HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL C. EVANS, in his capacity as Chairman of the Snohomish Tribe of Indians, and the SNOHOMISH TRIBE of INDIANS,

Plaintiffs,

v.

SECRETARY KENNETH SALAZAR, THE UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and the UNITED STATES OF AMERICA,

Defendants.

No. C08-0372-JCC

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Noted on Motion Calendar: Dec. 10, 2010

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On December 10, 2003, the Assistant Secretary-Indian Affairs ("Assistant Secretary") issued a determination denying the Plaintiff Snohomish Tribe of Indians' ("Plaintiffs" or "the petitioner") petition for acknowledgment as an Indian tribe under the federal acknowledgment regulations. 25 C.F.R. Part 83 (1994). The Assistant Secretary concluded that the petitioner did not demonstrate by a reasonable likelihood that: (1) it had been identified as an American Indian entity on a substantially continuous basis since 1900; (2) a predominant portion of the petitioning group comprises a distinct community and has existed as a community from first sustained contact with non-Indians until the present; (3) it had maintained political influence or authority over its members as an autonomous entity from first sustained contact with non-Indians to the present; and (4) a sufficient percentage of the petitioner's members demonstrated Snohomish ancestry. Because the petitioner failed to provide sufficient evidence regarding four of the seven mandatory criteria for federal acknowledgment, the petitioner is not entitled to be acknowledged as an Indian tribe with a government-to-government relationship with the United States.

The Assistant Secretary's decision was the result of a studied and thorough consideration of the totality of the evidence. The decision is extensively documented and the administrative record fully supports the decision. Accordingly, Defendants are entitled to summary judgment regarding Plaintiffs' challenge to the final determination brought pursuant to the Administrative Procedure Act ("APA"). In addition, Plaintiffs' procedural due process and equal protection claims are without merit and have no basis in the record. Defendants are also entitled to summary judgment on those counts.

BACKGROUND

I. Federal Acknowledgment Process

The purpose of the federal acknowledgment process is to determine which groups have existed continuously as Indian tribes and are therefore entitled to a government-to-government relationship with the United States. 25 C.F.R. § 83.2. The Department promulgated regulations governing the acknowledgment process in 1978, and revised the regulations in 1994. The

process is initiated when a group petitions to be acknowledged as an Indian tribe. § 83.4. The group must submit detailed evidence demonstrating that it meets seven mandatory criteria, which are detailed in § 83.7(a)–(g).

Failure to meet any one of the criteria will result in a determination that the group is not entitled to a government-to-government relationship with the United States. §§ 83.6(c), 83.10(m). The petitioner bears the burden of providing evidence to meet the criteria; the Department is not responsible for the actual research for the petitioner. §§ 83.5(c), 83.6(d). A criterion is considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. § 83.6(d). A petitioner will not satisfy a criterion if the available evidence demonstrates that it does not meet that criterion or if the available evidence is too limited to establish that it meets the criterion. *Id*.

When evaluating a petition, researchers from the Department's Office of Federal Acknowledgment[1/] ("OFA") generally work in a team of three: a historian, a genealogist, and an anthropologist. The members of this team prepare a proposed decision and reports that set forth the evidence submitted by the petitioner and third parties as well as verification research the Department conducted during its evaluation. The team members' work is subject to an extensive peer review within the Department. This process leads to a "Summary under the Criteria," which evaluates the evidence under the criteria and is the recommended decision.

After a review of the summary and the evidence, the Assistant Secretary issues a proposed finding based on the administrative record. § 83.10(h). The petitioner and third parties are then given time to respond to the proposed finding and submit additional documentation. §§ 83.10(I), 83.10(k). After the responses, the Assistant Secretary issues a final determination either acknowledging the group as an Indian tribe or denying the petition. § 83.10(l)(2).

1/ During the evaluation of Plaintiffs' petition this office was known as the Branch of Acknowledgment and Research ("BAR"). When the regulations were first adopted, the office was known as the Federal Acknowledgment Project ("FAP").

A petitioner or interested party may file a request for reconsideration within ninety days with the Interior Board of Indian Appeals, an administrative tribunal within the Office of Hearings and Appeals of the Department that is independent of the Assistant Secretary. § 83.11. Accordingly, the final determination is not final and effective until ninety days after its notice is published in the Federal Register or the action regarding reconsideration is complete. §§ 83.10(l)(4); 83.11(h).

II. The Legal Significance of Tribal Recognition.

A determination that a petitioner is an Indian tribe, i.e., merits federal acknowledgment, or federal recognition, establishes a government-to-government relationship between it and the United States. A positive determination under the regulations means that the group has retained inherent sovereign authority independent of the State in which it is located and independent of the United States, although it remains a domestic dependent nation. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17; 5 Pet.1 (1831). A group acknowledged under the regulations has demonstrated that it has continuously existed throughout history as a political entity. An Indian tribe, thus, has sovereign immunity, and may

- exercise jurisdiction over its territory and establish tribal courts,
- exercise jurisdiction in Indian country,
- administer funds under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450–450n,
- acquire new lands and establish gaming facilities under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721,
- bring a land claim under the Trade and Non-Intercourse Act, 25 U.S.C. § 177, and,
- obtain other federal benefits and exercise its own sovereign authority except as limited by federal law. 25 C.F.R. §§ 83.2, 83.11.

An Indian tribe is a political, not a racial, classification. *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Under the acknowledgment regulations, a collection of persons of Indian ancestry is not a tribe *unless* they and their ancestors are part of a continuously existing social and political community from historical times to the present. 25 C.F.R. § 83.3(a), (c); *see also Rice v. Cayetano,* 528 U.S. 495, 520 (2000) (quoting *Morton,* 417 U.S. at 553, n.24) (noting that "[t]he preference [is] political rather than racial in nature . . . granted to Indians not as a discrete

racial group, but, rather, as members of quasi-sovereign tribal entities"). As stated in the preamble to the 1994 regulations, "the essential requirement for acknowledgment is continuity of tribal existence . . . simple demonstration of ancestry is not sufficient." 59 Fed. Reg. 9280, 9282 (Feb. 25, 1994). A determination that a petitioning group is or is not a tribe is a decision with significant impacts on the petitioner, state and federal Government, other recognized Indian tribes, and non-Indians.

III. Chronology and Decision Making Regarding the Petition for Acknowledgment.

On March 3, 1975, the Bureau of Indian Affairs received a request for federal acknowledgment from the Plaintiffs. In 1978, the Department promulgated its federal acknowledgment regulations that established a uniform process for action on such requests, accepted the petitioner's request as part of its initial documented petition, published notice of the receipt of the petition in the Federal Register, and assigned the group petition number 12. On March 18, 1983, the Assistant Secretary signed a proposed finding ("PF") against federal acknowledgment of the petitioner and the Department published notice in the Federal Register on April 11, 1983. 48 Fed. Reg. 15540.

The PF found that the petitioner did not meet the criteria set out in the regulations for a government-to-government relationship with the United States. It determined that the petitioner was a limited organization established in 1950 in connection with the Snohomish claim before the Indian Claims Commission. 48 Fed. Reg. at 15540. Specifically, the PF found that the petitioner did not meet criteria a, b, c, and e of § 83.7 of the acknowledgment regulations.[2/] The PF concluded that the petitioner and the ancestors of its members have not historically formed

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[2/] The regulations were revised in 1994, so the PF was issued under different regulations than the FD. The petitioner had the opportunity to proceed under either set of regulations and elected to proceed under the 1994 regulations. FD Summ. at 2; ACR-FDD-V001-D0008 at 3. The revisions to the regulations made clearer the meaning of the criteria and made more explicit the kinds of evidence which may be used to meet the criteria. 59 Fed. Reg. 9280 (Feb. 25, 1994). "None of the changes made in these final regulations will result in the acknowledgment of petitioners which would not have been acknowledged under the previously effective acknowledgment regulations." *Id.*

part of the Snohomish tribe that was a signatory to the Treaty of Point Elliott since the mid-1800s. "The organization's membership is composed of descendants of 19th-century pioneer-Indian marriages . . . which occurred mainly between 1856 and 1875, [who] maintained few if any ties with the Snohomish tribe proper." PF at 1, 11.[3]/ Forty-one percent of the members were found not to demonstrate Snohomish ancestry. *Id.* According to the PF, "the current petitioner is a limited organization, established in 1950, with little social cohesion and exercising few functions. It does not have historical continuity as a community or political entity with the aboriginal Snohomish tribe." *Id.* at 2. The petitioner's members "do not now and have not historically formed a community nor have they been distinct from non-Indians." *Id.* at 14.[4]/

The regulations set a 120-day comment period for the petitioner and third parties to comment on the proposed finding that the Plaintiffs did not merit federal acknowledgment. Final Determination Summary ("FD Summ.") at 1–2. The Department delayed the start of the comment period due to the preparation of a Freedom of Information Act ("FOIA") response to the petitioner's June 24, 1983, request for the entire administrative record. In December 1983,

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[3]/ Pursuant to the Stipulation Regarding Defendants' Filing of the Administrative Record [Dkt. No. 44], filed August 7, 2008, Defendants will provide the Court with the cited portions of the administrative record in hard copy after briefing is completed. The PF is found in the record at Volume ADD-PFD, and the final determination is Volume ADD-FDD.

[4]/ The PF concluded for purposes of criterion (a), that the identifications of the historic Snohomish tribe were not identifications of the petitioner, and the petitioner was identified only since 1950 when it was formed. PF at 10. For purposes of criterion (b), the PF concluded that the petitioner had little evidence of significant social contact, past or present, among its component families, *id.* at 10, and the documentary and oral historical materials, as well as marriage and residence patterns indicate that they were socially and physically members of non-Indian communities. *Id.* at 11. There was limited interaction among members. *Id.* at 14. For purposes of criterion ©, political influence and authority, the PF concluded that the petitioner was not part of the political body of the historical Snohomish tribe, *id.* at 15, and were not part of separate off-reservation Snohomish Indian communities with separate leadership, *id.* at 17. For purposes of descent from the historical tribe, or tribes that amalgamated, only 59% demonstrated the required descent, an insufficient percentage. As of 1984, acknowledgment precedent established that 81% was the minimum percentage of descent from the historic tribe that would still meet criterion (e). FDR-HFD-V010-D0001.

the comment period was suspended pending completion of the FOIA response, while parallel issues were being resolved in litigation with another petitioner. Following completion of the FOIA response in June 1991, a new comment period of 120 days commenced on December 1, 1991, which was extended at the request of the petitioner. In March 1993, at the request of the petitioner, the comment period was extended indefinitely. ACR-FDD-V001-D0017.

On March 28, 1994, following notice and comment rule making, the Department's revised acknowledgment regulations became effective. The petitioner elected to be considered under the revised regulations. ACR-FDD-V001-D0008. On August 31, 1994, BIA provided a technical assistance meeting with the petitioner. During this meeting, BIA reviewed the work in progress, including whether the group could show unambiguous previous federal acknowledgment.[5]/ In January 1995, the petitioner submitted an information paper addressing its history and reorganization.

In December 1997, the Department informed the petitioner that suspension of the active consideration (or indefinite extension to the comment period) would be lifted and a 120 day comment period permitted. ACR-FDD-V002-D0166. The petitioner, however, objected to being placed on active consideration and requested further time to prepare its response to the proposed finding. ACR-FDD-V002-D0156. The Department, at petitioner's requests, extended the public comment period to September 11, 1998, and again to March 12, 1999. ACR-FDD-V002-D0153; ACR-FDD-V002-D0135.

On May 12, 1999, the petitioner submitted its comment on the PF. The comments consisted of a narrative, several supplementary reports, and extensive supporting documents. The Tulalip Tribes of the Tulalip Reservation ("Tulalip Tribes"), an interested party, also submitted extensive comments. Following an extension requested by petitioner, on November 5, 1999, the Department received the petitioner's response to third party comments.

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[5]/ Under the 1994 regulations, a group that can demonstrate substantial evidence of prior unambiguous federal acknowledgment may proceed under a streamlined process. 25 C.F.R. § 83.8.

On October 18, 2002, the Department recommended to the petitioner that the Department prepare a second PF, which would be an amended and revised version of the initial PF, instead of a final determination because of the length of time that had elapsed since the publication of the PF in 1983. The petitioner opposed the recommendation to prepare a second PF, as did the Tulalip Tribes.

On January 27, 2003, the Department notified the petitioner and interested parties that it had begun consideration of the evidence for the FD. On December 10, 2003, the Assistant Secretary issued its final determination against federal acknowledgment of the petitioner. 68 Fed. Reg. 68942-01. The decision included the 56-page Summary Under the Criteria, ("FD Summ.") and a 158-page Description and Analysis of the Evidence ("FD D&A"), with additional appendices. Notice of the FD was published in the Federal Register. *Id*.

In the FD, the Assistant Secretary concluded, as did the PF, that the petitioner did not merit acknowledgment as an Indian tribe under the federal acknowledgment regulations. Based on an extensive administrative record of evidence, analyses, reports, comments, and responses, the Assistant Secretary concluded that the petitioner did not demonstrate by a reasonable likelihood of the validity of the facts pertaining to the criterion that: (1) it had been identified as an American Indian entity on a substantially continuous basis since 1900; (2) a predominant portion of the petitioning group comprises a distinct community and has existed as a community from first sustained contact with non-Indians until the present; (3) it had maintained political influence or authority over its members as an autonomous entity from first sustained contact with non-Indians to the present; and (4) a sufficient percentage of the petitioner's members demonstrated Snohomish ancestry. The FD concluded, as did the PF, that the petitioner did not provide sufficient evidence to meet criteria 83.7(a), (b), ©, or (e).

The final determination Summary provides a detailed analysis of the evidence, whether submitted by the petitioner or collected by the Department's staff regarding the petitioner, interested parties, or collected by the Department's staff regarding its evaluation and verification of the evidence in the record on the petitioner, and discusses how the Department weighed the

evidence under the federal acknowledgment regulations. The analysis and weighing of the evidence by the OFA anthropologists, historians, and genealogists, and the Assistant Secretary is discussed more specifically below.

No party requested reconsideration of the final determination by the Interior Board of Indian Appeals. The FD, therefore, became effective March 9, 2004, ninety days after its publication in the Federal Register, pursuant to section § 83.10(l)(4).

On March 5, 2008, Plaintiffs filed a Complaint for Declaratory and Other Relief ("Complaint"), alleging that Defendants violated the APA, as well as Plaintiffs' procedural due process and equal protection rights. Specifically, Plaintiffs' Complaint alleges that: (1) the FD is arbitrary or capricious and contrary to law; (2) the FD was based on an interpretation and application of regulations that denied Plaintiffs procedural due process; and (3) exhibited bias based on race and gender. Compl. ¶¶ 74, 77, 82.

ARGUMENT

I. Summary Judgment is Appropriate in this APA Record Review Case.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and [] the movant is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c)(2); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247–48. The moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); Fed. R. Civ. P. 56(e)(2). In judicial review under the APA, the Court need not and, indeed, may not, "find" underlying facts; thus, there are no material facts essential to the Court's resolution of this action. *See*, *e.g.*, *Celotex*, 477 U.S. at 322; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) ("this case involves review of a final agency determination under the [APA]; therefore, resolution of this matter does not require fact

finding on behalf of this court"). Accordingly, summary judgment is the appropriate vehicle to resolve this case. Because an administrative review proceeding, such as this one, does not implicate the possibility of a trial, if the Court were to conclude from a review of the administrative record that the Assistant Secretary's decision was arbitrary or capricious, the remedy would be to remand the matter for reconsideration. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council*, 435 U.S. 519, 549 (1978); *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973).

The APA directs the Court to uphold the Assistant Secretary's final determination unless it is deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiffs bear the burden of showing that the Assistant Secretary acted arbitrarily in reaching the final determination. *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009) (citing *City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002)). Although the inquiry must be thorough, the standard of review is narrow and highly deferential, the Assistant Secretary's decision is "entitled to a presumption of regularity," and the Court cannot substitute its judgment for that of the agency decisionmaker. *Citizens to Preserve Overton Park, Inv. v. Volpe*, 401 U.S. 402, 415 (1971). The agency need only articulate 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). In making its determination, the Court must determine whether:

> The agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency enterprise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). *See also George*, 577 F.3d at 1010; *Miami Nation of Indians of Ind. v. Babbitt,* 112 F. Supp. 2d 742, 751 (N.D. Ind. 2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

On matters of tribal status, the Supreme Court has held "it is the rule of this court to follow the action of the executive and other political departments of the government, whose

more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same." *United States v. Holliday*, 70 U.S. 407, 419 (1865) (cited with approval in *United States v. Sandoval*, 231 U.S. 28, 47 (1913)). Indeed, the Department has special expertise in the determination of acknowledgment of Indian tribes. *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138-1139 (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). Accordingly, the Court owes substantial deference to the Department's application of its expertise.

An agency decision is also accorded an especially high level of deference where, as here, technical expertise informed the decision. *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)). The Court must also 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) (citations omitted); *Masayesva,* 792 F. Supp. at 1187 (citations omitted).

As explained below, the Assistant Secretary's decision is fully supported by the administrative record, and the Department did not act arbitrarily, capriciously, abuse its discretion, or act otherwise not in accordance with law. Accordingly, Defendants are entitled to summary judgment.

II. The Administrative Record Fully Supports the Final Determination Denying Acknowledgment to the Petitioner.

A. The Assistant Secretary Properly Concluded that the Petitioner Did Not Meet Mandatory Criterion 83.7(a), "Identification" of an Indian Entity on a Substantially Continuous Basis Since 1900.

The administrative record demonstrates that the petitioner has only been identified as an Indian entity on a substantially continuous basis since 1950. Thus, the Assistant Secretary properly concluded the petitioner did not meet criterion 83.7(a).

Criterion 83.7(a) requires a petitioner to demonstrate that it "has been identified as an American Indian entity on a substantially continuous basis since 1900." 25 C.F.R. § 83.7(a); *see also* FD Summ. at 15. The criterion requires external identification; evidence of identification

made by the petitioner or its members does not satisfy the applicable burden. § 83.7(a). Identifications as an Indian entity may come from federal authorities, state governments, county, parish, or other local governments, anthropologists, historians, and/or other scholars, newspapers and books, Indian tribes or national, regional, or state Indian organizations. 25 C.F.R § 83.7(a)(1)-(6); FD Summ. at 15. Identification must be of an "entity," not individual ancestors,[6]/ and "substantially continuous," which acknowledgment precedent has interpreted as requiring an identification every ten years.

After a comprehensive evaluation of the petition and evidence in the record, including the group's response to the Assistant Secretary's proposed finding and comments submitted by interested parties, the Assistant Secretary concluded that the petitioner did not meet the identification on a substantially continuous basis criterion. As a review of the administrative record makes clear, the petitioner does not meet criterion 83.7(a) "because the available evidence demonstrates that it has been identified as an American Indian entity only since 1950." 68 Fed. Reg. 68942; *see also* FD Summ. at 14–23 (summarizing the Department's conclusions on criterion 83.7(a)). The petitioner "has not demonstrated that it meets the requirements before 1950." *Id.*

The PF, which covered the time period up to 1980, found that the petitioner had not been identified by outside observers as a group until 1950. FD Summ. at 15. Accordingly, the FD focused on the periods 1900 to 1949 and 1980 to the time the FD was issued. Because the FD found that the petitioner has been identified as an entity from 1950 to the time of the FD, this brief focuses on the 1900 to 1949 time period where the evidence was insufficient to meet criterion (a).[7]/

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[6]/ "Identifications of individuals as Indians are not identifications of an entity." FD D&A at 1, 5, 7–8. "Identifications of individuals of Indian ancestry and granting of individual services do not qualify as an identification of a contemporary American Indian entity." *Id.* at 2.

[7]/ The PF found that the petitioner met the identification criterion from 1950 to 1980. The FD concluded that the evidence from 1980 to the present was "minimal but sufficient evidence to show that Federal officials, Indian groups, non-profit organizations, scholars, and newspapers have

The petitioner alleged that its ancestors were an off-reservation segment of the historical Snohomish tribe. The PF found that "the petitioner and its ancestors had not 'historically formed part of the historical Snohomish tribe proper,' which had evolved from the 'several bands' that had signed the Point Elliot Treaty of 1855." FD Summ. at 15. Shortly after the treaty, the Department found, the Snohomish tribe settled on the Tulalip reservation and became the predominant tribe there, *id.,* while the petitioner's ancestors married outside the tribe and ceased to participate in it. PF at 1, 11; FD Summ. at 5. Further, the Department found that the petitioners' ancestors did not traditionally form off-reservation communities that were distinct from the non-Indian groups in the area. PF at 1; FD Summ. at 15.

In the FD, the Department determined that it would accept outside identification of Indian groups as identification of the petitioner if they were an "[i]dentification of an off-reservation entity of [the petitioner's] ancestors, which either existed separately or was historically part of the historical Snohomish tribe at the Tulalip reservation" during the period of 1900 to 1935, or "[i]dentification of an off-reservation entity of the petitioner's ancestors separate from the Tulalip Snohomish who had organized a tribal government with other tribes as part of the IRA" for the period 1936 to 1950. FD Summ. at 16–17.

The administrative record supports the Department's finding that the petitioner and its ancestors were not part of the historical Snohomish tribe on the Tulalip reservation. In large part, the records for the pre-1950 period came from the records of the Tulalip Indian Agency and concerned the historical Snohomish tribe on the Tulalip reservation. The Department considered multiple documents from officials at the Tulalip Indian agency, including correspondence, annual reports, agency censuses, and court documents. These documents did not demonstrate that the petitioner's ancestors were involved in these matters. Thus, the evidence showed that identifications of the Snohomish reservation tribe before 1950 were not identifications of an entity of the petitioning group's ancestors. Further, none of these records identified an entity

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identified it as an American Indian entity." FD Summ. at 22.

made up of the petitioner's ancestors that "existed separately from or in combination with" the historical Snohomish tribe on the Tulalip reservation. FD Summ. at 18, 19; FD D&A at 11–14.

The Department also considered excerpts of city directories from 1900 to 1910 related to the area around Port Townsend that the petitioner submitted. The Department concluded that the directories did not show an entity of the petitioner's ancestors in the region, but "simply listed the names of some of the petitioner's ancestors who lived in a non-Indian community." FD Summ. at 18.

In addition, the Department considered the petitioner's documents that dealt with the efforts of Thomas Bishop, an ancestor of some of the petitioner members, to seek claims for a number of unenrolled and unalloted Indians around Puget Sound. The evidence, however, did not demonstrate that Bishop was a member or a leader of a Snohomish entity on or off the reservation, and did not otherwise identify an off-reservation entity of the petitioner ancestors either connected or not connected to the reservation Snohomish. FD Summ. at 18; FD D&A at 8–9, 14–15.

Further, documentation from 1917 that references an off-reservation claims organization known as the "Snohomish Tribe of Indians" does not demonstrate that outsiders viewed this organization as an American Indian entity. The FD analyzed the evidence and concluded that it shows that the Assistant Commissioner of Indian Affairs and the BIA referred to and dealt with individual Indians as opposed to a group or an entity. FD Summ. at 19; FD D&A at 16–17. "The only 'identifications' of the organization in the available evidence came from its own officers or from the lawyer hired as their spokesperson," which is not an "external" identification. *Id.* Further, references to this organization occurred only in 1917. FD Summ. at 22.

Other claims activity in 1923 and 1925 was reservation-based and did not include petitioner's ancestors. *Id.* at 19; FD D&A at 20. The evidence demonstrated that another claims group called the "Snohomish Tribe of Indians" came into existence around 1926, but that group was not a predecessor of the petitioner as its composition markedly differed from the 1950

petitioner organization, and thus identifications of it were not considered an identification of the petitioner. FD Summ. at 20. The group contained some of the petitioner's non-reservation ancestors and some of the reservation Snohomish, among others. The evidence also showed further that this group ceased to exist in 1935.[8]/

The record also contains a number of documents, dated 1935 to 1936, regarding the organization of the Snohomish and other tribes at the Tulalip reservation as the Tulalip Tribes under the Indian Reorganization Act ("IRA"). None of the documents mentioned an off-reservation entity of the petitioner's ancestors separate from or connected with the Tulalip Snohomish. FD D&A at 23–24, 26. More importantly, however, the evidence did not show that any of the 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. Similarly, the evidence in the record from the 1940s did not identify an group composed of petitioner's ancestors. *Id.*; FD D&A at 2–3, 31.

As detailed above, the petitioner failed to demonstrate that it had been identified as an American entity from 1900 to 1949 — a period of forty-nine years. Based on this lengthy period of non-identification, the petitioner did not show that it "has been identified as an American Indian entity on a substantially continuous basis since 1900." § 83.7(a). Accordingly, the Assistant Secretary properly concluded that the petitioner did not meet the identification on a substantially continuous basis criterion.

B. The Assistant Secretary Properly Concluded that the Petitioner Did Not Meet Mandatory Criterion 83.7(b) "Distinct Community" from Historical Times Until the Present.

An examination of the administrative record shows that a predominant portion of the petitioner's members did not maintain a distinct community at any time from 1855 to the present. Accordingly, the Assistant Secretary properly concluded that the petitioner did not meet

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[8]/ The PF found the Petitioner organized in 1950 for the purposes of pursuing a claim before the Indian Claims Commission. PF at 6; FD Summ. at 36.

the community criterion.

Criterion 83.7(b) requires a petitioner to demonstrate that: "A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b). Specifically, "community" is defined to mean:

> Any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from an identified as distinct from nonmembers. Community must be understood in the context of the history, geography, culture and social organization of the group.

§ 83.1.[9/] Community may be demonstrated by a combination of evidence such as significant rates of marriage within the group, significant social relationships connecting individual members, significant rates of informal social interaction that exist broadly among the members of a group, shared sacred or secular ritual activity or shared cultural patterns that differ from the non-Indian population. § 83.7(b)(1). The criterion may also be shown with other forms of evidence delineated in § 83.7(b)(2), which are sufficient in themselves to demonstrate community at that point in time.

The criterion requires social interaction. As summarized in *Miami Nation of Indians of Indiana v. Babbitt* ("*Miami Nation*"):

> The Department reads the regulation as requiring that the petitioning tribe's members meet and interact, that the petitioning tribe's members be distinct and seen as American Indian, and that the petitioning tribe be a dynamic group rather than simply many people with common Indian ancestors.

112 F. Supp. 2d at 747.

After a comprehensive evaluation of the petition and evidence in the record, including petitioner's and interested party's response to the PF, the Assistant Secretary concluded that the petitioner did not meet the community criterion. The evidence demonstrated that the group did not have significant rates of in-group marriage, and thus did not have kinship ties that such

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[9/] A petitioner can satisfy the community criterion if it submits evidence demonstrating any one of the factors listed at § 83.7(b)(2) or a combination of the factors listed at § 83.7(b)(1). § 87.3(b).

marriages create. FD Summ. at 34; PF at 10. The petitioner did not demonstrate that a significant number of its ancestors maintained relationships with the historical Snohomish tribe, or with other Snohomish descendants, or with each other. *Id.* No evidence submitted in response to the PF changed the PF's analysis on this criterion and, therefore, the PF was affirmed. *Id.*

The PF found that the petitioner's members were not distinct from non-Indians living in their vicinity, were geographically scattered around the Puget Sound area with little concentration in any one location around which group activities might revolve and were essentially "a collection of numerous and diverse family lines which have few ties with each other historically." PF at 14; FD Summ. at 24. According to the PF, the petitioner members are "almost entirely the descendants of Indian[-]white marriages occurring soon after treaty times," who became part of non-Indian communities and distinguished themselves from Indian communities. *Id.*; PF at 11 (noting that petitioner's ancestors "regarded themselves and were regarded by non-Indians as members of non-Indian communities.") Beyond participating in the 1926 claims organization, the petitioner and its ancestors have had little contact or social ties with the historical Snohomish tribe based on the Tulalip Reservation. FD Summ. at 24. The PF found that petitioner's ancestors did not form a group or groups distinct from the surrounding population, that interaction among members is limited, and the members often cannot distinguish members from non-members, including those in the immediate area. PF at 14. The comments and documents submitted in response to the PF did not provide cause to reverse the PF because they did not indicate that any distinct Indian community of the petitioner's ancestors existed at any time from 1855 to the present. FD Summ. at 34.

The Final Determination addressed four main factors in arguments and evidence submitted by the petitioner in response to the PF: (1) "Direct Ancestors" and "Indirect Ancestors"; (2) Intermarriage between Indians and Non-Indians; (3) a 1991 Social Network Analysis; and (4) Interviews and Affidavits.

On the Direct and Indirect Ancestor factor, the Department found that the petitioner's submitted evidence was not persuasive, in part because the petitioner erroneously defined "direct ancestor" and "indirect ancestor." The definitions the petitioner used did not comport with accepted genealogical standards.[10]/ The final determination concluded that the petitioner's erroneous use of these terms means that the tables and charts the petitioner relies on "do not accurately depict the ancestral relationships of the petitioner and means that some of the petitioner's analyses are not useful." FD Summ. at 27. Similarly, the maps and charts do not show accurate ancestral relationships between the petitioner's ancestors and other Snohomish people, on or off the Tulalip reservation. The actual relations among direct ancestors, accurately defined, were not close enough to assume that the individuals associated with each other. *Id.* Rather, additional evidence was necessary to demonstrate interaction.

The Department also considered again intermarriage between the petitioner and non-Indians in response to comments submitted on the PF. "Marriage is used as an indicator of social cohesion because people assumed generally to associate with the people they marry and because marriage establishes kin ties across family lines." *Id*. at 28. "[B]ecause of the impact of close kinship relationships on interaction in future generations and social cohesion, the Interior Department presumes a community's existence when at least half the petitioning tribe marries other members of the group." *Miami Nation*, 112 F. Supp. 2d at 748. If marriages between members of the group are less than fifty percent, other evidence must be used to show community. § 83.7(b)(2)(ii).

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[10]/ For example, the petitioner included siblings and descendants of siblings in their definition of "direct ancestor" when accepted genealogical standards would define those as "collateral relatives." FD Summ. at 26. The petitioner also defined "indirect ancestor" as "persons we have been able to identify as having a consanguineal or affinal relationship to a direct Snohomish ancestor, but which are not direct ancestors." The Department noted that "there is no such thing as an 'indirect ancestor,' although collateral relatives do descend from some common ancestor one or more generations in the past." *Id*. at 26. The petitioner used "indirect ancestor" to refer to people who married the collateral relatives of the petitioners' ancestors.

On the intermarriage analysis, the petitioner argued that the PF overestimated the rate of intermarriage with non-Indians and underestimated the amount of intermarriage with Snohomish residents of the Tulalip Reservation. Further, the petitioner submitted evidence intended to demonstrate that, among Coast Salish people, marriage outside the tribe was common and advantageous. The FD recognized these Coast Salish marriage patterns, including their complexity, but found that this did not explain the high rates of marriages to non-Indians among petitioner's members. The FD found also that the evidence identified in the regulations was "patterned out-marriages with other Indian populations" — not non-Indians — and the group, lacking marriages among its members, had "no evidence for continued kinship ties within the group or for social ties created by marriage with other members of Puget Sound Indian society." FD Summ. at 29. The evidence showed that after the first generation of petitioner's ancestors, the generations married non-Indians almost exclusively, providing no evidence of creating kin or social ties within a community. *Id.*

The FD also discounted the evidentiary value of chart submitted by the petitioner purporting to show "Snohomish-Indian Marriages" as it included marriages with no descendants in the petitioner, marriage partners listed as "unknown," and did not provide a means to substantiate or verify that the people being identified as Indians were actually Indian. FD Summ. at 29; FD D&A 38–39.

The Department also considered the petitioner's 1991 Social Network Analysis, which consisted of a number of interviews and questionnaires with group members. FD Summ. at 30–32. The petitioner submitted this analysis in response to the PF's analysis that there did not appear to be many shared contacts or experiences between organization members outside of formal organization activities. *Id*. at 30. The Assistant Secretary concluded, however, based on the analysis of the OFA experts, that the survey was flawed and thus was "not a valid instrument for demonstrating community among the members of" the petitioner. The survey only identified respondents by family line, a large group, making it impossible to tell which member of a specific family line knew which other members of other family lines. Further, the survey did not

contain information indicating the respondent's identity, so answers could not be tracked across the questionnaires and could not be used to demonstrate relationships between members of the group. In addition, the survey did not indicate whether people knew other members in the past or knew them currently. Accordingly, the FD found that the analysis was "not a valid instrument for demonstrating community among members of [the petitioner]." *Id*. The evidence, therefore, did not merit any change in the PF that there is a lack of interaction between group members.

To address the PF's conclusion that there was not sufficient evidence of community from 1855 to 1935, the petitioner argued that until the reorganization of the Tulalip Tribes, there was only one Snohomish community composed of on-reservation Snohomish, off-reservation Snohomish, and themselves, i.e., descendants of Indian-pioneer marriages. But, there was very little evidence indicating regular visits between the petitioner's ancestors in Jefferson County and those in either the Monroe/Sultan area, on the Tulalip reservation or with those on Whidbey Island. FD D&A at 41. The analysis of the evidence submitted "did not indicate that any distinct Indian group of [petitioner's] ancestors existed in this area" of Jefferson County where the petitioner's ancestors lived. FD Summ. at 25.

The FD evaluated the Report by Dr. Barbara Lane that the petitioner submitted to show that Indian and mixed Indian/non-Indian households who established homesteads near the rural community of Sultan interacted with each other and with other Indians. The FD concluded that it did not provide sufficient evidence to meet the community criterion. *Id.* at 30–31. The record shows that only 6 of the 21 families discussed in the report, representing 15 percent of petitioner family lines, had descendants in the petitioner. While some of the remaining families may be the petitioner's collateral relatives, there was not much evidence to show interaction between them and the petitioner ancestors. Further the report did not demonstrate the nature of the relationship between the Indian and mixed-Indian households in the Sultan area. For example, while the report describes marriages, the majority of them occurred mainly before 1900. Further, the report does not indicate that the families described in the report acted as a group or had identifiable leaders. *Id*. at 31. The FD concluded that the report "does not address what the

majority of the petitioner's ancestors were doing . . . or offer evidence to support interaction between the ancestors living in the Chimacum area and the Monroe/Sultan area." *Id.*; *see also* FD D&A 45–48.

The final determination also affirmed the conclusions reached in the PF with regard to Interview and Affidavits.[11]/ The interviews submitted in response to the PF mainly described, particularly in the Chimacum area, a predominantly non-Indian rural community where some of petitioner's members lived. It did not describe an Indian community or socially connected Indian communities composed of petitioner's members. FD Summ. at 32. The social activities — parties, get-togethers, and excursions – were mainly family or extended family gatherings, not community ones. *Id.* The analysis for the FD concluded that the interviews do not indicate that there was a community of mixed-Indian descendants socially distinct from the rest of the community. FD D&A at 43. Rather, petitioner's members were well-integrated into the local non-Indian community. *Id.* at 44.

The interviews confirmed the PF conclusion that the 1926 claims group included many people of non-Snohomish Indian ancestry. FD Summ. at 33. Although there were some memories of traveling to Tulalip to enroll for claims, there was not evidence of traveling to the reservation or to other Indian communities that would indicate social interaction. *Id.* at 32. The FD also found that the three affidavits submitted were of limited value and did not contain significant data that merited any change in the PF. *Id.* at 33.

Further, the evidence available for the FD showed a lack of social interaction between members at present. For example, in 2003, OFA conducted interviews with 25 members of the petitioner, 12 of whom were council members. The interviews did not show that most members of the group have contact with one another outside formal group functions. Most of the people

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[11]/ The Tulalip Tribes submitted a document and comments addressing "what the Tulalip Tribes believes is the over-reliance the petitioner placed on oral history and interviews for specific historic periods when both primary and secondary documentation was lacking." FD Summ. at 25. The Department noted that it "utilized available documentary evidence to supplement oral histories supplied by both the Tulalip Tribes and the petitioner." *Id.* at 26.

interviewed did not know and did not associate with other members of the group other than close family members. There were no organizations, such as churches or community groups, which involved a number of the petitioner's members. *Id.* The FD found that the interviews, "while indicating that the membership has become somewhat more active in the past 20 years, [are] consistent with the conclusions regarding the lack of community found in the PF." *Id.* at 34.

Accordingly, the administrative record supports the Department's finding that the petitioner did not meet the community criterion. The Department considered the relevant factors and data and explained its decision thoroughly. *See Miami Nation*, 112 F. Supp. 2d at 753 ("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)).

C. The Assistant Secretary Properly Concluded that the Petitioner Did Not Meet Mandatory Criterion 83.7©, "Political Influence or Authority" from Historical Times Until the Present.

A review of the administrative record demonstrates that the petitioner failed to show the existence of formal or informal political processes or a bilateral political relationship between the leaders and the group's members at any time from 1855 to the present. Accordingly, the Assistant Secretary properly concluded the petitioner did not meet the political influence or authority criterion.

Criterion 83.7© requires a petitioner to demonstrate that: "[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7©). "Political influence or authority" is defined in the regulations as:

> A tribal council, leadership, internal process or other mechanism which the group has used as a means of influencing or controlling the behavior of its members in significant respects, and/or making decisions for the group which substantially affect its members, and/or representing the group in dealing with outsiders in matters of consequence. This process is to be understood in the context of the history, culture and social organization of the group.

§ 83.1. A petitioner can demonstrate the maintenance of political influence or authority over its members with a combination of evidence such as the ability to mobilize significant numbers of members and significant resources from its members for group purposes; that most of the members consider issues acted upon or actions taken by group leaders to be of importance; that there is widespread knowledge, communication and involvement in the political processes of most of the group's members, and evidence of internal conflicts over valued group goals, policies, or decisions. § 83.7(c)(1). The criterion may also be shown with evidence delineated in § 83.7(c)(2). This criterion reflects the fact that a favorable acknowledgment decision establishes a government-to-government relationship with a pre-existing sovereign. *See Miami Nation*, 112 F. Supp. 2d at 749. In addition, once acknowledged, the group will exercise significant governmental powers over its members and territory.

After a comprehensive evaluation of the petitioner's petition and evidence in the record, the petitioner's and interested party's response to the PF, and the Department's own research, the Assistant Secretary concluded that the petitioner did not meet the political influence or authority criterion. The evidence failed to demonstrate the existence of informal political processes within the petitioner at any time.

The evidence in the record does not show that the petitioner maintained political influence or authority over its members as an autonomous entity from the first sustained contact with non-Indians to the present. Before 1914, no evidence demonstrates any political leadership for an off-reservation Snohomish group composed of petitioner's ancestors, and there was no evidence that petitioner's ancestors maintained tribal relations with the reservation Snohomish. FD Summ. at 35-36, 38; FD D&A at 81–82, 88–89. There was no available evidence of leadership over petitioner's ancestors for this period. FD Summ, at 37, 38. Rather, they were integrated in non-Indian communities. *Id.* at 37.

The FD specifically addressed and disagreed with the petitioner's argument that there was only one Snohomish entity until the Tulalip Tribes organized under the IRA in 1935, with on-reservation and off-reservation leaders working together. *Id.* at 37–38. As the FD noted, the

evidence did not show any indication that there was political interaction between the Tulalip Snohomish and any group of petitioner's ancestors. *Id.* There was also no indication in the evidence that the Bureau of Indian Affairs' agency knew of any entity of the petitioner's ancestors in the Port Townsend or Chimacum area. *Id.* The evidence did not support the petitioner's argument that these two areas were the center of political activity for an off-reservation Indian entity composed of petitioner's ancestors. There was no evidence, newspaper accounts, Indian office reports or other evidence to indicate that they functioned as a political focal point for any such group. *Id.* at 37. Further, the available evidence shows that the historical Snohomish tribe moved to the reservation shortly after the Point Elliott treaty and petitioner's ancestors, by and large, were not a part of the reservation Indians. *Id.* at 38. While the evidence shows that the reservation Indians had named leaders who exercised political influence over their members, there is no evidence indicating that this leadership extended to petitioner's members. *See id.* at 43; FD D&A at 92 (ancestors of petitioner listed on Roblin's 1919 roll were in a class that had "never associated or affiliated with any Indian tribe or tribes for several decades or even generations.").

There was no evidence of any named leaders, and no examples of political influence, over an identifiable group of petitioner's members. FD Summ. at 38. There was no off-reservation group that had dealings with federal officials. *Id.* The FD concluded for this time period, "[m]ost important, the evidence did not show any off-reservation [petitioner] leaders working with the Tulalip Snohomish leaders on political issues." *Id.*

Between 1914 and 1935, the only evidence for political activity was in 1917, the year in which a claims organization existed, and for a 1926 claims organization. PF at 15; FD Summ. at 36, 38. The evidence demonstrated that the 1917 organization was only involved in claims activities, which under acknowledgment precedent is insufficient evidence by itself to demonstrate criterion 83.7©. FD Summ. at 43. The evidence shows that the group existed only for one year and had no connection to the historical Snohomish on the reservation. PF at 15; FD Summ. at 36, 39.

The FD reviewed the evidence concerning the activities of Thomas Bishop and concluded that he was not a leader over petitioner's ancestors. FD Summ. at 38–39; FD D&A at 92, 97. The FD discounted evidence concerning the 1923 tribal committee composed of Indians enrolled at the reservation because it did not involve any off-reservation group of petitioner's ancestors, and no evidence indicated that the petitioner's ancestors elected any of the delegates. FD Summ. at 39.

The FD noted that while the evidence concerning the 1926 Snohomish claims organization demonstrated that some of the petitioner's ancestors were associated with it, there is no evidence that the organization exerted any political influence over the petitioner's ancestors or any other off-reservation entity. PF at 15–16; FD Summ. at 36, 38–39. This group was composed of both on- and off-reservation members. FD Summ. at 38. It did not function as part of any identifiable off-reservation group of petitioner's ancestors. FD D&A 102. The group was largely a claims organization, although it did organize some social activities, "and did not represent a formalization of the political structure on or off the reservation." FD Summ. at 39–40. The available evidence did not demonstrate that the members of the claims group were significantly involved or interested in these efforts. FD D&A at 103.

The evidence demonstrated also that the Tulalip Snohomish during this time had their own identifiable political leaders who exercised authority over their members, which did not include petitioner's members. FD Summ. at 40. Finally, the evidence in the record indicated that the 1926 claims organization ceased to exist in 1935, when the group lost its claims suit. PF at 15–16, FD Summ at 36, 40.

The FD concluded that the evidence submitted for the time period 1914 to 1935 did not merit a change in the conclusions of the PF. The evidence was insufficient to demonstrate political influence or authority within the petitioner. FD Summ. at 38, 40.

No evidence in the record shows that the petitioner had any type of formal or informal political organization between 1935 and 1949. The evidence does not support the petitioner's claims that the 1926 claims organization continued to meet during this period. FD Summ. at 40.

Although two members described being at such meetings in interviews, the Department discounted those memories because they were "fragmentary at best" and "not shown to be shared by most members of the group." *Id.* Further, no written documentary evidence supported a finding that meetings occurred, and interviews OFA conducted in 2003 did not describe any meetings during this time period. *Id.* While the petitioner argued that a number of factors — including the deaths of elder members, defeat of the claims case, adoption of the IRA by the Tulalip Snohomish, the Great Depression, and World War II — led to a lack of political activity during those years, there simply is no evidence of any political activity, formal or informal, during this time that would indicate the "group was asserting authority over its members." *Id.* at 41.

The FD also affirmed the conclusion of the PF that the reorganization of the Tulalip Tribes in 1935 was not a "split" between the petitioner's ancestors and the on-reservation Snohomish. FD D&A at 107. The available documentary records did not demonstrate that the off-reservation ancestors, or the 1926 claims organization, objected in anyway to the IRA reorganization. *Id.* at 107, 109. There is insufficient evidence to meet criterion 83.7© between 1935 and 1950. FD Summ. at 41.

The evidence for 1950 to 1969 consisted mostly of claims activity. In 1950, petitioner formed the "Snohomish Tribe of Indians" to pursue claims under the Indian Claims Commission Act. The evidence did not support the petitioner's assertion that the 1950 organization was a reorganization of the 1926 claims organization. *Id.* at 42. The membership differed too much from that in 1926, as the 1950 group was composed almost entirely of off-reservation descendants, unlike the 1926 group. Further, it had only very limited social aspects. *Id.*

The evidence in the record for the FD demonstrates that the 1950 organization was focused almost solely on the claims lawsuit, with some additional concern over hunting and fishing rights. *Id.* There were few sign-in sheets or attendance lists for the group's annual meetings, thus there was no means to determine if there was widespread knowledge or interest or involvement by the membership. *Id.* The minutes did not demonstrate that the leaders

influenced the members of the group or if the members influenced the leaders, as required to demonstrate political influence and authority. FD Summ. at 42–43.

Acknowledgment decisions provide that claims activities in and of themselves are not sufficient evidence of political influence and authority, but must be evaluated to show widespread knowledge among the group and must be combined with other evidence. *Id.* at 43. The evidence did not demonstrate that the claims activities, combined with the limited evidence concerning hunting and fishing activities, were significant political issues among most members of the group. *Id.* The petitioner did not demonstrate that there was concern or conflict over the issues, or that they were significant political issues. *Id.* Therefore, the petitioner did not demonstrate political authority or influence during this time period. *Id.*

Between 1970 and 1983, the PF found that most members of the group had little contact with one another or the leadership, and the evidence showed that members were not influenced by council decisions. PF at 17; FD Summ. at 36, 44–45. The evidence showed that although the officers of the group obtained some grants, focused on obtaining land, fishing rights, and administering some programs for the members, the evidence presented did not indicate a substantial number of members were taking part in the political processes of the group. FD Summ. at 44. Meeting minutes reflected only small attendance, and provided little information on who these individuals were. *Id.* The evidence submitted did not change the conclusion of the PF; there was insufficient evidence to demonstrate that there was widespread knowledge or communication within the membership. *Id.*

From 1983 to 2003, the group's leaders continued to pursue acknowledgment and became more active, but the evidence still does not show that the leadership maintained a bilateral relationship with the majority of members or that most members were involved in or knew about the political activities. FD Summ. at 45. Evidence was lacking as to attendance at the annual political meetings. Interviews did not identify any substantive political debates or discussions occurring during this time, nor did they demonstrate any internal conflicts that show controversy over valued group goals, properties, policies, processes, and/or decisions. *Id.* In

short, there is little evidence to demonstrate that the leadership's actions were important to a significant number of the group's members.

The evidence in the record thus supports the Department's finding that the petitioner had not demonstrated that it met the requirements of the political influence or authority criterion, 83.7©, from historical times to the present.

D. The Assistant Secretary Properly Concluded that the Petitioner Did Not Meet Mandatory Criterion 83.7(e), "Descent" from a Historical Tribe.

The administrative record shows that an insufficient percentage of petitioner's membership was able to document descent from a historical Indian tribe or tribes that joined together and functioned as a single autonomous political entity.

Criterion 87(e) requires that:

> The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

It also requires that the petitioner provide a membership list of all current members of the group, as certified by the group's governing body.

The PF found that the petitioner did not meet criterion 83.7(e) because the membership consists of a large number of non-Snohomish members and the group had "vague and loosely applied membership criteria." These two factors, according to the PF, "led to the conclusion that the petitioner was 'a collection of Indian descendants of Snohomish, as well as Clallam, Snoqualmie, and other Indian ancestry.'" PF at 26; FD Summ. at 49. The PF concluded that only 59 percent of the petitioner's membership was descended from the historical Snohomish tribe. The PF included in the 59 percent, any individual where the evidence indicated Snohomish and other tribal blood. PF at 22; FD Summ. at 51. The membership criteria itself, while vague and loosely applied, met the regulatory requirements.

In response to the PF, the petitioner submitted a 1999 revised membership list. The group also submitted comments on the evaluation in the PF and provided various documents — such as birth, marriage, and death certificates, probate record, and homestead records — and updated ancestry charts to help identify the members and their ancestors. The Tulalip Tribes

also submitted similar additional evidence, as well as affidavits, agency records, reservation censuses, and family genealogical records of Snohomish members of the Tulalip Tribes. FD Summ. at 50.

The FD noted a number of discrepancies in the petitioner's membership lists, and when discounting for deceased members, duplicate entries and disenrolled persons, concluded that the petitioner's membership included 1,113 members. *Id.* at 49. The petitioner did not include a statement describing the preparation of the membership list, as required by 83.7(e)(2), and did not include the required addresses for 11 percent of its members. *Id.* at 49–51.

In reevaluating the family line tribal designations, the Department considered again a number of primary and secondary sources, such as federal Indian and general population censuses, BIA probate records, and notes, affidavits, and lists of unenrolled Indians prepared by Charles E. Roblin in connection with his "Schedule of Unenrolled Indians of Western Washington" in 1919. *Id.* at 51.

As a result of reevaluation, the Department reaffirmed its conclusion that the 20 family lines found in the PF to be descended from the historical Snohomish tribe were sufficiently documented as Snohomish. *Id.* at 52. In addition, the Department found that two more family lines found in the PF to be of non-Snohomish ancestry and two new family lines were now sufficiently documented as Snohomish. This additional evidence documented that 69 percent of the petitioner's members demonstrated descent from the historical tribe.

All previous acknowledgment precedent requires that the petitioner demonstrate that at least 80 percent of their members descend from a historical tribe. *Id.* The record, therefore, supports the Department's finding that the Petitioner did not meet the descent criterion, 83.7(e).

III. Plaintiffs' Due Process Claim Should Be Dismissed.

Plaintiffs allege that the final determination violated the due process guarantee because the regulations allegedly are vague and ambiguous, allow interested parties to comment, and leave any hearing to the discretion of the Bureau of Indian Affairs. Compl. ¶¶ 75–79. Their argument fails, however, because the final determination regarding the petitioner's petition for

acknowledgment did not implicate the due process guarantee. Even if applicable, however, Defendants afforded the petitioner all the process it was due. Moreover, the petitioner's petition for acknowledgment received an unbiased, detailed and thorough evaluation as detailed above. Accordingly, Defendants are entitled to summary judgment regarding Plaintiffs' second cause of action alleging the final determination violated their due process rights. *Id.* ¶¶ 75–79.

1. The Petitioner Does Not Possess a Constitutionally Protected Property Interest and the Due Process Guarantee Does Not Apply.

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (citing U.S. Const., Amdt. 14) (additional citation omitted). If a government action does not deprive an individual of a protected property or liberty interest, the due process guarantee does not require any hearing or process whatsoever, even if the challenged action adversely affects that individual in other ways. *See, e.g., O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). Thus, "only after finding the deprivation of a protected interest" may the Court consider the petitioner's allegations regarding procedural defects in the application of the federal acknowledgment regulations to its petition. *American Mfrs. Mut. Ins. Co.*, 526 U.S. at 59; *see also Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) ("If the party has a protected interest, we then decide how much process is due." (internal quotation omitted)).

The petitioner does not possess the necessary "legitimate claim of entitlement." "The Constitution's 'procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits.'" *C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 200 (D.C. Cir. 2002) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972)) (emphasis in original); *see also Greenlee v. Bd. of Med. of D.C.*, 813 F. Supp. 48, 56 (D.D.C. 1993) ("[C]ourts generally have held that present enjoyment is integral to the existence of a property entitlement."). Indeed, the Supreme Court has explicitly stated: "We have never held that applicants for benefits, as distinct from those already receiving them have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth

Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986).

The petitioner cannot establish the critical constitutionally protected property interest, because it does not have a government-to-government relationship with the United States. The petitioner is a petitioner for acknowledgment, seeking the establishment of such a relationship. Accordingly, it is not already a recipient of the specific benefits and services that flow from acknowledgment. The petitioner is akin to an applicant for benefits, "as distinct from [one] already receiving" benefits and possessing a "legitimate claim of entitlement protected by the Due Process Clause." *Lyng*, 476 U.S. at 942. In addition, the petitioner cites no specific benefits it or its members had been receiving that were terminated by the final determination. Finally, the federal acknowledgment regulations expressly provide that even those groups which are acknowledged are not *immediately* entitled to any benefits. 25 C.F.R. § 83.12(c) states, in part:

> While the newly acknowledged tribe shall be considered eligible for benefits and services available to federally recognized tribes because of their status as Indian tribes, acknowledgment of tribal existence shall not create immediate access to existing programs. The tribe may participate in existing programs after it meets the specific program requirements, if any, and upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly acknowledge tribe.

In this case, the petitioner is simply petitioning for acknowledgment under the federal acknowledgment regulations. The petitioner clearly hoped that it would receive the benefits and services that flow from federal acknowledgment, but its unilateral expectations did not create a constitutionally protected property interest. *Roth*, 408 U.S. at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). Because the petitioner lacks the requisite entitlement to federal acknowledgment, the final determination did not deprive the petitioner of any due process rights.

2. Defendants Afforded the Petitioner Due Process of Law.

In any event, even if the due process guarantee applies to Plaintiffs' petition for acknowledgment, the process afforded to Plaintiffs was constitutionally adequate.

"'Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Due process is flexible and calls for such procedural protections as the particular situation demands.'" *Lepre v. Dep't of Labor*, 275 F.3d 59, 69 (D.C. Cir. 2001) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The Fifth Amendment "only requires that a person receive his 'due' process, not every procedural device that he may claim or desire." *Johnson v. United States*, 628 F.2d 187, 194 (D.C. Cir. 1980); *see also Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984) ("Although the right to be heard is an integral part of the due process, an individual entitled to such process is not entitled to dictate to the court the precise manner in which he is to be heard."). In addition, "the Supreme Court has held that due process does not always require a full administrative hearing." *Shelton v. Consumer Prods. Safety Comm'n*, 277 F.3d 998, 1007 (8th Cir. 2002) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 241 (1973)); *see also Parham v. J.R.*, 442 U.S. 584, 608 n. 16 (1979) ("[T]here is no reason to require a judicial-type hearing in all circumstances."). Indeed, the Supreme Court has established that:

> The essential requirements of due process . . . are *notice and an opportunity to respond.* The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.

Cleveland Bd. of Educ., 470 U.S. at 546 (emphasis added).

In *Miami Nation*, the court held that judicial review of the agency administrative record on the final decision itself is adequate assurance that a group's due process rights are protected. *Miami Nation of Indians of Ind., Inc. v. Babbitt,* 887 F. Supp. 1158, 1173 (N.D. Ind. 1995). As stated in *Miami Nation*, "[b]ecause the APA does not mandate a hearing and opportunity for cross-examination, and because Congress has not manifested an intent to provide such procedures, the absence of a provision for such procedures does not render the 1978 regulations arbitrary and capricious under 5 U.S.C. § 706(2)(A)." *Id.*

Further, Defendants' application of the federal acknowledgment regulations to the petitioner's petition provided the group with ample notice and an opportunity to respond. The

Department provided the petitioner with technical assistance letters advising the petitioner of deficiencies in its petition and evidentiary submissions, prior to issuance of the PF, and met with the petitioner in Seattle, Washington to review the work in progress and specific provisions of the regulations, and provided other meetings and technical assistance by phone prior to issuing the FD. FD Summ. at 2. The 41-page PF then set out in extensive detail the areas in which the Assistant Secretary concluded that there was insufficient evidence. It included a discussion of the evidence and how it was weighed under each criterion, providing petitioner a clear understanding of where evidence was insufficient under the regulations. *Id*.

In addition to the technical assistance provided to the petitioner after the PF as well, the Department provided to petitioner the full record, and permitted substantial extensions of time in order to allow the petitioner to prepare its responses to the proposed finding. *See* Background, Part III *supra.* When the Department in 1997 sought to end the indefinite extension of the comment period that petitioner had requested in 1993, the petitioner objected, requested additional time to respond to the PF, and the Department agreed. *Id.* The Department offered to prepare a second or amended PF, but the petitioner rejected the offer and requested that the evaluation for the final determination proceed. *Id.* The petitioner submitted its comments on the PF, and the Department then considered and addressed the comments, evidence, and additional analysis the petitioner submitted, delineating its conclusions in a 56-page Summary Under the Criteria and a 158-page Description and Analysis of the Evidence, with additional appendices. *See* FD Summ.; FD D&A.

In any event, the federal acknowledgment regulations also provided additional procedural safeguards that the petitioner declined to utilize. The regulations provide a petitioner with the opportunity to seek review of the decision made by the Assistant Secretary on its acknowledgment petition. 25 C.F.R. § 83.11. The petitioner had up to ninety days to file a request for reconsideration with the Interior Board of Indian Appeals ("IBIA") and the Assistant Secretary's determination does not become final until this deadline elapses. § 83.11(a)(2). The IBIA, an administrative tribunal that is independent from the Assistant Secretary, reviews

requests for reconsideration. § 83.11(a)(1). The reconsideration process is fully set out in the federal acknowledgment regulations and provides that the IBIA, at its discretion, may require a hearing by an administrative law judge. *Id.* Defendants also specifically informed the petitioner of the reconsideration process in the notice of the FD. 68 Fed. Reg. at 68944. The petitioner opted not to avail itself of this reconsideration process.

The federal acknowledgment regulations including the reconsideration process detailed in § 83.11 provide petitioners with constitutionally adequate notice and an opportunity to respond. The petitioner chose not to take full advantage of the process afforded to it. Accordingly, its due process claim should be rejected. *Kremer v. Chem. Const. Corp*., 456 U.S. 461, 485 (1982) ("The fact that [plaintiff] failed to avail himself of the full procedures provided . . . does not constitute a sign of their inadequacy."); *Long v. Dist. of Columbia*, 3 F. Supp.2d 1477, 1480 (D.D.C. 1998) *aff'd mem. by* 194 F.3d 174 (D.C. Cir. 1999) (rejecting the plaintiff's due process claim that she was entitled to an evidentiary hearing, in part, because of her failure to seek reconsideration of an adverse determination.); *Maples v. Martin*, 858 F.2d 1546, 1551 (11th Cir. 1988) (finding that a procedural due process claim failed because appellants did not utilize available procedure and presented no evidence that resort to it would have been futile: "Thus an opportunity to be heard that would have met the requirements of due process was lost to the appellants by their own inaction."); *Aronson v. Hall*, 707 F.2d 693, 694 (2d Cir. 1983) ("Having chosen not to pursue available administrative review, [plaintiff] is hardly in a position to claim that such review denied him due process.").

3. The Petition Received an Unbiased Evaluation.

The Department's evaluation of the petitioner's petition was unbiased, detailed and thorough. The petitioner's allegations that Tulalip Tribes had undue influence in the process is without merit. The regulations, adopted through notice and comment rule making, specifically provide that interested parties can comment. As discussed in the preamble to the 1994 revisions, "Interested parties participate fully in the acknowledgment process under the present regulations. . . . It is neither necessary nor appropriate . . . to prohibit the participation of third parties." 59

Fed. Reg. 9283. Nothing in the record demonstrates that Tulalip Tribes' comments and evidence were given undue weight in the Department's decision.

The petitioner's claims of bias also fail because they rest on nothing more than bald assertions without basis in the administrative record. The Supreme Court has long held that "the presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926). This Court recognized the importance of this principle in its Order [Dkt. No. 87] granting Defendants' Motion for Protective Order [Dkt. No. 84], stating "[t]he court assumes the record is properly designated absent evidence to the contrary" and noting that Plaintiffs had submitted no evidence, merely speculation. Order [Dkt. No. 87] at 3 (citation omitted).

4. The Regulations Are Not Unconstitutionally Vague.

The petitioner also argues that the regulations violate their procedural due process rights because the Department has discretion to define key terminology within the regulations "as narrowly or as broadly as the BIA desires under the circumstances." Compl. ¶ 77. Notably, Plaintiffs do not detail the specific terms they find to be vague or subject to interpretation. Their argument fails, in any event, because the regulations are not so vague or ambiguous as to violate any procedural due process right.

The Department's authority to promulgate the regulations has been upheld. *James*, 824 F.2d at 1137–38 ("Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2, 9 . . . Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations."); *Miami Nation,* 887 F. Supp. at 1165 (finding that 25 C.F.R. Part 83 was promulgated under Congress' delegation of authority to the President and to the Secretary to prescribe regulations concerning Indian affairs and relations; *United Tribe of Shawnee Indians,* 253 F.3d at 549 (same); *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1215 (D. Haw. 2002), *aff'd,* 386 F.3d 1271 (9th Cir. 2004), *cert. denied,* 125 S. Ct. 2902 (2005)

(same); *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 77 (D.D.C. 2002) (same). Courts have held that the Department considered the relevant factors and considerations in passing the regulations and the regulations, therefore, are not arbitrary or capricious. *See, e.g., Miami Nation,* 887 F. Supp. at 1172; *United Houma Nation v. Babbitt,* 1997 WL 403425 (D.D.C. 1997) (upholding agency's decision not to revise the 1994 regulations to remove the historic tribe requirement and to incorporate other procedural and substantive changes).

In *Miami Nation*, the court addressed the plaintiffs' claim that the regulations failed to define specific terms or to specify a burden of proof. 887 F. Supp. at 1172. The court granted summary judgment for the United States on this argument, finding that the Department had properly promulgated the regulations pursuant to its authority and had extensively considered the relevant factors in so doing. "The regulations are not arbitrary and capricious simply because the Miamis contend that a few terms are vague or because the burden of proof is unclear." *Id.* at 1173. Similarly, here, Plaintiffs' claim that the regulations are too vague should be dismissed.

Finally, the Department has issued over 48 final determinations under the regulations, 7 reconsidered final determinations, and more than 50 proposed findings, providing interpretations of regulations and of the evidence that is sufficient or not to satisfy the regulatory requirements. Although the agency can deviate from precedent, it must provide a reasoned explanation of any such departure. This precedent is publicly available. When Plaintiffs raised precedent in their comments in response to the PF, it was addressed in the FD. *See, e.g.*, FD Summ. at 43. Plaintiffs' due process claim should be dismissed.

IV. Defendants are Entitled to Summary Judgment on Plaintiffs' Equal Protection Claim.

The petitioner also argues that the Department violated the petitioner's equal protection rights. According to Plaintiffs, the Department discriminated against the petitioner on the basis of race and gender because it considered the group's high rates of intermarriage with white settlers and other tribes. In addition, the petitioner argues that the Department discriminated on the basis of gender because of the matriarchal descendancy of blood lines. This claim, however,

is without merit because the Department's consideration of intermarriage is for purposes of determining social ties among group members and is not based on race or gender. Nor is intermarriage a determinative factor in the decision.

The rational review basis governs the petitioner's equal protection claim because the regulation does not involve fundamental rights, liberty interests, or suspect classifications. *See Kahawaiolaa v. Norton,* 386 F.3d 1271, 1277–78 (9th Cir. 2004). Rational basis review, which is "highly deferential," requires the Court to uphold a classification "'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Id.* at 1279 (9th Cir. 2004) (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)). Plaintiffs have likewise not identified a "suspect class" being targeted by the regulations. The regulations, therefore, are constitutional if rationally related to a legitimate state interest. *Kaahumanu v. Hawaii,* 685 F. Supp. 2d 1140, 1155 (D. Haw. 2010).

Further, "the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller*, 509 U.S. at 320) (internal citations omitted); *Kahawaiolaa,* 386 F.3d at 1280. Under rational basis review, there is no equal protection violation "'so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" *Kahawaiolaa*, 386 F.3d at 1279 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11–12 (1992)); *see also Bd. of Trustees*, 531 U.S. at 366–67.

The classification at issue is political, not based on gender or race. It is well-established that distinctions based on tribal status are "'political rather than racial in nature.'" *Kahawaiolaa*, 386 F.3d at 1279 (quoting *Mancari*, 417 U.S. at 543 n.24). Of course, "[r]ational basis review begins with a strong presumption of constitutional validity," and "[i]t is Petitioner's burden to show that the law, as-applied, is arbitrary; and not the government's to establish rationality."

Graham v. Mukasey, 519 F.3d 546, 551 (6th Cir. 2008) (citing *Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 504 (5th Cir. 2006)). Here, the regulations seek to establish whether federally-recognized tribal status should be afforded to petitioners. Thus, the factors considered in this inquiry are aimed at reaching political, not racial classifications. *See, e.g., United Houma Nation,* 1997 WL 403425 at *7 (recognizing the "fundamental distinction between the political classification of groups as Indian tribes and the racial classification of persons as Indians"); Proposed Rule, 43 Fed. Reg. 23743, 23744 (June 1, 1978) ("While there is a large number of American citizens who are of Indian descent in this country, many of them do not and have not ever lived in tribal relations. A group of Indian descendants, living in the same general region, does not necessarily constitute an Indian tribe, even through the individuals may have recently joined together in some formal organization . . . .").

Further, even to the extent that the criterion considers intermarriage, the criteria is not based on race or gender. Instead, it considers intermarriage in the context of social ties within the Indian group claiming tribal status. *See* 25 C.F.R § 83.7(b)(1)(I), (ii), (b)(2); *Miami Nation,* 112 F. Supp. 2d at 754–55 (discussing marriage rates within the group dropping to 10 percent, "when so viewed, today's kinship rate tells nothing about the existence of close contemporary ties conducive to interaction"). The nature of the contacts within the group and marriage inside or outside the group are rational factors to determine whether a distinct community actually exists. *See* 25 C.F.R § 83.7(b). The key factor is that group members who are marrying outside the group are not creating kinship ties within the group, not the race or gender of either spouse. Further, in some cases, marriage outside the group can help prove community. *See* § 83.7(b)(1)(I) (noting that evidence can include, "as may be culturally required, patterned out-marriages with other Indian populations"). Thus, neither race nor gender factors into the Department's consideration.

In addition, the criteria to which the tribe refers, § 83.7(b), considers "community" in the context of social ties and interaction, and marriage outside the group is only one type of evidence. In order to be recognized, a group must "be a dynamic group rather than simply many

people with common Indian ancestors." *Miami Nation*, 112 F. Supp. 2d at 747. Marriage is one way to demonstrate social ties. As stated in the FD, high rates of marriage to other members of the group indicates tribal relationships. To state it simply, one tends to associate with who one marries. *See* FD Summ. at 28 ("Marriage is used as an indication of social cohesion because people assumed generally to associate with the people they marry and because marriage establishes kin ties across family lines."). It is clear in the decision document itself that marriage was evaluated in the context of social ties: "Few subsequent marriage have occurred among [the group's members] and thus the group lacks the kinship ties that such marriages create." *Id.* at 34.

Finally, rates of marriage within the group can be used to prove the community criterion, but does not *disprove* the community criterion. If a group has a rate of marriage within the petitioner's membership of 50 percent or greater, the petitioner meets the community requirement without other evidence. § 83.7(b)(2)(ii). If that intermarriage rate is less than fifty percent, the inquiry does not end there. Rather, other evidence must be used to show community. As the regulation states, the criterion can be met by showing "some combination of the following evidence and/or other evidence that the petitioner meets the definition of community set forth in § 83.1." § 83.7(b)(1). A petitioner could show, for example, shared cultural patterns, such as "language, kinship organization, or religious beliefs and practices," "[s]hared sacred or secular ritual activity encompassing most of the group," "[s]ignificant rates of informal social interaction which exist broadly among the members of a group," or "[a] significant degree of shared or cooperative labor or other economic activity among the membership." *Id.* In short, there are many ways to show that the "group comprises a distinct community and has existed as a community from historical times until the present" and marriage partners is only one type of evidence used to determine whether a petitioner has documented "community." § 83.7(b).

The evidence in this case shows that the Department, in fact, did consider factors other than simply intermarriage for the community criterion. For example, the Department conducted

interviews and considered affidavits the petitioner presented. The Department also considered the results of the surveys the petitioner presented to demonstrate community. None of the evidence tended to show that the petitioners meet and interact with each other on a social basis outside of formal group events. *See* Argument Part II B, *supra*. Instead, the evidence demonstrated that when the first female ancestors of the petitioner married pioneers, their descendants continued to marry outside the group and they and their descendants generally integrated into non-Indian communities and distinguished themselves from Indian communities. *See id.* The record shows that marriage to non-Indians is not the critical factor: it is the integration into non-Indian communities and the failure to demonstrate with other evidence that the petitioner maintained a distinct community from historical times to the present. § 83.7(b).

There is clearly a rational basis for the Department's inquiry into "whether a petitioning group comprises a distinct community and has existed as a community from historical times until the present." *Id.* "A 'community' means more than geographic proximity." *Miami Nation*, 112 F. Supp. 2d at 747. "In order to meet the requirements of 83.7(b) of the regulations, the petitioner must be more than a group of descendants with common tribal ancestry who have little or no social connection with each other." *Id*. The Department's decision, therefore, has a rational basis and did not violate the petitioner's equal protection rights. Defendants are entitled to summary judgment on this claim.

CONCLUSION

In sum, all seven criteria in the acknowledgment regulations are mandatory. The Court should remand this case only if it finds that the Department erred in its decision on all four of the criteria discussed above. The record fully supports the Department's decision. The Department considered the relevant factors and data, and explained its decision thoroughly. The decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Further, Plaintiffs' due process claim is without merit because the final determination regarding the petitioner's petition for acknowledgment did not implicate the due process guarantee. In any event, Defendants afforded the petitioner all the process it was due. Finally,

Defendants are entitled to summary judgment on Plaintiffs' equal protection claim because the Department's consideration of intermarriage is not a determinative factor in its decision, is for purposes of determining social ties among group members, and is not based on race or gender.

Accordingly, Defendants request that the Court grant its motion for summary judgment.

Respectfully submitted this 22nd day of October, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 22, 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 22nd day of October, 2010.

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