IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

It is now clear beyond any doubt that the Department of Interior (the "Department" or "Interior") denied equal protection of the law and acted arbitrarily and capriciously toward the Muwekma Ohlone Tribe ("Muwekma") by unreasonably refusing to reaffirm Muwekma's recognized status and by requiring it to submit instead to the burdensome procedures of 25 C.F.R. pt. 83 ("Part 83") while reaffirming the recognized status of two other similarly situated, previously recognized, central California Indian tribes – the Lower Lake Rancheria ("Lower Lake") and the Ione Band of Miwoks ("Ione") – without requiring them to submit to the same procedures. The Department also breached its fiduciary duty to the Tribe and violated the Tribe's due process rights, while misapplying the evidentiary standards in the Final Determination withdrawing recognition from the Tribe.

Because of a deficient administrative record, by order of September 21, 2006 this Court denied the parties' previous motions for summary judgment and remanded the matter to the Department with instructions to supplement the record and provide a detailed explanation of its refusal to reaffirm Muwekma's recognized status on the same basis as Lower Lake and Ione. *See* Memorandum Opinion ("Mem. Op.") at 31.

On November 27, 2006 Interior filed 276 documents as a supplement to the administrative record previously before the Court and a 21-page document entitled "Explanation to Supplement the Administrative Record - Muwekma Ohlone Tribe" ("Explanation"). [ECF Doc. 55-2]. The new documents add little to the documents presented by the Tribe in support of

its initial motion for summary judgment.[1] To the extent that they supply additional information, the documents strongly confirm that there was no rational basis for restoring Ione and Lower Lake to the list of federally recognized tribes through simple administrative correction while denying Muwekma's multiple requests for similar treatment. Indeed, one document contains a revealing statement from the head of the Branch of Acknowledgment and Research[2] about the recognition of Lower Lake and others:

> These . . . raise substantial questions as to why . . . the group claiming to be Lower Lake, and the two groups in Alaska would be acknowledged over other petitioners that can claim previous recognition. Such action would expose the Department to legal challenges on a broad scale from other petitioners, with histories similar to these groups, who might claim that, under the APA, the failure to accord them the same immediate "reaffirmation" outside of the regulations is arbitrary and capricious.[3]

The Assistant Secretary's actions created a standard which Muwekma also meets. However, Interior's supplement to the administrative record and its Explanation fail to satisfy

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[1] Many documents are copies of the same documents previously made available, and others are as many as four or five copies of the same document.

[2] The Branch is the division within the BIA responsible for reviewing acknowledgment petitions and handling related recognition matters.

[3] Supplemental Administrative Record ("SAR") Ex. 86 at 2 (Mem. from Fleming to Dep. Comm'r of Ind. Aff. of 12/27/00). By order dated December 3, 2006 the Court permitted Interior to serve a copy of the SAR on the Tribe and a courtesy copy on the Court. The documents cited in this Memorandum from the SAR are compiled and filed with this Memorandum electronically as "SAR Ex. __." The exhibits are numbered according to the order of citation in this Memorandum, beginning with the number 86. All documents cited in this Memorandum from the original administrative record ("AR Ex. __") were provided in four bound volumes of exhibits with the Tribe's filing of July 13, 2005 [ECF Doc. 35]. The remaining exhibits ("Ex. __") cited in this Memorandum are non-administrative record exhibits obtained from Interior through a Freedom of Information Act request, or are congressional materials, notices from the *Federal Register*, or other authority. These were also included in the bound volumes submitted with the July 13, 2005 motion. Exhibits 1 through 81 were filed in those bound volumes. We respectfully refer the Court to the bound volumes for those exhibits. Exhibits 82 through 85 were filed electronically with the Tribe's filing of October 12, 2005 [ECF Doc. 41], but none of those exhibits are cited in this Memorandum. Page citations are to the Bates Stamp pages.

this Court's September 21, 2006 Memorandum Opinion and Order. Mem. Op. at 15, 18, 32. Interior has not demonstrated material distinctions between Muwekma and the other two Tribes, and it is clear that Muwekma is entitled to reaffirmation of its federal-tribal relationship on the same basis as Lower Lake and Ione. The Court should enter an order requiring Interior to recognize Muwekma's status as a tribe under federal law and to include it in the list of federal recognized tribes.

II. STATEMENT OF FACTS

A. Procedural History of Muwekma Petition and This Case.

After Muwekma inquired of the Department in 1989 about the process for reaffirming its tribal status, the Department informed Muwekma that it was required to petition for recognition under the procedures in Part 83. Mem. Op. at 6 n. 7.[4] Pursuant to those procedures, Muwekma then filed a letter of intent to petition for federal recognition in March 1989. Mem. Op. at 5; (Answer ¶ 25 (first sentence).) In 1995 Muwekma presented a documented petition pursuant to Part 83. Mem. Op. at 6; (Answer ¶ 25 (second sentence).) In the meantime, in 1994, the Department re-affirmed the recognized status of the Ione Band of Miwoks, restoring them to the list of federally recognized tribes outside of the Part 83 process. Mem. Op. at 8.[5] Following submission of its documented petition, Muwekma repeatedly petitioned the Department to re-affirm Muwekma's status as a recognized tribe and restore it to the list of federally recognized tribes without proceeding through the Part 83 process, but in each instance the Department

[4] AR Ex. 46 (Letter from Little to Cambra of 4/25/89).

[5] *See also* AR Ex. 61; SAR Ex. 87 (Letter from Deer to Villa of 3/22/94).

refused and insisted that it lacked the authority to do so, notwithstanding its reaffirmation of the recognized status of Ione (and later Lower Lake). Mem. Op. at 9. On May 24, 1996, the Department affirmed that Muwekma was previously recognized as the "Verona Band." Mem. Op. at 6.[6] In 1998, the Department placed Muwekma's petition on the list of petitions awaiting active consideration. Mem. Op. at 6.

By 1999, ten years after commencing the process, the Department still had not taken up Muwekma's Part 83 petition. Mem. Op. at 7; *see also Muwekma v. Babbitt*, 133 F. Supp. 2d 42, 43 (D.D.C. 2001). Therefore, Muwekma filed suit under the APA seeking to compel the Department to commence consideration of its petition within a reasonable time. *See generally Muwekma v. Babbitt*, 133 F. Supp. 2d 30 (D.D.C. 2000). By order dated June 30, 2000, as amended, this Court ordered the Department to place Muwekma's petition on active consideration and to complete its review by 2002. *Id* at 42; *Muwekma v. Babbitt*, 133 F. Supp. 2d at 43. On December 29, 2000, during the pendency of *Muwekma v. Babbitt*, the Department re-affirmed the recognized status of Lower Lake, restoring it to the list of federally recognized tribes outside the Part 83 process. Mem. Op. at 8; (Answer ¶ 26 (first sentence).)[7]

On July 31, 2001, twelve years after the commencement of the petition process, the Department published a preliminary determination denying acknowledgment of Muwekma. Mem. Op. at 7.[8] Following Muwekma's comments and new evidence in response, the

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[6] AR Ex. 47 (Letter from Maddox to Cambra of 5/23/96).

[7] *See also* SAR Ex. 87 (Letter from Deer to Villa of 3/22/94).

[8] *See also* AR Ex. 7 (Proposed Finding); AR Ex. 41 (67 Fed. Reg. 58,631 (Sept. 17, 2002)).

Department published the Final Determination, effective December 16, 2002, withdrawing federal recognition. Mem. Op. at 7.[9] On June 6, 2003, Muwekma brought this action alleging that the Final Determination was in violation of law, arbitrary and capricious, and a violation of its due process and equal protection rights.

The Court denied the parties' respective motions for summary judgment and remanded the case to Interior to supplement the record. Mem. Op. at 12. In its Memorandum Opinion, the Court found that the Department of the Interior had conferred federal recognition upon Ione and Lower Lake, both, like Muwekma, previously recognized central California Indian Tribes, without requiring them to go through the "lengthy and thorough process of evaluation based on detailed documentation provided by petitioner" that was required of Muwekma.[10] Mem. Op. at 8 (internal quotations omitted). The Court recognized that Muwekma had repeatedly requested the same reaffirmation of recognized status granted to Lower Lake and Ione, but had been repeatedly advised that this was not available to it. *Id.* The Court held that Interior had not provided sufficient reasons for treating similar situations differently, in violation of the Administrative Procedure Act and the requirements of equal protection. *Id*. at 17-24. The Court rejected Interior's argument that its purchase of land for Lower Lake was an adequate explanation for the disparate treatment, finding: first, that argument only applies to Lower Lake, not Ione; and second, that nothing in the administrative record showed that this was a reason why Interior

[9] *See* AR Ex. 6 (Final Determination).

[10] The Court noted that "the Department does not dispute Muwekma's allegation that Ione and Lower Lake, like Muwekma 'were . . . Central California tribes previously recognized at least as late as 1927' who did not appear on the 1979 list of federally recognized tribes despite 'never [having] been terminated by Congress [or] by any official action of the [Department.]' " Mem. Op. at 9.

required Muwekma, but neither Ione nor Lower Lake, to go through the Part 83 procedure. *Id.* at 22 n.13.

The Court concluded by stating that "[u]pon remand the Department *must* provide a detailed explanation of the reasons for its refusal to waive the Part 83 procedures when evaluating Muwekma's request for federal tribal recognition, particularly in light of its willingness to 'clarif[y] the status of [Ione] . . . [and] reaffirm[] the status of [Lower Lake] without requiring [them] to submit . . . petition[s] under. . . Part 83.' " *Id*. at 31 (emphasis and brackets in original). The Court further admonished that "[s]uch an explanation may not rely on the fact that a 'lengthy and thorough' evaluation of Muwekma's petition led the Department to conclude that Muwekma failed to satisfy three of the modified Part 83 criteria." *Id*. (citations omitted). The Court remanded the matter to Interior "for the limited purpose of supplementing the administrative record in a manner consistent with this Opinion." *Id.* at 32. The Court explained that the purpose of the remand was for the Department to explain "whether it had a sufficient basis to require Muwekma to proceed under the heightened evidentiary burden of the Part 83 procedures in the first place, given Muwekma's alleged similarity to Ione and Lower Lake." *Id.*

B. History of Muwekma, Lower Lake, Ione and Other Indians in California.

The history of federal Indian policy in California is a unique and particularly shameful chapter in American history which deeply affected Muwekma, Lower Lake, and Ione. California became part of the United States in 1848 under the Treaty of Guadalupe Hidalgo. (Answer ¶ 11 (fourth sentence).) One year later, the Gold Rush began, and California tribes were overwhelmed

by a rapid influx of settlers. (Answer ¶ 11 (second sentence).) Following statehood in 1850, the federal government sent three federal commissioners to California to negotiate treaties with tribes throughout the state. (Answer ¶ (fourth sentence).) In 1851 and 1852 the commissioners negotiated eighteen treaties with the tribes of California, (Answer ¶ 11 (fifth sentence)), including two treaties ceding the aboriginal territory of the Muwekma Ohlone people.[11] At the urging of the California Legislature and Senate delegation, however, the United States Senate refused to ratify these treaties and instead sealed them in Senate files until they were discovered in the early twentieth century. (Answer ¶ 11 (seventh sentence).)

As a result of the Senate's actions, California tribes were left with none of the lands reserved in the treaties, and they became squatters on their own lands, forced to live at the mercy of non-Indian landowners. (Answer ¶ 12 (first sentence).) During the late nineteenth century non-Indians were particularly hostile to tribes, seeking out and killing Indians outright, often encouraged by local governments. (Answer ¶ 12 (second sentence).) The Secretary of the Interior eventually established three reservations in the northern part of the state and reservations in the south, but created none in the central region or near the San Francisco Bay area, leaving the thousands of Indians in those areas, including the Muwekma, Ione and Lower Lake, landless.[12] (Answer ¶ 12 (third sentence).)

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[11] AR Ex. 1 at 2-4 (Advisory Council on Calif. Indian Policy Final Reports and Recommendations); Ex. 2 (Treaty of Camp Fremont, March 19, 1851; Treaty of Dent's and Ventine's Crossing, May 28, 1851, reprinted in H.R. Rep. No. 56-736, at 780-783 (1899)); AR Ex. 3 (Maps- Distribution of Aboriginal Tribal Groups).

[12] In the Act of June 21, 1906, Congress appropriated funds to purchase land for homeless Indians in California, and in subsequent appropriations acts provided additional amounts. (Answer ¶ 14 (first sentence)). As noted *infra*, all three tribes – Muwekma, Ione, and Lower Lake – were considered eligible by Interior for the purchase of land under this 1906 Act.

As the Department found in its decision reaffirming Lower Lake, during the twentieth century the BIA "went through fundamental organization and philosophical changes following landmark legislation such as the 1934 Indian Reorganization Act and other federal policy shifts."[13] For example, in 1958 Congress enacted the California Rancheria Act, 72 Stat. 619, which authorized the termination of federal supervision and services to forty-one named tribes in California, subject to the consent of the Indians and adherence to specific procedures. *See generally Duncan v. Andrus*, 517 F. Supp. 1, 2-3 (N.D. Cal. 1977). In 1964 Congress extended the Act to all California tribes, subject to the same conditions.[14] It is important that neither Muwekma, Lower Lake, nor Ione were terminated under this Act or any other statute.[15] In the 1960's the termination policy ended, and in 1973 President Nixon articulated the policy of Indian self-determination. *See* Special Message to Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970); *see also* Indian Self-Determination & Education Assistance Act, 25 U.S.C. §§ 450-450n.

C. History of the Muwekma Ohlone Tribe.

1. Prior to 1927

As the Court found, there is no dispute that Muwekma is a tribe of Indians indigenous to the San Francisco Bay area, descendants of the Mission San Jose Indians, and previously

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[13] SAR Ex. 88 (Mem. from Ass't Sec. Gover to Reg. Dirs. of the Alaska and Pacific Regions of 12/29/00).

[14] Ex. 5 (Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390).

[15] *See* Answer ¶¶ 2 (third sentence),16 (first and second sentences). Most of the tribes subjected to a termination process were not lawfully terminated in accordance with the terms of the Act, and the tribes were restored. *See Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 261 (N.D. Cal. 1981); *Duncan*, 517 F. Supp. at 5-6.

federally recognized, at least from 1914 to 1927 as the Verona Band. Mem. Op. at 2-3. It is clear that no Act of Congress nor any action of an executive agency ever terminated this recognition. *Id.* at 2. Interior has also not only admitted, but affirmed based on its own review, that 99% of the current members of the Muwekma Ohlone Tribe are direct descendants of the members of the recognized Verona band, or are the members themselves.[16]

Muwekma survived the historical conditions discussed above and, in the late nineteenth century and early twentieth century, settled in villages known as Alisal, near Pleasanton, and El Molino, near Niles.[17] As it administered the 1906 Act authorizing purchase of land for homeless Indians and subsequent Acts, the Bureau of Indian Affairs ("BIA") acknowledged Muwekma under the name of the Verona Band, as a federally recognized tribe. Mem. Op. at 2-3.[18] In 1914 a BIA agent identified Muwekma as one of the tribes eligible for land purchases in a report to the Commissioner of Indian Affairs, also listing Lower Lake and Ione. (Answer ¶ 14 (third sentence).)[19]

In 1923 the Reno Agency of the BIA declared in its annual report that the Verona Band

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[16] AR Ex. 41 (67 Fed. Reg. at 58,631 (Sept. 17, 2002)).

[17] AR Ex. 6 at 9 (Final Determination); AR Ex. 7 at 49 (Proposed Finding).

[18] AR Ex. 7 at 6-7 (Proposed Finding). Also, in 1904 the Calfornia Indian Association took a census of landless Indians in the Northern Part of the state, which included 70 Costanoan Indians (Muwekma) at Pleasanton in Alameda County. AR Ex. 89 (Senate Document No. 131, 58th Congress, 2d Session, 1904, excerpted from Robert F. Heizer, ed., *Federal Concern about Conditions of California Indians*, Bellena Press Publications in Archeology, Ethnology & History, No. 13). This is the only AR Exhibit cited in this Memorandum which was not attached to the Tribe's prior filings. It is attached here.

[19] AR Ex. 8, SAR Ex. 90 at 1-2 (Letter from Asbury to Comm'r of Ind. Aff. of 12/7/14).

fell under its jurisdiction. (Answer ¶ 15 (second sentence).)[20] In 1927 L.A. Dorrington, the Superintendent of the Sacramento Agency, reported to the Commissioner of Indian Affairs on the non-reservation tribes in his jurisdiction, including Muwekma, Lower Lake, and Ione, and reported that the Muwekma Ohlone are "a band in Alameda County commonly known as the Verona Band, [whose members] were formerly those that resided in close proximity of the Mission San Jose." (Answer ¶ 14 (fifth sentence).)[21] He concluded that "[i]t does not appear at the present time that there is need for the purchase of land for the establishment of their homes."[22]

2. 1927 - 1947

The Depression and World War II dominated the period 1927 through 1947. Muwekma tribal members largely worked as farm labor when they could get jobs. The record contains substantial evidence of Muwekma community activities and interaction during this period, including evidence of attendance by members of several lineages at a number of funerals, god parenting, fostering, adopting, visiting, and formal gatherings organized by the Tribe.[23]

In the 1930's tribal leaders organized the Muwekma community to prepare and submit

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[20] *See also* AR Ex. 9 at 6 (Reno Indian Agency Annual Report (1923)).

[21] *See also* SAR Ex. 91 at 1 (Letter from Dorrington to Comm'r of Ind. Aff. of 6/23/07.)

[22] SAR Ex. 91 at 1. Interior considered a number of factors in deciding whether to purchase land for one of the eligible tribes. Need was foremost, and limitation on funding was a large factor. SAR Ex. 92 (Letter from Dorrington to Comm'r of Ind. Aff. of 12/8/28). With respect to the other tribes, Agent Asbury wrote "I am in no position to make any specific recommendations, at this time, but it is my opinion, that there is very little difference in their merit." SAR Ex. 90 at 4 (Letter from Asbury to Comm'r of Ind. Aff. of 12/7/14)]. *See also* AR Ex. 30 (Letter from Lofgren to Anderson of 1/12/01).

[23] *E.g.*, AR Ex. 6 at 52-63, 70-77 (Final Determination); AR Ex. 7 at 78-80 (Proposed Finding).

applications for benefits under the California Claims Act, Act of May 18, 1928, 45 Stat. 602, (codified as amended at 25 U.S.C. §§ 651-63), which allowed Indians of California to participate in a claims case against the United States. This Act preceded the Indian Claims Commission Act of Aug. 13, 1946, 60 Stat. 1049, which permitted Indians throughout the United States to sue for lost lands, and was thus the most important piece of Indian legislation affecting California Indians in that time period. The Act, as amended, required the Department in 1928 to prepare an initial roll of all eligible Indians entitled to receive benefits under the Act, to revise the roll in 1950, and then to prepare a third roll for distributing the proceeds of the judgment fund in 1968. 25 U.S.C. §§ 657-59. The Bureau enrolled Muwekma tribal members and their ancestors under the Act. In implementing the Act and preparing the rolls, the Bureau required evidence of tribal membership and thus recognized the existence of the Tribe as an entity during each of the enrollment periods in the 1930's, 1950's, and 1970's. BIA required applicants to demonstrate that they were members of a California tribe, not just ethnic Indians.[24]

The BIA also repeatedly admitted Muwekma Ohlone children to schools operated by the BIA for tribal children in the 1930s and 1940s.[25] This constituted federal recognition of Muwekma because the legal basis for providing special services to Indians is not their race but the political relationship between the tribe and the federal government. *See Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). Between 1941 and 1945, during World War II, at least 16

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[24] The Bureau verified and regularly rejected applications if it found that proof of membership in an Indian tribe was either insufficient or not submitted. *Id.* at 24; *see also* AR Ex. 70 at 2-3 (Index of Rejected Applications, Enrollment of California Indians (1932)).

[25] AR Ex. 6 at 30-31 (Final Determination); AR Ex. 11 (Marine Application; Letter from Snodgrass to Marine of 5/1/39); AR Ex. 12 (Guzman Application; Letter from Evans to Goldstien of 4/22/46).

Muwkema members served in the Armed Forces.[26]

3. 1947 thru 1990's

When the Muwekma veterans returned from World War II, the Tribe again became active on the home front. For instance, the Tribe's leaders again organized the community to enroll under the then-extended California Claims Act, in 1950 and 1957 and again between 1968 and 1970.[27]

Also in the 1960's, the Tribe mobilized to preserve the Ohlone Cemetery from destruction, an effort which succeeded.[28] As noted above, the Tribe established that its community engaged in a range of social and political activities demonstrating a tribal community, including funerals, god parenting, fostering, adopting, visiting, and formal gatherings. *Supra* n.27. The Tribe's leaders worked on gathering historical information about the Muwekma people from mission records.[29] The Tribe established the Ohlone Family Consulting Services, a cultural resource management firm, as well as the Tribe's economic arm, which has been in operation since the early 1980's and has provided employment for tribal members and served as a means for the Tribe to advance its political objectives related to cultural

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[26] AR Ex. 71 at 75 (Muwekma Response to Dep't).

[27] *See, e.g.*, AR Ex. 6 at 12, 81-83, 107 (Final Determination)

[28] *See e.g.*, AR Ex. 6 at 79-86 (Final Determination); AR Ex. 16 (Larry Smith, *Indian Woman Link to Past*, The Daily Review, Aug. 8, 1965); AR Ex. 17 at 1 (Letter from Galvan of 7/19/66).

[29] AR Ex. 6 at 128-29 (Final Determination).

resources.[30]

Since the late 1970's the Tribe has been active in working to preserve and ensure proper treatment of archeological resources and ancestral human remains uncovered as land development expanded in the San Francisco Bay area.[31] In 1989 the Tribe, with the support of the California State Native American Heritage Commission, persuaded Stanford University to return 550 Ohlone remains stored in its museum to the Tribe for reburial.[32] In 1996 the Tribe reached an agreement with Santa Clara University setting out the procedures for treatment of native remains and associated objects discovered in connection with a large redevelopment project on the University's campus.[33] The Tribe negotiated a similar agreement with the City of Palo Alto later that year[34] and has worked with a number of local governments, including the Cities of San Jose, San Francisco, and Santa Clara to adopt policies for the treatment of Native American remains in construction projects.[35] The Tribe adopted its modern constitution in 1991

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[30] AR Ex. 15 at 9-12 (L. Field et al., *A Contemporary Ohlone Tribal Revitalization Movement* (Fall 1992); AR Ex. 74 (Letter from Cambra to Burrows of 8/3/90); AR Ex. 75 (Ohlone Family Consulting Services pamphlet); AR Ex. 76 (Letter from Cambra to Lofgren of 2/27/85); AR Ex. 77 (County of Santa Clara Agreement for Services (Jul. 21, 1992)); AR Ex. 78 at 1 (Ohlone Consultant Services Organizational Meeting Agenda (Oct. 21, 1983)) (discussing "[w]hat can each member of the family contribute to the Ohlone Family Consultant Services?").

[31] *See* AR Ex. 18 (Letter from Cambra to Gov. Deukmejian of 11/19/84); AR Ex. 19 (Jeff Gottlieb, *Stanford OKs return of Ohlone Indian remains,* San Jose Mercury News, June 22, 1989); AR Ex. 6 at 119-120.

[32] *See* AR Ex. 19 (Jeff Gottlieb, *Stanford OKs return of Ohlone Indian remains*, San Jose Mercury News, June 22, 1989; AR Ex. 15 at 10, (L. Field et al., *A Contemporary Ohlone Tribal Revitalization Movement*).

[33] *See* AR Ex. 20 at (Memorandum of Agreement Between Santa Clara University and the Muwekma Ohlone Tribe of the San Francisco Bay (Feb. 1996)).

[34] *See* AR Ex. 21 at 3-6 (Memorandum of Agreement Between the City of Palo Alto and the Muwekma Ohlone Tribe of the San Francisco Bay (Dec. 1996)).

[35] AR Ex. 22 (Letter from LaBrie to Cambra of 10/10/91); AR Ex. 23 (Letter from Cambra to Labrie of 7/8/91); AR Ex. 24 (Letter from Hammer to City Council members of 9/19/94); AR Ex. 25 (Letter from Rountree to Cambra of 2/15/85); AR Ex. 26 (Letter from Lofgren to Cambra of 2/27/85); AR Ex. 27 (Burial Policy on Nat. Am.

and amended it in 1998 and 2000.[36] The Tribe's constitution and enrollment ordinance address membership procedures.[37]

The Tribe's continuing tribal status in recent years is evidenced by the local support that it has received from prominent political and other leaders. *See* Letters of support from the Sacramento Area Office of the Bureau of Indian Affairs,[38] from Condoleezza Rice (when she was Provost of Stanford University),[39] from Congresswoman Zoe Lofgren (the Tribe's representative in Congress),[40] and from the County of Santa Clara, the City of San Jose, the Chief of Police of San Jose, San Jose University, the Association of the United States Army, the San Francisco Board of Supervisors, and the Secretary of State of California, all of whom had worked with the Tribe.[41]

D. Ione Band of Miwoks

In 1994 the Assistant Secretary announced that Interior would reaffirm Ione without requiring it to go through the Part 83 procedure. She wrote that she was "reaffirming" the 1972

Burials).

[36] AR Ex. 7 at 40-42, 110-14 (Proposed Finding); AR Ex. 6 at 140-142 (Final Determination).

[37] AR Ex. 7 at 112-113 (Proposed Finding); AR Ex. 6 at 140-42 (Final Determination).

[38] AR Ex. 28 (Letter from BIA to Magdaleno of ½3/98).

[39] AR Ex. 29 (Letter from Rice to Reckord of 4/28/95).

[40] AR Ex. 30 (Letter from Lofgren to Anderson of 1/12/01).

[41] AR Ex. 31 (Letter from Lofgren to Cambra of 10/24/89); AR Ex. 32 (Office of the Mayor, City of San Jose, Cal., *Proclamation* (May 13, 1994)); AR Ex. 33 (Letter from Cobarruviaz to Reckord of 4/26/95); AR Ex. 34 (Letter from Walsh to Reckord of 4/28/95); AR Ex. 35 (Ass'n of the U.S. Army, Sixth Region, *Resolution* (Feb. 17, 1994)); AR Ex. 36 (San Francisco Bd. of Supervisors, *Resolution Honoring Muwekma Ohlone Tribe* (July 20, 1992)); AR Ex. 37 (State of Cal., *Resolution* (Feb. 14, 1994)).

finding of the Commissioner of Indian Affairs that "'Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated'" and directed that the Tribe be included in the list of federally recognized tribes and that Interior accept land into trust for the Tribe.[42]

1. Prior to 1927

Ione first appears in the supplemental administrative record in the same December 7, 1914 letter cited above from C.H. Asbury, a special Indian agent, to the Commissioner of Indian Affairs to report on his work to purchase land for homeless Indians.[43] Mr. Asbury reported that he had consulted with Agent Kelsey, his predecessor, regarding the tribes which had been found eligible for land purchases. *Id.* at 1. He identified 28 eligible tribes, including Muwekma, Lower Lake, and Ione. *Id.* at 1-2. Initially, he noted that "[t]he amount of money available is entirely inadequate to care for all of these settlements." *Id.* at 1. He wrote that "[i]t is hard to say that any particular bands are in the most need or the most deserving." *Id*. at 2. He reported that Agent Kelsey told him that he considered the Ione Indians "as about the next most in need of a home" after Lower Lake and that he had negotiated an option on some land but he could not secure it. *Id.* at 3.

In 1915 Special Agent Terrell took steps toward purchasing a 40-acre tract for Ione.[44]

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[42] SAR Ex. 87 (Letter from Deer to Villa of 3/22/94).

[43] AR Ex. 8, SAR Ex. 90 (Letter from Asbury to Comm'r of Ind. Affairs of 12/7/14).

[44] SAR Ex. 93 (Letter from Terrell to Comm'r of Ind. Aff. of 9/16/15).

While the Department approved the purchase,[45] the parties were unable to resolve questions related to title. Agent Terrell wrote that he visited the Ione Indians in May 1915 in order to prepare a census.[46] The record contains a letter dated December 28, 1916 from an individual inquiring about the status of the land purchase and responses from the government.[47] Edgar Miller, superintendent of the Greenville Agency, reported visiting the Ione Indians in 1922.[48]

2. 1927 – 1970

The supplementary materials reflect repeated failure during this time period to complete the purchase of land because of title issues, but virtually no contact with the Band.[49] In 1935 some of the title problems had been resolved, but Interior found the price unacceptable.[50] In 1941 the Indians of Ione did submit a petition for land to be purchased for them, but there is no record of further efforts to purchase the land, or indeed of any contact with Interior or activity by the Band between 1941 and 1970, a period of almost 30 years. In 1973 Interior reported that a

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[45] SAR Ex. 94 (Authority to Approve Purchase of 5/18/16).

[46] SAR Ex. 95 (Letter from Terrell to Oliver of 2/10/16; SAR Ex. 96 (Census of 5/11/15].

[47] SAR Ex. 96 (Letter from Clifford to Terrell of 12/28/16); SAR Ex. 97 (Letter from Oliver to Terrell of 1/31/17); SAR Ex. 98 (Letter from Terrell to Oliver of 2/3/17); SAR Ex. 98 at 12 (Letter of Terrell to Clifford of 2/5/17).

[48] SAR Ex. 99 (Letter from Miller to Comm'r of Ind. Aff. of 6/2/22).

[49] For example, the Solicitor and land owners were unable to resolve issues regarding the adequacy of the abstract for the property. *See e.g.,* SAR Ex. 93 at 22 (Letter from Terrell to Comm. Ind. Aff. of 11/30/15); SAR Ex. 93 at 25 (Letter from Stow to Terrell of 12/13/15); SAR Ex. 93 at 26 (Letter from Stow to Terrell of 12/20/15); SAR Ex. 100 (Letter from Hauke to Terrell of 7/14/16 ; SAR Ex. 100 (Letter from Terrell to Stow of 7/28/16). SAR Ex. 100 (Letter from Ione Coal Co. to Hauke of 6/8/16) ; SAR Ex. 98 (Letter from Hauke to Title Ins. Co. of 4/20/17).

[50] SAR Ex. 101 (Letter from Zimmerman to Englebright of 4/21/41); SAR Ex. 102 (Letter from Hooper to Comm'r of Ind. Aff. of 4/29/41).

1970 visit from two Ione families "was our first contact with this group in many years."[51]

3. 1970 - 1994

In 1972 California Indian Legal Services filed suit in state court on behalf of the Ione Indians to quiet title in the 40-acre tract that Interior had never purchased or placed into trust for the Band. CILS requested that the United States accept title to the property in trust for the Band.[52] In a letter dated October 18, 1972 the Commissioner of Indian Affairs Louis Bruce agreed.[53] Commissioner Bruce found:

> Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated. As stated earlier, they did not reject the Indian Reorganization Act and thus are eligible for the purchase of land under this act. The Sacramento Area Office of the Bureau of Indian Affairs should determine that the land is merchantable and free of encumbrance. I am directing the Sacramento Area Office to assist in the preparation of a document containing the membership roll and governing papers which conform with the Indian Reorganization [Act].

Id.[54] On October 31, 1972 the Superior Court for Amador County issued a judgment quieting title in the 40-acre parcel in members of the Ione Band "in fee simple absolute, free of any encumbrances whatsoever."[55] The property thus was not held in trust for Ione.

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[51] *See* SAR Ex. 103 (Letter from Morlock to Comm. Ind. Aff. of 6/8/73).

[52] SAR Ex. 104 at 2 (Letter from Seitz to Comm'r of Ind. Aff. of 7/20/72).

[53] SAR Ex. 105 (Letter from Bruce to Villa of 10/18/72).

[54] At the time the purchase was "contemplated," Interior admits all three Tribes were federally recognized. None of the three rejected the I.R.A., and no one claims that they did. *See supra* at 10.

[55] SAR Ex. 106 at 9 (*Burris v. W.H. Moffatt*, No. 8160 (Order of Oct. 31, 1972)).

In 1973 the Solicitor's office requested additional information about Ione, including whether the Bureau of Indian Affairs extended services to them at any time, accepted their children at Bureau schools or supplied Johnson-O'Malley payments for them.[56] The Central California Agency found no evidence of such services.[57] Commissioner Bruce's memorandum was not implemented, and in 1977 the Deputy Commissioner wrote the Sacramento Area Director that "[t]he question of extending Federal recognition to the Ione Band of Indians has been pending for a number of years," and that "processing the Ione's request under the new [acknowledgment] regulations, once they are finalized, will be the fastest way to reach a final determination as to the Ione Band's status."[58] The BIA repeatedly took the position that the Band was required to apply for acknowledgment under Part 83.[59]

In March 1991 the United States filed a brief with the District Court for the Eastern District of California arguing that the Ione Band was not recognized by Interior, and that Interior therefore did not have authority to take the land being lived on by several Ione families into trust. Interior also documented its lack of contact with Ione:

> Purchase efforts tapered by 1920 and only sporadic inquiries were made thereafter until ceased around 1940. By that time, the members of the Ione Band had lived on the 40-acre tract for several decades and they continued to do so with no

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[56] SAR Ex. 107 (Mem. from Pennington to Sacramento Area Dir. of 10/3/73).

[57] SAR Ex. 108 (Letter from Haggerty to Sacramento Area Dir. of 12/11/73).

[58] SAR Ex. 103 at 45 (Letter form Butler to Sacramento Area Director of 8/4/77); SAR Ex. 109(Letter from Haggerty to Burris of 9/28/77) [Doc. 97].

[59] SAR Ex. 110 (44 Fed. Reg. 116 (Dec. 19, 1978)). SAR Ex. 111 (Letter from Elbert to Burris of 2/15/90) ; SAR Ex. 112 (Letter from Elbert to Sen. Cranston of 2/20/90); SAR Ex. 113 at 7-12 (Mem. in Supp. Mot. to Dismiss by United States); SAR Ex. 114 (Letter from Brown to Sen. Inouye of 8/26/92).

> interference. See Declaration of defendant Harold E. Burris, Sr. Mr. Burris relates very clearly in his declaration that the only contact between the government and the Ione Indians during the years up to 1940 focused on efforts to purchase land. . . . The Indians never had any expectation that a further relationship would develop between their band and the government not did they expect further services. Between 1945 (or even earlier) and 1970, there was no contact between the government and the Ione Band or its members at least as to Indian or Indian-related matters. In fact, there was no leadership or governing structure with the Band whatsoever.[60]

In 1994 the Assistant Secretary reversed the position taken in litigation and announced that Interior would reaffirm Ione without requiring it to go through the Part 83 procedure. She directed that (1) the Tribe be included in the list of federally recognized tribes and (2) that Interior accept land into trust for the Tribe.[61]

E. Lower Lake Rancheria

In 2001 the Assistant Secretary reaffirmed Lower Lake, along with two other tribes, finding that those Tribes "have been officially overlooked for many years by the [BIA] even though their government-to-government relationship with the United States was never terminated."[62] The Assistant Secretary also found, "[a]t one time, each of these groups was

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[60] SAR Ex. 115 at 16 (Def.'s Reply to Pl.'s Opp. to Mot. to Dismiss) (internal citations omitted).

[61] SAR Ex. 87 (Letter from Deer to Villa of 3/22/94).

[62] The factual bases for Interior's administrative recognition of Lower Lake without requiring it to go through the Part 83 procedures are almost entirely incorporated in *three* documents from the fall and winter of 2000: a September 14 Memorandum from Superintendent of the Central California Agency supporting administrative recognition of Lower Lake, SAR Ex. 116, a December 27 Memorandum from Lee Fleming, the Chief of the Bureau of Acknowledgment and Research discussing the information available on Burt Lake, Lower Lake, and several Alaska tribes, SAR Ex. 86, and a December 29 Memorandum from Assistant Secretary for Indian Affairs to Regional Directors announcing his "re-affirming" the recognition of two Alaska Tribes and Lower Lake. SAR Ex. 88. Thus, these first two documents encompass the full extent of the Assistant Secretary's knowledge of Lower Lake at the time that he administratively reaffirmed the Tribe.

recognized by the Bureau. However, for reasons not clearly understood, they were simply ignored as the BIA went through fundamental organization and philosophical changes." *Id*. The Assistant Secretary finally found that "[t]he Indian tribes mentioned above should not be required to go though the Federal acknowledgment process outlined in the Federal Register at [Part 83] because their government-to-government relationship continued. The relationship was never severed." *Id*.

1. Prior to 1927

Lower Lake was a recognized tribe between 1914 and 1927.[63] Lower Lake appears in Interior's supplemental administrative record in the same December 7, 1914 letter from C.H. Asbury in which Muwekma and Ione also appear.[64] Mr. Asbury identified 28 tribes, including Lower Lake, which were eligible for land purchases under the appropriations acts for homeless Indians.[65] He wrote that "[t]he Lower Lake and Sulphur Bank Indians were visited a short time ago and there is some complaint being made by the owners of the land where some of these Indians live, asking that they be removed." *Id*. at 2-3. He recommended an examination of options for purchasing land for them. *Id*. at 3. In 1916 Interior purchased a 141-acre Rancheria in the vicinity of the town of Lower Lake, but "the land was uninhabited between 1916 and

[63] SAR Ex. 86 at 5 (Mem. from Fleming Dep. Comm'r of Ind. Aff. 12/27/00). According to Mr. Fleming, many of the Indian people identified as living near Lower Lake were from different bands and settled on the Sulphur Bank Rancheria. *Id*.

[64] AR Ex. 8, SAR Ex. 90 (Letter from Asbury to Comm'r of Ind. Affairs of 12/7/14).

[65] SAR Ex. 90 at 1-2 (Letter from Asbury to Comm'r of Ind. Affairs of 12/7/14).

1947" – more than 31 years.[66]

2. 1927 – 1947

In 1928 L.A. Dorrington identified Lower Lake in his report as a tribe eligible for land but found that the Tribe, like Muwekma, did not need it.[67] A 1935 letter informed the Band of an election under the Indian Reorganization Act and provided some conflicting membership lists, but there is no record that such an election took place.[68] In 1947 the Superintendent granted an "assignment of the entire Lower Lake Rancheria to Mr. and Mrs. Louis Johnson, and Mr. and Mrs. Harry Johnson."[69]

3. 1947 - 2000

In 1950 the Superintendent of the Sacramento Agency reported that the population of the Lower Lake Rancheria "consists of seven persons, 'full blood Indian, Pomo Tribe.'" *Id*. In the early 1950's Lake County sought to purchase the Rancheria for an airport, and Interior agreed if the County would also convey 41 acres of the tract to the Johnsons in fee. *Id.* at 3-4. The Act of July 20, 1956, 70 Stat. 595, authorized the sale of the Rancheria. *Id*. at 5. The transaction was completed, and Mr. Johnson later sold some of his 41 acres. *Id*. The report concluded that

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[66] SAR Ex. 116 at 3 (Mem. from Facio to Smith of 9/14/00); *see also* AR Ex. 59 at 2. The appendices to the Fleming report of Dec. 27, 2000 also show the purchase of the property and various reports in the 1930's and 1940's that the property was unoccupied. SAR Ex. 86 at Apps. 1-4 (Mem. from Fleming to Dep. Comm'r of Ind. Aff. 12/27/00).

[67] SAR Ex. 92 (Letter from Dorrington to Comm'r Ind. Aff. of 12/8/28); *supra* at 10.

[68] SAR Ex. 86 at App. 5 (Mem. from Fleming to Dep. Comm'r of Ind. Aff. 12/27/00). BAR had "no record of a vote being taken concerning acceptance of the Indian Reorganization Act in the 1930's," and a 1944 report showed that the Lower Lake "Rancheria at that time had never been occupied." *Id.*

[69] SAR Ex. 116 at 3 (Mem. from Fleming to Comm'r of Ind. Aff. 9/14/00).

"[r]ecords of the BIA demonstrate that the Lower Lake Rancheria is presently considered terminated," but that the Act terminating the Rancheria was only concerned with the sale of the land and was not a congressional termination of the Tribe. *Id*. at 5-7.[70]

The supplemental administrative record contains no reference to Lower Lake between 1956 and 1995, a gap of almost 40 years.[71] Regarding the tribal government status of Lower Lake, the September 15, 2000 report found that, "Indian persons lineally descended from those having at one time a connection to the Lower Lake Rancheria have continued to assert their identity as a tribe. The group successfully obtained funding from the Administration for Native Americans, U.S. Department of Health and Human Services to conduct research into their present status. . . . The group adopted a tribal constitution for tribal purposes on March 11, 1995 . . . ."[72]

In his memorandum, Mr. Fleming expressed concern that the BAR had "previously conducted a preliminary review of the group's membership and genealogy and had serious questions regarding possible dual enrollment with, and descent from, other federally recognized tribes," and raised questions about conflicting membership lists.[73]

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[70] It was necessary for the Assistant Secretary in his Dec. 29, 2000 decision to discuss the Act in order to explain that the Tribe was not terminated by an act of Congress – because if Lower Lake had been terminated by an act of Congress, the Assistant Secretary would have been without authority to recognize, restore, or reaffirm the federal-tribal relationship.

[71] *See, e.g*., SAR Ex. 117at 3-8 (Letter from ACCIP to Ass't Sec. Gover of 6/28/95) (suggesting recognition of Lower Lake).

[72] SAR Ex. 116 at 5 (Mem. from Facio to Smith of 9/15/00).

[73] SAR Ex. 86 at 4 (Mem. from Fleming to Dep. Comm'r of Indian Affairs of 12/27/00).

Assistant Secretary Gover reaffirmed Lower Lake in 2001. Mem. Op. at 8 n.9.[74]

III. ARGUMENT

For the reasons discussed below, the Muwekma Ohlone Tribe is entitled to summary judgment restoring it to the list of federally recognized tribes.[75]

A. THE DEFENDANTS VIOLATED THE TRIBE'S RIGHT TO EQUAL PROTECTION AND THE APA BY REFUSING TO RECOGNIZE THE TRIBE WHILE EXTENDING RECOGNITION TO LOWER LAKE AND IONE.

Interior's actions violated equal protection and the APA by restoring to recognition two similarly situated California tribes based on a lower evidentiary standard while denying recognition to Muwekma and, moreover, applying to Muwekma a *greater* evidentiary burden. Interior has failed to justify this disparate treatment. As this Court has held, "[b]oth 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." Mem. Op. at 15 (citations omitted); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (The guarantee of "equal protection of the laws" requires that similarly situated persons be treated similarly); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). As the D.C. Circuit recently noted, "[a] fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an

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[74] *See also* SAR Ex. 88 at 3 (Mem. from Ass't Sec. Gover to Reg'l Dirs. of the Alaska and Pacific Regions of 12/29/00).

[75] The applicable standards for summary judgment are set out in Mem. Op. at 12-13. The standard of review of the Final Determination is discussed at Mem. Op. at 13-15 though the Tribe reserves the right to appeal the Court's determination that it must be "particularly deferential."

exception in a similar case or point to a relevant distinction between the two cases." *Westar Energy, Inc. v. F.E.R.C.,* 2007 WL 92698, at 2 (D.C. Cir. Jan. 16, 2007) (citations omitted).

The supplemental administrative record and Explanation fail to provide "a rational basis for requiring Muwekma to adhere to the Part 83 procedure while exempting other tribes that are purportedly similarly situated." Mem. Op. at 18. There is no factual basis for treating Muwekma differently from Lower Lake and Ione. The Assistant Secretary articulated the standards for reaffirmation of previously recognized tribes in his 2001 reaffirmation of Lower Lake. He found in that decision: 1) Lower Lake was "officially overlooked for many years by the Bureau of Indian Affairs . . . even though [its] government-to-government relationship with the United States was never terminated," 2) "[a]t one time, [Lower Lake] was recognized by the Bureau. However, for reasons not clearly understood, [Lower Lake was] simply ignored as the BIA went through fundamental organization and philosophical changes," and 3) its "government-to-government relationship continued. . . . Here [Lower Lake] w[as] never administratively terminated nor were their relations with the United States broken."[76] This was equally true of Ione, and of Muwekma. All three were Central California tribes subject to the same history, conditions, and legislation. All three were previously recognized by the Bureau, officially overlooked for many years, but their government-to-government relationship with the United States was never terminated by any official act. *See supra* at 8-22; Mem. Op. at 2-3.

Interior now attempts to distance itself from this standard, asserting in its Explanation

[76] SAR Ex. 88 at 1 (Mem. from Ass't Sec'y. Gover the Reg'l Dirs. of the Alaska and Pacific Regions of 12/29/00).

regarding the decisions to recognize Lower Lake and Ione:

> Taken together, those decisions did not set forth a standard of proof or an alternative evidentiary burden. . . . It is not clear from those two actions what test would be applied to determine whether or not other groups would qualify for a similar exemption from the administrative process of acknowledgment.

Explanation at 9. However, Interior may not escape the precedential effect of its actions in those cases by now attempting to disclaim them when dealing with Muwekma. The Lower Lake and Ione decisions are based on a discernible standard, described above, which Muwekma has also satisfied. Moreover, the decisions in Lower Lake and Ione were proper, lawful, and reflect appropriate governmental action. They were proper exercises of the Assistant Secretary's power to correct prior administrative errors in disregarding those Tribes, in violation of his trust responsibility.

The material historical circumstances of the three Tribes demonstrate that Muwekma is similarly situated to Lower Lake and Ione: 1) all three Tribes were subjected to the particular historical circumstances in California, *see supra* at 6-8, 2) the Department found each of the Tribes eligible for land under the appropriations acts for homeless Indians, *see supra* at 8, 15, 20, 3) the Department recognized each of the Tribes for a period during the twentieth century, *see supra* at 8, 15, 20, 4) none of the Tribes were terminated by any Act of Congress, court order, or official action of the Department of the Interior, *see supra* at 8, 14, 19, and 5) all three Tribes continued their tribal status to the present day. These facts supported the Department's prior

reaffirmation of Lower Lake and Ione *and* today compel reaffirmation of Muwekma.[77]

However, not only did Interior fail to offer reaffirmation to the similarly situated Muwekma, but the Department imposed a higher evidentiary standard on the Tribe than either Lower Lake or Ione. This is evidenced by the fact that Muwekma's factual case for reaffirmation is stronger, as is clear from the detailed factual analysis *supra* at 8-22. For example, the Department found that at least ninety-nine percent of Muwekma's current members are direct descendants of the members of the previously recognized Tribe, *supra* at 9. Interior made no similar finding for Lower Lake or Ione. Also, while Muwekma had submitted its constitution and membership lists, Lower Lake and Ione were still compiling their membership lists when they were restored. While the record contains limited evidence that Lower Lake or Ione had an active tribal organization before the 1990's, Muwekma presented substantial evidence of ongoing social and political activities demonstrating tribal status.[78] The record contains no evidence of activity for periods of up to 30 years (for Ione) and 40 years (for Lower Lake), while reflecting continuous activity by Muwekma. *Supra* at 8-14. The substantial evidence of Muwekma's political organization to enroll in the California Claims Act, to save the Ohlone Cemetery, to

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[77] In another important similarity, the Assistant Secretary noted that the BIA Agency Director and Regional Director, as well as the Acting Director of Tribal Services, recommend administrative reaffirmation of Lower Lake's status. *Id.* Similarly, Muwekma was supported for recognition by ACCIP, by its Congresswoman, and by the California Area Director, as well as a variety of local governments. AR Ex. 28 at 1 (Letter from BIA to Magdaleno of ½3/98).

[78] That BIA considered including Lower Lake on the list of federally recognized tribes in 1980, but did not actually do so, is considered as part of a "pattern of Federal dealings with the Lower Lake" in the Explanation. *Id.* at 7. But this is no showing of a relationship. It is more significant that Lower Lake was not ultimately placed on the list, that both Lower Lake and Muwekma were left off the list without any official decision or action, and that neither tribe was on the list at the time they sought recognition either by correction or through the Part 83 process.

advocate for the proper treatment of ancestral remains and on recognition issues, as well as its evidence of other tribal activities spanning the period from 1927 to the present, *see supra* at 8-14, far exceed the level of evidence required of Lower Lake and Ione.

Accordingly, the Department should have *a fortiori* returned Muwekma to the list of recognized tribes outside of the Part 83 procedures, as it did with Lower Lake and Ione.[79]

B. THE DEPARTMENT'S EXPLANATION FAILS TO COMPLY WITH THE COURT'S REMAND FOR A "DETAILED EXPLANATION" FOR DIFFERENTIAL TREATMENT.

1. The Explanation's Reasoning is Contradictory and Factually Inaccurate.

This Court's Memorandum Opinion required the Department of Interior to "cogently explain why" Muwekma was required to complete a Part 83 petition, whereas Lower Lake and Ione were not. Mem. Op. at 21. However, Interior's Explanation does not provide the required "clear and coherent explanation." *Id.* at 26. The Explanation apparently but confusingly attempts to discredit Interior's prior actions and then, with little regard for facts, make up its own *post hoc* rationalization for Interior's action. The Court itself stated that it "owes no deference to [the agency's] purported expertise" when "[it] cannot discern it." Mem. Op. at 15 (quoting *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006)).

While it is difficult to follow the points of distinction argued in the Explanation's text,

[79] It is undisputed that the Department has the legal authority to recognize tribes outside of the Part 83 process. Mem. Op. at 19; Explanation at 18.

Interior's "Conclusion" states that the decisions in Lower Lake and Ione were "based on continuous dealing and the existence of clearly defined communal land holdings." Explanation at 21. Therefore, from best we can glean, the Department in this "Conclusion" and the remainder of the Explanation appears to assert three potential factual distinctions between Muwekma, Lower Lake, and Ione which the Department now concludes are important. The first is that Muwekma never held trust land and/or was never promised trust land. *Id.* at 4, 6, 11. The second is that Muwekma's situation was different because its recognized status had "lapsed" as opposed to a so-called "administrative error" found in the cases of the other Tribes. *Id.* at 3, 7. The third is that Lower Lake and Ione did not attempt to go through the recognition process, whereas Muwekma did. *Id.* at 2, 10, 21. None of these is based on fact or meets Interior's burden to show a *rational* explanation for different treatment.

2. The Alleged Trust Land Distinction Is Factually Incorrect, and Even If Correct, Would Not Be a Rational Basis For Distinction.

The Explanation's attempt to distinguish Muwekma from Lower Lake and Ione relies heavily on the proposition that Interior had at least intended to purchase federal trust property for Lower Lake and Ione. This fails to provide the Department with a rational basis for its decision, because tribes are regularly restored to recognition without trust land, and because this line of reasoning is merely a *post hoc* rationalization by Department officials that had nothing to do with the Ione or Lower Lake decisions at the time.

Both Congress[80] and the Department of the Interior[81] have repeatedly recognized tribes that had no land, and have specifically provided for the purchase of land, to be held in trust, *after* recognition. The Department itself has stated in plain terms that "[t]aking land into trust is a separate issue from Federal acknowledgment and does not impact" recognition analysis. Final Determination to Acknowledge the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 63 Fed. Reg. at 56,937.

As described previously, the Government's decision whether to attempt to obtain land for any of these three Tribes relied on factors not relevant here – such as the BIA's determination of need, or pure lack of sufficient governmental resources. *See supra* at 10 n.22. BIA Superintendent Dorrington reported in 1927 with regard to the Verona Band that "[i]t does not appear at the present time that there is need for the purchase of land for the establishment of their homes."[82] Earlier, an Interior agent complained that the "amount of money available is entirely inadequate" to investigate the situation of all the California Indians not already provided with land.[83] In any event, the decision whether or not to purchase land for a Tribe was totally irrelevant to its federal recognition in those days, and remains so today.

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[80] Usually, Congress provides a means for the acquisition or restoration of a land base for such tribes. *See, e.g.,* 25 U.S.C. § 711e (Siletz Indian Tribe); 25 U.S.C. § 712e (Cow Creek Band of Umpqua Tribe); 25 U.S.C. § 713f (Confederated Tribes of the Grand Ronde Community); 25 U.S.C. § 714e (Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians).

[81] *See, e.g.*. Final Determination to Acknowledge the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 63 Fed. Reg. 56,937 (Oct. 23, 1998) (recognizing Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan and ignoring complaint that Band planned to seek trust land after recognition).

[82] SAR Ex. 91at 1(Letter from Dorrington to Comm'r of Indian Affairs of 6/23/27).

[83] SAR Ex. 90 at 1 (Various Documents Related to Acquiring Clear Title to Land for Ione Band 12/7/14).

Furthermore, Interior's reliance on the federal trust land issue as some sort of meaningful distinction is belied by the Department's own analysis in its federal acknowledgment decisions under the Part 83 criteria. A review of those decisions[84] demonstrates that *not one* such decision uses the lack of federal trust land (or any attempts to secure such trust land) as evidence against a petitioner or as a negative factor under the criteria. Tribes recognized through Part 83 without any discussed history of trust land holdings or promises include the Match-e-be-nash-she-wish Band of Pottawatomi Indians (1998), Snoqualmie Indian Tribe (1997), Jena Band of Choctaws (1995), Mohegan Indian Tribe (1994), Wampanoag Tribal Council of Gay Head (1987), Poarch Creek (1984), and Jamestown Clallam Tribe (1980). In the few instances that federal trust land or reservations are mentioned in Interior's decisions, it is generally as a historical note that is otherwise inconsequential to the substance of the analysis under the criteria.[85] The Department cannot say now that this is a meaningful fact.

The Department's apparent attempt to make a distinction between the three Tribes based on purported trust land holdings or promises is nothing more than an unhelpful and unreliable *post hoc* rationalization that should be rejected by the Court. Generally, courts may not accept

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[84] These materials were made available to the Tribe pursuant to the Tribe's Freedom of Information Act Request, and they are also available, *inter alia*, at http://www.indianz.com/News/2005/008383.asp and http://www.indianz.com/adc20/adc20.html

[85] *See, e.g.,* Proposed Finding for Federal Acknowledgment of the San Juan Southern Paiute Tribe, 52 Fed. Reg. 29,735 (Aug. 11, 1987) (noting in the historical background section that the Tribe's 1907 reservation was returned to public domain by 1922); Proposed Finding for Federal Acknowledgment of Huron Potawatomi, Inc., 60 Fed. Reg. 28,426 (May 31, 1995) (finding a treaty - which also temporarily located the Huron Potawatomi on the Nottawaseppi Reserve – to be evidence of prior acknowledgment in order to place analysis of the tribe's petition under the modified Part 83 regulations).

post hoc rationalizations for agency decisions. *See, e.g., Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *accord Ass'n of Civilian Technicians v. F.L.R.A.*, 269 F.3d 1112, 1117 (D.C. Cir. 2001) ("Post-hoc rationalizations, developed for litigation are insufficient."); *Tabor v. Joint Bd. for the Enrollment of Actuaries*, 566 F.2d 705, 709-10 (D.C. Cir. 1977) ("[A]gency action cannot be sustained on post hoc rationalizations supplied during judicial review.") While an agency on court-ordered remand (as here) may certainly advance a more thorough explanation than in the original agency decision (in order to comply with the judge's remand order),[86] "[p]ost-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review." *Food Marketing Inst. v. I.C.C.*, 587 F.2d 1285, 1290 (D.C. Cir. 1978) (citing *Burlington*, 371 U.S. at 168); *accord AFL-CIO v. McLaughlin*, 702 F. Supp. 307, 310 (D.D.C. 1988) (rejecting agency explanation on remand as insufficient and enjoining agency from implementing new rule). The D.C. Circuit in *Food Marketing* explained the dangers of agency recalcitrance in remand situations:

> To be sure, where, as here, the remand merely requires the agency further to elaborate its reasoning, there is no requirement that the agency arrive at a different substantive result upon reconsideration. At the same time, we must recognize the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues. The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result.

587 F.2d at 1290. This recalcitrance is precisely what has happened in the current case. Interior officials have become wedded to their prior conclusion, and they have provided an additional

[86] *See, e.g., Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 7 (D.C. Cir. 2006).

Explanation on remand that is, at best, less than cogent. The Department alleges to have found a factual distinction between Muwekma, Lower Lake, and Ione – that the Department at one time may have held or at least intended to purchase trust land for the other two Tribes.[87] Explanation at 4, 8, 17. However, nowhere in the Explanation is the relevance of this distinction discussed. Rather, the Department merely provides conclusory statements that Muwekma "was treated differently because its situation was different. . . ." *Id.* at 17. One may find a host of factual differences between any two tribes, or any two plaintiffs, or any two cases,[88] but the Department was required by this Court's order not merely to hunt for some factual difference, but to provide a coherent explanation why that difference makes the disparate treatment of Muwekma, Lower Lake, and Ione rational. The Court "cannot even engage in meaningful review, unless [the Court] is told which factual distinctions separate arguably [similar situations], *and why those distinctions are important*." *Public Media Ctr. v. F.C.C.*, 587 F.2d 1322, 1331 (D.C. Cir. 1978) (emphasis added). This Interior has failed to do. The Circuit Court in *Food Marketing* ultimately accepted the agency's reconsidered explanation after remand because the agency in that case provided "greatly expanded consideration" to the interests of all the parties affected by its ruling, and because the explanation was based on "meaningful review of the record and not on mere abstract speculation." 587 F.2d at 1291-92. Interior in this case failed to do the same with

[87] In any case, the Verona Band (i.e. Muwekma) was also "includ[ed] on a list of groups for which land might be obtained" in the early part of the 20th century, so it is clear that this as a factual distinction lacks any merit. Explanation at 6. *See also supra* at 10.

[88] *See, e.g., Wright v. West*, 505 U.S. 277, 304 (1992) ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful . . . .") (concurring opinion).

the administrative record supplements and Explanation, but rather engaged in abstract speculation.

Furthermore, the trust land issue is an impermissible *post hoc* rationalization of the prior Lower Lake and Ione recognition decisions. As already detailed in the analysis of the Lower Lake and Ione materials above, and as the Court found, Mem. Op. at 22 n.13, in neither of those decisions did the Department state that the trust land issue was a factor weighing in the decision to recognize these two Tribes outside of the Part 83 process. *See supra* at 17-19, 21-22. The Department cannot now claim that this was an integral part of the rationale behind those decisions. Again, this is merely a new, *post hoc* rationale developed for the purposes of this litigation, and it should be rejected. *See, e.g., Ass'n of Civilian Technicians*, 269 F.3d at 1117; *Tabor*, 566 F.2d at 709-10.

Finally, the trust land issue is a false factual distinction in any case. Interior admits in several places that the Muwekma Tribe, as the Verona Band, was found to be eligible for trust land purchase and was a federally recognized tribe. Explanation at 11; Mem. Op. at 2. In a world of scarce government resources, what is more important to demonstrate Federal status as a tribe is not whether a group had trust lands (or was specifically promised trust lands), but whether a group was considered eligible for trust lands. As Interior clearly recognizes, all three Tribes were considered eligible by the Department. Perhaps more importantly, *none of the three Tribes possessed any trust land at the time they sought recognition*. Ione's land purchase never took place. *Supra at* 20-23. With regard to the Lower Lake Rancheria, no one lived on the land for 30 years, and then two private families were given the land, and then Congress authorized its

sale.[89]

3. There Is No Meaningful Distinction Regarding the Federal Relationship of the Three Tribes.

The "lapse" or "administrative error" distinction made in the Explanation is not distinction at all, or if it is one, it favors recognition of Muwekma. First, Interior points to no historical circumstances supporting such a distinction between Lower Lake and Ione and Muwekma. Interior took no formal action to terminate Muwekma, and there is no factual basis for finding that Muwekma's relationship "lapsed" while that of the other tribes did not. As discussed above, Muwekma presented substantially more evidence of its continuing status than Lower Lake and Ione from 1927 through to the present. If the federal relationship of Lower Lake and Ione did not lapse, Interior cannot claim, based on this record, that Muwekma's relationship with the federal government did.

Ultimately, the three Tribes have much in common with regard to their federal status from the early part of the twentieth century through the latter part. Assistant Secretary Gover emphasized in his recognition of Lower Lake and the two Alaska tribes that "[a]t one time, each of these groups was recognized by the Bureau. However, *for reasons not clearly understood, they were simply ignored* as the BIA went through fundamental organization and philosophical changes. . . ."[90] It is clearly prior recognition *and* subsequent disregard of the Tribes on which he

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[89] SAR Ex. 116 at 2 (Mem. from Fleming to Comm'r of Ind. Aff. of 9/15/00) [Doc. 243]; *See also supra* at 20-23.

[90] SAR Ex. 88 at 1 (Mem. from Ass't Sec. Gover to Reg'l Dirs. of the Alaska and Pacific Regions of 12/29/00) (emphasis added).

focused. *See supra at* 24. And Muwekma's situation, as has been argued consistently throughout the petition and litigation, is the same as that described by Assistant Secretary Gover – at a certain point, Interior after recognizing Muwekma, for reasons not clearly understood, simply ignored Muwekma, not by any official decision or congressional mandate. Such a breach of duty by Interior is properly remedied by administrative correction.

4. Muwekma's Part 83 Petition Does Not Distinguish It in Any Meaningful Way from the Other Two Tribes.

Interior seems to also imply in the Explanation that the fact that Muwekma went through the Part 83 process, whereas Lower Lake and Ione did not, is a meaningful distinction on remand. However, Interior does not elaborate as to why, and this is not a true factual distinction in any case. As the Court found, it was Interior that required Muwekma to go through the Part 83 process, not a choice made by Muwekma. Mem. Op. at 6 n.7. As Interior mentions several times in its Explanation, Muwekma pressed often for immediate reaffirmation while its petition was pending. Explanation at 12-15. As the Court has found, the Department "directed Muwekma to file a formal petition for acknowledgment along with detailed documentation in accordance with the Part 83 criteria" without offering an alternative procedure. Mem. Op. at 5-6 and n.7.[91] Moreover, Interior is incorrect in its facts. Ione entered the Part 83 process by filing a notice of intent to petition for acknowledgment under those regulations.[92]

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[91] The fact that Ione objected to being required to proceed through the Part 83 procedure presents a similarity with Muwekma, not a distinction because Muwekma, too, objected repeatedly to being forced to proceed through Part 83 and requested summary reaffirmation. *See* Mem. Op. at 9; Explanation at 12-15.

[92] SAR Ex. 112 (Letter from Elbert to Sen. Cranston pg 2/20/90); SAR Ex. 118 (Testimony of the Ione Tribal Council).

In sum, with the new information supplied by Interior, it is clearer than ever that there was no rational basis for restoring Ione and Lower Lake to recognition outside of the Part 83 procedures – simply correcting a mistake made for "reasons not clearly understood" – while applying a different and more difficult standard for Muwekma, one which the other two Tribes could not have possibly met. Interior did what is right for Lower Lake and Ione. It has dragged Muwekma through enough delay and cost. It is time for this Court to order that Muwekma be restored to the list of federally recognized tribes.

C. OTHER GROUNDS FOR SUMMARY JUDGMENT

In its initial Motion for Summary Judgment and Memorandum of Points and Authorities in support of the Motion, the Tribe presented a number of grounds for summary judgment in addition to violation of the APA and equal protection of the law. In its Memorandum Opinion of September 21, 2006, the Court ruled on only the denial of equal protection, and reserved consideration of the other grounds until a final ruling has been made on the equal protection issue. As to those other grounds, which remain valid and we reassert here, we refer the Court to our initial Memorandum of Points and Authorities [ECF Doc. 35]. We briefly, however, summarize the alternate grounds for the motion because they further demonstrate the lack of equal treatment afforded to Muwekma.

1. The Defendant's Failure to Afford Federal Recognition to the Muwekma Tribe Was a Breach of Their Trust Duty to the Tribe, and Exceeded Their Authority.

First, the Muwekma Ohlone Tribe was fully recognized as an Indian tribe in the recent past, and such recognition was not lawfully withdrawn. Accordingly, the Tribe continues to be

recognized as a matter of law, and the Final Determination's denial of the Tribe's petition, essentially withdrawing recognition, was contrary to law. Only Congress has power to terminate a tribe that has been federally recognized, and the Department has a trust duty to protect the trust relationship once a tribe has been recognized, not ignore it and then say the tribe is no longer recognized. In establishing the Federally Recognized Tribe List Act, requiring Interior to maintain a list of federally recognized tribe, Congress warned Interior not to withdraw federal recognition once granted. The House committee report stated:

> While the Department clearly has a role in extending recognition to previously unrecognized tribes, it does not have the authority to "derecognize" a tribe. However, the Department has shown a disturbing tendency in this direction. Twice this Congress, the Bureau of Indian Affairs (BIA) has capriciously and improperly withdrawn federal recognition from a native group or leader.[93]

That is exactly what has happened here. Interior claims the right to withdraw recognition from a tribe and require it to go through Interior's Part 83 procedure to re-establish that recognition without regard for the historical circumstances – resulting in large part from Interior's own failures and breach of trust – which compelled Muwekma to seek recognition. Interior's entirely different action in regard to Lower Lake and Ione comports with the intent of Congress in the List Act, and should be required for Muwekma as well.

2. The Department's Actions Violated the Tribe's Right to Due Process of Law.

The right to continued recognition, including the associated services, protections and financial benefits, once the right has been established, is a property right that cannot be revoked

[93] July 2005 Points and Authorities at 16 (quoting H.R. Rep. No 103-781, at 3 (1994) (Ex.52)).

without due process. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). The Department's application of Part 83 failed to afford the Tribe due process in the withdrawal of recognition. Also, the Department allowed advocates against the Tribe in a prior proceeding to participate in the decision-making process in violation of the letter and spirit of 5 U.S.C. § 554(d). Therefore, the Department's decision as to recognition for Muwekma was tainted with unlawful bias.

3. The Final Determination Arbitrarily and Capriciously Violated Recognition Regulations and Rejected Substantial Evidence of Tribal Status.

The Department required proof of various tribal activities and recognition during each ten years since last admitted recognition, a requirement found nowhere in Part 83. It then rejected evidence that during three separate periods since 1927 – between 1928 and 1932, 1948 and 1955, and 1968 and 1972 – the Bureau of Indian Affairs had enrolled all of the Tribe's members or their ancestors in the California Judgment Act after requiring proof of tribal identity and thus recognized the Tribe as an American Indian entity.[94]

The Department also arbitrarily rejected evidence that tribal members attended BIA boarding schools in Oregon and Riverside, California during the 1930's and 1940's on the ground that the record did not indicate whether these tribal members were accepted based on their degree of Indian blood or membership in a recognized tribal group, ignoring that the legal basis for providing such services to Indians is not their race but the political relationship between

[94] AR Ex. 6 at 23 (Final Determination).

the tribe and the federal government.[95]

The Final Determination arbitrarily rejected substantial evidence of external identification by scholars, including a 1955 report entitled "Continuity of Indian Population in California from 1770/1848 to 1955" prepared by anthropologists Alfred L. Kroeber and R. F. Heizer which concluded that, contrary to widespread belief, California tribes had not "die[d] out."[96] The report identified the Indians of the San Jose Mission, a clear reference to Muwekma as a tribal group, who took "[l]ater refuge" in Pleasanton as one of the groups which continued to maintain their existence. *Id.* The Final Determination also arbitrarily rejected substantial evidence of community and political continuity in violation of the Department's evidentiary standards. We refer the Court to our earlier Memorandum of Points and Authorities and Reply brief for further argument, but highlight these points because they constitute a separate ground for reversal of the Final Determination and also illustrate the extent of Interior's unfair and unlawful treatment of Muwekma.

D. THE APPROPRIATE RELIEF IS A JUDICIAL ORDER RESTORING THE TRIBE.

In a review of agency action upon remand, "the agency must adequately address the concerns that lead the Court to remand in the first place." *Nw. Forest Workers Ass'n. v. Yuetter*, 1989 WL 298427, at 3 (D.D.C. Feb. 26, 1989). Interior has not done so. Enough is enough. The proper remedy at this point is an order directing Interior to restore federal recognition to

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[95] AR Ex. 6 at 29-31 (Final Determination).

[96] AR Ex. 71 at 78-79 (Muwekma Ohlone Resp. to Proposed Findings); AR Ex. 15 at 15 (L. Field et al., A *Contemporary Ohlone Tribal Revitalization Movement (Fall 1992)*).

Muwekma. Muwekma's prior arguments for "direct judicial action," *see* Mem. Op. at 27-30 (quoting Pl's. Opp. at 13-15), apply with multiplied force now. It is certainly clear now that Interior "has had ample time and opportunity to provide a reasoned explanation of the decision," and there is "no useful purpose to be served by allowing the [agency] another shot at the target." *Greyhound Corp. v. I.C.C.*, 668 F.2d 1354, 1364 (D.C. Cir. 1981). The "Department has had two opportunities to provide a reasonable explanation of its actions," but "[i]n each of these instances, the Department has been unable or unwilling to provide such an explanation." *AFL-CIO v. McLaughlin*, 702 F. Supp. 307, 313 (D.D.C. 1988). *See also Mancari*, 417 U.S. at 554-55 (federal action affecting Indians is subject to reversal if the action is not rationally related to Congress' unique obligation toward Indians).

IV. CONCLUSION

Interior has no rational basis for its asserted distinctions. Any differences between the respective histories of Muwekma, Lower Lake, and Ione are far outweighed by the characteristics they share. The additions to the record and the Explanation provided by the Department of Interior simply provide further evidence of the similarities. All three are central California Tribes that were recognized by the United States at one time, and for unknown reasons or simple neglect were ignored and then left off the list of recognized tribes. Interior, in times when it sought to do justice, simply corrected its error. In the cases of Lower Lake and Ione, Interior properly determined that since the Government had recognized them in the 1920's, and neither an act of Congress nor an official act of Interior had ended that recognition, the Tribes should be restored to federal status so that they could have the benefit of federal programs designed to help

Indians. Muwekma is entitled to the same restoration. Indeed, its history of organization, dealing with Interior, applying for claims cases, sending children to Indian schools, preserving its tribal cemetery, and negotiating with local governments for the return of human remains, as well as the support the Tribe has received not only from the local offices of BIA but from the local governments, far exceeds the evidence considered by Interior in reaffirming Ione and Lower Lake.

The supplemental administrative record supports Muwekma's case, not Interior's, and Interior's Explanation is merely a *post hoc* attempt to fabricate distinctions between Muwekma and the other Tribes. For these reasons, the Court should order Interior to restore federal recognition to Muwekma. The Department has delayed and injured the Tribe and its members long enough.

Dated: February 16, 2007

Respectfully submitted,

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