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## THE ADMINISTRATIVE TRIBAL RECOGNITION PROCESS AND THE COURTS

*Roberto Iraola\**

### I. INTRODUCTION

The federal government's recognition of an American Indian group as a tribe enables the group to participate in federal assistance programs,<sup>1</sup> establishes a government-to-government relationship between the United States and the tribe, and "imposes on the government a fiduciary trust relationship to the tribe and its members."<sup>2</sup>

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\* Senior Advisor to the Deputy Assistant Secretary for Law Enforcement and Security at the Department of the Interior. J.D. Catholic University Law School (1983). The views expressed herein are solely those of the author and do not purport to reflect the views of the Department of the Interior.

1. As noted by one commentator, "[f]ederal recognition automatically qualifies tribes as eligible for multiple forms of federal assistance programs. Services such as financial assistance and social services, loans to tribal members, housing improvement programs, and health services are just a few of the many services and benefits provided to qualified, eligible Indian tribes." R. Spencer Clift, III., *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. IND. L. REV. 177, 195 (2003) (footnotes omitted); Alva C. Mather, Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgement Litigation*, 151 U. PA. L. REV. 1827, 1833 (2003) ("Arguably the most important benefit associated with federal recognition is the Indian tribe's eligibility for federal services."). See Federal Recognition for American Indian Tribes, 107th Cong. (2002) (statement of Barry T. Hill, Director, Natural Resources and Environment Before the Senate Committee on Indian Affairs (Sept. 17, 2002) ("In fiscal year 2002, the Congress appropriated about \$5 billion for programs and funding almost exclusively for recognized tribes.")).

2. H.R. REP. NO. 103-781, at 2 (1994) reprinted in 1994 U.S.C.C.A.N. 3768. See William W. Quinn, *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. Section 83*, 17 AM. IND. L. REV. 37, 38 (1992) ("The acknowledgment establishes a special bilateral government-to-government relationship between the tribal government and the United States. This status entitles the tribe to a variety of services and benefits, which are provided exclusively to American Indian tribes."); Jackie J. Kim, Comment, *The Indian Federal Recognition Administrative Procedures Act of 1995: A Congressional Solution to an Administrative Morass*, 9 ADMIN. L. J. AM. U. 899, 902 (1995) ("Federal recognition of an Indian tribe creates a formal government-to-government relationship between the tribe and the United States. This recognition guarantees benefits and services to Indian tribes by virtue of their status as tribes.") (footnotes

One important potential benefit from “quasi-government status” as a result of recognition is the exemption from laws regulating gambling.<sup>3</sup> Under the Indian Gaming Regulatory Act of 1988,<sup>4</sup> a tribe is permitted to operate casinos on lands that the government holds in trust if the state where the tribe is located allows gaming and the tribe enters into a compact with the state, which subsequently must be approved by the Secretary of the Interior.<sup>5</sup> The revenues from gaming operations have proven to be an important source of funding for some tribal governments.<sup>6</sup> In 2004, tribal casinos nationwide generated approximately \$18.5 billion in revenues, twice the take of Nevada’s

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omitted). In discussing tribal sovereignty, it is important to keep in mind that

Indian tribes pre-existed the federal Union and draw their powers from their original status as sovereigns before European arrival. Indian tribal sovereignty is a retained sovereignty, and includes all the powers of a sovereign that have not been divested by Congress or by tribes’ incorporation into the Federal Union. As a result, tribal sovereignty is not ‘conferred’ upon tribes through federal recognition. Rather, recognition is a process by which the Federal Government acknowledges that particular Indian entities retain their sovereign status.

*Oversight Hearing on the Tribal Acknowledgment Process: Hearing Before the House Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs, 107th Cong. (2002) (testimony of Tracy Toulou, Director, Office of Tribal Justice), available at [http://www.usdoj.gov/otj/testimony\\_feb\\_07\\_2002.htm](http://www.usdoj.gov/otj/testimony_feb_07_2002.htm) [hereinafter Toulou Testimony].*

3. GAO Report 02-49, *Indian Issues: Improvements Needed in Tribal Recognition Process* (Nov. 2, 2001) at 1, available at <http://www.gao.gov/new.items/d0249.pdf> (“The quasi-sovereign status created by this relationship exempts certain tribal lands from most state and local laws and regulations – including, where applicable, laws regulating gambling.”) [hereinafter GAO Report 02-49]; Clift, *supra* note 1, at 195 (“As a sovereign entity, officially recognized tribes are allowed to self govern and enjoy immunity from state taxation and regulations within tibal territory. Recognition as a tribe is also a prerequisite to being exempt from state laws or state constitutional provisions prohibiting casino gambling.”) (footnote omitted). See generally *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding that tribes had authority to establish gambling operations on their reservations outside state regulation provided the state allowed gambling). Quasi-government status also gives the recognized tribe additional powers including the power to establish a separate judiciary and to tax, as well as immunity from suit. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”); H.R. REP. NO. 103-781, at 2-3 (1994) reprinted in 1994 U.S.C.A.N. 3768 (“[Federal recognition] institutionalizes the tribe’s quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary.”) (footnotes omitted). See generally Vicky J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L. J. 681, 685-86 (1994) (discussing powers inherent in tribal self-government).

4. 25 U.S.C. §§ 2701-2721 (2004), 18 U.S.C. §§ 1166-1168 (2004). See *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689-90 (1st Cir. 1994) (discussing the Gaming Act).

5. 25 U.S.C. § 2701 (2004).

6. See GAO Report 02-49, *supra* note 3, at 9 (noting that according to a report by the National Gambling Impact Study Commission for the period 1995 through 1999, “of the 561 recognized tribes, only 193 tribes, or about 34 percent, actually participate[d] in gambling and only 27 tribes (or about 5 percent) generate[d] more than \$100 million on an annual basis.”)

casinos and more revenue than Marriott Hotels, A.G. Edwards and Starbucks combined.<sup>7</sup>

Since 1978, the tribal recognition process principally has been governed through regulations promulgated by the Department of the Interior (the “Department” or “DOI”).<sup>8</sup> Under the “federal acknowledgement process,”<sup>9</sup> regulations set forth the standard of evidence, burden of proof, criteria, and administrative procedures the executive branch of government utilizes in ascertaining whether a group is an Indian tribe.<sup>10</sup> This article, which is divided into three parts, examines the regulations and the judicial gloss placed on them by the courts. First, and by way of background, the article discusses how tribes historically were recognized. The article then reviews in detail the 1978 regulations as promulgated and amended. Lastly, the article discusses how courts have responded to challenges to, and interpreted various aspects of, these regulations.

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7. Electa Draper, *Indian Gaming's Future Eyed*, DENVER POST, March 30, 2005, available at <http://www.denverpost.com/Stories/0,1413,36~53~2788770,00.html> (last accessed Apr. 8, 2005) (“[The Indian Gaming Regulatory Act] resulted in an Indian gambling industry in which more than 220 tribes in 28 states pulled in \$18.5 billion last year, about twice the take of Las Vegas casinos.”); Jodi Rave, *Governors, Tribes Talk Gaming*, BILLINGS GAZETTE, March 30, 2005, available at <http://www.billingsgazette.com/index.php?id=1&display=rednews/2005/03/30/build/state/45-tribe-gambling.inc> (last accessed Apr. 8, 2005) (“Last year, tribal governments’ gross revenues from casinos topped \$18.5 billion more revenue than Starbucks, A.G. Edwards and Marriott Hotels combined.”).

8. See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. §§ 83.1 – 83.13 (2004). As explained more fully below, a tribe seeking federal recognition is not limited to the administrative process. It may seek recognition directly from Congress. See *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1097 (D.C. Cir. 2003) (“Although Congress has recognized tribes through legislation in recent years, it is ordinarily up to the Secretary of the Interior, through a painstaking bureaucratic process, to determine whether the United States will recognize the sovereignty of a putative tribe.”); Emma Schwartz, *Virginia Tribes Fight for Sovereignty*, L.A. TIMES, Oct. 12, 2004 at A12 (reporting on progress of six Virginia Indian tribes seeking to gain federal recognition from Congress before the 400th anniversary of Jamestown’s founding); Peter Hardin, *Senate May Vote on Recognizing 6 Tribes*, TIMES-DISPATCH, May 9, 2004, at B1 available at <http://www.timesdispatch.com>.

9. See Kim, *supra* note 2, at 899 (referring to program as the “federal acknowledgment process” or “FAP”) (footnote omitted); Rachael Paschal, Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209 (1991); Mather, *supra* note 1, at 1838 (same).

10. See Barbara N. Coen, *The Role of Jurisdiction in the Quest for Sovereignty: Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 NEW. ENG. L. REV. 491, 491 (2003) (“These regulations delineate the criteria, standard of evidence, burden of proof, and administrative procedures for federal acknowledgment utilized in determining whether a particular group is an Indian tribe.”); Quinn, *supra* note 2, at 40-41 (“It was not until the promulgation of the acknowledgment regulations in 1978 . . . that a systematic, uniform method for Indian groups to attain federal acknowledgment as Indian tribes was established.”).

## II. FEDERAL ACKNOWLEDGEMENT OF INDIAN TRIBES – AN OVERVIEW

The dominant role of Congress with respect to questions concerning a tribe's sovereignty and title to land is derived from its power "[t]o regulate Commerce . . . with the Indian Tribes,"<sup>11</sup> to "dispose of . . . Property belonging to the United States,"<sup>12</sup> and to provide advice and consent in the formulation of treaties.<sup>13</sup> While Congress has delegated the power to recognize tribes to the executive branch,<sup>14</sup> it also has been argued that the executive branch, independent of the power delegated by Congress, has inherent power over Indian matters.<sup>15</sup>

11. U.S. CONST. art. I, § 8, cl.3.; see FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 3 (Rennard Strickland et al. eds., 1982 ed.) ("Historically, the federal government has determined that certain groups of Indians will be recognized as tribes for various purposes. Such determinations are incident to the Indian Commerce Clause of the Constitution, which expressly grants Congress power '[t]o regulate Commerce . . . with the Indian Tribes.'" (footnote omitted) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW].

12. U.S. CONST. art. IV, § 3, cl. 2; see HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 209 ("The power of Congress under the Property Clause to dispose of and regulate 'the Territory or other Property belonging to the United States' has been considered an additional source of authority over Indian affairs") (footnotes omitted).

13. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties[.]"); see John W. Ragsdale, *The United Tribe of Shawnee Indians: The Battle for Recognition*, 69 UMKC L. REV. 311, 320 (2000) ("The paramount role of Congress stems from its constitutionally delegated control over federal property, its advisory role in the formulation of treaties, and its power 'to regulate Commerce . . . with the Indian tribes . . .'" (footnotes omitted); L.R. Weatherhead, *What Is An "Indian Tribe"?* – *The Question of Tribal Existence*, 8 AM. IND. L. REV. 1, 3 (1980) ("The powers over Indians conferred by the United States Constitution on the federal government spring principally from the treaty power and the commerce clause.") (footnotes omitted); Clift, *supra* note 1, at 184 (discussing Treaty Power and commerce clause).

14. See *Miami Nation of Indians of Ind., Inc. v. United States Dept. of the Interior*, 255 F.3d 342, 345 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002) ("[T]he general view nowadays . . . is that Congress has the power, both directly and by delegation to the President, to establish criteria for recognizing a tribe."). See also Quinn, *supra* note 2, at 47-53 (discussing delegation under 5 U.S.C. § 301 and 25 U.S.C. §§ 2, 9); Clift, *supra* note 1, at 188 ("Congress has delegated regulation over tribes – although some consider the duty a nondelegable, constitutionally empowered responsibility – to the executive branch (i.e., the [Bureau of Indian Affairs]).").

15. See Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 13 STAN. L. & POL'Y REV. 271, 272 (2001) ("In theory, the President could unilaterally recognize a tribe by taking action consistent with recognizing a foreign government, such as making a proclamation of recognition, establishing regular dealings with the tribe, or applying existing law to the tribe. Power to undertake certain diplomatic and administrative actions consistent with federal recognition of tribes is constitutionally and statutorily committed to the executive branch."). One commentator maintains:

Despite the legislature's general preeminence in Indian affairs under the so-called Indian Commerce Clause, the federal government's Indian authority is not wholly monopolized by Congress. Rather, the doctrine of tribal sovereignty and the government-to-government character of federal relations with Indian tribes – principles that necessarily

Historically, Indian tribes were granted recognition by the federal government through treaties.<sup>16</sup> In 1871, this practice ceased<sup>17</sup> and executive orders<sup>18</sup> and legislation<sup>19</sup> generally became the vehicles through which government recognition policy with respect to Indians was effected.<sup>20</sup> Following the passage of the Indian Reorganization Act

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underpin the entire corpus of Indian affairs jurisprudence – suggest also an important role for the executive branch, particularly with respect to matters of tribal recognition. Despite the seeming assumption by generations of courts and commentators that federal power over Indian affairs is left entirely in the hands of Congress, there also exists an important *independent* presidential power. That is, the fundamentally political nature of the federal-Indian relationship implicates the same constitutionally-given executive power involved in the recognition of sovereign governments in foreign relations.

Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENVER U. L. REV. 141, 143 (1995). *But see* Ragsdale, *supra* note 13, at 321 (2000) (“The Supreme Court has never confirmed th[is] power[], however, and the executive role in the recognition of Indian tribes . . . has been carried out within the parameters of congressional delegation or acquiescence.”) Perhaps, the best that can be said on this issue is that “the analogy to recognition of foreign governments has prevailed to the extent that Congress has delegated to the executive branch the power of recognition of Indian tribes without setting forth any criteria to guide the exercise of that power.” *Miami Nation of Indians of Indiana, Inc.*, 255 F.3d at 345.

16. *See* Mather, *supra* note 1, at 1831 (“Historically, treaty negotiations were the ‘accepted method’ for establishing a legal relationship between an Indian tribe and the United States government.”) (footnote omitted).

17. *See* Act of Mar. 3, 1871, 41st Cong. ch. 120, 16 Stat. 544 (1870) (codified at 25 U.S.C. § 71 (2004)). In *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51 (2d. Cir. 1994), the United States Court of Appeals for the Second Circuit observed:

Numerous reasons were advanced for termination of Indian policy based on treaty negotiations. After the War of 1812 the military importance of alliances with Indian tribes was diminished. The movement to end treaty making gained strength as a result of alliances between some of the southern Indian tribes and the Confederacy. The final decision to end treaty making resulted from a movement by members of the House of Representatives to equalize power between that body and the Senate through the removal of Indian relations from the treaty-making process.

*Id.* at 57.

18. *See* Sharon O’Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1472 (1991) (discussing how after Congress passed legislation ending treaty-making with Indian nations, for several decades, some “tribes received executive order reservations”). In 1919, Congress abolished the practice of establishing reservations through executive order. *See* Appropriations - Indian Department, Hastings Amendment, ch. 4, 41 Stat. 3 (1919) (codified at 43 U.S.C. § 450 (2004)).

19. In the legislative context, “acknowledgement” must be distinguished from “restoration.” As one commentator explains, during the 1950s, “Congress terminated the government-to-government relationship of several Indian tribes. The termination policy subsequently failed. The tribes once terminated have gradually been ‘restored’ to their former legal statuses as federally acknowledged via congressional legislation, since the executive is precluded from acknowledging a congressionally terminated tribe.” Quinn, *supra* note 2, at 42 n.21 (citations omitted). *See, e.g.*, Paiute Indian Tribe of Utah Restoration Act of 1980, H.R. 4996, 96th Cong. (1980) (codified at 25 U.S.C. §§ 761-68 (2004)).

20. *See* Henry Sockbeson, *Reflections on a Flawed System*, 37 NEW ENG. L. REV. 483, 485

of 1934,<sup>21</sup> the Department became more involved in recognition determinations because benefits created by the Act flowed only to descendants of recognized Indian tribes.<sup>22</sup>

Before the 1960s, the Department was able to assess each recognition request on an individual basis without any need for formal guidelines.<sup>23</sup> Then, in the 1970s, a series of cases brought by Indian groups seeking to enforce trust obligations and treaty rights,<sup>24</sup> and a report to Congress by the American Indian Policy Review Commission that criticized the Bureau of Indian Affairs (“BIA”)—in part for its inconsistent treatment of Indian groups—resulted in an increase in the number of requests.<sup>25</sup> This led to the promulgation of regulations

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(2003) (“Subsequent to the treaty period, which ended in 1871, and until the adoption of federal recognition regulations, the federal government made recognition decisions through legislation, basically on an ad hoc basis. As problems arose, they were resolved through legislation, or the President issued executive orders.”); Kim, *supra* note 2, at 905 (“Before the BIA implemented the FAP and its criteria, the United States relied on treaties, executive orders, legislation, and court decisions to determine whether a particular Indian group qualified for federal recognition as an Indian tribe.”) (footnotes omitted). See generally *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1202 (10th Cir. 2002) (“The federal government has formally recognized the rights of Indians to specified areas of land through treaties with tribes and by statute and executive order.”). With respect to court decisions, one commentator points out:

It is more exact . . . to say that courts can confirm a recognition after examining the treaties, statutes and executive orders to determine whether or not a political relationship has been established and maintained. Congress itself has stated that court decision can be the basis for recognition, but this is likely an observation of the court’s interpretative powers rather than a concession that the judiciary has an independent power to establish political relationships for the federal government.

Ragsdale, *supra* note 13, at 322-23 (footnotes omitted). See also Kim, *supra* note 2, at 905 (clarifying the observation made by some that tribal recognition can come about as a result of court decision). See generally *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) (“Whether a group constitutes a ‘tribe’ is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment.”); HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 3 (“For most current purposes, judicial deference to findings of tribal existence is still mandated by the extensive nature of congressional power in the field.”)

21. 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-494 (2004)); see Mather, *supra* note 1, at 1830-31 (discussing the purpose of the Act).

22. See *Golden Hill Paugussett Tribe of Indians*, 39 F.3d at 57 (“After passage of the Indian Reorganization Act recognition proceedings were necessary because the benefits created by it were made available only to descendants of ‘recognized’ Indian tribes.”).

23. See GAO Report 02-49, *supra* note 3, at 3 (“Until the 1960s, the limited number of requests by groups to be federally recognized permitted the Department to assess a group’s status on a case-by-case basis without formal guidelines.”).

24. See *Sockbeson*, *supra* note 20, at 487-489 (discussing key cases); Paschal, *supra* note 9, at 210-11 (same).

25. See *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*, 43 Fed. Reg. 39, 361 (Sept. 5, 1978) (noting how an increase in the number of requests for acknowledgment in the 1970s “necessitate[d] the development of procedures to enable the Department to take a uniform approach in their evaluation.”).

establishing policies and procedures to govern the acknowledgment of Indian tribes in 1978.<sup>26</sup> These regulations, presently codified at 25 C.F.R. §§ 83.1 – 83.13,<sup>27</sup> are discussed in detail below.<sup>28</sup>

### III. THE REGULATORY PROCESS

The Assistant Secretary for Indian Affairs (the “Assistant Secretary”) is responsible for promoting self-determination on behalf of the 562 federally recognized tribes and fulfilling the Department’s trust responsibilities.<sup>29</sup> He also oversees the Bureau of Indian Affairs, an

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26. See Kim, *supra* note 2, at 906 (identifying two main factors that led to promulgation of regulations as report by American Indian Policy Review Commission and cases involving treaty rights and trust obligations); Dan Gunter, *The Technology of Tribalism: The Lemhi Indians, Federal Recognition, and the Creation of Tribal Identity*, 35 IDAHO L. REV. 85, 95 (1998) (same).

27. Originally codified at 25 C.F.R. Part 54, see 43 Fed. Reg. 39,361 (Sept. 5, 1978), the regulations were renumbered in 1982 at 25 C.F.R. Part 83. See Coen, *supra* note 10, at 491 n.2. In 1994, the regulations were amended. See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280, 9280-9300 (Feb. 25, 1994). The changes entailed clarifying the requirements for acknowledgment and standards of evidence, reducing the burden of proof for those groups which could demonstrate prior Federal acknowledgment, providing independent review of decisions, revising timeframes for actions, providing an opportunity for a formal hearing, and defining access to records. *Id.* at 9280

28. The Department also promulgated guidelines to the regulations which are available to the public. See The Official Guidelines to the Federal Acknowledgment Regulations, 25 C.F.R. § 83 (Dept. 1997) [hereinafter Guidelines]. The regulations were promulgated in part under the general statutory authority found in 25 U.S.C. § 2 (2004) (“The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations.”); 25 U.S.C. § 9 (2004) (“The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for settlement of the accounts of Indian affairs.”); and 43 U.S.C. § 1457 (2004) (“The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: . . . 10. Indians.”). The regulations were the result of extensive consultation, discussion and comment. As reflected in the preamble, the input consisted of:

400 meetings, discussions and conversations about Federal acknowledgment with other Federal agencies, State government officials, tribal representatives, petitioners, congressional staff members, and legal representatives of petitioning groups; 60 written comments on the initial proposed regulations on June 16, 1977; a national conference on Federal acknowledgment attended by approximately 350 representatives of Indian tribes and organizations; and 34 comments on the revised proposed regulations, published on June 1, 1978.

43 Fed. Reg. 39,361 (Sept. 5, 1978).

29. Press Release, U.S. Department of the Interior, Martin Issues Final Determination to Decline Federal Acknowledgement of the Snohomish Tribe of Indians (Dec. 2, 2003) [hereinafter Snohomish Tribe Press Release], available at <http://www.doi.gov/news/031202a.htm>. Under the regulations, the Department must periodically publish a list of all federally acknowledged tribes in the Federal Register. 25 C.F.R. § 83.5(a) (2004). While the regulations require that the list be published at least every three years, *id.*, under the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, §104, 108 Stat. 4791 (1994) (codified at 25 U.S.C. §§ 479a-1 (2004)),

agency of approximately 10,500 employees that provides services to close to 1.4 million Alaska Natives and American Indians from federally recognized tribes, and the Office of Federal Acknowledgement (“OFA”), which administers the federal acknowledgement process.<sup>30</sup> The OFA directly reports to the Principal Deputy Assistant Secretary for Indian Affairs<sup>31</sup> and is staffed by three anthropologists, three historians, three genealogists, a secretary, and a director.<sup>32</sup>

### A. Standing

The regulations provide that only “American Indian groups<sup>33</sup> indigenous to the continental United States<sup>34</sup> which are not currently acknowledged as Indian tribes by the Department” may petition for recognition.<sup>35</sup> Organizations, corporations, associations, or recently formed groups may not be acknowledged.<sup>36</sup> Similarly, political factions,

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the list must be published annually.

30. See Snohomish Tribe Press Release, *supra* note 29; *Interior Department Tribal Recognition Process, Hearing Before Comm. on House Government Reform*, 108th Cong. (2004) (statement of Theresa Rosier, Counselor to the Assistant Secretary for Indian Affairs) (“The Federal acknowledgement process is implemented by the Office of Federal Acknowledgment . . . formerly the Branch of Acknowledgement and Research.”) [hereinafter Rosier Testimony].

31. See Rosier Testimony, *supra* note 30 (“Previously, the Branch of Acknowledgement and Research reported through the Office of Tribal Services and the Bureau of Indian Affairs to the Assistant Secretary – Indian Affairs. This realignment eliminated two layers of review and now provides more direct and efficient policy guidance.”). The regulations generally refer to the “Assistant Secretary” as the final decision maker. They define Assistant Secretary as “the Assistant Secretary – Indian Affairs, or that officer’s authorized representative.” By order of the Secretary of the Interior dated April 9, 2004, the Principal Deputy Assistant Secretary for Indian Affairs was delegated the authority to “perform all . . . duties relating to the federal recognition of Native American tribes, taking land into trust for gaming purposes, and other gaming matters.” Secretarial Order No. 3252, *Authorities Delegated to the Principal Deputy Assistant Secretary – Indian Affairs* (Apr. 9, 2004) available at [http://elips.doi.gov/elips/sec\\_orders/html\\_orders/3252.htm](http://elips.doi.gov/elips/sec_orders/html_orders/3252.htm).

32. Rosier Testimony, *supra* note 30 (“OFA is staffed with a director, a secretary, three anthropologists, three genealogists, and three historians.”).

33. The regulations define an “Indian group” or “group” as “any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be a tribe.” 25 C.F.R. § 83.1 (2004).

34. The regulations define “continental United States” as the “contiguous 48 states and Alaska.” *Id.* Native Hawaiians groups are not covered by the regulations. See *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1221 (D. Haw. 2002) (dismissing action by Native Hawaiian seeking recognition as tribe under the regulations finding they did not facially apply and that the issue of recognition presented “a political question inappropriate for judicial review”).

35. 25 C.F.R. § 83.3(a) (2004). Thus, “Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs may not be reviewed under the procedures established by [the] regulations.” *Id.* § 83.3(b).

36. *Id.* § 83.3(c). If a group meets the criteria for recognition, its decision to incorporate will have no bearing on the final decision reached by the Assistant Secretary. *Id.*

splinter groups, or any other groups that separate from the body of an acknowledged tribe,<sup>37</sup> or groups subject to legislation forbidding or terminating recognition as a tribe, may not be acknowledged.<sup>38</sup> Finally, groups whose petitions have been previously denied may not avail themselves of the administrative acknowledgement process.<sup>39</sup>

### *B. Letter of Intent, Petition, and Notice*

The recognition process starts with an Indian group filing a letter of intent requesting acknowledgement, signed by the group's governing body, with the Assistant Secretary for Indian Affairs (the "Assistant Secretary").<sup>40</sup> At the same time or later, the group must also submit a documented petition signed by the group's governing body setting forth why it meets the seven criteria that are required for recognition.<sup>41</sup> The Assistant Secretary has thirty days to acknowledge receipt of the letter or the documented petition (if no letter of intent was ever served), and sixty days to publish notice of the letter of intent or petition in the Federal Register and a major newspaper or newspapers of general circulation in the city or town nearest the petitioner.<sup>42</sup> The Assistant Secretary also

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37. *Id.* § 83.3(d).

38. *Id.* § 83.3(e). *See* United Auburn Indian Community, 24 I.B.I.A. 33 (1993) (ruling that Department of the Interior lacked the administrative authority to restore recognition of Indian tribe that was lawfully terminated pursuant to legislation).

39. 25 C.F.R. § 83.3(g)

40. *Id.* § 83.4.

41. *Id.* §§ 83.4(b), 83.6(a)-(c). The seven criteria are discussed in detail below. *See infra* notes 45-57 and accompanying text. After submitting a letter of intent, a group has "unlimited time under the regulations in which to prepare and submit a documented petition." *See* Guidelines, *supra* note 28, at 8.

42. 25 C.F.R. §§ 83.9(a), (c). The notice, which provides background information (i.e., name, location, and mailing address) about the petitioner, is designed in part to provide an "opportunity for interested parties and informed parties to submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgement and/or request to be kept informed of all general actions affecting the petition." *Id.* § 83.9(a). An "interested party" is "any person, organization or other entity who can establish legal, factual or property interest in an acknowledgement determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner." *Id.* § 83.1. It includes the governor and attorney general of petitioner's state, and may include local government units and unrecognized or recognized Indian groups that may be affected by the determination. *Id.* *See In re* Federal Acknowledgment of the Snoqualmie Tribal Organization, 34 I.B.I.A. 22 (1999) (stating that the definition of interested party under the regulation reflects "an intent to broaden the scope of those entitled to participate in the Departmental acknowledgement proceedings beyond the range of those entitled to intervene in Federal court proceeding under FED. R. CIV. PROC. 24, at least with respect to local governmental units, recognized Indian tribes, and unrecognized Indian groups"); *In re* Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomis Indians of Michigan, 33 I.B.I.A. 291 (1999) (ruling that interested party status is not restricted to local government units in the immediate vicinity of the group seeking acknowledgement and that such

must notify, in writing, the governor and the attorney general of the state where the petitioner is located,<sup>43</sup> as well as any recognized tribe or other petitioning tribe that “appears to have a historical or present relationship with the petitioner or which may otherwise be considered to have a potential interest in the acknowledgement determination.”<sup>44</sup>

### C. *The Contents of the Petition and Level of Proof*

For a group seeking tribal recognition to succeed, it must satisfy seven criteria.<sup>45</sup> Specifically, the group must demonstrate that: (i) it “has been identified as an American Indian entity on a substantially continuous basis since 1900;”<sup>46</sup> (ii) a predominant portion of it “comprises a distinct community and has existed as a historical community from historical times until the present;”<sup>47</sup> (iii) it “has maintained political influence or authority over its members as an autonomous entity from historical times until the present;”<sup>48</sup> (iv) it has

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party may file a request for reconsideration of a final decision before the Board even if it did not participate in the original proceedings before the Assistant Secretary). An “informed party” is a person or entity other than an interested party “who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner.” 25 C.F.R. § 83.1.

43. 25 C.F.R. § 83.9(b). As noted previously, the governor and attorney general of a petitioner’s state are considered “interested parties.” *Id.* § 83.1.

44. *Id.* § 83.9(b).

45. *Id.* § 83.6(c). The regulations provide that a petition “must include thorough explanations and supporting documentation in response to all of the criteria” and that the “criteria should be read carefully” taking into account the regulations’ definitions. *Id.*

46. *Id.* § 83.7(a). In determining a group’s Indian identity, factors to consider include:

- (1) Identification as an Indian entity by Federal authorities.
- (2) Relationships with State governments based on identification of the group as Indian.
- (3) Dealings with a county, parish, or other local government in a relationship based on the group’s Indian identity.
- (4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.
- (5) Identification as an Indian entity in newspapers and books.
- (6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

*Id.*

47. *Id.* § 83.7(b). The regulations define community as “any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers.” *Id.* § 83.1. They also provide guidance on the type of evidence needed to establish this criterion. *Id.* § 83.7(b)(1)-(2). See *Miami Nation of Indians of Ind. v. Babbitt*, 112 F. Supp. 2d 742, 747-48 (N.D. Ind. 2000), *aff’d*, 255 F.3d 342 (7th Cir. 2001) (“The Department reads the regulations as requiring that the petitioning tribe’s members meet and interact, that the petitioning tribe’s members be seen as American Indian, and that the petitioning tribe be a dynamic group rather than simply many people with common Indian ancestors.”).

48. 25 C.F.R. § 83.7(c).

submitted a copy of its “present governing documents including its membership criteria;”<sup>49</sup> (v) its “membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity;”<sup>50</sup> (vi) the group’s membership “is composed principally of persons who are not members of any acknowledged North American Indian tribe;”<sup>51</sup> and (vii) neither the group nor its members “are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.”<sup>52</sup>

Conclusive proof is not required to establish any of the seven criteria.<sup>53</sup> Rather, a criterion will be met “if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.”<sup>54</sup> Furthermore, while the regulations provide guidance on the type of evidence a group may want to rely upon to establish certain of the criteria,<sup>55</sup> such evidence is not mandatory.<sup>56</sup> A group may establish any of those criteria by suitable evidence that demonstrates the requirements of the criterion at issue, which includes its related

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49. *Id.* § 83.7(d).

50. *Id.* § 83.7(e). The types of evidence that may be used to satisfy this criterion are set forth in subsections (e)(1)(i) through (e)(1)(v). *See Ramapough Mountain Indians v. Babbitt*, No. 98-2136, 2000 U.S. Dist. LEXIS 14479, at \*9 (D.C. Cir. Sept. 30, 2000) (“The works of anthropologists, historians and other scholars, as well as newspapers and books, are acceptable to satisfy the identification requirement of criterion (a), but records are required to satisfy criterion (e).”). The group must provide an official list of its members certified by the group’s governing body, as well as a list of the group’s former members based on the group’s criteria. 25 C.F.R. § 83.7(e)(2).

51. 25 C.F.R. § 83.7(f). Even if the membership of the group is comprised of persons who have been associated with, or appeared on the rolls of, an acknowledged Indian tribe, the group may still meet this criterion if “it has functioned throughout history until the present as a separate autonomous Indian tribal entity, . . . its members do not maintain a bilateral political relationship with the acknowledged tribe, and . . . its members have provided written confirmation of their membership in the petitioning group.” *Id.*

52. *Id.* § 83.7(g).

53. *Id.* § 83.6(d).

54. *Id.* In rejecting preponderance of the evidence as the applicable standard in acknowledgment decisions, the Department noted during its revision of the regulations in 1994: ‘Preponderance’ is a legal standard focused on weighing evidence for versus against a position. It is not appropriate for the present circumstances where the primary question is usually whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion, for example, showing that political authority has been exercised.

Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994).

55. *See, e.g.*, 25 C.F.R. § 83.7(a)-(c).

56. *Id.* § 83.6(g).

definitions.<sup>57</sup>

#### D. Previously Acknowledged Groups

If a group can provide substantial evidence of prior federal acknowledgement,<sup>58</sup> its burden is lessened in the following manner.<sup>59</sup> First, it need demonstrate that it has been identified as an American Indian entity only “since the point of last Federal acknowledgement.”<sup>60</sup> Second, the group does not need to demonstrate that it existed as a distinct community historically, only that it presently comprises a distinct community.<sup>61</sup> Lastly, the group need only show present political influence or authority over its members.<sup>62</sup> The group also must meet the requirements of the remaining four criteria.<sup>63</sup>

#### E. Preliminary Review

Upon receipt of a documented petition, OFA conducts a “preliminary review of the petition for purposes of technical assistance.”<sup>64</sup> The purpose of this review is to identify deficiencies or important omissions in the petition and provide the group with an opportunity to withdraw the petition or address the deficiencies and/or

57. *Id.* The definitions provided in § 83.1 “are an integral part of the regulations, and the criteria should be read carefully with these definitions.” *Id.* § 83.6(c).

58. The regulations define “previous federal acknowledgement” as “any action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States.” 25 C.F.R. § 83.1. Such acknowledgement may be established by:

- (1) Evidence that the group has had treaty relations with the United States.
- (2) Evidence that the group has been denominated a tribe by act of Congress or Executive Order.
- (3) Evidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds.

*Id.* § 83.8(c)(1)-(3).

59. *Id.* § 83.8(a).

60. *Id.* § 83.8(d)(1). The group also “must have been identified by such sources as the same tribal entity that was previously acknowledged or as a portion that has evolved from that entity.” *Id.*

61. *Id.* § 83.8(d)(2).

62. *Id.* § 83.8(d)(3).

63. *Id.* § 83.8(d)(4). One commentator maintains that the Department’s promulgative authority over tribes whose existence had been acknowledged by Congress, the executive, or the courts prior to the regulations is open to question. *See* Ragsdale, *supra* note 13, at 338 (“It is one thing to find implicit authority in the BIA to promulgate regulations and adjudicate with respect to previously unacknowledged tribes; it is quite another to find implicit power in an agency to unilaterally terminate a formally-established, nation-to-nation relationship, to abrogate treaties or to counter Supreme Court opinions.”).

64. 25 C.F.R. § 83.10(b) (2004).

omissions.<sup>65</sup> If the petition contains evidence of, or claims previous federal acknowledgement, OFA determines whether the evidence is sufficient to trigger the lesser standard that is applicable to previously acknowledged groups.<sup>66</sup>

OFA also must investigate any petition which, together with a response to deficiencies identified during the technical review, possesses little or no evidence of the last three of the seven criteria needed for acknowledgment.<sup>67</sup> If the evidence presented “clearly establishes” that the group does not meet either of these three criteria, then it is not necessary to consider the petition under the remaining criteria.<sup>68</sup> If, on the other hand, the review does not clearly demonstrate that the group does not meet one or more of the last three mandatory criteria, then a full evaluation of the petition under all seven criteria must be undertaken.<sup>69</sup>

#### *F. Active Consideration and Proposed Findings*

After the deficiencies and/or omissions in the preliminary review are addressed, the petition is placed in active consideration.<sup>70</sup> The group and interested parties are notified of this action and provided with the names, addresses, and telephone numbers of OFA staff involved.<sup>71</sup> If there has been any substantive comment filed in connection with the petition prior to it being placed on active consideration or during the preparation of the proposed finding, the petitioning group must be given an opportunity to respond to such comments.<sup>72</sup>

Within one year after notifying the petitioning group that its petition was placed in active consideration, the Assistant Secretary must

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65. *Id.* § 83.10(b)(1)-(2). During this process, if a group submits materials in response to a deficiency identified during the technical review of the petition, additional review of those materials will be undertaken only if the group requests it. *Id.* § 83.10(c)(1).

66. *Id.* § 83.10(b)(3); *see supra* notes 58-63 and accompanying text. If the technical review process results in a request for additional evidence before a determination is made with respect to prior federal acknowledgment and the group declines to provide it, then its petition will be treated as one which does not claim prior federal acknowledgement. *Id.* § 83.10(c)(2).

67. *Id.* § 83.10(e); *see supra* notes 47-53 and accompanying text.

68. 25 C.F.R. § 83.10(e)(1) (2004). In this case, the group is denied acknowledgement and a finding to that effect is published in the Federal Register. *Id.* The period for receipt of comments to the proposed findings and the publication of a final determination are discussed in Section G below.

69. *Id.* § 83.10(e)(2).

70. The date the group is advised that the petition has been placed on active consideration determines the order in which petitions are considered. *Id.* § 83.10(d). When two or more documented petitions are found ready for active consideration on the same date, the register of incomplete petitions or of letters of intent determines the order of consideration. *Id.*

71. *Id.* § 83.10(f)(1).

72. *Id.* § 83.10(f)(2).

publish proposed findings in the Federal Register.<sup>73</sup> This period may be extended an additional 180 days at the Assistant Secretary's discretion.<sup>74</sup> The proposed findings must be accompanied by a report which summarizes the evidence and sets forth the reasoning and analyses used in arriving at the proposed findings.<sup>75</sup> Copies of this report must be provided to the petitioning group and interested and informed parties, and also be available to others, if requested in writing.<sup>76</sup>

### G. Response and Consultation

After publication of the proposed findings, the petitioning group or any organization or individual wishing to support or challenge those findings has 180 days to submit comments and evidence.<sup>77</sup> Upon a finding of "good cause," the comment period may be extended an additional 180 days.<sup>78</sup>

During the response period (and to the extent permissible by law), the Assistant Secretary shall make available to the petitioning group any records used in the proposed finding which the group does not already have.<sup>79</sup> Also, if requested by the group or an interested party, the Assistant Secretary must hold an on-the-record meeting addressing the analyses, reasoning, and factual support for the proposed finding.<sup>80</sup> At the conclusion of the comment period, the Assistant Secretary must consult with the petitioning group and any interested parties to determine a schedule for the consideration of the evidence and comments submitted.<sup>81</sup>

### H. Final Determination and Reconsideration

Within sixty days of the date of consideration of the comments and evidence, the Assistant Secretary must publish a final determination in the Federal Register.<sup>82</sup> This determination becomes final ninety days

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73. *Id.* § 83.10(h).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* § 83.10(i).

78. *Id.* Any informed or interested parties who submit comments or evidence must provide the petitioning group with copies of their submissions. *Id.* A petitioning group has at least sixty days to respond to any submissions by informed or interested parties. *Id.* § 83.10(k). This period may be extended at the discretion of the Assistant Secretary. *Id.*

79. *Id.* § 83.10(j)(1).

80. *Id.* § 83.10(j)(2).

81. *Id.* § 83.10(l).

82. *Id.* § 83.10(l)(2). This period may be extended "if warranted by the extent and nature of

after publication, unless a group or interested party files a request for reconsideration with the Interior Board of Indian Appeals (the “Board”).<sup>83</sup>

The Board has the authority to consider a timely request for reconsideration that alleges new evidence,<sup>84</sup> challenges as unreliable a substantial portion of the evidence relied upon in the final determination, questions the interpretation of the evidence, or challenges as inadequate or incomplete the research associated with the petition.<sup>85</sup> The Board may order a hearing before an administrative law judge if it finds that there are genuine issues of material fact that need to be resolved, or the record before it augmented.<sup>86</sup> If the petitioning group or interested party fails to establish any one of the grounds identified above by a preponderance of the evidence, the Board must affirm the decision of the Assistant Secretary.<sup>87</sup> If the Board affirms the decision but determines that the alleged grounds for reconsideration went beyond the four criteria described above, it must send the request for reconsideration to the Secretary of the Interior.<sup>88</sup> The Secretary has the discretion to ask the

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evidence and arguments received during the response period.” *Id.* § 83.10(l)(3).

83. *Id.* §§ 83.10(l)(4) & 83.11(a)(1)-(2). If the Assistant Secretary concludes that the petitioning group does not satisfy the governing criteria, and therefore, federal acknowledgement is not warranted, he must advise the group of alternatives to achieving Indian tribe status or through which its members may become members of an acknowledged tribe or eligible for benefits from the Department. *Id.* § 83.10(n). The Board has ruled consistently that the acknowledgement regulations are binding on the Department when presented with the question of which Indian entities should be considered “Indian tribes” under regulations and statutes which do not define the term. *See* Edwards, McCoy & Kennedy and Western Shoshone Business Council of the Duck Valley Reservation, 18 I.B.I.A. 454 (1990); Northwest Computer Supply, 16 I.B.I.A. 125 (1988).

84. In *In re Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, 33 I.B.I.A. 291 (1999), the Board ruled that documents which are alleged to represent new evidence must be so labeled and that where the Board cannot ascertain, “with reasonable diligence, what evidence is claimed to be new,” a request for reconsideration on that ground will be rejected. *See also* *In re Federal Acknowledgment of the Golden Hill Paugussett Tribe*, 32 I.B.I.A. 216 (1998) (“[T]he term ‘new evidence’ as that term is used in 25 C.F.R. Section 83.11(d)(1), includes only evidence that was not before the Assistant Secretary when she issued her Final Determination.”).

85. 25 C.F.R. § 83.11(d)(1)-(4) (2004); *see In re Federal Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama*, 34 I.B.I.A. 63 (1999) (“[I]n order for a petitioner to establish by a preponderance of the evidence that its research was inadequate or incomplete in some material respect, it must show, at a minimum, that additional research would produce material information not previously considered by the BIA.”)

86. 25 C.F.R. § 83.11(e)(4).

87. *Id.* §§ 83.11(e)(9) & (10). If the interested party or petitioning group establishes one or more of the grounds identified above by a preponderance of the evidence, then the Board must vacate the Assistant Secretary’s determination and remand the case for further consideration. *Id.* § 83.11(e)(10).

88. *Id.* § 83.11(f)(2). Section 83.11(f) has been interpreted to allow the Board to refer to the Secretary issues for clarification that “might not rise to the level of ‘grounds for reconsideration.’”

Assistant Secretary to reconsider the final determination on those grounds.<sup>89</sup> If he declines, the Assistant Secretary's determination becomes final.<sup>90</sup> If the Secretary asks the Assistant Secretary to reconsider, then the Assistant Secretary has 120 days to issue his reconsidered determination, which becomes final upon notice of publication in the Federal Register.<sup>91</sup>

As of July 2004, OFA had received 213 letters of intent from tribal groups seeking recognition and sixty-nine incomplete petitions.<sup>92</sup> Six petitions were on active consideration, and an additional thirteen completed petitions were awaiting consideration.<sup>93</sup> Three final determinations were under review by the Board following requests for reconsideration.<sup>94</sup>

#### IV. THE CASE LAW

If the petitioning group is recognized as a tribe, it becomes "eligible for the services and benefits that . . . are available to other federally recognized tribes" and also "to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States."<sup>95</sup> But what if the group is denied recognition as an Indian tribe? Can it obtain judicial review from such a ruling? What happens if a group seeks

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Absent such an interpretation, [it has been found,] matters which the Board identified as requiring clarification but over which the Board lacks jurisdiction, would simply languish, with no apparent possibility of correction within the Department." *In re* Federal Acknowledgement of the Ramapough Mountain Indians, Inc., 31 I.B.I.A. 61 (1997). Interested parties and the petitioning group have thirty days after notification of the Board's decision to submit comments to the Secretary. 25 C.F.R. § 83.11(f)(4). The Secretary has sixty days after receipt of all comments to determine whether to ask the Assistant Secretary to reconsider the decision. *Id.* § 83.11(f)(5).

89. 25 C.F.R. § 83.11(f)(2) (2004).

90. *Id.* § 83.11(h)(2).

91. *Id.* §83.11(g)(1), (h)(3). The same time frame (120 days) governs a remand from the Board. *Id.* § 83.11(g)(1).

92. ASSISTANT SEC'Y – INDIAN AFFAIRS, OFFICE OF FED. ACKNOWLEDGMENT, SUMMARY - STATUS OF ACKNOWLEDGMENT CASES (July 1, 2004).

93. *Id.*

94. *Id.* See 25 C.F.R. § 83.11(a)(1) ("Upon publication of the Assistant Secretary's determination in the Federal Register, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals.").

95. 25 C.F.R. §83.12(a) (2004). Since only Congress can abrogate a treaty, *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981), a tribe's failure to be recognized administratively does not affect its vested treaty rights. See *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002); *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir. 1995); cf. *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1058 (10th Cir. 1993) (stating that an unrecognized tribe had no standing to obtain statutory benefits under 25 U.S.C. § 81). See generally *Weatherhead*, *supra* note 13, at 30-40 (discussing definition of tribe involving treaty rights).

judicial recognition without first obtaining an administrative decision from the Assistant Secretary? Can the court consider such a request, or must the group first exhaust its administrative remedies? If the exhaustion of administrative remedies doctrine does not apply, should a court nonetheless stay the action pending administrative resolution of the tribal recognition question under the doctrine of primary jurisdiction?

During the past twenty-five years, DOI's acknowledgement regulations have been the subject of frequent litigation. The answers to the questions presented above, and others concerning the validity, scope, and application of the 1978 regulations, are addressed below.

#### A. *The Validity of the Regulations*

The first important consideration when reviewing the case law relating to the regulations is that courts uniformly have recognized that the regulations are the product of a lawful delegation of congressional authority.<sup>96</sup> But, as written, do the regulations exceed the Secretary's authority? This was the question presented in *Miami Nation of Indians of Indiana, Inc. v. Babbitt*.<sup>97</sup>

In *Miami Nation of Indians of Indiana, Inc.*, the Miami Nation of Indians of Indiana ("the Miamis") brought suit against the Secretary of the Interior and others after it was denied acknowledgment as an Indian tribe under the regulations.<sup>98</sup> As part of their challenge, the Miamis

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96. See *Miami Nation of Indians of Ind. Inc. v. United States Dept. of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002) (rejecting contention that regulations are not authorized by Congress); *United Tribe of Shawnee Indians v. United States*, 253 F. 3d 543, 549 (10th Cir. 2001) ("The BIA has been delegated the authority to determine whether recognized status should be accorded to previously unrecognized tribes."); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994) ("The BIA has the authority to prescribe regulations for carrying into effect any act relating to Indian affairs."); *James v. United States Dept. of Health and Human Serv.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) ("Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations."); *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F.Supp. 2d 76, 77 (D.D.C. 2002) ("Pursuant to . . . [congressional] delegation of authority to the DOI, BIA promulgated regulations establishing procedures for federal recognition of Indian groups as Indian tribes.")

97. 887 F. Supp. 1158 (N.D. Ind. 1995).

98. *Id.* at 1162. This litigation proceeded in stages. First, the court ruled that the statute of limitations barred the claim that the Secretary of the Interior's decision withdrawing acknowledgement of the Miamis based on an 1897 decision by the Assistant Attorney General was *ultra vires*. *Miami Nation of Indians of Ind., Inc. v. Lujan*, 832 F. Supp. 253, 253 (N.D. Ind. 1993). Next, the court ruled that the 1978 regulations under which the Miamis were denied acknowledgement were lawful. *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 887 F. Supp. 1158, 1177 (N.D. Ind. 1995). Lastly, the court ruled that the Department had not acted arbitrarily and capriciously by declining to acknowledge the Miamis as an Indian tribe. *Miami Nation of Indians*

argued that the regulations were invalid because the requirements they imposed were more burdensome than those which previously existed,<sup>99</sup> and because they did not employ a tribal abandonment standard under which a tribe could prove lineal descent from the treaty tribe and continuous tribal organization.<sup>100</sup> The Miamis further maintained that the regulations were deficient because they violated the Administrative Procedures Act (“APA”) by failing to explain policy issues and choices made in connection with their promulgation.<sup>101</sup> Lastly, the Miamis argued that the Secretary acted arbitrarily and capriciously in promulgating the regulations<sup>102</sup> and that the regulations did not meet constitutional requirements.<sup>103</sup> The court rejected all of these contentions.

The court initially ruled that because the regulations were promulgated pursuant to a congressional delegation of authority,<sup>104</sup> they were entitled to deference under *Chevron*.<sup>105</sup> The court then found that

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of *Ind., Inc. v. Babbitt*, 112 F. Supp. 2d 742, 763 (N.D. Ind. 2000), *aff’d*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

99. *Miami Nation of Indians of Ind., Inc.*, 887 F. Supp. at 1168. The Miamis argued that it was Congress’ intent to recognize all tribes and that the regulations frustrated that intent because “(1) the criteria became mandatory, rather than permissive; (2) the burden of proof was increased so that Indian tribes must provide proof from the time of first white contact of a group’s Indian identity; and (3) the community requirement was increased dramatically.” *Id.* at 1168.

100. *Id.* at 1169.

101. *Id.* at 1170.

102. *Id.* at 1171. Under the APA, a court’s review of regulations promulgated under 5 U.S.C. § 553 (2004) is limited to whether the regulations are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A) (2004). The Miamis argued that the regulations were arbitrary and capricious since they:

(1) change[d] the criteria that were previously used to recognize tribes without explaining the change into policy; (2) d[id] not provide [them] or decisionmakers with sufficient guidance in preparing or reviewing petitions because they d[id] not define key terms or specify a burden of proof; and (3) d[id] not provide for a formal hearing including the opportunity to cross-examine the government’s experts or for an independent review of the government’s final determination.

887 F. Supp. at 1171.

103. *Miami Nation of Indians of Ind., Inc.*, 887 F. Supp. at 1174. The Miamis maintained that the regulations did not afford them procedural or substantive due process and also violated the Equal Protection Clause. *Id.*

104. *Id.* at 1165. The court found that the 1978 regulations had been promulgated under the authority of 25 U.S.C. §§ 2, 25. *Id.* See *James v. United States Dept. of Health and Human Serv.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) (“Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations.”).

105. *Miami Nation of Indians of Ind., Inc.*, 887 F. Supp. at 1165. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court ruled:

The power of an administrative agency to administer a congressionally created . . .

the regulations reflected a reasonable interpretation of the statutory delegation of authority to the Secretary<sup>106</sup> and that their failure to explicitly include a voluntary abandonment standard for previously recognized Indian tribes did not render them invalid.<sup>107</sup> As to the Miamis' contention that the regulations were deficient because they failed to explain policy issues and choices, the court ruled that this contention was barred by the six-year statute of limitations governing such challenges.<sup>108</sup> Lastly, the court determined that the regulations did not represent an unannounced change in policy, and that the lack of a formal hearing in connection with the final acknowledgement determination, as well as a few vague terms and an unclear burden of proof, did not render them arbitrary and capricious.<sup>109</sup> The court also ruled that the regulations did not create a legitimate claim of entitlement that would trigger procedural protection under the due process clause,<sup>110</sup>

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program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such cases, a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the administrator of an agency.

*Id.* at 843-44 (quotations and citations omitted).

106. *Miami Nation of Indians of Ind., Inc.*, 887 F. Supp. at 1168-69. The court found that "Congress ha[d] not manifested an unambiguous intent to recognize all Indian tribes." *Id.* at 1169. Insofar as the regulations differing from past practices was concerned, given the deference owed the agency under *Chevron*, the court determined that such differences were insufficient to render the Secretary's action impermissible. *Id.*

107. *Id.* at 1169-70. The court reasoned that "if the regulations establish[ed] a permissible method for determining that a group continues to exist as an Indian tribe, then the regulations must also implicitly establish a method for determining whether the tribe has been abandoned." *Id.* at 1169. But even if the regulations foreclosed the presumption of continued tribal existence, the tribal acknowledgement standard found no support in any statutory authority, it was a court-made doctrine, and the Secretary's ultimate decision after a very active comment period was not unreasonable. *Id.* at 1169-70.

108. *Id.* at 1170-71.

109. *Id.* at 1171-73. The court found that all of the criteria in the regulations about which the Miamis complained "appeared in various prior acknowledgment decisions made by the Department." *Id.* at 1172. Furthermore, because the APA did not mandate a hearing and Congress had not expressed any intent to provide for such, the absence of a hearing in the regulations did not render them arbitrary and capricious. *Id.* at 1173.

110. *Id.* at 1175. The court reasoned that when applying the acknowledgement criteria under the regulations, the Assistant Secretary has "discretion both to view evidence from various sources and to initiate supplementary research." *Id.* The court went on to note that "[a]lthough the Assistant Secretary has no discretion to refuse federal recognition once he has determined that the [section] 83.7 criteria have been met, the Assistant Secretary nonetheless is vested with discretion to determine whether those criteria have been met." *Id.* In *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir.

that they did not violate substantive due process since they were not arbitrary and capricious,<sup>111</sup> and that they were rationally related to a legitimate government purpose, comporting with equal protection.<sup>112</sup> This ruling was affirmed on appeal.<sup>113</sup>

### B. Primary Jurisdiction and Exhaustion of Administrative Remedies

When faced with requests for judicial recognition of tribal status, depending on the context in which the issue is presented, courts routinely have invoked the doctrines of primary jurisdiction and exhaustion of administrative remedies to stay or dismiss actions.<sup>114</sup> Primary jurisdiction is a “prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts.”<sup>115</sup> It “comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[.]”<sup>116</sup>

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1995), the United States Court of Appeals for the Ninth Circuit ruled that the district court in *Greene v. Lujan*, No. C89-645Z, 1992 U.S. Dist LEXIS 21737 (W.D. Wash. Feb. 25, 1992) had not erred in ordering a formal adjudication under the provisions of the APA for a tribe which had sought and been denied recognition. *Greene v. Babbitt*, 64 F.3d at 1274-75. The regulations in force in that case, however, had not yet been amended to grant the Interior Board of Indian Appeals the authority to order hearings before an administrative law judge if genuine issues of material fact needed resolution in connection with the petition. *Id.* at 1275. In litigation that ensued following the formal adjudication, the district court reinstated findings of the administrative law judge which had been rejected by the Assistant Secretary after improper contact with one of the parties’ lawyers. *See Greene v. Babbitt*, 943 F. Supp. 1278, 1289 (W.D. Wash. 1996).

111. *Miami Nation of Indians of Ind., Inc.*, 887 F. Supp. at 1176.

112. *Id.* at 1177. *See United Houma Nation v. Babbitt*, No. 96-2095, 1997 U.S. Dist. LEXIS 10095, at \*27 (D.D.C. July 8, 1997) (“Nor is this Court persuaded that the regulations, first implemented in 1978, exceeded the agency’s authority.”).

113. *See Miami Nation of Indians of Ind., Inc. v. United States Dept. of the Interior*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

114. *Mather*, *supra* note 1, at 1849; *Ragsdale*, *supra* note 13, at 328 (“When the courts have confronted tribal attempts to bypass the administrative process and to secure instead a judicial declaration of recognition, they have with high predictability invoked either exhaustion or primary jurisdiction.”) (footnotes omitted).

115. *Syntek Semiconductor Co., LTD. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002).

116. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956); *see Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (“[The primary jurisdiction doctrine] is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency.”); *Piney Run Preservation Assoc. v. County Comm’rs of Carroll Cty.*, 268 F.3d 255, 262 n.7 (4th Cir. 2001) (“The doctrine has been deemed to apply in circumstances in which federal litigation raises a difficult, technical question that falls within the expertise of a particular agency.”).

The doctrine of exhaustion of administrative remedies is different.<sup>117</sup> It provides that “[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.”<sup>118</sup>

The seminal case on the application of the doctrine of exhaustion of administrative remedies in the tribal recognition context is *James v. United States Department of Health and Human Services*.<sup>119</sup> In *James*, the Gay Head Tribe sought federal acknowledgement without first going through the regulatory process, maintaining that they had been previously recognized in a report prepared by a Presidential Commission in 1822.<sup>120</sup> In affirming the dismissal of the complaint for failure to exhaust administrative remedies, the United States Court of Appeals for the District of Columbia Circuit held that the decision surrounding the recognition of the Gay Head Tribe “should be made in the first instance by the Department of the Interior since Congress ha[d] specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations.”<sup>121</sup> The court reasoned that the purpose of the regulatory scheme would be frustrated if the “Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.”<sup>122</sup> Following *James*, other courts have applied the doctrine in upholding the dismissal of claims brought by groups seeking or claiming tribal recognition who bypassed the regulatory framework designed to establish whether the group should be recognized as an Indian tribe.<sup>123</sup>

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117. See *Syntek Semiconductor Co., LTD.*, 307 F.3d at 780-81 (“The doctrine of primary jurisdiction is not equivalent to the requirement of exhaustion of administrative remedies.”); *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187, 191 (D. Conn. 1999) (“Primary jurisdiction is distinct from, although often confused for, the doctrine of exhaustion.”).

118. *Reiter*, 507 U.S. at 269; *W. Pac. R.R. Co.*, 352 U.S. at 63 (“‘Exhaustion’ applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.”).

119. 824 F.2d 1132 (D.C. Cir. 1987).

120. *Id.* at 1133, 1137.

121. *Id.* at 1137.

122. *Id.* In support of this proposition, the court relied on 25 U.S.C. §§ 2, 9 (2004). 824 F.2d at 1137.

123. See *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550-51 (10th Cir. 2001); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057-58 (10th Cir. 1993); *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F.Supp. 2d 76, 78-79 (D.D.C. 2002). To exhaust its administrative remedies, a group whose petition is denied may also need to seek review before the Interior Board of Indian Appeals. See *W. Shoshone Bus. Council*, 1 F.3d at 1055 n.3 (“[W]e note that Department of the Interior decisions are not final for purposes of [Section] 704 review if they are subject to appeal to a higher authority within the department.”); cf. *Connecticut ex*

Illustrative of the application of the doctrine of primary jurisdiction is *Golden Hill Paugussett Tribe of Indians v. Weicker*.<sup>124</sup> There, a group calling themselves the Golden Hill Paugussett Tribe of Indians (“Golden Hill”) brought an action against various individuals and entities under the Nonintercourse Act<sup>125</sup> for possession of, and rents and profits in connection with, certain lands in Connecticut.<sup>126</sup> At the time of the action, Golden Hill had a petition for recognition pending before the Bureau of Indian Affairs.<sup>127</sup> The district court granted defendants’ motions to dismiss on the grounds that Golden Hill was required to exhaust the administrative procedures governing tribal recognition prior to seeking a judicial determination of tribal status under the Nonintercourse Act.<sup>128</sup> The United States Court of Appeals for the Second Circuit affirmed, but on slightly different grounds.<sup>129</sup>

The court of appeals found that because the BIA lacked the authority to adjudicate Golden Hill’s land claim--only a court had the power to do that--the doctrine of exhaustion of administrative remedies did not appear to apply, because it requires that the claim be “cognizable in the first instance by an administrative agency alone.”<sup>130</sup> Under the doctrine of primary jurisdiction, however, the court reasoned that the Department’s creation of a structured administrative process with its uniform criteria “made deference to the primary jurisdiction of the agency appropriate.”<sup>131</sup> The court found that the BIA was “better

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*rel. Town of N. Stonington v. United States Dept. of the Interior*, No. 03-6142, 2004 U.S. App. LEXIS 10172, at \*4 (2d Cir. May 24, 2004) (“[U]ntil the Board’s review is complete, the plaintiffs neither have suffered nor will suffer harm sufficiently concrete to warrant judicial intervention in the BIA acknowledgment proceedings.”). Failure to exhaust administrative remedies also will preclude other forms of relief such as mandamus. *See United Tribe of Shawnee Indians*, 253 F.3d at 551 n.4; *W. Shoshone Bus. Council*, 1 F.3d at 1059.

124. 39 F.3d 51 (2d Cir. 1994).

125. The Nonintercourse Act states:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177 (2004). *See generally* *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 617-18 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) (discussing history of the Nonintercourse Act).

126. *Golden Hill Paugussett Tribe of Indians*, 39 F.3d at 54-55.

127. *Id.* at 55.

128. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 839 F. Supp. 130, 135 (D. Conn. 1993).

129. *Golden Hill Paugussett Tribe of Indians*, 39 F.3d at 56.

130. *Id.* at 58 (quoting *United States v. W. Pac. R.R.*, 352 U.S. 59, 63 (1956)).

131. *Golden Hill Paugussett Tribe of Indians*, 39 F.3d at 60. Comparing the judicial formulation of tribal status under the case law interpreting the Nonintercourse Act with the Department’s regulatory criteria, the court observed:

qualified by virtue of its knowledge and experience to determine at the outset whether Golden Hill [met] the criteria for tribal status,” and that resolution of that question, given the pendency of Golden Hill’s petition, would assist the district court in its ultimate disposition of Golden Hill’s claims under the Nonintercourse Act.<sup>132</sup> As a result, the court of appeals directed that the district court stay its proceedings pending a decision by the Department on Golden Hill’s recognition petition.<sup>133</sup> Following the teaching of *Golden Hill Paugussett Tribe of Indians*, courts have stayed actions under the doctrine of primary jurisdiction in cases involving a group claiming Indian tribe status under the Nonintercourse Act, and one claiming such status as a defense in an action seeking injunctive relief involving the building of a casino.<sup>134</sup>

### C. Unreasonable Delay

The resolution of a petition for recognition takes years.<sup>135</sup> The APA imposes a nondiscretionary duty on an administrative agency to pass upon a matter presented to it “within a reasonable time,”<sup>136</sup> and empowers a court to “compel agency action unlawfully withheld or unreasonably delayed.”<sup>137</sup> While an action seeking recognition is not the appropriate vehicle to contest undue delay,<sup>138</sup> relief has been sought

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The two standards overlap, though their application might not always yield identical results. A federal agency and a district court are not like two trains, wholly unrelated to one another, racing down parallel tracks towards the same end. Where a statute confers jurisdiction over a general subject matter to an agency and that matter is a significant component of a dispute properly before the court, it is desirable that the agency and the court go down the same track—although at different times—to attain the statute’s ends by their coordinated action.

*Id.* at 59.

132. *Id.* at 60. The court’s ruling did not address whether deference to the Department would have been appropriate if Golden Hill had not had a petition pending. *Id.* (“We need not decide whether deference would be appropriate if no recognition application were pending, but deferral is fully warranted here where the plaintiff has already invoked BIA’s authority.”).

133. *Id.* at 60-61. If, after eighteen months, no administrative ruling had been forthcoming then, upon defendant’s failure to make a showing as to why the stay should not be dissolved, the district court would have the authority to adjudicate the merits of the case. *Id.*

134. See *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1, 7-9 (E.D.N.Y. 2003); *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187, 191-95 (D. Conn. 1999). In both of these cases, the groups asserting Indian tribal status had petitions pending before the Department.

135. See Coen, *supra* note 10, at 494 (“The minimum time for the decision-making process, from the start of *active consideration* of a petitioner’s documented petition, is twenty-five months.”) (emphasis added).

136. 5 U.S.C. § 555(b) (2004).

137. 5 U.S.C. § 706(1) (2004).

138. See *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 79 (D.D.C. 2002) (“A direct suit in federal court seeking recognition . . . is not appropriate relief.”).

under the APA against the Department on the grounds that the decision regarding a recognition petition was unreasonably delayed.<sup>139</sup> In assessing the reasonableness of administrative delay, a court must consider “the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency.”<sup>140</sup> When the agency lacks resources and is allocating such resources in light of competing considerations, administrative delay, may not be deemed unreasonable.<sup>141</sup>

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139. See, e.g., *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 33 (D.D.C. 2000) (finding unreasonable delay in processing of petition and directing BIA to submit proposed schedule for resolving petition). The Department did not appeal the district court’s order in *Muwekma* where plaintiffs alleged they were entitled to expedited review because their tribe had been previously recognized.

140. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). As noted by the court in *Mashpee Wampanoag Tribal Council*, “[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.” *Id.* at 1100. Factors relevant to this inquiry include:

any statutory timetable or other indication of the speed with which [the Congress] expects the agency to proceed; the nature and extent of the interests prejudiced by the delay, with particular concern for matters of human health and welfare; and the effect of expediting delayed action on agency activities of a competing or higher priority.

*Id.* (internal quotations omitted). See *Telecomm. Research and Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (discussing factors).

141. *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100-01. In some instances, schedules governing the processing and evaluation of the petitions of certain groups have been the result of court-approved or court-ordered deadlines. See *Recognition of Indian Tribes: Hearing Before the Comm. on Senate Indian Affairs*, 107th Cong. (2002) (testimony of Michael R. Smith, Director, Office of Tribal Services, U.S. Dep’t. of the Interior). In testimony before the Senate in 2002, one DOI official noted:

Court orders impact other petitioners in the process and preempt the ability of the Department to manage the acknowledgment program and its resources in a uniform and equitable basis. They impact: i) the petitioner; ii) interested parties; iii) the general public; iv) the nature and quality of the review of the petition; v) those petitioners on active consideration; vi) those petitioners with higher priority on the ready list; and vii) the ability of the Department to manage the acknowledgment program and its resources.

By requiring the Department to give priority to one petition over another, court orders have forced us to divert limited resources. Based upon our experience, our adherence to the Court orders has interrupted, delayed, and adversely impacted the petitioners currently on active consideration and those who are high on the ready list and entitled to priority in consideration over petitioners under Court orders.

Court orders also adversely impact interested parties and the petitioners themselves. The interested parties identified with a specific petition include the states, states Attorneys General, surrounding towns, and recognized tribes. Certain court orders require the Department to prioritize petitions and truncate the time-frames in the regulations for interested parties and petitioners to submit comments on the proposed finding and to receive technical assistance. Court orders abbreviate the time period for responding to comments and accelerate the completion of the proposed findings and final determinations.

#### D. Substantive Challenges

The Department's final determination<sup>142</sup> with respect to the recognition of a group as an Indian tribe is subject to judicial review under the APA.<sup>143</sup> Specifically, under section 706(2)(a), a final decision may be not be disturbed unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>144</sup> To date, courts consistently have affirmed administrative decisions by the Department declining to recognize petitioning groups as Indian tribes as being not arbitrary, capricious, an abuse of discretion, or in violation of law.<sup>145</sup>

#### E. Summary of the Evolving Case Law

Litigation involving the acknowledgment regulations over the course of the past twenty-five years has established certain principles. First, the regulations are the product of a lawful delegation of congressional authority<sup>146</sup> and, as written, they do not exceed the

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*Id.* See Coen, *supra* note 10, at 503 ("In recent hearings on the acknowledgment process, Congress acknowledged its responsibility for the limited funding available to the [OFA (previously BAR)] and asked extensive questions concerning the recent judicial branch decisions that impacted the priorities and time periods established in the regulations.").

142. See *supra* notes 82-91 and accompanying text.

143. See, e.g., *Miami Nation of Indians of Ind., Inc. v. United States Dept. of the Interior*, 255 F.3d 342, 348-49 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002) (indicating that interpretation or application of acknowledgment regulations is subject to judicial review under the APA). See also Toulou Testimony, *supra* note 2 ("[the Secretary of the Interior's] determinations are subject to challenge under the Administrative Procedures Act . . . with regard to whether a group has properly been denied, or granted, acknowledgment.").

144. 5 U.S.C. § 706(2)(a) (2004).

145. See *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 112 F. Supp. 2d 742 (N.D. Ind. 2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002); *Ramapough Mountain Indians v. Norton*, No. 00-5464, 2001 U.S. App. LEXIS 27805 (D.C. Cir. Dec. 11, 2001), *cert. denied*, 537 U.S. 817 (2002). On the rulemaking front, the court in *United Houma Nation v. Babbitt*, No. 96-2095, 1997 U.S. Dist. LEXIS 10095, at \*33 (D.D.C. July 8, 1997), held that the "Department's decision to not initiate a rulemaking to change its regulations based on . . . amendments [to the Indian Reorganization Act of 1934] [could] not be considered as arbitrary and capricious or contrary to law."

146. See *Miami Nation of Indians of Ind., Inc. v. United States Dep't. of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001), (rejecting contention that regulations are not authorized by Congress); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001) ("The BIA has been delegated the authority to determine whether recognized status should be accorded to previously unrecognized tribes."); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994) ("The BIA has the authority to prescribe regulations for carrying into effect any act relating to Indian affairs."); *James v. United States Dep't. of Health and Human Serv.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) ("Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and

Secretary's authority.<sup>147</sup> Second, when faced with requests for judicial recognition of tribal status, depending on whether the issue is raised directly or derivatively, courts will stay or dismiss actions pending a determination on the recognition question by the Department by invoking the doctrine of primary jurisdiction,<sup>148</sup> or that of exhaustion of administrative remedies.<sup>149</sup> Third, actions alleging unreasonable delay in the administrative recognition process face the difficult hurdle of demonstrating that lack of resources and competing considerations are not the principal reason for delay.<sup>150</sup> Finally, groups that have been denied recognition confront the challenge of demonstrating that the Department's decision was arbitrary, capricious, an abuse of discretion, or in violation of law--a stringent standard to meet.<sup>151</sup>

## V. CONCLUSION

The Department of the Interior's regulations governing tribal acknowledgment have been the subject of criticism from several fronts. In 2001, for example, the Government Accounting Office issued a report criticizing the federal acknowledgement process's lack of transparency and delay.<sup>152</sup> Commentators have disparaged the regulations as being

relations."); *Burt Lake Band of Ottawa and Chippewa v. Norton*, 217 F.Supp. 2d 76, 77 (D.D.C. 2002) ("Pursuant to . . . [congressional] delegation of authority to the DOI, BIA promulgated regulations establishing procedures for federal recognition of Indian groups as Indian tribes.").

147. *Miami Nation of Indians of Ind. v. Babbitt*, 887 F. Supp. 1158 (N.D. Ind. 1995); *United Houma Nation v. Babbitt*, No. 96-2095, 1997 U.S. Dist. LEXIS 10095, at \*27 (D.D.C. July 8, 1997).

148. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60-61 (2d Cir. 1994); *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1, 7-9 (E.D.N.Y. 2003); *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187, 191-95 (D. Conn. 1999). In all three cases, petitions for recognition were pending before the Department at the time of the litigation.

149. *See United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550-51 (10th Cir. 2001); *W. Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057-58 (10th Cir. 1993); *James v. United States Dept. of Health and Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987); *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F.Supp. 2d 76, 78-79 (D.D.C. 2002).

150. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-01 (D.C. Cir. 2003).

151. *See Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 112 F. Supp. 2d 742 (N.D. Ind. 2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002) (affirming decision of Department refusing to recognize group as a tribe); *Ramapough Mountain Indians v. Norton*, No. 00-5464, 2001 U.S. App. LEXIS 27805 (D.C. Cir. Dec. 11, 2001), *cert. denied*, 537 U.S. 817 (2002). *See generally Wilkins v. Sec'y of the Interior*, 995 F.2d 850, 853 (8th Cir. 1993) ("Federal courts must defer to any reasonable interpretation given to the statute by the agency charged with its administration, as well as to the agency's interpretations and applications of its regulations and policies in carrying out its statutory duties, unless plainly erroneous.") (internal quotation omitted).

152. *See GAO Report 02-49, supra note 3, at 10* ("[C]learer guidance is needed on the key

vague and imprecise,<sup>153</sup> creating a “bureaucratic morass,”<sup>154</sup> and producing a “recognition process that is exorbitant and time-consuming.”<sup>155</sup> Some maintain that gaming concerns improperly influence the recognition process.<sup>156</sup> Congress also has conducted numerous oversight hearings<sup>157</sup> and regularly proposed legislation to remedy perceived deficiencies in the regulatory acknowledgment process, but such legislation has never passed.<sup>158</sup>

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aspect of the criteria and supporting evidence used in recognition decisions. . . . Second, the process is also hampered by limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties.”).

153. See, e.g., Jack Campisi, *Reflections on the Last Quarter Century of Tribal Recognition*, 37 NEW ENG. L. REV. 505, 509 (2003) (“[T]he root of the problem, the cause of the excess, rests squarely on the vagueness and imprecision of the language of the regulations.”); Paschal, *supra* note 9, at 227 (“The BIA is using evidence inconsistently and employing vague, unquantified standards to arrive at unreviewable conclusions.”). But see *Hearings Before the House Comm. on Government Reform*, 108th Cong. 1 (2004) (testimony of the Honorable Earl E. Devaney, Inspector General for the Department of the Interior) (“While this process has been harshly criticized for its lack of transparency, based on our experience, it is, relatively speaking, one of the more transparent processes in DOI, especially after several recent changes to the program.”).

154. See, e.g., Sockbeson, *supra* note 20, at 489 (referring to his personal experiences with the “incredibly time-consuming process” involved in achieving recognition for the Wampanoag Tribe of Gay Head).

155. Kim, *supra* note 2, at 913.

156. See, e.g., Alex Fryer, *Some Tribes Still See Promises Broken, Dreams Thwarted*, SEATTLE TIMES, May 3, 2004 (“The most strident opposition to a tribe’s petition often comes from established tribes . . . which worry about threats to revenues generated by their casinos. Those tribes sometimes flood the BIA with information arguing against recognition for a new tribe.”); Katherine H. Scott, *Tribal Process Called Corrupt; Congressional Panel Hears Claims that Casino Interests Influence the Process*, NORWICH BULLETIN, May 6, 2004, available at <http://www.norwichbulletin.com/news/stories/20040506/localnews/361859.html> (“Connecticut lawmakers have said the Bureau of Indian Affairs seem to act slower on recognition petitions from tribes that have no plans to open a casino, while tribes with casino plans and backing from deep-pocketed investors are put on a fast track.”); Angie Wagner, *Home of Their Ancestors is Left Unprotected*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, June 6, 2004, available at [http://www.startribune.com/viewers/story.php?template=print\\_a&story=4812586](http://www.startribune.com/viewers/story.php?template=print_a&story=4812586) (last visited June 7, 2004) (reporting how a tribe that has declined to apply for recognition “believe[s] one reason the process is so slow is because the government assumes tribes just want to open casinos”). But see Campisi, *supra* note 153, at 507-08 (“A cursory examination of the list of petitioners illustrates that the vast majority submitted letters of intent to petition well before the *Cabazon* case and the passage of the Indian Gaming Regulatory Act, as well as the American Indian Policy Review Commission report that was published in 1976.”) (footnotes omitted); Kim *supra* note 2, at 904 n.23 (“The recent backlash against Indian casinos hurts Indian groups that seek acknowledgment; however, Indian groups have petitioned for recognition long before Indian casinos became popular.”).

157. Kim, *supra* note 2, at 900 n.7 (“The Senate Committee on Indian Affairs held hearings on the Federal Acknowledgment process (FAP) in 1978, 1983, 1988, 1989, 1992, and 1995.”).

158. See Rosier Testimony, *supra* note 30, at 2 (“For the past few years, Congress has considered legislation almost annually to modify the criteria for groups seeking acknowledgment as Indian tribes or to remove the process altogether from the Department.”); Myers, *supra* note 15, at 285 (discussing proposed legislation); Ragsdale, *supra* note 13, at 341-43 (discussing the proposed Indian Federal Recognition Procedure Act of 1999 and the possibility of creating an independent

In September 2002, in response to the GAO Report, the Department implemented a Strategic Plan to address the deficiencies identified.<sup>159</sup> Many of the action items in the plan were completed by May 2004, and the Department is committed to finishing the remaining tasks.<sup>160</sup> At some point, Congress may change the administrative recognition process. Until then, review of final administrative decisions regarding the recognition of Indian groups as tribes will, as with other areas of administrative law, lie with the courts.

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commission with “legislatively established” criteria so closely resembling 25 CFR Part 83 that few advantages seem likely from the proposed change).

159. See Campisi, *supra* note 153, at 509-10 (discussing submission of Strategic Plan to Congress); see Coen *supra* note 10, at 500 (discussing “plan to make acknowledgment precedents more accessible and to provide clearer guidelines to the regulations in order to ensure consistency in the decisions and to improve public understanding of, and public confidence in, the acknowledgment decisions.”) (footnote omitted).

160. See Rosier Testimony, *supra* note 30, at 4 (“[T]he Department has completed many of the action items identified in the strategic plan. We plan to have all remaining tasks . . . completed by this fall. We do recognize . . . that some tasks will take longer to implement because they may require congressional action, regulatory amendment, or access to the Internet.”).