INTERIOR BOARD OF INDIAN APPEALS

In re Federal Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama

34 IBIA 63 (08/04/1999)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

IN RE FEDERAL ACKNOWLEDGMENT OF THE MOBILE-WASHINGTON COUNTY BAND OF CHOCTAW INDIANS OF SOUTH ALABAMA

IBIA 98-68-A

Decided August 4, 1999

Request for reconsideration of a final determination against Federal acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama.

Affirmed. One issue referred to the Secretary of the Interior.

1. Indians: Federal Recognition of Indians Tribes: Acknowledgment

> A petitioner may seek reconsideration of an acknowledgment determination on the grounds that its own research was inadequate or incomplete in some material respect. However, in order to carry its burden of proof under 25 C.F.R. § 83.11(e)(9) and (10), the petitioner must show, at a minimum, that additional research would produce material information not previously considered by the Bureau of Indian Affairs.

APPEARANCES: Samuel M. Hill, Esq., Birmingham, Alabama, for the Mobile-Washington County Band of Choctaw Indians of South Alabama; K.C. Becker, Esq., for the Assistant Secretary - Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE VOGT

The Mobile-Washington County (MOWA) Band of Choctaw Indians of South Alabama (Petitioner) seeks reconsideration of the "Final Determination Against Federal Acknowledgment of [Petitioner]" which was signed by the Assistant Secretary - Indian Affairs on December 17, 1997, and published at 62 Fed. Reg. 67398 (Dec. 24, 1997). For the reasons discussed below, the Board affirms the Final Determination but refers one issue to the Secretary of the Interior.

Background

On January 5, 1995, the Assistant Secretary published notice of a "Proposed Finding Against Federal Acknowledgment of [Petitioner]." 60 Fed. Reg. 1874. The notice stated that

the Proposed Finding was "based on a determination that [Petitioner] does not meet one of the seven mandatory criteria set forth in 25 CFR 83.7, specifically criterion 83.7(e)." 1/ Id.

Following a period for response and comments, the Assistant Secretary issued the Final Determination at issue here, stating in part:

> Initially the petitioner claimed descent from six historical Indian tribes: Apache, Cherokee, Chickasaw, Choctaw, Creek, and Houma. In its Response to the Proposed Finding, the petitioner continued to claim ancestry only from the historical Choctaw, Cherokee, and Creek tribes and narrowed its core ancestors from 30 to 5 individuals. The petitioner submitted additional evidence on four of the five of these ancestors from whom it claimed descent. The BIA searched for evidence, but could not locate any evidence connecting these four claimed core ancestors to the Choctaw or to any other historical tribe. Neither the petitioner nor the BIA found documentation acceptable to the Secretary that the core ancestors claimed to be Indian by [Petitioner], were descendants of the historical Choctaw tribe or any other Native American tribe.
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> The BIA found that all [Petitioner's] members descend from two core families that resided in southwestern Alabama by about 1830. Neither these two families nor their ancestors were found to be members of a historical tribe of American Indians, or of tribes which had combined and functioned as a single American Indian entity. The extensive evidence on these two families either does not support, or in part disproves, Indian ancestry. * * * There was no evidence in the substantial body of documentation submitted by the petitioner, or in the independent research by the BIA, to demonstrate Choctaw ancestry or any other Indian ancestry for 99% of the petitioner's membership. Thus, the petitioner fails to meet criterion (e), descent from a historical tribe.

62 Fed. Reg. at 67399. The Final Determination indicated that Petitioner's petition had been considered under 25 C.F.R. § 83.10(e). 2/ Id.

1/ 25 C.F.R. § 83.7 provides:

"The mandatory criteria are:

* * * * * * *

"(e) The petitioner's 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."

2/ 25 C.F.R. § 83.10(e) provides:

"Prior to active consideration, the Assistant Secretary shall investigate any petitioner whose documented petition and response to the technical assistance review letter indicates that there is

Petitioner filed a Request for Reconsideration on March 23, 1998, making two allegations: (1) In light of BIA's insistence on strict genealogical research and documentation, Petitioner's research was materially inadequate and (2) BIA required Petitioner to meet a higher burden of proof than that specified in 25 C.F.R. § 83.6(d).

Under 25 C.F.R. § 83.11(c)(2), the Board is required, as a preliminary matter, to determine whether a request for reconsideration alleges any of the grounds for reconsideration in 25 C.F.R. § 83.11(d). 3/ On April 22, 1998, the Board issued its determination under subsection 83.11(c)(2), noting that the only allegation made by Petitioner which arguably fell under 25 C.F.R. § 83.11(d) was its allegation that its own research was materially inadequate. Thus, the Board stated, "the threshold question here is whether the allegation described in subsection 83.11(d)(3)--'[t]hat petitioner's or the Bureau's research appears inadequate or

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fn. 2 (continued)
little or no evidence that establishes that the group can meet the mandatory criteria in paragraph (e), (f), or (g) of § 83.7.

"(1) If this review finds that the evidence clearly establishes that the group does not meet the mandatory criteria in paragraph (e), (f), or (g) of § 83.7, a full consideration of the documented petition under all seven of the mandatory criteria will not be undertaken pursuant to paragraph (a) of this section. Rather, the Assistant Secretary shall instead decline to acknowledge that the petitioner is an Indian tribe and publish a proposed finding to that effect in the FEDERAL REGISTER. * * *

"(2) If the review cannot clearly demonstrate that the group does not meet one or more of the mandatory criteria in paragraph (e), (f), or (g) of § 83.7, a full evaluation of the documented petition under all seven of the mandatory criteria shall be undertaken during active consideration of the documented petition pursuant to paragraph (g) of this section."

3/ 25 C.F.R. § 83.11(d) provides:

"The Board [of Indian Appeals] 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)."

incomplete in some material respect'--is intended to permit a petitioner for Federal acknowledgment to seek reconsideration on the basis of its own inadequate or incomplete research." Board's Apr. 22, 1998, Order at 2. The Board then observed:

> Although such a concept is alien to most legal proceedings, there is no mistaking the words of the regulation. BIA was undoubtedly aware when it drafted the regulation that many, probably most, of those seeking reconsideration would be unsuccessful petitioners. Yet it did not seek to exclude petitioners from those who were entitled to seek reconsideration on the grounds that "petitioner's * * * research appears inadequate or incomplete in some material respect."

Id. The Board reached a preliminary conclusion that BIA did intend to permit petitioners to assert this ground for reconsideration. The Board stated, however, that its preliminary conclusion was subject to reconsideration during further proceedings in this matter.

In his memorandum transmitting critical documents from the administrative record under 25 C.F.R. § 83.11(e)(8), the Assistant Secretary stated his position with respect to the scope of 25 C.F.R. § 83.11(d)(3). The Board allowed responses to the Assistant Secretary's statement. Petitioner filed a response.

No answer briefs were filed in response to Petitioner's Request for Reconsideration.

Discussion and Conclusions

The Assistant Secretary argues that the wording of the present 25 C.F.R. § 83.11(d)(3) was carried over from the original acknowledgment regulations issued in 1978 and that, under the 1978 regulations, only the Secretary could request reconsideration. He continues:

> When the regulations were amended in 1994 to allow third parties and petitioners to seek reconsideration, the language in the four criteria did not change, and thus created this ambiguity which would purportedly allow petitioners to allege inadequacies in their own petition as a grounds for reconsideration. However, such an interpretation does not follow logically in the context of the whole of the regulations which places the responsibility of research and the burden of proof on the petitioners for purposes of the final determination. * * *
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> * * * An interpretation of the regulations that would allow a petitioner after a final decision to suspend the final determination and to re-open its own research undermines the structure of the regulations which allow multiple op-

> portunities for a petitioner to complete its petition to their satisfaction while at the same time providing for a final resolution of the petitioning process. This regulation is better read to allow only third parties to challenge a final determination on the grounds that petitioner's research was inadequate to support the final determination. This reading is consistent with the burden of proof being put on the petitioner and would not render part of the regulations meaningless but would give effect to the rights of interested parties as recognized in the 1994 regulations. [Footnote omitted.]

Assistant Secretary's Transmittal Memorandum at 4-5.

In response, Petitioner contends that 25 C.F.R. § 83.11(d)(3) is clear and unambiguous, providing that "[t]he Board shall have the authority to review all requests for reconsideration that are timely and that allege any of the following: * * * (3) That petitioner's or the Bureau's research appears inadequate or incomplete in some material respect." (Emphasis added.) Petitioner further contends that the interpretation of subsection 83.11(d)(3) advocated by the Assistant Secretary would deprive the party most likely to be adversely affected, i.e., a petitioner, of an opportunity granted to third parties.

The grounds for reconsideration in 25 C.F.R. § 83.11(d) were discussed in the Federal Register preamble to the 1994 regulations:

> Comment: Some commenters wanted to omit all but the "new evidence" grounds for reconsideration. Others objected to any opportunity to present new evidence at all, on the grounds that "due diligence" to develop such evidence should have been exercised by the petitioner, who has the burden of proof under the regulations.
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> Response: The administrative process is predicated on providing a maximum opportunity to develop and provide evidence, as well as further analysis of existing evidence, free of as many procedural technicalities as possible. We believe this opportunity should extend to the reconsideration process. In addition, * * * we believe that the most thorough and equitable process requires consideration of more than just new evidence.

59 Fed. Reg. 9280, 9291 (Feb. 25, 1994).

Among other things, this statement evidences an intent to set aside such procedural technicalities as appellate rules which would preclude the consideration of evidence presented

for the first time on appeal (or, in this case, reconsideration). Given that the public comment referred specifically to new evidence presented by a petitioner, BIA's response makes it clear that the new evidence to be allowed includes new evidence presented by a petitioner.

A petitioner which has failed to discover evidence relevant to its case has almost certainly conducted inadequate research. Thus, BIA necessarily recognized that a petitioner may seek reconsideration based upon its own inadequate research at least to the extent of any previously undiscovered evidence.

The present wording of subsection 83.11(d)(3) may well be an unintended carryover from the earlier regulations, as the Assistant Secretary argues here. However, the quoted portion of the Federal Register preamble demonstrates that BIA specifically considered and rejected a contention that a petitioner ought not to be given a further opportunity during reconsideration proceedings to correct an earlier lack of due diligence. Thus, the Assistant Secretary's present position appears to conflict with the position taken in the final rulemaking document signed by a former Assistant Secretary. To the extent there is a conflict, the position stated in the Federal Register preamble carries more weight. Not only is it a published statement, it is also a statement contemporaneous with promulgation of the regulations. Cf. Watt v. Alaska, 451 U.S. 259, 272-73 (1981), concerning construction of a statutory amendment proposed by the Department of the Interior: "The Department's contemporaneous construction carries persuasive weight. * * * The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference."

In any event, the wording of subsection 83.11(d) is clear. The Board finds that a petitioner may seek reconsideration on the grounds that its own research was inadequate or incomplete in some material respect.

A close reading of the Assistant Secretary's position statement in this case reveals that it is based in part upon an assumption that a petitioner, simply by alleging that its research was inadequate or incomplete in some material respect, may be found entitled to reopen the acknowledgment proceedings. That is not the case. In order for the Board to remand a case for reconsideration on this basis, a petitioner must not only make the allegation but establish it by a preponderance of the evidence. See 25 C.F.R. § 83.11(e)(9) and (10).

Petitioner's "inadequate research" allegation is sketchy at best. Petitioner contends:

> BIA's strict reliance on genealogical evidence as a prerequisite to Federal acknowledgment is unfair and contrary to the intent of the Federal acknowledgment regulations. Nevertheless, to the extent that the BIA will rely only

> on such evidence, [Petitioner's] research must be considered materially inadequate or incomplete and therefore make reconsideration and remand appropriate.

Request for Reconsideration at 4. Petitioner also seeks a suspension of proceedings on remand, in order to give it "sufficient time to gather the resources necessary to conduct the kind of genealogical research required by the BIA." Id. at 5.

Petitioner's argument seems to be that, because BIA was not persuaded by the evidence Petitioner offered, Petitioner's research must have been inadequate. However, there is at least one alternative conclusion that could be drawn in this case: The evidence necessary to establish that Petitioner satisfies the mandatory criterion in 25 C.F.R. § 83.7(e) does not exist and therefore could not have been found even with the most exacting research. Thus Petitioner's failure to produce persuasive evidence during the proceedings before BIA does not, ipso facto, establish that its research was inadequate or incomplete in some material respect.

[1] The concept of "materiality" is fundamental here. The Board concludes that a "material" deficiency in a petitioner's (or BIA's) research is one that has resulted in a Final Determination having been made without the benefit of material information. The Board further concludes that, in order for a petitioner to establish by a preponderance of the evidence that its research was inadequate or incomplete in some material respect, it must show, at a minimum, that additional research would produce material information not previously considered by BIA.

Petitioner makes no such showing in this case. The Board finds that Petitioner has failed to establish by a preponderance of the evidence that its research was inadequate or incomplete in some material respect.

Appellant's second allegation is that BIA applied a standard of proof higher than the standard set in 25 C.F.R. § 83.6(d) in that it required conclusive proof that Petitioner meets the criterion in 25 C.F.R. § 83.7(e) rather than the lesser proof that would be needed to "establish[] a reasonable likelihood of the validity of the facts relating to that criterion." 4/ Petitioner contends that it was greatly prejudiced by BIA's application of an unauthorized "conclusive proof" standard.

4/ 25 C.F.R. § 83.6(d) provides:

"A criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met."

This contention does not state a ground for reconsideration that is within the Board's jurisdiction under 25 C.F.R. § 83.11(d). It will therefore be referred to the Secretary.

Petitioner has failed to establish any of the grounds for reconsideration in 25 C.F.R. § 83.11(d) by a preponderance of the evidence.

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 Assistant Secretary's Final Determination is affirmed. The following issue is referred to the Secretary of the Interior: Whether BIA improperly applied a conclusive proof standard in determining that Petitioner did not meet the criterion in 25 C.F.R. § 83.7(e).

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge