INTERIOR BOARD OF INDIAN APPEALS

In Re Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana

57 IBIA 101 (06/12/2013)

:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

IN RE FEDERAL ACKNOWLEDGMENT OF THE LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA	)	Order Affirming Decision and Referring Issues to the Secretary
	)	Docket No. IBIA 10-047
	)	June 12, 2013

In this proceeding before the Interior Board of Indian Appeals (Board), the Little Shell Tribe of Chippewa Indians of Montana, Petitioner #31 (Petitioner), seeks reconsideration of the Final Determination by the Acting Principal Deputy Assistant Secretary – Indian Affairs (Deputy Assistant Secretary) against acknowledgement of Petitioner as an Indian tribe within the meaning of Federal law.[1] Petitioner contends that it evolved from a group of mixed-blood, primarily French-Chippewa, hunters affiliated with the historical Pembina Band of Chippewa into a tribe composed of those descendants who settled in Montana and who were left out of tribes and reservations that included other mixed-blood individuals who have the same or similar ancestry, history, and culture as Petitioner's members.

The Final Determination concluded that Petitioner had failed to establish three of seven regulatory criteria for being acknowledged as a tribe under Federal law: (1) that it was identified on a substantially continuous basis since 1900 as an American Indian entity (criterion (a)); (2) that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present (criterion (b)); and (3) that Petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present (criterion (c)).

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[1] The Final Determination consists of a 237-page Summary Under the Criteria and Evidence for Final Determination Against Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, which was signed by the Deputy Assistant Secretary on October 27, 2009, exercising authority delegated to him by the Assistant Secretary – Indian Affairs. Notice of the Final Determination was published in the Federal Register on November 3, 2009. 74 Fed. Reg. 56861. The Board will refer to the Summary Under the Criteria and Evidence and the Federal Register notice interchangeably as the "Final Determination," but for citation purposes will use "FD" to cite to the Summary Under the Criteria and Evidence.

See 74 Fed. Reg. at 56863-65 (discussing criteria (a)–(c), 25 C.F.R. § 83.7(a)–(c)); *see also* 25 C.F.R. § 83.6(c), (d) (all seven criteria must be satisfied).

The acknowledgment regulations limit our jurisdiction in reviewing a final acknowledgment determination to four specific grounds for reconsideration. Petitioner alleges that all four grounds over which we have jurisdiction exist in this case, but we are not persuaded that Petitioner has met its burden to establish a basis for us to vacate the Final Determination and order reconsideration by the Assistant Secretary, and thus we affirm as required by the acknowledgment regulations.

Petitioner also asserts several grounds for reconsideration that are outside of our jurisdiction. As required by the regulations, we refer those alleged grounds for reconsideration to the Secretary of the Interior (Secretary).

Background

I. History

A large majority of Petitioner's current members have at least one ancestor who was identified in historical records as a descendant of the historical Pembina Band of Chippewa Indians (Pembina Band), a group of Chippewa Indians that became associated with a 19th century trading post on the Red River at Pembina, in what is now North Dakota.[2] 74 Fed. Reg. at 56865; FD at 22, 24; Technical Report for the Proposed Finding on the Little Shell Tribe of Chippewa Indians of Montana (PFTR) at 14. The residents of the settlement at Pembina apparently were predominantly Métis, and most apparently were hunters. PFTR at 16.[3] The Pembina Band included full-blood Chippewa Indians as well as some of their mixed-blood, i.e., Métis, relatives. FD at 22. Approximately 70 miles north of Pembina, near present-day Winnipeg, Manitoba, Canada, was a large Métis settlement along the Red River and one of its tributaries, the Assiniboine River, referred to as the Red River Settlement, which was divided into several parishes.

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[2] Pembina was in British territory until 1818, after which it was in American territory. PFTR at 14.

[3] In referring to individuals, the term "Métis" refers generally to children of non-Indian fathers (usually French-Canadian fur trappers or traders) and Indian mothers (in the present case, usually Cree or Chippewa), and their descendants. PFTR at 14. At a population level, the term Métis, as used in the Final Determination, usually refers to a people of a mixed French-Chippewa-Cree culture and language, distinct from both the European settlers and full-blood tribal Indians, although some individuals continued to associate with their full-blood tribal relatives. FD at 22-23.

Petitioner contends that it originated as a distinct band within the Pembina Band, consisting of mixed-blood individuals who were closely related by blood to full-blood members of the Band and who were part of a buffalo-hunting group within the Band composed of both mixed-bloods and their full-blood relatives. In order to define the "historical tribe," Petitioner identified a baseline list of mixed-bloods associated through treaty-related documents with the Pembina Band and individuals designated as "hunters" on the 1850 Pembina census, and then traced this baseline list back to 104 individuals identified as the earliest known ancestors (progenitors). *Id*. at 149-50; Sandra F. Kennedy & Anne Coyner, Petitioner's Response to Criterion B, C, E (Feb. 1, 2010) (Kennedy & Coyner), at 6-9, 14 (Request for Reconsideration, Ex. 2). The progenitors and their descendants constitute what Petitioner calls the "Little Shell Community Group" (LSCG), which apparently is used to identify members or potential members of the tribe. *Id*. at 8.[4]

The Final Determination found that in the 1840s and 1850s, most of the 104 progenitors or their children and grandchildren lived in the Métis settlements located at Pembina or in the St. Francis Parish of the Red River Settlement, with a small number living in the St. Boniface and St. Norbert Parishes. FD at 150. In the 1860s and 1870s, children and grandchildren of these progenitors continued to live in these settlements along the Red River, but they could also be found farther west in settlements in Saskatchewan, Alberta, and northern Montana. *Id*. at 151. The Final Determination found that these ancestors formed a minority in the Métis settlements in which they lived, *id*. at 150, and that Petitioner had not demonstrated that its "ancestors were a distinct community or communities within these Métis populations," *id*. at 74. By the 1880s, Petitioner's ancestors who had descended from the progenitors were located in various Métis settlements throughout the northern plains, including Manitoba, Saskatchewan, Alberta, North Dakota, and northern Montana. *Id*. at 151.

In the case of the Pembina Band, the Final Determination found that the evidence showed that Petitioner's ancestors "were only a portion of that group, which included a much larger mixed- and full-blood population," and that the "evidence did not show that these ancestors were a distinct community as part of the [Pembina Band] or as a separate community." *Id*. at 43. According to the Final Determination, "many of these ancestors migrated westward and lost their association with the [Pembina Band], while others remained in North Dakota and eventually became members of the federally recognized Turtle Mountain Band, a successor to the Pembina Band." *Id*.

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[4] The progenitors are not necessarily Pembina Chippewa, and include Indians from other tribal backgrounds, including Sioux, Assiniboine, and Cree. FD at 42. Thus, individuals who are included in the LSCG may or may not have Pembina Chippewa ancestry.

Petitioner's ancestors who migrated to Montana did so from various locations; by various routes; and due to a variety of social, economic, and political factors, during a 70-year period between the 1860s and 1930s, mostly between 1880 and 1910. *Id*. at 25, 29, 43. Petitioner suggests that some of its ancestors settled in Montana as early as the 1830s and 1840s. *See* Critical Documents (CD) Ex. 51 Interviews, 2007 KCook, NickVroohm46 (Vrooman Tr.), at 16-17. Those ancestors of Petitioner who migrated to Montana settled in and across two separate and expansive geographical regions. One region consisted of north-central Montana, including the Highline and Lewiston areas.[5] The other region consisted of the Front Range of the Rocky Mountains.

The Final Determination concluded that the evidence did not indicate that Petitioner's ancestors who migrated to Montana and elsewhere "moved together as a community or in a pattern that maintained any old community ties." FD at 75. According to the Final Determination, the evidence showed "that the migration was individualistic, gradual, and dispersed widely in a manner that did not maintain social cohesion," did not show that Petitioner's ancestors who settled in Montana "had previous social ties with each other and evolved, as communities, from predecessor communities," and "did not indicate that [P]etitioner's ancestors formed a distinct community or communities in the areas of Montana where they first settled." *Id*. at 76.

In 1882, the Turtle Mountain Reservation in north-central North Dakota (then the Territory of Dakota) was established for "the Turtle Mountain band of Chippewas and such other Indians of the Chippewa tribe as the Secretary of the Interior may see fit to settle thereon." 1 C. Kappler, Indian Affairs: Laws and Treaties 885 (1904) (Executive Order, Dec. 21, 1882).[6] The Turtle Mountain Band is recognized as having evolved from the Pembina Band, FD at 29, and included both mixed-blood and full-blood individuals as members. As noted earlier, some of Petitioner's ancestors enrolled in the Turtle Mountain Band.

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[5] The "Highline" describes an area along the railroad line across northern Montana. The "Lewistown" area is south of the Missouri River in central Montana. PFTR at 4; *see also* FD at 19 (area map of Montana). Both are in a large area of northeastern Montana referred to as the "Triangle."

[6] The Turtle Mountain Reservation is located approximately 100 miles west of Pembina, North Dakota. The 1882 reservation was drastically reduced in size by subsequent executive orders 2 years later. *See* Indian Affairs: Laws and Treaties at 885 (Executive Orders, March 29, 1884, and June 3, 1884); *Trenton Indian Service Area v. Great Plains Regional Director*, 54 IBIA 298, 299 (2012).

In 1916, a reservation was established in northern Montana for "Rocky Boy's Band of Chippewas" and for "such other homeless Indians in the State of Montana." Act of Sept. 7, 1916, 39 Stat. 739; *see* PFTR at 84. The Indians of the Rocky Boy's Reservation included people from Rocky Boy's Chippewa Band, and from Little Bear's band of Crees, which had fled Canada after an unsuccessful rebellion against Canadian policies toward the Métis. PFTR at 85; *see also* Nicholas C.P. Vrooman, The Little Shell Story (Feb. 1, 2010) (Vrooman) at 88 (Request for Reconsideration, Ex. 1). Some of Petitioner's ancestors apparently enrolled with Rocky Boy's Band.

Beginning in 1927, several organizations, which included some ancestors of Petitioner, were formed on behalf of "landless" Indians in Montana—primarily mixed-blood Indians who had not been incorporated into the Turtle Mountain or Rocky Boy's tribes, or into other Indian tribes,[7] and who had not been provided with a reservation or allotments. From the 1930s to the 1950s, there were two organizations, drawing support from two geographically separate areas of Montana, advocating on behalf of Montana's Chippewa-Cree population. FD at 95.[8] The Final Determination concluded that these organizations reflected evidence of political processes only within portions of Petitioner's ancestral families and only within parts of two geographical areas, and that most of Petitioner's ancestors were outside these processes. *Id*. at 96. From the 1930s to the 1950s, driven largely by the Great Depression, some of Petitioner's ancestors and current members moved to segregated Indian-Métis neighborhoods on the edges of towns. Subsequently, a large number of Petitioners' members began moving to urban centers, including Great Falls and Helena, Montana. 74 Fed. Reg. at 56864.

In 1992, approximately 19% of Petitioner's members were living in the Highline and Lewiston areas of Montana, 10% along the Front Range, 29% in urban areas (mostly

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[7] According to Petitioner, "[m]any Red River Pembina Plains-Ojibwa ancestral lines are today intermarried with the Salish, Kootenai, and Pen[d] d'Oreilles of Montana's Flathead Reservation." Vrooman at 47.

[8] One group, in 1939, began referring to itself as the "Little Shell Band." The adoption of the name appears to be related to Federal legislation that had been introduced to authorize Thomas Little Shell, an Indian leader living in North Dakota, to bring land claims against the United States. *See* PFTR at 7; *see also* Kennedy & Coyner at 104-05. Petitioner does not identify Thomas Little Shell as one of its historical leaders, and instead identifies with an earlier Chief Little Shell who in the 1890s objected to reducing the size of the Turtle Mountain Reservation and objected to striking numerous individuals from the Turtle Mountain roll (as purportedly "Canadian" Indians). The earlier Little Shell, born around 1830, died at Turtle Mountain in 1901, and apparently was the third Chief Little Shell. *See* PFTR at 4, 35 n.17, 72.

Great Falls), 12% elsewhere in Montana, and 30% out of state. *See* PFTR at 187 & Table 14.

II. Regulatory Criteria for Acknowledgment of a Group as an Indian Tribe

The Department of the Interior's (Department) acknowledgment regulations provide the administrative process by which an American Indian group may demonstrate that it is entitled as a matter of law to be Federally recognized as an Indian tribe, and thus entitled to a government-to-government relationship with the United States. 59 Fed. Reg. 9280 (Feb. 25, 1994); *see* 25 C.F.R. Part 83. Under those regulations, a group that petitions the Department to be acknowledged must satisfy seven criteria. 25 C.F.R. §§ 83.6(c), 83.7(a)–(g). Three of those criteria are relevant to Petitioner's request for reconsideration.

First, a petitioner must demonstrate that it "has been identified as an American Indian entity on a substantially continuous basis since 1900." *Id*. § 83.7(a) (criterion (a)). This criterion requires external identification of the petitioner as American Indian in character. *See* 59 Fed. Reg. at 9286. It must only be identified as an American Indian "entity"; the regulations do not require it to be identified as a "tribe."

Second, the regulations require that "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b) (criterion (b)). "Predominant" means at least half of the membership. FD at 10. "Community" is defined as

> any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from 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. Criterion (b) lists several types of evidence deemed relevant to the definition of "community." Among other types of evidence that may be used, distinct cultural patterns shared among a significant portion of the group may provide evidence to demonstrate that a petitioner meets the definition of "community." *See id*. § 83.7(b)(1).

Third, 25 C.F.R. § 83.7(c) (criterion (c)) requires that "[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present." "Political influence or authority" is defined as

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

Id. § 83.1. Demonstrating that the group meets the "community" criterion at more than a minimal level is also deemed relevant to showing the existence of political influence or authority. *Id*. § 83.7(c)(1)(iv).

A criterion is met if the evidence establishes "a reasonable likelihood of the validity of the facts relating to that criterion." *Id*. § 83.6(d). Conclusive proof is not required. *Id*. A petitioner must demonstrate the existence of community and political influence or authority "on a substantially continuous basis, but this demonstration does not require meeting these criteria at every point in time." *Id*. § 83.6(e). "Fluctuations in tribal activity during various years shall not in themselves be a cause for denial of acknowledgment under these criteria." *Id*. Departmental precedent also takes into account "patterns of migration and amalgamation." FD at 9.

III. Proposed Finding to Acknowledge Petitioner as an Indian Tribe

In 2000, then Assistant Secretary Gover signed a proposed finding to acknowledge Petitioner as an Indian tribe. In issuing the proposed finding, the Assistant Secretary noted that he was "depart[ing] from practice in previous acknowledgment decisions in certain respects, principally in giving different amounts of weight to various types of evidence than had been done in prior determinations." Summary Under the Criteria for the Proposed Finding for Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana (Proposed Finding) (July 14, 2000), at 6. While proposing a favorable determination for Petitioner, the Assistant Secretary also invited additional evidence and arguments from Petitioner and third parties, noting that supplemental evidence could reduce or eliminate the scope of the proposed departures from precedent. *Id*. at 7. Among the suggestions made to Petitioner in 2000 was that it "provide evidence to show if its current political system was a result of a past amalgamation of formerly separate social communities and their separate political organizations, or a political confederation of historically and currently separate social communities." FD at 11 n.14.

Petitioner responded to the proposed finding with various additional submissions and evidence. *See, e.g.*, CD Ex. 26, Pamela Bunte, Anne Coyner, Sandra F. Kennedy, and Nikole Lobb, Submission in Support of Proposed Finding, Criteria B & C: 19th Century (2005) (Bunte 19th C.); *id*., Pamela Bunte, Anne Coyner, Sandra F. Kennedy, and Nikole

Lobb, Submission in Support of Proposed Finding, Criteria B & C: 20th Century (2005). The Office of Federal Acknowledgment (OFA)[9] also received comments on the proposed finding from two third parties, to which Petitioner responded. 74 Fed. Reg. at 56862.

In 2007, OFA conducted interviews with 71 individuals in 56 interview sessions that included members of Petitioner and academic experts, to further develop the record, and also conducted some supplemental research for evidence that might be relevant to Petitioner's case. FD at 3, 49 n.38.

IV. Final Determination Against Acknowledgment

The Final Determination concluded that the departures from precedent in the proposed finding were inconsistent with the acknowledgment regulations and thus unwarranted, and concluded, based on the record, that Petitioner failed to satisfy criteria (a) (external identification), (b) (community), and (c) (political authority).

For criterion (a) (external identification of Petitioner as an Indian entity since 1900), the Final Determination found that the first evidence of such identification appeared in 1935. The Final Determination concluded that the absence of evidence for this criterion for the first 35 years of the relevant period was too long to satisfy criterion (a), even when taking into account historical circumstances and fluctuations in group activity. FD at 32; 74 Fed. Reg. at 56862. Although some of Petitioner's ancestors had been identified before or during this 35-year period as "Indian" or as individuals of mixed ancestry, these identifications of individuals were not identifications of Petitioner as an Indian "entity," or a group. FD at 32, 38. The Final Determination also found that references to "Cree Indians," or to collections of "wandering," "homeless," or "landless" Indians, who were likely of various tribal origins, were too indeterminate to identify Petitioner's ancestors or to identify an antecedent group as an Indian entity. *Id*. at 33, 38.

For criteria (b) (community) and (c) (political authority), the Final Determination also concluded that the evidence was insufficient. The Final Determination found that "many of [Petitioner's] ancestors were originally part of several Métis settlements on the Red River in Canada and in Pembina County in present-day North Dakota before the 1850s." *Id*. at 43. Although most of Petitioner's current members are descended from an ancestor who was descended from the historical Pembina Band, Petitioner's "earliest ancestors constituted only a portion" of that group, and the evidence did not show that

[9] OFA is located within the Office of the Assistant Secretary – Indian Affairs, and is the office with primary responsibility to handle acknowledgment petitions and prepare recommendations for the Assistant Secretary.

these earliest ancestors evolved as a distinct community and political group from the historical Pembina Band. *Id*. at 74.

The Final Determination found that "a much larger percentage of [Petitioner's] ancestors composed portions of multiple settlements along the Red River in Canada which were not part of Indian tribes, but populations of individuals descended from a variety of Indian-European marriages." *Id*. Although mixed-blood individuals who were close relatives of Pembina Band full bloods were entitled to receive scrip[10] for land under the Pembina and Red Lake Bands of Chippewa Indians Treaty of 1863, the Final Determination did not find that fact to be sufficient to demonstrate that those mixed-blood relatives were politically part of the Pembina Band, or that they formed a distinct community. *Id*. at 75. The Final Determination concluded that some of Petitioner's ancestors who received annuities were part of the Pembina Band, but that these ancestors and their children "dispersed widely soon after they received annuities." *Id*. Some became part of the Turtle Mountain Band, others settled in Saskatchewan, Alberta, Manitoba, and northern Montana "where they lost any possible social or political cohesion." *Id*.

The Final Determination concluded that the evidence showed that the migration to Montana by Petitioner's ancestors was individualistic and gradual, from a number of areas in Canada and North Dakota, and that Petitioner's ancestors settled in a widely dispersed manner, mostly as part of already existing, largely multi-ethnic settlements that included non-Indians, Indians, and Métis. *Id*. at 47, 76. The evidence "did not show that [Petitioner's] ancestors who settled in Montana had previous social ties with each other and evolved, as communities, from predecessor communities," or that they "formed a distinct community or communities in the areas of Montana where they first settled." *Id*. at 76. The Final Determination found that even in the case of the historical Pembina Band, the evidence "demonstrated [that Petitioner's] ancestors were only a portion of that group, which included a much larger mixed- and full-blood population." *Id*. at 43. The evidence was insufficient to show whether Petitioner's ancestors, before migrating to Montana, constituted a distinct community which had evolved from an Indian tribe. *Id*. at 44.

The Final Determination concluded, based on the available evidence, that Petitioner did not meet criterion (b) "for any period" of time. 74 Fed. Reg. at 56864. For criterion (c), the Final Determination concluded that from 1850 to 1900, the evidence "did not reveal political continuity from a historical Indian Tribe," and that while there was evidence of some political processes that involved some of Petitioner's ancestors after 1900, without a clear description of the Little Shell community for the relevant time periods, it

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[10] Scrip is "[a] document that entitles the holder to receive something of value," such as land. Black's Law Dictionary 1465 (9th Ed. 2009).

was not clear, for some periods, or possible for others, to determine to what extent the group as a whole was represented. *Id*. at 56864-65.

Framework for Board Review and Petitioner's Request for Reconsideration

I. Jurisdiction and Standard of Review

The Board's jurisdiction to review final acknowledgment determinations is limited to reviewing four grounds upon which the Board may vacate a final determination of the Assistant Secretary and remand it for reconsideration. 25 C.F.R. § 83.11(d)(1)–(4). The party requesting reconsideration has the burden to establish, by a preponderance of the evidence, *see id*. § 83.11(e)(9)–(10), one or more of the following:

> **New evidence**: "That there is new evidence that could affect the final determination." *Id*. § 83.11(d)(1).

New evidence includes only evidence that was not part of the administrative record for the final determination. *In re Federal Acknowledgment of the Golden Hill Paugussett Tribe*, 32 IBIA 216, 223 (1998). When a party requesting reconsideration relies on new evidence as a ground for reconsideration, it must submit the evidence with the request for reconsideration. *In re Federal Acknowledgment of the Ramapough Mountain Indians, Inc*., 31 IBIA 61, 66 (1997); *see also* § 83.11(b). The requester bears the burden to clearly identify the evidence claimed to be new, *In re Federal Acknowledgment of the Snoqualmie Tribal Org*., 34 IBIA 22, 30 (1999), and has the burden of proof to show that the new evidence could affect the determination, *Golden Hill Paugussett Tribe*, 32 IBIA at 223.

> **Material Reliance on Nonprobative Evidence**: "That a substantial portion of the evidence relied upon in the [final] determination was unreliable or was of little probative value." 25 C.F.R. § 83.11(d)(2).

To satisfy this ground for reconsideration, a party requesting reconsideration must identify specific evidence in the record that the party contends is "unreliable" or of "little probative value," and which, in fact, constituted "a substantial portion of the evidence relied upon" to reach a final determination. Thus, the party must demonstrate that the final determination (1) treated certain evidence as reliable and probative, when in fact it was not, and (2) relied upon that evidence as material to the outcome of one or more criteria. The Board does not review the sufficiency of otherwise probative and reliable evidence. *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1, 21-22 (2005).

> **Inadequate research**: "That the petitioner's or [OFA's] research appears inadequate or incomplete in some material respect." 25 C.F.R. § 83.11(d)(3).

When a party requesting reconsideration contends that its own research, or that conducted by OFA, was inadequate or incomplete in some material respect, the requester "must show, at a minimum, that additional research would produce material information not previously considered by [OFA]." *In re Federal Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama*, 34 IBIA 63, 69 (1999). Indeed, the requester "must do more than offer a general description of materials that [OFA] allegedly should have reviewed or researched more completely." *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 39 (2005).

> **Alternative interpretations of the evidence**: "That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the [seven mandatory criteria]." 25 C.F.R. § 83.11(d)(4).

In contrast to relying on new evidence, this ground necessarily must be formulated in reference to evidence that was in the record for a final determination. A requester seeking reconsideration based on an alternative interpretation of the evidence must clearly articulate an interpretation that OFA truly did not consider, either explicitly or implicitly, in reviewing or analyzing the evidence. *See Ramapough Mountain Indians*, 31 IBIA at 81. A showing of disagreement with OFA's analysis is not sufficient to establish that grounds for reconsideration exist under § 83.11(d)(4), *see Snoqualmie Tribal Org.*, 34 IBIA at 35, and disagreement with OFA over the *sufficiency* of the evidence does not constitute an "interpretation" of the evidence. Moreover, the requester has the burden of proof to demonstrate that the alternative interpretation offered would substantially affect the determination that the petitioner meets or does not meet one or more of the seven mandatory criteria in 25 C.F.R. § 83.7(a) through (g).

II. Petitioner's Request for Reconsideration

Petitioner divides its Request for Reconsideration (Request) into six arguments, the first of which broadly asserts that all four grounds for reconsideration under § 83.11(d)(1)–(4) exist, as further articulated in two exhibits accompanying the Request. Exhibit 1 is Vrooman's The Little Shell Story, a 115-page historical narrative offered as a "reinterpretation" of the evidence, as "new evidence," or to present new evidence to supplement Petitioner's prior submissions. Vrooman was among those whom OFA interviewed in 2007. *See* Vrooman Tr. Exhibit 2 is Petitioner's 153-page Response to the

Final Determination regarding criteria (b), (c), and (e), prepared by Kennedy & Coyner, who are two of the four authors of the Bunte 2005 submissions by Petitioner.[11] Exhibit 2 is offered to present Petitioner's reinterpretation of the evidence and new evidence, and includes various allegations that invoke each of the four grounds for reconsideration over which the Board has jurisdiction. Thus, Petitioner's first "argument" actually consists of numerous discrete alleged grounds for reconsideration that are incorporated in Exhibits 1 (Vrooman) and 2 (Kennedy & Coyner), all of which are presented within the framework of one or more of the four grounds for reconsideration that the Board has jurisdiction to consider.

Petitioner's remaining arguments, described in the Request itself and numbered 2 through 6, are as follows:

> 2. The regulations deny Petitioner due process on their face and as applied;
> 3. Criterion 83.7(a) (external identification as an Indian entity) is arbitrary, capricious, and contrary to law;
> 4. OFA applied incorrect standards to the issue of previous Federal acknowledgment;
> 5. The Final Determination ignored 25 C.F.R. § 83.6(d) and (e);[12] and
> 6. The reversal of the favorable Proposed Finding despite a stronger record, and no negative comment, is itself arbitrary, capricious, and contrary to law.

Request at 4-14.

Under the regulations, Petitioner's request for reconsideration constitutes its opening brief. *See* 25 C.F.R. § 83.11(e)(5). The Assistant Secretary submitted to the Board the documents from the record that are critical to the request for reconsideration, and made the entire record available to the Board. No party sought to appear as an interested party to file an answer brief.

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[11] The Final Determination concluded that Petitioner satisfied criterion (e), which requires a showing that its membership consists of individuals who descend from a historical tribe. 25 C.F.R. § 83.7(e). The Deputy Assistant Secretary found that Petitioner demonstrated that 89% of its members descend from at least one ancestor who was a descendant of the historical Pembina Band. FD at 144. Petitioner contends that an additional 5% of its current members can trace ancestry to the historic Pembina Band, but does not argue that this disagreement with OFA's already favorable finding for this criterion constitutes a ground for vacating and reconsidering the Final Determination.

[12] *See supra* at 107.

Discussion

Petitioner's Exhibits 1 and 2 include allegations that are within the Board's jurisdiction, but we conclude that that Petitioner has not met its burden to establish that reconsideration is warranted, and thus we affirm the Final Determination. We also conclude that the remaining arguments in Petitioner's Request, numbered 2 – 6, do not fall within the Board's jurisdiction, and therefore we refer those allegations to the Secretary for consideration.

We begin by discussing the lengthy narratives and arguments contained in Exhibits 1 and 2, in which Petitioner, through the analyses and critiques presented by Vrooman and by Kennedy & Coyner, argues that there are numerous grounds for us to vacate the Final Determination and order reconsideration. Some of the narratives, issues, and alleged grounds for reconsideration included in the two exhibits overlap or complement one another, and therefore we first summarize the narratives and allegations in both exhibits, before addressing them within the context of each of the grounds for reconsideration that we have jurisdiction to review.

I. Exhibits 1 & 2: Petitioner's Allegations that All Four Grounds for Reconsideration Under § 83.11(d) Exist

A. Vrooman: The Little Shell Story

Vrooman first paraphrases § 83.7(a)–(c), and then offers his work as a supplement to prior submissions by Petitioner to establish that Petitioner meets those three criteria.[13] The overall purpose of the document is to present "new evidence," a "reinterpretation," and "an unconsidered alternate interpretation of the evidence as a whole." Vrooman at 1, 3.

Vrooman offers as "new evidence," which was "[m]issing from consideration," the Fort Laramie Treaty of 1851 and the Blackfoot Treaty of 1855. *Id*. at 3. Vrooman argues that those treaties provide the necessary context to fully understand Petitioner in relation to Federally recognized tribes, and show that Petitioner has a "deeper history" across the

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[13] Although Vrooman includes criterion (a) (external identification of Petitioner as an Indian entity), he does not address it further in his narrative and does not challenge the Final Determination's conclusion that the evidence did not satisfy this criterion for the period 1900-1935, or that the 35-year absence of evidence for criterion (a) is too long to ignore in determining whether it is satisfied. To the extent Petitioner intended Vrooman's narrative to demonstrate, for criterion (a), one of the four grounds for reconsideration over which the Board has jurisdiction, we conclude it has failed to meet its burden of proof.

northern plains and in Montana than was previously understood, thus demonstrating why Petitioner's Métis ancestors should have been recognized as among those who shared a claim to the lands that were the subject of the treaties and should have been included among Federally recognized Indians. *Id*. at 6.

Vrooman contends that Petitioner's ancestors were among the people who formed a "*Nehiyaw Pwat* (meaning 'Cree Assiniboine') Confederacy" composed of Cree, Assiniboine, and Plains-Ojibwa (including the Métis). *Id*. at 4. But, according to Vrooman, the rightful place of the Métis within that Confederacy was never properly understood by policymakers and observers, and thus many Métis were improperly excluded from the 1851 and 1855 treaties, and from reservation settlements, and were eventually left landless and their descendants scattered across portions of Montana. *Id*. at 5-6.

Vrooman seeks to address OFA's conclusion that there was not sufficient evidence of connections among Petitioner's ancestors living in Montana, and in particular between those living on the Front Range in Montana and those living in the large Triangle area, *see id*. at 45, *supra* note 5, and to explain the dispersion of Métis people, who became "Displaced Peoples," "wandering landless Indians," Vrooman at 64. Vrooman states that Petitioner's ancestors and other Métis were "fully intermarried within their Cree and other Nehiyaw Pwat relatives," yet became "persona non grata" with no legal standing. Vrooman at 65 (citing Bunte 19th C.). According to Vrooman, what OFA saw as a lack of connection between Front Range ancestors and Triangle area ancestors can be explained by the "traditional Aboriginal strategy of survival [of Petitioner's Chippewa ancestors of] separating into small bands" located near non-Indian towns, until it was time to come together again. *Id*. at 72-73.

Petitioner argues through Vrooman that "[f]or the Little Shell, 'the seeking of community is the community,'" and that by the 1920s, when Petitioner's ancestors realized that they were not going to be included in recognized tribes and reservations, they moved to becoming an independent government, functioning as an independent tribal polity. *Id*. at 73 (quoting Petitioner's 1994 submission).

Vrooman proffers as a "new interpretation and evidence" a discussion of the "Little Shell Moccasin Flats Archipelago," defined and described as "a disperse, cohesive, and whole community that are the 'such other homeless Indians in the State of Montana,' who have evolved into the Little Shell Tribe of today." *Id*. at 99.

> Over time, the pre-reservation traditional historic [Moccasin Flats Archipelago] communities and post-Rocky Boy's and Turtle Mountain Allotment period [Moccasin Flats Archipelago] community distinctions evaporated into a realization of their ethnogenesis as one cohesive Little Shell

> Moccasin Flats Archipelago that defined them as a distinctly new tribal reality.

Id. at 105; *see also id*. at 102-03. Vrooman asserts that the phrase "homeless and wandering Indians" in Montana became "the catch-all phrase for the Little Shell ancestors." *Id*. at 92.

> Over the intervening years, many "*such other homeless Indians in the State of Montana*" have been adopted into existing federally recognized tribes in Montana. . . . This has occurred on a family to family basis, as well as by government seeking to handle certain instances (allotments and the Rocky Boy's adoptions) under pressure. The issue here is that the Little Shell Tribe is yet to be accommodated in the federal government's attempt to make right the complete settling of "*such other homeless Indians in the State of Montana*."

Id. at 99.

Between his introduction and his conclusion, Vrooman makes no reference to § 83.7(a)–(c). In his conclusion, Vrooman contends that his "significant new interpretation" and "substantial new evidence," identify Petitioner's ancestors as part of a broader polyethnic confederacy of tribal and Métis peoples with common aboriginal claims to lands in Montana, placing Petitioner's ancestors in Montana "far earlier" than previously thought, all of which serves to "reinforce" criteria (a) through (c), "speaks directly to" criterion (b), "directly pertains to" criterion (c), or "clarifies [OFA's] concerns" regarding the sufficiency of evidence for criteria (a) through (c). Vrooman at 107-09.

B. Kennedy & Coyner Response to Final Determination

Kennedy & Coyner also offer their work as a "reinterpretation" and "new evidence" to supplement Petitioner's prior submissions to OFA. Kennedy & Coyner provide an extensive discussion of the evidence and a critique of the Final Determination, both of which incorporate various arguments alleging that each of the four grounds for reconsideration, over which the Board has jurisdiction, have been established through their work, or through their work when read in conjunction with Vrooman's historical narrative.

For criterion (b) (community), Kennedy & Coyner present two general frameworks to offer alternative interpretations of the evidence. First, Kennedy & Coyner discuss and describe the criteria used for defining the LSCG, which they contend OFA misunderstood and misinterpreted. Kennedy & Coyner contend that, contrary to the Final Determination's conclusion, the LSCG does describe a historical tribe that existed during the 1800s onward—beginning with a group of mixed-blood hunters who constituted a distinct sub-band within the Pembina Band. Kennedy & Coyner at 14. Second, Kennedy

& Coyner present an interpretation of the evidence to demonstrate that what the Final Determination saw as the scattering and dispersal of Petitioner's ancestors was, in fact, a cultural pattern, a structured ritual migratory movement of the LSCG. *Id*. at 29. According to Kennedy & Coyner, OFA did not understand the "pattern of movement in bands of families" and the "traditional social strategies of flexible (sub-)band membership," by which groups of families or extended families might constitute "bands" or "band-lets," acting independently, yet still belonging to a larger cultural group and capable of merging and coalescing with other bands or band-lets as the need arose. *Id*. at 21, 27, 31.

> For the LSCG, the community is a known group of people that follow similar patterns of movement through a known set of places. [They] did not all move together . . . , rather they rotated in bands . . . maintaining connections. . . . [T]he cultural pattern was to move through a set of known places with smaller bands or band-lets of known families that all belonged together to the larger culture group. This follows the cultural pattern of the Chippewa band structure outlined in [Petitioner's 2005 submission], in which smaller groups lead by local leaders moved independently . . . [y]et at the same time, because the group's members shared common bloodlines, language, ethnic identity, movement patterns, and economic strategies, they were aware of the other bands and band-lets and also aware that they were of the same culture or the same group and therefore connected to one another.

Id. at 31; *see also* Bunte 19th C. at 148 ("[T]he métis political structure was based on kinship. Small (primarily kin) groups were the base unit. These small kin groups would come together for special purposes.").

In addition to presenting the above two frameworks for defining the LSCG and explaining culturally patterned movement, Kennedy & Coyner argue that OFA's 2007 interviews constitute "new evidence" because the transcripts were not made available to Petitioner for review and comment prior to issuance of the Final Determination. Although the Final Determination concluded that even with the information gathered through the 2007 interviews, the evidence was insufficient for Petitioner to demonstrate that it satisfied criterion (b) and (c), Kennedy & Coyner contend that the 2007 interviews, when properly analyzed, provide compelling new evidence that could affect the Final Determination's conclusion. Kennedy & Coyner also argue that because Petitioner did not have an opportunity to comment on the 2007 interview data, their analysis of that data constitutes an alternative interpretation of the evidence, not previously considered. They present an extensive analysis of the 2007 interview data, which they conclude is far more favorable to Petitioner than is reflected in the Final Determination.

With respect to criterion (c) (political authority), Kennedy & Coyner also argue that their explanation of the LSCG and of the Chippewa flexible political band structure provides an alternative interpretation of the evidence that would substantially affect the Final Determination. *See, e.g.*, Kennedy & Coyner at 58-59 (the Pembina mixed-bloods who were left out of other reservations "coalesced" as "landless Indians" (quoting Vrooman Tr. at 41-42)); *id*. at 137 ("[A]ll these people there, they're an act in progress, really. They're a nation being recreated." (quoting Harold Gray, CD Ex. 51 Interviews, 2007 KCook, Harold_and_ErnstGrayCntd35, at 33)). For criterion (c), Kennedy & Coyner also contend that the 2007 interview data should be accepted as new evidence, and their analysis accepted as an alternative interpretation of that evidence, not previously considered.

C. Discussion of Petitioner's Alleged Grounds for Reconsideration in Exhibits 1 and 2.

1. New Evidence (25 C.F.R. § 83.11(d)(1))

a. Fort Laramie Treaty of 1851 and Blackfoot Treaty of 1855

Petitioner argues that the Treaties of 1851 and 1855 are new evidence that could affect the Final Determination. Vrooman at 3-4. We disagree. Whether or not those treaties were specifically considered by OFA, they do not constitute evidence that could affect the Final Determination. Whatever evidence they provide regarding the transaction between the parties to the treaties, they have no probative value for evaluating whether Petitioner satisfies criteria (a) through (c). Nor are they truly "new evidence" for the purpose of providing context to historical evidence, because they were referenced in a resolution that Petitioner dates to the late 1920s,[14] which is in the record and which was considered by OFA. *See* CD Ex. 66 (Resolution of the Non Treaty Chippewa Cree Indians of Northern Montana, declaring themselves to have been in Montana since "time immemorial," and declaring that the 1851 Fort Laramie Treaty did not affect their right, claim, or title to lands in Montana, and that the 1855 Blackfoot Treaty was unconstitutional because it purported to appropriate their rights).[15] Vrooman provides an expanded explanation of what Petitioner contends is the historical significance of those treaties to its contention that it deserves to be recognized, but it is not materially different than what is

[14] The document itself is not dated, and it appears possible that it could be from the 1930s. *See* PFTR at 6, 98 (discussing organization called the Non-Treaty Chippewa-Cree Indians of Montana and contentions made by the group).

[15] The resolution was signed by 128 individuals, 76 of whom are in the LSCG. Petitioner also characterizes the resolution itself as "new evidence," Kennedy & Coyner at 97, but that is incorrect because, as noted, it is in OFA's record.

presented in the resolution itself. Regardless of whether the treaties themselves were not in OFA's record, and thus might constitute "new evidence," their relevance to Petitioner's narrative and historical claims by certain ancestors was considered by OFA, and they provide no basis for us to order reconsideration of the Final Determination.

b. OFA's 2007 Interviews

Petitioner contends that OFA's interviews in 2007 of Petitioner's members, family members, and experts, provide "new evidence" that could affect the Final Determination. Kennedy & Coyner at 36, 60. Petitioner acknowledges that OFA considered these interviews in the Final Determination, i.e., that the transcripts are in OFA's administrative record, but argues that the interviews should be treated as new evidence because Petitioner "was not allowed to comment on [the interviews] prior to" issuance of the Final Determination. *Id*. at 36.

The 2007 interviews do not constitute new evidence within the meaning of § 83.11(d)(1). "New evidence" under this subsection means evidence that was not in the record when the Final Determination was issued. *In re Federal Acknowledgment of the Nipmuc Nation*, 45 IBIA 231, 248 (2007); *Golden Hill Paugussett Tribe*, 32 IBIA at 223. It does not include evidence that might only be new to the petitioner or evidence that the petitioner has not previously analyzed. The 2007 interviews were part of the administrative record for the Final Determination. CD Ex. 51 Interviews; FD at 49 n.38. Accordingly, the interviews do not qualify as "new evidence," and this allegation fails to provide a ground for ordering reconsideration of the Final Determination under § 83.11(d)(1).

c. Narratives and Analyses by Vrooman and by Kennedy & Coyner

Vrooman and Kennedy & Coyner, in various portions of their narratives, suggest that their interpretations and presentation of evidence in the record, or their analyses, by themselves, constitute "new evidence" because they were not in OFA's record. But arguments presented in a request for reconsideration do not constitute "evidence," as we understand the meaning of that word for purposes of § 83.11(d)(1). Instead, they are an analysis of evidence offered for the purpose of seeking reconsideration. *See Ramapough Mountain Indians*, 31 IBIA at 70 (discussion of evidence already submitted not new evidence). To the extent Petitioner presents a "new" analysis of existing evidence, it might qualify as an "alternative interpretation of the evidence, not previously considered," § 83.11(d)(4), which we consider below. But the analysis itself does not constitute "new evidence," and we reject it as a ground for reconsideration under § 83.11(d)(1).

2. Material Reliance on Nonprobative Evidence (25 C.F.R. § 83.11(d)(2))

Petitioner alleges several times that the evidence relied upon by OFA, or that OFA's research or analysis, was unreliable or of little probative value. *See, e.g.*, Kennedy & Coyner at 80 (OFA's research "of little probative value"), 88 (OFA's analysis "of little probative value"), 93 (alleged grounds for reconsideration relate to "evidence that was 'unreliable or of little probative value'"), 94 (same). We conclude that Petitioner has not established any grounds for reconsideration based on material reliance on nonprobative evidence.

First, § 83.11(d)(2) applies to *evidence*. It does not apply to research or to analysis, in and of themselves. Research may be incomplete, *see* § 83.11(d)(3), and an analysis may be incomplete or incorrect, but the concepts of probative value and reliability refer to *evidence*. To characterize research and analysis as "unreliable" is simply a way to show disagreement with the Final Determination, which is not sufficient, in and of itself, to establish that grounds for reconsideration exist. *Snoqualmie Tribal Org.*, 34 IBIA at 35.

Second, Petitioner fails to identify any specific evidence in the record upon which the Final Determination improperly relied in concluding that Petitioner had failed to satisfy criteria (a) through (c). For the most part, Petitioner disagrees with OFA's conclusion that there was *insufficient* evidence to satisfy these criteria, but a finding of the insufficiency of evidence is not the same as affirmative, misplaced reliance on evidence. For example, Petitioner criticizes OFA for conducting additional research in historical newspapers for evidence that might be relevant to the issue of political leadership within Petitioner, arguing that it is "no surprise" that newspapers would not provide such evidence. Kennedy & Coyner at 86-87. But the Final Determination did not "rely" on the absence of evidence in the newspapers in the same way one might rely on affirmative evidence to determine that a fact is more likely than not. Instead, the Final Determination concluded that Petitioner's evidence of political leadership, even when supplemented with the newspaper research, remained *insufficient*. FD at 107.

Third, even where Petitioner arguably identifies specific evidence relied upon by OFA to reach a particular conclusion, Petitioner does not explain why that evidence itself was unreliable or nonprobative. For example, the Final Determination concluded that a 1927 meeting convened on behalf of "landless Indians" was quite limited in terms of geographic range and social makeup, consisting of "a large extended family and a limited region of northern Montana." *Id*. at 95. The Final Determination found that at the time of the meeting, none of the attendees lived in the Front Range region, and that the meeting did not involve members of Petitioner as a whole. Most of the attendees were found to be from the Highline area and either part of the Doney family or intermarried within that line. *Id*. Petitioner contends that the evidence relied on by OFA was unreliable or of little

probative value, but never explains why that is the case. Petitioner does not identify evidence to demonstrate that there were participants at the 1927 meeting who, at the time, were living in the Front Range region, or to demonstrate that the meeting encompassed more than a large extended family. Petitioner argues that a special committee was elected at the 1927 meeting "to represent the tribe as a whole," Kennedy & Coyner at 95, but provides no evidence that individuals from the Front Range participated in that election or agreed to be represented by such a committee. *See Nipmuc Nation*, 45 IBIA at 240 n.13, 269 (criterion (c) requires a showing of a bilateral relationship between leaders and followers).

In summary, none of Petitioner's allegations that the Final Determination relied on unreliable or nonprobative evidence provides a basis for ordering reconsideration.

3. Inadequate or Incomplete Research (25 C.F.R. § 83.11(d)(3))

Petitioner also argues that the Final Determination's analysis of the evidence, its failure to mention certain evidence specifically, or its conclusions, with respect to a variety of issues, are proof of inadequate and incomplete research. *See, e.g.*, Kennedy & Coyner at 32, 63, 69, 72-74, 80, 86, 93 , 94. As explained earlier, however, when a party requesting reconsideration contends that research conducted by OFA was inadequate or incomplete in some material respect, the requester "must show, at a minimum, that additional research would produce material information not previously considered by [OFA]." *Mobile-Washington County Band of Choctaw Indians*, 34 IBIA at 69. Petitioner fails to do that here. Instead, Petitioner details numerous instances in which it disagrees with the Final Determination's analysis or conclusions, but such disagreements, without more, are insufficient to meet a requester's burden of proof under § 83.11(d)(3) to demonstrate that OFA's research was inadequate.

4. Reasonable Alternative Interpretations, Not Previously Considered, of the Evidence Used for the Final Determination, That Would Substantially Affect the Determination (25 C.F.R. § 83.11(d)(4))

a. Vrooman's Historical Narrative: The Little Shell Story

Petitioner offers Vrooman's historical narrative as a "re-interpretation" of the evidence, thus apparently arguing that it is a reasonable alternative interpretation not previously considered by OFA. In order to satisfy its burden of proof based on an alternative interpretation of the evidence, Petitioner was required to: (1) articulate with specificity the evidence used in the Final Determination on which Vrooman relies in offering an "alternative interpretation"; (2) establish that the interpretation was not

"previously considered" by OFA; and, (3) demonstrate that it would substantially affect the determination with respect to one or more of the criteria for acknowledgment. *See In re Federal Acknowledgment of the Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians*, 45 IBIA 277, 293 (2007).

We are not convinced that Vrooman has presented an alternative interpretation of the evidence that was not considered by OFA. OFA interviewed Vrooman in 2007, and in that interview, Vrooman discussed Petitioner's ancestors as part of a Métis community, which he asserted was part of the Nehiyaw Pwat Confederacy. *See e.g.*, Vrooman Tr. at 6-7, 17, 59. Bunte explained the polyethnic culture of the northern plains, *see* Bunte 19th C. at 42, 54, and Vrooman described the settlement of Métis in Montana, *see* Vrooman Tr. at 52-55, 66-69. Vrooman's narrative offered with the Request may be more comprehensive, but the interpretation of the evidence is not materially new or different from an interpretation that was presented to OFA during its interview with Vrooman, and thus it was considered.

Moreover, Vrooman fails to address in any meaningful respect how his alternative interpretation would satisfy the regulatory criteria in § 83.7 for acknowledgment. In large measure, Vrooman presents a historical narrative to argue why he believes Petitioner *deserves* to be recognized as a tribe, but does not explain how his "alternative interpretation," even if it were not considered by OFA, would satisfy the regulatory criteria for being acknowledged as a tribe, thus demonstrating that it "would substantially affect the determination" with respect to one or more criteria.[16] Thus, Vrooman's narrative does not provide a basis for ordering reconsideration pursuant to § 83.11(d)(4).

b. Identification of the Little Shell Ancestral Community and Little Shell Community Group

Petitioner argues that although the evolution, culture, and history of the Little Shell ancestral community was "described at length" to OFA by Petitioner, the Final Determination "clearly misunderstood" and "misinterpreted the LSCG." Kennedy & Coyner at 5-6. We are not convinced, however, that the Final Determination is based on a

[16] When a final determination declines to acknowledge a petitioner as an Indian tribe, the regulations require that the Assistant Secretary inform the petitioner of alternatives, if any, to acknowledgment under the regulatory procedures. In the present case, the Final Determination noted the "Congress has plenary power over Indian affairs and, considering two historical factors, could recognize this petitioner as an Indian Tribe." 74 Fed. Reg. at 56866. The two factors are identified and discussed in the Federal Register notice. *See id*.

misunderstanding of Petitioner's definition of the Little Shell ancestral community or the LSCG.[17]

The Final Determination concluded that the "LSCG model does not identify a historical Indian tribe," and that Petitioner's claimed LSCG "was not a substantially continuous historical community, but a collection of individuals with shared Indian ancestry who did not have social interactions or relationships with each other as a distinct group or set of groups." FD at 42, 44. "Overall," the Final Determination concluded,

> the available evidence shows Little Shell is an organization of individuals of shared ancestry from the Pembina Band of Chippewa. They share some cultural traditions and historical experiences as Métis. While the membership includes large extended families, the evidence does not show that these are or were in the past linked to each other by kinship or other social ties into one or several communities. The evidence also does not show that the current organization evolved from a historical community or communities. The large extended families in the 20th century are not and have not been connected by regular social interactions and obligations, community events, internal disputes, or by common issues that unite them as a group.
>
> Many Little Shell ancestors, and some older current members, shared the experience of homesteading in Montana, and, subsequently, living in segregated neighborhoods on the edges of towns. . . . However, these common experiences do not demonstrate that there was social interaction and social relationships that bound them together into a community.

Id. at 78-79.

Petitioner argues that the LSCG *does* describe a tribe, that Petitioner "identified a historical Indian tribe, called it the LSCG, and traced its members through time to the present." Kennedy & Coyner at 14. While it is evident that Petitioner disagrees with the Final Determination, and with its evaluation of the evidence, it is not clear to us how that disagreement reflects an alternative interpretation of the evidence that OFA did not

[17] On the other hand, assuming that the Final Determination does misunderstand Petitioner's definition of the Little Shell ancestral community, the Request does not make that definition any more clear to us.

consider, and thus we conclude that Petitioner has failed to establish this as a ground for us to order reconsideration of the Final Determination.[18]

c. Flexible Band Structure and Migratory Movement as a Cultural Pattern

The Final Determination noted that Departmental precedent takes into account "patterns of migration and amalgamation," and noted that OFA had suggested to Petitioner that it provide evidence that its current political structure "was a result of a past amalgamation of formerly separate social communities and their separate political organizations, or a political confederation of historically and currently separate social communities." FD at 9, 11 n.14. The Final Determination did not find that the evidence supported such a conclusion. Instead, the Final Determination found that the evidence showed that some of Petitioner's ancestors were part of the Pembina Band, but that many other ancestors, who were not recognized as Pembina, were part of other Métis settlements. *Id*. at 24. According to the Final Determination, the evidence did not show that the

> portion of [Petitioner's] ancestors whom the Federal Government documented as having Pembina ancestry migrated as a group or maintained social connections to or from older settlements. Rather, the available evidence shows the petitioner's ancestors migrated on an individualistic basis from a number of areas in Canada and North Dakota, over a long time, finally settling in a dispersed pattern throughout Montana, where they mainly lived in already existing, largely multi-ethnic settlements, which included non-Indians, Indians, and Métis. The available evidence did not show the petitioner's ancestors maintained a distinct community while they migrated or after they settled in their new areas of settlement in Montana.
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> * * * *
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> In none of these multi-ethnic settlements did the petitioner's ancestors constitute a majority or even a significant percentage of the population. Nor did the available evidence demonstrate that they constituted a distinct Pembina Band of Chippewa enclave or a significant portion of a Métis enclave within any of these communities. Instead, they constituted only a small fraction of the population, living among a few extended family members, and not as part of any distinct community or communities in Montana. The available evidence also did not indicate any significant number

[18] For the same reason, Petitioner's re-presentation and explanation of data regarding marriages between certain individuals in the LSCG does not convince us that it is offering an alternative interpretation of the evidence that OFA did not consider.

> of the petitioner's ancestors within or between the two geographically separate regions interacted socially with each other.

Id. at 24, 25.

Petitioner offers, as an alternative interpretation of the evidence, an explanation of what the Final Determination concluded were migrations on an "individualistic basis," the "temporary" association of some of Petitioner's Métis ancestors with the Pembina Band, *id*. at 24, 43, 76, 151, and the seemingly "scattered" settlement of those ancestors of Petitioner who settled in Montana, *id*. at 57. Petitioner argues that OFA did not understand that this was in fact a "structured ritual in-migration," a "cultural pattern" of bands or band-lets of "families that all belonged together to the larger cultural group," and who had simply adopted the "traditional social strategies of flexible (sub-)band membership . . . connected through close kinship ties," though at times acting independently. Kennedy & Coyner at 27, 31. Thus, what OFA interpreted as "temporary" connections, or the absence of social interactions, was a shared cultural pattern within a "community knit together through ties of kinship/blood, common tribal affiliation, and shared social and economic activities." *Id*. at 19, 27, 31. This cultural pattern "knit together the ancestral community" because they knew they remained part of a cohesive cultural "whole." *Id*. at 20-21, 27.

A "cultural pattern" is one type of evidence that can be used to demonstrate the existence of "community" under § 83.7(b). *See* § 83.7(b)(1)(vii). We are not convinced, however, that what Appellant characterizes as a cultural pattern is an interpretation of the evidence that was not considered by the Final Determination. This interpretation of the evidence, though not labeled as describing a "cultural pattern," was clearly articulated by Petitioner in its submissions to OFA in 2005. *See* Bunte 19th C. at 43, 63-64, 149 (discussing observers' misunderstandings of the social and political structure of Chippewa, with bands & band-lets acting independently but coming together as needed; not "scattered" families without a political and social structure connecting them). In OFA's interview with Vrooman in 2007, he offered an interpretation that appears to largely mirror what Petitioner offers in its Request. *See* Vrooman Tr. at 41 (describing pattern of living in bands, coming together, breaking apart, coming together).

As we understand the Final Determination, the Deputy Assistant Secretary found that the evidence was insufficient to establish the existence of a distinct Little Shell band of Petitioner's ancestors within the Pembina Band, and insufficient to demonstrate that Petitioner's ancestors evolved as a distinct and continuous tribal community from the Pembina tribe or formed such a distinct community and political entity. Petitioner's argument appears to be that, of the disparate Métis families with some Pembina ancestry who settled in Montana, those who were left out of other reservations and tribes had or have a right to "coalesce" and be recognized as an Indian tribe. In some respects, both

Vrooman and Kennedy & Coyner articulate *the reasons why* no single "community," as that term is defined by the regulations, *see* 25 C.F.R. § 83.1, may have existed among the individuals included in the LSCG, and why no "political authority" may have existed over the family-based bands and band-lets which, collectively, comprised the portion of the LSCG who settled in Montana. But their "alternative interpretation," whether or not considered by OFA, does not explain how Petitioner satisfies the definitions of "community" and "political authority" from historical times to the present, on a substantially continuous basis.

Petitioner frequently defines itself in relation to geography—Montana—and in relation to being excluded from Federal recognition. Petitioner's members are "distinct because they don't belong somewhere." Kennedy & Coyner at 46 (quoting Carole Doney, CD Ex. 51 Interviews, 2007 KCook, SteveDoney_Carole_and_Spanky10, at 51). They are distinct from other Métis because "[t]hey belong to this place [Montana]." Kennedy & Coyner at 48 (quoting Vrooman Tr. at 66). They got "dropped" from Rocky Boy's and "that is how they coalesced under that identity now." *Id*. at 59 (quoting Vrooman Tr. at 41-42). The Métis who had been left out of tribes and reservations were part of the settled Métis communities since the 1850s and 1860s, "but never had an identity[;] now they started realizing that they needed an identity as an aboriginal people." Vrooman Tr. at 41-43.[19] "[T]hey're an act in progress really. They're a nation being re-created." Kennedy & Coyner at 137 (quoting Harold Gray at 33). For the Little Shell, "the seeking of community is community." Vrooman at 73.

Petitioner's arguments and its characterization of the evidence, however categorized, are not responsive to the Final Determination's conclusions regarding the underlying lack of evidence of *actual* social interaction, social connections, and a political structure within a community and political entity, as required by § 83.7(b) & (c). The Final Determination concluded that Petitioner's ancestors dispersed and settled, on an individualistic basis, in various places, including but not limited to Montana. The evidence, according to the Final Determination, did not establish that those who settled in Montana constituted a community or political entity. Even if each extended family, or a few families, could be understood to be a quasi-independent band or band-let, the Final Determination found no evidence of a cohesive "whole" community and political authority that bound each band and band-let together through actual social interaction and an exercise of political authority, however flexible. In effect, Petitioner's argument does not dispute that its ancestors "broke

[19] *See also* Vrooman Tr. at 43-45 (There were "two very different groups of people," the "haves" on the Front Range, and the "have-nots," who were living in the moccasin flats; Petitioner "is not just the have-nots"; it has taken in everyone to include all of the non-recognized Indians of Montana.)

apart," *see* Vrooman Tr. at 41, into individual and extended family units, some settling in various parts of western Canada, others becoming incorporated into the Turtle Mountain, Rocky Boy's, or other tribes, and still others ending up in Montana without being so incorporated.

Calling this dispersal a "cultural pattern," "structured in-migration," or "highly structured pattern" of movement through "known places" does not offer an interpretation that addresses the underlying substance of the definitions of "community" and "political authority" in the acknowledgment regulations. *See* §§ 83.1, 83.7(b) & (c). A collection of individuals who share the same cultural background and practices may be reflective of a "cultural pattern" in one sense, but it does not follow that the "pattern" constitutes probative evidence of criteria (b) or (c) if it does not also reflect and reinforce evidence demonstrating that the definitions of "community" and "political authority" are satisfied.

Our task, as limited by our jurisdiction, is to determine whether Petitioner has offered an alternative interpretation that was "not previously considered," and which, if considered, would substantially affect the Final Determination. We are not convinced that Petitioner has done so.

d. 2007 OFA Interviews

Kennedy & Coyner also analyze the 2007 interviews and argue, as an "alternative interpretation" of the interviews, that the interview data is far more favorable to Petitioner than was recognized by the Final Determination, and only bolsters Petitioner's case that it has met criteria (b) and (c). They contend that the interviews show that Petitioner's members "have significant social relationships with one another, and share significant rates of informal social interactions; while also facing strong patterns of discrimination and other social distinctions by non-members." Kennedy & Coyner at 61. Kennedy & Coyner also discuss the interview data in relation to political authority, e.g., concerning individual "job brokers" as evidence of political leadership of Little Shell members.

Petitioner, however, fails to establish that its more favorable interpretation of the 2007 interviews was not previously considered by OFA, as is required by § 83.11(d)(4). For example, the Final Determination indicates that OFA analyzed the 2007 interviews "to see how social relationships and interactions potentially tied" together Petitioner's ancestors who lived in rural homesteads. FD at 49; *see also id*. at 50, 56-57. OFA also considered evidence from the 2007 interviews that Petitioner's members participated in annual group events, *id*. at 67, 72; attended family gatherings, *id*. at 67-68; experienced discrimination and negative social distinctions, *id*. at 66, 73, 79; and considered themselves "as being socially distinct from Indians and non-Indians," *id*. at 66. Accordingly, it is apparent that

while OFA disagreed with the conclusions that Kennedy & Coyner draw from the 2007 interviews, OFA did consider the interpretations that they now offer.

II. Additional Alleged Grounds for Reconsideration Referred to the Secretary

In addition to its allegations that the Final Determination must be reconsidered based on grounds arising under § 83.11(d)(1)–(4), Petitioner contends that reconsideration is appropriate because Petitioner was denied due process, a portion of the Federal acknowledgment regulations is contrary to law, the Final Determination applied improper evidentiary standards, and the Final Determination suffers from procedural errors.[20] Petitioner does not identify any jurisdictional basis for the Board to review these alleged grounds for reconsideration, and, as explained below, we conclude that they do not fall within our jurisdiction under § 83.11(d)(1)–(4). Accordingly, the Board refers these allegations to the Secretary.

A. Denial of Due Process

Petitioner contends that reconsideration is warranted because after its last filing with OFA, OFA conducted the 2007 interviews and obtained additional documents and evidence, but there is no provision in the regulations that permitted Petitioner to review and comment on this additional evidence prior to the issuance of the Final Determination.[21]

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[20] In some cases, when a party has articulated a clear and discrete ground for reconsideration which, in substance, falls outside of our jurisdiction, even while invoking the jurisdictional language of § 83.11(d)(1)–(4), we have referred the allegation to the Secretary. *See Nipmuc Nation,* 45 IBIA at 246. In the present case, we construe the arguments raised by Petitioner through Exhibits 1 and 2, viewed in their entirety, as falling within our jurisdiction. To the extent portions of Petitioner's arguments in those exhibits might be construed as raising allegations outside our jurisdiction, we find no basis to reformulate them as discrete allegations that must be referred to the Secretary. In this regard, we note that Petitioner's counsel, in the Request itself, made no attempt to summarize the arguments or allegations contained in Exhibits 1 and 2, except to simply restate the language of § 83.11(d)(1)–(4) as a catch-all allegation. Nothing in our decision, of course, precludes the Secretary from construing Petitioner's exhibits as raising additional allegations that are appropriate for Secretarial consideration.

[21] Petitioner apparently obtained some materials related to the interviews through a Freedom of Information Act request, but claims that it "had to wait months to get the materials, was denied access to some materials, and was required to pay thousands of dollars to receive the documents that were provided." Request at 4. It is not clear exactly when Petitioner received what materials, and which materials were not provided to it.

Petitioner argues that the acknowledgment regulations deny it due process "on their face and as applied" because it "was not given the opportunity to review and analyze much important information prior to the issuance of the [Final Determination]." Request at 4-5.

The Board has previously held that alleged due process violations within the Federal acknowledgment process do not state a ground for reconsideration over which the Board has jurisdiction. *See Snoqualmie Tribal Org*., 34 IBIA at 35; *Ramapough Mountain Indians*, 31 IBIA at 81-82. Therefore, the Board will refer this ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that due process required that Petitioner be provided with an opportunity to review and comment on the interviews of 71 individuals conducted by OFA during 56 interview sessions, and other materials obtained by OFA after Petitioner's last filings and prior to the issuance of the Final Determination?

B. Criterion 83.7(a) (external identification as an Indian entity) is arbitrary, capricious, and contrary to law.

Petitioner does not contend that the Final Determination erred in concluding that it had not satisfied criterion (a), but argues that § 83.7(a) is arbitrary, capricious, and contrary to law. Petitioner contends that criterion 83.7(a) "should be struck down as a mandatory criterion for [Federal] acknowledgment." Request at 6. This allegation does not state any claim under § 83.11(d)(1)–(d)(4).[22] Therefore, the Board will refer this ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that application of criterion 83.7(a) in this case is arbitrary, capricious, and contrary to law?

[22] Separate and apart from § 83.11(d)(1)–(4), the Board has held, albeit in other contexts, that it "lacks authority to declare invalid a duly promulgated Departmental regulation." *Vitale v. Juneau Area Director*, 36 IBIA 177, 182 (2001) (citing *Cheyenne River Sioux Tribe v. Great Plains Regional Director*, 35 IBIA 281 (2000); *Shoshone-Bannock Tribes v. Portland Area Director*, 35 IBIA 242, 247 (2000)).

C. The Final Determination Applied the Incorrect Standard for Previous Federal Acknowledgment

Petitioner argues that the Final Determination applied an incorrect standard when examining whether Petitioner had demonstrated previous Federal acknowledgment.[23] The Federal acknowledgment regulations set forth a modified process for evaluating petitioners that provide "substantial evidence" of "unambiguous previous Federal acknowledgment." 25 C.F.R. § 83.8(a); *see also id*. § 83.8(d) (detailing the modified criteria). Petitioner argues that the Final Determination improperly required, in order to show previous unambiguous Federal acknowledgment, that the Federal government's actions were clearly premised on a government-to-government relationship with Petitioner. Petitioner contends that the preamble to the acknowledgement regulations contains a faulty interpretation of the definition of "previous Federal acknowledgment."[24] In addition, Petitioner claims that the Final Determination applied an incorrect burden of proof in determining whether Petitioner had met the substantial-evidence standard in § 83.8(a) for showing unambiguous Federal acknowledgment.

The Board has previously explained that allegations that a final determination used an improper evidentiary standard or misapplied the burden of proof do not state a ground for reconsideration over which the Board has jurisdiction. *Nipmuc Nation*, 45 IBIA at 247; *see also In re Federal Acknowledgment of the Cowlitz Indian Tribe*, 36 IBIA 140, 150 (2001). Therefore, the Board will refer this ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that the Final Determination erred in requiring Petitioner to demonstrate that the Federal actions relied upon by Petitioner to obtain the benefit of § 83.8, were clearly premised on Petitioner's ancestors being a tribal political entity with a government-to-government relationship with the United States, and that the Final Determination applied an incorrect burden of proof to the evidence that

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[23] The Proposed Finding, although proposing a favorable outcome for Petitioner, also concluded that the evidence did not show unambiguous previous Federal acknowledgment of Petitioner.

[24] The regulations define "previous Federal acknowledgment" to mean "action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States." 25 C.F.R. § 83.1. Petitioner contends that language in the preamble, which refers to a "government-to-government relationship," 59 Fed. Reg. 9280, 9283 (Feb. 25, 1994), is inconsistent with the regulatory definition. Request at 10-11.

Petitioner provided to show five instances of previous Federal acknowledgment?

D. The Final Determination Ignored 25 C.F.R. § 83.6(d) and (e).

Petitioner further claims that the final determination "ignores the requirements of § 83.6(d) and (e)." Request at 13. Subsection 83.6(d) provides, in relevant part, that "[a] criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion." And § 83.6(e) states, in relevant part, that "[e]valuation of petitions shall take into account historical situations and time period for which evidence is demonstrably limited or not available." Petitioner contends that the Final Determination failed to apply the appropriate burden of proof as set forth in § 83.6(d) and (e).

As noted above, the Board does not have jurisdiction over an allegation that the Final Determination applied the wrong evidentiary standard. *See Nipmuc Nation*, 45 IBIA at 247. Similarly, the Board lacks jurisdiction to consider a claim that a final determination violated the regulations. *Id*.[25] Therefore, the Board will refer this ground for reconsideration to the Secretary as follows:

Should reconsideration be granted based on the allegation that the Final Determination imposed upon Petitioner a burden of proof greater than that required by § 83.6(d), and failed to take into account the complexity of Petitioner's historical circumstances as required by § 83.6(e)?

E. The Reversal, Despite a Stronger Record, of the Unopposed Favorable Proposed Finding, Is Arbitrary and Capricious, and Contrary to Law

Finally, Petitioner argues that it was arbitrary and capricious, and contrary to law, for the Final Determination to reverse the favorable Proposed Finding. Petitioner contends that there was no basis for the reversal because "[n]o negative comments of any consequence were received" regarding the Proposed Finding and it strengthened its petition "so that any necessary departure from [Federal acknowledgment] precedent would be greatly reduced or indeed eliminated." Request at 14.

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[25] In conjunction with this allegation, Petitioner argues that if the Board remanded this matter under the appropriate burden of proof, it "would lead to an alternative interpretation of the evidence and a conclusion that the criteria were met." Request at 14. But simply referring to the language in § 83.11(d)(4), does not bring Petitioner's allegation within the scope of the Board's jurisdiction. *See Nipmuc Nation*, 45 IBIA at 246.

We do not have jurisdiction to consider an alleged procedural error of this nature. *See Nipmuc Nation*, 45 IBIA at 272 (Board lacked jurisdiction to consider allegation concerning the abandonment of conclusions reached in the proposed finding). Therefore, the Board will refer this ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that it was arbitrary and capricious, or contrary to law, for the Final Determination to reverse the favorable Proposed Finding, when no substantial negative comments were received regarding the Proposed Finding and Petitioner submitted evidence strengthening its petition?

Conclusion

For the reasons discussed above, we conclude that Petitioner has not established any grounds for us to vacate the Final Determination and order reconsideration by the Assistant Secretary, and therefore, as required by § 83.11(e)(9), we affirm the Final Determination with respect to the allegations that we have jurisdiction to review. As required by § 83.11(f)(1) & (2), we refer five allegations over which we lack jurisdiction to the Secretary for consideration.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms, to the extent of its jurisdiction, the Final Determination, and refers the Request to the Secretary to consider the five issues described above that are beyond our jurisdiction.

I concur:

// original signed	//original signed
Steven K. Linscheid	Thomas A. Blaser
Chief Administrative Judge	Administrative Judge