HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL C. EVANS, et al.,

Plaintiffs,

v.

SECRETARY KENNETH SALAZAR, et al.,

Defendants.

No. C08-0372-JCC

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Noted on Motion Calendar: Dec. 10, 2010

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Defendants hereby submit this brief in opposition to Plaintiffs' Motion for Summary Judgment. In this case, the Assistant Secretary-Indian Affairs (the "Department") issued a decision finding that the Petitioner Snohomish Tribe of Indians (the "petitioner" or "Plaintiffs") is not entitled to federal recognition as an Indian tribe because it did not meet four of the seven mandatory criteria in the acknowledgment regulations, 25 C.F.R. Pt. 83 (1994). The decision thoroughly considered the totality of the evidence, and the extensive administrative record fully supports the decision.

Plaintiffs' arguments in their cross-motion for summary judgment are without merit. Pls.' Mot. & Mem. in Supp. of Summ. J. (hereinafter "Pls.' MSJ") (Dkt. No. 95). The record shows that the Department considered all the relevant evidence and facts. Notably, the Department considered the historical context of the petitioner, including the petitioner's argument that it was an off-reservation part of the historical Snohomish tribe before 1935. The evidence in the record shows, contrary to Plaintiffs' argument, that the petitioner and its ancestors were neither an off-reservation part of the historical Snohomish tribe on the Tulalip reservation nor a separate off-reservation group. Instead, the evidence demonstrates that the petitioner is largely composed of descendants of 19th century marriages between Snohomish Indian women and pioneers who assimilated into the broader non-Indian community and retained few, if any, ties to the historical Snohomish tribe.

The record also shows that the Department used the proper standards in weighing evidence and did not, as Plaintiffs allege, resolve all issues and "gaps" in evidence against the petitioner. Instead, the Department evaluated the totality of the evidence and, using its expertise and generally accepted standards in the respective disciplines of anthropology, genealogy, and history, came to well-reasoned and thoroughly-explained conclusions. Accordingly, this Court should deny Plaintiffs' motion for summary judgment.

ARGUMENT

Summary judgment is appropriate in this Administrative Procedure Act ("APA") case because Plaintiffs have not carried their burden of showing the Department's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009) (noting that plaintiff bears the burden of showing that a federal agency acted arbitrarily). Further, this Court should not substitute its judgment for that of the agency. The Department has special expertise in the acknowledgment of Indian tribes, and courts should generally follow the political branches of government on the determination on tribal status. *United States v. Holliday*, 70 U.S. 407, 419 (1865); *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138–39 (D.C. Cir. 1987); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001); *Masayesva v. Zah,* 792 F. Supp. 1178, 1184–85 (D. Ariz. 1992).

In addition, all seven criteria in the acknowledgment regulations are mandatory. 25 C.F.R. Pt. 83. The Court should remand this case pursuant to the APA only if it finds that the Department erred in its decision on all four criteria that were decided against the petitioner. In this case, however, the record fully supports the Department's decision. The Department considered the relevant factors and data, and explained its decision thoroughly.[1]/ The decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

I. The Record Supports the Decision that the Petitioner Did Not Meet Mandatory Criterion 83.7(a), "Identification" of an Indian Entity on a Substantially Continuous Basis Since 1900.

The Department considered the full weight of the evidence and determined that the petitioner did not show that it "has been identified as an American Indian entity on a

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[1]/ The decision-making process included a Proposed Finding (PF) and Federal Register notice thereof, followed by a public comment period during which the Office of Federal Acknowledgment (OFA) provided technical assistance. The final decision is the Final Determination (FD or FD Summ.), accompanied by a Description & Analysis of the Evidence (FD D&A). Notice of the FD was published in the Federal Register. The petitioner did not request reconsideration of the FD before the Interior Board of Indian Appeals.

substantially continuous basis since 1900." 25 C.F.R. § 83.7(a). The record supports the Department's determination that the petitioner demonstrated identification as an American Indian entity only since 1950.[2]/ Plaintiffs argue that the Department failed to take the full historical context into account because it did not agree that until the 1935 Tulalip Reorganization, the historical Snohomish Tribe consisted of Snohomish descendants living both on and off the Tulalip Reservation. Pls' MSJ at 15–16.[3]/ Specifically, Plaintiffs argue that references to the "Snohomish Tribe" should have been construed as references to the petitioner because before 1935, there would have been no reason to distinguish between Tulalip Snohomish and off-reservation Snohomish "as, at that time, all persons of Snohomish descent could properly be called part of the Snohomish Tribe." *Id.* at 16. The record, however, shows that the Department considered and reasonably rejected Plaintiffs' argument.

The Department considered the historical context of the group, whether the petitioner was an off-reservation group of the historical Snohomish tribe before 1935. *See, e.g.,* 68 Fed. Reg. 68942 (noting petitioner's argument that "its mostly off-reservation ancestors were part of the historical Snohomish tribe primarily based at the Tulalip Reservation and remained so until 1935, when the historical Snohomish tribe and other tribes at this reservation reorganized as the Tulalip Tribes of the Tulalip Reservation under the Indian Reorganization Act"); FD. Summ. at 15–17. It described in detail the history of the Tulalip reservation, noting that several tribes resided there, with the Snohomish being the dominant one. *Id.* at 15. Further, the FD described off-reservation Snohomish who were connected to the historical Snohomish at the reservation. It found, however, that except in a few minor instances, those off-reservation people were not the petitioner's ancestors. *Id.* at 17.

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[2]/ Contrary to Plaintiffs' argument, *see* Pls.' MSJ at 19–20, the FD found that the petitioner met the Identification criterion for the period since 1950, including from 1980 to the present. *See* FD Summ. at 22. Thus, this brief focuses only on the period before 1950 where the FD found that the petitioner did not meet the requirements of criterion 83.7(a).

[3]/ This brief cites to the page numbers listed at the bottom of Plaintiffs' brief.

The Department found that the evidence did not support the petitioner's argument that before 1935 it was a part of the historical Snohomish tribe. For example, the PF found that the petitioner and its ancestors were not historically "part of the Snohomish tribe which was signatory to the Treaty of Point Elliott and which became centered on the Tulalip Indian Reservation after treaty times." 48 Fed. Reg. 15540. The PF also stated that the petitioner and its ancestors "incorrectly believed themselves, and were identified by some others, to be derived from the once substantial body of Snohomish and other Indians who were unable or unwilling to move onto the Tulalip Reservation in the 19th and early 20th century." PF at 1. The FD noted that the evidence submitted did not support any change to that conclusion. FD Summ. at 15. Thus, the Department determined, that identifications of the historical Snohomish tribe on the Tulalip Reservation were not identifications of the petitioner. The FD accordingly affirmed the PF's conclusion that since the petitioner and its ancestors were not part of the Snohomish tribe that came to be based on the Tulalip Reservation, references to the historical Snohomish tribe do not constitute identification of the petitioner. FD Summ. at 14. Thus, the record fully supports the Department's determination that references to the Snohomish tribe before 1935 did not refer to the petitioner or its ancestors.

The FD also discussed the impact of the Indian Reorganization Act ("IRA"). *See* FD D&A at 106–14. It noted the PF's finding that neither Tulalip agency records or minutes of the 1926 Snohomish claims organization, which included some of petitioner's members, indicated that the latter opposed the organization of the Tulalip Reservation under the IRA. *Id.* at 106. The PF also noted that there was no evidence that the reorganization of the Tulalip Tribes cut-off any group of off-reservation Snohomish ancestral to the petitioner from the political body of the Snohomish tribe, or that petitioner's ancestors tried to form or continue a separate organization without the Tulalip Snohomish. *Id.* at 106–07. In response, the petitioner argued that its off-reservation Snohomish descendants had significant interaction with the Tulalip Snohomish, and the Snohomish tribe split into two groups ("the on-reservation Snohomish who opted for a primary affiliation with the non-tribal Tulalip Tribes, Inc. and the off-reservation who

maintained their affiliation with the Snohomish Tribe") only after the IRA vote. *Id.* at 107; *see also* Pls.' MSJ at 4–5. The FD, however, affirmed the PF's findings that the available evidence did not show any such split as a result of the 1935 Tulalip organization. In fact, the evidence showed that the petitioner's off-reservation ancestors did not resist or protest the adoption of the IRA government and were not part of what became the Tulalip organization at that time. *Id.* In contrast, other off-reservation Snohomish remained a part of it. FD D&A at 112–13.

Further, the Department reasonably determined that there was no evidence of identification of an off-reservation group of the petitioner's ancestors. While the Department found that there were some off-reservation Indians who were part of the historical Snohomish tribe, those Indians were not the petitioner's ancestors. The petitioner's ancestors were never part of a community of off-reservation Indians, nor were they were in a bilateral political relationship or interacting with the historical Snohomish on the reservation.[4]/ Instead, the evidence demonstrated that the petitioner's ancestors lived primarily in non-Indian communities. FD Summ. at 17; *see, e.g.,* FD D&A 1–2 (noting that homestead records "did not describe an off-reservation entity of STI ancestors that existed separately from or in concert with the Tulalip Snohomish"), 5 (finding that GAO report and Court of Claims documents "did not identify any off-reservation entity of [the petitioner's] ancestors separate from or combined with the Tulalip Snohomish"), 7 (noting that a 1919 letter by the Acting Commissioner of Indian Affairs "did not identify any off-reservation entity of [the petitioner's] ancestors separate from or combined with the federally recognized Tulalip Snohomish"), 8–9 (noting that documents in record which dealt with Thomas Bishop did not "describe[] an off-reservation entity of [the petitioner's] ancestors apart from or connected to the Tulalip Snohomish, or identified Thomas Bishop as a member or leader of such an entity").

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[4]/ The Department reached the same conclusions in its analysis of criterion 83.7(c), "political influence or authority" from historical times until the present. The Department noted that "[t]he ancestors of the current group were not politically integrated with the historic Snohomish tribe or under its leadership. Moreover, they were not part of separate off-reservation Snohomish Indian communities with separate leadership." PF at 17.

Further, Plaintiffs' assertion that the Department erroneously resolved gaps in evidence against the petitioner is without merit. *See* Pls.' MSJ at 14, 17–19. Plaintiffs acknowledge that there is a dearth of evidence showing any tribal identifications from 1935 to 1949, but argue that the Department should ignore this gap, stating: "From 1935 to 1949, the Snohomish Tribe underwent a series of major upheavals that caused some fluctuation in the amount of tribal activity and interaction with non-Snohomish entities that led to a sparer record of recognition during this 15-year period." *Id.* at 17. Specifically, Plaintiffs cite the 1935 Tulalip organization and World War II as events that led to a decrease of interaction with non-Snohomish entities. *Id.* at 18. Plaintiffs argue that the Department wrongly assumed from this gap in evidence that no Snohomish organization existed during this time. *Id.* at 17–19. This argument fails for a number of reasons.

First, a "gap" or fluctuation assumes evidence before and after the time period. Here, there was a lack of evidence of identification before 1935 and the lack of identifications from 1935–1949 is a continuation of the prior time period — resulting in fifty years of insufficient evidence of identification.

Second, there is no evidence in the record that the Tulalip organization caused a split in the on- and off-reservation Snohomish members. FD D&A at 27–28, 106–14. The record simply does not show that any of petitioner's ancestors who belonged to the 1926 claims organization protested the reorganization of the Tulalip Tribes under the IRA "as one might expect if they viewed themselves as part of the historical Snohomish tribe." FD Summ. at 21.

Third, even accepting Plaintiffs' argument that World War II caused a decrease in tribal activity, this does not explain why there were no identifications from 1935 to 1941. Nor does it explain why other off-reservation groups, such as the Snoqualmie, were identified during this time, even in Tulalip agency documents. *See* FD D&A at 29–30 (noting documents mentioning Lummi and Swinomish reservations and Snoqualmie opposition to the proposed IRA), 31–32 (describing letter from Tulalip superintendent sent to several Indian groups, including off-reservation groups of Snolqualmie and Skagit, but not to petitioner's ancestors).

Further, while the regulations provide that "[f]luctuations in tribal activity during various years shall not in themselves be a cause for denial of acknowledgment" under the "existence of community and political influence or authority" criteria, there is no such provision allowing for fluctuations in tribal activity under the identification criterion. § 83.6(e). In addition, fifty years is more than a mere fluctuation "in tribal activity during various years."

In any event, however, the Department considered the evidence submitted for the time period of 1935 to 1949 and found that it did not identify any off-reservation group of the petitioner's ancestors, either apart from or combined with the Tulalip Snohomish. FD D&A at 28–32. For example, the FD describes a letter sent from the Tulalip superintendent to several Indian groups for the purpose of clearing up some dual enrollment issues discovered while preparing the Tulalip official membership roll. *Id.* at 30–31. The superintendent sent the letter "to the Suquamish Tribal Council, the Swinomish Indian Senate, the Suiattle Tribal Council, the Snoqualmie Tribal Council, and the Skagit Tribal Council, the last two being off-reservation groups." *Id.* at 31–32. He did not, however, forward the letter to an off-reservation entity of the petitioner's ancestors, even though Snohomish Indians were by far the largest proportion of Tulalip enrollees. Nor did the letter describe the existence of an off-reservation group of petitioner's ancestors. *Id.* Such evidence of identifications of other off-reservation groups indicates that the lack of identification of the petitioner is not because the historical record has "gaps," but rather supports the Department's determination that there was insufficient evidence that the petitioner met the "identification" criterion during the period of 1935 to 1949.

In short, the Department thoroughly examined the petitioner's claims that it was a part of the Snohomish Tribe on the Tulalip Reservation and also looked for evidence of a separate off-reservation group of the petitioner's ancestors. The evidence in the record did not support the petitioner's claims, and the Department thoroughly explained its determination. The Department also weighed the evidence concerning claims contracts and found it insufficient. FD at 19-20. The record also shows that the Department did not resolve all "gaps" in the evidence against the petitioner. Rather, the Department noted the lack of identification from 1900-1935, the sparse

record during the period 1935 to 1949 that contrasted with the records for other off-reservation groups during this time period, and concluded that there was insufficient evidence of "identification" of an Indian entity on a substantially continuous basis during this time period. Accordingly, the Department's decision on criterion 83.7(a) is supported by the record. The Department did not act arbitrarily, capriciously, or otherwise not in accordance with law.

II. The Record Supports the Decision that the Petitioner Did Not Meet Mandatory Criterion 83.7(b) "Distinct Community" from Historical Times Until the Present.

The record also supports the Department's determination that the petitioner has not provided sufficient evidence that it has comprised a distinct community on a substantially continuous basis under criterion 83.7(b). Plaintiffs argue that the Department erroneously concluded that the 19th century Snohomish who settled on the Tulalip Reservation "are the only historic Snohomish 'community,'" and that no off-reservation community of common interest existed. Pls.' MSJ at 20–21. According to Plaintiffs, the evidence shows "that the off-reservation Snohomish were part of a distinct and identifiable Snohomish community that socialized and interacted with each other as well as with the Snohomish residing on the Tulalip Reservation on a regular basis." *Id.* at 21. Plaintiffs' argument is belied by the administrative record, however.

A. The Evidence Supports the Department's Findings that the Petitioner Did Not Establish Community Separate from the Tulalip Tribes.

First, Plaintiffs' argument that the evidence shows community through residence in a geographic area that is small enough to facilitate social or economic interaction misstates the regulations' requirements. *See* Pls.' MSJ at 21–22. In terms of geographic area demonstrating community, the regulation states that community can be proven by showing that "[m]ore than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community." § 83.7(b)(2)(I). Plaintiffs argue that the petitioner's ancestors settled in four relatively concentrated geographic localities around Puget Sound. Pls.' MSJ at 22. Plaintiffs do not, however, argue either that more than 50 percent of the members

resided in these four areas or that any of the four geographic areas is exclusively or almost exclusively composed of members of the group. In fact, the PF found that the petitioner's "membership is scattered geographically around the Puget Sound area, with little concentration of members within any locality." FD D&A at 35. It also found that the petitioner's members live in largely non-Indian communities and are not distinct from those communities. FD Summ. at 24. Thus, there was not evidence under § 83.7(b)(2).

The FD, more importantly, found that there was little contact or social ties between the petitioner and its ancestors with either the historical Snohomish tribe on the Tulalip Reservation or even amongst the petitioner's members. FD Summ. at 32–34. Further, the PF found that the petitioner's members became part of non-Indian communities, distinguished themselves from Indian communities, and often cannot distinguish members from non-members, even in the immediate area. PF at 11, 14. And the evidence petitioner submitted to show that its ancestors lived in certain areas, such as Jefferson County, showed that:

> Jefferson County, which included Port Townsend, Chimacum, Hadlock, and other towns where most of the petitioner's ancestors lived, was a largely non-Indian county with some mixed Indian/non-Indian households and some all-Indian (mostly S'Klallam) households. The children of the mixed Indian households were well integrated into the larger community. The available evidence did not indicate that any distinct Indian group of STI ancestors existed in this area.

FD Summ. at 25. Likewise, the FD found that there was insufficient evidence "to demonstrate relationships between the Snohomish descendants in the Sultan/Chimacum/Whidbey Island areas from approximately 1870-1920." FD Summ. at 32. Whereas the evidence showed that Indian and mixed Indian/non-Indian households that established homesteads along the Skykomish River interacted with each other and with other Indians, most of those families did not have descendants in the petitioner. FD D&A at 46. In short, the Department thoroughly considered the petitioner's claims and found that the evidence did not support the claims about interaction among its ancestors based on geographic proximity.

The evidence also demonstrated that most of the petitioner's ancestors married non-Indians and became part of the non-Indian communities. *See* PF at 10; FD Summ. at 24.

"Marriage is used as an indicator of social cohesion because people are assumed generally to associate with the people they marry and because marriage establishes kin ties across family lines." FD Summ. at 28. The FD found that the petitioner's members were descended "from several generations of marriages to non-Indians." *Id.* at 29. More importantly, however, there was no other evidence for continued kinship ties. *Id.* For example, the petitioner submitted interviews with the grandchildren and great-grandchildren of the initial Indian/non-Indian marriages in the Chimacum area. FD D&A at 43. Those interviews "do not indicate that the community of mixed-Indian descendants was socially distinct from the rest of the community." *Id.* Most of the part-Indian descendants were well-integrated into the local, non-Indian community, and most married non-Indians. *Id.* at 44. The evidence showed that members of the petitioner "do not now and have not historically formed a community nor have they been distinct from non-Indians living in their vicinity." PF at 15. In short, contrary to Plaintiffs' assertions, the evidence that the petitioner's members became part of non-Indian communities and distinguished themselves from Indian communities, does not support a finding that there was a "named collective Indian identity continuously over a period of more than 50 years" that in conjunction with other evidence under 83.7(b)(1) would demonstrate that the petitioner's ancestors formed a distinct community. PF at 11, 14; *see* Pls.' MSJ at 23 regarding "an abandonment of Snohomish identity."

Nor does the record show, as Plaintiffs argue, "a significant degree of social and economic interaction throughout the region." Pls.' MSJ at 23–24. The Department fully analyzed the data provided by the petitioner and found it lacking. For example, in 1999, the petitioner submitted interviews from 14 group members purporting to establish community. The FD found, however, that the interviews did not show "an Indian community or a number of intertwined independent Indian communities," but, rather, "a predominantly non-Indian rural community in which there were a number of people of part-Indian descent." FD Summ. at 32. The events described were mainly family and extended-family gathering and were not considered evidence of broader social ties. *Id.*

B. The Department Considered and Gave Proper Weight to the Evidence.

1. Evidence of community between 1855–1900

The evidence in the administrative record shows that the Department considered all relevant factors and applied its expertise in weighing the evidence. Accordingly, the Department's determination is entitled to deference. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir. 2009) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989) (noting that an agency decision is accorded an especially high level of deference where technical expertise informed the decision). The record, therefore, supports a finding that the Department did not act arbitrarily, capriciously, or otherwise not in accordance with law.

First, the record supports the Department's rejection of Plaintiffs' definitions of "direct" and "indirect" ancestors in analyzing community. The Department relied upon accepted genealogical standards. FD Summ. at 27; FD D&A at 37–40. Based on these standards, the evidence the petitioner submitted did not demonstrate a close enough relationship between petitioner's ancestors and the Tulalip Snohomish descendants to assume interaction. FD D&A at 38. Petitioner's definition of "indirect ancestor," for example, described people who were Snohomish Indians, but had little or no interaction with and had no descendants in the petitioner. While Plaintiffs argue that using the standard definitions was an "illogical and narrow limitation on who could be considered a Snohomish," in fact, the Department's analysis did not impose such a limitation. Almost all of the people described were Snohomish. The question, however, was not whether the people were of Snohomish descent, but whether they had sufficient associations with the petitioner's ancestors to demonstrate community. FD Summ. at 26–28. The record supports the Department's finding that petitioner did not demonstrate sufficient ties to the Snohomish persons discussed, nor amongst themselves, to show community under 83.7(b).

Neither did the Department "arbitrarily reject[] a number of ancestral marriages as evidence of community interaction." *See* Pls.' MSJ at 26; FD D&A at 38. The Department articulated the reasons for finding the document to which Plaintiffs refer inadequate to demonstrate community. For example, the document used the same erroneous categorizations of

"direct ancestor" and "indirect ancestor" discussed above. FD D&A at 38. "Further, the chart includes the marriages of people who do not now have descendants in the petitioner, and are not known to have had descendants in the petitioner's membership in the past." *Id.* The Department also explained that the chart contained some inconsistencies, such as identifying the same person as both Cherokee and Snohomish in different places in the document. *Id.* at 39. Similarly, many people in the document were identified as "Indian" without giving a more detailed tribal identification. Many of these "Indian" identifications were of Indian populations across the country (such as Choctaw). In cases where either the spouse's tribal identification is not known or the spouse belongs to a tribe that is not part of traditional Coast Salish marriages, the Department explained that it could not properly classify the marriage as a patterned out-marriage. under the regulations. *Id.* The document also did not explain where information was obtained, so the Department was unable to verify petitioner's claims based on the evidence provided. *Id.* Accordingly, the decision provides a reasoned explanation and the record supports the Department's decision not to rely on plaintiffs' marriage analysis.

The record also explains the Department's treatment of Dr. Helen Norton's report. FD D&A 40–41. Dr. Norton stated that in marriages between Indian women and non-Indian men, the non-Indian men often migrated to Washington without any other family members. Dr. Norton concluded, therefore, that the Indian women "gained authority and control over the rearing of the Indian's most important resource, children." *Id.* at 40. The Department explained that this statement was not supported by the available evidence: "most of the Indian women in the prime [petitioner] generation had few family members in the area," and the evidence showed the women's closest kin, including parents, siblings, and Indian sisters-in-law, did not live in the area. *Id.* at 40–41. Further, the community was predominantly non-Indian and "the available evidence does not demonstrate that the Indian family members controlled or influenced children any more than non-Indian family members (such as non-Indian step-parents, half-siblings, or aunts and uncles) to support Dr. Norton's general statement." *Id.* at 41.

Further, the Department explained its conclusion that the petitioner's ancestors integrated into the non-Indian community. The evidence indicated that the petitioner's ancestors were not part of a larger Snohomish community, particularly after the deaths of the women in the "prime" or first generation. The findings stated that while these women were alive, they remained in contact with their relatives, but after they died, there is little evidence that the majority of the petitioner's ancestors remained in contact with their Indian relatives. FD D&A at 41. Most second and third-generation Snohomish descendants in the Chimacum area were well-integrated into the non-Indian community, for example, speaking only English, attending public schools and marrying non-Indians. FD D&A at 43–44. The evidence did not indicate that there was one church that most of the part-Indian families attended, or that they belonged to any one political or social institution. *Id.*

The Department's conclusion that there was little contact between the four main concentrations of Snohomish is also supported by the record. Pls.' MSJ at 27. As the FD explains, "[t]here is also very little evidence indicating regular visits between the petitioner's ancestors living in Jefferson county and those living in either the Monroe/Sultan area, on the Tulalip reservation or with those on Whidbey Island." FD D&A at 41. While several interviews indicated that a number of the women used to make visits to the Tulalip Reservation and stop on Whidbey Island for the night between 1915 and 1925, "there is no information available regarding any specific visits among Chimacum, Whidbey Island, and the Tulalip Reservation" that occurred before 1915. "The interviews also did not contain information to indicate how often these visits took place, their duration, or with whom specifically the women traveled or visited." *Id.* Similarly, the FD discussed discrimination, but the evidence did not indicate that, as a group, the mixed-Indian descendants separated themselves out of the general population or were separated out by others. *Id.* at 44.

Neither did the Department arbitrarily dismiss interaction between petitioners as "not important." Pls.' MSJ at 27. Plaintiffs cite specifically the finding itself, the Tilda Palla interview, the Josephine Yarr interview, and the Lane Report. The Department discussed all of

these documents in the FD in some detail. FD D&A at 53–55. The discussion included the specific strengths and weakness of each document as it relates to the petitioner's argument. For example, the FD evaluated the evidence in the record concerning the Hicks' family, including the Yarr interview that indicates that most of the Hicks' family associated with people on the reservation rather than the other part-Indians in Chimacum, and concluded that there were significant differences between the social networks of the off-reservation Snohomish, such as the Hicks, and the petitioner's ancestors. *Id.* The FD discusses the Lane Report and concluded that it did not address what the majority of the petitioner's ancestors were doing during the time period. FD. Summ. at 31. The FD concluded that there was insufficient evidence of any distinct community of petitioner's ancestors. None of the information was described as not important, or was arbitrarily dismissed. Rather, it was insufficient to document consistent interaction or significant social relationships among petitioner's ancestors as a group. § 83.1.

2. Evidence of community between 1900–1935

Plaintiffs rely heavily on the activities of Thomas and William Bishop as evidence of a continuous Snohomish community. Pls.' MSJ at 27–28. The FD contains an extensive discussion of the Bishops. FD D&A at 48–53. The FD explains that Thomas Bishop "spent many years as an advocate for landless Indians in Washington State," but his writings "reveal that he did not identify himself as the leader of the Snohomish, neither of an off-reservation group of Snohomish that may have existed, or of the Snohomish residing on the Tulalip reservation," but, rather, was a leader for landless or uncompensated Indians. *Id.* at 49. In his document, *Sacred Promises*, Thomas Bishop refers to injustices suffered by Indian communities in Washington, including several in the Chimacum area, but does not discuss a Snohomish community. Likewise, his references to communities of people descended from marriages to non-Indians also do not include a Snohomish community. *Id.* Accordingly, the record supports the Department's finding that there is no evidence to suggest that Thomas Bishop advocated on behalf of any specific Indian community, much less a Snohomish community of petitioner's ancestors. *Id.*

Similarly, the Department found little evidence to support petitioner's argument that William Bishop demonstrated a leadership role for either Indian descendants in the area or Snohomish descendants in particular. *Id.* at 50. The evidence demonstrated that William Bishop's activities were mainly business-related, and that he hired many local Indians as well as Indians from outside the area and non-Indians to assist in his logging operation and dairy farm. *Id.* at 50–51. The FD did not find that he advocated for a specific group of petitioner's ancestors. *Id.* Plaintiffs specifically mention the funerals of William Bishop and William Shelton as evidence of the connection between the Tulalip Snohomish and the petitioner. The FD includes a discussion of these funerals. *See id.* at 53. It explains that the evidence, including the obituaries for both men, but the obituaries did not provide evidence of leadership over a community of petitioner's ancestors. Further, "none of the interviews submitted by the petitioner included any descriptions of William Shelton visiting the homes of the part-Indian Snohomish families in the Chimacum area, either formally for business related to the claims organization, or informally for other reasons." *Id.* The FD points out that in fact, the reference to the William Bishop funeral is one of the few references in the record which demonstrated a social relationship between the Snohomish descendants and the on-reservation Snohomish outside of the formal meetings of the 1926 claims organization. However, even in combination with the other evidence in the record, the evidence was insufficient to find continuous community.

Similarly, the 1926 Snohomish claims organization did not establish a continuous community for purposes of 83.7(b). *See* Pls.' MSJ at 27–28. As explained in the FD, the 1926 group was not a predecessor of the petitioner. Its membership differed greatly from the 1950 organization from which this petitioner stems. FD Summ. at 20. The 1926 group also included many people of non-Snohomish Indian ancestry. FD Summ. at 33; FD D&A at 51–52. In any event, this group ceased to exist in 1935. FD Summ. at 33; FD D&A at 56. While the FD notes that there was "a social and cultural component to the organization," on whole, the evidence regarding the 1926 claims organization did not support petitioner's argument and the Department

explained its decision on this issue. As provided in the FD, overall, the evidence submitted to demonstrate relationships was insufficient to meet the requirements of criterion 83.7(b). FD Summ. at 32, 34.

3. Evidence of community between 1935–1949

Petitioner argues that it "submitted a number of interviews and affidavits that established that there was a distinct Snohomish community, continuously and principally descended from the off-reservation Snohomish described above, representing at least 9 groups of family lines." Pls.' MSJ at 28–29. As the preamble to the 1994 regulations state, "[w]eight is given to oral history, but it should be substantiated by documentary evidence wherever possible." 59 Fed. Reg. 9280, 9289. The Department noted these interviews and stated that they were important for the time period of 1935 to 1949 "because it was identified in the PF as the time when no evidence of political or social activity had [been] demonstrated." FD D&A at 57. The FD, however, found them of "limited value," providing "no significant data from the 1935–1950 period." FD. Summ. at 33.

The regulations provide that evidence of "strong patterns of discrimination" in addition to other evidence may demonstrate community. § 83.7(b)(1)(v). However, most of the interviewees "denied they have ever experienced 'discrimination'" on the basis of their Indian heritage. *Id.* at 57–58. Several of the interviewees, in fact, indicated that they distinguished themselves from the full-blood Indians living in the area. *Id.* at 58. The FD concluded:

> The information in the interviews does not demonstrate that the part-Indian descendants in the Chimacum area formed a separate, bounded community. Rather, they appear to have been well integrated into the non-Indian community. Discrimination and prejudice, while not non-existent, was not constant or particularly limiting. Marriages to non-Indian became even more the rule than they had been in the previous generation.

FD D&A at 59. The main social events during this time were picnics, but they were family, not community, events. FD. Summ. at 32. The Indian descendants living in the area were "well integrated" into the larger non-Indian community, and therefore were not a distinct community. FD D&A at 59.

In sum, the record supports the Department's position that the petitioner did not demonstrate "community" from 1936 to 1950.

4. Evidence of community between 1950–1998

According to Plaintiffs, the petitioner showed community for 1950 through 1998 through tribal meetings and activities, including annual meetings held at a Long House on the Tulalip Reservation until 1967. Pls.' MSJ at 29. Plaintiffs also allege that the petitioner filed its first petition for acknowledgment with the Department in 1975, and its current petition in 1979. *Id.* at 29–30.

The record shows, however, that the Department reasonably found that the petitioner did not demonstrate community during this time frame. For instance, the minutes of the annual meetings show that the petitioner at that time was "primarily interested in pursuing the claims settlement and securing hunting and fishing rights." FD D&A at 63. The evidence simply did not show that the petitioner was more than a claims organization or was interested in "hold[ing] the people together as a unit" or reaching "out to other Snohomish descendants in order to maintain cohesion." *Id.* at 63–64 (discussing how minutes showed the "organization dealt predominantly with preparing and submitting the claims case, pursuing hunting and fishing rights, and administrative tasks related to both issues"). As the FD notes, beginning in the 1970s, the petitioner began to address a more diverse body of issues. *Id.* at 65. The FD noted through the petition for acknowledgment, the petitioner "made its first steps toward establishing programs for its members," and also that the group "began to explore acquiring a reservation, and pursued fishing rights under *U.S. v. Washington*" during this time period. *Id.* at 66.

The FD found, however, that "the information submitted during this period does not demonstrate that the petitioner has satisfied criterion 83.7(b) for this period." *Id.* The petitioner's membership was still widely dispersed and there was not evidence indicating that group members interacted regularly. For instance, the residential addresses from the group's 1954 mailing list show that the 496 members were widely dispersed throughout the state of Washington, and petitioner did not demonstrate how its members remained in contact across the

distances. *Id.* at 63. The petitioner also presented little evidence of any gatherings other than those involving close family members. *Id.* at 64. "There is little evidence to demonstrate that members of the group acted together outside of the confines of the organization." *Id.* at 66. Plaintiffs do not point to any evidence in the record to show that this conclusion was arbitrary or capricious.

Plaintiffs also argue that they submitted a 1987 Socio-Economic Survey, in which the group's office contacted and interviewed 66 adult tribal members about their contacts with other tribal members during a 12-month period. Pls.' MSJ. at 30. While Plaintiffs referred to this survey in their comments on the PF, submitted in 1999, the FD notes that "a careful search of the submission did not reveal" the report itself. SNH FDD Vol. 1, Doc. 8 at 110–11; FD D&A at 69. Accordingly, the Department was unable to examine the report. FD D&A at 69.

According to Plaintiffs, the Social Network Analysis Dr. Norton conducted shows "a Snohomish sense of community." Pls.' MSJ at 30. The FD, however, discussed the many flaws with this analysis, none of which Plaintiffs refute in their brief. FD D&A at 66–69. In short, the survey was poorly designed. *Id.* Dr. Norton, in attempting to preserve each respondent's anonymity, collated responses, so that all 68 responses to each question are presented together and there is no way to track a single respondent's answers through the entire survey. *Id.* at 67. The result of this collation is that there is no way to determine, for example, how many of the respondents who had attended a Snohomish annual meeting were also members of the group's governing body, or even when they had attended an annual meeting (e.g., during the last year, last ten years, last thirty years?). *Id.* at 67–68.

In particular, this was problematic when trying to determine the relationship of group members as reflected in the diagram labeled "Figure 2." *Id.* at 68–69. The diagram did not demonstrate interactions across family lines, as the petitioner asserted, because it failed to show any time frames for relationships. By way of illustration, the petitioner could establish that an individual in one family knew another individual in another family and showed that connection on the diagram. The diagram did not, however, demonstrate whether the two individuals were

current friends, had met once fifty years ago, or some time in between. Nor did the diagram give any context for the relationship between entire family lines, or even indicate whether the relationship was maintained over some period of time. In short, the FD found serious flaws in the Social Network Analysis that limited its usefulness. Plaintiffs have not shown that the FD's determination, therefore, was arbitrary, capricious, or otherwise not in accordance with law.

Accordingly, the administrative record supports the Department's finding that the petitioner did not meet the community criterion in § 83.7(b). The Department considered the relevant factors and data and explained its decision thoroughly. *See Miami Nation of Indians of Ind. v. Babbit*, 112 F. Supp. 2d 742, 753 (N.D. Ind. 2000) ("An agency decision ordinarily isn't arbitrary and capricious if the court sees that the agency considered the relevant data and explained its decision, and the court can identify a rational connection between the agency's factual findings and its decision." (citing *Howard Young Med. Ctr. Inc. v. Shalala*, 207 F.3d 437, 441–42 (7th Cir. 2000)).

III. The Record Supports the Decision that the Petitioner Did Not Meet Mandatory Criterion 83.7(c), "Political Influence or Authority" from Historical Times Until the Present.

The Department's conclusion that the petitioner did not meet "Political Influence or Authority" from historical times until the present is also fully supported by the record. The petitioner did not provide sufficient evidence that it has maintained political influence or other authority over its members as an autonomous entity from first sustained contact until the present under criterion 83.7(c). Plaintiffs have not demonstrated that the Department failed to properly consider the petitioner's evidence or provide a reasoned explanation for its decision. *See* Pls.' MSJ at 31–38.

Rather than assuming that the Snohomish reservation leadership was the only legitimate leadership before 1935, the Department considered various types of evidence and found, repeatedly, that there was no evidence that either the petitioner's ancestors interacted politically with the reservation Snohomish or that there was separate off-reservation political activity by the petitioner's ancestors as a group. The Department considered several things. First, it considered

the petitioner's argument that there was political interaction between their off-reservation ancestors and the reservation leaders. Other than some limited claims activities, the evidence did not support this argument. The Department also considered off-reservation Snohomish leaders. Those leaders were found not to be the petitioner's ancestors, nor exercising political influence or authority over them as an autonomous entity. Finally, the Department considered whether there was separate political activity by the petitioner's off-reservation ancestors and found none, other than the claims activities, which by themselves is not sufficient for purposes of § 83.7(c). Even the claims activities, however, were actually dominated by the reservation Snohomish in the 1920s and 1930s.

Plaintiffs first argue that the FD wrongfully equated Snohomish tribal leaders as those leaders associated with the Tulalip Tribes. A review of the record, however, shows that the Department properly considered the petitioner's position and rejected it, based on the evidence. The petitioner claimed that it was part of the historical Snohomish tribe before 1935 and that its ancestors acted in concert with leaders from the reservation. The Department, therefore, looked for evidence of that political interaction, as well as of political influence for an off-reservation group of the petitioner's ancestors. FD Summ. at 37, 38. The Department, however, did not find evidence of either. *Id.* Instead, the evidence showed only limited forms of leadership on claim issues from a few of the petitioner's ancestors before 1935. *Id.* The available evidence did not demonstrate that the members had influenced or been influenced by the decisions of the council, *id.* at 36, and the organization does not represent a formalization of a political structure on or off the reservation. *Id.* at 40.

In addition, the FD shows that the Department did not describe the Tulalip Tribes before it discussed the IRA election on the reservation in 1935. *See, e.g.,* FD D&A at 81–106. The FD consistently states that there were several groups on the reservation, with the Snohomish being the dominant group. *See, e.g., id.* at 82. Plaintiffs' argument, therefore, that the Department ignored "the historical reality that, prior to 1935, there was no Tulalip Tribe" misses the mark. Pls.' MSJ at 33. The FD shows that the Department considered this argument, but did not find

evidence of on- and off-reservation Snohomish leaders exercising political authority over petitioner's ancestors before 1935. FD D&A at 77.

Nor did the documentary evidence show that there was an off-reservation group of the petitioner's ancestors with political leaders that acted either separately from or in concert with the Snohomish political leaders from the Tulalip reservation. *Id.* at 77, 79 ("Nor did the available evidence show any significant political connection between the Tulalip Snohomish and the off-reservation ancestors of the current petitioner before the claims activity of the 1920's."). In numerous places, the FD discusses the various types of off-reservation Indians connected to the reservation. The evidence showed, however, that these off-reservation Snohomish were not the petitioner's ancestors. *See, e.g.,* FD D&A at 83 n.58.

Importantly, the PF found that the petitioner's ancestors "were not politically integrated with the historic Snohomish tribe or under its leadership," nor were they "part of separate off-reservation Snohomish Indian communities with separate leadership." FD Summ. at 35 (citing PF at 17). There, quite simply, was insufficient evidence that the petitioner's ancestors had a bilateral political relationship with the reservation Snohomish or had any other "political influence or authority over any identifiable off-reservation entity during the late 19th and early 20th centuries." *Id*. at 36; FD D&A at 84 ("The available evidence did not indicate the existence of political authority between the petitioner's off-reservation ancestors or a separate off-reservation entity of STI ancestors and the Tulalip Snohomish."). For example, the Department identified leaders of the Tulalip Snohomish and described how those leaders took up several matters with the government, such as protesting a ban on reservation logging operations. FD D&A at 85–86. There was no evidence, however, that any of the petitioner's ancestors or leaders of an off-reservation entity of the petitioner's ancestors were involved in any of these matters.

Neither does the record show that the reorganization under the IRA created a split between the on- and off-reservation Snohomish. The evidence did not show any evidence of an off-reservation group of petitioner's ancestors, much less an off-reservation Snohomish group

opposing the IRA vote. The largest opposition to the IRA vote came from an off-reservation group, but it was an off-reservation group of Snoqualmie Indians. FD D&A at 29–30. Nowhere does the FD assume that the Tulalip Tribes was the sole successor to the historical Snohomish tribe. Instead, the FD examines the petitioner's claims. It found, however, that the petitioner did not evolve as a continuously existing political community from the historical tribe.

Contrary to Plaintiffs' assertions, the Department considered and did not ignore the "Salish" authority. Pls.' MSJ at 38; FD D&A at 79–81. For example, the FD quotes the Indian Claims Commission's ("ICC") finding that in 1855 and before, each of the Snohomish villages was "largely autonomous in a political sense, which was the type of political organization then found among the Indians throughout the Puget Sound area." FD D&A at 81. There was no evidence, however, of any informal leadership taking place over any group of petitioner's ancestors. The Department examined scores of newspapers from the Chimacum area, the claimed center of political activity for the petitioner, for this period and found no evidence of political influence or even of a tribal community. *Id.* at 78–79. Again, the evidence shows that most of the petitioner's ancestors "had assimilated into the larger" non-Indian community. *Id.* The FD also describes petitioner's assertions that there were informal political activities of an alleged off-reservation group, and concludes that the petitioner "provided no documentary evidence for such claims before about 1914." FD D&A at 77, 78. "Except for assertions in interviews long after the claimed events, there was no available primary evidence of informal or formal meetings, tribal or intertribal, among the STI ancestors as part of an Indian entity at the Bishop property holdings [in the Chimacum area] for the late 19th and early 20th centuries." It is not a question of resolving doubts against the petitioner. Rather, there simply was no evidence to support the petitioner's claims.

Plaintiffs again argue that the Department, in finding a gap in the evidence from 1935 to 1950, ignored the historical realities of the time; specifically, Plaintiffs allege that World War II and the Great Depression were in part responsible for the lack of evidence. Plaintiffs argue that the Department should have relied more heavily on the interviews the petitioner submitted

testifying that meetings took place during this time.

Plaintiffs' argument on this point, however, is wrong. The Department weighed the evidence consistent with the regulations, seeking corroborating evidence to support oral history. "Weight is given to oral history, but it should be substantiated by documentary evidence wherever possible." 59 FR 9280, 9289. Here, there was no documentary evidence that meetings actually took place between 1935 and 1950.

Despite the lack of corroborating evidence, the Department's FD goes on to discuss the two interviews Plaintiffs mention where the interviewees stated that meetings took place during this time frame. FD Summ. at 40; FD D&A at 114. The Department found these interviews to be less than persuasive evidence for several reasons. First, although the Department interviewed a number of people who were alive during this time frame, only two, Mr. Hawkins and Mr. Matheson, stated that meetings took place. FD Summ. at 40 ("These memories are fragmentary at best and are not shown to be shared by most members of the group."); FD D&A at 114. Second, neither interviewee could provide any details about the meetings. Mr. Hawkins stated that the group had meetings that consisted of a "bunch of Indians [who] got together," but could not give any details about dates, times, or places that these meetings took place, much less state the topics of discussion. FD D&A at 114. Mr. Matheson was similarly unable to give details. *Id.* Accordingly, the Department found the two interviews to be insufficient evidence to meet the political influence or authority criterion 83.7(c) during the 1935 to 1950 time frame.

Further, the Department considered and rejected the petitioner's arguments that the Great Depression and World War II were factors in the complete lack of evidence during this period. FD Summ. at 41; FD D&A at 114–15. The Department noted that the Depression was well under way by 1932, but the 1926 claims organization continued to meet until 1935. *Id.* Thus, several years of economic downturn did not prevent this group from meeting. Likewise, gasoline rationing during WWII would not have been an impediment to meetings between group members who lived near each other, such as those in the Chimacum community. *Id.* The petitioner also did not submit any such evidence, nor "any correspondence between members

living in different parts of the state indicating that people were keeping in contact with each other when they were not able to travel personally." *Id.* at 115.

Plaintiffs also argue that the Department erred by finding that the petitioner has not shown a political presence from 1950 to the present. According to Plaintiffs, the Department held the petitioner's 1950 "reorganization" against it, and also acted arbitrarily by finding that the petitioner was solely focused on recognition. Pls.' MSJ at 36–38. Plaintiffs' argument fails because the evidence shows that the 1950 group was a new group, not a reorganization of the 1926 claims group, and the Department reasonably determined that the focus on recognition was not sufficient evidence of a continuous political entity.

As an initial matter, the ICC simply ruled that the petitioner had standing to bring a claim. *See* FD D&A at 107 n.94. As the FD noted, "Such a ruling did not imply that the ICC recognized the tribal identity of the Snohomish Tribe of Indians formed in 1950, which the Federal government has never unambiguously acknowledged as an American Indian entity." *Id.*

Further, the evidence does not support the Plaintiffs' contention that the 1950 organization was a reorganization of the 1926 claims group. *See* Defs.' Mot. for Summ. J. (Dkt. No. 94) at 25; FD Summ. at 41–42. The membership of the two groups differed widely, partly because reservation residents were involved more broadly in the 1926 organization than the 1950 organization. FD Summ. at 41. The 1926 organization also had a social aspect — such as the organization of fairs and canoe races — that the 1950 organization lacked. *Id.*

Most importantly, however, the Department found that the petitioner did not meet criterion 83.7(c) for this time period because "[a]lthough claims activities may provide evidence of political authority, claims activities in and of themselves are not sufficient evidence of political influence and authority between the leaders of a claims organization and the membership." FD Summ. at 43. "The petitioner has not demonstrated that the claims issue and the right to hunt and fish without a license were a significant enough political issue among members." FD D&A at 123. Thus, Plaintiffs' argument that the Department used the petitioner's claims activities against it is false; the Department simply found that those activities

were not sufficient evidence of political authority.

Such a finding is reasonable and consistent with the Department's findings in other cases. despite Plaintiffs' claim that the Department's findings that the Jamestown Sk'lallum, Tunica-Biloxi, and Poarch Creek tribes conflict with this FD. Pls.' MSJ at 43. The FD, however, explains that with those three groups differed from this petitioner. In those cases, claims actions were a part of the history, but so were other political issues. FD Summ. at 43; FD D&A at 123. For example, the Jamestown S'Klallam were focused on maintaining the Shaker Church, the Poarch Creek group was involved in protesting segregated schooling for their children, and the Tunica-Biloxi sought economic aid so that relatives who had moved away could afford to return. FD Summ. at 43; FD D&A at 123. Those petitioners also had a prior political organization. The petitioner in the case at bar was not able to demonstrate political issues of importance to the group as a whole. Further, the petitioner did not demonstrate that even the claims issue was a significant political issue for the majority of the petitioner's members. FD Summ. at 43. The Department thoroughly explained its evaluation of the evidence and conclusions.

The evidence also supports the Department's findings that the petitioner "has not demonstrated that the leadership has maintained political influence or authority over the membership" from 1983 to the present. FD Summ. at 45. The FD notes that although regular meetings take place and the petitioner's leadership publishes a newsletter, "the petitioner still has not demonstrated that it maintains a close relationship with a significant majority of its membership, other than the small portion of members who grew up in or still live in the Chimacum area." *Id.*; FD D&A at 130–32. There is no indication in the record that the petitioner's members have had discussions that might show "controversy over valued group goals, properties, policies, processes, and/or decisions." *See* 25 CFR 83.7(c)(1)(v).

Finally, Plaintiffs' argument that the Department itself is responsible for the petitioner's failure to currently exercise political authority over its members is without merit. The rules for recognition did not change in 1994, as Plaintiffs allege. The preamble to the 1994 regulations

specifically states that the changes in the regulations are meant to "make clearer the meaning of the criteria for acknowledgment and make more explicit the kinds of evidence which may be used to meet the criteria." The standards for interpreting evidence and for showing continuity of tribal existence did not change. The preamble specifically stated that the changes to the regulations would neither result in the acknowledgment of petitioners that would not have been acknowledged under the prior regulations, nor the denial of petitioners that would have been acknowledged under the prior regulations. 59 Fed. Reg. at 9280. Further, the PF, issued under the 1978 regulations, found that the petitioner did not meet the criteria. Plaintiffs also received government technical assistance in the acknowledgment process. *See* Defs.' Mot. for Summ. J. at 31–32. While the acknowledgment process is admittedly a long one, the length of the process in this case is due at least in part to the petitioner's own actions. *Id.* at 4–7, 32.

IV. The Record Supports the Decision that the Petitioner Did Not Meet Mandatory Criterion 83.7(e), "Descent" from a Historical Tribe.

Finally, this Court should reject Plaintiffs' challenge to the Department's determination that an insufficient percentage of petitioner's membership was able to demonstrate descent from a historical Indian tribe. *See* Pls.' MSJ at 38–50. The record supports the Department's finding that the petitioner did not provide sufficient evidence that its membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity under criterion 83.7(e). Plaintiffs challenge this conclusion on two grounds. First, they assert that the Department erred in finding that only 69 percent of the petitioner's members were able to demonstrate descent. *Id.* at 39–49. Second, they argue that even if the Department was correct that only 69 percent of the petitioner's members have shown Snohomish descent, the Department has not and cannot establish that this percentage is insufficient to satisfy criterion 83.7(e) because the regulations do not specify a percentage. *Id.* at 39–40, 49–50. Both of these arguments, however, are rebutted by the record.

A. The Department Applied the Proper Standard of Review under § 83.7(e).

The regulations require that the petitioner's membership descend from a historical Indian tribe or from historical Indians which combined and functioned as a single autonomous political entity. § 83.7(e). Plaintiffs, therefore, misstate the regulations because the regulations do not specify that simply a "majority" of petitioner's members must demonstrate descent. *See, e.g.,* Pls.' MSJ at 39; FD Summ. at 52. In fact, the regulations do not provide that some members may lack descent. In interpreting the regulations, however, "[t]he Department's precedent has been to take into account the particular circumstances in which a portion of the petitioner's members might not be able to demonstrate that they meet the requirement of the criterion. . . ." FD Summ. at 52; 59 FR at 9289 ("The Department has intentionally avoided establishing a specific percentage to demonstrate required ancestry under criterion (e) . . . because the significance of the percentage varies with the history and nature of a group and the particular reasons why a portion of the membership may not meet the requirements of the criterion.").

Plaintiffs are correct that the regulations themselves do not specify that some types of evidence should be accorded more or less weight than others, but it is clear that the acknowledgment process is premised on the evaluation of the evidence by a team of experts. Here, professional genealogical standards applied to the determination of which evidence is more reliable than others. The Department has significant expertise in the area of tribal recognition and is entitled to deference in the employ of its expertise. *See James*, 824 F.2d at 1138. The Department uses its expertise to weigh the evidence, to determine which documents are entitled to more weight than others, and to determine what the documents show, and ultimately to determine if a criterion is met. Thus, the Department's determination of whether there was sufficient evidence to demonstrate that the petitioner's members are descended from an Indian tribe is entitled to deference.

In addition, for purposes of the seven criteria, the preamble to the 1994 regulations states that "the primary question is usually whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion . . . . In many cases, evidence

is too fragmentary to reach a conclusion or is absent entirely." 59 Fed. Reg. at 9280. The regulations, therefore, added language to conform with the existing practices and provide that in determining whether a criterion is met, a reasonable likelihood of the validity of the facts, and not conclusive proof, is all that is required. § 83.6(d). Similarly, a criterion is "not met if the available evidence is too limited to establish it, even if there is not evidence contradicting facts asserted by the petitioner." 59 Fed. Reg. at 9280. This standard applies to the determination of whether a criterion as a whole is met.

In determining whether the petitioner showed descent, the Department reviewed all the evidence, including the applications for enrollment in the 1926 Snohomish Claims Organization, descendancy rolls, ICC Docket 125 and Docket 93, the BIA 1926 Clallum census, and census records. FD D&A at 136. The FD also considered the petitioner's membership and enrollment criteria, as well as additional genealogical documents the petitioner submitted. F.D Summ. at 50. "When reliable documentation provided reasonable new evidence of Snohomish as well as other tribal descent, the ancestor and family line was designated as Snohomish." FD D&A at 139. After the petitioner submitted comments on the PF, the Department "re-examined the available evidence for documentation of previously undetected tribal ancestries." FD Summ. at 51. As a result of this re-evaluation, the FD confirmed that the family lines found to be descended from the historical Snohomish tribe in the PF were sufficiently documented as Snohomish, and found that four additional family lines were of Snohomish descent. *Id.* at 52.

B. The Department Considered the Evidence in Light of the Historical Facts.

Plaintiffs first argue that the Department failed to "take into account the historical and cultural complexities of the Coast Salish Tribes," including geography, intermarriage patterns, and tribal political alliances. Pls.' MSJ at 39. The FD notes that the petitioner's arguments in this regard "commonly did not include citations or references to any supporting evidence." FD Summ. at 51. Further, the record shows that the Department did consider the realities of the Coast Salish tribes, as discussed *supra*. Further, the FD noted that notwithstanding that the petitioner's ancestors claimed different tribal ancestry at different times, where there was reliable

evidence of Snohomish descent, the FD designated the ancestor as Snohomish. PF at 22; FD Summ. at 51; FD D&A at 139.

C. The Department Properly Considered the Roblin Rolls, Notes, and Affidavits.

Plaintiffs argue that the Department relied too heavily on the "unreliable" Roblin rolls (also known as the Roblin schedule). They also argue that the Department was inconsistent in its treatment of the rolls, finding them persuasive when they supported the Department's position and unreliable when they supported the petitioner's position. Pls.' MSJ at 40–43. A review of the record shows that while the Department considered the Roblin rolls as evidence, weighed the information along with other evidence, and explained when reliance on the information was appropriate.

The Department explained in its PF that it reached its conclusion based on Roblin's affidavits and schedule, as well as other sources. Although Roblin's notes and signed affidavits provided a substantial amount of contemporary, first-hand information on the petitioner's ancestors, other evidence of value was also used, such as the Federal census, school records, and official tribal rolls. PF at 22–23. The FD explained that the Roblin rolls and Roblin's handwritten notes and affidavits are considered primary information because Roblin interviewed individuals who were alive in the mid-19th century as well as their children. FD Summ. at 51. In the PF, the Department noted that credit was always given for any Snohomish Indian blood that could be documented by reliable sources. In instances where evidence indicated Snohomish as well as other tribal blood, the family was counted as Snohomish in the PF and FD. PF at 22; FD Summ. at 51.

Further, the PF stated that Roblin's notes and affidavits were often more important than the schedule itself because the affiant often identified all of his or her tribal blood. PF at 23. Thus, while Roblin selected one ancestry over others for use on his schedule, by relying more heavily on the affidavits than the schedule, the Department was able to give the ancestor or his descendant credit for Snohomish ancestry even if Roblin did not place the individual on the

schedule listed as Snohomish. *Id.* Thus, Plaintiffs' argument that Roblin tended to favor Snoqualmie lineage over Snohomish is irrelevant because the Department looked behind the Roblin rolls at the affidavits and notes. *See* Pls.' MSJ at 41. Accordingly, the Department has shown that its reliance on Roblin's materials was appropriate, and actually worked in favor of the petitioner. Further, Plaintiffs have not shown any evidence that Roblin's alleged "strong personal views against 'mixed blood' Indians" made his notes, affidavits, or schedules unreliable. *See* Pls.' MSJ at 42. The Department's decision on the proper weight to accord the Roblin documents is entitled to great deference as it is a clear application of the Department's expertise in determining tribal status. *See James*, 824 F.2d at 1138.

Plaintiffs also argue that the Department used the Roblin rolls inconsistently, rejecting the petitioner's reliance on the rolls when the affidavits did not mention Snohomish membership, yet relying on the rolls to support the Snoqualmie and Clallum ancestry of several families even when affidavits referring to Snohomish ancestry existed. Pls.' MSJ at 42–43. As the PF notes, the petitioner permitted membership for any person named on the Roblin schedule, regardless of tribal identity as ascribed by Roblin or even whether the individuals listed Snohomish ancestry on their application affidavits. The Department noted, therefore, that using such a standard for membership creates a substantial number of members who are unable to document Snohomish lineage. PF at 23. Accordingly, the Department explained that it must look behind the Roblin schedule and examine the affidavits and other evidence for Snohomish ancestry. *Id.* Again, this explanation is reasonable and is entitled to deference.

The Department also did not rely solely on the Roblin schedules while ignoring other evidence of ancestry. For example, in examining the Jimmicum family's lineage, in addition to the Roblin schedules, the Department considered federal censuses, Roblin's notes and affidavits, and the ICC Docket Schedules. FD D&A at 143–44; FDR GFD Vol. 9, Doc. 6 at 4; FDR GFD Vol. 5, Doc. 21 at 1–2. Similarly, Plaintiffs wrongly allege that the Department relied "almost solely" on the Roblin Schedule to classify the Skookum/Roberts family as Snoqualmie. Pls.' MSJ at 43. Instead, as the FD explains, the record did not contain evidence for the ancestry of

the Snookum/Roberts family, other than (1) one Roblin affidavit, which stated that Frank Roberts was half-Snoqualmie, and (2) the fact that four of petitioner's members in the Roberts family were approved for payment as Snohomish as part of Docket 125 of the ICC. FD D&A at 144. There was no evidence in the record, however, to support the Skookum/Roberts descendants' claim to payment on Docket 125. *Id*. Accordingly, the Department concluded that there was insufficient evidence to consider the Skookum/Roberts family line Snohomish. *Id.* Contrary to Plaintiffs' arguments, therefore, the Department did not rely solely on the Roblin schedules to the exclusion of contrary evidence. The record supports the Department's decision, and the Court should defer to the exercise of the Department's expertise.

Neither did the Department arbitrarily disregard Tulalip Agency census evidence (otherwise known as the "Tulalip roll"). The FD noted that "the 1934 Tulalip roll alone does not provide reliable information regarding individual ancestry, as some of the enrollees were enumerated as Snohomish when they had no Snohomish ancestry at all (e.g., many Samish were enumerated as Snohomish and none were enumerated as Samish)." FD D&A at 141. The Department's determination that the 1934 Tulalip Roll was unreliable because a number of individuals were listed with the wrong ancestry is not arbitrary, capricious, or otherwise not in accordance with law. Instead, the Department determined that, in light of the tribal ancestry errors, professional research standards required the Department to consider corroborating evidence. This determination is entitled to deference.

In terms of the Allen family, the Department examined not only the Tulalip rolls, but Roblin affidavits from Mary Mitchell's children, daughter-in-law, son-in-law, and grandson, who was seven years old at the time of Mary Mitchell's death. While the evidence was contradictory — Mary Mitchell's children did not testify that they or their mother had Snohomish ancestry, while her daughter-in-law, son-in-law, and grandson testified that she was part Snohomish — the Department explained that the statements from Mary Mitchell's in-laws were less persuasive than the evidence given by her actual descendants. FD D&A at 141. The Roblin notes of depositions of Mary Mitchell's children documented Snoqualmie ancestry for

the Allen family line. The Department, in its expertise, weighed the evidence and determined that "there is no reliable, contemporary evidence that the ancestress Mary Mitchell (Kla-bula-ite) was Snohomish or part Snohomish." *Id.* This decision is not arbitrary, capricious, or otherwise not in accordance with law.

Similarly, the Department did not arbitrarily disregard the Tulalip rolls for the Jimmicum family. Instead, the Department considered both the Tulalip rolls and other evidence in determining that the evidence did not show that the Jimmicum family line was of Snohomish descent. FD D&A at 143–44. As the FD notes, the ancestor, Mary Jimmicum, claimed Snohomish ancestry only once on a 1916 Power of Attorney affidavit, when she testified that her mother was full Snohomish and her father was full Snoqualmie. FD D&A at 143. On numerous other documents, Mary Jimmicum stated that she was of non-Snohomish ancestry. *Id.* The Department also considered that only one of the petitioner's members in the Jimmicum family line was approved for payment on the Snohomish Judgment Roll for Docket 125 of the ICC, and that member's Snohomish ancestry could have been inherited solely through her mother. *Id.* at 144.

Plaintiffs' statement that the Department relied on the Tulalip roll to find that the Preston line was part-Snohomish is also in error. The FD shows clearly that the Department considered all the evidence, not just the 1934 Tulalip roll, in reaching its conclusion. FD D&A at 152–54. For example, the Department examined the 1900 Federal census, affidavits, the Robson Schedule, Indian school censuses, Tulalip Agency Indian censuses, and the 1932 Tulalip Agency list of allottees on the Tulalip reservation. *Id.* Despite the Department's notation that the 1934 Tulalip roll contained a clear error in listing Leah (Preston) Phillips as full Snohomish when "her father was white," the Department concluded, based on all the evidence, "that the historical evidence beginning at least as early as 1900 and continuing through the Roblin era of depositions in 1916–1919, and later school censuses and Tulalip Reservation censuses sporadically, but consistently, attribute at least some Snohomish ancestry to the Preston family." FD D&A at 153–54. The record, therefore, does not support Plaintiffs' assertions that the Department relied

solely on the 1934 Tulalip rolls in some cases and arbitrarily disregarded it in others.

Plaintiffs also argue that the Department ignored Snohomish membership and leadership evidence "derived from early Snohomish Tribal Rolls, affidavits of tribal leaders, and the decades of Snohomish tribal participation and leadership by the Disputed Families." Pls.' MSJ at 44. The regulations provide that membership rolls, affidavits of recent leaders, and participation and leadership are evidence for 83.7(b), "community," and 83.7(c), political influence and authority. Contrary to Plaintiffs' assertions, however, the regulations do not provide that these types of evidence demonstrate 83.7(e), "descent." § 83.7. This is for good reason. Membership lists, for example, show who is in the group at a particular point in time. Participation in events and leadership as well as affidavits of recent leaders show social and political activities in a group. None of these factors demonstrate ancestry. Ancestry is demonstrated by tracing kinship, generation by generation, using birth, marriage and death records, probate records and wills, and, in some instances, censuses, in addition to other similar records. Voluntary statements on application papers and questionnaires, while frequently true, are useful primarily as corroborating evidence, not as "primary evidence." Being a leader or a member of a petitioner simply is not evidence of claimed ancestry. This is particularly true in a case such as the one at bar, where the Department noted repeatedly that the petitioner had "vague and loosely applied membership criteria." *See, e.g.,* FD D&A at 135, PF at 26.

Plaintiffs also assert that it was arbitrary for the Department to find that the Hawkins, Quinta, and Williams lineages were Clallum when those three families were rejected by the Clallum tribe for membership based on lack of proof of Clallum ancestry. Pls.' MSJ at 45. The evidence in the record, however, showed that there was insufficient evidence to classify these three families as Snohomish. FD D&A at 145–48. All three families claimed Clallum ancestry on most of the evidence in the record. *Id.* Further, the FD notes that two members of the Williams family applied for enrollment with the Tulalip Clallum tribe, and their applications were rejected "as 'unrecognized, unsupported,' by the Clallam committee, which means that they had not provided sufficient documentation. *Id.* at 148. The Clallam's rejection of these

applications does not indicate that the families do not have Clallum ancestry, or that they had Snohomish ancestry, but, rather, that they did not sufficiently document their application for that tribe. Similarly, the FD notes that "Mary Hawkins and a large number of her descendants applied for Clallam enrollment, but the Clallam committee classified them all as 'unrecognized, unknown' or 'unrecognized, disputed' Clallam." *Id.* at 145. Irrespective of the Clallum Tribe's rejection of these applications, the absence of Clallum ancestry does not prove Snohomish ancestry. Plaintiffs simply have not shown that the Department acted arbitrarily in finding that the evidence did not support a finding that these families were in fact Snohomish.

Moreover, the Department acted properly in considering Docket 125 evidence. The Bureau of Indian Affairs (BIA) prepared a roll of Snohomish for distribution of an award in ICC Docket 125. PF at 24. "Participation in the Snohomish judgment award was limited to persons who were 'lineal descendants of members of the Snohomish Tribe . . . as it was constitued in 1855; and was further restricted to persons who had not shared and were not eligible 'to share in a per capita distribution . . . recovered by any other tribe." *Id.* The Docket 125 award was shared between 192 people, including many of the petitioner's current members. *Id.*

The Department explained thoroughly why it considered the ICC Dockets 125 (Snohomish) and 93 (Snoqualmie) to be flawed. PF at 24–25. The Department conducted its own research on the petitioner's acknowledgment petition beginning in January 1981, approximately a year after the Docket 125 award was paid. The Department's research led it "to reach different conclusions from those reached by the agency regarding the tribal ancestry of some of the ancestors identified as Snohomish on the descendancy roll." PF at 24. Specifically, the Department considered Roblin's notes and affidavits signed by the ancestors themselves, whereas the local agency preparing the Docket 125 roll did not appear to use these documents. The Department also found it appropriate to rely more heavily on evidence more closely related in time to the original ancestor, rather than relying on later or more recent evidence, as the local agency did. *Id.* According to the PF, the Department also attempted to avoid assuming tribal ancestry based simply on place of birth, residence, or organizational membership. *Id.* at 24–25.

The Department also stated that it found "[a] number of verifiable inaccuracies." *Id.* at 25. Accordingly, Plaintiffs' assertion that the Department failed to explain why it found the Docket 125 roll unreliable is false. *See* Pls.' MSJ at 45.

Even after determining that Docket 125 might be inaccurate, because of the reasons stated, the Department did not reject all evidence contained in Docket 125. Instead, the Department considered other evidence when considering Docket 125. For example, contrary to Plaintiffs' assertions, the Department did not solely rely on the Docket 125 to find that the Harriman descendants were of Snoqualmie lineage. Instead, it looked at all the available evidence: 1916 affidavits, 1917 depositions, Roblin's notes and Schedule, Federal censuses, and Dockets 125 and 93. FD D&A at 142–43. There simply was not evidence that this family line was of Snohomish ancestry. Without such evidence, the Department cannot assume that the claim is valid. Such a decision is not arbitrary.

Moreover, the Department did not construe all contradictions in evidence against the Plaintiffs. Certainly, the evidence in some cases is contradictory. But the agency has expertise in this area and is charged with weighing the evidence. Nothing in the regulations requires the Department to assume Snohomish lineage simply because there might be some evidence, no matter how unreliable, supporting such a finding. Rather, the burden is on the petitioner to provide sufficient evidence that it meets the criteria.

And in every case, the Department fully explained how it weighed the evidence. For example, Plaintiffs assert that there is a "reasonable likelihood" that the Elwell family is Snohomish based on evidence in the record. The Department, however, noted that the strongest contemporary sources of information — the progenitor of the line Susan Elwell's own deposition and Roblins' notes — showed Snoqualmie descent. FD D&A at 142. While some evidence indicated Snohomish lineage, the Department found that evidence to be less persuasive because either the source of the information was not provided (in the case of two county histories and an ethnographic history) or it was based on evidence previously explained as unreliable (such as the Docket 125 roll). The Department articulated a rational connection between the facts found and

the conclusions made. *Or. Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). Accordingly, the Department's determination was not arbitrary, capricious, or otherwise not in accordance with law.

Finally, the Department's determination that 69 percent is insufficient to show that the petitioner's members descended from a historical tribe is reasonable and entitled to deference. The Court must defer to the Department's interpretations of its own regulations unless clearly erroneous or inconsistent with their language. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

As previously discussed, the regulations require descent from a historical tribe and do not specify that a "majority" of petitioner's members must demonstrate descent. *See, e.g.,* Pls.' MSJ at 38; FD Summ. at 52. The plain language of the regulations does not allow for some members to lack descent, but the Department has interpreted the regulations to take into account circumstances where some of a petitioner's members may not be able to demonstrate descent. FD Summ. at 52; 59 Fed. Reg. at 9289 ("The Department has intentionally avoided establishing a specific percentage to demonstrate required ancestry under criterion (e) . . . because the significance of the percentage varies with the history and nature of a group and the particular reasons why a portion of the membership may not meet the requirements of the criterion."). As Plaintiffs note, the Department has never found a petitioner to meet the descent criterion, however, with less than 80 percent of its members demonstrating descent. *See* Pls. MSJ at 49–50; FD Summ. at 52.

The Department's determination that 69 percent was insufficient to meet the descent criterion is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In its FD, the Department noted a PF for the Little Shell Band that suggested the descent criterion should be considered met with 62 percent of its members demonstrating ancestry because of the particular circumstances of that case. FD Summ. at 52–53. While the FD in Little Shell found based on new evidence that the group met this criterion, that FD rejected the proposed change to lower the percentage to meet criterion 83.7(e). Nonetheless, the Snohomish FD also explains why such deviation from the normal precedent was not warranted in the

petitioner's case. The petitioner here had the opportunity to fully demonstrate its case during the comment period. The petitioner also did not demonstrate special circumstances to justify a change from the 80% precedent. In short, the Department's determination that 69 percent was insufficient in light of previous precedent and the particular circumstances of this case did not violate the APA.

V. This Court Should Strike the Declaration of Steven F. Austin.

The Department moves to strike Steven F. Austin's declaration, filed with Plaintiffs' Motion for Summary Judgment. Decl. of Steven F. Austin, Ph.D. (Dkt. No. 97). Plaintiffs' challenge to the Department's action is governed by the APA's review provisions, which limit judicial review to the administrative record. Plaintiffs have made no effort to demonstrate that any of the exceptions to the record review rule apply, and such supplementation should not be allowed.

Plaintiffs seek to overturn the FD pursuant to the APA, contending that the FD is arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA. Compl. (Dkt. No. 1) *Id*. at ¶¶ 69–74. Plaintiffs also allege due process and equal protection claims. *Id*. at ¶¶ 75–84. The APA also provides the waiver of sovereign immunity for those claims and, accordingly, the APA's review provisions apply. *See* Order (Dkt. No. 87) (finding discovery not allowed on Plaintiffs' constitutional claims); *Bowles v. U.S. Army Corps of Eng'rs*, 841 F.2d 112, 116 (5th Cir. 1988) (noting that review is limited to whether the agency acted in an arbitrary or capricious fashion, even when plaintiffs allege actions taken contrary to a constitutional right); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004) ("The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on statutory or constitutional deficiencies were entitled to broad-ranging discovery.") (citing *Malone Mortgage Co. Am., Ltd. v. Martinez*, No. 3:02-CV-1870, 2003 WL 23272381 at *2 (N.D. Tex. January 6, 2003)); *Bailey v. U.S. Army Corps of Eng'rs.*, No. 02-639, 2003 WL 21877903 at *2 (D. Minn. Aug. 7, 2003) (noting, in an APA case, that a due process challenge to an agency's decision is reviewed on the

administrative record that was certified and submitted to the court).

As this Court is well aware, the APA limits judicial review to the agency administrative record. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Nat'l Audubon Society v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993); *see also* Order (Dkt. No. 87) (granting the Department's request for a protective order). The Court assumes the record is designated properly absent evidence to the contrary. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). Courts recognize that supplementation of the administrative record may be justified in certain limited circumstances: (1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) where there has been a strong showing of bad faith or improper behavior on the part of the agency decisionmakers. *See Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436–38 (9th Cir. 1988), *amended by* 867 F.2d 1244 (9th Cir. 1989); *Northcoast Envtl. Ctr. v. Glickman*, 136 F. 3d 660, 665 (9th Cir. 1998). These narrow exceptions to APA record review are just that — exceptions. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) ("Though widely accepted, these exceptions are narrowly construed and applied."); *Friends of the Earth v. Hinz,* 800 F.2d 822, 828–29 (9th Cir. 1986) (referring to "exceptions" to APA record review).

A party seeking to avail itself of one of the exceptions and supplement the record must meet its burden to show that the administrative record presented is inadequate to allow for effective judicial review, that one of the exceptions applies, and that supplementation is needed. *See Animal Def. Council*, 840 F. 2d at 1436–38 (affirming district court order limiting review to administrative record and prohibiting discovery because the plaintiffs did not show record presented was insufficient for review or applicability of any of the exceptions to the general rule that review of agency action is limited to the record); *Havasupai Tribe v. Robertson*, 943 F. 2d 32, 3 (9th Cir. 1991) (same); *Friends of the Earth,* 800 F.2d at 829 (same). Accordingly, supplementation of the record in an APA matter is the exception, not the rule, and should not

proceed where, as here, Plaintiffs have not made the requisite showing that such extra-record materials are justified under one of the limited exceptions.

Plaintiffs have made no attempt to demonstrate that any of the limited exceptions to the record review rule apply. They have not made any effort to demonstrate, for example, that the agency did not consider all the relevant factors or that the record is inadequate for judicial review. It is Plaintiffs' burden to show that one of the exceptions to the record review rule applies. *Animal Def. Council*, 840 F.2d at 1436–38. Plaintiffs have not met this burden and this Court should strike Dr. Austin's declaration from the record.

The declaration is a clear attempt to set up a "battle of the experts," which is inappropriate in an APA case. Federal agencies have the discretion to rely on the informed opinions of their own experts, and it is established that reviewing courts defer to the agencies' discretion on such matters. *Marsh*, 490 U.S. at 378 (holding that "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). It is particularly inappropriate in a case such as this, where the Department has vast expertise in determining tribal status, has been directed to employ that expertise, and has in fact done so in a thorough decision supported by an extensive administrative record. *See Marsh*, 490 U.S. at 376–77 (holding that court will defer to agency's analysis of "new" factual information)*; Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993) ("This is especially appropriate where, as here, the challenged decision implicates substantial agency expertise."); *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1540 (9th Cir. 1993) (noting that the court is to "defer to the agency's interpretation of equivocal evidence, so long as it is reasonable"); *Miami Nation of Indians of Ind. v. Babbitt*, 55 F. Supp. 2d 921, 925 (N.D. Ind. 1999) (precluding supplementation of the acknowledgment decision record by experts to "address the wisdom of the agency recommendation"). Even in circumstances where courts have found it appropriate to look outside the administrative record, "[c]onsideration of the

evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). Post-decision extra-record materials simply may not be advanced as a rationalization for attacking an agency's decision. *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).

Accordingly, because Dr. Austin's declaration is not in the administrative record and attempts to challenge the wisdom of the agency's decision, and because Plaintiffs have not even attempted to demonstrate that his declaration meets one of the exceptions to the record review rule in APA cases, the Department respectfully requests that this Court strike the declaration and references to it in Plaintiffs' materials from the record.

CONCLUSION

For the reasons stated above and in the Department's Motion for Summary Judgment, this Court should find that the Department's decision was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The Department fully articulated the reasons for its decision that Plaintiffs failed to meet four mandatory criteria for federal acknowledgment in 25 C.F.R. § 83.7, and the administrative record supports the decision. Accordingly, the Department requests that this Court grant its motion for summary judgment and deny Plaintiffs' motion.

Respectfully submitted this 19th day of November, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 19, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties requiring notice in this matter.

DATED this 19th day of November, 2010.

/s/ Devon Lehman McCune

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