

# 12-4544(L)

*To Be Argued By:*  
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## United States Court of Appeals

### FOR THE SECOND CIRCUIT

Docket Nos. 12-4544(L),  
12-4587(Con), 13-4756(Con)

SCHAGHTICOKE TRIBAL NATION,  
*Plaintiff-Appellant,*

SCHAGHTICOKE INDIAN TRIBE,  
*Intervenor-Plaintiff,*

-vs-

KENT SCHOOL CORP. INC., PRESTON  
MOUNTAIN CLUB, CONNECTICUT LIGHT &  
(For continuation of Caption, See Inside Cover)

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

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### **BRIEF FOR THE UNITED STATES OF AMERICA**

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STATES OF AMERICA,

*Defendants-Appellees,*

APPALACHIAN TRAIL CONFERENCE INC.,  
BARBARA G. BUSH, NEW MILFORD SAV-  
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*Intervenors-Defendants.*

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## Statement of Jurisdiction

This appeal is from judgments in three cases that were consolidated below. The United States District Court for the District of Connecticut had subject matter jurisdiction over the matter in *United States v. 43.47 Acres of Land*, 2:85cv1078 (AWT), a condemnation action filed by the United States, under 28 U.S.C. § 1358. The district court had jurisdiction over the two consolidated land claim cases, *Schaghticoke Tribal Nation v. Kent School Corporation, Inc.*, 3:98cv1113 (AWT) and *Schaghticoke Tribal Nation v. United States*, 3:00cv820 (AWT), under 28 U.S.C. § 1331.

The district court entered a final judgment in the condemnation action (85cv1078) on November 18, 2013. Joint Appendix (“JA\_\_”) 40; JA758-70. On December 17, 2013, the Schaghticoke Tribal Nation (STN) filed a timely notice of appeal from this judgment under Federal Rule of Appellate Procedure 4(a)(1)(B). JA40.1; JA779. The district court entered a final judgment in one land claim case (98cv1113) on October 16, 2012, JA71; JA755-56, and a final judgment in the other land claim case (00cv820) on October 18, 2012, JA89; JA757. The STN filed timely notices of appeal from these judgments on November 13, 2012. *See* JA771-74 (00cv820); JA775-78 (98cv1113). *See also* Federal Rule of Appellate Procedure 4(a).

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  
Presented for Review**

- I. Did the district court properly defer, under the doctrine of primary jurisdiction, to the Department of the Interior's expert fact-finding on two factual issues underlying the question whether the Schaghticoke Tribal Nation is an Indian tribe?
  
- II. Is the Schaghticoke Tribal Nation collaterally estopped from re-litigating the factual determinations made in the federal acknowledgment process when the relevant factors were identical in both proceedings and when the Schaghticoke Tribal Nation had a full and fair opportunity to contest those determinations?

# United States Court of Appeals

FOR THE SECOND CIRCUIT

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SCHAGHTICOKE TRIBAL NATION,

*Plaintiff-Appellant,*

SCHAGHTICOKE INDIAN TRIBE,

*Intervenor-Plaintiff,*

-vs-

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,*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Preliminary Statement

These three consolidated appeals are the latest chapter in a thirty-year saga which began as an effort to protect and preserve the Appalachian Trail. To serve that end, the United States moved to condemn 127 acres of land near the Schaghticoke state reservation in Kent, Connecticut, and that condemnation case was subsequently consolidated with two land claim cases filed by a group known as the “Schaghticoke Tribal Nation” (STN) against neighboring landowners. In all three cases, the STN claimed that it is an Indian tribe that had been dispossessed of its land in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177. Thus, a central issue in each case was whether the STN is an Indian tribe under federal law.

At the STN’s request, the consolidated cases were stayed in 1999 to allow the STN to complete the Department of the Interior’s (Interior) federal acknowledgment process—a formal regulatory process by which Interior decides whether a petitioning group is an Indian tribe. In 2005, at the end of that process, Interior concluded that the STN did not meet all of the criteria for federal acknowledgment and thus is not an Indian tribe under federal law. The STN challenged that decision in court, but the administrative determination was upheld by this Court.

At the conclusion of the court proceedings upholding Interior’s decision, the district court

granted judgment on the pleadings against the STN. As relevant here, the district court concluded that (1) under the doctrine of primary jurisdiction, it should defer to Interior's determination of two factual issues underlying its conclusion that the STN is not an Indian tribe, and (2) the STN was collaterally estopped from re-litigating those issues. Thus, the court concluded that the STN is not an Indian tribe entitled to the protection of the Nonintercourse Act.

The STN appeals from the district court's ruling. As set forth below, the court appropriately deferred to Interior's expertise on the intensely factual questions at issue in determining tribal status, and further, properly prohibited the STN from re-litigating issues decided in the agency proceedings. For these reasons, the district court judgments should be affirmed.

### **Statement of the Case**

These consolidated appeals arise from three consolidated actions. The first was an action filed in 1985 to condemn 127 acres of land adjoining the Schaghticoke reservation in Kent, Connecticut. *United States v. 43.47 Acres of Land*, No. 2:85cv1078 (AWT).<sup>1</sup> The second was a land claim filed in 1998 by the STN under the Nonintercourse Act. *Schaghticoke Tribal Nation*

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<sup>1</sup> The complaint in this case was subsequently amended to bring the total acreage to 127 acres.

*v. Kent School Corporation, Inc.*, No. 3:98cv1113 (AWT). The third was another land claim filed by the STN in 2000. *Schaghticoke Tribal Nation v. United States of America*, No. 3:00cv820 (AWT).

Because the STN raised a common claim in all three cases, *i.e.*, that it is an Indian tribe that has been dispossessed of Indian land in violation of the Nonintercourse Act, the cases were assigned to United States District Judge Peter C. Dorsey and managed together. They were stayed at the request of the STN to allow the STN to complete Interior's federal acknowledgment process, a process the STN had initiated in 1981. *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187 (D. Conn. 1999); JA683 (May 9, 2001 Scheduling Order). At the end of that process, Interior concluded that the STN is not an Indian tribe. The STN sought judicial review of this final agency decision under the Administrative Procedure Act (APA). Interior's decision was upheld by this Court in 2009. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009) (*per curiam*), *cert. denied*, 131 S. Ct. 127, *reh'g denied*, 131 S. Ct. 698 (2010).

At the conclusion of the appeal, the stay in the consolidated cases was lifted and the United States and the defendants filed motions for judgment on the pleadings. These parties argued that because the STN is not an Indian tribe, it could not pursue its claims under the Noninter-

course Act. United States District Judge Alvin W. Thompson, to whom the cases were then assigned, granted the motions and entered final judgments immediately in the two land claim cases. *United States v. 43.47 Acres of Land*, 896 F. Supp. 2d 151 (D. Conn. 2012); JA71; JA755-56 (98cv1113); JA89; JA757 (00cv820). The final judgment in the condemnation case was entered one year later after issues involving valuation and compensation were determined. JA40; JA758-70. The STN filed timely notices of appeal in all three cases. JA771-74; JA775-78; JA779.

**A. Beginning in 1975, the “Schaghticoke Indians” participate in lawsuits over land in Kent, Connecticut.**

The prologue to this case began in 1975 when a group then known as the Schaghticoke Tribe of Indians (Schaghticoke) filed a land claim suit, seeking title to privately owned property in the area around the Schaghticoke state reservation in Kent, Connecticut. *Schaghticoke Indians v. Kent School Corp.*, No. 2:75cv125 (PCD). That action was dismissed in 1993 for failure to prosecute.

Meanwhile, in 1984, the United States obtained through condemnation a parcel of property adjacent to the reservation for the Appalachian Trail. *United States v. 267.17 Acres of Land*, No. H-84-889. In 1985, the United States filed a companion condemnation action for another par-

cel adjacent to both the reservation and the parcel that was condemned in 1984 to relocate a portion of the Appalachian Trail. *United States v. 43.47 Acres of Land*, 855 F. Supp. 549, 550 (D. Conn. 1994).

In accordance with the requirements for bringing a condemnation action, the United States named several defendants who might have an interest in the property, including the Schaghticoke, who by virtue of their then-pending 1975 land claim action might have had an interest in the property being condemned. As a defense to the condemnation action, the Schaghticoke re-asserted their land claims pursuant to the Nonintercourse Act, 25 U.S.C. § 177. To properly assert such a defense, the court ruled that the Schaghticoke must first be determined by Interior to constitute an Indian tribe. *43.47 Acres of Land*, 855 F. Supp. at 551-52.

**B. The Schaghticoke begin the process of seeking federal acknowledgment as an Indian tribe.**

The Schaghticoke began the federal acknowledgment process on December 14, 1981. The Schaghticoke then asked the court to stay the condemnation proceedings, and the court did so. JA18. The Schaghticoke filed their first partially documented petition with Interior on December

7, 1994—13 years after initiating the process. *43.47 Acres of Land*, 896 F. Supp. 2d at 155.

Over the next three years, the Schaghticoke worked to complete their petition with technical assistance from Interior, and were placed on the waiting consideration list in 1997. *43.47 Acres of Land*, 45 F. Supp. 2d at 190.

Around the same time, the Schaghticoke filed two new lawsuits under the Nonintercourse Act seeking title to land to the north and south of the existing state reservation in Kent, naming the defendant-appellees here. In 1991, the Schaghticoke changed its name to the Schaghticoke Tribal Nation.<sup>2</sup> JA455. It became a substituted defendant in the 1985 Appalachian Trail condemnation action and was the named plaintiff in the two land claim suits: *Schaghticoke Tribal Nation v. Kent School Corp.*, No. 3:98cv1113 (PCD), and *Schaghticoke Tribal Nation v. United States of America*, No. 3:00cv820 (PCD). Although the three cases were managed jointly because they involved common questions of law and fact, a formal consolidation order was not entered until October 4, 2005. JA35.

Between the filing of its 1998 and its 2000 land claim cases, the STN also filed a motion to terminate the stay in the condemnation case and the 1998 land claim case. The STN sought to

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<sup>2</sup> For simplicity, the government refers to this group as “the STN” throughout this brief.

have the district court decide the issue of tribal status while its petition for acknowledgment remained pending before Interior. The court granted the motion to terminate the stay but encouraged the parties to agree upon a schedule for completing the administrative process. JA26.

The parties to the three cases negotiated and stipulated to a Scheduling Order which was entered by the court on May 9, 2001. JA683. The Scheduling Order established a framework and timetable for Interior to evaluate the STN's petition for acknowledgment as an Indian tribe under Interior's acknowledgment regulations. Although the Scheduling Order modified some of the timing provisions of the acknowledgment regulations, it provided that the regulations were otherwise applicable to Interior's consideration of the STN petition. JA692-93 (¶o). Other significant provisions of the Scheduling Order included the creation and sharing of a computerized database for all of the documents that were to become the administrative record, JA684-86 (¶¶a-d), as well as the opportunity for limited discovery, JA691-92 (¶m).

As significant to the issues presented here, the Scheduling Order expressly linked the land claim proceedings with the finality of Interior's acknowledgment decision. Paragraph (i) provided that Interior's determination "shall have no probative effect or value for purposes of the land claim issues remaining for the court's considera-

tion in these cases until such time as a final judgment is entered on any review” under the APA and further rights of appeal have been exhausted. JA689. The Order concluded with a provision that all proceedings in the district court in the consolidated cases would be stayed, except as otherwise provided in the Order, “unless leave of court is granted or all the parties agree.” JA693 (¶q).

On May 7, 2001, another group—calling itself the Schaghticoke Indian Tribe (SIT)—moved to intervene in the land claim cases. JA26. The SIT claims that it is the proper entity entitled to the land rights in question. The motion to intervene in each of the three consolidated cases was granted on June 18, 2001.<sup>3</sup> JA27; JA62; JA80.

**C. Interior issues a Proposed Finding that would deny federal acknowledgment to the STN, but after a comment period, reverses that decision in a Final Determination.**

Consistent with the timetable in the Scheduling Order, on December 5, 2002, the Assistant Secretary – Indian Affairs (AS-IA) issued a Proposed Finding against federal acknowledgment. *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 401 (D. Conn. 2008). The

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<sup>3</sup> The SIT filed its own application for federal acknowledgment with Interior; that application is currently pending adjudication.

basis for the negative proposed finding was that the STN did not demonstrate two of the mandatory criteria for acknowledgment: “community” and “political authority or influence,” as specified in 25 C.F.R. §§ 83.7(b) and (c). The AS-IA therefore proposed to decline to acknowledge the STN “as an Indian tribe within the meaning of Federal law.” 67 Fed. Reg. 76184, 76189 (Dec. 11, 2002).

After the issuance of the Proposed Finding, the updated database was provided to the parties, and comments on the Proposed Finding were filed by the STN and interested parties. See JA686-87 (Scheduling Order ¶¶e, f); 25 C.F.R. § 83.10(h). There were three informal technical assistance meetings between expert researchers in Interior and the STN and its researchers, one technical assistance telephone conference call with representatives of the State and interested municipalities and one with some members of the Schaghticoke Cogswell family. JA456. The STN responded to the comments submitted. JA456.

On January 29, 2004, the Principal Deputy AS-IA issued the Final Determination to acknowledge the STN as an Indian tribe within the meaning of federal law. JA447. The Final Determination reversed the Proposed Finding on the issues of “community” and “political influence or authority.” The Proposed Finding relied on the historic recognition of the Schaghticoke

by the State of Connecticut and the continuous existence of a state-established reservation *in conjunction with* other evidence to find community. In contrast to the Proposed Finding, the Final Determination found that state recognition alone was sufficient to demonstrate political influence or authority for certain time periods. JA572-76. Also in contrast to the Proposed Finding, the Final Determination included people who were not on the STN’s membership list as members of the petitioner for purposes of finding that the petitioner satisfied the “community” criterion.<sup>4</sup> JA307.

In accordance with the regulations, the State of Connecticut, the Kent School Corporation, CL&P, the Town of Kent, the SIT and other interested parties filed requests for reconsideration of the Final Determination with the Interior Board of Indian Appeals (IBIA). *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 401.

**D. The IBIA vacates the Final Determination.**

The requests for reconsideration focused on the Final Determination’s reliance on “state recognition” as evidence of “community” and “political influence or authority.” The requests also alleged a misapplication of the regulations by

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<sup>4</sup> The people who objected to being included on the STN’s membership list were the same people who had formed the SIT.

the improper calculation of marriage rates, challenged the membership as defined for the Final Determination, and raised other issues. *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 407-08. The STN filed a response in opposition to reconsideration on November 29, 2004.

On December 6, 2004, the Office of Federal Acknowledgment (OFA) filed a three-page Supplemental Transmittal with the IBIA. *Id.* at 408. OFA offered this submission as technical assistance and explained that the STN Final Determination was not consistent with prior acknowledgment case precedent in calculating the rates of marriages under the regulations and also noted that there was a material mathematical error in the marriage rate calculation for the period 1841-1850. *Id.*

On May 12, 2005, the IBIA vacated the Final Determination, and remanded it to the AS-IA for further work and reconsideration. *Id.* The IBIA concluded that the Final Determination erroneously relied on the State's implicit recognition of the STN as evidence of "community" or "political authority." *Id.* As to the marriage rate interpretation and miscalculation in the STN Final Determination, the IBIA left that matter to the AS-IA on reconsideration. *Id.* The IBIA also referred the membership list issues and other issues to the AS-IA. *Id.*

**E. After the IBIA decision, the district court permits discovery in the land claim litigation.**

Following the IBIA decision, the STN filed with Judge Dorsey a motion for permission to conduct discovery. Judge Dorsey allowed additional discovery for the purpose of determining whether the court's prohibition on meeting or contacting officials of Interior, as outlined in the Scheduling Order, had been violated. JA32. The STN conducted discovery from May 20, 2005 to October 1, 2005.

In addition, the STN asked the district court to amend the negotiated Scheduling Order, in order to obtain technical assistance from the OFA and to supplement the record. Judge Dorsey subsequently entered an order amending the Scheduling Order. JA240. Consistent with that Order, the OFA provided technical assistance to the parties on the marriage rate evaluation, additional documents were submitted, and supplemental briefs were filed with the agency. JA320.

**F. After further briefing from the parties, Interior issues a Reconsidered Final Determination that determines that the STN is not an Indian tribe under federal law.**

The Reconsidered Final Determination (RFD) was signed by the Associate Deputy Secretary on

October 11, 2005. The 86-page RFD concluded that the STN had not demonstrated two of the mandatory criteria for tribal acknowledgment: community, § 83.7(b), and political influence or authority, § 83.7(c), for significant periods of time. The RFD therefore declined to acknowledge the STN as an Indian tribe. JA361; JA374; 25 C.F.R. § 83.10(m).

The RFD discussed the IBIA decision and evaluated the specifics of the State's relationship with the Schaghticoke during certain time periods to glean any evidence that would show social interaction and bilateral political relations within the petitioner, and weighed it with the other evidence in the record. JA361; JA374. The RFD determined that the State's relationship did not provide evidence of social interaction or cohesion among, or political influence or authority within, the STN. The RFD concluded that, in the absence of any probative value attributed to state recognition, there was insufficient evidence of community for 54 years, and insufficient evidence to demonstrate political influence or authority of the petitioner over its members for approximately 165 years. JA361; JA374. The RFD also discussed agency precedent on marriage rates and corrected the erroneous calculation. JA322-54. Finally, the RFD concluded that the people who continued to object to being part of the STN could not be considered members under the definition of "member" in the regulations.

JA374-78. The RFD therefore declined to acknowledge the STN as an Indian tribe under federal law.

**G. The STN seeks judicial review of Interior's denial of tribal recognition under the APA, but the RFD is upheld.**

On January 12, 2006, the STN filed a new action in the district court, seeking judicial review of the RFD pursuant to the APA. *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 394. The primary issues raised were whether the RFD was an arbitrary and capricious decision and whether it had been affected by undue political influence. The State of Connecticut, the Town of Kent, the Kent School Corporation, Inc., and the Connecticut Light & Power Company intervened. The administrative record in this case contained 6,774 documents and 47,012 pages and included the updated database in electronic format. *43.47 Acres of Land*, 896 F. Supp. 2d at 162.

The STN filed a series of motions seeking discovery prior to filing a motion for summary judgment. The court recognized that APA review is usually limited to the administrative record, but it allowed the STN to take depositions in support of its claims. *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 404-09, 411.

On August 26, 2008, Judge Dorsey upheld the RFD and granted summary judgment against

the STN. As relevant here, the court considered, and rejected, the STN's request "to invalidate the RFD on the grounds that it is the impermissible product of undue political interference by federal and state legislators and their lobbyists with Interior's decision making process." *Id.* at 409. The court found that any pressure exerted during the process did not actually influence the decision maker who issued the RFD. *Id.* at 410-12. The court then concluded that the RFD was neither arbitrary nor capricious, but rather was a "researched and well-reasoned conclusion regarding the state recognition issue." *Id.* at 413. The court found that the IBIA "clearly concluded" that the State's recognition was not reliable or probative evidence for demonstrating the existence of community or political influence or authority and the RFD rationally gave less weight to state recognition of the STN when determining whether the group had failed to demonstrate community and political influence. *Id.* The court likewise held that the RFD's analysis of marriage rates was based on a reasonable interpretation of the acknowledgment regulations. *Id.* at 415-17. The court additionally concluded that the RFD properly determined that the STN had failed to demonstrate community and political authority for the period between 1996 and 2004 because a significant number of key Schaghticoke individuals had refused to consent to membership in the STN. *Id.* at 417-18.

This Court affirmed the district court’s judgment on appeal. *Schaghticoke Tribal Nation*, 587 F.3d 132. The Court noted that the STN had abandoned its claim that the RFD was arbitrary or capricious. Accordingly, as relevant here, the only issue on appeal was whether the RFD was the product of undue influence. *Id.* at 134. As to that issue the Court held that the evidence submitted by the STN could not support a claim of improper political influence. *Id.* In short, according to the Court, the only political pressure exerted in this case did not affect the actual decision makers: “[E]ven if the Connecticut elected officials ‘intended to’ influence the [RFD], there is no evidence that they did [so]....” *Id.* The Court thus affirmed the district court’s conclusion that the STN evidence did not support a claim of undue political influence. *Id.* The Supreme Court denied certiorari. *Schaghticoke Tribal Nation v. Salazar*, 131 S. Ct. 127, *reh’g denied*, 131 S. Ct. 698 (2010).

**H. The district court lifts the stay and the land claim cases proceed to motions for judgment on the pleadings.**

After the merits of the acknowledgment decision were affirmed on appeal, the defendants in the land claim cases moved to vacate the stay which had been entered by the district court as part of the May 9, 2001 Scheduling Order. JA36.

The district court granted the motion to vacate the stay on February 13, 2012. JA36. The defendants moved for judgment on the pleadings, and the court issued a ruling on September 30, 2012 granting the motions. *43.47 Acres of Land*, 896 F. Supp. 2d 151.

In the Ruling on Motions for Judgment on the Pleadings (Ruling) the district court explained the history and relationship of the three consolidated cases. The court noted that the common claim made by the STN in each case was that the STN “is an Indian tribe that has been dispossessed of Indian land without the approval of Congress” in violation of the Nonintercourse Act. *Id.* at 154. Accordingly, “[a]n issue that is common to all three cases is whether the STN exists as an Indian tribe under federal law.” *Id.*

After setting forth the background to the case, the court explained that for the STN to establish a *prima facie* case for a violation of the Nonintercourse Act, it would have to show that it is an Indian tribe. *Id.* at 156. On this point, the court first concluded that it should defer—under the doctrine of primary jurisdiction—to Interior’s expert determination that the STN had failed to prove two elements necessary for establishment of tribal status: distinct community, and political influence or authority over tribal members. *Id.* at 158. As the court explained, this deference was appropriate for three reasons: (1) Interior has broad responsibilities for Indian af-

fairs, including the authority to decide whether a group qualifies as a tribe under federal law, and further has the technical expertise necessary to make the complex regulatory decisions called for by the recognition regulations; (2) the STN had identified no substantive difference between the relevant standards for “community” and “political influence or authority” under the federal acknowledgment regulations and the comparable terms in *Montoya v. United States*, 180 U.S. 261 (1901)—the case that the STN argued provided the governing standard; and (3) the STN had identified no evidence on the relevant standards that was not presented to Interior such that deference to that decision would be inappropriate. 896 F. Supp. 2d at 158.

In addition, as relevant here, the court concluded that the doctrine of collateral estoppel barred the STN from re-litigating whether it could meet the definition of “community” and “under one leadership or government,” required by *Montoya* when it had already failed to meet the equivalent standards in the tribal recognition process. *Id.* at 160-61. Furthermore, the court concluded that the STN had a full and fair opportunity to litigate these issues in the administrative process. *Id.* at 162.

Thus, after concluding that the STN could not establish that it is a tribe, the court found that the STN could not establish a violation of the Nonintercourse Act. *Id.* Accordingly, the court

granted the motions for judgment on the pleadings in all three cases. The court directed that a partial judgment be entered in the condemnation case dismissing the interests of the STN and that final judgments be entered in the two STN land claim cases.<sup>5</sup> *Id.*

### Summary of Argument

I. The district court properly deferred, under the doctrine of primary jurisdiction, to Interior's factual findings that supported its determination that the STN is not a tribe under federal law. This Court has long recognized that deference to Interior's expert fact-finding in matters of tribal recognition is especially appropriate given Interior's knowledge and experience in those matters. Indeed, the STN itself *twice* requested and agreed to stay the district court litigation in favor of resolution of Interior's acknowledgment process. And once that process was resolved, the district court properly deferred to Interior's expert fact-finding on two issues: (1) that the STN had not been a distinct community over significant years, and (2) that the STN did not exercise political influence or authority over its members over significant years. Because these factual is-

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<sup>5</sup> A final judgment entered in the condemnation case after the parties negotiated a stipulation of compensation. None of the issues involved in the conclusion of the condemnation action are at issue in this appeal.

sues were squarely within Interior’s expertise, the district court properly deferred to Interior’s resolution of these issues.

Moreover, the factual issues regarding “community” and “political authority” which were before Interior during the acknowledgment process were substantively the same as the factual issues before the district court in its consideration of the STN Nonintercourse Act claim. Under the *Montoya* definition a plaintiff group was required to show, *inter alia*, that it was united in a community and under one leadership or government and other factors; the acknowledgment process also required a showing of community and political influence or authority. The fact-finding undertaken by Interior clearly demonstrates that the *Montoya* definition for assessing “community” and “political authority” were not satisfied here. The fact that there is another Indian group, the Schaghticoke Indian Tribe, that is also trying to obtain federal recognition from Interior, likewise demonstrates that STN has not satisfied the two *Montoya* standards.

II. The STN was collaterally estopped from re-litigating factual issues that it had already lost in proceedings before Interior. The STN argues that the application of collateral estoppel was inappropriate because the definition of “tribe” under the Nonintercourse Act is different from the standard for establishing tribal status under the acknowledgment regulations. That

may be so, but they both share the same requirements of present community and exercise of political authority. The district court did not find that the STN was collaterally estopped from re-litigating whether it was a tribe; it found, rather, that the STN was collaterally estopped from re-litigating these two factual issues resolved against it by Interior: community and political authority. Because the STN has not shown that the district court erred in finding those factors were identical, the court properly applied collateral estoppel.

Moreover, the STN had a full and fair opportunity to litigate all of the factual issues underlying Interior's determination of its tribal status. In an administrative process that stretched over more than ten years, the STN had ample opportunities to submit documentation, answer questions, challenge conclusions, respond to arguments and facts submitted by interested parties, and cure defective submissions. In addition, the STN used the APA to obtain federal court review of the agency's decision. In that review, the STN argued repeatedly that the agency process was fundamentally unfair due to outside political influences, and this Court rejected those arguments. The STN should not be heard to raise those arguments again now.

## Argument

**I. The district court properly applied the doctrine of primary jurisdiction when deferring to Interior’s determination that the STN failed to establish two elements in the acknowledgment process: a distinct community, and political influence or authority over members.**

**A. Governing law and standard of review**

**1. Judgment on the pleadings and standard of review**

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) may be granted “where material facts are undisputed and where a judgment on the merits is possible . . . .” *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). The Court “must view the pleadings in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party.” *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir. 1994) (internal quotations omitted).

This Court “review[s] a judgment under Federal Rule of Civil Procedure 12(c) de novo, accepting the complaint’s factual allegations as true and drawing all reasonable inferences in the plaintiff’s favor.” *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 178 (2d Cir.), *cert. denied*, 134 S. Ct. 241 (2013). Similarly, a district court’s de-

cision to defer resolution of an issue to an expert agency is reviewed *de novo*. *Ellis v. Tribune Television Co.*, 443 F.3d 71, 83 n.14 (2d Cir. 2006).

## 2. The Nonintercourse Act

The Nonintercourse Act restricts the alienation of tribal land without Congressional approval. 25 U.S.C. § 177; *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 204 (2005). It provides, in relevant part:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. To establish a *prima facie* case under 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).

To establish that the plaintiff has standing as an Indian tribe to assert a tribal claim under the Nonintercourse Act, courts may, but are not re-

quired to, make that determination in the first instance. The more common practice under the doctrine of primary jurisdiction, however, is for courts to defer resolution of the issue to Interior. *Id.* at 59-60.

### **3. The doctrine of primary jurisdiction**

As the Supreme Court explained in *United States v. Western Pacific Railroad Company*:

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. . . . ‘Primary jurisdiction[]’ . . . 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; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

352 U.S. 59, 63-64 (1956). “The primary jurisdiction doctrine serves two interests: consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of

facts through the agency’s specialized expertise, prior to judicial consideration of the legal claims.” *Golden Hill Paugussett*, 39 F.3d at 59.

While “[n]o fixed formula exists for applying the doctrine of primary jurisdiction,” this Court has generally focused on four factors: “(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency’s particular field of expertise; (2) whether the question at issue is particularly within the agency’s discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.” *Ellis*, 443 F.3d at 82-83.

In the unique context of whether an entity constitutes a tribe for purposes of federal law, this Court has held that “[Interior] is better qualified by virtue of its knowledge and experience to determine at the outset whether [the plaintiff] meets the criteria for tribal status.” *Golden Hill Paugussett*, 39 F.3d at 60. This 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, [Interior]’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 [Interior].” *Id.*

#### 4. Interior's regulations on federal acknowledgment of Indian tribes

Article I, Section 8 of the United States Constitution grants Congress the authority to regulate commerce with Indian tribes. Congress has delegated implementation of its statutes dealing with Indian affairs to Interior. *See* 43 U.S.C. § 1457.

Historically, tribes were granted federal recognition through treaties ratified by the Senate, through a course of dealings, or through *ad hoc* decisions within the Executive Branch. In 1832, Congress specifically authorized the Executive Branch to prescribe “such regulations . . . [for] the management of all Indian affairs.” 25 U.S.C. § 2; *see also* 25 U.S.C. § 9 and 43 U.S.C. § 1457. Pursuant to these authorities, Interior promulgated regulations for the acknowledgment of tribes. 25 C.F.R. Part 83. “The purpose of the regulatory scheme . . . is to determine which Indian groups exist as tribes.” *James v. U.S. Dept. of Health and Human Svcs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987). This federal recognition or acknowledgment of Indian groups as Indian tribes establishes a government-to-government relationship with the United States and is a prerequisite to the protection, services, and benefits of the federal government available to Indian tribes.

Interior's acknowledgment regulations—which were not promulgated until 1978—

established a regulatory process for the review and approval of petitions for acknowledgment of Indian tribes. *See* 25 C.F.R. Part 83; *see also* 43 Fed. Reg. 39,361 (1978); 59 Fed. Reg. 9,280 (1994).

Under the regulations, a group applies for acknowledgment by filing a “documented petition” that must provide documentation demonstrating that the petitioner meets seven mandatory criteria set forth in the regulations. *See* 25 C.F.R. §§ 83.6(c) and 83.7. Two of the mandatory criteria are pertinent here: (1) “[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present”; and (2) “[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.” 25 C.F.R. § 83.7(b), (c).

Upon receipt of a documented petition, the Office of Federal Acknowledgment (OFA) reviews the petition and its supporting documentation and provides technical assistance regarding additional research needed to support the petitioner’s claims. *See* 25 C.F.R. § 83.10(b). Interested parties that might be affected by an acknowledgment determination may become active participants in the process. *See* 25 C.F.R. §§ 83.1, 83.9.

Once OFA determines that the documentation in the petition is adequate to permit a full

review, the petition and its evidence are evaluated by a team of experts (an anthropologist, genealogist and historian). This team prepares a recommendation on the petition, which is reviewed by the other experts in OFA, and subsequently submitted to the Assistant Secretary – Indian Affairs, who issues a proposed finding. *See* 25 C.F.R. § 83.10(h). The proposed finding is a preliminary decision as to whether the petitioner meets the regulatory criteria based on the evidence before the agency at the time.

After publishing notice of the proposed finding in the Federal Register, there is a public comment period, during which OFA provides informal technical assistance and an optional formal meeting on the record where the petitioner and interested parties can question OFA experts on the proposed finding. In addition, the petitioners and third parties may submit additional arguments and evidence in support of or in opposition to the proposed finding. *See* 25 C.F.R. § 83.10(i), (j). After the close of the public comment period, the petitioner may respond to third-party comments. *See* 25 C.F.R. § 83.10(k).

Following this process, the OFA professional staff evaluates anew the evidence in the record, analyzes any public comments and responses, prepares a summary of the evidence under the regulatory criteria and recommends to the AS-IA whether the petitioner meets the mandatory criteria for acknowledgment as an Indian tribe.

The AS-IA then issues a final determination for the petition. *See* 25 C.F.R. § 83.10(l)(2). This determination is not considered final agency action until 90 days pass without the filing of a request for reconsideration with the IBIA. *See* 25 C.F.R. § 83.11(a)(2). If there is such a request, the IBIA may affirm or vacate the final determination, and shall refer issues outside its jurisdiction to the Secretary as possible grounds for reconsideration. *See* 25 C.F.R. § 83.11(a)-(g). Interior may then issue a reconsidered final determination. Once the decision is final for the agency, it may be challenged in federal court under the APA.

## **B. Discussion**

### **1. The district court properly deferred to Interior’s fact-finding under the doctrine of primary jurisdiction.**

To establish the first element of a claim under the Nonintercourse Act, *i.e.*, that the plaintiff is a “tribe,” “an Indian group must show that it is ‘a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.’” *Golden Hill Paugussett*, 39 F.3d at 59 (quoting *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (quoting *Montoya*, 180 U.S. at 266)). This language is the so-called “*Montoya* definition” for determining tribal status in the absence of fed-

eral acknowledgment. *See Candalaria*, 271 U.S. at 441-42. When courts are required to make this determination, they often defer to the fact finding which takes place during the acknowledgment process to make the factual determination of “community” and “political authority.”

Such a deferral is exactly what the district court did in this case. As the district court recognized, the central issue presented by this case, *i.e.*, whether the STN is an Indian tribe, was properly resolved by deferring, under the doctrine of primary jurisdiction, to Interior’s expert *fact-finding*. This Court recommended this very course of action for cases in this context. In *Golden Hill Paugussett*, this Court noted that while “[a] federal court . . . retains final authority to rule on a federal statute, [it] should avail itself of the agency’s aid in gathering facts and marshalling them into a meaningful pattern.” 39 F.3d at 60. Moreover, this Court explained that because Interior has a regulatory scheme for determining whether an entity is a tribe—and significant experience in implementing that scheme—it 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.*

Indeed, in this case, the STN *twice* requested and agreed to defer to Interior’s acknowledgment process the question of whether it was an Indian tribe for purposes of the Nonintercourse

Act. In the 1985 condemnation case, the government moved for summary judgment arguing that the STN (then known as the Schaghticoke Tribe of Indians) lacked standing to prosecute a land claim under the Nonintercourse Act unless it first had received a recognition or acknowledgment decision from Interior as to whether it was an Indian tribe. JA15. The district court granted the motion, entered summary judgment dismissing STN's claim, and subsequently entered a judgment and order of distribution. JA17.

However, on March 10, 1995, the court granted the STN's motion to reopen and entered the following order:

All proceedings herein are stayed until (1) September 10, 1996, or (2) the Bureau of Indian Affairs (BIA) determines the Schaghticoke's tribal status pursuant to 25 U.S.C. § 177, whichever occurs first. *See Golden Hill Paugussett Tribe of Indians v. Lowell P. Weicker, Jr.*, 39 F.3d 51 (2d Cir. 1994). The parties shall promptly report any determination by the BIA.

JA18-19. Eighteen months later as the STN had done nothing to advance the tribal recognition process, the government moved to reinstate the judgment. JA19. On October 28, 1996, the STN opposed the motion arguing that it had proceeded with due diligence and "at long last, appear[ed] to be on the verge of realizing its ulti-

mate destiny as a federally recognized Tribe under the provision of 25 C.F.R. Part 83.” Thus, the STN asked for additional time to allow it to submit a revised petition for acknowledgment with Interior. JA19.

On March 3, 1997, the court denied the government’s motion to reinstate the judgment, finding that the STN had shown sufficient diligence to demonstrate good cause to extend the stay. JA19. Additionally, on April 29, 1997, the STN formalized its request to extend the stay, conceding that the purpose of this extended stay was so that Interior could resolve the factual issues regarding tribal status that would be of considerable assistance to the district court in ultimately deciding the Nonintercourse Act claims. JA19.

Several years later, when there was still no decision on acknowledgment of the STN from Interior, the parties agreed, in the Scheduling Order, to defer to Interior’s acknowledgment process, and set a schedule for a final decision. The Scheduling Order, entered on May 9, 2001, JA683, specifically outlined the duties and obligations of the parties with respect to the STN’s federal recognition petition, as well as the time frame within which the parties were to accomplish certain tasks. The Scheduling Order also stated “[t]he final determination [of Interior] shall have no probative effect or value for purposes of the land claim issues remaining for the

court's consideration in these cases *until such time as a final judgment is entered* on any review of the final determination under the Administrative Procedure Act ("APA") and all further rights of appeal have been exhausted." JA689 (¶i (emphasis added)). In other words, in the Scheduling Order, the parties agreed not only to defer the decision of whether the STN was an Indian tribe to Interior but also to give that decision deference and probative effect once a final judgment was entered on the determination.

Now, having prevailed upon the district court to allow Interior to resolve its status as a tribe, the STN argues that Interior's decision deserves no deference, precisely because Interior's decision was unfavorable to the STN. In particular, the STN argues that if Interior had granted its petition for recognition, the district court would have had to adopt that finding as dispositive as to the first element of its Nonintercourse Act claim (*i.e.*, its status as a tribe). The STN then argues, however, that the converse of that statement is not true and, as the STN's recognition petition was denied, the district court had an obligation to independently adjudicate the very same issue. STN Br. at 47-49.

To be sure, the ultimate inquiry of "what is a tribe" under the acknowledgment regulations and the Nonintercourse Act are not the same, and the court retains an independent obligation to evaluate the merits of the STN's Noninter-

course Act claim. *Golden Hill Paugussett*, 39 F.3d at 60. But the fact that the court must make an independent determination on the STN's Nonintercourse Act claim does not prevent it from deferring to Interior on the *factual* questions that were properly before the agency. Thus, although the district court made its own legal judgment as to whether the STN is an Indian tribe (*i.e.*, whether it could establish the first element of a *prima facie* case under the Nonintercourse Act), on the facts, it properly deferred to Interior's expertise on two factual findings as relevant to the *Montoya* definitions—whether the STN demonstrated it has an established community and political authority over that community.

While Interior found that the STN had not demonstrated these elements for extended periods of history, *43.47 Acres of Land*, 896 F. Supp. 2d at 158, the failure to demonstrate community and political authority from 1996 to the present, *id.*, is dispositive under *Montoya*. See *Montoya*, 180 U.S. at 266. The resolution of these factual issues was squarely within the province—and expertise—of Interior and thus the district court appropriately deferred to Interior's findings.

The STN's argument to the contrary would require the district court to conduct an independent, and decidedly complex, evidentiary hearing to resolve the factual questions of community and political authority underlying the

issue of whether the STN is an Indian tribe. Such an independent inquiry and complex evidentiary hearing is certainly not what was contemplated by this Court when finding that deferral was appropriate. *See Golden Hill Paugussett*, 39 F.3d at 59-60. In short, while a district court “retains final authority to rule on a federal statute, [it] *should* avail itself of the agency’s aid in gathering facts and marshalling them into a meaningful pattern.” *Id.* at 60 (emphasis added).

The Supreme Court provided clear guidance on the doctrine of primary jurisdiction in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). *Ricci* was an antitrust action against a commodity exchange by a member of the exchange who claimed his membership was transferred in violation of exchange rules and statutory law. *Id.* at 290-91. The district court originally dismissed the complaint but was later directed by the Seventh Circuit to stay further proceedings to “permit administrative action to take place.” *Id.* at 291. The Supreme Court affirmed the stay. *Id.* In doing so, the Supreme Court found that the case seemed to “depend in the first instance on whether the transfer of [the plaintiff’s] membership was in violation of the Act,” and that this “pose[d] issues of fact . . . that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique market-place involved in [the] case.” *Id.* at 305 (foot-

note omitted). The Court found that the district courts should “avail themselves of the aid implicit in the agency’s superiority in gathering the relevant facts and in marshaling them into a meaningful pattern.” *Id.* at 305-306 (citations omitted). By doing so, the district court would not have to “relitigate the [factual] issues actually disposed of by the agency decision.” *Id.* at 306.

That is exactly what the district court did in this case. In applying the doctrine of primary jurisdiction, the district court deferred ruling on the STN’s Nonintercourse Act claims until such time as Interior made a determination as to whether the STN would be deemed an Indian tribe under the acknowledgment regulations. The court agreed that it must “independently apply [the] applicable law [of the Nonintercourse Act] to the factual findings” of Interior. *43.47 Acres of Land*, 896 F. Supp. 2d at 157. The district court explained why deference to Interior’s factual findings related to tribal status, and in particular, its factual findings on the STN’s evidence of community and political influence or authority over members, was appropriate:

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* .... 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.

*Id.* at 158. In short, the district court provided a well-reasoned explanation for deferring to Interior’s expert fact-finding under the doctrine of primary jurisdiction.

As this Court instructed, “[t]he 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.” *Golden Hill Paugussett*, 39 F.3d at 60. The *Golden Hill Paugussett* Court reasoned that “[a] federal agency and a district court are not like two trains, wholly unrelated to one another, racing down parallel tracks towards the same end. Where a statute confers jurisdiction over a general subject matter to an agency and that matter is a significant component of a

dispute properly before the court, it is desirable that the agency and the court go down the same track—although at different times—to attain the statute’s ends by their coordinated action.” *Id.* at 59. Thus, the Court found 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. This is a question at the heart of the task assigned by Congress to the BIA and should be answered in the first instance by that agency.” *Id.* at 60. The Court held that the district court should stay the *Golden Hill Paugussett* litigation pending the BIA’s decision on tribal status under the doctrine of primary jurisdiction. *Id.* at 60. Thus, even the *Golden Hill Paugussett* Court recognized that the standards overlapped sufficiently so that the agency’s determination would be directly relevant to the court’s determination—following along on the track directly behind the agency.

**2. The factual inquiry for determining “community” and “political authority” under the federal acknowledgment regulations resolved those same determinations under the Nonintercourse Act.**

The STN argues, primarily, that deference to Interior was inappropriate because the standards for judicial recognition under *Montoya* and federal recognition under Interior’s acknowl-

edgment regulations differ.<sup>6</sup> This argument need not be resolved, however. The deference to the primary jurisdiction of the agency is to the discrete, factual findings made as to “community” and “political authority,” not to an overall standard. And as set forth below, the factual inquiry resolved by Interior on these two issues was di-

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<sup>6</sup> Almost as an aside, the STN argues that the district court misapplied the standard for granting judgment on the pleadings. STN Br. at 49-50. As noted above, one of the factors cited by the district court in favor of deferring to Interior under primary jurisdiction was that the STN did 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.” *43.47 Acres of Land*, 896 F. Supp. 2d at 158. The STN contends that, as this was a motion for judgment on the pleadings, the district court’s reliance on the lack of additional evidence was inappropriate.

This argument mischaracterizes the district court’s comment. The district court did not *require* the STN to submit documents outside of the pleadings. The district court merely noted that when deciding whether it should defer to Interior’s factual findings, the STN had not identified any evidence that was not before Interior but that would be before the court. Accordingly, because Interior had before it all of the evidence that would presumably be before the court, the court could be confident in deferring to Interior.

rectly relevant to the district court's findings on the STN's Nonintercourse Act claim.

In land claim actions under the Nonintercourse Act, courts applied *Montoya* for determining tribal status in the absence of federal recognition. *Candelaria*, 271 U.S. at 441-42. The *Montoya* definition requires a four-part showing: a plaintiff must demonstrate that it is (a) "a body of Indians of the same or similar race," (b) "united in a community," (c) "under one leadership or government," and (d) "inhabiting a particular though sometimes ill-defined territory." *Montoya*, 180 U.S. at 266.

Subsequent judicial applications of the definition provided further content to the four requirements. First, to be "united in a community," a tribe must exist distinct and apart from others. *United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 586 (1st Cir. 1979). Although a tribe must be "a body of Indians of the same or similar race," tribal status cannot be based solely on a racial or ethnic basis. *United States v. Antelope*, 430 U.S. 641, 645 (1977). Tribal status must also be based on the existence of a political community. *Rice v. Cayetano*, 528 U.S. 495, 518-20 (2000); *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). Thus, a tribe is more than just a private, voluntary organization of individuals of Indian descent; it is a distinct community with authority or influence

over its members. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

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

As articulated by other courts, a tribe must have continuously maintained itself as a distinct community with a political organization or structure. *Washington*, 641 F.2d at 1373. The requirement of continuity is essential to any determination of tribal status. It reflects the need for a group to maintain its distinct community and the exercise of its authority throughout history to retain its tribal sovereignty. *Id.*; *United*

*Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 764 (1985).

In applying these standards, the district court properly deferred to Interior’s fact-finding. Interior denied the STN’s federal recognition application based on the STN’s failure to meet the criteria for “community” under 25 C.F.R. § 83.7(b) and “political influence or authority” under 25 C.F.R. § 83.7(c). In particular, Interior found that the STN had failed to establish (1) the existence of a distinct community from 1920 to 1967 and after 1996, and (2) political influence or authority over tribal members from 1801 to 1875, 1885 to 1967 and after 1996. *See 43.47 Acres of Land*, 896 F. Supp. 2d at 158.

These factual findings are directly relevant to the inquiry under *Montoya*, which requires, among other things, a showing by a body of Indians that they are “united in a community” and “under one leadership or government.” *Montoya*, 180 U.S. at 266. Accordingly, here, the district court properly concluded that because the STN had no distinct tribal community from 1920 to 1967 and after 1996, it could not establish that it was “united in community” under *Montoya*. Similarly, the court properly concluded that because the STN lacked political authority over its members for significant periods of time, including 1885 to 1967 and after 1996, it could not estab-

lish that it was a group under one leadership or government under *Montoya*. In short, the district court properly deferred to Interior's fact-finding as it applied the *Montoya* definition for evaluating the STN's claim to be an Indian tribe, when it concluded that the STN is not a tribe for purposes of the Nonintercourse Act.

## **II. The STN was collaterally estopped from re-litigating issues that were resolved against it by Interior in the regulatory acknowledgment process.**

### **A. Governing law and standard of review**

It is well-established that preclusion may apply to factual issues decided by an administrative agency. Courts generally “favor[] 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. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 107 (1991). “When an administrative agency is acting in a judicial capacity and resolve[s] 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.” *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (citations omitted). Precluding litigation of issues decided by an administrative agency is “justified on the

sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, “impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.” *Astoria Fed. Sav. & Loan Ass’n*, 501 U.S. at 107-108 (citation omitted). Absent evidence of statutory intent to the contrary, it is presumed that Congress expected that common law rules of collateral estoppel would apply to an agency’s decisions. *Id.* at 108.

The four part test for collateral estoppel was set forth in the proceedings below:

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.

*43.47 Acres of Land*, 896 F. Supp. 2d at 159 (quoting *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986)).

This Court reviews a district court's decision to apply collateral estoppel *de novo*. *Perez v. Danbury Hosp.*, 347 F.3d 419, 426 (2d Cir. 2003).

## **B. Discussion**

After initiating and continuing through the administrative process to its conclusion, the STN challenged Interior's findings through judicial review under the APA. 5 U.S.C. §§ 701, *et seq.* On APA review, the district court affirmed Interior's conclusion that the STN is not an Indian tribe under the acknowledgment regulations. *See Schaghticoke*, 587 F. Supp. 2d at 389. The district court specifically reviewed the factual findings reached with respect to the STN's failure to establish a "community" and "political authority" from historical times to the present. *Id.* at 421-22. The district court found that the decision was well reasoned, thorough, rational, based upon directives of the IBIA, and based upon a reasonable interpretation of the regulations and agency precedent. *Id.* at 413-16, 418. This Court affirmed. *Schaghticoke Tribal Nation*, 587 F.3d 132.

Despite being afforded extensive due process before the agency and during federal court review, the STN now argues that the district court's application of collateral estoppel to determine the factual issues of community and political authority was erroneous.

The STN does not seriously contest the second and fourth requirements of the four-part test. The factual issues of “community” and “political leadership” were properly before Interior, were fully litigated and decided there, and were necessary to the resolution of the STN’s acknowledgment petition. On this appeal, the STN principally argues that the issues were not identical and that it did not have a full and fair opportunity to litigate before the agency and courts. STN Br. at 26-35. Both claims are without merit.

**1. The factual issues of community and political authority before Interior were the same as the issues presented to the district court.**

As previously addressed in Argument I, Section B.2., the factual inquiry relating to community and political authority under *Montoya* was resolved by the factual findings for these same factors under the federal regulations. Moreover, courts that have addressed this issue since the promulgation of the acknowledgment regulations have declined to determine tribal status or to allow a non-recognized tribe to pursue a land claim. *Golden Hill Paugussett*, 39 F.3d at 60; *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993); *James*, 824 F.2d at 1138; *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1031 (E.D. Cal. 2012); *BGA, LLC v. Ulster County*, No. 1:08cv149 (GLS/RFT), 2010 WL

3338958, at \*9 (N.D.N.Y. Aug. 24, 2010); *New Jersey Sand Hill Band of Lenape & Cherokee Indians v. Corzine*, No. 09-683 (KSG), 2010 WL 2674565, at \*14 (D.N.J. June 30, 2010). The STN does not cite to any cases decided after Interior promulgated the acknowledgment regulations in 1978 in which a court has independently addressed tribal status as a part of an affirmative land claim.

The STN argues, nonetheless, that collateral estoppel should not apply because the federal acknowledgment standard is different (a higher standard) from the standard for establishing tribal status under *Montoya*. In support, the STN points to various court decisions, including this Court's decision in *Golden Hill Paugussett*, in which it stated that "tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act." 39 F.3d at 57. In addition, the STN argues that the standards *must* be different because if Congress meant to limit the meaning of an "Indian tribe" under the Nonintercourse Act to federally recognized tribes, it would have said so in the statute, as it has done in other statutes. These arguments are beside the point.

The district court did *not* find that the STN had to be federally recognized in order to bring a Nonintercourse Act claim. In fact, the district court, relying on *Golden Hill Paugussett*, held the exact opposite stating that it, the court, "re-

tain[ed] final authority to rule on a [Nonintercourse Act] claim,” *43.47 Acres of Land*, 896 F. Supp. 2d at 157, and recognized its specific duty to “independently apply applicable law to the factual findings.” *Id.* The district court found, however, that the relevant *facts* supporting a finding under the acknowledgment regulations for community and political authority also resolved the land claim question. And it was these facts that the STN could not re-litigate after losing before Interior.

Interior’s determination that “the STN did not provide sufficient evidence as to being a distinct community for the periods 1920-1967 and from 1996 to the present” is by itself fatal to the STN’s Nonintercourse Act claim under *Montoya*. Interior 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 these reasons, the district court correctly concluded that the STN “could not establish that it is a group ‘united in a community’ as required by the *Montoya* test.” *Id.* at 160-61.

With respect to the second issue, as pertinent here, the district court found that the STN could not establish the criteria of “under one leadership or government” as required by *Montoya*, because the STN failed to establish before Interior

the facts necessary to establish “political authority” under the regulations. *Id.* at 161. The district court properly relied on Interior’s finding that the “continued refusal of ‘most of the 42 individuals’ on the unenrolled members list to be members of the STN” demonstrated that “the STN’s membership list [did] not reflect a significant portion of the political system.” *Id.* at 161. Based on these facts, the court correctly concluded that the STN “could not establish that it is a group ‘under one leadership or government’ as required by the *Montoya* test.” *Id.*

In short, all of the STN’s arguments about the meaning of “Indian tribe” under the regulations and *Montoya* and purportedly differing standards in the two contexts are largely beside the point. To be sure, the STN disagrees with Interior’s findings on these two factual issues, but under the doctrine of collateral estoppel, the STN does not get a second chance to litigate factual issues—the existence of community and political authority—that it already litigated before Interior. Accordingly, the STN has not shown that the district court’s conclusion on this issue was in error.

**2. The STN had a full and fair opportunity to litigate the factual issues underlying its status as an Indian tribe through the federal acknowledgment process.**

The STN had every reasonable opportunity to make its case before the agency. Although the administrative process is not identical to that of a court, it provided the STN a full and fair opportunity to develop, present, and argue its evidence supporting its petition for federal acknowledgment as an Indian tribe and to argue against evidence and argument presented by interested parties.

The STN was afforded and took advantage of every aspect of Interior's process. 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 . . ." *43.47 Acres of Land*, 896 F. Supp. 2d at 162. The administrative record—47,000 pages—was provided to the STN at each step of the process as negotiated in the Scheduling Order. Additionally, the administrative record contained cd-roms and dvds with additional information. The STN had the benefit of several sessions of technical assistance from the OFA to improve the petition, cure deficiencies and present supporting evidence.

Moreover, the STN was the first petitioner to have the advantage of the newly developed database system that provided the documentary record in a relational database that enabled the STN's experts to search, review, sort, annotate and relate the contents of the enormous record. These procedures provided a firm foundation for the district court to defer to the expertise of Interior in its fact finding and to apply the doctrine of collateral estoppel to these findings.

Finally, Interior's decision was also reviewed in the district court and in this Court, following extensive discovery requested by the STN.

Notwithstanding this record, the STN again claims that the district court erred when it ignored the "concerted political campaign against the STN." STN Br. at 41. This argument is nothing more than an attempt by the STN to re-litigate an issue that was resolved against it by this Court in *Schaghticoke*, 587 F.3d 132. As described above, one of the STN's central arguments in the APA litigation—both in the district court and in this Court—was that the administrative process was fundamentally unfair due to outside political influences. These claims were firmly rejected by the district court. Specifically, the court found that "the evidence presented [did] not persuade the Court that the Congressional hearings, *ex parte* communications between legislators and agency officials, or the publicity on the issue as a whole ultimately af-

fecting Interior's decision to issue the RFD." *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 410. The district court concluded "the nexus between the pressure exerted and the actual decision makers is tenuous at best, and the evidence adequately establishes the STN's ineligibility for tribal recognition." *Id.* at 412. The decision of the district court was affirmed by this Court, *Schaghticoke Tribal Nation*, 587 F.3d at 134.

Having already lost on this issue, the STN should not be heard to complain again that the administrative process was unfair due to outside influences. The claims did not have merit then and they do not have merit now.

## Conclusion

For the foregoing reasons, the judgments of the district court should be affirmed.

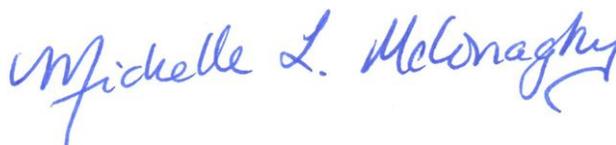
Dated: July 1, 2014

Respectfully submitted,

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A handwritten signature in black ink that reads "John B. Hughes". The signature is written in a cursive style with a large, sweeping initial "J".

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**Federal Rule of Appellate Procedure  
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,531 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink that reads "John B. Hughes". The signature is written in a cursive style with a large, sweeping initial "J".

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