



INTERIOR BOARD OF INDIAN APPEALS

San Juan Southern Paiute Tribe, In Re Federal Acknowledgement of the

18 IBIA 213 (03/27/1990)

Judicial review of this case:

Affirmed, *Masayesva v. Zah*, 792 F. Supp. 1178 (D. Ariz. 1992)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
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## IN RE FEDERAL ACKNOWLEDGEMENT OF THE SAN JUAN SOUTHERN PAIUTE TRIBE

IBIA 90-53-A

Decided March 27, 1990

Request for reconsideration of a decision by the Assistant Secretary - Indian Affairs to acknowledge the San Juan Southern Paiute Tribe.

Affirmed.

1. Indians: Federal Recognition of Indian Tribes: Acknowledgment

Under the terms of a referral to the Board of Indian Appeals by the Secretary of the Interior, where the party requesting reconsideration of a final determination to acknowledge an Indian tribe failed to establish one or more of the grounds for reconsideration at 25 CFR 83(c)(1)-(3), the Board affirms the final determination.

### OPINION BY ADMINISTRATIVE JUDGE VOGT

The Navajo Nation (opponent) seeks reconsideration of a December 11, 1989, determination by the Assistant Secretary - Indian Affairs that the San Juan Southern Paiute Tribe (petitioner) exists as an Indian tribe. For the reasons discussed below, the Board affirms the Assistant Secretary's determination.

#### Background

On June 5, 1984, petitioner submitted a documented petition for Federal acknowledgment under 25 CFR Part 83. The Bureau of Indian Affairs, Branch of Acknowledgment and Research (BAR), began active consideration of the petition on November 1, 1984. In February and March 1985, petitioner submitted additional materials pursuant to BAR's request.

Opponent submitted a preliminary response to the petition in June 1985. Both petitioner and opponent submitted substantial additional materials during the course of active consideration of the petition. On August 11, 1987, the Assistant Secretary published a notice of "Proposed Finding for Federal Acknowledgment of the San Juan Southern Paiute Tribe" in the Federal Register, 52 FR 29735. The notice stated in part:

This notice is based on a determination that the group satisfies the seven mandatory criteria set forth in 25 CFR

83-7. [1/] Therefore, [petitioner] meets the requirements necessary for a government-to-government relationship with the United States.

Members of [petitioner] live on lands in north central Arizona which were traditionally and aboriginally Southern Paiute. Today's members are predominantly lineal descendants of the Southern Paiute Indians whose ancestors have inhabited this area since first sustained contact with Euro-Americans around 1850. Both historically and up through the present day, the petitioner has been repeatedly identified by scholars, local non-Indians, Federal officials, other Southern Paiute bands, and members of the Navajo Tribe both as Southern Paiute and as a distinct body of people. This has occurred even in contexts where close interaction with the Navajos and some acculturation to Navajo culture has been evident.

Opponent submitted extensive comments on the proposed finding on March 8, 1988, to which petitioner responded on September 1, 1988. 2/

1/ 25 CFR 83.7 provides in part:

“All the criteria in paragraphs (a) through (g) of this section are mandatory in order for tribal existence to be acknowledged and must be included in the petition.

“(a) A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as ‘American Indian’, or ‘aboriginal’. \* \* \*

\* \* \* \* \*

“(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

“(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

“(d) A copy of the group's present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.

“(e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. \* \* \*

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“(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

“(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.”

2/ The 120-day response period established in 25 CFR 83.9(g) was extended by 90 days at the request of opponent. Petitioner was also granted an extension because of the extent of opponent's comments.

By letter of June 27, 1989, opponent sought to submit four boxes of additional materials, stating that the materials had become available since its March 1988 submission. Petitioner objected to the submission. By letter of August 30, 1989, the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) informed opponent that its additional materials would not be considered. The Deputy stated that the draft final determination was close to completion and that consideration of the additional material would cause a significant delay in the final determination. The Deputy further stated:

There has been extensive opportunity to comment upon this case. You submitted extensive materials in response to the San Juan Paiute petition at several intervals during the preparation of the proposed finding. After the proposed finding, staff members met with you and your staff to discuss the proposed finding and the research it was based upon. Voluminous extensive materials were provided by you in response to the proposed finding. The petitioner likewise submitted extensive materials after its initial documented petition in June 1985 [sic], during active consideration and also in response to the proposed finding and your comments upon the finding.

(Aug. 30, 1989, Letter at 2). The Deputy stated that opponent could request reconsideration after issuance of the final determination and could submit additional information in connection with the request.

The Assistant Secretary's "Notice of Final Determination That the San Juan Southern Paiute Tribe Exists as an Indian Tribe" was published in the Federal Register on December 15, 1989, 54 FR 51502. The notice stated that it was based on new evidence and arguments presented by opponent and petitioner, as well as evidence available to BAR prior to publication of the proposed finding. It found that some of the new evidence supported the proposed finding and that none of it warranted a different conclusion than that reached in the proposed finding. The notice gave the parties the opportunity to request the Secretary to direct reconsideration of the decision pursuant to 25 CFR 83.10. <sup>3/</sup> On December 20, 1989, the Assistant

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<sup>3/</sup> 25 CFR 83.10 provides in relevant part:

“(a) The Assistant Secretary's decision shall be final for the Department unless the Secretary requests him to reconsider within 60 days of such publication. If the Secretary recommends reconsideration, the Assistant Secretary shall consult with the Secretary, review his initial determination, and issue a reconsidered decision within 60 days which shall be final and effective upon publication.

“(b) The Secretary in his consideration of the Assistant Secretary's decision may review any information available to him, whether formally part of the record or not; \* \* \*.

“(c) The Secretary may request reconsideration of any decision by the Assistant Secretary but shall request reconsideration of any decision, which in his opinion:

Secretary approved a 121-page document entitled "Summary Under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the San Juan Southern Paiute Tribe" (summary).

By letter dated January 12, 1990, opponent requested the Secretary to direct the Assistant Secretary to reconsider the final determination. Petitioner submitted a response to opponent's request. By memorandum dated February 23, 1990, and received by the Board on February 27, 1990, the Secretary referred the matter to the Board under 43 CFR 4.330(a)(2). The Secretary's memorandum states: "[25 CFR 83.10(c)] requires that I request a reconsideration if a request to me meets the grounds set forth in subsections 83.10(c)(1-3) \* \* \*. In accordance with this memorandum, the Board is to decide whether to ask the Assistant Secretary to reconsider his decision only with regard to the requirements of these subsections." (Emphasis in original.) The memorandum further states:

The [Board] shall affirm the Assistant Secretary's determination if the Board finds that the party or parties requesting reconsideration have failed to establish at least one of the grounds under 83.10(c)(1-3) by a preponderance of evidence. The [Board] shall vacate the Assistant Secretary's determination and remand it to the Assistant Secretary for reconsideration if the appellant has established one or more grounds under 83.10(c)(1-3) by a preponderance of evidence. The Assistant Secretary's determination will become final upon receipt by the Assistant Secretary of a decision by the [Board] to affirm the determination. If the determination is returned for reconsideration, the Assistant Secretary shall, in accord with 83.10(a), issue a reconsidered determination within 60 days of receipt of the [Board's] decision. The reconsidered determination shall be final and effective upon publication in the Federal Register.

#### Discussion and Conclusions

Opponent objects to the acknowledgment of petitioner because it considers petitioner's members to be Navajos and members of opponent rather than of a separate Indian entity entitled to Federal acknowledgment. It contends that the final determination warrants reconsideration on all the grounds set forth at 25 CFR 83.10(c)(1)-(3), as well as on policy grounds.

Opponent argues that the decision reflects bad judgment and poor policy because it will encourage other secessionist movements; offends tribal

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fn. 3 (continued)

“(1) Would be changed by significant new evidence which he has received subsequent to the publication of the decision; or

“(2) A substantial portion of the evidence relied on was unreliable or was of little probative value; or

“(3) The petitioner's or the Bureau's research appears inadequate or incomplete in some material respect.”

sovereignty, in particular the right of a tribe to determine its own membership; and casts doubt on the fairness and impartiality of the acknowledgment procedure.

Concerning the criteria for acknowledgment at 25 CFR 83.7, opponent contends that the most glaring flaw in the final determination is its conclusion at page 28 of the summary that petitioner meets the criterion at 25 CFR 83.7(f), *i.e.*, that it is "principally composed of individuals who are not members of any other North American Indian tribe." Much of opponent's argument in this regard is directed toward interpretation of the definition of "member of an Indian tribe" at 25 CFR 83.1(k). <sup>4/</sup> Opponent also contends that the Assistant Secretary erred in concluding that petitioner met the criteria at 25 CFR 83.7(a)-(e). Finally, it requests the Secretary to direct the Assistant Secretary to consider the new evidence it submitted on June 27, 1989.

Pursuant to the Secretary's referral, the Board may review the final determination only under the criteria in 25 CFR 83.10(c)(1)-(3). <sup>5/</sup> Further, the Secretary has required that the party requesting reconsideration must establish by a preponderance of the evidence that one of the grounds in this subsection is present. <sup>6/</sup> Accordingly, opponent bears the burden of showing that: "(1) [the decision] would be changed by significant new evidence \* \* \* received subsequent to the publication of the decision; or (2) [a] substantial portion of the evidence relied on was unreliable or was of little probative value; or (3) [t]he petitioner's or the Bureau's research appears inadequate or incomplete in some material respect."

Although subsection (1) refers to new evidence received subsequent to publication of the decision, and opponent's new evidence was submitted prior to publication, the Board will consider the evidence under this subsection in light of BIA's decision not to consider it prior to issuance of the final determination.

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<sup>4/</sup> 25 CFR 83.1(k) provides:

"'Member of an Indian tribe' means an individual who meets the membership requirements of the tribe as set forth in its governing document or is recognized collectively by those persons comprising the tribal governing body, and has continuously maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept."

<sup>5/</sup> For this reason, the Board does not address opponent's policy argument or its argument concerning the proper interpretation of regulations.

<sup>6/</sup> The standard of review prescribed by the Secretary is in essence the standard normally employed by the Board in appeals from decisions of BIA officials under 25 CFR Part 2, *i.e.*, that an appellant bears the burden of proving error in the BIA decision. *See, e.g., Kahan v. Acting Muskogee Area Director*, 18 IBIA 180 (1990), and cases cited therein.

Opponent's proffered new evidence consists of:

(a) A May 1989 report by Dr. Klara Kelley, titled An Analysis of Archaeological Sites and Land Use Patterns in the Western Navajo Reservation. This report was prepared for opponent in connection with Masayesva v. Haskie, No. Civ. 74-842 PHX-EHC, D. Ariz.

(b) Field notes prepared in 1983 by Dr. Richard Stoffle, a consultant to petitioner, while interviewing members of petitioner's group.

(c) A transcript of a deposition of Angle Whiskers, a member of petitioner's group, taken by petitioner in Masayesva v. Haskie.

(d) A 1982 report prepared for petitioner by Drs. Pamela Bunte and Robert Franklin, titled A Preliminary Report on the Present and Historical Status of the San Juan Southern Paiutes.

(e) Excerpts from tapes and transcripts of interviews conducted by Drs. Bunte and Franklin with members of petitioner's group.

Opponent's contentions concerning the significance of this material are unpersuasive. As petitioner argues, opponent does little more than make a bare assertion that its new evidence is significant. The Board's independent review of the materials submitted fails to convince it that the materials constitute significant new evidence within the meaning of 25 CFR 83.10(c)(1). The Board finds that opponent has failed to carry its burden to show that its new materials constitute such evidence.

Opponent's request for reconsideration also fails to show that the final determination warrants reconsideration under 25 CFR 83.10(c)(2) or (3), *i.e.*, on grounds that a substantial portion of the evidence relied on was unreliable or was of little probative value, or on grounds that the petitioner's or the Bureau's research appears inadequate or incomplete in some material respect. The record in this matter is exhaustive. All parties were given the opportunity to submit extensive materials, and BAR's consideration of the petition was protracted because of the need to review all these materials. It would be difficult for any party to establish that BAR's research was inadequate or incomplete in this case, and opponent has not done so. Further, while opponent has voiced extensive disagreement with the weight given in the final determination to its own evidence vis-a-vis evidence from other sources, it falls far short of demonstrating that a substantial portion of the evidence relied upon in the final determination was unreliable or of little probative value.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior in his memorandum of February 23,

1990, and 43 CFR 4.1, the Assistant Secretary's "Final Determination That the San Juan Southern Paiute Tribe Exists as an Indian Tribe" is affirmed. 7/

//original signed

Anita Vogt  
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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7/ The Secretary's Feb. 23, 1990, memorandum made 43 CFR 4.315, concerning reconsideration of Board decisions, inapplicable to this proceeding. Therefore, no party may request reconsideration. Pursuant to the Secretary's memorandum, the Dec. 11, 1989, final determination will become final for the Department of the Interior upon the Assistant Secretary's receipt of this decision.