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TOLOWA NATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TOLOWA NATION v. UNITED STATES, UNITED STATES BUREAU OF INDIAN AFFAIRS; RYAN ZINKE, Secretary of the Interior; MICHAEL S. BLACK, Assistant Secretary of the Interior for Indian Affairs.	Case no. 3:17-cv-6478 **COMPLAINT** [5 USC §706, 25 CFR 83.7]

Plaintiff Tolowa Nation brings this action seeking declaratory and injunctive relief to reverse the February 18, 2016 Board of Indian Hearings decision denying the Nation federal recognition, and for a declaration and order granting such recognition.

I. INTRODUCTION

1. Plaintiff Tolowa Nation ("Nation") seeks federal recognition as an Indian tribe under the procedure established under Part 83 of Title 25 of the Code of Federal Regulations: "Procedures for Establishing That an American Indian Group Exists as an Indian Tribe."[1]

[1] "First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *U.S. v. Lara* (2004) 541 U.S. 193, 200.

2. This procedure "…is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 CFR §83.3(a). Emphasis added.

3. The Nation applied for recognition September 11, 1982. The exhaustively-researched application by renowned Indian attorney Allogan Slagle detailed the pre-colonization existence of the Tolowa people, their culture, their settlements in northwest California, the genocide which almost eradicated them, and their fragile recovery in various bands and on government-established rancherias.

4. The Tolowa Nation was initially an umbrella of Tolowa, some of whom splintered into rancherias with other tribes, after the 1982 application, as a result of 1983 stipulated judgment under *Tillie Hardwick v. U.S.,* (Northern District, Cal. 79-1710SW) (*Hardwick*), which reinstated the rancherias.

5. Throughout these developments the Tolowa Nation continued running its own affairs, with Genshu House as its cultural center, while it struggled to sustain its culture through regular dances and events.

6. On January 30, 2014, defendant Bureau of Indian Affairs denied the Nation's application for recognition. Published at 79 Federal Register 4953. The sole basis for the denial was the BIA's determination that the Nation had not met the requirement of continuous existence under 25 CFR §83.7(b).

7. After the Nation's petition for reconsideration, the Board of Indian Appeals affirmed denial of recognition on February 18, 2016. Docket No. IBIA 14-086.

II. PARTIES

8. Plaintiff TOLOWA NATION is composed of individuals descended from the Tolowa people, native Americans almost exterminated upon the arrival of Europeans to their homelands in the northwest corner of California, predominantly in what is now Del Norte County, California.

9. Defendant DEPARTMENT OF THE INTERIOR, acting through the Defendant Bureau of Indian Affairs, and its Defendant Office of Federal Acknowledgment, is the administrative agency that receives and processes applications from Indian groups for recognition of tribal status in accordance

with 25 C.F.R. Part 83, and the United States Constitution, statutes, regulations, treaties and legal requirements.

10. Defendant BUREAU OF INDIAN AFFAIRS and its Board of Indian Hearings is the United States government administrative agency which administers the federal regulations applied to the application of native Americans for federal recognition as an Indian tribe.

11. Defendant RYAN ZINKE is the Secretary of the Interior. Defendant MICHAEL S. BLACK is the acting Assistant Secretary for Indian Affairs, the highest-ranking official in the Bureau of Indian Affairs ("BIA"), which has direct responsibility for administering the acknowledgment procedures. Both defendants are officers or employees of the United States Department of the Interior and have direct or delegated statutory duties for carrying out relations with Indian tribes and the United States' trust obligations to tribes. 25 U.S.C. §§ 2, 9. Both are named here in their official capacities.

12. Defendant the UNITED STATES OF AMERICA includes all government agencies and officers, including the above-named Defendants, charged with the administration of Indian Affairs and responsibility for protection of property and rights of the Nation. Plenary authority over Indian affairs is reserved to the United States Congress under Article I, Section 8 of the United States Constitution.

III. JURISDICTION

13. Federal court jurisdiction of the federal law questions herein is founded upon Title 28 USC sections 1331 (federal question) and 1337 (congressional acts regulating commerce with Indian tribes), and the Administrative Procedure Act ("APA"), 5 USC §§ 701-706.

14. An actual controversy exists between the parties within the meaning of 28 USC §2201(a).

15. This Court may grant declaratory relief and additional relief, including an injunction, pursuant to 28 USC §§ 2201-2202 and 5 USC §§ 705-706.

16. Plaintiffs' claims herein arose in Del Norte County, California. Plaintiffs, their members or officers, live in Del Norte County or conduct their activities there. Therefore, venue lies in the Northern District of California pursuant to 28 USC §1391(b)(2).

17. Intradistrict assignment: This case is eligible for assignment to the Eureka Division under Civil Local Rule 3.2(f).

IV. ALLEGATIONS

18. Federal courts long have held that under the United States Constitution, Indian tribes are "domestic, dependent nations" over which Congress exercises plenary power. In tandem with its plenary power over Indian tribes, the United States has a trust responsibility towards tribes similar to the relationship between a ward and his guardian.

19. The significance of formal Departmental recognition of a tribe is underscored by the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791, 25 USC §479a *et seq*. Under that Act, a tribe's inclusion on the list of federally recognized tribes maintained by the Department "imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members... Appearing on the List is a functional precondition to receipt of those services. In addition to the BIA, other federal agencies which provide services to the tribes use the list to determine eligibility." House Report No. 103-781, Oct. 3, 1994 at 3.

20. These services include, but are not limited to: (a) the myriad programs administered by the Secretary and contracted to Indian tribes under the Indian Self-Determination and Education Assistance Act, P.L. 93-638, 25 USC §450 et seq.; (b) funding for on and off reservation Indian tribal child and family services programs under 25 USC §1933 et seq., similar to those provided by the United States Department of Health and Human Services; (c) Indian health education services, programs and grants available under 25 USC § 2100 et seq. (d) tribally controlled school grants under 25 USC §§ 2501-2511; (e) the Indian Child Welfare Act, 25 USC §1931 et seq.; (f) Indian Health Care and Substance Abuse Programs under 25 USC §1641 et seq.; (g) housing grants and housing assistance under the Native American Housing Assistance and Self Determination Act of 1996, 25 USC §4101 et seq.; (h) protection of tribal cultural resources under the Historical Preservation Act, 16 USC §470aa et seq.; and (i) funding for Indian tribal environmental quality programs administered by the United States Environmental Protection Agency, such as qualifying for "Treatment as a State" under the Clean Water Act, 33 USC §1377 et seq.; and the Clean Air Act §§ 7401-7671.

21. The Tolowa Nation is not on the list maintained by the Department. (73 Fed. Reg. 18553-01, April 4, 2008).

22. Tolowa Nations' original 1982 application for federal recognition was largely based on research prepared by native American attorney Allogan Slagle.[2] The four-part history submitted included meticulously cited research, including field notes and interviews with Tolowa people. That history is provided below.

23. Slagle's information had never previously been compiled. The rancherias, used by BIA to deny recognition here, had no history prior to their creation in 1906 (Smith River Rancheria) and 1908 (Elk Valley Rancheria). Nor were the rancherias required to prove their history and existence; the federal government created them by fiat. Indeed, as was the policy, the federal government compelled the landless natives—Tolowa, Yurok and any others—upon the federal ghettos.

24. In its request for BIA recognition and for reconsideration of BIA's denial, the Nation submitted further evidence to substantiate the facts below. This evidence includes Department of Interior historical documents, The Indian Appropriation Act of 1906 and 1908, the final order in *Tillie Hardwick*; evidence of the Nation's meeting place, Guschu Hall, a 2009 paper regarding Etchulet flooding by state agencies, and the roster of the 1983 Tolowa Nation council.

1. History of Tolowa pre-contact.

25. The Tolowa people's existence before the arrival of Europeans is irrefutable. The record already before the BIA and that in its own files establishes a culture centered on villages. This village orientation was the "distinct community" of the Tolowa.

26. Three main villages constituted the Tolowa at the time around 1850 when Europeans made their presence in Del Norte County permanent. Two on the Smith River, Howonquet and Yontocket, were those of the Smith River band of Tolowa. To the south, on the lagoon called Lake Earl, adjoining the Pacific Ocean, was the principal commercial village of Etchulet.

27. Around these villages were "suburb" or satellite villages. The main villages had contact, often coordination, but were sometimes in conflict with the other main villages. Alliances with other bands or tribes were undertaken individually by the Tolowa villages with other native people along the coast bordering California and Oregon. The evidence supporting the pre-colonial Tolowa demography is

[2] Mr. Slagle died in 2002.

extensively detailed in the initial application here. See especially Part II. Genealogy, from page 1, citing among others the archeological studies of Drucker and Kroeber and USFS ethnological studies.

28. The ethnography concludes that "tribelets" and "village communities" are more reflective of the communal life of the Tolowa. Their ongoing associations were clan and family connections. Then, and very much now, their political interaction took the form almost exclusively of assemblies for various purposes, whether conflict resolution (or conflict itself), social entertainment, or religious purpose. Part II, Genealogy, page 3.

2. History after arrival of Europeans.

29. The history of these villages after European arrival and through the latter 1800s, is the history of the near genocide of the Tolowa. The three villages give name to three successive, well documented, massacres of the Tolowa. The after smaller attacks on those closest to Crescent City, the two pre-eminent Smith River villages, Howonquet and Yontocket, were attacked in 1853 and largely eradicated, the plank house villages burned, and the people driven off.

30. Etchulet then became the cultural center of the Tolowa and its last refuge. It was finally attacked in 1855. Although many Tolowa men, women and children were murdered, the assault did not erase the people from the site. Remnants who survived are ancestors of those seeking recognition today.

a. Retreat to Etchulet.

31. With the villages of Howonquet and Yontocket eradicated, and those on the south lagoon displaced by Crescent City (incorporated in 1854 at the same time as the natives were being massacred), Etchulet, sometimes "Achulet," became the last physical "homeland" of the Tolowa.

32. The village to the Tolowa was more than simply a location, more than a physical place of residence. The Tolowa village was *situs* of generations of lives and the presence of those lives, even after they were gone, permeated the place, such that the Tolowa revered the village as a "community of souls."

33. The village of Etchulet, on the peninsula adjoining the Lake Tolowa, now the Pacific Shores subdivision, continued as home for the lake band of Tolowa. "It was this town which gave its name to the whole tribe" and "...may have been the wealthiest village of the Tolowa." Drucker 1937: 211-300.

34. The "lake" Tolowa of Etchulet were distinct from those of the Smith River, 22 miles to the north. The villages around the lagoons were in much closer contact and shared social and political interactions.

35. The relationship of the initial proposed Tolowa Nation membership role to the last of Etchulet's residents is notable. See "Atchulet" discussion beginning page 80 of Part II, Genealogy, and initial membership role beginning at page 115. [3]

36. Etchulet was not abandoned by children with families until 1913, according to a census taken at that time. Audrey Bowen's great uncles were still living there in 1928. Others lived in satellite villages of Etchulet, which often became the homes of dislocated Tolowa from elsewhere. See, for example, the discussion of Baby Town, beginning page 87 of the Genealogy.

37. The Etchulet-oriented family names include many of those on Nation membership rolls, such as Bowen, Brundin, Gorbet, Green, Hostler, Lopez, Scott, Smith and White.

38. It is important to note that these Tolowa as late as near 1930 were living independent of the Rancherias, which granted exclusive allotments in 1906 and 1907. Because the Rancherias were initially and until recently exclusive, prohibiting dual enrollments, these Tolowa found still living in the original historic villages as late as 1930, were independent of the Rancherias.

b. Distinctions from the Smith River Band.

39. Quoting a Klamath Indian counsel in 1927:[4]

40. "All Indians do not belong to the same race, any more than they belong to the same tribe... For instance, there are Klamathians, Algencians and Iroquoians, who are no more alike than an Irishman and a Norwegian."

41. As described above, the Tolowa along the Smith River suffered some of the earliest and most violent attacks of the European colonists. By the turn of the century many if not most of the villages along the Smith River were gone. Many of the survivors drifted to the villages throughout the area,

[3] In its preliminary determination BIA faulted the inconsistent membership rolls of the Tolowa Nation. Under review for more than 30 years, this is to be expected, especially where, as is well documented, Tolowa were forced on and off reservations and rancherias. A review of the censuses taken confirms that members are Tolowa or descendants.

[4] The Tolowa Nation of Indians, Parts III-IV: History 1906-Present, from original petition, see page 13.

around the river, the lakes, the coast and in between, many squatting and creating claims by the colonizers against the federal government. These factions were documented in the portrayal of disputes over the acquisition of relocation lands by Indian agent Charles E. Kelsey, 1907-08.

42. The distinction however remained, as exhibited by a 1907 letter, provided in the Nation's request for reconsideration, from the Department of Interior official seeking to secure lands for the "Smith River Indians."[5]

43. The letter describes attempts to purchase lands from white settlers for the purpose of providing a homeland "for the use of the Smith River Tribe."

44. The letter describes the differences between the "lake Indians" and the "river Indians" and the insistence of the "river Indians," "consisting of about three-fourths of those for whom the land is sought," to have lands along the Smith River.

45. The July 5, 1907 letter from C.E. Kelsey, "special agent for the California Indians," states that: "They still recognize the distinction between the bands."

46. "Some of the Lake Indians, about 15, have some land of their own," he notes, page 7 of the July 5 letter.

47. Thus, at the time of the creation of the Rancherias, the Lake Tolowa, including many of the members here, were already living independently around the lagoons of Lake Earl and Lake Tolowa.

3. The Rancherias.

48. While Tolowa had been repeatedly run off their land, many of the Lake Tolowa had returned and were living at or near the historical villages.

49. The landless, primarily Smith River band, being a problem to the settlers, became the focus of federal agents employing the Landless Indian Act, resulting in the acquisition of properties which ultimately became the Smith River Rancheria, near the river, and Elk Valley Rancheria, east of Crescent City.

[5] These documents, all of them admissible official Department of Interior records, are only a sampling for others which should be in the Department's possession, reflecting in detail the very noble efforts of Kelsey to aid the landless Indians around the state of California at that time.

a. Landless Indian Act.

50. "Early in the twentieth century, the United States sought to improve 'the landless, homeless or penurious state of many California Indians' by purchasing numerous small tracts of land known as 'rancherias.' *Williams v. Gover* (9th Cir. 2007) 490 F.3d 785, 787. The United States held these lands in trust for Indians who resided thereon. *Table Bluff Band of Indians v. Andrus* (N.D.Cal. 1981) 532 F.Supp. 255, 258. Trust lands could not be taxed or conveyed to others. *Id.* "The United States controlled the rancheria lands under the special fiduciary duty owed by the United States to the Indian people." *Hardwick v. United States* (N.D. Cal., Mar. 7, 2014, 5:79-CV-01710-JF) 2014 WL 1006576.

51. Referred to as the "Landless Indian Act," the legislation consisted of Congressional appropriations to fund purchase of these lands, later known as rancherias, in 1906 and 1908.

52. Notably, nothing in the appropriations provides a recognition of tribal status. Instead the acts provided basic services at the properties required for the settlement of the landless natives. Title to the land itself, as described below, remained in federal hands, in trust for the occupants.

b. Termination of Rancherias under the "Termination Act."

53. "In 1958, Congress passed the California Rancheria Termination Act ('Rancheria Act' or 'Act'), which provided that the lands of forty-one enumerated California rancherias were to be removed from trust status and distributed to the individual Indians of those rancherias. Cal. Rancheria Termination Act, Pub.L. No. 85–671, 72 Stat. 619 (1958), *amended by* Pub.L. 88–419, 78 Stat. 390 (1964). The Act directed the Indians of each enumerated rancheria, or the Secretary of the Interior after consulting them, to prepare a plan for distributing the rancheria's lands or for selling the lands and distributing the proceeds. *Id.* § 2(a)." *Hardwick v. United States* (N.D. Cal., Mar. 7, 2014, 5:79-CV-01710-JF) 2014 WL 1006576.

54. Thus, "when the distribution of the rancheria's assets was completed, the Band's formal status as a Tribe was to be terminated, thereby ending the eligibility of its members for services and benefits provided by the government to such persons because of their status as Indians." *Hopland Band of Pomo Indians v. U.S.* (Fed. Cir. 1988) 855 F.2d 1573, 1575.

55. By federal legislative fiat, the Smith River band was thus no longer a "tribe," if it had been before. That, again, was in 1958.

c. The* Hardwick *restoration of Rancherias.

56. In 1983, chronologically almost simultaneous with the filing for recognition of Tolowa Nation here, the terminated rancherias applied for renewed federal recognition in the *Tillie Hardwick* case, *supra*, brought against the United States. A court order stipulation was reached:

57. "The 1983 Stipulation divided the class members into three subclasses. The first subclass consisted of individuals who received assets of seventeen enumerated rancherias; the United States agreed to restore those individuals to Indian status, restore recognition of their tribes as Indian entities, and provide a mechanism by which individuals holding former rancheria lands could reconvey those lands to the United States to be held in trust." *Hardwick v. United States* (N.D. Cal., Mar. 7, 2014, 5:79-CV-01710-JF) 2014 WL 1006576.

58. The Smith River and Elk Valley rancherias were included in this first subclass. As a result of this legislative-judicial history, BIA appears to treat the rancherias as federally recognized tribes, although they were never afforded that status as a result of the recognition process under 25 CFR §83.11.

59. Neither rancheria was required to show any continuous history of existence. Indeed, there is no possible way that such a history could be shown, as both were creations of federal law, not history.

60. And, between 1958 and 1983, the rancherias did not exist, again as a result of federal legislative, and then judicial, fiat. There was no Smith River band during that period. The amalgamation of native bands that comprised the Elk Valley Rancheria became simply individuals holding title to the rancheria allotments they had received in the distribution during that period.

61. But meanwhile, the "lake" Tolowa band, that is, those who had lived at Etchulet, its satellites, and those south throughout Crescent City, who now owned their own property, continued their assemblies, continued to safeguard their historical community. They continued to exist.

4. The independent Tolowa Nation.

62. The Tolowa Nation has continued functioning as a community, although the rancherias have splintered into different governance for the allottees there. Even before the rancherias were terminated, the Lake Tolowa sustained their communal life through the Del Norte Indian Welfare Association.

a. Self-rule under the DNIWA.

63. The Del Norte Indian Welfare Association (DNIWA) was organized in 1928, around the time that the last of the lake Tolowa were leaving Etchulet. See generally The Tolowa Nation of Indians, Parts III-IV: History 1906-Present, from original petition, especially pages 50-60.

64. The first general meeting of the DNIWA was held in 1936 at Guschu Hall, according to a *Triplicate* article at the time. The DNIWA's many activities uniting the Tolowa from all locations—the rancherias and all else—are well documented in the original petition for recognition here.

65. Important for reconsideration now is the discussion, beginning at page 60 of the History 1906-Present of "The Rancherias at Termination." There, congressional testimony from 1954 is presented showing that the two rancherias were still unorganized as tribal governments and that: "The main community organization and traditional government remained in the Tolowa hereditary leadership, as embodied in Del Norte Indian Welfare Association and its daughter organization." Citing Slagle 1982-1985: Tolowa field notes.

66. The DNIWA had formal organization and leadership. By the time of the Tolowa Nation application for recognition in 1983, Audrey Bowen was president of the DNIWA. She was a lake Tolowa, Etchulet descendant, never at the rancherias. She later became the first president of the Tolowa Nation.

b. Guschu Hall maintained as spiritual and welfare center.

67. From a Sept. 6, 1929 article in the local *Triplicate* newspaper: Guschu Hall "was so arranged as to serve for a center of community interests as well as for worship, a reception room and a small kitchen being added. A fireplace will give warmth and cheer at such times." Guschu Hall became the home of the Del Norte India Welfare Association, and the center for tribal and community functions to the present date. See Part II, Genealogy, page 21 of post-1906 history.

68. By February 27, 1931, the Del Norte Triplicate reported that Guschu Church was fully paid off, "a clear sign of Tolowa will-power in cooperation with the Methodist missionaries and non-Indian supporters. Tolowa Methodists celebrated Easter that year on the beach, with a Sunrise Service and picnic breakfast." Del Norte *Triplicate*, April 3, 1931.

69. Audrey Bowen, then president of the DNIWA and key figure in the 1983 application for Tolowa Nation recognition, was instrumental in Tolowa Nation obtaining the Hall and dedicating it as the continuing center of Tolowa life. Tolowa Nation possession and operation of Guschu Hall has continued to this date as a spiritual and cultural center.

c. Maintenance of Etchulet.

70. Tolowa Nation continues efforts to protect the physical "community of souls" in the Lake Earl/Tolowa lagoon, especially in the protection of burial sites on the Etchulet peninsula. In 2004, the Tolowa Nation led an environmental protection lawsuit filed in Sacramento County Superior Court, seeking to preserve the Etchulet site and its burial grounds from flooding. (*Tolowa Nation et al. v. California Department of Fish & Game et al*, Sacramento County Superior Court case no. 04CS01254.)

71. The state Department of Fish & Game, however, succeeded in adopting a "Lake Earl Management Plan," which allows the lagoon levels to rise significantly higher than the historical levels maintained by the Tolowa and long after. This has already created loss of the burial locations and other artifact sites at the Etchulet site, according to studies prepared for Tolowa Nation. Tolowa Nation member Raja Storr has documented this loss in academic presentations of GIS display revealing the encroachment of the flooding on burial sites.

72. The Nation fights still against the state's efforts to convert the Tolowa's last historical homeland into a "wetland" for the propagation of endangered species by the state environmental agencies.

73. Recognition by the United States is vitally important for the Tribe and its members. Recognition, or acknowledgment, "is a prerequisite to the protection, services, and benefits of the federal government available to Indian tribes by virtue of their status as tribes" and "mean[s] that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 25 CFR §83 .2; see also *Muwekma v. Babbitt* (D.D.C. 2001) 133 F.Supp.2d 42, 43-44.

FIRST CLAIM FOR RELIEF

THE FINAL DETERMINATION DENYING RECOGNITION IS CONTRARY TO LAW

(25 CFR 83.7, 5 USC §706)

74. Plaintiffs incorporate all previous allegations as if fully set forth, and for a claim for relief, allege as follows:

75. In denying the Tolowa Nation's application for recognition, the BIA's final decision pointedly cites a lack of evidence, calling that submitted too often "secondary," and discounting the personal letters submitted.

76. Case law interpreting 25 CFR §83.3(a) provides clear principles in interpreting "substantially continuous."

77. "A petitioner, however, is not required to provide conclusive evidence under each of the Part 83 criteria; rather, a 'criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.'" *Muwekma Ohlone Tribe v. Salazar* (D.D.C. 2011) 813 F.Supp.2d 170, 174 aff'd, (D.C. Cir. 2013) 708 F.3d 209, citing 25 C.F.R. § 1.2.

78. "Therefore, the tribal entity must survive assimilation as a 'continuous separate, distinct and cohesive Indian cultural or political communit(ies).'" *U.S. v. State of Washington* (9th Cir. 1981) 641 F.2d 1368, 1373.

79. Indeed, BIA must give deference to the fragmentation, dislocation and usurping of tribal existence. "A degree of assimilation is inevitable under these circumstances and does not entail the abandonment of distinct Indian communities." *U.S. v. State of Washington* (9th Cir. 1981) 641 F.2d 1368, 1373.

80. "This requirement has been interpreted liberally in favor of Indian groups. '[C]hanges in tribal policy and organization attributable to adaptation do not destroy tribal status.' We have been particularly sympathetic to changes wrought as a result of dominion by non-natives." *Native Village of Venetie I.R.A. Council v. State of Alaska* (9th Cir. 1991) 944 F.2d 548, 557, citing *U.S. v. State of Washington, supra.*

81. Thus, the courts must give great deference to any evidence of tribal existence pre-non-native, and "it follows that the Indian groups to be recognized as sovereigns should be those entities which

historically acted as bodies politic, particularly in the periods prior to their subjugation by non-natives. There is, however, an additional prerequisite that an Indian group must meet in order to achieve present-day recognition as a sovereign: the modern-day group must demonstrate some relationship with or connection to the historical entity." *Native Village of Venetie I.R.A. Council v. State of Alaska* (9th Cir. 1991) 944 F.2d 548, 557.

82. "Some relationship or connection" was addressed by the Ninth Circuit as follows:

83. "For this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community." *U.S. v. State of Washington* (9th Cir. 1981) 641 F.2d 1368, 1372-73. Emphasis added.

84. "In sum, a relationship between the modern-day entity seeking tribal status and the Indian group of old must be established, but some connection beyond total assimilation is generally sufficient." *Native Village of Venetie I.R.A. Council v. State of Alaska* (9th Cir. 1991) 944 F.2d 548, 557.

85. A "substantially continuous" existence, then, involves recognition of the cultural and institutional havoc wreaked upon the natives by colonization, and the logical deference given to any evidence of tribal pre-existence. While an unbroken, wholly identical presence up to modern times is not necessary, there must be some proof, tied back through time, with pre-colonization existence.

86. The BIA's denial of recognition is based on the existence of the Rancherias. That is, that the Rancherias are Tolowa "tribes."[6] Regulation addresses this issue straight on in 25 CFR §83.3(d):

87. "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 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."

88. Furthermore, as provided in the second clause of 25 CFR §83.3(c):

[6] Final denial, January 30, 2014: "Nor did they show the petitioner was part of a community of Indians separate from the Smith River and the Elk Valley Tribes."

89. "The fact that a group that meets the criteria in § 83.7 (a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision."

90. "If the native villages of Venetie and Fort Yukon are the modern-day successors to sovereign historical bands of natives, the villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States." *Native Village of Venetie I.R.A. Council v. State of Alaska* (9th Cir. 1991) 944 F.2d 548, 558-59.

1. There was no actual federal recognition of the rancherias as "tribes" until *Hardwick* in 1983.

91. While the rancherias are referred to by the Final Decision as "tribes," there is no basis for this in law. Under the 1958 California Rancheria Act: "The United States controlled the rancheria lands under the special fiduciary duty owed by the United States to the Indian people." *Smith v. U.S.* (N.D. Cal. 1978) 515 F.Supp. 56, 57.

92. The federal "landless" Indian acts that established the California rancherias, and the Del Norte County rancherias, were not formal recognition of tribal status. Rather the Acts of 1906 (34 Stat. L., 325-333), and April 30, 1908 (35 Stat. L., 70-76), which authorized with "special appropriations ... to provide homes for the tribes in Northern California who were without lands ..." Letter dated October 13, 1913 to Representative Raker from C. F. Hauke, Second Assistant Commissioner.

93. The landless natives who accepted allotments on the rancherias were never formally recognized as Indians. And while the *Hardwick* stipulation appears to grant recognition in 1983 to those "tribes, bands, groups and communities," it concerned, including the two Del Norte County rancherias, it stated only that: "The status of the named individual plaintiffs and other class members of the seventeen rancherias named and described in paragraph 1 as Indians under the laws of the United States shall be restored and confirmed." See *Hardwick* stipulation, paragraph 3. That prior status is not specified.

94. Thus in 1983, when the Tolowa Nation had already organized for recognition, it was doing so while the rancherias were only then establishing themselves as federally recognized entities.

2. The Smith River band separated itself from the body of the Tolowa, not vice versa.

95. BIA's Final Determination states that the Tolowa Nation cannot prove itself distinct from the Smith River Rancheria or the Elk Valley Rancheria. This turns the facts on their head.

96. It is well established that the Smith River band was a distinct band, so demolished prior to the allotments at the Smith River Rancheria that they were landless and only had an organized mutual life, if at all, once the rancheria gave them a home.

97. No reasonable consideration would conclude that establishment of the Smith River Rancheria, or the Elk Valley Rancheria, meant the disappearance of the Tolowa. The record and historical evidence clearly shows that non-rancheria Tolowa continued to live at Etchulet and other villages long after the rancherias were created. Those landed Tolowa were still self-coordinated.

98. "No reservation or rancheria is the abode of a particular traditional Tolowa town or community, but is the result of aggregation of survivors of town massacres, removal, and reorganization on pieces of land the United States held in trust for them with the geographic bound of Tolowa aboriginal land base." Part II, Genealogy, of the Nation's original petition, pages 36-37; see further discussion, with citation to evidence following to page 42.

99. Recognizing splinter groups at the rancherias and denying recognition to the sovereign body turns defendants' own regulations on their head.

100. Tolowa Nation provided the BIA and the hearing officer with legal history satisfying 25 CFR §83.11(d)(4), that there is "new evidence" or "reasonable alternative interpretations" favoring recognition.

101. The history of the rancherias, their termination and reinstitution, is of the creation of lands purchased and held in trust, which eventually, but not until 1983—if at all—resulted in federal recognition of a "tribe-like" status.

102. That history certainly does not support a conclusion that there was no continuous existence of the Tolowa as an entity tied back to pre-colonial times, which was the basis of the BIA and administrative hearing decisions.

103. Defendants therefor failed to apply proper legal standards, both substantively and procedurally, and incorrectly interpreted the applicable rules and regulations in reaching the decision.

SECOND CLAIM FOR RELIEF

DENIAL OF RECOGNITION WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION

(5 USC §706)

104. Plaintiffs incorporate all previous allegations as if fully set forth, and for a claim for relief, allege as follows:

105. Under 5 USC §706(2)(A) of the Administrative Procedures Act, the Court will review an agency decision for whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

106. Defendants arbitrarily and capriciously cleaved to a fundamental error: that the Tolowa people were transformed as a people to the rancherias.

107. The BIA acted arbitrarily and capriciously and abused its discretion by failing to accord the evidence its proper weight when it disregarded the "reasonable likelihood" standard mandated by its Regulations by resolving all doubts against the Nation's petition.

108. Defendants' insistence that the Smith River and Elk Valley rancherias supplanted the independent Tolowa who continued at Lake Earl to within memory of living Tolowa has no basis in fact.

109. The BIA also evaluated and discounted each piece of evidence standing alone, without properly considering the record as a whole.

110. Plaintiffs seek the Court's declaration that the defendants failed to apply the correct standard of proof and violated their own regulations, and that the defendants' Final Determination against acknowledgment was arbitrary, capricious, an abuse of discretion and not in accordance with law.

THIRD CLAIM FOR RELIEF

DECLARATORY RELIEF

(28 USC §§2201, 2202)

111. Plaintiffs incorporate all previous allegations as if fully set forth, and for a claim for relief, allege as follows:

112. Lacking other remedy, plaintiffs request that the Court declare the rights and legal relations of the parties to the controversy pled here and order any further necessary or proper relief.

IV. PRAYER

Wherefore plaintiff Tolowa Nation respectfully prays for judgment granting it relief as follows:

1. Reverse the Final Determination and declare that the Department of the Interior has unlawfully failed to include the Tolowa Nation on the list of federally recognized tribes published in the Federal Register and that the Tolowa Nation be granted status of an Indian tribe recognized by the United States;

2. Pursuant to 5 USC §706(1), the Tolowa Nation respectfully requests that this Court grant the Final Determination and vacate the February 18, 2016 Hearing Board decision affirming the Final Determination;

3. Enjoin the defendants from withholding from the Tolowa Nation the benefits, services and protection the Department provides other federally recognized tribes and direct the defendants to place the Tolowa Nation on the Department's list of federally recognized tribes published annually in the Federal Register;

4. In the alternative, pursuant to 5 USC §706(2), the Nation respectfully requests that this Court grant its appeal and set aside the Final Determination denying recognition. The Nation further requests that this Court retain control over the Nation's petition or refer the matter to a Magistrate Judge or a Special Master to determine whether the Tolowa Nation is a federally recognized tribe. This relief is warranted based on the evidence that the BIA's decision-making process is manifestly arbitrary and unfair, lacking in fundamental due process protections, and that any review would be tainted by the staff's interest in protecting its prior conclusion. If the Final Determination is merely remanded the Department of the Interior and the OFA, it is likely that the Tolowa Nation's rights to due process will be violated again.

5. Order such other legal or equitable relief as is necessary to protect the rights declared by this Court.

DATE: November 7, 2017

KELLY T. SMITH
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TOLOWA NATION