IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

The Nipmuc Nation,

Plaintiff,

v.

Secretary Sally 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-TSH

Federal Defendants' Reply Memorandum in Support of Federal Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment

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LIST OF EXHIBITS

Administrative Record Bates Number	Exhibit Number	Description
NA/FDD/V024/N000444	14	Letter to Mr. Vickers
SL/RRI/V101/D0009	15	Response of the Nipmuc Nation to Proposed Finding Against Federal Acknowledgment (October 1, 2001)

FEDERAL DEFENDANTS' REPLY BRIEF[1]

Plaintiff Nipmuc Nation ("Plaintiff") does not dispute the fundamental and dispositive conclusion that there simply is not evidence in the administrative record of a "Nipmuc Nation" that existed as a political community from historical times to the present. Because there was insufficient evidence to demonstrate one or more of the criteria for federal acknowledgment, the Department of the Interior ("Interior") properly denied this petitioner federal acknowledgment as an Indian tribe. 25 C.F.R. § 83.6(d), 83.10(m).

All of Plaintiff's arguments about the evidence considered by Interior are mere flyspecks or misstatements that do not overcome the substantial evidence supporting the Final Determination, and Plaintiff does not dispute that the agency decision is due considerable deference because it applies the Department's technical expertise.

Plaintiff's arguments that the Final Determination was not made in accord with required procedures are not persuasive. Interior strictly adhered to the factors identified in the regulations, considering each and the evidence relevant to it. And, while the Acting Assistant Secretary in January 2001 issued a press release announcing his preliminary finding, his draft was subject to review and was not adopted by the ultimate decision maker. *See* Def.'s Ex. 8. The official Proposed Finding was issued in September 2001. In accord with the regulations, a public comment period followed the Proposed Finding, and the Plaintiff replied to the comments. Thereafter, the Department considered the more complete evidentiary record and issued a Final Determination in 2004. Review by the Interior Board of

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[1] The scheduling order agreed to by the parties, ECF No 14, and entered by the Court, ECF No. 19, provided four total briefs in this case:

- First: Plaintiff's Motion for Summary Judgment;
- Second: Defendants' combined Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment;
- Third: Plaintiff's Reply Brief;
- Fourth, Defendants' Reply Brief.

ECF No. 19. Instead of filing a single Reply as contemplated by the scheduling order, Plaintiffs filed two separate briefs. ECF Nos. 46, 48. Defendants refer to those two briefs together as "Plaintiff's Reply Brief" as contemplated in ECF Nos. 14 and 19, and respond accordingly in Defendants' instant Reply brief.

Indian Appeals (IBIA) followed, and the Secretary declined to refer issues for reconsideration. The Final Determination became final agency action subject to judicial review in 2006. Interior followed all applicable regulatory procedures and Plaintiff's arguments about improper procedure are not persuasive.

Finally, Plaintiff's allegations of both Due Process Clause and Equal Protection Clause violations lack legal and factual development and are merely conclusory statements. There is no merit to these claims as Plaintiff participated in a full and fair administrative process, and the resulting Final Determination is supported by substantial evidence in the record. Summary judgment should be granted for the Defendants.

I. THE FINAL DETERMINATION WAS NOT ARBITRARY AND CAPRICIOUS.

Plaintiff has not met its burden of demonstrating that Interior's decision, that the Nipmuc Nation did not provide sufficient evidence to meet the criteria for federal acknowledgment, was arbitrary and capricious or otherwise not in accordance with federal law. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 112 F. Supp. 2d 742, 751 (N.D. Ind. 2000), *aff'd sub nom. Miami Nation of Indians of Indiana, Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001).

Interior considered the evidence regarding whether the Plaintiff was identified from 1900 to the present as an American Indian entity under criterion 83.7(a), existed as a distinct community from historical contact to the present under 83.7(b), exercised political authority over its members from historical contact to the present under 83.7(c), and whose members descend from the historical tribe under 83.7(e). *See* Exhibit M, ECF No. 36-13, Final Determination ("FD") at 1. Interior was correct to find that Plaintiff did not meet each of these four mandatory criteria. Therefore, Interior's ultimate conclusion—that the Nipmuc Nation was not eligible for federal acknowledgment—was not arbitrary and capricious. As each of these criteria is mandatory, remand is appropriate under the APA only if the Court finds that Interior erred on each of these four criteria.

A. Throughout the process Plaintiff Nipmuc Nation defined itself and Interior deferred to its definition.

Plaintiff repeats its argument that the Defendants "usurped" its right to define the tribe seeking federal acknowledgment, ECF No. 48 at 4, but cannot support this statement. The Administrative

Record shows that Defendants never imposed a definition on the Plaintiff, but rather accepted each of the Plaintiff's self-definitions and analyzed them fairly to see if any met the regulatory criteria.

The clearest way to show that the Department evaluated the Nipmuc Nation as it defined itself is to refer to its own words. Its response to the Proposed Findings the Nipmuc Nation defined itself as follows:

> The original petition was filed in 1980 on behalf of the Nipmuc Tribal Council, Hassanamisco Reservation. It is this Hassanamisco tribal entity, now represented by the Nipmuc Nation, which has been identified on a substantially continuous basis since 1900. The present membership of this entity consists of tribal members "who can demonstrate that their family members and ancestors participated in the political and social community of the historic Nipmuc tribe on a substantially continuous basis." The "historic Nipmuc tribe" is interpreted as meaning "those individuals and families of Nipmuc and other Indian ancestry who were part of the Hassanamisco tribal community by the 1920's."

Def.'s Ex. 15 at 9.[2] This makes clear that the Plaintiff identified itself as the continuation of a "Hassanamisco tribal entity" whose ancestors "participated in" "the Hassanamisco tribal community by the 1920's." *Id.* Interior did not create this definition; rather, it was supplied by the Plaintiff. Plaintiff does not anywhere in its brief show that Interior failed to apply this definition offered by the Plaintiff.

Instead, Plaintiff argues that it actually "sought acknowledgment for the Nipmuc Nation, but Defendants constricted the petition to just the Hassanamisco band and analyzed the evidence with that narrowed focus." ECF No. 48 at 4. The self-definition in the block quote above belies this argument. Further, in the administrative process, Plaintiff focused its evidence on the Hassanamisco reservation and its proprietary families, a much narrower focus than its argument. FD at 11-12; *see, e.g.*, Def.'s Ex. 15. It is not surprising then that Interior looked to the history of the Hassanamisco and evidence provided to determine if the petitioner Nipmuc Nation (a "Hassanamisco tribal entity") met the criteria identified in the regulations. Of note, the Department did not find the existence of a "Hassanamisco tribal community by the 1920's." FD at 86-87.

[2] This was not the only definition that Plaintiff provided but is its definition at the time of the Final Determination. FD at 36-37.

But even though the evidence and argument submitted concerned the Hassanamisco proprietary families and reservation, there is simply no evidence that Interior excluded or did not consider evidence about a more broadly defined "Nipmuc Nation." To the contrary, throughout the Final Determination, Interior analyzed the totality of evidence—including evidence not related to Hassanamisco—to see if under any permutation of social and political organization and membership the Nipmuc Nation could meet the regulatory criteria.[3] FD at 34, 41-44, 85-89, and 151-154.

The one example Plaintiff provides of how an alleged "limited definition" caused Interior's analysis to be arbitrary and capricious concerns "Nipmuc communities outside Hassanamisco, such as Wabaquasset and off-reservation Nipmuc" which Interior allegedly "disregarded." ECF No. 48 at 4. The Administrative Record shows, however, that Interior did not disregard evidence of "off-reservation" individuals; rather it considered the limited evidence of contact after the 1730s between the "off-reservation" individuals and Hassanamisco or Dudley/Webster Indians and found that it was insufficient to demonstrate a larger "Nipmuc Nation." *See, e.g.*, FD at 42, 54 (discussing limited interaction among "off-reservation" Nipmuc families in South Central Massachusetts, Northeastern Connecticut, and Northwestern Rhode Island in the 1700s and early 1800s with either Hassanamisco or Dudley/Webster, and limited interactions in the first half of the 20th century in the context of pan-Indian events); 64 (discussing Jaha family, Dudley/Webster descendants).

In sum—and as will be explained when relevant to the individual criteria discussed in turn below—there is no evidence the Interior improperly defined the Plaintiff, or, based on a flawed definition, ignored any evidence presented by the Plaintiff. Regardless of which definition was analyzed, there simply is not evidence in the record to support the conclusion that there was a "Nipmuc Nation" that continuously existed as an Indian tribe. The evidence in the record was insufficient to

[3] For instance, see evaluation of evidence under criterion 83.7(b), as to whether the evidence was sufficient to demonstrate the existence of a community of either (1) the historical Hassanamisco Band; (2) a joint entity comprising descendants of the historical Hassanamisco Band, descendants of the historical Dudley/Webster Nipmuc Indians, and descendants of some off-reservation Nipmuc families; or (3) all persons whom the petitioner considered to be of Nipmuc heritage. FD at 41. Interior looked not only to Plaintiff's definition but also examined alternate paths by which Plaintiff could possibly have met the criteria and should not be punished for going above and beyond in this way.

demonstrate that the Plaintiff, however defined, was identified as an American Indian entity since 1900 under criterion (a); continuously existed as a distinct community under criterion (b); or exercised political authority over its members from historical times to the present under criterion (c). Nor is there evidence that the petitioner's members descend from a historical Nipmuc Indian tribe under criterion (e). For each of these independent reasons the Plaintiff was properly denied acknowledgment as an Indian tribe.

B. The Plaintiff was not externally identified as an "Indian entity" on a substantially continuous basis since 1900.

The first factor that Plaintiff failed to meet is the requirement that it has been identified by external sources as an American Indian entity on a substantially continuous basis since 1900. 25 C.F.R. § 83.7(a); *See* Procedures for Establishing an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280, 9286 (Feb. 25, 1994). To satisfy the criterion, external identification must be of the *petitioner*; they must be of an *entity*; the entity must be described as *American Indian,* and the identifications must be on a substantially continuous basis. *Id; see* ECF No 36-34 at 33.

Plaintiff's assertion that there was an entity made up of multiple Nipmuc bands, including the Hassanamisco, Dudley/Webster, and others, is just that—an assertion. FD at 41; PF at 34. There is no evidence in the record that this purported Nipmuc Nation entity (by that or any other name) existed and was identified as an Indian entity throughout the relevant time period (1900 – present). Plaintiff does not cite to any such evidence in the record that Interior overlooked or misinterpreted. Nor is there evidence of a broader entity consisting of "individuals and families of Nipmuc and other Indian ancestry who were part of the Hassanamisco tribal community" ever being identified on a substantially continuous basis in the historical record (1620-present) as an Indian entity. FD at 34-40. Because such an entity did not exist in 1900, if it exists today, it can meet criterion (a) only if its component parts separately meet the criterion before becoming this larger entity. Such evidence is not in the record. 25 C.F.R. § 83.7(a); *see* 59 Fed. Reg. at 9286; *see, e.g.*, Cowlitz Final Decision, 67 Fed. Reg. 607 608 (Jan. 4, 2002) (noting identifications of both Cowlitz bands).

Moreover, even assuming the historical record identified a Nipmuc Indian entity on a substantially continuous basis since 1900, the petitioner must show that it is that entity. This issue has been addressed in other acknowledgment decisions. For instance, if a petitioner shows in the historical record that an entity called the Snohomish Tribe was identified as Indian, the petitioner must also show that *it* is the Snohomish,[4] or an entity that evolved from that Snohomish historic tribe.[5] Plaintiff argues that this requirement is an "extra-regulatory burden," ECF No. 48 at 8-9 it is logical and consistent with the regulations to require both that an Indian entity was historically identified *and* that the current petitioner be that entity. *See* 69 Fed. Reg. 35,668, 35,671; ECF No. 36-34 at 38. This is not "extra-regulatory," but a burden all petitioners must meet to demonstrate continuous existence as an Indian tribe.

Here, Interior found that there were external identifications of the Cisco family's property as a "Hassanamisco reservation" and of families associated with it from 1900 to 1950. FD at 34-40; 12. But, that is not the same as finding that there was external identification of a broader "Hassanamisco tribal community" that encompassed individuals and families of Nipmuc or other Indian ancestry. Nor is it the same as finding that the petitioner is the Indian entity that was identified. Final Determination at 40-41. But here, only two percent of the petitioner's membership (which it provided to Interior and Interior did not select for them) descends from individuals from this one branch of the Cisco family that

[4] As to the Snohomish Indian Tribe petitioner, Interior did not accept identifications of an entity that did not include petitioner's ancestors:
The evidence shows that the petitioner and its ancestors were not part of the historical Snohomish tribe on the Tulalip reservation. Therefore, identifications of the Snohomish reservation tribe before 1950 do not qualify as identifications of an entity of the petitioning group's ancestors. Snohomish Final Decision, 68 Fed. Reg. 68,942 at 22 (Dec. 10, 2003).

[5] For instance, in the Muwekma decision, Interior addressed this issue and found: The Ohlone Indian Tribe, Inc., was the organization that cared for the Ohlone Indian Cemetery. . . . [T]he petitioner presents itself as having been an entity distinct from, and larger than, the Ohlone Indian Tribe, Inc. The evidence does not show that the petitioner's current organization evolved from the Ohlone Indian Tribe, Inc. That incorporated entity continues to exist as an entity separate from the petitioner. For these reasons, this Final Determination does not find an identification of the Ohlone Indian Tribe, Inc., to be an identification of the petitioner. ECF No. 36-34 at 38.

was central to the identification of a "Hassanamisco entity." FD at 41, 174-178; 69 Fed. Reg. at 35,668, 35,671. Nor was there other evidence showing continuity between what was identified as the Hassanamisco entity and the petitioner Nipmuc Nation.

Plaintiff argues with regard to 83.7(a) that "a petitioner's membership need only show that some of its ancestors were externally identified as Indian." ECF No. 46 at 12. This is incorrect; in fact, Interior's guidance and prior decisions provide that "identification of individuals as Indians is not sufficient to meet the criterion, which requires the identification of an Indian entity." ECF No. 36-34 at 33. The Ramapough decision cited by Plaintiff is consistent with this principle. In that case, Interior found that "the existence of a distinct *tri-racial entity* which is generally believed to have included an Indian component . . . shall be regarded as . . . identification of the existence of an American *Indian entity* under the regulations." ECF No. 47-2, Ex. B (emphasis added). As in their opening brief, Plaintiff again ignores the requirement that in order to meet criterion 83.7(a) of the regulations a petitioner must show that it—as an *entity*—was identified as American Indian.

Unlike Ramapough, Plaintiff's problem is that there is simply not evidence of external identifications of a Nipmuc Nation composed of multiple Nipmuc bands or their descendants *as an Indian entity* during the relevant time period. Identifications of individuals as Nipmuc Indians is not the same as identification of an *entity* composed of such individuals. *See Morton v. Mancari*, 417 U.S. 535, 553 (1974) (Indian tribe is a political entity—not a racial group). If, as Plaintiff argues, this criterion requires only that "some of its ancestors were identified as Indian" then a distinctly non-Indian entity with some Indian-descendant members could meet the criteria, which is contrary to the plain language and intent of the regulations. *See* 59 FR 9280-01.

Plaintiff also misreads the Match-e-be-nash-she-wish decision. The Match-e-be-nash-she-wish Band demonstrated criterion (a) even though it was identified by different names by external observers. For instance, the same Band when residing in Bradley was identified externally on censuses reports and other historical sources as "Bradley Indians" "Bradley Mission Indians" or "Bradley Pottawatomi," but were later known as the "Gun Lake Band" or "Match-e-be-nash-she-wish Band." Final Determination Match-e-be-nash-she-wish Band, 63 Fed. Reg. 56,936 at 156 (Oct. 23, 1998). Regardless, it was the same Band or group that was being identified by external observers, and that Band was the petitioner.

Id. In contrast, here, Plaintiff does not present the case of one group or entity being identified by a variety of names over time. Rather the identifications of "Hassanamisco" and "Dudley/Webster" were to separate entities that for the majority of the historical record (the 1600s to 1900s) had little interaction with each other, cannot be said to be the same entity, and are not together today.[6] *Cf.* ECF No. 36-34 at 34-36.

Plaintiff argues in several places in their brief that they represent a pan-Nipmuc entity that encompasses the Hassanamisco, Dudley/Webster and other purported bands of Nipmuc Indians. This argument is inconsistent with the view of the Dudley/Webster Nipmuc Indians who insist they "will not be allied, associated, or affiliated with the Hassanamisco Band or any other group of Nipmuck Indians." FD at 3. But this claim is inconsistent with the historical record. There is no evidence of a broader entity of combined Nipmuc bands after the 1600s, except for some evidence post-1970 for a short period of time. Plaintiff does not dispute this fundamental problem with its attempt to be acknowledged as an Indian tribe. For purposes of criterion 83.7(a), the petitioner did not provide sufficient evidence that it was identified by external sources since 1900 on a substantially continuous basis and hence is not eligible for federal acknowledgment.

C. The Plaintiff failed to demonstrate a distinct community from historical times to the present.

Just as Plaintiff could not demonstrate that the "Nipmuc Nation" had been externally identified as an Indian entity since historical times, it cannot demonstrate it formed a distinct community that existed from historical contact to the present as required by criterion (b). 25 C.F.R. § 83.7(b).

Plaintiff did not provide sufficient evidence of significant rates of marriage, significant social relationships connecting individual members, or significant rates of informal social interaction existing broadly among the members of the group, factors that in combination are evidence of community. *See*

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[6] Interior came to the same conclusion in the Muwekma decision, finding: "The problem . . . is not that the petitioner has adopted this name recently . . . The Proposed Finding did not make the use of the name 'Muwekma,' or 'Verona Band,' a requirement for an acceptable historical identification. Acknowledgment precedent is clear on the point that historical identifications of the petitioning group do not have to use the petitioner's current or preferred name. They do, however, have to be identifications of the petitioning group or a predecessor entity." ECF No. 36-34 at 36.

25 C.F.R. § 83.7(b)(1), FD at 48-49, 54, 60, 77. Nor did Plaintiff demonstrate that at least half of the members resided in a geographic concentration within an area exclusively or almost exclusively composed of members of the group, or that more than half of the members maintained distinct cultural patterns, such as language or kinship organization, evidence that demonstrates community. *See* 25 C.F.R. § 83.7(b)(2); FD 41-85.

Plaintiff does not dispute this lack of evidence of a continuously existing "Nipmuc Nation" community. Rather, Plaintiff argues that Interior improperly conflated the community and descent criteria, ECF No. 48 at 6. We disagree. When evaluating if a petitioner meets criterion (b), Interior evaluates whether ancestors of current members formed a community. If the current members do not descend from the individuals who were part of a community in earlier times, then the petitioner did not evolve from or is a continuation of that community. In this sense of continuity, genealogy is part of the evaluation of (b).[7] Interior looked to the factors identified in the regulation, discussed above, to see if the historical record evinced a community that intermarried, interacted socially, resided in the same geographic area, *and* that this community was the petitioner. FD 41-85. Criterion (b) necessarily entails genealogy for purposes of defining the composition of the entity and investigating patterns of marriage, kinship and social interaction over generations, to determine that it is a continuation of that same group. *See* 59 Fed. Reg. 9280; ECF No. 36-34 at 98-102. Interior did not improperly conflate criteria (b) and (e). Substantial evidence supports the decision that petitioner did not demonstrate distinct community from historical times to the present.

[7]Plaintiff's argument that it was an error to look to analysis concerning genealogy and descent to see if Plaintiff was the same entity as, or a successor entity to, a Hassanamisco entity is misplaced. The factors are not totally independent because they all concern the same purported tribe seeking recognition. Thus it is appropriate to refer in analysis of one factor to related analysis of another factor.

D. The Plaintiff failed to demonstrate political influence or authority from historical times to the present.

Just as Plaintiff could not demonstrate that it comprised a distinct community, Plaintiff was also not able to demonstrate that it maintained political influence or authority over its members as an autonomous entity from historical times to the present. *See* 59 Fed. Reg. at 9280

Again Plaintiff does not dispute Interior's conclusion directly. Instead, Plaintiff asserts that Interior used "factors and standards not made public" in the Final Determination. ECF No. 48 at 9. The Final Determination, however, delineates in over 200 pages the information and analysis relied on. As to criterion (c), Plaintiff itself cites to pages 88-154 in the Final Determination.[8] ECF No. 48 at 9. Plaintiff's claim lacks merit.

Plaintiff challenges the weight Interior gave to oral evidence because Interior allegedly "require[ed] . . . contemporary documentation that supported the oral evidence." *Id.* at 10. Interior did not "require" submission of corroborating evidence to support oral testimony evidence; but, Interior correctly gave more weight to oral interviews when corroborated with contemporary documentation. As stated at the technical assistance meeting:

> When people talk about what they have heard – what their grandparents told them, for example – this evidence is not as strong as personal, first-hand accounts of actual experiences. But, you can use such stories about long-past events as guideposts to finding written documentation.

ECF No. 36-5 at 23.[9] Moreover, Interior's precedent guidelines—which Plaintiff had access to and cited elsewhere in its arguments—are clear that oral evidence is stronger with corroborating evidence to

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[8] Plaintiff undercuts its own argument with this citation, as a review of this portion reveals it in fact directly lays out the specific factors relevant to that criterion, and Interior's conclusion logically follows from this analysis of the identified factors.

[9] Similarly, the Final Determination in MOWA , 62 Fed. Reg. 67,398 (December 24, 1997), provides at 5:

> Much of the evidence was oral history and unreliable when tested. Most of the sources were far removed and thus had no direct knowledge of the events as they occurred in the late 1700's and early 1800's. The taped interviews of the 1980's, for example, revealed that the memories of those interviewed were vague, and that specific names and relationships were unknown. Most of the information was found to be unsubstantiated by primary documentation.

supplement it. *See* ECF No. 36-34 at 81, 99, 118, 157, 188, 190. Thus, Plaintiff was aware that oral testimony should be buttressed with other documentation, which had they allege, "could have been submitted." ECF No 48 at 10.[10]

Giving more weight to the limited oral evidence under criterion (c) would not change the overall picture. This picture does not show that a unified "Nipmuc Nation" entity existed at the time reported in the oral evidence, or that it existed at all. As it did not exist, there was no community within which to exercise political authority. *See, e.g.*, ECF No. 36-34 at 167 ("There is no evidence of an ancestral UHN [petitioner] community, Indian or non-Indian, before 1830. . . . Without a community, there is no entity in which political influence may be exercised."); ECF No. 47-2 at 16. The Department's decision on criterion (c) is not arbitrary or capricious.

E. The Plaintiff failed to demonstrate descent from a historic tribe.

In order to meet this criterion, Plaintiff must identify a historical tribe (or tribes that combined), and show its members descend from this tribe (or tribes). *See* ECF No. 34-36 at 248. Plaintiff defined the historical tribe that its current membership traces its descent to as "those individuals and families of Nipmuc and other Indian ancestry who were part of the Hassanamisco tribal community by the 1920's" Def.'s Ex. 15 at 9. However, not only was there a lack of evidence of such a community but also, "historical" must date to first sustained contact. 25 C.F.R. § 83.1. For this basic reason the petitioner cannot demonstrate descent from this "historical tribe." But in its analysis, Interior did not stop with the petitioner's definition, but also analyzed whether its members descended from a *different* historical tribe, such as the Hassanamisco or Dudley/Webster, separately or together, as both were identified on rolls in the 1800s as bands or tribes.[11] But this analysis also failed to show that Plaintiff met criterion (e).

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[10] Petitioner had the opportunity to submit such evidence before the IBIA but did not.

[11] Interior's decision to acknowledge the Mashpee Wampanoag petitioner relied principally on the 1861 Earle Report and earlier documents for calculating descent from the historical Mashpee Indian tribe. Proposed Finding for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Incorporated of Massachusetts, 71 Fed. Reg. 17488 at 132-133 (Apr. 6, 2006); Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 at 30-35 (Feb. 22, 2007).

Plaintiff's argument that "all Plaintiff's members who could prove descent from ancestors identified as Nipmuc…should have been included in the descent count," misses the mark. ECF No. 46 at 5. First, Plaintiff's members being referred to (descendants of Mary (Curliss) Vickers) did not document Nipmuc ancestry. Second, just having Nipmuc ancestry is not evidence that an individual descended from the petitioner's historic *tribe*. *See Morton*, 417 U.S. at 553 n.24 (An Indian tribe is a political, not a racial, entity.); *see* ECF No. 36-34 at 234 (In the Houma Proposed Finding, although 84 percent of the petitioner's members had Indian ancestry, it failed criterion (e) because "this ancestry could not be reliably identified as descending from a specific historical tribe, nor from historical tribes which combined.. . . ."); Steilacoom Final Determination 73 Fed. Reg. 14,834 (Mar. 19, 2008) (Although 90% were documented Indians, it failed criterion (e) because only 0.5 percent on its 1995 membership list documented descent from persons described in 19th and early 20th century documents as Steilacoom Indians.); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001) (descent "says nothing about whether [the petitioner] . . . has continued to exercise that tribe's sovereign authority up to the present day.").[12]

Further, this argument fails because Plaintiff is in effect seeking to have it both ways—for criteria (a), (b), and (c) it defines the "historical tribe" as a small group (Hassanamisco tribal community), but for purposes of criterion (e), defines the "historical tribe" as a larger group, apparently all individuals who descend from the Nipmuc Indians at first European contact. *See* ECF No. 46 at 5. The regulations do not allow such inconsistent definitions. Moreover, had Plaintiff defined their historical tribe as the Nipmuc Indians at first European contact in the 1600s for purposes of criterion (e) they would then not be able to meet the requirements of (a), (b), and (c) since both Interior and Plaintiff agree that this over-arching entity ceased to exist shortly after contact and thus did not exist on a "substantially continuous basis." FD at 167.

[12] Plaintiff again argues that it was somehow inappropriate to consider evidence from criteria (a), (b), and (c) in considering whether Plaintiff's members descended from a historical tribe. ECF No. 46 at 9. Plaintiff is correct that the factors are separate and a petitioner can satisfy (e) even if it does not satisfy (a), (b), or (c) as, for example, the Dudley/Webster petitioner did. *See* ECF No. 46 at 9. But this does not mean each factor must be considered in a vacuum and nothing in the regulations suggests this counter-intuitive result.

Criterion (e) allows a petitioner to show descent from distinct tribes if the petitioner can show they amalgamated or combined. *See* ECF No. 36-34 at 260. Plaintiff argues that Interior should have "defer[red] to Plaintiff's conclusion in its definition that [a] 'combined' entity existed…" ECF No. 46 at 7. But Interior cannot simply accept Plaintiff's assertions—it must examine the evidence to see if in fact the two tribes did combine into one. Here, there was no evidence that the Hassanamisco and Dudley/Webster bands (or any other bands of Nipmuc descendants) combined into one entity. FD at 51. At best, there is some indication of occasional connections between descendants of the Hassanamsico and Dudley/Webster bands, but no evidence of a combination or political unity between them. *Id.* id at 167; *see, e.g.*, ECF No. 36-34 at 170 (Petitioner Cowlitz failed to show historical tribe composed of two tribes although "[t]here is evidence that by 1860, some of the Upper Cowlitz had intermarried with the Lower Cowlitz. There is no evidence, however, that the two bands were united under a single political leadership.").

Finally, Plaintiff repeats the argument that 177 of its members who descend from Mary (Curliss) Vickers should be combined with Hassanamisco and Dudley/Webster descendants for purposes of showing descent from a historical Indian tribe. ECF No. 46 at 11. The primary issue, again, is that there was no historical tribe consisting of the Hassanamisco, Dudley/Webster and "miscellaneous" Indians such as Curliss/Vickers. Therefore, even if there were evidence confirming Mary (Curliss) Vickers' descent from Dudley/Webster Indians, it is essentially irrelevant. To the extent that Interior sought to find if Plaintiff's members descended from either the Hassanamisco or Dudley/Webster tribes, Plaintiff never responded with new evidence to show that Curliss/Vickers was a Dudley/Webster descendant to overcome the reliable evidence that identified her as "Miscellaneous Indian" in 1861 and subsequently as Narragansett.

Interior relied on a thorough historical report based on first-hand knowledge and research that concluded that by 1861 that family line was not considered Nipmuc.[13] Petitioner submitted no evidence

[13] This evidence includes the 1861 Earle Report that identified Mary (Curliss) Vickers as"Miscellaneous Indian," a term Earle applied to Indian descendants who were not attached to any Massachusetts tribe—either because the separation had been so many generations distant in the past that no one could confirm the claim, or because the tribe was not a Massachusetts tribe. Interior

otherwise. Therefore, Interior's Final Determination that there was insufficient evidence to include Mary (Curliss) Vickers as a Dudley/Webster or other Nipmuc tribe descendant was reasonable.

Finally, that in the technical assistance meeting, an Interior researcher identified Mary (Curliss) Vickers' maternal aunt as a descendant of a Nipmuc Indian, *see* ECF No. 35 at 25, is not itself evidence that the Final Determination is arbitrary and capricious. *See, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007).

The discussion at the meeting parallels that in the Final Determination on the Steilacoom petitioner, where persons who did not descend from persons described in 19th and early 20th century documents as Steilacoom Indians, did not descend from the historical tribe. Steilacoom Final Determination 73 Fed. Reg. 14,834-35. Further, the Final Determination is based on a fuller record than available at the technical assistance meeting, including additional submissions by the petitioner and interested parties during the comment period, and after the Interior researchers had an opportunity to consider the more complete evidence in the record. This record included evidence that Mary and her grandmother were Narragansett. This Court should defer to Interior's reasonable conclusion in the Final Determination that Mary (Curliss) Vickers had not been demonstrated to be Nipmuc. *See United Tribe of Shawnee Indians*, 253 F.3d at 551; *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138–43 (D.C. Cir. 1987).

II. THE FINAL DETERMINATION WAS PROCEDURALLY PROPER.

Plaintiff argues that "improper procedure" is a reason to find the Final Determination to be arbitrary and capricious. ECF No. 48 at 2-3. Under the APA courts can set aside agency actions taken "without observance of procedure required by law," 5 U.S.C. § 706(2)(D). In undertaking this review courts seek "only to determine whether statutorily prescribed procedures have been followed." *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 116 (1st Cir. 2002) (internal quotation marks omitted).

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gave weight to the Earle Report because it was compiled through Earle's access to the guardianship records, interviews with the members of the tribes, and correspondence with town clerks. Based on that evidence, Earle was not able to confirm Mary (Curliss) Vickers' claim to Dudley/Webster through her grandmother Molly Pollock. FD at 177. Other evidence in the record includes Mary's children's Kansas Claims applications and a 1900 Senate report that identified Mary (and her grandmother) as Narragansett, not Nipmuc. *See* Def, Ex. 10 at 263.

In doing so, courts "must defer to the interpretation of a statute by the agency charged with administering it." *Hall v. Evans*, No. CIV.A. 00-338L, 2001 WL 474187, at *9 (D.R.I. Apr. 13, 2001); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (courts should provide "substantial deference to an agency's interpretation of its own regulations").

Here, Plaintiff argues that Interior failed to follow statutorily prescribed procedures concerning technical assistance and by not publishing notice of a draft Proposed Finding in the Federal Register. Notably, the administrative record demonstrates Interior's provision of technical assistance, formal and informal, to Plaintiff. Further, neither action is a final agency action subject to review under the APA. *See Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, Bureau of Indian Affairs*, 99 F. App'x 313, 314 (2d Cir. 2004).

Regardless, as to both allegations, Interior implemented its regulations in a reasonable way. Interior's reasonable interpretations of its regulations are entitled to deference. Interior took no action that was inconsistent with the statutorily prescribed procedures under any reasonable reading of the regulations. Plaintiff's argument has no merit.

A. A draft Proposed Finding never published in the Federal Register is unofficial and even if publically released does not bind the Agency.

Plaintiff argues that notice of the contents of a draft Proposed Finding in a press release required publication of this draft in the Federal Register, and failure to so publish is in contravention of regulation. ECF No. 48 at 14. Not so. While it was inappropriate to announce such a draft document, see Def's Ex. 8, failure to publish it in the Federal Register was not a violation of the applicable regulations. The relevant regulation, in full, states:

> Within one year after notifying the petitioner that active consideration of the documented petition has begun, the Assistant Secretary shall publish proposed findings in the Federal Register.

25 C.F.R. § 83.10(h); 59 FR 9280. These regulations provide for a single condition—passing of a year, subject to discretionary extensions, *id.* or suspension, § 83.10(g),—that triggers a requirement to publish proposed findings in the Federal Register. Nowhere do the regulations say what specific documents prepared by Interior constitute "the" Proposed Finding, notice of which must be published in the Federal

Register, which commences the comment periods on the argument and evidence relied upon in the Proposed Finding.

Plaintiff argues that "What is clear is that a proposed finding first exists and then is published. . ." and "the Assistant Secretary must publish in the Federal Register that document titled 'proposed finding.'" In other words, Plaintiff's reading of the regulations would seem to require that any document that exists and is titled "Proposed Finding" must be published in the Federal Register. No such requirement exists in the regulations. Although the Acting Assistant Secretary commenced drafting his draft proposed findings on the two Nipmuc petitioners on January 18, his draft remained in the building at the time the Administration changed. It was subject to review by – and was not adopted by – the new Administration. *See* Def.'s Ex. 8, Def's Ex. 14.

Interior's interpretation of the regulation—that only the document that is actually follows internal procedures, is reviewed for legal sufficiency, signed by the decision maker and then published in the Federal Register becomes the agency's Proposed Finding—is reasonable and deserves deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal citations omitted). Plaintiff has not demonstrated that the Proposed Finding was issued without observance of procedure required by law.[14]

B. That advice at the technical assistance meeting is alleged to be incomplete does not render the Final Determination or the process arbitrary and capricious.

Plaintiff argues that "the technical assistance meeting provided no assistance whatsoever" ECF No. 48 at 15, and presumably was procedurally improper for this reason. However, a review of the transcript of this meeting reveals that the Interior officials answered the questions asked and provided assistance on this complex historical and factual situation. Further, Plaintiff's suggestion that statements

[14] Plaintiff received the Acting Assistant Secretary's draft and was able to comment on it during the comment period on the actual Proposed Finding. The Acting Assistant Secretary's draft noted, but did not explain why, it did not follow precedent on criteria (a), (b), (c) and (e), when it found that the "Hassanamisco band," "but not the petitioner as a whole," met these criteria. ECF No. 36-21, Ex. U, at 3-5; *see also* Def's Ex. 14.

made in such a meeting are binding or that any deviation from them is a violation of regulations is without basis.

The relevant regulation states in full:

> (2) In addition, the Assistant Secretary shall, if requested by the petitioner or any interested party, hold a formal meeting for the purpose of inquiring into the reasoning, analyses, and factual bases for the proposed finding. The proceedings of this meeting shall be on the record. The meeting record shall be available to any participating party and become part of the record considered by the Assistant Secretary in reaching a final determination.

25 C.F.R. § 83.10(j); 59 FR 9280. The regulations also provide for informal technical assistance. 25 C.F.R. § 83.10(j)(1). But nothing in this regulation requires what Plaintiff is seeking here—namely that each statement at the meeting be binding Interior, irrespective of the evidence submitted during the comment period and the evaluation for the Final Determination. This interpretation would, in fact be impossible because the Interior personnel that appear at such meetings do not have the authority to issue a final decision for Interior, and cannot ignore the argument and evidence to be submitted during the comment period. These officials can only do their best to allow Plaintiff to inquire into "the reasoning, analyses, and factual bases for the proposed finding." That is what occurred here, and it was procedurally proper.

III. PLAINTIFF'S EQUAL PROTECTION AND DUE PROCESS CLAUSE CLAIMS HAVE NO MERIT AND ARE WAIVED.

Plaintiff asserts that they have not waived their due process and equal protection claims. ECF No. 48 at 2 n.1. However, their opening brief is devoid of any argument or factual analysis that would advance these claims, and their subsequent briefs do little more, thus these "mere allegations" are waived.[15] *See, e.g.*, *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough

[15] Plaintiff's initial brief mentions the words "due process" a total of three times, two of which are in the introduction and once is summarizing a case from the Western District of Washington with no analysis applying it to the instant case. *See* ECF No. 35 at 7, 40. The words "equal protection" appear on four pages but only conclusory in closing or opening paragraphs devoid of any factual or legal analysis. *Id.* at 7, 46, 50, 54.

merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. As we recently said in a closely analogous context: 'Judges are not expected to be mind readers. Consequently, a litigant has an obligation 'to spell out its arguments squarely and distinctly' or forever hold its peace.'") (citing *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988)); *Anderson v. Babbitt*, 230 F.3d 1158, 1163 (9th Cir. 2000) ("The mere allegation of a due process violation 'is not sufficient to raise a 'colorable' constitutional claim . . . .'" as "the plaintiff must allege 'facts sufficient to state a violation of substantive or procedural due process.'" (quoting *Hoye v. Sullivan*, 985 F.2d 990, 992 (9th Cir. 1992))).[16]

Even assuming Plaintiffs had not waived these arguments; they have no merit. Plaintiff has failed to show that any actions by Defendants deprived them of a constitutionally protected liberty or property interest, or that Interior's procedures fail to provide adequate process to review any decisions that allegedly caused a deprivation. Nor has Plaintiff shown that Interior's decision violates equal protection.

A. Plaintiff was provided with more than sufficient due process.

A claim for violation of procedural due process has two components. First, plaintiffs must show that a protected interest was taken. Second, they must show that the procedural safeguards surrounding the deprivation were inadequate. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 568–69 (1972). If government action does not deprive an individual of such an interest, the due process guarantee does not require any hearing or process whatsoever—even if the challenged action adversely affects that individual in other ways. *See e.g., O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980). Thus, "[o]nly after finding the deprivation of a protected interest" by the state may the Court

[16] *See also Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016) ("passing reference to his equal protection claim . . . is insufficient to prevent . . . waiver.") (citing *Jin Choi v. Univ. of Texas Health Sci. Ctr. at San Antonio*, 633 F. App'x 214, 215 n. 1 (5th Cir. 2015)); *Fox v. Town of Framingham*, No. 14-CV-10337-LTS, 2016 WL 4771057, at *8 (D. Mass. Sept. 13, 2016).

proceed to consider plaintiff's allegations regarding procedural defects in the application of the federal acknowledgment regulations to its petition. *See also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

The Part 83 regulations have been upheld against challenges of due process. The 1978 regulations, which did not provide for either a formal meeting on the record or review by the IBIA, were upheld in *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1173–77 (N.D. Ind. 1995). There, the *Miami* petitioner argued that the 1978 regulations did not afford groups procedural or substantive due process, and violated equal protection by establishing standards that impact "non-federally recognized tribes' freedom of association." *Id.* The court denied these claims and noted further that the Miami had no protected property interest because they were not receiving federal benefits. They were not entitled to an administrative hearing. *Id.* at 1175 n.4.

Here, as described in Defendant's opening brief the regulations as revised in 1994, provide Plaintiff had the opportunity to challenge Interior's decision in the IBIA. *See, e.g., Chuchua v. Pac. Reg'l Dir., Bureau of Indian Affairs*, 42 IBIA 1, 4, 2005 WL 3506563 (2005) ("An appellant's due process rights are protected by the right to appeal a BIA decision to [the IBIA]."); *Mobil Oil Corp. v. Albuquerque Area Dir., Bureau of Indian Affairs*, 18 IBIA 315, 332–33, 1990 WL 321061 (1990) (holding that the appellant's due process rights were adequately protected given the administrative review and the fact that appellant had fully participated in the IBIA proceedings). In short, by providing IBIA appeal procedures; and thus, the opportunity to be heard, Interior complied with any applicable requirements of procedural due process.

B. The Final Determination does not violate the equal protection clause.

The due process clause of the Fifth Amendment guarantees equal protection. U.S. Const. amend. V. To prevail on an equal protection claim, the plaintiff must show that the Government treated it differently from a similarly situated party and that the Government's explanation for the differing

treatment does not satisfy the relevant level of scrutiny. *See Barrington Cove Ltd. P'ship v. Rhode Island Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 7 (1st Cir. 2001); *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215–16 (D.C. Cir. 2013).

Here, the relevant level of scrutiny is rational basis because Interior's action does not target a suspect class or burden a fundamental right. *Tucker v. Branker*, 142 F.3d 1294, 1300 (D.C. Cir. 1998) ("A . . . classification that does not burden either a fundamental right or a suspect class must be reviewed under the rational basis test."); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("[T]he recognition of Indian tribes remains a political, rather than racial determination. Recognition of political entities, unlike classifications made on the basis of race or national origin[,] are not subject to heightened scrutiny. Consequently, we apply rational basis review . . . ."); *Morton*, 417 U.S. at 553.

Rational basis review in an APA case has been found to be "a similar analysis" as is made under the arbitrary and capricious standard under the APA. *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (quotation marks and brackets omitted). Agency action can be arbitrary and capricious if "the agency offers insufficient reasons for treating similar situations differently." *Id; Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215–16 (D.C. Cir. 2013).

As argued above, Plaintiff has not articulated to what group it is "similarly situated," nor how the Final Determination was arbitrary and capricious or fails to meet rational basis review. The reasoning and analysis in the Final Determination is consistent with acknowledgment precedent. The Final Determination passes rational basis scrutiny and is not a violation of Plaintiff's equal protection rights.

IV. CONCLUSION

In the Final Determination, the Department of the Interior found the Plaintiff Nipmuc Nation does not meet four of the mandatory criteria identified in the regulations. Therefore, Interior determined petitioner does not qualify for acknowledgment as an Indian tribe. The record fully supports this decision. The decision was neither arbitrary nor capricious or otherwise not in accordance with law and summary judgment should be granted in Defendant's favor.

Respectfully submitted on,

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CERTIFICATE OF SERVICE

I, Reuben S. Schifman, hereby certify that on December 16, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and copies will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Reuben Schifman___
REUBEN S. SCHIFMAN

CERTIFICATE OF CONFERENCE PER LOCAL RULE 7.1(A)(2)

Pursuant to Local Rule 7.1(A)(2), I have conferred with Plaintiff's counsel and was not able to resolve the issues presented in this brief.

/s/ Reuben Schifman___
REUBEN S. SCHIFMAN