

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BURT LAKE BAND OF OTTAWA AND
CHIPPEWA INDIANS,

Plaintiff,

v.

THE HONORABLE DAVID BERNHARDT,
et al.,

Defendants.

Case No. 1:17-cv-00038-ABJ

**FEDERAL DEFENDANTS’ REPLY IN SUPPORT OF THEIR
CROSS-MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

In its 1994 revisions to regulations governing the federal acknowledgment process (the “Part 83 process”), the United States Department of the Interior (“Department”) added a provision prohibiting unsuccessful petitioners from re-petitioning. In 2015, the Department declined to revise or eliminate the re-petition ban. *See* 25 C.F.R. § 83.4(d) (2015).

The Burt Lake Band of Ottawa and Chippewa Indians (“Plaintiff”) is such a petitioner, having unsuccessfully sought federal acknowledgment under the 1994 regulations. Over a decade later, Plaintiff now seeks to overturn the ban on re-petitioning and relitigate the merits of its petition. To that end, Plaintiff asserts violations of the Administrative Procedure Act (“APA”), the Due Process Clause of the Fifth Amendment, and the Equal Protection Clause of the Fifth Amendment. *See* Pl.’s Opp’n to Defs.’ Cross-Mot. for Summ. J. and Reply in Supp. of Pl.’s Mot. for Summ. J. at 1, ECF No. 32 [hereinafter, “Pl.’s Opp’n”].

This Court should grant summary judgment in favor of Federal Defendants. The Department, whose determination warrants judicial deference, did not act arbitrarily and capriciously in retaining the re-petitioning ban in the 2015 regulations. Furthermore, Plaintiff had a full and fair opportunity to petition for federal acknowledgment under the 1994 regulations and voluntarily declined to avail itself of the myriad of appellate options available under Part 83 and the APA. In addition, Plaintiff has failed to establish a protected liberty interest to which due process would attach or establish that it was treated differently than any other entity in violation of equal protection. Plaintiff's argument are without merit.

II. ARGUMENT

A. Federal Defendants are Entitled to Summary Judgment on Plaintiff's APA Claim.

Throughout its Opposition, Plaintiff adopts an overly simplistic view of the Department's role in Indian affairs. Plaintiff theorizes that because the Department has broad responsibility over Indian affairs, any regulation, no matter how reasonable, that could negatively impact an Indian group exceeds the Department's authority, is not entitled to deference, and violates the APA.¹ This claim fails on multiple grounds.

1. The Department did not exceed its statutory authority.

Plaintiff's first APA claim alleges that the Department exceeded its statutory authority by retaining the re-petitioning ban in the 2015 revision of the Part 83 regulations. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862 (July 1, 2015) (the "Final Rule"). According to Plaintiff, the Department contradicted Congress's express intent that Department regulations may *only* benefit Indian people. *See* Pl.'s Opp'n at 1. Contrary to

¹ Furthermore, as discussed *infra* in the Due Process Clause section, the Part 83 procedure has enough safeguards to ensure that any harm resulting from a re-petitioning ban is minimal.

Plaintiff's assertion, the ban on re-petitioning does not counteract "Congress' clearly stated objectives." *Id.*

As a preliminary matter, Congress has delegated to the Secretary of the Interior (the "Secretary") "management of all Indian affairs." 25 U.S.C. § 2. The Secretary further has the authority to promulgate regulations concerning "any act relating to Indian affairs." 25 U.S.C. § 9. The plain language of these statutes affords the Secretary broad discretion regarding Indian affairs, and Plaintiff does not dispute that the Department "has the authority to determine which Indian groups exist as [federally-recognized] tribes." Pl.'s Opp'n at 8. That power goes hand-in-hand with a related responsibility that Congress has entrusted to the Department: ensuring the accuracy of the *Federal Register's* list of federally-recognized tribes, which is the list used "by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States." 25 U.S.C. § 5130 notes (Congressional Findings ¶ 7).

With these broadly conceived statutes in mind, at least one court upheld the Department's authority to promulgate the acknowledgment regulations, despite the fact that "[n]o statute explicitly authorizes the Secretary of the Interior to promulgate regulations concerning the acknowledgment of Indian Tribes." *See Miami Nation of Indians of Ind., Inc. v. Babbitt*, 887 F. Supp. 1158, 1163 (N.D. Ind. 1995) (noting that the Secretary relied upon his general statutory authority contained in 25 U.S.C. §§ 2 and 9 when promulgating the acknowledgment regulations" and upholding those regulations) (citation omitted). And as noted, Plaintiff itself does not dispute the Department's authority to promulgate regulations governing the Part 83 process.

Plaintiff's next theory is that any regulation that allegedly negatively impacts Indian people presumptively violates the APA as contrary to Congress's express intention that the Department protect and benefit Indians in every circumstance. Pl.'s Opp'n at 15.² At the outset, the Department unquestionably is tasked with assisting the United States in carrying out its trust responsibility towards Indians and in furthering tribal self-governance. The myriad of statutes and court cases Plaintiff cites in its brief, *id.* at 13–15, support this point, with which Federal Defendants agree. But nowhere from these statutes or cases does there derive a principle that as a matter of law, Department regulations are presumptively invalid if they are perceived to negatively impact Indians in any way. Plaintiff cannot bootstrap an APA violation from its dissatisfaction with the results of its unsuccessful, and unchallenged,³ Part 83 petition. *See, e.g., Daingerfield Island Protective Soc'y v. Babbitt*, 823 F. Supp. 950, 954 (D.D.C. 1993) ("We are not called upon to agree or disagree with [the agency's] actions. The APA forbids substituting a court's judgment for that of the agency, and requires us to affirm an agency action if a rational basis exists for the agency decision."); *accord Presinzano v. Hoffman-La Roche, Inc.*, 726 F.2d 105, 110 (3d Cir. 1984) (disagreement with agency action insufficient "to show that that decision was based on irrelevant factors or that the judgment of the officials was 'clear error'" (citation omitted)).

Furthermore, Plaintiff's reliance on congressional intent to bolster its argument is misplaced; Congress repeatedly qualifies statutes benefiting Indians so that they apply only to federally recognized tribes, not unrecognized groups like Plaintiff. Plaintiff cites the Indian Self-

² Plaintiff supports this proposition with a citation to 43 U.S.C. § 1457. That statute merely charges the Department with "the supervision of . . . Indians" among many other things.

³ Federal Defendants reiterate that Plaintiff's suit is limited to the question of whether the re-petition ban is arbitrary and capricious under the APA. As discussed *infra*, Plaintiff repeatedly attempts to use this lawsuit as a means by which to re-litigate the merits of its Part 83 petition. The statute of limitations has long since passed for doing so either administratively or in federal court.

Determination and Education Assistance Act of 1975 (the “ISDEAA”) to support its claim that “[c]ongressional policy intended to benefit and protect Indians is not limited to federally recognized tribes, but includes all Indian peoples.” Pl.’s Opp’n at 15. However, the ISDEAA, by its own terms, applies only to federally recognized tribes, defining “Indian” for the purpose of the statute as “a person who is a member of an Indian tribe” and defining an “Indian tribe” as any “Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. § 5304(b).

Similar language appears throughout Title 25 of the United States Code, underscoring Congress’s intent to provide various benefits solely to federally recognized tribes. For example, the Indian Health Care Improvement Act of 1976 was enacted to “implement the Federal responsibility for the care and education of the Indian people.” Pub. L. No. 94-437, 90 Stat. 1400 (codified at 25 U.S.C. §§ 1601–1685). Like the ISDEAA, it defines “Indian” as “any person who is a member of an Indian tribe” and further defines an “Indian tribe” as one that is “recognized as eligible for the special programs and services provided by the United States.” 25 U.S.C. § 1603; *see also* Indian Financing Act of 1974, 25 U.S.C. § 1452(c) (defining tribe to mean “any Indian tribe, band, group, pueblo, or community . . . which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs”); 25 U.S.C. § 2021(20) (defining “Tribe” as one “recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians”). In sum, Plaintiff’s reliance on congressional intent is inapposite here, where laws to benefit Indian tribes consistently apply, by their own terms, only to federally recognized tribes.

Next, Plaintiff frames the Department's alleged regulatory excess as "a draconian decision to adopt an absolute prohibition on re-petitioning under any circumstances—and thereby definitively exclude dozens of groups from ever achieving self-determination." Pl.'s Opp'n at 16. Plaintiff seems to suggest that the re-petition ban therefore exceeds congressional intent to benefit Indians by permanently excluding them from any federal benefits or the opportunity to participate in self-governance. *Id.* But as discussed in further depth *infra*, Plaintiff mischaracterizes the nature of the re-petition ban. The ban applies *only after* petitioners have had numerous opportunities to gather and present evidence, receive technical assistance from the Office of Federal Acknowledgment (the "OFA"), respond in writing to OFA's proposed findings, avail itself of various administrative appeals, and challenge the merits decision under the APA in federal court. Plaintiff was afforded all of these opportunities, and even now, remains free to seek congressional recognition. The Department did not exceed its authority by making an informed determination that this process satisfies congressional intent even absent an opportunity to re-petition and Plaintiffs have pointed to no legal authority to support that position.

Finally, the re-petition ban has been codified in regulation since 1994. For twenty-five years, Congress has declined to amend this regulation, despite Plaintiff's argument that the re-petition ban flies in the face of longstanding and express congressional intent. As this Court has stated, while it "always exercises caution when construing legislative silence in the form of Congress' failure to enact a statute, it cannot ignore the evidence indicating that Congress is aware of the agency's regulations . . . but has nevertheless failed to act." *United Houma Nation v. Babbitt*, No. 96-2095, 1997 WL 403425, at *8 (D.D.C. July 8, 1997). In this case, "Congress was obviously aware of the policy in question and consciously acted or did not act in response to that

policy.” *Inner City Broad. Corp. v. Sanders*, 733 F.2d 154, 160 (D.C. Cir. 1984) (internal quotation marks omitted). Congress’s longstanding silence strongly undercuts Plaintiff’s claims as to congressional intent.

2. The Department’s decision to maintain the re-petition ban is entitled to deference.

Plaintiff next claims that the Department’s decision to maintain the re-petition ban in 2015 is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This claim fails.

First, Plaintiff asserts that “DOI failed to identify any statutory provision it was supposedly interpreting.” Pl.’s Opp’n at 2. Nevertheless, as noted above, Congress’s delegation of authority to the Department is clear and the Final Rule lists the relevant statutory authority. *See* Final Rule at 37,888 (citing, *inter alia*, 25 U.S.C. §§ 2, 9 and 43 U.S.C. § 1457). While these statutes are silent on the question of whether to allow re-petitioning, and in fact contain no specific directives whatsoever relating to acknowledgment, federal courts have nevertheless afforded the Department *Chevron* deference in Part 83 challenges. *See, e.g., Miami Nation*, 887 F. Supp. at 1163 (upholding Part 83 regulations despite the fact that “[n]o statute explicitly authorizes the Secretary of the Interior to promulgate regulations concerning the acknowledgment of Indian Tribes”); *United Houma Nation*, 1997 WL 403425, at *8 (“[T]he Department acts based on the statutory authority provided by Congress. And, simply put, that authority is ambiguous on the precise question of federal acknowledgment presented here. Since the Department’s statutory authority is ambiguous . . . the agency’s acknowledgment regulations are entitled to deference under *Chevron*.”).

Plaintiff next contends that the re-petition ban is not entitled to deference because it falls outside the Department’s area of expertise. Pl.’s Opp’n at 2. However, the distinction that

Plaintiff creates between rules governing the substantive review of a petitioner's evidence and rules governing the Part 83 procedure is unwarranted. An agency's expertise extends not only to the substantive review but also to the process. *See In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack."). The Department is in the best position to make decisions about how to achieve the stated aims of the 2015 revisions, as articulated in the Final Rule. *See* 80 Fed. Reg. at 37,862. Moreover, the Department is entitled to deference because of its unique expertise in the determination of acknowledgment of Indian tribes. *See James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138–39 (D.C. Cir. 1987) (noting that "[r]egulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations" and deferring to the Department's "developed expertise in the area of tribal recognition"); *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001).

Third, Plaintiff makes much of its alleged entitlement to the Indian canons of construction. Pl.'s Opp'n at 17–20. That is incorrect for several reasons. First, as Federal Defendants have established, the Indian canons do not inure to the benefit of non-federally recognized entities, particularly in the face of competing Indian interests. Defs.' Cross-Mot. for Summ. J., ECF No. 29 at 23–24 ["Defs.' Cross-Mot."]. As a result, Plaintiff's reliance on the cases cited in its Opposition applying the Indian canons of construction are unpersuasive because those cases involve federally-recognized tribes, not unrecognized groups like Plaintiff. *See* Pl.'s Opp'n at 17–20 (citing cases concerning the United Auburn Indian Community, the Blackfoot Tribe, the Muscogee (Creek) Nation, among others appearing on the list of Indian Entities

Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34,863 (July 23, 2018)).

According to the Supreme Court, “[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.” *Oneida Cnty. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985). Here, the Department has no trust responsibility toward Plaintiff. Plaintiff tries to circumvent that fact by asserting that the Department acknowledged its trust responsibility towards the Cheboygan Band, of which Plaintiff claims to be the successor in interest. Pl.’s Opp’n at 18, 36. However, the Department explicitly found in its Final Determination on Plaintiff’s Part 83 petition that Plaintiff is not a continuation of the historical Cheboygan Band. *See* Final Determination for the Burt Lake Band of Ottawa and Chippewa Indians, Inc., 71 Fed. Reg. 57,995, 57,996 (Oct. 2, 2006). Plaintiff’s disputed, and in fact, rejected, claim to successorship of the Cheboygan Band is immaterial here.

Next, Plaintiff claims that the Department “must also serve as a fiduciary and holds a higher responsibility to the Band (and others similarly situated) when carrying out decisions.” Pl.’s Opp’n at 19. Plaintiff supports this proposition by citing cases concerning the Department’s fiduciary duty to manage specific trust assets for Indians pursuant to individual statutes. *Id.* (citing *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) and *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984)). Not only are these cases entirely inapposite in the Part 83 context, but Plaintiff identifies no federal statute establishing its fiduciary relationship with the Department. And Plaintiff’s assertion that fiduciary responsibilities extend to individual Indians is misguided. *See Miami Nation of Indians of Indiana, Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342, 351 (7th Cir. 2001) (“The federal

benefits for the sake of which recognition is sought are extended to tribes, not to individuals, so if there is no tribe, for whatever reason, there is nothing to recognize.”).

Finally, Plaintiff claims that the Indian canons override any deference to which the Department is entitled under *Chevron*. Pl.’s Opp’n at 17. But as the D.C. Circuit has noted, the canons do not trump *Chevron* deference merely because a case involves federal Indian law. *See, e.g., Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008) (“[A]dherence to *Chevron* is consistent with the customary Indian-law canon of construction” when “the Secretary’s proposed interpretation does not run against any Indian tribe,” but for example, in that case, “only against one of the contestants in a heated tribal leadership dispute.”). That principle applies here. Because Plaintiff does not appear on the list of federally-recognized Indian tribes, the Department’s decision does not run against an Indian tribe and the canons are inapplicable. *Chevron*, and not the Indian canons, is the proper interpretive lens.

For all of these reasons, Federal Defendants’ decision to maintain the re-petition ban in 2015 should be subject to deference and upheld.

3. The Department’s decision to retain the ban on re-petitioning is not arbitrary and capricious.

Plaintiff next alleges that the re-petition ban violates the APA. Pl.’s Opp’n at 20-35. Pursuant to the APA, this Court must uphold the Department’s decision to retain the ban on re-petitioning unless the Department’s decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

Plaintiff bears the burden of showing that the Department acted arbitrarily in retaining the ban. *See Abington Crest Nursing & Rehab. Ctr. v. Sebelius*, 575 F.3d 717, 722 (D.C. Cir. 2009) (noting that the party challenging a regulation under the APA bears the burden of proof) (citation omitted). Although the inquiry must be thorough, the standard of review is narrow and highly

deferential, the Department's decision is entitled to "a presumption of regularity," and the Court cannot substitute its judgment for that of the agency. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). The agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotation marks omitted). When reviewing an agency's interpretation of the statute it administers, and as established above, the Court applies the familiar *Chevron* test. See *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 231 (D.C. Cir. 2003) (applying *Chevron* where plaintiffs alleged that agency's regulations exceeded its statutory authority).

a. The re-petition ban rationally furthers the Department's stated goals.

The Department revised Part 83 in order to "make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the process." 80 Fed. Reg. at 37,862.

Additionally, the Department explained:

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 [the Office of Federal Acknowledgment] in particular. The Part 83 process is not currently an avenue for re-petitioning.

Id. at 37,875. In short, the Department reasoned that the ban on re-petitioning furthers the goals of fairness, efficiency, and timeliness upon which the Final Rule was predicated.

Plaintiff incorrectly alleges that the re-petition ban merely masks the Department's sole interest in reducing its workload for the sake of "administrative convenience." Pl.'s Opp'n at 21.⁴ Plaintiff's skewed interpretation is at odds with Department's stated intent, which was concerned not only with the Department's workload but also with that of petitioning groups. *See, e.g.*, 80 Fed. Reg. at 37,886 (estimating that the "annual burden hours" for entities petitioning for federal acknowledgment will decrease by a minimum of approximately 6,390 hours under the 2015 regulations); *id.* at 37,877 (explaining that the Final Rule "streamlines the phased review and expedites the entire process . . . thereby resolving petitions sooner, reducing time delays, increasing efficiency, and preserving resources"). And as the D.C. Circuit has recognized, "[in] charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively." *Cal. Valley Miwok Tribe*, 515 F.3d at 1267 (quoting *Udall v. Littell*, 366 F.3d 668, 672 (D.C. Cir. 1966)).

The Department's stated goal of increasing efficiency further dovetails with its legitimate interest in administrative finality. *See Procedures for Establishing That an American Indian Group Exists as an Indian Tribe*, 59 Fed. Reg. 9280, 9291 (Feb. 25, 1994) (stating the Department's position "that there should be an eventual end to the present administrative process"). Administrative finality in the context of the Part 83 process is necessary, just as it is in other contexts. *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737 (2016) (Alito, J., concurring) ("[T]he principle of finality' is 'essential to the operation of our criminal justice system.' Thus, once a criminal conviction becomes final . . . state courts need not remain open indefinitely to

⁴ As a preliminary matter, Plaintiff incorrectly portrays the workload of the OFA as lighter than it is. Plaintiff claims that there are only three petitioners currently awaiting review, Pl.'s Opp'n at 22, but there are twice as many, three proceeding under the 1994 regulations and three under the 2015 regulations. *See* OFA website, <https://www.bia.gov/as-ia/ofa> (last visited Mar. 1, 2019). And regardless of how many petitioners there happen to be at the moment, the 2015 regulations estimate that there are on average ten petitioners per year. 80 Fed. Reg. at 37,886.

relitigate claims related to that conviction which were raised and decided on direct review.” (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)); *Tirado v. Bowen*, 842 F.2d 595, 596 (2d Cir. 1988) (“We recognize, of course, that claimants ordinarily should have but one opportunity to prove entitlement to benefits, otherwise disability administrative proceedings would be an unending merry-go-round with no finality to administrative and judicial determinations.”); *Chem. Weapons Working Grp., Inc. v. U.S. Dep’t of the Army*, 990 F. Supp. 1316, 1319 (D. Utah 1997) (“Although even more time and process might have been desirable from plaintiffs’ perspective, the process actually accorded them was sufficient for purposes of the collateral estoppel analysis.”); *see also* Defs.’ Cross-Mot. at 24–25 (citing cases).

Cases Plaintiff cites in support of this argument are inapposite. For example, *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987), concerned the unrelated doctrine of agency convenience as a defense to agency delay and inaction. *Id.* at 888. Plaintiff next cites *Illinois Public Telecommunications Ass’n v. Federal Communications Commission*, 117 F.3d 555, 567 (D.C. Cir. 1997), for the notion that any claim of administrative convenience must be “balanced” against competing concerns. Pl.’s Opp’n at 24. While this case does not hold that an agency must engage in such a balancing, Federal Defendants did so here. In order to effectuate the goals of increasing efficiency, reducing burdens, and streamlining the Part 83 process for both petitioners and the Department alike, the Department reasonably determined that in light of the myriad of existing procedural and appellate safeguards for petitioners, re-petitioning should continue to be prohibited. In no way was this determination arbitrary, capricious, or even based exclusively on administrative convenience in the first instance.

b. The Department adequately considered alternatives to the ban on re-petitioning.

Plaintiff next asserts that the Department violated the APA by disregarding alternatives to the ban on re-petitioning contained in 2015 Proposed Rule. PL's Opp'n at 1. According to Plaintiff, "the Final Rule did not discuss alternative approaches to re-petitioning other than the initially proposed rule which included a third party veto condition." *Id.* at 32.

Contrary to Plaintiff's claims, the text of the Final Rule confirms that the Department did consider alternatives. The administrative record shows that the Department received a total of 238 comments from an array of stakeholders on the issue of re-petitioning, some in support and some in opposition. AR000591. The Final Rule memorializes that the Department considered "comments both in support of and in opposition to allowing for any opportunity for re-petitioning, limiting re-petitioning by providing for third-party input, and other suggested approaches for re-petitioning," 80 Fed. Reg. at 37,875. And the Final Rule lists some of the alternatives proposed, including an exception to the ban for a "showing of some modification of evidence," like Plaintiff claims to have. *Id.*

There is no support for Plaintiff's apparent theory that in order to comply with the APA, agencies must engage in a line-by-line rebuttal of each comment submitted in response to its notice of proposed rulemaking. According to the Supreme Court, rulemaking "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man" *Motor Vehicle Mfgs. Ass'n*, 463 U.S. at 51 (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978) (internal quotation marks omitted)); *see also Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1139–40 (10th Cir. 1991) (agency is not required to "review every document arguably related to" the dispute when plaintiff "had numerous opportunities to present its views"); *NLRB v. Beverly*

Enterprises–Massachusetts, Inc., 174 F.3d 13, 26 (1st Cir. 1999) (agency decision maker “can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party”).

The Department did not need to discuss any set number of proposed alternatives to the re-petition ban, and it did not act arbitrarily by rejecting proposals that, if enacted, would undercut efficiency and timeliness. It proposed a rule, solicited public comment through a notice of proposed rulemaking, engaged in a deliberative process, exercised its discretion, and announced a decision rejecting alternatives to the ban on re-petitioning, including its own proposed rule. There was nothing arbitrary and capricious about the Department’s process.

c. The re-petitioning ban does not affect former petitioners like Plaintiff since it does not substantively change the Part 83 process.

Plaintiff repeatedly characterizes the post-Final Rule Part 83 process as “less onerous,” Pl.’s Opp’n at 5 (citation omitted), and “less stringent,” *id.* at 7, under the 2015 regulations than under the 1994 regulations. Plaintiff cannot substantiate those claims.⁵

As noted in the preamble of the Final Rule, the purpose of the rule is to “clarif[y] the criteria by codifying past Departmental practice in implementing the criteria,” and *codifying* an existing practice is not the same as *changing* an existing practice. 80 Fed. Reg. at 37,863. When an agency prescribes a regulation’s intent, as the Department has done here, courts “give great weight to an agency’s expressed intent as to whether a rule clarifies existing law or substantively changes the law.” *First Nat’l Bank of Chi. v. Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999) (citation omitted). Because the Department has stated that virtually every applicable aspect of the Final Rule is a clarifying regulation, this Court should defer to Interior’s conclusion that

⁵ The Department notes that no petitioner has yet received acknowledgment, or even a positive proposed finding, under the 2015 regulations. Plaintiff’s allegations that the 2015 regulations lower the substantive bar for petitioners thus is not supported.

an evaluation of Plaintiff's petition under the Final Rule would not result in a different outcome. And as discussed in Federal Defendants' cross-motion, neither of the Final Rule's substantive changes to the Part 83 process—concerning the criteria contained in 25 C.F.R. § 83.11(a) (2015) and § 83.11(b) (2015)—would impact Plaintiff's petition. *See* Defs.' Cross-Mot. at 21; *see also* Defs.' Mot. to Dismiss at 18–19 (“[A]llowing re-petitioning would not help Plaintiff because the only two substantive changes to the criteria do not affect its petition.”).

Regardless, Plaintiff argues that the criteria under the Final Rule are different from those under the 1994 regulations because “current and future petitioners now have the benefit of being able to point to any previous petitioner's success on a criterion as a ‘baseline’ and attempting to meet it with the same or similar quantum of evidence.” Pl.'s Opp'n at 27. The language relevant to Plaintiff's contention appears in the preamble of the Final Rule, where the Department explained that, “[i]f methodology or evidence was sufficient to satisfy a particular criterion in a decision for a previous petitioner, such evidence or methodology is sufficient to satisfy the particular criterion for a current petitioner.” 80 Fed. Reg. at 37,863; *see also* 25 C.F.R. § 83.10(a)(4) (2015). According to Plaintiff, the baseline approach, previously applied but only now codified, treats petitioners that already went through the Part 83 process “differently and adversely” from those that have yet to receive a determination. Pl.'s Opp'n at 41.

Plaintiff's argument is unavailing. As explained in Federal Defendants' cross-motion, the so-called “baseline approach” described in the Final Rule is not new. Defs.' Cross-Mot. at 6. The Final Rule simply codified an existing Departmental practice to promote consistency among decisions. Plaintiff still contends that “no evidence exists to support DOI's claim that [the baseline] approach was applied before 2015” and that, if it was applied, it amounted to a “secret law,” with standards unknown to petitioners. Pl.'s Opp'n at 28–29. However, Plaintiff's

allegations are baseless; as far back as March 2002, prior to active consideration on Plaintiff's petition, the Branch of Acknowledgment and Research (the predecessor of the present-day Office of Federal Acknowledgment) created a publicly available manual "to help researchers identify and find relevant acknowledgment precedent." *Acknowledgment Precedent Manual*, at ii (2002), <https://www.bia.gov/as-ia/ofa/guidelines-precedent-manual-and-sample-narrative> (last visited Mar. 14, 2019). The manual quotes extensively from its prior decisions, providing examples to petitioning groups of circumstances in which evidence sufficed to meet Part 83 criteria.

Plaintiff's own Final Determination illustrates that these guidelines, in effect prior to the Final Rule, are consistent with the approach codified in the Final Rule and demonstrative of the approach that OFA had consistently taken prior to their formal codification in 2015. For example, in its discussion of Plaintiff's inability to meet the requirements of the criterion contained in 25 C.F.R. § 83.7(e) (1994), OFA relied on the 2004 Final Determination regarding the Snohomish Tribe of Indians, explaining:

All previous petitioners who have met this criterion in a [Final Determination] have demonstrated that at least 80 percent of their members descend from a historical tribe. The Snohomish petitioner demonstrated that 69 percent of its members descended from the historical tribe and did not meet this criterion in its 2004 FD. The BLB petitioner has demonstrated that 68 percent of its members (218 of 320) descend from the historical band.

This is a lower percentage of descent from a historical tribe than for any previous petitioner that met criterion 83.7(e) and was acknowledged by the Department, and a lower percentage than another petitioner which failed to meet criterion (e). Therefore, the petitioner does not meet the requirements of criterion 83.7(e).

Summary under the Criteria and Evidence for Final Determination Against Acknowledgment of the Burt Lake Band of Ottawa and Chippewa Indians, Inc. at 125, Office of Fed.

Acknowledgment, Dep't of the Interior (Sept. 21, 2006) [hereinafter, the "Final Determination"]

(citation omitted), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/101_burtlk_MI/101_fd.pdf (last visited Mar. 13, 2019); *see also* 80 Fed. Reg. at 37,866–67 (discussing the ongoing application of the 80 percent threshold for criterion 83.7(e), consistent with previous positive determinations).

B. Federal Defendants Are Entitled to Summary Judgment on Plaintiff’s Due Process Claim.

1. Plaintiff received a full and fair hearing on the merits.

Plaintiff next argues that the Department violated its due process rights “by depriving it of its ability to ever present evidence in an effort to be federally recognized, . . .” Pl.’s Opp’n at 38. However, Plaintiff’s due process claim is unavailing; Plaintiff received a full and fair hearing on the merits of its petition for federal acknowledgment. To the extent that Plaintiff “seeks the opportunity to fully participate in [the Part 83] process,” *id.* at 36, it has already done so. Plaintiff argues that it should be allowed to re-petition “after the Band’s window to alter its original petition or appeal the 2006 decision had expired.” *id.* at 39. But Plaintiff’s failure to file a timely appeal of an adverse decision is the result of its own inaction, not an indictment of the Part 83 process.

Plaintiff also argues that its purported new evidence might result in a different outcome from that in the Final Determination. *Id.* at 26. However, Plaintiff’s claim, apart from being wholly speculative, does not amount to a due process violation. There is no reason why the Final Rule, promulgated nine years after the issuance of Plaintiff’s Final Determination, should trigger a right to present such evidence now. Plaintiff filed its petition in 1985, any time after which it could (and did) submit factual or legal arguments in support of its petition. Receipt of Petition for Federal Acknowledgment of Existence as an Indian Tribe, Burt Lake Band of Ottawa and Chippewa, 50 Fed. Reg. 41,746-02 (Oct. 15, 1985). After doing so, Plaintiff had ample time—

thirty years—prior to the issuance of the Final Determination to engage in a “lengthy fact-gathering process” and “develop[] and discover[] additional evidence.” Pl.’s Opp’n at 39.

Under the 1994 regulations, a petitioner receives technical assistance from the Department, which informs the petitioner of evidentiary gaps and provides the petitioner an opportunity to supplement or revise its documented petition. 25 C.F.R. § 83.10 (1994). Here, the Department provided technical assistance to Plaintiff beginning in 1995, making suggestions to improve the petition. Final Determination at 2. Plaintiff then had all of the time it needed to uncover evidence. Pursuant to the 1994 regulations, there are no “deadlines for certain Departmental actions nor for petitioners to submit documented petitions or to respond to technical assistance reviews. Deadlines only apply to the active consideration process, where both petitioners and the Department have specific timelines in which to act.” 59 Fed. Reg. at 9289. Plaintiff submitted evidence in support of its petition up to the day that active consideration began in December 2002. Final Determination at 3.

The Assistant Secretary–Indian Affairs signed a proposed finding declining to acknowledge Plaintiff in March 2004, with notice of the Proposed Finding appearing in the *Federal Register* in April 2004. Proposed Finding Against Federal Acknowledgment of the Burt Lake Band of Ottawa and Chippewa Indians, Inc., 69 Fed. Reg. 20,027 (Apr. 15, 2004). A 180-day comment period followed that notice, during which time Plaintiff requested and received three extensions for the purpose of completing additional research in support of its petition and submitting new evidence. Final Determination at 3, 25, 32. During the extended comment period, OFA provided further technical assistance to Plaintiff. In fact, as noted in Plaintiff’s Final Determination, OFA even reversed one of its negative proposed findings “based on the submission of new evidence during the comment period.” Final Determination at 17.

After the Department issued its adverse Final Determination, Plaintiff had the opportunity to file a request for reconsideration with the Interior Board of Indian Appeals. 25 C.F.R. § 83.11 (1994). If Plaintiff had chosen that process—which it did not—it would have had yet another opportunity to submit new evidence for consideration. 25 C.F.R. § 83.11(b), (d)(1) (1994) (“The Board shall have the authority to review all requests for reconsideration that are timely and that allege any of the following—That there is new evidence that could affect the determination.”). Plaintiff similarly chose not to appeal the Department’s decision to this Court, and the time for doing so has since expired. Still, Plaintiff retains the option to seek recognition directly from Congress, as other groups have done as recently as last year. *See* Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40 (Jan. 29, 2018).

Plaintiff may be unhappy with the amount of time that it took to process its petition, but that concern (which in part spurred the Department to revise the regulations) did not undercut Plaintiff’s ability to present evidence. The Final Rule did not violate due process.

2. Plaintiff cannot challenge the Part 83 process under the 1994 regulations.

Plaintiff asserts that it “is not challenging the substance of the agency’s 2006 final action on its Part 83 petition.” Pl.’s Opp’n at 41. But that is precisely what its challenge amounts to. Throughout its Opposition, Plaintiff refers to the Department’s findings and conclusion on the merits of Plaintiff’s petition as “factually erroneous” and “factually incorrect,” among other variations. *Id.* at 2, 5, 30, 35, 36, 39, 40. It describes the process under the 1994 regulations as “convoluted and inequitable.” *Id.* at 39. And it emphasizes the characterization of the process under the 1994 regulations as “broken.” *Id.* at 3, 7, 26, 29.

Plaintiff views the decision by the Department in 2015 to retain the ban on re-petitioning as an opportunity, by means of a legal challenge, to revisit the merits of its denied petition. *See Id.* at 24 (delving into the description of Plaintiff’s “new evidence,” documentation of the removal of certain individuals from its membership rolls). The Court’s consideration of Plaintiff’s APA claim, or due process claim, should not give Plaintiff a second bite of the apple on issues the Department previously decided, long past the date that Plaintiff could have filed a timely appeal for administrative or judicial review. *See Associated Mortg. Bankers Inc. v. Carson*, 279 F. Supp. 3d 58, 64 (D.D.C.), *reconsideration denied*, 281 F. Supp. 3d 5 (D.D.C. 2017).

3. Plaintiff has no property interest at stake, invalidating its due process claim.

Plaintiff’s due process claim is also unavailing because Plaintiff does not have a protected property or liberty right. As noted in Federal Defendants’ cross-motion, a “threshold requirement of a due process claim is that the government has interfered with a cognizable liberty or property interest.” Defs.’ Cross-Mot. at 25–26 (quoting *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 219–20 (D.C. Cir. 2013) (citation and internal quotation marks omitted)). Plaintiff fails to identify a cognizable liberty or property interest in re-petitioning under Part 83, which is fatal to its claim.

Furthermore, due process protections do not attach to applications for benefits, as opposed to the receipt of benefits; due process is “a safeguard of the security of interests that a person *has already acquired* in specific benefits.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576 (1972) (emphasis added). While Plaintiff asserts that it “does not seek to recover government benefits,” Pl.’s Opp’n at 35, it admits that it seeks acknowledgment through the Part 83 process for the purpose of receiving “the protection, services, and benefits of the federal

government.” *Id.* at 36. Federal Defendants have accordingly not “deprived” Plaintiff of any ongoing benefits that would potentially have inured to a federally-recognized tribal government and would thus give rise to a due process violation.⁶ *See, e.g., Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981) (noting that while a “right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right . . . the underlying right must have come into existence before it can trigger due process protection”) (citations and internal quotations omitted).

4. Plaintiff’s argument that it should receive special consideration because it is a successor to a treaty-signing tribe is unpersuasive.

Plaintiff asserts that it has a due process right to re-petition because it is a successor to the Cheboygan Band, which entered into two treaties with the United States. Pl.’s Opp’n at 18, 36. However, as noted, the Department explicitly found in its Final Determination that Plaintiff is not a continuation of or successor-in-interest to the historical Cheboygan Band. 71 Fed. Reg. at 57,996. Thus, the Cheboygan Band’s treaties with the United States are immaterial to Plaintiff’s legal challenge and are beyond the scope of this case.

Although some of Plaintiff’s members descended from the Cheboygan Band, the Department explained in the preamble to the 1994 regulations that:

[t]he Department’s position is, and has always been, that the essential requirement for acknowledgment is continuity of tribal existence rather than previous acknowledgment. The Federal court in *United States v. Washington*, rejected the argument that “because their ancestors belonged to treaty tribes, the appellants benefitted from a presumption of continuing existence.” The court further defined as a single, necessary and sufficient condition for the exercise of treaty rights, that tribes must have functioned since treaty times as “continuous separate, distinct Indian cultural or political communities”(641 F.2d 1374 (9th Circuit 1981)). Thus, simple demonstration of ancestry is not sufficient.

⁶ In making this argument, Federal Defendants in no way suggest the presence of an inherent due process right in the recognition status of a tribal entity.

59 Fed. Reg. at 9282. Federal courts have held that same, acknowledging “that Indian nations, like foreign nations, can disappear over time,” regardless of their previous relationship with the United States. *Miami Nation*, 255 F.3d at 346. The relationship between individual members of Plaintiff and a previously-recognized, but currently-non-continuous, Indian entity therefore does not support Plaintiff’s due process claim.

C. Federal Defendants Are Entitled to Summary Judgment on Plaintiff’s Equal Protection Claim.

Plaintiff’s argument that the ban on re-petitioning violates equal protection is unpersuasive. As Plaintiff concedes, because the ban on re-petitioning “does not ‘target a suspect class or burden a fundamental right,’ the relevant level of scrutiny is rational basis.” Mem. of P. & A. in Supp. of Pl.’s Mot. for Summ. J. at 40, ECF No. 27-1 (quoting *Tucker v. Branker*, 142 F.3d 1294, 1300 (D.C. Cir. 1998)).

There is a strong presumption of validity accorded government classifications not involving fundamental rights or suspect classes, as is the case here. Plaintiff therefore bears the burden of proving that there is no reasonably conceivable basis to support the classification. *Steffan v. Perry*, 41 F.3d 677, 684–85 (D.C. Cir. 1994). The government “has no obligation to produce evidence to sustain the rationality of a [regulatory] classification.” *Id.* at 684 (citation omitted). “This presumption of rationality does not apply merely to congressional or state legislative schemes, but extends to administrative regulatory action as well” *Id.* at 684–85 (citing *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935)).

At the outset, Plaintiff has not been treated differently than any other Part 83 petitioner and there is no equal protection violation to speak of. OFA considered Plaintiff’s Part 83 petition under the same parameters as every other petitioner under the 1994 regulations. To the extent Plaintiff argues that petitioners under the 2015 regulations face a lower standard, that argument

is unavailing for the reasons discussed *supra*. While the merits of Plaintiff's petition is beyond the scope of this case, Plaintiff's petition would fail to satisfy the 2015 regulations on precisely the same grounds as it failed the 1994 regulations.

As to the argument that the mere existence of the 2015 regulations inherently creates differing classes of petitioners in violation of equal protection, there is a rational basis for treating petitioners that have gone through the Part 83 federal acknowledgment process "differently" (that is, preventing re-petition) from those that have not. Unsuccessful petitioners have already availed themselves of the administrative research, technical assistance, and review process discussed *supra*, and had the option of pursuing administrative and federal court appeals. These petitioners, like Plaintiff, have had a full and fair opportunity to develop the factual case for their satisfaction of Part 83. The fact that they were unable to do so, and that the Department has declined to allow for an open ended, perpetual Part 83 process, does not violate equal protection. The only "difference" between pending and unsuccessful petitioners is that the latter have exhausted the rational administrative process, whereas the former have not. That does not violate equal protection, and Plaintiff cites no case law suggesting otherwise.

III. CONCLUSION

Defendants are entitled to summary judgment. The Department did not act arbitrarily and capriciously in retaining the re-petitioning ban in the 2015 regulations. Plaintiff also had a full and fair opportunity to petition for federal acknowledgment under the 1994 regulations and did not appeal that decision either within the Department or in district court. In addition, Plaintiff does not have a protected liberty interest to which due process would attach, and has not established that it was treated differently than any other entity in violation of equal protection.

Based on the foregoing analysis, Defendants respectfully request that this Court enter summary judgment in its favor on Plaintiff's remaining counts.

Respectfully submitted this 14th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2019, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

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