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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CLAIMS II-V OF AMENDED COMPLAINT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SAME CLAIMS

ORAL ARGUMENT REQUESTED

(Note on Motion Calendar for: November 1, 2019)

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants' Motion for Partial Summary Judgment on Claims II-V of the Amended Complaint should be denied. The Administrative Record (AR) demonstrates that Defendants are not entitled to judgment as a matter of law. Indeed, to the contrary, Plaintiffs are entitled to judgment as a matter of law on those claims and will file a cross-motion on all of their claims for relief shortly.

INTRODUCTION

Plaintiffs, Chinook Indian Nation, et al., (CIN) have brought claims against the defendants challenging the Defendants' revocation of trust funds previously awarded to the Chinook and challenging regulations promulgated by the Defendant Department of Interior (DOI) that prohibit the CIN from re-petitioning the federal government for official tribal acknowledgment. It is the claims pertaining to the re-petitioning ban that are the subject of the Defendants' partial summary judgment motion and this memorandum in opposition to it and cross-motion for summary judgment on those same claims.

SUPPLEMENTAL FACTUAL BACKGROUND

The Plaintiff Chinook Indian Nation members of the CIN trace their ancestry to the historic Chinook Tribe, including the Lower Band of the Chinook and Clatsop Tribe, who lived in the Lower Columbia River estuary. The CIN is the successor-in-interest to the historic Chinook tribe. (See Order on Motion to Dismiss, Dkt. #45). The historic Chinook Indians participated in treaty negotiations with the U.S. Government. They signed treaties in 1851 (AR00005184). However, those treaties were never ratified by Congress. Following their execution, and despite the lack of ratification, the federal government nonetheless appropriated the very lands the Chinook agreed to cede to the government in the unratified

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

treaty.[1] Following the creation of the Washington territory, the territorial governor, Isaac Stevens, began a new round of treaty negotiations in 1855 for the "fish-eating" coastal tribes to which the Chinook were invited. Gov. Stevens demanded that all coastal Indians including the Chinook relocate to the land of their historic enemies, the Quinault, but they and others including the Cowlitz and Chehalis refused to sign the treaty.[2] Nonetheless, the Quinault Indian reservation was subsequently expanded from 10,000 to 220,000 acres by Executive Order to accommodate members of all of the coastal tribes in the hope they would eventually reconsider, and individual land allotments in the expanded Quinault Reservation were then given to the Chinook. *Halbert v. U.S.*, 283 U.S. 753, 758-68 (1931). The Chinook tribal members hold more than 50% of those individual allotments (AR0005185). Those Chinook allotments remain a bone of contention between the two tribes and were responsible for the last-minute decision of the Quinault to seek reconsideration of the acknowledgment determination for the Chinook. (AR0005174-75); See, Ex. "A" handwritten notes of Liz Appel of BIA with former Rep. Brian Baird (D. WA) regarding proposed acknowledgment regulations 8/29/14.

The CIN was recognized by the Defendant as a federally acknowledged tribe in January of 2001, , but upon reconsideration and specifically upon appeal by the third party, Quinault Indian Nation, the Defendant Bureau of Indian Affairs (BIA)/Office of Federal Acknowledgment (OFA) [3] reconsidered its Final Determination and revoked the CIN's acknowledgment 18 months later. Defendants' Answer ¶14.

The history of federal acknowledgment of Indian Tribes is set forth in further detail

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[1] Indian Appropriation Bill, 1905, Hearing before the subcommittee of the Committee on Indian Affairs of the Senate of the U.S. 58th Cong. 3rd Sess. (1905) statement of Sen. Charles Fulton

[2] *"Boston Men" to the BIA: The unacknowledged Chinook Indian Nation*, pp. 268-69 (Robinson, John R.)

[3] Defendant Office Federal Acknowledgment (OFA) is the office within the Defendant Department of Interior (DOI) that implements the federal regulations regarding federal acknowledgment of American Indian tribes. The OFA was formerly known as the branch of acknowledgment and [in] research. *See* Order on Motion to Dismiss, *Supra* n. 2. See, 25 CFR § 83 F2.

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

in this Court's Order on the Motion to Dismiss at Dkt. #45, pp. 3-7. In a nutshell, prior to 1978, there were no regulations governing federal acknowledgment, and recognition prior to that time occurred on an ad hoc basis. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004). A regulatory tribal acknowledgment process was first established in 1978 and was amended in 1994. Significantly, however, it was the failures of those earlier acknowledgment processes, including inconsistencies in acknowledgment determinations, that ultimately led the DOI to adopt what it characterized as a "Federal Recognition Overhaul" in 2015 (AR0009365-66; Tienson Dec. Ex. "B, p. 1").

The 2015 "Overhaul" was adopted because, as then Assistant Secretary of Indian Affairs, Kevin Washburn, admitted, the DOI's 1978 and 1994 acknowledgment processes that applied in the years leading up to and including the Final Determination for Federal Acknowledgment of the Chinook in 2001, followed by reconsideration and revocation of its acknowledgment 18 months later was "broken." Fed. Reg. 37, 862-63 (July 1, 2015).

> To summarize…the [Part 83 federal acknowledgment] process is slow, expensive, inefficient, burdensome, intrusive, non-transparent, inconsistent, and unpredictable."

Hearing on the Federal Acknowledgment Process before the House Natural Resources Subcommittee on Indian, Insular and Alaska Native Affairs, 114th Congress 2 (April 22, 2015). The preamble to the proposed 2015 rule changes stated that the purpose of the changes to the recognition process was to promote "fairness and consistent implementation, and increasing timeliness and efficiency, while maintaining the integrity and substantive rigor of the process." 80 Fed. Reg. at 37,862. The 2015 amendments were first contemplated by the BIA in 2009 in an attempt to improve the process that had recognized only 17 petitions and denied 34 others since 1978. *Id*. In conjunction with the acknowledgment by the BIA that tribes whose petitions had been denied for reasons that were inconsistent with positive acknowledgment decisions made for other tribes, and the inclusion of new relaxed criteria for establishing a right to acknowledgment and a clarified "reasonable likelihood"

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

evidentiary standard, the Draft Rule (AR0005677 - 0005688) included a provision for limited re-petitioning (AR0005688).

However, in its notice and comment period for the 2015 regulations, the DOI heard from the State of Connecticut who feared more tribes seeking to open casinos (AR00005691) and from other tribes who feared reduction in power and benefits like the Quinault Indian Nation, who ultimately succeeded in securing reconsideration of the Final Determination to acknowledge the Chinook. The Quinault argued, as do the Defendants now, that the re-petitioning was unfair to other tribes because re-petitioning could "result in acknowledgment of previously denied petitioners." 80 Fed. Reg. 37,874. Exactly so! That was the entire purpose behind including the re-petitioning provision. However, it is important to note that even in the initial draft rule, a threshold showing that the re-petitioning tribes would be able to satisfy the new relaxed standards would first be required to be made and, regardless of its merit, a re-petitioning effort would only be allowed if the previously objecting third party agreed to allow it, thereby giving effective veto power to that third party. (AR0005688).

In fact, the Final Rule observed that most commenters and tribes opposed the third party veto *Id*. at 37,875; (AR000865@879) and, DOI ignored multiple alternative approaches suggested by the commenters that did not include a third-party veto. *Id*. *see, e.g.*, comment of Gary Johnson, president of Chinook Nation, ("A third party with political interests should have no voice in another tribe's recognition) (July 15, 2014, AR00005186). Others, including Chinook members, voiced similar objections (AR00005174, 0001206-1207, 006576) Of particular note were the objections to the third party veto and other comments made by over 30 professors of Indian Law nationwide (Scholars of American Indian Law Comment, September 30, 2014) (AR0001878 at 1893) ("While we support this proposed change to the extent 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-

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

petition."). ("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."). However, DOI only considered a re-petitioning provision that included the third-party veto. *Id*. at 37,874-75 (AR000865@878-79); (AR0006640) p. 40, Tienson Dec., Ex. "C", p. 40.

Without discussing or commenting on the validity or viability of any alternative approaches, Defendants then sweepingly concluded that all potential re-petition approaches — not just the third-party veto condition — were "not appropriate." 80 Fed. Reg. 37, 874-75;

Ultimately, and despite the eminent logic and fairness of allowing limited re-petitioning for wrongly denied petitioners, DOI reversed itself and opted to disallow any re-petitioning at all. This decision was made despite the objections that a ban would violate the equal protection and due process components of the Fifth Amendment, that to do so, would "prevent getting to the truth of whether a Tribe should be acknowledged;" that it "exceeded the BIA's authority," was "politically motivated"; and was "based on an invalid justification". *Id*. at 37,874-875. Thus, instead of allowing tribes that had devoted decades of their lives and enormous sums of money seeking recognition only to find themselves ultimately victimized by a broken, inconsistent and unpredictable process to have an avenue to achieve eventual recognition, the Department did just the opposite, and forever barred those victims, such as the Chinook from re-applying. DOI shirked all responsibility for their plight and, ignoring the relaxed standards in the new regulations, asserted: "Congress may take legislative action of recognized groups it finds have merit even though they do not meet the specific requirements of the acknowledgment regulations." *Id*.

CIN challenges the DOI's legal authority to make this decision and contends that it is not in accordance with the law, it is unreasonable and not supported by the record and is

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

arbitrary and capricious and violative of the APA. Plaintiffs further contend the decision to ban re-petitioning violates Plaintiffs' rights under the Fifth Amendment to Due Process and Equal Protection of the Law.

ARGUMENT

I. VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT (APA)

The APA requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Agency action is "arbitrary and capricious if the agency has . . . 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." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (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. *Id.*; *Humane Soc'y of U.S. v. Locke*, 626 F.3d. 1040, 1053 (9th Cir. 2010).

"One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, ___ U.S, ___ 136 S.Ct. 2117, 2125 (2016). Where an agency has failed to articulate an explanation for its action "clear enough that its path may be reasonably discerned, such action is arbitrary and capricious", *Id.*; *Fence Creek Cattle Co. v. U.S. Forest Service*, 602 F.3d 1125, 1132 (9th Cir. 2010). A decision is arbitrary and capricious if the agency: (1) relied on factors Congress did not intend it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation that runs counter to the evidence before the agency; or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010). Here, the DOI violated all of these standards, not just one.

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

First, it relied on factors Congress did not intend it to consider in prohibiting re-petitioning. Regardless of whether a re-petitioning ban existed in the 1994 rules, the DOI lacks statutory authority to enact such a ban and, therefore, its promulgation relied upon factors Congress did not intend for it to consider. Second, it entirely failed to consider an important aspect of the problem, namely, the effect on those once-denied tribal groups like the Chinook that would be permanently disadvantaged by the failure to adopt the proposed rule allowing re-petitioning. It forever forecloses them from ever achieving tribal status, from ever being able to achieve self-determination and from ever receiving the extensive benefits conferred upon federally acknowledged tribes. Third, the explanation given by the agency for the failure to adopt the proposed rule allowing re-petitioning runs counter to the evidence before the agency. Fourthly, that explanation is implausible and cannot be ascribed to the agency's expertise.

A. There Should Be No *Chevron* Deference to the DOI

The Defendants contend that this court is obligated to defer to the decisions of the agency pursuant to "C*hevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court held that where a statute the agency is charged with administering is ambiguous on "the precise question at issue," the court should defer to the agency's interpretation of that ambiguity so long as the interpretation (usually expressed in an implementing regulation) is reasonable. *Chevron* has had many critics especially in recent years and its continuing viability is an open question, especially after the recent Supreme Court's decision in *Kisor v. Wilkie*, ___ U.S. ___ 139 S.Ct. 2400 (2019). *Chevron* respects the right of agencies to apply their institutional expertise to fill gaps in the statutory schemes created by Congress, but that respect is premised on Congress itself, as the law-making body of the United States, having directed the agencies to act through legislation, but *Chevron* does not divest courts of their fundamental function of interpreting the laws. In applying *Chevron*, the court must first consider whether "the intent of congress is clear." If so, that ends the

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

inquiry. If, however, the statute is silent or ambiguous with respect to the issue then the court determines whether the agency engaged in a permissible construction of the statute. *Chevron*, *Supra,* 467 U.S. at 842; *Glacier Fish Co. LLC v. Pritzker*, 832 F.3d. 1113, 1120 (9th Cir. 2016).

The Re-Petitioning Ban is *Ultra Vires*

The 2015 Final Rule includes a one-paragraph section titled "Legislative Authority" which listed the enabling statutes DOI was relying upon in promulgating the regulatory overhaul as 25 U.S.C. §§ 2, 9 and 43, U.S.C. § 1457. DOI argues that these statutes provide the necessary authority to adopt a ban on re-petitioning. In those laws, Congress granted the Assistant Secretary Indian Affairs authority to 'have management of all Indian affairs and of all matters arising out of Indian relations.' This authority included the power to administratively acknowledge Indian tribes. The Congressional findings that supported the Federally Recognized Indian Tribe List Act of 1994 also expressly acknowledged that Indian tribes could be recognized "by the administrative procedures set forth in Part 83 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 103-0454 § 103(2), (3), (8) (November 2, 1994); 80 Fed. Reg. 126 at 37,885 (July 1, 2015) (AR0000865, 869) (hereinafter "Final Part 83 Rule"). While the agency clearly has authority to determine which Indian tribes should be acknowledged under federal law (*Kahawaiolaa*, *supra*), those laws provide no authority to DOI to forever exclude any Indian tribes from participating in the acknowledgment process by petitioning for re-reconsideration, especially following the adoption of new relaxed acknowledgment standards or based upon new information that, if applied, could result in acknowledgment.

In that regard, the draft rule, by its express terms would have allowed re-petitioning "if the previously unsuccessful petitioner . . . proves, by a preponderance of the evidence, that

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

a change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination or that the "reasonable likelihood" standard was misapplied in the final denial." (AR005688); (AR0006644) attach 1 p. 19 T. Tienson Dec., Ex. "F." As internal comments by one "BCSK" disclosed, DOI fully recognized that lowering the standards for acknowledgment would reinforce the need for a re-petitioning opportunity for those who were previously denied, like the Chinook; because such a lowering meant ". . . it is [a] weakening of the standard, *raising question of re-petitioning*." (emphasis added). (AR0006640), comment [A50], p. 21; Tienson Dec. Ex. C.

Plaintiffs submit the absence of any express statutory authority to ban re-petitioning by once-denied 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 is not in accordance with the law and therefore *ultra vires* and violative of the APA. 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, the statute need not explicitly prohibit re-petitioning. *New Mexico v. Department of Interior*, 854 F.3d 1207, 1222-23 (10th 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 (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."). Plaintiffs submit that the existence of express statutory authority is necessary to effectively nullify or terminate a tribe's existence and that statutory authority must include the authority to prohibit any re-petitioning for formal acknowledgment. It cannot be done by regulatory implication. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

In regard to the DOI's authority for acknowledging an Indian tribe, see AR0006644,

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

Ex. "E" to Tienson Dec. That document is a Notice informing the public of DOI's intent to revise its procedures for acknowledgment. Its significance is that it accurately states the full extent of the DOI's statutory authority: to adopt "[p]rocedures for establishing that an Indian Group exists as an Indian Tribe." There is no authority to prohibit tribal groups, even those once denied, from re-petitioning for acknowledgment especially when, as that same Notice reflects, the new rules are intended to improve the acknowledgment process, to make "consistent, well-grounded decisions" instead of the "burdensome, less transparent" decisions of the past. *Id*. p. 2.

Assertions of power by DOI/BIA must also "conform to Congressionally determined Indian policy." *Cohen's Handbook of Federal Indian Law*, § 2.01 (2017) ("*Cohen's Handbook*"). Congressional Indian policy is clearly and unambiguously intended to *benefit* Indian peoples and tribes. *See, e.g.*, 25 U.S.C. § 5302 (Indians Self-Determination Education Assistance Act) "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…" "It shall be the function and the duty of the Secretary of the Interior to . . . to *promote* the economic welfare of the Indian tribes and Indian individuals…" § 305(a). For the last 50 years, the cornerstone of Congressional Indian policy has been to promote tribal self-determination. *See, e.g.*, *Morton v. Mancari*, 4017 U.S. 535, 541-42 (1974). (emphasis added).

That policy was premised on the "concept of self-governance" and strengthening of trial governments. *Cohen's Handbook* cited the American Indian Policy Review Commission Final Report in 1977, which urged that future legislation regarding Indian policy be based on several objectives, including "reaffirmation and strengthening of the doctrine of tribal sovereignty and the trust relationships; increased financial commitment to the economic development of tribes and improvement to the standard of living of off-reservation Indians…and *federal recognition of terminated and other non-federally recognized tribes,*

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

including the extension of federal services to them." *Cohen's Handbook* § 107 (emphasis added). The Secretary of Interior is obligated to make regulations to protect and benefit Indians. 43 U.S.C. § 1415 ("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.") *United States v. Kemp*, 169 F.Supp. 568, 572 (E.D. Wa, 1959). The preamble to the revised Part 83 regulations states that they were made for the "benefit of Indian tribes." 25 C.F.R. § 83.2. That policy of benefitting and protecting Indians is not limited to federally recognized tribes but includes all Indian peoples. See *Cohen's Handbook* § 107 ("Self-determination opportunities prompted non-recognized groups to agitate for acknowledgment of their tribal status.") Forever prohibiting the Chinook and other similarly situated tribes from ever receiving the benefits of federal acknowledgment by prohibiting them from re-petitioning under the new regulations is thus contrary to congressional intent as expressed through numerous laws over a long period of years and the ban is completely antithetical to the entire motivation behind the adoption of the 2015 regulations.

The re-petitioning ban is not just lacking in express statutory authority, it frustrates the very policy Congress sought to implement (". . . we must reject those constructions that are contrary to clear congressional intent or frustrate the policy Congress sought to implement."); *Biodiversity Legal Foundation v. Badgley*, 309 F.3d. 1166, 1176 (9th Cir 2002). Accordingly, this court should not afford any deference to the DOI in adopting the re-petitioning ban.

Further, DOI is not entitled to any deference because it did not use its agency expertise. It failed to demonstrate that the decision it made to ban re-petitioning was of a type entrusted to an agency's expertise. It is therefore entitled to no deference. See, *Mayo Foundation for Medical Education & 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."

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1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
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Chevron deference is also inappropriate where the reasoning for the agency's actions, administrative efficiency, is "self-serving." *Amalgamated Sugar Company 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 *National Fuel Gas Supply v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987). For all of the above reasons, DOI's claimed "interpretation" of its statutory authority should be afforded no *Chevron* deference.

B. DOI Failed to Consider an Important Aspect of The Rule

A decision based upon agency self-interest cannot be upheld where, as here, there is no support in the record to justify its claim of administrative convenience and where that concern is outweighed by more significant and competing concerns. See *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) ("Any 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." That potential for harm to previously denied petitioners like the Chinook who believe they would be able to satisfy the newly adopted standard for acknowledgement is of overriding concern here and yet it was not even mentioned by the DOI. Instead, DOI focused only upon alleged harm to existing petitioners, claiming that re-petitioning would be unfair to petitioners who have not yet had a review and would impose "an additional workload on DOI." Final Part 83 Rule at 37,875 (AR0000865@879). See also, Tienson Dec., AR0006640, pp. 80-81, Ex. "C" in which DOI admits it never considered the administrative burden the new rule placed on re-petitioners, only that on new petitioners and then only "in collecting information to develop and submit the documented petition" *Id*.

C. DOI's Explanation for the Re-Petitioning Ban Runs Counter to the Evidence Before the Agency

DOI's explanation for reversing itself and deciding instead to ban all efforts to re-

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
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503.228.5222 ▪ 503.273.9175 (facsimile)

petition was as follows:

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

Final Part 83 Rule at 37,875 (AR0000865@879).

First, the rule does not "promote consistency." It entrenches the decisions the agency has admitted were inconsistent and unfair. Further, there is no support for the contention that the adoption of limited re-petitioning would adversely affect the wait time of current or future petitioners. In fact, the record demonstrates that wait time for review was not considered at all by the Defendants. *Haliwai-Saponi Indian Tribe Comment* (AR0006521@6523) ("Under Section 83.4 tribes reapplying for recognition should be given a time frame for review. It is unclear whether they must go to the back of the line once OHA (Office of Hearings and Appeals) determines that they satisfy the criteria to re-petition." According to BIA's own website, only three petitions are currently pending and six groups "will become" petitioners if and when they supplement their petitions. [4] DOI makes no effort to explain how it is that any of this small number of petitioners would be adversely affected by permitting the Chinook and other previously denied petitioners to re-petition in an effort to demonstrate they can now satisfy the new eligibility criteria. Moreover, and as the draft rule expressly contemplated, the Chinook and others similarly situated would be allowed to re-petition *only* after a judge first considered their evidence in light of the new regulations and then made a decision to allow the tribe to re-petition because it showed a likelihood of prevailing. AR0005688. This threshold requirement would virtually ensure there would be

[4] Office of Federal Acknowledgment (OFA), petitions in process, https://www.bia.gov/as/ia/ofa/petitions-process (last visited Oct. 2, 2019)

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503.228.5222 ▪ 503.273.9175 (facsimile)

no administrative burden created by re-petitioning.

Second, there is no evidence in the record to support the claim that there would be any increased workload. In fact, the BIA admitted there would likely be no increased administrative burden, conceding that the proposed rule would not open the floodgates to new petitions (see interview between Assistant Secretary of Indian Affairs Washburn and Hawaii State Tribes (AR006617@6622-23)). (Washburn: "I am doubtful that many groups would deserve reconsideration under the proposed rule…"). Tienson Dec. Ex. "C" (AR0006640) comment [A76] p. 41 ("Questionable how many viable petitioners are out there"). In that same summary of the rule, DOI's response to a commenter concerned about administrative efficiency and delays because of the adoption of the new rule, to include re-petitioning, was that "… the Department disagrees with the assertions that the rule will slow down the acknowledgment process. . ." *Id.* p. 83, thereby undermining the claim of administrative burden. Moreover, the initial pre-screening by the Office of Hearings and Appeals (OHA) and the assigned judge would not only substantially reduce any administrative burden by restricting re-petition applicants to only those very few who would likely be successful, but the pre-screening burden would not be borne by the Office of Federal Acknowledgement, which evaluates new and existing petitions. Finally, re-petitioners could be made to go to the back of the line and thus not disadvantage anyone.

As a result, there is no rational basis to support the DOI's purported justification for prohibiting re-petitioning. See also *United States v. Udy*, 381 F.2d 455, 458 (10th Cir. 1967) (ease of administration does not make an administrative determination any the less arbitrary when it otherwise had no substantial evidence to support it."). Even assuming there would be some increase in workload, DOI could even further limit the scope of a re-petitioning by restricting re-petitioning to only those very few tribes, like the Chinooks, who were once recognized – although the Chinook do not recommend that limitation. DOI however never considered any other alternative means of addressing its purported concerns

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

about workload, let alone the concerns of previously denied petitioners who might qualify for acknowledgment under the new rule.

The Defendants claim that the new rules promote "transparency," "fairness," "flexibility," and "integrity." The ban on re-petitioning promotes none of these principles. It is certainly not fair to forever ban the victims of an admittedly broken and inconsistent process from re-applying. There can be no integrity to such a process either. And it is not flexible if the Defendants refuse to even consider new evidence or allow one-time victims of its prior broken and inconsistent process to re-apply under less stringent rules knowing full well, as the draft rule recognized, that they very well may be able to satisfy them and achieve acknowledgment. And, finally, where is the transparency when the agency makes no effort to identify how many viable re-petitioners there may be and no attempt to quantify or explain how it would be burdened by allowing limited re-petitioning?

The Defendants' further contention that re-petitioning is unnecessary because there was no significant change to their acknowledgment criteria in the 2015 regulations is completely unsupported and plainly erroneous. There were several significant changes made in the 2015 Rules, all of which serve to relax or reduce the burden on petitioners for acknowledgment. Tienson Dec., Ex. "E", "Highlights of the Final Federal Acknowledgment Rule." (Information Fact Sheet) from the Asst. Secretary for Indian Affairs sets forth many, but not all, of the substantive changes wrought by the new Rules. The first such substantive change is described by the agency as follows:

> "The final rule promotes fairness and consistent implementation by providing that prior decisions finding evidence or methodology sufficient to satisfy any particular criterion is sufficient to satisfy the criterion for a present petitioner. The final rule further promotes consistent application by establishing a uniform evaluation period of more than a century, from 1900 to the present to satisfy tribal identification, community and political authority."

Tienson Declaration, Ex. E. As that Exhibit, points out, the previous rules required petitioners to show continuous identification from "first sustained contact" *Id.* at p. 2.

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

Importantly "the new final rule also allows the department to accept any and all evidence, such as the petitioner's own contemporaneous records as evidence that the petitioner has been an Indian entity since 1900." *Id*. at p. 2. So, newspaper reports, accounts by tribal citizens, and attendance at Indian schools, will now for the first time be considered instead of ignored by the OFA. The new rule also eliminates a third party's ability to seek limited reconsideration of a final decision", the only reason the Chinook's petition was ultimately denied.

As if to underscore the inconsistent treatment of earlier acknowledgment petitions and the extraordinary evidentiary burden placed on prior petitioners, one DOI staff member noted that the requirement to demonstrate "substantially continuous historical identification by authoritative knowledgeable external sources of leaders and/or governing body that exercises political influence or authority, together with a demonstration of one form of evidence listed in 83.11(c), was deleted, "because in practice, no petitioner has met this standard." AR0006640 p. 70 (Tienson Dec. Ex. "C")

Perhaps the most substantive change in the 2015 Rule is the effort to "clarify" the evidentiary burden for the seven-part criteria in which, DOI "sought to codify its non-regulatory precedent and procedures in Part 83" by allowing a petitioner to satisfy 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 38,878-79 (AR0000865@882-83) Accordingly, current and future petitioners now have the benefit of being able to point to any previous petitioner's success on any criterion as a "baseline" and then satisfy that criterion with the same or similar amount of evidence.

Before the adoption of the new rules, 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: October 2, 2019). Because of the ban on re-petitioning, none of these 33 previously denied petitioners can utilize this same "baseline" process that current

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

petitioners are allowed to do. The Defendants completely ignore that significant change in the rule because, "strictly speaking", it did not modify any one specific criterion for acknowledgment; it modified them all. The newly adopted "consistent baseline approach" will affect and relax the evidentiary burden for not just the Chinook, but for all petitioners in the future and for all mandatory criteria by curing the inconsistency the agency demonstrated in making its earlier decisions and that the agency itself acknowledged was a primary reason for allowing re-petitioning. *See* transcript of interview with Assistant Secretary Washburn. *Id.* (AR00617@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."). Illustrative of that inconsistent decision-making is the fact that, as the Defendant admitted, fully "72% of . . . currently recognized federal tribes could not successfully go through the [Part 83] process as it is being administered today." 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). (quoting Rev. John Norwood Delegates Report, the National Congress for American Indians Annual Conf. 1 (2010).

There is yet another significant relaxation in the new 2015 Rules unmentioned by DOI. It is now only necessary that a petitioning tribe establish a "reasonable likelihood of the validity of the facts relating to that criterion." 25 C.F.R. § 83.6(d). Heretofore, as commenters pointed out, that standard evolved and became more stringent over the years and was not consistently applied, resulting in unfair denials (AR0009144-45); AR0006640 p. 37, Tienson Dec., Ex. "C" (AR0003943); (AR0007960). Indeed, the draft rule expressly identified misapplication of the reasonable likelihood standard in the final denial as one of two alternative pre-requisites for a tribe to be allowed to re-petition (AR0005688). Plaintiffs and other similarly situated tribes should be allowed the opportunity to take advantage of this

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

change in the rules as well.

Of course, it was important for the DOI to assert, albeit falsely, that there were no changes to the criterion standards for acknowledgment because, as the agency recognized, if there were substantive changes, then re-petitioning should be allowed. Thus, when the Draft DOI Summary of the Rule suggests that the door should be left open to some re-petitioning, "BCSK" is quick to assert that there were no changes in the standard criteria and therefore, ". . . why would one allow re-petitioning?" AR0006640, p. 41 comment [A76] Tienson Dec., Ex. "C."

Failure to Adopt a Draft Policy is Subject to the APA

Where, as here, the agency initially proposed to include at least limited re-petitioning, the agency must explain and provide a "reasoned explanation for that change when it adopts a contrary conclusion." *Alaska Oil & Gas Association v. Pritzker*, 840 F.3d 671, 682 (9th Cir. 2016). Failure to do so is arbitrary and capricious. *Humane Society of U.S. v. Locke*, 626 F.3d 1040, 1053 (9th Cir. 2010);

If an agency proposes a policy or regulation and then decides against adopting its earlier draft regulation or policy, that decision is subject to the APA.

> ". . . [A] policy change violates the APA 'if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so'"

Organized Village of Kake v. U.S. Dept. of Agriculture, 795 F.3d 956, 966 (9th Cir. 2015) (citing Justice Kennedy's concurring fifth vote opinion in *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 537 (2009). *See also*, *Animal Legal Defense Fund v. Veneman*, 469 F.3d 826 (9th Cir. 2001); *vacated on other grounds* 490 F.3d 725 (2007) (*en banc*), concluding that a draft policy of an agency followed by a decision to not adopt the draft policy was reviewable under traditional APA analysis.

As for the contention that the ban on re-petitioning has been in place since 1994, this was an argument that was not mentioned or relied upon in the 2015 Final Rule and

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

effectively constitutes a *post-hoc* rationalization that this court cannot and should not consider. *Arrington v. Daniels*, 516 F.3d. 1106, 1113 (9th Cir. 2008); see *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947). HN22 "[A] reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency." "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.* at 196. The agency for the first time now also claims that one of the underlying purposes of the re-petitioning ban was to preclude parties from contesting matters that they have had a full and fair opportunity to litigate", that it "models the concept of finality and claim preclusion" and that it promotes the conservation of resources and the fostering of reliance on rulings by minimizing the possibility of inconsistent decisions." (Defs' Motion at 13). There is nothing in the Federal Register to support these *post-hoc* rationalizations. To the contrary, DOI stated only that "given the number of pending petitions as well as those that have not been submitted or have not submitted complete petitions, the final rule does not allow re-petitioning." See Tienson Declaration, Ex. A, p. 3. The explanations therefore should not be considered or given any weight for that reason alone. Moreover, claim preclusion would not apply because of the relaxed standards established for acknowledgment "in the new Rule." Applying the doctrine would result in a manifest injustice under such circumstances and accordingly cannot justify imposing the re-petitioning ban.

> The BIA's determination of tribal status is an adjudicative decision…. However, collateral estoppel does not apply to an agency's adjudicative determination if the legal standard governing the previously litigated issue is "significantly different." (citing *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F.Supp.2d 192, 199 (2nd Cir. 1992)
>
> The legal standards governing the determination of tribal status under the proposed changes to the Federal Acknowledgment Process at 25 C.F.R. Part 83 are significantly different. The changes in that rule are potentially outcome determinative for previously denied petitioners. Further the third party veto is an interference with the tribal-federal relationship." For all these reasons, the third party veto is improper and should be removed from the proposed Rule. comments of ASU College of Law Indian Legal Clinic. (AR0000008-9)

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

The fact that the Chinook were previously denied acknowledgement upon reconsideration and then failed to appeal that denial is irrelevant. There are new less restrictive acknowledgment standards now in place and a "clarified" and reduced evidentiary burden. Regardless, an appeal would have been futile without the revised standards contained within the 2015 Regulatory "overhaul" and with the continuing opposition of the powerful Quinault Indian Nation. See, *Agua Caliente Tribe of Cupeno Indians of Pala Reservation v. Sweeney*, 932 F.3d. 1207, 1218 (9th Cir. 2019) (futility is a recognized exemption from any exhaustion requirement).

In sum, the DOI's announced justifications for the ban on re-petitioning are not factually supported and they are completely inconsistent with the entire purpose for adopting the regulatory overhaul.

> "We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decision making process…We cannot ignore the disconnect between the decision made and the explanation and given….The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."

Department of Commerce v. New York, ___ U.S. ___ 139 S.Ct. 2551, 2575-76 (2019).

II. Equal Protection is Denied

The Defendants have violated the Equal Protection component of the Fifth Amendment by failing to treat the Chinook and other once-denied petitioners in the same manner as similarly situated tribes whose petitions have not yet been the subject of a Final Determination. The BIA's ban on re-petitioning creates a situation where the Chinook would be able to succeed in obtaining federal acknowledgement under the current Part 83 standards if allowed to re-petition because of the relaxed criteria, and clarified "reasonable

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

likelihood" standard and the required application of a "consistent baseline," but instead are forever prohibited from being acknowledged. The permanence of the ban on re-petition was questioned by BIA staff and some of them suggested allowing a later re-petitioning effort (AR0006640) p. 40 Tienson Dec., Ex. "C."

Rational basis review applies to Equal Protection challenges to Department of Interior regulations regarding Indian Tribes. *Kahawaiolaa, supra*, at pp. 1279-80. However, there is simply no rational basis for that discriminatory treatment. The ban effectively favors some tribal groups - - those groups whose petitions for acknowledgment have not yet been determined- - for no valid reason. As such, the ban cannot survive Equal Protection scrutiny. The CIN should be given an opportunity to avail itself of the new Rules to become a federally acknowledged tribe.

In essence, the Department's decision to eliminate re-petitioning for a small number of once-denied petitioners with potential viable claims under the new relaxed recognition rules is a classic case of government enacting laws to discriminate against a disfavored or unpopular group - - tribal groups that have been denied formal recognition. Perhaps the most instructive Supreme Court case involving an arbitrary restriction of benefits for a particular group perceived as unpopular is *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973). In that case, plaintiff challenged the constitutionality of an amendment to the Food Stamp Act of 1964, which redefined the term "household" to limit the program's eligible recipients to groups of related individuals. *Id*. at 529-30. While noting the "little legislative history" available on the amendment, the Court concluded that the legislation was aimed at groups that were unpopular - - so called "hippies" and "hippy communes." *Id*. at 534. The court struck down the law finding there was no rational basis between the announced purpose of the law and its "practical operation." More recently, in *Diaz v. Brewer*, 656 F.3d. 1008 (9th Cir. 2011), the court considered an Arizona State benefits program that limited eligibility to married couples. The state contended the law was rationally related to the

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

State's interest in cost savings and reducing administrative burdens. The 9th Circuit struck it down, holding the law was not rationally related to furthering such interests. The same is true here.

As commenters pointed out in their official comments, the proposed third-party veto is also a violation of equal protection. *See, e.g.*, *Association on American Indian Affairs* (September 29, 2014) (AR0007585@7586) ("We very much oppose the third party veto….To totally deny these tribes the right to re-petition over third party objections, however, may very well violate their right to equal protection of the laws . . .). Again, such difference in treatment between tribal groups whose petitions have not yet been finally determined and those who have been once denied, but seek to re-petition because of the relaxed standards just adopted is irrational. There is no reasoned basis for such discrimination. It therefore violates the Equal Protection component of the Fifth Amendment.

III. Due Process Violation

Plaintiffs concede that they have no present ability to challenge the re-petitioning ban as a violation of their First Amended right to Petition for Redress, or to challenge their earlier denial now on Due Process grounds. However, Plaintiffs contend that the DOI's decision to reject its draft rule allowing re-petitioning was unlawful and if that ban is overturned by this court, as Plaintiffs submit it should be, then the third party veto provision should be deleted as a violation of the Due Process Clause of the Fifth Amendment. There is no valid factual or legal basis for the Defendants to confer full-party status on another Indian tribe that is not seeking recognition in an adjudicative fact-finding process. Notice and an opportunity to be heard is sufficient to satisfy Due Process for affected or interested third parties. See, *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); AR0006640 p.62 comment [A112], Tienson Dec. Ex. "C."

A host of comments identified further objections to the third party veto:

LANDYE BENNETT BLUMSTEIN LLP
1300 SW Fifth Avenue, Suite 3600
Portland, Oregon 97201
503.224-4100 ▪ 503.224-4133 (facsimile)

THOMAS, COON, NEWTON & FROST
820 SW Second Avenue, Ste. 200
Portland, OR 97204
503.228.5222 ▪ 503.273.9175 (facsimile)

> "Other commenters stated that more limits on third-party participation should be imposed because third parties improperly weigh in on acknowledgment petitions based on land-into-trust issues, taxation, discrimination, gaming fears, financial and political pressures, and other factors that do not address whether the petitioner meets the criteria. . . . . Commenters provided suggestions for prohibiting or eliminating third party review, including imposing a requirement for comments and evidence to be directly relevant to whether the petitioner meets criteria."

Id. p. 43

- "Is unfair as that will not get to the truth of whether a tribe should be acknowledged;
- Treats tribe petitioners unequally;
- Allows for political intervention in what should be a fact-finding process;
- Is an illegal delegation of authority under the Appointment Cause and is legally unprecedented;
- Is illegal for other reasons (Fifth Amendment Due Process Clause, Supremacy Clause, Commerce Clause, Arbitrary and Capricious);
- Is based on an invalid justification (established equities) that fails to consider petitioner's interests; and/or
- Is politically motivated by Connecticut's influence."

Id. at p. 39. Plaintiffs submit all of those are in fact valid objections to the third party veto and valid arguments supporting the need for re-petitioning, but it is certainly violative of a re-petitioner's right to Due Process.

CONCLUSION

For all of the foregoing reasons, Defendants' Motion for Partial Summary Judgment on Plaintiffs Claims for Relief II-V should be denied and Plaintiffs' Cross-Motion for Summary Judgment on those same claims should be granted.

DATED: October 21, 2019.

LANDYE BENNETT BLUMSTEIN LLP

By: *s/ Thane W. Tienson*

Thane W. Tienson, WSBA #13310
ttienson@lbblawyers.com
James S. Coon, *Admitted Pro Hac Vice*
jcoon@tcnf.legal
Attorneys for Plaintiffs