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) September 24, 2007

MEMORANDUM IN SUPPORT OF THE SCHAGHTICOKE TRIBAL NATION'S MOTION FOR SUMMARY JUDGMENT

Thomas J. Murphy, Esq.
Steven D. Ecker, Esq.
Cowdery, Ecker & Murphy, L.L.C.
750 Main Street
Hartford, CT 06103
(860) 278-5555 (phone)

Skip Durocher, Esq.
Thomas M. Jancik, Esq.
Glenn M. Salvo, Esq.
Dorsey & Whitney, LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
(612) 340-2600 (phone)

Attorneys for Petitioner
the Schaghticoke Tribal Nation

Of Counsel:
Judith A. Shapiro, Esq.
6856 Eastern Ave., NW
Suite 206
Washington, DC 20012
(202) 723-6400

TABLE OF CONTENTS

INTRODUCTION

This case presents a stark question: Does the Schaghticoke Tribal Nation exist? On January 29, 2004, the Department of Interior concluded that it did when it issued its positive Final Determination ("FD"). The FD was the result of a careful review of the Tribe's acknowledgement petition, including thousands of pages of historical documents, by Department experts over the course of more than three years of active review. It was the correct decision. Within hours of its issuance, however, very powerful political forces began working to overturn this decision. Despite lip service to the contrary, those forces had no genuine concern for the process of federal acknowledgment, or the status of the Tribe *per se*. They sought simply to preclude another casino in the state. In pressing relentlessly to achieve that goal, however, they trampled on the Tribe's rights and caused the Department of the Interior to act in an unprecedented and arbitrary manner.

This is not a cut-and-dried appeal of a run-of-the-mill administrative decision. Every significant event in the course of this Tribe's loss of its federal acknowledgment was unprecedented. For example, the FD represented the only time that Secretary Norton directly participated in an acknowledgment decision. Following the announcement of the FD, the Secretary became the first in her position to be threatened with the loss of her job by powerful members of Congress because of a tribal acknowledgment decision. This threat was followed by intense political pressure aimed at the agency staff, including Congressional hearings in which the Connecticut Delegation and other opponents of the Tribe directly and specifically attacked the FD. Sadly, the political actors carried the day. For the first time in history, a federally acknowledged tribe had its acknowledgment taken away following more than a year and a half of unrelenting political pressure. That outcome required, among other things, the agency to issue an unprecedented "Supplemental Transmittal," which inaccurately confessed error in the FD and left the IBIA with no choice but to vacate that decision and remand to the agency for further

consideration. In the end, the Secretary responded to this political firestorm by absenting herself from the fray, entrusting this important decision to an illegally appointed, unauthorized Administration hand who had absolutely no experience in acknowledgment matters. Not surprisingly, in the face of this intense and relentless political pressure the agency reversed the Tribe's acknowledgment. There can be no question that this pressure and the resulting and unprecedented reversal of the "final" decision created an appearance of impropriety; black letter law confirms that this alone justifies reversal of the Reconsidered Final Determination ("RFD"). But, as discussed in Section I below, the Tribe can demonstrate that in addition to the appearance of impropriety, the RFD was the product of undue influence. Under either scenario, the Court must reverse that decision.

As set forth below, there are additional, independent reasons for the Court to reverse the RFD. As Section II demonstrates, the Department's delegation of this decision to James Cason is fatal to the RFD, because Mr. Cason illegally occupied both his full-time and delegated roles at Interior. In Section III, the Tribe establishes that the RFD was arbitrary and capricious with respect to three issues. First, the agency ignored—either intentionally or negligently—the IBIA's directions for reconsidering the significance of evidence of continuous and unique recognition by the State of Connecticut. This important issue had played a significant part in the issuance of the FD, and it should properly have continued to play a role following remand, had the agency bothered to follow the IBIA's instructions. Second, Interior officials twisted the application of the endogamy analysis to deny the Tribe the benefit of those provisions of the regulations. Finally, without warning or explanation, the Department changed its position in the RFD, abandoning the position it had consistently taken and advocated throughout the acknowledgment process, to conclude that the Tribe did not meet the requirements for community or political authority after 1996—despite the fact that between the FD and RFD, no new arguments were made and no new evidence was

presented to the agency relevant to this issue. The only change was the intensity of external pressure to revisit these issues and resolve them "strictly" against the Tribe. The agency's arbitrary and capricious actions with respect to each of these issues requires reversal of the RFD.

It is no exaggeration to say that this Court holds the fate of an historic people in its hands. Common sense dictates that hundreds of years of state recognition and the existence of a reservation that has been continuously occupied since colonial times can neither be an accident nor a meaningless coincidence. The Schaghticoke Tribal Nation has already demonstrated once that it deserves federal acknowledgment in perpetuity. No member of Congress nor any state governmental official should be permitted to rewrite history. For all the reasons set forth herein, the Tribe is entitled to summary judgment.

FACTUAL BACKGROUND

The Tribe incorporates by reference its Local Rule 56(a)1 Statement, which sets forth in separately numbered paragraphs a concise statement of each material fact as to which there is no genuine issue to be tried. (Hereafter cited as "PPFF __"). This memorandum will address the facts material to each of the Tribe's arguments in the context of its respective section.

STANDARDS OF REVIEW

Summary Judgment

By order dated July 21, 2007, the Court ordered the Tribe and Federal Respondents to file cross-motions for summary judgment. Order, July 21, 2007 (Doc. # 156). The Tribe should prevail on its motion as a matter of law. In moving for summary judgment, however, the Tribe does not waive its right to a trial on any material dispute of fact should the Court find the Tribe is not entitled to summary judgment in its favor.[1]

---

[1] A party does not, by moving for summary judgment, surrender its right to a trial if the court determines that the party is not entitled to judgment as a matter of law. *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994). Even if both parties file cross-motions for summary judgment, a court must ascertain whether

Summary judgment may be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Arbitrary and Capricious Review

Under the APA, a court must set aside agency action that it finds arbitrary, capricious, or an abuse of discretion, or in excess of statutory jurisdiction, authority, or limitations. 5 U.S.C. § 706(2). This Court should set aside an agency action 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." *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994) (quoting *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Judicial review of agency action under the arbitrary-and-capricious standard must be plenary, careful, and searching. *Perales v. Sullivan*, 948 F.2d 1348, 1353-54 (2d Cir. 1991).

ARGUMENT

I. Federal Respondents Have Denied the Tribe Due Process of Law.

A. The Agency Decision Was the Product of Undue Influence.

1. Introduction

At 5:10 p.m. on March 30, 2004, Secretary of the Interior Gale Norton left the Department of the Interior ("Department") and traveled to Capitol Hill where she had been summoned to meet with Representative Frank Wolf of Virginia and Representatives Christopher Shays, Nancy Johnson, and Rob Simmons of Connecticut. PPFF 1. Three months earlier, Principal Deputy

---

genuine issues of material fact exist to determine whether summary judgment is appropriate. *Dawson v. County of Westchester*, 373 F.3d 265, 272 (2d Cir. 2004).

Assistant Secretary of Indian Affairs Aurene Martin had issued the FD acknowledging that the Schaghticoke Tribal Nation exists as an Indian tribe within the meaning of Federal law. PPFF 2.

This would be Secretary Norton's second of three meetings with Representative Shays in March 2004. PPFF 3. Rep. Shays had used the first meeting, as he would his two subsequent meetings with the Secretary, to chastise the Department for reaching what he considered to be the wrong decision in the FD and to demand that Secretary Norton intervene and reverse it. PPFF 4.

How unusual was it for Secretary Norton to be meeting privately with members of Congress to discuss a tribal acknowledgment decision? Secretary Norton testified that the Tribe's FD was the *only* tribal acknowledgment matter that ever triggered meetings during this time period with any person outside the Department of the Interior. PPFF 5. What made this meeting even more unusual, and what set the tone for the next 18 months of a coordinated, relentless attack on the FD by the Tribe's opponents, was the threat laid down by Representative Wolf at this meeting. Showing a level of audacity rarely seen even on Capitol Hill, Representative Wolf told Secretary Norton that unless she reversed the Tribe's acknowledgment decision, he would ask President Bush to fire her. PPFF 6.

From January 29, 2004, when the agency issued the FD until the agency reversed itself on October 12, 2005 by issuing the RFD, the Tribe's opponents waged a vicious political attack on the FD. In addition to the threat on Secretary Norton's job, this included:

- *Ex parte* meetings and communications with Secretary Norton;
- Congressional hearings during which the FD—still pending before the agency at the time—was attacked and specific issues were argued and the agency's analysis was criticized, all in the presence of agency staff;
- Meetings and correspondence with the White House urging it to exert pressure on the Department; and
- Pressure from the White House on the Department.

Lost in the maelstrom of political pressure that engulfed the Department of Interior between the FD and the RFD was the fundamental fact that the Federal Acknowledgment Process is an adjudicative process. *Golden Hill Paugussett Tribe v. Rell*, 463 F. Supp. 2d 192, 200 (D. Conn. 2006). This means agency participants in the decisionmaking process must be neutral and unbiased and their decision based solely on the administrative record, not extraneous information or external influences. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The improper intrusion of politics into the adjudicative processes of an administrative agency sacrifices "the right of private litigants to a fair trial and, equally important . . . their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences." *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966). Thus, as the *Pillsbury* court noted, the mere *appearance of impropriety* is sufficient to invalidate the RFD.

Here, the undisputed facts reveal that the Connecticut Congressional Delegation, Connecticut state and local officials, and other public and private stakeholders regarded the acknowledgment process as a political game and unapologetically lobbied everyone from the White House, to Secretary Norton, to the IBIA, to the BIA, to this very Court. PPFF 7. From secret backroom meetings with Interior officials and other officials within the Bush Administration to a carefully coordinated public media campaign, the Tribe's opponents took every opportunity to send a persistent, message to the Department of Interior—sometimes directly, sometimes through the "backdoor"—that they would make life miserable at the Department of Interior unless and until the Department relented and reversed its decision to acknowledge the Tribe. This effort was soon joined by town and local officials, and private stakeholders like the affluent citizens coalition Town Action to Save Kent ("TASK"). TASK in turn hired the high-powered lobbying firm Barbour Griffith & Rogers ("BGR"), well known for its contacts within the Bush Administration, to assist elected officials in their pursuit of a political end to the Tribe's acknowledgment. Through the

media, public hearings, letters from influential politicians, calls for agency and congressional investigations, proposed bills, and secret backroom meetings, the Tribe's opponents placed unprecedented pressure on the Department of the Interior without regard to whether their actions violated federal laws, agency regulations, congressional ethics rules, court orders, or the due process rights of the Tribe and its members. PPFF 8.

As demonstrated below, the undisputed facts show that the appearance of impropriety permeated every element of the process that led to the RFD. This appearance of impropriety alone requires that the Court overturn the RFD. Moreover, the undisputed facts show further that the RFD is the product of undue influence.

2. Unprecedented Pressure On the Department To Reverse The FD: A Brief Chronology.[2]

a. January 29, 2004: The Campaign Begins.

On January 29, 2004, the very same day that the FD was issued, Representative Shays began the campaign against the FD by issuing a public statement harshly criticizing the Department for acknowledging the Tribe and effectively admitting that his real concern was about gaming: "It is extremely disappointing the Bureau of Indian Affairs recognized the Schaghticokes as a federal tribe. . . . This recognition may enable the Schaghticokes to build a casino, which I believe would be very detrimental to the state." Representative Shays vowed to "continue to work with Attorney General Dick Blumenthal to assist him in any way I can" with the process of getting the FD reversed. PPFF 9. This was a commitment that Shays was well positioned to make. He had been in the Congress for nearly twenty years and had risen to the position of Vice Chairman of the powerful Committee on Government Reform, which is the main investigative arm of the House of Representatives with broad authority to investigate any federal program or any issue with federal

---

2 For a broader, chronological outline of efforts to pressure the Department following the FD, see the timeline following this Memorandum (Tab A).

policy implications.[3] True to his word, Representative Shays and the rest of Connecticut's Congressional delegation immediately began to pressure the Department with unprecedented zeal to reverse the FD. What followed was a coordinated political assault on the FD choreographed among various participants to focus on common themes that were designed to exert the most pressure on the Department to undo the FD, and to disguise their true intentions by making it appear as though the concern was with the acknowledgment process and not with the actual FD.

b. March 30, 2004: The Threat to Secretary Norton.

As noted above, on March 30, 2004, Representative Wolf and members of the Connecticut Congressional Delegation summoned Secretary Norton to Capitol Hill to debate the FD in an *ex parte* meeting. The March 30 meeting took place after business hours in Representative Wolf's conference room. PPFF 10. Secretary Norton's congressional liaison David Bernhardt accompanied her to the meeting. PPFF 11. Early in his political career, Representative Wolf had served as Assistant to the Secretary of the Interior, and, like Mr. Bernhardt, as the head of the Department's Office of Congressional and Legislative Affairs. *Id.* Now, Representative Wolf was a member of the powerful House Appropriations Committee, which holds fiscal jurisdiction over the Department of the Interior, and an outspoken opponent of Indian gaming.[4] *Id.* Representative Wolf had taken an active interest in the Tribe's acknowledgment and the possibility that the Tribe

---

3 *See* http://oversight.house.gov/about.asp

4 Since the passage of the Indian Gaming Regulatory Act ("IGRA") in 1988, gambling opponents like Representative Wolf have conflated tribal acknowledgment and tribal gaming, attempting to stop the spread of tribal gaming facilities by stopping the acknowledgment of the tribes themselves. Unfortunately, this has infused anti-acknowledgment politics with a growing vehemence—especially in Connecticut, where, for example, a television station reported the following when the Golden Hill Paugussett petitioner was denied acknowledgment: "Golden Hill Paugussett tribe denied a gambling permit by the Federal Bureau of Indian Affairs." Renee Ann Cramer, *Perceptions of the Process: Indian Gaming as it Affects Federal Tribal Acknowledgment Law and Practices*, 27 Law & Policy 578, 599-600 (2005) (citing opposition to the Schaghticoke and Eastern Pequot petitioners in Connecticut as a "case in point" of the growing politicization of the acknowledgment process). In truth, the Tribe's focus has always been to survive, not to profit, by Federal Acknowledgment. The Tribe filed its Letter of Intent with the Department a decade before the passage of IGRA. Letter of Intent (June 26, 1981) (STN-V002-D002), *available at* http://indianz.com/adc20/adc20.html (Bureau of Indian Affairs Federal Acknowledgement Decision Compilation v 2.0).

would build a casino in Connecticut. *Id.* To put it mildly, Representative Wolf and the Representatives gathered in his conference room that evening were upset with Secretary Norton. PPFF 12.

Representatives Wolf, Shays, Johnson, and Simmons demanded that Secretary Norton explain the basis for the Department's decision to acknowledge the Tribe and in particular that she respond to recent criticisms of the FD by Connecticut Attorney General Richard Blumenthal. PPFF 13. Prior to the March 30 meeting, the Delegation had provided Secretary Norton with a newspaper article that discussed the Office of Federal Acknowledgment's ("OFA" or "agency") internal deliberations about the appropriate weight the agency should assign to the Tribe's "state recognition" evidence. PPFF 14. The Delegation echoed AG Blumenthal's criticisms, as reported in the article, which focused on an internal options memorandum prepared by the agency's professional staff during those deliberations.[5] In this article, AG Blumenthal described this deliberative memorandum as, "in essence, present[ing] completely lawless and false options for the political leaders to pick." PPFF 16. AG Blumenthal had raised these same concerns when he met *ex parte* with Secretary Norton two weeks earlier to protest the Department's decision to acknowledge the Tribe, at which time he warned her of the Connecticut "congressional delegation's high level of interest," and "our shared belief that an investigation is warranted." PPFF 17.

---

5 Contrary to AG Blumenthal's and the Delegation's criticisms, the fact that the OFA professional staff recommended in this memo that the Department create new precedent in light of the Tribe's unique historical relationship with the State of Connecticut is unsurprising, and says nothing about the legitimacy of that decision. The OFA's peer review process regularly highlights novel issues, as posed by the unique factual and historical circumstances of each petitioner, in such options memos. PPFF 15. When a novel issue arises in the acknowledgment process, the OFA will prepare such an options memo for the Assistant Secretary of Indian Affairs to alert him or her to the existence of the unresolved issue. *Id.* From 1993 to 1999, for example, every Final Determination and every Proposed Finding involved a similar options memo, many of which presented the Assistant Secretary with "options" requiring the Department to make new policy determinations, set new precedents, and clarify existing precedents. *Id.* Indeed, the only unusual thing about this options memo is that this predecisional, deliberative document found its way out of the OFA and into the hands of AG Blumenthal. The OFA normally considers these memos to be privileged. *Id.*.

In her deposition, Secretary Norton first tried to downplay the tenor of the meeting with Representative Wolf and the Connecticut Congressional Delegation, describing it only as "fairly emotional." PPFF 18. However, when shown a newspaper article describing the meeting titled "Angry Lawmakers Press Interior Secretary to Overturn Schaghticoke," Secretary Norton agreed that Representative Wolf had been angry. PPFF 19. When asked further whether she agreed that Rep. Wolf and the Connecticut Congressional Delegation were "pressing" her to overturn the decision, Secretary Norton replied: "That was the outcome they wanted." PPFF 20.

Secretary Norton did not tell Representative Wolf, the Connecticut Congressional Delegation, or AG Blumenthal during any of these private, *ex parte* meetings that she herself had participated in the deliberations about the proper use of state recognition evidence. PPFF 21. She did not tell them that she herself had spoken at length with Principal Deputy AS-IA Martin about how the agency should use state recognition evidence in the FD. PPFF 22. She did not tell them that in the course of these deliberations, Principal Deputy AS-IA Martin had presented Secretary Norton with the same options memorandum that Connecticut officials now were calling "a road map for committing robbery." PPFF 23.

Secretary Norton recognized that the Delegation was not satisfied with her response to their demands. PPFF 24. In the course of a very strong and pointed exchange with the Secretary, Representative Wolf threatened to go the President to have Secretary Norton removed from her job if she did not reverse the FD: "Congressman Wolf said he would tell the President he thought I ought to be fired." PPFF 25.

The memory of this exchange stuck with Secretary Norton three years and countless meetings later. Indeed, she recalled not only this meeting, but also telling others within the

Department, including her senior leadership team, about the meeting and Wolf's threat. PPFF 26. [6] Secretary Norton also recalls relaying this information to Principal Deputy AS-IA Martin and Mr. Cason. PPFF 26. Secretary Norton would later select Mr. Cason as the official to issue the RFD. PPFF 28. Tellingly, however, she did not share with Mr. Cason the fact that she had participated in the controversial deliberations on the use of state recognition evidence, or that she supported the Department's use of this very evidence in the FD—even after Mr. Cason informed her that he would be issuing the RFD overturning the FD and denying the Tribe's petition for acknowledgment.[7] *Id.*

c. April 1, 2004: Secretary Norton is Summoned Again.

Two days later, on April 1, 2004, the Connecticut Congressional Delegation again summoned Secretary Norton to Capitol Hill—this time to the Senate side—for another private, *ex parte* meeting to once more debate the FD. This time, Senators Lieberman and Dodd, Representative DeLauro, and what Mr. Bernhardt described as "a whole host of congressional

---

6 Senior officials at the Department of the Interior like Secretary Norton and her deputies, to put it mildly, attend a lot of meetings. Mr. Cason described his job, for example, as "drinking from a fire hose." PPFF27.

7 Secretary Norton tried to minimize the impact and significance of Representative Wolf's threat by claiming that she did not lose any sleep over it. In law as in life, however, actions speak louder than words. *Latecoere Int'l. v. U.S. Dept. Navy*, 19 F.3d 1342, 1365 (11th Cir. 1994). Agency officials cannot wipe away all evidence of undue influence simply by denying that they were affected by political pressure. *Id.* at 1365 ("We cannot agree that, by the simple expedient of denying bias, a government official can wipe away all evidence of it."); *accord Sokaogon Chippewa Comm. v. Babbitt*, 961 F. Supp. 1276, 1284 (1997) (finding Secretary of the Interior's denial of undue influence insufficient to defeat request for extra-record discovery in light of circumstantial evidence of undue influence). Here, because the evidence in the record belies such a claim, Secretary's Norton's assertion similarly must be rejected. Secretary Norton testified that after her "emotional" meeting with the powerful Congressman, she returned to the Department and told her staffers about it. PPFF 29. Just one month earlier in February 2004, in the context of allegations of wrongdoing raised by Representative Wolf with respect to the recognition of a California tribe, Representative Wolf had threatened to use his Appropriations Committee post to the detriment of the Department to press the outcome he sought. In response, Secretary Norton's spokesman was quoted in the media as saying: "Frank Wolf is a well-respected member. We look forward to working with him." PPFF 30. And in the months following Congressman Wolf's threat, Secretary Norton distanced herself from the decision making process even though she had been "very involved" in the FD and the meaningful policy decisions that led to it. PPFF 31. Most importantly, regardless of whether Secretary Norton admits that she was worried about the threat or directed anyone to take any actions in response to it, it is highly reasonable to conclude that employees without the benefit of a cabinet level position, such as the career agency staff, would have been influenced by the knowledge of forceful demands by a senior member of Congress from a committee of cognizance.

staff," joined Representatives Shays and Johnson. PPFF 32. Senator Dodd hosted this meeting. *Id.* Secretary Norton's congressional liaison Mr. Bernhardt once again accompanied her to this meeting. PPFF 33. That same day, Representative Shays had a private meeting with the Director of the President's Domestic Policy Council, Margaret Spellings (now Secretary of Education), to seek the President's assistance in convincing the Department to reverse the FD.[8] PPFF 34. The Connecticut Congressional Delegation and Connecticut state officials followed this meeting with letters to Deputy Assistant to the President of the United States and Director, Office of Intergovernmental Affairs, Ruben Barrales, and, later, to other high ranking officials within the Bush Administration, including Alberto Gonzalez. PPFF 35.

d. Mr. Bernhardt and the White House Get Involved.

Shortly after this meeting, Principal Deputy AS-IA Martin and Mr. Bernhardt were called to the White House to meet with three or four White House personnel, including Director Spellings, in the West Wing of the White House to discuss the FD. PPFF 36. Mr. Bernhardt, who had not been involved in the decisionmaking process that produced the FD, had requested that Principal Deputy AS-IA Martin attend this meeting in light of her involvement with the FD. PPFF 37. Following Mr. Bernhardt's deposition in this matter, Principal Deputy AS-IA Martin told the Tribe's attorney, Judith Shapiro, of the existence of this meeting with Director Spellings, as well as at least one—likely two—subsequent White House meetings to discuss the Tribe's petition. PPFF 38. These meetings involved Mr. Bernhardt and other senior Interior officials. PPFF 39. According to former Principal Deputy AS-IA Martin, following the first White House meeting, Mr. Bernhardt began to take a more active role in the Department's recognition decisions. PPFF 40.

---

8 The Tribe sought discovery regarding this meeting between Director Spellings and Rep. Shays, and subsequent meetings between Director Spellings and Department of the Interior officials relating to the Tribe's petition, which the Court denied. July 26, 2007 Order (Doc. # 152).

On several occasions throughout the spring and summer of 2004, Mr. Bernhardt told Principal Deputy AS-IA Martin that he was not happy with the FD's recognition of the Tribe. PPFF 41. Mr. Bernhardt, she advised, also began to meet regularly with Scott Keep and Barbara Coen, the attorneys involved in recognition matters from Interior's Solicitor's office, exchanging correspondence, cases, and articles. PPFF 42. He also periodically met with Lee Fleming, the Director of the OFA. *Id.* Former Principal Deputy AS-IA Martin said that she was excluded from these meetings, but was aware of them. *Id.* A reluctant whistleblower, Principal Deputy AS-IA Martin refused to submit an affidavit with these facts when asked to do so by the Tribe. PPFF 43. Mr. Bernhardt, at his deposition, was instructed by his counsel not to answer questions about meetings with the White House. *Id.* The Court denied the Tribe's motion seeking former Principal Deputy AS-IA Martin's deposition. *See* July 26, 2007 Order (Doc. # 156.)

Because of the limited discovery in this case, the Tribe is left to speculate as to what precisely occurred at these meetings and what role White House pressure played in the RFD. What the Tribe does know is that the Congressional Delegation and Connecticut officials used these private, *ex parte* communications with Secretary Norton and Senior White House Officials to make clear to the Administration and the Department that they would not rest until the FD was reversed.

e. Fall 2004: BGR Is Hired to Coordinate the Political Attack.

The Connecticut Congressional Delegation's efforts were effective from the beginning, but they became even more so with the assistance of the experienced and well-connected Washington, D.C. based lobbying firm Barbour, Griffith, and Rogers, LLC ("BGR"). BGR's Chief Operating Officer, Loren Monroe explained BGR's role to Govenor Rell's Washington D.C. Office Director Julie Williams: "Our role will be to coordinate and enhance local, state and federal political as well as legislative efforts, in tandem with legal strategies, to convince BIA/Interior to reject the petition."

PPFF 44.[9] During his deposition on August 23, 2007, Mr. Monroe admitted that BGR's "representation was broad and focused on Congress, [the] Executive Branch, working with the Governor, the AG, and [the] press." PPFF 45. Mr. Monroe explained that a coordinated political effort represented the most effective strategy under the circumstances:

> [F]or a small state, Connecticut has got an interesting political landscape. You've got a -- hopefully I won't offend anybody by talking like this, but a very active democratic attorney general, who is a leader on this issue. You have a relatively new moderate Republican governor. You have two democratic senators with years of history involved in this issue before we ever got involved, offered amendments and statements. You have very vulnerable moderate Republican members of Congress very involved in this issue.
>
> They all were very political in terms of wanting to one-up each other, who got more credit, who did this. They all had preexisting positions regarding Schaghticoke before we ever got involved. We felt one of the most effective things we could do as a firm was to harness the preexisting views of many of these people to get them to sing off the common hymnal so that we could all work in a coordinated fashion to send a message about the need to follow existing law. . . . . [We wanted to] [s]end a message to the decision makers of the Bureau of Indian Affairs, the people watching and listening to, were they following existing regulations.

PPFF 46.

Ironically, the same politicians who had at one time accused the Tribe of hiring high priced lobbyists to place undue political pressure on the Department now welcomed BGR with open arms. On November 22, 2004, Jim Perkins of TASK met with AG Blumenthal, Connecticut State Senator Andrew Roraback, Connecticut State Representative Mary Ann Carlson, and Kent First Selectman Lorry Schiesel. PPFF 47. During the meeting, AG Blumenthal not only welcomed the lobbying efforts of BGR, he actively encouraged BGR to "go directly to the administration and ask that [a] clear message be sent to the Secretary of Interior and . . . the BIA." *Id.*

One central element of this coordinated "message" was that the FD was flawed because the Department failed to apply the seven criteria for federal recognition "*strictly.*" PPFF 48. The objective was as clear as the message itself: strict in theory, fatal in fact. The Department was to

---

[9] Tab B, following this Memorandum, is a demonstrative exhibit showing the entities and activities coordinated by BGR in its effort to convince the Department to reverse the FD.

construe *against* the Tribe all evidence and precedent. Another element of this message was that the FD was a "symptom" of widespread problems within the BIA. PPFF 49. To lend credence to this notion, AG Blumenthal, Senator Dodd, and others demanded an Inspector General's investigation into whether any source of undue influence had affected the FD. *Id.* The Inspector General conducted an investigation but found that the allegations levied by AG Blumenthal and Senator Dodd were baseless:

> Our investigation found no evidence to support the allegation that lobbyists or representatives of STN directly or indirectly influenced BIA officials to grant Federal Recognition to STN.
>
> ...
>
> Although the STN recognition decision was highly controversial, we found that OFA and the Principal Deputy Assistant Secretary – Indian Affairs conducted themselves in keeping with the requirements of the administrative process, their decision-making process was made transparent by the administrative record, and those parties aggrieved by the decision have sought relief in the appropriate administrative forum – each as it should be. Therefore, we are closing this matter.

PPFF 49. Thus, the Inspector General verified that the agency and the Tribe had properly worked within the requirements of the administrative process to reach the positive FD. *Id.* Despite the outcome of this investigation, BGR focused the Tribe's opponents on a strategy formulated to call for reform within the BIA as a pretext for attacking the FD itself:

> Our view at this point was that might offer an opportunity because, frankly, we were trying to talk about the Schaghticoke issue in broader terms. Us running around pots and pans talking about Schaghticoke wasn't going to get anybody very interested. There was a huge case history already. Most people saw it as a Connecticut-specific issue, so frankly if they weren't in Connecticut, they weren't very interested. We saw the opportunity to use the Indian Affairs Committee investigation as a chance to highlight what we saw as a . . . flaw[] in the BIA recognition process, admitted by their own documents of BIA. So we saw a very public investigation and press interest into the Indian affairs investigation as a possibility to elevate the discussions of the BIA reform process.

PPFF 50. Ultimately, despite their rhetoric about "reforming the process," as Mr. Monroe conceded in his deposition, their ultimate goal was to kill the Tribe's petition. PPFF 51. "Our view was and our public statements were that if seven criteria were *strictly* adhered to, that Schaghticoke application would fall." (emphasis added). *Id.*

Because the Tribe has been permitted only limited discovery, it is impossible at this time to provide a complete description of the efforts of the Tribe's opponents to place pressure on the Department of Interior. Nevertheless, even with only limited discovery, FOIA requests to Federal, state, and local government agencies, and the FAIR database, the Tribe has uncovered enough to show that the RFD is not the product of fair, reasoned administrative desicionmaking.[10] In the following section, the Tribe will provide just a few more examples of the political pressure the Tribe's opponents applied to the Department in their effort to undo the FD.

3. The Tribe's Opponent's Used Both Public and Private Means to Pressure the Department.

As noted above, the Federal Acknowledgment Process is an adjudicative process, and the agency decision must be based solely on the administrative record and not extraneous information or external influences. *Golden Hill Paugussett* Tribe, 463 F. Supp. 2d at 200; *Gibson*, 411 U.S. at 579. The instant action is unique among the reported decisions discussing undue influence claims. Typically, these cases involve either private *ex parte* contacts by interested parties and their allies, or the public efforts of elected politicians to influence an agency's decisionmaking process. Here, the Tribe's opponents shamelessly combined both approaches. Although some efforts by the Tribe's opponents defy easy classification, the Tribe will first discuss their public and then their private efforts.

---

[10] The Federal Acknowledgment Information Resource ("FAIR") system is a computer database system, into which documents submitted by petitioners and interested or informed parties, or located by the research staff of the OFA (formerly the Branch of Acknowledgment and Research ("BAR")), are scanned and indexed to create a searchable administrative record. PPFF 52. The system was a pilot program developed at the time the Schaghticoke petition was being reviewed in response to the GAO's recommendation that the factual bases for the agency's acknowledgment decisions be made more transparent. *Id.* The system allows OFA researchers to have immediate access to the records when reviewing a petition and petitioning groups and third parties, such as state and local governments, to obtain the record on CD-ROM. *Id.*

a. The RFD Was Tainted In Both Appearance And Result By The Public Efforts of the Tribe's Opponents to Pressure The Agency.

Those opposing the Tribe's acknowledgment engaged in a systematic and coordinated political effort to effect a reversal of the FD. PPFF 53. As discussed above, this included a public relations campaign waged through the media. It also included legislative investigations, proposed legislation, and congressional hearings which engaged in direct, searching, and vehement attacks on the factual and legal predicate for the FD.

In House and Senate subcommittee hearings attended by agency staff, Members of Congress, AG Blumenthal and others went well beyond the hearings' investigatory function and focused directly and critically on the FD's factual and legal determinations, calling out the agency as lawless and threatening legislative fixes—from "personnel" changes, to taking the acknowledgment process away from the agency, to a bill expressly overruling the FD and forever terminating the Tribe. PPFF 54.

(i) The Legal Standard

While Congress, in its supervisory capacity, has the right to investigate an agency's actions to evaluate its efficiency, effectiveness, and compliance with congressional intent, there are limits to congressional intervention in agency proceedings. Here, the actions of the Connecticut Congressional Delegation were plainly impermissible and, as such, require the Court to invalidate the RFD. *Sokaogon Chippewa Community v. Babbitt*, 929 F. Supp. 1165, 1174 (W.D. Wis. 1996); *Pillsbury*, 354 F.2d at 963-65; *D.C. Fed'n of Civil Ass'ns v. Volpe*, 459 F.2d 1231, 1245-49 (D.C. Cir. 1971); *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610-11 (D.C. Cir. 1978); *Sierra Club v. Costle*, 657 F.2d 298, 408-410 (D.C. Cir. 1981).

The propriety of congressional contact depends, to a large degree, on the nature of the proceedings. *Sokaogon Chippewa Community*, 929 F.Supp. at 1174; *Volpe*, 459 F.2d at 1246-47 (distinguishing the standard applied to judicial or quasi-judicial agency action from those applied to

non-judicial, quasi-legislative agency action); *Sierra Club*, 657 F.2d at 408 n.533 (same). As noted above, the BIA's FD undeniably was an adjudicative determination. *See, e.g.*, *Golden Hill Paugussett Tribe v. Rell*, 463 F.Supp.2d 192, 200 (D. Conn. 2006).

In the context of adjudicative proceedings such as the acknowledgment process, in which the rights of private litigants are implicated, judicial scrutiny of congressional interference in the administrative process is heightened. *ATX v. U.S. Dep't of Transportation*, 41 F.3d 1522, 1527 (D.C. Cir. 1994); *cf.* Richard J. Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons From Chevron and Mistretta*, 57 U. Chi. L. Rev. 481, 498 (1990) ("As the agency decisionmaking process moves from policymaking to adjudication, judicially–imposed constraints on congressional pressure become necessary."). Accordingly, courts will invalidate an agency adjudication when the "appearance of impartiality" has been compromised, absent any proof of an effect on the outcome. *Pillsbury Co.*, 354 F.2d at 964; *see Volpe*, 459 F.2d at 1246-47 ("With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality."); *Koniag*, 580 F.2d at 610 (finding that a congressional letter "compromised the appearance of the Secretary's impartiality"); *Sokaogon*, 929 F. Supp. at 117 ("[E]ven an appearance of bias is improper in a quasi-judicial proceeding in which the decisionmaker is supposed to be impartial . . . .").

In *Pillsbury Co. v. FTC*, the seminal case on congressional interference with administrative adjudicatory proceedings,[11] the Fifth Circuit held invalid a Federal Trade Commission's ("FTC") divestiture order after concluding that congressional interference had impermissibly tainted the FTC's decisionmaking process. 354 F.2d 952 (5th Cir. 1966). The FTC brought an action under

---

11 *Pillsbury* has long been recognized as one of the leading cases on judicial scrutiny of congressional interference with adjudicative proceedings. *See, e.g.*, Harold H. Bruff & Ernest Gellhorn, *Congressional Control Of Administrative Regulation: A Study Of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1433 (1977); *ATX*, 41 F.3d at 1529 (citing *Pillsbury* as "leading precedent").

the Clayton Act against Pillsbury, claiming that, by acquiring competing flour millers, it had significantly reduced competition in the region. *Id.* at 953-54. While Pillsbury was preparing its defense, the Antitrust Subcommittee of the Senate Judiciary Committee summoned the FTC chair and his staff to appear and testify. *Id.* at 955. During that testimony the subcommittee subjected the commissioner to "a searching examination as to how and why he reached his decision . . . and criticize[d] him for reaching the 'wrong' decision." *Id.* at 964. The court concluded that this "constituted an improper intrusion into the [FTC's] adjudicatory processes," explaining that "private litigants [have a right] to a fair trial and, equally important, . . . [a] right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences." *Id.* at 963-64. Congress, by attacking the merits of a pending administrative adjudication, it reasoned, "sacrifices the appearance of impartiality -- the sine qua non of American judicial justice." *Id.* at 964.

Here, as in *Pillsbury*, the pressure on agency staff members and advisors, including OFA Director Lee Fleming, during House and Senate oversight hearings while the matter was still pending before the IBIA had, at the very least, the appearance of compromising the agency's impartiality. Couched as forums in which to discuss the shortcomings of the acknowledgment process, including ironically a perceived lack of objectivity and transparency, these criticisms were nothing more than a pretextual opportunity for the Connecticut Congressional Delegation and others opposing the Tribe's recognition to excoriate the agency's FD in an effort to influence the agency to reverse course. Indeed, certain members of Congress at these hearings went far beyond the boundaries of permissible oversight and personally involved themselves in the agency's decisionmaking process.

(ii) House Committee on Resources Hearing

On March 31, 2004, the United States House Committee on Resources held a hearing entitled, "Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs": *Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs: Hearing Before the House Committee on Resources*, 108th Cong., H.R. Serial No. 108–89 (March 31, 2004). PPFF 55. At this hearing, various members of the Connecticut delegation worked hard to undermine the perceived integrity of Interior's decision-making process. Congresswoman Johnson called on the Committee to "invalidate the Schaghticoke decision," which she argued was "flawed and illogical," and "impose a moratorium on [all] BIA acknowledgment decisions pending a comprehensive review of the BIA process . . . ." PPFF 56. Congressman Shays testified that the agency made the decision to grant the Tribe federal recognition "even though it seemed clear they did not meet the BIA criteria for proving continuity from pre-colonial times." *Id.* "The unfortunate reality highlighted by [this decision]," he added, "is that the BIA quite clearly did not decide this case on the merits." *Id.* Finally, Congressman Simmons testified that "[t]he record is clear that BIA is breaking its own rules to reach their own desired outcome and that of petitioning groups and their wealthy financial backers. The recent Schaghticoke decision is a case in point." *Id.* OFA Director Lee Fleming was present to witness these and similar comments. *Id.*

(iii) House Committee on Government Reform Hearing

Just over one month later, on May 5, 2004, the United States House Committee on Government Reform held a hearing concerning the agency's recognition process entitled, "Betting on Transparency: Toward Fairness and Integrity in the Interior Department's Tribal Recognition Process": *Betting on Transparency: Toward Fairness and Integrity in the Interior Department's Tribal Recognition Process*, Hearing Before the H. Comm. on Gov't Reform, 108th Cong., H.R. Serial No. 108–198 (May 5, 2004). PPFF 57. Theresa Rosier, Counselor to the AS-IA, and

Inspector General Earl E. Devaney were present and testified on behalf of the Department of the Interior. PPFF 58. OFA Director Fleming also was present but did not testify. *Id.* The Committee had taken a strong interest in the Schaghticoke's FD at the insistence of Representative Shays, the Committee's Vice-Chairman. *Id.* In his opening statement, Chairman Tom Davis acknowledged that the reason for the hearing was to address the concerns of the Connecticut Congressional Delegation with respect to the acknowledgments of the Tribe and the Connecticut-based Eastern Pequots. Specifically, Chairman Davis stated:

> The Connecticut Congressional Delegation recently brought to my attention two BIA recognition petitions filed by Connecticut tribes and asked the Committee to hold a hearing to explore questions about the objectivity and transparency of the BIA recognition process in connection with the decisions to recognize the Historical Eastern Pequot and the Schaghticoke tribes.
>
> * * *
>
> Both the Schaghticoke and Historical Eastern Pequot decisions are being challenged on various grounds by the Connecticut Attorney General, municipalities subject to Indian land claims, and other interested parties. In both cases, final recognition was granted by the Assistant Secretary for Indian Affairs despite proposed findings by the BIA that the tribes did not meet one or more of the seven mandatory criteria for status as a sovereign Indian nation.

PPFF 59. AG Blumenthal testified at this hearing, criticizing, as he had in the March 31 Hearing before the House Committee on Resources, the BIA's recognition of the Tribe. Demanding a moratorium on all BIA acknowledgment decisions, AG Blumenthal stated that the FD

> was as unprincipled as it [was] unprecedented. Never before has the BIA recognized a tribe that is admitted by the agency itself to completely lack evidence on two key required standards over decades . . . And never before has the BIA so twisted and distorted State recognition to cover its deliberate disregard for absent evidence.

PPFF 60. Representative Shays, likewise, referred to the FD as an example of "[j]ust how far the BIA had strayed from legal and factual reality." PPFF 61.

During this hearing in particular, Counselor Rosier, Inspector General Devaney, and Director Fleming were subjected to open congressional hostility as they repeatedly were asked by the Committee to defend the FD or concede that the agency had erred. PPFF 62. This is

exemplified in a heated exchange between Representative Simmons, Counselor Rosier, and AG Blumenthal, in which Simmons, at one point, lost his temper completely with the Department officials present at the hearing: "Mr. Chairman, let me extend my apologies to the two witnesses if I got a little hot. I am Irish. But I will tell you, as the attorney general and others know, I have been punching this pillow for a decade, and as the attorney general has pointed out, whenever it comes time to get concrete answers on the record, it just doesn't come to pass. So it is very frustrating." *Id.* In that exchange, Representative Simmons admonished the Department officials that he was aware of "factual evidence that the [seven mandatory criteria for federal acknowledgment] are not being followed in a mandatory way." PPFF 63. Defending the FD, Ms. Rosier responded that "[i]n the Schaghticoke decision—and I know we are going to disagree on this—we believe that the seven mandatory criteria were fulfilled. That was our recommendation." PPFF 64. Appalled, Rep. Simmons asked AG Blumenthal to respond to Ms. Rosier, asking him if there were any decisions in which he believed the seven criteria were not applied. *Id.* AG Blumenthal immediately pointed to the FD and what he claimed to be its factual and legal flaws:

> With all due respect [Ms. Rosier], in the Schaghticoke decision . . . those seven criteria have not been met, very clearly and unequivocally by the admission of the BIA itself. And it uses evidence that is clearly improper about State dealings to compensate for the acknowledged lack of evidence on those seven criteria. For example, it admits a seven decade gap, 1801 to 1875, on the existence of political authority, which is one of the key criteria, a gap that simply cannot be overcome by supposed State recognition that was not begun until 1973, even if it were proper to use that fact, which we contend it is not.

Id. As if to confirm his prior, ex parte private threat to seek Secretary Norton's removal from office, Congressman Wolf interjected at the hearing, referring to the "corrupt [acknowledgment] process" and suggesting that Secretary Norton should be "held in disgrace" in the memory of all prior secretaries. PPFF 65. He added that the Department had made a mistake regarding the FD and, if it was not fixed, "the fault would lie at the steps of Secretary Gale Norton and this Administration." *Id.*

The *Pillsbury* Court found that a Senate subcommittee had improperly influenced an FTC decision because its Members' questioning of agency officials improperly intruded into the decisionmaking process by challenging the agency's findings of facts and its application of the regulations to those facts. *See Pillsbury*, 354 F.2d at 964. Here, as in *Pillsbury*, the House Committee's questions "focuse[d] directly and substantially upon the mental decisional processes of [the agency]," suggesting, in substance and in form, that the manner in which the criteria for acknowledgment and the particular facts of the Tribe's case were interpreted and applied was improper. *See Pillsbury*, 354 F.2d at 964. The extent of the Committee's interrogation of the agency officials is evident in the following cross-examination by Representative Shays of Ms. Rosier concerning the Tribe's historic relationship with the State of Connecticut and the appropriate weight the OFA assigned various aspects of that relationship in applying the regulations to decide the FD:

> Mr. Shays. I would like, Ms. Rosier, to ask you the following question. Do you believe that it is an absolute requirement that a Indian tribe demonstrate social and economic and political continuity pre-colonial times, in other words, they never stopped? Do you believe that is a requirement in recognition?
>
> Ms Rosier. I believe the requirement and recommendation as outlined in 25 C.F.R. Part 83 is that all seven mandatory criteria must be met, and the burden of proof is that it is the reasonable likelihood of the validity of the facts. That is my job and the staff's job, to ensure that of those seven criteria, this burden of proof has been met.
>
> Mr. Shays. So in this room, if I turned out the light switch for a little bit of time and then turned it back on, even though you saw the lights on, that wouldn't be good enough, correct? The light has to be on the whole time.
>
> Ms Rosier. What we are recognizing at the Department of the Interior is a continuous political entity as a tribe, and we look at the community and we look at——
>
> Mr. Shays. Without interruption, correct?
>
> Ms. Rosier. We are looking at continuity.
>
> Mr. Shays. Continuity means without interruption, correct?
>
> Ms. Rosier. We are looking at a continuous relationship.
>
> Mr. Shays. Continuous relationship means it never stopped.

Ms. Rosier. A continuous relationship that meets the seven mandatory criteria.

Mr. Shays. Well, I don't want you to be evasive here. You are here to testify before the committee, and the bottom line is doesn't the tribe have to prove that they were always a tribe, socially, politically, economically, and that they never stopped being a tribe? Isn't that correct?

Ms. Rosier. Yes, that is correct.

Mr. Shays. OK. And do you understand that in the State of Connecticut we can recognize a State tribe where they actually had interruption? Are you aware of that?

Ms. Rosier. Not specifically, no.

Mr. Shays. Well, it is a fact. The fact is that State tribes in Connecticut don't have to show continuity.

Ms. Rosier. Congress can do that also, too. Congress can recognize a tribe too.

Mr. Shays. I understand that, but we are not talking about Congress recognizing a tribe. I am just trying to have you understand something, because I am under the impression you want to do the right thing, and the right thing requires that there be continuity.

[The Principal Deputy AS-IA] made a huge decision that is impacting improperly, and you heard the testimony from Mr. Blumenthal. The bottom line is we are telling you in the State of Connecticut we may recognize a State tribe that doesn't exist except in land. They may not have political, social, or economic continuity. There may just be one person living on that reservation. That doesn't meet the Federal standard, but it meets the State standard. And that is what is so outrageous about [the Principal Deputy AS-IA] and this Department continuing with the process of State recognition.

PPFF 66.

Representative Shays' characterization of the Tribe's state recognition evidence was grossly inaccurate, as the Tribe will demonstrate in detail below, and in applying the acknowledgment regulations to the facts, he multiplied his errors. More troubling for the instant analysis, however, is the fact that Representative Shays and the other Members of the Connecticut Congressional Delegation testifying before the panel did not do so in order to serve some legitimate oversight goal. Instead, they very clearly intended to pressure the agency into reversing the FD by forcing agency officials to question their interpretation of the acknowledgment criteria and the way in which they applied the specific facts before them to those criteria. Intrusions such as this into the decisionmaking process of a pending case are grossly improper and deprived the Tribe of any

inkling of procedural fairness, much less the appearance of impartiality -- the so-called "*sine qua non* of American judicial justice." *Pillsbury*, 354 F.2d at 964.

(iv) The Termination Bill

In the ensuing months, the Connecticut Congressional Delegation continued to press the Department. On March 3, 2005, Representative Johnson introduced legislation, styled the "Schaghticoke Acknowledgment Repeal Act of 2005"—the first termination bill since federal repudiation of the termination policy nearly 50 years ago. PPFF 67. At a news conference on March 4, 2005, Representative Johnson, in explaining why she introduced the Bill, stated:

> The BIA's decision was erroneous and unlawful, and it simply cannot be allowed to stand . . . . This decision was made by ignoring evidence, manipulating federal regulations and overturning precedent. The consequences of this decision, including a casino in Western Connecticut, would be deep and irreversible. Local taxpayers would face increased financial burdens, our infrastructure would be overwhelmed by the round-the-clock traffic, and huge areas would be subject to land claims. This bill makes sure that the people of Western Connecticut are not made to pay for the erroneous and unlawful decision of the BIA.

PPFF 68.

It is difficult to overstate the impact of the specter of termination on the BIA and others who work to preserve the heritage and promote the self-determination of America's native peoples. The period of American Indian history marked by the termination policy represents "the most concerted drive against Indian property and Indian survival since the removals following the act of 1830 and the liquidation of tribes and reservations following 1887." *Cohen's Handbook of Federal Indian Law* § 1.06, (Dean Nell Jessup Newton, University of Connecticut Law School, ed., 2005 ed.) (citation omitted); Robert N. Clinton, *Redressing the Legacy of Conquest*, 46 Ark. L. Rev. 77, 85 (1993) (referring to termination as a "systematic assault").

The results of termination were undeniably and uniformly tragic. Members of terminated tribes lost access to education, health, welfare, and housing assistance, as well as other social programs. Cohen, *supra*, § 1.06. The cultural integrity of tribes was destroyed as members lost control over basic matters such as education, adoption, and land use. *Id.* "Most terminated tribes

ultimately relinquished or lost their land," leading to an inability of tribal authorities to exercise their governmental powers. *Id.* In the end, the sovereignty of terminated tribes was weakened or destroyed as tribal governments became "increasingly divided and dysfunctional." *Id.* The "devastating effects" of termination lingered long after the government abandoned this failed policy experiment. Michael C. Walch, *Terminating the Indian Termination Policy*, 35 Stan L. Rev. 1181, 1181 (1983).

Eventually, even the federal government acknowledged the failure of termination. Addressing the issue, President Nixon stated, "Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to . . . expressly renounce, repudiate and repeal the termination policy[.]" President's Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564, 567 (July 8, 1970), *quoted in* Derek C. Haskew, *Federal Consultation with Indian Tribes*, 24 Am. Indian L. Rev. 21, 32 n.44 (2000).

Measured against such a tortured historical background, any action by a member of Congress that implied, or even hinted at, a return to the disastrous policy of termination would have been seen by the mission-minded agency staff as an unacceptable threat to every American Indian tribe, not to mention the legacy of the agency itself. With that very purpose obviously in mind, BGR's Loren Monroe predicted of Representative Johnson's Bill, "[it] won't pass but it will send another strong signal." PPFF 69.

(v) Senate Committee on Indian Affairs Hearing

Finally, just one day before the IBIA issued its order vacating and remanding the FD, the Senate Committee on Indian Affairs held an Oversight Hearing on the Federal Recognition of Indian Tribes. PPFF 70. The hearing was intended to be an oversight hearing on the recognition process generally, to be followed by several more hearings on the same subject. PPFF 71. The

intended, legitimate purpose for the hearing was to review how the acknowledgment process works and what, if anything, needed to be changed. *Id.* BGR, however, had other plans. *Id.* Using its contacts with Indian Affairs' staff, BGR orchestrated a scenario in which the Connecticut Congressional Delegation, Attorney General Blumenthal, and Connecticut Governor M. Jodi Rell,[12] could "surround[] the Department" and attack the BIA for issuing the FD, which it improperly characterized as fatally flawed, lawless, and illogical. *Id.*

OFA Director Fleming and Deputy Inspector General Mark Kendall appeared and testified on behalf of the agency. PPFF 72. In a statement before the panel, AG Blumenthal asked that Congress abolish the OFA's tribal recognition authority and impose an immediate six month moratorium on all recognition decisions, explaining that "the BIA's political leaders have disregarded the [seven mandatory criteria], misapplied evidence, and denied state and local governments a fair opportunity to be heard." PPFF 73. Governor Rell testified that the "BIA is awarding Federal recognition to tribes regardless of evidence to the contrary," adding that "historical reservation lands no longer exist as such, and haven't for well more than two hundred years. They are now cities and towns, filled with family homes, churches, schools, shopping areas and the like." PPFF 75.

During this same hearing, Connecticut Senator Joseph Lieberman attacked the Tribe's FD as an example of a "process that smacks of outright manipulation and abuse of government authority." PPFF 76. Congresswoman Johnson stated that the OFA's "erroneous and unlawful decision to acknowledge the [Tribe] was made by ignoring evidence, manipulating federal regulations and overturning precedent." PPFF 77. Congressman Shays stated that: "The bottomline for me is the recognition process is corrupt and has been for years. Regretfully, Indian recognition is too often

---

12 At the outset of the hearing, Chairman McCain observed that "[t]he State of Connecticut is well represented here this morning." PPFF 74.

not about recognizing true Indian tribes, but it is about Indian gaming and the license to print money." *Id.* at 10. PPFF 78. Finally, Congressman Simmons stated that "[i]ndeed, there is no better example of this disregard for the regulations in place than in the case of the Schaghticoke decision." PPFF 79.

Based on applicable case law, this congressional activity alone is sufficient to invalidate the RFD. *Pillsbury*, 354 F.2d at 963-65.

b. Private Communications with Executive and Administrative Officials Further Tainted the Agency's Proceedings.

Impermissible congressional pressure is not limited to communications made in public but includes, worse still, those communications made behind closed doors. The undisputed facts reveal that members of the Connecticut Congressional Delegation, officials from the State of Connecticut, including Governor Rell and AG Blumenthal, and other opponents of the Tribe's acknowledgment engaged in pervasive and impermissible private communications with Executive Branch and agency officials in order to convince the BIA to reverse the FD. During these proceedings, they wrote letters to, and had private meetings and telephone conversations with, officials from the BIA, IBIA, the Department, and the White House, condemning the FD and threatening political retribution to those who stood in their way. Such private, *ex parte* communications were in direct contravention of fundamental notions of due process, to wit, the right to notice and an opportunity to respond with relevant information, the acknowledgment regulations, as well as this Court's 2001 Scheduling Order.

(i) The Legal Standard

Private, *ex parte* communications with agency officials concerning the merits of a pending adjudicative proceeding violate a party's constitutional right to procedural due process. *See, e.g.*, *Volpe*, 459 F.2d at 1245-49; *Koniag*, 580 F.2d at 609-10; *Sierra Club*, 657 F.2d at 400 ("Where agency action resembles judicial action, . . . the insulation of the decisionmaker from *ex parte*

contacts is justified by basic notions of due process to the parties involved."). *Accord Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51-54 (D.C. Cir. 1977); *Action for Children's Television v. FCC*, 564 F.2d 458, 471 n.21 (D.C. Cir. 1977); *U.S. Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 539 (D.C. Cir. 1978). Courts have long recognized the inconsistency of secret *ex parte* contacts with the principles of fairness implicit in due process. *U.S. Lines*, 584 F.2d at 539 (citing *Morgan v. United States*, 304 U.S. 1, 18 (1938)). These principles require that adjudicative proceedings "be carried out in the open" and that the parties to the proceedings be afforded fair notice and a meaningful opportunity to be heard. *Sangamon*, 269 F.2d at 224; *see Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Guenther v. Comm'r of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989). *Ex parte* communications with agency officials involved in the decisionmaking process usurp a party's right to these basic, "trial-type procedures," *Action for Children's Television*, 564 F.2d at 471 n.21, and deprive it of the ability "to participate meaningfully in the decisionmaking process." *U.S. Lines*, 584 F.2d at 540.

In *Koniag*, eleven Native Alaskan villages brought an action challenging the adjudicatory decisions of the Secretary of the Interior with respect to their eligibility to receive land and money under the Alaska Native Claims Settlement Act ("ANSCA") in large part citing a single *ex parte* letter they argued constituted improper congressional pressure on the agency. 580 F.2d 601 (D.C. Cir. 1978). The Alaska area director of the BIA initially determined that the plaintiff villages were eligible for benefits. *Id.* at 604. Two days before the Secretary made his determination on their eligibility, however, Congressman Dingell sent him a letter stating his belief that the requirements of ANSCA had been misinterpreted and that "certain villages should not have been certified as eligible for land selections under ANSCA." *Id.* at 610. Although the congressman's letter did not specify the villages he believed to be ineligible, the court nevertheless, citing *Pillsbury* and *Volpe*,

concluded that the letter had "compromised the appearance of the Secretary's impartiality" and therefore impermissibly tainted the agency's decision. *Id.*

Here, as discussed below, the *ex parte* communications at issue were far more numerous and egregious.

(ii) Examples of the many *ex parte* communications.

AG Blumenthal and various members of the Connecticut Congressional Delegation engaged in a pervasive and vigorous, "beneath the radar" assault on the agency with the clear intention of affecting, in their favor, the outcome of the pending proceedings. The Tribe was never made aware of these contacts at the time, nor was it ever even afforded equal time to present its perspective. There are many examples:

- On March 4, 2004, just over one month after the FD, members of the Connecticut Congressional Delegation, including Representative Christopher Shays, met with Secretary Norton, Mike Rossetti (Secretary Norton's Counsel), and Mr. Bernhardt. The Representatives chastised the agency for the FD. PPFF 80.

- Within days of that meeting, on March 12, 2004, Representatives Shays, Simmons, and Johnson sent Secretary Norton a letter, asking her to conduct an internal investigation into the FD and asserting, based on an internal BIA memorandum, that the agency "was aware of inadequacies in the [Tribe's] application for federal recognition and sought ways to allow the recognition to go forward." PPFF 81.

- On March 16, 2004, the entire Connecticut Congressional Delegation sent Secretary Norton a letter, stating that they were "concerned that the agency apparently did not follow its 'regulations and existing precedent' in its acknowledgment of the Schaghticoke" and urging her "to take personal action and investigate what appears to be yet another instance of a flawed tribal recognition process." In her deposition, Secretary Norton recalled discussing, and sharing a copy of, this letter with Aurene Martin and David Anderson. PPFF 82.

- On March 17, 2004, Representatives Shays, Johnson, Simmons, and Wolf wrote Secretary Norton to request a meeting to discuss the merits of the FD, again referencing the internal BIA memorandum. PPFF 83.

- On March 17, 2004, AG Blumenthal met with Secretary Norton to contest the FD and personally deliver a letter to her in which he requested an internal OIG investigation into the decision. AG Blumenthal told Secretary Norton that the decision had been wrongly decided and argued in particular that "state recognition should not have been given as much weight as it was." Following this meeting, AG Blumenthal expressed confidence that "this matter now clearly is on her radar screen." PPFF 84.

- As noted above, Secretary Norton met with Representatives Wolf, Shays, and Johnson on March 30, 2004. When asked if, at any time during the meeting, she had been threatened, she stated

that "Congressman Wolf said he would tell the President he thought I ought to be fired." PPFF 85.

- Secretary Norton met with Senators Dodd and Lieberman, and Representatives Shays, Johnson, DeLauro, and what Mr. Bernhardt described as "a whole host of congressional staff." PPFF 32. on April 1, 2004.[13] In that meeting, Senator Lieberman expressed his concern with the proliferation of casinos in Connecticut, in general, and the FD, in particular. PPFF 86.

- On or about July 19, 2004, Representative Johnson contacted the BIA to request a meeting with agency officials including Principal Deputy AS-IA Martin in order to deliver to the BIA 8,000 survey postcards from her constituents in protest of the Schaghticoke's recognition. OFA Director Fleming "view[ed] this as pressure from an elected official," and felt it necessary to remind the OFA staff that "[t]he Federal acknowledgment process is not a popularity contest or poll." PPFF 88.

- On December, 9, 2004, Representatives Johnson, Shays, and Simmons sent Secretary Norton yet another letter, this time responding to the OFA's Supplemental Transmittal. In their letter, the Representatives stated that "[t]his latest revelation is just one of the errors used to satisfy the 'mandatory' political authority and political continuity criteria for federal recognition . . . and it strengthens our belief that the STN Final Determination was incorrectly decided." PPFF 89.

- Finally, on February 10, 2005, Representatives Shays, Johnson, and Simmons sent a letter to the IBIA, while the appeal of the FD was pending before that body, urging it to overturn the Tribe's FD. In response to this letter, Administrative Law Judge (ALJ) Linscheid warned Reps. Shays, Johnson, and Simmons that their conduct was subject to regulations prohibiting *ex parte* communications with the IBIA. PPFF 90.[14]

(iii) These communications created at least the appearance of impropriety.

Given the frequency and substance of these private communications, to which the Tribe was never given a meaningful opportunity to respond, it is clear that the "appearance of impartiality -- the *sine qua non* of American judicial justice" has been compromised. *Pillsbury*, 354 F.2d at 964. Indeed, it is hard to imagine a more serious and egregious corruption of the agency adjudicative processes than here, where senior agency officials were asked to prejudge the facts of a case then pending before them and, in at least one instance, threatened with political retribution if they did not act to ensure a favorable outcome.

---

13 Secretary Norton's calendar indicates that she also met with Senator Dodd on March 31. In her deposition testimony, however, Secretary Norton stated that she did not recall having two separate meetings and that, in fact, the March 31 and April 1 meetings "may have been consolidated." PPFF 87.

14 The IBIA appeal is a formal agency adjudication, and as such it is subject to 5 U.S.C. § 557(d)(1)(A), which expressly prohibits such *ex parte* communications.

(iv) The *ex parte* communications also violate the acknowledgment regulations.

Furthermore, these *ex parte* communications from the Connecticut Congressional Delegation directly contravene the letter and spirit of the acknowledgment regulations. To protect decisionmakers from political pressure and other improper attempts to influence the decision, and to ensure that petitioners are provided adequate notice and a meaningful opportunity to respond to arguments and evidence presented in opposition to their petitions, the acknowledgment regulations explicitly regulate the manner in which information and evidence may be submitted to the agency. Section 83.1 broadly defines "informed parties" and "interested parties" to bring within the regulatory scheme all persons and organizations who wish to "submit comments or evidence or to be kept informed of general actions regarding a specific petitioner." 25 C.F.R. § 83.1. The regulatory scheme of 25 C.F.R. Part 83 is comprehensive, and at no place does it permit the participation in the adjudicatory acknowledgment process of anyone other than the petitioner and the interested and informed parties. The members of Connecticut's congressional delegation and Congressman Wolf had no right, statutory or constitutional, to participate as clandestine interlopers in the Tribe's acknowledgment process. Their participation was improper and unlawful.

Confining participation in the acknowledgment process to the petitioner, informed parties, and interested parties, the regulations set forth in detail the times during the process when each participant may present information and evidence to the agency. *See, e.g.*, 25 C.F.R. §§ 83.9, 83.10(i), 83.10(j)(2); 83.10(k); 83.10(*l*)(1); 83.11(b)(2). Consistent with the adjudicatory nature of the process, for each time that the regulations permit interested and informed parties to submit written arguments or evidence, the regulations require that copies of these submissions be provided to the petitioner and placed in the record. *See, e.g.*, 25 C.F.R. §§ 83.10(i), 83.10(k); 83.10(*l*)(1), 83.11(b)(2). For each time that the regulations permit the interested and informed parties to present arguments or evidence in non-written form, the regulations require that such presentations be made

during a formal meeting of the parties, held in the open, with prior notice to petitioner, and on the record. *See, e.g.*, 25 C.F.R. §§ 83.10(j)(2). At every point in the administrative process that the regulations permit interested and informed parties to participate in the process and engage in substantive communications with the agency, the regulations require prior notice to the petitioner and a meaningful opportunity for the petitioner to be heard in response. *See, e.g.*, 25 C.F.R. § 83.10(K).

The regulations do not permit participants in the process – or their proxies – to present arguments and evidence in secret, *ex parte* meetings, letters, or other communications to the agency, nor do they permit anyone to subvert the acknowledgment process by pressuring agency decision-makers to deny a petition regardless of its merits through such *ex parte* communications. The Connecticut Congressional Delegation's and Congressman Wolf's surreptitious intrusion into the acknowledgment process at the request of, on behalf of, and in concert with the interested parties from the State of Connecticut was improper and violated the acknowledgment regulations.[15]

(v) The *ex parte* communications also violate the Court's Scheduling Order.

Finally, the *ex parte* communications violated this Court's 2001 Scheduling Order. Paragraph (1) of the Court's Scheduling Order prohibited *ex parte* contact: "No non-federal party or amici shall communicate or meet with any officials in the immediate offices of the Secretary of the

---

[15] Representative Wolf's and the Connecticut Congressional Delegation's contacts with agency officials also violated the requirements of the House Standards of Official Conduct, including the prohibition on *ex parte* communications with agency officials in adjudicative proceedings. *See* Rule 23 of the House (Code of Official Conduct), Advisory Opinion No. 1, reprinted at 116 Cong. Rec. 1077-78 (Jan. 26, 1970) and 5 USC 551(14), and 557(a) and (d) along with pages 3,4 and 5 of the House Ethics Manual. The Senate has a similar body of law. Senate Rule 43 is the primary expression of the law in the Senate. *See* Sen. Rpt. 102-283 and the Senate Ethics Manual at pp. 177-185 (2003 Ed.). The prohibition on *ex parte* contacts with Executive Branch agencies in adjudicative proceedings "was intended to ensure that decisions required by law to be made solely on the basis of the public record will not be influenced by secret discussions that some of the parties to the proceeding, or the public, do not know about. *Id.* at 181 (citation omitted). The only exception to this prohibition for members of Congress is for routine inquiries requesting information on the status of a matter pending before an agency. 5 U.S.C. § 551(14).

Interior, the Assistant Secretary-Indian Affairs or the Deputy Commissioner of Indian Affairs with respect to this petition, without notification to the other parties." After AG Blumenthal violated this order by his *ex parte* meeting with Secretary Norton on March 17, 2004, this Court recognized the "inappropriate nature" of such contacts, observing that "[w]ithout prior notice, a party's right to respond in a timely manner may be impaired" and that "[s]uch conduct, at the very least, appears improper and thus threatens to subvert the integrity of the appeal process itself."[16] PPFF 91.

Thereafter, AG Blumenthal began to encourage others to contact the Department on his behalf—attempting to accomplish indirectly what he was forbidden from accomplishing directly. PPFF 92. Similarly, Perkins Coie, a law firm that represents several interested parties, provided several Connecticut municipalities with telephone numbers for Principal Deputy AS-IA Martin, Secretary Norton's Counsel Michael Rossetti, and Kit Kimball, describing Ms. Kimball as someone who "covers intergovernmental affairs [for Secretary Norton] and may care about the local government angle." PPFF 93. Perkins Coie also provided these telephone numbers to Representative Shays, encouraging him to call the Department on behalf of its clients. *Id.*

---

16 The Department of the Interior and Intervenors may argue that this Court's order was not violated because it did not apply to the Connecticut Congressional Delegation. This argument, however, is meritless. Judicial orders could be too easily thwarted if parties were able to nullify them by carrying out prohibited acts through aiders and abettors who were not mentioned in the order. *See, e.g., Chicago Truck Drivers v. Bhd. Labor Leasing,* 230 F.Supp.2d 963, 969-70 (E.D. Mo. 2002). Accordingly, courts uniformly hold that "[e]ven a stranger to litigation can be held in contempt for violation of a court order if he or she has notice of it and acts in concert or privity with the party against whom the order is directed." *D.D. v. M.T.,* 550 A.2d 37, 50 (D.C. 1988); *accord* Annotation, *Violation of State Court Order by One Other than Party as Contempt,* 7 A.L.R. 4th 893 (1981) (collecting cases); *cf. Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 340-341 (1958) (finding that citizens of a state whose interests are represented by the state in litigation that results in an injunction against the state may be deemed in privity with the state and bound by the injunction despite the fact that the state is the only party to the injunction); *Wyoming v. Colorado,* 286 U.S. 494, 506-509 (1932) (same); Fed. R. Civ. P. 65(d) ("Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, *and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise*." (emphasis added)).

4. The RFD Is The Product Of Undue Influence.

The public and private efforts of the Tribe's opponents brought to bear intense media scrutiny on the Department and threatened another public relations nightmare for the Department of Interior, which already was struggling to retain the trust of Congress, of an embarrassed White House, and of the public in the midst of the explosive Abramoff scandal.[17] Unlike the seemingly intractable quagmire the Abramoff scandal had become, however, the pressure emitting from Connecticut had an easy and clearly marked release valve. Upon issuance of the RFD, the pressure simply disappeared: no more letters, no more meetings, no more investigations, no more hearings, no more threats, no more movement to "reform" the acknowledgment process, no more Schaghticoke Tribal Nation.

In light of the adjudicatory nature of the acknowledgment process, the Tribe need only show the mere appearance of impropriety, the existence of which this Court has already recognized in the actions of AG Blumenthal. Ruling on Motion to Amend Scheduling Order, Civ Nos. H-85-1078, 3:98cv1113 & 3:00vc820 (PCD), at 3 (June 14, 2004). Even if the Tribe were required to satisfy the heightened standard applicable to agency rulemaking – which it is not – the available evidence still demonstrates that the RFD is the product of undue influence. Actual influence can be shown by or inferred from such circumstances as the agency changing course or acting irrationally, or where the agency acts after being threatened with political retribution. *See ATX Inc. v. U.S. Dept. of Trans.*, 41 F.3d 1522, 1528-29 (D.C. Cir. 1994). From the manner in which the Department conducted the decisionmaking process to the RFD itself, there can be no other explanation.

---

17 "Simply stated, short of a crime, anything goes at the highest levels of the Department of the Interior," charged Earl E. Devaney, the Interior Department's Inspector General, at a 2006 hearing of the House Government Reform Subcommittee on Energy. PPFF 94

a. Mr. Cason Was Not The Sole Participant In The Deliberative Process.

In the past, the Federal Defendants have placed great emphasis on the fact that Mr. Cason, who signed the RFD as the "official" decisionmaker, has insisted that he was oblivious to and unaffected by political pressure. To the contrary, contemporaneous documents demonstrate that Mr. Cason had actual notice of the overwhelming political pressure. No clearer proof of this fact can be found than in documents that the Department fought in court to keep the Tribe from ever seeing. Just this past week, the Tribe received Mr. Cason's performance reviews for 2004 and 2005 in response to a FOIA request, but only after court proceedings in which Judge Underhill ruled that the Department's "withholding of the performance reviews [was] unlawful . . . ." PPFF 95. In assessing his ability to manage "high visibility issues" in 2005, Mr. Cason wrote:

> [I] made decisions to deny federal acknowledgment of Indian groups, including Schaghticoke and Eastern Peaquot [sic]. These were particularly controversial decisions involving an emotional Connecticut delegation and Governor's office and Indian entities that had been recognized by a predecessor Assistant Secretary.

PPFF 95. Having written that document within weeks of issuing the RFD, Mr. Cason cannot now credibly suggest that those political influences had no impact on his decision.

Mr. Cason's then-private acknowledgment of the degree of political opposition to the Tribe's recognition is exacerbated by his lack of any experience in matters of tribal recognition. Mr. Cason has testified that he based his decision solely on the recommendation he received from those present at an October 5, 2004 meeting, at which he merely signed the 88 page RFD, knowing nothing about the process, the evidence, or the substantive law supporting the decision beyond that described in the RFD. PPFF 96. By his testimony, by the regulations, and by common sense, in fact Mr. Cason played a crucial role in the reversal of the FD because he willingly adopted the recommendations of the political staff around him. Even if it were not readily proved that Mr. Cason was well aware of the political opposition to the Tribe's recognition, his personal failure to review the record cannot expunge the role political influence played in the recommendation made to

him by the agency staff—many of whom had been subjected to, and were aware of, the harsh critique of the FD described above. Just as improper political pressure directed at the final "decisionmaker" will invalidate the decision, political pressure directed at agency staff members, political advisors, and legal advisors who participate in the deliberative process will also invalidate the decision. *See, e.g., Pillsbury, Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966) (invalidating agency decision in light of congressional scrutiny directed at decisionmakers, legal advisors, and staff).

In *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995), the court held that the participation in an adjudicative decisionmaking process of a single biased staff member violates due process, as do circumstances which create the appearance that one member is biased. In so holding, the *Stivers* Court recalled Justice Brennan's common sense observations about the collective process of deliberation:

> [W]hile the influence of a single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the deliberative process. This deprives litigants of the impartiality that is the fundamental requirement of due process.

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 831 (1986) (Brennan, J., concurring), *quoted in Stivers*, 71 F.3d at 747.

b. Agency Officials Were Well Aware of the Political Pressure Being Exerted By Opponents of the Tribe.

It is obvious that everyone involved in the decision making process, from Secretary Norton to Mr. Cason to Deputy Secretary Steven Griles to Mr. Bernhardt, to the Solicitor's Office, down to the professional staff at OFA, was well aware of the political pressure that was exerted by the Tribe's political opponents.

Some of the most significant evidence in this regard comes from the testimony of OFA Director Fleming. During his deposition, Director Fleming confirmed that he was aware specifically, during the time period between the January 2004 FD and the RFD in October 2005,

that the Connecticut Congressional Delegation, AG Blumenthal, and other Connecticut State officials had heavily criticized the FD. PPFF 97.[18] In fact, Director Fleming admitted that when it came to criticism by public officials, members of Congress, and top state political officials, "this case is -- *is one of the top*." *Id.* (emphasis added). Even while attempting to downplay the pressure applied by the Connecticut Congressional Delegation, Director Fleming conceded as follows: "I would say they took an active part in expressing their concerns. As the evidence you presented, it's in the Congressional Record, it's in the media. It was an issue of concern for them." *Id.*

Director Fleming also learned through various media accounts that there were meetings between members of Congress and members of the Department of Interior on Capitol Hill in reaction to the Tribe's FD. PPFF 98. Of critical importance is the simple fact that many of these media accounts found their way into the FAIR database, where they were accessible to the OFA professional staff during their consideration of the Tribe's petition. *Id.*

Similarly, Congresswoman Nancy Johnson's overtly hostile termination legislation appears twice in the FAIR database, as does the press release from her office promoting the legislation. PPFF 99. Director Fleming testified that the BIA's congressional liaison personally provided Director Fleming with a copy of this legislation. PPFF 100. When Rep. Johnson attempted to meet personally with agency officials to deliver to the BIA 8,000 postcards from constituents protesting the Department's decision to recognize the Tribe, Director Fleming described this campaign to BIA officials as "pressure from an elected official." PPFF 101.

Secretary Norton also recalled specifically reviewing many of the countless newspaper articles that criticized the FD. PPFF 102. As previously discussed, she met personally with

---

[18] Director Fleming also recalled that he was "aware of a growing concern" among Connecticut officials beginning in February 2004. PPFF 97.

members of the Connecticut Congressional Delegation and then relayed their concerns regarding the FD directly to both Principal Deputy AS-IA Martin and Mr. Cason. PPFF 103.

The record also shows that the entire professional staff at OFA was subjected to the countless newspaper articles, letters, and other materials that were generated by the hostile opposition movement maintained by the Tribe's opponents. PPFF 104. Moreover, as noted previously, the professional staff at OFA was also subjected to direct pressure from elected officials. PPFF 105.

Substantial additional evidence shows the unprecedented level of involvement of senior agency officials in the decision-making process that resulted from the political firestorm that had been created:

- Solicitor's Office: A December 9, 2004 letter to Secretary Norton from Congresswoman Nancy Johnson, Congressman Christopher Shays, and Congressman Rob Simmons discussing the marriage rate calculations in the FD was routed to Scott Keep in the Solicitor's Office, with the note ("Route to Keep, he's expecting this). The Connecticut Congressional Delegation received a letter in response from the Solicitor herself, also acknowledging receipt of a similar letter from AG Blumenthal, both of which were placed into the FAIR database. PPFF 106.

- David Bernhardt: Mr. Bernhardt was not involved in the formulation of the FD, but became personally involved with the Tribe's Petition soon after with the Rep. Wolf meeting and other contacts, including with the White House, while the IBIA appeal was pending and then as the reconsideration process moved forward after the remand from the IBIA. PPFF 107.

- Steven Griles: The Deputy Secretary, Steven Griles specifically requested to be "fully briefed" on complaints that had been levied by interested parties about their curtailed involvement in the appeal process even though he ordinarily was not involved in the federal acknowledgment process at all. PPFF 108.

- Aurene Martin: At a National Indian Law conference that took place two weeks after Congressman Wolf threatened to arrange for the President of the United States to fire Secretary Norton if she did not reverse the FD, Principal Deputy AS-IA Martin felt compelled to mount a "spirited defense" of the FD. Through her comments at the conference Principal Deputy AS-IA Martin "rejected criticism originating from the state and its Congressional delegation against her reliance on the state's historic relationship with the tribe to bolster the tribe's petition for federal status." PPFF 109.

In the end, it cannot seriously be disputed that the relevant agency decisionmakers and their staff were fully aware of the coordinated political campaign and the resulting pressure on the Department.

c. The Political Pressure Intruded Into The Deliberative Process.

Not only were the agency participants in the deliberative process that produced the RFD aware of the intense political pressure to undue the FD, they permitted this political pressure to intrude into the actual deliberative process. For example, in response to pressure from AG Blumenthal and the Connecticut Congressional Delegation, Secretary Norton requested that the Inspector General give high priority to an investigation of the FD. PPFF 110. But more importantly, the administrative record contains artifacts of the deliberative process in the form of two OFA options memoranda. Both are snapshots of key moments in the agency's internal deliberations, and both expressly reflect OFA's consideration of the concerns and likely reaction of the Connecticut Congressional Delegation. PPFF 111.

Most noteworthy is the Chaney Memo, which initially was withheld in its entirety by Mr. Bernhardt in his current role as Solicitor of the Department of Interior, citing the deliberative process privilege, but which the Department later produced in redacted form in response to a FOIA request. This briefing paper included Solicitor Sue Ellen Wooldridge's recommendation that the agency "file a request for expedited consideration [of AG Blumenthal's Request for Reconsideration by the IBIA] *consistent with . . . the prior urging of the Congressional delegation.*" PPFF 112. Similarly, in OFA Genealogist Rita Souther's notes from a November 18, 2004 staff meeting with Mike Olsen, Acting Principal Deputy AS-IA, Ms. Souther wrote the following regarding the plan to issue the Supplemental Transmittal: "notify [Department] press people. Blumenthal will put worst spin on this & we should be prepared – be pre-emptive." PPFF 113. Interestingly, Ms. Souther also wrote in her notes the following cryptic passage: "(Hope) it encourages IBIA to refer [the marriage rate issue] & *other* issues back to OFA." *Id.* As these documents reflect, the Department's actions following the FD were informed by and responsive to AG Blumenthal and Connecticut's Congressional Delegation.

d. The Political Pressure Influenced The Result.

As demonstrated above, because the acknowledgement process is an adjudicative process, the mere appearance of impropriety here renders the RFD invalid. The undisputed facts, however, prove much more than mere appearances. The RFD is the product of undue influence.

To place the agency's path from the FD to the RFD in context, the Court should be aware that the Department has reviewed a total of 40 petitions in the 29 years since the adoption of the acknowledgment regulations. PPFF 114. At the time the Department issued the FD, sixteen petitions had been granted and eighteen had been denied. PPFF 115. No positive Final Determination had ever been reversed by the IBIA, the Department, or the courts. *Id.*

On December 2, 2004, the Solicitor's Office filed a memorandum with the IBIA styled "Supplemental Transmittal under 25 C.F.R. § 83.11(e)(8)" ("Supplemental Transmittal"). PPFF 116. In form, as well as in substance, the Supplemental Transmittal was unprecedented. This "Supplemental Transmittal" was the first ever filed in any acknowledgment proceeding. During every past IBIA review of a Final Determination, the OFA remained silent and neutral, allowing the IBIA to conduct an independent review of the decision—after which it always upheld the decision. In fact, Barbara Coen, the author of the Supplemental Transmittal, had previously described the OFA's policy of neutrality during the IBIA's consideration:

> Finally, there is independent review by the Interior Board of Indian Appeals (IBIA) through which the petitioner or interested party can challenge the final determination on four enumerated grounds before it is effective. During this IBIA administrative review, the Assistant Secretary–Indian Affairs and the BIA are neutral and do not defend the final determination.

Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New Eng. L. Rev. 491, 495 (2003). PPFF 117.

Violating its policy of neutrality, the Solicitor's Office attacked the agency's own prior decision—the supposedly "Final" Determination—attacking the marriage rate analysis that it had used in the FD and informing the IBIA that it could not affirm the FD "absent explanation or new

evidence." PPFF 118. Given this direction to the IBIA, the Supplemental Transmittal in effect was a reversal of the FD.

Even more astounding than the content of the "Supplemental Transmittal" was its timing. The Solicitor's Office did not file the Supplemental Transmittal until three days *after* the Tribe had filed its final brief before the IBIA. PPFF 119. By then, the deadline for the Tribe to seek reconsideration of the FD had long since passed. PPFF 120. By filing the "Supplemental Transmittal" when it did, the Solicitor's Office denied the Tribe any opportunity to respond. At the same time, the Solicitor's Office guaranteed an unprecedented IBIA reversal of the FD and remand to the agency.

It goes without saying that government agencies are not known to second-guess their final decisions. *See, e.g., Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (discussing *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987)). One would expect that absent some external stimulus, following the FD the OFA would have moved on and begun to process its next petition. (As this Court is well aware, the OFA has a thirty year backlog of such petitions. Status Summary of Acknowledgment Cases, Office of Federal Acknowledgment, at 4 (Feb. 15, 2007)). Here, to the contrary, it somehow occurred to the OFA— after months of *ex parte* meetings and intense political pressure by the Tribe's opponents—that it had made a "mistake" when calculating marriage rates. In truth, there was no mistake to discover.

To the contrary, as former Principal Deputy AS-IA Martin has explained, one of the more significant issues the OFA carefully considered prior to the FD was the marriage rate issue. PPFF 121. Principal Deputy AS-IA Martin permitted the professional staff "to use the methodology that they believed was most suitable when evaluating the STN petition." PPFF 122. And the professional staff unanimously decided to use the FD's methodology. *Id.* Furthermore, even if the OFA initially had used the RFD's methodology, the difference would not have been outcome-

determinative in the eyes of the OFA professional staff when they considered the Tribe's marriage rates—which the staff viewed as significant by any methodology in combination with the other evidence submitted by the Tribe in support of its petition. PPFF 123.[19]

Something more than a marriage-rate epiphany occurred between the issuance of the FD and the submission of the Supplemental Transmittal. Moreover, as this Memorandum will demonstrate, *infra*, in later "reweighing evidence" based on its new marriage rate analysis, the OFA took actions contrary to the language of the acknowledgment regulations, generally accepted scientific principles, and the advice of its own experts, without providing a reasonable explanation for its decision to disregard their advice. Where, as here, the agency suddenly reversed course and reached a weakly-supported determination in doing so, especially in light of unprecedented political pressure, the only reasonable inference is that the improper political pressure influenced the decision. *ATX*, 41 F.3d at 1528.

Similarly, because the IBIA determined that the FD had discussed its use of "state recognition" evidence on too general a level,[20] the IBIA remanded the FD so that the OFA could explain its analysis in greater detail. *STN*, 41 IBIA, at 29. Instead of simply providing this detailed explanation as the IBIA had instructed, however, the agency abruptly changed course and declared that it had re-weighed the evidence and now determined that the evidence submitted by the Tribe was insufficient. Amazingly, as previously discussed, Secretary Norton never shared with Mr.

---

19 25 C.F.R. § 83.7(b)(1)(i) requires the AS-IA and OFA to accord substantial weight to evidence demonstrating "significant rates of marriage within the group" when considered in combination with evidence showing that the petitioner met criteria (a) and § 83.7(c)(1)(iv) requires the AS-IA and OFA to accord substantial weight to the fact that a petitioner met criteria (b) "at more than a minimal level." In light of Ms. Martin's Declaration, it is notable that the RFD failed to include any analysis whatsoever of these requirements of the recognition criteria.

20 The IBIA explained that in order for the State's relationship with a petitioner to be probative evidence of criterion (b) or (c), it would need to be expressed in some way that reflected the actual or likely existence of the petitioning group as a distinct community, criterion (b), or of the petitioner as an autonomous entity maintaining political influence or authority over its members, criterion (c). STN, 41 IBIA, at 17-21. See discussion of state recognition, *infra*.

Cason the fact that she had participated in the deliberations on the use of evidence of the continuous state recognition of the Tribe with Principal Deputy AS-IA Martin, or that Secretary Norton herself supported the Department's use of this evidence in the FD as a matter of constitutional law and policy—even after Mr. Cason informed her that he would be issuing an RFD overturning the FD and denying the Tribe's petition for acknowledgment. PPFF 124.

Pillsbury rejects the notion that thick-skinned officials are able to simply ignore external pressure. *Pillsbury*, 354 F.2d at 964 ("this court is not so 'sophisticated' that it can shrug off such a procedural due process claim merely because the officials involved should be able to ... disregard the force of the intrusion into the adjudicatory process"). There are only two plausible explanations for Secretary Norton's silence. The first possibility is that she was content to permit her deputy to overrule her without protest because it meant that Rep. Wolf and the Connecticut Congressional Delegation would cease its attack on her and the Department. The second possibility is that she was told the IBIA had ruled the Department could not rely on state recognition evidence. The problem with the second explanation, however, is that the IBIA said no such thing – even a cursory review of its decision shows that it did not. How, then, did Gale Norton, the Secretary of the Interior, James Cason, the "final decisionmaker," and Lee Fleming, the head of the OFA, all get this wrong when they testified separately to their common understanding that the IBIA had forbidden the use of state recognition evidence? PPFF 125. This was, of course, the interpretation of the IBIA opinion by the Connecticut Congressional Delegation and AG Blumenthal, as reported widely in the media. PPFF 126. It also happens to be the view of state recognition advanced by Vice Chairman Shays at the May 5, 2004 hearing before the House Committee on Government Reform. PPFF 66. At best, senior Department officials, it seems, were so fixated on public perception, as projected by the Tribe's opponents, that they failed even to read the IBIA opinion. At worst, the Department decided to bow to the will of the Tribe's opponents to avoid any more criticism.

Finally, as discussed *infra*, without warning or explanation, the Department changed its position in the RFD, abandoning the position it had consistently taken and advocated throughout the acknowledgment process, to conclude that the Tribe did not meet the requirements for community or political authority after 1996 because the tribal members involved at the time in an intra-tribe conflict had not consented to being listed in the tribal roll. Here again, the OFA failed to provide a reasoned explanation for the unexpected reversal of the position the agency had consistently taken and advocated throughout the acknowledgment process. Between the FD and RFD, no new arguments were made and no new evidence was presented to the agency relevant to this issue. The only change was the intensity of external political pressure to revisit these issues and resolve them *strictly* against the Tribe.[21] The RFD cannot stand.

As the foregoing undisputed facts establish, the political pressure resulted in, at the very least, an appearance of impropriety. These undisputed facts further reveal that the RFD is the result of undue influence. For both of these reasons, the Court must invalidate the RFD.

II. The RFD is Void Because it Was Made by an Unauthorized Official.

A. Introduction

James Cason, the nominal decision-maker on the RFD, holds his full-time position as Associate Deputy Secretary ("ADS"), and held his delegation as AS-IA, in violation of both mandatory constitutional and statutory provisions. Lacking authority to act as he did, his decision is, by operation of law, null and void. Thus, not only was the RFD the product of the kind of

---

21 It is important to understand that the evaluation of evidence for an autonomous community under 25 C.F.R. § 83.7(b), and for political influence under 25 C.F.R. 83.7(c), for any and all periods of time, "must be understood in the context of the history, geography, culture and social organization of the group." 25 C.F.R. § 83.1. This requirement of the regulations allows the OFA and AS-IA to take into account the uniqueness of each petitioning group under the mandatory criteria. Similarly, the regulations make it clear that "continuous" does not mean without interruption. The regulations explicitly countenance some interruption by defining the term to mean "substantially without interruption." 25 C.F.R. 83.1. This also allows OFA and the AS-IA to take the unique history of each petitioner into account in evaluating the evidence under the criteria. The Tribe's opponents blatantly ignored these regulatory mandates when they argued over and over that the regulations must be strictly construed against the Tribe.

political influence shown to be improper in *Pillsbury*, but it was entrusted for delivery to an unauthorized official.

The constitutional flaw arises from a violation of the Appointments Clause. *See* U.S. Const. Art. II, sec. 2. That provision enforces important separation-of-powers principles by requiring certain officers of the United States to be appointed by the President and then confirmed by the Senate (hereafter "a PAS appointee"). Mr. Cason has held the title of ADS since August 9, 2001. PPFF 127. He was appointed to that position without confirmation by the Senate.[22] PPFF 128. An analysis of his responsibilities and actions, however, reveals that he is, in fact, a "principal officer" of the United States. As such, the Appointments Clause applies to his position, and his issuance of the RFD was *ultra vires* and void.

Beyond that fatal constitutional defect in his authority to serve as ADS, Mr. Cason's effort to exercise all or any part of the authority of the AS-IA represents a separate statutory violation. The Vacancies Reform Act ("VRA"), *see* 5 U.S.C. § 3345, *et seq.*, is a statutory scheme designed to enforce the Appointments Clause by ensuring that vacancies in PAS appointments are filled with due consideration for the Senate's vital confirmation role. By statute, the AS-IA must be appointed by the President with the advice and consent of the Senate. *See* 43 U.S.C. §§ 1453 and 1453a; *see also* 5 U.S.C. § 5315. As a consequence, the VRA applies when the AS-IA's post is vacant. At the time Mr. Cason issued the RFD in October 2005, the AS-IA position *was* vacant, the prior office holder having resigned approximately eight months earlier. When the AS-IA is not available to act, the VRA—a mandatory, unalterable statutory directive—dictates who must act in the AS-IA's

---

[22] There is no mystery why this Administration appointed Mr. Cason outside the PAS process; he is a scarred veteran of the PAS appointment process. In 1989, then-President George H.W. Bush nominated him to serve as the Assistant Secretary for Natural Resources and Environment in the Department of Agriculture. Mr. Cason's nomination was withdrawn when it became clear that massive opposition to his appointment precluded confirmation by the Senate. PPFF 129. Mr. Cason's new role at the Department, as described more fully above, reveals that the Administration has attempted to award him a position with all the responsibilities and benefits of a PAS appointment without the embarrassment attendant upon another unpleasant effort to obtain Senate confirmation.

place. Mr. Cason was *not* statutorily authorized to act in the capacity of the AS-IA. Consequently, he could not properly have rendered the RFD. The Act expressly renders his non-conforming action a nullity, which is not subject to ratification. *See* 5 U.S.C. §§ 3348(d)(1), (d)(2).

B. Mr. Cason's Actions Violated The Appointments Clause.

1. The Appointments Clause

The President of the United States has the power to "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States* . . . ." U.S. Const. Art. II, sec. 2, cl. 2 (emphasis added). The Presidential power to nominate so-called "principal" Executive officers, with the advice and consent of the Senate, is not a matter of mere "etiquette or protocol." *Buckley v. Valeo*, 424 U.S. 1, 125 (1976). The Appointments Clause "serves both to curb Executive abuses of the appointment power . . . and to promote a judicious choice of persons for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (internal citations omitted).

The Constitution permits the President and other PAS officials to appoint "inferior" officers without the advice and consent of the Senate. While the distinction between principal and inferior officers is not always perfectly clear, the Supreme Court has offered guidance for analyzing an officer's status. *See, e.g., Commonwealth of Penn. v. United States Dep't of Health and Human Services*, 80 F.3d 796, 802 (3d. Cir. 1996), citing *Morrison v. Olson*, 487 U.S. 654, 671 (1988)). A principal officer may be distinguished from an inferior officer based on (1) the scope of the officer's duties; (2) the scope of the officer's authority; (3) the length of the officer's tenure; and (4) whether the officer is subject to removal by a higher Executive Branch official. *Morrison*, 487 U.S. at 671-72. The term "inferior officer" connotes that the officer is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the

Senate." *Edmond*, 520 U.S. at 663. But, "[i]t does not follow . . . that if one is subject to some supervision and control, one is [automatically] an inferior officer." *Id.* at 667 (Souter, J., concurring). To the contrary, "[e]ven an officer who is subordinate to a department head can be a principal officer." *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting). One of the key tests to determining whether an officer is a "principal officer" is to measure whether he is authorized to make final decisions that are binding on the government. *See Edmond*, 520 U.S. at 662-65. James Cason is so authorized.

2. Mr. Cason's Role at Interior

The Tribe is not the first group to question Mr. Cason's non-PAS appointment as ADS. In 2002, Senator Bingaman expressed concern to the GAO about the suspicious circumstances of Mr. Cason's appointment. Relying exclusively on information provided by the Department's leadership—information that remarkably understated Mr. Cason's true role in the Department—GAO General Counsel Anthony H. Gamboa responded to Senator Bingaman's inquiry by saying that Mr. Cason was a "Non-Career Senior Executive Service employee" who "does not exercise significant authority pursuant to the laws of the United States." PPFF 130. Mr. Gamboa rested his conclusion, however, on the fundamental misunderstanding that Mr. Cason would act merely as the principal aide to the Deputy Secretary, offering "advice and assistance in the administration of the Deputy Secretary's responsibilities." PPFF 131. Mr. Cason, he concluded, would attend high-level meetings when the Deputy Secretary cannot attend, managing staff, acting as the Deputy Secretary's liaison to "DOI's legislative and communications directors," and coordinating "sensitive discussions between the Deputy Secretary and other high-level DOI officials." *Id.* In short, GAO simply accepted the claim of Department officials that the ADS was "an assistant to the Deputy Secretary, not . . . a second Deputy Secretary," noting that only rarely should the ADS make

significant policy decisions, and then *only in the absence of the Deputy Secretary. Id.* (emphasis added).

The truth is that Mr. Cason recognizes himself that he is effectively the third in command at the Department. PPFF 132. More importantly, Steven Griles, then-Deputy Secretary of Interior, recognized that Mr. Cason "has provided broad leadership within the Department on a variety of issues . . . ." PPFF 133. His high-level position for the past six years within Interior, as demonstrated by his Department-wide functions, rules out any effort to classify him as an "inferior officer" or a mere employee.[23] PPFF 133. *Cf., e.g., Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 228-29 (1839) (finding a district court clerk to be an inferior officer); *Ex parte Siebold*, 100 U.S. 371, 397-398 (1880) (finding an election supervisor to be an inferior officer); *Morrison v. Olson*, 487 U.S. 654 (1988) (finding a particular independent counsel to be an inferior officer because she was subject to removal by a higher officer, performed only limited duties, held only narrow jurisdiction, and her tenure was limited). Even a cursory review of Mr. Cason's role at the Department demonstrates that he is not an inferior officer. For example:

> (1) The federal government has represented in federal court proceedings that Mr. Cason, "[a]s Associate Deputy Secretary, . . . *shares authority and responsibility at the Secretarial level* for the oversight and management of the Department's Indian trust and associated reform efforts." In fact, documents that the Department fought in court to withhold from the Tribe reveal that Mr. Cason "has had extensive responsibility for framing the Secretary's and the Administration's policies" with respect to "a large number of sensitive and highly visible issues of significant public concern." PPFF 135.
>
> (2) Secretary Norton confirmed in her deposition that Mr. Cason was a member of "the top leadership" group at the Department and was also among the group of political appointees with whom she met regularly. PPFF 136.
>
> (3) Mr. Cason confirmed that he is involved with the Secretary in making policy decisions for the Department, and volunteered that he has 10,000 people working for him. As

---

[23] Other than Mr. Cason's position at Interior, the only reference we have found to an "Associate Deputy Secretary" in the vast federal bureaucracy is at the Department of Transportation ("DOT"). Not surprisingly, the position of ADS of DOT requires appointment by the President, with the advice and consent of the Senate. See 49 U.S.C. § 102. (DOT's "Associate Deputy Secretary" position underwent a title change in 2002 to "Under Secretary" of Transportation. See P.L. 107-295, 215(a)-(c). Even under its revised title, that position still requires appointment by the President with the advice and consent of the Senate.) PPFF 134.

described by Mr. Cason himself, his job entails so many responsibilities, it "is like drinking from a fire hose." PPFF 137.

(4) The federal government has fought efforts to take Mr. Cason's deposition in another case by reporting to a federal judge that "Mr. Cason's deposition should not be permitted because *high-ranking government officials* cannot be deposed absent extraordinary circumstances." On another occasion, they have characterized Mr. Cason to the court as a "*top executive department official*[]." (emphasis added). PPFF 138.

(5) In a FOIA-enforcement action brought by counsel for the Tribe in this District, the Department has again admitted that Mr. Cason is a high-level government official. PPFF 139.

(6) Mr. Cason is responsible for the Department's response to the *Cobell* litigation, a massive undertaking in which Native American parties have alleged that the Department is liable for over $176 *billion* for the mismanagement of Indian trust monies, and in which the Secretary of the Department, among others, has been held in contempt of court. The Department's internal documents reveal that, since 2001, Mr. Cason has "[c]losely managed all aspects of the *Cobell v. Norton* lawsuit, which is a highly visible and problematic issue." In fact, Mr. Cason described his own role in that case as "[p]rovid[ing] oversight and strategic leadership on all Cobell related work that takes place in the Department." *Id.* (emphasis added). Beyond just the Department, Mr. Cason's responsibility for this massive litigation involves "[p]rovid[ing] direction and coordination for [the] Federal team, composed of Interior, DOJ, and Treasury . . . ." He also was responsible for coordinating "Administration strategy" on this matter, which required briefing the President's Domestic Policy Council, the Office of Management and Budget, and Congress. Indicative of his role in this enormous case, it was Mr. Cason who announced a proposed plan to settle Cobell. PPFF 140.

(7) In describing his own job to an interviewer, Mr. Cason explained: "My job is to work on particularly difficult issues where the problem has not been solved lower down in the organization." Discussing *Cobell*, Mr. Cason noted that he "look[s] at all of [the Department's] programs, trying to redesign how they work and to streamline how we manage the land and natural resources that are in our care." PPFF 141.

(8) Mr. Cason has responsibilities that include revising long-standing Department policies. For example, his 2005 Performance Review reflects that he "[l]ed efforts to realign [the Department's] interpretation of the Indian Gaming Regulatory Act (IGRA) regarding the need to demonstrate that a Tribe has 'Indian land upon which it exercises jurisdiction' that it intends to use [for] gaming purposes, before DOI would approve a gaming compact. This effort challenged a two decade old precedent and is helpful in addressing the public concerns regarding the proliferation of off reservation Indian gaming." PPFF 142.

(9) Mr. Cason testifies before Congress on matters integral to the Department's mission. PPFF 143.

(10) Mr. Cason corresponds on behalf of the Department with, among other high-level officials, Governors, and, as he testified in his deposition, "in my job, I talk to Congressmen, Senators all the time about a wide variety of stuff." PPFF 144.

(11) By his own description, Mr. Cason, "[u]pon assuming the duties and responsibilities of the [AS-IA], became the driving force and strategic leader behind the efforts to improve our Indian education program." PPFF 145.

(12) Mr. Cason received annual monetary awards of a magnitude that required approval from, among others, the White House. PPFF 146.

The foregoing review of just a sampling of Mr. Cason's responsibilities makes plain that he is, in fact, a "principal officer." Having attested to other District Courts about the significance of Mr. Cason's role as a "high-ranking," "top executive department official" with "responsibility at the Secretarial level" for key Department functions, the government is now estopped from arguing that he is something less. Contrary to the purely subordinate portrayal of Mr. Cason's role to the GAO's General Counsel in 2002, Mr. Cason regularly makes decisions with respect to matters that bind the federal government, including in relation to the largest litigation matter ever brought against the Department. PPFF 147. Indeed, Mr. Cason's superior—the Deputy Secretary of the Interior—wrote that "Jim Cason has tackled some of [the Department's] most difficult, long-standing challenges in which conflict has often stymied progress." PPFF 148. Consequently, Mr. Cason illegally occupies the position of ADS. He should have been appointed to that post by the President and evaluated for confirmation by the Senate. Because he serves as a principal officer without Senate confirmation, Mr. Cason serves in violation of the Appointments Clause. The RFD issued in October 2005 under his name thus cannot stand, and the Tribe is entitled to summary judgment as a matter of law.

3. Mr. Cason's Actions as AS-IA Also Violated The VRA.

a. Introduction

Even if Mr. Cason's service as ADS somehow comports with the strictures of the Appointments Clause— which it does not—his delegated role as AS-IA independently violated the VRA. Congress enacted that statutory scheme precisely to preclude situations such as this one, where a "temporarily" appointed official who has not undergone Senate scrutiny is permitted to

exercise the responsibilities of a PAS position without time limit[24] and without notice to the proper authorities.[25] *See* S. Rep. 105-250, at 1-6.[26] In fact, Congress felt so strongly that this situation should not be permitted that it intentionally crafted this legislation to have harsh consequences for violations of its terms. *See* 5 U.S.C. § 3348(d). In particular, Congress specified that any violations of the VRA would nullify any actions taken by the unauthorized actor, and further provided that any such improper actions could *not* thereafter be ratified. *See* 5 U.S.C. §§ 3348(d)(1) & (d)(2).

The Founders intended the legislative branch to oversee the President's appointments because they wanted to improve the quality of appointees to high federal office. Mr. Cason was never appointed to serve as the AS-IA by the President, and thus was never confirmed for that position by the Senate. (In fact, because he could not survive Senate scrutiny, as noted previously, Mr. Cason was not even a PAS appointee to his own job as ADS.) One of the unfortunate consequences of this invalid delegation is that Mr. Cason had no experience with tribal recognition when he issued the RFD; by his own admission, "[p]rior to February 2005, [I] had no involvement in the Department's acknowledgment process." PPFF 149.

As is more fully described below, Mr. Cason undertook to fulfill the responsibilities of the PAS-appointed position of AS-IA *for over two years* in derogation of the VRA. There are three clear violations of the Act that matter here: (1) Secretary Norton's unlawful delegation of the AS-IA's responsibilities to Mr. Cason when the VRA plainly provides for another official to act in the event of a vacancy; (2) Mr. Cason's service as acting AS-IA beyond the time limits of the VRA;

---

[24] The VRA "provides that upon the death, resignation, or inability to serve of an officer of an executive agency ... the first assistant to the officer becomes the acting officer, subject to the bill's time limits." S. Rep. 105-250, at 2; 5 U.S.C. § 3346.

[25] "The [Act] also requires heads of agencies to report to the General Accounting Office on the existence of vacancies, persons serving in an acting capacity, the names of any nominees, and dates of disposition of such nominees." S. Rep. 105-250, at 2; 5 U.S.C. § 3349.

[26] One of the Congressional purposes in enacting this statute was to prevent Executive Agencies from "permitt[ing] positions to be held by acting officers for years without the submission to the Senate of a nominee." S. Rep. 105-250, at 5.

and (3) the Department's abject failure to report the AS-IA vacancy to Congress and the GAO, as required.

b. The Key Facts and Dates Related to Mr. Cason's Actions

The following chronology sets forth key dates and events related to who was authorized to decide the Tribe's petition for recognition in October 2005.

- On August 9, 2001, Mr. Cason became "ADS" of the Department. As described above, he was not appointed by the President or confirmed by the Senate for this, or any other, post. PPFF 128.
- On December 9, 2003, David Anderson became the AS-IA, appointed by the President and confirmed by the Senate. PPFF 150.
- In February 2004, Aurene Martin became the Principal Deputy Assistant Secretary - Indian Affairs (making her the first assistant to the AS-IA). Principal Deputy AS-IA Martin had been the Counselor to the AS-IA since October 2001. PPFF 151.
- On February 5, 2004 (*effective* May 5, 2004), Principal Deputy AS-IA Martin issued the FD. PPFF 152.
- On April 8, 2004, AS-IA Anderson formally recused himself from a host of issues, including matters of federal recognition of Indian tribes. PPFF 153.
- On August 17, 2004, AS-IA Anderson announced Principal Deputy AS-IA Martin's anticipated resignation as the Principal Deputy Assistant Secretary (effective on September 10, 2004). Beginning that same date, August 17, 2004, AS-IA Anderson transferred the functions and duties of the Principal Deputy Assistant Secretary to Michael Olsen. The Department's Press Release noted that Mr. Olsen was "Anderson's selection to assume the duties of the Principal Deputy Assistant Secretary . . . ." PPFF 154.
- Effective September 11, 2004, Michael Olsen took over the responsibilities of the departing Principal Deputy AS-IA Martin, becoming the Acting Principal Deputy Assistant Secretary - the first assistant to the AS-IA - where he remained at all relevant times. In this role, Michael Olsen was responsible for managing the tribal recognition process and was treated as such by the relevant agencies, including the OFA. In addition, Mr. Olsen handled countless matters for the Bureau of Indian Affairs in his capacity as Acting Principal Deputy AS-IA. He remained in that capacity at the time, and after, Mr. Cason purported to issue the RFD in October 2005. PPFF 155.
- Effective February 12, 2005, AS-IA Anderson resigned, leaving the office of AS-IA vacant. PPFF 156.
- Effective February 13, 2005, Secretary Norton purported to delegate the functions and duties of the AS-IA to Mr. Cason. No replacement of outgoing AS-IA Anderson was named, and Michael Olsen remained in his role as Acting Principal Deputy AS-IA - the first assistant to the AS-IA. PPFF 157.
- On May 12, 2005, the IBIA remanded the Tribe's FD to the AS-IA. *See In re Federal*

Acknowledgment of the Schaghticoke Tribal Nation, 41 IBIA 30 (May 12, 2005). PPFF 158.

- Effective October 17, 2005, under the authority purportedly transferred to him by the Secretary's February 13, 2005 delegation, Mr. Cason issued the RFD, which reversed the Tribe's federal recognition. PPFF 159.

- On August 1, 2006, President Bush nominated Carl J. Artman as the next AS-IA. He was confirmed by the Senate in March 2007. PPFF 160.

Taken together, these indisputable facts establish the violations of the VRA described below.

c. The Delegation to James Cason Violated the VRA's Automatic Assignment of Authority to the First Assistant.

The VRA commands that:

> If an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, . . . resigns . . . (1) the first assistant to the office of such officer *shall* perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346.

5 U.S.C. § 3345(a)(1) (emphasis added). Thus, when David Anderson resigned as AS-IA on February 12, 2005, the VRA mandated that Michael Olsen, who was then Anderson's first assistant, became, *by operation of law*, the person to perform the functions and duties of that office on a temporary basis.[27] Section 83.10 of the Code of Federal Regulations states, among other things:

- "the *Assistant Secretary shall* cause a review [of a documented petition for federal recognition] to be conducted," 25 C.F.R. § 83.10(a) (emphasis added);

- the "*Assistant Secretary shall* conduct a preliminary review of the petition for purposes of technical assistance." 25 C.F.R. § 83.10(b) (emphasis added);

- the "*Assistant Secretary shall* make a final determination regarding the petitioner's status" as a federally recognized Indian tribe. 25 C.F.R. § 83.10(l)(2) (emphasis added); and

- "[t]he *Assistant Secretary shall* acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies all of the criteria in § 83.7." 25 C.F.R. § 83.10(m) (emphasis added).

---

[27] Given his violation of the VRA, it is disturbing to realize that Mr. Cason understood the essential hierarchy built into the VRA. In a memorandum addressed to Secretary Norton on November 13, 2005 - just one month after his issuance of the RFD – Mr. Cason set forth the list of the officials within the office of the AS-IA who would act in the absence of the AS-IA. PPFF 161. Notably, the first person he identified to act in the absence of the AS-IA is the Principal Deputy Assistant Secretary - Indian Affairs, who, as noted above, was at all relevant times, Michael Olsen. In fact, the OFA participated in meetings with, and planned briefings for, Michael Olsen regarding the Schaghticoke Tribal Nation. PPFF 155. Despite this obvious understanding of Mr. Olsen's role, Mr. Cason, not Mr. Olsen, issued the RFD.

In short, the tasks of coordinating the recognition process and reaching a Final Determination are functions and duties that are assigned by law to the AS-IA. Those functions and duties of the AS-IA may be further delegated *only by* the AS-IA. *See* 25 C.F.R. § 83.1 (use of "Assistant Secretary" in the regulations "means the [AS-IA], or *that officer's* authorized representative" (emphasis added)). Thus, by federal regulation, it is an exclusive function and duty of the AS-IA -- a PAS appointee -- to decide whether to handle a tribal recognition matter or whether to delegate it to a representative.

The VRA is mandatory; it allows no room for Secretary Norton to elect to delegate the AS-IA's responsibilities to someone else. "Sections 3345 and 3346 are the *exclusive means* for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate," absent conditions not applicable here. 5 U.S.C. § 3347(a) (emphasis added). Mr. Cason was never in the chain of officials directed by that statute to act when the AS-IA's position is vacant.[28] He thus had no authority to act either in his own right or as the result of Secretary Norton's "delegation" because, by automatic operation of the VRA, Michael Olsen, the first assistant to the AS-IA, became the acting AS-IA for 210 days.[29] *See* 5 U.S.C. § 3346(a)(1).

---

[28] To the contrary, given his high position in the Department as the "first assistant" to the Deputy Secretary, Mr. Cason was recognized to be the person under the Act who would undertake the Deputy Secretary's responsibilities if *that* position were to become vacant. PPFF 162.

[29] The Reorganization Plan No. 3 of 1950 transfers "to the Secretary of the Interior all functions of all other officers of [DOI] and all functions of all agencies and employees of such Department." U.S.C.A. Reorg. Plan 3 1950. The Reorganization Plan also authorizes the Secretary to "make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary." *Id.* While the government will no doubt point to this language as the authority relied upon by Secretary Norton in her delegation to Mr. Cason of the AS-IA's duties, the VRA expressly directs that a Department's organic-appointment statute – the Reorganization Plan here – *may not* override the provisions of the Act. *See* 5 U.S.C. § 3347(b).

Had the law been followed, and had Michael Olsen been permitted to serve as the acting AS-IA beginning on February 13, 2005 as required, and had that 210-day period expired on September 10, 2005, with the office still vacant, and no one yet nominated by the President to fill it, the VRA then would have commanded that Secretary Norton—and "only" Secretary Norton herself—thereafter exercise the authority of the AS-IA. *See* 5 U.S.C. § 3348(b)(2). She could not have delegated these functions and duties beyond herself, and even if she could have done so, that's not what she in fact did. Thus, because the delegation to Mr. Cason was made in clear derogation of these dictates of the VRA, his actions are void. The VRA expressly directs that "[a]n action taken by any person who is not acting [in conformity with its provisions] in the performance of any function or duty of a vacant office to which [the Act] appl[ies] *shall have no force or effect.*" 5 U.S.C. § 3348(d)(1) (emphasis added). Moreover, the Act directs that no invalid agency action taken in violation of the Act may thereafter be ratified. *See* 5 U.S.C. § 3348(d)(2).

d. Mr. Cason's Actions Further Violated the Time Limits of the VRA.

In addition to the other constraints on acting officers imposed by Congress, the VRA places strict temporal limitations on a temporary officer's authority to perform the functions and duties of a vacant PAS office. Temporary authority to act pursuant to the VRA is strictly limited to 210 days, except in circumstances that are inapplicable here.[30] *See* 5 U.S.C. § 3346(a)(1).

The office of the AS-IA became vacant on February 12, 2005, when AS-IA David Anderson resigned. The 210-day limitation thus prohibited even a properly appointed temporary officer from

---

[30] In *Federal Deposit Insurance Corp. v. Hurwitz*, 384 F. Supp. 2d 1039, 1073 (S.D. Tex. 2005), the court examined the 210-day time limit of the VRA. The court noted that the acting employee's authority expired after 210 days from when the permanent office holder had resigned. *Id.* The court lamented the fact that the replacement director of the Office of Thrift Savings was not appointed by the President and confirmed by the Senate until almost five years later. *Id.* Applying the statute, the court concluded that after the 210-day period had run, "OTS was without a lawfully appointed head. Running a sub-cabinet office with unappointed officers for almost five years mocks the rule of law and the Constitution. A constitution followed only when convenient is not constitutive." *Id.*

occupying the vacant AS-IA office beyond September 10, 2005. By September 11, 2005, even Michael Olsen—had he been originally permitted to take on his statutory role as Acting AS-IA, and had it taken into October 2005 to decide the fate of the Tribe's Petition on remand with Mr. Olsen in charge—would have been disallowed by the Act from acting on the Petition. As an altogether improperly appointed acting AS-IA, Mr. Cason cannot possibly have had greater authority. Consequently, even if Mr. Cason initially could have been delegated the role in question, his time to act expired by September 10, 2005. Thus, his issuance of the RFD on October 12, 2005, constituted an independent violation of the time limitations of the VRA.

e. The Vacancy in the AS-IA Position was Never Reported.

Not surprisingly, Congress wanted a mechanism to ensure that Executive agencies complied with the mandatory terms of the VRA. The Act thus commands that whenever a vacancy in a PAS office occurs, "[t]he head of [an] Executive agency . . . *shall* submit to the Comptroller General of the United States [the head of the GAO] and to each House of Congress" specified information related to that vacancy. 5 U.S.C. § 3349(a). Among the information that must be provided is the identity of the vacant office, the date of the vacancy, the name of any acting official, and certain information related to the status of any nominees to fill the vacant position. *See id.* at § 3349(a)(1)-(4). No such reporting happened in this case.

The GAO maintains an "Executive Vacancy Database" to track vacancies in PAS offices. A review of that database reveals that the Department made no notification in compliance with the VRA upon the resignation of David Anderson in February 2005. PPFF 163. Counsel for the Tribe contacted the GAO to determine whether there were any vacancy reports that had not been posted on the GAO's database. Ms. Janet Dolan, the Paralegal Specialist in the General Counsel's Office at the GAO, advised that the GAO has not received any notice of vacancy in the AS-IA position that

has not been posted. PPFF 164. There is similarly no report of this vacancy having been reported to the U.S. Congress. *See id.*

These failures of notification are significant. the Department clearly knows how to report such vacancies when it chooses to comply. The last time the AS-IA position became vacant, in approximately January 2001, the Department advised the GAO in a report that is available through GAO's database even today. PPFF 165. It is not hard to imagine that one way to avoid the consequences of permitting the vacant AS-IA position to be handled by an otherwise unauthorized and un-confirmable individual is to withhold from the reporting authorities—GAO and Congress—the fact of the vacancy, and the identity of the individual who is acting to exercise the responsibilities assigned to the AS-IA. Because no notice was filed when AS-IA David Anderson resigned in February 2005, despite a clear statutory directive to do so, *see* 5 U.S.C. § 3349(a), GAO was precluded from fulfilling its statutory function under the VRA to alert the relevant Congressional and other officials when an acting official serves beyond 210 days, as occurred here. *See* 5 U.S.C. § 3349(b).

Because the facts relevant to Mr. Cason's assumption of the role of AS-IA are not in dispute, the Tribe is also entitled to summary judgment declaring the RFD void as a matter of law for violating the VRA.

III. The RFD is Arbitrary and Capricious.

A. Five of the Seven Criteria for Federal Acknowledgment are Uncontested.

There are seven criteria for federal acknowledgement. 25 C.F.R. § 83.7. In the RFD, the OFA conceded that the Tribe satisfied five of them. Specifically, the Tribe:

- proved that it has been identified as an American Indian entity on a substantially continuous basis since 1900, 25 C.F.R. § 83.7(a);
- provided the OFA with a copy of its present governing document including its membership criteria, 25 C.F.R. § 83.7(d);
- successfully demonstrated that its membership consists of individuals who descend from a

historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity, 25 C.F.R. § 83.7(e);

- proved that its membership is composed principally of persons who are not members of any acknowledged North American Indian tribe, 25 C.F.R. § 83.7(f); and
- proved that neither it nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship, 25 C.F.R. § 83.7(g).

PPFF 166.

Of the remaining two criteria, the OFA conceded that the Tribe met criteria (b) from first contact through 1920, and from 1967-1996, and criteria (c) from colonial times to 1801, and from 1876-1884, and 1967-1996. Thus, the dispute regarding the Tribe's recognition under the two remaining criteria is limited to a few decades. The RFD's conclusions with respect to these remaining criteria are arbitrary and capricious for the reasons described below.

B. State Recognition

1. The Department Failed to Apply the Standards Set Forth by the IBIA Regarding Use of State Recognition.

Perhaps the most egregious failure on the part of the agency was its unexplained refusal to adhere to the IBIA's directive that it clarify the original FD by providing a more detailed analysis of the probative value that was assigned to specific evidence regarding the State's continuous relationship with the Tribe. Rather than follow the IBIA's instructions, the Department did the exact opposite. As a result of political pressure, or perhaps outright incompetence, the Department misread the IBIA opinion and concluded that evidence regarding the State of Connecticut's long-standing recognition of the Tribe carried no probative value with respect to criterion (b) (relating to the existence of the Tribe as a distinct community from historical times to the present) and criterion (c) (relating to the continuity of political influence or authority over the Tribe's members from historical times to the present). Whether the IBIA's directions were ignored intentionally or merely negligently, the resulting RFD was arbitrary and capricious.

The Department's decision regarding state recognition was also arbitrary and capricious for a second reason. The Department failed to provide any explanation for the reversal of its prior policy decision to consider state recognition as probative evidence regarding criteria (b) and (c). During her deposition, Secretary Norton testified that the Department debated the policy implications of state recognition evidence and concluded that this evidence should be given substantial weight because of constitutional federalism principles. The IBIA never addressed this basis for the FD, nor did it have the jurisdiction to do so. Rather than discuss this aspect of its reasoning in the RFD, however, the Department simply reversed itself as though that policy decision had never been part of the FD. Such unexplained changes of opinion are arbitrary and capricious, requiring that the RFD be overturned.

a. Use of State Recognition as Evidence in the FD

The Tribe's relationship with Connecticut is continuous for a period that began before there was even a State or United States government. PPFF 167. The Colony and later the State assumed responsibility for administering funds and services to tribes and their lands within the State and was responsible for oversight of the Tribe's Reservation, and provided services to tribal members wholly based on their status as tribal members. *Id.* Indeed, the Tribe has maintained and continually used its 400 acre Reservation in the Town of Kent, Connecticut and controlled the allocation and use of its resources, including housing, development and the burial of tribal members in the cemetery. The State's role usurped that which is usually played by the federal government, as the traditional aspects of the government-to-government relationship in this case existed between the Tribe and the State rather than the Tribe and the federal government. *Id.* Nothing about that government-to-government relationship alters the fact of tribal political existence. The very fact of a continuing community that struggled to preserve and control tribal resources, often despite the adverse actions of the State, is evidence that the body politic continued throughout State dominance.

It is these unique characteristics, and the Tribe's inability—as an Indian tribe from the eastern United States—to establish a direct relationship with the federal government during early historical periods, that led the Department to thoughtfully consider and weigh the evidentiary impact of the Tribe's relationship with the State when preparing the FD.

In the FD, the Department summarized the State's relationship with the Tribe as follows:

> The State of Connecticut has since early colonial times continuously recognized the [Schaghticoke] as a distinct tribe with a separate land base provided by and maintained by the State. The continuous State relationship manifested itself in the distinct, non citizen status of the tribe's members until 1973. There is implicit in the relationship between the State and the [Schaghticoke] a recognition of a distinct political body, in part because the relationship originates with and derives from the Colony's relationship with a distinct political body at the time the relationship was first established. Colony and State laws and policies directly reflected this political relationship until the early 1800's. The distinct political underpinning of the laws is less explicit from the early 1800's until the 1970's, but the [Schaghticoke] remained non-citizens of the State until 1973. The State 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.

PPFF 168.

The Department then summarized the regulations applicable to the use of state recognition as evidence and whether those regulations permitted the Department to consider such evidence:

> The specific forms of evidence stated in the criteria in § 83.7 (a) through (c) and § 83.7 (e) are not mandatory requirements. The criteria may be met alternatively by any suitable evidence that demonstrates that the petitioner meets the requirements of the criterion statement and related definitions (25 CFR 83.6(g)).
>
> Thus, the AS-IA can conclude that continuous recognition with a reservation is evidence to demonstrate criterion 83.7(b) and 83.7(c) even though it is not specified. 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 . . . not merely to equate state recognition with the trappings of Federal recognition.

PPFF 169. Following this introduction, the Department carefully reviewed the character of the Tribe's relationship with the State and directly applied that evidence as part of its analysis regarding whether the Tribe had fulfilled the requirements of the federal acknowledgment regulations.

The Department first analyzed the impact of the State's continuous relationship with the Tribe in the context of 25 C.F.R. § 83.7(b), which requires the Tribe to show that "a predominant

portion of the petitioning group comprises a distinct community and has existed as a community from historical times to the present." This evidence was applied initially to the period of 1920-1940. According to the Department, compared to other periods, there was "less specific evidence concerning community" during this period. The Department recognized, however, that there was direct evidence of community for this period, including: (1) interviews; (2) State legislation and appropriations directed towards the Tribe; and (3) various forms of documentary evidence. The Department concluded by noting that "[c]ontinuous state recognition with a reservation provides additional evidence . . . where specific evidence of community exists." PPFF 170.

For the period from 1940 to 1967, the Department engaged in a similar analysis. First, the Department reviewed detailed evidence taken from interviews, as well as various forms of other documentary evidence, and concluded that the Tribe satisfied the criterion in 25 C.F.R. § 83.7(b). The Department also noted again that "[c]ontinuous state recognition" provided additional evidence to support the Department's conclusion that the Tribe satisfied 25 C.F.R. § 83.7(b) from 1940 to 1967. PPFF 171.

The Department did not use the State's unique and continuous relationship with the Tribe in its analysis again until it turned to an evaluation of 25 C.F.R. § 83.7(c), which requires the Tribe to show that it "has maintained political influence or authority over its members as an autonomous entity from historical times until the present." As noted by the Department, the State's relationship to the Tribe, "is documented to be continuously active throughout the history of the Schaghticoke, as demonstrated by state overseer actions, state statutes, and other actions of the executive, judicial and legislative branches of Connecticut's colonial and state governments." The Department recognized that during certain periods—1820 to 1840 and 1892 to 1936—there was little direct evidence of tribal political processes because the State had adopted a policy not to support tribal governments. PPFF 172.

In the context of prior petitions involving other tribes, the Department had determined that state-tribal relationships were not a substitute for direct evidence of political processes, but could be used to add evidence where there was already some direct, though insufficient, evidence. PPFF 173. With respect to the Tribe, however, the Department chose to modify its prior position to accurately reflect the evidentiary weight that the Department felt should be accorded to complex and uninterrupted state relationships such as that maintained by Connecticut and the Tribe. As explained by the Department, with respect to the Tribe:

> The Department's reevaluated position is that the historically continuous existence of a community recognized 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. This conclusion applies only because it has been demonstrated that the Schaghticoke have existed continuously as a community (within the meaning of criterion 83.7(b)) and because of the specific nature of their continuous relationship with the State. Further, political influence was demonstrated by direct evidence for very substantial historical periods before and after the two historical periods. Finally, there is no evidence to indicate that the tribe ceased to exist as a political entity during these two periods.
>
> The state relationship is documented to be a continuously active one throughout the history of the Schaghticoke, as demonstrated by state overseer actions, state statutes, and other actions of the executive, judicial and legislative branch of Connecticut's colonial and state governments. There are such state actions throughout the periods where there is little or no direct evidence of political influence within the group, 1820 to 1840 and 1892 to 1936.
>
> . . .
>
> The historical continuity of the group has been demonstrated. This state relationship provides sufficient evidence to conclude that political influence existed continuously within the Schaghticoke, including two specific historical periods during which there is almost no direct evidence of political influence, but during which community has been demonstrated. The Schaghticoke therefore meet criterion 83.7(c) throughout their history.

PPFF 174.

b. The Policy Considerations That Led to the Department's Decision

The Department's decision to allow the Tribe to use its relationship with the State to satisfy 25 C.F.R. § 83.7(c) during periods where direct evidence of political influence was otherwise minimal was not made without substantial deliberation and analysis. Nor was it solely the result of the Department's consideration of the evidence. During her deposition, Secretary Norton testified

that the Department held a meeting to discuss the policy concerns that were implicated by the use of a State's relationship with a Tribe in the context of federal acknowledgment proceedings. PPFF 175. Principal Deputy AS-IA Martin, Director Fleming, and various attorneys from the Department's Solicitor's Office attended this meeting. *Id.* Secretary Norton also stated that this meeting was atypical and that it was held because the Department recognized that its decision involved broader applications. *Id.*

Secretary Norton spoke at length with Principal Deputy AS-IA Martin about "what her decision was and how she was considering the issue." Secretary Norton also —for the first time in her career—had a direct role in the Department's decision regarding the Tribe's relationship with the State, and she stands by the Department's decision even to this day because she and others within the Department believed that constitutional federalism concerns supported the Department's decision to give substantial weight to evidence of the State's continuous recognition of the Tribe:

> Q. Eventually there was an OIG investigation with respect to that initial determination that was made on January 29, 2004, correct?
>
> A. Yes.
>
> . . .
>
> Q. You weren't aware of anything improper with respect to that determination?
>
> A. Quite the contrary.
>
> Q. Why do you say that?
>
> A. The concern was about the specific legal policy decision on how to handle the state recognition of the Tribe. And since I was very involved in that and 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 know that that was a decision reached on its merits.

PPFF 176.

c. The IBIA Decision

Because the Department's use of the Tribe's relationship with the State reflected a modification of the Department's prior policy, the State and the interested parties sought to use it as

one of their numerous justifications for seeking to overturn the FD before the IBIA. In the FD itself, the Department did not provide a detailed description of the evidentiary weight that it had given to each of the specific pieces of evidence regarding the State's relationship with the Tribe. Nor did the Department discuss the constitutional policy considerations that underscored its evaluation of that evidence.

On appeal, the IBIA only addressed the evidentiary aspects of the Department's state recognition analysis.[31] Importantly, although the IBIA remanded the FD for reconsideration, at no point did it *ever* preclude the Department from giving the Tribe's relationship with the State the evidentiary weight that Secretary Norton and others within the Department believed was appropriate. In fact, the IBIA stated just the opposite, making it clear that the Department *could* use state recognition evidence, as it had in the FD, as long as it provided a thorough explanation of the weight that it was giving to specific pieces of evidence, and explained why that weight was appropriate in light of the specific definitions in the regulations that were applicable to criteria (b) and (c). PPFF 177.

To explain its decision and provide guidance to the Department, the IBIA's order referred to its analysis in the related appeal involving the Eastern Pequot Tribe ("EP"). PPFF 178. In *Eastern Pequot*, tribal opponents urged the IBIA to hold that only "specific," "first-hand" evidence could be used to satisfy criteria (b) and (c), as opposed to "secondary or tertiary characterizations" based on "outside assessments and relationships." *Id.* The IBIA rejected this request and held that a "more logical and natural interpretation of the regulations" allows a state's relationship with a petitioner to be used for demonstrating criteria (b) and (c) "if that evidence is in fact reliable of one or more

---

[31] Notably, even if the Department had adequately explained the policy justifications that underscored its review of the Tribe's state recognition evidence, the IBIA could not have reviewed that aspect of the Department's decision because it did not have jurisdiction to do so. *See* 25 C.F.R. § 83.11(d)

specific elements of the definitions of "community" or "political influence or authority" contained in 25 C.F.R. § 83.1. *Id.* at 15.

The IBIA in *Eastern Pequot* also rejected the opposition's suggestion that a state's relationship with an Indian group is not relevant to criteria (b) and (c) because both criteria pertain to internal group processes, while a state relationship with a group does not necessarily reveal the types of inter-group activities that are necessary for demonstrating those criteria. PPFF 179. As explained by the IBIA:

> As a practical matter, we are *not* persuaded that the relationship between a state and a petitioner, which could be varied and complex, can never be probative evidence for demonstrating the existence of community or political influence and authority within the petitioner. Rather . . . the evidentiary relevance and probative value of such a 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.
>
> ...
>
> We conclude that neither the acknowledgment regulations, nor BIA's interpretation of those regulations through guidelines and other acknowledgement decisions, categorically precludes evidence of the relationship between a state and a petitioner from being considered for criteria (b) and (c). Instead, whether such evidence is relevant, reliable, or probative, and the proper weight to be afforded it, *must be determined on a case-by-case and fact specific basis*.

Id.

The IBIA next reviewed the specific evidence of state recognition that had been presented to support the EP Final Determination, and assessed whether that evidence—which showed an "implicit" recognition of the EP from the early 1800's to 1973—was sufficient to meet the requirements of criteria (b) and (c) under the IBIA's newly enunciated instructions. PPFF 180. Ultimately, the IBIA concluded that the Department had failed to show in the EP Final Determination that the EP's state recognition evidence was probative with respect to criterion (b). *Id.* As noted by the IBIA, the EP Final Determination treated the significance of state recognition, "on far too general of a level for us to be convinced that it is evidence that can be considered

reliable or probative for the entire definition of community, *and the FD makes no distinction between the components of that definition in considering the state relationship as probative.*" *Id.*

With respect to criterion (c), the IBIA reached a similar conclusion for the same basic reasons, commenting along the way about the Department's failure to link, in the EP Final Determination, the characteristics of the EP's relationship with the State to the components of the definition of "political authority or influence" contained within 25 C.F.R. § 83.1. PPFF 181. The IBIA ultimately concluded as follows:

> We are left with the firm conviction that "implicit" state recognition of the Eastern Pequot, and the underlying elements of that relationship, at least as used and explained in the FD, are of little or no probative value as evidence to demonstrate that the group actually met the definitions of "community" and "political influence or authority." In order for the State's relationship with the EP to be shown to be reliable and probative evidence of community and political processes, the FD must articulate more specifically how the State's actions toward the group during the relevant time period(s) reflected or indicated the likelihood of community and political influence or authority within a single group.

Id. The IBIA then remanded the EP petition back to the Department "for further work and consideration . . . ." *Id.*

d. State Recognition Analysis in the RFD

In light of the IBIA's decision regarding the Tribe, the Department's obligation with respect to the Tribe's petition was clear. The Department was required to make up for its original failure to provide a satisfactory explanation of the state recognition analysis in the FD by providing a thorough evaluation of all of the evidence regarding the Tribe's relationship with the State in a RFD—following the instructions that had been set forth by the IBIA in the EP Final Determination. In other words, the Department was required to "articulate specifically how the State's actions toward the [Tribe] during the relevant time period(s) reflected or indicated the likelihood of community and political influence or authority within" the Tribe, as those concepts are defined in 25 C.F.R. § 83.1. PPFF 182.

Moreover, as stated above, the probative value attributed to state recognition evidence in the FD was based, in part, on the Department's policy decision to give state recognition evidence substantial weight because of constitutional federalism principles. It was therefore incumbent upon the Department to emphasize those constitutional policy considerations to make it clear that they played a pivotal role in the Department's consideration of state recognition evidence.

Unfortunately, the Department did neither of these things. It made no attempt to support its previous decision under the new IBIA standards. Instead, it took the opportunity to reach a completely different decision that had nothing to do with the IBIA's new standards or the policy considerations that the Department had originally relied upon.

The Department's state recognition analysis in the RFD was approximately five pages long. PPFF 183. The Department began by outlining the periods of time that the State's recognition of the Tribe had been relied upon in the FD to determine that the Tribe met criterion (b) (1920 to 1967) and criterion (c) (1820-1840, 1870-1875, and 1892-1967). PPFF 184. Without any support, explanation, or analysis whatsoever, and without making any attempt to relate its observations to the pertinent time periods, the Department then proffered the following contradictory conclusions: (1) the State did not implicitly or explicitly predicate its legislation or policies regarding any Connecticut Indians on the basis of a government-to-government relationship with the Indians; (2) State legislation passed in 1973 and 1989, "did not provide evidence concerning the exercise of political authority or influence with the petitioner" even though it explicitly formalized a government-to-government relationship between the Tribe and the State; (3) evidence of the "actual interactions between the different representatives of the State and the [Tribe did] not provide evidence of political authority or influence in the group;" and (4) the "20th-century state relationship evolved over more than 200 years in often contradictory and *ad hoc* ways, in response

to short-term issues of immediate concern, or based on previous legislative actions that may have been out of date or in need of revision." *Id.*

After reciting these conclusions, the Department turned to its evaluation of what it considered to be the primary elements of the State's relationship with the Tribe. PPFF 185. Beginning with the "citizenship status" of tribal members, the Department made no effort to relate its analysis of this evidence to any of the elements of the definitions applicable to criteria (b) and (c), as required by the IBIA. *Id.* Instead, it noted that State law (enacted starting in 1902) linked the status of all State Indians to that of non-resident aliens. *Id.* It then curiously noted that although the State's Indians were not granted citizenship rights until legislation was passed in 1973, "there was no state policy or law that effectively prevented them from exercising citizenship rights . . . ." *Id.* Without further elaboration, the Department summarily concluded its analysis:

> State laws that defined the theoretical status of Connecticut Indians were not predicated on the existence of a government-to-government relationship with the Schaghticoke and other tribes, or the recognition of the group as a political entity. Moreover, the State did not pass the laws regarding the Schaghticoke and the other Indian groups because of its recognition of their being a separate political entity. The non-citizenship status of the Schaghticoke does not provide evidence regarding criteria 83.7(b) and 83.7(c).

Id.

Next, the Department turned to the State's creation of a system of overseers to act as guardians over the Tribe. PPFF 186. The Department first outlined in the most generic terms possible the transfer of responsibility over the Tribe from Litchfield County Courts, to the State Park and Forest Commission, and finally to the Commissioner of Welfare. *Id.* The Department then summarily recited the following facts: (1) no other residents of the State were placed under the guardianship of State agencies; (2) the State did not treat all Indian tribes in the same way with respect to guardianship; (3) non-Indians were sometimes placed under the care of the Welfare Commission when they were disabled or economically destitute; and (4) the jurisdiction of the Park

and Forest Commission did not apply to Tribal members who were not living on the reservation. *Id.* As a result of this "analysis," the Department concluded as follows:

> The creation and maintenance of the overseer system through 1926, and the transfer of jurisdiction over state recognized Indian tribes to two other state departments after that does not provide evidence that demonstrates a bilateral political relationship within the group, or that the group interacted with the state as one polity to another. 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).

Id. Once again, any attempt to relate evidence regarding the overseer system to the elements of the definitions contained with 25 C.F.R. § 83.1 was noticeably absent. *Id.*

Turning to the evidence in the record regarding the State's maintenance of Tribal reservation lands and other Schaghticoke resources, the Department observed that "[m]anagement by State officials was another instance where actions by the State would and did generate responses by the Schaghticoke." PPFF 187. The Department also observed that the integrity and use of the Tribe's reservation lands was "central to defining the historic relationship between the Schaghticoke and the State." Deeming this analysis sufficient, without more the Department reached a conclusion that appears contrary to the evidence it had just generically referenced:

> [T]he maintenance of the reservation by the State was not predicated on a government-to-government relationship with the group or the existence within the group of bilateral political relations that provides evidence for political influence or authority. This aspect of the State relationship based on the maintenance of the reservation does not provide evidence for criterion 83.7(c), although the responses by the Schaghticoke to the State's actions are evidence to be evaluated under criterion 83.7(c).

Id. Once again, despite repeated references to a "government-to-government" relationship, the Department made no reference to the actual definitions of community and political influence that are contained within the regulations or the requirement that the criteria and the evidence "must be understood in the context of the history, geography, culture and social organization of the group." 25 C.F.R. § 83.1. *Id.*

In the RFD, the Department wound up its analysis of the state recognition evidence by turning to what it describes as the "rationale for the State relationship." PPFF 188. First, the Department reached the curious conclusion that there was no material from any State body or State judicial organizations that articulated a reason for the distinct status that the Tribe maintained with the State. *Id.*[32] Ignoring other documents in the record that contain "a variety of informal opinions and comments as to the character of the Schaghticoke, and the status . . . . of the group's members," the Department then focused on two State Attorney General Opinions that purportedly "assert a political basis for the relationship between the State and the Schaghticoke." *Id.* The first Attorney General opinion, written in 1939, contains an isolated statement disputing the presence of "Indian tribal organizations" in the context of an argument opposing the authority of all Connecticut Indians to hunt and fish off reservation lands without a license. PPFF 189. The Department provided a nonsensical justification for its citation to this opinion: "In other words, no Connecticut law granted Indians an exemption from the requirement to obtain a State license to hunt, fish, or trap off reservation. The opinion does not preclude the exercise of political authority and influence by Schaghticoke within the definition of the regulations." *Id.*

With respect to the second Attorney General opinion, issued in 1955, the Department observed that the opinion cites a case from the Maine Supreme Court that contains language critical of the "political organization" of Indian tribes in Maine. PPFF 190. The Department then quoted similar language from the Attorney General Opinion questioning the "political organization and [] political existence" of Connecticut Indian tribes in general. *Id.* From these two Attorney General

---

32 The Department made this observation in spite of its recognition that numerous historical documents refer to the Tribe as a "tribe." *See* RFD at 51 [Murphy Decl. ¶ 1]. According to the Department, these documents were of no moment because they did not contain a separate definition of the word "tribe." *Id.* The Department completely ignored the fact that the State, and before it the Colony, recognized the Tribe as a self-governing entity and State law expressly recognized the Tribe's reservation and the Tribe's connection to the reservation. Conn. Gen. Stat. §§ 47-59a and 47-63; *see also Cohen's Handbook of Federal Indian Law* § 1.02 (2005 Ed.).

opinions, the Department concluded that "the AG did not consider the Schaghticoke to be exercising or possessing sovereign authority." *Id.*

A review of the entire RFD shows that the Department's truncated discussion of the four factors above comprised the sum total of the Department's written attempt to analyze the Tribe's state recognition evidence in light of the new IBIA standards. PPFF 191. Satisfied with its conclusion that the State's long-term, continuous dealings with the Tribe were entitled to no weight whatsoever, the Department marched through its remaining analysis of the other evidence pertaining to criteria (b) and (c). *Id.* In the end, the Department concluded that in light of its decision to exclude all evidence regarding state recognition, the Tribe could not meet criteria (b) and (c). *Id.*

e. The Department Failed To Adhere To The IBIA's Decision.

As outlined above, the IBIA explained that in order for the State's relationship with a petitioner to be probative evidence of criterion (b) or (c), it would need to be expressed in some way that reflected the actual or likely existence of the petitioning group as a distinct community (criterion (b)), or of the petitioner as an autonomous entity maintaining political influence or authority over its members (criterion (c)). But because the IBIA determined that the Eastern Pequot and Schaghticoke FDs had discussed the significance of state recognition on too general a level, the IBIA remanded both opinions so that the OFA could explain in greater detail—and with specific reference to the definitions applicable to those criteria that are contained in the acknowledgment regulations—the weight it had afforded this evidence. Instead of simply providing this detailed explanation, the Department abruptly changed course and declared that it had re-weighed the evidence and now determined that the state recognition evidence submitted by the Tribe was worthless. Not surprisingly, this about-face occurred at the height of the opposition groups' efforts to place political pressure on the Department to reverse the FD. But regardless of the reasons for

the Department's decision, the RFD must be vacated. The Department was required to adhere to the instructions enunciated by the IBIA, which it did not do. Moreover, the Department failed to provide an explanation for its sudden decision that state recognition evidence was meaningless.

Upon remand from the IBIA, the Department was, of course, required to follow the explicit instructions set forth by the IBIA. *See, e.g., Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary -- Indian Affairs (Operations), et al.*, 11 I.B.I.A. 54 (Feb. 10, 1983) (remand to the Deputy Assistant Secretary with directive for him to exercise discretion within procedures and polices adopted by the Department is obligatory); *Jeffrey Alan-Wilson v. Acting Sacramento Area Director, Bureau of Indian Affairs*, 33 I.B.I.A. 55, 56 (Oct. 14, 1998) (only issue for review is whether remand instructions were properly followed). However, this Court need not dig deep into the RFD to conclude that the Department's state recognition analysis does not comply with the IBIA's instructions. Nowhere does the Department attempt to follow the directives of the IBIA by providing a detailed analysis of the state recognition evidence, and the weight to be afforded that evidence, with specific reference to the definitions applicable to criteria (b) and (c). And the administrative record, as contained in the FAIR database, lacks *any* evidence to show that the Department attempted to perform the analysis required by the IBIA prior to drafting the RFD. PPFF 192.

To the contrary, the evidence in the record shows that the Department believed its analysis prior to formulating the FD adhered to the IBIA's requirement that specific state recognition evidence be directly probative of the criteria in the regulations. Most telling in this regard is an e-mail between two researchers within the OFA. There, George Roth, an anthropologist for OFA, stated:

> Thinking about it, what we said in Schaghticoke was that the petitioner couldn't automatically treat the State relationship as entirely analogous to the Federal – tribal relationship, and thus argue its character by citing rulings, etc. re the Federal relationship.

The character of the relationship needed to be shown directly, which we concluded we had done. [33]

PPFF 193. Similarly, in an e-mail from Dr. Virginia DeMarce to Mr. Roth sent shortly before the FD was published, Dr. DeMarce discussed the plethora of evidence in the record relating directly to the State's interactions with the Tribe, and her desire to reference all of that evidence in the FD. PPFF 194. ("I know that if we don't include every single annual overseer's report under 'state relationship' . . . Connecticut's lawyers will jump up and down" to argue that the Department did not consider other evidence as indicative of a "state relationship."); *see also id.* (noting that the Department considered the State's continuous relationship with the Schaghticoke to have been "vigorous" and that the evidence demonstrated "a well-defined existing community.").

In contrast, the record is devoid of evidence which shows that, subsequent to the IBIA opinion, the Department engaged in another analysis of the Tribe's state recognition evidence under the instructions set forth by the IBIA, and thereafter reached a different conclusion. In fact, the Department's legal staff wrongly advised Mr. Cason that the Department could no longer consider the State's recognition of the Tribe as probative evidence of criterion (b) and (c). PPFF 195. ("[A]s part of the briefing that I had on Schaghticoke . . . I was made aware . . . that the [state recognition] issue had been decided before, that it had been given to IBIA, IBIA made rulings, and that the substance of the change of position recommended for the Department was in recognition of IBIA's position that we could not use the State's recognition process to fill the gaps in data that we actually had available from the Schaghticoke) (emphasis added). Lee Fleming likewise was misinformed, testifying at his deposition that "[t]he IBIA stated that we could not use state recognition as probative evidence."). *Id.*

---

[33] It is particularly striking that this document—which directly contradicts the Department's published reasoning on the state recognition issue in the RFD—does not appear anywhere in the FAIR database.

Even if a new analysis of the state recognition evidence had been conducted, the Department would have had no reason to change its mind about the significance of state recognition evidence. The IBIA did not find that the Department's consideration of the Tribe's state recognition evidence was improper on the merits. It merely noted that the Department had not provided an adequate explanation for the favorable weight accorded to that evidence. And it never concluded that an adequate explanation could not be provided. As the District of Columbia Circuit Court of Appeals has explained, under these circumstances, the Department was required to stick with its original decision and explain it again in the clearest way that it could:

> There is always a danger that a [reviewing body], seriously pursuing its responsibility for review but ignorant of the technical side of a regulated trade, will be convinced by zealous litigants that there are substantive flaws in an agency's decision when, in reality, there is merely an unfortunate lack of clarity. Under such circumstances, the agency should stick to its guns, make the same decision again, observing all procedural requirements, and endeavor to substantiate it in the clearest, most coherent manner possible.

Independent U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 931 (D.C. Cir. 1982).

In light of the Department's strong feelings about the weight of the Tribe's state recognition evidence prior to the FD (and its obligation to defend those opinions), the RFD's lack of an analysis under the IBIA instructions, the starkly different outcome reached by the Department, and the deposition testimony regarding the Department's erroneous interpretation of the IBIA's decision, it is clear that the Department never performed another analysis as the IBIA had instructed. It simply decided, arbitrarily, to reject the state recognition evidence, and thereafter put forward a lame attempt to explain that erroneous decision.

(i) The Department's State Recognition Analysis in the RFD was Inadequately Explained Regardless of the IBIA Opinion.

Even if the Department had not been required by the IBIA to proffer a more detailed discussion of the Tribe's state recognition evidence—which it was—the RFD still would be arbitrary and capricious because the RFD does not contain a "reasoned analysis" of the Department's decision to reverse its prior decision to give probative weight to the Tribe's state

recognition evidence. Although an agency may reverse course, it must supply a reasoned analysis and explain its reasons for doing so. *Motor Vehicle Mnfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 56-57 (1983). The Second Circuit has explained that "'when an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act.'" *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 80 (2d Cir. 2006).

As noted above, prior to issuing the FD, the Department held the view that the Tribe's state recognition evidence was plentiful, probative, and directly related to the requirements of criteria (b) and (c). Despite this, the Department's reconsidered state recognition analysis in the RFD was truncated, conclusory, nonsensical, and resulted in the opposite conclusion. The Department failed to explain why it no longer believed that the state recognition evidence contained in the record was entitled to any weight with respect to criteria (b) and (c), when in the FD it had considered that same evidence to be strong and probative. *See West Harlem Envtl. Action v. EPA*, 380 F. Supp. 2d 289, 295 (S.D.N.Y. 2005) (noting that EPA had failed to explain why a document it relied on was any more compelling at the time it rescinded a requirement than it was at the time it created the requirement). Instead, in the RFD the Department repeatedly recited a small number of sometimes extraneous facts, and thereafter reached conclusions, without providing any explanations for those conclusions. *See Int'l Ladies' Garment Workers Union v. Donovan*, 722 F.2d 795, 815 n.35 (D.C. Cir. 1983) ("[a]n agency's failure to 'cogently explain why it has exercised its discretion in a given manner,' renders its decision arbitrary and capricious."). Moreover, the Department failed to specifically address numerous portions of the Tribe's state recognition evidence that it relied upon to support the state recognition findings in the FD. *Compare* FD Appendix IV [Murphy Decl. ¶ 4] with RFD at 49-50 [Murphy Decl. ¶ 1]; *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d

1486, 1511 (D.C. Cir. 1984) ("It is well established that an agency has a duty to consider reasonable alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.").

Most importantly, there is no other evidence in the record to shed light on the Department's new conclusions regarding the state recognition issue in the RFD. There are no notes, memoranda, e-mails, or other documents to show that the Department actually conducted an objective analysis of the state recognition evidence after the IBIA opinion and reached a different outcome as a result. Once again, both Mr. Cason and Director Fleming indicated that no such analysis was conducted because the Department had arbitrarily concluded that it could no longer consider state recognition evidence. PPFF 195. It is therefore impossible, on the administrative record as it now stands, to discern the Department's rationale for deciding that state recognition evidence that was once probative was now entitled to no weight.

f. Because the Department's Consideration of State Recognition Evidence in the FD was the Result of a Constitutional Policy Decision, the FD Should Stand as a Matter of Law.

As noted previously, during her deposition Secretary Norton discussed the internal policy debate within the Department regarding the importance of state recognition and its implications with respect to constitutional federalism principles. PPFF 197. Secretary Norton was correct to raise the importance of federalism as part of the Department's consideration of the weight that should be accorded to the specific evidence regarding the State's long-standing relationship with the Tribe. The Tenth Amendment to the United States Constitution requires the federal government—and by extension, federal agencies—to respect the power of states in issues not delegated to the federal government by the Constitution. "We previously have recognized that constitutional principles of federalism erect limits on the Federal Government's ability to direct state officers or to

interfere with the functions of state government." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 624 (1999).[34]

This policy debate within the Department, of course, helped lead to the Department's determination in the FD that state recognition could play a role in tribal recognition. Indeed, the administrative record contains an OFA briefing paper that discusses the Tribe's evidence of political authority for the periods 1820 to 1840 and 1892 to 1936. PPFF 198. This briefing paper is part of an institutionalized peer review process used by the Department to highlight novel issues of interpretation and to rigorously test the researcher's conclusions. *Id.* The Department concluded in the briefing paper that it had *never before* encountered a case in which evidence for community was so strong while there was also a paucity of direct evidence for political leadership during some periods. PPFF 199. Secretary Norton was therefore called upon to make a policy determination whether, under those unique circumstances, the strong evidence of the Tribe's longstanding and continuous relationship with the State could be used to satisfy criterion (c) for certain limited time periods. Secretary Norton and others within the Department debated this decision and concluded that principles of federalism supported the Department's view that the Tribe's state recognition evidence was entitled to substantial weight. PPFF 200.

These individuals were clearly those most qualified to render such a policy decision. *See* Richard J. Pierce, Jr., *Administrative Law Treatise* § 8.6, at 552 (2002) ("[t]he institutional mind has insights that are as profound as those of any individual and may be much more comprehensive, for the appropriate specialists collaborate by considering the judgment of each other, each contributing

---

[34] While the acknowledgment regulations give strong deference to a relationship between the federal government and a petitioning group, *see* 25 C.F.R. § 83.6, no petitioning groups from the eastern United States were able to take advantage of those provisions because, as a consequence of the early historical development of the United States, those groups were denied the opportunity to establish relationships with the federal government. *See Cohen's Handbook of Federal Indian Law* §§ 1.02, 1.03 (2005 Ed.). Instead, such groups were forced to deal exclusively with the governments of the eastern states. *Id.*

his or her own particular knowledge and skills."). And these individuals were entrusted with the discretion to render such policy decisions in the course of exercising their official duties. 25 U.S.C. §§ 2 and 9.[35] But most importantly, the IBIA had no jurisdiction to review or reverse this aspect of the Department's decision.

Pursuant to 25 C.F.R. § 83.11(d), the IBIA is limited to the review of evidentiary issues in the following categories: "(1) that there is new evidence that could affect the determination; (2) that a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; (3) that petitioner's or the Bureau's research appears inadequate or incomplete in some material respect; or (4) that there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in §83.7 (a) through (g)." Even the broadest reading of these categories does not allow the IBIA to review or reverse the Secretary's interpretation of the mandates of the United States Constitution, such as that which had been debated and agreed upon within the Department and reflected in the FD. *See also In re Federal Acknowledgement of Ramapough Mountain Indians, Inc.*, 31 IBIA 61, 81 (1997); *In re Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation*, 36 IBIA 245, 249 (2001). In other words, once the Department made the decision to treat the Tribe's state recognition evidence as probative in the FD, that decision was final, regardless of the pending IBIA review process.

The Department's decision that the Tribe's state recognition evidence should be entitled to substantial weight, because of principles of federalism, and because of the unique circumstances of

---

35 25 U.S.C. §§ 2 and 9 delegate broad authority from Congress over the administration of Indian affairs, while Congress derives its authority from the Indian Commerce Clause, U.S. CONST., art. I, § 8, cl. 3.

that case, was entitled to deference. Yet that aspect of the Department's decision was completely abandoned and ignored without explanation in the RFD.

C. The Tribe has Satisfied the Endogamy Criterion of 25 C.F.R. § 83.7(c).

A petitioner satisfies criterion (c) for any period in which it has demonstrated that "[a]t least 50 percent of the marriages in the group are between members of the group." 25 C.F.R. § 83.7(b)(2)(ii); 25 C.F.R. § 83.7(c)(3). The Tribe relied on this regulation and submitted evidence and analysis of its marriage rates throughout the 19th century. The OFA evaluated these submissions and correctly concluded in the positive FD that the Tribe had demonstrated sufficient in-group marriage rates—or "endogamy" rates[36]— to receive the benefit of the "carryover" provision,[37] under criterion (b)(2), to meet its burden of proof to demonstrate political influence or authority under § 83.7(c)(3) for the periods from 1800 to 1820, and from 1840 to 1870. PPFF 201.

After issuance of the FD, as noted above, the Department came under tremendous political pressure to reverse the FD. It responded to this pressure by "reweigh[ing] the evidence . . . based on a new endogamy analysis" and in a 180-degree reversal of its former conclusion, declared in the RFD that the Tribe was unable to satisfy its burden under § 83.7(c)(3) for the periods 1801 to 1820 and 1840 to 1870 by relying on the carryover provision of criterion (b)(2). To reach this result, the OFA took actions contrary to the language of the acknowledgment regulations, generally accepted scientific principles, and the advice of its own experts without providing a reasonable explanation for its decision. The agency's actions were arbitrary and capricious.

---

36 This memorandum uses the term *endogamy*, except as otherwise indicated, to refer to marriages between group members, and the term *endogamy rate*, synonymous with the term *in-group marriage rate* (or *rate of marriage within a group*), to refer to the calculation contemplated by 25 C.F.R. § 83.7(b)(2)(ii), with no substantive distinction intended between these terms.

37 Section 83.7(c)(3) links the community (b) and political authority (c) criteria by providing that a petitioning group which has met § 83.7(b)(2) for a particular time period is deemed to have provided sufficient evidence to "carryover" and thereby satisfy criterion (c) for that time period as well.

1. Procedural History

a. Endogamy Analysis in the FD

The OFA correctly began its marriage rate analysis in the FD by identifying each Schaghticoke tribal member who had married and classifying his or her marriage as "endogamous" or "exogamous" based on whether his or her spouse was also a Schaghticoke tribal member. PPFF 202. In determining whether a particular spouse was also a tribal member, the OFA used what it described as "the most conservative method of making such calculations." PPFF 203. In the absence of evidence that a tribal member's spouse also was a tribal member, the OFA presumed that the spouse was not a tribal member. PPFF 204. Thus, the OFA counted the marriage of each known tribal member to another known tribal member as an endogamous marriage. The OFA counted every other marriage of a known tribal member as an exogamous marriage.

The OFA then compared the number of marriages of tribal members that were between tribal members (endogamous marriages of tribal members), and the total number of marriages of tribal members (endogamous and exogamous marriages of tribal members) to calculate the percentage of marriages in the group that were between members of the group for each period. PPFF 205.

The following "Table 1" illustrates the OFA's methodology in the FD. Table 1 shows a marriage-rate analysis of a hypothetical population of eight tribal members (column 1), in which seven members of the tribe married (column 2). Of the seven marriages shown in Table 1, following the FD's methodology, the OFA would have counted 57% of them (4 out of 7 marriages) as marriages in the group that are between members of the group (column 3). Because "[a]t least 50 percent of the marriages in the group are between members of the group," the tribe in Table 1's hypothetical would have satisfied § 83.7(b)(2)(ii) for this period and would receive the benefit of

the carryover provision to meet its burden of proof to demonstrate political influence or authority under § 83.7(c)(3).

Table 1

Tribal Member	Married?	Endogamous (i.e., married another member of the Tribe)?	Exogamous (i.e., married a non-member)?
A	Yes (marriage to B recorded in overseer's reports)	✔	
B	Yes (marriage to A recorded in overseer's reports)	✔	
C	Yes (A's birth certificate identifies C as mother and D as father)	✔	
D	Yes (A's birth certificate identifies C as mother and D as father)	✔	
E	Yes (B's birth certificate identifies E as mother, but does not identify father)		✔
F	Yes (G's birth certificate identifies F as mother, but does not identify father)		✔
G	Yes (marriage to non-tribal member X)		✔
H	No	N/A	N/A
Total:	7 marriages in the group	**57% of marriages (4 out of 7 marriages) in the group are between members of the group**	43% of marriages (3 out of 7 marriages) in the group are not between members of the group

Thus, applying even this most conservative method of calculating the percentage of marriages in the Tribe that were between members of the Tribe for each period, the OFA found over a 50% endogamy rate from 1800 to 1820, and from 1840 to 1870.

b. Intervenors' Motion For Reconsideration

The State of Connecticut challenged the FD's marriage rate analysis in its Motion for Reconsideration that was filed with the IBIA on May 3, 2004. Selectively citing from *Webster's Third International Dictionary*, Connecticut argued that the OFA had incorrectly counted "individuals" instead of "marriages" in determining the Tribe's marriage rates. Connecticut argued that the correct definition of the term *marriage* "is the union of two individuals who are joined in a

special kind of social and legal dependence for the purpose of founding and maintaining a family." Connecticut's Reconsideration Brief at 93 (citing *Webster's Third New International Dictionary of the English Language* 1384 (1986)). PPFF 206. Because it takes two people to make a single "marriage" union, Connecticut argued that the OFA should have divided in half the FD's count of marriages that were between two members of the Tribe to account for the fact that each endogamous couple's "marriage" had been counted separately as a marriage for each spouse.

Table 2 applies Connecticut's proposed methodology to the hypothetical set out in Table 1. Applying Connecticut's methodology, of the five "marriage" unions shown in Table 1, Connecticut would count only 40% of them (2 out of 5 marriage unions) as marriages that are between members of the group (column 3). Because less than 50% of these "marriages" are between members of the group, applying Connecticut's methodology would mean that this hypothetical tribe failed to satisfy § 83.7(b)(2)(ii) for this period and would be denied the benefit of the carryover to meet its burden of proof to demonstrate political influence or authority under § 87.7(c)(3).

Connecticut did not suggest the need to similarly divide in half the number of "marriages" in which a tribal member married a non-tribal member to account for the fact that one-half of this "union" was not a member of the Tribe, and thus—at best—only one-half of this "marriage" was *in the group* and appropriately included in the ratio contemplated by the regulation, which asks whether "[a]t least 50 percent of the marriages *in the group* are between members of the group." 25 C.F.R. § 83.7(b)(2)(ii) (emphasis added).

Table 2

Tribal Member	Married?	Endogamous (i.e., married another member of the Tribe)?	Exogamous (i.e., married a non-member)?
A	Yes (marriage to B recorded in overseer's reports)	**1/2** ✔	
B	Yes (marriage to A recorded in overseer's reports)	**1/2** ✔	
C	Yes (A's birth certificate identifies C as mother and D as father)	**1/2** ✔	
D	Yes (A's birth certificate identifies C as mother and D as father)	**1/2** ✔	
E	Yes (B's birth certificate identifies E as mother, but does not identify father)		✔
F	Yes (G's birth certificate identifies F as mother, but does not identify father)		✔
G	Yes (marriage to non-tribal member X)		✔
H	No	N/A	N/A
Total:	5 marriages involving at least one member of the group	**40% of marriages (2 out of 5 marriage unions) involving at least one member of the group are between members of the group**	60% of marriages (3 out of 5 marriage unions) involving at least one member of the group are between one member of the group and one non-member

While Connecticut's "marriages" vs. "individuals" distinction might have been superficially appealing, this was not a case where the agency was free to choose between two reasonable usages of the term "marriage." To the contrary, the agency had already carefully considered and decided the FD, following the unanimous advice of staff experts and generally accepted social science methods. Moreover, as described below, Connecticut's proposed "union" definition of marriage, and the methodology it advocated in light of this definition did violence to the language of the regulation and was contrary to agency expertise and generally accepted social science methods. Nevertheless, in response to intense political pressure, the agency reversed course and rejected its own conclusions from the FD, whole-heartedly embracing Connecticut's flawed analysis as its own.

c. The Supplemental Transmittal and IBIA Remand

On December 2, 2004, three days after the Tribe submitted its Reply to the Connecticut Request for Reconsideration to the IBIA, the Solicitor's Office filed its unprecedented "Supplemental Transmittal" with the IBIA calling into question the agency's FD. Specifically, the Supplemental Transmittal expressed concern that the OFA may have used an incorrect methodology in calculating in-group marriage rates in preparing the FD and informed the IBIA that it could not affirm the FD "absent explanation or new evidence." PPFF 207. See discussion of Supplemental Transmittal, *supra*.

Based on the unprecedented Supplemental Transmittal, when the IBIA remanded the FD to the OFA for clarification of the probative value of the state recognition evidence, it also referred the marriage rates issue to the agency as a possible grounds for reconsideration:

> Because we are already vacating and remanding the FD to the Assistant Secretary for reconsideration based on Historical Eastern Pequot Tribe, and because OFA has acknowledged problems with the FD's endogamy rate calculations-at a minimum, inadequate explanation-we conclude that this matter is best left to the Assistant Secretary on reconsideration.

In re Federal Acknowledgment of the Schaghticoke Tribal Nation, 41 IBIA 30, 34 (May 12, 2005) (citing Supplemental Transmittal). The IBIA did not consider whether the OFA in fact had used the correct marriage rate methodology in the FD – it took the Supplemental Transmittal at face value and merely placed the marriage rates issue back in front of the OFA. PPFF 208.

d. Technical Assistance

On July 14, 2005, pursuant to the Amended Scheduling Order, OFA Director Fleming provided a technical assistance ("TA") letter to the Tribe on the marriage rate issue. The OFA's TA letter noted that the FD and prior acknowledgment decisions had used the term "endogamy" in discussing the marriage-rate analysis, and recognized that the term "endogamy" is "an anthropological term which describes the practice of marrying within a group as opposed to marrying outside of the group ('exogamy')." PPFF 209.

On July 25, 2005, the Tribe submitted eight scholarly articles that each supported the methodology the OFA had followed in the FD to calculate in-group marriage rates. PPFF 210. On August 12, 2005, the Tribe submitted a brief to the OFA defending the FD. In this brief, the Tribe defended the methodology the OFA had adopted in the FD based on an examination of the language of the regulation and a review of the scholarly social science literature, which demonstrated that the agency's FD was correct; that the Supplemental Transmittal, to the contrary, was wrong in its statements about "precedent;" and, moreover, that Connecticut's proposed alternative methodology was not a generally accepted scientific methodology, as required by the regulations. *Id.*

e. Endogamy Analysis in the RFD

Just two months later, on October 11, 2005, Mr. Cason signed the 88-page RFD, denying the Tribe's petition. The RFD purported to "reweigh[] the evidence for criterion (c) for the period 1801 to 1820 and 1840-1870 based on a new endogamy analysis." PPFF 211.

Repeating the distinction first suggested in Connecticut's Brief to the IBIA, that the regulation requires the counting of in- and out-group "marriages rather than individuals," the RFD interpreted the term *marriage* to mean "a union of two people." PPFF 212.

> Counting unions of two people, i.e., marriages rather than individuals, is an appropriate method of measuring the social links established by marriages. The ratio of links within a group versus those outside the group provides a valid measure of the level of social cohesion within the community.

Id. Based on this new methodology, the OFA found the Tribe unable to satisfy its burden under § 83.7(b)(2)(ii) for the periods 1801 to 1820 and 1840 to 1870, thereby denying the Tribe the benefit of the carryover to meet its burden of proof under criterion (c) for those periods.[38] *Id.*

---

[38] In preparing the RFD, the agency never even bothered to analyze whether the Tribe could still meet criterion (c) pursuant to § 87.3(c)(1)(iv) because under any marriage rate methodology the Tribe still has "significant" marriage rates under (b)(1)(i), which, combined with other evidence of community are sufficient to meet (c)(1)(iv).

2. The Language of the Regulation Demonstrates that the Methodology the OFA Adopted to Calculate Marriage Rates for the RFD Was Unreasonable, Arbitrary, and Capricious.

Under tremendous political pressure to reverse the FD, the Solicitor's Office of the Department of Interior, with little to no input from the OFA professional staff, adopted Connecticut's "individuals" vs. "marriages" rhetoric and required the OFA to look at whether the number of "marriage" unions between two tribal members exceeded the number of unions involving a tribal member and a non-member. This is not, however, even close to what the regulation requires. Any interpretation of a regulation must begin with an examination of the language of the regulation itself. *See, e.g.*, *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). By the plain meaning of the regulation, the relevant question is whether "[a]t least 50 percent of the marriages in the group are between members of the group." 25 C.F.R. § 83.7(b)(2)(ii). By virtue of this plain language, any methodology for calculating marriage rates based on the criteria established in § 83.7(b)(2)(ii) must exclude from consideration any *marriages* that are not *marriages in the group*.

The regulation sets up a simple ratio:

$$\frac{\text{Marriages In The Group That Are Between Members Of The Group}}{\text{Marriages In The Group}}$$

If this ratio is equal to or greater than 50% for any period, then the petitioner satisfies § 83.7(b)(2)(ii) for that period. Fundamentally, both the denominator and the numerator are measures of the in-group; the denominator comprises all marriages of group members, and the numerator comprises the subset of these marriages of group members that are between two members of the group. Any marriages that are not marriages *in the group* are excluded.

a. The RFD's methodology for calculating marriage rates fails to exclude from consideration "marriages" that are not "marriages in the group."

The RFD is based on quite a different—and fundamentally flawed—ratio. Despite the regulation's limitation of the word *marriages* by the phrase *in the group*, the RFD's ratio includes

both "marriages" (which it defines as "unions") *in the group* and "marriages" (again, "unions") that are not *in the group*. The RFD characterizes its marriage rate methodology as a "methodology for analyzing data concerning marriage within *and outside of* the petitioning group." RFD at 6 (emphasis added) [Murphy Decl. ¶ 1]. The RFD describes its ratio as "[t]he ratio of [marriages] within a group versus those outside the group." *Id.*

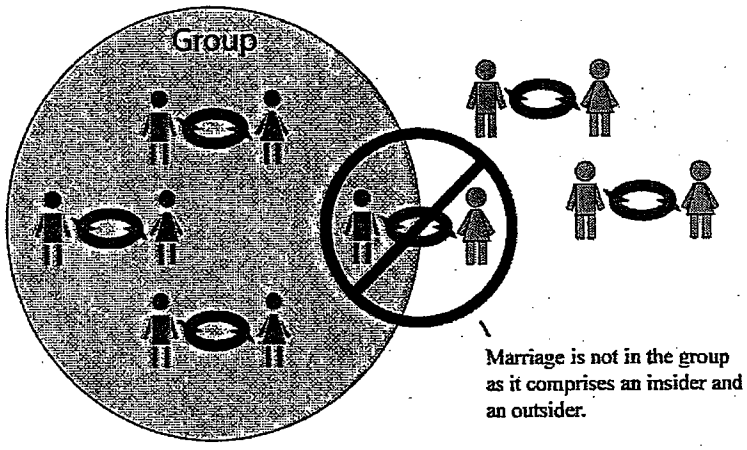
The RFD methodology can be represented as the following ratio:

$$\frac{\text{Marriages In The Group That Are Between Members Of The Group}}{\text{Marriages That Involve At Least One Group Member}}$$

Where, *Marriages That Involve At Least One Group Member*	=	Marriages In The Group That Are Between Members Of The Group	+	Marriages That Are Between One Member Of The Group And One Non-Member

See, e.g., RFD at 8 [Murphy Decl. ¶ 1].

While the RFD's methodology, so stated, properly limits the numerator of this ratio to "marriages" *in the group* that are between members of the group, the denominator improperly introduces into the ratio "marriages" that are not *in the group*.



Because the RFD's methodology reads the limitation *in the group* out of the regulation, it violates the basic rule of construction that a regulation "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so

that one section will not destroy another unless the provision is the result of obvious mistake or error." *APWU, AFL-CIO v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) (quoting *Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28, 31 (3d Cir. 1995)).

b. The RFD's incorrect definition of "marriage" required OFA to read the limitation *in the group* out of § 83.7(b)(2)(ii).

The RFD read the limitation *in the group* out of the regulation intentionally and necessarily, because otherwise its "union" interpretation of the term *marriage* renders the regulation incoherent. Section 83.7(b)(2)(ii) asks whether "[a]t least 50 percent of the *marriages in the group* are *between members of the group*." (Emphasis added.) If the phrase "marriages in the group" is equivalent to "marriages between members of the group," as the RFD treats these terms, then, *all* "marriages in the group" *are* "marriages between members of the group." Under this interpretation, in the ratio set up by the regulation,

$$\frac{\text{Marriages In The Group That Are Between Members Of The Group}}{\text{Marriages In The Group}}$$

the numerator (*Marriages In The Group That Are Between Members Of The Group*) would always equal the denominator (*Marriages In The Group*). By this tautology, any petitioner—including the Tribe—that has at least one in-group marriage necessarily satisfies the regulation with a 100% in-group marriage rate. Because this construction is absurd, the Court must reject it and search for another that permits a distinction between marriages *in the group* and marriages *between members of the group*. And because the RFD's interpretation of the word *marriage* requires this absurdity, the Court must reject it as well.

c. The Tribe's definition of *marriage* is consistent with the language and purpose of § 83.7(b)(2)(ii), and the methodology adopted by the OFA and AS-IA in the FD.

The RFD's definition of *marriage* is unreasonable because it either requires the agency to read the phrase *in the group* out of the regulation or it renders the regulation a mere tautology. To

the contrary, the FD's interpretation of the phrase *marriages in the group* allows the agency to give meaning to the entire regulation and at the same time permits the regulation to function as intended.

(i) Marriage: the act or practice of marrying by an individual member of the group

The word *marriage* has several common meanings depending on the context in which it is used. The word *marriage*—a nominalization of the verb *to marry*—can refer to *the act or practice of marrying* by an individual member of the group.[39] By this usage, consistent with the FD, each tribal member's taking of a spouse in marriage is properly counted as a *marriage*. Connecticut conveniently swallowed-up this usage in ellipses when it quoted *Webster's* in its brief:

> 1. a) the state of being united to a person of the opposite sex as husband and wife; b) the mutual relation of husband and wife; c) the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family . . . .**[2) an act of marrying or the rite by which the married status is effected . . .**] 3) an intimate or close union . . . .

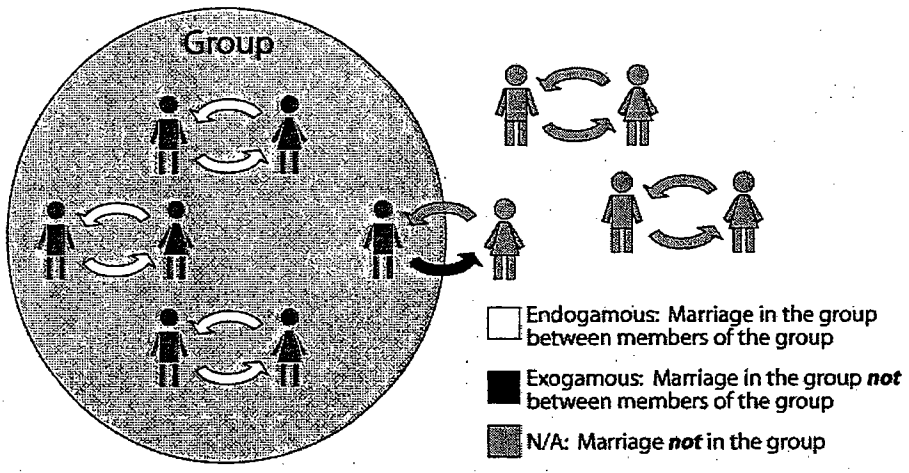
Connecticut's Reconsideration Brief at 93 (citing *Webster's Third New International Dictionary of the English Language* 1384 (3d ed. 1993)). PPFF 213.

Consistent with the FD, by correctly interpreting the word *marriage* within the regulation to mean the act or practice of marrying, the OFA would be able, on the one hand, to consider individually the *marriages* of two in-group spouses to each other, and count them as two *marriages in the group* that are *between members of the group*. On the other hand, it would be able to then consider individually the *marriage* of an in-group spouse to an out-group spouse, and count this as one *marriage in the group*. By adopting this usage of the term *marriage*, a petitioning group would be able to have *marriages in the group* that are not *between members of the group*—thus permitting

---

39 *See, e.g.*, American Heritage Dictionary 768 (2d ed. 1982); Chambers English Dictionary 874 (7th ed. 1988); Merriam-Webster's Collegiate Dictionary 713 (10th ed. 1999); Oxford English Dictionary (online edition); Webster's II New Riverside Dictionary 421 (Rev. ed. 1996);Webster's Third New International Dictionary of the English Language 1384 (1986).

the percentage of *marriages in the group* to fluctuate according to the ratio anticipated by the language of the regulation.

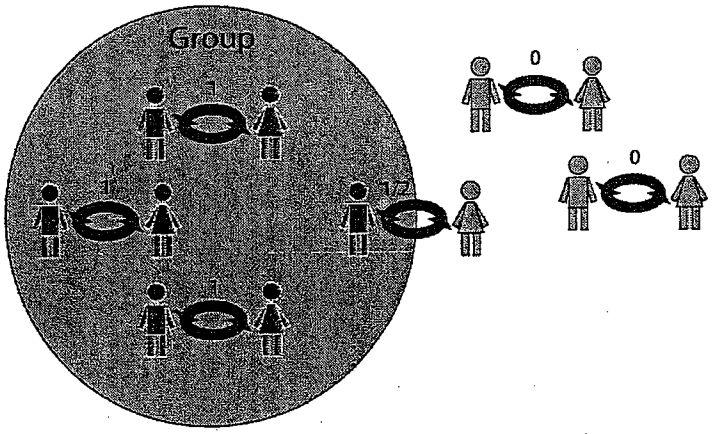


This is the methodology the OFA and AS-IA appropriately adopted in the FD, counting not "individuals" but individual *marriages in the group*.

(ii) Marriage: a union between two people as husband and wife

As demonstrated above, the regulation requires a definition of *marriages* that permits a distinction between marriages *in the group* and marriages *between members of the group*. There is only one other interpretation of the regulation that would permit the OFA both to give meaning to the phrase *in the group* and to evade the otherwise tautological result of the RFD's single-union definition of marriage. This interpretation also supports the Tribe's (and the FD's) methodology and requires this Court to reject the RFD's methodology.

For every endogamous "union" (every union formed between two members of the group who marry each other) it is fair to say that the union is "in the group" and thus to count the union as a *marriage in the group*. However, the same does not hold true for an exogamous union (a union formed between a member of the group and a non-member), which, at best, is only 1/2 a union in the group.



Because one-half of each exogamous "marriage" union is not *in the group*, the OFA should have divided the number of exogamous marriages in half. This would produce a formula that is the algebraic equivalent of the FD's methodology. This would permit variation between the term *marriages in the group* and its subset *marriages in the group that are between members of the group*. This is the only other interpretation of the regulation that would permit the OFA both to give meaning to the phrase *in the group* and to use a "union" definition of marriage.

3. The RFD's Methodology for Analyzing Marriage-Rate Patterns Was Arbitrary and Capricious Because It Failed to Apply Its Expertise And Its Decision Was Not The Product of a Reasoned Decisionmaking Process.

a. Endogamy Precedent

The regulations do not specify a methodology for calculating in-group marriage rates, other than to identify the relevant question as whether "[a]t least 50 percent of the marriages in the group are between members of the group." 25 C.F.R. § 83.7(b)(2)(ii). The Supplemental Transmittal falsely suggested that the FD interpreted § 83.7(b)(2)(ii) inconsistently with prior precedents and asserted that past acknowledgment decisions, cited in the Supplemental Transmittal at footnote 3, "specifically evaluate 83.7(b)(2)(ii)." This is not correct. In fact, no consistent approach emerges from those determinations. This is largely because the Department's prior final determinations do not lay out the steps undertaken to establish the numbers used to calculate marriage rates. Instead, the prior Final Determinations present the conclusions in brief narratives and tables showing the

number of "marriages" and percentage of "in-group marriages." When the reports discuss methodology, it is usually to identify data shortcomings and/or to explain the techniques applied in order to extrapolate data (e.g., sampling of certain portions of the membership list). The Department does not identify the underlying assumptions in these prior Final Determinations, nor do the reports explain the sources of the numbers used to calculate marriage rates. As demonstrated above, the mere fact that these Final Determinations refer to *marriages* or *marriages in the group* rather than *individuals* does not prove that these Final Determinations followed the same methodology as the RFD; *marriage* is commonly defined as "the act of marrying".

In May 2004 when Connecticut filed its appeal of the FD before the IBIA, the OFA's professional staff was uncertain as to what precedents had been set by previous acknowledgment decisions. Very few Final Determinations have relied upon the 83.7(b)(2)(ii) provision as a means for meeting the burden of proof under criterion (c). While marriage rates have been used extensively in the acknowledgment process as a basis for demonstrating community, the 83.7(b)(2)(ii) carryover provision was not adopted until the acknowledgment regulations were revised in February 1994 and became effective on March 28, 1994. Only in the Jena Band of Choctaw Proposed Finding (1994) and the Ramapough Mountain Indians FD (1996) did the agency conclude that the petitioner achieved marriage rates of at least 50% that served as "sufficient evidence" to meet both criteria (b) (community) and (c) (political authority).[40] PPFF 214. OFA

---

40 In the Supplemental Transmittal and the RFD, the agency attempted to avoid its duty to engage in reasoned, objective decisonmaking by pretending that it had previously considered and resolved the methodological issue, and that it was without discretion to do anything but to follow binding agency precedent. To the contrary, there is no evidence that the Department has ever considered the question of how "marriages" should be counted except in three cases. As noted, in *Jena* and *Ramapough*, current and former members of the OFA professional staff recall following the Schaghticoke FD's methodology. The third case involves the PF for Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana ("Little Shell PF"). This PF, however, can hardly count as binding precedent. The Little Shell petitioner is described in the preliminary finding as having counted the number of "members" in the Little Shell tribe who married, rather than the number of "marriages." Little Shell PF at 179 (Page 252 of 397) *available at* http://indianz.com/adc20/adc20.html. The AS-IA rejected the Little Shell petitioner's methodology in its PF.

Historian Dr. Virginia DeMarce recalled following the FD's methodology in *Jena*. Indeed, responding to Connecticut's "individuals" vs. "marriages" argument in its Reconsideration Request, she wrote that "This was discussed extensively in *Jena* peer review, and we decided to count each partner." PPFF 215. As a member of the BAR/OFA professional staff, Dr. Steven Austin performed the marriage-rate calculation in *Ramapough*. Indeed, Dr. Austin prepared the Tribe's marriage rate analysis following the same methodology he had used on behalf of the OFA/BAR in *Ramapough*. PPFF 216.

In preparing the FD, the OFA did not violate any well established agency precedent—the recorded memories of the OFA professional staff, in fact, are to the contrary. Moreover, the Department's so-called "precedents" are not reasoned because they do not address the powerful concerns raised by the Tribe in defense of the FD's methodology.[41] Alone, the Department's "precedents" do not provide an adequate justification for the methodology it adopted in the RFD. And in light of the RFD methodology's incompatibility with the language of the regulation and generally accepted anthropological, social science, and statistical practices, as well as the memory

---

In doing so, the agency committed the same methodological flaws as it did in the RFD. Moreover, the Little Shell PF remains open—it is subject to public comment and will ultimately be supplanted by a Final Determination. 25 C.F.R. § 83.10(e)-(l)(2). Such preliminary findings are inoperative pending the issuance of a Final Determination. *See Darby v. Cisneros*, 509 U.S. 137, 147-148 (U.S. 1993). Accordingly, the Little Shell PF is not binding agency precedent. To hold otherwise would be prejudicial not only to the Tribe but to the Little Shell petitioner, which is not present in this action. To hold otherwise would mean that when the Little Shell petitioner attempts to challenge its negative PF, both the Tribe's RFD, which relies on the Little Shell PF, and the Little Shell PF itself will stand against it as contrary precedents. The requirement that a decision be final before it becomes precedential exists to prevent such bootstrapping.

41 In *Brookings Municipal Telephone Co. v. FCC*, for example, the D.C. Circuit observed that "[i]t is well settled that an agency has a 'duty to consider reasonable alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.'" 822 F.2d 1153, 1169 (D.C. Cir. 1987)). Further, in the context of an adjudicative or quasi-adjudicative process, the agency's decision must be strongly responsive; the decision must respond directly to the evidence and arguments submitted by the parties. Melvin Eisenberg, *Participation Responsiveness and the Consultative Process: An Essay for Lon Fuller*, 92 Harv. L. Rev. 410, 413, (1978); 32 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure* § 8123 (2006).

and professional opinions of its own experts, the Department's reliance on this illusory body of "precedent" to rationalize its results-oriented RFD was arbitrary and capricious.

b. Expertise

If there is any reliable and relevant OFA precedent on this subject, it is that the OFA, in interpreting the acknowledgment regulations, will apply the expertise of its professional staff in the fields of anthropology, history, and genealogy. PPFF 217. The RFD, to the contrary, marks a significant departure from this precedent. Rather than presenting a scholarly response to the Tribe's defense of the Department's own prior methodology—what one would expect if anthropologists, historians and genealogists were in fact preparing the response—the RFD reads like a legal brief. It displays a lawyer's comfort with arguments about supposed precedent—even where they do not exist—but it quickly becomes incoherent when it purports to explain the "purpose" of the marriage rate analysis under the regulations, and to explain the RFD's methodology in light of that purpose. Because the RFD failed to respond to the FD's methodology with principles endorsed by even OFA's own experts, it cannot be considered reasoned decisionmaking. The RFD is arbitrary and capricious.

When an administrative agency is confronted with opposing views among specialists, it must be given discretion to rely upon the reasonable opinions of agency experts. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). At the very least, however, the agency must earn its expert status. 32 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure* § 8112 (2006) (citing *Vercillo v. CFTC*, 147 F.3d 548, 552 (7th Cir. 1998)). First and foremost, this means that the agency's decision must be the product of the agency's expertise. *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 601 (D.C. Cir. 1997). The agency must act in conformity with principles endorsed by experts in the field if it wishes its decisions to receive judicial deference. *Id.*

The OFA professional staff consists of three functional teams, one of which is assigned to each petition. Each team comprises an anthropologist, a historian, and a genealogist, who work in consultation with the Director and with each other to review a petition.[42] The Tribe's FD states that it "is the Department's evaluation of the evidence based on the criteria and standards set forth in the regulations at 25 CFR Part 83, and *the standards of the disciplines of anthropological, historical, and genealogical research.*" PPFF 218.

Citing this Court's order in *43.47 Acres of Land*, Barbara Coen—who wrote the Supplemental Transmittal – acknowledged that the participation of the expert OFA professional staff is critical to the decisionmaking process:

> Critical to the decision-making process is the evaluation of the petition materials by the Department's professional staff, the Branch of Acknowledgment and Research (BAR) in the Bureau of Indian Affairs (BIA). This review is conducted by a professional research team—usually composed of a cultural anthropologist, an historian, and a genealogist—who evaluate the evidence according to the methods and standards of their professions. This professional staff—with specialized knowledge and experience in acknowledgment, uniformly applying the regulations, and resolving complex factual issues within its realm—is key to the deference accorded the administrative decision.

PPFF 219.

Here, however, the record reflects that the OFA professional staff believed itself bound by "legal precedents,"[43] which required the staff to ignore its expertise and instead count the number of "marriages" and not "individuals"—as argued in Connecticut's brief to the IBIA and the Solicitor's Office's Supplemental Transmittal—despite members of the OFA staff's professional opinions that this method was "not adequate" and that instead "the analysis of marriage choices more accurately measures what marriage patterns is intended to show." PPFF 220.

---

42 Bureau of Indian Affairs, Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 FR 7052, 7053 (Feb. 11, 2000); *accord* Bureau of Indian Affairs, Office of Federal Acknowledgment; Reports and Guidance Documents; Availability, etc., 70 F.R. 16513 (March 31, 2005).

43 For example, the RFD inexcusably dismisses without consideration the scholarly literature demonstrating that the FD had followed the correct anthropological methodology and that Connecticut's methodology, to the contrary, was not a generally accepted social science methodology, noting simply—and incorrectly—that there was an agency precedent which trumps agency expertise. PPFF 220.

As previously discussed, the RFD represents a false choice when it rejects the counting of "individuals" in favor of counting "marriages." The OFA's TA letter noted that the FD and prior acknowledgment decisions had used the term "endogamy" in discussing marriage-rate analysis under the acknowledgment regulations. *Endogamy* is "an anthropological term which describes *the practice of marrying* within a group as opposed to marrying outside of the group ('exogamy')." PPFF 209. In fact, shortly after Connecticut filed its Request for Reconsideration, OFA Genealogist Rita Souther wondered in her notes on the calculation of marriage rates: "is there a standard of the anthro's on how to calculate the endogamy? –c'marriages or individuals?" PPFF 221. The scholarly articles submitted to the OFA by the Tribe and included in the FAIR database confirm that *the practice of marrying* is the common anthropological usage. For example, a leading 1959 article on marriage-rate analysis in the Journal of Anthropology includes the following passage:

> The total number of marriages is 514. This figure represents 254 marriages entered into by men and 260 by women. Since 161 of these marriages were between subjects of the study, the net number of unions is far smaller than 514, and is actually only 353.

PPFF 222. Dr. Ayoub explains that "marriage" is a "mutual choice situation," and she includes within her in-group-marriage-rate calculations each group member's choice of an endogamous or exogamous marriage partner, describing her total as "the total number of choices, that is, marriages." *Id.* Further clarifying that she is not just counting "individuals," but rather she is counting marriages, Dr. Ayoub states that "the number of marriage choices, not the number of individuals marrying, is recorded, so that one person may enter the table any number of times, once for each marriage he contracts." *Id.*

As previously discussed, in addition to the Tribe's analysis of the text of the regulation, the Tribe defended the methodology endorsed by the OFA in the FD with an analysis of the relevant social science literature, conducted by the Tribe's anthropologist, Dr. Steven Austin, who applied

his expertise and found a well-established—indeed unanimous—consensus in support of the Tribe's methodology for analyzing marriage patterns.

Dr. Austin's literature review produced eight professional journal articles that specifically address the calculation of endogamous marriage patterns. While the professional articles, all by specialists in the fields of social science and statistics, discuss a variety of equally legitimate measures of marriages in a group, they all conform to the Tribe's method of counting individually the marriages of each group member who marries, and excluding (or factoring out) the marriages of any non-group member. Fundamentally, none of the scholarly articles supports the Solicitor's Office's methodology for calculating *marriages in the group*. To the contrary, they all account for the social behavior of in-group members who marry, and they all exclude (or factor out) the social behavior of non-group members. PPFF 223.

The record compiled by the agency identifies only one member of the OFA professional staff as having reviewed these scholarly articles: OFA Historian Dr. Robert Jackson. Dr. Jackson read both Connecticut's brief and the Tribe's response, as well as the scholarly articles. While he disagreed with some of Dr. Austin's conclusions about the methods applied in these articles, he offered the following opinion on the fundamental point, further demonstrating the significant discomfort the professional staff experienced because of the incompatibility of the staff's scholastic training and professional experience with Connecticut's "marriages" vs. "individuals" dichotomy:

> Both briefs discuss what the appropriate measure and method for the analysis of marriage rates is. I have been mulling the question over, and would like to express my own opinion on the matter, for what it is worth. The purpose of the analysis of marriage rates is to establish the social boundaries of a group through the identification of endogamous and exogamous marriages. The facile method would be simply to analyze marriages, but in my view that is not adequate. My view is that the analysis of marriage choices more accurately measures what marriage patterns is intended to show.

PPFF 224.

Because the endogamy methodology in the RFD is inconsistent with the language of the regulation and generally accepted scientific principles, and because the agency ignored the advice

of its own experts without providing a reasonable explanation of its decision to do so, the RFD is arbitrary and capricious. Because the FD's marriage rate analysis, to the contrary, properly applied § 83.7(b)(2)(ii), the Court should reinstate the FD's conclusion that the Tribe's evidence of marriage rates provided sufficient evidence to satisfy criteria (b) and (c) for the periods from 1800 to1820, and from 1840 to 1870.

D. The Agency's Last-Minute Reversal Regarding Community and Political Authority After 1996 Was Arbitrary and Capricious.

As in every political body, internal conflict has always been a part of tribal life. Indeed, the Acknowledgment Regulations recognize that "internal conflicts which show controversy over valued group goals, properties, policies, processes and/or decisions" support federal recognition as they demonstrate evidence of political influence or authority within a tribe. 25 C.F.R. § 83.7(c)(1)(v).

For the past 40 years, intense inter-tribal conflict based primarily along family lines has existed relating to the Tribe's leadership and control of the Reservation. In the recent past, two groups of Schaghticoke descendants have emerged who oppose the current leadership and federal recognition of the Tribe, the "Schaghticoke Indian Tribe" or "SIT" and four members of the Coggswell family. The SIT has submitted its own petition for federal recognition and claims that it, not STN, is the true representative of the Tribe. *See In re Federal Acknowledgement of the Schaghticoke Tribal Nation*, 41 IBIA 30, 38 (2005). While the Coggswell family agree that the Schaghticoke satisfy the criteria to be federally recognized, they do not recognize the Schaghticoke Tribal Nation's ("STN") current leadership as legitimate. PPFF 225.

As part of its petition for acknowledgment, the Tribe submitted a 2001 membership list that did not include members of the SIT tribal faction or the four members of the Coggswell family. The agency stated in the PF that the Tribe did not meet the community and political authority criteria because the Tribe's 2001 membership list did not include approximately 60 individuals,

including SIT members and Coggswells, who had played a significant part in the social and political relations within the group between 1967 and 1996. PPFF 226. The agency concluded, however, that there continued to be a single political system including those individuals, even though they were no longer enrolled in the Tribe.[44] PPFF 227. During the Technical Assistance process, the OFA met with the Tribe on multiple occasions to discuss the individuals who were not included on the tribal roll. PPFF 229. The OFA encouraged the Tribe to bring as many of these individuals as possible into membership and advised the Tribe that it could present a stronger case for federal acknowledgment by making changes to its tribal constitution that would allow these individuals to enroll. PPFF 230. Following this advice, the Tribe amended its Constitution to identify 42 "Unenrolled Schaghticoke Community Members" who would be permitted to apply for membership in the Tribe for a period of 4 years as of the effective date of federal acknowledgment, notwithstanding any general closure of the tribal rolls. PPFF 231.[45] In the FD, the agency concluded that the Tribe had responded to its concerns regarding the unenrolled tribal members and found that the Tribe, defined by the two membership lists and approximately 14 other immediate family members, met the community and political authority criteria from 1996 to the present. PPFF 233. Without warning or explanation, however, the agency arbitrarily changed its position in the RFD, concluding that the Tribe did not meet the requirements for community or political authority after 1996 because 33 of the SIT members and Coggswells did not consent to be members of the Tribe.[46] PPFF 234.

---

44 The PF also concluded that criterion 83.7(b) also was not satisfied because substantial numbers of descendants of Joseph D. Kilson were enrolled for the first time beginning in 1996 and that there was little evidence of their association with the Tribe after the early 1900s. PPFF 228.

45 In response to the PF and the technical assistance meetings with the OFA, the Tribe also removed almost all of the Joseph D. Kilson descendants from its membership list. PPFF 232.

46 The RFD concluded that "33 of the 42 through the SIT and CG requests for reconsideration of the STN FD maintain that they do not consent to be part of the STN." PPFF 234.

1. The RFD Was Arbitrary and Capricious Because the Agency Reversed Its Position Without Adequate Explanation.

In the RFD, the agency reversed the position it had adopted in the FD and concluded that the Tribe did not meet the community and political authority criteria, 25 C.F.R. §§ 83.7(b) and 83.7(c), after 1996. RFD at 62 [Murphy Decl. ¶ 1]. The agency, however, failed to provide a reasoned explanation for the sudden, unexpected reversal of the position it had consistently taken and advocated throughout the acknowledgment process. As previously discussed, "'when an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act.'" *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 80 (2d Cir. 2006).

Prior to issuing the RFD, the agency had consistently taken the position that the Tribe could meet the requirements of criteria (b) and (c) after 1996 by amending its Constitution to allow the unenrolled tribal community members to reenroll. The Tribe followed the OFA's advice and amended its Constitution to identify 42 "Unenrolled Schaghticoke Community Members" who would be permitted to apply for membership in the Tribe for a period of four years as of the effective date of federal acknowledgment, notwithstanding any general closure of the tribal rolls. In the FD, the Principal Deputy AS-IA concluded that the Tribe had responded to the OFA's concerns regarding the unenrolled tribal members and found that the Tribe, defined by the two membership lists and approximately 14 other immediate family members, met the community and political authority criteria from 1996 to the present. FD at 58 [Murphy Decl. ¶ 4].[47]

The agency then reversed course without warning or adequate explanation in the RFD. Although the agency attempted to justify its reversal of position based on the Requests for

---

47 The Department exercises significant control over the composition of the base roll of a petitioning tribe and any changes in that roll. 25 C.F.R. § 83.12(b). The exercise of that authority by the Department in the FD was consistent with that authority.

Reconsideration filed by the SIT and the Coggswells with the IBIA, this explanation falls well short of adequately explaining that decision. The agency concluded in the RFD that the requests for reconsideration demonstrated that the 29 members of SIT and the 4 Coggswell family members did not consent to be part of the Tribe, and thus were no longer considered members of the Tribe. PPFF 235. Without these 33 individuals and 14 other individuals that the agency characterized as part of the community, the agency concluded that the Tribe did not constitute the entire community and political system of the group and could not be acknowledged. PPFF 236. The agency, however, declined to reconsider the FD on the basis that the 42 unenrolled tribal community members were not at the time of the FD sufficiently linked to the Tribe's membership, stating, "[t]he evidence for the STN FD and the STN FD's analysis demonstrated that such a connection existed at the time." *Id.* The agency also reaffirmed the agency's authority to acknowledge a larger group than defined by the petitioner's membership list under certain circumstances. PPFF 237.

Federal Respondents claim the RFD is based on the SIT and Coggswells' requests for reconsideration. As pointed out by the IBIA, however, the OFA and the AS-IA were fully aware prior to the issuance of the FD that the SIT members and the Coggswells did not consent to be members of the Tribe. *In re Federal Acknowledgement of the Schaghticoke Tribal Nation*, 41 IBIA 30, 38-39, 40 (2005). In response to the SIT's request for reconsideration based on what it characterized as new evidence that SIT was the legitimate tribe, the IBIA cited its decision in *In re Federal Acknowledgement of the Snoqualmie Tribal Organization*, 34 IBIA 22, 32 (1999), holding that if new evidence simply confirms a fact already known to the BIA and one that the BIA did not consider determinative, it does not establish grounds for reconsideration. *In re Schaghticoke*, 41 IBIA at 38. The IBIA stated that the "new evidence" raised by SIT "does little more than show that SIT is an active group and claims to be the true tribe—facts already known to the BIA." *Id.* PPFF 238.

Similarly, in response to SIT's argument that there is a reasonable alternative interpretation of the evidence, not previously considered, that would substantially affect the determination, the IBIA pointed out that this argument presumes that the OFA and the Principal Deputy AS-IA were not aware of and did not consider SIT's competing claim for acknowledgment. *Id.* at 40. In dismissing this argument for reconsideration, the IBIA stated that the Principal Deputy AS-IA "appears to have been well aware of the conflict between SIT and the Tribe, and the implications of that conflict." PPFF 239.

The agency has failed to explain why the same evidence available to the agency prior to the FD, that the SIT members and the Coggswells did not consent to be members of the Tribe and that SIT claimed to be the legitimate tribal government, led to a different conclusion in the RFD. *Cf. W. Harlem Envtl. Action v. EPA*, 380 F. Supp. 2d 289, 295 (S.D.N.Y. 2005) (noting that EPA had failed to explain why a document it relied on was any more compelling at the time it rescinded a requirement than it was at the time it created the requirement). As the IBIA pointed out, the SIT and Coggswells' requests for reconsideration presented no new evidence or alternatives that had not been considered by the agency. PPFF 240. Yet, the agency did not explain why the same evidence that initially supported a finding of community and political authority required the opposite conclusion on reconsideration. The agency thus failed to supply a reasoned explanation for its reversal of position, and its decision must therefore be reversed as arbitrary and capricious.

2. The RFD Was Arbitrary and Capricious Because the Agency Departed From Precedent Without Explanation.

In the RFD, the agency departed from its prior decisions relating to the significance and impact of inter-tribal conflict. As shown below, such a departure from precedent without explanation is arbitrary and capricious.

Although an agency is not permanently bound by its precedent, it cannot depart from precedent without explicitly recognizing that it is doing so and explaining its reasons for the

departure. *Shaw's Supermarkets, Inc. v. National Labor Relations Board*, 884 F.2d 34, 36 (1st Cir. 1989). As stated by the First Circuit in *Shaw's*, "Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action." *Id.* at 41.

The acknowledgment regulations specifically state that "internal conflicts which show controversy over valued group goals, properties, policies, processes and/or decisions" are evidence of political influence or authority. 25 C.F.R. § 83.7(c)(1)(v). The agency's past precedent has followed this directive and found that evidence of factional conflicts provided evidence of political processes. *See Miami of Indiana FD* (June 9, 1992) (MNI V002 D007) at 20, 22-23 *available at* http://indianz.com/adc20/adc20.html ; Technical Assistance Letter to A. Cunha from Office of Tribal Services (Sept. 12, 1994), at 6 (stating that factional conflict is not evidence against the continued existence of a tribe or its political viability but that "sometimes a dispute or factionalism is evidence that *supports* the existence of community or political process") (Pep V001 D004, at 7). PPFF 241. In particular, the OFA relied on past precedent in the Tribe's PF, citing the *Snoqualmie* decision as precedent for using documentation of political conflict as evidence to support a finding of community under 83.7(b). PPFF 242. Additionally, in concluding that the inter-tribal conflict in this case provided significant evidence of political process under 83.7(c), the OFA cited the findings in *Tunica-Biloxi* and *Miami of Indiana* for the proposition that the inability to resolve conflicts is not evidence that the political processes do not exist. The FD subsequently affirmed the discussion in the PF that the inter-tribal conflict demonstrated evidence of community and political authority. PPFF 243.

In the RFD, the agency concluded that the SIT and Coggswells are not part of the Tribe because they did not consent to be members and affirmatively declined to be enrolled. RFD at 62

[Murphy Decl. ¶ 1]. The agency, however, did not distinguish or even mention its prior precedent relating to internal conflicts, or the precedent it relied on in the PF and FD to support a finding of community and political authority. In a similar case, *Philadelphia Gas Works v. Fed. Energy Regulatory Comm'n*, 989 F.2d 1246 (D.C. Cir. 1993), the Federal Energy Regulatory Commission (FERC) had relied on its precedent in a prior case to prohibit a gas company from recovering overrun penalties through a purchased gas adjustment ("PGA") filing. On appeal, FERC issued a new order allowing the company to include the overrun penalties in its PGA filing, without mentioning the precedent on which it had relied in its initial order. *Id.* at 1248. The D.C. Circuit held that FERC had failed to adequately explain its decision and in particular had failed to reconcile its decision with prior precedent and remanded the case to the agency. *Id.* at 1250-51. Similarly, in this case, the agency has failed to explain why the continuing tribal conflict no longer supports a finding of community and political authority. As in *Philadelphia Gas Works*, the RFD did not even mention the *Tunica-Biloxi* and *Miami of Indiana* precedents relied on in the PF for the conclusion that the inability to resolve conflicts is not evidence that political processes do not exist. Although the agency may change course and depart from prior precedent, it must explain its reasons for doing so. Because it failed to do so here, the RFD is arbitrary and capricious and must be overturned.

3. The Agency's Retroactive Application of the Consent Requirement Was Improper.

Even if the agency had not reached its decision in an arbitrary and capricious manner, the agency's retroactive application of the requirement that the SIT members and the Coggswells consent to membership in the tribe was nevertheless improper. The Tribe relied on the agency's representations that it could meet the requirements for federal acknowledgment by amending its tribal constitution to allow additional individuals to enroll, and it would be inequitable to subject the Tribe to a new rule adopted by the agency at the eleventh hour of the proceeding. The

circumstances of this case are very similar to those in *Lehman v. Burnley*, 866 F.2d 33 (2d Cir. 1989), where the Second Circuit held that a new policy could not be applied retroactively.

Lehman involved the question of whether expenditures by local governments could be reimbursed to states under the Recreational Boating Safety Act. *Id.* at 35. New York participated in the federal boating safety program and applied for and received federal funds to match the amount of state and local government expenditures. *Id.* After a Coast Guard representative announced in October 1983 that the Coast Guard interpreted the Act to disqualify local expenditures, New York sought clarification of the policy. *Id.* The Coast Guard reversed its position in January 1984 in a letter sent to New York and other states which stated that local expenditures could be included. *Id.* In reliance on that statement, New York entered into contracts with several localities in which it agreed to reimburse them for the costs of their safe boating programs. *Id.* Four months later, in May 1984, the Coast Guard reversed itself again and stated that local expenditures were not reimbursable. *Id.* The Coast Guard applied the policy retroactively and New York's grant for fiscal year 1984 was greatly reduced. New York appealed the Coast Guard's decision to the Secretary of Transportation, who denied the appeal and upheld the Coast Guard's interpretation of the statute. *Id.* at 36. New York sought judicial review, and while the Second Circuit concluded that the new interpretation was reasonable, it held that it should be applied prospectively only. *Id.* at 38.

In *Lehman*, the Second Circuit noted that "[r]etroactivity is not favored in the law," and applied a five-factor test to determine whether to apply the agency's ruling retroactively. *Id.* at 37. The five factors are: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party,

and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. *Lehman*, 866 F.2d at 37.

The *Lehman* court concluded that (1) the case was technically one of first impression, (2) although previous interpretation was not well-established, the Secretary's decision constituted departure from prior practice upon which New York had based several programming decisions, (3) New York relied to its detriment on the former rule by entering into contracts with localities, and the localities made expenditures in reliance on being reimbursed by the federal government, (4) New York faced the burden of having to withdraw from some programs and to cut other proposed programs, and (5) the Secretary articulated no statutory interest that would be served by applying the rule retroactively. *Id.* at 38. After considering these factors, the Second Circuit concluded that the rule should apply prospectively only. *Id.*

As discussed above, prior agency decisions have found that inter-tribal conflicts provide evidence of political processes, and this case presents an even greater departure from established precedent than in *Lehman*. As noted in the FD, previous acknowledgment decisions have used a combination of membership lists to define the petitioner's membership where one list was found to be incomplete. FD at 57 (citing *Tunica-Biloxi*, *Snohomish*, *Historic Eastern Pequot*, and *Principal Creek Nation*). In particular, the Historic Eastern Pequot FD recognized a single tribe represented by two separate petitioners without the members' consent, less than two years prior to the FD in the Tribe's case. And, as previously discussed, the agency consistently took the position from the beginning of the acknowledgment process that the Tribe could meet the requirements for federal acknowledgment by amending its tribal constitution to allow additional individuals to enroll.

Additionally, the Tribe relied to its detriment on the agency's representation. As previously discussed, the Tribe amended its Constitution to identify 42 "Unenrolled Schaghticoke Community Members" who would be permitted to apply for membership in the Tribe as of the effective date of

federal acknowledgment and believed the agency's representations that this constitutional amendment would cure defects in the petition for acknowledgment. PPFF 244. The acknowledgment regulations are structured so that a petitioner will have advance warning if the agency does not believe it meets the requirements for federal acknowledgment, *see, e.g.*, 25 C.F.R. §§ 83.5(c), 83.10(b), (c)(1), (h), (j), but the Tribe had no such warning in this case. If the Tribe had been aware that it would not be able to meet the community and political authority criteria of 25 C.F.R. § 83.7(b) and (c) after 1996, the Tribe would have pursued other options, such as seeking more time to resolve the conflict with the SIT. Under 25 C.F.R. § 83.10(g), the Assistant Secretary has the discretion to suspend active consideration of a documented petition upon the request of a petitioner for good cause. Good cause would have existed in this case where the Tribe relied on the agency's suggestion that it could satisfy the community and political authority criteria after 1996 by amending its Constitution to identify the "Unenrolled Schaghticoke Community Members." The Tribe's reliance is particularly compelling given the BIA's responsibility for carrying out the federal trust obligation to Indian tribes,[48] and the provisions of the acknowledgment regulations that require the BIA and the OFA to provide technical assistance to the Tribe at various points during the acknowledgment process. *See* 25 C.F.R. § 83.10(b), (c)(1), (j)(1); *see also Mobile Communications Corp. v. Fed. Communications Comm'n*, 77 F.3d 1399 (D.C. Cir. 1996) (remanding to FCC to address preference holder's reliance concerns after FCC reversed itself at the eleventh hour).

With regard to the fourth factor, the agency's new interpretation has placed an overwhelming burden on the Tribe by precluding it from obtaining federal acknowledgment and the rights and benefits that accompany such acknowledgment. Finally, the purposes of the

---

48 The First Circuit's decision in *Joint Tribal Council of Passamaquody Tribe v. Morton*, 528 F.2d 370, 378 (1st Cir. 1975), held that a trust relationship exists between the United States and non-recognized tribes under the Nonintercourse Act.

Acknowledgment Regulations are not served by allowing a small group of dissenting individuals to prevent an entire tribe from being recognized. For all of these reasons, the agency's retroactive application of the consent requirement was arbitrary and capricious and merits reversal.

RELIEF SOUGHT

With respect to state recognition, endogamy, and the intra-tribal conflict issue, the agency did not have the discretion to rule against the Tribe in the RFD. The failure of the agency to find in favor of the Tribe was arbitrary, capricious, and contrary to law. Further, the RFD is invalid because it is the product of undue influence and because James Cason did not have authority to sign it. For each one of these reasons, the Court should grant summary judgment to the Tribes, vacating the RFD and reinstating the FD.

Should this Court determine that the agency had the discretion to rule against the Tribe with respect to state recognition, endogamy, or the intra-tribal conflict issue, the Court should nonetheless remand the Tribe's petition back to the agency because of the appearance of impropriety that permeated every element of the process that led to the agency's RFD. Here, in fact, there is much more than mere appearance, although appearance is all the Tribe need show. As already noted, the RFD is in fact the product of undue influence. In light of the agency's susceptibility to undue influence and the significant impact a decision not to acknowledge the Tribe would have on the lives of the Tribe's members, should the Court find that remand is appropriate, the Court should require a formal agency adjudication pursuant to 5 U.S.C. § 554, including a full evidentiary hearing before the agency with the right to present evidence and cross-examine experts before a neutral administrative law judge, or, in the alternative, a U.S. Magistrate Judge.[49] *See*

[49] The acknowledgment process lacks any provision for a hearing or the cross-examination of witnesses. *Cohen's Handbook of Federal Indian Law* § 302(7)(a), at 159 (2005). Formal procedural safeguards are necessary to ensure that the agency will exercise its good faith judgment, and reach a decision based solely upon the evidence properly before it.

Greene v. Lujan, No. C89-645Z, 1992 WL 533059 (W.D. Wash. Feb. 25, 1992) (vacating the BIA's decision to deny the Samish Tribe federal acknowledgment and remanding the case to the agency for a formal adjudication in light of the significant impact of non-acknowledgment on the lives of the Samish Tribe members and the attendant danger of an erroneous decision absent such procedure); *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (holding that administrative agencies should be given great latitude in crafting their own rules of procedure but at the same time recognizing that "in some circumstances additional procedures may be required in order to afford . . . aggrieved individuals due process," and observing that "a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction.") (citing *U.S. v. Florida East Coast R. Co.*, 410 U.S. 224, 242-45 (1973); *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 446 (1915).

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court grant its motion for summary judgment.

Respectfully submitted,

SCHAGHTICOKE TRIBAL NATION

By: _____

Thomas J. Murphy (ct07959)
Steven D. Ecker (ct03762)
Cowdery, Ecker & Murphy, L.L.C.
750 Main Street
Hartford, CT 06103
(860) 278-5555 (phone)
(860) 249-0012 (fax)
tmurphy@cemlaw.com
ecker@cemlaw.com
aotoole@cemlaw.com

Skip Durocher, Esq
Thomas M. Jancik, Esq.
Glenn M. Salvo, Esq.
Dorsey & Whitney, LLP
50 South Sixth Street,
Suite 1500
Minneapolis, MN 55402-1498
(612) 340-2600 (phone)
(612) 340-2868 (fax)
durocher.skip@dorsey.com
jancik.thomas@dorsey.com
salvo.glenn@dorsey.com

Of Counsel:
Judith A. Shapiro, Esq.
6856 Eastern Ave., NW
Suite 206
Washington, DC 20012
(202 723-6400