UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MUWEKMA OHLONE TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:03 CV 1231 (RBW)
	)	
DIRK KEMPTHORNE,	)	
Secretary of the Interior, et al.	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants, by and through their undersigned counsel, hereby move this Court for an Order granting summary judgment, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, in Defendants' favor. In support of this Cross-Motion, Defendants submit the accompanying Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment and the entire Supplemental Administrative Record and the Administrative Record, the index of which is on file with the Court.

Respectfully submitted,

MATTHEW J. MCKEOWN
Acting Assistant Attorney General
United States Department of Justice

Dated this 16th day of March, 2007.

/s/ Sara E. Culley

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MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. Introduction

Plaintiff Muwekma Ohlone Tribe ("Plaintiff") is not entitled to be acknowledged as an Indian tribe with a government-to-government relationship with the United States. Plaintiff claims that Defendants Dirk Kempthorne, Secretary of the Interior and Carl J. Artman, Assistant Secretary-Indian Affairs ("Defendants") violated the Equal Protection Clause and Administrative Procedure Act ("APA") by failing to excuse Plaintiff from completing the process set out in the federal acknowledgment regulations. In reality, no basis existed for exempting Plaintiff from this process which is utilized to determine which groups have existed continuously as Indian tribes and are therefore entitled to a government-to-government relationship with the United States.

Plaintiff's Equal Protection Clause and APA claims fail, because it has offered no proof that it is similarly situated to the Lower Lake Rancheria ("Lower Lake") and the Ione Band of Miwok ("Ione"). It does not, therefore, merit similar treatment outside the federal acknowledgment regulations. The relatively brief statements that represent the decision documents to reaffirm the government-to-government relationship between the United States and Lower Lake and Ione do not articulate an alternative standard for acknowledgment. Rather, they articulate a summary of core principles deduced from voluminous documentary evidence spanning many decades. Unlike Lower Lake and Ione, Plaintiff lacked critical evidence demonstrating that it is a continuously existing political entity. Plaintiff also lacked a long-standing governmental relationship with the United States. In addition, Lower Lake and Ione have been treated as having collective rights in tribal lands that were subject to administrative errors by the Department of the Interior ("Department") in the late 20th Century. Plaintiff,

however, cannot demonstrate that it possesses collective rights in tribal lands. Defendants also applied the proper evidentiary standard to Plaintiff. Moreover, Defendants' decision to require Plaintiff to complete the process set out in the federal acknowledgment process is in keeping with Defendants' long-held position that continuity of tribal existence is essential in determining acknowledgment. Because Plaintiff has not carried its heavy burden of negating every conceivable rational basis for Defendants' decision, Plaintiff's claims should be rejected.

II. Factual and Procedural Background

On September 6, 2002, the Assistant Secretary-Indian Affairs ("Assistant Secretary") issued a final determination denying Plaintiff's petition for acknowledgment as an Indian tribe under the federal acknowledgment regulations. 25 C.F.R. Part 83 (1994).[1/] The Assistant Secretary concluded that Plaintiff did not demonstrate by a reasonable likelihood that it: 1) had been identified as an American Indian entity on a substantially continuous basis since 1927; 2) was a distinct community at present; 3) exercised political influence or authority over its members since 1927.

On June 6, 2003, Plaintiff filed a Complaint for relief alleging that Defendants violated the APA and various constitutional provisions. Pls.' Compl., ¶¶ 1-47. After the parties completed briefing in this case, the Court entered an Order on September 21, 2006. In its Order, the Court "deni[ed] both parties' motions without prejudice and direct[ed] the Department to supplement the administrative record." Ct.'s Order of September 21, 2006, 2. The Court's Order stated that Defendants "must provide a detailed explanation of the reasons for its refusal to

[1/] Defendants set out the factual and procedural background in greater detail in its initial Cross-Motion for Summary Judgment (Dkt. No. 40).

waive the Part 83 procedures when evaluating [Plaintiff's] request for federal tribal recognition, particularly in light of its willingness to 'clarify the status of . . . [Ione] . . . [and] reaffirm[] the status of [Lower Lake] without requiring [them] to submit . . . petition[s] under . . . Part 83.'" *Id.* at 31. The Court stated that this issue is dispositive of Plaintiff's Equal Protection Act and APA claims. *Id*. at 32.

In accordance with the Court's Order of September 21, 2006, Defendants filed their Explanation to Supplement the Administrative Record ("Supplement") on November 27, 2006. Along with the Supplement, Defendants also provided the Court and Plaintiff with a supplemental administrative record. In the Supplement, the Principal Deputy Assistant Secretary fully set forth the reasons underlying the decision to reaffirm federal recognition of Lower Lake and the decision to clarify the status of Ione. He noted that:

> The Department's decision to clarify the status of Ione in 1994 and to reaffirm federal recognition of Lower Lake in 2000 . . . were not based merely on a finding that those groups were previously recognized by the federal government at some time in the past. The decision documents in those cases stressed factors other than previous recognition.

Ex. 1 (Supplement) at 2. The Principal Deputy Assistant Secretary also explained why there was no basis for exempting Plaintiff from the federal acknowledgment regulations. As detailed in the Supplement:

> [Plaintiff] was treated differently from Ione and Lower Lake because its situation was different from the situation of those two groups. [Plaintiff] was treated similarly to other petitioners that received a finding of previous federal acknowledgment because its circumstances were similar to their circumstances. [Plaintiff] received the treatment and evaluation it merited with a finding of federal previous acknowledgment. No exemption from the regulatory process was due [Plaintiff] because of the finding of previous federal acknowledgment.

Ex. 1 at 17.

On February 16, 2007, Plaintiff filed a Motion for Summary Judgment (Dkt. No. 60). In response, Defendants file a Cross-Motion for Summary Judgment and Combined Response in Opposition and the instant Memorandum in support thereof.

III. Statutory Background

Plaintiff brings claims against Defendants pursuant to the Equal Protection Clause and the APA. "Both the Equal Protection Clause and the APA prohibit agencies from treating similarly situated petitioners differently without providing a sufficiently reasoned justification for the disparate treatment." Ct.'s Order of September 21, 2006, 15 (citations omitted). As the D.C. Circuit noted in *Women Prisoners of District of Columbia Dept. of Corrections v. District of Columbia*, "the Constitution, however, 'does not require things which are different in fact or opinion to be treated in law as though they were the same.' Thus, the 'dissimilar treatment of dissimilarly situated persons does not violate equal protection.'" 93 F.3d 910, 924 (D.C. Cir. 1996) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994)) (additional citations omitted).

In bringing its Equal Protection Clause claim, Plaintiff does not allege that it is a member of a suspect class. Accordingly, its claim must be assessed under the deferential rational basis standard. *See* Ct.'s Order of September 21, 2006, 18 ("The relevant inquiry here is whether the Department has provided a rational basis for requiring [Plaintiff] to adhere to the Part 83 procedure while exempting other tribes that are purportedly similarly situated."). In *American Towers, Inc. v. Williams*, the court explained the rational basis standard providing:

> To pass constitutional muster under the equal protection component of the Fifth Amendment's Due Process Clause, an official government action need only bear a rational relationship to a legitimate governmental purpose so long as no suspect or quasi-suspect class is involved . . . . In defending against an equal protection

> claim, the government must offer a rational basis for its conduct, but it has no obligation to present any evidence to sustain the rationality of its decision. Indeed, the burden is on the one attacking the government's action to negative every conceivable [rational] basis which might support it, whether or not the basis has a foundation in the record.

146 F. Supp. 2d 27, 30-31 (D.D.C. 2001), *aff'd*, 50 Fed. Appx. 448 (D.C. Cir. 2002) (internally citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985); *Steffan v. Perry*, 41 F.3d 677, 684 (D.C. Cir. 1994)) (emphasis added).[2/]

"The party challenging agency action has the burden to prove that the action was arbitrary, capricious, or otherwise unlawful." Ct.'s Order of September 21, 2006, 14 (citation omitted). As this Court noted in *Islamic American Relief Agency v. Unidentified FBI Agents*, "under the arbitrary and capricious standard, the Court does not undertake its own fact-finding,

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[2/] Because Plaintiff is not a member of a suspect class, Plaintiff brings what is known as a "class of one" equal protection claim. As noted in Defendants' initial Motion for Summary Judgment, a high standard is needed to sustain a "class of one" equal protection claim. *See, e.g., Jennings v. City of Stillwater*, 383 F.3d 1199 (10th Cir. 2004). In discussing such claims, the Tenth Circuit stated:

> In the wake of *Olech*, the lower courts have struggled to define the contours of class-of-one cases. All have recognized, that, unless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors. It is always possible for persons aggrieved by government action to allege, and almost always possible to produce evidence that they were treated differently from others, with regard to everything from zoning to licensing to speeding to tax evaluation.

Id. at 1210-11; *see also Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005) (Class of one claims "are cases in which the plaintiff does not claim to be a member of a class that the defendant discriminates against, but argues only that he is being arbitrarily worse than some one or ones identically situated to him. If that is the law and any unexplained or unjustified disparity in treatment by public officials is therefore to be deemed a prima facie denial of equal protection, endless vistas of federal liability are opened."); *Engquist v. Oregon Dept. of Agriculture*, – F.3d –, 2007 WL 415249 *5 (9th Cir. 2007).

rather, the Court must review the administrative record as assembled by the agency." 394 F. Supp. 2d 34, 44 (D.D.C. 2005), *aff'd*, – F.3d – , 2007 WL 445936 (D.C. Cir. 2007) (citation omitted). "This review is highly deferential to the agency." *Id*. (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003)). "And 'there is a presumption in favor of the validity of [the] administrative action.'" *Id*. (quoting *Bristol-Myers Squibb Co. v. Shalala*, 923 F. Supp. 212, 216 (D.D.C. 1996)). "If the 'agency's reasons and policy choices . . . conform to certain minimal standards of rationality the [decision] is reasonable and must be upheld." *Id*. at 45 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983)). "Moreover, because the Department has 'special expertise' in determining whether petitioning tribes are entitled to tribal recognition . . . the Court must be particularly deferential to its determinations." Ct.'s Order of September 21, 2006, 14 (citations omitted).

IV. Defendants Provided a Detailed and Rational Explanation for its Treatment of Plaintiff.

In its Supplement, Defendants provided a detailed and rational explanation for its treatment of Plaintiff. The Principal Deputy Assistant Secretary fully explained why there was no basis for exempting Plaintiff from the process set out in the federal acknowledgment regulations. Plaintiff cannot sustain its Equal Protection Clause and APA claims, because it is not similarly situated to Lower Lake and Ione. In contrast to Lower Lake and Ione, Plaintiff cannot demonstrate that it has a long-standing and continuing governmental relationship with the United States. Plaintiff also has not been treated as having collective rights in tribal lands. In addition, Defendants applied the proper evidentiary standard to Plaintiff. Furthermore, Plaintiff has not carried its heavy burden of negating every conceivable rational basis for Defendants'

decision to evaluate Plaintiff within the federal acknowledgment process. Defendants had a very clear rational basis for requiring Plaintiff to complete the process set out in the federal acknowledgment process. This decision is in keeping with Defendants' long-held position that continuity of tribal existence is essential in determining acknowledgment.

A. Plaintiff is Not Similarly Situated to Lower Lake and Ione.

Plaintiff's claims fail, because it is not similarly situated to Lower Lake and Ione. "The threshold inquiry in evaluating an equal protection claim is . . . 'to determine whether a person is similarly situated to those persons who allegedly received favorable treatment.'" *Women Prisoners of District of Columbia Dept. of Corrections*, 93 F.3d at 924 (quoting *United States v. Whiton*, 48 F.3d 356, 358 (8th Cir. 1995)). In this case, Defendants treated Plaintiff "differently from Ione and Lower Lake because its situation was different from the situation of those two groups." Ex. 1 at 17. After the Ione decision but years before the Lower Lake decision, as the Department reviewed Plaintiff's submissions and provided continuing technical assistance,[3/] it became increasingly evident Plaintiff lacked critical factors demonstrating that it is a continuously existing political entity. For example, Plaintiff cannot demonstrate that it possesses a long-standing governmental relationship with the United States. In addition, Plaintiff lacks collective rights in lands. Unlike Plaintiff, the Supplement details that Lower Lake and Ione have a long-standing government-to-government relationship with the United States. Both of these Indian tribes also have been treated as having collective rights in tribal lands. Because Plaintiff is not similarly situated to either Lower Lake or Ione, Plaintiff cannot satisfy the threshold requirement necessary to sustain its claims. Neither the Constitution nor the APA

[3/] *See* Defs.' Mot. (Dkt. No. 40), Ex. 1.

requires federal agencies to treat factually different situations as though they were the same. Accordingly, Plaintiff's claims should be rejected.

1. Plaintiff Lacks a Long-Standing Governmental Relationship with the United States.

Plaintiff is not similarly situated to Lower Lake or Ione, because it lacks a long-standing governmental relationship with the United States. In their Supplement, Defendants detail a pattern of federal dealings with Lower Lake and Ione which evidences their long-standing and continuing governmental relationship with the United States. Ex. 1 at 4-8. The purpose of the federal acknowledgment process is to determine which groups have existed continuously as Indian tribes and are therefore entitled to a government-to-government relationship with the United States. 25 C.F.R. § 83.2. Because of their long-standing and continuing governmental relationship with the United States, Lower Lake and Ione were not required to proceed through the federal acknowledgment process. In contrast to these two Indian tribes, "there is no evidence of any federal dealings with a Muwekma group or Verona band after 1927." *Id*. at 3. Indeed, examination of the evidence shows that "no similar examples for [Plaintiff] exist to provide a basis for concluding, or even contending, that any [f]ederal acknowledgment of [Plaintiff] continued to exist." *Id*. at 7. Accordingly, Plaintiff is not similarly situated to Lower Lake and Ione. Thus, Plaintiff was properly evaluated within the federal acknowledgment process. *Id*.

In making the decision to reaffirm federal recognition of Lower Lake, the Assistant Secretary "concluded that the federal relationship between Lower Lake and the United States had never ended." *Id*. at 3. Indeed, throughout the last century, the United States had multiple dealings with Lower Lake. The United States "purchased land to establish the Lower Lake Rancheria on January 25, 1916." *Id*. at 7; Supp. A.R. Doc. 243, 2. This land was held in trust

until legislation authorized its sale in 1956. Ex. 1 at 7. In 1927, a federal employee recommended that land be purchased for Lower Lake. *Id*.; Supp. A.R. Doc. 42, 9. "In 1935, the agency again sought to acquire additional land for the band and other small groups." Ex. 1 at 7; Supp. A.R. Doc. 243, app. 6. In 1944, the Bureau of Indian Affairs ("BIA")[4] "noted the existence of a Lower Lake group off the rancheria." Ex. 1 at 7. "In 1947, the agency authorized an individual to move onto the rancheria and in 1950 it surveyed the rancheria's population." *Id*.; Supp. A.R. Doc. 243, app. 7-8.

In the Second Session of the 82d Congress, on July 1, 1952, the House passed Resolution 698 that provided in part:

> That the Committee on Interior and Insular Affairs . . . is authorized and directed to conduct a full and complete investigation and study of the activities and operations of the Bureau of Indian Affairs, with particular reference to (1) the manner in which the Bureau of Indian Affairs has performed its functions of studying the various tribes, bands and groups of Indians to determine their qualifications for management of their own affairs without the supervision of the Federal Government; (2) the manner in which the Bureau of Indian Affairs has fulfilled its obligations of trust as the agency of the Federal Government charged with the guardianship of Indian property; (3) the adequacy of law and regulations to assure the faithful performance of trust in the exchange, lease, or sale of surface or subsurface interests in or title to real property or disposition of personal property of Indian wards.

H.R. Rep. No. 2503, at 1 (1953).[5] House Report 2503 included Lower Lake. *See* H.R. Rep. No. 2503, at 525, 526, and 914 (1953). Also, in 1953, the BIA consulted with Indians living on the

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[4] Prior to 1947, the BIA was known as the Office of Indian Affairs.

[5] The comprehensive report was 1594 pages, plus 157 maps and 47 pages of index. The title of Part I of the Report was the "Analysis of historical, social and statistical data regarding individual tribes (directory of Indian tribal and band groups)." The title of Part II of the Report was "Analysis of Federal Law relating to Indian Tribes, including acts of Congress, treaties, and Executive orders," with subpart A titled "Tribes and reservations (alphabetically arranged)."

Lower Lake Rancheria regarding a proposed bill to sell this land. Ex. 1 at 7; Supp. A.R. Doc. 243, app. 13.[6/]

In addition, "in 1980, the BIA central office and regional office considered including the Lower Lake Rancheria on the list of federally recognized tribes." Ex. 1 at 7; Supp. A.R. Doc. 191, n.1. In the Assistant Secretary's decision to reaffirm federal recognition of Lower Lake, made in 2000, he also noted that Lower Lake successfully obtained funding from the United States Department of Health and Human Services to strengthen their tribal government structure. Supp. A.R. Doc. 250.[7/]

Like Lower Lake, Ione had a long-standing governmental relationship with the United States although sporadically documented. In making the decision to clarify the status of Ione, the Assistant Secretary concluded that "a relationship between the Ione Band and the United States continued to exist until the 1970's and that creation of a continuing trust relationship was contemplated at that time." Ex. 1 at 4. Throughout the 1910's and 1920's, the United States attempted to purchase land for Ione. *Id*. at 7. The Ione group was identified by a federal employee in 1915. *Id.*; Supp. A.R. Doc. 14. "In 1916, the Indian Office obtained a deed and abstract of title for purchase of land for the Ione band . . . and the Department provide the Office with a formal 'Authority' for the purchase." Ex. 1 at 7; Supp. A.R. Doc. 20, 21. Following these

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[6/] The land at issue was sold for the purpose of establishing an airport. Ex. 1 at 5; Supp. A.R. Doc. 250, 3. Assistant Secretary Gover concluded Lower Lake's government-to-government relationship with the United States continued to exist even after the sale of the land. Ex. 1 at 6.

[7/] When citing to the Supplemental Administrative Record, Defendants retain the numbering utilized to organize the Supplemental Administrative Record. The document number for each document appears in the footer at the bottom of the page. For convenience, Defendants have attached the Supplemental Administrative Record documents cited in this brief.

events, "the Department undertook extensive, but unsuccessful, efforts to clear title to the land" for Ione. Ex. 1 at 7; Supp. A.R. Doc. 12, 17, 23, 28-33, 35, 39. In 1927, a federal employee stated that "the Department 'been considering the purchase of a tract for the Indians at Ione for the past several years.'" Ex. 1 at 7; Supp. A.R. Doc. 42, 2 (quoting Superintendent Dorrington). In 1933, the Commissioner of Indian Affairs was informed by correspondence from a federal employee about the "general 'Ione situation.'" Ex. 1 at 7; Supp. A.R. Doc. 46-47. In 1941, the Department evaluated a petition from Ione requesting the purchase of land. Ex. 1 at 7-8; Supp. A.R. Doc. 52. In 1970, two members of Ione "contacted BIA about the status of the land on which they lived." Ex. 1 at 8; Supp. A.R. Doc. 125, 4. In 1972, the California Rural Indian Land Project contacted the Commissioner of Indian Affairs and requested that the United States accept title to the 40-acre tract of land and hold it in trust for Ione. Ex. 1 at 8; Supp. A.R. Doc. 60, 125. Also, in 1972, Commissioner of Indian Affairs Louis Bruce announced a policy to accept land to be held in trust for the band. Ex. 1 at 4; Supp. A.R. Doc. 162.[8/] As a recent opinion of the Department explains, at this time, there is reason to conclude that the Commissioner believed he was dealing with Ione as a federally recognized tribe. Ex. 1 at 4; Supp. A.R. Doc. 276.

It is also important to note that the Federal Register list of entities recognized by the Secretary of Interior as a tribe was first published on February 6, 1979. 44 Fed. Reg. 7235 (Jan. 31, 1979). The decisions regarding Lower Lake and Ione, were based, in part, on evidence that these Indian tribes had a relationship with the United States near the time of the publication of this list. Ex. 1 at 6.

[8/] The contemplated land acquisition was not completed. Ex. 1 at 4.

Unlike Lower Lake and Ione, Plaintiff's relationship with the United States ended much much farther in the past. "There is no evidence . . . that a Muwekma group had a relationship with the federal government at any time after 1927." *Id*. In 1936, the BIA "stated that it did not have a relationship with [Plaintiff's] ancestors." *Id*.; *see also id*. at 3 and Supp. A.R. Doc. 49-50 (noting that "a BIA superintendent informed an ancestor of [Plaintiff's] members, who was seeking federal services, that, 'you do not have ward status.'"). As Defendants detailed in their Supplement:

> In contrast to Lower Lake and Ione, which had trust lands, agreements, legislation, or consultation decades later than 1927, no similar examples for [Plaintiff] exist to provide a basis for concluding, or even contending, that any federal acknowledgment of [Plaintiff] continued to exist.

Id. at 7. "No Congressional act, appropriation, or approved agreement mentioned a Verona band." *Id*. at 11. Indeed, any federal dealings with a Verona entity or Plaintiff ended half a century prior to the publication of the Federal Register list of entities recognized by the Secretary of Interior as a tribe. *Id*. at 4.

Moreover, Plaintiff has offered no proof that it has a long-standing governmental relationship with the United States. Because Plaintiff cannot meet its burden of showing that it is similarly situated to Lower Lake and Ione, on this issue its claims fail. *Islamic American Relief Agency*, – F.3d – , 2007 WL 445936 (affirming the district court's finding that the plaintiff could not support its equal protection claim, because it failed to show that it was treated differently than a similarly situated entity). Prior to its inquiries regarding federal recognition in 1989, Plaintiff's Motion cites two instances that it believes demonstrate that it has a governmental relationship with the United States. These allegations fail to establish that Plaintiff is similarly situated to Lower Lake and Ione. Plaintiff argues that the BIA recognized it

as a tribal entity during enrollment periods for judgment funds awarded to the "Indians of California" in a claims case against the United States. Pl.'s Mot. (Dkt. No. 60) at 11**.** The Assistant Secretary, however, undertook a thorough examination of the Act of 1928 (45 Stat. 602) and the subsequent claims application process and concluded that it did not require current tribal affiliation. Defs.' Mot. (Dkt. No. 40) at 12-13.[9/] Plaintiff also relies on the records it submitted demonstrating that three individuals attended BIA schools in the 1930's and 1940's. Pl.'s Mot. (Dkt. No. 60) at 11**.** The Assistant Secretary, however, concluded that the individuals were admitted to the schools, based upon their individual characteristics rather than any recognition or identification of an Indian entity to which they belonged. Defs.' Mot. (Dkt. No. 40) at 13.[10/] Accordingly, it is clear that in these instances, cited by Plaintiff, the United States was not treating Plaintiff as a tribal entity; rather, it provided funds and services to individual Indians. Consequently, these allegations fail to establish that Plaintiff is similarly situated to Lower Lake and Ione.

2. Plaintiff Lacks Collective Rights in Lands.

Secondly, Plaintiff is not similarly situated to Lower Lake and Ione, because it lacks collective rights in lands. In their Supplement, Defendants explain that Lower Lake and Ione have been treated as having collective rights in tribal lands. Ex. 1 at 4-8. This factor has

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[9/] The Assistant Secretary concluded that the Act "required descent from a California Indian rather than descent from a specific historical tribe." Defs.' Reply (Dkt. No. 43) at 3. Thus, BIA "did not need to approve or reject claims of specific tribal ancestry." *Id.*

[10/] The Assistant Secretary examined these records and found that they contained no information regarding tribal membership and no tribal certification or endorsement. Defs.' Mot. (Dkt. No. 40) at 13. The records also included a number of generic references, which applied to many separate Indian groups and not to a specific Indian entity. *Id.*

historically been used by Defendants, in order to determine tribal status. *Id*. at 4; *see also* Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law*, 13 (1982 ed).[11/] In comparison, Plaintiff "never had any trust lands or any agreement to acquire trust lands on its behalf." Ex. 1 at 4-5. Because Plaintiff is not similarly situated to Lower Lake and Ione, Plaintiff was properly evaluated within the federal acknowledgment process.

An examination of the Supplement and other evidence contained in the Administrative Record clearly shows that Lower Lake has been treated as having collective rights in tribal lands. As noted above, the United States "purchased land to establish the Lower Lake Rancheria on January 25, 1916." *Id*. at 7; Supp. A.R. Doc. 243, 2. Besides this land purchase, a federal employee also recommended that land be purchased for Lower Lake in 1927. Ex. 1 at 7; Supp. A.R. Doc. 42, 9. In addition, "in 1935, the agency again sought to acquire additional land for the band and other small groups." Ex. 1 at 7; Supp. A.R. Doc. 243, app. 6. The United States held land in trust on behalf of Lower Lake for forty years. *Id*.

Like Lower Lake, Ione also has been treated as having collective rights in tribal lands. In making the decision to clarify the status of Ione, the Assistant Secretary "described her action as completing a policy that Commissioner of Indian Affairs Louis Bruce announced in 1972 to accept land to be held in trust for the band." Ex. 1 at 4; Supp. A.R. Doc. 162. In his letter of October 18, 1972, the Commissioner had outlined this policy and specifically described the parcel land to be held by the United States in trust for Ione. Ex. 1 at 5; Supp. A.R. Doc. 63. This policy was a continuation of earlier efforts made by the Department to obtain land for Ione. Ex. 1 at 5, Supp. A.R. Doc. 12, 17, 20, 23, 28-33, 35, 39 (detailing that the United States "negotiated

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[11/] *See also* Felix S. Cohen, *Handbook of Federal Indian Law*, 271 (1942 ed.).

to purchase land for Ione band in 1916 . . . and made numerous efforts into the 1920's to acquire clear title for the band"). Moreover, "members of the Ione band with the assistance of a project of the California Indian Legal Services . . . quieted title in themselves and other members of the band residing on the land in 1972." Ex. 1 at 5; Supp. A.R. Doc. 60, 62, 64. Upon clarifying Ione's status in 1994, the Assistant Secretary also accepted a parcel of land to be held in trust by the United States on behalf of Ione. Supp. A.R. Doc. 162.

In contrast to Lower Lake and Ione, Plaintiff lacks collective rights in lands. The United States has never held land on behalf of Plaintiff. Ex. 1 at 6. "A fundamental difference between [Plaintiff] and Lower Lake is that the United States purchased land in 1916 to create the Lower Lake Rancheria, but did not do so for the Verona band." *Id*. at 5-6; Supp. A.R. Doc. 243. In comparison to Ione, "at no time did a Muwekma group or Verona band have any similar promise or agreement to hold a specific tract of land in trust on its behalf." *Id*. at 5. In response, Plaintiff does not attempt to argue that it has ever possessed lands held in trust; instead, it places emphasis on the finding that the band was potentially eligible for a trust land purchase. Pl.'s Mot. (Dkt. No. 60) at 33. Plaintiff's attempt to minimize this factual distinction is without merit. "The BIA's temporary consideration of a Verona band for a land purchase . . . began and ended with a report by a BIA agent in the field." Ex. 1 at 11. "There is no available evidence that any federal agent ever engaged in negotiations or discussions to obtain land on behalf of a Verona band or Plaintiff." *Id*. at 5. Moreover, "a geographical settlement at the Verona railroad station . . . no longer existed after 1915." *Id*. at 5. Indeed, "after 1927, there is no available evidence that the federal government ever considered acquiring land for a Verona group." *Id*. at 6. "Because no land purchase was made, no trust asset existed and no federal trust relationship with the group

was created." *Id*. at 11. Accordingly, it is clear that Plaintiff has not been treated by the government as having collective rights in tribal lands.

Finally, Plaintiff suggests that any distinction made based on trust land holdings or the intent to purchase trust land is not a rational basis for distinction in granting an exemption from the full regulatory process. Pl.'s Mot. (Dkt. No. 60) at 28 (arguing that "this line of reasoning is merely a *post hoc* rationalization"). Plaintiff's attempt to explain away this factual distinction should not be permitted. As set out in *Felix S. Cohen's Handbook of Federal Indian Law*, the factors that:

> The considerations which, singly or jointly, have been particularly relied upon by [Defendants] in reaching the conclusion that a group constitutes a tribe or band have been . . . that the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.

Id., 13 (1982 ed). Consequently, Plaintiff's claim that "the decision whether or not to purchase land for a Tribe was totally irrelevant to its federal recognition" is baseless. Pl.'s Mot. (Dkt. No. 60) at 29. Here, the purchase of trust land for Lower Lake demonstrates that the United States recognized an obligation to this Indian tribe as its beneficiaries. In addition, Ione's common land base, which it successfully quieted title to, demonstrates that the Tribe's members lived in a centralized geographic location. This sort of evidence has historically been utilized by Defendants, in order to determine tribal status. The federal acknowledgment regulations even recognize the importance of a land base for tribal status by providing that a petitioner will be considered to have provided sufficient evidence of community, mandatory criteria b, if more than fifty percent of the members reside in a geographical area exclusively or almost exclusively composed of members. 25 C.F.R. § 83.7(b)(2)(I). A petitioner which meets the high evidentiary standards of 25 C.F.R. § 83.7(b)(2) for community will also be considered to have met the

requirements for maintaining political influence or authority, criteria c, pursuant to 25 C.F.R. § 83.7(c)(3). *See, e.g.*, the Huron Potawatomi, 60 Fed. Reg. 66,315.[12/]

Thus, Defendants appropriately considered the fact that Lower Lake and Ione have been treated as having collective rights in tribal lands in making their decisions regarding the two Indian tribes. Plaintiff, however, cannot demonstrate that it satisfied this factor; and, accordingly it was properly evaluated within the federal acknowledgment process.[13/]

3. Plaintiff's Alleged Similarities are Unavailing.

Plaintiff attempts to portray itself as similar to Lower Lake and Ione. Pl.'s Mot. (Dkt. No. 60) at 25. Plaintiff's alleged similarities, however, are unavailing. Plaintiff's "claimed similarity of itself to Ione and Lower Lake is based on a selective and partial comparison while a more thorough comparison shows that the claimed similarity is neither persuasive nor sufficient." Ex. 1 at 3. The factors that Plaintiff relies on are similar to many Indian groups in California. For example, Plaintiff argues that all three groups "were subjected to the particular historical circumstances in California." Pl.'s Mot. (Dkt. No. 60) at 25. These historical circumstances, however, do not provide a basis for Defendants to evaluate groups residing in

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[12/] *Compare Miami Nation of Indians of Indiana v. United States*, ("*Indiana Miami*") 255 F.3d 342, 346 (7th Cir. 2001) (upholding Department's decision not to acknowledge petitioner who lived dispersed throughout area rather than in its own communities).

[13/] Plaintiff attempts to counter the central importance accorded a communal land base in tribal status determinations by quoting language from the Federal Register Notice of the final determination to acknowledge the Match-e-be-nash-she-wish Band of Pottawatomi Indians (MBPI) as a tribe. Pl.'s Mot. at 29. The quoted language suggests that taking land into trust is a separate issue from acknowledgment. Plaintiff has taken the language out of context. The language at issue was in response to a third party comment that argued that MBPI did not have a modern community because it intended to acquire land in trust in Detroit, some distance away. The quoted language has no relevance here.

California in a different manner than other petitioners. Indeed, Plaintiff is more properly viewed as being similarly situated to the many petitioners from California who have completed or are in the midst of completing the acknowledgment process.[14/] Plaintiff also places great emphasis on its past federal acknowledgment. Pl.'s Mot. (Dkt. No. 60) at 25 (stating that the "Department recognized each of the Tribes for a period during the twentieth century."). As set out in greater detail below, previous acknowledgment is insufficient to establish the continuity of tribal existence necessary to establish that a group is entitled to present acknowledgment. Moreover, "the mere existence of a previous relationship with the federal government was not the basis for providing an exception to the acknowledgment process in the case of either Ione or Lower Lake." Ex. 1 at 4.

In support of its argument Plaintiff also alleges that none of the three groups at issue were ever terminated and that they have all continued their tribal status to present day. Pl.'s Mot. (Dkt. No. 60) at 25. These allegations fail to establish that Plaintiff is similarly situated to Lower Lake and Ione. The fact that Plaintiff was not terminated by any Act of Congress, court order, or official action by the Department is not determinative. Recognized tribes can cease to exist; they

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[14/] The Department acknowledged the Death Valley Timbi-Sha Shoshone Band on January 3, 1983, 47 Fed. Reg. 50,109. The Department has received letters of intent to petition for acknowledgment as provided for in the regulations from over 70 other groups in California. In addition to Plaintiff, at least eight of these groups claim Ohlone or Coastanoan (or Costanoan) origins as reflected in their names alone. Coastanoan Band of Carmel Mission Indians, Petitioner 110, 53 Fed. Reg. 40,274; Indian Canyon Band of Coastanoan/Mutsun Indians, Petitioner 112, 54 Fed. Reg. 29,948; Amah Mutsun Band of Ohlone/Costanoan Indians, Petitioner 120, 56 Fed. Reg. 57,196; Esselen/Coastanoan Tribe of Monterey County, Petitioner 131, 57 Fed. Reg. 60,970; Ohlone/Costanoan - Esselen Nation, Petitioner 132, 58 Fed. Reg. 6,060; Costanoan-Rumsen Carmel Tribe, Petitioner 143, 60 Fed. Reg. 8,132; Costanoan Ohlone Rumsen-Mutsun Tribe, Petitioner 147, 60 Fed. Reg. 8,128; and Costanoan Tribe of Santa Cruz and San Juan Bautista Missions, Petitioner 210, 64 Fed. Reg. 67,585.

can also choose to terminate their tribal existence. *Indiana Miami*, 255 F.3d at 346 ("It is equally obvious that Indian Nations, like foreign nations, can disappear over time . . . whether through conquest, or voluntary absorption into a larger entity, or fission, or dissolution, or movement of population."); *Mashpee Tribe v. New Seabury Corp*., 592 F.2d 575, 587 (1st Cir. 1979) ("A tribe, even if it is federally recognized . . . can choose to terminate tribal existence.") (citation omitted). Here, utilizing its special expertise in Indian matters, Defendants rationally concluded that Plaintiff is not a continuously existing political entity entitled to a government-to-government relationship with the United States. In contrast, Defendants concluded that Lower Lake and Ione had a long-standing and continuing governmental relationship with the United States. *See* Section A, Part I.

Indeed, "the Lower Lake and Ione decisions emphasized circumstances that reveal differences between [Plaintiff] and those two groups, not similarities shared by the three groups." Ex. 1 at 5. Plaintiff lacked critical evidence demonstrating that it is a continuously existing political entity. These key factual distinctions led Defendants to require Plaintiff to complete the federal acknowledgment process. Because Plaintiff is not similarly situated to Lower Lake and Ione, Plaintiff's claims should be rejected.

B. Defendants Applied the Proper Evidentiary Standards to Plaintiff.

Defendants applied the proper evidentiary standard to Plaintiff. Plaintiff suggests that the Assistant Secretary applied a lower evidentiary burden to Lower Lake and Ione. This assertion, however, is flawed because it rests on Plaintiff's refusal to recognize the crucial differences between itself and other groups, such as Lower Lake and Ione, which have existed continuously as political entities. *See* Section A. While it is true that Defendants did not require Lower Lake

or Ione to submit the hundreds of pages that Plaintiff ultimately submitted, the evidentiary burden can not be reduced to a simple comparison of the number of pages of documentation without regard to the substance of the events documented. Requiring a showing of trust lands or the attempted acquisition of trust lands accompanied by long-standing federal dealings ended by a specific administrative error, as was the case with Lower Lake and Ione, may be a more difficult evidentiary burden to satisfy than the one contained in the regulatory process.

Examining Plaintiff's allegations also shows that Defendants did not apply a more rigorous evidentiary burden to it. Plaintiff points to the finding that the majority of Plaintiff's current members are direct descendants of the members of the previously recognized Verona band. Pl.'s Mot. (Dkt. No. 60) at 26. It contends that Defendants did not make a similar finding for Ione and Lower Lake.[15/] Descendancy, however, is not determinative of which Indian groups are entitled to a government-to-government relationship with the United States. Because of the political nature of the relationship, "groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations – a political relationship – is indispensable." 43 Fed. Reg. 39361-62 (Sept. 5, 1978); *see also* 59 Fed. Reg. 9280, 9282 (Feb. 25, 1994). Plaintiff also contends that it has presented stronger evidence entitling it to acknowledgment. Pl.'s Mot. (Dkt. No. 60) at 26 (arguing that it submitted "substantial evidence of ongoing social and political activities demonstrating tribal status" and its constitution and membership lists). The

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[15/] As noted above, this finding offers little support for Plaintiff's claim. Eight other petitioning groups have claimed, at various times, to descend from a Costanoan group or use the Ohlone or Costanoan tribal name. "The existence of these other Costanoan or Ohlone petitioners reveals . . . that the Muwekma petitioner does not have an uncontested claim to represent the descendants of all the Ohlone of the San Francisco Bay Area or all the territory of Costanoan-speaking peoples." Defs.' Reply (Dkt. No. 43) at 18.

Assistant Secretary, however, undertook a through evaluation of the evidence and reached a contrary conclusion. Ex. 1 at 3-9 (comparing Plaintiff to Lower Lake and Ione); *see also* Defs.' Mot. (Dkt. No. 40) at 11-24. Plaintiff disagrees with the Assistant Secretary's interpretation and weighing of the evidence, however, a decision that a group is not entitled to a government-to-government relationship with the United States is not arbitrary and capricious "simply because different evidence led to a different conclusion" in an earlier decision. *Indiana Miami*, 112 F. Supp. 2d 742, 753 (N.D. Ind. 2000) (rejecting the Indiana's Miami's argument that they presented evidence comparable to a successful petitioner).

C. Defendants had a Rational Basis for Evaluating Plaintiff Within the Federal Acknowledgment Process.

Defendants had a rational basis for evaluating Plaintiff within the federal acknowledgment process. In order to demonstrate that Defendants lacked a rational basis for evaluating Plaintiff within the federal acknowledgment process, Plaintiff must negate *every conceivable* basis for Defendants' actions. *American Towers, Inc. v. Williams*, 146 F. Supp. 2d at 30-31.[16/] It is impossible, however, for Plaintiff to meet this burden, because Defendants had a very clear rational basis for their decision. Indeed, there were no grounds for exempting Plaintiff from the process set out in the federal acknowledgment regulations.

Throughout this case, Plaintiff has argued, primarily, that Defendants should not have required it to complete the federal acknowledgment process because it was previously recognized. *See* Pl.'s Mot. (Dkt. No. 60) at 34-35; *see also* Court's Order of September 21, 2006 (Plaintiff "argues . . . that it is similarly situated to Ione and Lower Lake, as all three entities are

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[16/] Regarding Plaintiff's APA claim, it is Plaintiff's burden to show that Defendant's decision did not conform to certain minimal standards of rationality.

'Central California tribes previously recognized at least as late as 1927'. . . "). Previous acknowledgment, however, is insufficient to establish that a group should not be required to complete the federal acknowledgment process. Indeed, on the contrary, the federal acknowledgment regulations, themselves, make express provision for handling petitioners claiming previous acknowledgment. 25 C.F.R. § 83.8. Neither the Lower Lake or Ione decisions endorse the theory that prior recognition is sufficient to prove continuity of tribal relations. Ex. 1 at 4. As detailed above, in the Lower Lake and Ione decisions Defendants stressed the importance of historical circumstances which were more compelling than mere previous federal acknowledgment. *Id*.; *see also* Section A.

An Indian tribe is more than a group of individuals with the same Indian ancestors; rather, it is a continuously existing political entity possessing a government-to-government relationship with the United States. If Defendants acknowledged Plaintiff merely on the grounds of its limited previous federal acknowledgment and their current status as Indians based on descent from that previously acknowledged group, as Plaintiff has urged, that acknowledgment would constitute an unconstitutional racial classification. Therefore, Defendants had a rational basis for concluding that Plaintiff's previous acknowledgment[17/] did not merit exempting Plaintiff from completing the process set out in the federal acknowledgment regulations.

In *Morton v. Mancari*, the Supreme Court addressed an equal protection action brought

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[17/] Defendants note the limited nature of Plaintiff's previous acknowledgment – "before 1927 there was no available evidence of any federal dealings with the group . . . [s]ince such governmental dealings with a Verona band did not exist, they also did not end." Ex. 1 at 11. "The BIA's temporary consideration of a Verona band for a land purchase . . . began and ended with a report by a BIA agent in the field. The Department's preliminary determination of previous federal acknowledgment was based on this temporary federal consideration of the group." *Id*. at 11.

by non-Indian employees of the BIA challenging the BIA's employment preference for qualified Indians. 417 U.S. 535, 537 (1974). The *Morton* Court ruled that the BIA hiring preference was not granted to Indians as a "discrete racial group" but as "members of quasi-sovereign tribal entities" and held that the preference was "reasonably and directly related to a legitimate, nonracially based goal." *Id*. at 554. *Morton's* finding concerning the political classification of groups as Indian tribes is routinely followed in acknowledgment cases. The *United Houma Nation v. Babbitt*, court recognized:

> [The] fundamental distinction between the political classification of groups as Indian tribes and the racial classification of persons as Indians. Failure to recognize this distinction results in the misperception that nonrecognition as a tribe is equivalent to refusal to recognize a person's Indian heritage.

1997 WL 403425 *7 (D.D.C. 1997). In keeping with *Morton*, the *Indiana Miami* court explained that:

> For purposes of acknowledgment and dealings with the federal government, a tribe is a political institution . . . so racial or ancestral commonality isn't enough, without a continuously existing political entity.

112 F. Supp. 2d at 746. In *United Tribe of Shawnee Indians v. United States*, the court explained that a group's descent "says nothing about whether [the group] has maintained its identity . . . and has continued to exercise that tribe's sovereign authority up to the present day." 253 F.3d 543, 548 (10th Cir. 2001). *See also United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981) (Holding that to be recognized as the successor tribe, group members must be lineal descendants of the historic tribe *and* must have maintained tribal relations.).

Defendants recognize the important distinction between the permissible political classification of groups as Indian tribes and the unconstitutional racial classification of persons as Indians. Consequently, Defendants require that Indian groups must be able to demonstrate

that they have continuously maintained tribal relations in order to be acknowledged. Indeed, Defendants' "position is, and has always been, that the essential requirement for acknowledgment is continuity of tribal existence rather than previous acknowledgment." 50 Fed. Reg. 9280, 9282. If Defendants exempted Plaintiff from the process set out in the federal acknowledgment regulations on the basis of its previous federal acknowledgment, it would constitute an unconstitutional racial classification. Such a decision is not sanctioned by the Constitution, the federal acknowledgment regulations, or the Lower Lake and Ione decisions. Accordingly, Defendants rationally required Plaintiff to complete the process set out in the federal acknowledgment regulations.

An examination of the timing of Plaintiff's requests to be exempted from the process set out in the federal acknowledgment regulations also confirm the rationality of Defendants' actions. Indeed, Plaintiff's "requests for immediate action often were compatible with a plea for expedited treatment within the regulatory process." Ex. 1 at 9. Plaintiff asked for 'immediate' reaffirmation and, in 2001, for reaffirmation 'apart from BAR proceedings,'[18/] but the only claim it made that it merited such action was that it had previous federal acknowledgment." *Id*. at 17. As noted above, the Lower Lake and Ione decisions "were not grounded on previous acknowledgment." *Id*. Plaintiff's claim that it was similar to Lower Lake was made shortly before the *Muwekma I* court ordered Defendants to begin an evaluation of Plaintiff within the federal acknowledgment process. *Id*. at 16-17. Plaintiff's "comparison cited factors . . . that were considered in the evaluation under the regulations." *Id*. at 17. Moreover, the minimal

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[18/] The Departments' Office of Federal Acknowledgment was previously known as the Branch of Acknowledgment and Research ("BAR").

comparison offered by Plaintiff did not rely upon the reasoning set out in the Lower Lake decision. *Id*. Because Plaintiff did not "argue that its situation was similar to that of Ione, there was no need for the Department to evaluate such a comparison." *Id*. Consequently, Defendants explained to Plaintiff that previous federal acknowledgment was insufficient to allow them to exempt Plaintiff from the process set out in the regulations. *Id*. Defendants then proceeded to evaluate Plaintiff's petition in accordance with the regulations.

Because Plaintiff has not carried its heavy burden of negating every conceivable rational basis for Defendants' decision to evaluate Plaintiff within the federal acknowledgment process, Plaintiff's claims should be rejected.

V. Defendants are Entitled to Summary Judgment.

The Court's Order of September 21, 2006 contemplated that the parties would provide additional briefing regarding Plaintiff's Equal Protection Clause and APA claims. The Court also reserved consideration regarding Plaintiff's other claims. Accordingly, Defendants briefly recount the additional reasons why they are entitled with summary judgment.

As detailed in Defendants' initial briefing, the Assistant Secretary's Final Determination not to acknowledge Plaintiff is fully supported by the extensive administrative record in this case. Upon review, the Assistant Secretary concluded that Plaintiff failed to provide sufficient evidence regarding three of the seven mandatory criteria for federal acknowledgment. Defs.' Mot. (Dkt. No. 40) at 11-24. Specifically, the Assistant Secretary determined that Plaintiff was not identified as an Indian entity "for a period of almost four decades after 1927." In addition, Plaintiff was identified only for a "6-year period during the 55 years between 1927 and 1982." The Assistant Secretary further determined that Plaintiff failed to demonstrate that it is a distinct

community at present. Plaintiff also failed to show the existence of informal political processes within a group of their ancestors at any time. In addition, Plaintiff's current organization did not demonstrate a political process or a bilateral political relationship between its named leaders and its members. In making the detailed determination regarding Plaintiff, the Assistant Secretary thoroughly considered and evaluated each of the pieces of evidence cited by Plaintiff in its Motion as examples of alleged arbitrary findings. Defs.' Mot. (Dkt. No. 40) at 12-14 (evaluating Plaintiff's submissions concerning enrollment for judgment funds, attendance at BIA schools, and alleged scholarly identifications). Plaintiff disagrees with the Assistant Secretary's conclusions; however, Plaintiff offers nothing to show that the Assistant Secretary's determinations were arbitrary and capricious.

Defendants are also entitled to summary judgment regarding Plaintiff's first cause of action alleging that the final determination is contrary to law, because it exceeds the six year statute of limitations set out in 28 U.S.C. § 2401(a). Plaintiff's claim accrued long ago and was certainly fixed by 1979, when the list of entities recognized by the Secretary of the Interior as a tribe was published. Furthermore, because Plaintiff could not meet the mandatory criteria set out in the federal acknowledgment regulations, the final determination was lawful. Plaintiff's claim also fails, because the final determination did not violate any trust obligation. Plaintiff has not, in any of its briefing, identified a fiduciary duty which requires Defendants to list Plaintiff as a federally recognized tribe or provide its members with the benefits and services that are connected to acknowledgment.

In addition, Plaintiff was not deprived of due process of law. Because Plaintiff does not have an existing government-to-government relationship with the United States, it does not

possess the requisite "legitimate claim of entitlement" triggering the due process guarantee. *C&E Services, Inc. of Washington v. District of Columbia Water and Sewer Authority*, 310 F.3d 197, 200 (D.C. Cir. 2000) ("The Constitution's "procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits, . . . a Fifth Amendment-protected property interest arises only upon award.") (emphasis in original) (citation omitted). As noted in Defendants' earlier briefing, this is further supported by the fact that Plaintiff is not presently a recipient of the specific benefits and services that flow from acknowledgment. *Greenlee v. Board of Medicine of District of Columbia*, 813 F. Supp. 48, 56 (D.D.C. 1993) ("Present enjoyment is integral to the existence of a property entitlement.").

In any event, Defendants provided Plaintiff with extensive process. Defs.' Mot. (Dkt. No. 40) at 45-47; Defs.' Reply (Dkt. No. 43) at 20-22 (discussing Defendants' lengthy review process, the technical assistance letters sent to Plaintiff, the over 250 page proposed finding detailing the areas in which Plaintiff needed to submit additional evidence, the formal meeting allowing Plaintiff's members and researchers to receive guidance from Defendants' experts and that Defendants provided six months for Plaintiff to submit such evidence, comments, and arguments). Moreover, Plaintiff ignored the procedural safeguard offered by Defendants. Indeed, Plaintiff failed to take advantage of the independent review process before the Interior Board of Indian Appeals (IBIA) guaranteed by the regulations. 25 C.F.R. § 83.11. If Plaintiff had elected to seek review by the IBIA, it could have received an independent review of each of its evidentiary challenges, equal protection, due process, and improper conduct claims. Defs.' Mot. (Dkt. No. 40) at 46-47; Defs.' Reply (Dkt. No. 43) at 21-22. If Plaintiff sought to raise grounds beyond those for which IBIA could require reconsideration, those grounds are not

ignored but referred to the Secretary. 25 C.F.R. § 83.11(f). Indeed, Plaintiff might even have had a hearing before an administrative law judge to resolve genuine issues of material fact. 25 C.F.R. § 83.11(e)(4). Accordingly, Plaintiff's due process claim are without merit.

Finally, Plaintiff's claims of unlawful bias also must be rejected. Plaintiff's allegations regarding 5 U.S.C. § 554(d) fail, because § 554(d) has no applicability to this case. Defs.' Mot. (Dkt. No. 40) at 48. Plaintiff's unfounded allegations regarding the bias of various Departmental staff members are also without merit and must be disregarded. Plaintiff received a highly detailed and unbiased evaluation. Because Plaintiff is not a continuously existing political entity, it is not entitled to be acknowledged as an Indian tribe with a government-to-government relationship with the United States.

VI. Conclusion.

Plaintiff is not entitled to be acknowledged as an Indian tribe with a government-to-government relationship with the United States. Plaintiff's Equal Protection Clause and APA claims fail, because it has offered no proof that it is similarly situated to Lower Lake and Ione based on factors that can be discerned in the Lower Lake and Ione decisions. Unlike Lower Lake and Ione, Plaintiff lacks a long-standing governmental relationship with the United States. There is no evidence that Plaintiff had a relationship with the United States at any time after 1927. In addition, Lower Lake and Ione have been treated as having collective rights in tribal lands. Plaintiff, however, has not been treated in this manner. Indeed, a geographic settlement at the Verona railroad station no longer existed after 1915. Contrary to Lower Lake and Ione, Plaintiff lacked critical evidence demonstrating that it is a continuously existing political entity. Defendants were not required to treat Plaintiff in the same manner as Lower Lake and Ione,

because the situations were factually different. Accordingly, Plaintiff's claims should be rejected. Likewise, Defendants applied the proper evidentiary standard to Plaintiff. In addition, Defendants had a very clear rational basis for requiring Plaintiff to complete the process set out in the federal acknowledgment process. This decision was in keeping with the requirements of *Morton v. Mancari* and the Defendants' long-held position that continuity of tribal existence is essential in determining acknowledgment.

The Assistant Secretary's decision not to acknowledge Plaintiff was fully documented and based upon a lengthy administrative record of information, analyses by Defendants' experts, reports, comments by Plaintiff and responses. Defendants properly evaluated Plaintiff, provided Plaintiff with extensive process, and treated Plaintiff in a fair and unbiased manner. Based on the briefing set out above as well as Defendants' initial motion for summary judgment and reply, Defendants are entitled to summary judgment on all grounds.

Plaintiff suggests that if the Court were to determine that the final determination is not supported by the administrative record, the Court should enter an order acknowledging Plaintiff. Plaintiff's suggestion should be disregarded. In a previous acknowledgment case, the *Ramapough Mountain Indians v. Babbitt* court explained that:

> [The court] has no authority to conduct a de novo review, grant recognition, order the BIA to grant recognition, or retain jurisdiction. If the agency's action was arbitrary and capricious, violated the plaintiffs' constitutional rights, or followed procedures contrary to law, the only remedy is an order vacating the Final Determination and remanding the case.

2000 U.S. Dist. Lexis 14479, *aff'd*, 25 Fed. Appx. 2 (D.C. Cir. 2001). The *Ramapough Mountain Indians* court detailed the correct remedy in such situations, because the Constitution vests in Congress plenary power over relations involving Indians. Article I, Section 8, cl. 3.

Congress, in turn, has delegated to the Executive Branch management and regulation of Indian affairs. 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457. *See also Indiana Miami*, 887 F. Supp. 1158, 1163-64 (N.D. Ind. 1995); *United Tribe of Shawnee Indians*, 253 F.3d at 549. Adoption of Plaintiff's proposed remedy would require this Court to perform Executive Branch duties in areas that concern nonjusticiable political questions. Accordingly, if necessary, remand to the Department for further evaluation would be the appropriate remedy in this case.[19/]

Based on the aforementioned, Defendants respectfully request that the Court enter summary judgment in their favor.

Respectfully submitted,

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Dated this 16th day of March, 2007.

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[19/] Plaintiff also suggests that its proposed remedy should be adopted because Defendants have delayed. Pl.'s Mot. (Dkt. No. 60) at 40-41. Defendants acknowledge that prior to *Muwekma I* delays in the processing of Plaintiff's petition occurred, as result of the large number of petitioners that need to be evaluated and issues connected to funding. Following the *Muwekma I* court's Order of January 16, 2001, however, Defendants met every required deadline. Plaintiff requested two extensions regarding the court's deadlines. Accordingly, delay should not be a factor in accessing the proper remedy, if necessary.

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