

# 08-4735-cv

*To Be Argued By:*  
JOHN B. HUGHES

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United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 08-4735-cv**

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SCHAGHTICOKE TRIBAL NATION  
*Plaintiff-Appellant,*

-vs-

DIRK KEMPTHORNE, Sec. Dept of the Interior, JAMES  
E. CASON, Assoc. Deputy Sec. Dept of the Interior, U.S.  
DEPT OF INTERIOR, BUREAU OF INDIAN AFFAIRS,  
OFFICE OF FEDERAL ACKNOWLEDGMENT,  
INTERIOR BD OF INDIAN APPEALS,  
*Defendants-Appellees,*

(For continuation of Caption, See Inside Cover)

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE DEFENDANTS-APPELLEES**

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NORA R. DANNEHY  
*Acting United States Attorney*  
*District of Connecticut*

JOHN B. HUGHES  
WILLIAM J. NARDINI  
*Assistant United States Attorneys*

THE KENT SCHOOL CORPORATION, STATE OF  
CONNECTICUT, TOWN OF KENT, THE  
CONNECTICUT LIGHT AND POWER COMPANY,  
*Intervenor-Defendants-Appellees.*

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## **Statement of Jurisdiction**

The district court (Peter C. Dorsey, J.) had subject matter jurisdiction over this civil case pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Judgment entered on August 27, 2008. JA 557. On September 19, 2008, the petitioner filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). JA 559. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

## **Statement of Issues Presented for Review**

1. Did the district court properly find that there was no undue political influence upon the decision maker within the Department of the Interior who ultimately denied tribal acknowledgment to the petitioner?

2. Did the district court properly find that the ultimate denial of tribal acknowledgment was made by an authorized official, and that there was accordingly no violation of the Vacancies Reform Act?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 08-4735-cv**

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SCHAGHTICOKE TRIBAL NATION

*Plaintiff-Appellant,*

-vs-

DIRK KEMPTHORNE, Sec. Dept of the Interior, JAMES  
E. CASON, Assoc. Deputy Sec. Dept of the Interior,<sup>1</sup> U.S.  
DEPT OF INTERIOR, BUREAU OF INDIAN AFFAIRS,  
OFFICE OF FEDERAL ACKNOWLEDGMENT,  
INTERIOR BD OF INDIAN APPEALS,

*Defendants-Appellees,*

THE KENT SCHOOL CORPORATION, STATE OF  
CONNECTICUT, TOWN OF KENT, THE  
CONNECTICUT LIGHT AND POWER COMPANY,  
*Intervenor-Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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<sup>1</sup> Pursuant to Fed. R. App. P. 43(c)(2), Kenneth L. Salazar, the current Secretary of the Interior, should be substituted in the caption for Dirk Kempthorne, the former Secretary. Laura Davis, the current Associate Deputy Secretary of the Interior, should be substituted for James E. Cason, the former Associate Deputy Secretary of the Interior.

## **Preliminary Statement**

On October 11, 2005, the Associate Deputy Secretary of the Department of the Interior, James E. Cason, issued a decision that the Schaghticoke Tribal Nation (STN) was not an Indian tribe with a government-to-government relationship with the United States. JA 561. This final agency action was based on a consensus recommendation of the professional staff of the Office of Federal Acknowledgment (OFA) and their superiors. JA 2063.

This decision, issued as a Reconsidered Final Determination (RFD), was the culmination of an extensive administrative process that included a Proposed Finding (PF), JA 869, a petitioner and public comment period on it, a petitioner's response to the comments, and a Final Determination (FD). JA 651. The FD was reviewed by the independent Interior Board of Indian Appeals (IBIA) in response to requests for reconsideration filed by various interested parties. Following response briefs by the STN, the IBIA vacated and remanded the FD to the Department of the Interior (Department). The STN and interested parties submitted additional comments to the agency after the remand, and the Department then issued the final agency decision, the RFD.

The RFD found that the STN had not provided sufficient evidence to demonstrate two of the mandatory criteria for acknowledgment as an Indian tribe entitled to a government-to-government relationship with the United States under the federal acknowledgment regulations, 25 C.F.R. Part 83.

In the district court, STN sought review under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Its Amended Petition raised a variety of issues, including that the RFD was the result of undue political influence and that Associate Deputy Secretary Cason lacked authority to issue that decision. STN requested that the court declare the RFD to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. After cross-motions for summary judgment, the court granted summary judgment for the Federal Defendants and the Intervenor-Defendants on all issues, and denied the STN's motion for summary judgment. On appeal, STN no longer challenges the RFD as arbitrary and capricious, or as an abuse of discretion. The appeal raises only two issues: (1) whether the RFD was the result of undue political influence, and (2) whether the Associate Deputy Secretary had authority to issue the RFD under the Vacancies Reform Act. This Court should affirm the district court ruling after *de novo* review.

### **Statement of the Case**

This is an appeal from a ruling by the United States District Court for the District of Connecticut (Peter C. Dorsey, J.) granting summary judgment for the Federal Defendants and the Intervenor-Defendants.

On December 5, 2002, the Assistant Secretary - Indian Affairs (AS-IA) of the Department of the Interior, Neal McCaleb, issued a Proposed Finding that would have denied the STN federal acknowledgment. JA 869.

On January 29, 2004, Principal Deputy AS-IA Martin issued a Final Determination that reversed course and instead would have acknowledged the STN as an Indian Tribe. JA 651-868.

On May 12, 2005, the Interior Board of Indian Appeals vacated the Final Determination. JA 901-914.

On October 11, 2005, Associate Deputy Secretary James Cason issued a Reconsidered Final Determination that, like the original Proposed Finding, denied the STN federal acknowledgment. JA 561-650.

On January 12, 2006, the STN filed a petition for review in the United States District Court for the District of Connecticut pursuant to the APA, 5 U.S.C. § 701 *et seq.* JA 7 (docket entry). The district court allowed the State of Connecticut, the Town of Kent, the Kent School Corporation and the Connecticut Light & Power Company to intervene on June 14, 2006. JA 9 (docket entry).

On March 30, 2007, STN filed an amended petition for review, which added a claim that the RFD had been issued by an unauthorized official. JA 135-167. Various discovery orders followed.

STN filed a motion for summary judgment on September 24, 2007, JA 207-86, and the Federal Defendants and the Intervenor-Defendants filed their cross-motions for summary judgment on November 8, 2007, JA 287-446.

On August 26, 2008, the court denied STN's motion and granted the Federal Defendants and Intervenor-Defendants' cross-motions. JA 505-556.

Judgment entered on August 27, 2008. JA 557-558.

The petitioner filed a timely notice of appeal on September 19, 2008. JA 559-560.

### **Statement of Facts**

#### **A. Beginning in 1975, a group calling itself the Schaghticoke Indians participates in lawsuits over land in Kent, Connecticut.**

The request by the Schaghticoke Indian group to obtain federal acknowledgment began with a prologue in 1975 when a group then known as the Schaghticoke Indians filed a land claim suit. The claim sought property privately owned in the area around the Schaghticoke state reservation in Kent, Connecticut. *Schaghticoke Indians v. Kent School Corp.*, Civil No. 2:75-cv-00125 (PCD). That land claim or ejection action was dismissed in 1993 for failure to prosecute.

Meanwhile, in 1984 the United States obtained through condemnation a parcel of property adjacent to the reservation for the Appalachian Trail. *United States v. 267.17 Acres of Land*, Civil No. H-84-889. In 1985, the United States filed a companion condemnation action for another parcel of property adjacent to both the reservation and the parcel that was condemned in 1984. *United States*

*v. 43.47 Acres of Land*, 855 F. Supp. 549, 552 (D. Conn. 1994). The purpose of this condemnation action was to relocate a portion of the Appalachian Trail which then ran through a corner of the reservation onto the 43.47 acre parcel and to connect the trail to the previously obtained parcel.

In accordance with the requirements for bringing a condemnation action, the United States named several defendants who might have an interest in the property. One of these defendants was the Schaghticoke Indians, who by virtue of their then-pending 1975 land claim action might have an interest in the property being condemned. During the course of the condemnation action, the then-owner of the property (the Preston Mountain Club) and the United States reached an agreement as to the value of the parcel, and \$75,000 was placed in escrow in the Registry of the U.S. District Court where it remains to this day. As a defense to the condemnation action, the Schaghticoke Indians re-asserted their land claims pursuant to the Trade and Intercourse Act, 25 U.S.C. § 177. To properly assert such a defense, the court ruled that the Schaghticoke must first be determined by the Bureau of Indian Affairs (BIA) to constitute an Indian Tribe. *United States v. 43.47 Acres of Land*, 855 F. Supp. 549, 551 (D. Conn. 1994).

**B. The Schaghticoke Indians begin the process for seeking federal acknowledgment as an Indian tribe.**

During the period between the 1975 land claim action filed by the Schaghticoke Indians and the 1985 condemnation action filed by the United States, the Schaghticoke initiated the federal acknowledgment process by filing, on December 14, 1981, a Letter of Intent, pursuant to 25 C.F.R. § 83.4. The Schaghticoke asked the court to stay the condemnation proceedings to allow them more time to complete the administrative process. The court granted the request and the Schaghticoke filed their first documented petition on December 7, 1994 – 13 years after initiating the process.

Over the next several years, while the condemnation action remained stayed, the Schaghticoke worked to complete their petition. The Branch of Acknowledgment and Research (BAR) (which in 2003 was redesignated as the Office of Federal Acknowledgment) provided technical assistance, *see* 25 C.F.R. § 83.10(b)(2), which advised them where additional documentation was needed. The Schaghticoke submitted additional documentation and in April 1997 requested that their petition be placed on the “Ready, Waiting for Active Consideration” list pursuant to 25 C.F.R. § 83.10(d). Although it had taken the Schaghticoke over 15 years to complete their petition sufficiently to be placed on the waiting consideration list, in early 1998 the group sent a letter to the Department requesting that their petition be considered out of order. The Assistant Secretary-Indian Affairs (AS-IA) denied

that request. *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187, 190 (D. Conn. 1999).

Around the same time, the Schaghticoke filed two new land claim suits under the Non-Intercourse Act for land both to the north and south of the existing reservation in Kent. These land claim suits named as defendants the property owners of the affected parcels including the Town of Kent, Kent School Corporation, Connecticut Light and Power Company (CL&P), the United States, Preston Mountain Club and Loretta Bonos. The State of Connecticut was also named due to its statutory obligation to provide care and management to reservation lands. Conn. Gen. Stat. § 47-65. In 1991, the group changed its name to the Schaghticoke Tribal Nation. JA 659. It became a substituted defendant in the 1985 Appalachian Trail condemnation case and was the named plaintiff in the two land claim suits: *Schaghticoke Tribal Nation v. Kent School Corp.*, Civil No. 3:98-cv-01113 (PCD), and *Schaghticoke Tribal Nation v. United States of America*, Civil No. 3:00-cv-00820 (PCD). The 1985 condemnation case and the two STN land claim cases were all supervised by Judge Peter C. Dorsey and handled as if they were consolidated, since they involved common questions of law and fact, although a formal consolidation order was not entered until October 4, 2005. JA 1509.

Between the filing of the first and second of its land claim cases, STN also filed a motion to terminate the stay that had been entered in the condemnation case and the 1998 land claim case. STN sought to have the district court decide the tribal status issue itself since the Bureau

of Indian Affairs had a backlog of cases awaiting active consideration. The court granted the motion to terminate the stay and “assumed control” of the scheduling of the administrative acknowledgment process, but it did not want to exclude the BIA from that process. The court encouraged the parties to agree upon a schedule for completing the administrative process. *Ruling on Pending Motions*, 2:85-cv-01078 (PCD) and 3:98-cv-01113 (PCD).

The parties to the three cases negotiated a schedule to complete the administrative process and stipulated to a Scheduling Order which was signed by Judge Dorsey on May 8, 2001. JA 2258. The Scheduling Order established a framework and timetable for the Department of the Interior to evaluate the petition for tribal acknowledgment filed by the STN under the seven mandatory criteria of the acknowledgment regulations. While the court deviated from some of the timing provisions of the acknowledgment regulations, the regulations were otherwise applicable to the BIA’s consideration of the STN petition. JA 2267 (Scheduling Order ¶10). Other significant provisions of the Scheduling Order included the creation and sharing of a computerized database for all of the documents that were to become the administrative record<sup>2</sup> and a prohibition on communications by a non-

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<sup>2</sup> This database, named the Federal Acknowledgment Information Resource system (FAIR), was just then being created and would later serve as a model for other acknowledgment petitions. It provides on-screen access to images of all of the documents in the record, linked to entries  
(continued...)

federal party with any officials in the immediate Office of the Secretary of the Interior, the AS-IA, or the Deputy Commissioner of Indian Affairs with respect to the STN petition without notification to the other parties. JA 2258-2268.

**C. The Assistant Secretary - Indian Affairs issues a Proposed Finding that would deny federal acknowledgment to the STN, and a comment period follows.**

After the entry of the Scheduling Order in May 2001, the STN and others made additional submissions for the record and the FAIR database was served on the parties. On December 5, 2002, the AS-IA issued a Proposed Finding (PF) that denied federal acknowledgment. JA 869. Notice of the Proposed Finding was published in the Federal Register. 67 Fed. Reg. 76184 (Dec. 11, 2002), JA 2252. The basis for the PF's negative finding was that the STN did not satisfy two of the mandatory criteria for acknowledgment: "community" and "political authority or influence," as specified in 25 C.F.R. § 83.7(b) and (c).

The updated FAIR database was provided to the parties as provided in Scheduling Order ¶e. In accordance with the regulations, 25 C.F.R. § 83.10(h), JA 2238, and the Scheduling Order ¶f, JA 2262, comments on the proposed finding were filed by STN and interested parties. There were three informal technical assistance meetings between

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<sup>2</sup> (...continued)  
of information extracted from them.

OFA researchers and STN and its researchers, one technical assistance telephone conference call with representatives of the State and interested municipalities and one with some members of the Schaghticoke Coggsell family. JA 660. STN responded to the comments submitted, and the Department then started its evaluation of the evidence for the Final Determination (FD). JA 660.

During this evaluation, the professional staff in OFA prepared a Briefing Paper dated January 12, 2004, setting forth two issues and options for consideration with respect to the FD. JA 875-880. The first issue raised with the AS-IA was a lack of evidence supporting the STN's political influence or authority for a substantial historical period, and insufficient evidence for another period, even though STN met the community criterion during those periods. No previous petitioner had presented this situation. The Briefing Paper noted that the Schaghticoke had been a continuously state-recognized tribe with a state reservation, but that under existing acknowledgment precedent in the Historical Eastern Pequot FD, as in the STN PF, regarding the weight to be given to such state acknowledgment, STN would not satisfy the criterion. The Briefing Paper noted that there was no previous petitioner that met the criteria for a substantial time period, then did not meet one of the criteria for two separate but substantial periods and then met the criteria again, for a substantial period to the present. There were four possible options discussed in the Briefing Paper. The one recommended by OFA to the AS-IA was to "[a]cknowledge the Schaghticoke under the regulations despite the two

historical periods with little or no direct political evidence, based on the continual state relationship with a reservation and the continuity of a well defined community throughout its history.” JA 877, 879.

The second issue in the Briefing Paper was whether the STN should be acknowledged even though a substantial and important part of its present-day community were not on its then-current membership list because of political conflicts within the group. This incomplete membership was one reason the PF had found that the STN did not meet the community criterion. Again, the OFA briefing paper listed available options and recommended “including in the group’s membership individuals who have not specifically assented to or been accepted as members, albeit appearing on past membership lists.” JA 880. Although Gale Norton as Secretary of the Interior did not regularly participate in the acknowledgment process, she did meet with Principal Deputy AS-IA Aurene Martin and others to discuss the STN petition and the issue of state recognition. JA 955, 958, 960-961.

**D. The Department reverses course and issues a Final Determination that would acknowledge the STN as an Indian tribe, prompting significant outcry from the Connecticut congressional delegation and state officials.**

On January 29, 2004, shortly after the Briefing Paper was presented, Principal Deputy AS-IA Martin issued a Final Determination (FD) acknowledging the STN as an Indian Tribe within the meaning of federal law. JA 651.

The FD reversed the findings of the PF on the issues of “community” and “political influence or authority.” As pertinent here, the FD relied on the historic recognition of the Schaghticoke by the State of Connecticut and the continuous existence of a state-established reservation in conjunction with other evidence to find community, as done previously in the STN PF and under the Historical Eastern Pequot precedent. JA 674-717. The FD, however, reversed the STN PF and deviated from precedent, by finding that such state recognition was alone sufficient to demonstrate political influence or authority for certain time periods. JA 776-780. Also, in contrast to the PF, the FD included persons not on the STN’s membership list as members of the petitioner, and found that the petitioner satisfied the “community” criterion. These findings would later become the subject of requests for reconsideration filed by several interested parties and the basis for an order by the Interior Board for Indian Appeals (IBIA) vacating the FD and remanding the matter back to the Assistant Secretary. JA 901-914.

Notice of the FD was published in the Federal Register on February 5, 2004. 69 Fed. Reg. 5570 (Feb. 5, 2004). JA 2247. The Notice specifically stated that the determination would become final and effective on May 5, 2004, pursuant to 25 C.F.R. § 83.10(1)(4), unless a request for reconsideration was filed pursuant to § 83.11, or unless the ongoing negotiations provided for in the Scheduling Order paragraph (j) modified the availability of the IBIA process. JA 2247. In accord with the Scheduling Order, the FAIR database reflecting additions to the record to date was provided to the parties in the litigation. The parties

concluded their negotiations and reported to the court that the IBIA process would not be modified and would be available to all parties. *Report and Joint Motion On Consent To Amend Scheduling Order*, 2:85-cv-1078 (PCD), (Doc. 221) February 27, 2004. In accordance with the Notice and the regulations, the State of Connecticut, the Kent School Corporation, CL&P, the Town of Kent and other interested parties filed Requests for Reconsideration of the FD with the IBIA on May 3, 2004. JA 902 n.1.

Much of the activity complained of by STN on this appeal occurred during the three-month period between the issuance of the FD and the filing of the Requests for Reconsideration, when nothing on the STN petition was pending before the Department. Immediately following the FD U.S. Representative Christopher Shays and Connecticut Attorney General Richard Blumenthal issued press releases criticizing the FD, but each of them indicated that they had “to respect the process” and would file an immediate appeal with the Department of the Interior and in the courts if necessary. JA 1297, 1298. In that regard, the entire Connecticut Congressional delegation signed a letter to Principal Deputy AS-IA Martin, dated February 19, 2004, indicating their support for a full and fair review of the Final Determination under existing regulations and asking her to maintain the full appeal rights of the interested towns, an apparent reference to the then-ongoing negotiations under the Scheduling Order about the availability of the IBIA process. JA 1337.

Two weeks later, on March 4, 2004, Representative Shays met with Secretary Norton, at his request, and expressed his displeasure with the STN FD and his concern about the proliferation of casinos in Connecticut. JA 974-975. The meeting was also attended by Michael Rossetti (Counsel to Secretary Norton) and David Bernhardt (from the Department's Congressional and Legislative Affairs Office). JA 973-974. Secretary Norton testified in her deposition that it was a straightforward conversation which she may have later discussed with the Department people who were at the meeting, but that she did not recall the specifics of any conversations or that she even discussed it with Aurene Martin. JA 976. Secretary Norton's perspective was that she would "entertain working with him on amendments to the Indian Gaming Regulatory Act, and that was really where his focus ought to be," JA 975, and that "the [acknowledgment] decisions were ones which should be based on the merits of the inquiry by the career professionals," JA 976.

Three members of the Connecticut Congressional delegation (Representatives Johnson, Shays, and Simmons) sent a letter on March 12, 2004, to Secretary Norton discussing the Briefing Paper of January 12, 2004, which had presented options to the decision maker and was included as part of the record provided to the parties as part of the FAIR database. The delegation's letter stated that the briefing memo "indicates that the Bureau of Indian Affairs was aware of the inadequacies in the Schaghticoke Tribal Nation's application for federal recognition and sought ways to allow the recognition to go forward nonetheless." JA 1345. The delegation requested that

Secretary Norton personally conduct an internal investigation of the matter and delay any further recognition until the issue was resolved. JA 1345.

The Connecticut delegation also sent Secretary Norton a letter dated March 16, 2004, in which they urged her to take personal action and “investigate what appears to be yet another instance of a flawed tribal recognition process.” The letter concluded with a request for a meeting to discuss what efforts were being made to reform the tribal recognition process. JA 1356-1357. This request was followed up by another letter dated March 17, 2004, which also requested a meeting to “discuss the tribal recognition process.” JA 1366.

Senator Dodd also sent a letter on March 12, 2004, requesting that the Office of Inspector General (OIG) investigate the process associated with the STN FD. JA 1426. Secretary Norton shortly thereafter, on March 31, 2004, requested the OIG to give the investigation a high priority. JA 996-997. The OIG investigation was completed in August 2004. The results of the investigation were set forth in a memorandum to Secretary Norton and a letter to Senator Dodd, JA 1425-1428, in which Inspector General Devaney stated that the “investigation found that the regulatory acknowledgment process was followed, and that no outside influence or personal bias affected the decision to grant acknowledgment to the STN.” JA 1425. The letter to Senator Dodd dealt with the specific allegations including that the BIA “bent the rules,” that the Briefing Paper with the options was a “smoking gun,” and that STN representatives influenced BIA officials. The

Inspector General found none of these allegations to have merit. He concluded that the decision-making process was made transparent by the administrative record, and those parties aggrieved by the decision had sought relief in the appropriate administrative forum. JA 1428. On August 31, 2004, Governor Rell sent a letter to the Connecticut Congressional delegation criticizing the Inspector General's Report and urging a legislative initiative to modify the existing tribal recognition process. JA 1810. This letter was not sent to anyone in the Department.

Coincidentally, on March 17, 2004, Connecticut Attorney General Richard Blumenthal attended the annual Conference of Western Attorneys General at the Department. JA 982. As the meeting ended, Attorney General Blumenthal approached Secretary Norton and handed her a letter and had a brief conversation with her about the contents of the letter. JA 981-983. The letter discussed the Briefing Paper and the use of state recognition in the Final Determination. JA 1368. Attorney General Blumenthal issued a press release about his letter that made it sound as though he had a one-on-one private meeting with Secretary Norton in her office. JA1299. The reality was that there was a brief exchange with the Secretary as people were leaving a conference with a large number of other State Attorneys General. JA 982-983.

Attorney General Blumenthal sent a copy of his letter to the STN and other parties to the litigation that same day. JA 1510-1511. On April 6, 2004, STN filed a motion to amend paragraph (1) of the May 8, 2001 Scheduling Order, which covered communication or contact with officials in

the Department without notification to the other parties, to clarify that the notice required was *prior* notice and not after the fact. *See* Doc. # 231 in 2:85-cv-1078 (PCD). The Court granted STN's motion and adopted the proposed language change to require two business days' prior notice before any communication or contact with officials with respect to the STN petition. JA 1510-1513.

As a result of the prior letters from the Congressional delegation requesting a meeting, Secretary Norton met with Representatives Johnson, Shays, and Simmons from Connecticut and Representative Frank Wolf from Virginia on March 30, 2004. The Secretary was accompanied by David Bernhardt from the Department's Congressional and Legislative Affairs Office. JA 1034, 1038. Secretary Norton testified in her deposition that the Connecticut delegation complained about the proliferation of casinos in Connecticut and Representative Wolf suggested that there should be a moratorium on both tribal recognition and additional gaming approvals. In response, Secretary Norton explained how the tribal acknowledgment process operated and that she had taken pains to make it an examination of the evidence and that the decisions should be based on facts. JA 989. Secretary Norton also testified that despite the criticisms being made about the recognition process, decisions were being made in an appropriate way, by weighing the evidence and reaching conclusions based on it. JA 989. In the limited discussion about the Schaghticoke petition that took place during the meeting, the Secretary reiterated her view that the decision had been reached through a fair and reasonable process,

and that the delegation's focus should be the Indian Gaming Regulatory Act. JA 990.

The meeting was described as emotional with strong feelings expressed by the Members of Congress. When asked if any threats had been made, Secretary Norton reported that "Congressman Wolf said he would tell the President he thought I ought to be fired." JA 990. Secretary Norton dryly explained that while she didn't recall her exact response, "I did not lose any sleep over that threat." JA 990. It was not a concern and nothing came of it. JA 1014. More to the point, Secretary Norton testified that she took no action with respect to the Schaghticoke petition as a result of that meeting. JA 1014. While Secretary Norton may have told others in her leadership team about it, there was no indication that she or anyone else conveyed that information to the professional staff at OFA. JA 991, 1017. The Representatives reported frustration with Secretary Norton's response. JA 994-995. One month later, the State and other interested parties sought review before the IBIA.

On March 31, 2004, the House Committee on Resources held a hearing on the "Federal Recognition And Acknowledgment Process By The Bureau of Indian Affairs." JA 1689. One member of the Connecticut Congressional delegation attended the hearing, giving brief comments and a prepared statement. Two other members also submitted prepared statements, as did Attorney General Blumenthal, which criticized the STN FD. The focus of the hearing, however, was on the recognition process as a whole and not the particular STN petition.

According to the committee chairman, the purpose of the hearing was “to examine the administrative process used by the Bureau of Indian Affairs to determine which groups are federally recognized tribes.” JA 1692. The Director of the Office of Federal Acknowledgment, R. Lee Fleming, attended this hearing and provided a prepared statement and an oral presentation, and then answered questions. JA 1705-1716. Mr. Fleming testified about the workload of OFA, about a GAO Report that suggested improvements to the acknowledgment process, and about the development of the new FAIR database system to provide on-screen access to all documents in the administrative record of a case. Mr. Fleming made no specific mention of the STN petition. JA 1705-1713.

Secretary Norton had a second meeting with members of the Connecticut Congressional delegation on April 1, 2004. Again she was accompanied by David Bernhardt from the Congressional and Legislative Affairs Office. JA 988-989, 991-992, 1034, 1041. The discussions at that meeting were related to Indian gaming issues, land claim issues, the recognition process generally, and procedural matters. JA 1041. Mr. Bernhardt testified that he did not recall ever having a discussion with Associate Deputy Secretary James E. Cason about the Congressional meetings or the Schaghticoke petition generally. JA 1042. Similarly, Mr. Cason did not recall ever having discussed with David Bernhardt any conversation Bernhardt may have had with the Connecticut Congressional delegation about the Schaghticoke matter. JA 1085, 1089.

According to a Declaration filed by one of STN's counsel of record, Judith Shapiro, she had a conversation in April 2007 with Aurene Martin, former Principal Deputy AS-IA and the deciding official of the STN FD. Attorney Shapiro recounted that Martin had stated that in the Spring of 2004 she accompanied David Bernhardt to a meeting in the White House with Margaret Spellings, the Director of Domestic Policy. Martin told Shapiro that the meeting was "in the nature of what had occurred with respect to the Petitioner [STN] to that point." JA 1269. Although Mr. Bernhardt never confirmed his attendance at such a meeting he did testify that he never conveyed information to James Cason regarding any matters at the White House. JA 1044. STN's counsel did not recount any comment by Ms. Martin indicating any White House position on the FD. More specifically, it is significant to note that Ms. Martin did not say there was any pressure exerted to change that decision.

Just as the State and other interested parties were filing their Requests for Reconsideration with the IBIA, pursuing the administrative remedies provided for in the regulations, 25 C.F.R. § 83.11, a Congressional hearing was held on May 5, 2004, by the House Committee on Government Reform. The Chairman of the Committee, Representative Tom Davis, stated that the purpose of the hearing was to evaluate the fairness and efficiency of the federal acknowledgment process both generally and in the context of two Connecticut (Schaghticoke and Historical Eastern Pequot) tribal recognition decisions. "Our goal today is to look at these decisions as a case study of the overall recognition process." JA 1617. The hearing testimony of

Attorney General Blumenthal and Connecticut Representatives Simmons and Shays was critical of the recognition process and the STN and HEP decisions. JA 1623, 1636, 1642. The hearing was also attended by three representatives from the Department of the Interior: OFA Director Fleming; Theresa Rosier, Counselor to the AS-IA; and Inspector General Earl Devaney. While Department officials were strongly questioned by the Committee participants, the questions were on varied topics not limited to the STN FD. JA 1631-1646. OFA Director Fleming, when asked at his deposition about the criticisms of the STN FD that he heard at the Congressional hearings, stated that they played no role in the OFA recommendation to Mr. Cason concerning the proposed recommended final determination. JA 1250.

While the Requests for Reconsideration were pending before the IBIA and spring turned to summer in 2004, Representative Johnson unsuccessfully attempted to arrange a meeting with BIA officials to deliver 8,000 postcards that she had solicited from constituents indicating their position either for or against building a new casino in Western Connecticut. JA 1826. During an exchange of e-mails within the Department by its media and Congressional relations employees and various offices, it was first suggested by George Skibine, then Director of the Office of Indian Gaming and Acting Deputy Assistant Secretary for Policy and Economic Development, that this was a “PR ploy” by Johnson connected to her opposition to recognizing new tribes in Connecticut. OFA Director Fleming agreed and gave several reasons why this information should not be accepted at the office of the PD

AS-IA. The press secretary for Johnson indicated that although the postcards did not even mention the Schaghticoke petition, the presentation was in reference to that. Mr. Fleming concluded his e-mail to George Skibine with the fundamental observation that “the federal recognition process is not a popularity contest or poll.” This type of writing campaign was not the type of evidence that would be considered in the acknowledgment process, since it was not related to the criteria in the regulations. JA 1825. JA 1229. Without any meeting, the postcards were delivered to the Office of Indian Gaming – and were never delivered to OFA, and are not part of the administrative record.

**E. The Interior Board of Indian Appeals vacates the Final Determination based on deviations from precedent identified by the Office of Federal Acknowledgment.**

As noted above, the State and other interested parties filed Requests for Reconsideration with the IBIA on May 3, 2004, challenging the use made of “state recognition.” The State argued that its state recognition of Indians was based on descent, neither explicitly nor implicitly based on a political relationship, and thus was not evidence of the existence of community and political influence or authority within a petitioner. The Requests also alleged a misapplication of the regulations by the improper calculation of marriage rates, challenged the membership as defined for the FD, and raised other issues. JA 906-907. STN filed its response in opposition to reconsideration on November 29, 2004.

Meanwhile, on November 16, 2004, OFA prepared a briefing paper that requested guidance from Department officials on whether it should inform the IBIA that the STN FD had unintentionally departed from precedent in its marriage rate analysis and that there was a material mathematical error. JA2064. The OFA discovered these errors when reading the Requests for Reconsideration. The briefing paper presented three options, questioned whether the FD would withstand judicial review in light of these errors, and requested guidance on how OFA should proceed on other petitions until the issue was resolved. A modified option was undertaken and on December 6, 2004, the OFA filed a three-page Supplemental Transmittal with the IBIA. JA 881-885. OFA offered this submission as technical assistance to the IBIA and explained that the STN FD was not consistent with prior acknowledgment case precedent in calculating the rates of marriages under the regulations. It also noted that there was a material mathematical error in the calculation for the period 1841-1850. JA 907. The Supplemental Transmittal concluded with the assessment that the analysis in the FD under 25 C.F.R. § 83.7(b)(2)(ii) and the carryover provision in § 83.7(c)(3) “should not be affirmed on these grounds absent explanation or new evidence.” JA 885, 907. The technical assistance provided in the Supplemental Transmittal did not discuss any other issue raised in the Requests for Reconsideration.

There was immediate reaction to the Supplemental Transmittal from Attorney General Blumenthal who issued a press release, JA1301, and Representatives Johnson, Shays and Simmons who wrote a letter to Secretary Norton.

JA 1373. Each called for the STN FD to be vacated. Attorney General Blumenthal followed up with a letter to Secretary Norton, dated December 13, 2004, requesting her to direct that the STN FD be withdrawn. Counsel for the STN, Eric W. Wiechmann, also wrote to Secretary Norton on December 17, 2004, opposing Blumenthal's request. JA 2206. In a letter dated December 23, 2004, the Solicitor of the Department of the Interior, Sue Ellen Wooldridge, responded to Attorney General Blumenthal and advised that the Secretary had declined to take the action suggested by him. JA 1443, 1448. That same letter also advised that in light of these unique circumstances, the Department would file a motion to expedite the IBIA proceedings consistent with the court-approved negotiated partial settlement agreement (the Scheduling Order) in the land claim litigation. JA 1443, 1446. Solicitor Wooldridge pointed out that during IBIA review, the IBIA could address all grounds raised by the interested parties before IBIA that are within its jurisdiction, including new arguments and evidence before it. She concluded that until the administrative process was complete, it would be premature to draw conclusions from the evidence in the record. JA 1449. Solicitor Wooldridge also responded to Representatives Johnson, Shays and Simmons in identical letters dated January 5, 2005, advising that until the administrative process was complete, it was premature to draw a final conclusion without a review of all the evidence in the record. JA 1437.

Representatives Johnson, Shays and Simmons subsequently sent a one-page letter dated February 10, 2005, to Chief Administrative Law Judge Steven K.

Lindscheid, at the IBIA. JA 1450-1451. The letter requested the status of the requests for reconsideration, an account of what the IBIA had done to date, and inquired when a decision was anticipated. While first expressing the hope that the IBIA would adjudicate the matter according to the federal regulations, “based on a thorough and impartial review of the evidence in the record” the Representatives then opined on the merits of the appeal. JA 1451. Judge Lindscheid responded in a letter dated February 22, 2005, in which he chastised the Representatives for expressing their views of the merits in the IBIA appeal which was a “formal administrative proceeding, governed by regulations that prohibit *ex parte* communications.” JA 1452-1454. All of the parties to the STN matter before the IBIA were provided copies of the Representatives’ letter and given an opportunity to respond.

Around this time, Representative Johnson introduced legislation entitled “Schaghticoke Acknowledgment Repeal Act of 2005” (H.R. 1104), (109th Congress) for the express purpose of overturning the acknowledgment determination made in the STN FD. JA 1487-1507. The proposed legislation languished. The ultimate decision maker, James Cason, later stated that he was not even aware of its existence. JA 1086.

On May 11, 2005, the Senate Committee on Indian Affairs held an Oversight Hearing On Federal Recognition of Indian Tribes. JA 1730-1810. Representatives Johnson, Shays and Simmons and Connecticut Governor Rell all spoke critically of the recognition process. Attorney General Blumenthal, in a prepared statement, called for

Congress to abolish the BIA recognition authority, replace it with an independent Commission, and impose a six-month moratorium on recognition decisions. JA 1758-1765. OFA Director Fleming and Assistant Inspector General Mary Kendall also testified on a variety of subjects from workload to statutory reform. JA 1745-1751. Fleming testified at his deposition that the Congressional criticism he heard at the hearing had no impact on his recommendation to Mr. Cason, who issued the Reconsidered Final Determination. JA 1250.

Coincidentally, on May 12, 2005, the day after the Senate Hearing, the IBIA issued two lengthy decisions that vacated the final determinations for both the Historical Eastern Pequot (HEP – another Indian group from Connecticut seeking federal acknowledgment) and the Schaghticoke. JA 901-945. In each case, the IBIA vacated the Final Determinations and remanded them back to the Assistant Secretary for further work and reconsideration. The IBIA did a complete analysis of the “state recognition” issue in the HEP case, and relied on that analysis in vacating the STN FD. JA 906. In HEP, the IBIA concluded that the State of Connecticut’s “implicit” recognition of the Eastern Pequot as a distinct political body was not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority within that group. JA 932-939. The FD “fails to articulate how that status [under state law] is probative of actual interaction, social relationships, or a bilateral relationship between the group and its members. Instead the FD uses state recognition as nonspecific catch-all ‘additional evidence’ to tip the scales for finding that criteria . . . are

satisfied.” JA 937. “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.” JA 937. As to the marriage rate interpretation and miscalculation raised in STN, the IBIA left that matter to the Assistant Secretary on reconsideration. JA 908. The IBIA also referred the membership list issues and other issues in STN to the Assistant Secretary. JA 909, 912-914.

**F. After the IBIA vacates the Final Determination and remands for further consideration, the district court permits discovery in the land claim litigation.**

Following the IBIA decision, the STN went back to Judge Dorsey in the land claim litigation and filed a Motion for Permission to Conduct Discovery. Judge Dorsey allowed the additional discovery for the purpose of determining whether the Court’s Scheduling Order prohibition on meeting or contacting officials of the Department had been violated. *Ruling on Motion for Permission to Conduct Discovery* (May 20, 2005) (Doc. # 249 in 2:85-cv-1078 PCD). STN conducted discovery from May 20, 2005 to October 1, 2005.

Also following the May 12, 2005, IBIA decision, Counselor to the AS-IA Michael Olsen (to whom had been delegated the functions of the Principal Deputy AS-IA)

issued a letter dated May 23, 2005, advising the parties as to the procedures for the reconsideration after the remand within the regulatory time period, 25 C.F.R. § 83.11(g). Unhappy with those procedures, STN went back to the district court to again seek an amendment to the negotiated Scheduling Order of May 8, 2001, in order to obtain technical assistance from the OFA concerning the marriage rate issue and to be able to supplement the record with additional documentation. In response to the court's request for briefs on this motion to amend, the Department submitted a proposal that would allow some additional technical assistance and supplemental submissions by the parties to the administrative proceedings on the marriage rate issue. On or about July 8, 2005, Judge Dorsey orally transmitted his decision to adopt the procedures suggested by the Department and subsequently entered the order. JA 567. *Order on Motion to Amend Scheduling Order*, July 23, 2005 (Doc. # 97 in 3:00-cv-820 PCD). Consistent with that Order, the OFA provided technical assistance to the parties on the marriage rate evaluation on July 14, 2005. Documents submitted by July 25, 2005, that were in accordance with the provisions of the Order and briefs submitted by August 12, 2005, were reviewed for the Reconsidered Final Determination. JA567.

Unbeknownst to the parties in the land claim litigation, after Judge Dorsey communicated his decision to modify the Scheduling Order but before he entered the order, Governor Rell sent a letter to Judge Dorsey dated July 11, 2005. JA 1459. In the letter, the Governor urged Judge Dorsey to deny both the STN motion to amend the Scheduling Order and the alternative proposal suggested by

the Department, and to deny any further extensions of time for issuance of the agency decision after remand. The Governor's letter was later made a part of the record on September 30, 2005. *Schaghticoke Tribal Nation v. Kent School Corp.*, 3:98-cv-1113 (PCD) (Doc. No. 209); *Schaghticoke Tribal Nation v. United States*, 3:00-cv-820 (PCD) (Doc. No. 120); *United States v. 43.47 Acres of Land*, 2:85-cv-1078 (PCD) (Doc. No. 284).

Also unbeknownst to the parties, Judge Dorsey responded to the Governor in a letter dated August 19, 2005, explaining that he allowed the extension to avoid any subsequent reversal by another court that "might buy a due process argument." JA 1461. When the existence of the letter from Judge Dorsey to Governor Rell came to light a year later, in 2006, it was made a part of the record in this case and the STN requested permission to take additional discovery about the letter. In a subsequent ruling denying STN's Motion for Clarification and For Supplemental Discovery, JA 76, 88-89, Judge Dorsey explained that his letter had no substantive significance insofar as the merits of STN's claims were concerned but provided some explanation why the court accommodated STN's requests for technical assistance and to supplement the record, which as referenced in the letter "was designed to protect STN's due process rights." Judge Dorsey also noted that there was no evidence that Associate Deputy Secretary James E. Cason, the decision maker for the Reconsidered Final Determination, was improperly influenced by the court's August 19, 2005, letter. Moreover, the court also noted, a declaration from the Governor's Counsel for Policy stated that upon receipt by the Governor the letter was filed away

and “not disseminated to any person or otherwise used for any purpose.” JA 89.

**G. After receiving further briefing from the parties, the Department issues a Reconsidered Final Determination that denies, as did the original Proposed Finding, tribal acknowledgment to the STN.**

In February 2005, the Assistant Secretary-Indian Affairs (AS-IA) resigned. At that time, the Principal Deputy AS-IA (PD AS-IA) position, previously held by Aurene Martin, was vacant. With no one appropriately situated to automatically become Acting AS-IA, Secretary Norton issued Secretarial Order No. 3259, which delegated the non-exclusive functions and duties of the AS-IA to Associate Deputy Secretary Cason, effective February 13, 2005. JA 1912. This delegation was extended on August 11, 2005, and March 31, 2006. JA 2041.

The Reconsidered Final Determination (RFD) was signed by Cason on October 11, 2005. It was his first acknowledgment decision and was issued simultaneously with the Reconsidered Final Determination on the HEP. 70 FR 60099 (Oct. 14, 2005), JA 1099, 1102, 1106. Prior to the delegation to him of functions and duties related to acknowledgment of Indian Tribes in February 2005, Cason had no involvement in the Department’s acknowledgment process. JA 1082-1083. In preparation for making that decision, Cason met with the Director and the professional staff of OFA and representatives from the Office of the Solicitor. JA 1084, 1098, 1100-1102.

Cason outlined his authority to make the RFD and the process by which he made that decision in a Declaration in support of *Federal Respondents' Memorandum In Opposition to Petitioner's Motion for Leave to Take Discovery*, (Doc No. 85) 3:06-cv-81 (PCD). Cason explained that in addition to reading the recommended decision, he relied upon the oral presentation by the Director of OFA and the experts in OFA who had evaluated the evidence submitted during the administrative process. JA 1291 (¶ 7). The briefing occurred on October 5, 2005, and included a discussion of the evidence under the regulatory criteria and the answers to questions posed by Cason. JA 1292 (¶ 8). Cason also declared that he inquired of all the staff if they had been pressured by anyone to reach the result that they had recommended, and all responded "no." JA 1292 (¶ 11). As to his own role, Cason stated that he had not been pressured to reach a particular result by anyone either in or outside the Department. JA 1292 (¶ 12). Specifically, Cason stated in his declaration that at no time had Secretary Norton advised him how he should decide the case or that there was pressure on her or the Department to decide it one way or the other. JA 1293 (¶ 15). Although Cason was aware that Secretary Norton had met with members of the Connecticut Congressional delegation, that knowledge did not impact his decision on the STN petition. JA 1293 (¶ 16). Finally, Cason outlined that he did not meet or discuss the STN petition or the Reconsidered Final Determination, prior to it being issued on October 11, 2005, with any non-federal parties subject to the Scheduling Order, with members of the Connecticut delegation, with the citizens advocacy group TASK, with the lobbying firm Barbour, Griffith & Rogers which had

been retained by TASK, or with anyone outside the Department. JA 1294 (¶¶ 21-25).

Despite this very clear statement that there was no pressure exerted on or felt by Cason or the professional staff of OFA, Judge Dorsey allowed additional discovery. Cason's subsequent deposition testimony was consistent with his declaration that there was no basis for STN's claim that the Reconsidered Final Determination was the result of undue political influence. JA 1099, 1101, 1103, 1108. Cason did not recall having any conversations with David Bernhardt about the meetings Bernhardt had attended with Secretary Norton and the Connecticut delegation. JA 1085, 1089, JA 1030-1031, 1041-1042. Bernhardt played no role whatsoever in the Reconsidered Final Determination, and had no recollection of attending the meeting with Cason and OFA on October 5, 2005, when it was discussed. He testified, "the odds that I attended are incredibly low, like zero." JA 1046. Even though Bernhardt attended several meetings with Secretary Norton and the Congressional delegation in the Spring of 2004, there is no connection between those meetings and the RFD issued in October 2005 or with the decision maker. JA 1085, 1089. Cason himself did not speak to any members of the delegation about the STN petition. JA 1085, 1089. In addition, Cason testified that he did not have any contact with Connecticut Attorney General Blumenthal, Governor Rell or her staff, nor did he speak to anyone at the White House about the Schaghticoke petition. JA 1091-1093. Cason was not even aware of Representative Johnson's proposed bill to reverse the prior Final Determination to acknowledge the STN, JA

1086, or her attempt to deliver postcards relating to a casino survey she had conducted. JA 1099.

The 86-page Reconsidered Final Determination issued by Associate Deputy Secretary Cason on October 11, 2005, concluded that STN did not satisfy two of the mandatory criteria for tribal acknowledgment: community, § 83.7(b), or political influence or authority, § 83.7(c), for significant periods of time. The RFD therefore denied acknowledgment. JA 608, 621. The RFD concluded that there was insufficient evidence of community for 54 years, and insufficient evidence to demonstrate political influence or authority of the petitioner over its members for approximately 165 years. JA 608, 621. The RFD discussed the IBIA decision and evaluated the State's continuous recognition with a reservation to glean any evidence available that would show interaction and bilateral political relations within the petitioner, and weighed it with the other evidence in the record. JA 608-621. The RFD discussed agency precedent on marriage rates and corrected the calculation. JA 569-599. Finally, the RFD concluded that the people who continued to object to being part of the petitioner could not be considered members under the definition of "member" in the regulations. JA 621-625.

**H. STN files a petition for review of the Department's denial of tribal recognition in the district court, and obtains discovery.**

After the RFD was issued, the STN filed a Petition for Review in the District Court on January 12, 2006, pursuant to the APA. The primary issues raised in the original

petition were that the RFD was an arbitrary and capricious decision and that it had been affected by undue political influence. STN later filed an Amended Petition for Review on March 30, 2007, which added a claim that the RFD had been issued by an unauthorized official. On June 14, 2006, the district court allowed the State of Connecticut, the Town of Kent, the Kent School Corporation and the Connecticut Light & Power Company to intervene. On June 15, 2006, the federal defendants filed the Administrative Record, which contained 6,774 documents and 47,012 pages and included the updated FAIR database, in electronic format. JA 25-59.

STN filed a series of motions seeking extensions of time and discovery prior to filing a motion for summary judgment. Although the Federal Defendants and the Intervenor-Defendants opposed the requests for discovery, as a result of proceedings before a parajudicial officer (PJO) on August 11, 2006, the Federal Defendants agreed to conduct a search and provide certain files, e-mails and calendars of several Department officials, not otherwise part of the administrative record. JA 116. In a ruling entered on November 3, 2006, the court recognized that review of an agency decision is usually limited to the administrative record, but it allowed STN to take depositions of former Secretary Gale Norton and Associate Deputy Secretary James Cason – though it did not allow all of the requested depositions. JA 82-87. After those depositions, STN moved for additional depositions and discovery, JA 91, which the court also allowed. In the March 19, 2007, Ruling noted above, the court allowed the depositions of former Deputy Chief of Staff and Counselor

to the Secretary David Bernhardt, OFA Director R. Lee Fleming, and Loren Monroe, a lobbyist hired by the citizen group.

Still unable to establish any evidence of undue political influence affecting the RFD, STN made one final request for further discovery including White House records. The court noted that this was STN's sixth request for discovery outside the administrative record. JA 198. After analyzing the basis for the requested discovery and once again outlining the significant burden placed on a party moving for discovery in a case involving judicial review of an administrative record, the court denied the request based on the inadequacy of the showing made by STN. "In sum, the information provided by STN consists of nothing more than unsubstantiated allegations and speculation of bad faith or improper behavior on the part of agency decision makers. STN has shown that members of Congress were concerned about the Final Determination, however, there is no evidence of a nexus between the pressure and the actual decision maker." JA 204-205.

**I. The district court grants summary judgment against STN, finding that the Department's denial of tribal acknowledgment was not the product of undue political influence and the issuance of that decision by Associate Deputy Secretary James Cason did not violate the Vacancies Reform Act.**

On August 26, 2008, Judge Dorsey granted summary judgment against STN in a 52-page written ruling. At the outset, the court clarified the scope of the record before it,

striking some documents submitted by STN and admitting others. JA 506-12. Next, the court outlined the standard for reviewing agency actions under the APA, JA 512-15, the regulatory background for tribal recognition, JA 515-17, and the facts of the case, JA 517-32.

The court then proceeded to consider, and reject, STN's request "to invalidate the RFD on the grounds that it is the impermissible product of undue political interference by federal and state legislators and their lobbyists with the Department's decision making process." JA 532. The court began its analysis with two key principles: "First, 'the *appearance* of bias or pressure may be no less objectionable than the reality.' Second, 'judicial evaluation of the pressure must focus on the *nexus* between the pressure and the actual decision maker.'" JA 532-33 (citations omitted; emphasis added in district court ruling). The court observed that "[t]here is no question that political actors exerted pressure on the Department over the course of 2004 and 2005 in opposition to the FD's acknowledgment of STN," but the court held that the focus of inquiry was "whether the evidence presented shows that the pressure exerted can be deemed to have actually influenced the decision maker who issued the RFD." JA 533. The court held that it did not:

In this case, the evidence presented does not persuade the Court that the Congressional hearings, ex parte communications between legislators and agency officials, or the publicity on the issue as a whole ultimately affected the Department's decision to issue the RFD.

JA 533.

The court first looked at the congressional hearings, and concluded that no evidence showed that they “had any impact on Associate Deputy Secretary Cason, the decision maker for the RFD.” JA 535. Turning to the legislators’ ex parte communications, the court likewise concluded that nothing in the record established that those communications “actually influenced the decision making process resulting in the RFD.” JA 535-36. Not only did all of the Department officials who were deposed testify that none of these communications “had any impact on the decision making process that culminated in the RFD,” but there was also “no evidence that Mr. Cason even had any direct contact” with those outside the Department who were lobbying with respect to the STN recognition issue. JA 536.

The court recognized that “it may be the case that Congressional pressure compromises an administrative proceeding even where the record would allow the decision maker to reach the same conclusion independently,” but held that here “the nexus between the pressure exerted and the actual decision makers is tenuous at best, and the evidence adequately establishes STN’s ineligibility for tribal recognition.” JA 537. In short, the court concluded “that political influence did not enter the decision maker’s ‘calculus of consideration.’” *Id.*

The court then spent considerable time analyzing the merits of the RFD, and held that it was neither arbitrary nor capricious. JA 537-50. The court found that the RFD rationally gave less weight to state recognition of the STN

when determining whether the group had failed to demonstrate community and political influence, and that the Department's change in position on this issue between the FD and the RFD was "thorough, rational, and well-reasoned," JA 541, and justifiably based on the IBIA's construction of the acknowledgment regulations, JA 542. The court likewise held that the RFD's analysis of marriage rates within STN was based on a reasonable interpretation of the acknowledgment regulations; indeed, it noted that STN's proposed method for measuring endogamy was "ill-suited to the regulations." JA 544-46. The court also concluded that the RFD properly determined that STN had failed to demonstrate community and political authority for the period between 1996 and 2004 because a significant number of key Schaghticoke individuals had refused to consent to STN membership. JA 547-50.

Finally, the district court held that Associate Deputy Secretary James Cason was authorized to issue the RFD, based on the Secretary's delegation to him of duties that were normally assigned to the Assistant Secretary - Indian Affairs (AS-IA) – a position that was vacant at the time. The court first rejected STN's claim that Cason's designation without Presidential nomination and Senate confirmation violated the Appointments Clause of the Constitution. JA 550. Next, the court held that Cason's performance of the duties of the AS-IA did not violate the Vacancies Reform Act, 5 U.S.C. §§ 3345 *et seq.* As the court observed, because both the AS-IA and Principal Deputy AS-IA positions were vacant at the time, the VRA permitted the Secretary to delegate to Cason any functions or duties that were not required by statute or regulation to

be performed only by the official occupying that position. JA 552. Because tribal acknowledgment decisions are not assigned by statute or regulation only to the AS-IA, the delegation to Cason comported with the VRA. JA 552-53.

Having found no merit to any of STN's claims, the court denied STN's motion for summary judgment and granted the respondents' cross-motions for summary judgment.

On this appeal, STN challenges only two of the district court's rulings: (1) that the RFD was untainted by undue political influence, and (2) that Cason's issuance of the RFD did not violate the VRA. STN has abandoned any claim that the RFD was arbitrary and capricious.

### **Summary of Argument**

1. The Reconsidered Final Determination was not the result of undue political influence. This Court has held that “[t]o support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to *and did cause* the agency's action to be influenced by factors not relevant under the controlling statute.” *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984) (emphasis added). The evidence shows that Associate Deputy Secretary James Cason, the ultimate decision maker who issued the RFD, was insulated from any outside political pressures. Cason did not participate in any meetings with members of Congress or other public officials regarding the STN petition, and he testified in a deposition that he was unaffected by any extraneous influences. Congressional

committee hearings on acknowledgment were handled by other members of the Department, who in turn treated them as routine oversight matters. Other attempts to influence Secretary Norton likewise were not channeled in any way to Cason, who was ultimately responsible for making the STN acknowledgment decision. Indeed, Cason's decision was based on the consensus recommendation of the career staff at OFA and their superiors, which in turn was prepared in light of the IBIA's vacatur and remand of what it identified as reliance on unreliable and nonprobative evidence in the previously issued Final Determination.

Nor should the RFD be invalidated on the theory that it was tainted by the appearance of bias. As noted above, this Court has held that it will vacate agency action only if political pressure *actually* influenced that action. Even if this Court were to depart from its own standard and instead rely on other circuits' cases holding that an "appearance of bias" may invalidate agency action, those cases stand for the limited proposition that agency action may be invalidated only when extraneous influences have been exerted against the actual decision maker and have entered into the decision maker's calculus of consideration. Moreover, an "appearance of bias" standard, even if arguably appropriate in formal adjudicative settings where *ex parte* contacts are strictly prohibited, would make little sense in the context of informal adjudicatory processes like the tribal acknowledgment process. For example, as the acknowledgment regulations provide, petitioners and interested parties are expected to obtain "technical assistance" from the OFA during the process, and these contacts take place on an *ex parte* basis. Such an informal

decisionmaking process is quite different from, for example, proceedings before administrative law judges of the IBIA which are more strictly judicial in nature and where there must be an exclusion of *ex parte* contacts that could be construed as extraneous influences. In any event, because here the decision maker himself – Associate Deputy Secretary Cason – was not questioned and no extraneous influences entered into his consideration when he issued the RFD, there is no basis in the record for concluding that the RFD was somehow tainted by even the appearance of bias.

2. The Associate Deputy Secretary had authority to issue the Reconsidered Final Determination under the Vacancies Reform Act. The VRA provides that, when a vacancy arises in a position held by an official appointed by the President with the advice and consent of the Senate, that vacancy must be filled by the “first assistant” to that official, unless the President temporarily designates someone else to temporarily perform that official’s duties. 5 U.S.C. § 3345. When the “first assistant” position is also empty, however, the agency head may delegate any functions and duties of the vacant position that are not required by statute or regulation to be performed exclusively by the official occupying that position. 5 U.S.C. § 3348(a)(2).

When the positions of the Assistant Secretary - Indian Affairs (AS-IA) and Principal Deputy Assistant Secretary - Indian Affairs (PD AS-IA) both became vacant, the Secretary delegated the non-exclusive functions and duties of the AS-IA to the Associate Deputy Secretary, James

Cason. The AS-IA's duties include the authority to issue preliminary and final decisions regarding tribal acknowledgment. 25 C.F.R. §§ 83.1, 83.10(h),(l)(2), 83.11(g). The AS-IA's regulatory duties are non-exclusive, because the regulations that assign to the AS-IA the duty of issuing tribal recognition decisions also defined the AS-IA itself as being the AS-IA *or that officer's authorized representative*. In other words, the regulations themselves assume that the AS-IA's regulatory duties are inherently delegable. Associate Deputy Secretary Cason was accordingly authorized, under the VRA, to issue the RFD.

## ARGUMENT

### **I. The district court properly found that there was no undue political influence upon the decision maker of the Reconsidered Final Determination.**

#### **A. Relevant facts**

The relevant history of this case is set forth above in the Statement of Facts and will not be repeated here.

Nevertheless, an understanding of the tribal acknowledgment process is essential to address STN's claims. The purpose of the acknowledgment process is to determine which groups have existed continuously as Indian tribes and are therefore entitled to a government-to-government relationship with the United States. Acknowledgment by the Department is a prerequisite to eligibility for the protections, services and benefits available to Indian tribes by virtue of their status as tribes,

as well as the limitations and obligations of such tribes. 25 C.F.R. § 83.12(c). The Department first promulgated regulations governing the acknowledgment process in 1978, which were then revised in 1994. 25 C.F.R. Part 83, *Procedures For Establishing That An American Indian Group Exists As An Indian Tribe*. JA 2229. The process is initiated when a group submits a letter of intent requesting to be acknowledged as an Indian tribe. 25 C.F.R. § 83.4. The group must submit detailed evidence demonstrating that it meets seven mandatory criteria. 25 C.F.R. § 83.6(a). If a group fails to meet any one of the criteria, the group is not eligible for federal recognition as an Indian tribe. 25 C.F.R. § 83.6(c) and § 83.10(m).

The petitioner bears the burden of providing evidence to meet the criteria; the Department is not responsible for conducting research for the putative tribe. 25 C.F.R. § 83.5(c) and § 83.6(d). A criterion is considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. 25 C.F.R. § 83.6(d). The petition is evaluated by the Office of Federal Acknowledgment (formerly known as the Branch of Acknowledgment and Research) through a team of three experts: a historian, a genealogist, and an anthropologist. The regulations also provide for informal technical assistance, allowing frequent discussions between the professional staff at OFA and researchers for the petitioner, as well as interested parties. § 83.10(b). The members of the OFA team assigned to the petitioner verify and evaluate the evidence and prepare a recommendation as to whether the petitioner meets the regulatory criteria. Their recommendation is then subject to extensive peer review

within OFA. This process leads to a “Summary Under the Criteria,” which evaluates the evidence and recommends a decision: the Proposed Finding (PF).

The decision maker is the AS-IA, who issues the PF based on the administrative record. 25 C.F.R. § 83.10(h). The petitioner and third parties are then given time to respond to the proposed finding, discuss it either informally with OFA staff or formally at an on-the-record meeting, and submit additional documentation. 25 C.F.R. § 83.10(i), 83.10(j)(2), and 83.10(k). This process culminates with a Final Determination (FD) by the AS-IA either acknowledging the group as an Indian tribe or denying the petition. 25 C.F.R. § 83.10(1)(2).

The FD does not become a final and effective agency decision if the petitioner or an interested party requests reconsideration with the Interior Board of Indian Appeals (IBIA). 25 C.F.R. § 83.11. The IBIA has the authority to review requests for reconsideration based on the following allegations: (1) there is new evidence that could affect the determination, (2) a substantial portion of the evidence relied on was unreliable or of little probative value, (3) the research conducted appears inadequate or incomplete in some material respect, or (4) there are reasonable alternative interpretations of the evidence, not previously considered, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria. 25 C.F.R. § 83.11(d). The statement of grounds for reconsideration are considered the opening briefs. The opposing party is allowed an answering brief,

and a petitioner may submit a reply. 25 C.F.R. § 83.11(d)(5)(6).

The IBIA will affirm the AS-IA determination if it finds that the petitioner or interested party has failed to establish at least one of the enumerated grounds, and will vacate the determination if one or more of the grounds is established. 25 C.F.R. § 83.11(e)(9),(10). Grounds outside the IBIA's jurisdiction are referred back to the Department. 25 C.F.R. § 83.11(f)(1). Following a remand from the IBIA, the AS-IA issues a Reconsidered Final Determination (RFD) in 120 days, addressing all valid grounds for reconsideration as determined by the IBIA. 25 C.F.R. § 83.11(g).

### **B. Governing law and standard of review**

In an APA case, a district court's grant of summary judgment is reviewed *de novo*. *Karpova v. Snow*, 497 F.3d 262, 267-68 (2d Cir. 2007). This Court reviews an agency's determination as would a district court, which means that it will set aside an agency's findings only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *Henley v. Food and Drug Admin.*, 77 F.3d 616, 619 (2d Cir. 1996). Notably, STN has not challenged the final decision of the Department of the Interior on its merits. The issues raised on appeal do not include an assertion that the Reconsidered Final Determination was arbitrary and capricious or an abuse of discretion. STN Brief at 2. Instead, STN is essentially arguing that the RFD was "otherwise not in accordance in law" on the grounds that (1) its due process right to a fair administrative hearing was violated by undue

political influence and (2) the Reconsidered Final Determination was made by an unauthorized individual. Accordingly, this Court should review these claims *de novo*.

The same *de novo* standard of review applies when there are cross-motions for summary judgment. “We review *de novo* a district court’s ruling on cross-motions for summary judgment, in each case construing the evidence in the light most favorable to the non-moving party.” *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 167 (2d Cir. 2007); *Fund for Animals v. Kempthorne*, 538 F.3d 124, 131 (2d Cir. 2008). Like the district court, this Court may not make credibility determinations or weigh the evidence and must resolve all ambiguities and draw all permissible inferences in favor of the non-moving party. *Jaegly v. Couch*, 439 F.3d 149, 151 (2d Cir. 2006). When there are cross-motions for summary judgment “each party’s motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration.” *Morales v. Quintel Entertainment, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001).

### **C. Discussion**

On appeal, STN has abandoned its challenge to the merits of the RFD denying tribal recognition. Instead, it focuses primarily on the claim that its right to a fair administrative proceeding was compromised by improper political influence. This claim has two strands. On the one hand, STN renews its argument that, notwithstanding

consistent deposition testimony by Department officials and others to the contrary, the RFD must have been the “product of undue influence.” STN Br. at 73. In the alternative, STN asks this Court to adopt the broad proposition that an “appearance of bias” alone is sufficient to invalidate an agency decision, “even in the absence of evidence that the bias or pressure actually caused or produced the result.” STN Br. at 63. STN asks the Court to depart from precedent and “embrace” a stark version of this rule that lacks the careful limitations which the D.C. Circuit has placed upon it, and to remand for the district court to consider this theory. STN Br. at 70. For the reasons that follow, neither claim has any merit.

**1. The district court properly concluded that the undisputed facts showed that the decision maker who issued the Reconsidered Final Determination was not influenced by political pressures.**

There is a strong presumption that government officials act in good faith, and “a presumption of regularity attaches to the actions of Government agencies.” *Estate of Landers v. Leavitt*, 545 F.3d 98 (2d Cir. 2008) (quoting *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001)). As the Supreme Court long ago explained, “[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). The district court ruled that this baseline presumption had not been overcome by the evidence

presented by STN. Specifically, “the evidence presented by STN does not show that the legislative activity *actually* affected the outcome on the merits by the IBIA” and, with respect to the RFD, “[n]othing suggests that the actual decision maker was impacted by the political pressure exerted by state and federal legislators or their surrogates.” JA 537. To the contrary, the evidence uniformly established that the decision maker was insulated from any outside interference.

In reaching that conclusion, the district court’s analysis comported with this Court’s rule that “[t]o support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to *and did cause* the agency’s action to be influenced by factors not relevant under the controlling statute.” *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984) (emphasis added). In other words, this Court has required proof that extraneous factors *actually influenced* the agency’s decision. *Id.*; accord *Chemung County v. Dole*, 804 F.2d 216, 222 (2d Cir. 1986). The district court properly recognized that the focus for determining whether the presumption of regularity has been overcome “is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator’s decision making process.” JA 505 (quoting *Peter Kiewit Sons’ Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 169-70 (D.C. Cir. 1983)). As the *Kiewit* case also noted, “[a] court must consider the decisionmaker’s input, not the legislator’s output. The test is whether ‘extraneous factors intruded into the *calculus of consideration*’ of the individual

decisionmaker.” *Id.* at 170 (quoting *D.C. Federation of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1972)). The judicial evaluation of the alleged pressure must focus on the nexus between the alleged pressure and the decision maker. *ATX, Inc. v. U.S. Dep’t of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994). If not targeted directly at the decision maker, congressional actions – “such as contemporaneous hearings” – will not invalidate an agency action. *Id.* at 1528 (citing *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978)).

In the extensive depositions of former Secretary Norton, Associate Deputy Secretary James Cason, Solicitor David Bernhardt, Director of OFA R. Lee Fleming, and lobbyist Loren Monroe, there is no evidence indicating that the decision making process was impacted in any way by improper political influence. More specifically, there is no evidence that the decisionmaker who issued the RFD – Associate Deputy Secretary James Cason – was influenced by correspondence from or meetings between former Secretary Norton and David Bernhardt (then with the Department’s Congressional and Legislative Affairs Office) and the Connecticut Congressional delegation, or any action taken by the Connecticut Governor, or by congressional hearings, or by any alleged lobbying activity. After all of the discovery and depositions, STN has not shown *any* actual impact on the RFD by congressional, public official, lobbyist, or media noise.

First and foremost, there was no evidence that Cason had any contact with the Connecticut Congressional delegation, the White House, or any lobbyist concerning the

STN petition. His deposition testimony established that he did not receive, directly or indirectly, any communication from the Connecticut Congressional delegation (JA 1089), any Connecticut state officials (JA 1092), the citizen group TASK, which opposed STN recognition (JA 1095), or from the lobbying firm that had been retained by TASK (JA 1097). Cason also testified that he did not consider any factors or criteria that were not discussed in the RFD. JA 1109. He testified that “the thing that was relevant to that decision . . . was the conclusion of all the data . . . and the analysis of the OFA staff . . . that allowed them to draw a conclusion . . . on a criteria-by-criteria basis.” JA 1108. STN presented no evidence that the RFD was a result of undue political influence on Cason. On this basis alone, the district court was justified in granting summary judgment against STN.

Even looking at those officials one step removed from Cason – the decision maker who issued the RFD – the evidence is one-sided: There is no evidence that the political activities in Connecticut or Washington had any impact on other actors within the Department. For example, David Bernhardt, formerly of the Department’s Congressional and Legislative Affairs Office, testified at his deposition that he was not aware of any meetings by members of Congress with the White House specifically regarding the Schaghticoke petition. JA 1043. Nor was he ever advised that anyone at the White House had received complaints from members of Congress concerning the STN petition. *Id.* Bernhardt never conveyed any information to James Cason regarding matters at the White House. JA 1044. Accordingly, there was no evidence that the political

activity of which STN complains was somehow channeled to the Department – much less to Cason himself – through the White House.

Indeed, other portions of Bernhardt’s testimony confirmed that actions by Connecticut officials were not so exceptional that they could have been expected to have any effect on agency decision making. Bernhardt attended two meetings with the Connecticut delegation in March and April 2004 and recalled them as more specifically concerned with Indian gaming, general concerns over the acknowledgment process, and land claims, although dissatisfaction with the Schaghticoke decision was expressed. JA 1034, 1035. At that time, no Schaghticoke matter was pending before the Department. Bernhardt pointedly disagreed with the characterization of the meetings as being on the STN decision. JA 1036. He noted further that, on a relatively regular basis, a member of Congress is not pleased with a particular act that the Department has taken, “[a]nd we go up and visit with them and continue on our way.” JA 1035. Contrary to STN’s suggestion that the congressional meetings, hearings and criticisms somehow influenced the STN RFD, it is clear from the testimony of David Bernhardt and others that Department officials were used to such criticism and were not influenced by it.

STN attempts to raise the specter of political influence in the RFD by suggesting that former Secretary Norton was so intimidated by the Connecticut congressional delegation in the Spring of 2004 that she “distanced herself” from what had previously been an active role in the STN

recognition process. STN Brief at 70, 81. This argument mischaracterizes the record. First, prior to the issuance of the FD, Secretary Norton had only limited involvement in the acknowledgment process. When OFA requested guidance in its Briefing Paper dated November 14, 2004, and presented options that included departing from precedent, JA 875, former PD AS-IA Aurene Martin met with Secretary Norton to discuss the matter because it involved an issue with a broad application beyond the individual case – namely, the “role of state recognition of a tribe.” JA 957, 958, 960. Although STN’s brief describes Secretary Norton as having been “‘very involved’ in the STN acknowledgment process,” STN Br. at 70, in fact the Secretary testified only that she had been “very involved” “in the specific legal policy decision on how to handle the state recognition of the tribe,” JA 960.

Second, Secretary Norton’s deposition testimony demonstrates that she was not intimidated by the congressional delegation. Secretary Norton was very clear in her deposition that her priority for her Administration was to avoid the “complaints that decisions had been made by ‘politicals’ in the previous administration who counteracted the findings of the professionals on the career staff.” JA 948, 955. She reaffirmed her actions to keep politics out of the decision making process and have acknowledgment decisions based on the merits of the inquiry by the career professionals. JA 955, 976, 989. Concerning the STN RFD, Secretary Norton testified that she had no role in the final decision other than that she might have asked the Associate Deputy Secretary whether

he was following the career staff recommendation, and he said he was. JA 963.<sup>3</sup>

As to the “threat” from Congressman Wolfe of Virginia that he would inform the White House that she ought to be fired, Norton pointed out that she lost no sleep over it. JA 990. At her deposition, Secretary Norton presented a full accounting of the meeting with the congressional delegation, characterizing their concerns as being related to gaming, not the acknowledgment decision itself. JA 989-990. She offered to work with the delegation on amendments to the Indian Gaming Regulatory Act to address their concerns. JA 989-990. Norton testified that she and others, including Cason, “did not take [the threat] seriously.” JA 1017.<sup>4</sup> Even if viewed as a “threat,” the deposition testimony of Mr. Fleming, Director of OFA, indicated that he did not recall even being aware of it at the time and thus could not have been influenced by it. JA 1219.

Contrary to STN’s argument that Governor Rell pressured Secretary Norton regarding the Schaghticoke petition, the administrative record shows that Secretary

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<sup>3</sup> “To the extent I had conversations with him [Mr. Cason], it would have been directing him to follow the established administrative process and not take extraneous matters into consideration.” Norton Dep. 263:9-13. JA 1014.

<sup>4</sup> “I did not anticipate that anything would come of that threat even if he did follow through and call the White House. And, in fact, nothing did come from that.” Norton Dep. at 264, JA 1014.

Norton had no intention of discussing specific acknowledgment cases with the Governor and that the Governor's staff was so informed. Furthermore, Secretary Norton did not even recall having a phone conversation with Governor Rell. JA 1004. As to STN's concerns over Attorney General Blumenthal's contact with the Secretary in the hallway following a meeting of Attorneys General, the Secretary testified, "I talked with him briefly . . . I don't recall any in-depth discussion." JA 983.

Lacking any evidence that Cason was influenced in issuing the RFD, or that Secretary Norton received and transmitted political pressures to Cason, STN resorts to arguing that formulation of the RFD was a "collaborative decision" and that the career professionals on the OFA staff must have been influenced by political pressure. STN Br. at 74. For example, STN cites Representative Johnson's July 2004 survey of constituents concerning a casino in western Connecticut and its delivery to the Department as an example of undue influence, citing an e-mail from OFA Director Fleming in which he stated, "I view this as pressure from an elected official." JA 1824. A review of the complete e-mail exchange, however, demonstrates that Representative Johnson's PR ploy was appropriately handled by the Department and was never a factor in the acknowledgment process. JA 1824-1827. As Fleming also noted, acknowledgment decisions "must be based on the evidence," and the "acknowledgment process is not a popularity contest or poll." JA 1824. Fleming testified that the postcard survey played no role whatsoever in the acknowledgment process, which is concerned with application of the seven mandatory criteria to the evidence.

JA 1244. Fleming saw the attempted delivery of the postcard survey for what it was: a PR ploy and an “attempt” at political pressure which he successfully deflated. In fact, the survey did not mention Schaghticoke, and it was never provided to OFA. Furthermore, even though Fleming was aware of the casino survey (though not its results), Cason testified that he had no discussion with Fleming about it. JA 1099. Secretary Norton herself knew little, if anything, about it. JA 973, 1004.

STN also argues that congressional hearings exerted undue influence on the Department, exposing the Director of OFA to the hostility of Congress. Fleming testified that for him, these hearings are routine matters, having attended over 19 hearings and having testified at four. JA 1221. In response to questioning about whether he was intimidated or influenced by comments from Representatives Johnson and Shays, or Attorney General Blumenthal at these hearings, Fleming emphatically answered that he was never intimidated or influenced. JA 1245.

Associate Deputy Secretary Cason indicated that he did not remember being briefed on the hearings, although he assumed that he would have been informed during his routine meetings with BIA staff. JA 1076, 1088. Similarly, Secretary Norton was not aware of the hearings other than as routine matters. JA 948, 980. The district court rejected the suggestion that congressional hearings pressured the Department to change its acknowledgment decision concerning the STN. “In this case, the evidence presented does not persuade the Court that the Congressional hearings, *ex parte* communications between legislators and

agency officials, or the publicity on the issue as a whole ultimately affected the Department's decision to issue the RFD." JA 505, 533. "The Congressional hearings in this case reviewing the BIA's acknowledgment processes do not amount to undue interference with the Department's RFD of STN's status." JA 535.

As to the role of the lobbying firm hired by a citizens group, Loren Monroe of Barbour Griffith & Rogers stated at his deposition that "our main point had nothing to do with inside back room deals for or against the Schaghticoke. . . .all we had to do was press for current law and regulations and precedent to be followed in a transparent and open way." JA 1155. Indeed, Monroe indicated that persons were so sensitive to the lobbying issue, that there would have been a push-back if the citizens group had asked for anyone at the White House to contact the Department.<sup>5</sup> Moreover, Monroe had no contact with anyone at the Department of the Interior, let alone the

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<sup>5</sup> In response to the question: "Did anyone from the White House ever tell you that they were going to contact Department of Interior?" Mr. Monroe answered: "They did not. They were – again, this was the height of the Abramoff investigation, so everybody was hypersensitive, particularly the White House, particularly Congress, about being seen as meddling or doing anything improper at the BIA, Indian affairs . . . Most people had a hands-off attitude toward it.

\* \* \* So no, we did not ask anybody at the administration to contact anybody at BIA, and frankly, had we, I think we would have gotten a big pushback because I don't think anybody would have been comfortable doing so." JA 1110, 1162-1163.

decision maker, James Cason, or any of the OFA staff. JA 1159, 1179, 1193. There was no influence by the lobbying firm, undue or otherwise, on the issuance of the RFD.

In short, the only evidence in the record shows that neither OFA nor the official who approved the RFD was influenced by the various political efforts surrounding STN recognition. To conclude otherwise would be to let speculation trump evidence.

**2. There is no legal rationale for invalidating action by an unbiased agency decisionmaker based solely on an unfounded “appearance of bias.”**

Unable to meet the recognized standard of showing actual influence on the decision maker, STN asks this Court to depart from its precedents and “embrace” a new standard – that the “appearance of bias” alone invalidates an agency decision, “even in the absence of evidence that the bias or pressure actually caused or produced the result.” STN Br. at 63. STN candidly recognizes that this Circuit has never adopted such a theory. It nevertheless points to decisions of the D.C. Circuit which, it claims, has adopted a broad principle that even unbiased decisionmaking can be overturned based solely on appearances to the contrary. STN’s argument is flawed in at least two respects. First, it mischaracterizes the tribal recognition process as an adjudicative proceeding, in an effort to reduce the level of influence that must be shown to invalidate a recognition decision. Second, it dramatically misreads the D.C. Circuit opinions upon which it relies, by overlooking the fact that

agency action may be invalidated by a showing of an “appearance of bias” only when there is evidence that improper influence was exerted over the actual decision maker – not when the decision maker is effectively insulated from outside political pressures.

**a. The acknowledgment process is an informal agency decision making process, not a formal adjudicative proceeding.**

STN seeks to define the administrative process for tribal acknowledgment as adjudicative or quasi-judicial in nature, STN’s Brief at 63, for the obvious reason that courts are much less tolerant of possible political pressure when adjudicative proceedings are involved. The tribal acknowledgment process outlined above, however, is not a formal adjudication or formal proceeding.

The APA defines “agency proceeding” as a “rule making,” “adjudication,” or “licensing” process defined in 5 U.S.C. § 551. An adjudication is the agency process for the formulation of an order and is further defined in § 554 (an adjudication required by statute to be on the record after opportunity for an agency hearing).

The federal acknowledgment process is not an adjudication within the meaning of these sections of the APA. It is not comparable, for example, to a social security disability review hearing before an Administrative Law Judge or a removal hearing before an Immigration Judge. As noted above, the acknowledgment regulations provide

for technical assistance and an informal one-on-one exchange of information between the OFA professional staff and the petitioner or interested parties, their researchers, or informed parties.<sup>6</sup> In this case, the negotiated Scheduling Order in the consolidated land claim cases as amended, ¶ 1, similarly reflects the ability of the parties to discuss matters informally with the acknowledgment staff, and allowed contacts with persons in the Office of the Secretary or Office of the AS-IA after two days' advance notice, without any requirement that other persons be present. JA 1510. By contrast, only proceedings before the administrative judges of the IBIA may be considered adjudicative or quasi-judicial within the meaning of the APA.

Although the district court described the federal acknowledgment system as an “adjudicative process,” that characterization improperly transposes concepts from a case dealing with collateral estoppel into the APA context. In this regard, the district court relied on *Golden Hill*

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<sup>6</sup> The informal nature of the decision making process is apparent in the notice published in the Federal Register, “Office of Federal Acknowledgment: Reports and Guidance Documents; Availability, etc..” This notice “encourage[s]” petitioners to provide a copy of their non-privacy material directly to the State Attorney General, an interested party in the acknowledgment process, and “advises” petitioners, third parties and their representatives not to contact the Associate Deputy Secretary or any other Department official who may have been delegated authority to decide matters concerning the acknowledgment petition “during the last 60 days” before a PF or FD is issued. 70 Fed. Reg. 16513, 16516 (March 31, 2005).

*Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 200 (D. Conn. 2006). JA 532. The petitioner in that case asked the court to make its own determination of tribal status after the Department had already denied the petition under the acknowledgment regulations. The court deferred to the Department's factual findings in the acknowledgment decision on the Golden Hill petition for purposes of giving those findings collateral estoppel effect. The court noted that the acknowledgment process entailed the essential elements of an adjudication, including adequate notice, the right to present evidence and legal argument, the right to respond, and a final decision. *Id.* at 199-200. The court concluded that the "Final Determination was an 'adjudicative' one, sufficient for application of the collateral estoppel doctrine." *Id.*

The court did *not* rule that the administrative process was a formal adjudicative process within the meaning of the APA, 5 U.S.C. § 551 *et seq.*, which would impose a prohibition on *ex parte* communications. The court recognized that the regulations clearly provide for a give-and-take exchange of information without all sides being notified or present. The regulations provide for *ex parte* informal technical assistance, available individually to the petitioner or interested parties, and the petitioner making filings without providing them to interested parties, both of which are inconsistent with a formal adjudicatory process. In reaching its conclusion, the *Golden Hill Paugussett* court did not distinguish between informal and formal adjudicative proceedings. Indeed, if the acknowledgment process were considered a formal adjudicative process within the meaning of the Administrative Procedure Act,

then the informal meetings between STN and the OFA researchers would have been prohibited *ex parte* contacts. Such a conclusion would radically change the process in effect since 1978 and would dramatically alter the agency's ability to provide technical assistance when applying its regulations for determining tribal status. While the Department agreed with the court's findings in *Golden Hill Paugussett* and its application of the collateral estoppel doctrine, the agency considers its acknowledgment process to be an informal adjudicative process and the give-and-take exchange of information provided for in the regulations is proper, is not *ex parte* communications, and is inconsistent with a formal adjudicatory proceeding.<sup>7</sup> See *United States v. Navajo Nation*, 537 U.S. 488, 513 (2003) (contrasting administrative appeal process under 25 C.F.R. § 2.20, which is "largely unconstrained by formal requirements," with "review of a more formal character, in which *ex parte* communications would have been prohibited," under 43 C.F.R. § 4.27(b)).

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<sup>7</sup> *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1540 n.15 (9th Cir. 1993); *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (in informal agency policymaking, concept of *ex parte* contacts is of "questionable utility"); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 118 n.9 (2d Cir. 1984) (noting that FCC rules permit *ex parte* contacts in informal rule making proceedings, until an item is placed on Commission's meeting agenda); *Viacom Int'l Inc. v. FCC*, 672 F.2d 1034, 1043 (2d Cir. 1982) (Commission's rules against *ex parte* contacts not violated since it was not a rule making or an adjudication but an interpretation of an existing rule).

Incorrectly characterizing the informal process established by the acknowledgment regulations as a formal adjudication, STN compares the actions taken at the congressional hearings relating to the process, to those in *Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966). This comparison fails for at least three reasons.

First, *Pillsbury* concerned the Federal Trade Commission, a “quasi-judicial agency,” *id.* at 960, which was then considering whether to void a corporate merger involving the Pillsbury baking company. While the case was pending before the agency, the FTC chairman was called before subcommittees of the Senate and House Judiciary Committees, and was grilled at length by Members of Congress who strongly disagreed with an interim decision that the FTC had taken in the Pillsbury matter. 354 F.2d at 955-56. The questions about the pending case were so “probing” that the FTC chairman felt obliged to disqualify himself from further participation in the still-pending adjudication. *Id.* at 956, 961, 963. *Pillsbury* clearly focused on the judicial function of the Commission as material to its holding, noting that the congressional intervention was not in the agency’s *legislative* function, but rather, in its *judicial* function. *Id.* at 964. The court in *Pillsbury* made this distinction because the congressional investigation was “focuse[d] directly and substantially upon the mental decisional process of a Commission *in a case pending before it.*” *Id.* *Pillsbury* might provide an apt comparison to proceedings before the IBIA, but STN does not claim that the IBIA was subjected

to extraneous pressures – indeed, it does not raise any challenge to the IBIA decision, which vacated the FD.

Second, in this case, the Congressional hearings referenced by STN focused generally on the acknowledgment process itself, rather than the STN FD in particular. Further, most of the activity complained of by STN on this appeal occurred during the three-month period between the issuance of the FD and the filing of the Requests for Reconsideration, when no request relating to the STN petition was pending before the Department. Indeed, the Senate Oversight Hearing, held the day before the IBIA issued its two lengthy opinions, was the only one that took place after the Associate Deputy Secretary James Cason was assigned the functions and duties of the Assistant Secretary-Indian Affairs, and it occurred months before he issued the RFD.

Third, unlike *Pillsbury*, the congressional hearings in this case did not probe into the particular case at issue here or into the “mental decisional processes” of the deciding official, James Cason. Unlike the FTC chairman who recused himself in *Pillsbury*, Cason was not even in attendance at the hearings. Indeed, one of the most striking facts in *Pillsbury* was that, “of the four commissioners who actually participated in the final 1960 Pillsbury decision,” two actually appeared before the congressional committees that had questioned FTC officials about the then-pending case and were therefore “substantially exposed to whatever ‘interference’ was embodied in the hearings.” *Id.* at 956. A third was “indirectly ‘affected’” because, at the time of those hearings, he served as the assistant to a third official

was appeared before the committees. *Id.* Unlike the *Pillsbury* officials, Cason was not exposed to the congressional activities regarding tribal recognition, and so there can be no claim that he was “affected” in any way. *See Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978) (declining to invalidate agency decision based on *Pillsbury* where “none of the persons called before the subcommittee [in hearings about BIA eligibility determinations] was a decisionmaker in these cases”).

**b. There is no legal basis for invalidating an RFD that is the product of an unbiased decisionmaker based solely on an “appearance of bias,” where the alleged political influence was not exerted upon the decisionmaker.**

As noted above, this Court has held that in order to make out “a claim of improper political influence on a federal administrative agency, there *must* be some showing that the political pressure was intended to and *did cause the agency’s action to be influenced* by factors not relevant under the controlling statute.” *Town of Orangetown*, 740 F.2d at 188 (emphasis added); *Chemung County*, 804 F.2d at 222. In other words, the law of this Circuit requires proof of an actual impact upon a decisionmaker before an agency action will be invalidated by allegations of extraneous political influence.

Unable to meet the recognized standard of showing actual influence on the decision maker, STN asks this Court

to adopt a new rule that the “appearance of bias” alone invalidates an agency decision, “even in the absence of evidence that the bias or pressure actually caused or produced the result.” STN Br. at 63. Even assuming that a panel of this Court could adopt a new standard that abrogates circuit precedent – which it cannot – STN’s argument misreads the D.C. Circuit opinions upon which it relies. All of the decisions dealing with an “appearance of bias” require a showing that extraneous influences were brought to bear on the actual decisionmaker, such that a nexus between the agency’s decision and those influences can be traced. The cases are most sensibly read to hold only that where the actual impact of extraneous influences cannot be determined, direct interference with the decision maker may be presumed to have tainted the ultimate decision. An examination of these cases demonstrates these points.

For example, STN cites *Koniag, Inc., The Village of Uyak v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978). That case concerned decisions of the Secretary of the Interior, finding certain Native Alaskan villages ineligible for certain federal benefits. For reasons that are unrelated to the questions at issue here, the D.C. Circuit invalidated the agency action. *Id.* at 608-10. When determining whether the proper remedy was to remand the matter to the Secretary, the D.C. Circuit considered whether the Secretary remained tainted by “improper congressional interference.” *Id.* at 610-11.

The court looked first at the effect of congressional hearings, held when the Department and the Secretary were considering the cases, where Congressman Dingell “made

no secret of his displeasure with some of the initial BIA eligibility determinations.” *Id.* at 610. But the court found no flaw in the proceedings in that respect because the decision maker had not been called before the subcommittee. *Id.* Further, an advisor’s mere presence when the subcommittee expressed its strong beliefs that the BIA decisions were in error was not enough, even though that advisor briefed the Secretary at that time. *Id.*

In contrast to the finding that congressional criticism during hearings did not invalidate the decision, the *Koniag* court then reviewed a letter actually received by the decision maker (there, the Secretary) from Congressman Dingell immediately before his determination that a number of the villages were ineligible, and found that the letter “compromised the appearance of the Secretary’s impartiality” and thus “compromised the appearance of the Secretary’s impartiality.” *Koniag*, 580 F.2d at 610.

As the *Koniag* opinion makes clear, an appearance of bias or partiality is a factor only if it is the decision maker who is the recipient of the untoward political interference. In the present case, as discussed more fully above, the deposition testimony was clear that the actual decision maker on the RFD, James Cason, was not the recipient of any outside political pressures. He did not attend any of the congressional hearings regarding the acknowledgment process. Nor is there any indication that he was briefed on their content prior to making his decision in October 2005. He testified that he never discussed any Schaghticoke matter with Bernhardt, who attended two congressional meetings. JA 1085, 1089. Unlike *Koniag*, where the letter

that created the appearance of partiality was sent to the decision maker himself, Cason received no such letter and had no contact with the congressional delegation or any lobbyist on this matter. In his declaration, ¶12 (JA 1292) Cason made clear that he received no pressure from anyone.

The D.C. Circuit's decision in *ATX* reinforces the conclusion that congressional activities do not call into question the RFD regarding STN, because they were not aimed at the decision maker. *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522 (D.C. Cir. 1994). In *ATX*, an ALJ of the Department of Transportation had presided over a quasi-judicial proceeding and determined that ATX should not be granted permission to operate a new airline, and the Department issued a final order embodying that decision. *Id.* at 1525-26. ATX filed a petition for review, claiming that members of Congress, who were hostile to the founder of ATX, had improperly interfered with the proceeding. *Id.* at 1528. The court looked at two proposed bills in the House, letters to the Secretary, and a Congressman's testimony before the ALJ during the agency hearing. One of the basic principles guiding the court was that "congressional actions not targeted directly at the decision makers – such as contemporaneous hearings – do not invalidate an agency decision." *Id.*

Measured against this standard, the court found no flaw in the process. As most relevant here, the fact that congressional letters influenced the Secretary of Transportation to set the matter for a hearing was of no moment, because the only problematic influence is "when congressional influence *shapes* the agency's determination

of the merits.” *Id.* (emphasis added). As the court explained, the Assistant Secretary who acted as the final decision maker was aware of the letters, but he had “insulated his own decisionmaking process from congressional interference” and the basis of his decision was clearly laid out in a lengthy published opinion. *Id.* Nor was there any reason to infer that the letters influenced his decision, given that he did not reverse the ALJ or issue a weakly reasoned determination. *Id.* at 1529. In other words, there was no basis for concluding that the agency’s appearance of impartiality had been tainted by the exertion of influence upon the decision maker such that the agency action should be invalidated.

Moreover, the court found no evidence that the congressional activity had *actually* affected the outcome on the merits. *Id.* The nexus between the pressure exerted and the actual decision makers was so tenuous and the decision so strictly on the merits that it had to conclude political influence did not enter the decision maker’s “calculus of consideration.” *Id.* at 1530 (quoting *Volpe*, 459 F.2d at 1246).

As in *ATX*, the record shows no nexus between the alleged pressure and the decision maker, James Cason. Before Cason signed the consensus recommended RFD, as was his custom, he polled each person involved in preparing the decision and asked if anyone had pressured them to reach the result in the recommended decision. JA 1290, 1292. Each one stated that they were not pressured to reach a particular result. JA 1292. Cason also declared that he was not pressured to reach a particular result on STN’s

petition by anyone outside the Department or from within the Department. *Id.* (¶ 12). In addition, although he was aware of Secretary Norton’s meeting with members of the Connecticut delegation on the federal acknowledgment process, “[t]his knowledge did not impact my decision on the Schaghticoke petition.” JA 1293 (¶ 16). Like the Assistant Secretary in *ATX*, Cason’s testimony demonstrates that he “insulated his own decisionmaking process from congressional interference,” 41 F.3d at 1528.

Nor is there any basis for inferring, circumstantially, that Cason’s decision was influenced by congressional pressures. As in *ATX*, the grounds for the final agency determination were publicly laid out in a lengthy opinion constituting the RFD. 41 F.3d at 1529. Likewise, as in *ATX*, the decisionmaker did not “suddenly . . . reverse course or reach a weakly-supported determination” that might warrant an inference of undue influence. *Id.*; *see also Press Broadcasting Co. v. FCC*, 59 F.3d 1365, 1370 (D.C. Cir. 1995). It is undisputed that Cason adopted an RFD that was recommended by the career staff at OFA, and that this recommendation came more than eighteen months after the FD and five months after the IBIA had identified flaws in the FD and remanded for further reconsideration. STN does not argue that the IBIA’s decision was poorly reasoned or politically tainted; indeed, STN has abandoned any claim that the RFD is incorrect on the merits, let alone “weakly-supported.” Accordingly, STN does not dispute the district court’s conclusion that the RFD was a well reasoned, thorough, researched decision supported by the record evidence. JA 539, 541, 545, 549. In light of that undisputed finding, it would be purely speculative to infer that Cason’s

decision must have been shaped by extraneous political influences.

**II. The district court properly found that there was no violation of the Vacancies Reform Act and that the Reconsidered Final Determination was made by an authorized official.**

**A. Relevant facts**

Within the Department of the Interior there is an Office of the Secretary which includes the Secretary of the Interior, a Deputy Secretary, four Assistant Secretaries and a number of staff and support positions. The most senior staff position is the Associate Deputy Secretary. One of the four Assistant Secretaries is the Assistant Secretary - Indian Affairs (AS-IA). The AS-IA has a Principal Deputy (PD AS-IA). For most of the period during which Gale Norton was the Secretary of the Interior, the Deputy Secretary was Steven Griles. James Cason became the Associate Deputy Secretary on August 9, 2001. This position did not require appointment by the President or confirmation by the Senate.

Associate Deputy Secretary Cason was delegated duties involving federal acknowledgment of Indian tribes when both the AS-IA and the PD AS-IA positions became vacant. The chronology is as follows: On December 9, 2003, David Anderson became the AS-IA after appointment by the President and confirmation by the Senate. The PD AS-IA was Aurene Martin, and in that capacity she issued the STN Final Determination on January 29, 2004. Shortly thereafter, on April 8, 2004, AS-IA Anderson formally

recused himself from all matters involving federal recognition of Indian tribes. Later, in response to the anticipated resignation of PD AS-IA Aurene Martin effective September 10, 2004, AS-IA Anderson transferred the functions and duties of the PD AS-IA to Michael Olsen, who was a Counselor to the AS-IA. Mr. Olsen undertook the functions and duties of the PD AS-IA, but was not appointed to that position until June 2006; until then, he remained Counselor to the AS-IA. When AS-IA Anderson resigned effective February 12, 2005, the Office of AS-IA became vacant. Since the position of PD AS-IA was already vacant, there was no one who would automatically become the acting AS-IA. Accordingly, Secretary Norton issued Secretarial Order No. 3259, which delegated the non-exclusive functions and duties of the AS-IA to Associate Deputy Secretary Cason, effective February 13, 2005. JA 1912. This delegation was extended on August 11, 2005, and March 31, 2006. JA 2041. The AS-IA position remained vacant and Mr. Olsen remained Counselor to the AS-IA while also performing the functions and duties of the PD AS-IA.

The IBIA vacated the STN FD on May 12, 2005, and remanded the matter to the AS-IA for reconsideration. Since the AS-IA position remained open, the duty of deciding the reconsideration was handled by Associate Deputy Secretary Cason under the delegation in Secretarial Order 3259. On October 11, 2005, Cason issued the RFD declining to acknowledge the STN as an Indian tribe under federal law. JA 562.

As noted above, the district court ruled that the Secretary of the Interior permissibly delegated the non-exclusive duties and functions of the vacant AS-IA position to Associate Deputy Secretary Cason, consistent with the Vacancies Reform Act. JA 550-555.

### **B. Governing law and standard of review**

The Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d (VRA or Act) governs how a vacancy in a position held by an official appointed by the President with the advice and consent of the Senate (PAS) may be filled on an “acting” basis. *See* 5 U.S.C. § 3345. Specifically, the VRA requires that the employee who holds the position of “first assistant” to the absent PAS shall automatically perform the functions and duties of the PAS position, unless the President designates another person to temporarily perform the functions or duties of the PAS. The Department’s orders of succession for the AS-IA establish that the PD AS-IA is the first assistant to the AS-IA, who would, upon a vacancy, succeed to the office on an acting basis pursuant to 5 U.S.C. § 3345(a)(1). JA 2032. In early 2005, when the AS-IA resigned, the PD AS-IA position was vacant. With no one appropriately situated to become the acting AS-IA, the Secretary delegated the non-exclusive functions and duties of the AS-IA position to the Associate Deputy Secretary, James E. Cason.<sup>8</sup>

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<sup>8</sup> The President did not exercise his option under Section 3345(a)(2) and (3) of designating another specified officer to become acting AS-IA.

Although there is no private right of action under the VRA itself, STN appears to raise its VRA claim as part of its APA action. *See* JA 159-160. In effect, STN appears to claim that if Cason lacked authority to issue the RFD, then that decision was “otherwise not in accordance with law” under APA § 706(2)(A).

### **C. Discussion**

#### **1. The Vacancies Reform Act permits reassignment of any functions or duties not required by statute or regulation to be performed by the official occupying the position.**

In a preliminary Ruling on March 19, 2007, the district court acknowledged that the Department did not have anyone appropriately situated to become acting AS-IA under the VRA, and recognized that the Act permits reassignment of any functions or duties not required by statute or regulation to be performed by the official occupying the position. JA 110. The Court then found that the Department made a permissible delegation of the AS-IA’s non-exclusive functions and duties to the Associate Deputy Secretary:

Secretary Norton issued Secretarial Order 3259 . . . which re delegated the authority delegated to the AS-IA to the Associate Deputy Secretary, “except for those functions or duties that are required by statute or regulation to be performed only by the [AS-IA].” (Secretarial Order 3259, Exh. 2 to Fed. Resp. Mem.

Opp. Mot. Amend.) The Order provided that the duties required by statute or regulation to be performed only by the AS-IA will be performed by the Secretary herself, in accordance with the [VRA]. Cason, therefore, did not assume the position of Acting AS-IA, but only assumed the duties of the position not required by statute or regulation to be performed only by the AS-IA.

JA 133 (footnote omitted). Thus, after this preliminary ruling, there was no question about whether the Department permissibly delegated to Cason the authority to perform the non-exclusive duties and functions of the AS-IA under the Act. The only question remaining was whether tribal acknowledgment determinations are an exclusive duty to be performed only by the AS-IA (or, if the position is vacant, the Secretary). JA 133. When the court revisited this issue in the summary judgment ruling, it agreed “that acknowledgment decisions are not a function or duty assigned by statute or regulation only to the AS-IA for purposes of the VRA, 5 U.S.C. § 3348.” JA 554.

**2. Tribal acknowledgment determinations are not exclusively assigned by statute or regulation to the AS-IA.**

The Court correctly decided that Federal acknowledgment determinations are not duties or functions required by statute or regulation to be performed only or exclusively by the AS-IA. First, there is no question that acknowledgment determinations are governed by regulations at 25 C.F.R. Part 83. This Part cites as its

statutory authority the Secretary of the Interior’s general authority found at 5 U.S.C. § 301, 25 U.S.C. §§ 2 and 9, and 43 U.S.C. § 1457.<sup>9</sup> Review of these statutory sections reveals that they do not even mention acknowledgment determinations, let alone assign the function “only,” “exclusively,” or “solely” to the AS-IA. Accordingly, the requirement to make acknowledgment determinations is not assigned by statute only to the AS-IA.

Second, under the Department’s regulations, the AS-IA has responsibility for making acknowledgment determinations on behalf of the Secretary. *See* 25 C.F.R. Part 83. JA 2229. The regulations, however, never indicate that acknowledgment is a function or duty assigned “only,” “exclusively,” or “solely” to the AS-IA. To the contrary, the regulation explicitly makes tribal acknowledgment determinations a function that may be delegated by the AS-IA, when it defines the term Assistant Secretary in Part 83 to include “[the AS-IA], *or that officer’s authorized representative.*” 25 C.F.R. § 83.1 (emphasis added). Indeed, prior to making the delegation to the Associate Deputy Secretary, the Department reviewed the functions and duties of the AS-IA to determine whether any such duties are required to be performed only by the AS-IA. This review identified only three potentially relevant statutory sections and no regulations assigning functions or duties

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<sup>9</sup> Part 83 constitutes an exercise of the Secretary’s authority to delegate duties to Departmental officers and employees under Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), 5 U.S.C. Appendix 1 (“Reorganization Plan No. 3”).

exclusively to the AS-IA. None of these involved acknowledgment determinations. JA 2019, 2037. The inescapable conclusion, therefore, is that acknowledgment determinations are not assigned by statute or regulation *only* to the AS-IA for purposes of the VRA § 3348.

Although STN appears to recognize that acknowledgment determinations are delegable non-exclusive functions, they nonetheless attempt to fashion an exclusive function or duty out of the definition section in 25 C.F.R. § 83.1. STN seems to argue that the definition section creates an exclusive duty for the AS-IA to designate who must make an acknowledgment determination. STN Br. at 85. This is not the case, because this definitional language does not assign any function or duty to the AS-IA or indeed require any action of the AS-IA. Rather, it provides that other officials may perform the responsibilities of Part 83, with the condition precedent that they have been designated to do so. In contrast to this definition are those sections that actually assign some function or duty to the AS-IA, as defined in § 83.1. For example, § 83.10(a) provides that “the [AS-IA] shall cause a review to be conducted,” and § 83.10(b) states that “the [AS-IA] shall conduct a preliminary review.” These and others in Part 83 are the sections that assign a function or duty to the AS-IA. The definition section (§ 83.1) merely confirms that the functions or duties are not exclusive to the AS-IA.

Even if the Court accepted STN’s claim that § 83.1 somehow assigns only to the AS-IA the decision of whether to delegate an acknowledgment determination, the

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

**3. The Vacancies Reform Act permits the Secretary to delegate certain non-exclusive responsibilities of the AS-IA.**

STN claims that the Department violated the VRA because the Act required Michael Olsen, whom STN describes as the “acting” Principal Deputy AS-IA, to become the acting AS-IA when that position became vacant, and not James Cason. This is wrong for two reasons.

First, as noted above, the Department did not install James Cason as “acting” AS-IA. He remained the Associate Deputy Secretary, and was simply delegated the non-exclusive functions and duties of the AS-IA.

Second, Michael Olsen did not become the PD AS-IA until June 2006, and until that time could not succeed the AS-IA under the VRA. Prior to that time, he remained the

Counselor to the AS-IA. It is true that when PD AS-IA Aurene Martin resigned in September 2004, then-AS-IA Mr. Anderson “asked Mike Olsen, Counselor to the Assistant Secretary-Indian Affairs . . . to assist me in managing the workload normally assigned to the Principal Deputy Assistant Secretary.” JA 2027. As a result, while serving as Counselor, Olsen was also essentially functioning as the *acting* PD AS-IA. A person who is only “acting” as a first assistant to a PAS cannot succeed to the “acting” PAS position, i.e., one cannot be a “double acting.”<sup>10</sup>

Finally, despite STN’s claims, Olsen’s status at the time is not relevant to determining whether the delegation of non-exclusive functions and duties to Mr. Cason somehow violated the VRA. For even if Olsen, or someone else, had been the acting AS-IA, it was still permissible under the VRA for the Secretary to re-assign or re-delegate the non-exclusive duties of the AS-IA position pursuant to the

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<sup>10</sup> See *United States v. Halmo*, 386 F. Supp. 593, 595 (D. Wis. 1974) (In October 1973, Robert Bork, the solicitor general at the Department of Justice, was acting deputy attorney general, the first assistant position to the attorney general. When the position of attorney general became vacant, Mr. Bork became acting attorney general because of his appointed position as the solicitor general. By law, the solicitor general was next in line to succeed the attorney general after the deputy attorney general: “Mr. Bork assumed office not as a “first assistant” under the provisions of 5 U.S.C. § 3345 and 28 U.S.C. § 508(a), but rather as solicitor general, Mr. Bork became acting attorney general pursuant to 28 U.S.C. § 508(b) and 28 C.F.R. § 0.132(a).”)

Secretary's authority under Section 2 of Reorganization Plan No. 3. Thus, the focus on Olsen serves no purpose because the propriety of the delegation hinges on the authority of the Secretary to reassign non-exclusive duties, not on the availability of someone to become acting AS-IA. STN's focus on Olsen is a mere distraction that has no effect on the ultimate conclusion: that acknowledgment determinations are a non-exclusive duty of the AS-IA that can be – and were – properly delegated under the VRA.

**4. No other provision in the VRA invalidates Cason's authority to issue the RFD.**

In a footnote at the end of its brief, STN makes cursory mention of two additional arguments based on the VRA that the district court rejected. STN Br. at 86 n.8. These arguments should be disregarded based on this Court's rule that "an argument made only in a footnote [is] inadequately raised for appellate review." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir.1998). Even if preserved, both arguments are meritless.

First, although the district court ruled that the time limitations in Section 3346 of the VRA apply only to persons serving in an acting capacity under Section 3345, JA 555, STN vaguely attempts to reassert this issue on appeal by claiming that "[e]ven if Mr. Cason had been properly appointed, the 210-day limitation would have expired prior his issuance of the RFD." STN Br. at 86 n.8. As further explained by the district court, the VRA sets no time limits on redelegations of nonexclusive duties. The

only relevant time limitations are those contained in the Secretary's delegation Order.<sup>11</sup>

Similarly, STN also appears to renew the claim that the Department failed to provide notice to the Comptroller General of the AS-IA vacancy, as required by VRA § 3349, implying that such failure somehow invalidated Mr. Cason's authority to issue the RFD. STN Br. at 86 n.8. This argument was properly rejected by the district court because it was premised solely on evidence that had been stricken from the record as inadmissible hearsay – a conclusion that STN does not contest on appeal. JA 555 n.13. While it is true that the Department complied only with that portion of the VRA requiring congressional notification regarding the AS-IA vacancy, while apparently failing to also notify the Comptroller General, it is irrelevant to Cason's authority. Nothing in the VRA says that failure to report a vacancy nullifies decisions made by a person exercising the non-exclusive duties and functions of the position under a valid delegation. Further, although the VRA does not require an agency to report that it has delegated the non-exclusive duties and functions of a PAS position or the name of the person to whom those duties and functions have been delegated, the Department clearly did so.<sup>12</sup> Accordingly,

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<sup>11</sup> The Order was due to expire on August 14, 2005, but was amended twice to extend the expiration date. JA 2020, 2041-2044.

<sup>12</sup> The Department's February 2005 announcement of the resignation of AS-IA Anderson and the delegation of duties to Cason was very public: It was issued by Secretarial Order, (continued...)

STN's claim does not in any way undermine Cason's legitimate authority to issue the RFD.

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<sup>12</sup> (...continued)

posted on the Department's website, and announced via a January 31, 2005 press release. That press release was contemporaneously transmitted to the Senate Committee on Indian Affairs and the House Committee on Resources (to both the majority and minority members). *See* JA 2018, 2028-2031, 2045-2047. In addition, when Cason testified before the Senate's Committee on Indian Affairs on March 9, 2005, he told the Committee that "I am the associate deputy secretary of the Department, and currently I have delegated authorities of the [AS-IA] while we are searching for a new assistant secretary." JA 2075.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: May 6, 2009

Respectfully submitted,

NORA R. DANNEHY  
ACTING UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in cursive script that reads "John B. Hughes".

JOHN B. HUGHES  
ASSISTANT U.S. ATTORNEY

William J. Nardini  
Assistant United States Attorney (of counsel)

**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 21,000 word limitation provided by special order of this Court, in that the brief is calculated by the word processing program to contain approximately 20,593 words, exclusive of the Table of Contents, Table of Authorities, the Addendum of Statutes and Rules, and this certification.

A handwritten signature in black ink that reads "John B. Hughes". The signature is written in a cursive style with a large initial "J" and "H".

JOHN B. HUGHES  
ASSISTANT U.S. ATTORNEY

## **ADDENDUM**

## **5 U.S.C.A. § 3345 Acting Officer**

**(a)** If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--

**(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;

**(2)** notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

**(3)** notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if--

**(A)** during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

**(B)** the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

**(b) (1)** Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if--

**(A)** during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person--

**(i)** did not serve in the position of first assistant to the office of such officer; or

**(ii)** served in the position of first assistant to the office of such officer for less than 90 days; and

**(B)** the President submits a nomination of such person to the Senate for appointment to such office.

**(2)** Paragraph (1) shall not apply to any person if--

**(A)** such person is serving as the first assistant to the office of an officer described under subsection (a);

**(B)** the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

**(C)** the Senate has approved the appointment of such person to such office.

**(c) (1)** Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve

in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

**(2)** For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

## **5 U.S.C.A. § 3346 Time limitation**

**(a)** Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office--

**(1)** for no longer than 210 days beginning on the date the vacancy occurs; or

**(2)** subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

**(b)(1)** If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

**(2)** Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve--

**(A)** until the second nomination is confirmed; or

**(B)** for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

**(c)** If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

## **5 U.S.C.A. § 3347 Exclusivity**

**(a)** 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 (including the Executive Office of the President, and other than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless--

**(1)** a statutory provision expressly--

**(A)** authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

**(B)** designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

**(2)** the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

**(b)** Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

## **5 U.S.C.A. § 3348 Vacant office**

**(a)** In this section--

**(1)** the term “action” includes any agency action as defined under section 551(13); and

**(2)** the term “function or duty” means any function or duty of the applicable office that--

**(A)(i)** is established by statute; and

**(ii)** is required by statute to be performed by the applicable officer (and only that officer); or

**(B)(i)(I)** is established by regulation; and

**(II)** is required by such regulation to be performed by the applicable officer (and only that officer); and

**(ii)** includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

**(b)** Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--

**(1)** the office shall remain vacant; and

**(2)** in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government

Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

**(c)** If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

**(d)(1)** An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

**(2)** An action that has no force or effect under paragraph (1) may not be ratified.

**(e)** This section shall not apply to--

**(1)** the General Counsel of the National Labor Relations Board;

**(2)** the General Counsel of the Federal Labor Relations Authority;

**(3)** any Inspector General appointed by the President, by and with the advice and consent of the Senate;

**(4)** any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

**(5)** an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

## **5 U.S.C.A. § 3349 Reporting of vacancies**

**(a)** The head of each Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) shall submit to the Comptroller General of the United States and to each House of Congress--

**(1)** notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

**(2)** the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

**(3)** the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

**(4)** the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

**(b)** If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to--

**(1)** the Committee on Governmental Affairs of the Senate;

**(2)** the Committee on Government Reform and Oversight of the House of Representatives;

- (3) the Committees on Appropriations of the Senate and House of Representatives;
- (4) the appropriate committees of jurisdiction of the Senate and House of Representatives;
- (5) the President; and
- (6) the Office of Personnel Management.

**5 U.S.C.A. § 3349a. Presidential inaugural transitions**

**(a)** In this section, the term “transitional inauguration day” means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

**(b)** With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring--

- (1)** 90 days after such transitional inauguration day; or
- (2)** 90 days after the date on which the vacancy occurs.

**5 U.S.C.A. § 3349b. Holdover provisions**

Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office--

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.

**5 U.S.C.A. § 3349c. Exclusion of certain officers**

Sections 3345 through 3349b shall not apply to--

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that--

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation;

(2) any commissioner of the Federal Energy Regulatory Commission;

(3) any member of the Surface Transportation Board;

or

(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

**5 U.S.C.A. § 3349d. Notification of intent to nominate during certain recesses or adjournments**

**(a)** The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

**(b)** If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.