Case No. 11-5328

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Not yet scheduled for oral argument)

MUWEKMA OHLONE TRIBE,
Appellant

v.

KENNETH LEE SALAZAR, Secretary of the Interior, and
LARRY ECHO HAWK, Assistant Secretary for Indian Affairs,
Appellees

On Appeal from the United States District Court for the District of Columbia
Docket No. 1:03-CV-01231 (RBW)

BRIEF OF APPELLANT MUWEKMA OHLONE TRIBE

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Dated: April 3, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the Muwekma Ohlone Tribe submits the following information.

A. Parties

1. Appellant. The Muwekma Ohlone Tribe ("Muwekma" or "Tribe") is an Indian tribe located in Northern California in the San Francisco Bay area. The Department of the Interior has confirmed that the Tribe was federally recognized as the "Verona Band" as late as 1927. Over 99% of current Muwekma members are direct descendants of members of the Verona Band, and no act of Congress, court ruling, or prior act of the Executive has altered the Tribe's status.

2. Appellees. The Appellees are Kenneth Salazar, Secretary of the Interior, and Larry EchoHawk, Assistant Secretary for Indian Affairs. As the Appellees are sued in their official capacities, we refer in this brief to the Appellees as "Interior" or "the Department." At the time of the filing of this case in the district court in 2003, Gale Norton served as Secretary of the Interior, and Aurene M. Martin served as Acting Assistant Secretary of the Interior.

3. Intervenors and *Amici*. There are currently no intervenors or *amici* before this Court, and there were none in the district court. The district court

allowed Mr. Paul Maas Rivenhoover to file a motion to intervene [Dkt. 75], but denied that motion. Order of Oct. 26, 2011.[1]

B. Rulings Under Review

1. Order Dated September 28, 2011 of Reggie B. Walton, United States District Judge. Dkt. 73.

2. Memorandum Opinion dated September 28, 2011 of Reggie B. Walton, United States District Judge ("*Muwekma 2011*"). Dkt. 74. This decision is also reported as *Muwekma v. Salazar*, 813 F. Supp. 2d 170 (D.D.C. 2011).

3. Prior to the final decision of September 28, 2011, the district court issued a decision on September 21, 2006 remanding to Interior for further explanation, *Muwekma v. Kempthorne*, 452 F. Supp. 2d 105 (D.D.C. 2006) [Dkt. 53] ("*Muwekma 2006*"), and an order for supplemental briefing on September 30, 2008. *Muwekma v. Kempthorne,* No. 03-1231 (RBW) (D.D.C. Sept. 30, 2008) [Dkt. 68] ("*Muwekma 2008*").

C. Related Cases

This case has not previously been before this Court or any court, besides the district court below. *Muwekma v. Babbitt*, 133 F. Supp. 2d 30 (D.D.C. 2000) ("*Muwekma 2000*") and *Muwekma v. Babbitt*, 133 F. Supp. 2d 42 (D.D.C. 2001)

[1] Citations in this brief to the docket entries in the district court below are of the form "Dkt. ___." The Order of Oct. 26, 2011 was not given a docket number.

("*Muwekma 2001*"), *recons. denied*, *Muwekma v. Norton*, 206 F. Supp. 2d 1 (D.D.C. 2002) are decisions in a related case discussed *infra*.

CORPORATE DISCLOSURE STATEMENT

The Appellant is the Tribal government of the Muwekma Ohlone Tribe. It is not a publicly held corporation and has no parent corporation. No publicly held company owns ten percent or more of its stock.

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Note: Relevant statutes, regulations, and rules are included in the Addendum to this brief.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
AR	Administrative Record
BAR	Branch of Acknowledgment and Research (now known as the OFA)
BIA	Bureau of Indian Affairs
Dkt.	Docket
Explanation	Interior's "Explanation to Supplement the Administrative Record – Muwekma Ohlone Tribe" dated November 27, 2006 [Dkt. 55]
Final Determination	Interior's "Final Determination Against Federal Acknowledgment of the Muwekma Ohlone Tribe," 67 Fed. Reg. 58,631 (Sept. 17, 2002)
Ione	Ione Band of Miwok Indians
Lower Lake	Lower Lake Rancheria Koi Nation
Muwekma	Muwekma Ohlone Tribe
OFA	Office of Federal Acknowledgment (previously known as the BAR)
Part 83	The federal acknowledgment regulations of 25 C.F.R. Part 83
Reaffirmation	Acknowledgement of an Indian tribe's federal status outside of the Part 83 process
SAR	Supplemental Administrative Record filed by Interior on November 27, 2006
Tejon	Tejon Indian Tribe of California

JURISDICTIONAL STATEMENT

Nature of Action. This appeal is brought by Muwekma under sections 701 to 706 of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"), for judicial review of Interior's "Final Determination to Decline to Acknowledge the Muwekma Ohlone Tribe," 67 Fed. Reg. 58,631 (Sept. 17, 2002) ("Final Determination"), refusing to acknowledge Muwekma as a federally recognized tribe. The Tribe is aggrieved by the decision, which was final for the Department. *Id*.

District Court Jurisdiction. The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337 (civil actions brought by Indian tribes), and 5 U.S.C. § 702 (APA challenges).

Final Judgment. The district court entered an order granting summary judgment to Interior and denying summary judgment to Muwekma in a final order deciding all claims and closing the case on September 28, 2011. Dkts. 73, 74.

Appellate Court Jurisdiction. This Court has appellate jurisdiction to review the district court's summary judgment pursuant to 28 U.S.C. § 1291. *See Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 488 (D.C. Cir. 2009).

Timeliness. Muwekma filed a timely appeal on November 22, 2011. Dkt. 76; Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES PRESENTED

The following issues are on appeal in this case:

(1) Since it is undisputed that (a) Muwekma was federally recognized at least as late as 1927; (b) only Congress has the authority to terminate the federal recognition of a tribe; and (c) Congress never terminated Muwekma, did the court below err in affirming Interior's 2002 Final Determination that Muwekma is not a federally recognized Tribe?

(2) Did the district court err in ruling that a six-year statute of limitations bars Muwekma's claim that Interior's Final Determination violated the law, when the Tribe filed suit within seven months after Interior's decision?

(3) Did Interior violate Muwekma's right to equal protection under the Constitution and the APA by refusing to reaffirm Muwekma's recognition while reaffirming the recognition of two similarly situated tribes – the Lower Lake Rancheria Koi Nation ("Lower Lake") and the Ione Band of Miwok Indians ("Ione") – without requiring those Tribes to comply with the procedures and evidentiary burdens under the 25 C.F.R. Part 83 federal acknowledgment regulations ("Part 83")?

(4) Did Interior's Final Determination violate Muwekma's right to due process of law, and did the district court err in ruling that Muwekma lacked a protectable property interest in continued recognition, based on the circular

reasoning that Interior found Muwekma was not a recognized tribe and thus had no such interest?

(5) Did Interior act arbitrarily and capriciously in arriving at its Final Determination against Muwekma by applying improperly burdensome evidentiary standards and by unreasonably rejecting evidence of Tribal continuity?

STATEMENT OF THE CASE

The Muwekma Ohlone Tribe, which all parties agree was federally recognized through at least 1927, has sought reaffirmation of its federally recognized status from the Department of the Interior and the courts since 1989, over twenty years. Interior agrees that Muwekma was previously recognized, that no action by Congress or the courts de-recognized the Tribe, and that over 99% of the current members are direct descendants of the members of the recognized tribe. The Tribe continued its activity from 1927 to the present, through its internal social and political interactions, its commercial activity, and its relations with the federal, state, and local governments. At least nine individuals from the 1927 members were still alive in 1989, and one elder still survives today.

Muwekma shares a common history with Ione and Lower Lake, each of which is a similar small California tribe, previously recognized by the same federal actions that recognized Muwekma. Neither Lower Lake nor Ione was required to go through the burdensome regulatory procedures demanded of Muwekma. Interior merely corrected the error of omitting those Tribes from the list of federally recognized tribes, stating in the case of Lower Lake, "for reasons not

clearly understood, [they] were simply ignored as the BIA went through fundamental organization and philosophical changes."[2]

The Department refused to provide Muwekma the same remedy and instead subjected the Tribe to a protracted and onerous procedure under Part 83 without good reason, due process, or equal protection of the law. Interior thus required the Tribe to bear the burden of correcting the Department's own error that is contrary to law and congressional policy. This was not only unfair and unlawful, it was a breach of the federal government's trust duty to protect the Tribe and its relationship with the United States.

Not every case presents a question of the honor of our Nation, but this one does. Muwekma and its members for too long have been unlawfully deprived of the statutory benefits and services that are their right. This Court should reverse the decision below and order Interior to reaffirm Muwekma's status as a federally recognized tribe.

[2] SAR Ex. 88 at 1. Exhibit citations in this brief refer to the exhibits that the Tribe provided in briefing to the district court below. Exhibits 1-81 were filed with Muwekma's 7/13/05 brief [Dkt. 35]. Exhibits 82-85 were filed with Muwekma's 10/12/05 brief [Dkt. 41]. Exhibits 86-118 were filed with Muwekma's 2/16/07 brief [Dkt. 60]. Exhibit 119 was filed with Muwekma's 4/6/07 brief [Dkt. 63]. "AR" means the exhibit came from the Administrative Record. "SAR" means the exhibit came from the Supplemental Administrative Record filed by Interior on 11/27/06 [Dkt. 55]. The page numbers listed for AR and SAR cites are the BATES page numbers.

STATEMENT OF THE FACTS

A. Background history of Indians in California.

The history of Indians in California is a unique and particularly regrettable chapter in American history, which greatly affected Muwekma, Lower Lake, Ione, and others. Under Spanish rule, Indians in California were forced into missions, including Muwekma at Mission San Jose. When Mexico freed itself from Spain in 1821, Mexico abolished the missions and sold the lands. The mission Indians continued to live on their aboriginal lands on or near the former missions.[3]

California became part of the United States in 1848 under the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922. (Answer [Dkt. 6] ¶ 11 (fourth sentence).) One year later, the Gold Rush began, and a rapid influx of settlers overwhelmed the California tribes. (*Id.* ¶ 11 (second sentence).) In 1851 and 1852, three federal commissioners negotiated eighteen treaties with the California tribes, (*Id.* ¶ 11 (fourth and fifth sentences)) – including two treaties ceding the aboriginal territory of the Muwekma people and establishing reservations for them.[4] However, at the urging of the California Legislature and Senate delegation, the United States Senate did not ratify these treaties and instead sealed them in Senate files, where they were discovered in the early twentieth century. (Answer ¶

[3] *See* AR Ex. 15 at 2.

[4] *See* AR Ex. 1 at 5-8; Ex. 2; AR Ex. 3.

11 (seventh sentence).) As a result, California tribes were left with none of the lands reserved in the treaties, but they continued to live in villages on their aboriginal lands. (*Id.* ¶ 12 (first sentence).)

B. History of the Muwekma Ohlone Tribe.

1. Recognition through at least 1927.

The Muwekma are the descendants of the Mission San Jose Indians. In the late nineteenth century and early twentieth century, the Tribe settled in villages known as Alisal (near Pleasanton) and El Molino (near Niles).[5]

As the Bureau of Indian Affairs ("BIA") administered acts of Congress authorizing purchases of land for homeless Indians, the BIA acknowledged Muwekma as a federally recognized tribe, under the name Verona Band. *Muwekma 2011, supra,* at 5-8.[6] In 1914 BIA agent C.H. Asbury identified Muwekma – along with Lower Lake and Ione – as one of twenty-eight tribes eligible for land purchases. (Answer ¶ 14 (third sentence).)[7] However, Interior made no land purchase for Muwekma due to lack of sufficient funding and to findings that other tribes were in more desperate need.[8] In 1923, the BIA Reno

[5] AR Ex. 6 at 9; AR Ex. 7 at 49.

[6] *See also* AR Ex. 7 at 11-12.

[7] AR Ex. 8 at 1-2; SAR Ex. 90 at 1-2.

[8] SAR Ex. 90 at 1-2. Asbury reported that his BIA predecessor considered Ione "as about the next most in need of a home" after Lower Lake, and that he had negotiated an option on some land for Ione but he could not secure it. *Id.* at 3.

Agency confirmed that the Verona Band fell under its jurisdiction. (Answer ¶ 15 (second sentence).)[9] In 1927, the BIA Superintendent in Sacramento reported that Muwekma was "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).)[10] 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."[11]

Interior correctly determined that these facts establish that the United States recognized Muwekma at least until 1927. *Muwekma 2011, supra,* at 7-8.

2. Tribal continuity from 1927 to 2000s.

No Act of Congress, no court, and no prior executive action ever purported to terminate Muwekma's federal recognition after 1927. *Id.* at 8. Moreover, the Tribe did not fade away. Interior's own findings show tribal continuity from 1927 to the present – including tribal community through 1950 or 1960, ongoing social interaction as late as 1980, and external identification as a tribe in the 1960s,

[9] *See also* AR Ex. 9 at 6.

[10] *See also* SAR Ex. 91 at 1.

[11] SAR Ex. 91 at 1. Interior considered a number of factors in deciding whether to purchase land for the eligible tribes – including need and funding limitations. SAR Ex. 92 at 1-2.

1970s, and from 1982 to the present.[12] Interior also confirmed that, as of 2002, 99% of the current members of Muwekma were direct descendants of the members of the recognized Verona Band.[13] As stated above, at least nine individuals from the Verona Band were still alive and part of the Muwekma community in 1989, when Muwekma wrote to Interior about federal recognition.[14] *Infra* at 12. Three of these elders remained alive when briefing began in the district court below. Muwekma S.J. Br. 7/13/05 [Dkt. 35] at 9. One elder, Hank Alvarez, still survives today from that recognized group and remains active with the Tribe.

The record contains additional evidence of substantial Muwekma tribal community and political authority throughout the period since 1927. For example, in the 1930s, Tribal leaders organized the Muwekma people to prepare and submit 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 *et seq.*), which allowed Indians of California to participate in a claims case against the United States. In the 1960s, the Tribe successfully mobilized to preserve the Ohlone Cemetery from

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[12] For example, Interior found evidence of god-parenting, adoptions, and fostering among Muwekma members in the years through the 1950s and beyond, which it agrees are signs of tribal continuity. *See, e.g.*, AR Ex. 6 at 52-63, 70-77; AR Ex. 7 at 78-80.

[13] AR Ex. 41 at 2.

[14] Hank Alvarez, Mary Munoz Media Achuleta (b. 1910), Enos Sanchez (b. 1910), Dolores Sanchez Martinez Franco (b. 1911), Eddie Thompson (b. 1914), Margart Martinez (b. 1919), Robert Sanchez (b. 1917), Lawrence Thompson (b. 1918), Robert Corral (b. 1926).

destruction.[15] Muwekma leaders also worked on gathering historical information about the Muwekma people from mission records.[16] Muwekma adopted its modern constitution in 1991 and amended it in 1998 and 2000.[17]

Since the late 1970s, the Tribe has been active in working to preserve and ensure the proper treatment of archeological resources and ancestral human remains uncovered as land development expanded in the San Francisco Bay area.[18] In the early 1980s, Muwekma established the Ohlone Family Consulting Services, a cultural resource management firm and the Tribe's economic arm, which has provided employment for Tribal members and served as a means for Muwekma to advance its objectives related to cultural resources.[19] In 1989, the Tribe persuaded Stanford University to return 550 Ohlone remains for reburial.[20] In 1996, Muwekma reached an agreement with Santa Clara University setting out the procedures for treatment of native remains and associated objects.[21]

The record also shows substantial Muwekma external identification as a tribe and support from local governments and community leaders. The BIA

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[15] *See, e.g.*, AR Ex. 6 at 84-91; AR Ex. 16; AR Ex. 17 at 1.

[16] AR Ex. 6 at 128-29.

[17] AR Ex. 7 at 45-47, 175-79; AR Ex. 6 at 141, 145-146.

[18] *See* AR Ex. 18; AR Ex. 19; AR Ex. 6 at 124-25.

[19] AR Ex. 15 at 9-12; AR Ex. 74; AR Ex. 75; AR Ex. 76; AR Ex. 77; AR Ex. 78.

[20] *See* AR Ex. 19; AR Ex. 15 at 10.

[21] *See* AR Ex. 20 at 2-5.

assisted Muwekma members during the post-1927 time period, on the basis of their tribal affiliation. The BIA admitted Muwekma children to schools operated by the BIA for tribal children in the 1930s and 1940s.[22] At the urging of Muwekma leaders, *supra* at 9, the BIA enrolled Muwekma members under the California Claims Act (and the Act's amendments) in the 1930s, 1950s, and 1960s. In implementing the Act and preparing the rolls, the BIA required evidence of tribal membership, not just Indian descent.[23] Muwekma negotiated an agreement regarding treatment of native remains and objects with the City of Palo Alto in 1996 (similar to the 1996 agreement with the University of Santa Clara) and has worked with a number of other local governments on these issues, including the cities of San Jose, San Francisco, and Santa Clara.[24] Letters of support for Muwekma have been supplied to Interior from the Sacramento Area Office of the BIA,[25] Stanford University Provost Condoleezza Rice,[26] Congresswoman Zoe Lofgren (the Tribe's representative in Congress),[27] the County of Santa Clara, the

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[22] AR Ex. 6 at 30-31; AR Ex. 11; AR Ex. 12.

[23] *See*, *e.g.*, AR Ex. 6 at 17, 81-83, 107. The BIA verified and regularly rejected applications if it found that proof of membership in an Indian tribe was either insufficient or not submitted. *Id.* at 29. *See also* AR Ex. 70 at 2-3.

[24] *See* AR Ex. 21; AR Ex. 22; AR Ex. 23; AR Ex. 24; AR Ex. 25; AR Ex. 26; AR Ex. 27.

[25] AR Ex. 28.

[26] AR Ex. 29.

[27] AR Ex. 30.

City of San Jose, the Chief of Police of San Jose, San Jose State University, the Association of the United States Army, the San Francisco Board of Supervisors, and the Secretary of State of California – the majority of whom have worked with the Tribe on a government-to-government basis.[28]

In 1989, Muwekma wrote Interior regarding its federal recognition. The Department told Muwekma it must file a petition for acknowledgment along with detailed documentation in accordance with the elaborate procedure set forth in Part 83. *Muwekma 2006, supra,* at 109.

C. Interior's reaffirmation of Ione and Lower Lake outside the Part 83 process.

In 1994, Assistant Secretary Ada Deer announced that Interior would reaffirm Ione without requiring the Band to go through the Part 83 procedure. She based this decision on a finding that "[f]ederal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated" in the 1910s and 1920s.[29] The Assistant Secretary directed (1) that

[28] AR Ex. 31; AR Ex. 32; AR Ex. 33; AR Ex. 34; AR Ex. 35; AR Ex. 36; AR Ex. 37.

[29] SAR Ex. 87 (citing SAR Ex. 105 at 2). Notably, this is the same period when the BIA confirmed Muwekma was eligible for trust land purchase. *Supra* at 7-8 (citing BIA letters from 1914 through 1927).

Ione be included in the list of federally recognized tribes and (2) that Interior finally accept land into trust for the Band.[30]

In 2000, Assistant Secretary Kevin Gover reaffirmed the federal recognition of Lower Lake (along with two other tribes), finding that they "ha[d] been officially overlooked for many years by the [BIA] even though their government-to-government relationship with the United States was never terminated."[31] He found, "[A]t one time, each of these groups was recognized by the [BIA]. However, for reasons not clearly understood, they were simply ignored as the BIA went through fundamental organization and philosophical changes." *Id*. The Assistant Secretary concluded, "The 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*.

D. Procedural history of this case.

Following Interior's instructions in 1989, *supra* at 12, Muwekma gathered the extensive materials required for the Part 83 petition and, in 1995, submitted a formal petition for acknowledgment with "thousands of pages" of "primary and secondary source documents." *Muwekma 2006, supra,* at 109. Interior concluded in 1996

[30] SAR Ex. 87.

[31] *See* SAR Ex. 88 at 1, 3.

"that the Pleasanton or Verona Band of Alameda County[, from which members of the Muwekma tribe are directly descended,] was previously acknowledged by the federal government between 1914 and 1927." *Id*. at 110 (brackets in original). In early 1998, Interior placed Muwekma's Part 83 petition "on the list of petitions ready for consideration." *Id*.

For several years, Interior took no action on Muwekma's petition. *Muwekma 2000, supra,* at 32-33. Considering the rate at which Interior was considering Part 83 petitions, the Tribe calculated that it could be more than twenty years before Interior decided Muwekma's petition. *Id*. at 40. In 1999, Muwekma filed a complaint under the APA in the United States District Court for the District of Columbia, asking that court to order Interior to rule on Muwekma's petition within one year. Interior moved to dismiss the complaint, arguing that the Department had the exclusive right to determine when it would consider such petitions. *Id.* at 33-34.

On June 30, 2000, Judge Urbina ruled in favor of Muwekma. *Id*. at 42. The court noted that the Federally Recognized Indian Tribe List Act[32] "prohibits the Secretary from removing or omitting tribes once placed on the list and underscores that Congress has the sole authority to terminate the relationship between a tribe and the United States." *Id.* at 37-38. Judge Urbina emphasized that federal recognition provides a tribe with health care and other human needs, *id.* at 39-40, and that other

[32] Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 479a-1 and note).

previously recognized tribes had been restored to the list of recognized tribes without going through the Part 83 procedure at all. *Id.* at 37. He ordered Interior to propose a deadline for ruling on Muwekma's petition. *Id.* at 41. He also agreed with Interior that the Department should address in the first instance issues related to the reaffirmation of other tribes outside Part 83. *Id*. at 38.

Interior then submitted a proposed deadline for considering the petition, but no date by which it needed to reach a decision on the petition. Muwekma challenged this. Interior vigorously opposed the imposition of a deadline. Judge Urbina ruled against Interior, ordering Interior to decide the petition by March 11, 2002. *Muwekma 2001, supra,* at 51. Judge Urbina found that "[n]ot only are [Interior's] arguments erroneous, but they are glaringly disingenuous as well." *Id.* at 49.

After further delay, Interior issued its Final Determination in September 2002, denying recognition to Muwekma. The decision became final on December 16, 2002. *Supra* at 1. Contrary to Judge Urbina's decision and Interior's own insistence, *Muwekma 2001, supra,* at 38, Interior in the Final Determination did not address the Department's recognition of Lower Lake and Ione outside of Part 83, or Muwekma's request for similar treatment.

On June 6, 2003, Muwekma filed the present suit, seeking reversal on the grounds that Interior had denied Muwekma equal protection under both the APA

and the Constitution by requiring Muwekma to submit to the Part 83 procedure while administratively restoring both Lower Lake and Ione to federal recognition. Muwekma also asserted that Interior mis-applied the standards of Part 83, denied Muwekma due process, and violated Interior's trust responsibility to Muwekma. *Muwekma 2006, supra*, at 112 n.11.

On September 21, 2006, Judge Walton issued a decision on the parties' motions for summary judgment. *Muwekma 2006*. The court compared Interior's treatment of Muwekma to that of Ione and Lower Lake:

> Neither Ione nor Lower Lake were required by the Department to submit a formal petition for tribal acknowledgment under Part 83, nor to undergo the "lengthy and thorough" process of evaluation "based on detailed documentation provided by the petitioner," before receiving the benefits of federal tribal recognition.
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> Moreover, 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]." On several occasions, Muwekma requested that the Department reaffirm its tribal status through administrative correction, as the Department had done with Ione and Lower Lake, without requiring that its completed petition be evaluated under the Part 83 criteria.
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> [N]otwithstanding the Department actions to the contrary with respect to the Ione Band and Lower Lake, [Department] staff repeatedly advised [Muwekma] that the Assistant Secretary [of Indian Affairs] lacked authority to administratively reaffirm tribal status.

Muwekma 2006, supra, at 111, 118 n.12 (citations omitted).[33] The district court ruled "that the defendants have not articulated a sufficient basis for the Department's disparate treatment of Muwekma and the Ione and Lower Lake Tribes" in allowing those two tribes "to be considered for federal recognition without having to submit thousands of pages of documentary material." *Id.* at 116, 118. The court concluded that remand was necessary and ordered:

> Upon 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."
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> At issue for the purpose of this remand is not whether the Department correctly evaluated Muwekma's completed petition under the Part 83 criteria, but 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. at 124 (emphasis in original).

On November 27, 2006, Interior filed a number of documents as a Supplementary Administrative Record ("SAR") and an "Explanation to Supplement the Administrative Record – Muwekma Ohlone Tribe" [Dkt. 55]. *Muwekma 2008,*

[33] Interior's authority to waive the Part 83 regulations and reaffirm tribes administratively is clear. *Muwekma 2011, supra*, at 4.

supra, at 2. The new information confirmed that Interior treated Muwekma unfairly. One of the documents included a warning from the head of the Branch of Acknowledgment and Research ("BAR")[34] that if Interior recognized Lower Lake outside the Part 83 procedures there would be no way under the APA to deny other similarly situated tribes reaffirmation" outside of the Part 83 procedures.[35] Other Interior documents showed that there had been no contact between Interior and Lower Lake between 1956 and 1995, a gap of almost 40 years,[36] and that there had been no contact between Interior and Ione between 1941 and 1970, a period of almost 30 years,[37] much less any proof that they were functioning as Indian tribes since 1927. Yet Interior still contended that Muwekma must prove its continued existence as an Indian tribe with "thousands of pages of documentary material" spanning six decades. *Muwekma 2006, supra*, at 117.

On February 16, 2007, Muwekma filed a renewed motion for summary judgment. Dkt. 60. On September 30, 2008, the district court issued an order dismissing "the defendants' hand-waiving reference to 'highly fact-specific determinations'" that "[did] not free the defendants of their obligation to justify the decision to treat the plaintiff differently from Ione and Lower Lake based on the

[34] The BAR was Interior's precursor to today's Office of Federal Acknowledgment ("OFA").

[35] *See* SAR Ex. 86 at 2.

[36] SAR Ex. 117 at 3-8.

[37] SAR Ex. 101; SAR Ex. 103 at 1.

administrative record for the plaintiff's petition." *Id*. at 5-6 (citations omitted). Judge Walton found that "the Department . . . ha[d] never provided a clear and coherent explanation for its disparate treatment of [Muwekma] when compared with Ione and Lower Lake, nor had it ever articulated the standards that guided its decision to require [Muwekma] to submit a petition and documentation under Part 83 while allowing other tribes to bypass the formal tribal recognition procedure altogether." *Id.* at 6 (internal quotation and citation omitted). The court stated:

> [The court] remanded this case to the Department so it could explain why it treated similarly situated tribes differently, not so that it could construct post hoc arguments as to whether the tribes were similarly situated in the first place. It certainly did not remand the case so that the Department could re-open the record, weigh facts that it had never previously considered, and arrive at a conclusion vis-à-vis the similarity of the plaintiff's situation to those of Ione and Lower Lake that it had never reached before.

Muwekma 2008, supra, at 9 (emphasis on "why" in original, other emphasis added). The court said it was the "law of the case" that Muwekma, Lower Lake, and Ione were similarly situated. *Id.* at 7-8. The court said it was prepared to rule in the Tribe's favor, and he ordered the parties to address the question of whether Interior was bound by this law of the case. *Id.* at 9-10. The parties submitted their final briefs on this issue by December 2008. Dkt. 70.

The district court issued no decision in 2009, or in 2010. The court did not hear oral argument. Muwekma sought a status conference in December 2010, but it

was not granted. Dkts. 72, 73. Finally, on September 28, 2011, nearly three years after the parties filed their final briefs, the district court issued its Memorandum Opinion. *Muwekma 2011*. The court, in what seemed a total reversal of its earlier orders, ruled on every single point for Interior – accepting Interior's arguments that there was no violation of equal protection, no breach of trust responsibility, no denial of due process, no violation of Congress's sole authority to remove a tribe from recognition, and no arbitrary and capricious error in Interior's ruling against Muwekma under Part 83. *Id.* at 47. This appeal followed.

E. Interior's January 2012 reaffirmation of the Tejon Indian Tribe of California outside the Part 83 process.

On January 3, 2012, while this appeal was pending, Assistant Secretary Larry Echo Hawk "reaffirmed" federal recognition of the Tejon Indian Tribe of California, again outside the Part 83 procedure.[38] According to the Department, the Tejon Tribe "first requested confirmation of its status in 2006" (as compared to Muwekma in 1989). *Id.* at 1. Similar to the reaffirmation of Lower Lake, the Department admitted in reaffirming Tejon that "[d]ue to an administrative error,

[38] *See* Press Release, U.S. Department of the Interior, Echo Hawk Issues Reaffirmation of the Tejon Indian Tribe's Government-to-Government Status (Jan. 3, 2012), *available at* http://bia.gov/idc/groups/public/documents/text/idc015898.pdf. The Court may take judicial notice of this new decision, though it is not part of the record on appeal. *See*, *e.g.*, *Conecuh-Monroe Cmty. Action Agency v. Bowen*, 852 F.2d 581, 583-84 (D.C. Cir. 1988) (taking judicial notice of a new administrative decision issued after the trial court's decision but not included in the record).

the [BIA] failed for several years to place [Tejon] on the list of federally recognized tribes that the BIA is required to publish annually." *Id.* Consequently, the Assistant Secretary concluded, "I her[e]by affirm the federal relationship between the United States and the Tejon Indian Tribe. This concludes the long and unfortunate omission of the Tejon Indian Tribe from the list of federally recognized tribes." *Id.*

SUMMARY OF ARGUMENT

The district court erred in dismissing each of Muwekma's arguments and accepting each of Interior's defenses. A reversal on any one of these grounds would be sufficient to overturn the district court's opinion below.

First, Interior had no authority to decide that Muwekma was no longer recognized, because, as Interior admits, only Congress has the authority to terminate a tribe's federal recognition, and Congress has never terminated Muwekma's federal recognition. This claim is timely because Muwekma brought it within a few months of Interior's Final Determination, which was the final agency action that purported to deny recognition to the Tribe. Had Muwekma sued earlier, the court would have dismissed the action for failure to exhaust administrative remedies.

Interior also violated Muwekma's right to equal protection of the law by administratively reaffirming Lower Lake and Ione while subjecting Muwekma to

the burdensome Part 83 process. This represents a departure from precedent and disparate treatment of similarly situated parties. The district court should not have accepted Interior's *post hoc* rationales for treating the tribes differently.

Interior also violated Muwekma's right to due process by denying the Tribe a hearing and right to present and cross-examine witnesses, and by allowing staff who were involved in losing the *Muwekma 2000* and *Muwekma 2001* litigation to also be involved in the recognition decision. The district court erred by using circular logic to rule that Muwekma had no property interest subject to due process of law.

Finally, Interior violated the APA by arbitrarily and capriciously denying substantial evidence Muwekma presented to show its continuing existence, rejecting evidence Interior has accepted in other rulings, and requiring proof beyond that which Interior's regulations require.

Interior should be ordered to return Muwekma to the list of federally recognized tribes. Further remand would be futile. *See, e.g., Greyhound Corp. v. I.C.C.*, 668 F.2d 1354, 1364 (D.C. Cir. 1981) (where the agency "has had ample time and opportunity to provide a reasoned explanation of the decision," there is "no useful purpose to be served by allowing the [agency] another shot at the target").

ARGUMENT

I. Standard of Review.

All issues in this appeal are subject to *de novo* review. *See*, *e.g.*, *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 998 (D.C. Cir. 2008) (summary judgment); *Shays v. F.E.C.*, 528 F.3d 914, 919 (D.C. Cir. 2008) (APA). This Court applies the same summary judgment standard as the district court. *See Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997). In "all cases agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law or if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) (internal quotation and citation omitted).

II. The District Court Was Wrong to Rule That Muwekma's Claim to Continued Recognition Is Barred by the Six Year Statute of Limitations.

A. Congress has the sole authority to terminate the federal relationship with a tribe, and it never did so with Muwekma.

The district court states, "[I]t does not appear to be disputed . . . that 'Congress has the sole authority to terminate tribes.'" *Muwekma 2011, supra,* at 32 (emphasis added). This has long been the law. The Supreme Court has held:

> Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial.

United States v. Nice, 241 U.S. 591, 598 (1916) (emphasis added); *accord Tiger v. Western Inv. Co.*, 221 U.S. 286, 315 (1911). *See also United States v. Sandoval*, 231 U.S. 28, 46 (1913).

Congress reaffirmed its exclusive authority to terminate tribes when it enacted the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4792 (codified at 25 U.S.C. § 479a-1 and note). An important impetus to this Act was Congress' finding that Interior was exceeding its authority by attempting to administratively terminate recognized tribes. The House Natural Resources Committee, the committee with jurisdiction over Indian legislation, explained the purpose of the Act in a report:

> 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.

H.R. Rep. No. 103-781, at 3 (1994) (emphasis added). *See also Muwekma 2000, supra*, at 37-38 (the Federally Recognized Tribe List Act "underscores that Congress has the sole authority to terminate the relationship between a tribe and the United States").

The Department itself has recognized its limitations, ruling in an Interior Board of Indian Appeals proceeding that "[i]n passing this [Federally Recognized Tribe List] Act, Congress made it emphatically clear that the Department lacks

authority to withdraw recognition of an Indian tribe, and that only Congress has such authority." *Rosales v. Sacramento Area Dir.*, 32 I.B.I.A. 158, 166 (Apr. 22, 1998).[39] The BIA recently applied this principle again in determining that a tribe was under federal jurisdiction in 1934, stating, "the Federal Government's failure to take any action towards or on behalf of a tribe during a particular time period does not necessarily reflect a termination of its relationship with the tribe since only Congress can terminate such a relationship."[40]

As only Congress has the power to terminate a tribe, and it never terminated Muwekma, then Muwekma is still a federally recognized tribe, and Interior had no authority to rule otherwise. Indeed, Interior has overstepped its authority in requiring previously recognized tribes to petition under 25 C.F.R. § 83.8 at all. Once a tribe establishes that it was previously recognized – especially within the lifetime of current members – then Interior by law may not reach an adverse determination under Part 83 and thereby terminate the tribe.

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[39] Ex. 53 at 7.

[40] Letter from Randall Trickey, Eastern BIA Regional Director to Hon. Earl Barbry, Sr., Chairman, Tunica-Biloxi Tribe of Louisiana, at 5 (Aug. 8, 2011). *Accord* U.S. Dep't of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington for the Cowlitz Indian Tribe, at 97-98 (Dec. 2010) ("Cowlitz Decision"). As with the Tejon reaffirmation press release, *supra* note 38, the Court may take judicial notice of these Interior decisions, which came out after the parties' briefing below, but before Judge Walton's decision.

B. The 2002 Final Determination was an unlawful act of withdrawal of Muwekma's federal status by Interior, and this suit was brought well within six years of that act.

The district court ruled that the six-year statute of limitations in 28 U.S.C. § 2401(a) barred Muwekma's claim that Interior exceeded its authority. *Muwekma 2011, supra,* at 32. The court concluded that "the most obvious point at which the Muwekma could have first brought suit against the agency for purportedly terminating its tribal status was in 1989, when it was clear that [Muwekma] was aware that it was not a federally recognized tribe. Given that the Muwekma did not bring this action against the Department until 2001 [*sic*]. . . its unlawful termination of tribal status claim is plainly barred by the limitations period of 28 U.S.C. § 2401(a)." *Id.* at 33.[41] That is not the law.

The district court's decision is inconsistent with the administrative exhaustion doctrine, which would have prevented the Tribe from bringing an action in 1989 as the court suggested. Had Muwekma gone straight to court at that time (or while the Part 83 petition was pending), the district court would have dismissed the action for failure to exhaust administrative remedies. In *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132 (D.C. Cir. 1987), a tribal group in Massachusetts filed suit to declare that it was a federally recognized tribe.

[41] The court below is even wrong on the date of filing this suit. Interior's ruling became final on Dec 16, 2002. This suit was filed on June 6, 2003, a little more than six months later, and well within six years. Dkt. 1.

On review, this Court held that the claim must be dismissed for failure to exhaust administrative remedies – namely, the Part 83 process:

> [T]he determination whether these documents adequately support the conclusion that the [tribal group] were federally recognized in the middle of the nineteenth century, or whether other factors support federal recognition, should be made in the first instance by the Department of the Interior . . . . The purpose of the regulatory scheme set up by the Secretary of the Interior . . . would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.

Id. at 1137. *See also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (unfair labor practice charge must be heard by NLRB before judicial review).[42] Moreover, statutes of limitations are tolled during such administrative exhaustion, because the cause of action accrues only when the agency reaches its final decision. *See*, *e.g.*, *Crown Coat Front Co. v. United States*, 386 U.S. 503, 510-19 (1967); *Viola v. United States*, 483 F.2d 1209, 1211 (D.C. Cir. 1973).

The Part 83 proceeding was Interior's preferred and required means of determining whether the Department agreed that Muwekma remained a federally

[42] Interior itself also successfully argued this in 1991 and 1992 before the U.S. District Court for the Eastern District of California, which dismissed a claim brought by Ione for recognition on the grounds that Ione had not exhausted the Part 83 administrative remedy. SAR Ex. 113 at 2 (Government's exhaustion argument); SAR Ex. 115 at 13-15 (same); SAR Ex. 114 at 1 (noting that Ione claim was dismissed for failure to exhaust administrative remedies).

recognized tribe.[43] Interior's Final Determination was the triggering event for the statute of limitations.[44] Muwekma promptly brought this suit after the Final Determination.

This case is not like *Miami Nation of Indians of Ind. v. Lujan*, 832 F. Supp. 253 (N.D. Ind. 1993), discussed by the district court. *Muwekma 2011, supra*, at 34. In that case, a published 1897 Opinion of the Assistant Attorney General, interpreting various treaties and Acts of Congress, stated that the Miami Nation of Indians of Indiana was no longer federally recognized as a result of those treaties and Acts. The district court in *Miami* held that a claim that the Attorney General's Opinion was in error had to be brought within six years of the issuance of his Opinion. There was no comparable determination here until Interior decided in 2002 that Muwekma was not federally recognized. In other words, the equivalent to the 1897 Attorney General's Opinion in *Miami* is the 2002 Final Determination for Muwekma. Even using *Miami*'s reasoning, the statute of limitations did not start running until 2002.

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[43] A tribe may be under federal jurisdiction (or recognized) at a point in time "even though the Federal Government did not believe so at the time." *Carcieri v. Salazar*, 555 U.S. 379, 397, 398-99 (2009) (Breyer, J., concurring).

[44] *See, e.g.*, *Mowa Band of Choctaw Indians v. United States*, No. 07-0508-CG-B, 2008 WL 2633967, at *3 (S.D. Ala. July 2, 2008) (holding that a tribe's claim based on a Part 83 determination accrued once the administrative determination became final).

Later in the district court's opinion below, *Muwekma 2011, supra*, at 40, the court stated (inconsistently) that a tribe can just cease to exist or fade away, without any action by Congress, relying on the Seventh Circuit's opinion in the related *Miami* appeal, *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001). However, neither the Supreme Court, nor any other court, has followed this *Miami* opinion in this respect.[45] Indeed, the opinion is contrary to well-settled principles that any decline in the exercise of tribal rights that results from illegal conduct by others (*i.e.*, Interior illegally ignoring Muwekma) can have no legal effect on the existence of those rights, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 669 n.14 (1979), and that courts will not infer termination or abrogation of tribal status or rights unless Congress makes its intent to do so express. *See, e.g.*, *United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *Chippewa Indians of Minn. v. United States*, 307 U.S. 1, 4-5 (1939).

Moreover, the factual distinctions between the Miami and Muwekma are stark. The Seventh Circuit noted that Miami tribal members were dispersed around the country, that "[o]nly about 20 percent of this group socialize with one another,"

[45] Justice Breyer recognized in his concurring opinion in *Carcieri v. Salazar*, 555 U.S. 379 (2009), that Interior has a history of getting its lists of tribes wrong, based on the false impression that certain tribes had dissolved. *Id.* at 398-399. He also noted that Interior has sometimes corrected these errors. *Id.*

that "only 3.5 percent attend the annual reunion," that the reunion "is the sole organized event of the group," and that the tribe "had no structure," *Miami*, 255 F.3d at 349-51 – as compared to the very substantial community interactions, activities, and tribal structure in the record for Muwekma. *Supra* at 8-12. In addition, the relevant time period in this case is 1927 and thereafter, within the lifetime of current members, rather than going back to 1854 as in *Miami*. 255 F.3d at 351. There is no basis for holding that Muwekma has abandoned its tribal existence.[46]

III. The District Court Erred in Dismissing Muwekma's Equal Protection Argument.

Interior also violated equal protection and the APA by exempting Lower Lake and Ione from the Part 83 process and restoring their recognition, while applying a greater burden to Muwekma and denying its recognition.

The Constitution's Fifth and Fourteenth Amendments require the federal government to treat similarly situated persons the same. U.S. Const. amends. V, XIV; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The APA likewise prohibits federal agencies from treating like cases differently:

> A fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case,

[46] Indeed, Interior did not find that Lower Lake or Ione had abandoned tribal existence despite gaps in the record of thirty and forty years. *See infra* at 37-39 (describing record for Lower Lake and Ione).

> then it must either make an exception in a similar case or point to a relevant distinction between the two cases.
>
> * * *
>
> [D]issimilar treatment of evidently identical cases . . . seems the quintessence of arbitrariness and caprice.

Westar Energy, Inc. v. F.E.R.C., 473 F.3d 1239, 1241 (D.C. Cir. 2007) (overruling FERC for denying an energy company's waiver of a filing deadline, where FERC had waived that deadline for another company) (quotations omitted).

Equal protection and the APA thus prevent an agency from subjecting one party to a stricter test or heavier burden than similar parties. *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (village's demand of a 33-foot easement for connecting to a water main, where the village had requested only 15 feet from similarly situated property owners, was a violation of equal protection); *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441 (1923) (county's tax assessment of a bridge at 100% of its value, where other property owners were assessed at 55% of value, was a violation of equal protection); *Catawba Cnty. v. E.P.A.*, 571 F.3d 20, 51-52 (D.C. Cir. 2009) (vacating EPA's air quality classification of one county because it was subjected to a more stringent test than nearby counties without coherent explanation).

Equal protection and the APA also require that once an agency establishes a precedent, it is arbitrary and capricious to depart from that precedent without sufficient explanation. *See, e.g., Republic Airline, Inc. v. U.S. Dep't of Transp.*

("USDOT"), 669 F.3d 296, 299-302 (D.C. Cir. 2012) (vacating USDOT's refusal to allow an airline to transfer a valuable "slot exemption" as part of an airline merger, because USDOT ignored three of its own precedents that allowed such transfers during prior mergers); *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1115-16, 1119-20 (D.C. Cir. 2010) (vacating Interior's decision on proper methodology for assessing the value of tribal oil and gas, because Interior did not address its departure from three prior decisions); *Verizon Tel. Cos. v. F.C.C.*, 570 F.3d 294, 301-302 (D.C. Cir. 2009) (vacating the FCC's decision to deny telephone company an exception to mandatory access rules, where FCC utilized a new test that was inconsistent with multiple FCC precedents and did not provide reasonable explanation for the change); *Westar Energy*, *supra*, 473 F.3d at 1241-43.

Not just any agency explanation will suffice to depart from precedent or subject similar parties to different burdens; the agency must rely on real and meaningful differences, not feigned differences. An agency must "do more than enumerate factual differences, if any, between [one case] and the other cases; it must explain the relevance of those differences to the purposes of" the underlying law. *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730, 733 (D.C. Cir. 1965) (vacating FCC decision to disqualify one applicant for radio license renewal on the basis of past deceptive broadcasting practices, where FCC granted renewal to another party

that was involved in the same deception). Moreover, a court "cannot engage in meaningful review, unless [the court] is told which factual distinctions separate arguably [similar situations], and why those distinctions are important." *Pub. Media Ctr. v. F.C.C.*, 587 F.2d 1322, 1331-32 (D.C. Cir. 1978) (vacating for lack of coherent explanation FCC's finding that eight radio stations violated the fairness doctrine, but four others did not, in airing the same advertising).

Similarly, the agency's explanation may not be a *post hoc* rationalization that had nothing to do with the underlying decisions, or that was developed for litigation purposes. The law "does not allow [this Court] to affirm an agency decision on a ground other than that relied upon by the agency." *Republic Airline*, 669 F.3d at 302 (rejecting FAA's new argument first briefed on appeal) (citation omitted). *See also, e.g., TNA Merch. Projects, Inc. v. F.E.R.C.*, 616 F.3d 588, 593 (D.C. Cir. 2010) (finding an agency's argument in court "fatal[ly] flaw[ed]" when "it was not the rationale the [agency] gave in its orders"); *Conn. Dep't of Pub. Util. Control v. F.E.R.C.*, 484 F.3d 558, 560 (D.C. Cir. 2007) (same); *Jicarilla*, 613 F.3d at 1120 (rejecting Interior's *post hoc* rationale for failing to apply – or even discuss – the agency's three on-point precedents). This Court in *Food Mktg. Inst. v. I.C.C.*, 587 F.2d 1285 (D.C. Cir. 1978), explained how the rule against *post hoc* rationales is particularly applicable in remand situations (like here), because of the dangers of agency recalcitrance:

> 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.

Id. at 1290.

A. The Lower Lake and Ione decisions are agency precedent that Interior should have followed for Muwekma, a similarly situated tribe.

Interior was correct in reaffirming Lower Lake and Ione outside of Part 83. Like Muwekma, they had been federally recognized and, through no fault of their own, Interior later ignored them. Congress had not de-recognized them, and they had not dissolved. Interior properly admitted its error.

Assistant Secretary Gover articulated a standard for reaffirmation in the 2001 reaffirmation of Lower Lake. He found that Lower Lake was "officially overlooked for many years by the [BIA] . . . even though [its] government-to-government relationship with the United States was never terminated," and that "[a]t one time, [the tribe] was recognized by the Bureau," but that "for reasons not clearly understood, [the tribe was] simply ignored as the BIA went through fundamental organization and philosophical changes."[47]

[47] SAR Ex. 88 at 1.

Interior invoked the same chief factor in the recent Tejon reaffirmation: that although Tejon had once been recognized, "[d]ue to an administrative error, the [BIA] failed for several years to place [Tejon] on the list of federally recognized tribes that the BIA is required to publish annually." Press Release, *supra* note 38.

The standard articulated in the Ione reaffirmation letter was even less stringent, apparently relying solely on the fact that Ione had been considered eligible for trust land holdings in the pre-1927 era (like Muwekma). Indeed, the only justification that Interior provided was that "[f]ederal recognition was evidently extended to the Ione Band of Indians at the time that Ione land purchase was contemplated," which was in the 1910s and 1920s (like Muwekma).[48]

These reaffirmation decisions did not rely on – or even discuss – other factors such as (1) whether the tribes had trust land holdings, (2) whether the tribes were in the Part 83 process, or (3) whether there was a well-documented history of contacts or federal interaction between the time of most recent confirmed recognition and the current day – which Interior raised as *post hoc* rationales on remand in this case. *See infra* at 41-43.

Like Lower Lake, Ione, and Tejon, Muwekma (1) was federally recognized during the 20th century (at least as late as 1927); (2) was never terminated by any Act of Congress or court order; (3) for some unknown reason was forgotten and

[48] SAR Ex. 87.

mistakenly left off of the BIA's list of recognized tribes; and (4) continued to exist and to seek reaffirmation. Thus, Muwekma is like these other tribes in all the respects that actually matter for the purposes of an administrative reaffirmation decision. Based on the above precedent, this should have resulted in a simple correction of the illegal administrative mistake of leaving Muwekma off the list – just as Interior did for the other three Tribes.

Interior itself recognized that it was setting a reaffirmation precedent that tribes like Muwekma could rely on. When Interior considered reaffirming Lower Lake, senior staff warned that if Interior recognized Lower Lake outside the Part 83 procedures, there would be no way under the APA to deny similarly situated tribes reaffirmation outside of the Part 83 procedures. *Supra* at 18 and note 36.

The instant case has many parallels to this Court's recent decision in *Republic Airline, supra*. In that case, an airline sought to transfer its valuable "slot exemption" at Reagan National Airport, normally not transferable, to its new corporate merger partner. Despite three USDOT precedents allowing similar "slot exemption" transfers in cases of merger, USDOT informed the airline that the transfer was prohibited. As Interior did with Muwekma and Part 83, *Muwekma 2011, supra,* at 18, USDOT instead told the airline that it could apply for the open "slot exemption" through the usual regulatory application process, like any other airline. The airline did so, but also continued to ask for the kind of simple transfer

that the USDOT had allowed previously for mergers. Eventually, USDOT awarded the "slot exemption" to another airline. This Court, on review, vacated the decision and held that USDOT had violated the APA, by failing to adequately address USDOT's departure from precedent in more than a few cursory and unpersuasive sentences. 669 F.3d at 297-302. Here, Interior similarly failed to provide adequate explanation for its obvious departure from precedent – a violation of equal protection and the APA.

B. It was a denial of equal protection to subject Muwekma to a more burdensome test than Lower Lake and Ione.

No matter how one might articulate the test for reaffirmation outside Part 83, there can be no doubt that Interior subjected Muwekma to a stricter test and a more burdensome process involving "thousands of pages" of historical documentation not required of the other tribes. *Muwekma 2006*, *supra*, at 109-110.[49] If those Tribes had been illegally subjected to the Part 83 process, they would not have satisfied it. The record (even as supplemented by Interior on remand) actually shows long periods of time during which Interior had no relationship whatsoever with either Lower Lake or Ione, and during which Interior questioned the very continued existence of those two tribes.

For example, for Lower Lake, the record contains no evidence of contact between 1956 (when Congress terminated the Rancheria) and 1995, a gap of

[49] *See* SAR Ex. 116; SAR Ex. 86; SAR Ex. 88.

almost forty years.[50] Even before 1956, the land was "uninhabited between 1916 and 1947," more than thirty-one years.[51] At the time of the 1956 Act, Interior had already sold almost all of the Rancheria land to the County for an airport and conveyed the remaining forty-one acres to four individual Indians in fee.[52] Moreover, a review of the group's conflicting membership lists and genealogy raised "serious questions" from Interior regarding dual enrollment and descent from other tribes, in both 1935 and again in 2000.[53] The Department for a time also even considered the 1956 Act to have terminated the Tribe.[54]

Similarly, the record shows no contact for Ione for the years between 1941[55] and 1970,[56] a gap of almost thirty years. A 1970 visit from two Ione individuals was noted by Interior as the "first contact with this group in many years."[57] In a court filing in 1991, Interior itself stated that "[b]etween 1945 (or even earlier) and 1970, there was no contact between the government and the Ione Band . . . ."[58] In the same pleading, Interior stated that "there was no leadership or governing

[50] *See* SAR Ex. 116; SAR Ex. 117.

[51] SAR Ex. 116 at 3; Ex. 59 at 2. *See also* SAR Ex. 86 at 27-32.

[52] SAR Ex. 116 at 3-5.

[53] SAR Ex. 116 at 2-3; SAR Ex. 86 at 34-39.

[54] SAR Ex. 116 at 5-7; Act of July 20, 1956, 70 Stat. 595.

[55] *See* SAR Ex. 101; SAR Ex. 102.

[56] SAR Ex. 103.

[57] SAR Ex. 103 at 1.

[58] SAR Ex. 115 at 16.

structure with the [Ione] Band whatsoever" between 1945 and 1970. *Id.* In fact, Ione did not have a formal constitution until after reaffirmation in 1994, and various groups were vying for control of the entity.[59]

In contrast, the record for Muwekma contains substantial evidence of community activities – such as god-parenting, fostering, adoption, formal gatherings organized by the Tribe, and organizing to protect the Ohlone cemetery.[60] Interior's own findings show tribal continuity from 1927 to the present – including tribal community through 1950 or 1960, ongoing social interaction as late as 1980, and external identification as a tribe in the 1960s, 1970s, and from 1982 to the present. *Supra* at 8-9. Interior also determined that 99% of Muwekma members are descendants of the tribe as recognized in 1927, so Interior's concerns about membership and leadership conflicts with respect to Lower Lake and Ione, *supra* at 38, are wholly absent with respect to Muwekma. The BIA enrolled Muwekma members in the late 1920s, 1930s, 1950s, late 1960s, and 1970s under the California Claims Act.[61] The BIA also enrolled Muwekma children in BIA schools.[62] The Tribe created and then amended its formal constitution in 1991,

[59] *See, e.g.*, SAR Ex. 111 at 6; SAR Ex. 112 at 4-5; SAR Ex. 119 at 5.

[60] *E.g.*, AR Ex. 6 at 52-63, 70-77, 79-86; AR Ex. 7 at 78-80; AR Ex. 16; AR Ex. 17 at 1.

[61] *E.g.*, AR Ex. 70.

[62] AR Ex. 6 at 30-31; AR Ex. 11; AR Ex. 12.

1998, and 2000, respectively. Tribal members from the Verona Band survived into the 2000s and remained active with the Tribe. *Supra* at 9 and note 14.

These documented facts indicate a pattern of tribal activity and federal dealings that goes far beyond anything demonstrated in the record for Lower Lake and Ione. Yet Interior subjected Muwekma to an arbitrary decade-by-decade test to prove tribal community, authority, and external identification from 1927 through 1989, *infra* at 54-55, without subjecting Lower Lake or Ione to the same test. It is clear from Interior's own record that Ione and Lower Lake both would have failed such a test, with admitted gaps in the record of thirty and forty years. Interior itself admitted in the proceedings below that any relationship between the Government and Lower Lake and Ione was "sporadically documented." Def. Mem. 3/16/07 [Dkt. 61] at 10.[63] But these were previously recognized tribes that – like Muwekma – had not been disestablished by Congress but ignored by Interior. Interior correctly returned them to the list of recognized tribes. Subjecting Muwekma to the more rigorous and burdensome Part 83 test and failing to return Muwekma to the list is unfair disparate treatment, and a violation of Muwekma's right to equal protection under the law.

[63] Interior in the briefing below disingenuously asserted that the Lower Lake and Ione reaffirmation decisions were based on "voluminous documentary evidence spanning many decades," only to later state the opposite and more accurate fact (in the very same brief, no less), that any documentation was actually "sporadic" at best. *Id.* at 1, 10.

C. The district court should not have accepted Interior's improper *post hoc* rationales for different treatment of Muwekma, Lower Lake, and Ione.

The district court erred when it found "the Department's explanation sufficient" to distinguish Muwekma from Lower Lake and Ione. *Muwekma 2011, supra,* at 45. The Explanation was merely a series of improper *post hoc* rationales that had nothing to do with the decisions themselves.

Interior had the duty to address the reaffirmation of Lower Lake and Ione outside Part 83 in the Final Determination of Muwekma, as Interior itself had demanded before Judge Urbina. *Muwekma 2001, supra,* at 38. But instead Interior ignored equal protection as an issue, did not mention Lower Lake or Ione in its Final Determination on Muwekma, and only addressed these when ordered to do so by the district court on remand. *Muwekma 2006, supra,* at 125. Interior's resulting explanation was thus not an examination of the issue of reaffirmation outside Part 83, but an after-the-fact justification.

In its Explanation, Interior relied on three *post hoc* arguments for different treatment of Muwekma: (1) that Muwekma had entered the Part 83 process, (2) that Lower Lake and Ione had "collective rights in land," and (3) that Lower Lake and Ione had demonstrated a "pattern of federal dealings" throughout the time period during which they were mistakenly left off Interior's list of recognized tribes. Dkt. 55 at 4-9; *Muwekma 2008, supra,* at 3-4; *Muwekma 2011, supra,* at

45-47. These arguments were *post hoc* by definition, because they were not stated in any of the reaffirmation decisions, *supra* at 34-35, nor the Muwekma Final Determination. Therefore, the district court should have rejected them completely. *See, e.g., Republic Airline*, 669 F.3d at 302; *TNA Merch. Projects, Inc.*, 616 F.3d at 593; *Conn. Dep't of Pub. Util. Control*, 484 F.3d at 560. Moreover, they are factually defective.

Interior first asserted a distinction based on the fact that Muwekma had entered the Part 83 process, whereas Lower Lake and Ione allegedly had not. Dkt. 55 at 2-3. However, this was demonstrated to be a wholly false distinction because Ione was also a Part 83 petitioner. *Id*. at 2 n.1. And, in any event, Muwekma only went to the substantial work and expense of preparing a petition because Interior told it to do so. *Supra* at 12. Following Interior's direction cannot fairly be a basis to deny Muwekma reaffirmation. [64]

Interior also asserted distinctions between the three tribes based on holding "collective rights in land," claiming that Lower Lake and Ione had such rights, but Muwekma did not. These distinctions were wholly erroneous as well. The Department had in the 1910s and 1920s considered all three Tribes to be eligible for trust lands, *supra* at 7-8, 12. While Interior attempted to purchase some lands

[64] The court below does not appear to have relied on this untrue distinction. But it illustrates Interior's pattern of providing only *post hoc* rationales in its Explanation.

for Ione, it never actually did. *Supra* note 29. The Lower Lake Rancheria was unoccupied for thirty years, sold, and then terminated by Congressional legislation by 1956. *Supra* at 37-38. Moreover, collective land holdings is not a factor that Interior considers in any of its recognition decisions, nor is it a part of the Part 83 decision-making process.[65] Indeed, it is most common for tribes to seek recognition first, without any trust land holdings, and then request lands to be taken into trust. *See* 25 C.F.R. Part 151.

Finally, Interior asserted a *post hoc* distinction based on an alleged "pattern of federal dealings" with Lower Lake and Ione. However, neither the Lower Lake nor Ione reaffirmation decisions relied on any documented, ongoing federal interaction between those tribes and the federal government – because there was none. *Supra* at 37-39 (explaining gaps of thirty and forty years respectively with no federal contact whatsoever with Ione and Lower Lake).[66]

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[65] The Department itself has stated that "[t]aking land into trust is a separate issue from Federal acknowledgement and does not impact" recognition analysis. 63 Fed. Reg. 56,937 (Oct. 23, 1998).

[66] In explaining this alleged distinction, the court below relied heavily on contacts from the pre-1927 time period. *Muwekma 2011, supra,* at 45-46 (citing several reports and letters from 1915 through 1927). However, there is no dispute that Muwekma was recognized at least up until 1927, just like Lower Lake and Ione. *Supra* at 8. Therefore, there is no meaningful distinction to be made between the three tribes during that earlier time period. Along the same lines, relying on Interior's Explanation, the district court considered the 1956 Act terminating the Lower Lake Rancheria to be a meaningful federal interaction. *Muwekma 2011, supra,* at 45; Act of July 20, 1956, Pub. L. No. 751-668, 70 Stat. 595. To the

Therefore, the district court should not have accepted these *post hoc* explanations by Interior. *Muwekma 2011, supra,* at 45-47. The court gave lip service to the dangers of *post hoc* rationales, *Muwekma 2006, supra,* at 121, 124-25, *Muwekma 2008, supra,* at 9, but ultimately accepted them anyway.

IV. Interior Violated Muwekma's Right to Due Process of Law, and the District Court Was Wrong to Rule That Muwekma Had No Such Right.

Muwekma, as a previously recognized tribe, had a right to a formal adjudicatory hearing in any proceeding that could result in the loss of that recognition, including the opportunity to present expert witnesses, argument, and facts to the decision-maker and to cross-examine staff involved in evaluating the Tribe's claims. Muwekma further had a right to a determination untainted by conflict of interest on the part of departmental staff. Interior failed to provide such due process in its evaluation of Muwekma's petition.

A. Muwekma has a property right in continued recognition that Interior may not revoke without due process.

1. The district court's reasoning is circular and irrational.

The district court erroneously denied Muwekma's right to due process. As the court noted, the Tribe asserts that "[t]he 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 without due

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contrary, Interior for a time considered that Act as having terminated the Lower Lake Tribe itself, not just the land status. SAR Ex. 116 at 5-7.

process." *Muwekma 2011, supra,* at 41. However, the district court held that it did not need to consider Muwekma's due process claim, because of the Tribe's "failure to demonstrate that it possessed a property right in its prior acknowledgment," or that it "continued to exist." *Id*.

The district court's reasoning is circular and creates the kind of classic "Catch-22" scenario which this Court has consistently rejected: since the Department ruled against Muwekma's recognition claims, Muwekma has no property right and the Department is not required to provide Muwekma with due process in making the determination that Muwekma challenges. Put differently, any tribe that is denied recognition in a Part 83 proceeding cannot contest the result as taking the tribe's property without due process, because it is not a tribe and thus had no property to lose.[67] This is ridiculous. It permits Interior to avoid providing claimants with due process by reaching a negative determination on their claim. In *Weyburn Broad. Ltd. P'ship v. F.C.C.*, 984 F.2d 1220 (D.C. Cir. 1993), this Court vacated and remanded a case where the FCC put a petitioner in a similar "Catch-22" scenario:

> But the FCC puts appellants in a Catch-22 situation. Appellants have not been able to establish whether there was intent to deceive because

[67] The court below wrongly dismissed Muwekma's breach of fiduciary duty claim using the same circular logic: since Muwekma was denied recognition in the Part 83 proceeding, Muwekma cannot sustain a breach-of-trust challenge to the loss of federal status, because Muwekma is not a federally recognized tribe and is thus owed no fiduciary duty by Interior. *Muwekma 2011, supra,* at 39-40.

> an issue has not been allowed [by the FCC or the Administrative Law Judge], but an issue has not been allowed because they have not established an intent to deceive. Joseph Heller himself could not have fashioned a tidier dilemma.

Id. at 1232. *See also Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 869 n.5 (D.C. Cir. 1984) (overruling the district court's "Catch-22 quality of . . . reasoning");[68] *Bennett v. Tucker*, 827 F.2d 63, 73 (7th Cir. 1987) ("A state may not deprive an individual of his or her property interest without due process, and then defend against a due process claim by asserting that the individual no longer has a property interest.").

2. The decision below is contrary to Supreme Court and other precedent.

Interior had no right to end Muwekma's previous recognition. *See supra* at 23-25. But even in Interior's attempt to do so, it did not afford Muwekma adequate procedural protections. As the Supreme Court said in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982):

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[68] Judge Greene concurred in *Am. Airways Charters*, pointing out, *id.* at 876:

> The Catch-22 label from Joseph Heller's book of the same name has been applied so often to so many situations that it has now acquired the status of a cliché. But it is difficult to imagine a situation where that label is more apt: a corporation is summarily designated by a governmental agency as a "Cuban national," but it is not allowed effectively to defend itself against that designation on the theory that, because it is a "Cuban national," the designating agency need not permit it to be represented by counsel to challenge the designation. If there are precedents in American law to such circular processes, they have not been pointed out to us.

> While the legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Id. at 432 (quoting *Vitec v. Jones*, 455 U.S. 480, 490-91 n.6 (1980)) (internal quotation omitted).

The district court's ruling that no property is at issue is contrary to multiple Supreme Court decisions which broadly define the class of benefits and other property interests protected by due process. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Social Security benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Goss v. Lopez*, 419 U.S. 565, 575 (1975) (school attendance). Muwekma's interest in recognition involves substantial benefits and interests that readily bring it within the class of interests entitled to due process protection. As the district court acknowledged, "[t]he question of whether a Native American [g]roup constituted an Indian tribe is one of immense significance in federal Indian law." *Muwekma 2011, supra,* at 2 (citation omitted). Recognition "is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2; *see also Muwekma 2001, supra*, at 43 ("without federal acknowledgment, an Indian tribe would not be eligible for numerous federal programs that directly affect the tribe's health and welfare"). Indeed, Congress recognized the importance of recognition when it enacted the Federally Recognized Indian Tribe List Act

expressly to prevent the Department from withdrawing recognition from tribes. *See supra* at 24.

The Tribe's claim to recognition need not be beyond dispute to make the Due Process Clause applicable. *See Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) ("protection of 'property,' however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' including statutory entitlements") (citations omitted).

The Ninth Circuit has also expressly held that a tribe has a property right in federal recognition and that the Part 83 proceeding violates due process. *See Greene v. Babbitt*, 64 F.3d 1266, 1271-73 (9th Cir. 1995), discussed *infra* at 49-53.

Contrary to these Supreme Court and Ninth Circuit rulings, the district court erroneously held that a favorable determination on Muwekma's recognition and reaffirmation claims was a prerequisite to a right to due process protections in securing such a determination.

B. Muwekma did not have the opportunity to review all of the Department's evidence, cross-examine witnesses, present its own expert witnesses, or argue to the decision-maker.

The hallmarks of procedural due process – notice, opportunity to be heard, and an impartial decision maker – were entirely lacking in the Department's procedures. Interior required the Tribe to submit thousands of pages of documents

of evidence addressing the seven regulatory criteria under Part 83 without providing the opportunity to explain this evidence or advocate its position before the Department's decision-maker. While Interior staff consulted with the Tribe regarding its petition,[69] Interior provided no formal hearing. Further, Muwekma was afforded no opportunity to cross-examine the staff professionals who developed and interpreted evidence against the Tribe, or to present its own experts to contest those findings.

The Ninth Circuit held in *Greene* that not only does due process apply to Interior's procedures under Part 83, *supra* at 48, but that those procedures were "constitutionally inadequate." 64 F.3d at 1274. The Ninth Circuit stated that "the interests affected by meeting threshold eligibility requirements for the myriad federal benefits available to Indians is very great," and that the risk of erroneous deprivation was high because under the Part 83 procedures:

> The petitioning tribe could not call witnesses; there was no argument permitted before the authority making the decisions; the petitioning tribe did not have access to all of the material evidence . . . . The district court also questioned the impartiality of those making the decision because of possible ex parte contacts reflected in the record and other indications that the issue in the particular case may have been prejudged.

[69] *See* AR Ex. 68 at 56-57.

Id. at 1274.[70] The Ninth Circuit concluded the "Samish demonstrated that due process requires far more procedural protections than the informal procedures used by the Department of Interior in denying them tribal recognition" and affirmed the district court's determination that due process required a formal hearing on the petition. *Id.* at 1275. This Court should so hold here.

C. Interior improperly allowed advocates against Muwekma in prior litigation to participate in the decision-making process.

The APA specifically provides that, for due process, an agency employee who takes an adversarial role in one case "may not, in that or a factually related case, participate or advise in the [agency's] decision . . . except as witness or counsel in public proceedings." 5 U.S.C. § 554(d)(2). The APA also does not, of course, replace or diminish the Constitution on due process of law. Constitutional due process also requires that an agency render decisions that are free from bias and potential staff conflicts of interest. *See, e.g., Amos Treat & Co. v. S.E.C.*, 306 F.2d 260, 266-67 (D.C. Cir. 1962) (allowing an agency officer responsible "for the initiation, conduct and supervision" of an investigation against a party to subsequently participate in the adjudication on the merits "would be tantamount to that denial of administrative due process").

[70] Although the Department later amended the Part 83 procedures that were at issue in *Greene*, *see* 59 Fed. Reg. 9,280 (Feb. 25, 1994) (Ex. 45), the current Part 83 procedures still deny petitioners the right to call witnesses, cross-examine witnesses, examine all evidence, and provide argument to the decision-maker before the preliminary and final determinations are reached.

The court below held that section 554(d) only applies to statutorily-mandated administrative hearings and there is no "statute that requires the Department to provide a hearing to an applicant seeking acknowledgment as a Native American tribe." *Muwekma 2011, supra,* at 42. This APA provision, however, has been construed much more broadly than this. It is settled law that "hearings necessitated by the Constitution are included in the scope of hearings that are covered by section 554 of the APA." *Collord v. Dep't of Interior*, 154 F.3d 933, 936 (9th Cir. 1998) (citation omitted). The district court in *Greene,* ruling on the same administrative process at issue here (*i.e.*, Part 83 tribal recognition), held that constitutional due process mandates the application of section 554. *Greene v. Lujan*, No. C89–645Z, 1992 WL 533059, at *8-9 (W.D. Wash. Feb. 25, 1992), *aff'd, Greene,* 64 F.3d at 1275.

Here, several Interior attorneys and staff participated in both the defense of Interior in *Muwekma 2000* and *Muwekma 2001* and the "deliberations and preparation of the final determination." (Resp. to Pls.' Statement of Material Facts ¶ 48 [Dkt. 40-2]; Answer ¶ 43 (first sentence).) The staff's advocacy against the Tribe in *Muwekma 2000* and *Muwekma 2001*, and subsequent participation in the Final Determination, impermissibly violated Congress' intention "to preclude from decision[-]making in a particular case . . . all persons who had, in that or a factually related case, been involved with ex parte information, or who had developed, by

prior involvement with the case, a 'will to win.'" *Grolier, Inc. v. F.T.C.*, 615 F.2d 1215, 1220 (9th Cir. 1980). This resulted in unconstitutional bias and a violation of the APA.

This case is strikingly similar to *Greene*. Ex parte communications alone between the attorney-advisor and the decision-maker about the merits of the determination were enough to violate the Tribe's due process rights in the Ninth Circuit's *Greene* decision. *Greene,* 64 F.3d at 1275 (federal agency's ex parte contacts with agency decision maker during Tribal recognition process rendered the proceedings fundamentally unfair and violated the Tribe's Fifth Amendment due process rights). The district court's follow-up case to the Ninth Circuit's *Greene* decision confirmed that a violation occurred when the Department allowed one attorney involved in the litigation "to participat[e] in, advis[e], or assist[] the Assistant Secretary with her final decision as to tribal recognition for the [Tribe]." *Greene v. Babbitt*, 943 F. Supp. 1278, 1286 (W.D. Wash. 1996). The *Greene* court described the impermissible dual roles assumed by the government attorney in that case:

> The government attorney [name omitted] was the Department of Interior's representative and counsel, and he argued and defended the Department's position in [earlier proceedings]. As an advocate, he was prohibited from participating in, advising, or assisting the Assistant Secretary with her final decision as to tribal recognition for the Samish.

Id. Here, the Departmental staff who defended Interior in Muwekma's unreasonable delay action and participated in reviewing Muwekma's Part 83 petition included the very same government attorney the *Greene* court admonished.[71] The full participation of the same staff here, as in *Greene*, "represents the antithesis of due process and was fundamentally unfair" to the Tribe. *Id*. at 1286.

Former Assistant Secretary Gover, in testifying before the Senate Committee on Indian Affairs after leaving office, warned about staff control of Part 83:

> Certain individuals in the Solicitor's office were drafters of the Part 83 rules; participate in OFA's consideration of the petition; . . . help to draft the decisions of the Assistant Secretary; . . . and assist in the litigation in federal court that results from the Department's final actions. These individuals have an inappropriate degree of control, direction, and influence in the process.[72]

The harm that Gover warned of is even more pronounced when the litigation precedes the administrative decision, as with Muwekma.

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[71] The district court in *Greene* found the attorney to be in contempt of court. *Id.* at 1289.

[72] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the S. Comm. On Indian Affairs, 108th Cong. 4 (2004) (Statement of Kevin Gover, Assistant Secretary for Indian Affairs). Gover also testified that because Part 83 also limits access to the Assistant Secretary by outsiders, "OFA staff [have] extraordinary power to control the outcome." *Id.* at 3.

V. Interior's Final Determination Was Arbitrary and Capricious.

We have shown above that Muwekma should not have been subjected to the Part 83 procedures at all, because those procedures did not afford due process, were beyond Interior's authority, and denied Muwekma equal protection. Even beyond that, Interior's Part 83 Final Determination was arbitrary and capricious, rejecting evidence showing the Tribe's survival through difficult times while being ignored by its trustee.

A. Interior applied improperly burdensome evidentiary rules.

Interior subjected Muwekma to evidentiary burdens that exceed the Part 83 regulations. For example, as Assistant Secretary Gover admitted in his testimony to Congress, also cited *supra* at 53, Interior places two unlawful evidentiary burdens on tribes in the Part 83 process: First, Interior unlawfully requires tribes to a meet a decade-by-decade test for continuity that is not found in the Part 83 regulations. Second, Interior also requires tribes to show "conclusive proof" in meeting the regulatory criteria, which flatly contradicts Part 83's plain language requiring only a "reasonable likelihood." 25 C.F.R. § 83.6(d). In his testimony, Gover admitted:

> [It was] wrong and illegal to apply the "ten-year" approach as a rule of law. BAR maintained that if conclusive proof of political influence was absent during any ten-year period, continuity was broken and the petition had to be denied.

Gover Statement, *supra*, note 72, at 4 (emphasis added). Gover further admitted that because the ten-year requirement was not in the regulations, then in order to be legal, it first "must go through notice-and-comment rulemaking under the [APA], which it did not do." *Id*.[73] Interior thus violated its own regulations by admittedly subjecting tribes, including Muwekma,[74] to these higher burdens.

In another example, Interior violated the Part 83 regulations that require the Department to consider the limitations and difficulties tribes may have in compiling comprehensive historical evidence. 25 C.F.R. § 83.6(e). In following this regulatory rule in a decision for another tribe, Interior accepted evidence about an influenza pandemic and the loss of the tribe's reservation, relying on those hardships (from the years 1918 to 1928) to excuse the tribe's "administrative obscurity" in the later years 1940 until 1968.[75] However, Interior did not provide the same consideration to Muwekma. Instead, Interior rejected the pre-1927 materials that Muwekma submitted to explain any potential perceived deficiencies

[73] *See also Morton v. Ruiz,* 415 U.S. 199, 236 (1974) (BIA denying benefits based on unpromulgated rule was breach of trust).

[74] AR Ex. 6 at 29, 30, 32, 33, 35, 40, 43 (referencing Interior's findings for Muwekma in a decade by decade fashion); *see also id*. at 48 ("This Final Determination disagrees with the petitioner's contention that it has been identified in every decade since 1927. Therefore, . . . the petitioner does not meet the requirements of criterion (a).").

[75] Ex. 69 at 40.

in Muwekma's historical record. *Muwekma 2011, supra,* at 39. The court below erred in upholding Interior on this point.

B. Interior improperly rejected substantial evidence of Tribal continuity.

Because Interior applied the overly strict evidentiary requirements described above, the Final Determination arbitrarily rejected a great deal of Muwekma's substantial evidence of continuing Tribal activity from 1927 to the present.

For example, Interior arbitrarily rejected evidence of the BIA providing education services to Muwekma children.[76] The district court affirmed the Department's conclusion that BIA school enrollment did not show identification as a federally recognized tribe. *Muwekma 2011, supra,* at 36-38. However, this is directly contrary to Interior's recent finding that the BIA's provision of education to Cowlitz members was evidence that the Cowlitz Tribe was under federal jurisdiction. In response to arguments that the Cowlitz Indians had been absorbed into surrounding tribes, Interior ruled:

> The provision of services to, and actions on behalf of, Cowlitz Indians by the Federal Government continued into the 20th century. Descriptions of these actions and documentary evidence of the actions is provided by the Cowlitz submissions and is found in the federal acknowledgment record. These services included attendance by Cowlitz children at BIA operated schools . . . .[77]

[76] AR Ex. 6 at 29-31.

[77] Cowlitz Decision, *supra* note 40, at 99 (emphasis added).

Similarly, Interior apparently considered attendance at BIA schools important in the case of Ione. When Interior officials sought to determine in 1970 if Ione had ever been federally recognized, one of the first questions Interior asked was whether the BIA ever accepted Ione children in its schools.[78] Clearly, Interior believes BIA school enrollment is persuasive evidence of federal recognition – just not for Muwekma.

In another example, Interior rejected evidence that during three separate periods since 1927 – between 1928 and 1932, 1948 and 1955, and 1968 and 1972 – the BIA enrolled all of the Tribe's members or their ancestors in the California Claims Act, thereby continuing to recognize the Tribe as a tribal entity. The BIA required applicants to demonstrate their tribal affiliation in sworn and witnessed applications, and BIA examiners approved the applications.[79] The BIA regularly rejected applications if it found that proof of membership in an Indian tribe was either insufficient or not submitted.[80] In the Final Determination, Interior quibbled about ambiguous responses to the tribal affiliation question in two applications, and the district court affirmed. *Muwekma 2011, supra,* at 36. However, Interior

[78] SAR Ex. 107.

[79] Interior and the district court mistakenly relied upon the argument that the statute did not require tribal membership, *Muwekma 2011, supra,* at 13, but what is actually important to demonstrate identification as a tribe is BIA's practice in implementing the Act.

[80] AR Ex. 6 at 19, 24.

failed to take into account the true significance of the claims rolls – that Muwekma's efforts during each enrollment period to encourage and organize members to enroll and serve as witnesses for each other before the BIA demonstrated significant political activity, community ties, and identification as a tribe.

In perhaps the most egregious example, Interior also failed to consider the evidentiary impact of the fact that in 1989 nine individuals who were from the Verona Band were still alive and very much a part of the Muwekma community. *See supra* note 14. One of those elders – Hank Alvarez – is still living today. This should be sufficient, without more, to support an inference of a continuing tribal community.

The court below erred in upholding these arbitrary rejections of evidence by Interior.

CONCLUSION

This Court should reverse the district court's decision and order Interior to reaffirm Muwekma's federal recognition. While sometimes the final disposition in an APA case is to remand to the agency for further explanation, Interior here has already had more than one remand. That is enough.

Respectfully submitted,

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Form 6. Certificate of Compliance with Rule 32(a)

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(s) /s/ Harry R. Sachse

Attorney for Appellant Muwekma Ohlone Tribe

Dated: April 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2012, the enclosed Brief of Appellant was served through the Court's Electronic Case Filing (ECF) system to counsel for the Appellees:

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ADDENDUM

This addendum includes relevant statutes, regulations, and rules relied upon in the brief.

TABLE OF CONTENTS

Statutes

Regulations

UNITED STATES STATUTES AT LARGE

CONTAINING THE

LAWS AND CONCURRENT RESOLUTIONS
ENACTED DURING THE SECOND SESSION OF THE
EIGHTY-FOURTH CONGRESS
OF THE UNITED STATES OF AMERICA

1956

AND

PROCLAMATIONS

VOLUME 70

IN ONE PART

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1957

Public Law 751 CHAPTER 660

AN ACT

July 20, 1956
[H. R. 11163]

To amend section 2 of the Act of March 29, 1956 (70 Stat. 58), authorizing the conveyance to Lake County, California, of the Lower Lake Rancheria, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act of March 29, 1956 (70 Stat. 58), is amended by striking all of the section following the phrase "for the following-described land, to wit", and inserting: "Beginning at a point on the east line of lot 2, section 34, township 13 north, range 7 west, Mount Diablo base and meridian, that is situated south 48 degrees 17 minutes 30 seconds east, a distance of 849.39 feet from a point that is north 48 degrees 19 minutes 57 seconds west, a distance of 4,276.27 feet from the southeast corner of said section 34 and from said point of beginning, running thence north along the east line of said lot 2 to the the center of said

Lower Lake Rancheria, Lake County, Calif. Acts, p. 59.

section 34; thence east along the line running east and west through the center of said section 34, a distance of 431.9 feet; thence north 48 degrees 12 minutes west, a distance of 464.5 feet; thence west to the west line of said lot 2; thence south along the west line of said lot 2 to the U. S. meander line of Clear Lake; thence southeasterly along said meander line to the east line of said lot 2; thence north along the east line of said lot 2, to the point of beginning, containing 41 acres, more or less."

Approved July 20, 1956.

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 554

§ 554. Adjudications

Currentness

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of--

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 384; Pub.L. 95-251, § 2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

Notes of Decisions (158)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

Footnotes

1 So in original.

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXV. Indians of California

25 U.S.C.A. § 651

§ 651. "Indians of California" defined

Currentness

For the purposes of this subchapter the Indians of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State.

Credits
(May 18, 1928, c. 624, § 1, 45 Stat. 602.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
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Subchapter XXV. Indians of California

25 U.S.C.A. § 652

§ 652. Claims against United States for appropriated lands; submission to United States Court of Federal Claims; appeal; grounds for relief

Currentness

All claims of whatsoever nature the Indians of California as defined in section 651 of this title may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the United States Court of Federal Claims by the attorney general of the State of California acting for and on behalf of said Indians for determination of the equitable amount due said Indians from the United States; and jurisdiction is conferred upon the United States Court of Federal Claims, [1] to hear and determine all such equitable claims of said Indians against the United States and to render final decree thereon.

It is declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief.

Credits

(May 18, 1928, c. 624, § 2, 45 Stat. 602; Apr. 2, 1982, Pub.L. 97-164, Title I, § 150, 96 Stat. 46; June 27, 1988, Pub.L. 100-352, § 6(b), 102 Stat. 663; Oct. 29, 1992, Pub.L. 102-572, Title IX, § 902(b)(1), 106 Stat. 4516.)

Notes of Decisions (1)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

Footnotes

1 So in original. Comma probably should not appear.

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXV. Indians of California

25 U.S.C.A. § 653

§ 653. Statutes of limitations unavailable against claims; amount of decree; set-off

Currentness

If any claim or claims be submitted to said courts, they shall settle the equitable rights therein, notwithstanding lapse of time or statutes of limitation or the fact that the said claim or claims have not been presented to any other tribunal, including the commission created by the Act of March 3, 1851 (Ninth Statutes at Large, page 631): *Provided*, That any decree for said Indians shall be for an amount equal to the just value of the compensation provided or proposed for the Indians in those certain eighteen unratified treaties executed by the chiefs and head men of the several tribes and bands of Indians of California and submitted to the Senate of the United States by the President of the United States for ratification on the 1st day of June, 1852, including the lands described therein at $1.25 per acre. Any payment which may have been made by the United States or moneys heretofore or hereafter expended to date of award for the benefit of the Indians of California, made under specific appropriations for the support, education, health, and civilization of Indians in California, including purchases of land, shall not be pleaded as an estoppel but may be pleaded by way of set-off.

Credits
(May 18, 1928, c. 624, § 3, 45 Stat. 602.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
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Subchapter XXV. Indians of California

25 U.S.C.A. § 654

§ 654. Claims presented by petition; filing date; amendment; signature and verification; official letters, documents, etc., furnished

Currentness

The claims of the Indians of California under the provisions of this subchapter shall be presented by petition, which shall be filed within three years after May 18, 1928. Said petition shall be subject to amendment. The petition shall be signed and verified by the attorney general of the State of California. Verification may be upon information and belief as to the facts alleged. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence and the departments of the Government shall give the said attorney access to such papers, correspondence, or furnish such certified copies of record as may be necessary in the premises free of cost.

Credits
(May 18, 1928, c. 624, § 4, 45 Stat. 602.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
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25 U.S.C.A. § 655

§ 655. Reimbursement of State of California for necessary costs and expenses

Currentness

In the event that the court renders judgment against the United States under the provisions of this subchapter, it shall decree such amount as it finds reasonable to be paid to the State of California to reimburse the State for all necessary costs and expenses incurred by said State, other than attorney fees: *Provided*, That no reimbursement shall be made to the State of California for the services rendered by its attorney general.

Credits
(May 18, 1928, c. 624, § 5, 45 Stat. 602.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
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25 U.S.C.A. § 656

§ 656. Judgment amount deposited in Treasury to credit of Indians; interest rate; use of fund

Currentness

The amount of any judgment shall be placed in the Treasury of the United States to the credit of the Indians of California and shall draw interest at the rate of 4 per centum per annum and shall be thereafter subject to appropriation by Congress for educational, health, industrial, and other purposes for the benefit of said Indians, including the purchase of lands and building of homes, and no part of said judgment shall be paid out in per capita payments to said Indians: *Provided*, That the Secretary of the Treasury is authorized and directed to pay to the State of California, out of the proceeds of the judgment when appropriated, the amount decreed by the court to be due said State, as provided in section 655 of this title.

Credits
(May 18, 1928, c. 624, § 6, 45 Stat. 603.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXV. Indians of California

25 U.S.C.A. § 657

§ 657. Revision of roll of Indians

Currentness

The Secretary of the Interior, under such regulations as he may prescribe, is authorized and directed to revise the roll of the Indians of California, as defined in section 651 of this title, which was approved by him on May 16, 1933, in the following particulars: (a) By adding to said roll the names of persons who filed applications for enrollment as Indians of California on or before May 18, 1932, and who, although determined to be descendants of the Indians residing in the State of California on June 1, 1852, were denied enrollment solely on the ground that they were not living in the State of California on May 18, 1928, and who were alive on May 24, 1950; (b) by adding to said roll the names of persons who are descendants of the Indians residing in the State of California on June 1, 1852, and who are the fathers, mothers, brothers, sisters, uncles, or aunts of persons whose names appear on said roll, and who were alive on May 24, 1950, irrespective of whether such fathers, mothers, brothers, sisters, uncles, or aunts were living in the State of California on May 18, 1928; (c) by adding to said roll the names of persons born since May 18, 1928, and living on May 24, 1950, who are the children or other descendants of persons whose names appear on said roll, or of persons whose names are eligible for addition to said roll under clauses (a) or (b) of this section, or of persons dying prior to May 24, 1950, whose names would have been eligible for addition to said roll under clauses (a) or (b) of this section if such persons had been alive on May 24, 1950; and (d) by removing from said roll the names of persons who have died since May 18, 1928, and prior to May 24, 1950. Persons entitled to enrollment under clause (a) of this section shall be enrolled by the Secretary of the Interior without further application. Persons claiming to be entitled to enrollment under clauses (b) or (c) of this section shall, within one year after May 24, 1950, make an application in writing to the Secretary of the Interior for enrollment, unless they have previously filed such an application under this section. For the purposes of clause (d) of this section, when the Secretary of the Interior is satisfied that reasonable and diligent efforts have been made to locate a person whose name is on said roll and that such person cannot be located, he may presume that such person died prior to May 24, 1950, and his presumption shall be conclusive. The Secretary of the Interior shall prepare not less than five hundred copies of an alphabetical list of the Indians of California whose names appear on the roll approved on May 16, 1933, giving the name, address, and age at time of enrollment of each such enrollee, together with such other factual information, if any, as the Secretary may deem advisable as tending to identify each enrollee, and shall distribute copies of this list to the various communities of California Indians. The Indians of California in each community may elect a committee of three enrollees who may aid the enrolling agent in any matters relating to the revision of said roll. After the expiration of the period allowed by this section for filing applications, the Secretary of the Interior shall have until June 30, 1955, to approve and promulgate the revised roll of the Indians of California provided for in this section. Upon such approval and promulgation, the roll shall be closed and thereafter no additional names shall be added thereto.

Credits

(May 18, 1928, c. 624, § 7, 45 Stat. 603; Apr. 29, 1930, c. 222, 46 Stat. 259; June 30, 1948, c. 765, § 1, 62 Stat. 1166; May 24, 1950, c. 196, § 1, 64 Stat. 189; June 8, 1954, c. 271, § 1, 68 Stat. 240.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXV. Indians of California

25 U.S.C.A. § 658

§ 658. Distribution of $150 from fund to each enrolled Indian

Currentness

Notwithstanding the provisions of section 656 of this title, the Secretary of the Interior, under such regulations as he may prescribe, is hereby authorized and directed to distribute per capita the sum of $150 to each Indian of California living on May 24, 1950, who is now or may hereafter be enrolled under sections 651 and 657 of this title. The Secretary of the Interior may, in his discretion, make such distribution from time to time to persons on the roll of the Indians of Califoria approved on May 16, 1933, as he identifies such enrollees, before the completion of the revised roll provided for in section 657 of this title. The Secretary of the Interior is authorized to withdraw from the fund on deposit in the Treasury of the United States arising from the judgment in favor of the Indians of California entered by the Court of Claims on December 4, 1944, and appropriated for them by section 203 of the Act of April 25, 1945 (59 Stat. 77), such sums as may be necessary to make the per capita payments required by this section, including not to exceed $15,000 for the purpose of defraying the expenses incident to carrying out the provisions of sections 657 and 658 of this title. Such payments shall be made out of the accumulated interest on such judgment fund and so much of the principal thereof as is necessary to complete the payments. The money paid to enrollees pursuant to this section shall not be subject to any lien or claim of any nature against any of such persons, except for debts owing to the United States.

Credits
(May 24, 1950, c. 196, § 2, 64 Stat. 190.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXV. Indians of California

25 U.S.C.A. § 659

§ 659. Distribution of judgment fund

Currentness

(a) Preparation of Indian roll

The Secretary of the Interior shall prepare a roll of persons of Indian blood who apply for inclusion thereon and (i) whose names or the name of a lineal or collateral relative appears on any of the approved rolls heretofore prepared pursuant to this subchapter and the amendments thereto or (ii) who can establish, to the satisfaction of the Secretary, lineal or collateral relationship to an Indian who resided in California on June 1, 1852, and (iii) who were born on or before and were living on September 21, 1968.

(b) Contents

The roll so prepared shall indicate, as nearly as possible, the group or groups of Indians of California with which the ancestors of each enrollee were affiliated on June 1, 1852. If the affiliation of an enrollee's ancestors on that date is unknown, it shall be presumed to be the same as that of the ancestors' relatives whose affiliation is known unless there is sound reason to believe otherwise. Applicants whose ancestry is derived partly from one of the groups named in section 660(b) of this title and partly from another group of Indians in California shall elect the affiliation to be shown for them on the roll.

(c) Application for enrollment

Application for enrollment shall be filed with the Area Director of the Bureau of Indian Affairs, Sacramento, California, on forms prescribed for that purpose.

Credits

(Pub.L. 90-507, § 1, Sept. 21, 1968, 82 Stat. 860.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
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25 U.S.C.A. § 660

§ 660. Equal share distribution of 1964 appropriation

Currentness

(a) Persons covered; amounts

The Secretary shall distribute to each person whose name appears on the roll prepared pursuant to section 659 of this title, except those whose ancestry is derived from one or more of the groups named in subsection (b) of this section, an equal share of the moneys which were appropriated by the Act of October 7, 1964 (78 Stat. 1033), in satisfaction of the judgment of the Indian Claims Commission in consolidated dockets numbered 31, 37, 80, 80-D, and 347, plus the interest earned thereon, minus attorneys fees, litigation expenses (including the reimbursement of funds expended under authority of the Acts of July 1, 1946 (60 Stat. 348), August 4, 1955 (69 Stat. 460), and July 14, 1960 (74 Stat. 512)), a proper share of the costs of roll preparation, and such amounts as may be required to effect the distribution.

(b) Persons excepted

Persons whose ancestry is derived solely from one or more of the following groups and persons of mixed ancestry who elected to share, other than as heirs or legatees of enrollees, in any award granted to any of the following groups shall not share in the funds distributed pursuant to subsection (a) of this section: Northern Paiute, Southern Paiute, Mohave, Quechan (Yuma), Chemehuevi, Shoshone, Washoe, Klamath, Modoc, and Yahooskin Band of Snakes.

Credits

(Pub.L. 90-507, § 2, Sept. 21, 1968, 82 Stat. 860.)

Notes of Decisions (1)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXV. Indians of California

25 U.S.C.A. § 661

§ 661. Equal share distribution of undistributed balance of 1945 appropriation

Currentness

(a) Persons covered; amounts

The Secretary shall distribute to each person whose name appears on the roll prepared pursuant to section 659 of this title regardless of group affiliation an equal share of the undistributed balance of the moneys appropriated in satisfaction of the judgment of the Court of Claims in the case of The Indians of California against United States (102 Court of Claims 837; 59 Stat. 94), plus the interest earned thereon, including the reimbursed moneys and unexpended balances of the funds established by the Acts of July 1, 1946 (60 Stat. 348), August 4, 1955 (69 Stat. 460), and July 14, 1960 (74 Stat. 512), minus a proper share of the costs of roll preparation and such amounts as may be necessary to effect the distribution.

(b) Credit to judgment account

The Secretary of the Treasury is authorized and directed to credit to the judgment account referred to in subsection (a) of this section, for distribution as a part of such account, the sum of $83,275, plus interest at 4 per centum per annum from December 4, 1944, which sum represents the value of sixty-six thousand six hundred and twenty acres of land erroneously used as an offset against said judgment.

Credits

(Pub.L. 90-507, § 3, Sept. 21, 1968, 82 Stat. 860; Pub.L. 91-64, Aug. 25, 1969, 83 Stat. 105.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXV. Indians of California

25 U.S.C.A. § 662

§ 662. Heirs of deceased enrollees; tax exemption

Currentness

Each share distributable to an enrollee under sections 660 and 661 of this title shall be paid directly to the enrollee or, if he is deceased at the time of distribution, to his heirs or legatees unless the distributee is under twenty-one years of age or is otherwise under legal disability, in which case such disposition shall be made of the share as the Secretary determines will adequately protect the best interests of the distributee. Funds distributed under sections 659 to 663 of this title shall not be subject to Federal or State income taxes.

Credits
(Pub.L. 90-507, § 4, Sept. 21, 1968, 82 Stat. 861.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXV. Indians of California

25 U.S.C.A. § 663

§ 663. Rules and regulations; filing deadline

Currentness

The Secretary is authorized to prescribe rules and regulations to carry out the provisions of sections 659 to 663 of this title, which rules and regulations shall include an appropriate deadline for the filing of applications for enrollment under section 659 of this title. The determinations of the Secretary regarding eligibility for enrollment, the affiliation of an applicant's ancestors, and the shares of the cost of roll preparation to be charged to each of the two funds referred to in sections 660 and 661 of this title shall be final. Not more than $325,000 in all shall be available under sections 659 to 663 of this title for the costs of roll preparation and of the distribution of shares.

Credits
(Pub.L. 90-507, § 5, Sept. 21, 1968, 82 Stat. 861.)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

PL 103–454, November 2, 1994, 108 Stat 4791

UNITED STATES PUBLIC LAWS
103rd Congress - Second Session
Convening January 25, 1994

Additions and Deletions are not identified in this document.
8848

PL 103–454 (HR 4180)
November 2, 1994
FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT OF 1994

An Act to provide for the annual publication of a list of federally recognized Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—WITHDRAWAL OF ACKNOWLEDGEMENT OR RECOGNITION

<< 25 USCA § 479a NOTE >>

SEC. 101. SHORT TITLE.

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

<< 25 USCA § 479a >>

SEC. 102. DEFINITIONS.

For the purposes of this title:
(1) The term "Secretary" means the Secretary of the Interior.
(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.
(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

<< 25 USCA § 479a NOTE >>

SEC. 103. FINDINGS.

The Congress finds that—
(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;
(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;
(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

<< 25 USCA § 479a–1 >>

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST.—The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) FREQUENCY OF PUBLICATION.—The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 161. United States as Party Generally (Refs & Annos)

28 U.S.C.A. § 2401

§ 2401. Time for commencing action against United States

Effective: January 4, 2011
Currentness

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Credits
(June 25, 1948, c. 646, 62 Stat. 971; Apr. 25, 1949, c. 92, § 1, 63 Stat. 62; Sept. 8, 1959, Pub.L. 86-238, § 1(3), 73 Stat. 472; July 18, 1966, Pub.L. 89-506, § 7, 80 Stat. 307; Nov. 1, 1978, Pub.L. 95-563, § 14(b), 92 Stat. 2389; Jan. 4, 2011, Pub.L. 111-350, § 5(g)(8), 124 Stat. 3848.)

Notes of Decisions (1058)

Current through P.L. 112-90 (excluding P.L. 112-74, 112-78, and 112-81) approved 1-3-12

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter F. Tribal Government
Part 83. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe (Refs & Annos)

25 C.F.R. § 83.1

§ 83.1 Definitions.

Currentness

As used in this part:

Area Office means a Bureau of Indian Affairs Area Office.

Assistant Secretary means the Assistant Secretary--Indian Affairs, or that officer's authorized representative.

Autonomous means the exercise of political influence or authority independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the history, geography, culture and social organization of the petitioning group.

Board means the Interior Board of Indian Appeals.

Bureau means the Bureau of Indian Affairs.

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

Continental United States means the contiguous 48 states and Alaska.

Continuously or continuous means extending from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption.

Department means the Department of the Interior.

Documented petition means the detailed arguments made by a petitioner to substantiate its claim to continuous existence as an Indian tribe, together with the factual exposition and all documentary evidence necessary to demonstrate that these arguments address the mandatory criteria in § 83.7(a) through (g).

Historically, historical or history means dating from first sustained contact with non-Indians.

Indian group or group means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

Indian tribe, also referred to herein as tribe, means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe.

Indigenous means native to the continental United States in that at least part of the petitioner's territory at the time of sustained contact extended into what is now the continental United States.

Informed party means any person or organization, other than an interested party, who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner.

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

Letter of intent means an undocumented letter or resolution by which an Indian group requests Federal acknowledgment as an Indian tribe and expresses its intent to submit a documented petition.

Member of an Indian group means an individual who is recognized by an Indian group as meeting its membership criteria and who consents to being listed as a member of that group.

Member of an Indian tribe means an individual who meets the membership requirements of the tribe as set forth in its governing document or, absent such a document, has been recognized as a member collectively by those persons comprising the tribal governing body, and has consistently maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept.

Petitioner means any entity that has submitted a letter of intent to the Secretary requesting acknowledgment that it is an Indian tribe.

Political influence or authority means a tribal council, leadership, internal process or other mechanism which the group has used as a means of influencing or controlling the behavior of its members in significant respects, and/or making decisions for the group which substantially affect its members, and/or representing the group in dealing with outsiders in matters of consequence. This process is to be understood in the context of the history, culture and social organization of the group.

Previous Federal acknowledgment means action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States.

Secretary means the Secretary of the Interior or that officer's authorized representative.

Sustained contact means the period of earliest sustained non-Indian settlement and/or governmental presence in the local area in which the historical tribe or tribes from which the petitioner descends was located historically.

Tribal relations means participation by an individual in a political and social relationship with an Indian tribe.

Tribal roll, for purposes of these regulations, means a list exclusively of those individuals who have been determined by the tribe to meet the tribe's membership requirements as set forth in its governing document. In the absence of such a document, a tribal roll means a list of those recognized as members by the tribe's governing body. In either case, those individuals on a tribal roll must have affirmatively demonstrated consent to being listed as members.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

Notes of Decisions (139)

Current through March 22, 2012; 77 FR 16760.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter F. Tribal Government
Part 83. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe (Refs & Annos)

25 C.F.R. § 83.2

§ 83.2 Purpose.

Currentness

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.3

§ 83.3 Scope.

Currentness

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations.

(c) Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations. The fact that a group that meets the criteria in § 83.7 (a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision.

(d) Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged under these regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe.

(e) Further, groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.

(f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(g) Indian groups whose documented petitions are under active consideration at the effective date of these revised regulations may choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994. This option shall apply to any petition for which a determination is not final and effective. Such petitioners may request a suspension of consideration under § 83.10(g) of not more than 180 days in order to provide additional information or argument.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.4

§ 83.4 Filing a letter of intent.

Currentness

(a) Any Indian group in the continental United States that believes it should be acknowledged as an Indian tribe and that it can satisfy the criteria in § 83.7 may submit a letter of intent.

(b) Letters of intent requesting acknowledgment that an Indian group exists as an Indian tribe shall be filed with the Assistant Secretary--Indian Affairs, Department of the Interior, 1849 C Street, NW., Washington, DC 20240. Attention: Branch of Acknowledgment and Research, Mail Stop 2611–MIB. A letter of intent may be filed in advance of, or at the same time as, a group's documented petition.

(c) A letter of intent must be produced, dated and signed by the governing body of an Indian group and submitted to the Assistant Secretary.

SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.5

§ 83.5 Duties of the Department.

Currentness

(a) The Department shall publish in the Federal Register, no less frequently than every three years, a list of all Indian tribes entitled to receive services from the Bureau by virtue of their status as Indian tribes. The list may be published more frequently, if the Assistant Secretary deems it necessary.

(b) The Assistant Secretary shall make available revised and expanded guidelines for the preparation of documented petitions by September 23, 1994. These guidelines will include an explanation of the criteria and other provisions of the regulations, a discussion of the types of evidence which may be used to demonstrate particular criteria or other provisions of the regulations, and general suggestions and guidelines on how and where to conduct research. The guidelines may be supplemented or updated as necessary. The Department's example of a documented petition format, while preferable, shall not preclude the use of any other format.

(c) The Department shall, upon request, provide petitioners with suggestions and advice regarding preparation of the documented petition. The Department shall not be responsible for the actual research on behalf of the petitioner.

(d) Any notice which by the terms of these regulations must be published in the Federal Register, shall also be mailed to the petitioner, the governor of the state where the group is located, and to other interested parties.

(e) After an Indian group has filed a letter of intent requesting Federal acknowledgment as an Indian tribe and until that group has actually submitted a documented petition, the Assistant Secretary may contact the group periodically and request clarification, in writing, of its intent to continue with the petitioning process.

(f) All petitioners under active consideration shall be notified, by April 16, 1994, of the opportunity under § 83.3(g) to choose whether to complete their petitioning process under the provisions of these revised regulations or the previous regulations as published, on September 5, 1978, at 43 FR 39361.

(g) All other groups that have submitted documented petitions or letters of intent shall be notified of and provided with a copy of these regulations by July 25, 1994.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.6

§ 83.6 General provisions for the documented petition.

Currentness

(a) The documented petition may be in any readable form that contains detailed, specific evidence in support of a request to the Secretary to acknowledge tribal existence.

(b) The documented petition must include a certification, signed and dated by members of the group's governing body, stating that it is the group's official documented petition.

(c) A petitioner must satisfy all of the criteria in paragraphs (a) through (g) of § 83.7 in order for tribal existence to be acknowledged. Therefore, the documented petition must include thorough explanations and supporting documentation in response to all of the criteria. The definitions in § 83.1 are an integral part of the regulations, and the criteria should be read carefully together with these definitions.

(d) A petitioner may be denied acknowledgment if the evidence available demonstrates that it does not meet one or more criteria. A petitioner may also be denied if there is insufficient evidence that it meets one or more of the criteria. A criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.

(e) Evaluation of petitions shall take into account historical situations and time periods for which evidence is demonstrably limited or not available. The limitations inherent in demonstrating the historical existence of community and political influence or authority shall also be taken into account. Existence of community and political influence or authority shall be demonstrated on a substantially continuous basis, but this demonstration does not require meeting these criteria at every point in time. Fluctuations in tribal activity during various years shall not in themselves be a cause for denial of acknowledgment under these criteria.

(f) The criteria in § 83.7 (a) through (g) shall be interpreted as applying to tribes or groups that have historically combined and functioned as a single autonomous political entity.

(g) The specific forms of evidence stated in the criteria in § 83.7 (a) through (c) and § 83.7(e) are not mandatory requirements. The criteria may be met alternatively by any suitable evidence that demonstrates that the petitioner meets the requirements of the criterion statement and related definitions.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.7

§ 83.7 Mandatory criteria for Federal acknowledgment.

Currentness

The mandatory criteria are:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification by other than the petitioner itself or its members.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

(1) This criterion may be demonstrated by some combination of the following evidence and/or other evidence that the petitioner meets the definition of community set forth in § 83.1:

(i) Significant rates of marriage within the group, and/or, as may be culturally required, patterned out-marriages with other Indian populations.

(ii) Significant social relationships connecting individual members.

(iii) Significant rates of informal social interaction which exist broadly among the members of a group.

(iv) A significant degree of shared or cooperative labor or other economic activity among the membership.

(v) Evidence of strong patterns of discrimination or other social distinctions by non-members.

(vi) Shared sacred or secular ritual activity encompassing most of the group.

(vii) Cultural patterns shared among a significant portion of the group that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization, or religious beliefs and practices.

(viii) The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name.

(ix) A demonstration of historical political influence under the criterion in § 83.7(c) shall be evidence for demonstrating historical community.

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

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

(ii) At least 50 percent of the marriages in the group are between members of the group;

(iii) At least 50 percent of the group members maintain distinct cultural patterns such as, but not limited to, language, kinship organization, or religious beliefs and practices;

(iv) There are distinct community social institutions encompassing most of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The group has met the criterion in § 83.7(c) using evidence described in § 83.7(c)(2).

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

(1) This criterion may be demonstrated by some combination of the evidence listed below and/or by other evidence that the petitioner meets the definition of political influence or authority in § 83.1.

(i) The group is able to mobilize significant numbers of members and significant resources from its members for group purposes.

(ii) Most of the membership considers issues acted upon or actions taken by group leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication and involvement in political processes by most of the group's members.

(iv) The group meets the criterion in § 83.7(b) at more than a minimal level.

(v) There are internal conflicts which show controversy over valued group goals, properties, policies, processes and/or decisions.

(2) A petitioning group shall be considered to have provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders and/or other mechanisms exist or existed which:

(i) Allocate group resources such as land, residence rights and the like on a consistent basis.

(ii) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(iii) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior;

(iv) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(3) A group that has met the requirements in paragraph 83.7(b)(2) at a given point in time shall be considered to have provided sufficient evidence to meet this criterion at that point in time.

(d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

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

(1) Evidence acceptable to the Secretary which can be used for this purpose includes but is not limited to:

(i) Rolls prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, or other purposes;

(ii) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iii) Church, school, and other similar enrollment records identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(v) Other records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(2) The petitioner must provide an official membership list, separately certified by the group's governing body, of all known current members of the group. This list must include each member's full name (including maiden name), date of birth, and current residential address. The petitioner must also provide a copy of each available former list of members based on the group's own defined criteria, as well as a statement describing the circumstances surrounding the preparation of the current list and, insofar as possible, the circumstances surrounding the preparation of former lists.

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.8

§ 83.8 Previous Federal acknowledgment.

Currentness

(a) Unambiguous previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment. If a petitioner provides substantial evidence of unambiguous Federal acknowledgment, the petitioner will then only be required to demonstrate that it meets the requirements of § 83.7 to the extent required by this section.

(b) A determination of the adequacy of the evidence of previous Federal action acknowledging tribal status shall be made during the technical assistance review of the documented petition conducted pursuant to § 83.10(b). If a petition is awaiting active consideration at the time of adoption of these regulations, this review will be conducted while the petition is under active consideration unless the petitioner requests in writing that this review be made in advance.

(c) Evidence to demonstrate previous Federal acknowledgment includes, but is not limited to:

(1) Evidence that the group has had treaty relations with the United States.

(2) Evidence that the group has been denominated a tribe by act of Congress or Executive Order.

(3) Evidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds.

(d) To be acknowledged, a petitioner that can demonstrate previous Federal acknowledgment must show that:

(1) The group meets the requirements of the criterion in § 83.7(a), except that such identification shall be demonstrated since the point of last Federal acknowledgment. The group must further have been identified by such sources as the same tribal entity that was previously acknowledged or as a portion that has evolved from that entity.

(2) The group meets the requirements of the criterion in § 83.7(b) to demonstrate that it comprises a distinct community at present. However, it need not provide evidence to demonstrate existence as a community historically.

(3) The group meets the requirements of the criterion in § 83.7(c) to demonstrate that political influence or authority is exercised within the group at present. Sufficient evidence to meet the criterion in § 83.7(c) from the point of last Federal acknowledgment to the present may be provided by demonstration of substantially continuous historical identification, by authoritative, knowledgeable external sources, of leaders and/or a governing body who exercise political influence or authority, together with demonstration of one form of evidence listed in § 83.7(c).

(4) The group meets the requirements of the criteria in paragraphs 83.7 (d) through (g).

(5) If a petitioner which has demonstrated previous Federal acknowledgment cannot meet the requirements in paragraphs (d) (1) and (3), the petitioner may demonstrate alternatively that it meets the requirements of the criteria in § 83.7 (a) through (c) from last Federal acknowledgment until the present.

SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.9

§ 83.9 Notice of receipt of a petition.

Currentness

(a) Within 30 days after receiving a letter of intent, or a documented petition if a letter of intent has not previously been received and noticed, the Assistant Secretary shall acknowledge such receipt in writing and shall have published within 60 days in the Federal Register a notice of such receipt. This notice must include the name, location, and mailing address of the petitioner and such other information as will identify the entity submitting the letter of intent or documented petition and the date it was received. This notice shall also serve to announce the opportunity for interested parties and informed parties to submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment and/or to request to be kept informed of all general actions affecting the petition. The notice shall also indicate where a copy of the letter of intent and the documented petition may be examined.

(b) The Assistant Secretary shall notify, in writing, the governor and attorney general of the state in which a petitioner is located. The Assistant Secretary shall also notify any recognized tribe and any other petitioner which appears to have a historical or present relationship with the petitioner or which may otherwise be considered to have a potential interest in the acknowledgment determination.

(c) The Assistant Secretary shall also publish the notice of receipt of the letter of intent, or documented petition if a letter of intent has not been previously received, in a major newspaper or newspapers of general circulation in the town or city nearest to the petitioner. The notice will include all of the information in paragraph (a) of this section.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.10

§ 83.10 Processing of the documented petition.

Currentness

(a) Upon receipt of a documented petition, the Assistant Secretary shall cause a review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe. The review shall include consideration of the documented petition and the factual statements contained therein. The Assistant Secretary may also initiate other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status. The Assistant Secretary may likewise consider any evidence which may be submitted by interested parties or informed parties.

(b) Prior to active consideration of the documented petition, the Assistant Secretary shall conduct a preliminary review of the petition for purposes of technical assistance.

(1) This technical assistance review does not constitute the Assistant Secretary's review to determine if the petitioner is entitled to be acknowledged as an Indian tribe. It is a preliminary review for the purpose of providing the petitioner an opportunity to supplement or revise the documented petition prior to active consideration. Insofar as possible, technical assistance reviews under this paragraph will be conducted in the order of receipt of documented petitions. However, technical assistance reviews will not have priority over active consideration of documented petitions.

(2) After the technical assistance review, the Assistant Secretary shall notify the petitioner by letter of any obvious deficiencies or significant omissions apparent in the documented petition and provide the petitioner with an opportunity to withdraw the documented petition for further work or to submit additional information and/or clarification.

(3) If a petitioner's documented petition claims previous Federal acknowledgment and/or includes evidence of previous Federal acknowledgment, the technical assistance review will also include a review to determine whether that evidence is sufficient to meet the requirements of previous Federal acknowledgment as defined in § 83.1.

(c) Petitioners have the option of responding in part or in full to the technical assistance review letter or of requesting, in writing, that the Assistant Secretary proceed with the active consideration of the documented petition using the materials already submitted.

(1) If the petitioner requests that the materials submitted in response to the technical assistance review letter be again reviewed for adequacy, the Assistant Secretary will provide the additional review. However, this additional review will not be automatic and will be conducted only at the request of the petitioner.

(2) If the assertion of previous Federal acknowledgment under § 83.8 cannot be substantiated during the technical assistance review, the petitioner must respond by providing additional evidence. A petitioner claiming previous Federal acknowledgment who fails to respond to a technical assistance review letter under this paragraph, or whose response fails to establish the claim, shall have its documented petition considered on the same basis as documented petitions submitted by groups not claiming previous Federal acknowledgment. Petitioners that fail to demonstrate previous Federal acknowledgment after a review of materials submitted in response to the technical assistance review shall be so notified.

Such petitioners may submit additional materials concerning previous acknowledgment during the course of active consideration.

(d) The order of consideration of documented petitions shall be determined by the date of the Bureau's notification to the petitioner that it considers that the documented petition is ready to be placed on active consideration. The Assistant Secretary shall establish and maintain a numbered register of documented petitions which have been determined ready for active consideration. The Assistant Secretary shall also maintain a numbered register of letters of intent or incomplete petitions based on the original date of filing with the Bureau. In the event that two or more documented petitions are determined ready for active consideration on the same date, the register of letters of intent or incomplete petitions shall determine the order of consideration by the Assistant Secretary.

(e) Prior to active consideration, the Assistant Secretary shall investigate any petitioner whose documented petition and response to the technical assistance review letter indicates that there is little or no evidence that establishes that the group can meet the mandatory criteria in paragraph (e), (f) or (g) of § 83.7.

(1) If this review finds that the evidence clearly establishes that the group does not meet the mandatory criteria in paragraph (e), (f) or (g) of § 83.7, a full consideration of the documented petition under all seven of the mandatory criteria will not be undertaken pursuant to paragraph (a) of this section. Rather, the Assistant Secretary shall instead decline to acknowledge that the petitioner is an Indian tribe and publish a proposed finding to that effect in the Federal Register. The periods for receipt of comments on the proposed finding from petitioners, interested parties and informed parties, for consideration of comments received, and for publication of a final determination regarding the petitioner's status shall follow the timetables established in paragraphs (h) through (l) of this section.

(2) If the review cannot clearly demonstrate that the group does not meet one or more of the mandatory criteria in paragraph (e), (f) or (g) of § 83.7, a full evaluation of the documented petition under all seven of the mandatory criteria shall be undertaken during active consideration of the documented petition pursuant to paragraph (g) of this section.

(f) The petitioner and interested parties shall be notified when the documented petition comes under active consideration.

(1) They shall also be provided with the name, office address, and telephone number of the staff member with primary administrative responsibility for the petition; the names of the researchers conducting the evaluation of the petition; and the name of their supervisor.

(2) The petitioner shall be notified of any substantive comment on its petition received prior to the beginning of active consideration or during the preparation of the proposed finding, and shall be provided an opportunity to respond to such comments.

(g) Once active consideration of the documented petition has begun, the Assistant Secretary shall continue the review and publish proposed findings and a final determination in the Federal Register pursuant to these regulations, notwithstanding any requests by the petitioner or interested parties to cease consideration. The Assistant Secretary has the discretion, however, to suspend active consideration of a documented petition, either conditionally or for a stated period of time, upon a showing to the petitioner that there are technical problems with the documented petition or administrative problems that temporarily preclude continuing active consideration. The Assistant Secretary shall also consider requests by petitioners for suspension of consideration and has the discretion to grant such requests for good cause. Upon resolution of the technical or administrative problems that are the basis for the suspension, the documented petition will have priority on the numbered register of documented petitions insofar as possible. The Assistant Secretary shall notify the petitioner and interested parties when active consideration of the documented petition is resumed. The timetables in succeeding paragraphs shall begin anew upon the resumption of active consideration.

(h) Within one year after notifying the petitioner that active consideration of the documented petition has begun, the Assistant Secretary shall publish proposed findings in the Federal Register. The Assistant Secretary has the discretion to extend that period up to an additional 180 days. The petitioner and interested parties shall be notified of the time extension. In addition to

the proposed findings, the Assistant Secretary shall prepare a report summarizing the evidence, reasoning, and analyses that are the basis for the proposed decision. Copies of the report shall be provided to the petitioner, interested parties, and informed parties and made available to others upon written request.

(i) Upon publication of the proposed findings, the petitioner or any individual or organization wishing to challenge or support the proposed findings shall have 180 days to submit arguments and evidence to the Assistant Secretary to rebut or support the proposed finding. The period for comment on a proposed finding may be extended for up to an additional 180 days at the Assistant Secretary's discretion upon a finding of good cause. The petitioner and interested parties shall be notified of the time extension. Interested and informed parties who submit arguments and evidence to the Assistant Secretary must provide copies of their submissions to the petitioner.

(j)(1) During the response period, the Assistant Secretary shall provide technical advice concerning the factual basis for the proposed finding, the reasoning used in preparing it, and suggestions regarding the preparation of materials in response to the proposed finding. The Assistant Secretary shall make available to the petitioner in a timely fashion any records used for the proposed finding not already held by the petitioner, to the extent allowable by Federal law.

(2) In addition, the Assistant Secretary shall, if requested by the petitioner or any interested party, hold a formal meeting for the purpose of inquiring into the reasoning, analyses, and factual bases for the proposed finding. The proceedings of this meeting shall be on the record. The meeting record shall be available to any participating party and become part of the record considered by the Assistant Secretary in reaching a final determination.

(k) The petitioner shall have a minimum of 60 days to respond to any submissions by interested and informed parties during the response period. This may be extended at the Assistant Secretary's discretion if warranted by the extent and nature of the comments. The petitioner and interested parties shall be notified by letter of any extension. No further comments from interested or informed parties will be accepted after the end of the regular response period.

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

(1) Unsolicited comments submitted after the close of the response period established in § 83.10(i) and § 83.10(k), will not be considered in preparation of a final determination. The Assistant Secretary has the discretion during the preparation of the proposed finding, however, to request additional explanations and information from the petitioner or from commenting parties to support or supplement their comments on a proposed finding. The Assistant Secretary may also conduct such additional research as is necessary to evaluate and supplement the record. In either case, the additional materials will become part of the petition record.

(2) After consideration of the written arguments and evidence rebutting or supporting the proposed finding and the petitioner's response to the comments of interested parties and informed parties, the Assistant Secretary shall make a final determination regarding the petitioner's status. A summary of this determination shall be published in the Federal Register within 60 days from the date on which the consideration of the written arguments and evidence rebutting or supporting the proposed finding begins.

(3) The Assistant Secretary has the discretion to extend the period for the preparation of a final determination if warranted by the extent and nature of evidence and arguments received during the response period. The petitioner and interested parties shall be notified of the time extension.

(4) The determination will become effective 90 days from publication unless a request for reconsideration is filed pursuant to § 83.11.

(m) The Assistant Secretary shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies all of the criteria in § 83.7. The Assistant Secretary shall decline to acknowledge that a petitioner is an Indian tribe if it fails to satisfy any one of the criteria in § 83.7.

(n) If the Assistant Secretary declines to acknowledge that a petitioner is an Indian tribe, the petitioner shall be informed of alternatives, if any, to acknowledgment under these procedures. These alternatives may include other means through which the petitioning group may achieve the status of an acknowledged Indian tribe or through which any of its members may become eligible for services and benefits from the Department as Indians, or become members of an acknowledged Indian tribe.

(o) The determination to decline to acknowledge that the petitioner is an Indian tribe shall be final for the Department.

(p) A petitioner that has petitioned under this part or under the acknowledgment regulations previously effective and that has been denied Federal acknowledgment may not re-petition under this part. The term "petitioner" here includes previously denied petitioners that have reorganized or been renamed or that are wholly or primarily portions of groups that have previously been denied under these or previous acknowledgment regulations.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter F. Tribal Government
Part 83. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe (Refs & Annos)

25 C.F.R. § 83.11

§ 83.11 Independent review, reconsideration and final action.

Currentness

(a)(1) Upon publication of the Assistant Secretary's determination in the Federal Register, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals. Petitioners which choose under § 83.3(g) to be considered under previously effective acknowledgment regulations may nonetheless request reconsideration under this section.

(2) A petitioner's or interested party's request for reconsideration must be received by the Board no later than 90 days after the date of publication of the Assistant Secretary's determination in the Federal Register. If no request for reconsideration has been received, the Assistant Secretary's decision shall be final for the Department 90 days after publication of the final determination in the Federal Register.

(b) The petitioner's or interested party's request for reconsideration shall contain a detailed statement of the grounds for the request, and shall include any new evidence to be considered.

(1) The detailed statement of grounds for reconsideration filed by a petitioner or interested parties shall be considered the appellant's opening brief provided for in 43 CFR 4.311(a).

(2) The party or parties requesting the reconsideration shall mail copies of the request to the petitioner and all other interested parties.

(c)(1) The Board shall dismiss a request for reconsideration that is not filed by the deadline specified in paragraph (a) of this section.

(2) If a petitioner's or interested party's request for reconsideration is filed on time, the Board shall determine, within 120 days after publication of the Assistant Secretary's final determination in the Federal Register, whether the request alleges any of the grounds in paragraph (d) of this section and shall notify the petitioner and interested parties of this determination.

(d) The Board shall have the authority to review all requests for reconsideration that are timely and that allege any of the following:

(1) That there is new evidence that could affect the determination; or

(2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; or

(3) That petitioner's or the Bureau's research appears inadequate or incomplete in some material respect; or

(4) That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in § 83.7 (a) through (g).

(e) The Board shall have administrative authority to review determinations of the Assistant Secretary made pursuant to § 83.10(m) to the extent authorized by this section.

(1) The regulations at 43 CFR 4.310–4.318 and 4.331–4.340 shall apply to proceedings before the Board except when they are inconsistent with these regulations.

(2) The Board may establish such procedures as it deems appropriate to provide a full and fair evaluation of a request for reconsideration under this section to the extent they are not inconsistent with these regulations.

(3) The Board, at its discretion, may request experts not associated with the Bureau, the petitioner, or interested parties to provide comments, recommendations, or technical advice concerning the determination, the administrative record, or materials filed by the petitioner or interested parties. The Board may also request, at its discretion, comments or technical assistance from the Assistant Secretary concerning the final determination or, pursuant to paragraph (e)(8) of this section, the record used for the determination.

(4) Pursuant to 43 CFR 4.337(a), the Board may require, at its discretion, a hearing conducted by an administrative law judge of the Office of Hearings and Appeals if the Board determines that further inquiry is necessary to resolve a genuine issue of material fact or to otherwise augment the record before it concerning the grounds for reconsideration.

(5) The detailed statement of grounds for reconsideration filed by a petitioner or interested parties pursuant to paragraph (b)(1) of this section shall be considered the appellant's opening brief provided for in 43 CFR 4.311(a).

(6) An appellant's reply to an opposing party's answer brief, provided for in 43 CFR 4.311(b), shall not apply to proceedings under this section, except that a petitioner shall have the opportunity to reply to an answer brief filed by any party that opposes a petitioner's request for reconsideration.

(7) The opportunity for reconsideration of a Board decision provided for in 43 CFR 4.315 shall not apply to proceedings under this section.

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

(9) The Board shall affirm the Assistant Secretary's determination if the Board finds that the petitioner or interested party has failed to establish, by a preponderance of the evidence, at least one of the grounds under paragraphs (d)(1)–(d)(4) of this section.

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

(f)(1) The Board, in addition to making its determination to affirm or remand, shall describe in its decision any grounds for reconsideration other than those in paragraphs (d)(1)–(d)(4) of this section alleged by a petitioner's or interested party's request for reconsideration.

(2) If the Board affirms the Assistant Secretary's decision under § 83.11(e)(9) but finds that the petitioner or interested parties have alleged other grounds for reconsideration, the Board shall send the requests for reconsideration to the Secretary. The Secretary shall have the discretion to request that the Assistant Secretary reconsider the final determination on those grounds.

(3) The Secretary, in reviewing the Assistant Secretary's decision, may review any information available, whether formally part of the record or not. Where the Secretary's review relies upon information that is not formally part of the record, the Secretary shall insert the information relied upon into the record, together with an identification of its source and nature.

(4) Where the Board has sent the Secretary a request for reconsideration under paragraph (f)(2), the petitioner and interested parties shall have 30 days from receiving notice of the Board's decision to submit comments to the Secretary. Where materials are submitted to the Secretary opposing a petitioner's request for reconsideration, the interested party shall provide copies to the petitioner and the petitioner shall have 15 days from their receipt of the information to file a response with the Secretary.

(5) The Secretary shall make a determination whether to request a reconsideration of the Assistant Secretary's determination within 60 days of receipt of all comments and shall notify all parties of the decision.

(g)(1) The Assistant Secretary shall issue a reconsidered determination within 120 days of receipt of the Board's decision to remand a determination or the Secretary's request for reconsideration.

(2) The Assistant Secretary's reconsideration shall address all grounds determined to be valid grounds for reconsideration in a remand by the Board, other grounds described by the Board pursuant to paragraph (f)(1), and all grounds specified in any Secretarial request. The Assistant Secretary's reconsideration may address any issues and evidence consistent with the Board's decision or the Secretary's request.

(h)(1) If the Board finds that no petitioner's or interested party's request for reconsideration is timely, the Assistant Secretary's determination shall become effective and final for the Department 120 days from the publication of the final determination in the Federal Register.

(2) If the Secretary declines to request reconsideration under paragraph (f)(2) of this section, the Assistant Secretary's decision shall become effective and final for the Department as of the date of notification to all parties of the Secretary's decision.

(3) If a determination is reconsidered by the Assistant Secretary because of action by the Board remanding a decision or because the Secretary has requested reconsideration, the reconsidered determination shall be final and effective upon publication of the notice of this reconsidered determination in the Federal Register.

SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.12

§ 83.12 Implementation of decisions.

Currentness

(a) Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. The newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States. It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes.

(b) Upon acknowledgment as an Indian tribe, the list of members submitted as part of the petitioners documented petition shall be the tribe's complete base roll for purposes of Federal funding and other administrative purposes. For Bureau purposes, any additions made to the roll, other than individuals who are descendants of those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of § 83.7(e) and maintaining significant social and political ties with the tribe (i.e., maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition).

(c) While the newly acknowledged tribe shall be considered eligible for benefits and services available to federally recognized tribes because of their status as Indian tribes, acknowledgment of tribal existence shall not create immediate access to existing programs. The tribe may participate in existing programs after it meets the specific program requirements, if any, and upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly acknowledged tribe.

(d) Within six months after acknowledgment, the appropriate Area Office shall consult with the newly acknowledged tribe and develop, in cooperation with the tribe, a determination of needs and a recommended budget. These shall be forwarded to the Assistant Secretary. The recommended budget will then be considered along with other recommendations by the Assistant Secretary in the usual budget request process.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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25 C.F.R. § 83.13

§ 83.13 Information collection.

Currentness

(a) The collections of information contained in § 83.7 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1076–0104. The information will be used to establish historical existence as a tribe, verify family relationships and the group's claim that its members are Indian and descend from a historical tribe or tribes which combined, that members are not substantially enrolled in other Indian tribes, and that they have not individually or as a group been terminated or otherwise forbidden the Federal relationship. Response is required to obtain a benefit in accordance with 25 U.S.C. 2.

(b) Public reporting burden for this information is estimated to average 1,968 hours per petition, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this collection of information, including suggestions for reducing the burden, to both the Information Collection Clearance Officer, Bureau of Indian Affairs, Mail Stop 336–SIB, 1849 C Street, NW., Washington, DC 20240; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.
SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

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