INTERIOR BOARD OF INDIAN APPEALS

In re Federal Acknowledgment of the Juaneno Band of Mission Indians, Acjachemen Nation

57 IBIA 149 (06/27/2013)

United States Department of the Interior

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

IN RE FEDERAL ACKNOWLEDGMENT OF THE JUANEÑO BAND OF MISSION INDIANS, ACJACHEMEN NATION	)	Order Affirming Decision and Referring Issues to the Secretary
	)	Docket No. IBIA 11-124
	)	June 27, 2013

In this proceeding before the Interior Board of Indian Appeals (Board), the Juaneño Band of Mission Indians, Acjachemen Nation, Petitioner #84A (Petitioner), seeks reconsideration of the Final Determination by the Assistant Secretary – Indian Affairs (Assistant Secretary) against acknowledgment of Petitioner as an Indian tribe within the meaning of Federal law.[1] Petitioner is located in the City of San Juan Capistrano, Orange County, California. Petitioner's members claim descent from historical Indian tribes or groups that as a result of Spanish policy combined into one political entity at the San Juan Capistrano Mission by 1834, when Mexico ordered secularization of the Mission.[2] The Final Determination concluded that Petitioner did not satisfy four of the seven regulatory criteria for Federal acknowledgment: (1) that it was identified as an American Indian entity on a substantially continuous basis since 1900 (criterion (a)); (2) that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present (criterion (b)); (3) that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present (criterion (c)); and (4) that its membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous entity (criterion (e)). *See* 76 Fed. Reg. at 15537-38 (discussing criteria (a)-(c) and (e), 25 C.F.R. § 83.7(a)-(c), (e)); *see also* 25 C.F.R. § 83.6(c), (d) (all seven criteria must be satisfied).

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[1] Notice of the "Final Determination Against Acknowledgment of [Petitioner]" was published in the Federal Register on March 21, 2011. 76 Fed. Reg. 15337.

[2] Mexico won independence from Spain in 1821 and ceded California to the United States in 1848. California acquired statehood in 1850.

The Board's jurisdiction to review final acknowledgment determinations is limited to reviewing four grounds upon which the Board may vacate a final determination of the Assistant Secretary and remand it for reconsideration. 25 C.F.R. § 83.11(d)(1)-(4). The Board does not have authority to review the Assistant Secretary's determination *de novo*. *In re Federal Acknowledgment of the Ramapough Mountain Indians, Inc.*, 31 IBIA 61, 68-69 (1997). Rather, the party requesting reconsideration has the burden to establish, by a preponderance of the evidence, *see* 25 C.F.R. § 83.11(e)(9)-(10), one or more of the following grounds:

> § 83.11(d)(1): "That there is new evidence that could affect the determination";
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> § 83.11(d)(2): "That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value";
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> § 83.11(d)(3): "That the petitioner's or the [Office of Federal Acknowledgment's] research appears inadequate or incomplete in some material respect"; or
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> § 83.11(d)(4): "That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the [seven mandatory criteria]."

Petitioner alleges that all four of these grounds are present in this case, but it has not met its burden to establish any of them and thus we affirm the Final Determination. Petitioner also asserts five grounds for reconsideration that are outside of our jurisdiction and, as required by the regulations, we refer those alleged grounds for reconsideration to the Secretary of the Interior (Secretary).

Background

I. Petition for Federal Acknowledgement

An organization known as the Juaneño Band of Mission Indians (JBM), which was formed in 1978 and included members claiming descent from the historical Indian tribe of the San Juan Capistrano (SJC) Mission, submitted a letter of intent to petition for Federal acknowledgement in 1982. Proposed Finding (PF) at 2. The Department of the Interior (Department) designated the JBM as Petitioner #84.

Following the submission of supporting materials and an initial technical assistance review with the Office of Federal Acknowledgment (OFA),[3] the JBM was placed on the "ready, waiting for active consideration" list in 1993. *Id.* Due to a subsequent election dispute, some individuals from the JBM formed another group, which separately sought Federal acknowledgment. *Id.* at 2-3. The original JBM group was designated Petitioner #84A and the second group was designated Petitioner #84B. *Id.* Petitioner #84A, the Juaneño Band of Mission Indians, Acjachemen Nation (JBA), again split into two groups after a 1997 election dispute. *Id.* at 3. The Department accepted the leadership of one of those groups (Petitioner) representing the JBA/Petitioner #84A. *Id.* at 4. The Department granted the other group interested party[4] status for purposes of both the 84A and 84B petitions, and accordingly referred to it as the "JBMI-IP."[5] *Id.* Both petitions were placed on the "active consideration" list in 2005. *Id.*

II. Proposed Finding Against Acknowledgment

On November 23, 2007, the Assistant Secretary signed a Proposed Finding against acknowledgment of Petitioner as an Indian tribe, based on a failure to satisfy criteria (a),

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

[4] "Interested party" is defined in the Federal acknowledgment regulations as:

> any person, organization or other entity who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner. 'Interested party' includes the governor and attorney general of the state in which a petitioner is located, and may include, but is not limited to, local government units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination.

25 C.F.R. § 83.1.

[5] The Department also granted interested party status on both petitions to California Cities for Self-Reliance Joint Powers Authority (Joint Powers Authority), an entity representing six cities in Los Angeles County, located between 41 and 60 miles from Petitioner, that are opposed to the petitions. In this proceeding on Petitioner's request for reconsideration, the JBMI-IP and Joint Powers Authority again sought interested party status. The Board denied both motions but permitted the Joint Powers Authority to file a brief as amicus curiae.

(b), (c), and (e). Notice of the Proposed Finding was published on December 3, 2007. 72 Fed. Reg. 67948.[6]

The Proposed Finding defined "the historical Indian tribe" as the Indian population at the SJC Mission in 1834. PF at 5. Before that time, socially connected, culturally similar, and politically allied Indian populations moved from local villages to the SJC Mission. *Id.* Spanish policy at the Mission created a political structure for this resident Indian population and, by the time that the Mexican government ordered secularization of the Mission in 1834, the groups converged into a single political entity. *Id.* Thus, Petitioner could meet the acknowledgment criteria by demonstrating that it is a continuation of the historical Indian tribe of the SJC Mission that existed in 1834. *Id.* at 33; *see* 25 C.F.R. § 83.6(f) (the regulations provide for acknowledgment of "tribes or groups that have historically combined and functioned as a single autonomous political entity").

At the time of the Proposed Finding, Petitioner's membership criteria required descent from individuals on a 1933 Census Roll.[7] PF at 182. The Proposed Finding found that although the 1933 Census Roll was an acceptable form of evidence, inclusion on the roll was insufficient, standing alone, to demonstrate descent from the historical SJC Indian tribe because applicants were not required to demonstrate descent from a *tribe*. *Id.* at 183-85; *see also* Final Determination (FD) at 32 ("The 1933 Census Roll was not a proxy roll for group or tribal membership. . . . [M]any people who enrolled in 1928 as SJC descendants were not actually descendants of the historical SJC population."). Accordingly, among other conclusions adverse to Petitioner, the Proposed Finding counted only 2% of Petitioner's members identified in its 2005 certified membership list as demonstrating descent from the historical SJC Indian tribe. PF at 201.

III. Final Determination

Like the Proposed Finding, the Final Determination defined the "historical Indian tribe" as the Indian tribe at the SJC Mission in 1834. FD at 14. For the Final Determination, Petitioner substantially changed its membership composition and submitted a 2009 certified membership list composed only of those members who claim descent from

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[6] The Assistant Secretary also issued a proposed finding, *see* 72 Fed. Reg. 67951 (Dec. 3, 2007), and a final determination, *see* 76 Fed. Reg. 15335 (Mar. 21, 2011), against acknowledgment of Petitioner #84B. No one sought reconsideration of that decision.

[7] The official name of this document is "Census Roll of the Indians of California under the Act of May 18, 1928," 45 Stat. 602 (codified at 25 U.S.C. § 652 et seq.). *See* PF at 173 n.180.

the historical SJC Indian tribe, i.e., not based on the 1933 Census Roll, which Petitioner now describes as "unreliable and greatly flawed." Request for Reconsideration, Ex. 1 at 9. In comparison to the 2005 membership list, which contained 1640 adults, the 2009 membership list contains 1940 children and adults. FD at 95. The difference is not explained by the inclusion of children on the 2009 list. Of the 1940 members identified on the 2009 list, a majority (1244) was not previously listed as members in 2005. *See id.* And, of the 1640 members identified on the 2005 list, a majority (943) is omitted from the 2009 list. *See id.*

The Final Determination is consistent with the Proposed Finding in that it denied Petitioner's petition for failure to meet criteria (a), (b), (c), and (e). According to the Final Determination, Petitioner failed to demonstrate that it satisfied criterion (a) (identification as an American Indian entity since 1900) for the time period of 1900 to 1997, because there were only identifications of Petitioner as such an entity between 1997 and 2005. FD at 28. The Final Determination concluded that the historical and/or contemporary references in the record to groups of Indians in the San Juan Capistrano area did not identify Petitioner or an entity from which Petitioner evolved. *Id.* at 24, 28. For example, identifications of the JBM were deemed not to be identifications of Petitioner due to discontinuity between the JBM membership and Petitioner's membership. *See id.* at 27-28.

The Final Determination concluded that Petitioner did not demonstrate that it met criterion (b) (existence as a distinct community from historical times to present) at any time after 1862. FD at 65. During 1862-1863, a smallpox epidemic killed an estimated 88 of approximately 200 SJC Indians in a period of less than 3 months. *Id.* at 42-43. The Final Determination concluded that there was insufficient evidence to show that the community recovered from the smallpox epidemic and that instead the remaining SJC Indians were absorbed into the local population of ethnically-mixed Old Mexican/Californio families and non-SJC Indians who moved to the town prior to 1900. *Id.* at 64-65. It also found that Petitioner's 2005 membership list reflected that ethnic mix, whereas the 2009 membership list no longer mirrors the composition of the mid-19th century general population of the town or the social community described in Petitioner's earlier submissions in support of Federal acknowledgment. *Id.* at 65. The Final Determination stated that this change in membership "appears [intended] to address criterion (e), descent, not to define a preexisting community or social group." *Id.* at 61.

The Final Determination concluded that Petitioner failed to satisfy criterion (c) (political influence or authority over its members as an autonomous entity from historical times to present) for any time period after 1834. *Id.* at 86. It concluded, *inter alia*, that Petitioner did not demonstrate that the Mission Indian Federation, founded in 1920, and other pan-Indian organizations that included SJC Indians among their members were precursors of Petitioner or that there was a bilateral relationship between the leadership of

those groups and an entity of SJC Indian descendants. *See id.* at 73-74, 76-77, 87. For the 1994 to present time period, the Final Determination concluded that political influence or authority was not maintained due to changing membership and exclusions of persons who had been active in earlier organizations and identified as important tribal members in the Proposed Finding. *See id.* at 83-86.

Lastly, notwithstanding that Petitioner amended its membership list to include only persons who claimed descent from the historical SJC Mission Indians, the Final Determination concluded that Petitioner did not satisfy criterion (e). The Final Determination found that only 61% of Petitioner's members demonstrated such descent, and that no previous petitioner had satisfied this criterion without at least 80%. *Id.* at 109. The Final Determination identified several factors for this insufficient percentage. Among them was that 285 members claim descent from Uriol Mireles, who according to the Final Determination was not demonstrated to be the same person as Jose Uriol, son of Fernando and Carlota, historical SCJ Indians. *Id.*

IV. Request for Reconsideration

In its June 20, 2011, Request for Reconsideration (Request), and in two supporting memoranda labeled "Exhibit 1" and "Exhibit 2" that Petitioner refers to as its "detailed statement of grounds for reconsideration set forth in § 83.11(d)(1)-(4)," Request at 2, Petitioner asserts that all four grounds for invoking the Board's jurisdiction exist. As a threshold issue, Petitioner asks, pursuant to 25 C.F.R. § 83.11(e)(3)-(4), that the Board retain independent experts to provide comments, recommendations, or technical advice concerning the determination, and that it require an evidentiary hearing conducted by an administrative law judge.[8] Request at 6. Because we find neither to be necessary in this case, we deny both requests.

In its Request, Petitioner articulates two "broad issues as to the validity and interpretation of the [Federal acknowledgment] regulations themselves." *Id.* at 1. Petitioner asserts that (1) criterion § 83.7(a) is arbitrary, capricious, and contrary to law; and (2) the regulations deny Petitioner due process on their face and as applied. *Id.* at 3-6. As discussed *infra*, these allegations are not grounds for reconsideration over which the Board has jurisdiction, and we therefore refer these arguments to the Secretary for consideration.

[8] Petitioner also asserts that we exercise *de novo* review over requests for reconsideration, which is incorrect. *See supra* at 150.

In Exhibit 1, Petitioner contends that the Board has jurisdiction under § 83.7(d)(1)-(4) to order reconsideration of the Final Determination's conclusions that Petitioner did not satisfy criteria (a), (b), and (c). In Exhibit 2, Petitioner alleges errors in OFA's genealogical analysis and contends that the Board has jurisdiction under § 83.7(d)(1)-(4) to order reconsideration of the conclusion that Petitioner did not satisfy criterion (e).[9]

On September 30, 2011, the Assistant Secretary filed the documents from the record that are critical to the request for reconsideration, and made available to the Board the entire record. In response to Petitioner's request for reconsideration, the transmittal of critical documents stated:

> In reviewing the request for reconsideration concerning the documentation in the record on Uriol Mireles and Jose Uriol, OFA found that an error occurred in the preparation of the FD when it indicated that certain documents were not in the record. This error impacts the evaluation in the FD of Uriol Mireles, including Maria and Regina Mireles. A review of these cited documents indicates that an additional 249 persons documented descent, raising the percentage of members that documented descent from the historical tribe to 74% from 67%.[10] This percentage does not change the overall conclusion on criterion 83.7(e).

Transmittal of Documents Central to Request for Reconsideration (Transmittal of Critical Documents), Sept. 30, 2011, at 2. Thus, the Assistant Secretary acknowledged an error in the Final Determination but stated that the error would have no effect on the determination. For reasons we elaborate below, we conclude for those matters within our jurisdiction that Petitioner has not met its burden of proof and we affirm the Final Determination.

Discussion

Although Petitioner's Request and Exhibits 1 and 2 recurrently cite to and use the language of § 83.11(d)(1)-(4) in seeking the Board's review, in most instances its allegations fall outside the grounds of our jurisdiction. In a few instances Petitioner makes

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[9] Included with Exhibit 2 is a document entitled "Response to OFA's Untimely and Impartial Disclosure of Relevant Genealogical Facts" (Response to Disclosure), in which Petitioner elaborates on alleged violations of due process and flaws in OFA's genealogical analysis.

[10] The actual percentage calculated in the Final Determination was 61%, not 67%. *See* 76 Fed. Reg. at 15338.

allegations that, if proven by a preponderance of the evidence, would establish one or more of the grounds in § 83.11(d)(1)-(4). But in those instances Petitioner does not meet its burden of proof. Therefore, with respect to Petitioner's allegations that fall within one or more of the four grounds over which we have jurisdiction to review the Final Determination, we affirm the Final Determination. As required by the regulations, we refer to the Secretary five remaining grounds for reconsideration that are outside of our jurisdiction.

I. Petitioner's Alleged Grounds for Reconsideration under § 83.11(d)(1)-(4)

Petitioner makes a few allegations that fall within with Board's jurisdiction under 25 C.F.R. § 83.11(d)(1)-(4), but Petitioner has not met its burden of proof for these allegations.

A. Newly Discovered Sources of Information

Petitioner alleges that it discovered new evidence in March 2011. Exhibit 1 at 2. It describes some or all of this as "evidence (sources) of new information not previously submitted by the petitioner or analyzed by OFA." *Id.* at 3. In support, Petitioner provided a *list* of 13 texts and large document collections that Petitioner asserts "could or will substantially affect the outcome of the [Final Determination] and provide reasonable alternative interpretations that were not previously considered." *Id.* Petitioner's arguments that are based on these documents refer to all four grounds for invoking the Board's jurisdiction, but in all cases fail to establish a ground for the Board to vacate the Final Determination and order reconsideration.

Petitioner has not established that these documents are, in fact, new. Petitioner did not file any of these documents with the Board, yet we have held that when a party requesting reconsideration relies on new evidence as a ground for reconsideration, it must submit the evidence with the request for reconsideration. *Ramapough Mountain Indians*, 31 IBIA at 66; *see* 25 C.F.R. § 83.11(b) (a request for reconsideration "shall include any new evidence to be considered"). For the same reason, Petitioner's assurance that "additional evidence, analysis, and items [that] OFA said were lacking or should have been completed will be made available," Exhibit 1 at 8, is insufficient. Moreover, although "new" evidence includes only evidence that was *not* part of the administrative record for the final determination, *In re Federal Acknowledgment of the Golden Hill Paugussett Tribe*, 32 IBIA 216, 223 (1998), according to the Assistant Secretary, "[s]ome documents from these collections are in the administrative record," Transmittal of Critical Documents, Attach. at 6. "Where the Board cannot determine, with reasonable diligence, what evidence is claimed to be new, a Request for Reconsideration will be deemed not to have carried its burden of proof with respect to the new evidence." *In re Federal Acknowledgment of the*

Snoqualmie Tribal Org., 34 IBIA 22, 31 (1999). Without the documents themselves, we cannot make a determination of what "evidence" or information is new.

Petitioner has also failed to establish that its purported new evidence "could affect the determination," 25 C.F.R. § 83.11(d)(1), that it reveals OFA's reliance on unreliable or non-probative evidence, *see id.* § 83.11(d)(2), that it uncovers material inadequacy in Petitioner's or OFA's research, *see id.* § 83.11(d)(3), or that it offers alternative interpretations that "would substantially affect the determination," *id.* § 83.11(d)(4). The burden is on the party requesting reconsideration to demonstrate that its purported new evidence could affect the determination. *See, e.g., Golden Hill Paugussett Tribe*, 32 IBIA at 223. And the requester "must do more than offer a general description of materials that [OFA] allegedly should have reviewed or researched more completely." *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 39 (2005). Petitioner's list of references and its unsubstantiated assertions[11] are inadequate to meet its burden. Furthermore, unlike a claim of new evidence, a request for reconsideration that is based on an alternative interpretation of evidence must be formulated in reference to evidence that *was* in the record for the final determination, and the requester must clearly articulate the interpretation that OFA truly did not consider. *See Ramapough Mountain Indians*, 31 IBIA at 81. As discussed *infra*, in those instances where Petitioner articulates an alternative interpretation based on the purported new evidence, OFA did consider that interpretation. Therefore, Petitioner's list of alleged new sources of information does not supply a basis for us to vacate the Final Determination and order reconsideration.

B. Newly Submitted Tribal Ordinances

Petitioner did file with the Board, "as new evidence under 83.11(d)(1)," and to "substantiate[] the Tribe's right to determine and identify its membership," two JBA Tribal Council ordinances issued in 2008. Exhibit 1 at 9; Ordinance Nos. 03-06-2008-01 and 03-06-2008-02 (Mar. 6, 2008) (Exhibit 1, Attach.). While the Final Determination noted that the ordinances were not included with Petitioner's comments on the Proposed Finding, *see* FD at 88, 92, Petitioner has not demonstrated by a preponderance of the evidence that they constitute "new evidence that could affect the determination," 25 C.F.R. 83.11(d)(1). Petitioner had described the content of the ordinances to OFA. *See* FD at 89 ("[Petitioner] stated . . . that '[o]n March 6, 2008, the Tribal Council adopted an ordinance to remove

[11] As an example of Petitioner's unsupported claim that these documents could or would affect the determination, Petitioner asserts: "New material research not previously considered by OFA would support a reasonable alternative interpretation of the evidence. (See Heizer: 1979; Krober; Spicer: 1971, for new material not previously considered in the FD.)." Exhibit 1 at 6.

those individuals from its roll who lacked evidence of descent from the historic tribe as defined by OFA.'"). Based on Petitioner's description and other corroborating evidence in the record, including Petitioner's "removal of a significant number of persons who did not document descent," the Final Determination concluded that Petitioner satisfied 25 CF.R. § 83.7(d) (criterion (d)) (the petitioner must provide its present governing document or a current statement describing in full its membership criteria and current governing procedures). FD at 89. As Petitioner itself recognizes, "[t]he FD correctly stated" that Petitioner determines its own membership. Exhibit 1 at 8; *see* FD at 31. Because OFA considered the substance of the ordinances, they are not new evidence that could affect the determination. *See Ramapough Mountain Indians,* 31 IBIA at 74.

C. Alternative Interpretation of the Evidence Regarding Identification as an American Indian Entity

Petitioner interprets the Final Determination as concluding that it was not identified by external observers as an American Indian entity on a substantially continuous basis from 1900 to 1997 because the historical and contemporary references in the record "did not identify the petitioner's ancestors specifically as the Juaneño Band of Mission Indians." Exhibit 1 at 5. Petitioner contends that a reasonable alternative interpretation of the evidence is "that the identification . . . of an Indian entity in and around San Juan Capistrano Mission from 1900-1997, defines an Indian entity that evolved into [Petitioner], regardless of the name non-Indians used to describe them." *Id.* Petitioner asserts that references by external observers to the "Mission Indians, San Juan Indians, the San Juan Capistrano Indians, the Indians of San Juan Capistrano, San Juaneños, San Juan Capistrano Indians, Juaneño Band of Mission Indians, and simply Juaneño," all refer to Petitioner, and that "[t]here is no reference, academic or non-academic, to any other Indian entity or Tribe living in or near the vicinity of the Mission San Juan Capistrano or within the boundary of the Acjachemen Nation from historical times to the present." *Id.*; *see also id.* at 7 ("The fact that outside observers described 'the Indians' in newspaper accounts indicates the SJC Indians were a distinct community, identifiable from others.").

This is not an interpretation that went unconsidered by OFA. The Final Determination states:

> The JBA petitioner devoted considerable effort to showing that sources could link Indians of the SJC Mission—both in historical and contemporary times—to a variety of terms . . . . Criterion 83.7(a) allows for inconsistency in terms applied to an entity; however, the criterion requires that, despite variations in terminology, the entity identified in a document to be the petitioner or . . . an entity from which the petitioner evolved.

FD at 24. The Final Determination did not conclude that Petitioner failed to satisfy criterion (a) due to any lack of specific references to the "Juaneño Band of Mission Indians," and it expressly considered and rejected Petitioner's interpretation that the various historical and contemporary references to "Mission Indians" and other groups were identifications of Petitioner or an entity from which Petitioner evolved. *Id.* Thus, this is not an alternative interpretation within the meaning of § 83.11(d)(4). *See Ramapough Mountain Indians*, 31 IBIA at 81.

D. Alternative Interpretation of the Evidence Regarding Political Authority

Petitioner contends that the Final Determination failed to consider an alternative interpretation regarding low participation of descendants of the historical SJC Indian tribe in meetings of organizations of claimed SJC Indian descendants during the early- to mid-20th century. Exhibit 1 at 6. Because the earliest available membership record of the JBM group is dated 1979, OFA examined several lists that purport to identify members of pre-JBM organizations of claimed SJC Indian descendants, including the Mission Indian Federation (MIF) (discussed *supra* at 153-54). FD at 33. OFA found that only between 21% and 35% of the people on those historical lists are individuals whom Petitioner currently believes to be SJC Indian descendants. *Id.* at 34; *see also id.* at 77. Petitioner argues that OFA failed to consider a reasonable alternative interpretation that California Indian households were composed of extended families, that the households discussed important issues before meetings, and that on behalf of the larger, extended family, only the elders of the households attended meetings. Exhibit 1 at 6.

Our understanding of Petitioner's argument is that many more SJC Indian descendants should be counted among those who actively participated in the organizations, and that, once counted, Petitioner would meet criterion (c) for the early- to mid-20th century time period. However, OFA did assume that first-degree relatives (parents, children, and siblings) were in contact with each other, and it stated that contact between more distant relatives must be supported with evidence. FD at 40 n.38. As discussed above, Petitioner alleges but fails to supply "[n]ew material research not previously considered" on this and other issues. Exhibit 1 at 6. And even if we were to assume the facts alleged as true, Petitioner has not shown how they "would substantially affect the determination" that Petitioner does not meet criterion (c). 25 C.F.R. § 83.11(d)(4). The Final Determination found insufficient evidence that the MIF or any of the other pan-Indian organizations during this time period was a precursor of Petitioner, or that there was a bilateral relationship between the leadership of any of those groups and an entity of SJC Indian descendants. *See supra* at 153-54. Moreover, Petitioner's argument does not address other time periods during which the Final Determination concluded that Petitioner did not exercise political authority. Therefore, we find no basis for the Board to vacate the Final Determination and order reconsideration.

II. Additional Alleged Grounds for Reconsideration Referred to the Secretary

Petitioner also alleges several grounds for reconsideration that do not implicate one of the four grounds for the Board's review of the Final Determination. In accordance with 25 C.F.R. § 83.11(f)(1)&(2), we refer the following five grounds to the Secretary for consideration.

A. Criterion 83.7(a) (external identification as an Indian entity) is Arbitrary, Capricious, and Contrary to Law

Petitioner argues that criterion (a) is arbitrary, capricious, and contrary to law. Petitioner contends that criterion (a) "should be struck down as a mandatory criterion for [Federal] acknowledgment." Request at 4. This allegation does not state any claim under § 83.11(d)(1)-(4). *In re Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana*, 57 IBIA 101, 128 (2013). Therefore, we refer this ground to the Secretary as follows:

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

B. Denial of Due Process

Petitioner contends that reconsideration is warranted because the acknowledgment regulations deny it due process "on their face and as applied." Request at 5. Petitioner contends that it was denied due process because it "was not given the opportunity to review and analyze much important information prior to [or after] the issuance of the [Final Determination]." *Id.* at 6. Specifically, Petitioner claims that after publication of the Final Determination, it obtained three of four genealogical workpapers referenced in the Final Determination, however, "OFA refused to turn over the fourth genealogical worksheet."[12] *Id.* at 5. Petitioner also contends that no workpapers were "delivered or prepared" for several ancestral groups, which Petitioner contends prevented it from demonstrating satisfaction of criterion (e). Response to Disclosure at 2, 5, 10. And Petitioner contends that OFA did not provide the names of all individuals whose descent OFA determined was not sufficiently documented so that Petitioner could seek to "rebut the FD for these individuals." Exhibit 2 at 9; *see id.* at 62.

[12] A letter included in the OFA critical documents purported to transmit to Petitioner four genealogical workpapers. Letter from OFA to Petitioner, June 15, 2011 (Crit. Docs., Ex. 8). Fax copies of workpaper #2 and workpaper #4, and a partial fax copy of workpaper #1, are contained in Exhibit 2 of Petitioner's request for reconsideration.

Alleged due process violations within the Federal acknowledgment process do not state a ground for reconsideration over which the Board has jurisdiction. *Little Shell Tribe of Chippewa Indians of Montana*, 57 IBIA at 128, and cases cited therein. Therefore, the Board will refer this ground for reconsideration to the Secretary as follows:

> Should reconsideration be granted based on the allegation that due process required that Petitioner be provided with an opportunity to review and comment on OFA's genealogical workpapers prior to issuance of the Final Determination, or based on the allegation that Petitioner did not receive one of the genealogical workpapers and other information regarding the individuals whose descent OFA determined was not sufficiently documented?

C. OFA Staff Was Not Sufficiently Qualified and Applied Incorrect Standards to Evaluate the Evidence

Petitioner contends that OFA staff did not possess the requisite skills, and did not use "professional anthropological, historical, and genealogical proof standards," to evaluate evidence. Exhibit 1 at 1; Exhibit 2 at 4, 10, 25, 30, 59-60. Petitioner also contends that OFA staff did not apply 25 C.F.R. § 83.6(d) (a criterion shall be considered met if the "available evidence establishes a reasonable likelihood of the facts relating to that criterion," without requiring "[c]onclusive proof of the facts relating to [it]"). Exhibit 1 at 1; Exhibit 2 at 4, 25, 30, 59-60. The Board does not have jurisdiction over allegations that OFA staff was unqualified and wrongfully construed evidence against the petitioner. *See In re Federal Acknowledgment of the Golden Hill Paugussett Tribe*, 40 IBIA 126, 127 (2004) (Board lacked jurisdiction over allegation that BIA either through ignorance or intent wrongfully construed evidence against the petitioner). Nor does the Board have jurisdiction over allegations that an improper evidentiary standard or burden of proof was applied. *See id.*; *In re Federal Acknowledgment of the Cowlitz Indian Tribe*, 36 IBIA 140, 151 (2001); *In re Federal Acknowledgment of the Mobile-Washington County Band of Choctaw Indians of South Alabama*, 34 IBIA 63, 69-70 (1999). The Board will refer this ground to the Secretary as follows:

> Should reconsideration be granted based on allegations that OFA staff was not adequately skilled to evaluate evidence, did not apply appropriate evidentiary standards, and misapplied the burden of proof in its analysis of the evidence?

D. OFA Purposefully Misconstrued Evidence Regarding Criterion (e)

Petitioner contends that OFA took evidence regarding the genealogy of Petitioner's members out of context in the pursuit of a "purposeful and diabolical agenda" to ensure

Petitioner's failure to meet criterion (e). Exhibit 1 at 2; Exhibit 2 at 5, 8-9. The Board does not have jurisdiction over allegations of bias or misconduct. *See Golden Hill Paugussett Tribe*, 40 IBIA at 127-28; *In re Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation*, 36 IBIA 245, 251-52 (2001); *In re Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, 33 IBIA 291, 301-02 (1999). The Board will refer this ground to the Secretary as follows:

> Should reconsideration be granted based on allegations that OFA staff was biased against Petitioner and took steps to prevent Petitioner from satisfying criterion (e)?

E. OFA Ignored Evidence

Petitioner contends that "OFA appears to have ignored or omitted evidence from its evaluation," including materials and information that Petitioner provided but "OFA later in the [Final Determination] stated did not exist or should have been included in the Petition." Exhibit 1 at 2; Exhibit 2 at 7. Evidence that was contained in the record but allegedly excluded from consideration by OFA is not "new evidence," and therefore the Board lacks jurisdiction over this allegation. *See Ramapough Mountain Indians*, 31 IBIA at 66. The Board will refer this ground to the Secretary as follows:

> Should reconsideration be granted based on the allegation that, in its evaluation, OFA ignored evidence contained in the record?

Germane to the above issue, in the Transmittal of Critical Documents, the Assistant Secretary acknowledged that OFA overlooked evidence in the record regarding Uriol Mireles and concluded that an additional 249 persons have documented descent from the historical SCJ Indian tribe—raising the portion of Petitioner's members with documented descent to 74%. Transmittal of Critical Documents at 2. The Assistant Secretary asserted that "[t]his percentage does not change the overall conclusion on criterion 83.7(e)." *Id.*; *see supra* at 155 & n.10. We leave it for the Secretary to determine whether a more complete explanation, or other action, is warranted regarding the Assistant Secretary's statement that 74% is insufficient to satisfy criterion (e).

Conclusion

For the reasons discussed above, we conclude that Petitioner has not established any grounds for us to vacate the Final Determination and order reconsideration by the Assistant Secretary, and therefore, as provided by § 83.11(e)(9), we affirm the Final Determination with respect to the allegations that we have jurisdiction to review. As provided by

§ 83.11(f)(1)&(2), we refer to the Secretary five alleged grounds for reconsideration that are outside of our jurisdiction.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms, to the extent of its jurisdiction, the Final Determination, and refers Petitioner's request for reconsideration to the Secretary to consider five alleged grounds for reconsideration.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge