

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHINOOK INDIAN NATION, et. al.,

Plaintiffs,

v.

DAVID BERNHARDT, et al.,

Defendants.

CASE NO. 3:17-cv-05668-RBL

ORDER ON CROSS-MOTIONS FOR
PARTIAL SUMMARY JUDGMENT
ON CLAIMS II-V

DKT. ## 93, 97

INTRODUCTION

THIS MATTER is before the Court on the parties’ Cross-Motions for Partial Summary Judgment on Claims II-V. Dkt. ## 93 & 101. Plaintiff Chinook Indian Nation (CIN) is a tribal group and nonprofit corporation comprised of individuals claiming descent from the historic Chinook Tribe of the Columbia River Basin.¹ This case stems from CIN’s decades-long battle to gain federal recognition as a Native American tribe from Defendant U.S. Department of Interior

¹ The remaining Plaintiffs—Anthony A. Johnson and Confederated Lower Chinook Tribes and Bands—are also affiliated with the historic Chinook Tribe and will be collectively referenced as “CIN.”

1 (DOI).² CIN began their petition process in 1981, briefly received recognition in 2001, but then
2 saw the decision reversed in 2002. *See* Dkt. # 45 at 7-9. Under then-existing DOI regulations, the
3 2002 denial barred CIN from re-petitioning for recognition. In 2014, a proposed amendment to
4 the DOI regulations would have created an exception to the ban on re-petitioning for groups able
5 to demonstrate that the reasons for their denial are no longer valid. However, DOI ultimately
6 eliminated this exception and continued to bar re-petitioning in the 2015 Final Rule, despite
7 changing other aspects of the recognition requirements. CIN now challenges this decision to
8 maintain the ban on re-petitioning in the 2015 regulation, arguing that it exceeds DOI’s statutory
9 authority, is arbitrary and capricious, and violates the Fifth Amendment’s Equal Protection
10 Clause.³

11 BACKGROUND

12 The Court’s prior Order on Defendants’ Motion to Dismiss provides a full description of
13 CIN and its attempt to gain federal recognition. *See* Dkt. # 45 at 2, 7-9. Because the claims at issue
14 here do not turn on CIN’s past attempt at recognition, the Court will not revisit that background.
15 However, a detailed description of the evolution of DOI’s regulations is warranted.

16 1. The Tribal Recognition Process and the 1994 Amendments

17 To be viewed as an independent entity by the United States, a Native American tribe must
18 gain recognition by the Federal Government. “Federal recognition affords important rights and
19 protections to Indian tribes, including limited sovereign immunity, powers of self-government, the
20

21 ² The remaining Defendants—David Bernhardt; Bureau of Indian Affairs, Office of Federal
22 Acknowledgment; United State of America; and Tara Katuk MacLean Sweeney—are all
affiliated with DOI and will be referred to collectively as “DOI.”

23 ³ CIN’s Motion concedes that CIN’s claims under the Fifth Amendment’s Due Process Clause
24 (Claim III) and First Amendment’s Petition Clause (Claim V) are currently without merit.
Dkt. # 97 at 23. Those claims are accordingly dismissed without prejudice.

1 right to control the lands held in trust for them by the federal government, and the right to apply
2 for a number of federal services.” *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004).
3 Since 1978, DOI has controlled the tribal recognition process through its “Part 83” regulations,
4 which set procedures for petitioning and establish mandatory criteria that petitioners must meet.⁴

5 Those seven criteria require that:

6 (a) the group has been identified from historical times to the present, on a
7 substantially continuous basis, as Indian; (b) “a predominant portion of the
8 petitioning group comprises a distinct community and has existed as a community
9 from historical times until the present”; (c) the group “has maintained political
10 influence or other authority over its members as an autonomous entity from
11 historical times until the present”; (d) the group has a governing document; (e) the
12 group has lists of members demonstrating their descent from a tribe that existed
13 historically; (f) most of the members are not members of any other acknowledged
14 Indian tribe; (g) the group’s status as a tribe is not precluded by congressional
15 legislation.

16 *Id.* at 1274 (summarizing the criteria now contained in 25 C.F.R. § 83.11 (2015)). Within DOI, the
17 Bureau of Indian Affairs’ Office of Federal Acknowledgement (OFA) is tasked with implementing
18 the Part 83 regulations on a petition-by-petition basis to determine which tribes should receive
19 recognition.

20 The Part 83 regulations have been amended twice. The first set of amendments occurred in
21 1994, and it was this manifestation that first barred tribes from re-petitioning for recognition if
22 they had been previously denied (hereafter referred to as “the re-petition ban”). 25 C.F.R. § 83.3(f)
23 (1994). *See* Procedures for Establishing That an American Indian Group Exists as an Indian Tribe,
24 59 Fed. Reg. 9280 (Feb. 25, 1994). In addition to the ban, the amendments also created an
evidentiary standard that required petitioners to prove a “reasonable likelihood of the validity of

⁴ The regulations are promulgated largely by DOI’s Bureau of Indian Affairs. For simplicity’s sake, however, the Court will simply refer to “DOI” when discussing promulgation of the Part 83 regulations.

1 the facts” related to each criterion—an ambiguous metric that fell somewhere below “conclusive
2 proof.” 25 C.F.R. § 83.6(d) (1994).

3 **2. The 2014 Proposed Rule**

4 The second set of amendments to the Part 83 regulations was finalized in 2015, but the
5 Proposed Rule—which is integral to CIN’s claims—was published in 2014. *See* Federal
6 Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30766 (May 29, 2014). Acknowledging
7 that “[t]he current [recognition] process has been criticized as ‘broken,’” the Proposed Rule aimed
8 to “make the process and criteria more transparent, promote consistent implementation, and
9 increase timeliness and efficiency, while maintaining the integrity of the process.” *Id.* at 30766.
10 To achieve these goals, it added “objective standards” and altered some of the requirements from
11 the 1994 regulations. *Id.* at 30766. Perhaps most controversially, the Proposed Rule newly defined
12 the “reasonable likelihood” evidentiary standard to mean “there must be more than a mere
13 possibility” but a petitioner need not prove that the facts are “more likely than not” true. *Id.* at
14 30773 (§ 83.10(a)(1)); *see also* Comments on Proposed Rule by George Roth, AR000521-548
15 (explaining petitioner-friendly innovations in the 2014 Proposed Rule). Other significant changes
16 included:

- 17 • Requiring petitioners to demonstrate their existence as a distinct community and political
18 authority only “from 1934 until the present,” 79 Fed. Reg. at 30775 (§ 83.11(b), (c)), rather
19 than “from historical times until the present,” § 83.7(b), (c) (1994).
- 20 • Allowing automatic satisfaction of criteria (b) (Community) and (c) (Political Authority)
21 with proof that “[t]he petitioner has maintained since 1934 to the present a State
22 reservation” or “[t]he United States has held land for the petitioner or collective ancestors
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1 of the petitioner at any point in time from 1934 to the present.” 79 Fed. Reg. at 30775
2 (§§ 83.11(b)(3) & (c)(3)).

- 3 • Newly defining “substantial interruption” to mean “a gap, either as a fluctuation in tribal
4 activity or a gap in evidence, of 20 years or less.” *Id.* at 30775 (§ 83.10(b)(5)).

5 Some of these changes were implemented to ease the burden on petitioners in light of the
6 U.S.’s ugly history of discouraging Indian identity. For example, the 1934 evaluation start date for
7 criteria (b) and (c) “reflect[ed] the United States’ enactment of the Indian Reorganization Act
8 (IRA), which reversed the Federal Indian policy of allotment and assimilation that was aimed at
9 destroying tribal governments and their communities.” 79 Fed. Reg. at 30767. By moving the date
10 up to 1934, the Proposed Rule spared petitioners the more difficult task of locating evidence from
11 a time when “tribes had little to gain, and much to lose” by documenting their existence for the
12 Federal Government. *Id.* at 30768.

13 In light of these lower evidentiary burdens, the Proposed Rule also created an exception to
14 the re-petition ban. Under the exception, groups that had previously been denied recognition could
15 re-petition if: (i) they obtained consent from “[a]ny third parties that participated as a party in an
16 administrative reconsideration or Federal Court appeal concerning the petitioner,” and (ii) either
17 “[a] change from the previous version of the regulations to the current version of the regulations
18 warrants reconsideration of the final determination” or “[t]he ‘reasonable likelihood’ standard was
19 misapplied in the final determination.” *Id.* at 30773 (§ 83.4(b)(1)). A judge at DOI’s Office of
20 Hearings and Appeals (OHA) would serve a gatekeeping function by deciding whether re-petition
21 applications met these initial requirements before OFA would consider re-petitions on the merits.
22 *Id.* (§ 83.4(b)(2)).

1 This possibility of re-petitioning combined with the new, more relaxed evidentiary
2 requirements evoked a variety of responses. Many commenters supported DOI's revisions and
3 even suggested they should go further by eliminating the third-party consent requirement for
4 re-petitioning. *See, e.g.*, AR000610-15; AR000616-43. As one former OFA staffer commented,
5 "Acknowledgement decisions should not be based on political considerations . . . ; [t]hey should
6 be about doing the right thing in light of U.S. history and Indian law." AR000610. In an interview,
7 Assistant Secretary of Indian Affairs Kevin Washburn stated that the "modest exception" to the
8 re-petition ban was warranted "just out of fairness" if the new rule made substantive changes to
9 DOI's regulations. AR0006622. He went on to say that he was "doubtful that many groups would
10 deserve reconsideration under the Proposed Rule." AR0006623.

11 Others, including local governments and previously-recognized tribes, argued vociferously
12 that the chance for a second bite at a now easier-to-swallow apple would cause a flood of
13 re-petitions. *See, e.g.*, AR000600-10; AR000616-16; AR000644-47. They asserted that this would
14 threaten their settled interests in land that could now be turned over to successful re-petitioners.
15 *See, e.g.*, Testimony of Connecticut towns, AR000575-84; Letter from California State
16 Association of Counties, AR0000270-73; Testimony of Quinault Indian Nation, AR000550-58.
17 Governmental entities and politicians from Connecticut were especially vocal in challenging the
18 proposed changes. *See* Letter from Connecticut AG, AR0006892; Letter from Connecticut Towns,
19 AR0009055; AR000575. The Quinault Tribe—the same tribe that originally argued against CIN's
20 recognition and succeeded in having it rescinded in 2002—was also a critic. *See* AR000550.

21 **3. The 2015 Final Rule**

22 In the Final Rule, DOI reversed course by eliminating the exception to the blanket re-
23 petition ban from the 1994 rule. DOI provided the following explanation for its decision:
24

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

13 80 Fed. Reg. at 37875.

14 DOI also removed several of the provisions relaxing assessment standards. Specifically,
15 “the Final Rule does not adopt the proposed evaluation start date for criteria (b) (Community) and
16 (c) (Political Authority) of 1934 [and] maintains the current standard of proof as ‘reasonable
17 likelihood’ without the proposed incorporation of judicial explanations of the phrase.” *Id.* at 37863.
18 In addition, DOI removed the provision allowing automatic satisfaction of criteria (b) and (c)
19 through proof of a state reservation or U.S.-held land and did not define “substantial interruption”
20 as “a gap of 20 years or less.” *Id.* at 37870, 37872.

21 Politicians from Connecticut called the rollbacks in the Final Rule a “big victory” for their
22 state. AR0009655. The governor praised the “sustained and coordinated advocacy by our office,
23 Senators Blumenthal and Murphy, our entire Congressional delegation, as well as localities and
24 interested third parties in our state” and “thank[ed] President Obama and Vice President Biden for
heeding [the state’s] concerns.” AR0009655-56.

Despite this, the 2015 Final Rule still alters the 1994 rule’s standards in petitioner-friendly
ways. Significantly, the Final Rule adds a new “baseline” evidentiary standard that states:
“Evidence or methodology that the Department found sufficient to satisfy any particular criterion
in a previous decision will be sufficient to satisfy the criterion for a present petitioner.” 80 Fed.

1 Reg. at 37889 (25 C.F.R. § 83.10(a)(4)). DOI added this provision to “promote[] consistency” after
2 recognizing that “the previous rule was criticized as inconsistent and unpredictable.” *Highlights of*
3 *the Final Federal Acknowledgement Rule (25 CFR 83)*, Bureau of Indian Affairs (June 29, 2015),
4 available at: <http://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc1-030769.pdf>. And while
5 the Final Rule jettisoned the proposed 1934 evaluation start date for criteria (b) and (c), it still
6 moved the date up to 1900. 80 Fed. Reg. at 37889-90 (§ 83.11(a), (b), (c) (2015)). Other notable
7 changes from the 1994 rule include:

- 8 • Allowing petitioners to rely on evidence of self-identification as an Indian tribe, rather than
9 only external identification. *Compare id.* at 37889 (§ 83.11(a)(7) (2015)) *with* § 83.7(a)
10 (1994);
- 11 • Allowing automatic satisfaction of criterion (e) (Descent) through evidence of “a tribal roll
12 directed by Congress or prepared by the Secretary on a descendency basis for purposes of
13 distributing claims money, providing allotments, providing a tribal census, or other
14 purposes, unless significant countervailing evidence establishes that the tribal roll is
15 substantively inaccurate,” 80 Fed. Reg. at 37890-91 (§ 83.11(e)(1) (2015));
- 16 • Loosening the requirements for criterion (f) (Unique Membership) for tribes with members
17 who are already part of a recognized tribe. *Compare id.* at 37891 (§ 83.11(f) (2015)) *with*
18 § 83.7(f) (1994).

19 DISCUSSION

20 CIN’s challenge under the Administrative Procedures Act (Claim II) breaks down into
21 two separate claims. First, CIN argues that DOI lacks statutory authority to promulgate the 2015
22 re-petition ban. Second, CIN asserts that DOI’s decision to maintain the re-petition ban in the
23 2015 Final Rule was arbitrary and capricious. Finally, CIN also challenges the ban under the
24

1 Fifth Amendment’s Equal Protection Clause as a discriminatory classification. The Court will
2 address each claim in turn.

3 **1. Administrative Procedure Act – Absence of Statutory Authority**

4 The Ninth Circuit has explained that a claim challenging an administrative rule as “issued
5 without statutory authority should be construed as a claim challenging agency action ‘in excess
6 of statutory jurisdiction, authority, or limitations, or short of statutory right’ under 5 U.S.C.
7 § 706(2)(C).” *See Clouser v. Espy*, 42 F.3d 1522, 1528 n.5 (9th Cir. 1994); *see also Sierra Club*
8 *v. Trump*, 929 F.3d 670, 712 (9th Cir. 2019) (relying on *Clouser*). The starting point for such an
9 analysis is to interpret the statutes from which the agency purports to derive authority. *San Luis*
10 *& Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1227 (9th Cir. 2017) (citing
11 *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

12 In promulgating the 2015 Part 83 regulations, DOI principally relies on 25 U.S.C. §§ 2, 9
13 and 43 U.S.C. § 1457. 80 Fed. Reg. at 37885. Section 2 states, “The Commissioner of Indian
14 Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such
15 regulations as the President may prescribe, have the management of *all* Indian affairs and of *all*
16 matters arising out of Indian relations.” (emphasis added). Section 9 provides rulemaking power
17 to the President, and section 1457 tasks the Secretary of the Interior with supervision over the
18 subject of “Indians.” As another source of authority, DOI cites “The Congressional findings that
19 supported the Federally Recognized Indian Tribe List Act of 1994[,] [which] expressly
20 acknowledged that Indian tribes could be recognized ‘by the administrative procedures set forth
21 in part 83 of the Code of Federal Regulations.’” 80 Fed. Reg. at 37885 (quoting Public Law 103-
22 454 §§ 103(2), (3), (8) (Nov. 2, 1994)).

1 CIN argues that the List Act of 1994’s explicit acknowledgement of DOI’s power to
2 recognize tribes also entails an inverse implication that DOI may not limit which tribes can
3 obtain recognition—in other words, DOI is authorized to *give* but not to *take*. For further
4 support, CIN points to the statement in the Act that only Congress may terminate a tribe’s
5 recognized status. *See* Public Law 103-454 §§ 103(4), (5). According to CIN, the re-petition ban
6 is tantamount to terminating recognition for those tribes who have previously been denied but
7 could satisfy the lower standards in the 2015 Part 83 regulations. CIN urges that such a reading
8 of the List Act complies with the principle that “statutes are to be construed liberally in favor of
9 the Indians, with ambiguous provisions interpreted to their benefit.” *Montana v. Blackfeet Tribe*
10 *of Indians*, 471 U.S. 759, 766 (1985).

11 While CIN’s arguments hold some appeal, the Court agrees with DOI that its expansive
12 power over Indian affairs encompasses the re-petition ban. *See Haugrud*, 848 F.3d at 1228 (“The
13 absence of limiting language indicates Congress intended to delegate broad authority to the
14 Secretary . . .”). Courts have repeatedly emphasized the broad sweep of authority over Indian
15 affairs granted by 25 U.S.C. §§ 2, 9, leaving no ambiguity for the Court to interpret in CIN’s
16 favor. *See James v. U.S. Dep’t of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987);
17 *Agua Caliente Tribe of Cupeno Indians of Pala Reservation v. Sweeney*, 932 F.3d 1207, 1218
18 (9th Cir. 2019); *see also Haugrud*, 848 F.3d at 1229 (distinguishing a broad grant of authority
19 from an ambiguous one). If section 2 and 9 empower DOI to regulate the recognition process (as
20 CIN admits they do), it follows that DOI may also place limitations on that process. A contrary
21 conclusion would have no rational endpoint and tie DOI’s hands when regulating federal
22 recognition.

1 Nor can the Court embrace CIN’s interpretation of the List Act of 1994. Even if read
2 charitably toward tribes, Congress’s finding that “Indian tribes presently may be recognized by .
3 . . . the administrative procedures set forth in part 83” simply does not create a new limitation on
4 DOI’s power over federal recognition. To the extent the Act does explicitly limit DOI’s power to
5 terminate recognition, the Court does not agree with CIN that the re-petition ban is tantamount to
6 terminating tribal recognition. By this logic, if DOI were to substantively heighten the criteria for
7 recognition under Part 83, a tribe that had not yet petitioned but would have succeeded under the
8 old rules could argue that the new rules amount to “termination” of their status. Yet this would
9 be the wrong conclusion, as the power to regulate the recognition process will inevitably involve
10 decisions that limit the ability of some tribes to gain recognition. In short, the Court is unwilling
11 to hold that the re-petition ban exceeds DOI’s authority.

12 **2. Administrative Procedure Act – Arbitrary and Capricious**

13 A final agency action may be set aside if it is “arbitrary, capricious, an abuse of
14 discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). “A rule is
15 arbitrary and capricious ‘if the agency has relied on factors which Congress has not intended it to
16 consider, entirely failed to consider an important aspect of the problem, offered an explanation
17 for its decision that runs counter to the evidence before the agency, or is so implausible that it
18 could not be ascribed to a difference in view or the product of agency expertise.’” *Providence*
19 *Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) (quoting *Motor Vehicle Mfrs.*
20 *Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). “[T]he touchstone
21 of ‘arbitrary and capricious’ review under the APA is ‘reasoned decisionmaking.’” *Altera Corp.*
22 *& Subsidiaries v. Comm’r of Internal Revenue*, 926 F.3d 1061, 1080 (9th Cir. 2019) (quoting
23 *State Farm*, 463 U.S. at 52). Courts will sustain an agency action if the agency has “examine[d]

1 the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational
2 connection between the facts found and the choice made.’” *Id.* (quoting *State Farm*, 463 U.S. at
3 43 (internal quotation omitted)). This standard also applies to how an agency considers and
4 responds to “significant comments” that raise points that could change a proposed rule. *Id.*
5 (quoting *Am. Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) (internal quotation
6 omitted)).

7 “[C]ourts will ‘uphold a decision of less than ideal clarity if the agency’s path may
8 reasonably be discerned.’” *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1052 (9th Cir. 2007).
9 (quoting *State Farm*, 463 U.S. at 43). “Moreover, [w]here the agency’s line-drawing does not
10 appear irrational and the [party challenging the agency action] has not shown that the
11 consequences of the line-drawing are in any respect dire . . . [courts] will leave that line-drawing
12 to the agency’s discretion.” *Id.* (quoting *Leather Indust. of Am. v. EPA*, 40 F.3d 392, 409
13 (D.C.Cir.1994)). However, the agency cannot engage in post-hoc rationalizations; “[t]he grounds
14 upon which an administrative order must be judged are those upon which the record discloses
15 that its action was based.” *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 87 (1943). And
16 when an agency changes position, it must provide “good reasons” for the shift. *See F.C.C. v. Fox*
17 *Television Stations, Inc.*, 556 U.S. 502, 515 (2009).⁵

18
19 ⁵ DOI concedes that the decision to include the re-petition ban in the 2015 Final Rule is
20 reviewable under 5 U.S.C. § 704 as a final agency action. *See* Dkt. # 99 at 6 n.14. However, DOI
21 argues that cases cited by CIN related to an agency’s shift in informal policy are inapplicable.
22 *See Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016) (citing *Fox Television*
23 *Stations*, 556 U.S. at 515). This is true to the extent that the 2015 Part 83 amendments are a
24 different type of agency action calling for a different analytical approach. But *Fox Television*
Stations explains that all types of agency action are ultimately subject to the same requirements
in § 706(2)(A) of the APA. 556 U.S. at 515. The only difference is what counts as “arbitrary and
capricious” in a given scenario. *Id.* Here, even though DOI did not rescind an established policy
or prior regulation, the shift in position between the Proposed and Final Rules requires “good
reasons” to avoid being arbitrary and capricious. *See id.*

1 Under the APA, the court’s role on summary judgment is not to engage in independent
2 fact finding, but to “determine whether or not as a matter of law the evidence in the
3 administrative record permitted the agency to make the decision it did.” *Occidental Eng’g Co. v.*
4 *Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir.1985). When determining if an
5 agency’s action was arbitrary and capricious, courts should be “highly deferential” to the
6 agency’s decision, *Providence Yakima*, 611 F.3d at 1190, and not “substitute [the court’s own]
7 judgment for that of the agency.” *J & G Sales*, 473 F.3d at 1051. But despite this forgiving
8 standard, courts still must “engage in a substantial inquiry[,] . . . a thorough, probing, in-depth
9 review” of the agency action. *Native Ecosystems Council v. U.S. Forest Serv., an agency of U.S.*
10 *Dep’t of Agric.*, 418 F.3d 953, 960 (9th Cir. 2005) (quoting *Citizens to Preserve Overton Park,*
11 *Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971)). If a court holds an agency action to be arbitrary and
12 capricious, “the proper course [is] to remand to the Agency.” *Nat’l Ass’n of Home Builders v.*
13 *Def. of Wildlife*, 551 U.S. 644, 657 (2007); *see also Fed. Power Comm’n v. Idaho Power Co.*,
14 344 U.S. 17, 20, 73 S. Ct. 85, 87, 97 L. Ed. 15 (1952) (When reviewing an administrative
15 decision, “the function of the reviewing court ends when an error of law is laid bare.”).

16 DOI contends that the agency’s decision to maintain the re-petition ban in the 2015 Final
17 Rule was supported by three main justifications: “consistency . . . , “fair[ness] . . . , [and]
18 efficiency.” 80 Fed. Reg. at 37875 (AR0009813). First, DOI argues that the re-petition ban
19 promotes consistency in the same manner as the doctrine of *res judicata*: by ensuring that the
20 agency’s decisions have finality. Second, DOI insists that “time that would have been spent by
21 agency personnel on re-petitions would be time taken away from first-time petitioners.” DOI
22 Reply Br., Dkt. # 99, at 8; *see also* 80 Fed. Reg. at 37875. Third, DOI argues that adding re-
23 petitioners to the numerous tribes that may seek recognition would overburden the agency. *See*
24

1 Dkt. # 99 at 9 (citing AR0006619-20 and AR0000270). DOI also rejects the notion that
2 substantive changes to the agency's criteria or standards require an exception to the re-petition
3 ban. In any case, DOI contends that there are only two substantive change in the Final Rule:
4 (1) allowing tribes to rely on self-identification for criterion (a) and (2) changing the manners in
5 which marriages are considered as evidence for criterion (b). *Id.* at 10. Other changes supposedly
6 only codified the agency's informal procedures. ⁶ *Id.*

7 CIN disputes that any of the justifications put forth by DOI are logical or supported by
8 the administrative record. First, CIN argues that banning re-petitioning does not promote
9 consistency because it entrenches unfair decisions from the past. This is so because, according to
10 CIN, the Final Rule contains several significant changes that ease petitioners' burdens, including
11 the new provision allowing petitioners to rely on the type or amount of evidence from any past
12 decision granting recognition, § 83.10(a)(4) (2015), and the new evaluation period for criteria (b)
13 and (c) of 1900 to the present, § 83.11(b), (c) (2015). Second, CIN asserts that DOI never
14 actually considered re-petitioners' impact on the wait time for new petitioners or where
15 re-petitioners would be placed in line relative to new groups. Finally, CIN argues that DOI
16 represented that the Proposed Rule's narrow exception to re-petitioning would not impact the
17 efficiency of the agency, which is currently considering just three pending petitions and six
18 potential petitions. *See* U.S. Department of Interior: Indian Affairs, *Office of Federal*
19 *Acknowledgement: Petitions in Process* (Dec. 7, 2019), available at: [https://www.bia.gov/as-ia/
20 ofa/petitions-process](https://www.bia.gov/as-ia/ofa/petitions-process).

21 _____
22 ⁶ DOI also complains that CIN has tried to "have it both ways" by attacking the third-party
23 consent requirements in the Proposed Rule's exception while also arguing that the choice to
24 eliminate the exception was arbitrary and capricious. Dkt. # 99 at 6, 8 n.16. But CIN's belief that
the proposed exception did not go far enough does not preclude them from arguing that getting
rid of the exception completely violated the APA.

1 The Court agrees with CIN—DOI’s reasons for eliminating the re-petition ban exception
2 from the Final Rule are illogical, conclusory, and unsupported by the administrative record in
3 violation of the APA. First, DOI “entirely failed to consider an important aspect of the problem”
4 when it did not explain why banning re-petitioning is appropriate in light of the Final Rule’s
5 amended standards. *See Providence Yakima*, 611 F.3d at 1190. In the Proposed Rule, the
6 re-petition ban exception was created to promote “uniformity based on previous decisions” by
7 allowing re-petitioning “in those limited circumstances where changes to the regulations would
8 likely change the previous final determination.” *See* 79 Fed. Reg. at 30767. Bizarrely, the Final
9 Rule cites nearly the same justification for *removing* the exception, stating: “The Final Rule
10 promotes consistency, expressly providing that evidence or methodology that was sufficient to
11 satisfy any particular criterion in a previous positive decision on that criterion will be sufficient
12 to satisfy the criterion for a present petitioner.” 80 Fed. Reg. at 37875. Rather than explain why
13 the Final Rule’s revised standards obviate the need for re-petitioning, DOI insisted that banning
14 re-petitions would serve the same goal as allowing them.

15 Unfortunately, the opposite is true. As the Proposed Rule recognized, banning re-
16 petitions undermines the goal of applying DOI’s standards consistently to all petitioners. DOI
17 argues that allowing re-petitioning is unnecessary because the Final Rule merely codifies
18 existing practices and does not alter the substantive criteria for recognition. Dkt. # 99 at 9-11.
19 But this claim is belied by DOI’s own justification for the new “baseline” evidence standard,
20 which acknowledges that “the previous rule was criticized as inconsistent and unpredictable.”
21 *Highlights of the Final Federal Acknowledgement Rule (25 CFR 83)*, Bureau of Indian Affairs
22 (June 29, 2015), available at: [http://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc1-](http://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc1-030769.pdf)
23 [030769.pdf](http://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc1-030769.pdf). The decision to codify this baseline standard apparently came about because the
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1 agency had a practice of *not* holding petitioners to consistent requirements across cases. DOI
2 also tries to gloss over other important changes to the substantive criteria, such as the new 1900-
3 present consideration period for criteria (b) & (c) and the ability to satisfy criterion (e) by
4 demonstrating descendance through a congressional roll. *See* 25 C.F.R. § 83.11(a), (b), (e)(1)
5 (2015). These are significant revisions that could prove dispositive for some re-petitioners. The
6 Final Rule gives no explanation for why such changes no longer warrant an exception to the re-
7 petition ban or are out-weighed by other concerns.⁷

8 Second, the Final Rule fails to rationally connect the 2015 re-petition ban to the evidence
9 in the record or provide “good reasons” for the decision to eliminate the exception. *See Altera*
10 *Corp.*, 926 F.3d at 1080; *Fox Television Stations*, 556 U.S. at 515 (2009). The result is arbitrary
11 line-drawing with dire consequences for tribes like CIN. *See J & G Sales*, 473 F.3d at 1052. DOI
12 now insists that the ban promotes “consistency” by implementing res judicata, but this is not the
13 type of “consistency” referenced in the Final Rule’s actual justification. *See* 80 Fed. Reg. at
14 37875. Instead, the use of the word “consistency” in the Final Rule mirrors the provision
15 establishing the “baseline” evidentiary standard, which is antithetical to banning re-petitions. *Id.*
16 at 37863; *see also id.* at 37862 (stating that one aim of the Final Rule is “codifying and
17 improving upon past Departmental implementation of standards, where appropriate, to ensure
18 consistency, transparency, predictability and fairness”). There is no reason why new petitioners
19 should be entitled to this “consistency” while past petitioners are not.

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22 ⁷ Interestingly, a prior draft of the Final Rule justified eliminating the re-petition ban exception
23 by explaining that “the criteria in the Final Rule remain substantively unchanged overall, so the
24 Department does not anticipate the Final Rule would result in different outcomes to past
decisions.” AR000687. This language was removed from the Final Rule that was ultimately
published, suggesting that the agency concluded it was inaccurate.

1 In fact, the words “res judicata” and “finality” are nowhere to be found in DOI’s own
2 justification for the re-petition ban. *Id.* at 37875. The Final Rule references these concepts when
3 describing comments by those opposed to the re-petition ban exception, *id.* at 37874, but it does
4 not incorporate those comments into DOI’s own final reasoning. The mere fact that some
5 commenters raised these issues is not enough for the agency to rely on them now. Even if it was,
6 the Court is skeptical that res judicata is applicable in a situation such as this where legal
7 standards changed between the 1994 and 2015 regulations. *See Golden Hill Paugussett Tribe of*
8 *Indians v. Rell*, 463 F. Supp. 2d 192, 199 (D. Conn. 2006) (quoting *Metromedia Co. v. Fugazy*,
9 983 F.2d 350, 365 (2d Cir. 1992)) (explaining that res judicata does not apply when legal
10 standards governing the issues are “significantly different”). Appeals to “finality” when
11 justifying the re-petition ban are more convincingly premised on a desire to protect “settled
12 expectations” and avoid “unfair[ness] to stakeholders . . . who have already litigated against [an]
13 unsuccessful original petition.” 80 Fed. Reg. at 37874. The Court does not judge the
14 appropriateness of these goals, but if they actually motivated DOI’s decision they agency should
15 have said so directly.

16 DOI’s “fairness to new petitioners” justification is similarly unavailing. There is no
17 evidence in the record demonstrating why the existence of pending petitions became a decisive
18 issue after the Proposed Rule was published. Indeed, DOI defended the re-petition ban exception
19 by stating that it would *not* impact pending petitions and that few re-petition applications would
20 likely be accepted at all. *See Washburn Interview*, AR0006623; *see also Draft Final Rule*, Dkt
21 # 98-3, at 41 (comment stating: “Questionable how many viable petitioners are out there”). Since
22 the Final Rule did away with some of the Proposed Rule’s petitioner-friendly changes, the threat
23 to new petitioners seemingly got smaller rather than greater. For those few re-petition
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1 applications that were accepted, the Proposed Rule did not state whether they would be
2 addressed right away or sent to the back of the line. *See* Haliwa-Saponi Tribe Comment,
3 AR000614. If DOI was concerned about pending petitions, it would have been simple to give
4 them priority. Furthermore, when re-petitions finally were addressed, OFA would only have to
5 re-consider the aspects of the original decision that were identified as erroneous. This task would
6 surely take less time than deciding a whole new petition. In short, the re-petition ban exception
7 would only be detrimental to existing petitioners if DOI designed it to be.

8 For many of the same reasons, DOI's "efficiency" justification is also unsupported. The
9 Final Rule emphasizes that the "Department, and OFA in particular," would face an increased
10 workload if re-petitioning were allowed. 80 Fed. Reg. at 37875. But the Proposed Rule tasked
11 OHA judges with screening re-petition applications, not OFA. *See* 79 Fed. Reg. at 30767.
12 Furthermore, DOI identifies no evidence in the record showing why general efficiency concerns
13 came to outweigh the Proposed Rule's reasons for allowing re-petitioning. If the Final Rule truly
14 does not relax standards significantly, as DOI claims, then few re-petitions can be expected to
15 make it to OFA at all. Of course, there is the possibility that some re-petition applications would
16 successfully proceed to OFA, which could slow down the process for future petitioners. But if
17 such tribes have valid claims to recognition under the new standards, shutting them out to further
18 some vague notion of administrative efficiency seems the definition of arbitrary. Merely
19 referencing "efficiency," without more, is insufficient to sustain a regulation as draconian as the
20 2015 re-petition ban. The decision to maintain the re-petition ban in the 2015 Final Rule was
21 thus arbitrary and capricious and must be remanded to DOI for further evaluation consistent with
22 this Order.

1 **3. Equal Protection Clause**

2 CIN also challenges the re-petition ban under the Fifth Amendment’s Equal Protection
3 Clause. The Ninth Circuit has held that categorizations based on tribal recognition status
4 demonstrate a preference that is “political rather than racial in nature,” making the “highly
5 deferential” rational basis review appropriate. *Kahawaiolaa*, 386 F.3d at 1279 (quoting *Morton*
6 *v. Mancari*, 417 U.S. 535, 554 (1974)). Under the rational basis test, a regulation must be upheld
7 “if there is a rational relationship between the disparity of treatment and some legitimate
8 governmental purpose.” *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). “In defending
9 a statute on rational-basis review, the government ‘has no obligation to produce evidence to
10 sustain the rationality of a statutory classification’; rather, ‘[t]he burden is on the one attacking
11 the legislative arrangement to negative every conceivable basis which might support it.’” *Id.* at
12 1279-80 (citing *Heller*, 509 U.S. at 320).

13 CIN argues that the 2015 re-petition ban “effectively favors some tribal groups—those
14 groups whose petitions for acknowledgement have not yet been determined—for no valid
15 reason.” Dkt. # 97 at 22. CIN compares this situation to *U. S. Department of Agriculture v.*
16 *Moreno*, where the Court struck down a statute limiting government benefits to households with
17 related members because the law arbitrarily targeted “hippies,” a politically unpopular group.
18 413 U.S. 528, 534 (1973); *see also Diaz v. Brewer*, 656 F.3d 1008, 1014-15 (9th Cir. 2011) (law
19 limiting benefits to married couples discriminated against same-sex couples, who legally could
20 not marry in Arizona, for no legitimate purpose).

21 DOI responds that, first, the 1994 Part 83 regulations also contained the re-petition ban,
22 meaning that the 2015 Final Rule did not treat previously-denied tribes any differently than
23 before. Second, DOI points to the consistency, efficiency, and fairness justifications for the Final
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1 Rule. Finally, DOI relies on the principle that “the Fifth Amendment does not forbid . . .
2 statutory changes to have a beginning and thus to discriminate between the rights of an earlier
3 and later time.” *Califano v. Webster*, 430 U.S. 313, 321 (1977) (internal quotation omitted); *see*
4 *also Cont’l Coal, Inc. v. Cunningham*, 553 F. Supp. 2d 1273, 1282 (D. Kan. 2008) (applying
5 *Califano*’s reasoning to a zoning ordinance requiring only properties with non-preexisting uses to
6 obtain a conditional use permit).

7 The Court is persuaded that the principle in *Califano* precludes striking down the 2015
8 re-petition ban under the Equal Protection Clause. In essence, CIN claims that it is being
9 discriminated against because of the *time* it chose to petition for federal recognition. However,
10 for equal protection purposes, the government has a legitimate interest in limiting the temporal
11 scope of new laws, including the 2015 Part 83 regulations. CIN’s equal protection claim is thus
12 untenable as a matter of law.

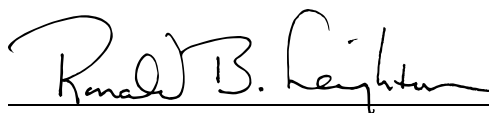
13 CIN also has not met its burden of demonstrating that there is no conceivable legitimate
14 basis for the re-petition ban. Unlike CIN’s arbitrary and capricious claim, it is not incumbent on
15 the government to justify its regulation under rational basis review. CIN must affirmatively
16 demonstrate that efficiency, fairness, and finality are *not* legitimate purposes for the re-petition
17 ban. It fails to do this. Instead, CIN draws comparisons to cases striking down laws
18 discriminating against unpopular groups, such as hippies and same-sex couples, when
19 distributing benefits. *See Moreno*, 413 U.S. at 534; *Brewer*, 656 F.3d at 1014-15. The
20 temporally-based classification at issue here is a far cry from such blatant discrimination.
21 Consequently, CIN’s equal protection claim fails.

1 **CONCLUSION**

2 For the above reasons, CIN's Motion is GRANTED and DOI's Motion is DENIED with
3 respect to the claim that the 2015 re-petition ban is arbitrary and capricious in violation of the
4 APA. The Final Rule is remanded to DOI to further consider its justification for the re-petition
5 ban or otherwise alter the regulation consistent with this Order. CIN's Motion is otherwise
6 DENIED and DOI's Motion is GRANTED with respect to Claims III-V.

7 IT IS SO ORDERED.

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9 Dated this 10th day of January, 2020.

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11 Ronald B. Leighton
12 United States District Judge
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