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Legal Sidebar

District Court Rejects DOI's Ban on Tribes' Re-petitioning for Federal Recognition

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On January 10, 2020, the U.S. District Court for the Western District of Washington held that the Department of the Interior's (DOI) 2015 Final Rule revising 25 C.F.R. Part 83 to ban Indian groups from re-petitioning after DOI denied federal recognition was "arbitrary and capricious." The case, *Chinook Indian Nation v. Bernhardt*, involved DOI's "Procedures for Federal Acknowledgment of Indian Tribes" (Part 83 Process), that govern how an Indian group may obtain federal recognition, enter into a government-to-government relationship with the United States, and become eligible for services and benefits provided to federally recognized Indian tribes and their members. The case addresses the re-petitioning ban, which has been in the regulations since 1994, as well as an exception to that ban that was included in a 2014 Proposed Rule, but omitted in final rules promulgated in 2015.

This Legal Sidebar provides background on federal recognition of Indian tribes; analyzes the court's holding; and discusses considerations for Congress, including recent legislation addressing the federal recognition administrative process.

Federal Recognition of Indian Tribes

Over the years, Indian tribes have received federal recognition through treaties, executive orders, congressional enactments, judicial decisions, and ad hoc administrative rulings. Although the Federally Recognized Tribe List Act states that "a decision of a United States court" could confer federal recognition, federal courts generally decline to grant recognition, deferring to DOI's jurisdiction in this matter. However, Congress occasionally provides legislative recognition. For example, in the 116th Congress, section 2870 of P.L. 116-92 conferred federal recognition on the Little Shell Tribe of Chippewa Indians.

DOI's February 1, 2019, list of "Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs" identifies 573 federally recognized Indian tribes (excluding the Little Shell Tribe's addition). Generally, to gain federal recognition, an Indian tribe must petition through the DOI Part 83 Process, administered by DOI's Office of Federal Acknowledgement (OFA). As of November 12, 2013, DOI had 356 letters of intent from groups seeking recognition. Since the Part 83 Process was established in 1978, DOI has denied 34 petitions for federal recognition. Under Part 83, an

Indian tribe seeking federal recognition must submit a documented petition and satisfy the following seven criteria:

1. *Indian Entity Identification*—by establishing that the group has been identified as an American Indian entity "on a substantially continuous basis since 1900";
2. *Community*—by showing that the group has existed as a distinct community from 1900 to the present;
3. *Political Influence or Authority*—by establishing that the entity has maintained political influence over members "as an autonomous entity from 1900 to the present";
4. *Governing Document*—by providing the group's governing documents, including its membership criteria;
5. *Descent*—by showing members descend from a single tribe or a combined tribe that functioned as a single entity;
6. *Unique Membership*—by showing that most of its members are not members of another federally recognized tribe; and
7. *Congressional Termination*—by showing that Congress has not terminated the group's relationship with the federal government.

Re-petitioning Denial of Federal Recognition

In addition to the seven criteria for recognition listed above, DOI's regulation excludes petitions from "an entity that previously petitioned and was denied Federal acknowledgment . . . ." A proposed revision of the DOI's Part 83 Process in 2014 would have included exceptions to the re-petitioning ban, but the final rule issued in 2015 omitted those exceptions. According to DOI, "[a]llowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular."

The District Court Decision in *Chinook Indian Nation v. Bernhardt*

In *Chinook Indian Nation v. Bernhardt,* the Chinook Indian Nation (CIN) challenged DOI's authority to issue the re-petitioning ban. CIN seeks federal recognition based on its members' descent from historic Chinook bands who lived near the Columbia River in the 18th and 19th centuries. In 2002, DOI denied CIN's petition for federal acknowledgement by rescinding a favorable determination issued in 2001 that had been challenged administratively by a third party. DOI declined to recognize the CIN in part because CIN failed to satisfy requirements for criteria relating to Indian entity identification, community, and political influence.

In challenging the final rule, CIN alleged that (1) DOI lacked authority to promulgate a ban on re-petitioning, and (2) failure to include the exception to the re-petitioning ban in the final rule was arbitrary and capricious under the Administrative Procedure Act (APA). In defense of its authority to issue the 2015 rule, DOI relied on three statutes that give the President and the Secretary of the Interior broad general authority over "Indian affairs": 25 U.S.C. §§ 2 and 9 and 43 U.S.C. § 1457. The court agreed with the agency's interpretation of these statutes and held that DOI's "expansive power over Indian affairs encompasses the re-petition ban" and that the power "to regulate the recognition process . . . [includes a power to] place limitations on that process."

The court agreed with CIN's claim that the re-petitioning ban should be set aside under the APA as "arbitrary and capricious" and remanded the final rule for "DOI to further consider its justification for the re-petition ban." The court declared that DOI's "reasons . . . are illogical, conclusory, and unsupported by the administrative record." The court determined that DOI failed to: (1) consider the effect on some re-

petitioners of "significant revisions [in the revised regulations] that could prove dispositive for some re-petitioners"; (2) "rationally connect the 2015 re-petitioning ban to the evidence in the record"; and (3) substantiate the agency's "'efficiency' justification."

CIN also raised an Equal Protection claim that the court rejected. Citing precedent that a distinction based on federal recognition is a political rather than racial classification, the court applied a rational basis test. The court held that the "'disparity of treatment" of tribes who had petitioned under the old version of the regulations versus those who had petitioned under the new regulations was rationally related to the "legitimate governmental purpose'" of "limiting the temporal scope of new laws."

Considerations for Congress

Chinook focuses attention on both DOI's rulemaking process and CIN's desire to have a second administrative review of its case for federal recognition despite having been denied recognition in 2002. *Chinook* highlights DOI's Part 83 Process that has evolved from delegating general authority to DOI to regulating how an Indian group enters into government-to-government relations with the United States. The issues with the re-petitioning ban identified in the litigation may suggest an opportunity for Congress to conduct oversight of the process and/or to consider enactment of statutory procedures and standards for that process. For example, H.R. 3744, as introduced in the 115th Congress, would have enacted statutory standards for DOI to use in processing petitions for recognition and, as reported by the House Committee on Natural Resources, it would also have included a requirement for an Act of Congress to finalize federal recognition.

Congress alone has authority to impose restrictions on federal recognition. For example, P.L. 115-121, the Thomasina E. Jordan Virginia Indian Tribes of Virginia Recognition Act of 2017, includes gaming prohibitions and geographic limits on taking land into trust for the Virginia tribes. Some groups seeking recognition, according to a recent study, lobby Congress for recognition at the same time they pursue a petition with DOI. Since 1978, when the Part 83 Process was established, Congress has legislatively recognized a total of 26 tribes (including the Little Shell Tribe of Chippewa Indians, recognized in 2019) that, for various reasons—e.g., unsuccessfully petitioning DOI, dissatisfaction with or ineligibility for the Part 83 Process—have sought legislative recognition. S. 1368/H.R. 1964 pending in the 116th Congress is one such bill. It would recognize the Lumbee Indian Tribe of North Carolina, a state-recognized tribe made ineligible for federal programs and services for Indians by a 1956 statute.

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