Muwekma Ohlone Tribe v. Salazar, No. 11-5328, 2013 WL 765009 (D.C. Cir. March 1, 2013).

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In *Muwekma Ohlone Tribe v. Salazar*,[1] the United States Court of Appeals for the District of Columbia Circuit denied the Muwekma's petition to order the Secretary of the Interior to recognize it as an Indian tribe. This case is significant because the Muwekma were previously a federally recognized Indian tribe, but, unlike other similarly situated tribes, they were not allowed to enjoy a summary process to re-attain recognition. The circuit court held the Muwekma case is distinguishable from other cases where previously recognized tribes enjoyed an easier road to recognition because the interaction between Muwekma members and the federal government did not equate to interaction on a government-to-government basis.

Beginning with the passage of the Indian Reorganization Act of 1934 and until 1978, the Department of the Interior ("DOI") conducted proceedings to determine if a tribe should be recognized; these determinations were made on an *ad hoc* basis.[2] In 1978, the DOI established a formal recognition procedure ("Part 83 process") for groups "not already acknowledged" or "receiving services from the Bureau of Indian Affairs."[3] The Part 83 process provides that groups seeking recognition "must satisfy" seven criteria with "thorough explanations and supporting documentation."[4] Groups, such as the Muwekma, that were once recognized have a lower threshold for satisfying the first three of the seven criteria. Those groups need only show that (1) they have been identified "since the point of last federal acknowledgement . . . by such sources as the same tribal entity that was previously acknowledged or as a portion that has

[1] Muwekma Ohlone Tribe v. Salazar (*Salazar II*), No. 11-5328, 2013 WL 765009 (D.C. Cir. March 1, 2013).
[2] *Id*. at *1.
[3] 25 C.F.R. § 83.3(a)-(b).
[4] 25 C.F.R. § 83.6(c).

evolved from that entity;" (2) "it comprises a distinct community at present;" and (3) "political influence or authority is exercised within the group at present."[5] Most notably, the DOI may waive the Part 83 process if waiver is "in the best interest of the Indians."[6]

The Muwekma Ohlone Tribe filed a "petition for acknowledgment" with the United States Department of the Interior and the Assistant Secretary for Indian Affairs, requesting recognition as an Indian tribe. The Muwekma are a group of Indians from the San Francisco Bay who descended from a previously-recognized tribe known as the Verona Band.[7] Their petition for acknowledgment was filed with the DOI in 1995 and was denied in 2002. The Muwekma challenged the denial in district court.[8] After requesting more information for its rationale,[9] the United States District Court for the District of Columbia sustained the DOI's denial, and granted summary judgment in favor of the DOI.[10]

The Muwekma alleged that the DOI denied its Fifth Amendment Equal Protection right by requiring them to proceed under the Part 83 process, despite summarily recognizing two other Indian tribes outside the Part 83 process.[11] The Muwekma claimed they were previously recognized like the other tribes, so they were entitled to the same summary approval.[12] They argued that like the other tribes, the Muwekma Tribe "(1) was federally recognized during the 20th Century . . ; (2) was never terminated by any Act of Congress or court order; (3) for some unknown reason was forgotten and mistakenly left off of the BIA's list of recognized tribes; and

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[5] *Salazar II*, 2013 WL 765009, at *2; 25 C.F.R. § 83.8(d)(1)-(3).
[6] 25 C.F.R. § 1.2.
[7] *Salazar II*, 2013 WL 765009, at *3.
[8] Muwekma Ohlone Tribe v. Kempthorne, 452 F. Supp. 2d 105 (D.D.C. 2006).
[9] *Id*. at 125.
[10] Muwekma Ohlone Tribe v. Salazar, 813 F. Supp. 2d 170, 188 (D.D.C. 2011).
[11] *Salazar II*, 2013 WL 765009, at *5.
[12] *Id*.

(4) continued to exist and to seek reaffirmation."[13] Because of this disparate treatment, they argued, the decision was arbitrary and capricious under the Administrative Procedure Act.[14]

Reviewing the district court's summary judgment decision, the circuit court agreed, holding that the "Interior's emphasis on government-to-government interaction as a distinguishing characteristic is not arbitrary."[15] The circuit court further held that "interaction between Muwekma *members* and the federal government does not equate to *tribal* interaction with the federal government on a government-to-government basis."[16] These member interactions included sending their children to BIA schools and enrolling in the California Claims Act.[17] Finally, the circuit court agreed with the district court that because of the differing relationships with the federal government, the Muwekma Tribe was not similarly situated with the other tribes.[18]

This decision is important because it upholds the DOI's emphasis on government-to-government interaction to show contiguity within a group seeking recognition as an Indian tribe. Even where tribal members invariably existed and participated in government programs, this does not constitute a government-to-government relationship rising to the level necessary for tribal recognition. Likewise, participation in these activities is not, at least by itself, sufficient to show that the group was externally identified as an Indian tribe because former members can still participate in these government programs even after their tribe has faded away.[19] The D.C. Circuit showed great deference to the DOI's consideration of the types of evidence provided by

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[13] *Id*. at *6 (alteration in original) (quoting Brief for Appellant at *36, 2012 WL 2675362.).
[14] *Id*. "If [an] agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases." *Id*. (alteration in original) (quoting Westar Energy, Inc., v. Fed. Energy Regulatory Comm'n, 473 F.3d 1239, 1241 (D.C. Cir. 2007)).
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*. at *7.
[19] I*d*. at *11-*12.

different tribes and the weight given to such evidence, acknowledging that tribes may face special circumstances that warrant different treatment.[20]

[20] *Id*. at *10-*11.