UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

The Nipmuc Nation, Plaintiff, v. Secretary S.M.R. Jewell, The United States Department of the Interior, Bureau of Indian Affairs, Office of Federal Acknowledgment, and the United States of America, Defendants.	Civil Action No. 4:14-cv-40013

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Nipmuc Nation ("Plaintiff" or the "Nipmuc Nation") opposes the Motion for Summary Judgment filed by Defendants S.M.R. Jewell, The United States Department of the Interior (the "DOI"), Bureau of Indian Affairs (the "BIA"), Office of Federal Acknowledgment (the "OFA"), and the United States of America ("USA," and collectively with the DOI, the BIA and the OFA, "Defendants") (ECF No. 40). As grounds for opposition, Plaintiff states:

BACKGROUND

Defendants submitted a combined brief seeking summary judgment and opposing Plaintiff's Motion for Summary Judgment. ECF Nos. 40, 40-1. In the instant brief, Plaintiff addresses Defendants' Motion for Summary Judgment only. Plaintiff has simultaneously filed its Reply Brief that addresses Defendants' Opposition to Plaintiff's own Motion for Summary Judgment.

INTRODUCTION

Defendants rely on two main points to support their Motion: (1) only two bands of the Nipmuc Nation have explicit historical support in the 1861 Earle Report and Plaintiff's membership cannot prove sufficient descent from these two bands to satisfy 25 C.F.R. § 83.7(e) (1994); and (2) as Plaintiff failed criterion § 83.7(e), it also should fail the criteria set forth in § 83.7(a) (external identification), § 83.7(b) (community) and § 83.7(c) (political influence).

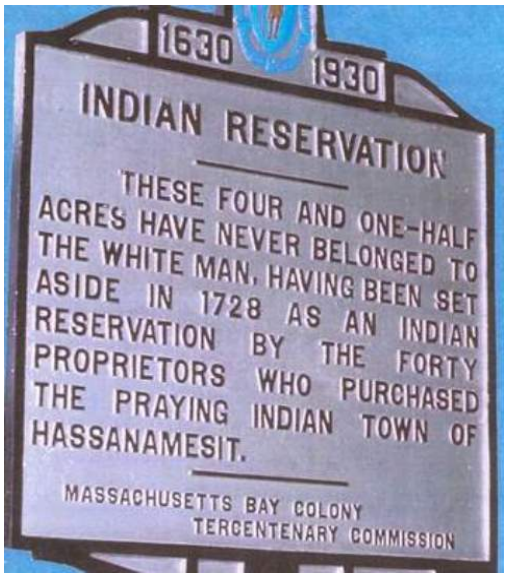
Both points illustrate how Defendants have violated their own regulations, and acted arbitrarily, capriciously and contrary to law. As discussed below, § 83.7(e) prohibits Defendants from creating a new definition of who is and who is not a Nipmuc for descent purposes. Defendants limited the Nipmucs to the two bands mentioned in the 1861 Earle Report, but Plaintiff's self-definition encompasses descendants from other bands of the historical tribe. Building on this shaky foundation, Defendants then injected their flawed descent analysis into three other criteria to find an insufficient portion of Plaintiff's members could prove external identification, community or political influence. As each criterion under § 83.7 must be considered independently, Defendants' domino effect reasoning is improper. Defendants' findings on the four failed criteria should be vacated and their Motion should be denied.

UNDISPUTED FACTS RELEVANT TO THIS OPPOSITION

The facts are undisputed. Historically, Nipmucs existed in a number of bands scattered around Massachusetts, Connecticut, and Rhode Island. ECF No. 40-1, at 6-7. The Hassanamisco band was centered in present-day Grafton, Massachusetts. The Chaubunagungamaung[1] band of Nipmucs was historically located in present-day Dudley and Webster, Massachusetts. *Id*., at 7. In the 18th and 19th centuries, the land reserved for the Nipmucs in Massachusetts was sold off, including the sale of the reservation land located in Dudley in 1891. ECF No. 36-27, at 23, 47,

[1] For simplicity, the Chaubunagungamaung band is referred to as the Dudley/Webster band in this brief.

50. However, a portion of land located in present-day Grafton, Massachusetts has remained in Nipmuc hands from historical times until the present and is designated as a reservation by Nipmucs. ECF Nos. 36-13, at 10, and 40-1, at 7. A plaque located at the Hassanamisco reservation, which was erected in 1930, is pictured here:



The 1850 census shows evidence of intermarriages and shared households between "off-reservation" Nipmuc families and the Hassanamisco and Dudley/Webster bands. ECF No. 36-13, at 42. The Earle Report, authored in 1861, identifies the existence of the Hassanamisco and the Dudley/Webster bands (referred to as the "Dudley Indians" in the report). ECF No. 40-1, at 7. The Earle Report also identifies other individuals with Indian heritage, but the report classifies these individuals as "Miscellaneous Indians." *Id.*, at 7; ECF No. 36-13, at 172. In 1869, the Enfranchisement Act ended "wards of the state" status for Nipmucs and granted them full citizenship. ECF No. 36-13, at 10. A continuous tribal fund was established for Nipmuc Indians up until 1869, and after that time, appropriations were made on an individual basis from the Commonwealth to those "Hassanamisco" Indians who were alive in 1869. *Id.*, at 32. These appropriations continued through 1938. *Id.*

Nipmucs have organized and hosted an annual fair, called the "Hassanamisco Fair" in Grafton since at least the mid-1920s until the present. ECF No. 36-13, at 80. The Nipmuc Nation received formal recognition by the Commonwealth of Massachusetts in 1976 in an executive order issued by Governor Dukakis, recognizing the Tribal Council of Nipmuc was the governing body of the Nipmuc Tribe and ordering state agencies to "deal with … the Hassanamisco Nipmuc Tribal Council on matters affecting the Nipmuc Tribe." ECF No. 36-28, at Sec. I.

ARGUMENT

I. Defendants' Descent Analysis Contradicted the Factual Record, Ignored Plaintiff's Self-Definition and Used Circular Reasoning.

Under 25 C.F.R. § 83.7(e), Defendants must determine whether a sufficient number of Plaintiff's members can prove Nipmuc descent. Defendants improperly disqualified many of Plaintiff's ancestors because they did not accept that Plaintiff's members could trace descent from off-reservation Nipmuc lines. In so doing, Defendants rejected the factual record that they assembled, improperly relied on their findings from the other acknowledgment criteria and denied that Plaintiff's self-definition could encompass Nipmuc bands other than Hassanamisco and Dudley/Webster.

A. Defendants Reject Their Own Factual Record by Concluding that No Historical Nipmuc Tribe Existed.

The purpose of the descent criterion is to ensure that the members of the petitioner can prove that they are descendant from a historical Native American tribe. The regulation states:

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

25 C.F.R. § 83.7(e) (1994) (Emphasis added). Defendants denied that there was a historical tribe from which Plaintiff could prove descent because: "Plaintiff had not shown that a 'Hassanamisco

tribal community' or other Indian entity consisting of Plaintiff's ancestors existed in the 1920s (or at any other time)." ECF No. 40-1, at 26.

This conclusion stands in stark contrast to the historical factual record assembled by Defendants. A Nipmuc tribe existed in Massachusetts and southern New England between 1600 and 1700. ECF No. 40-1, at 6-7; *see also*, ECF No. 36-27, at 78 ("there clearly was a historical Hassanamisco band and reservation, and as indicated in the proposed finding for petitioner #69B, there clearly was a historical Chaubunagungamaug band and reservation…."). The Nipmuc Nation consisted of various bands, which included, but were not confined to, the Hassanamisco and Dudley/Webster bands. *See* ECF No. 36-27, at 26, 38-39. Nipmuc ancestors dispersed throughout southern New England in the 1800s as Nipmuc lands were sold off and as more tribal members experienced economic hardship and sought opportunities in urban areas. *See id*., at 74, 76-77. By the end of the 19th century and through the 1920s, the Hassanamisco reservation in Grafton became the central location for Nipmuc activity and was the site of annual fairs that continue until the present time. ECF No. 36-13, at 80. "Although both [Hassanamisco and Dudley/Webster] originated from the pre-contact Nipmuc Indians of central Massachusetts, they descended from two different 17th century praying towns…." ECF No. 36-13, at 178.

Defendants should have concluded, based on these factual admissions, that a historical Nipmuc tribe existed. Thus, all of Plaintiff's members who could prove descent from ancestors identified as Nipmuc, through reference to historical documents or otherwise, should have been included in the descent count. *See* 25 C.F.R. §83.7(e). As discussed in Section D *infra*, this did not occur.

B. Defendants Improperly Defined Plaintiff As Two Separate Tribes And Thus Limited and Divided Plaintiff's Ancestor Pool.

Instead of allowing Plaintiff's members to prove descent from the single historical tribe, Defendants redefined Plaintiff and limited the acceptable ancestor pool to only two bands: Hassanamisco and Dudley/Webster. "Therefore this analysis of new evidence under criterion 83.7(e) will continue to rely upon the identifications of the historical Hassanamisco and Dudley tribes in 1861 and 1889-1891 to be the 'historical tribes' for purposes of tracing descent under 83.7(e)." ECF No. 36-13, at 167; ECF No. 40-1, at 26. Limiting descent to these two bands is a rejection of Plaintiff's self-definition of "the individuals and families of Nipmuc and other Indian ancestry who were part of the Hassanamisco tribal community by the 1920s." ECF No. 36-13, at 37. Specifically, this limitation ignores the existence of Nipmuc bands from other areas, such as Natick or Connecticut. ECF No. 36-13, at 172 n.147; ECF No. 36-27, at 34, 39.

The regulation allows for tribes to combine for descent purposes. 25 C.F.R. § 83.7(e). Defendants claim that proceeding under the "combination" theory of the regulation requires Plaintiff to prove that the Hassanamisco and Dudley/Webster "tribes" combined and functioned as a single autonomous political entity, which it failed to do.[2] However, using the combination theory is unnecessary here because Plaintiff is one tribe composed of multiple bands. Plaintiff's self-definition necessarily includes the Hassanamisco and Dudley/Webster bands (without triggering the combination theory) because it defines a Nipmuc as anyone with Nipmuc ancestry and who was a part of the Hassanamisco community as of the 1920s.

Plaintiff's self-definition was intended to take into account the fact that the historical bands had dispersed over a wide geographic area over time and Nipmucs had intermarried with non-Nipmucs. To distinguish individuals of Nipmuc heritage, Plaintiff anchored its definition to

[2] "And further, the two separate tribes never 'amalgamated' and therefore cannot be treated as a single historical tribe under the regulations." ECF No. 40-1, at 26.

those who were part of the Hassanamisco community by the 1920s. *See* ECF No. 36-13, at 37. That does not mean descent can only be proven from Hassanamisco ancestors, nor does it justify relying solely on the Earle Report's classifications. Defendants' reliance on the Earle Report's list of "Dudley" and "Hassanamisco" Indians unfairly narrowed the ancestor pool from which Plaintiff's current members could legitimately claim descent, especially where Earle lists many families as "Miscellaneous Indians." *Id*., at 172. Earle's lack of expertise in Native American history and genealogy in 1861 should not be forever binding on the Nipmuc descendants, especially where Defendants concede that other evidence beyond the Earle report is appropriate to show Nipmuc heritage for those categorized as "Miscellaneous." ECF No. 36-27, at 207-08 (Curless/Vickers Nipmuc heritage established by census records and witness statements among other documents).

Even if the "combination" theory is used to evaluate the petition, reference to the historical record and deference to the Nipmuc Nation's self-definition should have allowed Plaintiff to prove descent from the two historical "tribes" and "Miscellaneous Indians" discussed in the Earle Report. Plaintiff's self-definition recognizes that off-reservation, Dudley/Webster and Hassanamisco Nipmucs centered on the sole remaining reservation in the 1920s. From this point forward, a more formally organized group, comprised of individuals with Nipmuc heritage, emerged. Defendants' own precedent states that under criterion § 83.7(e), "acknowledgment decisions allow for … the formal or informal merger of bands and tribes." Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan Final Determination, Sullivan Opposition Decl. Ex. A, at 19. For descent purposes, no further inquiry should have taken place. Defendants should have deferred to Plaintiff's conclusion in its definition that a "combined" entity existed

after the 1920s and allowed the current members to prove descent from the historical Nipmuc bands and off-reservation families.

As is discussed in Section D below, this segregation ultimately harmed Plaintiff because Defendants would not even sum the descendants of the Hassanamisco and Dudley/Webster bands together (or even consider the off-reservation Nipmucs) to arrive at the final descent totals. "Descent from a historical tribe for purposes of criterion 83.7(e) can be calculated from either the Dudley/Webster or Hassanamisco tribes, but not from a combination of both tribes, since there is no evidence of amalgamation." ECF No. 36-13, at 178 (finding that 2 percent of proven Hassanamisco descent is inadequate and separately that 53 percent of Dudley/Webster is also insufficient). Failing to sum the descent numbers violated Plaintiff's right to determine for itself its tribal makeup and to identify its historical origins. (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence….").)

C. Defendants Reasoning Is Circular And Contrary to Precedent.

Defendants relied upon their conclusions in criteria § 83.7(a), (b) and (c) to fail Plaintiff on the descent criterion. In their descent evaluation, Defendants conclude that "[a]s seen in OFA's analysis under criteria § 83.7(a), (b) and (c) above, the petitioner has not demonstrated that such a 'Hassanamisco tribal community' embracing all of the petitioner's ancestors existed in the 1920's or at any point in time since then."[3] ECF No. 36-13, at 167; *see also* ECF No. 40-1, at 26. Defendants thus conclude that there was never a historical tribe from which Plaintiff's members could have proven descent once it failed the identification, community and political authority criteria of § 83.7(a), (b) and (c). To complete their circular logic, as is discussed in

[3] Plaintiff takes the opportunity to compare this action to the broader and historical attempt by Defendants to legislate and assimilate the Nipmuc and Native American identity out of existence. *See* ECF No. 36-2, at 5-10; ECF No. 36-3, at 6-12; ECF No. 36-4, at 7-10.

further detail below in Part II, Defendants also referenced and/or relied upon their flawed descent analysis to fail Plaintiff on criteria § 83.7(a), (b) and (c).

Defendants' own precedent requires each criterion to be evaluated independently and even if a petitioner fails criteria (a), (b), and (c), it can still pass criterion (e). One such example is Petitioner 69B, the splinter group of the Dudley/Webster band. In that decision, Defendants found against the Dudley/Webster band on criteria § 83.7(a), (b) and (c), but found that it proved sufficient descent to satisfy criterion § 83.7(e). *See* ECF No. 36-34, at iv. Additionally, Defendants' prior decisions show multiple instances where a petitioner failed criteria § 83.7(a), (b) and (c), but passed criterion (e). *See, e.g.*, ECF No. 36 - 34, at iv - v. (Petitioners Principal Creek, Tchinouk, Duwamish, Chinook, Muwekma, Little Shell Band (Montana)). Moreover, Defendants found the following petitioners satisfied criterion § 83.7(e), despite failing on criteria (b) and (c): Miami of Indian, Eastern Pequot, Paucatuck, Eastern Pequot and Schaghticoke. ECF No. 36-34, at iv – v; *cf.* ECF No. 36-13, at 178 (evaluating criterion (e) and finding "the evidence does not support the assertion that in this case of petitioner 69A such a 'coalesced' entity had come into being by the 1920s **(see discussion under criteria 83.7(b) and 83.7(c)**") (Emphasis added). Failure of the first three criteria cannot stand as a basis to fail the Nipmuc Nation on the descent criterion.

Even Defendants admit descent should be considered separate and apart from the community and political criteria. ECF No. 36-19, at 44 ("and this is where we have to be careful not to confuse criterion 83.7(e), **which is strictly descent**, with 83.7(b), which is community and (c) which is [political] participation") (Emphasis added). As Defendants' researcher Virginia DeMarce went on to explain, a petitioner may be able to show descent, but whether the petitioner can prove community or political influence is a group-wide analysis not evaluated on the

individual level. *See id.*, at 43-44. Ms. DeMarce then gave her own personal example, claiming that since she can prove her grandparents were born in Germany and emigrated to the United States, her mother can prove German descent. *Id.*, at 45. The implicit reasoning is that Ms. DeMarce has documentation showing descent from a known population of German ancestors, which is not contingent on how much or little Ms. DeMarce's grandparents participated in the German community or political process. The analogous reasoning should apply to the Nipmuc Nation. A vast majority of Plaintiff's members can prove descent from ancestors who have documented lineage from the historical Nipmuc tribe. As such, sub-dividing the tribe into separate bands to lower the descent figures was inappropriate, artificial and arbitrary. Furthermore, making descent contingent on an ancestor's community or political participation is illogical and inappropriate.

D. Defendants' Flawed Analysis Skewed the Math.

This flawed descent analysis corrupted the relatively simple math calculation needed to show that the Nipmuc Nation met § 83.7(e). Plaintiff's total membership for the Final Determination was 526. ECF No. 36-13, at 176. According to Defendants' tabulation, 509 individuals proved Native American ancestry. ECF No. 36-13, at 176 (descent table lists only 17 individuals as potentially non-Indian). However, Defendants manipulated this total to drive the Nipmuc descent percentage artificially lower. As stated above, Defendants refused to add the Hassanamisco descendants (11) with the Dudley/Webster descendants (277). Then, Defendants excluded 178 off-reservation Nipmucs from the count because Defendants found that they did not clearly descend from either of these two bands. What is especially nefarious about this exclusion is that these 178 people were previously considered by Defendants to have proven

Nipmuc descent in the proposed negative finding.[4] *Compare* ECF No. 36-27, at 203, 207-08, 217 n.303 (finding the Curless/Vickers family line as Nipmuc: "this family has documented off-reservation Nipmuc descent (see discussion above)"), *with* ECF No. 36-13, at 177 (finding Curless/Vickers line not Nipmuc). Plaintiff has already stated why the Curless/Vickers line should have been included in the descent count in its opening brief, thus it bears no repeating here. ECF No. 35, at 21 – 23. In sum, the math should have supported, at a minimum, a finding of descent for: the Hassanimisco descendants (11), the Dudley/Webster descendants (277) and the Curless/Vickers descendants (178), for a minimum total of 466. This amount represents of 88.6 percent of Plaintiff's 526 members, which is more than sufficient to satisfy § 83.7(e). ECF No. 36-13, at 177 n.150 (stating that 85 percent is sufficient based on precedent); *see* ECF No. 35, at 23.

II. Defendants' Flawed Descent Analysis Cannot Support Rejecting The Nipmuc Nation on Criteria 25 C.F.R. § 83.7(a), (b) and (c).

A. Defendants Failed to Comprehend that Identification is Evaluated Separate and Apart from Descent.

Defendants used their artificially low figures from the descent calculation to justify failing Plaintiff on the identification criterion of § 83.7(a). "Petitioner 69A, since the **large majority** of the ancestors of the membership of the petitioner as it currently stands before the Department were not included in the Hassanamisco entity being identified by external observers during the period from 1900 through the mid-1970's, does not meet the requirements of criterion 83.7(a)." ECF No. 36-13, at 41 (Emphasis added). "An external identification of the narrower Hassanamisco entity is not the same as an external identification of the current petitioner... the Hassanamisco descendants constituting 11 of the petitioner's 526 members (**see further**

[4] As was discussed in Plaintiff's opening brief, Ms DeMarce admitted that Mary Curless Vickers was of Nipmuc descent. ECF No. 35, at 25-26.

discussion under criterion 83.7(e))." ECF No. 36-13, at 41 (Emphasis added). However, as Defendants' precedent establishes, reference to descent figures in the context of analyzing identification is inappropriate. The identification analysis is performed independently of the descent analysis and no minimum percentage is required to show external identification.

Defendants' decision in the Ramapough Final Determination is illustrative. Defendants found that "[t]he RMP, the group which included ancestors of the RMI, was described from 1900 until 1978 as an isolated community of mixed-race origins, or a tri-racial isolate, **one of whose components** was perceived to be Indian in origin." Sullivan Opposition Decl. Ex. B at 20 (emphasis added). Thus, Defendants found that "the existence of a distinct tri-racial entity which is generally believed **to have included an Indian component in its originating population** shall be regarded as minimal evidence for identification of the existence of an American Indian entity under the regulations." *Id*. (emphasis added).

This decision teaches a petitioner's membership need only show that some of its ancestors were externally identified as Indian. No minimum floor is required. Defendants found the Ramapough satisfied criterion (a), even though it failed on the descent analysis of criterion (e). Sullivan Opposition Decl. Ex. B, at 20, 119; *see also* ECF No. 36-34, at iv – v, (showing Burt Lake Band, Houma, BCCM and PACIT passing (a), but failing (e)). Furthermore, in the Burt Lake Band Final Determination, Defendants found that the petitioner met criterion (a) without any reference to how many current members descend from the identified portion of the tribe. Sullivan Opposition Decl. Ex. C, at 25-26.

Defendants relied upon the fact that only 11 members proved Hassanamisco descent to fail Plaintiff on criterion (a). Such reliance was improper because Defendants' precedent does not require a petitioner to prove external identification applied to a minimum percentage of its

membership.

B. Defendants' Flawed Descent Conclusions Divided the Nipmuc Nation and Skewed the Community Analysis.

Borrowing from the descent analysis, Defendants separate the Nipmuc Nation into two entities and state that community was proven for an insufficient number of current members to satisfy § 83.7(b). *See* ECF No. 36-13, at 86-87. This strict separation of the entities permeated the community analysis. The reliance on this strict separation originates from the flawed and segregated descent calculation: "Nonetheless, it appears that the primary Hassanamisco social ties continued to be among those descendants of the proprietary families who lived in Grafton and Worcester….The evidence does not show interaction between the above persons and the ancestors of the majority of the petitioner's current membership **(see under criterion 83.7(e))**…." ECF No. 36-13, at 86 (Emphasis added).

Defendants acknowledge the Hassanamisco ancestors maintained a community from the mid-19th century until the early 1950s. ECF No. 36-13, at 85. Defendants recognize Hassanamisco Nipmucs (Siscos and Giggers) had connections with the Dudley/Webster Nipmucs: "From 1900 to 1953, the evidence shows the maintenance of pre-existing ties among some elements of the Hassanamisco proprietary families, the re-establishment of some tenuous ties between the Sisco family and the Giggers beginning in the 1920's [sic], and establishment of ties between the Siscos and some Dudley/Webster families." ECF No. 36-13, at 85.[5] Additionally, "[f]rom the 1920's [sic] through the 1970's [sic], the evidence in the record showed occasional social interaction between Hassanamisco descendants and [Dudley/Webster] descendants…. From 1978 through 1996, the evidence in the record showed interaction between

[5] Plaintiff notes that the 2015 regulations require a petitioner to prove community existed from "1900 until the present" and that a petitioner need only prove it for a "statistically significant sample of known adult members." 25 C.F.R. § 83.11(b).

some Hassanamisco descendants and some [Dudley/Webster] descendants….:" *Id.*, at 42 (quoting ECF No. 36-27, at 128-29). Despite these findings, Defendants argue that "the available discussions of the Hassanamisco proprietary families and the Dudley/Webster families do not pertain to most of the petitioner's members or their ancestors because the ancestors of ninety eight percent of the current members do not descend from Hassanamico proprietary families and another forty-seven percent of the current members do not descend from Dudley/Webster." ECF No. 40-1, at 20.

Summing just the descendants of Hassanamisco and the Dudley/Webster bands show that 288 out of 526, approximately 55 percent, of Plaintiff's ancestors demonstrated evidence of a community in the most relevant timeframe (1900 – 1996).[6] Even just considering the 277 members of the Dudley/Webster band would yield a calculation of approximately 53 percent. As a showing of over 50 percent is sufficient to meet § 83.7(b), Defendants misapplied their own precedent.[7] *See* ECF No. 36-34, at 62.

C. Defendants' Denial That a Historical Tribe Existed in the Descent Analysis Infected the Political Influence Analysis.

Criterion 83.7(c) only requires that a petitioner maintain political influence or authority over its members as an "autonomous entity" from historical times until present.[8] 25 C.F.R. § 83.7(c) (1994). Nothing requires Plaintiff's members to prove that a particular percentage of their ancestors maintained political authority over the tribe from historical times until present. The key determining factor for this criterion is that a distinct entity, which could have changed in nature and character over time, maintained political influence. *See* ECF No. 36-34, at 137

[6] *See* Note 5; also note that Plaintiff's petition was put on active consideration in 1995. ECF No. 40-1, at 8.
[7] Defendants fail to discuss how the off-reservation Nipmuc, such as the Curless/Vickers family line, fit into the community analysis. *See* ECF No. 36-13, p. 85-88.
[8] Plaintiff notes that the 2015 regulations require a petitioner to prove political influence or authority existed from "1900 until the present." 25 C.F.R. § 83.11(c).

("political connections between leaders and members may be informal"; and "[tribal] unity is not required under the regulations before the [petitioning] group amalgamated").

Referencing the descent discussion, Defendants' § 83.7(c) findings simply denied that a historical Nipmuc tribe existed and once again ignored Plaintiff's self-definition: "Since the other major components or families antecedent to petitioner 69A (Dudley/Webster descendants and Curless/Vickers) were not associated with Hassanamisco prior to 1900, nor have they been shown to have **amalgamated** with Hassanamisco either prior to or subsequent to 1900 within the meaning of the 25 CFR part 83 regulations, petitioner 69A does not meet criterion 83.7(c) prior to 1900." ECF No. 36-13, at 151 (Emphasis added). The only other area where Defendants address "amalgamation" is in their 83.7(e) findings. *See id*., at 163, 167, 176-78. Compounding this error, Defendants applied the descent analysis to the post 1900 timeframe in their political influence evaluation: "For the period from 1900 to 1961, the evidence in the record does not demonstrate that any Hassanamisco 'tribal entity' that **included the majority of the current petitioner's ancestors** existed in any definable sense." ECF No. 36-13, at 152 (Emphasis added).

Defendants never articulated why Plaintiff's activity from the 1920s onward failed to meet the combination (Defendants call it "amalgamation") standard of § 83.7(e). Defendants' brief mention of the combination theory concludes, "[t]he petitioner has not provided any evidence that the two tribes amalgamated in 1861, or at any time thereafter." *See* ECF No. 36-13, at 176. This dismissive statement shrugs off the entire body of evidence Plaintiff provided from 1920 through the present discussing how Nipmuc individuals centered around the Hassanamisco reservation. As discussed *supra* in Section I, Part B, this statement also ignores Plaintiff's self-definition (tied to the Hassanamisco community in the 1920s), ignores the existence of other

bands of the Nipmuc Nation and ignores the factual admissions made by Defendants about the historical existence of the Nipmuc tribe. For these reasons, Defendants inappropriately infused and relied upon the descent analysis in the evaluation of criterion § 83.7(c).

CONCLUSION AND REQUEST FOR RELIEF

Defendants conducted a flawed analysis of the descent criterion and then used that reasoning to improperly support their identification, community and political influence analyses. For the foregoing reasons, the Nipmuc Nation respectfully requests that this Court deny Defendants' Motion for Summary Judgment.

DATED: October 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher P. Sullivan, hereby certify that on October 24, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants by first-class mail.

/s Christopher P. Sullivan
Christopher P. Sullivan