Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CECILE HANSEN, in her capacity as Chairwoman of the Duwamish Tribe, and the DUWAMISH TRIBE,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the Interior for Indian Affairs; LARRY ECHO HAWK, Assistant Secretary of the Interior for Indian Affairs; THE UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS; OFFICE OF FEDERAL ACKNOWLEDGMENT; and THE UNITED STATES OF AMERICA,

Defendants.

No. C08-0717-JCC

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON FIRST CAUSE OF ACTION

NOTE ON MOTION CALENDAR: AUGUST 10, 2012

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION AND RELIEF REQUESTED

Since March 28, 1994, the Duwamish Tribe ("Duwamish") is the *only* Indian entity whose acknowledgment petition has been denied by the Department of the Interior without first being evaluated under the more favorable 1994 regulations. As the Department itself acknowledges, those regulations "allow[] petitioners who ha[ve] demonstrated unambiguous previous Federal acknowledgment to proceed using a reduced evidentiary burden."[1] Under Department precedent, the Duwamish have demonstrated unambiguous previous Federal acknowledgement and therefore the right to be evaluated under the 1994 regulations. Ninety-nine (if not one hundred) percent of the Duwamish are direct descendants of the Duwamish who signed the Treaty of Point Elliott with the Federal government in 1855. An unbroken chain of shared activities connect the Duwamish today to the Duwamish that signed the 1855 Treaty. Therefore, the Department was required to give the Duwamish the benefit of the 1994 regulations,[2] but it did not. That error must be rectified.

The Department acted arbitrarily and capriciously in refusing to consider the Duwamish petition under the 1994 regulations because, in so doing, it treated similarly situated petitioners differently without offering a reasoned explanation for doing so. It also failed to follow—or even acknowledge—its own precedent. When the new regulations became effective in 1994, both the Duwamish and Chinook affirmatively elected to proceed under the preexisting 1978 regulations. In January 2001, however, the Department applied the 1994 regulations (as well as the 1978 regulations) in evaluating the petition of the Chinook. Nine months later, though, the Department completely ignored this precedent and considered the Duwamish petition only under the 1978 regulations. In its decision, the Department's sole explanation for doing so was that the Duwamish had elected in 1994 to be

[1] Declaration of Jonathan H. Harrison in Support of Plaintiffs' Motion for Summary Judgment on First Cause of Action ("Harrison Declaration" or "Harrison Decl."), Ex. 3 ("Duwamish Sept. FD"), 7. Documents in the administrative record contain the page citation of the administrative record.

[2] Harrison Decl., Ex. 5 ("Chinook RFD"), 63-65.

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evaluated under the 1978 regulations—but that was equally true of the Chinook.

Evaluating the Chinook but not the Duwamish under the 1994 regulations was especially unwarranted. The Department's initial justification for classifying the Chinook as a previously unambiguously acknowledged tribe was that the Chinook were named in a 1925 special jurisdictional Act ("1925 Act"). That ***same*** 1925 Act, however, ***also named the Duwamish*** (as a party to the 1855 Treaty of Point Elliott). In fact, the 1925 Act provides much stronger evidence of acknowledgment for the Duwamish Tribe than the Chinook. The 1925 Act authorized the Court of Claims to hear claims by treaty tribes, like the Duwamish, and certain non-treaty tribes, like the Chinook. The resulting 1934 Court of Claims decision identified the plaintiff in this case—the Duwamish Tribe—as being the historic Duwamish tribe that signed the Treaty of Point Elliott. Indeed, the 1934 decision made a monetary award to the Duwamish on the basis of its "tribal" claims. By contrast, the 1934 decision found that the historic Chinook bands ceased to exist in the 1860s. The Chinook did not even introduce the 1925 Act as evidence. The Department nonetheless evaluated whether that Act constituted unambiguous acknowledgment of the Chinook. The Duwamish *did* introduce the 1925 Act and the 1934 Court of Claims decision as evidence, but the Department chose not to evaluate whether they constituted unambiguous acknowledgment of the Duwamish.

In sum, the Department was required to evaluate the Duwamish petition, like the Chinook petition, under both the 1978 and 1994 regulations. Initially, the Department did exactly that. In January 2001, the Department issued its Initial Final Determination granting the Duwamish petition. After withdrawing the Initial Final Determination, however, the Department chose to ignore its own precedent from the Chinook case, evaluate the Duwamish petition only under the 1978 regulations, and thus deny the Duwamish their rights to equal treatment under the Administrative Procedure Act. This Court has authority to remand the case to the Department with instructions to apply the 1994 regulations. The Duwamish

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respectfully request that the Court do just that.

II. STANDARD OF REVIEW

Under the APA, agency action must be reversed and remanded if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (quotation omitted). Agency action is "arbitrary and capricious" if the agency fails to consider an important factor or aspect of the problem or fails to provide a reasoned explanation for its action. *See, e.g.*, *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010); *Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150-51 (9th Cir. 2009). An agency's reasoned explanation must be given within the challenged decision itself and be supported by the record for that decision. *Cal. Energy Comm'n*, 585 F.3d at 1150-51. Courts, therefore, may not consider purported explanations raised for the first time during litigation. *See, e.g.*, *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1243 (D.C. Cir. 2007).

An agency fails to engage in reasoned decision-making, and thus acts arbitrarily and capriciously, if it "applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record." *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776-77 (D.C. Cir. 2005); *see also Muwekma Ohlone Tribe v. Kempthorne,* 452 F. Supp.2d 105, 115 (D.D.C. 2006). Put simply, if an agency makes an exception in one case, it "must either make an exception in a similar case or point to a relevant distinction between the two cases." *Westar Energy*, Inc., 473 F.3d at 1241. Vitally, the agency's explanation for reaching different decisions in two cases cannot be based on a fact that is common to both cases. *Id.* at 1242.

An agency similarly fails to engage in reasoned decision-making, and thus acts arbitrarily and capriciously, if it departs from prior precedent without addressing that

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precedent and giving a reasoned explanation for departing from it. If an agency does not even consider relevant precedent, it "necessarily" fails to engage in reasoned decision-making. *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006). Similarly, if an agency departs from prior precedent without addressing that precedent in its decision, the agency fails to satisfy the most basic requirements of the APA. *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16, 129 S.Ct. 1800, 1811 (2009). An agency cannot "depart from prior policy *sub silentio*" but must instead address prior precedent to "display awareness that it *is* changing position." *Id.* (emphasis in original). If an agency diverges from prior precedent, the agency thus must give a reasoned explanation, supported by evidence in the record, for doing so. *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989). An agency's reasoned analysis is critical to ensure that prior precedent is being deliberately changed, as opposed to casually ignored. *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1125 (D.C. Cir. 2003). Put simply, "[s]ilence in the face of inconvenient precedent is not acceptable." *Jicarilla Apache Nation v. U.S. Dep't of Interior,* 613 F.3d 1112, 1120 (D.C. Cir. 2010).

The party challenging agency action must establish that the agency's error was not harmless, but the harmless error rule is "not . . . a particularly onerous requirement." *Shinseki v. Sanders*, 556 U.S. 396, 410, 129 S.Ct. 1696, 1706 (2009). An error is harmless only if it "had no bearing on the procedure used or the substance of [the] decision reached." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1091-92 (9th Cir. 2011) (quotation omitted). To establish harm, the Duwamish are not required to prove that the Department's decision would have been different, only that it "might" have been different. *Jicarilla*, 613 F.3d at 1121; *PDK Laboratories Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004).

III. STATEMENT OF FACTS

A. Unambiguous Federal Acknowledgment of the Duwamish Tribe.

The historic Duwamish tribe lived along the rivers south of Lake Washington long

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before the first non-Indian settlers came to the Northwest. Harrison Decl., Ex. 2 ("Duwamish PF"), 31-33. In 1855, Chief Seattle and other Duwamish tribal leaders signed the Treaty of Point Elliott on behalf of the historic Duwamish tribe. *Id.*, 37-45. Thus began a government-to-government relationship between the Duwamish and the United States. *Id.*, 37-49. Today, approximately 99 percent, if not all, of the members of the Duwamish are descended from members of the historic Duwamish tribe that signed the Treaty of Point Elliott.[3] *Id.*, 24.

The Treaty of Point Elliott was ratified by Congress and proclaimed by the President in 1859. *Id.*, 45. Over the twenty-year period between 1860 and 1879, the United States made slightly more than $150,000 in appropriations for the "Dwamish and allied tribes" under Article VI of the 1855 Treaty. *Id.*, 49. After 1879, when the United States finished making appropriations due under Article VI of the treaty, Congress continued to pass appropriations statutes for the benefit of the "D'wamish and other allied tribes in Washington" until 1923. *Id.*, 49-50.

In 1925, Congress passed a special jurisdictional Act (i.e., the 1925 Act) intended in large part to rectify wrongs to Indian tribes who had not received what they were promised in treaties. *See* Harrison Decl., Ex. 7 ("1925 Act"), 6-7; Harrison Decl., Ex. 8, 24-26 ("[S]ome of these tribes, at least, may be entitled to further payments under the positive contracts made in the treaties with the government."). The first portion of that Act's first clause gave the Court of Claims jurisdiction to "[h]ear and determine" and "render final judgment" on claims brought by "the tribes and bands of Indians . . . with whom were made any of the [four western Washington] treaties [of the 1850's]" (specifically including the 1855 Treaty of Point Elliott) "[g]rowing out of said treaties . . . ." 1925 Act, pp. 6-7. In other words, the first

[3] This evidence of Federal acknowledgment of the Duwamish is relevant because (1) evidence of unambiguous Federal acknowledgment at any point (even in 1855) entitles the Duwamish to evaluation under the 1994 regulations, *see* Section A.1.c, *infra*, and (2) under the 1994 regulations the Duwamish are only required to establish tribal continuity since the last point of unambiguous Federal acknowledgment, *see* Section A.1.d(i)-(vi), *infra*.

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portion of the Act gave the Court of Claims jurisdiction only to hear claims (1) brought by tribes who were parties to ratified treaties from the 1850s ("treaty tribes") for (2) claims based on alleged violations of those treaties. Harrison Decl. Ex. 9 ("1934 Court of Claims Decision"), 79 Ct. Cl. 530, *571-72 (June 4, 1934). It was well-established that the United States only entered into treaty relations with Indian governmental entities, not individual Indians. Harrison Decl., Ex. 8, 24-25. For that reason, the Act did not permit Indians to bring individual claims based on alleged treaty violations. *Id.*

The historic Duwamish tribe was the first signatory to the Treaty of Point Elliott.[4] The Duwamish—the plaintiff in this case—was the first named "treaty-tribe" plaintiff in the Court of Claims case. 1934 Court of Claims Decision, *530. Twenty-two tribes or bands had been parties to the 1855 Treaty of Point Elliott. *Id.*, *541. Only eleven of them brought suit in the Court of Claims. *Id.*, *533. No claims were filed by the other eleven tribes or bands or filed on behalf of their descendants. When the plaintiffs submitted their proposed findings of fact to the Court of Claims, the treaty tribe plaintiffs expressly asserted that they *were* the historic treaty tribes. Harrison Decl., Ex. 10, Claimants' Requests for Findings, Findings 1 and 15.[5] In the Federal government's May 1933 response to those proposed findings, the government *did not dispute* that the Duwamish Tribe (the petitioner) was the historic Duwamish treaty tribe. Harrison Decl., Ex. 11, United States' Objections to Findings of Fact Proposed by Plaintiffs, Findings 1 and 15.

When the Court of Claims issued its decision in 1934, the Court held that "[t]he following plaintiffs *were* parties to the Treaty of Point Elliott, viz: The Duwamish . . . ." Court of Claims Decision, *533 (emphasis added). The Court then entered a monetary judgment in favor of the Duwamish. *Id.*, *537-*538, *574-*576. The judgment was based on the Federal government's failure to make the compensation promised in Article VII of the

[4] Chief Seattle, the first signatory, signed for other tribes as well. Duwamish PF, 41.
[5] These pleadings are part of the public record to the 1934 Court of Claims decision.

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Treaty for the "tribal" properties (longhouses) that were taken as a result of the Treaty. *Id.*; *see also id.*, *575-*576 ("[T]he treaty dealt with the tribe as such . . . we think the claims are tribal.") [6]

The second part of the 1925 Act's first clause gave the Court of Claims jurisdiction to decide any claims brought by specifically named Indian tribes or bands that had not entered into ratified treaties with the United States, including the Chinook. 1925 Act, 6. The Court of Claims ultimately dismissed the Chinook claims. The Court of Claims held, first, that it had no jurisdiction to resolve claims that were not based on ratified treaties and, second, found in the alternative that the historic Chinook bands had ceased to exist in an organized form by approximately 1860. 1934 Court of Claims Decision, *600, *608-*610.

B. Application of the Revised 1994 Regulations to the Jena Choctaw, Huron Potawatomi, Snoqualmie, and Chinook.

1. Election of the 1994 Regulations

The revised 1994 regulations became effective on March 28, 1994. Harrison Decl., Ex. 6, 59 F.R. 5280, *5280 (Feb. 24, 1994) ("Feb. 24, 1994 Rules"). The 1994 regulations automatically applied to all petitions that came under active consideration after March 28, 1994. 25 C.F.R. § 83.3(g). By contrast, Indian groups whose petitions were under active consideration as of March 28, 1994:

> [M]ay choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994.

Id. As of March 28, 1994, a number of tribes that had originally petitioned under the 1978 acknowledgment regulations still had petitions under active consideration. These petitioners included the Duwamish, the Chinook, the Jena Choctaw, the Huron Potawatomi, and the Snoqualmie. Harrison Decl., Ex. 12 ("DRAFT Precedent Manual" dated 3/1/2002), 4

[6] The Duwamish did not receive a monetary recovery because an offset exceeded the amount of the judgment for breach of Article VII. Court of Claims Decision, *611-*612.

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(columns PF / F.R. or FD / F.R.) (identifying dates of publication of Proposed Findings and Final Determinations).

The Department's February 1994 comments to the regulations state that the Department "thinks it unlikely" that any petitioner would choose to proceed under the 1978 regulations. 59 F.R. 9280, *9285 (Feb. 25, 1994). In the same section, the Department states that if a Department decision made under the 1978 regulations was vacated or otherwise returned to the Department by a court, the "court would . . . provide guidance" with respect to "what procedures" (i.e., what version of the regulations) should be applied depending on the facts of the specific court ruling. *Id.* at *9285.

2. The Department's Application of the 1994 Regulations to the Jena Choctaw, Huron Potawatomi, and Snoqualmie

By the April 26, 1994 regulatory deadline, the Huron Potawatomi and Snoqualmie had not made an affirmative election about what regulations under which to proceed. Amended Petition for Relief (Dkt. 49), ¶¶ 78, 79; Defendants' Answer to Amended Petition for Relief (Dkt. 54), ¶¶ 78, 79. The Jena Choctaw appear not to have done so.[7] Ultimately, the Department on its own initiative applied the 1994 regulations to the petitions of the Jena Choctaw (in 1994), Huron Potawatomi (in 1995), and Snoqualmie (in 1997). DRAFT Precedent Manual, 4 (columns PF / 83.8 and FD / 83.8).

3. The Department's Precedent Manual

As the columns headed "FD / 83.8" and "FD / F.R." show, after March 28, 1994, the Duwamish was the *only* Indian petitioner whose petition was denied without being evaluated under the 1994 regulations (i.e., marked "NA"). To provide context, the Department created the "DRAFT Precedent Manual" in response to a General Accounting Office report that noted

[7] *See* Summary . . . for Proposed Finding for Federal Acknowledgment of the Jena Band of Choctaw Indians, 5 (located at http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/PetitionsResolved/Petition45/index.htm (last visited April 12, 2012)

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that "transparent guidance on past precedent is not readily available to affected parties or the decisionmaker," which seriously handicapped the decision-making process. *See* November 2011 GAO Report, Improvements Needed in Tribal Recognition Process, pp. 11, 14, available at www.gao.gov/new.items/d0249.pdf , last visited April 13, 2012. The GAO recommended that the Bureau of Indian Affairs provide transparent guidelines, and the Bureau agreed to create and regularly update a precedent manual. *Id.*, pp. 20, 39-42. Unfortunately, the "DRAFT" precedent manual on the Department's website has not been updated since 2002. Sections addressing the application of the regulations "as modified by previous Federal acknowledgment" were never drafted and are in large part *still* left to be filled in: ""... text. . . .." (... PF xxxx, p)." DRAFT Precedent Manual, 28, 43.

4. The Chinook Petition

In April 1994, the Chinook elected to proceed under the 1978 regulations. Harrison Decl., Ex. 4 ("Chinook FD"), 5-6. In 1995, the Chinook asked whether it could instead proceed under the 1994 regulations. *Id.*, 6. Before the Department addressed the issue, the Chinook reaffirmed its initial choice to proceed under the 1978 regulations. *Id.* On August 27, 1997, the Department issued its Proposed Finding against acknowledgment of the Chinook, evaluating the petition under only the 1978 regulations. *Id.*

On December 31, 1997, the Chinook Tribe requested an "opinion" whether the Department "would allow the Chinook Indian Tribe's petition for federal acknowledgment to proceed under the 'New Regulations' of 1994." Chinook FD, 6. On March 13, 1998, the Department responded that it "could not" evaluate the petition under the 1994 regulations because (1) the Chinook Tribe had twice chosen to proceed under the 1978 regulations; (2) applying the two versions of the regulations "would ultimately produce the same results"; and (3) evaluating the petition under the 1994 regulations would not reduce the research burden on the government's investigators nor provide benefits for the administrative process.

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Id. The Assistant Secretary – Indian Affairs confirmed this position in May 1998. *Id.*

In January 2001, however, the Department reversed course and considered the Chinook's petition under both the 1978 and 1994 regulations. Chinook FD, 12-14. In the January 2001 Chinook decision, the Department explained why it changed its position. First, the Department had discretion to apply the 1994 regulations as well as the 1978 regulations, "barring prejudice to the petitioner." *Id.*, 13; *see also* 25 C.F.R. § 1.2. Second, the 1994 regulations would reduce the evidentiary burden on the Chinook, while still requiring them to prove continued tribal existence since the last point of federal acknowledgment. Chinook FD, 13. Third, it was improper to "ignore" credible evidence of previous unambiguous Federal acknowledgement—specifically, 1912 and 1925 Acts of Congress naming the Chinook—even though the Chinook had not identified either Act in its petition. *Id.*, 13.

The Department did not issue another opinion on the Chinook petition until July 5, 2002 (after its decision on the Duwamish petition). Chinook RFD, 1.[8] In the July 5, 2002 reconsidered Chinook decision, the Department reaffirmed the legal conclusions from its earlier January 2001 Chinook decision. The Department held that 25 C.F.R. § 1.2 gave it the authority to evaluate the Chinook petition under the 1994 regulations, as the Department can make exceptions to the regulations set out in Chapter 25 if doing so will not prejudice the Indians. Chinook RFD, 62. The Secretary of the Interior then held:

> On the grounds that it is in the "best interest of the Indians," including the Chinook . . . that the reconsideration of the Final Determination in this case should be made under both the 1978 and 1994 regulations to resolve the questions raised about whether the results would be different under the 1994 regulations than the 1978 regulations, I waive the regulatory requirements of section 83.3(g) that a petition be completed under either the 1978 or the 1994 regulations, based on a timely election by a petitioner.

Id. That is, evaluation under both set of regulations would benefit the Chinook, as it would show *whether the result of applying the two versions of the regulations would be the same.*

[8] Pursuant to the Department's position that published decisions are law, the July 5, 2002 decision is precedent for this Court's decision.

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Id. Accordingly, the Department again applied the 1994 regulations to the Chinook petition. The Department found, on reconsideration, that the Chinook had not been unambiguously acknowledged after 1855. *Id.*, 64. Even so, however, the Chinook still significantly benefited from the reduced burden of proof of the 1994 regulations: the Chinook only had to prove the existence of community in the "present," not since historical times (as required under the 1978 regulations). 25 C.F.R. § 83.8(d)(2).

C. The Department's Evaluation of the Duwamish Petition.

1. The Department's June 18, 1996 Proposed Findings on the Duwamish Petition

In petition materials submitted prior to 1994, the Duwamish had already provided the Department with substantial evidence of unambiguous previous Federal acknowledgment. *See* 025 PFR-GPF-V004-D00002, pages 5-7; 025 PFR-APF-V022-D0028, pages 388, 395-96; 035 DUW-FDD-V002-D0007, pages 19-20, 26. On April 5, 1994, the Duwamish (like the Chinook) elected to complete the petitioning process under the 1978 regulations. Duwamish PF, 6; Sept. Duwamish Sept. FD, 7. The Department had said that such election would make no difference to the outcome. 59 F.R. 9280, *9281 (Feb. 25, 1994).

In 1996, the Department issued an adverse Proposed Finding on the Duwamish's petition. The Department found that the historic Duwamish tribe unquestionably existed until sometime in the 1890s. Duwamish PF, 54-58. There were continuing social, religious, and economic relationships among at least some of the Duwamish through at least 1915-17. Duwamish PF, 9-10. On December 23, 1915, the Board of Directors of the "Duwamish tribe" submitted, to the "Duwamish tribe," "the following names as members of the Duwamish tribe of Indians to this date, and ask the approval of the same; and that the said list be forwarded to the Honorable Commissioner of Indian Affairs." Harrison Decl., Ex. 13 ("1915 Roll"). The Department concluded that there was no evidence that the 1915 organization "had engaged in

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any activity [between 1917 and 1925]. Duwamish PF, 76.

The Duwamish petitioner has unquestionably existed since at least 1925. Duwamish PF, 76. The Department concluded, however, that the 1925 organization (the petitioner) was not the same group as the 1915 organization, based on an analysis of membership lists. Duwamish PF, 72-83. The Department disputed the Duwamish argument that the 1915 roll, which listed "members . . . to this date," was subject to supplementation, instead arguing that "to this date" was only meant to allow inclusion of later-born children. Duwamish Sept. FD, 55. In doing so, the Department somehow overlooked a ***1920*** document titled "***List of Members of Duwamish Tribe***" – a supplemental membership list, with addresses, which was sent to the Bureau of Indian Affairs (as the 1915 roll had been). Harrison Decl., Ex. 14. The 1920 "List of Members" both increases the number of members of the 1925 Organization who are identified, before 1925, as being part of the "Duwamish Tribe," and also contradicts the Department's suggestion that there was no organized Duwamish group active between 1917 and 1925.

The Department found that because the Duwamish petitioner purportedly did not exist before 1925, it could not satisfy § 83.7(a), (b), or (c) of the 1978 regulations before 1925. Duwamish Sept. FD, 9-10. The Department also found there was no evidence of external identification of the petitioner between 1925 and 1939, *id.*;[9] no evidence of community between 1925 and the present (although the Department did concede there was an increase in group activities beginning in the 1970s), *id.*, 9-10, 243-53; and no evidence of political influence or authority between 1925 and the present, *id.*, 9-10. The Department thus concluded that the Duwamish did not satisfy § 83.7(a), (b), or (c) of the 1978 regulations. *Id.*

The Department agreed that the Duwamish satisfied § 83.7(d)-(g) of the 1978 regulations. Duwamish Sept. FD, 9-10. Approximately 99 percent, if not 100 percent, of the

[9] This is obviously wrong, as the Duwamish were identified as an Indian entity in the 1934 Court of Claims decision.

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members of the Duwamish descend from the historic Duwamish tribe. *Id.*, 10. The Duwamish have a constitution and have been governed continuously since 1925 by members of a Board of Directors. Duwamish PF, 22-23. Only a tiny number of Duwamish (if any) are members of other tribes and the Duwamish have never been denied acknowledgment by an Act of Congress. Duwamish Sept. FD, 9-10.

2. In 2001, the Department Initially Applied the 1994 and 1978 Regulations—as It Had Just Done with the Chinook—in Making a Final Determination on the Duwamish Petition

On January 19, 2001, two weeks after the Chinook Final Determination was made, the Assistant Secretary—Indian Affairs signed a Final Determination acknowledging the Duwamish. Harrison Decl., Ex. 1. The acting Assistant Secretary-Indian Affairs then informed the Duwamish by phone that it was a federally recognized tribe. In the January 2001 decision, the Department evaluated the Duwamish petition under the 1994 as well as the 1978 regulations, Harrison Decl., Ex. 1, 7, 20-24, 51-53, and reached a favorable acknowledgement decision under both sets of regulations. The notice of the Department's initial decision granting acknowledgment states that the petition was evaluated under both the 1978 and 1994 regulations. Harrison Decl., Ex. 15, 3-9, 14-15. The Department discussed, in detail, evidence of previous unambiguous acknowledgment—*e.g.*, the 1855 Treaty of Point Elliott and the appropriation statutes passed between 1860 and 1923. Harrison Decl., Ex. 1, 20-24. The Department also cited and quoted from the 1925 special jurisdictional Act and referenced the 1934 Court of Claims decision. *Id.*, 24.

Although a typed copy was prepared for publication within a few days (one that has been withheld from the Duwamish), ACR-FDD-V002-D0132_0001, the First Final Determination was not published before President George W. Bush took office. Instead, a staff member at the Department withheld the "controversial" Initial Final Determination and it was ultimately not published. Harrison Decl., Ex. 16.

3. In September 2001, the Department Without a Reasonable Explanation

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Evaluated the Duwamish Only Under the 1978 Regulations

On September 25, 2001, the Department reversed course and issued a Final Determination denying the Duwamish petition. The Department acknowledged that § 83.8 of the revised 1994 regulations "allowed petitioners who had demonstrated unambiguous previous Federal acknowledgment to proceed using a *reduced evidentiary burden*." Duwamish Sept. FD, Page 7 (emphasis added). But the Department simply deleted the pages of the January Final Determination that addressed evidence of previous Federal acknowledgment (e.g., the list of appropriation statutes) and deleted the evaluation of the petition under the 1994 regulations. *Cf.* Harrison Decl., Ex. 1, 20-24. The Department's *sole* explanation for evaluating the Duwamish petition under the 1978 regulations (only) was that the Duwamish "chose to continue pursuing acknowledgment under the 1978 regulations which had no special provision for previous Federal acknowledgment." Duwamish Sept. FD, 7.

After a FOIA request, the Duwamish finally received a copy of the January Final Determination with the Assistant Secretary—Indian Affairs' handwritten edits (even though a typed version existed) a few days before the deadline for filing for reconsideration before the IBIA. ACR-RFR-V001-D0053. The Duwamish moved for reconsideration and argued that the Second Final Determination should be withdrawn and the First Final Determination enforced. Harrison Decl., Ex. 17. The Interior Board of Indian Appeals ("IBIA") held that it had no jurisdiction over that legal question. 37 IBIA 95 (1/04/2002). The IBIA referred the Duwamish request for reconsideration to the Secretary of the Interior. *Id.* On May 8, 2002, the Secretary declined to ask the Assistant Secretary-Indian Affairs to reconsider the Second Final Determination.[10]

[10] *See* Secretary's Decision Document (5/08/2002), available at http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/PetitionsResolved/Petition25/index.htm (last visited April 12, 2012).

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D. The Department's Decision on the Duwamish Petition Does Not Address the Department's Chinook Precedent. The record for the Duwamish petition does not contain a copy of the Department's January 2001 decision on the Chinook petition. In its September 2001 Final Determination, the Department does not even mention the work "Chinook," much less address the Chinook decision. In this litigation, the Department has *never* argued that it considered the Chinook petition in making its decision on the Duwamish petition.

IV. ARGUMENT

For two reasons, the Department's Final Determination on the Duwamish petition must be reversed and remanded with instructions to apply the 1994 regulations. First, the Department treated similarly situated tribes differently, without providing a reasoned explanation for the disparate treatment. Second, the Department failed to follow its own precedent, and failed to distinguish – or even acknowledge – that precedent. Either of these two errors, standing alone, is arbitrary and capricious.

A. The Department Treated the Similarly Situated Duwamish and Chinook Differently, Without a Reasoned Explanation.

The Department violated the APA by treating the similarly situated Duwamish and Chinook differently without offering a reasoned explanation for doing so. The Chinook petition was evaluated under the 1994 and 1978 regulations even though the Chinook elected in April 1994 to proceed under the 1978 regulations; the Duwamish petition was not. This cannot be disputed. Treating similarly situated petitioners differently without any explanation whatsoever is arbitrary and capricious.

1. The Duwamish and Chinook Petitioners Were Similarly Situated.

A party asserting disparate treatment must show evidence that the two parties were similarly situated. *P.I.A. Michigan City, Inc. v. Thompson*, 292 F.3d 820, 826 (D.C. Cir.

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2002). The Duwamish were similarly situated to the Chinook in that (a) both petitioners chose in April 1994 to proceed under the 1978 regulations; (b) under the 1994 regulations, the Department was required to determine whether the Duwamish qualified for evaluation under § 83.8; (c) the Duwamish qualified for evaluation under § 83.8 of the 1994 regulations; (d) the Duwamish would benefit from evaluation under § 83.8 of the 1994 regulations; and (e) there was evidence that the Federal government had acknowledged the Duwamish in the 1925 special jurisdictional Act (as well as the 1934 Court of Claims decision). These compelling similarities required the Department to apply the 1994 regulations to both petitions.

a. In April 1994, Both the Duwamish and Chinook Chose to Proceed Under the 1978 Regulations

In the 1994 regulations, the only relevant time period for making an "election" of regulations is the period between March 28, 1994 and April 26, 1994. 25 C.F.R. 83.3(g). Both the Duwamish and the Chinook chose to proceed under the 1978 regulations during this period.

b. The Department Was Required to Evaluate Evidence of Unambiguous Acknowledgment

The 1994 regulations *require* the Department to evaluate evidence of previous unambiguous acknowledgment, whether or not a petitioner argues it was previously acknowledged. Section 83.10(b)(3) states that if a petition "claims previous Federal acknowledgment *and/or* includes evidence of Federal acknowledgment," the Department's technical assistance review "*will* include a review to determine whether that evidence is sufficient to meet the requirements of previous Federal acknowledgment . . . ." *Id.* (emphasis added); *see also* Section 83.8(b) ("A determination of the adequacy of the evidence of previous Federal action acknowledging tribal status *shall* be made . . .") (all emphasis added).

The Duwamish presented substantial evidence of prior acknowledgment. "Previous

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Federal acknowledgment" means "action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States," and includes: (1) evidence that the group has had treaty relations with the United States; (2) evidence that the group has been denominated a tribe by act of Congress or Executive Order; and (3) evidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds. 25 C.F.R. 83.8(c). Additionally, courts have the power to "confirm a recognition after examining the treaties, statutes and executive orders to determine whether or not a political relationship has been established and maintained." John W. Ragsdale, Jr., *The United Tribe of Shawnee Indians: The Battle for Recognition*, 69 UMKC L. Rev. 311, 322-23 (2000). For the Duwamish, the 1855 Treaty of Point Elliott establishes previous unambiguous acknowledgment. Subsequent evidence the Department would be required to evaluate includes the distribution of appropriations under Article VI of the Treaty through 1880, subsequent appropriations statutes, and the 1925 special jurisdictional Act. Further, in that Act Congress gave the Court of Claims jurisdiction to "determine" whether the claimant tribes were in fact the historic treaty tribes – and the Court of Claims determined they were. *Cf.* Ragsdale, at 322-23.

c. The Duwamish Qualify for Evaluation Under the Reduced Evidentiary Burden of the 1994 Regulations

The Duwamish qualify for *evaluation* under § 83.8. The 1994 regulations "do not envision a petitioner demonstrating that it *meets* the acknowledgment criteria in order to be *evaluated* under section 83.8." Chinook RFD, 60 (emphasis in original).[11] To qualify for evaluation under Section 83.8, a petitioner must only show the following:

[11] The Department earlier misrepresented its own test and argued that the Duwamish would not qualify for evaluation under § 83.8. *See* Defendants' Opposition to Motion for Leave to File Amended Complaint (Dkt. 44), 10.

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(1) "The Government acknowledged, by its actions, a government-to-government relationship between the United States and an Indian tribe;"

(2)(a) "A predominant portion of [the petitioner's] members descend from the previously acknowledged tribe;" and

(2)(b) The petitioner "will be able to advance a claim that some of its members or ancestors with descent from the historical tribe participated in group activities at various times since last Federal acknowledgment."

Chinook RFD, 63-65.

All three prongs of the threshold analysis are met in the case of the Duwamish.

First, the historic Duwamish tribe entered into a government-to-government relationship with the United States by signing the 1855 Treaty.

Second, approximately 99 percent, if not 100 percent, of the Duwamish membership descends from the historic Duwamish treaty tribe. The Chinook, by contrast, barely scraped over the bar with 85 % descent (the rule requires 80% descent).

Third, "some" Duwamish members or ancestors participated in group activities at various times. Chinook RFD, 63-65. Indeed, although the rule does not require the existence of an organization, a Duwamish organization existed as late as 1915, and the current petitioner has existed at least since 1925. As the Chinook qualify for evaluation under § 83.8 with much less evidence, it was arbitrary and capricious to hold that the Duwamish do not.

d. The 1994 Regulations Would Reduce the Burden for the Duwamish

The 1994 regulations reduce the evidentiary burden for petitioners who demonstrate previous acknowledgment in six major ways: (1) they significantly shorten the time period in which petitioners must show that they continued to exist as tribes; (2) they reduce, in part, the requirement of showing external identification; (3) they substantially reduce the showing a petitioner must make regarding community; (4) they provide alternatives, which may be easier to meet, to satisfy the showing a petitioner must make of political influence or authority; (5) they recognize the importance of evidence like the 1925 Act and 1934 Court of

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Claims decision; and (6) they reduce or eliminate a risk of error that exists under the 1978 regulations if important historical evidence has been destroyed, lost, or overlooked.

i. *Tribal* Existence

Under the 1994 regulations, previous unambiguous Federal acknowledgment conclusively establishes a petitioner's existence as a tribe up to the point of last such acknowledgment. 25 C.F.R. § 83.8(a), (b). If a petitioner provides "substantial evidence of unambiguous Federal acknowledgment," the petitioner will then only be required to demonstrate that:

- The group has been identified as an American Indian entity since the point of last federal acknowledgment (not since historical times), and as the same tribal entity that was previously acknowledged or as a portion that has evolved from that entity;
- The group comprises a distinct community at present (but need not provide evidence to demonstrate existence as a community historically);
- Political influence or authority has been exercised since the point of last federal acknowledgement (not since historical times), where "political influence or authority" can be shown by identifying "substantially continuous historical identification, by authoritative, knowledgeable external sources, of leaders and/or a governing body who exercise political influence or authority, together with demonstration of one form of evidence listed in § 83.7(c)."

25 C.F.R. 83.8(d). In summary, a petitioner is only required to submit evidence showing that the tribe continued in existence *after* the last point of unambiguous Federal acknowledgment. Contemporaneous unambiguous Federal acknowledgment conclusively establishes tribal existence up to that point.

ii. External Identification.

With previous unambiguous acknowledgment, the petitioner no longer needs to show identification since historical times (as under the 1978 regulations), but only since the last point of unambiguous Federal acknowledgment. The petitioner does need to show

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identification as the "same tribal entity that was previously acknowledged or as a portion that has evolved from that entity." Here, of course, the Court of Claims in 1934 identified the Duwamish petitioner as being the historical Duwamish tribe that signed the Treaty of Point Elliott in 1855.

iii. Community

Under the 1994 regulations, a previously-acknowledged petitioner must establish community "in the present," not since historical times. 25 C.F.R. § 83.8(d)(2). The Department acknowledged that community activity among the Duwamish increased beginning in the 1970s. Duwamish PF, 243-252. Also, 50 or more years of continuous existence as an Indian entity is evidence of community. 25 C.F.R. § 83.7(b)(1)(viii). The 1978 regulations do not contain an analogous provision. The Duwamish petitioner (unlike the Chinook) has existed *at least* since 1925 – well over 50 years.

iv. Political Influence or Authority

The 1994 regulations only require a showing of political influence or authority since the last point of unambiguous acknowledgment, not since historical times. Additionally, previously acknowledged tribes can satisfy the rule by showing "substantially continuous historical identification, by authoritative, knowledgeable external sources, of *leaders and/or a governing body* who exercise political influence or authority, together with demonstration of one form of evidence listed in § 83.7(c)." 25 C.F.R. § 83.8(d)(3) (emphasis added). The Duwamish can thus use external identification of their Board of Directors as part of the evidence needed to establish this element.

v. Evidence of Unambiguous Acknowledgment

The 1925 Act and 1934 Court of Claims decision are far more supportive of the Duwamish tribal status than they were of the Chinook's tribal status. For example:

- The Duwamish asserted that they were the historic treaty tribe; the government did not dispute this.

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- The Court of Claims identified the plaintiff Duwamish Tribe as the historic treaty tribe.
- The Court of Claims found in the Duwamish's favor on an expressly "tribal" claim and entered a monetary judgment.

The Department had an obligation to not "ignore" this evidence in ruling on the Duwamish petition, and to instead evaluate it under the 1994 regulations.

vi. Risk of Error

If the Duwamish were unambiguously acknowledged in 1925 and/or 1934, then the Department erred in concluding the Duwamish did not exist as a tribe at that point. The 1994 regulations guard against this risk of error by giving the appropriate weight to the *contemporaneous* judgment of the Executive branch, Congress, or courts. The Department used § 83.8 to evaluate evidence the Chinook did not cite; yet the Department closed its eyes to the same evidence after the Duwamish cited it – creating an unnecessary risk of error.

2. The Department's Only "Explanation" for Treating the Duwamish Differently Is Inadequate as a Matter of Law

Both the Duwamish and the Chinook elected in 1994 to have their respective petitions considered under the 1978 regulations. The Chinook were permitted an exception to this election; the Duwamish were not. This is not in dispute. Under the APA, if one petitioner is permitted an exception, other petitioners deserve equal treatment or, at the very least, a reasonable explanation for why they are not treated equally. *Westar Energy*, Inc., 473 F.3d at 1241. The Department's sole explanation for its decision to limit review of the Duwamish petition to the 1978 regulations was that the Duwamish chose in April 1994 to proceed under the 1978 regulations. This explanation is insufficient as a matter of law because it is equally true of the Chinook. A rationale that is equally true for two parties cannot serve as a "reasoned explanation" for treating them differently. *McLaughlin*, 864 F.2d at 872.

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B. The Department Acted Arbitrarily and Capriciously by Departing from Its Chinook Precedent Without Explanation.

The Department's January 2001 decision on the Chinook petition was precedent on at least two points. First, the Department had the authority to waive a petitioner's election to proceed under the 1978 regulations. Second, the Department should waive a petitioner's choice of the 1978 regulations if doing so would benefit the petitioner—e.g., if there was evidence of unambiguous acknowledgment the Department could not in fairness "ignore."

The Chinook decision is precedent because it was a ruling from the "official policymaker" whose decisions bind the Department. *S. Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 103 n.7 (1st Cir. 2002). Further, by the Department's own definition in this litigation, the Chinook decision is precedent because it was published in the Federal Register. Indeed, the Department's March 1, 2002 "DRAFT Acknowledgment Precedent Manual" specifically identifies as precedent not only "petitions which have received a final determination . . . [but also] petitions which have received only a proposed finding . . . ." Harrison Decl., Ex. 12, 6. Because even proposed findings count as precedent, the Chinook Final Determination counts as precedent.

In the January Final Determination, the Department properly followed precedent, did not "ignore" evidence, and evaluated the Duwamish petition under both the 1978 and 1994 regulations. In the September Final Determination, however, the Department abruptly switched positions and evaluated the Duwamish petition only under the 1978 regulations. The Department either had to follow the Chinook precedent or explain why it was not doing so. The Department indisputably did neither.

Instead, the Department simply ignored the Chinook precedent. Failure to *consider* relevant precedent means the Department "necessarily" did not engage in reasoned decision-making. *Williams Gas*, 475 F.3d at 326. The Department's failure to *address* "a decision

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reaching a contrary result on similar facts" renders the action arbitrary and capricious. *Jicarilla,* 613 F.3d at 1120. Indeed, the Department expressly acknowledged in this litigation that "**If the document is not cited or referenced . . . Plaintiffs are free to argue that the Department did not consider that decision in deciding Plaintiffs' petition for acknowledgment or acted contrary to its precedent, and thus that the Department acted arbitrarily**." Defendants' Opposition to Duwamish Tribe's Motion to Compel Completion of the Administrative Record (Dkt. 60), 10 (emphasis added). As the Department did not cite or reference (much less distinguish) the Chinook decision, its decision was arbitrary and capricious.

C. The Department's Failure to Evaluate the Duwamish Under the 1994 Regulations Prejudiced the Duwamish.

To justify remand, the Duwamish must show that the Department's APA violations were not harmless. Here, the Department's error was not harmless and certainly not "clearly" harmless. *Bushmann v. Schweiker,* 676 F.2d 352, 358 (9th Cir. 1982). The Department ruled favorably on the Duwamish petition when the 1994 and 1978 regulations were applied in January 2001, yet ruled against the petition when only the 1978 regulations were applied in 2002. It is "certainly conceivable" that the Department *might* reach a different result if it applied the 1994 regulations, as it in fact *did* reach a favorable result in January 2001 when the 1994 regulations were applied. *Jicarilla*, 613 F.3d at 1121. An unexplained departure from precedent is not harmless where the Department may, on remand, decide to follow precedent and apply the 1994 regulations to the Duwamish decision. *Id.* This is particularly true where it is clear that the Department did not use § 83.8 to evaluate important evidence – in particular, the 1925 Act and 1934 Court of Claims decision – that the Department would be required to evaluate under § 83.8 today.

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V. CONCLUSION

The Department revised its acknowledgment regulations in 1994 because it recognized that there were serious flaws in the 1978 regulations that prejudiced petitioners. The Department should be conscious—and in the Chinook decision, was conscious—of the *possibility* that applying the two regulations might have different results. Since March 28, 1994, the Department has guarded against this risk of error by *never* denying a petition without first evaluating it under the more favorable 1994 regulations—except in the case of the Duwamish.

Remand is a matter of simple justice. The survival or extinction of a prominent Indian tribe, closely intertwined with the history of this region, is an issue of fundamental importance. It is a historic accident that the Duwamish will be the last petitioner for whom the "election" provision of the 1994 regulations is an issue. There can be no reasonable dispute that if the Duwamish petition had been decided just a few days earlier, and the decision published before the change in Administration, that the Department would have evaluated the Duwamish petition under the 1994 regulations just as it did the Chinook's. Unless remanded, the Duwamish decision will forever stand for the proposition that an Indian petitioner can be denied a full and fair evaluation of its tribal status by an accident of timing leading to its being evaluated by one administration rather than another.

All the Duwamish ask for in this motion is that the Court order the Department to *evaluate* its petition under the 1994 regulations. This is something the Department has done before, most notably in the case of the Chinook. All evidence in the record points to the conclusion that the Department's decision to treat the Duwamish and the Chinook differently was an unexamined one. Remand for the purpose of having the Department consider and address its own precedent is not only appropriate but required. The Duwamish respectfully request that this Court enter an appropriate Order granting this Motion.

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Dated this 13th day of April, 2012.

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Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CECILE HANSEN, in her capacity as Chairwoman of the Duwamish Tribe, and the DUWAMISH TRIBE,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the Interior for Indian Affairs; LARRY ECHO HAWK, Assistant Secretary of the Interior for Indian Affairs; THE UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS; OFFICE OF FEDERAL ACKNOWLEDGMENT; and THE UNITED STATES OF AMERICA,

Defendants.

No. C08-0717-JCC

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON FIRST CAUSE OF ACTION

NOTE ON MOTION CALENDAR: AUGUST 10, 2012

This Court, having considered Plaintiffs' Motion for Summary Judgment on First Cause of Action, Declaration of Jonathan H. Harrison in Support of Plaintiffs' Motion for Summary Judgment on First Cause of Action and attachments thereto, Defendants' Opposition and any declarations attached thereto, Plaintiffs' Reply, and all other filings in this matter, ORDERS that the Plaintiffs' Motion for Summary Judgment on First Cause of Action is hereby GRANTED. The Duwamish acknowledgment petition is REMANDED to the Department of the Interior for evaluation under the 1994 regulations.

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The Duwamish shall have 120 days from the date of remand to provide briefing to the Department regarding the application of the 1994 regulations to the Duwamish petition.

DATED this ____ day of _____, 2012.

_____
HONORABLE JOHN C. COUGHENOUR
UNITED STATES DISTRICT COURT JUDGE

Presented by:

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