2015 Acknowledgement Regulations Invalidate Native American Treaties

By Bart T. Stupak and Justin Nemeroff

Before 1978, the existence of a treaty alone between a Native American group and the federal government was conclusive evidence to demonstrate a government-to-government relationship.[1] Today, groups seeking federal acknowledgement as a Native American tribe must undertake an arduous petitioning process, referred to as Part 83.[2]

The Part 83 process was created by the Department of Interior (DOI) with petition review performed by the Bureau of Indian Affairs. It was established based on a shift in congressional intent beginning in the 1960s toward "meaningful Indian self-determination policy."[3] Today, Indian groups can only achieve optimal economic, health, educational, and social benefits provided by the federal government that are necessary for self-determination by becoming federally recognized through the Part 83 process.[4]

Since its inception in 1978, the Bureau of Indian Affairs has developed unrealistic hurdles for native people to prove their existence as a cohesive, distinct native community with social, cultural, and political ties since their first contact with the American government from 1789 through present day. The Part 83 acknowledgement process has been severely criticized within and outside of the Bureau as being time consuming, expensive, inefficient, and unpredictable as to the criteria and necessary proof, and for rendering inconsistent results. Federal courts recognized that "a federal acknowledgment petition can be over 100,000 pages long and cost over $5 million to assemble; the Bureau estimated time for completion of review is 30 years."[5] Under the Part 83 process, the Bureau recognized only 17 of 51 petitions.[6] Simply put, the Part 83 process was broken.

The initial 1978 acknowledgement regulations of 25 CFR Part 83 were modified in 1994; the Bureau published further guidance in 2000, 2005, and 2008.[7] Despite its guidance, the Bureau testified before Congress that it recognized the decades-long criticisms that the acknowledgment process was "broken."[8] As a result, in 2012, the DOI attempted to completely overhaul the process. It published a proposed rule in 2014 and sought public comment. On July 1, 2015, the Bureau published its revised regulations (Final Rule).[9]

2015 acknowledgment regulations

The 2014 proposed rule included substantive changes to the seven-part criteria as well as a possible re-petitioning avenue for previously denied tribal petitioners. During the notice and comment period, the DOI received more than

2,800 comments on the proposed 2015 changes to the Part 83 process.[10] Many commenters expressed support for the proposed rule, which allowed previously denied petitioners to re-petition given that the proposed regulations "significantly and fundamentally change both the criteria and procedures used to review petitions."

Under the 2015 revised rule, the DOI decided (again) that it would not allow *any* re-petitioning and claimed that the agency's workload was too heavy to consider the submission of new evidence.[11] Additionally, the DOI claimed that there were *no* substantive changes to the criteria, but it allowed current (and future) petitioners to apply a "baseline" standard.[12] This meant that current petitioners could successfully demonstrate a criterion by showing the Bureau how a previous petitioner met a certain criterion using the same or similar evidence. Previously denied petitioners did not have the opportunity to benefit from such a standard and, being permanently barred from re-petitioning, never will.

The Burt Lake Band

The Burt Lake Band of Ottawa and Chippewa Indians is a signatory to the Treaty of Washington in 1836 and the Treaty of Detroit in 1855[13] in which it ceded all of its land to the United States in exchange for economic, health, educational, and social benefits provided by the federal government.

Burt Lake Band members have a torturous history with the DOI and the Bureau, which ignored, cheated, and denied tribal members their rights and privileges under two treaties. Even after Burt Lake's tribal village was illegally burnt to the ground in 1900 by law enforcement for nonpayment of real estate taxes, the Bureau continued to ignore its plight.[14]

The Burt Lake Band is recognized by the state as an historic Michigan tribe.[15] Like the other historic Michigan tribes, the Burt Lake Band applied for federal acknowledgement under the 1978 Bureau regulations. All Michigan tribes that petitioned for acknowledgement were granted recognition by either the Bureau or Congress—except Burt Lake.[16]

In 2000, the Bureau successfully lobbied against Burt Lake's congressional recognition legislation by promising Congress that it would decide Burt Lake's acknowledgement petition within six months.[17] Six years later, the Bureau denied Burt Lake's petition based on three subjective criteria.[18] Burt Lake's petition cost tribal members millions of dollars over the 28 years it took the Bureau to make a determination. Even after denial, Burt Lake continued to meet with Bureau officials to rectify the deficiencies in its acknowledgement petition.[19]

The Burt Lake Band's lawsuit

After being denied its petition, Burt Lake continued discussions with the Bureau on the petition's deficiencies; held individual meetings with Bureau officials; commented on the 2015 proposed acknowledgement regulations; and sent legal representatives to meet with the Bureau to submit newly discovered evidence to correct the petition's deficiencies. The Bureau never answered or responded to the Burt Lake Band's requests to resolve the deficiencies.[20]

In January 2017, the Burt Lake Band sued the DOI, Secretary of Interior, and Secretary of Indian Affairs in the United States District Court for the District of Columbia. The Band challenged the agency's 2015 acknowledgement regulations, claiming the department's administrative actions were arbitrary and capricious under the Administrative Procedure Act and denied the Band's equal protection and due process rights under the Fifth Amendment to the Constitution.[21]

The district court found that the Burt Lake Band had in fact suffered an injury in which relief can be granted and had standing to challenge the agency's 2015 acknowledgment regulations. It also determined that the 2015 regulations may have violated the Administrative Procedure Act and the Band's due process and equal protection rights.[22]

The case is currently pending before the court on cross-motions for summary judgment.

Violation of the Administrative Procedure Act

The Burt Lake Band argues that the 2015 rule violates the Administrative Procedure Act in two principal ways. First, the DOI's decision to ban all re-petitioning exceeds its statutory authority because this power is not delegated to it by any law; in fact, it squarely contradicts Congress's intent.[23] The general enabling statutes from which the DOI purportedly asserted its authority[24] are meant to benefit Indian people and support those groups on the path to self-determination, not thwart their attempts to lift their community out of hardship and dependence.[25] An absolute ban on re-petitioning, which prevents Indian groups such as Burt Lake from submitting additional evidence or applying the baseline standard and thereby achieving recognition, undoubtedly undermines Congress's objectives.

Second, the DOI's reasoning for refusing to permit re-petitioning was arbitrary and capricious. The DOI's Final Rule rejected all re-petitioning after considering only one approach, ignoring dozens of alternatives submitted by commenting parties. The DOI's reasoning was two-fold: (1) the ban would lighten the agency's workload and (2) re-petitioning was unnecessary given that the new rule did not substantively change Part 83's criteria.[26]

The Burt Lake Band argued that the DOI did not identify any evidence in the record to support these reasonings

AT A GLANCE

The Bureau of Indian Affairs' 2015 acknowledgment regulations strip away treaty rights and deny tribal sovereignty.

and, even if it did, they are irrational and should not be owed any deference. The DOI's first rationale—administrative convenience—is self-serving and arbitrarily chooses the DOI's interests over Indian groups. The second rationale is factually incorrect. The baseline approach materially eased the Part 83 process compared to the inconsistent process under which the Burt Lake Band applied. In addition, the DOI failed to consider important aspects of the re-petitioning issue in its decision-making, such as the effect a permanent ban has on tribes that develop or discover additional evidence after a negative determination.[27]

Violation of due process and equal protection

The Burt Lake Band further argued that the ban on re-petitioning also violates the Due Process Clause. Because of the ban, a tribe like Burt Lake cannot submit new evidence it has developed or discovered demonstrating that the DOI's decision on a specific criterion under the previous rules was factually incorrect. Thus, the DOI has prevented the Band from its right to petition for redress of grievances in accordance with its constitutionally protected due process rights. Moreover, Burt Lake—and the dozens of other Indian groups who were denied recognition under the old rules—were not provided with equal protection under the law. These previously denied petitioners will never be given the opportunity to prove recognition under the easier (and more consistent) standard under which current petitioners are now reviewed.[28]

The DOI could have easily limited the scope of re-petition to permit only the submission of new evidence related to application of a specific criterion a group initially failed to meet. This narrow avenue of re-petitioning would not be overly burdensome to the Bureau, and would permit equal protection and due process of the law. Instead, it chose to ban all re-petitioning without adequate reasons for doing so.

Department of Interior attempt to invalidate treaties

Burt Lake also argued in its briefing that by permanently prohibiting similar tribes from ever being federally recognized, the DOI has effectively disregarded the Band's treaties with the United States. The DOI did not consider the disastrous effects its ban would have on the Burt Lake Band or any other non-recognized tribes with valid, exiting treaties with the government.[29]

The import of a treaty with the United States is unmatched. A treaty is an express recognition that the United States dealt with a tribe in a government-to-government relationship. Since Burt Lake's treaty rights—tracts of lands—were never actually given to it, the only significance of its treaties is proof that it was, and should still be, a federally recognized tribe. But by recognizing that such treaties exist and at the same time banning all re-petitioning, the Bureau is effectively voiding the import of these treaties without Congress's approval.

The Supreme Court has expressly stated that, in the absence of an explicit statement, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[30] Burt Lake contends that the re-petitioning ban usurps congressional power in violation of the Constitution.[31]

Summation

Native American groups seeking federal acknowledgement under the Part 83 process as revised by the 2015 regulations must be mindful that the Bureau of Indian Affairs' determination on their petitions invalidates longstanding treaties that form the basis of Native Americans' unique sovereign government-to-government relationship. ■

Note: *Burt Lake Band of Ottawa and Chippewa Indians v The Hon David Bernhardt*, Case No. 1:17-cv-00038-ABJ (D D.C.), is pending before Hon. Amy Berman Jackson. The lawsuit is the first known lawsuit challenging the validity of the 2015 regulations and the nullification of treaty rights through administrative action. An identical lawsuit is pending in federal district court in the state of Washington using Burt Lake's allegations. The Burt Lake Band is represented by Venable LLP attorneys Bart Stupak, Moxi Upadhyaya, Justin Nemeroff, and Erin Cass.

Congressman Bart T. Stupak served 18 years in the U.S. House of Representatives from Michigan's first congressional district. Stupak works as an attorney in the Legislative and Government Affairs group at the Venable LLP law firm in Washington, D.C. He is licensed to practice law in Michigan and Washington, D.C.

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ENDNOTES

1. *Mackinac Tribe v Jewell*, 829 F3d 754, 755–756; 424 US App DC 236 (2016) ("[H]istorically, the United States recognized tribes through treaties, executive orders, and acts of Congress," and even after the passage of the IRA in 1934, "[r]ecognition by the federal government proceeded in an ad hoc manner…"). See also *State v Sebastian*, 243 Conn 115, 150 n 43; 701 A2d 13 (1997) ("'Between 1834 and 1871, Congress continued to deal directly by means of its treaty-making power with American Indian tribes, but in 1871, recognition by treaty ended as Congress terminated its treaty-making authority.'") (citation omitted); *Carcieri v Salazar*, 555 US 379, 398; 129 S Ct 1058; 172 L Ed 2d 791 (2009) ("The Department, for example, did not recognize the Stillaguamish Tribe until 1976, but its reasons

for recognition in 1976 included the fact that the Tribe had maintained treaty rights against the United States since 1855."); *Cherokee Nation of Oklahoma v Norton*, 389 F3d 1074, 1081 (CA 10, 2004) ("DOI's 1996 decision to extend Federal recognition to the Delawares [was] based on its legal analysis of the 1866 Cherokee Treaty and 1867 Agreement.").

2. 25 CFR 83.
3. "The federal government began to abandon the termination policy in 1958" and moved to self-governance, which was "rooted in a recognition of government-to-government relationships between the federal government and individual Indian tribes." *Cohen's Handbook of Federal Indian Law* (New York: LexisNexis, 2017), § 1.07 ("Self-determination opportunities prompted non-recognized groups to agitate for acknowledgment of their tribal status.").
4. The D.C. Circuit has suggested, but not formally held, that federal recognition is a "prerequisite to organization." *Mackinac Tribe v Jewell*, 829 F3d 754, 758; 424 US App DC 236 (CA D.C., 2016) (Brown, J., concurring).
5. *Id.* at 755 (citing Jackson, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 Rutgers L Rev 471, 478 (2012)). In fact, the Bureau of Indian Affairs admitted that "72% of…currently recognized federal tribes could not successfully go through the [Federal Acknowledgment] process as it is being administered today." *The Incomplete Loom* at 507 (quoting Norwood, *Delegate's Report, The National Congress of American Indians Annual Conference 1* (2010)).
6. *Federal Acknowledgment of American Indian Tribes; Final Rule*, 80 Fed Reg 37,862 (July 1, 2015) ("Of the 51 petitions resolved since this process began, only 17 petitions have been approved for acknowledgment and 34 have been denied.").
7. *Changes in the Internal Processing of Federal Acknowledgment Petitions*, 65 Fed Reg 7,052 (February 11, 2000); *Office of Federal Acknowledgment; Reports and Guidance Documents; Availability, etc.*, 70 Fed Reg 16,513 (March 31, 2005); and *Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures*, 73 Fed Reg 30,146 (May 23, 2008).
8. *Oversight Hearing Before the Subcommittee on Indian, Insular and Alaska Native Affairs of the Committee of Natural Resources, US House of Representatives*, 114th Cong 2 (2015) (testimony of Assistant Secretary-Indian Affairs Kevin Washburn: "[M]embers of this chamber have repeatedly explained for the past two decades that the process is broken and in need of reform.").
9. *Federal Acknowledgment of American Indian Tribes; Final Rule.*
10. *Oversight Hearing* (testimony of Washburn: "We have held 22 meetings (11 tribal consultations and 11 public meetings) and 4 nationwide teleconferences. Over the past two years, we have received thousands of comments on this regulatory initiative, including comments from States and local governments, federally recognized Indian tribes, inter-tribal organizations, non-federally recognized tribes, and members of the public.").
11. *Federal Acknowledgment of American Indian Tribes; Final Rule.*
12. *Id.* at 37,865 ("[A] petitioner today satisfies the standards of evidence or baseline requirements off a criterion if that type or amount of evidence was sufficient in a previous decision.").
13. 7 Stat 491 (1836) and 11 Stat 621 (1855); *Grand Traverse Band of Ottawa & Chippewa Indians v Ofc of the US Atty for the Western District of Mich*, 369 F3d 960, 961–962 n 2; 2004 Fed App 0151P (CA 6, 2004) ("[T]he 1855 Treaty…permit[s] the United States to deal with the Ottawas and the Chippewas as separate political entities.").
14. *Burt Lake Band of Ottawa and Chippewa Indians v The Hon David Bernhardt*, Case No. 1:17-cv-00038-ABJ as amended, ECF No. 11 (D D.C., 2019), ¶¶ 8-132, 156–161 (hereinafter "Burt Lake Band Complaint II"). See also *About Burt Lake Band*, Burt Lake Band of Ottawa and Chippewa Indians <http://www.burtlakeband.org/#about> [https://perma.cc/V9AF-FD3Y#about] and Norton, *Indian/Colonial Point's Shameful Past*, Traverse City Record Eagle (August 20, 2000), available at <http://www.burtlakeband.org/Media/Docs/A%20Shameful%20Past.pdf> [https://perma.cc/PBE8-GSKL]. All websites cited in this article were accessed June 19, 2019.
15. Michigan Indian Directory, Michigan Dep't of Civil Rights and Michigan Indian Legal Svcs (2016–2017) <https://www.michigan.gov/documents/mdcr/IndianDirectoryUpdated1-30-17_550084_7.pdf> [https://perma.cc/ZJJ4-TKPW].
16. See H Rep 110-794 (July 29, 2008) (the House Committee on Natural Resources made a finding listing each Michigan tribe since 1972 not organized under the Indian Reorganization Act but recognized or reaffirmed as federally recognized tribes).
17. *Summary Under the Criteria and Evidence for Final Determination Against Acknowledgment of the Burt Lake Band of Ottawa and Chippewa Indians, Inc*, BLB-V001-D006 (US Dep't of the Interior September 26, 2006), p 10 ("Members of Congress introduced recognition legislation on behalf of the [Burt Lake Band] on several occasions since 1987. The Department generally opposes recognition legislation that bypasses the Federal acknowledgment process.") available at <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/101_burtlk_MI/101_fd.pdf> [https://perma.cc/DZ2A-5CDF] and 143 Cong Rec H9937–9941, H9938 (November 4, 1997) (debate of H R 948, the Burt Lake Band of Ottawa and Chippewa Indians Act, statement of Rep. Shays: "What we are trying to do [by passing this bill] is circumvent a process of petition before the Bureau of Indian Affairs…is trying to determine [whether] this group of people still constitute[s] a tribe today….As the Bureau of Indian Affairs has stated, they expect to know within 6 months whether or not they can recommend that [the Burt Lake Band] should be Federally recognized.") available at <https://www.congress.gov/crec/1997/11/04/CREC-1997-11-04-pt1-PgH9937.pdf> [https://perma.cc/TWG3-Q8ZV]. The bill did not pass, falling below the two-thirds majority threshold by a vote of 240–176 (H R J 948, 105th Cong, Roll No. 574 (1997)).
18. *Summary Under the Criteria and Evidence for Final Determination Against Acknowledgment of the Burt Lake Band of Ottawa and Chippewa Indians* at 4 ("The [Bureau of Indian Affairs] found that the petitioner met three, but did not satisfy four of the seven mandatory criteria set forth in 25 CFR 83.7. The failure to meet these criteria flowed from a crucial problem: the presence in the petitioner's membership since 1984 of the descendants of John B. Vincent (b. 1816).").
19. *Burt Lake Band Complaint II* at Exhibits E and F (2016 letters to Bureau of Indian Affairs officials requesting reconsideration).
20. *Id.*
21. *Burt Lake Band Complaint II.*
22. *Burt Lake Band of Ottawa and Chippewa Indians v The Hon David Bernhardt*, Case No. 1:17-cv-00038-ABJ, ECF No. 20 at 10–18 (D D.C., 2018) (hereinafter "Burt Lake Band Complaint I").
23. *Id.*, Plaintiff's Mot for Summ J, ECF No. 27-1 at 27–32 and Plaintiff's Reply and Opposition to Def Cross-Mot for Summ J, ECF No. 32 at 7–19 (October 12, 2018).
24. 25 USC 2 and 25 USC 9.
25. *Cohen's Handbook of Federal Indian Law* at § 1.07 ("Other courts have concluded that these general statutes only provide authority to the Secretary to issue regulations in order to implement other specific statutory rights and programs, or to enforce a right recognized or confirmed under a previous statute or treaty.").
26. *Burt Lake Band Complaint I*, ECF No. 27-1 at 32–38 and ECF No. 32 at 20–35.
27. *Id.*
28. *Burt Lake Band Complaint I*, ECF No. 27-1 at 38–44 and ECF No. 32 at 35–41.
29. *Burt Lake Band Complaint I*, ECF No. 32 at 33–35 (given Burt Lake Band's well-documented treaty rights, "[b]y banning all previously-denied petitioners, the Secretary of Interior has breached his unique fiduciary responsibility to the [Burt Lake] Band.").
30. *Menominee Tribe of Indians v United States*, 391 US 404, 413; 88 S Ct 1705; 20 L Ed 2d 697 (1968).
31. *Washington v Confederated Bands & Tribes of Yakima Indian Nation*, 439 US 463, 479; 99 S Ct 740; 58 L Ed 2d 470 (1979) ("[T]reaty rights are preserved unless Congress has shown a specific intent to abrogate them.") (internal citation omitted); *United States v State of Wash*, 641 F2d 1368, 1371 (CA 9, 1981) ("The Department of the Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so.").