



INTERIOR BOARD OF INDIAN APPEALS

In re Federal Acknowledgment of the Webster/Dudley Band of
Chaubunagungamaug Nipmuck Indians

45 IBIA 277 (09/04/2007)

Petitioner's Request for Secretary to Direct Additional Reconsideration by Assistant Secretary -
Indian Affairs Denied, Letter from Solicitor David L. Bernhardt to Petitioner, Jan. 28, 2008

Related Board cases:

40 IBIA 149

41 IBIA 96

41 IBIA 100

45 IBIA 231

1. *External identification*: This criterion requires that a petitioner be identified by external sources as an American Indian entity on a substantially continuous basis since 1900. 25 C.F.R. § 83.7(a) (“criterion (a)”); *see* 59 Fed. Reg. 9286 (Feb. 25, 1984).
2. *Community*: This criterion requires that a predominant portion of a petitioning group comprises a distinct community and has existed as a community on a substantially continuous basis from historical times² until the present. 25 C.F.R. §§ 83.7(b) (“criterion (b)”); *see id.* § 83.6(e).
3. *Political authority*: This criterion requires that a petitioner has maintained political influence or authority over its members as an autonomous entity on a substantially continuous basis from historical times until the present. *Id.* §§ 83.7(c) (“criterion (c)”); *see id.* § 83.6(e).

The jurisdiction of the Board of Indian Appeals (Board) to review challenges to a final acknowledgment determination is limited to reviewing allegations that fall within one of four grounds for reconsideration, *see* 25 C.F.R. § 83.11(d)(1)-(4), only two of which are relied upon by Petitioner in this case: (1) there is new evidence that could affect the determination, *id.* § 83.11(d)(1); and (2) 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 fails to meet one or more of the seven mandatory criteria, *id.* § 83.11(d)(4).

The party requesting reconsideration bears the burden to establish before the Board, by a preponderance of the evidence, that one or more grounds for reconsideration exist. *Id.* § 83.11(e)(9), (10). Additional alleged grounds for reconsideration that are not within the Board’s jurisdiction must be referred to the Secretary of the Interior (Secretary), if the Board affirms the final determination, or to the Assistant Secretary, if the Board vacates and remands it for further work and reconsideration. *See id.* § 83.11(e)(10), (f)(1), (f)(2).

Although not designated by number in the petition, we identify eleven grounds for reconsideration that Petitioner has raised, of which nine are within our jurisdiction. With respect to those nine, we affirm the final determination because Petitioner has failed to establish, by a preponderance of the evidence, that reconsideration is warranted. With respect to the two grounds for reconsideration that fall outside the Board’s jurisdiction, we

² “Historical” is defined to mean “dating from first sustained contact with non-Indians.” 25 C.F.R. § 83.1.

describe and refer one to the Secretary for consideration, as appropriate. We decline to refer the other one to the Secretary because Petitioner has not articulated its allegation with sufficient clarity to enable the Board to describe it for referral to the Secretary.

Early History and Geographical Orientation

At the time of first sustained contact with non-Indians, which began in the early 1600's, the Nipmuc³ Indians lived in small groups in what is now central Massachusetts and northern Connecticut and Rhode Island. Summary under the Criteria and Evidence for Proposed Finding [Against Federal Acknowledgment of the] Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians (PF), Sept. 25, 2001, at 20-21 & n.35. Beginning in the 1640's, Nipmuc leaders established relationships, both formal and informal, with the Massachusetts Bay Colony, and began entering into land transactions through deeds and land cessions. *See id.* at 27. During the same time period, English colonists undertook efforts to convert the Indians of Massachusetts to Christianity. *Id.* at 28. In the 1670's, missionaries began to organize some of the Nipmucs into "praying towns." PF at 89. In 1672, the Nipmuc "praying town" of Chaubunagungamaug was established at the foot of Lake Chaubunagungamaug, at what later became Dudley, and then Webster, Massachusetts. *Id.* at 29, 89; FD at 3.⁴

King Philips War (1675-1676) significantly disrupted the Nipmuc population, and following the war, only a small number of Nipmuc remained in central Massachusetts and northeastern Connecticut, some resettling at Chaubunagungamaug, which was just north of the present-day border between Massachusetts and Connecticut. *See* PF at 32. In 1681, under the direction of the General Court of Massachusetts Bay Colony, an examination of Indian title and claims to the Nipmuc country was conducted, after which Nipmuc individuals associated with Chaubunagungamaug engaged in additional land transactions to

³ Petitioner's name uses the spelling "Nipmuck." The final determination uses what apparently is the current standardized spelling, "Nipmuc," except where otherwise appropriate, e.g., quoting historical documents. *See* FD at 7. This decision follows the same practice.

⁴ The praying town of Chaubunagungamaug pre-dated the town of Dudley (est. 1732). PF at 22. A portion of the Town of Dudley later became part of the Town of Webster (est. 1832). PF at 57; *see* FD at 3. Other Nipmuc praying towns included Hassanamisco (Grafton), Waeuntug (Uxbridge), Quinshepaug (Mendon), Packachoag (Auburn), Manchaug (Sutton), Quabaug (Brookfield), and Wabaquasset (Woodstock, Connecticut). PF at 29.

convey lands over which they claimed title to the Massachusetts Bay Colony and to individual purchasers. *See id.* at 34, 45-56, 90. The Nipmuc grantors also reserved some of the lands for themselves.

In 1746, the Massachusetts Bay Colony legislature enacted legislation that provided for guardianship over Indians and their lands, including the Nipmucs at Dudley. *Id.* at 52, 91. By 1763, most of the lands that had been reserved by Dudley Indians apparently had been conveyed away, often to pay for the needs of the Indians. *See id.* at 54, 92. In 1797, the remaining lands were sold, but the grantee deeded approximately 26 acres to the Commonwealth of Massachusetts for the benefit of the Indians. *Id.* at 57. Those lands became a state-supervised reservation. *Id.*

By 1870, only a small number of Dudley Indians were living near the 26-acre reservation. *Id.* at 72. The majority were living elsewhere in Worcester County, Massachusetts, or in Windham County, Connecticut. *Id.* at 72, 96. In 1886, acting upon a petition submitted on behalf of the Dudley Indians, the Probate Court in Worcester, Massachusetts, authorized the sale of those 26 acres. *Id.* at 74-75 & n.126. Subsequently, the Massachusetts legislature authorized the funds held in two trust accounts to be distributed to the Dudley Indians, a list of distributees was prepared, and the funds were distributed in 1891. *Id.* at 75-76. At the time, Chaubunagungamaug family lines represented by residents of Webster and Dudley included Sprague, Pegan, and Jaha. *Id.* at 97. Other family lines of Chaubunagungamaug descendants were more scattered (e.g., Humphrey) or lived elsewhere (e.g., most Belden descendants lived in Boston). *Id.*

Petition for Federal Acknowledgment

In 1980, Zara CiscoeBrough, as “chief of the Nipmuc Tribal Council,” and referring only to the Hassanamisco Reservation in Grafton, Massachusetts, submitted a letter of intent to BIA to petition for Federal acknowledgment as an Indian tribe. FD at 3.⁵ BIA assigned number 69 to the petition. *Id.* Although the letter of intent was limited in scope, by 1980 some descendants of the Dudley/Webster Indians were cooperating with the “Hassanamisco Band Council” on the petition. *Id.*

In 1984, “The Nipmuc Tribal Council Federal Recognition Committee” submitted a narrative and documented petition #69 to BIA, which focused on the Hassanamisco and Dudley/Webster Nipmuc groups. *Id.* The first formal governing document of the

⁵ *See In re Federal Acknowledgment of the Nipmuc Nation*, 45 IBIA 231, 233-34 & n.6 (2007) for a discussion of the Hassanamisco Nipmuc and the “Hassanamisco Reservation”.

“Nipmuc Tribe (or Nation),” dated November 21, 1983, was signed by Walter A. Vickers of the “Hassanamisco Band of Nipmuc,” and by Edwin W. Morse, Sr., as leader of the “Chaubunagungamaug Band of Nipmuck.” *Id.*

In 1995, BIA placed petition #69 in active consideration status. *Id.*

In 1996, Morse announced that the Chaubunagungamaug Band was withdrawing from petitioner #69 and notified BIA that the Band was disassociating itself from the Hassanamisco Band or any other group of Nipmuc Indians, and would pursue Federal recognition on its own. *Id.* at 4. BIA accepted the withdrawal of the Chaubunagungamaug Band, after which Petitioner was designated petitioner #69B and the Nipmuc Nation (associated with Hassanamisco) was designated petitioner #69A. *Id.*⁶

On September 25, 2001, the Assistant Secretary signed a proposed finding against acknowledging Petitioner as an Indian tribe. Notice of the proposed finding was published on October 1, 2001. 66 Fed. Reg. 49,970. The proposed finding noted that Petitioner asserted continuity with the historical Chaubunagungamaug Band, or those Nipmuc Indians associated with the Dudley/Webster reservation. PF at 19; 66 Fed. Reg. at 49,971. It found that 87 percent of Petitioner’s members descended from the historical Dudley/Webster Nipmuc, as evidenced by descent from Dudley/Webster Indians listed on the 1861 Earle Report, compiled by the Massachusetts Superintendent of Indian Affairs, and on the 1891 final distribution list for the assets of the reservation property in Webster. *See* PF at 19; 66 Fed. Reg. at 49,972.⁷ More specifically, the proposed finding found that

⁶ The Principal Deputy Assistant Secretary - Indian Affairs subsequently declined to acknowledge petitioner #69A as an Indian tribe within the meaning of Federal law. Petitioner #69A filed a request for reconsideration with the Board, which we are also deciding today. *See Nipmuc Nation*, 45 IBIA 231.

⁷ Petitioner defined its eligible membership as descendants of the Chaubunagungamaug, or Dudley/Webster, Nipmuc reservation in Worcester County, Massachusetts. PF at 4. The proposed finding noted that a majority of identified descendants of the historical Dudley/Webster Indians had chosen to affiliate with petitioner 69A, rather than with Petitioner. *Id.* at 4, 19; *see also Nipmuc Nation*, 45 IBIA at 243 (53 percent of petitioner 69A’s members descend from six families who were identified as Dudley/Webster Indians in 1861).

all of Petitioner's members with known Chaubunagungamaug Nipmuc ancestry traced their ancestry to Lydia Ann Sprague Nichols Shelley Henries. PF at 122-23.⁸

The proposed finding concluded, however, that although Petitioner had shown genealogical descent from the historical Dudley/Webster tribe, it had not shown continuity either of community (criterion (b)) or political authority (criterion (c)). PF at 19. Petitioner's core group consisted of the extended Morse family, descended from Lydia Sprague through the Sprague/Henries family line. *See* FD at 42; 66 Fed. Reg. at 49,971. The proposed finding concluded that the evidence did not demonstrate community between the extended Morse family and descendants of other Dudley/Webster Nipmucs, or even between the extended Morse family and other descendants of the Sprague/Henries family line. 66 Fed. Reg. at 49,971. In addition, the proposed finding concluded that Petitioner failed to satisfy criteria (a) because between 1900 and 1978, although there were occasional identifications of individuals and single families as descendants of the Dudley/Webster Indians, there were no external identifications of Petitioner (or any antecedent group to Petitioner) as an American Indian entity. PF at 79.

Final Determination

Following publication of the proposed finding and further proceedings, including the receipt of comments and additional evidence in response to the proposed finding, the Principal Deputy Assistant Secretary signed the final determination on June 18, 2004, and notice of the determination was published in the *Federal Register* on June 25, 2004. 69 Fed. Reg. 35,664. The final determination concluded, based on the evidentiary record, that Petitioner does not satisfy criteria (a), (b), and (c) for Federal acknowledgment as an Indian tribe. FD at 1.

With respect to criterion (a)⁹ the final determination concluded that even with additional evidence submitted by Petitioner, the evidence did not demonstrate external

⁸ Lydia Sprague was listed on both the 1849 Briggs Report and the 1861 Earle Report of Dudley Indians, and was married three times, to non-Nipmuc men, during her lifetime. Nipmuc Nation Final Determination at 185-86; PF at 98.

⁹ Evidence constituting external identification of a group as an American Indian entity may, among things, come from Federal, state, or local officials, from scholars, from newspapers and books, and from relations with Indian tribes or Indian organizations. *See* 25 C.F.R. § 83.7(a)(1)-(6).

identification, on a substantially continuous basis, of Petitioner (or of an American Indian entity antecedent to petitioner) from 1900 to the present. 69 Fed. Reg. at 35,665-666. Specifically, the final determination found that there was no evidence of a Dudley/Webster entity after 1891 that was antecedent to Petitioner, which was organized in 1981. *Id.* at 35,666.

With respect to criterion (b)¹⁰ — distinct community on a substantially continuous basis — the final determination left unchanged the finding in the proposed finding with respect to the period up to 1891: the historical Dudley/Webster tribe met criterion (b) through 1870, primarily because of residence on the state-supervised reservation, and between 1870 to 1891, on a minimal but sufficient level. 69 Fed. Reg. at 35,666. It also found, however, that Petitioner, whose members consisted of descendants from three genealogically definable family lines — Sprague/Henries, Sprague/Nichols, and Dorus/White — did not constitute a community either before or since 1980. *Id.*; FD at 46. The final determination concluded that there was no evidence that these families formed a single community before 1980 or that they form a community today. 69 Fed. Reg. at 35,666. According to the final determination, the evidence indicated that members of the Sprague/Nichols and Dorus/White family lines did not know the Morse family (which created Petitioner’s organization) before they joined it. *Id.*; FD at 46; *see* PF at 123 (subsequent to separating from Petitioner 69A, Mr. Morse decided to add individuals from other families, most of whom were descendants of Lydia Sprague through Eva Viola Brown Heath).¹¹

¹⁰ Examples of the types of evidence that may be relevant to determining whether a petitioner satisfies criterion (b) include significant rates of marriage within the group, significant social relationships connecting individual members, significant rates of informal social interaction which exist broadly among the members of a group, and geographic concentration within an area exclusively or almost exclusively composed of members of the group. *See* 25 C.F.R. § 83.7(b)(1)(i)-(iv), (b)(2).

¹¹ The final determination found that 82 percent of Petitioner’s members have documented descent from the historical Dudley/Webster tribe that was identified in 1861, consisting of members who have descent from the Sprague/Henries and Sprague/Nichols families. 66 Fed. Reg. at 35,667. The final determination concluded that descendants of Martha (Dorus) Hewett (i.e., the Dorus/White family line), had not demonstrated Dudley/Webster ancestry, although it found that there was a reasonable likelihood that she was of Indian descent and a collateral relative of a Dudley/Webster family. *Id.*

For criterion (c) the final determination found Petitioner had not demonstrated that there was a Dudley/Webster Indian group or community that was antecedent to Petitioner and which continued to exist after 1891, within which political influence or authority were exercised. 69 Fed. Reg. at 35,666-667.¹² Nor did the evidence demonstrate that Petitioner exercised political influence or authority over its membership since it was formed in 1981. *Id.* at 35,667; FD at 63-64.

Petitioner filed a timely request for reconsideration with the Board. The State of Connecticut and the Northeastern Connecticut Council of Governments filed answer briefs, and Petitioner filed a reply.

Board Jurisdiction/Scope of Review

As noted earlier, the Board's jurisdiction to review final acknowledgment determinations is limited to reviewing four alleged grounds for reconsideration, only two of which are invoked by Petitioner in this case: (1) there is new evidence that could affect the determination, 25 C.F.R. § 83.11(d)(1); and (2) 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 in 25 C.F.R. § 83.7(a) through (g), *id.* § 83.11(d)(4).

New evidence only includes evidence that was not part of the administrative record for the final determination. *In re Federal Acknowledgment of the Golden Hill Paugussett Tribe*, 32 IBIA 216, 223 (1998). When a party requesting reconsideration relies on "new evidence" as a ground for reconsideration, it must submit the evidence with the request for

¹² Examples of relevant evidence for criterion (c) 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. 25 C.F.R. § 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). Criterion (c) requires a showing of "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." *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1, 3 (2005). A formal structure is not required, but there must be both leaders and followers. *Id.*

reconsideration. *In re Federal Acknowledgment of the Ramapough Mountain Indians, Inc.*, 31 IBIA 61, 66 (1997). The requester bears the burden to clearly identify the evidence claimed to be new, *In re Federal Acknowledgment of the Snoqualmie Tribal Org.*, 34 IBIA 22, 30 (1999), and has the burden of proof to show that the new evidence could affect the determination, *Golden Hill Paugussett Tribe*, 32 IBIA at 223.

In contrast to the “new evidence” ground for reconsideration, 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 OFA truly did not consider, either explicitly or implicitly. *See Ramapough Mountain Indians*, 31 IBIA at 81. A showing of disagreement with OFA’s analysis is not sufficient to establish that grounds for reconsideration exist under subsection 83.11(d)(4), *see Snoqualmie Tribal Org.*, 34 IBIA at 35, and disagreement with OFA over the *sufficiency* of the evidence does not constitute an “interpretation” of the evidence. Moreover, the requester has the burden of proof to demonstrate that the alternative interpretation offered would substantially affect the determination that the petitioner meets or does not meet one or more of the seven mandatory criteria in 25 C.F.R. § 83.7(a) through (g).

Discussion

A. Introduction

Petitioner divides its Request for Reconsideration into three sections. Within Section One of the Request, we identify eight apparent alleged grounds for reconsideration, the first six of which appear intended to relate to criterion (a) (external identification) and the last two of which appear to relate to criterion (b) (community).¹³ For its first seven arguments, Petitioner invokes “new evidence” as a ground for reconsideration, but with one exception the evidence is not new, and the one piece of new evidence that is offered could not affect the determination. For the same arguments, Petitioner also invokes “alternative

¹³ Section One begins by quoting criterion (a), 25 C.F.R. § 83.7(a), and with Petitioner’s brief statement characterizing its understanding of criterion (a). Some arguments within the section clearly are related to criterion (a); others, although included within Section One, appear to be related to criterion (b), although none of the arguments refer specifically to any particular criterion.

interpretation” as a ground for reconsideration, but only expresses disagreement with OFA’s conclusions, which is insufficient to provide a basis for ordering reconsideration under subsection 83.11(d)(4). *See Snoqualmie Tribal Organization*, 34 IBIA at 35. The eighth ground for reconsideration, which appears under the heading “Conclusion of Section One” but apparently relates to criterion (b), does not identify the jurisdictional basis for reconsideration, so we assume Petitioner intends to invoke either “new evidence” or “alternative interpretation,” or both. We conclude, however, that the eighth ground for reconsideration, discussing geographic maps and marriages, fails as well because it satisfies neither subsection 83.11(d)(1) nor (d)(4).

Section Two of Petitioner’s Request for Reconsideration contains no argument, but apparently is intended to raise a ninth ground for reconsideration based on a consultant’s report, authored by Kathleen Bragdon and titled “New Evidence Concerning the Chaubunagungamaug Band of Nipmuck Indians.” The report itself, however, is not evidence, and the “new evidence” purportedly relied upon by its author was not submitted to the Board. In addition, while the report contains the author’s own analysis of evidence, it does not separately or clearly articulate any specific error in the final determination or specific grounds for reconsideration. Therefore, we conclude that Section Two of the Request provides no basis for ordering reconsideration.

Section Three of Petitioner’s Request apparently is intended to raise two additional grounds for reconsideration, which Petitioner correctly understands to fall outside the Board’s jurisdiction. We describe one ground and refer it to the Secretary. We conclude, however, that the second “issue” in this section merely states Petitioner’s unsupported speculation and does not articulate any clear ground for reconsideration that we are able to describe, and therefore we decline to refer it to the Secretary.

We begin by addressing the first nine grounds for reconsideration (in Sections One and Two of the Request) under one or both of the two grounds on which Petitioner relies to invoke the Board’s jurisdiction: (1) new evidence that could affect the determination (25 C.F.R. § 83.11(d)(1)), or (2) an alternative interpretation, not previously considered, of the evidence, that would substantially affect the determination (25 C.F.R. § 83.11(d)(4)). We then address the final two grounds for reconsideration (in Section Three of the Request) raised by Petitioner, which fall outside of our jurisdiction.

B. New Evidence or a Reasonable Alternative Interpretation, Not Previously Considered, of the Evidence Regarding Criterion (a) — External Identification of Petitioner as an American Indian Entity Since 1900

1. 1930 Historical Marker

Petitioner contends that the final determination does not address the relevance of a historical marker erected in 1930 entitled, “Chaubunagaungamaug Site of the Indian Praying Town,” which Petitioner argues demonstrates external recognition of Petitioner “by the State of Massachusetts although contemporary in 1930 but certainly historical even before 1900.” Request at 5.

This evidence is not new. *See* OFA’s Transmittal of Documents, Exhibit 4, at 2. Therefore, it cannot constitute a ground for reconsideration under 25 C.F.R. § 83.11(d)(1). In addition, Petitioner fails to articulate a reasonable alternative interpretation of this evidence, whether or not previously considered, that would substantially affect the determination that Petitioner failed to satisfy criterion (a). The marker identifies the site of the historical Chaubunagungamaug praying town, but provides no evidence of any external recognition of any Dudley/Webster or Chaubunagungamaug entity as still existing in 1930. Moreover, Petitioner’s argument apparently reflects a misunderstanding of criterion (a), which pertains to external identifications *since* 1900, 25 C.F.R. § 83.7(a), and not “before 1900,” Request at 5.

2. Speck and Gilbert 20th Century Identifications of “Nipmuck Society”

Petitioner takes issue with a statement in the final determination that “there are, in fact, 20th century external identifications of ‘Nipmuck Society’ (Speck 1943; Gilbert 1947), but . . . these identifications do not mention the antecedents of [Petitioner].” Request at 5-6; *see* FD at 12 n.8. Petitioner contends that “OFA elected to disregard the evidence as suggestive of outside recognition . . . albeit as a ‘vague reference to the group.’” Request at 6. Petitioner suggests that “[c]ombined with other evidence,” the references to “Nipmuck Society” by Speck and Gilbert must be external identifications of it or of an antecedent to it.

Notwithstanding Petitioner’s invocation of the phrase “new evidence,” the Speck and Gilbert works are not new evidence, as shown by Petitioner’s own reference to their citation in the final determination. Therefore, Petitioner has not stated a ground for reconsideration under 25 C.F.R. § 83.11(d)(1). In addition, OFA clearly considered whether the references by Speck and Gilbert to “Nipmuck Society” could be construed as identifying Petitioner or an entity that was antecedent to Petitioner, but concluded that they could not,

see FD at 12 n.8. Therefore, Petitioner has not stated an alternative interpretation that was “not previously considered,” as required by 25 C.F.R. § 83.11(d)(4). Petitioner simply disagrees with OFA’s conclusion regarding this evidence, but disagreement with OFA’s conclusion is not sufficient to satisfy Petitioner’s burden of proof for demonstrating a ground for reconsideration. *See Snoqualmie Tribal Org.*, 34 IBIA at 35. Therefore, we reject this argument as a ground for ordering reconsideration.

3. 1938 Sturbridge, Massachusetts, Bicentennial Program Participants

Petitioner offers, as new evidence, a 1938 list of participants in an “Indian Episode” of a bicentennial pageant program for Sturbridge, Massachusetts. Among the participants were several individuals who, according to Petitioner, are ancestors of some of its members. Petitioner also argues that the Town’s request for “the Tribe” to participate demonstrates a relationship based on and reflecting an identification of the group’s Indian identity. Request at 7.

This evidence is not new, *see* OFA’s Transmittal of Documents, Exhibit 4, at 2. Therefore, it does not state a ground for reconsideration under 25 C.F.R. § 83.11(d)(1). In addition, to the extent that Petitioner intends to state an “alternative interpretation” of this evidence under subsection 83.11(d)(4), its interpretation is not reasonable: the bicentennial program evidence does not provide evidence of any contemporary identification of a then-existing Indian entity, Nipmuc or otherwise. Therefore, with respect to this evidence, we conclude that Petitioner has failed to demonstrate a ground for reconsideration.

4. Documentation of Pan-Indian Gatherings in the 1950’s

Petitioner’s response to the proposed finding against Federal acknowledgment included a narrative and exhibits prepared by Dr. James McClurken, titled “Nipmuck Indian Council of Chaubunagungamaug. Comments on The Proposed Finding Issued by the United States Department of Interior, Bureau of Indian Affairs. September 27, 2002.” In its Request for Reconsideration, Petitioner’s contention regarding the documentation of pan-Indian gatherings states in its entirety: “The Pan Indian gatherings of the 1950’s are well documented in the submission of Dr. James McClurken. The purpose of the submission was to demonstrate that the Tribe, albeit as Nipmuck people, did in fact participate in external social event[s] and were recognized as members of such.” Request at 7-8.

Neither McClurken’s report nor the evidence of pan-Indian gatherings in the 1950’s is new evidence, and therefore Petitioner has failed to state a ground for reconsideration

under subsection 83.11(d)(1). With respect to subsection 83.11(d)(4), Petitioner has not offered any reasonable alternative interpretation, not previously considered, of the evidence of the pan-Indian gatherings. OFA clearly considered the pan-Indian gatherings, and the possibility that they might provide a source of identification of a Dudley/Webster entity that was antecedent to Petitioner, but concluded that they did not. *See* FD at 19-20. Moreover, Petitioner's assertion that the Tribe, "albeit as Nipmuck people," participated in the gatherings, does not articulate a reasonable alternative interpretation of the evidence: it assumes the existence of a tribe, but does not describe with any specificity what "entity" was identified, such that it can be determined to be a group antecedent to Petitioner. We conclude that Petitioner's argument regarding the documentation of pan-Indian gatherings in the 1950's fails to provide a basis for ordering reconsideration.

5. Woodstock and Thompson Historical Societies

Petitioner submits as new evidence a note recounting a visit from one of Petitioner's researchers to the Woodstock (Connecticut) Historical Society in 2002. The note describes an encounter between the researcher and (apparently) a staff person, during which the researcher inquired about evidence of recognition of Petitioner during the early part of the 1900's. As described in the note, the staff person indicated that certain records for the period from 1910 to 1950 had been destroyed, and did not provide the researcher with assistance. Petitioner also attaches an excerpt from an endnote in a work by Joan E. Luster, titled "An Historical Sketch, Indians of Thompson in the Pre-Colonial Period & Colonial Periods," which criticizes the Thompson Historical Society. Petitioner argues that the towns of Thompson and Woodstock, Connecticut, "were at best discriminatory in their providing requested material by researchers." Request at 8.

Although the note recounting the visit to the Woodstock Historical Society apparently constitutes "new evidence," *see* OFA's Transmittal of Documents, Exhibit 4, at 2, the work by Luster is not new evidence, *see id.* For either one, Petitioner fails to articulate how it constitutes probative evidence that Petitioner satisfied criterion (a), or even if probative, how it could affect the determination that Petitioner failed to satisfy that criterion. Therefore, we reject this as a ground for ordering reconsideration.

6. State Records Concerning Nipmuc Individuals

Petitioner contends that OFA did not properly review certain state records that it had submitted to demonstrate that the State of Connecticut "engaged in a breaking up of the families of Nipmuck people with prejudic[ial] intent." Request at 9. Petitioner submits certain documents, one of which it contends shows that the State of Connecticut identified Eva Viola Heath (the mother of Petitioner's Chairman, Bert Heath), as having "Indian

characteristics.” *Id.* Petitioner contends that the purpose of submitting the records, which also indicate the placement of one of the children in a foster home, as showing “intentional destruction of the Tribal entity, which at a minimum should evince recognition by an outside party, but also shows the difficulty of direct documentation as contemplated under 25 CFR § 83.7(a).” Request at 9.

Petitioner fails to explain how any of these documents, none of which is new, is probative evidence for demonstrating that an Indian entity, whether “tribal” or not, existed or was externally-recognized. None of the documents, from which some information has been redacted, refers to any individuals as Nipmuc or to an Indian group or entity.

We conclude that these documents do not constitute grounds for ordering reconsideration.

C. Evidence or Arguments Regarding Criterion (b) — Existence of Community¹⁴

1. Newspaper Articles, Interviews, and Personal Papers

Petitioner argues that “[n]ewspaper articles, interviews and the personal papers of individuals were either not reviewed or were dismissed without consideration of the value offered.” Request at 10. Petitioner asks the Board to review the evidence for the purposes submitted and refers to McClurken’s submission and Kathleen Bragdon’s Response to Third Party Comments, dated December 2002.

Petitioner’s reference to previously-submitted comments, without the identification of new evidence or any clear articulation in its request of one or more reasonable new and alternative interpretations of the evidence, cannot provide a basis for ordering reconsideration under subsections 83.11(d)(1) or (d)(4). Petitioner has not identified any particular errors in the final determination and does not articulate any alternative interpretations of the evidence for our consideration. Instead, it only refers the Board to comments that clearly were previously considered because they were submitted previously

¹⁴ As noted earlier, the introduction to Section One in Petitioner’s Request identifies only criterion (a), but it appears that Petitioner intended to raise the following two arguments in connection with criterion (b) — community — although the Request does not specifically refer to either criterion within these two arguments themselves. We assume, for purposes of our discussion, that these arguments were intended to relate to either criterion (b), or criterion (a), or both, and we have considered them accordingly.

to OFA.¹⁵ We conclude that Petitioner has failed to identify any new evidence, and the analyses previously submitted do not constitute alternative interpretations, not previously considered, of the evidence that was used in the final determination. Therefore, we reject this argument as a ground for ordering reconsideration.

2. Residency, Marriages, and “Conclusion of Section One”

In a section titled “Conclusion of Section One,” Petitioner contends that the submissions of McClurken and Bragdon in 2002 (during the comment period on the proposed finding) “clearly show a kinship based society existing throughout the 20th century.” Request at 10. Petitioner argues that geographic maps and overlays show a distinct community in the 1800’s and show families still living in the same areas. Petitioner also asserts that marriages between ancestors clearly show interaction between families. Finally, Petitioner argues that “[t]he fact that no documentation data exists during the meetings of the extended families does not automatically [mean that] no interaction existed,” and that interview evidence indicating participation by ancestors in “these events clearly supports a community knowing each other.” Request at 12; *cf.* FD at 33-34.¹⁶

With the exception of a reference to Bragdon’s report of 2003, discussed below, Petitioner does not refer to any new evidence in relation to these arguments, and therefore we find no basis for ordering reconsideration under 25 C.F.R. § 83.11(d)(1). In addition, Petitioner has not shown that any of its “interpretations” of the evidence offered in this section, which are in fact more in the nature of disagreement with OFA’s conclusions rather than clearly articulated alternative interpretations of specific evidence, constitute interpretations “not previously considered” by OFA, *see id.* § 83.11(d)(4). To the contrary, Petitioner’s own cross-references to specific portions of the final determination illustrate that OFA did consider whether the evidence referred to was sufficient to satisfy the necessary criteria.

We conclude that Petitioner has failed to establish, in this portion of its Request, any grounds for ordering reconsideration.

¹⁵ We also note that OFA did consider newspaper articles, interviews, and personal papers. *See, e.g.*, FD at 15-16, 31, 45, 56, 62.

¹⁶ The Request does not identify any specific interview evidence or evidence of “meetings of the extended families,” Request at 12, referring to the three family lines represented by Petitioner’s members, which it claims may be traced to ancestors on the 1861 Earle Report and the 1891 disbursement list. The final determination concluded that only two of the three family lines could be identified as being of Dudley/Webster descent.

D. Bragdon, *New Evidence Concerning Chaubunagungamaug Band of Nipmuck Indians*, August 1, 2003

Section Two of Petitioner's Request for Reconsideration refers to an excerpt from an attached document titled "New Evidence Concerning the Chaubunagungamaug Band of Nipmuck Indians," prepared by Kathleen J. Bragdon, dated August 1, 2003. The referenced excerpt, pages 83-93, discusses what is characterized as "new oral interviews with eight tribal members." Bragdon (2003), at 83. In its Request, Petitioner makes no arguments regarding Bragdon's work or the interviews, apparently believing that Bragdon's work is self-explanatory.

Although Bragdon purports to discuss and analyze these "new oral interviews," Petitioner did not submit the transcripts from any of the interviews.¹⁷ Reconsideration under subsection 83.11(d)(1) must be based on "new evidence," and a petitioner's failure to submit any of the "new evidence" on which it purports to rely — even if described in a petitioner's brief or consultant's report — is fatal to the request.¹⁸ In the absence of the purported "new evidence," itself, we decline to consider Bragdon's analysis as a proper basis for reconsideration under subsection 83.11(d)(1).

Even if we were to consider Bragdon's report, either in its entirety or only the specific pages referred to by Petitioner, as intended to offer an "alternative interpretation" of the evidence under subsection 83.11(d)(4), we would find it insufficient to satisfy Petitioner's burden of proof to demonstrate that reconsideration is warranted. Bragdon offers her analysis of a variety of evidence concerning the Dudley Nipmuc Indians, or concepts of "tribal identity and distinctiveness," or "Native authenticity," *see, e.g.*, Bragdon (2003), at 56 (referring to the "artificiality" of the notion of "tribe"), with no discussion of or reference to specific alleged errors in the final determination or how her analysis and the

¹⁷ The interviews are identified as among the appendices to the report, *see* Bragdon (2003), at 99, but no appendices were submitted nor were any of the referenced documents.

¹⁸ In its reply brief, Petitioner asserts that "the Office of Federal Acknowledgment, and only that Office, has not only the delegated authority, but also the expertise to evaluate the new evidence." Reply Brief at 10-11. It is unclear whether Petitioner intends by this statement to suggest that Bragdon's report should be deemed sufficient for purposes of the Board's review, and that only OFA has the authority to actually review and evaluate the "new evidence" that is discussed but which was not submitted. If that is Petitioner's understanding, it is mistaken: subsection 83.11(d)(1) clearly requires the Board to conduct its own evaluation of proffered "new evidence" to determine whether it "could affect" a final determination.

evidence fits into demonstrating the regulatory criteria for acknowledgment found in 25 C.F.R. § 83.7. Thus, even if Bragdon's report is offered to provide an alternative interpretation of the evidence, it was incumbent upon Petitioner (1) to articulate with some specificity the evidence used in the final determination on which Bragdon relies in offering an "alternative interpretation,"¹⁹ (2) to establish that the interpretation was "not previously considered" by OFA, and (3) to demonstrate that it would substantially affect the determination with respect to one or more of the criteria for acknowledgment. Petitioner has not done this, and therefore we reject Bragdon's report as a basis for ordering reconsideration.

In connection with the Bragdon "New Evidence" report, Petitioner also asks the Board to reevaluate McClurken's submission in October of 2002. A request for the Board to reevaluate previously-submitted comments, however, does not state a ground for reconsideration under either subsection 83.11(d)(1) or (d)(4), and therefore we reject this as a basis for ordering reconsideration.

C. Other Grounds for Reconsideration

1. Letter to Michael Lawson on Office of the Secretary Letterhead

Petitioner submits with its Request for Reconsideration a document that appears to be a letter printed on stationery of the Office of the Secretary, United States Department of the Interior. The letter — unsigned — is addressed to Dr. Michael Lawson (apparently one of petitioner 69A's consultants), and gives what purports to be "insider" information and advice concerning the two Nipmuc petitions for acknowledgment, one from Petitioner and the other from petitioner 69A. The document is date-stamped "OCT 30 2003" and also date-stamped as "RECEIVED NOV 10 2003." As evidenced by another letter submitted by Petitioner, dated November 13, 2003, from the law firm of Dorsey and Whitney LLP to the Inspector General (IG) of the Department, the document was submitted by counsel for Petitioner to the IG for investigation into its authenticity and the circumstances surrounding it. The results of any investigation that may have been conducted by the IG are not in the record before the Board.

¹⁹ We note that although each chapter of Bragdon's 2003 report is headed by a cursory and vague description of "new evidence," e.g., "Deeds," "Account Books," "Guardians Accounts," the report itself does not clearly identify which evidence is truly new, and documents that are copied into the report (e.g., page from account book) itself are largely illegible. None indicates actual social interaction within a definable community or political influence or authority within such a community.

Petitioner notes that the authenticity of this document is in question, but contends that “[e]ven ignoring the authenticity issue, the fact that the document was sent and received by the Tribe . . . raises issues of proper conduct,” and should, when considered with other “facts” set out by Petitioner, constitute grounds for reconsideration. Request at 14. The other “facts” cited by Petitioner include OFA’s simultaneous consideration of petitions for acknowledgment submitted by Petitioner and by petitioner 69A, OFA’s references and comparison in the final determination to the petition submitted by petitioner 69A, the use of marriage records and data for both petitions, and delays during OFA’s consideration of the petitions.

Petitioner correctly recognizes that this additional alleged ground for reconsideration is outside the jurisdiction of the Board. The issue for the Board is whether Petitioner has articulated a ground for reconsideration with sufficient clarity that we are able to describe it for referral to the Secretary. *See* 25 C.F.R. § 83.11(f)(1). We understand Petitioner to allege that the circumstances surrounding the above-described document, combined with alleged procedural irregularities in consideration of its petition, constitute a ground for reconsideration. As we have noted in earlier decisions, the Board’s role with respect to “other alleged grounds for reconsideration” in acknowledgment cases is to describe them, but not to apply a “merits” filter. *See Historical Eastern Pequot Tribe*, 41 IBIA at 28 n.13.²⁰ Therefore, the Board will refer this ground for reconsideration to the Secretary as follows:

Should reconsideration be granted based on the allegation that procedural irregularities or improprieties are demonstrated, either individually or collectively, by (1) the document written on Office of the Secretary letterhead, dated October 30, 2003; (2) OFA’s simultaneous consideration of the petitions for Petitioner and petitioner 69A; (3) the requirement of serving Petitioner’s petition and supplement on petitioner 69A; (4) OFA’s use of marriage records and data in a way that reduced the percentage of inter-tribal marriages; and (5) delays during OFA’s consideration of the petitions.

2. Note from Deputy Commissioner of Indian Affairs

Finally, Petitioner submits a handwritten note, dated January 19, 2001, apparently addressed to Lee Fleming as Director of OFA, written on Deputy Commissioner of Indian Affairs letterhead, discussing draft decisions for petitioner 69A and “Duwamish.” The note states that “Mike A.” (apparently referring to then Acting Assistant Secretary Michael

²⁰ On the other hand, if the subject of an allegation clearly falls outside the acknowledgment regulations, the Board will decline to refer it to the Secretary. *See id.*

Anderson) “wants the [negative] recommendations/draft decisions revised to be positive.”
See Request, Attachment F, Handwritten Note, Jan. 19, 2001, at 1-2

Petitioner acknowledges that the document does not refer to Petitioner, but contends that “with all of the other aspects of consideration tying [the petitions for petitioner 69A and Petitioner] together, it is not inconceivable that a similar action occurred for this Tribe’s Petition.” Request at 15.

We conclude that Petitioner’s speculation — that it is “not inconceivable that a similar action occurred for this Tribe’s Petitioner” — does not articulate a ground for reconsideration of the final determination that we are able to describe. Aside from being speculative, it is based on an incorrect premise. Petitioner describes this document as purporting to instruct Fleming “to change the Final Determination for Petitioner 69A.” The date on the document, however, indicates that it pertains to a preliminary positive *proposed* finding regarding petitioner 69A that was superseded by a subsequent negative *proposed* finding for petitioner 69A. *See Nipmuc Nation*, 45 IBIA at 272 n.37. Because this alleged ground for reconsideration simply expresses Petitioner’s speculation, and because Petitioner has not articulated how it is relevant to the final determination for Petitioner, we are unable to describe any alleged ground for reconsideration and decline to refer this issue to the Secretary.

Conclusion

For the reasons stated 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, we conclude that Petitioner has failed to demonstrate, by a preponderance of the evidence, that reconsideration of the final determination is warranted under either 25 C.F.R. §§ 83.11(d)(1) or (d)(4), and therefore we affirm the final determination with respect to Petitioner’s allegations over which we have jurisdiction. We have discussed Petitioner’s additional allegations that fall outside of our jurisdiction, only one of which we describe and refer to the Secretary, as provided by 25 C.F.R. § 83.11(f)(2), for consideration, as appropriate.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge