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 DAVID BERNHARDT, [1] *et al.*,	*	Hon. Amy Berman Jackson
Defendants.	*	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

[1] Acting Secretary of the Interior David Bernhardt automatically replaces former Secretary of the Interior Ryan Zinke, pursuant to Federal Rule of Civil Procedure 25(d).

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INTRODUCTION

Plaintiff Burt Lake Band of Ottawa and Chippewa Indians ("Burt Lake Band" or the "Band") submits this opposition to Defendants' ("DOI") cross-motion for summary judgment and reply in support of the Band's motion for summary judgment, and requests that the Court grant summary judgment in favor of the Burt Lake Band on the remaining counts. By promulgating its 2015 revisions to the Part 83 process which prohibits any tribe who was previously denied under the 1978 or 1994 rules, such as the Band, from re-petitioning, DOI has (1) violated the Administrative Procedure Act (APA), 5 U.S.C. § 706; (2) the Due Process clause of the Fifth Amendment; and (3) the Equal Protection clause of the Fifth Amendment. For the reasons explained herein, DOI's arguments to the contrary are without merit.

The 2015 Final Rule violates the APA in two principal ways. First, DOI's decision to ban all previously-denied groups from re-petitioning under the revised Part 83 process exceeds its statutory authority because this power is not delegated to it by any provision of the law; in fact, it squarely contradicts the intent of Congress. The statutes from which DOI purportedly asserts such authority are meant to *benefit* Indian people and support Indian groups' path to self-determination, not thwart their attempts to lift their community out of hardship and dependence. An absolute ban, which permanently prevents Indian groups from submitting additional factual information to the administrative record and thereby achieving recognition, undoubtedly undermines Congress' clearly stated objectives.

Second, DOI's two-fold reasoning articulated in its Final Rule for refusing to permit any re-petitioning was arbitrary and capricious. DOI's Final Rule rejected all re-petitioning after considering only one approach and ignoring alternatives submitted by commenting parties, because DOI claimed that (1) the ban would lighten the agency's workload, and (2) re-petitioning was unnecessary based upon the fact that the new rule did not substantively change Part 83's

criteria. These justifications are unreasonable on their face, and DOI failed to meet its burden under the APA by identifying *any* evidence in the record that supports these rationales. In addition, DOI clearly failed to consider important aspects of the re-petitioning issue in its decision-making, such as the effect it may have on tribes who develop or discover additional evidence after a negative determination. Finally, the Court owes no deference to the agency's rationale because (1) DOI failed to identify any statutory provision it was supposedly interpreting; (2) its decision did not require specialized agency expertise; (3) its decision was entirely self-serving; and (4) when interpreting a statute pertaining to Indians, this Court must construe it liberally in favor of Indians, which trumps any requirement that the Court defer to the agency's reasoning. For these reasons, DOI's action is contrary to law and is arbitrary and capricious under the standards established in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (internal citation omitted).

The ban on re-petitioning also violates the Due Process Clause. DOI's argument to the contrary is fundamentally flawed because the Band is not seeking to recover government benefits, nor does it claim to have an "unlimited right" to petition for those benefits. Rather, the Band seeks a determination that the absolute ban on re-petitioning is unlawful to the extent a tribe seeks to submit new evidence that it has developed which shows that DOI's decision in applying specific criteria under the previous version of the rule was factually erroneous. Moreover, by permanently prohibiting tribes such as the Band from ever being federally recognized, DOI has effectively disregarded the Band's Treaties with the United States. DOI has moreover prevented the Band

from its right to petition for redress of grievances, in accordance with its constitutionally-protected due process rights.

Finally, the Court should deny DOI's motion for summary judgment and grant the Band's motion based on DOI's violation of the Band's equal protection rights. The ban on re-petitioning fails to survive rational basis review, particularly with regard to tribes that have not yet submitted a petition for acknowledgment under the Part 83 process. DOI continues to rely on its own, self-serving rationale—administrative convenience—as the basis for the ban on re-petitioning, but under the case law, this rationale cannot satisfy even rational basis review.

BACKGROUND

The Burt Lake Band refers back to its motion for summary judgment and specifically incorporates the factual background surrounding DOI's effort to reform the "broken" Part 83 regulations established in 1994, including comments to DOI during the notice-and-comment rulemaking process. *See* ECF No. 27-1 at 22-27 (hereinafter "BLB Mot.").[2] To fully address DOI's arguments raised in its cross-motion, however, the Band expands briefly here on DOI's proposed rule set forth in 2014 that would permit re-petitioning in limited circumstances, its reasoning in the Final Rule for rejecting all re-petitioning, and DOI's purported invocation of statutory authority in the Final Rule that DOI claims permitted it to ban all re-petitioning.

[2] *See also* Ltr. from Rep. Steve Daines (July 24, 2014) (AR0002189) ("broken, burdensome tribal recognition process"); Testimony of former Asst. Sec'y Ind. Affairs Kevin Gover, before the Senate Cmte. on Indian Affairs (April 21, 2014) (AR0006721 at 6722) ("The federal recognition program is one of the few undertakings in which the United States can definitively correct grievous historic wrongs and begin in an immediate way to undo the legacy of the genocidal policies of the past."); *Mackinac Tribe v. Jewell*, 829 F.3d 754, 760 (D.C. Cir. 2016) (Brown, J., concurring) (expressing "significant concerns about both the length and the integrity of this process"); American Indian Law Professors (Sept. 30, 2014) (AR0001878) ("The current process is broken and has proven to be inconsistent time-consuming and inefficient").

Under the 1994 regulations, re-petitioning was not available in any manner. In 2014, DOI proposed a limited avenue of re-petitioning for groups that were denied under the 1987 or 1994 rules. *See* 79 Fed. Reg. 118 at 35129 (June 19, 2014) (AR0000026) ("This rule would also establish procedures for a new repetition authorization process for petitioners whose petitions have been denied."); BIA's Comparison Chart of 1994 Rule and 2014 Proposed Rule (AR0005590 at 5593). The proposed rule focused on a condition (dubbed the "third party veto") which would "require the consent of any third party that participated in the reconsideration or appeal of the prior decision, and would require the petitioner to prove to an administrative judge that reconsideration of the decision is appropriate." BIA Talking Points (AR0007906); ECF No. 30 at 10-11 (hereinafter "DOI Mot.").[3] The proposed rule would have provided as follows:

> (1) A petitioner may re-petition only if:
>
> > (i) Any third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the petitioner has consented in writing to the re-petitioning; **and**
> >
> > (ii) The petitioner proves, by a preponderance of the evidence, that either:
> >
> > > (A) A change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination; or
> > >
> > > (B) The "reasonable likelihood" standard was misapplied in the final determination.

79 Fed. Reg. 103 at 30,774 (May 29, 2014) (hereinafter "Proposed Part 83 Rule") (AR0005487 at 5495) (emphasis added). Thus, DOI only proposed a re-petitioning avenue for those groups where a third party was involved and where the third party now approves of the re-petitioning effort.[4]

[3] When citing to the DOI Motion, this brief will refer to the Court-stamped number at the top of each page and not the number at the bottom of each page.

[4] Asst. Sec'y Indian Affairs email to reporter (May 27, 2014) (AR0005622) ("It is important to note that the consent provision comes into play only when a petitioner has sought recognition was

This proposed rule gave no consideration to a scenario in which the merits of a petition changed or new evidence was subsequently discovered and submitted by the petitioner, including evidence which demonstrated that the agency's initial determination was factually incorrect.

During the notice-and-comment process, Defendants received feedback concerning the amended Part 83 scheme from "more than 2,800 commenters." Office of the Asst. Sec'y Indian Affairs News Release (May 22, 2014) (AR0005528 at 5529). Many of these comments expressed support for re-petitioning in other limited situations that was not contingent upon inclusion of a third party veto condition. For example, the Burt Lake Band supported re-petitioning because "[a]llowing new petitioners to be recognized under less onerous criteria without giving the same opportunity to a Tribe denied acknowledgment under prior more stringent criteria would be grossly unfair." Burt Lake Band Comment (Sept. 23, 2013) (AR0000284 at 287); *see also* Duwamish Tribe Comment (Sept. 25, 2014) (AR0002995 at 2996) ("Although we strongly support this addition [of re-petitioning], the ability to re-petition is rendered meaningless" by requiring a third party veto condition); Scholars of American Indian law Comment (Sept. 30, 2014) (AR0001878 at 1893) ("While we support this proposed change to the extent that it allows previously-denied petitioners to re-petition we recommend abandoning the requirement that petitioners obtain an interested third party's consent in order to re-petition.").

The Final Rule contained a "legislative authority" section identifying the authority DOI believed it had for revising the Part 83 procedures as whole. This section broadly claimed that:

> Congress granted the Assistant Secretary-Indian Affairs authority to 'have management of all Indian affairs and of all matters 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.

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ultimately unsuccessful and a third party prevailed in litigation concerning that decision. The proposed rule allows re-petitioning in very limited circumstances.") (emphasis added).

> 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).

80 Fed. Reg. 126 at 37,885 (July 1, 2015) (AR0000865 at 889) (hereinafter "Final Part 83 Rule").

DOI ultimately decided it would not allow <u>any</u> type of re-petitioning in the Final Rule. In reaching this conclusion, DOI only discussed in the Final Rule a re-petitioning provision that would include this "third party veto." *Id.* at 37,874-75 (AR0000865 at 878-79). The Final Rule observed that most commenters and tribes opposed the third party veto, and those few "in support of the third party condition stated that they would prefer not to allow re-petitioning at all, but if re-petitioning is allowed, then third party veto is necessary . . . ." *Id.* at 37,875 (AR0000865 at 879). Thus, DOI ignored multiple alternative approaches suggested by the commenters that did not include a third party veto. *Id.* ("a few commenters suggested *different* approaches to re-petitioning, allowing re-petitioning in only certain circumstances, such as if . . . "a substantial number of years passes and there is significant new evidence . . . [or] there is a showing of some modification of evidence.").

Without discussing or commenting on the viability of any of these alternative approaches, Defendants sweepingly concluded that all potential re-petitioning approaches—not just the third party veto condition—were "not appropriate." *Id.*; *see also* BLB Mot. at 26. DOI's explanation for its decision to ban <u>all</u> re-petitioning (not just its decision to reject a rule including a third party veto) was two-fold. DOI claimed that (1) the agency's workload is too heavy to permit re-petitioning and consider the submission of new evidence, and (2) the new Part 83 process "promotes consistency":

> 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 repetitions on the Department and OFA in particular.

Final Part 83 Rule at 37,875 (AR0000865 at 879). Therefore, DOI apparently concluded that if a re-petitioning procedure with a third party veto was not "appropriate," then no type of re-petitioning was appropriate. This decision-making process was deeply flawed, and is arbitrary and capricious in several respects under the *State Farm* standard. The Burt Lake Band challenges both (1) DOI's legal authority to make this decision and (2) DOI's reasoning as unreasonable, unsupported, and arbitrary and capricious.

ARGUMENT

I. Count IV: Violation of the Administrative Procedure Act (APA)

DOI's decision to ban all re-petitioning violates the APA in two ways. First, DOI exceeded its statutory authority by deciding to permanently exclude Indian groups from the acknowledgment process (and thus, its decision was *ultra vires*). Second, even if this Court were to determine that DOI's enabling statutes do not foreclose a total re-petitioning ban, DOI's reasoning was unreasonable, arbitrary and capricious for a myriad of critical reasons, including that (1) it cannot rely upon a self-serving interest (administrative convenience) to permanently exclude Indian groups from seeking recognition under the statutory mechanism adopted by Congress; and (2) previously-denied petitioners must have some opportunity to avail themselves of the 2015 revised Part 83 rules, which substantively changed a "broken" system specifically to create a less stringent and more consistent standard.

The Court in its review should not afford DOI any deference because it failed to identify any specific statute it was purportedly interpreting and applying, and because its self-interested decision to lighten its own workload at the expense of groups petitioning for acknowledgment is not the kind of action to which deference is afforded.

A. The Court Should Not Afford Any Deference to DOI

1. DOI Did Not Offer Any Agency Interpretation

DOI, without any explanation or support, argues that this Court should automatically provide it deference pursuant to the *Chevron* doctrine. DOI Mot. at 19. As a threshold matter, deference under *Chevron* (or any other standard) is not applicable on this record because DOI did not identify any specific statutory provision that is purportedly ambiguous, and therefore, did not set forth in the Final Rule any alleged agency interpretation of this unidentified provision for this Court to review.

The 2015 Final Rule included a one-paragraph section titled "legislative authority," which merely listed DOI's enabling statutes (25 U.S.C. §§ 2, 9, and 43 U.S.C. § 1457). DOI argues that these statutes together provide it the authority to promulgate Part 83 because Congress granted DOI "sweeping responsibility over matters pertaining to Indian tribes, and specifically delegated to the Department the authority 'to determine which Indian groups exist as tribes.'" DOI Mot. at 19; Final Part 83 Rule at 37,885 (AR0000865 at 889). This argument is a red herring. The Band does not challenge the agency's authority to determine which Indian groups exist as tribes: Congress has clearly provided DOI and BIA with the authority to create and implement a Part 83 process (i.e., to determine how to acknowledge or deny Indian groups).[5] The issue in this case is

[5] Thus, DOI's reliance in both the Final Rule and its cross-motion on *Miami Nation of Indians of Indiana, Inc. v. United States Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001) and *James v. United States Dep't of Health & Human Servs*., 824 F. 2d 1132, 1138-39 (D.C. Cir. 1987) is misplaced. These cases held that it is within DOI's authority and specialized expertise to develop

a much narrower question: whether Congress granted DOI the authority to exclude Indian groups from participating in this process by petitioning for re-consideration and submitting newly-developed factual information that would affect DOI's determination.

Critically, DOI has not specified which statutory provision, if any, it is applying to justify the ban on re-petitioning. Merely identifying DOI's enabling statutes to apply to the entire Final Rule is not sufficient to receive deference on this narrow issue. *See, e.g., Teva Pharm., USA, Inc. v. U.S. Food & Drug Admin.*, 182 F.3d 1003, 1007 (D.C. Cir. 1999) (FDA failed to establish that it was entitled to *Chevron* deference because it "offered no particular interpretation of [the court-decision trigger] provision"). DOI states in its cross-motion that because the "**statutes**" (plural) "are silent on th[is] question," the Court must evaluate "'whether the agency's answer is based upon a permissible construction of the **statute**'" (singular), and DOI is entitled to deference as long as the agency's statutory interpretation "is reasonable.'" DOI Mot. at 20-21 (emphasis added). DOI here inconsistently claims that it interpreted both multiple statutes and a single statute. Thus, it indisputably does not identify which statute (or statutes) it interpreted, how it interpreted that provision, and why its interpretation was reasonable.

In essence, the agency defaulted on performance of the steps it was required to take for application of the *Chevron* doctrine and impermissibly seeks to impose this burden on the Court. DOI improperly asks the Court to interpret its enabling statutes for it and come to the erroneous conclusion that some combination of these statutes automatically grants it the authority to take all actions that Congress has not explicitly prohibited it from taking. That cannot be.

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the formal avenue to recognize groups as Indian tribes. *See* Final Part 83 Rule at 37,885 (AR0000865 at 889); DOI Mot. at 19-20.

As a result, DOI has not undertaken the most basic requirement necessary for application of *Chevron*—to identify the statutory provision that it interprets as governing resolution on the question, describe the alleged ambiguity in the text, and set forth in the administrative record why it believes its interpretation of the statute is a reasonable one. *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 921 (9th Cir. 2006) ("We have not had occasion, however, to apply the second, deferential prong of *Chevron* where, as in this case, there is no statutory interpretation adopted by the BIA.") (emphasis added); *Bejjani v. I.N.S.*, 271 F.3d 670, 678 (6th Cir. 2001) ("The INS asserts that the Court should utilize the analysis set forth in *Chevron*. . . The INS does not, however, direct our attention to any particular "interpretation" rendered by the agency."), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *see, e.g., Int'l Swaps & Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n*, 887 F. Supp. 2d 259, 268 (D.D.C. 2012) ("Because this case involves the CFTC's interpretation of a statute it is charged with implementing, this Court applies the two-part test of [*Chevron*]."). As a matter of law, the *Chevron* doctrine is not applicable here, and DOI's interpretation is entitled to no deference.[6]

2. DOI Is Not Entitled To Any Deference Because It Did Not Use Its Agency Expertise

There is also a second, independent reason why DOI's interpretation of the statute(s) is not entitled to deference. Even assuming *arguendo* that this Court did find that DOI presented an agency interpretation for review, courts in this Circuit do not apply deference to an agency's interpretation where, as here, the decision is not the type specifically entrusted to an agency's "expertise." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).

[6] Even if the Court performs the *Chevron* two-step analysis, DOI's ban on re-petitioning fails both steps. *See infra* Sections I(B)-(C).

"If an agency fails or refuses to deploy [its] expertise . . . it deserves no deference." *Id.*; *see also Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56 (2011) (*Chevron* deference is premised on the need for an agency to apply "more than ordinary knowledge" when "fill[ing] . . . gap[s] left, implicitly or explicitly, by Congress"); *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 797–98 (D.C. Cir. 2004) (not entitled to *Chevron* deference where agency did not "bring its experience and expertise to bear in light of competing interests at stake"); *Lynch v. Lyng*, 872 F.2d 718, 724 (6th Cir. 1989) ("[T]he amount of weight accorded an agency interpretation diminishes further when the interpretation does not require special knowledge within the agency's field of technical expertise."); *Jordan v. Lyng*, 659 F. Supp. 1403, 1411 (E.D. Va. 1987) (refused *Chevron* deference in part because the USDA's interpretation was not "the result of detailed rule-making in a complex area in which the agency has special expertise").

This Court has no way to determine whether DOI employed its expertise in claiming that the agency would be overburdened by having to consider re-petitions because DOI offered no explanation as to why it believed its workload would be greater. Even if it had, the decision to ban re-petitioning is one based solely on DOI's view of its workload, not based upon its expertise of determining whether an Indian group exists as a tribe or not. *See* DOI Mot. at 20-22. As a result, the cases that DOI cites in support are inapposite. *See id.* Simply deciding that a ban on re-petitioning would lighten its workload and streamline review is the kind of decision that any agency that accepts appeals or petitions must consider. DOI's decision did not require any specialized expertise in Indian acknowledgment.

Moreover, *Chevron* deference is inapplicable where the reasoning for the agency's action—here, administrative efficiency—is "self-serving." *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 824 (9th Cir. 2009) ("*Chevron* deference may be inappropriate where, as

here, (1) the agency has a self-serving . . . interest in advancing a particular interpretation of a statute, and (2) the construction advanced by the agency is arguably inconsistent with Congressional intent.") (citing *Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n,* 811 F.2d 1563, 1571 (D.C. Cir. 1987)). Consequently, DOI's "interpretation," to the extent one even exists, should be afforded no deference.

B. DOI Acted In Excess of Its Statutory Authority

Under the APA, courts must set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). This analysis is synonymous with *Chevron* step one. *Shays v. F.E.C.*, 337 F. Supp. 2d 28, 51 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) ("Under the *Chevron* analysis, a court first asks 'whether Congress has directly spoken to the precise question at issue.'") (internal citation omitted).

A reviewing court must consider whether the intent of Congress or the statutory text "forecloses the agency's assertion of authority." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 326 (D.C. Cir. 2017) (quoting *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 301 (2013)). If the intent of Congress is clear, and the agency did not follow Congress's unambiguously expressed intent, "that is the end of the matter." *Safari Club*, 878 F.3d at 326 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The legislative history and Congress's objective are also relevant under this inquiry. *See Int'l Swaps*, 887 F. Supp. 2d at 268 ("The Court must assess the statutory text at issue, the statute as a whole, and review legislative history where appropriate."); *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 142 (D.D.C. 2013) (courts must also look to the law's "object and policy"); *Shays v. F.E.C.*, 337 F. Supp. 2d at 75(in *Chevron* step one, "courts employ traditional tools of statutory construction. Among these tools is a statute's legislative history.") (collecting cases).

DOI agrees that the applicable statutes are silent and nowhere expressly delegate to them the authority to absolutely ban re-petitioning. DOI Mot. at 20-21. It argues, however, that Congressional silence with respect to each of the enabling statutes should be interpreted as a "blank check" which grants DOI the power to define the scope of its own authority pertaining to Indian affairs. *See id.* at 19-21. For Congress to be deemed to have plainly spoken on this issue, the statute(s) at issue do not need to explicitly forbid re-petitioning. *See New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1222–23 (10th Cir. 2017) ("[I]n directly speaking to the specific regulatory question or problem, Congress need not 'explicitly delineate everything an agency cannot do.'") (quoting *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) (en banc) ("*Chevron* does not require Congress to explicitly delineate everything an agency cannot do before we may conclude that Congress has directly spoken to the issue. Such a rule would 'create an ambiguity in almost all statutes, necessitating deference to nearly all agency determinations.'")); *see also Prestol Espinal v. Attorney Gen.*, 653 F.3d 213, 220 (3d Cir. 2011).

Here, although the three enabling statutes do not explicitly mention re-petitioning, both Congressional intent and the Indian canon of statutory construction mandate the conclusion that DOI acted in excess of its statutory authority.

1. DOI's Complete Ban on Re-Petitioning is Contrary to Congressional Intent

A decision to permanently ban any Indian group from re-entering the Part 83 process, even if it wished to submit new evidence or the criteria that DOI applied have substantively changed, squarely contradicts Congressional intent and, therefore, exceeds DOI's statutory authority.

Assertions of power by DOI or BIA must "conform to congressionally determined Indian policy." Cohen's Handbook of Federal Indian Law § 2.01 (2017) (hereinafter "Cohen's

Handbook").[7] Congressional Indian policy is clearly and unambiguously intended to benefit and protect Indian peoples and tribes. *See, e.g.,* 25 U.S.C. § 5302 (Indian Self-Determination and Education Assistance Act ("ISDEAA")) ("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 . . ."); *id.* § 13 (Snyder Act) (". . . for the benefit, care, and assistance of the Indians throughout the United States . . ."); *id.* § 185 ("Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations . . . [the government] shall take such measures . . . as may be necessary to protect such Indian . . ."); *id.* § 305(a) ("It shall be the function and the duty of the secretary of the Interior . . . to promote the economic welfare of the Indian tribes and Indian individuals. . . ."); *id.* § 2000 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children . . . .").

For the last half-century, the cornerstone of Congressional Indian policy has been the promotion of self-determination. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 541–42 (1974) ("The purpose of [Congress's] preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."). By the 1960s, Congress abandoned "the Indian policy that Congress unashamedly called 'termination,' and the "repudiated termination policy

[7] DOI's Proposed Rule issued on May 22, 2014 recognized Felix Cohen as the "most important Federal Indian law scholar in American history, sometimes known as the 'Blackstone of Federal Indian law,'" and cites Cohen's Handbook therein for support. *See* Proposed Part 83 Rule at 30,768 (AR0005487 at 5489).

was quickly replaced with a new policy designed to use expanded social, economic, and political assistance as a 'new trail to eventual assimilation.'" Cohen Handbook § 1.07 (internal citation omitted). Congressional policy has since been premised on the "concept of self-governance" and strengthening tribal governments. *See id.*

In 1977, Congress issued an extensive report on Indian policy, which included a proposal that future legislation be based on several main objectives, including "reaffirmation and strengthening of the doctrine of tribal sovereignty and the trust relationship; increased financial commitment to the economic development of tribes and improvement of the standard of living of off-reservation Indians . . . and federal recognition of terminated and other non-federally recognized tribes, including the extension of federal services to them." Cohen's Handbook § 1.07 (citing American Indian Policy Review Comm'n, Final Report 6–9 (1977)) (emphasis added).

The Secretary of Interior is charged, through the President, with making regulations to protect and to benefit Indians. 43 U.S.C. § 1457; *see also United States v. Camp*, 169 F. Supp. 568, 572 (E.D. Wash. 1959) ("The Secretary is charged not only with the duty to protect the rights and interest of the tribe, but also the rights of the individual members thereof."). Even the Preamble to the revised Part 83 regulations that DOI implemented in 2015 state that they were made "for the benefit of Indian tribes." 25 C.F.R. § 83.2 (emphasis added).

Congressional policy intended to benefit and protect Indians is not limited to federally recognized tribes, but includes all Indian peoples. The ISDEAA of 1975, for example, from which DOI in part claims it derives its authority (DOI Mot. at 19), declared Congress' "commitment" and "obligation" to "individual Indian tribes and to the Indian people as a whole." 25 U.S.C. § 5302 (emphasis added). Through this pronouncement, Congress recognized its obligation to act in response to the Indian peoples' desire to establish independent, stable communities by aiding in

educational, health, and economic assistance. *Id.* In furtherance of this commitment, Congress expressly authorized DOI to establish "meaningful Indian self-determination policy" with clear guidance on how DOI should establish this policy: the implementation of this policy requires "maximum Indian participation" and declared it a "major national goal of the United States" to provide these "essential" services. *Id.* (emphasis added).

Today, Indian groups can only achieve optimal economic, health, educational, and social benefits provided by the federal government that are necessary for self-determination by becoming federally recognized through the Part 83 process created in 1978. *See* Cohen's Handbook § 1.07 ("Self-determination opportunities prompted non-recognized groups to agitate for acknowledgment of their tribal status."). It follows then that a draconian decision to adopt an absolute prohibition on re-petitioning under any circumstances—and thereby definitively exclude dozens of groups from ever achieving self-determination—is contrary to Congressional policy. DOI's decision to permanently exclude Indian groups from benefits, which are intended to reach as many Indians as possible, directly conflicts with the clear Congressional goal of self-determination. Thus, DOI squarely violated the legislative scheme set forth in Chapter 25 of the U.S. Code by intentionally excluding Indian groups, which may be eligible for acknowledgement, from applying under Part 83 (regardless of whether they have applied before).

Congress did not give DOI or BIA the implicit authority to ban all forms of re-petitioning. Congress has certainly provided gaps through its silence for DOI to determine what the requirements should be to qualify for re-petitioning (such as a modified/supplemented petition or discovery of new evidence). But Congress has not provided any room in this scheme to permanently ban Indian groups from re-applying under any circumstances simply because it applied under the 1978 or 1994 regulations. In order to reach such a result, DOI must have

implicitly found that BIA's initial fact-finding is infallible and the result of its decision would never be different if a petitioner had the opportunity to submit additional facts or develop additional evidence. Congress does not permit such a finding, especially where its goal is to support and expand self-determination as much as possible. Thus, DOI's decision is *ultra vires*.

2. The Indian Canon of Statutory Construction Trumps *Chevron* Deference and Demands a Finding that DOI's Ban on Re-Petitioning is *Ultra Vires*

Not only does Congressional intent foreclose a reading of the enabling statutes as permitting a total ban on re-petitioning, but the Court's application of the "Indian Canon of statutory construction" does as well. *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003). In this case, this Court must apply the independent "Indian Canon" which requires that statutes be liberally construed in favor of Native Americans. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law."); *Muscogee (Creek) Nation v. Hodel,* 851 F.2d 1439, 1444-45 (D.C. Cir. 1988) (statutes pertaining to Indians must be "construed liberally in favor of the Indians."); *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 881 (D.C. Cir. 2000) ("On remand, Interior is to reconsider the facts contained in the nine-volume administrative record under the Indian claim-favoring canon."). In *Muscogee,* the D.C. Circuit first clearly held that even where interpretation of an ambiguous statute is one entrusted to an agency, we give the agency's interpretation "careful consideration" but "we do not defer to it." *Id.* at 1445 n. 8 (emphasis added). Since *Muscogee*, the D.C. Circuit has repeatedly invoked this canon of construction to override an agency's claim that its interpretation of a statute is entitled to deference.[8]

[8] *See Com. of Mass. v. U.S. Dep't of Transp*., 93 F.3d 890, 893 (D.C. Cir. 1996) (the Indian Canon limits "the breadth of ambiguity" under *Chevron*, "constrain[s] the possible number of reasonable ways to read an ambiguity in a statute" and permits the Court to reject "agency interpretations of statutes that may have been reasonable in other contexts because the agency

Defendants are correct that the Indian Canon arises from "principles of equitable obligations . . . applicable to the trust relationship between the United States and the Native American people," but this is not an impediment to application here. DOI Mot. at 25 (quoting *Cobell*, 240 F.3d at 1101). The Burt Lake Band, as the descendants of the signatories to two Treaties with the United States, has a clear trust relationship with the United States. *See* BLB Mot. at 6-8; *see also Mackinac Tribe v. Jewell*, 829 F.3d 754, 755 (D.C. Cir. 2016) ("Between 1785 and 1855, the United States entered into numerous treaties with a group of Native Americans known as the Ottawa and Chippewa Nation. These people were located in Michigan and comprised several autonomous tribes linked by similar culture and shared language.").[9]

DOI offers no support—nor is there any—for the proposition that a tribe must be "federally recognized" to have a trust relationship with the United States or to avail itself to the protection afforded by this Canon. DOI Mot. at 25-26. Moreover, the United States has previously recognized its trust relationship with the Band when it filed a suit on behalf of the "Cheboygan

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interpretation would not favor the Indians"); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (recognizing this "departure from the *Chevron* norm"); *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 541-42 (D.D.C. 2014) (same); *Cook Inlet Tribal Council v. Mandregan*, No. 14-CV-1835 (EGS), 2018 WL 5817350, at *3 (D.D.C. Nov. 7, 2018) (same); *Seneca Nation of Indians v. Dep't of Health and Human Services.*, 945 F. Supp. 2d 135, 141–42 & n. 5 (D.D.C. 2013) (same).

[9] A trust relationship exists if three elements exist: "(1) a trustee (the United States); (2) a beneficiary (Native Americans); and (3) a trust corpus (property, such as timber, lands, or funds)." *Tsosie ex rel. Estate of Tsosie v. United States*, 441 F. Supp. 2d 1100, 1103 (D.N.M. 2004), *aff'd*, 452 F.3d 1161 (10th Cir. 2006). Through the Treaty of 1836, the United States granted the Band full right and title "one tract of one thousand acres to be located . . . on the Cheboygan." 7 Stat. 491 (1836); *accord United States v. State of Mich.*, 471 F. Supp. 192, 264 (W.D. Mich. 1979) ("Both tribes have reservations held in trust for them by the federal government . . . which are within the boundaries of the reservations retained in the Treaty of 1836.") (emphasis added). Then, through the Treaty of Detroit, the United States held in trust "[f]or the Cheboygan band, townships 35 and 36 north, range 3 west." 11 Stat. 621; *Grand Traverse Band of Ottawa & Chippewa Indians*, 369 F.3d 960, 961-62 (6th Cir. 2004) ("[T]he 1855 Treaty . . . permit[s] the United States to deal with the Ottawas and the Chippewas as separate political entities.") (emphasis added).

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 . . . ." *United States v. John W. McGinn and A.L. Agate,* Equity No. 94, Compl. ¶ 1 (E.D. Mich. June 22, 1911).

As a result, the Indian Canon must be applied to DOI's interpretation of its enabling statutes (25 U.S.C. §§ 2, 9 and 43 U.S.C. § 1457).[10] *See Red Lake Band of Chippewa Indians v. Swimmer,* 740 F. Supp. 9, 13 (D.D.C. 1990) ("[T]he mere absence of specific statutes imposing a trust obligation with respect to the Indian tribes' right to self-government does not bar a claim . . . on the ground that Congress has violated its special obligation to the Indians."). Moreover, DOI owes a greater obligation to the Burt Lake Band specifically: the Secretary of Interior must also serve as a fiduciary and holds a higher responsibility to the Band (and others similarly situated) when carrying out decisions. *See Cobell,* 240 F.3d at 1099 ("Courts 'must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.'"); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) ("When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one 'reasonable' choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe.").

[10] DOI also argues that the Indian Canon cannot apply where application "might favor one group of Indians to the detriment of other group of Indians." DOI Mot. at 25-26 (citing *Rancheria v. Jewell,* 776 F.3d 706, 713 (9th Cir. 2015) ("The canon has been applied only when there is a choice between interpretations that would favor Indians on the one hand and state or private actors on the other."). However, DOI does not state how some Indians may be adversely affected by an Indian-favoring interpretation which would invalidate a total ban on re-petitioning or which Indian tribes would be affected. For the reasons described below, current petitioners do not have to wait longer should DOI or BIA decide to implement an order of priority. *See infra* Section I(C)(1). Nor has DOI offered any other explanation. Therefore, this argument is unavailing.

Applying these canons, it is clear that an absolute ban on re-petitioning would not be a liberal construction of a silent statute in favor of Indians because it would permanently deprive Indian groups of rights they may otherwise have. In fact, a wholesale ban on re-petitioning is the least favorable approach DOI could have taken and therefore, must be found unlawful. As a result, each of the enabling statutes that DOI *could have interpreted* unambiguously forecloses the DOI from banning re-petitioning in all forms. DOI's decision to adopt a rule absolutely prohibiting re-petitioning therefore must be struck down.

C. DOI's Reason for Barring Re-Petitioning Was Arbitrary and Capricious

The two-pronged rationale offered by DOI in the Final Rule for banning re-petitioning also constitutes a violation of the APA. From its inception in 2012, the notice-and-comment rulemaking process re-opened the issue of whether DOI should adopt a rule permitting a re-petitioning procedure and if so, under what circumstances. *See* DOI Mot. at 9-11. DOI's decision to ban all re-petitioning under Part 83 was arbitrarily decided in 2015 based on two rationales for which no reasonable basis was provided and because it failed to consider critical aspects of the question. The Final Rule did not allow any re-petitioning because (1) re-petitioning would create a heavier agency workload which would be unfair to current petitioners; and (2) the 2015 Rule "did not substantially change the standards for acknowledgement" and therefore, re-petitioning was not necessary. *See id.* at 19-20. Both of DOI's bases are unsupported by the record and not rationally related to Congressional policy and goals.

1. Administrative Convenience is Not a Valid or Reasonable Basis to Ban Re-Petitioning Entirely

DOI admits that administrative efficiency was its primary basis for determining that all re-petitioning was inappropriate. *See* DOI Mot. at 22. In the Executive Summary to the Final Rule, DOI declared that the revised Part 83 process it adopted promotes "timeliness and efficiency" (it

repeats this phrase at least three times) but claims it did not change the rules substantively.[11] *See* Final Part 83 Rule at 37,862 (AR0000865 at 866). Thus, DOI makes clear that the principal justification for revising the Part 83 process as it did was to serve the agency's own bureaucratic self-interest. Decisions based upon agency self-interest cannot be upheld where, as here, there is no support in the record to justify its claim and where administrative convenience is outweighed by more significant and competing concerns. *See Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) ("[A]ny plea of administrative error, administrative convenience . . . or need to prioritize in the face of limited resources . . . must always be balanced against the potential for harm.").

DOI found in the Final Rule that (i) re-petitioning would be unfair to petitioners who have not yet had a review, and (ii) would impose an "additional workload" on DOI. Final Part 83 Rule at 37,875 (AR0000865 at 879). Both of these findings are unsupported in the record and, therefore, lack any rational basis.

First, there is no support for the argument that adoption of a limited re-petitioning rule would adversely affect the wait time of current or future first-time petitioners. DOI Mot. at 22. Adoption of a rule permitting re-petitioning would not dictate the order for review of the various petitions; nor has the Band argued that a re-petition should be heard before tribes with petitions currently pending. In fact, the record demonstrates the wait time or priority of review was not considered at all by DOI. *See* Haliwa-Saponi Indian Tribe Comment (AR0006521 at 6523) ("Under § 83.4 tribes reapplying for recognition should be given a time frame for review. <u>It is unclear</u> whether they must go to the back of the line once OHA determines that they satisfy the

[11] As discussed *supra*, this is incorrect. The rules did substantively and materially change in a way that unfairly affects all previously-denied petitioners. *See* Section I(C)(2). DOI has effectively admitted that the Part 83 criteria changed when it codified a rule requiring BIA to apply a "baseline" approach to proving each of the seven criteria under 25 CFR § 83.7.

criteria to repetition.") (emphasis added). According to BIA's own website, only three petitions are currently pending and seven groups will "become petitioners when they supplement their petitions,"[12] and DOI fails to explain how any one of three groups with pending petitions (or that of any group that may submit an original petition in the future) would be adversely affected by permitting the Band to submit additional evidence. *See Amerijet Int'l Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[C]onclusory statements will not do; an agency's statement must be one of reasoning.") (internal quotation marks and citation omitted). DOI could address any concern of possible unfairness by simply adopting an order of priority for consideration of various petitions in whatever manner it wishes.

Second, DOI did not offer any evidentiary support for the claim that BIA would have to work harder, and did not even attempt to quantify the potential increased workload. In fact, BIA's own officials acknowledged during the rulemaking process that the proposed rule would not open the floodgates to new petitions. *See* Tr. of Interview between Sec'y of Ind. Affairs Kevin Washburn and Hawaii State Tribes (AR006617 at 6622-23) (Washburn: "I'm doubtful that many groups would deserve reconsideration under the proposed rule . . . ."). As a result, there is no rational basis to support its explanation.

Through its cross-motion, DOI exaggerates its claim of increased agency workload by raising unsubstantiated *post hoc* justifications. DOI asserts, without citation of evidence to support its claim, that permitting the Band and others similarly situated "to submit information on an *ad hoc* and ongoing basis [would] prohibit[] the agency from finalizing any Part 83 determination"

[12] *See* Office of Fed. Acknowledgment (OFA), *Petitions in Process*, https://www.bia.gov/as-ia/ofa/petitions-process (last visited Feb. 14, 2019).

and would lead to petitions "in perpetuity."[13] DOI Mot. at 23-24. There is no evidence to support its claim that re-petitioning necessarily would occur without substantive and temporal limits. *United States v. Udy*, 381 F.2d 455, 458 (10th Cir. 1967) ("[E]ase of administration does not make an administrative determination any the less arbitrary when it otherwise had no substantial evidence to support it.").

Unlike the resources required to review a new petition, affording a previously-denied petitioner a limited, supplemental submission of new evidence or argument on a specific criterion would not require consideration of hundreds of thousands of pages or the effort of analyzing a comprehensive petition. *See Mackinac Tribe*, 829 F.3d at 758 ("[A] federal acknowledgment petition can be over 100,000 pages long and cost over $5 million to assemble; the BIA estimated time for completion of review is 30 years."). Instead, DOI could easily limit the scope of a re-petition to permit only the submission of new evidence related to application of a specific criterion a group initially failed to meet. For example, the Burt Lake Band, in its comment submitted to DOI, suggested a method which would maximize "administrative economy" while also permitting re-petitioning:

> When a Tribe re-petitions, any criteria found to have been met in the review of its earlier petition should be conclusive for the new petition without further review. Given the stringent standards previously applied administrative economy would not be served by revisiting the earlier conclusion in the Tribes favor.

[13] As a *post hoc* justification not set forth in its Final Rule, the Court must not consider this argument. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (reviewing courts must confine their review to the grounds advanced by the agency in the administrative proceeding and prohibits *post-hoc* rationalizations); *Council for Urological Interests v. Burwell*, 790 F.3d 212, 223 (D.C. Cir. 2015). Moreover, DOI's newly-raised argument flies in the face an alternative approach expressly mentioned in the Final Rule that would only consider re-petitioning based on new evidence "after a substantial number of years passes." Final Part 83 Rule at 37,875 (AR0000865 at 879).

See Burt Lake Band Comment (Sept. 23, 2013) (AR0000284 at 287) (emphasis added). DOI could easily draft a rule that limits the scope of re-petitioning to prevent the opening of the floodgates that it purports to fear.

Finally, DOI's decision to prohibit re-petitioning in order to lighten BIA's workload was not weighed against the potential adverse effect this absolute ban would have on Indian groups. *See Cutler v. Hayes*, 818 F.2d at 898; *see also Ill. Pub. Telecomms. Ass'n v. F.C.C.*, 117 F.3d 555, 567 (D.C. Cir. 1997) ("The Commission's balancing of the competing concerns of administrative efficiency and consumer convenience was not arbitrary.").

The Preamble to the Final Rule declares that the revised Part 83 process also promotes "transparency," "fairness," "flexibility," and "integrity." *See* Final Part 83 Rule at 37,862-63 (AR0000865 at 866-67); Transcript of Tribal Consultation (Kenosha, Wi. July 17, 2014) (AR0006272 at 6279-80). It is unclear how the DOI's decision to lighten its own workload, while at the same time, preventing new evidence from coming to light, is fair to Indian groups. DOI's ban on re-petitioning does not promote "transparency" or "flexibility" either. The Band's petition is a prime example. In response to the grounds on which DOI denied its original submission in 2006, the Band since removed individuals from its membership rolls to satisfy the "descent" criterion (25 C.F.R. § 83.7(f)) as DOI had applied it. In addition, the Little Traverse Bay Band ("LTBB"), which objected to the Band's petition and fatally impacted its chances of being recognized, issued a resolution reversing its opposition and recognizing the Band as its own distinct Tribe. *See* LTBB Resolution dated Sept. 9, 2012 (attached hereto as **Exhibit A**) ("The undersigned Tribal Councilors . . . declare that they are in support of the reaffirmation of the Burt Lake Band."). Under these so-called "flexible" and "fair" rules, DOI refuses to even consider this new evidence, despite knowing that it may well be outcome determinative. To permanently bar

even a limited, evidence-based review of the agency's decision only promotes rigidity and distrust in the acknowledgment system.

Thus, DOI's unsupported concern about potential wait time for first-time petitioners should not be prioritized before, and is greatly outweighed by, concerns of fundamental injustice (which is in stark conflict with the clear Congressional intent as to the scope of DOI's authority). *See Cutler*, 818 F.2d at 898. The Burt Lake Band waited over 20 years for a decision on its petition and watched every other landless Michigan tribe become recognized or re-affirmed in some manner. But now the 2015 Final Rule forecloses any further opportunity for review—no matter how limited in scope—simply because DOI now expresses a concern that providing a fair hearing to the Band and doing it justice based on the relevant factors somehow would slow down the process for three petitioners. BLB Mot. at 38-39. The agency's own interests of administrative convenience do not come before those fundamental rights of Indian groups that DOI was directed to "support[]" and "assist[]." Final Part 83 Rule at 37,862 (AR0000865 at 866); *see also* BLB Mot. at 37-38.

2. DOI's Claim That the Part 83 Process Did Not Materially Change Is Both Unfounded and Not Relevant to a Ban on Re-Petitioning Where a Previously-Denied Petitioner Has New Evidence

DOI's second rationale, that no re-petitioning is necessary because the standards for acknowledgment did not materially change in the 2015 rule, is both irrelevant to the issue in this case and without merit. *See* DOI Mot. at 22 (the Final Rule "did not substantially change the standards for acknowledgement, but aimed to provide for consistent results").

a. *The Purported Lack of Changes in the Part 83 Process Does Not Support a Complete Ban on Re-petitioning*

DOI contends that the Final Rule was "specifically designed . . . to avoid changes in previous Part 83 decisions, thus making any re-petition inherently unnecessary." *Id.* at 22-23

(emphasis added). This explanation, however, only accounts for a situation where a previously-denied petitioner applies again with the same evidence. DOI's assertion that the Part 83 standards did not substantially change (which is incorrect as explained *infra*) does not explain why re-petitioning would be "inherently unnecessary" in circumstances where "significant new evidence" or "modif[ied]" circumstances strengthen the merits of the petitioner's original petition. Final Part 83 Rule, at 37,875 (AR0000865 at 879).

DOI cites to its negative determination on the Band's petition in 2006 as if it supports its argument. *See* DOI Mot. at 23 ("Plaintiff's own case perfectly demonstrates this point."). It contends that there are only "two substantive changes" (in 25 C.F.R. § 83.7(a) and (b)) and neither would assist the merits of the Band's petition because (1) the Band already satisfied criterion 83.7(a), and (2) the change to 83.7(b) was not part of BIA's decision to find that the Band did not meet this criterion. *See id*. But this claim does not support its argument that banning re-petitioning was reasonable on the record of its rulemaking. If the Band has collected new evidence that meaningfully improves its chances of demonstrating that it satisfies criterion 83.7(b), then DOI's position that the standard has not changed is not dispositive of the need for re-petitioning. Therefore, even if this Court were to accept (which it should not) that there are no meaningful substantive changes to the applicable criteria, DOI has failed to meet its burden of demonstrating how this explanation is rationally related to banning re-petitioning "in all circumstances."[14] *See Glob. Tel*Link v. FCC*, 866 F.3d 397, 413 (D.C. Cir. 2017) ("[W]e simply cannot comprehend the

[14] Asst. Secretary of Indian Affairs Kevin Washburn admits that, as part of DOI's consideration to improve the "broken" 1994 rules, DOI "ultimately decided for purposes of this proposed rule that re-petitioning **should not be foreclosed in all circumstances,** but that an administrative judge should determine based on specific criteria when re-petitioning should be allowed." *See* Asst. Sec'y Ind. Affairs email to reporter (May 27, 2014) (AR0005622) (emphasis added).

agency's reasoning. Where, as here, an agency's 'explanation for its determination . . . lacks any coherence,' we owe 'no deference to [the agency's] purported expertise.'") (citation omitted)).

b. *DOI Incorrectly Argues That the 2015 Final Rule Did Not Substantively Change the Rigors of the Acknowledgment Process*

DOI's explanation as to why banning re-petitioning is warranted is also plainly erroneous because the Part 83 standards did substantively change and the changes demand that previously-denied petitioners be given an opportunity to demonstrate acknowledgment under this new standard.

In its 2015 Final Rule, to "clarify" the seven-part criteria, DOI "sought to codify its non-regulatory precedent and procedures into Part 83" by allowing a petitioner to prove a certain criterion "if that type or amount of evidence was sufficient for a positive decision on that criterion in prior final decisions." Final Part 83 Rule, at 37,878-79 (AR0000865 at 882-83) (emphasis added). Thus, current and future petitioners now have the benefit of being able to point to any previous petitioner's success on a criterion as a "baseline" and attempting to meet it with the same or similar quantum of evidence. *Id.* Before 2015, 33 petitions were denied under the 1978 or 1994 regulations. *See* OFA, *Decided Cases*, https://www.bia.gov/as-ia/ofa/decided-cases (last visited Feb. 14, 2019). None of these previously-denied petitioners can utilize this same "baseline" process that current petitioners can.

In order to claim that the Part 83 process did not change "except in two instances," DOI narrowly focuses on the fact that the Final Rule modified two of the seven criteria. DOI Mot. at 8-9. The "consistent baseline approach," however, is not part of any one criterion. Such a reading of the 2015 amendments' effects deliberately ignores the colossal effect the newly-codified rule has on pending petitions. In essence, DOI implicitly argues that it was BIA's practice before 2015 to apply this baseline rule haphazardly, and nothing has changed in how BIA applies the rules

except the fact that the baseline practice is now controlling regulatory precedent. DOI overlooks the fundamental impact of incorporating this practice as a binding rule. Because there was no such codification before 2015, DOI would only be speculating as to whether a "consistent baseline approach" was applied with respect to the Band's petition or any other particular petition given that it was not required or disclosed to petitioners at the time. The application of a secret, internal "baseline approach" before 2015 is not demonstrated in the record before this Court and therefore no evidence exists to support DOI's claim that this approach was applied before 2015.

DOI also contends that this "baseline approach" was only codified to "avoid precisely this type of allegation of inconsistency and unfair dealing." DOI Mot. at 17. Contrary to DOI's unsupported claim, this consistent baseline approach was incorporated into the Part 83 rule precisely *because* previously-denied petitioners were treated inconsistently before 2015. As Indian scholars, tribes, and Congressional members have observed,[15] all too often a petitioner under the 1978 or 1994 standards would be handed an inconsistent result and was unable to discern what it meant to satisfy the burden of proof. *See* Harry S. Jackson III, Note, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 Rutgers L. Rev. 471, 507 (2012) ("72% of . . . currently recognized federal tribes could not successfully go through

[15] Ltr. from Mich. Senators to BIA (June 17, 2014) (AR0002186) ("It is our hope" that the revised Part 83 rules "ensure that all tribes are given a fair shot at federal recognition"); *Fixing the Federal Acknowledgment Process: Hearing before the Cmte. on Indian Affairs*, 111 Cong. 470 (Nov. 4, 2009) ("I think there are some very flagrant examples of that inconsistent application of the criteria.") (Statement of Frank Ettawageshik, Nat'l Congress of Am. Indians); *id.* ("[I]nconsistent interpretation of data that seems to be occurring.") (Statement of U.S. Sen. Byron L. Dorgan of North Dakota); Mashpee Wampanoag Tribe (Sept. 25, 2013) (AR0006581 at 85) ("Justice requires that those denied acknowledgment based on a elements that were changed through this regulatory reformation be given the opportunity of demonstrating that their applications would have been successful under the new regulations. To do otherwise would be validating the very shortcomings the Department is seeking to correct. This very important effort to reform the regulations should not abandon or ignore those tribes seriously damaged by the prior process.").

the [Part 83] process as it is being administered today."). In fact, DOI's own officials admit that a limited re-petitioning rule was proposed "out of fairness" to those previously-denied petitioners who would not get the benefit of this consistent baseline approach. *See* Tr. of Interview with Asst. Sec'y Ind. Affairs and Hawaii State Tribes (AR006617 at 6622) ("We thought there should be some modest exception or modest provision to reconsider tribes or groups that had been denied recognition in the past just out of fairness. We put a very narrow proposal into the rule for doing that.") (emphasis added).

By its own admission, DOI codified the non-transparent, internal baseline approach that BIA purportedly followed under the 1994 rule, but had not shared with petitioners or the public that DOI was following any standard baseline practice. The Burt Lake Band and other petitioners did not have notice of the facts BIA would consider relevant to its decision and how it would assess those facts until the decision was actually issued. The agency's application of secret law, without affording a petitioner an opportunity to respond by way of a re-petition, that would present the full range of available facts responsive to the actual standards which were applied, is both arbitrary and capricious.[16] Thus, the only way in which the Band can receive "fair" and "consistent"

[16] In its cross-motion, DOI mischaracterizes the Band's reason for pointing out that the Part 83 process was widely considered to be "broken." DOI Mot. at 17-18. DOI claims that the Department itself "never described Part 83 as 'broken'" and the Band is "insinuating that any pre-2015 negative determination inherently illegitimate and must be overturned." *Id.* As a factual matter, DOI and its officials have described the pre-2015 process as "broken" or defunct when explaining the reason for reforming Part 83. *See* 80 Fed. Reg. 126, at 37,539 (July 1, 2015) (AR0009834 at 9835) ("[T]he only administrative avenue available to [Indians] is widely considered 'broken.'"); Testimony of Asst. Sec'y Ind. Affairs Kevin Gover, before the Senate Cmte. on Indian Affairs (April 21, 2014) (AR0006721 at 6722) ("What I found was a deeply problematic and fundamentally flawed program."). Moreover, the Band does not contend that each negative decision is *per se* illegal or invalid; rather, the Band argues here that because BIA has applied a "fundamentally flawed" acknowledgment criteria over the last few decades, the accuracy of some negative determinations may be called into question, and those groups who received negative determinations before 2015 and have a sufficient basis to challenge the

treatment in its effort to show that it is entitled to acknowledgment is to have the opportunity to re-petition and demonstrate that DOI's initial factual findings were erroneous under the public and non-public assessment criteria it actually applied.

DOI provides no basis for the conclusion embedded in its 2015 Final Rule that the result of its fact-finding "should be the same" "because the standards have not changed." DOI Mot. at 24. It is important to note that the standard of proof under Part 83 does not require that a petitioner conclusively prove each criterion; only that it establish a "reasonable likelihood of the validity of the facts relating to that criterion." 25 C.F.R § 83.6(d). Under these circumstances, it is inequitable and irrational to deny the Burt Lake Band and other similarly situated petitioners the ability to develop and submit to DOI additional facts to address the erroneous factual conclusions the agency reached by application of non-codified rules of decision and procedures of which they did not have notice.

Accordingly, neither of DOI's two reasons for banning all re-petitioning withstands legal scrutiny.

3. DOI's Post-Hoc Explanation Must Not Be Considered, But, In Any Event, Undermine Its Decision

In addition to its two articulated bases, DOI now relies extensively on its findings in the 1994 final rule that banned re-petitioning and argues, for the first time, that this "Court can also take into account that the Part 83 regulations have contained a ban since 1994 and Congress has not acted to remove the ban." DOI Mot. at 22. This reasoning was not included in the 2015 Final Rule and constitutes a *post hoc* rationalization that this Court cannot consider. *See Chenery Corp.*, 318 U.S. at 88; *Council for Urological Interests*, 790 F.3d at 223.

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determination should be able to qualify for re-consideration under a rule that DOI now promotes as more fair, transparent and consistent.

In any event, this is neither evidence of reasoned decision-making nor does it support DOI's argument. The 1994 final rule promulgated by DOI explicitly considered an opportunity to allow "groups to return to the process with new evidence," but ultimately decided such an avenue would "burden the process for the numerous remaining petitioners" and there must "be an eventual end to the present administrative process." *Procedures for Establishing That an American Indian Group Exists as an Indian Tribe,* 50 Fed. Reg. 38 at 9,291 (Feb. 25, 1994) (AR0007927 at 7928) (emphasis added). The 2015 Final Rule is even more inadequate—it failed to even recognize a limited re-petitioning rule for a group with new evidence (instead focusing only on a rule requiring third party veto) and failed to merely incorporate its findings from 1994 into the Final Rule as it claims to have done. *See* DOI Mot. at 4 ("The Department acted reasonably in determining that the 1994 ban on re-petitioning should not change . . . ."). It did not, as DOI now argues, "reasonably" determine that the 1994 ban should not change for reasons expressed back in 1994; rather, it reopened the entire issue in 2015 by way its request for public comment on this specific issue and received extensive comments. The agency articulated even less reasoning in support of the absolute prohibition on re-petitioning than it had in 1994.

Moreover, DOI's argument that Congress has not acted to remove the ban since 1994 is misleading. Over the last decade, Congress and DOI's own officials have specifically demanded comprehensive overhaul to the 1994 regulations based on its unfairness, unpredictability, and lack of integrity. The fact that the ban was again included in the 2015 regulations is less compelling than it was in 1994 and even more reason for this Court to heed Congressional intent. But DOI chose not to modify the total ban, and as a result, the Band filed this suit challenging its failure to do so.

4. Defendants Failed to Discuss or Consider Important Factors

Finally, even though DOI's only two justifications are unsupported, unpersuasive, and inconsistent with Congressional policy, its decision is even more unreasonable in light of its failure to consider several critical factors unique to the federal acknowledgment process. *See United States Sugar Corp. v. Env. Prot. Agency*, 830 F.3d 579, 606 (D.C. Cir. 2016) ("A rule is arbitrary and capricious if the agency: (1) 'has relied on factors which Congress has not intended it to consider,' (2) 'entirely failed to consider an important aspect of the problem,' . . . .") (quoting *State Farm*, 463 U.S. at 43).

First, the Final Rule did not discuss alternative approaches to re-petitioning other than the initially proposed rule which included a third party veto condition. The administrative record demonstrates that a plethora of tribes and scholars recommended DOI reject the third party veto condition, but still adopt a rule permitting limited re-petitioning primarily because the changes to the acknowledgment process were potentially outcome determinative.[17] *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) ("Congress did expect agencies to

[17] *See, e.g.*, Assoc. on Am. Indian Affairs (Sept. 29, 2014) (AR0007585 at 7586) ("We very much oppose the third party veto . . . To totally deny these tribes the right to re-petition if a third party objects, however, may very well violate their right to equal protection of the laws and their inherent right recognized by UNDRIP to be treated as a tribe if they are in fact legitimate."); Miami Nation of Indiana (Sept. 30, 2014) (AR0002964 at 2967 n.2) ("This does not affect the Nation since no third party participated in [our petition, b]ut it does seem unduly harsh to effectively preclude such tribes from re-petitioning altogether by giving their opponents a veto over this opportunity. The Nation urges the Department to find some middle ground on this issue."); Confederation of Sovereign Nanticoke (Sept. 29, 2014) (AR003011 at 3012) (agrees with "[a]llowing tribes who have previously been denied to reapply under the new regulations although we disagree with providing third parties with veto power over the right to reapply"); George Roth, Ph. D Comments (Sept. 27, 2014) (AR0003511 at 3536) ("If current regulations are maintained, some form of re-petitioning, after the passage of a substantial number of years and a showing of significant new evidence, would be of some value."); Comment by Collection of University Professors (Sept. 30, 2014) (AR0003941 at 3957) ("Furthermore, the third party veto unfairly deprives tribes the benefit of more rational revised criteria, and this is improper."); Ariz. St. Univ. Indian Legal Clinic (Sept. 30, 2014) (AR0000003 at 8) ("This third party veto language should be removed").

consider an applicant's wants when the agency formulates the goals of its own proposed action."). Unlike the 1994 Final Rule, the Final Rule did not consider the viability of any rule adopting limited re-petitioning that did not include a third party veto condition. Thus, this Court has no ability to discern whether DOI considered an option to allow re-petitioning only where a number of years have passed and new evidence has come to light. *Gila River Indian Cmty. v. United State*s, 729 F.3d 1139, 1150 (9th Cir. 2013) ("Without an explanation of the agency's reasons, it is impossible to know whether the agency employed its expertise or 'simply pick [ed] a permissible interpretation out of a hat.'") (quoting *Vill. of Barrington*, 636 F.3d at 660). The fact that DOI did not discuss any of these alternatives in its Final Rule suggests that DOI failed to consider the implications of a total ban.

Second, DOI's decision not to allow any form of limited re-petitioning specifically for new or modified evidence is unreasonable and astoundingly deaf to the plight of many of these Indian groups that have had incredible difficulty finding and compiling vast amounts of historical documentation, sometimes from over a century ago. *See Mackinac Tribe*, 829 F.3d at 758 (providing sufficient documentation "is admittedly a nuanced and time-consuming process . . . .") (Brown, J., concurring); Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Fed. Acknowledgment Litig.*, 151 U. Pa. L. Rev. 1827, 1838 (2003) ("The DOI's procedure for becoming federally recognized entails extensive documentation and proof of legitimate Indian status, which in reality creates further difficulties for non-recognized tribes rather than provide a means for recognition of all Indian tribes.") (emphasis added). A reasonable decision by DOI would have considered the competing paperwork burdens on the Indians and the agency, and would have included an explanation as to why the agency's convenience outweighed

that of Indian groups. In the Final Rule, DOI failed to do so, and instead chose the least forgiving approach whereby Indian groups have one shot to prove their case.

Finally, DOI clearly did not consider the disastrous effects its ban would have on the Burt Lake Band (or any other non-recognized tribes with valid, exiting treaties with the Government). All of the landless (i.e., non-reservation holding) Michigan tribes that were parties to the Treaties in 1836 and 1855 filed for recognition under the 1978 regulations, and the Burt Lake Band was the only tribe denied recognition. By banning all previously-denied petitioners, the Secretary of Interior has breached his unique fiduciary responsibility to the Band. *Jicarilla Apache Tribe*, 728 F.2d at 1567 (10th Cir. 1984).

Overall, in determining whether DOI's consideration was thorough and its reasoning valid, this Court should consider that any alternative other than a complete ban that would have actually promoted the intended "goals" of the 2015 regulations. For example, DOI could have adopted a limited avenue for those denied petitioners who, after at least 5-10 years, were able to present new or modified evidence that would purport to successfully satisfy all seven criteria. DOI's goals of administrative efficiency would not be hindered because of how few petitioners would be eligible (by DOI's own admission) and those groups that were entitled to a second review would not submit additional facts on each criterion again, but only those that were resolved against them. Moreover, a previously-denied petitioner would also be able to take advantage of the "consistent baseline approach" and show that it can establish success on a criterion in a similar manner to that which a successfully acknowledged Tribe had followed. Allowing re-petitioning in this manner promotes the central goals of consistency, integrity, and transparency and is consistent with Congressional intent. *See Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 245 (D.D.C. 2016), *aff'd*, 879 F.3d 1177 (D.C. Cir. 2018) ("[T]he reason for the agency's decision

must be 'both rational and consistent with the authority delegated to it by Congress.'") (quoting *Xcel Energy Servs. Inc. v. Fed. Energy Regulatory Comm'n*, 815 F.3d 947, 952 (D.C. Cir. 2016)) (emphasis added). DOI chose the only possible option that undermines the regulations' express purpose to benefit Indians.

This absolute ban thus exceeds agency authority. The DOI did not offer a complete and rational explanation of its decision-making nor did it consider several critical relevant factors in deciding to ban all forms of re-petitioning. Accordingly, DOI's decision to ban all re-petitioning was an arbitrary and capricious action, and in violation of the APA. Judgment on Count IV must be awarded in favor of the Burt Lake Band.

II. Count V: Violation of Due Process Rights

A. The Ban on Re-Petitioning Deprives the Band of Its Federally Recognized Right to Be Acknowledged

The Burt Lake Band is entitled to summary judgment on Count V, the Band's due process claim. DOI argues that the Band "does not show that it has a legitimate claim of entitlement to government benefits because the Department's denial of Plaintiff's Part 83 petition did not terminate any pre-existing federal benefits to which Plaintiff was entitled." DOI Mot. at 28. But the Band does not seek to recover government benefits, nor does it claim that it has an "unlimited right" to petition for those benefits. Rather, the Band seeks a determination that the absolute ban on re-petitioning is unlawful because it permanently forecloses the Band from being able to present additional, relevant evidence to show that DOI erred as a factual matter in denying its petition for recognition. Without authorization from Congress, DOI adopted a rule that forever prohibits a tribe from re-petitioning for federal recognition through Part 83 (the only avenue through which a tribe may do so). In doing so, DOI has violated the Band's due process rights.

Moreover, DOI has mischaracterized the Band's arguments regarding the relevance of the Petition Clause. The Band has not raised a standalone First Amendment claim. Rather, the Band has argued that the cases applying Petition Clause support the Band's APA and Due Process challenge to the legality of DOI's actions by demonstrating the importance the courts have attached to giving petitioners an avenue for administrative relief from agency actions they believe are factually erroneous.

B. DOI Has Effectively Nullified the Band's Treaties with the United States

DOI completely ignored the Band's pre-existing, protected interest in being federally recognized (or here, re-affirmed), pursuant to its two treaties with the United States. The Band has been formally recognized by the federal government, including in the Treaty of Washington in 1836 and the Treaty of Detroit in 1855. *See supra* note 10. But in order to receive the protection, services, and benefits of the federal government, the Band must be acknowledged through the Part 83 process. *See* 25 C.F.R. § 83.2(a). This lawsuit, therefore, seeks the opportunity to fully participate in that process. By permanently prohibiting the Band from re-petitioning pursuant to the newly-revised Part 83 process, BIA has prevented the Band from exercising its due process rights and effectively precluded application of the Treaties which award the Band those rights.

The import of a treaty with the United States is unmatched. Moreover, courts have recognized that the treaties between Indian tribes and the federal government are awarded a special significance. "Interpretation of Indian treaties is 'guided by special rules of construction'" and like statutes affecting Indians, courts must (1) "interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them" and (2) interpret them "liberally in favor of the Indians." *United States v. Brown*, No. CRIM. 13-68(JRT/LIB), 2013 WL 6175202, at *5 (D. Minn. Nov. 25, 2013), *aff'd*, 777 F.3d 1025 (8th Cir. 2015) (quoting *United States v. Gotchnik*,

222 F.3d 506, 509 (8th Cir. 2000) and *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)). *See also Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *U.S. v. Bresette*, 761 F. Supp. 658, 661 (D. Minn. 1991). Moreover, courts are "bound to construe the Treaty to reserve to the Tribes all rights necessary to effectuate the purpose of the Treaty." *Swim v. Bergland*, 696 F.2d 712, 716 (9th Cir. 1983) (interpreting the purpose of the treaty as the parties intended "was to enable the Tribes to transform themselves from a nomadic to an agrarian society and that grazing rights were essential to help effectuate this transformation").

The Band has a previously-recognized right to be acknowledged as a tribe, as expressly set forth in the two Treaties. By refusing to recognize this right—and banning the Burt Lake Band from ever re-petitioning again—DOI's action has the effect of nullifying the Band's treaties with the United States. Prior to 1978, the existence of the Treaties alone was conclusive evidence to demonstrate a government-to-government relationship. *Stand Up for California!*, 204 F. Supp. 3d at 297 ("[H]istorically, the United States recognized tribes through treaties, executive orders, and acts of Congress," and, 'even after the passage of the IRA,' in 1934, '[r]ecognition by the federal government proceeded in an ad hoc manner . . . .'" (quoting *Mackinac Tribe*, 829 F.3d at 756). The United States is no longer holding the lands it originally promised in trust for the Band as a reservation. Now, the treaties are only evidence to demonstrate that the government has a fiduciary responsibility to the Burt Lake Band, and the only way to enforce that obligation is through the Part 83 process.

But by recognizing that such treaties exist and banning all re-petitioning, BIA is effectively voiding the treaties without the approval of Congress. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 479 (1979) ("[T]reaty rights are preserved unless

Congress has shown a specific intent to abrogate them.") (internal citation omitted); *United States v. State of Wash.*, 641 F.2d 1368, 1371 (9th Cir. 1981) ("The Department of the Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so."). The D.C. Circuit has suggested, but not formally held, that federal recognition is a "prerequisite to organization." *Mackinac Tribe*, 829 F.3d at 758. Moreover, the Supreme Court has expressly stated that, in the absence of an explicit statement, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Menominee Tribe of Indians v. United States*, 291 U.S. 404, 413 (1968).

If the Band cannot utilize its Treaties and is precluded from properly organizing as a recognized community, BIA's decision blatantly contradicts Congressional intent by having deliberately created an impediment to assisting in the Band's development. Moreover, BIA's decision to permanently prohibit the Band from ever organizing as a recognized tribe has usurped Congressional authority by rendering these Treaties useless, and should be afforded no deference whatsoever. *See Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1079 (10th Cir. 2004) ("We do not afford any deference to the DOI's position on this issue because Congress did not give it the discretion to administer those treaties and agreements.") (internal citation omitted) (emphasis added); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("Legislative silence is not sufficient to abrogate a treaty."). BIA clearly violated the Band's due process rights by depriving it of its ability to ever present evidence in an effort to be federally recognized, in accordance with its Treaties.

C. Defendants Fail to Acknowledge the Realities of the Part 83 Process

Finally, BIA relies heavily on the fact that the Band had multiple opportunities to appeal its original petition. *See* DOI Mot. 10-11. This is another red herring. There is no significance to the Band's decision not to seek further administrative or judicial review of the 2006 decision. This

Court has jurisdiction to consider the Band's challenge to the Final Rule, and DOI does not contend otherwise. In any event, review of the 2006 decision would have been meaningless because the evidence that the Band believes shows that the agency decision was factually erroneous was not in the rule-making record, and had to be developed in a lengthy fact-gathering process and then submitted through a re-petition.

The relevant issue is whether, after a final determination, a denied petitioner has an opportunity to supplement, augment, or change its showing in its original petition. DOI repeatedly argues that the Band, as a previously-denied petitioner for acknowledgment, has been provided adequate "procedural safeguards" because it has "had many opportunities to develop the evidence" before its Final Determination, to request reconsideration or to appeal to a federal district court. *See* DOI Mot. at 3-4. None of these "opportunities," however, allowed the Band to re-petition after the Band's window to alter its original petition or appeal the 2006 decision had expired. The Band did not have a meaningful opportunity to present a case that DOI's factual finding was erroneous, once it had developed and discovered additional evidence, which would materially alter its factual showing and the merits of its petition. Significantly, the revised rule allows currently pending petitioners to "supplement" their petitions under the 2015 amendments. The purpose in doing so necessarily undercuts Defendants' argument that the prior process was sufficient. If the pre-existing "procedural safeguards" were sufficient, there would be no need to supplement currently pending petitions.

Defendants argue that re-petitioning is unnecessary because the Band already had an opportunity to present evidence. But the convoluted and inequitable process that the Band has been forced to endure encapsulates the flaws in Defendants' argument, and also shows that the Band has a protected interest. Providing multiple opportunities during the Part 83 process does

not make up for ultimately foreclosing the possibility that newly-discovered evidence that addresses flaws in the agency's factual findings could ever be considered, particularly in the context of locating and collecting difficult-to-find, historical evidence such as is at issue here.

For these reasons, the Court should deny Defendants' cross-motion and grant the Band's motion for summary judgment on Count V.

III. Count VI: Violation of Equal Protection Rights

The Band (and not DOI) is entitled to summary judgment on Count VI because DOI has violated the Band's equal protection rights with regard to similarly situated petitioners who have already been federally recognized and petitioners who have not yet received a decision and are permitted to proceed under the revised 2015 rules. DOI summarily dismisses the Band's arguments, but fails to explain how it has succeeded under rational basis review. DOI cannot survive this analysis for the reasons discussed below.

DOI again relies on an administrative convenience argument, which is improper, as already discussed. Moreover, the Band is not seeking to jump ahead "other groups waiting to have their petitions considered." DOI Mot. at 33. Instead, the Band is asking for the eminently reasonable (and constitutional) right to have *all* of its evidence heard, even if that evidence was not available prior to the promulgation of the 2015 rule. Tribes with petitions that are currently pending are permitted to supplement their petitions in order to meet the requirements for federal acknowledgement. By permanently denying the Band and other tribes whose petitions were denied under the previous rule the opportunity to do the same, BIA violates those tribes' equal protection rights. The only basis that BIA can articulate is that it would "use Department time and resources to take another bite at the apple." *Id*. This is not rational; it simply elevates the convenience of BIA over the rights of a tribe with Treaties between itself and the United States to

ever be federally recognized and access the benefits and privileges that all other federally recognized tribes enjoy.

Moreover, BIA's argument that the Band is attempting to revive a claim barred by the statute of limitations mischaracterizes the Band's argument. The Band is not challenging the substance of the agency's 2006 final action on its Part 83 petition. Rather, the Band is arguing that the revised rules now codify a "consistent baseline approach" (as discussed *supra* at Section I(C)(2)(b)), which treats petitioners with new evidence differently and adversely compared to those who have yet to receive a determination. The Band should be given an opportunity to avail itself of this controlling precedent to show how it can satisfy criteria that it previously failed to meet with a quantum of evidence that was sufficient for other landless tribes who were acknowledged under the Part 83 process.

Accordingly, the Court should grant summary judgment in favor of the Band on Count VI.

CONCLUSION

For these reasons, and those set forth in the Band's Motion for Summary Judgment, the Band respectfully requests that the Court deny Defendants' Cross-Motion for Summary Judgment and grant the Band's Motion for Summary Judgment on all counts.

Oral Hearing Requested

Pursuant to LCvR 78.1, Plaintiff requests an oral hearing on Plaintiff's motion for summary judgment and Defendants' cross-motion for summary judgment.

Dated: February 14, 2019

Respectfully submitted,

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