No. 17-16838

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGUA CALIENTE TRIBE OF CUPEÑO INDIANS
OF THE PALA RESERVATION,

Plaintiff – Appellant,

v.

JOHN TAHSUDA,[1] Acting Assistant Secretary – Indian Affairs,
United States Department of the Interior,

Defendant – Appellee,

On Appeal from the U.S. District Court for the Eastern District of California, Case No. 2:15-cv-02329-JAM-KJN (Hon. John A. Mendez)

ANSWERING BRIEF FOR DEFENDANT-APPELLEE

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GLOSSARY

APA	Administrative Procedure Act
Assistant Secretary	Assistant Secretary of the Interior – Indian Affairs
Cupeño	Agua Caliente Tribe of Cupeño Indians of the Pala Reservation
ER	Plaintiff-appellant's excerpts of record
IRA	Indian Reorganization Act
List Act	Federally Recognized Indian Tribe List Act of 1994
PBMI	Pala Band of Mission Indians
SUWA	Southern Utah Wilderness Alliance

INTRODUCTION

Plaintiff-appellant is a group of Indians calling itself the "Agua Caliente Tribe of Cupeño Indians of the Pala Reservation" (Cupeño). After being disenrolled from the federally recognized Pala Band of Mission Indians, the Cupeño separately organized and requested that the Department of the Interior's Assistant Secretary–Indian Affairs recognize them on a government-to-government basis. The Assistant Secretary declined to do so absent receipt of a documented petition submitted by the Cupeño under Interior's regulations governing the longstanding administrative process for acknowledging federally recognized Indian tribes.

On the theory that it is already a federally recognized tribe, the Cupeño filed suit to compel the Assistant Secretary to "correct" the official list of federally recognized Indian tribes by including it on that list. The district court dismissed the suit for failure to exhaust the required administrative paths to federal recognition, and it rejected the Cupeño's claim that the Assistant Secretary acted arbitrarily and capriciously by not treating the Cupeño the same as three other tribes whose names had been added to the list outside the normal administrative process. As demonstrated below, the district court's order was correct and may be affirmed on any of numerous grounds.

STATEMENT OF JURISDICTION

We agree with the jurisdictional statement in the Cupeño's brief (at 1) except that, for the reasons discussed below at pp. 19-28, we disagree that the district court had jurisdiction over the Cupeño's request to compel Interior to recognize it as an Indian tribe.

ISSUES PRESENTED

1. Whether the district court correctly dismissed, on any of the following grounds, the Cupeño's request to compel Interior to "correct" the list of federally recognized Indian tribes by adding it to the list:

a. The Cupeño failed to exhaust required administrative remedies.

b. The Cupeño's request is unripe.

c. Interior has primary jurisdiction to resolve the Cupeño's request.

d. Interior does not have any mandatory, discrete duty under any statute or regulation to grant the Cupeño's request.

2. Whether the district court correctly rejected, on any of the following grounds, the Cupeño's challenge to Interior's decision not to "correct" the list of federally recognized Indian tribes by adding plaintiff to the list:

a. Interior's decision is committed to its discretion as a matter of law.

b. The Cupeño's challenge to Interior's decision is time-barred.

c. Interior's decision is not arbitrary, capricious, or contrary to law or constitutional right.

STATEMENT OF THE CASE

1. Overview of the federal government's recognition of Indian tribes

The United States maintains a formal relationship with several hundred Indian tribes. Recognition of that relationship "may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004) (internal quotation marks omitted). Federal recognition serves as "a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes." 25 C.F.R. 83.2. For example, federally recognized tribes may receive "assistance for such purposes as corrections, child welfare, education, and fish and wildlife and environmental programs," and they may, in certain circumstances, conduct gaming under federal law. *Timbisha Shoshone Tribe v. U.S. Dep't of the Interior*, 824 F.3d 807, 809 (9th Cir. 2016) (internal quotation marks omitted).

As noted above, the federal government has recognized Indian tribes through a variety of means. In 1934, Congress passed the Indian Reorganization Act (IRA), discussed below, which was intended "to permit the tribes to set up legal structures designed to aid in self-government," for

example, by enabling them to organize by adopting a constitution and bylaws that could be submitted to the Secretary for his approval. *Id.* Numerous tribes organized under the Act, and federal recognition gained greater importance because the Act's benefits were made available to the members of "recognized" Indian tribes and their descendants. 25 U.S.C. 5129 (definition of "Indian"); *see also*, *e.g.*, 25 U.S.C. 5108 (authorizing acquisition of land in trust for "Indians").

"In 1934, when Congress enacted the IRA, there was no comprehensive list of recognized tribes, nor was there a formal policy or process for determining tribal status." *Cty. of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012, 1023 (9th Cir. 2017). Until the late 1970s, therefore, the United States continued to recognize Indian tribes on an ad hoc, case-by-case basis. *Kahawaiolaa*, 386 F.3d at 1273. In 1978, pursuant to broad authority delegated by Congress to the Secretary of the Interior regarding Indian affairs, the Secretary[2] promulgated regulatory procedures for recognizing Indian tribes. *Id.* at 1273-74 (discussing regulations first published at 43 Fed. Reg. 39,361,

[2] This brief refers to the "Secretary" interchangeably with the Assistant Secretary–Indian Affairs, the official to whom full authority for acknowledging Indian tribes has been delegated. *See* 109 DM 8, 209 DM 8, *available at* http://elips.doi.gov/ELIPS/Browse.aspx?startid=452&dbid=0; *see also* 25 U.S.C. 1a (permitting Secretary's delegation of authority to the former Commissioner of Indian Affairs); 42 Fed. Reg. 53,682, 53,682 (Oct. 3, 1977) (transferring Commissioner's authority to Assistant Secretary).

39,362–39,364 (Sept. 5, 1978) (codified as amended at 25 C.F.R. pt. 83)); *see also* 25 U.S.C. 2 (delegating authority over "the management of all Indian affairs and of all matters arising out of Indian relations"); 43 U.S.C. 1457 (charging the Secretary with "the supervision of public business relating to" Indians).

Those regulations (commonly referred to as the "Part 83" regulations) apply to "indigenous entities that are not federally recognized Indian tribes." 25 C.F.R. 83.3. A group wishing to obtain federal recognition as an Indian tribe must submit a documented petition explaining how it meets the criteria for federal acknowledgment. 25 C.F.R. 83.20, 83.21. Because the district court rejected the Cupeño's claim due to its failure to follow the acknowledgment regulations, we provide a brief overview of the regulatory process to provide context for understanding why the Cupeño were required to follow that process.

Among other criteria, a petitioner must show that it "has been identified as an American Indian entity on a substantially continuous basis since 1900"; that it "comprises a distinct community" and has "existed as a community from 1900 until the present"; that it has "maintained political influence or authority over its members as an autonomous entity from 1900 until the present"; that its membership is composed of "individuals who descend from a

historical Indian tribe" who, principally, "are not members of any federally recognized Indian tribe"; and that Congress has not terminated or forbidden federal recognition. 25 C.F.R. 83.11(a)–(g).

Part 83 applies not only to groups seeking recognition in the first instance, but also to currently unrecognized groups that were previously recognized, whether by treaties, executive orders, or some other means. 25 C.F.R. 83.12; *see also Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013). Previous federal recognition does not automatically entitle an Indian group to current recognition. Rather, if a petitioner provides "substantial evidence of unambiguous Federal acknowledgment" at some prior date, 25 C.F.R. 83.12(a), the regulation "relaxes" the evidentiary burden for obtaining acknowledgment today. *Muwekma*, 708 F.3d at 212 (discussing former regulation). Even an entity once recognized as an Indian tribe in the past must demonstrate that it comprises a distinct community at present and that it has continued to be identified as an Indian entity and has maintained political influence or authority over its members since the prior acknowledgment or since 1900, whichever is later. 25 C.F.R. 83.12(b); *see also* 25 C.F.R. 83.11(a)–(c).

A positive acknowledgment determination makes the group eligible for "the protection, services, and benefits of the Federal Government available to

those that qualify as Indian tribes and possess a government-to-government relationship with the United States." 25 C.F.R. 83.2(a); *see also* 25 C.F.R. 83.46(a). Once acknowledged, the group is added to the list of federally recognized Indian tribes, which Interior regularly publishes in the Federal Register. *See* 25 C.F.R. 83.6(a). Interior began regularly publishing that list when it created the Part 83 process. *See* 43 Fed. Reg. at 39,362–39,363; 44 Fed. Reg. 7235, 7235-37 (Feb. 6, 1979) (ER340-42) (first list published pursuant to the new regulations).[3]

Congress subsequently enacted the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (List Act), which identifies the Part 83 process as one means of recognizing the federal status of Indian tribes. *Id*. The List Act instructed the Secretary to annually "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 5131(a).

On July 1, 2015, concurrent with the publication of revised Part 83 regulations, Interior published a policy that "any group * * * seeking Federal acknowledgment as an Indian tribe administratively must petition under 25 CFR part 83 from this date forward." 80 Fed. Reg. 37,538, 37,539

[3] Citations to "ER" are to the plaintiff-appellant's Excerpts of Record.

(July 1, 2015) (ER412); *see also* 80 Fed. Reg. 37,862, 37,887–37,895 (July 1, 2015) (adopting revised Part 83 regulations). Previously, Interior had received comments criticizing its use of administrative approaches other than the Part 83 process for acknowledging Indian tribes. After amending its regulations to improve transparency in the acknowledgment process, Interior determined that Part 83 would be the "sole administrative avenue for acknowledgment as a tribe." 80 Fed. Reg. at 37,539.

2. Statement of facts

a. The government's early interaction with Cupeño Indians

Plaintiffs are the descendants of Indians who resided at the village of *kúpa* near Agua Caliente Creek and Warner Hot Springs in San Diego County, California, referred to as the "Agua Caliente" tribe or Cupeños. Following the Mexican-American War, the United States in 1851 negotiated a treaty at the San Louis Rey Mission with various Indians, including the "Agua Caliente" and the "Pala" band (also referred to as the Luiseño based on their residence near the mission). ER183. In exchange for the Indians' agreement to acknowledge the United States' sovereignty over their territory and to refrain from all hostilities, the United States committed to provide for the Indians' welfare and to set apart land on which the Indians could reside. ER180-81.

The treaty was never ratified, but in 1875 President Grant issued an executive order setting apart separate reservations for the permanent use and occupancy of the "Pala" and "Agua Caliente." ER241-42 (emphasis omitted). Five years later, however, President Hayes issued an executive order specifying that so much of his predecessor's directive "as relates to the Agua Caliente Indian Reservation in California be, and the same is hereby, canceled." ER494. Thus, the Cupeño were left without a reservation, although they continued to occupy land at Warner Springs, where they had traditionally resided. *See* ER128.

Some years later, settlers succeeded in suing to quiet title and to evict the Cupeño. *See Baker v. Harvey*, 181 U.S. 481, 491 (1901). Not long afterward, Congress authorized the Secretary to acquire land for the Cupeño. *See* Act of May 27, 1902, ch. 888, 32 Stat. 245, 257 (ER247). The Secretary ultimately selected a tract adjacent to the Pala reservation where the Cupeño were allowed to reside along with other Indians. *See* ER250-56 (deed).

b. Organization of the Pala Band of Mission Indians

In 1934, after decades of federal policies directed toward removing Indians from tribal life and assimilating them into contemporary society, Congress enacted the IRA, which was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes'

acquisition of additional acreage and repurchase of former tribal domains." *Cty. of Amador*, 872 F.3d at 1017 (internal quotation marks omitted). The statute's overriding purpose "was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Section 16 of the IRA provided a means by which an Indian tribe may organize its government "for its common welfare" by "adopt[ing] an appropriate constitution and bylaws," which the tribe may put into effect by submitting them to the Secretary and obtaining his approval. 25 U.S.C. 5123(a). The term "tribe" may refer to "any * * * organized band" of Indians or to "the Indians residing on one reservation." 25 U.S.C. 5129.[4]

Section 18 of the IRA required the Secretary, shortly after the statute was passed, "to call * * * an election" at Indian reservations to allow the adult residents to opt out of the statute's application. 25 U.S.C. 5125. If "a majority

[4] The IRA, however, does not require tribes to organize through constitutions approved under the statute's prescribed procedures. Technical amendments to the statute in 2004 codified Interior's longstanding practice of respecting a tribe's right to organize its government as it sees fit: "Notwithstanding any other provision of [the] Act, each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in [Section 5123]." 25 U.S.C. 5123(h)(1). The technical amendments further provide that nothing in the IRA invalidates "any constitution or other governing document adopted by an Indian tribe after June 18, 1934," the date of the IRA's enactment, "in accordance with" a tribe's retained authority. 25 U.S.C. 5123(h)(2).

of the adult Indians" on a reservation "vote[d] against its application," then the statute "shall not apply" to the reservation. *Id*.

On December 18, 1934, the Secretary held a single Section 18 election for the Indians residing on both tracts of the Pala Reservation, and the eligible adult Indians voted against applying the IRA. *See Aguayo v. Jewell*, 827 F.3d 1213, 1218 (9th Cir. 2016). Notwithstanding that vote, the Indians residing on the Pala reservation in 1959 adopted articles of association to form an entity called the Pala Band of Mission Indians (PBMI), which included descendants of both the Luiseño and the Cupeño. ER662; *see also* ER557-63. Because PBMI had already voted against applying the IRA, it was not required to follow that statute's procedures to organize its government. Nevertheless, PBMI submitted its articles of association to the Secretary, who approved them in 1960. ER564. The articles may be amended by the general council, and the amendment "shall be in effect upon the approval of the [Assistant Secretary]." ER563.

c. The Cupeño's withdrawal from PBMI and its request for the Secretary to "correct" the federally recognized tribes list.

After the Secretary adopted the Part 83 regulations in 1979, the first list of federally acknowledged Indian tribes published in the Federal Register included the "Pala Band of Luiseno Mission Indians, Pala Reservation, California." 44 Fed. Reg. at 7236 (ER341). In 1997, PBMI's general council voted to adopt a constitution that replaced the articles of association. *See*

ER347-60. The Council submitted the constitution to Interior, which approved it retroactive to the date it was adopted. ER345.

In 2011, PBMI's executive committee disenrolled about 150 members of Cupeño descent. *See Aguayo*, 827 F.3d at 1221. Some of those individuals asked Interior to review the merits of the disenrollment decision, but the Assistant Secretary declined to do so on the grounds that it was inappropriate for him to interfere with PBMI's internal affairs. *See id.* This Court upheld the Assistant Secretary's decision. *See id.* at 1226-29.

In September 2014, pursuant to a resolution of its general council (ER403), PBMI requested that the Secretary change the name on the list of federally acknowledged Indian tribes to reflect the official name stated in PBMI's constitution. In December 2014, the Cupeño notified the Secretary that it had withdrawn from PBMI and requested that the Secretary "correct" the list of federally acknowledged tribes to include the group. ER394. The Cupeño's request stated that PBMI "does not have sovereign authority" over the Cupeño's members and asserts that PBMI "is not even a tribe" with independent sovereignty of its own. ER396. Six months later, the Cupeño reiterated its request that Interior "update" the federally acknowledged tribes list to include the Cupeño. ER382.

In January 2016, Interior published in the Federal Register a list of federally acknowledged Indian tribes identifying the "Pala Band of Mission Indians" as the tribe "previously listed as the Pala Band of Luiseno Mission Indians of the Pala Reservation, California." 81 Fed. Reg. 5019, 5022 (Jan. 29, 2016) (ER186). The Cupeño did not appear on the list.

On February 17, 2016, the Assistant Secretary denied the Cupeño's request to be added to the recognized tribes list. ER488-90. The Assistant Secretary cited Interior's recently adopted policy that it would no longer accept requests for acknowledgment outside the Part 83 process. ER489. He distinguished three instances prior to the policy's adoption where Interior had reaffirmed the government's relationship with tribes outside that process, on the ground that "none of those tribes claimed to be withdrawing or dissociating from a federally recognized tribe." *Id*.

d. The district court litigation

On November 9, 2015, the Cupeño filed suit against the Assistant Secretary seeking to compel him to respond to the group's letters. ER691-97. After the Assistant Secretary responded by denying the group's request, as discussed above, the Cupeño filed an amended complaint advancing a single claim that seeks relief on two distinct legal grounds. ER687-90. First, the Cupeño seeks to compel the Assistant Secretary to acknowledge the group as

eligible for federal services as an Indian tribe. ER689. Such a theory is best construed as a claim seeking to compel agency action unlawfully withheld. *See* 5 U.S.C. 706(1). Second, the Cupeño asserts that the Assistant Secretary's denial of the group's request to be added to the list is "arbitrary, capricious, and does not accord with the law," ER687, and seeks to have that decision reversed. That theory is best understood as a challenge to final agency action under 5 U.S.C. 706(2).

The parties cross-moved for summary judgment, and at a hearing on those motions, the court ruled in favor of the Assistant Secretary. ER26-38. Principally, the court held "that it does not have jurisdiction" to compel the Assistant Secretary to "correct the federally recognized Indian Tribe list to add the plaintiff to that list absent the plaintiff utilizing the Part 83 process" established under the regulations. ER26-27. That was so because the Part 83 process is "mandatory," even for a plaintiff "who is contending that it has always been or was a previously recognized federal Indian Tribe." ER27.

As the court stated, the "whole reason behind the [Part 83] process is that the [D]epartment, unlike a district court, * * * has the expertise to make the determinations" about whether to recognize Indian tribes, "and that the courts should, in a number of cases, yield to that expertise." *Id*. Otherwise, the court explained, the "whole purpose of the regulatory scheme * * * would be

frustrated." *Id*. The court acknowledged that there may be "a lot of evidence to support the position" that the Cupeños ought to be recognized as an Indian tribe, "but that evidence has got to be presented to the proper body first, not to the district court first." ER19.

Outside the Part 83 process, the court held, the Assistant Secretary's rejection of a request to "reaffirm" federal recognition of an Indian tribe "is not subject to APA review." ER30. That is so both because the agency's discretion to take such actions prior to Part 83's adoption was regarded as "a political question," *id.*, and because even after Part 83's adoption, the Assistant Secretary's discretion to acknowledge an Indian tribe outside that administrative process "has not been canalized" by any statute or regulation, ER31; *see also* ER36 ("There is no administrative process for * * * correcting a list" of federally recognized tribes.).

Because the court found it "undisputed" that the Cupeño never filed a Part 83 petition, it rejected the group's request to compel the Secretary to update the federally recognized tribes list as "premature" and "nonjusticiable." ER37-38. The court rejected the Cupeño's argument that the Assistant Secretary had acted arbitrarily and capriciously by not correcting the list outside the Part 83 process for the Cupeño. ER32-34. The court entered judgment for the Assistant Secretary (ER41), and this appeal follows.

STANDARD OF REVIEW

This Court reviews de novo the district court's grant of summary judgment, thereby reviewing directly the agency's action under the Administrative Procedure Act (APA). *See Aguayo*, 827 F.3d at 1221; *accord Cty. of Amador*, 872 F.3d at 1020. The Court may affirm on any basis supported by the record. *See Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 860 n.17 (9th Cir. 1995). Under the APA, agency action is not reviewable if it is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Reviewable agency action may be held and unlawful and set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

SUMMARY OF ARGUMENT

The Cupeño presses two principal legal theories to challenge its absence from the federally recognized tribes list: one, that the district court should have compelled the Assistant Secretary to add the group to the list; and two, that the court should have set aside the Assistant Secretary's decision not to administratively "correct" the list absent a Part 83 petition. The district court correctly rejected both theories.

1. First, the Cupeño seeks a ruling compelling Interior to add it to the federally recognized tribes list. The district court, however, followed the decisions by courts of appeals that have consistently declined to address an

Indian group's acknowledgment request in the first instance. To obtain federal acknowledgment as an Indian tribe, the Cupeño must exhaust administrative remedies by following the process established by Interior's regulations at Part 83. Until it avails itself of that process, the Cupeño's suit to compel the Secretary to add it to the federally recognized tribes list is unripe. All such requests must proceed through the administrative process for acknowledgment, as Interior's recent policy guidance confirms.

Even if the court has jurisdiction over the Cupeño's request to compel addition to the list, that claim should be dismissed because the Secretary has primary authority to resolve it in the first instance. Moreover, the APA does not permit a court to compel Interior to recognize the Cupeño as an Indian tribe because no statute or regulation imposes an unequivocal duty on the agency to do so.

2. Second, the district court correctly rejected the Cupeño's challenge to the Assistant Secretary's letter denying a request to "correct" the official list of Indian tribes outside the Part 83 process for several reasons. First, there is no law to apply to the question whether the Assistant Secretary may elect an extra-regulatory procedure for list correction, for no statute or regulation provides any standard to guide a court's review. Thus, the question is committed to the Assistant Secretary's discretion as a matter of law.

Additionally, the general six-year statute of limitations bars the Cupeño's claim. The Cupeño asserts that the Secretary recognized it as an Indian tribe separately from PBMI, and that its omission from the original list in 1979 was erroneous. Even if that were true, the Cupeño's claim would be time-barred because it was not brought within six years of the list's original publication. Nor could any tolling doctrine save such a claim from untimeliness without eviscerating the purpose behind the statute of limitations.

In any event, the Cupeño's challenge fails on the merits because the Assistant Secretary's decision was neither arbitrary nor capricious; rather, it had a rational basis because other reaffirmed tribes were not similarly situated to the Cupeño in several material respects. First, the Cupeño recently dissociated from a federally recognized tribe, adding complexity better addressed through the more formal process under Part 83. Next, the Cupeño could not demonstrate a separate pattern of dealings showing government-to-government relations. Finally, even if the other tribes were similarly situated, the Secretary's denial was rational because Interior has formalized a policy of relying solely on the Part 83 process to acknowledge federal recognition of tribes. That policy, which the Cupeño does not challenge, disposes of the Cupeño's request altogether.

The district court's judgment should be upheld.

ARGUMENT

I. The district court correctly refused to compel the Secretary to recognize the Cupeño as an Indian tribe.

As noted, this Court may affirm the district court's decision on any of several other threshold grounds, including failure to exhaust administrative remedies, lack of ripeness, or primary jurisdiction. The Court may also affirm on the ground that the Cupeño fail to identify a discrete, mandatory legal duty as required to state a claim for compelling unlawfully withheld agency action. We address these issues in turn.

A. The Cupeño failed to exhaust the administrative remedies available for obtaining federal recognition.

In its Part 83 regulations, Interior has provided a formal administrative process for obtaining recognition as an Indian tribe, and Congress has ratified that process through the List Act. Absent a proper petition under the regulations and a final administrative decision on that petition, a court may not insert itself into the recognition process. That is so because it is only after Interior applies its regulations and makes a final decision on a petition that judicial review of its determination whether to recognize an Indian group as a tribe is available under the APA. *Cf. Miami Nation of Indians v. U.S. Dep't of the Interior*, 255 F.3d 342, 349 (7th Cir. 2001) (stating that Interior's Part 83 regulations "brin[g] the tribal recognition process within the scope of the

Administrative Procedure Act"); *see also Kahawaiolaa*, 386 F.3d at 1276 (final decisions on Part 83 requests are subject to judicial review).

Under the doctrine of administrative exhaustion, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) (internal quotation marks omitted). The exhaustion rule prevents premature interference with agency processes to allow an agency to function efficiently, correct its own errors, apply its expertise, and compile a record for judicial review. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). Consequently, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; until that recourse is exhausted, suit is premature and must be dismissed. *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993). In the context of federal recognition of Indian tribes, the "prescribed administrative remedy," *Woodford*, 548 U.S. at 89, is the long-established Part 83 procedures. Because the Cupeño has failed to pursue its tribal recognition claim through those procedures, it cannot maintain its claim seeking to compel recognition.

The Cupeño may not avoid the administrative process for acknowledgment on the ground that it was previously the subject of a statute or the signatory to a treaty. The Secretary's regulations apply to groups

previously recognized as Indian tribes through those legal authorities. *See* 25 C.F.R. 83.12; *see also Muwekma*, 708 F.3d at 218 ("[T]he Part 83 process applies to a petition of a previously recognized tribe that seeks current recognition on that basis."). That is so because "Indian nations, like foreign nations, can disappear over time * * *, whether through conquest, or voluntary absorption into a larger entity, or fission, or dissolution, or movement of population." *Miami Nation*, 255 F.3d at 346. Allowing a plaintiff to obtain recognition in court based on evidence of *former* federal recognition without first participating in the administrative process risks overlooking critical historical and factual developments better assessed in the first instance by the agency to which Congress has delegated authority.

Although this Court has not yet confronted the issue, other courts of appeals have held that an Indian group may not circumvent the Part 83 process by asking a court to declare, based on statutes or treaties, that its predecessors belonged to a previously acknowledged Indian tribe. In *James v. Department of Health and Human Services*, 824 F.2d 1132 (D.C. Cir. 1987), an Indian group sought an order directing the Secretary to add the group to the federally recognized tribes list, even though the group had not petitioned Interior for acknowledgment. *Id.* at 1134-35. The group argued that exhaustion would be redundant because the group already had been recognized through federal

government reports produced in the 1800s. *Id.* at 1137. The D.C. Circuit affirmed the district court's dismissal of the group's claim based on its failure to exhaust administrative remedies. As that court explained, Congress authorized the Secretary "to prescribe regulations concerning Indian affairs," and the Part 83 regulations were designed "to determine which Indian groups exist as tribes." *Id.* Those purposes would be "frustrated" if courts determined in the first instance whether groups have been previously recognized. *Id.* By contrast, the D.C. Circuit explained, requiring exhaustion allows "Interior the opportunity to apply its developed expertise in the area of tribal recognition," and to develop a record that would aid in judicial review. *Id.* at 1138.

In *Muwekma*, the D.C. Circuit reviewed Interior's denial of an Indian group's petition for recognition and rejected an argument that Interior should have waived the Part 83 process due to the group's past recognition. 708 F.3d at 212, 214-17. *Muwekma* also held that Interior's denial of a Part 83 petition did not terminate the group's once-recognized status. *Id.* at 218-19. Part 83 "applies to a petition of a previously recognized tribe that seeks current recognition on that basis," and previous recognition does not automatically require addition to the list. *Id.* As the D.C. Circuit further explained, the Part 83 process "allow[s] Interior to engage in factfinding" regarding an Indian group's allegedly unlawful historical termination and to "correct any error in

not previously placing [the group's] name on tribal recognition lists." *Id.* at 218.

In *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 546 (10th Cir. 2001), an Indian group that had not completed the Part 83 process sought a judicial declaration that it had been federally recognized during the 19th century through a treaty and a Supreme Court decision. The Tenth Circuit affirmed the district court's refusal to issue such a declaration because "exhaustion is required when, as here, a plaintiff attempts to bypass the regulatory framework for establishing that an Indian group exists as an Indian tribe." *Id.* at 550 (citing *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056-58 (10th Cir. 1993)). The Tenth Circuit explained that previous recognition "says nothing about whether [an entity] has maintained its identity with the [tribe] and has continued to exercise that tribe's sovereign authority up to the present day." *Id.* at 548. After discussing *James*, *id.* at 550-51, the Tenth Circuit agreed that tribal recognition requires "specialized agency expertise" and that requiring exhaustion would produce a "useful record" for judicial review. *Id.* at 551 (internal quotation marks omitted).

Indeed, every court of appeals to have considered the question since *James* has reached the same conclusion, albeit after applying varying legal doctrines. *See Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016)

(applying "prudential considerations" to dismiss suit demanding tribal recognition); *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y*, 369 F.3d 960, 968-69 (6th Cir. 2004) (holding that Interior had power to restore recognition to illegally terminated tribe via the acknowledgment process); *Miami Nation*, 255 F.3d at 350 (applying political question doctrine and explaining that the acknowledgment process "covers a previously recognized tribe"); *see also Wyandot Nation of Kansas v. United States*, 858 F.3d 1392, 1398-99 (Fed. Cir. 2017) (applying primary jurisdiction doctrine); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 58-60 (2d Cir. 1994) (same); *W. Shoshone*, 1 F.3d at 1056-58 (applying zone-of-interests test).

The Cupeño contends (at 41-42) that by relying on the rationale that Part 83 applies to previously recognized Indian tribes as a ground for holding that the Cupeño failed to exhaust administrative remedies, the district court's decision violates the principles in *SEC v. Chenery Corporation*, 318 U.S. 80, 87 (1943). Under *Chenery*, courts may not uphold an agency action based on a "determination of policy or judgment which the agency alone is authorized to make." *Id.* at 88. The Cupeño's argument is misplaced because the Assistant Secretary's decision necessarily relies on Part 83's applicability by directing the Cupeño to follow that administrative process. *See* ER489. Regardless, *Chenery*'s rationale does not apply to questions of statutory application or interpretation.

See, *e.g.*, *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1089 n.10 (9th Cir. 2014); *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 977-78 (9th Cir. 2005); *Ry. Labor Executives' Ass'n v. ICC*, 784 F.2d 959, 969 (9th Cir. 1986). That precept should likewise apply to questions of interpreting and applying regulations like Part 83.

B. The Cupeño's claims are not ripe.

The request for a court order compelling Interior to recognize the Cupeño as an Indian tribe is not ripe for review, as the district court correctly recognized. *See* ER37-38 (holding that judicial review in this case is "premature"). Ripeness reflects constitutional considerations that implicate "Article III limitations on judicial power," as well as "prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). The ripeness inquiry considers both "the fitness of the issues for judicial decision" and "the hardship of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003). In the administrative context, the doctrine is intended to prevent courts from entangling themselves in abstract disagreements and to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt by the parties. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

Because the Cupeño has not availed itself of the Part 83 process, there is no decision from Interior on the question of recognition and no corresponding administrative record for this Court to review. Should the Cupeño submit a documented petition, Interior's experts in anthropology, history, and genealogy would evaluate the evidence to determine if the petition satisfies various criteria pertaining to the group's identification, community, political influence and authority, and descent from a historical tribe. *See* 25 C.F.R. 83.11, 83.12. Interior's expertise in such areas is well recognized. *See, e.g.*, *Miami Nation*, 255 F.3d at 347; *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) ("It cannot be denied that [Interior] has special expertise and extensive experience in dealing with Indian affairs."). Only after these issues are resolved in a final decision from Interior would the claim asserted by the Cupeño be ripe for judicial review, which would be assisted by any factual record Interior might develop. *See United Tribe of Shawnee Indians*, 253 F.3d at 551; *James*, 824 F.2d at 1138.

Proceeding here without allowing Interior to resolve these factual issues would impede agency administration, *see id.* at 1137, and would invite the "deliberate flouting of administrative processes," *McKart v. United States*, 395 U.S. 185, 195 (1969). Putative tribes might commence the administrative acknowledgment process, and then opt to start over in district court if they

appeared headed for an adverse administrative decision; or they might pursue administrative and "judicial" acknowledgment simultaneously. Such a course would run counter to the orderly system of tribal recognition established in Interior's regulations. It would also embroil courts in complex historical, anthropological, and genealogical matters better left for the other branches of government to address in the first instance. *See*, *e.g.*, *Miami Nation*, 255 F.3d at 347; *United Tribe of Shawnee Indians*, 253 F.3d at 550; *James*, 824 F.2d at 1138.

Requiring the Cupeño to engage in the administrative process could ultimately result in its becoming a federally recognized tribe and thereby avoid altogether the need for judicial intervention in this dispute. *See James*, 824 F.2d at 1138 ("[I]n the event that the dispute is resolved at the administrative level, judicial economy will be served."). If the Cupeño's federal recognition claim has merit, the group might succeed in obtaining acknowledgment through the administrative process. But it is up to the Cupeño to avail itself of that process and obtain a final decision from Interior. Until the Assistant Secretary has an opportunity to consider the group's contentions in a proper petition addressing the pertinent regulatory criteria for recognition, the Cupeño's claim is unripe.

The Cupeño contends that its suit is ripe for review because Interior denied its request for "correction" of the list of federally recognized tribes. Br. 44-45. That contention fails insofar as it concerns the Cupeño's request for the

court to compel Interior to update the list, for Interior's policy identifies the Part 83 process as the sole means by which a previously recognized tribe may get on the list. ER412. To the extent, however, that the Cupeño exhausted its options for arguing that Interior's denial of its "correction" request is arbitrary and capricious, we demonstrate below (at pp. 34-44) why that claim fails.

C. Even if the Cupeño's claims were justiciable, Interior should be accorded primary jurisdiction.

Even if the Cupeño's demand to be added to the list were currently justiciable, it should be dismissed under the doctrine of primary jurisdiction. That prudential doctrine "comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956). In such cases, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 64. Where, as here, further judicial proceedings are not contemplated, the case may be dismissed rather than merely stayed. *See Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 761 (9th Cir. 2015). The doctrine is properly invoked where the dispute "is not within the conventional experience of judges but rather involves * * * considerations within the agency's particular field of expertise." *Brown v. MCI WorldCom*

Network Servs., Inc., 277 F.3d 1166, 1172-73 (9th Cir. 2002) (internal quotation marks omitted).

As the district court recognized (ER27-28), tribal acknowledgment directly implicates Interior's specialized expertise and delegated authority, and it is better suited to the agency's institutional capabilities than to those of the judiciary. *See W. Shoshone Bus. Council*, 1 F.3d at 1057-58. If this case were "properly cognizable in court," the primary jurisdiction doctrine would apply because the case turns on a question of tribal acknowledgment, which is "within the special competence" of Interior. *Golden Hill*, 39 F.3d at 57-61 (invoking the primary jurisdiction doctrine to await Interior's decision on the plaintiff's pending acknowledgment petition); *see also Wyandot Nation*, 858 F.3d at 1398-99 (dismissing tribal accounting claim on primary jurisdiction grounds). Thus, primary jurisdiction doctrine provides another ground for affirming the district court's judgment.

D. The Assistant Secretary does not have a mandatory, discrete duty in any statute or regulation to recognize the Cupeño as an Indian tribe.

Even if it were appropriate for the district court to consider the Cupeño's tribal recognition request in the first instance, the APA would not provide the relief that the group seeks. The APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). That provision, however, "does not give [courts] license to 'compel agency action'

whenever the agency is withholding or delaying an action [a court] think[s] it should take." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). Rather, a court's authority to compel agency action is "carefully circumscribed to situations where an agency has ignored a specific * * * command" in federal statute or binding regulation. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004) (*SUWA*). The "purportedly withheld action must not only be 'discrete,' but also 'legally required,'" *Hells Canyon*, 593 F.3d at 932, meaning that the text of the statute or regulation contains an "unequivocal command" about which an official has "no discretion whatever," *SUWA*, 542 U.S. at 63 (internal quotation marks omitted).

No statute or regulation places an "unequivocal command" upon Interior officials to recognize any particular Indian tribe, much less to do so outside the Part 83 process. The Cupeño argues (at 35) that the List Act imposes such a duty. That statute states: "The Secretary shall publish in the Federal Register a list of all Indian Tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 USC 5131(a). Although the statute does impose a mandatory duty on the Secretary, he discharges that responsibility whenever he *publishes* the list of recognized tribes, placing tribes he has recognized on that list. *See*, *e.g.*, 81 Fed. Reg. at 5022 (ER186). The List

Act does not provide any substantive standard for recognition, much less for updates and corrections to the list.

Although the Cupeño contends (Br. 35) that the official list must be updated to address inaccuracies, Congress found in the List Act that the list "should" be accurate and reflect all of the federally recognized tribes, 108 Stat. at 4792, not that it must. In any event, the statute does not prescribe any particular process for Interior to follow in addressing alleged inaccuracies. Nor does it prohibit Interior from relying on the Part 83 process to do so. *Cf.* 108 Stat. at 4791 (affirming that "Indian tribes presently may be recognized * * * by the administrative procedures set forth in part 83 of the Code of Federal Regulations"). Furthermore, the Indian canon of construction does not assist the Cupeño (*cf.* Br. 34-35), for the List Act contains no ambiguities about whether Interior may rely on the Part 83 process to address list inaccuracies. *See*, *e.g.*, *King Mtn. Tobacco Co. v. McKenna*, 768 F.3d 989, 995 (9th Cir. 2014) (canon did not alter the outcome of the case where the relevant text was "not ambiguous"). Moreover, even if ambiguous, that ambiguity by definition means there is no "unequivocal command" upon Interior officials to list the Cupeño, much less to do so outside the Part 83 process. *Cf. Our Children's Earth Found. v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008) (declining to compel agency

official to take action where "[a]t most, the statutory provisions and legislative history are ambiguous").

As discussed above (at pp. 7-8), Interior's policy identifies Part 83 as the sole avenue for its establishing an Indian group's federally recognized status. Before formalizing that policy, the Assistant Secretary acknowledged that Indian tribes were recognized outside the Part 83 regulations. Such recognition was based on 25 U.S.C. 2, which provides that the Assistant Secretary "shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." *Id.*; *see* 42 Fed. Reg. at 53,682 (transferring authority). Where Congress has delegated such power over Indian affairs to the Executive Branch, it has done so in exceedingly broad terms. *See*, *e.g.*, 43 U.S.C. 1457; 25 U.S.C. 9 (allowing the President to prescribe "such regulations as he may think fit" for administering Indian affairs). None of those statutes, however, provides the specificity required before a court may compel Interior officials to take any particular action.

Lacking any statute or regulation that supports its claim, the Cupeño relies heavily on several informal administrative decisions that predate Interior's current policy, which decisions the Cupeño contends are "precedents" Interior should have followed. Br. 31-32. That contention fails.

Although disparate treatment of similarly situated tribes might conceivably be the basis for setting aside an agency decision as arbitrary and capricious, we refute the argument that the Cupeño is materially similar to other tribes reaffirmed outside the Part 83 process. *See infra* pp. 39-44. Regardless, any similarity of the Cupeño to the tribes reaffirmed by past administrative decisions provides no basis for a court's compelling Interior to take action. To compel such action, the agency's legal obligation must be "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon*, 593 F.3d at 932. Determining the Cupeño's factual similarity to other reaffirmed tribes, however, constitutes a discretionary exercise in judgment, which necessarily defeats mandamus. *See SUWA*, 542 U.S. at 64 (courts may compel an agency to perform only a "ministerial or non-discretionary act" (internal quotation marks omitted)); *San Luis Unit Food Producers v. United States*, 709 F.3d 798, 808 (9th Cir. 2013) (rejecting claim to compel action where agency was "unmistakably vested with * * * discretion").

Finally, nothing in the Secretary's general "trust responsibility to Indians" permits a court to compel Interior to alter the list, as the Cupeño asserts (Br. 33). The government's general trust responsibility does not include any duty "to take action beyond complying with generally applicable statutes and regulations." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir.

2006) (internal quotation marks omitted); *see also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011) ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (the government's trust obligation toward Indians is typically "discharged by compliance with general regulations and statutes").

* * *

The district court correctly rejected the Cupeño's request to compel the Assistant Secretary to recognize it as an Indian tribe absent the group's participation in the Part 83 process. Each of the several grounds just discussed—exhaustion, ripeness, primary jurisdiction, and the lack of an unequivocal legal duty—provides an independent basis for affirmance.

II. The district court correctly rejected the Cupeño's challenge to the Assistant Secretary's refusal to acknowledge the group as an Indian tribe absent a Part 83 petition.

The district court's rejection of the Cupeño's challenge to the Assistant Secretary's letter should be affirmed for several reasons. First, the Assistant Secretary's determination whether to modify the federally recognized tribes list outside the Part 83 process is committed to his discretion by law because no statute or regulation provides any standard for making that determination. Even if there were law to apply, the Cupeño's claim is time-barred because it

seeks correction of an alleged inaccuracy that appeared on the list when it was first published in 1979. Such a claim should have been brought long ago. Regardless, the Assistant Secretary's decision was not arbitrary or capricious because his determination that the Cupeño is not similarly situated to other Indian groups that were added to the list outside the Part 83 process was rational and supported by the record.

A. The decision whether to make an exception to the Part 83 process is committed to the Assistant Secretary's discretion by law.

The district court held that the APA's right of judicial review was "inapplicable" to the Assistant Secretary's refusal to "reaffirm" the Cupeño as a separate Indian tribe absent the group's submission of a Part 83 petition. ER31. That holding is correct, for there is no statutory or regulatory standard to guide judicial review of the Assistant Secretary's refusal to acknowledge the Cupeño outside the Part 83 process. The Assistant Secretary's decision therefore is "committed to [his] discretion by law," 5 U.S.C. 701(a)(2); specifically, the statute that delegates to him broad authority over the federal government's management of Indian affairs. *See* 25 U.S.C. 2.

Judicial review under the APA is unavailable for "agency action [that] is committed to agency discretion by law." 5 U.S.C. 701(a)(2); *see also Heckler v. Chaney*, 470 U.S. 821, 828 (1985) ("[B]efore any review at all may be had, a party must first clear the hurdle of [section] 701(a)."). This exception "is very

narrow, and is applicable only where statutes are drawn so broadly 'that there is no law to apply.'" *Moapa Band of Paiute Indians v. U.S. Dep't of the Interior*, 747 F.2d 563, 565 (9th Cir. 1984) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)). "Preclusion of judicial review is not lightly inferred, and usually will not be found absent a clear command of the statute." *Id.* (citing *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970)).

No statute or regulation provides a standard for when, if at all, the Secretary should correct or update the federally recognized tribes list outside the Part 83 process. *See supra* pp. 7, 32 (discussing the List Act and 25 U.S.C. 2). Nor could tribal law could not provide any standard for the Assistant Secretary's choice of administrative path here. *Cf. Aguayo*, 827 F.3d at 1225; *Alto v. Black*, 738 F.3d 1111, 1124-25 (9th Cir. 2013). Because there is no law to apply to the Cupeño's claim, it is unreviewable.

B. The Cupeño's request to "correct" the list is time-barred.

Claims brought under the APA are subject to the general six-year statute of limitations in 28 U.S.C. 2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." That rule "applies to actions brought under the APA," *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991), including disputes over an Indian tribe's

recognition status in relation to the federally recognized tribes list. *See Big Lagoon Rancheria v. California*, 789 F.3d 947, 954 (9th Cir. 2015). Such lists are published in the Federal Register, which is typically "sufficient to give notice of the contents of the document to a person subject to or affected by it," 44 U.S.C. 1507, and to begin the running of the statute of limitations. *See Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990).

The Cupeño contends that the Assistant Secretary failed to include it on the federally recognized tribes list in 1979 due to "administrative error," and that this alleged oversight has continued to the present. ER666-67. But the Cupeño has *never* appeared on the federal list in the nearly four decades since it was first published. Only now does the Cupeño seek a court order to have the list "correct[ed]." ER690. Such a request is time-barred.

The Cupeño cannot avoid the statute of limitations by relying on some recent development such as PBMI's administrative change request, its disenrollment of certain Cupeño Indians, or the Cupeño's decision to dissociate from PBMI and organize its own government. This Court has stated that the "continuing violations" doctrine—which "allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period"—"almost certainly does not apply to APA claims." *United States v. Estate of Hage*, 810 F.3d 712, 721 (9th Cir. 2016) (internal quotation marks

omitted). If a litigant could base its claim on an assertion that it had recently identified an "administrative error" in the 1979 list, it could readily evade the statute of limitations and subject the Secretary's well-settled decisions to challenge decades later merely by writing the Secretary a letter. That result cannot be correct, for it would have the effect of "tolling the statute of limitations indefinitely and thus stripping it of all meaning." *Garcia v. Brockway*, 526 F.3d 456, 466 (9th Cir. 2008) (rejecting application of the continuing violation doctrine).

Regardless, the continuing violation doctrine would not apply even on its own terms. That doctrine (like related theories such as equitable tolling and the discovery rule) is relevant only when an injury is not definite or readily ascertainable. *See*, *e.g.*, *Urie v. Thompson*, 337 U.S. 163, 169 (1949) (statute did not start running for injury that was "unknown and inherently unknowable" until its "accumulated effects" were "manifest," where there was "no suggestion that [plaintiff] should have known he had [been injured] at any earlier date"). By contrast, where a plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury," doctrines extending the statute of limitations are inapposite. *United States v. Kubrick*, 444 U.S. 111, 122 (1979). Here, the Cupeño's exclusion from the federally

recognized tribes list has been readily discoverable since 1979. The continuing violation doctrine therefore would not apply to this case.

C. The Assistant Secretary's letter rejecting the Cupeño's requested "correction" was not arbitrary, capricious, or contrary to law or constitutional right.

"Where the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made, the decision is not arbitrary or capricious" under the APA. *Cty. of Amador*, 872 F.3d at 1027 (internal quotation marks and brackets omitted). Claims that an agency has failed to supply a "rational basis" for decisions concerning allegedly different treatment of federally recognized tribes do not implicate any heightened standard of review. *See*, *e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974); *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005); *Kahawaiolaa*, 386 F.3d at 1279. Accordingly, like other rational basis challenges to agency action, the Cupeño's claims are reviewed under ordinary standards in the APA. *See Ursack Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 955 (9th Cir. 2011) (internal quotation marks omitted) (review of rational basis challenge is "folded into" the APA claim).

The Assistant Secretary's letter declining to recognize the Cupeño as an Indian tribe absent a Part 83 petition rationally demonstrates why the group is different from the three other tribes whose relationship with the United States

has been reaffirmed outside the normal administrative process, to wit: "none of those tribes claimed to be withdrawing or dissociating from a federally recognized tribe." ER489. The Cupeño does not dispute the Assistant Secretary's statement. Rather, it contends that it *already is* a federally recognized tribe that should be added to the official list. But that assertion only begs the question to be addressed by the Part 83 process.

Moreover, the distinction on which the Assistant Secretary relied is supported by Interior's regulations, which incorporate a presumption against recognizing as an Indian tribe any "splinter group, political faction, community, or entity of any character that separates from the main body of a currently federally recognized Indian tribe" unless the group clearly demonstrates criteria showing its longstanding political autonomy and unique membership. 25 C.F.R. 83.4(b); *see also* 25 C.F.R. 83.11(f). The Cupeño withdrew from another federally recognized tribe after leaders of PBMI attempted to disenroll them. *See* Br. 13-14. Interior recommended against that disenrollment, but because PBMI's articles of association do not require Interior's approval for making such membership decisions, the Department did not prohibit the disenrollment. Challenges to that decision, brought by various Cupeño Indians, failed. *See Aguayo*, 827 F.3d at 1229. Particularly in the context of highly contested membership or leadership disputes within a tribe,

the formal Part 83 process provides a better vehicle for Interior to apply its expertise through careful judgments about tribal recognition based on a complete factual record.

The Assistant Secretary also found that the Cupeño had not demonstrated a separate pattern of dealings showing government-to-government relations with the group as an Indian tribe. ER489. That stands by contrast with the other reaffirmed tribes. For instance, Interior has explained that both the Lower Lake and Ione Band reaffirmation decisions "found some evidence of continuing Federal recognition in documentation of a relationship with the Federal Government" prior to the reaffirmation request. ER420; *see also Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 199 (D.D.C. 2011) (discussing evidence before Interior "that the federal government dealt with [the Ione and Lower Lake tribes] as tribes"), *aff'd*, 708 F.3d at 211. As for the Tejon Tribe, Interior found that its investigation into the tribe's land needs and Interior's correspondence with Congress in the years before publishing the first federally recognized tribes list supported a similar conclusion. *See* ER478-79 (finding a "continuing relationship between the United States and the Tribe").

The Cupeño identifies several factors from Interior's past administrative decisions that it believes compel the conclusion that Interior should have affirmed the Cupeño as a tribe outside the Part 83 process. Br. 53-59. As

already explained, however, the Assistant Secretary rationally distinguished the Cupeño from the other reaffirmed tribes. But even if the other factors were controlling, Interior may newly formalize its policies, as it did here. *See*, *e.g.*, *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515-16 (2009). The Cupeño does not challenge Interior's policy. Rather, it contends (Br. 47) that the policy is "not relevant" because correcting "administrative errors" lies wholly outside the Part 83 process.

That distinction makes no difference. To be sure, Interior does not intend the new policy to prevent it from updating existing entries on the list in every circumstance. For example, Interior updated PBMI's designated entry in response to a tribal resolution requesting that the entry be changed to match PBMI's governing documents. *See* ER186. However, not only was that request initiated by the official action of a tribe already appearing on the list, but confirming the request involved examining the articles of association on their face, not sifting through reams of documentary evidence and making complex judgments about historical facts, as the Cupeño seeks. *See* ER557. Those latter endeavors are better suited to the Part 83 process.

The Cupeño asserts that PBMI is "inferior and less permanent" than the historic tribes that compose it, and that it is not, itself, a single tribe. Br. 58. But the viability of PBMI as a tribe does not dictate the separate question whether

Interior should determine the Cupeño to be a federally recognized tribe. And in any event, Congress defined "tribe" under the IRA to include both "any * * * organized band" and "the Indians residing on one reservation." 25 U.S.C. 5129. As the Cupeño acknowledges (at 8), Interior has long regarded the lands occupied by the Luiseño and the Cupeño as "one reservation." Thus, after the passage of the IRA in 1934, the Indians residing on that reservation were a "tribe" as a matter of federal law. *See Stand Up for California! v. United States Dep't of the Interior*, 879 F.3d 1177, 1181-83 (D.C. Cir. 2018). And after PBMI ratified their articles of association in 1959, they became an "organized band." In 1994, moreover, Congress amended the IRA to confirm that all federally recognized tribes stand on an equal footing as to their recognized status, insofar as Interior may not "diminis[h] the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. 5123(f). The Cupeño's suggestion that PBMI is something less than a tribe therefore finds no support in the pertinent statutes.

The Cupeño also argues (at 39) that the regulations themselves require the Assistant Secretary first to determine whether they apply to the Cupeño. The regulations apply to "indigenous entities that are not federally recognized Indian tribes." 25 C.F.R. 83.3. Here, the Cupeño's absence from the official list

is sufficient to establish the regulations' applicability. *See*, *e.g.*, *W. Shoshone Bus. Council*, 1 F.3d at 1057 ("the Tribe's absence from this list is dispositive" of whether it is federally recognized); *Edwards, McCoy & Kennedy v. Acting Phoenix Area Dir., Bureau of Indian Affairs*, 18 IBIA 454, 457 (1990) (Interior was "precluded from considering [a] group as an Indian tribe" when it did not appear on the official list). At a minimum, the official list provides a rational basis for the Assistant Secretary's decision to apply the regulations.

Finally, the Cupeño contends (at 45) that Interior's policy is not relevant because the Assistant Secretary "simply quoted it" and did not explain why it matters. That contention fails, however, because the Assistant Secretary's reliance on the policy as a reason for denying the Cupeño's request for relief outside the Part 83 process "may be reasonably discerned," which is all that is necessary for upholding the decision. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) (internal quotation marks omitted). In any event, a remand to the Assistant Secretary to clarify that the policy *does* apply to requests for error correction that are better construed as acknowledgment requests would be pointless.

* * *

Because the Assistant Secretary's letter was rational and supported by the record, the district court correctly rejected the Cupeño's challenge.

CONCLUSION

For these reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for defendants-appellees is not aware of any related cases under 9th Cir. R. 28-2.6.

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Signature of Attorney or Unrepresented Litigant: s/ Brian C. Toth

Date: Feb 16, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

9th Circuit Case Number(s) 17-16838

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Feb 16, 2018 .

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