



THE SECRETARY OF THE INTERIOR
WASHINGTON

Memorandum

SEP - 4 2001

To: Assistant Secretary - Indian Affairs
From: Secretary *[Signature]*
Subject: Federal Acknowledgment of the Cowlitz Indian Tribe Petitioner - IBLA Referral

By a decision dated May 29, 2001, the Interior Board of Indian Appeals (IBIA) affirmed your predecessor's February 18, 2000, Final Determination, 65 Fed. Reg. 8436, to federally acknowledge the Cowlitz Indian Tribe (Cowlitz) petitioner. In re Federal Acknowledgment of the Cowlitz Indian Tribe, 36 IBLA 140 (2001). Although it affirmed your predecessor's decision, the IBIA also referred to me, in accordance with 25 C.F.R. § 83.11(f)(2), three issues that the Quinault Tribe (Quinault) allege support reconsideration. These issues include:

1. Whether erroneous statements in the Final Technical Report relating to the enumeration of the Cowlitz metis in the 1878 census had an effect on the BIA's analysis and/or the AS-LA's decision to issue the Final Determination, which is sufficient to warrant reconsideration of the Final Determination;
2. Whether the BIA misapplied the burden of proof in 25 C.F.R. § 83.6 (d); and
3. Whether the BIA's analysis of the evidence was arbitrary and inconsistent.

The acknowledgment regulations do not contemplate that I assume the ultimate decision-making power. Rather, they provide that I have the "discretion to request that the Assistant Secretary reconsider the final determination on [the] grounds" identified by the IBIA. 25 C.F.R. § 83.11(f)(2).

Pursuant to 25 C.F.R. § 83.11(f)(4), the petitioner and interested parties have thirty (30) days from receiving notice of an IBIA referral to submit comments to me. Comments addressing the IBIA's May 29, 2001, referral of the three issues to me were received on July 5, 2001, from Cowlitz and Quinault. The comments received from Cowlitz argued that I should rule that there is no reason for requesting a reconsideration of your predecessor's Final Determination. The Quinault's comments, however, urged me to reconsider the Final Determination on all three of the grounds that the IBIA identified and referred back. No other persons, organizations, or entities identified as interested parties in the matter submitted comments.

The regulations at 25 C.F.R. § 83.11(f)(5) provide that I must determine whether to request a reconsideration of your predecessor's acknowledgment determination and notify all parties of

this decision within sixty (60) days of receiving all comments. The 60-day deadline for my final determination in this matter is Tuesday, September 4, 2001.

In examining your predecessor's decision, the acknowledgment regulations allow me to "review any information available, whether formally part of the record or not." 25 C.F.R. § 83.11(f)(3). Accordingly, in a letter dated July 24, 2001, the Office of the Solicitor, on my behalf, asked the BAR to provide comments and analysis for the purpose of assisting my review of your predecessor's Final Determination. The Office of the Solicitor established August 8, 2001, as the deadline for the BAR's provision of comments and analysis, and set August 20, 2001, as the deadline for the petitioner and interested parties to respond to the BAR's submission.

The BAR's August 8, 2001, submission recommended that I should exercise my discretion under the regulations and refer the first issue and that part of the second issue concerning previous federal acknowledgment to you for reconsideration. The BAR recommended that I should not refer the remaining portion of the second issue or the third issue to you.

Responses addressing the BAR's August 8, 2001, recommendation to me were received on August 20, 2001, from the Cowlitz and Quinault. No other persons, organizations, or entities identified as interested parties in the matter submitted timely responses to the BAR's recommendation.

The Cowlitz disagreed with the BAR's recommendation and argued that I should rule that there is no basis for requesting a reconsideration of your predecessor's Final Determination. Additionally, Cowlitz stated that if I decide to refer the matter to you for reconsideration, the review should be given high priority and a decision rendered within thirty (30) days. The Quinault also disagreed with the BAR's recommendation and renewed their previous request to me that I exercise my discretion under the regulations by asking you to fully reconsider all three of the issues referred by the IBIA.

After reviewing the documentation pertaining to this matter, I have decided to exercise my discretion and request that you reconsider the Cowlitz Final Determination based on the IBIA's first issue and the portion of the second issue concerning unambiguous previous federal recognition. In essence, I have fully adopted the BAR's August 8, 2001, recommendation concerning this matter.

With respect to the first issue, further review is necessary in order to provide a more complete explanation of the Department's final decision in this matter. Although the IBIA noted that the erroneous statements regarding the censuses in the Final Technical report were probably inadvertent and had a minimal impact on the BAR's analysis, the IBIA also indicated that "it is conceivable that those statements had some impact either on the BIA analysis or on the decision of the Assistant Secretary to issue the Final Determination." 36 IBIA 144-145. In order to clarify this issue and determine whether the erroneous facts in question adversely impacted the

Final Determination, I am referring this issue to you for further review.

I am also referring the second issue to you for further review, but only the portion that pertains to the application of the burden of proof in the context of unambiguous previous federal recognition. The question of burden of proof with respect to unambiguous previous federal recognition is tied to the first issue. I am not referring the portions of this issue pertaining to the burden of proof for political authority and community to you because they are unrelated to the first issue and the IBIA did not specifically include these topics within the scope of its second referral. 36 IBIA 140, 150-151. Furthermore, the issue of burden of proof as it relates to political authority and community has been thoroughly addressed in the Technical Report to the Cowlitz Final Determination and the Cowlitz Final Determination. Thus, further review of the burden of proof concerning political authority and community would be redundant and therefore, unlikely to change the Final Determination.

Finally, I am not referring the third issue to you because it also has been sufficiently addressed in the Technical Report to the Cowlitz Final Determination. The Technical Report specifically and thoroughly addresses the Quinault's assertions regarding this issue in several instances, and clearly articulates a rational basis for the decision made. Upon review of this report, I am satisfied that the BAR analyzed the collected evidence and applied it to the regulations in an appropriate, reasoned and consistent manner. Any further review of the third issue would be redundant and therefore, unlikely to change the Final Determination.

Without in any way passing on the merits of these issues identified by the IBIA, I hereby request that you address the first issue and the portion of the second issue concerning unambiguous previous federal recognition and, in accordance with the regulations, issue a reconsidered determination within 120 days of receipt of this request. 25 C.F.R. § 83.11(g)(1).

Thank you for your attention to this matter.