



MUWEKMA OHLONE INDIAN TRIBE

OF THE SAN FRANCISCO BAY AREA REGION

'Innu Huššištak Makiš Mak-Muwekma *"The Road To The Future For Our People"*

September 24, 2013

TRIBAL CHAIRPERSON
ROSEMARY CAMBRA

TRIBAL VICE CHAIRPERSON
MONICA V. ARELLANO

TRIBAL COUNCIL
HENRY ALVAREZ
DOTTIE LAMEIRA
JOANN BROSE
GLORIA E. GOMEZ
ROBERT MARTINEZ, JR.
RICHARD MASSIATT
SHEILA SCHMIDT
CAROL SULLIVAN
KARL THOMPSON (TRES)
FAYE THOMPSON-FREI

TRIBAL ADMINISTRATOR
NORMA E. SANCHEZ

The Honorable Kevin Washburn
Assistant Secretary – Indian Affairs
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

Re: Proposed Amendments to 25 C.F.R. Part 83 – 1076-AF18

Horše Tuuxi Assistant Secretary Washburn:

As the Chairwoman of the Muwekma Ohlone Indian Tribe, I want to thank you for your work at reforming the Federal acknowledgement process codified at 25 C.F.R. Part 83. Your assessment of the process during your March 19, 2013 testimony before the House of Representatives Subcommittee on Indian and Alaska Native Affairs was correct: it is expensive, inefficient, burdensome, intrusive, less than transparent, and certainly unpredictable. I add that it is unjust because it delays and denies recognition to deserving tribes. Improving the acknowledgment procedure for tribes is compelled by the UN Declaration on the Rights of Indigenous Peoples and the trust responsibility which both require the government to protect the rights of unrecognized tribes to self-determination and from the forces of assimilation.[*See* Articles 3, 5, 8 and 11.] The clearest means for fulfilling these obligations with respect to unrecognized tribes is by establishing or reaffirming the government-to-government relationship in appropriate circumstances. We sincerely appreciate your efforts to reform the process, and are pleased to share with you our preliminary thoughts on both the process and your proposed revisions to 25 C.F.R. Part 83 set out in the preliminary discussion draft.

A. Brief History of the Muwekma Ohlone Tribe

The Muwekma Ohlone Tribe has a deep interest in the government's acknowledgement policy as it has been struggling to restore its formal recognition for decades. The Muwekma Ohlone Tribe is the present day successor of the Verona Band of Alameda County, which maintained a government-to-government relationship with the United States at least as late as 1927. The members of the Tribe are the descendants of the native peoples who occupied the southern, eastern and western regions of the San Francisco Bay area from time immemorial, including all of the present day counties of San Francisco, San Mateo, Alameda, Santa Clara and Contra Costa.

During the late 18th and early 19th centuries, Spanish missionaries forced our ancestors into Missions Dolores, San Jose and Santa Clara. With the secularization of the Mission system in the 1830s, our ancestors were excluded from the Missions and settled in a number of rancherias in Alameda County, including the Alisal Rancheria near Pleasanton, the Del Mocho Rancheria near Livermore, the El Molino Rancheria near Niles, as well as other rancherias in Sunol and San Leandro/San Lorenzo.

While the treatment of California's native population under Spanish and Mexican authority was intolerable, the situation became much worse when Mexico ceded California to the United States under the Treaty of Guadalupe Hidalgo in 1848, and gold was discovered in California. In fact, from its entry into the Union, California's official Indian policy, which was supported by the federal government, can only be described as a policy of subjugation and extermination.¹ As the first U.S. census for California in 1850 showed, during the first two years under American jurisdiction, the Native population of California dropped from an estimated 148,000 to barely over 32,000.

The history of the 18 California Indian treaties submitted for Senate ratification on June 1, 1852 is well known. Under pressure from California's Congressional delegation the Senate rejected these treaties in 1852, and a veil of secrecy was imposed that was not lifted until 1905.

The BIA appointed Special Agent Charles E. Kelsey to compile a census of landless Indians in northern California Indians in 1905. That census documented the Muwekma communities located at Niles and Pleasanton in Alameda County. In 1906 the Congress began appropriating funds for the purchase of land for landless California Indians, and in 1914 the BIA designated the Verona Band as a tribe eligible for land purchase. In 1923 the Reno Agency of the BIA recognized that the Verona Band came under federal jurisdiction. In 1927 Special Agent Dorrington found the Verona Band eligible for land acquisition but did not acquire land for the Tribe. Agent Dorrington did little in regard to purchases of lands for homeless Indians in later years as well and refused to respond to multiple inquiries from the Commissioner about such matters. In 1928 Agent Dorrington reported that he would not purchase additional lands for Indians until Congress provided funds for the maintenance and improvement of the lands already purchased. In 1930 in a letter to the Commissioner of Indian Affairs, Agent Dorrington expressed the view that the Department should cease purchasing land for tribes. In 1931 Oscar H. Lipps, Dorrington's successor, wrote that "the Government has been woefully negligent and inefficient" critically of the implementation of the land purchase program. Indeed, Dorrington's decision refusing to provide a home for the Band was a violation of the trust duty and the government-to-government relationship between the Band and the United States. In the 1940s and 1950s, BIA officials in California began advocating for termination of tribes – ushering in

¹ See An Act for the Government and Protection of the Indians, April 22, 1850 (California's first law legalizing the enslavement of Indians); Clifford E. Trafzer and Joel R. Hyer, *Exterminate Them* 19 (Michigan State University Press, 1999)(quoting California Governor Peter Burnett's 1851 Annual Message to the California Legislature that "a war of extermination will continue to be waged between the races until the Indian races become extinct . . ."); see also Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians* 15 (2002) (available at <http://www.library.ca.gov/crb/02/14/02-014.pdf>).

the termination era of the 1950s, in which the government pursued a policy of terminating tribes and eliminating the BIA's role in Indian affairs in California.²

No Act of Congress, no court, and no prior executive action ever purported to terminate Muwekma's federal recognition after 1927. OFA's own findings show tribal continuity from 1927 to the present – including evidence of tribal community, social interaction and external identification as a tribe. OFA also confirmed that, as of 2002, 99% of the current members of Muwekma are direct descendants of the members of the recognized Verona Band. At least nine individuals from the Verona Band were still alive and part of the Muwekma community in 1989, when Muwekma wrote to OFA about federal recognition.

Muwekma has engaged in a long struggle to vindicate its continuing right to a government-to-government relationship. Following Interior's instructions given in 1989, Muwekma gathered the extensive materials and, in 1995, submitted with "thousands of pages" of "primary and secondary source documents" in support of a Part 83 petition.³ OFA concluded in 1996 "that the Pleasanton or Verona Band of Alameda County was previously acknowledged by the federal government between 1914 and 1927."⁴ In 1998 OFA placed Muwekma's Part 83 petition "on the list of petitions ready for consideration."⁵ However, considering the rate at which OFA was considering Part 83 petitions, the Tribe calculated that it could be more than twenty years before OFA decided Muwekma's petition.⁶ In 1999 Muwekma filed suit, asking that court to order Interior to act on Muwekma's petition within one year. Interior argued that the Department had the exclusive right to determine when it would consider such petitions.⁷ The court rejected this argument and ruled in favor of the Tribe, noting that the Federally Recognized Indian Tribe List Act "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."⁸ The court emphasized that federal recognition provides a tribe with health care and other human needs,⁹ and that other previously recognized tribes had been restored to the list of recognized tribes without going through the Part 83 procedure.¹⁰ The court

² Advisory Council on California Indian Policy Termination Report – The Continuing Destructive Effects of the Termination Policy on California Indians 5 (Sept. 1997) ("The BIA in California launched a massive effort to convince Congress that all of the California Indians residing on trust lands were ready for termination.").

³ *Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 109 (D.D.C. 2006).

⁴ *Id.* at 110.

⁵ *Id.*

⁶ *Muwekma v. Babbitt*, 133 F. Supp. 2d 30, 40 (D.D.C. 2000).

⁷ *Id.* at 33-34.

⁸ *Id.* at 37-38.

⁹ *id.* at 39-40

¹⁰ *Id.* at 37

held that the BIA should address in the first instance issues related to the reaffirmation of other tribes outside Part 83.¹¹ BIA issued a final determination in 2002 finding that Muwekma satisfied criteria (d), (e), (f) and (g) but nevertheless denying Muwekma's petition. The decision did not address the Department's recognition of Lower Lake and Ione outside of Part 83, or Muwekma's request for similar treatment. Nevertheless, the courts denied the Tribe's claims for judicial review of the BIA decision.¹²

B. Comments

1. A Process Unique for California Is Required.

Reform of Part 83 must include a solution tailored to the unique circumstances of California Indians. While Indian tribes in all regions of the country have historically been subjected to harsh policies intended to destroy tribal communities and deprive them of their lands and culture, the history of Indian policies in California have had uniquely tragic effects. In the Advisory Council on California Indian Policy Act of 1992, P.L. 102-416 § 2(2) Congress found "due to the unique historical circumstances of the Indians of California, Federal law and policies have often dealt specifically with California Indians."

After years of hearings and careful, detailed study, the Advisory Council concluded that the process in Part 83 is not appropriate for California tribes and that it fails to account for federal and state policies that contributed to the destruction and repression of California Native people.¹³ The report states:

Several historical events create a need for California-specific solutions to the California tribes' status issues: (1) the federal government's negotiation of eighteen treaties with California tribes during the 1850's and the Senate's refusal to ratify those treaties; (2) the 96% reduction in the population of California's tribal people brought by the onslaught of white miners and settlers during the Gold Rush era and the drive for statehood for California; (3) the BIA's creation of lists or "rolls" of California Indians for purposes of distributing land claims judgments; (4) the federal government's provision of services to "the California Indians" as a group, including creation of public domain allotments for many California Indians who were not settled on rancherias or reservations; and (5) the termination of 44 California tribes during the 1950s and 1960s. Moreover, there has always been, and continues to be, a blatant federal neglect of the California tribes. As a result of these events, the federal government's relationship with the tribes is unique, which suggests that California tribes should not be subjected to the existing process for achieving tribal recognition.

¹¹ *Id.* at 38.

¹² *See Muwekma Ohlone Tribe v. Salazar*, 708 F. 3d 209 (D.C. Cir. 2013).

¹³ Advisory Council on California Indian Policy, Final Reports and Recommendations - Executive Summary 20 (Sept. 1997).

Rather, a process should be established that takes the unique needs and special circumstances of California Indian groups into account.¹⁴

As a member of the Advisory Council's Recognition Task Force, I participated in the preparation of the Report on Federal Recognition. The simple fact that only one California petitioner has successfully secured federal recognition through Part 83 strongly suggests that the process is simply inappropriate for California petitioners, and unfortunately, I am concerned that the proposed changes to Part 83 may not fix such a defective system.

Before finalizing any draft regulations, your office should identify those members of the Recognition Task Force still involved in acknowledgement issues, and invite those individuals to meet in Washington D.C. to discuss how to implement the recommendations contained in the Recognition Task Force Report, which should involve, at a minimum, (i) a special section within OFA dedicated solely to California petitioners, and (ii) a regulatory framework uniquely applicable to California petitioners consistent with the recommendations contained in the Recognition Report. I have spoken with several of my former colleagues on the Recognition Task Force, and the general consensus is that your efforts to revise the regulatory process is a most welcome development, and members of the Task Force would welcome the opportunity to share our knowledge and experience with your office in the hope of finally developing a uniquely California solution to the recognition process.

2. 1934 Is an Appropriate Start Date for Evidence of Tribal Status.

The discussion draft proposes to change to 1934 the beginning date of the period for which evidence of community and political authority is required under Section 83.7(b) and (c). The Tribe supports this proposal because 1934 corresponds to the enactment of the Indian Reorganization Act (IRA). The IRA represents a 180-degree turnabout in Federal Indian policy. The government's pre-1934 assimilation policy affirmatively sought to destroy tribal governments and their property rights, assimilate individual Indians into non-Indian society, by, *inter alia*, discouraging and, sometimes prohibiting outright, expressions of Indian culture and identity. In contrast, the IRA marks the beginning of the modern self-determination policy intended to protect Indian lands and support tribal governments. Requiring tribes to document continuing tribal existence in the face of government attacks on that very existence during the period before 1934 is unfair and contrary to the trust duty and today's self-determination policy.

Such a change is particularly important for California petitioners for, as the Advisory Council found, the IRA "represented the first, time, since the pre-treaty era, that California tribes were encouraged to function openly and publicly."¹⁵ Prior to 1934 federal and state policies "prohibited or discouraged essential elements of tribal authority and culture."¹⁶ In California the federal assimilation policy was compounded by anti-Indian policy specific to California. For example, "genocide and California state laws which indentured Indians and discriminated against them during the latter half of the 19th century resulted in wide geographic dispersal of tribal

¹⁴ Advisory Council on California Indian Policy, The ACCIP Recognition Report - Equal Justice for California 9 (Sept. 1997).

¹⁵ Advisory Council on California Indian Policy Report, Reports and Recommendations - Executive Summary 23 (Sept. 1997).

¹⁶ *Id.* at 22.

members.”¹⁷ These policies together “created conditions in California . . . that made it impossible, or extremely dangerous or difficult, for most California Indian tribes . . . to freely or publicly engage in tribal relations or to identify themselves as Indians.”¹⁸

The proposed change to 1934 also conserves precious resources of tribes and the Department that otherwise would be expended in gathering, presenting and evaluating evidence related to earlier historical periods.

OFA must take account of the efforts World War II on petitioners’ ability to document their existence in the 1940s and early 1950s. Evaluation of California petitioners must also account for the obstacles imposed by the limited federal services provided in California and the government’s failure to provide land or otherwise serve so many Native communities in California, as discussed *supra* at 2.

3. Tribes Denied Previously Should Be Able to Re-Petition Under New Regulations - Section 83.10(r)

The discussion draft proposes to provide that “[a] petitioner that has petitioned under this part . . . that has been denied Federal acknowledgement may not re-petition to OFA under this part unless its request for re-petitioning proves, by a preponderance of the evidence, that a change from the previous version of these regulations to the current version of the regulations warrants reversal of the final determination.” The Tribe supports the inclusion of this provision. The discussion draft proposes substantial changes to the acknowledgement procedures and criteria.

Giving unsuccessful petitioners the opportunity to demonstrate that they qualify under the revised regulations is consistent with principles of fairness, justice and the federal trust obligation. However, the Tribe proposes revisions to this provision to ensure that it is fairly implemented.

- a. The AS-IA (rather than OFA) should evaluate requests under this provision to re-petition because such a determination should be made at the same level as the prior decision.
- b. An AS-IA decision denying a request to repetition under this provision should be appealable *de novo* to Interior’s Office of Hearings and Appeals (OHA). The preponderance of the evidence standard requires the decision maker to weigh evidence which decisions should be subject to review.¹⁹ OHA should be given the opportunity to correct any errors in a denial of a request before it can be reviewed by the courts.

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 22.

¹⁹ See *Metropolitan Stevedore Company v. Rambo*, 521 US 121 (1997); *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2003); *Kennedy v. Southern California Edison Company*, 268 F.3d 763 (9th Cir. 2001); *Kosakow v. New Rochelle Radiology Associates*, 274 F.3d 706, 711 (2nd Cir. 2001).

- c. A petitioner that is permitted to re-petition under this provision should receive the benefit of prior favorable determinations, including findings of previous recognition and of satisfaction of a criterion, in whole or part. There is no reason to expect that the outcome on such findings would be different on re-petitioning. Furthermore, it conserves limited resources of petitioners and the Department.

Based on the comments above, the Tribe suggests replacing the last sentence of Section 83.10(r) in the discussion draft with the following:

A petitioner seeking to re-petition under the revised regulations must submit a written request to the AS-IA with a concise statement and supporting evidence. If the AS-IA grants a request, the AS-IA will notify the petitioner in writing that the final determination is reversed, and the petitioner is authorized to submit a new petition to OFA. The petitioner may appeal a denial of a request made under this Section to OHA under a *de novo* standard of review. A decision by OHA affirming a denial under this section shall be final for the Department. A petitioner that re-petitions pursuant to this section shall benefit from any favorable finding made in the prior decision under this Part, including, but not limited to, a finding of previous acknowledgment and a finding that the petitioner satisfied a criterion in whole or in part, and the petitioner shall not be required to present evidence with respect to such a finding, and OFA shall not revisit such a finding.

4. Prior Finding of Previous Acknowledgment Should Be Conclusive on Re-Petition - Section 83.8(b)

Consistent with the comments in Part B.3, the Tribe recommends the addition of the following at the end of Section 83.8(b): “A determination of previous Federal acknowledgment in a prior decision issued under this Part shall be binding and conclusive on re-petition pursuant to Section 83.10(r).”

5. Expedited Favorable Determination - Section 83.10(g)(3)

Section 83.10(g)(3)(ii) providing for an expedited favorable determination should be revised to read: “The United States has held land for the group or found it eligible for land at any point in time since 1934.” There are instances in which the government has found a tribe eligible for land but did not provide land even though a government-to-government relationship existed. For example, while the BIA found the Ione Band of Miwok eligible for land in 1914, it did not purchase land. While the BIA did not treat Ione as recognized for decades thereafter, in 1994 the Assistant Secretary reaffirmed Ione outside the Part 83 process. Implicit in the 1994 reaffirmation decision was that the determination of eligibility for land was premised on an existing government-to-government relationship. The government’s failure to set aside land for a Tribe should not prevent the tribe from receiving an expedited favorable determination.

6. Criteria for Previously Recognized Tribes - Section 83.8(d)

The discussion draft proposes to require previously recognized tribes to satisfy criteria (b) and (c) for the present, but not before. (Previously recognized petitioners still must satisfy criteria (d), (e), (f) and (g)). This approach strikes a reasonable balance between the trust obligation and the Department’s need to ensure that a tribe that was previously recognized has continued its status. The federal trust duty attached to a tribe when it was previously recognized.

If a tribe demonstrates its status at present, then the proposed change presumes continuing tribal status from the date of prior recognition until just before present.

In the absence of evidence of intentional tribal dissolution or congressional termination, the omission of a previously recognized tribe from the list of federally recognized tribes implies an error and failure by the federal government to maintain and protect the government-to-government relationship that was established when the tribe was previously recognized. Such a failure was a breach of the government’s fiduciary duty to the tribe. The United States, including the Department of Interior, has a fiduciary duty to protect its government-to-government relationship with tribes. The courts have applied the trust responsibility to assessing the scope of services to be provided to tribes,²⁰ and to questions involving tribal status.²¹ Congress has likewise repeatedly reaffirmed the breadth of its trust responsibility to tribes. The trust responsibility as specifically addressed by Congress includes health, housing, education, cultural preservation, economic development and the protection of tribal governmental authority.²² Implicit in all of these must be the duty of the government to maintain that underlying federal recognition for each acknowledged tribe, or else the other listed duties would be meaningless.²³

The Advisory Council on California Indian Policy found that recognition of tribes pursuant to the homeless Indian appropriations acts established a trust relationship.²⁴ Congress expressly acknowledged the trust relationship with California tribes when it enacted the California Rancheria Act, which provided for the termination of California tribes and those fiduciary obligations, but only on terms governed by the Act.²⁵

²⁰ *McNabb v. Bowen*, 829 F.2d 787, 789, 794-795 (9th Cir. 1987) (under trust doctrine federal government may not abandon Indians and refuse health services).

²¹ For example, in *Angle v. United States*, 709 F.2d 570, 574-75 (9th Cir. 1983), the Ninth Circuit found that the California Indian Judgment Act established a trust between the United States and all the California Indians as collective “tribes, bands or groups.”

²² *See, e.g.*, No Child Left Behind Act of 2001, 20 U.S.C. § 7401; Tribally Controlled School Grant Act, 25 U.S.C. § 2502(e); Higher Education Amendments of 1992, 25 U.S.C. § 3302(7); Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. § 2401(1) and (2); Indian Health Care Improvement Act, 25 U.S.C. § 1601(a). For example, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n, requires the federal government to provide many benefits to federally recognized tribes, 25 U.S.C. § 450b(e), while strongly and explicitly upholding the trust relationship in carrying out these duties. *See, e.g.*, 25 U.S.C. § 450n.

²³ *See also* 25 U.S.C. § 476(f) (prohibiting federal agencies from taking any action that “classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes”).

²⁴ Advisory Council, *The ACCIP Recognition Report: Equal Justice for California* 18 n.75 (1997).

²⁵ *Duncan v. Andrus*, 517 F.Supp. 1, 2-3, 6 (N.D.Cal. 1977).

As noted, a presumption of continuing status from the date of last recognition until the present (when the petitioning tribe must satisfy criteria (b) and (c)) compensates for the government's failure to protect and preserve the government-to-government relationship with the tribe. The Department relies on the same presumption in determining whether a tribe was "under federal jurisdiction" in 1934, and is thus eligible to acquire land in trust under the Indian Reorganization Act. In ruling on the Cowlitz Tribe's application for trust land acquisition, the Department explained that where a tribe is found to have been under federal jurisdiction prior to 1934, "the Federal Government's failure to take actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status," and "the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934."²⁶ The same analysis was applied by the Department in its 2011 determination that the Tunica-Biloxi Tribe was under federal jurisdiction in 1934. The Department concluded that the Tribe's jurisdictional status remained intact in 1934, because "[d]espite occasional misstatements by Department officials, no action of the Federal Government has ever abrogated its treaty obligations under the Treaty of Paris and no action of the Federal Government has ever terminated its relationship with and obligations to the Tribe."²⁷ Under these decisions, tribal status is presumed to have continued in the absence of affirmative evidence that the tribe was dissolved.

That presumption also recognizes that historically, including during the period since 1934, the BIA played a dominant role in tribal affairs, and that its decisions, whether right or wrong, controlled those affairs.²⁸ As a result, when the government's own administrative error is the reason a tribe was no longer recognized, it would be unfair to require a tribe to demonstrate continued tribal status throughout the period of federal neglect. A tribe cannot fairly be asked to bear the burden of correcting a federal error that is contrary to law, as well as to congressional policy. That is, Congress alone has authority to terminate a tribe; Interior has no such authority. As the Supreme Court long ago explained:

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*

²⁶ Record of Decision Trust Acquisition, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington for the Cowlitz Indian Tribe 95 (Apr. 2013).

²⁷ Letter dated 8/11/11 from Regional Director to Hon. Earl Barbry, Sr., Chairman, Tunica-Biloxi Tribe of Louisiana at 4. The Regional Director also stated that "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." *Id.* at 2. The Department emphasized again that "the absence of any probative evidence that a tribe's jurisdictional status was terminated prior to 1934 would strongly suggest that such status was retained in 1934." *Id.*

²⁸ See *Carciere v. Salazar*, 555 U.S. 379, 398-399 (2009) (Breyer, J., concurring) (noting erroneous Departmental finding that a tribe was dissolved, and recognizing that a tribe may have been under federal jurisdiction in 1934 "even though the Federal Government did not believe so at the time").

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. W. Inv. Co.*, 221 U.S. 286, 315 (1911).²⁹ Congress reaffirmed its sole authority to terminate tribes when it enacted the Federally Recognized Indian Tribe List Act of 1994.³⁰ Moreover, the impetus for that reaffirmation included Congress' finding that the BIA was exceeding its authority under federal law by attempting to administratively terminate certain tribes. As the House Natural Resources Committee explained in a report:

25 C.F.R. § 83.5 requires the Department to publish in the Federal Register, not less than every three years, a list of all Indian tribes entitled to receive services from the BIA by virtue of their status as Indians . . . While the Department clearly has a role in extending recognition to previously unrecognized tribes, it does not have the authority to "derecognize" a tribe. However, the Department has shown a disturbing tendency in this direction. Twice this Congress, the Bureau of Indian Affairs (BIA) has capriciously and improperly withdrawn federal recognition from a native group or leader.³¹

More fundamentally, denying recognition to tribes that survived despite the Bureau's improper actions would endorse past violations of law and policy.³² Conversely, applying a presumption for previously recognized tribes which are not recognized today due to federal failures would right a grievous wrong in a manner consistent with congressional policy.³³ The proposed revisions to Section 83.8(d) are therefore essential to correct injustices.

²⁹ Even when Congress acts, the courts will not infer termination or abrogation of tribal status or rights unless Congress makes its intent to do so express. *United States v. Dion*, 476 U.S. 734, 738-40 (1986) (congressional abrogation of treaty rights must be clear and plain); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968) (congressional intent to abrogate treaty rights must be explicit); *Chippewa Indians of Minn. v. United States*, 307 U.S. 1, 5 (1939) (congressional intent to terminate guardianship of tribes must be clear).

³⁰ Pub. L. No. 103-454, 108 Stat. 4791 (1994), codified as amended at 25 U.S.C. § 479a-1 and note.

³¹ H.R. Rep. No. 103-781, at 2 (1994) (emphasis added). The Department itself, through the Interior Board of Indian Appeals, has recognized 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 IBIA 158, 166 (1998).

³² See also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 669 n.14 (1979) (The decline in Indian exercise of tribal fishing rights due to illegal regulation and illegal exclusionary tactics by non-Indians had no legal effect on those).

³³ See *State of Fla., Dep't of Bus. Regulation v. U.S. Dep't of Interior*, 768 F.2d 1248, 1250 (11th Cir. 1985) (Department waived regulations in trust land acquisition because of cultural significance to tribe of proposed use of land and consistency of use with Congressional policy).

Also, Section 83.8(d)(2) and (3) should be revised to clarify that the phrase “at present” means the date on which the previously acknowledged tribe files a petition under the revised regulations.

7. Extent of tribal participation – Section 83.7(b)

a. The discussion draft proposes to change to a specific but unstated percentage the requirement that a petitioning tribe demonstrate that a “predominant” portion of the tribe is a distinct community. We agree that requiring evidence that a “predominant” portion of a petitioning tribe satisfy the criterion for distinct community requires too much as it fails to account for the disruptive effects of federal Indian policies aimed at destroying tribal communities and tribal cultures. It also fails to recognize that tribal communities, like most small subordinated communities in the United States, are diverse, with multiple religions and distinct social patterns and that they are vulnerable to economic forces that can break up small and poor communities.

However, rather than establishing a precise threshold in percentage terms for such a showing, the Tribe proposes that the criterion be revised to require a showing of a “significant” portion. Such a requirement would be consistent with Section 83.7(b)(1)(i) – (iv) and (vii) which require a showing of “significant” social ties and cultural patterns. It would also be consistent with the real circumstances of petitioning tribal communities, particularly in the modern era. At the same time, it would continue to require a showing of a social and cultural distinctness.

b. The discussion draft proposes to change the requirement in Section 83.7(b)(2)(i) – (iii) that 50 percent of a petitioning tribe live together, intermarry or maintain distinct cultural patterns in order to satisfy criterion (b) at a given point in time. For the reasons stated above, the Tribe agrees that 50 percent is unreasonably high. The Tribe proposes that the threshold be reduced to 30 percent. A 30 percent threshold for residential living, intermarriage and distinct cultural patterns – all of which are important indicators of community – would provide adequate evidence that the community has a critical mass of its citizens who closely interact and provide a basis for social and political continuity.

8. The AS-IA Should Issue Final Decisions, and OHA Should Conduct Hearings Requested by Petitioning Tribe – Section 83.10(k) – (p)

The discussion draft proposes that OHA, rather than AS-IA issue final determinations and that a petitioning tribe or interested party have the opportunity to request a hearing on the petition. The Tribe proposes that AS-IA issue final determinations, but that OHA conduct any hearings and issue a recommended decision at the conclusion of a hearing. The reasons are set forth below.

Recognizing a tribe or withholding recognition are important decisions that involve policy judgments that the Secretary should not delegate to administrative law judges.

Principles of fairness and, in some cases, the law (due process) require that before denying recognition to a tribe, the Department to hold a hearing and permit the tribe to present evidence to a decisionmaker and cross-examine witnesses against its petition.

However, only tribes should be able to request a hearing. Other parties do not have the same interest in opposing recognition as a tribe has in securing or reaffirming it. The proposed text in Section 83.10(n)(2) permitting an interested party to request a hearing should be deleted.

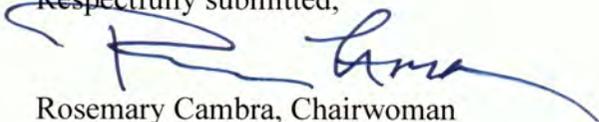
Finally, OHA should conduct hearings as it has infrastructure and expertise necessary to do so, while AS-IA does not have the time or resources for hearings.

C. Conclusion

As the elected Chairwoman for my Tribe, this matter is of utmost importance to my People and me. Should you have any questions I can be reached at (408) 314-1898 or via email at rcambra@muwekma.org. The Vice Chairwoman, Monica V. Arellano can be contacted at marellano@muwekma.org and our Tribal Administrator Norma Sanchez can be reached at nsanchez@muwekma.org and her telephone number is (408) 616-0442.

The Tribe looks forward to continuing efforts at reform of the acknowledgment process. It is a matter of justice for Indians in California and elsewhere. Kiš horše 'ek-hinnan 'ayye 'uṭaspu méene.

Respectfully submitted,



Rosemary Cambra, Chairwoman
Muwekma Ohlone Tribe
PO BOX 360791
Milpitas, CA 95036

cc:
Muwekma Tribal Council

**THE ACCIP TERMINATION REPORT:
THE CONTINUING DESTRUCTIVE EFFECTS OF
THE TERMINATION POLICY ON CALIFORNIA
INDIANS**

**A Report by the
Advisory Council on California Indian Policy
September, 1997**

TABLE OF CONTENTS

Summary	1
Recommendations	2
I. Introduction	6
II. The Historical Context of the Termination Policy in California	7
III. History of the California Rancheria Act	9
IV. Implementation of the Act	12
A. The failure to properly fund and plan the termination process	13
B. The failure to ensure that the rancheria distribution plans actually met the Indians' needs and that water and sanitation facilities were provided as promised	15
C. The failure to ensure that termination would not occur until the specific requirements of the Rancheria Act and the individual rancheria distribution plans had been met	16
V. The Trust Obligations of the Federal Government in the Termination Process	16
VI. Efforts to "Un-Terminate" or Restore California's Terminated Tribes	17
VII. The Lingering Effects of Termination on California Tribes	18
A. Effects on Tribes that Remain Terminated	19
B. Effects on Restored Tribes	20
1. The lack of a land base sufficient to support tribal housing and economic development	20
2. Difficulties encountered in reconstituting tribal communities under a unified leadership	20
3. The lack of supplemental "catch-up" funding to address newly restored tribes' inability to effectively compete with tribes that have never suffered termination	21
4. The lack of adequate technical assistance and support services to guide and assist the tribes in the difficult process of restoration	22
Conclusion	22
Endnotes	23

Appendix A. A Comprehensive History of the Rancheria Act

Appendix B. Status of Tribes Listed in the Rancheria Act

LIST OF EXHIBITS

Exhibit 1. The Report of C. E. Kelsey to the Commissioner of Indian Affairs (1906).

Exhibit 2: Excerpts from the Deposition of Leonard M. Hill.

Exhibit 3: Excerpt from the Deposition of Maurice Babby.

Exhibit 4: Memorandum of Sacramento Area Director to Area Indian Advisory Board, dated October 8, 1976.

Exhibit 5: Bureau of Indian Affairs, "Study of Wilton Rancheria."

to include an additional appropriation of \$100,000 to purchase lands for homeless California Indians. The House assented to the Senate amendment, and the bill was enacted as part of the Indian Office Appropriation Act of 1906.³⁰

The 1906 appropriation was followed by similar appropriations on an almost annual basis through 1933,³¹ just prior to the enactment of the Indian Reorganization Act (hereafter "IRA") in 1934.³² That Act delegated specific authority to the Secretary of Interior to acquire land for Indians.³³ The land acquisition program for the homeless California Indians ultimately resulted in the creation or purchase of some 82 rancherias.³⁴ These rancherias, however, did not always provide proper homesites, irrigable land, a water supply, and other necessities. In fact, several rancherias were virtually uninhabitable due to the lack of a fresh water supply.³⁵ Thus, the main goal of the land acquisition program—to provide homeless California Indians with a secure and usable land base—was not realized in most cases. Nevertheless, the lands that were acquired did provide a refuge, if only temporary, and limited means of subsistence to many California Indians. However, because of the poverty, low educational achievement, and the small, isolated nature of the rancheria communities, they became the most vulnerable targets of the termination policy.

III. History of the California Rancheria Act

The IRA and other New Deal legislation generally encouraged tribal autonomy and self-determination of Indian tribes. Beginning in 1944, however, another change in federal Indian policy further aggravated the problems on the rancherias. Forces within the BIA began to propose partial liquidation of the rancheria system.³⁶ At this early date, this recommendation was prompted, in part, by a sincere dissatisfaction with the inherent problems that existed as a result of the way the rancherias were acquired and managed by the federal government.

Following the resignation of Commissioner John Collier in February of 1945, those who favored the rapid, total and—if necessary—involuntary assimilation of Indians into the "mainstream" of dominant white society gained great influence with the BIA.³⁷ Shortly thereafter, termination became the focal point for Congress' federal Indian policy.

The BIA in California launched a massive effort to convince Congress that all of the California Indians residing on trust lands were ready for termination.³⁸ Many of those familiar with the situation of the Indians in California, including Felix Cohen, the great Indian law scholar, disagreed. The Association on American Indian Affairs (AAIA), joined by Mr. Cohen, registered strong dissents with Congress over the process outlined in the early bills for withdrawal of federal responsibility and services in California. The following statement by the AAIA, echoed in letters and statements from many of the California Indians themselves, illustrates the significant break from prior federal Indian policy that termination represented:

The legislation bears internal evidence of a marked change from the enlightened constructive Federal policy in Indian affairs of recent years. The former policy stood for honorable fulfillment of Federal obligations, constructive rehabilitation

**ADVISORY COUNCIL ON CALIFORNIA INDIAN
POLICY
FINAL REPORTS AND RECOMMENDATIONS
TO THE
CONGRESS OF THE UNITED STATES
PURSUANT TO
PUBLIC LAW 102-416**

EXECUTIVE SUMMARY
September, 1997

TABLE OF CONTENTS

I.	Introduction	1
A.	Creation of the Advisory Council on California Indian Policy	1
B.	Context of the Work of the Advisory Council	2
1.	A Federal Pattern of Dishonor and Neglect	2
2.	Federal Awareness of the Situation of the California Indians (1852-1997)	7
3.	The Time for Decisive Federal Action Is <i>Now</i>	16
C.	Major Themes of the ACCIP Reports	17
1.	The Need to Recast the Federal-Indian relationship in California	17
2.	The Need to Formulate a New Federal Indian Policy in California Through a Dialogue Between the Federal Government and the California Indians	17
3.	The Need to Address Specific Substantive Issues Identified in the Advisory Council's Reports	18
D.	The Advisory Council's Proposed Definition of California Indian	18
II.	The Reports And Recommendations	19
A.	The Report on Federal Recognition	20
B.	The Report on Termination	24
C.	The Community Services Report	28
D.	The Report on Economic Development	33
E.	The Report on Trust and Natural Resources	40
F.	The Report on Indian Education	43
G.	The Report on California Indian Cultural Preservation	51
H.	The Report on Indian Health	58

In addition, the Historical Overview report, which provides important historical information on the California Indians and their relations with the federal government, will assist the reader in placing the reports and recommendations in context. What follows is a brief summary of each report, accompanied by a list of the related Advisory Council recommendations. Some recommendations, such as the proposed definition of "California Indian," appear in more than one report because of their importance and relevance to more than one subject area.

A. The Report on Federal Recognition

Summary: At every hearing the Advisory Council conducted, the testimony confirmed that tribal status clarification is a primary issue of concern to California Indians. The term "unacknowledged" refers to those Indian groups whose status as tribes has never been officially "recognized" by the United States or, if recognized in the past, is now denied by the United States. There are more unacknowledged Indian tribes in California than in any other single state.

The current federal acknowledgment process (25 C.F.R. Part 83) is not appropriate for California tribes. Since the procedure was established in 1978, only one California tribe has successfully completed the process. A major problem with the current process is that it requires unacknowledged tribes to prove their status as self-governing entities continuously throughout history, substantially without interruption, as though that history did not include the federal and state policies that contributed to the destruction and repression of these very same native peoples and cultures.

The issue of federal recognition is crucial to all California Indians because its focus is the development of a coherent and consistent federal process for determining which Indian tribes shall be included within the federal-tribal trust relationship. This report discusses the history of federal neglect of California Indians and how that history has led to the current situation of many of the unacknowledged tribes. It also discusses the problems presented by the current federal acknowledgment process, and explains how the proposed "California Tribal Status Act of 1997," or equivalent administrative policy and regulatory changes, will result in a more just procedure for California tribes seeking federal acknowledgment.

The report does not recommend specific tribes for recognition, because the entire recognition process, as applied to California Indians, is flawed. Indeed, the Advisory Council recommends that the Federal Acknowledgment Procedure be modified to ensure that all California tribes seeking recognition are assured of a fair determination of their status.

Recommendations:

- 1. The California Tribal Status Act of 1997 (CTSA) should be enacted to address the unique status problems of California's unacknowledged tribes.**

Discussion: This California-specific legislation contemplates the creation of a Commission

sense for two reasons. First, the advent of a new Indian reorganization policy represented the first time, since the pre-treaty era, that California tribes were encouraged to function openly and publicly. Second, using 1934 as the base date would also eliminate the need to include those provisions mentioned above governing presumptions and allowances for interruptions in continuity of tribal identity and exercise of tribal political influence. For example, a petitioner would have to demonstrate evidence as a distinct Indian group from 1934 to present, and if the character of the group as an Indian entity has from time to time been denied, this would not be considered conclusive evidence that this criterion has not been met. This would be a workable and fair way to apply this criterion to petitioning California tribes.

The Advisory Council recommends that the term “community” be defined more broadly to account for the fact that genocide and California state laws which indentured Indians and discriminated against them during the latter half of the 19th century resulted in wide geographic dispersal of tribal members. Therefore, for California Indian groups, the focus of the term should be on networks of social interaction between group members, regardless of territorial proximity, though the geographic proximity of members to one another and to any group settlement or settlements would still be a factor in determining whether a community exists. Moreover, as long as there is an existing community that can demonstrate descendancy from an Indian group that historically inhabited a specific area, it should suffice.

Finally, the requirement that a “predominant portion” of the membership of the petitioner comprise a community as defined is problematic. The Advisory Council recommends that a “substantial portion” be set as the standard. This standard reflects the unique problems created by wide geographic dispersal and dislocation of California Indian groups.

3. Technical assistance to complete the Federal Acknowledgment Process should be provided to those petitioning California tribes that have requested such assistance.

Discussion: For the past 36 months the Advisory Council has provided state-wide leadership and a forum for tribes to communicate, assist each other and organize resources. It is necessary for this forum to continue. Re-authorization of the Advisory Council is one potential mechanism for ensuring ongoing leadership. A consortium of tribes with adequate funding would be another vehicle.

The lack of available funds to assist the California tribes in completing petitions and developing realistic economic plans is extremely alarming because the Task Force learned at the White House and national meetings of unacknowledged tribes, that other regions with far fewer tribes in need of completing the process have received far more financial support. In the last 36 months, the Recognition Task Force was given a budget of \$25,000 to work on recognition issues and to finalize this report. With this modest sum, the Task Force was able to organize educational meetings and workshops on legislation, attend and represent the California tribes at meetings, as well as gather information from the BAR and tribes to complete this report. This

THE ACCIP RECOGNITION REPORT

Equal Justice for California

A Report by
The Advisory Council on California Indian Policy
September, 1997

TABLE OF CONTENTS

Summary	1
Recommendations	2
Opening Statement	6
I. Introduction	6
A. Tribal Existence v. Federal Recognition	7
B. Evolution of the Term "Federal Recognition"	8
II. A History of Injustice	9
A. The California Indian Treaty Period (1851-1852)	9
B. The Extermination Period (1853-1890)	11
C. The Allotment Period	12
D. The Homeless California Indian Act Period (1906-1933)	12
E. The Indian Reorganization Period and the California Indian Claims Cases (1934-1969)	12
F. The Termination Period (1944-1969)	14
G. The Modern Era	15
III. The Federal Acknowledgment Process—A Continuing Injustice	16
IV. The Draft California Tribal Status Act—An Opportunity to Redress Injustice	19
V. Conclusion	22
Endnotes	24
Appendix A: The Draft California Tribal Status Act	

LIST OF EXHIBITS

- Exhibit 1: Branch of Acknowledgment and Research, "Summary Status of Acknowledgment Cases (as of February 13, 1997)."
- Exhibit 2: Memorandum of Sacramento Area Director to Area Indian Advisory Board, October 8, 1976.
- Exhibit 3: Examples of Obvious Deficiency/ Technical Assistance Letters from the Branch of Acknowledgment and Research.

Summary

The Advisory Council on California Indian Policy was created by Congress in 1992 to conduct a comprehensive review and analysis of the many problems facing California Indians. At every hearing the Council conducted, it was confirmed that tribal status clarification is the primary issue of concern to California Indians.

The term "unacknowledged" refers to those Indian groups whose status as tribes has never been officially "recognized" by the United States or, if recognized in the past, is now denied. There are more unacknowledged Indian tribes in California than there are in any other single state.

The current federal acknowledgment process (25 C.F.R. Part 83) is not appropriate for California tribes. Since the procedure was established in 1978, only one California tribe has successfully completed the process. A major problem with the current process is that it requires unacknowledged tribes to prove their status as self-governing entities continuously throughout history, substantially without interruption, as though that history did not include the federal and state policies that contributed to the destruction and repression of these very same native peoples and cultures.

The issue of federal recognition is crucial to all California Indians because its focus is the development of a coherent and consistent federal process for determining which Indian tribes shall be included within the federal-tribal trust relationship. This report discusses the history of federal neglect of California Indians and how that history has led to the current situation of many of the unacknowledged tribes. It also discusses the problems presented by the current federal acknowledgment process, and explains how the proposed "California Tribal Status Act of 1997," or equivalent administrative policy and regulatory changes, will result in a more just procedure for California tribes seeking federal acknowledgment.

The report does not recommend specific tribes for recognition, because the entire recognition process, as applied to California Indians, is flawed. Indeed, the Advisory Council recommends that the Federal Acknowledgment Procedure be modified to ensure that all California tribes seeking recognition are assured of a fair determination of their status.

acknowledgment. Only one California tribe, the Death Valley Timbi-Sha Shoshone Band, has successfully completed the process.¹³

In 1994, the Department of the Interior attempted to make attaining recognition even more difficult by declaring that only “historic tribes” were eligible for acknowledgment. The Department further required “clear and convincing evidence” that a group met all criteria for acknowledgment, including existence as an “historic tribe.” Congress quickly responded by invalidating the restrictive Interior policy.¹⁴ However, the attempt to restrict acknowledgment to a narrowly defined group of “historic tribes” remains illustrative of the BAR’s inability to fairly evaluate acknowledgment petitions.¹⁵

II. A History of Injustice

Historical considerations play a central role in any evaluation of the complex situation of the California Indians, especially where questions of federal recognition and eligibility for federal programs and services are at issue. Thus, the drafters of legislative measures to address the problems of California Indian groups cannot be fully informed without an examination of the unique and, in many aspects, tragic history of the federal-Indian interaction in California during the last century-and-a-half. This history provides some initial answers to the questions of why so many California tribes remain unacknowledged by the federal government, and why so many remain homeless in their ancestral homeland.

Several historical events create a need for California-specific solutions to the California tribes’ status issues: (1) the federal government’s negotiation of 18 treaties with California tribes during the 1850’s and the Senate’s refusal to ratify those treaties; (2) the 96% reduction in the population of California’s tribal people brought about by the unprecedented onslaught of white miners and settlers during the Gold Rush era and the drive for statehood for California; (3) the BIA’s creation of lists or “rolls” of California Indians for purposes of distributing land claims judgments; (4) the federal government’s provision of services to “the California Indians” as a group, including creation of public domain allotments for many California Indians who were not settled on rancherias or reservations; and (5) the termination of 40 California tribes during the 1950s and 1960s. Moreover, there has always been, and continues to be, a blatant federal neglect of the California tribes.¹⁶ As a result of these events, the federal government’s relationship with the tribes is unique, which suggests that California tribes should not be subjected to the existing process for achieving tribal recognition. Rather, a process should be established that takes the unique needs and special circumstances of California Indian groups into account.

A. The California Indian Treaty Period (1851-1852)

Prior to the arrival of the first Spanish expedition in 1766, the Indians of California were divided into about 500 separate and distinct bands, and enjoyed the sole use, occupancy and possession of all lands in the state. The California Mission Period, extending from 1769 to 1848, had a devastating effect on the aboriginal cultures. Yet, under Spanish and later Mexican rule, the Indians’ right of occupancy was, to some extent, protected. After Mexico’s defeat in the

Force also reviewed the narratives of the California petitions which have been submitted to BAR, reviewed testimony from tribal people at 11 hearings throughout California, and conducted regional meetings and workshops regarding recognition issues for the petitioning tribes.

69. The status of the Ione Band was confirmed by the Assistant Secretary of Indian Affairs in 1994.

70. 25 C.F.R. § 83(a)-(g).

71. 25 C.F.R. § 83.8.

72. 25 C.F.R. § 83.8(c).

73. 25 C.F.R. § 83.8(d)(1) and (3).

74. 25 C.F.R. § 83.8(d)(2).

75. L.A. Dorrington, Superintendent of the Sacramento Indian Agency during the late 1920s, prepared a report for the Commissioner of Indian Affairs on the land needs of numerous California Indian bands living at the margins of non-Indian society, often concentrated in the rural and mountainous areas of the state on scattered public domain allotments, with little or no contact with the Indian agency. In his report to the Commissioner, dated June 23, 1927, Dorrington mentions how little was known of the Indian population and their needs, and the extreme difficulty in getting to some of these isolated areas. Dorrington identifies the Indian bands, their estimated population, and includes his assessment of their need for land and homes. While his report contains little discussion of how these assessments were made, or the reasoning behind the decisions to not recommend the purchase of lands for some bands, it does provide an important source of information on the those Indian bands whose status as such was recognized but which had little contact with the BIA. As to these bands, if their members were residing on public domain allotments, or on lands set aside for them by other means, Dorrington uniformly recommended that no further purchase of land be made for the group. Thus, in many cases, the public domain allotments became a substitute for the creation of new reservations or rancherias.

The Dorrington report provides evidence of previous federal acknowledgment for modern-day petitioners who can establish their connection to the historic bands identified therein. Clearly, the BIA “recognized” its trust obligations to these Indian bands when it undertook—pursuant to the authority of the Homeless California Indian Acts and the Allotment Act—to determine their living conditions and their need for land. The fact that some were provided with land and others were not did not diminish that trust.

Among those California Indian groups that have petitioned for federal acknowledgment, there are several who that can trace their origins to one or more of the bands identified in the Dorrington report. The Muwekma Tribe is one whose connection to the Verona Band (*id.* at 1) has been recently confirmed in a letter from the BAR, but there are at least eight others: Dunlap Band of Mono Indians (*see* Dorrington, at pp. 6-7, reference to the “Dunlap band”); Kern Valley Indian Community (*id.* at 7-8, reference to “Indians ... around the town of Kernville”); Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians (*id.* at 7-8, reference to the “Tejon