INTERIOR BOARD OF INDIAN APPEALS

In Re Federal Acknowledgment of the Historical Eastern Pequot Tribe

41 IBIA 1 (05/12/2005)

Reconsidered Final Determination by Associate Deputy Secretary:
70 Fed. Reg. 60,099 (Oct. 14, 2005)

Related Board cases:
42 IBIA 133
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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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IN RE FEDERAL ACKNOWLEDGMENT OF THE HISTORICAL EASTERN PEQUOT TRIBE	:	Order Vacating and Remanding Final Determination
	:	Docket Nos. IBIA 02-165-A 02-166-A 02-169-A
	:	May 12, 2005

The State of Connecticut (State); the Towns of Ledyard, North Stonington, and Preston, Connecticut (Towns); and the Wiquapaug Eastern Pequot Tribe (WEP) filed requests for reconsideration of the Final Determination (FD) by the Assistant Secretary - Indian Affairs (Assistant Secretary), to acknowledge the historical Eastern Pequot tribe as an Indian tribe within the meaning of Federal law. 1/ The Assistant Secretary issued the FD on June 24, 2002, and notice of the FD was published on July 1, 2002. 67 Fed. Reg. 44,234. The FD concluded that a single historical Eastern Pequot tribe, represented by and consisting of two petitioners, the Eastern Pequot Indians of Connecticut (EP) and the Paucatuck Eastern Pequot Indians of Connecticut (PEP), satisfied the regulatory criteria for Federal acknowledgment. For the

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1/ The State's request was docketed as IBIA 02-165-A, the Towns' request was docketed as IBIA 02-169-A, and WEP's request was docketed as IBIA 02-166-A. WEP claims to be an Indian group descended from the historical Eastern Pequot Tribe, and is separately seeking Federal acknowledgment in proceedings before the Department's Office of Federal Acknowledgment.

The Towns of Brookfield, Colchester, Cornwall, Danbury, Darien, Easton, Fairfield, Greenwich, Kent, Monroe, New Canaan, New Fairfield, New Milford, Norwalk, Orange, Roxbury, Shelton, Stamford, Stonington, Trumbull, Warren, Washington, Weston, Westport, Wilton and Woodstock, Connecticut, and the Housatonic Valley Council of Elected Officials, filed a brief as amicus curiae in support of the requests for reconsideration filed by the State and the three Towns. The Board treated amici's filing as a possible independent request for reconsideration, but following amici's clarification of their intent, the Board dismissed their submission as a separate request for reconsideration, without prejudice to their right to participate as amici in the remaining proceedings. In re Federal Acknowledgment of the Historical Eastern Pequot Tribe, 38 IBIA 144 (2002).

reasons discussed below, the Board of Indian Appeals (Board) vacates the FD and remands it to the Assistant Secretary for further work and reconsideration, and also describes for the Assistant Secretary additional alleged grounds for reconsideration that are not within the Board's jurisdiction.

Regulatory Framework

The Department of the Interior's acknowledgment regulations provide the administrative process by which an American Indian group may demonstrate that it is entitled to be recognized as an Indian tribe, within the meaning of Federal law, and thus entitled to a government-to-government relationship with the United States. 59 Fed. Reg. 9280 col. 1 (Feb. 25, 1994); see 25 C.F.R. Part 83. Under those regulations, a group that petitions the Department to be acknowledged must satisfy seven criteria. 25 C.F.R. §§ 83.6(c), 83.7(a)–(g). The first three of those criteria are relevant to the issues over which the Board has jurisdiction in this case.

First, a petitioner must demonstrate 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)). This criterion requires external identification of the petitioner as American Indian in character. See 59 Fed. Reg. at 9286 col. 2. The regulation lists several types of evidence of such external identification that may be relied upon to demonstrate criterion (a), including "[r]elationships with State governments based on identification of the group as Indian." 25 C.F.R. § 83.7(a)(2).

Second, the regulations require that "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b) (criterion (b)). "Community" is defined as "any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. *Community* must be understood in the context of the history, geography, culture and social organization of the group." 25 C.F.R. § 83.1.

Criterion (b) lists several types of evidence deemed relevant to the definition of "community." Some examples include marriage rates and patterns, social relationships and interaction among members, shared economic activity among the membership, cultural patterns shared among members of the group, discrimination or other social distinctions by non-members, and the persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name. See id. § 83.7(b)(1). Some combination of the listed types of evidence, or other evidence, may be used to demonstrate that a petitioner meets the definition of "community" in section 83.1.

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

> 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.

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" in section 83.1. 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).

An "essential requirement" of criterion (c), as previously interpreted by the Assistant Secretary, "is that group leaders influence the opinions or actions of a substantial number of group members on issues regarded as significant to the group as a whole and [that] the actions of leaders are influenced by the group." Mar. 7, 1994, Summary Under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the Mohegan Tribe of Indians of the State of Connecticut, at 27. Described another way, "[i]t must be shown that there is a political connection between the membership and leaders and thus that the members of a tribe maintain a bilateral political relationship with the tribe. This connection must exist broadly among the membership." June 9, 1992, Summary Under the Criteria and Evidence for Final Determination Against Federal Acknowledgment of the Miami Nation of Indians of the State of Indiana, Inc., at 15; see also Official Guidelines to the Federal Acknowledgment Regulations, 25 CFR 83, at 49 (Sept. 1997) (Critical Documents (CD) Ex. 73) (formal structure not required, but there must be leaders and followers); Sept. 12, 1994, Letter from Morris (BIA) to Cunea (PEP) (CD Ex. 48) (same); Mar. 13, 1990, Letter from Eden (BIA) to Sebastian (EP) (CD Ex. 47) (evidence should be provided to show how political processes and authority were maintained within the group).

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." 25 C.F.R. § 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." 25 C.F.R. § 83.6(d). Conclusive proof is not required. Id. The regulations describe specific forms of suitable evidence that may be used to demonstrate the requirements, but "[t]he criteria may be met alternatively by any suitable evidence that demonstrates that the petitioner meets the requirements of the criterion statement and related definitions." 25 C.F.R. § 83.6(g).

Factual Background

The Proposed Findings (PF) for EP and PEP and the FD extensively recite the history of the Eastern Pequot, which need not be repeated here. To briefly summarize, however, the designation of a group of Pequot Indians as the "Eastern Pequot" apparently can be traced back to the second half of the 17th century, from the pattern of dispersal of Pequot prisoners among the Mohegan, Narragansett, and Eastern Niantic, after the so-called "Pequot War of 1637." See Summary under the Criteria and Evidence for Proposed Finding - Eastern Pequot Indians of Connecticut (SCE PF EP) at 13 (Mar. 24, 2000). According to the EP PF, a group of Pequots, which became the antecedent to both the EP and PEP petitioners, came to settle in an area within the present-day boundaries of the State of Connecticut. Sometime in the mid- to late- 17th century, the Colony of Connecticut assumed responsibility for the care of what became referred to as the Eastern Pequot, appointing governors and overseers for them, and setting aside land for them, which became known as the Lantern Hill Reservation, located near North Stonington, Connecticut. From that time to the present, the Colony, and later State, of Connecticut maintained oversight responsibilities for the Lantern Hill Reservation and had a distinct relationship with the Eastern Pequot who resided or were entitled to reside on the reservation lands.

On June 28, 1978, EP submitted to BIA a letter of intent to petition for Federal acknowledgment. On June 20, 1989, PEP submitted a letter of intent to petition for Federal acknowledgment. Both EP and PEP asserted descent and tribal continuity from a historical Eastern Pequot tribe. The two primary antecedent family lines for PEP are the Gardner and Jackson families. The primary antecedent family line for EP is the Sebastian family.

On January 1, 1998, the Assistant Secretary placed the EP petition on active consideration, and on April 2, 1998, the Assistant Secretary decided to consider the EP and PEP petitions simultaneously.

On March 31, 2000, the Assistant Secretary published notices of two PFs, one for each petitioner. 65 Fed. Reg. 17,294 (PEP); 65 Fed. Reg. 17,299 (EP). Each PF proposed to determine that the respective petitioner exists as an Indian tribe. Each was based on a determination that the "historical Eastern Pequot tribe" satisfied criteria (b) and (c) from historical times to 1973, and that each petitioner satisfied the remaining five criteria in section 83.7.

The Assistant Secretary declined to make proposed findings for EP and PEP for criteria (b) and (c) for the post-1973 period, stating that there was insufficient information to determine whether a single tribe existed, composed of both petitioners (as factions of that tribe), or whether one or both petitioners should be separately acknowledged as a tribe(s). 65 Fed. Reg. at 17,299 cols. 2-3, 17,302 col. 3, 17,304 cols. 1-2. The Assistant Secretary also noted the possibility that neither petitioner might receive a favorable final determination, after consideration of the evidence and analysis received during the comment period. Id. at 17,304 col. 2.

In proposing to find that the historical Eastern Pequot tribe satisfied the criteria for community and political authority through 1973, the Assistant Secretary characterized the relationship between the State of Connecticut and the Eastern Pequot as "state recognition" of the historical Eastern Pequot tribe, and described that relationship as an "important consideration" in the proposed findings to acknowledge Petitioners. SCE PF EP at 135. As further described by the Assistant Secretary:

> The evaluation of these petitions pertains to Indian groups which have had both continuous recognition by the State of Connecticut and continuous existence of a state reservation since the colonial period. These unique factors provide a defined thread of continuity through periods when other forms of documentation are sparse or do not pertain directly to a specific criterion. State recognition under these circumstances is more than the identification of an [Indian] entity, because it reflects the existence of a tribe. The general body of evidence has been interpreted in the context of the tribe's relationship to the colony and the state.
>
> * * * * Members of the tribe occupied a somewhat different status than non-Indians within Connecticut. This evidence provides a common backbone and consistent backdrop for interpreting the evidence of continued tribal existence. When weighed in combination with this historical and continuous existence, evidence on community and political influence carries greater weight tha[n] would be the case under circumstances where there was no evidence of a longstanding relationship with the state based on being a distinct community.

65 Fed. Reg. at 17,300 col. 1.

On June 24, 2002, after receiving comments on the proposed findings, the Assistant Secretary issued the FD, concluding that the historical Eastern Pequot tribe, consisting of both EP and PEP, constituted a single tribe, which satisfied the seven regulatory criteria for Federal acknowledgment in 25 C.F.R. § 83.7. See 67 Fed. Reg. 44,234. 2/ In reaching that conclusion, the FD considered and rejected arguments raised by the State and Towns that the State's relationship with the Eastern Pequot was based purely on the Indian descent of individuals and not on any State view that the group constituted a politically-functioning Indian tribe. The FD also rejected PEP's arguments that it was not and had never been part of the same tribe as EP, and that the acknowledgment regulations do not permit the Assistant Secretary to "combine" two petitioners into a single recognized tribe. 67 Fed. Reg. at 44,235 col. 2. 3/

In concluding that the historical Eastern Pequot tribe satisfied criterion (b) from the colonial period through 1973, the FD relied upon a variety of evidence, including reservation residency, marriage rates within the group, and various patterns of social association. See, e.g., SCE FD EP at 135; see 67 Fed. Reg. at 44,236 cols. 1-2. For the period from 1940 to 1973, the FD found that there was a strong demonstration of social cohesion among the families antecedent to EP; that the main antecedent family to PEP, the Gardners, was sufficiently small and closely related to assume social cohesion within that family; and that the Jackson family functioned as a "bridge" or "connector" between the otherwise then separate EP and PEP antecedent family lines. 67 Fed. Reg. at 44,237 col. 1.

2/ In addition to the Federal Register notice, the Assistant Secretary signed determinations for each petitioner: Summary Under the Criteria and Evidence for Final Determination in Regard to Federal Acknowledgment of the Eastern Pequot Indians of Connecticut as a Portion of the Historical Eastern Pequot Tribe (SCE FD EP) (June 24, 2002), and Summary Under the Criteria and Evidence for Final Determination in Regard to Federal Acknowledgment of the Paucatuck Eastern Pequot Indians of Connecticut as a Portion of the Historical Eastern Pequot Tribe (SCE FD PEP) (June 24, 2002). These two documents share certain identical sections addressing common issues, such as the Assistant Secretary's consideration of the State relationship and the reservation. For convenience, the Board will refer and cite to the SCE FD EP, rather than to both documents. Pagination in all citations is based on hard copies of documents in the administrative record, rather than on electronic copies.

3/ Since the 1970's, when the two petitioning groups were organized, there has been conflict between the two over the issues of descent from and continuity with the historical Eastern Pequot tribe, and over the use of the Lantern Hill reservation. The conflict itself pre-dated the 1970's, and arose, at least in part, based on the contention by members of PEP that the members of EP were not, in fact, of Indian descent.

For the post-1973 period, the FD concluded that the geographic pattern of residence among the EP members was "sufficiently close to be supporting evidence of more direct evidence of social connections," SCE FD EP at 19, although it found EP's reports that were intended to demonstrate modern community problematic, see id. at 136. For PEP, the FD found that the present geographic pattern of residence made significant social interaction feasible, but was insufficient to provide supporting evidence of community. 67 Fed. Reg. at 44,237 col. 2. Instead, the FD relied on interview evidence and an analysis provided by PEP concerning a "core social group" to find that PEP satisfied the "community" criteria. For the tribe as a whole during this period, the FD found that the evidence reflected increasing social polarization between EP and PEP, but that "political processes of the entire Eastern Pequot" bridged the two groups and showed the existence of a single community, because the "crucial focus" of both petitioners was to control and maintain access rights to the single reservation, which the State had established for a single group. Id.

In finding that criterion (b) was satisfied, the FD did not specifically identify for any particular time period or periods to what extent the State's relationship with the Eastern Pequot was considered as relevant evidence, or what weight was being given to such evidence. The FD did state, however, that the State's relationship with the Eastern Pequot provided "an additional form of evidence," which was weighed with other evidence, and which "exists throughout the time span, but is most important during specific periods where the other evidence in the record concerning community and political influence would be insufficient by itself." SCE FD EP at 78. As such, the FD indicates that absent the evidence of the State's relationship with the Eastern Pequot, the evidence for criterion (b) was insufficient for at least one or more unspecified time periods.

With respect to criterion (c) — political influence or authority — for the period between 1873 and 1920, the FD found that political influence had been shown in part by a series of petitions presented to the State Superior Court from 1873 through 1883, signed by individuals from families antecedent to both EP and PEP, as members of the Pequot tribe of Indians of North Stonington. In addition, the FD found that new evidence demonstrated that Calvin Williams functioned as a leader during at least part of this time period, dealing with the state-appointed overseer and consulting with the membership on decisions. 67 Fed. Reg. at 44,237 col. 3; SCE FD EP at 145.

For the period between 1913 and 1940, the FD found that the "strong character of the community, especially based on intermarriage ties, provides strong supporting evidence for the existence of significant political processes." 67 Fed. Reg. at 44,237 col. 3. The FD further stated:

> For the time period between 1913 and 1940, particularly from 1913 to 1929, between the death of Calvin Williams and the appearance of Atwood I.

> Williams, Sr., [in 1933] as an influential leader, the continuous State relationship with the Eastern Pequot as an Indian tribe provides additional evidence which, in combination with the limited direct evidence, demonstrates continuity of political processes throughout periods in which there is not sufficient positive evidence by itself, but in which positive evidence exists.

67 Fed. Reg. at 44,238 col. 1; see SCE FD EP at 22.

The FD found that Atwood I. Williams, Sr. was "the state-recognized leader for all of the Eastern Pequots from 1933 until his death in 1955," and that there was limited evidence that he was elected by a portion of the membership and that the State took notice of this election. 67 Fed. Reg. at 44,237 col. 3 – 44,238 col. 1. "Even though Williams took a stance against the membership of the Brushell/Sebastian portion of the Eastern Pequots, he was recognized by and dealt with the State as leader of the entire group." Id. at 44,238 col. 1. The FD also noted, however, that "State implementation of [Williams'] status was inconsistent and varied," but "existed throughout the time span from 1933 to 1955." Id.

Aside from the evidence regarding Atwood I. Williams, Sr., for the period between 1940 and 1973, the FD noted sporadic additional evidence to support the existence of political processes, although it found that there was insufficient evidence to demonstrate that any particular individuals served as either formal or informal leaders. The FD reiterated, however, its finding that social community existed throughout this period. As it did for the analysis of criterion (c) for the period between 1913 and 1940, the FD also considered the State's relationship with the Eastern Pequot in concluding that criterion (c) was satisfied for the period from 1940 to 1973:

> The continuous state relationship with the Eastern Pequot as an Indian tribe and continuing existence of the Lantern Hill reservation with tribal members resident on it under state supervision is additional evidence which, in combination with the other evidence, demonstrates continuity of political processes throughout the period, from 1940 to 1973, in which there is not otherwise sufficient positive evidence, but in which positive evidence does exist.

67 Fed. Reg. at 44,238 col. 3.

For the 1970's, the FD concluded that the "bridge" formed by the Jackson family between the Sebastians of EP and the Gardners of PEP demonstrated that there was a "single political field" within which the conflict between the Sebastians and Gardners played out, rather than a conflict between two completely separate groups. According to the FD, the Jacksons did not align themselves with PEP until 1989, indicating that "alignments among the Eastern Pequot subgroups were still being adjusted in 1989." Id.

For the post-1973 period, the FD found that the events that led to the formation of the EP and PEP were a contest for power over access to the reservation, the legitimacy of the Sebastians as Eastern Pequots, and competition to obtain designation as the Eastern Pequot tribe's sole representative. 67 Fed. Reg. at 44,239 col. 1. According to the FD, each petitioner demonstrated substantial political processes within its own membership, involving common issues dating from at least the 1920's, when there was "strong evidence" for the existence of a single community. Id. Each petitioner, according to the FD, controlled the allocation of reservation resources — a type of evidence supporting political influence and authority — although the allocation was "not sufficient evidence of political processes in itself under [25 C.F.R.] § 83.7(c)(2)(i), because the processes are parallel rather than a single process, but is strong evidence of political processes." Id. at 44,239 col. 2. In the context of these common issues and conflict over the same resource and status, the FD concluded that the evidence demonstrated that only a single tribe existed, "notwithstanding the present organization of those [political] processes into two distinct segments." Id. at 44,239 col. 3. Finally, in finding that criterion (c) was satisfied for the period from 1973 to the present and that both petitioners constituted a single tribe, the FD stated:

> The continuous historical State recognition and relationship are based on the existence of a single Eastern Pequot tribe, resident on a single land base which the tribe has occupied since colonial times and continues to occupy jointly. These facts provide added evidence that the petitioners meet the regulations as a single political body, notwithstanding current divisions and organization.

67 Fed. Reg. at 44,239 col. 3; SCE FD EP at 27.

The FD addressed at some length its use and consideration of the relationship between the State and the Eastern Pequot in determining that criteria (b) and (c) were satisfied, describing the character, underpinnings, and evidentiary value of the relationship as follows:

> This final determination concludes that the State relationship with the Eastern Pequot tribe, by which the State since colonial times has continuously recognized a distinct tribe with a separate land base provided by and maintained by the State, and which manifested itself in the distinct, non-citizen status of the tribe's members until 1973, provides an additional form of evidence to be weighed. This evidence exists throughout the time span, but is most important during specific periods where the other evidence in the record concerning community or political influence would be insufficient by itself. The continuous State relationship, although its nature varied from time to time, provides additional support in part because of its continuity throughout the entire history of the Eastern Pequot tribe.

> There is implicit in this state-tribal relationship a recognition of a distinct political body, in part because the relationship originates with and derives from the Colony's relationship with a distinct political body at the time the relationship was first established. Colony and State laws and policies directly reflected this political relationship until the early 1800's. The distinct political underpinning of the laws is less explicit from the early 1800's until the 1970's, but the Eastern Pequot remained non-citizens of the State until 1973. The State after the early 1800's continued the main elements of the earlier relationship (legislation that determined oversight, established and protected land holdings, and exempted tribal lands from taxation) essentially without change or substantial questioning throughout this time period.

SCE FD EP at 14 (emphases added).

> This relationship defined the Eastern Pequot tribe as a group with a distinct status not shared by any non-Indian group in the State, and was based on their status as a group rather than being a racial classification of individuals. By contrast, Connecticut treated individual, non-tribal, Indians the same as the remainder of the population.

Id. at 29.

The FD continues:

> There are significant periods at the beginning and the end of the historical span which partake of a Colony or State relationship with a distinct political community. Through most of the intervening period from the American Revolution to 1973, the relationship was less explicitly based on the status of the tribes as distinct political communities. However, the tribes continued to be based on a distinct status not shared by non-Indians, and not a welfare relationship as argued by the third parties.

Id. at 30.

The FD identified the "major elements" of the "continuous" relationship between the State and the historical Eastern Pequot tribe as: (1) a separate reservation land base set aside by the State since 1683 for the Eastern Pequot, which was not subject to taxation or adverse possession; the land and the funds derived from it were defined as belonging to the tribe, although title was held by the State; (2) State-appointed overseers, since 1764, with authority over the tribe's reservation land and funds, and responsible for the welfare of the tribe's members; (3) the non–State-citizenship status of members of the tribe until 1973, under which

they were not legally eligible to vote in State and local elections, which was a distinction that applied to members of the specific tribes recognized by the Colony and State and not to other Indians living within the State; and (4) Colony and State laws which, until 1808, "clearly reflect the idea that the tribes had a distinct political status," a status which continued after 1808 in the form of the first three elements. SCE FD EP at 29-30.

With respect to the citizenship status of Eastern Pequot Indians, the FD discussed several pieces of evidence to support its conclusion that the Eastern Pequot did not have state citizenship prior to enactment of a 1973 state statute. 4/ First, at a 1939 hearing concerning the Lantern Hill Reservation, a state official presented a statement asserting that "[t]hese Indians are not citizens of the town; * * * they are state wards." SCE FD EP at 62. Second, in 1941, a state official described Grace (Jackson) Gardner Boss, an Eastern Pequot, as not being a voter, while simultaneously describing her husband — apparently not Eastern Pequot — as a voter. Id. Third, the FD noted a 1953 state bill, which was introduced but not passed, "[t]o end the second class citizenship of Connecticut's few remaining Indians," and which referred to "the Eastern Pequot tribe and the several members thereof residing in the town of North Stonington, or in any other town in this state." Id.

The FD also noted contrary evidence, including a 1956 state official's statement that tribal members on reservations in Connecticut "have all the rights of American citizens," and a 1961 statement by a state legislative committee chairman that "Indians in Connecticut have full citizenship privileges." SCE FD EP at 63. To reconcile this conflicting evidence, the FD concluded that "[w]hile practices may have changed, the evidence submitted showed no legal change in the citizenship status of Connecticut's tribal Indians," until the State enacted special legislation in 1973. Id. The 1973 Act provided: "It is hereby declared the policy of the state of Connecticut to recognize that all resident Indians of qualified Connecticut tribes are considered to be full citizens of the state and they are hereby granted all the rights and privileges afforded by law, that all of Connecticut's citizens enjoy." See SCE FD EP at 63 (quoting Conn. Gen. Stat. § 47-59a).

Although the FD expressly considered the State's relationship with the Eastern Pequot as significant, it also concluded that the relationship is "not evidence sufficient in itself to meet the criteria," and is "not a substitute for direct evidence at a given point in time or over a period of time." SCE FD EP at 14. Rather, the FD treated the State's relationship as "additional

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4/ No question has been raised whether the Eastern Pequot were considered citizens of the United States long before 1973. According to the FD, what was unclear was whether a 1924 Federal statute granting United States citizenship to Indians living in tribal relations was considered by Connecticut to automatically bestow State citizenship on Connecticut's tribal Indians. The State and Towns dispute the premise that the Eastern Pequot were living in tribal relations in 1924.

evidence which, when added to the existing evidence, demonstrates that the criteria are met at specific periods in time." Id.

Requests for Reconsideration

For the most part, the State and Towns allege the same or similar grounds for reconsideration of the FD. As discussed below, the Board has jurisdiction over some of those allegations, but not others.

The primary objection raised by the State and Towns to the FD is to its use of the State's relationship with and purported "recognition" of the Eastern Pequot as a political entity as evidence to find that Petitioners satisfied the "community" and "political influence or authority" criteria in the regulations. The State and Towns contend that "state recognition" can never be used as evidence for criterion (b) or (c). They also contend that various evidence relied upon to characterize the relationship as "state recognition" was unreliable or of little probative value, that BIA's or the petitioners' research was inadequate or incomplete, or that "new evidence" refutes certain evidence on which the FD relied. Among other things, the State and Towns challenge the FD's conclusion that Eastern Pequots were not citizens of the State and not eligible to vote in state or local elections until 1973. The State and Towns also raise several other challenges to evidence possibly relied upon in the FD to conclude that criteria (b) and (c) were satisfied, and that EP and PEP were two factions within a single tribe, rather than separate groups that are not part of a single community and political framework.

The Eastern Pequot Tribal Nation (EPTN) 5/ responds by contending that the Assistant Secretary fully analyzed and considered all of the arguments raised by the State and Towns, and that they have nothing new to say here. EPTN contends that (1) the State's relationship with the Eastern Pequot was and is based on tribal political status; (2) the State and Towns grossly exaggerate the weight that the FD places on the issue of the Eastern Pequot's citizenship status and voting rights; (3) the State and Towns have not demonstrated that the FD relied upon non-probative evidence, and the "new evidence" they proffer is not truly new, and could not affect the determination because it is of a type already considered by the FD; and (4) the FD's application of the state relationship was "determinative with other existing evidence for only two small periods of time totaling approximately 34 years, out of over 300 years of continuous tribal existence," EPTN Answer Br. at 68. EPTN also suggests that the FD could have reached a favorable determination without relying on the state relationship.

5/ Since issuance of the FD, the membership of EP and PEP have organized as EPTN, and appear as such before the Board. See EPTN Answer Br. at 1 n.1.

WEP's primary contention is that the Assistant Secretary should have considered including WEP in the single Eastern Pequot tribe that the FD acknowledged. As explained below, the Board concludes that all of WEP's alleged grounds for reconsideration, though sometimes cast in the language of the Board's jurisdiction, are in substance outside the scope of the Board's jurisdiction.

Board Jurisdiction, Scope and Standard of Review

The Board's jurisdiction to review a final determination of the Assistant Secretary - Indian Affairs on a petition for Federal acknowledgment is limited to reviewing four grounds for reconsideration:

> (1) That there is new evidence that could affect the determination; or
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> (2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; [6/] or
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> (3) That petitioner's or the [Bureau of Indian Affairs'] 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).

25 C.F.R. § 83.11(d)(1)–(4).

The party requesting reconsideration bears the burden to establish, by a preponderance of the evidence, that one or more of the grounds for reconsideration over which the Board has jurisdiction exist. 25 C.F.R. § 83.11(e)(9), (10).

If a request for reconsideration alleges additional grounds for reconsideration that do not fall within the Board's jurisdiction, the Board is required to describe those grounds and

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6/ The regulations do not define the terms "unreliable" or "of little probative value," nor has the Board done so is prior acknowledgment decisions. Black's Law Dictionary (6th ed. 1990), however, defines "reliable" as "[t]rustworthy, worthy of confidence." It defines "probative evidence" as "tending to prove, or actually proving an issue; that which furnishes, establishes, or contributes toward proof[;] * * * having fitness to induce conviction of truth, consisting of fact and reason co-operating as co-ordinate factors." (Citations omitted.)

refer them to the Secretary, if the Board affirms the final determination, or to the Assistant Secretary - Indian Affairs, if the Board vacates and remands it for further work and reconsideration. See 25 C.F.R. § 83.11(e)(10), (f)(1), (f)(2).

Discussion

State and Towns' Alleged Grounds for Reconsideration

1. Use of "State Recognition" Generally as Evidence for Criterion (b) or (c).

The State and Towns contend that the FD must be reconsidered because the acknowledgment regulations categorically preclude the use of a state relationship with a petitioning group, even state recognition of the group as a political entity, as relevant evidence for satisfying criterion (b) or (c).

As an initial matter, we must decide whether we have jurisdiction to consider what is in effect a legal argument that the regulations and precedent never permit a state's relationship to be used as evidence of criterion (b) or (c). Subsection (d)(2) of 25 C.F.R. § 83.11 allows the Board to consider allegations that the Assistant Secretary improperly relied upon evidence that is unreliable or of little probative value. If the regulations or precedent preclude the use of a state's relationship with a petitioning group as relevant evidence for criteria (b) and (c), then by definition such evidence cannot be considered or relied upon as having any "probative" value for those criteria. Therefore, we conclude that the scope of the Board's jurisdiction under 25 C.F.R. § 83.7(d)(2) is broad enough for us to consider the State and Towns' arguments that the regulations simply do not permit the State's relationship to be considered as reliable or probative evidence for criterion (b) or (c).

The State argues that by including state relationships as suitable evidence under criterion (a) — external identification of a group as American Indian — but not under criteria (b) and (c), principles of statutory construction require us to interpret the regulations as intended to exclude such evidence from consideration for criteria (b) and (c). We disagree. As the State concedes, the regulations expressly provide that the examples of suitable evidence listed for each criterion are not exclusive. See 25 C.F.R. § 83.6(g). While we agree that principles of statutory construction might support a conclusion that a type of evidence listed for criterion (a), but not for criterion (b) or (c), cannot be considered as *necessarily* or even presumptively suitable evidence for criterion (b) or (c), we do not agree that those principles of construction mandate a conclusion that BIA intended that such evidence could *never* be accepted as suitable for criterion (b) or (c).

The State and Towns seek to distinguish the types of evidence listed as suitable for criteria (b) and (c), which the Towns describe as "first-hand" and "specific," as opposed to

"secondary or tertiary characterizations" based on "outside assessments and relationships," which the Towns contend are relevant "only" to criterion (a). Towns' Request for Recon. at 7. We are not prepared to interpret the regulations in such a categorical and limited manner, based on such broad generalizations. Instead, we believe that a more logical and natural interpretation of the regulations, and one which considers their overall purpose and intent, is that a state's relationship with a petitioner may be used for demonstrating (b) and (c) if that evidence is in fact reliable and probative of one or more specific elements of the definitions of "community" or "political influence or authority" in 25 C.F.R. § 83.1. In other words, the definitions themselves should control whether evidence may be considered probative. The listed examples of suitable evidence for the various criteria may identify types of evidence that BIA deemed to be *intrinsically* suitable for demonstrating the respective criteria. We are not convinced, however, that the regulations were intended to categorically exclude evidence from consideration under criterion (b) or (c), simply because it was deemed intrinsically suitable for demonstrating criterion (a), but not deemed intrinsically suitable for demonstrating (b) or (c).

The State quotes BIA's 1997 Guidelines, which say that "gaining state recognition has no effect on the Federal recognition process," but that a long-standing relationship between a state and a petitioner can be used to satisfy criterion (a). See State Request for Recon. at 32. The State then asserts that this language is "unequivocal" in declaring "that state recognition has no bearing on Federal recognition." Id. But the State omits the word "gaining" from its paraphrase. The word "gaining" suggests that BIA intended to address the practical effect of recently-obtained state recognition. And BIA's comment on using a long-standing relationship for showing criterion (a) does no more than restate what is explicitly provided for in the regulations. But this guidance, addressing as it does two issues at opposite ends of a spectrum, does not, in our view, carry with it any necessary implication for the distinct, and more complicated, issue in the present case — whether a state relationship or state recognition may ever be used as probative evidence for criterion (b) or (c).

Previous acknowledgment decisions, such as the favorable determination for the Mohegan Indian Tribe and the negative determination for the Golden Hill Paugussett Tribe, which the State cites as further support for its position, do little more than take the same approach as the guidelines in stating the obvious — that state recognition has been deemed intrinsically suitable as evidence for demonstrating criteria (a), but is not dispositive for the ultimate determination whether a group is entitled to Federal recognition. None of the language relied upon by the State from prior Departmental acknowledgment decisions addresses the precise issue raised in this case.

The State and Towns also contend that a state's relationship with an Indian group is simply not relevant to criteria (b) and (c) because both criteria pertain to internal group processes, and a state relationship with a group does not reveal the types of activities and relationships within the group that are necessary for demonstrating those criteria. That

argument, in our view, oversimplifies the components of criteria (b) and (c), and overgeneralizes the potential character of state relationships with petitioners. As a practical matter, we are not persuaded that the relationship between a state and a petitioner, which could be varied and complex, can *never* be probative evidence for demonstrating the existence of community or political influence and authority within the petitioner. Rather, as discussed in more detail below, the evidentiary relevance and probative value of such a relationship depends on the specific nature of the relationship, the specific underlying interaction between a state and a petitioner, and how that relationship and interaction reflect in some way one or more of the elements in the definitions of "community" or "political influence or authority" contained in section 83.1. As such, we disagree with the State and Towns' contention that a state relationship can *never* be used for criterion (b) or (c) because it is *inherently* nonprobative or *necessarily* different in type from the types of evidence allowed for (b) and (c).

We conclude that neither the acknowledgment regulations, nor BIA's interpretation of those regulations through guidelines and other acknowledgment decisions, categorically precludes evidence of the relationship between a state and a petitioner from being considered for criteria (b) and (c). Instead, whether such evidence is relevant, reliable, or probative, and the proper weight to be afforded it, must be determined on a case- and fact-specific basis.

2. Use of "Implicit" State Recognition of the Eastern Pequot in the FD.

Although we reject the State and Towns' argument that evidence regarding a state relationship with a petitioner must be categorically excluded from consideration for criteria (b) and (c), we agree with them that there is nothing *intrinsic* in such evidence that makes it relevant or probative for criteria (b) and (c). EPTN does not appear to disagree with this point, nor does the FD suggest otherwise. The point of disagreement is whether the State's relationship with the Eastern Pequot in this case, as used and relied upon in the FD, constitutes evidence that is either unreliable or of little probative value for demonstrating criteria (b) and (c).

The FD concluded that four particular elements of the State's relationship with the Eastern Pequot — explicit laws prior to the 1800's and again after 1973, a reservation, state overseers, and noncitizenship status — and the continuity of the latter three elements over time, made the State's relationship probative of (b) and (c) because it constituted "implicit" recognition between the early 1800's and 1973 that the Eastern Pequot existed as a tribal political entity. The FD reached this conclusion even while noting that the "nature" of the relationship itself varied from time to time. See SCE FD EP at 14. Alternatively, the FD characterized the "political underpinnings" of this relationship as "less explicit" during that 170-year time span, but emphasized that the three legal and administrative elements of the relationship remained. Id.

The FD then used the State's continuous relationship and implicit recognition of the Eastern Pequot as a political entity, as "additional evidence" that tipped the scales for demonstrating criteria (b) and (c) when the other evidence for a particular time period was insufficient. With respect to criterion (b), it is not clear to what extent the FD actually relied on state recognition, but the FD does suggest that it made the difference at least for one or more time periods. See SCE FD EP at 78 (state relationship "exists throughout the time span, but is most important during specific periods where the other evidence in the record concerning community and political influence would be insufficient by itself"). And for criterion (c), for at least portions of the 60-year period between 1913 and 1973, the FD specifically invoked state recognition to overcome otherwise insufficient evidence. See id. at 22; 67 Fed. Reg. at 44,238 cols. 1, 3. In addition, the State's continuous relationship was given some indeterminate weight for the post-1973 period to support the FD's finding that the two petitioners in fact constituted two factions of a single tribe. See SCE FD EP at 26-27; 67 Fed. Reg. at 44,239 cols. 2-3.

The State and Towns, of course, dispute the notion that there was any state recognition — implicit or otherwise — of the Eastern Pequot as a political entity, at least until relatively recently. 7/ Assuming, however, for the sake of argument, that there is reliable and probative evidence to support the FD's finding that the distinct elements of the relationship existed on a continuous basis, through which the State did implicitly recognize the Eastern Pequot as a political entity between the 1800's and 1973, the issue is whether such implicit state recognition constitutes evidence that is reliable or of more than little probative value for criterion (b) or (c).

To satisfy criterion (b), a petitioner must "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." 25 C.F.R. § 83.1 (defining "community"). We agree with EPTN that the State's relationship with the Eastern Pequot may be probative of the second part of the definition — whether its members were differentiated

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7/ In 1979, the Governor of Connecticut formally certified, for revenue sharing purposes, that certain groups within the State described as Indian tribes, including the Paucatuck Eastern Pequot, had recognized governing bodies which exercised substantial governmental functions, including making membership determinations and making reservation land assignments. See Nov. 8, 1979, Letter from Grasso to Williams (EPTN Answer Br. Exh. 23); see also Apr. 9, 1996, Letter from Stetson to Deer (CD Exh. 77 at 104a) (discussing same certification for Golden Hill Tribe of the Paugussett Nation). In 1989, the State enacted legislation "recogniz[ing] that the indigenous tribes, the Schaghticoke, the Paucatuck Eastern Pequot, the Mashantucket Pequot, the Mohegan and the Golden Hill Paugusett are self-governing entities possessing powers and duties over tribal members and reservations." Conn. Gen. Stat. § 47-59a(b) & note.

from and identified as distinct from nonmembers. But we fail to see how the State's "implicit" recognition of the Eastern Pequot as a political entity, without more, would be probative for showing "that consistent interactions and significant social relationships exist within its membership," id. And even if the State had laws and administrative mechanisms that were structured to treat the Eastern Pequot as a single group, that fact alone would not seem to be probative for showing whether the Eastern Pequot actually existed as a single community. The FD does not suggest that the Eastern Pequot were coerced by elements of the State relationship to be a single community. In order for the State's relationship to be probative of the first part of the definition of "community," it would need to be more than "implicit," and would need to be expressed in some way that reflected the actual or likely existence of those interactions and social relationships. But the FD treats the significance of state recognition in this case on far too general a level for us to be convinced that it is evidence that can be considered reliable or probative for the entire definition of community, and the FD makes no distinction between the components of that definition in considering the state relationship as probative.

We have the same difficulty with the FD's use of state recognition for criterion (c). Criterion (c) requires a petitioner to demonstrate that it has maintained political influence or authority over its members. 25 C.F.R. § 83.7(c). As interpreted by the Assistant Secretary, this requires a showing that the members maintain a bilateral relationship with the tribe, and that the connection exists broadly among the membership. June 9, 1992, Summary Under the Criteria and Evidence for Final Determination Against Federal Acknowledgment of the Miami Nation of Indians of the State of Indiana, Inc., at 15. As with criterion (b), this criterion requires at least some evidence of interaction within the group — leaders influencing followers and followers influencing leaders. Once again, we fail to see how "implicit" state recognition of a group as a political entity constitutes probative evidence that the group actually exercises political influence or authority, and that there are actually leaders and followers in a political relationship. Rather, there needs to be more than "implicit" recognition, and the relationship between the State and the group needs to be expressed in some way that reflects the existence or likely existence — not simply theoretical or presumed — of political influence or authority within the group, as defined by section 83.1.

For example, the FD states that from 1933 through 1955, the State (through a court decree) recognized Atwood Williams, Sr. as the leader of the entire Eastern Pequot tribe, that there is evidence that he was elected, and that the State took notice of that election. See supra, 41 IBIA at 8. To the extent that the evidence shows that the State's actions were in response to or reflective of political processes within the group, we think it would be probative, at least for the time period for which the State's actions can be shown to reflect those processes. The FD notes, however, that the State's "implementation" of Atwood Williams' status was "inconsistent and varied," that the State had to be "reminded" of that status, and that from 1941 through 1947, there was no documentation of activities by Williams. SCE FD EP at 23; 67 Fed. Reg. at 44,238 col. 1. As such, it is not clear that a state-court-decreed recognition in 1933 of

Williams as the elected leader of the group could be probative for more than a portion of the 1933 through 1955 time period to demonstrate one or more elements of the definition of political influence or authority found in 83.1. 8/ We do not suggest that evidence of Williams' leadership or interaction with the membership must be shown at every point in time between 1933 and 1955. The regulations do not require that. See 25 C.F.R. § 83.6(e). Our difficulty is that the FD appears to assume that the State court decree in 1933 has probative value for showing political processes within the group for the entire subsequent 22-year period, and that the State's recognition of Williams as leader of the entire Eastern Pequot tribe is probative for showing that a bilateral relationship existed between the leadership and members of the group as a whole, including the Sebastians. 9/

In addition, the probative value of particular evidence cannot be determined in a vacuum. Rather, it must be determined in context, and in relation to other evidence. The FD appears to use the 1933 state court decree as evidence of Williams' leadership and political processes within the group for the entire period between 1933 and 1955. Yet it also notes that in 1939, the State Attorney General issued an opinion asserting that "Indian tribal organizations" no longer existed within the State. SCE FD EP at 70. In 1955, the State Attorney General issued a similar opinion, stating that Connecticut Indians had "wholly lost their political organization and their political existence." See State's Request for Recon. Ex. 18. 10/ In that context, we fail to see how "implicit" state recognition of the group as a tribe, or even explicit recognition of Williams as a leader in 1933, can be treated as reliable and probative evidence for demonstrating the definition of political influence and authority for the group as a whole for the entire 22-year time period. The issue, of course, is not whether the 1939 and 1955 Attorney General opinions are themselves probative that the Eastern Pequot tribe no longer existed — they may not be. Rather, the issue is on what basis the State's admittedly "inconsistent and varied" relationship with Williams can be viewed as reliable and probative evidence of criterion (c) for the entire period, or whatever period(s) of time is sufficient to meet the "substantially continuous basis" requirement in section 83.6(e).

8/ Probative evidence of political influence or authority is not limited to direct evidence of internal interaction within a group, as the State and Towns seem to suggest. It includes, for example, evidence that shows that leaders are "making decisions for the group which substantially affect its members," or are "representing the group in dealing with outsiders in matters of consequence." 25 C.F.R. § 83.1.

9/ The PF and FD found that Atwood Williams, Sr., who descended from PEP antecedent families, opposed reservation residency by descendants of Tamar (Brushell) Sebastian (the primary EP family line). SCE PF EP 113, 115; SCE FD EP at 150-51.

10/ As the State points out, the FD did not mention the 1955 Attorney General opinion.

For the 1955 - 1973 period, the FD found that there was insufficient evidence to demonstrate that any particular individuals served as either formal or informal leaders of the group as a whole, and it cites no evidence that the State dealt with particular individuals as leaders of the entire group. 67 Fed. Reg. at 44,238 col. 2. It does discuss several examples of individuals asserting leadership in discrete or limited contexts, and concludes that "the whole complex of individual leaders' activities * * * provides some evidence to demonstrate political influence." Id. at 44,238 col. 2-3. It then invokes the "continuous state relationship," in combination with the other evidence, as demonstrating continuity of political processes for this time period, "in which there is not otherwise sufficient positive evidence, but in which positive evidence does exist." Id. at 44,238 col. 3. In this context, we fail to see how implicit state recognition or the "continuous state relationship," used in such a non-specific way, can be considered reliable or probative evidence for demonstrating criterion (c), when no particular component of the definition of "political influence or authority" is discussed, and the 1955 Attorney General opinion is not addressed.

Nor do we think that the underlying elements of the State's relationship with the Eastern Pequot, even as understood and characterized in the FD, may be relied upon in such a general way as probative evidence of criterion (b) or (c). For example, the existence of an Eastern Pequot reservation may have been conducive to community and political processes within the group, but the FD itself acknowledges that it could not be used as direct evidence that such community or political processes actually existed. And its probative value as indirect evidence would seem to depend upon a more specific showing that the State's action in maintaining the reservation reflected one or more components of the definitions of community or political influence or authority for the group.

Similarly, assuming that Eastern Pequots legally remained noncitizens of the State until 1973, and even assuming that their noncitizen status was tied to a continued status under State law as "tribal" Indians, it is far from clear — particularly in the context of evidence suggesting uncertainty among State officials concerning their citizenship status — that their legal status under state law in any way actually reflected or was tied to a continuation of the actual internal group activities or processes that would directly demonstrate the requirements of criterion (b) or (c). For example, although the FD refers to "members" of the Eastern Pequot as disenfranchised until 1973, it does not indicate how they were determined to be "members," or whether the criteria for "membership" remained the same throughout the relevant time periods. The PF found that from 1941 to 1973, there was "no evidence in the record that the State of Connecticut was looking at 'membership' in the Eastern Pequot tribe in any meaningful sense. * * * Connecticut paid no attention to anyone who didn't apply for reservation residency, and evaluated that simply on the basis of being able to show descent and 1/8 blood (very vaguely defined and certainly not scientifically computed)." SCE PF EP at 89. Although the FD — unlike the PF and apparently based on additional evidence — identified the non-State-citizenship status of Eastern Pequots as a key element of the relationship between them and the

State, it does not explain how that status is specifically probative for demonstrating the definitions of "community" and "political influence or authority." Was it in some way reflective of differentiating members from nonmembers (a component of the definition of community), or of current dynamics within the group, or was it simply a historical hold-over? 11/

The FD goes to great length to explain how the Eastern Pequot may have had a distinct status under state law — a status not shared by Indians generally or by non-Indians — but fails to articulate how that status is probative of actual interaction, social relationships, or a bilateral relationship between the group and its members. Instead, the FD uses state recognition as nonspecific catch-all "additional evidence" to tip the scales for finding that criteria (b) and (c) are satisfied.

We have considered the voluminous discussion in the FD concerning the state relationship with the EP, the elements of that relationship, and the underlying specific evidence relied upon to characterize those elements and that relationship. We have also considered the extent to which the FD does, or does not, articulate how that relationship is used for demonstrating particular elements within the definitions of "community" and "political influence or authority." We are left with the firm conviction that "implicit" state recognition of the Eastern Pequot as a political entity, and the underlying elements of the relationship, at least as used and explained by the FD, are of little or no probative value as evidence to demonstrate that the group actually met the definitions of "community" and "political influence or authority." In order for the State's relationship with the EP to be shown to be reliable and probative evidence of community and political processes, the FD must articulate more specifically how the State's actions toward the group during the relevant time period(s) reflected or indicated the likelihood of community and political influence or authority within a single group. And it may be that the State's interaction may be probative for some purposes, but not others. But we conclude that, as used in the FD, the State's relationship was unreliable and of little probative value as evidence for criteria (b) and (c).

That conclusion, by itself, is not sufficient to order reconsideration. Under 25 C.F.R. § 83.11(d)(2), in addition to establishing that evidence relied upon was either unreliable or of little probative value, a party requesting reconsideration must establish that it constituted a "substantial portion" of the evidence relied upon. The Board has applied the "substantial portion" test by looking at the practical effect of the unreliable or non-probative evidence. For

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11/ For example, in comments on the PFs, PEP contended that "eligibility for [state 'welfare' benefits to Eastern Pequot individuals] was contingent upon the existence of a bilateral political relationship between the individual and the Tribe." Sept. 4, 2001, Eberhardt & Karns, at 11 (CD Ex. 14). The FD does not make that finding, but if supported by the evidence in the record, that aspect of the State's relationship would seem to have probative value for criterion (c).

example, evidence that is unreliable or of little probative value does not constitute a "substantial portion" where reversing the affected portion of the final determination would not change the ultimate determination. In re Federal Acknowledgment of the Ramapough Mountain Indians, Inc., 31 IBIA 61, 80 (1997); cf. The American Heritage Dictionary (1976) (definition of "substantial" includes "material" and "considerable in importance"). Conversely, if the affected portion of a final determination, if reversed, would or likely could change the ultimate determination, then the evidence that is unreliable or of little probative value may constitute a "substantial portion" of the evidence relied upon.

EPTN contends that state recognition was only determinative for a couple of small periods of time, totaling 34 years, 12/ or that it may not have really been determinative at all. EPTN contends that the State and Towns overstate the degree to which the FD relied upon state recognition. In effect, EPTN suggests that whether the state recognition evidence is unreliable or of little probative value does not matter here, because it did not constitute a "substantial portion" of the evidence relied upon in the FD, as required to meet the burden of proof for reconsideration under 25 C.F.R. § 83.11(d)(2).

We disagree. The FD quite clearly acknowledges that state recognition is "most important" for those time periods when the other evidence would be insufficient. It is not the Board's role to re-analyze or re-weigh the evidence, or to determine whether the time periods in which there is insufficient evidence, without reliance on state recognition, are sufficiently short that criteria (b) and (c) could still be demonstrated on a "substantially continuous basis." See 25 C.F.R. § 83.6(e). Whether or not the FD *could* have reached the same conclusion without relying on state recognition, it chose to rely on it to tip the scales in favor of Petitioners. As described in the FD, state recognition was a material and important part of certain portions of the finding that the historical Eastern Pequot tribe satisfied criteria (b) and (c). If those affected portions were reversed, it likely could affect the ultimate determination. Therefore, we conclude that the FD's use of the State's relationship constituted a "substantial portion" of the evidence relied upon in the FD.

We conclude, with respect to the FD's use of implicit state recognition and the State relationship with the Eastern Pequot, that the State and Towns have satisfied their burden of proof to show that a substantial portion of the evidence relied upon in the Assistant Secretary's

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12/ EPTN's figure is based on its contention that the FD only used the State's relationship as additional evidence between 1913-1929 and 1955-1973. EPTN Answer Br. at 5, 68. The FD itself invokes the State's relationship for the periods between 1913-1940 and 1940-1973, and also for the post-1973 period, although it does appear to have relied on it more heavily for some periods than for others. See 67 Fed. Reg. at 44,238 cols. 1, 3. Even accepting EPTN's characterization, we would vacate and remand because of the significance that the FD attached to state recognition in reaching a favorable determination.

determination was unreliable or of little probative value. Therefore, we must vacate and remand the Final Determination to the Assistant Secretary for further work and reconsideration, pursuant to 25 C.F.R. § 83.11(d)(2) and (e)(10).

3. Noncitizenship Status of the Eastern Pequot

As indicated earlier, in addition to their general attack on the FD's use of state recognition, the State and Towns also contend that in this case, the State's relationship with the Eastern Pequot was never actually one of recognizing the group as a political entity — implicitly or otherwise — and that the FD's conclusion to the contrary is based on evidence that is unreliable or of little probative value, refuted by reliable evidence in the record, and refuted by new evidence. In particular, the State contends that one of the key elements on which the FD relied for characterizing the nature of the State's relationship with the Eastern Pequot was the conclusion that, until 1973, they were not citizens of the State and not eligible to vote. The State argues that the evidence relied upon by the FD to reach this conclusion was unreliable and of little probative value, and contradicted by new evidence showing numerous Eastern Pequot individuals on voter registration lists.

As we noted earlier, the probative value of particular evidence cannot be determined in a vacuum, but must be considered in context. In light of our discussion and conclusion above concerning the use of the State's relationship — including the elements of that relationship — as evidence for criteria (b) and (c), we believe it is unnecessary for the Board to address this argument. On reconsideration, if the Assistant Secretary decides that it is still necessary or appropriate to treat the citizenship status of Eastern Pequots as probative of either criteria (b) or (c), he will necessarily have to re-examine and re-analyze the evidence concerning their citizenship status in order to determine precisely how that status is probative at a given time. In addition, upon reconsideration and as part of that re-examination of the evidence, the Assistant Secretary should consider the new evidence offered by the State, which appears to show that certain Eastern Pequot individuals were included on state voter registration rolls.

4. Evidence of Community in the 20th Century

The State contends that the evidence, without reliance on state recognition, is insufficient to support a finding that one or both petitioners, or a single Eastern Pequot tribe as a whole, satisfied the "community" criterion for much of the 20th century. In addition, however, the State argues that the remaining "limited" evidence that the FD relied upon for finding that this criterion was satisfied is not probative. In particular, the State contends that "Fourth Sunday meetings" and "High Street meetings" involving Eastern Pequots are not probative evidence of community. The State also argues that the FD's conclusion that the Jackson family served as a "bridge" between the otherwise estranged Sebastian and Gardner

families is based on unreliable interview summaries. See State's Request for Recon. at 37-40, 45-47.

Whether or not the evidence as a whole — in the absence of reliance on implicit state recognition — would be sufficient to find that criterion (b) is satisfied, is an issue that is not within the Board's jurisdiction. In any event, it is something that the Assistant Secretary will have to examine on reconsideration in light of our conclusion about state recognition.

With respect to the reliability and probative value of the evidence, however, we conclude that the State has not carried its burden to prove that the evidence it challenges is either unreliable or of little probative value for showing interaction or social connections between Eastern Pequots from the various family lines, relevant to criterion (b). In addition, although interview summaries may be a less desirable form of evidence than interview transcripts, we are not prepared to rule that interview summaries are necessarily unreliable or of little probative value. As EPTN points out, the FD specifically took into account the State and Towns' concerns about the use of interview evidence and summaries. EPTN Answer Br. at 74-75. We agree with EPTN that the State and Towns are essentially asking the Board to second-guess the weight that the FD gave to this evidence, which we cannot do. See In re Federal Acknowledgment of the Snoqualmie Tribal Organization, 34 IBIA 22, 35 (1999). We recognize that there is not always a clear line between weight of evidence and reliability or probative value, and on reconsideration, it may be appropriate for the Assistant Secretary to address the State's arguments that too much weight was afforded to too little evidence. We conclude, however, that the State has not demonstrated, by a preponderance of the evidence, that the evidence of meetings and social activities involving Eastern Pequots, and the interview summaries, are unreliable or of little probative value.

5. Evidence of a Single Political Entity in the Post-1973 Period

The State similarly contends that the evidence, without reliance on state recognition, is insufficient to support a finding that criterion (c) was satisfied during the 20th century. As already stated, the Board does not review the sufficiency of otherwise probative and reliable evidence. Particularly for the pre-1973 period, the FD's evaluation of the evidence of political influence and authority within the group as a whole appears to have been closely connected with reliance on state recognition. Therefore, we leave it to the Assistant Secretary, on reconsideration, to reevaluate the evidence as a whole for the pre-1973 period.

With respect to the post-1973 period, the State contends that in order to find that EP and PEP were part of a single political entity, the FD "manufactured" a unifying, overarching political process based on a theory of "parallel" but separate political processes within each petitioner. See State's Request for Recon. at 51-55. The State argues that the FD itself found that "[t]here was little data to show any present community connection between the members

of the two groups or to demonstrate that the dispute takes place within a framework in which there are relationships between the members and/or leaders of the two memberships." State's Request for Recon. at 53 (quoting SCE FD EP at 177) (State's emphasis omitted). The State argues that despite this finding, the FD found that because each group could demonstrate its own political processes, and because both groups were competing for the same goals — control of the reservation and recognition as the sole representative of the Eastern Pequot — the "parallel political processes" in this context were evidence of a single overall political entity. According to the State, that reliance on "parallel" processes, communities, or political authorities is not what the regulations require. State's Request for Recon. at 53.

These allegations challenge the FD's analysis and interpretation of the evidence, in finding that EP and PEP constituted factions of a single political entity, rather than two separate entities, during the post-1973 period. Allegations that the Assistant Secretary erred in analyzing or interpreting the evidence are not within the scope of the Board's jurisdiction. In re Federal Acknowledgment of the Cowlitz Indian Tribe, 36 IBIA 140, 145, 150-51 (2001). Therefore, we refer the State's allegations to the Assistant Secretary, as follows: Should the FD be reconsidered on the ground that the FD improperly disregarded a lack of evidence of connections between EP and PEP, or of a single political framework, and improperly relied on "parallel political processes" within EP and PEP, and competition for the same resource and status, as evidence that EP and PEP were factions within a single political entity.

6. The Two 1873 Documents

The Towns contend that the FD gave improper weight to a June 26, 1873, Eastern Pequot petition and a June 27, 1873, list of Eastern Pequot members, to tie the Petitioners' ancestors to the historical Pequot Tribe, and in particular Tamar Brushell, an ancestor of EP members. The Towns argue that the "origins and validity" of the petition are "very questionable." Towns' Request for Recon. at 52 In addition, the Towns contend that the list of tribal members is "of questionable reliability." Id. at 56.

While casting its allegations in the jurisdictional language of the Board, in substance the Towns appear to be challenging the authenticity of these documents. The Board does not have jurisdiction to review the authenticity of documents, nor would it have the expertise to do so. Similarly, with respect to the Towns' assertion that the FD gave "improper weight" to these documents, we have already noted that this issue is not within the Board's jurisdiction.

We refer these allegations to the Assistant Secretary as follows: Should the FD be reconsidered on the ground that the authenticity of the 1873 petition and list has not been satisfactorily demonstrated, or on the ground that the FD gave improper weight to those documents?

7. Reservation Residency Evidence

The Towns also contend that the FD placed "improper and incorrect weight" on the purported residency of Petitioners' ancestors on the Lantern Hill Reservation. The Towns argue that incomplete or inadequate research resulted in a "critical" incorrect determination in the FD that a majority of Petitioners' ancestors resided on the reservation in the pre-1873 time period. Towns' Request for Recon. at 57.

We find that the Towns have not satisfied their burden of proof to demonstrate that the petitioners' or BIA's research was incomplete or inadequate in some material respect. The Towns offer their own analysis of census data from 1850 through 1920, but do not contend that it is "new evidence" or that the census data was not part of the record considered by the Assistant Secretary.

In effect, the Towns contend that the Assistant Secretary made a critical error in how he analyzed the available evidence, which is different from showing that the research itself was inadequate or incomplete.

These allegations challenge the FD's analysis or interpretation of the evidence, and are not within the Board's jurisdiction. See Cowlitz Indian Tribe, 36 IBIA at 145, 150-51. Therefore, to the extent that the Towns contend that the FD is based on an erroneous analysis of the evidence, we refer this allegation to the Assistant Secretary: Should the FD be reconsidered on the ground that it placed improper or incorrect weight on evidence regarding the residency of Petitioners' ancestors on the Lantern Hill Reservation?

8. Recognition of a Single Tribe Based on Two Acknowledgment Petitions

The State contends that recognition of a single tribe, based on two separate acknowledgment petitions, is not permitted under the regulations. State's Request for Recon. at 57-59. This issue is not within the scope of the Board's jurisdiction, and therefore we refer it to the Assistant Secretary: Should the FD be reconsidered on the ground that recognition of a single tribe, based on two separate acknowledgment petitions, is not permitted under the regulations?

9. Tribal Membership Rolls

The State contends that the tribal membership rolls don't reflect the requisite tribal relations, and that the Assistant Secretary failed to account for a recent "massive enrollment drive," which added individuals with little or no prior contacts with Petitioners. State Request for Recon. at 48. The composition of a petitioner's membership is not an issue that is within the Board's jurisdiction to review. See In re Federal Acknowledgment of the Snoqualmie

Tribal Organization, 31 IBIA 299, 301 (1997); In re Federal Acknowledgment of the Snoqualmie Tribal Organization, 31 IBIA 260, 261-62 (1997). Therefore, we refer this allegation to the Assistant Secretary: Should the FD be reconsidered on the ground that the tribal membership rolls do not reflect the requisite tribal relations?

10. Proposed Findings for the Post-1973 Period

The State alleges that the proposed findings unlawfully failed to include proposed findings for the post-1973 period, thereby denying interested parties proper notice and a meaningful opportunity to comment. State's Request for Recon. at 59-63. This issue is not within the scope of the Board's jurisdiction, and therefore we refer it to the Assistant Secretary: Should the FD be reconsidered on the ground that the proposed findings denied interested parties of proper notice and meaningful opportunity to comment with respect to the post-1973 period?

11. Other Alleged Procedural Irregularities

The State contends that the FD is a product of a process "marked by irregularities." State's Request for Recon. at 64. The State argues that former Assistant Secretary Gover's role in the proceedings was "highly questionable," id. at 67, including his issuance of a February 11, 2000, memo — without notice or opportunity for public comment — that prohibited BIA from conducting independent research in acknowledgment proceedings. This issue is not within the scope of the Board's jurisdiction, and therefore we refer it to the Assistant Secretary: Should the FD be reconsidered on the ground that the proceedings were marked by irregularities, including the Assistant Secretary's issuance of the February 11, 2000, memo concerning BIA research in acknowledgment proceedings?

12. Congressional Delegation of Authority

The State and Towns contend that there is no proper delegation of authority from Congress to BIA to recognize a group as an Indian tribe. State's Request for Recon. at 69-71; Towns' Request for Recon. at 4. This issue is not within the scope of the Board's jurisdiction, and therefore we refer it to the Assistant Secretary: Should the FD be reconsidered on the ground that BIA does not have authority to recognize a currently non-federally-recognized group as an Indian tribe?

WEP's Alleged Grounds for Reconsideration

WEP's fundamental objection to the FD is that the Assistant Secretary did not consider whether WEP, as a group also claiming descent from the historical Eastern Pequot tribe, should

have been combined with Petitioners EP and PEP as constituting the present-day continuation of the historical Eastern Pequot tribe. WEP contends that the FD should be reconsidered because: (1) the Assistant Secretary should have issued a revised Proposed Finding before "combining" the two petitioners, in order to afford WEP notice and an opportunity to comment; (2) the Assistant Secretary failed to clearly establish the conditions under which other "factions" of the historical Eastern Pequot Tribe might be afforded entry into the recognized group, and therefore violated due process and equal protection of law to WEP as a similarly situated, recognizable group; (3) the Assistant Secretary committed procedural error by not considering WEP's submissions as formal comments on the proposed finding, and therefore those submissions should be considered as "new, relevant and material evidence," and a ground for reconsideration under 83.11(d)(1); (4) the Assistant Secretary exceeded his legal authority "in recognizing non-Indians as Indians," to the prejudice of WEP's "aboriginal" rights to the reservation lands; and (5) the Assistant Secretary failed to provide relevant information from the record requested by WEP under the Freedom of Information Act (FOIA).

Although WEP attempts to bring at least some of these allegations within the Board's jurisdiction by arguing that its submissions constitute "new evidence" that the Board may review under 25 C.F.R. § 83.11(d)(1), in substance all of WEP's allegations are outside of the Board's jurisdiction. Clearly, WEP's procedural challenges are outside of our jurisdiction. And even if WEP's submissions should be considered as "new evidence," WEP's only argument about how it "could affect" the determination is that it could change the composition of the tribal membership. As EPTN correctly notes, and as we have already held, membership issues are outside the Board's jurisdiction. EPTN Answer Br. at 88-89.

We therefore refer WEP's allegations, as described above but with the exception of WEP's FOIA contention, 13/ to the Assistant Secretary.

13/ The Board recognizes that allegations falling outside of its jurisdiction may or may not state grounds that actually would warrant *reconsideration* of the FD, as distinct from simply repeating arguments that were fully considered in the FD or provide no real basis for reconsideration. The regulations, however, require that the Board "describe" for the Assistant Secretary alleged grounds for reconsideration that fall outside the Board's jurisdiction. 25 C.F.R. § 83.11(f)(1). Given the absence of any explicit role — or standard — for the Board to screen such allegations, the Board's general practice is to refer such allegations to the Secretary or Assistant Secretary, who have jurisdiction to decide whether further consideration is appropriate. In limited circumstances, however, the Board has declined to refer allegations to the Secretary or Assistant Secretary. See, e.g., Snoqualmie Tribal Organization, 31 IBIA 299; Snoqualmie Tribal Organization, 31 IBIA 260. In the case of WEP's FOIA allegation, because FOIA appeals are clearly governed by 43 C.F.R. § 2.18, and not 25 C.F.R. Part 83, we decline to refer this issue to the Assistant Secretary.

Conclusion

For the reasons discussed above, and pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 83.11, the Board vacates and remands the Final Determination to the Assistant Secretary for further work and reconsideration, pursuant to 25 C.F.R. § 83.11(e)(10). Pursuant to 25 C.F.R. § 83.11(f)(1), the Board has also described alleged grounds for reconsideration that are outside of the Board's jurisdiction, which are referred to the Assistant Secretary for consideration, as appropriate.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Anita Vogt
Senior Administrative Judge