THE HONORABLE 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 Ken Salazar, The United States Department of the Interior, Bureau of Indian Affairs, Office of Federal Acknowledgment, and the United States of America, Defendants.	Case No. CV08-00372-JCC **PLAINTIFFS' CORRECTED MOTION AND MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT** **NOTE ON MOTION CALENDAR: DECEMBER 10, 2010** **ORAL ARGUMENT REQUESTED**

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MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 56, Local Rule CR 7 and the Orders of this Court, Plaintiffs' Snohomish Tribe of Indians and its Chairman Michael C. Evans respectfully move the Court for an order granting it Summary Judgment declaring that (1) the BIA Final determination against federal acknowledgement of the Snohomish Tribe of Indians be reversed and vacated; and (2) the Snohomish Tribe of Indians is entitled to be recognized and acknowledged as an Indian Tribe by Defendants.

MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

I. STATEMENT OF FACTS

A. Snohomish Tribal History

The Snohomish Tribe (much like the federally recognized Samish, Snoqualmie, and Clallam tribes), consists of people descended from aboriginal Coastal Salish. (Wayne Suttles, Coast Salish Essays (1987) at 31-32 (Ex. 1)[1]). The Snohomish are currently inhabitants of the area on and near Puget Sound in the State of Washington, including primarily in Snohomish County, Island County, San Juan County and Jefferson County. (SNH-FDD-V010-D0050 at 3)[2]

During the 19th Century, the Snohomish members lived in the lower Snohomish River valley area, including the area of the Tulalip Reservation, the upper Snohomish-Skykomish River valley area, particularly the Monroe-Sultan area along the Skykomish River and its tributaries, the southern half of Whidbey Island, and the Chimacum-Port Townsend area on the Quimper Peninsula. (SNH-PFD-V006-D0005 at 5). The tribal members farmed around their homes and roamed this region depending upon the season and availability of fish, clams,

[1] As used herein, all references to "Ex." refer to the exhibits attached to the Declaration of Richard B. Allyn, filed contemporaneously herewith.

[2] The citation above refers to its location in the Administrative Record. Pursuant to the Court's Order of August 7, 2008 (Dkt. 44), the U.S. Government has agreed to produce these records and will do so at the conclusion of briefing.

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game, roots, berries and other gatherable food. (*Id.*; *see also* SNH-FDD-V009-D0003 at 7-13).

As was the custom among tribes in this area, some Snohomish members intermarried with other tribes as well as with non-native white settlers. (PFR-APF-V008-D0020; SNH-FDD-V007-D0001 at 9-10; SNH-FDD-V009-D0003 at 8). These members, notwithstanding their "mixed" heritage, retained loyalty and identity with their Salish kin system and traditions. (PFR-APF-V008-D0020; SNH-FDD-V007-D0001 at 9-10; SNH-FDD-V009-D0003 at 8).

1. The Treaty of Point Elliot

In January 1855, Isaac Stevens, the Governor of the Territory of Washington and Superintendent of Indian Affairs for the Territory, convened a meeting of the leaders of the principle Indian tribes that lived on or near he north and east part of Puget Sound for the purposes of entering into a treaty. (SNH-PFD-V003-D0008 at 14-20). Governor Stevens determined that the Snohomish Tribe should be in attendance and summoned the Snohomish leaders from that area to Point Elliott, Washington. (*See id.*).

To induce the assembled tribes to abandon their traditional lands, the Government offered the Snohomish Tribe and dozens of other tribes cash, relocation to reservations, public schooling and health services, and access to traditional hunting and fishing grounds. (*Id.; see also* PFR-GPF-V010-D0016). One of the reservations was to be set aside by the mouth of the Snohomish River for the Snohomish Tribe and the Snoqualmie, Stillaguamish and Skykomish tribes that lived nearby. (PFR-GPF-V010-D0016 at 2). This reservation was to be adjacent to a larger reservation on Tulalip Bay, a "general reservation" for "all the Indians living west of the Cascade Mountains." (*Id.*). Ten Snohomish leaders, designated "chiefs" or "sub-chiefs" by Governor Stevens, signed the Treaty of Point Elliott on January 22, 1855 (the

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"Treaty") (*Id.* at 4-5), and Congress ratified the treaty four years later.[3] (FDR-MFD-V001-D0176).

But, due to the influx of white settlers into the area during that time, the government ultimately abandoned its promise to provide two separate reservations; instead, the Executive Order combined the two reservations into a single, smaller "general reservation" adjacent to Tulalip Bay, presently known as the Tulalip Reservation. FDR-AFD-V001-D0002 at 3; see also FDR-HFD-V005-D0002 at 2-3; FDR-HFD-V005-D0047 at 11).

2. The Tulalip Reservation and the Snohomish People Prior to 1935.

Once established, the Tulalip Reservation's land could not support the number of Indians designated by the government to live thereon. (FDR-HFD-V005-D0047 at 11). Much of the land was covered with timber or marshland, and could only be made inhabitable with great effort and cost. (FDR-HFD-V005-D0039 at 10). The poor conditions on the reservation were exacerbated by the government's policies discouraging the tribes' religious practices and the use of native languages, as well as the government's repeated interruptions of efforts to develop the land. (FDR-HFD-V005-D0047 at 11).

As a result of these conditions, many in the Snohomish Tribe were unwilling to relocate to the reservation, or left the reservation. (*Id.*). At the time of a survey conducted by Special Indian Agent Charles Roblin in 1919, some 394 Snohomish resided off the Tulalip Reservation, a number three times greater than the total number of Indians actually living on the reservation. (PFR-APF-V004-D0062; FDR-HFD-V005-D0039 at 14).

Indeed, a substantial majority of the Snohomish Tribe continued to reside outside the Tulalip Reservation in four relatively concentrated geographic localities: the lower Snohomish River valley area, the Monroe-Sultan area along the Skykomish River and its tributaries, the southern half of Whidbey Island, and the Chimacum-Port Townsend area on

[3] It is well documented that the "chiefs" who signed the Treaty of Point Elliot gained their qualifications for such a designation solely because they were *present* at the time of the signing. *E.g.* PFR-APF-V018-D0036 at 2.

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the Quimper Peninsula. (SNH-FDD-V010-D0050 at 3). Within these larger geographical areas, many Snohomish tended to reside in "clusters" or "bands" in close proximity to each other. (*Id.*) These "clusters" facilitated social interaction, as well as localized governance, among the members of the Snohomish Tribe. (Ex. 1 at 209-230).

Both the Snohomish living on and off of the reservation gathered together regularly for social and political activities until the mid-1930s. (*E.g.,* PFR-APF-V011-D0042; D0046; D0048; D0054; D0057). Included in these activities, which were open to all Indians of Snohomish descent, was the formation of the "Snohomish Tribe of Indians" in 1917 – and its subsequent incorporation under Washington state law in 1927 – whose purpose under its bylaws was to (1) promote, encourage and foster the literary, social and educational development of its members, (2) establish and cultivate closer acquaintanceship and camaraderie among the members, and (3) buy, sell, lease, mortgage, and hold real and personal property. (TUL-FDD-V017-D0007 at 18). The tribal officers elected in 1923, as well as the governing board of the Snohomish Tribe of Indians at the time of its 1927 incorporation, consisted of Snohomish residing on and off the reservation. (PFR-APF-V011-D0028; D0031).

3. The Indian Reorganization Act and its Effect of the Snohomish Tribe

In 1930, the superintendent of Indian affairs encouraged the creation of a separate tribal council consisting solely of reservation residents. (SNH-PFD-V005-D0038). At the time, the council was organized "to act on reservation questions only," and reservation residents continued to participate in their respective tribal organizations. (*Id.* at 4). In 1935, however, in response to the Indian Reorganization Act, Tulalip Reservation residents descended from many tribes voted to reorganize as an independent, non-aboriginal entity, now known as the Tulalip Tribes, Inc. (SNH-FDD-V020-D0070 at 1-2). Members of the Snohomish Tribe residing off of the reservation were not allowed to participate in the vote,

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even though it effectively separated the Snohomish living on the reservation from the majority of the Snohomish Tribe residing off the reservation. (FDR-GFD-V007-D0001 at 24).

Notwithstanding the separation from the Snohomish minority residing on the reservation, the Snohomish Tribe continued to meet for both political and social purposes. (*E.g.,* PFR-APF-V024-D0007 at 4-5; FDR-MFD-V001-D0039; SNH-PFD-V011-D0002). And during this time, Commissioner of Indian Affairs John Collier wrote separately to the Tulalip Tribes, Inc. and the Snohomish tribal councils. (*E.g.,* SNH-FDD-V015-D0026). In fact, for the next twenty years, the Tulalip Indian Agency continued to consult routinely and separately with both tribal councils. (*See id.,* TUL-FDD-V013-D0120).

In addition to council meetings, the Snohomish tribal members continued to interact within their community "clusters," and marriage between members of the Snohomish Tribe took place regularly. (SNH-FDD-V008-D0036 at 7; SNH-FDD-V033-D0012 at 3; SNH-FDD-V008-D0035 at 7-9).

4. The Snohomish Reorganization in 1950

In 1950, the Snohomish Tribe adopted a new constitution that reflected the many changes to the tribal community in the previous three decades, including the death of many tribal leaders, the need for a more rigid governmental structure to pursue increasingly available federal benefits, and the rapid mobilization and industrialization of the area. (PFR-APF-V013-D0013). The Snohomish tribal council obtained treaty-fishing "blue cards," lobbied for better health care, and supervised successful litigation under the Indian Claims Commission Act of 1946. (*E.g.,* PFR-APF-V009-D0089, D0091; SNH-FDD-V020-D0081-82; FDR-HFD-V004-D0003).

Indeed, the Snohomish tribal council continued and expanded its political activity in the ensuing decades. By the 1970s, funds from state and Federal agencies enabled the Snohomish Tribe to establish an office, hire staff to maintain the group's enrollment information, and administer social initiatives such as food stamp and food voucher programs.

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(*E.g.,* PFR-APF-V020-D0023 at 2; PFR-APF-V013-D0032; PFR-APF-V020-D0029). The Snohomish Tribe was, and continues to be, active in a number of regional and national inter-tribal organizations. (*E.g.,* PFR-APF-V022-D0021; SNH-FDD-V024-D0071).

The Snohomish Tribe currently consists of members verified as descendants of historic Snohomish tribe including signatories of the Treaty. (FD at 139-156). A substantial portion of the Tribe continues to live in the same geographic "clusters" created by the tribal ancestors. (SNH-FDD-V010-D0050). Tribal members continue to gather formally and informally, pay membership dues, vote, and intermarry with members of the Snohomish and other Coastal Salish tribes of the Puget Sound area. (*E.g.,* SNH-FDD-V026-D0024; *see also* http://www.snohomishtribe.com).

5. Snohomish Recognition

The Snohomish Tribe has been acknowledged as an Indian Tribe by the United States government formally through the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927) (PFR-GPF-V010-D0016); through the Act of February 12, 1925, 43 Stat. 886, Ch. 214 (authorizing Snohomish Tribe to sue the United States in *Duwamish et al Indians v. United States,* 79 Ct Cls at F-275) (Ex. 2); and informally through consultation on claims-related matters, pending federal legislation, treaty matters, and internal Snohomish tribal operations. (*E.g.,* FDR-HFD-V004-D0003 at 1; SNH-FDD-V020-D0081; FDR-MFD-V001-D0036; SNH-PFD-V003-D0065; *see also* PFR-APF-V006-D0003).

The Snohomish Tribe has also been recognized as a political and governmental entity by the State of Washington, neighboring tribes, and numerous historians researching the Salish Indian populations of the Puget Sound region. (SNH-PFD-V004-D0081; PFR-APF-V022-D0006; ACR-FDD-V002-D0182; PFR-APF-V022-D0021; PFR-APF-V022-D0004; SNH-PFD-V005-D0017). In fact, prior to the holding of *United States v. Washington,* 476 F. Supp. 1101 (W.D. Wash. 1979), it was undisputed that the Snohomish Tribe of Indians had exclusive standing to bring a claim on behalf of the aboriginal Snohomish Tribe as it existed

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in 1855. (FDR-MFD-V001-D0186; FDR-HFD-V004-D0003 at 8; ACR-PFD-V001-D0083; PFR-APF-V009-D0137; SNH-FDD-V019-D0011).

B. Administrative Background

In 1978, the Department of the Interior published regulations governing the procedure for official federal recognition of Indian Tribes ("Regulations"). 25 C.F.R. Part 83 (1978). These Regulations came about after Congress began conditioning eligibility for most programs benefiting American Indians upon status as a tribe recognized by the federal government. *See* 25 C.F.R. § 83.2.

Under these Regulations, the BIA (through its Branch of Acknowledgment and Research ("BAR")) conducts its own research, accepts materials from the petitioning tribe and any other interested parties, publishes proposed findings and a summary of evidence supporting the federal findings. 25 C.F.R. § 83.10. The Assistant Secretary for Indian Affairs makes a final decision after a notice and comment period. *See id.*

The criteria under which the BAR must determine federal acknowledgment is presently codified at 25 C.F.R. § 83.7. Specifically, the BAR must find (a) the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900; (b) a predominant portion of the petitioning tribe comprises a distinct community and has existed as a community from historical times until the present; (c) the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present; (d) evidence of a governing procedures and membership criteria; (e) the petitioner's membership consists of individuals descending from a historical Indian tribe; (f) the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and (g) neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship. 25 C.F.R. § 83.7.

II. HISTORY OF THE SNOHOMISH PETITION

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The Snohomish Tribe initially petitioned for federal recognition in 1975. (SNH-PFD-V001-D0001 to D0073). The initial Petition consisted of a brief narrative and dozens of exhibits. (*Id.*). In response to the regulatory changes promulgated in 1978, however, the Snohomish Tribe, in November 1979, provided the BAR with a revised Petition more than 100 pages long and supported by nearly 300 exhibits, carefully addressing each of the criteria necessary for recognition under the new Regulations. (SNH-PFD-V002 to V007). The Petition included a detailed genealogical study, eyewitness accounts, tribal constitutions and bylaws, studies, reports and identifications made during the past 150 years by anthropologists, historians, local residents, scholars, journalists, and others familiar with the community, and federal and state government reports and documents during the same period. (*Id.*). The Snohomish Tribe supplemented the revised Petition in 1980, and continued to do so thereafter. (SNH-PFD- V008-D0002 to D0051).

In 1983, notwithstanding the Snohomish Tribe's detailed Petition, the BAR issued its Proposed Findings against federal acknowledgment. (ACR-FDD-V001-D0151). The BAR found that the Snohomish Tribe had met three criteria: (1) the Tribe provided evidence of current governing procedures and membership criteria under 25 C.F.R. § 83.7(d); (2) the membership of the Tribe is composed principally of persons who are not members of any acknowledged North American Indian tribe (including the Tulalip Tribes, Inc.), as required under 25 C.F.R. § 83.7(f); and neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship, as required under 25 C.F.R. § 83.7(g). (*Id.*) The BAR determined, however, that the Snohomish failed the referenced criteria (a), (b), (c), and (e). (*Id.*)

After more than 15 years of additional research, the Snohomish Tribe submitted Comments on the Proposed Findings in 1999. (SNH-FDD-V001-D0008). The Tulalip Tribes, Inc. also submitted comments as an "interested party" opposing federal acknowledgement of the Snohomish Tribe. (TUL-FDD-V023-D0001 to D0003). Although

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the 1999 Comments by the Snohomish Tribe effectively rebutted the BAR's concerns in the Proposed Findings, the BAR issued a Final Determination on December 10, 2003 denying the Snohomish Petition. (ACR-FDD-V002-D0008 to D0019). The Final Determination stated that the Snohomish failed the same criteria as it did in the 1983 Proposed Findings. Specifically:

A. 25 C.F.R. § 83.7(a)

Despite the Snohomish Tribe providing documentation showing a continuous pattern of tribal interaction with non-Snohomish people and entities, both before and after its separation from the Snohomish affiliated with the Tulalip Tribes, Inc., the BAR determined that the Snohomish Tribe has been identified as an American Indian entity on a substantially continuous basis only since 1950, thereby failing to meet the criteria listed in 25 C.F.R. § 83.7(a). The BAR concluded that only those Snohomish Indians on the Tulalip Reservation constituted true Snohomish Indians. (ACR-FDD-V002-D0010). The BAR used this assumption to find that any reference to the "Snohomish Tribe" must necessarily refer to the Tulalip Snohomish.

B. 25 C.F.R. § 83.7(b)

Despite considerable evidence showing both formal and informal tribal gatherings on a regular basis, a notable geographical concentration (facilitating social interaction), and a core group promoting traditional Snohomish culture, the BAR determined that the Snohomish Tribe did not form a community, nor were they distinct from non-Indians living in the vicinity, thus failing to meet the criteria listed in 25 C.F.R § 83.7(b). (ACR-FDD-V002-D0011).

C. 25 C.F.R. § 83.7(c)

The BAR determined that the Snohomish Tribe failed to meet the requirements of 25 C.F.R. § 83.7(c), that the tribe maintain a political organization from historical times to the present, determining (1) there were no signs of *any* off-reservation tribal leaders until the

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1920s, (2) those off-reservation leaders participating in government in the 1920s and 1930s did not represent an off-reservation tribal entity, (3) there were no signs of an off-reservation Snohomish governmental entity until the 1950s, (4) the off-reservation tribal government's focus was primarily on the pursuit of federal claims (and later on federal recognition), rather than on retaining and preserving tribal culture and identity. (ACR-FDD-V002-D0012).

D. 25 C.F.R. § 83.7(e)

Finally, the BAR determined that the Snohomish Tribe failed to meet the requirements of 25 C.F.R. § 83.7(e), that the membership of the Snohomish Tribe consists of individuals who have descended from a tribe which existed historically or from historical tribes which combined and functions as a single autonomous entity. The BAR evaluated three areas: present and past membership lists, their composition and relationship to one another; the organization's membership criteria and members' eligibility under the group's own defined criteria; and descent from a historical tribe or from tribes which combined and functioned as a single autonomous entity. Based on this evaluation, the BAR concluded that a significant majority—69 percent—of the Snohomish Tribe's members had descended from persons who were members of the historical Snohomish Tribe in the 19th century. Nonetheless, the BAR determined that the Snohomish Tribe failed to meet this criterion. (ACR-FDD-V002-D0014).

The Final Determination became effective on March 9, 2004. *See* Office of Federal Acknowledgment; Final Determination Against Federal Acknowledgment of the Snohomish Tribe of Indians, 68 Fed. Reg. 68, 942-01 (Dec. 10, 2003) (ACR-FDD-V002-D0020). At that point, the Snohomish Tribe had exhausted all mandatory administrative remedies.

III. LEGAL STANDARDS

A. Summary Judgment

Summary judgment should be granted when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party

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must show the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

B. The Snohomish Tribe's Due Process Claims Under the Fifth Amendment to the United States Constitution

The Snohomish Tribe has claimed that the BAR's actions in denying the Petition for Recognition were a violation of the Tribe's right to procedural due process under the Fifth Amendment to the United States Constitution. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process clause of the Fifth or Fourteenth Amendment." *Matthews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d. 18 (1976). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333; 96 S.Ct. 902. Courts have previously ruled that the "interests affected by meeting threshold eligibility requirements for the myriad federal benefits available to Indians is very great. The risk that such eligibility might unfairly be denied is real because of the lack of procedural safeguards [in 25 C.F.R. Part 83]." *Greene v. Babbitt*, 64 F.3d 1266, 1275 (9th Cir. 1995).

Here, the wrongful denial of the Snohomish Tribe's Petition for Recognition has denied the Tribe its right to participate in the benefits, both financial and cultural, that the federal government affords to acknowledged tribes. Such benefits include various fishing and hunting rights, educational and healthcare benefits for Tribe members, and the cultural and political significance of acknowledgement that the Tribe is an American Indian sovereign entity. The BAR's failure to adequately follow and apply its own regulations and standards of proof denied the Snohomish Tribe a meaningful opportunity to have its Petition heard and

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thus violated the Tribe's right to procedural due process.

C. The Snohomish Tribe's Claims Under the Administrative Procedures Act

In reaching its decision, an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Buckingham v. Sec. of United States Dep't of Agriculture*, 603 F.3d 1073, 1080 (9th Cir. 2010) (internal quotations omitted). In deciding a challenge to an agency's action under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq*, a court may set that action aside if the court determines that the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Buckingham,* 603 F.3d at 1080. The court must determine if the agency did in fact properly examine the relevant evidence and factors, and whether there has been a "clear error of judgment" on the part of the agency. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Because the determination of whether an agency acted arbitrarily and capriciously is a question of law, it is an appropriate matter for disposition by summary judgment. *See Singh v. Wiles*, No. C07-1151RAJ, 2010 WL 3835183 (W.D. Wash. Sept. 28, 2010); *Arctic Sole Seafoods v. Gutierrez*, 622 F.Supp.2d 1050, 1056 (W.D. Wash. 2008).

The BAR has a specific set of regulations governing how it is to evaluate Petitions for Recognition, which are discussed immediately below. Here, the BAR failed entirely to follow its own regulations and standards regarding federal acknowledgment and recognition of Indian tribes, and to properly examine the data and factors regarding the Snohomish Tribe's Petition for Recognition. Consequently, its denial of that Petition was arbitrary and capricious as a matter of law. The Snohomish Tribe is therefore entitled to an Order granting summary judgment in its favor and compelling the BAR to provide it with federal recognition as an

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Indian tribe.[4]

D. The BAR's Regulations and Standards Under 25 C.F.R. 83.1, *et seq*.

For this Court to determine whether the BAR acted arbitrarily and capriciously in denying the Snohomish Tribe's Petition for Recognition, it must look to whether the BAR properly evaluated that Petition under the applicable regulations. 25 C.F.R. § 83.1 *et seq* set out specific standards of evidence that a petitioning tribe must submit, but also instruct the BAR as to what standard of proof it must apply when evaluating that evidence.

The regulations dictate that the BAR shall consider that each of the criteria found in Section 83.7 is met if "the available evidence establishes *a reasonable likelihood of the validity of the facts* relating to that criterion," and "conclusive proof of the facts" shall not be required. 25 C.F.R. 83.6(d). This standard was added to the Regulations in 1994 to address precisely the situation where "evidence is too fragmentary to reach a conclusion or is absent entirely." *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*, 59 Fed. Reg. 9280, 9280 (Feb. 25, 1994) (codified at 25 C.F.R. pt. 83) (the process "only requires evidence providing a reasonable basis for demonstrating that a criterion is met or that a particular fact has been established."). Further, the BAR is required to:

> take into account historical situations and time periods for which evidence is demonstrably limited or not available. The limitations inherent in demonstrating the historical existence of community or political influence or authority shall also be taken into account. Existence of community and political influence or authority shall be demonstrated on a substantially continuous basis, but this demonstration does not require meeting these criteria at every point in time. Fluctuations in tribal activity during various years shall

[4] Although the usual remedy for violations of the APA is a remand for further administrative proceedings, the Court has the discretion to "order relief tailored to the situation." *See Greene v. Babbitt*, 943 F.Supp. 1278, 1287 (W.D. Wash. 1996) (quoting *Benten v. Kessler*, 799 F.Supp. 281, 291 (E.D.N.Y. 1992)). In *Greene*, as here, an Indian tribe (the Samish Tribe), spent over 20 years seeking federal recognition. *Id*. The court noted there that "when agency delays or violations of procedural requirements are so extreme that the court has no confidence in the agency's ability to decide the matter expeditiously and fairly, it is not obligated to remand." *Id*. at 1288. The Snohomish Tribe has spent over 30 years in the recognition process, and has no confidence that the BAR will act with speed or appropriate care upon remand. Therefore the Snohomish Tribe seeks an Order in which this Court exercises its equitable power to declare the Tribe eligible for federal recognition.

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> not in themselves be a cause for denial of acknowledgement under these criteria.

25 C.F.R. § 83.6(e). Under these regulations, the BAR should have found in favor of federal recognition because the Snohomish Tribe presented sufficient evidence to create a reasonable basis for concluding that it meets each criterion. However, in clear violation of its own regulations, the BAR resolved every evidentiary gap or ambiguity against the Snohomish Tribe, and held it to a standard of proof not found in the regulations. By doing so, the BAR acted arbitrarily and capriciously, and its denial of the Petition for Recognition should not stand. Because the BAR's conclusion is contrary to law, summary judgment for the Snohomish Tribe is appropriate.

IV. ARGUMENT

A. The BAR Failed to Properly Consider the Evidence Demonstrating the Continuous Recognition of Snohomish Tribe as an Indian Entity from Historical Times to the Present.

The record as submitted to the BAR shows a reasonable likelihood that the petitioning Snohomish Tribe has been identified on a substantially continuous basis as an American Indian entity. This is contrary to the BAR's conclusion that the Snohomish Tribe failed to meet Criterion 83.7(a). That criterion reads:

> The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. …

25 C.F.R. 83.7(a). The BAR failed to properly implement its own standards in considering the evidence the Snohomish Tribe presented under Criterion 83.7(a) and improperly resolved all doubts and evidentiary gaps against the Tribe. The BAR's determination that the Tribe failed this Criterion was arbitrary and capricious and should be rejected.

1. The record as presented to the BAR supports the conclusion that the Snohomish Tribe satisfies Criterion 83.7(a).

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It is first important to note that the BAR conceded that for the years 1950 through 1979, the Snohomish Tribe met the evidentiary standards of Criterion 83.7(a). (*See* ACR-FDD-V002-D0010 at 1). This discussion, therefore, is primarily directed at the periods 1900-1949 and 1980 to present.

Criterion 83.7(a) lists several types of evidence that may be submitted to support a petitioning Tribe's claim to identification as an American Indian entity "on a substantially continuous basis since 1900." 25 C.F.R. § (a). This list is not exclusive, and includes:

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with nation, regional, or state Indian organizations.

Id. The Snohomish Tribe painstakingly undertook to compile all available evidence for all time periods and showed a reasonable likelihood of the validity of its assertion that it has been identified as an American Indian entity on a substantially continuous basis from historical times to the present. The following discussion shows how the BAR misinterpreted the evidence and misapplied its own regulations for the periods 1900-1934, 1935-1949, and 1980 to the present.

a) 1900-1934

The primary flaw in the BAR's analysis of the evidence the Snohomish Tribe submitted in support of Criterion 83.7(a) is that the BAR failed completely to take into account the historical context in which the ancestors of the Snohomish Tribe of Indians found themselves in the period between 1900 and 1934. During that time, the Tulalip Tribes did not

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exist as a corporate entity, or even as an American Indian entity. Rather, the Tulalip Reservation was populated by members of a number of tribes. (*See* SNH-FDD-V020-D0076). A significant number of Snohomish people never moved onto the reservation. The BAR acknowledged as much in its Recommendation and Summary of Evidence for Proposed Finding Against Federal Acknowledgement of the Snohomish Tribe. (PFR-GPF-V012-D0016 at 2). Prior to the 1935 Tulalip Reorganization, the Snohomish people living both on and off the reservation comprised the "historical" Snohomish Tribe.

The record for this time period is replete with references by Federal authorities and other non-Snohomish people to the "Snohomish Tribe." For example, in a November 19, 1917 letter to the Commissioner of Indian Affairs, attorney Jesse Simmons indicated that he had entered into "two separate contracts with two separate tribes of Indians, viz: the Snoqualmie Tribe and the Snohomish Tribe, to represent them in presenting their claims against the Government…" (PFR-APF-V024-D0023 at 1). In response, the Assistant Commissioner, Mr. Merritt, acknowledged the contracts with these tribes. *Id*. at 2. There is no reason that those records would have made a distinction between the "Tulalip Snohomish" and the "off-reservation Snohomish" as, at that time, all persons of Snohomish descent could properly be called part of the Snohomish Tribe. (*See also* PFR-APF-V011-D0042, D0046, D0048).

This intermingling was also described in a 1929 letter to the Commissioner of Indian Affairs from Tulalip Agency Superintendent August Duclos. Mr. Duclos discussed the fact that many Indians in the Puget Sound area lived a "nomadic life" in search of work and fishing camps, rather than residing on a reservation. (PFR-APF-V029-D0009 at 1). He also stated that he believed that "nearly all the Indians in the Puget Sound Country are descendants of those Indians who were parties to to [sic] the various Treaties with the United States." (*Id*. at 3). Later he states that:

[s]hould the Snohomish Tribe or any other tribe of Indians in the Puget Sound

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> Country ever secure judgment against the United States in payment of the claims which they have against the government, it is reasonable to suppose that an approved roll will be made in order to ascertain the rights of the parties in interest. Pending that time, this Office should be provided with some clearly defined rule of procedure for ascertaining the rights of these citizen Indians of all the above named tribes or bands, as the occasion or necessity demands, that is, educational rights, medical attention, enrollments, assistance in time of need etc.

(*Id.* at 4). This letter constitutes clear acknowledgement by a government official not only that the Snohomish Tribe existed as an Indian entity, but also that persons of Snohomish descent living off the Tulalip Reservation had rights to federal benefits and claims as Snohomish Indians.

Even in the BAR's own findings, it acknowledged that the "Tulalip Snohomish" and the "off-reservation" Snohomish acted jointly to pursue claims against the United States government in the *Duwamish et al v. United States* treaty claims suit in 1926. (PFR-GPF-V012-D0016 at 2, 5; *see also* TUL-FDD-V007-D0014). Prior to 1935, there was simply no distinction between the on- and off-reservation Snohomish. The many references in the record to the Snohomish Tribe during the period prior to 1935 must be taken as evidence that the Snohomish Tribe has satisfied Criterion 83.7(a) for this period.

b) 1935-1949

Once again, for this time period, the BAR arbitrarily and capriciously resolved all evidentiary questions against the Snohomish Tribe, in direct contravention to its own regulations. From 1935 to 1949, the Snohomish Tribe underwent a series of major upheavals that caused some fluctuation in the amount of tribal activity and interaction with non-Snohomish entities that led to a sparer record of recognition during this 15-year period. Rather than give the Snohomish Tribe of Indians credit for the evidence presented, the BAR declared that "[n]o Snohomish organization existed form 1935 until 1950." (PFR-GPF-V012-D0016 at 2).

First, in 1935, the Indians of various tribal ancestry living on the Tulalip Reservation

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reorganized under the Indian Reorganization Act of 1934 to form a new corporate and tribal entity – the Tulalip Tribes, Inc. This threw the off-reservation Snohomish into some confusion, as they continued to be Snohomish Indians, but were suddenly forced to choose between remaining true to their Snohomish ancestry and attempting to enroll in a new tribe centered around a reservation on which they had never lived and which had no room for them. This difficult position is exemplified by a February 4, 1936 letter from Tulalip Superintendent O.C. Upchurch, Mr. Thomas Bishop, an off-reservation Snohomish, is informed that the "Snohomish Indians, as a tribe, do not get a quarterly allowance." And, "since no more individual allotments are to be made [on the reservation], we do not see how you could better yourself by coming here." (TUL-FDD-V0013-D0049).

During this period, of course, World War II also occurred, as well as serious economic depression, which caused many people, not just the Snohomish, to focus on daily subsistence rather than tribal activity. Yet despite these challenges, the Snohomish Tribe did continue to operate and had dealings with the federal government and other non-Snohomish entities. On November 2, 1937, the Deputy Commissioner of Internal Revenue for the United States Treasury Department sent a letter to the "Snohomish Tribe of Indians," explaining the need for the Tribe to clarify some tax information. (SNH-FDD-V015-D0063). The subsequent correspondence shows that it was not at all clear to the federal government that the Snohomish Tribe no longer existed. (*See* TUL-FDD-V013-D0077; SNH-FDD-V015-D0068; SNH-FDD-V015-D0069). Indeed, even the Assistant to the Commissioner of Indian Affairs seemed confused as to exactly what constituted the Tulalip Tribes, Inc. (SNH-FDD-V020-D0079).

In fact, the Snohomish Tribe did not cease to exist upon the Tulalip reorganization. The Tribe continued to hold Tribal Council meetings, sometimes even using space on the Tulalip reservation. (*See* SNH-FDD-V008-D0017 at 4-8; SNH-FDD-V015-D0026; TUL-FDD-V013-D0120). The Snohomish Tribe suffered a brief period of fluctuation in tribal

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interaction with non-Snohomish people, which under the BAR's regulations should not be used as a conclusive reason to find against recognition. The BAR again disregarded the historical context in which the Snohomish Tribe existed during the period 1935 to 1949, and ignored the evidence submitted, which renders its denial of recognition arbitrary and capricious and contrary to law.

c) 1980 forward

It is for this time period that the BAR's finding against the Snohomish Tribe for this criterion is most capricious. The Snohomish Tribe first filed its Petition for Federal Recognition in 1975 (SNH-PFD-V001-D0001 to D0073), at which time it had the support of the Western Washington Agency (PFR-APF-V019-D0004) as well as the Commissioner of Indian Affairs, both of whom recommended that the Snohomish Tribe be granted federal recognition. (FDR-MFD-V001-D0169). A draft letter was even prepared in 1974 for the Department of the Interior to send the Chairman of the Snohomish Tribe, recommending federal recognition of the Tribe. (FDR-MFD-V001-D0170). Despite that support, the BAR determined to force the Snohomish Tribe into the full, lengthy federal recognition process, rather than granting federal recognition as it should have done. It is simply astonishing for the BAR to claim in 1999, after decades of ongoing dealings with the Snohomish Tribe, that the Tribe had not satisfied Criterion 83.7(a) for the period 1979. (ACR-FDD-V002-D0010).

Even in its own analysis for the Final Determination, the BAR demonstrates that the Snohomish Tribe satisfied this Criterion for this period. The BAR cites to documents from 1980, 1981, 1990, 1998, 1999, and 2000, all of which identify the Snohomish Tribe of Indians as an American Indian Entity. (ACR-FDD-V002-D0010 at 33-34).

The BAR was well aware during the 1980s and 1990s that the Snohomish Tribe was an American Indian entity seeking federal recognition, and that it had many communications with the BAR in that respect. The Snohomish Tribe participated in the *United States v. State of Washington* litigation which extended from the late 1970s through even into 2010. The

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Snohomish Tribe was permitted repeatedly to act as an intervenor or amicus curiae in that litigation, which was related exclusively to the rights of Indian tribes. *See e.g. United States v. Washington*, 459 F.Supp. 1020, 1058-60 (W.D. Wash. 1978); 873 F.2d 240 (9th Cir. 1989). Regardless of the outcome of that litigation, it is clear that the involved courts and other parties, including the Tulalip Tribes, recognized that the Snohomish Tribe was seeking to enforce its rights as an American Indian entity, and treated it as such.

2. Summary

For the periods 1900 to 1934, 1935-1949, and 1980 to the present, the BAR unjustifiably ignored the historical context surrounding the Snohomish Tribe and resolved every evidentiary doubt against the Tribe. This is a clear violation of the BIA's regulations and renders the BAR's Final Determination arbitrary and capricious.

B. The BAR Failed to Properly Consider the Evidence That a Predominant Portion of the Snohomish Tribe Comprises a Distinct Community and Has Existed as a Community from Historical Times to the Present.

The Snohomish Tribe satisfied the criterion set forth in 25 C.F.R. 83.7(b), establishing a reasonable likelihood that a predominant portion of the Snohomish Tribe has existed as a community from historical times until the present. The BAR failed to apply its own regulations for analyzing and weighing a petitioner's evidence of long-standing community identity and thus its conclusion that the Snohomish Tribe failed to satisfy criterion (b) is arbitrary and capricious.

In denying the Snohomish Tribe's Petition under criterion (b), the BAR erroneously concluded that (1) the 19th century Snohomish who settled and joined with Indians from other distinct tribal groups on the Tulalip Reservation are the only historic Snohomish "community," and (2) all Snohomish who did not move to the reservation simply vanished as a community of common interest. This theory has been fostered in recent years by the Tulalip Tribes, Incorporated. which has sought to establish itself as the sole successor to the aboriginal Snohomish, and has fought against any recognition of the Snohomish Tribe as well

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as other landless tribal groups in the Puget Sound region.

However, the record does not support this conclusion. The Snohomish Tribe's extensive evidence established that the off-reservation Snohomish were part of a distinct and identifiable Snohomish community that socialized and interacted with each other as well as with the Snohomish residing on the Tulalip Reservation on a regular basis, at least up to the 1960s. Even after 1935, the Snohomish Tribe, which had itself incorporated in 1927, continued to act as a separate community including organizing and submitting the Snohomish Tribe's Petition for federal recognition in 1975 and 1979, and subsequent submissions and responses to the BAR up to the present.

1. The evidence supports a finding of a longstanding Snohomish community separate from the Tulalip multi-tribal community.

The §83.7(b) "distinct community" criterion provides nine categories of evidence that could be used to demonstrate that the Snohomish Tribe comprises a distinct community as defined. [5] They can be used in combination, are not exclusive, and other evidence may be offered. 25 C.F.R. §83.7(b)(1). Additionally, the Snohomish Tribe will have provided sufficient evidence of community at a given point in time if evidence is provided to demonstrate any one of five circumstances. 25 C.F.R. §83.7(b) (2). Acceptable evidence includes residence within a geographic area that is small enough to facilitate social or economic interaction, evidence of marriage with other Snohomish (or with other indians in light of the Coast Salish Indians pattern of tribal exogamy), other direct evidence of social or economic interaction, evidence of shared indian cultural patterns, and evidence of either self-

[5] "Community" is defined in the regulations as follows:
"…any group of people which can demonstrate that consistent interactions and significant social relationships exist within the membership and that its members are differentiated from and identified as distinct from nonmembers. Community must be understood in the context of the history, geography, culture, and social organization of the group. 25 C.F.R . § 83.1 (Emphasis added.)

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identification as Snohomish by members of the Snohomish community or identification by non-members in the form of discrimination or otherwise. 25 C.F.R. §83.7(b).

a. Snohomish Residence Patterns

19th and 20th century census records and related residential, marital and cultural evidence established that there was a distinct Snohomish community in addition to the Tulalip location. (SNH-FDD-V001-D0008 at 52-93). Snohomish settled in off-reservation communities in part because the reservation promised by the 1855 Treaty of Port Elliot was not minimally developed until the 1870's, was covered with forest, had little tillable land, and many indians from different tribal groups competed for the limited number of land allotments.. By 1909, the allotment of all the Reservation land was complete and there was not enough land for all the treaty pledges. (SNH-FDD-V001-D0008 at 64; SNH-FDD-V003-D00011; D0013 to D0015; FDR-HFD-V005-D0039 at 15-18; SNH-FDD-V020-D0076).

The evidence submitted to the BAR demonstrated that a significant portion of the Snohomish Tribe resided in four relatively concentrated geographic localities around Puget Sound since 1855: (1) the lower Snohomish River valley area, including but not limited to the Tulalip Reservation, (2) the Upper Snohomish-Skykomish River valley area, particularly the Monroe-Sultan area, (3) the southern half of Whidbey Island, and (4) the Chimacum-Port Townsend area on the Quimper Peninsula in Jefferson County. (SNH-FDD-V001-D0008 at 51-53, 126). The Snohomish tended to reside in loose clusters within these geographical areas which facilitated social interaction among tribal relatives and friends.[6] These Snohomish residential clusters have been documented and authenticated by the Snohomish Tribes evidentiary submissions and expert anthropologists.[7]

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[6] SNH-FDD-V001-D0008 at 51; *see also*, *Snohomish Tribe of Indians v. United States* (Docket No. 125) Indian Claims Commission, 4 ICC 549, finding 14 (1956) (FDR-HFD-V004-D0002).

[7] E.g., See e.g., Colin E. Tweddell, *A historical and Ethnological Study of the Snohomish Indian People: A Report Specifically Covering Their Aboriginal and continued Existence, and Their Effective Occupation of a definable Territory*, American Indian (continued . . .)

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b. Marriage Patterns

The Snohomish Tribe's ancestors include a large number of Snohomish women who married bachelor white men who moved to the region in the 1800s for jobs in the lumber industry and related work. (SNH-FDD-V001-D0008 at 94-97; SNH-FDD-V010-D0004; SNH-FDD-V033-D0008). However, there were also many marriages between Snohomish Indians and with members of other tribes in the area. *Id*. None of these marriage patterns have been shown to extinguish Snohomish identification or social interaction within the broader Coast Salish Indian community much less with Snohomish relatives, neighbors and friends. *Id* at 96. There is no evidence of an abandonment of Snohomish identity. (See, e.g., FDR-AFD-V001-D0020; Ex. 1).

c. Other Evidence of Social and Economic Interaction, Shared Indian Cultural Patterns and Identification verify the Snohomish sense of their Community

The Snohomish Tribe has provided substantial evidence of social and economic interaction among members of the Tribe, evidence of the persistence of Indian cultural patterns, and evidence of discrimination directed against members of the Snohomish Tribe. (SNH-FDD-V001-D0008 at 98-122). Taken together, this evidence shows a significant degree of social and economic interaction throughout the region, up through the first part of the 20th century, with continuing social interaction through the second half of the century. One exception was the Snohomish living on the Tulalip Reservation who increasingly chose to segregate themselves from the Snohomish Tribe in favor of their non-tribal affiliation with the other Indian members of the reservation corporation created in 1935. (*Id).*

The historical documentary record to support the Snohomish Tribe's evidence of community had to be supplemented with oral histories. (SNH-FDD-V001-D0008 at 98-108).

(. . . continued)
Ethnohistory: Indians of the Northwest, Garland, New York (1974) TUL-FDD-V014-D0006;Dr. Barbara Lane, *Identity, Treaty Status and Fisheries of the Snohomish Tribe of Indians* (1975) (FDR-HFD-V005-D0039)

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Snohomish oral histories recalled the sharing of resources and responsibilities and social interaction among Snohomish friends and relatives. These interviews included recollections going back to the 19th century based upon the activities of grand parents and great grand parents. (*See e. g.,* SNH-FDD-V008-D0002, D0014, D0019, D0027, D0034, D0036). The Snohomish witnesses described communal gatherings, berry picking and clam digging excursions, and communal raising of children. (*See e.g.,* SNH-FDD-V008-D0002).

In addition to the Chimacum area (including Port Townsend, Port Ludlow, Irondale and Hadlock), evidence was submitted that corroborated the Snohomish Tribe's historical connections with Snohomish living on Whidbey Island, up the Snohomish River to Monroe and Sultan, as well as with Snohomish relatives on the Tulalip Reservation. (See also SNH-FDD-V008-D0036; SNH-FDD-V008-D0035; SNH-FDD-V007-D0080). All of these interviews are full of historical recollections of the speaker's experience as well as that of his or her relatives, friends and ancestors extending back to the 19th century. They depict off-reservation Snohomish living, working and socializing with each other as well as with other people of Indian descent. They practiced Indian ways, including using dug-out canoes, smoke houses, hunting, fishing, and gathering clams on the beach. (See also, SNH-FDD-V008-D0007; SNH-FDD-V008-D0023).

Like the rest of the country, the 1930 to 1950 era of the Great Depression and World War II was a difficult period for Snohomish. Nonetheless, Snohomish families continued to visit each other and stay in contact. (SNH-FDD-V001-D0008 at 107-108; SNH-FDD-V008-D0036 at 11). The record demonstrates that, like the rest of the country, social and economic activities resumed and increased during the post-war recovery up to the current time.

d. Tulalip members are no more "Indian" than off-reservation Snohomish.

The BAR Determination repeatedly supposes that the Tulalip residents of Snohomish ancestry are the exclusive "Snohomish Tribe proper." (*See e.g.,* ACR-FDD-V001-D0155 at 1-

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2). This assertion is legally in dispute. It assumes that somehow the Tulalip residents of multi-tribal ancestry have remained "Indian" while the off-reservation Snohomish petitioners have become more Americanized. In fact the opposite appears to be the case. (SNH-FDD-V001-D0008 at 115-118). As the Tulalip Agency superintendent observed in 1914, "Tulalip is the name of a place and not a people…Tulalip is not an Indian of the Tulalip tribe for there is no such tribe; he is merely an Indian who lives or belongs at Tulalip." (SNH-FDD-V020-D0076 at 147). There is nothing in the archival record to indicate that the Tulalip Snohomish who joined the Tulalip Tribes, Incorporation in 1935 were any more "Indian" or a more socially cohesive community than other, off-reservation Snohomish.

2. The BAR wrongly disregarded the evidence presented.

a. The Snohomish evidence of community for 1855-1900 was wrongly minimized and rejected.

To start, the BAR sought to eliminate the historical community involvement of a large number of a large number of families. This would erase 150 years of participation. When challenged, the BAR acknowledged that it had wrongly rejected some family lines in the Proposed Findings of 1983. After having summarily dismissed consideration of 17 family lines, the BAR attacked the Snohomish Tribe's ancestry rolls by quarreling with its description of "direct" and "indirect" ancestors. It rejecting consideration of "indirect" ancestors who it described as "collateral" relatives composed of consanguinals (siblings and relatives by blood) and affinals, relatives acquired by one's own marriage or one's blood relatives. (ACR-FDD-V002-D0011 at 3-4). This conclusion resulted in the barring consideration of all of the Snohomish consanguinal siblings who descended from a common ancestor (e.g., Mother, father, grand parents); people who had to have been Snohomish themselves. This illogical and narrow limitation on who could be considered a Snohomish reflects a disregard for the letter and spirit of §83.6 d) and (e). Further, the BAR arbitrarily rejected a number of ancestral marriages as evidence of community interaction for a number

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of other reasons without citing any authority. (See ACR-FDD-V002-D0011 at 5; SNH-FDD-V033-D0008).

Next, the BAR attacked the anthropologist Dr. Norton's report, *Social, Marital, Economic and Political relationships of the Snohomish Tribe of Indians In the Late 19th and Early 20th Centuries*. (SNH-FDD-V009-D0003 at 1-75). This well-documented report supported the Snohomish evidence of social relations and community between 1855 to 1930. Without citing to any contrary evidence, the BAR discounted examples of Snohomish leadership, particularly in the Chimacum area. It also discounted the fact that Indian women could be leaders among the Snohomish people. (ACR-FDD-V002-D0011 at 6). The BAR refused to acknowledge that while many Indian women married white men, these men were first generation in the area, having left their families of origin back in other states or countries. Norton opined that, in the absence of in-laws and husband's siblings, the Indian mother was in a powerful position to influence child rearing and maintain relationships with her Indian side of the family.

For the period 1855 to 1900 it is obvious that non reservation Indians may have gaps in documentation, and that circumstantial evidence needs to be credited. The Snohomish Tribe submitted substantial evidence that provided a *reasonable likelihood* or *basis* for concluding there was a Snohomish community that socialized and worked together. (*See e.g.*, SNH-FDD-V008-D0036; SNH-FDD-V008-D0034; SNH-FDD-V008-D0026). The BAR's response was to minimize the evidence supporting the fact of the Chimacum area Snohomish community.

The BAR concluded that the second and third- generation children growing up in the Chimacum region integrated into the white community and that their Indian ancestry was no longer an issue. (ACR-FDD-V002-D0011 at 9-10). This conclusion is not supported by the evidence. Landless Indians in the Puget Region necessarily lived in and around white communities. Nonetheless, Snohomish still suffered instances of discrimination and

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continued to have a sense of their own community. (See e.g., SNH-FDD-V008-D0036; SNH-FDD-V008-D0031; FDR-HFD-V005-D0039 at 18). The Bishop family in particular produced two sons, Thomas and William, who became famous leaders not only of their Snohomish community but of Indian causes generally.

The BAR acknowledged that Snohomish lived in Snohomish County along the Snohomish/Skykomish River system, particularly near Monroe and Sultan, as well as on Whidbey Island. But it concluded there was little contact between the four main Snohomish community locations. (ACR-FDD-V002-D0011 at 12). This conclusion is not supported by the record. The Snohomish Tribe has offered sufficient evidence to conclude these Snohomish lived and believed they were part of a larger Snohomish community. While there are gaps in the record of strict continuity, actions before and after a time period provide a *reasonable likelihood* or *basis* for concluding that persons of Snohomish ancestry have tried to maintain their tribal identity. (*See*, SNH-FDD-V001-D0008 at 62-67; SNH-FDD-V008-D0026; SNH-FDD-V008-D0034; SNH-FDD-V007-D0001, D0002). Yet, the BAR arbitrarily dismisses such interaction as not "important." (ACR-FDD-V002-D0011 at 12).

b. The BAR wrongly rejected 1900 to 1935 community evidence.

During the 1900 to 1935 period, the Snohomish community was socially active and vibrant. (*See e.g.*, SNH-FDD-V008-D0002). As an example, the considerable record of the activities of Thomas and William Bishop demonstrate a continuous Snohomish community. Thomas Bishop spent years advocating for Indian causes, including seeking land allotments for landless Indians. (ACR-FDD-V002-D0011 at 15-16). He founded the Northern Federation of American Indians. The BAR arbitrarily discounted Tom Bishop as a Snohomish leader simply because he also advocated for other non-reservation, unalloted Indians. (*Id).*

William Bishop lived from 1861 to 1934. He became a State Senator and was an advocate for local Indians, including Snohomish. (ACR-FDD-V002-D0011 at 16-17; SNH-

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FDD-V008-D0023, D0024; SNH-FDD-V008-D0036). William Bishop, along with William Hicks and fellow off-reservation Snohomish George Morrison and Tulalip Snohomish leaders William and Robert Shelton, joined together to incorporate the present day Snohomish Tribe Incorporated. The organizational papers were filed in 1927. Meetings were periodically held and all Snohomish were invited. While their principle goal was to pursue rights and claims for Snohomish off and on the reservation, the organization was involved with putting on social and cultural events. (ACR-FDD-V002-D0011 at 18). It became another bonding force in the greater Snohomish community. Nonetheless, the BAR derisively discounted the organization and its off-reservation leadership because it was "primarily focused on claims." (ACR-FDD-V002-D0011 at 18, 21). This conclusion is arbitrary and without any basis for undermining the organization's role in preserving and furthering the Snohomish community.

A demonstration of the common connection between Tulalip Snohomish and their off-reservation counterparts is that when William Bishop died William Shelton from the Reservation was an honorary pall bearer at Chimacum. When Shelton died William Bishop's sons attended his funeral presumably at Tulalip. The latter's obituary said Mr. Shelton had visited the Chimacum area many times. (ACR-FDD-V002-D0011 at 19). The organization they helped found for the furtherance of Snohomish member's interests continued to meet.

c. The BAR wrongly rejected 1935 to 1949 community evidence.

In 1935, the U. S. Court of Claims turned down various Indian claims, including the Snohomish. At this point, the Tulalip Reservation Snohomish and their fellow reservation neighbors of other trial ancestry abandoned the larger Snohomish Tribe and formed the Tulalip Tribes, Inc. (ACR-FDD-V002-D0011 at 21-22). Thereafter, it is uncontested that the off-reservation Snohomish continued with Snohomish Tribe Incorporated as a tribal coordinating body because their Tulalip cousins set up an organization that excluded them.

The BAR Proposed Finding pointed to a perceived gap in evidence of a continuing

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Snohomish community during this period of the Great Depression and World War II. (ACR-FDD-V002-D0011 at 23). In response, the Snohomish Tribe submitted a number of interviews and affidavits that established that there was a distinct Snohomish community, continuously and principally descended from the off-reservation Snohomish described above, representing at least 9 groups of family lines. (*See* SNH-FDD-V008-D0007, D0014, D0016, D0019, D0026, D0034, D0036; SNH-FDD-V033-D0018). Mr. Hawkins in particular is noteworthy as he verified that the Tribal Council continued to meet through the Great Depression and 1940s, even if the meeting minutes cannot be found. They all confirmed that a Snohomish community of interest that had continually existed since the 1800's. (SNH-FDD-V008-D0016, D0017).

The BAR critiques the Petitioners as (1) being organized under family lines, (2) not living in a separate, bounded community, (3) not subject to discrimination, and (4) no Indian marriages. (ACR-FDD-V002-D0011). These grounds ignore the reality that landless Puget Sound Indians faced by 1950. The Snohomish Tribe was forced to act on its own, and deal with a contemporary world, but the record reflects that the Snohomish never abandoned their loyalty to their ancestral heritage. The BAR judged Petitioners against a mold based on earlier or different Indian community assumptions not typical of the Puget Sound area Indians.

d. The BAR wrongly rejected 1950 to 1998 community evidence.

The record is replete with evidence of Snohomish Tribe meetings and activities. (SNH-FDD-V022-D0001 through V026-D0114). The Snohomish Annual Meetings were usually held at a Long House at the Tulalip Reservation until 1967. (ACR-FDD-V002-D0011 at 29). Concerns included claims and hunting and fishing rights. There were tribal leaders who served as officers and council members. A meal would be served and a meeting might last all day. (ACR-FDD-V002-D0011 at 28).

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During the 1970s and 1980s, the Snohomish Tribe took on more issues for the benefit of its members. It filed its first Petition for Acknowledgement in 1975 and the current Petition in 1979. (ACR-FDD-V002-D0011 at 31-32). It is important to note that the Snohomish Tribal community received the full support for federal recognition from the BIA's Superintendent in Seattle**:** "This Agency fully supports the Snohomish Tribe's efforts to obtain formal federal recognition…We recommend approval of the Snohomish Tribe's petition for federal acknowledgement." (SNH-PFD-V017-D0002). (Emphasis added.) The Snohomish Tribe continues to enjoy significant community interaction, as is clearly shown by the evidence.

i. 1987 Socio-Economic Survey.

In response to the Snohomish Tribe's initial Petition, the BAR's 1983 Proposed Finding Against Federal Acknowledgment concluded that members of the Snohomish Tribe "do not form a Snohomish group distinct from the surrounding population," and "are socially and culturally part of the non-indian neighborhoods in which they reside." (PFR-GPF-V012-D0016 at 14-17).

The Snohomish Tribe responded to this particular opinion by conducting a Socio-Economic Survey in 1987. The Tribal Office contacted and interviewed 66 adult tribal members. Questions included a focus on contacts between tribal members during a 12 month period. From the 37 valid responses 208 tribal members with 88 different surnames were identified. 29 of the 37 persons stated that they had had at least one "core lineage" contact a year. (SNH-FDD-V001-D0008 at 110-111).

ii. Professional Social Network Study Demonstrated a Snohomish Sense of Community.

The Snohomish Tribe retained an expert, Dr. Norton, who conducted a comprehensive Social Network Analysis by use of an extensive membership survey. She interviewed 68 Snohomish members, 19 of whom were identified as core members and 46 selected at random. 55% spent their childhood in nearby traditional Snohomish communities. The results

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of the survey are addressed in the 1999 Comments, (SNH-FDD-V001-D0008 at 112-115), and the Norton Survey, (SNH-FDD-V009-D0008). Dr. Norton found that Snohomish men and women had extensive contacts with each other, 75% of respondents had attended a Snohomish Annual Meeting, 46% had attended Snohomish Tribal meetings, and 22% had attended *some* Indian social and cultural events within the past year, such as weddings, funerals, naming ceremonies, and potlatches. (SNH-FDD-V001-D0008 at 113-114).

This expert-led study repudiated the BAR's conclusion that the Snohomish do not consider themselves to be Indians. Dr. Norton's interview survey subjects were included many of the same persons that the BAR had previously interviewed to arrive at its negative conclusion. (SNH-FDD-V001-D0008 at 115).

The Snohomish Tribe has presented ample evidence of additional community events, including an annual powwow attended by hundreds of members, naming ceremonies where a member takes a traditional Snohomish name, and tribal enterprises to raise money for the organization. (ACR-FDD-V002-D0011 at 36-39). The BAR again dismissed these activities because they had only been documented for 20 years, (ACR-FDD-V002-D0011 at 40), and concluded that the Snohomish Tribe did not demonstrate a significant portion of its members regularly associate with each other outside the confines of the Snohomish Indian organization. (*Id).* This last conclusion is far too narrow for any landless tribe whose members do not have the benefit of a reservation with its community buildings and school. The BAR thus erected an artificial and arbitrary barrier that is impossible to overcome for people largely living in an urban/suburban environment. Yet, the Snohomish still proved their sense of community by tenaciously advocating for federal recognition for almost 50 years.

C. The BAR Failed to Properly Consider the Evidence Supporting the Snohomish's Continuous Political Authority Over Its Members.

For many of the same reasons the BAR improperly determined that the Snohomish failed to establish it maintained a distinct community, the BAR also improperly determined

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that the Snohomish Tribe failed to maintain political influence over its members. The Final Determination wrongfully equated Snohomish Tribal leaders as those leaders associated with the Tulalip Tribes, Inc. (*E.g.*, ACR-FDD-V002-D0012 at 77-105). There is no reasonable basis for such a restricted definition of a Snohomish tribal leader, and the Final Determination is plainly in error with respect to this finding.

And once the Tulalip Tribes, Inc. separated from the main Snohomish tribe in 1935, the BAR failed to take historical circumstances into account and, pursuant to its obligations under the regulations, weigh the evidence in favor of determination. 25 C.F.R. § 83.6(d), (e). The record presented by the Snohomish Tribe clearly illustrated an "authority" entirely consistent with historical practices.

The fact that the BAR held against the Snohomish tribe for its pursuit of claims is telling indeed, because it illustrates BAR's failure (or perhaps refusal) to understand the very nature of the authority the Snohomish tribe actually exerted over its people. Again, the BAR's failure to take historical circumstances into account is in violation of its obligations under its own regulations.

1. General Overview of Salish "Authority"

As stated above, the Snohomish are part of the native Coastal Salish, a loose confederation of native tribes along the northern Pacific coast that includes such tribes as the Duwamish, Snoqualmie, and dozens of other tribes in northern Washington. (Ex. 1 at 31-32; *see also* FDR-AFD-V001-D0020 at 8). Prior to treaty times, these tribes were all relatively nomadic in nature; there was, therefore, no real centralized "leadership." Instead, each tribe consisted of a set of "clustered" affiliated families or bands, with each band following its own leadership organization. (SNH-FDD-V001-D0008 at 54, 150; Ex. 1 at 209-230)

Thus, the "political authority" the Snohomish Tribe historically provided to its members was what it effectively has provided to the present: cultural preservation, education, and social interaction. This "authority" was often exercised through less formal tribal

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gatherings, which because of the very nature of the Salish people, often consisted of neighboring tribal families. (*Id.*).

The BAR final determination ignores this historical reality, and states that there is no documentation of political influence over tribal members prior to the 20th century. But there *would not be* any documentation of this type of influence. The very nature of these gatherings (not to mention that many tribal members at that time were illiterate) suggests that these types of meetings would not be documented. The BAR improperly uses the lack of evidence *against* the Snohomish Tribe, in violation of its regulatory obligations. *See* 25 C.F.R § 83.6(e).

2. Political Organization of the Snohomish Tribe of Indians prior to 1935

The BAR's final determination also disregards the historical reality that, prior to 1935, there was no Tulalip Tribe. Instead, there were several tribes, including the Snohomish, which had members both on and off the Tulalip reservation. Snohomish "authority" existed through the various Snohomish social and cultural gatherings that often, but not always, took place on the Tulalip reservation. Indeed, in addition to the Tulalip reservation activities, there were also activities in Chimacum and elsewhere. (SNH-FDD-V009-D0003 at 45-46)

During this time, there was no distinction between the on and off-reservation Snohomish, and all participated together in social and political activities. The "leadership" of the Snohomish at that time consisted of members both on and off the reservation. (*See, e.g.,* SNH-FDD-V001-D0008 at 152-161; SNH-PFD-V003-D0032; SNH-PFD-V008-D0013; SNH-PFD-V005-D0032 at 4; SNH-PFD-V005-D0034 at 3-4). And in fact, at the time, the *majority* of tribal members actually lived off the reservation. (PFR-APF-V004-D0062; FDR-HFD-V005-D0039 at 14).

The BAR based its denial of the Snohomish's political authority largely upon the improper presumption that the only *real* Snohomish were those living on the Tulalip reservation. ACR-FDD-V002-D0012 at 1. They dismissed various off-reservation leaders as

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"migratory," when indeed the Snohomish tribe historically *was* essentially migratory. (*Id.* at 22). And based upon this false premise, the BAR concluded that the on-reservation Tulalip leaders were the only legitimate leaders of the pre-1935 Snohomish tribe.

Of course, this conclusion ignores many of the facts. The rolls of both the 1917 and 1927 Snohomish tribal organizations show that the tribe consisted of, and was led by, individuals living on and off the reservation. (*E.g.,* PFR-APF-V024-D0026-D0027; TUL-FDD-V017-D0007). The by-laws of both organizations demonstrated that the intent of these organizations, among other goals, was to preserve history and culture. (E.g., PFR-APF-V013-D0010, D0018). The tribal organization planned a number of social events and distributed charity. (E.g., TUL-FDD-V017-D0007 at 25-29, 31, 43; PFR-APF-V011-D0046).

It was, therefore, improper for the BAR to simply dismiss pre-1935 Snohomish leadership as "Tulalip" leadership. The Snohomish tribe, as it existed prior to 1935, was an all-inclusive entity that extended beyond the borders of the Tulalip reservation, and its political authority extended to all members of the tribe, whether they lived on the reservation or not. The BAR's failure to recognize this—and instead determine, without factual support, that no Snohomish tribe existed but for the Snohomish on the Tulalip reservation—was arbitrary and capricious.

3. The Indian Reorganization Act

The BAR appears to accept the Tulalip Tribe's assertion that the Snohomish Tribe effectively "merged" into the Tulalip organization once it was formed in 1935. (ACR-FDD-V002-D0012 at 30-38). Of course, in accepting this assertion, BAR fails to recognize that no such merger ever took place.

The reality is that, in 1935, Native Americans living on reservations had little choice but to reorganize to handle reservation affairs and to have a single voice when communicating with the U.S. government. *See* 25 U.S.C. § 476(e). At the time, then, the Tulalips' formation under the IRA was primarily a ministerial one, and its function more closely resembled the

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then-existing Tulalip business counsel.[8] (*E.g.,* SNH-FDD-V015-D0047).

Importantly, this incorporation was *not* an abandonment of prior treaty affiliation. (SNH-FDD-V015-D0048; TUL-FDD-V007-D0061 at 3). U.S. government documents at that time noted that that the Tulalip Tribes, Inc. did not replace or otherwise succeed individual tribes. (TUL-FDD-V008-D0006; SNH-FDD-V020-D0077 at 1-2, 5). And for years, a Snohomish Tribal council and a Tulalip business council coexisted. (TUL-FDD-V007-D0061 at 3; SNH-FDD-V020-D0077 at 7 (noting the Tulalips could not claim benefits from "the main tribes from which they are descendents.")). In fact, the U.S. Government communicated with each of these entities separately. (SNH-FDD-V015-D0028).

Given the evidence within the record, it was a clear abuse of discretion for the BAR to determine that the Tulalip Tribes, Inc. was the sole successor-in-interest to the historical Snohomish tribe. Indeed, given the record, it is clear that *two* successors—the current Snohomish Tribe and what eventually developed into the Tulalip tribal council—exist.

4. Political Continuity 1935-1950

The BAR has determined that there is no adequate record to support the existence of political authority between 1935 (the incorporation of the Tulalip Tribes, Inc.) and 1950 (when the current Snohomish Tribe of Indians re-incorporated). (ACR-FDD-V002-D0012 at 38-43). This finding again ignores the historical circumstances.

As stated in numerous documents, the activity of the Snohomish Tribe did, in fact, decline after the IRA in 1935, but this decline in participation was due in no small part to the Great Depression and the World War II. (SNH-PFD-V005-D0032 at 4-5). During this time, the economic constraints on individuals within the tribe made regular meetings problematic. (*See id.*) Nevertheless, meetings did occur periodically, and the Snohomish tribe submitted

[8] According to documents of that era, the Indians off the reservation were *not* encouraged to incorporate under the IRA because the government considered the act as a means to improve land management, and off-reservation Indians had no land to manage. (*E.g.*, PFR-APF-V016-D0011).

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multiple interviews and affidavits to the BAR to that effect. (SNH-FDD-V008-D0017 at 4-5, 37-38; FDR-MFD-V001-D0039 at 4).

The BAR arbitrarily and capriciously disregarded this evidence, stating that because there was no *documentary* evidence of such meetings there was no real evidentiary support. (ACR-FDD-V002-D0012 at 38). The BAR placed little weight on the multiple interviews wherein eyewitnesses to the tribal meetings testified that they took place, again ignoring the reality that documentation for such meetings—if indeed any such documentation ever existed—easily could have been misplaced over the course of several decades.

Indeed, the regulations do not *require* the evidence be documentary, and in ignoring or underrating the significant evidence demonstrating that an organizational structure existed from 1935 to 1950, the BAR determined all lack of documentation against the Snohomish. 25 C.F.R. § 83.6(g). This is contrary to the express requirements of 25 C.F.R. § 83.6(e), which expressly states that "[f]luctuations in tribal activity during various years shall not in themselves be a cause for denial of acknowledgment under these criteria."

Furthermore, with respect to the evidence that it *did* consider, it discredited the various meetings taking place during that era as "family" or "informal social gatherings." (ACR-FDD-V002-D0012 at 39-40). Again, this assertion ignores the historical reality of the Salish people. The Salish historically had no "government" as we understand the term to mean. (SNH-FDD-V001-D0008 at 54, 150; Ex. 1 at 209-230). Instead, they had gatherings to share and preserve their culture. (*Id.*). This type of interaction was the "politic" of the Snohomish tribe historically, and the interaction taking place during the period shortly after the IRA was consistent with the political authority the Snohomish exercised from historical times. The BAR's failure to accept and acknowledge this authority was an abuse of discretion.

5. The Snohomish Tribe of Indians: 1950 to the Present

a. Reorganization in 1950

The BAR also used the re-incorporation of the Snohomish Tribe in 1950 against it,

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stating this reorganized entity was formed primarily to pursue claims against the federal government. (ACR-FDD-V002-D0012 at 41-43). This was indeed a curious finding, as the federal government at that time actually considered this organization to be the successor in interest of the historical Snohomish Tribe. (SNH-FDD-V020-D0077 at 1-2, 5).

It is also a curious finding in that it should come as no surprise that an existing tribe due monetary compensation from the government would pursue such claims. In fact, if anything, the fact that the Snohomish Tribe pursued claims against the government should weigh *in favor* of recognition, as this would be evidence that the leaders of the tribe sought this money to preserve the history and culture of the tribe. (PFR-APF-V013-D0013). Indeed, the BAR had no difficulty with the fact that the Jamestown Clallams, Tunica-Biloxi or Poarch Creek councils were organized primarily for claims purposes. (*E.g.*, Ex. 3-5).

Once more, and contrary to the Final Determination, the bylaws of the re-organized Snohomish Tribe evince a purpose far broader than merely claims pursuit. (PFR-APF-V013-D0013). Indeed, like its predecessor organizations, the Snohomish bylaws emphasized the preservation of Snohomish history and culture.

Thus, the BAR's finding with respect to the 1950 re-organization is not only false, it is wholly arbitrary. There is no basis to use claims pursuit as a consideration against recognition. And since the BAR did, in fact, use Snohomish claims pursuit against it, while simultaneously disregarding other evidence of tribal leadership, its finding must be overturned.

b. The Current Snohomish Tribe of Indians

The Final Determination also goes so far as to state that the *current* Snohomish Tribe of Indians fails to exercise sufficient political authority over its members, stating that there is no evidence that members maintain contact with leadership. (ACR-FDD-V002-D0012 at 52-56). The Final Determination also states that the current leadership spends its all its energy devoted to the pursuit of recognition, and that there is no evidence any other issues are

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important to the group.[9] (*Id.* at 55-56).

The Snohomish Tribe has been seeking recognition from the government for nearly forty years. During this time, the rules for recognition changed no fewer than three times, and in each instance more and greater obstacles were placed in front of the Snohomish in their pursuit of recognition. And during this time, without any governmental aid and assistance, the Snohomish have had to expend their own resources to fight an increasingly difficult battle.

It makes complete sense, then, for the Snohomish leaders to be focused on recognition. Recognition brings with it federal aid and benefits for tribal members. *See* 25 C.F.R. § 83.2. Recognition brings with it a certain status. And, in reality, recognition brings with it cultural and historical preservation.

If indeed the evidence supports the BAR's conclusion that tribal membership has declined or its members have become less interested in tribal activity, this is entirely the result of the frustration tribal members (as well as their leaders) have found in the BAR's moving-target recognition guidelines since they first sought recognition forty years ago. The BAR cannot, therefore, use recent dwindling tribal interest against recognition when the BAR is entirely *the cause* of this tribal apathy.

6. Summary

The fact that a minority of members of the Snohomish tribe joined with their non-Snohomish neighbors and formed the Tulalip Tribes, Inc. in 1935, and later withdrew from the larger Snohomish Tribe, should not deprive the Snohomish of legitimacy. Throughout the past century and a half, the Snohomish Tribe has maintained a political influence over its members, notwithstanding the many obstacles placed in front of it, be it Tulalip defection,

[9] Curiously, the BAR also cites to the *U.S. v. Washington* case as a factor in its decision against recognition. In *U.S. v. Washington*, the Court determined that the Snohomish would not be entitled to treaty fishing rights because it was not a federally recognized tribe. Now, the BAR states that because the Snohomish do not have treaty fishing rights they should not be federally recognized. 476 F. Supp. 1101 (W.D. Wash 1979). This circular logic is also indicative of the BAR's failure to adhere to its own regulations.

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limited resources, and, for the past forty years, the unjust processes of the BIA.

In short, the petition and follow-up comments demonstrate that there was an active and participatory tribal organization from historical times. The BAR's use of the Snohomish's many obstacles against it, rather than for it, was an abuse of process warranting reversal of the Final Determination.

V. THE BAR FAILED TO PROPERLY APPLY THE STANDARDS OF CRITERION 83.7(E) – THAT A MAJORITY OF THE SNOHOMISH TRIBE OF INDIANS DESCEND FROM A HISTORICAL INDIAN TRIBE.

The BAR's determination that the Snohomish fails to satisfy criterion 83.7(e) because 69 percent of its members, or 17 families, allegedly do not descend from the Snohomish Tribe, is arbitrary and capricious and in violation of the standards set forth in 25 C.F.R. 83.7. BAR rejects five family lineages as being Snoqualmie (Allen, Elwell, Harriman, Jimmicum, and Skookum/Roberts); five as Clallam (Cooper, Hawkins, Quinta, Thomas and Williams), and four as "other" (Anderson, Clawson, Hume, McLouth) (together, "the Disputed Families"). (ACR-FDD-V002-D0019.)

In reaching its conclusion, the BAR violates the regulations by failing to take into account the historical and cultural complexities of the Coast Salish Tribes. These complexities include their geography, intermarriage patterns and tribal political alliances that are discussed at length by the Snohomish Tribe (SNH-FDD-V001-D0008 at 25-41; SNH-FDD-V003-D0002). These factors explain why, for example, the same individual may have claimed different tribal affiliations at different times, and why individuals listed on the Snohomish Membership Rolls may have also have claimed Snoqualmie blood. (Austin Aff. at 30-37).

Rather than construing this evidence in the context of Coast Salish cultural realities, the BAR latches on to any evidence attesting to non-Snohomish lineage, and then discredits or ignores contradictory evidence that supports Snohomish lineage. In some instances, the BAR relies on the very same evidence to prove Non-Snohomish lineage that it rejects where such

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evidence demonstrates Snohomish affiliation. When viewed in total, the Snohomish Tribe has presented sufficient evidence to demonstrate a "reasonable likelihood" that the majority of the Disputed Families are Snohomish, and therefore at least 80 percent of the membership "consists of individuals who descended from" the historical Snohomish Tribe.[10]

Further, even if the BAR is correct that 69 percent of the Tribe's membership is Snohomish, the BAR has not established, nor can it establish, that this percentage is *not* "sufficient" to satisfy criterion (e). In fact, the Regulations provide no guidance whatsoever as to what percentage is "good enough." Therefore, the BAR's decision that 69 percent is too low to satisfy criterion (e) is arbitrary and capricious.

A. The Standard of Review Under 83.7(e)

Any interpretation of a regulation must begin with an examination of the language of the regulation. *See, e.g., Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). In order to satisfy 83.7(e), the Snohomish Tribe must demonstrate that the Tribe's membership "consists of individuals who descend from a historical Indian tribe . . ." 25 C.F.R. 83.7(e). The type of evidence that is "acceptable" to the Secretary *includes but is not limited to*:

> (i) Rolls prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, or other purposes;
> (ii) *State, Federal, or other official records* or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
> (iii) Church, school, and other similar enrollment records identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
> (iv) *Affidavits of recognition by tribal elders, leaders, or the tribal governing body* identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
> (v) *Other records or evidence* identifying present members or

[10] It is noteworthy that BAR reclassified four family lines in the FD, bringing the percentage it classified as Snohomish from 59 percent in the PF to 69 percent in the FD.

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> ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

25 C.F.R. 83.7(e) (emphasis added). The regulations do not specify that some types of this evidence should be accorded more or less weight than others. The BAR shall consider that the criterion is met if "the available evidence establishes *a reasonable likelihood of the validity of the facts* relating to that criterion," and the BAR shall not require "conclusive proof of the facts." 25 C.F.R. 83.6(d). Where there is *some* documentation of tribal descent, a Petitioner can satisfy criterion (e). *See, e.g., Ramapough Mountain Indians v. Norton,* 25 Fed. Appx. 2 (D.C. Dec. 11, 2001)

B. The Roblin Rolls are Unreliable and Cannot Be Used Against the Tribe.

The BAR's conclusion relies heavily on records prepared by BIA Special Indian Agent Charles E. Roblin, who between 1916 and 1919 enumerated more than 4,000 unenrolled and landless Indians in Western Washington (referred to as the "Roblin Rolls"; SNH-PFD-V003-D0006). (ACR-FDD-V002-D0014 at 1-22.) BAR has acknowledged that it placed "considerable importance" on "the individual affidavits given to Charles E. Roblin from 1916 to 1918 . . . . which were used by Roblin as the basis for his Schedule of Unenrolled Indians of Western Washington, dated 1919." (PFR-GPF-V012-D0016 at 22.)

The Snohomish Tribe has demonstrated that much of the information contained in the Roblin Rolls is biased, contains serious errors and omissions as to the tribal affiliations of the unenrolled Indians, and is contradicted and superceded by other government and tribal records. (SNH-FDD-V001-D0008 at 34 to 37; SNH-FDD-V009-D0023 at. 5). As Tribal historian and genealogist Helen Norton states, "[h]eavy reliance on [the Roblin] records—or the typed portions of them—have compounded errors and omissions officially severing the Snohomish people from their rightful past and future." (SNH-FDD-V009-D0023 at 5.)

The Roblin Rolls are unreliable insofar as they misidentify the Indians residing along the Skykomish River as Snoqualmie. (*See, e.g.,* SNH-FDD-V003-D0002 at 20, Jimmicum

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family is identified in the 1900 census as Skykomish; ACR-FDD-V002-D0014 at 9, classified by Roblin and later by the BAR as Snoqualmie). The Skykomish were a band of Snohomish living in what was traditional Snohomish/Skykomish territory. (SNH-FDD-V009-D0023 at 44). Proof of the Skykomish/Snohomish tribal affiliation comes from the recognized fact that the Skykomish and Snohomish both speak the Northern Lushootseed language the Snohomish, whereas the Snoqualmie speak Southern Lushootseed. (SNH-FDD-V009-D0023 at 44; *See also* Ex. 6).

Also, in cases of multiple ancestry, Roblin tended to favor the Snoqualmie lineage. (SNH-FDD-V001-D0008 at 36.) This does not mean, however, that such families did not have Snohomish lineage as well, and permissibly chose to identify themselves as Snohomish. (*Id.*) It is reasonable to assume that applicants with multiple ancestries asserted only one identity in situations where one was adequate for the purpose. (*Id.*) As Norton states,

> When it is stated . . . that someone is 'full-blood Snoqualmie,' it appears that the statement often means that the person is a full-blood Indian whose Snoqualmie ancestry or affiliation is being emphasized at the moment, not that every single ancestor of the person was a Snoqualmie.

(SNH-FDD-V003-D0002 at 22.) Therefore, it is likely that the tribal affiliations identified in the Roblin affidavits may have been incomplete if not completely inaccurate.

Roblin also had strong personal views against "mixed blood" Indians—i.e. Indians who are descendants of Indian women who married early pioneers—and whether they should receive allotments. (SNH-PFD-V003-D0006) He states,

> It appears that this sudden interest of person of mixed Indian blood, in obtaining their 'rights' and 'what is justly due them,' results from the activities of a few mixed-blood Indians who started a movement a few years ago for this purpose.

(*Id at 3*). He accused Thomas Bishop of stirring up the "mixed bloods" with propaganda promising land and money if they joined the Northwest Federation. (SNH-FDD-V001-D0008

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at 35, SNH-PFD-V003-D0006 at 2 -3). The BAR never even mentions this bias, nor takes into account how it could have affected the information he recorded in his notes and records.

C. The Roblin Schedules Should Not be Determinative of the Lineage of the Disputed Families.

The unreliability of Roblin's records has been further compounded by BAR's inconsistent use of them in its analysis. In the Proposed Findings, the BAR rejects the Snohomish's reliance on the Schedules when the accompanying Roblin affidavits made no mention of Snohomish membership, stating:

> [t]his interpretation of the Roblin schedule has included persons who ancestors' affidavits make no mention of Snohomish ancestry and will unfortunately continue to create a membership which includes a substantial number who are . . . unable to establish Snohomish Indian ancestry." (PFR-GPF-V012-D0016 at 23.)

In the Final Determination, however, the BAR itself relies *solely* on the 1919 Roblin Schedule to support the Snoqualmie and Clallam ancestry of many of the Disputed Families, even when affidavits attesting to Snohomish ancestry existed. For example, the Final Determination labels the Jimmicum family Snoqualmie based solely on Roblin's Snoqualmie Schedule, *despite the fact that affidavits attesting to Snohomish ancestry existed.* (ACR-FDD-V002-D0014 at 9-10.) The BAR relies almost solely on the Roblin Schedule to classify the Skookum/Roberts family as Snoqualmie (ACR-FDD-V002-D0014 at 10), See also ACR-FDD-V002-D0014 at 8 (Harriman Family); ACR-FDD-V002-D0014 at 11 (Cooper Family). This use of the Roblin Schedule against the Tribe, especially when contradicted by other evidence of Snohomish lineage, is arbitrary and capricious.

D. The BAR Arbitrarily Disregards Tulalip Agency Census Evidence.

Similarly, the BAR rejects most evidence of Snohomish tribal lineage found in the early Tulalip Agency Census (also known as the "Tulalip Roll"). For example, the BAR rejects evidence of the Allens' Snohomish lineage in the 1927, 1928 and 1934 Tulalip Agency

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census (SNH-FDD-V003-D0002 at 13), stating "the 1934 Tulalip Roll alone does not provide reliable information regarding individual ancestry, as some of the enrollees were enumerated as Snohomish when they had no Snohomish ancestry (e.g. *many Samish were enumerated as Snohomish* . . .)" (ACR-FDD-V002-D0014 at 7) (emphasis added). This same reasoning led to the rejection of Tulalip Agency Census evidence for the Jimmicum Family. (*Id.* at 9.) The fact that "some" *Samish* individuals were wrongly listed on the Tulalip Roll, without more, does not make it *reasonably likely* that the Disputed Families listed on those rolls are Non-Snohomish. Yet, the BAR did not follow its own prescription, when it specifically relied on the 1934 Tulalip Agency Census to support listing members of the Preston family as part-Snohomish (ACR-FDD-V002-D0014 at 19.) This blanket disregard for Tulalip Agency Census evidence is arbitrary and capricious.

E. The BAR Ignores Snohomish Membership and Leadership Evidence.

Most puzzling of all, the BAR *ignores* most supporting evidence in the Record derived from early Snohomish Tribal Rolls, affidavits of tribal leaders and the decades of Snohomish tribal participation and leadership by the Disputed Families. This type of evidence is specifically cited in 83.7(e)(iv) and (v) to be "acceptable." The early verification of Snohomish membership was the result of hearings conducted by the Snohomish Tribal Committee that took place on the Tulalip Reservation between 1926 and 1932. (SNH-FDD-V009-D0023 at 4, citing SNH-PFD-V005-D0041, D0043, D0045 and D0053; SNH-PFD-V008-D0014 to D0025). How it is "reasonably likely" that the leaders of the Snohomish Tribe could have been so confused for so long about their Indian identity is never explained by the BAR. For example, Clifford Allen was Snohomish Tribal Chairman from 1968 to 1976, and the Allen family was confirmed as part of the Tribe's Membership Rolls starting in 1926 (SNH-FDD-V003-D0002 at 12-13).[11] Yet, the FD *makes no mention of this* when it

[11] Allen has submitted testimony in the record that he attended Snohomish tribal meetings with his uncle William Allen in 1918. (Allen Affidavit, June 26, 1974; SNH-FDD-V004-D0011 at 2).

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classifies the Allens as Snoqualmie. (ACR-FDD-V002-D0014 at 7.)[12]

Likewise, Forrest Elwell was Snohomish Tribal Chairman in the 1950s, and widely recognized as a Tribal leader by the Federal Government and other Tribal groups (SNH-FDD-V003-D0002 at 16). Yet, the FD *makes no mention of any of this*, and classifies the Elwells as Snoqualmie. (ACR-FDD-V002-D0014 at 8.) See also SNH-FDD-V003-D0002 at 25 and ACR-FDD-V002-D0014 at 10; (Skookum) ACR-FDD-V002-D0014 at 11 (COOPER); SNH-FDD-V003-D0002 at 25 and ACR-FDD-V002-D0014 at 11 (Hawkins); SNH-FDD-V003-D0002 at 37 and ACR-FDD-V002-D0014 at 12 (Quinta)).

This result is event more perplexing when the BAR labels as Clallam the Hawkins, Quinta and Williams lineages, when in 1925 and 1926, all three families *were rejected* by the Clallam Tribe for membership based on lack of proof of Clallam ancestry and lack of proof of association with the Clallam Tribe. (SNH-FDD-V003-D0002 at 27.).

To rely heavily on the records of non-Indian Charles Roblin, and completely disregard evidence from the Snohomish Tribe's own history and records, without explaining any basis for finding such evidence unreliable or biased, is arbitrary and in violation of the regulations.

F. The BAR Arbitrarily Disregards Claims Docket No. 125 Evidence.

Finally, the BAR almost uniformly discounts Snohomish Judgment Roll for Docket 125 (hereafter "Docket 125") as evidence of the Disputed Families' tribal lineage. (*See, e.g.,* ACR-FDD-V002-D0014 at 8 (18 Elwells on the Docket); ACR-FDD-V002-D0014 at 10 (4 Skookum Roberts); ACR-FDD-V002-D0014 at 11 (63 Coopers); ACR-FDD-V002-D0014 at 14 (7 Williams). The BAR fails to explain why this evidence is so unreliable, when the Docket is cited at 83.7(d)(i) as evidence "prepared by the Secretary on a descendancy basis for purposes of distributing claims money," and it therefore "acceptable." The BAR

[12] The Snohomish Membership Roll accurately included members of families confirmed by BAR to be Snohomish (presumably based on other evidence), such as the Newberry Family—which had been erroneously classified by BAR as "other" in the PF. (ACR-FDD-V002-D0014 at 18.)

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discredits this information because it "may have relied" on the 1934 Tulalip Census. (*See, e.g.,* ACR-FDD-V002-D0014 at 7).[13] But in fact, since the BAR has arbitrarily discredited that the earlier Census source evidence of Snohomish ancestry, it has created an arbitrary basis for discrediting all subsequent Roll evidence, including Docket 125. Thus, it rejects the Docket 125 evidence with the conclusory statement, "[t]here is no evidence in the record to support the . . .claim to payment on Docket 125." (*See, e.g.*, ACR-FDD-V002-D0014 at 11.) [14]

Yet, the BAR does not hesitate to use a Family's *absence* from Docket 125 as evidence *against* the Tribe. For example, where *no* Harriman descendants are listed on Docket 125, but instead were listed as Snoqualmie, the BAR cites that to support its Snoqualmie classification. (ACR-FDD-V002-D0014 at 9, 10). This is mere speculation, and is arbitrary.

G. The BAR Construes All Contradictions or Gaps in the Evidence Against the Snohomish Tribe.

The Snohomish Tribe submitted ample conclusive historical evidence supporting the Snohomish ancestry of the Disputed Families. In many cases, consideration of this evidence is simply absent from the Final Determination. To be sure, contradictions and mixed identifications exist in the historical record, whereby the same individuals in some cases reported different tribal affiliation at different times. The simplest explanation, as stated above, is multiple ancestry, and the BAR has provided no reasonable basis to interpret such contradictions against the Snohomish Tribe.

The following is a brief highlight of supporting evidence for some of the Disputed Families demonstrating how the BAR acted arbitrarily in discrediting supporting evidence.

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[13] The BAR can't dispute the accuracy of Docket 125 in the case of the Newberry Family, erroneously classified as "other" in the PF and reclassified as Snohomish in the FD, as it lists those family members.

[14] In one instance, however, the FD does appear to accept Docket 125 evidence as reliable, in the case of the reclassified Newberry family which had 50 members on the Docket 125 Roll. (ACR-FDD-V002-D0014 at 18.)

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1. The Allen Family

There is at least a "reasonable likelihood" that the Allen family is Snohomish, based on the following evidence in the record: (SNH-FDD-V003-D0002 at 12 - 13):

- **A typed affidavit dated March 17, 1917** from Anna Burn, daughter of Mary Mitchell, stating that her mother was a full-blood Skykomish Indian. (SNH-FDD-V004-D0005 at 8);

- **Handwritten notes for Albert Young,** husband of Minnie, identifying *the father of* Mary Mitchell as Snohomish-Snoqualmie, and her mother as Snoqualmie; (SNH-FDD-V004-D0005 at 1 – 4)

- **A letter from Grace Tallman Pownall dated June 10, 1918**, stating that *Tubulicia*, the mother of George Allen (her deceased husband) was full-blood Snohomish-Snoqualmie (SNH-FDD-V004-D0005 at 6).

- **Snohomish Tribal Committee Rolls of 1932 and 1954** identified members of the Allen lineage as Snohomish. SNH-FDD-V003-D0002 at 12 – 13 citing 1932 roll (i.e. the 1926A list) and SNH-PFD-V005-D0069 at 1.

- Clifford Allen, son of George Allen and Grace Pownall, and grandson of *Tubilicia*, was **Snohomish tribal chair** from 1968 to 1976.

2. The Elwell Family

There is at least a "reasonable likelihood" that the Elwell family is Snohomish, based on the following supporting evidence in the Record:

- **1911 official government records from the Cushman Trades School** listing three grandsons of progenitor Susan Elwell as three-quarters Snohomish (Cushman Trades School (1911); SNH-FDD-V009-D0023 at 52).

- **1917 Roblin Affidavit from Forrest Elwell,** son of Susan, stating that he was Snohomish, as was his mother. (Aff. of Forest Elwell, 4/20/1917). (SNH-FDD-V004-D0066)

- **Historical and government sources** state that Susan Elwell was Snohomish. (SNH-FDD-V009-D0023 at 52-53; see sources cited therein.)

- **1929 Letter from August F. Duclos, Superintendent of the Tulalip Indian Agency,** stating that the Elwell family "is recognized from the Snohomish Tribe," as being descended from the union of John Elwell and "a Snohomish woman." (SNH-PFD-

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V003-D0040)

- **1932 Snohomish Roll** listed numerous members of the Elwell family. (SNH-FDD-V003-D0002 at 15)

- **1933 Letter from J.C. Cavill, Superintendent of the Tulalip Agency,** acknowledging the acceptance of Susan Elwell's granddaughter, Ora Elwell (adopted daughter of Forrest), "a Snohomish Indian from the Public Domain Reservation," as a student at Everett General Hospital. (SNH-FDD-V004-D0073 to D0074)

- **1944 Letter from O.C. Upchurch, Superintendent of the Tulalip Agency,** acknowledging the Snohomish Indian blood of Irene Elwell Knapp, Susan Elwell's granddaughter, so she could be admitted to the Indian hospital on the Colville Reservation. (SNH-FDD-V004-D0076)

- **Forrest Elwell was chairman of the Snohomish Tribe** in the 1950s. (see e.g. FDR-MFD-V001-D0021, PFR-APF-V006-D0005, and PFR-APF-V020-D0010)

- **1954 Snohomish Roll** listed many members of the Elwell family. (SNH-FDD-V003,-D0002 at 16)

3. Jimmicum

There is at least a "reasonable likelihood" that the Jimmicum family descended from John and Mary Jimmicum is Snohomish, based on the evidence submitted by the Tribe, based on the following supporting evidence (SNH-FDD-V003-D0002 at 20 - 23):

- **1900 Census** lists John Jimmicum and his wife Mary as Skykomish or Snohomish (SNH-FDD-V009-D0023 at 43.)

- **1916 Bishop Affidavit of Mary Jimmicum** stating that her father was Snoqualmie and her mother Snohomish and she belonged to the Snoqualmie-Snohomish Tribe (Aff. of Mary Jimmicum, 4/12/1916); (SNH-PFD-V025-D0017 at 5 – 6)

- **1916 Bishop Affidavit of Adelaide Jimmicum** (daughter of Mary) confirms that father and/or grandfather were Snohomish-Snoqualmie; (SNH-PFD-V025-D0017 at 8)

- **1934 Tulalip Agency Census** lists the children of Jesse Jimmicum (son of John and Mary) as Snohomish; (SNH-FDD-V003-D0002 at 22-23)

- **1953 Anthropological study** lists the Jimmicum lineage as Skykomish or Snohomish (Colin E. Tweddell cite); (SNH-FDD-V003-D0002 at 23)

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4. Skookum/Roberts

There is at least a "reasonable likelihood" that the Skookum/Roberts family is Snohomish, based on the following supporting evidence in the Record:

- **1914 Deposition of William Hicks** identifies Progenitor Skookum Mary is recognized to be sister of BAR-classified Snohomish Sallie Wilson Bishop (SNH-FDD-V004-D0222; *see also* Aff. of Laura Smith (4/23/1918) SNH-FDD-V004-D0223);
- **1927 Snohomish Roll lists children of Skookum Mary** who were still alive at the time—Mary Roberts MacFarland and Frank Roberts; (SNH-FDD-V003-D0002 at 25);
- **1954 Snohomish Roll** lists Skookum/Roberts lineage; id;
- **Claims Docket 125** lists descendants of Skookum Mary.

Each of the above families was also listed on Claims Docket 125 as Snohomish. (PFR-MPF-V002-D0003, D0004). The historical record demonstrates a reasonable likelihood that the majority of the Disputed Families, which have called themselves Snohomish for over 100 years, and multiple generations, are Snohomish. For their core identity to be rejected on the basis of Roblin's affidavits and Schedules alone, is arbitrary and capricious and should be rejected by this Court.

H. Even if the Evidence Shows That 69 Percent of the Snohomish Tribe's Members Descend From an Historical Tribe, the BAR's Conclusion that 69 Percent Does Not Satisfy Criterion (E) is Arbitrary and Capricious.

As stated above, the regulations do not specify what percentage of ancestry is sufficient to satisfy criterion (e). To the contrary, the Department intentionally avoided establishing a specific percentage to demonstrate required ancestry under criterion (e). (59 FR 9289); *See also* Little Shell Final Determination ("Little Shell FD") Ex. 8 at 14. The Department has taken this position because "the significance of the percentage varies with the history and nature of a group and the particular reasons why a portion of the membership may

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not meet the requirements of the criterion." (59 FR 9289). Criterion (e) can be met with less than 100 percent of the members having established descent from the historical tribe for "very particular reasons" based on "the history and nature of a group." Ex. 8 at 14, 15. In fact, in the Little Shell Proposed Finding, the BAR found that the Tribe satisfied criterion (e) with only 62 percent tribal descent. *Id.* at 15. However, this determination was reversed in the Little Shell Tribe's Final Determination. According to the Department's own analysis, no group with a percentage lower than 80 percent has met criterion (e). However, it is noteworthy that the tribe with 80 percent was the Samish, another Coast Salish Tribe. *Id.* This suggests that the "very particular reasons" that may have compelled the BAR to recognize the Samish with just 80 percent ancestral membership, could apply here as well: evidence of multiple ancestry, inter-tribal and Indian-Pioneer marriages, and membership in multiple tribes. In any event, the BAR never gives any indication in the FD why the Tribe's 69 percent *did not* warrant deviation from the 80 percent standard, nor why 69 percent may be reasonable in the context of Coast Salish kinship patterns. For this reason, its finding that 69 percent failed to satisfy criterion (e) is arbitrary and capricious.

CONCLUSION

The Snohomish Tribe of Indians urges this Court to find that it has satisfied the criteria for federal acknowledgement as a matter of law and that Defendants arbitrarily and capriciously denied recognition, in violation of the Fifth Amendment to the United States Constitution and of the Regulations found in 25 C.F.R. § 83.1, *et seq*. The Snohomish therefore requests that the Court grant summary judgment declaring that the Final Determination denying federal recognition be reversed and vacated, and that the Snohomish is entitled to be recognized and acknowledged as an Indian Tribe by Defendants.

DATED this 30th day of December, 2010.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 30th day of December, 2010, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

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Executed at Seattle, Washington this 30th day of December, 2010.

s/Leah Burrus
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