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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TOLOWA NATION, Plaintiff, v. UNITED STATES OF AMERICA; UNITED STATES BUREAU OF INDIAN AFFAIRS; RYAN ZINKE, Secretary of the Interior; TARA MACLEAN SWEENEY[1], Assistant Secretary - Indian Affairs, Defendant.	Case No. 17-cv-6478 RS DEFENDANTS' NOTICE OF MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT; DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Hearing Date: December 20, 2018 Hearing Time: 1:30 p.m. Courtroom: 3 Honorable Richard Seeborg

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Assistant Secretary Sweeney is automatically substituted for her predecessor in office.

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NOTICE OF MOTION

TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that, on Thursday, December 20, 2018, at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 3, 17th floor, 450 Golden Gate Avenue, San Francisco, California, the Honorable Richard Seeborg presiding, Defendants United States of America, United States Bureau of Indian Affairs, Interior Secretary Ryan Zinke, and Assistant Secretary – Indian Affairs Tara MacLean Sweeney will appear and move the Court for an order granting judgment in Defendants' favor pursuant to Rule 56(a) of the Federal Rules of Civil Procedure.

RELIEF SOUGHT BY DEFENDANT

Defendants move for judgment in their favor on all claims in the Complaint.

ISSUE TO BE DETERMINED

Whether the decision of the Assistant Secretary – Indian Affairs to deny Plaintiff's Petition for Federal Acknowledgment as an Indian Tribe was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 30, 2014, the Assistant Secretary-Indian Affairs ("Assistant Secretary" or "AS-IA") issued a Final Determination ("FD") denying the Plaintiff Tolowa Nation's ("Plaintiff" or "petitioner") petition for acknowledgment as an Indian tribe under the federal acknowledgment regulations. 25 C.F.R. Part 83 (1994). The Assistant Secretary concluded that the petitioner did not demonstrate that "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from first sustained contact with non-Indians until the present." 25 C.F.R. § 83.7(b).

The Assistant Secretary's decision was the result of a studied and thorough consideration of the totality of the evidence. The decision is extensively documented, and the administrative record fully supports the decision. Accordingly, Defendants are entitled to summary judgment regarding Plaintiff's challenge to the Final Determination brought pursuant to the Administrative Procedure Act ("APA").

II. BACKGROUND

A. Federal Acknowledgment Process

In the nineteenth century, Congress delegated to the Executive Branch the authority to manage Indian affairs and authority to prescribe regulations to carry out the various acts relating to Indian affairs. 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457. Pursuant to these authorities, the Department of the Interior ("the Department") promulgated regulations in 1978 governing the process through which entities could gain federal acknowledgment as an Indian tribe and revised the regulations in 1994.[2] *See generally* 25 C.F.R. Part 83 ("Part 83").[3] Implemented by the Department's Office of Federal Acknowledgment ("OFA"), Part 83 regulations establish "uniform standards and procedures" to determine what entities are Indian tribes. *Miami Nation of Indians of Indiana, Inc., v. Babbitt*, 887 F. Supp. 1158, 1167 (N.D. Ind. 1995).

The process is initiated when a group petitions to be acknowledged as an Indian tribe. 25 C.F.R. § 83.4. The group must submit detailed evidence demonstrating that it meets seven mandatory criteria, which are detailed in 25 C.F.R. § 83.7(a)–(g). Failure to meet any one of the criteria will result in a determination that the group is not entitled to a government-to-government relationship with the United States. 25 C.F.R. §§ 83.6(c), 83.10(m).[4] The petitioner bears the burden of providing evidence to meet the criteria; the Department is not responsible for the actual research for the petitioner. 25 C.F.R. §§ 83.5(c), 83.6(d). A criterion is considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. 25 C.F.R. § 83.6(d). A petitioner will not

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[2] Further revisions of the regulations became effective July 31, 2015. 80 Fed. Reg. 37,862 (July 1, 2015). Citations in this brief are to the 1994 regulations, which are applicable to the January 30, 2014 Final Determination to deny federal acknowledgment to Plaintiff. 79 Fed. Reg. 4953. The Department lists the 1994 regulations online at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/admindocs/25CFRPart83_1994_FinalRule.pdf.

[3] Prior to enacting the Part 83 regulations, the United States "historically recognized tribes through treaties, statutes, and executive orders." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008).

[4] Among other things, federal acknowledgment imbues an Indian tribe with a host of sovereign authorities over its members and its lands, entitles the tribe to sovereign immunity from suit, qualifies the tribe for a host of federal benefits, etc.

satisfy a criterion if the available evidence demonstrates that it does not meet that criterion or if the available evidence is too limited to establish that it meets the criterion. *Id.*

When evaluating a petition, OFA researchers generally work in a team of three: a historian, a genealogist, and an anthropologist.[5] The members of this team prepare a Proposed Finding that sets forth the evidence submitted by the petitioner and third parties, as well as independent verification research the Department conducted during its evaluation. The team members' work is subject to an extensive peer review within the OFA, as well as review by the Department's Office of the Solicitor for legal sufficiency.

After a review of the summary and the evidence, the Assistant Secretary issues a proposed finding based on the administrative record, which is published in the Federal Register. 25 C.F.R. § 83.10(h). The petitioner and third parties are then given time to comment on the proposed finding and submit additional documentation. 25 C.F.R. §§ 83.10(i), 83.10(k). During this time, OFA also provides technical assistance to the group, either informally or through an on-the-record meeting, and makes available any records used for the proposed finding. 25 C.F.R. § 83.10(j). Following the comment period, the petitioner has a period to respond to the comments submitted. 25 C.F.R. § 83.10(k). OFA then evaluates all the evidence and arguments in the record and prepares a summary under the criteria, which is also subjected to peer and Solicitor Office review. 25 C.F.R. § 83.10(l)(2). The Assistant Secretary then issues a final determination either acknowledging the group as an Indian tribe or denying the petition. 25 C.F.R. § 83.10(l)(2).

A petitioner or interested party may file a request for reconsideration within ninety days of the Final Determination with the Interior Board of Indian Appeals ("IBIA"), an administrative tribunal within the Department's Office of Hearings and Appeals that is independent of the Assistant Secretary. 25 C.F.R. § 83.11. Accordingly, the final determination is not final and effective until ninety days after its notice is published in the Federal Register or the action regarding reconsideration is complete. 25 C.F.R. §§ 83.10(l)(4), 83.11(h).

[5] On July 27, 2003, the Department reorganized the Office of the AS-IA and the Branch of Acknowledgment and Research was taken out of BIA, renamed OFA, and placed under AS-IA. It is the Assistant Secretary who is the ultimate decision maker, not the BIA.

B. Tribal Acknowledgment

A determination that a petitioner is an Indian tribe and merits federal acknowledgment or federal recognition establishes a government-to-government relationship between it and the United States. A positive determination under the regulations means that the group has retained inherent sovereign authority independent of the State in which it is located and independent of the United States. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Under the acknowledgment regulations, a collection of persons of Indian ancestry is not a tribe *unless* they and their ancestors are part of a continuously existing social and political community from historical times to the present. 25 C.F.R. § 83.3(a), (c). As stated in the preamble to the 1994 regulations, "the essential requirement for acknowledgment is continuity of tribal existence . . . simple demonstration of ancestry is not sufficient." 59 Fed. Reg. 9280, 9282 (Feb. 25, 1994).

C. Factual and Procedural Background

1. Early History of Tolowa Indians, 1853-1908

In the mid-nineteenth century, non-Indian settlers encountered Tolowa Indians living in several villages in the Smith River area of what is now Del Norte County, California. Proposed Finding ("PF") at 6, ADD-PFD-V001-D0002 at 12. The Tolowa Indians were described as speaking an Athabascan dialect linguistically separate from their Yurok and Klamath neighbors. *Id.* They existed on a yearly subsistence cycle of sea lion hunting in the spring, smelt fishing in the early summer, salmon fishing in the late summer, gathering of acorns and other plants in the fall, and hunting in the winter. *Id.* at 12, ADD-PFD-V001-D0002 at 18.

In 1855, the Federal government made efforts to relocate Indians from the mouth of the Smith River to the Klamath Reservation, though the records are insufficient to determine which villages were removed to the reservation. *Id*. at 6, ADD-PFD-V001-D0002 at 12. These efforts proved largely unsuccessful, as many of these Indians left the reservation to return to their homes. The threat of violence against the Indians by white settlers through the 1850s led the Indian Agents[6] and military to

[6] "Indian agents" were appointed by the Commissioner to act as local liaisons between tribes and the United States. *See, e.g.*, *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1099 (9th Cir. 1986).

remove the Indians from the mouth of the Smith River repeatedly. *Id*. at 6-7, ADD-PFD-V001-D0002 at 12-13. These efforts ceased at the latest in 1861, when a flood destroyed the Klamath Reservation.

In 1866, Indian Agent William Bryson described a reservation at Smith River, but specified that it held only Yurok and Wylackie people. The same agent described in detail the location and numbers of off-reservation Indians living in the same area their fathers had lived fifty years earlier. *Id*. at 7, ADD-PFD-V001-D0002 at 13. Among the off-reservation Indians, Bryson identified 300 living at Smith River, 200 living at Burnt Ranch, 150 living at Lagoon, and 150 living in Crescent City. These locations corresponded with the village identifications made by Federal officials when first contact was made in the 1850s. *Id.* Bryson observed that each village was under the control of a subordinate chief subject to the will of a Grand Tyhee named Guylish who lived at the mouth of the Smith River. *Id.* As late as 1913, Indians continued to live either on or near their historical villages, often working as wage laborers in nearby Crescent City. PF at 8, ADD-PFD-V001-D0002 at 14.

Historian Stephen Powers, who traveled throughout California in the 1870s writing ethnographic articles on many Indians he encountered, discusses, in his recollection of 1877, three bands led by headmen, with no reference to a single leader or unifying political authority. PF at 8, 10, ADD-PFD-V001-D0002 at 14, 16. Powers observed that the bands had the coast partitioned off among them and resisted any attempt at incursion. PF at 8, ADD-PFD-V001-D0002 at 14.

Anthropologist Philip Drucker wrote about Tolowa Indians in 1937. Based upon information from people he interviewed, Mr. Drucker stated that, in the 1880s, the Tolowa Indians in the area lived in a number of villages, each of which "was an almost completely independent economic unit, surrounded by a continuous area from which subsistence could be obtained." *Id*.; Drucker 1937, 226, PFR-APF-V016-D0005 at 11. He identified the villages as Howonquet, located on the north side of the mouth of the Smith River; Yontocket (Burnt Ranch), located on the south side of the mouth of the Smith River; Nelechundun, a fishing site located further up the Smith River; Etchulet, on the west side of Lake Earl; Mestleten, located on the shore southeast of Crescent City; and Tataten, located to the east of Lake Earl on land where Crescent City is currently located. *Id.*

In 1907, Special Agent Charles Kelsey listed specific individual Indians residing on the islands at the mouth of the Smith River, at the nearby fishing ranch, and at Yontockett, Howonquet, Lake Earl, and Crescent City, including Athabascan-speaking seasonal workers at the Smith River fishery. Kelsey 2/2/1907, PFR-APF-V006-D0010 at 1; PF at 9, ADD-PFD-V001-D0002 at 15. By 1913, informants told Special Agent John Terrell that the Indians living around Lake Earl had moved away from the lake, with most relocating to Crescent City to work in the saw mill or on nearby ranches. Terrell 6/22/1915, 1, PFR-HPF-V001-D0053 at 1; PF at 9, ADD-PFD-V001-D0002 at 15.

In 1906 and 1908, the United States acquired land for the Del Norte County Indians,[7] under the authority of the Indian Appropriation Acts, establishing what would become the Smith River Rancheria and the Elk Valley Rancheria. *In re Federal Acknowledgment of the Tolowa Nation*, 62 IBIA 187, 189 (Feb. 18, 2016), ADD-IBD-V001-D0001 at 1. Today, the Indian communities at Smith River Rancheria and Elk Valley Rancheria are federally recognized Indian tribes.

2. Plaintiff's Petition for Federal Acknowledgment

On September 11, 1982, the "Tolowa-Tututni Tribe of Indians"[8] submitted a petition for federal acknowledgment. PF at 2, ADD-PFD-V001-D0002 at 18; ACR-PFD-V001-D0091 at 1. The Department acknowledged receipt of the material from Plaintiff and initiated an interactive process with Plaintiff to identify, solicit, and provide evidence relevant to the petition. PF at 5, ADD-PFD-V001-D0002 at 11. That process is memorialized in letters back-and-forth between the parties spanning from 1983 to 1999 and set forth in the Administrative Record at ACR-PFD-V001-D0065 at 1; ACR-PFD-V001-D0088 at 1; ACR-PFD-V001-D0081 at 1; ACR-PFD-V001-D0064 at 1; PFR-MPF-V001-D0212 at 1; ACR-PFD-V001-D0060 at 1; ACR-PFD-V002-D0055 at 1; ACR-PFD-V001-D0032 at 1; ACR-PFD-V001-D0028 at 1; ACR-PFD-V002-D0057 at 1; ACR-PFD-V002-D0058 at 1; ACR-PFD-V001-D0015 at 1; TNC-PFD-V008-D0002 at 1. During this process, the Department received a document entitled: "Resolution No. 94-41 Resolving that the Tolowa Nation Federal Acknowledgment petition be

[7] Membership of the Rancherias were comprised of Tolowa Indians living in the area.

[8] In 1984, the Tolowa-Tututni Indians changed their name to Tolowa Nation. PF at 3. Defendants' use of the name(s) selected by Plaintiff to describe itself does not constitute an acknowledgment or acceptance of Plaintiff as an Indian tribe.

disallowed and be found in contempt of the greater Tolowa tribe. Crescent City, CA." TNC-PFD-V008-D0002 at 1. The Department responded that this interested party would be notified of any change in the status of the petition. ACR-PFD-V001-D0038 at 1.

By letter of July 26, 1996, Plaintiff requested that its petition be placed on the list of petitions ready for active consideration. ACR-PFD-V001-D002 at 1. The Department placed Plaintiff's petition on that list effective July 30, 1996. PF at 4, ADD-PFD-V001-D0002 at 10. On August 3, 2009, the Department notified Plaintiff that its petition had been placed on active consideration and asked for an updated membership list. ACR-PFD-V002-D0071 at 1. Plaintiff responded with an updated membership list, selected meeting minutes 1996-2009, a packet labeled "Tolowa Nation General Activities 1996-2009," and a packet labeled "Nation Resources Planning and Interpretation Class." ACR-PFD-V002-D0084 at 1.

3. Decision Not to Acknowledge the Petitioner as an Indian Tribe

After conducting exhaustive research into Plaintiff's Petition, the Department ultimately concluded that there was insufficient evidence to meet one of the criteria. The Department decided to issue a decision based on that sole criterion, rather than evaluating Plaintiff's ability to meet the remaining six criteria. 73 Fed. Reg. 30146, 30148 (May 23, 2008) (AS-IA guidance directive encouraging OFA to do findings on only one criterion if such criterion is dispositive against acknowledgment), PFR-APF-V033-D0087 at 1, 3. The Department subsequently prepared and issued the Summary under the Criteria and Evidence for the Proposed Finding against Acknowledgment of the Tolowa Nation, dated November 18, 2010. ADD-PFD-V001-D0002 at 1.

At its core, the Proposed Finding concluded that the administrative record associated with Plaintiff's Petition was insufficient to demonstrate that a "predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b). In relevant part, the Proposed Finding noted that:

(1) "[E]vidence shows the present petitioner to be a group of activists whose main purpose is to promote the revitalization of their shared language and culture, facilitate the provision of educational and health services to Indians in Del Norte County . . . . While they interact with leaders in the Smith

River and Elk Valley Rancherias, evidence did not show that the rest of the petitioner membership is involved in these activities, maintains relations outside the formal structure, or that the petitioner is a distinct community from the Smith River and Elk Valley Rancherias."

(2) A comparison of Plaintiff's membership lists over time shows high variability and turnover, rather than the continuity expected by the regulations. "Such high variability or turnover is indicative of individuals or families recruited by the leadership from a population which has little other involvement in the [Plaintiff's] organization."

(3) While many of the Plaintiff's leadership, and their ancestors, were active in the Del Norte Indian Welfare Association ("DNIWA"), the organization through which Plaintiff claims to have sustained its communal life, DNIWA's membership included Rancheria members as well. Thus, the DNIWA was not a community of the petitioner and its ancestors that was distinct from other Tolowa communities. PF at 41-42, ADD-PFD-V001-D0002 at 47-48.

The Department published a notice of the Proposed Finding and request for comments on November 24, 2010. S*ee* 75 Fed. Reg. 71732, 71732-33, ACR-PFD-V002-D0001 at 1. There followed a period in which the petitioner and other parties could submit comments on the Proposed Finding. The initial comment period ended May 23, 2011. At the petitioner's request, the comment period was extended 180 days to November 21, 2011. Fleming 5/20/2011, ACR-FDD-V001-D0032 at 2. The petitioner submitted 267 pages of documents, and two third parties submitted brief comments. The petitioner submitted no response to these third-party comments. On January 30, 2014, the Assistant Secretary published a Notice of Final Determination without a separate report or other summary. 79 Fed. Reg. 4953;[9] ADD-FDD-V001-D0001 at 1. The notice provided that the comments and documents submitted in response to the Proposed Finding did "not provide evidence that changes the analysis or conclusions" of the Proposed Finding that the petitioner's ancestors did not form a distinct community. *Id.* at 4954, ADD-FDD-V001-D0001 at 2. Following issuance of the Final Determination, Plaintiff filed

[9] The Final Determination incorporated the Proposed Finding by reference with only a minimal amount of additional discussion or findings. Unless otherwise indicated, Defendants will therefore generally refer to the Proposed Finding in discussing the sufficiency of the Department's analysis as a matter of law, with the understanding that the Final Determination is technically the final agency action properly before this Court.

a timely request for reconsideration with the IBIA. 62 IBIA 187, ADD-IBD-V001-D0001 at 1. The decision became final on February 18, 2016, when the IBIA affirmed the Assistant Secretary's Final Determination. 62 IBIA at 199, ADD-IBD-V001-D0001 at 13.

III. ARGUMENT

Plaintiff brings this action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, seeking that this Court reverse the Final Determination, require Interior to recognize Plaintiff as an Indian tribe, and, in the alternative, that the Court set aside the Final Determination and refer the matter to a Magistrate Judge or Special Master to determine whether Plaintiff should be recognized as an Indian tribe. Plaintiff's Brief at 31-32. However, the Plaintiff fails to demonstrate that the Final Decision was arbitrary or capricious within the meaning of the APA. Accordingly, Plaintiff's claims fail, and Defendants are entitled to summary judgment.

A. Summary Judgment Is Appropriate in this APA Record Review Case

Summary judgment is appropriate when "there is no genuine issue as to any material fact and [ ] the movant is entitled to a judgment as a matter of law." *See* FED. R. CIV. P. 56(c)(2); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In conducting judicial review under the APA, the Court need not and, indeed, may not, "find" underlying facts; thus, there are no material facts essential to the Court's resolution of this action. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) (finding that "this case involves review of a final agency determination under the [APA]; therefore, resolution of this matter does not require fact finding on behalf of this court"). Accordingly, summary judgment is the appropriate vehicle to resolve this case. If the Court were to conclude from a review of the administrative record that the Assistant Secretary's decision was arbitrary or capricious, the remedy would be to remand the matter to the agency for reconsideration. *Vt. Yankee Nuclear Power Corp. v. Natural Res.s Def. Council*, 435 U.S. 519, 549 (1978); *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973). The remedies sought by Plaintiff in its complaint are unavailable. 5 U.S.C. § 706(2).

B. Standard of Review

The APA directs the Court to uphold the Assistant Secretary's Final Determination unless it is deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiff bears the burden of showing that the Assistant Secretary acted arbitrarily in reaching the final determination. *See George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009), *citing City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002). Although the inquiry must be thorough, the standard of review is narrow and highly deferential. The Assistant Secretary's decision is "entitled to a presumption of regularity," and the Court cannot substitute its judgment for that of the agency decision maker. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2104), *citing Citizens to Preserve Overton Part, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated in part on other grounds as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977). The agency need only articulate a rational connection between the facts found and the conclusions made. *Or. Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). The Court must determine whether:

> The agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). *See also George*, 577 F.3d at 1010; *Miami Nation of Indians of Ind. v. Babbitt*, 112 F. Supp. 2d 742, 751 (N.D. Ind. 2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

When adjudicating an entity's alleged status as a federally recognized Indian tribe, the Supreme Court has held that "it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same." *United States v. Holliday*, 70 U.S. 407, 419 (1865), *cited with approval in United States v. Sandoval*, 231 U.S. 28, 47 (1913). Indeed, the Department has special expertise in the determination of acknowledgment of Indian tribes. *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138-39 (D.C. Cir. 1987) (noting that

"[r]egulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations" and deferring to the Department's "developed expertise in the area of tribal recognition"); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001). Accordingly, the Department's application of its expertise is entitled to particular deference.

An agency decision is also accorded an especially high level of deference where, as here, technical expertise informed the decision. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir. 2009), *citing Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989). The Court must also defer to the Department's interpretations of its own regulations unless clearly erroneous or inconsistent with their language. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations omitted); *Akootchook v. United States*, 271 F.3d 1160, 1167 (9th Cir. 2001).

As explained below, the Assistant Secretary's decision articulates a rational connection between the facts in the record and the conclusion that there is insufficient evidence to find that Plaintiff existed as a separate community of Tolowa. The Department did not act arbitrarily, capriciously, abuse its discretion, or act otherwise not in accordance with law.

C. The Assistant Secretary Applied the Correct Burden of Proof

The burden of proof for federal acknowledgment is set forth by regulation. "A criterion shall be considered met if the available evidence establishes *a reasonable likelihood of the validity of the facts* relating to that criterion." 25 C.F.R. § 83.6(d) (emphasis added). If there is "*insufficient evidence* that [a petitioner] meets one or more of the criteria" or "if the evidence available demonstrates that [a petitioner] does not meet one or more criteria," the petitioner may be denied acknowledgment. *Id.* (emphasis added). In other words, facts established through the "reasonable likelihood" standard are examined and weighed to determine whether a petitioner has sufficient evidence to meet a criterion.

25 C.F.R. § 83.7(b) requires that a predominant portion of the petitioning group comprises a *distinct community* and has existed as a community on a continuing basis from historical times to the present. 25 C.F.R. § 83.7(b) (emphasis added). Plaintiff claims that its burden is to show only that a "reasonable basis" exists to conclude that Plaintiff meets the requirement for continuous existence. Plaintiff's Memorandum of Points & Authorities in Support of Motion for Summary Judgment

("Plaintiff's Brief") at 24. The "reasonable likelihood" standard, set forth in the regulations, applies by its terms to establishing the validity of individual facts, not to the overall burden of proof. The Department applied the correct standard; to wit, whether the record as a whole contains sufficient evidence to satisfy the criterion at 25 C.F.R. § 83.7(b). Arguments that the Department erred in using the sufficient evidence standard are undercut by the plain language of the regulations, requiring the Department to determine whether evidence in the record is sufficient or insufficient to establish whether a criterion has been met. *See* 25 C.F.R. § 83.6(d). Lastly, the Department is not examining the evidence to determine whether Tolowa Indians exist; it is examining the evidence to determine whether it is sufficient to show that Plaintiff comprises a distinct and continuous *community* of Tolowa, as defined by regulation. Plaintiffs have failed to demonstrate that the Department misapplied the regulatory evidentiary standard in evaluating the evidence in the record.

D. The Assistant Secretary Properly Concluded That Plaintiff Did Not Meet Criterion 25 C.F.R. § 83.7(b)

As noted above, 25 C.F.R. § 83.7(b) requires that a predominant portion of the petitioning group comprises a distinct community and has existed as a community on a continuing basis from historical times to the present. 25 C.F.R. § 83.7(b). Examples of forms of evidence that in combination may demonstrate this criterion include significant rates of marriage within the group, significant social relationships connecting individual members, and significant rates of informal social interaction broadly among the members of the group. 25 C.F.R. § 83.7(b)(1). Other evidence, such as fifty percent of the members residing in a geographic concentration within an area exclusively or almost exclusively composed of members of the group, or fifty percent of the members maintaining distinct cultural patterns, such as language, or kinship organization, is sufficient in itself to demonstrate community for a given time period. 25 C.F.R. § 83.7(b)(2). The regulations also take into account historical situations and time periods in which evidence might by demonstrably limited or not available, by requiring the existence of community to be demonstrated on a substantially continuous basis rather than at every point in time. 25 C.F.R. § 83.6(e).

"Continuously or continuous means extending from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption." 25 C.F.R. § 83.1. "Community" is defined at 25 C.F.R. § 83.1 to mean:

> Any group of people which can demonstrate that consistent interactions and significant social relationships exist *within its membership* and that *its members are differentiated from and identified as distinct from nonmembers.* Community must be understood in the context of the history, geography, culture and social organization of the group.

(Emphasis added.)

At the outset, in its complaint and motion, Plaintiff refers generally to the presence of Tolowa Indians in Del Norte County, California as proof that it satisfies 25 C.F.R. § 83.7(b). Complaint at ¶ 25, Plaintiff's Brief at 3. The Department does not dispute that Tolowa people have been present in Del Norte County from the time of sustained first contact to the present. *See generally* PF at 20-40; ADD-PFD-V001-D0002 at 26-46. That fact, however, does not speak to criterion 25 C.F.R. § 83.7(b), which requires that Plaintiff show that it existed as a distinct community differentiated, and identified as distinct, from others who are not members of its community as it evolved over time from first sustained contact to the present.. 25 C.F.R. § 83.1 (defining "community"). In other words, it is not enough for the Plaintiff merely to show the general existence of Tolowa people in the relevant geographic area; rather, the Plaintiff must provide sufficient evidence to demonstrate that it exists as a distinct community now and has existed as a community on a continuing basis from the 1850s to the present day. Furthermore, because there were other Tolowa Indians in the area who were part of Smith River Rancheria or Elk Valley Rancheria, or whose descendants became part of Smith River Rancheria or Elk Valley Rancheria, the petitioner must show that it or its ancestors formed a community distinct from these other Tolowas.

An examination of the Proposed Finding demonstrates that OFA examined the record as a whole, searching each time period (1853-1868, 1869-1902, 1903-1933, 1934-1949, 1950-1982, and 1983-2010) for evidence of Plaintiff's continuous existence as a "distinct community." *See* PF at 20-40, ADD-PFD-V001-D0002 at 26-46. As the Department concluded, the evidence did not show that the Plaintiff or its

ancestors existed in a "distinct community" at any period from first sustained contact in the 1850s until the time of the finding in 2010. PF at 42; ADD-PFD-V001-D0002 at 48.

For example, during the time period extending from 1869-1902, OFA researchers examined evidence that included eyewitness recollections from field notes taken by anthropologist Phillip Drucker in 1934 relating to the 1880-1890 time frame; reports of Agent Charles E. Kelsey, from 1907 to 1913, relating to Indians who had lived consistently near the mouth of the Smith River from around 1870 to 1907; a monograph by Cora Dubois, originally published in 1939, concerning the Ghost Dance in Del Norte County during the 1870s; U.S. Census information from 1870-1880; and Government Land Office records. From these records, the petitioner did not demonstrate that there was a distinct community of Plaintiff's ancestors existing or evolving at this time. PF at 22, ADD-PFD-V001-D0002 at 28; Phillip Drucker 1934, PFR-HPF-V005-D0106 at 1; Charles E. Kelsey 2/2/1907, PFR-APF-V006-D0009 at 1; Kelsey 4/25/1907, PFR-APF-V006-D0012 at 1; Kelsey 5/11/1907, PFR-HPF-V004-D0036 at 1; Kelsey 5/24/1907, PFR-APF-V003-D0015 at 2; Kelsey 7/5/1907, PFR-HPF-V004-D0026 at 1; Kelsey 4/10/1908, PFR-HPF-V004-D0049 at 1; Kelsey 9/15/1908, PFR-HPF-V004-D0043 at 1; Kelsey 10/26/1908, PFR-HPF-V004-D0040 at 1; Kelsey 9/30/1909, PFR-HPF-V004-D0018 at 1; Kelsey 12/28/1912, PFR-APF-V004-D0015 at 1; Kelsey 7/25/1913, PFR-APF-V004-D0015 at 1; Kelsey 10/4/1913, PFR-HPF-V005-D0001 at 2; Cora Dubois 1939 (2007), PFR-APF-V016-D0006 at 1.

Anthropologist Phillip Drucker's eyewitness, George White, identified people as living in semi-autonomous villages. Of the people listed, there are only two lineal ancestors from Plaintiff's 2009 membership roll: Fred Charley and Willie Pete. Fred Charley was listed as living in a village called Mestleten, next to Crescent City, and Willie Pete was listed as living in Tataten village. George White's list included several individuals living at the lagoon (presumably what is now called Lake Earl), but none is a known ancestor of Plaintiff's members. PF at 22; ADD-PFD-V001-D0002 at 28; Phillip Drucker 1934, PFR-HPF-V005-D0106 at 1. The eyewitness noted examples of shared sea lion hunting, the settlement of disputes over fishing sites along the Smith River, marriage practices, and revenge killing. ADD-PFD-V001-D0002 at 28. The finding acknowledges that the evidence demonstrates that two of Plaintiff's ancestors were involved in activities indicative of social community, while noting that

the evidence does not show that the Plaintiff's ancestors constituted an entity distinct from other Tolowa Indians, such as those who became part of Smith Valley Rancheria or Elk Valley Rancheria. PF at 22-23; ADD-PFD-V001-D0002 at 28-29.

Special Agent Charles Kelsey's account of the Fish Ranch at Smith River between 1906 and 1909 included mention of John and Sam Lopez and Louis Whipple, who were ancestors of some of Plaintiff's members from its 1983 membership list. However, there were no descendants of these men on the 2009 membership list. PF at 23, ADD-PFD-V001-D0002 at 29; Kelsey 9/15/1908, PFR-HPF-V004-D0043 1; Kelsey 9/30/1909, PFR-HPF-V004-D0018 at 1.

The 1870 Federal census showed Winchuck Joe, from Lagoon near Lake Earl, and Longhair Bob, from Smith River, both of whom are lineal ancestors of Plaintiff's. However, the census information contains no information indicative of "community," as that term is defined by regulation. PF at 24, ADD-PFD-V001-D0002 at 30.

For the time period of 1903-1933, OFA examined petitioner's narrative and underlying documentation, including census application data from 1933, anthropological studies, and modern-day oral accounts regarding the formation of the Smith River and Elk Valley Rancherias, as well as additional information such as correspondence by Indian Agents.[10] ADD-PFD-V001-D0002 at 30. According to the Indian Agent's documentation, there were Tolowa Indians involved with the formation of the Smith River Rancheria during this time period, but there is little or no evidence of a connection between the Smith River Tolowa and Plaintiff's known ancestors at that time. The 1920 census shows that two families, which are ancestors of 26% of Plaintiff's members, were living in Crescent City with Indian families that are ancestors of families in Elk Valley Rancheria. Those two families ultimately enrolled in the Elk Valley Rancheria. Another family, ancestral to 36% of Plaintiff's members, resided

[10] Smith River Rancheria and the Elk Valley Rancheria are both currently federally recognized tribes. 79 Fed. Reg. 4748, 4750 (Jan. 29, 2014). The tribes were terminated by the Federal Government in the 1950s; however, they were restored in 1983 as part of a settlement agreement of the *Tillie Hardwick* litigation. Originally filed in 1979 in the Northern District of California, *Tillie Hardwick, et al. v. United States of America*, No. C-79-170-SW, was a class action made up of individuals or heirs from thirty-four terminated Rancherias. In that case, the plaintiffs sought to have their federal recognition and entitlement to federal Indian benefits restored. Smith River and Elk Valley were among the seventeen tribes restored under the 1983 settlement agreement.

at Lake Earl. PF at 25, ADD-PFD-V001-D0002 at 31. Communications regarding the purchase of the Cutler-Griffin Tract of land provide evidence of social interaction, indicative of community, around the mouth of the Smith River. However, most of the Indians involved in this process became members of the Smith River Rancheria, and none is a direct ancestor of Plaintiff's members. PF at 25, ADD-PFD-V001-D0002 at 31; 1928 Applications for 1933 Census Roll, PFR-APF-V026-D0001 at 1; Kelsey 2/2/1907, PFR-APF-V006-D0009 at 1; Lopez 4/23/1907, PFR-APF-V004-D0008 at 1; Kyselka 5/12/1908, PFR-HPF-V004-D0047 at 1; Kelsey 9/30/1909, PFR-HPF-V004-D0018 at 1; Executive Order 1495 3/11/1912, PFR-APF-V008-D0010 at 1. The record demonstrates that the Department carefully evaluated the evidence as a whole and found insufficient evidence of Plaintiff as a distinct historical community among the Tolowa.[11]

The evidence also fails to support a theory that the Tolowa were a single unified community from which the Rancherias split off, leaving Plaintiff as the remainder. *See* Plaintiff's Brief at 29-31. *See also* PF at 27-40, ADD-PFD-V001-D0002 at 33-46. Although the Plaintiff claims its ancestors remained at Lake Earl and were located in Crescent City, the Department found no evidence of a community at either location; rather, the petitioner's ancestors were noted to be in different locations. *See* PF at 25-27, ADD-PFD-V001-D0002 at 31-33.

The Plaintiff also claims that the DNIWA existed as its tribal organization from its origin in the 1930s through the 1960s, yet the petitioner provided no documentation as to DNIWA's formation and based its claims on modern-day oral accounts. *See* PF at 27, ADD-PFD-V001-D0002 at 33. OFA's research revealed that the active members of DNIWA included both ancestors of Plaintiff and a significant number of persons from the Elk Valley and Smith River Rancherias. *See* PF at 31-32, ADD-PFD-V001-D0002 at 37-38. For example, there is evidence that, during the implementation of Federal

[11] Plaintiff takes issue with the Department's repeated requests that Plaintiff provide evidence of how its group was distinct from the Tolowa on the Elk Valley and Smith River Rancherias. *See* Plaintiff's Brief at 25, 27, 28**.** This is not an assumption by the Department that the Rancherias were the Tolowa tribe. Rather, OFA had a regulatory obligation to examine whether Plaintiff could show that it evolved as a distinct social community of Indians since the 1850s or separated from another Indian tribe into a distinct community prior to recent times. The Department concluded that there was insufficient evidence that either occurred.

termination of Elk Valley Rancheria and Smith River Rancheria, the BIA declined DNIWA's offer to represent the Rancherias and considered DNIWA an advocacy organization, not an Indian tribal entity. *See* PF at 32, ADD-PFD-V001-D0002 at 38. After Smith River Rancheria established the Howonquet Indian Council, the DNIWA made clear the boundary regarding political influence between the two, and the evidence indicates that DNIWA members considered the organizations and their functions separate. *See* PF at 33, ADD-PFD-V001-D0002 at 39. The existence and function of DNIWA does not support a finding that, through it, Plaintiff constituted a distinct community, or that Plaintiff evolved somehow from DNIWA into a distinct community. PF at 32-35, 41-42, ADD-PFD-V001-D0002 at 38-41, 47-48.

In its complaint, the Plaintiff objects to the Department's request for additional information clarifying DNIWA's status as it related to the Plaintiff. Plaintiff's Brief at 26. The Plaintiff alleges the Department possessed evidence of a band distinct from the Rancherias, and, therefore, the request for additional evidence exceeded the Part 83 regulations. *Id*. The Plaintiff fails to identify the specific evidence that allegedly supports its claim. In the Proposed Finding, the Department discusses historian Stephen Powers' 1870 publication, *Tribes of California*, in which he observed "three tribes or bands of Indians" in the area. ADD-PFD-V001-D0002 at 14, 16. However, such observations would be useful only in understanding the history of Tolowa Indians in the 1870s, but would not be useful for establishing the existence or distinctiveness of Indian communities several decades later.

It is important to note that Plaintiff's objection is to guidance from the Proposed Finding's analysis for the 1934-1949 period, that "'further documentation provided by the petitioner would be important to clarifying DNIWA's status during this time." The Proposed Finding's request is reasonable and proper because it is asking for clarification and suggesting guidance for the petitioner regarding the requirements of criterion 25 C.F.R. § 83.7(b).

OFA also examined Plaintiff's membership rolls for 1986, 1996 and 2009. PF at 38-41, ADD-PFD-V001-D0002 at 44-47; Membership List 1986, PFR-MPF-V004-D0004 at 1; Membership List 1996, PFR-MPF-V004-D0006 at 2; Membership List 2009, TNC-PFD-V009-D0003 at 1. During the decade between the 1986 and 1996 rolls, the Smith River Rancheria opened its membership, and many individuals left Plaintiff to join the Smith River Rancheria. However, the Department compared the two

membership rolls and determined that 176 individuals (52% of the 1986 roll) had neither remained with Plaintiff nor transferred to Smith River Rancheria. Of the 338 people on the original roll in 1986, only 94 (28% of the original roll) were on the list in 1996. OFA compared the 1996 roll to the 2009 roll and found that they had only 77 individuals in common (48 % of the 1996 list and 88% of the 2009 list). ADD-PFD-V001-D0002 at 44-47. Rather than showing continuity of membership, this shows a lack of stability in membership. From the Department's examination of the membership rolls and site interviews in 2010, it concluded in the Proposed Finding that the high variability "is indicative of individuals or families recruited by the leadership from a population which has little other involvement in the [Plaintiff's] organization." PF at 41, ADD-PFD-V001-D0002 at 47.

The Proposed Finding describes the lengthy and thorough evaluation undertaken by OFA following its own independent research and years of interactive engagement with Plaintiff in an effort to solicit or obtain all relevant evidence. While there is no question that Tolowa Indians have resided in Del Norte County during the entire time period at issue, 1853 to 2010, there is insufficient evidence to establish that Plaintiff's membership exists now as a community, and that its ancestors have existed as a distinct community, on a substantially continuous basis, at any point since 1853. The presence of Tolowa villages and/or Tolowa families in the same geographic region throughout the historical period does not give rise to a presumption that Plaintiff existed throughout the historical period as a distinct community. The Department recognizes these evidentiary shortcomings by concluding that there is insufficient evidence of Plaintiff's existence as a distinct community between first sustained contact in 1853 and the issuance of the Proposed Finding in 2010.

In *Amador County v. U.S. Dep't of the Interior*, 136 F. Supp. 3d 1193, 1213 (E.D. Cal. 2015), the District Court had before it an APA challenge principally concerning the purchase of land to be held in trust for the Ione Band of Miwok Indians ("Ione Band"). In contesting the land purchase, the defendant and defendant intervenor also challenged the Department's recognition of the Ione Band as an Indian tribe. Recognizing the limited nature of its role in reviewing that issue, the District Court stated:

> It is clearly beyond the scope of this Court's authority and expertise to conduct an independent investigation into the genealogy and political history supporting recognition of the Ione Band as a distinct tribe, and then to substitute that analysis for the BIA's. Rather, the Court's role is to ensure that the BIA made no 'clear error in judgment' that would render its action arbitrary and capricious.

Amador County v. U.S. Dep't of the Interior, 136 F. Supp. 3d 1193, 1213 (E.D. Cal. 2015), *citing The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008). With respect to the Department's determination that the Ione Band was a distinct tribe, the *Amador County* court noted that there was evidence in the record of political and genealogic overlap between the Ione Band and two other bands in the area during the 20th century. However, the court found that the Department was not arbitrary and capricious in its decision to recognize the Ione Band as a distinct tribe, because the record reflected that "the Department gave adequate consideration to this determination, including the possibility of genealogical and political overlap between groups." *Id.*

Plaintiff takes issue with the weight that the Department gave to certain evidence. *See, e.g*, Plaintiff's Brief at 26. Weighing evidence is within the Department's particular expertise and central to the Department's duty in determining the sufficiency of the evidence. *See James*, 824 F.2d at 1138-39. As discussed above, OFA has a team of three experts, a historian, a genealogist, and an anthropologist, evaluate each petition for acknowledgment. The Proposed Finding and the discussion above reflect that the Department considered the evidentiary record as a whole, and, in that process, employed its expertise to determine the relative reliability of various sources of information. The Department has "examine[d] the relevant data and articulate[d] a satisfactory explanation" for reaching the decision it reached. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43. Under the narrow standard of review applicable in this case, the Court must conclude that the Department's decision was not arbitrary or capricious. *See id.*

IV. CONCLUSION

The record fully supports the conclusion of the Assistant Secretary that there is insufficient evidence that Plaintiff exists as a distinct community of Tolowa and that it has so existed continuously since the first sustained contact between Tolowa and non-Indians in the 1850s. That decision was based

on a thorough and reasoned review of the evidentiary record and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Accordingly, Defendants request that the Court grant their motion for summary judgment and deny Plaintiff's motion.

Respectfully submitted,

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DATED: September 17, 2018

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