

United States District Court, D. Connecticut.

UNITED STATES of America,

v.

43.47 ACRES OF LAND, more or less, situated in the County of Litchfield, Town of Kent et al.

No. H851078(PCD).

Jan. 31, 2000.

RULING ON MOTION FOR RECONSIDERATION

DORSEY.

*1 Schaghticoke Tribal Nation (the "Tribe") moves for reconsideration of the denial of its motions for separate trial to determine tribal status in the above captioned cases, *United States v. 43.47 Acres of Land, et al.* (the "condemnation action"), and *Schaghticoke Tribal Nation v. Kent School Corporation, et al.* (the "land claim action" or "Schaghticoke II"). See *Ruling on Pending Motions*, dated March 31, 1999 ("Ruling"). The motions [Dkt. No. 130, Civ. No. H-85-1078; Dkt. No. 48, Civ. No. 3:98cv1113] are GRANTED. On reconsideration, the prior ruling stands.

Three possible grounds warrant reconsideration: an intervening change in the controlling law; the availability of newly discovered evidence; or the need to correct clear error or prevent manifest injustice. See *D. Conn. Local Civ. R. 9(e); Metropolitan Entertainment Co., Inc. v. Koplik*, 25 F.Supp.2d 367, 368 (D.Conn.1998). The Tribe submits information concerning the status of the Tribe's petition before the Branch of Acknowledgment and Research (BAR), previously contained in its Fourth Supplemental Memorandum which was not considered. See *Ruling*, p. 2 n. 1. The Tribe states that it was informed by a BAR representative that resolution of its petition would take six to nine years. The Tribe argues that the BAR has deteriorated to the point that it essentially no longer functions. The Tribe also challenges the Ruling's primary jurisdiction analysis, specifically under the administrative delay and uniformity factors. The Tribe argues that the Ruling's underestimation of BAR's delay and misinterpretation of the law necessitates reconsideration and correction of the outcome.

The Tribe's arguments, both factually and legally, focus on the Ruling's analysis of the administrative delay factor. The Tribe argues that the true extent of potential delay, i.e., as long as six to nine years, was not clear previously and that such delay should have controlled the final determination. The amount of potential delay is inordinate at three years, and even more so at six years. The factor of potential delay weighs heavily in the Tribe's favor, and more heavily under a better informed analysis. Nevertheless, this factor alone does not determine the question of primary jurisdiction or outweigh all of the other factors together.

The Tribe cites no case law which suggests that administrative delay at a certain, arbitrary point necessarily renders the other factors meaningless. In *Golden Hill Paugussett Tribe of Indians v. Weicker*, on which the Tribe heavily relies, the case was ordered stayed for 18 months so that the

issue could be revisited. Golden Hill did not suggest, nor could there be, any finite time limit at which the doctrine of primary jurisdiction becomes inapplicable. 39 F.3d 51, 61 ("Were no agency ruling to be made in this specified time frame, we are not requiring a dissolution of the stay. Rather such lapse should simply provide the BIA or the defendants an opportunity to show why the stay should not then be dissolved"). However long the delay portends to stretch, the determination of deferral remains a matter of court discretion. See, e.g., *American Automobile Mfrs. Ass'n v. Massachusetts Dep't. of Env'tl. Protection*, 163 F.3d 74, 81-81 (1st Cir.1998) ("In cases where the potential for delay is found to be too great to justify straightforward referral, the court may, in its discretion, either choose not to refer the matter to the agency, or take such other action as it deems appropriate") (emphasis added); *Hydrocarbon Trading and Trans. Co., Inc. v. Exxon Corp.*, 89 F.R.D. 650, 654 (S.D.N.Y.1981). Such discretion is to be exercised by analysis under the factors previously enumerated. The potential for delay only in conjunction with the other factors may determine the outcome. See *National Communications Ass'n, Inc. v. American Tel. and Tel. Co.*, 46 F.3d 220, 225 (2d Cir.1995) (administrative delay and all other factors weigh against deferral to agency); *ITT World Communications, Inc. v. Western Union Tel. Co.*, 524 F.Sup. 702, 707 (S.D.N.Y.1981).

***2** The Tribe also requests reconsideration of the Ruling's uniformity of agency action analysis. The Tribe argues that judicial determination of its status would not disrupt BAR's established procedure. The Tribe notes that BAR advanced the petition of the Pawcatuck Eastern Pequot Tribe to be considered along with that of the Eastern Pequot Indians of Connecticut and argues that greater reasons exist to justify immediate consideration of the Tribe's status. BAR decided to consider the two petitions together because they may actually comprise a single Tribe, notwithstanding the interests of the competing constituencies. This point illustrates that BAR capably employs its own procedures to determine priority of decision and may amend them as necessity requires. The Tribe may repeat these arguments to BAR.

The Tribe's supplemental information does not demonstrate that BAR no longer functions. As stated previously, BAR's staffing, funding, and procedures are matters left to the discretion of Congress, to whom the Tribe may appeal. Such was the case 19 years ago, when the Tribe initiated this process with its letter of intent to petition. While the Tribe is not "punished" for having taken 16 years to complete its BAR application, it cannot escape some responsibility for having caused these circumstances. It is inconsistent for the Tribe to invoke this process, take 16 years to perform its obligations, and then castigate BAR for delay.

As the Ruling made clear, all other factors--uniformity of agency action, the need for specialized knowledge, the nature of the dispute, the helpfulness of an agency decision, and whether this question "lays at the heart of the task assigned" by Congress--count in favor of deferral. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (2d Cir.1979). Weighed against all these factors, the inordinate potential delay does not necessitate a separate trial on this issue. Accordingly, the Ruling stands.

The BAR should decide the question of tribal status. If it is clear, at some point, that protracted delay will continue in the face of the purported Tribe's best effort to avail itself of the agency's procedures to obtain a determination, the question of a court determination can be revisited.

SO ORDERED.

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