's other similar efforts to portray the overseer's provision of assistance to individual persons residing off the reservation as demonstrating community. STN AR, at 72.

In sum, the petitioner has offered no direct, and little indirect, evidence that community relations or activities took place between the increasingly dispersed members of the group. That overseers continued to provide assistance to persons that moved away from the reservation only shows that the State chose to provide that assistance; it can support no inference that actual relations or community-based activities existed between those still residing on the reservation and those who lived elsewhere. Indeed, there is no real evidence offered, even among those living on the reservation, that community activities, and not just individualized economic activities, persisted or that cultural and economic activities crossed family group lines. The absence of such evidence is fatal to the petition.

**c. The Absence of Evidence of Bilateral Political Relations**

The proof of bilateral political relations is critical to tribal acknowledgment. Such proof must show not just the existence of individuals claiming or identified as having leadership status, but must demonstrate that leaders exercised actual influence over the broader membership and that the broader membership also participated in and influenced political activity. *Miami* Final Determ., SC 5; *Muwekma* Prop. Find.,

SC 22. In the nineteenth century, with two isolated exceptions in 1876 and 1884, there is a serious absence of evidence of sustained political influence and authority.

There was a demonstrable lack of leaders in the 1800s, at least in any political sense, as even the petitioner admits. *E.g.*, STN HS, at 72 (noting that "[i]t is difficult to identify specific Schaghticoke leaders during the first half of the 19th century . . . ."); STN SE, at 47 (conceding the lack of identifiable leaders in overseer reports or by contemporary observers). Ironically, the petitioner attempts to explain the lack of political leadership by "the depressing conditions on the reservation" and apparent sickness among members. STN AR, at 55. It is precisely this lack of political activity and leadership at times when group members are in need that is significant under the acknowledgment criteria. *See* 25 C.F.R. § 83.7(c)(2). The absence of evidence that tribal political leadership existed to take action with regard to such basic group needs is a compelling demonstration that a political community did not exist.

In fact, the lack of leadership is reflected in the degree of involvement of the overseers in providing for Schaghticoke individuals. As is detailed in the petitioner's Anthropological Report, all the activities expected of effective community leadership were performed by the overseers. *E.g.*, STN AR, at 53-65. Given the absence of effective internal leadership, external authority in the form of the overseer was necessary to provide for all sorts of matters, from determining who would receive assistance in the form of food, clothing or fuel to making arrangements for funerals. *Id*.

The petitioner concedes as much. Although the petitioner attempts to portray the role of the overseer as "the chief conduit through which the Tribe's power and sovereignty was drained off by the surrounding European polity," it nevertheless acknowledges that all significant group decisions were relegated to the overseer without any evidence that overseers were interacting with group leaders, as opposed to individuals only. STN AR, at 13, 73. As yet another example of its efforts to turn negative evidence into something that it hopes could support acknowledgment, the petitioner asserts, without explanation or evidence, that the overseer's dominant role in the absence of effective tribal leadership "would only enhance the elder's role in the political process." *Id*. at 73. The notion that the lack of internal leadership and the predominance of an external authority would "enhance" the internal political authority turns the requirement of criterion (c) on its head. In any event, the assertion is completely lacking in evidentiary support.

**d. Eunice and Abigail Mauwee as Matriarchal Leaders**

After conceding the difficulty in identifying political leaders for the first half of the nineteenth century, the petitioner attempts to portray Eunice Mauwee as the tribal leader and "culture-keeper" from the 1830s to 1860. She is then supposed to have been succeeded in this matriarchal role by her alleged descendants Abigail Mauwee Harris, Lavinia Mauwee Carter and Rachel Mauwee. STN SE, at 48. The petitioner's need to find leaders in the form of "culture-keepers" stems from the fact that there were no others exercising political leadership. Interestingly, Eunice Mauwee herself

is reported as having stated that the position of chief had been vacant since her grandfather's death. David T. Lawrence, *Biographical Sketch of Eunice Mauwee* (1852) (SN-V011-D0114). Nonetheless, what is apparent from the petitioner's treatment of these persons is the lack of evidence of actual political influence or the existence of bilateral political relations.

The petitioner offers two categories of evidence that Eunice Mauwee, the granddaughter of Gideon Mauwee and daughter of Joseph (Chuse) Mauwee, was a political leader. First, it asserts that Eunice Mauwee "represented the Tribe to outsiders and was accorded royal status because of ancestry." STN HR, at 72. The references to royal status appear not to be contemporary, *see* Lawrence, *Biographical Sketch* (SN-V011-D0114), but rather were later characterizations by non-Indians. (SN-V002-D0194; SN-V002-D0197 SN-V002-D0198; SN-V014-D0040). How non-tribal members may have viewed a purported leader, of course, is of little evidentiary value in assessing the person's actual role in the group.

The second form of evidence offered for Eunice Mauwee's leadership is the assertion that "she played an important role as a matriarchal culture-keeper who helped preserve Schaghticoke tribal language, history, and traditions such as basket making." STN HR, at 72. This, however, is not political leadership. There is no evidence of any of the types of ***political*** activities necessary under criterion (c), such as the ability to mobilize significant numbers of members or resources, the allocation of group resources, the resolution of group disputes, the exertion of strong influence

over members or the organization of group economic activity. 25 C.F.R. § 83.7(c); *see* McMullen Report, at 13 (JT Ex. 3). Indeed, the petitioner is unable to even demonstrate that in this role as culture-keeper Eunice Mauwee influenced other members broadly or even that she passed on the history and cultural traditions broadly beyond her extended family. *Miami* Final Determ., SC 15, 20; *Muwekma* Prop. Find., SC 33-34. The fact that this matriarchal culture-keeper role was limited to her direct descendants would suggest the opposite.

Even less evidence of actual political leadership is offered for Eunice Mauwee's purported successors, Abigail and Rachel. Other than referring to Abigail as a basket maker and asserting the role of culture-keeper, the petitioner actually offers no evidence of political activity or evidence that is even remotely relevant to establishing the existence of bilateral political relations. STN HS, at 74; STN AR, at 16. Although Eunice Mauwee and her granddaughters were perhaps important persons among the Schaghticoke reservation residents, the petitioner's own expert, Dr. McMullen, concluded, "[t]here is no evidence that [Eunice Mauwee] played a true leadership role or that any other single individual played such a role during the nineteenth century." McMullen Report, at 9; *see also id*. at 14 ("An equation between culture-keepers and leaders is flawed: this situation is not like Mohegan or Pequot because no overt political action is apparent or demonstrated.") (JT Ex. 3).

### e. The Harris Succession

A difficult inconsistency exists in the petitioner's narrative of the latter nineteenth-century's political leadership. At the same time that it attempts to create a basis for asserting a form of matriarchal authority on behalf of Eunice Mauwee and her descendants, the petitioner also posits political leadership by Chiefs Henry Harris and his son James "Jim Pan" Harris.

A serious break in the succession of chiefs exists from the leaders of the late-1700s and the Harris line beginning with Henry Harris in 1864. As the petitioner concedes, Henry Harris was not a Schaghticoke. STN HR, at 74. It is noteworthy that a non-Schaghticoke would be needed to revitalize group leadership, a characteristic that recurred in the twentieth century.[18] He married Abigail Mauwee, which appears to be a source of his purported authority. *Id*. The only other evidence offered for his political leadership is his apparent recognition as an excellent basket maker and recognition by non-Indians. *Id*. at 85; SN-V011-D0057, p.1. Yet, once again, personal crafting skills do not demonstrate, for example, the capacity for organizing group economic activities or broadly influencing others. *Muwekma* Prop. Find., SC 24. More fundamentally, the petitioner posits that Henry's wife, Abigail, also exercised matriarchal authority at the same time that he was supposedly chief.

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[18] *See* discussion of Franklin Bearce's role in pursuing land claims and in reorganizing the group in section III.B.5.a.

The limited evidence for this duality of leadership is the fact that Abigail's signature is first on the 1876 petition, a place the petitioner assumes connotes sachem status. STN AR, at 73. As McMullen retorts, "[t]he suggestion of Abigail Mauwee's matriarchal authority is anthropologically naïve and internally contradictory since her husband Henry Harris is said to be the leader at this point." McMullen Report, at 15.

A similar dearth of evidence is offered for the political leadership of James Harris, Henry's son. The petitioner contends that at Henry's death, James succeeded to the position of chief. The only evidence offered for any sort of special role for James is, like his father, basket making, and his activity as a rattlesnake hunt guide.[19] STN HR, at 74, 85. Like the evidence regarding his father's leadership, the petitioner's submissions fall far short of the level necessary to demonstrate political influence over the broader membership.

**f. The 1876 and 1884 Petitions**

The petitioner relies heavily on two petitions in the latter part of the nineteenth century to demonstrate political influence and authority. The appropriate inference to be drawn from these petitions is that the Schaghticoke group was not a real political community within the meaning of the acknowledgment regulations. Instead, these were individuals, dependent on the aid and oversight of State agents, who on two

separate and essentially isolated occasions jointly signed a petition for an appointment of a new overseer. Without more, these sporadic events cannot support a finding that the petitioner exercised political influence and authority in the nineteenth century.

The two petitions, submitted in 1876 and 1884, both requested that the General Assembly appoint a new overseer. These were the first petitions – indeed, the first documented arguably political actions of any sort -- by the Schaghticoke since 1799. STN HR, at 82. The petitioner asserts that the petitions "strongly suggest that the petition was not the result of a random coming together, but rather that the signers, from various families and locations, were also linked together by significant social, cultural, and political ties." *Id*. at 83; *see also* STN AR, at 73. However, there is no evidence offered regarding the context in which the petitions were produced. The petitioner has not demonstrated that the petition for the appointment of an overseer was the product of internal political processes, as opposed to the actions prompted by the person seeking the appointment.

At the very least, the proposition that these petitions demonstrate a continuance of political activity is unsupported. Three-quarters of a century had passed since the previous petitions of the late eighteenth century. This can hardly be called sustained political leadership or influence. At the most, the petitions reflect a response to a

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[19] The significance of the rattlesnake hunts will be addressed more fully below in the context

crisis – the lack of an overseer. Sporadic, crisis-oriented leadership, as opposed to sustained, continuous political activities and relations, is insufficient. *Mashpee v. New Seabury Corp.*, 592 F.2d 575, 585 (1st Cir.), *cert. denied*, 464 U.S. 866 (1979). Two petitions over a century cannot qualify as anything but sporadic leadership.

#### 4. The Absence of Community and Leadership in the Early Twentieth Century

After reviewing the petitioner's 1994 documented petition, the BIA commented in the TA Letter regarding the lack of evidence demonstrating community and political authority for the twentieth century. BIA TA Letter, at 5-7. The petitioner went to great lengths thereafter to attempt to make up for the insufficient proof, including several supplemental reports devoted exclusively to the twentieth century. However, as demonstrated below, the petitioner's evidence is still deficient. In particular, there is a serious lack of evidence as to how community and bilateral political relations were maintained as group members continued to be dispersed. In fact, the evidence reflects that community ties across family lines were minimal and that leadership was ambiguous at best.

##### a. Continued Dispersal and the Lack of Inter-Family Contacts

As the petitioner itself concedes, in the early twentieth century it continued to experience a strain on community relations, such as they were, due to the dispersal of

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of the early twentieth century community and political evidence in section III.B.4.C.

Schaghticoke members away from the reservation. STN TCA, at 56, 66. The nature of the increasingly dispersed group is illustrated in State and other documents from the period. For example, the 1926 Report of the State Park and Forest Commission, which was given overseer jurisdiction over Connecticut Indian groups, referred to the Schaghticoke as a "remnant." CT Ex. 1. The Park and Forest Commission reports and meeting minutes during the period of its jurisdiction from 1925 to 1941 reflect the diminishing numbers residing on the reservation, often numbering only ten or twelve. CT Exs. 1 & 2.

A 1935 report prepared for the BIA by Gladys Tantaquidgeon,[20] a student of Professor Frank Speck at the University of Pennsylvania and a Mohegan tribe member, *see* STN HR, at 101, provides an interesting portrayal of the Schaghticoke group during this period.[21] CT Ex. 3. The report was a detailed survey of the New England Indians. Although for other Indian groups she had identified various tribal organizations and political leadership structures, for the Schaghticoke she noted "none." Similarly, although for other groups she identified various arts and crafts, such as basketry, for the Schaghticoke she found "none." For the categories "Ceremonies," "Myths," and "Folk Beliefs," she noted "none" for the Schaghticoke.

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[20] The STN has excluded a significant portion of the Tantaquidgeon report concerning the Schaghticoke Indians from the materials submitted in support of its petition. Compare CT Ex. 3 with SN-V026-D0203.

In sharp contrast to the petitioner's contention of the importance of basket making to the maintenance of community, Tantaquidgeon reported that "[t]hey do not know how to make baskets or bows and arrows nor do they seem inclined to learn how." She also noted that "[t]he Schaghticoke have not had a chief or headman in recent times." With regard to their treatment by the State, she found:

> They are dependent upon the State for their maintenance. The State has repaired the dwellings and made them comfortable to live in . . . . They complain that the overseers never visit them and that the State does very little for them. It may be true that the members o[f] the Commission do not visit them often but the local agent is there to take care of their needs. He takes food to the reservation regularly and furnishes clothing when needed. The investigation proved that the Schaghticoke are well provided for.

Tantaquidgeon Report (CT Ex. 3).

The petitioner suggests that Tantaquidgeon's findings may be skewed because her investigation focused solely on reservation residents and did not examine the broader community of those not living on the reservation. STN TCA, at 24. The petitioner's efforts to demonstrate the existence of this broader community, however, fall short. Significantly, the petitioner is unable to establish that significant community relations between reservation and non-reservation members existed, particularly in the critical form of cross-family ties.

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[21] The BIA has previously relied on the Tantaguidgeon Report as probative evidence. *See*, Paucatuck Eastern Pequot Prop. Find. Charts, Crit. (c), at 22.

The petitioner repeatedly asserts that members living off the reservation "kept in touch" with those residing on the reservation through a variety of informal meetings, visits to the reservation and family communications. *E.g*., STN AR, at 83, 90, 94. First, no direct evidence of the maintenance of contacts is provided. Moreover, the petitioner as much as concedes that all community activity was "informal," and that no organized tribal activity existed for most of the early twentieth century. Most importantly, the petitioner can point to almost no evidence that the efforts to "keep in touch" involved anything other than ordinary family contacts, rather than the sort of contacts across family lines that are necessary to establish tribal community. *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 109, 119; *Muwekma* Prop. Find., SC 22, 25-26; *Miami* Final Determ., SC 5; *Steilacoom* Prop. Find., SC 14.

For example, evidence offered by the petitioner regarding trips to the reservation invariably refers to visiting relatives. STN AR, at 90, 94, 97; STN CR, vol. IV (Interviews of T. Lamb, 4/13/99, at 32-35; R. Birch, 2/5/95, at 16, 23-24, 43, 47-48; M. Lydem, 8/6/99, at 8-11); *see Schaghticoke Tribe of Indians v. Kent School Corporation*, Civ. Action No. H-75-125, Deposition of C. Velky, at 29-30 (JT Ex. 69); Cogswell Family Interview Transcript (November 15, 2001) ("Cogswell Interview"), at 25-26, 77-78 (JT Ex. 70). This evidence, based solely on oral history interviews of persons who were young children at the time, does not indicate that these visits involved inter-family contacts. Instead, they were exclusively contacts

with at best extended family members, involving picnics and other similar family outings typical of family groups. As the BIA has concluded in the past, maintaining relations with extended family members is not sufficient evidence of community. *Miami* Final Determ., SC 5; *Muwekma* Prop. Find., SC 22.

This conclusion is buttressed by statements by brothers Theodore W. Cogswell, Jr. and Truman Cogswell, the grandsons and great-grandsons of Wilson Truman Cogswell and George Cogswell, respectively. They recall visiting the reservation in the 1930s and 1940s, but those visits involved contacts only with Cogswell and Kilson families. Cogswell Interview, at 24-26 (JT Ex. 70). They also recall Cogswell family gatherings in the Bridgeport area where they lived. *Id*. at 47-48. What is notably absent were contacts with other Schaghticoke families off the reservation. Indeed, not only were there no contacts with the Howard Harris family, even though they also lived in the Bridgeport area, the Cogswells stated that they had not even heard of him despite the petitioner's claim that Howard Harris was chief. *Id*. It is incomprehensible that anything constituting real community relations could exist if members off the reservation knew nothing about each other – not even claimed leadership status – despite living in relative close proximity and despite contacts with family elders residing on the reservation. *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 109, 199; *Nipmuck (Webster/Dudley Band)*, Prop. Find., SC 105-06.

Faced with the lack of cross-family contacts, the petitioner made one last effort to create an inferential model from which one might assume the existence of

community relations across family lines. The defects of this inferential model proposed in the petitioner's Community Report by Dr. Steven Austin were discussed previously in section III.B.2.d. Austin's Community Report does not provide any new evidence, but merely attempts to place the little extant evidence of community into a new construct. The shortcomings of his model are revealed in light of the absence of actual evidence of interfamily contacts and the Cogswell interview evidence. In the absence of direct evidence, rather than inferences and presumptions, the petitioner cannot satisfy criterion (b) for the first several decades of the twentieth century.

#### b. The Ambiguity of Schaghticoke Leadership

Tantaquidgeon reported in 1935 that the Schaghticoke lacked political leadership or organization. Tantaquidgeon Report (CT Ex. 3). Similarly, the State Park and Forest Commission reported in 1936 that there was no leader recognized by the group. Park & Forest Comm'n Minutes (Mar. 11, 1936) (CT Ex. 2). The petitioner tries to suggest that this is because outsiders could not recognize that, during the early part of the twentieth century, tribal leadership was informal. STN TCA, at 23-24. Actually, it was not merely that leadership was informal. Rather, the leadership of the group suffered from the same problems as did the overall community. The absence of bilateral political relations, particularly among those dispersed and living away from the reservation, was manifested in a kind of ambiguous duality of purported leadership and the inability to exert political influence among different family groups.

According to the petitioner, the position of chief passed from James Harris at his death in 1909 to his son Howard Harris. Succession was not immediate, because in 1909, Howard was only nine years old. In the meantime, the petitioner asserts that George Cogswell, an elder reservation resident, served as a sagamore. STN HR, at 91-92. The petitioner asserts that this "duality of leadership appeared to have arisen to meet the on and off reservation needs." STN AR, at 16. The problem with this attempted leadership paradigm is that it reflects the lack of a unitary political community. Indeed, the evolving dual nature of the leadership – the Cogswell/Kilson line represented on the reservation and the Harris/Mauwee line represented off the reservation, with little cross-family interactions – echoes throughout the twentieth century and into the factionalism of the modern period.[22]

The ambiguity infecting the early twentieth-century leadership is reflected in the petitioner's own analysis. On the one hand, the petitioner asserts that George Cogswell, even after the death of James Harris, "does not seem to have been perceived as a tribal leader either by members, surrounding society or white writers." STN Pet., at 85. Instead, "[m]embers of the Harris family ***speculate*** that James Harris's sons Frank or Charles Harris, being the eldest in the family may also have been tribal leaders. They are known ***to have resolved Harris family matters***, at least." *Id*. (emphasis added). In other places, the petitioner emphasizes a purported leadership

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[22] The modern political factionalism is discussed below in section III.B.6.

role for George and Frank Cogswell, at least on the reservation. STN HR, at 91-92; STN TCA, at 27, 42. These inconsistencies, and the trouble the petitioner has in resolving them, speak volumes about the actual leadership situation. The "duality of leadership" reflects a breakdown in the Schaghticoke community, the inability to maintain relations and the lack of a leadership structure that exerted political influence over anything other than extended family groups. Obviously, this is insufficient under criterion (c). *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 142; *Miami* Final Determ., SC 23; *Muwekma* Prop. Find., SC 30, 33-34, 38-39.

The petitioner attacks the Park and Forest Commission's determination that there was no leader recognized by the Schaghticoke as either ignoring the existence of Howard Harris as chief or as part of the State's efforts to achieve detribalization. STN AR, at 107. The first suggestion is difficult to accept. As the petitioner itself documents, Howard Harris had engaged in a lengthy process to obtain permission from the Park and Forest Commission to reside on the reservation. *Id*.; Park & Forest Comm'n Minutes (April 11, 1927) (CT Ex. 2). It is therefore unlikely that the State could not have known about his claim to leadership unless he himself had failed to assert it. Similarly, the suggestion that the State suppressed recognition of the leadership is belied by the report itself, which included references to leaders of other Connecticut Indian groups. Park & Forest Comm'n Minutes (Mar. 11, 1936) (CT Ex. 2). The better explanation is found in the words of the report itself, which stated that no leader was "recognized by the tribe." *Id*. In other words, members of the

group, particularly those on the reservation, apparently did not acknowledge the leadership claim of Howard Harris.

Again, this is entirely consistent with the statements by Theodore and Truman Cogswell that their family had no knowledge of Howard Harris and his purported leadership until much later. Cogswell Interview, at 46-47 (JT Ex. 70). They state that in the early twentieth century William Truman Cogswell and then his son Frank Cogswell were chief, but that their leadership extended only to the Cogswell/Kilson families. *Id*. at 90-96. The failure of the leadership to transcend family lines is a fatal flaw to the petition.

Even under this ambiguous dual leadership structure asserted by the petitioner, there is a dearth of evidence of actual political influence. As discussed below, the purported leadership relating to the rattlesnake hunts had little to do with tribal political authority. The petitioner offers no evidence that significant issues for the membership were even addressed, let alone resolved by the purported leaders. The absence of such evidence is revealing. It demonstrates that the duality of leadership was not the result of the political structure adapting to the varying needs of the group; rather, it quite clearly shows the breakdown of community relations and the inability to maintain any level of bilateral political relations on a tribal basis. In other words, Starna and McMullen were correct in their assessment of the stark deficiencies in the petitioner's evidence during this period.

### c. The Rattlesnake Hunts

The petitioner offers evidence of the rattlesnake hunts, beginning in the late-nineteenth century and diminishing around 1920, as demonstrating both distinct community and political leadership. Indeed, the rattlesnake hunts occupy a central place in the petitioner's evidence for the early twentieth century. For example, the only significant examples of the leadership activities cited by the petitioner for James Harris and George and Frank Cogswell is their leading of rattlesnake hunts. STN Pet., at 84; STN TCA, at 26, 42. Unfortunately for the petitioner, when properly viewed, the rattlesnake hunts were not a tribal activity, but were focused on outsiders. As such, these hunts, and the purported leadership of them, cannot be evidence under criteria (b) or (c). Instead, it is little more than evidence of the activities of individual Schaghticoke members with the non-Indian community. *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 108; *Nipmuck (Webster/Dudley Band)*, Prop. Find., SC 109. There is no credible evidence to suggest that the rattlesnake hunts were a significant cultural practice of the broader group. Given that so few Schaghticoke individuals were involved, and given the substantial involvement of non-Indians, the rattlesnake hunts hardly demonstrate a distinct community with bilateral political relationships.

The Schaghticoke Rattlesnake Hunters' Club was organized by George Cogswell with non-Schaghticoke Richard Howell, the sports editor for the *Bridgeport Herald*. As the petitioner describes it, the Rattlesnake Club

> ***hosted newspapermen and other non-Indians from Connecticut and New York***, who came every year to the reservation and were guided by Schaghticoke tribal members. Other active members included Lindsay Denison of *The New York Sun*, noted newspaper humorist Frank Ward O'Malley, and the local South Kent resident John Monroe.

STN HS, at 86 (emphasis added); *see also* STN TCA, at 26-30. Indeed, the hunts were largely staged for the non-Indian participants. STN AR, at 79, 82; STN CR, at 32-34. The extensive non-Indian membership of the club and participation in the hunts deprives it of any evidentiary value for proving meaningful community or political authority. James Harris and George Cogswell may have served as hunt guides and leaders of the hunt club, but this was plainly an activity whose focus was not on the tribal community but on interactions with the non-Indian community.[23]

The non-tribal nature of the rattlesnake hunts is underscored by the petitioner's assertion that they largely ended with Prohibition. STN HR, at 86 ("The annual hunts ended with the onset of prohibition in 1919, which suggests that more was involved than merely hunting."); STN TCA, at 40. It is hardly consistent with the nature of a core community activity that legal restrictions on alcohol should bring about its demise. Moreover, evidence exists to demonstrate that rattlesnake hunting was common in the area among non-Indians, reflecting that the activity had little to do

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[23] Notably, neither Frank Speck nor Gladys Tantaquidgeon reported anything relating to the rattlesnake hunts as having tribal or cultural significance. One would expect references to such a purportedly central cultural and community activity, particularly since Speck interviewed James Harris. *See* STN HR, at 88-90; F. Speck, The Scatacook Indians, in Anthropological Papers of the

with tribal community. *Ecologists rattled by death of snakes, New Milford News Times (April, 1993)* (JT Ex. 72).

The other connection with rattlesnakes on the reservation was the collection of venom for sale to pharmaceutical companies and sale of snakes to zoos. STN HR, at 87; STN AR. at 82. These activities, done to provide supplemental income, STN AR, at 82, do not indicate significant community or political activity. Rather, they reflect a largely individualized economic activity.

In none of these activities is there evidence of the degree to which Schaghticoke members, other than the few recognized hunt leaders, were involved. Given that the principal participants were non-Indians, the rattlesnake hunts cannot support the petitioner's efforts to demonstrate either community or political authority.

**d. Schaghticoke Cemetery**

The petitioner relies heavily on the significance of the reservation cemetery to establish Schaghticoke community. In particular, the petitioner cites the 1904 relocation of the cemetery because of the construction of the hydroelectric dam at Bull's Bridge on the Housatonic River. STN HS, at 91; STN TCA, at 16-18; STN AR, at 81-82. However, despite the claimed significance and trauma of the cemetery's relocation, there is no evidence of any ***tribal*** activity in response to the event. All the

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American Museum of National History, vol. III, at 205. 06 (1909) (JT Ex. 71). Tantaquidgeon Report

petitioner's evidence relates to actions of others, a salient point made by McMullen in criticizing the petitioner's lack of community and political evidence. McMullen Report, at 15 (JT Ex. 3).

Ironically, the petitioner notes the significance of a grave marker for Eunice Mauwee in the Schaghticoke cemetery, erected in 1905. This is hardly evidence of Schaghticoke community. As the petitioner concedes, the grave marker was erected not by members of the petitioner, but by a group of non-Indians led by Kent resident Mrs. John Hopson. STN HR, at 91; STN AR, at 82.

The early decades of the twentieth century were thus marked by substantial group passivity. The absence of any meaningful tribal leadership is evident and in fact is manifested in the uncertain, conflicting and dualistic nature of the purported leadership of the Cogswell and Harris families on and off the reservation. Similarly, the failure to maintain any real inter-family contacts demonstrates the lack of a distinct Schaghticoke community within the meaning of the acknowledgment regulations. This serious gap in the petitioner's evidence precludes federal acknowledgment.

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(CT Ex. 3).

### 5. The Limited Evidence of Community and Political Activity from the 1940 to 1970 Confirm the Petition's Deficiencies

Beginning in the 1940s and 1950s, there is some evidence of a process that the petitioner describes as the "reorganization" of the group. It arose out of an effort to pursue land claims before the Indian Claims Commission. Two aspects of this effort are quite revealing about the petitioner's lack of leadership and community, however. First, this activity was relatively short-lived, and the group returned to a largely passive mode until renewed "reorganization" activities began again in the 1960s and 70s. Second, the activity was prompted by a non-Schaghticoke, Franklin Bearce. STN Pet. at 58 (describing Bearce as the cause of the increased political activity of the period). In fact, leadership ambiguity, a pervasive feature in the past, continued. The purported chief, Howard Harris, did not exercise influence over the broader Schaghticoke membership, and his leadership was minimal. That it took an outsider to initiate political activity and renewed interest in community demonstrates the serious lack of internal leadership and community prior to his arrival on the scene. *See Duwamish* Final Determ., SC 48-50.

#### a. The Role of Franklin Bearce

Franklin Bearce, who also used the name Elewaththum Swimming Eel Bearce, is an intriguing personality. He first appears in the Schaghticoke narrative when, in 1933, Bearce, then a New York resident, applied to the State Park and Forest Commission to be certified as a Schaghticoke Indian. Park & Forest Comm'n Minutes, 6/26/1933, 7/19/1933, 9/13/1933 (CT Ex. 2); STN AR, at 105. An

investigation followed, and the Commission declined to recognize him as a Schaghticoke. (SN-V013-D0011). Indeed, although petitioner members later would follow his leadership, they did not accept at the time, nor presently, his claim that he was a Schaghticoke or that he was a Schaghticoke chief. STN AR, at 119; STN TCA, at 71. He had a strong interest in and was involved in various Pan Indian organizations. STN TCA, at 64, 71-72. With the Schaghticoke, he organized pow-wows, led group meetings, and initiated and took charge of the land claims pursued in the 1950s.

The predominant characteristic of the Schaghticoke group when Bearce arrived on the scene was one of substantial passivity. Although the petitioner contends that Howard Harris was chief, there is no evidence of actual political leadership by him, and in fact the first election of Howard Harris as chief did not occur until 1954, an action that was clearly prompted by Bearce. STN HR, at 114-15; STN TCA, at 74-76; SN-V002-D0020, pp. 1-2. Moreover, his leadership did not extend over the entire membership. The ambiguous dualism of the early decades continued, with no recognition of Howard Harris as a leader by the Cogswell/Kilson family members. Cogswell Interview, at 93-98, 112-13, 116, 125-28 (JT Ex. 70). The community activities remained largely constrained to extended family contacts, rather than involving meaningful tribal community activities. *Id*. at 25-26, 46-47, 81-83, 91-92, 114-15; STN AR, at 117-18.

### b. The Pow-Wows and Pan Indian Activities

Bearce sought to stir the Schaghticoke group from its passivity. In particular, he proposed and organized two pow-wows in 1939 and 1941. The events were clearly less about Schaghticoke community than they were about broader Indian celebrations, and as such are not evidence of community under criterion (b). *Nipmuc (Hassanamisco Band),* Prop. Find., SC 111-12; *Nipmuck (Webster/Dudley Band),* Prop. Find., SC 109.

The 1939 pow-wow, which was called an "American Indian Day" celebration, was organized by Bearce. In public announcements for the pow-wow, and in a letter to Frank Speck inviting him to it, Bearce described himself as "Chief" and "Medicine Sagamore" of the Schaghticoke, and indicated that Frank Cogswell was sachem. No mention is made of the purported chief, Howard Harris. STN HR, at 101-02; American Indian Day Celebration Announcement (JT Ex. 73); SN-V017-D0126-D0127. The event was sponsored by Pan Indian organizations, the Eastern Algonquin Indian Federation, of which Bearce was a leader, and the Indian Association of America. STN HR, at 102; STN AR, at 100-01. Participants in the program included the Governor, the national commissioner of the Boy Scouts, several non-Schaghticoke Indians, and other non-Indians. The general public was invited, and specific invitation was offered to Boy Scouts and Girl Scouts, and members of veteran, patriotic, and historical societies. Celebration Announcement (JT Ex. 73). Attending

the pow-wow were large numbers of non-Schaghticoke members, including other Indians and the general public. STN Pet. at 57.

Again in 1941, a large Bearce-organized, Pan Indian pow-wow was held. It celebrated the annual Corn Harvesting Festival of the Federated Eastern Indian League. STN AR, at 121. This event, sponsored by the Town of Kent and "what was described as the 'Schaghticoke Tribal Council' and Mahican Chairman Grey Fox (unidentified)," was held at the farm of Mrs. Florence Bonos adjacent to the reservation. STN HR, at 102. The petitioner speculates that the pow-wows were held off the reservation because the State might not have allowed them on the reservation. *Id*. However, it offers no evidence that permission was sought or any other evidence that the State precluded any form of community activity on the reservation. McMullen Report, at 9. Some 6,000 non-Indians attended to observe the 100 Indian participants. STN HR, at 102-03; STN TCA, at 50-51. The petitioner is unable to detail how many of the Indian participants were Schaghticoke members or what portion of the Schaghticoke membership participated. Bearce described himself again as a Schaghticoke leader, using the title of Chief Medicine Man. STN HR, at 102.

The Pan Indian nature and public attendance of the pow-wows diminish the significance of these events as evidence of community. *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 111-12; *Nipmuck (Webster/Dudley Band)*, Prop. Find., SC 109. Moreover, the inability of the petitioner to demonstrate substantial participation by Schaghticoke members, as opposed to the large numbers of other Indians involved,

reveals the continuing weak community ties of the petitioner. Most significantly, the fact that the pow-wows were prompted by the leadership of a non-Schaghticoke reflects the serious lack of internal political authority. *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 145, 148-53, 166; *Duwamish* Final Determ., SC 50.

These conclusions are further supported by the Pan Indian activities of individual Schaghticoke members. Frank Cogswell, for example, is cited for having participated in a number of pow-wows and other ceremonies of other New England Indian groups, such as the Penobscot of Maine, the Narragansett of Rhode Island, and Onandaga in New York. STN TCA, at 50. Similarly, other Cogswell family members attended Narragansett gatherings because of the marriage of Theodore Cogswell into a Narragansett family. STN HR, at 116-17; Cogswell Interview, at 68-69 (JT Ex. 70). Plainly, these activities with other Indian groups do not constitute evidence of Schaghticoke tribal community. *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 112.

The petitioner contends that several smaller pow-wows were also held during the 1930s and 1940s. STN AR, at 121. However, the petitioner offers little evidence that documents such gatherings or meetings, and almost no detail is provided as to the breadth of group participation, the nature of the activities involved or the extent to which these gatherings involved more than extended family groups.

### c. The ICC Land Claims

The petitioner relies heavily on the land claims pursued in the name of the Schaghticoke group in the 1950s. However, it took a nonmember, who had no previous tribal relations, to inject interest and motivation into the group. This not only undermines the Bearce-led community and political activities as persuasive evidence under criteria (b) and (c), it exposes the serious lack of political authority and community prior to his arrival on the scene. *Duwamish* Final Determ., SC 48-50.

In 1949, Bearce prompted Schaghticoke members to initiate a land claim before the federal Indian Claims Commission ("ICC"). The claim was somewhat vague and quixotic, seeking recovery of large portions of Connecticut and New York, including Manhattan and the Bronx. STN Pet., at 63; ICC Dkt. 112 Petition (JT Ex. 74). It was ultimately dismissed, and efforts by Bearce to revive it were unsuccessful. STN Pet., at 64. It is noteworthy that the United States had asserted as a defense to the claim that the Schaghticoke was not a tribe under federal law. ICC Dkt. 112, Answer, First Defense (JT Ex. 75). What is most significant for purposes of the acknowledgment petition is that it was Bearce who initiated the claim and undertook all of the efforts necessary to pursue it, once again reflecting the lack of effective internal tribal leadership.

The land claims project commenced with a meeting called by Bearce on July 10, 1939. STN HR, at 109; SN-V017-D0130. That Bearce initiated the meeting is telling: this was not a matter arising from within the Schaghticoke political process.

The meeting was attended by a mere seventeen adult Schaghticoke. Those attending elected Bearce as chairman of the "Schaghticoke Indian Claims Committee," and authorized him to present the claim to the ICC. The petitioner asserts that this meeting "shows the continued interest and involvement of the tribal community" and "the existence of a tribal business council and ongoing political processes within the Schaghticoke community." STN HR, at 110. How a sparsely attended meeting, prompted and orchestrated by a nonmember, proves this is hard to fathom. If anything, it shows the opposite.

Bearce filed the claim with the ICC shortly after the meeting. Interest of Schaghticoke members appears to have rapidly waned. In a 1951 letter to a Schaghticoke member, Bearce wrote: "Have not heard any comments from any of the Tribe on the filing of the Tribes (sic) Claims with the Commission." (JT Ex. 76). Bearce nonetheless persisted, identifying himself to the ICC as a Schaghticoke Indian and chief, despite the lack of any such recognition by the Schaghticoke members. ICC Dkt. 112, Bearce Affid. (JT Ex. 74); STN AR, at 119; STN TCA, at 71, 74 n.169. After the Justice Department in 1954 challenged his authority and status as a Schaghticoke Indian, STN Pet., at 58; STN Hr, at 113-14; SN-V013-D0011; SN-V026-D0168, Bearce needed a source of legitimacy. This led him to call a meeting of Schaghticoke members to discuss the status of the land claims. Among other things, Bearce pleaded his case for Schaghticoke membership, but was rejected unanimously by those attending. STN Pet., at 87, 90. At this same meeting, elections were held –

the first formal elections ever – and Howard Harris was elected tribal chairman. STN HR, at 114. It is apparent that the decision to conduct formal elections was prompted by Bearce's efforts to legitimize his pursuit of the land claim.

The ICC ultimately dismissed the claim in 1958 for failure to prosecute. What is most telling about this period is the extent to which Bearce, the outsider whose claims to Schaghticoke descent were rejected by the petitioner, was the instigator of the political activity. STN Pet., at 58. The degree to which Bearce, and not any internal leader, was the dominant actor is acknowledged time and again by the petitioner. Trudie Lamb stated that "Swimming Eel was definitely responsible for lighting a fire under the Schaghticoke people, in the 40s and 50s." (SN-V045-D0234, pp. 4-5). In a letter to Bearce in 1955, Howard Harris himself wrote: "You know I haven't been in this long enough to know what to do. . . . We don't see enough of each other to talk things over to have some sort of understanding between you and myself, for you know what you are doing." (JT Ex. 77).

**d. The "Reorganization" of the Schaghticoke Group**

With the end of the ICC land claim – and the departure of Bearce from the stage – the Schaghticoke political activity immediately dissipated. Indeed, at a 1972 meeting, Irving Harris described the history of the group from 1940 to 1970, summarized in the minutes of the meeting. Irving Harris stated:

> 1940-1955 a few people on reservation; ***no push so things died out***. 1955-57 Swimming Eel worked with us on Docket 112 [the

> ICC land claim]. 1957-1967 ***big lapse nothing happened***. Since 1967 Indians and others have become interested in Indian affairs.

Council Mtg. Minutes, 11/18/1972 (SN-V025-D0018) (JT Ex. 78) (emphasis added). This summation of the lack of political activity, by the person who was the purported leader of the group, is compelling. As John Pfeiffer, an anthropologist engaged by the petitioner, wrote in 1994: "Howard Harris was aging. Earl Kilson lived on the Reservation with his family, apparently unwilling or unable to act as Chief. In effect, the tribe had no leader in the early 1960's." Dr. John Pfieffer, et al., 1994 Draft Petition, at 12 (SN-V014-D0062). The lack of bipolar political relations under Howard Harris's tenure – stemming from Howard Harris's murky succession to the position of chief and culminating in the utter passivity after the Bearce-inspired activity – cannot be ignored. Duwamish Final Determ., SC 63; *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 161; *Nipmuck (Webster/Dudley Band)*, Prop. Find., SC 139-41.

Moreover, the petitioner remains unable to identify with certainty who exercised leadership. The Cogswell family never accepted the leadership of Howard Harris. Cogswell Interview, at 93-98, 116-18, 125-28 (JT Ex. 70). Earl Kilson, an elder reservation resident, said that Frank Cogswell was the "unofficial tribe chieftain." (SN-V024-D0027, p. 14). Paulette Crone Morange, when interviewed in 1996, indicated the persistent uncertainty of leadership. (SN-V012-D0158, p.17). Russell Kilson said flat out: "As far as I know there was all the way up 'til (sic) when Irving took Chief, in what, in 1963 (sic), there was no Chief here on this Reservation,

nothing." (SN-V0037-D0084, p.3). Earl Kilson, a reservation resident, similarly said that there was no chief or tribal meetings at the time. Earl Kilson Interview, at 8 (KS Ex.; Bates #s BIA 00381-00428). The continuing ambiguity over the group's leadership, so reminiscent of the duality of purported leadership in the first part of the century, undermines the petitioner's claim of political authority. What it evidences more than anything else is the lack of leadership. If leaders existed who actually exerted political influence broadly over group members, these sorts of contradictions could not exist. This is not merely the result of less than perfect recollections. Such stark and opposing views of the group's leadership cannot be reconciled except by concluding that real leadership and influence did not extend across family groups – indeed, did not exist at all.

When Irving Harris became chief after the death of his father Howard in 1967, he engaged in a number of efforts to reorganize the group. However, when organizational meetings were held, many of those attending had never before met each other. (SN-V024-D0027, pp.18-19). Frank Parmalee, a Cogswell family member, was not even aware that he was a Schaghticoke descendant until told so by Paulette Crone. (SN-V014-D0047, pp. 5-6 ). Irving Harris's sister, Catherine Velky, testified that at the first organizational meeting in 1967 or 1968, very few – maybe twenty – attended, giving the reason that "we didn't know other Schaghticokes at that time." Catherine Velky Depo., at 23 (JT Ex. 69). The few attending were family members. *Id*. at 24. As reflected in a 1997 interview of Earl Kilson, he knew almost nothing

about the Harris family members. Earl Kilson Interview, at 8, 20, 37 (KS Ex.; Bates #s BIA 00381-00428).

Numbers reported in the petitioner's own records reflect the dramatic expansion of membership. The ICC land claim lists the names of 73 "legal and enrolled members" in 1949. Dkt. 112 Petition (JT Ex. 57). In 1975, the petitioner identified 181 members. *Schaghticoke Tribe of Indians, et al. v. Kent School Corp., et al.*, No. H-75-125, Responses to Defendants' Interrogatories (JT Ex. 79). In fact, the most remarkable increases in membership have occurred in just the past few years. Tribal rolls submitted by the petition show 129 members in 1994 (SN-V003-D002), 170 members in 1997 (SN-V008-D003), and an astounding increase to 330 in 2001 (STN Genealogical Addition No. II to April 1998 Addendum, vol. VI, item 2).

The efforts to reorganize the group, to create formal political structures and to expand the tribal rolls in the 1960s and 1970s and continuing through to the present, illustrate the lack of community and political authority in prior decades. *Nipmuck (Webster/Dudley Band)*, Prop. Find., SC 105. The apparent extraordinary lack of familiarity with other purported group members, especially across family lines, is consistent with the absence of a distinct Schaghticoke community prevalent in the earlier part of the century.

As the BIA has elsewhere concluded, proof of distinct community is defeated by recent expansions of group membership to include those who previously did not

exist in tribal relations. *Nipmuc (Hassanamisco Band)*, Prop. Find., SC 115-16, 118. This is precisely the quandary in which the petitioner finds itself. After over a century and half in which the historical record reveals an absence of community relations, the petitioner has attempted in recent times to create them anew. The group that was forged in the 1970s and thereafter is, for all intents and purposes, a new entity. *Muwekma* Prop. Find., SC 36. Given the long, largely uninterrupted periods of lack of community and bilateral political relations, the creation of this new entity cannot be accorded federal tribal status.

### 6. The Persistence of Modern Factionalism Demonstrates the Lack of Political Authority

Beginning over 20 years ago, a deep-seated, intractable division has existed among the Schaghticoke. Indeed, the factionalism has grown so severe that one group, calling itself the SIT, also referred to as the "Russell Group" after its leader Alan Russell, rejects the legitimacy of the STN petitioner and its leadership, also referred to as the "Harris-Velky Group" after its previous and present leaders. The STN petitioner attempts to portray this persistent factionalism as evidence of political influence and authority. Although this factionalism may reflect some political activity on the part of the two factions, it hardly is evidence of real political authority. Repeatedly, the two factions have had to turn to external authorities – in particular State agencies and the courts – to seek resolution of their conflicts. These factions, which are formed largely on family lines, are but the current manifestation of the lack of political leadership capable of transcending family groups that has persisted

through much of the petitioner's history. The patent inability of the petitioner to resolve this continuing modern factionalism demonstrates the lack of political authority and precludes acknowledgment of the petitioner under the mandatory criteria. Perhaps more importantly, it also demonstrates the absence of any tradition of bilateral political relations to which the Schaghticoke may refer in resolving governance disputes.

Criterion (c) includes as possible evidence of political influence or authority evidence that "[t]here are internal conflicts which show controversy over valued group goals, properties, policies, processes and/or decisions." 25 C.F.R. § 83.7(c)(1)(v). However, such evidence is not in and of itself sufficient to demonstrate political authority. In contrast, the regulations identify categories of evidence considered "sufficient evidence" under criterion (c) for any particular given point in time. Specifically, such evidence includes evidence that group leaders or other mechanisms exist that:

(i) Allocate group resources such as land, residence rights and the like on a consistent basis;

(ii) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(iii) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior;

(iv) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

25 C.F.R. § 83.7(c)(2). Plainly, the factionalism of the past two decades cannot constitute such "high-level" evidence of political authority. In fact, it is evidence of the inability to allocate group resources, the inability to settle disputes, the inability to exert strong influence on the behavior of individual members, and the inability to organize or influence economic activities.

As the Supreme Court directed a century ago, an Indian tribe must be "united in a community under one leadership or government . . . ." *Montoya v. United States*, 180 U.S. 261 (1901). That is a description that hardly fits the petitioner. The BIA has concluded that factionalism is acceptable evidence of political authority only when there are political processes for resolving those conflicts. *See Miami* Final Determ., Tech. Rep., at 49-52 (discussing Tunica-Biloxi decision's treatment of factionalism, and emphasizing the existence of political leadership and mechanisms for conflict resolution). Particularly, as in the petitioner's case, when the conflicts repeatedly require turning to external authorities to resolve disputes, any claim of meaningful political authority is seriously undermined.

A second serious deficiency in the STN's petition is the extremely limited evidence that the issues giving rise to these persistent conflicts were matters of importance to the broader membership. Throughout the discussions and analyses provided in the petitioner's reports are lengthy descriptions of actions taken by the factions' leaders and their closest supporters. Little evidence, however, is offered of the political activities of the broader group. As the BIA has made clear, the latter

evidence is critical to establishing bilateral political relations necessary to satisfy criterion (c). *Miami* Final Determ., Tech. Rep. at 51-59.

### a. The Genesis of Modern Factionalism

The current conflicts between the SIT/Russell Group and the STN/Harris-Velky Group have their roots in the refusal of the Harris-Velky Group, originally led by Irving Harris, to recognize the legitimacy of tribal elections and leadership decisions commencing with the December 9, 1979 tribal elections (SN-V021-D00227). The conflict escalated to the point that the Harris-Velky Group refused to recognize the 1980 tribal constitution and the membership of persons outside of the Harris family. STN TL, Doc. #2. The petitioner's outright exclusion of non-Harris family members from tribal membership followed.[24] *See* 1994 tribal rolls consisting solely of Harris family members. SN-V003-D0002. The unyielding nature of the factionalism is revealed in a series of controversies between the competing groups over development policies and use of resources on the reservation. Although these are

[24] On October 10, 1975, a total of 181 individuals were identified as members of the Schaghticoke Indian Tribe. Town Ex. 3, Response to Interrogatory #3. Only 59 of these individuals are identified as STN members on its 1994 membership list. SN-V003-D0002. Members of the following families identified as tribal members in 1975 were excluded from membership in 1994: Andrews; Bishop; Bradley; Brown; Cogswell; Csire; Gonsalves; Grinage; Harrison; Johnson; Kayser; Lydem; Nadeau; Parmalee; Peckham; Pennywell; Renault; Rich; Ritchie; Russell; Sanabria; Simonds; Tani; Tilford; Van Vulkenburgh and Williams. Several individuals, including Trudie Lamb (Richmond), a former tribal leader and the Schaghticoke's representative to the CIAC, had also been dropped from the 1994 membership roll.

obviously important matters, it is the petitioner's inability to resolve the long-term internal conflicts that is significant.

The factionalism had its beginnings in a decision to allow Gail Russell Harrison and Trudie Lamb to build houses on the reservation. STN HR, at 142; *See* SN-V027-D0053; SN-V025-D0068; SN-V024-D0158. At the December 12, 1979 tribal elections (SN-V021-D00227), a so-called pro-development slate of candidates, led by Maurice "Butch" Lydem, was elected to the tribal council, replacing the prior council led by Irving Harris. STN HR, at 142. Lydem favored pursuing policies of economic development, including seeking federal grants, and the construction of housing on the reservation. These policies were opposed by the Harris faction. *Id*. at 143-44; STN AR, at 162.

The Lydem council[25] drafted a tribal constitution, which was presented to and adopted at the tribal meeting of December 7, 1980. SN-V022-D0057; SN-V025-D0082; SN-V022-D0055. *See also* JT Ex.80 (CIAC DOC 01251). The Harris faction, however, opposed the Lydem council and the 1980 constitution. *id.* STN TL, Doc. #2. The Harris faction's opposition led, in December, 1981, to the creation of its own separate tribal council under the umbrella of the non-stock corporation known as The Schaghticoke Indians of Kent, Connecticut, Inc. (“SIK, Inc.”) (SN-V030-

D0048.) This council was elected by and consisted solely of Harris family members. STN HR, at 144; SN-V025-D0116, p.13 of 13; SN-V017-D0173; (JT Ex. 80). With the SIT headed by the Lydem council, and SIK, Inc., headed by the Harris council, the framework for the deep-seated, intractable divisions among the Schaghticoke was in place.

In March, 1982, citing personality clashes and members' personal problems standing in the way of tribal progress, Lydem resigned as tribal chairman. SN-V022-D0061. At the subsequent council meeting on March 28, 1982, Trudie Lamb was elected to replace Lydem as tribal chairman and as delegate to the Connecticut Indian Affairs Council. SN-V025-D0096; SN-V025-D0098; STN HR, at 145; STN AR, at 166. The council also appointed Alan Russell, Russell Kilson and Sandra March to fill the existing vacancies on the council until the next annual tribal meeting. SN-V025-D0096. *See also* SN-V025-D0103 and 1980 Constitution, SN-V022-D0057, p. 2, Article VI.

The Harris faction reacted to the appointment of Alan Russell, Russell Kilson and Sandra March to the tribal council by circulating a petition calling for a special

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[25] For ease of reference, the various councils during this period will be referred to by its then-chairperson.

meeting of the tribe.[26] STN TL, Doc. #8. Upon receipt of the petition, the Lamb council convened a special council meeting on July 18, 1982. At this meeting the Harris faction appeared and sought removal of the three appointees as having been improperly appointed, and further sought to "impeach" or "recall" the entire tribal council.

The Lamb council and the Harris faction perceived the July 18th meeting from completely different perspectives. The STN petitioner has submitted, without distinction, two sets of minutes for this meeting. One set, prepared by Gail Harrison, secretary of the Lamb council, purport to be minutes of the meeting of the SIT tribal council. (SN-V025-D0114, p. 1.) The second set of minutes, prepared by Linda Manning, acting for SIK, Inc., purport to be the minutes of a special tribal meeting. (Incomplete minutes at SN-V025-D0114, pp. 2-6; complete minutes at STN TL, Doc. #9.) The Lamb council took no action other than to schedule the tribal elections for August 1, 1982. SN-V025-D0114, p. 1. The Harris faction, however, purported to recall Trudie Lamb, Jeff Kilson, Alan Russell, Sandra March and Claudette Bradley from the tribal council and to schedule a special tribal meeting for August 1, 1982.[27] Manning minutes (complete set) at STN TL, Doc. #9, pp.6-7.

The Lamb council called the August 1, 1982 SIT tribal meeting for the election of three members to the tribal council pursuant to the 1980 constitution. *See* SN-

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[26] For insight into the reaction of the Harris faction, see Paula Rabkin's notes describing the confrontation between Irving Harris and his followers and Trudie Lamb following the April 18, 1982 membership meeting. JT Ex. 81. (Rabkin notes, CIAC 05007-05009).

[27] The Harris faction purported to be acting pursuant to the 1980 Constitution, Article VI, Section 3. Manning minutes (complete set) at STN TL, Doc. #9, pp. 6-7.

V025-D0107; SN-V025-D0114 and SN-V022-D0057. At that meeting, however, Irving Harris and thirty-six of his followers appeared, sought to "recall" the entire SIT tribal council and sought to elect their own slate of candidates in lieu thereof. SN-V025-D0116. In the heated discussion that followed, Harris acknowledged that for two years prior, he and his followers had been having their own separate "tribal meetings." SN-V25-D0116, p.13.

Harris and his followers were unsuccessful in replacing the Lamb council at the August 1, 1982 tribal meeting. *See* Lydem/Velky/Manning minutes of 12:00 noon August 1, 1982 Tribal Meeting, STN TL, Doc. #12 indicating "Voting Canceled". After the SIT tribal meeting was adjourned, however, Harris and his followers conducted their own meeting and elected their own tribal council. SN-V025-D0119; SN-V025-D0121; *see also* Manning minutes of 12:30 p.m. August 1, 1982 Tribal Meeting, STN TL, 2nd part of Document #12. The participants in this election consisted solely of Harris family members. SN-V025-D0119; SN-V025-D0121. The Harris faction's tribal council was elected to lead SIK, Inc. *See* SN-V017-D0173; SN-V019-D0195; SN-V025-D0029; SN-V025-D0025; SN-V025-D0027; Manning minutes, August 22, 1982, STN TL, Doc. #15.

Following the dual elections of August 1, 1982, Irving Harris challenged Lamb's legitimacy to the Connecticut Indian Affairs Council ("CIAC"), claiming that he had been elected Chief at the August, 1982 tribal elections. The Lamb council, in turn, refused to recognize Irving Harris' election. STN HR, at 147-48; STN AR, at

166. On October 4, 1982, the CIAC refused to recognize the validity of the elections held by the Harris faction on August 1, 1982 and recognized that at least six of the Lamb council members remained in office. STN TL, Doc. #16. Also in 1982, the Harris group initiated a legal action in the superior court, seeking an injunction to halt plans by Lamb to construct a house on the reservation. The effort to obtain judicial intervention failed. STN HR, at 147. However, the need for the Harris faction to turn to the CIAC and to the State courts reflected the lack of internal tribal mechanisms or processes to resolve these conflicts.

Although the decision of the CIAC was subsequently voided on procedural grounds by the Connecticut Freedom of Information Commission ("FOIC") on the complaint of the Harris faction (STN TL, Doc. #18; SN-V025-D0126), the Lamb council proceeded to schedule an election for December 5, 1982 for the three vacant SIT council seats. STN TL, Doc. #17. The results of the December 5, 1982 election have not been submitted by the petitioner. Starting with the minutes of the February 20, 1983 SIT tribal council meeting, however, it appears that Harris faction members – to wit, Irving Harris, Maurice Lydem and Kay Pane – were elected to fill the three vacant seats. SN-V025-D0125. These three individuals, together with Gail Harrison, were now simultaneously serving as the members of both tribal councils, i.e., that of the SIT and that of SIK, Inc. SN-V025-D0126.

Although both factions were now "represented" on the SIT tribal council, they did not meet in council together. Over the next several months, each faction of the

council purported to act on the council's behalf. *See* SN-V025-D0125; SN-V025-D0126; SN-V025-D0130; SN-V025-D0132; SN-V025-D0140; SN-V025-D0142; SN-V025-D0144. Moreover, the Harris faction's SIK, Inc. council continued to function as a separate body. SN-V025-D0126.

The ostensible "merger" of the two factions on the SIT tribal council came abruptly to an end at the SIT's June 26, 1983 annual tribal meeting. Immediately prior to the annual meeting, the Harris faction on the tribal council met to discuss the balloting. Irving Harris reported that members of his family present for the annual meeting would not participate in the meeting or in the tribal election. SN-V025-D0148. Although twelve to fifteen members of his family were present (SN-V025-D0149 and D0150), they claimed to have been notified that the meeting had been postponed until July 17. SN-V025-D0148.

The annual tribal meeting commenced shortly after the conclusion of the tribal council meeting. SN-V025-D0146. Irving Harris opened the meeting and then authorized Gail Harrison to conduct the meeting and to proceed with the elections for four tribal council seats. The election resulted in Alan Russell, Sandy March, Gail Harrison and Neil Kilson being elected to the tribal council. SN-V025-D0146. *See also* SN-V025-D0149 and SN-V025-D0150; STN TL, Doc. #21 and #22. The tribal council, including Irving Harris and Kay Pane, both members of the SIK, Inc. council, met on July 17, 1983. SN-V025-D0152 and D0154. Alan Russell was elected tribal

chairman by the new tribal council (the "Russell council" ). SN-V025-D0152 and D0154.

The Harris faction, however, refused to recognize the legitimacy of the June 26th election and the July 17th selection of Alan Russell as tribal chairman. STN HR, at 149. Instead, on July 17th, the Harris faction held its own "tribal meeting" of SIK, Inc. SN-V025-D0156, p. 2 of 2; STN TL, Doc. #24. This meeting re-elected the Harris faction leaders as the SIK, Inc. tribal council; acknowledged the 1973 corporate by-laws as its governing constitution (thereby rejecting the 1980 Constitution);[28] and affirmed that the 1973 corporate logo be continued as the group's logo. SN-V025-D0156, p. 2 of 2; STN TL, Doc. #24; *see also* SN-V026-D0042. On July 21, 1983, the tribal council of SIK, Inc. (Harris council) met and elected its leaders. SN-V025-D0156. Thereafter, the Harris faction proceeded to conduct the affairs of SIK, Inc. as a completely separate group. *See* SN-V025-D0157; STN TL, Doc. #29.

**b. Continued Recourse to External Authorities**

After the events of July, 1983, the CIAC was again required to answer the question of what group properly represented the Schaghticoke Indians on the CIAC. The CIAC rendered decisions on July 3, 1984 (STN TL, Doc. #31), September 15,

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[28] The CIAC repeatedly rejected the 1973 corporate by-laws of SIK, Inc. as a valid constitution, and had instead recognized the validity of the 1980 Constitution of the Schaghticoke Indian Tribe. STN TL, Docs. #31, #33 and #41; Town Ex. 4.

1984 (STN HR, at 150; Town Ex. 4; STN TL, Doc. #33) and May 18, 1985 (STN TL, Doc. #41), all affirming that the 1980 Constitution was the only valid constitution and that the Russell council was the recognized tribal council. Each decision, however, was appealed by the Harris faction to the Connecticut FOIC, and each decision was voided by the FOIC solely on procedural grounds. STN TL, Docs. #38, #40 and #43.

Yet again in 1985, appeals were made to the CIAC after a disputed election. This time, however, resort to the external authority was by the Russell faction, challenging the election of Irving Harris. The challenge, as reflected in a letter by Trudie Lamb Richmond, contested the validity of the elections, asserting:

> Firstly, need I point out that these elections cannot even be considered valid. There were no members of the recognized Tribal Council to conduct a meeting and hold elections. Secondly, no letters went out to the full tribal membership to notify them of such a function.

SN-V024-D0098. The CIAC however affirmed Harris's election. STN HR, at 152-53; SN-V024-D0152.

The bitterness of the continuing conflict, and the petitioner's inability to resolve it internally, is reflected in two lawsuits between the Russell and Harris Groups. In 1986, the *Hartford Courant* published a story regarding allegations of financial improprieties and mismanagement by the Russell leadership. Trudie Lamb Richmond, Alan Russell, and Gail and Edward Harrison (Russell faction members) sued Irving Harris, Paulette Crone, June Hatstat (Harris faction members), the *Hartford Courant* and its reporter for defamation. STN HR, at 153-58; STN AR, at

172. After eight years of litigation, the state superior court dismissed the action, concluding that there was no evidence that the statements reported in the *Courant* article were made with malice. STN HR, at 154; SN-V020-D0055.

The second lawsuit is even more troubling from the perspective of the petitioner's capacity for political leadership. In 1984, the Harris faction challenged the authority of Alan Russell to enter into a contract on behalf of the Schaghticoke Indian Tribe with Keith Potter to permit logging on the reservation. The Harris faction unsuccessfully asserted its claims in the logging controversy to various state agencies, including the Governor, the CIAC and the Connecticut DEP. *See* SN-V027-D0060; SN-V027-D0062; SN-V027-D0066; SN-V027-D070; SN-V024-D0012; SN-V024-D0156 and SN-V024-D0158. In 1989, the Harris faction brought suit in the name of SIK, Inc. alleging that Russell lacked the authority to enter into the contract with Potter and that Russell had failed to account for the proceeds of the sale of timber. *Schaghticoke Indians of Kent, Connecticut, Inc. v. Potter*, 217 Conn. 612, 614 (1991) (Town Ex. 1). The case was litigated to the Connecticut Supreme Court, which reversed the trial court's dismissal of the lawsuit,[29] and remanded with

[29] The superior court had granted Russell's motion to dismiss on the ground that the court lacked jurisdiction over an internal tribal dispute. 217 Conn. at 614.

direction that the lower court conduct further proceedings for the purpose of assessing the Schaghticoke's tribal status.[30] *Id*. at 629-30.

The STN petitioner asserts that as a result of the logging controversy, the tribe once again came together under Chief Harris in 1985. STN HR, at 152. Relying on June 30, 1985 minutes of a purported annual meeting of the Schaghticoke Indian Tribe, the petitioner states: "Chief Harris was successful in the summer of 1985 in reclaiming the tribal chairmanship in an election in which both factions were represented". The minutes of that meeting, however, do not support his contention. Instead, the minutes specifically state: "Other faction not present"; and "[m]eeting any other place by other faction is invalid because we were not given due notice of any

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[30] The Supreme Court noted: "there is no evidence that the Schaghticoke are a tribe or that they have any form of tribal self-government. The record is devoid of evidence as to whether the tribe is still, or has ever been, a cohesive cultural or ethnic unit. Furthermore, there is no evidence as to the existence, if any, of a tribal government or of an attempt by the Schaghticoke Indians, through tribal legislation or otherwise, to control the use of reservation lands in a way that would be inconsistent with the oversight of the [Connecticut Department of Environmental Protection]." 217 Conn. at 629. The Supreme Court remanded the case back to the trial court to determine: (1) whether the Schaghticoke Indians are still a tribe; (2) whether they have in the past and presently continue to exercise some form of tribal sovereignty; and (3) whether the state act in question would unduly infringe on their sovereignty. 217 Conn. at 612. After remand, SIK, Inc. did not further pursue the case and it was ultimately dismissed for failure to prosecute.

The Supreme Court decision is conspicuously absent from the materials filed by the STN in support of its petition The STN has pointed to the *reversed* trial court decision as the "strongest identification ever" that the State of Connecticut recognizes the Schaghticoke as a "sovereign tribal entity." STN SE, p. 17 (SN-V004-D0001, p. 20). It further asserts that the *reversed* appellate court decision recognized that the "Schaghticoke Reservation was considered 'Indian Country' as that term was used in federal law." STN HR, p. 158 (SN-V006-D0001, p. 162). Finally, it *falsely* asserts that the Connecticut Supreme Court "denied" the subsequent appeal filed by the State of Connecticut. STN HR, p. 158 (SN-V006-D0001, p. 162). The STN's ultimate conclusion that the case represents "the State's strongest identification and liberal interpretation of the tribal sovereignty of the Schaghticoke

change according to constitution." SN-V025-D0184. Moreover, the list of candidates placed in nomination and the list of people present shows that the meeting was a meeting of the membership of SIK, Inc., attended only by the Harris faction. *See* SN-V024-D0098; SN-V025-D0187 through SN-V025-D0190; SN-V026-D0042.

The repeated need of the STN to resort to the state courts and other external authorities to resolve its leadership and other disputes, including one so central to a purported tribe's existence as the development or preservation of its reservation lands, demonstrates the basic lack of the STN leadership's influence and authority. Indeed, as the petitioner concedes, attempts to remove members of the Russell faction living on the reservation have failed. The petitioner attempts to portray all this activity – whether in the form of leadership challenges made to the CIAC or the litigation of unresolved disputes between the Russell and Harris/Velky factions – as evidence of political activity. *E.g.*, STN AR, at 175. However, all that this contentious factionalism and the repeated recourse to external authorities show is the absence of meaningful political leadership and authority. Moreover, the present day conflicts evidence the complete absence of any political tradition of governance to guide the Schaghticoke. Despite all of the controversies in the last twenty years, the Schaghticoke have never once referred to their own political tradition as a means of

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tribe." (STN HR, p. 158 (SN-V006-D0001, p. 162)) is wholly unsupported by the Supreme Court decision.

resolving their disputes. The reason is obvious – the Schaghticoke have no political tradition. As a result, they have no model of governance from any historic period to which reference may be had for resolution of their modern day conflicts.

### c. The Tribal Constitution

After the events of June through September 1985, the Harris/Velky Group moved to consolidate its position as recognized by the CIAC. It amended the corporate by-laws of SIK, Inc. to identify that entity as a tribal entity (SN-V026-D0042; *see also* SN-V025-D0215) and to restrict membership and voting rights.[31]

The 1973 corporate by-laws of SIK, Inc.[32] had provided that voting membership in the corporation was open to any person 16 year of age or older who contributed $1.00 annually and who was an

> authentic descendant of the Schaghticoke Tribe of Indians . . . who can prove through a birth certificate or other legal record that he or she is directly related to an Indian who is genealogically recorded as a Schaghticoke Indian by the State of Connecticut.

[31] *See* SN-V025-D0214, SN-V025-D0217 and SN-V027-D0072 for action pertaining to revocation of voting rights of Russell faction members. The 1994 minutes of the STN indicate that for seven years Trudie Lamb Richmond and her family, Gail Harrison and her family and members of Butch Lydem's family had lost their voting privileges or had been otherwise been removed from the tribal rolls. SN-V025-D0305; SN-V025-D0307; SN-V025-D0310. After receipt of the Technical Assistance letter from the BIA indicating that descent from more than one individual was required, the voting rights of these individuals were restored on October 1, 1995. SN-V026-D0017. *See also* SN-V026-D0015. In March 1995, the STN Tribal Council considered a motion to revoke the voting rights of Irving Harris, the STN's former chief, but withdrew the motion since he was not considered a voting member of the STN. SN-V026-D0007, p. 2; *see also* SN-V025-D0315.

[32] The original thirty-one Schaghticoke Indian members of the corporation are identified at SN-V024-D0170.

SN-V025-D0029, p. 1. On November 1, 1987, the corporate by-laws were amended to become the "Articles of Constitution" of SIK, Inc. SN-V026-D0042; SN-V026-D0043; SN-V025-D0214. The amended by-laws/constitution provided for the election by the tribal voters of a "Chief" for life. [33] Article IV, Section 2; SN-V026-D0043, p. 3 of 4. It also served to restrict membership to persons of "direct matrilineal or patrilineal descendency from the first chief and founder of Schaghticoke 'Gideon Mauwee'." SN-V026-D0043, Article IV, Section 1(a). Thus, persons who descended through ancestors other than Gideon Mauwee, such as the Cogswells, were precluded from tribal membership.[34] *See* T. Cogswell Interview pp. 131-138, 146-166 (JT Ex. 70); Town Ex.7; SN-V026-D0176; SN-V004-D0004; SN-V004-D0007.

In 1991 the Articles of Constitution were again amended. The 1991 amendments changed the corporation's name to the Schaghticoke Tribal Nation, Kent,

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[33] Prior to November 1, 1987, Irving Harris had been the president (chief) of SIK, Inc. He supposedly resigned as chief and as a tribal council member on June 4, 1987. STN TL, Doc. #62. Harris' resignation was not signed by him. Instead, it was signed "for him" by B.K. (Betty Kaladish) STN TL, Doc. #62. Harris denies this resignation and asserts that he never resigned as tribal leader or chairman of the SIK, Inc. JT Ex. 82. (CIAC DOC. 05412). *See also* SN-V030-D0050 and AC-V004-D0020. Although the November 1, 1987 amendments to the constitution provided that the "chief " would be selected by the vote of tribal members, Richard Velky became "chief for life" on November 19, 1987 when he was named chairman of the tribe by eight members of the tribal council. SN-V025-D0217. He thereafter assumed and has since claimed to be the "chief" of the STN. *See* SN-V027-D0070; SN-V027-D072; SN-V027-D0074. Subsequent to November 19, 1987, no tribal election for chief was ever held. The only elections were to fill vacancies on the tribal council. *See* SN-V025-D0225; SN-V025-D00235; SN-V025-D0243; SN-V025-D0266; SN-V025-D0282.

[34] The 1987 Articles of Constitution also restricted voting rights to those members who were permanent residents of the State of Connecticut. SN-V026-D0043, Article V. Only voting members (thus, permanent Connecticut residents) were permitted to hold office as members of the tribal council. SN-V026-D0043, Article IX, Section 4(d).

Connecticut, and eliminated some of the prior references suggestive of the entity's existence and structure as a corporation. The limitations on membership, voting rights and authority to hold tribal office remained substantially the same as set forth in the 1987 Articles of Constitution. SN-V026-D0046.

In direct response to the BIA's Technical Assistance letter stating that descent from more than one individual (Gideon Mauwee) was required to meet the requirements for federal recognition, the Articles of Constitution were again amended on October 1, 1995. SN-V026-D0015; AC-V004-D0011, p. 8. The 1995 amendments expanded membership to those persons having "direct matrilineal or patrilineal descendency from the first chief, 'Gideon Mauwee' or direct matrilineal or patrilineal descendency from any person identified on the 1910 U.S. Federal Census as a Schaghticoke Indian."[35] SN-V026-D0017; SN-V026-D0048, Article IV, Section 1(a).

In 1997, a new STN constitution was adopted by the "voting" membership, i.e., those members who were permanent Connecticut residents. The 1997 constitution (SN-V034-D0006) froze the membership of the tribal council. Tribal council members then in office would remain in office until the first annual meeting following

[35] Voting rights, however, remained limited to permanent residents of the State of Connecticut (Article V), as did the right to sit on the tribal council (Article IX, Section 4(4)) and the right to reside on the reservation (Article XII, Section 1).

federal recognition of the STN as an Indian tribe. At that time the tribal council would stagger its members' terms for additional periods of from six to nine years. Article VI, Section 2; Article X, Section 1; SN-V034-D0006, pp. 10-11, 26. Until then, the tribal council is a self-perpetuating body, with the tribal council filling any vacancies that arise in its own membership. Article VI, Section 11; SN-V034-D0006, pp. 12-13. The 1997 constitution also established Richard Velky as Chief "for the duration of his life" or until "removed" as otherwise provided in the constitution.[36] Article X, Sections 1 and 9; SN-V034-D0006, pp. 26, 28. With the broader tribal membership thus having no meaningful say in the choice of leaders or in their policy decisions, the relationship of STN tribal members to the leadership cannot be said to be a bilateral political relationship.[37]

#### d. Recent Developments and the Continuing Inability to Resolve the Factionalism.

The petition materials attempt to convey the false notion that the factionalism is all a matter of the past and that the Russell and Harris/Velky Groups have since reconciled. STN HR, at 168; STN AR, at 187. Recent actions of the factions belie

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[36] The 1997 constitution removed the residency requirement for membership voting. However, because the constitution was adopted prior to removal of that residency requirement, individuals who otherwise qualified for membership under the 1995 amendments but who resided in states other than Connecticut, were disqualified from voting on the constitution. *See* T. Cogswell Interview, pp. 136, 141-145 (JT Ex. 70).

[37] Even Irving A. Harris has broken with the Velky leadership as being non-representative of the Schaghticoke Indians. Harris strongly opposes recognition of the STN as an Indian tribe. SN-V030-D0050; AC-V004-D0020.

this purported reconciliation. The same disputes – challenges to the legitimacy of the Velky leadership and controversy over the cutting of timber on the reservation – continue in external forums. The Russell Group defies the Velky leadership and claims to be the rightful leadership of the Schaghticoke Indians. Indeed, the Russell Group has indicated that it intends to submit evidence in opposition to the STN petition, and, in fact, has filed with the BIA its own letter of intent to petition for acknowledgment.[38] 66 Fed. Reg. 66,916 (Dec. 27, 2001).

The STN petitioner's declaration that the leadership conflict has ended is unsupported by the evidence. It contends that since 1985 there have been no challenges to the group's leadership. STN TL, at 1, 11. The only way that it can make this statement, however, is by defining the opposing faction – the Russell Group – out of its membership. The STN petitioner asserts that Alan Russell and others of his supporters "voluntarily withdrew" from the STN in 1997 by opting to form their own rival group. [39] *Id*. at 2, 14. Thus, according to the STN petitioner, because

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[38] The acknowledgment regulations expressly preclude the acknowledgment of splinter groups or factions. 25 C.F.R. § 83.3(d). A third group, apparently calling itself simply the Schaghticoke Tribe, has also filed a letter of intent to petition. 66 Fed. Reg. 66,916. At present, little is known of this third group.

[39] The STN petitioner states: "[A]s of today, Alan Russell is not even included in the Tribe's membership because he voluntarily withdrew from the Tribe and started his own group on October 24, 1997." STN TL, at 2. This assertion is contradicted by the record. Not only did the Harris/Velky Group "revoke" Alan Russell's voting privileges on November 1, 1987 (SN-V025-D0214) and sue him over the logging dispute in *Schaghticoke Indians of Kent, Connecticut, Inc. v. Potter*, 217 Conn. 612 (1991), it did not recognize him as a tribal member on its membership lists of November 22, 1994 (SN-V003-D0002) or April 11, 1997 (SN-V008-D0003).

Russell has left the STN fold, he cannot have any claim to tribal leadership. *Id*. at 14. The fact that the factional conflict became so extreme that the only means of resolution was the mutual nonrecognition of the two factions is hardly evidence of effective political authority. In any event, the petitioner's effort to tidy up the messiness of this persistent factionalism is not supported by recent events.

For example, the conflict over logging has returned to the courts. In June, 2001, the STN initiated an action against Ronald Harrison for trespass. Ronald Harrison is a resident on the reservation, living in a garage apartment of the house of his mother, Gail Harrison. The Harrisons are members of the SIT/Russell Group. The STN/Velky Group alleges that Harrison had brought heavy equipment onto the reservation and began removing timber from the reservation without permission from the STN. *STN v. Harrison*, Complaint, at 6 (JT Ex. 83). The lawsuit sought an injunction from further acts of alleged trespass and damages against Harrison. The SIT/Russell Group sought to intervene and dismiss the action against Harrison. *STN v. Harrison*, Mem. in Support of Motion to Dismiss (JT Ex. 84). The Superior Court dismissed the case, concluding that it lacked jurisdiction over this internal tribal dispute. *STN v. Harrison*, 2001 Conn. Super. Lexis 3341 (Nov. 27, 2001) (JT Ex. 85). An appeal of the dismissal has been filed.

What is more telling than the outcome are the positions taken by the factions regarding the authority of the petitioner's leadership. For instance, Richard Velky submitted to the court a sworn affidavit stating that he was the chief of the STN and

outlined the source of his purported authority. He stated that on June 4, 1987, then-Chief Irving Harris resigned,[40] and that he was appointed acting chairman by the tribal council until new council elections were held, after which he was appointed chairman/chief. Affidavit of Richard Velky, at 2 (JT Ex. 86); *see* SN-V025-D0200; SN-V025-D0217. Since that time, he has been and continues to be the "duly-elected leader of the Tribe." *Id*. at 3. On June 6, 2001, the council passed a resolution authorizing him "to take appropriate action to stop persons residing on the reservation from 'misuse, destroy, lay waste or in other ways, cause damage, harm or destruction to the Reservation . . . ." (sic) *Id*. at 5. The action he chose, obviously, was to seek intervention of external authorities given the Schaghticoke's inability to resolve this long-standing conflict by internal processes.

In contrast, Alan Russell also submitted a sworn affidavit outlining his view of the leadership dispute. Russell states in his affidavit that he is a Schaghticoke Indian, a member of the Schaghticoke Indian Tribe, a resident of the reservation, and chairman of the Schaghticoke tribal council. Affidavit of Alan Russell, at 1 (JT Ex. 87). He states:

- None of the Schaghticoke Indians on the [SIT] tribal rolls are members of the group calling itself the STN.

[40] Irving Harris' alleged resignation is a mystery surrounding the Velky leadership. Harris's purported written resignation was never signed by him. Instead, it was signed for him by B.K. (Betty Kaladish) STN TL, Doc. #62. Harris denies that he ever resigned as chief. JT Ex. 82. (CIAC DOC. 05412)

- That Richard Velky and his group calling itself the STN "are not connected to The Schaghticoke Indian Tribe and have no authority on our Reservation."
- The Schaghticoke Indian Tribe does not have a Chief for Life, the position claimed by Richard Velky.

*Id*. at 1-2.

The brief filed on behalf of the SIT further described the Russell Group's view of the leadership dispute. They contend that the Harris/Velky Group was "created by Richard Velky's uncle, Irving Harris, when he broke away from the Schaghticoke Indian Tribe." *STN v. Harrison*, Mem. in Support of Motion to Dismiss, at 2 (JT Ex. 84). Specifically, the Russell Group contends that Irving Harris "created his own tribal council out of the former Board of Directors of the Schaghticoke Indian Tribe's corporation (*i.e.*, the Schaghticoke Indian Tribe of Kent, Connecticut, Inc.)." *Id*. It further contends that, despite the CIAC's determination that Alan Russell and his council represented the Schaghticoke Indian Tribe, the Harris/Velky faction continued to assert that they were the legitimate leaders and representatives. *Id*. at 2-3. The Russell Group also maintains that the Harris/Velky Group usurped the SIT's original letter of intent to petition for federal recognition, but that the SIT is preparing its own petition as well as comments on the STN petition. *Id*. at 4.

Plainly, the Russell and Harris/Velky Groups do not recognize the other's claim to leadership. Each asserts that it is the true representative of the Schaghticoke tribe. The dispute at this juncture appears to be utterly intractable. It represents a complete

breakdown in the petitioner's internal political processes, and an overwhelming lack of political influence and authority, regardless of which faction one would consider to be the legitimate leader. The pervasive inability to resolve such basic questions of political community is a fatal defect in the petition.

The ruptures in the petitioner's purported community resulting from the factionalism have had effects elsewhere among those claiming Schaghticoke descent. For example, the brothers Theodore W. Cogswell, Jr. and Truman Cogswell, the grandsons and great-grandsons of William Truman Cogswell and George Cogswell, respectively, had resigned from the tribal rolls of the petitioner specifically because of their opposition to what they perceive to be the illegitimate leadership of the Velky faction. Cogswell Interview, at 136-38 (JT Ex. 70); Letters dated Dec. 18 & 29, 2001 (Town Exs. 13; 14). Indeed, the Cogswell brothers have recently filed a request for interested party status for the express purpose of opposing the STN petition, indicating that they intend to submit evidence, among other things, that the Velky leadership is illegal. Request for Interested Party Status dated Jan. 8, 2001 (JT. Ex. 88). That members of the Cogswell family line – a critical family line for the petitioner – should take such drastic steps is telling. Stated simply, the petitioner's leadership lacks political influence and authority that transcends family lines.

The point of this exposition is not to suggest which faction has the better claim to leadership. Rather, it highlights the persistent and unresolved nature of the factionalism that infects the petitioner. For over twenty years, the Russell and

Harris/Velky Groups have battled. Repeatedly, the factions have turned to external authorities for resolution. In light of both the persistence of the conflict – which, given the Russell Group's adamant opposition to the Velky leadership, has only worsened – and the need to seek resolution outside the petitioner's own political processes, the petitioner cannot satisfy criterion (c) for the modern period.

### 7. State Recognition of an Indian Group Cannot Make Up for the Lack of Proof Required Under the Mandatory Criteria

The evidence of relations with State government does not support recognition of the petitioner as an Indian tribe under federal standards. For most, if not all, of the historical period from colonial times to the present, the State never treated the Indian groups under its jurisdiction as distinct social communities having political authority or sovereignty. Indeed, the evidence reflects a profound lack of State standards or evaluation similar to that required by the federal acknowledgment regulations. Moreover, the manner in which the State recently recognized the existence of several State tribes is not a basis for supporting federal recognition.

#### a. The Petitioner Distorts the Significance of State Recognition

The petitioner repeatedly distorts the nature and significance of the State's relationship with the Schaghticoke group. The petitioner contends that the appointment of overseers and appropriations for the Schaghticoke group reflects the State's continued acknowledgment of the group's status as a sovereign Indian community. STN AR, at 13, 86, 111; STN CR, at 24, 37, 48; STN Pet., at 83.

Indeed, the petitioner goes so far as to assert that the mere use of the word "tribe" in State documents with reference to the Schaghticoke group is sufficient evidence of community and political authority under criteria (b) and (c). STN CR, at 36.

The petitioner's claims regarding state recognition are not only wrong, but are internally inconsistent. Its own analysis of state relations reveals that the State at no point acted in a manner that recognized the petitioner as a tribal community within the meaning of the federal acknowledgment regulations. For example, despite repeated references in their petition to the role of overseers as evidence that the State acknowledged a relationship with a sovereign political community, the petitioner admits that the overseers dealt with members of the Schaghticoke group on an ***individual***, not tribal, basis. STN AR, at 14 (State policy was to "deal[] directly with individuals on a one-on-one relationship rather than through tribal leaders"). There is no evidence that the nineteenth-century overseers dealt with the group as a collective. Nor is there evidence that the group acted collectively with the overseer, for example, in decisions with regard to who should receive assistance, or that group leaders interacted with the overseer on such matters. The absence of such evidence illustrates both that there was no State recognition of a distinct, political autonomous group as well as the actual lack of community and leadership. As repeatedly noted by the petitioner itself, the overseer reports consistently demonstrate that accounts were

maintained and settled on an individual basis.[41] STN AR, at 62, 71; Abel Beach Account Books (SN-V011-D0039). The same is evidenced in the records of the Park and Forest Commission and the Welfare Department. CT Ex. 1; 2; SN-V019-D0105 to D0181.

In fact, the records of the Welfare Department are particularly instructive. Detailed accounts were kept of specific expenditures incurred on an individual-by-individual basis. Notations recite expenditures for groceries, clothing, medical needs, and the like provided for specific individuals. SN-V019-D0107 to -D0115. Nothing in these records even hints at any tribal decision making or interaction with group leadership. Rather, the Welfare Department records, just like those for the nineteenth-century overseers and the Park and Forest Commission, reflect that the relationship between the State and the Schaghticoke group was one primarily characterized as involving individualized assistance, not any interaction with a collective or autonomous community.

Similarly, and quite remarkably, the petitioner asserts, on the one hand, that the Welfare Department, through the exercise of its oversight and welfare responsibilities, acknowledged the sovereign existence of the petitioner, STN AR, at 111, and on the other hand, that under the Welfare Department the Schaghticoke group "found [itself]

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[41] The overseer's role in the nineteenth century as demonstrating a lack of community and

without autonomy . . . ." STN AR, at 114. Repeatedly, the petitioner complains about the restrictive policies of the State in terms of issues such as membership and use of and access to the reservation. However, the reality is that these policies reflected the State's view that these groups were not self-governing communities in the sense required under the acknowledgment regulations. As even the petitioner concedes that State overseers and agencies treated the Schaghticoke members as individuals in need of assistance and lacking tribal autonomy, it is impossible to then conclude that the State recognized the group as a sovereign entity. *See*, Conn. Atty. Gen. Op. (May 18, 1939 and Nov. 4, 1955) (JT Ex. 89).

As discussed, the kind of relationship the State had with the Schaghticoke group does not indicate recognition of a political sovereign, but rather of a group of individuals in need of assistance from the State. Nonetheless, the petitioner incorrectly contends that various enactments for appropriations for the Schaghticoke group evidences the State's acknowledgment of a sovereign community. STN AR, at 86. An examination of the legislation does not support this assertion. For example, the petitioner relies on Special Acts in 1915, 1917, 1919, and 1921 in which appropriations were made for the "Schaghticoke tribe of Indians." These appropriations were made to the overseer "for the maintenance, support, care and education of said Indians under the direction of the judge of the court of common

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political leadership is discussed in more detail in section III.B.3 above.

pleas for Litchfield county." STN AR, at 86. In fact, a review of the legislative history of the appropriations reveals, not a recognition of a sovereign community, but of a small group of persons in need of care. On several occasions, the group is referred to as a "remnant" of a tribe, members of which are scattered throughout the State. The clear legislative purpose of providing the appropriations was to provide assistance to individuals needing it. Joint Standing Committee on Appropriations, Public Hearings (Mar. 12, 1919); *Id*. (Feb. 23, 1921); *Id*. (Feb. 7, 1923); *Id*. (Mar. 2, 1927); *Id.* (May 5, 1937) (JT Ex. 90). This is hardly evidence of recognition of a sovereign entity; rather, all it demonstrates is that the State was consistently exercising an oversight and welfare role for dependent persons in need of care and assistance. *Nipmuc (Hassanamisco Band)* Prop. Find., SC 141-42.

**b. Absence of State Standards for Determining Indian Status and the Lack of Relevance of State Recognition**

The petitioner's reliance on State recognition is also deeply flawed as a legal matter. Exclusive authority over Indian relations is vested in the United States under the Constitution. U.S. Const. art. I, § 8 (power of Congress to regulate commerce with Indian tribes); art. II, § 2 (power of President to make treaties with the advice and consent of the Senate). A State can no more recognize a tribe for Federal purposes than it can deny its existence for Federal purposes. As the Supreme Court recognized more than a century ago in *Elk v. Wilkins*, 108 U.S. 94 (1884), there is a fundamental distinction between tribes in relation with the federal government and groups or remnants of tribes in relationships with the states. The latter had generally lost the

power of self-government and were placed under the control and protection of state law. *Id.* at 107-08. State recognition cannot and should not control the decision to place an Indian tribe in a government-to-government relationship with the United States. *See* 25 C.F.R. § 83.2.

As the BIA has on numerous occasions stated, state recognition of an Indian group is not binding on the federal government because state standards vary widely and may have little relation to federal acknowledgment standards. *Mohegan* Final Determ., TR at 172. This principle is particularly applicable here. Throughout most of the colonial and state periods, Connecticut lacked a specific definition, statutory or otherwise, of "Indian" or "Indian tribe" and had no process for making determinations of such status. Instead, the record indicates that overseers were appointed on a more or less ad hoc basis for Indian groups. This lack of standards – and the lack of relevance to federal standards – continues through the present.

In 1989, the Connecticut General Assembly enacted Public Act 89-368, codified at Conn. Gen. Stat. § 47-59a. It provides that the State recognizes five enumerated "indigenous tribes," including the Schaghticoke, and that these groups

> are self-governing entities possessing powers and duties over tribal members and reservations. Such powers and duties include the power to: (1) Determine tribal membership and residency on reservation land; (2) determine the tribal form of government; (3) regulate trade and commerce on the reservation; (4) make contracts; and (5) determine tribal leadership in accordance with tribal practice and usage.

Conn. Gen. Stat. § 47-59a. The legislation expressly provides that *"**[n]othing in [it] shall be construed to confer tribal status under federal law on the indigenous tribes named in section 47-59a**. . . ."* Conn. Gen. Stat. § 47-66h(b) (emphasis added); *see State v. Sebastian*, 243 Conn. 115, 146-47, 701 A.2d 13 (1997) ("No authority exists for the proposition that a state has the authority to determine whether a tribe that has not been acknowledged formally by the federal government satisfies the requirements for federal acknowledgment"; citing 25 C.F.R. § 83.7(a)(2)).

There is nothing in the legislative history of the Public Act that suggests that the legislature conducted the sort of historical, genealogical or anthropological research of any of the recognized groups or their members contemplated by the federal acknowledgment standards. In particular, there is no evidence, either by way of legislative findings or legislative history, that the recognized groups in fact exercised any of the powers enumerated in the legislation regarding membership and tribal government, let alone that they exercised these functions as a distinct community with bilateral political relationships historically and on a continuous basis.

Moreover, even under the recent state legislation these groups were not self-governing in a sense that is relevant to federal acknowledgment standards. For instance, although membership and leadership disputes are to be settled by "tribal usage and practice," the legislation provides for an arbitration-type procedure, including possible appointment of a third member of the arbitration council by the Governor and a right to appeal to the Superior Court. Conn. Gen. Stat. §§ 47-66i, 47-

66j. Similarly, the legislation provides that the Connecticut Department of Environmental Protection, with the advice of the Connecticut Indian Affairs Council, shall have control and management of tribal reservation lands and tribal funds. *Id.*, §§ 47-65, 47-66. Plainly, state recognition in this legislation does not contemplate the existence of the elements of distinct community and bilateral political relationships that are the fundamental prerequisites for federal recognition.

This conclusion is supported by the legislative history. Proposals in the bill that became Public Act 89-368 to declare the referenced Indian groups as "sovereign nations retaining limited sovereign powers . . .," House Bill 7479, § 20(b) (JT Ex. 91), and to give the recognized groups the power to tax reservation residents, *id.*, were deleted from the final bill that became law. Not only was there no evaluation even approaching the standards necessary for federal recognition, it is clear from the limited nature of the powers accorded the State recognized tribes that no determination was made that these groups had the attributes necessary for federal recognition.

In sum, the State's recognition of Indian groups was not based on an evaluation of the sort of considerations that would support federal acknowledgment. In fact, the legislature expressly stated that its recognition was not intended to be used as evidence in support of federal recognition, underscoring that the purpose of and basis for State recognition was quite different from that for federal recognition and the concomitant establishment of government-to-government relations.

### c. Under the Regulations, State Recognition Does Not Augment or Supplement Evidence for the Other Mandatory Criteria

That a state had a relationship with a group of Indians living on a reservation is not evidence that the group acted as a distinct social community with political autonomy. Rather, evidence of relationships with state government is considered under the regulations only with regard to criterion (a), identification as an Indian entity. It is not listed as appropriate evidence with regard to any other criteria and cannot be used as a substitute for such evidence or as a basis for giving greater weight to such evidence.[42]

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[42] The BIA in the *Eastern Pequot* and *Paucatuck Eastern Pequot* proposed findings relied on *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), as precedent for the use of state recognition as evidence for criteria other than criterion (a). *See Eastern Pequot* Prop. Finding 63. A proper reading of *Passamaquoddy* compels a rejection of this case as precedent for such purposes. In that case, the federal defendants ***stipulated*** that the plaintiff was a tribe of Indians. On the basis of this stipulation, the court held that the plaintiff was a tribe for the purposes of the Nonintercourse Act, 25 U.S.C. § 177. *Passamaquoddy*, 528 F.2d at 376-78. Because of the stipulation, neither the court nor the parties engaged in the kind of detailed analysis contemplated by the acknowledgment regulations. Courts have specifically distinguished *Passamaquoddy* on the basis that tribal status for purposes of the Nonintercourse Act was stipulated and that it therefore has no precedential value. *E.g.*, *Golden Hill Paugussett Tribe of Indians v. Weicker*, 839 F. Supp. 130, 133 (D. Conn. 1993), *rev'd on other grounds*, 39 F.3d 51 (2d Cir. 1994); *United States v. 43.47 Acres of Land*, 855 F. Supp. 549, 551-52 (D. Conn. 1994); *Miami Tribe of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1166 (N.D. Ind. 1995).

Moreover, the reliance on State recognition in the Pequot proposed findings is of no precedential value. In addition to the fact that the Pequot findings are only proposed and not binding, it has been documented that those positive findings were issued as a result of a directive from the former Assistant Secretary to reverse the BIA staff's recommended negative proposed findings. The former Assistant Secretary accomplished this result by placing unprecedented and undue weight on state recognition. The impropriety of this political involvement is documented in the report issued by the Department of the Interior's Inspector General on the acknowledgment process, where it is noted that there was a pattern of political interference in proposed and final determinations under the last Administration, including the Pequot findings.

There is no basis to assume that state recognition demonstrates "consistent interactions and significant social relationships" within the group's membership, as required under the regulations for criterion (b). 25 C.F.R. § 83.1 (definition of community). State recognition says nothing about the nature of the relationships among group members and whether any such relationships are significant enough to be the basis for a distinct community. Similarly, there is no basis for assuming that there have been continuous bilateral political relationships, the hallmark of federal tribal existence. To the contrary, state recognition demonstrates that the ***State*** exercises the political functions that constitute the critical characteristics necessary for satisfying criterion (c). *See* Conn. Gen. Stat. §§ 47-65, 47-66, 47-66i, 47-66j.

The acknowledgment regulations reduce the burden of proof as to the other criteria only when there was prior ***federal*** recognition for a tribe, 25 C.F.R. § 83.8; 59 Fed. Reg. 9282, ***not*** for state recognition. Among the evidence for prior Federal acknowledgment is "[e]vidence that the group has been treated by the Federal Government [not the State] as having collective rights in tribal lands or funds." 25 C.F.R. § 83.8 (c) (3).[43] The rationale for this distinction is obvious: The purpose of the acknowledgment criteria -- demonstrating a basis for establishing government-to-

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[43] When the regulations were first proposed, they included as factors for consideration whether the group had been treated "by a state or by a Federal Government agency as having, collective rights in land...." Proposed § 54.7(c)(8), 42 Fed. Reg. 30,648 (1977). Significantly, those provisions were never adopted. Instead, what is required is ***federal*** treatment of the group as having collective rights. 25 C.F.R. § 83.8(c)(3).

government relations between a tribe and the federal government -- may be satisfied in part by evidence of prior acknowledgment by the federal government. In contrast, the same can not be said for state recognition. As demonstrated above, state recognition does not carry with it an evaluation of the factors necessary for federal recognition.

Most tellingly, if it was intended that state recognition should have a similar role in replacing or supplementing evidence required for the other criteria, the regulations could and should have expressly provided for such treatment. Instead, the regulations expressly limit the relevance of state relations to criterion (a). Under the basic rules of construction, the regulation's failure to provide for a similar treatment of state recognition as it does for prior federal recognition, and its limitation of the relevance of state recognition to criterion (a), must be taken as demonstrating that state recognition is not to be given any weight as to the other criteria, nor is it to be used as a surrogate for satisfying the other criteria. *See Hohn v. United States*, 524 U.S. 236, 258 (1998).

State recognition, therefore, has little if any weight in evaluating the principal factors necessary for federal acknowledgment, particularly criteria (b) and (c).

## C. The Failure of the STN to Prove Descent of Its Members from the Historical Schaghticoke Tribe

The Petitioner has the burden of proving that its members "descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." 25 C.F.R. § 83.7(e).

To satisfy its evidentiary burden under this criterion, the STN must proffer evidence that demonstrates a "reasonable likelihood of the validity of the facts" upon which they assert descent from an historical tribe. *Id.*, § 83.6(d). This burden of proof is exclusively on the petitioners. *Id.*

At this time, Respondents cannot say for certain whether the STN meet criterion (e). In large part, this is because the STN have not made vital records and other key documents available to the Respondents. As a result, Respondents reserve the right to assert in the future a final position on this issue. For purposes of these comments, Respondents note that there are several key questions left unanswered by the petitioner's evidence.

### 1. Standards Under Criterion (e).

In its Golden Hill Paugussett Final Determination, BIA cites with approval the need to establish genealogical findings for criterion (e) under the "preponderance of the evidence" test. *Golden Hill Paugussett* Final Determination, at 9. This burden of proof is generally accepted in the field of genealogy. For example, the "preponderance of the evidence" test is relied upon by the Board for Certification of

Genealogists in its Applications Guide under Specific Requirements for Certified American Indian Lineage Specialist, ¶ 9-C (Jan. 1995).

In addition, this standard is set forth in the professional texts recommended by BIA. At the January 23, 2002, formal technical assistance meeting for the Dudley/Webster band of Nipmuc Indians, Dr. Virginia DeMarce recommended two basic texts for conducting genealogical research for tribal acknowledgment petitions. Both of the texts set forth a preponderance of the evidence test. *See* Nipmuc Transcript, at 34.

The first text referred to by Dr. DeMarce is Genealogical Research Methods and Studies, issued by the American Society of Genealogists. In its discussion of the "standard of proof" required for genealogical research, this text states:

> First, it must be clear that genealogical facts, except in rare instances, cannot be proven to an *absolute certainty*. Therefore, if a pedigree cannot be proven to an *absolute certainty*, what standard is applied? In civil matters before the courts, the requirement is that, the party seeking to establish facts or prove the case must do so by a *preponderance of the evidence*. *Preponderance of the evidence* simply means proving a case by a greater weight of the evidence . . . .

American Society of Genealogists, Genealogical Research Methods and Sources, 38 (1960)(emphasis in original).

The second text relied upon by Dr. DeMarce is Evidence! Citation and Analysis for the Family Historian by Elizabeth Shown Mills. Mills not only affirms

the need to use the preponderance of the evidence test, but explains that, for genealogical purposes, this test is more rigorous than in judicial proceedings. As she states:

> Modern genealogy draws heavily from law in its handling of evidence. ***Yet genealogy requires a higher standard of proof than does most civil litigation, and attempts to define genealogical concepts by legal terms create confusion***. Consider this comparison:
>
> - The justice system requires that a date be set for trial, that all known and valid evidence be considered at this time, and that a decision be made then and there on the basis of that evidence. To avoid clogging the court system, the law permits decisions to be made in the closest of cases – even when the evidence on one side barely outweighs that on the other. This is the legal standard of proof called *preponderance of the evidence*.
> - Genealogy rarely seeks an arbitrary time or deadline by which one must decide the parentage of a distant forebear. If clearly convincing evidence does not exist to accept or reject a point, the genealogist can – and should – simply delay a decision until suitable evidence is found.

Mills, Evidence! Citation for Analysis for the Family Historian 46-47 (1997) (emphasis added).

To meet this heavy burden, a proponent of a genealogical theory cannot merely rely upon an abundance of documents, as the petitioner does. As Mills states:

> Each time we accept or reject a fact or a probability, that decision should be based upon careful consideration of where the *weight of the evidence lies*. That weight is based upon the *quality of the evidence*, not upon the number of documents accumulated – although a reliable effort to determine the "truth" or likelihood requires us to consult all known sources.

*Id.* at 46 (emphasis in original).

Mills admonishes genealogists and researchers to adhere to the highest professional standards and most rigorous and scrupulous research techniques. As she explains:

> As careful genealogists, when we thoroughly exhaust all potential resources, we will carefully analyze each element and apply at least the [thirteen principles][44] set forth in this chapter. If the weight of the evidence suggests a reasonable conclusion, we will labor to disprove our hypothesis as diligently as we labor to prove it. When we find contrary evidence, we will adequately and logically rebut it – or else delay our decision until clearer support can be assembled. When we are convinced that all valid evidence points to a conclusion that we and others of experience and rational thinking can accept as clearly convincing, then we may be ready to present our case.

*Id.* at 47.

### 2. Significant Questions Remain As To Tribal Descent

As discussed in this section, the petitioner has left many important questions unanswered and has not, to date, fulfilled its burden under these standards. Important

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[44] The 13 principles are: 1) direct evidence is easier to understand, but indirect evidence can carry equal weight; 2) reliable genealogical conclusions are based on the weight - not quantity - of evidence found; 3) evidence should be drawn from a variety of independently created sources; 4) original source material generally is more reliable than derivative material; 5) the reliability of a derivative work is influenced by the degree of processing it has undergone; 6) the purpose of a record and the motivation of its creators frequently affect its truthfulness; 7) the most reliable informants have firsthand knowledge of the events to which they testify; 8) the veracity and skill of a record's creator will have shaped its content; 9) timeliness generally adds to a document's credibility; 10) penmanship can establish identity, date, and authenticity; 11) a record's custodial history affects its trustworthiness; 12) all known records should be used and a thorough effort made to identify unknown materials; and 13) the case is never closed on a genealogical conclusion. *Id.* at 45-58.

evidence and documentation necessary to prove that the STN membership descends from the historical Schaghticoke tribe is lacking. For example, the STN should have submitted individual records (birth, marriage, death certificates) for the current membership rolls; probate records; military records; school records; church records (membership lists, records of baptisms, birth, deaths); and tax records. In addition, the petitioners should have conducted thorough research in census records for 1790 to 1880 and 1920.

As an initial matter, the STN have failed to address the problem identified by BIA in its 1995 TA Letter, where concern was expressed over whether the Schaghticoke descended from more than one family line (Mauwee). As BIA stated:[45]

> In the 1991 constitution provided to the BAR with the Schaghticoke petition, membership in the group is dependent upon descendancy from Gideon Mauwee. This may present a problem in the acknowledgment process, since Federal acknowledgment as an Indian tribe is dependent on descendancy from a tribal unit – not upon descent from a single individual. Do the modern Schaghticoke descend only from Gideon Mauwee, or also from many other Schaghticoke families into which Mauwee's children and grandchildren married? Many early Schaghticoke documents include mention of the Warrups Chickens family, and others who joined with Gideon Mauwee at Kent. If your current membership also descends from those families, your family history charts and other genealogical

[45] As BIA has previously determined, criterion (e) cannot be satisfied by reliance on a person or one nuclear family. *See, e.g.*, Golden Hill Paugussett Final Determination, at 5 (Sept. 17, 1996), BIA, Official Guidelines to the Federal Acknowledgment Regulations, at 54 (1997), Letter from Ada Deer to Daniel Inouye (Oct. 18, 1995).

> documents should include these lines as well as showing the Mauwee descent.

The STN petitioner has not resolved this issue. In fact, there is a significant question whether they can do so. The petitioner has expanded the number of families from whom their current membership is descended by including the Cogswell, Bunker, Harris and Warrups families in an attempt to show they are not descended from a single individual – Gideon Mauwee. This is problematic as the current members are not descended from individuals who were included on the 1789 Stiles' membership list. In addition, as discussed below, there are unanswered questions regarding the petitioner's descent from the Mauwee family.

All of the following questions are yet to be answered:

1. **Nancy Kelly:** Where did she come from and why is she considered a Schaghticoke? The Kelly name was not on any early overseer reports or membership lists. On the 1880 and 1920 federal censuses, she reported that she was white. On the 1880 census, she said her children were Indian, but she was white. On the 1900 census, she stated that she was Indian and of the Pequot tribe, but her parents' tribal affiliation was unknown. Did she take the Indian identity because she had married someone of supposed Indian ancestry or because she was living on the reserve?

These questions are relevant to criterion (e) because Nancy Kelly and her mother Eliza Kelly married sons of Alexander Kilson and Parmelia Mauwee. Both Nancy and Eliza had several children, some of whom are descendants currently on the

membership list. If the Kellys were Indian, this could add another Indian family line that is needed to prove the Schaghticokes do not descend from a single line (Mauwee). However, these facts have not been demonstrated.

2. **Henry Harris:** Who exactly is Henry Harris and who are his parents? His death certificate in 1895 did not list his parents. The petitioner claims he and Abigail Mauwee were married, however, the marriage document the STN relies upon says that Abigail Harris and Henry Stephen Tuncas (Toncas) were married February 5, 1864 in Stratford. Their birthplaces were given as Kent, and this was the first marriage for both. It is unclear why Abigail's surname is given as Harris and Henry's surname is given as Tuncas. This does not agree with Abigail Mauwee and Henry Harris. Henry Harris's death certificate gave his birthplace as New Milford, not Kent. Also, according to the information submitted by the STN, Henry Harris from Kent was in the Connecticut Volunteer Force until April 11, 1864.

These questions are relevant to criterion (e) because the petitioner states that Abigail (Mauwee) Harris and Henry Harris have a son, James. James has descendants that are currently on the membership list. It is necessary for the petitioner to prove that Abigail Mauwee and Henry Harris and Abigail Harris and Henry Stephen Tuncas (Toncas) are one and the same persons. If James is not the son of Henry Harris, this would mean that there is only a single line of descent from the Mauwee.

3. **James Harris:** James was born in 1850, 14 years before Abigail Harris and Henry Stephen Tuncas were married. There appears to be no positive proof that Abigail Mauwee and Henry Harris are his parents, other than a death certificate. This information was, obviously, not given by him, but by a daughter. Also, a Henry Harris was dismissed from the Methodist Episcopal Church in Gaylordsville in 1897 to attend the Kent Congregational Church. Why would this have occurred if he had been living in Kent according to federal census for nearly 30 years. Gaylordsville is a considerable distance from Kent, especially when one had to go by horse and buggy.

These questions are relevant to criterion (e) because the current membership contains descendants of James Harris, the purported son of Henry Harris. It is necessary to establish the residency of both Henry and James in order to develop a profile and trace the evolution of their lives, which would help in discovering whether or not James is the son of Henry. It is critical to establish the paternity of James due to the fact that his mother is claimed to be a Mauwee, and it is necessary to have another line of descent to satisfy criterion (e).

4. **Alexander Kilson:** Alexander Kilson was on the 1830 federal census for Salisbury, Connecticut. He was listed as a "Free White Person (including heads of family)". The STN claim: "Benjamin Chickens a known Schaghticoke was noted under the same "white" designation in 1820 in Chenago Co. New York. Therefore Kilson maybe Indian." There needs to be documentation that Kilson is an Indian beyond this unsupported claim.

These questions are relevant to criterion (e) because Alexander Kilson married Parmelia Mauwee. If Alexander Kilson was not an Indian, the STN would not meet the criterion – an Indian tribe is dependent on descendancy from a tribal unit – not upon descent from a single individual. Again, there are several Kilson descendants on the current membership roll. However, unless Kilson is a Schaghticoke Indian, the petitioner would be reduced to a potential line from a single individual – Mauwee.

5. **Jeremiah Cogswell:** From what source does Jabez Cogswell derive his designation as a Schaghticoke Indian when his father, Jeremiah Cogswell, was not on the membership rolls? There was a "Jer Cogswell" on the 1789 Stiles report. This individual was reported to be three years old. This is not the Jeremiah Cogswell, father of Jabez. Jabez's father was born circa 1777, according to an 1842 petition to the General Assembly by James Wadsworth of Cornwall. (Connecticut State Archives, Gen. Ass. Records: Record Group 2: Box 1; Folder 15) (JT Ex. 92). Jeremiah did not die in 1838, as the petitioner has suggested. (FTM – Feb. '99: Jeremiah Cogswell). He actually died in September 1849. (Connecticut State Archives, Gen. Ass. Records: Record Group 2; Box 1; Folder 22) (JT Ex. 93). Since there were two contemporaneous Jeremiah Cogswells who were Indian, the petitioner needs to show which one (if either one) was the son of Eliza Chicken Warrups. Second, the petitioner needs to show how the issue of Jeremiah and Wealthy (who was not Indian) Cogswell, namely Jabez, came to be included in the Schaghticoke tribe.

These questions are relevant to satisfying criterion (e) because there are a number of individuals who are on the current membership rolls who are descended from Jabez Cogswell. The Cogswells are known Indians, and if it can be proven that they were Schaghticoke, this could prove a bilateral descent (Mauwee and Cogswell) for the petitioner, assuming questions are answered about the Mauwee line.

6. **Chicken Warrups:** According to the information contained in relevant documents,[46] Chicken Warrups and his family were not part of the Schaghticoke tribe.

Eunice Warrups Chickens was the great aunt of Eliza Chickens Warrups as she was the sibling of Captain Thomas Chicken Warrups. Eliza Chickens Warrups was the daughter of Benjamin and granddaughter of Captain Thomas Chickens Warrups. She married Peter Mauwee and they had children, but it does not appear any of the children had descendants who are on the current tribal rolls. However, it may be that Eliza had two children before her marriage to Peter Mauwee – these children being Rufus Bunker and Jeremiah Cogswell (FTM – Feb. '99: Eliza Warrups Chickens). The fathers of these children are unknown, and none of the Bunker descendants are on

[46] Resolution to Petition of Cornwall – May Session, 1824 – Connecticut State Archives; Gen. Ass. Records: Record Group 2; Box 1; Folder 8 (JT Ex. 94): "The Committee to whom was referred the Petition of the Town of Cornwall by their agent Peter Bicree praying for a Reimbursement of the Expenditures of the Town of Cornwall in the support of Eunice Warrups Chickens a poor Indigent Sqaw, Report that having investigated the subjects they find that the said Eunice together with several other Indians of the same family were many years since possessed of some real estate in the Town of Kent in the neighborhood of the Schaghticoke tribe of Indians but did not belong to this tribe

the current membership rolls. Of Jeremiah's six children, only one of them has been included on the membership rolls – that being Jabez. The petitioner needs to show that the father of Jabez was the son of Eliza Chickens Warrups as there were two contemporaneous Jeremiah Cogswells. The petitioner also should explain how Jabez was allowed to become a member of the tribe and why only one of his children have descendants who are on the current membership rolls.

These questions are relevant to satisfying criterion (e) because allowing Jabez Cogswell and his descendants to be included as members of the tribe has created a bilateral line of descent which would give STN more than a single line of descent to satisfy criterion (e).

7. **Rachel and Abigail Mauwee:** The evidence offered by the petitioners regarding Abigail and Rachel Mauwee is both deficient, in that important vital records are not supplied, and unpersuasive, because the role of these two individuals in establishing descent of the petitioner from the historical tribe has unanswered questions.

The petitioners claim that Rachel and Abigail were sisters. They are identified by the petitioner as the granddaughters of Eunice Mauwee, which would make them

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and that the said land has by order of the Genera Assembly all been sold for the benefit of said family . . . ."

the great, great granddaughters of Gideon Mauwee. Yet, the petitioner fails to show who the parents of Abigail and Rachel were or which one of the parents was an offspring of Eunice Mauwee. Eunice is reported to have out-lived her nine children, whose names are unknown, and the petitioners fail to provide vital records or other documentary records showing who her children were. The petitioners can trace their descent to Abigail, but they have not answered questions necessary to connect Rachel and Abigail to Eunice. This means there is a critically important void in the evidence offered by the petitioner regarding its line of descent. Unless the petitioner can bridge this gap, there will not be sufficient evidence to tie this petitioner to the Mauwee family of the historical tribe.

Other unexplained facts and inconsistencies in the record also call into question the petitioner's conclusions regarding Rachel and Abigail. These inconsistencies and questions, when considered together, cast doubts on the connection of Rachel and Abigail to the Mauwee family. For example, according to David Lawrence in his *Biographical Sketch of Eunice Mauwee* (SN-V011-D0114), Eunice Mauwee claimed to be the last full-blooded Indian of the tribe. This statement, however, is contradicted by the June 2, 1884 Petition to the Litchfield County Common Court of Pleas, which claims that Henry Harris, his wife Abigail and

their son James were full-blood Indians. This inconsistency raises questions about whether Abigail was in fact Eunice's granddaughter.[47]

Another inconsistency is found in the Federal Census records for the years of 1880 and 1900 (JT Ex. 95). In the 1880 Federal Census for Trumbull, County of

[47] Similar questions exist regarding Rachel, who was not listed on the 1884 Petition. If Rachel and Abigail were sisters, why was she not listed on the Petition?

Fairfield, Connecticut, a "Rachel Maury" is listed as being 70 years old, Indian and a basket maker. It also shows Rachel being born in Scatacook, New York, and it appears her parents were also born there (but this information is not really clear). *Id.* This is in contrast to the 1900 Federal Indian Census for Kent, Connecticut, in which Rachel is shown to be born in Connecticut, as were her parents. However, in that census she is identified as a Pequot Indian, based on her representation. The discrepancy needs to be explained by the petitioner as the location of the family is necessary to show they were actually part of this tribe and not of another. *Id.*

Serious questions, therefore, exist as to the true relationship among Eunice, Abigail and Rachel. The petitioners would fail to prove their descent from the historical tribe if both Abigail and Rachel cannot be shown to be the biological descendants of Eunice Mauwee.

All of these questions are critical to the determination of whether the petitioner satisfies criterion (e). Unless, at a minimum, these questions can be answered, the STN cannot meet its burden of proof under the preponderance of the evidence test. The evidence offered to date is incomplete, unreliable, and not entitled to sufficient weight to meet the petitioner's burden of proof. Respondents intend to continue to research these issues and to press for release of the STN vital records that are central to any acknowledgment petition.

## IV. CONCLUSION

For the reasons discussed in these comments, the STN petitioner group has not satisfied its burden of proof under 25 C.F.R. Part 83. BIA should issue a negative proposed finding.

Respectfully submitted,

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KENT SCHOOL CORPORATION
DAVID J. ELLIOTT
ALLAN B. TAYLOR
ERIC L. SUSSMAN
Day, Berry & Howard LLP
CityPlace I
185 Asylum Street
Hartford, CT 06103-3499
(860) 275-0196

DONALD C. BAUR
Perkins Coie LLP
607 Fourteenth Street, NW
Washington, DC 20005
(202) 434-1621

_____

THE CONNECTICUT LIGHT
& POWER COMPANY
JAMES K. ROBERTSON
RICHARD L. STREET
Carmody & Torrence
50 Leavenworth Street
P.O. Box 1110
Waterbury, CT 06721
203-573-1200

STATE OF CONNECTICUT

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RICHARD BLUMENTHAL
Attorney General

MARK F. KOHLER
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06106
(860) 808-5020

TOWN OF KENT
JEFFREY SIENKEIWICZ
Sienkiewicz & McKenna, P.C.
9 South Main Street
P.O. Box 786
New Milford, CT 06776-0786
860-354-1583