12-4544-cv (L)
12-4587-cv (CON), 13-4756 (CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

SCHAGHTICOKE TRIBAL NATION,
Plaintiff-Appellant,

SCHAGHTICOKE INDIAN TRIBE,
Intervenor-Plaintiff,

v.

KENT SCHOOL CORP. INC., PRESTON MOUNTAIN CLUB, CONNECTICUT LIGHT & POWER COMPANY, TOWN OF KENT, LORETTA E. BONOS, Admin. of Estate of Florence E. M. Baker Bonos, EUGENE L. PHELPS, Estate of, SAM KWAK, UNITED STATES OF AMERICA,
Defendants-Appellees,

APPALACHIAN TRAIL CONFERENCE, INC., BARBARA G. BUSH, NEW MILFORD SAVINGS BANK,
Intervenors-Defendants.

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

BRIEF OF AMICUS CURIAE STATE OF CONNECTICUT in support of the defendants-appellees and of affirmance of the district court

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STATEMENT OF THE ISSUES

1. Did the district court properly conclude that the plaintiff Schaghticoke Tribal Nation was collaterally estopped from claiming it is an Indian tribe within the meaning of the Nonintercourse Act, 25 U.S.C. § 177, based on the findings the Bureau of Indian Affairs made when it denied the plaintiff's petition for federal acknowledgment as an Indian tribe?
2. Did the district court properly defer under the doctrine of primary jurisdiction to the Bureau of Indian Affairs' findings on the issue of the Schaghticoke Tribal Nation's status as an Indian tribe?

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STATEMENT OF INTERESTS OF AMICUS CURIAE

This amicus brief is submitted by the State of Connecticut pursuant to Fed. R. App. P. 29(a) in support of the defendants-appellees.

In these consolidated appeals, the plaintiff–appellant Schaghticoke Tribal Nation (STN) seeks to dispossess current municipal and private landowners of property it claims was alienated long ago in violation of the Nonintercourse Act, 25 U.S.C. § 177. The State has a substantial interest in not only the stability of long-established property ownership rights, but also in the central issue in this appeal: the tribal status of the STN. Federal recognition of a group as an Indian tribe, whether through the administrative process conducted by the Bureau of Indian Affairs or by a court, raises a host of very significant governmental issues relating to a federally recognized Indian tribe's sovereign status and immunities from state law and regulation.

For this reason, the State was an active party in the federal acknowledgment proceedings that resulted in the decision to deny tribal acknowledgment to the STN, as well as the STN's appeal from that decision under the Administrative Procedures Act. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008), *aff'd per curiam*, 587 F.3d 132 (2d Cir. 2009), *cert. denied*, 131 S.Ct. 127 (2010). Moreover, the State was an amicus party in the underlying district court proceedings in these actions.

ARGUMENT

The factual question of the plaintiff-appellant STN's status as an Indian tribe for purposes of the Nonintercourse Act – necessary for standing to bring land claims under it – was preclusively decided when the Bureau of Indian Affairs (BIA) denied the STN's petition for federal tribal acknowledgment. Following this Court's precedent, the district court stayed the consolidated actions pending the BIA's administrative decision on the STN's acknowledgment petition for the very purpose of avoiding an unnecessary separate court litigation of the STN's tribal status. In denying the STN federal acknowledgment, the BIA determined that it had failed to exist as a community or to exercise political influence or authority for long periods of time. These factors – continuous existence as a community and continuous exercise of political authority – are key requirements for both the BIA's administrative criteria and the standard the courts have followed under the Nonintercourse Act.

The issues of community and political authority the BIA decided are substantively identical and control the court's resolution of the STN's tribal status. Moreover, the STN had a full and fair opportunity to litigate the issue before the BIA. Indeed, the question of the fairness of the BIA's decision process was itself previously adjudicated in the STN's direct appeals from the BIA decision. The STN is therefore precluded by the doctrine of collateral estoppel from relitigating

the issue of tribal status. The district court properly concluded that the STN lacks standing as an Indian tribe to assert claims under the Nonintercourse Act.

Collateral estoppel, also known as issue preclusion, applies when (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided; (3) the party against whom preclusion is sought had a fair and full opportunity to litigate the issue; and (4) the resolution of the issue was necessary to a final judgment on the merits in the prior litigation. *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003); *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 91 (2d Cir. 1997). The doctrine applies with equal force to administrative decisions such as the BIA's acknowledgment decision.[1] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991); *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 199-200 (D. Conn. 2006) (*GHP v. Rell*). The prerequisites for collateral estoppel are fully satisfied here.

For the same reasons, the doctrine of primary jurisdiction supports the district court's affording preclusive deference to the BIA's findings. *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 305-06 (1973). The STN should be precluded from relitigating the question of tribal status.

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[1] The STN does not contest that the BIA acknowledgment decision constitutes an adjudicative decision for purposes of collateral estoppel. *See Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 200 (D. Conn. 2006).

I. THE BIA'S FACTUAL DETERMINATION THAT THE STN HAS NOT CONTINUOUSLY EXISTED AS A COMMUNITY OR EXERCISED POLITICAL AUTHORITY HAS PRECLUSIVE EFFECT FOR THE JUDICIAL INQUIRY OF TRIBAL STATUS UNDER THE NONINTERCOURSE ACT.

A plaintiff asserting claims under the Nonintercourse Act must demonstrate that it is an Indian tribe under federal law. Under *Montoya v. United States*, 180 U.S. 261, 266 (1901), and its progeny, a court must evaluate whether the plaintiff asserting tribal status has existed as a community with political leadership. Similarly, a petitioner seeking federal acknowledgment under the BIA's regulatory criteria must demonstrate that it has existed as a community and has exercised political authority. 25 C.F.R. § 83.7. As to these two key requirements of community and political authority under both standards, the inquiry is substantively identical. The BIA denied the STN's petition for federal tribal acknowledgment under the administrative criteria because the STN did not exist as a community or exercise political authority for very long periods. These factual determinations have preclusive effect for the inquiry under the *Montoya* standard, and the district court properly applied collateral estoppel in dismissing the STN's claims.

A. As to the Key Requirements of Community and Political Authority, the Standards under *Montoya* and the BIA's Acknowledgment Criteria Are Sufficiently Identical to Apply Colleral Estoppel.

The STN has pursued two courses of action that both require that, to establish its status as a federal Indian tribe, it prove that it has continuously existed as a community with political authority. In these consolidated actions, the STN seeks to recover lands alleged to have been conveyed long ago in violation of the Nonintercourse Act, 25 U.S.C. § 177, which provides:

> 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.

(Emphasis added.) To bring a land claims action under the Nonintercourse Act, the plaintiff must establish that it is an Indian tribe. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) (*GHP v. Weicker*); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

The STN also sought federal tribal recognition through the BIA's administrative process. Federal acknowledgment creates a government-to-government relationship between the United States and an Indian tribe, entitling the tribe to the immunities and privileges of a quasi-sovereign entity and to the benefits and services available to Indian tribes from the federal government. 25 C.F.R. § 83.2. Because the BIA's decision on the STN's petition for tribal

acknowledgment would aid in the resolution of the question of tribal status for purposes of the Nonintercourse Act land claims, the district court, following this Court's decision in *GHP v. Weicker*, stayed the land claim actions pending the BIA's decision. JA 154-81. As this Court indicated in *GHP v. Weicker*,

> the BIA is better qualified by virtue of its knowledge and experience to determine whether [the plaintiff] meets the criteria for tribal status. This is a question at the heart of the task assigned by Congress to the BIA and should be answered in the first instance by that agency.

GHP v. Weicker, 39 F.3d at 60.

1. In Denying Federal Tribal Acknowledgment to the STN, the BIA Preclusively Found That the STN Has Not Continuously Existed as a Community with Political Authority.

After extensive proceedings, the BIA denied the STN's petition for federal tribal acknowledgment in 2005. JA 313-404. The BIA's decision was the culmination of a long administrative process. A proposed finding was first issued in 2002, concluding that the STN lacked sufficient evidence of community and political authority for most of its history. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 401-02 (D. Conn. 2008) (*STN I*). In 2004, however, the then-acting assistant secretary issued a final determination reversing course. The original final determination concluded that, even though the STN lacked evidence of community and political authority, the otherwise insufficient evidence could be bolstered by the State's recognition of the Schaghticoke and maintenance of a state reservation for it. *Id.* at 402. The State and appellees

sought reconsideration through an administrative appeal to the Interior Board of Indian Appeals (IBIA). The IBIA vacated the final determination, concluding, among other errors, that the BIA had violated the acknowledgment regulations by misusing state recognition as a substitute for actual evidence of community and political authority. *Id.* at 407-08. In particular, it concluded that the state recognition, on its own, was not probative of either community or political authority. *Id.* at 408 (citing *In re Fed. Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 20 (2005)). The IBIA therefore remanded the matter to the IBIA for reconsideration.

The BIA's Reconsidered Final Determination issued in 2005 concluded that the STN could not satisfy two of the key criteria for tribal acknowledgment: continuous existence as a distinct community and continuous exercise of political influence or authority. More specifically, it found that STN lacked evidence that it existed as a community from 1920 to 1967 and after 1996, JA 358-61, and that it similarly lacked evidence that it exercised political influence or authority from 1801 to 1875, 1885 to 1967, and after 1996. JA 369-74. The RFD further concluded that the State's relationship with the STN – so-called "state recognition" – was not explicitly or implicitly based on a government-to-government relationship between the State and the Schaghticoke or on the existence of tribal

political authority. Therefore, it was not evidence of the actual exercise of political influence or authority within the group. JA 362-68.

The STN appealed the BIA's decision under the Administrative Procedures Act, 5 U.S.C. § 702 *et seq*. The district court dismissed the appeal, holding in particular on the issue of state recognition that the BIA's decision

> presents a thorough, rational, and well-reasoned evaluation, leading to the conclusion that [the elements of the State's relationship with the Schaghticoke] do not add up to demonstrate the actual existence of political community throughout most of the history of the Schaghticoke. The record supports the [BIA's] conclusion on remand that the State's relationship, as understood through an examination of each of the underlying elements and supporting record evidence, does not provide the missing evidence of community and political authority that STN lacks to meet the acknowledgment criteria.

STN I, 587 F. Supp. 2d at 414. This Court affirmed.[2] *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009) (*STN II*), *cert. denied*, 131 S.Ct. 127 (2010).

2. Collateral Estoppel Applies to the BIA's Factual Determinations Because Both the *Montoya* Standard and the Acknowledgment Criteria Require Community and Political Authority for Tribal Status.

Now, after participating in years of extensive administrative proceedings involving the submission of an extraordinary volume of documents and evidence

[2] On appeal to this Court, the STN did not pursue its claims as to the BIA's treatment of state recognition, but principally claimed that the BIA's process was unfair because of alleged improper political influence. *See* discussion in section II below.

before the BIA, the STN glibly asks this Court to ignore the BIA's detailed and careful findings as irrelevant. It asserts that the standards the BIA applies for tribal acknowledgment are simply too different from the federal common law standards for tribal status under the Nonintercourse Act for collateral estoppel to apply. STN Br., at 25-35. The argument "misses the mark" and "does not undermine application of deference and/or collateral estoppel to those factual determinations made by the BIA which are relevant to the assessment of plaintiff's Nonintercourse Act claim in this court." *GHP v. Rell*, 463 F. Supp. 2d at 201. The factual findings of the BIA on the STN's acknowledgment petition – that the STN lack existence as a community and exercise of political authority for very long periods of time – have preclusive effect and collaterally estop the STN from claiming it has federal tribal status for purposes of the Nonintercourse Act.

The judicial standards the federal courts have applied and the BIA regulatory standards for federal acknowledgment are different in some ways. However, as to the key factual findings in the BIA's decision – community and political authority – the standards are materially identical. As this Court observed, the judicial standard and the BIA regulatory criteria "both have anthropological, political, geographical and cultural bases and ***require, at a minimum, a community with a political structure***." *GHP v. Weicker*, 39 F.3d at 59 (emphasis added); *accord GHP v. Rell*, 463 F. Supp. 2d at 201.

In land claims under the Nonintercourse Act, courts have applied the so-called *Montoya* standard. *See United States v. Candelaria*, 271 U.S. 432, 441-42 (1926); *GHP v. Weicker*, 39 F.3d at 59; *Mashpee*, 592 F. 2d at 582. The *Montoya* test requires a plaintiff to demonstrate that it is (1) "a body of Indians of the same or similar race," (2) "united in a community," (3) "under one leadership or government," and (4) "inhabiting a particular though sometimes ill-defined territory." *Montoya*, 180 U.S. at 266. The BIA's acknowledgment regulations establish seven criteria that a petitioner must satisfy: (a) identification as an American Indian entity since 1900; (b) continuous existence as a distinct community (community); (c) continuous maintenance of political influence or authority over members as an autonomous entity (political authority); (d) governing document including membership criteria; (e) descent from a historical Indian tribe and membership list (descent); (f) membership composed primarily of persons not members of an acknowledged tribe; and (g) no congressional legislation terminating or forbidding acknowledgment. 25 C.F.R. § 83.7. Obviously, some of the regulatory criteria are not explicitly part of the *Montoya* standard. However, the core regulatory criteria – community, political authority, and descent – are substantively identical to *Montoya*'s requirements.

The STN asserts, in a very generalized way, that the *Montoya* standard is more flexible, and presumably easier to satisfy, than what it describes as the more

detailed BIA regulatory criteria. STN Br., at 31-35. What the STN fails to do, however, is to demonstrate how the BIA's factual determinations as to the lack of community and political authority – factors that are key to both the *Montoya* and administrative standards – are not preclusive under *Montoya* as well.

A fuller understanding of the *Montoya* standard's requirements and their relationship to the BIA's regulatory criteria, something the STN does not undertake, demonstrates why the BIA's factual determinations on community and political authority have collateral estoppel effect. To satisfy the requirement of "united in a community," a group must exist as a distinct social community. *United States v. Washington,* 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Mashpee*, 592 U.S. at 586. To satisfy the "under one leadership or government" requirement, the group must have substantial influence over its own affairs, in which political leadership is meaningful and involves the group's broader membership and not just a few, self-appointed leaders. *Mashpee*, 592 F.2d at 582-83. There must be sustained continuity of political leadership, rather than occasional or crisis-driven activity, exercising a significant degree of influence on significant issues in the lives of the members. *Id.* at 584-85. Moreover, a group must have maintained both community and political authority continuously, without extended gaps of such existence. *Washington*, 641 U.S. at 1373. Continuity of existence is an essential attribute of tribal sovereignty, without

which tribal status cannot be maintained. *Id.*; *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013); *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342, 350-51 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

The community and political leadership components of the *Montoya* standard are central to tribal status. Although under *Montoya* a tribe must be "Indians of the same or similar race," a tribe cannot be based solely on Indian descent. *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Instead, as the *Montoya* standard makes clear, tribal status is dependent on the continual existence as a distinct community with the exercise of political authority.

This is also the core of the BIA's regulatory criteria. As the BIA stated when it first adopted acknowledgment regulations in 1978:

> The Department must be assured of the tribal character of the petitioner before the group is acknowledged. Although the petitioners must be American Indians, groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations – a political relationship – is indispensable.

43 Fed. Reg. 39361, 39362 (Sept. 5, 1978). For this reason, like the *Montoya* standard, the BIA's acknowledgment regulations have community and political authority as their central requirements. It is those criteria, not other criteria that are not explicitly part of the *Montoya* standard, that the STN failed to satisfy.

Nonetheless, the STN asserts that the BIA's more "rigorous" process should preclude collateral estoppel. STN Br., at 28. The distinctions it points to, however, are trivial. First, it complains that the BIA's regulations require the submission of a "documented petition," which includes detailed arguments and documentary evidence that the criteria are met, and such a submission is not required under *Montoya*. *See* 25 C.F.R. § 83.1. The form in which an agency requires evidence to be submitted cannot control the application of collateral estoppel. Certainly a court would require detailed arguments and evidence to satisfy the *Montoya* standard. *See Mashpee*, 592 F.2d at 582-88; *Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009). Similarly, the STN complains that the BIA's acknowledgment regulations provide that the criteria must be established under a "reasonable likelihood" standard. Yet, it makes no effort, because it cannot, to demonstrate how that is a material distinction for purposes of collateral estoppel.

In the end, the STN cannot avoid the consequences flowing from the BIA's factual determinations. On the issues of community and political authority – central requirements under both the *Montoya* and BIA's regulatory standards – the BIA conclusively determined that the STN, for very long periods of time, did not exist as a community or exercise political authority within the group. After exhaustively evaluating the evidence the STN submitted, the BIA factually

determined that the limited and isolated evidence of Schaghticoke individuals' activities simply did not show the kind of community cohesion necessary or that political influence or authority on important group matters was exercised. These same factual determinations control the analysis under *Montoya*.

Still, the STN suggests that a court could somehow, under the *Montoya* standard, reach a different conclusion on the significance of state recognition and a state reservation.[3] STN Br., at 29. Beyond speculating that such a possibility is conceivable, the STN does not offer any legal analysis or factual basis on which a court could do so. Indeed, it makes no effort to grapple with the BIA's factual determinations that the State's historical relationship with the Schaghticoke was indeterminate and definitely ***not*** based on the existence of a community with political authority within the meaning of both *Montoya* and the acknowledgment regulations. JA 362-68.

Similarly, the STN complain that a court under *Montoya* would not have required the inclusion of unenrolled Schaghticoke individuals, as did the BIA. STN Br., at 30-31. The BIA concluded that, for the period after 1994, the STN did not satisfy community or political authority because a significant number of key

[3] The STN observes that the BIA is considering amendments to the acknowledgement regulations that could change the significance of state recognition for purposes of federal acknowledgment. STN Br., at 29. The BIA's proposed rulemaking does not aid the STN here. The STN's petition was decided under the existing regulations, after all, and new regulations have not yet been, and may never be, adopted.

Schaghticoke were not members of the STN. JA 376-78. First, this is hardly the most significant of the STN's factual shortcomings. Much more important are the failures to exist as a community or to exercise political authority for large swaths of the nineteenth and twentieth centuries. JA 358-61, 369-74. Second, the issue is plainly relevant to the *Montoya* requirement that the tribe exist as a united community. The BIA concluded that the STN did not consist of the complete Schaghticoke group because the unenrolled members were from significant Schaghticoke family lines that were not represented in the STN. JA 376-78. The STN does not and cannot explain why such a factual determination would not be an important consideration under *Montoya*.

The STN also cites numerous federal statutes that may contain certain different definitions or scope as to Indian tribes. STN Br., at 36-41. The argument is entirely beside the point. Congress certainly may and has defined Indians or Indian tribes differently for different purposes.[4] However, what controls here is the extent to which the BIA's decision to deny acknowledgment resolved the factual issues that are material to the judicial standard developed for claims asserted under

[4] Notably, there are some federal statutes cited by the STN that expressly include state recognized tribes for purposes of those statues. STN Br., at 38 (citing 25 U.S.C. §§ 4103, 450b(e)). By negative implication, where Congress has not expressly included state recognized tribes, it did not intend to bring such groups within the scope of the relevant statute. *See Levin v. United States*, 133 S.Ct. 1224, 1233 (2013). Moreover, this reflects Congress's understanding that state recognition of a tribe is not the same as, and cannot be the basis for, recognizing a group as a federal tribe.

the Nonintercourse Act. As demonstrated above, it did, and collateral estoppel should apply.

B. STN Is Not Entitled to Tribal Status under the *Montoya* Standard

The STN blithely argues, in a few short paragraphs, that it would clearly be entitled to eligibility under the *Montoya* standard. STN Br., at 26-28. The argument is entirely baseless. First, the STN rely on state law that provides that the Schaghticoke tribe is recognized by the State as "self-governing entit[y]" with power to determine tribal membership and reservation residency. Conn. Gen. Stat. § 47-59a. If federal tribal status were that simply resolved, this issue would have been decided years earlier. Obviously, it is not so simple. That state law affords state recognized tribes with the authority over membership, reservation residency and the form of tribal government does not show that the group ***actually*** exercised such political authority within a distinct community as required by *Montoya* and the acknowledgment regulations. Moreover, this statute was first enacted in 1973, and therefore can say nothing about whether the STN did or did not exist as a community or exercised political authority before that point. This is critical because it is principally in the periods prior to the enactment of the state recognition statute that the BIA found that the STN lacked evidence of community and political authority. JA 358-62, 369-74. In fact, the BIA explicitly found that state recognition did not provide evidence of either community or political

authority for those periods that the STN otherwise lacked evidence. JA 362-68. This factual determination was expressly affirmed in the STN's direct APA appeal. *STN I*, 587 F. Supp. 2d at 414. Plainly, the STN's effort to bootstrap itself on the basis of state law fails.

Second, the STN argues that under *Montoya* it is "definitively" united in a community under one leadership or government – simply because it has a membership list. STN Br., at 27. This is nonsense. It takes the district court to task for noting that the BIA's denial was based, in small part, on the fact that there were 42 unenrolled Schaghticoke members, some of whom are members in a rival Schaghticoke faction, known as the Schaghticoke Indian Tribe. *Id.* at 27, 30-31. The BIA's determination was based on the fact that those unenrolled members reflected significant Schaghticoke family lines that were not represented in the STN, without whom a Schaghticoke community could not exist. JA 376-78. Again, this determination was explicitly affirmed on appeal, and the STN's arguments to the contrary were rejected. *STN* I, 587 F. Supp. 2d at 417-18. The STN cannot dispute this determination. More importantly, as discussed above, the factual determination obviously goes to the question of whether the Schaghticoke are "united under one leadership," because they plainly are not.

Third, the STN argues it has always inhabited a particular territory – specifically, the state reservation in Kent, Connecticut. That the State has

maintained a reservation for the Schaghticoke does not by itself prove anything. As the BIA's factual determinations show, very few Schaghticoke members have in fact lived on the reservation, and residency patterns fail to show the existence of an actual community. JA 352-61.

In effect, the STN claim it is entitled to tribal status under *Montoya* because it is a state recognized tribe with a state reservation and a membership list. It offers no legal support for such a bold proposition, because there is none. Moreover, it is directly contradicted by the BIA's factual determinations as to the significance of the State's historical relationship with the Schaghticoke. JA 362-68.

C. The Doctrine of Primary Jurisdiction Supports Collateral Estoppel on the Issue of Tribal Status.

The district court stayed the plaintiffs' land claims actions to allow the BIA to proceed with its administrative process and decide the STN's acknowledgment petition for a very good reason: the BIA's decision would very likely resolve the factual issues relating to tribal status. And it did.

As this Court stated,

> [t]he [*Montoya* and BIA] 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.

GHP v. Weicker, 39 F.3d at 59. The twin justifications for primary jurisdiction – agency expertise and uniformity in decisions – are furthered and indeed require that collateral estoppel preclude relitigation of the factual determinations of the BIA. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1991); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 305-06 (1973); *Far East Conf. v. United States*, 342 U.S. 570, 574 (1952).

The STN argues that the deference appropriate under primary jurisdiction goes only one way – if the BIA acknowledged the STN, the district court would have been bound by that determination, but when the BIA declined to acknowledge it, the BIA's factual determinations can be ignored. STN Br., at 46-48. This neither follows from the purposes of primary jurisdiction nor is supported by the nature and scope of the BIA's factual determinations. As demonstrated above, the principles of collateral estoppel fully apply to the BIA's determinations, particularly as to the lack of community and political authority, and the doctrine of primary jurisdiction is well served by their application here.

II. THE FAIRNESS OF THE BIA'S PROCESS IN DENYING THE STN'S ACKNOWLEDGMENT PETITION HAS ALREADY BEEN ADJUDICATED, AND COLLAERAL ESTOPPEL BARS FURTHER LITIGATION OF ITS FAIRNESS.

The question of the fairness of the BIA's administrative process has already been preclusively litigated. In its direct APA appeal, the STN alleged that the BIA's decision to deny federal acknowledgment was unfair and the product of improper political pressure. That claim was rejected. *STN II*, 587 F.3d at 134. Yet the STN now reassert those very same claims as a basis for avoiding the collateral estoppel effect of the acknowledgment denial. This contention is easily disposed. The same claims of unfairness were fully and fairly adjudicated in its APA appeal, and the judicial determination rejecting the claims itself collaterally estops the STN from religating the fairness question. *See Purdy*, 337 F.3d at 258.

The STN contends that it should not be precluded from relitigating the issue of its tribal status under federal law because the process resulting in the decision to deny federal acknowledgment was unfair. In support, it offers up the very same claims and arguments it made in its direct appeal under the APA of the BIA's acknowledgment decision – claims that were themselves fully and fairly adjudicated by this Court.

Indeed, in an effort to show that the BIA's administrative decision making process was unfair, it does little more than quote the district court's recitation of its claims and evidence in the APA appeal. STN Br., at 42-45. The STN does not

purport to offer any claim or evidence that was not adjudicated by the district court and affirmed by the Court in the APA appeal. Instead, it simply regurgitates the very same claims made there – that various elected officials and others expressed strong opposition to the acknowledgment of the STN in numerous ways and venues. *Id.*; *STN I*, 587 F. Supp. 2d at 403-07; *STN II*, 587 F.3d at 134.

Those claims were fully adjudicated and found wanting. The district court's review of the claims and evidence of alleged improper influence was lengthy and detailed. *STN I*, 586 F. Supp. 2d at 409-12. Yet, it found:

> In sum, the evidence presented by STN does not show the legislative activity *actually* affected the outcome on the merits by the BIA.... Nothing suggests that the actual decision maker was impacted by the political pressure exerted by state and federal legislators or their surrogates.... [T]he Secretary and other deposed Department officials testified that the Congressional delegation has no impact on their work or ultimate decisions.

Id. at 412. Similarly, as this Court stated when it affirmed the district court:

> Significantly, ... Interior Department officials uniformly testified in depositions that they were not influenced by the political clamor surrounding the Schaghticoke.... Any political pressure, moreover, was exerted upon senior Interior Department officials, there is no evidence that any pressure was exerted upon Cason, who was the official ultimately responsible for issuing the Reconsidered Final Determination.... As a result, even if the Connecticut elected officials "intended to" influence the Reconsidered Final Determination, there is no evidence that they "*did* cause the agency's action to be influenced by factors not relevant under the controlling statute."

STN II, 587 F.3d at 134 (quoting *Town of Orangetown v. Ruckelshaus,* 740 F.2d 185, 188 (2d Cir. 1984); emphasis original). Plainly, the claims of unfairness it

asserts now to avoid collateral estoppel – that allegedly improper political influence was brought to bear on the administrative decision makers – are the very claims of unfairness rejected in the APA appeal.

Nor can the STN complain that it did not have a full and fair opportunity to litigate these claims of unfairness. The district court in fact afforded the STN the unusual opportunity to depose several high-level Interior Department officials, including the then-Secretary of the Interior and Associate Deputy Secretary James Cason, the actual decision maker. Nothing prevented the STN from making its case in the direct APA appeal that the administrative process was unfair. Having failed to do so successfully in that litigation, the STN cannot now avoid the preclusive effect of that adjudication.

The STN makes a half-hearted effort to argue that it nonetheless should be allowed to relitigate the question of tribal status because the APA standard of review is a deferential one. STN Br., at 45. The argument fails. As this Court made clear, the standard for evaluating the fairness of an administrative decision where there are claims of improper political influence requires "'some showing that the political pressure was intended to and did cause the agency's actions to be influenced by factors not relevant under the controlling statute.'" *STN II*, 587 F.3d at 134 (quoting *Orangetown*, 740 F.2d at 188)). That is the standard applied in the

direct APA appeal, and the STN makes no argument that some other standard would apply if it were allowed to relitigate the issue.[5]

The STN in the end asserts that "there is reason to doubt" the fairness of the BIA proceedings. STN Br., at 46. Unfortunately for it, it needs something more than a doubt. Moreover, the claims that it suggests cause that doubt have already been adjudicated and resolved. The BIA proceedings were conducted fairly, and the STN is precluded from relitigating the issue of their fairness.

[5] Indeed, this Court expressly rejected the STN's argument that a broader "appearance of bias" standard ought to apply. *STN II*, 587 F.3d at 134 n.1.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the plaintiff's action should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 32

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,569 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman 14-point font.

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I hereby certify that true and accurate copies of the foregoing brief were filed electronically. 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.

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