INTERIOR BOARD OF INDIAN APPEALS

In re Federal Acknowledgment of the Nipmuc Nation

41 IBIA 96 (06/15/2005)

Related Board cases:
40 IBIA 149
41 IBIA 100
45 IBIA 231
45 IBIA 277

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 NIPMUC NATION	:	Order Dismissing Requests For Reconsideration
	:	Docket Nos. IBIA 04-152-A 04-153-A
(Foster and Wheaton Requests)	:	June 15, 2005

Catherine Foster and Kathryn Akuahah Wheaton (Requesters) filed requests for reconsideration, pursuant to 25 C.F.R. § 83.11, of the Final Determination Against Federal Acknowledgment of the Nipmuc Nation, Petitioner #69A (Petitioner), as an Indian tribe. The Final Determination (FD) was issued by the Principal Deputy Assistant Secretary - Indian Affairs on June 18, 2004, and notice of the determination was published in the Federal Register on June 25, 2004. 69 Fed. Reg. 35,667. 1/ For the reasons discussed below, the Board dismisses both requests for lack of standing. 2/

Requesters are enrolled members of Petitioner, and are among a portion of Petitioner's members that the FD found to have descended from a historical tribe. Under 25 C.F.R. § 83.7(e) (criterion (e)), a petitioner seeking to be acknowledged as an Indian tribe within the meaning of Federal law must demonstrate that its "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." The FD concluded that Petitioner failed to satisfy criterion (e). See 69 Fed. Reg. at 35,671 col. 2. 3/

1/ Petitioner also filed a request for reconsideration (Docket No. IBIA 04-151-A), which is separately pending before the Board.

2/ The requests for reconsideration were docketed as Docket Nos. IBIA 04-152-A (Foster) and 04-153-A (Wheaton). On Oct. 21, 2004, the Board consolidated the two cases. Because the two requests are identical, the Board will refer to them jointly as the "request."

3/ The FD also concluded that Petitioner failed to satisfy three other criteria for federal acknowledgment: 25 C.F.R. §§ 83.7(a), (b) and (c). 69 Fed. Reg. at 35,667.

Requesters contend that Petitioner's membership roll should have included additional individuals who descend from historical bands of Nipmucs, which presumably would have increased the percentage of members shown to descend from a historical tribe. Requesters want the Department to consider genealogical evidence concerning these individuals, and allow the tribal roll to be amended to include them. This, in Requesters' view, would improve Petitioner's chances for demonstrating criterion (e) on reconsideration, and should also be done as a matter of fairness to the individuals who would be added to Petitioner's base membership roll. In addition, Requesters support reconsideration of the FD's conclusion, see id., that 45 percent of Petitioner's members had not documented descent from a historical Indian tribe.

On receipt of the request for reconsideration, the Board allowed briefing on whether Requesters qualify as "interested parties," entitled to submit a request for reconsideration. Only Requesters and the State of Connecticut filed briefs.

The acknowledgment regulations define "interested party" as —

> any 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 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.

25 C.F.R. § 83.1. Interested parties are entitled to participate extensively in the acknowledgment process, and are allowed to file requests with the Board for reconsideration of a final determination. 25 C.F.R. § 83.11(a)(1).

Requesters contend that they have a "factual interest" in the acknowledgment determination because they "have a factual interest in ensuring that the [Office of Federal Acknowledgment (OFA)] and the Board have before it as complete a tribal roll as possible when reconsidering [the FD]." Requesters' Brief at 4. Requesters state that they represent the interests of, and are supported by, Nipmucs who are eligible for membership but were not included on the tribal roll. Id. They do not, however, purport to formally represent such a group as its "attorney," nor do they purport to be a "new group" of Nipmucs. Id. at 5.

Requesters assert that their "sole intent is to ensure that the [OFA] is aware of the correct number of Nipmuc members so that it can make a fully informed decision." Id. at 2 n.1. According to Requesters, they have factual information and appropriate knowledge that would assist the Department in making a proper determination, "and are akin to scholars in

that they know who descends from the historic Nipmuc Nation [and] have expertise on the Nipmuc genealogical history." Id. at 8-9. Requesters argue that no basis exists to allow a scholar to be deemed an interested party, with full participatory rights, but not tribal members who also may be scholars or experts. Id. at 9.

The Board has previously construed the phrase "legal, factual or property interest in an acknowledgment determination" as "encompassing interests that would (or might) be affected by the change in status of an Indian group resulting from an acknowledgment determination." In re Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 33 IBIA 291, 298 (1999). In other words, to be an interested party, one must have a stake in the outcome of an acknowledgment determination.

As members of Petitioner, Requesters are, of course, affected by the acknowledgment determination, but any interest they have as members is derived from Petitioner, shared by the membership as a whole, and represented by Petitioner's own participation in the proceedings. In the context of recognized tribes, the Board has held that individual tribal members do not have standing to bring appeals based on their assessment of what is in the best interest of the tribe. See, e.g., Displaced Elem Lineage Emancipated Members Alliance v. Sacramento Area Director, 34 IBIA 74, 77 (1999); Frease v. Sacramento Area Director, 17 IBIA 250, 256 (1989). 4/ Nothing in the acknowledgment regulations indicates that the Department intended to confer "interested party" status on the individual members of a petitioning group, as members.

Requesters have not shown that they have a personal protectable interest — factual or otherwise — that is affected by the outcome of the acknowledgment determination. An individual's conviction — however strong — that an acknowledgment determination should be based on all relevant facts, or that a petitioner should be allowed to reopen its membership roll, is not the type of "interest" encompassed within the definition of "interested party."

For purposes of this decision, the Board assumes that Requesters have expertise in Nipmuc genealogical history and could offer valuable information. The difficulty with Requesters' argument that they are "akin to scholars" is that the Board has previously rejected "interested party" status for a scholar who sought to participate as an individual in reconsideration proceedings. See In re Federal Acknowledgment of the Golden Hill Paugussett Tribe, 32 IBIA 216, 220 (1998) (rejecting "interested party" status for ethno-historian).

4/ Requesters seek to distinguish the Board's tribal standing cases by arguing that in those cases, the appellants were opposing the tribe's position, whereas in this case Requesters support Petitioner's request for reconsideration, but wish to supplement it with their own. The principles in the Board's standing cases do not rest on whether an appellant supports or opposes the tribe's position.

In the 1991 proposed revisions to the acknowledgment regulations, the Department deleted the term "other party" and added the term "interested party," initially defined broadly. See 56 Fed. Reg. 47,320 col. 2-3, 47325 col. 1 (Sept. 18, 1991). In the final rule, however, the Department distinguished between an "interested party" and an "informed party." 59 Fed. Reg. 9280, 9283 (Feb. 25, 1994). 5/ The definition of "interested party" was modified to include only those with a significant protectable interest in a decision — i.e., those who were or might be affected by the decision. See 59 Fed. Reg. at 9283 col. 2; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 33 IBIA at 298. Interested parties were afforded extensive rights of participation in the acknowledgment process. The Department recognized that it was appropriate and useful to allow other parties, such as scholars with valuable knowledge, to participate as well, but in a more limited manner. Therefore, in the final rule, the Department created the category of an "informed party," with more limited rights of participation. Only a petitioner or an interested party is allowed to file a request for reconsideration. See 25 C.F.R. § 83.11(a).

The Board concludes that Requesters have not shown that they have a legal, factual or property interest in the acknowledgment determination. For that reason, they do not qualify as "interested parties," within the meaning of 25 C.F.R. § 83.1, and do not have standing to file a request for reconsideration under 25 C.F.R. § 83.11(a).

Therefore, 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, the Board dismisses the Foster and Wheaton requests for reconsideration for lack of standing.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Anita Vogt
Senior Administrative Judge

5/ "Informed party" is defined 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." 25 C.F.R. § 83.1.