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 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,

and

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 (New Haven)

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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STATEMENT OF JURISDICTION

This is a consolidated appeal by Plaintiff-Appellant, the Schaghticoke Tribal Nation ("STN"), from judgments entered in the United States District Court for the District of Connecticut (Alvin W. Thompson, J.) upon the granting of motions for judgment on the pleadings filed on behalf of Defendants-Appellees Kent School Corporation, the Town of Kent, the Connecticut Light & Power Company and the United States of America (collectively, "Defendants"). On September 30, 2012, the Court granted Defendants' motions for judgment on the pleadings. SPA1-21; JA694-714. Judgments were entered in the District Court on October 15, 2012 (SPA22-23; JA755-756), October 18, 2012 (SPA24; JA757), and November 18, 2013 (SPA25-37; JA758-770) and Notices of Appeal were timely filed on November 13, 2012 and December 17, 2013 (JA771-774; JA775-778; JA779-780). This consolidated appeal is from final judgments disposing of all parties' claims, and this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the District Court err in finding that by virtue of the Bureau of Indian Affairs' (the "BIA") denial of federal recognition STN cannot establish it is an Indian tribe for any purpose and thus cannot establish a *prima facie* violation of the Indian Nonintercourse Act, 25 U.S.C. §177 ("Nonintercourse Act")?

2. Did the District Court err by effectively limiting the applicability of the Nonintercourse Act to federally-recognized tribes or tribes that have not sought federal recognition?

3. Did the District Court erroneously determine that STN is collaterally estopped from asserting that it is an "Indian nation or tribe of Indians" under the Nonintercourse Act by virtue of the decision of the BIA denying STN's application for federal acknowledgment pursuant to 25 C.F.R. Part 83 (the "Regulations")?

4. Was it error for the District Court to determine that the standards utilized by the BIA to grant federal acknowledgment pursuant to the Regulations and by the court to determine whether STN is an "Indian nation or tribe of Indians" entitled to the protections of the Nonintercourse Act are identical?

5. Did the District Court err in finding that STN had a full and fair opportunity to litigate its status as a tribe in the proceedings for federal acknowledgment before the BIA?

6. Did the District Court err is finding it appropriate to defer to the BIA's factual findings?

7. Did the District Court err in granting Defendants' motions for judgment on the pleadings, because STN failed to present additional evidence not submitted to the BIA in support of its claim to be "Indian nation or tribe of Indians" entitled to the protections of the Nonintercourse Act?

STATEMENT OF THE CASE

This proceeding is the consolidation of three actions: United States of America v. 43.47 Acres of Land, Docket No. 2:85-cv-1078 (AWT) (the "Lead Case"); the Schaghticoke Tribal Nation v. Kent School Corp. Inc., Docket No.: 3:98-cv-1113 (AWT) (the "1998 Schaghticoke Case"); and the Schaghticoke Tribal Nation v. United States of America, Docket No.: 3:00-cv-820 (AWT) (the "2000 Schaghticoke Case", and together with the Lead Case and the 1998 Schaghticoke Case, the "Consolidated Cases"). The first was brought by the Government to condemn certain land that STN claims as Tribal land. The second and third were brought by STN against the Defendants, claiming Tribal ownership of certain land to which Defendants also assert ownership. Each of these Consolidated Cases is based on the Nonintercourse Act,[1] which invalidates any transfer of lands "from any Indian nation or tribe of Indians" unless "by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

At the same time as fighting for the reversion of its Tribal land, STN sought federal acknowledgement by the BIA as an Indian tribe, which would have qualified it for "the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. Part 83.2. The threshold issue in each of the Consolidated Cases was the determination of STN's application for federal acknowledgment.

However, what should have been an unremarkable administrative process devolved into a battle, pitting STN against the unrelenting opposition of the State of Connecticut, Defendants, paid lobbyists, and the Connecticut Congressional Delegation.[2] Notwithstanding the fervent opposition, STN was successful, albeit temporarily, and received federal acknowledgement in February 2004.

Following months of political pressure and inappropriate *ex parte* communications with the BIA in violation of a District Court order, STN's acknowledgment was denied upon "reconsideration" by the BIA in October 2005.

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[1] Congress passed a series of similar Nonintercourse Acts beginning in 1790. The final Nonintercourse Act was passed in 1834 and codified as 25 U.S.C. § 177.

[2] In the years 2004 and 2005, which included parts of the 108th and 109th Congresses, the Connecticut Congressional Delegation consisted of Representatives John Larson, Rob Simmons, Rosa DeLauro, Chris Shays, and Nancy Johnson, and Senators Christopher Dodd and Joseph Lieberman.

STN's challenge to the BIA's determination pursuant to the Administrative Procedures Act ("APA") was denied by the District Court. Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 421 (D. Conn. 2008). This Court affirmed the District Court's decision denying the STN's challenge to the BIA determination. Schaghticoke Tribal Nation v. Kempthorne, 587 F.3d 132, 134 (2d Cir. 2009).

Embracing a process the opponents of recognition described as "flawed," "lawless," and "corrupt," when the BIA favored acknowledgement, Defendants moved for judgment on the pleadings based upon the doctrines of primary jurisdiction and collateral estoppel to convince the District Court to adopt the BIA's reversal of the United States' earlier acknowledgment of STN as a federally recognized tribe as conclusive of STN's claims to land pursuant to the Nonintercourse Act.

On September 30, 2012, the Honorable Alvin W. Thompson, United States District Judge for the District of Connecticut, granted the motions for judgment on the pleadings filed by Defendants. United States v. 43.47 Acres of Land in Litchfield, Civil No. 2:85-cv-01078(AWT), 2012 U.S. Dist. LEXIS 147612 (D. Conn. Sept. 30, 2012) (the "Decision"); Decision, SPA1-21; JA694-714. Judgment was entered in the 1998 and 2000 Schaghticoke Cases on October 15, 2012 (SPA22-

23; JA755-756) and October 18, 2012 (SPA24; JA757), respectively, and in the Lead case on November 18, 2013 (SPA25-37; JA JA758-770). STN timely filed Notices of Appeal on November 12, 2012 and December 17, 2013 (JA771-774; JA775-778; JA779-780).

STATEMENT OF FACTS

A. Litigation Over STN's Tribal Land Begins And STN Obtains Short-Lived BIA Recognition

STN began its quest for federal acknowledgment in 1981. While STN was moving through the administrative process, the Government filed a condemnation action in 1985 with respect to land in which STN and others claimed an interest located in Kent, Connecticut. Later, while its first petition for federal acknowledgment was pending, STN filed complaints in 1998 and 2000 under the Nonintercourse Act involving other lands in Kent, Connecticut. The 1985 and 1998 actions were stayed pending the determination of STN's petition for federal recognition. Ruling on Pending Motions, JA154-166. The three actions were ultimately consolidated before the Honorable Peter C. Dorsey on October 3, 2005. Order of Consolidation, JA193-194; JA247-248.

Due to delays in the review of STN petition by the BIA, on May 8, 2001, the District Court entered a scheduling order establishing a framework for the Department of the Interior (the "DOI") to determine STN's petition under the acknowledgement regulations, including, *inter alia*, the establishment of a centralized administrative record and database, and the setting of deadlines for i) the Office of Federal Acknowledgment (the "OFA") to develop both a proposed finding and a final determination, ii) the comment period, and iii) any requests for review and reconsideration of the final determination (the "Scheduling Order"). Scheduling Order, JA171-181; JA225-235. The Scheduling Order also barred *ex parte* communications with respect to STN's petition by any non-federal party or *amici* with any officials in the immediate offices of the Secretary of the Interior, the Assistant Secretary – Indian Affairs (the "AS-IA") or the Deputy Commissioner of Indian Affairs. Scheduling Order, JA179; JA233.

As set forth in the Scheduling Order, during the comment periods following the issuance of the proposed finding and final determination, the parties and *amici* were able to submit comments, written briefs and documentary evidence and were able to request technical assistance from the AS-IA. Scheduling Order, JA175-176; JA229-230.

On December 5, 2002, the OFA issued the "Summary under the Criteria and Evidence for Proposed Finding against Acknowledgment for the Schaghticoke Tribal Nation" (the "Preliminary Finding"). See Schaghticoke Tribal Nation, 587 F. Supp. 2d at 401. Following the comment period and submission of additional evidence, the Acting Assistant Secretary for Indian Affairs acknowledged STN as a federally recognized tribe on its "Summary under the Criteria and Evidence for Final Determination to Acknowledge the Schaghticoke Tribal Nation" (the "Final Determination") on January 29, 2004. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 402; Final Determination, JA446-657.

On May 3, 2004, the State of Connecticut, the Kent School Corp., Connecticut Light & Power Co., the towns of Kent, Danbury, Bethel, New Fairfield, Newton, Ridgefield, Stamford, Greenwich, Sherman, Westport, Wilton, Weston, and the Housatonic Valley Council of Elected Officials, among others, filed requests for reconsideration of the Final Determination with the Interior Board of Indian Appeals (the "IBIA"). Schaghticoke Tribal Nation, 587 F. Supp. 2d at 401, 407-08; In re Federal Acknowledgment of the Schaghticoke Indian Nation, 41 IBIA 30, 31 n. 1 (2005). On December 2, 2004, three days after STN submitted its response opposing the requests for reconsideration, the OFA filed an unprecedented Supplemental Transmittal (the "ST") with the IBIA, calling into question its own calculation of marriage rates in the Final Determination. Schaghticoke Tribal Nation, 587 F. Supp.

2d at 408. Because the ST was filed after the briefing period concluded, STN could not respond to the ST (Schaghticoke Tribal Nation, 587 F. Supp. 2d at 408), and STN's request for technical assistance with respect to the ST was denied in January 2005.

On May 12, 2005, the IBIA vacated and remanded the Final Determination deciding that the tribe's recognition by the State of Connecticut for almost 300 years was not probative for purposes of federal recognition, and the BIA may have erroneously relied upon state recognition in deciding to recognize STN. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 408.

Soon after the IBIA vacated and remanded the Final Determination, Acting Principal Deputy AS-IA Michael Olsen issued a letter to the parties on May 23, 2005, setting forth restrictive procedures that would govern reconsideration of the Final Determination on remand from the IBIA including a prohibition on the submission of unsolicited briefs, arguments and evidence. Order on Motion to Amend Order, JA186-192; JA240-246. In response, STN moved to amend the Scheduling Order to modify Mr. Olsen's procedures in order to require technical assistance and the submission of evidence concerning the analysis of marriage rates. Id. By order, dated July 23, 2005, the District Court rejected STN's proposed procedure and ultimately adopted the Government's alternative proposal to modify

the procedures by providing for OFA technical assistance letters to the parties, the filing of briefs, and the submission of historical documents or evidence concerning the marriages of STN members, as well as any documents specifically requested in the technical assistance letter. Id.

Thereafter, STN submitted four envelopes containing additional evidence, two of which were rejected by the OFA and returned to STN unopened. On October 11, 2005, the OFA issued the virtually unheard of "Summary of the Criteria and Evidence: Reconsidered Final Determination Denying Federal Acknowledgment of the Petition Schaghticoke Tribal Nation" (the "Reconsidered Final Determination"). Reconsidered Final Determination, JA312-404.

B. The Relentless Political Campaign To Overturn The Final Determination And Bash The Federal Recognition Process

Pursuant to the District Court's Scheduling Order, STN was prohibited from *ex parte* communications with the key people at the BIA, OFA and DOI. But that did not prevent the opponents of acknowledgment from bringing to bear their considerable influence. Connecticut's Representatives, Senators, Governor and Attorney General, state and local officials, and other paid lobbyists and private stakeholders (the "Schaghticoke Opposition") "fiercely opposed" the Final Determination's acknowledgement of STN and advocated for its reversal by employing a relentless political campaign that included an onslaught of letters,

demands for investigations, meetings, lobbying efforts, congressional hearings and proposed legislation. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 402-403.

1. The Schaghticoke Opposition Lobbied The White House, The DOI, The IBIA, The BIA And The District Court Attempting To Overturn STN's Federal Acknowledgment

Throughout 2004 and 2005, the Schaghticoke Opposition lobbied the Secretary of the Interior, the BIA, the IBIA, the White House, and even the District Court, about reversing the Final Determination. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 403.

Before the ink dried on the Final Determination, the Schaghticoke Opposition commenced a letter writing campaign against STN and the Final Determination to Secretary of the Interior, Gale Norton, the BIA, the IBIA, United States Attorney General Alberto Gonzalez, Inspector General Earl Devaney and even Judge Dorsey. For example, Connecticut's Representatives, Senators and Attorney General wrote to Sec. Norton expressing their displeasure with the BIA's decision to acknowledge STN and requesting meetings. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 404. In addition, Connecticut Representative Nancy Johnson not only contacted the BIA directly in July 2004 requesting a meeting to deliver postcards from her constituents protesting STN's recognition, and together with her fellow Connecticut Reps. Christopher Shays and Robert Simmons, wrote directly to the

IBIA in February 2005, urging it to overturn the Final Determination. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 404-405. Connecticut Attorney General Blumenthal also wrote to United States Attorney General Alberto Gonzalez relating to the Final Determination and Governor Rell even wrote to Judge Dorsey, *ex parte*, in July 2005 urging the Court not to allow STN any more extensions of time or to submit any additional evidence to the BIA. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 403-404.

Members of the Schaghticoke Opposition also demanded investigations into the BIA's process and the Final Determination. For instance, in March 2004, Reps. Johnson, Shay and Simmons wrote to Sec. Norton demanding that she personally investigate the STN matter and Connecticut Senator Christopher Dodd sent a letter to Interior Inspector General Earl Devaney requesting that the Office of the Inspector General conduct an investigation. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 404, 405, n.7.

The unprecedented level of political interference in the purportedly "quasi judicial" federal acknowledgement process with respect to the Final Determination is also clear from the countless meetings between the members of the Schaghticoke Opposition and the BIA. For example, on March 30 and April 1, 2004, Sec. Norton met with Reps. Johnson, Shays and Simmons, among other members of

Congress, as well as Senators Dodd and Joseph Lieberman, where she was pressed to overturn the Final Determination and even subjected to threats of being fired. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 404-405.

Also in March 2004, Attorney General Blumenthal met with Sec. Norton, *ex parte* and in violation of the Scheduling Order, to discuss his disagreement with the findings of the Final Determination and his desire to reform the tribal recognition process. Ruling on Motion to Amend Scheduling Order, JA182-185; JA236-239. Attorney General Blumenthal was specifically admonished by the District Court for his violation of an order amending the Scheduling Order in June 2004. Id.

In addition to the foregoing efforts, a community organization strongly opposed to the Final Determination, Town Action to Save Kent ("TASK") hired the prominent Washington D.C. lobbying firm Barbour, Griffith & Rogers, LLC ("BGR") to lobby against STN's federal recognition. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 403 ("a community organization in the Town of Kent…hired the Washington lobbying firm Barbour Griffith & Rogers (BGR) to advocate on its behalf"). As set forth in BGR's Lobbying Registrations publicly filed pursuant to the Lobbying Disclosure Act of 1994 (Section 4), BGR's specific lobbying issues for TASK included, *inter alia*, Indian gaming and federal tribal recognition, and the

agencies contacted by BGR were, *inter alia*, the DOI, and members of the House of Representatives and the Senate.[3]

2. The Factual And Legal Determinations Of The Final Determination Were Directly Attacked In House And Senate Hearings And Through Proposed Legislation

Within weeks of the BIA's acknowledgment of STN, the first of three congressional hearings on the Final Determination was held on March 31, 2004, before the U.S. House of Representatives Committee on Resources, entitled "Federal Recognition and Acknowledgement Process by the Bureau of Indian Affairs," where the Connecticut Congressional Delegation specifically challenged the merits and integrity of the Final Determination and the BIA's process (the "March 2004 Hearing").[4] Schaghticoke Tribal Nation, 587 F. Supp. 2d at 405. Participants in the hearing included, *inter alia*, i) Reps. Johnson, Shays and Simmons, ii) Lee Fleming, Director, OFA, BIA, DOI, iii) the Connecticut towns of North Stonington, Ledyard and Preston, iv) Attorney General Blumenthal, and v) representatives of various

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[3] See the Lobbying Registration dated December 6, 2004 available at http://disclosures.house.gov/ld/ pdfform.aspx?id=8078311; the Lobbying Registration dated February 11, 2005 available at http://disclosures.house.gov/ld/pdfform.aspx?id=8086994; the Lobbying Registration dated August 12, 2005 available at http://disclosures.house.gov/ld/pdfform.aspx?id=8105763.

[4] An Authenticated U.S. Government Information copy of the transcript of the March 2004 Hearing is available at http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg92827/pdf/CHRG-108hhrg92827.pdf.

tribes of Indians (not of the Schaghticoke Nation) and anti-casino gaming alliances. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 406; (Transcript of the March 2004 Hearing at p. III). Rep. Johnson, among others, called upon the Committee to invalidate the "flawed and illogical" Final Determination and "to impose a moratorium on BIA acknowledgment decisions pending a comprehensive review of BIA process…" Schaghticoke Tribal Nation, 587 F. Supp. 2d at 406; Transcript of the March 2004 Hearing at p. 8.

On May 5, 2004, the House of Representatives Committee on Government Reform held a hearing, entitled "Betting on Transparency: Toward Fairness and Integrity in the Interior Department's Tribal Recognition Process," ostensibly concerning the tribal acknowledgment process, but specifically attacking the decisions to federally recognize STN and the Historical Eastern Pequots (the "Pequots") (the "May 2004 Hearing").[5] Schaghticoke Tribal Nation, 587 F. Supp. 2d at 405-06. Participants in the hearing included, *inter alia*, i) Attorney General Blumenthal, ii) Theresa Rosier, Counselor to the AS-IA, DOI, iii) Lee Fleming, Director, OFA, BIA, DOI, iv) Earl Devaney, Inspector General, DOI, v) representatives from the city of Danbury and towns of Ridgefield and North

[5] An Authenticated U.S. Government Information copy of the transcript of the May 2004 Hearing is available at http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg95868/pdf/CHRG-108hhrg95868.pdf.

Stonington, vi) representatives from the Eastern Pequots, and vii) Reps. Shays and Simmons. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 406; (Transcript of the May 2004 Hearing at p. III). At the hearing, Attorney General Blumenthal criticized the BIA's recognition of STN, describing the BIA as "lawless" and the Final Determination as "unprincipled." Schaghticoke Tribal Nation, 587 F. Supp. 2d at 406; (Transcript of the May 2004 Hearing at p. 28). The DOI representatives in attendance, Messrs. Fleming and Devaney and Ms. Rosier, were repeatedly asked to defend the Final Determination or concede error and were subjected to a barrage of antagonistic questioning. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 406.

In March of 2005, Reps. Johnson, Shays and Simmons even went another step further and introduced proposed legislation to expressly repeal the federal acknowledgement of STN, entitled "the Schaghticoke Acknowledgement Repeal Act of 2005" (the "Act").[6] Schaghticoke Tribal Nation, 587 F. Supp. 2d at 406. In this regard, the Representatives wanted Congress to find that the Final Determination was "unlawful and erroneous and in violation of Federal regulations" in order to "protect the taxpayers and municipalities of the State of Connecticut from the undue burdens and violations of sovereignty…" See the Act at p. 19.

[6] An Authenticated U.S. Government Information copy of the Act is available at http://ww.gpo.gov/fdsys/pkg/BILLS-109hr1104ih/pdf/BILLS-109hr1104ih.pdf.

The third and final congressional attack of the Final Determination took place on May 11, 2005, at a U.S. Senate Committee on Indian Affairs hearing on Oversight of Federal Recognition of Indian Tribes (the "May 2005 Hearing").[7] Schaghticoke Tribal Nation, 587 F. Supp. 2d at 407. Participants in the hearing included, *inter alia*, i) Richard Velky, Chief, STN, ii) Kenneth Cooper of TASK, iii) Senators Dodd and Lieberman, iv) Reps. Johnson, Shays and Simmons, v) Lee Fleming, Director, OFA, BIA, DOI, vi) Mary Kendall, Deputy Inspector General, DOI, vii) Connecticut Gov. Rell, viii) Attorney General Blumenthal, and ix) Arizona Senator John McCain, Chairman, Committee on Indian Affairs. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 405, 407; Transcript of the May 2005 Hearing at p. III.

At the hearing, the Connecticut Representatives again alleged that the Final Determination was "erroneous" and "unlawful" and accused the BIA of wrongdoing and the recognition process as being "corrupt." Schaghticoke Tribal Nation, 587 F. Supp. 2d at 407; Transcript of the May 2005 Hearing at pp. 9-10. Gov. Rell, STN's statutory "agent" under Connecticut law, testified that the acknowledgment process was "broken" and recommended that Congress invalidate the Final Determination. Transcript of May 2005 Hearing at pp. 14-15. Notably, on

[7] An Authenticated U.S. Government Information copy of the transcript of the May 2005 Hearing is available at http://www.gpo.gov/fdsys/pkg/CHRG-109shrg21352/pdf/CHRG-109shrg21352.pdf.

May 12, 2005, ***the very next day***, the IBIA decided to vacate and remand the Final Determination. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 408.

Six months later on October 11, 2005, Acting Assistant Secretary Cason issued the agency's extraordinary Reconsidered Final Determination denying federal acknowledgment. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 408-409.

On January 12, 2006, STN filed a petition for review of the Reconsidered Final Determination by the District Court pursuant to the Administrative Procedures Act asserting that the Reconsidered Final Determination was arbitrary and capricious, and affected by undue political influence. After limited discovery regarding the issue of political influence, STN moved for summary judgment in September 2007. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 395. The issue before the District Court on the motion for summary judgment was limited to whether the evidence presented showed that the political pressure exerted actually influenced the decision maker that issued the Reconsidered Final Determination. Id. at 410.

Despite recognizing the concerted political campaign against STN and the Final Determination by Connecticut's Congressional Delegation, its Governor and Attorney General, state and local officials, public and private stakeholders and community organizations, the District Court denied STN's motion in August 2008,

concluding that the BIA's determination was neither arbitrary nor capricious, and STN failed to establish that the political pressure, lobbying, and threats to BIA personnel actually affected the ultimate result. Schaghticoke Tribal Nation, 587 F. Supp. 2d at 421-22.

STN appealed the District Court's decision to this Court in March 2009, on the ground that the Reconsidered Final Determination was fatally tainted by undue political influences that affected the ultimate result, and that Associate Deputy Secretary James Cason was not legally authorized to issue the Reconsidered Final Determination. Schaghticoke Tribal Nation v. Kempthorne, 587 F.3d 132, 134 (2d Cir. 2009). On November 4, 2009, the Second Circuit affirmed the District Court's finding that STN failed to establish that the political activity and lobbying actually influenced the determination. Id.

Asserting that STN had exhausted the administrative process to determine its existence as an Indian tribe, Defendants moved for judgment on the pleadings. On September 30, 2012, the Honorable Alvin W. Thompson, United States District Judge for the District of Connecticut, granted the motions for judgment on the pleadings. Decision, SPA1-21; JA694-714.

THE DECISION OF THE DISTRICT COURT

Judge Thompson granted the motions for judgment on the pleadings concluding that the decision of the BIA denying STN federal acknowledgement conclusively established it was not "an Indian nation or tribe of Indians" under the Nonintercourse Act. Therefore "the STN cannot establish a *prima facie* violation of the Nonintercourse Act." Decision, SPA20-21; JA713-714.

In his ruling, Judge Thompson declined to find that the standards for BIA acknowledgment and protections under the Nonintercourse Act differed because STN failed to articulate exactly how the standards differed. The District Court therefore found that the BIA decision that STN did not qualify for federal recognition collaterally estopped STN from litigating whether STN came within the scope of the Nonintercourse Act. Specifically, the Court identified the BIA's determination that STN did not meet its requirements for community or political influence or authority because 42 of the tribal members did not agree that STN represented the Schaghticoke Indians. Decision, SPA16-17; JA709-710. In ruling that the BIA decision was dispositive of STN's non-tribal status, the District Court also noted that STN failed in its opposition to the motions to "identify any evidence of community or political influence or authority that was not presented to the BIA and which, if presented to the Court, would justify the Court reaching a different conclusion." Decision, SPA12; JA705.

SUMMARY OF ARGUMENT

The District Court's application of the doctrine of collateral estoppel and judicial deference to the BIA's determination that STN did not qualify to be a federally recognized tribe, in order to bar STN from seeking to enforce its claim to its ancestral tribal land was erroneous. The BIA standards for recognition and the level of proof required are more rigorous than eligibility under the common law test that enables a tribe to enforce its rights under the Nonintercourse Act. Equally, the political interference and pressure exerted on the BIA against STN deprived STN of having a full and fair opportunity to present its claim to be a tribe before an impartial tribunal.

STANDARDS OF REVIEW

A. The Appellate Standard Of Review

This Court reviews a "district court's grant of judgment on the pleadings *de novo*, 'employing the same. . . standard applicable to dismissals pursuant to Fed. R. Civ. P. 12(b)(6).'" Valentine Properties Associates, LP v. United States HUD, Case No. 11-1795-cv, 2012 U.S. App. LEXIS 22164, at *1-2 (2d Cir. Oct. 25, 2012) (citing Johnson v. Rowley, 569 F.3d 40, 43 (2d Cir. 2009)); see also Lohnas v. Astrue, Case No. 11-2383-cv, 2013 U.S. App. LEXIS 2422, at *1 (2d Cir. Jan. 31, 2013) (citing Jasinski v. Barnhart, 341 F.3d 182, 184 (2d Cir. 2003)) ("This

Court reviews *de novo* orders granting motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c)"). In this regard, this Court "will accept all factual allegations in the complaint as true and draw all reasonable inferences in [Appellant's] favor." Valentine Properties Associates, LP, 2012 U.S. App. LEXIS 22164 at *2 (internal quotation marks omitted).

B. The Standard Of Review Of A Motion For Judgment On The Pleadings

The plausibility standard applicable to motions to dismiss applies to Rule 12(c) motions for judgment on the pleadings. See, e.g, L–7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 429 (2d Cir. 2011) ("[i]n deciding a Rule 12(c) motion, we 'employ [ ] the same...standard applicable to dismissals pursuant to [Rule] 12(b)(6)") (citing Johnson v. Rowley, 569 F.3d 40, 43 (2d Cir. 2009)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations omitted).

In considering a motion to dismiss for failure to state a claim, a district court should follow a "two-pronged approach" to evaluate the sufficiency of the complaint. Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010). "A court 'can

choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'" Id. (quoting Iqbal, 556 U.S. at 679). "At the second step, a court should determine whether the 'well-pleaded factual allegations,' assumed to be true, 'plausibly give rise to an entitlement to relief.'" Id. (quoting Iqbal, id.). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (internal quotation marks omitted).

In deciding a motion for judgment on the pleadings, the court must accept all factual allegations in STN's Complaint as true and draw all reasonable inferences in STN's favor. See, e.g., Johnson, 569 F.3d at 43.

ARGUMENT

POINT I

THE DISTRICT COURT'S APPLICATION OF COLLATERAL ESTOPPEL TO THE BIA DECISION DENYING FEDERAL ACKNOWLEGMENT THEREBY PRECLUDING STN FROM SEEKING TO ENFORCE ITS RIGHTS TO ANCESTRAL TRIBAL LAND PURSUANT TO THE NONINTERCOURSE ACT WAS ERRONEOUS

In granting the motions for judgment on the pleadings, the District Court found that STN is barred by issue preclusion by virtue of the BIA's determination that STN did not qualify as an Indian tribe under the Regulations. Decision, SPA7-8; JA700-701. Specifically, the District Court found that STN is

collaterally estopped from litigating the issue of its status as an Indian tribe and is bound by the BIA's determination that STN does not qualify as a federally acknowledged tribe under the Regulations, effectively limiting the application of the Nonintercourse Act to only federally recognized tribes or tribes that have never sought recognition. Decision, SPA20-21; JA713-714.

The law of collateral estoppel is clear:

> Collateral estoppel is permissible as to a given issue if "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits."

Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc., 409 F.3d 87, 91 (2d Cir. 2005) (quoting Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997)). Further, the application of collateral estoppel is an issue of fairness. It is neither automatic nor mandatory:

> This court has been careful to assure that collateral estoppel is not employed unfairly…. Moreover, an adjudicator is generally accorded "broad discretion" in whether or not collateral estoppel should apply in a given case.

Id. at 91-92 (citing Parklane Hoisery v. Shore, 439 U.S. 322, 331 (1979) (internal citations omitted). Further, it is the burden of the proponent to establish that the application of collateral estoppel is appropriate. Id. at 92.

As detailed below, affording collateral estoppel to the BIA's determination was in error because: (1) the issues before the BIA and the Court were not identical; (2) therefore the issue was not litigated previously; (3) STN did not have a full fair opportunity to litigate the issue; and (4) fairness dictates that STN have an opportunity to establish its claims in an impartial forum, isolated from political pressures and influence.

A. The BIA's Determination Is Not Dispositive Of STN's Rights Under The Nonintercourse Act As The Standards For The Determination Of Its Tribal Status Are Different

The Nonintercourse Act prohibits and invalidates the "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians..." without the consent of the federal government. Consequently, if a group wishes to use the courts to protect aboriginal title to its land, it must demonstrate in its *prima facie* case that it is an Indian tribe. The criteria for doing so are set forth in the Montoya v. United States, 180 U.S. 261 (1901) (the "Montoya criteria"). To fulfill the Montoya criteria, the 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." Id. at 266.

It is well settled that "recognition through federal common law, *i.e.* application of the Montoya criteria, is one way to determine tribal status, and the only way courts have done so." Further, "the court is bound by precedent to apply the Montoya criteria for tribal recognition pursuant to federal common law." Gristede's Foods, Inc. v. Unkechauge Nation, 660 F. Supp. 2d 442, 469-470 (E.D.N.Y. 2009).[8]

STN's eligibility under the Montoya criteria is clear and should have precluded judgment on the pleadings. The Connecticut Appellate Court has ruled in Schaghticoke Indian Tribe v. Michael J. Rost that "the Schaghticoke tribe is recognized by the state as a self-governing entity that possesses power to, *inter alia*, '[d]etermine tribal membership and residency on reservation land...'". Schaghticoke Indian Tribe v. Michael J. Rost, 138 Conn. App. 204, 205, 50 A.3d 411, 413 (2012). This proposition is further codified in Connecticut General Statutes § 47-59a(b), which states, in relevant part:

> The state of Connecticut further recognizes that the indigenous tribes, the Schaghticoke… are self-governing entities possessing powers and duties over tribal members and reservations. Such powers and duties include the power to: (1) Determine tribal membership and residency on reservation land; (2) determine the tribal form of government; (3) regulate trade and commerce on the reservation; (4) make contracts, and (5) determine tribal leadership in accordance with tribal practice and usage.

[8] There is no statutory or common law amendment to the Montoya criteria, nor has there been any congressional or judicial proclamation that only BIA-recognized tribes can be afforded the protections of the Nonintercourse Act.

Further, STN is definitively united in a community under one leadership or government. It has a certified membership list comprised of 271 members. In re Federal Acknowledgment of the Schaghticoke Indian Nation, 41 IBIA 30, 37 (2005). Curiously, that fact is omitted from the District Court's decision, which only mentions that there are 42 unenrolled community members, 33 of which favor a different leader. Decision, SPA16-17; JA709-710. The fact that a small segment of the community dispute STN authority to govern the tribal people does not make STN any less of a community being led by one recognized government. Additionally, even though the minority and majority groups differ in their opinions as to who should lead the group, both agree that the Schaghticoke Indians should be recognized as a longstanding tribe. In re Federal Acknowledgment of the Schaghticoke Indian Nation, 41 IBIA at 38.

Moreover, STN has always inhabited a particular (though sometimes ill-defined) territory. Indeed there is a 400-acre reservation, depleted from its original 2,500 acres, which is located on the New York/Connecticut border within the boundaries of Kent in Litchfield County, Connecticut in and around which tribal members reside. It is one of the oldest reservations in North America, as its land was

set aside in 1736 as a reserve to the Schaghticoke people by the General Assembly of the Colony of Connecticut, 40 years before the American Revolution.

In contrast to the Montoya criteria, the BIA's test for federal recognition is a much more rigorous analysis of seven mandatory elements. The requirements of these mandatory criteria are further defined and detailed in the some forty-plus subsections to these provisions. The rigorous nature of these standards is evidenced by the very text of these Regulations. For example, the mandatory criteria ***must*** be established through submission of a "Documented Petition" containing:

> …detailed arguments made by a petitioner to substantiate its claim to continuous existence as an Indian tribe, together with the factual exposition and all documentary evidence necessary to demonstrate that these arguments address the mandatory criteria in § 83.7(a) through (g).

25 CFR§ 83.1. An evaluation of a tribe under the Montoya critera requires no such submission.

Moreover, the BIA must deny the petition if the tribe does not meet every single criterion. 25 C.F.R. § 83.6(d). Further, the burden is on the tribe to establish "a reasonable likelihood of the validity of the facts relating to each criterion." Id. § 83.6(c).

Also, as set forth in the Reconsidered Final Determination, the BIA found that Connecticut's recognition of STN and the establishment of a state

reservation for the tribe was of little weight in establishing that STN exercised political influence or authority pursuant to 25 C.F.R. § 83.7(c) during certain periods of time. Reconsidered Final Determination, JA362-368. A Court could find, however, under the less rigid common law Montoya criteria, that the continuous recognition of STN by the State of Connecticut as an indigenous self-governing tribe and the existence of a state reservation for hundreds of years is both significant and probative of whether STN is "a body of Indians of the same or similar race, united in a community under one leadership or government". Montoya, 180 U.S. at 266. Notably, even the BIA is considering revisiting its prior position of the weight given to state recognition in the federal acknowledgment process. In March 2013, the BIA issued a Discussion Draft of proposed revisions to the Regulations which, if adopted, would afford added significance to state recognition in the federal acknowledgement process. Indeed, under the proposed revisions, a tribe such as STN which has had a "reservation recognized by the state since 1934" would be eligible for an expedited proposed favorable finding without having to satisfy the criteria set forth in 25 C.F.R. § 83.7(c).[9]

The Regulations also specifically require that to be included as a member of a Tribe for federal acknowledgement, the individual must consent to be

[9] See http://www.bia.gov/cs/groups/xraca/documents/text/idc1-022705.pdf.

included as a member of that Tribe. Reconsidered Final Determination, JA377-378. In particular, the Regulations define a "member of an Indian group" as "an individual who is recognized by an Indian group as meeting its membership criteria *and who consents to being listed as a member of that group*" and the "Tribal roll" as defined "for purposes of the regulations, means a list exclusively of those individuals who have been determined by the tribe to meet the tribe's membership requirements" and "have *affirmatively demonstrated consent to being listed as members*." 25 C.F.R. Part 83.1 (emphasis added).

Specifically citing the foregoing statutory language, the Reconsidered Final Determination concluded that the 33 individuals on the unenrolled tribal members list who did not consent to inclusion on the STN membership list (29 of which are members of SIT) were not part of STN, and thus, STN did not meet all seven of the mandatory federal acknowledgment criteria. Reconsidered Final Determination, JA37-38. It is beyond dispute that i) the Montoya criteria do not contain a specific "consent" requirement or other specific limitations on the membership criteria and, more importantly, ii) the Regulations do not apply to the determination of the applicability of the Nonintercourse Act. Interestingly enough, the BIA has, in previous precedent, actually relied upon evidence of such political conflicts within a group as "good evidence" of the exercise of political influence and the functioning of political processes. See, e.g. the "Summary under the Criteria and

Evidence for Final Determination for Federal Acknowledgment of the Snoqualmie Tribal Organization", dated August 22, 1997, at, *inter alia*, p. 97 of 167.[10]

Accordingly, the District Court clearly erred in adopting wholesale the BIA's factual determination that STN could not satisfy mandatory criteria 83.1(b) and (c) as a result of the 33 unenrolled members who did not consent and equating the BIA's determination under the Regulations with the District Court's determination under the Montoya criteria. Decision, SPA17; JA710.[11]

The rigorous standards and procedure for federal acknowledgment were, no doubt, established because federal acknowledgement brings with it an array of benefits and assistance that are unavailable to non-federally recognized tribes. Federal acknowledgment is the "prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2. Acknowledgment also brings with it "the immunities and

[10] See http://www.bia.gov/cs/groups/xofa/documents/text/idc-001369.pdf.

[11] The District Court also erred in relying upon this factual finding in its analysis of community and political authority because the weight given to this factual finding by the BIA could have been significantly greater than the weight the District Court should afford it because the BIA was deciding whether or not to confer a government-to-government relationship between STN and the United States of America. The possible existence of a small sect contesting current tribal leadership should not be given as much weight when being considered only in terms of protecting aboriginal lands under the Nonintercourse Act. It is beyond reason to argue that if any member of your tribe (or government) favors a different leader at any point in time that the entire tribe would then lose its right to protect its lands.

privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." Id.; see also, Shinnecock Indian Nation v. Kempthorne, Case No. 06-5013, 2008 U.S. Dist. LEXIS 75826, at *5-6 (E.D.N.Y. Sept. 30, 2008) at*16 (acknowledging that the common law Montoya criteria is a lesser standard than the federal recognition regulations by holding that while the district court clearly had the authority to determine the common-law status of a tribe, common law recognition had no binding effect on the BIA for purposes of determining federal tribal recognition that would establish a government-to-government relationship); State of New York v. the Shinnecock Tribe a/k/a the Shinnecock Indian Nation, 400 F. Supp. 2d 486, 469 n.7 (E.D.N.Y. 2005) (finding genealogical testimony regarding tribal ancestry not to be determinative of a tribe's satisfaction of the Montoya criteria).

The distinction between qualification for federal acknowledgment and qualification for the purposes of the Nonintercourse Act has been recognized by this Court. In Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51 (2d Cir. 1994) the Second Circuit reversed the District Court's dismissal of the plaintiff Indian tribe's Nonintercourse Act claim even though the plaintiff was not a federally recognized tribe. Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d at 61. Specifically, the Court stated, "tribal status for the purpose of obtaining federal

benefits is not necessarily the same as tribal status under the Nonintercourse Act." Id. at 57.

Similarly, in Mashpee Tribe v. Seabury Corp., 592 F.2d 575 (1st Cir. 1979), the First Circuit Court of Appeals recognized that the common law standard is a flexible one that must take into account changes in tribal characteristics over time and differences between tribes in different areas of the country. Id. at 588. Thus, in upholding the jury instructions of the district court, the First Circuit stated with regard to the Montoya criteria:

> The court did a good job with a very difficult task. Its explanation related the elements of the broad legal definition, developed when Indian tribes' relationship to the United States was very different, to the particular history of this group and to the modern position of Indians in our society. We think it appropriate that the definition of "tribe" 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 difference conditions.

That the Montoya criteria are more flexible is demonstrated by the case of Gristede's Foods, Inc. v. Unkechuage Nation, 660 F. Supp. 2d 442 (E.D.N.Y. 2009). In Gristede's Foods, the court applied the Montoya criteria to the Unkechuage Nation of Long Island to determine whether it is an Indian tribe, and therefore enjoyed sovereign immunity. 660 F. Supp. 2d at 469-78. Significantly, in that case the court applied the Montoya criteria without any reliance on what the BIA

might or might not require for federal recognition. Id. at 469-77. Instead, it applied an approach which recognized that forces of assimilation and the dominant culture in the tribal group required a flexible approach. Thus, the court observed that the Montoya criterion "a body of Indians of same or similar race" involved:

> ….analyzing race based on how a particular Indian group was and is perceived within its own group and by the dominant culture acknowledges different and evolving definitions of race in different contexts and throughout the centuries, thereby acknowledging the notion of race as a social construct. Furthermore, by considering common ancestry of the group as a whole, in addition to the blood quantum or other criteria required by a tribe for its members, and de-emphasizing strict biology as a measure of race, the court may incorporate a tribe's self-defined criteria into its consideration of the Montoya criterion "of the same or similar race".

Gristede's Foods, 660 F. Supp. 2d at 471. Addressing the "continuity" criterion, the court observed:

> [U]nited in a community under one leadership or government," is a construct of the dominant government, not necessarily a criterion of the Indian group to whom it is applied. Application of Montoya's "united in a community under one leadership or government" criterion "require[s] considerable flexibility and understanding with respect to changes within native groups over time and differences between native groups in different parts of the country.

Id. at 473 (internal citations omitted). The application of these same flexible considerations to STN would undoubtedly result in a far different determination than the BIA reached in the Reconsidered Final Determination.[12]

Because both the applicable standards and standard of proof are vastly different for the two distinctly different types of review, the District Court's application of collateral estoppel was error. Issues of fact may bear the same label without being identical. "They are not identical if the legal standards governing their resolution are significantly different." Metromedia v. Fugazy, 983 F.2d 350, 365 (2d Cir. 1992) (abrogated on different issue in Anegada Master Fund, Ltd. v. PXRE Group Ltd., 680 F. Supp. 2d 616 (S.D.N.Y. 2010)). Thus as Section 28 of the Restatement (Second) Judgments states "relitigation of the issue in a subsequent action between the parties is not precluded [where] [t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action." That is precisely the case here -- the BIA inquiry is far more rigorous and the tribe's burden greater than a district court's analysis of the Montoya criteria. Because they are two separate

[12] See, e.g., Native Village of Venetie I.R.A. Council v. State of Alaska, Case Nos. F86-0075, F87-0051, 1994 U.S. Dist. LEXIS 18930 (D. Alaska Dec. 23, 1994) (recognizing a tribe, which the court found not to be federally recognized as a matter of law, as an "Indian tribe" under the "alternative common law test", the Montoya criteria).

inquiries, a decision by the BIA against federal recognition should not collaterally estop STN from preventing the misappropriation of its ancestral land through the protection of the Nonintercourse Act.

B. The District Court's Determination Is Contrary To Long Standing Principles Of Statutory Construction Regarding Interpretation Of Federal Indian Law And Congressional Intent

When construing a statute, federal courts "give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Statutory construction "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." United States v. Albertini, 472 U.S. 675, 680 (1985), reversed on other grounds, 783 F.2d 1484 (9th Cir. 1986) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)). "To ascertain Congress's intent, [courts] begin with the statutory text because if its language is unambiguous, no further inquiry is necessary." Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 116 (2d Cir.2007) (citations omitted); see also Tyler v. Douglas, 280 F.3d 116, 122 (2d Cir. 2001) ("If the statutory terms are unambiguous, review generally ends and the statute is construed according to the plain meaning of its words.").

In the case of the Nonintercourse Act the language is broad but clear. It applies to "any Indian nation or tribe of Indians." A term broad enough to encompass STN, a tribe possessing a reservation and recognized by the State of Connecticut and its colonial predecessor for more almost 300 years.

"There has never been a single, all-purpose definition of the terms 'Indian tribe' or 'Indian nation' for federal purposes, despite references to such entities in the United States Constitution and a wide variety of federal enactments." Cohen's Handbook § 3.02[1]. Similar terms may have different meanings in the context of federal Indian law, and the risk of using an erroneous standard is the alienation of indigenous people from their aboriginal title to their land.

One need only review federal statutes to recognize the terms of "Indian tribe," "Indian nation," and "Indian" are used differently in different contexts. Simply, a people who are defined as an "Indian tribe" for purposes of one federal statute, may not be "Indian tribe" for another. Indeed, the BIA's Reconsidered Final Determination recognizes that federal acknowledgment is not the *sine qua non* of tribal status for all federal law purposes. "Numerous statutes deal with Indian tribes without defining what an 'Indian tribe' is, and many condition eligibility for certain benefits on being an Indian tribe that is 'recognized by the Federal Government.'" Reconsidered Final Determination, JA384.

Thus Congress has expressly limited some provisions to federally recognized tribes, extended others to include state recognized tribes, and still others to Indian tribes without any limitation. To illustrate, the following is a chart of several federal statutes which are limited to federally-recognized Indian tribes or include Indian tribes that are not federally-recognized such as STN:

Citation	Title	Definition	Type of Tribe
25 U.S.C. §465	Indian Reorganization Act	Tribes "under federal jurisdiction"	Federally-recognized
25 U.S.C. §4103	Native American Housing and Self Determination Act	"A tribe that is a federally recognized tribe or a State recognized tribe."	Federally-recognized, State recognized Includes STN
25 U.S.C. §450b(e)	Establishing cause of action for misrepresentation of Indian produced goods	"an Indian group that has been formally recognized as an Indian tribe by--(i) a State legislature; (ii) a State commission; or (iii) another similar organization vested with State legislative tribal recognition authority."	Federally-recognized, State recognized Includes STN

Citation	Title	Definition	Type of Tribe
25 U.S.C. §81	Contracts and Agreements with Indian Tribes	defines "Indian tribe" by referencing Section 450b(3) which, in turn, defines "Indian tribe" as "an Indian tribe, band, nation or other organized group or community … which is recognized as *eligible for the special programs and services provided by the United States to Indians because of their status as Indians*" (emphasis added).	Federally-recognized
13 U.S.C. §184(1)	Addresses Interim Current Data for the Census	Defines "local unit of general purpose government," to include "Indian tribe"	In practice, includes the Schaghticoke Reservation as an American Indian Area and its own census tract

Clearly Congress can, and does, expressly limit the scope of benefits to federally-recognized tribes when it intends to do so. In any event, while Congress may not have been as precise in defining which group is an Indian tribe under the Nonintercourse Act, it was clear in that Congress ***did not intend*** the Nonintercourse Act to apply to ***only*** federally recognized tribes. If that was Congress' intent, the Nonintercourse Act could have been amended any time over the past 30 years to

protect only "federally recognized Indians" as the Congress has done in other statutes.

When interpreting federal Indian law, "the standard principles of statutory interpretation do not have their usual force." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); see also Cohen's Handbook of Federal Indian Law §2.02[1] at 113 (Nell Jessup Newton ed., 2012) (hereinafter, "Cohen's Handbook"). "The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor." Cohen's Handbook, §2.02[1] at 113 (emphasis added). See also, Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with… traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence."); County of Oneida v. Oneida Indian Nation, 470 U.S. 266, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians is ambiguous provisions interpreted for their benefit"); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973) ("any doubtful expressions in [treaties] should be resolved in the Indians' favor"); California Valley Miwok Tribe v. United States, 515 F.3d 1262, 1266 n. 7 (D.C. Cir. 2008) (statute are

"to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit").

Indeed, the Supreme Court has stated that "[w]hen we are faced with… two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'" County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. at 767-68).

Thus, in finding the issues identical for collateral estoppel purposes, the District Court erred in reading the BIA's definition of Indian tribe into the Nonintercourse Act and effectively holding that the Nonintercourse Act only applies to federally recognized tribes or tribes who have never sought federal recognition. Proper construction of the Nonintercourse Act dictates the opposite result.

C. STN Did Not Have A Full And Fair Opportunity To Litigate Its Status As A Tribe For All Purposes Through The Federal Acknowledgment Process

In the Decision, the District Court erred when it ignored the concerted political campaign against STN and its federal recognition and erroneously found

that STN had full and fair opportunity to litigate simply because it "had 14 years to prepare and submit its petition to the BIA". Decision, SPA18-19; JA711-712.

An administrative decision does not preclude litigation in court "if there is reason to doubt the quality, extensiveness or fairness of [administrative] procedures," Montana v. United States, 440 U.S. 147, 164 (1979), or where "the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim...." Kremer v. Chemical Construction Corp., 456 U.S. 461, 480-81 (1982). As the record of the evidence adduced in connection with the review of the BIA's determination before Judge Dorsey suggests, there is every reason to doubt the quality and fairness of the BIA proceedings.

One need only read Judge Dorsey's opinion to understand the extent of the war waged by the Schaghticoke Opposition to reverse the Final Determination:

> There is no dispute that the majority of Connecticut's Congressional delegation, the Governor, the Attorney General, and other anti-gaming advocates in Washington fiercely opposed the [Final Determination's] acknowledgment of [STN]. It was public knowledge that state and local interests urged the Department to reverse its acknowledgment decision.
>
> ***
>
> There is no question that throughout 2004 and 2005 the Connecticut Congressional delegation, Connecticut state and local officials, and other public and private stakeholders, including a community organization in the Town of Kent which hired the Washington lobbying firm Barbour Griffith & Rogers (BGR) to advocate on its behalf,

> lobbied the Secretary of the Interior, the BIA, the IBIA, the White House, and even this Court about reversing the acknowledgment decision.

Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 389, 402-04.

Meetings were held between members of Congress and BIA officials at which the BIA officials were made to understand that reversal of the Final Determination was imperative, and that the officials' jobs might be in jeopardy if that did not occur. Id. at 404. Thereafter, BIA officials were called to the White House to discuss STN acknowledgement. Id. at 406.

Beginning within a few weeks of the issuance of the Final Determination granting federal recognition to STN and continuing throughout the period that the Final Determination was under review by the IBIA, STN's acknowledgment became the focus of well-publicized Congressional subcommittee hearings in which the BIA, its procedures and STN acknowledgment became the target of continuous attack. Id. at 405. Thus, for example in May 2004, the House Committee on Government Reform held a hearing for the articulated purpose of addressing concerns about the STN acknowledgment. At that hearing, then-Attorney General Blumenthal characterized the Final Determination "as unprincipled," and contending that the BIA "twisted and distorted State recognition to cover its deliberate disregard of absent evidence." Id. At the same hearings, BIA officials

were pressured to defend the Final Determination or concede that the agency erred. Id.

Again in May 2005, the BIA and STN were subjected to another well-publicized attack in the guise of a legislative hearing. During that hearing,

> AG Blumenthal asked that Congress abolish the OFA's tribal recognition authority and impose a six-month moratorium on all recognition decisions, explaining in his written testimony that "the BIA's political leaders have disregarded the [seven mandatory criteria], misapplied evidence, and denied state and local governments a fair opportunity to be heard." May 2005 Hearing at 89. Governor Rell testified that the "BIA is awarding Federal recognition to tribes regardless of evidence to the contrary," …Senator Lieberman attacked the [Final Determination] as an example of a "process that smacks of outright manipulation and abuse of government authority." Id. at 139. Representative Johnson testified that the OFA's "erroneous and unlawful decision to acknowledge the [STN] was made by ignoring evidence, manipulating federal regulations, and overturning precedent." Id. at 133. Representative Simmons stated, "Indeed, there is no better example of this disregard for the regulations in place than in the case of the Schaghticoke decision." Id. at 181….

Schaghticoke Tribal Nation, 587 F. Supp. at 407.

While the opposition to the recognition of STN exerted their influence, communicated with the BIA, and had multiple public opportunities to pressure the BIA to reverse STN acknowledgment, STN was denied any similar access to BIA policy and decision makers by court order. Thus, STN was rendered powerless to

defend itself against the concerted political ambush aimed to strip STN of its federal recognition.

Following months of this continuous onslaught -- and the very next day after the Connecticut Congressional Delegation testified at the May 11, 2005 Senate hearing -- the IBIA issued its decision directing the BIA to "reconsider" its prior acknowledgment of STN. That reconsideration was the responsibility of a political appointee, not an administrative judge. See 25 CFR § 83.11(f).

While it is true that both Judge Dorsey and the Second Circuit affirmed the BIA's Reconsidered Final Determination, that does not bar the District Court from consideration of the tactics and pressure surrounding the administrative proceedings in connection with the application of collateral estoppel. The issues before Judge Dorsey and the Second Circuit were limited to ascertaining whether sufficient bases were demonstrated to overturn the administrative determination of an agency under 5 U.S.C. § 706. The standard for such court action is high and the scope of review narrow:

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 286 (1974).

However, STN did not seek to re-litigate the merits of the BIA determination nor did it ask the District Court to overturn the administrative decision. STN simply sought to establish that even assuming that the common law and BIA standards are the same, which they are not, there is reason to doubt the "fairness" of the BIA proceedings. Thus, the District Court erred in deciding to apply collateral estoppel in this case. Instead, STN should have been afforded the opportunity to have its right to the protections of 25 U.S.C. § 177, pursuant to the common law Montoya criteria, adjudicated in a neutral forum, before an independent federal judge.

POINT II

THE DISTRICT COURT ERRED IN DECIDING TO DEFER TO THE BIA'S DETERMINATION THAT STN LACKS TRIBAL STATUS

The doctrine of primary jurisdiction is intended to foster judicial economy and consistency, to promote "consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency," "and the resolution of technical questions of fact through the agency's specialized expertise, prior to judicial consideration of the legal issues." Golden Hill Paugussett Tribe of Indians v.

Weicker, 39 F.3d 51, 59 (2d Cir. 1994). The doctrine can be applied where an issue or claim may be addressed in either a court or an administrative agency. Its application may serve to narrow the issues in dispute for the court, but it does not relieve the court of its role in interpreting statute, for which it retains "final authority." Federal Maritime Board v. Isbrandtsen Company, Inc., 356 U.S. 481, 486 (1959); see also, Weicker, 39 F.3d at 60.

Here, the lower court determined that the BIA had primary jurisdiction pursuant to which the Consolidated Cases were stayed pending the Assistant Secretary's decision on STN's application for federal recognition as an Indian tribe. Had the BIA determined that STN met the rigorous mandatory criteria for federal acknowledgment, STN's standing and rights under the Nonintercourse Act would be dispositive. The converse, however, is not true. As described in detail above in Section I.A., the District Court is not bound by a denial of federal recognition by the BIA because the standard for determining federal recognition differs significantly from that of determining applicability of the Nonintercourse Act.

In any event, primary jurisdiction did not abrogate the District Court's obligation and power to adjudicate the issues before it:

> The Tribe's claim is not cognizable in the first instance solely by the BIA. In fact, the BIA lacks the authority to determine plaintiff's land claim. Regardless of whether the BIA were to acknowledge Golden Hill as a tribe for purposes of federal benefits, Golden Hill must still

> turn to the district court for an ultimate judicial determination of its claim under the Nonintercourse Act.

Weicker, 39 F.3d at 58. While the District Court may have found the administrative determination of assistance in deciding STN's claims, the administrative decision was not a substitute for the exercise of the court's authority to consider the facts and interpret the application of the statutory protection afforded ancestral land by the Nonintercourse Act. Indeed, as the BIA was not considering, construing or applying the Nonintercourse Act, deference might be inappropriate in this case. In any event, the unchecked deference urged by Defendants and followed by the District Court cedes to the Legislative Branch the ability to confer upon the Executive Branch the power to substitute its administrative proceeding for an independent judicial determination of the protections afforded STN pursuant to the statute.

The District Court incorrectly found that it was appropriate to defer to the BIA's factual findings. In making its determination, the District Court relied upon the BIA's expertise, STN's apparent failure to articulate any substantive difference between the federal acknowledgment criteria and the Montoya criteria, and STN's purported failure to identify any evidence that was not presented to the BIA. Decision, SPA12; JA705. While STN does not dispute that the BIA has expertise in examining historical records and analyzing the highly specific federal recognition criteria set forth in the Regulations, the substantial differences in being a

federally recognized tribe versus being a tribe under the Nonintercourse Act, make deference to BIA's factual findings and determinations based upon those factual findings inappropriate. Indeed, it cannot seriously be argued that simply being able to invalidate the transfer of tribal lands by court action is equal to i) being recognized as having a government-to-government relationship with the United States, ii) being eligible for funding and services from the BIA, iii) possessing certain inherent rights of self-government, iv) and being entitled to receive certain federal benefits, services, and protections from the United States government[13] -- in sum, the rights and benefits of a tribe of Indians under the Nonintercourse Act are significantly different than the rights and benefits of a federally acknowledged tribe.

POINT III

STN'S FAILURE TO SUBMIT EVIDENCE NOT PRESENTED TO THE BIA IS IRRELEVANT TO DETERMINATION OF THE MOTIONS BEFORE THE COURT

In adopting the BIA's determination, and precluding STN from pursuing its claims the District Court observed that STN did "not identify any evidence of community or political influence or authority that was not presented to the BIA…" Decision, SPA12; JA705. The District Court's reliance upon a lack of additional "evidence" was inappropriate. The District Court was not asked to grant

[13] See http://www.bia.gov/FAQs/index.htm.

summary judgment. The motions before it were motions for judgment on the pleadings -- motions which are directed only to the sufficiency of the pleadings and not the existence of issues of fact as demonstrated by evidence. Because STN was limited in the information that it could properly put before the District Court in its opposition to the motions for judgment on the pleadings and based solely on its submission, and the District Court should have denied the motions.[14]

CONCLUSION

For the foregoing reasons, the Judgment of the District Court should be reversed and the matter remanded to the District Court for further proceedings.

Dated: Greenwich, Connecticut
April 1, 2014

Respectfully submitted,

By: _____

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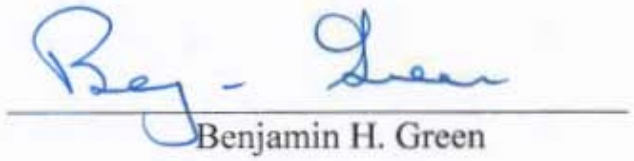
[14] In any event, STN did identify relevant evidence that was not considered by the BIA – STN was prevented from submitting two envelopes containing evidence directly relevant to the reconsideration of the Final Determination. Equally, STN noted that advances on historical analysis caused one expert to reverse his opinion and conclude STN has been a tribe with a continuous existence.

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 10,961 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 complied with typeface and type style requirements. This brief has been prepared in proportionally-spaced typeface using Microsoft Word software with Times New Roman 14-point font.



Benjamin H. Green

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Plaintiff, v. 43.47 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LITCHFIELD, TOWN OF KENT, ET AL., Defendants.	Civil No. 2:85-cv-01078(AWT) CONSOLIDATED
SCHAGHTICOKE TRIBAL NATION, Plaintiff, v. KENT SCHOOL, ET AL., Defendants.	Civil No. 3:98-cv-01113(AWT)
SCHAGHTICOKE TRIBAL NATION, Plaintiff, v. UNITED STATES OF AMERICA, ET AL., Defendants.	Civil No. 3:00-cv-00820(AWT)

RULING ON MOTIONS FOR JUDGMENT ON THE PLEADINGS

This is a consolidated action composed of three cases: United States v. 43.47 Acres of Land, et al., Docket 2:85-cv-1078(AWT) ("USA v. 43.47 Acres"); Schaghticoke Trial Nation v. Kent School Corporation, Inc., et al., Docket 3:98-cv-1113(AWT) ("STN v. Kent

School"); and Schaghticoke Tribal Nation v. United States, et al., Docket 3:00-cv-820(AWT) ("STN v. USA"). A common claim made by the Schaghticoke Trial Nation (the "STN") in each case is that the STN is an Indian tribe that has been dispossessed of Indian land without the approval of Congress in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177 (the "Nonintercourse Act").

The United States and the land claim defendants, i.e., Kent School Corporation, Inc. ("Kent School"), the Town of Kent and Connecticut Light and Power Company ("CL&P"), move for judgment on the pleadings in the consolidated case. They argue that the STN is collaterally estopped from litigating the issue of whether the STN is an Indian tribe due to a determination by the Bureau of Indian Affairs ("BIA") that the STN is not an Indian tribe. They further argue that the STN, therefore, lacks standing to pursue a claim under the Nonintercourse Act and the ability to establish a violation of the Nonintercourse Act.

For the reasons set forth below, the motions for judgment on the pleadings are being granted. Because the court finds that the STN cannot establish a prima facie violation of the Nonintercourse Act, it does not reach the issue of standing.

I. FACTUAL AND PROCEDURAL BACKGROUND

In all three matters, the STN asserts land claims pursuant to the Nonintercourse Act, which provides in relevant part that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title

or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

The lead case, USA v. 43.47 Acres, is a condemnation action involving the federal government's attempt to acquire title to two parcels of land (Parcel 265-2, which is composed of 43.47 acres, and Parcel 265-33, which is composed of 83.52 acres) under its powers of eminent domain. The STN has intervened, claiming to own the land on the basis that it was wrongfully conveyed in violation of the Nonintercourse Act.

The two other cases in this consolidated action, STN v. Kent School and STN v. USA, are land claim actions filed by the STN. The named defendants are parties who have a current ownership interest in parcels claimed by the STN. The STN alleges that between 1801 and 1911 those parcels were sold or transferred by the State of Connecticut in violation of the Nonintercourse Act. The STN argues that those transfers are void, illegal and of no effect, and that Kent School, the Town of Kent and CL&P should be ejected and the land should be returned to the STN.

An issue that is common to all three cases is whether the STN exists as an Indian tribe under federal law. If the STN does not qualify as an Indian tribe, it cannot establish a prima facie case of a violation of the Nonintercourse Act. See Golden Hill Paugussett

Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994) (setting forth the elements of a prima facie case based on a violation of the Nonintercourse Act). To obtain federal acknowledgment of tribal status, a group may petition the BIA, a bureau within the Department of the Interior to whom regulation of Indian matters has been delegated. During the federal acknowledgment process, the BIA utilizes the Department of the Interior's procedures and policy for acknowledging that certain groups exist as Indian tribes, and a petitioner must satisfy all the mandatory criteria in 25 C.F.R. § 83.7(a)-(g) for tribal status to be acknowledged. See 25 C.F.R. §§ 83.2, 83.6. Such recognition is necessary before a group can take advantage of certain federal privileges and programs available to Indian tribes.

In December 1994, the STN submitted a petition to the BIA requesting acknowledgment as an Indian tribe under 25 C.F.R. pt. 83. In March 1999, the court stayed USA v. 43.47 Acres and STN v. Kent School to provide the BIA the opportunity to decide whether the STN constituted an Indian tribe for purposes of federal acknowledgment. The court vacated the stay in September 2000 but reinstated it when the Department of the Interior, the STN and the land claim defendants agreed on an expedited and enhanced administrative process by which the BIA would review and act upon the STN's petition for acknowledgment. Thus, in May 2001 the court entered a scheduling order permitting the BIA to determine the merits of the STN's petition

for federal acknowledgment and, more specifically, determine whether the STN existed as an Indian tribe under federal law.

On October 11, 2005, the BIA issued a Reconsidered Final Determination (the "RFD") concluding that the STN did not satisfy two of the mandatory criteria for federal acknowledgment. Specifically, the BIA found that the STN does not meet the criteria for "community" under 25 C.F.R. § 83.7(b) or "political influence or authority" under 25 C.F.R. § 83.7(c). Reconsidered Final Determination to Decline to Acknowledge the Schaghticoke Tribal Nation, 70 Fed. Reg. 60,101 (Oct. 14, 2005). Thus, the BIA found that the STN is not entitled to federal acknowledgment as an Indian tribe. Id.

On January 12, 2006, the STN appealed the RFD to this court pursuant to the Administrative Procedures Act. After extensive discovery, the parties filed cross-motions for summary judgment. In ruling on the cross-motions for summary judgment, the court concluded that the BIA's final determination was "reasonable based on the evidence before it" that the STN failed to satisfy the criteria of "community" and "political influence or authority" due to the fact that a substantial portion of the Schaghticoke refused to be enrolled as members of the STN. Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 418 (D. Conn. 2008). The court entered judgment for the respondents. Id. at 422. The decision was affirmed on appeal by the Second Circuit, Schaghticoke Tribal Nation v. Kempthorne, 587

F.3d 132 (2d Cir. 2009), and the Supreme Court denied certiorari, Schaghticoke Tribal Nation v. Salazar, 131 S. Ct. 127 (2010).

Based on the foregoing, on February 7, 2012, Kent School, the Town of Kent and CL&P moved to vacate the stay in all three cases. This court granted that motion, and Kent School, the Town of Kent, CL&P and the United States moved for judgment on the pleadings.

II. LEGAL STANDARD

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). 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. L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 429 (2d Cir. 2011). When deciding a motion for judgment under Rule 12(c) or a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and draw inferences in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement."

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557) (internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555 (internal citations omitted). The plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. "The issue is not whether plaintiff will prevail, but whether he is entitled to offer evidence to support his claims." United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 236).

On a Rule 12(c) motion, the court considers "the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for factual background of the case." Roberts v. Babkiewicz, 582 F.3d 418, 419 (2d Cir. 2009). The court's consideration may include "any written instrument attached to [the complaint] as an exhibit,...materials incorporated in it by reference,...and documents, that although not incorporated by reference, are 'integral' to the complaint." Sirva v. Morton, 380 F.3d 57, 67 (2d Cir. 2004); Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002).

III. DISCUSSION

"To establish a prima facie case of a violation of the [Nonintercourse] Act, 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." Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994). For the reasons set forth below, the court concludes that it is appropriate to defer to the BIA's determination that the STN does not qualify as an Indian tribe and finds that the STN is barred from relitigating that determination. The court also concludes that, since the STN cannot establish that it is an Indian tribe, it cannot establish a prima facie violation of the Nonintercourse Act.

A. Primary Jurisdiction and Deference to Factual Findings

Primary jurisdiction is "[a] judicial doctrine whereby a court tends to favor allowing an agency an initial opportunity to decide an issue in a case in which the court and the agency have concurrent jurisdiction." Black's Law Dictionary (9th ed. 2009). This doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956).

Primary jurisdiction "recognizes that even though Congress had not empowered an agency to pass on the legal issues presented by a case raising issues of federal law, the agency's expertise may,

nevertheless, prove helpful to the court in resolving difficult factual issues." Johnson v. Nyack Hosp., 964 F.2d 116, 122 (2d Cir. 1992) (emphasis in original); see also Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 304 (1976). The primary jurisdiction doctrine serves two interests: (1) "it ensures uniformity and consistency in the regulation of business entrusted to a particular agency" and (2) "it is intended to recognize that, with respect to certain matters, the expert and specialized knowledge of the agencies should be ascertained before judicial consideration of the legal claim." Nader, 426 U.S. at 303-04 (internal citations omitted); Goya Foods, Inc., v. Tropicana Prods., Inc., 846 F.2d 845, 851 (2d Cir. 1988) (internal citations omitted). With respect to such technical, complicated issues of fact, primary jurisdiction "does more than prescribe the mere procedural timetable of the lawsuit. It is a doctrine allocating the lawmaking power." Western Pac. R.R., 352 U.S. at 63 (internal citations omitted). In resolving such issues of fact, the doctrine thus "promot[es] the proper relationship between the courts and administrative agencies charged with particular regulatory duties." Id.

In Golden Hill v. Weicker, the Second Circuit noted that "[a] federal court, of course, retains final authority to rule on a federal statute, but should avail itself of the agency's aid in gathering facts and marshaling them to a meaningful pattern." 39 F.3d at 60. The court went on to observe that "the BIA is better qualified by virtue

of its knowledge and experience to determine at the outset whether [the plaintiff] meets the criteria for tribal status." Id. The court also noted that "the creation . . . of the acknowledgment process currently set forth in 25 C.F.R. Part 83—a comprehensive set of regulations, the BIA's experience and expertise in implementing these regulations, and the flexibility of the procedures weigh heavily in favor of a court's giving deference to the BIA." Id.; see also, Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113, 114-15 (1973) (per curiam) (holding that judicial actions should have been stayed to permit review by the Commodity Exchange Commission).

Here, the STN argues that when determining federal recognition for land disputes under the Nonintercourse Act, the court is not bound by the BIA's denial of federal recognition, but rather only bound by an approval of federal recognition. The STN does not provide authority supporting this proposition, and the court has not found any case law, regulation or precedent that supports it. In addition, the STN argues that the court has an independent obligation to determine whether the STN is an Indian tribe under the Nonintercourse Act, so the BIA approval or denial of federal acknowledgment is irrelevant. The court agrees that it must independently apply applicable law to the factual findings. However, as explained in Golden Hill Paugussett Tribe of Indians v. Rell when analyzing Golden Hill v. Weicker:

> While the Second Circuit observed that that "[r]egardless of whether the BIA were to acknowledge Golden Hill as a tribe for the purposes of federal benefits, Golden Hill must still turn

> to the district court for an ultimate judicial determination of its claim under the Nonintercourse Act," the court relied on the doctrine of primary jurisdiction in holding that "the BIA is better qualified by virtue of its knowledge and experience to determine at the outset whether Golden Hill meets the criteria for tribal status" and that "[t]he BIA's resolution of these factual issues regarding tribal status will be of considerable assistance to the district court in ultimately deciding Golden Hill's Nonintercourse Act claims."

463 F.Supp.2d 192, 195 (D. Conn. 2006).

In the present action, after the district court consolidated the cases, primary jurisdiction and deference to the BIA were appropriate based on several factors: "the need for uniform agency action, the degree to which expert or specialized knowledge is required, the nature of the dispute, whether the agency's determination will prove helpful, historical application of the doctrine, the agency's authority, whether the dispute lies at the heart of the agency's assignment from Congress, and the potential delay in resolving the underlying dispute." U.S. v. 43.47 Acres of Land, 45 F. Supp. 2d 187, 191-92 (D. Conn. 1999) (noting that "[n]o factor alone is determinative").

After the court stayed the case pending the BIA's determination of the STN's tribal status, the BIA rejected the STN's claim that it is an Indian tribe entitled to federal recognition and protection because the STN failed to meet all the criteria for federal acknowledgement as an Indian tribe required by 25 C.F.R. § 83.7. Reconsidered Final Determination to Decline to Acknowledge the Schaghticoke Tribal Nation, 70 Fed. Reg. 60,101. Specifically, the

BIA found that the STN had presented insufficient direct evidence (1) of a distinct tribal community from 1920 to 1967 and after 1996 and (2) of "political influence or authority" over tribal members from 1801 to 1875, 1885 to 1967 and after 1996, a total of about 165 years. Id.

This court finds it appropriate to defer to the BIA's factual findings contained in the RFD for several reasons. First, the BIA is entrusted with broad responsibilities relating to Indian affairs, including making determinations regarding whether groups qualify as Indian tribes under federal law. This agency has the expertise to examine historical records and documents (including marriage records, residency patterns and other census data) to determine whether a group meets the criteria set forth in 25 C.F.R. pt. 83. Second, the STN does not articulate any 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) (providing the test for courts to use in determining whether to recognize a group as an Indian tribe). Third, the STN does not identify any evidence of community or political influence or authority that was not presented to the BIA and which, if presented to the court, would justify the court reaching a different conclusion. Therefore, the court should defer to the BIA's determination that the STN lacks tribal status.

B. Collateral Estoppel

The STN contends that collateral estoppel does not bar it from relitigating its existence as an Indian tribe under the Nonintercourse Act. Courts "have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." Astoria Fed. Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991). "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." Id. (quoting United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)). For collateral estoppel to apply to an adjudicative determination:

> (1) issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigating in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.

Gelb v. Royal Globe Ins. Co, 798 F.2d 38, 44 (2d Cir. 1986), cert. denied, 480 U.S. 948 (1987). The issues "are not identical if the legal standards governing their resolution are significantly different . . . . Further, . . . a decision by an administrative agency cannot be the basis for collateral estoppel unless it was an adjudicative decision." Golden Hill v. Rell, 463 F. Supp. 2d at 199

(quoting Metromedia v. Fugazy, 983 F.2d 350, 365 (2d. Cir. 1992), abrogated on other grounds as recognized by Yung v. Lee, 432 F.3d 142, 147-48 (2d Cir. 2005)).

With respect to the first element of collateral estoppel, the STN contends that the issues in the judicial and administrative proceedings are not identical because the common law criteria for establishing tribal existence under Montoya differ significantly from the criteria used to establish tribal existence under the federal acknowledgment regulations, 25 C.F.R. pt. 83. However, the tests to prove tribal status under the Nonintercourse Act and through the BIA are substantially similar. For land claims under the Nonintercourse Act, courts have applied the Montoya test to determine tribal status. This test was developed before the BIA's regulatory process for recognition in order to determine tribal status in the absence of federal acknowledgment. See United States v. Candelaria, 271 U.S. 432, 441-42 (1926). The four-part Montoya test requires that a plaintiff show that it is (a) "a body of Indians of the same or a 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.

The federal acknowledgment regulations are explicitly derived from and are to be interpreted in light of case law concerning tribal status because "the acknowledgment criteria are based on and consistent with the past determinations of tribal existence by

Congress, the courts, and the Executive Branch." 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), cert. denied, 534 U.S. 1129 (2002). The federal acknowledgment regulations require that a petitioning group satisfy seven mandatory criteria:

> (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. . . .
> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. . . .
> (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. . . .
> (d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.
> (e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. . . .
> (f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its

> members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.
>
> (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

25 C.F.R. § 83.7. Of the seven criteria, the three core criteria, which are substantially similar to the Montoya test, are that the petitioning group show that "(a) they have identified since 1900 as 'American Indian' or 'aboriginal' on a substantially continuous basis, (b) a predominant portion of their group comprises a distinct community and has existed as such from historical times to the present, and, (c) they have maintained tribal political influence or authority over its members as an autonomous entity throughout history until the present." Golden Hill v. Weicker, 39 F.3d at 59. In this case, the factual analysis with respect to the questions relating to community and relating to "political influence or authority"/"under one leadership or government" is identical under the federal acknowledgment regulations and the Montoya test.

The BIA found that the STN failed to satisfy the "community" criterion because the STN did not provide sufficient evidence as to being a distinct community for the periods 1920-1967 and post-1996. Reconsidered Final Determination to Decline to Acknowledge the Schaghticoke Tribal Nation, 70 Fed. Reg. at 61,102. For the period since 1996, the BIA found that the STN "did not represent the entire Schaghticoke community from 1997 to the present" because at least 33

of the 42 individuals on the STN's list of unenrolled members "specifically declined to consent to be part of the STN petitioner." Id. For the same reasons, the STN could not establish that it is a group "united in a community" as required by the Montoya test.

The BIA also found that the STN did not satisfy the "political influence or authority" criterion because it failed to provide sufficient evidence for the periods 1801-1875, 1885-1967 and post-1996. Id. at 61,102-03. In particular, the BIA found that the STN did not satisfy the criterion for the period after 1996 due to the continued refusal of "most of the 42 individuals" on the unenrolled members list to be members of the STN, which it found to demonstrate that the "STN's membership list does not reflect a significant portion of the political system." Id. at 61,103. For the same reasons, the STN could not establish that it is a group "under one leadership or government" as required by the Montoya test. Thus, the first element of collateral estoppel is satisfied.

With respect to the second element of collateral estoppel, the STN argues that the BIA's final determination of tribal status is not an adjudicative decision. In determining whether an agency action constitutes an adjudicative decision, the Second Circuit has considered the factors set forth in the Restatement (Second) of Judgments § 83(2). See Delamater v. Schweiker, 721 F.2d 50, 53-54 (2d Cir. 1983); Golden Hill v. Rell, 463 F.Supp.2d at 199. Those factors are:

> (a) Adequate notice to persons who are bound by the adjudication . . . ;
> (b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut the evidence and argument of opposing parties;
> (c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
> (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
> (e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain the evidence and formulate legal contentions.

Restatement (Second) of Judgments § 83(2).

In this case, each of the five Restatement factors is present in the BIA process. First, the STN had adequate notice, having itself initiated the BIA proceedings. Second, the STN had the right, as well as ample opportunity, to present evidence and argument both in support of its petition and to rebut evidence and arguments by the United States and the land claim defendants. The STN had a full and fair opportunity in litigating the matter, as evidenced by the 14 years it had to prepare and submit its petition to the BIA, and by the fact that the STN was afforded several sessions of technical assistance from the Office of Federal Acknowledgment. Third, the issues were formulated in terms of the application of the federal acknowledgment regulations to the STN's evidence. The RFD produced by the BIA concluded that that the 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). "The court specifically reviewed the findings reached in the RFD that the STN had failed to establish 'community' (criterion (b)) and 'political authority' (criterion (c)) from historical times to present, finding the RFD to be thorough, rational, well reasoned, based on the directive of the [Interior Board of Indian Appeals] and based upon a reasonable interpretation of the regulations and agency precedent." Schaghticoke Tribal Nation v. Kempthorne, 587 F.Supp.2d 389, 418 (D. Conn. 2008). Fourth, the BIA issued a final decision concerning STN's tribal status. See Reconsidered Final Determination to Decline to Acknowledge the Schaghticoke Tribal Nation, 70 Fed. Reg. 60,101. Thus, fifth, although the BIA administrative process does not replicate judicial proceedings in all details, it is sufficiently similar to the essential procedures courts employ to make application of the doctrine of collateral estoppel appropriate. Therefore, because the BIA process is an adjudicative one, the second element of collateral estoppel is satisfied.

With respect to the third element of collateral estoppel, the STN had a full and fair opportunity for litigating in the prior proceeding. As noted previously, the STN had 14 years to prepare and submit its petition to the BIA. Following the issuance of the scheduling order, the BIA undertook an extensive evaluation of the

STN's petition in order to determine whether the STN was an Indian tribe. The administrative process included submission of evidence, argument and comment by the STN and other interested parties and the evaluation and sifting of that evidence by the Department of the Interior's professional staff. Of note, the filed administrative record included 6,774 documents, which comprised over 47,000 pages, as well as number of CD-ROM disks and DVDs with additional information. In addition, the STN was afforded several sessions of technical assistance from the Office of Federal Acknowledgment to improve the petition, cure any deficiencies and present supporting evidence. During the BIA process, the STN also had the opportunity to comment on and respond to proposed decisions. See 25 C.F.R. §§ 83.10(h), (i), (j), (k). Thus, the third element of collateral estoppel is satisfied.

With respect to the fourth element of collateral estoppel, the issue previously litigated was necessary to support a valid and final judgment on the merits because the acknowledgement regulations require that a petitioning group satisfy all seven mandatory criteria. Therefore, the fourth element of collateral estoppel is satisfied.

Thus, the STN is collaterally estopped from litigating the issue of its status as an Indian tribe and is bound by the BIA's determination that the STN does not qualify as an acknowledged Indian tribe. The STN, therefore, cannot establish an element of a prima facie violation

of the Nonintercourse Act, i.e. that the STN is an Indian tribe. See Golden Hill v. Weicker, 39 F.3d at 56.

IV. CONCLUSION

For the reasons set forth above, the motions for judgment on the pleadings (Doc. No. 306 and Doc. No. 316) are hereby GRANTED. In United States v. 43.47 Acres of Land, et al., Docket 2:85-cv-01078(AWT), partial judgment shall be entered dismissing the interests of the Schaghticoke Tribal Nation. In Schaghticoke Tribal Nation v. Kent School Corporation Inc., et al., Docket 3:98-cv-1113(AWT), and Schaghticoke Tribal Nation v. United States, et al., Docket 3:00-cv-00820(AWT), final judgment shall be entered for the defendants.

It is so ordered.

Dated this 30th day of September 2012 at Hartford, Connecticut.

/s/AWT
Alvin W. Thompson
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SCHAGHTICOKE TRIBAL NATION, and SCHAGTICOKE INDIAN TRIBE	:	
v.	:	CASE NO. 3:98CV1113 (AWT)
KENT SCHOOL CORPORATION, INC., PRESTON MOUNTAIN CLUB, CONNECTICUT LIGHT & POWER COMPANY, TOWN OF KENT, LORETTA E. BONOS, APPALACHIAN TRAIL CONFERENCE, INC., BARBARA G. BUSH, EUGENE L. PHELPS, NEW MILFORD SAVINGS BANK, SAM KWAK, STATE OF CONNECTICUT, and UNITED STATES OF AMERICA.	:	

JUDGMENT

This action came on for consideration of the motion for judgment on the pleadings, filed by the United States and the land claim defendants, before the Honorable Alvin W. Thompson, United States District Judge.

The court considered the motion and the full record of the case including applicable principles of law. On July 13, 1998, the case was withdrawn as to New Milford Savings Bank. On February 5, 2001, the United States of America was substituted for Applachian Trial Conferrence, Inc. On March 24, 2004, Sam Kwak was substituted for Barbara G. Bush. On December 27, 2011, motions to dismiss the Schagticoke Indian Tribe were granted. On September 30, 2012, the court filed a ruling granting the motion for judgment on the pleadings in case number 2:85CV1078 as to the remaining defendants.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants Kent School Corporation, Inc., Preston Mountain Club, Connecticut Light & Power Company, Town of Kent, Loretta E. Bonos, Eugene L. Phelps, Sam Kwak, State of Connecticut, and the United States of America.

Dated at Hartford, Connecticut, this 15th day of October, 2012.

ROBERTA D. TABORA, Clerk
United States District Court

By /s/ SLS
Sandra Smith
Deputy Clerk

EOD 10/15/12

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SCHAGTICOKE TRIAL NATION, and SCHATICOKE INDIAN TRIBE :

v. : CASE NO. 3:00CV820 (AWT)

UNITED STATES OF AMERICA, CONNECTICUT LIGHT & POWER COMPANY, and SAM KWAK, :

AMENDED JUDGMENT

This action came on for consideration of the defendants' motion for judgment on the pleadings, before the Honorable Alvin W. Thompson, United States District Judge.

The court considered the motion and the full record of the case including applicable principles of law. On February 24, 2012, the court granted the motion to dismiss filed by Connecticut Light & Power Company. On September 30, 2012, the court filed a ruling in case number 2:85CV1078, granting the motion for judgment on the pleadings.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants United States of America, Connecticut Light & Power, and Sam Kwak, LLC.

Dated at Hartford, Connecticut, this 18th day of October, 2012.

ROBERTA D. TABORA, Clerk
United States District Court

By /s/ SLS
Sandra Smith, Deputy Clerk

EOD 10/18/12

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL NO. 2:85-CV-1078 (AWT)
43.47 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LITCHFIELD, TOWN OF KENT [TRACT 265-23]; 83.52 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LITCHFIELD, TOWN OF KENT [TRACT 265-33]; PRESTON MOUNTAIN CLUB, INC., ET AL.,	:	
	:	
Defendants.	:	

FINAL JUDGMENT APPROVING STIPULATION OF JUST COMPENSATION

Upon consideration of the Stipulation of Just Compensation executed by the United States of America and the defendant Preston Mountain Club, Inc., it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Pursuant to the record in this case, it appears that on December 16, 1985, the United States filed a Complaint in Condemnation against 43.47 acres of land [Tract 265-23]. A Judgment and Order of Distribution was entered on July 5, 1994 and compensation in the amount of $76,072.50 was awarded to Preston Mountain Club, Inc. The United States deposited the amount of $76,072.50 into the Registry of the Court but prior to disbursement of said amount the Judgment was vacated on March 10, 1995. The sum of $76,072.50 remained on deposit with the Registry of the Court with interest having accrued since the date of deposit. The United States of America has the right to condemn for public use the property described in the Amended

Complaint filed herein. (ECF No. 224) See Schedule "A" attached to the Amended Complaint and reattached hereto. The property to be taken consists of two parcels of approximately 127 acres in total situated in the Town of Kent, County of Litchfield, State of Connecticut and described as Tract Nos. 265-23 and 265-33, in Schedule B attached to the Amended Complaint and reattached hereto (the "Property"). The United States provided notice of condemnation to the defendants (including "unknown others") by mail or personal service, and/or by publishing notice of condemnation in the Litchfield County Times. The owner of the Property, the Preston Mountain Club, Inc., filed an appearance and answer. The Schaghticoke Tribe of Indians which claimed an interest in the Property filed an appearance and answer. On or about July 13, 1998 the Schaghticoke Tribe of Indians provided notice that its interests were now in the name of the Schaghticoke Tribal Nation. The interest of Frank H. Turkington and Heirs in the Property and described in paragraph six of the Amended Complaint as a "possible mineral interest" and the interest of others who may have had a claim in the Property whose names were unknown and who were made parties under the designation "Unknown Others," as described in paragraph eight of the Amended Complaint, were the subject of an Order of Service by Publication Under Rule 71A(d)(3) F.R.C.P. (ECF No. 237). The publication occurred but no appearances on behalf of those interests have been filed.

2. This action came on for consideration of the motion for judgment on the pleadings, filed by the United States, before the Honorable Alvin W. Thompson, United States District Judge, on March 9, 2012. (ECF No. 316)

3. The Court considered the motion and the full record of the case including applicable principles of law.

4. On September 30, 2012 the Court filed a ruling granting the motion for judgment on the pleadings by the United States and directed that partial judgment be entered dismissing the interests of the Schaghticoke Tribal Nation.

5. In order to settle this condemnation action, the United States and the Preston Mountain Club, Inc. have agreed that the just compensation payable by the United States for the taking of the property and the estates described in the Amended Complaint, together with all improvements thereon and appurtenances thereunto belonging, shall be the sum of $507,960.00 inclusive of interest, attorney's fees and costs. See Schedule C, Stipulation of Just Compensation.

6. The said sum of $507,960.00 shall be full and just compensation for the taking of a fee simple absolute title and in full satisfaction of any and all claims of whatsoever nature against the United States by reason of the institution and prosecution of this action and taking of the said lands and all appurtenances thereunto belonging. It is clear to the Court, by way of the Stipulation filed herein, that the amount of just compensation has been agreed to.

7. The said sum of $507,960.00 shall be subject to all liens, encumbrances and charges of whatsoever nature existing against the said property at the time of vesting of title thereto in the United States and all such taxes, assessments, liens and encumbrances shall be payable and deductible from the said sum.

8. Defendant Preston Mountain Club hereby represents to the best of its knowledge and belief that at the date of taking they had exclusive right to the compensation herein, excepting the interest of parties having liens or encumbrances of record and unpaid taxes and assessments, if any, and that no other person or entity is entitled to the same or any part thereof. In the event that any other party is ultimately determined by a court of competent jurisdiction to have any right to receive compensation for the property taken in this case, Defendant Preston

Mountain Club, Inc. shall refund into the Registry of the Court the compensation distributed herein, or such part thereof as the Court may direct, with interest thereon calculated in accordance with the provision of 40 U.S.C. § 3116, from the date of the receipt of the deposit by Defendant Preston Mountain Club, Inc. to the date of repayment into the Registry of the Court.

9. The parties shall be responsible for their own legal fees, costs, and expenses (including attorney fees, consultants' fees, and any other expenses).

10. The United States of America previously deposited into the Registry of the Court the amount of $76,072.50 in 1994. With interest, the current balance of that account is now at least $88,480.19 as of September 5, 2013. The United States shall deposit the additional sum of $419,479.81 into the Registry of the Court to be consolidated with the amount already on deposit.

11. The fee simple absolute title to the above described tracts of land shall vest in the United States free and discharged of all claims and liens of every kind whatsoever upon payment of the additional deposit of $419,479.81 into the Registry of the Court and the total amount of deposit then equals $507,960.00. The said estates and interests are hereby condemned and taken for the use of the United States of America as authorized by law.

12. Upon presentation of written certification by Defendant Preston Mountain Club, Inc. to the Clerk of Court and to the United States Attorney's Office that all taxes, liens, encumbrances and assessments of whatsoever nature against Tract Nos. 265-23 and 265-33 have been satisfied or removed, and when the United States concurs in the certification of such payment, the Clerk of Court shall disburse to the Preston Mountain Club, Inc. the amount of $507,960.00 by electronic funds transfer or by check. If there is an appeal from this Final Judgment and a reversal of the judgment in this case, Preston Mountain Club, Inc. will return the

total amount of the compensation paid pursuant to this Judgment to the Registry of the Court, within fifteen days from the issuance of the mandate, to await further proceedings.

13. The Clerk of Court shall provide five (5) certified copies of this Judgment and Order of Distribution to the United States Attorney's Office.

14. The Clerk of Court shall close the file in this case upon issuance of the above check.

15. The Court retains jurisdiction to make and enter such further orders and judgments as may be necessary and proper in this premises.

This 18th day of November, 2013.

/s/ Judge Alvin W. Thompson
HONORABLE ALVIN W. THOMPSON
UNITED STATES DISTRICT JUDGE
DISTRICT OF CONNECTICUT

The entry of the above order is consented to by the undersigned.

COUNSEL FOR PRESTON MOUNTAIN CLUB, INC.

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ACTING UNITED STATES ATTORNEY

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Schedule A

APPALACHIAN NATIONAL SCENIC TRAIL

AUTHORITY FOR THE TAKING

The authority for the taking of the land is under and in accordance with the Act of Congress approved August 1, 1888, 25 Stat. 357, as amended, 40 U.S.C. § 3113; the Land and Water Conservation Fund Act of 1965, 78 Stat, 897, as amended, 16 U.S.C. § 4601-4 et. seq.; the Act of October 2, 1968, 82 Stat. 919, as amended, 16 U.S.C. § 1241, et. seq., which Act authorized the Appalachian National Scenic Trail, and under the authority of the Department of the Interior and Related Agencies Appropriation Act of 1984, 97 Stat. 919 and the Department of the interior and Related Agencies Appropriation Act for Fiscal Year 1999, October 21, 1998, 112 Stat. 2681-232, Public Law 105-277; and the Consolidated and Emergency Appropriations Act, 1999, October 21, 1998, 112 Stat. 2681-241, which Act appropriated funds for such purposes.

PUBLIC USES

The public uses for which said land is to be taken are as follows: The land is required for the proper administration, preservation, and development of the Appalachian National Scenic Trail for the benefit and enjoyment of the public. The said land has been selected for acquisition by the United States of America for said purposes, and for such other uses as may be authorized by Congress or by Executive Order.

DESCRIPTION:

Schedule B

TRACT 265-23

All that certain tract or parcel of land lying and being situated in the Town of Kent, Litchfield County, State of Connecticut, and being more particularly described as follows:

BEGINNING at a point in the New York/Connecticut State Line, said point being a corner common to lands formerly of Nicholas Frankie, et. al., now lands of the United States of America (Appalachian National Scenic Trail, Tract 265-10) and subject owner, said point having coordinate values of North 315,503.19 and East 390,657.01; thence, severing the lands of subject owner, the following two bearings and distances: North 86° 04' 01" East, 1,350.00 feet; and

North 49° 17' 32" East, 2,378.25 feet to a point in the property line of lands, now or formerly, of The Kent School, South 04° 41' 15" West, 1,700.00 feet to a point in the boundary line of lands now or formerly, of the Schaghticoke Indian Reser said point also being a corner common to lands of Kent School and subject owner; thence, with the boundary line of said Indian Reservation, South 87° 11' 15" West, 3,029.95 feet to another point in said State Line, also being a point in the eastern boundary line of said Government Lands Tract (265-10) and a corner common to lands of said Indian Reservation and subject owner; thence with the boundary line of said Government Lands (Tract 265-10) and said State Line, North 04° 28' 20" East, 199.90 feet to the point of beginning.

Containing 43.47 acres, more or less.

The above-described parcel, designated as Tract 265-23, Appalachian National Scenic Trail, is a portion of the same land acquired by The Preston Mountain Club, Incorporated, from the Chase Companies, Incorporated, by deed dated January 26, 1925 and recorded June 2, 1925 in Warrantee Volume 30, Page 512, in the Land Records of the Kent Town Clerk's Office, Litchfield County, State of Connecticut.

AND

TRACT 265-33

All that certain tract or parcel of land lying and being situated in the Town of Kent, Litchfield County, State of Connecticut, and being more particularly described as follows:

BEGINNING at Appalachian Trail Monument 264-CT-97 on the property line of lands formerly of Kent School Corporation, now of the United States of America (Appalachian National Scenic Trail, Tract 264-07) and marking a corner common to other lands of The Preston Mountain Club (Appalachian National Scenic Trail, Tract 265-23) and subject owner; thence, with the property line of said Preston Mountain Club, the following two bearings and distances:

South 49° 17' 32" West, 2,378.25 feet; and,

South 86° 04' 01" West, 1,350.00 feet to Appalachian Trail Monument 265-CT-28 on the New York/Connecticut State Line, marking a corner common to lands formerly of Nicholas Frankie, et al., now of the United States of America (Appalachian National Scenic Trail, Tract 265-10), lands formerly of David C. Lillis, et al., now of the United States of America (Tract 265-32), lands of said Tract 265-23 and subject owner, thence, with the State Line, North, 1,700.00 feet to a corner common to lands of said Tract 265-32 and subject owner; thence severing the lands of said Preston Mountain Club, South 88° 58' 33" East, 3,150.15 feet to the pont of beginning.

Containing 83.52 acres, more or less.

The above-described parcel, designated as Tract 265-33, Appalachian National Scenic Trail, is a portion of the same land acquired by The Preston Mountain Club, Incorporated, from The Chase Companies, Incorporated, by deed dated January 26, 1925 and recorded June 2, 1925 in Warrantee Volume 30, Page 512, in the Land Records of the Kent Town Clerk's Office, Litchfield County, State of Connecticut.

BEARINGS AND COORDINATES REFER TO CONNECTICUT STATE PLANE COORDINATE SYSTEM.

ESTATE TO BE ACQUIRED:
The fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

Schedule C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Plaintiff, v. 43.47 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LITCHFIELD, TOWN OF KENT [TRACT 265-23]; 83.52 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LITCHFIELD, TOWN OF KENT [TRACT 265-33]; PRESTON MOUNTAIN CLUB, INC., ET AL., Defendants.	:	CIVIL NO. 2:85-CV-1078 (AWT)

STIPULATION OF JUST COMPENSATION

Plaintiff United States of America ("United States") and Defendant Preston Mountain Club, Inc., by and through their counsel of record, respectfully submit this Stipulation reflecting a settlement agreement as to the just compensation to be paid for the subject property in this condemnation action. This Stipulation fully resolves the above-titled action. The parties stipulate as follows and request an order of final judgment in accord with the following stipulations:

1. This stipulation concerns the just compensation for approximately 127 acres of real property located in the Town of Kent, Litchfield County, Connecticut as more particularly described in Schedule B of the Amended Complaint and reattached hereto (the "Property"). The Property is currently owned by Defendant Preston Mountain Club, Inc.

2. In order to settle this condemnation action, the parties agree that the just compensation payable by the United States for the taking of the property and estates described in the Amended Complaint filed herein (ECF No. 224), together with all the improvements thereon and appurtenances thereunto belonging, shall be the sum of $507,960.00, inclusive of interest, attorneys' fees and costs.

3. On December 16, 1985, the United States filed a Complaint in Condemnation against 43.47 acres of land [Tract 265-23]. A Judgment and Order of Distribution was entered on July 5, 1994 and compensation in the amount of $76,072.50 was awarded to Preston Mountain Club, Inc. The United States deposited the amount of $76,072.50 into the Registry of the Court but prior to disbursement of said amount the Judgment was vacated on March 10, 1995 (ECF No. 83). The sum of $76,072.50 remained on deposit with the Registry of the Court and with interest the amount on deposit is now $88,480.19 as of September 5, 2013.

4. On March 3, 2004, the United States filed an Amended Complaint in Condemnation adding an additional parcel to the proposed condemnation comprised of 83.52 Acres [Tract 265-33].

5. As the amount currently on deposit with the Registry of the Court is at least $88,480.19, the deficiency amount between this amount and the agreed settlement of $507,960.00 is $419,479.81. Upon entry of a judgment on this stipulation, the United States shall pay into the Registry of the Court the deficiency amount of $419,479.81, so that the total amount on deposit will be the agreed upon amount of compensation of $507,960.00.

6. The said sum of $507,960.00, plus any additional interest in the Registry of the Court existing at the time of disbursement, shall be full and just compensation and in full satisfaction of any and all claims of whatsoever nature against the United States by reason of the

institution and prosecution of this action and taking of the said lands and all appurtenances thereunto belonging.

7. The said sum of $507,960.00 shall be subject to all liens, encumbrances and charges of whatsoever nature existing against the said property at the time of vesting of title thereto in the United States and all such taxes, assessments, liens and encumbrances shall be payable and deductible from the said sum.

8. Defendant Preston Mountain Club, Inc. represents to the best of its knowledge and belief that as of the date of this Stipulation they had exclusive right to the compensation herein, excepting the interest of parties having liens or encumbrances of record and unpaid taxes and assessments, if any, and that no other person or entity is entitled to the same or any part thereof. In the event that any other party is ultimately determined by a court of competent jurisdiction to have any right to receive compensation for the property taken in this case, Defendant Preston Mountain Club, Inc. shall refund into the Registry of the Court the compensation distributed herein, or such part thereof as the Court may direct, with interest thereon calculated in accordance with the provision of 40 U.S.C. § 3116, from the date of the receipt of the deposit by Preston Mountain Club, Inc. to the date of repayment into the Registry of the Court.

9. The parties shall be responsible for their own legal fees, costs and expenses (including attorneys' fees, consultants' fees, and any other expenses).

10. The parties hereto consent to the entry of all orders and judgment necessary to effectuate this stipulation and agreement.

11. The signatory parties hereto will take no appeal from the entry of judgment in accord with this stipulation and agreement.

12. Upon the Court's Order entering judgment and the United States depositing the deficiency amount into the Registry of the Court, in accord with this Stipulation of Just Compensation, the Defendant Present Mountain Club, Inc. may seek and shall be entitled to immediate distribution of all sums on deposit in the Registry of the Court, together with any interest earned thereon while on deposit.

Wherefore, the parties request that the Court enter a Final Judgment Approving Stipulation of Settlement.

DATED: September 27, 2013

UNITED STATES OF AMERICA

DEIRDRE M. DALY
ACTING UNITED STATES ATTORNEY

/s/ John B. Hughes
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PRESTON MOUNTAIN CLUB, INC.

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CERTIFICATION

I hereby certify that on September 27, 2013, a copy of the foregoing Stipulation 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/ John B. Hughes
JOHN B. HUGHES
CHIEF, CIVIL DIVISION