UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v	:	Civil No. 2:85-CV-1078 (AWT)
	:	CONSOLIDATED
	:	
43.47 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LITCHFIELD, TOWN OF KENT, ET AL.	:	
	:	
Defendants.	:	July 6, 2012

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

The United States submits this Reply Memorandum In Support of its Motion for Judgment on the Pleadings in these consolidated cases. The United States also adopts and joins in the arguments made in the Reply Brief in Support of Motions for Judgment filed by the land claim case defendants on June 29, 2012. *See* Docket No. 331.

The Memorandum in Opposition filed by the Schaghticoke Tribal Nation ("STN") correctly notes that during the same time frame in which it filed two land claim cases, STN was also seeking federal acknowledgment as an Indian Tribe from the Bureau of Indian Affairs ("BIA"). In fact, these two matters were so intertwined that the administrative proceedings under the acknowledgment regulations became the major focus of the land claim litigation. This focus led to the issuance in these consolidated cases of the Court's Scheduling Order which governed the timing of the administrative proceedings. *See* Scheduling Order filed May 9, 2001,

referenced at page 3 of the United States Motion for Judgment on the Pleadings, filed March 9, 2012 [Doc. No. 316], and attached hereto as Exhibit A.

The terms of the Stipulated Order were negotiated by all of the parties and it was the STN which sought to streamline the administrative process by requesting, for example, shorter deadlines for the submission of comments, information, documents, analysis and arguments. Pursuant to paragraphs (b), (c) and (d) of the Stipulated Order, STN fully participated in the development and creation of the first-ever FAIR database. Time limits for responding to the initial Proposed Finding and to Reply were also negotiated. *See* Stipulated Order Paragraph (f). Opportunities for seeking technical assistance including formal technical assistance pursuant to 25 C.F.R. § 83.10(j)(2) were set forth. *See* Stipulated Order Paragraph (g). Although STN ultimately chose not to engage in this formal technical assistance, it should not now be heard to complain about a lack of opportunity to present evidence and question witnesses. *See* Memorandum In Opposition at p. 3.

Paragraph (i) of the Stipulated Order provided that the Final Determination would become effective after 90 days - unless independent review and reconsideration by the Interior Board of Indian Appeals ("IBIA") was requested under 25 C.F.R. § 83.11. That is exactly what transpired after the issuance of the Final Determination – the defendants in the land claim cases filed a request for reconsideration with the IBIA. After thorough briefing by all parties on the issues presented for reconsideration, the IBIA rendered its decision which vacated the Final Determination and sent the matter back to the Secretary for a new decision.

The Stipulated Order also allowed for discovery relevant to the issue of tribal acknowledgment and ordered that this discovery be conducted in accordance with the Federal

Rules of Civil Procedure. *See* Stipulated Order Paragraph (m).

This summary review of the Stipulated Order, negotiated by and among all the parties, clearly demonstrates that the STN not only received the guidance of the regulations and technical assistance from the BIA, but also benefitted from the supervision of the administrative process by the United States District Court. Prior to the entry of the Stipulated Order, the STN had made several attempts to expedite consideration of its petition by the BIA. *See e.g. Schaghticoke Tribal Nation v. Kent School Corp. Inc.,* 3:98cv1113 (AWT), Memorandum of Law in Support of Motion for Separate Trial to Determine Tribal Status at 7, July 13, 1998, [Doc. No. 16] and *United States v. 43.47 Acres of Land,* 2:85cv1078 (AWT), Memorandum of Law in Support of the Schaghticoke Tribal Nation's Motion to Terminate Stay at 9, June 28, 2000 [Doc. No. 151].

The question is – why? What was the motivation for STN to seek Court supervision of the administrative process and why did it seek to have those proceedings expedited. The answer is that at every step of this process, it was clear that the parties expected that the final outcome would have a lasting impact on the land claim litigation and not just on the status of STN as federally recognized Indian Tribe. If STN had received acknowledgment, it would have sought to use that determination in support of its claim for Indian Nonintercourse Act standing in the land claim litigation.

However, the STN never received federal acknowledgment because the Final Decision of January 29, 2004, never became effective. Pursuant to the regulations, a decision does not become effective if a request for reconsideration is filed with the Interior Board of Indian Appeals ("IBIA") is filed. *See* 25 C.F.R. Part 83.11. The STN now asks this Court to treat the past 25 years of litigation as if it never happened. The United States and the land claim

defendants have asserted the doctrine of collateral estoppel and it should be applied here to bar the STN's attempt to re-litigate the issue of whether it is an Indian Tribe for federal purposes.

STN is correct that the application of the Nonintercourse Act criteria and the BIA criteria under the regulations can reach different results, but the United States is not seeking a "rubber stamp" of the BIA determination. What the United States is requesting is that the Court defer to the Agency's expertise and apply the principles of collateral estoppel to preclude STN from re-litigating issues which have already been decided. "APA does not mandate a hearing and opportunity for cross-examination and because Congress has not manifested an intent to provide such procedures, the absence of a provision for such procedures does not render the 1978 regulation arbitrary and capricious ...." *Miami Nation of Indians of Indiana v. Babbitt*, 887 F. Supp. 1158, 1173 (N.D. Indiana 1995).

STN argues at page 3 of its Memorandum in Opposition that it was prevented from submitting all relevant evidence in the BIA proceedings and did not have a full and fair opportunity to litigate the issues in a neutral forum. Nothing could be further from the truth. STN took over fourteen years to prepare and submit its petition. They had every opportunity to present any and all information they wanted and were afforded several sessions of technical assistance from the Office of Federal Acknowledgment. STN admits as much at page 5 of its Opposition Memorandum.

When STN submitted its response to the requests for reconsideration of the Final Determination by the IBIA, it had every opportunity to address the marriage rate issue which was one of the grounds cited by the various interested parties who had filed the requests for reconsideration. Once that briefing was closed, the OFA did submit a Supplemental Transmittal

calling into questions its own calculation of marriage rates. Although STN was not initially afforded any additional briefing, after taking the matter to United States District Court Judge Peter Dorsey, STN was allowed that opportunity. In fact, STN was again provided additional technical assistance. This chronology not only demonstrates that STN was provided a full opportunity to present evidence but also the continuing role of the District Court in supervising administrative proceedings.

In its recitation of the history of the tribal acknowledgment issue, the STN duly notes the challenge it made to the Reconsidered Final Determination dated October 11, 2005, through its filing of an Administrative Procedure Act review by the District Court ("APA case"). Rather than "limited" discovery, as suggested by STN in its Opposition Memorandum at page 7, there was extensive and unprecedented discovery conducted by STN in the APA case on the question of political influence. Instead of a review of the existing record, (including a database containing over 47,000 pages) which is the normal procedure for an APA case, STN made requests for additional production and depositions.

When it suited the purposes of STN, it sought District Court intervention into the BIA determination of whether STN should be recognized as an Indian Tribe. Now that a decision adverse to their recognition has been issued, STN wants to completely divorce the District Court's involvement and APA Ruling from having any impact on the same issue to be decided for purposes of the Indian Nonintercourse Act.

STN accurately reports that the United States District Court denied STN's motion for summary judgment in August of 2008, concluding that "the BIA's determination was neither arbitrary nor capricious, and the Schaghticoke Nation failed to establish that the political

pressure, lobbying, and threats to BIA personnel actually affected the ultimate result." Memorandum in Opposition at page 8. It is further reported by STN that it appealed the decision of the District Court to the Second Circuit Court of Appeals which affirmed the District Court's finding that the Schaghticoke Nation failed to establish that political activity and lobbying actually influenced the Reconsidered Final Determination. Memorandum in Opposition at page 8.

Clearly, this issue has been raised by STN, addressed by the District Court, found to lack merit, and was affirmed by the Second Circuit. It is a mystery why STN then proceeds to discuss the very same details covered in its appeal for six pages of its Memorandum in Opposition (pages 8-14). Re-visiting the already decided issue of alleged political influence in no way supports STN's claim that the standards for determining standing under the Nonintercourse Act and federal acknowledgment under the BIA regulations are different.

It is true that Courts have stated that the standards under the Nonintercourse Act are not necessarily the same as the criteria for tribal recognition under the federal acknowledgment regulations. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F. 3d 51, 57 (2d Cir. 1994). The test under the Nonintercourse Act is set forth in *Montoya v. United States*, 180 U.S. 261 (1901) which held that a group must show that it is "a body of Indians of the same or similar race, united in a community under one leadership of government, and inhabiting a particular though sometimes ill-defined territory." *Id.* at 266. For the reasons set forth in the land claim defendants' Reply Brief, at pages 3-7 and particularly the discussion of the case *Golden Hill Paugussett Tribe of Indians v. Rell,* 463 F. Supp. 2d 192, 200-201 (D. Conn. 2006), the United States joins in the request for the Court to defer to the expert judgment of the BIA.

As pointed out in Defendants' Memorandum of Law in Support of Motion for Judgment on the Pleadings, Docket No. 307, at page 11, it is one thing for a court to evaluate a plaintiff's purported tribal status in the ***absence*** of a federal administrative determination of tribal acknowledgment. However, it is a wholly different matter when the plaintiff has sought acknowledgment through the administrative process and the federal government has explicitly rejected tribal acknowledgment.

CONCLUSION

For all of the reasons set forth in the United States Motion for Judgment on the Pleadings, in the Land Claim Defendants' Motion for Judgment on the Pleadings and in the Reply Briefs, the Court should grant said motions and dismiss the STN land claim cases (3:98cv1113 AWT and 3:00cv820 AWT), and re-enter the Judgment previously entered in the United States' condemnation case (2:85cv1078 AWT), allow Preston Mountain Club its just compensation and direct the resolution of the remaining claims in that case.

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY

/s/ John B. Hughes
JOHN B. HUGHES
ASSISTANT UNITED STATES ATTORNEY
CHIEF, CIVIL DIVISION
157 CHURCH STREET, 25TH FLOOR
NEW HAVEN, CT 06510
FEDERAL BAR #ct05289
Tel: (203) 821-3700; Fax: (203) 773-5373
John.hughes@usdoj.gov

CERTIFICATION

I hereby certify that on July 6, 2012, a copy of the foregoing Reply Memorandum in Support of Motion for Judgment on the Pleadings was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

A copy of the foregoing Reply Memorandum in Support of Motion for Judgment on the Pleadings was also served by mail on the following:

Loretta E. Bonos, Pro Se (deceased)
Admin. of the Est. Of Florence E.M. Baker Bonos
c/o Kenneth D. McCall, Esq.
Admin. of the Estate of Loretta E. Bonos
433 Q. Street
Washington, DC 20001

/s/

John B. Hughes