



## INTERIOR BOARD OF INDIAN APPEALS

Southern Band of the Cherokee Nation v. Director, Bureau of Indian Affairs

54 IBIA 217 (01/19/2012)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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SUITE 300  
ARLINGTON, VA 22203

SOUTHERN BAND OF THE	)	Order Affirming Decision
CHEROKEE NATION,	)	
Appellant,	)	
	)	
v.	)	Docket No. IBIA 10-022
	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	January 19, 2012

The Southern Band of the Cherokee Nation (Appellant) appealed to the Board of Indian Appeals (Board) from an October 7, 2009, decision of the Director, Bureau of Indian Affairs (BIA), in which the Director declined to assist Appellant in organizing a tribal government under § 3 of the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 503.<sup>1</sup> Appellant is not Federally recognized as an Indian tribe,<sup>2</sup> and because of that fact, the Director concluded that Appellant is not eligible to organize under § 503.<sup>3</sup>

On receipt of the appeal, the Board issued an Order to Show Cause (OSC) why the Director's decision should not be summarily affirmed on the ground that § 503 only applies to a "recognized" tribe or band, and Appellant is not so recognized, as evidenced by the

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<sup>1</sup> Appellant submitted to the Assistant Secretary - Indian Affairs (Assistant Secretary), a Constitution and By-Laws, as approved by Appellant on March 7, 2009, and requested the Assistant Secretary's supervision of Appellant's procedural steps to comply with § 503. The Director's decision was in response to that request.

<sup>2</sup> *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010) (List of all Federally recognized tribes, published pursuant to 25 U.S.C. § 479a-1), supplemented, 75 Fed. Reg. 66,124 (Oct. 27, 2010); *see also* 74 Fed. Reg. 40,218 (Aug. 11, 2009) (2009 list) .

<sup>3</sup> The Director referred Appellant to the Office of Federal Acknowledgment and to the procedures contained in 25 C.F.R. Part 83 (Procedures for Establishing that an American Indian Group Exists as an Indian Tribe).

Federally recognized tribes list published in the Federal Register. In response to the OSC, Appellant submitted a brief that reiterated and expanded upon the arguments already presented in its notice of appeal. But while Appellant makes arguments for why it *should* be Federally recognized, Appellant fails to refute the fact that it is not presently recognized by the Department of the Interior (Department), and that neither the Director nor the Board has authority to decide to recognize Appellant as an Indian tribe.

Section 503 expressly applies to “any *recognized* tribe or band of Indians residing in Oklahoma,” and Appellant is not so recognized. (Emphasis added). Appellant claims to be descended from, and the successor-in-interest to, the “so-called southern Cherokees” referred to in an 1866 treaty (Treaty). Treaty with the Cherokee Indians, art. VIII, July 19, 1866, 14 Stat. 799, 801. Appellant’s relationship to the group referenced in the Treaty might well be relevant to a Federal acknowledgment determination, but what is relevant under § 503 is whether Appellant is already a “recognized” tribe — i.e., presently acknowledged and recognized by the United States to exist as an Indian tribe. Unless or until Appellant is Federally recognized as an Indian tribe, § 503 does not apply.

Appellant contends that it is similarly situated to the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) and the Delaware Tribe of Indians, Oklahoma (Delaware Tribe), and thus should be permitted to organize under § 503, as those tribes were. However, both of those tribes are Federally recognized, *see* 75 Fed. Reg. at 60,811, 60,813, and neither the Director nor the Board has authority to ignore that controlling distinction. The UKB was eligible for OIWA reorganization after it received tribal recognition through special legislation that specifically recognized it for purposes of § 503. *See* Act of Aug. 10, 1946, 60 Stat. 976.

The Delaware Tribe’s history of recognition is more complicated, and its reorganization as a separate tribal government, and the reestablishment of direct government-to-government relations with the United States, were made pursuant to a Memorandum of Agreement with the Cherokee Nation and a decision of the Assistant Secretary. *See* 74 Fed. Reg. at 40,218-19; *see also Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074 (10th Cir. 2004) (setting aside final decision to retract 1979 decision regarding the Delaware Tribe, 61 Fed. Reg. 50,862 (Sept. 27, 1996)).

Appellant claims that it is a division within the Cherokee Nation of Oklahoma, similar to, but even more favorably situated than was, the Delaware Tribe, and that the listing of the Cherokee Nation as Federally recognized necessarily includes Federal recognition of Appellant. But regardless of Appellant’s status within the Cherokee Nation, the fact remains that Appellant is not itself separately included on the Federal Register list, which constitutes the official list of all entities that the Secretary of the Interior recognizes as

Indian tribes.<sup>4</sup> Whether or not Appellant's alleged status within the Cherokee Nation is relevant for consideration by the Assistant Secretary, it is not relevant to our determination of whether the Director erred in declining to offer assistance to Appellant to organize under § 503 on the grounds that Appellant is not presently Federally recognized by the Department and that the lack of such recognition is a matter that is beyond the authority of the Director to decide.<sup>5</sup> For this reason, we reject Appellant's argument that the Director violated Appellant's due process rights in failing to include "any *meaningful* discussion of the documentation of the Southern Band's federal recognition." Notice of Appeal at 7-8 (unnumbered).<sup>6</sup>

Appellant also invokes § 4 of OIWA, 25 U.S.C. § 504, which authorizes the Secretary to issue a charter as a local cooperative association to "ten or more Indians" who reside within Oklahoma. Section 504 authorizes the Secretary of the Interior to issue a charter to such a group "as a local cooperative association for one or more of the following purposes: Credit administration, production, marketing, consumers' protection, or land management." Appellant apparently construes § 504 to mean that if Appellant is a community of ten or more Indians residing in Oklahoma, it is entitled under § 504 to receive assistance from the Secretary in organizing and adopting a tribal constitution and by-laws under § 503. That is not the case. Whether or not Appellant is entitled to a charter under § 504 as a cooperative association does not determine whether Appellant is entitled to organize under § 503. Section 503 is the provision under which Appellant sought to organize and § 503, by its terms, applies to "recognized" tribes or bands.

In conclusion, § 503 does not apply to a group that is not Federally recognized as a tribe or band, Appellant is not on the list of Federally recognized tribes published by the Assistant Secretary, and the Director does not have authority to decide that a group should be Federally recognized. Thus, the Director had no obligation or basis to provide Appellant

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<sup>4</sup> "Indian tribe," as defined in 25 U.S.C. § 479a, includes a band.

<sup>5</sup> Similarly, we find that Appellant's argument that the Department is prohibited from avoiding a determination on whether Appellant is "already acknowledged" as a tribe, *see* Response to OSC at 12, even if a matter for possible consideration by the Assistant Secretary in an appropriate context, is not relevant to our resolution of this appeal.

<sup>6</sup> Nor do we agree with Appellant's characterization of the Decision as improperly "dismissive." *Id.* at 8 (unnumbered). The Director simply chose not to address documentation that was not relevant to the issue that he decided: whether Appellant is entitled to organize under § 503.

with technical assistance to organize under § 503, and we affirm his decision declining to do so.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Director's decision.<sup>7</sup>

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge

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<sup>7</sup> We decline Appellant's invitation to refer "the issue of [Appellant's] prior acknowledgment" to the Assistant Secretary, pursuant to 43 C.F.R. § 4.337(b) (referral of discretionary issues in an appeal to the Assistant Secretary), but nothing, of course, precludes the Assistant Secretary from considering that issue, to the extent appropriate and in an appropriate context.