

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MUWEKMA OHLONE TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:03 1231 (RBW)
	)	
GALE A. NORTON,	)	
Secretary of the Department of the Interior, et al.	)	
	)	
Defendants.	)	
_____	)	

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS AS  
TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and LCvR 7(h), Plaintiff Muwekma Ohlone Tribe (“Tribe”) hereby submits the following Statement of Material Facts As To Which There Is No Genuine Issue in support of the Plaintiff’s Motion for Summary Judgment.

1. During the Spanish time period, the Muwekma lived and worked near Mission San Jose, often being referred to as the Mission San Jose Indian Tribe. (Answer ¶ 10.)

2. In the late nineteenth and early twentieth century, the Muwekma people settled in villages known as Alisal, near Pleasanton, and El Molino, near Niles, land located within the Tribe’s aboriginal territory. Administrative Record (“AR”)<sup>1</sup> Ex. 6 at 9; AR Ex. 7 at 50.

3. In 1905, the BIA conducted a census of landless Indian communities in Northern California in which it referred to the Tribe as “the Verona Band,” taking the name from a railroad

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<sup>1</sup> Citations to “AR Ex. \_\_\_” and “Ex. \_\_\_” refer to Exhibits to Plaintiff’s Memorandum of Points and Authorities in support of its Motion for Summary Judgment.

station located near the Tribe's settlement. (Answer ¶ 13 (second and third sentences).)

4. In the Act of June 21, 1906, Congress appropriated funds to purchase land for homeless Indian tribes in California and in subsequent appropriations acts provided additional amounts in nearly every year until 1937 for the same purpose. (Answer ¶ 14 (first sentence).)

5. In 1914, a BIA agent identified Muwekma as one of the tribes eligible for land purchases in a report to the Commissioner of Indian Affairs. (Answer ¶ 14 (third sentence).) AR Ex. 8 at 1-2;

6. In 1927, the Superintendent of the Sacramento Agency reported to the Commissioner of Indian Affairs that Muwekma was eligible for land purchases as a "band in Alameda County commonly known as the Verona Band, [whose members] were formerly those that resided in close proximity of the Mission San Jose." (Answer ¶ 14 (fourth and fifth sentences).)

7. In 1923, the Reno Agency of the BIA declared in its annual report that the Tribe fell under its jurisdiction. (Answer ¶ 15 (second sentence).)

8. Congress has never enacted legislation terminating the trust relationship with the Muwekma Tribe in that name, the name of the Verona Band, or any other name. (Answer ¶¶ 2, 16.)

9. No decision by a court, by the Department of Interior, or any division of the Executive Branch has ever terminated the Tribe. (Answer ¶ 16 (second sentence).)

10. Sometime after 1927, the Department began substantially reducing the benefits and services provided to the Tribe without notice to the Tribe or public or any formal decision by the Department. Ex. 10 at 4-5.

11. In 1979, the Department published a list of federally recognized tribes in which it failed to include the Tribe. (Answer ¶ 16 (sixth sentence).)

12. On three separate occasions, in 1933, 1955 and 1970, the Department enrolled Muwekma tribal members or their ancestors pursuant to the Act of May 18, 1928, Pub. L. No. 70-423, ch. 624, 45 Stat. 602 (“California Claims Act”). (Answer ¶ 17 (second sentence));

13. Muwekma tribal members and their ancestors received payments from the judgment fund established pursuant to the California Claims Act. AR. Ex. 6 at 23, 32, 81-82.

14. The BIA educated Muwekma Ohlone people at its schools for Indian children. AR Ex. 6 at 25-26; AR Ex. 11; AR Ex. 12; AR Ex. 13.

15. The BIA application for enrollment in the California Judgment Act stated, “What is your degree of Indian blood and to what Tribe or Band of Indians of the State of California do you belong?” AR 6 at 17.

16. Muwekma tribal members and their parents or grandparents submitted applications under the California Judgment Act and identified themselves as “Mission San Jose,” or “Ohlone,” not simply California Indian, and the Bureau approved these applications. AR Ex. 6 at 23-25.

17. The Bureau verified and regularly rejected applications for enrollment under the California Judgment Act if it found that proof of membership in an Indian tribe was either insufficient or not submitted. AR Ex. 6 at 21-24; AR Ex. 70 at 2-3.

18. The 1951 roll under the California Judgment Act identified nearly all Muwekma as Mission San Jose Tribe. AR Ex. 71 at 76-77.

19. During the third enrollment period under the California Judgment Act the Bureau

advised applicants in an April 7, 1971 letter that “it is necessary that we establish not only an applicant's tribal affiliation, but also those of his parents and possibly even his grandparents to satisfy the requirements contained in the law.” AR Ex. 81.

20. In the 1960's, a large number of Muwekma people worked together in an effort to preserve the Ohlone Cemetery. AR Ex. 6 at 119-20; AR Ex. 16; AR Ex. 17 at 1.

21. In 1989 the Tribe, with the support of the California State Native American Heritage Commission, persuaded Stanford University to return 550 Ohlone remains stored in its museum to the Tribe for reburial. AR Ex. 19; AR Ex. 15 at 10-11.

22. The Tribe reached agreements with Santa Clara University and the City of Palo Alto setting out the procedures for treatment of native remains and associated objects discovered in connection with a large redevelopment project on the University's campus. AR Ex. 20 at 2-5; AR Ex. 21 at 3-6.

23. The Tribe has worked with a number of local governments, including the Cities of San Jose, San Francisco and Santa Clara to adopt policies for the treatment of Native American remains in construction projects. AR Ex. 22; AR Ex. 23; AR Ex. 24; AR Ex. 25; AR Ex. 26; AR Ex. 27.

24. The Tribe has received local support from prominent political and other leaders. AR Ex. 28; AR Ex. 29; AR Ex. 30; AR Ex. 31; AR Ex. 32; AR Ex. 33; AR Ex. 34; AR Ex. 35; AR Ex. 36; AR Ex. 37.

25. The Sacramento Area Director of the Bureau of Indian Affairs supported recognition of Muwekma. Ex. 28.

26. In 1989 the Tribe inquired with the Department regarding the process for

returning to the list of recognized tribes, and the Department responded that the Tribe was required to petition under 25 C.F.R. pt. 83 and disclosed nothing regarding alternate procedures for securing recognition. AR Ex. 46.

27. The Tribe filed a letter of intent to petition for federal acknowledgment in March, 1989. (Answer ¶ 25 (first sentence).)

28. In 1995, the Tribe submitted a documented petition consisting of several thousands of pages of exhibits and explanations. (Answer ¶ 25 (Second Sentence).)

29. On May 24, 1996, the BAR concluded that the Tribe had been recognized as late as 1927 as the Verona Band of Alameda County. AR Ex. 47.

30. In 1994, the BIA reaffirmed the status of the Ione Band of Miwoks, a previously recognized tribe, to the list of federally recognized tribes without requiring Ione to complete the procedures under 25 C.F.R. pt. 83. (Answer ¶ 26 (first sentence).)

31. In 2000 the Department reaffirmed the Lower Lake Rancheria to the list of federally recognized tribes without requiring Lower Lake to complete the petition process under 25 C.F.R. pt. 83. (Answer ¶ 26 (fourth sentence).)

32. When Muwekma repeatedly requested, for many years, that the Department return the Tribe to the list of recognized tribes outside of Part 83, the Department refused or ignored the requests, citing a lack of authority, notwithstanding its inconsistent actions with respect to Ione and Lower Lake. (Answer ¶ 27.)

33. The Department vigorously opposed Muwekma's claim in *Muwekma v. Babbitt* for action on its petition within a reasonable time and asserted its authority to act on petitions based on the Department's priorities. (Answer ¶ 29.)

34. The Tribe's suit in *Muwekma v. Babbitt* was the first action in which a tribe successfully challenged the Department's slow pace of deciding petitions and failure to reduce its backlog. (Answer ¶ 30 (fourth sentence).)

35. On July 30, 2001, the Assistant Secretary for Indian Affairs issued a Proposed Finding on the Ohlone/Costanoan Muwekma Tribe in which it proposed to decline recognition of the Tribe. 66 Fed. Reg. 40,712 (Aug. 3, 2001) (AR Ex. 51); AR Ex. 7.

36. On September 6, 2002, the Department issued its Final Determination denying recognition of the Tribe. 67 Fed. Reg. 58,631 (Sept. 17, 2002) (AR Ex. 41); AR Ex. 6.

37. In the Final Determination, the Department found that Muwekma was a previously recognized tribe as the Verona Band, that the Tribe's current members are at least 99% direct descendants of the previously recognized Tribe, and that no official action was ever taken by the United States to end the Tribe's recognition. 67 Fed. Reg. at 58,631 - 32 (Sept. 17, 2002) (AR Ex. 41); AR Ex. 6.

38. Department officials have stated that recognition, once established, is permanent, and creates a perpetual government-to-government relationship with the United States. AR Ex. 46 at 1; AR Ex. 54 at 1-2.

39. The Department recognized Lower Lake Rancheria in the early twentieth century as eligible for land for homeless Indians but later ceased interacting with Lower Lake. AR Ex. 60.

40. Lower Lake was not terminated by Congress, a court or the Executive Branch. AR Ex. 60.

41. Department records reflect that Lower Lake did not form "an active government

functioning as the ‘Lower Lake Rancheria Interim Council’” until 1994 and only adopted a tribal constitution and enrollment ordinance in 1995. Ex. 58 at 3; Ex. 59 at 4.

42. The Ione Band of Miwok was recognized in the early twentieth century as eligible for land for homeless Indians, but the only contact between Ione and the Department from about 1920 to 1940 involved the land purchase, with efforts limited to sporadic inquiries until 1940. Ex. 66 at 16.

43. Between 1945 (or even earlier) and 1970, there was no contact between the BIA and the Ione Band or its members at least as to Indian or Indian-related matters. Ex. 66 at 16.

44. Between 1945 (or even earlier) there was no leadership or governing structure within Ione. Ex. 66 at 16.

45. Ione was not terminated by Congress, a court or the Executive Branch. Ex. 66; Ex. 67.

46. The Department did not afford the Tribe the opportunity to present at a hearing evidence and argument in support of the Tribe’s petition to the Department prior to the Proposed Finding or Final Determination. 66 Fed. Reg. 40,712, 40,712-14 (Aug. 3, 2001) (AR Ex. 51); AR Ex. 7; 67 Fed. Reg. 58,631-32 (Sept. 17, 2002) (AR Ex. 41). AR Ex. 6.

47. The Department did not afford the Tribe the opportunity to cross-examine the staff who evaluated the evidence submitted in support of the Tribe’s petition for recognition and prepared the Proposed Finding and Final Determination. 66 Fed. Reg. 40,712, 40,712-14 (Aug. 3, 2001) (AR Ex. 51); AR Ex. 7; 67 Fed. Reg. 58,631-32 (Sept. 17, 2002) (AR Ex. 41). AR Ex. 6.

48. Scott Keep, an attorney advisor for the Department, represented the Department in the *Muwekma v. Babbitt* litigation and later participated and advised the Department in

connection with the Department's evaluation of Muwekma's petition for recognition. Answer ¶ 43 (first sentence).

49. In its recognition decision on the San Juan Paiute Tribe, the BIA took into account the influenza pandemic from 1918 and 1928 and the 1922 loss of the reservation, which explained the Paiute's "administrative obscurity" lasting from 1940 until 1968. Ex. 69 at 2.

50. In analyzing the community interaction element in the Little Shell petition for acknowledgment, the BIA stated in its proposed finding that "[b]ecause of the size of Little Shell petitioner's membership and its wide geographic distribution, there is no expectation under the regulations that any individual member would have an informal acquaintance with all or even most of the rest of the petitioner's members." Ex. 73 at 22.

51. In the San Juan Paiute acknowledgment decision, the BIA accepted evidence of a leader's ability "to coordinate migrant farm work" to satisfy the political authority criterion. Ex. 69 at 59.

Dated this 13<sup>th</sup> day of July, 2005.

Respectfully submitted,

/s/ James T. Meggesto

Colin Cloud Hampson (Bar No. 448481)  
SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & PERRY, LLP  
750 B Street, Suite 1840  
San Diego, CA 92101  
(619) 546-5585

Harry R. Sachse (Bar No. 231522)  
James T. Meggesto (Bar No. 459900)  
SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & PERRY, LLP  
1425 K Street, N.W., Suite 600  
Washington, D.C. 20005  
(202) 682-0240