INTERIOR BOARD OF INDIAN APPEALS

Barry Adams and David Hanson v. Acting Midwest Regional Director,
Bureau of Indian Affairs

50 IBIA 354 (11/30/2009)

United States Department of the Interior

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

BARRY ADAMS and DAVID HANSON, Appellants,	)	Order Affirming Decisions
v.	)	Docket Nos. IBIA 09-136, 09-139
ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	November 30, 2009

Barry Adams and David Hanson (Appellants) seek review of two identical decisions issued by the Acting Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), both dated July 22, 2009, in which she affirmed the decisions of the Superintendent, Michigan Agency, BIA (Superintendent). The Superintendent declined Appellants' requests that BIA countersign treaty fishing identification cards issued to them by the "Mackinac Tribe of Odawa and Ojibwa Indians" ("Mackinac Tribe"). Appellants contend that they are entitled to have BIA countersign such identification cards because the "Mackinac Tribe" was a "direct 'Signatory' to the Treaties of 1820 - 1836 and 1855." Notices of Appeal at 2 (emphasis omitted). We docket these appeals, and affirm the Regional Director's decisions because the Regional Director properly determined that the "Mackinac Tribe" presently is not Federally recognized as an Indian tribe with treaty fishing rights.

Upon receipt of Appellants' appeals, the Board of Indian Appeals (Board) issued an Order to Show Cause (OSC) why the Regional Director's decisions should not be summarily affirmed. The treaty fishing identification applications and cards presented by Appellants to BIA for countersignature requested BIA to certify that each applicant "is a member of the tribe or community indicated and is entitled to exercise tribal fishing rights secured by the Treaty of March 28, 1836 (7 Stat. 491)." On both applications, the tribe was identified as the "Mackinac Tribe," and the applications were signed by an individual identified as the tribal chairman. The Superintendent and the Regional Director both declined to sign the applications because the "Mackinac Tribe" is not listed in the Federal Register as a Federally recognized Indian tribe. *See* 25 U.S.C. §§ 479a, 479a-1 (defining

"Indian tribe" and requiring the Secretary of the Interior to publish a list of Indian tribes recognized as eligible for special programs and services from the United States).

In response to the Board's OSC, Appellants concede that the "Mackinac Tribe" is not Federally recognized as an Indian tribe, but argue that this fact is irrelevant to whether the "Mackinac Tribe" still has treaty-reserved fishing rights, and thus that the Regional Director erred in stating that the tribe is not recognized as having such rights. Appellants also argue that the Regional Director improperly treated the list of Federally recognized tribes that is published in the Federal Register as dispositive in determining that the tribe has no recognized treaty fishing rights.

We agree that the Federal Register list of Federally recognized tribes does not determine the existence or nonexistence of treaty rights. But it does identify those entities presently recognized *by the Federal government* to exist as Indian tribes, and so controls BIA's response to Appellants' requests to countersign tribal fishing rights identification cards. We begin our analysis with 25 C.F.R. Part 249, which contains BIA's "Off Reservation *Treaty* Fishing" regulations. (Emphasis added.) Pursuant to these regulations and, *if authorized by BIA*, "tribal authorities" may issue treaty fishing identification cards. 25 C.F.R. § 249.3(a).[1] In order to be valid, such "*tribal* cards" also must be countersigned by BIA. *Id*. (emphasis added). Section 249.3(b) expressly limits the issuance of treaty fishing identification cards to members of a "tribe." Thus, both subsections (a) and (b) require the existence of a tribe before one can be entitled to receive a treaty fishing identification card under Part 249.

The word "tribe" is not separately defined for purposes of Part 249, but under the regulations that set forth the policies and procedures for establishing recognition of a group that exists as an Indian tribe, the term "Indian tribe" is defined to mean a tribe, band, pueblo, village, or community "that the Secretary of the Interior presently acknowledges to exist as an Indian tribe." 25 C.F.R. § 83.1. That definition is mirrored in the statutory definition related to the requirement that the Secretary publish in the Federal Register a list of all Federally recognized tribes. *See* 25 U.S.C. §§ 479a(2) and 479a-1; *see also* 25 C.F.R. § 83.5(a). Appellants concede that the "Mackinac Tribe" is not presently acknowledged by the Secretary to exist as an Indian tribe. And it is undisputed that the "Mackinac Tribe"

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[1] Appellants do not contend that BIA ever authorized the "Mackinac Tribe" to issue tribal cards, and the absence of such authorization could have served as an independent ground for BIA to decline to countersign the cards presented by Appellants.

does not appear on the list of Federally recognized tribal entities published in the Federal Register. *See* 74 Fed. Reg. 40,218 (Aug. 11, 2009); 73 Fed. Reg. 18,553 (Apr. 4, 2008).[2]

Appellants argue that the Federal Register list of Federally recognized tribes is irrelevant to the "Mackinac Tribe's" treaty fishing rights. They claim that the purpose of the list is limited to identifying "Indian [e]ntities [w]ho are eligible to receive government services . . . and has nothing to do with [treaty rights]." Response to OSC at 2 (emphasis omitted). It is true that the list does not determine what treaty rights have been reserved and by whom, but the list does identify those entities that are Federally acknowledged to exist as "tribes" and, as such, the list is binding on BIA. Moreover, Federal acknowledgment of tribal existence is a prerequisite to the protection of the Federal government available to tribes by virtue of their status as tribes, which includes protection of treaty rights. *See* 25 C.F.R. § 83.2. In addition, the treaty fishing identification card program clearly is a "special program[] and service[] provided by the United States to Indians because of their status as Indians," 25 U.S.C. § 479a-1, and thus the purpose of the Federal Register list and the purpose of Part 249 are wholly consistent.

Ultimately, neither BIA nor this Board has been delegated the authority to determine whether an entity that is not identified on the Federal Register list as a Federally recognized tribe is entitled to be acknowledged to exist as an Indian tribe. That authority exists elsewhere, e.g., pursuant to the recognition process set forth in 25 C.F.R. Part 83. *See Interim Ad Hoc Committee of the Karok Tribe v. Sacramento Area Director*, 13 IBIA 76, 87 (1985) (25 CFR Part 83 governs the administrative Federal acknowledgment of Indian tribes). Thus, where a group is not listed as a recognized tribe in the Federal Register, the process of Federal acknowledgment that is found in 25 C.F.R. Part 83 *is* the administrative process for such groups as the "Mackinac Tribe." Only after becoming Federally recognized as a tribe, and after a determination that the tribe is a successor in interest to treaty rights, would the "Mackinac Tribe" and its members be entitled to participate in the tribal treaty fishing identification card program described in 25 C.F.R. Part 249.

Therefore, in refusing Appellant's request under Part 249 to countersign for tribal identification cards, the Regional Director correctly relied on the Federal Register list of recognized tribes and on the absence from that list of the "Mackinac Tribe," as grounds to

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[2] The list of Federally recognized tribes has been published in the Federal Register for over 30 years. *See, e.g.*, 44 Fed. Reg. 7235 (Feb. 6, 1979).

deny Appellants' request.[3] The Regional Director's additional statement that the "Mackinac Tribe" is not "recognized as having [treaty] fishing rights," Decision at 2, also was correct, as a factual matter, and thus served as a proper additional ground to find that Appellants were not entitled to the requested identification cards.[4] But we do not construe the statement as purporting to independently determine whether the "Mackinac Tribe" has fishing rights, only whether it is *presently* recognized by the United States as having fishing rights, which it is not.[5]

Appellants suggest that "[t]he very existence and 'sovereignty' of the Mackinac Tribe . . . could very well hang on the decisions made by this . . . Board." Response to OSC at 1 (emphasis omitted). Appellants misconstrue both the Regional Director's decision and the scope of this appeal. The decision at issue is whether Appellants are entitled to have BIA countersign treaty fishing rights identification cards issued by the "Mackinac Tribe." Again, whether BIA may do so is controlled by BIA's regulations, 25 C.F.R. Parts 83 and 249. We express no opinion, and read no inference from the Regional Director's decision, as to whether the "Mackinac Tribe" is entitled to Federal acknowledgment as an Indian tribe

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[3] Appellants cite *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), for the proposition that the continuing existence of tribally-reserved treaty rights is not dependent upon continuing Federal recognition, and can survive termination. *See also United States v. Michigan*, 471 F. Supp. 192, 265 (W.D. Mich. 1979), *modified on other grounds*, 623 F.2d 448 (1980) (*per curiam*), *further modified on other grounds*, 653 F.2d 277 (6th Cir. 1981). We do not disagree. But that proposition is not relevant to BIA's authority to countersign tribal treaty fishing identification cards, which is derived from 25 C.F.R. Part 249, and is limited to those entities that currently are identified as Federally recognized tribes.

[4] The Regional Director identified five tribes as recognized successors in interest to the tribes that signed the Treaty of 1836: The Sault Ste. Marie Tribe of Chippewa Indians (Sault Ste. Marie Tribe), Bay Mills Indian Community, Little River Band of Ottawa, Little Traverse Bay Bands of Odawa Indians, and Grand Traverse Band of Ottawa and Chippewa. Decision at n.1. Each of these tribes is Federally recognized. *See* 74 Fed. Reg. at 40,219–40,221; 73 Fed. Reg. at 18,553, 18,554, 18,556.

[5] Appellants apparently are members of the Sault Ste. Marie Tribe, but contend that the rules and regulations of the Sault Ste. Marie Tribe deny them eligibility to exercise treaty fishing rights, notwithstanding their membership. Whether or not that is the case, it is not relevant to our determination that Appellants are not entitled to have BIA countersign tribal fishing cards issued by the "Mackinac Tribe."

pursuant to 25 C.F.R. Part 83, and, if so acknowledged, whether the "Mackinac Tribe" possesses treaty rights that may be exercised by its members.[6]

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 Regional Director's July 22, 2009, decisions.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

[6] Appellants appear to construe the Regional Director's decision to suggest that the "Mackinac Tribe" no longer possesses treat fishing rights as a *legal* matter. We construe his statement more simply: As a *factual* matter, the present-day group identified as the "Mackinac Tribe" is not recognized by the Federal government as having treaty fishing rights.