



INTERIOR BOARD OF INDIAN APPEALS

In re Federal Acknowledgment of Match-e-be-nash-she-wish Band
of Pottawatomi Indians of Michigan

33 IBIA 291 (05/21/1999)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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IN RE FEDERAL ACKNOWLEDGMENT OF THE MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS OF MICHIGAN

IBIA 99-34-A

Decided May 21, 1999

Request for reconsideration of a final determination to acknowledge an Indian tribe.

Dismissed. Four issues referred to the Secretary of the Interior.

1. Indians: Federal Recognition of Indian Tribes: Acknowledgment

A person who satisfies the definition of "interested party" in 25 C.F.R. § 83.1 may file with the Board of Indian Appeals a request for reconsideration of a final determination to acknowledge or not to acknowledge an entity as an Indian tribe, regardless of whether that person participated in the original proceedings before the Assistant Secretary - Indian Affairs.

APPEARANCES: Dennis J. Whittlesey, Esq., Washington, D.C., for the City of Detroit; Barbara N. Coen, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Assistant Secretary - Indian Affairs; Conly J. Schulte, Esq., Omaha, Nebraska, for the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The City of Detroit (City) filed a request for reconsideration of the Final Determination of the Assistant Secretary - Indian Affairs (Assistant Secretary) to Acknowledge the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan (Band). The Final Determination was published at 63 Fed. Reg. 56936 (Oct. 23, 1998). For the reasons set forth below, the Board of Indian Appeals (Board) dismisses this request for reconsideration of the Final Determination, but refers four issues to the Secretary of the Interior (Secretary) pursuant to 25 C.F.R. § 83.11(f)(2).

Background

The Band presents a relatively succinct statement of the background facts of this case, from which the Board quotes.

On June 24, 1992, the Band submitted to the BAR [Branch of Acknowledgment and Research, Bureau of Indian Affairs (BIA)] a letter of intent requesting acknowledgment that it exists as an Indian Tribe, in accordance with 25 C.F.R. Part 83. On May 14, 1994, the Band submitted a documented petition for federal acknowledgment. On December 24, 1996, the Band's petition was placed on active consideration, in accordance with 25 C.F.R. § 83.10(d). On July 16, 1997, the Assistant Secretary * * * published notice of his proposed finding to acknowledge that the Band exists as an Indian Tribe within the meaning of federal law. 62 Fed. Reg. 38,113 (July 16, 1997). In accordance with 25 C.F.R. § 83.10(i) the Assistant Secretary published notice that any individual or organization wishing to comment on the proposed finding was to submit * * * comments, arguments, and evidence within one hundred eighty (180) calendar days from the publication of * * * notice.

On the last business day prior to the close of the 180 day period, BAR * * * received a letter from * * * Counsel for the City * * *, stating:

The City * * * requests an extension of the comment period of thirty (30) days so that it may complete its analysis and comments on the petition and your staff's proposed positive determination.

The [BAR] has accepted the role in the acknowledgment process of what is known as an "Interested Party" and we believe that the City * * * clearly falls within that category, as recognized by BAR.

In its capacity as an Interested Party, the City respectfully submits that it is entitled to a fair opportunity to review and comment on the proposed determination. The concerns of the City arise from the recently-disclosed fact that the * * * Band intends to seek lands for gaming in the Detroit area, despite the fact that its traditional lands were identified in its petition materials and by BAR and the proposed determination as being far to the north. Because of the geographical distance between the Tribe and the City, [the City] was unconcerned with the proposed determination.

However, given the [Band's] current plans to assert rights to lands in the Detroit area, the City clearly will be affected by the final positive determination and seeks time in which to assess the merits of the petition and validity of the proposed findings in favor of federal acknowledgment.

(January 8, 1998 letter * * *). Prior to January 8, 1998, the City * * * had not requested to be either an Interested Party or an Informed Party concerning the Band's petition, nor had [the City] participated * * * in the acknowledgment process.

On the final day of the comment period, January 12, 1998, [the City] submitted comments to the BAR * * *.

* * * * *

[The City's] request for an extension of the comment period was not granted. * * * [The City] did not object to--or appeal from--the denial of its request to extend the regular comment period.

On September 10, 1998, * * * [the] Director of the Office of Tribal Services, [BIA,] sent a letter to [counsel for the City] stating:

The City * * * is not an Interested Party within the meaning of 25 C.F.R. 83.1, but is an Informed Party. The City * * * has not demonstrated that it has a legal, factual or property interest in an acknowledgment determination. "Interested party" includes the Governor, Attorney General of the State in which a petitioner is located, and may include certain local governmental units, and any recognized Indian Tribes and unrecognized Indian groups that may be affected by an acknowledgment determination.

The [Band] is located on the western side of Michigan in Allegan County, with nearby local governmental units such as Bradley, Allegan (the County Seat), Grand Rapids (approximately 20 miles to the north), and Kalamazoo (approximately the same distance to the south). None of these local towns or cities have requested interested party status. The City of Detroit is located on the eastern side of Michigan and is 142 miles from Kalamazoo, and 158 miles from Grand Rapids. A distant jurisdiction seeking Interested Party status based solely on conjectured claims about

possible future actions does not fall within the definition of Interested Party in 25 C.F.R. 83.1.

* * * Following receipt of this letter, [the City] did not notify BAR, BIA, or the Assistant Secretary of any objection to its status as an Informed Party, nor did [the City] appeal from the Informed Party determination * * *.

On October 23, 1998, the Assistant Secretary * * * published notice of the final determination to acknowledge the [Band]. 63 Fed. Reg. 56936 (Oct. 3, 1998) * * *. In the BIA technical report accompanying the Final Determination, the BIA * * * analyzed each of the comments submitted by [the City] * * *.

Band's Brief at 2-4.

On January 15, 1999, the Board received a request for reconsideration of the Final Determination from the City. In an order dated January 19, 1999, the Board noted that it had "not considered interested party status in terms of standing to petition for reconsideration of an acknowledgment decision," and allowed briefing on the question of whether the City was an "interested party" within the meaning of 25 C.F.R. § 83.11(a)(1). Briefs have been received on that question from the City, the Band, and the Assistant Secretary. 1/

Discussion and Conclusions Interested Party Status

Acknowledgment determinations are governed by regulations in 25 C.F.R. Part 83. 25 C.F.R. § 83.11(a)(1) provides in pertinent part that "the petitioner or any interested party may file a request for reconsideration" of the Assistant Secretary's final determination on acknowledgement. "Interested party" is defined in 25 C.F.R. § 83.1 as follows:

[A]ny person, organization or other entity who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general

1/ As the Assistant Secretary notes at footnote 1, page 1, of his brief, the preamble to the 1994 revision of 25 C.F.R. Part 83 states: "The [BIA] under the regulations does not participate as an active party [on reconsideration] opposing or supporting the submissions of petitioner or interested parties or defending the determination." 59 Fed. Reg. 9280, 9292 (Feb. 25, 1994). The question of the City's status for purposes of 25 C.F.R. § 83.11(a)(1) involves an issue of regulatory interpretation. The Assistant Secretary was therefore included in the Board's order for briefing on interested party status.

actions regarding a specific petitioner. “Interested party” includes the governor and attorney general of the state in which a petitioner is located, and may include, but is not limited to, local governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination.

Section 83.1 defines “informed party” to mean “any person or organization, other than an interested party, who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner.”

The City bases its argument that it is an interested party in this matter on statements which were allegedly made toward the end of the acknowledgment proceeding before BAR “by the [Band] and its business partners that the [Band] intended to acquire land in the Detroit Metropolitan Area for the purposes of developing a casino.” Request for Reconsideration at 1-2. It acknowledges that “[p]rior to that time, [it] did not have interested party status since the [Band] had identified its traditional occupancy area as far from the City, and there had been no disclosures to the City of the Band’s intentions to relocate to land within the City’s urban area.” Id. at 2. The City argues that the disclosure of the Band’s intentions “clearly established the City’s status as an interested party, since the regulations specifically define the term as including ‘local governmental units. . .that might be affected by an acknowledgment determination.’ (25 C.F.R. §83.1).” Id.

The Board first considers an argument raised by the Band which, if accepted, would obviate the need to address the City’s contentions.

The Band argues:

[T]he Board should rule that a Request for Reconsideration can only be *initiated* by a Tribal Petitioner, the governor or attorney general of the state in which a petitioner is located, or a third party that has previously been granted Interested Party status. Such a ruling would carry out the intent of the 1994 revisions [to Part 83] (to provide a faster and improved process) by encouraging third parties to resolve status issues early on in the acknowledgment process. Such ruling would also serve to protect Tribal Petitioners from potential abuse of the reconsideration process by non-interested third parties who would file a petition for reconsideration solely to delay the effect of a final positive determination.

Band’s Brief at 7-8.

The Band apparently bases its understanding of “the intent of the 1994 revisions” on a statement in the summary section of the preamble to the revision to the effect that the changes

were “intended to provide a faster and improved process of evaluation” of acknowledgment petitions. 59 Fed. Reg. at 9280.

In addition to the summary section, the preamble contains an extensive discussion specifically addressed to comments received on the proposed definition of “interested party.” In responding to comments that third parties should not be permitted to participate in acknowledgment proceedings, the Department stated:

Particular concern was expressed that interested parties might be able to delay the effective date of an acknowledgment determination without sufficient reason.
* * *

* * * [T]he Department’s position is that parties which may have a legal or property interest in a decision, such as recognized tribes or non-Indian governmental units, must be allowed to participate.

59 Fed. Reg. at 9283.

It appears that one goal of the revision of Part 83 was to speed up the processing of acknowledgment petitions. However, with full knowledge that participation by third parties would undoubtedly slow the process, the Department decided that it would not make acknowledgment determinations without considering the concerns of third parties. The Board finds that the Band places too much emphasis on the sentence in the summary section of the preamble.

[1] More importantly, the Board has previously rejected the substance of the Band’s argument. In In re Federal Acknowledgment of the Golden Hill Paugussett Tribe, 32 IBIA 216 (1998), the Board repeated a holding it made in a March 25, 1997, interim order concerning participation by interested parties in a reconsideration proceeding. That holding was addressed to “an argument made by the Assistant Secretary that, in order to be an interested party before the Board, a person must have requested interested party status when the acknowledgment petition was pending before the Assistant Secretary.” 32 IBIA at 219. The Board stated:

The definition of “interested party” in 25 C.F.R. § 83.1 does not contain the limitation advocated by the Assistant Secretary. Nor does the Assistant Secretary identify any provision in the regulations that would put potential interested parties on notice that they are required to enter the acknowledgment proceedings by a certain point in the proceedings or lose any right to participate in the future.

Moreover, the preamble to the final regulations clearly recognizes that the Board may determine “interested parties” for purposes of reconsideration proceedings before the Board: “The Assistant Secretary and the [Board], respectively,

will determine which third parties qualify as interested parties in the formal meeting and the process of review of requests for reconsideration.” 59 Fed. Reg. 9283 (Feb. 25, 1994). This statement evidences no intent to limit the Board’s authority to determine interested parties in the manner suggested by the Assistant Secretary.

Id.

The Band has made no argument which convinces the Board that its analysis in Golden Hill was incorrect or that that analysis is not applicable to the situation in which a person seeks interested party status for purposes of filing a request for reconsideration.

As a practical matter under the particular circumstances of this case, the City has stated that it did not consider itself an interested party “early on in the acknowledgment process.” It argues that it acquired interested party status only when statements were made late in the process about the Band’s intentions in regard to the acquisition of land in trust. The Band does not dispute the City’s assertions concerning the timing of the statements. Neither has it explained how the City could have resolved its status before it was aware that it might be an interested party. ^{2/}

The Board rejects the Band’s argument that only persons who were granted interested party status before the Assistant Secretary should be considered interested parties for the purpose of filing a request for reconsideration.

The Assistant Secretary makes an argument which appears to have some elements in common with the argument just addressed. This argument is that the City never actually requested interested party status during the acknowledgment proceedings before BAR, but instead belatedly claimed to be an interested party and stated its intention to participate. To the extent that this argument may include assertions that the City acted too late and/or that it was not an interested party before BAR, the Board rejects the argument for the reasons just discussed. To the extent that the argument makes assertions concerning what form a “request” for interested party status must take in acknowledgment proceedings before BAR, the Board finds the discussion not relevant to the decision it is called upon to make.

The Board turns to the question of whether the City is an interested party here.

^{2/} Certainly, if a third party knows or should know early in the acknowledgment process that it is probably an interested party, it would be to the benefit of all concerned, including the third party, for that party to begin its participation at an early point. Nevertheless, as the Board noted in Golden Hill, the regulations do not contain a time restriction on participation by third parties.

The City and the Band devote large portions of their briefs to debating the Band's alleged intention to attempt to acquire land in trust for gaming purposes within or near the Detroit Metropolitan Area. ^{3/} The Board finds most of this debate unproductive in resolving the issue before it. The City bases its claim that it is an interested party on public statements made by the Band and/or others in a business relationship with the Band that the Band intends to attempt to acquire land in trust in the Detroit Metropolitan Area. The Band, although denigrating those statements, does not deny that the statements were made, that it has had such an intention, or that it continues to have such an intention. The Board finds that there is sufficient evidence before it to conclude that the Band has been considering attempting to acquire land in trust within or near the Detroit Metropolitan Area.

The City focuses its argument that it is an interested party on the second sentence of the definition of "interested party," arguing that a local governmental unit may be an interested party if it "might be affected by an acknowledgment determination." The Assistant Secretary and the Band rely on the first sentence of the definition, arguing that, in order to be an interested party, a local governmental unit must establish "a legal, factual or property interest in an acknowledgment determination." The City's argument appears to be supported by the preamble to the final rule, which states: "[T]he Department's position is that parties which may have a legal or property interest in a decision, such as recognized tribes or non-Indian governmental units, must be allowed to participate." 59 Fed. Reg. at 9283.

Neither the regulations nor the preamble explains what is meant by the phrase "legal, factual or property interest in an acknowledgment determination." Arguably only the group seeking acknowledgment would have a "legal, factual or property interest" in the acknowledgment determination per se. Clearly, however, other entities or individuals might have an interest in the results which would flow from an acknowledgment determination. Because the phrase would be meaningless otherwise, the Board construes it as encompassing interests that would (or might) be affected by the change in status of an Indian group resulting from an acknowledgment determination.

Although the preamble does not state why BIA believed that local governmental units might have a "legal or property interest in a decision" where other entities or individuals might

^{3/} A favorable acknowledgment determination will not automatically result in any particular land being taken into trust for the Band. The acquisition of land in trust for the Band will be governed by regulations in 25 C.F.R. Part 151 and will be within BIA's discretion in the absence of legislation mandating that certain land be acquired in trust for the Band. Therefore, it is not a foregone conclusion that any particular land will be acquired in trust for the Band.

Furthermore, it is not certain that any particular land which may be acquired in trust for the Band may be used for gaming purposes. See 25 U.S.C. § 2719 (1994).

not, the reason is apparent. Local governmental units in the vicinity of a newly acknowledged tribe would be affected by an acknowledgment determination in a number of ways, but perhaps most significantly by the possibility--indeed the likelihood--that land would be taken into trust for the tribe, thus removing it from the tax rolls and from the jurisdiction of the affected local government. However, even with respect to those local governmental units in the immediate vicinity of the tribe, it may not be possible to know, prior to acknowledgment of the tribe, exactly which units might be affected. This is because, except with respect to land which the group might own prior to acknowledgment, the precise land the tribe may request to have taken into trust will not be known. ^{4/} Because it is not possible to determine with any certainty which local governmental units will ultimately have an actual "legal, factual or property interest," the Board has previously granted "interested party" status to local governmental units in the vicinity of the group seeking acknowledgment without requiring that they "establish" their interests. See Golden Hill, supra; In re Federal Acknowledgment of the Ramapough Mountain Indians, 31 IBIA 61, 63 (1997). The uncertainty as to the actual impact on any given local governmental unit may have been what led BIA to state in the preamble "that parties which may have a legal or property interest in a decision, such as recognized tribes or non-Indian governmental units, must be allowed to participate." (Emphasis added.) 59 Fed. Reg. at 9283.

Nothing in the regulations restricts eligibility for "interested party" status to local governmental units in the immediate vicinity of the group seeking acknowledgment. In this case, although the City is not geographically close to the Band, the potential impact of an acknowledgment determination on it is similar, if not identical, to that faced by local governmental units in the vicinity of the Band. The Board concludes that, where the Band has voiced an interest in seeking to have land in the Detroit Metropolitan Area taken into trust for it, the City has "interested party" status for the purpose of seeking reconsideration of the Final Determination. ^{5/}

^{4/} A proposed revision to BIA's land acquisition regulations would allow newly acknowledged tribes to designate a "Tribal Land Acquisition Area," which would correspond to the "reservation" of the tribe for land acquisition purposes. 64 Fed. Reg. 17574, 17578-79, 17586-88 (Apr. 12, 1999). Such a designation would apparently not be made until after the tribe was acknowledged. Thus, it would not be helpful in identifying those local governmental units which would be interested parties in the acknowledgment determination itself.

^{5/} It is true, as the Band argues, that the City would have an opportunity to participate in the trust acquisition proceeding if the Band were to apply to have land within City boundaries taken into trust. This would also be true for any local governmental unit within whose boundaries the Band sought to have land taken into trust. The fact that a local governmental unit could participate in a trust acquisition proceeding does not deprive it of an opportunity to participate as an interested party in the acknowledgment proceeding.

Alleged Grounds for Reconsideration

The Board turns to the question of whether the City has alleged grounds for reconsideration that are within the Board's limited jurisdiction. 6/ 25 C.F.R. § 83.11(d) provides:

The Board shall have the authority to review all requests for reconsideration that are timely and that allege any of the following:

- (1) That there is new evidence that could affect the determination; or
- (2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; or
- (3) That petitioner's or the Bureau's research appears inadequate or incomplete in some material respect; or
- (4) That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in § 83.7(a) through (g).

Under 25 C.F.R. § 83.11(b), "[t]he * * * interested party's request for reconsideration shall contain a detailed statement of the grounds for the request, and shall include any new evidence to be considered." Subsection 83.11(b)(1) further provides that "[t]he detailed statement of grounds for reconsideration filed by * * * interested parties shall be considered the appellant's opening brief." See also 25 C.F.R. § 83.11(e)(5).

The City alleges four grounds for reconsideration. The first allegation is that "BAR Improperly and Secretly Refused to Permit the City to Participate as an Interested Party." Request for Reconsideration at 1. In support of this ground for reconsideration, the City submits a copy of its January 8, 1998, letter to BAR and BIA's September 12, 1998, reply. The Board finds nothing in this argument which falls within the grounds for reconsideration listed in 25 C.F.R. § 83.11(d).

The second allegation raised by the City is that its "Expert Was Given No Serious Consideration Despite the Fact that He Identified Major Flaws in the Case Supporting Acknowledgment of the [Band]." Id. at 2. The City concedes that its expert's comments were addressed, but

6/ The Assistant Secretary addressed this question in his brief in response to the Board's Jan. 19, 1999, order for briefing on interested party status. This portion of the Assistant Secretary's brief exceeds the briefing ordered, and has not been considered.

argues that “his comments were given little consideration beyond cavalier dismissal with no apparent additional research by BAR into the matters presented.” Id. The City also states that its expert’s comments were preliminary because it was not informed whether its motion for a 30-day extension of the comment period had been granted.

The Board finds that this allegation raises disagreement with BAR’s analysis of the City’s comments and asserts that the City had insufficient time to prepare more extensive comments. However, despite the fact that the City filed its request for reconsideration 83 days after the publication of the Assistant Secretary’s Final Determination, the City submitted to the Board only the comments which it had submitted to BAR on January 12, 1998, and made no attempt to show the existence of any of the grounds for reconsideration listed in 25 C.F.R. § 83.11(d). The Board finds that this allegation does not fall within 25 C.F.R. § 83.11(d).

The third allegation raised by the City is that “BAR Demonstrated a Bias in Favor of the * * * Band and Contrary to the Interests of Other Petitioning Tribes.” Id. at 3. The City here contends that BAR was obviously biased in favor of the Band because of the “efficiency” with which it considered the Band’s petition. The City compares BAR’s consideration of the Band’s petition with those of several other petitioning Indian groups, and contends that the Band was given preferential treatment and “was inexplicably afforded a ‘jet stream’ in final review.” Id. This allegation does not fall within 25 C.F.R. § 83.11(d).

The City’s final allegation is that it “Was Denied Access to [the Band’s] Responses to [the City’s expert’s] Study and, Thus, Had No Opportunity to Reply.” Id. at 4. This allegation does not fall within 25 C.F.R. § 83.11(d).

The Board concludes that it does not have jurisdiction over any of the allegations raised by the City. Therefore, the Board dismisses this request for reconsideration of the Assistant Secretary’s Final Determination.

25 C.F.R. § 83.11(f)(1) requires the Board to “describe in its decision any grounds for reconsideration other than those in paragraphs (d)(1)-(d)(4) of this section alleged by * * * [an] interested party’s request for reconsideration.” Subsection 83.11(f)(2) further requires that, if the Board “finds that the * * * interested parties have alleged other grounds for reconsideration [not within its jurisdiction], the Board shall send the requests for reconsideration to the Secretary. The Secretary shall have the discretion to request that the Assistant Secretary reconsider the final determination on those grounds.”

Therefore, under 25 C.F.R. § 83.11(f)(2), the Board refers four grounds for reconsideration to the Secretary. Those grounds are: (1) “BAR Improperly and Secretly Refused to Permit the City to Participate as an Interested Party;” (2) The City’s “Expert Was Given No Serious Consideration Despite the Fact that He Identified Major Flaws in the Case Supporting Acknowledgment of the [Band];” (3) “BAR Demonstrated a Bias in Favor of the * * * Band and Contrary

to the Interests of Other Petitioning Tribes;” and (4) The City “Was Denied Access to [the Band’s] Responses to [the City’s expert’s] Study and, Thus, Had No Opportunity to Reply.”

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 83.11(d), this request for reconsideration of the Assistant Secretary’s October 23, 1998, Final Determination to Acknowledge the Match-e-be-nash-she-wish Band of Pottawatomis Indians of Michigan is dismissed. However, pursuant to 25 C.F.R. § 83.11(f)(2), the four issues listed above are referred to the Secretary. 7/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

7/ All motions not previously addressed are hereby denied. Arguments not specifically addressed were considered and rejected.