INTERIOR BOARD OF INDIAN APPEALS

In Re Federal Acknowledgment of the Pamunkey Indian Tribe

62 IBIA 122 (01/28/2016)

Related Board case:
61 IBIA 133

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

IN RE FEDERAL ACKNOWLEDGMENT OF THE PAMUNKEY INDIAN TRIBE	)	Order Dismissing Request for Reconsideration
	)	Docket No. IBIA 16-003
	)	January 28, 2016

Stand Up for California! (Stand Up), a non-profit organization that focuses on gambling issues affecting California, filed a Request for Reconsideration (Request), under 25 C.F.R. § 83.11 (2014), challenging the Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe (Final Determination) issued by the Assistant Secretary – Indian Affairs (Assistant Secretary) on July 2, 2015.[1] *See* 80 Fed. Reg. 39144 (July 8, 2015). The Final Determination concluded that the Pamunkey Indian Tribe (Tribe), which is located in the Commonwealth of Virginia, is entitled to be acknowledged as an Indian tribe within the meaning of Federal law because the Tribe satisfies the seven mandatory criteria under 25 C.F.R. § 83.7 for such acknowledgment.

We dismiss Stand Up's request, for lack of standing, because Stand Up has failed to show that it is an "interested party" to the Final Determination within the meaning of the Federal acknowledgment regulations. Interested party status may be based on a "factual interest," but Stand Up fails to articulate any type of factual interest that we believe was intended to be covered by the acknowledgment regulations, nor does Stand Up allege that it is adversely affected by the Assistant Secretary's determination to acknowledge the Tribe. Stand Up's interpretation of the term "factual interest" incorrectly seeks to direct attention away from the requirement to assert its own factual interest in the matter, arguing that by proffering allegedly valuable evidence that is relevant to the acknowledgment determination, it meets the standing requirements of the acknowledgment regulations. We disagree, and therefore dismiss Stand Up's request for reconsideration.

---

[1] In 2015, the Federal acknowledgement regulations were revised, effective July 31, 2015. *See* 80 Fed. Reg. 37862 (July 1, 2015). The Final Determination was issued under the previous regulations, which provide for filing requests for reconsideration with the Board. All citations in this order, and accompanying discussion, are to the regulations as codified in the 2014 edition of the Code of Federal Regulations, prior to the 2015 revisions.

Background

This proceeding involves a determination by the Assistant Secretary whether the Pamunkey Tribe, based on the evidence in the record, satisfies the regulatory criteria to be acknowledged as an Indian tribe, within the meaning of Federal law. The Assistant Secretary concluded that the Tribe had submitted "voluminous and clear documentation" that his experts viewed as "truly extraordinary," and which he concluded "easily satisfies" the regulatory criteria. 80 Fed. Reg. at 39144.

Stand Up disagrees with that assessment. In the proceedings before the Assistant Secretary, Stand Up and MGM National Harbor submitted joint comments in opposition to the Tribe's petition.[2] 80 Fed. Reg. at 39145. The Assistant Secretary found those comments and the evidence proffered with them unconvincing. *Id*. at 39145-49. Stand Up also apparently submitted some additional comments out of time, which were not specifically addressed by the Assistant Secretary. Request, Oct. 6, 2015, at 1.

Stand Up submitted a timely request for reconsideration of the Final Determination to the Board, alleging that one or more grounds over which the Board has subject matter jurisdiction provided a basis to set aside the Assistant Secretary's decision. *See* 25 C.F.R. § 83.11(d) (2014).[3] Because it was unclear on what basis Stand Up claimed to have standing as an "interested party" under the Federal acknowledgment regulations, which is a requirement for requesting reconsideration, the Board ordered briefing on that issue. In so doing, the Board ordered Stand Up to submit "all evidence and argument upon which it

---

[2] MGM National Harbor's website identifies it as a "world-class Destination Resort Casino at National Harbor," which is located in Maryland adjacent to the I-495 beltway around Washington, D.C. *See* www.mgmnationalharbor.com (last visited on Jan. 7, 2016; copy added to record). MGM National Harbor did not seek reconsideration of the Final Determination.

[3] As evidence in support of its request, Stand Up submitted a 6-page exhibit, titled "Final Supplement to March 2015 Report Titled: 'Historical Pamunkey Indian Ancestor Edward 'Ned' Bradby: An Investigative Commentary.'" No authorship is attributed to the exhibit, which appears to offer a summary of, and commentary on, selected historical records from the National Archives. Under the acknowledgment regulations, Stand Up's Request constitutes its opening brief on the merits, and no reply by Stand Up to opposing parties' answer briefs would be permitted. 25 C.F.R. § 83.11(e)(5)-(6). A requester who seeks reconsideration of a final acknowledgment determination based on new evidence must submit the new evidence on which it relies with its request for reconsideration. *In re Federal Acknowledgment of the Pamunkey Indian Tribe*, 61 IBIA 133, 133 (2015); *In re Federal Acknowledgment of the Ramapough Mountain Indians*, 31 IBIA 61, 66 (1997).

relies to demonstrate that it is an 'interested party,' under the regulations." Notice of Receipt of Timely Request for Reconsideration and Order for Briefing on Standing, Oct. 9, 2015, at 3.

Stand Up filed a brief on standing. The Tribe and the Assistant Secretary filed answer briefs in opposition, arguing that Stand Up lacks standing. Stand Up filed a reply brief.[4]

Discussion

Only an "interested party" may request reconsideration of a final determination by the Assistant Secretary to Federally acknowledge a petitioning group as an Indian tribe. 25 C.F.R. § 83.11(a)(1). The term is defined in the acknowledgment regulations as follows:

> Interested party means 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.

Id. § 83.1 (emphases added).

The Board has interpreted the regulations to require that for a party to qualify as an "interested party," its "interest" in the acknowledgment determination, whether legal, factual, or property, must be "significant," and to require a showing of injury to the interest and causation—that the requester was or might be "affected" by the final determination for

---

[4] It is clear that the acknowledgment regulations do not permit a requester, other than when a petitioner is the requester, to file a reply brief on the merits. But the Board permitted Stand Up to file a reply brief on the threshold issue of standing.

The Governor of Virginia submitted a letter to the Board, which expressed support for Federal acknowledgment of the Tribe, but which did not address the issue of Stand Up's standing. *See* Letter from McAuliffe to Board, Nov. 24, 2015. Because the views expressed in the letter are not relevant to our disposition of this appeal, and because it was not served on Stand Up, we give it no consideration.

which reconsideration is sought. *See In re Federal Acknowledgment of the Shinnecock Indian Nation*, 52 IBIA 127, 130 & n.6 (2010); *In re Federal Acknowledgment of the Nipmuc Nation*, 41 IBIA 96, 99 (2005); *In re Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, 33 IBIA 291, 298 (1999).

In the present case, Stand Up claims to have a "factual interest," and on that basis argues that it has standing. Stand Up contends that it is a non-profit organization that is registered with the California Secretary of State, which "focuses on gambling issues affecting California, including tribal gaming, card clubs, horse racing, satellite wagering, charitable gaming and the state lottery." Stand Up Brief on Standing[5] (Stand Up Br.), Nov. 9, 2015, at 1. Stand Up identifies its goals as, "1) to educate lawmakers, law enforcement, local governments and citizens about the cultural, economic and political impacts of state and tribal government gaming[;] and 2) to develop a focused policy that safeguards communities, local governments, and tribal governments and promotes mutually cooperative and beneficial government to government relationships." *Id*.

We question whether Stand Up's "interest" as an organization to "educate" and develop a "policy" relating to gaming in California would qualify as a significant factual interest "in" or which could be "affected by" *any* Federal acknowledgment determination, within the meaning intended by the acknowledgment regulations. In our view it clearly does not constitute a factual interest in the Final Determination to acknowledge the Pamunkey Tribe.

As noted above, the Board has construed the regulations to require a showing of injury and causation to the particular interest being asserted by a requester. Stand Up argues that such a requirement improperly applies judicial standing principles, because, according to Stand Up, the Board has suggested that the Department's inclusion of "factual" interests in the definition of "interested party" was intended to broaden standing beyond judicial standing. Stand Up Br. at 3-4 (citing *In re Federal Acknowledgment of the Snoqualmie Tribal Organization*, 34 IBIA 22, 25 (1999)). But Stand Up confuses the *type* of interest that may be cognizable under the acknowledgment regulations—factual, legal, or property—which may be broader than the type of cognizable interest for judicial standing, with the requirement that the requester's interest must still be "in" the acknowledgment determination and "affected by," or potentially affected by it, which the Board has

---

[5] Stand Up's pleading is styled as a "Declaration and Brief on Standing," but no declaration or other evidence is enclosed with the brief. The brief is signed by Cheryl Schmit, who identifies herself as the Director of Stand Up. Stand Up does not purport to rely on the individual interests of its members to show standing, and thus we only address its standing as an organization.

construed to incorporate an injury and causation requirement.[6] *Shinnecock Indian Nation*, 52 IBIA at 130.

Even were we to assume that Stand Up has identified a "factual interest," within the meaning of the regulations, Stand Up fails to establish how that interest is "in" or "affected by" the Final Determination, i.e., that it has an actual stake in the outcome of the acknowledgment proceeding for the Tribe. Stand Up argues that "Tribal acknowledgment directly affects the gaming environment[] in California." Stand Up Br. at 2. Why or how that is the case is left unarticulated and unexplained by Stand Up, and no declarations accompany its brief. Nor, as relevant to our disposition of this case, does Stand Up explain how acknowledgment of the Tribe, which is located in Virginia, would affect in any way the "gaming environment[] in California," or how that in turn would affect Stand Up as an organization, which states its goals as seeking to educate and to develop policy related to gambling issues affecting California.

Stand Up posits an interpretation of the definition of "interested party" which, it argues, affords it standing based on its submission of "valuable historical information and analysis." Stand Up Br. at 3, 6. As an initial matter, we might well dismiss Stand Up's request for lack of standing based solely on its own argument, because it is hardly self-evident that its exhibit, without attribution of authorship, and with assertions not clearly supported by selective and not always legible reproductions of portions of historical records, qualifies as valuable historical information.

More fundamentally, however, we reject Stand Up's interpretation of the regulations. Stand Up seeks to direct attention away from a requester's own cognizable interest—factual, legal, or property—in an acknowledgment determination. But the threshold determination of standing must be based on evidence offered *regarding the requester* to establish *its interest*, which in turn must be shown to have a nexus to an acknowledgment determination sufficient to demonstrate injury and causation.

Stand Up relies on language in the preamble to the Department's 1994 revisions to the acknowledgment regulations. In the 1994 rule, the term "interested party" was defined

---

[6] Stand Up also argues that in appropriate cases the Board has entertained appeals where parties lacked standing in order to correct manifest error or injustice. Stand Up Br. at 3 n.1. The case cited by Stand Up, *Estate of Clara Seltice Sherwood*, 14 IBIA 238 (1986), does not support that assertion—the appellant undoubtedly had standing in both probate estates addressed by the Board's decision, because his heirship was at stake—and in any case the limited "evidence" submitted with Stand Up's request would fall far short of demonstrating manifest error or injustice.

for the first time. In the final rulemaking the Department revised the definition of "interested party" that had been proposed, and which had been open-ended,[7] and created a new category for "informed party," with the following explanation:

> [T]he Department's position is that parties which may have a legal or property interest in a decision, such as recognized tribes or non-Indian governmental units, must be allowed to participate. *Other parties, such as scholars with a knowledge of the history of a petitioning group, often are able to contribute valuable information not otherwise available*. . . . *Thus, participation of such interested parties is both appropriate and useful*.
>
> The Department agrees that third parties without a significant property or legal interest in a determination should not be permitted to participate without limit. Therefore, the definition of interested party has been revised to refer to third parties with a significant property or legal interest. A separate phrase informed party, has been defined in § 83.1 to refer to all other third parties. Language throughout the regulations has been revised to reflect this distinction. *The revised and additional definitions should be read together with the language of § 83.11, on reconsideration*, ...

Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280, 9283 (Feb. 25, 1994), *quoted in* Stand Up Br. at 4-5 (Stand Up's italics and underlining).

Stand Up construes the reference to "participation of such interested parties" as reflecting an intent to confer interested party status on "scholars with a knowledge of the history of a petitioning group."[8] Stand Up Br. at 4-5. But while Stand Up attempts to rely on the preamble language to bolster its claim to have standing based on a purported "factual" interest, it concedes that the preamble language quoted above fails to include any reference to "factual" interests in explaining the revised definition of interested party. *Id*. In fact, when the Department explained the revised definition of "interested party," it stated

---

[7] As originally proposed, the definition of "interested party" meant "any person or organization who has requested that they be informed of general actions pursuant to these regulations that are initiated by the Assistant Secretary and/or petitioners, and any person or organization who submits comments or evidence in support of or in opposition to a petitioner's request for acknowledgment as an Indian tribe." Proposed Rule, 56 Fed. Reg. 47320, 47325 (Sept. 18, 1991).

[8] The inclusion of scholars in the definition of interested party would not necessarily benefit Stand Up, which makes no claim, as an organization, to scholarship in the fields of history or ethnology.

that the term had been revised to refer to "third parties with a significant *property or legal interest*," and that the category of "informed party" had been developed "to refer to *all other third parties*." 59 Fed. Reg. at 9283 (emphases added). And the Board has denied interested party status to an ethno-historian, thus rejecting an interpretation of the regulations that would necessarily treat scholars as interested parties. *See In Re Federal Acknowledgment of the Golden Hill Paugussett Tribe*, 32 IBIA 216, 220 (1998); *see also Nipmuc Nation*, 41 IBIA at 98.

Stand Up contends that because the definition of interested parties refers to "factual" interests, the preamble language cannot be construed to exclude factual interests. That may well be the case, but it does not follow that the Department intended the term "factual interest" to be an expansive category, or to eliminate the injury and causation requirements that can be inferred from the definition of interested party. If anything, the Department's clear emphasis on third parties with a "significant property or legal interest" would seem to compel a conclusion that the category of "factual interest" was intended to be construed narrowly. In any event, we are not convinced that the Department intended the broad reading urged by Stand Up.

Finally, Stand Up argues that an erroneous Federal acknowledgment determination will have "significant impacts to the State and local government jurisdictions, surrounding communities, property owners, businesses, Indian and non-Indian individuals, and federally-recognized Indian tribes as well," and thus the "public interest" supports a finding that Stand Up has standing. Stand Up Br. at 6-7. We disagree. Stand Up may only assert its own interests, *see Quapaw Tribal Remediation Authority v. Acting Eastern Oklahoma Regional Director*, 61 IBIA 55, 64 (2015), and the regulations do not grant standing to a requester based on an allegation that it is asserting a "public" interest.[9]

To summarize, we are not convinced that Stand Up has a factual interest in the Final Determination, within the meaning intended by the acknowledgment regulations, and thus we conclude that it is not an "interested party" entitled to seek reconsideration.

---

[9] Stand Up also argues that the Department's recent changes to the Federal acknowledgment regulations "will likely result in a dramatic increase in the number of recognized Indian governments in California," and that because of the proposed changes, Stand Up established a national project on Federal acknowledgment. Stand Up Br. at 2. But as pointed out by the Tribe, the Assistant Secretary's determination was not based on the revised regulations, and Stand Up has failed to show how changes to the Federal acknowledgment regulations have any relevance to its standing to challenge the Final Determination.

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 dismisses Stand Up's request for reconsideration for lack of standing.

I concur:

// original signed	//original signed
Steven K. Linscheid	Thomas A. Blaser
Chief Administrative Judge	Administrative Judge