

THE HON. RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

**CHINOOK INDIAN NATION**, an Indian Tribe  
and as successor-in-interest to The Lower  
Band of Chinook Indians; **ANTHONY A.  
JOHNSON**, individually and in his capacity as  
Chairman of the Chinook Indian Nation; and  
**CONFEDERATED LOWER CHINOOK TRIBES  
AND BANDS**, a Washington nonprofit  
corporation,

Plaintiffs,

v.

**DAVID BERNHARDT**, in his capacity as  
Secretary of the U.S. Department of Interior;  
**U.S. DEPARTMENT OF INTERIOR; BUREAU  
OF INDIAN AFFAIRS, OFFICE OF FEDERAL  
ACKNOWLEDGMENT; UNITED STATES OF  
AMERICA**; and **TARA KATUK MAC LEAN  
SWEENEY**, in her capacity as Acting Assistant  
Secretary – Indian Affairs,

Defendants.

Case No. 3:17-05668-RBL

**PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT RE: CLAIMS II-V  
OF PLAINTIFFS' FIRST AMENDED  
COMPLAINT**

**ORAL ARGUMENT REQUESTED**

*(Note on Motion Calendar for:  
December 13, 2019)*

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF'S FIRST  
AMENDED COMPLAINT - 1  
Case No. 3:17-05668-RBL

## INTRODUCTION

Plaintiffs Chinook Indian Nation, et al (“CIN” or “Chinook”) brought claims against the Defendants seeking judicial recognition as a federally acknowledged tribe (Claim I), challenging regulations promulgated by the Defendant Department of Interior (DOI) in 2015 that forever prohibit the CIN and other un-recognized tribes that were once denied recognition from re-petitioning the federal government for official tribal acknowledgment (Claims II-V) and challenging the Defendants revocation of Trust Funds previously awarded to the Chinook (Claims VI-VIII). Defendants thereafter filed a Motion to Dismiss All Claims. The Court dismissed Claim I, but denied Defendants’ request to dismiss all other claims (see Order on Motion to Dismiss Dkt. 45).

Pursuant to Fed.R.Civ.P. 56, Plaintiffs move the Court for summary judgment to be entered in their favor on Claims II through V of their First Amended Complaint; i.e. the so-called “Re-Petitioning Claims.” Defendants recently moved for summary judgment regarding the re-petitioning claims. Plaintiffs’ response and opposition memorandum to the Defendants’ motion was characterized in part as a “cross-motion for summary judgment.” In their Reply memo, Defendants objected to the cross-motion contending that it did not comply with applicable procedural rules. Accordingly, to avoid any procedural objections, Plaintiffs now formally file a cross-motion for summary judgment on their re-petitioning claims, Claims II-V. To avoid needless repetition, this motion incorporates and relies upon the arguments Plaintiffs made earlier in conjunction with the response memorandum they filed on October 21, 2019. (Dkt. 97).

## PLAINTIFFS’ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V

### Additional Relevant Background Facts:

Plaintiffs’ re-petitioning claims pertain to the Defendants 2015 “overhaul” of its federal acknowledgment regulations (25 CFR 83). DOI’s Draft Rule which was also published

PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF’S FIRST  
AMENDED COMPLAINT - 2  
Case No. 3:17-05668-RBL

1 in the Federal Register is found at AR0005676-5688. *See also* 79 Fed. Reg. 35129 et. seq.  
 2 (June 19, 2014). The Draft Rule included the re-petitioning provision and an explanation as  
 3 to how the re-petitioning provision would work procedurally can be found in § 4.1060-1063,  
 4 AR0005688.

5 Plaintiffs' first re-petitioning claim (Claim II) alleges violation of the Administrative  
 6 Procedures Act (APA) and is based upon the Administrative Record (AR) surrounding the  
 7 2015 regulatory changes to the tribal federal acknowledgment process, both as initially  
 8 proposed and as finally adopted. The Defendants supplemented the AR with numerous  
 9 additional documents subsequent to the filing of their own Motion for Summary Judgment.  
 10 Plaintiffs' Memorandum in Opposition to Defendants' Motion included a Declaration from  
 11 Plaintiffs' counsel, Thane Tienson, that attached several of the additional documents that  
 12 were provided by Defendants' counsel to become part of the AR, but that had not yet been  
 13 formally enumerated as part of the revised AR. Subsequent to the filing of Defendants' Reply  
 14 (Dkt. 99), Defendants formally supplemented the AR (Dkt. 100) and this motion relies in part  
 15 upon those supplemental documents. Plaintiffs submit, however, that the incomplete status  
 16 of the AR during briefing militates in favor of Plaintiffs' request for oral argument concerning  
 17 the motions.

18 Within the AR are numerous transcripts of tribal consultations that were performed  
 19 in conjunction with the draft federal acknowledgment regulations in various parts of the  
 20 country. *See e.g.* AR000147-162, 243-253, 324-333, 349-361, 406-422, 5146-5162. The  
 21 transcripts reflect that Deputy Assistant Secretary for Indian Affairs Larry Roberts or  
 22 Assistant Secretary Elizabeth Appel presided over the consultations and routinely began  
 23 them by saying the following or something very similar: <sup>1</sup>

24  
 25  
 26 <sup>1</sup> Their preliminary remarks were always similar and included informing attendees that there would be a  
 PowerPoint presentation of about 20 minutes and that everyone should also have handout materials. *See, e.g.*,  
 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF'S FIRST  
 AMENDED COMPLAINT - 3  
 Case No. 3:17-05668-RBL

1 “We’re here to talk about the Part 83 process that was the Federal  
2 Acknowledgment process that was [first] promulgated in 1978.

3 So very briefly there are three ways in which a tribe can be federally  
4 recognized. One is through judicial court order, one is through federal  
5 legislation, and the last is administratively by the Department of the Interior.

6 And of the 566 federally-recognized tribes today, 17 have been recognized  
7 through the federal acknowledgment Part 83 process. The other 549 tribes  
8 have been acknowledged in a different form . . . “essentially . . . have not gone  
9 through the Part 83 process.”

10 How did we get to this point? We have heard as an Administration from a  
11 number of folks and the public and elsewhere that the process is broken, that  
12 it takes too long, that it costs too much, that it is too subjective, that the results  
13 are unpredictable, and that it is not transparent. And in issuing this Discussion  
14 Draft and looking at issuing a rulemaking here we are trying to address some  
15 of those concerns, that we have heard from the public about the process being  
16 broken.” AR000242-244.

17 The Re-petitioning provision of the Proposed Rule was a central feature of it. Indeed,  
18 the Draft Rule was captioned “Hearing and Re-Petition Authorization Processes concerning  
19 Acknowledgment of American Indian Tribes.” AR0005677. There was also an express  
20 recognition by DOI in its Power Point presentation made in conjunction with its tribal  
21 consultations regarding the proposed new Rules that the reason for including a re-  
22 petitioning provision was to meet the Goals of “transparency” and ‘integrity’. AR 0005524,  
23 6395, 6455 and 7924. The goal of “integrity” was served because the re-petitioning  
24 provision gave those tribes that had been denied acknowledgment under the previous  
25 “broken” “inconsistent” and “unpredictable” processes the opportunity to take advantage of  
26 the newer, less stringent rules governing acknowledgment. *See e.g.* AR0005618-19.

27 Consequently, the agency’s preliminary oral remarks at these tribal consultations also  
28 always included a reference to the re-petitioning provision. *See e.g.* AR000251-252;  
29 0000359:

30 \_\_\_\_\_  
31 AR0005004. The PowerPoint slides can be found at AR 0005507-5527, 6378-98, 6438-58, and 7968-77. all  
32 included remarks about the re-petitioning provision.

33 PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF’S FIRST  
34 AMENDED COMPLAINT - 4  
35 Case No. 3:17-05668-RBL

1 “And then what we’ve provided is an opportunity for those, you know we have  
2 heard that the process is broken. That’s a viewpoint that a lot of people have  
3 expressed.

4 **And so** as part of the Discussion Draft we have included a narrow opportunity  
5 for a petitioner who has been denied federal acknowledgment under the  
6 previous regulations, that they could re-petition if they prove by a  
7 preponderance of evidence to either the Assistant Secretary or the Office  
8 Hearings Appeals, whoever would be the decisionmaker there, that they could  
9 re-petition if a change in the new version of the regulations warrants reversal  
10 of their final determination. And then if that was provided by a preponderance  
11 of the evidence, then they could re-petition.” (emphasis supplied).

12 The words “And so” make express what is implicit: the reason for including the re-  
13 petitioning provision in the Draft Rule was simple fairness - - to give those tribes  
14 disadvantaged by the previous “inconsistent,” “unpredictable,” “broken” processes an  
15 opportunity to obtain recognition if they could show that the changes in the  
16 acknowledgment rules would lead to a positive decision and to thereby at least attempt to  
17 inject some amount of justice, integrity and equity into the tribal recognition process. In that  
18 regard, the text of the re-petitioning provision in the rule required a preliminary evidentiary  
19 showing by the previously unsuccessful petitioner to prove either:

20 (1) A change from the previous version of the regulations to the current  
21 version of the regulations warrants reconsideration of the final  
22 determination; or

23 (2) The ‘reasonable likelihood’ standard was misapplied in the [earlier] final  
24 denial.” §4-1063, AR0005688.<sup>2</sup>

25 There is thus a clear linkage between the proposed changes in the acknowledgment  
26 criteria and the inclusion of a re-petitioning provision.

In July 2002, following the issuance of a January 2001 Final Determination

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<sup>2</sup> The proposed rule, however, would not require petitioners to resubmit evidence, but would allow the petitioner to submit supplemental evidence. See § 4.106(b)(b) of the Draft Rule. AR0005688.

acknowledging the Chinook<sup>3</sup>, the Defendant Bureau of Indian Affairs (BIA) Office of Federal Acknowledgment (OFA) issued its “Reconsideration on Referral by the Secretary and “Summary Under Criteria and Evidence for the Reconsidered Final Determination Against, Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation (formerly: Chinook Indian Tribe Inc.)<sup>4</sup>.” *See also* Defendants’ Answer ¶ 14, 15. Accordingly, the Chinook would have been categorized as an “unsuccessful petitioner” as that term was used in the proposed rule and have been subject to the re-petitioning provision. (*See* “Repetition Authorization Process” §4.1060 *et. seq.*; AR0005688.) They should have succeeded according to former Assistant Secretary for Indian Affairs Kevin Gover, *see* AR0007962.

Unsurprisingly, the re-petitioning provision proved to be controversial during the notice and comment period. This was also true of the so-called “third party veto” provision included within it, whereby any previously denied tribe would have to obtain consent from any tribe that had previously participated as a party in an administrative reconsideration or Federal court appeal to be eligible for formal acknowledgment. Legal scholars, members of the Chinook and many others objected to that third party provision. *See e.g.* AR0001206, 1207, 3910-3912, 5163-5168, 5169, 5173, 5176, 1893-1896. Predictably many tribes that were already recognized objected to any re-petitioning, fearing competition from a newly recognized nearby tribe for casino revenue or, in the case of the Quinault Indian Nation, concerned about maintaining control of valuable land allotments (AR000550-558, 1206, 1207, 5163-5175).

Similarly, states like Connecticut that were concerned about upsetting their established revenue-sharing agreements with existing acknowledged tribes regarding casino revenue also objected to re-petitioning and supported the third party veto provision.

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<sup>3</sup> 66 Fed. Reg. 1690 (Jan. 9, 2001).

<sup>4</sup> 67 Fed. Reg. 46204 (July 12, 2002).

AR0005691. The clear majority of comments, however, were very supportive of the re-petitioning provision because of the obvious fairness and equity of including such a provision in the face of a comprehensive change to the acknowledgment process. This was especially true of Indian law scholars, but they objected to the inclusion of the third party veto provision, also for reasons of fairness, and pointed out that due process concerns could easily be satisfied by simply giving interested third parties, like the Quinault in the case of the Chinook, notice of any re-petitioning application and an opportunity to be heard without conferring party status, let alone veto power on such entities. *See* the collection of comments regarding the Re-petition set forth at AR000600-647, *e.g.* AR0006640, p. 62 comment [A112] *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

Plaintiffs urge the Court to pay special attention to the September 20, 2014 comments of the Indian professors and scholars of American Indian law and policy. They appear at AR1878-1899. The first signator is Robert Anderson, the Director of the Native American Law Center at the University of Washington School of Law and a recognized authority on Indian law. As that letter notes, “[t]he current process is broken and has proven to be inconsistent, time-consuming and inefficient. Revising the recognition process is an important step to ensure that the rights of all tribes indigenous to the United States are respected. The process must be reformed to promote equity and integrity.” AR0001878.

Continuing, the professors and scholars also remarked upon the importance of the inclusion of the newly clarified “reasonable likelihood” evidentiary standard to apply to the acknowledgment criteria, emphasizing that it is a lesser standard than a preponderance of the evidence, but that the standard had hardened over the years leading to inconsistent results in the acknowledgment process:<sup>5</sup>

“Inconsistent application of the reasonable likelihood standard puts an

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<sup>5</sup> *See also Boyde v. California*, 494 U.S. 370, 380 (1990); Lorinda Riley, *Shifting Foundation: The Problem With Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. Rev. L. & Soc. Change 629, 639 (2013).



1 incredible burden on tribes. Over time, the Department's interpretation of the  
 2 reasonable likelihood standard has resulted in the need for increased certainty  
 3 and voluminous evidence and more conclusive analysis by the Department.  
 4 An illustration of this is comparing the experiences of two Louisiana tribes  
 5 who submitted petitions. In 1978, the Tunica-Biloxi Tribe filed a petition 78  
 6 pages long. The Tribe received federal recognition three years later in 1981.  
 7 The United Houma Nation applied for federal recognition in 1979. By the time  
 8 the United Houma Nation's petition was evaluated, it had submitted more than  
 9 19,100 pages of evidence. The BIA issued a proposed finding against the  
 10 Nation in 1994. AR0001880.

11 The professors and scholars fully supported the provision for re-petitioning for  
 12 previously denied tribes, but urged eliminating its third party veto provision: "This  
 13 requirement unfairly burdens a small number of tribes and could potentially be used as a  
 14 sword by third parties against future petitioners. Furthermore, the third party veto unfairly  
 15 deprives tribes of the benefits of the more rational revised criteria, and this is improper."  
 16 AR0001893-94.

17 They (as did Plaintiffs in their Opposition Memorandum, *see* p. 20) also questioned  
 18 the applicability of collateral estoppel and *res judicata* to those past acknowledgment  
 19 decisions after revised and less stringent regulatory standards have been adopted. They  
 20 cited several reported decisions refusing to grant preclusion under similar circumstances,  
 21 pointing out that whether acknowledgment decisions are indeed "adjudicative" is also  
 22 unsettled. *See also, Northwest Sea Farms v. U.S. Army Corp of Engineers*, 931 F. Supp. 1515,  
 23 1522-23 (D. Wa., 1996); Concerns similar to those of the professors and scholars about the  
 24 need for clarification of the reasonable likelihood standard were voiced by the Arizona State  
 25 University College of Law Indian Legal Clinic. *See* AR0009144-9145.

26 In his testimony before the subcommittee on Indian and Alaska Native Affairs in the  
 House of Representatives in the hearing on the federal acknowledgment process on April 22,  
 2015, then Assistant Secretary for Indian Affairs Kevin Washburn repeated comments of  
 other Congressional Representatives and officials criticizing those processes. He began his  
 testimony by quoting Chairman Donald Young (R. AK), "I think we can all agree that reforms

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF'S FIRST  
 AMENDED COMPLAINT - 8  
 Case No. 3:17-05668-RBL



1 to expedite the process and to upgrade fairness, consistency and transparency are  
 2 warranted.” “The process is broken” (Congressman Dale Kildee); “the process is broken”  
 3 (Senator John Tester); “it is quite clear the process for acknowledgment is broken” (Senator  
 4 Byron Dorgan). [https://www.doi.gov/ocl/hearings/114/tribalrecognition\\_042215](https://www.doi.gov/ocl/hearings/114/tribalrecognition_042215).

5 Tellingly, this characterization of the former acknowledgment process as “broken”  
 6 was made a headline of an official U.S. Department of Interior Indian Affairs press release  
 7 regarding the proposed 2015 overhaul of federal acknowledgment regulations. “Proposed  
 8 rule would address ‘broken’ process AR0005528. *See also* AR0009508 (“the new regulation  
 9 updates a 37-year old process that has been roundly criticized as broken.”). The  
 10 characterization of the 1978 and 1994 acknowledgment process as “broken” was repeated  
 11 routinely by Deputy Assistant Secretary Roberts and Assistant Secretary Appel in all of the  
 12 tribal consultations they held regarding the draft revisions to the federal acknowledgment  
 13 regulations. *See e.g.* AR0000243-251, 324, 351, 407, 5148. In short, contrary to the  
 14 Defendants’ contention that there was never an admission on the part of the Defendants that  
 15 the process was “broken” (*see* Defendants’ Reply, p. 2), Plaintiffs submit that is demonstrably  
 16 untrue.

17 To remedy that broken process, as the DOI acknowledged it was doing, DOI proposed  
 18 a new rule that would attempt to address the multiple defects by adopting a “. . . proposed  
 19 rule that would comprehensibly revise 25 CFR Part 83 to improve the processing of petitions  
 20 for Federal Acknowledgment of Indian tribes. . . .” AR0005677. In sum, all of the changes in  
 21 2015 proposed rule, including re-petitioning, were intentionally designed to remedy the  
 22 “inconsistent,” “unpredictable,” “expensive,” “slow,” and “cumbersome” process that had  
 23 been in place since a regulatory tribal acknowledgment process was first adopted in 1978.  
 24 *See, e.g.* AR0005528-29.

25 ///

26 ///

PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF’S FIRST  
 AMENDED COMPLAINT - 9  
 Case No. 3:17-05668-RBL

## LEGAL ARGUMENT

### Summary Judgment Standard

Summary judgment is usually only appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. But when a court is reviewing an administrative agency's decision, the standard set out in Rule 56 does not apply. *See Richards v. I.N.S.*, 554 F.2d 1173, 1177 (D.C. Cir. 1977). Courts review an agency's decision under the APA. *See Ramaprasadh v. Fed. Aviation Admin.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003).

When a party challenges agency action under the APA, "the district judge sits as an appellate tribunal" and the "entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077 (D.C. Cir. 2001). A court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 705. Agency action is arbitrary and capricious 'if the agency (1) relied on a factor that Congress did not intend it to consider; (2) entirely failed to consider an important factor or aspect of the problem; (3) failed to articulate a rational connection between the facts found and the conclusions made; (4) 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; or (5) made a clear error in judgment.'" *Cal. Energy Comm'n v. Dept. of Energy*, 585 F.3d 443, 1150-51 (9<sup>th</sup> Cir. 2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In the context of claims arising under the APA, the scope of judicial review is limited to "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The administrative record is "not necessarily those documents that the agency has compiled and submitted as the administrative record." *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9<sup>th</sup> Cir. 1989) (internal citation omitted). Rather, "[t]he whole record" includes everything that was before

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF'S FIRST AMENDED COMPLAINT - 10  
Case No. 3:17-05668-RBL

1 the agency pertaining to the merits of the decision.” *Portland Audubon Soc’y v. Endangered*  
 2 *Species Comm.*, 984 F.2d 1534, 1548 (9<sup>th</sup> Cir. 1993) (internal citation omitted). “The ‘whole’  
 3 administrative record, therefore, consists of all documents and materials directly or  
 4 indirectly considered by agency decision-makers and includes evidence contrary to the  
 5 agency’s position.” *Thompson*, 885 F.3d at 555 (emphasis added).

6 The DOI’s Decision to Withdraw Its Proposed Rule Allowing Limited Re-Petitioning  
 7 was Arbitrary and Capricious.

8 Plaintiffs incorporate all arguments they previously made in their Opposition Brief  
 9 *see pp. 7-21.*

10 The Defendants argue that several of the cases relied upon by Plaintiffs in their  
 11 Opposition Brief concern withdrawal of an informal policy, not rulemaking and are therefore  
 12 inapposite (Defendants’ Reply Brief n. 14 pp. 6-7). That is incorrect. The re-petitioning  
 13 provision was a draft legislative (as opposed to interpretive) rule. A draft legislative rule is  
 14 a draft policy and both are “final agency actions” subject to APA review. Perhaps the best  
 15 explanation of legislative rules, interpretive rules and policy statements and APA review is  
 16 to be found in a case earlier cited by Plaintiffs, *Animal Legal Defense Fund v. Veneman*, 469  
 17 F.3d 826 (9<sup>th</sup> Cir. 2006) at 838-44, *vacated on other grounds*, 490 F.3d 729 (9<sup>th</sup> Cir. (*en banc*)).  
 18 The court in *Animal Legal Defense Fund* was dealing with the withdrawal of what it said was  
 19 “best considered as a proposed interpretative rule”, but what the agency had labeled as a  
 20 draft policy. 496 F.3d at 840. The court then engaged in a lengthy analysis of agency actions  
 21 explaining that when a federal agency proposes to adopt a rule that, if adopted, would have  
 22 legal consequences attached to it, publishes the draft rule in the Federal Register and then  
 23 receives and reviews extensive public comments and thereafter decides to abandon the  
 24 proposed rule, it is a “final agency action” and it must provide a reasoned explanation for its  
 25 decision to not adopt that draft legislative rule. 496 F.3d at 843-44. The proposed re-  
 26 petitioning rule at issue in the present case was a draft legislative rule with legal

PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF’S FIRST  
 AMENDED COMPLAINT - 11  
 Case No. 3:17-05668-RBL

1 consequences. The decision to abandon it after extensive notice and comment is absolutely  
2 subject to APA review.

3 In support of its decision, the *Animal Legal Defense Fund* court cited several other  
4 cases in which an agency changed a draft rule: *NRDC v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979);  
5 *International Union, United Mine Workers of America v. United States Department of Labor*,  
6 358 F.3d 40, 41-44 (D.C. Cir. 2004); *Professional Drivers Counsel v. Bureau of Motor Carrier*  
7 *Safety*, 706 F.2d 1216 (D.C. Cir. 1983); *Center for Auto Safety v. National Highway Traffic*  
8 *Safety Administration*, 710 F.2d 842 (D.C. Cir. 1983); *Defenders of Wildlife v. Norton*, 258 F.3d  
9 1136 (9<sup>th</sup> Cir. 2001). All support the contention that the decision not to adopt the draft rule  
10 allowing limited re-petitioning was required to be accompanied by a reasoned explanation  
11 as to why it was no longer necessary. Otherwise, DOI's action is arbitrary and capricious in  
12 violation of § 706(2) of the APA. *Animal Defense Fund*, 496 F.3d at 843-44.

13 Of particular significance, as the *Animal Legal Defense Fund* court pointed out, was the  
14 fact, that, as here, the draft rule was published in the Federal Register and was followed by a  
15 period of public notice and comment. That fact further enables judicial review by providing  
16 courts with materials necessary to evaluate the rule and the agency's rationale for its  
17 subsequent decision to withdraw it. In sum, the Defendants' position that it need not justify  
18 its decision to abandon its draft rule providing for re-petitioning is wholly without merit.

19 Defendants also assert that documents in the record suggest that "the media has  
20 reported 70 or 80 additional groups in California alone that are seeking recognition or - -  
21 "potentially hundreds of Indian groups which may desire acknowledgment from the federal  
22 government as an Indian tribe. . . ." (Defs.' Reply Brief at p. 9). However, at the present time,  
23 as Plaintiffs stated in their Opposition Brief at p. 14, there are only three groups whose  
24 pending petitions have not yet been resolved and, an additional 6 groups who "will become"  
25 petitioners if and when they supplement their petitions. *Id.* n. 4. Further, as the  
26 Departments' own officials and staff acknowledged in the AR, there is a difference between

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF'S FIRST  
AMENDED COMPLAINT - 12  
Case No. 3:17-05668-RBL

1 “potential petitioners” and “viable petitioners.” “Questionable how many viable petitioners  
 2 are out there.” AR000688 Comment [A76] p. 41 and AS-IA Washburn’s comment “I’m  
 3 doubtful that many groups would deserve reconsideration under the proposed rule. . .”  
 4 (AR0006617 at 6622-23).

5 These comments by experienced BIA staff are telling. Defendants knew well that very  
 6 few previously unsuccessful tribes would be deemed eligible for re-petitioning because of  
 7 the proposed re-petitioning rules’ requirement that any previously denied tribe first make a  
 8 *prima facie* showing of eligibility for acknowledgment under the new rules before an  
 9 administrative law judge. Then and only then would re-petitioning be allowed. Coupled with  
 10 the third party veto provision, the additional administrative burden that the OFA would  
 11 experience as a consequence of allowing limited re-petitioning would have been slight.  
 12 Indeed, if limited re-petitioning would have placed such an enormous administrative burden  
 13 on the Department, then why did it propose it in the first place? Plaintiffs submit that there  
 14 is no significant administrative burden that the Department would have experienced as a  
 15 result of allowing limited re-petitioning and, regardless, the Department made no showing  
 16 that there would be any such burden and it ignored altogether the consequence of not  
 17 allowing limited re-petitioning on those tribes that had been previously denied because of  
 18 misapplication of the reasonable likelihood standard or because they were unable to take  
 19 advantage of the new less stringent rules under the 2015 overhaul.

20 The decision to eliminate the proposed rule allowing re-petitioning required DOI to  
 21 provide an accurate, reasoned, rational, and legally sound explanation for doing so. It utterly  
 22 failed to do so. The DOI’s action is therefore arbitrary and capricious and violative of the  
 23 APA.

24 The Defendants’ Decision to Prohibit Re-Petitioning is *Ultra Vires*

25 Plaintiffs incorporate by reference their prior argument concerning this issue at  
 26 pp. 9-12 of Plaintiff’s Opposition Memorandum.

PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF’S FIRST  
 AMENDED COMPLAINT - 13  
 Case No. 3:17-05668-RBL

1 The 2015 Final Rule includes a one-paragraph section titled “Legislative Authority”  
 2 which listed the enabling statutes DOI was relying upon in promulgating the regulatory  
 3 overhaul as 25 U.S.C. §§ 2, 9 and 43 U.S.C. § 1457.<sup>6</sup> DOI asserts that these statutes provide  
 4 the necessary authority to adopt a ban on re-petitioning by once-denied tribes even after the  
 5 adoption of less stringent criteria to achieve acknowledgment. DOI is wrong. All three  
 6 statutes confer broad general authority over supervision and management of Indian affairs.  
 7 In 25 U.S.C. §2, Congress granted the Assistant Secretary - Indian Affairs the authority to  
 8 ‘have management of all Indian affairs and of all matters arising out of Indian relations.’ §9  
 9 grants the President the authority to prescribe such regulations as he may think fit for  
 10 carrying into effect the various provisions of any act relating to Indian affairs or for the  
 11 settlement of the accounts of Indian affairs. 43 U.S. C. § 1457 grants the Secretary of the  
 12 Interior, broad authority, *inter alia*, over Indians. However, all three laws long pre-date the  
 13 initial adoption in 1978 of regulations regarding federal recognition of Indian tribes.

14 Congressional findings that supported the Federal Recognized Indian Tribe List Act  
 15 of 1994 , 25 U.S.C. § 5131, for the first time , expressly acknowledged that “Indian tribes  
 16 presently may be recognized by the administrative procedures set forth in part 83 of the  
 17 Code of Federal Regulations denominated ‘Procedures for Establishing that an American  
 18 Indian Group Exists as an Indian Tribe’ or by a decision of a United States Court.” *See*, Public  
 19 Law 103-454 §103(3) (November 2, 1994); While the agency clearly has authority to  
 20 determine which Indian tribes should be acknowledged under federal law (*Kahawaiolaa v.*  
 21 *Norton*, 386 F.3d 1271, 1273 (9<sup>th</sup> Cir. 2004), those laws provide no authority to DOI to forever  
 22 exclude any Indian tribes from participating in the acknowledgment process by petitioning  
 23 for re-reconsideration, especially following the adoption of new relaxed regulatory  
 24 standards that, if applied, could result in acknowledgment and when the new regulations

25  
 26 <sup>6</sup> 80 Fed. Reg. 126 At 37,855 (July 1, 2015) (AR0000865, 869) (hereinafter “Final Part 83 Rule”).

were designed to remedy past defects that resulted in inconsistent and unpredictable acknowledgment determinations. “Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.” *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000); (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

Further, statutes concerning Indian tribes are to be construed so as to resolve any doubts in favor of the tribes:

[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, “[the] canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.” *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). \* \* \* statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, e.g., *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

*Monatana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

In determining [congressional] intent, we are cautioned to follow “the general rule that ‘[d]oubtful expressions are to be resolved in favor of the weak and defense people who are the wards of the nation, dependent upon its protection and good faith.’”

*McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 174 (1973); quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

Plaintiffs submit the obligation to be solicitous towards Indian tribes and Indian people coupled with the absence of any express statutory authority to ban re-petitioning by once-denied tribes or, for that matter, any reliance by DOI upon the only statutes expressly dealing with federal acknowledgment of Indian tribes, forecloses any ability of the DOI to enact such a regulation. It is not statutory gap-filling; it is law-making, and the regulation exceeds the agency’s authority and is not in accordance with the laws passed by Congress and therefore *ultra vires* and violative of the APA.

PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF’S FIRST AMENDED COMPLAINT - 15  
Case No. 3:17-05668-RBL



Under the APA, courts must set aside agency action if there is no Congressional authority to adopt the regulation at issue. To invalidate a regulation on that basis, a statute need not explicitly prohibit re-petitioning. *New Mexico v. Department of Interior*, 854 F.3d 1207, 1222-23 (10<sup>th</sup> Cir. 2017) (“In 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 (10<sup>th</sup> 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 most all statutes necessitating deference to nearly all agency determinations.”)).

In summary, Plaintiffs submit that the existence of express statutory authority is necessary to terminate a tribe’s quest for federal acknowledgment and that statutory authority must include the authority to prohibit any re-petitioning for formal acknowledgment especially after the standards governing acknowledgment have been formally relaxed. It cannot be done by regulatory implication. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 73 (1978).

#### The Defendants’ Decision to Prohibit Re-Petitioning Violates the Equal Protection Component of the Fifth Amendment

Plaintiffs continue to maintain that the decision to abandon the proposed opportunity for re-petitioning for once-denied tribes violates the equal protection component of the Fifth Amendment (see Plaintiffs’ argument in its Memorandum in Opposition pp. 21-23). With respect to Plaintiffs Equal Protection Claim (Claim V), *Califano v. Webster*, 430 U.S. 313, 321 (1977) is easily distinguished. That case simply held that Congress was within its rights in 1972 to make a change in benefits for Social Security recipients. Doing so was not violative of equal protection given the fact that Congress expressly reserved in the law a right to “alter, amend or repeal any provision of the act” and the Fifth Amendment did not forbid statutory changes to discriminate between the rights of an earlier and later time in order to reduce the

PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF’S FIRST AMENDED COMPLAINT - 16  
Case No. 3:17-05668-RBL

1 disparity in economic conditions existing between men and women caused by a long history  
2 of discrimination against women.

3 A more relevant and more recent example of a federal regulation invalidated on equal  
4 protection grounds is *Sassman v. Brown*, 99 F.Supp.3d 1223, 1236 (E.D. Ca 2015). There, the  
5 court invalidated a refusal to permit male inmates from participating in an early release  
6 program for prisoners. Distinguishing the holding in *Califano*, the court in *Sassman*  
7 concluded that the law's classification did not substantially relate to the achievement of the  
8 announced governmental objective of helping to promote reunification of inmates with their  
9 children after leaving prison because the hearings to determine eligibility for that early  
10 release program were individualized and there was therefore no basis to exclude an entire  
11 group (all male inmates) from such individualized hearings. In effect, the rule made no sense.  
12 The same is true here. By denying any opportunity for once-denied tribes to re-petition for  
13 federal acknowledgment in the wake of the adoption of the new, relaxed criteria, the  
14 Defendants are, in effect, penalizing the victims of the broken and inconsistent and  
15 unpredictable process the new regulations were intended to redress. There is no rational  
16 basis for the DOI's action. As such, it violates the Equal Protection component of the Fifth  
17 Amendment and it should be struck down.

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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF'S FIRST  
AMENDED COMPLAINT - 17  
Case No. 3:17-05668-RBL

**CONCLUSION**

For all of the above reasons and those set forth in Plaintiffs' Opposition Memorandum (Dkt. 97), Plaintiffs' Motion for Partial Summary Judgment regarding Claims II-V of its First Amended Complaint should be granted.

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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF PLAINTIFF'S FIRST  
AMENDED COMPLAINT - 18  
Case No. 3:17-05668-RBL