

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE MASHPEE WAMPANOAG
TRIBAL COUNCIL, INC.,

Plaintiff,

v.

GALE A. NORTON, et al.,
Defendants.

Case No.: 1:01CV00111
(JR)

EIGHTH DECLARATION OF R. LEE FLEMING

I, R. Lee Fleming, do hereby state as follows:

I. Introduction

1. I am employed by the Department of the Interior ("Department"), which has responsibility for matters arising out of Indian relations with the United States.
2. I hold the position of Director, Office of Federal Acknowledgment ("OFA"), which is primarily responsible implementing 25 C.F.R. Part 83, and report to the Assistant Secretary - Indian Affairs ("AS-IA") through the Principal Deputy AS-IA.

II. Acknowledgment Process Update

OFA Staffing

3. On February 3, 2005, one of OFA's three (3) anthropologists retired from Federal service. This anthropologist is now a part-time OFA contractor and the vacancy is being replaced.
4. On May 16, 2005, the Department hired a historian to fill a vacancy resulting from the retirement of one of OFA's three (3) historians.
5. OFA staff now comprises one (1) director, one (1) secretary, three (3) genealogists, three (3) historians, and two (2) anthropologists. Presently, OFA has two (2) full teams and

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one (1) partial team to review and evaluate petitions. OFA has continued to contract with technicians for the entry of data, records management, and Freedom of Information Act production. The total number of full-time contracted staff is six (6) and OFA also has one (1) part time-time contracted Federal Acknowledgment Specialist.

6. The Department advertised for an anthropologist position to bring OFA back up to three (3) full teams.
7. With respect to hiring an anthropologist, OFA worked with the Department's personnel office in reviewing the job position description and drafting the job vacancy announcement. The vacancy announcement was posted in the usual places, such as the OPM web site, and the vacancy announcement was distributed to national professional societies, organizations, colleges, and universities. The closing of the announcement is June 15, 2005. The interviews, selection, and hiring of an anthropologist are expected to occur between late June and early July 2005.
8. The Department also has taken steps to hire three additional professional staff and establish a fourth team by approximately October 1, 2005.

Current Acknowledgment Workload and Projected Schedules

Ready List

9. As of February 4, 2005, the following twelve (12) petitioners are on the Ready list in the order in which they were declared ready:
 - a. Juaneno Band of Mission Indians, CA;
 - b. Mashpee Wampanoag Tribal Council, Inc., MA;
 - c. Brothertown Indians of Wisconsin, WI;
 - d. Juaneno Band of Mission Indians, CA;
 - e. Tolowa Nation, CA;
 - f. Piro/Manso/Tiwa Indian Tribe of the Pueblo of San Juan de Guadalupe, NM;
 - g. Meherrin Tribe, NC;
 - h. Southern Sierra Miwuk Nation, CA;
 - i. Muscogee Nation of Florida, FL;
 - j. Georgia Tribe of Eastern Cherokees, Inc., GA;
 - k. Shinnecock Indian Nation, NY; and
 - l. Amah Band of Ohlone/Coastanoan Indians, CA.

Exhibit 1 at 3 (Status Summary of Acknowledgment Cases).

Active Consideration

10. As of February 4, 2005, the following seven (7) petitioners are on active consideration under various regulatory phases:

- a. St. Francis/Sokoki Band of Abenakis of Vermont, VT (research team working on a proposed finding);
- b. Little Shell Tribe of Chippewa Indians of Montana, MT (in comment period);
- c. Steilacoom Tribe, WA (in comment period);
- d. Biloxi, Chitimacha Confederation of Muskogees, LA (research team working on amended proposed finding);
- e. Point Au Chien Indian Tribe, LA (research team working on amended proposed finding); and
- f. United Houma Nation, Inc., LA (awaiting final determination after related proposed findings in ¶ 10 d and e are completed); and
- g. Burt Lake Band of Ottawa and Chippewa Indians, Inc., MI (in comment period).

Exhibit 1 at 2 (Status Summary of Acknowledgment Cases). For a more detailed description of these petitioners, including general background, membership size, and petition size information, *see* Fleming 7th Decl. at ¶¶ 21 and 22. *See also* Exhibit 1 at 2.

11. During the next two years, the Department anticipates issuing six (6) proposed findings, nine (9) final determinations, and two (2) reconsidered final determinations. The projected schedule below should allow the Department to start the review and evaluation for Mashpee's proposed finding in October 2005, issue a proposed finding in April 2006, and issue a final determination in late March 2007. This projected schedule represents a significant change from the schedule the Department originally proposed in its supplemental declaration ("7th Declaration") filing in February 2005, which called for placing the Mashpee petition on active consideration in August 2006, issuing a proposed finding in March 2007, and completing a final determination in December 2007. *See* Fleming 7th Decl. at ¶ 23. The changes are possible because of recent developments on other petitions that are on active consideration. The projected dates provided in paragraph 27 of the 7th Declaration have been provided in parenthesis for comparison.

Based on the regulatory processing phases under active consideration, a projected schedule for all the petitions on active consideration and the Ready list up to the Brothertown petitioner is as follows:

- a. Steilacoom Tribe
- | | | |
|----------------------------|--------------|------------------|
| Close of comment period | August 2006 | (August 2005) |
| Close response period | October 2006 | (September 2005) |
| Begin final determination | October 2006 | (October 2005) |
| Final determination issued | January 2007 | (January 2006) |
- b. Burt Lake Band of Ottawa and Chippewa Indians, Inc.
- | | | |
|----------------------------|---------------|-----------------|
| Close of comment period | May 2005 | (April 2005) |
| Begin response period | May 2005 | (April 2005) |
| Close response period | July 2005 | (May 2005) |
| Begin final determination | November 2005 | (November 2005) |
| Final determination issued | February 2006 | (February 2006) |
- c. St. Francis/Sokoki Band of Abenakis of Vermont
- | | | |
|----------------------------|----------------|------------------|
| Begin proposed finding | February 2005 | (February 2005) |
| Proposed finding issued | September 2005 | (September 2005) |
| Begin comment period | September 2005 | (September 2005) |
| Close comment period | March 2006 | (February 2006) |
| Begin response period | March 2006 | (February 2006) |
| Close response period | May 2006 | (March 2006) |
| Begin final determination | May 2006 | (March 2006) |
| Final determination issued | August 2006 | (June 2006) |
- d. Biloxi, Chitimacha Confederation of Muskogees, Inc.
- | | | |
|------------------------|---------------|-----------------|
| Begin proposed finding | February 2005 | (February 2005) |
|------------------------|---------------|-----------------|

	Proposed finding issued	October 2005	(October 2005)
	Begin comment period	October 2005	(October 2005)
	Close comment period	April 2006	(March 2006)
	Begin response period	April 2006	(March 2006)
	Close response period	June 2006	(April 2006)
	Begin final determination	July 2006	(April 2006)
	Final determination issued	October 2006	(July 2006)
e.	Point Au Chien Indian Tribe		
	Begin proposed finding	February 2005	(February 2005)
	Proposed finding issued	October 2005	(October 2005)
	Begin comment period	October 2005	(October 2005)
	Close comment period	April 2006	(March 2006)
	Begin response period	April 2006	(March 2006)
	Close response period	June 2006	(April 2006)
	Begin final determination	July 2006	(April 2006)
	Final determination issued	October 2006	(July 2006)
f.	United Houma Nation, Inc.		
	Begin final determination	July 2006	(April 2006)
	Final determination issued	October 2006	(July 2006)
g.	Little Shell Tribe of Chippewa Indians of Montana		
	Begin response period	February 2005	(February 2005)
	Close response period	April 2005	(April 2005)
	Begin final determination	November 2006	(March 2007)
	Final determination issued	February 2007	(June 2007)

h. Juaneno Band of Mission Indians

Begin proposed finding	September 2005	(July 2006)
Proposed finding issued	May 2006	(February 2007)
Begin comment period	May 2006	(February 2007)
Close comment period	November 2006	(July 2007)
Begin response period	November 2006	(July 2007)
Close response period	January 2007	(August 2007)
Begin final determination	January 2007	(August 2007)
Final determination issued	March 2007	(November 2007)

i. Mashpee Wampanoag Tribal Council, Inc.

Begin proposed finding	October 2005	(August 2006)
Proposed finding issued	April 2006	(March 2007)
Begin comment period	April 2006	(March 2007)
Close comment period	October 2006	(August 2007)
Begin response period	October 2006	(August 2007)
Close response period	December 2006	(September 2007)
Begin final determination	January 2007	(September 2007)
Final determination issued	March 2007	(December 2007)

j. Brothertown Indians of Wisconsin

Begin proposed finding	January 2006	(September 2006)
Proposed finding issued	September 2006	(April 2007)
Begin comment period	September 2006	(April 2007)
Close comment period	March 2007	(September 2007)
Begin response period	March 2007	(September 2007)
Close response period	May 2007	(October 2007)

- | | | | |
|--|----------------------------|-------------|----------------|
| | Begin final determination | May 2007 | (October 2007) |
| | Final determination issued | August 2007 | (January 2008) |
- k. Historical Eastern Pequot Tribe (Eastern Pequot Indians of Connecticut petitioner and the Paucatuck Eastern Pequot Indians of Connecticut petitioner)
- | | | | |
|--|------------------------|--------------------|--|
| | Begin Reconsideration | May 12, 2005 | |
| | Reconsideration Issued | September 12, 2005 | |
- l. Schaghticoke Tribal Nation
- | | | | |
|--|------------------------|--------------------|--|
| | Begin Reconsideration | May 12, 2005 | |
| | Reconsideration Issued | September 12, 2005 | |

The projected schedule for the petitioners on active consideration, petitioners ¶ 11 a - j, is based on the regulatory and Departmental standards and practices that a three member OFA research team applies to evaluate a petition and determine if it has met the seven mandatory criteria required to establish tribal status pursuant to the acknowledgment regulations. Additionally, this projected schedule assumes the petitioners and interested third parties do not seek extensions of time or other logistical problems do not arise requiring additional time to process and render a well-reasoned, defensible decision.

Post Review Process

12. The following five (5) petitioners are in the post final determination review process under 25 C.F.R. §§ 83.10(1)(4) & 83.11 as the result of requests to the Interior Board of Indian Appeals (“IBIA”) for reconsideration and technically are considered still to be on active consideration:
- a. Historical Eastern Pequot Tribe, comprising two petitioners – the Eastern Pequot Indians of Connecticut petitioner and the Paucatuck Eastern Pequot Indians of Connecticut petitioner;
 - b. Schaghticoke Tribal Nation, CT;
 - c. Nipmuck Nation, MA; and
 - d. Webster/Dudley Band of Nipmuc Indians, MA.

13. On May 12, 2005, IBIA issued a decision vacating and remanding to the AS-IA for further work and reconsideration of the June 2002 final determination finding that the Eastern Pequot and Paucatuck Eastern Pequot acknowledgment petitioners were parts of a single Historical Eastern Pequot Tribe and entitled to be acknowledged as an Indian tribe. IBIA found that the final determination improperly relied on the continuous relationship between the State and the tribe to provide additional evidence of “community” (criterion b) and “political influence or authority” (criterion c), when the other evidence was not sufficient during certain periods to establish existence of these criteria. IBIA’s decision also referred half a dozen other issues to the AS-IA raised by the requests for reconsideration but outside its jurisdiction. Pursuant to 25 C.F.R. § 83.11 (g)(1), the AS-IA has 120 days, or until September 12, 2005, in which to issue a reconsidered final determination. The OFA will conduct the analysis for both reconsidered petitions and provide recommendations to the AS-IA. Exhibit 2 (IBIA Order Vacating and Remanding Final Determination).
14. On May 12, 2005, IBIA issued a second decision also vacating and remanding to the AS-IA for further work and reconsideration of the January 2004 final determination finding that the Schaghticoke Tribal Nation was entitled to be acknowledged as an Indian tribe. IBIA vacated the determination for the same reason that it vacated the Historic Eastern Pequot determination, i.e., the State’s “implicit” recognition of the group as a distinct political body is not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority within that group. IBIA’s decision also referred several other issues to the AS-IA raised by the requests for reconsideration but outside its jurisdiction. Pursuant to 25 C.F.R. § 83.11 (g)(1), the AS-IA has 120 days, or until September 12, 2005, in which to issue a reconsidered final determination. The OFA will conduct the analysis for this reconsideration and provide a recommendation to the

AS-IA on the matter. Exhibit 3 (IBIA Order Vacating and Remanding Final Determination).

Completion of the Acknowledgment Process and Litigation

15. The Golden Hill Paugussett (“GHP”) petitioner recently completed the post review process and has indicated that it may file suit to challenge its negative final determination. On October 18, 2004, IBIA issued an order dismissing GHP’s request for reconsideration of its final determination for lack of jurisdiction but also referred the request to the Secretary of the Interior (“Secretary”) to review whether, based on the eleven allegations raised by GHP, the determination should be reconsidered by the AS-IA. In February 2005, the Secretary issued a decision declining to refer any of these allegations to the AS-IA for reconsideration. The decision not to acknowledge GHP is final and effective for the Department.
16. The Department issued a negative final determination for the Muwekma Ohlone Tribe (“Muwkema”) petitioner Department on September 17, 2002. The Muwekma petitioner filed a suit challenging its final determination and alleging, among other things, that the Department had illegally withdrawn its earlier recognition of the group as an Indian tribe. Presently, the parties to this case are engaged in discovery. The OFA has provided assistance to the Office of the Solicitor and the Department of Justice in this litigation and will likely continue to do so in the immediate future.
17. The Juaneno Band of Mission Indians petitioner informed the Department that it does not support skipping other petitioners, such as the Mashpee, ahead of its position on the Ready list. Exhibit 4 at question 4 (Juaneno Band letter).
18. The number of petitioners on active consideration and on reconsideration, the established multi-phased schedules necessary to process and evaluate these petitions, the regulatory priority of the Juaneno Band of Mission Indians petitioner ahead of the Mashpee

petitioner on the Ready list, and other administrative management priorities, preclude consideration of the Mashpee petition until October 1, 2005, under the present regulatory and Departmental standards and practices that a three member OFA research team applies to evaluate a petition and determine if it has met the seven mandatory criteria required to establish tribal status pursuant to the Federal acknowledgment regulations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Signed this 2nd day of June, 2005.


R. Lee Fleming