



INTERIOR BOARD OF INDIAN APPEALS

Central Council of Tlingit and Haida Indian Tribes of Alaska v.  
Chief, Branch of Judicial Services, Bureau of Indian Affairs

26 IBIA 159 (08/03/1994)



# United States Department of the Interior

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

CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES

v.

CHIEF, BRANCH OF JUDICIAL SERVICES, BUREAU OF INDIAN AFFAIRS

IBIA 94-98-A

Decided August 3, 1994

Appeal from a decision declining to consider an application for a FY 1994 Special Tribal Court grant.

Affirmed.

1. Indians: Federal Recognition of Indian Tribes: Generally--Indians:  
Tribal Government: Generally

In determining whether an Indian entity is an Indian tribe for purposes of a particular Bureau of Indian Affairs program, the Bureau must first look to the definition of "Indian tribe" in the statute or regulation governing the program. If the relevant statute or regulation does not define the term, the regulations in 25 CFR Part 83 control the determination.

APPEARANCES: Edward K. Thomas, its President, for appellant; Neil McDonald, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Central Council of Tlingit and Haida Indian Tribes seeks review of a February 8, 1994, decision of the Chief, Branch of Judicial Services, Bureau of Indian Affairs (Chief, BIA), declining to consider appellant's application for a FY 1994 Special Tribal Court grant. For the reasons discussed below, the Board affirms the Chief's decision.

### Background

On December 17, 1993, appellant submitted an application for a FY 1994 Special Tribal court grant, pursuant to the program announcement published in the Federal Register on October 14, 1993, 58 FR 53374. On February 8, 1994, the Chief issued a decision declining to consider appellant's application on the grounds that it exceeded the 50-page limit imposed in Part IV, section E(3), of the announcement, 58 FR at 53377. Appellant appealed the decision to the Board.

After a briefing schedule was established, the Chief filed a motion to dismiss the appeal. She contended:

The Notice of Availability of FY 1994 Special Tribal Court Funds, 58 Fed. Reg. 53,375 (1993), defined eligible applicants as "the governing body of a federally-recognized tribe" or "multi-tribal or consortium arrangements." The Central Council does not appear on the October 21, 1993, list of entities recognized as eligible for funding and services from the Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (1993). If the Central Council intended to apply for funding under a multi-tribal or consortium arrangement, the application did not contain the requisite resolutions from the tribal councils of each participating tribe. The Central Council therefore failed to meet either criteria for eligibility.

Appellant did not respond to the Chief's motion to dismiss. Nor did it file a brief making further arguments in support of its appeal. Accordingly, this appeal is now ripe for decision.

#### Discussion and Conclusions

In Puyallup Tribe of Indians v. Chief, Branch of Judicial Services, 26 IBIA 125 (1994), the Board addressed a motion to dismiss filed under circumstances somewhat similar to those present here. The Chief there contended that the application at issue must be rejected, not only for the reason given in her decision, but also for another reason not mentioned in the decision. The Board denied the motion, stating that it would not "dismiss the appeal on the basis of a new reason for rejection raised for the first time in the Chief's motion to dismiss."

In this appeal also, the Chief's motion to dismiss is based upon a reason not communicated to appellant in her decision. In this case, however, unlike Puyallup, the motion to dismiss raises the threshold question of appellant's eligibility for the grant program. Therefore, while not condoning the Chief's failure to state this reason in her decision, the Board will address her motion to dismiss.

The eligibility criteria for project grants under the Special Tribal Court grant program are set out in Part II, section A, of the program announcement:

The governing body of a federally-recognized tribe, 25 U.S.C. 450b(e), with an established judicial system or newly created tribal judiciary, including those which intend to establish a judicial system, may apply for funding under this announcement.

Tribes with populations less than 400 are encouraged to apply for funding under a multi-tribal or consortium arrangement. Tribes currently served by Courts of Indian offenses may apply for funding under this announcement; however, such funding shall be limited to the development of tribal law and order codes.

As the Chief contends, appellant does not appear on BIA's most recent list of "Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs," published in the Federal Register on October 21, 1993, 58 FR 54364. Appellant did, however, appear on earlier lists. See note 1, infra.

The preamble to the 1993 list noted that the immediately preceding list, published in 1988, included non-tribal entities. The preamble continued:

The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 CFR 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states. \* \* \*

\* \* \* \* \*

Because the list published by this notice is limited to entities found to be Indian tribes, as that term is defined and used in 25 CFR part 83, it does not include a number of non-tribal Native entities in Alaska that currently contract with or receive services from the Bureau of Indian Affairs pursuant to specific statutory authority, including ANCSA village and regional corporations and various tribal organizations. These entities are made eligible for Federal contracting and services by statute and their non-inclusion on the list below does not affect the continued eligibility of the entities for contracts and services. [Footnote omitted].

(58 FR at 54365-66). 1/

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1/ Appellant was included on all lists published between 1982 and 1988. See 47 FR 53130, 53135 (Nov. 24, 1982); 48 FR 56862, 56866 (Dec. 23, 1983); 50 FR 6055, 6059 (Feb. 13, 1985); 51 FR 25115, 25119 (July 10, 1986); 53 FR 52829, 52833 (Dec. 29, 1988).

Concerning the differences between the 1982 list and the 1988 list, the preamble to the 1993 list stated:

"The [Alaska] entities appearing on the [1982] list were traditional councils that were identified as tribes in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1602(c), and that had been dealt with by the Bureau of Indian Affairs on a government-to-government basis and Indian Reorganization Act councils organized under the Indian Reorganization Act (IRA), 25 U.S.C. 473a, and dealt with on a government-to-government basis by the BIA. These entities parallel the kinds of entities listed on the list for the contiguous 48 states. \* \* \* The 1988 list departed from the previous lists in a number of respects. Rather than being limited to traditional Native governments and governments reorganized under Federal law,

The 1993 list, like its predecessors, was published under authority of 25 CFR 83.6(b) (1993), which required the Secretary to publish in the Federal Register a list of "all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs."<sup>2/</sup> The definition of Indian tribe for purposes of 25 CFR Part 83 (1993) appeared at 25 CFR 83.1(f) (1993) and provided: "Indian tribe, also referred to herein as tribe, means any Indian group within the continental United States that the Secretary of the Interior acknowledges to be an Indian tribe." (Emphasis in original.)

[1] Had the eligibility criteria for the Special Tribal Court grant program required that a tribal applicant appear on the current Federal Register listing of "Indian entities," or even if no definition of "Indian tribe" had been cited in the program announcement,<sup>3/</sup> the Board might agree with the Chief that appellant did not qualify as a tribe.<sup>4/</sup> However, the program announcement explicitly incorporated the definition of "Indian tribe" in 25 U.S.C. § 450b(e) (1988),<sup>5/</sup> which defines the term for purposes of the Indian Self-Determination Act (P.L. 93-638).

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fn. 1 (continued)

as were the prior lists, the 1988 list was expanded to include nine categories of Alaska entities, including the state-chartered regional, village and urban corporations established pursuant to ANCSA."

58 FR at 54364-65.

This discussion suggests that appellant's inclusion on the 1982, 1983, 1985, and 1986 lists meant that it was then an entity with which BIA dealt on a government-to-government basis. If this was the case, however, the explanation given in the 1993 preamble for the omission of certain entities would not appear to pertain to appellant.

<sup>2/</sup> The version of Part 83 in effect in 1993, and during all times relevant to this appeal, was initially published in 1978. A revised version of Part 83 was published on Feb. 25, 1994, 59 FR 9280, and became effective on Mar. 28, 1994.

<sup>3/</sup> The Board has held that, where statutes or regulations do not define the term "Indian tribe," Departmental officials are bound by the regulations in 25 CFR Part 83. E.g., Edwards, McCoy & Kennedy v. Acting Phoenix Area Director, 18 IBIA 454 (1990), dismissed sub nom. Western Shoshone Business Council v. Babbitt, No. \_\_\_\_ (D. Utah), affirmed 1 F.3d 1052 (10th Cir. 1993).

<sup>4/</sup> At least this would be the case if appellant's eligibility were judged as of Dec. 17, 1993, the date it submitted its application. If, on the other hand, it were judged as of the date of publication of the program notice, appellant would presumably be eligible under this standard. The program notice was published on Oct. 14, 1993, 1 week prior to publication of the 1993 list of "Indian entities," which omits appellant. On Oct. 14, 1993, appellant was listed on the then-current list, i.e., the 1988 list.

<sup>5/</sup> All further citations to the United States Code are to the 1988 edition or supplements thereto.

25 U.S.C. § 450b(e) defines "Indian tribe" as

any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. [Brackets in original. ]

This definition is broader than traditional definitions of "Indian tribe" and includes entities, notably Alaska regional and village corporations, which are not normally considered to be tribes. See Cook Inlet Native Association v. Bowen, 810 F.2d 1471 (9th Cir. 1987).

Although an Indian entity need not be a tribe under 25 U.S.C. § 450b(e) in order to enter into a P.L. 93-638 contract, 6/ only Indian tribes are described as eligible to participate in the Tribal Self-Governance Demonstration Project, established under Title III of P.L. 93-638. Act of Oct. 5, 1988, section 209, 102 Stat. 2296, as amended by Act of Dec. 4, 1991, sections 2-6, 105 Stat. 1278; and Act of Oct. 29, 1992, section 814, 106 Stat. 4590, 25 U.S.C. § 450f note. 7/ The record in this appeal indicates that appellant has entered into a self-governance compact with the Department. Accordingly, it appears that appellant should be deemed an Indian tribe under 25 U.S.C. § 450b(e), whether or not it is considered to be an Indian tribe for purposes of 25 CFR Part 83 (1993). 8/

This conclusion is bolstered by the fact that the Special Tribal Court announcement indicated that an applicant which had qualified as a self-governance tribe was deemed to be a tribe within the meaning of the announcement:

Self-governance Tribes. For purposes of this announcement, a self-governance tribe is one which has a signed 1994 annual funding agreement at the time the application for Special

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6/ A tribal organization, as defined in 25 U.S.C. § 450b(l), may also contract, but only upon the request of an Indian tribe. See 25 U.S.C. § 450f(a).

7/ See, e.g., section 302(a) of P.L. 93-638, 25 U.S.C. § 450f note: "The Secretaries [of the Interior and Health and Human Services] shall select thirty tribes to participate in the demonstration project."

8/ The House report on the 1991 amendment to P.L. 93-638 stated:

"The Committee [on Interior and Insular Affairs] agrees with the Department's policy that regional tribes such as the Central Council of Tlingit and Haida Indian Tribes of Alaska, and consortium of tribes and villages are eligible in the self-governance demonstration project as agents for their member tribes and communities. This policy is consistent with the

Tribal court funds is submitted. With the exception of the self-governance resolution and letter from the chief executive officer of the tribe, [9/] the application requirements for self-governance tribes are the same as those for all other tribes. [Emphasis added.]

Part III, section B(2).

Under the circumstances here, the Board finds that appellant's omission from the 1993 list of Indian entities is not controlling. As indicated in the preamble to the 1993 list, quoted supra, the eligibility of Alaska entities for various BIA programs is not intended to be limited to those entities appearing on the list but, rather, depends upon the criteria of the programs themselves. In this case, appellant meets the eligibility criterion established in the announcement for the Special Tribal Court grant program, i.e., inclusion within the definition of Indian tribe in 25 U.S.C. § 450b(e).

The Board finds that appellant was an eligible applicant under the FY 1994 Special Tribal Court grant program. The Chief's motion to dismiss is therefore denied.

As noted above, the Chief's February 8, 1994, decision rejected appellant's application on the grounds that it exceeded the page limit stated in

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fn. 8 (continued)

longstanding practice where such regional tribes and consortiums are authorized by communities, federally-recognized tribes, and villages to contract under P.L. 93-638 for BIA programs and services. The Committee believes that this determination should only be made where there is a clear statement of such an intent from the participating tribes, villages and communities. For purposes of the Demonstration Project, each such consortium and regional tribe should be counted as one tribe. This determination of eligibility shall only apply with respect to Alaska and will have no effect on the Alaska Native Claims Settlement Act."

H.R. Rep. No. 320, 102nd Cong., 1st Sess. 6-7 (1991), reprinted in 1991 U.S. Code Cong. & Admin. News 899, 904.

It is arguable that this discussion indicates that appellant, described here as a "regional tribe," should be regarded as the equivalent of a consortium and that it should therefore be required to apply for a Special Tribal Court grant as a consortium, rather than a tribe.

The Board believes that the better interpretation of the Committee's statement is that once appellant met the stated requirements for the Self-Governance Project, it was to be deemed a tribe for purposes of that project. In such a case, appellant should also be deemed an Indian tribe within the meaning of 25 U.S.C. § 450b(e).

9/ These documents were required from self-governance tribes under Part III, section B(2) and Part IV, section E(2), of the program announcement. Both were included in appellant's application.

the announcement of the Special Tribal Court program. Part IV, section E, of the announcement provided:

(3) Each application shall not exceed fifty (50) pages, space and one-half or double-spaced, exclusive of required forms and assurances which are listed below. Applications which are single-spaced will be considered only if it is determined the applicant has not thereby gained a competitive advantage.

(4) The following documents are excluded from the 50 page limitation: A tribal resolution or endorsement or such other written expression as tribal laws or practice require; written assurance of the procedures required in OMB Circular A-128; proof of non-profit status; Standard Forms (SF) 424 and 424B; Certification regarding a Drug-free Workplace, DI-1955 (May 1990); Assurance--Non-construction Programs; and, Certification Regarding Lobbying. All required forms are included at the end of this announcement.

(5) Within the 50 page limitation, the following guidelines are suggested:

(a) Background and summary description (one page);

(b) Program narrative (20-30 pages);

(c) Budget and budget justification (5-10 pages); and

(d) Applicant's capability statement, including an organization chart and vitae for key project personnel, including consultants and third-party technical assistance providers (5-10 pages).

(6) In addition, applicants are encouraged to include letters endorsing or supporting the proposed project which are specific and/or verify tangible commitments to the project, e.g., staff, facilities, training.

The Chief found that appellant's application was 56 pages long. Appellant contends that letters of support and divider pages should not be counted.

In Nisqually Indian Tribe v. Chief, Branch of Judicial Services, 26 IBIA 2 (1994), the Chief acknowledged that the language of section E(6) was ambiguous and that, therefore, letters of support should not be counted in the 50-page limit. In Omaha Tribe of Nebraska v. Chief, Branch of Judicial Services, 26 IBIA 122 (1994), the Board found that divider pages should not be counted.

Even when letters of support and divider pages are excluded, however, appellant's application still exceeds the 50-page limit.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Chief's February 8, 1994, decision is affirmed.

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//original signed  
Anita Vogt  
Administrative Judge

I concur:

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge