INTERIOR BOARD OF INDIAN APPEALS

In re Federal Acknowledgment of Ramapough Mountain Indians, Inc.

31 IBIA 61 (07/18/1997)

Decision by Assistant Secretary - Indian Affairs:
November 7, 1997

Judicial review of this case:
Summary judgment for defendants granted, *Ramapough Mountain Indians v. Babbitt*, Civil No. 98-2136 (JR) (D.D.C. Sept. 30, 2000)
Affirmed, *Ramapough Mountain Indians v. Norton*, 25 Fed. Appx. 2 (D.C. Cir. 2001)
Cert. denied, 537 U.S. 817 (2002)

United States Department of the Interior

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

IN RE FEDERAL ACKNOWLEDGMENT OF THE
RAMAPOUGH MOUNTAIN INDIANS, INC.

IBIA 96-61-A Decided July 18, 1997

Request for reconsideration of a final determination against Federal acknowledgment.

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

1. Indians: Federal Recognition of Indian Tribes: Acknowledgment

   In considering a request for reconsideration of a final determination concerning Federal acknowledgement of an entity as an Indian tribe, the Board of Indian Appeals has authority to determine whether the request for reconsideration has established, by a preponderance of the evidence, one or more of the grounds for reconsideration in 25 C.F.R. § 83.11(d)(1)-(4).

2. Indians: Federal Recognition of Indian Tribes: Acknowledgment

   In considering a request for reconsideration of a final determination concerning Federal acknowledgement of an entity as an Indian tribe, the Board of Indian Appeals has authority, under 25 C.F.R. § 83.11(f)(2), to refer certain grounds for reconsideration to the Secretary of the Interior. The Board finds that its authority under this provision includes the authority to refer matters requiring clarification, whether or not they constitute grounds for reconsideration.

3. Indians: Federal Recognition of Indian Tribes: Acknowledgment

   For purposes of reconsideration of a final determination concerning Federal acknowledgment of an entity as an Indian tribe, a "reasonable alternative interpretation[ ], not previously considered, of the evidence used for the final determination" does not include an interpretation, however reasonable, which has been considered and rejected. 25 C.F.R. § 83.11(d)(4).

APPEARANCES: Albert J. Catalano, Esq., and Ronald J. Jarvis, Esq., Washington, D.C., for petitioner; Brian L. Miele, its Mayor, for the

Village of Hillburn, New York; David M. Wagner, Esq., New City, New York, for the Legislature of Rockland County, New York. 1/

OPINION BY ADMINISTRATIVE JUDGE VOGT

The Ramapough Mountain Indians, Inc. (Petitioner, RMI) seeks reconsideration of a "Final Determination Against Federal Acknowledgment of [Petitioner]," notice of which was published at 61 Fed. Reg. 4476 (Feb. 6, 1996). For the reasons discussed below, the Board affirms the Final Determination but refers four issues to the Secretary of the Interior pursuant to 25 C.F.R. § 83.11(f)(2).

Background

In 1978, Petitioner submitted a letter of intent to petition for Federal acknowledgment as an Indian tribe. In 1990, it submitted a documented petition. After preliminary discussions with the Branch of Acknowledgment and Research, Bureau of Indian Affairs (BAR; BIA), Petitioner submitted a revised petition. The BIA began active consideration of the revised petition in July 1992.

On December 6, 1993, the Assistant Secretary - Indian Affairs published a "Proposed Finding Against Federal Acknowledgment of [Petitioner]." 58 Fed. Reg. 64,662 (Dec. 8, 1993). Following a period for response and comments, the Assistant Secretary issued her Final Determination on February 6, 1996, concluding that Petitioner failed to satisfy the criteria in 25 C.F.R. §§ 83.7(b),(c), and (e), three of the seven mandatory criteria for Federal acknowledgment. 2/

Petitioner filed a Request for Reconsideration under 25 C.F.R. § 83.11. The request was received by the Board on May 6, 1996. Petitioner alleged:

> [T]here is new evidence which could affect the outcome of the proceeding that must be considered; the record reveals that the BIA has disregarded probative evidence and based its decision on unreliable evidence; and there are reasonable alternative inter-

1/ In addition, a filing which might be construed as an entry of appearance was made by Beverly Tanenhaus, Esq., for the State of New Jersey. However, no brief or other position statement was filed on behalf of the State of New Jersey.

2/ The Proposed Finding was issued under regulations promulgated in 1978, 43 Fed. Reg. 39,361 (Sept 5, 1978), 25 C.F.R. Part 83 (1993), which remained in effect until replaced by new regulations effective Mar. 28, 1994, 59 Fed. Reg. 9293 (Feb. 25, 1994). Pursuant to Petitioner's request, the Final Determination concerning its petition was issued under the 1994 regulations.

Except where otherwise noted, all citations to the regulations in 25 C.F.R. Part 83 are to the 1994 revision.

pretations which the BIA failed to consider that could affect the outcome of the proceeding.

Request for Reconsideration at 2-3.

On May 7, 1996, the Board determined, pursuant to 25 C.F.R. § 83.11(c)(2), that Petitioner had alleged grounds for reconsideration under 25 C.F.R. § 83.11(d).

Interested Parties

Lists of potential interested parties were submitted by the Assistant Secretary and by Petitioner. Briefing was suspended to allow for a determination of interested parties for purposes of the proceedings before the Board. The Governors and Attorneys General of the States of New Jersey and New York were determined to be interested parties by the terms of the definition of "interested party" in 25 C.F.R. § 83.1. 3/ Other individuals and entities included on either of the two lists were given an opportunity to request interested party status before the Board. Of those requesting interested party status, the Legislature of Rockland County, New York, and the Village of Hillburn, New York, were determined to be interested parties. 4/

The briefing schedule was reinstated on September 26, 1996. Answer briefs were filed by the Legislature of Rockland County, New York, and the Village of Hillburn, New York, both supporting Petitioner's Request for Reconsideration. No briefs were filed by the New Jersey or New York State

3/ Section 83.1 provides:

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

4/ There were three other requests for interested party status. Two were from individuals who failed to show that they qualified under the definition in § 83.1. The third was from the Town of Ramapo, New York, which failed to serve its request on the other parties after being given two opportunities to do so.

The two individuals and the Town of Ramapo, as well as a number of other persons who requested to be informed of the Board's decision, are included on the distribution list for this decision.

officials. Neither the Assistant Secretary nor BIA has participated as an active party in this proceeding. 5/

Petitioner's Motions and Requests

Petitioner has filed a number of motions and requests upon which the Board has not yet acted.

By a request dated May 23, 1996, Petitioner sought to supplement its Request for Reconsideration. Petitioner stated that the materials included in its Supplement to Request for Reconsideration (Petitioner's Supplement) were more legible copies of documents already submitted or materials specifically referred to in the Request for Reconsideration.

The Board initially intended to rule on this request prior to the reinstatement of briefing. However, in light of subsequent filings made by Petitioner, the Board postponed its ruling and gave the parties an opportunity to respond to all of the materials submitted by Petitioner.

No party has objected to the materials in Petitioner's Supplement. Therefore, except to the extent that materials in Petitioner's Supplement constitute untimely new evidence (see discussion below), the Board admits these materials into the record.

Under 25 C.F.R. § 83.11(e)(8), the Assistant Secretary designated and transmitted a number of documents to the Board as Critical Documents. 6/ The documents were received by the Board on June 14, 1996. On August 9, 1996, the Board received from Petitioner a filing entitled "Comments on Administrative Record and Motion to Supplement Record" (Petitioner's Comments). 7/ Attached to the filing were four volumes of exhibits and

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5/ The preamble to the 1994 regulations states: "[BIA] under the regulations does not participate as an active party [in proceedings before the Board] opposing or supporting the submissions of petitioner or interested parties or defending the determination." 59 Fed. Reg. at 9292.

6/ Subsection 83.11(e)(8) provides:

"For purposes of review by the Board, the administrative record shall consist of all appropriate documents in the [BAR] relevant to the determination involved in the request for reconsideration. The Assistant Secretary shall designate and transmit to the Board copies of critical documents central to the portions of the determination under a request for reconsideration. The [BAR] shall retain custody of the remainder of the administrative record, to which the Board shall have unrestricted access."

7/ Arguably Petitioner's filing, insofar as it constitutes an objection to the record, is untimely under 43 C.F.R. § 4.336, which allows only 15 days for objections to the record. However, the procedures in acknowledgement cases, as well as the records in those cases, are more complex than in other appeals, making the 15-day limit somewhat unrealistic. Further, in this

a videotape. The Board requested the Assistant Secretary to review the materials submitted by Petitioner and to advise the Board whether these materials had been a part of the administrative record when this matter was pending before her.

The Assistant Secretary's response listed each document submitted by Petitioner and indicated whether each was a part of the administrative record before the Assistant Secretary and whether each had been transmitted to the Board as a part of the Critical Documents. The response indicated that the great majority of the documents were, either in whole or in part, a part of the administrative record before the Assistant Secretary and had also been transmitted to the Board as part of the Critical Documents. Petitioner was given an opportunity to respond to the Assistant Secretary's submission in its Reply Brief.

Petitioner contends:

> [M]any documents [in the Critical Documents] were arranged in a manner which serves to "bury" key evidentiary material. Some voluminous exhibits are partially or totally irrelevant and simply serve to obfuscate important issues. Other exhibits are apparently deliberately placed out of order to diminish their importance.
>
> The Petitioner's Supplement is designed to correct many of these deficiencies by highlighting, rather than hiding, critical documents and evidence. This Supplement will assist the Board in understanding the elements of the Petitioner's case and how the various documents interrelate and corroborate each other. [Footnote omitted.]

Petitioner's Comments at 1-2.

Petitioner also contends that BIA omitted certain documents which Petitioner considers critical to its case. Petitioner's Comments at 1; Reply Brief at 1, 13. Nevertheless, Petitioner agrees with the Assistant Secretary that nearly all of the documents it submits with its Comments are already part of the record.

Insofar as Petitioner's documents duplicate documents already before the Board, the documents might be rejected as unnecessary. However, Petitioner clearly considers its case to be enhanced by its arrangement of the documents. The Board sees no particular harm in admitting the duplicative documents, in the arrangement favored by Petitioner.

To the extent documents included with Petitioner's Comments are in the administrative record but were not transmitted to the Board under 25 C.F.R. § 83.11(e)(8), their admission into these proceedings will undoubtedly make

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fn. 7 (continued)
case, proceedings on the merits were stayed at the time Petitioner filed its request, so that no delay in the proceedings resulted. Accordingly, the Board has not held Petitioner to the time limit in § 4.336.

their review more convenient for the Board. 8/ With respect to documents falling into this category, the Board finds that Petitioner has a right to add them to the materials before the Board.

As to any documents which were not part of the administrative record before the Assistant Secretary, such documents might be construed as new evidence under 25 C.F.R. § 83.11(d)(1). However, 25 C.F.R. § 83.11(b) requires that a "request for reconsideration * * * include any new evidence to be considered." Petitioner's Comments were not filed with its Request for Reconsideration. Nor were they filed within the time allowed in 25 C.F.R. § 83.11(a)(2) for filing such requests. Thus, any "new evidence" submitted for the first time with Petitioner's Comments would require rejection on the basis of untimeliness. 9/

The Board admits the documents submitted with Petitioner's Comments, subject to the caveat in the preceding paragraph.

Petitioner also filed a Motion to Strike, seeking to strike Exhibits 26-A and 26-B of the Critical Documents. These documents are listed in the table of contents for the Critical Documents as: Steven L. Austin, "Anthropologist's Field Notes taken and Interview Transcripts of work done in New Jersey on behalf of the BAR" and "Anthropologist's Transcript of field work interview with Rev. Ruth Wainwright." Petitioner contends that these notes are incompetent under the Federal Rules of Evidence because, inter alia, their authenticity and completeness cannot be determined. Petitioner further contends that the notes are inadmissible hearsay under these same rules; that the notes are inaccurate and incomplete; that statements in the notes are inconsistent with other statements made by Austin; and that Petitioner has suffered a due process violation in connection with these documents because they were withheld from Petitioner until they were submitted to the Board in these proceedings. 10/

8/ As the regulations provide, and as Petitioner recognizes, the Board has access to the entire administrative record in the custody of BIA. 25 C.F.R. § 83.11(e)(8).

9/ The same is true of documents submitted as new evidence with Petitioner's Reply Brief.

10/ With respect to this last contention, Petitioner alleges:

"[T]he purported field notes were made available to Petitioner for the first time only when submitted to the Board as part of the Administrative Record, despite Petitioner's repeated oral requests to the BAR staff to make Austin's preliminary report and notes available. The only response received by Petitioner to these entreaties was stonewalling--the assertion that such records 'did not exist.'"

Motion to Strike at 5.

The Board returns to this contention at the end of this decision.

Even if these documents would be inadmissible in a Federal court under the Federal Rules of Evidence, they are part of the record in this administrative proceeding because the Assistant Secretary considered them in reaching the decision now under review. Accordingly, the documents are properly before the Board, and the Board therefore declines to strike them.

Arguably, Petitioner should have contended, as it did with respect to certain other evidence discussed below, that the Austin notes are unreliable evidence under 25 C.F.R. § 83.11(d)(2). As noted, however, Petitioner alleges that the notes were not made available to it prior to the time it filed its Request for Reconsideration. If that was in fact the case, a question on which the Board reaches no conclusion here, Petitioner might well be excused from failing to challenge the notes as unreliable in its Request for Reconsideration. Giving Petitioner the benefit of the doubt in this regard, the Board construes Petitioner's Motion to Strike as an argument that the Austin notes are unreliable evidence under 25 C.F.R. § 83.11(d)(2) and discusses this argument below.

Petitioner also filed a Request for Oral Argument and a Request for Evidentiary Hearing. Finding neither an oral argument nor an evidentiary hearing necessary in this case, the Board denies both requests.

Discussion and Conclusions

Under 25 C.F.R. § 83.6(c), "[a] petitioner must satisfy all of the criteria in paragraphs (a) through (g) of § 83.7 in order for tribal existence to be acknowledged." The Assistant Secretary determined that Petitioner failed to satisfy the criteria in paragraphs (b), (c), and (e) of section 83.7. These paragraphs require that:

> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical [11/] times until the present.
>
> * * * * * *
>
> (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. [12/]
>
> * * * * * *

11/ Section 83.1 provides: "Historically, historical or history means dating from first sustained contact with non-Indians."

12/ The Assistant Secretary found that Petitioner satisfied the criteria in § 83.7(b) and (c) for the period 1870-c.1950. However, she stated: "Meeting a criterion for a limited period is not sufficient to meet the criterion overall because of the requirement of continuous existence. No adequate evidence has been submitted to show the continuous existence of a community from first sustained contact with non-Indians until 1870, or from 1950 to the present." 61 Fed. Reg. at 4477.

> (e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

Petitioner has alleged grounds for reconsideration of the Assistant Secretary's determination under 25 C.F.R. § 83.11(d)(1), (2), and (4), contending:

> (1) That there is new evidence that could affect the determination; * * *
>
> (2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or of little probative value; [and]
>
> * * * * * *
>
> (4) That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in § 83.7(a) through (g).

The burden of proof imposed upon petitioner and the standard of proof the Board must apply are set out in 25 C.F.R. § 83.11(e)(9) and (10):

> (9) The Board shall affirm the Assistant Secretary's determination if the Board finds that the petitioner or interested party has failed to establish, by a preponderance of the evidence, at least one of the grounds under paragraphs (d)(1-4) of this section.
>
> (10) The Board shall vacate the Assistant Secretary's determination and remand it to the Assistant Secretary for further work and reconsideration if the Board finds that the petitioner or an interested party has established, by a preponderance of the evidence, one or more of the grounds under paragraphs (d)(1-4) of this section.

Taken together, these several regulatory provisions require that Petitioner establish by a preponderance of the evidence that one or more of the grounds in 25 C.F.R. § 83.11(d)(1), (2), and/or (4) exist with respect to one or more of the findings which caused the Assistant Secretary to decline to acknowledge Petitioner, i.e., her conclusions that Petitioner failed to satisfy the criteria in 25 C.F.R. § 83.7(b), (c), and (e).

[1] In addition to stating the burden and standard of proof, 25 C.F.R. § 83.11(e)(9) and (10) establish the scope of the Board's review authority. While some of Petitioner's contentions in this case appear to assume that

the Board has authority to review the Assistant Secretary's determination de novo, that is not the case. The Board's adjudicatory authority is limited to the questions of whether Petitioner has established one or more of the grounds in 25 C.F.R. § 83.11(d)(1), (2), or (4).

With respect to any grounds for reconsideration other than those in 25 C.F.R. § 83.11(d), the Board has the more limited authority described in 25 C.F.R. § 83.11(f):

> (1) The Board, in addition to making its determination to affirm or remand, shall describe in its decision any grounds for reconsideration other than those in paragraphs (d)(1-4) of this section alleged by a petitioner or interested party's request for reconsideration.
>
> (2) If the Board affirms the Assistant Secretary's decision under § 83.11(e)(9) but finds that the petitioner or interested parties have alleged other grounds for reconsideration, the Board shall send the requests for reconsideration to the Secretary. The Secretary shall have the discretion to request that the Assistant Secretary reconsider the final determination on those grounds.

[2] The Board interprets its authority under 25 C.F.R. § 83.11(f) to incorporate the authority to refer issues to the Secretary for clarification, even if those issues might not rise to the level of "grounds for reconsideration." Absent such an interpretation, matters which the Board identified as requiring clarification, but over which the Board lacks jurisdiction, would simply languish, with no apparent possibility of correction within the Department. 13/ In this case, the Board has identified a few such matters, which it discusses at the end of this decision.

The Board first addresses Petitioner's contention that "there is new evidence that could affect the determination" not to acknowledge Petitioner as an Indian tribe. With its Request for Reconsideration, Petitioner submits 11 items as new evidence. These are:

1. A December 7, 1995, letter from Borough Historian Elbertus Prol, Borough of Ringwood, New Jersey, to the Secretary of the Interior.

2. Three maps.

3. A May 1, 1996, affidavit from Reverend Ruth R. Wainwright, pastor of the Brook Presbyterian Church, Hillburn, New York.

4. A document entitled "Christie Family Gen."

13/ In other kinds of appeals, the Board is sometimes able to clarify a BIA decision in the process of issuing its own decision. Given the Board's limited jurisdiction in acknowledgment appeals, this does not appear possible here.

5. A November 6, 1995, letter from Marie Skodak Crissey to Roger D. Joslyn.

6. A November 8, 1995, letter from Edmund Carpenter, Vice-President, Rock Foundation, New York, New York, to the Secretary of the Interior.

7. A May 1, 1996, letter from Jennifer C. Griffin, Curator, Historical Society of Rockland County, New York, to Chief Ronald Redbone VanDunk.

8. An October 31, 1995, letter from Robert D. Griffin, First Vice-President, Bergen County, New Jersey, Historical Society, to the Secretary of the Interior.

9. A retyped copy of a newspaper article, with a caption indicating that the article was written by Alanson Skinner and published about 1911 in an unidentified newspaper.

10. A printed document titled "Biography of Edward C. Smith in the Community," with a handwritten note stating "Testimonial Dinner 9/12/62."

11. A May 2, 1996, affidavit from Linda Powell, Petitioner's custodian of records.

Five of the items, Nos. 1, 3, 5, 6, and 8, are recent letters))or in the case of No. 3, a recent affidavit))expressing views and/or interpretations of the already submitted evidence which differ from BIA's interpretation. None of these documents, however, point to any new evidence. Rather, they simply discuss evidence that was before BIA. The Board concludes that Petitioner has failed to establish by a preponderance of the evidence that any of these documents is either itself new evidence or identifies new evidence which could affect the determination.

Item No. 2 consists of three maps. With respect to these maps, Petitioner's Request for Reconsideration states in its entirety:

> **Map Evidence** is being introduced to demonstrate the proximity of Victor Jacquemont's host's house to a known Ramapough community of the 1820's, to which Victor Jacquemont is referring when he describes a community of mixed-blood Indians remaining in the Ramapough Mountain region. This view is supported by Robert A. Scott, the President of Ramapo College, which is now on the site from which Jacquemont was writing. The BAR previously rejected Jacquemont's account because it was not "certain" that Jacquemont was referring to this Ramapough community. Another map shows the historical development and Indian movements in the geographic region during the relevant time periods--to demonstrate a continuing presence.

Request for Reconsideration at 12.

Two of the three maps have no hints whatsoever as to their source, although the annotations on the two maps have a similar type style, suggesting that they derive from the same unidentified source. The annota-

tions indicate that the maps are intended to depict certain locations related to Petitioner's history.

The third map appears to have been copied from page 44 of an unidentified book. The page has a running head reading: "From Pioneer Settlement to Suburb."

Petitioner submits slightly different versions of these maps with its Supplement. The first two maps are now in color but still fail to reveal their source. The new version of the third map is marked with yellow highlights and bears at the left the handwritten word "Mountains," with arrows on either side. Petitioner states:

> The third map, taken from Professor Bischoff's history of Mahwah, further documents, through color coding, the closeness of the Christy and Hopper homes to the foothills and the nearby mountains in 1767. The map clearly demonstrates that the neighboring mountainous land was ripe for Indian squatters.

Attachment 3 to Petitioner's Supplement.

As discussed above, in order to be timely, documents presented as new evidence were required to be included in Petitioner's Request for Reconsideration or at least submitted within the time allowed for filing requests for reconsideration. Petitioner's Supplement was not filed within that time. Therefore, to the extent the Supplement versions of the maps contain additional information, that additional information arguably constitutes untimely "new evidence," which cannot be considered. Even assuming, however, that the Supplement versions of these maps can be fully considered, the end result would be the same in all cases.

The first two maps have no source identification in either version. Without some idea of the source of these maps, the Board has no means of determining whether the maps are evidence at all, let alone whether they are evidence which could affect the determination not to acknowledge Petitioner. Therefore, the Board finds that Petitioner has failed to establish by a preponderance of the evidence that these two maps are new evidence which could affect the determination.

With the help of the additional information in Petitioner's Supplement, the Board concludes that the third map was probably taken from Henry Bischoff and Mitchell Kahn, From Pioneer Settlement to Suburb: A History of Mahwah, New Jersey 1700-1976 (1978 and 1979). This work was considered by BIA and is therefore not new evidence. All that could be construed as new evidence are the yellow highlights and the word "Mountains," which appear on the Supplement version of the map. These markings, whose maker is not identified, are insufficient to render the map itself new evidence. Nor do the markings add any meaningful new information. The Board finds that Petitioner has failed to establish by a preponderance of the evidence that either the map or its new markings are new evidence which could affect the determination.

Item No. 4, titled "Christie Family Gen," is a three-page typed document concerning the genealogy of a Christie family. No source for this document appears on the document itself. Nor is the source identified in Petitioner's description of the document. Petitioner's discussion of the document states in its entirety:

> **Biographical Material on Squire Christy**, an eyewitness to relevant history, whom the BIA discounted in its analysis of the facts. Squire Christy, born in 1816, lived at the foot of the Ramapough Mountains for his entire life. His father, David I. (J.) Christy (b. 1781 - d. 1863) was a prominent judge in the area, and married some of the Ramapough families. His grandfather was John D. Christy (b. 1748 - d. 1836). The Christy family dated back into the early 1700's in New Jersey. In an 1890 interview, Squire Christy reported that he knew from his father and his grandfather that the mixed-blood Indian "mountain tribes" had been there from the 1700's. In the interview, he directly connected Ramapough family members of the 1890's to these tribes.

Request for Reconsideration at 13. The 1890 interview referred to by Petitioner is evidently the one reported in an article entitled "A People with Pink Eyes," published about 1890 in The New York World. This article is a part of the record here and was considered by BIA during the earlier proceedings. 14/

The document Petitioner now offers as new evidence does not discuss the ancestors of any of Petitioner's members. Rather, it concerns only the Christie family. Petitioner does not claim that the Christie family is in any way related to the ancestors of Petitioner's members. Nor does it explain how genealogical/biographical information concerning an unrelated family could affect the determination not to acknowledge Petitioner. The Board finds that Petitioner has failed to establish by a preponderance of the evidence that Item No. 4 is new evidence which could affect the determination.

Item No. 7 is a May 1, 1996, letter from the Curator of the Historical Society of Rockland County, New York, which attaches notations concerning two bowls in the collection of the Historical Society. These notations were evidently not submitted to BIA during the time this matter was pending before it.

Petitioner describes the letter and attachments thus:

> **Letter from the Rockland County, New York Historical Society** documenting the presence of Indians in the Rockland County, New York area in the 1800-1820 period. The evidence submitted with the letter also shows that Indians in the Ramapough region were called "Ramapo Indians" circa 1800. Additional evidence submitted

14/ The article is listed in BIA's "Source Materials for Proposed Finding" under its title.

> with the letter concerns a basket bought from an "Indian squaw" in the region in 1793. This evidence directly contradicts the BAR's position that all the Munsee had left the area by 1760.

Request for Reconsideration at 13-14.

The notation concerning one bowl states that it was purchased in 1889 by Alfred Ronk from John Hemmion, who stated that the bowl had been made by a Ramapo Indian and had been the property of one of the first settlers at Ramapo. The notation concerning the other bowl states that it had been purchased from the "Indians at Upper Nyack in 1822." This second notation is initialled "G.H.B." The Curator's letter states that this notation was probably made by George Henry Budke, a Rockland County historian and, if so, "the information is most likely reliable."

Not discussed in the Curator's letter, but apparently also from the files of the Rockland County Historical Society is a handwritten note which states: "Harry C. Stuart, 47 W[?], Suffern N.Y., Basket bought of an Indian squaw by Phebe Allison in 1793. She gave it to Jane Smith in 1841. Jane Smith gave it to her daughter Mrs. Emma Stuart in 1887. My mother Emma O. Stuart after she died Feb. 4/1938 gave the Basket to her son Harry Stuart."

Even if entirely accurate, the information in these notations shows at most that there were Indians in the general area at various times in the past. It does not show that those Indians were Petitioner's ancestors. Further, it has no bearing on the question of whether Petitioner satisfies the "community", "political influence," and "tribal descent" criteria in 25 C.F.R. § 83.7 (b), (c), and (e). The Board finds that Petitioner has failed to establish by a preponderance of the evidence that these notations or the letter transmitting them are new evidence which could affect the determination.

Item No. 9 is a retyped copy of a newspaper article titled "What the New Race Means," apparently published about 1911. 15/ Petitioner states that the author was an anthropologist with the Museum of Natural History
in New York.

The article describes a group known as the "Jackson Whites," a group which has been identified with ancestors of Petitioner's members. The article states: "That this tribe is the product of Indian, Dutch and negro ancestry is undoubtedly correct. The intermixture of the three races is very evident in their [phy]sical makeup." The article then describes the physical characteristics of one individual, stating in part: "The long,

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15/ The heading on the page reads: "What the New Race Means By Alanson Skinner (circa 1911) (first column is fragmentary) From unidentified newspaper article in files of Eugenics Record Office (file # A 124: Albinism))."

No copy of the original article is included with Petitioner's filing.

thin jaw was ty[pical] of the Delaware Indian tribes, from one or two of whom the Jackson-Whites are [-----] descended." The article also states that the teeth and the hair of this individual were characteristic of Delaware Indians. Apparently it is these references to Delaware Indians which Petitioner intended to call to the Board's attention.

Although this article was not considered by BIA, other works by Skinner, as well as works by other anthropologists and historians of the same era, were considered. See, e.g., Proposed Finding Anthropological Report at 6-9; Proposed Finding Historical Report at 64-67. These works contained statements similar to the statements made in the article now produced. The BIA found statements of this nature, even those made by professional historians and anthropologists of the era, unpersuasive. In the Final Determination Technical Report at 25-26, BIA summarized: "The technical reports [for the Proposed Finding] noted that since 1870, there had been repeated attributions of Indian ancestry for the RMP [16/] by journalists and local residents, and later by anthropologists, historians, genealogists, social workers, and medical doctors. These were analyzed in the Proposed Finding and rejected as unsubstantiated assertions."

Petitioner's newly produced article is simply another example of the same kind of evidence already analyzed by BIA. Petitioner offers no reason why this article should be found persuasive, when the other works were not, on the question of whether Petitioner satisfies the "community", "political influence," and "tribal descent" criteria in 25 C.F.R. § 83.7 (b), (c), and (e). The Board finds that Petitioner has failed to establish by a preponderance of the evidence that this article is new evidence which could affect the determination.

Item No. 10 is a two-page printed document entitled "Biography of Edward C. Smith in the Community." No date is printed on the document. However, a handwritten note at the bottom states: "Testimonial Dinner 9/12/62." The biography states in part: "Eddie came from Holland Dutch Algonquin Indian and Negro stock. * * * Samuel DeFreese [Smith's grandfather] was an Algonquin Indian." Petitioner states, concerning this biography: "The article further documents Indian ancestry of the DeFreese line." Request for Reconsideration at 14.

Like the previous document, this one is similar to evidence already considered by BIA, but rejected as unsubstantiated, concerning the Indian ancestry of Petitioner's ancestors. Again, Petitioner fails to show that

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16/ Ramapo Mountain People. This term, as used in the Final Determination, is defined in the Final Determination Summary at 10:

"[A] term used in this report as a designation for the people of the Van Dunk, Mann, DeGroat, and DeFreese families living in and around (or originating from) the towns of Mahwah, New Jersey, Ringwood, New Jersey, and Hillburn, New York. Not all of the RMP are members of [Petitioner], although they share a common ancestry. * * * As used in this final determination, RMP is not synonymous with 'Jackson Whites,' the latter being much broader in meaning and less well-defined."

this document could be found persuasive on the question of whether Petitioner satisfies the "community", "political influence," and "tribal descent" criteria in 25 C.F.R. § 83.7 (b), (c), and (e). The Board finds that Petitioner has failed to establish by a preponderance of the evidence that this document is new evidence which could affect the determination.

Item No. 11 is a May 2, 1996, affidavit from Linda Powell, Petitioner's custodian of records. Petitioner contends that this affidavit documents "that 55% of the Tribe continues to live in the same geographic area." Request for Reconsideration at 14. 17/

The affidavit states in part:

> Of the 2693 (excluding deceased) total members of the Tribe listed on tribal rolls submitted to the Bureau of Indians [sic] (including the updates), 1377 of the members are living within the core geographic areas of Mahwah, NJ, Ringwood, NJ and Hillburn, NY. This translates into 55% of the Tribal members living in the core geographic area.

Petitioner does not, in the "new evidence" section of its Request for Reconsideration, explain the significance of Powell's statement. From contentions made elsewhere in the Request for Reconsideration, however, it can be deduced that the statement relates to BIA's findings concerning "community," particularly with respect to the number of Petitioner's members found to be residing in "a geographical area exclusively or almost exclusively composed of members of the group." 25 C.F.R. § 83.7(b)(2)(i). 18/

In the Final Determination Technical Report, at page 80, BIA stated that only one third of Petitioner's members presently reside in Petitioner's core geographical area. In her memorandum transmitting the Critical Documents (Transmittal Memorandum), the Assistant Secretary concedes that the residence percentage stated in the Final Determination Technical Report was in error:

17/ A June 27, 1996, declaration from Powell was submitted with Petitioner's Comments. To the extent Petitioner may have intended the statements made in this declaration to constitute new evidence, they cannot be so considered because they are untimely under § 83.11(b).

18/ Subsection 83.7(b)(2) provides:

"A petitioner shall be considered to have provided sufficient evidence of community at a given point in time if evidence is provided to demonstrate any of the following:

"(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community."

> The Proposed Finding Summary at 10 correctly notes that 44% of [Petitioner's] membership lives within the three settlement area, leaving 56% of the membership outside the core area. * * * However, instead of the 44%/56% split, the Final Determination Technical Report at 79-80 incorrectly references a split of one third and two-thirds. This error does not change the analysis under § 83.7(b)(2)(i) which requires "more than 50% of the membership" to live in a village-like setting and which requires also that the remaining membership maintain consistent interaction with some members of the community.

Assistant Secretary's Transmittal Memorandum at 4 n.2.

Petitioner disagrees even with the percentages given in this corrected statement. Petitioner's Comments at 5. Undoubtedly, Petitioner hopes to use the Powell affidavit to support its argument in this regard.

However, in addition to requiring "more than 50 percent" resident membership, 25 C.F.R. § 83.7(b)(2)(i) requires that the "balance [i.e., non-resident portion] of the group maintain[ ] consistent interaction with some members of the community." The BIA found that Petitioner failed to satisfy this latter requirement as well as the requirement concerning percentage of residents. Final Determination Technical Report at 80.

Powell's affidavit addresses only the first of the two requirements in 25 C.F.R. § 83.7(b)(2)(i). Thus, even if the affidavit were determined to establish beyond doubt that more that 50 percent of Petitioner's members presently reside in the core area, BIA's conclusion with respect to 25 C.F.R. § 83.7(b)(2)(i) would not be changed, because Petitioner has produced no new evidence which could affect BIA's finding concerning interaction between resident and non-resident members. Therefore, the Board finds that Petitioner has failed to establish by a preponderance of the evidence that the Powell affidavit is new evidence which could affect the determination. 19/

In summary, the Board finds that Petitioner has not established by a preponderance of the evidence that any of the 11 items it offers as new evidence could affect the determination not to acknowledge Petitioner as an Indian tribe.

Petitioner next argues under 25 C.F.R. § 83.11(d)(2) that a substantial portion of the evidence relied upon by the Assistant Secretary was unreliable or of little probative value. Two types of evidence, Petitioner contends, were improperly relied upon: (1) descriptions of individuals as "mulatto,""colored," "free persons of color," or "Negro" in 18th and 19th century documents))such descriptions, Petitioner alleges, having led the Assistant

19/ Despite this conclusion, the Board believes that clarification of various statements made by BIA relating to the percentage of residents in the core geographical area is in order. The Board returns to this subject at the end of the decision.

Secretary to assume that the individuals were non-Indian; and (2) tax lists, which Petitioner contends were improperly interpreted by BIA as showing that individuals with Ramapough names were living among the general population, rather than in an isolated group. In addition, as discussed above, the Board treats Petitioner's Motion to Strike as an argument that the notes of anthropologist Steven Austin are unreliable.

As to the racial labels employed in various documents, Petitioner contends that BIA "seeks to base its findings on them, engaging in significant intellectual gymnastics to try to avoid characterization of Ramapough ancestors as 'Indians.'" Request for Reconsideration at 15-16. However, Petitioner quotes statements from BIA's Proposed Finding which indicate that BIA, like Petitioner, understood that the racial terms might have included Indians. The quoted statements further indicate that BIA did not use these labels as evidence that the individuals described were not Indian. Rather, the statements indicate that BIA simply declined to accept the labels as evidence that the individuals were Indian. 20/

The Board finds that Petitioner and BIA agree that the racial labels used in census and other records are not reliable evidence that the individuals described were or were not Indian. The Board further finds that Petitioner has not established by a preponderance of the evidence that BIA relied on these labels to reach its conclusions that Petitioner failed to satisfy the criteria in 25 C.F.R. § 83.7(b), (c), and/or (e).

As to the tax lists, it appears likely that Petitioner's argument is directed to the Assistant Secretary's determination that Petitioner failed to satisfy the "community" criterion in 25 C.F.R. § 83.7(b), insofar as that determination concerned the period prior to 1870. Petitioner contends that the fact that individuals are listed sequentially in a tax list does not mean that they were living adjacent to each other. Therefore, Petitioner argues, the tax lists which show Ramapough names interspersed with non-Ramapough names are not evidence that Petitioner's ancestors were living among the general population rather than in a distinct community.

The BIA discussed the tax lists, together with other evidence, in the Proposed Finding Historical Report. Petitioner's Response to Proposed Finding (Response), which it filed with BIA, objected to BIA's use of the tax lists and submitted a newspaper article concerning a trip taken by a local tax collector through the Ramapo Mountain region, apparently sometime

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20/ For instance, one of the statements quoted by Petitioner reads:

"Early Federal census records recorded the families as 'free persons of color,' a description which can include American Indian, but which does not allow the BAR to conclude that persons so designated were necessarily American Indian." Proposed Finding Summary at 4, quoted in Request for Reconsideration at 18. (Emphasis by Petitioner.)

during the 1890's. 21/ Petitioner contended before BIA that this article proved conclusively that Petitioner's ancestors were living in the mountains, while the non-Ramapoughs were living in the valley. In the Technical Report for the Final Determination, BIA stated:

> An article written in the 1890's describing a settlement does not provide primary evidence for circumstances in 1810, or in 1840. Residential patterns, population, and economic circumstances may have changed drastically in the interval. In the United States in the 19th century, they certainly did. No reasonable scholar would accept a description of northern New Jersey and southern New York in 1890, however accurate, as providing a description of the population distribution of the same area a half-century earlier.

Final Determination Technical Report at 14. Although this statement makes no specific mention of the January 1905 article, Petitioner apparently interprets the statement as referring to that article. Petitioner clearly considers the BIA response inadequate. Request for Reconsideration at 22.

Before the Board, Petitioner again cites the New York Sun article, as well as another article published in The World in 1890. 22/ It cites nothing for the period before 1870 which would call into question the interpretation of the pre-1870 tax lists employed by BIA. 23/ Nor does it refute BIA's statement concerning the relevance of articles published in the 1890's or later to the analysis of population distribution during an earlier period.

The Board finds that Petitioner has not established by a preponderance of the evidence that the tax lists cited by BIA are unreliable evidence on the question of pre-1870 population distribution.

The Board next considers Petitioner's Motion to Strike as a contention that certain field notes and interview transcripts, identified as the work of anthropologist Steven Austin, are unreliable evidence. The notes and transcripts derive from a trip taken in January 1993 to the Ramapo Mountain area and describe interviews with some of Petitioner's members and others in the area.

Petitioner first objects to the notes and transcripts on the grounds that they lack authentication.

21/ The article is titled "Ramapo's Mountaineers" and was published in The New York Sun in Jan. 1905. It is listed in BIA's "Source Materials for Proposed Finding" under its title.

22/ Although its citation to this second article is imprecise, Petitioner is apparently referring to the New York World article mentioned above. See footnote 14 and accompanying text.

23/ As noted in footnote 12, BIA found that Petitioner satisfied the "community" requirement of § 83.7(b) for the period 1870-1950.

It is true, as Petitioner contends, that the notes are unsigned and undated. They are in an informal format and have the appearance of a working document. Clearly, they were used to support the Proposed Finding, as they are cited extensively in the Proposed Finding Anthropological Report, in a section concerning fieldwork data. See, e.g., Proposed Finding Anthropological Report at 20-31. The fact that the notes are informal and unsigned does not mean that they are unreliable, although the condition of the notes makes it difficult to assess their intended scope and purpose absent a statement from the author or other knowledgeable person. However, given the conclusion reached below, the condition of the notes is not critical here.

Petitioner next challenges the "accuracy and completeness" of the notes and transcripts. In support of this challenge, Petitioner submits two affidavits. One is a July 18, 1996, affidavit from Reverend Ruth R. Wainwright, who states that she considers the report of an interview with her, as well as other parts of the notes, to be inaccurate and distorted. The second affidavit, dated August 2, 1996, is from a detective with the Bergen County, New Jersey, Sheriff's Department, who disputes certain statements attributed to another police officer, a detective with the Mahwah, New Jersey, Police Department. It is not clear whether the Bergen County detective is questioning the accuracy of the notes or the veracity of the Mahwah detective.

The Wainwright affidavit is arguably sufficient to show by a preponderance of the evidence that the report of the interview with her is unreliable. However, the substance of the interview, both as reported in the notes and as described in the affidavit, has minimal relevance, at best, to BIA's analysis of the criteria upon which the Final Determination was based.

The affidavit of the Bergen County detective is insufficient to prove by a preponderance of the evidence that the report of the interview with the Mahwah detective is unreliable. Further, the statements which the notes attribute to the Mahwah detective, which concern that detective's beliefs about Petitioner's members, are essentially irrelevant to BIA's analysis of the criteria upon which the Final Determination was based.

Next, Petitioner contends that the Austin notes are inconsistent with statements Austin made to some of Petitioner's members. In support of this contention, Petitioner submits affidavits from five of those members, each stating that Austin had expressed a favorable attitude toward acknowledgment of Petitioner. Petitioner evidently considers the notes unfavorable to Petitioner's acknowledgment and thus at odds with the statements described in the affidavits. "This," Petitioner contends, "raises the clear question of whether Mr. Austin was for some unknown reason compelled, despite his convictions, to alter his position once he returned to Washington." Motion to Strike at 5.

The Board finds this argument unpersuasive. The notes do not express Austin's view, one way or the other, as to whether Petitioner should be acknowledged. Even if Austin made the statements attributed to him in Petitioner's affidavits, those statements would be insufficient to show that

Austin distorted, either voluntarily or involuntarily, the data he collected during his January 1993 trip.

Petitioner is required to show by a preponderance of the evidence that a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or of little probative value. Assuming Austin's notes are unreliable in some respects, or even in all respects, Petitioner must still show that the notes constitute a substantial portion of the evidence relied upon by the Assistant Secretary.

Austin's notes were used in connection with BIA's analysis of Petitioner's recent and present-day community and political structure. Even if the notes were found unreliable in their entirety and even if, as a result of such a finding, BIA were to reverse its conclusion concerning Petitioner's post-1950 community, the ultimate determination concerning Petitioner's satisfaction of the criteria in 25 C.F.R. § 83.7(b) and (c) would not be affected. This is so because BIA's conclusion that Petitioner failed to satisfy the criteria for the period before 1870 did not depend upon the Austin notes but, rather, upon evidence which, except as discussed above, Petitioner does not challenge. Likewise, BIA's conclusion that Petitioner failed to satisfy the criterion in 25 C.F.R. § 83.7(e) did not depend upon the Austin notes and would not be altered were those notes to be entirely disregarded. Under these circumstances, the Board finds that the challenged evidence does not constitute a substantial portion of the evidence relied upon. 24/

The Board finds that Petitioner has not shown by a preponderance of the evidence that a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or of little probative value.

Petitioner next argues under 25 C.F.R. § 83.11(d)(4) that BIA "Failed To Consider Reasonable Alternative Interpretations Of The Evidence That Would Substantially Affect The Determination That The Petitioner Does Not Meet Criteria (b), (c) and (e)." Request for Reconsideration at 23.

In this part of its Request for Reconsideration, Petitioner contends that BIA applied the wrong standard of proof, requiring that Petitioner make its case by conclusive evidence in violation of 25 C.F.R. § 83.6(d), and that BIA failed to use proper genealogical methodology, resulting in an unreasonable interpretation of the evidence. Petitioner then discusses the criteria in 25 C.F.R. § 83.7(b), (c), and (e) individually, contending with respect to each that BIA failed to consider reasonable alternative interpretations of the evidence which would have caused BIA to conclude that Petitioner satisfied that criterion.

24/ Petitioner's remaining argument concerning the Austin notes))that Petitioner suffered a deprivation of due process because the notes were withheld from it))is addressed below.

Throughout this part of its argument, Petitioner puts forth various reasons why BIA should have interpreted the evidence differently than it did. Most of its discussion is devoted to contentions concerning the standard of proof, the weight given to various pieces of evidence, and allegations of improper interpretation of the evidence. Although Petitioner alleges that BIA "failed to consider" certain interpretations of the evidence, what emerges from Petitioner's long and somewhat rambling argument is that BIA considered and rejected those interpretations.

[3] The ground for reconsideration set out in 25 C.F.R. § 83.11(d)(4) is: "That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one of more of the criteria in § 83.11(a) through (g)." (Emphasis added.) The Board construes this paragraph as contemplating reconsideration in the case of a reasonable alternative interpretation which BIA, through inadvertence or otherwise, truly did not consider. The Board does not construe the paragraph to apply to an interpretation, even a reasonable one, which BIA has considered and rejected. In other words, the Board does not construe this paragraph as authorizing the Board to reweigh the evidence or to second-guess BIA's interpretation of the evidence that was before it.

Petitioner does not offer any new interpretation of the evidence that BIA did not, or arguably did not, consider. The Board finds that Petitioner has failed to show by a preponderance of the evidence that "there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination" that Petitioner fails to satisfy the criteria in 25 C.F.R. § 83.11(b), (c), and/or (e).

Having found that Petitioner has not established by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d)(1), (2), or (4) are present here, the Board affirms the Assistant Secretary's February 6, 1996, Final Determination.

As to matters not within the Board's jurisdiction, Petitioner has alleged violations of due process and BIA misconduct in general. Most of these allegations have been addressed previously, in responses by various Departmental officials to filings Petitioner made with the Secretary of the Interior. Three of the due process allegations, however, do not appear to have been addressed previously. The Board therefore refers these allegations to the Secretary under 25 C.F.R. § 83.11(f)(2).

As discussed above, see footnote 10 and accompanying text, Petitioner contends that BIA refused to furnish it with copies of the notes of anthropologist Steven Austin until the notes were submitted to the Board as a part of the Critical Documents. The Board recommends that the Secretary determine whether this allegation is well-founded and, if so, whether it constitutes a basis for reconsideration in this case.

Petitioner also contends that BIA violated Petitioner's right to due process by failing to provide consultation under 25 C.F.R. § 83.10(l). 25/ Petitioner made this allegation at pages 5-7 of an October 16, 1995, document filed with the Secretary titled "Motion for Reconsideration and Immediate Suspension of Proceeding." The allegation was not specifically addressed in the December 18, 1995, response signed by the Solicitor. Petitioner repeats the allegation before the Board. The Board recommends that the Secretary determine whether the allegation is well-founded and, if so, whether it constitutes a basis for reconsideration in this case.

The third allegation concerns BIA's finding that Petitioner failed to satisfy the "community" requirement under 25 C.F.R. § 83.7(b) for the period after 1950. Petitioner argues that BIA reversed itself on this point. It contends that, in the Proposed Finding, BIA found that Petitioner did show "community" for the entire period after 1870 but, without notice to Petitioner, changed this finding to conclude in the Final Determination that Petitioner failed to satisfy the requirement for the period after 1950. Petitioner suggests that, in technical assistance meetings and letters, BIA misled Petitioner by stating that Petitioner should concentrate on bolstering its research for the period 1750-1820, without mentioning a need for further research on the later period. Petitioner alleges, inter alia, that BIA's failure to give Petitioner notice of the change of position was a denial of due process. The Board recommends that the Secretary determine whether this allegation is well-founded and, if so, whether it constitutes a basis for reconsideration in this case.

In connection with this allegation, the Board also recommends that the Secretary request the Assistant Secretary to address an apparent discrepancy between the Proposed Finding and the Final Determination concerning Petitioner's "community" for the post-1870 period. This apparent discrepancy may well be a result of the change in regulations. The Board believes, however, that some clarification is warranted.

As noted above, the Proposed Finding was made under the 1978 regulations, which were still in effect in 1993. Section 83.7(b) (1993) required: "Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area."

25/ Subsection 83.10(l) provides:

"At the end of the period for comments on a proposed finding, the Assistant Secretary shall consult with the petitioner and interested parties to determine an equitable timeframe for consideration of written arguments and evidence submitted during the response period. The petitioner and interested parties shall be notified of the date such consideration begins."

At page 10 of the Proposed Finding Summary, BIA discussed Petitioner's present-day population distribution and interrelationships between resident and non-resident members. It stated, however, that, "[b]ecause the RMI do not meet the requirements of criterion b on other grounds, it was not necessary to definitively evaluate this question." On the following page, the following conclusion appears:

> The RMI do not meet the requirements of criterion b between 1850 and the present, because although there is significant evidence they were socially cohesive and distinct during this period, they were not distinct as Indians, as called for by the criterion. * * * The RMI do not meet the requirements of the regulations for criterion 83.7(b) before 1850 because they did not exist as a separate, distinct community, however identified.

Id. at 11.

The requirement that a community be viewed as American Indian was removed from 25 C.F.R. § 83.7(b) in the 1994 revision of the regulations. As pointed out in the Notice of the Final Determination in this case, 25 C.F.R. § 83.7(b) "now requires only the existence of a distinct community." 61 Fed. Reg. at 4477. 26/

The Notice of Final Determination, 61 Fed. Reg. at 4476, states: "The Proposed Finding determined that the petitioner's ancestral group did show community for the period 1870-1950, based on extensive endogamy and geographical residential concentration." See also Final Determination Summary at 23: "The Proposed Finding found that there was sufficient evidence that the RMP were a distinct community from about 1870 to 1950."

In the Board's view, these statements are inaccurate in that they indicate that the Proposed Finding (1) had distinguished between the 1870-1950 period and the post-1950 period and (2) had concluded that Petitioner satisfied the "community" requirement for the 1870-1950 period, or would do so absent the now-removed requirement that the community be viewed as American Indian. As the Board reads the conclusion reached by the Proposed Finding, the only time-period distinction made was between the pre-1850 period and the post-1850 period. Further, as the Board understands the Proposed Finding, no conclusion was reached on the question of whether Petitioner satisfied the community requirement, as presently constituted, for any of the period after 1850, because the negative conclusion in the proposed finding was based on another, now-removed, requirement. 27/

26/ In addition, in the 1994 revision, the requirement that members be descendants of an Indian tribe was moved from § 83.7(b) to § 83.7(e).

27/ Petitioner's argument that BIA changed its position suggests that Petitioner reads the Proposed Finding differently, construing it as having concluded that Petitioner satisfied the community requirement for the modern period.

Although this is not a critical point, the Board recommends that, at the same time Petitioner's due process allegation is considered, the Assistant Secretary be requested to clarify the statements in the Final Determination concerning the findings made in the Proposed Finding.

Another point which the Board believes requires clarification is also related to the "community" requirement in 25 C.F.R. § 83.7(b). It concerns Petitioner's "core geographical area," 28/ as used to determine residency percentages under 25 C.F.R. § 83.7(b)(2)(i). The Proposed Finding stated:

> A substantial portion of the RMI ancestors and their descendants have lived in the three Ramapo Mountain communities of Stag Hill/Mahwah, Hillburn, and Ringwood, from the 1870's to the present. According to the 1992 RMI membership list submitted to BAR, there are about 2,654 members of the group. Slightly over one-half of these members (1,333) live in a 10-mile geographical core area that includes the three principal settlements of Stag Hill/Mahwah, New Jersey, Hillburn, New York, and Ringwood, New Jersey, with 44 percent in the settlements themselves.

Proposed Finding at 10. The Assistant Secretary's Transmittal Memorandum (quoted above in connection with the Powell affidavit) indicates that "44% of [Petitioner's] membership lives within the three settlement area, leaving 56% of the membership outside the core area." This latter statement suggests that the core geographical area, which the Proposed Finding seemed to describe as a 10-mile area, was viewed in the Final Determination as consisting only of the settlements, and perhaps their immediate environs. It appears possible that Petitioner's argument concerning the percentage of members resident in the core area (see discussion of Powell Affidavit, supra) results in part from the apparent discrepancy between the Proposed Finding and the Final Determination/Transmittal Memorandum as to the reach of Petitioner's core geographical area.

Possibly related to this discrepancy is another undefined term, "village-like setting." The Assistant Secretary's Transmittal Memorandum stated that, to be considered residents of the core area, members must live in a village-like setting. The term also appears in the Final Determination Summary, which states at page 22:

> The term "geographical community" [29/] is used as a designation for people living in a village-like setting. It is

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28/ Sometimes, "geographical core area." There is no definition of either version of this term in § 83.1. As used in the Proposed Finding and Final Determination, it appears to be a shorthand way of referring to the geographical area described in § 83.7(b)(2)(i), i.e., "a geographical area exclusively or almost exclusively composed of members of the group."

29/ There is no definition of the term "geographical community" in § 83.1.

The term "community" is defined as "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

> accepted by the regulations as a high level of evidence if more than 50% of the petitioner's members live in such a setting. This means that BIA is willing to assume that people who share kinship ties and live in a limited, homogeneous, isolated geographical area are interacting with each other in significant ways, if there is no significant evidence to the contrary.

The problem with these statements is that 25 C.F.R. § 83.7(b)(2)(i), to which they presumably refer, has no requirement that core area resident members live in a village-like setting. The regulation requires only that the members live in a "geographical area exclusively or almost exclusively composed of members of the group." It is conceivable, although perhaps unlikely, that the requirements of the regulation could be met in an undeveloped rural area, or even in an urban area.

It appears possible that imposition of the "village-like setting" requirement was the cause of BIA's apparent alteration in its conclusion concerning the population of Petitioner's core geographical area. To the extent the imposition of a requirement not stated in the regulations resulted in a conclusion adverse to Petitioner))even though the specific conclusion was not critical to the ultimate determination concerning Petitioner's acknowledgment))the Board recommends that the Secretary determine the requirement to be invalid. 30/

The Board recommends that the Secretary request the Assistant Secretary to clarify the scope of Petitioner's core geographic area, to explain the apparent discrepancy in the Proposed Finding and the Final Determination on this point, and to delete the "village-like setting" requirement.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 83.11, the Assistant Secretary's February 6, 1996, Final Determination is affirmed and the four issues just discussed are referred to the Secretary.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

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fn. 29 (continued)
and identified as distinct from nonmembers. Community must be understood in the context of the history, geography, culture and social organization of the group."

30/ Cf., e.g., Robles v. Sacramento Area Director, 23 IBIA 276 (1993), holding invalid a restriction upon adult vocational training services which does not appear in the regulations governing the program.