IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BURT LAKE BAND OF OTTAWA AND CHIPPEWA INDIANS,	*	
Plaintiff,	*	
	*	Case No. 1:17-cv-00038-ABJ
v.	*	
THE HONORABLE RYAN ZINKE, In his official capacity as Secretary of the Interior,	*	Hon. Amy Berman Jackson
THE HONORABLE JOHN TASHUDA, In his official capacity as Acting Assistant Secretary – Indian Affairs, Department of the Interior, and	*	
UNITED STATES DEPARTMENT OF INTERIOR,	*	
Defendants.	*	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

After nearly 200 years of mistreatment, Plaintiff Burt Lake Band of Ottawa and Chippewa Indians ("the Band") submits this motion for summary judgment on Counts IV, V, and VI of the Complaint as part of its longstanding efforts to obtain recognition and fair and equitable treatment from the federal government. Without any statutory authority, the Department of the Interior, through the Bureau of Indian Affairs ("BIA"), unlawfully adopted a regulation, 25 C.F.R. § 83.4(d), that created an absolute prohibition on the Band's ability to submit additional evidence in support of its application for federal recognition as a sovereign Indian tribe. In doing so, Defendants have denied the Band the right to petition for federal acknowledgment as a sovereign tribe and for redress of grievances under the First Amendment, on the sole ground that its initial petition was previously denied. Additionally, the regulation is arbitrary and capricious because it denies the Band and other tribes the right to petition the government for statutory rights based solely on the administrative convenience of BIA.

The United States has twice recognized the Cheboygan Band (the Burt Lake Band's predecessor) as a sovereign and autonomous Indian nation through the Treaty of Washington in 1836 and the Treaty of Detroit in 1855.[1] These Treaties, which remain in effect today, impose upon the federal government the duty to provide services and benefits and to assist the Burt Lake

[1] Burt Lake Band was formerly called the Cheboygan (or Cheboigan) Band of Ottawa and Chippewa Indians ("Cheboygan Band"), named for its proximity to the lake near where it first settled. *Summary under the Criteria and Evidence for Final Determination Against Acknowledgement of the Burt Lake Band of Ottawa and Chippewa Indians, Inc.*, Department of Interior, Petition 101, at 2. (Sept. 21, 2006) ("Final Determination"). When Cheboygan Lake was renamed Burt Lake, the Tribe became known as the Burt Lake Band.

Pursuant to LCvR7(n), the parties will submit a joint appendix and, if necessary, supplemental appendix, within 14 days following the final memorandum on the Motion containing all sources cited herein. If the Court wishes to review any sources prior to receiving the appendices, Plaintiff will provide a copy of the documents cited herein to the Court.

Band. The federal government again openly recognized its fiduciary obligations to the Burt Lake Band in 1917, when it brought suit in federal district court against a timber baron who had burned down tribal members' homes and forcibly ejected them from reservation lands that they had purchased and entrusted to the State of Michigan. The Burt Lake Band has never regained these lands. And unlike every other "landless" tribe in Michigan, the Band has not been federally recognized.[2]

The federal government provides significant services and programs for Indian Tribes and their members. To receive those benefits, a tribe must be formally recognized or reaffirmed as such by the United States under 25 C.F.R. Part 83. In 1985, the Band submitted a Part 83 Petition seeking federal recognition. Two decades later, BIA denied the petition on the ground that the Band had submitted facts that satisfied four of the seven criteria required under Part 83. Since BIA denied the Band's petition, the tribe has collected additional evidence which it believes would satisfy the remaining three criteria on which its original showing was found to be inadequate.

In 2015, BIA issued a final rule that revised Part 83 and substantially liberalized the criteria that a petitioning tribe must satisfy to obtain recognition. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862 (July 1, 2015) ("Final Part 83 Rule") (AR0000865-99). Despite the universal conclusion that the previous application process under Part 83, under which the Band's petition was denied, was a "broken system," BIA adopted a new rule that absolutely prohibited tribes whose petitions for recognition previously had been denied from re-petitioning for approval. Specifically, 25 C.F.R. § 83.4(d) states that BIA "will not acknowledge . . . an entity that previously petitioned and was denied Federal acknowledgment under these regulations or

[2] "Landless" is a term coined by the federal government to describe tribes that did not own or live on a communal reservation.

under previous regulations in part 83 of this title." Accordingly, the Band and other similarly-situated tribes are categorically banned from ever seeking recognition again through Part 83 – the only vehicle by which a tribe may seek federal recognition.

As a result of the neglect and adamant refusal of the United States to abide by its statutory and fiduciary obligations and its Treaty commitments to the Burt Lake Band, its members have been unlawfully divested of its aboriginal land. This has had substantial adverse effects on the Band's members, including deprivation of social services, health benefits, educational assistance and other services and grants which Congress has provided for the benefit of Indian Tribes. BIA's 2015 amendment of Part 83 denies the Band the only avenue to reaffirming its sovereign status to which it is entitled and securing the benefits guaranteed by the Treaties and by Congress. The 2015 rule prevents the Band from re-petitioning to address the deficiencies relied upon by BIA in denying the Band's petition in 2006, under the less demanding criteria established in 2015. Section 83.4(d) ignores more than a century and a half of broken promises by the federal government and continues a disgraceful history of violations of applicable Treaties and laws of the United States.

Through this lawsuit, the Band seeks to have Section 83.4(d) declared unlawful so that it may submit newly-gathered documentation to satisfy the criteria for recognition. The Band also seeks to petition for the first time under the more appropriate (and less onerous) "reaffirmation phase" of 25 C.F.R. § 83.12 based on the federal government's consistent acknowledgment of its tribal status for more than a century. Under either phase of the revised Part 83 procedures, the Band believes that it would satisfy the applicable criteria and become a federally-recognized tribe if it were not absolutely prohibited by an arbitrary dictate issued by BIA from re-petitioning the government under any circumstances to obtain the rights to which a tribe is entitled under the Part 83 process.

In adopting Section 83.4(d), BIA violated: (1) the Administrative Procedure Act, by adopting a categorical ban on re-petitioning that is not authorized by Congress and that is, in any event, arbitrary and capricious because it ignored the legal rights of petitioning tribes and is based entirely on BIA's bureaucratic concerns and desire to reduce its workload; (2) the Due Process Clause of the Fifth Amendment, by denying the Band the right to petition BIA for redress of its grievances and by categorically prohibiting it from submitting a carefully developed supplemental record demonstrating that it satisfies all of the applicable and regulatory criteria necessary to obtain the most fundamental right of recognition as a sovereign Indian tribe; and (3) the Equal Protection Clause of the Fifth Amendment, by treating the Band and other similarly-situated tribes, whose petitions for recognition were denied prior to 2015, differently and adversely compared to other tribes whose petitions for recognition were not submitted or decided until after adoption of Section 83.4(d) in 2015. The Court should grant the Band's motion for summary judgment and declare that Section 83.4(d) is unlawful and must be vacated because it has deprived the Band of the right to re-petition for recognition on multiple statutory, regulatory, and constitutional grounds.

STATEMENT OF FACTS

I. The History of the Relationship Between the United States and the Band

A. The 1836 Treaty of Washington and The Band's Purchase of Lands Held in Trust For It

On March 28, 1836, the Cheboygan Band of Ottawa and Chippewa Indians— along with other Chippewa and Ottawa bands—signed a Treaty together as the "Ottawa & Chippewa Tribe of Indians" under which they ceded millions of acres of land in the Upper and Lower Peninsulas of Michigan in exchange for annuity payments to the separate tribes over a 20-year period. *Summary under the Criteria and Evidence for Final Determination Against Acknowledgement of the Burt Lake Band of Ottawa and Chippewa Indians, Inc.*, Department of Interior, Petition 101,

at 6-7 (Sept. 21, 2006) ("Final Determination"). Upon ratification, this solemn agreement came to be known as the Treaty of Washington. 7 Stat. 491 (1836); Letter from Bruce Hamlin, Tribal Chair, The Burt Lake Band of Ottawa & Chippewa Indians, Inc. to Elizabeth Appel, United States Department of the Interior (Sept. 23, 2013) ("Hamlin Letter to Appel") (AR0000284-85). The "Ottawa & Chippewa Tribe of Indians" was a fictitious, collective name used by the federal government to refer to a loose regional confederation of autonomous bands and did not accurately reflect the identities of the separate Tribes involved.[3] As signatories to the Treaty of Washington, the Cheboygan Band (predecessors of the Burt Lake Band) was given full right and title to "one tract of one thousand acres to be located . . . on the Cheboigan [sic]." 7 Stat. 491 (1836). This referred to the area on Indian Point that jutted into Cheboygan Lake. *See* Final Determination at 7. Rather than ratify the Treaty as negotiated, the United States Senate unilaterally modified the clause providing reservations, and created a deadline to execute the allotments within five years "unless the United States grant them permission to remain on said lands for a longer period." 7 Stat. 491 (1836).

The Band never had the opportunity to elect what specific lots of land would become its home and reservation because officials of the Office of Indian Affairs never set the land aside for the reservation. Consequently, the lands in their aboriginal territory were open for sale to, and were purchased by, non-Indian settlers after the five-year deadline. *See* Memorandum from Dr.

[3] *See Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty.*, 369 F.3d 960, 961 n.2 (6th Cir. 2004) ("*Grand Traverse Band*") ("Henry Schoolcraft, who negotiated the 1836 Treaty of Washington on behalf of the United States, combined the Ottawa and Chippewa nations into a joint political unit solely for purposes of facilitating the negotiation of that treaty. In the years that followed, the Ottawas and Chippewas vociferously complained about being joined together as a single political unit.").

James M. McClurken to Congressman Robert Davis, at 4, Michigan State University (1991) (on file with the Michigan State University Museum) ("McClurken Memo").

Following the Treaty of Washington, the Band lived in a state of uncertainty for fear that the federal government would force its members to move west of the Mississippi River. *See* Letter from Bruce Hamlin, Chairman, Burt Lake Band of Ottawa and Chippewa Indians to Barack Obama, President, United States of America (Oct. 2, 2015) ("Hamlin Letter to Obama"). The members considered ways to protect themselves and decided to purchase lands using their annuity payments from the Treaty of Washington. *Id.* The members believed this was the best method to keep the land out of the hands of non-Indian purchasers. *Id.*

From 1845 to 1850, on the advice and with the assistance of United States officials, the Band used its annuity payments to purchase lands in Cheboygan County, Michigan and place them in trust with the Governor of Michigan. Final Determination at 7. The Band was advised by two federal officials, the Michigan Superintendent at the Office of Indian Affairs and the Mackinac Agent, that the trust thereby created would prevent taxation of their lands, subsequent loss of their land through tax sales, and secure the Band's collective future. *See* Hamlin Letter to Obama. The Band entrusted its lands to William A. Richmond, an agent with the Office of Indian Affairs[4] in Michigan, who, in turn, placed the lands "in trust to the Office of Governor of Michigan and his Successors for the Cheboygan Band of Indians whom Kie-She-go-we is Chief." *Id.* Thus, a BIA official helped the Band create these permanent land trusts.

[4] The Office of Indian Affairs was renamed the Bureau of Indian Affairs on September 17, 1947. *See* The Bureau of Indian Affairs, *Frequently Asked Questions*, https://www.bia.gov/FAQs/ (last visited Oct. 11, 2018).

B. The 1855 Treaty of Detroit

The United States eventually abandoned the policy of removing the Ottawa and Chippewa bands from Michigan. By 1854, the United States had shifted its focus to concentrating tribes on reservations. Consequently, the federal government called for a new treaty with each of the individual Michigan Tribes and Bands to codify this intention. On May 14, 1855, President Pierce signed an executive order which withdrew 27 townships and partial townships in Michigan from public sale in anticipation of the upcoming treaty negotiations, so that no claims would be made on the areas intended for reservations. Department of the Interior, *Executive Orders Relating to Indian Reservations: From May 14, 1855 to July 1, 1912* at 79 (1912).

Augustine Hamlin, Jr. of the Cheboygan Band was chosen by 55 headmen from 11 different Michigan bands to be their lead negotiator and spokesman in discussions that led to the Treaty of Detroit. The Treaty sought to establish permanent and distinct communities for these Tribes, and to correct the mistake in the Treaty of Washington classifying the various bands as one collective and fictitious unit. The chiefs from independent Tribes came as delegates with power of attorney from their members to negotiate with the government. The delegate for the Cheboygan Band was authorized only to return with cash from the United States, not land, so that they could purchase more land themselves, having no faith in the security of the government's Treaty-preserved lands given the outcome of the 1836 Treaty of Washington. As a result, the Band did not sign the Treaty in July 1855, unlike the other Ottawas. Finally, in 1856, the Band signed an amended version of the Treaty. 11 Stat. 621 (1856). Thus, the Band executed the Treaty as a separate political unit from all other Ottawas in Michigan.

The Treaty of Detroit was ratified by the Senate on April 15, 1856. *Id*.[5] Article 5 of the Treaty acknowledged that all signatory bands were separate and autonomous governments. *Id.* The purpose of Article 5 was to enable the United States to address disputes with separate Tribes on a discrete and localized basis. The federal government believed this approach would be cheaper and more efficient than attempting to negotiate, adjudicate and engage with a fictitious entity that was actually a loose confederation of independent Tribes.

Article I of the Treaty of Detroit explicitly granted two allotments to the Band: "*Seventh*. For the Cheboygan band, townships 35 and 36 north, range 3 west." 11 Stat. 621 (1856); Final Determination at 7. These two townships were nearby the land already purchased by and held in trust for the Band. *Id.* Unfortunately, most of the land allotted to the Band and other tribes was unavailable due to persistent land fraud and because federal Indian agents had failed to execute or convey the allotments provided for in the Treaty. *See* McClurken Memo, at 4. In addition, the United States included in the Treaty a requirement that "immediate allotment" was required by a fixed deadline or else the land would be sold to non-Indian settlers. *See id*. Due to this provision, the allotments guaranteed by the Treaty were never actually patented on behalf of the Band. *See id.* Thus, yet again, the Band had no recourse against the federal government in its unsuccessful efforts to secure a permanent reservation and home.

In a subsequent attempt to resolve the allotment issues, Congress enacted the Homestead Act in 1872. 17 Stat. 381 (1872). This statute granted 320 Ottawa and Chippewa Indians, as signatories to the 1855 Treaty of Detroit, including Band members, lands to effectuate the

[5] *See Grand Traverse Band*, 369 F.3d at 961 n.2 ("To address [the tribes'] complaints, the 1855 Treaty of Detroit contained language dissolving the artificial joinder . . . . This language, however, was not intended to terminate federal recognition of [any separate] tribe, but to permit the United States to deal with the Ottawas and the Chippewas as separate political entities.").

allotment scheme created in the Treaty. *Id.*; Final Determination at 7. The Act allotted some of the area granted (but not patented) to the Band by the Treaty of Detroit, but did not extinguish the Band's right to a reservation under the Treaties. While this statute gave land for homes to some Band members, it did not provide the Band collectively with a communal reservation as it had been promised by two Treaties. The Band remained "landless," a status that would result in the unfair deprivation of its rights in the future.

In 1872, Secretary of the Interior Columbus Delano also improperly interpreted the 1855 Treaty of Detroit as providing for dissolution of the tribes once annuity payments were completed in the spring of 1872.[6] On that basis, he declared that "tribal relations will be terminated" upon the completion of payments.[7] "Beginning in that year, the Department of the Interior, believing that the federal government no longer had any trust obligations to the tribes, ceased to recognize the tribes either jointly or separately."[8]

C. The "Burn Out" of the Band and its Repercussions

From 1860 to 1900, the Band resided in Indian Village on Colonial Point, in Cheboygan County. Final Determination at 7. The land was valuable because of the timber growing on it. *See id.* at 7. Within a few years of their purchase, the six land patents the Band had placed in trust with the Governor of Michigan between 1845 and 1850 were taxed by the County Treasurer in a

[6] *Grand Traverse Band*, 369 F.3d at 961 n.2.

[7] *Id.* (quoting *Letter from Secretary of the Interior Delano to Commission of Indian Affairs* at 3 (Mar. 27, 1872)). This interpretation subsequently has been held to be incorrect. *Id.* at 961 ("[T]hen-Secretary of the Interior, **Columbus Delano, improperly severed the government-to-government relationship** between the Band[s] and the United States, ceasing to treat the Band[s] as . . . federally recognized tribe[s].") (emphasis added); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 161 (D.D.C. 1980) ("[W]hat the treaty dissolved was an artificial amalgam of the Ottawas and the Chippewas, not the Chippewas themselves.").

[8] *Grand Traverse Band*, 369 F.3d at 961 n.2.

haphazard and inconsistent manner that violated the terms of the trust. *See* Hamlin Letter to Obama.

For several decades after the lands were placed in trust, the Band attempted to pay its taxes, but it was turned away. *Id.* On other occasions, the Band was never even notified that its land had been taxed. *Id.* Eventually, the trust status of the Band's land was forgotten (or ignored). The County Treasurer declared the land taxable and escheated it to the State of Michigan for non-payment. *Id.*

In 1884, a wealthy timber baron named John McGinn illegally obtained tax titles to the Band's lands. *See* Hamlin Letter to Appel (AR0000287). By 1897, McGinn had purchased all of the trust lands at a tax sale. *See* Hamlin Letter to Obama. In October 1900, McGinn, the local Sheriff, and several Deputies, armed with a writ of assistance, forcibly removed Band members from their homes at Indian Village. *See* Hamlin Letter to Appel (AR0000287). While the men of the Band were collecting their paychecks, the officers ejected the women, children, and elderly from their homes, doused the 25 buildings standing on the properties with kerosene, and burned the village to the ground. *Id.* This tragic event is referred to as the "Burn Out." *Id.* The Band was once more left homeless and destitute. *Id.* Having no money and no place to live following the "Burn Out," Band members had to move as far as thirty miles away to live with relatives and friends. *See id.*

In 1903, the Michigan legislature passed a Joint Resolution in response to the tragic "Burn Out" which authorized the purchase of up to 400 acres of land "for the benefit and use of said (She-boy-gan) band of Indians and their descendants." 1903 Mich. Pub. Acts 446. Joint Resolution No. 20 recognized that the Band had lost its lands that were conveyed to the Governor of Michigan in trust in 1846, 1847, and 1849, and that the State was acting due to its "moral

obligation." *Id.* at 445; Final Determination at 8. Despite the Joint Resolution, the State of Michigan never purchased any lands for the Band. The Joint Resolution remains valid law today, but Michigan has never acted to purchase and allocate any lands for the Band.

D. The United States Recognizes its Treaty Obligations to the Band

In 1911, the United States recognized and complied with its Treaty obligations to the Band. The government filed a bill of equity against McGinn in the United States District Court for Eastern Michigan. Compl. at ¶ 1, *United States v. John W. McGinn and A.L. Agate*, Equity No. 94 (E.D. Mich. 1911). The government sued on behalf of the "Cheboygan band of Indians [which] is now and was at all the times mentioned in this bill of complaint a tribe of Indians under the care, control, and guardianship of the plaintiff and **said band is now and was at all times mentioned in this bill of complaint recognized by the plaintiff** through its chiefs or head men which it annually elects." *Id.* (emphasis added). The Complaint affirmatively stated that "the said Band of Indians purchased the said land from the plaintiff under its general land laws and patents from the said land were issued to the Governor of Michigan and his successors in office **in trust** for the said Cheboygan Band of Indians." *Id.* at ¶ 2 (emphasis added). The lawsuit sought to have all previous conveyances and land patents to McGinn set aside and cancelled, and the writ of assistance declared null and void. This relief, if granted, would have resulted in fee simple ownership in the six properties being returned to the Band. The members of the Band relied upon the United States to protect their interests pursuant to the federal government's Treaty obligations.

Through these actions and statements in federal court, fifty years after the Treaty of Detroit, the United States once again recognized the Band as an independent Indian nation. In 1917, however, the court dismissed the United States' lawsuit on the ground that that the written instrument signed by Band members in 1848 conveyed the land in question to the Governor of Michigan in fee absolute. *See United States v. Shepherd and Ramsey*, Equity No. 94 (E.D. Mich.

1917). The court held that no trust relationship had been created with the State and that the lands were appropriately subject to State taxation.

> The Cheboygan Indians were a small band and have never been treated, considered or recognized as a nation or a tribe. Their lands, whether held as communal property by the band or in severalty (held separately) by the individual members, were not tribal lands and hence were not within the prohibition of the General Act of Congress forbidding conveyance of lands belonging to a nation or tribe of Indians without consent of the Government. *Whatever may have been the earlier status of these Indians, by treaty, in 1855, the tribal organization of the Ottawa and Chippewa Indians of Michigan was dissolved* . . . To all appearances the Federal Government abandoned and relinquished all right of guardianship over these Indians and their property more than a third of a century before the present suit was instituted . . . The question upon which the decision of this case hinges is whether these lands were taxable. That question must be answered in the affirmative. . . . Upon the full performance of treaty (1855) obligations, the dissolution of the tribal organization of the Ottawa and Chippewa Indians of Michigan, and their final attainment of citizenship (1850 Michigan constitution) . . . the Government relinquished its right of guardianship over these Indians and their property and cannot now represent them . . . A decree will be entered dismissing the Bill of Complaint without costs.

Department of Justice File No. 158012, RG 60, National Archives II (emphasis added).

The court mistakenly and inaccurately[9] held that the United States no longer had a relationship with the Band because the fictitious entity referred to in the 1836 Treaty of Washington had "dissolved" and became separate groups. As noted, the imaginary confederation, "Ottawa & Chippewa Tribe of Indians," that the United States referred to in 1836 never existed as a group and could not be dissolved because all the Tribes were and had been autonomous. *See Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty.*, 369 F.3d 960, 961 n.2 (6th Cir. 2004). Even if such a confederation were "dissolved," the United States had reaffirmed its relationship with the separate and sovereign "Cheboygan band" when it explicitly provided land to the Band in the Treaty of Detroit. Unlike the other signatories, the Band's

[9] This interpretation of the "dissolution" provision in Article V of the 1855 Treaty of Detroit has been ruled as error. *Grand Traverse Band*, 369 F.3d at 961 n.2.

sovereignty is uniquely bolstered by its independence during negotiations of the Treaty and its act of signing the Treaty only on behalf of the Band's members. 11 Stat. 621 (1856). Therefore, the Band was at all times a separate group of Indians and was never "dissolved," and the United States' obligations were never "relinquished." The Band urged the federal government to appeal the District Court's decision, but no appeal was filed. *See* Hamlin Letter to Obama.

By way of comparison, the Huron Potawatomi Indians recorded a deed conveying their lands to the Governor of Michigan in perpetuity that utilized the exact same language as the Band did in conveying their land to the Governor. *Id.* Lands were duly held in trust for the Huron Potawatomi, and to this day its members live on their reservation. *Id.*

II. The Band's Attempts at Reaffirming Federal Recognition

A. The Band's 1934 Petition

In 1934, Congress enacted the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 *et seq.* (1934), which "sought to strengthen tribal governments and restore the Indian land base." S. Rep. No. 111-247, at 2 (2010) (internal quotations omitted). One main objective of the Act was to restore tribal land held in trust because it was "essential to tribal self-determination." *Id.* at 3.

Section 5 of the IRA authorized the Secretary of the Interior to "acquire land in trust for the benefit of any tribe that was federally recognized at the time of trust land acquisition." *Id.* at 4. Section 19 of the IRA broadly defined those who were eligible to petition for recognition under the statute. 25 U.S.C. § 479. A successful petition under the IRA would enable a tribe such as the Band to hold elections within one year after the petition was granted, to reorganize its political structure in a manner mandated by the IRA, and finally restore its permanent trust lands to renew self-determination.

The Band promptly filed a petition for reorganization under the IRA. BIA never acted on its 1935 Petition.[10]

While waiting for BIA's decision, the Band organized the Northern Michigan Ottawa Association ("NMOA") to pursue claims for lack of compensation for lands sold to the federal government in 1836. In 1970, NMOA finally won a multimillion dollar award before the Indian Claims Commission. BIA, however, refused to distribute the funds to the "landless tribes" and the Band, on the ground that these Indians were not a part of a federally-recognized Tribe, despite being heirs of Treaty signatories. In response, in 1997, Congress amended the Michigan Indian Land Claims Settlement Act to specifically provide payment of judgment funds to one unique tribe that had not been federally recognized: the Burt Lake Band. Pub. L. 105-143, 111 Stat. 2663 (1997). The Band, skeptical about accepting the judgment as anything other than a tribe federally recognized by Congress – like all other Tribes who already received payment – chose not to apply for payment from fear that BIA would use its acceptance against the tribe, as a basis for denying its Part 83 Petition.

B. The Band's Part 83 Petition

In 1978, the DOI promulgated Part 83, establishing a uniform procedure for which Indian groups could seek federal recognition through what is known as the Federal Acknowledgment Process. 25 C.F.R. § 54 (1978) (subsequently renumbered as 25 C.F.R. § 83); *Mackinac Tribe v. Jewell*, 829 F.3d 754, 756 (D.C. Cir. 2016). A tribe seeking to be acknowledged by BIA must pursue the Part 83 process even if, like the Burt Lake Band, the tribe claims that it has previously

[10] In its Memorandum Opinion deciding Defendants' Motion to Dismiss, the Court dismissed Counts II and III that were based on the agency's failure to act.

been recognized by the federal government. *Id.* at 757. Part 83 "applies only to indigenous entities that are not federally recognized Indian tribes." 25 C.F.R. § 83.3 (1978).

There are two main avenues to become federally acknowledged under Part 83. A tribe can be "recognized" for the first time if it produces evidence sufficient to satisfy seven criteria set forth in 25 C.F.R. § 83.7(a)-(g). In the alternative, a previously recognized tribe can be "reaffirmed" pursuant to § 83.12 if it satisfies two of the criteria set forth in § 83.7 and submits proof of past recognition through treaties, acknowledgement of rights by the federal government, or past allocation of land by the government.

In 1978, the Band organized a committee of its members – living all over Michigan due to the deprivation of their communal home – to begin to organize a more modern tribal government, from which the present-day governmental structure of the Band evolved. Final Determination at 10-11. By April 1980, the Band had established a committee to research its tribal history, developed a more formal constitution, and sought new avenues to obtain tax-exempt status and federal recognition. *Id.* With the encouragement of BIA officials, the Band began compiling documentation to create an extensive petition under the Part 83 process. For all intents and purposes, BIA controlled *de facto* which tribes could submit petitions and under what process to apply, by suggesting to tribes, like the Band, that it would consider a petition if the tribe applied for "recognition" rather than "reaffirmation." As a result of discussions with BIA personnel, on September 6, 1985, the Band submitted a petition for federal recognition as an Indian Tribe under Section 83.7. Final Determination at 2. BIA placed the Petition on "active consideration" within two years, yet more than twenty years passed before it acted on the Petition.

Several significant events occurred while the Petition was under consideration. In 1983, the DOI published in the Federal Register a list of all "potential pre-1966 Indian damage claims

identified by or presented to the Department of Interior's Statute of Limitations Program as required by Sec. 3(a) of the Indian Claims Limitation Act of 1982, Pub. L. 97-394." 48 Fed. Reg. 13,698 (March 31, 1983). The notice indicated that "claims are grouped by *Indian Tribes*." *Id.* (emphasis added). The DOI included on page 349 of the list, Claim F60474-003 for "Cheboygan Band Land," describing the claim as a "tax forfeiture." *Id*. at 13,876. DOI thus used the same name over 100 years later that the government had used when it recognized "the Cheboygan band" and granted it allotments of land under the 1855 Treaty of Detroit.

On January 6, 1986, the Michigan Commission on Indian Affairs, acting on State authority, officially recognized ten Indian Tribes in the State of Michigan, including the Burt Lake Band. *See* Hamlin Letter to Appel (AR0000285). By formally recognizing the Burt Lake Band of Ottawa and Chippewa Indians as a sovereign Tribe, this declaration was intended to support the Band's Part 83 Petition and to encourage the federal government to follow suit.

The Burt Lake Band remains the only one of the ten Michigan historic tribes not recognized by BIA. The federally-recognized Michigan tribes have acknowledged the Burt Lake Band as the successor to the Cheboygan Band that signed the 1836 Treaty of Washington and the 1855 Treaty of Detroit. They thereby supported the reaffirmation of the Burt Lake Band's status as a federally-recognized Indian tribe.

III. BIA's 2006 Part 83 Decision

In 2006, after 20 years of "active consideration," BIA rejected the Band's Petition for recognition under Part 83. Final Determination for the Burt Lake Band of Ottawa and Chippewa Indians, Inc., 71 Fed. Reg. 57,995 (Oct. 2, 2006) ("Summary of Part 83 Decision"). BIA found that the Burt Lake Band satisfied four of the seven criteria in 25 C.F.R. § 83.7. *Id*. The four criteria were (1) Section 83.7(a), which required the Band to have been identified as an American Indian entity continuously since its last acknowledgment, which had occurred in 1917; (2) Section

83.7(d), which required that the Band provide a copy of its governing document, a constitution first ratified by its members in the 1980s; (3) Section 83.7(g), which required an absence of evidence that the Band was the subject of congressional legislation expressly forbidding or terminating its federal relationship, and which was satisfied by the two federal Treaties in 1836 and 1855 which prove that Congress did establish a relationship with the Band; and (4) Section 83.7(f), which required that Band membership be comprised principally of persons who are not members of any acknowledged North American Indian tribe. *Id.* at 57,995-996; Final Determination at 17. These four criteria were all objective standards, requiring literally thousands of pages of proof and records that the Band produced.

Conversely, the three criteria BIA found the Band was deemed not to have met were entirely subjective in nature. First, BIA found that the Band did not meet Section 83.7(b) (the "Distinct Community" criterion), which requires that a "predominant portion" of the group must exist as a distinct community. Summary of Part 83 Decision at 57,995. To satisfy this criterion, the Band had submitted photographs, sign-in sheets, funeral records, and interviews with its members. *Id.* BIA found that the Band was not a distinct social community on the grounds that its "core social community" predominantly included members of a federally-recognized tribe, the Little Traverse Bay Band ("LTBB").[11] *Id.*

[11] If the Band had petitioned under the "reaffirmation" process of § 83.12 (as opposed to the recognition process), this Distinct Community criterion would be the only requirement in § 83.12 that the Band would have failed to satisfy based on BIA's 2006 findings: "(a) The petitioner may prove it was previously acknowledged as a federally recognized Indian tribe . . . by providing substantial evidence of unambiguous Federal acknowledgment, . . . including, but not limited to, evidence that the petitioner had:

(1) Treaty relations with the United States;

(2) Been denominated a tribe by act of Congress or Executive Order;

(3) Been treated by the Federal Government as having collective rights in tribal lands or funds; or

(4) Land held for it or its collective ancestors by the United States.

Second, Section 83.7(c) requires that a petitioner must maintain political influence and authority over its members (the "Political Authority" criterion). *Id.* BIA found that the Burt Lake Band failed to meet this criterion because there was insufficient evidence of a governing body on a continual basis since 1917. *Id.* at 57,995-96. As with all "landless" Michigan Tribes, BIA did not act on its 1935 Petition. The Band was never authorized under the IRA to elect officials from among its members and organize a political structure.

Finally, Section 83.7(e) requires that membership consist of individuals who descend from a historical Indian tribe (the "Descent" criterion). *Id.* at 57,996. BIA found that of the 320 members listed as Band members, only 68% could document descent back to 1900. *Id.* Of the 102 who could not, 53 had "married into the group" and 49 lacked sufficient documentation. *Id.* Since this ruling, the Burt Lake Band has spent considerable time and resources updating its membership rolls. Today, every member can trace their descent back to the 1900 "Burn Out" or the Durant Roll of 1908 – a list of Tribes and its members compiled by BIA to determine who remained entitled to Treaty annuity payments.

BIA denied the Burt Lake Band Petition despite recognizing that it maintained a strong Indian community, and that its sovereign status was supported by scholars, federal, state, and local officials, and other tribes. The Part 83 decision also failed to take into account the Band's unique history in which its lands had been taken unlawfully and that the federal government had

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(b) Once the petitioner establishes that it was previously acknowledged, it must demonstrate that it meets:

(1) **At present, the Community Criterion**; and

(2) Since the time of previous Federal acknowledgment or 1900, whichever is later, the Indian Entity Identification Criterion and Political Authority Criterion."

25 C.F.R. § 83.12 (2015) (emphasis added). The Band can now satisfy the Distinct Community criterion, and could successfully earn "reaffirmation" if it were permitted to apply under this more appropriate avenue today.

previously deprived it of its rights. The Band's failure to possess communal land, which occurred through no fault of its own and was the consequence of more than a century of exploitation, served as the basis for BIA's conclusion that the Band lacked sufficient community ties under Section 83.7(b).[12] *Id.* at 57,995. However, the federal government failed to honor its promises to provide the Band with a reservation, despite the terms of the 1836 and 1855 Treaties. As noted, federal officials themselves helped the Band create those permanent land trusts in 1845 and 1850. But the Band lost the lands it entrusted to the State of Michigan in the "Burn Out" of 1900. Despite this undisputed evidence of the unfair treatment the Band had suffered, BIA refused to recognize that this lack of communal land would cause the Band to be more dispersed.

While the Band's members awaited a decision on its Part 83 Petition, upon the advice of BIA personnel, some of its most indigent members made the decision to enroll in federally-recognized Michigan Tribes to obtain federal services, such as health care and prescription drug assistance that only a federally-recognized Tribal member was legally entitled to receive. *See* Steven L. Austin, Austin Research Associates, Comments on the 2014 Proposed Rule for Title 25 Code of Federal Regulations Part 83 (Sept. 30, 2014) (AR0001850 at 868). These critical benefits were simply not available to members of the Band. A significant number of its members had no other option but to enroll in other tribes, which weakened the Band's ability to satisfy the Descent criterion in Section 83.7(e). BIA failed to consider this reality or the adverse consequences on the

[12] "Trust land is essential to tribes' ability to protect or promote their historic, cultural and religious ties to land where their ancestors lived. Trust land is also vital to tribal economic development and self-government as tribes provide a wide range of governmental services to their members including, running schools and health clinics, administering housing, and providing court, law enforcement and numerous other key social and governmental services." S. Rep. No. 111-247, at 1 (2010).

tribe of its own delays in finding twenty years later that the Band had not satisfied Sections 83.7(b) and (e).

BIA also found that the Band lacked sufficient political structure over its community under Section 83.7(c). Summary of Part 83 Decision at 57,995-996. The Band was substantially disadvantaged in meeting this criterion by virtue of BIA's failure to act on its 1935 Petition.

Finally, BIA failed to consider that, as recently as 1997, Congress had attempted to recognize its fiduciary obligations to the Band and enable it to become eligible for a tribal disbursement under the Michigan Indian Land Claims Settlement Act.

IV. BIA's Adoption of Regulatory Prohibition on Reapplying For Federal Acknowledgment Under the 2015 Amendments to Part 83

In 2015, in response to criticisms that the Part 83 process lacked transparency, efficiency, and consistency, BIA promulgated a Proposed Rule to amend its admittedly "broken"[13] process for federal recognition under Part 83, which was designed, intentionally or not, to make tribes like the Burt Lake Band fail. The Preamble to the Final Rule states that the purpose for these changes to the process was to promote "fairness and consistent implementation, and increasing timeliness and efficiency, while maintaining the integrity and substantive rigor of the process." Federal Acknowledgment of American Tribes, 80 Fed. Reg. 37862 (July 1, 2015) ("Final Part 83 Rule").

[13] *The Obama Administration's Part 83 Revisions and How They May Allow the Interior Department to Create Tribes, Not Recognize Them: Oversight Hearing Before the Subcomm. on Indian, Insular and Alaska Native Affairs of the H. Comm. on Nat. Res.*, 114th Cong. (2015) (statement of Kevin K. Washburn, Assistant Secretary of Indian Affairs) ("Washburn testimony") at 11 (listing at least six Senators on the Indian Affairs Committee describing the Part 83 process as "broken," "complicated," and in need of reform); *see also Hearings on S. 297 Before the S. Comm. on Indian Affairs* 108th Cong. (2004) (statement of former Assistant Secretary for Indian Affairs Kevin Gover) (AR0006723) (describing the recognition process as "deeply problematic and fundamentally flawed," noting that "agency staff essentially defies supervision by political appointees by overwhelming policy makers with information while the public's access to the policy maker is severely limited" and that the process "was distrusted by its constituent petitioners").

Revisions to Part 83 had been under consideration within BIA since 2009, with the goal of improving a fundamentally flawed process that since 1978 had resulted in granting recognition to only 17 tribes and denying the petitions of 34 others. Washburn Testimony at 9. Washburn laid out four guiding principles for amending the Part 83 process: transparency, timeliness, efficiency, and flexibility. *Id.* at 11-12. The fourth, flexibility, emphasized that the amended Part 83 process should understand "the unique history of each tribal community, and avoid[] the rigid application of standards that do not account for the unique histories of tribal communities." *Id.* at 12.

The D.C. Circuit has recognized that under the prior Part 83 procedure, which the Band tried unsuccessfully to satisfy, "'a federal acknowledgment petition can be over 100,000 pages long and cost over $5 million to assemble; BIA estimated time for completion of review is 30 years.'" *Mackinac Tribe*, 829 F.3d at 758 758 (Brown, J. concurring) (quoting Harry S. Jackson III, Note, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 RUTGERS L. REV. 471, 497 (2012)). BIA itself admitted that "72% of . . . currently recognized federal tribes could not successfully go through the [Federal Acknowledgment] process as it is being administered today." *Mackinac Tribe*, 829 F.3d at 760 (Brown, J. concurring) (quoting Jackson, *supra*, at 507).

The Final Rule ultimately adopted by BIA in 2015 differs in several significant respects from the process under which the Band's 1985 Petition for Recognition was considered. First, rather than relying on "inconsistent and unpredictable" criteria, the amended Part 83 process promotes a "consistent baseline," meaning that "if a particular amount of evidence or a particular methodology was sufficient to satisfy a criterion in a decision made in 1980, 1990 or 2000, that baseline threshold remains the same for petitioners today." *Information Fact Sheet*: *Highlights of the Final Federal Acknowledgment Rule (25 CFR 83)*, Bureau of Indian Affairs (June 29, 2015),

https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc1-030769.pdf. This would mean that, if the Band were to petition for acknowledgment today, BIA would be compelled to conclude that the Band should be recognized or reaffirmed just like the other "landless" Michigan tribes such as the Huron Potawatomi (recognized by BIA in 1995) because of their Treaty relationships with the United States.

Second, and most significantly, the amended Part 83 prohibits any tribe from re-petitioning for federal acknowledgment if it previously had applied under the "broken" pre-2015 process and its petition had been denied. 25 C.F.R. § 83.4(d). As amended, Section 83.4(d) provides:

"The Department will not acknowledge . . .

> (d) An entity that that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title . . . ."

In the Proposed Rule, BIA sought public comment on a provision that would allow "limited" re-petitioning if the opponents of the original petition consented. This conditional approach would have given other, non-federal government entities (such as tribes already recognized by BIA, states, and local government) a third-party veto over the recognition process. Hearing and Re-petitioning Authorization Processes Concerning Acknowledgement of American Indian Tribes. 79 Fed. Reg. 35,129 at 35,140 (June 19, 2014) (AR0000037). Opponents of "limited re-petitioning" argued that re-petitioning was "unnecessary"; "inefficient"; and "unfair to *other* . . . tribes." Final Part 83 Rule, at 37,874 (AR0000865) (emphasis added). Most astonishingly, the opponents argued that re-petitioning "could result in acknowledgement of previously denied petitioners." *Id.*

Throughout the consideration of the 2015 Rule revisions, Indian Law scholars, law professors, tribes and a former BIA acknowledgment official strongly argued that the significant

fundamental changes to both the criteria and procedures in the 2015 Final Rule must provide a right to re-petition or be "grandfathered" re-petitioning rights. *See, e.g.*, Letter from Patty Ferguson-Bohnee, Director, Arizona State University Indian Legal Clinic to Karl Johnson, United States Department of the Interior (Sept. 30, 2014) (AR0000003-013); Letter from Robert T. Anderson et al., Indian Law Professors to Elizabeth Appel, United States Department of the Interior (Sept. 30, 2014) (AR0001878-899); Public Meeting of Department of Interior, Office of Assistant Secretary for Indian Affairs, Federal Acknowledgment of Indian Tribes (July 1, 2014) (AR0004519-702); George Roth, Ph.D, Comments and Analysis of Proposed Revised Acknowledgment Regulations, (Sept. 27, 2014) (AR0003536); Letter from the Nanticoke Lenni-Lenape Tribal Nation to Elizabeth Appel, United States Department of the Interior (Sept. 29, 2014) (AR0007564-65). The Association of American Indian Affairs similarly argued that prohibiting tribes whose petitions were previously denied the right to re-petition under the new rules "may very well violate their right to equal protection of the laws and their inherent right recognized by" the United Nations Declaration on the Rights of Indigenous People. Letter from Jack F. Trope, Executive Director, Association on American Indian Affairs to Karl Johnson, United States Department of the Interior (Sept. 24, 2014) (AR0007585).

Commentators on the Proposed Rule argued that a prohibition on re-petitioning "treats petitioners unequally"; would violate Equal Protection and Due Process clauses of the Fifth Amendment; would "prevent getting to the truth of whether a tribe should be acknowledged"; would exceed BIA's authority; was "politically motivated"; and was "based on an invalid justification (established equities) that fails to consider petitioners' interests." Final Part 83 Rule, at 37,874-75 (AR0000865 at 878-79).

In its comments on the Proposed Rule, the Band generally supported the revisions to resolve longstanding and well-understood problems with the recognition process, but objected strongly to the suggestion that Part 83 should be amended to authorize BIA to refuse to reconsider a re-petition of any tribe denied federal recognition due to BIA's previous error under the "broken" Part 83 process. *See* Hamlin Letter to Appel (AR0000284-288). It submitted that permitting re-petitioning would save a small and not wealthy Tribe such as the Band from having to compile another long and expensive Part 83 petition. *Id.* (AR0000285-86). Additionally, the Band supported the proposal to allow for re-petitioning because it would be "grossly unfair" to allow new petitioners to be recognized under less stringent criteria, without giving the same opportunity to a Tribe that previously had been denied recognition under a process BIA itself admitted was "broken." *Id.* (AR0000285 at 287).

BIA rejected these arguments. In the Final Rule, it adopted an absolute prohibition on re-petitioning. 25 C.F.R. 83.4(d) ("The Department will not acknowledge . . . (d) an entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations"). The only basis the agency offered for prohibiting re-petitioning is that:

> The proposed rule would have provided for a limited opportunity for re-petitioning. After reviewing the comments both in support of and in opposition to allowing for any opportunity for re-petitioning, limiting re-petitioning by providing for third-party input, and other suggested approaches for re-petitioning, the Department has determined that allowing re-petitioning is not appropriate. The final rule promotes consistency, expressly providing that evidence or methodology that was sufficient to satisfy any particular criterion in a previous positive decision on that criterion will be sufficient to satisfy the criterion for a present petitioner. The Department has petitions pending that have never been reviewed. Allowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular. The Part 83 process is not currently an avenue for re-petitioning.

Final Part 83 Rule at 37,875 (AR0000865 at 879). This is the only rationale BIA provided and, under the *Chenery* doctrine,[14] this is the only basis on which Section 83.4(d) can be upheld in the face of the Band's arbitrary and capricious challenge. Unless the Court declares Section 83.4(d) unlawful, the Band will never have an opportunity to re-petition and seek to show that it satisfies the current BIA criteria for recognition.

V. The Band Can Now Satisfy BIA's Recognition Process If Allowed to Re-Petition

As noted, the Band was deemed to have failed to make an adequate factual showing regarding three criteria under the Part 83 recognition process that was in effect in 2006. Summary of Part 83 Decision at 57,995; Final Determination at 17. Based on meticulous research and newly discovered evidence, the Band believes that, if permitted to re-petition, it can now satisfy all seven recognition criteria of § 83.7 (or, the reaffirmation process of § 83.12) under the amended Part 83. Since BIA's decision in 2006, the Band has spent significant time and effort updating its membership rolls and met with BIA officials. In 2006, BIA found that the Band did "not meet [the Descent criterion of] 83.7(e) because only 68% of its members have demonstrated descent from ancestors who were part of the historical tribe." *Id.* at 18. The Band can now demonstrate descent for more than 80% of its current members, which is the measurement BIA has used and continues to use in determining the Descent criterion. Final Part 83 Rule at 37,867 (AR0000865 at 871) ("The 80 percent threshold was [an attempt] to codify this existing Departmental practice.").

BIA also found in 2006 that the Band had failed to establish that it was a distinct community from the Little Traverse Bay Band ("LTBB") under § 83.7(b). Summary of Part 83

[14] *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (agencies may not rely on *post hoc* rationalizations).

Decision at 57,995. Pursuant to Section 83.7(b)(2), however, a petitioner can satisfy both this Distinct Community criterion and the Political Authority criterion by providing sufficient evidence to demonstrate any of the following:

> (i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the entity, and the balance of the entity maintains consistent interaction with some members residing in that area;
>
> (ii) At least 50 percent of the members of the entity were married to other members of the entity; . . . .

25 C.F.R. § 83.11(b)(2). Based on its updated membership rolls, the Band can now submit substantial evidence that at least 50 percent of its members were married to other members of the Band. *See* § 83.7(b)(2)(ii). Therefore, the Band believes it can submit new factual material which shows that it now satisfies all three criteria it originally was found not to have satisfied in 2006.

Moreover, in 2016, the Band found at least two new pieces of evidence that BIA did not have before it in 2006 and which would independently demonstrate that the Band can satisfy the Political Authority and Distinct Community criteria. For example, BIA did not have the opportunity to consider a LTBB Resolution approved and signed by the LTBB Council in September 2012. This Resolution declared that the Burt Lake Band "continues to exist as a distinct Tribal entity" despite living in such close proximity to LTBB. This Resolution is particularly significant given that (a) the LTBB is the federally-recognized tribe that BIA considered to be too intertwined with Burt Lake Band members for the Band to be able to satisfy the Distinct Community criterion; and (b) during BIA's consideration of the Band's Part 83 Petition, LTBB was publically opposed to its federal recognition.[15]

[15] *See Burt Lake Band of Ottawa and Chippewa Indians v. Norton et al*, No. 1:01-cv-00703-RWR (D.D.C. April 12, 2002) (Dkt. No. 49) (Little Traverse Bay's Motion For Leave to File Brief In Support of Federal Defendants' Motion to Dismiss and In Opposition to Plaintiff's Motion for Summary Judgment).

Under the new Part 83 procedures and amended criteria, the Band believes it can make the necessary showing that it should be recognized or reaffirmed through the Federal Acknowledgment processes. However, BIA's categorical ban on re-petitioning in Section 83.4(d) denies the Band the opportunity to re-petition and ever to be recognized. It improperly privileges the agency's own narrow concern with its internal administrative operations over meritorious adjudication of Petitions that seek to qualify for recognition, and thus for the rights and benefits that Congress and the Treaties have provided for tribes like the Burt Lake Band.

ARGUMENT

In cases such as this one, a court will "review the administrative record to determine whether the agency's decision was arbitrary and capricious, and whether its findings were based on substantial evidence. *Forsyth Memorial Hosp., Inc. v. Sebelius*, 639 F.3d 534, 537 (D.C. Cir. 2011) (citing *Troy Corp. v. Browner*, 120 F.3d 277, 281 (D.C. Cir. 1997)). The facts concerning the actions of BIA in adopting Section 83.4(d), and thereby prohibiting re-petitioning, for recognition are well-established in the administrative record and cannot be disputed. Moreover, as set forth below, the Band is entitled to judgment as a matter of law. Accordingly, the Court should grant the Burt Lake Band's motion for summary judgment on Counts IV – VI of the Complaint.

I. Count IV – Agency Action in Violation of APA

Under 5 U.S.C. § 706(2), the Court should declare the provision of Part 83 that prohibits re-petitioning for federal recognition, Section 83.4(d), to be unlawful as it is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law.

A. BIA acted outside its authority by promulgating a regulation that categorically and permanently prohibits a tribe from re-petitioning for federal recognition.

Congress did not delegate to BIA any authority to prohibit a tribe from re-petitioning for federal recognition if its initial petition was denied for failure to make an adequate factual showing. Such an interpretation of BIA authority under Part 83 would run contrary to the essential purpose of the Federal Acknowledgment process, which was intended—as fully stated above—to provide a consistent, transparent, and flexible process by which tribes could petition for federal recognition. On this basis alone, the regulation is unlawful as a matter of law.

Congress has authorized BIA to "manage[] all Indian affairs and [] all matters arising out of Indian relations." *See* 25 U.S.C. § 2 ("The Commissioner of Indian Affairs 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."); 25 U.S.C. § 9 ("The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."). It is well settled that BIA may take actions only within the authority granted by Congress. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) ("Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature.").

BIA can cite to no authority which explicitly grants it the authority to prohibit a tribe from petitioning for recognition or re-petitioning when its initial submission was deemed inadequate. Nowhere in the Final Rule does DOI claim that BIA has been granted such express authority. The statute unambiguously does not. The Legislative Authority section of the Preamble to the Final

Rule consists largely of broad, general statements by Congress acknowledging that BIA has authority to recognize tribes. Final Part 83 Rule at 37,885 (AR000065 at 889).[16] But nothing in these broad findings purports to identify any statutory authority that authorizes BIA to promulgate an absolute prohibition on re-petitioning.

As the Supreme Court has explained, "[i]t is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that 'doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 174 (1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). The D.C. Circuit has also made clear that statutes affecting Indians must "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)); *see also Redding Rancheria v. Hargan*, 296 F. Supp. 3d 256, 267 (D.D.C. 2017) ("Because the D.C. Circuit

[16] The Legislative Authority section provides:

> Congress granted the Assistant Secretary-Indian Affairs (then, the Commissioner of Indian Affairs) authority to "have the management of all Indian affairs and of all mattes arising out of Indian relations." 25 U.S.C. 2 and 9, and 43 U.S.C. 1457. This authority includes the authority to administratively acknowledge Indian tribes. See, e.g., Miami Nation of Indians of Indiana, Inc. v. United States Dep't of the Interior, 255 F.3d 342, 346 (7th Cir. 2001); James v. United States Dep't of Health & Human Servs., 824 F. 2d 1132, 1137 (D.C. Cir. 1987). The Congressional findings that supported the Federally Recognized Indian Tribe List Act of 1994 expressly acknowledged that Indian tribes could be recognized "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,'" and described the relationship that the United States has with federally recognized tribes. See Public Law 103-454 Sec. 103(2), (3), (8) (Nov. 2, 1994).

Final Part 83 Rule at 37,885 (AR0000865 at 889).

precedent is clear and binding on this Court, phase one of the Tribe's suit will be analyzed under the canon favoring the Tribe so long as its construction is reasonable."). This canon "ensures that statutes passed for the benefit of Indian tribes are interpreted to their benefit." *Forest Cty. Potawatomi Cmty. v. United States*, No. 15-105(CKK), 2018 U.S. Dist. LEXIS 153333, at *17 (D.D.C. Sept. 10, 2018).

The prohibition was created by BIA in 2015 as part of the regulatory revision that recognized the broken nature of the Part 83 process, under which far more tribes have been rejected than granted recognition. BIA sought to address this inequity by lowering the barriers for tribes seeking recognition, and to restore trust in the Federal Acknowledgment process. Proceeding re: Tribal Consultation of Draft Revisions to Federal Acknowledgment Regulations (25 CFR 83), Department of the Interior (July 29, 2013) (Supplemental Record of Petoskey Hearing at 19). Moreover, the 1994 version of Part 83, under which the Band submitted its Petition in 1985, did not contain a prohibition on re-petitioning, nor was there any such prohibition when BIA rejected the Band's Petition in 2006. BIA does not point to any of the provisions cited in the Legislative Authority section that purportedly empowers it to adopt § 83.4(d), which is a complete ban. Nothing in the Congressional findings on which BIA relies permits the creation of such an absolute roadblock to recognition.

BIA cannot now rely on some other purported legislative authority to justify the absolute and permanent prohibition created by Section 83.4(d). "It is axiomatic that we may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review." *Williams Gas Processing - Gulf Coast Co., L.P. v. FERC*, 373 F.3d 1335, 1345 (D.C. Cir. 2004). Over 75 years of Supreme Court precedent has held that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was

based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Mere "*post hoc* rationalizations by agency counsel will not suffice." *W. Union Corp. v. FCC*, 856 F.2d 315, 318 (D. C. Cir. 1988); *see also Council for Urological Interests v. Burwell*, 790 F.3d 212, 223 (D.C. Cir. 2015) (concluding that the Court may not consider a *post hoc* argument because "the Secretary did not articulate it during the 2008 rulemaking" process); *API v. Johnson*, 541 F. Supp. 2d 165, 173, 182 (D.D.C. 2008) (finding that the Environmental Protection Agency's explanation of its definition of "navigable waters" is too conclusory and does not meet the *Chenery* standard because it is not sufficiently "clear, cogent and reasoned" in the record).

Moreover, the provisions on which BIA relies come from a statute that requires DOI to publish a list of federally-recognized tribes and does not deal with the petitioning or re-petitioning process. The Federally Recognized Indian Tribal List Act of 1994, Pub. L. 103-454, 108 Stat. 4791, 4791-92 (1994). That statute and those findings relate to a different function, which depends upon the outcome of the Part 83 process but does not establish the procedures under which that process is to be conducted. *Id.*

Nor did Congress give BIA implicit legislative delegation to ban re-petitioning. To the contrary, the prohibition is contrary to Congress's stated policy and the purpose of the regulations themselves.

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a *meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.* In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 5302(b) (emphasis added). Yet, the DOI and BIA revised the Part 83 tribal acknowledgment regulations in 2015 to prohibit re-petitioning, directly contradicting Congressional intent and despite admitting that the previous process for petitioning for federal recognition was "'broken' and in need of reform." *See* Final Part 83 Rule at 37,862 (AR0000866). Even the regulation itself acknowledges that the purpose of the regulation is to "implement Federal statutes *for the benefit of Indian tribes*." 25 C.F.R. § 83.2 (emphasis added). Despite its purported purpose, the 2015 Amendment fails to assist tribes in the federal recognition process; to the contrary, it creates an insurmountable barrier, for those tribes whose initial Petitions were deemed inadequate between 1978 and 2015.

BIA's authority to "have the management of all Indian Affairs and of all matters arising out of Indian relations" does not extend to preventing tribes from petitioning for federal recognition under a fair and equitable process, particularly when doing so is completely contrary to Congress's express commitment "to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." *Compare* 25 U.S.C. § 2 *with* 25 U.S.C. § 5302.

Accordingly, as a matter of law, there is no statutory basis under which the ban on re-petitioning can be upheld. The Court should find that Section 83.4(d) is unlawful on its face and reject any eleventh hour effort by Defendants to preserve the prohibition in Section 83.4(d) by relying on any new or *post hoc* justification.

B. Even assuming Congress granted BIA the authority to promulgate Section 83.4(d), the ban on re-petitioning is arbitrary and capricious and should be vacated.

Under 5 U.S.C. § 706(2)(A), "[i]n all cases agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971) (internal quotations omitted). "[C]ourts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). The D.C. Circuit has explained that, "[w]hile we have long held that agency determinations based upon highly complex and technical matters are entitled to great deference, we do not defer to the agency's conclusory or unsupported suppositions." *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 220 (D.C. Cir. 2013) (citations and internal quotation marks omitted).

When applying the "arbitrary and capricious" standard, in particular, a court must determine

> whether "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."

Empresa Cubana Exportadora de Alimentos y Productos Varios v. United States Dep't of Treasury, 516 F. Supp. 2d 43, 53 (D.D.C. 2007) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). An agency's action is arbitrary or capricious unless the agency's reason for taking the action is "both rational and consistent with the authority delegated to it by Congress." *Xcel Energy Servs. Inc. v. Fed. Energy Regulatory Comm'n*, 815 F.3d 947, 952 (D.C. Cir. 2016). Here, BIA's reason for prohibiting re-petitioning is neither.

In explaining the reasons for the revisions to Part 83 as a whole, BIA explained:

> Specifically, the process has been criticized as too slow (a petition can take decades to be decided), expensive, burdensome, inefficient, intrusive, less than transparent and unpredictable. This rule reforms the process by, among other things, institutionalizing a phased review that allows for faster decisions, reducing the documentary burden while maintaining the existing rigor of the process; allowing for a hearing on a negative proposed finding to promote transparency and integrity; enhancing notice to tribes and local governments and enhancing transparency by posting all publicly available petition documents on the Department's website;

> establishing the Assistant Secretary's final determination as final for the Department to promote efficiency; and codifying and improving upon past Departmental implementation of standards, where appropriate, to ensure consistency, transparency, predictability and fairness.

Final Part 83 Rule at 37,862 (AR0000866).

With respect to BIA's decision to adopt Section 83.4(d) and change its longstanding procedures by introducing a new prohibition on re-petitioning, the totality of BIA's justification for its action is as follows:

> The final rule promotes consistency, expressly providing that evidence or methodology that was sufficient to satisfy any particular criterion in a previous positive decision on that criterion will be sufficient to satisfy the criterion for a present petitioner. The Department has petitions pending that have never been reviewed. Allowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular. The Part 83 process is not currently an avenue for re-petitioning.

Id. at 37,875 (AR0000879).

Based on BIA's explanation, the prohibition on re-petitioning is arbitrary and capricious for several reasons. First, BIA "entirely failed to consider an important aspect of the problem" and contradicted its own stated reason for amending the Part 83 rules. *See Empresa*, 516 F. Supp. 2d at 53 (quoting *Bowman Transp., Inc.*, 419 U.S. at 286). Here, the entire basis for revising the petitioning process under Part 83 was that the previous system was "broken" and "in need of reform." Final Part 83 Rule at 37,862 (AR0000866). Yet tribes such as the Band that had submitted petitions and been denied recognition under the previous, defective process are not permitted to re-petition under the standards created by the purportedly fixed process. BIA has adopted a "one bite at the apple" rule that prohibits tribes from re-petitioning under the current system, even though they (1) were injured by the procedural shortcomings and dysfunctional substantive standards applied by the agency in denying their Petitions, and (2) submitted their

Petitions under processes which did not prohibit re-petitioning. The Band is now absolutely prohibited from re-petitioning in all circumstances, notwithstanding that it responds to the concerns expressed by BIA in its 2006 decision. Rather, at a time when Part 83 did not prohibit re-petitioning, the Band chose the difficult path of seeking and obtaining additional, hard-to-discover factual evidence in response to the agency's finding that the original factual submission was inadequate. But now, under the 2015 amendments that purportedly comprise a "more equitable set of criteria," the Band is prohibited from ever re-petitioning or supplementing its petition with new facts, in its decades-long effort to show that the tribe is entitled to recognition and the statutory benefits Congress provides to recognized tribes.

Second, BIA's explanation "runs counter to the evidence before the agency." *Empresa*, 516 F. Supp. 2d at 53 (quoting *Bowman Transp., Inc.*, 419 U.S. at 286). BIA states that preventing re-petitioning "promotes consistency" because tribes' "evidence or methodology" that was acceptable before will be sufficient to meet the revised standards. Final Part 83 Rule at 37,875 (AR0000879). But this is an obvious tautology for a rule that consciously adopted fairer and less rigorous tests. The revised Part 83 does nothing for the tribes that need "consistency" the most – the ones that applied for and were denied recognition under an admittedly broken system that was hardwired to result in denials of petitions. Rather than receiving equitable treatment consistent with the "fortunate" tribes that filed their petitions less than 20 years before the 2015 amendments, and had not yet been denied in 2015, tribes such as the Band that received a negative decision prior to the revision of the rules are absolutely prohibited from having their cases reconsidered under the new rules and an augmented administrative record, even though there is no other difference between the two groups of applicants, except the random chance of when after 20 years BIA finally acted.

Third, there is no "rational connection" between the facts found and BIA's stated explanation. *Muwekma*, 708 F.3d at 220 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). BIA's conclusion that the rule promotes consistency is unsupported by the record. The tribes who have not yet filed a petition or whose petitions had not yet been decided at the time that the 2015 Amendments came into effect are permitted to proceed under the revised rules under fairer and less stringent standards. Moreover, the tribes whose petitions are pending are permitted to decide whether to proceed under the original rule or the 2015 Amendments, including supplementing their petitions. 25 C.F.R. § 83.7. Rather than creating consistency, the 2015 rule is designed to create two different classes of tribes, separated only by when BIA's indefinite, two decades-long period of delay finally ended.

Finally, and most importantly, BIA's reliance on the "goals of increasing efficiency and timeliness" by having its employees avoid "the additional workload associated with re-petitions" is arbitrary and capricious and cannot support a rule that imposes a complete prohibition on re-petitioning. Final Part 83 Rule at 37,875 (AR0000879). A federal agency cannot absolutely refuse to ever consider citizen petitions for redress of grievances by claiming resource constraints. Although courts will defer to agency judgments regarding the internal allocation of resources,[17] agencies cannot refuse to receive a petition or enact an absolute legal prohibition against its consideration for concern that its staff might be inconvenienced by having to consider a petition the applicant has every legal right to submit. Here, a tribe that was denied a fair hearing under the former broken system seeks only to have its eligibility for statutory rights determined under the new rules and an augmented evidentiary record that addresses the concerns it took BIA two decades to find and articulate.

[17] *See Cutler v. Hayes*, 818 F.2d 879, 897 (D.C. Cir. 1987).

BIA cannot, in the exercise of its discretion and without express statutory authority, simply refuse to receive, consider, or act on petitions for redress to vindicate a regulated entity's statutory rights, based only on its own administrative convenience and efficiency concerns. The Band has a constitutional right to petition the government for redress of its grievances. U.S. Const., amend. I (the First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances"). This right extends to petitioning of agencies for relief from an agency's erroneous decisions or to seek reconsideration of its actions. *See Am. Bus. Ass'n v. Rogoff*, 649 F.3d 734, 738 (D.C. Cir. 2011) (citing *Cal. Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). "At present day, a federal acknowledgment petition can be over 100,000 pages long and cost over $5 million to assemble; BIA estimated time for completion of the review is 30 years. That means a case worker could start the review process her first day at BIA and retire with her full pension before ever completing it. That's appalling." *Mackinac Tribe v. Jewell*, 829 F.3d 754 758 (D.C. Cir. 2016) (Brown, J., concurring) (citing Harry S. Jackson III, Note, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 RUTGERS L. REV. 471, 497 (2012)).

BIA tries to bolster its administrative convenience argument by stating that allowing re-petitioning by tribes whose petitions were was denied before 2015 would be unfair to the tribes that have never applied for recognition or whose petitions were still pending when the rules were amended. BIA's assertion rests on an unstated premise that the tribes that re-petition would have a right to priority consideration of their applications and that the agency's acceptance of a re-petition would necessarily delay the consideration of new petitions by other tribes. BIA offers no direct support for this proposition.

However, assuming that BIA's rules in force prior to 2015 would have given priority to re-petitions, the agency could easily have included in the 2015 amendments (and could adopt today) a procedural provision that establishes a different order of priority for consideration of re-petitions, in order to create a process it believes would be fairer to all petitioning tribes. Accordingly, there is no merit to BIA's argument that the ban on re-petitioning was necessary in order to preserve fairness for tribes that had not submitted petitions. Imposition of a total ban on re-petitioning was anything but necessary. The agency could have, but chose not to, amend its rules to address any fairness concerns potentially raised by permitting re-petitioning. It chose instead to adopt a new "one bite at the apple" rule to reduce its workload by terminating the ability of an entire class of tribes to respond to the agency's concern about the adequacy of the facts first presented.

In the end, BIA's addition of this purported "fairness" rationale to the Preamble, in an attempt to justify the prohibition on re-petitioning, serves only to demonstrate that the agency action was not driven by a "fairness" concern, but only by BIA's desire to reduce its own workload for its own convenience, regardless of the effect of this ban on the statutory rights of tribes whose petitions had previously been denied.

II. Count V: The Rule Violates the Due Process Clause

BIA has violated the Fifth Amendment by depriving the Band and similarly-situated entities of their due process rights, by adopting a rule that absolutely prohibits a tribe from re-petitioning for federal recognition, without regard to the strength of the evidence that the Band can adduce in support of its eligibility for recognition under the criteria established by Congress and thus the eligibility of the Band and its members for the benefits Congress has provided by statute. Part 83 of BIA's rules is the only avenue through which a tribe may petition for federal recognition. As BIA itself has formally recognized in the Federal Register, the process under which the Band's initial Part 83 Petition was denied in 2006 was "broken" – that is, deeply flawed.

Final Part 83 Rule at 37,862 (AR0000866). In response to this recognition, and absent any grant of authority from Congress in the statute, in 2015 BIA adopted Section 83.4(d) which permanently prohibits the Band from re-petitioning for recognition, even though the Tribe is prepared to present additional evidence to show that it currently meets all the required Part 83 criteria. 25 C.F.R. § 83.4(d). The only rationale BIA offered for prohibiting a tribe from re-petitioning for recognition was its own administrative convenience – that it did not want to expend the time and resources necessary to consider a supplementary evidentiary submission by a tribe that was gathered at great expense and in response to the agency's prior identification of respects in which its initial application was deemed inadequate. In promulgating a rule that creates an absolute barrier to the Band's ability to obtain consideration of a revised petition designed to respond to BIA's initial findings, BIA has denied the Band its constitutional right to petition the government for redress of grievances, in a manner that violates the Due Process Clause of the Fifth Amendment by privileging its own bureaucratic convenience over the Band's right to seek to demonstrate that it qualifies for federal recognition under the procedures and statutory criteria that Congress established.

Part 83.4(d) improperly restricts the Band's ability to seek redress of a grievance under the Petition Clause, which provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. "The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). The Supreme Court has explained that "precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387

(2011). This right "'extends to [petitioning] all departments of the Government,' including administrative agencies and courts." *Rogoff,* 649 F.3d at 738 (citing *Cal. Motor Transp. Co.*, 404 U.S. at 510).

The Band has a protected interest in being federally recognized. "Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law* § 3.02(3) (2012 ed.). Federal recognition is a "prerequisite to the protection, services, and benefits of the Federal Government" available to tribes. 25 C.F.R. § 83.2(a). Part 83, as amended, prohibits the Band from exercising its right to petition the government "for a redress of grievances" by preventing the Band from ever presenting supplemental evidence to BIA in its efforts to vindicate the right to obtain the federal recognition and federal benefits that are provided by statute for tribes than can BIA demonstrate their eligibility. A "one and done" rule that precludes tribes from submitting additional evidence to respond to BIA's rejection of a prior petition constitutes a fundamental denial of due process.

III. Count VI: The Rule Violates the Equal Protection Clause

"To prevail on an equal protection claim, the plaintiff must show that the government has treated it differently from a similarly situated party and that the government's explanation for the differing treatment 'does not satisfy the relevant level of scrutiny.'" *Muwekma,* 708 F.3d at 215 (quoting *Settles v. U.S. Parole Comm'n,* 429 F.3d 1098, 1102 (D.C. Cir. 2005)). Because BIA's action does not "target a suspect class or burden a fundamental right," the relevant level of scrutiny is rational basis. *Tucker v. Branker,* 142 F.3d 1294, 1300 (D.C. Cir. 1998) ("A . . . classification that does not burden either a fundamental right or a suspect class must be reviewed under the rational basis test.").

Under the rational basis test, there must be "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). "[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (internal quotations omitted). Here, there is no "conceivable set of facts" that can provide a legitimate or rational basis for BIA's discriminatory treatment of the Band and other similarly-situated tribes whose petitions were denied under the pre-2015 version of Part 83 versus the tribes whose petitions are resolved under the post-2015 version.

The clearest proof that there is no rational basis for BIA's discrimination against the Band and other similarly-situated tribes by prohibiting them from re-petitioning is set forth in the agency's own justification for its decision to treat tribes whose petitions were denied prior to 2015 differently from tribes whose petitions had not been filed or resolved by that date. Rule 83.4(d) clearly discriminates against the Burt Lake Band and other tribes whose original petitions were denied under the pre-2015 process. The Band is forever prohibited from supplementing its petition, re-petitioning for recognition, or petitioning for reaffirmation. By contrast, tribes that have not yet petitioned for federal recognition or not yet received decisions on petitions pending in 2015 will have their claims resolved under the no-longer "broken" process and its less demanding standards. BIA has also permitted those tribes with petitions currently pending to choose to be evaluated under the Part 83 process as amended in 2015, or under the previous versions. *See* U.S. Dept. of Interior, Office of Federal Acknowledgment, https://www.bia.gov/as-ia/ofa; *see also* 25 CFR 83.7(b). Those petitioners are permitted to "supplement their petitions with additional material." *Id.* In other words, Section 83.4(d) denies re-petitioning to the tribes

whose petitions were resolved under a system that BIA itself admits was designed to minimize the chances of obtaining recognition.

In the Preamble to the Final Rule, BIA states that its decision on re-petitioning promotes "consistency."

> After reviewing the comments both in support of and in opposition to allowing for any opportunity for re-petitioning, limiting re-petitioning by providing for third-party input, and other suggested approaches for re-petitioning, the Department has determined that allowing re-petitioning is not appropriate. **The final rule promotes consistency, expressly providing that evidence or methodology that was sufficient to satisfy any particular criterion in a previous positive decision on that criterion will be sufficient to satisfy the criterion for a present petitioner.** The Department has petitions pending that have never been reviewed. Allowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular. The Part 83 process is not currently an avenue for re-petitioning.

80 Fed. Reg. at 37,875 (emphasis added).

BIA bases its action on one of the fundamental principles of administrative law – that like cases should be decided in a like manner. To create public confidence in the integrity of its processes, agency regulations must ensure that similar cases are decided in the same manner, to instill confidence and head off public cynicism that the results of the administrative process are determined by political factors rather than legal rules. BIA properly embraces the "like cases should be decided in the same manner" principle for tribes whose petitions for recognition had not been decided before the Final Rule was issued. It expressly takes the position that "evidence or methodology that was sufficient to satisfy any particular criterion in a previous positive decision on that criterion will be sufficient to satisfy the criterion for a present petitioner." *Id*.

BIA provides no rational justification, however, why the same basic principle of fair administrative practice should not apply to tribes whose petitions for recognition had been denied

before 2015. Indeed, the justification for applying the "like for like" principle to these tribes and allow them to re-petition is even stronger than for tribes whose petitions have not yet been denied. The agency itself admits that the pre-2015 process was designed to make it harder for tribes to obtain recognition that the post-2015 process, and that in practice, far more tribes were denied recognition than were granted recognition under the prior "broken" system. Basic principles of administrative fairness dictate that the Band and other tribes that were adversely affected by having their petitions considered under processes and criteria that BIA itself admits were defective, and that it has abandoned, should have a right to submit a supplemental petition, containing newly available evidence and examples of prior recognition decisions by the agency, to show that its case presents evidence and methodology that the agency deemed "sufficient to satisfy any particular criterion in a previous prior decision . . . ." *Id.* A core principle that is applicable post-2015 should be equally applicable pre-2015. Based on BIA's own logic, the Band is entitled to be treated in the same manner as the post-2015 tribes and to supplement the record by referring to previous BIA decisions.

The only rationale that BIA offers for not allowing the Band and other tribes to re-petition is its own administrative convenience. It complains that applying basic fairness principles would "impos[e] the additional workload associated with" having to review a new supplemental submission by a tribe that would require BIA to review the applicant's reliance upon the agency's own prior decisions and determine whether a showing the agency was deemed "sufficient" in a prior case should be deemed "sufficient" in its case. BIA's only justification for not treating petitioning tribes in the same manner is that it does not want to spend the time and energy required to review its own prior administrative precedents brought to its attention by the applicant's supplemental petition. Based on Assistant Secretary Washburn's Congressional testimony, there

are only 17 "previous positive decision(s)" in the universe of precedents from 1978 to 2015 that a re-petitioning tribe could cite, and only 34 unsuccessful applicants that would be added to the group of tribes eligible to re-petition. Washburn Testimony at 9.

A process that denies equal treatment to tribes that suffered under a prior process that was stacked against them, based simply on the agency's concern for its own administrative convenience, cannot and does not provide a rational basis for the disparate treatment against re-petitioning practiced by Section 83.4(d).

The Band believes that, if permitted to re-petition, it could focus BIA on its own "previous prior decision(s)" recognizing other tribes that would provide strong precedent for federal recognition of the tribe, when applied to a supplemented factual record providing BIA with additional evidence that was not available to it when it deemed the Band's original submission to be inadequate.

For example, the Huron Potawatomi Nation, another "landless" Michigan tribe, also petitioned for recognition under the pre-2015 version of Part 83. In 1996, BIA granted the tribe's petition and recognized it as an Indian tribe within the meaning of federal law. In concluding that the Huron Potawatomi Nation had successfully established its right to reaffirmation under Part 83, BIA expressly relied on the language of an identical deed of trust from the Huron Potawatomi to the Governor of Michigan as the Burt Lake Band's deeds. Within its analysis of the Huron Potawatomi's petition, BIA recognized that the federal Treaty satisfied the criteria established by Part 83, and is conclusive evidence of prior federal recognition of a "landless" tribe that had lost its identity. Accordingly, the Band would seek to show that the logic of BIA's prior conclusion in its "previous positive decision" on the Huron Potawatomi's petition would apply to the Band with full effect, and would warrant its recognition.

In addition to the Huron Potawatomi, BIA granted "positive decision(s)" on Part 83 petitions that reaffirmed the sovereign status of the Grand Traverse Band of Ottawa and Chippewa Indians on May 27, 1980; and the Gun Lake Tribe in August 23, 1999. The Band also would cite to those positive decisions where appropriate.

For these reasons, the Court should conclude that BIA violated the Equal Protection Clause by providing no rational basis for its decision to discriminate between two groups of tribes, defined only by whether they had petitioned recognition under an older, defective process or an improved post-2015 process, concerning whether they would be permitted to re-petition to demonstrate that they were entitled to federal recognition under statutes adopted by Congress.

CONCLUSION

For the reasons set forth above, the Court should grant the Burt Lake Band's motion for summary judgment on Counts IV, V, and VI of its Complaint.

Dated: October 12, 2018

Respectfully submitted,

/s/ Moxila A. Upadhyaya

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2018, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Moxila A. Upadhyaya
Moxila A. Upadhyaya