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)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

Benjamin Heyward Green
ZEICHNER ELLMAN & KRAUSE LLP
35 Mason Street
Greenwich, Connecticut 06830
203-622-0900

Attorneys for Plaintiff-Appellant Schaghticoke Tribal Nation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

REGULATIONS

OTHER AUTHORITIES

PLAINTIFF-APPELLANT'S REPLY BRIEF

Plaintiff-Appellant, the Schaghticoke Tribal Nation ("STN" or "Appellant"), hereby submits this reply brief in response to the briefs submitted by Defendants-Appellees the Kent School Corporation, Inc., the Town of Kent, the Preston Mountain Club, the Connecticut Light & Power Company, Sam Kwak and the United States of America (collectively, "Defendants" or "Appellees")[1] and in further support of its appeal.

ARGUMENT

POINT I

APPELLEES PRESENT NO JUDICIAL AUTHORITY SUPPORTING THEIR ASSERTION THAT THE BIA ACKNOWLEDGMENT CRITERA OF A "DISTINCT COMMUNITY" AND "POLITICAL INFLUENCE OR AUTHORITY" ARE THE SAME AS "UNITED IN A COMMUNITY UNDER ONE LEADERSHIP OR GOVERNMENT" UNDER MONTOYA

In its Opening Brief, STN argued that the District Court's application of the doctrine of collateral estoppel and judicial deference to the BIA's determination that STN did not qualify as a federally recognized tribe was erroneous because the

[1] Defendants-Appellees the Kent School Corporation, Inc., the Town of Kent, the Preston Mountain Club, and the Connecticut Light & Power Company submitted a Joint Brief which will be referred to herein as the "Kent Brief". Defendant-Appellee Sam Kwak joined in the Kent Brief. The Brief of Defendant-Appellee the United States of America will be referred to herein as the "USA Brief".

standards for determining tribal status under the BIA's Regulations[2] and under the common law Montoya criteria are different. (See, e.g., Opening Brief at pp. 25-36; 47).

Appellees argue that the District Court properly deferred to the factual determinations made by the BIA that STN failed to satisfy the "community" and "political authority" criteria under the Regulations because that inquiry is the same or substantially the same as the District Court's determination under Montoya whether STN is a group "united in a community under one leadership or government". (USA Brief at pp. 39-43) (Kent Brief at pp. 30-39). As detailed below, Appellees provide no legal basis to establish that these elements of the two standards are the same.[3]

Appellees have been unable to identify a single judicial decision standing for the proposition that the Regulations and the Montoya criteria are coterminous or that

[2] Unless otherwise indicated, capitalized terms used herein shall have the meaning ascribed to them in Appellant's Opening Brief.

[3] The United States also argues, incorrectly, that the deference it urges is not the overall standard but to the factual inquiry by the BIA with respect to the Regulation criterion of "community" and "political authority". (USA Brief at pp. 39-43). The differing standards, however, include all sub-standards, criteria, elements and all other aspects of the two tests. In any event, it is a distinction without a difference as Appellees have failed to show that the factual issues related to "distinct community" and "political influence and authority" criteria before the BIA were the same as those before the District Court when determining whether STN was "united in a community under one leadership or government" under Montoya.

the factual determinations of tribal status under both standards are the same. In fact, as Appellees even acknowledge, as has this Court, although the two tests may overlap they may not always yield the same results. (Kent Brief at pp. 36-37).

In support of their argument that the District Court properly applied the BIA's factual findings in this case because the relevant elements of Montoya are the same as the Regulations, Appellees cite to eight cases purportedly representing judicial applications of the Montoya criteria (USA Brief at pp. 41-43) (Kent Brief at pp. 31-33). However, these cases do not support their argument. In fact, only one analyzes the Montoya criteria at all.[4]

The only case cited by Appellees as expounding on the Montoya criteria that actually addresses the elements of Montoya is Mashpee Tribe v. Seabury Corp., 592 F.2d 575 (1st Cir. 1979). As cited by STN in its Opening Brief, the First Circuit in

[4] United States v. Washington, 641 F.2d 1368 (9th Cir. 1981) (analyzing whether the tribe descended from a treaty signatory); United States v. Antelope, 430 U.S. 641 (1977) (addressing constitutional claims of unlawful discrimination under the Major Crimes Act to Indians); Rice v. Cayetano, 528 U.S. 495 (2000) (addressing constitutional claims regarding statutory voting preference for native Hawaiians); Morton v. Mancari, 417 U.S. 535 (1974) (addressing constitutional challenge to statute giving preference to hiring of native Americans in the BIA); United States v. Mazurie, 419 U.S. 544 (1975) (addressing constitutional claims regarding the statute providing for Indian regulation of alcohol in Indian country); Tribe of Shawnee Indians v. United States, 253 F.3d 543 (10th Cir. 2001) (analyzing whether the tribe descended from a treaty signatory); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) (addressing claims challenging taxation of the tribe's oil and gas royalties).

Mashpee recognized that the common law Montoya criteria is a flexible standard that must take into account changes in tribal characteristics over time. (Opening Brief at p. 33). Appellees cite to the recitation of the lower court's jury instructions in Mashpee as further explaining the community and leadership required by Montoya. (USA Brief at p. 42) (Kent Brief at p. 32). The lower court's jury instructions (which the Circuit Court held may have been unclear and overstated in parts), however, do not evince or even imply that the BIA criteria are the same as the Montoya criteria.[5] Mashpee, 592 F.2d at 582-587.

Appellees also argue that STN has "not articulated the existence of a single substantive difference between the criteria of "community" and "political authority" used in the Regulations and the Montoya criteria.[6] (Kent Brief at p. 36). It is Appellees' burden, however, as the proponent to establish that the application of collateral estoppel is appropriate. Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc., 409 F.3d 87, 92 (2d Cir. 2005). Appellees failed to establish the identity of

[5] In addition to not even analyzing the Montoya criteria, the other cases cited by Appellees do not stand for the propositions they purportedly support and/or do not include many of the terms used in Appellees' Briefs such as "political" and "authority or influence". See, e.g., United States v. Washington, 641 F.2d 1368 (9th Cir. 1981); Rice v. Cayetano, 528 U.S. 495 (2000); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Mazurie, 419 U.S. 544 (1975).

[6] Notably, neither the term "political" nor "authority" appear anywhere in the Montoya criteria as Appellees suggest and are in fact terminology used only in the Regulations. Appellees improperly conflate the terms used in the Regulations and Montoya. (See also, e.g., USA Brief at pp. 35; 47).

the two sets of standards in the District Court and their failure continues on this appeal. In any event, STN did identify substantive differences between "community" and "political influence or authority" under the Regulations and "united in a community under one government or leadership" under Montoya.

For example, the Regulations contain seven mandatory criteria together with forty plus subsections identifying how each mandatory criterion can be demonstrated. (Opening Brief at p. 28). The Regulations also require submission of a documented petition and set forth the specific burden of "a reasonable likelihood of the validity of the facts relating to each criterion". (Id.). In addition to numerous other highly specific requirements, the Regulations also contain a consent requirement with respect to tribal membership. (Id. at 29). It is beyond dispute that the Montoya criteria do not contain any of the foregoing requirements and Appellees can point to no case holding that the Regulations are interchangeable with the Montoya criteria.

STN also argued in its Opening Brief that a substantive difference between the Regulations and the Montoya criteria is the treatment of evidence of state recognition and establishment of a state reservation. (Opening Brief at pp. 28-29). In the Reconsidered Final Determination, the BIA reversed its earlier determination finding that Connecticut's recognition of STN as an indigenous self-governing tribe and the establishment a state reservation for STN was of little weight in establishing

"community" or "political influence or authority" under the Regulations. (Opening Brief at pp. 28-29).[7]

Appellees can point to no case holding what weight or probative value a district court could afford evidence of long standing state recognition of a tribe or the establishment and maintenance of a state reservation in analyzing the Montoya criteria. Indeed, in light of the fact that the OFA and the IBIA held diametrically opposing views as to the relevance and weight to be accorded state recognition it cannot seriously be argued that it would not be fully within the fact finder's discretion to find that such evidence is probative of a group's status as an Indian tribe under Montoya.

It is worth noting that despite the fact that Appellees fail to prove that the relevant elements of the Regulations and the Montoya criteria are the same, they nevertheless argue that the BIA's findings with respect to Regulation criteria (b) and (c) are directly relevant to the District Court's inquiry under the Montoya criteria of "united in a community under one leadership or government". (USA Brief at p. 49). In this regard, the United States argues that in concluding that STN could not establish it was a group "united in a community under one leadership or government"

[7] As discussed in more detail below in Point III, the BIA is now proposing that the establishment of a state reservation since 1934 actually ***satisfies*** the mandatory Regulation criteria of "community" and "political influence and authority". (See infra at pp. 15-21).

under Montoya, the District Court properly relied upon the BIA's finding that the refusal to be part of the STN petitioner of at least 33 of the 42 individuals on STN's list of un-enrolled members demonstrated that STN did not meet the "community" or "political influence or authority" criteria under the Regulations. (USA Brief at pp. 49-50).

Not only does STN claim that the District Court clearly erred in adopting wholesale this determination by the BIA (Opening Brief at pp. 30-31), but STN is perplexed that the United States would highlight the existence of these 33 individuals as a key factual finding demonstrating the absence of "one leadership" without so much as a footnoted reference to STN's certified membership role of 271 people (Reconsidered Final Determination, JA375). The existence of a disaffected minority cannot act to veto the aspirations and desires of the vast majority. It is beyond reason to argue that a tribe cannot be a federal or common law tribe for that matter unless 100% of its people are in complete agreement about tribal leadership. As is true with the United States of America, political disagreement and competition can be the hallmarks of a community or government structure.

Accordingly, while perhaps instructive to the District Court, the BIA's factual findings under a highly specific and more burdensome standard are not dispositive of

the District Court's evaluation of the facts under a lower, less specific and less burdensome common law standard.

POINT II

THAT STN'S LAND CLAIMS ARE BARRED BY VIRTUE OF THE EQUITABLE DOCTRINES OF LACHES, ACQUIESCENCE AND IMPOSSIBILITY WAS NOT RAISED IN THE DISTRICT COURT AND THE RECORD BEFORE THIS COURT IS INSUFFICIENT TO ADDRESS THE MERITS OF THIS FACTUAL ARGUMENT ON THIS APPEAL

In apparent recognition that collateral estoppel is not an appropriate basis to dismiss STN's claims, Appellees the Kent School Corporation, Inc., the Town of Kent, the Preston Mountain Club, the Connecticut Light & Power Company, and Sam Kwak now introduce an entirely new basis in an attempt to justify the District Court's dismissal of STN's claims. Relying upon this Court's recent decision in Stockbridge-Munsee Community v. State of New York, __ F.3d __, 2014 U.S. App. LEXIS 11691 (2d Cir. June 20, 2014) and three cases cited in that opinion, Appellees argue that STN's claims are barred by equitable doctrines of laches, acquiescence and impossibility. (Kent Brief at pp. 39-43). This argument was not raised below and Appellees should not be permitted to assert it now. In any event, application of these equitable doctrines requires a factual analysis which is beyond the scope of the record in this case.

"[A]n appellate court will not consider an issue raised for the first time on appeal." Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994). As this rule is not jurisdictional, this Court has recognized it has discretion to consider an argument "not asserted below where necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding." Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir. 2004). In this regard, this Court's decision in Allianz Ins. Co. v. Lerner, 416 F.3d 109, 114 (2d Cir. 2005) is instructive. In Allianz, the trial court granted summary judgment against the appellant. In the lower court proceedings, the appellant had opposed summary judgment asserting a particular lease provision was ambiguous. Id. On appeal, the appellant sought to assert that two other provisions in that document were ambiguous and therefore summary judgment was inappropriate. Id. The Court declined to address this and affirmed the decision below:

> The circumstances here do not militate in favor of an exercise of discretion to address the new arguments on appeal. Because both arguments are based on the terms of the Lease, they were both available to the defendants below. See id. (availability of argument below weighs against exercising discretion to hear the belated argument on appeal). Defendants proffer no reason for their failure to raise the arguments below, nor do they suggest that there will be any great injustice if we refuse to address them. In these circumstances, we decline the invitation to address the untimely arguments.

Id.

Although STN disputes that this defense has any merit, Appellees argument was available below. Moreover, Appellees have not even bothered to articulate any basis that would justify this Court's exercise of discretion to consider this argument now on appeal. Further, STN had no opportunity to respond to the argument before the District Court and there is no reason to believe, or evidence in the record, that Judge Thompson even considered it. Moreover, should this Court reverse the decision below and reinstate STN's claims, such defenses could still be asserted. Thus, declining to address Appellees' untimely arguments now would not result in manifest injustice.

In any event, the determination of a defense based upon the equitable doctrines which Appellees seek to invoke is fact based and the record is wholly insufficient to determine its application in this case.

The nature of the defense to an Indian land claim based upon equitable doctrines of laches, acquiescence and impossibility was articulated by the Supreme Court in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005). This decision was preceded by 20 years of litigation regarding the rights of the Oneida nation, a federally recognized tribe, to assert sovereignty over ancestral land long after the tribe had relocated to another state and conveyed its land to the

state of New York.[8] In City of Sherrill, the Oneida nation purchased on the open market parcels of land in the city of Sherrill which were at one time ancestral tribal lands but had been sold by the tribe approximately 200 years earlier. Having reacquired this land, the Oneida nation sought to reassert its sovereignty arguing that this land was no longer subject to taxation or regulation by the City of Sherrill or New York State.

The Court ruled that equitable considerations barred the Oneida nation from asserting its claim to sovereignty over the land:

> Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneida's long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue.

City of Sherrill, 544 U.S. at 202.

[8] Although in this case the actions have been pending for a number of years, all of the litigation in these consolidated actions has focused exclusively on STN's attempt to gain federal acknowledgment and not the substance of its land claims. See, e.g., Schaghticoke Tribal Nation v. Kempthorne, 587 F.3d 132, 133-1345 (2d Cir. 2009).

The Court's decision was not based solely on the passage of time. Instead, the Court entered into an evaluation of facts, apparently developed over the years of litigation, regarding the character of the land to determine that whatever historical rights the tribe might have were outweighed by the great disruption which might be occasioned by giving effect to these rights. Id. at 215-221. These facts included a detailed history of the Oneida, how the land came to be conveyed, the heavy development of the land subject to the regulation of New York State and the City of Sherrill, the present non-Indian character of the land and its inhabitants, and the appreciation in value of land "converted from wilderness to become part of cities like Sherrill". Id. at 215.

In applying City of Sherrill, this Court noted in Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005) that the defense articulated by the Supreme Court "can in appropriate circumstances, be applied to Indian land Claim cases". Further, as the issue had been raised in the district court, the Court was able to identify the factors which supported the application of the defense in that case:

> These considerations include the following: [g]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation; at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere; the long-standing, distinctly non-Indian character of the area and its inhabitants; the distance from 1805 to the present day; the [Tribe's] long delay in seeking equitable

> relief against New York or its local units; and developments [in the area] spanning several generations.

Cayuga Indian Nation, 413 F.3d at 277.

Equally, in Stockbridge-Munsee Community, this Court was able to rely upon the factual record developed in the district court for its determination of the applicability of the defense. Just as in City of Sherrill, the application of the defense was litigated in the district court and the appeal was preceded by three decisions and decade's long litigation conducted by other Iroquois tribes. Stockbridge-Munsee Community, 2014 U.S. App. LEXIS 11691 at *2-7. Thus, the Court was able to articulate the facts which supported the application of the defense:

> …the Stockbridge have not resided on the lands at issue since the nineteenth century and its primary reservation lands are located elsewhere (in Wisconsin); the Stockbridge assert a continuing right to possession based on an alleged flaw in the original termination of Indian title; and the allegedly void transfers occurred long ago, during which time the land has been owned and developed by other parties subject to State and local regulation.

Id. at *7.

In contrast, while Appellees observe that this Court may affirm the District Court's dismissal on a different basis so long as that basis is supported by the

record (Kent Brief at p. 42) no where do they bother to specify a factual basis in the record for their argument.[9] That is because the record does not provide a factual basis.

Unlike the claims in City of Sherrill, Cayuga Indian Nation, or Stockbridge-Munsee Community, STN's claims include land abutting STN's state recognized reservation. Amended Complaint, JA249. On the other hand, the record is bereft of any information regarding the land's character. Indeed there is nothing in the record to suggest that the land has experienced any development much less developed subject to regulation by state or local government. Similarly, there is nothing suggesting what, if any, people inhabit the disputed land let alone the character of such inhabitants. Indeed at best the record shows that the Preston Mountain Club agreed that $507,960.00 represented fair compensation for nearly 127 acres of land in Litchfield County Connecticut, taken by the Government. Final Judgment in Lead Case, SPA26-27; JA759-760. This represents a price of approximately $4,000.00 per acre. Such a low price suggests that, at the very least,

[9] Appellees state "in the centuries since STN's dispossession, the lands at issue have been owned and developed by parties subject to state and local regulation, including a private school, a utility company, and the Town of Kent", citing to the Decision. (Kent Brief at p. 41). But Judge Thompson makes no reference anywhere in the Decision to any development of the land much less development subject to any state or local government regulation. Decision, SPA1-21; JA694-714.

the parcels sought by the United States in the Lead Case to which STN asserted a claim had little, if any, development or inhabitants.

In sum, Appellees' motions for judgment on the pleadings went to the legal sufficiency of STN's claims and sought dismissal exclusively upon the basis that the BIA acknowledgment determination collaterally estopped STN from asserting it was a tribe and therefore it could not seek the protection of the Nonintercourse Act. Appellees have offered no reason why its equitable defense argument was not raised below nor have they identified anything in the record to support adjudication of its belated argument now on appeal. Indeed the record does not present a sufficient factual basis upon which to support their argument. This Court should therefore decline to consider it on this appeal.

POINT III

DEFERENCE TO THE BIA DETERMINATION AND THE APPLICATION OF COLLATERAL ESTOPPEL BASED UPON THAT DETERMINATION WOULD BE UNFAIR AND INAPPROPRIATE AS THE BIA'S PROPOSED RULE REPRESENTS A COMPLETE REFORM OF THE FEDERAL ACKNOWLEDGMENT STANDARDS AND PROCESS PURSUANT TO WHICH STN WOULD MEET THE SUBSTANTIVE DEFINITIONS OF A TRIBE

The acknowledgment process under which the STN was denied recognition has been the subject of much criticism:

> The OFA criteria, the agency's application of those criteria, and the process itself have all drawn considerable criticism primarily focused on the fact that the process takes too much time, is costly, and produces inconsistent results. Concerns have been raised that unwritten, improper policy considerations, such as the size and potential drain of a tribe on federal resources or the relative wealth of a tribe or its investment partners, have influenced outcomes; that the criteria are biased against amalgamated tribes and tribes that have difficulty proving continuous political or geographic existence because of actions taken by the federal government itself; that some criteria, such as treatment of the group by other tribes or surrounding non-Indian communities, invite submission of negative evidence by groups self-interested in nonrecognition; and that the standard of proof has been applied unevenly

Cohen's Handbook of Federal Indian Law § 3.02(7)(A) (2005) at p. 159; (see also Opening Brief at pp. 14-17).

In Appellant's Opening Brief, STN discussed that the BIA issued a Discussion Draft of proposed revisions to the Regulations in March 2013. (Opening Brief at p. 29). On May 22, 2014, after STN's Opening Brief was filed, the BIA released the Proposed Rule setting forth significant revisions to the federal acknowledgment Regulations and Process (the "Proposed Rule"). See "Federal Acknowledgment of American Indian Tribes; Notice of Proposed Rule," 79

Federal Register 103 (29 May 2014), pp. 30766 - 30781.[10] In releasing the Proposed Rule, the BIA acknowledged the nature of the dissatisfaction with the Regulations which the Proposed Rule seeks to address:

> The current process has been criticized as "broken" or in need of reform. Specifically, the process has been criticized as too slow (a petition can take decades to be decided), expensive, burdensome, inefficient, intrusive, less than transparent and unpredictable.

Id. at p. 30766.

According to the BIA, the "revisions seek to make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency…" Id. Also according to the BIA, the "proposed rule would reform the process by, among other things, institutionalizing a phased review that allows for faster decisions; reducing the documentary burden; allowing for a hearing on the proposed finding to promote transparency and process integrity; establishing the Assistant Secretary's final determination as final for the Department to promote efficiency; and establishing objective standards, where appropriate, to ensure transparency and predictability." Id.

[10] Also see the copy of the Proposed Rule released on May 22, 2014 by the BIA available on the BIA's website at http://www.bia.gov/cs/groups/xopa/documents/text/idc1-026772.pdf.

Most relevant of the substantial changes proposed are: (1) evidence of criteria (b) and (c) is only required from 1934 to the present; (2) a petitioner may satisfy criteria (b) and (c) by demonstrating ***only*** that it has maintained a State reservation since 1934; (3) the "reasonable likelihood" burden of proof standard applied by the BIA does not require "more likely than not" but requires less of a showing; (4) a petitioner is entitled to a hearing before a judge evidentiary in nature upon the issuance of a negative proposed finding; and (5) the ***entire IBIA reconsideration process*** is deleted.

Under the Proposed Rule, STN would meet all substantive requirements for federal recognition. In the Reconsidered Final Determination, the BIA affirmed that STN satisfied the criteria of (a), (d), (e), (f) and (g). Reconsidered Final Determination, JA321-322. STN's federal recognition was stripped away based upon the BIA's reevaluation of only criteria (b) and (c) for certain time periods. Reconsidered Final Determination, JA352-361; 373-374, et seq. As depicted in the table below for ease of reference, under the Proposed Rule, STN would now satisfy the requirements for the periods during which the BIA found STN did not satisfy the criteria for community or political influence and authority in the Reconsidered Final Determination:

Regulation Subsection	**Reconsidered Final Determination**	**Affect of Proposed Rule**
(b) community	Reconsidered 1920-1940 based upon new evidence	Satisfied -- maintained State reservation since 1934
	Reconsidered 1940-1967 based upon new evidence	Satisfied -- maintained State reservation since 1934
	Reevaluated 1997-present based upon 42 un-enrolled individuals	Satisfied -- maintained State reservation since 1934
(c) political influence and authority	Reweighed 1801-1820 based upon endogamy analysis	Not relevant -- time period before 1934
	Reweighed 1840-1870 based upon endogamy analysis	Not relevant -- time period before 1934
	Reweighed 1820-1840 based upon state recognition	Not relevant -- time period before 1934
	Reweighed 1870-1875 based upon state recognition	Not relevant -- time period before 1934
	Reweighed 1892-1967 based upon state recognition	Satisfied -- maintained State reservation since 1934
	Reweighed 1884-1892 based upon new evidence	Not relevant -- time period before 1934
	Reevaluated 1997-present based upon 42 un-enrolled individuals	Satisfied -- maintained State reservation since 1934

In the Decision, the District Court relied upon the BIA Regulations in deciding to defer to the BIA findings. There has been no change in the statutory scheme pursuant to which BIA has been charged to make its determination. Nevertheless, the BIA now proposes a drastically different set of requirements which STN would undoubtedly meet. Moreover, the greatest modification proposed by the BIA is formalizing the existence of a State reservation as

dispositive of the criteria of "community" and "political influence and authority". Significantly, it was those two criteria upon which STN's acknowledgment was denied after the BIA found the evidence submitted insufficient and rejected the existence of STN's reservation since 1736 as not probative. See, e.g., Reconsidered Final Determination, JA373.

STN is not arguing that it should be federally recognized or that it will be recognized and therefore a reversal is required.[11] The import of the Proposed Rule for this case is that the factual determination by the BIA that STN did not meet the criteria to be a tribe was based upon standards and criteria which the agency itself no longer deems appropriate to determine that issue. Moreover, under the Proposed Rule, STN meets all of the substantive criteria of a tribe. Therefore, assuming, *arguendo*, that deferral was appropriate, it would no longer be appropriate to defer to BIA's determination or to give collateral estoppel to that determination as a result of the BIA's recent actions. STN is entitled to a judicial determination in a neutral forum that it is a tribe under the common law Montoya criteria.

[11] Indeed, the Proposed Rule, as it is currently written, prohibits reapplication by a tribe previously denied acknowledgment unless a party which had opposed the prior recognition consents to reconsideration. 79 Federal Register 103 at p. 30774. The opponents of BIA recognition included the Appellees and the State of Connecticut, which appears in this appeal as *Amicus Curriae*. Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 389, 394-395 (D. Conn. 2008). It is doubtful such consent could be obtained.

Finally, the application of collateral estoppel is discretionary. Should this Court find itself reluctant to reverse the Decision based upon these developments which were not before Judge Thompson, it is respectfully requested that the dismissal be vacated and the action remanded to the District Court so that it may consider whether, in light of the changes proposed by the BIA, a different result is warranted.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's Opening Brief, the Judgment of the District Court should be reversed and the matter remanded to the District Court for further proceedings.

Dated: Greenwich, Connecticut
July 15, 2014

Respectfully submitted,

By: _____

Benjamin H. Green
ZEICHNER ELLMAN & KRAUSE LLP
35 Mason Street
Greenwich, Connecticut 06830
Tel: (203) 622-0900
Fax: (203) 862-9889
E-mail: bgreen@zeklaw.com
Attorneys for Plaintiff-Appellant

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 4,909 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