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**Supplemental Analysis to the Indian Legal Clinic's Testimony
Before the Senate Committee on Indian Affairs'
2009 Oversight Hearing on Fixing the Federal Acknowledgment Process**

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INTRODUCTION

At the "Fixing the Federal Acknowledgement Process" hearing on November 4, 2009, the Indian Legal Clinic ("Clinic") agreed to investigate alternatives to the current Federal Acknowledgment Process ("FAP") and to provide a supplemental analysis to the Senate Committee on Indian Affairs ("Senate Committee") with regards to this research. The following Student Attorneys in the Clinic assisted in drafting this supplemental analysis: Derrick Beetso, Alex Bohler, Sean Cahill, Jason Croxton, Harpreet Kaur, Dan Lewis, Julian Nava, Dallin Maybee, Rebecca Ross, and Vanessa Verri.

The Senate Committee has already identified the various problems hampering the FAP and the Office of Federal Acknowledgement ("OFA"). The Clinic recommends that Congress not undertake any initiative that merely tinkers with the current FAP. This supplemental analysis includes a discussion of fundamental changes to the acknowledgement process that should be included in any reform and a discussion of alternatives to the FAP that Congress can consider. Appendix A includes a proposed division of regions to assist in administering the process. Appendix B provides an analysis of the appeals process currently in place through the Interior Board of Indian Appeals.

Many of the reforms addressed in this report require Congress to pass an organic statute firmly recognizing and granting legitimacy to the FAP. This supplement discusses the following reforms:

- A. Keep acknowledgment decisions in OFA, provided Congress passes an organic statute (1) authorizing 25 C.F.R. Part 83 and (2) reforming key aspects of the acknowledgment process as discussed in Section I; or
- B. Pass an organic statute that (1) reforms key aspects of the acknowledgment process as discussed in Section I and (2) establishes a formalized adjudicative process by either (a) appointing an administrative law judge or (b) creating an independent commission; or
- C. Create a purely political process through the creation of a (1) White House Commission, (b) an independent political acknowledgment agency, or (c) a special investigator tasked with evaluating petitions and making recommendations regarding acknowledgment to Congress or the White House.

I. ANY REFORM IMPLEMENTED BY CONGRESS MUST INCORPORATE CERTAIN FUNDAMENTAL CHANGES TO FIX A "BROKEN" PROCESS

Whether Congress reauthorizes OFA under an organic statute or adopts an entirely new FAP, Congress should implement the following changes to resolve the existing funding, timeliness, transparency, and consistency issues impeding the process:

- A. **Funding for Applicants** – Provide additional funding for necessary expenses, such as research, hiring of experts, and long distance travel to hearings or meetings to assist in expediting the FAP.

- B. **Funding for Decision Makers** – Appropriate sufficient funding for research and investigation of petitions to decrease delays faced by petitioners.
- C. **Additional Staffing** – Increase staff levels to facilitate research and to expedite the evaluation of petitions.
- D. **Clear Standard of Proof** – Define a clear standard of proof to ensure the appropriate legal standard is applied.
- E. **Transparency** – Adopt requirements that increase transparency. True transparency increases visibility for both parties. Transparency will provide a means for petitioners to determine what is necessary to complete their petitions. The acknowledgment decision making body will be able to "weed out" spurious or problematic petitions faster because a petitioner's lack of evidence will be more readily apparent.
- F. **Discovery** – Provide petitioners with access to all documents in their petition files. As Senator Tester identified during the November 4, 2009 hearing, it is difficult for an "expert" with no direct knowledge of the state where the tribe lives to make an informed determination whether to recognize a tribal applicant. Discovery will give petitioners an opportunity to rebut evidence lacking credibility and supplement the record with credible and relevant evidence.
- G. **Initial Cursory Review** – Authorize the acknowledgement decision making body to (1) expedite the denial of petitions for those that clearly cannot meet the criteria and (2) conduct cursory reviews of petitions to determine whether further work is necessary before any action is taken on the petition.
- H. **Interactive Website for Petitioners** – Create an interactive website for use by the acknowledgment decision making body and petitioners. A website is a cost-effective method of facilitating communication between parties, contributes to transparency, reduces discovery costs, increases processing speed, and allows collaboration between parties that can clear any misconceptions or inconsistencies.
- I. **Criteria for Acknowledgment** – Use the criteria set forth at 25 C.F.R. Part 83, provided the following changes are implemented:
 - 1. Proof of Community: Combine social and political community into one criterion. Under the FAP, many of the requirements for social and political community can satisfy both criteria. A petitioner should be encouraged to provide political information to support the criterion, but it should not be a deciding factor if there is no record available to provide this information.
 - 2. Timeframe: Accept evidence supporting any criterion created after March 4, 1789 or the date the petitioner's state received statehood, whichever is later.

3. **Tribal Ancestors:** Accept evidence of descendancy from Indians living together as a tribal community since 1871 – the end of formal treaty making and near the end of formal reservation removal – or statehood, whichever is later.

Evaluations of evidence under this criterion should take into account how tribal people were viewed and treated in the region where they lived and should allow the acknowledgment decision making body to interpret and evaluate evidence that considers political history in the analysis. For example, members of tribes may have lived in several villages with each village having its own social and political community. Further, tribes subject to policies such as termination, reservations, and removal should be able to justify any realignment of its members in light of the region's political history and the survival of the people.

If the petitioner was considered a tribe by outsiders prior to 1900 and descend from tribes at the time of statehood then this history should be taken into account. Indian communities are not static and the criteria should reflect the historical realities of each tribe in determining whether a petitioner meets this criteria based on the totality of the circumstances.

If Petitioners are required to provide documentation prior to statehood, they may have problems accessing documents, those documents may be limited or may not exist, or documents they can access may be in a foreign language because they were prepared by a foreign sovereign. Most importantly, whether the burden is met must be evaluated in light of evidence that maintaining a social and political existence in the face of state government hostility results in a weak record of documented existence, especially documentation prepared and published by non-Indians.

- J. **Regional Offices:** Create regional acknowledgement offices, divided roughly by geography and ethnography. See Appendix A, Map of Recommended Regional Acknowledgement Jurisdictions.
- K. **Transition of Petitions:** Any new process should provide for transferring undecided petitions in OFA to the new process upon application by the petitioner. Tribes whose petitions are complete under OFA standards should have priority review under the new process.

II. REAUTHORIZE OFA'S AUTHORITY TO ISSUE ACKNOWLEDGMENT DETERMINATIONS

Should Congress decide not to create a new process for deciding acknowledgment petitions and instead maintain the current system administered by OFA, Congress should still consider passing an organic statute reauthorizing OFA and incorporating the reforms discussed in Part I above. By doing so, the statute will clearly set forth the federal government's policy toward federal acknowledgment and will ensure that the interests of both federally recognized and petitioning tribes, which are at times conflicting, are represented by OFA and the Bureau of Indian Affairs ("BIA"). Legislation guiding OFA as to its responsibilities in recognizing tribal governments would strengthen the recognition process. In addition, a statute could implement the creation of regional offices and provide for public hearings on the record.

A. Passage of an Organic Statute Governing the Federal Acknowledgment Process

The FAP is administered pursuant to federal regulations codified at 25 C.F.R. Part 83. These regulations were not promulgated through a statute granting specific authorization for the creation of an FAP;¹ instead, they were passed under broader agency powers as set forth in 25 U.S.C. § 2 and 9, 5 U.S.C. § 301,² and 43 U.S.C. § 1457.³ Under Title 25, Section 2, the BIA possesses broad authority to manage Indian affairs, and Section 9 confers the Executive Branch with broad authority to establish regulations that give effect to provisions relating to Indian affairs. Pursuant to the authority granted under Section 2, the Secretary promulgated a set of seven criteria that must be met by a petitioning tribe to receive a positive finding from OFA.

While these statutes provide the BIA and the Department of the Interior with the statutory authority to pass and administer 25 C.F.R. Part 83, the absence of an organic statute setting forth the official policy regarding federal acknowledgment and clear guidelines about the administration of such process has led to a system that disserves both federally recognized tribes and petitioning tribes seeking acknowledgment. Further, the existing FAP may not comport with administrative law doctrine.

Under the Administrative Procedure Act,⁴ Congress may delegate to an executive agency the authority to promulgate regulations that implement a statute. Agencies must implement the statute both as it expressly requires and also pursuant to reasonable interpretations the agency makes when the statute is silent or ambiguous on a given issue. In the leading administrative law case, the Supreme Court held that an agency's reasonable interpretation of an ambiguous statute is afforded a high level of deference.⁵ So long as the agency's statutory construction is reasonable, any ensuing regulation is binding unless procedurally defective, arbitrary or

¹ See, e.g., *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) (discussing the absence of a specific statute authorizing regulations to govern the FAP).

² "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

³ "The Secretary of the Interior is charged with the supervision of public business relating to . . . Indians."

⁴ Pub. L. 79-404, 60 Stat. 238 (1946) (codified as amended at 5 U.S.C. §§ 500-584, 701-706).

⁵ See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

capricious in substance, or manifestly contrary to the statute.⁶ Since there is no statute governing the FAP, petitioners are not afforded meaningful review of decisions even though they are required to engage in an adjudicative process. Further, there is no check on whether OFA is applying the appropriate legal standard.

An organic statute would (1) strengthen the statutory authority of the BIA and OFA to make federal acknowledgment decisions, and (2) provide better guidance for OFA to ensure that the process is more timely, transparent, fair and consistent.

B. An Organic Statute Should Address Conflict of Interest Issues

Housing OFA within the BIA creates obvious conflict of interest problems due to the BIA's responsibility to represent the interests of federally recognized tribes. Given the limited financial resources allocated to federally recognized tribes, each determination in support of acknowledgment by OFA results in a larger number of tribes sharing a limited amount of federal funding.

The BIA's primary responsibility is to represent the interests of the 564 tribes with whom the United States maintains a government-to-government relationship.⁷ Arguably, this interest is not being served when the BIA, through OFA, is acknowledging tribes who are then eligible to claim a share of federal funding. An organic statute setting forth how the federal government balances these interests would help to alleviate this conflict. A better approach may be to remove and separately fund the FAP apart from the BIA, but in the absence of that option, there should be a clear statement from the federal government regarding its policy and approach to managing this conflict.

III. TERMINATE OFA AND ESTABLISH A FORMAL ADJUDICATIVE PROCESS FOR MAKING ACKNOWLEDGMENT DETERMINATIONS

Congress can abrogate 25 C.F.R. Part 83 and revoke the authority of OFA to review and issue federal acknowledgment determinations by enacting new legislation to decide federal recognition acknowledgment cases. Through this legislation, Congress could establish a formal adjudicative process for making acknowledgment decisions that either appoints an administrative law judge, an independent commission, or a combination of both.

Kevin Gover, former Assistant Secretary for Indian Affairs ("AS-IA") stated in his 2000 testimony that "I know it's unusual for an agency to give up a responsibility like this, (but) this one has outgrown us . . . it needs more expertise and resources than we have available."⁸ The BIA is responsible for overseeing a large majority of issues affecting federally recognized Indian communities throughout the United States, i.e., tribes which have already met the threshold which necessitates a trust responsibility. Perhaps, the decision to acknowledge tribes and include

⁶ *Id.*

⁷ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009).

⁸ *Testimony before the Committee on Indian Affairs United States Senate regarding S. 6.11 "Federal Recognition"* (May 24, 2000) (statement of Kevin Gover, former AS-IA).

them in the federal trust relationship is a decision best made by an independent agency. This agency could be specifically designed to address the backlog of petitions for federal acknowledgement. In the past, the federal government has acknowledged situations which required the creation of commissions, special tribunals, or "think tanks" to best resolve complex issues, and it could do the same with federal acknowledgment.

The recommendations for the adjudicative processes allow for transparency, efficiency, and collaboration between petitioners and parties evaluating the evidence supporting the petition. An ALJ or Commission process enables petitioners to be apprised of all information, controversies, or questions that arise while the evidentiary record is being developed. Because the standards would be clarified and there would be an open exchange of material, petitioners would have a clear direction of what is expected of them during the process. These efforts will decrease the backlog of petitions and resources required to evaluate them while increasing efficiency, communication, and an understanding of the acknowledgment process.

A. Administrative Law Judge Process

Should Congress want to formalize the adjudicative process, it can appoint an administrative law judge ("ALJ") to issue or review decisions approving or denying acknowledgment. There are several ways to incorporate an ALJ into the federal recognition process. Congress could appoint an ALJ that issues determinations after evaluating the evidence submitted with petitions. Another option would be to create an independent commission or research office to make an initial determination that would be subject to review by an ALJ upon request of the petitioner. Any ALJ venue should be separate from the Interior Board of Indian Appeals ("IBIA").

An ALJ system, governed by the Administrative Procedure Act ("APA"),⁹ provides an objective framework. The Supreme Court has described the administrative adjudicative process as follows:

[T]he [APA] contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. When conducting a hearing, . . . a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. Hearing examiners must be assigned to cases in rotation They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. Their pay is also controlled by the Civil Service Commission.

In light of these safeguards, the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.¹⁰

⁹ Pub. L. 79-404, 60 Stat. 238 (1946) (codified as amended at 5 U.S.C. §§ 500-584, 701-706.

¹⁰ *Butz v. Economou*, 438 U.S. 478, 514 (1978).

This political insulation is necessary to afford tribes applying for recognition a fair and impartial process. An ALJ process "permit[s] an oral hearing with direct and cross-examination, testimony under oath, the development of a complete and exclusive record on which the decision is based, and the presence of a neutral presiding officer."¹¹

1. Overview

The ALJ would review an evidentiary record compiled by the petitioner with the assistance of a regional research team to determine whether the evidence demonstrates a reasonable likelihood of the validity of the facts supporting the acknowledgment criteria. Regional research teams, headed by a regional director, can be housed within academic institutions and can be funded through federal grants to assist in the development of a sufficient evidentiary record. Each region with petitioners would have support staff consisting of a three-person regional research team, allowing regions with large number of petitioners to have more than one team. Each team of three would consist of an anthropologist, a historian, and a genealogist similar to OFA's current technical staff.¹² The distinct difference between OFA's experts and the regional office experts is that the team would provide petitioner assistance, make evaluations of the submitted evidence, and act more as expert witnesses during the process, rather than conduct most of the analysis for acknowledgement determinations. The final legal determination, as to whether the petitioner meets the criteria of "reasonable likelihood" would be determined by the ALJ. This would create a clear precedent for future determinations.

Creating regional offices for agency adjudications is not uncommon. The Office of Disability Adjudication and Review, for example, has ten regional offices.¹³ There are over 1,100 ALJs and 4,900 support staff in the field organization.¹⁴ Of course, an ALJ process this expansive is not necessary for the federal acknowledgement process. Due to the low number of petitions, when compared to social security claims, the number of ALJs retained would be significantly lower.

Once the petitioner's record is complete, the petitioner can submit its application and supporting evidence to the ALJ for review. The ALJ would preside over each petition, thus offering a complete, fair and impartial hearing, compounded with sound legal review and expedient court proceedings. The ALJ will hold an adjudicatory hearing in the region where the petitioner is located, allowing the petitioner to orally present the evidence supporting the petition and to challenge evidence offered by parties opposing recognition. Other interested parties may be allowed to participate in the hearing at the discretion of the ALJ. Based on the evidentiary record and the adjudicatory hearing, the ALJ will assess whether the evidence supports acknowledgment using the "reasonable likelihood" standard.

¹¹ William F. Fox, Jr., UNDERSTANDING ADMINISTRATIVE LAW 11 (Matthew Bender & Co., Inc. 1982).

¹² U.S. GENERAL ACCOUNTING OFFICE, INDIAN ISSUES: BASIS FOR B.I.A.'S TRIBAL RECOGNITION DECISIONS IS NOT ALWAYS CLEAR 4-5, GAO-02-936T (2002).

¹³ Social Security Online, Hearings and Appeals Website, *available at*, http://www.ssa.gov/appeals/ho_locator.html.

¹⁴ *Id.*

Also, because the ALJ would be the initial reviewer of petitions for acknowledgement, the scope of review would be expanded to all relevant documents. The current administrative appeals process established under 25 C.F.R. Part 83 limits review to four factors.¹⁵

2. Proposed Procedures for an Administrative Law Judge Process

An ALJ process could use the following process. Alternatively, this process could also be used by replacing the "ALJ" with a "Commission" and then using the ALJ to review challenges to the Commissions' decision.

1. The petitioner initiates the ALJ process by first filing a letter of intent with the ALJ, including a brief summary of how the petitioner meets the acknowledgment criteria. If an active application exists with OFA, the petitioner must complete a transfer request form to move its files and all relevant documentation from OFA to the ALJ with this letter of intent.
2. Within thirty (30) days of receiving the letter of intent, the ALJ must:
 - a. Publish the letter of intent on the ALJ website;
 - b. Request OFA to send the petitioner's files to the regional research team located in the region where the petitioner resides; and
 - c. Send a letter to the petitioner detailing the administrative procedures the petitioner must follow, including the immediate next steps the petitioner must complete and contact information for the regional research team tasked with assisting the petitioner.
3. Within sixty (60) days of receipt of petitioner's files from OFA, the regional research team must:
 - a. Review the petitioner's application and any supporting evidence;
 - b. Meet, or schedule a meeting, with the petitioner to identify the additional evidence that must be included with the petition; and
 - c. Develop a plan with the petitioner for gathering additional evidence as needed, clearly defining and delineating the responsibilities of the regional research team and the petitioner (the "Research Plan").
4. The petitioner and the regional research team will gather evidence as required by the Research Plan. Evidence gathered will be published on the ALJ website so that both the petitioner and the regional research team are aware of all of the evidence being obtained. Private or sensitive data will be redacted as necessary. Membership files shall be excluded from the on-line database.
 - a. The petitioner can challenge the evidence gathered by the regional research team by requesting it be removed from the record or by challenging its inclusion in the record at the adjudicative hearing.

¹⁵ The Interior Board of Indian Appeals process is discussed in Appendix B.

- b. No other party may submit evidence at this stage.
5. After 180 days of evidence gathering, the regional research team and the petitioner will meet to review the status of the Research Plan, and the parties will determine together whether there is sufficient evidence to submit the petition to the ALJ.

If there is not sufficient evidence, extensions of up to 180 days may be granted pursuant to a Revised Research Plan detailing the evidence gathering goals that must be achieved by the regional research team and the petitioner.

6. After the evidence gathering is completed, the petitioner must submit the petition and supporting evidence to the ALJ with a detailed statement demonstrating how the supporting evidence establishes a reasonable likelihood of the validity of the facts relating to each acknowledgment criterion. The petitioner must disclose in its petition the evidence contained in the record it will challenge at the adjudicatory hearing.
 - a. The petitioner can challenge the admissibility of evidence gathered by the regional research team included in the record; such challenge must be included in the petition to the ALJ. This places the regional research team on notice that it will have to participate in the adjudicative hearing to defend the inclusion of the challenged evidence in the record.
 - b. The petitioner can also challenge methods used by the regional research team in evaluating and analyzing the petition.
7. Within thirty (30) days, the ALJ must publish the petition on its website.
8. Within thirty (30) days of the petition's publication on the ALJ website, interested parties must file either:
 - a. A written challenge to the petition and the evidentiary basis for such challenge. The challenge must indicate whether the party requests to participate in the adjudicative hearing (such challenge will be considered by the ALJ when he or she evaluates the evidence supporting the petition).

The ALJ may permit such interested parties to participate in the adjudicative hearing, either through the presentation of oral testimony, or by examining witnesses at the hearing.
 - b. Failure to file a written challenge within this thirty (30) day timeframe precludes an interested party from participating in the adjudicative hearing and all related proceedings.
 - c. All written challenges must be published on the ALJ website as soon as possible after they are received.
9. Within sixty (60) days of the deadline for filing written challenges, the ALJ will schedule an adjudicative hearing. The ALJ, in his or her discretion, may grant extensions requested by any participating party upon a showing of good cause. The petitioner has an absolute right to participate in this hearing; as such, good cause is shown when the petitioner requires additional time to prepare for the adjudicative hearing.
 - a. The regional research team and interested parties who satisfy the procedures outlined above may, at the ALJ's discretion, also participate in the hearing.

- b. The adjudicative hearing will provide the petitioner with the opportunity to present evidence (written or oral) to support its petition, challenge evidence supplied by the regional research team, or to respond to oral or written challenges submitted by interested parties. The petitioner may examine or cross-examine witnesses as needed.
 - c. The adjudicative hearing may provide the regional research team an opportunity to defend its inclusion of evidence challenged by the petitioner, either through oral testimony, written evidence, or through the examination or cross-examination of witnesses.
 - d. The adjudicative hearing may provide interested parties who are challenging the petition an opportunity to support its challenge through the presentation of oral testimony, written evidence, or through cross-examination of witnesses.
10. At the conclusion of the adjudicative hearing, the ALJ will issue an order concluding whether the petition satisfies the acknowledgment criteria. This order will be published on the ALJ website within seven calendar days of its issuance.
 - a. If the order concludes the petitioner met its evidentiary burden, the BIA is directed to add the petitioner to its list of federally recognized tribes published annually in the Federal Register pursuant to 25 U.S.C. § 479a-1. The order is suspended if a party properly appeals the order according to the procedures outlined below.
 - b. If the order concludes the petitioner did not meet its evidentiary burden, the ALJ will issue an order denying the petition for acknowledgment.
11. Within thirty (30) days of the ALJ's publication of the acknowledgment order, the petitioner must file a notice of appeal with the ALJ and provide notice to all parties who participated in the adjudicative hearing of such notice of appeal to preserve the appeal. The notice of appeal will be published on the ALJ website within one week of its receipt.
12. The party seeking the appeal must file an action in federal district court.
13. The federal court will determine the deadline for briefing, and at its discretion, may schedule a hearing to allow parties to orally present the arguments they raise in their briefs.
14. The federal court will review the ALJ decision using a clearly erroneous standard.

A finding by the federal court that the ALJ's acknowledgment order was clearly erroneous vacates the acknowledgment order and returns it to the ALJ to conduct another hearing and issue a new acknowledgment order.
15. If the federal court affirms the ALJ's decision to recognize the petitioner, such affirmation triggers the BIA to add the tribe to its list of federally-recognized tribes published in the Federal Register pursuant to 25 U.S.C. § 479a-1.

B. Independent Commission

Through the creation of an independent commission ("Commission"), the responsibility for the FAP would be transferred from the AS-IA to a legislatively created body. Such Commission would likely expedite the FAP by relieving the overburdened and underfunded OFA. The Commission could be housed outside of the Department of Interior or within the Department of Interior provided that it is separate from the AS-IA and the BIA; alternatively, the Commission could be a separate agency by itself.

1. Composition

The Commission should be comprised of at least seven to nine members, with one Chairperson and a Vice Chairperson. The President, with the advice and consent of the Senate, would appoint the commissioners and the Chairperson.¹⁶ The Commission would vote to select the Vice Chairperson. Appointees must have extensive backgrounds and demonstrated expertise in Indian law and policy, anthropology, genealogy, or Native American history and culture. Furthermore, the Commission should be comprised of individuals from diverse political backgrounds who do not have any financial interests or management responsibility for any Indian tribe or petitioner.¹⁷

2. Powers and Authorities

The Commission would adopt rules that establish the procedures of the Commission and that govern the manner of operation, organization, and personnel of the Commission.¹⁸

In addition to a Washington, D.C. office, the Commission should establish and appropriate staff regional offices throughout the country.¹⁹ The staff and regional offices will process petitions and provide technical assistance to petitioners. Each Commissioner would oversee the regional staff office located in the region he or she represents. Such decentralization would likely reduce the burdens associated with the acknowledgment process on petitioning Indian groups, experts, staff, and Commissioners. Regional staff offices would allow the Commission and staff to gather relevant and dispositive data more easily, improving the efficiency of the FAP. This approach would also decrease overall expenses associated with the FAP by reducing the time necessary to process petitions and by keeping Commissioners and staff "in the field."

Regional staff offices could also provide technical and legal assistance to petitioners, and petitioners could assist the work of the Commission and its staff. Thus, the process would move

¹⁶ See Indian Tribal Federal Recognition Administrative Procedures Act, H.R. 3690, 111th Cong. § 4(b) (2009). Though not fully explored in this analysis, Congress may have the legal authority to create an independent commission for federal acknowledgement and select its members due to its plenary power over Indian affairs. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

¹⁷ *Id.*

¹⁸ *Id.* at § 4(c)(3).

¹⁹ Appendix A provides a map proposing different regions that could be established.

from what is currently characterized as an adversarial process to one of collaboration and cooperation, with increased transparency.

3. Proposed Procedures for an Independent Commission

The Commission procedures can follow the same process outlined in the proposed ALJ procedures in Section II(A)(2) of this report with the following exceptions:

- The Commission would hold public hearings in the petitioner's region to collect testimony for the record.
- At the conclusion of the process, the Commissioners will vote as to whether the petition satisfies the acknowledgment criteria. A majority of the Commissioners, including either the Chairperson or Vice Chairperson, must be present to comprise a quorum authorized to vote. A simple majority vote is required, but the Chairperson will make the decisive vote in the event there is a tie.
- The Commission decision could be appealed to federal district court, or the Commission decision could be appealed to an ALJ.

4. Sunset Provisions and Funding

A possible deterrence to adopting this recommendation is funding. Such a proposal calls for an increase in staff with a certain degree of regional expertise. Funding was identified as a major impediment to the Indian Claims Commission ("ICC"). The ICC was created in 1946 to "hear 'ancient claims': those claims by tribes against the United States that accrued prior to August 13, 1946."²⁰ While the ICC differs significantly from federal recognition because the ICC sought to adjudicate claims brought by tribes that were already federally recognized, the analogy is still useful as an example of the federal government's attempt to alleviate a backlog of claims pertaining to Indian issues.

Under the ICC, all "claims had to be filed within 5 years; 375 were. These claims were subsequently divided up into over 600 'dockets.'"²¹ "The ICC was originally intended to function for 10 years, but its life was extended until 1978. By that time it had adjudicated more than 500 claims, mostly relating to land."²² The remaining "102 dockets . . . were transferred to the Court of Claims" to be resolved.²³ According to former AS-IA Carl Artman, what the ICC essentially offered was a "one-time offer to expedite Indian claims," after which time the remaining claims would be referred to the Federal Court of Claims.²⁴ Similarly, the current backlog of petitions for federal acknowledgement begs for a similar sort of resolution. While unrecognized tribes do not fall under the umbrella of the federal government's trust responsibility to Indian tribes, as

²⁰ Judith V. Royster & Michael C. Blumm, *NATIVE AMERICAN NATURAL RESOURCES AND LAW: CASES AND MATERIALS*, 143 (2nd ed. 2008).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Interview with Professor Carl Artman, Director of the Economic Development in Indian Country Program, Sandra Day O'Connor College of Law at Arizona State University, in Tempe, AZ (Nov. 30, 2009). Professor Artman is also a former AS-IA.

petitioning parties to a federally regulated process, they deserve a venue of review which is both efficient and expedient.

Using the ICC as a point of reference, a sunset provision should be included in the organic legislation for a Commission. The provision should include timelines and specific dates by which petitions must be filed by petitioners and could establish the date the administrative duties and authority of the independent commission will terminate. Limiting the Commission's duties and authority to a specific scope of time will ensure that all potential petitioners submit petitions in a timely manner and provide incentives to the Commission to fulfill its duties within the allotted lifespan. Indian tribes who do not meet the requirements of the sunset provision would be able to pursue federal acknowledgment through another process, including congressional recognition.

Funding issues could be alleviated by forming partnerships with universities in each region. Participating universities could be offered partial funding to support a research program they host, and the evidence gathered through such program could be made available to students and faculty interested in using it to support academic publications or study aids. Additionally, participating universities could offer students academic credit for their assistance with the program. According to Artman, an estimated funding amount might range somewhere "around \$4 million per year, after ten years, capping out to around \$40 million total cost," a relatively conservative amount to solve a dismal process.²⁵ Of course, the budget would need to be generated from general governmental funds, and not removed from the overall budget allotted to federally recognized tribes.

Even if no universities participate in the program and a regional staff office must be created, the office can also offer opportunities for students to intern at the office in exchange for academic credit. Student groups or interns could assist in promoting the opportunity to students so that a steady stream of interns would be available to assist the regional staff office.

IV. ESTABLISH A POLITICAL PROCESS FOR MAKING ACKNOWLEDGMENT DECISIONS

As an alternative to an adjudicative process, Congress or the White House could adopt a purely political process to recognize tribes. This could be accomplished by creating a White House commission, an independent political acknowledgment agency, or appointing a Special Investigator. Replacing the current FAP with a political process would be more consistent with the way governments traditionally form political relationships.

Moreover, the federal government's decision to establish a government-to-government relationship with a quasi-sovereign Indian tribe is a political question usually inappropriate for judicial review.²⁶ Nevertheless, the federal government currently determines whether to form a

²⁵ *Id.*

²⁶ *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913) ("whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."); *cf. Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating that although Congress is responsible for such determinations, Congress cannot "bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe").

governmental relationship with an Indian tribe through a process of adjudicative fact-finding. Success through the FAP depends on the fulfillment of fact-based criteria to the satisfaction of OFA. As a result, the government's decision not to acknowledge a tribe implies that the tribe does not exist, even though a tribal entity exists irrespective of OFA's evaluation of a petitioner. Since federal recognition is a political decision not a legal decision establishing existence, the White House or Congress could oversee the federal recognition process.

A. White House Commission

Turning the process over to the White House places the decision making authority in the hands of a political body, which is critical because so much of this process is, ultimately, a political question. Instead of being relegated to a department that deals primarily with natural resources, parks, forests, and other federal lands, the recognition process for tribes could be handled utilizing the same framework for recognizing foreign nations. The Chief Executive, through diplomacy, currently recognizes foreign nations and then makes a case-by-case decision on whether to establish government-to-government relations with that foreign nation.

Due to historical neglect and discriminatory federal and state policies towards Indian tribes, unrecognized tribes may not have the resources to assert sovereignty in a way that is obvious to the average American. Thus, the average American may not easily notice Indian tribes that are unrecognized or that lack reservations. Nevertheless, unrecognized tribes have survived as separate political groups despite challenges to their communities.

For present-day recognition of a government-to-government relationship, however, both a foreign nation and an Indian tribe should be evaluated in terms of their "legitimacy." Treating the recognition of tribes similar to the recognition of foreign nations would evaluate the "legitimacy" of a tribal nation and its government in a political context. Political factors such as the possibility of Indian gaming, poverty among tribe members, land claims, and claims over natural resources can enter into the political calculus. Many Indians suspect that these political factors already intrude into the OFA process. In the context of federal tribal recognition, this straight-forward diplomatic process, rather than the over-reliance on OFA, is an alternative model.

1. White House Commission Procedures

Under this proposed alternative, the petition process would be similar to the OFA process. The petitioners would submit documents, as well as any other relevant evidence demonstrating how they meet the criteria for federal recognition, to the White House Commission. The difference would be that the White House Commission is independent of the Department of Interior, thus eliminating any perceived biases currently present in the petitioning process.

After petitions are submitted, the White House Commission, consisting of genealogists, historians, anthropologists, and tribal cultural experts (including regional tribal experts), will review each petition applying the "reasonable likelihood" standard. The White House Commission could establish a baseline of necessary information to make a decision, presumably using criteria similar to the FAP. In addition, it would verify information and consult with the

appropriate researchers before submitting a detailed report and recommendation regarding the petition to the President of the United States.

Once this process is completed, the President may issue a proclamation recognizing the tribe and the President's decision would be final. Although the finality of the decision seems harsh, those seeking federal recognition will always maintain the right to lobby Congress for recognition.

2. Sunset Provisions

Along with the implementation of a White House Commission, sunset provisions may assist in expediting the process. The Commission can be authorized to operate for a limited number of years. During this time the Commission will be responsible for evaluating and making a final determination on all petitions for federal recognition. Similar to the Indian Claims Commission established in 1964,²⁷ the Commission would facilitate the recognition process for a fixed amount of time and all determinations would be established under the political question doctrine, which is not subject to court review.

By implementing a sunset provision, unrecognized tribes seeking to file a petition will have a specific timeframe in which to submit their petitions. For example, the sunset provision could require all petitioning tribes to file their petitions within five years. At the time that the Commission is established and holds its first meeting, unrecognized tribes will receive notice that they have a one-year period to submit their letters of intent to file a petition.²⁸ After one year, the petitioning tribes will have five years to finalize their petitions. This timeframe allows the Commission to make final determinations on the petitions that are currently facing a backlog under OFA and would provide a decision within a reasonable amount of time.

Furthermore, a sunset provision allows budgetary spending to be more focused on the administration and review process. The \$2.9 million dollars appropriated in FY2008 to OFA is still not enough per year to handle petitions.²⁹ This amount is clearly insufficient to meet past, present, and future acknowledgment petitions. For a sunset provision to work, an injection of funding is necessary to expedite the process. On the federal side, it is clear that there is a lack of funding in the long-term and there are little or no incentives offered to keep knowledgeable experts such as genealogists and historians employed in the acknowledgment process. OFA teams that currently process and review petitions are overworked and overburdened. Employment incentives must factor into this process so as to increase the amount of teams reviewing petitions.

Congress should appropriate sufficient funding to complete this commission in a certain time period, for example ten to twenty years, instead of prolonging the process. A set timeframe allows for the expedition of the acknowledgment process, saves federal appropriations in the

²⁷ Act of August 13, 1946, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. § 70a *et seq.*).

²⁸ All Petitions that have or are currently being submitted to the Office of Federal Acknowledgment will be automatically transferred to the White House commission and a notice of transfer will be sent to the petitioning tribes.

²⁹ CONGRESSIONAL RESEARCH SERVICE, CRS REPORT TO CONGRESS- INTERIOR, ENVIRONMENT, AND RELATED AGENCIES: FY 2008 APPROPRIATIONS, Order Code RL34011 (Feb. 3, 2008) *available at* <http://www.nationalaglawcenter.org/assets/crs/RL34011.pdf>.

long-term, and provides a definite determination to tribes within a reasonable period of time. By guaranteeing a supply of funding, the federal government can address federal acknowledgment issues once and for all while also saving money in the long term.

The overall goal of a sunset provision is to implement a system that is efficient economically, politically, and socially, while expediting the process so that petitioners receive a timely determination. Arguably the most appealing aspect of this alternative is its cost benefits. This process seeks to process all petitions for federal recognition within ten to twenty years. For this process to work, there must be sufficient funding. Assuming four teams of reviewers can complete two determinations per year, the commission should complete reviews and recommendations for eight petitions each year. Within ten years, the maximum yield would be eighty petitions. If we estimate the cost of four teams, their equipment, office space, and other needs at \$6 million per year (double the amount currently provided to OFA), then this alternative's total cost may be estimated to be approximately \$60 million over ten years.

B. Independent Political Acknowledgment Agency

Another option is to politicize the entire process. This alternative would consist of creating an independent agency that evaluates Indian tribal acknowledgement through a political process. This type of independent agency would also require an organic statute.

The current OFA process has turned what used to be a political determination made through treaty-making and diplomacy into a fact-finding adjudication. Now, the bureaucratizing of the process has resulted in acknowledgment being something very different than a political process. First, the current OFA process relies on facts rather than political realities. Second, the process now turns on questions of law rather than whether government-to-government relations *should* exist.

Under an independent political acknowledgment agency, the political determination would be made by a "special master" who heads an acknowledgement decision making body. This decision making body would consider the totality of the tribal applicant's situation, including the history and cohesiveness of the petitioning tribe.

The special master would then make a political recommendation either to Congress or to the President, who can approve or disapprove the recommendation. If the recommendation supports acknowledgment, the recommendation would have a time limit much like a congressional statute. After the time limit expires, the recommendation would go into effect. In that way, the President or Congress does not have to put their political seal of approval on the tribal recognition. However, if Congress or the President disapproves of the special master's recommendation, it can express official disapproval and the tribe will not be recognized.

Creating a special master would require the passage of a statute. The statute should state Congress' intent to politicize the federal acknowledgement process and identify whether Congress or the President will have final decision making authority regarding acknowledgment. There would be no appeal of the decision because of its political nature.

An independent political acknowledgement agency would:

- Be given authority under an organic statute stating the intent of Congress to make recognition of Indian tribes a political question, not a legal adjudication.
- Be led by a "special master" who reports directly to either Congress or the President.
- Make recommendations regarding acknowledgment of Indian tribes taking into account political realities.
- Recommend either to Congress or the President whether to acknowledge petitioners.
- Create a deadline by which Congress or the President must disapprove positive recommendations. After the expiration of the deadline, if no action is taken by Congress or the President, the tribe would be considered recognized, in the same way that Congressional laws go into effect automatically if the President does not sign them.

C. Special Investigator

As an alternative to an agency which politically decides acknowledgement, Congress can appoint Special Investigators on an ad hoc basis to compile, evaluate, and make recommendations regarding applicant tribes seeking a federal relationship with the United States.

The structure would be similar to the independent agency making political recommendations, mentioned in the previous section. The applicant tribe, in consultation with the Secretary of the Interior, could agree on a "special investigator" to compile the record and make a recommendation to Congress based on the record. The special investigator should not be a federal government employee and should not be an employee or consultant of the applicant tribe. Thus, the special investigator would occupy a position similar to an arbitrator.

Under this option, a separate special investigator would be appointed to each applicant tribe ready to be evaluated. Using special investigators to make recommendations to Congress will also change the process from an adjudicative determination to a political decision, similar to the independent political acknowledgment agency proposed above. Likewise, the special investigator's decision will not be subject to appeal and thus negates *res judicata* problems. The recommendation by the Special Investigator will go into effect within 120 days unless Congress affirmatively votes to disapprove the positive recommendation.

CONCLUSION

The Clinic strongly supports the effort of the Senate Committee to pursue reforms to the federal acknowledgment process. Congress should incorporate certain universal changes for any federal acknowledgment process it adopts. Those reforms, discussed in Part I, are aimed to fix the consistency, transparency, timeliness, and funding problems not being addressed by the current OFA process. Petitioners and OFA will continue to face these problems unless these universal changes are adopted.

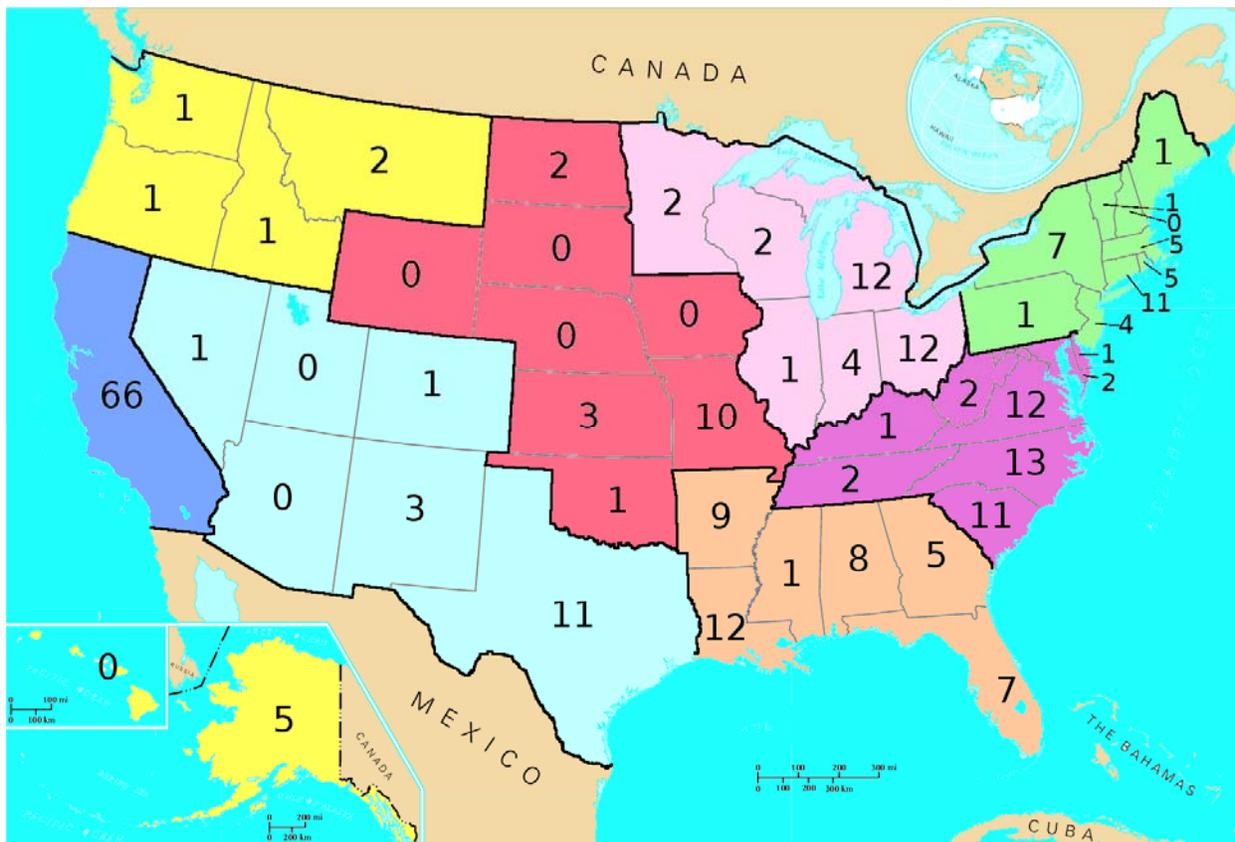
While the Clinic supports the creation of an entirely new process that is housed outside of the BIA, the Clinic is mindful of the complexities of the legislative process and the obstacles posed by setting up a new system. If Congress chooses to keep an adjudicative process for recognition, the Clinic suggests that Congress pass an organic statute to provide direction and to ensure that there is meaningful review. At a minimum, Congress should consider passing a statute reforming the current OFA process. Without a statute, there is no assurance that petitioners will be treated under a consistent framework since there is no guidance for courts to consider in reviewing recognition decisions.

Another alternative available to Congress and the White House is to create a purely political process. This process may disfavor tribes because there would be no review and could potentially be no standards. Such a process would further the establishment of recognizing the political relationship. Further, Congress or the White House would have to be involved in the process.

APPENDIX A

Maps Establishing Regional Acknowledgement Jurisdictions

Map 1: Map of Recommended Regional Acknowledgment Jurisdictions³⁰

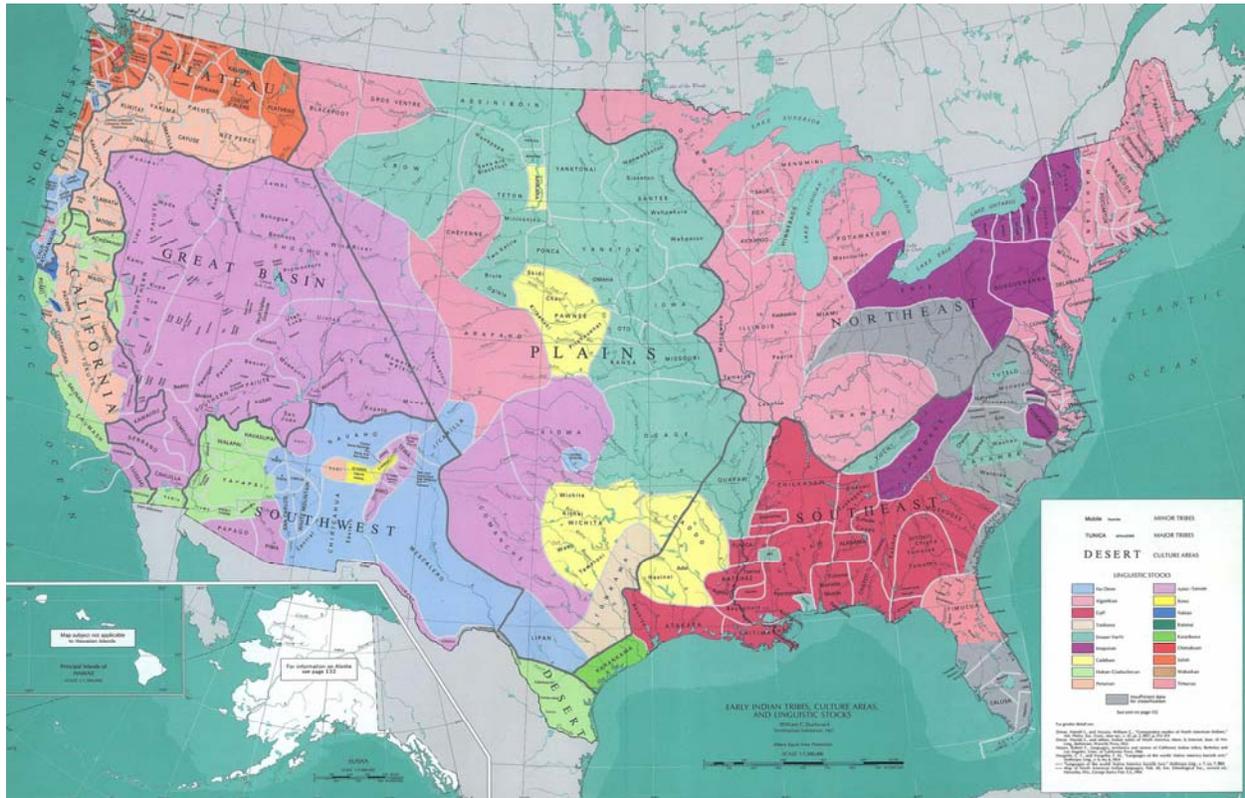


³⁰ Source: Dep't of Interior (n.d.) available at <http://www.nationalatlas.gov/asp/popups.asp?imgFile=../printable/images/preview/outline/states%28light%29.gif&imgw=588&imgH=450>.

TABLE 1. Number of Unresolved Petitions by Suggested Region

REGION 1			
Alaska	7	Montana	2
Hawaii	0	Oregon	1
Idaho	1	Washington	1
REGION 1 – TOTAL			12
REGION 2			
California	66		
REGION 2 – TOTAL			66
REGION 3			
Arizona	0	New Mexico	3
Colorado	1	Texas	11
Nevada	1	Utah	0
REGION 3 – TOTAL			16
REGION 4			
Iowa	0	Oklahoma	1
Kansas	3	North Dakota	2
Missouri	10	South Dakota	0
Nebraska	0	Wyoming	0
REGION 4 – TOTAL			16
REGION 5			
Illinois	1	Minnesota	2
Indiana	4	Ohio	12
Michigan	12	Wisconsin	2
REGION 5 – TOTAL			33
REGION 6			
Alabama	8	Georgia	5
Arkansas	9	Louisiana	12
Florida	7	Mississippi	1
REGION 6 – TOTAL			42
REGION 7			
Delaware	1	South Carolina	11
Kentucky	1	Tennessee	2
Maryland	2	Virginia	12
North Carolina	13	West Virginia	2
REGION 7 – TOTAL			44
REGION 8			
Connecticut	11	New York	7
Maine	1	Pennsylvania	1
Massachusetts	5	Rhode Island	5
New Hampshire	0	Vermont	1
New Jersey	4		
REGION 8 – TOTAL			35
GRAND TOTAL			264

Map 2: Map of Cultural and Language Groups of Indians³¹



³¹ Smithsonian Institution (1967).

APPENDIX B

Analysis of the Existing IBIA Appellate Process under OFA

During the November 4, 2009 Senate Committee hearing, questions arose regarding the appellate review of OFA determinations. This appendix addresses those questions and discusses why continuing under the OFA adjudicative system without the benefit of meaningful review is problematic.

The Interior Board of Indian Appeals ("IBIA") is an appellate review body comprised of administrative law judges who hear challenges to the BIA's decisions and actions.³² The IBIA also hears OFA appeals.³³

The current FAP, set forth at 25 C.F.R. Part 83, outlines the process for challenging final determinations issued by the AS-IA and limits the scope of IBIA's jurisdiction when it reviews these challenges.³⁴ Technically speaking, parties do not "appeal" a final determination to the IBIA; instead, parties *request* that the IBIA *reconsider* the final determination so that it may be vacated by the IBIA and a "reconsidered final determination" may be issued by the AS-IA.³⁵ While OFA does the substantive work leading to the issuance of a final determination, OFA decisions are issued under the name of the AS-IA as the political appointee tasked with overseeing OFA.

A. Current Process for Appealing Final Determinations

Parties seeking to appeal an AS-IA final determination must utilize the IBIA appellate process outlined in the FAP regulations.³⁶ This process allows for a limited review of OFA determinations by different divisions of the Department of Interior: either by the IBIA or by the Secretary of the Interior ("Secretary").³⁷ After the administrative appellate process is completed, and the challenging party fails to obtain reconsideration, that party can appeal to the federal district court.³⁸

³² See U.S. Dep't of the Interior, Office of Hearings and Appeals, About the Interior Board of Indian Appeals, http://www.oha.doi.gov/about_ibia.htm.

³³ See U.S. Dep't of the Interior, Indian Affairs, Who We Are, <http://www.bia.gov/WhoWeAre/index.htm>.

³⁴ See 25 C.F.R. § 83.11.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Administrative Procedure Act, 5 U.S.C. § 702 (2006) (permitting judicial review brought by a party adversely affected by an agency action); see also *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 133-34 (2d Cir. 2009) (challenging OFA's issuance of a reconsidered final determination that reversed its original position and denied acknowledgment).

1. First Step: Request Reconsideration from the IBIA

Petitioners, or other interested parties,³⁹ may request reconsideration of a final determination issued by the AS-IA. A party requesting reconsideration may only do so after the final determination is published in the Federal Register.⁴⁰ This request must be received by the IBIA within ninety days from the date of publication.⁴¹ The reconsideration request "shall contain a detailed statement of the grounds for the request and shall include any new evidence to be considered."⁴² The party requesting reconsideration "shall mail copies of the request to the petitioner and all other interested parties."⁴³

a. IBIA's Limited Jurisdiction

The IBIA has limited jurisdiction and can only review challenges that are brought on at least one of the following four grounds:

(1) [t]hat there is new evidence that could affect the determination; or (2) [t]hat a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; or (3) [t]hat petitioner's or the [OFA's] research appears inadequate or incomplete in some material respect;⁴⁴ or (4) [t]hat there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the [acknowledgment] criteria in § 83.7(a) through (g).⁴⁵

If a reconsideration request does not challenge the final determination on one of these grounds, the IBIA must dismiss the request for lack of jurisdiction.⁴⁶ This means, for example, that the IBIA could not hear a challenge to a final determination on the basis that OFA used the wrong

³⁹ An "interested party" is "any person, organization or other entity who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner. 'Interested party' includes the governor and attorney general of the state in which the petitioner is located, and may include, but is not limited to, local governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination." 25 C.F.R. § 83.1.

⁴⁰ *Id.* at § 83.11(a)(1).

⁴¹ *Id.* at § 83.11(a)(2); *see also In re Fed. Acknowledgment of the St. Francis/Sokoki Band of Abenakis of Vermont*, 46 IBIA 13 (2007) (dismissing petitioner's request for reconsideration as untimely because petitioners sent the request to OFA within one week of the ninety-day deadline, and the request was not forwarded by OFA and received by the IBIA until two days after the deadline).

⁴² 25 C.F.R. § 83.11(b).

⁴³ *Id.* at § 83.11(b)(2).

⁴⁴ Despite the language here, it should be noted that neither the BIA nor OFA conduct any independent research when evaluating a petition for federal acknowledgment. *See Changes in the Internal Processing of Federal Acknowledgment Petitions*, 65 Fed. Reg. 7,052 (Feb. 11, 2000).

⁴⁵ *Id.* at § 83.11(d)(1)-(d)(4).

⁴⁶ *See, e.g., In re Fed. Acknowledgment of the Cowlitz Indian Tribe*, 36 IBIA 140 (2001) (dismissing request for reconsideration because challenging the [Bureau of Indian Affairs] analysis of the evidence . . . is not a matter within the [IBIA's] jurisdiction").

evidentiary standard when it evaluated a petition because the IBIA lacks jurisdiction to conduct such an inquiry.⁴⁷

If the reconsideration request is based on one of the four grounds stated in 25 C.F.R. § 83.11(d), then the requesting party must demonstrate, by a preponderance of the evidence, that one of these four grounds existed when the AS-IA issued the final determination.⁴⁸ If the requesting party fails to meet this burden, the IBIA will issue a written decision affirming the AS-IA determination.⁴⁹

If the burden is met and the IBIA vacates the final determination, the petition returns to the AS-IA to issue a "reconsidered final determination."⁵⁰ The regulations do not require the AS-IA to reverse his or her position when a petition is referred back; a reconsidered final determination may reach the same or the opposite result as the original final determination. Either way, the IBIA has *no jurisdiction* to review reconsidered final determinations.⁵¹

The IBIA may "establish such procedures as it deems appropriate to provide a full and fair evaluation of a request for reconsideration under this section to the extent they are not inconsistent with these regulations."⁵² The IBIA has the discretion to request comments from experts outside of OFA, the petitioner, and other interested parties.⁵³ The IBIA may also require a hearing before an administrative law judge of the Office of Hearing and Appeals ("OHA") "if the [IBIA] determines that further inquiry is necessary to resolve a genuine issue of material fact or to otherwise augment the record before it concerning the grounds for reconsideration."⁵⁴ According to the OFA website, IBIA has never requested this type of hearing for any appeals of final determinations.⁵⁵

⁴⁷ The experience of the Mobile-Washington County Band of Choctaw Indians ("MOWA") illustrates this point. The IBIA refused to evaluate the allegation that OFA used a "conclusive proof" standard instead of the "reasonable likelihood" standard set forth in the regulations when it evaluated MOWA's petition because the IBIA lacked jurisdiction over the issue under 25 C.F.R. § 83.11; *In re Fed. Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of S. Alabama*, 24 IBIA 63, 69 (1999).

⁴⁸ 25 C.F.R. § 83.11(e)(10).

⁴⁹ *Id.* at § 83.11(e)(9).

⁵⁰ *Id.* at § 83.11(e)(10).

⁵¹ *In re Fed. Acknowledgment of the E. Pequot Indians of Conn. and the Paucatuck E. Pequot Indians of Conn.*, 42 IBIA 133, 134 (2006) (declining jurisdiction over challenges to reconsidered final determinations issued by OFA).

⁵² 25 C.F.R. § 83.11(e)(2).

⁵³ *Id.* at § 83.11(e)(3).

⁵⁴ *Id.* at § 83.11(e)(4).

⁵⁵ See U.S. Dep't of the Interior, Indian Affairs, Documents Pertaining to the Interior Board of Indian Appeals, <http://www.bia.gov/WhoWeAre/AS-IA/OFA/IBIADocs/index.htm> (last visited Dec. 3, 2009).

b. Secretarial Review

When a request for reconsideration contains allegations of error that fall outside of the four grounds enumerated in 25 C.F.R. § 83.11(d), the IBIA may address the grounds upon which it has jurisdiction and issue a decision either affirming or vacating the final determination.⁵⁶ If the IBIA vacates the final determination on one of the four grounds within its jurisdiction, the petition is returned to the AS-IA so that the AS-IA can issue a reconsidered final determination.⁵⁷ On the other hand, if the IBIA affirms the final determination on one of its jurisdictional grounds, then the IBIA refers the additional allegations that fall outside its jurisdiction to the Secretary.⁵⁸

The Secretary, after reviewing these allegations, can then exercise his or her discretion to request that the AS-IA reconsider the final determination based on these additional allegations.⁵⁹ The Secretary has only exercised this discretion once. The Secretary requested the AS-IA to reconsider a determination supporting acknowledgment, which the AS-IA did, resulting in a reversal of a positive final determination.⁶⁰

2. Next Step: Appeal to the Federal District Court

Under the regulations for the IBIA, there is no express right to appeal a final determination in federal court. Nevertheless, the APA permits such a cause of action.⁶¹ The federal court will abstain, however, from reviewing an agency decision until the administrative appeals process has been exhausted.⁶²

a. Exhausting the Administrative Appellate Process

Under the current IBIA process, the final determination is considered a final agency action either (1) 120 days after the publication of the final determination in the Federal Register if no party submits a timely request for reconsideration,⁶³ (2) the date the Secretary notifies all interested parties that the Secretary declines to request that the AS-IA reconsider the final determination,⁶⁴ or (3) the date the reconsidered final determination is published in the Federal Register.⁶⁵

⁵⁶ *Id.* at § 83.11(f)(1).

⁵⁷ *Id.* at § 83.11(e)(10).

⁵⁸ *Id.* at § 83.11(f)(2).

⁵⁹ *Id.* at §§ 83.11(f)(3); (f)(5).

⁶⁰ *See* Reconsidered Final Determination to Decline to Acknowledge the Chinook Indian Tribe/Chinook Nation, 67 Fed. Reg. 46,204 (Jul. 12, 2002).

⁶¹ *See* Administrative Procedure Act, 5 U.S.C. § 702 (2006) (permitting judicial review brought by a party adversely affected by an agency action).

⁶² *Blumenthal v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 99 Fed. Appx. 313 (2d. Cir. 2004) (affirming district court dismissal of action challenging OFA's issuance of a final determination acknowledging the Paucatuck Eastern Pequot Indians and Eastern Pequot Indians as not ripe for judicial review because plaintiffs had also submitted a request for reconsideration with the IBIA which had not yet been evaluated).

⁶³ 25 C.F.R. § 83.11(h)(1).

⁶⁴ *Id.* at § 83.11(h)(2).

⁶⁵ *Id.* at § 83.11(h)(3).

b. Federal District Court's Scope of Review

Under the APA, a federal district court reviewing an agency decision "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."⁶⁶ Depending on the remedy requested, the court has the power to compel the agency to act or hold an agency action unlawful and set it aside.⁶⁷ The court can exercise this authority when the agency action is found to be:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.⁶⁸

Agency decisions are afforded a high level of deference in the federal court.⁶⁹ A party seeking to reverse a final determination or a reconsidered final determination must overcome this high level of deference. To date, no petitioner has been able to do so.⁷⁰

B. IBIA Decisions: A Representative Sample

The IBIA appellate process is limited in its scope and insufficient to remedy errors made by OFA and the AS-IA. The IBIA's limited jurisdiction prevents some of the most egregious problems from being addressed and no petitioner has ever obtained a reversal of a negative final determination through the IBIA process. The IBIA has issued twenty-six decisions affecting fourteen petitioners.⁷¹ The IBIA affirmed the AS-IA's final determination to acknowledge three of these petitioners.⁷² For another seven, the IBIA affirmed the AS-IA's decision to deny acknowledgment.⁷³ The AS-IA originally issued final determinations recognizing the remaining

⁶⁶ 5 U.S.C. § 706 (2006).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

⁷⁰ *E.g., Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (2008), *aff'd on other grounds* 587 F.3d 132 (2d. Cir. 2009) (granting summary judgment to defendants concluding that, as a matter of law, the Department of the Interior did not act in an arbitrary and capricious manner when it reversed course and issued a reconsidered final determination denying acknowledgment).

⁷¹ See U.S. Dep't of the Interior, Indian Affairs, Documents Pertaining to the Interior Board of Indian Appeals, available at <http://www.bia.gov/WhoWeAre/AS-IA/OFA/IBIADocs/index.htm> (last visited Dec. 3, 2009).

⁷² Those tribes are the Snoqualmie Indian Tribe, the Match-e-be-nash-she-wish Band of Pottawatomis Indians of Michigan, and the Cowlitz Tribe of Indians.

⁷³ Those tribes are the Ramapough Mountain Indians, Inc., the Golden Hill Paugussett Tribe, the Mobile-Washington County Band of Choctaw Indians of South Alabama, the Duwamish Indian Tribe, the Nipmuc Nation, the Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians, and the St. Francis/Sokoki Band of Abenakis of Vermont.

four petitioners, but these were later reversed during the administrative appellate process.⁷⁴ The issues faced by the petitioners below reflect how the IBIA contributes to the systemic problems of the current FAP.

1. The IBIA Process Does Not Address Systemic Problems in the FAP

The IBIA has limited jurisdiction, and only the Secretary has the discretion to request the AS-IA to reconsider a determination based on issues that fall outside of the IBIA's jurisdiction. This gap in jurisdiction means that some of the worst problems plaguing the acknowledgment process are never addressed by the current appellate process.

a. Mobile-Washington County Band of Choctaw Indians

For example, after the AS-IA issued a final determination denying acknowledgment of the Mobile-Washington County Band of Choctaw Indians ("MOWA"), the MOWA requested reconsideration on the grounds that OFA evaluated their petition using a "conclusive proof" standard instead of the required "reasonable likelihood" standard.⁷⁵ The IBIA lacked jurisdiction to consider the claim and referred the issue to the Secretary.⁷⁶ The Secretary declined to exercise his jurisdiction to request the AS-IA to reconsider the final determination. As a result, no court ever fully evaluated the issue of whether the proper standard of proof was used in evaluating the MOWA petition.⁷⁷

b. Golden Hill Paugussett Tribe

The Golden Hill Paugussett Tribe faced a similar obstacle.⁷⁸ The Golden Hill Paugussett Tribe was denied acknowledgment and submitted a request for reconsideration. That request detailed allegations of *ex parte* communications between the Department of Interior and adverse interested parties leading up to a final determination against acknowledgment.⁷⁹ Again, the IBIA refused to evaluate the allegation due to lack of jurisdiction.⁸⁰ The IBIA then referred the issue to the Secretary, who refused to request that the AS-IA reconsider the final determination but offered no explanation for her decision.⁸¹

⁷⁴ Those tribes are the Paucatuck Eastern Pequot Indians of Connecticut, the Chinook Indian Tribe/Chinook Nation, the Eastern Pequot Indians of Connecticut, and the Schaghticoke Tribal Nation.

⁷⁵ See *In re Fed. Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of S. Alabama*, 24 IBIA 63, 69 (1999).

⁷⁶ *Id.*

⁷⁷ See Mem. from Sec'y Leshy to Samuel M. Hill, Esq. on [the MOWA's] Request for Reconsideration of Determination Against Acknowledgment (Nov. 26, 1999) available at <http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/PetitionsResolved/Petition86/index.htm>.

⁷⁸ See *In Re Fed. Acknowledgment of the Golden Hill Paugussett Tribe*, 40 IBIA 126, 128-29 (2004).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Mem. from Sec'y Norton to Aurelius H. Piper on the Request for Reconsideration (Mar. 18, 2005) available at <http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/PetitionsResolved/Petition81/index.htm>.

2. The IBIA Process Worsens the Transparency and Inconsistency Problems Plaguing OFA

For many years petitioners have identified inconsistency in decision-making and OFA's lack of transparency as major problems with the FAP.⁸² When a petitioner does not have full access to the evidentiary record used by the AS-IA in making its determination, and when the standard used by OFA to evaluate the evidence for the petition is neither clear nor consistent, federal acknowledgment becomes a moving target that petitioners may find impossible to hit.

In the case of the four petitioners discussed below, each achieved federal acknowledgment only to have it taken away through the administrative appellate process. What these petitioners encountered shows how the IBIA does not offer petitioners "a full and fair evaluation of a request for reconsideration" as required by 25 C.F.R. Part 83. Instead, the IBIA appeals process fosters the transparency and inconsistency problems that plague OFA.⁸³

a. Paucatuck Eastern Pequot Indians of Connecticut and Eastern Pequot Indians of Connecticut

These two Pequot tribes originally filed separate petitions for federal acknowledgement with the AS-IA. After issuing separate proposed findings for each, the AS-IA evaluated the petitions together and issued one final determination recognizing the Historical Eastern Pequot Tribe ("HEP"), which comprised both petitioners.⁸⁴ The State of Connecticut and several towns within the State requested reconsideration of the final determination, based on several allegations.⁸⁵

The allegations included the claim that the AS-IA relied too heavily on evidence of state recognition of the HEP, and did so for a substantial portion of the evidence.⁸⁶ According to the IBIA, evidence of state recognition is relevant and permissible to help demonstrate a petitioner meets the acknowledgment criteria set forth in 25 C.F.R. § 83.7, but it cannot be the "most important" evidence used.⁸⁷ The IBIA stated that the AS-IA did not adequately specify how state recognition demonstrated "community" or "political influence" to satisfy §§ 83.7(b) and (c).⁸⁸ Thus, the evidence "was unreliable and of little probative value" to support the determination that these criteria were satisfied and the final determination was vacated in its entirety.⁸⁹

The State also challenged the authority of the AS-IA to combine petitions and issue one final determination to acknowledge both as a "combined" tribe.⁹⁰ Because the IBIA could vacate the

⁸² See *Testimony before the Senate Committee on Indian Affairs: Oversight Hearing on Fixing the Federal Acknowledgment Process* 33-36 (Nov. 4, 2009) (statement of Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic at Arizona State University O'Connor College of Law").

⁸³ 25 C.F.R. § 83.11(e)(2).

⁸⁴ *In re Fed. Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1, 1 (2005).

⁸⁵ *Id.*

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 21-22.

⁸⁸ *Id.*

⁸⁹ *Id.* at 22-23.

⁹⁰ *Id.* at 26.

determination and remand the petitions to the AS-IA, and because the IBIA concluded that the issue fell outside its jurisdiction, it remanded the issue to the AS-IA to consider while preparing a reconsidered final determination.⁹¹ The AS-IA declined to address the issue in the reconsidered final determination, stating that the issue was "addressed fully in the [final determinations] and did not merit reconsideration."⁹² The AS-IA issued a reconsidered final determination denying acknowledgment to both tribes.⁹³

The HEP then requested that the IBIA review the reconsidered final determination on the basis that the IBIA "opened up new issues and new interpretations of existing evidence which the [petitioning tribes] were never given an opportunity to address."⁹⁴ The tribes asked the IBIA to use its authority under the regulations to "establish such procedures as it deems appropriate to provide a full and fair evaluation of a request for reconsideration."⁹⁵ The IBIA declined to do so, stating that because reconsidered final determinations are "final" upon publication in the Federal Register under the regulations, the IBIA has no jurisdiction to review requests for reconsideration of them.⁹⁶

b. Schaghticoke Tribal Nation

Like the HEP, the AS-IA originally issued a final determination acknowledging the Schaghticoke Tribal Nation ("STN").⁹⁷ Originally, STN received a negative proposed finding on the basis that state recognition of STN "was of a narrower quality" than the relationship between the HEP and Connecticut.⁹⁸ As described by the IBIA, STN then submitted additional evidence supporting its petition, and the AS-IA then reevaluated the evidentiary value of state recognition and issued a final determination acknowledging STN.⁹⁹

Following the submission of five requests for reconsideration of this final determination, the IBIA vacated the final determination and remanded the petition back to the AS-IA.¹⁰⁰ This occurred on the same day the IBIA vacated the final determination for the HEP.¹⁰¹ Citing to its HEP decision, the IBIA restated the limited function state recognition can play in the federal acknowledgment process, then in a conclusory fashion, stated that the AS-IA "used state recognition in the same way [it] found to be impermissible in [the HEP decision]."¹⁰² The IBIA characterized the AS-IA's use of state recognition as filling in the gaps left by an absence of

⁹¹ *Id.*

⁹² Reconsidered Final Determination to Decline to Acknowledge the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut, 70 Fed. Reg. 60,099 (Oct. 14, 2005).

⁹³ *Id.*

⁹⁴ *In re Fed. Acknowledgment of the E. Pequot Indians of Conn. and the Paucatuck E. Pequot Indians of Conn.*, 42 IBIA 133, 133 (2006).

⁹⁵ *Id.*

⁹⁶ *Id.* at 134.

⁹⁷ *In re Fed. Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 30 (2005).

⁹⁸ *Id.* at 31.

⁹⁹ *Id.* at 31-32.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 34.

¹⁰² *Id.* at 34.

evidence for certain time periods. It also concluded that the AS-IA relied on state recognition more heavily than it did when it issued the final determination to recognize the HEP.¹⁰³

These factors demonstrated to the IBIA, by a preponderance of the evidence, that a "substantial portion" of the evidence used to prove some of the acknowledgment criteria was "unreliable and had little probative value" to require that the final determination be vacated and the petition remanded to the AS-IA.¹⁰⁴

After the petition was remanded and the AS-IA issued a reconsidered final determination denying acknowledgment, STN appealed the decision in federal district court.¹⁰⁵ The STN alleged, among other things, that the reconsidered final determination issued by the AS-IA was "arbitrary and capricious under the [APA and] the result of improper political influence in violation of STN's due process rights."¹⁰⁶

The court stated it was not permitted to conduct a de novo review of the agency decision, and instead defers to the expertise of the agency and will only set aside an agency decision for being arbitrary and capricious when

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁰⁷

The court rejected STN's argument that the AS-IA issued the reconsidered final determination in a manner inconsistent with the IBIA decision, noting that the IBIA clarified the evidentiary weight of state recognition, the reconsidered final determination included a lengthy discussion of state recognition evidence in light of this clarification, and the AS-IA is permitted to reverse its position "so long as it provides a reasoned analysis for doing so."¹⁰⁸ The court held that the thirteen pages in the reconsidered final determination devoted to the evidence of state recognition were sufficient to meet this standard.¹⁰⁹

On the issue of improper political influence, the court engaged in a lengthy discussion detailing the extent of the political firestorm created by the acknowledgment of the STN and the statements made publicly and privately by state and federal officials regarding the decision to recognize the STN. The court described the decision up as an example of corruption at the agency.¹¹⁰ A significant amount of evidence pertaining to improper communications demonstrating political influence in the decision to issue a reconsidered final determination

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 394 (D. Conn. 2008).

¹⁰⁶ *Id.* at 394-95.

¹⁰⁷ *Id.* (quoting *Vt. Pub. Research Group v. U.S. Fish & Wildlife Serv.*, 247 F. Supp. 2d 505 (D. Vt. 2002)).

¹⁰⁸ *Id.* at 412-13.

¹⁰⁹ *Id.* at 413.

¹¹⁰ *Id.* at 402-410.

denying acknowledgment was stricken from the record due to hearsay and other admissibility problems.¹¹¹

Despite the vehement and large-scale opposition to acknowledging the STN, the court concluded that the political pressure did not influence the AS-IA's decision to issue a reconsidered final determination denying acknowledgment:

There is no question that political actors exerted pressure on the Department [of Interior] over the course of 2004 and 2005 in opposition to the . . . acknowledgment of STN, both publicly through Congressional hearings and media publicity and privately through meetings and correspondence with the Secretary and other agency officials. The issue for the Court is to determine whether the evidence presented shows that the pressure exerted can be deemed to have actually influenced the decision maker who issued the [reconsidered final determination]. 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 [reconsidered final determination].¹¹²

Because STN had no evidence that the AS-IA was *actually* influenced by the political pressure, the court held that STN failed to prove its claim.¹¹³

STN appealed the decision to the Second Circuit but dropped the issue of whether the decision to issue a reconsidered final determination was arbitrary and capricious.¹¹⁴ The appellate court affirmed the district court decision, concluding that the political pressure may have influenced the Department of the Interior, but no evidence existed demonstrating it influenced AS-IA Cason, "who was the official ultimately responsible for issuing the Reconsidered Final Determination."¹¹⁵

Open questions remain: what actions taken by the AS-IA could be considered arbitrary and capricious? What actions of political influence rise to the level of *actually* influencing the AS-IA? How would a petitioning tribe obtain evidence of *actual* influence that would be admissible in federal court? The *Schaghticoke* case highlights the difficulties faced by petitioning tribes in the appellate process and demonstrates the difficulty, if not impossibility, faced by petitioning tribes trying to obtain a favorable outcome in the appellate process.

¹¹¹ *Id.* at 398.

¹¹² *Id.* at 410 (emphasis added).

¹¹³ *Id.*

¹¹⁴ *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 133 (2d. Cir. 2009).

¹¹⁵ *Id.* at 134.

c. Chinook Indian Tribe/Chinook Nation

In the case of the Chinook Indian Tribe/Chinook Nation ("Chinook"), the IBIA affirmed the AS-IA's final determination acknowledging the Chinook.¹¹⁶ When it affirmed the determination, the IBIA referred several issues to Secretary Gale Norton for her review.¹¹⁷ The issues included allegations that the prior AS-IA (under the previous administration) should not have evaluated the petition under the revised 1994 regulations, that the analysis used by the former AS-IA departed from agency precedent, and that the AS-IA relied too heavily on the Chinook's status as a state-recognized tribe when evaluating whether they met the acknowledgment criteria.¹¹⁸ After evaluating these issues, Secretary Norton exercised her discretion and requested AS-IA Neal McCaleb to reconsider the final determination acknowledging the Chinook.¹¹⁹ AS-IA McCaleb then issued a revised final determination denying the Chinook federal acknowledgement.¹²⁰ This is the only time the Secretary of the Interior has exercised her discretion to request that the AS-IA reconsider a final determination.

C. Summary: The Current Appellate Process is Inadequate

The issues discussed above demonstrate how the administrative appellate process fails to address some of the most serious problems plaguing the federal acknowledgment process. In no case has a petitioner been denied acknowledgment and obtained a reversal of that decision through the IBIA process. Four tribes received federal acknowledgment only to have their favorable determinations reversed by the IBIA or the Secretary.¹²¹ If a petitioner appeals the decision in federal court, they must overcome high deference given to the agency, something no tribe has yet been able to do.

This system discourages petitioning tribes from utilizing the administrative process to resolve disputes. For example, what incentive would the Little Shell Tribe of Chippewa Indians have to challenge the final determination denying them acknowledgment?¹²² The IBIA, limited in its jurisdiction, can at best vacate the final determination and send the petition back to the same office that denied acknowledgment. The IBIA may also refer issues to the Secretary, but the Secretary has only once exercised the discretion to request the AS-IA reconsider a final determination, and that was to vacate a determination in support of acknowledgment. Agency actions are afforded a high level of deference in federal court, limiting a petitioner's ability to successfully challenge a final determination in that venue. For all of these reasons, it would be impractical and a waste of time and resources to go through the administrative appellate process

¹¹⁶ *In re Fed. Acknowledgment of the Chinook Indian Tribe/Chinook Nation*, 36 IBIA 245 (2001).

¹¹⁷ *Id.* at 250-252.

¹¹⁸ *Id.*

¹¹⁹ See Mem. from Sec'y Norton to Asst. Sec'y McCaleb on Fed. Acknowledgment of the Chinook Indian Tribe/Chinook Nation Petitioner (Nov. 6, 2001), available at <http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/PetitionsResolved/Petition57/index.htm>.

¹²⁰ See Reconsidered Final Determination to Decline to Acknowledge the Chinook Indian Tribe/Chinook Nation, 67 Fed. Reg. 46,204 (Jul. 12, 2002).

¹²¹ They are the Paucatuck Eastern Pequot Indians of Connecticut, the Eastern Pequot Indians of Connecticut, the Chinook Indian Tribe/Chinook Nation, and the Schaghticoke Tribal Nation.

¹²² See Final Determination Against Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, 74 Fed. Reg. 56,861 (Oct. 27, 2009).

only to end up in the same position. If the administrative appeals process continues to be the means by which parties can challenge final determinations, it needs to be reformed to better address the systemic problems faced by the federal acknowledgment process.

The federal acknowledgment process should be transparent, fair, and consistent. The IBIA should offer a party challenging a final determination a meaningful opportunity to be heard and allow parties to subject the most egregious errors committed by OFA to scrutiny so that they may be corrected. The IBIA should not "rubber stamp" AS-IA determinations just as it should not let undue influence guide the decision to affirm or vacate a final determination. If an alternative to the current OFA-IBIA process is not established, the regulations need to be strengthened so that parties, especially petitioning tribes, can be confident that the federal acknowledgment process has integrity, treats petitioners fairly, and reinforces the importance of the political relationship between tribes and the federal government.