

## **Simermeyer, Sequoyah**

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**From:** ARLINDA LOCKLEAR [REDACTED]  
**Sent:** Friday, July 22, 2011 10:44 AM  
**To:** Simermeyer, Sequoyah  
**Cc:** Heather Sibbison  
**Subject:** proposed reaffirmation standard  
**Attachments:** Muwekma clarification.pdf

**FOIA6**

Good morning, Sequoyah. This email summarizes our discussion of June 28 regarding the reaffirmation standard, as garnered from existing Interior material, to be applied to the Tejon Tribe.

As you know, the DOI filed a supplement to the administrative record in the Muwekma case in late 2006. Fyi, that pleading is attached. The purpose of the supplement was to explain why DOI had declined to reaffirm the federal recognition of Muwekma. DOI explained that the AS-IA has authority to reaffirm federal recognition of a tribe under very narrow circumstances and has, in fact, done so for 2 tribes in the Lower 48 - Ione Band and Lower Lake. DOI further explained that this step is appropriate where, by reason of an apparent administrative record, a recognized tribe was erroneously omitted from the first list of recognized tribes compiled in 1969. Under such circumstances, reaffirmation of the federal relationship does not implicate the Part 83 acknowledgment regulations on federal acknowledgment, since that process applies only where there is no long-standing federal relationship that has neither lapsed nor been administratively terminated (or alternatively, it is appropriate to waive the regulations under such circumstances.)

What we discussed at our meeting of June 28 were ways to sort of operationalize the general conditions laid out by DOI in the Muwekma supplement.

1. There must be evidence of explicit federal recognition of and administrative assumption of responsibility for the tribe. This sets a very high bar for the quality of the relationship, one that distinguishes it from the provision of Part 83.8 regarding previous federal acknowledgment (which can be triggered by a single incident without any administrative assumption of trust responsibilities toward the tribe.)
2. The federal relationship must be long-standing and continuous and must not have either been terminated or allowed to lapse. This appears in the Muwekma supplement. We propose to set a minimum number on this concept, one that is consistent with past decisions by DOI: first, the relationship must have continued for at least 40 years (as in the case of Lower Lake); or alternatively, that the relationship is evidenced by explicit recognition & administrative action thereon in modern times, such as in the lives of current tribal members (as in the case of Ione Band.)
3. There must be evidence that current Tribe consists of the same folks who were explicitly recognized. The acknowledgment regulations have a similar requirement called criterion e, proof of descent from the historic tribe. The minimum that OFA requires on this criterion is that at least 80% of the current members must be able to prove descent from the historic tribe. So we suggested that DOI adopt that same minimum to determine that the current tribe is the same tribe explicitly recognized by the US, i.e., that 80% of the membership are either the same individuals or descend from members of the recognized tribe.
4. There must be no evidence that the tribe was administratively terminated. This appears in the Muwekma supplement as well as the Lower Lake decision. The absence of such evidence indicates that an administrative error was made in 1969 when the tribe was omitted from the first list of recognized tribes.

Appropriately, this is a very high standard, one that very few tribes will be able to meet. And if a tribe can meet this standard, then in all fairness that tribe should have its relationship reaffirmed.

As applied to the Tejon Tribe, it is clear that the Tribe should be reaffirmed. It has a history of 110 years of continuous federal recognition and active supervision by the BIA - from 1848 (according to the Department of Justice) until 1962 (when lands withdrawn for the Tribe were restored by public lands order to the public domain.) There is no evidence of administrative termination of the relationship. Indeed, the record contains no explanation as to why the Tribe was not put on the list 7 years later when the BIA prepared the first list of recognized tribes. Finally, every member of the Tribe descends directly from the membership listed on the Terrell census of 1915 (prepared by the US as part of its work to assert a land claim on behalf of the Tribe, in its capacity as trustee.) And importantly, many of the current members of the Tribe were alive during active supervision of the Tribe by the BIA and, today, all are related at least as close as the 3d degree.

We would be happy to expand upon any of the above.

Arlinda & Heather.

**Explanation**

to

**Supplement the Administrative Record**

**Muwekma Ohlone Tribe**

On September 6, 2002, Assistant Secretary – Indian Affairs Neal McCaleb made a final determination pursuant to the Department of the Interior's (Department's) acknowledgment regulations, 25 CFR Part 83, that the Muwekma Ohlone petitioner (Muwekma) had failed to establish that it met the requirements to be acknowledged to exist as an Indian tribe entitled to the privileges and immunities available to federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States. Notice of the final determination was published in the Federal Register (67 Fed. Reg. 58,631). The procedural history of the Department's processing of the Muwekma petition for acknowledgment is summarized in the Federal Register Notice and in the final determination.

The Muwekma did not seek reconsideration of the final determination before the Interior Board of Indian Appeals as provided for in 25 CFR § 83.11, but instead filed the above referenced suit in the United States District Court for the District of Columbia. The Muwekma and the Department of Justice on behalf of the Department filed cross motions for summary judgment. On September 21, 2006, the Court denied both parties' motions and remanded the matter to the Department and ordered (Order) it to supplement the administrative record and explain why it treated the Muwekma differently than it treated the Lone Band of Miwok Indians and the Lower Lake Rancheria, which the Muwekma alleges had essentially the same claim to tribal status as the Muwekma.

More specifically, the Court ordered:

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 "clarify[y] the status of [Lone] . . . [and] reaffirm [] the status of [Lower Lake] without requiring [them] to submit . . . petition[s] under . . . Part 83 . . . In addition, the Department shall express its position regarding whether it is permitted, under 25 C.F.R.

§ 1.2 or otherwise, to waive or make exceptions to the Part 83 acknowledgment procedures, and whether this waiver or exception imposes a lesser evidentiary burden on petitioning tribes than the completion of a part 83 petition. [Emphasis in the original.] (Order at 31-32)

### **The Department's refusal to waive the regulations for Muwekma**

#### **The "reaffirmation" decisions compared to Muwekma**

The Court's Order requires the Department to provide an explanation of the reasons for its refusal to waive its acknowledgment regulations on behalf of Muwekma (District Court 9/21/2006, p.31). The Court refers to its Order as one that allows the Department "to complete its evaluation" (p.32) of the Muwekma petition by providing "a clear and coherent explanation" (p.26) of its position. This request for an explanation arises from what the Court describes as "Muwekma's claim that the Department has treated it differently from similarly situated tribal petitioners" (p.24).<sup>1</sup> As the Court notes, the key issue relating to the alleged disparate treatment of Muwekma is "Muwekma's alleged similarity to Ione and Lower Lake" (p.32). The basis of Muwekma's argument, as described by the Court, is that Muwekma "is similarly situated to Ione and Lower Lake, as all three entities . . . [were] previously recognized at least as late as 1927" (p.16).

The Department's decisions to clarify the status of Ione in 1994 and to reaffirm Federal recognition of Lower Lake in 2000, however, were not based merely on a finding that those groups were previously recognized by the Federal Government at some time in the past. The decision documents in those cases stressed factors other than previous recognition. Any similarity Muwekma may have to those groups based on the circumstance of prior historical acknowledgment before 1927, therefore, does not require that Muwekma receive similar treatment outside the Department's acknowledgment process. In contrast to Muwekma, Ione and Lower Lake did not submit petitions for acknowledgment and therefore did not as a petitioner receive a preliminary determination of previous acknowledgment from the Department. Indeed, Ione objected to being made to proceed through the acknowledgment process.<sup>2</sup>

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<sup>1</sup> It is inaccurate for Muwekma to claim that it was treated differently from other petitioners for Federal acknowledgment as an Indian tribe, as Lower Lake did not petition and Ione was placed on the list of petitioners by the Department, on the basis of a presumed historical claim in 1916, without having submitted a letter of intent to petition under the acknowledgment regulations.

<sup>2</sup> Subsequent to the October 1972 decision by the Commissioner of Indian Affairs to accept land in trust for the Ione Band, the Solicitor's Office raised questions as to the criteria for administratively recognizing Indian tribes. The questions persisted until the Department adopted its acknowledgment regulations in 1978. Thereafter, until Assistant Secretary Deer clarified the Ione's status, the Department insisted that all groups go through the acknowledgment process to obtain recognition of tribal status. Ione objected to having to go through the process. *Ione Band of Miwok Indians v. Burris*, Civ. No S-90-993 (LKK)(E.D. Calif. 1992)[Doc. # 142]; *Ione Band of Miwok Indians v. Sacramento Area Director*, 22 IBIA 194 (1992).

Muwekma's claimed similarity of itself to Ione and Lower Lake is based on a selective and partial comparison, while a more thorough comparison shows that the claimed similarity is neither persuasive nor sufficient. The Ione and Lower Lake decisions justified action on behalf of those groups by describing historical situations that Muwekma did not share. On the basis of the circumstances that were considered particularly significant to the decision makers as expressed in their decision documents, Muwekma was not similarly situated to either Ione or to Lower Lake.

***Previous Federal acknowledgment alone was not sufficient for an exception***

Assistant Secretary Gover's action of December 29, 2000, to "reaffirm" the Lower Lake Rancheria made a distinction between Indian groups that should be required to go through the Federal acknowledgment process and those that should not. Gover argued that groups not subject to the process were those whose "government-to-government relationship continued" (Gover 12/29/2000, p.1 [Doc. #250]). He emphasized the "long-standing governmental relationship" of such groups (Gover 12/29/2000, p.2 [Doc. #250]). In contrast, he declared that groups that had previously been acknowledged, but whose relationship with the Federal Government had not continued to exist, were subject to the acknowledgment process. He thus accepted the basic premise of the regulations about previous acknowledgment.<sup>3</sup> Gover specifically stated that "the acknowledgment regulation provides a process" for groups to seek recognition "when a previously existing government-to-government relationship has lapsed, or when the government-to-government relationship was terminated through an administrative process" (Gover 12/29/2000, p.1 [Doc. #250]).

The Muwekma petitioner can be distinguished, by this reasoning, from Lower Lake. Because there is no evidence of any Federal dealings with a Muwekma group or Verona band after 1927, any relationship the group had with the Federal Government had "lapsed." The lack of recognized acknowledgment was indicated in 1936 when a BIA superintendent informed an ancestor of the petitioner's members, who was seeking Federal services, that, "[y]ou do not have ward status" (Nash 2/21/1936 [Doc. #49]; see also Nash 1/23/1940 [Doc. #50]). Gover's "reaffirmation" of Lower Lake was based on his finding that its relationship with the United States had neither lapsed nor been administratively terminated. He characterized its absence from the initial list of federally recognized tribes published in 1979 as an "administrative error" derived from an incorrect interpretation of the Lower Lake Act of 1956 that provided for the sale of the lands of the rancheria (P.L. 84-443, 70 Stat. 58 [Doc. #54]). He argued that, in contrast to later termination legislation, the 1956 Lower Lake Act did not contain provisions that explicitly terminated the Lower Lake Rancheria. Gover concluded that the Federal relationship between Lower Lake and the United States had never ended. In

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<sup>3</sup> *United States v. Washington* (Five Intervenors Phase), 641 F.2d 1368 (9<sup>th</sup> Cir. 1981); *Miami Nation of Indians of Indiana, Inc. v. Dept. of the Interior*, 255 F.3d 342 (7<sup>th</sup> Cir. 2001), cert. denied, 534 U.S. 1129 (2002); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543 (10<sup>th</sup> Cir. 2001); *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76 (D. D.C. 2002).

contrast, any Federal dealings with a Verona entity had ended half a century prior to the 1979 publication of a list of federally recognized tribes.

Assistant Secretary Deer's action of March 22, 1994, to include the Ione Band of Miwok on the list of federally recognized tribes provided no explicit justification for making an exception to the Federal acknowledgment process. Deer described her action as completing a policy that Commissioner of Indian Affairs Louis Bruce announced in 1972 to accept land to be held in trust for the band (Deer 3/22/1994 [Doc. #162]). Although she did not review in her written decision the history that made her action necessary, the contemplated land acquisition in 1972 was not completed and Ione was not included on the initial list of federally recognized tribes in 1979. A recent opinion of the Department characterizes Commissioner Bruce's 1972 letter as a statement that he was "dealing with the Band as a recognized tribe" (Artman 9/19/2006 [Doc. #276]). Deer's 1994 decision contained an implicit conclusion that a relationship between the Ione Band and the United States continued to exist until the 1970's and that creation of a continuing trust relationship was contemplated at that time. No similar evidence exists for Muwekma.

Neither Assistant Secretary Gover's action in 2000 nor Assistant Secretary Deer's action in 1994 justified clarifying the status of an Indian group outside of the existing Federal acknowledgment process on the grounds that the group had been previously acknowledged at some time in the past. Deer emphasized that a decision to accept land to be held in trust for Ione had not been implemented, not just that Ione had been previously recognized. Gover emphasized that Lower Lake had continuing recognition, not just past recognition. He explicitly noted that groups whose previous Federal acknowledgment had lapsed or been brought to an end by administrative action were required to proceed through the acknowledgment process. The mere existence of a previous relationship with the Federal Government was not the basis for providing an exception to the acknowledgment process in the case of either Ione or Lower Lake.

***Muwekma was not "similarly situated" to Lower Lake and Ione***

Both the Lower Lake decision in 2000 and the Ione decision in 1994 stressed the importance of circumstances more compelling than previous Federal acknowledgment at some time in the past. Previous Federal acknowledgment by itself was not sufficient to explain those actions. The additional considerations identified in those decisions distinguish those two cases from Muwekma. The loss or perceived loss of trust lands, and thus the lack of the status based on the existence of a Federal trust relationship, figured prominently in the decision makers' explanations of those two decisions. The Ione and Lower Lake situations, however, were not the same. Whether the historical situation involved trust lands actually held, as in the case of Lower Lake, or trust lands not acquired despite an agreement to do so, as in the case of Ione, these historical circumstances did not apply to the Muwekma petitioner. The existence of collective rights lands was one of the five factors historically relied on by the Department in determining tribal status (Cohen 271 (1942 ed.)). Muwekma never had any trust lands

or any agreement to acquire trust lands on its behalf. The Lower Lake and Ione decisions emphasized circumstances that reveal differences between Muwekma and those two groups, not similarities shared by the three groups.

Assistant Secretary Deer said in her decision in 1994 that she was "reaffirming" statements made by Commissioner Bruce in 1972 and carrying out his announced policy to accept a parcel of land to be held by the United States in trust for the Ione Band of Miwok Indians (Deer 3/22/1994 [Doc. #162]).<sup>4</sup> The tract of land was specifically described in Bruce's 1972 letter (Bruce 10/18/1972 [Doc. #63]). At no time did a Muwekma group or Verona band have any similar promise or agreement to hold a specific tract of land in trust on its behalf. The Federal Government negotiated to purchase land for the Ione band in 1916 (Hauke 5/2/1916 [Doc. #20]) and made numerous efforts into the 1920's to acquire clear title for the band (correspondence 1915-1925 [Doc. #s 12, 17, 23, 28-33, 35, 39]). Members of the Ione band with the assistance of a project of the California Indian Legal Services had quieted title in themselves and other members of the band residing on the land in 1972 (California Rural Indian Land Project 1/20/1972 [Doc. #60]; Seitz 7/20/1972 [Doc. #62]; McGee 10/31/1972 [Doc. #64]). There is no available evidence that any Federal agent ever engaged in negotiations or discussions to obtain land on behalf of a Verona band or Muwekma group. A Verona band was merely considered between 1914 and 1927 as a group possibly eligible for a potential land purchase. A geographical settlement at the Verona railroad station, however, no longer existed after 1915. The Ione decision was based on the historical circumstance of an uncompleted acquisition of trust land on the group's behalf. Because no similar historical agreement existed for a Muwekma group, Ione and Muwekma were not similarly situated.

Assistant Secretary Gover noted in his decision in 2000 that "the Lower Lake Rancheria lost its land pursuant to the Lower Lake Act . . . which sold its land for the purpose of establishing a local airport" (Gover 12/29/2000, p.3 [Doc. #250]).<sup>5</sup> A fundamental

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<sup>4</sup> It is not possible to identify confidently the materials in front of Assistant Secretary Deer when she made her Ione decision in 1994. Several items relating to Ione were submitted to a member of her staff and to the head of the office of legislative affairs who advised her on the issue. These items included a submission of seven documents described as background materials by an attorney for Ione (Slagle 3/14/1994 [Doc. #156]); a manuscript of about 40 pages prepared by that attorney entitled *Buena Vista Rancheria*, rather than the Ione Band (Slagle n.d. in [Doc. #5]); a fax from the Senate Committee on Indian Affairs of a 1990 letter by the chairman, Senator Inouye, to former Secretary Lujan supporting Ione recognition (Aoki 3/14/1994 [Doc. #155]); and a memorandum of the Office of the Solicitor transmitting eight documents, including an internal research paper on the history of the Ione issue (Assistant Solicitor 3/18/1994 [Doc. #158]). While extensive records relating to Ione were available in the Department, it is not known that any particular records were before Deer. From these available materials, Deer referenced only a single document in her decision, the October 18, 1972, letter of Commissioner Bruce.

<sup>5</sup> Assistant Secretary Gover's decision in 2000 indicated that he relied upon a recommendation submitted from the regional office in California. That document consisted of an analysis and 30 exhibits (Risling 9/14/2000; and Facio 9/15/2000 [Doc. #243]). In addition, the chief of the Branch of Acknowledgment and Research submitted a memorandum in opposition to proposed "reaffirmations" (Fleming 12/27/2000 [Doc. #249]).

difference between Muwekma and Lower Lake is that the United States purchased land in 1916 to create the Lower Lake Rancheria (Risling 9/14/2000, p.2 [Doc. #243]), but did not do so for a Verona band, despite including it on a list of groups for which land might be obtained. After 1927, there is no available evidence that the Federal Government ever considered acquiring land for a Verona group. In contrast to Lower Lake, which had trust lands as late as 1956, a Muwekma group never had land held in trust on its behalf. Therefore, no loss of trust lands could serve as a basis for treating Muwekma differently from other petitioners, or for arguing that a group's Federal relationship continued to exist even though its trust lands had been sold. For these reasons, Lower Lake and Muwekma were not similarly situated.

The Ione and Lower Lake decision documents raise some general historical issues, and evidence not expressly relied upon in those decisions may be considered for a comparison of Muwekma to Ione and Lower Lake on these historical circumstances. The Lower Lake action of 2000 recognized that group outside of the administrative process of acknowledgment on the basis of a judgment that the group never lost its Federal recognition. The Ione action of 1994 may have been based on a similar, but unstated, conclusion. Both decisions found some evidence of continuing Federal recognition in documentation of a relationship with the Federal Government near the time of the publication of the first list of federally recognized tribes in 1979. Such conclusions made a distinction—explicitly for Lower Lake and implicitly for Ione—between those groups and other groups whose Federal relationship had actually ended farther in the past. Both actions appear to have relied upon a concept of administrative error in which a misinterpretation of the group's status, rather than an actual change in its status, resulted in the group being left off the list of federally recognized tribes. On each of these considerations – continuing Federal recognition and administrative error – Muwekma can be distinguished from Ione and Lower Lake.

Lower Lake was “reaffirmed” rather than reviewed under the acknowledgment process because, according to Assistant Secretary Gover, its government-to-government relationship with the United States continued to exist until, and even after the 1956 Act. There is no evidence, however, that a Muwekma group had a relationship with the Federal Government at any time after 1927. The BIA stated that it did not have a relationship with Muwekma ancestors in the 1930's. A Muwekma group, therefore, had no long-standing governmental relationship with the United States.<sup>6</sup> Muwekma is not

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<sup>6</sup> The Muwekma petitioner claimed in its petition that the receipt by individual ancestors of certain Government benefits or services, such as payment of Indian claims awards or attendance at Indian schools, constituted the Government's identification of them as a historical group, but not that it constituted Federal acknowledgment of them as an Indian tribe. These arguments were fully considered for the proposed finding and final determination and not found sufficient to meet the requirement in criterion 83.7(a) of substantially continuous identification of the petitioning group as an Indian entity. The evidence demonstrates that many of the petitioner's members or ancestors were put on the claims roll of the “Indians of California” after 1928 because of their lineal descent from an Indian who resided in California in 1852 and that several ancestors were accepted at Government Indian schools in the 1930's and 1940's because of their individual degree of Indian blood, not because they were members of a recognized Indian tribe (*Muwekma PF*, Summary, 13; Description, 9; and *Muwekma FD*, 25-26, 29, 44). Therefore, evidence that individual Muwekma members or ancestors were included on the claims roll or

similar to Ione and Lower Lake because of previous acknowledgment until 1927 as asserted by Muwekma; rather, it is dissimilar because of its lack of dealings with the Federal Government after that date. In contrast to Lower Lake and Ione, which had trust lands, agreements, legislation, or consultation decades later than 1927, no similar examples for Muwekma exist to provide a basis for concluding, or even contending, that any Federal acknowledgment of Muwekma continued to exist. Because Muwekma's Federal relationship had "lapsed," to apply Gover's distinction, Muwekma was properly evaluated within the acknowledgment process.

The Federal Government purchased land to establish the Lower Lake Rancheria on January 25, 1916 (Risling 9/14/2000, p.2 [Doc. #243]). The Government held this land in trust until the Act of 1956 authorized its sale. In 1927, in the same report that advised against the purchase of land for a Verona band, Superintendent Dorrington of the Sacramento Agency recommended that land be purchased for the Lower Lake band (Dorrington 6/23/1927, p.9 [Doc. #42]). In 1935, the agency again sought to acquire additional land for the band and other small groups (Risling 9/14/2000, app.6 [Doc. #243]). In 1944, the agency's "Rockwell Report" noted the existence of a Lower Lake group living off the rancheria. In 1947, the agency authorized an individual to move onto the rancheria (Risling 9/14/2000, app.7 [Doc. #243]) and in 1950 it surveyed the rancheria's population (Risling 9/14/2000, app.8 [Doc. #243]). In 1953, an agency employee consulted with the Indians on the rancheria about the proposed bill to sell the land (Risling 9/14/2000, app.13 [Doc. #243]). Also in 1953, House Report 2503 of the U.S. House of Representatives listed the Lower Lake Rancheria, but not any Verona band (U.S. House 1953, p.914 [Doc. #53]). In 1980, the BIA central office and regional office considered including the Lower Lake Rancheria on the list of federally recognized tribes, but did not do so (see Girvin 6/28/1995, n.1 [Doc. #191]). This evidence demonstrates a pattern of Federal dealings with the Lower Lake Rancheria that differs from the absence of any similar evidence for a Verona band.

The Federal Government attempted to purchase land for an Ione group in the 1910's and 1920's. The group for which land was to be purchased was identified by a census made by a special agent in 1915 (Terrell 5/11/1915 [Doc. #14]). In 1916, the Indian Office obtained a deed and abstract of title for the purchase of land for the Ione band (Hauke 5/2/1916 [Doc. #20]) and the Department provided the Office with a formal "Authority" for the purchase (Interior 5/18/1916 [Doc. #21]). The Department undertook extensive, but unsuccessful, efforts to clear title to the land for the band (see correspondence 1915-1925 [Doc. #s 12, 17, 23, 28-33, 35, 39]). In 1927, Superintendent Dorrington stated, in contrast to his remarks on Verona, that the Department had "been considering the purchase of a tract for the Indians at Ione for the past several years" (Dorrington 6/23/1927, p.2 [Doc. #42]). In 1933, the next superintendent informed the Commissioner of Indian Affairs about the general "Ione situation" (Lipps 10/5/1933 [Doc. #46]; Collier 12/4/1933 [Doc. #47]). In 1941, the Department considered a petition from the "Indians of the Ione Valley" requesting the

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attended Indian schools does not demonstrate the existence of a government-to-government relationship with a Muwekma group at that time.

purchase of land (Hooper 4/29/1941 [Doc. #52]). In 1970, two Ione individuals contacted the BIA about the status of the land on which they lived ("Background," ca. 1991, p.4 [Doc. #125]). In January of 1972, the California Rural Indian Land Project (CRILP) of the California Indian Legal Services proposed bringing a quiet title action on behalf of the Ione Band (California Rural Indian Land Project 1/20/1972 [Doc. #60]) and requesting that the land be accepted and held in trust, which led to Commissioner Bruce's letter in 1972 ("Background," ca. 1991, p.5 [Doc. #125]). CRILP brought the action in July (Seitz 7/20/1972 [Doc. #62]) and got a favorable judgment October 31, 1972 (McGee 10/31/1972 [Doc. #64]).<sup>7</sup> No comparable evidence exists for a Verona band at any time.

The Lower Lake Act of 1956 to sell the trust lands of that rancheria and the 1972 letter of Commissioner Bruce to accept lands to be held in trust for an Ione group each directly raised the question of a continuing Federal relationship with those groups. No such question arose about Muwekma's status after 1927 because a Muwekma group had no trust lands and no agreement to acquire trust lands. No issue other than trust lands raised a question about Muwekma's status after 1927. Muwekma is not similar to Ione and Lower Lake because of previous acknowledgment as asserted by Muwekma; rather, it is dissimilar because of its lack of trust lands or attempts to acquire trust lands. These land issues not shared by Muwekma provided the circumstances in which Deer and Gover found administrative error. The Ione decision found that a specific agreement to accept lands to be held in trust was not completed. The Lower Lake decision found that the Department misinterpreted a Federal statute to sell trust lands. No comparable misinterpretation of a specific Act or failure to carry out a specific agreement can be alleged in the case of Muwekma.

Superintendent Dorrington's report in 1927, which advised that a land purchase did not need to be made for members of a Verona band, does not represent comparable administrative error (Dorrington 6/23/1927, p.1 [Doc. #42]). Although Muwekma has contended that Dorrington failed to carry out his instructions, Dorrington's instructions contained no request for specific action or a specific result on behalf of a Verona band (Meritt 1/8/1927, 5/26/1927 [Doc. #40, 41]). The appropriation acts that authorized purchases of land for homeless California Indians after 1906 also did not mandate action specifically on behalf of a Verona band. In contrast, the 1956 Act was specifically about the Lower Lake Rancheria and Commissioner Bruce's 1972 agreement was specifically about the Ione Band. In those two instances the action concerned specific, clearly defined parcels of land. No such defined tract existed for a Verona band. The instructions Dorrington received in 1927 were to submit a general report about California Indians, "without making an extensive field investigation," and to identify the bands "for whom land should be purchased" (Meritt 1/8/1927

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<sup>7</sup> The complaint listed some members of the Ione Band individually and "other members of the Ione Band" as plaintiffs (Seitz 7/20/1972 [Doc. #62] p. 10). An internal dispute within the Band resulted and raised questions over whether the land was "Indian country." Although he ultimately concluded that the state had jurisdiction over the land, the judge in analyzing the matter concluded that there was "a reasonable inference" that the trust relationship existed between the Band and the United States and had never been terminated (Karlton 11/19/1992 [Doc. #147] p. 20).

[Doc. #40]). Muwekma disagrees with the superintendent's judgment about priorities for Congressional appropriations, but this is not the same thing as showing he failed to carry out his instructions. His instructions were to report on the extent and cost of proposed land purchases and he did so.

While some common factors might be discerned in the Ione and Lower Lake decisions, the rationale those two decisions gave for their actions was too brief in each case to establish a general standard by which exemptions from the acknowledgment process have been made. Taken together, those decisions did not set forth a standard of proof or an alternative evidentiary burden. They did not state alternative criteria for acknowledgment. They did not set forth any procedures for an alternative process. The reasons given in those decisions for the "reaffirmation" of each group's status were limited. Those decision documents did not justify action merely on a finding that the group was once recognized in the past. It is not clear from those two actions what test would be applied to determine whether or not other groups would qualify for a similar exemption from the administrative process of acknowledgment. It is clear, however, that the historical circumstances of Muwekma can be distinguished from those of Ione and Lower Lake.

#### *The administrative history of the Muwekma petition*

The Court's Order requires the Department to "articulate the standards that guided its analysis" of Muwekma's request to be recognized outside its regulatory process (District Court 9/21/2006, p.28) and to show that it "sufficiently justified in the administrative record . . . its decision to treat Muwekma differently from Ione and Lower Lake" (p.22). Muwekma contends that it "repeatedly requested, for many years, that the Department return the Tribe to the list of recognized tribes outside of [25 CFR] Part 83" (Plaintiff's Motion for Summary Judgment 7/13/2005, p.12). As support for this statement, Muwekma does not provide a list of the specific requests it made. Rather, it cites the Department's agreement that Muwekma made "several requests" that the Department "reaffirm" its status (Department's Answer 8/12/2003, p.23). Muwekma made some of those requests in writing, either as a letter or as part of a petition submission, and others in informal meetings with Departmental officials.

A review of the administrative history of the Muwekma petition shows that Muwekma's requests for immediate action often were compatible with a plea for expedited treatment within the regulatory process. Indeed, when Muwekma filed suit against the Department, it requested a prompt evaluation of its petition.<sup>8</sup> In its written requests for administrative "restoration" or "reaffirmation," Muwekma did not expressly compare its

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<sup>8</sup> When Muwekma filed suit in Federal District Court in the District of Columbia in early December 1999, the primary relief it sought was an order requiring the Department to conclude its evaluation of Muwekma's petition within 12 months (*Muwekma I* [Doc. #237]). Muwekma alleged that the Department's action on its petition had been unlawfully withheld or unreasonably delayed in violation of the Administrative Procedures Act. Muwekma did not allege that it had been erroneously left off the list of federally recognized tribes beginning with the first list published in the *Federal Register* in 1979.

situation to that of the Ione band. It offered a general comparison to Lower Lake just before the Court ordered active consideration of the petition to begin. Muwekma cited the Ione case only as authority for the Department to take action outside the regulations. Muwekma's requests for action were based implicitly on the Department's preliminary determination that Muwekma was eligible to be evaluated as a previously acknowledged group. The Department consistently explained to Muwekma, however, that previous Federal acknowledgment was not sufficient by itself to merit evaluation or acknowledgment outside the regulatory process.

The acknowledgment regulations first became effective October 2, 1978. Those regulations called for the Department to locate and notify all possible unrecognized Indian groups of their opportunity to petition. This effort became known as the "locator project." The regulations required the Department to include in this search all groups listed in the final report of the American Indian Policy Review Commission (AIPRC). A Verona band or Muwekma group was not included in the AIPRC report. The Department also contacted state Indian commissions, state officials, Indian agencies, and scholars to request information on possible petitioners (Geary 8/21/1979 [Doc. #105]; Geary 9/11/1979 [Doc. #106]; Locator Project 4/00/1980 [Doc. # 107]). As a result of these efforts, the Department did not receive any information about a Verona band or Muwekma Ohlone group. The first list of federally recognized tribes was published in 1979 and did not include a Verona band or Muwekma group (44 *Fed. Reg.* 7,325 (Feb. 9, 1979)). Muwekma did not come forward to seek to correct an alleged error on that list. Its letter of intent to petition, submitted a decade after publication of that list, did not allege such an error had occurred.

Muwekma submitted a letter of intent to petition that was dated May 2, 1989, and received by the BIA on May 9, 1989 (Cambra 5/2/1989 [Doc. #109]). It submitted its documented petition in the form of Exhibits A through L between July 1995 and September 2000 plus a letter in February 2001 before the start of active consideration. The revised acknowledgment regulations published on February 25, 1994, included new provisions, as section 83.8, providing a reduced evidentiary burden for groups that demonstrated they had unambiguous Federal acknowledgment in the past. This revision was intended to help speed the acknowledgment process for some petitioners by reducing the time period for which a demonstration and evaluation of their continuous existence would be required. The regulatory standard and the principle requirement of demonstrating continuous existence over the required time period did not change. The regulations provide for a preliminary determination of the question of a group's previous acknowledgment solely for purposes of evaluating the group within the regulatory process. Muwekma indicated in August 1995 that it would seek to be evaluated under section 83.8 of the regulations when it submitted a petition exhibit "to demonstrate that Verona Band did have a previous relationship with this government" (Cambra 8/15/1995 [Doc. #193]).

The Department informed the Muwekma petitioner in May 1996 that it had "concluded on a preliminary basis" that a Pleasanton or Verona band was "previously acknowledged between 1914 and 1927" (Maddox 5/24/1996 [Doc. #201]). It described

this finding as “a determination of eligibility to be evaluated under section 83.8” that limited the petitioner’s burden to “tracing the group’s existence from 1927 to the present.” The Department noted that in 1914 a special Indian agent included a Verona band among the groups to be considered for a purchase of land under the appropriations for homeless California Indians which began in 1906 (Ashbury 12/17/1914 [Doc. #11]). The band also was named in a 1923 annual report of the Reno Indian agency (BIA Reno Agency 1923 [Doc. #34]). A report of an agency superintendent in 1927 again considered a Verona band for a possible land purchase, but recommended against it (Dorrington 6/23/1927, p.1 [Doc. #42]). The BIA’s temporary consideration of a Verona band for a land purchase thus began and ended with a report by a BIA agent in the field. The Department’s preliminary determination of previous Federal acknowledgment was based on this temporary Federal consideration of the group.

The proposed finding and final determination evaluated the Muwekma petition under section 83.8 as a previously acknowledged group. The Department’s findings also noted the limited nature of the previous acknowledgment. A report that described the available evidence supporting the proposed finding noted that during the period before 1927 there was no available evidence of any Federal dealings with the group such as consultations, discussions, meetings, or correspondence (*Muwekma PF*, Description, 40 [Doc. #265]). Since such governmental dealings with a Verona band did not exist, they also did not end. No Congressional act, appropriation, or approved agreement mentioned a Verona band. Although BIA agents listed a Verona band for a potential land purchase, the Government did not identify a tract of land to purchase and did not negotiate with any landowner to purchase land for the group. Because no land purchase was made, no trust asset existed and no Federal trust relationship with the group was created. The BIA considered acting on behalf of the group, but did not do so. There is no reason now to conclude that such temporary consideration of a Verona band created a permanent relationship for it. During the years between 1914 and 1927, then, the only Federal status the Verona band had was a potential status.

The Department followed its preliminary determination of previous acknowledgment by providing Muwekma with a technical assistance (TA) review letter on October 10, 1996 (Maddox 10/10/1996 [Doc. #210]). This preliminary review of the petition documentation is required by the regulations (25 CFR § 83.10(b)) to inform a petitioner of any obvious deficiencies or significant omissions apparent in the documented petition and thus provide a petitioner with an opportunity to supplement or revise the documented petition before it is evaluated on its merits. This 10-page letter noted significant omissions in the petition, including the observation that it contained “virtually no documents” for the years following 1930. This letter repeated the advice that the petitioner would need to demonstrate its case since 1927, thus reducing its evidentiary burden by a century. The TA review letter also noted that the preliminary determination of previous Federal acknowledgment shifted the issue of continuity and descent from the Indians at early 19th-century Mission San Jose to one of continuity and descent from the Indians located near the Verona railroad station about 1927 (Maddox 10/10/1996 [Doc. #210]; see also 9/3/1996 [Doc. #208]).

The Muwekma petitioner's response to the TA review letter took the form of a supplemental submission labeled "Exhibit H" which was received by the Department on November 4, 1996. Although the exhibit consisted mostly of photocopies of documents, it also included a narrative "response" to the TA review letter. At the conclusion of that 17-page "response," the petitioner cited the Assistant Secretary's delegated "authority to make acknowledgment decisions" and requested that the Assistant Secretary "proceed with immediate administrative restoration of the Muwekma Tribe as a federally acknowledged Tribe" (Petitioner's Ex. H, p.17 [Doc. #211]). The request did not make any comparison of Muwekma's situation to that of Ione and did not expressly contend that previous acknowledgment was a basis for immediate restoration. This statement was not an explicit request to be evaluated outside the acknowledgment process as an exemption from the regulations. As part of a petition submission, the request may be read as a demand for immediate evaluation within the administrative regulatory process in which the Assistant Secretary makes the acknowledgment decisions, which is the relief Muwekma sought in its original litigation against the Department for undue delay in violation of the Administrative Procedure Act (APA)(*Muwekma I* [Doc. #237]).

Later oral explanations in informal meetings made the Department aware that Muwekma sought a form of immediate "restoration" without going through the regulatory process. In January 1997, Muwekma representatives met with Assistant Secretary Deer and Departmental staff. The Department's letter to Muwekma of March 14, 1997, in response to a letter about that meeting, indicates that the meeting concerned issues of the expedited processing of a previously acknowledged petitioner under the regulations and the Assistant Secretary's ability to acknowledge a group without using the regulatory process. This letter stated the Department's position that the "essential requirement for Federal acknowledgment of a tribe is the tribe's continuity of tribal existence" (Maddox 3/14/1997 [Doc. #216]). The letter also cited legal precedent that previously acknowledged petitioners did not benefit from a presumption of continuing existence. "The Assistant Secretary cannot acknowledge" a previously acknowledged group, the Department explained, "without a showing that the group has continued to exist as a tribe since the time of its last Federal recognition" (Maddox 3/14/1997 [Doc. #216]). The letter informed Muwekma it would have to make that demonstration under the regulations, and summarized the reduced evidentiary burden Muwekma would have as a previously acknowledged petitioner.

In a letter to the Department dated January 16, 1998, Muwekma requested the Assistant Secretary to publish a notice in the *Federal Register* within two weeks "confirming the federal acknowledgment of the Muwekma Tribe" (Cambra 1/16/1998 [Doc. #217]). This letter formally requested for the first time action that could not be achieved through the regulatory process. While acknowledgment could be achieved through the regulatory process, it could not be achieved so quickly or, perhaps, as "confirming" a relationship rather than acknowledging continued tribal existence. Muwekma based this request on an argument that the "previous status clarification" of the Ione Band in 1994 established a precedent that such action could be taken by the Assistant Secretary. Muwekma did not contend in this letter that its situation was comparable to that of Ione.

It did not contend that action similar to that for Ione was required on its behalf because both it and Ione were previously acknowledged. This letter referenced the Ione case only as authority to act outside the regulations, not to claim that Muwekma and Ione were similarly situated.

At this time Muwekma also acted through the Advisory Council on California Indian Policy (ACCIP) and participated in meetings the ACCIP arranged with Departmental staff. The chair of the ACCIP acknowledgment task force prepared a draft agenda for a meeting to discuss circumstances allegedly unique to California that proposed the meeting specifically consider her petitioning group and Muwekma. Her draft agenda sought to justify "special consideration" and included a discussion of "options available to expedite the reaffirmation" of the two petitioners (Magdaleno 2/3/1998 [Doc. #221]). Her options were specific legislation, action by the Assistant Secretary to "reaffirm" the two groups and place them on the *Federal Register* based on submitted documents, and action by the Assistant Secretary based on a recommendation of the BIA area director for California. The area director's existing letter to Muwekma pledged only "to support" its efforts to obtain Federal recognition status "by providing assistance whenever possible" (Jaeger 1/27/1998 [Doc. #220]; see also Smith 1/23/1998 [Doc. #219]). When the Department indicated its intent of discussing California in general rather than specific cases, the ACCIP task force complained that this "would delay any reaffirmation process" for the two groups (Magdaleno and Cambra 2/17/1998 [Doc. #224]; see also Maddox 2/5/1998 [Doc. #223]). This exchange indicated the interest of the ACCIP and Muwekma in the use of an alternative to the regulatory process.

A discussion of these issues occurred at a meeting between Departmental staff members and the ACCIP task force at Menlo Park, California, on February 18 and 19, 1998. Muwekma representatives attended the meeting. After this meeting, and only one month after requesting immediate clarification of its status, Muwekma wrote to the Department to state, "[w]e are formally requesting to be put on 'Ready' status to be considered for active consideration" (Cambra 2/20/1998 [Doc. #228]). The Department agreed that the petitioner's recent submissions made its petition ready for evaluation and therefore placing the petitioner on the "ready for active consideration" list as of March 26, 1998 (Maddox 3/26/1998 [Doc. #232]). The effect of this decision was that the Department acted on the more recent request. The Department chose to act on the request that was compatible with its position that previously acknowledged groups must proceed through the administrative process under the regulations.

During the period from 1994 to 2000, Ione was the only example Muwekma cited of a group acknowledged as an exemption from the acknowledgment regulations. To the extent that Muwekma asked to be treated as another exception, it did not present an argument that it merited such treatment because its situation was comparable to that of Ione. To the extent that Muwekma requested to be treated as an exception because of its previous acknowledgment, it based its claim on a circumstance that was not used as the basis for the Ione action. Muwekma, however, was comparable to other petitioners the Department had determined were previously acknowledged and evaluated within the

administrative process under the regulations. By the start of active consideration of the Muwekma petition in February 2001, five petitioners had received final determinations under section 83.8 as previously acknowledged groups: Huron Potawatomi (1995), Snoqualmie (1997), Match-e-be-nash-she-wish Band (1998), Cowlitz (2000), and Chinook (2001).<sup>9</sup> Thus, prior to the start of active consideration in 2001, there was no basis for granting an exemption from the regulations based on previous acknowledgment and clear precedent for opposing such a request.

On June 30, 2000, the District Court in *Muwekma I* ordered the Department to develop within 30 days a plan for resolving the Muwekma petition (Notice 7/28/2000 [Doc. #239]). On July 14, 2000, Muwekma's attorney wrote to Assistant Secretary Gover to suggest "removing this case from the BAR process" and "restoring the Muwekma Tribe to the status of a federally recognized tribe" (Sachse 7/14/2000 [Doc. #238]). Gover replied, on July 28, 2000, with an alternative suggestion. He indicated that he was considering a policy to waive the first-in first-out provisions of the acknowledgment regulations in order to give priority consideration to a petitioner that could establish on a preliminary basis "that it had prior Federal recognition after 1900 and that its current members are representative of and descends [*sic*] from that previously recognized tribal entity" (Gover 7/28/2000, p.1 [Doc. #240]). He stated, using the language required to justify a waiver of the regulations, that it would be "in the best interest of the Indians" to waive the regulations in this fashion. Instead of agreeing to remove the Muwekma petition from the acknowledgment process, Gover proposed to evaluate it within the process in an expedited manner. Thus, the same decision maker who reaffirmed Lower Lake outside the acknowledgment process declined to consider Muwekma in a similar fashion.

Assistant Secretary Gover signed his Lower Lake decision on December 29, 2000, and it was announced with a press release on January 3, 2001 (Gover 12/29/2000 [Doc. #250]). He relied upon a recommendation to reaffirm Lower Lake prepared by the Central California Agency and forwarded by the regional office in California (Risling 9/14/2000 [Doc. #243]; Facio 9/15/2000 [Doc. #243]). The recommendation resulted from an initiative of the BIA central office to seek restoration of terminated California rancherias. The agency recommendation consisted of an analysis supported by 30 exhibits. Muwekma lacked such a recommendation. Although Muwekma attempts to portray a 1998 letter from Area Director Jaeger to Muwekma as a comparable recommendation, that letter merely expressed a willingness to support and help Muwekma in its efforts to seek acknowledgment, and did not present a recommendation to the central office supported by documentation (Jaeger 1/27/1998 [Doc. #220]). The agency and regional office did not include Muwekma in the recommendation they made to the Deputy Commissioner in 2000.

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<sup>9</sup> Determinations of previous Federal acknowledgment do not assure a final determination to acknowledge a petitioner. Three petitioning groups determined eligible to be evaluated under section 83.8 of the regulations—Chinook (2001), Muwekma (2002), and the Burt Lake Band (2006)—have received negative final determinations.

After Assistant Secretary Gover's decision on Lower Lake was announced, and after Gover then left office, Muwekma's attorney again contacted the Department about the Muwekma petition. On January 4, 2001, he placed a telephone call to Acting Assistant Secretary Anderson and sent a letter to the Department's attorneys, which was forwarded to the Deputy Commissioner of Indian Affairs. In this letter, he said that the Lower Lake action was "what needs to be done" for Muwekma. The letter characterized his request as seeking "clarification of the status of the Muwekma Tribe by returning it to the list of federally recognized tribes" (Sachse 1/4/2001, p.6 [Doc. #251]). His reasons why Muwekma should be recognized included, in addition to ending the pending litigation against the Department, a reliance upon the recommendations of the ACCIP, resolutions of support from local governments, and the alleged support of the BIA area director as indicated in his 1998 letter. Muwekma's attorney offered a comparison of Muwekma to Lower Lake, but not Ione, which mentioned previous Federal acknowledgment as late as 1927, eligibility for the purchase of land, eligibility of individual to receive claims award payments as California Indians, and lack of Congressional termination of a Verona band. He asserted that Muwekma was more entitled to clarification of its status than was Lower Lake (Sachse 1/4/2001, 2-5 [Doc. #251]).

On January 16, 2001, Muwekma's attorney met with Acting Assistant Secretary Anderson. Two days later the Acting Assistant Secretary met with Departmental staff to discuss the Muwekma request. At this meeting he apparently concluded that Muwekma did not have evidence of the continuity of a long-standing Federal relationship that would make its situation comparable to that of Lower Lake, based on Assistant Secretary Gover's reasoning, and allow him to take similar action on Muwekma's behalf. It appears that the Acting Assistant Secretary may also have been considering action similar to that accorded Lower Lake for the Burt Lake Band petitioner of Michigan. At the same time that the Muwekma attorney's request was being considered, staff at the regional office in Minneapolis informed the central office that it could "tell the AS/IA [Assistant Secretary - Indian Affairs] that our recommendation is to allow the BAR process to continue" for Burt Lake (Springer 1/18/2001, 4:08 pm [Doc. #258]). It appears that neither Muwekma nor Burt Lake were treated outside the regulations at this time because both were seen as having problems of continuity that needed to be investigated or because both were already being considered within the regulatory process.<sup>10</sup>

After the change of administrations on January 20, 2001, the Deputy Commissioner's staff transmitted to the acknowledgment staff the correspondence received from Muwekma's attorney, plus a letter from Representative Lofgren in support of "expedited procedures" for Muwekma (Lofgren 1/12/2001 in [Doc. #259]), with a notation to file the letters because they had "been taken care of" by the Deputy Commissioner or Acting Assistant Secretary (transmittal note 1/29/2001 [Doc. #259]). It is not clear from the documentary record how Muwekma was informed of the Department's position. The available evidence demonstrates that the Department heard

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<sup>10</sup> *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76 (D. D.C. 2002).

the argument on Muwekma's behalf by its attorney, but did not take the action he requested. At the approximate time of the Lower Lake decision, and under the same administration, the Department again declined to treat Muwekma as if its situation were similar to that of Lower Lake.

The District Court ordered the Department, at Muwekma's request, to begin to evaluate the petition under the regulations by February 12, 2001. Muwekma then contended, in a cover letter to its petition submission dated February 9, 2001, both that it "must be examined under the criteria in 25 CFR § 83.8" of the regulations and that it was "entitled to reaffirmation apart from BAR [Branch of Acknowledgment and Research] proceedings" (Cambra 2/9/2001, pp.1, 2 [Doc. #260]). Muwekma cited the Lower Lake and Ione cases as "precedents" it claimed rebutted the Department's "proposition that all previously recognized tribes must obtain recognition through the BAR process" (Cambra 2/9/2001, p.3, n.2 [Doc. #260]).<sup>11</sup> This presentation noted these two cases as authority for the Department to exempt Muwekma from the acknowledgment process, but did not contend that Muwekma was similarly situated to Ione and Lower Lake except to refer to Lower Lake as a "previously recognized" tribe and to Ione as "reaffirmed." Thus, Muwekma advanced no claim to an exemption from the regulations except for a finding of previous acknowledgment.

In its submission for the final determination, dated January 24, 2002, Muwekma asserted that its "trust relationship" with the United States had "never dissolved" ("Overview," p.1, enclosed with Cambra 1/25/2002 [Doc. #268]). "Rather," it argued, the evidence showed that Muwekma had "survived and maintained the core attributes of an Indian tribe," thus describing the Federal relationship in terms of the regulatory requirement of continuous existence. Muwekma also asserted that the BIA had "abandoned its trust responsibility" ("Overview," p.7 [Doc. #268]). Its statement that Muwekma deserved to "be reaffirmed," however, was contained in a sentence about what it perceived to be the Federal Government's duty "in the recognition process" ("Overview," p.1 [Doc. #268]). Thus, this petition submission cast the "reaffirmation" of Muwekma in terms of acknowledgment through the regulatory process. At this stage of the process, Muwekma did not expressly request treatment similar to Ione and Lower Lake through an exemption from the regulations.

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<sup>11</sup> Muwekma also noted that two Alaska groups were "reaffirmed" as part of the Lower Lake decision in 2000 and cited Departmental decisions relating to the Delaware Tribe in 1996 and the Kickapoo Traditional Tribe of Texas in 1989. While the Assistant Secretary's 2000 reaffirmations of the two Alaska groups do not expressly state it, the Department had been treating their cases as appeals from being left off the 1993 Federal Register list (58 Fed. Reg. 54,364 (Oct. 21, 1993)(Jordan 6/4/1998 [Doc. #233]; Jordan 1/26/1999 [Doc. #235]; Roberts 10/22/1993 [Doc. #152]; Aschenbrenner 3/2/1995 [Doc. #177]). The Solicitor's opinion on the Kickapoo did not recognize a tribe, but interpreted an Act of Congress in 1983 that allowed the Texas Kickapoo to organize as a separate tribe (P.L. 97-429, 96 Stat. 2269). The decision to list the Delaware as a federally recognized tribe has been reversed by the 10<sup>th</sup> Circuit Court of Appeals (389 F.3d 1074, 10<sup>th</sup> Cir. 2004).

**Summary as to refusal to waive the regulations for Muwekma**

Muwekma asked for "immediate" reaffirmation and, in 2001, for reaffirmation "apart from BAR proceedings," but the only claim it made that it merited such action was that it had previous Federal acknowledgment. The Ione and Lower Lake reaffirmations, however, were not grounded on previous acknowledgment. Muwekma's claim to be similar to Lower Lake was made just before the Court ordered the Department to begin an evaluation of Muwekma's petition under the regulations. Muwekma's comparison cited factors, such as previous acknowledgment, lack of termination, and individual claims eligibility, that were considered in the evaluation under the regulations. The minimal comparison Muwekma offered of its similarity to Lower Lake did not rely upon the reasoning of Assistant Secretary Gover's decision. Because Muwekma did not argue that its situation was similar to that of Ione, there was no need for the Department to evaluate such a comparison.

The Department explained to the Muwekma petitioner that the Department's position of requiring a demonstration of continued tribal existence since last Federal recognition was based on both legal precedent and the provisions of the acknowledgment regulations. The Department explained to the petitioner that the Department's regulations provided for evaluation of previously acknowledged groups. Previous Federal acknowledgment, therefore, was not a basis for an exemption from the regulations. Other petitioners with a preliminary determination that they had previous acknowledgment were evaluated within the regulatory process, and Muwekma received the same treatment as those similarly situated petitioners.

Muwekma was treated differently from Ione and Lower Lake because its situation was different from the situation of those two groups. Muwekma was treated similarly to other petitioners that received a finding of previous Federal acknowledgment because its circumstances were similar to their circumstances. Muwekma received the treatment and evaluation it merited as a petitioner with a finding of Federal previous acknowledgment. No exemption from the regulatory process was due Muwekma because of the finding of previous Federal acknowledgment. The Department processed the Muwekma petition properly and treated the Muwekma petitioner fairly.

**Waiver or exceptions to 25 CFR Part 83**

**Is the Department permitted to waive or make exceptions to its acknowledgement regulations, 25 CFR Part 83?**

The Department's general regulations relating to Indians, Title 25 of the Code of Federal Regulations (CFR), provides that the Secretary may waive any of the regulations when he determines that it is in the "best interests of the Indians." The regulations provide:

Notwithstanding any limitations contained in the regulations of this chapter [I], the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I [Parts 1 to 301] of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians. (25 CFR § 1.2)

Therefore, the Secretary or those with proper delegated authority can waive the provisions in the Department's acknowledgement regulations, 25 CFR Part 83. Logically, the authority to waive the regulations would include waiving them in whole or in part.

If it is otherwise permitted by law, the Secretary's authority to waive or make exceptions to the regulations is limited only by the general requirement that the waiver be in the best interests of the Indians. The Secretary has broad authority to handle all public business related to Indians (43 USC § 1457). Thus, we believe that the Secretary is permitted by law to take any actions he deems necessary and proper in handling public business related to Indians that are not otherwise prohibited. Absent a prohibition in the law, the Secretary's authority to waive or make exceptions to the regulations is limited, therefore, only by the general requirement that the waiver be in the best interests of the Indians.

The question becomes who are the Indians that the Secretary must consider in making his determination of the best interests. The Indians whose interests the Secretary must consider are all the Indians who will be affected by any waiver or exception. The best interests of the Indians can not be determined exclusively by the interests of the Indians seeking a waiver of the regulations or and exception to them. Presumably, Indians would only seek a waiver of the regulations if it was in their best interests. Therefore, to say that a petitioner is the only group that the Secretary must consider in making his determination of the best interests is to render the best interests standard meaningless. The universe of Indians that the Secretary must consider in making his determination of best interests under the acknowledgment regulations is the other acknowledgment petitioners and recognized Indian tribes that may be directly affected by the proposed waiver or exception action.<sup>12</sup>

The Secretary has waived the regulations as to procedural requirements in a number of instances to consider two petitioners with closely related histories at the same time even though one of the petitioners was lower on the list of those petitioners "Ready, Waiting for Active Consideration" (Ready List). Also, for example, during the course of the earlier litigation involving the Muwekma petitioner, the Secretary waived the regulations to provide that any petitioner that had a preliminary determination of

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<sup>12</sup> *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1101 (D.C. Cir. 2003)(district court erred in requiring the Secretary to issue a final decision on Mashpee petition for acknowledgment as an Indian tribe within one by disregarding the importance of "competing priorities.").