I

109TH CONGRESS
1ST SESSION

H. R. 1104

To repeal the Federal acknowledgment of the Schaghticoke Tribal Nation.

IN THE HOUSE OF REPRESENTATIVES

MARCH 3, 2005

Mrs. JOHNSON of Connecticut (for herself, Mr. SHAYS, and Mr. SIMMONS) introduced the following bill; which was referred to the Committee on Resources

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A BILL

To repeal the Federal acknowledgment of the Schaghticoke Tribal Nation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Schaghticoke Acknowledgment Repeal Act of 2005''.

SEC. 2. REPEAL OF THE FEDERAL ACKNOWLEDGMENT OF THE SCHAGHTICOKE TRIBAL NATION.

(a) FINDINGS.—Congress finds the following:

(1) The Bureau of Indian Affairs should acknowledge petitioning groups as Indian tribes within

the meaning of Federal law only when petitioning groups fully, faithfully, and objectively satisfy each of the 7 mandatory acknowledgment criteria under section 83.7 of title 25, Code of Federal Regulations.

(2) The Bureau of Indian Affairs issued a Proposed Finding, a preliminary decision, dated December 2, 2002, and published in the Federal Register on December 11, 2002 (67 Fed. Reg. 76184), that declined to acknowledge the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law because the tribe did not satisfy each of the 7 mandatory criteria under section 83.7 of title 25, Code of Federal Regulations, more particularly:

(A) The Proposed Finding concluded that the Schaghticoke Tribal Nation did not satisfy criterion 83.7(b), the demonstration of a continuous community from the first sustained historical contact to the present, because there was ''insufficient evidence'' to demonstrate that a community existed for 36 years from 1940 to 1967 and from 1996 to the present.

(B) The Proposed Finding concluded that the Schaghticoke Tribal Nation did not satisfy criterion 83.7(c), the demonstration of contin-

uous political authority and influence within the community, because there was ''insufficient evidence'' or ''no specific evidence'' or both to demonstrate that political authority and influence was exercised within the community for 165 years from 1801 to 1875, 1885 to 1967, and 1996 to the present.

(C) The Proposed Finding concluded further concerning criterion 83.7(c) that the State of Connecticut's continuous relationship with individuals claiming to be Schaghticoke and living on land set aside for them as a reservation did not provide additional evidence during those periods when there was an absence of specific evidence of the exercise of political influence within the group within the meaning of the acknowledgment regulations.

(D) The Proposed Finding raised concerns that the Schaghticoke Tribal Nation's membership list excluded prominent individuals who had been ousted from or refused to be a part of the Schaghticoke Tribal Nation petition, including members of the rival Schaghticoke Indian Tribe, members of the Coggswell family, and former Chief Irving Harris. In addition, the

membership list included newly recruited Joseph D. Kilson descendents who had not had any connection with the Schaghticoke group throughout the 20th century.

(3) After further public comment and submissions by the petitioner and interested parties, the Bureau of Indian Affairs issued a Final Determination, dated January 29, 2004 and published in the Federal Register on February 5, 2004 (69 Fed. Reg. 5570), that acknowledged the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law.

(4) The Final Determination reached this positive result only through the following:

(A) Explicit, premeditated manipulation of both the evidence and established acknowledgment standards, as evidenced by the following:

(i) In a briefing paper dated January 12, 2004, prepared by the Office of Federal Acknowledgment and submitted to Principal Deputy Assistant Secretary-Indian Affairs Aurene Martin regarding the forthcoming Final Determination, the Office of Federal Acknowledgment requested guidance from the Principal Deputy Assist-

ant Secretary-Indian Affairs on whether the Schaghticoke Tribal Nation should be ''acknowledged even though evidence of political influence and authority is absent or insufficient for two substantial historical periods, and if so, on what grounds?''.

(ii) In the briefing paper, Office of Federal Acknowledgment staff recommended, and the Principal Deputy Assistant Secretary-Indian Affairs endorsed, an analytic approach that explicitly discarded prior agency precedent and regulations governing the acknowledgment process to overcome the absence and insufficiency of evidence to demonstrate continuous political influence and authority, as the regulations require.

(iii) This approach, according to the briefing paper, ''would require a change in how continuous state recognition with a reservation was treated as evidence.''.

(iv) The briefing paper also acknowledged the possibility of declining acknowledgment of the Schaghticoke Tribal Nation, saying that option ''maintains the

current interpretations of the regulations and established precedents concerning how continuous tribal existence is demonstrated.''.

(B) Ignoring agency admissions that ''insufficient direct evidence'' or ''little or no direct evidence'' exists to satisfy the political authority criterion for a period of 118 years, as evidenced by the following:

(i) The Bureau of Indian Affairs admits in the Final Determination that ''there is little or no direct evidence to demonstrate political influence within the Schaghticoke between 1892 and 1936,'' and elsewhere that ''there is insufficient direct evidence to demonstrate criterion 83.7 (c) between 1892 and 1936.''.

(ii) The Bureau of Indian Affairs admits in the final determination that ''there remains little direct evidence concerning political authority or influence among the schaghticoke for this time period [1801–1875]''.

(iii) The Bureau of Indian Affairs admits in a January 12, 2004, briefing paper

prepared for the Principal Deputy Assistant Secretary-Indian Affairs that ''evidence of political influence and authority [within the Schaghticoke Tribal Nation] is absent or insufficient for two substantial historical periods.''

(C) An arbitrary reevaluation and erroneous interpretation of the State's relationship with the Schaghticoke, where the Bureau of Indian Affairs overturned longstanding judicial precedent and interpretation that it repeatedly relied upon in prior acknowledgment decisions involving New England Indian groups, as evidenced by the following:

(i) The Final Determination acknowledged that in using the State's relationship with the group as evidence to satisfy the political community and authority criteria, the Bureau of Indian Affairs was reversing its holding in the Proposed Finding, which stated that ''a continuous state relationship with a reservation did not provide additional evidence during those periods when there was an absence of specific evidence of the exercise of political influence

within the group within the meaning of the acknowledgment regulations.''.

(ii) To reach the positive result in the Final Determination, the Bureau of Indian Affairs erroneously equated the fact that the State of Connecticut had set aside tracts of land where individuals claiming descent from a tribe that existed in colonial times could live, including providing funds and an overseer for these individuals, with the act of recognizing a sovereign entity that has existed as a distinct political community as it is understood under Federal law.

(iii) The Bureau of Indian Affairs used this faulty analysis to fill gaps where, by the agency's admission, ''insufficient'' or ''little or no direct'' evidence existed to demonstrate continuous community and political authority.

(iv) The use of the State's relationship with the Schaghticoke group as evidence of continuous political authority specifically subverts the intent of the regulations, since the Bureau of Indian Affairs

previously considered and rejected the use of such arrangements as evidence because it merely emphasized Indian ancestry, not the existence of tribal political authority.

(v) In the Final Determination acknowledging the Mohegan tribe in Connecticut, the Bureau of Indian Affairs properly interpreted State recognition, declaring that ''State recognition is one form of evidence that a group meets criterion (a), but it is not grounds for automatically considering a group to be entitled to Federal recognition.''. In addition, the Bureau of Indian Affairs adhered to this precedent and interpretation of a State relationship in its proposed findings and final determinations concerning the Narrangansett tribe in Rhode Island, the Gay Head Wampanoag tribe in Massachusetts, and the Historic Eastern Pequot and the Golden Hill Paugussett tribes in Connecticut.

(vi) Without the Bureau of Indian Affairs' use of this erroneous interpretation of the State's relationship with the Schaghticoke group to substitute for ''in-

sufficient'' or absent evidence necessary to satisfy the continuous community and political authority criteria, the Schaghticoke Tribal Nation would not have satisfied these mandatory criteria and would have been denied acknowledgment.

(D) Unprecedented and inaccurate methods to calculate tribal marriage rates, without which the Schaghticoke Tribal Nation would not have reached the 50 percent intra-marriage rate threshold and consequently would not have satisfied the criteria for political authority for a 74 year period from 1801 to 1875, as evidenced by the following:

(i) Under section 83.7(c)(3) of title 25, Code of Federal Regulations, (commonly known as the so-called ''carry-over'' provision), in the absence of direct evidence, a petitioner can satisfy the political authority criterion for a particular period if it demonstrates one of that ''at least 50 percent of the marriages in the group are between members of the group,'' a threshold that demonstrates community for a particular period under section

83.7(b)(2)(ii) of title 25, Code of Federal Regulations.

(ii) Because the Bureau of Indian Affairs admits in the Final Determination that ''there remains little direct evidence concerning political authority or influence among the Schaghticoke for this time period [1801 to 1875],'' the agency invoked the carry-over provision to demonstrate political authority for this period because it calculated that more than 50 percent of the marriages in the group were between members of the group.

(iii) In a filing before the Interior Board of Indian Appeals, dated December 2, 2004, the Office of the Solicitor, Bureau of Indian Affairs, admitted that the Final Determination used a methodology in calculating and analyzing marriage rates that ''is not consistent with prior precedent in calculating rates of marriages under 83.7(b)(2)(ii) and provides no explanation for the inconsistency.''.

(iv) The Office of the Solicitor states that ''previous acknowledgment decisions

interpret 83.7(b)(2)(ii) to require that 50 percent of the marriages are between members of the group. In contrast, the Summary on [Schaghticoke Tribal Nation] inadvertently relied on the number of members of the group who married other members, which results in a higher count.''.

(v) The Office of the Solicitor also concludes that mathematical errors were made in tabulating marriage rates in the Final Determination that when corrected reduces the rate below 50 percent, regardless whether ''marriages'' as is customary, or ''members of the group who marry other members,'' which is unprecedented, is counted.

(vi) Since the Schaghticoke Tribal Nation marriage rates do not meet the 50 percent threshold, the carry-over provision is rendered inoperative.

(vii) Without the carry-over provision to substitute for insufficient evidence to demonstrate political authority for the time period from 1801 to 1875, the political authority criterion is not satisfied, and the

Bureau of Indian Affairs should have declined Federal acknowledgment in the Final Determination.

(viii) The Office of the Solicitor further advises that during the Interior Board of Indian Appeals request for reconsideration currently under way, the Final Determination ''should not be affirmed on these grounds absent explanation or new evidence.''.

(E) A fraudulent membership list for the Schaghticoke Tribal Nation, without which the Schaghticoke group could not be acknowledged—a result the Office of Federal Acknowledgment within the Bureau of Indian Affairs calls ''undesirable'' in internal briefing papers, as evidenced by the following:

(i) The Schaghticoke group has experienced intense factional conflict for many years, with the resulting split in the early 1990s between the Schaghticoke Tribal Nation and the Schaghticoke Indian Tribe into two distinct groups with district communities and political processes.

(ii) The January 12, 2004, briefing paper prepared by Office of Federal Acknowledgment staff for the Principal Deputy Assistant Secretary-Indian Affairs states the ''Schaghticoke Tribal Nation membership list did not include a substantial portion of the actual social and political community.''.

(iii) The briefing paper concludes that ''the activities of these individuals were an essential part of the evidence for the [Proposed Findings] conclusion that the [Schaghticoke Tribal Nation] met criterion 83.7(b) [community] and 83.7(c) [political authority] from 1967 to 1996 and their absence was one of the reasons the [Proposed Finding] concluded these criteria were not met from 1996 to the present. After 1996, these individuals either declined to reenroll as the leadership required of all members, or subsequently relinquished membership, because of strong political difference with the current [Schaghticoke Tribal Nation] administration''.

(iv) In response to concerns raised in the Proposed Finding, the Schaghticoke Tribal Nation unsuccessfully attempted to purge the Kilson descendents from the membership list and to persuade prominent Schaghticokes, including Schaghticoke Indian Tribe members, the Coggswells and Irving Harris, to rejoin.

(v) On September 27, 2003, the day before the end of the Schaghticoke Tribal Nation's comment period prior to the issuance of the Final Determination, 15 Schaghticoke Indian Tribe members applied for and were granted membership in the Schaghticoke Tribal Nation. Nine of those 15 signed a letter on September 29, 2003, however, stating that they were not Schaghticoke Tribal Nation members, had no intention of becoming members, and that ''[their] signatures were obtained by fraud''.

(vi) In the briefing paper, Office of Federal Acknowledgment staff expresses disappointment that these irregularities could undermine the Schaghticoke Tribal

Nation's goals, saying ''the current status of a long-term pattern of factional conflict may either have the undesirable consequence of negatively determining Schaghticoke's tribal status. . .''.

(5) Congress acknowledges that two noted Native American anthropologists retained to advocate for the Schaghticoke Tribal Nation concluded after exhaustive, years-long research that the group did not and could not establish continuous community and political authority as required by the acknowledgment regulations, more particularly:

(A) Dr. William Starna, a professor of anthropology and expert in tribal acknowledgment at the State University of New York at Oneonta, who has worked on behalf of tribal petitioners Gay Head Wampanoag, Golden Hill Paugussett, and Eastern Pequot in addition to the Schaghticoke Tribal Nation, concluded in two separate reports, in 1989 and again in 1993, that the Schaghticoke Tribal Nation could not satisfy either the continuous community or political authority and influence criteria.

(B) Dr. Ann McMullen, a professor of anthropology and expert in tribal acknowledgment

at Brown University, who has worked on behalf of tribal petitioners Mashpee and Paucatuck Eastern Pequot, conducted further research at the request of the Schaghticoke Tribal Nation. In a 1999, report Dr. McMullen affirmed Dr. Starna's s conclusions, saying that ''too much still rests on Schaghticoke as a piece of Indian land occasionally occupied by Indians and not the focal point for a larger dispersed tribe''.

(6) Paragraph (4) demonstrates that the Schaghticoke Tribal Nation does not satisfy each of the seven mandatory criteria for acknowledgment under section 83.7 of title 25, Code of Federal Regulations. If further demonstrates willful manipulation of both the acknowledgment regulations and existing agency precedent by the Bureau of Indian Affairs.

(7) For the reasons described in paragraphs (4) and (6), the Final Determination acknowledging the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law is erroneous and unlawful.

(8) Congress cannot allow the erroneous and unlawful decision of the Bureau of Indian Affairs to acknowledge the Schaghticoke Tribal Nation as an

Indian tribe within the meaning of Federal law to stand because of the significant, harmful, and irreversible effects it would have on neighboring communities, more particularly:

(A) A sovereign, federally acknowledged Indian tribe is exempted from a broad range of State laws and regulations, including State and local taxation.

(B) A sovereign, federally acknowledged Indian tribe is granted rights under Federal law to engage in casino-style gaming under the Indian Gaming Regulatory Act, and the construction and operation of a Las Vegas-style casino in Western Connecticut would place unbearable burdens on municipalities, on local tax bases and taxpayers, and on an aging transportation infrastructure that could not tolerate the volume of traffic such a facility would create.

(C) A sovereign, federally acknowledged Indian tribe has standing in Federal court to pursue land claims litigation on property under the Federal laws commonly known as the ''Non-Intercourse Act'', claims that threaten landowners' property rights, cloud title in wide-

spread areas, and prevent the sale of real property.

(b) PURPOSES.—The purposes of the Act are as follows:

(1) To repeal the Bureau of Indian Affairs' acknowledgment of the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law.

(2) To correct the unlawful and erroneous decision by the Bureau of Indian Affairs, in violation of Federal regulations and contrary to longstanding agency precedent, to acknowledge the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law.

(3) To protect the taxpayers and municipalities of the State of Connecticut from the undue burdens and violations of sovereignty described in subsection (a)(8).

(4) To affirm the 7 mandatory acknowledgment criteria and prevent a precedent setting decision that relaxes them for northeastern groups.

(c) DEFINITIONS.—For the purposes of this Act, the following definitions apply:—

(1) SCHAGHTICOKE TRIBAL NATION.—The term ''Schaghticoke Tribal Nation'' means the Schaghticoke Tribal Nation, a federally recognized

Indian tribe based at 33 Elizabeth Street, 4th Floor, Derby, Connecticut, 06148.

(2) FINAL DETERMINATION.—The term ''Final Determination'' means the decision document containing an administrative decision made pursuant to section 83 et seq. of title 25, Code of Federal Regulations by the Office of Federal Acknowledgment, Bureau of Indian Affairs, dated January 29, 2004, affirmed by Aurene M. Martin, Principal Deputy Assistant Secretary-Indian Affairs, published in the Federal Register on February 5, 2004 (69 Fed. Reg. 5570), that acknowledged the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law.

(3) REQUEST FOR RECONSIDERATION.—The term ''Request for Reconsideration'' means the administrative appeal of the Final Determination, initiated by the Attorney General of the State of Connecticut on behalf of the State and Interested Parties pursuant to section 83.11 of title 25, Code of Federal Regulations, In re Federal Acknowledgment of the Schaghticoke Tribal Nation, Docket Nos. IBIA 04–83–A, IBIA 04–94–A, IBIA 04–95–A, IBIA 04–96–A, and IBIA 04–97–A.

(d) REPEAL OF THE FEDERAL ACKNOWLEDGMENT OF THE SCHAGHTICOKE TRIBAL NATION.—

(1) The Schaghticoke Tribal Nation is not an Indian tribe within the meaning of Federal law and does not maintain a government-to-government relationship with the United States.

(2) The Final Determination acknowledging the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law, maintaining a government-to-government relationship with the United States, is repealed.

(3) The outcome of the Request for Reconsideration shall have no effect on this Act.

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