INTERIOR BOARD OF INDIAN APPEALS

In re Federal Acknowledgment of the Duwamish Tribal Organization

66 IBIA 149 (04/17/2019)

Related Board case:
37 IBIA 95

United States Department of the Interior

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

IN RE FEDERAL ACKNOWLEDGMENT OF THE DUWAMISH TRIBAL ORGANIZATION	)	Order Affirming Final Determination on Remand and Referring Issues to the Secretary
	)	Docket No. IBIA 16-008
	)	April 17, 2019

In this proceeding before the Interior Board of Indian Appeals (Board), the Duwamish Tribe, a.k.a. Duwamish Tribal Organization (DTO or Petitioner), seeks reconsideration of the Final Determination on Remand (FDR) against acknowledgment of Petitioner as an Indian tribe within the meaning of Federal law, issued by the Assistant Secretary – Indian Affairs (Assistant Secretary).[1] The FDR was issued in the wake of an order by the United States District Court for the Western District of Washington (District Court) that vacated the original Final Determination against acknowledgment of Petitioner and remanded the matter to the Department of the Interior (Department) with instructions to either consider DTO's petition under the acknowledgment regulations as revised in 1994 or explain why the petition was considered exclusively under the original 1978 regulations.[2]

In the FDR, the Assistant Secretary evaluated DTO's petition under both sets of regulations. The Assistant Secretary concluded that Petitioner did not satisfy the first three

[1] The "Final Decision on Judicial Remand Against Acknowledgment of the Duwamish Tribal Organization" was signed by the Assistant Secretary on July 24, 2015, and a Notice of the FDR was published in the *Federal Register* on July 29, 2015. 80 Fed. Reg. 45230 (Notice of corrections to the FDR); 80 Fed. Reg. 39142 (July 8, 2015) (Notice of the FDR).

[2] *Hansen v. Salazar*, No. C08-0717-JCC, 2013 U.S. Dist. LEXIS 40622, at *33-34 (W.D. Wash. Mar. 22, 2013). The acknowledgment regulations were revised while DTO's petition was under active consideration by the Department. Although DTO had formally elected to have its petition considered under the 1978 regulations, *see id.* at *10, the District Court found that it was arbitrary and capricious for the Department not to either consider DTO's petition under both sets of regulations as was done for the Chinook Indian Tribe or explain why the Department handled the two petitions differently, *id.* at *33.

of seven mandatory criteria for Federal acknowledgment in 25 C.F.R. § 83.7(a)-(g) (1994):[3] (1) that it was identified as an American Indian entity on a substantially continuous basis since 1900 (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 it has maintained political influence or authority over its members as an autonomous entity from historical times until the present (criterion (c)).[4] The Assistant Secretary also concluded that Petitioner did not show that it qualified for evaluation under a modified set of criteria (a)-(c) in the 1994 regulations, because it did not demonstrate unambiguous previous Federal acknowledgment as a tribe under 25 C.F.R. § 83.8.[5] And the Assistant Secretary again concluded that Petitioner did not satisfy the criteria in 25 C.F.R. § 83.7(a)-(c) (1982).[6]

Under the 25 C.F.R. Part 83 regulations, 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. *See* 25 C.F.R. § 83.11(d)(1)-(4). The Board does not have authority to review the Assistant Secretary's determination *de novo*. *In re Federal Acknowledgment of the Ramapough Mountain Indians, Inc.*, 31 IBIA 61, 68-69 (1997). Rather, the party requesting reconsideration has the burden to establish, by a preponderance of the evidence, *see* 25 C.F.R. § 83.11(e)(9)-(10), one or more of the following grounds under § 83.11(d)(1)-(4): (1) "That there is new evidence that could affect the determination"; (2) "That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value"; (3) "That petitioner's or the [Office of Federal Acknowledgment's] research appears inadequate or incomplete in some material respect"; or (4) "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]."

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[3] Unless otherwise noted, hereafter we cite to the 1994 version of 25 C.F.R. Part 83.

[4] *See* 80 Fed. Reg. at 39142-43 (discussing criteria (a)-(c), 25 C.F.R. § 83.7 (a)-(c)); *see also* 25 C.F.R. § 83.6(c) (requiring that all seven criteria be satisfied).

[5] *See* 80 Fed. Reg. at 39144 (discussing 25 C.F.R. § 83.8).

[6] *See* 80 Fed. Reg. at 39142-43. The original acknowledgment regulations were first codified at Part 54 of 25 C.F.R., *see* 43 Fed. Reg. 39361 (Sept. 5, 1978), and were redesignated at Part 83 of 25 C.F.R. in 1982, *see* 47 Fed. Reg. 13326, 13327 (Mar. 30, 1982). In this decision, we refer to those regulations as the "1978 regulations."

Petitioner alleges that grounds (1), (3), and (4) are present in this case, but it has not met its burden to establish any of them and thus we affirm the FDR. Petitioner also asserts several grounds for reconsideration that are outside the Board's jurisdiction, including that its petition should be considered under the most recent amendments to Part 83, which became effective on July 31, 2015.[7] We refer those alleged grounds for reconsideration to the Secretary of the Interior (Secretary), as required by 25 C.F.R. § 83.11(f)(2).

Regulatory and Historical Background

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

As explained above, in the FDR, the Assistant Secretary considered DTO's petition under both the 1978 and the 1994 regulations. Under both sets of regulations, a group that petitions for Federal acknowledgment must satisfy all seven criteria in § 83.7(a)-(g). The first three of those mandatory criteria are relevant to the issues over which the Board has jurisdiction in this case.

A. Criterion § 83.7(a)

Under the 1994 regulations, the petitioner must establish under criterion (a) that it "has been identified as an American Indian entity on a substantially continuous basis since 1900." 25 C.F.R. § 83.7(a). Criterion (a) requires external identification of the petitioner as American Indian in character. *See* Final Rule, *Procedures for Establishing That an American Indian Group Exists as an Indian Tribe*, 59 Fed. Reg. 9280, 9286 (Feb. 25, 1994). The petitioner must only be identified as an American Indian "entity"; the regulations do not require that it be identified as a "tribe." *See id.* Under the 1978 regulations, the petitioner must establish such identification on a substantially continuous basis "from historical times until the present." 25 C.F.R. § 83.7(a) (1982). Thus, under the 1994 regulations, "[t]he requirement for substantially continuous external identification has been reduced to require that it only be demonstrated since 1900." 59 Fed. Reg. at 9286.

B. Criterion § 83.7(b)

Under the 1978 regulations, the petitioner must show under criterion (b) that "a substantial portion of the petitioning group inhabits a specific area or lives in a

[7] *See* 80 Fed. Reg. 37862 (July 1, 2015).

community[8] viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area." 25 C.F.R. § 83.7(b) (1982). Under the 1994 regulations, the petitioner must show that "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical[9] times until the present." 25 C.F.R. § 83.7(b). "Community" is defined in the 1994 regulations as:

> [A]ny 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.

Id. § 83.1 (definition of "Community").

In revising the regulations, the Department explained that, consistent with "current practices in interpreting the regulations," it "omitted an apparently implied requirement that a group live in a geographical community," "so that the definition of community could encompass all forms of social interaction and not just the traditional circumstances where a tribe lived on a separate land[]base." 59 Fed. Reg. at 9286-87. The Department replaced the term "substantial" with "predominant" in § 83.7(b) due to the focus on the social character of the group and "to state a requirement that at least half of the membership maintains significant social contact with each other." *Id.* at 9287. The Department also added language to make it "explicit that community must be demonstrated historically as well as presently." *Id.*

Revised § 83.7(b) lists several types of evidence deemed relevant to the definition of "community." Some examples include marriage rates and patterns, social relationships and interaction among members, shared economic activity among the membership, discrimination or other social distinctions by non-members, cultural patterns shared among members of the group, and the persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name. *See* 25 C.F.R. § 83.7(b)(1). Some combination of the listed types of evidence, or other

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[8] "Community" and "specific area" are defined in the 1978 regulations as "any people living within such a reasonable proximity as to allow group interaction and a maintenance of tribal relations." 25 C.F.R. § 83.1(o) (1982).

[9] The terms "historically," "historical," and "history" are defined in the 1994 regulations as "dating from first sustained contact with non-Indians." 25 C.F.R. § 83.1 (definition of "Historically, historical or history").

evidence, may be used to demonstrate that a petitioner meets the definition of "community." *Id.*

C. Criterion § 83.7(c)

Under the 1994 regulations, the petitioner must establish under criterion (c) that it "has maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7(c). Criterion (c) in the 1978 regulations contains similar language. *See* 25 C.F.R. § 83.7(c) (1982). The revised regulations provide a definition of "political influence or authority," which is

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

25 C.F.R. § 83.1 (definition of "Political influence or authority"); *see also* 59 Fed. Reg. at 9288 (stating that the definition "is not a change from present requirements" and "reflects the legal and policy precedents underlying the regulations").

As revised in 1994, criterion (c) lists various examples of evidence considered relevant to demonstrating political influence or authority, and provides that the criterion "may be demonstrated by some combination of the [listed] evidence . . . and/or by other evidence" that the petitioner meets the definition of "political influence or authority." 25 C.F.R. § 83.7(c)(1). Some examples of the listed evidence include the group's ability to mobilize significant numbers of members and resources from its members for group purposes, the importance to the membership of issues acted upon by group leaders, and widespread knowledge, communication, and involvement in political processes by most of the group's members. *Id.* § 83.7(c)(1)(i)–(iii). 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 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.*

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); *see also* 59 Fed. Reg. at 9280 (stating that the Department was "codifying current practices" by adding the foregoing language in § 83.6(d) to the revised regulations). Conclusive proof is not required. 25 C.F.R. § 83.6(d).

D. Unambiguous Previous Federal Acknowledgment, 25 C.F.R. § 83.8

Under the 1994 regulations, unambiguous previous Federal acknowledgment constitutes "acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgement." 25 C.F.R. § 83.8(a). "Previous Federal acknowledgment" means "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." *Id.* § 83.1 (definition of "Previous Federal acknowledgment"). Revised § 83.8 provides a non-exhaustive list of evidence that may be used to demonstrate previous Federal acknowledgement. *Id.* § 83.8(c)(1)-(3). If a petitioner provides substantial evidence of unambiguous Federal acknowledgment, the criteria in § 83.7(a)-(c) are modified for that petitioner. *Id.* § 83.8(a), (d)(1)-(5).

Such a petitioner need only show identification as an American Indian entity on a substantially continuous basis under criterion § 83.7(a) "since the point of last Federal acknowledgment," rather than since 1900. *Id.* § 83.8(d)(1). The group must also show that it has been identified "as the same tribal entity that was previously acknowledged or as a portion that has evolved from that entity." *Id.* Under criterion § 83.7(b) as modified, a previously acknowledged group must show that it "comprises a distinct community at present" but "need not provide evidence to demonstrate existence as a community historically." *Id.* § 83.8(d)(2). Finally, under criterion § 83.7(c) as modified, the group must show that "political influence or authority is exercised within the group at present," i.e., "from the point of last Federal acknowledgment to the present." *Id.* § 83.8(d)(3). As noted by the District Court in *Hansen*, "the 1978 regulations 'made no distinction between tribes that had been previously . . . acknowledged and those that had never been federally acknowledged.'" *Hansen*, 2013 U.S. Dist. LEXIS 40622, at *7 (quoting *Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 109 (D.D.C. 2006)).[10]

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[10] The District Court also noted that, on one hand, the Department "consistently maintained that the final determination on a particular petition would be the same regardless of whether the petition was evaluated under the 1978 or 1994 regulations." *Hansen*, 2013 U.S. Dist. LEXIS 40622, at *7 (citing 59 Fed. Reg. at 9280). On the other hand, the District Court observed, the same *Federal Register* notice stated that "'[i]n some circumstances, the burden of evidence to be provided is reduced' under the 1994

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II. History

The Duwamish Indians were identified as a historical tribe by Federal officials and American settlers in the western territory of Washington in the 1850s. Proposed Finding Historical Technical Report, Approved June 18, 1996, at 1 (PF HTR) (Critical Documents (CD) 4).[11] The Duwamish generally occupied the territory at the southern end of Lake Washington and along the Duwamish, Black, and Cedar Rivers, but the specific villages and geographical locations native to the historical tribe have been disputed. *Id.* at 1, 4.

In 1855, the Federal government negotiated the Treaty of Point Elliott with the Duwamish and 21 allied tribes. *Id.* at 1, 10-14; Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. Under the Treaty of Point Elliott and several other treaties that the Government negotiated with the tribes of the Puget Sound region during the mid-1800s, the tribes ceded nearly all their territory in western Washington to the United States. *See, e.g.*, Treaty of Medicine Creek art. 1, Dec. 26, 1854, 10 Stat. 1132. The treaties provided for the establishment of reservations in the Puget Sound region, including the Lummi Reservation, the Port Madison Reservation of the Suquamish Tribe, the Swinomish Reservation, the Tulalip Reservation, the Muckleshoot Reservation, and the Puyallup Reservation. The treaty tribes also reserved off-reservation fishing rights. *See United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974). The Government attempted to relocate the Duwamish to the Port Madison Reservation, PF HTR at 18-19,[12] but many remained in traditional villages such as those along the Black and Cedar Rivers, *id.* at 1-2, 19.

The Duwamish who remained off-reservation were subject to discrimination and removal efforts by white settlers. *See id.* at 27; Petitioner's Second Request for Reconsideration, Oct. 27, 2015, at 3 (RFR). Over time, the population of the off-

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(…continued)
regulations." *Id.* (quoting 59 Fed. Reg. at 9280); *see also* 59 Fed. Reg. at 9282 ("The changes reduce the burden of evidence for previously acknowledged tribes to demonstrate continued tribal existence.").

[11] Under 25 C.F.R. § 83.11(e)(8), the Assistant Secretary must designate and transmit to the Board copies of critical documents central to the portions of the final determination subject to the request for reconsideration and make the entire record available to the Board. On July 22, 2016, the Assistant Secretary transmitted the critical documents to the Board, including 10 numbered documents and 167 documents labeled by filename only. When citing to the critical documents in this decision, we cite either to the document number, e.g., "CD 4," or to the filename if the document is unnumbered.

[12] *See also United States v. Washington*, 476 F. Supp. 1101, 1103 (W.D. Wash. 1979).

reservation Duwamish villages diminished. PF HTR at 1-2. The census returns for 1910 and 1920 do not show any of these Indian settlements remaining. Summary Under the Criteria and Evidence for the Proposed Finding Against Federal Acknowledgment, June 18, 1996, at 6 (Proposed Finding) (CD 4). Reservation censuses showed that many of the Indians from these traditional villages moved to or affiliated with various reservation communities. *Id.* Beginning in the 1850s, some Duwamish women married non-Indian pioneers and moved away from the reservations and traditional villages, settling throughout western Washington. *Id.* Most of Petitioner's current members are descendants of the Duwamish women who married non-Indian pioneers. *See id.* at 7. About 99% of Petitioner's members (386 of 390 members in 1992) descend from the historical Duwamish Indian tribe as it existed before 1880. FDR at 77 (CD 1).

Petitioner heavily relies on three rolls or lists as evidence of its membership and continuity between the historical Duwamish tribe and DTO. First, in 1915, Charles Satiacum and William Rogers, identifying themselves as chief and sub-chief, respectively, of the "Duwamish Tribe of Indians," compiled a list on behalf of Duwamish who had resided on the Black, White, and Cedar Rivers. *Id.* at 60. The list, known as Satiacum's roll, includes 318 named individuals. *Id.* at 43, 87. In cooperation with Thomas Bishop, a Snohomish Indian who led the Northwest Federation of American Indians, the men sought to obtain Federal land allotments or monetary compensation for Duwamish descendants. *See* PF HTR at 45-48; FDR at 60. The Office of Federal Acknowledgment found that many of the individuals on Satiacum's list were also listed on the 1915 Indian census rolls of the Office of Indian Affairs as members of reservations. PF HTR at 46-48. Satiacum and Rogers were listed as members of the Puyallup and Port Madison reservations, respectively. *Id.* at 46.

After a number of allotment applications were received by the Department from the Northwest Federation of American Indians in 1916, special allotting agent Charles Roblin was tasked with quantifying the number of "unattached" Indians in western Washington. *Id.* at 41. As part of the survey he created a list, referred to as Roblin's roll, of 143 unenrolled Duwamish Indians living in the region in 1919.[13] *Id.* at 42. Roblin found that these off-reservation Duwamish were scattered throughout western Washington in isolated communities of immediate households or families. *Id.*

Petitioner, DTO, was established in 1925 by descendants of the off-reservation Duwamish Indians. PF HTR at 3; *see also* RFR at 5, 29 (stating that the "Duwamish

[13] The origins and purposes of Roblin's roll are detailed in a genealogical report attached to the Proposed Finding. *See* Proposed Finding Genealogical Technical Report, Approved June 18, 1996, at 36-39 (PF GTR).

Tribal Organization" was established in 1925). DTO adopted a constitution and by-laws, and produced a membership list in 1926 that included 398 on- and off-reservation members. *See* PF HTR at 3, 49-50. DTO has existed as an organization since 1925, holding annual meetings and collecting dues from its members. *Id.* at 50. In the 1920s, DTO pursued claims against the United States based on the Treaty of Point Elliott in the Court of Claims, and later did so in proceedings before the Indian Claims Commission. *Id.* at 55-60. DTO has been identified several times as an Indian entity since 1939. *Id.* at 4; Proposed Finding at 3-4.

Procedural Background

I. DTO's Petition, the Final Determination, and DTO's First Request for Reconsideration

DTO expressed its intent to seek Federal acknowledgment by letter dated June 7, 1977. FDR at 5. DTO filed a documented petition in 1987 and, after supplementation, the petition was placed on active consideration in 1992. *Id.* Because DTO's petition was under active consideration when the 1994 regulations became effective, DTO was given the choice of which version of the regulations would be applied in evaluating its petition. *See* 25 C.F.R. §§ 83.3(g), 83.5(f); FDR at 5. DTO formally elected to have its petition evaluated under the 1978 regulations. FDR at 5. Assistant Secretary Ada Deer signed a Summary Under the Criteria and Evidence for the Proposed Finding Against Federal Acknowledgment of DTO on June 18, 1996. Proposed Finding (CD 4). The Proposed Finding against acknowledgment was based on Petitioner's failure to meet the criteria in § 83.7(a)-(c) (1982). *Id.* at 1. A notice of the Proposed Finding was published in the *Federal Register* on June 28, 1996. *See* 61 Fed. Reg. 33763.

After the period for comments on the Proposed Finding closed, in December 2000, a draft final determination against acknowledgment was sent to Acting Assistant Secretary Michael J. Anderson.[14] *See* FDR at 6. The draft concluded that Petitioner did not meet the requirements of § 83.7(a)-(c) of the 1978 regulations. *See id.* Anderson informed BIA that he disagreed with the draft and that he would issue a final determination to acknowledge DTO as an Indian tribe. *See id.* at 7. In Anderson's January 19, 2001, revised draft determination, he reviewed the petition under both the 1978 and the 1994 regulations. *See id.* at 7 n.9. Anderson did not expressly analyze DTO's petition under 25 C.F.R. § 83.8,

[14] The draft Final Determination was prepared by the Branch of Acknowledgment and Research (BAR), within the Office of Tribal Services, Bureau of Indian Affairs (BIA). In 2003, the BAR became the Office of Federal Acknowledgment (OFA) within the Office of the Assistant Secretary. *See* FDR at 5 n.4.

concerning unambiguous previous Federal acknowledgment, but he used Federal relationships, claims legislation, and appropriation legislation for the "D'Wamish and other allied tribes" to support a conclusion that Petitioner continuously existed and met the criteria in § 83.7(a)-(c) for the years before 1925. *See id.* at 15-16. However, Anderson did not sign the revised determination or the required copies of the *Federal Register* notices before the end of his term. *Id.* at 7.

After the next administration assumed office, Assistant Secretary Neal A. McCaleb reviewed and disagreed with Anderson's changes, *see id.*, and approved a Summary Under the Criteria and Evidence for Final Determination Under 25 C.F.R. 83 for DTO on September 25, 2001 (Final Determination) (CD 6). A notice of the Final Determination was published in the *Federal Register* on October 1, 2001, and stated that DTO had not submitted sufficient evidence to meet the criteria in § 83.7(a)-(c) (1982). 66 Fed. Reg. 49966, 49966-67. DTO filed a timely request for reconsideration (First Request for Reconsideration) with the Board as provided by the 1994 regulations. *See* 25 C.F.R. § 83.11; *see also* 59 Fed. Reg. at 9285 (explaining that petitioners who chose to have their petitions considered under the 1978 regulations could nonetheless seek reconsideration by the Board under the 1994 regulations).

In its First Request for Reconsideration, Petitioner argued that Anderson's draft decision constituted a final determination, and asked the Board to remand the matter with instructions to "retract" the Final Determination and "reinstate" Anderson's "[d]ecision." *In re Federal Acknowledgment of the Duwamish Tribal Organization*, 37 IBIA 95, 96 (2002) (*DTO I*). The Board dismissed the request, finding that Petitioner had not alleged any grounds within its jurisdiction under § 83.11(d)(1)-(4). *Id.* The Board referred two issues to the Secretary pursuant to § 83.11(f)(1)-(2):[15] "(1) Whether the January 19, 2001, action taken by [Anderson] was a final determination to acknowledge Petitioner and (2) if so, whether the [Final Determination] should be retracted and the January 19, 2001, final determination reinstated." *Id.* On May 8, 2002, the Secretary declined to direct reconsideration by the Assistant Secretary, and the Final Determination became effective and final for the Department on that date. *See* 25 C.F.R. § 83.11(h)(2) ("If the Secretary declines to request reconsideration under paragraph (f)(2) of this section, the Assistant

[15] Subsection 83.11(f)(1) requires the Board to "describe in its decision any grounds for reconsideration other than those in paragraphs (d)(1)-(d)(4) of this section alleged by a petitioner's . . . request for reconsideration." Subsection 83.11(f)(2) further requires that, if the Board "finds that the petitioner . . . ha[s] alleged other grounds for reconsideration [not within its jurisdiction], the Board shall send the requests for reconsideration to the Secretary. The Secretary shall have the discretion to request that the Assistant Secretary reconsider the final determination on those grounds."

Secretary's decision shall become effective and final for the Department as of the date of notification to all parties of the Secretary's decision."); Memorandum from Secretary to Assistant Secretary, May 8, 2002 (CD 9).

II. Judicial Review and Remand

DTO petitioned for review in the United States District Court for the Western District of Washington. *See Hansen*, 2013 U.S. Dist. 40622, at *14. As relevant to the District Court's decision to vacate the Final Determination and remand the matter, Petitioner argued, for the first time, that the Department's failure to evaluate its petition under both the 1978 and the 1994 regulations violated the Administrative Procedure Act and its equal protection rights under the Constitution, because the petition of the Chinook Indian Tribe, which was under consideration at the same time as DTO's petition, had been evaluated under both sets of regulations despite Chinook's formal election for consideration under the 1978 regulations.[16] *Id.* at *14-15.

The District Court concluded that the Department's "failure to either consider the Duwamish petition under both sets of guidelines, or provide some explanation for its differing treatment of the Duwamish and Chinook petitioners," was arbitrary and capricious. *Id.* at *33. The District Court considered, *inter alia*, that the Final Determination did not explain why DTO's petition was analyzed exclusively under the 1978 regulations, and DTO would otherwise be "left to wonder why one administration thought [its] petition should be considered under both sets of rules, but a second did not"; Acting Assistant Secretary Anderson analyzed DTO's petition under both sets of regulations and concluded that DTO should be acknowledged, which suggests that "it is at least possible that application of the 1994 regulations would result in a different decision"; and, even if the Department were to analyze the petition under the 1994 regulations and reach the same decision as the Final Determination, DTO would benefit from receiving an analysis under both sets of regulations. *Id.* at *28, 32-33.

The District Court vacated the Final Determination and remanded the case to the Department "to either consider the Duwamish petition under the 1994 acknowledgment regulations or explain why it declines to do so." *Id.* at *33-34. At the same time, the District Court explained that it had not considered whether the Department's determination on the merits under the 1978 regulations was supported by substantial evidence. *Id.* at *33.

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[16] Applying both sets of regulations, the Chinook final determination was for acknowledgment, *see* 66 Fed. Reg. 1690 (Jan. 9, 2001), however, the Secretary referred certain issues to the Assistant Secretary for reconsideration and the reconsidered final determination was against acknowledgment, *see* 67 Fed. Reg. 46204 (July 12, 2002).

The District Court expressed no other guidance on how the Department was to proceed on remand.

III. The Final Determination on Remand

The Government appealed the District Court's decision to the Ninth Circuit Court of Appeals. After the parties executed a settlement, the appeal was dismissed on June 9, 2014, leaving the District Court's decision in place. *See* FDR at 1. Consistent with the District Court's decision, the FDR analyzes the petition under both the 1978 and the 1994 regulations. *See id.* The FDR discusses Anderson's draft decision but reaches a decision against acknowledgment and states that the FDR should be read together with the Summary under the Criteria and the technical reports that make up the Proposed Finding against acknowledgment. *Id.*

A. The Record for the Final Determination on Remand

The Assistant Secretary declined, as a preliminary issue, a request by DTO to reopen the record and consider additional evidence. *Id.* at 2. He noted that the District Court did not express any specific requirements for the decision-making process on remand. *Id.* He also noted that "[t]he IBIA review process included in the 1994 regulations was available to petitioners proceeding under the 1978 regulations when the revised regulations became effective. The IBIA review process expressly provides the opportunity for petitioners and interested parties to submit new evidence to the IBIA."[17] *Id.* In the prior proceedings, Petitioner offered no additional evidence to the Board or the Secretary before the Final Determination became effective and final for the Department, subject to judicial review. *See id.* The Assistant Secretary concluded that the "[s]ubmission of new or additional evidence by the petitioner following a final and effective final determination is tantamount to re-petitioning," the 1994 regulations prohibit re-petitioning,[18] and therefore additional evidence "cannot be accepted." *Id.* at 2-3. The Assistant Secretary also stated that, on remand, the Department treated Petitioner in the same manner as it had treated the Chinook Indian Tribe, basing its review "on the evidence submitted previously under the 1978 regulations and through the IBIA process." *Id.* at 2. And he asserted that "the 1978 regulations require as comprehensive a record as the 1994 regulations. Therefore, reopening the record on remand is not justified based on the regulatory revisions." *Id.*

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[17] Subsection 83.11(b) of 25 C.F.R. provides, "The petitioner's or interested party's request for reconsideration . . . shall include any new evidence to be considered."

[18] Subsection 83.10(p) of 25 C.F.R. states that "[a] petitioner that has petitioned under this part or under the acknowledgment regulations previously effective and that has been denied Federal acknowledgment may not re-petition under this part."

Thus, the Assistant Secretary limited his review on remand to any evidence submitted during the prior administrative proceedings, submitted to the Board with Petitioner's First Request for Reconsideration, submitted to the Secretary following the Board's review, or submitted to the District Court.[19] *Id.* at 2-3, 9-10.

B. Unambiguous Previous Federal Acknowledgement

After deciding not to allow supplementation of the record on remand, the Assistant Secretary examined the record to determine, first, whether Petitioner met the requirements for finding unambiguous previous Federal acknowledgment and thus could avail itself of the modified criteria in § 83.7(a)-(c). *Id.* at 12. The FDR concluded that, even though Petitioner's members descend from the historical Duwamish tribe, Petitioner failed to demonstrate that it was either a continuation of, or had evolved as a group from, the historical Duwamish tribe with which the Federal government had a political relationship during and after treaty times. *Id.* at 12-16. The FDR reasoned that four tribes—Lummi, Suquamish, Swinomish, and Tulalip—"are the continuation of the 'D'Wamish and other allied tribes' referred to by the 1855 [Treaty of Point Elliott] and in subsequent appropriation legislation." *Id.* at 13. These four tribes and the Muckleshoot Indian Tribe have had many descendants of the historical Duwamish tribe from the date they were established to the present. *Id.* The FDR found that the DTO members and their ancestors "generally, never enrolled, and are not enrolled presently, in these five recognized tribes," and the DTO ancestors were not among the "D'Wamish and other allied tribes" that populated the treaty reservations after the 1855 treaty negotiations and received congressional appropriations. *Id.* In addition, the FDR found that Petitioner's ancestors left the tribe as individuals or individual families before 1880 and dispersed throughout western Washington, where they established separate homes and did not have contact or act together in a separate Indian entity that would formally organize as the "Duwamish Tribal

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[19] The District Court found that materials that DTO sought to add to the administrative record during appeal were, with one exception, sources of law and therefore did not need to be included in the record. As for the one exception—a non-legal source document that was not before the Assistant Secretary—the District Court rejected DTO's motion to supplement the record. *See* Order on Motion to Compel Completion of the Administrative Record at 3-4, *Hansen v. Kempthorne*, No. C08-0717-JCC (Jan. 10, 2012). The FDR states that, although the District Court found no requirement to add the foregoing materials to the administrative record, they were considered on remand. FDR at 3.

The FDR also notes that, in *Hansen*, DTO submitted 131 exhibits in support of motions for summary judgment, and the FDR lists these documents in an appendix. *See* FDR at 11 & Appendix I. The FDR states that "very few of these documents are actually new to the record" and that they are discussed in the FDR where relevant. FDR at 11.

Organization" in 1925. *Id.* at 14. The FDR disagreed with the finding in Anderson's draft decision that Petitioner was previously acknowledged, explaining that the draft "did not cite any evidence showing how DTO ancestors were part of the 'D'Wamish and other allied tribes' between 1855 and 1925 or 1939, and the evidence showed them living elsewhere." *Id.* at 15-16. Therefore, the FDR concluded that the evidence did not support Petitioner's claim of unambiguous previous Federal acknowledgment. *Id.* at 16. The FDR further concluded that, even if Petitioner were assumed to have been previously recognized, it would not meet the criteria in § 83.7(a)-(c) as modified by § 83.8(d)(1)-(3) under the 1994 regulations, nor would it meet the criteria in § 83.7(a)-(c) under the 1978 regulations. *Id.* at 16-17.

C. The Criteria in § 83.7(a)-(c) of the 1978 and the 1994 Regulations

The Assistant Secretary next evaluated DTO's petition under the seven mandatory criteria in § 83.7, without modification. He concluded that Petitioner satisfied the criteria in § 83.7(d)-(g) under both the 1978 and the 1994 regulations. *See id.* at 2. He concluded that there was insufficient evidence in the record to show that Petitioner met the criteria in § 83.7(a)-(c) under either set of regulations. *Id.*; *see also infra* note 48.

Specifically, the FDR concluded that Petitioner did not meet criterion § 83.7(a) of the 1978 regulations because the evidence did not show outside identification of Petitioner as an Indian entity on a substantially continuous basis since the date of first sustained contact with non-Indians, in this case since the 1850s, or from 1900 to the present as required under the 1994 regulations. *Id.* at 17, 20. The FDR found that Petitioner has only been identified as an Indian entity from 1939 to the present. *Id.* The FDR reasoned that identifications of the "Duwamish" and "D'Wamish and allied tribes" between 1900 and 1924 were not of Petitioner, because most of Petitioner's ancestors had left the Indian tribes of the treaty reservations by the 1880s; villages noted on maps located on the Cedar and Black Rivers were not those of Petitioner and likely did not exist after 1907; and pre-1925 identifications of a Duwamish entity could not have been DTO, because it did not form until 1925. *Id.* at 20, 26-28. The FDR further reasoned that Anderson's draft decision did not cite to evidence for the time periods lacking identifications of DTO as an entity (from the mid-1850s to 1939 under the 1978 regulations, and from 1900 to 1939 under the 1994 regulations), and that Anderson's draft misconstrued appropriations bills between 1860 and 1923, which concerned funding of the reservation treaty tribes, as applying to Petitioner. *Id.* at 27.

The FDR concluded that Petitioner did not meet criterion § 83.7(b) for community under the 1978 or 1994 regulations at any time. *Id.* at 17, 30. Under the 1978 regulations, the FDR concluded that, even though Petitioner's members descend from the historical Duwamish tribe, the evidence did not show that a substantial portion of DTO

members inhabited a specific area or lived in a community viewed as American Indian and distinct from other populations in the area.[20] *Id.* at 18, 55. Under the 1994 regulations, the FDR concluded that the evidence did not show that a predominant portion of DTO comprises a distinct community and has existed as a community from historical times until the present. *Id.* at 18, 55. The FDR reasoned that Petitioner's ancestors—primarily Duwamish women and their non-Indian spouses—dispersed throughout western Washington soon after first sustained contact with non-Indians in the mid-1850s and that, by the 1880s, their descendants did not maintain a distinct community comprising a dispersed off-reservation population. *Id.* at 17, 55. Nor, according to the FDR, did they remain part of the historical Duwamish tribe, which moved to the treaty reservations, nor evolve from the historical Duwamish tribe to become the DTO after 1925. *Id.* The FDR specifically rejected Petitioner's assertions that its ancestors were part of the historical Duwamish tribe after the 1880s and before 1925,[21] *see id.* at 30-42; that Satiacum's 1915 roll and the post-1926 DTO membership lists represent a single and continuous entity at different points in time, *see id.* at 42-44; and that Petitioner and its ancestors maintained a community between 1925 and the present, either with the Indians of the historical Duwamish settlements, with the Duwamish who moved to reservations, or with each other, *see id.* at 44-54. The FDR further found that Anderson's draft decision incorrectly "accepted that isolated families without links to other DTO families demonstrated the petitioner met criterion (b)," and failed to address "the lack of any evidence of interaction among DTO's ancestors and other evidence indicating they did not interact." *Id.* at 54.

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[20] The FDR explains that, under the 1978 regulations, the Department does not require members to live in close proximity to one another. FDR at 51. Instead, "[p]etitioners usually demonstrate that they are a community by utilizing non-geographical evidence such as actual interaction, distinct social networks, conflict and resolution of conflict, decisionmaking, cooperative and reciprocal relationships, and similar activities." *Id.* Where petitioners do live in a "village-like setting" or "exclusive neighborhood," the Department assumes that interaction existed without requiring other evidence. *Id.* at 51 n.56. The FDR also explains that this practice was codified in the 1994 regulations. *Id.* (citing 25 C.F.R. § 83.7(b)(2)(i)).

[21] The FDR found that about 84% of DTO's membership in 1991 descended from five Duwamish women, and in all about 95% of the membership descended from marriages between non-Indian pioneers and Duwamish women. FDR at 31 n.27. The FDR further found that "generally, the DTO ancestors did not marry either historical Duwamish Indians, residing on four reservations, or each other. . . . [T]he out-married women whose children subsequently married other Duwamish Indians or into any of the various western Washington tribes are not ancestors of the petitioner; rather, they were members of federally recognized tribes." *Id.* at 34 & n.29.

Finally, the FDR concluded that Petitioner did not meet criterion § 83.7(c) for political influence or authority under the 1978 or 1994 regulations, because Petitioner did not demonstrate that it has exercised political influence or authority over its members as an autonomous entity at any time, and not from historical times (i.e., from the mid-1850s) to the present as required under both sets of regulations. *Id.* at 18, 72. The FDR reasoned that the historical Duwamish tribe maintained tribal political influence over some of Petitioner's ancestors until 1896; Satiacum's 1915 roll was created as part of an inter-tribal claims effort led by Thomas Bishop, a Snohomish Indian who headed the Northwest Federation of American Indians, and is not an initial DTO membership list; DTO began to organize in late 1925; and there was insufficient evidence that DTO members were involved in "decision-making, conflict resolution, undertaking and running events and programs, or . . . other activities, which reveal political processes from late 1925 to the present."[22] *See id.* at 18, 43, 57, 60, 71-72. The FDR found that Petitioner failed to submit information and evidence to correct the inadequacies discussed in the Proposed Finding. *Id.* at 71. The FDR also found that the evidence in the record controverted Anderson's draft decision, for example, to the extent the draft accepted Petitioner's assertion that "the claims organization, of which some of the DTO petitioner's ancestors were a part, was on behalf of a tribal entity that pursued non-claims goals." *Id.* at 72.

IV. The Second Request for Reconsideration

On October 27, 2015, the Board received a second request for reconsideration (Second Request for Reconsideration or RFR) from Petitioner, asserting that there are three grounds for reconsideration in this case: (1) under 25 C.F.R. § 83.11(d)(1), that there is new evidence that could affect the determination; (2) under § 83.11(d)(3), that the research on which the FDR is based is inadequate or incomplete in some material respect; and (3) under § 83.11(d)(4), that there are reasonable alternative interpretations, not considered by the Assistant Secretary, of the evidence used for the FDR, that would substantially affect the determination that Petitioner does not meet the mandatory criteria in § 83.7(a)-(c). *See* RFR at 12. Petitioner recognizes that it also "raises a number of legal arguments that are outside the scope of the IBIA's review and which must be referred to the Secretary . . . , including the question of whether the Petition must be considered under the new regulations that went into effect in July 2015." *Id.*

[22] In the context of considering whether Petitioner would meet criterion § 83.7(c) under the 1994 regulations if it were previously Federally acknowledged, the FDR found that no knowledgeable observers identified leaders of a DTO entity before 1939. FDR at 17, 72 n.66.

As a threshold question, on November 10, 2015, the Board solicited briefing on whether the FDR is subject to review by the Board despite a statement in the *Federal Register* notice that the "Final Decision on Remand (corrected) is final for the Department on publication of this notice."[23] 80 Fed. Reg. 45230 (July 29, 2015). After considering briefs from Petitioner, the Assistant Secretary, and the Muckleshoot Indian Tribe, which moved for leave to participate as an interested party in opposition to reconsideration, the Board concluded that the FDR is subject to Board review.[24] For that reason, in this decision, the Board refers to the FDR as the "Final Determination on Remand," rather than the "Final Decision on Remand."

The Board explained in part that:

> The Board's authority to consider appeals from decisions concerning the acknowledgment of Indian tribes is governed by 25 C.F.R. § 83.11. *In re Federal Acknowledgment of the Golden Hill Paugussett Tribe*, 34 IBIA 55, 55 (1999).
>
> . . . Other than the subject matter limitations on the types of claims the Board may consider, *see* 25 C.F.R. § 83.11(d), the only regulatory limitation on the Board's review in § 83.11 is § 83.11(h)(3), which provides: "If a determination is reconsidered by the Assistant Secretary because of *action by the Board remanding a decision* or because the *Secretary has requested reconsideration*, the reconsidered determination shall be final and effective upon publication of the notice of this reconsidered determination in the Federal Register." 25 C.F.R. § 83.11(h)(3) (emphases added).
>
> It is undisputed that neither of these circumstances is present here. . . .
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> . . . .

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[23] The Board has long held that, as a quasi-judicial tribunal charged with the responsibility of performing objective independent review of agency action, the Board has jurisdiction to determine its own jurisdiction. *See, e.g.*, *Navajo Nation v. Office of Indian Education Programs*, 40 IBIA 2, 17 (2004) (Board has not been delegated general authority to review decisions of the Assistant Secretary, but it may do so when authority has been specifically granted to the Board by the Assistant Secretary or by regulation).

[24] Order Determining That the "Final Decision on Remand" Is Subject to Review by the Board, Order Allowing Motions for Interested Party Status, and Order for Critical Documents, Mar. 7, 2016, at 4 (March 7, 2016, Order).

> . . . In our view, the absence of provisions that specifically apply to final determinations issued on judicial remand means, as the Department suggested in the preamble,[25] that we must look to the remand order itself and then determine how or to what extent the administrative review process applies.
>
> In this case, the *Hansen* court *vacated* the Final Determination and remanded the matter to the Department. Thus, presumptively, however it is styled, the Assistant Secretary's decision constituted a new final determination under § 83.10, and Petitioner had a right to seek reconsideration under § 83.11(a). Section 83.11(h)(3) does not state that a reconsidered determination, issued after a remand by a Federal court, is final for the Department. . . . Under the plain terms of the regulations, the Board has authority, under § 83.11(e), to review the Final Decision on Remand, because it is not final and effective under § 83.11(h)(3), and a right of Board review is consistent with the district court's decision.

March 7, 2016, Order at 2-4.

In response to the Board's order and pursuant to 25 C.F.R. § 83.11(e)(8), the Assistant Secretary transmitted to the Board copies of critical documents central to the portions of the FDR under Petitioner's request for reconsideration.[26] Transmittal of Critical Documents, July 22, 2016, at 1.

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[25] The preamble to the 1994 rule states, in response to a request for clarification "on what procedures would apply if a court were to vacate or otherwise return a decision for reconsideration," as follows: "Provisions would be made regarding what procedures should be followed on an individual basis depending on the specific court ruling. Because the court would be expected to provide guidance for each case of this type, no general provisions can be included in the regulations." 59 Fed. Reg. at 9285.

[26] Subsection 83.11(e)(8) provides that "[t]he Assistant Secretary shall designate and transmit to the Board copies of critical documents central to the portions of the determination under a request for reconsideration. The [Office of Federal Acknowledgment] shall retain custody of the remainder of the administrative record, to which the Board shall have unrestricted access."

The Board granted amicus status to the Muckleshoot Indian Tribe and the Puyallup Tribe of Indians (collectively, Amici Tribes) by order of September 14, 2016,[27] and they filed briefs in opposition to Petitioner's request for reconsideration. *See* Amicus Muckleshoot Indian Tribe's Brief (Br.) in Opposition to Duwamish Request for Reconsideration, Nov. 18, 2016 (Muckleshoot Br.); Amicus Puyallup Tribe's Br. in Opposition to Duwamish Tribal Organization's Request for Reconsideration, Nov. 18, 2016 (Puyallup Br.). Petitioner filed a combined reply brief responding to the opposition briefs. *See* DTO Reply Br., Jan. 9, 2017. In doing so, Petitioner reorganized and/or reframed several of its arguments in an apparent effort to clarify why it believes that certain arguments fall within one of the grounds for the Board to order reconsideration by the Assistant Secretary under § 83.11(d).

Scope of Review

A petitioner or interested party may file a request for reconsideration with the Board within 90 days of the date of publication of the final determination. 25 C.FR. § 83.11(a). The Board's jurisdiction on a request for reconsideration is limited by § 83.11(d) to reviewing requests for reconsideration that allege one or more of the following:

> (1) That there is new evidence that could affect the determination; or
>
> (2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; or
>
> (3) That petitioner's or the [Office of Federal Acknowledgment's] research appears inadequate or incomplete in some material respect; or
>
> (4) 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 criteria in § 83.7 (a) through (g).

Id. § 83.11(d)(1)-(4). The burden is on the petitioner to establish, by a preponderance of the evidence, that at least one of the grounds for reconsideration exists. *See id.*

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[27] In its order, the Board noted that the Muckleshoot Indian Tribe, the Puyallup Tribe of Indians, the Suquamish Tribe of the Port Madison Reservation, and the Tulalip Tribes requested that the Secretary assume jurisdiction over this matter pursuant to 43 C.F.R. § 4.5. The Secretary did not do so.

§ 83.11(e)(9)-(10). The Board is required to describe in its decision any grounds for reconsideration alleged by the petitioner that are outside the Board's jurisdiction, *id.* § 83.11(f)(1), and if the final determination is affirmed, the Board must refer those grounds to the Secretary, *id.* § 83.11(f)(2).

Discussion

Petitioner seeks reconsideration based on the grounds set forth in § 83.11(d)(1), (3), and (4). For the following reasons, even assuming that the Board has authority to consider Petitioner's purported new evidence despite the Assistant Secretary's decision not to reopen the record on judicial remand, the Board finds that Petitioner has failed to meet its burden of proof to show, by a preponderance of the evidence, that any grounds for reconsideration exist in this case. Therefore, the FDR is affirmed. In addition, because Petitioner asserts grounds for reconsideration that do not fall within one of the grounds described in § 83.11(d)(1)-(4), the Board refers those alleged grounds for reconsideration to the Secretary as required by § 83.11(f)(2). *See infra* Part IV.

I. New Evidence

Petitioner contends that it has new evidence that could affect the determination that it does not meet the criteria in § 83.7(a)-(c) of the 1978 and 1994 regulations. DTO Reply Br. at 21-55 & Appendix A; RFR, *passim*. Subsection 83.11(d)(1) authorizes the Board, when reviewing a request for reconsideration, to decide whether "there is new evidence that could affect the determination." In this case, on remand from the District Court, the Assistant Secretary denied DTO's request to reopen the record and allow the submission of additional evidence, beyond the evidence that was submitted to the District Court, in support of its petition for Federal acknowledgment. *See* FDR at 2.

Petitioner appears to challenge the Assistant Secretary's decision not to reopen the record and consider additional evidence on judicial remand. DTO argues that "a significant amount of the Tribe's new evidence consists of information the AS-IA is not aware of because of the Department's refusal to consider anything other than what is contained in the decades-old, stale administrative record." DTO Reply Br. at 22. But the Board ordinarily does not have jurisdiction to review a decision of the Assistant Secretary. *See Cherokee Nation v. Acting Eastern Oklahoma Regional Director*, 58 IBIA 153, 161 (2014). Subsection 83.11(e) provides that the Board shall have authority to review the Assistant Secretary's acknowledgment determinations only "to the extent authorized by [§ 83.11]." The Board can find nothing in § 83.11(d)(1) that authorizes the Board to review the Assistant Secretary's decision not to consider new evidence.

In addition, by requesting that the Board consider the purported new evidence, Petitioner indirectly challenges the Assistant Secretary's decision not to do so. When the Board determines that there is new evidence that could affect the determination, the Board orders reconsideration by the Assistant Secretary in light of the new evidence; the Board cannot make an acknowledgment determination. *See* 25 C.F.R. § 83.11(e)(10). In this case, the Assistant Secretary has already decided not to consider new evidence on judicial remand, and the Board's review is a part of the judicial remand proceedings leading to a final Departmental determination. If the Board were to consider Petitioner's purported new evidence and decide that it could affect the FDR, we question under what authority the Board could then require the Assistant Secretary to consider such evidence despite the Assistant Secretary's prior decision not to do so. *See Cherokee Nation*, 58 IBIA at 161.

This case is distinguishable from *In re Federal Acknowledgment of the Choctaw Nation of Florida*, 57 IBIA 195 (2013). There, the Assistant Secretary refused to consider an untimely comment on a proposed finding, pursuant to 25 C.F.R. § 83.10(*l*)(1), which provides that unsolicited, untimely comments on a proposed finding "will not be considered in preparation of a final determination." The Board held that § 83.10(*l*)(1) did not preclude the Board from reviewing the comment as new evidence submitted with a timely request for reconsideration under § 83.11(b) and (d)(1). 57 IBIA at 198. Here, Petitioner seeks review of purported new evidence not through reconsideration of an original final determination, but through reconsideration of a final determination issued on judicial remand. As discussed *supra*, the preamble to the 1994 regulations explain that the Department contemplated that the procedures following a judicial remand would vary case-by-case.

With respect to the Board's review, the exclusion of new evidence from these proceedings on judicial remand is not inconsistent with the District Court's decision. The District Court instructed the Department on remand to either consider DTO's petition under the 1994 regulations or explain why it declined to do so. Though the District Court vacated the Final Determination, it expressly did not decide whether the decision was supported by substantial evidence in the record, it rejected DTO's request to supplement the record, and it explicitly did not preclude the Assistant Secretary from making the same decision under the 1978 regulations. *See Hansen*, 2013 U.S. Dist. LEXIS 40622 at *33; *supra* at 159, 161 n.19. On remand, the Assistant Secretary limited his review to the evidence that was presented to the District Court. We find nothing in the District Court's decision that requires that Petitioner be given another opportunity to present new evidence to the Board.[28]

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[28] We also again note that, in cases where the Board remands a decision to the Assistant Secretary or the Secretary requests reconsideration by the Assistant Secretary, there is no

(continued…)

Even if the Board were to assume that it has jurisdiction to consider Petitioner's purported new evidence, the Board would conclude, for the reasons discussed below, that Petitioner has not presented new evidence that could affect the final determination. This is based in part on analyses provided by the Assistant Secretary and the Amici Tribes of the purported new evidence. To the extent Petitioner argues that reconsideration should be granted because the Assistant Secretary refused to reopen the record and additional evidence remains to be uncovered, *see* DTO Reply Br. at 53; RFR at 75, the Board concludes that this argument is not within the Board's limited scope of review and therefore refers the argument to the Secretary. *See infra* Part IV.

A. Standard for "New Evidence"

New evidence includes only evidence that was not part of the administrative record for the final determination. *In re Federal Acknowledgment of the Tolowa Nation*, 62 IBIA 187, 194 (2016), *aff'd*, *Tolowa Nation v. United State*s, No. 17-cv-06478-RS (N.D. Cal. Mar. 12, 2019); *In re Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana*, 57 IBIA 101, 110 (2013). When a party requesting reconsideration asserts the existence of new evidence, it must submit the evidence with the request for reconsideration. 25 C.F.R. § 83.11(b); *Ramapough Mountain Indians*, 31 IBIA at 66. The requesting party bears the burden both to clearly identify the evidence claimed to be new and prove that the new evidence could affect the final determination. *Little Shell Tribe*, 57 IBIA at 110; *In re Federal Acknowledgment of the Juaneño Band of Mission Indians, Acjachemen Nation*, 57 IBIA 149, 157 (2013). If new evidence is simply another example of the same or similar evidence already considered, does not add any substantively new information to the record, or would simply confirm a fact already known to the decision maker and not considered to be determinative, the evidence does not satisfy the "could affect" standard in § 83.11(d)(1). *In re Federal Acknowledgment of the Nipmuc Nation*, 45 IBIA 231, 248 (2007).

B. Petitioner's Purported New Evidence

As new evidence, Petitioner submitted with its Second Request for Reconsideration 298 exhibits and 9 declarations. *See* RFR, Appendix C (declarations) and Appendix D (exhibits). Petitioner asserts that this evidence was not before the District Court and that it was submitted to the Department for the first time with its RFR. *See* RFR at 3 n.3; DTO Reply Br. at 23.

(…continued)
subsequent opportunity to submit new evidence to the Board. *See* 25 C.F.R. § 83.11(h)(3) (providing that the reconsidered final determination is final for the Department).

A table analyzing Petitioner's purported new evidence was provided by the Assistant Secretary with the transmittal of critical documents from the administrative record. *See* Transmittal of Critical Documents, Attachment 2, Table of Exhibits in DTO's Appendix D and DOI's Administrative Record (Assistant Secretary's Table of Exhibits). The Assistant Secretary categorized Petitioner's exhibits into four groups. First, the Assistant Secretary's Table of Exhibits identifies exhibits that are, contrary to Petitioner's claim, contained in the administrative record. Transmittal of Critical Documents at 1. Second, if an exhibit is not in the record, but the record contains a comparable document, the comparable document is listed. *Id.* The Assistant Secretary also transmitted these comparable documents to the Board as critical documents from the record. *See id.* at 2. Third, the table notes whether an exhibit is a "newly created document" or "NCD," i.e., one that was created after the close of the administrative record. *Id.* at 1. The Transmittal of Critical Documents explains that the "record for the FDR includes all documents and evidence submitted before May 2002 [when Secretary Norton declined additional review of DTO's petition] and evidence submitted to the district court before its decision in March 2013." *Id.* at 2. The Transmittal of Critical Documents further explains that both the Final Determination and the FDR "evaluated the DTO and its members as of 2001, using the evidence discussed above." *Id.* Fourth, if none of the foregoing three categories applies to an exhibit, and yet there is discussion in the Proposed Finding or the FDR that is pertinent to the exhibit, the table lists the relevant pages of the Proposed Finding or the FDR. *See id.* at 1-2.

The Amici Tribes note that, based on the information in the Assistant Secretary's Table of Exhibits, of Petitioner's 298 exhibits, 39 are already in the record; 211 are comparable to documents in the record; 48 were created after the close of the record; and 2 contain information that is otherwise referenced in the FDR.[29] Muckleshoot Br. at 12; Puyallup Br. at 9. The Muckleshoot Tribe also submitted its own table analyzing Petitioner's purported new evidence and identifying which exhibits were not referenced in the RFR. Muckleshoot Br., Exhibit 1, Appendix D Index to DTO RFR (Muckleshoot's Table of Exhibits). The Amici Tribes assert that, of Petitioner's 298 exhibits, 126 are not discussed or cited in the RFR. *See* Muckleshoot Br. at 12; Puyallup Br. at 10. In addition, the Amici Tribes argue that, where the RFR does reference purported new evidence, it fails to explain what information in the exhibits is actually new or its significance. Muckleshoot Br. at 12; Puyallup Br. at 10.

[29] The Board notes that some exhibits are listed in more than one category in the Assistant Secretary's Table of Exhibits: One exhibit (182) is listed as being both contained in the record and comparable to other documents in the record, and several exhibits are listed as both comparable to another document(s) in the record and as newly created.

In its reply brief, Petitioner asserts that it specifically identified each piece of new evidence in its RFR and reply brief, including by citing to certain new exhibits in bold font. DTO Reply Br. at 23. Petitioner provided a table that lists each exhibit and declaration; cites the page(s), if any, on which the exhibits and declarations are referenced in Petitioner's RFR; and identifies any of the three acknowledgment criteria in dispute (§ 83.7(a)-(c)) to which the exhibits and declarations allegedly are relevant. *Id.* at 24-48 (Petitioner's Table of Exhibits). Petitioner also summarized how in its view certain exhibits or declarations could affect the Assistant Secretary's determination that Petitioner did not meet the criteria in § 83.7(a)-(c). *See id.* at 49-53.

The Board has reviewed the information and arguments provided by Petitioner, the Assistant Secretary, and the Amici Tribes, and concludes that Petitioner has not met its burden to demonstrate that there is new evidence that could affect the determination.

i. Exhibits Already in the Record

In its reply brief, Petitioner asserts that the Amici Tribes have not shown that 39 of Petitioner's exhibits are duplicative of documents in the record, *see* DTO Reply Br. at 22, but Petitioner does not refute the Assistant Secretary's finding that those exhibits are already contained in the record. In addition, the Board has identified two exhibits, numbered 98 and 236, that are the same as another exhibit(s) included with the RFR and identified by the Assistant Secretary as already contained in the administrative record.[30] *Compare* DTO Exhibit 98 *with* DTO Exhibit 105, and *compare* DTO Exhibit 236 *with* DTO Exhibits 237-39. Copies of Petitioner's exhibits that are already in the record were not transmitted to the Board as critical documents from the record, *see* Transmittal of Critical Documents at 2, and the Board has not verified that all 41 exhibits are duplicative of documents in the record. However, Petitioner has provided no evidence to the contrary. In the face of the Assistant Secretary's finding, it is insufficient for Petitioner, who bears the burden to show that there is new evidence that could affect the determination, *see Juaneño Band of Mission Indians*, 57 IBIA at 157, to rely on a bare, unsworn challenge. Therefore, the Board concludes that Petitioner has failed to meet its burden to prove that these 41 exhibits are new evidence. A list of these 41 exhibits is included in an **Appendix** hereto.

[30] These two exhibits (plus DTO Exhibit 182, discussed *supra* note 29) are listed in the Assistant Secretary's Table of Exhibits as comparable to documents in the record.

ii. Exhibits Not Cited by Petitioner in the RFR

Petitioner does not dispute the Amici Tribes' assertion that 126 of Petitioner's exhibits lack any reference in the RFR.[31] The Board also notes that, of the 126 exhibits, 19 have been found by the Assistant Secretary to already be in the record, as explained above. The remaining 107 exhibits are listed in the **Appendix** hereto.

A petitioner that offers "new evidence" to support reconsideration has the burden to demonstrate how the proffered evidence could affect the determination. *Nipmuc Nation*, 45 IBIA at 256. Accordingly, a petition that simply attaches documents alleged to be "new evidence," and fails to explain how the evidence could affect the determination, does not meet the petitioner's burden to establish that reconsideration is warranted based on new evidence. *See id.*

Although these exhibits are listed in Petitioner's table in its reply brief, the references are insufficient to satisfy the requirement that Petitioner show, by a preponderance of the evidence, that the new evidence could affect the determination. For most exhibits, Petitioner simply placed a mark signifying whether the exhibit allegedly relates to criterion (a), (b), and/or (c) of § 83.7, without further explanation.[32] This is not sufficient to show how the evidence could affect the determination; instead it attempts to shift the burden to the Board to examine each exhibit and infer how Petitioner believes it could affect the determination. As such, the information in Petitioner's Table of Exhibits does not overcome the absence of references to the exhibits in the RFR, and Petitioner has not proved that these exhibits are new evidence warranting reconsideration of the petition under § 83.11(d)(1).

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[31] Petitioner's Table of Exhibits included in its reply brief identifies 134 exhibits as lacking any reference in the RFR. The Muckleshoot Tribe has identified 8 of these exhibits as being referenced in the RFR at page 53, namely, DTO Exhibits 100, 102, 104, 107, 109, 111, and 113-14. *See* Muckleshoot Br. at 12 & Muckleshoot's Table of Exhibits. All eight exhibits are included in a general citation: "Canoeing Events. *See generally* MTR Exs. 98-169." RFR at 53 n.33 (emphases omitted). None of the eight exhibits are cited in the ensuing discussion in the RFR, which concerns canoeing events in 1989 and later. *See id.* at 53.

[32] The Board notes that two exhibits (107 and 295) that Petitioner has identified as not cited in the RFR also lack any such mark indicating their relevance to § 83.7.

iii. Exhibits with Comparable Documents in the Record

We now turn to whether some of Petitioner's exhibits are comparable to documents in the record that were already considered, and thus do not constitute new evidence that could affect the determination. *See Nipmuc Nation*, 45 IBIA at 248. As explained *supra*, the Amici Tribes assert, based on the Assistant Secretary's Table of Exhibits, that 211 of Petitioner's 298 exhibits are comparable to documents in the record. Petitioner contends that the Amici Tribes have not shown how these 211 exhibits are comparable to documents in the record. DTO Reply Br. at 22. Petitioner also contends that the Amici Tribes' assertion is "belied by the fact that a significant amount of [Petitioner's] new evidence" consists of information that was not before the Assistant Secretary due to his refusal to reopen the record on remand from the District Court.[33] *Id.* The only specific example mentioned by Petitioner, without citation to any of its exhibits, involves the establishment of the Duwamish Longhouse and Cultural Center. *See id.* Among the comparable documents identified by the Assistant Secretary is a "Duwamish Longhouse & Cultural Center Annual Support Appeal and Duwamish Tribal Services 2009 Year-End Report." *See* DUW-WWD-V002-D0049. Petitioner does not, through its unsupported assertions, show that its purported new evidence adds substantively new information to the record. *See Nipmuc Nation*, 45 IBIA at 248. Of these 211 exhibits, the Board has, at this point in our analysis, identified 3 that are already in the record and, of the remaining 208 exhibits, 94 that are not referenced in the RFR. This leaves 122 exhibits out of the 211 for consideration. The Board has reviewed these 122 exhibits, which are listed in the **Appendix** hereto, and compared them to the associated "comparable documents." Based on the Assistant Secretary's findings, the absence of argument from Petitioner to the contrary, and the Board's review, the Board concludes that the exhibits are, with two possible exceptions, comparable to documents or other information already contained in the record.

Because it is not obvious to the Board on what basis the Assistant Secretary found that two of the exhibits are comparable to documents in the record, we address them more specifically. Exhibit 160 is an undated, handwritten document listing Salish language terms used in connection with canoes or canoeing, with asterisks indicating the terms that are frequently used. *See* DTO Reply Br. at 35 (table). The documents that the Assistant Secretary listed as comparable are a technical report discussing the modern Duwamish community, *see* DUW-FDD-V006-D0002, and an anthropologist's workpaper

[33] To the extent Petitioner claims that some of its exhibits are relevant to cultural and political events that are of "more recent vintage," such as establishment of the Duwamish Longhouse and Cultural Center, which opened in 2009, DTO Reply Br. at 22-23, Petitioner has failed to show that comparable documents are not in the record.

summarizing a study conducted by Petitioner's researcher, *see* OFA-REM-V007-D0014. Both documents refer to paddling dugout canoes, but do not reference Salish terms used for canoes or canoeing. Petitioner's only citation in the RFR to Exhibit 160 is in the form of a "see generally" string cite used to support the assertion that "Petitioner supports significant social relationships connecting individual members," including "Canoeing Events." RFR at 52-53; *see supra* note 31. Petitioner provides no additional information regarding Exhibit 160 and does not show how it could affect the FDR. *See* FDR at 46, 50 (discussing a lack of evidence of wide participation by the DTO's membership, beyond a "few members from a single family," in activities to revitalize Duwamish culture, such as learning the Salish language and canoe building). For that reason, even assuming that Exhibit 160 is not comparable to documents in the record, the Board concludes that Petitioner has failed to show that Exhibit 160 is new evidence that could affect the determination.

The second exhibit, Exhibit 296, is described in Petitioner's reply brief as "1953 House Res. Rpt. 2503 – Table K" (1953 Report). DTO Reply Br. at 46 (table). Petitioner points to Table K of the 1953 Report, which is titled "Indian tribal governing bodies," as evidence of unambiguous previous Federal acknowledgment. *See* RFR at 32. The Assistant Secretary identified three documents as "comparable" to this exhibit: FDR-GFD-V001-D0003; FDR-GFD-V001-D0004; and PFR-APF-V020-D0002. It is not obvious to the Board what makes the content of the first two documents comparable to the exhibit. However, the third document is a questionnaire that was apparently prepared by the same congressional subcommittee that prepared Table K, and the questionnaire and Table K are discussed together in the Historical Technical Report. *See* PF HTR at 66-67 (referring to Table K as "U.S. House 1952, 1366, 1370"). Moreover, the FDR accepts the 1953 Report as an external "identification of the DTO for 1953," FDR at 22, and Petitioner acknowledges that the 1953 Report was considered by the Assistant Secretary, *see* RFR at 32. Therefore, it is apparent that the information in Table K was considered and Exhibit 296 does not constitute new evidence that could affect the determination.[34] *See also Tolowa Nation*, 62 IBIA at 195-96 (appropriation acts were in the record, but even if they were not, petitioner failed to explain what new information they provide that would affect the final determination). We discuss the 1953 Report and Table K further, *infra*.

iv. Petitioner's Remaining Exhibits

After excluding the exhibits discussed above that are already in the record, that are not referenced in the RFR, and/or that are comparable to documents in the record,

[34] To the extent that Petitioner cites Exhibit 296 in support of its argument that there are reasonable alternative interpretations of the 1953 Report that would support a finding of previous Federal acknowledgment, this argument is considered in Part II.B, *infra*.

28 exhibits remain for consideration as purported new evidence.[35] These exhibits are listed in the **Appendix** hereto.

In the RFR, Petitioner presented and explained its purported new evidence as follows:

> In order to assist the IBIA in identifying the new evidence while still presenting [it] in the most cohesive, least disjunctive, way possible, Petitioner did not separate out the new evidence . . . and instead explains it in the context of the existing evidence. This structure was chosen because in many cases the new evidence, standing alone, will not necessarily necessitate reconsideration, *but the need for reconsideration is obvious when the new evidence is reviewed and analyzed alongside existing evidence*.

RFR at 12 n.11 (emphasis added). It is not obvious to the Board that these 28 exhibits support reconsideration. A petitioner that makes reference to new evidence, without explaining the import of the new evidence, improperly seeks to avoid its burden of showing that the evidence "could affect" the determination. *See Nipmuc Nation*, 45 IBIA at 256.

Moreover, 27 of the exhibits[36] post-date 2001 and are among the 48 "newly created documents" identified in the Assistant Secretary's Table of Exhibits. As discussed *supra*, the time frame utilized by the Assistant Secretary to determine whether Petitioner and its members meet the acknowledgment criteria in § 83.7(a)-(c) ended in 2001, the year that the Final Determination was issued, and the Assistant Secretary based the FDR on the record that was before the District Court when it vacated the Final Determination and remanded the case. *See* Transmittal of Critical Documents at 2. The FDR concluded that Petitioner failed to demonstrate that it met criterion (a) prior to 1939 and failed to demonstrate that it met criteria (b) and (c) of § 83.7 at any time. *See supra* at 162-64. Petitioner argues that the purported new evidence submitted with its Second Request for

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[35] The following summarizes how the Board arrived at this number: First, of Petitioner's 298 total exhibits, *41 are already in the record*. Second, of the 298 exhibits, 126 are not referenced in the RFR, and 19 of the 126 are already in the record, leaving *107 exhibits that are "new" to the record but are not referenced in the RFR*. Third, of the 298 exhibits, 211 are purportedly comparable to documents in the record, 3 of the 211 are already in the record, and 94 of the 211 are not referenced in the RFR, leaving *122 exhibits that are "new" to the record, are referenced in the RFR, but are comparable to documents in the record*. Subtracting these three categories of documents from the total 298 exhibits, *28 remain for consideration* by the Board (298 - 41 - 107 - 122 = 28).

[36] *See* DTO Exhibits 1-3, 5-6, 9-10, 12-23, 26, 30, 32-35, 42-43.

Reconsideration shows that the record is lacking, especially with respect to more recent DTO activities. RFR at 75; *see also* DTO Reply Br. at 53-55 & Appendix A. According to Petitioner, "[t]he 1978, 1994, and 2015 regulations require an analysis of the Duwamish Tribe, including the community and political influence or authority criteria, at present," RFR at 75, which Petitioner construes to mean from the mid-1970s to the filing of its Second Request for Reconsideration in 2015, *id.* at 41, 46, 59; *see also* Muckleshoot Br. at 15 (asserting that Petitioner seeks to "refocus its evidence on a new present timeframe" and "fails to offer 'new evidence' to overcome the deficiencies with respect to criteria (a) – (c) for other relevant time periods" predating the mid-1970s). To the extent that Petitioner relies on the newly created documents to challenge the time frame used by the Assistant Secretary to determine whether Petitioner meets the criteria for acknowledgment, or to seek review of its petition under the regulations as amended in 2015,[37] these issues are beyond the jurisdiction of the Board and are referred to the Secretary. *See infra* Part IV.

The 28th exhibit, Exhibit 185, is a 1974 press release announcing the appointments of three superintendents to BIA's Alaska agency offices, including the appointment of Peter Three Stars to the Bethel Agency. *See* DTO Exhibit 185 at 1-2. Petitioner cites this document in its discussion of Three Stars's 1974 draft memorandum on whether Duwamish descendants should be recognized as an Indian tribe and made eligible for treaty fishing rights. *See* RFR at 7. The record shows that Three Stars's evaluation was considered, *see* PF HTR at 72-73, and the fact he was subsequently promoted is not new evidence that could affect the determination.[38] Thus, Petitioner has not shown that any of the 28 remaining exhibits could affect the final determination against Federal acknowledgment, and as such, do not constitute new evidence warranting reconsideration under § 83.11(d)(1).

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[37] For example, DTO Exhibit 15 is an October 28, 2014, letter from Petitioner to the Assistant Secretary requesting that its petition be analyzed under the 2015 regulations and, regardless of which regulations are applied, that the record be reopened because "[a]ll of the regulations require an analysis of the Duwamish community, including political influence or authority, *at present*."

[38] To the extent Petitioner argues that the Assistant Secretary's "treatment of the Three Stars Report is arbitrary and capricious in light of the favorable treatment and significant weight given to it in other acknowledgment cases," RFR at 8 n.8, that argument is outside the Board's jurisdiction and thus is referred to the Secretary. *See infra* Part IV.

v. Petitioner's Declarations

Petitioner also submitted nine declarations with its Second Request for Reconsideration.[39] Petitioner fails to show that any of the declarations, individually or as a group, warrant reconsideration.

One declaration discusses a purported July 1, 2015, telephone call in which the Assistant Secretary relayed the adverse acknowledgment decision. Dombrowski Decl. at 2. This declaration is not referenced in the RFR and thus Petitioner fails to show how the declaration could affect the final determination. *See Nipmuc Nation*, 45 IBIA at 256.

Several of the declarations describe activities of Petitioner or the declarant that occurred after 2001. *See* Hansen Decl. at 4-5, 9; Nelson Decl. at 5-9; N. Sackman Decl. at 2-3; Slaughter Decl. at 5, 9-10; Workman Decl. at 4-8; Zetterberg Decl. at 2-6. However, the FDR analyzed Petitioner's and its members' activities through 2001, *see* Transmittal of Critical Documents at 2, and Petitioner does not show how the post-2001 activities are relevant to the FDR's analysis and could affect the final determination.

In addition, several of the declarations provide information that is already in, or comparable to information in, the record. Therefore, this information is not new evidence that could affect the FDR. *See* Hansen Decl. at 2-6 (chairwoman elected in 1975 describes subsequent litigation over fishing rights, efforts to build the Longhouse, DTO tribal services, and the Paddle to Seattle); Nelson Decl. at 2-3, 9-10 (describing annual tribal meetings and her time on the tribal council from the late 1990s to the early 2000s); Rasmussen Decl. at 5-6 (describing the displacement of the Duwamish, claims initiatives, and his time on the tribal council from the early 1980s until 2008); J. Sackman Decl. at 2-4, 6 (describing annual tribal meetings, identification cards from the United States Indian Service and the State of Washington Department of Game, and his time on the tribal council in the early 1980s); Slaughter Decl. at 3-9 (describing annual tribal meetings and her family's traditional Duwamish basket weaving and carving); Workman Decl. at 2-3, 7-8 (describing annual tribal meetings and the Paddle to Seattle). Many of the declarants relate personal biographical information and family stories, which do not contradict the analysis in the FDR.

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[39] *See* Declaration of Linda Dombrowski, Oct. 21, 2015; Declaration of Cecile Hansen, Oct. 21, 2015; Declaration of Edith Loyer Nelson, Sept. 9, 2015; Declaration of James Rasmussen, Oct. 26, 2015; Declaration of Joseph Sackman, Sept. 30, 2015; Declaration of Nancy Sackman, Sept. 29, 2015; Declaration of Mary Lou Slaughter, Oct. 8, 2015; Declaration of Ken Workman, Sept. 15, 2015; Declaration of Kathie Zetterberg, Oct. 11, 2015.

Further, none of the declarations could affect the Assistant Secretary's determination that Petitioner does not meet criterion (a) of § 83.7 for lack of external identification of Petitioner as an Indian entity at any time prior to 1939. *See* FDR at 17. The declarations do not provide any new, substantive evidence of external identification, i.e., "by other than the petitioner itself or its members," prior to 1939. *See* 25 C.F.R. § 83.7(a). Several declarants state that their own references and/or external references to Petitioner, which they call "the Duwamish Tribe," are to the historical Duwamish tribe. *See, e.g.*, Nelson Decl. at 1-2. To the extent that Petitioner relies on the declarants' statements to satisfy criterion (a), conclusory statements are insufficient to satisfy Petitioner's burden of proof to show that the declarations could affect the FDR. *See Nipmuck Nation*, 45 IBIA at 266. Nor, for the reasons discussed above, are we persuaded that this "new evidence" could affect the FDR with respect to criterion (b) or (c) of § 83.7.

C. Tribal Researcher's Evidence Included with Petitioner's Reply Brief

In its reply brief, Petitioner states that, "[i]n addition to the new evidence submitted with the [Second] Request for Reconsideration, [a] tribal researcher . . . has identified additional evidence that . . . appears to be new, supports opening the record, and further demonstrates the AS-IA's materially inadequate research." DTO Reply Br. at 54. Petitioner then lists 12 "new" pieces of evidence in a chart indicating the acknowledgment criteria to which each document relates, and attaches the documents as an appendix to the reply brief. *Id.* at 54-55 & Appendix A.

The regulations provide that the Board has authority to review requests for reconsideration that are timely, 25 C.F.R. § 83.11(c)-(d), and that a "petitioner's . . . request for reconsideration . . . shall include any new evidence to be considered," *id.* § 83.11(b). Because the purported new evidence at issue was not submitted with Petitioner's request for reconsideration, or at least submitted within the time allowed for filing requests for reconsideration, the Board could not order reconsideration based upon it. *See Ramapough Mountain Indians*, 31 IBIA at 71. Even if the Board could consider the purported new evidence, Petitioner does not explain how it could affect the FDR. *See also infra* Part III (rejecting Petitioner's assertion that these examples of "new evidence" show that OFA's research was inadequate or incomplete).

Thus, in sum, even if the Board were to assume that it has jurisdiction to review Petitioner's purported new evidence, the Board would conclude that none of the evidence is new evidence that could affect the Assistant Secretary's final determination.

II. Reasonable Alternative Interpretations of the Evidence Used for the FDR

Petitioner also argues that there are reasonable alternative interpretations of the existing evidence in the record that were not considered by the Assistant Secretary and that warrant reconsideration of whether Petitioner meets the criteria for Federal acknowledgment. Specifically, Petitioner alleges that alternative interpretations relating to the Assistant Secretary's analysis of previous Federal acknowledgment, and continuity between the historical Duwamish tribe and Petitioner, warrant reconsideration of the FDR. For the following reasons, the Board is not convinced that Petitioner has met its burden to show that grounds for reconsideration exist under § 83.11(d)(4).

A. Standard for "Reasonable Alternative Interpretations"

The "alternative interpretation" ground for reconsideration necessarily must be formulated in reference to evidence that was used in the final determination. A requester seeking reconsideration based on an alternative interpretation of the evidence must clearly articulate an interpretation that truly was not considered, either explicitly or implicitly, in reviewing or analyzing the evidence. *Tolowa Nation*, 62 IBIA at 198. A showing of disagreement with the Department's analysis is not sufficient to establish that grounds for reconsideration exist under subsection 83.11(d)(4). *In re Federal Acknowledgment of the Snoqualmie Tribal Organization*, 34 IBIA 22, 35 (1999). And disagreement over the sufficiency of the evidence does not constitute an "interpretation" of the evidence. *In re Federal Acknowledgment of the Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians*, 45 IBIA 277, 285 (2007). 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 § 83.7(a)-(g). *Id.*

B. Petitioner's Claim of Unambiguous Previous Federal Acknowledgment

The FDR concluded that the record did not support Petitioner's claim of unambiguous previous Federal acknowledgment under 25 C.F.R. § 83.8 of the 1994 regulations, which would have modified the relevant time period for consideration of whether Petitioner meets the acknowledgment criteria in § 83.7. FDR at 16; *see supra* at 154 (discussing previous Federal acknowledgment). Under the 1994 regulations, evidence to demonstrate previous Federal acknowledgment includes, but is not limited to, "[e]vidence that the group has had treaty relations with the United States," 25 C.F.R. § 83.8(c)(1); "[e]vidence that the group has been denominated a tribe by act of Congress or Executive Order," *id.* § 83.8(c)(2); and "[e]vidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds," *id.* § 83.8(c)(3). The Assistant Secretary based his conclusion that Petitioner did not satisfy

§ 83.8, in part, on his determination that Petitioner "is not the same entity as the historically acknowledged tribe," and that Petitioner did not "as a group, [evolve] out of the historical Duwamish tribe, or out of a later continuation of that historical Indian tribe." FDR at 16. Petitioner argues that the Assistant Secretary's analysis of whether it was previously Federally acknowledged was in error, RFR at 30, and that alternative interpretations of the evidence support a finding that Petitioner meets the criteria for previous acknowledgment under § 83.8, DTO Reply Br. at 16-21. Specifically, Petitioner argues that there are reasonable alternative interpretations of (1) a 1925 Act of Congress, (2) a 1934 Court of Claims decision, and (3) Table K of a 1953 congressional report that support a finding of unambiguous previous Federal acknowledgment and were not considered. *See* DTO Reply Br. at 16-21; RFR at 32-37.

i. The 1925 Special Jurisdictional Act

In 1925, Congress passed special jurisdictional legislation that authorized Indian tribes in the State of Washington to submit to the Court of Claims certain claims against the United States growing out of treaties, including the Treaty of Point Elliott. *See* PF HTR at 56; *see also* Act of Feb. 12, 1925, ch. 214, 43 Stat. 886 (1925 Act). Petitioner acknowledges that "the Department nominally considered whether the 1925 Act amounts to [unambiguous previous Federal acknowledgment]," but argues that it failed to consider whether "the 1925 Act constitutes an express congressional denomination of the Duwamish Tribe as a tribe" by reference to the Treaty of Point Elliott. DTO Reply Br. at 16-17; *see also* RFR at 37. Petitioner asserts that, in the proposed finding to recognize the Jamestown Clallam Tribe, the Department "suggested" that inclusion of a tribe in claims legislation amounted to denomination of the claimant as a tribe by act of Congress, and that the 1925 Act could therefore be interpreted as demonstrating previous acknowledgment of Petitioner under subsection 83.8(c)(2). DTO Reply Br. at 17.

Petitioner fails to show that its alternative interpretation was not considered, explicitly or implicitly, by the Assistant Secretary. Contrary to Petitioner's argument, in the FDR, the Assistant Secretary concluded that "the 1925 claims legislation is not a basis for unambiguous Federal acknowledgment," citing the "extensive analysis" of the 1925 Act in the Chinook reconsidered final determination against acknowledgment. FDR at 15 (citing Chinook Reconsidered Final Determination, July 5, 2002, at 15-16, 28-32 (Chinook RFD)). The FDR explained that the 1925 Act "sought to allow claims against the United States based on historical events and historical tribes, 'whether or not those tribes still existed as tribes.'" *Id.* (quoting Chinook RFD at 30). In fact, the Chinook RFD expressly rejected an interpretation of the 1925 Act as congressional recognition of a Chinook tribe

or band as existing in 1925.[40] *See* Chinook RFD at 29-30. Thus, Petitioner errs in asserting that the Assistant Secretary did not consider its interpretation that the 1925 Act constituted congressional denomination of Petitioner as an Indian tribe.

ii. The 1934 Court of Claims Decision

After Congress authorized tribes to file claims against the United States under the 1925 Act, the "Duwamish and allied tribes" filed a claim with the Court of Claims on August 21, 1926.[41] PF HTR at 56. In 1934, the Court of Claims issued its decision. *Duwamish v. United States*, 79 Ct. Cl. 530 (1934) (1934 Decision). DTO obtained a monetary award for improvements, i.e., longhouses, that were surrendered when the treaty tribes removed to their respective reservations set apart under treaty.[42] *Id.* at 577.

Petitioner argues that the 1934 Decision amounts to unambiguous previous Federal acknowledgment of DTO. DTO Reply Br. at 18. First, Petitioner contends that during the litigation before the Court of Claims, the Federal government did not dispute that "the plaintiff Duwamish Tribe in the litigation was the same entity as the historical Duwamish tribe that was signatory to the 1855 Treaty of Point Elliott," and this demonstrates Federal acknowledgment under subsection 83.8(c)(1). *Id.* Second, according to Petitioner, the 1934 Decision itself held that "the Duwamish plaintiff—i.e., the Petitioner—was a party to the Treaty of Point Elliott" and the same entity as the historical Duwamish tribe, and that the FDR failed to consider whether this interpretation of the evidence amounts to unambiguous previous Federal acknowledgment. RFR at 36; *see also* DTO Reply Br. at 18. And third, Petitioner contends that because the Court of Claims disagreed with the Government that the longhouse claims were "individual" claims (which were not permitted by the 1925 Act), instead finding that they were "tribal" claims, this is evidence that the Federal government treated Petitioner as having collective rights in tribal lands or funds, and demonstrates Federal acknowledgment under subsection 83.8(c)(3). DTO Reply Br. at 18-19.

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[40] And, unlike DTO or even the historical Duwamish tribe, "Chinook" was specifically named in the 1925 Act.

[41] Petitioner asserts that the historical Duwamish tribe "formed the DTO on the belief . . . that it was a necessary legal vehicle through which to bring a claim under the 1925 special jurisdictional act . . . ." RFR at 29.

[42] Decades later, Duwamish descendants obtained a monetary award based on claims for loss of Indian title lands in proceedings before the Indian Claims Commission. *See* PF HTR at 69-72.

Petitioner's contentions amount to disagreement with the Assistant Secretary's analysis, rather than reasonable alternative interpretations that were not considered. The FDR rejected Petitioner's contention that it is a continuation of or evolved as a group from the historical Duwamish tribe, and it is apparent from the record that Petitioner's contention and the 1934 Decision were considered in relation to one another. The FDR states that it takes into consideration all materials in the record, including all materials that were submitted in the District Court proceedings. *See* FDR at 9-10. This includes the 1934 Decision itself, *see id.* at 81, and a brief submitted by the Department in the *Hansen* litigation, which stated that "the Department considered the 1925 act and the subsequent 1934 Court of Claims decision when considering the DTO's petition but . . . did not consider it to be evidence of previous federal acknowledgment," and that "[t]he record does not support finding that the Court of Claims recognized a tribe here." Muckleshoot Br. at 25 (quoting Defendant's Reply Br. at 10-11, *Hansen v. Salazar* (Dec. 12, 2012)). The Department explained that the parties "litigated the claims of the historical tribe, but there is no evidence that the Court found the DTO was the continuation of the historical tribe, was entitled to recognition by the government, or was anything [other] than a legal party-in-interest for the purpose of satisfying the historical claims." *Id.* Therefore, we disagree that Petitioner's alternative interpretations were not considered, explicitly or implicitly, in issuing the FDR.

iii. Table K of the 1953 Congressional Report

As discussed *supra*, in 1953, the House Committee on Interior and Insular Affairs issued a report, H.R. Rep. No. 82-2503 (1952) (1953 Report), as part of congressional efforts to implement the "termination" of Federal trust responsibility for Indian tribes. *See* PF HTR at 66. Attached to the 1953 Report at Table K was a list titled "Indian tribal governing bodies," which included the Duwamish Tribal Council. *Id.* at 66-67. The Historical Technical Report explained that "[t]he inclusion of the Duwamish Tribal Council [on Table K] has been interpreted by some as evidence that the Duwamish were a federally-recognized tribe at that time." *Id.* at 66. However, the Historical Technical Report continued, "identification and classification of the Duwamish by congressional staff in House Report 2503 . . . was both inconsistent and apparently at odds with the position of the Bureau of Indian Affairs." *Id.* at 67. The Assistant Secretary accepted the 1953 Report as an external identification of Petitioner under § 83.7(a), but found that the report fell short of unambiguous previous Federal acknowledgment due to internal inconsistency and conflict with BIA's dealings with DTO "only for the limited, specific purposes of claims." FDR at 22.

Petitioner argues that the Assistant Secretary "inexplicably failed to consider the 1953 Report in the context of" previous Federal acknowledgment, i.e., that it constitutes previous acknowledgment "as of January 1953." DTO Reply Br. at 19; *see also* RFR at 32.

But the Historical Technical Report considered whether the 1953 Report was evidence of previous Federal acknowledgment of DTO, and the FDR cites to this analysis. FDR at 22 (citing PF HTR at 66-68). The FDR makes clear that the interpretation put forth by Petitioner was considered, and it therefore does not constitute grounds for reconsideration under § 83.11(d)(4).

Petitioner also asserts that it is being treated differently from the Snoqualmie petitioner, which was also included on Table K of the 1953 Report and is Federally recognized. DTO Reply Br. at 20-21; RFR at 33-34. At the same time, citing the Snoqualmie final determination, Petitioner acknowledges that "the Department generally finds [previous Federal acknowledgment] based on 'the overall body of evidence,' rather than an isolated inclusion on a list." RFR at 34 n.20; *see also Snoqualmie Tribal Org.*, 34 IBIA at 33 (noting that "BIA distinguished the Department's treatment of the STO during the period 1934-1953 from its treatment of the [DTO]" for lack of "the extensive, clear cut documentation supporting [DTO's] recognized status equivalent to that of the Snoqualmie," and because "[l]ists alone . . . may not be strong evidence unless their basis and meaning are clearly spelled out and understood"). Petitioner asserts that the Department's "approach" to previous Federal acknowledgment "is contrary to law because the regulations do not require multiple incidents of acknowledgement." RFR at 34 n.20. To the extent Petitioner argues that the Department treated Petitioner differently from tribes that it argues are similarly situated, or misinterpreted the Part 83 regulations, those arguments are not grounds for the Board to order reconsideration and are referred to the Secretary. *See infra* Part IV.[43]

C. Petitioner's Claim That the 1915, 1919, and 1926 Rolls Show Continuity Between the Historical Duwamish Tribe and Petitioner

Prior Federal acknowledgment aside, DTO argues that three alternative interpretations concerning Satiacum's 1915 roll, Roblin's 1919 roll of unaffiliated Duwamish, and DTO's 1926 roll warrant reconsideration of the FDR under § 83.11(d)(4). Petitioner relies on these three rolls (and several other rolls) as evidence of its membership and continuity between the historical Duwamish tribe and DTO. *See generally* PF GTR at 7-18. The FDR found, with respect to criterion (a), external identification, that "Roblin's

[43] The Board also notes that, in its Second Request for Reconsideration, Petitioner raised a fourth alternative interpretation, alleging acknowledgment of DTO by Congress and the Department from the 1930s through the early 1950s. *See* RFR at 38-40. Petitioner did not discuss this interpretation in its reply brief. To the extent that Petitioner has not abandoned it, for the reasons described by tribal amicus, we disagree that it is an alternative interpretation that was not considered. *See* Muckleshoot Br. at 26-29.

list did not identify a Duwamish entity that is the petitioner or from which the petitioner evolved," in part because "[l]ess than 10 percent of the names on the Roblin Roll were on the petitioner's" 1926 enrollment list. FDR at 25. As a result, the FDR also found that, contrary to the Anderson draft decision, "appropriations bills between 1860 and 1923 . . . did not pertain to the DTO petitioner or its ancestors and, therefore, cannot be used to demonstrate" that Petitioner meets § 83.7(a). *Id.* at 27-28. For criterion (b), community, the FDR analyzed these three rolls to determine whether continuity existed that could show that Petitioner formed a distinct community from historical times until the present, and ultimately determined that discrepancies among the rolls weighed against such a finding. *Id.* at 35-37, 41-44; *see also id.* at 87-90 (finding that 18% of the 1991-1992 DTO membership descend from individuals on the 1915 roll). And as to whether Petitioner could show that it met criterion (c), political influence, the FDR determined that the different composition of the rolls weighed against a finding that tribal leaders exercised continuous political authority over an organization that would become DTO. *See id.* at 60-61.

Petitioner argues that the differences between the names on the 1915 and 1926 rolls can be explained by "tribal members' mixed ancestry," which may have caused some members to enroll with other tribes between 1915 and 1926. DTO Reply Br. at 4-5; *see also* RFR at 23-24. Second, DTO alleges that a discriminatory Departmental policy concerning pioneer marriages resulted in ancestors of DTO being left off the 1915 roll, and that this explains differences between the 1915 and 1926 rolls. DTO Reply Br. at 5-6; *see also* RFR at 24. And third, Petitioner contends that the 1919 roll includes such omitted ancestors and "fills in the gaps" between the 1915 and 1926 rolls. DTO Reply Br. at 7-8; RFR at 24-25 & Appendix A. Petitioner asserts that these alternative interpretations of the rolls would substantially affect the Assistant Secretary's determination as to whether DTO evolved as a group out of the historical Duwamish tribe, and therefore also substantially affect his determinations under the criteria in § 83.7(a)-(c). DTO Reply Br. at 9.[44] For the following reasons, the Board disagrees that these are reasonable alternative interpretations of the evidence used for the FDR that were not considered.

i. Petitioner's Interpretation That Mixed Ancestry Explains the Different Composition of the 1915 and 1926 Rolls

According to Petitioner, differences between Satiacum's 1915 list and the 1926 DTO roll can be explained by mixed ancestry. DTO Reply Br. at 4. Pointing to the

[44] Petitioner also alleges here, and elsewhere, that the Assistant Secretary used a "legally untenable standard" that Petitioner must demonstrate that it evolved as a group out of the historical Duwamish tribe. We refer that allegation to the Secretary. *See infra* Part IV.

Snoqualmie acknowledgment case as an example, Petitioner contends that "the Department has acknowledged a history of 'dual enrollments, if not dual allegiances, among the . . . native peoples of Washington' that served to explain significant outflows of tribal membership in the 1910s and 1920s." *Id.* Petitioner believes that mixed ancestry—caused by the "traditional emphasis on exogamous marriage outside of the tribe, or because of a historic choice that was made whether or not to go to a reservation"—explains why "a significant number of individuals appearing on the 1915 Roll do not later appear on the 1926 Roll," and asserts that this "attrition" "should not be held against the Duwamish." *Id.* at 5.

It is apparent that the Assistant Secretary considered the "mixed ancestry" of the Duwamish Indians when analyzing the 1915 and 1926 rolls and concluding that the evidence did not support acknowledgment of Petitioner. Under criterion § 83.7(b), the FDR discussed Petitioner's "well-documented pattern of out-marriages," finding that "generally, the DTO ancestors did not marry either historical Duwamish Indians, residing on four reservations, or each other," and that "the out-married women whose children subsequently married other Duwamish Indians or into any of the various western Washington tribes are not ancestors of the petitioner; rather, they were members of federally recognized tribes." FDR at 34 & n.29. The FDR considered whether "the people identified as 'Duwamish' in historical records and often discussed in the petitioner's narratives actually interacted with the DTO petitioner's ancestors." *Id.* at 35. The FDR found that many of the Duwamish on Satiacum's 1915 list were already residing on reservations. *See id.* at 36-37; *see also id.* at 61 (stating that many of the individuals recorded as Duwamish on the 1915 roll are listed in BIA and Federal censuses as residing on reservations before and after 1915, and concluding that the 1915 roll "merely records descendants of the historical Indian tribe whether or not they were members of the reservation tribes or part of the general population"). The FDR found that Petitioner did not show that its "ancestors interacted with one another as part of an off-reservation Indian community, with communities where Indians lived, or with reservation Duwamish Indians."[45] *Id.* at 36; *see also id.* at 44 ("The evidence as presented does not demonstrate community among Duwamish families on Satiacum's 1915 list and DTO's 1926 list.").

[45] One of Petitioner's researchers appeared to argue that a higher recorded blood quantum for Duwamish Indians in the Roblin data showed that the Duwamish were a distinct community because they were less ethnically mixed than other tribes in the region. *See* FDR at 41-42. The FDR found that these statistics did not help Petitioner due to a failure to connect the full-blood individuals on Roblin's roll to the 1926 DTO list, and to demonstrate interaction among those on the 1926 list. *Id.* at 42.

Further, the FDR described how Petitioner's evidence "contrasts" with that of the Snoqualmie petitioner, "which presented evidence that it continued to be part of the Snoqualmie tribe acknowledged by the Treaty of Point Elliott in 1855 until the organization of the tribal government on the Tulalip Reservation," and, "[a]fter the formation of the reservations [sic] government, . . . left the reservation in a group and eventually became acknowledged as a separate, non-reservation tribal entity." FDR at 14; *see also* DTO Reply Br. at 12 (noting that, despite membership ebbs and flows based on divided tribal loyalties, the Snoqualmie leadership councils "retained a remarkable degree of continuity over time").

Therefore, the Board concludes that the Assistant Secretary did consider mixed ancestry and dual enrollments. Petitioner's position that the different composition of the 1915 and 1926 rolls "should not be held against" it amounts to disagreement with the Assistant Secretary's analysis and is insufficient to meet its burden to show that grounds for reconsideration exist under § 83.11(d)(4).

ii. Petitioner's Interpretation That Discrimination Against Pioneer Marriages Explains the Differences Between the 1915 and 1926 Rolls

Petitioner claims that another explanation for the different composition of the 1915 and 1926 rolls can be found in "the Department's discriminatory policy toward pioneer marriages" beginning in 1894. DTO Reply Br. at 6. A law passed by Congress in 1888 declared that Indian women who married citizens would obtain citizenship by such a marriage, and the Commissioner of Indian Affairs interpreted this to mean that these Indian women also severed their ties to their Indian tribes and that as a result their children could not be deemed tribal members. *See* PF HTR at 24 (citing Act of Aug. 9, 1888, 25 Stat. 392). Petitioner argues that based on this discrimination, and "the fact that the 1915 Roll was intended for the Department's use, the most reasonable conclusion is that the Duwamish Tribe would have omitted participants in, and descendants of, pioneer marriages from the 1915 Roll."[46] DTO Reply Br. at 6. Petitioner further argues that the

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[46] Petitioner's interpretation appears at odds with the view of the Commissioner of Indian Affairs (Commissioner) in requesting that Roblin prepare the 1919 roll. The Historical Technical Report explains that in 1916 the Department received 82 applications for enrollment and allotment on the Quinault Reservation, and in response the Commissioner instructed Roblin to determine if the applicants had been enrolled and maintained tribal relations with an eligible tribe. PF HTR at 41. The Commissioner pointed out the Department's position that children from a mixed marriage were not entitled to tribal enrollment, and, "*[b]elieving that many of the applicants would be excluded from enrollment* at Quinault, the Commissioner asked for a 'separate enrollment' of the 'unattached and

(continued…)

Department's policy had relaxed by 1926, "thus eliminating the reason to omit pioneer marriage participants and descendants from its official rolls." *Id.* According to Petitioner, this alternative interpretation explains the "substantial differences" between the rolls, and "why the 1926 Roll contained a large number of pioneer marriage participants and descendants who were omitted from the 1915 Roll." *Id.*

Petitioner's interpretation was considered by the Assistant Secretary. Petitioner's argument was first raised in the District Court proceedings. *See* Defendant's Reply Br. at 19, *Hansen v. Salazar* (Muckleshoot Br., Exhibit 2). The Department responded:

> First, the 1915 list was not compiled by the government and thus it did not dictate whether or not descendants of pioneer marriages should be included. Rather, "Charles Satiacum and William Rogers produced a list of members, to which they referred as 'the Duwamish Tribe of Indians.'" PF at 6. Second, as Plaintiffs note, some pioneer marriages were included on the 1915 list. Pls.' Opp'n at 35-36; PF ATR at 86. The documents demonstrate that some descendants of pioneer marriages remained with the historical tribe, and that some women who married non-Indians either returned to or never left the reservations. *See, e.g.*, PF at 6; PF ATR at 14. Third, Plaintiffs suggest that the 1926 list differs from the 1915 list because it includes descendants of pioneer marriages, i.e., members were added to the list as governmental policies on pioneer marriage descendants changed. *See* Pls.' Opp'n at 35-36. If that were true, however, one would expect to find more of the members from the 1915 group on the list. . . . Plaintiffs also ignore evidence about other differences between the groups, such as different goals. The FD noted that the 1925 group's "membership, leadership and activities were substantially different than the Duwamish tribe identified in earlier documents." FD at 15.

Id.

(…continued)
homeless Indians' of Washington state." *Id.* (emphasis added). It is also worth noting that the Quinault applications and Satiacum's 1915 roll were both submitted to the Commissioner by the Northwestern Federation of American Indians, which called for the protection of treaty fishing and hunting rights and for allotment of lands to unallotted Indians. *See id.* at 48-49. The Anthropological Technical Report found that this advocacy "applied to the descendants of pioneer marriages as well as Indians." Proposed Finding Anthropological Technical Report, Approved June 18, 1996, at 80 (PF ATR) (CD 4).

Further, the FDR found that the families resulting from pioneer marriages, which "dispersed throughout western Washington," "separated from other Duwamish descendants, whether the latter were residing off or on reservations," and did not form a distinct community. FDR at 31; *see also id.* at 38 ("The records show that the Duwamish descendants who were connected with the historical Indian tribe and interacting with the reservation communities . . . generally differed from the individual descendants and families who would form the DTO petitioner in late 1925."). As argued by tribal amicus, while evidence of discrimination "may offer one possible explanation for the loss of contact among DTO ancestors," "[i]t is the fact that these DTO ancestral families scattered throughout Puget Sound and failed to sustain sufficient contact with one another to maintain a community that is the basis for denial, not marriage to non-Indians." Muckleshoot Br. at 20. Therefore, the Board concludes that Petitioner's offered interpretation is not a reasonable alternative interpretation that went unconsidered, and instead amounts to disagreement with the decision.

iii. Petitioner's Interpretation That the 1919 Role Completes Continuity Between the 1915 and 1926 Rolls

Petitioner argues that the Assistant Secretary did not consider whether Roblin's roll "serves to fill in gaps between the 1915 Roll and the 1926 Roll caused by the Department's discriminatory policy" concerning pioneer marriages. DTO Reply Br. at 7-8; RFR at 24-25 & Appendix A. Petitioner asserts that the 1919 roll "was specifically aimed at capturing individuals who identified as members of the Duwamish Tribe but who were excluded from formal enrollment under the Department's policy . . . ." DTO Reply Br. at 7. When the 1919 roll is factored in, Petitioner contends, "there is substantially more overlap," with 113 or 44% of the individuals on the 1926 list appearing on the 1915 roll *and/or* the 1919 roll. *Id.* at 7-8. In addition, Petitioner contends that a "likely more accurate view of tribal affiliation and composition" results from analyzing "the overlapping of family members" on the three rolls, which analysis, according to Petitioner, shows that 50 of the 100 "family groups" on the 1926 roll are represented by one or more individuals appearing on the 1915 roll *and/or* the 1919 roll. *Id.* at 8.

The Board disagrees that this interpretation of the data was not at least implicitly considered by the Assistant Secretary. The FDR analyzed the relationship of both the 1915 roll and the 1919 roll to the 1926 roll, and in both instances the Assistant Secretary concluded that the rolls did not document a tribal entity that would become DTO. *See* FDR at 23-25, 27-28, 41-44, 60-62. The FDR considered a theory proposed by a DTO historian that Satiacum's list was "an initial DTO list, which later expanded into a more complete 1927-1934 list by an ongoing process of enrollment." *Id.* at 61. The FDR found that the facts in the record "lead to the conclusion that Satiacum's 1915 list merely records descendants of the historical Indian tribe whether or not they were members of the

reservation tribes or part of the general population." *Id.* The FDR also concluded that Roblin's list, which included less than 10 percent of the names on DTO's 1926 membership list, was a Government list that "identified unenrolled individual Indian descendants rather than a Duwamish entity," and that "Roblin's list did not identify a Duwamish entity that is the petitioner or from which the petitioner evolved." *Id.* at 25. The Genealogical Technical Report noted that there are several families listed in the 1915 roll, 1919 roll, or 1926 roll who may have living descendants who are eligible for membership in DTO, and that most of the families were already enrolled with other tribes by 1919. PF GTR at 26, 38.

In addition, the FDR concluded that the majority of the individuals on the 1915 list could not be linked, even with an expanded analysis to include "close relatives," to lists prepared for Petitioner's organization after 1925. FDR at 18. The FDR explained:

> Department researchers conducted a statistical analysis of various membership lists and a comparison of leaders that showed that a minority of the individuals named on Satiacum's 1915 list appeared on lists prepared for the DTO petitioner's organization after 1925. See Appendix II. The PF noted that a more careful analysis showing the relationships of close relatives who may appear on the lists might demonstrate that a higher proportion of individuals on the two lists are linked. [Petitioner's researcher] provided data on individuals to show in which cases individuals from a single "family line" may appear on both lists, even though single individuals themselves may not. The Department genealogist performed further analysis based on this new submission. She found that by including close relatives in the analysis, a larger proportion, but still a minority, of individuals on these lists could show they were linked to both the lists of Duwamish created before 1920 and lists of members created by the DTO after 1925, either on their own or through a close relative. However, the new analysis concludes that the evidence is insufficient when weighed with other available evidence to demonstrate political influence or authority within the petitioner . . . .

Id. at 71.

Moreover, as discussed above, Petitioner does not provide evidence in support of its underlying theory, which was considered by the Department, for the differences among the rolls, i.e., that the 1915 list excluded certain individuals based on a discriminatory Departmental policy concerning pioneer marriages. Considering the in-depth analysis of the rolls in the FDR and the Proposed Finding, the Assistant Secretary was plainly aware of similarities and differences of composition among the 1915, 1919, and 1926 rolls. The FDR found that Petitioner failed to substantiate its claim that DTO's 1926 membership is a continuation of an earlier Duwamish group reflected in the 1915 roll. The Board concludes

that the Assistant Secretary considered whether the various rolls, taken together, link the historical Duwamish tribe with DTO, or, as Petitioner puts it, whether Roblin's roll "fills in the gaps." Accordingly, Petitioner's alternative interpretation does not provide grounds for reconsideration under § 83.11(d)(4).

D. Petitioner's Claim of Continuity of Tribal Leadership and Organization

Finally, Petitioner argues that there are two alternative interpretations of the evidence, not previously considered, regarding DTO's leadership and organization "during the time period in which the AS-IA found there to be a break with the historical Duwamish Tribe (*i.e.*, 1917 to 1925)." DTO Reply Br. at 9; *see also* RFR at 25-29. Petitioner states that these interpretations involve (1) "the Tribe's continuity of leadership during this period," and (2) "the context in which the Duwamish Tribe adopted the formal structure of the 'Duwamish Tribal Organization' in 1925." DTO Reply Br. at 9. The FDR concluded that "the petitioner formed DTO in late 1925," and that its "membership, leadership, and activities differed substantially from the historical Duwamish tribe." FDR at 26; *see also id.* at 71. Petitioner argues that there is continuity in tribal leadership between the 1917 organization and the 1925 organization that shows DTO is a continuation of, or evolved as a group from, the historical Duwamish tribe, and that this interpretation would substantially affect the determination that DTO failed to meet the acknowledgment criteria in § 83.7(a)-(c). DTO Reply Br. at 10, 15.

i. Petitioner's Interpretation That Transition in Leadership from 1917 to 1925 Shows Continuity

The 1915 list of members prepared by the Duwamish Tribal Council lists Charles Satiacum as chief. FDR at 60. When DTO was created in 1925, Peter James was elected chairman. PF HTR at 60. Petitioner contends that "a natural transition in primary leadership between Chief Satiacum and Peter James," the grandnephew of Satiacum, "demonstrates continuity between the 1917 organization and the 1925 organization." DTO Reply Br. at 10. Petitioner also argues that "there is substantial connectivity of Board-level leadership in 1925 with the Tribe in 1917," including two members who were also members of the 1917 tribal board, and others who were listed, or had relatives listed, on the 1915 roll. *Id.* at 11. According to Petitioner, the Assistant Secretary did not consider the alternative interpretation that this evidence regarding leadership demonstrates continuity between the 1917 and 1925 organizations. *Id.*

The FDR did, in fact, consider whether the historical Duwamish tribe and DTO could be linked through continuity of leadership. *See, e.g.*, FDR at 42-44, 60-63. The Historical Technical Report, in distinguishing DTO from Satiacum's organization, explained: "It was not the officers of Satiacum's organization who called the new

association into being, but a different group of eight men. Only two of these men had been on the board of Satiacum's group, and only four of the eight had belonged to the earlier organization." PF HTR at 49. The report also found that "[l]eaders of the 1915 organization were more likely than members to maintain an affiliation with [DTO], although less than half did so. Only three of the seven members of the 1915 board who were living in 1926 were members on the constitutional list of 1926." *Id.* at 53. The Assistant Secretary clearly considered evidence of continuity in leadership between the historical tribe and DTO, but found that any overlap was outweighed by the differences between the two organizations. Thus, Petitioner's alternative interpretation of the evidence was considered and does not provide a basis for reconsideration under § 83.11(d)(4).

ii. Petitioner's Interpretation That the Formation of DTO Shows Continuity

Petitioner also argues that "the creation of [DTO] in 1925 was merely a formalistic reorganization of the existing tribe and not the creation of a new, altogether separate entity." DTO Reply Br. at 13. Petitioner contends that other tribes that reorganized around the same time period are Federally recognized, and that the FDR did not consider this alternative interpretation of DTO's formation as evidence of continuity between the historical Duwamish tribe and DTO. *Id.* at 13-15.

However, the FDR explicitly rejects this interpretation. At the end of its analysis under § 83.7(a), the FDR states: "We find no evidentiary support for the statement in the [Anderson] draft that the historical Duwamish Indian tribe, mentioned repeatedly in congressional appropriations, reorganized as the DTO in late 1925, and [DTO] represents a continuation of the historical tribe." FDR at 28 n.26 (internal citation omitted). From this statement and the FDR as a whole, the interpretation put forth by Petitioner clearly was considered and cannot serve as a basis for reconsideration under § 83.11(d)(4).[47]

III. Inadequate or Incomplete Research

Petitioner next alleges that reconsideration is warranted under 25 C.F.R. § 83.11(d)(3) ("petitioner's or the [Office of Federal Acknowledgment's] research appears inadequate or incomplete in some material respect"). *See* DTO Reply Br. at 53-55 & Appendix A; RFR at 74-75. Petitioner expressly argues that OFA's research is materially inadequate or incomplete. DTO Reply Br. at 53. Petitioner argues that the exhibits and

[47] To the extent that Petitioner argues that the Department treated Petitioner differently from tribes that it argues are similarly situated, that argument is not grounds for the Board to order reconsideration and is referred to the Secretary. *See infra* Part IV.

declarations it submitted to the Board regarding DTO's newly constructed Duwamish Longhouse, "among other new evidence" that it does not specify, "show the material inadequacies and incompleteness of the record." *Id.* According to Petitioner, the Assistant Secretary's decision is based "upon an outdated and incomplete record it refused to let the Duwamish supplement." *Id.*

To succeed on this ground for reconsideration, Petitioner must show that, at a minimum, additional research would produce *material* information not previously considered. *Choctaw Nation*, 57 IBIA at 201; *see also In re Federal Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama*, 34 IBIA 63, 69 (1999). The Assistant Secretary concluded that, based on the evidence in the record, Petitioner did not meet criterion (a) prior to 1939 and did not meet criteria (b) and (c) of § 83.7 at any time. *See supra* at 162-64. Petitioner essentially argues that the mere existence of additional evidence proves that the research conducted for the FDR is materially inadequate or incomplete, without explaining in any detail how the substance of the evidence calls the sufficiency of the existing research and the Assistant Secretary's conclusions into question.[48] *See* DTO Reply Br. at 53; RFR at 75. The only additional evidence that Petitioner describes with any particularity is that of current cultural activities. *See* DTO Reply Br. at 53 (discussing events at the Duwamish Longhouse); RFR at 75 (same). As previously discussed, post-2001 activities are outside the time frames considered in the FDR. Petitioner does not show that evidence material to time periods under which the petition was found to be lacking evidentiary support would be located with further research. *See Juaneño Band of Mission Indians*, 57 IBIA at 159. Nor, as discussed earlier, has Petitioner provided grounds for reconsideration of the FDR's conclusion that it was not previously Federally acknowledged, which would shorten the relevant time periods under the 1994 regulations.[49]

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[48] The Board notes that the FDR is based not solely on a "lack" of evidence to support Petitioner's petition, but also on what the evidence that either DTO submitted or the Department's researchers located shows. *See* FDR at 28.

[49] In its Second Request for Reconsideration, Petitioner also asserts that, based on previous Federal acknowledgment, the regulations only require an analysis of the community and political influence or authority criteria "at present," which Petitioner construes to mean from the mid-1970s to 2015. *See* RFR at 41, 75 (citing RFR at IV.E.2.b-c); *see also id.* at 59 (asserting that the "at present" language in § 83.8(d)(2) and (3) means that Petitioner need only demonstrate community and political influence or authority "fifteen years before the Duwamish Tribe's petition was ready for active consideration up through the date of th[e] request for reconsideration, i.e. mid-1970s to 2015"). Petitioner's assertion that the Assistant Secretary misinterpreted the "at present" language is not a ground for the Board to order reconsideration and is referred to the Secretary, as discussed in Part IV, *infra*.

To the extent that Petitioner's objection to the adequacy or completeness of the research expresses disagreement with the Assistant Secretary's decision not to reopen the record, that decision is outside the Board's jurisdiction. And, as discussed in Part I, *supra*, the Board has considered the purported new evidence that Petitioner submitted with its Second Request for Reconsideration and concluded that the documents and testimony presented are not "new evidence" that could affect the FDR.

Although Petitioner does not expressly argue that its own research was inadequate or incomplete, which would also be subject to the Board's review pursuant to § 83.11(d)(3), to the extent that the documents located by Petitioner's researcher and attached to its reply brief amount to such a claim, Petitioner fails to explain how these documents support a finding that the research was materially inadequate or incomplete. *See* DTO Reply Br. at 54-55. Conclusory statements based solely on the existence of the documents, with no reference to their substance, are insufficient to satisfy Petitioner's burden of proof to establish this ground by a preponderance of the evidence. *See* 25 C.F.R. § 83.11(e)(10); *Little Shell Tribe*, 57 IBIA at 111; *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 39 (2005). And, on their face, the documents appear similar to other evidence in the record, for example, certain documents identify the "Duwamish and other tribes" as receiving congressional appropriations. The FDR concluded that such identifications and appropriations applied to the reservation treaty tribes, not to Petitioner. FDR at 13, 27-28.

IV. The Board Refers the Following Grounds for Reconsideration to the Secretary

Petitioner has also alleged several grounds for reconsideration that do not fall within the Board's limited jurisdiction under § 83.11(d)(1)-(4). In accordance with § 83.11(f)(2), the Board refers the following issues to the Secretary.

A. Whether the Assistant Secretary Applied the Wrong Standard of Proof

Petitioner argues that the Assistant Secretary "applied the wrong standard of proof" in two ways. RFR at 12. First, Petitioner contends that the Assistant Secretary

> failed to draw inferences in favor of Petitioner despite the regulations' unambiguous statement that "[c]onclusive proof of the facts relating to a criteria shall not be required," and that "criterion shall be considered met if the available evidence establishes a ***reasonable likelihood*** of the validity of the facts relating to that criterion."

Id. at 12-13 (quoting 25 C.F.R. § 83.6(d)); *see also supra* at 154 (discussing § 83.6(d)). For example, Petitioner asserts that the Assistant Secretary "was required to draw

reasonable inferences in favor of the DTO" that certain pre-1939 identifications were of DTO and/or its ancestors. RFR at 44. Second, Petitioner argues that the Assistant Secretary failed to take into account "historical situations"[50] affecting the availability of evidence, "including the fact that the Duwamish Tribe does not have a land base and the manner in which the Duwamish Tribe's ancestors were forced by settlers to disburse [sic]." *Id.* at 13. According to Petitioner, the Assistant Secretary required Petitioner to "definitively prove each of the criterion while drawing all inferences against it and without ever considering the historical circumstances surrounding the Duwamish Tribe's collective journey from the signing of the Treaty of Point Elliott to today." *Id.*

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. *See Little Shell Tribe*, 57 IBIA at 129 (citing *Nipmuc Nation*, 45 IBIA at 247). Accordingly, the Board refers this alleged ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that the FDR applied an incorrect standard of proof in that it did not "draw reasonable inferences in favor of the DTO" when applying the "reasonable likelihood" standard, and failed to consider "the historical circumstances" when applying the standard?

B. Whether the Assistant Secretary Erred in Applying an "Evolved as a Group" Standard

Petitioner contends that the Assistant Secretary erred in requiring that DTO demonstrate that it "evolved as a group" out of the historical Duwamish tribe. RFR at 13-14, 66; DTO Reply Br. at 8, 15. According to DTO, only in the context of criterion § 83.7(a) concerning external identification, as amended for petitioners that have shown

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[50] Subsection 83.6(e) provides:

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

previous Federal acknowledgment, must a petitioner show that it is the same group as or "evolved out of the group that was previously acknowledged . . . ." RFR at 14 (emphasis omitted). Petitioner contends that an "evolved as a group" requirement is not otherwise found in the regulations. *Id.* The Amici Tribes disagree. *See, e.g.*, Muckleshoot Br. at 16-18.

Petitioner's claim that the Assistant Secretary misinterpreted the regulations does not state a ground for reconsideration over which the Board has jurisdiction. *See Little Shell Tribe*, 57 IBIA at 129. Therefore, the Board refers this alleged ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that the Assistant Secretary misinterpreted the regulations in requiring Petitioner to demonstrate that it had evolved as a group from the historical Duwamish tribe?

C. Whether DTO Was Treated Differently from Other Similarly Situated Tribes

Petitioner alleges that the FDR failed to follow acknowledgment case precedent and that it was treated differently from other tribes that it argues are similarly situated to DTO, and thus the FDR is arbitrary and capricious. *See, e.g.*, RFR at 8 n.8, 17, 19, 27-28, 33-34; DTO Reply Br. at 5 n.1, 13 & n.8, 20 n.11.

This allegation is not one of the grounds on which the Board may order reconsideration under § 83.11(d). *See Nipmuc Nation*, 45 IBIA at 247 ("[A]llegations that a final determination violated the regulations, failed to adhere to its acknowledgment case precedent, or used an improper evidentiary standard do not state a ground for reconsideration over which the Board has jurisdiction."). Accordingly, the Board refers this alleged ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that the FDR failed to follow acknowledgment case precedent and treated Petitioner differently from similarly situated tribes?

D. Whether the Record Should be Reopened to Allow Supplementation

As explained *supra* at 160, the Assistant Secretary declined to reopen the record on remand. Therefore, the record for the FDR includes "all materials in the administrative record at the time of the [Final Determination], materials before the IBIA and before the Secretary when on May 8, 2002, the Secretary declined to refer any issues to the AS[-]IA, and materials that were submitted in the [district] court proceedings." FDR at 9-10; *see*

also Transmittal of Critical Documents at 2. Both the Final Determination and the FDR "evaluated the DTO and its members as of 2001, using the evidence discussed above." Transmittal of Critical Documents at 2. Petitioner argues that the FDR is based upon an "outdated and incomplete record" that must be supplemented. DTO Reply Br. at 53; *see* RFR at 75. Specifically, Petitioner argues that the regulations "require an analysis of the Duwamish Tribe, including the community and political influence or authority criteria, at present," and that Petitioner has submitted "a sampling of relevant evidence along with [its] request [for reconsideration] . . . but believes that that evidence is incomplete." RFR at 75. Petitioner further argues that "historical evidence material to the Petition is still being uncovered and developed as the Duwamish Tribe attempts to meet the evolving/changing evidentiary and legal standards in each new AS-IA decision." *Id*

To the extent that this argument may be construed as a challenge to the Assistant Secretary's decision to deny Petitioner's request to reopen the record on remand, and/or as a challenge to the Secretary's interpretation of the regulations and time frames used for analysis, it is outside the Board's jurisdiction. Accordingly, the Board refers this alleged ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that the Assistant Secretary erred in denying Petitioner's request to reopen the record on remand and/or used the wrong time frames for analysis under the regulations?

E. Whether DTO's Petition Should be Considered Under the 2015 Regulations

During remand from the District Court's decision in *Hansen*, Petitioner requested that its petition be reviewed under the acknowledgment regulations as amended in 2015, and the request was denied. *See* FDR at 3. In its Second Request for Reconsideration, DTO maintains that its petition should be considered under the 2015 regulations, which "went into effect on July 31, 2015 . . . a mere two days after the AS-IA denied the DTO's Petition." RFR at 76; *see also* DTO Reply Br. at 56.

Petitioner's claim that the Assistant Secretary erred in denying its request to have its petition considered under the 2015 regulations does not state a ground for reconsideration over which the Board has jurisdiction. *See In re Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation*, 36 IBIA 245, 250 (2001) (referring to the Secretary issues concerning the propriety of applying the 1994 regulations). Accordingly, the Board refers this alleged ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that DTO's petition should be considered under the 2015 regulations?

Conclusion

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 denies Petitioner's request for reconsideration under § 83.11(d)(1), because Petitioner failed to meet its burden to show that new evidence exists that could affect the determination. The Board denies Petitioner's request for reconsideration under § 83.11(d)(4), because Petitioner failed to meet its burden to show that that there are reasonable alternative interpretations, not previously considered, of the evidence used for the FDR that would substantially affect the determination that Petitioner does not meet the criteria in § 83.7(a)-(c). And the Board denies Petitioner's request for reconsideration under § 83.11(d)(3), because Petitioner has not provided a basis for the Board to find that the research appears inadequate or incomplete in some material respect. The Final Determination on Remand is affirmed subject to referral of the issues listed in Part IV, *supra*, to the Secretary.

I concur:

// original signed
Thomas A. Blaser
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

APPENDIX

1. Petitioner's Exhibits That Are <u>Already in the Record</u> (41)

98	194	209	233
105	195	210	236
178	197	221	235
182	199	223	237
184	201	224	238
186	203	225	239
187	204	226	241
188	205	227	289
189	206	228	
192	207	230	
193	208	231	

2. Petitioner's Exhibits That Are Not in the Record and <u>Not Referenced in the Request for Reconsideration</u> (107)

11	67	181	274
24	68	183	275
25	69	190	276
27	75	196	277
28	76	211	278
29	77	212	279
31	78	213	280
37	79	214	281
38	80	215	282
39	81	216	283
40	82	217	284
44	83	218	285
45	84	219	286
47	85	220	287
50	86	234	288
52	87	242	290
53	88	243	291
54	89	244	292
55	90	245	293
56	91	246	294
57	92	247	295
58	93	248	297
59	94	249	298
62	95	250	
63	96	251	
64	97	252	
65	171	272	
66	179	273	

3. Petitioner's Exhibits That Are Not in the Record, Are Referenced in the Request for Reconsideration, and Are Comparable to Documents in the Record (122)

4	115	146	180
7	116	147	191
8	117	148	198
36	118	149	200
41	119	150	202
46	120	151	222
48	121	152	229
49	122	153	232
51	123	154	240
60	124	155	253
61	125	156	254
70	126	157	255
71	127	158	256
72	128	159	257
73	129	160	258
74	130	161	259
99	131	162	260
100	132	163	261
101	133	164	262
102	134	165	263
103	135	166	264
104	136	167	265
106	137	168	266
107	138	169	267
108	139	170	268
109	140	172	269
110	141	173	270
111	142	174	271
112	143	175	296
113	144	176	
114	145	177	

4. Petitioner's Remaining Exhibits (28)

1	13	21	35
2	14	22	42
3	15	23	43
5	16	26	185
6	17	30	
9	18	32	
10	19	33	
12	20	34	