

UNITED STATES DEPARTMENT OF THE INTERIOR

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

**In re FEDERAL ACKNOWLEDGMENT :
PETITION OF THE EASTERN PEQUOT :
INDIANS OF CONNECTICUT :**
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**In re FEDERAL ACKNOWLEDGMENT :
PETITION OF THE PAUCATUCK :
EASTERN PEQUOT INDIANS OF :
CONNECTICUT : AUGUST 1, 2001**

**COMMENTS OF THE STATE OF CONNECTICUT
ON THE PROPOSED FINDINGS ISSUED IN RESPONSE
TO THE PETITIONS FOR TRIBAL ACKNOWLEDGMENT
OF THE EASTERN PEQUOT INDIANS OF CONNECTICUT
AND THE PAUCATUCK EASTERN PEQUOT INDIANS
OF CONNECTICUT**

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I. INTRODUCTION

The State of Connecticut respectfully submits this brief in response to the proposed findings on the petitions for federal acknowledgment of the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut.¹ The State is an interested party in these proceedings, and submits this brief pursuant to 25 C.F.R. § 83.10(i) and the order of the United States District Court (Covello, C.J.) in *State of Connecticut ex rel Richard Blumenthal v. Department of Interior*. Submitted with this brief is an appendix, providing a more detailed analysis of certain issues, and exhibits.

A. The Proposed Findings

On March 31, 2000, then Assistant Secretary-Indian Affairs Kevin Gover issued proposed findings to acknowledge both petitioners. 65 Fed. Reg. 17294, 17299. Several aspects of the proposed findings are remarkably unusual: First, in issuing the proposed findings, Assistant Secretary Gover overruled the recommendations of the Branch of Acknowledgment and Research ("BAR") that the petitioners should not be acknowledged. Serious questions about Mr. Gover's role and impartiality in the proceedings persist. Second, proposed findings to acknowledge were issued despite the express finding that the Department did not have "sufficient information and analysis to determine" whether the petitioners satisfied the mandatory criteria for the period from

¹The following terms are used to describe the various groups: The "Pequots" or "Pequot Tribe" refers to the original Pequot tribe prior to its dispersal following the Pequot War of 1637. "EP Petitioner" refers to the petitioner no. 35, Eastern Pequot Indians of Connecticut. "PEP Petitioner" refers to the petitioner no. 113, Paucatuck Eastern Pequot Indians of Connecticut. Both petitioners claim to be descended from the group for which the Lantern Hill reservation was established in 1683 following the post-war dispersal of the Pequot Tribe. When necessary to refer to that group rather than to the individual petitioners, the group will be referred to as the "Eastern

1973 to the present. *Id.* at 17295, 17300. Third, despite serious gaps in satisfactory evidence of tribal existence and political authority, the Department concluded that these evidentiary deficiencies could be overlooked and greater weight assigned the limited evidence because of the purported "longstanding relationship with the state based on being a distinct community." *Id.* at 17294, 17300.

In an exceptional, if not wholly unprecedented, action, Assistant Secretary Gover rejected the recommendations of the agency's experts that had been reached only after an extensive and diligent review of the petitioner's evidence. Ironically, we now know, consistent with BAR recommendations, that Mr. Gover had originally directed that the BAR staff prepare proposed findings rejecting the petitions, but a short time thereafter, without any new evidence or analysis that could have justified the reversal, the Assistant Secretary changed his instructions and ordered positive proposed findings for both petitioners. Tr., Technical Assistance Meeting ("TA") 7/11/01, at 190. This reversal was in direct conflict with the recommendations of the BAR staff that substantial evidentiary gaps in the petitions existed, particularly with regard to criteria (b) and (c) (distinct community and political authority, respectively). In order to overcome these problems, the proposed findings had to be manipulated in ways not contemplated by the acknowledgment criteria, including failing to make proposed findings for the post-1973 period and excusing the absence of evidence by inflating and distorting the significance of state recognition.

Pequot Group."

The proposed findings note that the split between the two petitioners "evolved in recent times." *Id.* at 17295, 17301. Unable to make a finding whether after 1973 the petitioners became two separate tribes, whether they represented two factions of one tribe, or whether they even satisfied the criteria at all for this period, the Department expressly declined to make proposed findings as to criteria (b) and (c) for the post-1973 period. *Id.* at 17297-98, 17302-04. Despite the absence of a finding as to these two critical criteria, the Department proposed that acknowledgment was appropriate. This flies in the face of the requirement that a petition should be denied if even one of the criteria is not satisfied. 25 C.F.R. § 83.6(d).

Aside from the inability to make findings for the post-1973 period, the Department noted other lapses in evidence for criteria (b) and (c). However, the proposed findings suggested that, contrary to the regulations and precedent, the history of relations between the petitioners and the State could be used to make up for what otherwise would be insufficient evidence under the criteria. 65 Fed. Reg. at 17294, 17300. Specifically, the proposed findings assert that state recognition and the existence of a state reservation are "unique factors" that "provide a defined thread of continuity through periods when other forms of documentation are sparse or do not pertain directly to a specific criterion." *Id.* As demonstrated below, the proposed findings are incorrect both in terms of their characterization of the nature of State relations and of their proper treatment under the acknowledgment regulations.

B. The Role of Assistant Secretary Gover

Assistant Secretary Gover's actions both in reversing his own original instructions and in rejecting the expert recommendations of BAR staff are so unusual that in and of themselves they deserve scrutiny. BAR staff had identified numerous deficiencies sufficient to warrant a

conclusion that the petitioners should not be acknowledged. Indeed, these deficiencies were serious enough that the proposed findings had to fashion a proposition that had no precedent in either BIA or judicial decisions: That state recognition could supplement the absence of sufficient proof of community and political authority. As demonstrated below, this newly devised effort to paper over the evidentiary deficiencies cannot withstand scrutiny.

Assistant Secretary Gover's role in these acknowledgment proceedings prompted the State to take the extraordinary step of requesting that he recuse himself from further involvement in the proceedings. On July 14, 2000, Attorney General Blumenthal wrote to Assistant Secretary Gover asking him to recuse himself from the EP and PEP petitions. Among the bases for this request was Gover's unprecedented decision in the proposed finding to give significant weight to the recognition the State had provided to these groups in order to fill the gaps in both group's continuity of existence under criteria (b) and (c). This new principle could be improperly used as precedent for acknowledgment of Gover's former client, the Golden Hill Paugussett petitioner. Gover had previously recused himself from participating in the Golden Hill matter due to his prior representation of that group. On the advice of agency counsel, Gover also agreed not to participate in petitions that presented issues that could directly influence the outcome of the Golden Hill Paugussett petition. A similar request by Attorney General Blumenthal on July 27, 2000, was made to the Solicitor for DOI, John Leshy, asking him to review and consider the Attorney General's July 14, 2000, recusal request because of the incurable taint of the Assistant Secretary's participation in the EP and PEP petitions and the need to prevent an obvious conflict of interest and improper command influence in those petitions. The Attorney General again requested that the proposed findings be withdrawn and that the petitions be considered by an

independent decisionmaker not under the control of Assistant Secretary Gover and who did not report to him. Despite these and other repeated requests expressing concern about Assistant Secretary Gover's role, no remedial action was taken in response. The Golden Hill Paugussett petitioner is in fact attempting to use the EP and PEP proposed findings as precedent in support of its petition.

Moreover, various irregularities have come to light through technical assistance. First, Assistant Secretary Gover initially suggested to staff that "we perhaps should not look quite as deeply into the petitioner's claims." Tr., TA 7/11/01, at 202. Second, it was reported in technical assistance that BAR staff had found notes by Don Juneau, a consultant brought in by Assistant Secretary Gover, regarding a meeting apparently with Loretta Tuell, the Director of the Office of American Indian Trusts and special counsel to Mr. Gover. *Id.* at 203, 208-09. The notes appear to reflect a discussion regarding what petitions would be given "positive" findings, and included a reference to the "E. Paucatuck." *Id.*; *see* Ex. 1. Finally, the very nature of Assistant Secretary Gover's instructions to staff raises questions. Mr. Gover initially told staff "to finalize a negative." Tr., TA 7/11/01, at 190. However, shortly after this initial instruction, Mr. Gover reversed himself and directed that BAR staff prepare positive proposed findings notwithstanding "the evidentiary gaps that appear in the historical record." Mem. from Assistant Secretary Gover to Lee Fleming, Mar. 16, 2000 (Ex. 2). As BAR staff indicated in technical assistance, no new evidence was developed in the period prior to Mr. Gover's reversal of instructions.

All of these actions seriously question the impartiality of the proposed findings. The State respectfully submits that the Department must carefully consider the petitions, and the application of the regulations, in their proper light.

C. Summary of Position

On the basis of the evidence in the present record, neither petitioner has succeeded in satisfying the mandatory criteria. Both petitioners, however, will have the opportunity to submit additional evidence and arguments -- which the State has not been afforded an opportunity to review prior to this filing nor will the State have an opportunity to respond formally after this filing. The State has only the record as it now exists as a basis for its comments, and as demonstrated below, the present record does not justify the acknowledgment of either petitioner.

The proposed findings' reliance on State recognition to augment or excuse the absence of otherwise insufficient evidence is misplaced. The State's relationship with the petitioners was not based on a recognition of the Connecticut Indian groups as sovereigns exercising autonomous political authority and having bilateral political relationships. Moreover, judicial precedent does not support the Department's misuse of the history of the State's relations with the petitioners. Indeed, a long line of judicial decisions demonstrates the distinct difference between federal recognition -- which assumes a government-to-government relationship -- and state recognition -- which does not.²

As BAR originally found, the petitioners have failed to provide sufficient evidence of community and political authority for several periods. EP Charts, Crit. (b), 49-50; PEP Charts, Crit. (b), 56; EP Charts, Crit. (c), 52; PEP Charts, Crit. (c), 55. The evidence of sporadic activity and social interactions in the centuries since, rarely extending beyond limited groups, falls far

2 ²Discussed below at § III.

short of the evidence needed to show both continuous distinct community under criterion (b)³ and the exercise of political authority and influence under criterion (c).⁴

Finally, as to the question of whether there are two tribes or one tribe with two factions, the State submits that the proposed findings actually miss the real significance of the serious and continuing factional dispute between the petitioners. There is absolutely no basis for recognizing two tribes merely because of divisiveness between the two groups. Indeed, the inability of the petitioners to internally resolve their disputes -- and their repeated efforts to seek resolution by outside authorities -- demonstrates a continuing lack of the political autonomy required for federal recognition.⁵

3 ³Discussed below at § IV.

4 ⁴Discussed below at § V.

5 ⁵Discussed below at § VI.

II. Acknowledgment Standards

The petitioners must satisfy each of the seven mandatory criteria for acknowledgment.⁶ The burden of proof is on the petitioners. 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.**” 25 C.F.R. § 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 required, the available evidence must establish “a reasonable likelihood of the validity of the facts relating to that criterion” for that

⁶ 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.

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.” 25 C.F.R. § 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).

The regulations specify that organizations “**of any character that have been formed in recent times may not be acknowledged.**” *Id.* § 83.3(c) (emphasis added). *See also* 59 Fed. Reg. 9284 (definition of continuity “would not permit recently formed groups in areas with long-standing non-Indian settlement and /or governmental presence to claim historical existence as a tribe”). 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*, 2001 U.S. App. Lexis 13277 (7th Cir. 2001). In the 1987 Solicitor’s Office opinion which was 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 bilateral nature of membership cannot be underestimated.

Memorandum BIA.IA.0779, April 3, 1987, from Assistant Solicitor, Branch of Tribal Government and Alaska to Deputy to the Assistant Secretary--Indian Affairs (Tribal Services), Subject: Issues Pertaining to acknowledgment of San Juan Southern Paiutes and relationship of 25 CFR §§83.1 (k), 83.3 (d) and 83.7 (c) and (f), at 4, Ex. 27. In a 1988 opinion, also relied on in *Zah*, Assistant Solicitor Keep stated:

[I]t is because membership in an Indian tribe is a bilateral, political relationship that the courts have deferred to the tribes in determining membership in the absence of Congressional action. The political relationship, therefore, provides an inherent limitation on the power of a tribe to determine its membership.

[W]hile it is true that membership in an Indian tribe is for the tribe to decide, that principle is dependent on and subordinate to the more basic principle that membership in an Indian tribe is a bilateral, political relationship. *A tribe does not*

have authority under the guise of determining its own membership to include as members persons who are not maintaining some meaningful sort of political relationship with the tribal government.

Memorandum BIA.IA.0259, March 2, 1988, from Assistant Solicitor, Branch of Tribal Government and Alaska, to: Chief, Division of Tribal Government Services, Subject: Nature and extent of the Secretary's authority to disapprove amendments to the membership provisions of the Constitution of the Citizen Band of Potawatomi Indians, 2, 6, 7 (Ex. 28).

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) (emphasis added). 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; *see also* BIA, Official Guidelines, 47.

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.” 59 Fed. Reg. 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 mandatory criteria incorporate these principles. Criterion (b) requires a showing that "[a] predominant portion of the petitioning group comprises a *distinct community and has existed as a community from historical times until the present.*" *Id.*, § 83.7(b) (emphasis added). The members of a community, in turn, must be "differentiated from and identified as distinct from nonmembers." *Id.*, § 83.1. Thus, differentiation only from non-Indians is insufficient under this definition. Similarly, criterion (c) requires the petitioner to have maintained political influence or authority over its members "*as an autonomous entity from historical times until the present.*" *Id.*, § 83.7(c) (emphasis added).⁷ A petitioner must historically have been politically independent of the control of any other Indian governing entity. *Id.*, § 83.1. "Historical" or "history," for these purposes, is expressly defined as "dating from first sustained contact with non-Indians." *Id.* The term "sustained contact," in turn, refers to "the period of *earliest* sustained non-Indian settlement

8 ⁷*See also id.*, § 83.7(e) (requiring descent from a historic tribe or tribes which "combined and functioned as a single *autonomous* entity" (Emphasis added)); *id.*, § 83.7(f) (requiring petitioner, if its membership has appeared on the rolls of an acknowledged tribe or has been otherwise associated with it, to "establish that it has functioned throughout history until the present as a *separate and autonomous* Indian tribal entity..." (emphasis added); 59 Fed. Reg. 9289 (1994) (acknowledgment available in rare cases where petitioner has been erroneously regarded "as part of or associated with another tribe, but has been a separate, autonomous group

and/or governmental presence in the local area in which the historical tribe or tribes from which the petitioner descends was located historically." *Id.* (emphasis added).

The requirement of distinct tribal status is also supported by the leading court decisions that constitute the judicial precedents that the regulations codify.⁸ *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).

Thus, the question of separate and distinct tribal status at the time of earliest sustained contact is essential to the issue of whether a petitioner is an historic Indian tribe. This is because recognition of tribes as "distinct, independent, political communities" is based on "their original

throughout history").

⁹ *See Miami Final Determ.*, at 1. The acknowledgment criteria, moreover, are consistent with past determinations of tribal existence by Congress. For example, when Congress reaffirmed Federal recognition of the Lac Vieux Desert Band of Lake Superior Chippewa Indians and the trust relationship with it in 1988, it emphasized that this group, "although currently recognized by the Federal Government as part of the Keweenaw Bay Indian Community, has *historically existed, and continues to exist, as a separate and distinct Indian tribe...*" 25 U. S. C. § 1300h (1) (emphasis added). Congress also referred to the prior failure of the United States "to recognize

tribal sovereignty." F. Cohen, *Handbook of Federal Indian Law* 122 (Department of the Interior, Office of the Solicitor, 1942) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). It is that original sovereignty from which tribal powers are derived. *See id.* The limited, inherent sovereignty of Indian tribes is ultimately based on the fact that "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities." *United States v. Wheeler*, 435 U. S. 313, 322-23 (1978) (emphasis added); *see also Brendale v. Confederated Tribes & Bands of Yakima*, 492 U. S. 408, 425 (1989). Stated otherwise, the self-governing power of Indian tribes "arises from their original tribal sovereignty over their members" and "their inherent sovereignty as the aboriginal people of this continent." *Montana v. King*, 191 F. 3d 1108, 1112 (1999); *Montana v. Gilham*, 133 F. 3d 1133, 1136 (9th Cir. 1998).

As demonstrated below, both the EP Petitioner and the PEP Petitioner cannot meet these standards.

the independent status of the tribe." *Id.*, § 1300h (5).

III. STATE RECOGNITION OF AN INDIAN GROUP CANNOT MAKE UP FOR THE LACK OF PROOF REQUIRED UNDER THE MANDATORY CRITERIA.

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. In fact, reliance on State recognition for Federal acknowledgment purposes would set a dangerous precedent inasmuch as the same logic would require significant weight to be given to a State's refusal to recognize a tribe. In either case, 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.

The evidence of the petitioners' relationships with State government does not support recognition of either 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. Absence of State Standards for Determining Indian Status and the Lack of Relevance of State Recognition.

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. Final Determ., TR, at 97; *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.

Furthermore, how the colony or state viewed the group is immaterial. Mere conclusions by outside parties as to the nature of the group are not acceptable evidence for federal recognition. Instead, “detailed, specific evidence,” as well as “thorough explanations and supporting documentation” are required. 25 C.F.R. § 83.6(a) and (c). In *Mohegan*, for example, the existence of political influence or authority was not demonstrated by the mere fact of State recognition or a colonial and state reservation. *Mohegan* PF, Hist. Rep. 17. Instead, political influence or authority was demonstrated by actual, specific evidence.⁹ There is absolutely no indication in *Mohegan* of the dilution of the evidentiary standards based on the relations with or actions of the colony or the State.

10 ⁹For example, the evidence that the BIA relied on in *Mohegan* included petitions stating either that the tribe had “consulted together,” or were signed by the “Committee for the tribe,” “Indian overseers appointed by the Mohegan Tribe,” or “Indian overseers or head men of said tribe”; *Mohegan* PF, Hist. Rep. 26; a legislative committee finding that “rules and principles of the Ancients and Elders of the tribe have uniformly been tenacious” in the distribution of land, and that the group also had “preserved certain Rules and Principles” to determine tribal and membership identity; *Id.*; a legislative committee conducting a hearing at the Mohegan Church reported that the “chief men among the Mohegans were assembled, and the chief women were not far off.” *Id.* at 30.

Turning to the present petitioners, there is no evidence that the contacts between the colony and the State after the Pequot War with the Eastern Pequot Group were based on any determination that they exercised political influence or authority within the meaning of the acknowledgment regulations. To the contrary, the colony viewed the Eastern Pequot Group as subordinate to English rule. Subsequently, the colony and the State regarded the Eastern Pequot Group as unable to govern, protect or provide for itself without outside assistance. Although the colony provided a reservation for the group and the State has allowed that reservation to continue, the fact that the land is held in the name of the group does not prove political influence or authority. Collective rights in land can also exist for religious organizations, estates, trusts and voluntary associations, none of which necessarily exercise any significant governance over its members or beneficiaries.

Only in relatively recent times has the State assumed that the group was autonomous. There is no indication that the State ever conducted any significant investigation to determine if the group in fact exercised political influence within the intent of the BIA mandatory acknowledgment criteria. Nor does it appear that the State ever utilized the specific standards for political influence or authority under mandatory criterion (c). The State legislation and other colonial and State actions, when properly viewed, demonstrates that these petitioners were never viewed as sovereign political entities. For a detailed discussion of colonial and State legislation and relations with the Eastern Pequot Group, see Appendix § I.

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 Paucatuck Eastern Pequots, 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 Superior Court. Conn. Gen. Stat. §§ 47-66i, 47-

66j (*see* Ex. 56). 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) (Ex. 3), 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 any of the attributes necessary for federal recognition.¹⁰

In sum, the State’s recognition of Indian groups was not based on historical or genealogical standards or an evaluation of the sort of considerations that would support federal

11 ¹⁰A recent Superior Court decision ruled that the Eastern Pequots are entitled to sovereign immunity, based in part on the state statutes declaring the groups to be self-governing. *First American Casino Corporation v. Eastern Pequot Nation*, No. 541674 (Conn. Super. Ct. July 16, 2001, 8-9 (Ex. 4)). The Court did so without holding an evidentiary hearing. Its logic is inconsistent with the Federal District Court decision in the matter, which held that only a federally recognized tribe was subject to the Indian Gaming and Regulatory Act, 25 U. S. C. §§ 2701-2721 (IGRA) as well as 25 U. S. C. § 81, requiring BIA approval of contacts with Indian tribes; *First American Casino Corp. v. Eastern Pequot Nation*, No. 2:97CV846 (RNC), at 5, 9-10 (D. Conn. July 13, 1999) (Ex. 5); and the Connecticut Supreme Court's decision in *State v. Sebastian*, 243

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.

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

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.

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.¹¹ 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.

Conn. 115 (1997).

12 ¹¹Although 25 C.F.R. §§ 83.7(b)(1) and (c)(1) allow other evidence that that specified, that other evidence must show that petitioner meets the definitions of community and political

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. 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.” § 83.8 (c) (3).¹² The rationale for this distinction is obvious: The purpose of the acknowledgment criteria -- demonstrating a basis for establishing government-to-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

influence or authority in § 83.1.

13 ¹²When 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 alone of the group as having collective rights. 25 C.F.R. § 83.8(c)(3).

it to be used as a surrogate for satisfying the other criteria. *See Hohn v. United States*, 524 U.S. 236, 258 (1998) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

The reliance in the proposed finding on *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F. 2d 370 (1st Cir. 1975) as a precedent for use of state recognition as evidence for criteria other than criterion (a) is misplaced. *See* EP PF 63. There is no evidence that the parties stipulated to tribal existence because of state recognition, there was no admission that the group unequivocally met the *Montoya* standard of tribal existence completely, and in fact the Federal government denied that the group was Federally recognized.¹³

¹⁴ ¹³ A proper reading of *Passamaquoddy* compels a rejection of this case as precedent for the purposes cited at EP PF 63. In that case, the federal defendants *stipulated* that the plaintiff was a “tribe of Indians in the racial and cultural sense....” Stipulation and Agreed Statements of Facts, *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, No. 1960 (D. Maine) (Ex. 6). 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. In fact, no finding, express or implied, was made with regard to the plaintiff’s status for purposes of federal recognition, and the federal defendants refused to admit that the plaintiff met the tribal requirements of *Montoya v. United States*, 180 U.S. 261 (1901) in all respects, from which current acknowledgment standards are to a large extent derived. Ex. 7. In this respect, the BIA researchers’ notes state: “We made no analysis of similarities or differences from the Maine cases as to their relationship with that state, their character as tribes, nor as to standards for determining tribal existence in use at the time.” Ex. 8. More importantly, nothing in the court’s decision or in the stipulation itself reflects that the basis for the stipulation was that state recognition could serve as a surrogate or supplement to satisfying the requirements for federal recognition. 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.

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 107-08.¹⁴

State recognition, therefore, has little if any weight in evaluating the principal factors necessary for federal acknowledgment such as distinct community or political influence and authority. The BIA has in past decisions indicated that state recognition has no significant effect

Supp. 1158, 1166 (N.D. Ind. 1995). Indeed, in deciding not to seek certiorari from the Supreme Court in *Passamaquoddy*, the Department's Office of the Solicitor expressly determined that the stipulation of the plaintiffs as a tribe "in the racial and cultural sense" distinguished the case from others in which a group might seek federal recognition. Letter of David E. Lindgren, Acting Solicitor, dated Jan. 27, 1976 (Ex. 9). In sum, the Department cannot invoke the stipulation in *Passamaquoddy* in aid of the petitioner.

15 ¹⁴*Elk v. Wilkins* is consistent with the opinion of the House Indian Affairs Committee in 1830 that the tribes in the "old States," including Connecticut, were "controlled by regular laws" and were "thus brought within the ordinary jurisdiction of the States." H. Rep. No. 227, 21st Cong., 1st Sess., 8 (1830). Ex. 10. The Committee also referred to the fact that "[m]ost of the tribes in the old States have guardians, under some denomination or other, appointed by law to take charge of their property." *Id.* at 5, 11. See also *Journal of the Senate of the United States of America*, 21st Cong., 2d Sess., December 6, 1830, at 166, Ex. 11; *Register of Debates in Congress*, 19th Cong., 1st Sess. (1826), at 1597, Ex. 12; H. Rep. No. 474, 23d Cong., 1st Sess. 88 (1834) Ex. 13; Rulings of Commissioners of Indian Affairs, July 10, 1899 and Oct. 12, 1931, to the effect that the Indians of Connecticut were not under Federal control, but were subject to the laws of the several states and entitled to the rights and privileges of citizenship, and other documents, Exs. 14 & 15; J. Blunt, *A Historical Sketch of the Formation of the Confederacy, Particularly with Reference to the Provincial Limits and the Jurisdiction of the General Government Over Indian Tribes and the Public Territory* 93, 103 (1825) (when tribes lost their independent character and became members of a state, they were subject to state, not Congressional power, and that as of 1802, "most of the Indian tribes within the undisputed limits of the old-thirteen states, had lost their independent character," except in the territory claimed by both the United States and Georgia, involving treaty tribes) Ex. 16; see also other historical

on the federal recognition process. *Mohegan* Final Determ., TR at 172; *Miami Nation of Indiana*, Admin. Rec. vol. SR-XI.A, BAR Guidelines, Directive and Manuals (Ex. 17). That conclusion should apply with equal force here.

documents received from the BIA and BIA directives excerpts, Ex. 17.

C. **Federal Recognition, Unlike State Recognition, Has Always Required Satisfaction of Certain Basic Standards Premised on the Existence of a Distinct Political Society Capable of Self-Government.**

Whether by treaty or otherwise, federal recognition has always incorporated certain basic concepts that remain central to acknowledgment under the regulations, concepts that are not inherent in state recognition. Federal recognition of Indian tribes by treaty in the 18th and 19th centuries was predicated on the existence of a distinct political society capable of self-government. See Felix C. Cohen, Handbook of Federal Indian Law, 39-40 (1942). This basic principle was repeatedly recognized in judicial decisions. *E.g.*, *Elk v. Wilkins*, 112 U.S. 94, 108 (1884) (distinguishing independent tribes from groups under state control that had lost their character as a nation, citing *Fletcher v. Peck*, 10 U.S. 87, 146-47 (1810) (Johnson, J.)); *Kansas Indians*, 72 U.S. 737, 755-56 (1866) (emphasizing continuity of tribal organization governing members and exercising oversight of tribal affairs); *Cherokee Nation v. Georgia*, 30 U.S. 25 (1831) (characterizing tribe as “a distinct political society separated from others, capable of managing its own affairs and governing itself”); *Worcester v. Georgia*, 31 U.S. 515, 559-60 (1832) (referring to tribes as “distinct, independent political communities”). By contrast, where a group did not constitute a distinct community with the capacity of self-governance, federal recognition, by treaty or otherwise, was not accorded; instead, such groups were deemed to be under state control. See *Elk v. Wilkins*, 112 U.S. 94, 108 (1884).

It is clear then, that since the earliest periods of our history federal law has made a strong distinction between federal and state recognition. That federal recognition of Indian tribes in the nineteenth century included the basic concepts of tribal continuity, distinct community, bilateral

political relationships and tribal descent is reflected in a mid-nineteenth century treatise by Schoolcraft that was prepared under the direction of the BIA. Henry R. Schoolcraft, *Historical And Statistical Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States* (1851-1857) (Ex. 18). It addressed issues of social solidarity and in particular questions of political authority and tribal governance, *id.*, vol.I, at 193-95, and emphasized that recognition through treaties was accomplished *only* where there existed competent political authority. *Id.* at 194, 224.

These principles were carried forward in judicial and administrative decisions into the 20th century and ultimately formed the basis for the acknowledgment regulations. For example, in *Montoya v. United States*, 180 U.S. 261 (1901), the Supreme Court defined an Indian tribe as “a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.” Similarly, in *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. Candelaria*, 271 U.S. 432, 439 (1925), the Supreme Court affirmed that the recognition of Indian tribe must be based on existence of a communal life and exercise of political authority. These principles eventually coalesced in what became known as the “Cohen criteria,” emphasizing the exercise of political authority and social solidarity of the community, Cohen, Handbook of Federal Indian Law, at 271, and were applied by the BIA in pre-regulation acknowledgment decisions. *See, e.g.*, 2 Op. Sol. 1255 (Mar. 20, 1944) (Catawba tribe) (Ex. 19); 1 Op. Sol. 774 (July 29, 1937) (Keetowaw group) (Ex. 20); 1 Op. Sol. 864 (Dec. 13, 1938) (Miami & Peoria Tribes of Okla.) (Ex. 21); 1 Op. Sol. 724-25 (Mar. 15, 1937) (St. Croix Chippewas) (Ex. 22); 1 Op. Sol. 668 (Aug. 31, 1936) (Mississippi Choctaws) (Ex. 23); Cohen, Handbook of Federal Indian Law, at 271.

The present regulations are expressly based on these precedents. The requirements of distinct community and political influence are drawn directly from the standards originating in the earliest periods of federal relations with Indian tribes. *See, e.g., Mohegan Final Determ., Sum. Crit. 7.* No corresponding history of basic principles exists for state recognition or state relations generally. Accordingly, state recognition cannot be an appropriate basis for supporting federal recognition in the absence of independent evidence satisfying the acknowledgment criteria.

IV. THE PETITIONERS LACK EVIDENCE OF DISTINCT COMMUNITY UNDER MANDATORY CRITERION (b) FOR SEVERAL PERIODS.

Mandatory criterion 83.7(b) requires proof that a predominant portion of the group has constituted a distinct community from historical times until the present. A community is a group having “consistent interactions and significant social relationships” and which is also “differentiated from and distinct from nonmembers.” 25 C. F. R. § 83.1. There must be “substantial social relationships and/or social interaction . . . maintained widely within the membership.” 59 Fed. Reg. 9286 (1994). The members must be “more than simply a collection of Indian descendants.” *Id.*

The staff of the Branch of Acknowledgment of Research (BAR) had found that neither petitioner had met mandatory criterion (b) for various periods. No other conclusion can be supported by the evidence.

A. EP Petitioner.

The BAR staff recommended that the EP Petitioner “has not demonstrated the existence of modern community. The EP Petitioner therefore does not meet the requirements of 83.7 (b).” EP Charts, Crit. (b), 49-50.¹⁵ The charts also indicate a lack of evidence from 1842 to 1872 as well as from 1884 through the present. *Id.* at 20-23, 27-50. The evidence submitted by the EP Petitioner does not demonstrate that social relations were “broadly maintained” among the membership and that social interaction occurred “with significant frequency.” *Id.* at 42 (quoting

16 ¹⁵Although the charts accompanying the proposed findings have been described as a work in progress, TA 7/10/01-7/11/01, they supplement the report for the proposed findings, describe how evidence has been weighed, and indicate the regulatory provisions and precedents that have been applied to the evidence. 65 Fed. Reg. 7052, 7053.

Miami Final Determ.). As demonstrated below, the BAR staff recommendations are amply supported by the evidence and should be maintained.

1. Occupation of Reservation by Portion of Group and Overseers' Reports Insufficient Evidence of Community.

The assertion in the proposed finding that occupation of a distinct territory by a portion of a group is evidence of community, even if it is less than 50 percent of the total membership (65 Fed. Reg. 17296; EP PF 69), contravenes the regulatory requirement that to qualify as evidence of community, *more than 50 per cent* of the members must reside in an area exclusively or almost exclusively composed of the group membership, and that the balance of the group must maintain consistent interaction with some community members. 25 C.F.R. §83.7(b)(2)(i). The EP Petitioner must show that social and political relationships actually existed. 59 Fed. Reg. 9287. Mere geographical concentration -- unless it involves a geographical area exclusively or almost exclusively inhabited by more than 50 percent of the members -- does not prove community. *See* 59 Fed. Reg. 9287. “[A]ll acknowledgment decisions ... have required evidence that significant social interaction and/or social relationships are **actually** maintained within the petitioner’s membership.” *Id.* (emphasis added). *See also* EP PF 136 (“The concentration of members of a petition in a general area where there was historically a community is not good evidence that a present day population of descendants in the same area are still maintaining social ties, unless there are distinct neighborhoods or settlements.”).

The proposed finding's citation to *Snoqualmie* as precedent for attaching significance to geographical distribution is misplaced. That decision specifically stated that, while geographical distribution was close enough in that case so that significant social interaction was possible, *it was*

not close enough to assume that interaction was actually occurring. *Snoqualmie* PF Sum. Crit. 14 (internet version). Rather, the findings in *Snoqualmie* on community were based in part on the existence of “substantial social ties” between most of the membership and that “significant social relationships and a significant degree of social contact exist” because of the nature of the tribes’ political processes, not simply geographic proximity. *Id.* at 14, 15. *Snoqualmie* does not, therefore, stand for the proposition that social interaction can be assumed by any level of geographic proximity.

The record also does not support the use of overseers’ reports to prove community. *See* 65 Fed. Reg. 17296. These reports do not satisfy criterion (b). EP Charts, Crit. (b), 22, 30, 34. Although consistency of membership may sometimes be supporting evidence of community, the proposed finding acknowledged that this alone does not demonstrate community.¹⁶ *See* EP PF 98-99. In fact, the BAR staff concluded that the overseer reports “provided no direct evidence concerning internal community within the tribe as a whole, or within its individual subgroups.” EP Charts, Crit. (b), 30. *See also id.*, 34.

This conclusion is correct. There is no evidence that the reports were premised on knowledge that “a social group” existed. 65 Fed. Reg. 17,296. The reports do not indicate significant social relationships or substantial and consistent social interaction among the membership, as required by the regulations. *See* 25 C.F.R. § 83.1 (definition of community); 59 Fed. Reg. 9286. Instead, they are for the most part simply a listing of the members in various

¹⁶Furthermore, the overseers’ reports were not consistent before the Civil War or after 1880’s. TA 7/10-11/01. “They [petitioners] in fact don’t have constancy of membership.” BIA Researchers’ files, at 14, Ex. 24.

cases, and an itemization of benefits or income they received. *See, e. g.*, EP Charts, Crit. (b), 22. There were no rules or written procedures identified for determining membership, and there were significant periods during which the overseer reports were markedly inconsistent. Formal Meeting Transcript ("FM Tr.") 103, 107-08; Technical Assistance Meeting July 10-11, 2001 ("TA"). In any event, mere identification of a group as an Indian entity does not prove community. *See* 59 Fed. Reg. 9286. Accordingly, the overseer reports cannot satisfy criterion (b).

2. The Evidence of Indian Identification Is Insufficient.

The proposed finding relies on the persistence of a named, collective Indian identity continuously for over 50 years, citing various state petitions purportedly made by or on behalf of the EP petitioner.¹⁷ 65 Fed. Reg. 17,296 (citing § 83.7(b)(1)(vii)). However, there were virtually no petitions submitted during the 19th century,¹⁸ and none at all after 1883. Even the 1800 petition was signed by a non-Indian. EP PF 50. There is little other evidence of the members collectively identifying themselves as an Indian group, until the first documented existence of an actual membership list in 1978. *See* EP PF 6.¹⁹ *See Steilacoom* PF, Sum. Crit. 12. Furthermore, identity alone is not useful for determining whether a community exists. FM Tr. 341. Therefore, this evidence cannot establish criterion (b).

18 ¹⁷Although the Summary Under Criteria cites such evidence for the period from 1883 to the 1920s, EP PF 79-80, in technical assistance it was revealed that *this evidence did not exist for this period*. TA 7/10/01.

19 ¹⁸There were no petitions between 1800 and 1839, 1842 and 1873 and after 1883.

3. Limitations of Marriage Calculations.

The marriage rate for the EP Petitioner falls far short of the 50 percent minimum required for sufficient evidence in and of itself for community under § 83.7(b)(2)(ii). *See* FM Tr. 335.²⁰ Although significant marriage rates falling short of the 50 percent threshold may be evidence of community, such evidence alone would not be sufficient. 25 C.F.R. § 83.7(b). Fifteen percent of marriages were with Narragansetts, 10 percent were with Western Pequots, and 6 percent with other Indian populations. EP PF 90. By contrast, the largest category of marriages (36 percent) were with non-Indians. EP PF 90. Patterned out-marriages to other Indian groups may still be considered evidence of community, but only to the extent “as may be culturally required.” 25 C.F.R. §83.7(b)(1)(i). There is no evidence that in this case the out-marriages were in fact culturally required. *See* FM Tr. 495-96. Moreover, the fact that the group may be “part of the Indian society of the region” is immaterial. 65 Fed. Reg. 17296. The issue is whether petitioner is “distinct from nonmembers,” not simply from non-Indians. 25 C.F.R. § 83.1. The out-marriages to other Indians, therefore, is not significant evidence of a distinct community.

In any event, the marriage reconstruction and analysis was only a partial one, covering the period from 1883 to 1936, *id.*, and it was admitted in the technical assistance meeting that there may be cases for which marriage date is missing. TA 7/10/01. Although the proposed finding states that there were marriages between Pequots in different towns, EP PF 99, the evidence does

20 ¹⁹There were references to membership figures in 1976, but no actual lists were indicated. EP PF 6.

21 ²⁰Although the proposed finding stated the figure was 39 percent, the actual figure was 32 percent. EP PF 90; FM Tr. 493.

not show how many such marriages there were, and the actual numbers may have been few. TA 7/10/01. From 1940 to 1973, the social ties based on prior marriages were “somewhat diminished.” *See* EP PF 99. After 1960, in fact, the significance of the earlier intermarriages was diminished, as people became more distantly related to each other. FM Tr. 186. This evidence is therefore insufficient for purposes of criterion (b).

4. Deficiencies in Kinship Claims.

The proposed finding itself acknowledged that “degree of genealogical relationship [in kinship links] is not close enough to assume without further evidence that social connections are maintained.” EP PF 89. While the proposed finding concluded that there were kinship relations and that social ties were maintained well beyond immediate kinsmen, *id.* 89, 99-100, the BIA also acknowledged that “[n]o actual, systematic description of the kinship links among the members established by marriages between different family lines is provided.” EP PF 89. The EP Petitioner did not provide an analysis of other issues regarding kinship relations, including what the kin links were and whether they were for immediate family members or more distant relatives. *Id.* at 90. The BIA concluded that most of the EP Petitioner’s description of “enclaves” involved visiting close relatives or did not distinguish between visiting immediate kin or other Pequots, and were therefore were of limited value. *Id.* at 93-94. This evidence is therefore insufficient under criterion (b).

5. Problems Regarding Validity and Reliability of Interviews and Oral Histories.

The BIA found that almost all the descriptions of social gatherings, as well as geographic enclaves, were based on interviews and oral history, the adequacy of which “varied substantially

from instance to instance.” EP PF 82; *see also* EP Chart, Crit. (b), 32. The standards that the BIA has itself used in the past to evaluate interview evidence includes consideration of the following factors: whether the informant was in a position to have knowledge of what happened; whether the informant provides specifics; whether the informant has any known prejudices; whether interviews conflict with others; whether interviews were done with the informant's understanding of what was at stake; whether they were conducted in the presence of the group's leaders; whether the interviewer leads the informant in questioning.²¹ TA 7/10/01; BIA Post-Hearing Mem., *Greene v. Babbitt*, Office of Hearings and Appeals (provided in BIA TA letter of July 6, 2001). BIA standards require that interview evidence be "corroborated by written materials such as meeting minutes, correspondence and newsletters." *Cowlitz* FD, Tech. Re. 26.

The EP Petitioner has, for the most part, provided only extracts of interviews. FM Tr. 413; TA 7/10/01. Thus, it is impossible to determine whether the interviews also included negative information and whether leading or suggestive questions were used in the interview. *See, e.g.*, William Bingham interview of Alton Smith and Justine Miller 51-52, 86-88 (Falzarano Tr). The methodology of these interviews cannot be evaluated without having the actual questions and answers. Nor can it be readily determined whether the procedures such as those recommended by the Oral History Evaluation Guidelines of the Oral History Association (adopted

22 ²¹A discussion of the validity and reliability of interviews and oral histories in general is provided in Appendix § II.

1989, revised September, 2000) have been followed.²² In short, the value of the interviews is extremely limited in the absence of the ability to validate the interview methodology.

The Department in the past has criticized interviews not conducted on the basis of a fair representation of the overall membership. *E.g.*, *Samish Tribe* Final Determ., 52 Fed. Reg. 3709 (1987);²³ *see also Miami* Final Determ. TR 12 (requiring systematic social research and criticizing information as anecdotal and obtained from key informants), *aff'd, Miami Nation of Indians of Indiana v. United States Dept. of Interior*, 2001 U.S. App. Lexis 13277 (7th Cir. 2001). There is no evidence whether the EP Petitioner's interviews consisted of a fair cross-section of the membership.

The BIA interviews appear to be based on key informants. FM Tr. 136. Although there was an attempt to get a good cross-section of the membership, they did not consist of a survey. *Id.* at 136, 151. As the BIA has acknowledged, a distinction must be made between the interviewee's own knowledge and experience and what he was told by others, because the latter obviously raises more difficult questions of validity. *Id.* at 137. In the present case it appeared there was at least some distortion of information obtained. *See* FM Tr. 145. The degree of precision of information obtained varied, depending on the interviewee. FM Tr. 155; *see also id.* at 154. Thus, this evidence is insufficient to establish criterion (b).

6. The Fourth Sunday Meetings Accounts Are Based Primarily on Imprecise Interviews and Are of Limited Value.

23 ²² *See* Appendix § II.

24 ²³ Although the *Samish* were eventually recognized, this principle did not appear to be overruled. N

The BIA discussions of the Fourth Sunday Meetings appear to be based primarily on interviews, and at least some of the interview information (regarding attendance) is based on less than precise information. *See* FM Tr. 353, 366. Both the EP petitioner's and the BIA's interviews occurred about sixty years or more after the fact, and the interviewees would have been young children at the time of the meetings. There is an indication that at least some of the interviewees did not actually participate in the meetings. *Id.* The only documentation for these meetings states that Mrs. Calvin (Emeline) Williams "has prayer meeting in her house three or four times a year. Anybody comes that wants to." EP PF 115 (quoting J. R. Williams notebook c. 1941). This indicates the limited scope and frequency of the meetings, as well as the fact that they were not necessarily limited to members of the group.

There was no evidence supporting the EP Petitioner's claim of an annual meeting involving a larger Fourth Sunday Meeting with attendance representing 20 to 25 percent of the membership. FM Tr. 351, 363-66, 373. In fact, members of other Indian groups, as well as non-Indians attended. *See id.* at 356.²⁴ In any event, the meetings did not appear to involve a predominant number of members, meaning at least half of the membership. 59 Fed. Reg. 9287. Therefore, these meetings are insufficient evidence of community relations under criterion (b).

7. The Alden Wilson Picnics Are Insufficient Evidence of Community.

25 ²⁴ *See* interview of Eleanor Wilson Manson and Margaret Wilson, at 4: "And that was not all Indians, or not all family. Other people were welcome to come to the meetings . . . [including] "[f]riends of theirs [who] ... were not Indians Everybody was welcome. . . ." (no transcription indicated).

The Alden Wilson picnics, which the EP Petitioner asserts occurred from approximately 1940 to 1960 (EP PF 96), also are insufficient evidence of community. First, the evidence is based on interview data given decades after the fact. FM Tr. 423. There does not appear to be any documentary evidence at all for these picnics. *See* FM Tr. 423. The EP Petitioner claimed that “one third or more” of the total members attended them, EP PF 96, but, there is no reliable evidence supporting that figure. Even if that number is inaccurate, the EP Petitioner has not even claimed that attendance was as high as 50 per cent, the threshold required for proof of distinct community. *See* 59 Fed. Reg. 9286.

The BIA could not substantiate the claim that the picnics involved the cooperation of many families, EP PF 96, and there is no evidence that the picnics represented participation by the Eastern Pequot Group as a whole. At any rate, contact by members only on an annual basis cannot constitute tribal relations for acknowledgment purposes. BIA, *Official Guidelines to the Federal Acknowledgment Regulations* 47 (Sept., 1997). Therefore, these picnics cannot establish community under criterion (b).

8. No Proof of Modern Community.

In the proposed finding, the BIA did not find "social cohesion as far as the modern community went," FM Tr. 197, including the period after 1960. *See id.*, 186; EP Charts, Crit. (b), 49-50. The membership “fluctuated significantly during the petitioning process,” jumping from 70 in 1976 to 647 in 1998. EP PF 6. If consistency in membership is supportive of community (*see* 65 Fed. Reg. 17296), then an unstable and erratic membership composition is not. The substantial increase also indicates that most of the members were not part of a historic community, but instead of a recently formed group. BIA interviews confirm the lack of

significant social relationships widely distributed among the membership. *E.g.*, BIA interview, Lynn and Eddie Powers Side I, 23 (Pro-Typists Tr.); BIA interview, Geneva Sebastian 19 (Tape No. 23, Falzarano Tr.); BIA interview, Larry Sebastian 10-12 (Tape No. 14, Falzarano Tr.); BIA interview Vivian Lancaster/C. Eccleston 23 (Tape No. 4, Falzarano Tr.); BIA interview of L & E Powers 6 (Tape No. 7, Falzarano Tr.).

Consequently, the EP Petitioner has not established community from historical times to the present as required by mandatory criterion (b).

C. PEP Petitioner

The BAR staff found that the PEP petitioner “has not provided evidence that it has maintained a continuous community from historical times to the present. The petitioner therefore does not meet the requirements of criterion 83.7 (b).” PEP Charts, Crit. (b), 56. The general defects regarding distinct community discussed for the EP Petitioner apply also to the PEP Petitioner. However, there are additional deficiencies. For example, the Gardner families, the principal members of the PEP Petitioner, did not participate in the Fourth Sunday Meetings and Alden Wilson picnics. Therefore, these events cannot even be properly cited as community evidence for the PEP Petitioner.

The PEP Petitioner's evidence of community is seriously lacking. First, except for Charlotte Potter Wheeler’s unexplained appearance on the 1835 and 1836 overseer reports as a beneficiary and the appearance of Molly Gardner who is otherwise unidentified, on the 1844-49 overseer reports, EP PF 56, there is no evidence that either the Wheelers or the Gardners were part of the Eastern Pequot community until Marlboro Gardner was recorded in the Ned household

in 1870. *See* TA 7/11/01.²⁵ No Gardners or Wheelers signed the 1839 and 1841 petitions, EP Tech. Rep. 209-11 (EP/PEP common historical background section), and there is no affirmative evidence that they were members of an Eastern Pequot community during this period. *See* EP PF 56-57. Even when Marlboro Gardner did appear in the Ned household in 1870, he did not appear to be listed among the Indians in North Stonington, which identified a residential group. *See* U. S. Census, 1870, North Stonington, Conn., p. 45, National Archives Microfilm Publication, Microcopy No. 593, Population Schedules of the Ninth Census of the United States. According to Agnes Cunha, a Paucatuck Eastern Pequot official, “Marlboro never interacted here. He never stayed in.” BIA interview, Agnes Cunha I and II, 32 (Pro-Typists Tr.).

Marlboro Gardner’s collateral relatives appeared more regularly in the overseer records than did Mr. Gardner’s own immediate family. PEP PF 82. Regarding the period from 1920 to 1940, the proposed finding notes that “[o]ther external, descriptive material in the record that might contribute to an understanding of community is very sparse.” PEP PF 84.

The PEP Petitioner’s description of community after 1920 is only done in very general terms. *Id.* at 92. Most of the members were no longer living on the reservation in the early 1900’s. *Id.* In addition, “[t]he ‘kinship clusters’ are not clearly defined, but appear to be no more than close family groups.” *Id.*; *see also id.* at 95. The PEP petition does not indicate how these clusters are connected to each other. PEP Charts, Crit. (b), 33; PEP PF 95. There are “few descriptions of social events that brought members together,” other than meetings at Helen LeGault’s home which were said to be social and political. PEP PF 92. No clear dates are

26 ²⁵There were occasional payments to Harry Gardner during some of these years, but they were for services rendered, not for benefits or income as a group member. *See* EP PF 57, 75

provided for these, and the only documented ones occurred in the 1970's and later. *Id.* As time went on, the close kinship ties as of 1920 "became more diffuse." PEP Charts, Crit. (b), 33.

As even the proposed finding noted, for the period from 1940 to 1973, "there was not good evidence to show social gatherings involving most of the group (as defined by the petitioner)." PEP PF 95. There also appears no evidence of "any informal social interaction between the Sebastians and the Gardners among members in their 60's or younger (born after 1940)," or "significant social connections between the Jacksons in recent eras with either the 15 Gardners or the Sebastians," even though the Paucatuck membership list now includes some Jackson descendants. *Id.* at 96; *see also id.* at 136.

The PEP Petitioner has not provided sufficient evidence showing separate social gatherings of their family lines. *Id.*, 96. Those gatherings or activities that did occur appeared to involve only family groups, and not, as a rule, the overall membership.²⁶ Although the interviews refer to members making an effort to attend annual meetings, actual attendance is not shown. However, even if such annual meetings were held, contact only "annually at the tribal meeting, if then," is insufficient evidence of tribal relations. BIA, *Official Guidelines to the Federal Acknowledgment Regulations* 47 (1997).

27 ²⁶ *See, e. g.*, BIA interview, Linda Strange I, 7 (Pro-Typists Tr.) ("[W]e were a tribe separate. We really didn't--you know, we were family. We had connections but we weren't--we never did anything together really."); BIA interview, Linda Strange II, 13, 14 (Pro-Typists Tr.) (referring to an issue which "I feel it's more like a family thing....It's not like...a tribal thing;" citing also "problems tribally--not tribally, family."); BIA interview, Jeff Tingley, Sides I and II (Pro-Typists Tr.) (referring to a family reunion at the Geer farm that "wasn't a tribal thing, that was just a reunion for the Geers.").

As with the EP Petitioner, the BIA did not find social cohesion sufficient to demonstrate a modern community. FM Tr. 197; *see also id.* at 467. The BAR staff therefore properly recommended that the PEP Petitioner had not met mandatory criterion (b), and the evidence in the record strongly supports that conclusion.

V. **THE PETITIONERS LACK EVIDENCE OF POLITICAL INFLUENCE OR AUTHORITY UNDER MANDATORY CRITERION (c) FOR VARIOUS PERIODS.**

A petitioner must prove that it "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). Political influence or authority means a leadership process or other mechanism which influences or controls membership behavior in significant respects, makes decisions for the group which substantially affect its members, or represents the group in dealing with outsiders in matters of consequence. 25 C.F.R. § 83.1. "It 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. Although they need not exercise coercive authority, "political influence must not be so diminished as to be of no consequences or of minimal effect." *Id.*

In applying these principles, the BIA has stated:

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.

Miami FD, Sum. Crit. 15, *aff'd*, *Miami Nation of Indians of Indiana v. United States Dept. of Interior*, 2001 U.S. App. Lexis 13277 (7th Cir. 2001) (cited as precedent, EP Charts, Crit. (c), 35).

Finally, political authority must have been exercised on a substantially continuous basis from historical times to the present. Continuous means "from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption." 25

C.F.R. § 83.1. Because there are significant periods of time during which neither petitioner can demonstrate political authority, the petitions must be rejected.

For a more detailed discussion of several issues relating to criterion (c), including the affect state relations had on the ability of the petitioners to exercise political authority, see Appendix § III.

A. EP Petitioner

The BAR recommended that the EP Petitioner "has not shown the existence of political authority or influence for the period from 1883-1920, or for the period from [1940] to the present. The petitioner therefore does not meet the requirements of criterion 83.7 (c)."²⁷ EP Charts, Crit. (c) 52. A review of the evidence amply supports this conclusion and reveals other periods in which the evidence appears deficient.

1. Loss of Political Autonomy After the Pequot War.

The assignment of the Eastern Pequot Group to the Eastern Niantic Sachem Ninigret from the end of the Pequot War in 1637 to 1654 (EP PF 103) resulted in a loss of political autonomy. From 1655 to 1677, the Eastern Pequot Group was transferred to the administration of Harmon Garrett, who was also an Eastern Niantic. *Id.* at 104, 29. Thus for over half a century after first sustained contact, the petitioners' claimed predecessors were under the control of other Indians, and did not lead or control their own separate and distinct group. The fact that the loss of autonomy was not permanent is not determinative. Political influence or authority must be

28 ²⁷Although the charts state this period was from 1960 to the present, in Technical Assistance, BAR staff clarified that the lack of political authority actually extended from 1940 to the present. TA 7/10/01-7/11/01.

demonstrated on a substantially continuous basis, even though it need not be shown at every point in time. 25 C.F.R. § 83.6(e); *see also id.* § 83.3(a) (criteria 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.”). Control of a group by other Indian leaders for two generations or more after first sustained contact indicates that the group has not functioned as an autonomous entity throughout history.

Although Momohoe, the subsequent colonial-appointed leader from about 1678 to 1695 (EP PF 104), is said to have had some Pequot ancestry, there is no evidence that he was part of the Eastern Pequot Group when he was given supervisory authority, and there is no evidence that he was ever selected by the group. *See* PE PF 30 & n. 42. Thus, until the end of Momohoe’s reign in 1695, there is no evidence that the Eastern Pequot Group had leadership of its own. Even assuming that Momohoe’s widow succeeded him as a leader, there is no evidence that after her death any one individual held a position comparable to that of sachem. EP PF 105.

The proposed findings cite the *Mohegan* and *Narragansett* decisions as some precedent for finding political authority for the EP Petitioner. EP PF 103. However, those decisions involve quite different situations. As noted above, the Mohegans were documented as a separate group as early as 1614, at the time of first contact, *Mohegan* PF, Hist. Rep. 11, and had separated completely from the Pequots prior to the Pequot War, as illustrated by the fact that the Mohegans had joined the English against the Pequots in that battle. *See id.* at 13. Similarly, the Narragansetts had combined with the Niantics, each of which had been separate and distinct political entities. *Narragansett* PF at 1-2. The mandatory criteria permits recognition for groups “that have historically combined and functioned as a single autonomous entity.” 25 C.F.R. §

83.6(g). Unlike the Narragansetts, the Eastern Pequot Group did not combine and function with the Eastern Niantics as “a single autonomous political entity.” Instead, following the Pequot War, the colonial government placed them under the supervision and control of the Eastern Niantic leader. *See* EP PF 103. Consequently, the proposed findings themselves demonstrate that the petitioners cannot satisfy this criterion.

2. Evidence of State Petitions Reveals a Lack of Internal Government and Sporadic Leadership At Most.

Although a group that is subject to colonial and State overseers does not necessarily lose political autonomy, the group must still have internal political influence or authority of its own, even if it is exercised subject to the laws and oversight of non-Indian governmental authorities. *See* EP PF 104; 25 C.F.R. § 83.1. For example, in *Mohegan*, the BIA concluded that “[t]he nature of the continuing political structure of the Mohegan during the early 19th century is, again, best evidenced by petitions submitted periodically to the Connecticut General Assembly on behalf of the group or its individual members,” citing petitions stating the Mohegans had “consulted together,” and referring to such organizations as the “Committee for the tribe,” “Indian Overseers appointed by the Mohegan Tribe,” and “Indian overseers or head men of said tribe.” *Mohegan* PF, Hist. Rep. 26.²⁸

29 ²⁸Although State overseers had also forwarded to the General Assembly some Mohegan petitions without the approval of group leaders in 1807, 1808 and 1820, it was during this general period that the a State legislative committee had found that the “rules and principles of the Ancients and Elders of the tribe [regarding distribution of lands] have uniformly been tenacious” and “adopted and strictly pursued.” *Mohegan* PF Hist. Rep. 26. The Committee also found that the tribe had “preserved certain Rules and Principles by which to determine the identity of said tribe and members thereof.” *Id.* The State documentation of the Mohegans, therefore, in contrast to that in the present case, indicated the existence of political influence and authority.

Regarding the Eastern Pequot Group, by contrast, 18th and 19th century documents, including those involving appointment of overseers, provide little if any information about internal political process or political influence or authority. *See* EP PF 102, 104, 106-07. Some of the State petitions actually demonstrate a lack of internal governing ability.²⁹ In 1766, various Stonington Indian inhabitants requested the appointment of an overseer because “Great Differance Difecaulty & Troubles” existed among them. Conn. Ind. Papers, IP, II:250. Although the individual signers (not designated as counselors or other officers) indicated that they acted on behalf of the rest of Pequot Indians, it again appears that the group was unable to settle its problems on its own. In addition, in 1788, various Pequot Indians sought overseers precisely because there was no one within the group to apportion the group’s profits and expenses equally and “a very great variety of other matters render[ed] it absolutely necessary that some Person be appointed to superintend our general concerns....” Conn. Ind. Papers, IP, II:252; *see also* EP PF 48.

Contrary to the proposed finding’s report (EP PF 106), this last petition indicates a substantial lack of internal political process. Group members had requested non-Indian supervision to provide the internal political influence and authority which the group was unable to maintain on its own. The mandatory criteria require that it is the *petitioner* that must exercise political influence or authority among its members, not that the State exercise it because of the

30 ²⁹There were significant gaps in the submission of petitions from 1723 to 1749, from 1800 to 1839, and from 1842 to 1873, each representing nearly a generation or more. In fact, the 1800 petition was signed only by a non-Indian, EP PF 50, and there is no evidence as to who drafted or presented it or whether the group or the non-Indian signer took the initiative in this matter. In this respect, the finding that the group “had sufficient internal political organization to...create a

group's inability to do so. Political influence is a leadership mechanism that "the group has used," not that outsiders have. 25 C.F.R. § 83.1. In the present case, the evidence demonstrates that the group was unable to influence membership behavior in significant respects, make decisions for the group which substantially affected its members, or otherwise resolve its own disunity. Whatever leadership is demonstrated by this evidence was at best sporadic and not continuous. *See Mashpee v. New Seabury Corp.*, 592 F. 2d 575, 585 (1st Cir. 1979) ("sporadic, crisis-oriented leadership that would disappear as soon as the crisis was resolved" is insufficient), *cert. denied*, 464 U. S. 866 (1983), 444 U. S. 866 (1979).

3. Lack of Political Authority in the Later Nineteenth and Early Twentieth Centuries.

Although Calvin Williams was the first signer of the 1873 petition and 1874 remonstrance (EP PF 109-110), had signed the 1883 petition (EP PF 111), and had married persons whose families had been associated with the reservation, he was not documented to have Eastern Pequot or other Indian ancestry or that he or his ancestors had previously maintained tribal relations with the group. EP PF 77; FM Tr. 298, 300. Any actual and continuous political influence that he may have exercised -- which itself appears tenuous and insubstantial -- is therefore not attributable to the petitioner, but to an outsider who moved onto the reservation.

After the petition submitted in 1883, the proposed findings themselves found that "the records submitted in evidence for the next 50 years contained almost no documentation concerning leadership or political process among the Eastern Pequot." EP PF 112. For this lengthy period of time, there is "no document which pertained directly to or reflected internal

formal document and present it" (EP PF 106) is unsupported by the evidence.

political processes of the Eastern Pequot tribe.” EP Charts, Crit. (c), 14. Although the BIA report states that Calvin Williams’s leadership in the 1870’s and 1880’s “may” have continued into the 20th century (EP PF 112), it did not find that it had actually done so. FM Tr. 339. His obituary stated that he had preached for a long time in southern New London county, but did not identify him as an Eastern Pequot leader. *See* EP PF 112. Although the BIA report cites a claim by a Paucatuck Eastern Pequot researcher that Mr. Williams was paid from tribal funds for preaching (EP PF 112), the document to back up that claim is not in the records that BAR requested from the Paucatucks. FM Tr. 357; *see also id.* at 329. Even if he did preach on the reservation, there is no evidence that he exercised actual political influence or authority as defined by the regulations. *See* 25 C.F.R. § 83.1.

There appears insufficient evidence that Emeline Sebastian Williams was an informal tribal leader (EP PF 116), insofar as this suggests that she exercised political influence or authority. The relevant BAR chart indicates only that she had “some” influence as an informal leader, which was “possibly somewhat localized.”³⁰ EP Charts, Crit. (c), 22. Regarding her organizing the Fourth Sunday meetings (EP PF 116), the only documentary evidence available is that prayer meetings were held at her house three or four times a year and that anyone could attend them. EP PF 115 (quoting J. R. Williams notebook). There is no valid evidence that indicates that the meetings

31 ³⁰Although she was one of four persons who endorsed an application for membership, the exact capacity in which she did so cannot be determined. The other three signers have not been identified as leaders of any sort. Therefore, her endorsement is also consistent with the fact that it was provided as a knowledgeable person, rather than as a leader. There is no evidence that the group had authorized her or any one else to act for them in these matters.

were “political.” *See* EP PF 116.³¹ The petitioner’s and BIA interviews do not fairly support the claim that “the problems of the group with the overseers regarding the land or assistance, trespassers, and similar common concerns were discussed.” *Id.* at 116-17. In fact, there appear to be no interviews that substantiate this statement. The oral histories conflict with each other regarding the actual character of the meetings. TA, 7/10/01. Most of the interviews described the meetings as prayer meetings or otherwise of a religious, rather than political, nature.³²

The BIA did not find evidence that Emilene Williams was a contact person with the overseer. FM Tr. 368. She was not mentioned in any of the overseer records in this capacity or in any other leadership role. *See, e.g.*, 1929 overseer’s report regarding the Franklin Williams application (EP PF 83); 1931 overseer’s report and Gilbert Raymond’s ledger for 1932 (EP PF 113). The J. R. Williams notebook states only that she had prayer meetings in her house three or four times a year. EP PF 115. There is no mention of any contact role she had with the overseer. In addition, Emeline Williams evidently did not take over responsibility for the meetings until “toward the end of the 1920’s.” BIA Researchers’ files, 7, Ex. 26.

The evidence submitted demonstrates that, whatever Emeline Williams’ actual role was, she did not appear to exercise political influence or authority within the meaning of the regulations.

32 ³¹This appears to have been based on petitioner’s narrative, see BIA Researchers’ files, at 6, Ex. 25 (evidently quoting EP Narrative 7/98, at 50), and not “detailed, specific evidence” and “supporting documentation,” as required. § 83.6 (a) and (c); 59 Fed. Reg. 9289 (standards of evidence). This finding, therefore, does not appear to be based on acceptable proof.

33 ³²For a detailed discussion of the inadequacy of the interview evidence regarding the Fourth Sunday Meetings, see Appendix § II.C.

4. Lack of Evidence of Political Influence and Authority on the Part of Alden Wilson.

There is insufficient evidence to support a finding of political influence and authority exercised by Alden Wilson. As in the case of Emeline Williams, the chart simply states that he had “some” influence, “possibly somewhat localized.” EP Charts, Crit. (c) 22. First, he was not listed as a member on the overseer reports. Second, the BIA found that his picnics were not political in nature. *See* EP PF 97; TA 7/10/01-7/11/01. Nor can it be established that most of the members attended them. *See* EP PF 96. Indeed, participants at the picnics included non-Pequots and non-Indians. *Id.* Third, his activities did not involve the Gardner or Jackson branch. FM Tr. 413, 416. While BAR found that his activities did extend beyond his immediate kin, they did not find that it covered all the Sebastians. *Id.* at 412, 415.

Although the interview data indicates that Alden Wilson provided financial assistance to some members, it does not demonstrate that he was consulted by Pequots on personal matters or advised them accordingly. *See* EP PF 117. Individuals may have sought his economic help, but there is no evidence that they followed his advice on any significant matter or that they even sought it.³³

Thus, there is no specific evidence that he made decisions for the group, FM Tr. at 419, nor is there credible evidence that he oversaw tribal operations. EP PF 117. While Alden Wilson was a successful and considerate person who may have financially assisted various individual members, there is insufficient evidence of actual political influence and authority. There is no

34 ³³For a detailed discussion of the interviews regarding the Alden Wilson picnics, see Appendix § III.D.

indication that he had a political connection which existed broadly among the membership, that he had a bilateral political relationship with the overall group as a whole. *See Miami* FD, Sum. Crit. 15; 57 Fed. Reg. 27,312; *Mashpee*, 592 F. 2d 583-84.

5. Insufficient Evidence of Political Influence or Authority of Atwood Williams.

There is insufficient evidence that Atwood Williams exercised political influence or authority. He did not appear on the overseer reports as a member prior to the time he purportedly exercised any leadership, EP PF 112-13; FM Tr. 388-89, suggesting that he had no bilateral political relationship with the group prior to 1929. *See* EP PF 83; *San Juan Paiute* FD Sum. Crit. 22. To the extent that he may have exercised leadership, it certainly was not extended over the entire membership. FM Tr. 388. Indeed, he opposed the Sebastians and was not a leader for that subgroup, EP PF 113, 115, and he tried to eliminate a portion of the group from the membership. FM Tr. 390-91. Although the Gardners purportedly supported him (FM Tr. 404), they only comprised 20 percent of the overall membership. FM Tr. 405. There was no evidence that the other 80 percent supported him, and some evidence that at least some of the Sebastians opposed him.³⁴ *Id.* at 406. There is no showing that the overall membership supported or authorized him to act on their behalf in his objections to the overseer's membership listings, accounts and other matters in 1931 and 1932. *See* EP PF 113 (describing these objections); FM Tr. 395.

A 1934 BIA report stated that Atwood Williams “claims to be the tribal chief...and is seeking legal recognition as such. This office is honorary...’.” EP Charts, Crit. (c), 22. “The

35 ³⁴There is also interview evidence from the Jacksons that does not support him as a leader. FM Tr. 396.

report specifically expressed doubt that Williams was effectively the leader of the group.” *Id.*

The State genealogical charts c. 1938 stated: “Atwood I. Williams ‘Chief Silver Star’ appears to be a self-appointed Chief whose influence is quite largely gone. (1936)” *Id.* As BAR commented, “This report specifically expressed doubt that Williams was effectively the leader of the group.”³⁵

Id. Similarly, the 1941 J. R. Williams notebook observed: “Atwood got signatures of all those who would chip in certain amount and called these member [*sic*] of tribe, all others not.” *Id.* at 24. BAR analyzed this record as “express[ing] specific doubts concerning the leadership of Atwood I. Williams.” *Id.*

There is thus insufficient evidence that Atwood Williams exercised political influence or authority for the overall group.

6. Lack of Political Influence or Authority from 1940 to the Present.

For the period from 1940 to the present, much of the material specifically does not demonstrate internal leadership or provide direct data on the internal political authority or influence within the antecedent to the EP Petitioner. *See* EP Charts, Crit. (c), 23, 27 (excerpt from J. R. Williams notebook and Helen LeGault 1955 correspondence); TA, 7/11/01. Some activities involved only the descendants of one person and did not extend more broadly among the EP Petitioner's members. EP Charts, Crit. (c), 30 (Sebastian Foundation). As the BAR staff

36 ³⁵Although a 1936 Park and Forest Commission document stated that Mr. Williams was the leader and was presently recognized by the tribe, it does not indicate the basis for this statement. *See* EP Charts, Crit. (c), 22 at 22. This was the same year that the same commission stated that he was a self-appointed chief whose influence was largely gone. *Id.*

37

noted, the EP Petitioner's minutes and related documents from 1976 to 1999 discussed activities which

in themselves are not distinguishable from a voluntary association. For these to be useful evidence, the petitioner needs to show that there [has been] widespread participation, political communication, and the like (83.7(b)(1)(iii)). There was little evidence in the minutes to show where there were expressions of membership opinion, interest, or participation in the central actions of the council.

Id. at 39. The lack of broadly based political influence is confirmed by the BIA interviews, which are discussed in Appendix § III.E.

There is therefore no evidence that the EP Petitioner has continuously and historically maintained political influence or authority over its overall membership.

B. PEP Petitioner

The BAR found that the PEP Petitioner "has not demonstrated the continuous existence of political process from 1883 to the present, although it has been shown for some portions of that period. The petitioner therefore does not meet the requirements of criterion 83.7(c)." PEP Charts, Crit. (c) 55. The PEP Petitioner suffers from the same deficiencies under criterion (c) discussed as to the EP Petitioner through the mid-20th century and has not presented evidence of meeting this criterion for the rest of this period.

For the last part of the 19th century and for much of the 20th century, BAR found a lack of political influence or authority. *E.g.*, PEP Chart, Crit. (c) 14 (no documents reflecting existence of internal political authority or influence from 1884 to 1928); 15 (no direct evidence concerning political process from 1914 to 1928); 28 (no information concerning political process in 1949 and 1955); 47-48 (no evidence, description or data of political process in 1982 and 1983). Indeed, there is no evidence of political activity or influence by the Gardners or the Wheelers until Marlboro Gardner signed the 1874 Remonstrance to the New London Superior Court. Neither family signed the 1839 or 1841 petitions or the legible portions of the 1873 petition. *See* EP Technical Report (Common Historical Background) 13, 209-211; EP PF 109. Eunice Wheeler Gardner did not sign the 1874 or 1883 remonstrance and petition. *See* EP PF 110-111. Furthermore, the PEP Petitioner cannot rely on the claims regarding Emeline Sebastian Williams and Alden Wilson from 1920 to 1960, because these did not involve the Gardner families (at least those unrelated to the Jacksons), who comprise most of the Paucatuck membership. *See* PEP PF 136.

Although in the late 1930's and 1941 there were pronounced internal conflicts which the BAR concluded were evidence under criterion (c) (PEP Charts, Crit. (c), 21, 24), there is no evidence of political influence or authority beyond that. It is the exercise of leadership that is ultimately required, not just the existence of internal conflicts. "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.

Those claiming to be leaders lacked broad support among the overall membership. While Atwood Williams may have had the approval of the Gardners for the relatively short period in which he was active,³⁶ he did not have the backing of the overall membership, including the Sebastian families.

There is also a significant lack of evidence of political influence or authority for Helen LeGault. In an entry made between 1935 and 1937, the overseer stated that she was not even a member of the group. PEP Charts, Crit. (c), 16. No political influence or authority is shown for Mrs. LeGault in the various correspondence between 1948 to 1953 (*id.* at 26), various contacts she had with the State Welfare Department from 1955 to 1959 (*id.* at 30, 31, 32), her testimony before the Connecticut General Assembly in 1961 (*id.* at 33), and additional contacts with the Connecticut Welfare Department between 1966 and 1973 (*id.* at 35). Although she was appointed to the Connecticut Indian Affairs Council ("CIAC") in 1973, all persons who signed the letter appointing her were her close relatives. PEP PF 142. Even though the appointment states that she was acting as a spokesperson for the group as a whole, instead of as an individual, the

BAR noted that “this significant action was taken by only a small proportion of the overall body of Eastern Pequots descendants, and without participation of the Hoxie/Jackson and Brushell/Sebastian lineages.” PEP Charts, Crit. (c), 37. In fact there was significant evidence that the Hoxie/Jackson family did not view her as their leader, either in the 1960’s or 1970’s. PEP Charts, Crit. (c), 35, 38, 40, 41; PEP PF 142.

By the time of a complaint by the Hoxie/Jackson descendants that Mrs. LeGault had excluded them from the membership list, the BAR found that “it seems clear that Mrs. LeGault did not perceive her organization as including the entire membership of what is now [the PEP Petitioner], and thus was not a leader of the portion of the current petitioner’s ancestors who are Hoxie/Jackson descendants.” PEP Charts, crit. (c), 42. Despite assertions that the Hoxie/Jacksons had internal leadership of their own separate from both the LeGault/Williams and the Sebastian groups (PEP Charts, Crit. (c), 40), there is no evidence that either of these other groups supported that leadership. In fact, the Hoxie descendants asserted that only they were true Eastern Pequots and denied that both Tamar Brushell (Sebastian) and Marlboro Gardner were authentic ancestors. PEP PF 143.

Although the PEP Petitioner now represents that it consists of the Hoxie/Jackson lines, it is significant that it had excluded them from membership from 1973 until 1991, and that group, in turn, had refused to recognize the PEP Petitioner’s authority and legitimacy as represented by the Gardners. *Id.* It is clear, therefore, that the PEP Petitioner includes within its members those

38 ³⁶His core activity years were 1933 to 1936, with some lesser level of activity noted for several years before and after that. FM Tr. 393.

over whom it did not exercise political influence or authority during significant periods. BIA interview data confirm the lack of genuine political influence or authority. *See* Appendix § III.F.

Finally, the significant expansion in membership by about 50 percent in only 15 years (*see* PEP PF 6) indicates the absence of a continuous bilateral political relationship between the group and many of its present members. *See Masayeva v. Zah*, 792 F. Supp. 1178, 1181, 1188; *San Juan Paiute* PF, Sum. Crit. xvi; *San Juan Paiute* FD, Sum. Crit. 22; Mem., Assistant Solicitor, Branch of Tribal Government and Alaska, Mar. 2, 1988.

In sum, the PEP Petitioner has not demonstrated that it has maintained political influence or authority from historical times to the present, as required by criterion (c).

VI. THERE IS ONLY ONE EASTERN PEQUOT GROUP WITH TWO DIVIDED FACTIONS THAT ARE NOT UNITED IN A COMMUNITY UNDER A SINGLE LEADERSHIP OR GOVERNMENT.

In response to the BIA's request that the interested parties address the question of whether the petitioners can be viewed as one or two tribes after 1973,³⁷ EP PF 61, PEP PF 139, the State submits that the evidence, when properly viewed, demonstrates that there is but one group. This group is split by two divided factions that are not "united in a community under one leadership or government," as required for tribal existence. *Montoya v. United States*, 180 U. S. 201 (1901). Although there is unquestionably a serious, unresolved conflict between the two petitioners, they are historically part of the same group, claiming genealogical ties to each other. The State and the Federal government have viewed them as one group that has been unable to settle its differences. For the reasons discussed above, neither faction, together or separately, can satisfy the mandatory criteria for recognition.

There is absolutely no authority to acknowledge two groups that became independent of each other only in 1973. "Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations." 25 C. F. R. § 83.3(c). 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." *Id.* Groups which have become separate and distinct in relatively recent years

39 ³⁷Even the proposed findings acknowledged that "there is some evidence that only one tribe exists within the meaning of the regulations." EP PF 61. The proposed findings also stated that almost every identification from the 1970's through the present describes the petitioners as "rival groups within the context of the Lantern Hill reservation and the historic Eastern Pequot tribe." EP PF 64. Prior to 1973, the proposed findings appear to conclude that there was only

have been neither historically autonomous (independent of the control of any other Indian entity) as required by mandatory criterion (c), nor historically distinct from nonmembers, as required by mandatory criterion (b).

Both petitioners claim they are derived from a single historical group. EP PF 61. When the Lantern Hill land was originally set aside for the Eastern Pequot Group in 1683, there was only one overall group. The land was procured for “Mamohoe and his company.” Committee report to the Connecticut General Court, October, 1683, quoted at *BIA Technical Report, supra*, at 133. The first recorded objection to the Sebastians’ residence on the reservation was not made until approximately 15 years after the death of Tamar Brushell Sebastian. EP PF 129.³⁸ Finally, the Sebastians and the Gardners are linked genealogically through the Jackson family. EP PF 99.

The State statutes refer to only one group -- the “Paucatuck Eastern Pequot.” Conn. Gen. Stat. § 47-59a (b). The Connecticut Indian Affairs Council (“CIAC”) and the Connecticut courts have consistently viewed the two petitioners as part of one group consisting of individuals who were rivals, even though they may have used different group names. *See, e.g., Paucatuck Eastern Pequot Indians v. Indian Affairs Council*, 18 Conn. App. 4, 6-8 & n.3 (1989) (Ex. 29) (dispute over the right to a seat on the CIAC, in which the Connecticut Appellate Court referred to the two groups as factions of the same tribe).

The Federal Department of Housing and Urban Development (“HUD”) was unable to resolve this factional division when acting on a housing grant application by the PEP Petitioner.

one tribe. EP PF 135; FM Tr. 63, 348.

40 ³⁸The BIA also notes an unconfirmed reference to an objection in a 1991 interview.

On December 21, 1990, the Chicago Office of Indian Programs ("COIP") of HUD initially notified Ms. Agnes Cunha, whom it addressed as Chairperson of the Paucatuck Eastern Pequot Indians, that it had approved its grant application. Letter of Leon Jacobs, Director, Office of Indian Programs, to the Hon. Agnes Cunha, Dec. 21, 1990, Ex. 30. Subsequently, because of opposition by the EP Petitioner, HUD stated that the "status of the on-going dispute was not clear to the COIP when the Housing Authority was approved," that it had relied in good faith on the representations made by the Paucatuck Chairperson, and that "[t]he status of the Eastern Pequots was unknown to the COIP as was the *depth of the division* between all persons claiming to be members of the State recognized Pequot tribe." Letter of Leon Jacobs, Director, Office of Indian Programs, to the Hon. Agnes Cunha, Chairperson, Paucatuck Eastern Tribe, Oct. 23, 1991, Ex.____. (emphasis added). Having reviewed the information regarding the factional dispute, HUD viewed as "most significant . . . the fact that the Indian Affairs Council seat held by the Paucatuck or Eastern Pequots is vacant and had been since December 3, 1983." *Id.* HUD therefore suspended the housing grant "until such time that it can be shown that there is a representative tribal government elected by all persons eligible to vote as tribal members." *Id.* Although the COIP strongly encouraged both factions to resolve the dispute, it also stated that it had no authority to force its resolution. *Id.*

Later, in response to a request that counsel review its prior determination that the organizational transcript and formation of the Eastern Paucatuck Pequot Housing Authority was legally acceptable, in light of the new information regarding the factional dispute, the Regional Counsel stated:

These two groups have apparently been engaged, literally for decades, in various legal battles. Each group asserts in this litigation that it should be granted state recognition as the sole authentic legal tribal government. The groups also disagree on other issues, including the correct name of the tribe and who is entitled to use of the reservation.

Memo to Leon Jacobs, Dir. COIP, from Lewis Nixon, Regional Counsel, Oct. 6, 1993 (Ex. 32).

The Regional Counsel concluded that "HUD lacks the authority to validate the authenticity of any tribal government," *Id. at. 2*, and after referring to the requirements of State law, stated that "[u]ntil the issue of the identity of the tribe is resolved," an Indian Housing Authority could neither be properly created nor legally approved. *Id.* Approval of the organizational transcript was then withdrawn.

Both the CIAC controversies and the HUD ultimate rejection of the housing grant indicate two salient points. First, the petitioners have not been viewed as two separate and independent "tribes," but instead as rival subgroups or factions of one overall group. The HUD documentation referred to "the two factions," noted the claims of each to be the "lawfully elected tribal government," and indicated that the paramount issue of "who is the tribe" had to be resolved under state law. *See* Memorandum of Isaac Pimentel, June 30, 1993, Ex. 33; Memorandum of Lewis Nixon, Regional Counsel, Oct. 6, 1993, Ex. 32; *see also* Exs. 34 & 35. Second, the evidence shows that neither petitioner has the ability to resolve leadership and membership disputes for the entire group, to influence or control membership behavior in significant respects, to make decisions for the group which substantially affect its members, or to represent the group to outsiders in matters of consequence. *See* 25 C.F.R. § 83.1 (definition of political influence or authority); 25 C.F.R. § 83.7(c)(2) (requiring evidence of settlement of "disputes between members or subgroups by mediation or other means on a regular basis").

Although “internal conflicts which show controversy over valued *group* goals . . . policies, processes and/or decisions” may be part of the evidence of political influence or authority (25 C.F.R. § 83.7(c)(1)(iii)) (emphasis added), the controversy in question must be over the acts of the group which the group is able to settle, not battles which occur outside of a tribal political system. *See* EP PF 152. Otherwise, the group is not “united in a community under one leadership or government,” a touchstone of tribal existence. *United States v. Montoya*, 180 U. S. 261, 21 S. Ct. 358, 359 (1901); *see Miami* FD Tech. Rep. 51 (“The factional divisions, *and the political processes for resolving the conflicts between them*, were important supporting evidence.” (emphasis added)).

In the present case, the overall group is disunited. Both factions have refused to recognize the legitimacy of the other's leadership, membership, right to live on the reservation, and, in some cases, ancestry. They disagree as to the proper name for the overall group. There is no informal social interaction between the Sebastians and the Gardners who were born after 1940, according to available interviews. EP PF 100. There is no substantial evidence in the interviews of any “significant social connections” between the Jacksons in the recent period with either the Sebastians or the Gardners, notwithstanding the prior marriages of Atwood Williams and Grace Jackson (his aunt) with Gardners. *Id.*

Thus, the question is not whether there is one tribe or two. Because of the continuing and unresolved factional dispute, as well as the other deficiencies discussed above, neither petitioner can meet the judicial or BIA requirements for recognition as a tribe.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This certifies that the foregoing was served by overnight delivery this 1st day of August, 2001, on the following:

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