INTERIOR BOARD OF INDIAN APPEALS

In Re Federal Acknowledgment of the Snoqualmie Tribal Organization

34 IBIA 22 (07/01/1999)

Related Board cases:
31 IBIA 260
Reconsideration denied, 31 IBIA 298
31 IBIA 299

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

IN RE FEDERAL ACKNOWLEDGMENT OF
THE SNOQUALMIE TRIBAL ORGANIZATION

IBIA 98-29-A Decided July 1, 1999

Request for reconsideration of a final determination to acknowledge the Snoqualmie Tribal Organization.

Affirmed. Two issues referred to the Secretary of the Interior.

1. Indians: Federal Recognition of Indian Tribes: Acknowledgment

   A Federally recognized Indian tribe which shows that it has a historical or present relationship with a petitioner for Federal acknowledgment is an interested party in proceedings before the Board of Indian Appeals concerning acknowledgment of the petitioner.

2. Indians: Federal Recognition of Indian Tribes: Acknowledgment

   A party which requests reconsideration of an acknowledgment determination on the basis that "[t]here is new evidence that could affect the determination" must, as a threshold matter, clearly identify the evidence claimed to be new. The party must also include that new evidence with its petition for reconsideration.

APPEARANCES: James H. Jones, Jr., Esq., Everett, Washington, for the Tulalip Tribes of Washington; Peter T. Connick, Esq., Seattle, Washington, for the Snoqualmie Tribal Organization.

OPINION BY ADMINISTRATIVE JUDGE VOGT

The Tulalip Tribes of Washington (Tulalip Tribes) seek reconsideration of the "Final Determination To Acknowledge the Snoqualmie Tribal Organization [STO]" which was signed by the Assistant Secretary - Indian Affairs on August 22, 1997, and published at 62 Fed. Reg. 45864 (Aug. 29, 1997). For the reasons discussed below, the Board affirms the Final Determination but refers two issues to the Secretary of the Interior.

Background

On May 6, 1993, the Assistant Secretary published notice of a "Proposed Finding for Federal Acknowledgment of the Snoqualmie Indian Tribe." 58 Fed. Reg. 27162. 1/ That notice was issued under acknowledgment regulations promulgated in 1978, 25 C.F.R. Part 83 (1993).

Revised regulations were published in 1994. The 1994 regulations included modified requirements for petitioners which are able to show unambiguous previous Federal acknowledgment.

The Final Determination was issued under the 1994 regulations. It stated in part:

> Substantial evidence showed that the [STO] had unambiguous previous Federal acknowledgment under 25 CFR 83.8 until January 1953. The Snoqualmie tribe was acknowledged by the Treaty of Point Elliott in 1855 and continued to be acknowledged after that point. The [STO] was acknowledged as a separate, nonreservation tribal entity by 1934. There were multiple, consistent Federal dealings with the non-reservation Snoqualmie Band between 1934 and January 1953 which treated it as a recognized tribe under the jurisdiction of the Federal Government. Evidence includes consistent identification in Indian agency documents which clearly identified the tribes under the jurisdiction of the Western Washington Agency as well as in other Federal documents. Agency and central office documents describe and characterize the STO as a tribe and distinguish it from voluntary organizations created for claims. Between 1937 and 1944, agency and central office officials developed plans to provide a reservation for the band under the 1934 Indian Reorganization Act.

62 Fed. Reg. at 45865. The Final Determination was supported by a "Summary under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the [STO]" (Summary), which was approved by the Assistant Secretary on August 22, 1997, and a Technical Report. These documents were prepared by the Bureau of Indian Affairs' Branch of Acknowledgment and Research (BIA; BAR).

1/ Whereas this finding proposed to acknowledge the "Snoqualmie Indian Tribe," the Final Determination acknowledged the "Snoqualmie Tribal Organization." The Board does not find an explanation for the name change in the Final Determination or the accompanying reports. It is apparent, however, that the entity acknowledged in the Final Determination is the same entity discussed in the Proposed Finding.

The Tulalip Tribes sought reconsideration under 25 C.F.R. § 83.11, alleging all four of the grounds for reconsideration in 25 C.F.R. § 83.11(d). 2/ The STO filed a response and, at the same time, filed a motion to dismiss the Request for Reconsideration on the grounds that the Tulalip Tribes lacked standing.

Motion to Dismiss

The STO contends that the Tulalip Tribes are not an "interested party" under 25 C.F.R. Part 83 and therefore lack standing to file a Request for Reconsideration. In support of this contention, the STO cites rulings in proceedings concerning acknowledgment of the Samish Tribe.

In Federal court proceedings concerning the Samish Tribe, the Tulalip Tribes were denied permission to intervene under Fed. R. Civ. Proc. 24. See Greene v. United States, 996 F.2d 973 (9th Cir. 1993). Following remand to the Department, the Swinomish Indian Tribal Community was denied permission to participate as a party in the administrative See Nov. 29, 1993, order in Greene v. Babbitt, Docket No. Indian 93-1. In that order, Administrative Law Judge David Torbett cited the Ninth Circuit decision in Greene and stated:

> Whether or not the Samish are federally recognized as an Indian tribe is an isolated issue in which the Swinomish have no direct interests. As the undersigned sees it the issue of federal recognition is uniquely between the United States and the tribal group which alleges that it should be recognized as an official Indian tribe.

Judge Torbett's Nov. 29, 1993, Order at 1-2.

2/ 25 C.F.R. § 83.11(d) provides:

"The Board [of Indian Appeals] shall have the authority to review all requests for reconsideration that are timely and that allege any of the following:

"(1) That there is new evidence that could affect the determination; or

"(2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; or

"(3) That petitioner's or the Bureau's research appears inadequate or incomplete in some material respect; or

"(4) That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in § 83.7 (a) through (g)."

As noted, the Federal court ruling on intervention was made under the Federal Rules of Civil Procedure. Judge Torbett relied in part upon the Federal court ruling. More importantly for present purposes, Judge Torbett issued his order prior to promulgation of the present acknowledgment regulations, which were published on February 25, 1994, 59 Fed. Reg. 9280, and became effective on March 28, 1994.

At the time Judge Torbett issued his ruling, there was no definition of the term "interested party" in the acknowledgment regulations. Thus, it was entirely reasonable and proper for him to be guided by the analysis used in the Federal courts regarding intervention under Fed. R. Civ. Proc. 24.

[1] The present regulations, however, provide at 25 C.F.R. § 83.1:

> Interested party means 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 governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination.

In defining "interested party" in this manner, BIA signalled an intent to broaden the scope of those entitled to participate in Departmental acknowledgment proceedings beyond the range of those entitled to intervene in Federal court proceedings under Fed. R. Civ. Proc. 24, at least with respect to local governmental units, recognized Indian tribes, and unrecognized Indian groups.

The present regulations also contain new language in 25 C.F.R. § 83.9(b), concerning notice of petitions for acknowledgment: "The Assistant Secretary shall also notify any recognized tribe and any other petitioner which appears to have a historical or present relationship with the petitioner or which may otherwise be considered to have a potential interest in the acknowledgment determination." Discussing this provision in the preamble to the final rule, BIA stated: "Language has been added to § 83.9(b) to provide that recognized tribes and petitioners that can be identified as being affected by or having a possible interest in a petition determination will be notified of the opportunity to comment. Such tribes and petitioners will be considered interested parties." (Emphasis added.) 59 Fed. Reg. at 9283. The language of subsec. 83.9(b) helps to flesh out the definition of "interested party" in sec. 83.1 insofar as that definition includes recognized Indian tribes, such as the Tulalip Tribes. It clearly indicates that a tribe which has "a historical or present relationship with the petitioner" is one which "might be affected by an acknowledgment determination" concerning that petitioner.

As the STO contends, the Board has authority to determine which third parties qualify as "interested parties" in proceedings before the Board and is not required to base its determinations in this regard upon "interested party" determinations made by the Assistant Secretary for purposes of proceedings before BIA. The Board has so held. In re Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 33 IBIA 291 (1999); In re Federal Acknowledgment of the Golden Hill Paugussett Tribe, 32 IBIA 216 (1998). Thus, the fact that the Assistant Secretary considered the Tulalip Tribes an interested party in proceedings before BIA does not bind the Board here.

The regulations in 25 C.F.R. Part 83 do, however, bind the Board. Thus the Board must determine whether or not the Tulalip Tribes are an interested party here based upon the language of the regulations, rather than upon the provisions of Fed. R. Civ. Proc. 24 and/or the conclusions reached in administrative proceedings conducted prior to promulgation of the present regulations.

The Board discussed the definition of "interested party" at length in Match-e-be-nash-she-wish Band, ultimately concluding that a local government, although not geographically close to the petitioner, was an interested party if it could show that the petitioner had voiced an interest in seeking to have land taken into trust in the vicinity of that local government. In this case, the Tulalip Tribes base their claim to interested party status upon the fact that they are a successor (and claim to be the sole adjudicated successor) to the historical Snoqualmie tribe. They have clearly shown "a historical or present relationship" with the STO. The Board finds that the Tulalip Tribes are an interested party under 25 C.F.R. Part 83 because they "might be affected by [the] acknowledgment determination" concerning the STO.

Accordingly, the STO's motion to dismiss is denied.

Discussion and Conclusions

The Tulalip Tribes divide their objections to the Final Determination into four categories, which they discuss in Part III of their Request for Reconsideration. With respect to each category, they contend that some or all of the grounds for reconsideration in 25 C.F.R. § 83.11(d) exist.

In Part III.A of their Request for Reconsideration, the Tulalip Tribes argue that BIA failed to consider whether the STO is a splinter group whose acknowledgment is prohibited by 25 C.F.R. § 83.3(d). 3/ In this regard, they contend that (1) a reasonable alternative

3/ 25 C.F.R. § 83.3(d) provides:

"Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged under these

interpretation of the evidence, which BIA did not consider, is that the STO is a splinter group of the Snoqualmie tribe, the main body of which is now a part of the Tulalip Tribes; (2) BIA's research is inadequate and incomplete in a material respect because BIA did not accept the offer the Tulalip Tribes made in a September 23, 1994, letter to provide certain genealogical materials; (3) BIA's research is inadequate and incomplete in a material respect in that BIA did not consider a genealogical report submitted by the Tulalip Tribes (Brown's Report No. 2); 4/ and (4) Brown's Report No. 2 is new evidence. In connection with this last argument, they state that they are submitting, and do submit, a copy of the report with their Request for Reconsideration as required by 25 C.F.R. § 83.11(b).

The Board first addresses the last two contentions, concerning Brown's Report No. 2. BIA discussed this report in the Technical Report, noting that it "analyzes the membership of the Tulalip Tribes" and "is concerned with demonstrating that most of the descendants of the historical Snoqualmie tribe became members of the Tulalip Tribes." Technical Report at 135. BIA continued:

> Because of the extensive privacy materials included, and because the Privacy Act prevented the Tulalip Tribes from reviewing much of the genealogical materials in the administrative record of the proposed finding, the Tulalip Tribes protested the requirement to provide Brown's Report Number Two and its documentation to the STO. Section 83.10(i) of the acknowledgment regulations requires that third party commentors provide copies of their comments directly to the petitioner. The Department as a matter of policy and to uphold the regulations declines to consider third party comments that were not provided to the petitioner. [*] However, there is no need to consider the actual report and accompanying exhibits for this final determination because the underlying argument is not valid.
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> [*] The Tulalip Tribes provided an extra copy of Brown's Report Number Two to the Department and requested that it not be provided to the STO unless the Department required either that STO limit who could review it, or that other

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fn. 3 (continued)
regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe."

4/ Although the Tulalip Tribes give the date of this report as Sept. 5, 1997 (Request for Reconsideration at 20), they appear to be referring to a Sept. 5, 1994, Supplemental Report by Sharon Brown.

> protective arrangements be made. Report Number Two and the extensive genealogical documentation accompanying it were not provided to the STO. The STO, although aware of the Tulalip Tribes' request and the transmission of its copy to the Department, did not request these materials.

Id. at 136.

The Tulalip Tribes contend that the material in Brown's Report No. 2 is "directly relevant to show that the Snoqualmie tribe is at Tulalip and part of the Tulalip Tribes, and to the question of whether the STO is a political faction or splinter group that separated from the main body of the Snoqualmie tribe." Request for Reconsideration at 22. Thus, they reason, BIA's failure to consider these materials shows that its research is inadequate and incomplete in a material respect.

While acknowledging that BIA considered the argument underlying Brown's Report No. 2 to be invalid, the Tulalip Tribes do not address BIA's reason for reaching this conclusion.

On this point, the Technical Report states at page 137:

> The basic premise of [the Tulalip Tribes'] argument, that most of the descendants of the historical Snoqualmie tribe are not part of the STO, does not provide an argument against acknowledgment of the STO under the acknowledgment regulations. The requirement in the regulations is to show continuous tribal existence. The administration and interpretation of the regulations, consistent with law and policy concerning tribal existence, recognize that historical tribes may have separated into more than one political unit. There is no requirement that, to be acknowledged, a petitioner must represent the entirety or even the majority of the contemporary descendants of the historical tribe.

With respect to the issue they raise here, the Tulalip Tribes fail to show the relevance of the genealogical information in Brown's Report No. 2 to the question of whether the STO is a splinter group. That question, as BIA recognized, must be answered by reference to political organization rather than genealogy.

The Board finds that the Tulalip Tribes have not established by a preponderance of the evidence that, because BIA did not consider Brown's Report No. 2 and accompanying materials, its research is inadequate or incomplete in some material respect. The Board further finds that they have not established by a preponderance of the evidence that the report is new evidence that could affect the determination. 5/

5/ The Board addresses the subject of "new evidence" further below.

The Board returns to the first contention made in Part III.A of the Request for Reconsideration))i.e., the "reasonable alternative interpretation" argument. The Tulalip Tribes' brief exposition of this argument demonstrates that it too is based upon a genealogical premise, rather than upon matters concerning political organization. The Board finds that the Tulalip Tribes have failed to establish by a preponderance of the evidence that there is a reasonable alternative interpretation, 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 Sec. 83.7 (a) through (g).

In their second contention in Part III.A (that BIA's research is inadequate and incomplete in a material respect), the Tulalip Tribes cite Item 12, page 5, in their September 23, 1994, letter to the Assistant Secretary. The description of this item in the September 23, 1994, letter states in its entirety:

> 12. VOLUMES OF TULALIP ENROLLMENT DEPARTMENT EXHIBITS (T77)
>
> These are supporting exhibits of the Tulalip Enrollment Department. Family tree charts have been prepared for Tulalip Snoqualmie members. Given the comment deadline, it was not possible to complete adding the source document references to each chart. That work is being done at this time. These charts, or particular charts that you may desire to see, will be made available for BAR staff review upon request.

It seems clear from this description that the materials referenced are genealogical in nature and thus would suffer the same relevance problem as Brown's Report No. 2. In any event, by failing to provide anything more than an extremely general description of the materials, the Tulalip Tribes have failed to establish by a preponderance of the evidence that BIA's research is inadequate or incomplete in some material respect.

To summarize its conclusions as to Part III.A of the Request for Reconsideration, the Board has found that the Tulalip Tribes have not established by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d) exist with respect to the contention that the STO is a splinter group.

In Part III.B of their Request for Reconsideration, the Tulalip Tribes argue that grounds for reconsideration exist with respect to BIA's determination that the STO was entitled to be considered under 25 C.F.R. § 83.8 because it was the subject of unambiguous previous

Federal acknowledgment between 1934 and 1953. 6/ In connection with this argument, the Tulalip Tribes discuss several categories of evidence.

The first category consists of documents relating to proposals to acquire land for the STO during the late 1930's and early 1940's. The Tulalip Tribes list a number of documents, some of which they state were not considered in the Technical Report. The documents described as "not considered" are apparently the documents they intend to argue are new evidence under 25 C.F.R. § 83.11(d)(1). In later parts of their Request for Reconsideration, discussed further below, the Tulalip Tribes follow this same practice))that is, they list numerous documents, interspersing those they seem to concede were considered by BIA with those they contend were not considered (and apparently contend are new evidence).

Although it is not entirely clear, the Tulalip Tribes may be contending that only those documents specifically discussed in the Technical Report can be deemed to have been considered by the Assistant Secretary. The Board rejected a similar contention in In re Federal Acknowledgment of the Golden Hill Paugussett Tribe, 32 IBIA 216, 223 (1998). In that case, the Board held that "new evidence" under 25 C.F.R. § 83.11(d)(1) includes only evidence that was not before the Assistant Secretary at the time she issued her Final Determination. 7/

[2] A party which requests reconsideration of an acknowledgment determination on the basis that "[t]here is new evidence that could affect the determination" bears the burden of showing, as a threshold matter, that the evidence presented as new is truly new. An essential first step in carrying that burden is to identify clearly the evidence claimed to be new. The Tulalip Tribes have not done so in this case. Moreover, although they are aware of the requirement in 25 C.F.R. § 83.11(b) that a request for reconsideration include any new evidence, and

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6/ 25 C.F.R. § 83.8 provides in part:

"(a) Unambiguous previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment. If a petitioner provides substantial evidence of unambiguous Federal acknowledgment, the petitioner will then only be required to demonstrate that it meets the requirements of § 83.7 to the extent required by this section."

25 C.F.R. § 83.1 defines "Previous Federal acknowledgment" as "action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States."

7/ This case demonstrates that not all evidence submitted by the parties will necessarily come before the Assistant Secretary. As discussed above, Brown's Report No. 2 was specifically not considered. Thus, that report is "new evidence" under Golden Hill Paugussett Tribe although, as the Board held above, it is not "new evidence which could affect the determination."

although they have submitted numerous documents as exhibits, they have not identified which of those documents (except for Brown's Report No. 2) they claim to be new evidence.

It would seem to be a simple thing to state clearly which documents are claimed to be new evidence and to label the corresponding exhibits clearly. In the future, parties who seek reconsideration of acknowledgment decisions on this basis will be expected to do so. 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 new evidence.

Because it involves a new interpretation of 25 C.F.R. § 83.11(d)(1), this requirement will not be applied here. Instead, the Board will presume, as indicated above, that the Tulalip Tribes intended to argue that the evidence it describes as "not considered" is new evidence under 25 C.F.R. § 83.11(d)(1).

The Assistant Secretary's transmittal of critical documents under 25 C.F.R. § 83.11(e)(8) included two lists that are useful here))a "List of Documentary Exhibits from the Administrative Record Transmitted to Interior Board of Indian Appeals" and a list titled "Documents Cited in the Tulalip Tribes' Request for Reconsideration Which Are Not in the Administrative Record." A review of these two lists reveals that virtually all of the documents listed by the Tulalip Tribes in their Request for Reconsideration, including those described as "not considered," were a part of the administrative record before the Assistant Secretary.

With respect to the documents listed by the Tulalip Tribes in the part of its Request for Reconsideration concerning land acquisition proposals, only one was not included in the administrative record. That is an article by Frank W. Porter III, titled "In Search of Recognition: Federal Indian Policy and the Landless Tribes of Western Washington," American Indian Quarterly, Vol. XIV, No. 2, Spring, 1990. 8/ The Tulalip Tribes quote from page 123 of the article, concerning the land acquisition proposals.

The Tulalip Tribes contend that the documents they cite concerning proposed land acquisitions demonstrate that the proposals were made only by lower level officials, were never approved by officials in authority, and were never brought to fruition. Thus, they contend, these proposals do not constitute "action of the Federal government" under the definition of "previous Federal acknowledgment" in 25 C.F.R. § 83.1.

8/ The Assistant Secretary states that an equivalent document is included in the administrative record, i.e., Frank W. Porter, III, "Without Reservation: Federal Indian Policy and the Landless Tribes of Western Washington," in State and Reservation: New Perspectives on Federal Indian Policy, (George Pierre Castile & Robert L. Bee eds., 1992).

In addition to contending that new evidence exists concerning the land acquisition proposals, the Tulalip Tribes contend that the evidence relied upon by BIA concerning these proposals was unreliable or of little probative value; that BIA's research was incomplete in a material respect; and that there is a reasonable alternative interpretation of the evidence, i.e., that "it does not reflect action of the Federal government at all, but mere proposals for action by lower level agency officials that never even became definite before they were abandoned." Request for Reconsideration at 31.

The Tulalip Tribes fault the Technical Report for, inter alia, not specifically discussing "abandonment" of the land acquisition proposals. However, it is clear from the context of the Technical Report that no land acquisitions were ever made for the STO and that the STO was considered to be a non-reservation tribe or group during the period in question. Thus, any new evidence that might exist to show that land acquisitions were never completed would simply confirm a fact already known to BIA))a fact BIA clearly did not consider determinative of the question of the STO's previous acknowledgment.

The Tulalip Tribes address the land acquisition proposals in isolation rather than in the context in which the Technical Report discussed them. From this narrow perspective, they contend that only completed land acquisitions should qualify as "action of the Federal government" under the definition of "previous Federal acknowledgment."

The land acquisition proposals are only one of several examples cited in the Technical Report as evidence of the Department's relationship with the STO during the 1930's and 1940's. As is obvious from the discussion in this part of the Technical Report (and from the Final Determination, see excerpt quoted supra), BIA considered the relevant "action of the Federal government" to be the Department's treatment of the STO as a recognized tribe over an extended period of time. The land acquisition proposals reflect the Department's understanding that land acquisitions could be made for the STO and thus were evidence supporting a conclusion that the STO was recognized during the period in question. From this perspective, it is of little significance that the land acquisitions were not completed.

The Board concludes that the Tulalip Tribes have not established by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d) exist with respect to evidence concerning proposals for land acquisitions for the STO.

The second category of evidence discussed in Part III.B of the Request for Reconsideration includes lists, correspondence, and reports on which the STO appeared. A major point of the Tulalip Tribes' argument here is that BIA did not pay adequate attention to lists and other documents in which the STO appeared together with the unrecognized Duwamish

Tribal Organization. 9/ The Tulalip Tribes list a number of documents, some of which they contend were not considered in the Technical Report. They follow the listing with a discussion of some of them.

The Tulalip Tribes contend that, with respect to lists, correspondence, and reports on which the STO appears, there is new evidence that could affect the determination; the evidence relied upon by BIA was unreliable or of little probative value; and there is a reasonable alternative interpretation of the evidence, i.e., that the STO "was not the subject of the requisite action of the Federal government clearly premised upon identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States." Request for Reconsideration at 51. With respect to some of the documents discussed, the Tulalip Tribes allege that BIA's analysis was incorrect or incomplete.

In the Technical Report, BIA distinguished the Department's treatment of the STO during the period 1934-1953 from its treatment of the Duwamish Tribal Organization:

> The Duwamish Tribal Organization appears on a few of the lists of "tribes" with which the agency was dealing in the early 1940's * * *. For Duwamish, however, there is not the extensive, clear cut documentation supporting their recognized status equivalent to that of the Snoqualmie * * *. They are only represented on lists. Snoqualmie documentation is equivalent to that for the Nooksack, Skagit-Suiattle, and Jamestown Clallam. It includes discussion of their status, and plans for a reservation. Lists alone, as noted above, may not be strong evidence unless their basis and meaning are clearly spelled out and understood. [Citations omitted.]

Technical Report at 25 n.50.

Many of the documents cited by the Tulalip Tribes mention or discuss, in addition to the STO and/or the Duwamish Tribal Organization, other tribes whose Federal acknowledgment is unquestioned. Thus, inclusion on such documents cannot be deemed evidence that the groups mentioned were not acknowledged.

In their discussion of individual documents, the Tulalip Tribes object primarily to the manner in which BIA analyzed certain documents. Although they clearly disagree with BIA's analysis, such disagreement does not constitute a basis for reconsideration.

9/ The Assistant Secretary published a "Proposed Finding Against Federal Acknowledgment of the Duwamish Tribal Organization" on June 28, 1996, 61 Fed. Reg. 33762.

The Board concludes that the Tulalip Tribes have not established by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d) exist with respect to lists, correspondence, and reports on which the STO appeared.

The next section of Part III.B of the Request for Reconsideration is titled "Approval of claims attorney contract." It is not clear what the point of this section is. The Tulalip Tribes do not contend that any grounds for reconsideration exist with respect to this subject.

The next category of evidence discussed in Part III.B concerns STO leader Jerry Kanim's attendance at meetings with tribal, state, and Federal authorities. The Tulalip Tribes contend that the evidence considered by BIA on this subject was unreliable and of little probative value to show Federal action. In particular, they contend that neither Kanim's attendance at meetings with state officials nor his leadership role in general reflects Federal action.

The Tulalip Tribes cite page 22 of the Technical Report, which states in part:

> Also in 1950, Jerry Kanim played a lead role, on behalf of both reservation and non-reservation tribes, in agency-sponsored meetings with state officials * * *. Throughout the 1940's, Kanim had played a similar leadership role in meetings involving the tribes, the agency, and state authorities. The Indian Service representatives treated the Snoqualmie and Kanim in the same manner as the recognized reservation tribes and leaders attending these meetings.

As to Federal action, it is the last sentence of this discussion which is relevant, not the statements that Kanim served as a leader.

The Tulalip Tribes also contend that there is new evidence concerning Kanim's activities. As to this alleged new evidence, however, they make only a general reference to a 1997 report "and exhibits cited." Request for Reconsideration at 54. Even under the relaxed standards applied here (see discussion of new evidence, supra), this vague statement is entirely inadequate to identify the new evidence.

The Board finds that the Tulalip Tribes have failed to establish by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d) exist with respect to Jerry Kanim's attendance at meetings with tribal, state, and Federal authorities.

The next category of evidence discussed in Part III.B of the Request for Reconsideration concerns the STO and the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479. The Tulalip Tribes object in particular to the statement in the Technical Report that, "[b]etween 1937 and 1944, the Indian Service proposed to acquire land for the STO so that

it could organize under the [IRA]," Technical Report at 18, and to statements concerning the eligibility of the STO to organize under the IRA. They contend that evidence relied upon by BIA was unreliable or of little probative value; there is new evidence that could affect the determination; and there is a reasonable alternative interpretation of the evidence.

BIA cited contemporaneous Departmental documents for the statements it made concerning the STO and the IRA. Clearly, the Tulalip Tribes disagree with BIA's analysis of those and other documents, and/or the weight given some of the documents. As noted above, however, a showing of disagreement with BIA's analysis is not sufficient to establish that grounds for reconsideration exist. The Board finds that the Tulalip Tribes have failed to establish by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d) exist with respect to BIA's discussion of matters relating to the IRA.

In the final section of Part III.B of the Request for Reconsideration, the Tulalip Tribes contend that any previous Federal acknowledgment of the STO was not "unambiguous" under 25 C.F.R. § 83.8(a). They incorporate arguments made in the preceding sections of their Request for Reconsideration and allege that grounds for reconsideration exist based upon those earlier arguments. For the same reason it rejected those earlier arguments, the Board rejects them here.

Part III.C of the Request for Reconsideration concerns the statement made on page 2 of the Summary that "[b]efore the 1930's, the [STO] was acknowledged as part of the Snoqualmie tribe as a whole" and the statement made at page 31, n.67, of the Technical Report that "it is adequate to show that the STO evolved from the Snoqualmie who were dealt with by the United States and who signed a treaty."

The Technical Report states that certain arguments and evidence submitted by the Tulalip Tribes "were not reviewed for this final determination because under 83.8, tribal existence need only be demonstrated from 1953 to the present." Technical Report at 14 n.16. The Tulalip Tribes contend that BIA should not have reached a conclusion as to the pre-1930's acknowledgment of the STO or a conclusion as to the evolution of the STO from the treaty tribe without considering the Tulalip Tribes' evidence on these points. They seek reconsideration on the ground that BIA's failure to consider their evidence on these points "violates the right of interested parties to participate and be heard under the regulations, and violates due process." Request for Reconsideration at 74, 78. They also seek reconsideration on the grounds that the evidence relied upon by BIA was unreliable and of little probative value; BIA's research was incomplete in a material respect; and there are reasonable alternative interpretations of the evidence.

The Tulalip Tribes' allegations of violations of due process and the regulatory right to be heard are not within the jurisdiction of the Board under 25 C.F.R. § 83.11. See 25 C.F.R. § 83.11(d), (f). Accordingly, these allegations will be referred to the Secretary.

As to the remaining allegations made in Part III.C of the Request for Reconsideration, the Board finds that the Tulalip Tribes' general allegations are insufficient to establish by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d) exist with respect to the statement concerning the STO's pre-1930's acknowledgment and the statement concerning the STO's evolution from the treaty tribe.

In Part III.D of their Request for Reconsideration, the Tulalip Tribes "seek reconsideration on the grounds that Washington II [10] bars any determination that the STO was acknowledged as part of, was part of, has evolved from, or is the same as, the Snoqualmie treaty tribe, or a part thereof." Request for Reconsideration at 85. They contend that "[t]he decision should be clarified as not reaching any of those questions" and that "[t]he inconsistencies and ambiguities in the decision concerning such questions should be eliminated." Id.

This contention does not state a ground for reconsideration that is within the Board's jurisdiction under 25 C.F.R. § 83.11. It will therefore be referred to the Secretary.

In accordance with the above discussion, 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 Assistant Secretary's Final Determination is affirmed. The following two issues are referred to the Secretary of the Interior:

(1) Whether the Tulalip Tribes' regulatory right to participate in the acknowledgment proceedings and/or its due process rights were violated by BIA's decision not to review the evidence referenced at page 14 n.16 of the Technical Report; and

(2) Whether the Final Determination must be modified to delete determinations barred by Washington II or to make clear that no such determinations were intended.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

10/ United States v. Washington, 476 F. Supp. 1101 (W.D.Wash. 1979), aff'd y, 641 F.2d 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).