UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SCHAGHTICOKE TRIBAL NATION, Petitioner, v. DIRK KEMPTHORNE, SECRETARY, DEPARTMENT OF THE INTERIOR, ET AL., Respondents, STATE OF CONNECTICUT, KENT SCHOOL CORPORATION, THE CONNECTICUT LIGHT AND POWER COMPANY, and TOWN OF KENT, Intervenor-Respondents.	:	CIVIL NO. 3:06CV00081(PCD) November 8, 2007

FEDERAL RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF FEDERAL RESPONDENTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

On October 11, 2005, the Associate Deputy Secretary James E. Cason issued the Reconsidered Final Determination that the Schaghticoke Tribal Nation (STN or petitioner) was not an Indian tribe within the meaning of Federal law as provided in the Federal acknowledgment regulations, 25 C.F.R Part 83 (1994) (Fed. Exh. A). This final agency action was based on a consensus recommendation of the professional staff of the Office of Federal Acknowledgment (OFA).

The Reconsidered Final Determination (RFD) was the culmination of an extensive administrative process that included a Proposed Finding (PF), a petitioner and public comment period on it, a petitioner's response to the comments, and a Final Determination (FD). The FD was reviewed by the independent Interior Board of Indian Appeals (IBIA) in response to requests for reconsideration filed by various interested parties. Following response briefs by the STN, the IBIA vacated and remanded the FD to the Department of the Interior. Additional comment to the agency by the STN and interested parties occurred post-remand, and the Department issued the final and effective agency decision, the Reconsidered Final Determination.[1]

The final agency decision, the RFD, found that the STN did not provide sufficient evidence to demonstrate that it was as an Indian tribe entitled to acknowledgment of a government-to-government relationship with the United States under the Federal acknowledgment regulations, 25 C.F.R. Part 83.

STN asks the Court to declare the RFD to be arbitrary, capricious, an abuse of discretion or not in accordance with law. STN challenges further the authority of the Associate Deputy

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[1] Federal Respondents here refer to the Petitioner's Memorandum in Support of its Motion for Summary Judgment (Dkt #166) as "STN Memo." Documents provided to the Court as numbered exhibits to the Murphy Declaration in support of STN Memo (Dkt #168) and cited in this brief are cited initially as "STN Exh." The RFD is STN Exh. 1; the FD is STN Exh. 4; the decision *In Re Federal Acknowledgment of the Schaghticoke Tribal Nation,* 41 IBIA 30 (May 12, 2005) is STN Exh. 112. The PF is Intervenors' Exh. A, DD-V001-D0004 & D0005. After the initial citation to exhibit number, these documents are cited by name.

Secretary to issue the decision. Federal Respondents here cross-move for summary judgment on all issues, respond to Petitioner's motion for summary judgment, and request that the Court deny Petitioner's motion in all respects, and grant this cross motion for summary judgment.

SUMMARY OF ARGUMENT

The Department has the authority to determine which Indian groups will be acknowledged as Indian tribes entitled to government-to-government relations with the United States. In exercising that authority, the Department adopted regulations to govern the process of groups petitioning for federal acknowledgment as Indian tribes.

The Department, acting through OFA, has a unique expertise under the acknowledgment regulations in evaluating petitions it receives. It reviewed every argument presented by STN and interested parties, analyzed all the evidence submitted, and provided reasons why there were problems with the analysis presented by the parties, or problems caused by a lack of evidence. After this thorough analysis and review using standards of the respective disciplines of anthropology, history, and genealogy, the Department concluded in its final decision, the RFD, that the record before it did not establish by a reasonable likelihood of the facts that the STN met either the community criterion 83.7(b) or the political influence criterion 83.7(c).

Each of these criteria is mandatory under the regulations to demonstrate continuous existence as a tribe. 25 C.F.R. §§ 83.7, 83.10(m). Because both criteria are mandatory, before this court could remand the decision to the agency, it must first find that the decision on each of the criteria was arbitrary and capricious under the Administrative Procedure Act (APA). As long as the evaluation of the evidence under either § 83.7(b) or § 83.7(c) in the RFD is reasonable, based on the agency's interpretation of the regulations, the decision should be affirmed.

The agency decision is fully supported by the record and is not arbitrary, capricious, an abuse of discretion, or not in accordance with law. Extensive depositions of former Secretary of the Interior Gale Norton, Associate Deputy Secretary James E. Cason, Solicitor David L.

Bernhardt, Director of the Office of Federal Acknowledgment R. Lee Fleming, and lobbyist Loren Monroe of Barbour Griffith Rogers disclosed no undue influence on any of the decision makers in reaching this decision. The Associate Deputy Secretary accepted the consensus recommendation from the professional staff in the OFA. A thorough search of Mr. Cason's e-mail and files showed no contact with the persons advocating one way or the other on the STN petition. Congressional committee hearings on acknowledgment were handled by the Department as routine congressional matters.

The regulations provide that the Assistant Secretary or that officer's authorized representative shall issue the preliminary and final decisions. 25 C.F.R. § 83.1. When the positions of the Assistant Secretary-Indian Affairs (AS-IA) and Principal Deputy Assistant Secretary - Indian Affairs (PD-ASIA) were both vacant, the Secretary, under the Vacancies Reform Act, re-delegated the duties of the Assistant Secretary to the Associate Deputy Secretary. The Associate Deputy Secretary concurred with the recommended decision of the experts in the OFA and issued the final agency decision. The Director of OFA, as well the acting PD-ASIA, approved and signed off on the decision.

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE IN THIS ADMINISTRATIVE PROCEDURE ACT RECORD REVIEW CASE.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). As here, where an action is a challenge to a final agency action, such challenge is brought pursuant to the APA, 5 U.S.C. § 701, *et seq*. *Sierra Club v. United States Army Corps of Engineers,* 772 F.2d 1043, 1050 (2d Cir. 1985). Under the APA, judicial review is not *de novo* review. Rather, Congress, recognizing that administrative agencies are more knowledgeable than the courts in many specialized areas of fact determination, requires the courts to exercise considerable deference in their review of agency decisions. *NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). *State of*

New York Dep't of Social Services v. Shalala, 21 F.3d 485, 492 (2d Cir. 1994) (standard of review is deferential, presuming validity of agency actions as long as the decision has a "rational basis").

In reviewing an agency action under the APA, the agency's action may be overturned only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The courts look for consideration of relevant data, a satisfactory explanation of the decision, and a rational connection between the facts the agency found and the decision it made. *Miami Nation of Indians of Indiana v. Babbitt,* 112 F. Supp. 2d 742, 751 (N.D. Ind. 2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001)*, cert. denied*, 534 U.S. 1129 (2002). The task of the reviewing court "is to determine whether the agency has considered the pertinent evidence, examined the relevant factors, and articulated a satisfactory explanation for its actions including whether there is a rational connection between the facts and the choice made." *J. Andrew Lange, Inc. v. FAA,* 208 F.3d 389, 391 (2d. Cir. 2000) (internal quotations omitted). The objective of the court's inquiry is "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971); *Stewart Park and Reserve Coalition, Inc. v. Slater,* 352 F.3d 545, 557 (2d Cir. 2003).

The agency's weighing the evidence differently than that advocated by others does not make the decision arbitrary and capricious. *United States v. Morgan,* 313 U.S. 409, 419 (1941) (the Secretary can attach a different significance to the data), *Miami Nation,* 112 F. Supp. 2d at 751 (same). "An agency decision is arbitrary and capricious if 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Vermont Public Research Group v. United States Fish & Wildlife Serv.,* 247 F. Supp. 2d 495, 505 (D. Vt. 2002) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*

Auto Ins. Co., 463 U.S. 29, 43 (1983); *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 456, 498 (2d Cir. 2005).

The filed administrative record includes approximately 6,774 documents comprising over 47,000 pages, as well a number of CD-ROM disks and DVDs with additional information. A complete description of the administrative record is set forth in the Notice of Manual Filing of Administrative Record [Dkt #31] filed June 15, 2006.

II. THE RECONSIDERED FINAL DETERMINATION OF THE ASSOCIATE DEPUTY SECRETARY DENYING ACKNOWLEDGMENT TO THE SCHAGHTICOKE TRIBAL NATION IS FULLY SUPPORTED BY THE ADMINISTRATIVE RECORD.

A. The Legal Significance of Tribal Recognition

A determination that a petitioner is an Indian tribe, i.e., merits federal acknowledgment, or federal recognition, establishes a government-to-government relationship between it and the United States.[2] A positive determination under the regulations means that the group has inherent sovereign authority independent of the State in which it is located and independent of the United States, although it remains a domestic dependent nation. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17; 5 Pet.1 (1831). A group acknowledged under the regulations has demonstrated that it has continuously existed throughout history as a political entity. An Indian tribe, thus, has sovereign

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[2] The Department's authority to promulgate the regulations is discussed in the RFD at 68-69, and was upheld in *James v. U.S. Department of Health and Human Services*, 824 F.2d 1132, 1137, 1138 (D.C. Cir. 1987) ("Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2, 9 . . . Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations."), *Miami Nation of Indians of Indiana, Inc. v. Babbitt,* 887 F. Supp. 1158, 1165 (N.D. Ind. 1995) (finding that 25 C.F.R. Part 83 was promulgated under Congress' delegation of authority to the President and to the Secretary to prescribe regulations concerning Indian affairs and relations), *aff'd*, 255 F.3d 342, 346 (7th Cir. 2001)*, cert. denied*, 534 U.S. 1129 (2002); *United Tribe of Shawnee Indians v. United States,* 253 F.3d 543, 549 (10th Cir. 2001) (same); *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1215 (D. Haw. 2002), *aff'd,* 386 F.3d 1271 (9th Cir. 2004), *cert. denied,* 125 S. Ct. 2902 (June 13, 2005) (same); and *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 77 (D.D.C. 2002) (same).

immunity, and

- may exercise jurisdiction over its territory and establish tribal courts,
- may exercise jurisdiction in Indian country,
- may administer funds under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450-450n,
- may acquire new lands and establish gaming facilities under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721,
- may bring a land claim under the Trade and Non-Intercourse Act, 25 U.S.C. § 177, and,
- may obtain other federal benefits and exercise its own sovereign authority except as limited by federal law. 25 C.F.R. §§ 83.2, 83.11.

A tribe is a political, not a racial, classification. *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Under the acknowledgment regulations, a collection of persons of Indian ancestry is not a tribe *unless* they and their ancestors are part of a continuously existing political community from historical times to the present. 25 C.F.R. § 83.3(a), (c). *See, Rice v. Cayetano,* 528 U.S. 495, 519-520 (2000) *citing Morton v. Mancari,* "[t]he preference [is] political rather than racial in nature . . . granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." As stated in the preamble to the 1994 regulations, "the essential requirement for acknowledgment is continuity of tribal existence . . . simple demonstration of ancestry is not sufficient." 59 *Fed. Reg.* 9280, 9282 (Feb. 25, 1994). A determination that a petitioning group is or is not a tribe is a decision with significant impacts on the petitioner, State, Federal Government, other recognized Indian tribes, and non-Indians.

B. Overview of the Acknowledgment Regulations, the Decision-Making Process, and Three Issues Raised by the STN

The acknowledgment process commences when a group petitions the Department for acknowledgment as an Indian tribe. 25 C.F.R. § 83.5. There are seven mandatory criteria for determining whether a petitioner is an Indian tribe, a continuously existing sovereign. 25 C.F.R. § 83.7(a)-(g). The two criteria for which the STN did not provide sufficient evidence are:

> 83.7(b): A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

> 83.7(c): The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

As defined in the regulations, "community" means any group of people that can demonstrate that "consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers." 25 C.F.R. § 83.1.

The regulations provide examples of how a group may demonstrate community at a particular time through a combination of "direct" evidence, such as "significant rates of marriage within the group," "significant social relationships connecting individual members," and "significant rates of informal social interaction which exist broadly among the members of the group." *See* § 83.7(b)(1)(i)-(ix). Alternatively, a group may demonstrate community at a particular time if it can show that more than 50% of its members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the rest of the group consistently interacts with it, or, if at least 50% of the members speak a distinct language. Community is demonstrated also for a time period if at least 50% of the marriages in the group are between members. *See* § 83.7(b)(2)(i)-(v).

The RFD found that STN failed to provide sufficient evidence of community for approximately 54 years, from 1920-1967 and from 1997-2004, using evidence either under § 83.7(b)(2), or a combination of evidence under § 83.7(b)(1). 70 *Fed. Reg.* 60101, 60102 col. 2-3 (Oct. 4, 2005), Fed. Exh. B.

Political influence or authority is defined, in part, in the regulations as the group "influencing or controlling the behavior of its members in significant respects," or making decisions for the group that "substantially affect its members." 25 C.F.R. § 83.1. It is a bilateral relationship between the members and their leaders. *Miami Nation of Indians,* 112 F. Supp. 2d at 756.

A group may demonstrate political influence or authority over its members at a particular time by providing a combination of evidence, for example, that it could mobilize significant numbers of members and resources from its members for group purposes, that members consider actions taken by leaders to be important, or that there is widespread knowledge and involvement in political processes by most of the members. § 83.7(c)(1)(i)-(iii). Sufficient evidence for political authority at a particular time would be if the group allocates group resources, such as land, on a consistent basis, or settles disputes among members on a regular basis. § 83.7(c)(2)(i)-(ii).

The RFD concluded that STN did not provide sufficient evidence to demonstrate political influence or authority over its members from 1801-1875, from 1885-1967, and from 1996-2004, for a total of approximately 165 years. 70 *Fed. Reg.* at 60102-103, Fed. Exh. B.

The RFD was the culmination of an extensive administrative process that included a Proposed Finding, petitioner and public comment on it, a petitioner response to the public comments, a Final Determination, independent review by the IBIA, additional limited comment by petitioner and interested parties, and the final agency decision, the RFD. The Department's evaluation of this petitioner followed a court approved negotiated agreement between the Department, STN, and parties to the several concurrent lawsuits, entered May 8, 2001.[3] The order established time lines for submission of materials to the Department and deadlines for submission of comments and issuance of the PF and the FD. Following the FD, the regulatory

[3] The several lawsuits in Federal district court include two land claim suits under the Non-Intercourse Act, *Schaghticoke Tribal Nation v. Kent School Corp. et al.*, Civil No. 3:98 CVO1113 (PCD) and *Schaghticoke Tribal Nation v. U.S. and the Connecticut Light and Power Company*, Civil No. 3:00 CV00820 (PCD). These cases were consolidated with the third lawsuit and lead case, *United States of America v. 43.47 Acres of Land et al.,* Civil No. H-85-1078(PCD), filed on December 16, 1985, in which the United States seeks to condemn certain lands adjacent to the Schaghticoke state reservation for the Appalachian Trail. All three lawsuits involve the question of whether the STN is an Indian tribe under Federal law.

procedures for reconsideration were followed, as modified at the request of petitioner.[4]

Under 25 C.F.R. § 83.10(h), the Proposed Finding, or preliminary decision, on the STN was issued on December 5, 2002. This decision document analyzed and evaluated all of the evidence then in the record in the context of the regulations. Notice of the PF was published in the *Federal Register*, 67 *Fed. Reg.* 76184 (Dec. 11, 2002), Fed. Exh. C.

The PF found that the Schaghticoke Tribal Nation did not provide sufficient evidence that it (1) was continuously a community or (2) exercised political influence throughout history over its members. STN provided sufficient evidence to satisfy the other criteria. *Id.*

The Department provided the STN and all parties to the litigation a copy of the complete database used in the evaluation and analysis for the PF.[5]

A roughly 8-month comment period followed publication of the PF and its record. During this time, OFA professional staff provided extensive technical assistance to the parties. FD at 4. Extensive comments were received on the PF. Following the comment period, the STN had until September 29, 2003, to reply to the third-party comments.

Following an analysis and evaluation of all the evidence in the record, the OFA professional staff determined that, under the regulations and existing acknowledgment decision precedent, the STN did not meet all criteria in the regulations - the STN did not provide sufficient evidence of community and political authority for significant periods of time. The OFA posited two issues to the Principal Deputy Assistant Secretary - Indian Affairs:

(1) "Should the petitioner be acknowledged even though evidence of political influence

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[4] Dkt #250, *United States of America v. 43.47 Acres of Land,* "Motion to Amend Scheduling Order etc." by STN filed June 15, 2005.

[5] This database is called FAIR - Federal Acknowledgment Information Resource system. It provides on-screen access to the images of all of the documents in the record, which are linked to entries of information OFA researchers extracted from the documents. OFA researchers' notes and analysis of the evidence and meeting notes are in the FAIR database.

> and authority is absent or insufficient for two substantial historical periods, and if so, on what grounds?" BR-V016-D0040 at 1, and,
>
> (2) "Should the STN be acknowledged (subject to decision on Issue 1) even though a substantial and important part of its present-day social and political community are not on the current membership list because of political conflicts within the group?" *Id.* at 4.

The OFA asked for direction on these issues in a January 12, 2004 Briefing Paper. STN Exh. 69. OFA posed these questions because the group existed before and after periods in which evidence of community and political influence was absent or insufficient, and because a dispute within the group prevented the petitioner's membership list from reflecting those who participated, or had participated in the prior two decades, in the political community.

The PD-ASIA answered both questions in the affirmative and the FD explains this conclusion. It states that the existence of continuous state recognition provided evidence of *continuity* of the group, permitting the group to meet the regulatory criteria without sufficient direct evidence of community and political influence during certain time periods. FD at 14. This conclusion and its later reversal by the Interior Board of Indian Appeals are critical to the merits of STN's current challenge. The FD concluded also that since the certified membership list and the second list of unenrolled individuals reflected the "actual" political community, and since the Assistant Secretary-Indian Affairs did not have the authority to acknowledge only part of a group, the two lists should be combined to define the acknowledgeable group. FD at 56, 58.

The Final Determination concluded that the STN merited federal acknowledgment. This document analyzed and weighed all the evidence in the record and explained what evidence was sufficient, and what evidence was too limited, to demonstrate that the petitioner met the criteria under the regulations under existing precedent. The FD indicated where state recognition made a difference in the conclusions, and why persons who were not enrolled members were considered part of the petitioner for purposes of meeting the community and political influence criteria.

1. The Use of State Recognition in the Final Determination

There are three critical issues associated with the FD. The first issue concerns the use of state recognition as evidence to meet the criteria, where the FD departed from precedent under the acknowledgment regulations, including the PF on STN. The FD concluded that notwithstanding the insufficient evidence to establish community criterion 83.7(b) and political influence criterion 83.7(c) under existing precedent, the continuous historic state recognition of the Schaghticoke, coupled with a state-maintained reservation from colonial times, could be considered evidence to meet these two criteria. FD at 14. This use of state recognition allowed the STN to meet the criteria even when there was no other direct evidence in that time period for the specific criteria. FD at 16. The FD concluded that state recognition substituted for direct evidence even when the State did not deal with or identify formal or informal leaders of the Schaghticoke, did not consult with members concerning issues which concerned the entire group, and even when there was no evidence of the internal political influence within the petitioner. STN Exh. 69, Briefing paper at 1-2.[6] As stated in the FD, although state recognition rested on the continuous recognition of a distinct political community with a unique status, distinct from non-Indians of Connecticut, it did *not* show the existence of a government-to-government relationship. FD at 14. It was used in the FD as "evidence bearing on continuity of the group's

[6] "The petitioner has little or no direct evidence to demonstrate that criterion 83.7(c) has been met between 1820 and 1840 and between approximately 1892 and 1936. . . . If applied as it was in the Schaghticoke PF, the weight of continuous state recognition with a reservation would not provide additional evidence to demonstrate that criterion 83.7(c) (political influence) has been met for this time period. . . . [The state relationship] did not extend to direct dealings with Schaghticoke leaders or consultation with the group on group matters during the time periods in question." STN Exh. 69 at 1-2. As provided in the FD: "Although there is insufficient direct evidence to demonstrate criterion 83.7(c) between 1892 and 1936, this final determination concludes that overall, based on the continuous state relationship with a state-provided reservation, that there is sufficient evidence of political continuity throughout history that the STN meets the requirements of 83.7(c)." FD at 122.

existence." *Id.*[7]

This use of the continuous state recognition as a substitute for direct evidence of community and political influence provided sufficient evidence of community criterion (b) for the 47 years of 1920-1967, and to meet political criterion (c) for the 100 years 1820-1840, 1870-1875, and 1892-1967. 69 *Fed. Reg.* 5570, 5571, 5573 (Feb. 4, 2004) (Fed. Exh. D), RFD at 48. Without reliance on state recognition, there was insufficient evidence for these 100 years, under one or both of the criteria.

This Final Determination used state recognition in a broader fashion than it was used previously in the Proposed Finding on the STN, or in the Historical Eastern Pequot Final Determination issued about 18 months earlier in June 2002. In those decisions, state recognition had to be coupled with direct evidence of social interaction and political authority within the group in order to be weighed as additional evidence under the criteria. STN Exh. 69 at 1.[8]

Ultimately, the Interior Board of Indian Appeals rejected both uses of state recognition (either as direct evidence alone, or as evidence in conjunction with other evidence to show community or political influence) and vacated the Final Determination on the STN (and on the Pequots). The IBIA concluded "that the State of Connecticut's 'implicit' recognition of the Eastern Pequot [and Schaghticoke] as a distinct political body . . . is not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority

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[7] The Department's direct examination of the laws, policies and actions of the State of Connecticut, as summarized in the PF and FD on the STN, and in the Eastern Pequot and Paucatuck Eastern Pequot PFs and FDs, did *not* equate state recognition with the same trappings as Federal recognition. FD at 16. A political basis for the state relationship was only implicit.

[8] In addition, as stated in the PF on the STN, the state's relationship with the Schaghticoke petitioner was of a narrower quality than the state relationship with the historical Eastern Pequot. Thus, the state relationship provided a more limited amount of additional evidence, especially with regard to demonstrating political criterion 83.7(c), consistent with the reasoning in the EP final determination. PF at 11.

within that group." *In re Federal Acknowledgment of Schaghticoke Tribal Nation,* 41 IBIA 30, 34 (2005), STN Exh. 112. Since state recognition "constituted a substantial portion of the evidence relied upon" in the FD, the IBIA vacated and remanded the decision. *Id. See* in depth discussion below, II.C.

2. The Analysis of Marriage Rates in the Final Determination

The second issue in the Final Determination was its analysis of marriage rates. Marriage rate analysis did not appear in the PF. It occurred in the FD in response to petitioner's comments submitted during the response period. Under the regulations, high marriage rates also are considered evidence for political authority.[9] The analysis of marriage rates in the FD allowed the STN to meet political criterion (c) from 1801-1820 and from 1840-1870, a total of 50 years, but it did not solve petitioner's insufficient evidence for the other 100 years identified in the FD.

The State of Connecticut in its brief before the IBIA pointed out that the analysis of marriage rates in the STN FD was not consistent with prior acknowledgment decisions because the FD counted members, not marriages. CT-V011-D0004. The OFA acknowledged this error to the IBIA in a Supplemental Transmittal dated December 2, 2004, admitting the FD's unintentional change from precedent, and thus had no explanation for the change. STN Exh. 73. The OFA also pointed out a mathematical error in its calculations.[10] Ultimately, the IBIA concluded that "[b]ecause we are already vacating and remanding the FD . . . for reconsideration based on *Historical Eastern Pequot Tribe*, and because OFA has acknowledged problems with the FD's endogamy calculations - at a minimum, inadequate explanation - we conclude that this

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[9] 25 C.F.R.§ 83.7(c)(3). The rationale behind this regulatory provision is that a showing that more than 50% of the marriages are between members of the group is evidence of a strong cohesive community that implies the existence of internal political authority.

[10] Shortly thereafter, the Department requested expedited consideration of the pending case, IB-V005-D0033, consistent with the STN's initial request for expedited consideration. IB-V004-D0007 at 11.

matter is best left to the Assistant Secretary on reconsideration." 41 IBIA at 36.

3. The Membership Used for the Final Determination

The third issue in the Final Determination was the inclusion of persons who did not consent to being enrolled in the petitioner as "members" of the STN for purposes of the evaluation of community and political influence for the time period after 1996. In the Proposed Finding, the STN failed to satisfy the community and political influence criteria after 1996 in part because a substantial portion of the actively involved membership, whose activities helped STN meet these criteria for the earlier time period, were no longer members of the petitioner. PF at 20.[11] These individuals, about 60 in number, were a "substantial element" of the community and political system as it existed between 1967 and 1996.[12] FD at 53-55. Omitted from the certified membership list were some significant residents of the Schaghticoke reservation, prior leaders and active members. Despite the PF conclusion that the STN failed community without these individuals, they did not enroll in the petitioner after the PF, and thus were not members of the STN at the time of the FD.[13]

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[11] Important segments of the group as it existed prior to 1996 resigned membership in the petitioner or declined for internal political reasons, to participate in STN's enrollment process.

[12] As discussed more fully on pages 53-55 of the FD, the following persons are examples of persons not members of the STN:

- Reservation resident and former chairman Alan Russell, his family, and the Gail (Russell) Harrison and Marjorie (Russell) Overend family;
- Former chairman/chief Irving Harris and his immediate family;
- Several members of the Cogswell family including sons of "sagamore" Truman Cogswell, who held office themselves during the 1960's;
- Former council members Gary Ritchie, and Phillip Johnson and Shelley (Kayser) Nadeau, and her immediate family.

As stated in the FD, these individuals "were formerly enrolled with the STN or have been closely involved with the STN throughout their lives." FD at 6. Some of these individuals are members of the Schaghticoke Indian Tribe (SIT).

[13] Before the FD issued, OFA received copies of letters from 15 of the 54-60 individuals indicating that they wished to join STN, but 9 of them rescinded those statements within days.

Although "member" of a petitioner is defined in the regulations as requiring "consent[] to being listed as a member of that group," 25 C.F.R.§ 83.1, and although most of these individuals did not so consent, and some affirmatively resigned, the FD, in contrast with the PF, included them as part of the group, thus allowing the petitioner to meet community and political authority from 1996 to the time of the decision. The FD concluded that the certified membership list and the second list of unenrolled individuals reflected the apparent political community that existed, despite the disagreement, and since the Assistant Secretary-Indian Affairs did not have the authority to acknowledge only part of the group, the two lists could be combined. FD at 56. These individuals, however, continued to object before the IBIA to being considered members of the STN. The IBIA referred this issue back to the Department as a possible ground for reconsideration. 41 IBIA at 42.

4. The RFD is the Final Agency Action Under Review.

The FD proposing to acknowledge the STN never became effective because as provided in the regulations, interested parties filed requests for reconsideration before the Interior Board of Indian Appeals in April and May 2004. 25 C.F.R. § 83.11(a)(2). The IBIA vacated the decision a year later in May 2005.

The STN filed a motion with the Court in the consolidated land claim cases seeking technical assistance on marriage rate calculations and additional time to submit information to the Department.[14] Consistent with the Court's order, the Department provided written technical assistance and guidance to STN and the parties on July 14, 2005, allowed briefing, and accepted evidence pertinent to the marriage rate issue. RFD at 4. Associate Deputy Secretary James Cason, by letter to the parties, brought the timing of the regulations into conformity with the

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FD at 52.

[14] Dkt #250, *United States of America v. 43.47 Acres of Land,* "Motion to Amend Scheduling Order etc." by STN filed June 15, 2005.

extended timing in the court order by waiving the regulations and extending his time period to issue the RFD. Fed. Exh. E.

The Reconsidered Final Determination was issued on October 11, 2005. The Associate Deputy Secretary signed the consensus recommended decision provided by the OFA. In the RFD, the OFA professional staff analyzed and evaluated the evidence in the record consistent with the analysis and direction provided by the IBIA. As had been done once before, on the Chinook petition, the Department changed a FD proposing to acknowledge a petitioner into a RFD not to acknowledge the group. *Compare* 66 *Fed. Reg.* 1690 (Jan. 9, 2001) (FD on Chinook) *with* 67 *Fed. Reg.* 46204 (July 12, 2002) (RFD on Chinook). That same day, the Department also issued reconsidered final determinations on the Pequot petitioners, finding that they did not merit federal acknowledgment, reversing the final determination. *Compare* 67 *Fed. Reg.* 44,234 (July 1, 2002) (FD on Pequot) *with* 70 *Fed. Reg.* 60,099 and 60,101 (Oct. 14, 2005) (RFDs on Pequot).

The RFD concluded that STN did not provide sufficient evidence for acknowledgment as an Indian tribe. This 86-page decision is the final agency action now under review under the Administrative Procedure Act. The RFD affirms the analysis and conclusions in the FD and PF that were not rejected, revised, or inconsistent with the analysis and conclusions in the RFD. Its conclusions are discussed below.

At the time the Department issued its RFD, it had made 37 final decisions, and 42 proposed findings (37 plus an additional five on other petitions), weighing evidence and interpreting the regulations. The agency's interpretation of its own regulations is entitled to deference, *Chevron v. National Resources Defense Council,* 467 U.S. 837, 843-45 (1984); *Masayesva v. Zah,* 792 F. Supp. 1178, 1187 (D. Ariz. 1992), as is the weight given to the evidence by the agency. *Miami Nation of Indians of Indians v. Babbitt,* 55 F. Supp. 2d 921, 925 (N.D. Ind. 1999) (the focus of judicial review is not the wisdom of the agency decision but the

process by which the decision was reached). The agency has developed its expertise in acknowledgment, employing experts in the fields of history, anthropology and genealogy. *James v. U.S. Department of Health and Human Services,* 824 F.2d 1132, 1138 (D.C. Cir. 1987); *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368, 1383 (2d Cir. 1977) (court is not empowered to substitute its judgment for that of the agency).

The STN failed to provide sufficient evidence of both community and political influence or authority for significant periods of time. Because both criteria are mandatory, before this court could remand the decision to the agency, it must find first that the decision on each of the criterion was arbitrary and capricious under the APA. As long as the evaluation of the evidence under either (b) or (c) in the RFD is reasonable based on the agency's interpretation of the regulations, the decision should be affirmed.

C. The IBIA Concluded Properly that Continuous State Recognition Was Not Probative to Demonstrate Either Community or Political Authority.

As discussed in both the PF and FD, Connecticut's continuous relationship as it existed with the Schaghticoke was an "implicit" recognition of a distinct political body, coupled with a state reservation from colonial times until the present, a state administered Schaghticoke tribal fund and state appropriations for them into the 1950's, and non-state-citizenship status of its members until 1973. FD at 13, 14-15.[15]

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[15] The FD found that the state recognition was an "implicit recognition of a political body" because the relationship originated in the Colony's relationship with a distinct political body, which was not questioned later by the State. "The distinct political underpinning of the laws is less explicit from the early1800's until the 1970's." FD at 14-15. As stated in the PF, the State after the early 1800's continued the main elements of the earlier relationship (legislation that determined oversight, established and protected land holdings, and exempted tribal lands from taxation) essentially without change or substantial questioning throughout this time period. PF at 184. The FD concluded that the State did not deal with or identify formal or informal leaders of the Schaghticoke and did not consult with members concerning issues which concerned the entire group. Thus the relationship was not direct evidence of community or political authority or influence within the petitioner, nor did it reflect such processes. The relationship was only "implicit." STN Exh. 69; FD at 14.

The Interior Board of Indian Appeals, however, did not accept this implicit relationship as evidence under the criteria. The IBIA decision vacated the FD, concluding that the State's "implicit" recognition of the Schaghticoke as a distinct political body - "even assuming it is a correct characterization of the relationship - is not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority within that group." 41 IBIA at 34. The IBIA relied on the extensive legal analysis in its decision *In Re Federal Acknowledgment of the Historical Eastern Pequot Tribe (HEP),* 41 IBIA 1 (May 12, 2005), issued the same day, vacating the FDs on the Eastern Pequot and Paucatuck Eastern Pequot petitioners. STN Exh. 113.

The IBIA in its *HEP* decision concluded that the state relationship as discussed in the FD was of little probative value as evidence of community or political influence or authority.[16] The decision noted that the state relationship was not intrinsically suitable to demonstrate community or political influence and authority as required by criteria (b) and (c). 41 IBIA 15, 16. "Rather . . . the evidentiary relevance and probative value of such a [state] relationship depends on the specific nature of the relationship, the specific underlying interaction between a state and a petitioner, and how that relationship and interaction reflect in some way one or more of the elements in the definitions of 'community' or 'political influence or authority' contained in section 83.1" of the regulations. 41 IBIA at 16. It must be determined on a case- and fact-

[16] The IBIA delineated the major elements of the state relationship as: "(1) a separate reservation land base . . . which was not subject to taxation or adverse possession; the land and funds derived from it were defined as belonging to the tribe, although title was held by the State; (2) State-appointed overseers, since 1764, with authority over the tribe's reservation land and funds, and responsible for the welfare of the tribe's members; (3) the non-State citizenship status of members of the tribe until 1973, under which they were not legally eligible to vote in State and local elections, which was a distinction that applied to members of the specific tribes recognized by the Colony and State and not to other Indians living within the State; and (4) Colony and State laws which, until 1808, 'clearly reflect the idea that the tribes had a distinct political status', a status which continued after 1808 in the form of the first three elements." 41 IBIA at 10-11.

specific basis. *Id.*

The IBIA assumed for the sake of argument that there was probative evidence that the elements of the state relationship existed on a continuous basis through which the State implicitly recognized its "tribes" as political entities, but posited that "the issue is whether such implicit state recognition constitutes evidence that is probative of criterion (b) or (c)."[17] 41 IBIA at 17. The IBIA agreed that the relationship may be probative of the group being "distinct" as required as part of the community criteria, but that the existence of the relationship does not show the other necessary part of the community criterion: "consistent interactions and significant social relationships exist within its membership." *Id.* at 17-18. Even if the state laws "were structured" to treat them "as a single group," "that fact alone would not seem to be probative for showing whether [the group] actually existed as a single community." To be probative, the state relationship would need to actually "reflect[] the actual or likely existence of those interactions and social relationships" within the petitioner's membership. The IBIA found that the discussion in the FD of the state relationship was too general to provide evidence of the social relationships and interactions within the petitioner. *Id.* at 18.

Similarly to meet political criterion (c), there must be evidence of political authority or influence: the leaders must maintain political influence or authority over its members. *Id.* at 18, 25 C.F.R. § 83.7(c). The IBIA noted that the essential requirement of criterion (c) is "that group leaders influence the opinions or actions of a substantial number of group members on issues regarded as significant to the group as a whole and [that] the actions of leaders are influenced by the group." 41 IBIA at 3. This bilateral political relationship must exist broadly within the group. *Id.* at 18. The IBIA concluded: "We fail to see how 'implicit' state recognition of a group

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[17] The IBIA rejected arguments that state recognition could never be used, finding the argument an over-simplification and over-generalization of the potential character of state relationships with petitioners that "could be varied and complex." 41 IBIA at 15-16.

as a political entity constitutes probative evidence that the group *actually* exercises political influence or authority, and that there are *actually* leaders and followers in a political relationship. Rather, there needs to be more than 'implicit' recognition, and the relationship between the State and the group needs to be expressed in some way that reflects the existence or likely existence - not simply theoretical or presumed - of political influence or authority within the group, as defined in 83.1."[18] *Id.* (emphasis added).

The IBIA noted also that the probative value of any action by the State had to be determined in context and in relation to other evidence during the same time period, including other actions and opinions by the State denying such political existence.[19] *Id.* at 19.

The IBIA concluded that state recognition and the continuous relationship as used in a non-specific way in the Eastern Pequot and Schaghticoke FDs, was not additional evidence of community or political influence within the group. Although the existence of a reservation "may have been conducive to community and political processes within the group . . . its probative value as indirect evidence would seem to depend upon a more *specific* showing that the State's action in maintaining the reservation reflected one or more components of the definitions of community or political influence or authority for the group." *Id.* at 20 (emphasis added).[20] If the

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[18] For instance, the IBIA in *HEP* stated that although the State took action apparently in response to the group's election of Atwood Williams, "there was no documentation of activities" by him. *Id.* at 18. Although leadership need not be shown at every point between 1933 and 1955, the IBIA explained its disagreement with the analysis and evaluation in the FD: "[O]ur difficulty is that the FD appears to assume that the State court decree in 1933 has probative value for showing political processes within the group for the entire subsequent 22-year period . . . and that a bilateral relationship existed between the leadership and members of the group as a whole. . ." *Id.* at 19. The IBIA, thus, required "direct" and more frequent evidence of the political processes within the group.

[19] The IBIA referenced the State's opinion in 1955 that the Connecticut Indians had "wholly lost their political organization and their political existence." *Id.* at 19.

[20] In contrast, the STN FD used state recognition as direct evidence: "The Department's reevaluated position is that the historically continuous existence of a community recognized

state relationship was "simply a historical hold-over," it would not reflect the current dynamics within the group that must be shown under the regulations.[21] *Id.* at 21.

Finally, the IBIA concluded that the use of state recognition was a substantial portion of the evidence relied upon and could affect the ultimate decision of the Department. 25 C.F.R. 83.11(d)(2). Therefore, it vacated and remanded the FD to the Department. *Id.* at 21-23, *In Re Federal Acknowledgment of the Schaghticoke Tribal Nation,* 41 IBIA at 34.

D. Following an In-depth Analysis, the Reconsidered Final Determination Properly Concluded that the STN Did Not Meet the Mandatory Criterion 83.7(c)"Political Authority or Influence."

1. Burden of Proof

Section 83.6 of the regulations states that"[t]he Department shall not be responsible for the actual research on behalf of the petitioner." The burden of proof is on the petitioner to demonstrate that it meets the seven mandatory criteria. The preamble to the 1994 revised regulations further elaborates the standard of proof required:

> [T]he primary question is usually whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion, for example, showing that political authority has been exercised. In many cases, evidence is too fragmentary to reach a conclusion or is absent entirely. In response to these comments, language has been added to § 83.6 codifying current practices by stating that facts are considered established if the available evidence demonstrates a reasonable likelihood of their validity. *The section further indicates that 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*

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throughout its history as a political community by the State and occupying a distinct territory set aside by the State (the reservation), provides sufficient evidence for continuity of political influence within the community, even though direct evidence of political influence *is absent* for two historical time periods." FD at 120 (emphasis added).

[21] In addressing the state citizenship status of the group, the IBIA noted that the Assistant Secretary will need "to determine precisely how that status is probative at a given time. . . and consider the new evidence offered by the State, which appears to show that certain Eastern Pequot individuals were included on state voter registration rolls." *Id.* at 23. Such evidence pre-dating 1973 was presented to the IBIA regarding the Schaghticoke as well. CT-V007-D0021. STN did not submit evidence to IBIA in response to the State's evidence.

petitioner.

59 *Fed. Reg.* at 9280. (Emphasis added).

The political authority criterion, § 83.7(c), requires sufficient evidence to demonstrate "that the petitioner has maintained tribal political influence or other authority over its members . . . throughout history until the present." Political influence or authority is defined in § 83.1 as "a tribal council, leadership, or internal process or other mechanism" used by the group "to influence or control behavior of its members in significant respects" or "making decisions for the group which substantially affect its members" or dealing with outsiders "in matters of consequence."

This criterion reflects the fact that a favorable acknowledgment decision establishes a government-to-government relationship with a *pre-existing* sovereign government. If acknowledged, the group will exercise significant governmental powers over its members and trust territory, including law enforcement, taxing authority, and a court system. Thus, to meet this criterion, the petitioner must demonstrate that the group leaders make decisions and act on matters of consequence to the members or affect members' behavior in more than a minimal way, that members influence the leaders, that there is concerted group action - - that the group is a political entity where members and leaders have a bilateral political relationship. This requirement is consistent with the fact that regulation of Indian tribes "is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'" *United States v. Antelope*, 430 U.S. 641, 646 (1977). *See*, *United States v. Washington,* 641 F.2d at 1373 (to warrant special treatment, Indian tribes must have continuously functioned as distinct Indian cultural or political communities); *Morton v. Mancari,* 417 U.S. at 553 (a tribe is a political, not a racial, classification).

2. The Conclusions in the PF and FD Based on the Analysis of the Evidence Foreshadowed the Conclusions in the RFD Concerning the State Relationship.

The detailed analysis of the evidence and data in the record done previously for the PF and the FD concluded that the available direct evidence was insufficient to demonstrate community and political influence or authority - that was the reason that the OFA prepared the briefing paper for the PD-ASIA positing the two questions discussed above. *See* II.B. *supra*. Nevertheless, although much of the review had been done previously for the PF and the FD, the OFA reviewed again the evidence of the state relationship on reconsideration, following the reasoning of the IBIA decision as to when and how state recognition could be used as evidence.

STN does not challenge the evaluation and weighing of the little specific direct evidence provided under the criteria in the FD and RFD. Rather, it challenges only the RFD's conclusions on state recognition, marriage rates, and membership, seeking mainly to revert to the FD's general use of state recognition, bypassing the directions and conclusions of the IBIA.[22] STN offers no argument on state recognition that appeared in the record and which was not addressed in the PF, FD, or RFD. The state relationship and the political influence criterion is discussed next since the evidence is so lacking under this criterion.

As provided in the *Federal Register* notice for the PF: "For the period from 1801 to 1860, there is *no* evidence in the record pertaining to political authority or influence. There are *no* leaders named either by outside observers or in internal documents. *The State or the overseer did not deal with leaders* . . . [T]he evidence submitted did not include any data showing that the group expressed its views or was consulted with regard to the 1852 or 1861 overseer appointment . . . There is no direct information in regard to political process." 67 *Fed. Reg.*

[22] The inadequacy of the FD's analysis of state recognition as pointed out by the IBIA, the mathematical error as well as the departure from marriage rate precedent without providing an explanation, and the membership issue, if subject to judicial review, would likely be found arbitrary and capricious under the APA.

76187 (emphasis added), Fed. Exh C.

The Final Determination reiterated the limitations found in the PF concerning the state relationship for purposes of evaluating the political influence criteria in 25 C.F.R. § 83.7(c): "In this instance, there are substantial periods of time, from the early 1800's until 1876 and from 1885 until the late 1960's, when the State did not deal with or identify formal or informal leaders of the Schaghticoke, and did not consult with members concerning issues which concerned the entire group." FD at 13. In fact, "[i]n the 1930's, the State declared affirmatively that there were no leaders recognized by the group." *Id.*[23] As summarized in the briefing paper, "[t]he petitioner has little or no direct evidence to demonstrate that criterion 83.7(c) has been met between 1820 and 1840 and between approximately 1892 and 1936 . . . [The state relationship] did not extend to direct dealings with Schaghticoke leaders or consultation with the group on group matters during the time periods in question." STN Exh. 69 at 1-2. The FD evaluated the direct evidence of political relationship within the Schaghticoke during these time periods, but concluded that it was insufficient under existing precedent. FD at 120, 122. Referencing 1820-1840 and 1892-1936, the FD at 120 found that "direct evidence of political influence is *absent* for two historical periods" and insufficient for additional time periods. FD at 122, 124. No prior decision to acknowledge a group had any such absence or lack of evidence.

The Reconsidered Final Determination reviewed the state recognition of the Schaghticoke to determine, as advised by the IBIA, whether actions by the state reflected the existence or likely

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[23] The Schaghticoke PF concluded that Connecticut's relationship with the Schaghticoke differed materially from that with the historical Eastern Pequot tribe. Specifically, it concluded that, unlike the historical Eastern Pequot where there were recognized leaders with whom the State or state-authorized officials dealt, for the Schaghticoke there were no such dealings between 1800 and 1967, except for two petitions, one in 1876 and one in 1884, to which the Litchfield County Superior Court responded. Thus, the PF found that relationship of this petitioner with the State was different in a material aspect from that of the historical Eastern Pequot. FD at 13. No new evidence during the comment period or before the IBIA changed that conclusion.

existence of political influence or authority within the group. 41 IBIA at 18. The RFD concluded that "[t]he State did not implicitly or explicitly predicate its legislation and policies regarding the Schaghticoke . . . on the basis of the recognition of a government-to-government relationship with the Indians, or on the basis of any recognition of the existence of bilateral political relationship within the group." RFD at 48. Although the state relationship "had a foundation in the more than 200 year history of the maintenance of the Schaghticoke reservation near Kent by the Colony and later the State . . . in reviewing the specific state relationship with the Schaghticoke, consistent with the IBIA ruling, the evidence of the actual interactions between the different representatives of the State and the Schaghticoke does not provide evidence of political authority and influence in the group." RFD at 48.

As concluded previously in the PF, following a review of testimony in 1919, 1921, and 1923 concerning appropriations for the Schaghticoke, "[n]one of the comments made at the . . . legislative hearings referred to any tribal leadership or indicated that either the State, the legislators, or the overseer dealt with tribal leaders in requesting these appropriations." PF at 185-186. Similarly, the PF found that the evidence "do[es] not contain any evidence that either the . . . [State Park and Forest Commission] or the overseers whom it appointed consulted with the residents on the Schaghticoke reservation in regard to its management . . . nor on the appointment of a new overseer." PF at 191. Neither did other state records "contain any evidence that there was a leader designated by either the reservation residents specifically or the Schaghticoke as a whole for purposes of dealing with the State. Rather, the State dealt directly with individuals. It did not indicate any awareness of the existence of a tribal leader, even when corresponding with those individuals who, such as Howard N. Harris, the petitioner asserts to have been leaders." PF at 191. The FD confirmed these conclusions, as did the RFD. FD at 122, 124, RFD at 57.

The RFD found also that the more recent state legislation in 1973 and 1989 did not

provide evidence concerning the exercise of political authority within the petitioner, even though it did establish a government-to-government relationship between the State and the Schaghticoke. RFD at 48.

The RFD reviewed the state laws from 1902 and 1918 that linked the status of Indians with non-citizen aliens, until repealed in the early 1970's. The RFD concluded that there was no state policy that prevented Indians from exercising citizenship rights. Further, the theoretical legal status was not predicated in fact on the existence of a government-to-government relationship with the Schaghticoke, nor on the recognition of the group as a political entity. RFD at 49.

The RFD concluded that the citizenship status did not provide evidence of internal relations within the Schaghticoke. RFD at 49. In fact, evidence before the IBIA included voter rolls that included Schaghticoke during the time period when they were "non-citizens." CT-V007-D0021. Nor was there evidence that the state relationship caused the STN to act as a group in response. *Id.* at 55, 57, 58.

The RFD then reviewed the state's overseer system and its successors in the Litchfield Superior Court, Court of Common Pleas, the Park and Forest Commission and Commissioner of Welfare. The review did not find evidence that demonstrates a bilateral political relationship within the group, or that the group interacted with the state as one polity to another. RFD at 50. The RFD concluded that "there is insufficient evidence in the record that shows the exercise of political authority or influence within the group deriving from the overseer system or of interactions between Schaghticoke members and representatives of the State that demonstrate political organization and activity. The State's guardianship role does not provide evidence to demonstrate criterion 83.7(c)." RFD at 50.

The Department in the RFD reviewed the final aspect of the state relationship - that of the reservation lands, residency and management of the Schaghticoke resources. It determined that

this relationship was not predicated on a government-to-government relationship, but that responses by the Schaghticoke to the State's actions are evidence to be evaluated under political criterion (c). *Id.* These responses as evaluated in the FD, however, did not show group action - the evidence of political processes within the petitioner remained insufficient. *Id.*, FD at 120-124.

The state documents in the administrative record do not characterize what the "tribe" was for purposes of maintaining the reservation, managing of its assets, and providing financial support and services. The record included no material in which the State or a judicial body articulated a specific reason or rationale for the distinct status of the Schaghticoke as a state recognized tribe after the 18th century, and did not characterize it as a political body. RFD at 51. Thus, the state relationship did not provide evidence for community or political influence by the Schaghticoke over its members.

Neither the state actions or state documents provided significant evidence about the character of the group. *Id.* The RFD reviewed the two Attorney General opinions from 1939 and 1955 but they did not demonstrate that there was political influence or authority within the group. RFD at 51. The opinions and evidence surrounding them did not provide significant evidence about the character of the Schaghticoke, and did not assert a political basis for the state relationship. *Id.*[24] Since the state relationship did not provide evidence "that reflected or indicated the likelihood of community or political influence or authority within a single group" (41 IBIA at 21), the Department was left only with the direct evidence of political authority or

[24] The 1939 opinion concerned full-blooded Indians and concluded that they did not have a right to hunt and fish off reservation without a license, and did not opine on their rights on reservation. The opinion provided that the State does "not have at the present any Indian tribal organizations . . . [T]hey are as completely subject to the laws of this State as any of the other inhabitants thereof. " RFD at 51. The 1955 opinion concluded that "There has been no continuity or succession of political life or power" between the state Indians and the Indians who made treaties in the colonial period.

influence within the record that the PF and FD had found to be insufficient to meet the regulatory criteria. Therefore, the RFD concluded that the STN *failed* to meet criterion 83.7(c), political influence or authority, from 1801-1875, from 1885-1967, and 1996-2004. These earlier time periods had been identified in the PF as periods where evidence was absent or insufficient.[25] These periods were identified also in the FD as lacking in direct evidence. FD at 120, 122, 124.

The STN does not challenge how the Department weighed and evaluated the little direct evidence of political authority or influence that was provided. Thus, STN has waived its ability to challenge the evaluation of the specific direct evidence that was evaluated in the various decisions as insufficient. *See Knipe v. Skinner,* 999 F.2d 708, 711 (2d Cir. 1993) ("Argument may not be made for the first time in a reply brief."); *Ernst Haas Studio, Inc. v. Palm Press, Inc.,* 164 F.3d 110, 112 (2d Cir. 1999) ("[N]ew arguments may not be made in a reply brief."). *See also U.S. ex rel. Smith v. Yale-New Haven Hosp., Inc.,* 411 F. Supp. 2d 64, 73 (D. Conn. 2005) ("It goes without saying that a reply brief should respond only to issues and arguments raised in the opposition brief" citing D. Conn. L. Civ. R. 7(d).); *Cuba-Diaz v. Town of Windham,* 274 F. Supp. 2d 221, 230 n.8 (D. Conn. 2003) (same). The insufficiency of the specific evidence, therefore, is referenced here only for purposes of background.

1801-1967: As discussed above, the state relationship did not provide any direct evidence during this period - it did not reflect the existence of social interactions, group action, or political authority within the group. The State did not deal with or identify any leaders of the Schaghticoke, and did not consult with members concerning group issues, except for the two petitions submitted in 1876 and 1884. Other than these 8 years between 1876-1884, both the PF and the FD found insufficient direct evidence of a bilateral political relationship within the STN

[25] Quoting from the PF, "In this instance, there are substantial periods of time, from the early 1800's until 1876 and from 1885 until the late 1960's, when the State did not deal with or identify formal or informal leaders of the Schaghticoke, and did not consult with members concerning issues which concerned the entire group." RFD at 47.

for the other 154 years.[26] There is no dispute that the FD relied *solely* on the implicit state relationship to determine that the STN met political criterion (c) for some time periods, and relied partially on the implicit state relationship for other significant periods. Little new direct evidence under this criterion was provided to the IBIA by the STN for these periods.

The Reconsidered Final Determination concluded that for the time period 1801-1875, based on the analysis of the specific state relationship with STN and the "[l]ittle direct evidence of political influence or authority" during these periods, that the STN does not meet criterion 83.7(c) for the years 1801-1875. RFD at 52.

The RFD reviewed again the evidence submitted for the time period after 1884, including new evidence submitted to the IBIA concerning an 1892 petition to the Litchfield County Court of Common Pleas. RFD at 53. The new evidence made clear that the petition was an individual action, not taken on behalf of the Schaghticoke as a group. *Id.* With evidence for this time period lacking, the RFD concluded that the STN does not meet criterion 83.7(c) for the period 1885 to 1892.

The RFD reviewed the state relationship and "new evidence" before the IBIA concerning the sale of reservation lands in 1898 and a report and census in 1902. The RFD rejected STN's inference that the Schaghticoke "must have been consulted," finding no evidence that such consultation occurred, and the argument duplicated an argument already rejected in the FD at 92-94. RFD at 54. Petitioner's census argument before the IBIA was rejected because nothing submitted to IBIA "shows that the preparation of the census in any way constitutes evidence of political authority or influence regarding criterion 83.7(c). *Id.*[27] The review of state recognition

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[26] The mistaken marriage rate calculations provided indirect evidence of political authority for 1801-1820 and 1840-1870. *See* discussion of marriage rate below, II.E.

[27] In response to an STN report submitted to the IBIA, the RFD reviewed again an undated newspaper article where two persons attended a court session. The RFD concluded

discussed above added no evidence of political authority within the group. Thus, the RFD affirmed the conclusions in the PF and FD that the STN did not provide sufficient evidence to meet political authority from 1892 to 1936.[28]

The Department reviewed the 1936 report of the State in which the State declared affirmatively that there were no leaders recognized by the group. RFD at 47 citing PF at 10; RFD 56. The RFD concluded that the actions by the State did not present evidence of political influence or authority within the STN. The STN thus failed to provide sufficient evidence for 1885-1936. *Id.* For 1937 to 1967, the RFD found that the mere existence of the state relationship did not reflect actual political activity within the petitioner, and as in the PF, STN did not meet criterion (c) for this period. From 1996 to 2004, the RFD concluded as did the PF that STN did not meet political criterion (c) because of the make up of its membership. This issue is discussed below, II.F.2.

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again that the evidence did not show that attendance "was the result of a group decision" or why they attended. *Id.* at 55. Similarly, no evidence concerning the cemetery flooding showed political activity by the group nor any decision making process. *Id.* The RFD reevaluated the trip to New Milford, and found nothing that indicates that it was a result of a group decision making process. "STN's new argument does not overcome the issues raised in the STN FD concerning this evidence." *Id.* The STN does not challenge these conclusions.

[28] The RFD noted, and the STN does not challenge, that there was insufficient evidence that James H. Harris (died 1909) and George Cogswell (died 1923) were leaders. RFD at 57. "None of the contemporary descriptions of their activities described roles as leaders of the Schaghticoke." RFD at 54 citing PF at 26. The references to them "do not provide substantial evidence that they exercised political influence or carried out activities which meet the definition of political influence in § 83.1 of the regulations." *Id.* Similarly, the RFD reviewed the Rattlesnake Club and not only found no evidence of "leaders," but also reviewed the participation and concluded that it was not a community activity. RFD at 56 citing FD at 98-99. It did not encompass most reservation residents and did not include Schaghticokes who lived off reservation, a majority of the membership. *Id.* at 56. It involved mostly non-Indians. The RFD concluded that arguments presented by STN before the IBIA do not address the reasons articulated in the STN FD that discounted the rattlesnake hunts, "culture keepers" and other evidence presented to demonstrate political influence. RFD at 55-57. STN now does not challenge these conclusions.

In short, the RFD concluded that no significant political processes existed among the Schaghticoke for nearly one and a half centuries. In fact, the political authority was demonstrated only for 1876-1884 and 1967-1996. There was, thus, no continuous political processes throughout history. There was no demonstrable political relationship with most of the membership and the STN did not act on matters of sufficient importance to the membership. No petitioner has been acknowledged under the regulations with such a deficiency of evidence. The Schaghticoke do not meet the intent of the regulations and the precedents underlying the regulations. Consistent with § 83.6(d) where a petitioner can be denied for a lack of evidence, the Department denied acknowledgment to the STN. STN did not meet its burden of proof. This decision is reasonable based on the record and is not arbitrary and capricious. It withstands judicial review.

E. The Analysis of Marriages in the Final Determination Was Not Consistent With Acknowledgment Precedent. The Marriage Rate Analysis in the FD Impacted Only a Limited Period of Time.

The marriage rate analysis was an issue that IBIA suggested "was best handled on reconsideration." 41 IBIA at 36. Under § 83.7(c)(3), a group that provides sufficient evidence under community criterion (b) that "[a]t least 50 percent of the marriages in the group are between members of the group" also meets the political influence criterion for the same time period. The marriage rate analysis in the FD impacts 50 years of political influence criterion (c), but does not impact the deficiencies in evidence concerning political influence for the other 115 years for which the RFD found that STN failed to meet 83.7(c).[29] Thus, even if this Court does not defer to the agency's interpretation of its own regulations concerning marriages, STN would still fail political criterion (c) because of the other significant time periods for which the STN failed to provide evidence to demonstrate political influence or authority during its history. The

[29] The marriage analysis impacts only 1801-1820 and 1840-1870. STN otherwise failed to meet political authority criterion (c) from 1820-1840, 1870-1875, 1885-1967, 1996-2004.

RFD would remain valid.

The RFD lists the marriages counted for purposes of the RFD, based on the data in the administrative record, and an analysis of who was a member of the group for purposes of determining which marriages were within the group and which ones were not. See RFD 14-36, 72-83.[30] Petitioner does not challenge any of those facts or categorization of the marriages as within or without the group. Petitioner challenges only the method of calculating under the regulations - whether to count marriages or individuals in the marriage.

The RFD at 6-36 discusses the marriage rate analysis. The acknowledgment decision precedent provides that for purposes of calculating the marriage rate under § 83.7(b)(2) of the regulations, marriages are counted, not the individuals in the marriage. Appendix 1 of the RFD in table format lists the acknowledgment decisions that analyzed marriage rates under this provision of the regulations, § 83.7(b)(2)(ii).[31] This precedent was detailed to the parties by letter dated July 14, 2005. STN Exh. 99.

The RFD explains that the purpose of calculating marriage rates within the group under 83.7(b)(2) concerns the "social links" within the group established by marriages. "The ratio of

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[30] In addition, the RFD corrects the mathematical error that occurred in the FD for the years 1841-1850. RFD at 36.

[31] STN argues at fn. 40 of its brief that "current and former members" of OFA "recall" the *Jena* and *Ramapough* methodology as the same as used in Schaghticoke. No current member of OFA is identified. Nevertheless, such recollections, including that of a former anthropologist who now works for STN, are mistaken. The prior decisions speak for themselves. *See* Genealogical Technical Report on *Jena* at 11-12: "There were 14 marriages within the Choctaw population between 1950 and 1959, 7 of the marriages, 50 percent, had both a Choctaw husband and wife. Thus, the high degree of in-group marriages was maintained until 1959." Fed. Exh. F. *See* discussion of *Jena,* RFD at 35. Contrary to what is stated in the Declaration of Dr. Steven Austin, STN Exh.110 ¶ 3, the *Ramapough* decision counted marriages and does not discuss methodology. *See* RFD at 71 and AC-V015-D0015 (Salerno to Roth). *See* July 14, 2005, letter to parties at 7 (STN Exh. 99), and RFD at 10-11, 12-14, discussing STN's arguments and acknowledgment precedent, and work notes of OFA professional staff at BR-V010-D008, BR-V014-D0008.

links [marriages] within a group versus those outside the group provides a valid measure of the level of social cohesion within the community." RFD at 8.

The language in the regulations themselves supports the interpretation used in the RFD and prior acknowledgment precedent of counting marriages. Whereas the language in other subsections of 83.7(b)(2) is in the context of 50 percent "of the *members*" or "of the groups *members*," the subsection at issue here references "50 percent of the *marriages*" are between members of the group. *Compare* §§ 83.7(b)(2)(i) and (b)(2)(iii) *with* § 83.7(b)(2)(ii).

The RFD cites the *Little Shell* PF that counted marriages and specifically rejected the methodology STN seeks: "The acknowledgment regulations plainly refer to the percent of *marriages,* not the percent of *members* of the group affected. Thus, the percent of *members* participating in in-group marriages is not relevant evidence for the 50 percent requirement of the regulations." RFD at 10.[32] As stated in the RFD, "[t]he use of the term 'marriages' rather than 'individuals involved in marriages' within a group reflects the intent of the regulations to measure social links." RFD at 14.

STN argues that "any methodology for calculating marriage rates based on § 83.7(b)(2)(ii) must exclude from consideration any *marriages* that are not *marriages in the group,*" (emphasis in original), STN Memo at 87. In other words, marriages to outsiders are excluded from the calculation. *See* STN's graphic crossing out a marriage to an outsider. STN Memo at 88. STN's proposed methodology of ignoring marriages of group members to persons outside the group, would lead always to rates of 100% - an absurd result - that does not measure social cohesion.

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[32] STN argues that a proposed finding has no precedential value. Although a proposed finding is subject to revision in the final determination, when there is no final determination yet, the decision provides evidence for precedent. The *Little Shell* PF discussion of marriage rates "provides a clear example and explanation of the interpretation of the regulations which are consistent with other acknowledgment decisions." RFD at 11.

Alternatively, STN argues that the appropriate way to count marriages is to *divide* a marriage outside the group by 2. (STN Memo at 91-92). Such procedure, however, does not reflect the language of the regulations or the precedent detailed in the RFD, and in the technical assistance provided. STN Exh. 99. Further, STN's proposed procedure does not measure social cohesion and social links as well as the Department's method of counting marriages. RFD at 14. As concluded in the RFD, "[m]arriages is a bilateral link which can be measured directly." *Id.*

The RFD also analyzed the articles and argument presented by the STN following the IBIA decision. The RFD discusses the articles, concluding that counting individuals was appropriate for the studies in the articles - which had "a different purpose than under the regulations" - but was not an appropriate measure for the regulations. RFD at 12. The RFD rejects STN's argument that there is a "unanimous consensus" in counting individuals.[33] *Id.*

Applying the precedent of counting marriages, the RFD concluded that at no time since 1810 did the STN provide evidence that 50% of the marriages were within the group. RFD at 36. Thus, there is no carryover evidence to political criterion (c) after 1810. The conclusions in the RFD are based on precedent dating from 1994, are a reasonable interpretation of the regulations, and should be upheld.[34]

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[33] Petitioner argues that "only" the OFA historian read the articles it submitted to OFA. STN Memo at 97-99. STN thus ignores the discussion and analysis of the articles in the RFD, a consensus recommendation. Fed. Exh. G. The memorandum of an OFA historian, Dr. Jackson, cited by STN actually contradicts STN's argument and STN Memo fn. 43, when it concluded that "[t]he 1983 article by McCaa and Schwartz . . . rejected the statistical analysis used by Cohen, the methodology adopted by STN in it's [sic] analysis of marriage patterns." STN Exh. 101 at 2.

[34] STN argues that the RFD should have analyzed the marriages in combination with other evidence to find political under § 83.7(c)(iv). STN Memo fn. 38. Such analysis is unwarranted when there is an *absence* of political evidence, as here for significant periods, because the lower rates of marriages must be *combined with* political evidence, and no such political evidence existed. 25 C.F.R. § 83.7(c)(1). Further, the FD did this analysis and found the evidence insufficient to meet political criterion (c), necessitating reliance on state recognition. 69 *Fed. Reg.* at 5572 (noting the "insufficient evidence" under (c) despite "strong evidence of

Petitioner argues also that the Supplemental Transmittal to the IBIA in December 2004 and the marriage analysis in the RFD was a result of "tremendous political pressure," "with little to no input from the OFA professional staff." STN Memo at 87, 95. Such arguments ignore the evidence in the record demonstrating OFA's questioning the marriage rate calculation on reading the Request for Reconsideration filed before the IBIA (AC-V015-D0005), and OFA's subsequent meeting on July 14, 2004 questioning the interpretation used in the FD (STN Exh. 102) and a meeting agenda in August 17, 2004 to discuss further the issue (BR-V014-D0050). These meetings within OFA culminated in a "Briefing Paper on Schaghticoke Reconsideration Request" dated November 16, 2004. Fed. Exh. H. The briefing paper, prepared by OFA, points out the inconsistency in the STN FD from acknowledgment precedent and provides options on how to proceed. OFA's recommendation was to file before IBIA to insure that the errors can be corrected and advise IBIA of the precedent. Fed. Exh. H at 2, STN Exh. 117 at 1. OFA noted the difficulty in remaining silent while IBIA might take a year to decide the case, raising "questions concerning how to evaluate acknowledgment cases" and "what technical advice to provide petitioners" in the interim. *Id.* All evidence points to a professional staff doing its job.[35]

Although Petitioner questions why the December 2, 2004 Supplemental Transmittal was not filed before it had filed its response brief to the State's Request for Reconsideration, STN ignores the fact that filing in December treated all parties equally, allowing IBIA to determine if additional briefing by all parties was appropriate. Such briefing was permitted by the Court post-

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community" for 1820-1840) and 69 *Fed. Reg.* at 5573 (noting insufficient evidence of political for 1892-1934, but with community evidence *and* state recognition, would meet (c)), Fed. Exh. D. *See also,* PF at 24-25.

[35] As testified by Secretary Norton, if a mistake was made, it should be corrected. Norton Dep. at 53, 58, STN Exh.3. The administrative process needed to respond to the mistake. *Id.* at 269. *Accord*, Solicitor Bernhardt testified "in order to maintain the integrity of the administrative process" they should inform the IBIA. Bernhardt Dep. at 102-3, STN Exh. 9.

remand following the technical assistance letter of July 14, 2005. Contrary to Petitioner's argument that the filing before IBIA was "unprecedented," STN Memo at 41, the OFA previously had pointed out an error in an FD to the IBIA.[36]

Petitioner's argument also ignores the law: "[T]he requirement of reasoned decisionmaking - the requirement that the APA places on agencies and that sets them apart from legislatures - implies that an agency may not deviate from its regulations without a reason . . . 'A rational person acts consistently, and therefore changes course only if something has changed.'" *Miami Nation of Indians,* 255 F.3d at 348-9; *Miami Nation of Indians,* 979 F. Supp. 771, 781 (N.D. Ind. 1996) ("[I]t may be arbitrary and capricious for an agency to apply one rule in some cases and the other in other cases without acknowledging or explaining the inconsistency."). Had OFA not admitted that a change in interpreting the regulations occurred without explanation and if the IBIA had not remanded the FD, a Court applying the 7th Circuit's reasoning in all likelihood would have remanded the decision.

F. The Schaghticoke Petitioner Failed to Demonstrate a Continuous Community Throughout History.

To demonstrate the community criterion 83.7 (b), the Petitioner must provide sufficient evidence that a predominant portion of the group comprises a distinct community and has existed as a community from historical times until the present. Community is defined in the regulations as any group of people that demonstrates that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and

[36] The Department informed the IBIA of errors in *In Re Federal Acknowledgment of the Ramapough Mountain Indians, Inc.,* 31 IBIA 61, 75 (1997) ("The Assistant Secretary concedes that the residence percentage stated in the Final Determination Technical Report was in error.") STN Exh. 122.

identified as distinct from nonmembers.[37] 25 C.F.R. § 83.1. The Reconsidered Final Determination found that the STN failed to provide sufficient evidence of community from 1920-1967 and from 1997-2004.

In the Proposed Finding, the STN met this criterion from 1920-1940 only by adding in state recognition, and failed it between 1940-1967 because there was not enough actual evidence of community on which to hang state recognition.[38] STN failed community between 1997 and 2004 in part because its membership list did not include a substantial portion of the community that was active from 1967-1996.

The STN met the criterion in 1920-1967 in the FD because the Department relied on state recognition as evidence - a finding that was subsequently vacated by the IBIA. STN met community criterion (b) in 1997-2004 in the FD when the OFA included unenrolled persons as part of the group to be acknowledged - an issue referred back by IBIA.

1. 1920-1967: STN Failed to Provide Sufficient Evidence to Demonstrate Community.

The Final Determination relied on the state relationship to meet criterion (b) for 1920-1940. FD 40, 59. No new evidence for this period was submitted before the IBIA. As discussed above in II.C and II.D.2 of this brief, the RFD reviewed the state relationship for this period and

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[37] As stated in the preamble to the 1994 revisions of the regulations, 59 *Fed. Reg.* at 9,287 regarding the requirement to demonstrate that social relationships actually exists, "the intent of the regulations and . . . the legal precedents underlying the regulations . . . require demonstration of the social solidarity of the tribe . . . [Existing acknowledgment] determinations have required evidence that significant social interaction and/or social relationships are actually maintained within the petitioner's membership."

[38] The PF found that direct evidence concerning community after 1920 was limited, but with state recognition, was sufficient to meet community. 67 *Fed. Reg.* at 76186 col.1, Fed. Exh. C. The PF found that "There is not sufficient evidence to demonstrate that criterion 83.7(b) is met between 1940 and 1967. . . The present analysis of this data . . . conclude[s] that the petitioner's claims to have demonstrated community . . . from 1940 to 1967 were *not* established." *Id.* col.2.

found that it did not provide additional evidence of community or political influence within the Schaghticoke. Thus, with no evidence to be derived from the state relationship, the STN did not meet (b) for 1920-1940. RFD at 37.

The RFD concluded similarly that for the period 1940-1967, the STN failed to provide sufficient evidence to demonstrate community. "The [s]tate actions did not provide evidence of community or political influence within the Schaghticoke, and the remaining evidence was insufficient to demonstrate the necessary social interaction among the Schaghticoke." RFD at 37.

The STN does not challenge the evaluation of the direct evidence that was insufficient to find community. Therefore, as the cases cited above in II.D.2 hold, STN is precluded from raising a challenge in its reply brief. Such evidence, thus, is referenced here only for the limited purpose of background. STN challenges only the issue of state recognition discussed above in II.C and II.D.2. Based on the above discussion of state recognition not reflecting any significant interaction within the Schaghticoke, the decision on community in the RFD is reasonable and should be affirmed.

2. Membership: The Reconsidered Final Determination Correctly Excluded Persons Who Were Not Enrolled in the Petitioner and Correctly Concluded that STN Did Not Meet Community or Political Influence From 1996 to Present.

The analysis of both political influence and community from 1996 to the present is impacted by the set of membership issues referred back to the Department as a possible ground for reconsideration. One such issue was whether the FD erred in including on the base membership roll of the STN, persons who were not enrolled in the group, some of whom had affirmatively objected to being part of STN. 41 IBIA at 37, 39.

The regulations define "member" of a petitioner as "an individual who is recognized by an Indian group as meeting its membership criteria *and who consents* to being listed as a

members of that group." 25 C.F.R. § 83.1, emphasis added.

The PF concluded that the STN did not meet criteria 83.7(b) or 83.7(c) from 1996 to the present in part because a substantial segment of the group that was actively involved in the community and whose activities helped demonstrate these criteria before 1996, were no longer listed as members.[39] Thus, STN's membership reflected only a part of the actual community.

During the comment period, STN submitted its new membership list with 271 living members. It submitted a second list of 42 persons who were not enrolled, but who it considered were part of the community and who would likely qualify for membership. RFD at 59. The FD found that these individuals, as well as 14 others, were part of the community. They were actively involved in the STN political and social community, but refused to enroll in the STN. The FD found that there was one group and "merged" the lists for purposes of the base roll membership of the Petitioner.[40] FD at 57-58.

Subsequently, when the membership issue was before the IBIA, 33 of these 42 unenrolled persons affirmatively declined to consent to being included on the STN membership list or be considered part of the STN if it were acknowledged. The RFD concluded that they thus are not "members" within the meaning of § 83.1. RFD at 62. This conclusion is consistent with the

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[39] For the period after 1996, the PF concluded "The present-day community, as defined by the 2001 STN membership list does not meet the requirements of criterion 83.7(b) . . . Important segments of the group as it existed prior to 1996 have resigned membership . . . or do not appear on the current membership list . . . The absence of these individuals, who were a part of the social and political relations within the group between 1967 to 1996, means that the current petitioner, as defined by its most recent enrollment, is substantially less than the entire community. . . . the Department . . . does not have the authority to acknowledge petitioners which were parts of unrecognized tribes." 67 *Fed. Reg.* at 76186 col. 3, Fed. Exh. C.

[40] As stated in the FD, "[T]he September 28, 2003, STN membership list reflects the most current stance of a conflict within the Schaghticoke that in the past . . . has resulted in a divided and then a re-united group. The current certified membership list includes only part of the actual Schaghticoke political community because those in opposition to the current leadership have refused to re-enroll until certain political issues are resolved. Thus, the list only reflects part of the body in conflict." FD at 55.

court decision in an acknowledgment case, *Masayesva v. Zah,* 792 F. Supp. 1178, 1187-88 (D. Ariz. 1992). RFD at 61-62. There, the court held that a necessary pre-condition to being a member was consent to a bilateral political relationship, both by the Paiutes and the Navajo Nation.

These 33 persons, and an additional 14 others, were part of the political community but were not in the STN. The result was that "STN does not reflect the community and political processes that existed between 1996 and the time of the STN FD." RFD at 62. The RFD concluded, therefore, that STN failed to meet either political criterion (c) or community criterion (b) for that time "because as defined by its membership list, it does not constitute the entire community and political system." *Id.* Further, "the Secretary has no authority to acknowledge only part of a community." *Id.*[41] Simply stated, it was not the same group that met the criteria for the prior time period of 1967-1996.

Petitioner argues that the RFD's conclusion - that these individuals were not part of the petitioner - was a "last-minute reversal." STN Memo at 99, 101. This argument ignores the similar conclusion in the PF that STN failed both community criterion (b) and political criterion (c) from 1996-present, in part because of the significance of the omission of these individuals. PF at 20. In technical assistance (TA) to the STN, the OFA advised "that it is very important that the STN membership substantially include these individuals and families," and "as it now stands the group is not the same group that was active from the 1960's to 1996." STN Exh. 105 at 2-3.

STN asserts that OFA "had consistently taken the position" that the group "could meet the requirements . . . by amending its constitution." STN Memo at 101. This assertion is belied by the just referenced TA letter, as well as STN's own letters to the un-enrolled members:

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[41] To be acknowledged as an Indian tribe, a group must constitute a community which is distinct and whose members have significant social ties with each other. Social and political interactions do not distinguish those on the STN certified membership list from those not on that list.

"B.A.R. [now OFA] along with our professionals agree that we will have a much stronger petition if we go forward as one." TC-V005-D0035 at 2. "[W]e were told that . . . [our] efforts for federal recognition would be enhanced if our tribal rolls included as many historically significant members as possible." SN-V063-D0006, SN-V063-D0011 (same). Even STN admits here that OFA "encouraged" them "to bring as many of these individuals as possible into membership." STN Memo at 100. STN's understanding of the significance of the membership list is evidenced also by STN's submission of the second list of unenrolled members, an attempt to comply with OFA's consistent advice. STN Exh. 106 at 3. Thus, STN understood that amending the constitution alone was not sufficient; it had to be followed by actual changes in the membership.

The RFD provides a reasoned explanation for its conclusion that these individuals were not members of the petitioner. The explanation is founded on documents and evidence in the record, in the definition of "member" in the regulations, in court cases, and in a prior acknowledgment precedent decision concerning the Narragansett cited in RFD at 61. The RFD's conclusions regarding STN's membership are reasonable and should be upheld.

III. THE RECONSIDERED FINAL DETERMINATION WAS NOT IMPACTED BY ALLEGED UNDUE POLITICAL INFLUENCE

The regulatory process under 25 C.F.R. Part 83 provides for informal technical assistance, allowing frequent discussions between the professional staff at OFA and researchers for the petitioner, as well as interested parties. The Department testified against more formal adjudicatory proceedings, finding them "inappropriate for complex, research-based decisions" like acknowledgment determinations. *Federal Recognition Administrative Procedures Act: Hearing before the Committee on Indian Affairs United States Senate on S. 479,* 104th Cong., 1st Sess. 1, at 107, 108 (1995), Fed. Exh. I. Such formal procedures conflict with the Department's program of outreach and assistance to petitioners that has cut down the expense of researching

acknowledgment cases. *Id.* at 61, 63.[42]

The negotiated Scheduling Order in the consolidated land claim cases as amended, ¶ l, reflects the ability of the parties to discuss matters informally with the acknowledgment staff, and allows contacts with persons in the Office of the Secretary or Office of the AS-IA after 2-days advance notice. "Ruling on Motion to Amend Scheduling Order" [Dkt #238], June 14, 2004.

On November 29, 2006, the court in *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192 (D. Conn. 2006), deferred to the Department's factual findings in the acknowledgment decision on the Golden Hill petitioner for purposes of giving those findings collateral estoppel effect. The court noted that the acknowledgment process entailed the essential elements of an adjudication, including adequate notice, the right to present evidence and legal argument, the right to respond, and a final decision. *Id.* at 199-200. The court concluded that the "Final Determination was an 'adjudicative' one, sufficient for application of the collateral estoppel doctrine." *Id.* The court did *not* rule that the administrative process was a formal adjudicative process within the meaning of the APA, 5 U.S.C. § 551 *et seq*., which would impose a prohibition on *ex parte* communications. The court recognized that the regulations clearly provide for a give-and-take exchange of information.

Discussions in the informal adjudicative process are not *ex parte* communications.[43] In

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[42] As stated in *Golden Hill Paugussett Tribe of Indians v. Weicker,* 839 F. Supp. 130, 134 (D. Conn. 1993), "the adversarial process is not conducive to the inquiry at issue" in acknowledgment cases.

[43] *Portland Audubon Society v. Endangered Species Committee,* 984 F.2d 1534, 1540 n.15 (9th Cir. 1992); *Sierra Club v. Costle,* 657 F.2d 298, 400 (D.C. Cir. 1981) (in informal agency policymaking, concept of *ex parte* contacts is of questionable utility); *Carlin Communication, Inc. v. FDD,*749 F.2d 113, 119 n.9 (2d Cir. 1984) (FCC's *ex parte* rules specifically permit *ex parte* contacts in informal rule making proceedings, such as this one, until an item is placed on the Commission's meeting agenda); *Viacom Intern. Inc. v. FCC,* 672 F.2d 1034, 1043 (2d Cir. 1985) (Commission's rules against *ex parte* contacts not violated since it was not a rule making or an adjudication but an interpretation of an existing rule). *See* APA definition of *ex parte* § 551(14), which is limited by the term "party" (§ 551(3)), which is turn is

addition, routine congressional inquiries are *excluded* from the APA restrictions on *ex parte* communications, *even* in the formal adjudicatory proceedings, licensing, and rule making. 5 U.S.C. § 551(14), *see, e.g.* § 557(d)(2). The court in *Golden Hill* did not find otherwise.[44]

STN elevates the informal proceedings under the regulations to a formal adjudication, and the questioning at the hearings, to those in *Pillsbury Co. v. Federal Trade Commission,* 354 F.2d 952 (1966). This comparison fails. *Pillsbury* concerned the FTC, a "quasi-judicial agency," and the questioning was of the chairman of that body, who then felt compelled to disqualify himself as the matter was still a pending adjudication. *Id.* at 960, 961, 963. *Pillsbury* clearly focused on the judicial function of the Commission as material to its holding, noting that the congressional intervention not in the agency's *legislative* function, but rather, in its *judicial* function." (emphasis in original, *id.* at 964). The court in *Pillsbury* made this distinction because the congressional investigation was "focuse[d] directly and substantially upon the mental decisional process of a Commission" in a case pending before it. Although STN's comparison might fit if Congress queried the IBIA judges while the matter was pending before them, that did not occur here.[45] Moreover, the hearings referenced by the STN focused more on the acknowledgment

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limited to "agency proceeding," defined in § 551(12).

[44] Petitioner argues that the acknowledgment process is limited to "petitioner and the interested and informed parties," and that Connecticut's Congressional delegation's participation was "unlawful." STN Memo at 32. This argument ignores that the delegation is listed as informed parties. AC-V014-D0094, page 13 and 28. Petitioner argues also that the congressional meetings and hearings were *ex parte* "submissions to the agency" that need to be provided to the petitioner, including "prior notice," and that the delegation was bound by this Court's Scheduling Order. STN Memo at 32-33, 34 n.16. This argument is without foundation - the regulations cannot and do not limit congressional hearings to the comment period of the regulations, nor could this court's Scheduling Order. Petitioner's argument ignores the separateness of the three branches of government. The one *ex parte* communication to the formal adjudication before IBIA was provided to the parties as was an opportunity to respond. IB-V002-D0011.

[45] The IBIA issued its decisions in HEP and STN the day after the hearings. The extensive decisions, totaling 42 pages, could not have been written in reaction to the hearing.

process itself and certainly not the mental decisional process of the deciding official.

Finally, STN's argument that the hearings caused the change between the FD and the RFD because after the RFD "the pressure simply disappeared . . . no more hearings, no more movement to 'reform' the acknowledgment process" is erroneous. STN Memo at 35. Two hearings were held on the acknowledgment process this fall - including one for an independent Commission to handle acknowledgment.[46]

There is a strong presumption that government officials act in good faith, and a presumption of validity in administrative action, *Udall v. Washington, Virginia and Maryland Coach Co.,*398 F.2d 765, 769 (D.C. Cir. 1968); *China Trade Center, L.L.C. v. Washington Metro. Area Transit Auth.,* 34 F. Supp. 2d 67, 70-71 (D.D.C. 1999). As cited previously by this Court in its Order [Dkt #156] dated July 21, 2007, "the proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decision making process," citing *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers,* 714 F.2d 163, 169-70 (D.C. Cir. 1983). The judicial evaluation of the alleged pressure must focus on the nexus between the alleged pressure and the decision maker. *ATX, Inc. v. U.S. Dep't of Transportation,* 41 F.3d 1522, 1528 (D.C. Cir. 1994). If not targeted directly at the decision maker, congressional actions "such as contemporaneous hearings - do not invalidate an agency decision." *ATX* at 1528, citing *Koniag, Inc. v. Andrus,* 580 F.2d 601, 610 (D.C. Cir. 1978).

STN, nevertheless, relies on *Koniag* for the proposition that alleged private, *ex parte* communications with agency officials concerning the merits of a pending adjudicative

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[46] 110th Congress: Oversight Hearing on the Federal Acknowledgment Process, September 19, 2007 and Hearing on HR 2837, the Indian Tribal Federal Recognition Administrative Procedures Act, (independent Commission), October 3, 2007. *See also* Hearing on HR 65, the "Lumbee Recognition Act" and HR 1294, the "Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2006."

proceeding violate a party's constitutional right to procedural due process, and impermissibly taint the decision. STN Memo at 28-29. The facts in *Koniag* concerned congressional hearings and a letter from Congressman Dingell to the Secretary of the Interior stating that subordinate Interior officials misinterpreted the Alaska Native Claims Settlement Act and that certain Alaska villages should not have been certified as eligible for benefits. The Secretary, the decision maker, received the letter two days before he made the determination.

The court looked first at the effect of the congressional hearings where Congressman Dingell "made no secret of his displeasure with some of the initial BIA eligibility determinations." But the court did not apply the *Pillsbury* decision because none of the persons called before the subcommittee was a decision maker. Further, an advisor's mere presence when the subcommittee expressed its strong beliefs that the BIA decisions were in error was not enough to invalidate the decision, even though that advisor briefed the Secretary at that time. In contrast, the *Koniag* court then reviewed the letter received by the decision maker from Congressman Dingell and found that it "compromised the appearance of the Secretary's impartiality" and thus tainted the agency's decision. *Koniag,* 580 F.2d at 610.

The most significant aspect of *Koniag* was that the letter was sent to and received by the actual decision maker, the Secretary of the Interior, immediately before his decision. In the instant case, however, as discussed more fully below, the deposition testimony was clear that the actual decision maker on the RFD, James Cason, was not influenced in any way by factors outside of the administrative record. He did not attend any of the hearings regarding the acknowledgment process referenced by STN. Nor is there any indication that he was briefed on their content prior to making his decision in October 2005. Unlike *Koniag* where the letter which created the appearance of impartiality was sent to and received by the decision maker, no such letter was received by Mr. Cason. His Declaration (STN Exh. 87, ¶¶ 12, 21-22) and deposition testimony (STN Exh. 16) are clear that he received no pressure from anyone.

The court in *ATX* carefully examined the challenged congressional pressure and found that none of it was sufficient to invalidate the adjudication. *ATX,* 41 F.3d at 1528. The court looked at two proposed bills in the House, letters to the Secretary and a Congressman's testimony at an agency hearing. The court found no evidence that the congressional activity actually affected the outcome on the merits. *Id.* at 1529. The court noted that the nexus between the pressure exerted and the actual decision makers was so tenuous and the evidence so strictly on the merits that it had to conclude political influence did not enter the decision maker's "calculus of consideration." *Id.* at 1530. Similarly here, STN does not show any nexus between the alleged pressure and the decision maker.

Despite extensive depositions of former Secretary Norton (5 hours), Associate Deputy James Cason (2½ hours), Solicitor David Bernhardt (3 hours), Director of OFA R. Lee Fleming (5 hours), and lobbyist Loren Monroe (6 hours), there is no evidence indicating that the decision making process was impacted in any way by correspondence from the Connecticut delegation or Governor, by congressional hearings, or by any alleged lobbying activity. Despite the extensive depositions, Petitioner cites no evidence of any impact between congressional, lobbyist, and media noise and the RFD. Indeed, Mr. Monroe indicated that persons were so sensitive to the lobbying issue, there would have been a push-back if the citizen group had asked for anyone at the White House to contact the Department.[47]

Mr. Cason signed the consensus recommended RFD. As provided in his Declaration,

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[47] In response to the question: "Did anyone from the White House ever tell you that they were going to contact Department of Interior?" Mr. Monroe answered: "They did not. They were -- again, this was the height of the Abramoff investigation, so everybody was hypersensitive, particularly the White House, particularly Congress, about being seen as meddling or doing anything improper at the BIA, Indian affairs . . . Most people had a hands-off attitude toward it. * * * So no, we did not ask anybody at the administration to contact anybody at BIA, and frankly, had we, I think we would have gotten a big pushback because I don't think anybody would have been comfortable doing so." Monroe Deposition, 208-210, STN Exh. 23.

STN Exh. 87, he polled each person involved in preparing the decision asking them if anyone pressured them to reach the result in the recommended decision. *Id.* ¶ 11. Each one stated that they were not pressured to reach a particular result. *Id.* ¶ 11. He declared also that he was not pressured to reach a particular result on STN's petition by anyone outside the Department or from within the Department. *Id.,* ¶ 12. In addition, although he was aware of Secretary Norton's meeting with members of the Connecticut delegation on the federal acknowledgment process, "[t]his knowledge did not impact my decision on the Schaghticoke petition." *Id.,* ¶ 16.

There was no evidence that Mr. Cason had any contact with the Connecticut congressional delegation, the White House, or any lobbyist concerning the STN. His deposition testimony established that he did not receive, directly or indirectly, any communication from the Connecticut Congressional delegation (Cason Dep. at 50-51), any Connecticut State officials (Cason Dep. at 65-66), from BGR (Cason Dep. at 82) or TASK (Cason Dep. at 75-76). STN Exh. 16. He testified further that he did not consider any factors or criteria that were not discussed in the RFD. Cason Dep. at 130. He testified that "the thing that was relevant to that decision . . . was the conclusion of all the data . . . and the analysis of the OFA staff . . . that allowed them to draw a conclusion . . . on a criteria-by-criteria basis." Cason Dep. at 129. Nevertheless, STN argues, without any basis in fact, that the RFD was a result of undue political influence.

Solicitor Bernhardt at his deposition on April 10, 2007, testified that he was not aware of any specific meetings by members of Congress with the White House specifically regarding the Schaghticoke petition. Bernhardt Dep. 88-89. STN Exh. 9. Nor was he ever advised that anyone at the White House had received complaints from members of Congress concerning the STN petition. *Id.* He referenced the two meetings with the Connecticut delegation in March and April 2004 as more specifically concerned with Indian gaming, general concerns over the acknowledgment process and land claims, although dissatisfaction with the Schaghticoke

decision was expressed. *Id.* at 52-53, 56-57. Contrary to STN's argument that the meetings were to "debate the FD," (STN Memo at 8), Mr. Bernhardt specifically disagreed with the characterization of the meetings as being on a specific recognition decision. *Id.* at 58-59. He noted further that, on a relatively regular basis, a member of Congress is not pleased with a particular act that Interior has taken, "And we go up and visit with them and continue on our way." *Id.* at 57.

STN argues that former Secretary Norton was so intimidated by the Connecticut congressional delegation in the Spring of 2004 that she withdrew from any role on the RFD that was issued over a year later. Her statements and demeanor at her deposition belie any such conclusion. She was very clear in her deposition that her priority for her Administration was to avoid the "complaints that decisions had been made by politicals in the previous administration who counteracted the findings of the professionals on the career staff." Norton Dep. at 28, STN Exh. 3. She reaffirmed her actions to keep politics out of the decision making process and have acknowledgment decision based on the merits. Norton Dep. at 29, 112-113, 164-165. Concerning the RFD, she testified that she would have asked the Associate Deputy Secretary if he was following the career staff recommendation and he said he was. *Id.* at 58.[48]

The difference in Secretary Norton's involvement between the FD and the RFD is that Cason followed a unanimous OFA recommended decision. In contrast, for the FD, former PD-ASIA Aurene Martin approached Secretary Norton when OFA requested direction in the Briefing Paper and presented options that included changing precedent.[49] STN Exh. 69.

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[48] "To the extent I had conversations with him [Mr. Cason], it would have been directing him to follow the established administrative process and not take extraneous matters into consideration." Norton Dep. at 263.

[49] Petitioner questions why the briefing paper was in the administrative record, implying that it was released as a result of pressure. The Department has included such briefing papers in the record, subject to limited assertions of deliberative process privilege, consistent with *Miami*

As to the "threat" from the Congressman from Virginia that he would inform the White House that she ought to be fired, Norton pointed out that she lost no sleep over it. Norton Dep. at 168-9. She presented a full accounting of the meeting with the congressional delegation, characterizing their concerns as being related to gaming, not the acknowledgment decision itself. *Id.* at 162-169. She offered to work with the delegation on amendments to the Indian Gaming Regulatory Act to address their concerns. *Id.* at 164-166. Norton testified that she and others, including Cason, "did not take [the threat] seriously." *Id.* at 275-76.[50]

Even if viewed as a "threat," the deposition of R. Lee Fleming, Director, OFA, indicates that he was not aware of it and thus could not have been influenced by it. Fleming Dep. at 48, STN Exh. 54.

Contrary to STN's argument that Governor Rell pressured Secretary Norton on the Schaghticoke, the administrative record shows that Secretary Norton had no intention of discussing specific acknowledgment cases with her, and that the Governor's staff was so informed. AC-V015-D0019. Furthermore, Secretary Norton did not even recall having received a phone call from Governor Rell. Norton Dep. at 225. As to STN's concerns over Attorney General Blumenthal's contact with the Secretary in the hallway following a meeting of Attorneys General, "I talked with him briefly . . . I don't recall any in-depth discussion." *Id. at* 138-139.

STN cites also Representative Nancy Johnson's July 2004 survey of constituents concerning a casino in western Connecticut and its delivery to the Department as an example of

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Nation of Indians v. Babbitt, 979 F. Supp. 771 (N.D. Ind. 1996), and 55 F. Supp. 2d 921, 925 (N.D. Ind. 1999) (referencing draft briefing paper).

[50] "I did not anticipate that anything would come of that threat even if he did follow through and call the White House. And, in fact, nothing did come from that." Norton Dep. at 264.

undue influence, citing an email from OFA Director Fleming.[51] The complete email exchange, however, shows the futility of the postcards because, as Mr. Fleming noted, acknowledgment decisions "must be based on the evidence," not a popularity poll. STN Exh. 48. Further, Mr. Cason testified that he had no discussion with Mr. Fleming concerning the survey, and Secretary Norton knew little about it, if anything. Cason Dep. at 93, Norton Dep. at 98-99, 222-225.

STN argues that congressional hearings were an undue influence on the Department, exposing the Director of OFA to the hostility of Congress. Mr. Fleming testified that for him, these hearings are routine matters, having attended over 19 hearings and testified at four. Fleming Dep. at 77. Similarly, the Associate Deputy Secretary indicated that he did not remember being briefed on the hearings, although he assumed that he would have been informed during his routine meetings with BIA staff.[52] Cason Dep. at 47-48. Similarly, Secretary Norton was not aware of the hearings other than as routine matters. Norton Dep. at 126-127. Although STN would like this Court to believe that congressional hearings pressured the Department to change its acknowledgment decisions concerning groups in Connecticut, that theory ignores the history of such hearings and ignores the fact that such hearings still occur. *See* "Federal Defendants' Memorandum in Response to Motion for Extension of Time," at 9 n.4 [Dkt. #53], Aug. 4, 2006, that lists the history of these hearings.

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[51] The survey was provided to the Indian gaming office within the BIA. A tally of the survey was never made. It provides no evidence to evaluate under the acknowledgment criteria.

[52] Question: Do I understand correctly that you knew nothing about the hearing before Senator McCain's committee on tribal recognition issues?

Answer: Well, if you say knew nothing, I don't know the answer to that. If the subject had come up, it's entirely possible that it did come up from the standpoint of our Congressional liaison person, Jackie Cheek, mentioning in a staff meeting to me that we have a hearing coming up on this issue. And the -- it was likely at that time to say, "Okay, well, who is going to testify?" I didn't testify so I didn't have personal knowledge about what was there, but it's entirely possible Lee Fleming went to testify and I knew he was going to testify. Cason Dep. at 47-48.

Petitioner characterized the hearings as focusing on alleged "lawlessness" in the acknowledgment process and questioned Mr. Fleming at his deposition about his recollection of these hearings. Mr. Fleming answered, "My recollection is the contrary, with comments by Earl Delaney the Inspector General, making comments of the integrity of the office; and his deputy assistant, Mary Kendall, expressing the same." In response to the question "And your view, I take it, is that your office conducts itself consistently with the way Mary Kendall and Earl Delaney viewed the office, correct?," Mr. Fleming answered, "That is my position, yes." Fleming Dep. at 98. In response to questioning about whether he was intimidated or influenced by comments from Congressman Johnson, Representative Shays, or Attorney General Blumenthal, he answered, "no."[53] Fleming Dep. at 170, 171, 172.

As to the deposition of Mr. Monroe, STN quotes the pertinent part - his purpose was "to send a message about the need to follow existing law . . . existing regulations." STN Memo at 14. He had no contact with the decision makers or with OFA staff. There was no influence.

STN points to only two alleged intrusions of political influence into the administrative process documented in the administrative record. STN Memo at 40. The first STN characterizes as a recommendation that the Department file a motion to expedite the proceedings before IBIA, "consistent with" the "prior urging" of the Congressional delegation, and the second is the OFA genealogist notes that Attorney General Blumenthal "will put worst spin" on the Supplemental Transmittal informing IBIA of the marriage rate issue. STN argues these actions "were informed

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[53] STN tried to demonstrate that Mr. Fleming would have been "intimidated" and that he would have relayed either his concerns or congressional concerns to Mr. Cason. STN questioned Mr. Cason if he had any conversations with Mr. Fleming about the hearing. Mr. Cason answered, simply, "Not that I recall. I have weekly staff meetings with senior folks in Indian Affairs. He comes to those staff meetings on occasion. So as I go around the room, just much like this room, I would call on each of the people there, and they say a few words. So he may have said something like I went to the hearing and here's what got discussed, but it wasn't memorable if he did." Cason Dep. at 50.

by and responsive to" influence by Connecticut. Not so.

First, the filing of the motion to expedite was consistent with the negotiations on Scheduling Order ¶ j. It was consistent also with the previous request by STN to expedite the IBIA proceedings. SN-V078-D0002 at 11. Second, the action was *inconsistent* with the then wishes of the congressional delegation that wanted the Department to pull the matter from IBIA, but was consistent with their *prior* position (and STN's) that the full IBIA procedures apply. AC-V014-D0084 at 3-4; STN Exh. 58 at 1-2 in response. The genealogist's notes indicate, if anything, the anticipated *negative* comments from Connecticut, about the decision to file the Supplemental Transmittal. STN Exh. 117.

STN argues also that the RFD should be remanded to the Department because it did not address an issue mentioned by Secretary Norton at her deposition. STN Memo at 78-79. Secretary Norton stated, three years after the event, that she discussed state recognition "from a perspective of federalism" and what long standing state recognition meant under the regulations. She used the term once.[54] These recollections were in reference to her discussion with former PD-ASIA Aurene Martin concerning the OFA Briefing Paper. Petitioner here paraphrases these comments as "constitutional principles of federalism," and "the mandates of the United States Constitution," even though "constitution" and "constitutional" do not appear in the transcript of Secretary Norton's deposition. Petitioner then argues that the RFD did not address these

[54] Norton Dep. at 48: "the specific legal policy decision on how to handle the state recognition of the tribe . . . And since I . . . discussed that from a perspective of federalism, and what does it mean to have state recognition, and how does that relate to the criteria for federal recognition, I knew that was a decision reached on its merits." Norton Dep. at 281: Question: "And I think you also testified that as a matter of federalism, you believed that there was significance to the hundreds of years of state recognition to the tribe? Answer: That is why the January 2004 decision appeared reasonable to me."

principles as required when the RFD changed the FD's conclusions on state recognition.[55]

This argument should be rejected for two reasons. First, a "constitutional principle of federalism" is not addressed in the FD or in the regulations. The FD did not use the term "federalism," or even "constitution" or "constitutional" in the context of state recognition. To the extent that "federalism" might equate state recognition with federal recognition, the FD rejected this notion, declining to equate state recognition with the same trappings as federal recognition.[56] The FD concluded that state recognition "does not show the existence of a government-to-government relationship, which has a particular meaning in the Federal-Indian relationship." FD at 14. Instead, it provided evidence bearing on continuity of the group. *Id.* To the extent that "federalism" means giving weight to state recognition, that concept was rejected by the IBIA, unless it reflected the actual evidence of, or existence of, community or political influence within the STN.

Second, even assuming *arguendo* that STN's characterization of Secretary Norton's comment is accurate, it would be a post-hoc rationalization years after the event that is not supported in the decision making document.[57] Clearly, the OFA could not anticipate that three

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[55] Petitioner argues also that the IBIA was without jurisdiction to review or reverse this issue. STN Memo at 79. The IBIA addressed this issue, finding jurisdiction under 25 C.F.R. § 83.11(d)(2), which allows IBIA "to consider allegations that the Assistant Secretary improperly relied upon evidence that is unreliable or of little probative value. If the regulations or precedent preclude the use of a state's relationship with a petitioning group as relevant evidence for criteria (b) and (c), then by definition such evidence cannot be considered or relied upon as having any "probative" value for those criteria. Therefore, we conclude that the scope of the Board's jurisdiction . . . is broad enough for us to consider the . . . arguments." 41 IBIA 14.

[56] As provided in the FD at 16: "However, it is necessary to determine the character of the state's relationship by a direct examination of the laws, policies and actions of the State of Connecticut, as was done in the Schaghticoke PF and in the Eastern Pequot and Paucatuck Eastern Pequot proposed findings and final determinations, not merely equate state recognition with the same trappings as Federal recognition."

[57] *Overton Park,* 401 U.S. at 419, provides that judicial review is based on the record at the time of the decision, not on *post hoc* rationalizations. Petitioner's argument illustrates the

years later, Secretary Norton would use a term that it would need to address. Judicial review must be based on the record, and the word "federalism" did not appear in the FD.

IV. ASSOCIATE DEPUTY SECRETARY JAMES CASON HELD PROPERLY DELEGATED AUTHORITY TO ISSUE THE RFD

A. The Department's Delegation of the Non-Exclusive Duties and Functions of the AS-IA to Mr. Cason Authorized Him to Make the STN Acknowledgment Determination.

1. The Court Correctly Ruled that the Department Has Delegated the Non-Exclusive Duties and Functions of a Vacant PAS Position Consistent with the VRA.

The Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d (VRA or Act) governs how a vacancy in a position held by an official appointed by the President with the advice and consent of the Senate (PAS) may be filled on an "acting" basis. *See* 5 U.S.C. § 3345. Specifically, the VRA requires that the employee who holds the position of "first assistant" to the absent PAS shall automatically perform the functions and duties of the PAS position, unless the President designates another person to temporarily perform the functions or duties of the PAS. The Department's orders of succession for the Assistant Secretary - Indian Affairs (AS-IA) establishes that the PD-ASIA is the first assistant to the AS-IA, who would, upon a vacancy, succeed to the office on an acting basis pursuant to 5 U.S.C. § 3345(a)(1).[58] In early 2005, when the AS-IA resigned, the PD-ASIA position was vacant. With no one appropriately situated to become acting AS-IA, the Secretary delegated the non-exclusive functions and duties of the AS-IA position to the Associate Deputy Secretary, Mr. James E. Cason.[59]

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pitfalls of depositions in APA review cases and the courts' admonition for record review.

[58] *See* Secretarial Memorandum, Designation of Successors for Presidentially-Appointed, Senate-Confirmed Positions, January 5, 2004 and November 13, 2005 (Declaration of Michael D. Olsen, dated October 31, 2007 ("Olsen Declaration") ¶ 3, Exhibit 4).

[59] The President did not exercise his options under Section 3345(a)(2) and (3) of directing another PAS officer, or an officer or employee of the Department, to become acting AS-IA.

After acknowledging that the Department did not have anyone appropriately situated to become acting AS-IA under the VRA, the Court recognized in its March 19, 2007 Ruling that the Act permits reassignment of any functions or duties not required by statute or regulation to be performed by the official occupying the position. 2007 U.S. Dist. LEXIS 19535, *40-41.[60] The Court then found that the Department made a permissible delegation of the AS-IA's non-exclusive functions and duties to the Associate Deputy Secretary:

> Secretary Norton issued Secretarial Order 3259 . . . which delegated the authority delegated to the AS-IA to the Associate Deputy Secretary, "except for those functions or duties that are required by statute or regulation to be performed only by the [AS-IA]." (Secretarial Order 3259, Exh. 2 to Fed. Resp. Mem. Opp. Mot. Amend.) The Order provided that the duties required by statute or regulation to be performed only by the AS-IA will be performed by the Secretary herself, in accordance with the [VRA] [footnote omitted]. Cason, therefore, did not assume the position of Acting AS-IA, but only assumed the duties of the position not required by statute or regulation to be performed only by the AS-IA.

Id. at 41. Thus, there is no question about whether the Department permissibly delegated to Mr. Cason the authority to perform the non-exclusive duties and functions of the AS-IA under the Act. As noted in the Ruling, the only question remaining is whether tribal acknowledgment determinations are an exclusive duty to be performed only by the AS-IA (or, if the position is vacant, the Secretary). *Id*. at 42.

2. Acknowledgment Determinations Are Not an Exclusive Duty or Function of the AS-IA.

The Court poses the question whether Federal acknowledgment determinations are duties or functions required by statute or regulation to be performed only or exclusively by the AS-IA. For the reasons set forth below, the answer is that acknowledgment determinations are *not* required by statute or regulation to be performed only by the AS-IA.

First, there is no question that acknowledgment determinations are governed by

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[60] Ruling on Petitioner's Motion for Additional Limited Discovery and on Petitioner's Motion For Leave to Amend Complaint.

regulations at 25 C.F.R. Part 83. This Part cites as its statutory authority the Secretary of the Interior's general authority found at 5 U.S.C. § 301, 25 U.S.C. §§ 2 and 9, and 43 U.S.C. § 1457.[61] Review of these statutory sections reveals that they do not even mention acknowledgment determinations, let alone assign the function "only," "exclusively," or "solely" to the AS-IA. Accordingly, the requirement to make acknowledgment determinations is not assigned by statute only to the AS-IA.

Second, under the Department's regulations, the AS-IA has responsibility for making acknowledgment determinations on behalf of the Secretary. *See* 25 C.F.R. Part 83. The regulation, however, never indicates that acknowledgment is a function or duty assigned "only," "exclusively," or "solely" to the AS-IA. To the contrary, the regulation explicitly makes tribal acknowledgment determinations a function that may be delegated by the AS-IA, when it defines the term Assistant Secretary in Part 83 to include "[the AS-IA], or that officer's authorized representative." 25 C.F.R. § 83.1. Furthermore, prior to making the delegation to the Associate Deputy Secretary, the Department reviewed the functions and duties of the AS-IA to determine whether any such duties are required to be performed only by the AS-IA. This review identified only three potentially relevant statutory sections and no regulations assigning functions or duties exclusively to the AS-IA. None of these involved acknowledgment determinations.[62] The inescapable conclusion, therefore, is that acknowledgment determinations are not an function or duty assigned by statute or regulation only to the AS-IA for purposes of VRA § 3348.

Although STN appears to recognize that acknowledgment determinations are delegable

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[61] Part 83 constitutes an exercise of the Secretary's authority to delegate duties to Departmental officers and employees under Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), 5 U.S.C. Appendix 1 ("Reorganization Plan No. 3").

[62] *See* Memorandum from Solicitor to Secretary, *Redelegation of Duties of Assistant Secretary-Indian Affairs*, Jan. 28, 2005 (Olsen Declaration ¶ 4, Exhibit 5).

non-exclusive functions, they nonetheless attempt to fashion an exclusive function or duty out of the definition section in 25 C.F.R. § 83.1. STN seems to argue that the definition section creates an exclusive duty for the AS-IA to designate who must make an acknowledgment determination. This is not the case, because this definitional language does not assign any function or duty to the AS-IA or indeed require any action of the AS-IA. Rather, it provides that other officials may perform the responsibilities of Part 83, with the condition precedent that they have to have been designated to do so. In contrast to this definition are those sections that actually assign some function or duty to the AS-IA, as defined in § 83.1. For example, § 83.10(a) provides that "the [AS-IA] shall cause a review to be conducted," and § 83.10(b) states that "the [the AS-IA] shall conduct a preliminary review." These and others in Part 83 are the sections that assign a function or duty to the AS-IA - the definition section merely confirms that the functions or duties are not exclusive to the AS-IA.

Even if the Court accepts STN's claim that § 83.1 somehow assigns the decision of whether to delegate an acknowledgment determination only to the AS-IA, the delegation to Mr. Cason is still permissible under the VRA. If STN is correct and the decision to name an authorized officer is an exclusive duty under the VRA, under § 3348(b)(2) that duty becomes one only the Secretary can exercise. And that is exactly what happened here: Secretary Norton in fact exercised that duty when she made the delegation to the Associate Deputy Secretary in Secretarial Order 3259. Accordingly, because an acknowledgment determination is not exclusively assigned to the AS-IA, the delegation to Mr. Cason is proper under the VRA and that delegation included the authority to make such determinations.

3. The Department's Delegation of Certain Responsibilities of the AS-IA Is Permissible Under the Vacancies Reform Act.

As discussed in IV.A.1 above, the Court's March 19, 2007 Ruling found that the Department properly delegated the non-exclusive duties of the AS-IA. STN, however, expends

substantial energy revisiting allegations of a violation of the VRA. STN's allegations are nothing more than a red herring that ignores the Court's ruling and evades the Court's question whether acknowledgment is an exclusive duty of the AS-IA. In doing so, STN fails to put forth any evidence that acknowledgment determinations are an exclusive function or duty of the AS-IA.

Nonetheless, STN's effort to reopen the VRA issues requires a response to correct their invalid arguments and conclusions. First, STN's claim that the Department violated the VRA because the Act requires another official to act in the event of a vacancy is inapposite. As this Court has found, the Department did not install an "acting" official when it redelegated the non-exclusive functions and duties. Rather, it reassigned the non-exclusive functions and duties to the Associate Deputy Secretary in compliance with the VRA, as confirmed by the Act's legislative history:

> Delegable functions of the office could still be performed by other officers or employees, but the functions and duties to be performed only by the officer whose appointment is by the President by and with the advice of the Senate could be performed solely by the head of the executive agency. For any such office located within a department, that would mean only the head of the department could perform those functions. All the normal functions of government thus could still be performed.

See S. Rep. 105-250 at 18-19.[63] Therefore, it remains clear that the Department acted appropriately under the VRA.

Second, STN's attempt to transform the Counselor to the AS-IA, Michael Olsen, into the

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[63] *See also* the Department of Justice Office of Legal Counsel's *Guidance on Application of the Federal Vacancies Reform Act of 1998*, March 22, 1999, Question 48 (The answer to Question 48 states that as a result of Congress' narrowly defining "function and duties," "[m]ost and in many cases all, the responsibilities performed by a PAS officer will not be exclusive, and the Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency.") Fed. Exh. J.

PD-ASIA is misplaced, misleading, and irrelevant.[64] When PD-ASIA (Ms. Martin) resigned in September 2004, the AS-IA, Mr. Anderson "asked Mike Olsen, Counselor to the Assistant Secretary-Indian Affairs . . . to assist me in managing the workload normally assigned to the Principal Deputy Assistant Secretary." *See* Memorandum from the AS-IA, *Leadership Transition*, dated August 16, 2004 (Olsen Declaration ¶2, Exhibit 2). Significantly, this memorandum does not appoint Mr. Olsen to the PD-ASIA position. Mr. Olsen remained officially the Counselor to the AS-IA until June 2006, when he in fact was appointed PD-ASIA.[65]

If Mr. Olsen had been the appointed PD-ASIA when Mr. Anderson resigned, he would have been the first assistant and would have automatically become acting AS-IA. Instead, Mr. Olsen continued to hold the position of Counselor to the AS-IA, while also essentially functioning as the *acting* PD-ASIA. A person who is acting in the position that is the first assistant to a PAS cannot succeed to the acting PAS position, i.e., one cannot be a "double acting."[66]

The facts clearly show that at all relevant times Mr. Olsen was Counselor to the AS-IA, performing additional duties of the position of PD-ASIA, but was never the first assistant and

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[64] The PD-ASIA is the first assistant to the AS-IA, who would, upon a vacancy, succeed to the office on an acting basis pursuant to 5 U.S.C. § 3345(a)(1). *See* Secretarial Memorandum, Designation of Successors for Presidentially-Appointed, Senate-Confirmed Positions, January 5, 2004 and November 13, 2005 (Olsen Declaration ¶ 3, Exhibit 4).

[65] *See* Michael D. Olsen's SF 50-Bs approved May 26, 2003, October 29, 2004 and June 9, 2006 (Olsen Declaration ¶ 1, Exhibit 1).

[66] *See U.S. v. Halmo*, 386 F. Supp. 593, 595 (1974) (In October 1973, Robert Bork, the solicitor general at the Department of Justice, was acting deputy attorney general, the first assistant position to the attorney general. When the position of attorney general became vacant, Mr. Bork became acting attorney general because of his appointed position as the solicitor general. By law, the solicitor general was next in line to succeed the attorney general after the deputy attorney general: "Mr. Bork assumed office not as a "first assistant" under the provisions of 5 U.S.C. § 3345 and 28 U.S.C. § 508(a), but rather as solicitor general, Mr. Bork became acting attorney general pursuant to 28 U.S.C. § 508(b) and 28 C.F.R. § 0.132(a).")

never became acting AS-IA.[67] Accordingly, there is no basis to disturb the Court's conclusion that the Department did not have anyone appropriately situated to become the acting AS-IA under the VRA, or the resulting finding that it permissibly delegated the non-exclusive functions and duties.

Finally, despite STN's claims, Mr. Olsen's status is not relevant to determining whether the delegation somehow violated the VRA. For even if Mr. Olsen, or someone else, had been the acting AS-IA, it would still be permissible under the VRA for the Secretary to re-assign or re-delegate the non-exclusive duties of the AS-IA position pursuant to his authority under Section 2 of Reorganization Plan No. 3. Thus, the focus on Mr. Olsen serves no purpose because the propriety of the delegation hinges on the authority of the Secretary to reassign non-exclusive duties, not on the availability of someone to become acting AS-IA. STN's focus on Mr. Olsen is a mere distraction that has no effect on the ultimate conclusion: that acknowledgment determinations are a non-exclusive duty of the AS-IA that can be - and were - properly delegated under the VRA.

4. Nothing in the VRA Invalidates Mr. Cason's Authority to Make the RFD.

STN attempts to apply the VRA's time limits for how long an employee or officer can hold a PAS position on an acting basis to the Secretary's delegation to Mr. Cason. *See* 5 U.S.C. § 3346. However, STN's efforts are incorrect and misleading because the time limitations in § 3346 apply only to a person serving in an acting capacity under § 3345. The VRA sets no time limits on redelegations of nonexclusive duties - the only relevant time limitations are those

[67] The attachment to the November 13, 2005 Secretarial Memorandum, Designation of Successors for Presidentially-Appointed, Senate-Confirmed Positions, lists Mr. Olsen in the Position One spot, but identifies him clearly as acting PD-ASIA. This designation confirms that he did not hold the position of first assistant and could not automatically become the acting AS-IA in February 2005. *See* Olsen Declaration ¶ 3, Exhibit 4).

contained in the Secretary's delegation Order.[68]

STN also claims that the Department failed to provide the notice required by VRA § 3349, implying that such failure somehow invalidates Mr. Cason's authority to issue the RFD. This argument also is misleading.[69] While it is true that the Department failed to make the specific notification required by the VRA, it is irrelevant to Mr. Cason's authority. Nothing in the VRA says that failure to report a vacancy nullifies decisions made by a person exercising the non-exclusive duties and functions of the position under a valid delegation. Further, the VRA does not require an agency to report that it has delegated the non-exclusive duties and functions of a PAS position or the name of the person to whom those duties and functions have been delegated. Accordingly, STN's claim does not in any way undermine Mr. Cason's legitimate authority to issue the RFD.

B. Mr. Cason's Position Does Not Require Presidential Nomination and Senate Confirmation under the Appointments Clause.

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[68] The Order was due to expire on August 14, 2005, but was amended twice to extend the expiration date. *See* Order 3259, Order 3259 Amendment No. 1 dated August 11, 2005, and Order 3259 Amendment No. 2, dated March 31, 2006 (Olsen Declaration ¶ 5, Exhibit 6).

[69] STN also implies the Department tried to hide the delegation to Mr. Cason from Congress. Nothing could be farther from the truth. The Department's February 2005 delegation to Mr. Cason was very public - it was issued by Secretarial Order, posted on the Department's website, and announced via a January 31, 2005 press release. That press release was contemporaneously transmitted to the Senate Committee on Indian Affairs and the House Committee on Resources (to both the majority and minority members). *See* U.S. Department of the Interior Press Release, January 31, 2005 "*Assistant Secretary for Indian Affairs Dave Anderson Announces His Decision to Resign and Resume His Entrepreneur Career*" and the Department of the Interior's Congressional and Legislative Affairs Office Fax Log Sheet for January 31, 2005 (Olsen Declaration ¶ 3, Exhibit 3 and ¶ 6, Exhibit 7). In addition, when Mr. Cason testified before the Senate's Committee on Indian Affairs on March 9, 2005, he told the Committee that "I am the associate deputy secretary of the Department, and currently I have delegated authorities of the [AS-IA] while we are searching for a new assistant secretary." *See Views of the Administration and Indian Country of How the System of Indian Trust Management, Management of Funds and Natural Resources, Might Be Reformed*, 2005: Hearing Before the Committee on Indian Affairs United States Senate, 109th Cong. 1st Sess. (March 9, 2005) (Statement of Jim Cason, Associate Deputy Secretary, Department of the Interior) Fed. Exh. K.

STN creates much smoke around Mr. Cason's appointment as Associate Deputy Secretary and his actions carrying out the non-exclusive duties and functions of the AS-IA in 2005, but the facts clearly demonstrate that there is no fire. The Department properly appointed Mr. Cason as Associate Deputy Secretary without presidential nomination and Senate confirmation because the duties of that position are of such a nature that they do not render the occupant a "principal" officer of the United States. While the Department contends that the facts demonstrate that the Associate Deputy Secretary is an "employee" rather than an "inferior" officer, the court need not decide that question because the position, whether inferior officer or employee, does not require presidential appointment and Senate confirmation.

The Comptroller General reviewed Mr. Cason's appointment in 2002, determining that Mr. Cason, in his role as Associate Deputy Secretary: "(3) appears to have been properly appointed to his position as a Non-Career Senior Executive Service federal employee." *See* Opinion B-290233, issued October 22, 2002; 2002 U.S. Comp. Gen. LEXIS 265, p.2, STN Exh. 78. The Comptroller General's analysis sets forth the limited nature of the Associate Deputy Secretary's role and duties, though he recognized that the Associate Deputy Secretary performed substantial tasks.[70] The list of accomplishments that Mr. Cason prepared as part of his

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[70] The Comptroller General found that:

> [T]he DOI Associate Deputy Secretary performs highly important - but limited - tasks. Virtually all of the Associate Deputy Secretary's functions involve coordination and management rather than ultimate decisionmaking on policy issues. To be sure the issues he coordinates and manages are complex, sensitive and substantial, and his position is undoubtedly a critical one requiring a high degree of expertise and skill. But . . . officials can exercise substantial judgment and discretion and yet not qualify as constitutional officers. In addition . . . the DOI Associate Deputy Secretary's most "officer"-like authority - his rulemaking authority exists only "occasionally and temporarily." Thus, in the words of *Buckley* [*v. Valeo,* 424 U.S. 1 (1976)], the DOI Associate Deputy Secretary is one of the "lesser functionaries subordinate to officers . . . [and] subject to the control or direction of . . . other executive . . . authorities.

performance evaluations evidences his limited role with respect to these tasks: he notes that he "managed," "provided oversight," "worked on," and "implemented" Department policies and initiatives.[71] As Associate Deputy Secretary, Mr. Cason is not the policy-maker exercising significant authority on behalf of the United States - that is the Deputy Secretary. Instead, Mr. Cason is the Deputy Secretary's trusted assistant who exercises the Deputy Secretary's authority when managing projects or implementing policies on behalf of the Deputy Secretary and/or the Secretary, including making necessary decisions to carry out his responsibilities. Accordingly, he is appropriately considered an employee rather than an officer of the Department. Pursuant to her authority under Reorganization Plan No. 3, the Secretary therefore properly appointed Mr. Cason Associate Deputy Secretary in 2001 as a Departmental employee, which required neither presidential nomination nor Senate confirmation. *See STN Local 56(a)(1) Statement* ¶¶ 127-28.

Whether he is an officer or employee, however, it is clear that Mr. Cason is not a principal officer requiring presidential appointment and Senate confirmation. The Appointments Clause requires that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

See U.S. Const., Art. II § 2, cl. 2. The "officers of the United States" required by the Appointments Clause to be nominated by the President and confirmed by the Senate are referred to as "principal" officers and consist primarily of agency heads. *Buckley v. Valeo*, 424 U.S. 1,

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See Opinion B-290233 at 16-17, STN Ex 78.

[71] It is to be expected that Mr. Cason's 2005 performance evaluation reflects added - and more policy-oriented and decisionmaking - responsibilities and duties as he was then exercising the delegated non-exclusive duties and functions of the AS-IA.

125 (1976); *Edmond v. U.S.*, 520 U.S. 651, 663 (1997). The Court in *Edmond* articulated the difference between principal and inferior officers:

> [W]e think it evident that "inferior officers are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."

Edmond at 663; *see also* Opinion B-290233 at 11 (noting that notwithstanding his high degree of expertise and skill, "the Associate Deputy Secretary is one of the "lesser functionaries") STN Exh. 78. At best, Mr. Cason is an inferior officer because he is always subject to the supervision and authority of both the Deputy Secretary and Secretary, who are both presidentially appointed and Senate confirmed.

The fact that the Associate Deputy Secretary serves at the pleasure of the Secretary and can be removed by him at any time is indicative of that position's subordinate role to the Secretary.[72] The Court made clear in *Edmond* that "[t]he power to remove officers . . . is a powerful tool for control" and a significant factor in the principal versus inferior office analysis. *Edmond* at 663; *see also Morrison v. Olson*, 487 U.S. 654, 671 (1988) ("First, appellant is subject to removal by a higher Executive Branch official."); *see also Silver v. United States Postal Service*, 951 F.2d 1033, 1038-39 (9th Cir. 1991) ("The significance of appointment and removal power is well established in Appointments Clause jurisprudence."). Thus, while Mr. Cason performed a variety of important duties, "the fact that []he can be removed by the [Secretary] . . . indicates that []he is to some degree 'inferior' in rank and authority." *See Morrison*, 487 U.S. at 671. Therefore, Mr. Cason clearly cannot be considered a principal officer requiring presidential appointment and Senate confirmation.

STN, nonetheless, expends a great deal of energy attempting to demonstrate that Mr.

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[72] As the appointing official, the Secretary has the power to remove Mr. Cason as removal power is incident to the power to appoint. *Ex parte Hennen*, 38 U.S. 230, 259 (1839).

Cason performs important tasks - STN coined the term "PAS duties" - which it believes somehow creates a requirement for presidential nomination and Senate confirmation. The fact that a position carries great responsibility or requires the incumbent to exercise significant authority does not, however, render the occupant a principal officer:

> We do not dispute that military appellate judges are charged with exercising significant authority on behalf of the United States. This, however, is also true of offices we have held were "inferior" within the meaning of the Appointments Clause.

Edmond at 662. In fact, "[t]he exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer." (Cites omitted). *Id.* Thus, despite STN's efforts, the extent and significance of Mr. Cason's responsibilities can do no more than render him an inferior officer.

Assuming *arguendo* that Mr. Cason, as Associate Deputy Secretary, is an inferior officer, such status creates no requirement that he be presidentially appointed and Senate confirmed. While some inferior officers are required by statute to be appointed by the President and confirmed by the Senate, most inferior officers and all employees may simply be appointed by the Department head. *Buckley* at 132-133; *see also Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998) (holding that members of an administrative review board who act for the Secretary and issue final agency decisions on matters such as wage and hour matters and cases arising under whistleblower statutes are inferior officers properly appointed by the head of the Department). Mr. Cason, at most, is one such inferior officer because, while the AS-IA is required by statute to be appointed by the President and confirmed by the Senate (*see* 43 U.S.C. § 1453), there is no statute requiring Senate confirmation of the Associate Deputy Secretary. As a result, the Secretary's appointment of Mr. Cason as Associate Deputy Secretary without presidential nomination and Senate confirmation did not violate the Appointments Clause.

Finally, STN's challenge to Mr. Cason's appointment must be deemed waived as it is not timely. An action challenging the decision-maker's appointment must be made at or around the time the challenged decision takes place. In addition, the agency involved must have reasonable notice of the claimed defect in the official's title to office. *Ryder v. U.S.*, 515 U.S. 177, 182 (1995); *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984). Here, the RFD was issued in October 2005 and STN did not seek to challenge Mr. Cason's appointment until January 2007, well over a year later. STN also knew that Mr. Cason would be making the acknowledgment determination prior to the time he made it, Fed. Exh. E, yet did not raise any questions at that time about his authority to make the determination. Moreover, the Department did not have any notice of a potential problem with Mr. Cason's appointment. Rather, the Department actually had confirmation from the Comptroller General that Mr. Cason had been properly appointed. Thus, STN fails to meet both prerequisites necessary to challenge Mr. Cason's appointment.

V. THE RECONSIDERED FINAL DECISION IS REASONABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Petitioner disagrees with the Department's conclusion concerning state recognition. That disagreement does not mean that the decision is arbitrary or capricious.[73] The Department extensively reviewed the material submitted by the STN and interested parties and determined that it was insufficient to meet the regulatory criteria. A court will not substitute its judgment for

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[73] *United States v. Morgan,* 313 U.S. 409, 419 (1941) (the Secretary can attach a different significance from the data); *McKinley v. United States,* 828 F. Supp. 888, 892 (D. N.M. 1993) ("that the agency chose to follow the opinions of its own experts is not grounds for overturning the [agency] decision"); *Ethyl Corporation v. Environmental Protection Agency,* 541 F. 2d 1, 36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (after "careful study of the record," the court "must take a step back from the agency decision. We must look at the decision . . . as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.") When there are conflicting views, an agency has the discretion to rely on its own qualified experts. *Marsh v. Oregon Natural Defense Council*, 490 U.S. 360, 378 (1989); *County of Suffolk,* 562 at 1383 (court is not empowered to substitute its judgment for that of the agency); *Miami Nation of Indians,* 55 F. Supp. 2d 921, 925 (N.D. Ind. 1999)(same).

that of the agency as long as the agency decision is supported in the record. *Overton Park,* 401 U.S. at 416. Deference to the agency is particularly appropriate when the matter involves a considerable exercise of agency expertise, *Baltimore Gas and Electric Co. v. NRDC,* 462 U.S. 87 (1983), and an interpretation of its own regulations. *Miami Nation of Indians*, 112 F. Supp. 2d at 755-56.

Here, there is a reasonable basis for the Department's interpretation, it is consistent with agency precedent, and with the analyses of the court cases which uphold the continuity requirements for determining tribal existence. The Department is best suited to interpret this precedent. *Zheng v. U.S. Dept. of Justice,* 416 F.3d 129, 131 (2d Cir. 2005) (quoting *Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001) ("'[W]e must accord deference to an agency's reasonable interpretation of its own precedents[.]'").)[74]

The decision not to acknowledge the STN is supported in the administrative record and is reasonable. It is not arbitrary and capricious and was not impacted by political events. It is consistent with acknowledgment precedent and the acknowledgment regulations.

Under the APA, if the Court were to find the RFD arbitrary and capricious, the appropriate remedy is a remand to the agency. STN requests that there be a formal adjudicatory hearing on remand. However, STN did not avail itself of the process already in place that provides for an on-the-record meeting after the PF where petitioner and interested parties can question and cross-examine OFA professional staff, § 83.10(j)(2). This process was permitted as well under the negotiated Scheduling Order, ¶ g. STN did not avail itself of a hearing when it should have; it should not obtain one now.

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[74] And, as observed by the Supreme Court in addressing questions of tribal existence, "[it] is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865), cited with approval in *United States v. Sandoval*, 231 U.S. 28, 47 (1913).

"An examination of the statutes that authorized the 1978 regulations does not reveal an intent on the part of Congress to require a hearing and opportunity for cross-examination." *Miami Nation of Indians,* 887 F. Supp. 1158, 1173.[75] Although one acknowledgment case provided for a formal hearing when the prior regulations did not, it occurred after a court found that the plaintiff had a protected property interest, having been receiving federal benefits. *Id.* at 1175 n.4, citing unpublished opinion in *Greene v. Lujan.* An adjudicatory hearing is not appropriate in this case if a remand were to occur. If this Court is considering any remedy other than a remand, Federal Respondents respectfully request the opportunity to brief the issue.

CONCLUSION

For the foregoing reasons, the Reconsidered Final Determination denying acknowledgment to the Schaghticoke Tribal Nation was reasonable. The Associate Deputy Secretary had the authority to issue the decision that was the consensus recommendation following an extensive evaluation by the OFA experts. STN did not carry its burden of proof - it did not provide sufficient evidence to establish that it existed continuously as a community, exercising political authority over its members. The decision making process was not impacted by any political pressure. STN's Motion for Summary Judgment should be denied and the Federal Respondents' Cross-Motion for Summary Judgment should be granted.

Dated this 8th day of November, 2007.

[75] "Because the APA does not mandate a hearing and opportunity for cross-examination, and because Congress has not manifested an intent to provide such procedures, the absence of a provision for such procedures does not render the 1978 regulations arbitrary and capricious under 5 U.S.C. § 706(2)(A)." *Id.*

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY

/s/ John B. Hughes
John B. Hughes
Assistant U.S. Attorney
Federal Bar No. ct05289
157 Church Street
New Haven, CT 06510
203-821-3700
203-773-5373 (fax)
john.hughes@usdoj.gov

Sara E. Culley
US Department of Justice
Natural Resources Section
PO Box 663
Washington, DC 20004
202-305-0466
202-305-0267 (fax)
sara.culley@usdoj.gov

Of Counsel:

Barbara N. Coen, Esq.
Office of the Solicitor
U.S. Department of the Interior
1849 C. Street N.W.
Mailstop 6513
Washington, D.C. 20240
(202) 208-6060

Timothy E. Murphy, Esq.
Katherine M. Aldrich, Esq.
Office of the Solicitor
U.S. Department of the Interior
1849 C. Street N.W.
Mailstop 7312
Washington, D.C. 20240
(202) 208-5216

CERTIFICATION

I hereby certify that on November 8, 2007, a copy of the foregoing Federal Respondents' Memorandum in Opposition to Petitioner's Motion for Summary Judgment and in Support of Federal Respondents' Cross-motion for Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/

JOHN B. HUGHES
CHIEF, CIVIL DIVISION