12-4544-cv(L)

12-4587-cv(CON), 13-4756-cv(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 CORPORATION, PRESTON MOUNTAIN CLUB, CONNECTICUT LIGHT & POWER COMPANY, TOWN OF KENT,

(Additional Caption On the Reverse)

On Appeal from the United States District Court for the District of Connecticut

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JOINT BRIEF OF DEFENDANT-APPELLEES KENT SCHOOL CORPORATION, PRESTON MOUNTAIN CLUB, CONNECTICUT LIGHT & POWER COMPANY & TOWN OF KENT

David J. Elliott
Jaime Bachrach
John W. Cerreta
Day Pitney LLP
242 Trumbull Street
Hartford, CT 06103
Counsel for Defendant Kent School Corp.

Richard L. Street
Carmody & Torrance
50 Leavenworth Street
P. O. Box 1110
Waterbury, CT 06721
Counsel for Defendant Connecticut Light & Power Co.

Jeffrey B. Sienkiewicz
Sienkiewicz & McKenna P.C.
18 Aspetuck Ridge Road
P.O. Box 786
New Milford, CT 06776
Counsel for Defendant Town of Kent

James R. Fogarty
Fogarty Cohen Selby & Nemiroff, LLC
Suite 406
1700 East Putnam Ave.
Old Greenwich, CT 06870
Counsel for Defendant

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,

and

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

Intervenors-Defendants.

CORPORATE DISCLOSURE STATEMENT

Respondent Kent School Corporation discloses that it is a Connecticut corporation and has no parent corporation, and there is no publicly held company owning 10% or more of the corporation's stock.

Respondent Connecticut Light and Power Company is a Connecticut corporation, which is a wholly owned subsidiary of Northeast Utilities. Northeast Utilities is a publicly traded Massachusetts Business Trust chartered as a stockholding company. No publicly held corporation owns 10% or more of Northeast Utilities' stock.

Respondent Town of Kent discloses that it is a municipal corporation organized under the laws of the State of Connecticut, that it has no parent corporation and that there is no publicly held corporation owning 10% or more of the corporation's stock.

Respondent Preston Mountain Club discloses that it is a Connecticut corporation, that it has no parent corporation, and that no publicly held corporation owns 10% or more of the corporation's stock.

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COUNTER-STATEMENT OF THE ISSUES

1. Whether the District Court was correct in its application of the doctrine of primary jurisdiction and properly accorded deference to the factual determinations of the Bureau of Indian Affairs (the "BIA") which are relevant to the assessment of Schaghticoke Tribal Nation's ("STN") status as an Indian tribe and its claims under the Nonintercourse Act.

2. Whether the District Court was correct in its application of the doctrine of collateral estoppel and properly concluded that collateral estoppel barred STN from relitigating the issue of its status as an Indian tribe because it was bound by the BIA's determination that STN did not qualify as an Indian tribe.

3. Whether the District Court's judgment should in any event be affirmed under this Court's "well-established" rule holding that "Indian land claims asserted generations after an alleged dispossession . . . are subject to dismissal on the basis of laches, acquiescence, and impossibility."[1]

COUNTER-STATEMENT OF THE CASE AND THE FACTS

Before the Court are three consolidated matters in which STN has asserted land claims pursuant to the Nonintercourse Act, 25 U.S.C. § 177 (the "Nonintercourse Act"). The essential claim made by STN in each case is that STN

[1] *See, e.g., Stockbridge-Munsee Cmty. v. New York*, __ F.3d__, 2014 U.S. App. LEXIS 11691, *6 (2d Cir. June 20, 2014).

is an American Indian tribe and that it has been dispossessed from Indian land without the approval of Congress in violation of the Nonintercourse Act. However, if STN does not exist as an Indian tribe under federal law, then it has no standing to pursue its claims under the Nonintercourse Act.

United States of America v. 43.47 Acres of Land, Docket No. 2:85-cv-1078 (AWT), is a condemnation action involving the federal government's attempt to acquire title to two parcels of land under its powers of eminent domain. *See* Amended Complaint in Condemnation, JA249. STN intervened, claiming to own the land on the basis that it had been wrongfully conveyed in violation of the Nonintercourse Act. *See* Amended Answer and Affirmative Defenses, JA260.

Schaghticoke Tribal Nation v. Kent School Corporation, Docket No. 3:98-cv-1113 (AWT), and *Schaghticoke Tribal Nation v. United States of America*, Docket No. 3:00-cv-820 (AWT), are land claim actions filed by STN. The defendant-appellees are those who have or had ownership interest(s) in parcels claimed by STN (the "land claim defendants"). STN alleges, *inter alia*, that between 1801 and 1911 those parcels were sold or transferred by the State of Connecticut in violation of the provisions of the Nonintercourse Act and that those transfers are "void, illegal and of no effect." STN seeks, among other relief, that the land claim defendants should be ejected and possession of the land should be returned to STN. *See* Complaints, JA91, JA195.

STN contemporaneously sought federal acknowledgment by the BIA pursuant to 25 C.F.R. Part 83. By letter dated December 14, 1981, a group calling itself the Schaghticoke Indian Tribe ("SIT") filed a notice of intent to submit an acknowledgment petition with the Department of the Interior ("the Department"), BIA. Thirteen years later, on December 12, 1994, STN submitted a "documented" petition to the BIA requesting acknowledgment as an Indian tribe. As set forth in a 2008 opinion issued by the United States District Court for the District of Connecticut ("District Court"), the policies and procedures established by the BIA for acknowledging certain Indian groups as tribes serve several purposes:

> Federal acknowledgment of tribal existence by the [Department of the Interior] is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment also establishes a government-to-government relationship with the United States and entitles a tribe to the immunities and privileges available to other federally acknowledged Indian tribes. The acknowledgment regulations apply to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department" and are "intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present. Because a tribe is a political, not a racial, classification, the essential requirement for acknowledgment is continuity of tribal existence.
>
> The acknowledgment regulations contain seven criteria, each of which must be satisfied by the petitioner . . . . A petition must be denied if the available evidence demonstrates that it does not meet one or more of the criteria, or if there is insufficient evidence that it meets one or more of the criteria. Although conclusive proof is not required, the available evidence must establish a reasonable likelihood of the

> validity of the facts relating to that criterion. The burden of proof rests on the petitioner.

Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 400 (D. Conn. 2008) ("*Schaghticoke Tribal Nation*") (affirming the denial of STN's federal acknowledgement petition) (internal quotation marks and citations omitted), *aff'd*, 587 F.3d 132 (2d Cir. 2009), *cert. den. sub. nom. Schaghticoke Tribal Nation v. Salazar*, __ U.S. __, 131 S. Ct 127, *rehearing den.*, __ U.S. __, 131 S. Ct. 698 (2010).

Recognizing that the doctrine of primary jurisdiction requires courts to transfer to administrative agencies the power to determine complex factual issues such as those pertaining to the determination of tribal status, the District Court initially stayed these proceedings to allow the BIA the opportunity to decide whether STN constituted an Indian tribe for purposes of federal acknowledgment.[2] The District Court vacated the stay in 2000[3] but reinstated it when, after prolonged negotiations, the Department, STN and the land claim defendants agreed on an expedited and enhanced administrative process by which the BIA would review and act upon STN's petition for acknowledgment. Thus, on May 8, 2001, the District Court entered a Scheduling Order,[4] the purpose of which was

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[2] Ruling on Pending Motions (Mar. 31, 1999), JA154, JA166.

[3] Ruling on Pending Motions (Sept. 11, 2000), JA167.

[4] JA171.

> to permit, and establish a framework for, the determination by the Department . . . on the petition for tribal acknowledgment submitted by the Schaghticoke Tribal Nation. This Order is meant to serve the rights and interests of all parties to the captioned litigation and allow the DOI to determine the merits of the petition on a schedule other than that set forth in the applicable regulations, 25 C.F.R. Part 83 . . . .

JA172. The Scheduling Order permitted the BIA to determine the merits of STN's petition for federal acknowledgment, and more specifically whether STN existed as an Indian tribe within the meaning of federal law.

Following issuance of the Scheduling Order, the BIA undertook an extensive evaluation of STN's petition in order to determine whether STN existed as an Indian tribe. The administrative process included submission of extensive evidence, argument and comment by STN and other interested parties, and the evaluation and sifting of that evidence by the Department's professional staff.[5] In 2002, the BIA issued a Proposed Finding Against Acknowledgment, *see* 67 Fed. Reg. 76184 (Dec. 11, 2002),[6] followed by a "Final Determination To Acknowledge [STN]" ("Final Determination") that ignored the absence of evidence of "community" and "political authority," criteria for acknowledgment required by

[5] The filed administrative record included approximately 6,774 documents comprising over 47,000 pages, as well as a number of CD-ROM disks and DVDs with additional information. A complete description of the administrative record was set forth in the Notice of Manual Filing of Administrative Record [Docket # 131] filed in the case entitled *Schaghticoke Tribal Nation v. Kempthorne*, Civ. No. 3:36-cv-00081 (PCD).

[6] The Federal Register Notice of the Proposed Finding is located at JA295.

Part 83, by relying on an *implicit* state relationship and endogamy rates, *see* 69 Fed. Reg. 5570, 5573 (Feb. 5, 2004).[7] Thereafter, the land claim defendants and the State of Connecticut sought review of the Final Determination by the independent Interior Board of Indian Appeals ("IBIA"). The IBIA vacated and remanded the Final Determination. *See In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 2005 WL 2672009 (May 12, 2005). The parties then submitted further comments and submission of evidence, and finally the BIA issued the Department's Reconsidered Final Determination To Decline To Acknowledge the Schaghticoke Tribal Nation ("RFD") on October 11, 2005. *See* 70 Fed. Reg. 60101 (Oct. 14, 2005);[8] *see also Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 401-03, 407-09.

The RFD – the Department's final determination of STN's acknowledgment petition – concluded that STN did not satisfy two of the mandatory criteria necessary for federal acknowledgment, specifically "community" under 25 C.F.R. § 83.7(b) and "political influence or authority" under 25 C.F.R. § 83.7(c). *See* RFD at JA351, JA361, JA374. Because of this, STN was not entitled to acknowledgment as an Indian tribe. *See* 70 Fed. Reg. at 60102-03.

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[7] The Federal Register Notice of the Final Determination is located at JA302.

[8] The RFD is located at JA312. The Federal Register Notice of the RFD is located at JA308.

Upon rejection of its petition for acknowledgment, STN appealed the RFD to the District Court by petition for review pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (the "APA"). STN based its appeal, in large part, on the claim that the RFD was the result of *ex parte* contacts and improper political influence by politicians and groups opposed to STN's acknowledgment petition. The District Court permitted STN to conduct extensive discovery to search for evidence supporting its allegations, which led to the depositions of former Interior Secretary Gale Norton; Associate Deputy Secretary James Cason (the official who actually issued the RFD); F. Lee Flemming, the Director of the Office of Federal Acknowledgment; David Bernhardt, former deputy chief of staff to Secretary Norton; and Loren Monroe, a lobbyist with Barbour Griffith and Rogers, LLC, relating to its work for a citizen group known as Town Action to Save Kent ("TASK"). *See Schaghticoke Tribal Nation v. Norton*, No. 3:06-cv-81, 2007 U.S. Dist. LEXIS 19535, *7, 12 (D. Conn. Mar. 19, 2007).

Despite this extensive discovery, STN failed to produce any evidence that political pressure or alleged *ex parte* contacts impacted the RFD. The District Court concluded that the Congressional hearings, communications between legislators and agency officials, and the publicity on the acknowledgment issue as a whole did not affect the Department's decision to issue the RFD. *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 410-11. Further, the District Court determined

that:

> the nexus between the pressure exerted and the actual decision makers is tenuous at best, and the evidence adequately establishes STN's ineligibility for tribal recognition. Accordingly, the Court concludes that political influence did not enter the decision maker's "calculus of consideration." In the absence of such interference, there is no clear violation of STN's due process rights to justify this Court's extraordinary interruption of the administrative process.

Id. at 412 (internal citations omitted).

Moreover, on the question of whether the determination to deny federal acknowledgment to STN was proper, the District Court found that the RFD properly re-examined the State of Connecticut's relationship with STN in accordance with the instructions of the IBIA and that the RFD's conclusion that the state relationship failed to demonstrate the actual existence of a political community throughout most of STN's history was a "thorough, rational and well-reasoned evaluation" of the evidence. *Id.* at 413-14. The District Court found that the RFD's conclusion that Schaghticoke marriage rates were insufficient to provide evidence of "community" and "political authority" under 25 C.F.R. §§ 83.7(b)(2)(ii) and (c)(3) was premised upon a reasonable interpretation of the regulations and agency precedent. Moreover, that conclusion represented an "informed, reasoned decision" after the professionals within the agency had "engaged with the academic debates on this issue." *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 415-16.

Finally, the District Court concluded that the RFD was "reasonable based on the evidence" in determining that after 1996, STN failed to satisfy criteria (b) community and (c) political authority, based on the fact that a substantial portion of the Schaghticoke refused to be enrolled as members of STN. *Id*. at 418. The District Court granted the motions for summary judgment filed by the respondents, which included the land claim defendants, denied the motion filed by STN and entered judgment for the respondents. *Id.* at 395, 422.

STN appealed the District Court's decision to this Court. *See Schaghticoke Tribal Nation*, 587 F.3d at 133. On appeal, STN abandoned its claim that the RFD was arbitrary and capricious and focused solely on the claims that the RFD was the product of improper political influence and was issued in violation of the Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d. In rejecting STN's appeal, this Court observed:

> Although Connecticut political figures showed keen interest in whether the Department of the Interior acknowledged the Schaghticoke, the evidence submitted by the Schaghticoke cannot support a claim of improper political influence. To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute.
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> * * *
>
> Significantly, however, 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 of the 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.

587 F.3d at 134 (internal quotation marks and citations omitted; emphasis in original). Accordingly, the Second Circuit affirmed the District Court's holding that STN had not proven that there was improper political influence. *See id.*

Thereafter, as a result of STN having exhausted all administrative and judicial remedies relating to the decision to deny federal acknowledgment, the land claim defendants and the United States moved the District Court to enter judgment on the pleadings pursuant to Rule 12(c). Motions for Judgment on the Pleadings, JA264, JA405. The land claim defendants and the United States argued that the BIA's determination that STN was not an Indian tribe entitled to acknowledgment was entitled to due deference under the doctrine of primary jurisdiction and preclusive effect under the rules of collateral estoppel. *Id.* at JA275-91, JA406.

On September 30, 2012, the District Court granted the motions for judgment on the pleadings. Ruling on Motions for Judgment on the Pleadings ("District Court Ruling"), SPA1-21. The District Court applied the doctrine of primary jurisdiction and held that deference to the BIA's factual findings was appropriate, in part, because there was no "substantive difference between the terms 'community' and 'political influence or authority used in 25 C.F.R. pt. 83 and the

terms 'united in a community' and 'under one leadership or government'" used in *Montoya v. United States*, 180 U.S. 261, 266 (1901) (hereafter, "*Montoya*"). District Court Ruling at SPA10-12. In addition, the District Court compared the common law criteria for establishing tribal existence under *Montoya* and the core criteria for federal acknowledgment under 25 C.F. R. Part 83 and found that the factual analysis for questions relating to community and governance were "identical" for purposes of applying collateral estoppel. *Id.* at SPA14-16. The District Court also determined that the other elements for collateral estoppel were satisfied and held that, because STN was collaterally estopped from litigating the issue of its status as an Indian tribe, it could not establish a *prima facie* case of a violation of the Nonintercourse Act. *Id.* at SPA17-21. These consolidated appeals followed.

SUMMARY OF ARGUMENT

In a carefully crafted, detailed and thoughtful decision, the District Court thoroughly considered the arguments raised in this appeal by STN. STN's arguments on appeal are wholly without merit, for a variety of reasons.

First, STN's contention that the District Court erred in its application of the doctrine of primary jurisdiction and in deferring to the BIA's factual determinations which relate to STN's claims under the Nonintercourse Act is simply wrong. Among many reasons, STN's argument completely ignores a case,

the reasoning of which should be adopted by this Court and which is dispositive of STN's arguments concerning the doctrine of primary jurisdiction. *See Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192 (D. Conn. 2006) ("*Golden Hill*").

STN's core argument – that the BIA's factual determinations are not dispositive of STN's rights under the Nonintercourse Act, as the standards for determination of tribal status are different – is unavailing. "[F]actual determinations by an agency operating under the primary jurisdiction doctrine should not be relitigated in federal court" and the fact that the standards for tribal acknowledgment under the criteria set forth in 25 C.F.R. Part 83 and the requirements for existence as a "tribe" for recovery under the Nonintercourse Act slightly differ "does not undermine application of deference [under primary jurisdiction principles] and/or collateral estoppel to those factual determinations made by the BIA which are relevant to the assessment of plaintiff's Nonintercourse Act claim." *Golden Hill*, 463 F. Supp. 2d at 198, 201. The District Court properly applied primary jurisdiction to conclude that the BIA is better qualified by virtue of its knowledge and experience to determine at the outset whether STN met the criteria for tribal status, and also appropriately concluded that the BIA's resolution of factual issues regarding STN's acknowledgment petition provided considerable guidance for ultimately deciding STN's Nonintercourse Act claims.

Second, STN's argument that the District Court erred in applying collateral estoppel to the BIA's decision denying STN federal acknowledgment and precluding relitigation of this issue in court also is unavailing. STN's argument that it did not have a full and fair opportunity to litigate its status as an Indian tribe through the federal acknowledgment process is itself foreclosed because the decision in *Schaghticoke Tribal Nation*, as affirmed by this Court, conclusively and finally determined that issue. As Judge Dorsey observed, "the evidence presented by STN does not show that 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;" "the Court concludes that political influence did not enter the [BIA] decision maker's 'calculus of consideration.'" 587 F. Supp. 2d at 412 (internal citations omitted).

STN's additional claim – that the standards for tribal status are different under 25 C.F.R. Part 83 and under the Nonintercourse Act and thus collateral estoppel does not apply – also cannot be sustained. As Judge Arterton found in *Golden Hill*, "[g]iving collateral estoppel to [the BIA's factual] findings, they preclude Golden Hill from demonstrating in this action that it is a group 'united in a community under one leadership or government.' As this is a component of

tribal status under *Montoya* . . . these findings preclude recovery by Golden Hill under the Nonintercourse Act as a matter of law." 463 F. Supp. 2d at 201.

Third, even if STN could show some error (which it cannot), the decision below should also be affirmed under this Court's settled precedent barring STN's claims. It is now "well-established" in this Court that "Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility." *See, e.g., Stockbridge-Munsee Cmty. v. New York*, __ F.3d__, 2014 U.S. App. LEXIS 11691, *6 (2d Cir. June 20, 2014). That rule is fully applicable here, and it dooms STN's land claims. The District Court's judgment should be affirmed.

STANDARD OF REVIEW

On appeal of a district court's decision to dismiss a complaint under Rule 12(c), the reviewing court engages in a *de novo* review employing the same standards that were applicable in the court below. *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009). The District Court correctly held that, when considering a Rule 12(c) motion for judgment on the pleadings, the court uses the same standard as used to address a Rule 12(b)(6) motion to dismiss for failure to state a claim. This Court must affirm the decision dismissing the complaint if, accepting the factual allegations contained in the complaint as true and drawing all reasonable

inferences in favor of the plaintiff, the plaintiff can prove no set of facts that would entitle it to relief, and the defendants are entitled to judgment as a matter of law. *Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 360, 363 (2d Cir. 2005); *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001); *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994). The Court may consider documents that are attached to, incorporated by reference in, or integral to the complaint, as well as any matters subject to judicial notice. *Sira v. Morton*, 380 F.3d 57, 59 (2d Cir. 2004); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-153 (2d Cir. 2002). Here, it is highly appropriate for this Court to take judicial notice of the RFD, including the factual findings contained therein, as these are within the scope of materials that can be considered on a Rule 12(c) motion. *See Golden Hill*, 463 F. Supp. 2d at 197; *see also Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DEFERRED TO THE BIA'S FACTUAL DETERMINATIONS UNDER THE DOCTRINE OF PRIMARY JURISDICTION

STN argues that the District Court erred in applying the doctrine of primary jurisdiction to the factual findings underlying the BIA's decision denying acknowledgment to STN as an Indian tribe. STN claims that the District Court should not have deferred to the BIA because (a) the standard for determining tribal

status under the acknowledgment regulations differ significantly from the standard for determining tribal status under the Nonintercourse Act (discussed *infra* at 30-39); and (b) the District Court had an independent obligation to conduct a factual inquiry into the tribal status of STN for purposes of its Nonintercourse Act claim. STN Br. at 46-49. These claims are without merit.

The District Court properly granted deference to the factual determinations of the BIA. The primary jurisdiction doctrine "serves two interests: consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of facts through the agency's special expertise, prior to judicial consideration of the legal claims." *Golden Hill*, 463 F. Supp. 2d at 197 (quoting *Golden Hill Paugussett Tribe v. Weicker*, 29 F.3d 51, 59 (2d Cir. 1994) ("*Golden Hill v. Weicker*") (internal quotation marks omitted)). Further, "factual determinations made by an agency operating under the primary jurisdiction doctrine should not be relitigated in federal court." *Golden Hill*, 463 F. Supp. 2d at 198 (citing *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306 (1973) ("The adjudication of the Commission . . . would obviate the necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision.")); *see also Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 68 (2d Cir. 2002) (discussing the primary jurisdiction "principle . . . that in cases raising issues of facts not within the conventional

expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.").

In applying the doctrine of primary jurisdiction, courts have avoided hard-and-fast rules, instead evaluating its application on a case-by-case basis. *See United States v. Western Pacific RR Co.*, 352 U.S. 59, 64 (1956); *Tassy*, 296 F.3d at 68. In the unique context of this matter, however, primary jurisdiction required the Court to defer to, and accept as conclusive, the factual findings underlying the BIA's decision not to acknowledge STN. Under the primary jurisdiction doctrine, STN was precluded from re-litigating the BIA's findings.

First, STN should not have been permitted to collaterally attack the BIA's findings at this stage in the litigation. The proper vehicle to challenge the BIA's findings was through its appeal under the APA. 5 U.S.C. § 701, *et seq.*; *see Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 255 F.3d 342, 348-49 (7th Cir. 2001. STN pursued that avenue and the District Court concluded that the RFD was neither arbitrary, capricious, nor an abuse of discretion, nor otherwise made in violation of law. *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 421-22. The District Court specifically reviewed the findings reached in the RFD that the Schaghticoke had failed to establish "community" (criterion (b)) and "political authority" (criterion (c)) from historical times to the present, finding the RFD to be

thorough, rational, well reasoned, and based upon the directives of the IBIA and a reasonable interpretation of the regulations and agency precedent. *Id.* at 413-16, 418.

Second, as the Supreme Court in *Ricci* observed, in applying the doctrine of primary jurisdiction, an agency's determination, itself subject to judicial review, "obviate[s] any necessity for the [district] court to relitigate the issues actually disposed of by the agency decision." *Ricci*, 409 U.S. at 306. Here, STN has obtained judicial review of the BIA's RFD. Given such circumstances, it was proper for the District Court not to permit STN to re-litigate the factual findings made by the BIA. The very reason that the litigation was stayed and the issue of STN's tribal status referred to the BIA under the primary jurisdiction doctrine was to permit the BIA to use its specialized competence and expertise to determine whether STN existed as an Indian tribe for purposes of its Nonintercourse Act claims. Thus, the issue of STN's status as an Indian tribe was actually disposed of by the BIA, and the BIA's decision was affirmed on appeal. *See id.*; *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic No. 99*, 400 U.S. 62, 72 (1970) (denying collateral attack on ruling by federal agency where party challenging ruling "had every opportunity to participate" in the agency proceeding and "to seek timely review").

Permitting re-litigation of the facts surrounding STN's tribal status would contravene the justifications for invoking the primary jurisdiction doctrine in the first instance – the BIA's superior expertise and authority to make the relevant factual determinations and the need for consistency in results. *Golden Hill v. Weicker*, 39 F.3d at 59-60; *see also Ellis v. Tribune Television Co.*, 443 F.3d 71, 81-82 (2d Cir. 2006); *Tassy*, 296 F.3d at 67-68. The twin justifications for primary jurisdiction – agency expertise and uniformity – demanded that the District Court accept as settled the BIA's findings. As the Supreme Court has articulated:

> Uniformity and consistency in the regulation of [a subject matter] entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574 (1952); *see also Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958). In other words, under the doctrine of primary jurisdiction and the deference due the BIA thereunder, what was left for the District Court was to apply the relevant law – the *Montoya* standard – to the facts found by the BIA. The District Court properly applied the relevant law to the facts, and its decision should not be disturbed by this Court.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES RELITIGATION OF STN'S STATUS AS AN INDIAN TRIBE UNDER THE NONINTERCOURSE ACT

In rejecting STN's petition for federal acknowledgment, the BIA found that STN had not existed as a distinct community or exercised political authority or influence from historical times to the present, mandatory criteria under 25 C.F.R. § 83.7(b) and (c), and that STN does not exist as an historical Indian tribe. *See* 70 Fed. Reg. at 60103. Specifically, the RFD concluded that insufficient evidence existed to satisfy criterion (b) (community) from 1920 to 1967 and after 1996. RFD, JA353-54, JA360-61. It further determined that there was insufficient evidence to satisfy criterion (c) (political authority) from 1801 to 1875, from 1885 to 1967, and after 1996, a total of about 165 years. *Id.*, JA368-69, JA373-74. The BIA's factual findings are compelling and are entitled to collateral estoppel in these proceedings. *Golden Hill*, 463 F. Supp. 2d at 200-01. In light of the BIA's factual determinations, the only legal conclusion that the District Court could have reached is that STN lacks tribal status. Thus, the District Court properly held that, as tribal status is one element of a *prima facie* case under the Nonintercourse Act, the BIA's findings precluded recovery by STN under the Nonintercourse Act as a matter of law. *Id.* at 201.

A. To Prevail on the Merits Under the Nonintercourse Act, STN Must Constitute an Indian Tribe Within the Meaning of Federal Law

STN asserts land claims pursuant to the provisions of the Nonintercourse Act. That Act restricts the transfers of land "from any Indian nation or tribe of Indians" without the approval of Congress. 25 U.S.C. § 177. To have standing to pursue such claims and to establish a violation of the Nonintercourse Act, STN was first required to demonstrate that it was, and continues to be, an Indian tribe. *See Delaware Nation v. Pennsylvania*, 446 F.3d 410, 418 (3d Cir. 2006); *Seneca Nation of Indians v. New York*, 382 F. 3d 245, 258 (2d Cir. 2004); *Golden Hill v. Weicker*, 39 F. 3d at 56-57; *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 579, 581 (1st Cir. 1979). The elements necessary to establish a *prima facie* case based on violation of the Nonintercourse Act have been set out by Judge Arterton in *Golden Hill v. Rell*:

> a plaintiff must show that (1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. Federal courts have held that to prove tribal status under the Nonintercourse Act, an Indian group must show that it is "a body of Indians of the same or a similar race", united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.

463 F. Supp. 2d at 195 (internal quotation marks, citations and brackets omitted).

STN is not a federally recognized Indian tribe, which is the first prong for establishing the right to bring a claim of a violation of the Nonintercourse Act. Indeed, the federal government has expressly denied STN's petition for federal acknowledgment as an Indian tribe. For most purposes, courts have held that the federal administrative acknowledgment process is an administrative remedy that must be exhausted by an unrecognized tribe before seeking judicial relief as an Indian tribe. *See, e.g.*, *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550-51 (10th Cir. 2001); *Native American Mohegans v. United States*, 184 F. Supp. 2d 198, 222-23 (D. Conn. 2002).

As this Court has noted, "tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act." *Golden Hill v. Weicker*, 39 F.3d at 57. Nonetheless, 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. *See Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975) (lack of formal recognition by federal government does not necessarily preclude tribal status under the Nonintercourse Act). It is a wholly different matter when the plaintiff has sought acknowledgment through the administrative process, and the federal government has explicitly rejected the group's status as an Indian tribe. In this latter situation, which applies here, a plaintiff cannot attempt to make an end

run around the federal administrative determination by seeking recognition of tribal status by the court.

B. STN Had a Full and Fair Opportunity to Litigate its Tribal Status

Contrary to STN's claims, the BIA's prior adjudication – as reviewed and affirmed by both the District Court and this Court – provided STN with more than an adequate opportunity to litigate its tribal status.

1. *Adjudications by administrative agencies provide parties with adequate opportunities to litigate disputed issues and are generally entitled to preclusive effect*

The basic principle underlying the law of collateral estoppel is that each party should receive one, but only one, "full and fair opportunity to litigate an issue." *Montana v. United States*, 440 U.S. 147, 153 (1979). Federal law has long "favored application" of this rule to proceedings before administrative agencies. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). So long as the "agency . . . act[s] in a judicial capacity" and provides a fair process for "resolv[ing] disputed issues of fact," relitigation of agency findings is properly barred under normal rules of issue preclusion. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

Among the factors to be considered in assessing the fairness of agency procedures are whether participants receive notice and an opportunity to be heard, whether the process affords a right to present evidence and witnesses, and whether

the presiding officer issues findings "in a judicial capacity." *Delamater v. Schweiker*, 721 F.2d 50, 53-54 (2d Cir. 1983) (citing *Restatement (Second) of Judgments* § 83(2)). Agency proceedings that provide these basic procedural rights are routinely held to satisfy the "full and fair opportunity" element of collateral estoppel. *See, e.g.*, *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482-83 (1982) (agency proceedings held "full and fair" where claimant could submit "exhibits," "present testimony," and had "an opportunity to rebut evidence" submitted by opposing party); *Chauffeur's Training Sch., Inc. v. Spellings*, 478 F.3d 117, 132-33 (2d Cir. 2007) ("full and fair opportunity" provided by agency where parties could "submit evidence and argument to the ALJ," the "procedure was adjudicative," and the ALJ "acted in a judicial capacity").

Moreover, and perhaps more important for present purposes, the "right to obtain judicial review" of an agency proceeding is also a crucial factor in the analysis, particularly when one party later challenges "the fundamental fairness of [the agency] proceeding" at issue. *See Restatement (Second) of Judgments* § 83, cmt. c. "[W]here the claimant [has] sought" and received "judicial review" of a contested agency finding, "subsequent litigation" of that finding is regularly barred. *Richards v. North Shore Long Island Jewish Health Sys.*, No. 10-4544, 2011 U.S. Dist. LEXIS 140618, *13-14 (E.D.N.Y. Dec. 6, 2011) (citing *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 730 (2d Cir. 2001)).

Indeed, this Court itself has not hesitated to recognize the adequacy of agency procedures where the findings at issue were "reviewed" and affirmed "under the [APA] in district court." *Chauffer's Training Sch., Inc.*, 478 F.3d at 132-33 ("barring relitigation of [agency] findings" made in an "administrative order [that] was reviewed under the APA"); *see also Kremer*, 456 U.S. at 484 (findings of state administrative agency entitled to preclusion where "judicial review in the Appellate Division [was] available to assure that . . . the [agency's] determination was not arbitrary and capricious"). In addition, the Tenth Circuit has specifically upheld the "fullness [and] fairness" of an agency's proceedings notwithstanding a later claim that a "hearing officer was biased," because any such bias claim could have been litigated and determined [as it was here] in an administrative "appeal [of] the ruling to [a] state district court." *Brockman v. Wyoming Dep't of Family Services*, 342 F.3d 1159, 1166-67 (10th Cir. 2003).

2. *The proceedings before the BIA, and the review of those proceedings in federal court under the APA, provided the requisite full and fair opportunity to STN*

Under these established principles, STN's prior opportunity to litigate its tribal status was full, fair, and more than adequate to warrant the application of issue preclusion. STN does not (and cannot) dispute that the BIA's administrative regulations provided ample opportunity to present evidence, to submit arguments, and to be heard at "a hearing . . . on disputed issues of fact." 25 C.F.R. §§ 83.4,

83.6, 83.10-11; *see generally Golden Hill*, 463 F. Supp. 2d at 199-200 (describing the procedures and evidentiary rules set out in the BIA's governing regulations). Nor does STN deny that it in fact used these procedures to submit "evidence, argument and comment" throughout the course of the extensive proceedings before the BIA. *See* District Court Ruling, SPA20-21 (describing the extensive proceedings conducted by the BIA); *see also Kremer*, 456 U.S. at 482-83.

Rather, the sole basis for STN's challenge to the fairness of the BIA proceedings is its claim that "the opposition to . . . STN[']s]" recognition improperly "exerted their [political] influence" on the proceedings before the BIA. STN Br. at 44. Federal administrative law, however, provided STN with ample means of raising and litigating its concerns about improper political influence in judicial review proceedings under the APA, 5 U.S.C. § 701, *et seq.* *See generally Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984) ("federal administrative agency" decisions are subject to reversal upon "some showing that . . . political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute"). And in this particular case, STN took full advantage of this opportunity and presented its "improper political influence" claims to both the District Court, *see* 587 F. Supp. 2d 389 (D. Conn. 2008), and three judges of this Court, *see* 587 F.3d 132 (2d Cir. 2009), in APA judicial review proceedings. Both Courts -- indeed, all four of the

Article III judges to consider the claim -- found "no evidence that any" improper political "pressure [had been] exerted upon [the] career employee of the Interior Department who" decided STN's tribal status. *Schaghticoke Tribal Nation*, 587 F.3d at 134; *see also* 587 F. Supp. 2d at 412 ("[n]othing suggests that the actual decision maker was impacted" by political pressure).

The fact that this "review[] under the APA" was available and provided is more than sufficient to safeguard the fullness and fairness of STN's opportunity to litigate. *Chauffeur's Training Sch., Inc.*, 478 F.3d at 132-33; *see also Brockman*, 342 F.3d at 1166-67 (state agency procedures held full and fair where claimant had opportunity to challenge hearing officer's alleged "bias" in an "appeal . . . to the state district court"). But even if there were some doubt about the issue, any such doubt would surely be resolved by the extraordinary measures taken by the District Court in *Schaghticoke Tribal Nation* to ensure the fairness of the BIA proceedings. In considering STN's petition for review under the APA, the District Court did not simply decide the case on the administrative record. Rather, the court went so far as to "permit[] extra-record discovery" on STN's improper influence claims, pursuant to which STN deposed James Cason (the agency official who adjudicated the tribal status issue), former Interior Secretary Gail Norton, and several other officials and lobbyists. 587 F. Supp. 2d at 411; *compare Camp v. Pitts*, 411 U.S. 138, 142 (1973) (noting that "[t]he focal point for judicial review" should

ordinarily "be the administrative record already in existence, not some new record made initially in the reviewing court"). Even after completing this extra-record discovery, STN was unable to marshal *any* evidence to support its claim of improper political influence. *See Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 412 ("political influence did not enter the decision maker's calculus"); 587 F.3d at 134 (affirming judgment and concluding that "the Schaghticoke's evidence did not support a claim of improper political influence"). The failure to do so should remove any doubt about the adequacy of STN's opportunity to litigate.

Given that the "agency adjudication [at issue] was [*twice*] subjected to judicial review and [*twice*] upheld," STN clearly received a full and fair opportunity to litigate its tribal status. *Restatement (Second) of Judgments* § 83, cmt. c; *see Chauffeur's Training Sch., Inc.*, 478 F.3d at 132-33. Moreover, under normal principles of collateral estoppel, STN's claim that it lacked the requisite full and fair opportunity is *itself* foreclosed by the prior decisions of the District Court and this Court in the APA review. *See generally Dresser v. The Ohio Hempery*, No. 98-2425, 2010 U.S. Dist. LEXIS 102223, *10-11 (E.D. La. Sept. 13, 2010) (noting that "a decision as to whether unfairness in the administrative proceedings violated Dresser's due process rights could have preclusive effect in this case on the issue of whether Dresser had a 'full and fair' opportunity to litigate his . . . defense").

In its brief before this panel, STN recycles precisely the same arguments about improper political influence that it made in the APA litigation before both the District Court and this Court. *Compare, e.g.*, STN Br. at 44 (alleging a "concerted political ambush aimed to strip STN of its federal recognition"), *with Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 402 (noting STN's claim to have been victimized by "undue influence exerted by state and congressional political forces").[9] The ultimate issue decided in the APA proceedings is also functionally identical, in all material respects, to the issue here – both the question of "improper political influence" and "full and fair opportunity to litigate" come down to whether the agency proceedings comported with due process and principles of fundamental fairness. *Dresser*, 2010 U.S. Dist. LEXIS 102223, *10-11; *compare Kremer*, 456 U.S. at 483-84 & n. 24 ("what a full and fair opportunity to litigate entails is the procedural requirements of due process"), *with Orangetown*, 740 F.2d at 188-89 (improper political influence claim turns on whether the "communications [with] public officials . . . depriv[ed] Orangetown of due process"). And the prior rejection of STN's political-influence claim was plainly "necessary to support [the] final judgment" of this Court in the APA litigation. *Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005);

[9] Indeed, STN acknowledges that "[o]ne need only read Judge Dorsey's opinion [in the APA case] to understand" STN's current claims in this litigation. STN Br. at 42.

see Schaghticoke Tribal Nation, 587 F.3d at 134 (affirming District Court's judgment on the ground that "the Schaghticoke's evidence did not support a claim of improper political influence"). Thus, even without considering the issue *de novo*, this Court could and should independently hold that STN's "full and fair opportunity" arguments are themselves foreclosed by principles of collateral estoppel. *See Dresser*, 2010 U.S. Dist. LEXIS 102223, *10-11.

Either way, it is clear that STN has already received one adequate opportunity to litigate the issue of tribal status. It "deserves no rematch after a defeat fairly suffered." *See Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 107.

C. In All Respects Material to STN, the *Montoya* Factual Inquiry for Determining Tribal Status Under the Nonintercourse Act and the Factual Determinations Under The Acknowledgment Regulations Are Substantially Similar

STN argues that the Court erred in applying collateral estoppel to the RFD because the standards for determining tribal status under the acknowledgment regulations are different than the standards applicable under *Montoya*. This claim has no merit, especially since there is no requirement that the standards be identical. Instead, as this Court has held, "[t]o meet the identity-of-issues prong of collateral estoppel, it is not necessary that the issues be exactly identical; it is sufficient that 'the issues presented in [the earlier litigation] are substantially the same as those presented by [the later] action.'" *Zherka v. City of New York*, 459 Fed. Appx. 10, 13 (2d Cir. 2012) (brackets in original) (quoting *ITT Corp. v.*

United States, 963 F.2d 561, 564 (2d Cir. 1992) ("Under *Montana*, we must determine first whether the issues presented in ITT-1 are substantially the same as those presented by this action")); *see also* District Court Ruling, SPA14 ("[T]he tests to prove tribal status under the Nonintercourse Act and through the BIA are substantially similar.").

1. *The acknowledgment regulations draw on and are closely linked to standards under the Nonintercourse Act*

In land claims actions under the Nonintercourse Act, courts have applied the so-called *Montoya* test for determining tribal status in the absence of federal acknowledgment. *See United States v. Candelaria*, 271 U.S. 432, 441-42 (1926); *Mashpee Tribe*, 592 F.2d at 582; *Joint Tribal Council of Passamaquoddy Tribe*, 528 F.2d at 377. The *Montoya* test, which was developed long before the formal administrative process for recognition was established, requires a four-part showing: a plaintiff must demonstrate that it is (a) "a body of Indians of the same or similar race," (b) "united in a community," (c) "under one leadership or government," and (d) "inhabiting a particular though sometimes ill-defined territory." *Montoya*, 180 U.S. at 266.

Judicial applications of the *Montoya* standard have further explained the four requirements. First, although a tribe must be "Indians of the same or similar race," a tribe cannot be based solely on a racial or ethnic basis. *United States v. Antelope*, 430 U.S. 641, 645 (1977). Tribal status must be based on the existence of a

political community. *Rice v. Cayetano*, 528 U.S. 495, 518-20 (2000); *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Second, to be "united in a community," a tribe must exist distinct and apart from others. *United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981); *Mashpee Tribe*, 592 F.2d at 586. Thus, a tribe is more than just a private, voluntary organization of individuals of Indian descent; it is a distinct community with authority or influence over internal and social relationships among its members. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

Under the third *Montoya* factor, to be "under one leadership or government," a tribe must have some degree of control or influence over its own internal affairs and the relations between its leaders and members. *Mashpee Tribe*, 592 F.2d at 582-83. Political leadership must be meaningful in that it must extend beyond just a core group of involved members to include a predominant portion of the membership of the group. *Id.* at 584. Although a formal government complete with coercive or binding authority is not required, tribal status is dependent on the exercise of a significant degree of influence on significant issues in the lives of members. *Id.* at 584-85. Moreover, sporadic, crisis-oriented leadership is insufficient. There must be a sustained continuity of tribal leadership. *Id.* at 583, 585. Without such leadership or at least informal political influence, a tribe does not satisfy the *Montoya* standard. *Id.* at 585.

Finally, a tribe must have *continuously* maintained itself as a distinct community with a political organization or structure. *Washington*, 641 F.2d at 1373. The requirement of continuity is essential to tribal status. It reflects the need for a group to maintain its distinct community and the exercise of its authority throughout history to retain its tribal sovereignty. *Id.; see also United Tribe of Shawnee Indians*, 255 F.3d at 548; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

The acknowledgment standards promulgated and administered by the BIA are quite similar, if not identical, in pertinent respects to the judicial standards. Federal acknowledgment or recognition of an Indian tribe is the formal political act of acknowledging and confirming the continual existence through history of a tribe as a distinct political community entitled to a government-to-government relationship with the federal government. 25 C.F.R. § 83.2; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 138 (2005). Although historically, Indian tribes have been recognized in many different ways, including by treaty, congressional enactment, executive or administrative action, or, in rare instances, court decision, *see id.*, §§ 3.02[5], 3.02[6], since 1978 federal acknowledgment has been delegated to an administrative process within the Department, pursuant to 25 C.F.R. Part 83. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273-74 (9th Cir. 2004).

In 1978, the Department first adopted regulations establishing a process for federal recognition of Indian tribes. 43 Fed. Reg. 39,361 (Sept. 5, 1978).[10] In promulgating the acknowledgment regulations in 1978, the Department stated:

> 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*. at 39,362 (emphasis added). Moreover, the acknowledgment regulations are explicitly derived from and are to be interpreted in light of case law concerning tribal status. *See, e.g., Final Determination That the Miami Nation of Indians of the State of Indiana, Inc. Do Not Exist as an Indian Tribe*, at p. I.B.1.5 (June 9, 1992), http://www.bia.gov/idc/groups/xofa/ documents/text/idc-001516.pdf, *aff'd*, *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).

[10] The regulations were amended in 1994. *See* 59 Fed. Reg. 9280 (Mar. 28, 1994). The amendments to the regulations provided for a reduced burden of proof for petitioners with evidence of previous federal acknowledgment, 25 C.F.R. § 83.8; independent review of a final determination by the Interior Board of Indian Appeals, including the opportunity for a hearing before an administrative law judge, *id.* at § 83.11; and other procedural changes. 59 Fed. Reg. 9280. The substantive criteria remained the same, and the amendments were not intended to "result in the acknowledgment of petitioners which would not have been acknowledged under the previously effective acknowledgment regulations." *Id.* The STN's petition was decided under the amended regulations.

2. *Due to the similarity in standards, the District Court was entitled to apply collateral estoppel to the BIA's determination*

Significantly, the BIA determined that STN failed to satisfy two of the core criteria of the acknowledgement standards, 25 C.F.R. § 83.7(b) and (c) – ones that mirror the central factors of the *Montoya* test. In particular, the BIA found (1) a lack of a distinct community for approximately 54 years from 1920 to 1967 and after 1996; and (2) a lack of political authority for approximately 165 years from 1801 to 1875, 1885 to 1967, and after 1996. RFD, JA351, JA353-54, JA360-61, JA368-69, JA373-74. Accordingly, the BIA found that STN had failed to provide sufficient evidence to demonstrate that it was an Indian tribe entitled to acknowledgment of a government-to-government relationship with the United States. *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 409.

According to STN, the fact that the BIA determined that STN is not an Indian tribe entitled to federal acknowledgment does not preclude it from asserting its existence as an Indian tribe in the pending litigation. STN argues that the common law criteria for establishing tribal existence under *Montoya* are significantly different from the criteria used to establish tribal existence under the acknowledgment regulations, 25 C.F.R. Part 83. Among its arguments, STN claims that the *Montoya* criteria are more "flexible" than the BIA regulations. STN Br. at 28-36. Not one of the cases cited by STN, however, involves a situation analogous to the one here – where the BIA has definitively determined

that an Indian group does not qualify for federal acknowledgment and nonetheless that group seeks, pursuant to the *Montoya* criteria, to enforce the provisions of the Nonintercourse Act.[11]

STN has not articulated the existence of a single substantive difference between "community" and "political authority" as used in *Montoya* and those terms as used in the acknowledgment regulations. As this Court has noted, the *Montoya* test and the regulatory criteria "both have anthropological, political, geographical and cultural bases and require, at a minimum, a *community with a political structure*." *Golden Hill v. Weicker*, 39 F.3d at 59 (emphasis added). Although the two may not always necessarily yield the same results, the BIA's

[11] For example, at page 33 of its Brief, STN cites *Mashpee Tribe* for the statement that the *Montoya* definition of a "tribe" should remain "broad enough and flexible enough to continue to reflect the inevitable changes in the meaning and importance of tribal relations for the tribal members and the wide variations among tribal groups living in different parts of the country under different conditions." 592 F.2d at 588. But the First Circuit went on to note that the Mashpees lost the case under the Nonintercourse Act not because of a failure of the law to protect Indians in changing times, but rather because of "a failure of the evidence to show that this group was an object of the protective laws." *Id.*

In addition, STN cites *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442 (2009), for the proposition that the *Montoya* criteria are more flexible than the BIA standards. STN Br. at 33-35. However, the district court in *Gristede's Foods, Inc.* explicitly noted that "[t]he Unkechauge has never been rejected from BIA recognition and has no pending BIA application. Additionally, the Unkechauge is not affirmatively seeking federal recognition from this court in an attempt to circumvent the administrative process prescribed by Congress." 660 F. Supp. 2d at 469. Based on these facts, *Gristede's Foods, Inc.* is entirely distinguishable.

findings in STN's RFD demonstrate in all material respects that STN lacks tribal status for purposes of both federal acknowledgment and the Nonintercourse Act.[12]

Moreover, as discussed earlier, Judge Arterton addressed this very issue in *Golden Hill*. In light of Golden Hill's argument that the acknowledgment standards differed, Judge Arterton considered whether the BIA's factual determinations precluded relitigation of tribal status and came to the following conclusion:

> Plaintiff's reliance on the Second Circuit's observation that the criteria for federal tribal acknowledgment and the requirements for existence as a "tribe" for recovery under the Nonintercourse Act are distinct misses the mark because, while accurate, it does not undermine application of deference and/or collateral estoppel to those factual determinations made by the BIA which are relevant to the assessment

[12] In its Brief, STN argues that the District Court erred in accepting BIA's factual determination that STN did not qualify as an "Indian tribe" because the District Court's application of collateral estoppel to the facts found by the BIA was contrary to rules of statutory construction. STN Br. at 36-41. STN claims that the Nonintercourse Act uniformly applies to "any Indian nation or tribe of Indians," and refers to several federal statutes in support of its argument that there is no "single, all-purpose definition of . . . Indian tribe." *Id.* at 37 (internal quotation marks and citation omitted). This argument merits little attention.

As discussed immediately above, STN has submitted no authority for the proposition that the standards for defining an "Indian tribe" under 25 C.F.R. Part 83 and the Nonintercourse Act are different and ignores the overwhelming authority that they are either identical or functionally equivalent. *See, e.g.*, *Golden Hill*, 463 F. Supp. 2d at 200-01. The District Court properly considered these authorities in evaluating these standards and had no need to consider the language of other, irrelevant federal statutes dealing with "Indian tribes." Moreover, despite STN's claim to the contrary (STN Br. at 41), the District Court did not hold that the Nonintercourse Act only applies to federally recognized tribes or tribes that have never sought federal recognition.

> of plaintiff's Nonintercourse Act claim in this court. Indeed, the Second Circuit also observed that "[t]he *Montoya/Candelaria* definition and the BIA criteria both have anthropological, political, geographical and cultural bases and require, at a minimum, a community with a political structure. The two standards overlap, though their application might not always yield identical results." *Golden Hill*, 39 F.3d at 59.
>
> Giving collateral estoppel effect to the factual findings of the BIA in its Final Determination, as upheld by subsequent administrative review, the Court considers whether those findings dictate a conclusion that plaintiff cannot demonstrate that it is an "Indian tribe," as defined in *Montoya* and its progeny, thus precluding recovery under the Nonintercourse Act.
>
> As noted above, in order to demonstrate tribal status for purposes of the Non-intercourse Act, *Montoya* and its progeny require that "an Indian Group must show that it is 'a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.'" *Golden Hill*, 39 F.3d at 59 (citing *Candelaria*, 271 U.S. at 442; *Montoya*, 180 U.S. at 266). The BIA's factual findings preclude plaintiff's satisfaction of all of these criteria. Specifically, the BIA concluded that Golden Hill had not existed as a "distinct tribal community" after 1823, Final Decision at 91-92, that there was no evidence of "political influence or authority over tribal members" after 1802, and in fact that "two of the three named and documented Turkey Hill descendants stated in 1910 that the Turkey Hill tribe had long since ceased to exist as a political entity and made no mention of the Golden Hill descendants," *id.* at 102-03. Giving collateral estoppel to these findings, they preclude Golden Hill from demonstrating in this action that it is a group "united in a community under one leadership or government." As this is a component of tribal status under *Montoya* and its progeny, and as tribal status is one element of a prima facie case under the Nonintercourse Act, these findings preclude recovery by Golden Hill under the Nonintercourse Act as a matter of law.

Golden Hill, 463 F. Supp. 2d at 200-01.

Here, the RFD found that STN had failed to provide sufficient evidence to demonstrate that it was an Indian tribe entitled to acknowledgment of a government-to-government relationship with the United States. *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 409. Given these findings, no basis exists to conclude that STN has tribal status for purposes of the Nonintercourse Act.[13]

III. STN'S CLAIMS ARE IN ANY EVENT BARRED BY PRINCIPLES OF LACHES, ACQUIESCENCE AND IMPOSSIBILITY

The District Court properly deferred to the BIA's factual findings under the doctrine of primary jurisdiction, *see supra* at 15-19, and properly applied collateral estoppel to bar relitigation of STN's tribal status, *see supra* at 20-39. The Court need go no further to affirm the judgment below. But even if the Court were to

[13] STN makes one final argument – constituting less than one page – that also merits scant attention. STN Br. at 49-50. In its discussion of primary jurisdiction, the District Court observed that STN did not identify any evidence of community or political influence or authority not presented to the BIA which would justify the District Court reaching a different conclusion. District Court Ruling, SPA12. STN now claims that the District Court improperly relied on a "lack of additional 'evidence,'" STN Br. at 49, but this argument is not an accurate portrayal of the District Court's decision. Instead, the District Court decided a Rule 12(c) motion and properly confined itself to the pleadings and matters of which it could take judicial notice. *Id.* at SPA7.

STN also makes the spurious complaint that it was prevented by the BIA from submitting two envelopes containing evidence relevant to the RFD. STN Br. at 50 n.14. Neither the land claim defendants, the District Court, nor this Court have any idea what this "evidence" purports to be or how this material would establish "political influence or authority" for the roughly 165 years when no such evidence existed, nor how this material would establish 'community" for the roughly 55 years when such evidence was lacking. Thus, STN's argument about any additional "evidence" should be disregarded.

find some error, the judgment should still be affirmed on an alternative ground: STN's land claims are clearly foreclosed on the basis of laches and related equitable principles. *See, e.g.*, *Stockbridge-Munsee Cmty. v. New York*, __ F.3d__, 2014 U.S. App. LEXIS 11691, *6 (2d Cir. June 20, 2014).

Under a string of recent decisions by both the Supreme Court and this Court, "it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility." *Id.*; *see also City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005); *Oneida Indian Nation of N.Y. v. County of Oneida*, 618 F.3d 114, 135-40 (2d Cir. 2010); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 268, 277 (2d Cir. 2005). These decisions foreclose tribal claims under the Nonintercourse Act that seek to "revive . . . sovereign control through equitable relief in court." *Sherrill*, 544 U.S. at 216-17. They also bar claims seeking money damages, rather than ejectment. *Cayuga Indian Nation of N.Y.*, 413 F.3d at 275 ("[D]isruptiveness is inherent in the claim itself . . . rather than an element of any particular remedy which would flow from [a] possessory land claim."). And this Court has made clear that this bar on ancient land claims applies without regard to whether landowners have established the traditional elements of a laches defense. *County of Oneida*, 617 F.3d at 127

(application of this "equitable defense . . . does not focus on the elements of traditional laches," but rather on lapse of time, "the disruptive nature of claims long delayed," and interference with settled "expectations of individuals and entities far removed from the events giving rise to the plaintiffs injury").

These decisions are controlling here, and they directly foreclose STN's claims in these consolidated cases. STN claims to have been wrongfully dispossessed of its ancient tribal lands by the State of Connecticut in violation of the Nonintercourse Act. *See* District Court Ruling, SPA2-3; *see also* JA91-126 (Comp. in 98-cv-1113); JA195-209 (Comp. in 00-cv-820). The alleged unlawful transfers date back centuries and were completed "between 1801 and 1911." District Court Ruling, SPA2-3; *compare, e.g.*, *Stockbridge-Munsee*, 2014 U.S. App. LEXIS 11691, *6 (claimants "ha[d] not resided on the lands at issue since the nineteenth century"). STN did not challenge these transfers or seek to eject the current landowners until many decades after being dispossessed. JA91-126 (Comp. filed in 1998); JA195-209 (Comp. filed in 2000); *compare, e.g.*, *Stockbridge-Munsee*, 2014 U.S. App. LEXIS 11691, *3 (original complaint filed "in 1985"). Further, in the centuries since STN's dispossession, the lands at issue have been owned and developed by parties subject to state and local regulation, including a private school, a utility company, and the Town of Kent. District Court Ruling, SPA2-3; *compare, e.g.*, *Stockbridge-Munsee*, 2014 U.S. App. LEXIS

11691, *6 ("allegedly void transfers occurred long ago, during which time the land has been owned and developed by other parties subject to State and local regulation"). No less than in prior cases, permitting STN to press these claims now would be "inherently disruptive of state and local governance" and would impinge on the "settled expectations of current landowners." *See id.*

To be sure, this equitable defense was not the basis for the Court's opinion and judgment below. The defendants, however, have properly raised and preserved these equitable principles since the beginning of this litigation. *See, e.g.*, JA135 (pleading "abandonment" and "laches"); JA145-46 (raising defenses of "estoppel" and "laches" based on STN's "delay[] [of] almost two hundred years in asserting its claimed rights"); JA152 (same). And this Court may properly affirm a decision on any ground supported in the record. *See Giovanniello v. ALM Media, Inc.*, 726 F.3d 106, 109 (2d Cir. 2013) ("We are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied."). Addressing the issue now would have the added benefit of putting an end to this seemingly interminable litigation, and it would relieve both the parties and the District Court of the burdens of a costly and wholly futile remand. The Court should therefore hold that STN's claims are barred by principles of "laches, acquiescence, and impossibility," *see Stockbridge-Munsee*

Cmty, 2014 U.S. App. LEXIS 11691, *6, and it should affirm the District Court's judgment.

IV. CONCLUSION

Despite an administrative record containing some 6,774 documents totaling some 47,000 pages (*see* footnote 5), the BIA found that STN had presented insufficient evidence to establish that it satisfied the requirements for acknowledgment as an Indian tribe under applicable law. Deferring to the BIA's factual findings under the doctrine of primary jurisdiction and giving collateral estoppel effect to these findings, as the District Court correctly decided, precludes STN from establishing that it exists as an Indian tribe under *Montoya*.

For the foregoing reasons, the District Court's decision should be affirmed.

Respectfully Submitted

DEFENDANT, KENT SCHOOL CORPORATION

By */s/ David J. Elliott*

David J. Elliott
Jaime Bachrach
John W. Cerreta
Day Pitney LLP
242 Trumbull Street,
Hartford, Connecticut 06103-1212
Phone: (860) 275-0100
Fax: (860) 275-0343
e-mail: djelliott@daypitney.com

DEFENDANT, TOWN OF KENT

By */s/ Jeffrey B. Sienkiewicz*

Jeffrey B. Sienkiewicz
Sienkiewicz & McKenna, PC
18 Aspetuck Ridge Road, P.O. Box 786
New Milford, CT 06776
Phone: (860) 354-1583
Fax: (860) 355-4439
e-mail: nrn4jds@aol.com

DEFENDANT, CONNECTICUT LIGHT AND POWER COMPANY

By */s/ Richard L. Street*

Richard L. Street
Carmody & Torrance
50 Leavenworth Street
P. O. Box 1110
Waterbury, CT 06721
Phone: (203) 573-1200
Fax: (203) 575-2600
e-mail: rstreet@carmodylaw.com

DEFENDANT, PRESTON MOUNTAIN CLUB

By */s/ James R. Fogarty*

James R. Fogarty
Fogarty Cohen Selby & Nemiroff, LLC
Suite 406
1700 East Putnam Avenue
Old Greenwich, CT 06870
Phone: (203) 629-7301

Their Attorneys

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 10,784 words, excluding the parts of the brief that are exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Pursuant to Fed. R. App. P. 32(a)(5) and 32(a)(6), the undersigned counsel further certifies that this brief complies with the typeface and type style requirements. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with14-point Times New Roman font.

/s/ David J. Elliott
David J. Elliott

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a copy of foregoing 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.

/s/ David J. Elliott
David J. Elliott