IN THE

Supreme Court of the United States

RAMAPOUGH MOUNTAIN INDIANS and SILENT WOLF, CHIEF RAMAPOUGH MOUNTAIN INDIANS,

Petitioners,

v.

GALE A. NORTON, SECRETARY, U.S. DEPT. OF INTERIOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALBERT J. CATALANO
MATTHEW J. PLACHE
CATALANO & PLACHE PLLC
3221 M Street, N.W.
Washington, D.C. 20007
(202) 338-3200

JAMES A. MOODY
Counsel of Record
1101 30th Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 298-4766

Attorneys for Petitioners

174043

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

The Ramapough Mountain Indians ("RMI") descend from the historical Leni Lenape Indians — also variously called "Delaware" or "Munsee," among other names. Most of the RMI still live in the Ramapough Mountains on the border of New York and New Jersey, where their 18th century ancestors moved in the face of European settlement. Scholars and historians universally agree that the RMI descend from the Lenape Tribe. The RMI are recognized as an Indian Tribe by the State of New Jersey. In 1979, they applied for federal recognition pursuant to the Bureau of Indian Affairs ("BIA") acknowledgment regulations at 25 C.F.R. Part 83. The Part 83 regulations require a petitioner to demonstrate, with a reasonable likelihood, that it has maintained a distinct community from historic times, and that its members descend from a historical Tribe or Tribes that combined. BIA refused to recognize the RMI, finding that the Tribe had "Afro-Dutch" ancestry and no Indian ancestry. At oral argument before the Court of Appeals, the BIA conceded that the RMI are Indians, but asserted that the Tribe provided no evidence of descent from the aboriginal Lenape Indians, who are the only Indian tribal group ever to have occupied the region. The Court of Appeals concluded that the BIA had not "clearly erred" in refusing to infer Lenape Tribal ancestry for the RMI. Accordingly, the question presented for review is:

Whether the Bureau of Indian Affairs can deny Tribal descent by dismissing key pieces of evidence under a conclusiveness standard, ignoring reasonable inferences, and discounting each piece of evidence in isolation without regard to the cumulative weight of the evidence.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Page

Other Authorities:

Cited Authorities

Page

TABLE OF APPENDICES

Petitioner RMI respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

The Court of Appeals upheld the decision of the Bureau of Indian Affairs denying Federal recognition as a Native American nation to the petitioner. In so doing, the Court of Appeals acknowledged that the RMI made a "strong argument" that the BIA used the wrong standard of law — conclusive rather than reasonable likelihood — in evaluating the case and the issue of tribal descent. Nevertheless, the Court of Appeals did not decide the threshold issue of proper legal standard of review. Without citing any precedent, the court further found that the BIA was not required to make inferences from the record evidence in ruling on tribal descent. With each piece of evidence isolated and held up to a "conclusive" standard, the BIA erected an unlawful filter and thus determined that the RMI presented "no evidence" of tribal descent. In essence, the Court of Appeals found that the BIA has absolute power in deciding issues of federal recognition and need not adhere to the plain language of its own promulgated regulations or the requirements of established administrative law. Unless this Court intervenes, the 23-year epic struggle of the Ramapough Mountain Indians to claim their rightful heritage and to be federally recognized will tragically end with the rewriting of American history and the administrative genocide of the Tribe.

OPINIONS BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit affirming the Memorandum Opinion and Order of the district court granting summary judgment (Appendix A) is reported at 25 Fed. Appx. 2.

The February 15, 2002 order of the Court of Appeals denying rehearing (Appendix D) is not reported. The Memorandum Opinion and Order of the United States District Court for the District of Columbia granting summary judgment (Appendix C) and the Order of that court denying the Government's motion for correction and clarification (Appendix B) are not reported. The Bureau of Indian Affairs notice of Reconsidered Final Determination (Appendix E) is published at 63 Fed. Reg. 888 (January 7, 1988). The Bureau of Indian Affairs notice of Final Determination (Appendix F) is published at 61 Fed. Reg. 4476 (February 6, 1996).

STATEMENT OF JURISDICTION

On February 15, 2002 the D.C. Circuit Court of Appeals entered its order denying the petition for rehearing in this matter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

25 U.S.C. § 2:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior . . . have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 9:

> The President may prescribe such regulations as he may think fit for carrying into effect the various

> provisions of any act relating to Indian affairs, and for he settlement of the accounts of Indian affairs.

25 C.F.R. § 83.7(e)(1) of the Federal Acknowledgment regulations provides:

> The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity.
>
> (1) Evidence acceptable to the Secretary which can be used for this purpose includes but is not limited to:
>
> * * *
>
> (ii) State, Federal or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
>
> (iii) Church, school and other similar enrollment records, identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
>
> (iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors or present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(v) Other records or evidence identifying present members or ancestors or present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

Additional relevant provisions of 25 C.F.R. Part 83 are reproduced as Appendix G.

STATEMENT OF THE CASE

A. *Background.*

The Ramapough Mountain Indians ("RMI") are a Tribe of 2600 Native Americans living in settlements in and near the Rampough Mountains. There are four core RMI families — Mann, Van Dunk, Defreese, and DeGroat — tracing back to the late 1700's; 98% of the current membership descend from at least two of these four major families. Proposed Finding Against Federal Acknowledgment of the Ramapough Mountain Indians, 59 Fed. Reg. 64662 (December 8, 1993). The BIA's staff Anthropologist concluded that the RMI, has "existed as an isolated community for nearly 200 years." AR000449.[1] The BIA's staff historian concluded that the RMI, "does represent a distinct community with significant continuity from the early 19th century to the present." AR000307. Based on the RMI's very high levels of in-group marriage, the BIA's genealogist concluded, "the RMI consists of a group of people who have lived along the border of

1. Unless otherwise noted, fact citations are to the 30,000-page Administrative Record developed by the BIA in reviewing the RMI's petition and referenced with the "AR" number that the BIA assigned.

northern New Jersey and southern New York State for more than 200 years." AR000461.

Eighteenth century Indian deeds for land sold by Lenape Indians in the Ramapough Mountain area establish that several local Indians had by the 1720's taken the surname, "Manes" (AR006102, 6108), probably derived from the Dutch name "Mannde" (AR006084-87), who was one of the original 17th century Dutch patent holders for the Tappan/Hackensack/Ramapough region (AR006075-79). Certified Genealogist Roger Joslyn determined that the RMI Mann family line descends from these "Manes" Indians.[2] BIA admitted it could offer no alternative ancestors for this line (whether "Afro-Dutch" or otherwise). AR000327.

A Lenape/Tappan Indian named John Defries, who was born about 1735, was listed on the Colonial New York muster rolls during the 1760's in Tappan — located about three to five miles from the Ramapough Mountains. AR006111-20. The BIA instructed the RMI to trace its genealogy to this Tappan Indian in order to prove descent from an Indian Tribe. AR009506. Certified Genealogist Roger Joslyn traced the Defreese line to this Tappan Indian, based on a reasonable likelihood. (Submitted herewith as a Lodging). BIA rejected this link as not being documented with "certainty" (AR009527) and not being "clear" (AR000470).

In 1765, Peter Hasenclever, who managed the Ramapough Mountain ironworks at Ringwood (one of the

2. February 18, 2000 report of Roger Joslyn. Although this report was submitted to BIA subsequent to the agency proceedings, it is based on information contained in the Administrative Record, some of which the BIA did not disclose to the RMI until after the close of the agency proceeding.

three main RMI settlements is in Ringwood, NJ), wrote a letter giving a detailed description of Lenape Indians still living in the Ramapough Mountains. AR006131-32. This letter is significant as it demonstrates that the Lenape had not all left the area by 1758, as asserted by the BIA as a major basis for rejecting the RMI's descent from the Lenape Tribe. AR020179.

Documented RMI ancestors appear in the earliest tax records for the area, dating from the 1770's, with their names grouped together on the various rolls, showing they were living in proximity to each other. Although the tax records do not show exact locations, property deeds dating from the 1820's show that the RMI ancestral settlement was located in the Ramapough Mountains, in an area known as the Green Mountain Valley.[3] In 1827, Victor Jacquemont, a French naturalist, wrote a letter documenting that a community of "mixed race" Lenape/ Delaware Indians were living in that same area. BIA refused to credit the Jacquemont letter as evidence of Lenape descent for the RMI, stating it was not "certain" that he was referring to the RMI ancestors. AR000118.

During the 1870's, Reverend George Ford established a church in the mountains for the RMI ancestors, where he preached to them for four years. He documented that they had "considerable Indian blood coming down from the early days." AR006263-93. Contemporaneously with Ford's ministry, the 1876 centennial history of Bergen County, documented that Lenape Indians — referred to as, "Hackensacky" Indians — still lived in the Ramapough Mountains. The BIA refused to credit Ford's letter or the 1876 history as evidence of Indian or Lenape ancestry for the RMI.

3. Cohen, David, *The Ramapo Mountain People*, (Rutgers University, 1974), pgs. 45-56. Cohen's book, which was the sole source for BIA's contention that the RMI have only Afro-Dutch ancestry, appears in full in the Administrative Record.

In the 1890's, Christian R. Christie (a/k/a "Squire" Christie, 1816-1895), a member of a prominent family that had settled in the area before 1750, documented in an interview that a "semi-civilized race of . . . half Indian" people, with the names, Van Dunk, Mann and Degroat, had lived in the Ramapough Mountains since the time of his grandfather, and descended from the Indians who had lived in the region "before there were records." AR006195. BIA gave no credit to this evidence.

In 1910, linguist Dynley Prince studied the RMI ancestors and identified them as descendants of the Lenape, based on their continued use of a remnant of the historic Lenape language known as "Jersey Dutch," which had died out years earlier. AR000290, 423. In 1911, Alanson Skinner, a well-respected anthropologist and curator of the NY Museum of Natural History, documented Charles Mann, an RMI ancestor, as a Lenape descendent. AR006385. In 1911, world-renowned Anthropologist and expert on the Lenape, Dr. Frank Speck, documented that the RMI community dated to before the Revolutionary War and was descended from Lenape Indians. AR006344. The Vineland Study, a study of the RMI by the State of New Jersey, identified numerous RMI ancestors as Indians descended from the historic Lenape tribe. AR006536-41, 22315. This finding was affirmed by the State Colony of New Jersey, another N.J. State institution. AR006364.

An official 1947 Federal report from the Smithsonian Institution written by anthropologist William Harlem Gilbert, Jr. entitled, "Surviving Indian Groups of the Eastern United States," documents that the RMI are descendents of the Lenape Indians. AR006391-92. This Federal report identifies the family names of DeGroat, De Vries, Mann, and Van Dunk as historic RMI families. AR006395. During the 1970's, the State of New Jersey officially recognized the RMI as an Indian Tribe.

During the petitioning process, Certified Genealogist Roger Joslyn prepared an extensive genealogical study of the RMI, demonstrating their descent from the Lenape. His conclusions are set forth in the Lodging.

The preceding discussion represents only the briefest overview of some of the evidence of descent presented by the RMI in its recognition petition, and included in the 30,000-page Administrative Record before the BIA.

B. *The Acknowledgment Process.*

Historically, Congress, Courts and the BIA have all exercised the power of recognizing Indian Tribes. *Cherokee Nation of Oklahoma v. Babbitt,* 117 F.3d 1489 (D.C. Cir 1997); *Mashpee Tribe v. New Seabury Corp.,* 592 F.2d 575 (1st Cir. 1979); *Montoya v. United States*, 180 U.S. 261 (1901). Prior to 1978, the BIA made determinations of federal recognition on an *ad hoc* basis. *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 42 (2001). In 1978, the Department of the Interior promulgated its Part 83 regulations governing the acknowledgment of Indian Tribes. 25 C.F.R. Part 83. As authority for these regulations, the Department relies on its general delegation of authority over Indian affairs from Congress, 25 U.S.C. §§ 2 & 9. The acknowledgment regulations require that a petitioning group be identified by outsiders as an "Indian" entity, and also require a detailed examination of a petitioning Indian group's community, political leadership, and descent from an historical Tribe or Tribes that combined, from the time of first sustained White contact until modern times. 25 C.F.R. § 83.7. Under the regulatory process, the BIA's technical staff — the Branch of Acknowledgment and Research ("BAR"), composed of historians, anthropologists and genealogists — evaluate a petition, make technical findings and submit a report to the Assistant Secretary who then signs the final recognition decision.

The legal test to be applied in the process of evaluating petitions and rendering decisions is that of "reasonable likelihood." 25 C.F.R. § 83.6(d). *Greene v. Babbitt*, Case No. Indian 93-1, pg. 18, August 31, 1995 (Torbet, ALJ) ("if the Petitioners have by a simple preponderance of the reliable, probative and material evidence made a case which taken as a whole tends to show the truth of the Petitioners allegations, then they are entitled to recognition"). BIA's rules state, "Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met." 25 C.F.R. § 83.6(d). The Department revised its Part 83 regulations in 1994, in part to address disparities arising from the tendency of historical identifications to deny Indian ancestry. 59 Fed. Reg. 9280, 9286 (February 25, 1994).[4]

C. *The Administrative Proceedings Below.*

On August 14, 1979, the RMI filed with BIA a notice of intent to petition for federal recognition under the Part 83 procedures. The RMI conducted extensive research and submitted a petition. On March 5, 1992, BIA placed RMI's "revised" petition on "active consideration."[5]

---

4. In many historical identifications, Indians were referred to simply as "colored," along with other non-White individuals.

5. Throughout the period of active consideration, representatives of Atlantic City casino gambling interests put enormous pressure on the BIA against recognizing the RMI as an Indian Tribe on the basis that if recognized, the RMI might seek to pursue a gambling enterprise that would create economic competition to Atlantic City gambling businesses. The RMI had begun the process of seeking BIA recognition years before the 1986 passage of the Indian Gaming Act that legalized Indian gaming.

On December 8, 1993, BIA issued a Proposed Finding, asserting that the RMI had failed to meet four of the seven mandatory criteria—community, political authority, descent from a Tribe, and viewed as an Indian entity.[6] On April 22, 1994, the RMI invoked its right pursuant to 25 C.F.R. § 83.3(g) to have its petition considered under the revised rules. On January 6, 1996, the BIA issued a Final Determination stating that the Tribe had failed to satisfy *three* of the seven mandatory criteria — community, political authority, and descent — and finding that the RMI had met the community and political authority criteria for the period 1870 to 1950.

The RMI appealed the negative determination to the Interior Board of Indian Appeals ("IBIA"). On January 18, 1997, IBIA affirmed BIA's decision, but asked the Secretary to reconsider four issues raised by the RMI. On January 7, 1998, the Secretary issued a Reconsidered Final Determination, affirming and "correcting" the BIA's Final Determination.

D. ***The Judicial Proceedings Below.***

The RMI appealed the final agency action to the United States District Court for the District of Columbia. The RMI's complaint contended that the BIA had acted arbitrarily, capriciously and in violation of law and Constitutional right. As a remedy, the RMI asked the District Court to grant it recognition. At oral argument, Judge Robertson indicated he did not believe he had authority to recognize the RMI himself,

6. This proposed negative determination had been announced by representatives of Atlantic City casino gambling interests (then-Congressman Robert Toricelli) several weeks earlier, on November 17, 1993, three weeks before it was signed by the Assistant Secretary.

but expressed his agreement that if he did remand the case to BIA, BIA would, after several more years, simply rubberstamp its earlier decision and the case would return to District Court.[7] The District court asked the RMI "would you want to be sent back to the BIA? Or do you want something in a posture that would enable you to take it to the Court of Appeals." *Id.* Ultimately, the court found that it lacked authority to recognize the tribe and issued an "appealable" order so the Court of Appeals could decide the matter.

In affirming the decision of the agency to deny recognition the District Court adopted BIA's findings, including its findings that the RMI was unable to prove descent. Nevertheless, the court observed that the BIA may have "rejected a great deal of information based on its own lack of knowledge about Native American history." Appendix C.

The Court of Appeals summarily affirmed BIA's "no descent" finding, although it did observe in dicta that RMI had made a persuasive case that BIA probably had failed properly to evaluate the community and political authority criteria, among other problems. During oral argument, BIA conceded that the RMI are Indians — "The Court: So the question of whether they're Indians at all is not on the table . . . They won that . . . Is that right? — Mr. Bryson: That's right." However, the Court uncritically and without analyzing the overwhelming evidence of descent in the record, accepted BIA's impossible burden of proof standard.

7. Transcript of Oral Argument, pg. 95-96 (RMI "has told me that a remand would be devastating; and I can well understand that a remand would be devastating because it would send this back to the BIA . . . it may very well be that if they just relooked at it through a different legal lens, they would come out the same way and it would be several years down the pike and everybody would still be waiting.")

REASONS FOR GRANTING THE WRIT

A. BIA IMPOSED AN IMPOSSIBLE BURDEN OF PROOF IN CONFLICT WITH THIS COURT'S DECISION IN *ALLENTOWN MACK SALES v. NATIONAL LABOR RELATIONS BOARD*

1. BIA Required Clear and Convincing Evidence where the Rules only Require Preponderance of the Evidence.

Although it is undisputed that the rules require the BIA to apply a "reasonable likelihood" standard (25 C.F.R. § 83.6(d)), in this case there is clear record evidence that the BIA applied a "conclusiveness" standard of review. This standard was *specifically* applied to the issue of tribal descent, and used by BIA to dismiss pivotal pieces of evidence. For example, in articulating her overall negative proposed finding with regard to criterion (e), Tribal descent, the Assistant Secretary concluded, "there is no *conclusive* evidence that these families are Indian, are 'of Indian descent' or have any affiliation with the tribes who resided in the New York-New Jersey area at the time of historic contact." AR000303 (emphasis added). Although the Assistant Secretary removed the word "conclusive" from her Final Determination, and stated that she was making her decision under the "reasonable likelihood" test, she failed to explain how the change in standard of review altered her analysis of the evidence. In fact, except for the word "conclusive" her analysis remained the same. AR000085, 88. Moreover, the BIA technical report accompanying the Final Determination, still expressed use of the conclusive standard in addressing whether the RMI ancestors were living in the Lenape/Delaware Indian community documented by Victor Jacquemont in 1827, concluding, "it is not *certain* that this was the case." AR000118 (emphasis added).

The District Court found the staff's use of the illegal "conclusive" standard "disturbing" but not persuasive, observing that the "BIA's Final Determination clearly states that the reasonable likelihood standard was applied overall." Appendix C, pg. 14a. In ending the analysis based on the standard that the Assistant Secretary *said* she applied, without analyzing what standard she *did* apply, the District Court failed to complete the review required under *Allentown Mack Sales v. National Labor Relations Board*, 522 U.S. 359, 375 (1998), where this Court stated, "The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by . . . agency personnel . . . , and effective review of the law by the courts." Having promulgated regulations governing federal recognition the BIA is required to adhere to the requirements of those regulations. *Miami Nation of Indians v. United States*, 2001 U.S. App. LEXIS 13277 (7th Cir. 2001).

The Court of Appeals acknowledged that the RMI made "strong arguments" regarding the application of the wrong standard of law by the BIA, but declined to rule on that issue, noting that the RMI had presented "no evidence" of Tribal descent based on BIA's assertions to the court. Appendix A. The Court's reasoning suffers from circularity — a primary reason that the BIA was able to find "no evidence" of tribal descent was *because* BIA had applied an impossible and illegal standard in rejecting the RMI's evidence. The Court of Appeals failed to perform the minimum task of judicial review when it accepted uncritically BIA's impossible burden standard, failing to discuss the many items of descent evidence presented to the BIA and discussed by RMI in its briefs.

2. BIA Examined and Rejected Each Piece of Evidence in Isolation and Failed to Credit the Cumulative Weight of the Evidence.

The RMI's petition relies on numerous different pieces of evidence that corroborate each other and combine to demonstrate that the RMI meet the descent criterion — there is no single piece of evidence that makes the entire case. For example, the same individuals (and their descendants) living in the RMI Green Mountain Valley community at the time Victor Jacquemont documented Lenape Indians in the area in 1827, also appear on the rolls of Reverend Ford's church in the 1870's, were found to be Lenape descendants by the Vineland Study in 1911, and are mentioned by name in the Smithsonian Report during the 1940's. BIA, however, never analyzed how each separate piece of evidence corroborates and supports the other pieces, but instead simply assessed each piece separately, determined it provided no evidence of descent and dismissed it. This violates established law and the BIA's rules. § 83.6(d); *Greene v. Babbitt*, Case No. Indian 93-1, pg. 18, August 31, 1995 (Torbet, ALJ) (evidence must be reviewed "as a whole"). *See, e.g., Dickerson v. Zurko,* 527 U.S. 150 (1999); *Bourjaily v. United States*, 483 U.S. 171, 180 (1987) ("a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.").

BIA stated its untenable rule of law to the District Court as follows: "Items of evidence which individually provide no evidence of tribal descent cannot, when considered cumulatively, provide reliable evidence of tribal descent."[8] The District Court refused to address this issue, asserting, "Evaluation of an agency's decision against the 'arbitrary and capricious' standard does not require analysis of whether, and how, the agency treated

8. BIA Reply Brief to District Court, pg. 45 (June 30, 2000).

each piece of evidence, or whether it properly used one piece of evidence to corroborate another." Appendix C, pg. 24a. The District Court was mistaken. This issue requires a hard look *de novo* as it involves the BIA's failure to follow its own rules requiring consideration of the evidence "as a whole". 5 U.S.C. § 706(2)(D); *Allentown Mack Sales*, at 374 ("it is hard to imagine a more violent breach of [the reasoned decision-making requirement] than applying a . . . standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly amend it.")

It was only by refusing to credit the cumulative weight of RMI's evidence that BIA could find, and the courts below could uncritically accept, that RMI had presented *no evidence* of descent. In adopting BIA's contention on this pivotal matter and issuing a ruling based on BIA's invalid finding — i.e., RMI had no evidence of descent — the Court of Appeals implicitly approved BIA's failure to follow established law requiring consideration of the evidence as a whole.

3. BIA Refused to Make Reasonable Inferences Based on the Evidence.

This Court has held that an administrative agency *must* accept all inferences the evidence fairly demands — an agency "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands. 'Substantial evidence' review exists precisely to ensure that the [agency] achieves minimal compliance with this obligation, which is the foundation of all honest and legitimate adjudication." *Allentown Mack Sales*, at 378-379. BIA however refused to

make reasonable inferences from the evidence before it. For example, the combination of Reverend Ford's identification of the RMI mountain community of the 1870's as "Indian", in conjunction with the 1876 Bergen County history documenting "Hackensacky" Indians — which was a band of the Lenape — in the mountains, leads to a reasonable inference that the RMI were Lenape Indians. The fact that Lenape Indians are the only Indians ever to have occupied the area, demands a similar inference. BIA's refusal to make these inferences is indefensible under *Allentown*, particularly in light of the fact that there is *no contrary evidence in the record* that might dispel these inferences.

The Court of Appeals upheld BIA's refusal to make reasonable inferences, in violation of *Allentown*, stating, "this court cannot conclude that the Secretary . . . clearly erred in refusing to make the inference[s] urged by RMI. . . ." Appendix A, pg. 2. The Court of Appeals' failure to require BIA to make reasonable inferences was clear error, as was its review of this issue under the *clearly erroneous* standard.

Part of the basis for BIA's refusal to credit the Lenape ancestry of the RMI was its erroneous contention that all of the Lenape had been *removed* by the so-called Treaty of Easton in 1758. AR000284; AR020179. The RMI demonstrated to the courts below that the Treaty of Easton was not a removal document. But even with this fundamental flaw in the BIA's reasoning revealed, the Court of Appeals still declined to require the BIA to make reasonable inferences, and uncritically adopted BIA's assertion that there was "no" evidence of descent among the 30,000-page Administrative Record.

4. BIA Imposed Non-Existing "Earliest Ancestor" and Primary Source Rules.

On the plain face of BIA's rules, the descent criterion can be established with evidence that "present members or ancestors of present members" have been identified as descending from a historical Indian Tribe. § 83.7(e)(1)(i)-(v). Of particular significance under the rules are Federal or State reports. § 83.7(e)(1)(ii). Thus, the 1940's Smithsonian Report that names particular RMI family lines and identifies the RMI as a continuation of the historical Lenape tribe, should be counted as significant evidence of descent. BIA gave no credit to the report, and instead demanded that the RMI provide primary source evidence contemporaneous with its earliest 18th century ancestors identifying those individuals as members of a historical Indian tribe. AR000085, 88. In other words, BIA demanded an 18th century base roll, similar to those made by Federal agents for many western tribes during the late 19th century.[9] This requirement clearly violated the plain language of the descent criterion; the BIA's decision must be reversed under *Allentown*. While the District Court specifically upheld the BIA's use of its ersatz primary source rule, the Court of Appeals observed, "We agree that RMI has presented strong arguments regarding the Secretary's . . . occasional application of a primary-source rule. . . ." Appendix A. As noted, however, the Court of Appeals still upheld the BIA's decision based BIA's finding, uncritically adopted by the court, of "no" evidence of descent. The court's ruling suffers from circularity — i.e., BIA used the improper primary source and earliest ancestor rules to reject RMI's evidence of descent. Thus, BIA's use of these unlawful rules was clear error.

---

9. BIA Brief to Court of Appeals, pg. 33-34.

5. BIA Ignored Established Laws of Descent.

The decision of the Court of Appeals is particularly egregious because it allows the BIA to ignore long established legal precedents embodied in the BIA's own regulations and interpretative public notice and to rewrite the law of descent as applied to Native Americans. BIA states in the RMI case, "[T]he standards used by the BIA to evaluate evidence do not differ from those universally accepted by genealogists" (AR000111). According to the BIA "these are the rules of evidence applied in court proceedings involving pedigree, ancestry or heirship cases . . ." (AR000113). However, these legal precedents were ignored by the agency in its finding of "no evidence" of tribal descent.

In sharp contrast to its actual *use* of a "conclusive" standard in reviewing RMI tribal descent, the BIA pays lip-service to the truth that in establishing descent, "CONCLUSIVE PROOF is not possible . . . It is impossible to "prove" ancestry to an absolute certainty." AR000112. BIA nonetheless went on to reject evidence of descent, observing that BIA cannot base its decision on "hearsay," or traditional evidence. AR006672-74. It is universally understood by genealogists that virtually all available genealogical documentation is in fact "hearsay" (AR000113). This hearsay evidence is acceptable under all established legal precedents and should have been given strong probative weight by the BIA. *Fulkerson v. Holmes*, 117 U.S. 389, 397 (1886). *See also Ware v. Beach,* 322 P.2d 635, 639-640, *cert. denied*, 358 U.S. 819 (1958). ("Evidence as to the general reputation in the community concerning the race of a member of the community is competent.") Federal Rules of Evidence, Rule 803(19) authorize evidence of heritage based on "Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's . . . ancestry, or similar fact

or personal or family history." Likewise, evidence of heritage is acceptable under Rule 803(21) based on "Reputation in a community, arising before the controversy, as to . . . reputation as to events of general history important to the community or State or nation in which located."

The RMI presented numerous family, eyewitness and historical accounts of "ancestors of present tribal members" as being Lenape descendants. Moreover, these descendents traced back to the "first known" RMI ancestors. However, the BIA systematically and unlawfully rejected this strong evidence of descent under criterion (e) because it was based on "hearsay" and/or failed to prove the issue of descent "conclusively." Given, the clear error of the Court of Appeals in allowing the BIA to ignore the law of descent as embodied in its own regulations and interpretive guidelines (Appendix H), this Court should intervene. *United States v. Mid-Continent Petroleum Corp.*, 67 F.2d 37, 45 (10th Cir. 1947) (General reputation evidence is not only acceptable, but is highly credible).

6. BIA Imposed a Higher Burden of Proof on RMI for Establishing Indian Ancestry than BIA Used for Finding Afro-Dutch Ancestry.

While BIA rejected Lenape descent for the Defreese line based on what it found to be a one generation gap between the Tappan/Lenape Indian John Defries and subsequent RMI ancestors, BIA applied a much more lenient standard to identify African ancestry for the Tribe. For example, BIA offered two possible alternative ancestors for the Defreese line: "a Dutch sea captain (Jan de Vries), and a 'free Negro' (John DeVries)" and asserted that these were "equally possible" ancestors.[10] This observation makes no sense, and violated genealogical

10. BIA Brief to Court of Appeals, pg. 36.

methodology. BIA failed to disclose that the Dutch sea captain was living in New York City during 1640-1650, a century earlier, while the "free Negro" was living in New York City in 1703, and there is no evidence that either of them or their descendants ever migrated to the Ramapough mountain area. AR000470. Similarly, in the Van Dunk line, BIA was perfectly willing to bridge a multiple-generation gap back to a New York City "free Negro" on 17th century records. AR006538. BIA's use of this double standard imposes an invalid racial distinction, and must be rejected.

B. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWERS BECAUSE OF THE OVERWHELMING IMPORTANCE OF THE ISSUES PRESENTED BY THIS CASE.

The RMI petition is only the third case to reach the appellate stage under the BIA's acknowledgment rules. There are several hundred petitions pending before BIA, most of which will likely be appealed to the Federal Courts because of the importance of Federal recognition and the chaos that characterizes the decision-making process at BIA.

The court in the Samish Indian Tribe case criticized BIA's decision-making process as biased and unreliable, and ordered special independent fact-finding procedures and heightened due process on remand, ultimately leading to Tribal recognition. *Greene v. Babbitt*, No. C89-645Z (Dist. Ct. W.D. Wash. October 15, 1996). During on-the-record testimony on remand, the BIA admitted it consistently applied an unlawfully burdensome standard of proof. *Greene v. Babbitt*, Case No. Indian 93-1 (1995).

The General Accounting Office recently concluded that the BIA's recognition process is seriously flawed.[11] Among the GAO's findings was that the BIA "continues to struggle with the question of what level of evidence is sufficient to meet criteria in recognition cases. The lack of guidance . . . creates controversy and uncertainty . . ." GAO Report, at 10. The Report also found that while the agency states that it "will continue to apply the precedents established in past decisions . . . it is not clear what they are or how that information is made available to petitioners." GAO Report, at 14. The GAO report was prompted in large part by local citizens and various states who believe that the BIA's recognition process lacks standards and thus has lead to a number of tribes being recognized primarily because they have deals with casino interests. The current Assistant Secretary for Indian Affairs, Neal McCaleb, has acknowledged that the process is flawed and has made it a goal to improve "this important federal function to serve Indian tribes." *Id.*

During 2000, the previous Assistant Secretary, Kevin Gover, testified to Congress that BIA's recognition process is irreparably broken, and asked Congress to take away BIA's authority to recognize Tribes and lodge it with an independent Commission.[12] Congress has struggled for years, and has been unable to come up with any alternative. It is undisputed that the BIA process has broken down with inconsistent and prejudged decisions outside the legal standards of the APA. *See United States Of America v. 43.47 Acres of Land, United*

11. United States General Accounting Office, GAO-02-49, "Improvements Needed in Tribal Recognition Process", November 2001, "GAO Report".

12. "Tribes and Tribulations: BIA Seeks to Lose a Duty," Washington Post, June 2, 2000, pg. A31.

States District Court for the District of Connecticut, 2000 U.S. Dist. LEXIS 14289 (D.C. Conn. 2000) "Mr. Gover, (Assistant Secretary Indian Affairs) who is in charge of the recognition process, admitted that the BAR process has broken down and he admitted that the current administration would be unable to reform it.")

John A. Shapard, Jr., the former BAR Chief and principal author of the Part 83 regulations, has stated that the RMI petition is one of the strongest ever presented (AR006761), and that BAR staff were biased against the RMI based on a hidden policy preference, expressly contrary to the no minimum blood quantum rule, that the RMI are not sufficiently "Indian" to deserve formal Federal recognition due to a perception that they have mixed-race ancestry.[13]

Shortly after the final decision on the RMI petition, BIA abandoned the BAR staff's unfair dual role of judge and adversary inflicted on RMI, by conceding that the staff should no longer compile lengthy technical reports in an effort to rebut petitioner's submissions, but should base decisions on outside submissions alone. 65 Fed. Reg 7052 (February 11, 2000). *See also* "Why Does it Take So Long?: Federal Recognition and the American Indian Tribes of New England, by Jack Campisi and William Starna, *Northeast Anthropology*, No. 57 (Spring 1999):

> The criteria that appear in the regulations . . . are so imprecise as to be unusable in any legitimate anthropological or historical analysis; . . . the professional staff [at BAR] was not in the past, and is not today, sufficiently knowledgeable or

13. Declaration of John A. Shapard, Jr., July 27, 2000.

> suitably trained to make competent decisions regarding the status of American Indian communities; and . . . the application of the criteria by these same staff members has been idiosyncratic and often contradictory.

After more than twenty years of a failed federal recognition process the time is ripe for this Court to address the appropriate standards of agency review in these cases of great national importance. The decisions of the District Court and of the Court of Appeals are so overly deferential that the BIA will have almost unlimited power in rejecting or recognizing tribes if this Court does not act.

BIA used the impossible burden of proof standard against the RMI in an attempt to achieve administrative genocide. Such absolute power in the hands of the BIA in recognition decisions has the inevitable result of granting and denying recognition based solely on political influence, economic (e.g., gambling) concerns, and invalid racial classifications. This Court should intervene to address the appropriate standard for agency and court review of recognition cases. The Court's decision in this case will have far reaching consequences, eventually impacting hundreds of petitioning tribes, millions of local citizens and numerous states concerned with that the recognition process should function in a fair, orderly and reliable manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. MOODY
Counsel of Record
1101 30th Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 298-4766

ALBERT J. CATALANO
MATTHEW J. PLACHE
CATALANO & PLACHE PLLC
3221 M Street, N.W.
Washington, D.C. 20007
(202) 338-3200

Attorneys for Petitioners

APPENDIX