UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I. Introduction

Defendants Dirk Kempthorne, Secretary of the Interior and Carl J. Artman, Assistant Secretary-Indian Affairs' ("Defendants") Cross-Motion for Summary Judgment explained that no basis existed for exempting Plaintiff Muwekma Ohlone Tribe ("Plaintiff") from the federal acknowledgment process. Plaintiff's Reply compares itself to the Lower Lake Rancheria ("Lower Lake") and the Ione Band of Miwok ("Ione"); however, it is not similarly situated to these two Indian tribes.

Although Ione and Lower Lake were exempted from the regulatory process of federal tribal acknowledgment, there is no alternative standard for acknowledgment outside of that process. Plaintiff's Reply seeks to create a standard for exemptions from the existing acknowledgment process, but its alleged standard is not found in both the Ione and Lower Lake decisions. Those two decisions emphasized correcting an administrative error on behalf of groups that had either trust land or collective rights to land and a history of dealings with the federal government. These factors of collective rights to land and federal dealings provided a rational basis for these actions outside of the regulatory process because they were factors historically used to demonstrate continuous tribal existence which, according to the Department of the Interior's ("Department") long-held position, is essential in determining federal acknowledgment.

Plaintiff lacks these critical factors. A pattern of federal dealings with Ione and Lower Lake existed. In comparison, there is no evidence that Plaintiff had a relationship with the federal government at any time after 1927. Unlike Ione and Lower Lake, Plaintiff also cannot demonstrate that it possesses collective rights in tribal lands. Indeed, a geographical settlement

at the Verona railroad station no longer existed after 1915. Plaintiff's status also was not affected by a specific administrative error relating to the loss or acquisition of lands to be held in trust by the United States. Because Plaintiff lacks these critical factors, its situation is not similar to that of Lower Lake and Ione and it was properly evaluated within the federal acknowledgment process.

Accordingly, Plaintiff's claim that Defendants violated the Equal Protection Clause and Administrative Procedure Act ("APA") should be rejected and Defendants' Cross-Motion for Summary Judgment should be granted.

II. Defendants Provided a Detailed and Rational Explanation for its Treatment of Plaintiff.

Defendants have provided a detailed and rational explanation on why no basis existed for exempting Plaintiff from the process set out in the federal acknowledgment regulations both in their twenty-one page, single-spaced, Supplement and in their Motion. In its Reply, Plaintiff suggests that it does not have the burden of proving Defendants' actions were arbitrary and capricious pursuant to the Administrative Procedure Act ("APA"). Pl.'s Reply (Dkt. No. 63) at 2. By the same token, Plaintiff argues that it is not required to negate every conceivable rational basis for Defendants' decision pursuant to the Equal Protection Clause. *Id.* Defendants, however, have clearly met the Court's requirement that they provide "a detailed explanation of the reasons for its refusal to waive the Part 83 procedures when evaluating [Plaintiff's] request for federal tribal recognition . . . ." Ct.'s Order of September 21, 2006 at 31. Because Plaintiff is challenging the explanation provided by Defendants, the burden now lies with Plaintiff to sustain its Equal Protection Clause and APA claim.

Plaintiff cannot make the requisite showing in order to obtain summary judgment

regarding its claims. *American Towers, Inc. v. Williams*, 146 F. Supp. 2d 27, 30-31 (D.D.C. 2001), *aff'd*, 50 Fed. Appx. 448 (D.C. Cir. 2002) (regarding Equal Protection Clause claims "the burden is on the one attacking the government's action to negative every conceivable [rational] basis which might support it, whether or not the basis has a foundation in the record.") (citations omitted); Ct.'s Order of September 21, 2006, 14 ("The party challenging agency action has the burden to prove that the action was arbitrary, capricious, or otherwise unlawful.") (citation omitted). Plaintiff is not similarly situated to Lower Lake and Ione. Defendants also applied the proper evidentiary standards to Plaintiff. Moreover, Defendants had a rational basis for evaluating Plaintiff within the federal acknowledgment process. As detailed below and in Defendants' earlier filings, Defendants are entitled to summary judgment on all of Plaintiff's claims.

A. Plaintiff is Not Similarly Situated to Lower Lake and Ione.

Plaintiff cannot demonstrate that it is similarly situated to Lower Lake and Ione. Unlike these two Indian tribes, Plaintiff lacks a long-standing governmental relationship with the United States. Plaintiff also offers no evidence that it possesses collective rights in land. Accordingly, Defendants' Motion should be granted.

1. Plaintiff Lacks a Long-Standing Governmental Relationship with the United States.

Defendants' Motion set forth the pattern of federal dealings with Lower Lake and Ione, which provided evidence of their long-standing and continuing governmental relationship with the United States. Defs.' Mot. (Dkt. No. 61) at 8-13 (discussing events in 1916, 1927, 1935, 1947, 1952, 1953, 1956, and 1980 that evidenced such a pattern regarding Lower Lake and events in the 1910's-1920's, 1927, 1933, 1941, 1970, and 1972 that evidenced such a pattern

regarding Ione). Defendants' Motion detailed that Plaintiff could not exhibit such a pattern. Indeed, "there is no evidence . . . that a Muwekma group had a relationship with the federal government at any time after 1927." Defs.' Ex. 1 to Defs.' Mot. (Dkt. No. 61) at 6. Plaintiff did not have a long-standing governmental relationship with the United States; thus, it is not similarly situated to Lower Lake and Ione. The lack of such evidence regarding Plaintiff also makes clear that there was no basis for exempting Plaintiff from the requirements of the federal acknowledgment regulations.

Plaintiff's Reply attempts to diminish the significance of the federal dealings with Lower Lake and Ione, however, these attempts fail. For example, Plaintiff claims that the supplemental administrative record contains no evidence of contact between Defendants and Lower Lake between 1956 and 1995. Pl.'s Reply (Dkt. No. 63) at 7-8. The supplemental record, however, contains a 1980 reference by the Bureau of Indian Affairs ("BIA") to Lower Lake, which Plaintiff, itself, cites in its Motion for Summary Judgment. Pl.'s Mot. (Dkt. No. 60) at 26, n. 78; *see also* Supp. A.R. Doc. 191, 1 (noting that Lower Lake was described as having a government to government relationship with the United States in 1980 and BIA considered including Lower Lake on the list of entities acknowledged to have such a relationship).[1/] Plaintiff also questions the significance of Defendants' attempts to take land into trust for Ione. Pl.'s Reply (Dkt. No. 63) at 7. These attempts, however, demonstrate that Defendants had a relationship with Ione and recognized obligations to this entity.

While the supplemental administrative record contains evidence of multiple federal

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[1/] With the exception of Supp. A.R. Doc. 60, Defendants submitted copies of the relevant documents from the supplemental administrative record in conjunction with its Cross-Motion for Summary Judgment. Supp. A.R. Doc. 60 is attached to this filing.

dealings with Lower Lake and Ione, comparable evidence does not exist regarding Plaintiff. As noted above, there is no evidence of any federal dealings with Plaintiff at any time after 1927. Moreover, in 1936, the BIA "stated that it did not have a relationship with [Plaintiff's] ancestors." Defs.' Ex. 1 to Defs.' Mot. (Dkt. No. 61) at 6; *see also* Supp. A.R. Doc. 49 (informing Plaintiff's ancestor that her family was not entitled to relief from the BIA, because they did "not have ward status"); Supp. A.R. Doc. 50 (noting that Plaintiff's ancestor is not eligible for any aid from Federal funds, because she did not have ward status; and, further noting that she would have the same status as any other citizen seeking aid through state and county welfare agencies). Plaintiff makes no attempt to address this evidence. Instead, Plaintiff's Reply merely reasserts its position without engaging Defendants' evaluation in its final determination of Plaintiff's arguments and its evidence in any substantive manner. *See, e.g.*, Pl.'s Reply (Dkt. No. 63) at 9 (citing in support of its claims enrollment in the California Claims Act of May 18, 1928 and the enrollment of three children in BIA schools). Defendants have explained the reasons for rejecting Plaintiff's claims and for finding its submissions insufficient. Indeed, Plaintiff's assertions about an Indian claims enrollment process and education at BIA schools were fully evaluated in the final determination and rejected. *See, e.g.*, Defs.' Mot. (Dkt. No. 61) at 13 (noting that enrollment in the claims process did not require current tribal affiliation and that the children were admitted to the schools based on their individual characteristics). Thus, it is clear that Plaintiff cannot point to a pattern of federal dealings to support its claim. Accordingly, Plaintiff it is not similarly situated to Lower Lake and Ione; and, its claims should be dismissed.

2. Plaintiff Lacks Collective Rights in Lands.

Defendants' Motion also explained that, unlike Lower Lake and Ione, Plaintiff lacks collective rights in lands. Defs.' Mot. (Dkt. No. 61) at 13-17; *see also id*. 14 (detailing that the United States held land in trust on behalf of Lower Lake for forty years); *id*. at 14- 15 (explaining the efforts made by the Department of the Interior ("Department") to obtain land for Ione and noting that the members of Ione successfully quieted title to land); *id*. at 15 (stating that the United States has never held land in trust for Plaintiff and that after 1927 there is no available evidence that the United States ever considered obtaining land for a Verona group); Defs.' Ex. 1 to Defs.' Mot. (Dkt. No. 61) at 5 ("a geographical settlement at the Verona railroad station . . . no longer existed after 1915"). Plaintiff's lack of collective rights in land clearly demonstrates that it is not similarly situated to Lower Lake and Ione. Moreover, it shows that no basis existed for exempting Plaintiff from the process set out in the federal acknowledgment regulations.

Plaintiff tries to dismiss the significance of the critical distinction regarding collective rights in land, however, these attempts are unavailing. As Defendants explained in their Motion, the purchase of trust land for Lower Lake demonstrates that the United States recognized an obligation to this Indian tribe as its beneficiaries. In addition, Ione's common land base, which it successfully quieted title to, demonstrates that Ione's members lived in a centralized geographic location. This sort of evidence has historically been utilized by Defendants, in order to determine tribal status.[2/] As set out below, if such evidence is present it is accorded great weight pursuant to the federal acknowledgment regulations. The fact that Lower Lake and Ione possessed collective rights in land provided evidence that these Indian tribes are continuously

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[2/] *See* Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law*, 271 (1942 ed.); *Felix S. Cohen's Handbook of Federal Indian Law*, 13 (1982 ed.).

existing political entities. Plaintiff lacked this critical evidence demonstrating that it also is a continuously existing political entity entitled to federal acknowledgment.

It is important to note that Plaintiff's Reply improperly conflates the concepts of possessing collective rights in land and possessing trust land. Pl.'s Reply (Dkt. No. 63) at 10 (claiming that Ione was not treated as having collective rights in tribal lands, because land was not taken into trust on its behalf until 2006). Possessing tribal trust land does imply that a group has collective rights in land. Not all situations involving collective rights in land, however, involve tribal trust land. For example, Ione possessed collective rights in land even before land was taken into trust on its behalf. Defs.' Mot. (Dkt. No. 61) at 14-15. Indeed, the Ione were not, as Plaintiff suggests, merely individual Indians living in a California town. The Band lived on an Indian Rancheria, composed almost exclusively of Indian residents, who worked on a ranch that was contiguous to the Rancheria. This land is the same property where they have lived continuously and collectively until the present.[3/] Accordingly, Plaintiff's attempt to suggest that Ione did not possess collective rights in land misses the mark.

Plaintiff's attempt to diminish this distinction in regards to Lower Lake also fails. In discussing Lower Lake, Plaintiff claims that "no one lived on the Rancheria land for 30 years." Pl.'s Reply (Dkt. No. 63) at 11. Documentation in the supplemental administrative record,

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[3/] *See, e.g.*, Supp. A.R. Doc. 17, 37; Supp. A.R. Doc. 33, 1, 10; Supp. A.R. Doc. 52, 1; Supp. A.R. Doc. 60; Supp. A.R. Doc. 62, 3, 10-14;. Examination of the findings in the final determination regarding Plaintiff makes even more clear the distinctions between Plaintiff, Lower Lake, and Ione. For example, Plaintiff's members are widely distributed in southeastern San Francisco Bay and San Jose, California. Defs.' Mot. (Dkt. No. 40) at 17. Indeed, Plaintiff's members live among several million non-Muwekma. *Id.*; *see also Miami Nation of Indians of Indiana, Inc. v. Department of the Interior,* ("*Indiana Miami*"), 255 F.3d 342, 346 (7th Cir. 2001).

however, "suggests that there were at least 20 Indians residing on the Lower Lake Rancheria." Supp. A.R. Doc. 243, 3. *See also id.* (discussing a list of 36 Indians that intended to make their home on the Rancheria); Def.'s Resp. to Pl.'s Statement of Material Facts, ¶ 22 (disputing Plaintiff's characterization of documents regarding Lower Lake).

Plaintiff makes repeated assertions that issues related to collective rights in lands are not raised in the Lower Lake and Ione decisions. Pl.'s Reply (Dkt. No. 63) at 12, 18, 19. In fact, both decisions clearly reflect that this was a relevant factor underlying the action taken by the Assistant Secretary. Defs.' Ex. 1 to Defs.' Mot. (Dkt. No. 61) at 4-8. In the Lower Lake decision, the Assistant Secretary indicated that he was acting to correct a misinterpretation by the BIA of the effect of the sale of the trust land of the Lower Lake Rancheria in 1956. Supp. A.R. Doc. 250, 3. In the Ione decision, the Assistant Secretary stated that she was acting to correct a failure to complete an acquisition of land to be held in trust authorized by the Commissioner of Indian Affairs in 1972. Supp. A.R. Doc. 162.

Plaintiff also suggests that the collective rights in land factor has no relevance to the federal acknowledgment determinations or exemptions from the regulatory process. Pl.'s Reply (Dkt. No. 63) at 12-13. While Plaintiff is correct that having collective rights in land is not required for acknowledgment, such collective rights or tribal trust lands, where and when they are demonstrated are given great weight by the federal acknowledgment regulations. *See e.g.*, 25 C.F.R 83.7(c)(2)(i). In addition, the federal acknowledgment regulations place significance on living in an exclusive geographical settlement. *See* 25 C.F.R 83.7(b)(2)(i). [4/]

[4/] If Plaintiff had shown that they met either of these sections of the criteria during any period, they would have met the community and political requirements during that period. Although Plaintiff did not demonstrate either of these factors, it still could have met the requirements of

Because Plaintiff lacks collective rights in land, it is not similarly situated to Lower Lake and Ione. Plaintiff's attempts to explain away this critical distinction should not be permitted. Because collective use or ownership of land was historically considered an appropriate factor in favor of federal acknowledgment, it provided a rational basis for exempting Lower Lake and Ione from the federal acknowledgment process. Likewise, the lack of trust land or collectively owned land is a rational basis for not granting Plaintiff an exemption from the regulatory process Accordingly, Plaintiff's claims should be dismissed.

3. Plaintiff's Alleged Similarities are Unavailing.

Plaintiff's Reply claims that it "has made a substantial evidentiary showing of similar situation." Pl.'s Reply (Dkt. No. 63) at 14-15. In reality, however, Plaintiff offers nothing new to advance its claims. Defendants' Motion analyzed each of the alleged similarities relied upon by Plaintiff and explained their insignificance. For example, Defendants' Motion pointed out that Plaintiff's claims relied on factors that are similar to many Indian groups in California. Defs.' Mot. (Dkt. No. 61) at 17-19 (noting that many groups were subjected to the historical circumstances in California, that over 70 groups from California are in the midst of completing the acknowledgment process, and that at least 8 groups claim Ohlone or Costanoan origins). Defendants noted that neither Lower Lake nor Ione were excepted from the regulatory process on the basis of the mere existence of a previous relationship with the United States. *Id*. at 18. Plaintiff states that the most important similarity between itself and Lower Lake and Ione is "the absence of any act of Congress, the courts, or administrative action terminating the [groups]."

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the acknowledgment regulations with other evidence. The Department determined that it did not do so. The Department did not decline to acknowledge Plaintiff, because it lacked collective rights in land.

Pl.'s Reply (Dkt. No. 63) at 15. Because recognized Indian tribes can cease to exist, Defendants explained that this factor was not determinative of its decisions. Defs.' Mot. (Dkt. No. 61) at 18-19 (citing *Indiana Miami*, 255 F.3d 342 (7th Cir. 2001); *Mashpee Tribe v. New Seabury Corp*., 592 F.2d 575, 587 (1st Cir. 1979)). Defendants further reiterated that "the Lower Lake and Ione decisions emphasized circumstances that reveal differences between [Plaintiff] and those two groups, not similarities shared by the three groups." Defs.' Ex. 1 to Defs.' Mot. (Dkt. No. 61) at 5. Plaintiff should not be permitted to merely rely on factors that are shared by many other groups to make their claims. Plaintiff cannot demonstrate that it meets the key factors present regarding Lower Lake and Ione. Namely, a long-standing governmental relationship with the United States and collective rights in lands. Consequently, its claims should be dismissed.

B. Defendants Applied the Proper Evidentiary Standards to Plaintiff

Defendants' Motion also made clear that Defendants applied the proper evidentiary standards to Plaintiff. Defs.' Mot. (Dkt. No. 61) at 19-21. Defendants explained that an evaluation of the evidentiary burden cannot simply be reduced to comparing the number of pages of documentation entities are required to submit. Defendants contended that requiring groups to make a showing of collective land rights in conjunction with a pattern of long-standing federal dealings ended by a specific administrative error, as was utilized in the Lower Lake and Ione decisions, might be an even more difficult evidentiary burden to satisfy than the one contained in the federal acknowledgment regulations. In footnote 32, Plaintiff makes the conclusory statement that "the Lower Lake and Ione decisions were based on vastly less documentation than a Part 83 petition, as well as a more sparsely documented showing of political activity and federal relationship than required of [Plaintiff]." Pl.'s Reply (Dkt. No. 63) at 18, n. 32. Plaintiff

makes no attempt to address Defendants' arguments. Moreover, as seen above, Plaintiff did not provide comparable evidence to Lower Lake and Ione. Thus, Plaintiff's earlier suggestion that the Assistant Secretary applied a lower evidentiary burden to Lower Lake and Ione must be disregarded.

C. Defendants had a Rational Basis for Evaluating Plaintiff Within the Federal Acknowledgment Process.

Defendants' Motion demonstrated that Defendants had a very clear rational basis for evaluating Plaintiff within the process set out in the federal acknowledgment regulations. Defs.' Mot. (Dkt. No. 61) at 21-25. Defendants' Motion detailed why Plaintiff's previous acknowledgment did not provide sufficient basis for exempting Plaintiff from this process. Defendants explained that if Plaintiff was acknowledged merely on the basis of its limited previous federal acknowledgment which began in 1914 and ended in 1927, then this action would constitute an unconstitutional racial classification. *Id*. at 22-23 (discussing *Morton v. Mancari*, 417 U.S. 535 (1974); *United Houma Nation v. Babbitt*, 1997 WL 403425 (D.D.C. 1997); *Indiana Miami*, 112 F. Supp. 2d 742 (N.D. Ind. 2000); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543 (10th Cir. 2001); *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981)).

Plaintiff offers little to refute Defendants' argument regarding impermissible racial classifications and the timing of Plaintiff's requests. *See, e.g*., Pl.'s Reply (Dkt. No. 63) at 22 (claiming without authority that "it is impossible for Interior to make an impermissible racial-based classification in recognizing or reaffirming the existence of a political entity.") *cf.*, *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (after noting Congress's broad powers over Indians, the Court stated "it is not meant by this that Congress may bring a community or body of people

within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."). Defendants detailed that their decision was in keeping with caselaw, the federal acknowledgment regulations, the Lower Lake and Ione decisions, and the timing of Plaintiff's requests to be exempted from the process. Defs.' Mot. (Dkt. No. 61) at 21-25.

Plaintiff's Reply primarily concentrates, instead on its attempts to set forth an alternative standard for acknowledgment. *See* Pl.'s Reply (Dkt. No. 63) at 15-18 (discussing the alleged standard it identifies as the "reaffirmation standard"). Plaintiff, however, utilizes only the Lower Lake decision to define this standard. This alleged standard cannot be found in the Ione decision. In addition, the alleged standard created by Plaintiff involving previous acknowledgment "within the lifetime of current members" cannot be found in either the Lower Lake or Ione decisions. *Id*. at 17. Plaintiff's attempt to require the "Department to demonstrate that the tribe is or was terminated" is also inappropriate. *Id*. Plaintiff can point to nothing requiring the Department to show that petitioners do not exist. The federal acknowledgment regulations require that the petitioning group demonstrate continued existence. Furthermore, the requirement – suggested by Plaintiff – would lead to the logical inconsistency of requiring the Department to prove a negative. Plaintiff's argument that the Department must show termination or abandonment was squarely rejected by the Seventh Circuit in *Indiana Miami*. 255 F.3d at 350.

In any event, the Lower Lake and Ione decisions do not articulate an alternative standard

for acknowledgment. Rather, both decisions show that considerations in keeping with the necessity of demonstrating continuity of tribal existence led to Defendants' actions regarding Lower Lake and Ione. Plaintiff's efforts to draw the Court into fabricating a "standard" for reaffirmation out of these two admittedly brief decisions recognizing a longstanding relationship with the United States, communal interest in land and correcting an administrative error, stand in stark contrast to the Department's efforts to develop general regulations through notice and public comment. *See* 43 Fed. Reg. 39,361 (Sept. 5, 1978); *Indiana Miami,* 887 F. Supp. 1158, 1161-62 (N.D. Ind. 1995). Consequently, Plaintiff's attempts to create an alternative standard for acknowledgment should be rejected.

Plaintiff's efforts to portray Defendants' arguments as post hoc rationalization are also unpersuasive. Pl.'s Reply (Dkt. No. 63) at 18-21. Plaintiff challenges Defendants' Supplement. This Supplement, however, was provided in compliance with the Court's Order of September 21, 2006. In its Supplement, in accordance with their special expertise in the determination of acknowledgment of Indian tribes, Defendants provided a detailed and rational explanation why no basis existed for exempting Plaintiff from the federal acknowledgment process. Indeed, this Supplement is not a post hoc rationalization. Rather, it is a distillation of the long-standing policy considerations that governed Defendants' decisions regarding Lower Lake, Ione, and Plaintiff. The decision documents regarding Lower Lake and Ione are relatively brief, however, Plaintiff has offered no serious argument that these decisions should not be viewed within the context of the explanation set forth in Defendants' Supplement. Defendants' position in its Supplement and this litigation are entirely consistent with the federal acknowledgment regulations and Defendants' long-held view that "the essential requirement for acknowledgment

is the continuity of tribal existence . . . ." 59 Fed. Reg. 9280, 92892 (Feb. 25, 1994). That Defendants' decisions regarding Lower Lake and Ione may have become more clear in the course of litigation does not mean that Defendants should not be accorded substantial deference. *National Wildlife Federation v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) ("[D]eference to an interpretation offered in the course of litigation is still proper as long as it reflects the 'agency's fair and considered judgment on the matter.'") (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)); *see also Public Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 7 (D.D.C. 2000) (according substantial deference to agency's interpretation of a regulation included in declaration submitted during litigation). Therefore, the Court should reject Plaintiff's argument regarding an alleged post hoc rationalization.[5/]

Plaintiff's allegations regarding an alternative standard for acknowledgment and post hoc rationalization are without merit. Defendants had a very clear rational basis for evaluating Plaintiff within the federal acknowledgment process; and, accordingly, Plaintiff's claims should be dismissed.

D. Defendants are Entitled to Summary Judgment.

As Defendants have demonstrated, Plaintiff's Equal Protection and APA claim should be dismissed. Plaintiff has failed to negate every conceivable rational basis for Defendants' decision to evaluate Plaintiff within the federal acknowledgment process. *American Towers, Inc.*, 30-31 (D.D.C. 2001). Likewise, Defendants' decision is well founded in the evidence and

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[5/] Plaintiff's argument regarding post hoc rationalization does not appear to have any relevance to the Equal Protection Clause portion of its claim. Pursuant to the rational basis standard, used to evaluate such claims, "the burden is on the one attacking the government's action to negative every conceivable [rational] basis which might support it, whether or not the basis has a foundation in the record." *American Towers, Inc.*, 146 F. Supp. 2d at 30-31 (emphasis added).

the reasoning behind this decision has been clearly stated. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983). In Defendants' Motion, Defendants also briefly set out the additional reasons showing that they are entitled to summary judgment on all claims. Plaintiff's Reply fails to refute Defendants' arguments.

Defendants' Motion explained that Plaintiff failed to meet three of the seven mandatory criteria necessary to establish its continuous existence as a political entity. Defs.' Mot. (Dkt. No. 61) at 25-26; *see also* Defs.' Mot. (Dkt. No. 40) at 11-24. Because the fundamental touchstone of acknowledgment is continuous existence, Plaintiff is not entitled to be acknowledged as an Indian tribe possessing a government-to-government relationship with the United States. Plaintiff describes the findings in Assistant Secretary's final determination as arbitrary and capricious. Pl.'s Reply (Dkt. No. 63) at 23. In fact, the final determination lays out the evidence in detail and the reasoning behind the findings are clearly stated and transparent.[6/]

Throughout its filing, Plaintiff includes misleading and overstated assertions about its alleged history, social character and political activities.[7/] Utilizing its expertise in Indian

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[6/] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

[7/] *See, e.g.*, *id*. at 9 (claiming that "the record contains substantial evidence of god parenting, fostering, adopting, and formal gathering organized by [Plaintiff]"); *id*. (claiming that the "Tribe" organized "to protect the Ohlone Cemetery"); *id*. (claiming that "the California Claims Act . . . . required evidence of tribal membership"); *id*. (claiming that enrollment in BIA schools "implies acknowledgment as a tribe"); *id*. at 20 (claiming that it has "demonstrated substantial evidence of continuing activity and federal relationship" to 1970); *id*. at 22 (claiming that it "presented substantial evidence satisfying all seven of the criteria in Part 83); *id*. at 23-24 (claiming that enrollments related to the California Claims Act "show a continuing relationship with the Department of Interior, as does the fact that Muwekma children were enrolled in BIA

acknowledgment matters, Defendants rejected Plaintiff's claims. For example, Plaintiff's assertion that the Department required tribal affiliation to approve individual applications under the California Claims Act of 1928 was thoroughly evaluated for the final determination and found to be incorrect. It is clear that the Department did not require tribal affiliation, because the Department approved applicants who did not know any information about his or her band or Indian tribe (or the band or Indian tribe of his or her ancestors). The Act only required descent from an Indian living in California in 1852 not current tribal affiliation. Plaintiff also asserts that Defendants impermissibly "required proof of each criterion in each ten-year period." Pl.'s Reply (Dkt. No. 63) at 24. Plaintiff, however, cites no example of such an alleged error. The final determination regarding criterion 83.7(a) did not accept Plaintiff's assertion that it had been identified as an Indian entity in every decade. A missing decade did not result in Plaintiff's failure to satisfy this criterion; instead, a lack of identification as an Indian entity between 1927 and 1965 resulted in this finding. Plaintiff also makes the misleading assertion that Defendants excluded evidence before 1927 and after 1985. *Id*. at 25. Plaintiff cites a passage from the final determination regarding criterion 83.7(a) as if applied to the entire process of the evaluation of Plaintiff's petition. It did not.[8/] Plaintiff's objections are without merit; thus, the Assistant

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schools); *id*. at 25 (claiming that Defendants made a "positive conclusion that a community existed only thirty years ago, within the lifetimes of adult tribal members). The Assistant Secretary's final determination analyzed and rejected each of these claims.

[8/] Moreover, petitioners with a finding of previous federal acknowledgment need to demonstrate that they meet criteria 83.7(a) and (c) only since the last date of federal acknowledgment and meet criterion 83.7(b) "at present." 25 C.F.R 83.8. Furthermore, in the Final Determination, Defendants did consider evidence after 1985 for criteria 83.7(a)-(c). Indeed, the Final Determination concluded that Plaintiff met criterion 83.7(a) after 1985.

Secretary's findings in the highly detailed final determination should be upheld.[9/]

Plaintiff also summarily claims that its assertions regarding the final determination support its allegations regarding violations of 5 U.S.C. § 554(d). *Id*. Because this case involves a review of agency action not based on a record developed in an evidentiary hearing, the procedural requirements of § 554 do not apply. *No Oilport! v. Carter*, 520 F. Supp. 334, 371 (W.D. Wash. 1981).

As Defendants detailed in their Motion and earlier filings, Plaintiff's first cause of action exceeds the six year statute of limitations set out in 28 U.S.C. § 2401(a). Defs.' Mot. (Dkt. No. 61) at 26. Plaintiff asserts that its present claims could not have accrued until the time of the final determination. Pl.'s Reply (Dkt. No. 63) at 25. Defendants, however, have explained that numerous events have occurred that placed (or should have placed) Plaintiff on notice regarding its lack of federal acknowledgment more than six years ago. Defs.' Reply (Dkt. No. 43) at 9 (citing the comprehensive 1952 congressional survey of Indian tribes, the Department's 1972 published list of Indian tribes and Indian groups, and the 1979 Federal Register list and ensuing lists; none of which mentioned Plaintiff). Plaintiff contends that omission from these lists does not constitute an express repudiation, however, Plaintiff offers no authority for this argument. In each of these instances, it is clear that Defendants maintained the position that it did not view Plaintiff as entitled to a government to government relationship with the United States.

Defendants' Motion pointed out that Plaintiff has failed to identify a fiduciary duty which

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[9/] Plaintiff's Reply also includes arguments which contradict one another. For example, Plaintiff claims that Defendants failed to consider that there were historical "time periods for which evidence is demonstrably limited or not available." Pl.'s Reply (Dkt. No. 63) at 24. This argument contradicts Plaintiff's assertion that it "presented substantial evidence satisfying all seven of the criteria." *Id*. at 23.

requires Defendants to list Plaintiff as a federally recognized Indian tribe or provide its members with the benefits and services that are connected to acknowledgment. Defs.' Mot. (Dkt. No. 61) at 26. "An Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Shoshone Bannock Tribe*, 56 F.3d 1476, 1482 (D.C. Cir. 1995). Plaintiff cites 25 U.S.C. § 2, however, this general statute certainly does not contain the requisite unambiguous provision requiring Plaintiff's recognition as a federally recognized Indian tribe.

Defendants' Motion explained that Plaintiff was not deprived of due process of law. Defs.' Mot. (Dkt. No. 61). Defendants asserted that Plaintiff does not possess the requisite "legitimate claim of entitlement" triggering the due process guarantee. Plaintiff cites *Greene v. Lujan*, 1992 WL 533059 (W.D. Wash. Feb. 25, 1992), in order to argue that it possesses this necessary claim of entitlement. As Defendants noted previously, the *Greene* court focused on the loss of benefits by individual Samish in making its findings. Defs.' Reply (Dkt. No. 43) at 27. Plaintiff has not presented evidence that any of its members have lost benefits that would trigger the due process guarantee.

Defendants' Motion also summarized the extensive process that it afforded Plaintiff. Defs.' Mot. (Dkt. No. 61) at 27. Plaintiff's Reply offers nothing to suggest that it did not receive the benefits of Defendants' lengthy review process, the technical assistance letters sent to Plaintiff, the over 250 page proposed finding detailing the areas in which Plaintiff needed to submit additional evidence, and the formal meeting allowing Plaintiff's members and researchers to receive guidance from Defendants' experts. Plaintiff also does not dispute that Defendants provided six months for Plaintiff to submit such evidence, comments, and arguments. Indeed,

Plaintiff cannot refute that the Fifth Amendment "only requires that a person receive his "due" process, not every procedural device that he may claim or desire." *Johnson v. U.S.*, 628 F.2d 187, 194 (D.C. Cir. 1980). Plaintiff also asserts that because the independent review process before the Interior Board of Indian Appeals (IBIA) is discretionary, it "had a perfect right under the regulations and APA to seek review by this Court." Pl.'s Reply (Dkt. No. 63) at 29. Plaintiff is correct that this procedural safety guard is optional, however, "the fact that [Plaintiff] failed to avail [itself] of the full procedures provided . . . does not constitute a sign of their inadequacy." *Kremer v. Chemical Const. Corp*., 456 U.S. 461, 485 (1982).

Finally, it is important to reiterate that this is the second suit brought by Plaintiff. In its first complaint, Plaintiff asked to be added to the list of tribal entities. Defs.' Ex. 1. When Plaintiff filed its motion for summary judgment in that case, however, it was based on undue delay. Defs.' Ex. 2. The relief Plaintiff requested was that the Department complete the processing of its application within a year. *Id*. The relief that the court granted was to require the Department to complete its processing of Plaintiff's petition within the Court's mandated timetable. *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 42, 51 (D.D.C. 2001). The Department fulfilled this requirement, although Plaintiff requested extensions even after agreeing that it would not do so. It is only after Plaintiff got the relief it requested and ignored the administrative remedies available to it before the Department's administrative tribunals that the Plaintiff sought to circumvent the process it had so vigorously fought to invoke.

III. Conclusion

Based on the aforementioned and the Defendants' earlier filings, Defendants respectfully request that the Court enter summary judgment in their favor on all of Plaintiff's claims.

Respectfully submitted,

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Dated this 27th day of April, 2007.

__/s/ Sara E. Culley_____
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