United States Department of the Interior

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

IN RE FEDERAL ACKNOWLEDGMENT OF THE TOLOWA NATION	)	Order Affirming Final Determination
	)	Docket No. IBIA 14-086
	)	February 18, 2016

The Tolowa Nation, Petitioner #85 (Petitioner), seeks reconsideration, pursuant to 25 C.F.R. § 83.11, of the Final Determination Against Federal Acknowledgment of the Tolowa Nation (Final Determination).[1] The Final Determination concluded that Petitioner is not entitled to be acknowledged as an Indian tribe within the meaning of Federal law because it did not meet the requirements of 25 C.F.R. § 83.7(b), which is one of the seven mandatory criteria for such acknowledgment.[2] Notice of the determination was published in the Federal Register on January 30, 2014. 79 Fed. Reg. 4953.[3]

The jurisdiction of the Board of Indian Appeals (Board) to review challenges to a final acknowledgment determination is limited to reviewing allegations that fall within four

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[1] In 2015, the Federal Acknowledgement regulations were revised, effective July 31, 2015. *See* 80 Fed. Reg. 37862 (July 1, 2015). The Final Determination was issued under the previous regulations, which provide for filing requests for reconsideration with the Board. All citations in this order, and accompanying discussion, are to the regulations as codified in the 2014 edition of the Code of Federal Regulations, prior to the 2015 revisions.

[2] Subsection 83.7(b) requires a showing that "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present."

[3] In this case, the Federal Register notice served as the Final Determination. *See* 79 Fed. Reg. at 4954 ("the Department did not produce a separate detailed report or other summary under the criteria pertaining to this [Final Determination]"). The Assistant Secretary – Indian Affairs (Assistant Secretary) issued a Summary under the Criteria and Evidence for the Proposed Finding against Acknowledgment of the Tolowa Nation (Proposed Finding) on November 18, 2010. (Administrative Record (AR) 3). Notice of the Proposed Finding was published on November 24, 2010. *See* 75 Fed. Reg. 71732.

listed grounds for reconsideration: (1) there is new evidence that could affect the determination; (2) a substantial portion of the evidence relied upon in the determination was unreliable or of little probative value; (3) the supporting research appears inadequate in some material respect; or (4) there are reasonable alternative interpretations, not previously considered, of the evidence that would substantially affect the determination regarding the petitioner's satisfaction of one or more of the seven mandatory criteria. *See* 25 C.F.R. § 83.11(d)(1)-(4); *see also In re Federal Acknowledgment of the Juaneno Band of Mission Indians, Acjachemen Nation*, 57 IBIA 149, 150 (2013).

The party requesting reconsideration bears the burden to establish, by a preponderance of the evidence, one or more of these four grounds for reconsideration. 25 C.F.R. § 83.11(e)(9), (10); *see also In re Federal Acknowledgment of the Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians*, 45 IBIA 277, 278 (2007). Additional alleged grounds for reconsideration that are not within the Board's jurisdiction must be referred to the Secretary of the Interior (Secretary), if the Board affirms the final acknowledgment decision, or to the Assistant Secretary, if the Board vacates and remands it for further work and reconsideration. *See* 25 C.F.R. § 83.11(e)(10), (f)(1)-(2).

Petitioner alleges two grounds for reconsideration. First, Petitioner claims that new evidence shows that it has existed as a community distinct from the Federally recognized Smith River and Elk Valley Rancherias from historical times to the present, and that it continued in existence even after those Rancherias were terminated. Petitioner also argues that the Assistant Secretary did not consider the reasonable alternative interpretation that the Rancherias evolved as splinter groups from the larger Tolowa Nation, and that the Rancherias are comprised of the descendants of river Indians, as opposed to the lake Indians that make up the Tolowa Nation. The Board is not persuaded that Petitioner has met its burden of establishing either ground by a preponderance of the evidence as a basis for us to vacate the Final Determination and order reconsideration by the Assistant Secretary, and thus we affirm as required by the acknowledgment regulations.[4]

Background

I. Brief History

In 1851, the Federal government identified a number of Indian villages in Del Norte County, California, that were linguistically distinct from surrounding tribes. Proposed Finding at 5-6. Located along the Smith River and Lake Earl, the Indians in these villages

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[4] Petitioner does not assert any grounds for reconsideration that are outside the Board's jurisdiction. *See* 25 C.F.R. § 83.11(f).

spoke an Athabascan dialect, and were collectively referred to as Tolowa by other local tribes. *Id.* at 6. In 1853, with the incorporation of Crescent City, California, first sustained contact between the Federal government and the Tolowa villages began. *Id.*

In 1855, the Federal government established a reservation at Klamath, California, in the southwestern region of Del Norte County, and began removing, or attempting to remove, people from the village at the mouth of the Smith River to the reservation. *Id.* One purpose of the reservation was to concentrate the Indian population of northern California on a smaller land base, while also protecting them from the increasing threat of violence from white settlers. *Id.* at 6-7. Despite the government's efforts, the Tolowa resisted relocation, and those who had been relocated would often return to their villages in the Smith River valley, in the vicinity of Crescent City and the Smith River. *Id.* Ultimately the removal efforts were short-lived because the buildings and agricultural lands on the Klamath Reservation were destroyed by a flood in 1861. *Id.* at 7.

Over the next four decades, the Tolowa lived mainly in their historical villages, and worked in fisheries along the Smith River, or in the saw-mill or on ranches near Crescent City, California. *Id.* at 9-10. In 1906 and 1908, Congress appropriated money for the purchase of lands for the "support and civilization of the Northern Indians, California." Indian Appropriation Act of 1906, 34 Stat. 325, 333; Indian Appropriation Act of 1908, 35 Stat. 70, 76. Special Agent Charles E. Kelsey was tasked with acquiring suitable land for the Indians of Del Norte County, and cooperated with Indian communities living along the Smith River and near Lake Earl to find acceptable tracts of land. Proposed Finding at 25. One of the initial tracts, called the "Cutler-Griffin Tract," was opposed by a group of Indians and non-Indians because "said land is entirely unfitted for the home of Del Norte County Indians as it has neither river, lake, or ocean frontage." *Id.* The Hoopa Agency Superintendent at the time noted that the opposition involved local politics, but also concluded that the Indians preferred "land accessible to fishing . . . [and] gardening." *Id.*

Kelsey located another tract "more satisfactory to the Indians," which was acquired by the United States in 1908 and became the core of the Smith River Rancheria. *Id.*; *see* 1908.09.15 Kelsey to Commissioner at 1 (AR 7).[5] The Elk Valley Rancheria was subsequently established pursuant to the authority of the Indian Appropriation Act of 1908. Today, both Rancherias are Federally recognized tribes. *See* 79 Fed. Reg. 4748, 4750, 4752 (Jan. 29, 2014); *see also* Theodore H. Haas, *Ten Years of Tribal Government*

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[5] The administrative record on appeal is organized into 16 numbered exhibits, many of which are comprised of multiple documents. To facilitate identifying the cited document in a multi-document exhibit, we will retain in this decision the formatting used for the title of the document provided in the table of contents to the administrative record.

Under I.R.A. 14 (U.S. Indian Serv. ed. 1947) (documenting the Rancheria votes on the Indian Reorganization Act of 1934).

Petitioner maintains that its ancestors are drawn from those Tolowa who did not join the Rancherias. Request for Reconsideration, Apr. 30, 2014, at 5 (Request). Instead, Petitioner asserts that it emerged from the community of Tolowa villages around the Smith River and the lagoon called Lake Earl, from pre-contact time through the destruction of those villages in the mid-1800s, when Tolowa survivors took refuge around the village of Etchulet. *Id.* at 9-10. Petitioner states that, while Etchulet was also attacked in 1855, some Tolowa remained and those survivors are the ancestors of the group now seeking recognition. *Id.* at 10. Petitioner distinguishes between two groups of Tolowa, the "river Indians," who Petitioner states were primarily landless, and the "lake Indians," who it characterized as living independently around the lagoons of Lake Earl and Lake Tolowa. *Id.* at 11-12. Petitioner maintains that these landless Indians were the focus of Federal land acquisition resulting in the establishment of the Smith River and Elk Valley Rancherias, while the "lake" Tolowa, who had lived in the environs of Etchulet and south throughout Crescent City, owned their own property and maintained their "historical community." *Id.* at 12, 14.

Petitioner claims that its members have "sustained their communal life" through the Del Norte Indian Welfare Association (DNIWA), which Petitioner asserts was established in 1928, and provided the formal organization and leadership for the Tolowa Nation in a time when the Rancherias "were still unorganized as tribal governments." *Id.* at 14. Petitioner notes that during this time, "the main community organization and traditional government remained in the Tolowa hereditary leadership, as embodied in [DNIWA] and its daughter organization." *Id.* (citing Slagle 1982-1985: Tolowa Field Notes). Petitioner alleges that its members therefore comprise a separate and distinct community entitled to Federal acknowledgment.

II. Petition for Federal Acknowledgment

On September 11, 1982, the "Tolowa-Tututni Tribe of Indians" submitted a resolution titled "Petition for Federal acknowledgment of its Status as an Indian Tribe." Proposed Finding at 2. The "Tolowa Recognition Project Provisional Council" submitted a resolution in support of the petition on March 22, 1983. *Id.* at 2-3; *see also* Tolowa Recognition Project, 3/19/1983 (pages 1 and 2) (AR 16). The Tolowa-Tututni Indians subsequently changed their name to Tolowa Nation. Proposed Finding at 3.

The Department of the Interior (Department) issued the first deficiency letter to Petitioner on April 6, 1988. *Id.* The Department met with Petitioner on May 1, 1995, to clarify questions raised by the letter, and Petitioner updated its submission on November 8,

1995. *Id.* at 3-4. The Department issued a subsequent deficiency letter, and Petitioner further supplemented the record. *Id.* at 4. The petition was placed on the list of petitions ready for active consideration on July 30, 1996. *Id.*

On December 22, 1999, Petitioner requested "previous recognition" status based on the record. A tribe that has previously been acknowledged by the Federal government, as defined in § 83.1, is subject to modified criteria for recognition pursuant to § 83.8.[6] The Department responded that, since the petition had been declared ready for active consideration, it would include consideration of whether the Tolowa Nation had previously been acknowledged as part of the evaluation of the petition for recognition as a whole. *Id.* at 4-5. On August 3, 2009, the petition was placed on active consideration. *Id.* at 5.

III. Proposed Finding and Final Determination

On November 18, 2010, the Department issued a Summary under the Criteria and Evidence for the Proposed Finding against Acknowledgment of the Tolowa Nation. A notice of the Proposed Finding and request for comments was published on November 24, 2010. *See* 75 Fed. Reg. 71732, 71732-33. On January 30, 2014, the Department published a Notice of Final Determination without a separate report or other summary. *See* 79 Fed. Reg. at 4953. The notice stated that the comments and documents submitted in response to the Proposed Finding did "not provide evidence that changes the analysis or conclusions in the [Proposed Finding] that the petitioner's ancestors did not form a distinct community," and incorporated the reasoning of the Proposed Finding. *Id.* at 4954.

The Assistant Secretary concluded that the evidence submitted by Petitioner and obtained through the Department's research was "insufficient to demonstrate that Petitioner [] meets the mandatory criterion for . . . § 83.7(b)." Proposed Finding at 20. Subsection 83.7(b) requires that Petitioner 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). The Department considered evidence of community development and interaction during six specific time periods, beginning with first sustained contact with the Tolowa in 1853, and lasting through the inception of the acknowledgment process to the present. Proposed Finding at 20. Ultimately, the Assistant Secretary concluded that the evidence was "insufficient to show

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[6] The regulation provides that "[u]nambiguous previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment." 25 C.F.R. § 83.8(a). If a petitioner submits substantial evidence of previous acknowledgment, the evidentiary requirements of § 83.7 are modified with regard to the relevant time period. *Id.* at § 83.8(d)(1)-(5).

either that Petitioner [] existed as a distinct continuous community from 1853 to the present, that it evolved from the villages or settlements from 1869-1900, or evolved as a distinct community from the Elk Valley or Smith River Rancherias that formed between 1906 and 1915." *Id.* In particular, the Assistant Secretary found that Petitioner had not proven "consistent interactions and significant social relationship[s] within its membership and that its members are differentiated from, and identified as distinct from, nonmembers." *Id.* at 40-41.

The Assistant Secretary declined to apply the modified criteria for previous Federal acknowledgment pursuant to § 83.8. First, the Assistant Secretary concluded that there was insufficient evidence to show whether Petitioner's ancestors were removed to the Klamath Reservation, or any other reservation during that time period, and as such the record did not "reflect a relationship with a political entity and is not substantial evidence of unambiguous Federal acknowledgment of [the] petitioner." *Id.* at 17. Next, the Assistant Secretary determined that although the Smith River and Elk Valley Rancherias are Federally recognized, "[P]etitioner's ancestors were not enrolled at these rancherias and did not evolve as a group from them," and therefore recognition of the Rancherias was not evidence of previous acknowledgment of Petitioner. *Id.* at 18. Finally, the Assistant Secretary rejected Petitioner's contention that the Federal government had previously recognized DNIWA, Petitioner's alleged predecessor and political representative, because the "government never considered DNIWA a tribal political entity." *Id.*

With regard to the merits of Petitioner's claim to have evolved from or through DNIWA, independent of the Rancherias, the Assistant Secretary reviewed the membership and activities of DNIWA, and concluded that the record did not support the assertion. *Id.* at 41-42. "[T]he evidence shows that many of the current petitioner's leadership, and their ancestors, were active in DNIWA, and that DNIWA's overall membership included both rancheria members and the petitioner's ancestors." *Id.* at 41. Further, the Assistant Secretary stated that the "[e]vidence fails to show if and how DNIWA functioned as a community that included a predominant portion of the petitioner's membership," or how it "evolved into the present petitioner." *Id.* at 41-42.

The Assistant Secretary concluded that Petitioner was, instead, a group of activists focused on promoting the interests of their community and the revitalization of their language and culture, but that a majority of Petitioner's members were not consistently involved in these activities and were not a distinct community from the members of the Smith River and Elk Valley Rancherias. *Id.* at 41. In addition, the Assistant Secretary noted that the high turnover rate among Petitioner's membership suggested weak ties between the members and Petitioner's organization. *Id.*

After reviewing the record and Petitioner's submissions in response to the Proposed Finding, the Assistant Secretary concluded that the evidence did not demonstrate that Petitioner's ancestors evolved as a community distinct from the Elk Valley and Smith River Rancherias, or that Petitioner evolved as a distinct community from "any other Tolowa entity that may have existed before 1908." Final Determination at 4955. Moreover, despite Petitioner's assertion that it evolved from DNIWA, the Assistant Secretary found that the evidence showed that DNIWA did not function as a distinct community from the Rancherias from its inception through the beginning of the instant Federal acknowledgment process. *Id.*

IV. Request for Reconsideration

On April 30, 2014, the Board received Petitioner's request for reconsideration. Petitioner argues that new evidence shows that the Tolowa Nation continued to exist apart from the Rancherias "throughout the off-and-on existence of the Rancherias," and that the present day Tolowa Nation has cooperated to purchase and maintain the "tribal headquarters at the Guschu Hall," and to protect "the ancestral Lake Earl village of Etchulet, the 'community of souls' which is the presence [sic] and past of Tolowa cultural existence." Request at 5.

In addition, Petitioner asserts that the Assistant Secretary failed to consider the reasonable alternative interpretation that "the Tolowa tribe itself continued to exist separate and apart from the Rancherias, which splintered off from the body as a whole," and that although the Tolowa Nation's "organizational efforts were fitful, they were not somehow superseded, co-opted or supplanted by the on, off[,] and on again existence of Rancheria governance." *Id.* In support of its alternative interpretation, Petitioner argues that a meaningful distinction existed between the "lake" and "river" Indians, and that the lake Indians form the basis of Petitioner's ancestry, while the river Indians formed the membership of the Smith River Rancheria. *See id.* at 10-12.

On July 1, 2014, the Elk Valley Rancheria filed a motion for interested party status pursuant to 25 C.F.R. § 83.1.[7] On July 7, 2014, the Smith River Rancheria also requested interested party status. On August 6, 2014, the Board granted the Rancherias interested party status, and they subsequently filed separate oppositions to Petitioner's request for reconsideration. *See* Elk Valley Rancheria's Answer to Request for Reconsideration,

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[7] Section 83.1 defines an interested party as "any person, organization or other entity who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner."

Sept. 1, 2014; Smith River Rancheria's Answer to Request for Reconsideration, Sept. 15, 2014. Petitioner filed a consolidated reply on October 16, 2014.

On July 31, 2014, the Assistant Secretary transmitted to the Board a CD-ROM of "documents from the administrative record central to the portions of the determination under the request for reconsideration." Letter from Solicitor's Office to the Board, July 31, 2014, at 1. The 16 exhibits provided in the administrative record included documents referenced in Petitioner's request for reconsideration that were in the record before the Assistant Secretary, and other documents comparable to or related to issues identified in Petitioner's request. *Id.*[8]

Discussion

Petitioner seeks reconsideration on two grounds: that new evidence shows the continued existence of the Tolowa Nation apart from the Rancherias, and that the Assistant Secretary did not consider the reasonable alternative interpretation that the Tolowa tribe preceded the Rancherias, which "splintered off from the body as a whole." Request at 5.

I. New Evidence

New evidence includes only evidence that was not part of the administrative record for the final determination. *In re Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana*, 57 IBIA 101, 110 (2013). When a party requesting reconsideration asserts the existence of new evidence, it must submit the evidence with the request for reconsideration. *See* 83.11(b); *see also In re Federal Acknowledgment of the Ramapough Mountain Indians, Inc.*, 31 IBIA 61, 66 (1997). The requesting party bears the burden to clearly identify the new evidence, and prove that the new evidence could affect the final determination. *Juaneno Band of Mission Indians, Acjachemen Nation*, 57 IBIA at 157.

Petitioner has not satisfied its burden to show that the documents submitted to the Board for reconsideration are, in fact, new evidence that could affect the Assistant Secretary's decision. As we explain below, most of the documents submitted already exist in the administrative record, and were considered by the Assistant Secretary prior to issuing the Final Determination. Of those documents that are new, none would affect the outcome

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[8] As noted *supra*, n.5, citations to the administrative record in this decision are to the documents and exhibit numbers listed in the selective record transmitted to the Board. For a complete list of the administrative record, see the bibliography to the Proposed Finding. *See* Proposed Finding at 43-50.

of the decision. For this reason, Petitioner has failed to persuade the Board that new evidence warrants reconsideration of the acknowledgment decision.

A. Departmental Correspondence

Petitioner's Exhibit A consists of three historical letters between agents of the Department regarding the acquisition of land for landless Indians in Northern California. The first is an October 15, 1908, letter from the Assistant Secretary to the Commissioner of Indian Affairs, authorizing the Commissioner to purchase land from William Westbrook for use of the "Indians of the Smith River Tribe." Request, Ex. A (Assistant Secretary Letter). The second is a September 10, 1907, letter from the Commissioner of Indian Affairs to the Secretary of the Interior summarizing and transmitting the report of Agent Kelsey, and recommending the purchase of land from William Westbrook. Request, Ex. A (Commissioner Letter). The third is a July 5, 1907, letter from Agent Kelsey to the Commissioner of Indian Affairs documenting his efforts to acquire land for the Smith River Rancheria. Request, Ex. A (Kelsey Letter). The letters were offered to show that the Tolowa Nation existed prior to the creation of the Rancherias, and that the Rancherias were created for the landless "river" Indians, as opposed to the "lake" Indians. *See* Request at 16; *see also id.*, Ex. A (underlined references to the "Smith River Tribe" and "River Indians").

The Kelsey Letter was in the administrative record before the Assistant Secretary and, for that reason, cannot be considered new evidence. *See* 1907.07.05 Kelsey to Commissioner (AR 8); *see also Little Shell Tribe*, 57 IBIA at 110. The Assistant Secretary and Commissioner Letters were not in the administrative record, but Petitioner has not explained what new information they provide that could affect the Final Determination. These letters refer to the same subject matter, and provide the same information, as the Kelsey Letter that was previously considered by the Assistant Secretary. In particular, the distinction between "river" and "lake" Indians made by Kelsey in his July 5, 1907, letter was simply summarized and repeated in the Commissioner's Letter. *Compare* Kelsey Letter at 13-14, *with* Commissioner Letter at 5. Evidence that is substantively duplicative of evidence already in the record, or that simply reaffirms a fact or position already concluded in the acknowledgment decision, will not affect the Assistant Secretary's determination and is not new evidence. *See Ramapough Mountain Indians, Inc.*, 31 IBIA at 74-75. Thus the documents provided as Exhibit A do not constitute a ground for reconsideration under 25 C.F.R. § 83.11(d)(1).

B. Indian Appropriation Acts of 1906 and 1908

Petitioner offered the Indian Appropriation Acts of 1906 and 1908 (collectively, Acts) to support Petitioner's alternative interpretation that the Rancherias were created to house "landless" Indians that splintered from the Tolowa Nation, and were not intended to

bestow tribal status on such Indians to the exclusion of the Tolowa Nation. *See* Request at 12. The cited Acts, however, were in the administrative record, and therefore do not constitute new evidence for reconsideration. *See* Appropriation Acts, 1906, 1908 (AR 9). Even if the Acts were not in the record, Petitioner has not explained what new information they provide that would affect the Final Determination. *See* Proposed Finding at 17 (discussing the effect of the appropriation acts). As such, they do not constitute grounds for reconsideration.

C. *Tillie Hardwick* Order and Stipulation

Petitioner offers a copy of the *Tillie Hardwick* settlement documents as new evidence that the Tolowa Nation continued to exist from historical times to the present, despite the termination of the Smith River and Elk Valley Rancherias in the 1960s. *See* Request at 13; Request, Ex. C (*Hardwick v. United States*, No. 79-1710 (N.D. Cal. stipulated judgment entered Aug. 2, 1983)). The settlement restored 17 California Rancherias, including the Smith River and Elk Valley Rancherias, after they had been terminated following enactment of the California Rancheria Act of 1958, 72 Stat. 619. Proposed Finding at 18 n.10. A copy of the settlement is in the administrative record and was discussed in the Proposed Finding. *See id.* at 36; *see also Hardwick v. U.S.* August 2, 1983 "Order Approving Entry of Final Judgement (sic) in Action," with attached "Stipualtion (sic) for Entry of Judgement (sic)" signed July 15 and July 19, 1983 (AR 10). Therefore, Exhibit C is not new evidence and is not a ground for reconsideration pursuant to 25 C.F.R. § 83.11(d)(1).

D. Guschu Teahouse & Galleria Website

Petitioner's Exhibit D is a printed copy of a page from the Tolowa Nation's website describing the use of the Guschu Teahouse & Galleria (Guschu Hall) and advertising its availability for event rentals. *See* Request, Ex. D. The website explains that Guschu Hall "is owned by the Tolowa Nation" and features "local artists *from the entire community in this portion of the coast of Northern California and Southwest Oregon*." *Id.* at 1 (emphasis added). The building is described as featuring "local crafts *including American Indian* crafts," but that it is currently closed except to event rentals. *Id.* (emphasis added). Attached to the printed webpage is a photograph of Guschu Hall. *See id.* Petitioner submits Exhibit D as evidence of the continued existence of the Tolowa community as the heirs of DNIWA, the original owners of Guschu Hall. *See id.* at 15, 19.

A photograph of Guschu Hall was in the administrative record and, although the particular photograph offered by Petitioner may be more recent, it is substantively the same as photographs in the record and is not new evidence. *See* Two Photographs of Guschu Hall, Undated (AR 13). The printed webpage was not in the administrative record, but Petitioner has failed to explain its significance or show that it would affect the Final

Determination. The webpage provides the same type of information about the purpose and use of Guschu Hall that is already found in the record and that was considered by the Assistant Secretary. *See, e.g.*, Guschu Teahouse and Galleria, May 13, 2006 (AR 13) (advertising a lecture series, comedy monologue, and story tellers performing at Guschu Hall); Guschu Mattice Announcement (AR 13) (advertising an art exhibit at Guschu Hall). In addition, the webpage is not probative of the Tolowa Nation's continued existence as a community; it describes Guschu Hall as being utilized by the regional community of Northern California and by unspecified "American Indians," and does not show any purpose exclusive to the Tolowa Nation. Thus Exhibit D is not new evidence and does not constitute a ground for reconsideration.

E. Article by Raja Storr

Petitioner asserts that the Tolowa Nation continues to organize independently of the Smith River and Elk Valley Rancherias. In support of this contention, Petitioner offers an article by Raja Storr summarizing the history of the Tolowa Indians living near Lake Earl, and describing their current efforts to fight state agencies' adverse environmental policies to protect Tolowa burial sites from flooding by rising lagoon levels. *See* Request at 15; Request, Ex. E.

The Storr article was in the administrative record, was considered by the Assistant Secretary, and as such does not constitute new evidence for the purposes of reconsideration. *See* Storr, Raja. "Protecting Culturally Significant Sites: Establishing Indigenous Geographic Concepts through Remote Sensing," April 29, 2009 (AR 14). Even if the article were new to the record, it would not affect the Final Determination because, although it suggests that the Tolowa Nation is an active tribal entity, it does not demonstrate that Petitioner is a distinct "community," within the meaning of the regulations, the shortcoming upon which the Assistant Secretary's decision to deny acknowledgment was based.

F. Tolowa Recognition Project Provisional Council Members

Finally, Petitioner offers a 1983 list of provisional council members of the Tolowa Recognition Project in support of its assertion that the members of the "provisional council of the Tolowa Nation in 1983 . . . were all DNIWA members." Request at 19; Request, Ex. F. Although Petitioner fails to explain the document's significance, Exhibit F is presumably thought to support Petitioner's narrative of having evolved from or through DNIWA as a distinct community. The list of provisional council members was not in the administrative record, but it is not new evidence. The information provided by Exhibit F is equally discernable by reviewing the signatures to a Tolowa Recognition Project resolution that was before the Assistant Secretary on review of the petition for acknowledgment. *See*

Tolowa Recognition Project, 3/19/1983 (pages 1 and 2) (AR 16). Thus, it is unclear how Exhibit F offers new evidence that could affect the Final Determination, and it therefore does not constitute grounds for reconsideration.

II. Reasonable Alternative Interpretation

Petitioner also asserts the alternative interpretation ground for reconsideration. *See* 25 C.F.R. § 83.11(d)(4). A requester seeking reconsideration based on a reasonable alternative interpretation of the evidence must clearly articulate an interpretation that the Assistant Secretary truly did not consider, either explicitly or implicitly. *Chaubunagungamaug Nipmuck Indians*, 45 IBIA at 285. However, § 83.11(d)(4) does not authorize the Board to reweigh the evidence or second-guess the Assistant Secretary's interpretation of the evidence that was before it. *Ramapough Mountain Indians*, 31 IBIA at 81. Mere disagreement with the Assistant Secretary's reasoning is insufficient to establish grounds for reconsideration, and disagreement over the sufficiency of the evidence does not constitute an "interpretation" warranting reconsideration. *Chaubunagungamaug Nipmuck Indians*, 45 IBIA at 285.

Petitioner's alternative interpretation is that "the Tolowa tribe itself continued to exist separate and apart from the Rancherias, which splintered off from the body [of the tribe]." Request at 5. Petitioner alleges that the Assistant Secretary failed to consider whether the Rancherias were created "for some Tolowa and not others" to house the "landless, largely Smith River, band" and that the Rancherias "did not supplant the separate and distinct Tolowa Nation." Petitioner's Reply at 7. Petitioner maintains that "although [Petitioner's] organizational efforts were fitful, they were not somehow superseded, co-opted or supplanted by the on, off[,] and on again existence of Rancheria governance." Request at 5; *see also* Petitioner's Reply at 10.

We disagree with Appellant's contention that the Assistant Secretary truly did not consider, either implicitly or explicitly, this "alternative interpretation." For example, in discussing the requirement to demonstrate Petitioner's descent and continuous existence from a historical Indian tribe, the Assistant Secretary explained that Petitioner could prove either "descent and continuous existence from all the villages within such a cultural and social group as one Tolowa tribe, or . . . that the historical tribe was a single village or some kind of subgroup of these villages." Proposed Finding at 9. After reviewing the record, the Assistant Secretary observed that "the lack of a historical list of the petitioner's ancestors and the persons socially connected to them in a community from 1855 to 1907, compounds the difficulty of connecting the petitioner to a historical tribe, at the village level or within such a cultural and social group as a greater Tolowa tribe." *Id.* at 12.

Upon examining the evidence provided by Petitioner and evidence obtained by the Department, the Assistant Secretary concluded that, "[i]n general, evidence is insufficient to show either that Petitioner [] existed as a distinct continuous community from 1853 to the present, that it evolved from the villages or settlements from 1869-1900, or evolved as a distinct community from the Elk Valley or Smith River Rancherias that formed between 1906 and 1915." Proposed Finding at 20. This conclusion does not depend upon the premise that the Rancherias "superceded" or "supplanted" the Tolowa Nation, as Petitioner claims, but required that Petitioner produce evidence that it—the Tolowa Nation—did, in fact, descend from and develop as a distinct community from a historical Tolowa tribe, and that its membership functioned as a community with the formation of DNIWA to the present. Petitioner failed to produce such evidence. *See id.* at 40-41; *see also* 75 Fed. Reg. at 71732-33. The Proposed Finding requested additional documentation regarding Petitioner's ancestors and communal relations "to show how those ancestors evolved as a community," but Petitioner failed to provide sufficient evidence to clarify its historical roots. Final Determination, 79 Fed. Reg. at 4954.

Even if the alternative interpretation offered by Petitioner had not been considered by the Assistant Secretary, the evidence submitted by Petitioner to the Board does not meet Petitioner's burden to demonstrate that the alternative interpretation would substantially affect the determination that Petitioner does not meet the requirements of § 83.7(b). The Assistant Secretary determined that Petitioner failed to prove that the Tolowa Nation, as represented in its petition for acknowledgement and supported by the evidence, constituted a distinct community in its own right. *Id.* at 4955. Neither the evidence presented here, nor the alternative interpretation advanced by Petitioner, provides sufficient grounds for finding that Petitioner comprises a distinct community and has existed as a distinct community from historical times to the present.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms, to the extent of its jurisdiction, the Final Determination.

I concur:

Robert E. Hall
Administrative Judge

Steven K. Linscheid
Chief Administrative Judge

In Re Federal Acknowledgment
of the Tolowa Nation
Docket No. IBIA 14-086
Order Affirming Final Determination
Issued February 18, 2016
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