



The Office of the Muwekma Ohlone Tribal Council

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August 13, 2024

Mayor Matt Mahan  
City of San Jose  
200 E. Santa Clara St.  
San José, CA 95113

**Re: Request to Add Resolution on Federal Recognition for Muwekma Ohlone Tribe to the City Council meeting Agenda of August 13, 2024.**

Dear Mayor Mahan,

I am pleased to provide you on behalf of the Muwekma Ohlone Tribe responses to the points made in the letter dated August 7, 2024 from Congresswoman Lofgren regarding the proposed resolution supporting the Tribe's recognition.

First, let me say that I am surprised with the vigorousness with which the Congresswoman seeks (1) to deny the Tribe's legitimate claim for justice for the people of the Muwekma Ohlone Tribe and their ancestors, and (2) to discourage the City Council from voicing its views on the matter to Congress. The arguments in the Congresswoman's letter do not undercut the Tribe's powerful and just case for recognition.

Each key point of Congresswoman Lofgren's letter is discussed below.

- *The letter argues that Interior's denial of acknowledgment to the Tribe is conclusive of the Tribe's entitlement to recognition.* This is wrong for two reasons. First, Tribes may also seek federal recognition by act of Congress. Congress has expressly reserved such authority in the Federally Recognized Tribe List Act,<sup>1</sup> and since 1970, Congress has passed legislation to federally recognize or reaffirm 26 Indian tribes.<sup>2</sup> This includes tribes that were terminated and denied recognition in the acknowledgment process. For example, in 2019 Congress recognized the Little Shell Band, which was initially denied

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<sup>1</sup> Pub. L. 103-454, title I, § 103(3) ("Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court"), (5) ("Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated").

<sup>2</sup> S. Rep. 116-190, 116<sup>th</sup> Cong., 2d Sess. 2 (2020) (listing 25 tribes recognized by Congress to date); National Defense Authorization Act for Fiscal year 2020, Pub. L. 116-92, § 2870 (recognizing the Little Shell Band).

recognition by Interior.<sup>3</sup> Second, legally the Interior Department may reconsider the acknowledgment decision. The Supreme Court confirmed that the Department has the power to change its mind on matters of recognition, and recognized that this authority has long been exercised by the Department.<sup>4</sup> In the litigation for judicial review of Interior's recognition decision regarding Muwekma the courts held only that the decision was not arbitrary and capricious or contrary to law. These decisions do not preclude the Department from making a different determination now. Nor do they preclude Congress from reversing Interior just as it reversed itself in restoring terminated tribes and it recognized Little Shell.

- *The letter cites the Office of Federal Acknowledgment's conclusion that Muwekma did not satisfy certain criteria for acknowledgment.* The acknowledgment decision was wrong as it refused to consider relevant evidence of community, including godparenting relationships spanning decades of the 20<sup>th</sup> century, the activism to save the Ohlone Cemetery, and the Tribe's organization of Muwekma economic activities in the late 20<sup>th</sup> century. The Department's decision improperly rejected a number of categories of evidence that demonstrated continuing tribal status and federal interaction with the Tribe, including BIA approval of Muwekma tribal members' California Judgment Act enrollment applications that Muwekma children attended Chemawa Indian School in Oregon in 1940s.<sup>5</sup>

Interior's decision failed to consider important information about historical circumstances affecting the Tribe's ability to document its continuing status. This violated Interior's own regulations.<sup>6</sup> Historically California tribes suffered from brutal

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<sup>3</sup> *Id.*; S. Rep. 116-190, at 3 ("In 2009, the Department issued a negative 'final determination' against federally acknowledgment of Little Shell."). Little Shell appealed the decision to the Interior Board of Indian Appeals, and it was referred to the Assistant Secretary for reconsideration. Little Shell elected to proceed under the new 2015 acknowledgment regulations but had not resubmitted its petition. *Id.*

<sup>4</sup> See *Carcieri v. Salazar*, 555 U.S. 379, 398-399 (2009) (Breyer, J., concurring) (noting that the Department of the Interior did not recognize Stillaguamish Tribe until 1976 but then acknowledged that the Tribe had maintained treaty rights against the United States since 1855; that in 1934 Department thought the Grand Traverse Band of Ottawa and Chippewa Indians had dissolved, but later recognized the Tribe as having existed continuously since 1675; and that in the 1930s the Department thought that the Mole Lake Tribe no longer existed, but later recognized the Tribe); see also *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) (rejecting interpretation of Indian Reorganization Act that would "[bind the government by its earlier errors or omissions.>").

<sup>5</sup> As discussed below, in its recent decision finding the Mashpee Wampanoag Tribe was under federal jurisdiction in 1934 for purposes of the Indian Reorganization Act, the Interior Department relied on evidence that Mashpee students were enrolled in the Carlisle Indian School.

<sup>6</sup> Acknowledgment regulations governing the acknowledgment process stress that OFA should "[t]ake into account historical situations and time periods for which evidence is demonstrably

policies by the state and federal governments aimed at wiping them out entirely. Indians in California suffered through centuries of imperial rule by the Spanish and Mexican governments, which repressed Indian religion and lifeways and imposed forced labor. After the United States obtained California from Mexico, United States commissioners negotiated and signed a series of treaties with the California Indian tribes under which the tribes agreed to cede millions of acres of valuable land in the State in exchange for 8 million acres of reservations and compensation for their ceded lands. At the urging of the Legislature and U.S. Senators, the Senate never ratified the treaties and kept them secret for decades. In the meantime, the State passed laws that legalized enslavement of Indians and organized and paid for militias to hunt down and kill Indians throughout California with the goal of exterminating them.<sup>7</sup> Over 303 militia units involving 35,000 California volunteers served between 1851 and 1866.<sup>8</sup> The State and federal governments expended as much as \$1.5 million, more than \$24 million in today's dollars, to pay the militias for campaigns to kill Indians.<sup>9</sup> These policies contributed to an 80 percent decline of the Native population from 1846 to 1873.<sup>10</sup> In the early 20th century a study by the federal government "found that Indians had been forced from agriculturally productive lands and were then living on worthless lands in distressing conditions." *Duncan v. Andrus*, 517 F. Supp. 1, 2 (N.D. Cal. 1977). Governor Newsom recently recognized that "the State historically sanctioned over a century of depredations and prejudicial policies against California Native Americans" and apologized for "the many instances of violence, maltreatment and neglect California inflicted on tribes . . ." in Executive Order N-15-19 (June 18, 2019).

In addition to suffering from the policies and events described above, in the early 20<sup>th</sup> century the tiny Muwekma communities were decimated by a flu epidemic and then forced to leave to pursue work. Formal and informal discrimination also forced the Muwekma to downplay their tribal organization, identities, and culture. Yet Interior's

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limited or not available," and "the limitations inherent in demonstrating historical existence of community and political influence or authority" and to "[a]pply these criteria in context with the history, regional differences, culture, and social organization of the petitioner." 25 C.F.R. § 83.10(b)(2), (3) and (5). Furthermore, they require that "[d]istinct community must be understood flexibly in the context of the history, geography, culture, and social organization of the entity," and the maintenance of political influence or authority "is to be understood flexibly in the context of the history, culture, and social organization of the entity." *Id.* § 83.11(b), (c).

<sup>7</sup> See generally William Wood, *The Trajectory of Indian Country in California*, 44 *Tulsa L.R.* 317, 333-44 (2008); Chris Clarke, *Untold History: The Survival of California's Indians*, KCET (Sept. 26, 2016), <https://www.kcet.org/shows/tending-the-wild/untold-history-the-survival-of-californias-indians>; *Stand Up for Cal.! v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 228-29 (D.D.C. 2016).

<sup>8</sup> Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe* 174 (2016).

<sup>9</sup> *Id.* at 14, 252-53, 320-21.

<sup>10</sup> *Id.* at 10.

decision failed to take account of these historical circumstances in direct violation of its own regulations. Not only was this unlawful, but this history highlights the powerful force of justice pushing Muwekma's recognition claim.

- *The letter points to the court's decision in Muwekma Ohlone Tribe v. Salazar rejecting the Tribe's request for judicial review under the Administrative Procedure Act of the negative acknowledgment decision.* The court's rejection of the Tribe's lawsuit is not a basis for withholding support for recognition because the issues in that case were limited to the questions whether the acknowledgment decision was arbitrary and capricious or contrary to law.<sup>11</sup> The court's holding was limited to whether the legal standard required reversal, and did not extend to a determination whether it was correct.
- *Developments subsequent to the acknowledgment decision and subsequent litigation support the Tribe's claim to acknowledgement.* In 2022 a federal district court held the Tribe is entitled to sovereign immunity protecting federally recognized tribes. In *Weiss v. Perez*, 602 F. Supp. 3d 1279 (N.D. Cal. 2022), the court found the tribe satisfied the test for tribal status recognized in *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) and *Montoya v. United States*, 180 U.S. 261, 266 (1901). *Id.* at 1295 n.3. The court dismissed a lawsuit involving claims in which the Tribe had a protected interest based on its determination that "the Tribe is a Native American tribe entitled to sovereign immunity, it cannot be joined to his lawsuit." *Id.* at 1295.

In January 2021 the Tribe submitted new evidence in the form of a 150-page detailed report prepared by Dr. Christine Grabowski entitled *The Origin and Continuity of the Muwekma Ohlone Indian Tribe (MOIT)* dated December 2020. That report demonstrated that Interior's decision contained significant errors ejecting substantial evidence that the Tribe presented and failing to consider historical context of such evidence. A federal court recently held, "evaluating the evidence in isolation and failing to view the probative evidence 'in concert'" is contrary to the Department's approach. *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 218 (D.D.C. 2020). The acknowledgment decision evaluated all, or nearly all evidence in isolation, without consideration of the relationship between different kinds and pieces of evidence, which was contrary to this principle described above as well as to the Part 83 regulations.

Subsequent changes in the law show that the acknowledgment decision's rejection of evidence that Muwekma tribal members attended BIA boarding schools during the 1930s and 1940s was error. The decision rejected the evidence on the ground that the record did not indicate whether these tribal members were accepted based on their degree of Indian blood or membership in a recognized tribal group. However, since then, an

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<sup>11</sup> *Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp.2d 170, 199 (D.D.C. 2011) ("there exists no basis upon which it may overturn the agency's findings"); 708 F.3d 209 (D.C.Cir. 2013) (affirming district court).

Interior Solicitor’s opinion determined that BIA actions taken for or on behalf of individual tribal members is probative of a tribe’s status as under federal jurisdiction, including the education of Indian children at BIA schools. Sol. Op. M-37029 19.<sup>12</sup> A federal district court held that the Department’s rejection of evidence that the BIA educated Mashpee tribal members at BIA schools over a period of 13 years on the ground that it “was not evidence of federal action towards the Mashpee Tribe itself – just towards a handful of Mashpee students,” was “expressly inconsistent with express language in the M-Opinion.” *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 220. The court held, “[t]he M-Opinion thus expressly allows for a federal action towards some tribal members – here students – to serve as evidence that supports a finding that a tribe as a whole was under federal jurisdiction.” *Id.* In a later decision, the Department noted BIA schools were part of the “federal Indian policy aimed at breaking up tribal communities across the country” and found that BIA education of Mashpee children at BIA schools “provides probative evidence of federal jurisdiction over the Tribe and its members.” Interior Mashpee Tribe Fee-to-Trust Decision 19 (Dec. 22, 2021).

I look forward to discussing these issues as consideration of the proposed resolution proceeds.

Respectfully submitted,



Charlene Nijmeh  
Chairwoman

CC: Councilmembers

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<sup>12</sup> The Department later withdrew this opinion and in 2020 replaced it with a different standard accepting evidence about the “establishment of schools and other service institutions for the benefit of a tribe.” *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 219 (D.D.C. 2020) (citing Mar. 10, 2020 memorandum). However, the Department since reinstated M-37029. *See* Sol. Op. M-37070 (Apr. 27, 2021).