22-5197

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

KURT KANAM, PILCHUCK NATION
PLAINTIFFS-APPELLANTS,
v.,

BUREAU OF INDIAN AFFAIRS ET AL
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
For the District of Columbia
(No. 21-cv-01690) (Hon. Richard J. Leon)

KURT KANAM, PILCHUCK NATION OPENING BRIEF ON THE MERITS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs-Appellants Kurt Kanam and Pilchuck Nation hereby certifies as follows:

(a) Parties and Amici.

Kurt Kanam and Pilchuck Nation are Plaintiffs in the district court and Appellants in this Court.

Pursuant to Circuit Rule 26.1, Kurt Kanam and Pilchuck Nation certifies that they are not a nonprofit corporation, is not a corporation and does not issue stock, and in which no publicly held corporation has any form of ownership interest. Pilchuck Nation was historically located in Snohomish County Washington. Kurt Kanam was legal adopted by Robert Posenjak and is the legal descendant of Pat Kanam Chief of the aboriginal Pilchuck Tribe.

The Bureau of Indian Affairs, (BIA), Deb Haaland, Bryan Newland, and Darryl LaConte are the Defendants in the district court and Appellees in this Court. No amici appeared in the district court and no amici have yet appeared in this Court.

Appellant understands that one or more parties may appear as amicus curiae in this appeal.

(b) Ruling Under Review.

Plaintiff-Appellant appeals the June 28, 2022, final order and Opinion of the United States District Court for the District of Columbia (Judge Richard J. Leon.), which granted Defendant-Appellee's motion to dismiss. The opinion is unreported and was filed on the District Court's docket on June 28, 2022. U.S. District Court for the District of Columbia Case #21-cv-01690-RJL, Document #30 and #31 Filed: 07/28/2022.

(c.) Related Cases.

The ruling under review has not previously been before this Court or any other court. There is one related case pending in this U.S. District Court for the District of Columbia of which counsel are aware. Case No. 22-cv-03183-RBW.

TABLE OF AUTHORITIES

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedures Act
BIA	Bureau of Indian Affairs
DOI	U.S. Department of Interior
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
SEC	Securities Exchange Commission

INTRODUCTION

This appeal is regarding two unanswered petitions to the United States Department of Interior ("DOI") that were attempting to add the Pilchuck Nation to the list of federally recognized tribes pursuant to the existing text "or by decision of a U.S. Court" in 25 U.S.C. 479 (a), 25 U.S.C. § 5130, 5131, ("List Act").[1]

Plaintiffs Kurt Kanam and Pilchuck Nation ("Pilchuck et al"), filed suit in the United States District Court for the District of Columbia, under the Administrative Procedures Act ("APA"), writ of mandamus and declaratory relief, against the Bureau of Indian Affairs ("BIA"), Deb Haaland, Bryan Newland, and Darryl LaConte. ("BIA et al")

In the agency review by the District Court, counsel for the BIA et al, filed a Motion to Dismiss and alleged Pilchuck et al could not state a claim because Congress gave DOI broad authority to process all Judicial branch petitions for federal tribal recognition under the administrative process in "Part 83" of the List Act, using an alleged DOI "express policy,"[2] developed

[1] Federally Recognized Indian Tribe List Act of 1994 Pub. L. 103-454 Sec. 103 (Nov. 2, 1994). (Codified as 25 U.S.C. 479 (a). The statue 25 U.S.C. § 479 (a), is in the Statutory Notes and Related Subsidiaries of 25 U.S.C. § 5130, 5131.
[2] APP. 83.

in 2015. BIA et al also alleged the District Court did not have jurisdiction until Pilchuck et al filed a "Part 83" application.

However, the agency did not file a certified administrative record with the District Court to support its post hoc "express policy," position, as required by Local Court Rule 7 (n) (1), D.C. Circuit and U.S. Supreme Court precedent, and agency APA policy.[3]

Once the BIA et al counsel used those post hoc arguments for the agency position in the litigation itself, a remand should have been granted by the District Court when it was requested.[4] The agency agreed in part.[5]

In its ruling, the District Court did not uphold opposing counsel's alleged uncertified DOI "express policy" position. Instead, the District Court enforced a "Circuit Court" precedent[6] that allegedly required all Judiciary branch recognition, to be done under "Part 83", even without a "Part 83" application and allegedly without the agency having a process to effectuate tribal recognition for the Judiciary branch.[7]

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[3] , https://www.fws.gov/policy/e1282fw5.pdf, https://www.acus.gov/sites/default/files/documents/ARWG-Handbook-DRAFT.pdf
[4] APP. 273, 388, 406, 408, 412, 415, 419 and 421.
[5] APP. 82, 83.
[6] APP. 453-454.
[7] APP. 78-79.

Without a "Part 83" application, the District Court erred taking hypothetical jurisdiction of the case to determine the merits of the Karluk Tribal Court judgment and did so without a certified administrative record or evidence to substantiate the alleged agency policy position.

This Opinion must be reversed because, (1) District of Columbia Circuit and U.S. Supreme Court case law mandates bar, (A) taking hypothetical jurisdiction of the case to determine the merits (B) substituting the opinion of the District Court or the opinion of counsel for that of DOI.

The Opinion should also be reversed for the other reasons argued below.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this timely appeal from a final judgment in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1291. Pilchuck et al also seek ultra vires review. "The case law in this circuit is clear that judicial review is available when an agency acts ultra vires," or outside of the authority Congress granted. (See *Aid Ass'n for Lutherans v. U.S. Postal Serv* 321 F.3d 1166 (D.C. Cir. 2003) at 1173.

The District Court had jurisdiction under 5 U.S.C. §701-706, 28 U.S.C. § 1331, 28 U.S.C. § 1361 and 28 U.S.C. §§ 2201 and 2202.

STATEMENT OF ISSUES

1. Whether the District Court could take hypothetical jurisdiction to decide the merits of the Karluk Tribal and U.S. District Court for the Western District of Washington judgments.

2. Whether the BIA et al collateral attack on the Karluk Tribal court judgement is barred by the doctrine of claim preclusion.

3. Whether any of Pilchuck et al claims are barred by the doctrine of claim preclusion.

4. Whether the District Court's finding that Pilchuck et al were required to exhaust administrative remedies under "Part 83" of the List Act and could not invoke the language "or by a decision of a U.S. Court" in the List Act was in error because (1) the District Court did not base its decision on a certified (DOI) agency record (2) the District Court could not substitute the opinion of the District Court and the opinion of the counsel for that of the agency. (3) Congress conferred a statutory right for tribes to seek federal tribal recognition under three separate and disjunctive criteria in the List Act: (A) "Part 83," (B) an "Act of Congress," (C) "or by a decision of a U.S. Court, and not under just one criteria under "Part 83" (4) only Congress can change a statute and the Congress has not amended the List Act nor has the

Act been repealed by implication (5) the agency did not have authority to change the statute and such an agency action is ultra vires (6) the District Court failed to give plain effect to the language "or by a decision of a U.S. Court," and rule that language was disjunctive from "Part 83" (7) the District Court erred by ruling that "Circuit Court" precedent created an a "Part 83" federal tribal recognition process for Judicial branch recognition.

5. Whether the District Court's finding that the Pilchuck et al motions were moot was in error.

STATUTES

5 U.S.C. § 301, 5 U.S.C. § 701-706, 25 U.S.C. § 2, § 9, § 479 a, § 479 a –1, § 5131, Pub. L. 103-454 Sec. 103 (Nov. 2, 1994), 28 U.S.C. § 1331, 28 U.S.C. § 1361, 28 U.S.C. § 2201, 28 U.S.C. § 2202, and 43 U.S.C. §1457.

STATEMENT OF CASE

A. Nature of the Case.

The Pilchuck et al appeal seeks a ruling the DOI "express policy"[8] and now "Circuit Court" policy to conduct all Judiciary branch federal tribal recognition under "Part 83", are ultra vires and thus invalid.

This appeal first seeks a remand to the agency for an official answer to the "express policy" position and the removal of the Judiciary branch federal tribal recognition from the List Act.

[8] APP. 83, 116, 388

This appeal also seeks other relief as outlined below:

B. Course of Proceedings.

1. The Karluk Tribal Court Was Under a Valid Contract.

On March 3, 2010, the Karluk Tribal Council signed a contract with the Native American Justice Project. The Native American Justice Project then began to execute the terms of the contract with the Honorable Judge Orbie Mullins presiding. The Karluk Tribal Court began to decide cases and render judgements for the Karluk Tribe. APP. 365-370.

2. The Karluk Tribal Court Ruled Pilchuck Nation Had Treaty Rights Under the Point Elliott Treaty of 1855. 79 Parties Were Served with the Order.

On March 22, 2012, the Karluk Tribal Court, through a Declaratory Order, declared Pilchuck Nation to have treaty rights under the Point Elliott Treaty of 1855. The Karluk Tribal Court order was served on 79 parties. None of the parties served with the Karluk Tribal Court order challenged the jurisdiction of the Karluk Tribal Court or the validity of its judgment declaring the Pilchuck Nations rights under the Point Elliott Treaty of 1855. That judgement became final. APP. 146-148.

3. The Clerk for the U.S. District Court for the Western District of Washington Registered the Karluk Tribal Court Judgement.

On April 16, 2012**,** after recognizing that no party had timely appealed the Karluk Tribal Court order, the Court Clerk for the U.S. District Court for

the Western District of Washington registered the Karluk Tribal Court judgement as a "Registered Foreign Judgement" under the Uniform Foreign Judgement Act. The Court Clerk placed a certified stamp from the U.S. District Court for the Western District of Washington on the judgment. Kanam also registered the Karluk Tribal Court Judgement domestically in Thurston County Superior Court. APP. 145, 222.

4. Pilchuck et al Filed Petitions Requesting the Defendants to Add the Pilchuck Nation to the List of Federally Recognized Indian Tribes.

On May 27, 2014, Kurt Kanam filed a petition for publication asking that DOI add the Pilchuck Nation to the list of federally recognized tribes. In support of that petition for publication Kaman submitted the Karluk Tribal Court order and the Registered Foreign Judgment from the U.S. District Court for the Western District of Washington. Kanam also requested the Pilchuck Nation be granted the same rights granted to the Stillaguamish Tribe in *Stillaguamish v. Kleppe*, No 75-1718 (Sept. 24, 1976) as cause to add Pilchuck Nation to the list of federally recognized tribes. The Pilchuck Nation filed its petition and request for publication on March 30, 2021. The Pilchuck Nation requested DOI to add them to the list pursuant to the same Karluk Tribal Court order and Registered Foreign Judgment U.S. District

Court for the Western District of Washington and requested the same rights as the Stillaguamish obtained in *Stillaguamish v. Kleppe*. APP. 227- 228

5. The Pilchuck et al File Suit in the U.S. District Court for The District of Columbia.

On July 1, 2021, Pilchuck et al filed a Complaint in the U.S. District Court for the District of Columbia, (Dkt#1) alleging that BIA et al "failed to consider Plaintiffs' Petitions to include the Pilchuck Nation on the List of federal recognized tribes pursuant to the List Act. Pilchuck et al alleged they were a treaty tribe that occupies the status of a party to one or more of the Stevens treaties and therefore, holds for the usual and accustomed places outside reservation boundaries, in common with others. In support of that allegation, Pilchuck et al note that "on March 22, 2012, the Karluk Tribal Court, through a Declaratory Order, declared Plaintiff Pilchuck Nation to be a treaty tribe." Compl. at 4, ¶ 13. Additionally, Pilchuck et al alleged that "Plaintiff Pilchuck Nation Tribe in U.S. v. Washington" and that "[t]here the District Court upheld the [Stillaguamish's] aboriginal treaty rights." APP. 10-17.

In their Complaint, Pilchuck et al set forth three causes of action. First, Pilchuck et al allege that BIA et al consideration of their petitions for inclusion on the List was "unlawfully withheld or unreasonable delayed," in

violation of the Administrative Procedure Act ("APA"). Compl. 6, ¶ 23 (quoting 5 U.S.C. § 706 (1). Second, Pilchuck et al allege that the BIA et al failure "to consider Pilchuck et al petition for a period of 7 years" constitutes arbitrary and capricious action in violation of the APA. Compl. 7, ¶ 30. Third, Pilchuck et al allege that BIA et al violated Pilchuck et al's rights to due process under the Fifth Amendment of the U.S. Constitution "by failing to consider their petitions in a timely manner." Compl. 7, ¶ 34.

Based on the claims listed above, Pilchuck et al requested that the Court "compel the agency to review and act upon Pilchuck et al petition to include the Pilchuck Nation into the list of Federally recognized tribes, pursuant to the List Act [sic] within 30 days of service of this Complaint." Compl. 8, ¶ 34.

On September 29, 2021, the BIA et al filed a motion to dismiss, (Dkt#7) arguing that DOI made a regulatory determination that they were authorized to use an "express policy," to conduct all federal tribal recognition under Part 83", and that those administrative procedures had to be exhausted even if a tribe had a ruling by a U.S. Court recognizing a tribe's treaty right. BIA et al also argued Congress gave them "broad authority" to use 2015 DOI guidelines to conduct all federal tribal

recognition under Part 83. BIA et al also argued Kanam was estopped but not Pilchuck Nation. APP. 24-50

On October 12, 2021, Pilchuck et al responded to the Motion to Dismiss (Dkt#8) and argued amongst other things that the BIA et al did not provide any evidence Congress converted the Congressional and Judicial functions in the List Act to an all-administrative process under "Part 83." The Pilchuck et al also argued DOI was required to give effect to the plain meaning of "or by a decision of a U.S. Court" and argued the motion should be converted to a motion for summary judgment because the BIA et al brought-up matters outside the pleadings when they cited a 2015 DOI guideline, which was not referenced in the complaint. Kanam also argued he was not estopped due to hypothetical jurisdiction. APP. 51-70

On October 19, 2021, the BIA et al filed a reply brief (Dkt#9) alleging amongst other things that Pilchuck et al had not exhausted administrative remedies while simultaneously arguing there was not an administrative process under the APA for the language "or by decision of a U.S. Court," in the List Act. BIA et al did not address the hypothetical jurisdiction argument. APP. 71-90

On November 1, 2021, after recognizing that there may not be jurisdiction or relief under the APA, Pilchuck et al requested leave to amend

the original complaint. (Dkt#10) Pilchuck et al dropped the APA claims and better articulated already pled writ of mandamus and declaratory judgment claims, because relief under the APA would be futile without administrative procedures for a tribe to assert the same rights as the Stillaguamish tribe in *Stillaguamish v. Kleppe*, No 75-1718 (Sept. 24, 1976) by invoking the text "or a decision of a U.S. Court." APP. 91-90

On May 2, 2022, after determining that APA relief was still necessary to command a certified administrative record confirming the actual agency policy position and determining the District Court could not substitute the position of counsel or allow counsel to create a post hoc agency record in the reviewing court, Pilchuck et al requested another leave to amend. (Dkt#23) In that Motion for Leave to Amend, Pilchuck et al sought to add APA claims back to the complaint to provide the authority to compel an agency administrative record. Pilchuck et al also requested a Motion for Expedited Hearing (Dkt#24), Motion for Leave to File Memorandum of Law in Support of Pilchuck et al Expedited Complaint for Administrative Review, Declaratory, Injunctive and Mandamus Relief (Dkt #25). APP. 177-370

On May 16, 2022, BIA et al responded to the Motion for Leave to Amend, Motion for Expedited Hearing, Motion for Leave to File Memorandum of Law in Support of Pilchuck et al Expedited Complaint for

Administrative Review, Declaratory, Injunctive and Mandamus Relief. (Dkt#26) In that Response, BIA et al argued amongst other things that the motions were a "surreply," written to defeat a Motion to Dismiss. APP. 371-391.

On May 23, 2022, Pilchuck et al file a consolidated reply arguing chiefly that the District Court could not resolve this case without an official agency record and agency position. APP. 392-431

On June 22, 2022, Pilchuck et al filed a Motion to Compel, (Dkt#29) requesting that the District Court order the Defendants-Appellees to comply with Local Rule 7 (n) (1), District Court of Columbia, District Court of Columbia Court of Appeals, and U.S. Supreme Court case law, and certify an DOI agency administrative record. APP. 432-442.

C. Disposition Below.

1. District Court Opinion.

On June 28, 2022, the District Court made a ruling, (Dkt#30, (Dkt#31). The Opinion: (a) dismissed the Pilchuck et al complaint, (Dkt#1) (b) denied Pilchuck et al motions for Leave to Amend (Dkt#10) (Dkt#23) and (c) ruled the Motion for Expedited Hearing (Dkt#24), Motion for Leave to File Memorandum of Law in Support of Plaintiff's Expedited Complaint for Administrative Review, Declaratory, Injunctive and Mandamus Relief (Dkt

#25) , and the Pilchuck et al Motion to Compel Administrative Record (Dkt #29) were moot. There was no ruling on hypothetical jurisdiction and claim preclusion issues. APP. 447-459

The District Court held that "Circuit Court" precedent decided that Judiciary branch federal tribal recognition must be done under "Part 83" of the List Act despite the fact agency council claimed there was no process for Judiciary branch relief.

The District Court also held that DOI administrative procedures were required to be exhausted and ruled other motions were denied and moot.

SUMMARY OF ARGUMENT

The District Court impermissibly leapfrogged local court rules and appellate court precedent, to impermissibly take hypothetical jurisdiction of this case under the APA, after the agency alleged it did not have an APA process to effectuate the relief requested by the Plaintiffs.

In addition, Pilchuck et al never filed a "Part 83" application to invoke the APA review the agency claimed it did not have. The District Court then failed to follow the prerequisite steps of requiring an appeal at the Tribal Court before taking jurisdiction in a tribal case. Those decisions must be reversed.

Pilchuck et al argues that the District Court decision should also be reversed because: (a) Circuit Court and U.S. Supreme Court precedent does not allow hypothetical jurisdiction (b) Circuit Court and U.S. Supreme Court precedent requires that a reviewing court must base its ruling on the whole administrative record (c) there is no proof Congress ever gave DOI "broad authority" to use 2015 DOI guidelines to conduct Judiciary branch federal tribal recognition under "Part 83" (d) the text "or by decision of a U.S. Court" is still in the List Act, and Circuit Court precedent cannot render it useless or superfluous and any contrary agency actions trying to do so without Congressional authority would be ultra vires.

The District Court Opinion should also be reversed because Local Rule 7 (n) (1), District of Columbia Circuit precedent and U.S. Supreme Court precedent require the agency administrative record for the District Court to quote and uphold in reviews of agency actions. District of Columbia Circuit precedent and U.S. Supreme Court precedent also does not allow the District Court to substitute its own "post hoc" opinion and the position of BIA et al counsel for that of DOI.

The District Court opinion should be reversed as ultra vires, and the case should be remanded to DOI with orders to show cause why the agency is not required follow the will of Congress and perform its ministerial duty

to comply with the text "or a decision by a U.S. Court" and effectuate a Judiciary branch federal tribal recognition.

STANDARD OF REVIEW

The District Court's decision to grant the BIA et al motion to dismiss is reviewed de novo. See *Cierco v. Mnuchin*, 857 F.3d 407, 414 (D.C. Cir. 2017). When the U.S. Court of Appeals for the District of Columbia is reviewing an order granting a motion to dismiss for failure to state a claim, "we take the facts as alleged in the complaint." (See *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (per curiam), *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005).

ARGUMENT

A. The District Court Erred Taking Hypothetical Jurisdiction to Determine the Merits of the Karluk Judgment.

In addition, to arguing that Pilchuck et al could not state a claim, the BIA et al has argued in its Motion to Dismiss that the District Court did not have jurisdiction because Pilchuck et al did not file a 'Part 83" application.[9]

In its rulings, the District Court erred by taking jurisdiction of the case without a "Part 83" application to decide the merits of the Karluk Tribal court judgement. The District Court should have decided whether the agency

[9] BIA et al also argued Pilchuck et al could not state a claim because they did not file a "Part 83"application.

had a policy position that removed Judiciary branch authority from the List Act and whether the agency had lawful authority to change the text ‘or decision by a of a U.S. Court.” Especially, given the agency position of having and not having an APA process for federal tribal recognition for the Judiciary branch.

Pilchuck et al laid out statutory interpretation case law arguments in the response to the BIA et al Motion to Dismiss, to assist the District Court in deciding if the Judiciary branch authority had been removed from the List Act. However, the Pilchuck et al statutory interpretation of the List Act was never addressed by BIA et or the District Court.

Pilchuck et al also requested the District Court follow Circuit and U.S. Supreme Court precedent and order an agency remand since there was so much smog surrounding the agency policy.

The District Court did not address either of those arguments and ultimately ruled Pilchuck et al did not state a claim because there was not a “Part 83” application by Pilchuck and determined that ‘Circuit Court” precedence required a “Part 83” application.

The District Court should have ruled it lacked jurisdiction without a ‘Part 83” application and should not have decided the merits of the Karluk Tribal court jurisdiction and validity of the court’s judgement. However,

when the court decided the merits of the Karluk jurisdiction and judgement, it ran afoul of Supreme Court and D.C. Circuit precedence and its rulings must be overturned.

The DC Circuit has held: "the District Court plainly should have satisfied any jurisdictional concerns before turning to a merits question[.]" *See Kaplan v. Cent. Bank of the Islamic Republic of Iran* 896 F.3d 501, 510 (D.C. Cir. 2018) (Quoting *Gilmore v. Palestinian Interim Self-Gov't Auth.* , 843 F.3d 958, 964 (D.C. Cir. 2016).

The Supreme Court settled the issue in *Sinochem International Co. v. Malaysia International Shipping Corp*. , 549 U.S. 422, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007). There, the Court explained that its decision in Steel Co. "clarified that a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." Id. at 430-31, 127 S. Ct. 1184 (emphasis added).

Here, once the District Court determined “Circuit Court” precedent required a “Part 83” application, jurisdiction was lost because Pilchuck et al never filed one. Furthermore, BIA et al admitted it did not have an administrative process under the APA to effectuate the text “or by a decision of a U.S. Court. The District Court should have denied APA jurisdiction.

The District Court then doubled down on its first jurisdictional error by deciding the merits of the Karluk Tribal judgment because it lacked jurisdiction without the issue first going to the Tribal Court for the appeal.

Pilchuck et al can raise this issue for the first time on appeal." a party may raise jurisdictional issues for the first time on appeal has been repeatedly reaffirmed. See, *Lorazepam Clorazepate v. Mylan*, 631 F.3d 537, 540 (D.C. Cir. 2011) *(quoting e.g., Mansfield, Coldwater L.M. Ry. v. Swan*, 111 U.S. 379, 382-83, 4 S.Ct. 510, 28 L.Ed. 462 (1884).

The District Court also then erred failing to address the writ of mandamus and declaratory and injunctive relief issues raised in the original and amended complaints. Those forms of relief should have survived dismissal.

On appeal, BIA et al impermissibly wants the appeals court to keep hypothetical jurisdiction and rule on the validity of the Karluk Tribal court judgement. This time they also challenge the validity of the U.S. District Court for the Western District of Washington judgement for the first time on appeal. Essentially, they want the Court of Appeals to triple down on jurisdictional errors.

The Court of Appeals for District of Columbia should not continue the tact of taking hypothetical jurisdiction to rule on the merits of the Karluk

Tribal Court judgement or the U.S. District Court for the Western District of Washington judgement.

This appeal should be centered around jurisdiction, agency remand, and a statutory interpretation of the List Act to determine whether there is no longer a Judiciary function for the DOI to effectuate the text "or by a decision of a U.S. Court." These issues are vital to any court confirming whether they have jurisdiction and are vital for guiding others.

B. The District Court Erred Not Ordering a Remand to the Agency.

The District Court erred because: (a) the court failed to bar post hoc rationalizations for DOI by agency counsel (b) the court failed to review the case using a certified administrative record and should remand the case pursuant to "*SEC v. Chenery Corp.* , 318 U.S. 80 (1943) *and* Citizens to Preserve Overton Park, Inc. v. Volpe. ,401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), and compel DOI to follow Local Court

rule 7(n) (1), Circuit Court [10], and U.S. Supreme Court [11] precedent to require a certified administrative record because the District Court must view the "whole record."

Pilchuck et al argued the grounds for ignoring the text of the List Act was "post hoc" and inadequate. Pilchuck et al then asked the District Court for a Chenery remand for the agency to offer "a fuller explanation of the agency's reasoning at the time of the agency action," *Pension Benefit Guaranty Corporation v. LTV Corp*., 496 U. S. 633, 654 (emphasis added),

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[10] **Collecting District of Columbia cases***: Amos Treat & Co. v. Securities & Exchange Commission* 306 F.2d 260 (D.C. Cir. 1962) *Braniff Airways, Incorporated v. C.A.B***,** 379 F.2d 453 (D.C. Cir. 1967) *Sign Pictorial U.L. 1175 v. N.L.R.B* 419 F.2d 726 (D.C. Cir. 1969*, National Petroleum Refiners Association v. F.T.C.* 392 F. Supp. 1052 (D.D.C. 1974). *Rodway v. United States Dept. of Agriculture* 514 F.2d 809 (D.C. Cir. 1975)*, Evening Star Newspaper Co. v. Kemp* 533 F.2d 1224 (D.C. Cir. 1976)*, Home Box Office, Inc. v. F.C.C.* 567 F.2d 9 (D.C. Cir. 1977)**,** *Walter O. Boswell Memorial Hosp. v. Heckler* 749 F.2d 788 (D.C. Cir. 1984), *Tavoulareas v. Piro* 817 F.2d 762 (D.C. Cir. 1987), *International Longshoremen's Assoc. v. Natl. Mediation Bd*. Civil Action No. 04-824 (RBW) (D.D.C. Mar. 30, 2005)**,** *Amn. Radio Relay v. F.C.C , 524 F.3d 227 (D.C. Cir. 2008)***,** *Mayo v. Jarvis 203* F. Supp. 3d 31 (D.D.C. 2016) *Kiakombua v. McAleenan* Civil Action No. 19-cv-1872 (KBJ) (D.D.C. Aug. 27, 2019).

[11] **Collecting U.S. Supreme Court cases***: Citizens to Preserve Overton Park, Inc. v. Volpe ,* 401 U.S. 402, 420, 91 S. Ct. 814, 28 L.Ed.2d 136 (1971*) Camp v. Pitts , 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973), Steadman v. SEC,* 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981*) Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.* , 463 U.S. 29, 43–44, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), *Bowen v. Massachusetts***,** 487 U.S. 879 (1988), *Marsh v. Oregon Natural Resources Council* **,** 490 U.S. 360 (1989)**,** *Shinseki v. Sanders***,** *556 U.S. 396 (2009), In re United States***,** 138 S. Ct. 371 (2017*)* **,** *Biestek v. Berryhill***,** *139 S. Ct. 1148 (2019)*

or to "deal with the problem afresh" by taking new agency action, *SEC v. Chenery Corp*., 332 U. S. 194, 201.

The rule requiring a new decision before considering new reasons is not merely a formality. It serves important administrative law values by promoting agency accountability to the public, instilling confidence that the reasons given are not simply convenient litigating positions and facilitating orderly review. See *Department of Homeland Security v. Regents of the University of California,* 140 S. Ct. 1891 (2020).

Typically, an "administrative order cannot be upheld unless the grounds on which the agency acted in exercising its powers were those upon which its action can be sustained." *Securities and Exchange Commission v. Chenery Corp*., 318 U.S. 80, 95, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943). See also *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 50, 103 S.Ct. 2856, 2870, 77 L.Ed.2d 443 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). This rule rests on several bases. The most important of these is the conviction that "[i]t is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Investment Company Institute v. Camp*, 401 U.S. 617, 628, 91 S.Ct. 1091, 1098, 28 L.Ed.2d 367 (1970).

Where Congress or the Executive vouchsafes part of its authority to an administrative agency, it is for the agency and the agency alone to exercise that authority. Judicial review of the propriety of administrative action properly encompasses not a determination of the outer limit of an administrator's raw power, but an examination of the reasoning and rationale actually offered for the particular action being reviewed. Thus, " post hoc rationalizations by counsel for agency action are entitled to little deference." *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 468 U.S. 137, 143, 104 S.Ct. 2979, 2983, 82 L.Ed.2d 107 (1984).

The District Court should have sent this case back to the agency if it wanted to settle the jurisdiction issue fairly and in compliance with appellate court precedent banning post-hoc rationalizations.

This ban on post-hoc rationalizations traces to *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) which roots the requirement firmly in the APA. In addition to Overton *Park*, the other great modern case where the Supreme Court articulates an agency's duty to give reasons, and the Court's unwillingness to consider different reasons, is *SEC v. Chenery*

Corp., 332 U.S. 194 (1947).[12]

Both cases were cited as authority in this case, and neither were addressed nor overcome by opposing counsel or the District Court. The District Court impermissibly judged the propriety of the agency action solely by the grounds invoked by the agency counsel and not the agency.

The U.S. Supreme Court has long held a court is "not to substitute its judgment for that of the agency," See *FCC v. Fox Television Stations, Inc*., 556 U. S. 502, 513 (2009). In addition, The U.S. Supreme Court has routinely held that court's are not to substitute counsel's discretion for that of the agency. See e.g., *Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962)* ("For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review.").

Other courts have done likewise. See *In re Lee,* 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("'[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.'" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *McCray v. Wilkie,* 31 Vet. App.

[12] *Chenery II*, 332 U.S. at 196 (describing the holding as the "simple but fundamental rule . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency").

243, 258 (2019) ("[T]he Secretary's impermissible post-hoc rationalization cannot make up for shortcomings in the Board's assessment."); *Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018) (holding that the "Court cannot accept the Secretary's post-hoc rationalizations" to cure the Board's reasons-or-bases errors), aff'd, 964 F.3d 1381 (Fed. Cir. 2020); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2015) ("[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.").; The agency must articulate its rationale. See *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 n.73 (1981) ("[T]he courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale.").

The District of Columbia has consistently ordered a remand when the agency fails to articulate the basis for its conclusion the case is remanded back to the agency. See, e.g., *Air Transp. Ass'n of Can. v. FAA*, 254 F.3d 271, 279 (D.C. Cir. 2001) ("Because the FAA has failed to articulate the basis for its conclusion . . . [we] remand to the FAA for further proceedings consistent with this opinion."); *AT&T Corp. v. FCC,* 236 F.3d 729, 737 (D.C. Cir. 2001) (remanding an FCC order "so that the Commission may 'examine the relevant data and articulate a satisfactory explanation for its action'" (quoting *State Farm*, 463 U.S. at 43)); *Muwekma Ohlone Tribe v.*

Kempthorne, 452 F. Supp. 2d 105, 125 (D.D.C. 2006). *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1326 n.244 (D.C. Cir. 1984) ("Courts disregard post hoc rationalizations of an agency's position on preexisting records

C. The District Court Erred Failing to Bar BIA et al From Relitigating the Karluk Case.

Pilchuck et al argues collateral estoppel and Res Judicata should be applied to BIA et al because it was nearly 10 years too late to challenge the decisions of two competent courts of record.

At common law, the principles of res judicata and collateral estoppel applied only to a decision by a "court of competent jurisdiction." *Aurora City v. West, 7 Wall*. 82, 102, 19 L.Ed. 42 (1869) ; accord, *Hopkins v. Lee*, U.S. 6 Wheat. 109, 113, 5 L.Ed. 218 (1821) ; Restatement of Judgments §§ 4, 7, and Comment f, pp. 20, 41, 45 (1942). That rule came with the corollary requirement that the court be "legally constituted"—that is, a court "known to and recognized by the law." 2 H. Black, Law of Judgments § 516, p. 614 (1891). A court not "legally constituted" lacked jurisdiction to enter a legally binding judgment, and thus any such judgment could have no preclusive effect. See *B&B Hardware, Inc. v. Hargis Indus., Inc*. 575 U.S. 138 (2015)

DOI never answered the judgement by the Karluk Tribal Court within the required 30 days and never made any claims or defenses until nearly 10 years later in this case. In addition, DOI failed to address the Pilchuck's Registered Foreign Judgement in the U.S. District Court for the Western District of Washington. it is far too late for DOI to make this belated collateral attack nearly 10 years after being served with the Karluk Tribal Court and U.S. District Court for the Western District of Washington judgements. In sum, the U.S. District Court for the District of Columbia was not the "legally constituted" court to review the decisions of those courts.

The judgements of the Karluk Tribal and District Court for the Western District of Washington are final orders which were not appealed by any party. 79 parties including the DOI, had a full and fair opportunity to litigate claims in those courts.

Furthermore, BIA et al is estopped from arguing its 2015 guidelines changed the federal tribal recognition process after arguing to the D.C. Circuit that the guidelines did no such thing. See *Mdewakanton Band of Sioux in Minnesota v. Bernhardt*, 464 F. Supp. 3d 316 (D.D.C. 2020).

"The preclusive effect of a judgment is defined by claim preclusion and issue preclusion." See *Taylor v. Sturgell,* 553 U.S. 880 (2008) (internal quotation marks omitted). Under collateral estoppel, "once a court has

decided an issue of fact or law necessary to its judgment, that decision preclude prelitigation of the issue in a suit on a different cause of action involving a party to the first case." *U.S. Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 696 (D.C. Cir. 2009) (quoting *Novak v. World Bank*, 703 F.2d 1305, 1309 (D.C. Cir. 1983). By precluding parties from contesting matters they have already had a full and fair opportunity to litigate, collateral estoppel "conserve[s] judicial resources, avoid[s] inconsistent results, engender[s] respect for judgments of predictable and certain effect, and [] prevent[s] serial forum-shopping and piecemeal litigation." *McGee v. District of Columbia*, 646 F. Supp. 2d 115, 123 (D.D.C. 2009) (internal quotation marks omitted).

Federal courts must give judgments litigated either in the same court or in other federal courts full preclusive effect. (See *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 874 (1984). Courts have held that, collateral estoppel prohibits 'the relitigation of factual or legal issues decided in a previous proceeding and essential to the prior judgment." *Franco v. Dist. Of Columbia*, 3 A.3d 300, 303-04 (D.C. 2010) (quoting *Elwell v. Elwell*, 947 A.2d 1136, 1140 (D.C. 2008). Collateral estoppel applies when:

> "(1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum."

Modiri v. 1342 Rest. Group, Inc., 904 A.2d 391, 394 (D.C. 2006) (quoting *Davis v. Davis*, 663. A.2d 499, 501 (D.C. 1995). When applicable, collateral estoppel renders conclusive the determination of issues of fact or law that have been previously decided. *Franco*, 3 A.3d at 304.

For collateral estoppel to apply, "the previously resolved issue must be identical to the one presented in the current litigation; similarity between the issues is insufficient." *Dist. of Columbia v. Gould*, 852 A.2d 50, 56 (D.C. 2004) (citing *Hutchinson v. Dist. of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998). "To have preclusive effect in a subsequent proceeding," an issue must have been "actually litigated" in the first proceeding, *Modiri*, 904 A.2d at 394, meaning that it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined*," Ali Baba Co. v. WILCO, Inc*., 482 A.2d 418, 422 (D.C. 1984) (citing Restatement (Second) of Judgments § 27(d) (1982).

Here, the District Court erred because the BIA et al had full and fair opportunity to challenge the identical issue in both the Karluk Tribal Court and the U.S. District Court for the Western District of Washington. Accordingly, the BIA et al are now barred from asking this court to re-determine the previously resolved issue of whether Pilchuck Nation was entitled a judgement or whether the Pilchuck had the legal ability to register that foreign judgment. Once an issue is raised and determined, the entire issue is precluded, not just particular arguments raised in support of it. (See *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254, 258-59 (D.C. Cir. 1992). The BIA et al should be estopped from making a new jurisdictional challenge 10 years later in the wrong forum.

In the briefing of the Motion for Summary Affirmance to this court, the BIA et al renewed its collateral attack and impermissibly tries to relitigate factual or legal issues decided in the Karluk Tribal court and U.S. District Court for the Western District of Washington proceedings "which were essential to the prior judgments."

In a ruling by the Circuit panel, the litigants are being instructed to

address whether the doctrine of claim preclusion should be applied.

Pilchuck et all respectfully argues the doctrine of claim preclusion should be applied to the BIA et all collateral attack on the validity of the Karluk Tribal court and U.S. District Court for the Western District of Washington judgments, but not to the Pilchuck et al.

D. None of the Pilchuck et al claims are barred by the Doctrine of Claim Preclusion and the Case is Ripe for Review.

The Pilchuck Nation has been invited by both the agency and the District Court to bring its claims for federal tribal recognition under a "Part 83" application. If Pilchuck et al is not precluded from bringing those claims, they are not precluded from bringing other claims.

The agency clearly abandoned claim preclusion rebuttal in the BIA et al reply brief and conceded the claim preclusion issues were trumped by hypothetical jurisdiction arguments. See *Twp. of Saddle Brook v. United States*, No. 10-213C (D.C. Cir. Mar. 16, 2012). "Unlike the Emperor Nero, litigants cannot fiddle as Rome burns. A party who sits in silence . . . does so at his or her own peril." *United States v. Funds From Prudential Securities*, 300 F. Supp. 2d 99 (D.D.C. 2004) quoting" *Vasapolli v. Rostoff*, 39 F.3d 27, 36 (1st Cir. 1994). The fact is the Pilchuck Nation was never a litigant.

The District Court did not rule on the matter. In addition, a belated cross appeal is not allowed because the BIA et al would be seeking to enlarge the scope of the District Court judgment. (See *Crocker v. Piedmont Aviation, Inc*. 49 F.3d 735 (D.C. Cir. 1995). Cross appeal is also barred by Fed.R.App. P. 3 and Fed.R.App. P. 4, because it is untimely after 30 days. (See also *T Street Dev. v. Dereje,* No. 08-7123 (D.C. Cir. Apr. 1, 2009).

In this appeal Pilchuck et al is challenging the authority of the alleged al "Part 83" federal tribal recognition process as ultra vires. If the Court of Appeals for the District of Columbia rules on the statutory interpretation arguments and determines the text "or by a decision of a U.S. Court" can be effectuated either by informal APA action, writ of mandamus or Declaratory relief, then Pilchuck et al would have rights to effectuate its judgements in any a manner determined by this court, because all those forms of relief were sought in this case. There was no claim splitting.

On the one hand BIA et al argued that all federal tribal recognition must be done under the "Part 83" process, [13]and that the 2015 DOI guidelines were "substantive" enough rules to have determined the Pilchuck et al rights to federal tribal recognition required a "Part 83 application."

[13] At the same time BIA et al argues Congress has federal tribal recognition authority but the Judiciary does not even though the List Act contains both Congressional and Judicial federal tribal recognition authority.

On the other hand, the Agency simultaneously argues that decision is not final and is not subject to judicial review because administrative remedies have not been exhausted. In other words, they argued they had both a “substantive” and an “Interpretive rule.”

The D.C. circuit has quoted the Attorney General's Manual on the Administrative Procedure Act (1947), which offers "the following working definitions categorized three agency actions: (1) “substantive rules” (2) Interpretive rules” and General statements of policy agency actions.[14]

Pilchuck et al respectfully argues the 2015 guidelines is a “substantive rule’ that determined that the rights of Pilchuck Nation for federal tribal recognition. This determination of the Pilchuck Nation’s rights is a final agency action because the “substantive rule” consummated the agency decision making process and has now been confirmed to have legal consequences since this case was dismissed based on the ruling Pilchuck could not state a claim for relief without partaking in the “Part 83” process established not only by “substantive rule’ but “Circuit Court” precedence.

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[14] A substantive rule is one “issued by an agency pursuant to statutory authority and which implement[s] the statute.... Such rules have the force and effect of law.” (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947), *Am. Mining Cong. v. Mine Safety & Health Admin.* - 302 U.S. App. D.C. 38, 995 F.2d 1106 (1993) An interpretative rule, by contrast, is one “issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.” Id. (quoting Attorney General's Manual 30 n.3). A substantive rule, in other words, creates new law, whereas an interpretative rule simply explains existing law.

"An agency action is final only if it is both 'the consummation of the agency's decision making process' and a decision by which 'rights or obligations have been determined' or from which 'legal consequences will flow.' " *Nat'l Min. Ass'n v. McCarthy* , 758 F.3d 243, 250 (D.C. Cir. 2014).

This court must not allow BIA et al to have it both ways and needs to pick an argument since BIA et al continues to assert conflicting and hazy boundaries that the 2015 DOI guidelines to be "substantive rules," and "interpretive rules" or "general statements of policy" actions.

The Court of Appeals for the District of Columbia has devised a more refined approach to navigating the hazy boundary between substantive and interpretative rules, territory "enshrouded in considerable smog*." Am. Min. Cong.*, 995 F.2d at 1108 (quoting *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C.Cir.1984) (en banc)) (internal quotation marks omitted). This Circuit uses a four–prong test to map the character of agency action, in which the fulfillment of any of the four prongs signals a substantive, rather than interpretative, rule. See id. at 1112.

At first glance this case easily meets the fulfilment to classify the BIA et al Policy as a "Substantive rule." That is so because in *Mdewakanton Band of Sioux in Minnesota v. Bernhardt*, 464 F. Supp. 3d 316 (D.D.C. 2020), the District of Columbia confirmed that DOI would no longer accept requests

for acknowledgment outside Part 83. The court cited the federal register's "Requests for Administrative Acknowledgment of Federal Indian Tribes, 80 Fed. Reg. 37538-02, 2015 WL 3958642 (July 1, 2015)". The application of the 2015 DOI guidelines as a substantive rule is now "Circuit Court" precedent.

However, in this case, DOI first argues the 2015 guidelines removed the Judiciary function of the List Act. Then in the face of the statutory interpretation arguments in the List Act, DOI argues they simply don't have procedures to effectuate the Judiciary function.[15] At the very least he DOI "express policy" and "Circuit Court" precedent is so "enshrouded in considerable smog*,"* this court should conduct the *"*four–prong test" that was not conducted in *Mdewakanton.*

If this court decides the 2015 DOI guidelines are "substantive rules", the court should finally address whether "2015 DOI guidelines" or the "Circuit Court" precedence are "substantially justified" within the meaning of the List Act given Pilchuck does not seek historic recognition and has not filed a "Part 83" application. To date, the Agency and the District Court have not met this burden required by the D.C. Circuit See *Wilkett v. ICC*, 844 F.2d 867, 871 (D.C. Cir. 1988). "Substantially justified" means "justified in

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substance or in the main — that is, justified to a degree that could satisfy a reasonable person. That is no different from . . . [having] a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks and citation omitted).

At every stage of this litigation, Pilchuck et al has made statutory interpretation arguments regarding the List Act, 25 U.S.C. § 2 and 25 U.S.C. § 9. However, neither the District Court nor the BIA et al addressed those arguments.

Pilchuck et al has consistently argued the 2015 guidelines and "Circuit Court" precedent violate the "clear rights" of the Pilchuck Nation under the List Act and the text "or a decision by a U.S. Court.". The U.S. Supreme Court has held that immediate judicial review is permitted where the assertion of jurisdiction "would violate a clear right of a petitioner by disregarding a specific and unambiguous statutory, regulatory, or constitutional directive." See *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L.Ed.2d 210 (1958).

The lack of the statutory interpretation argument rebuttal made by BIA et al and the District Court suggests the List Act does not allow the agency to usurp Judiciary branch functions.

This court should take note of the elaborate statutory interpretation arguments put forth in the Summary Affirmance and Summary Reversal briefing and the lack of cogent response to them. The Supreme Court has held Courts "must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In one round of briefing before this court this court has had no rebuttal as to whether the text "or by a decision of a U.S. Court" does not say what it means and means what it says.

While agencies are generally assumed to possess authority under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* , 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), to issue rules resolving statutory ambiguities, an agency can issue a major rule—i.e., one of great economic and political significance—only if it has clear congressional authorization to do so. See infra at 418–19 (Kavanaugh, J., dissenting).

Here, the List Act as written does not give clear congressional authorization to remove or usurp the Judiciary's role in the federal tribal recognition process. The List Act says, "or by a decision by a U.S. Court."

The Government has not met the burden of proving that its position, including both the underlying agency action and the arguments defending that action in court, was "substantially justified" within the meaning of the Act. See *Wilkett v. ICC,* 844 F.2d 867, 871 (D.C. Cir. 1988). "Substantially justified" means "justified in substance or in the main — that is, justified to a degree that could satisfy a reasonable person. That is no different from . . . [having] a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks and citation omitted)

In summary disposition, the BIA et al avoided the repeal by implication arguments, and to date no court has settled the statutory interpretation issues raised by Pilchuck et al. That is what this appeal is asking the Court of Appeals to do.

On the other hand, if the court agrees with the BIA et al position that the 2015 DOI guidelines are “Interpretive rules” and “General statements of policy” actions, this court cannot require Pilchuck et al to adhere to the alleged all “Part 83” federal tribal recognition process. In that case, this court would have jurisdiction to rule on the proper form of relief for federal tribal recognition and the merits of the other issues in this case.

Pilchuck et al respectfully argues the 2015 DOI guidelines and “Circuit Court” precedent constitutes a final agency action in the D.C Circuit and by the precedent set by the U.S. Supreme court.

In *Appalachian Power Co. v. EPA* , 208 F.3d 1015 (D.C. Cir. 2000), the court held that an EPA guidance document was final action because EPA had articulated a "position it plans to follow in reviewing State-issued [Title V] permits" and "a position EPA officials in the field are bound to apply." Id. at 1022. In *National Environmental Development Ass’n’s Clean Air Project v. EPA* ("NEDACAP "), 752 F.3d 999 (D.C. Cir. 2014), the court held that an EPA guidance document was a reviewable final action because it "provides firm guidance to enforcement officials about how to handle [Title V] permitting decisions" and "compels agency officials" to apply certain permitting standards. Id. at 1007.

Contrary to the District Court’s conclusion here, for purposes of final agency action, the 2015 DOI “express policy” and “Circuit Court” precedent has the same effect as the documents at issue in Appalachian Power Co. and NEDACAP. Both policies articulate DOI’s new position on reviewing requests for federal tribal recognition. It dictates how agency officials will act. It alters the legal regime by advancing a new interpretation of the List Act which removed the Judiciary function while somehow

maintaining Congressional federal tribal recognition which is found in the same List Act.

Then, without a part 83 application, and a without an alleged APA process, the case is ripe for review under writ of mandamus or declaratory relief.

E. The "Circuit Court" Policy and DOI "Express Policy" are Ultra Vires and Should be Invalidated.

There are three basic tenets of administrative law that form the premise of an ultra vires claim. First, "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). "Second, agency actions beyond delegated authority are ultra vires and should be invalidated." *Am. Hosp. Ass'n v. Azar*, 410 F.Supp.3d 142, 151 (D.D.C. 2019), rev'd on other grounds, 964 F.3d 1230 (D.C. Cir. 2020) (citing *Transohio Sav. Bank v. Dir., Off of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992). Third, the Court must look to an agency's enabling statute and subsequent legislation to determine whether the agency has acted within the bounds of its authority. See *Univ. of D.C. Faculty Ass'n/NEA v. D.C. Fin. Responsibility & Mgmt. Assistance Auth*., 163 F.3d 616, 620-21 (D.C. Cir. 1998) (explaining that ultra vires claims require courts to review the relevant statutory materials to determine whether "Congress intended the [agency] to have the power that it exercised when it [acted]").

Here, any agency or court action placing the Judiciary's federal tribal

recognition authority under "Part 83" would be ultra vires and should be invalidated by this court because Congress has never delegated such authority to DOI or the courts. The BIA et al, and the District Court, have all impermissibly decided that a statute can be modified by an agency or by a court decision.

However, this Court has a long history of refusing to re-write statutes. Congress may amend the statute we may not. "*Griffin v. Oceanic Constractors, Inc*., 458 U.S. 564, 576 (1982)*, Mylan Pharms., Inc. v. Sebelius ,* 856 F. Supp. 2d 196 (D.D.C. 2012)., and allowing agencies to do the same. See *Council for Urological Interests v. Burwell*, 790 F.3d 212 (D.C. Cir. 2015). "Federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own"—or the Government's—"conceptions of prudent public policy." *Duberry v. District of Columbia*, 316 F. Supp. 3d 43, 56 (D.D.C. 2018) (citing *United States v. Rutherford* , 442 U.S. 544, 555, 99 S. Ct. 2470, 61 L.Ed.2d 68 (1979).

As shown above, any alleged power for an agency or any Court to re-write the List Act and remove a path of federal tribal recognition pursuant to the text "or by a decision of a U.S. Court," would be illusory power, in contempt of Congress and a violation of the separation of powers principles.

The District Court erred changing the standards of federal tribal recognition, after the agency claimed it had not. When Congress

decides to recognize a tribe, the newly recognized tribe does not request writs or file for declaratory relief, they just notify the agency. If the statute did not contain a ministerial duty for the Judiciary, Congressional recognition would not have one either since both branches obtain authority from the same Congressional Act. Thus, the agency and court policy should be invalidated.

F. The District Court Failed to Give Effect to the Plain Meaning of The List Act.

The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is plain and unambiguous, it must be applied according to its terms. *Sebelius v. Cloer*, 569 U.S. 369 (2013).

The same rules of statutory construction are well established in the District of Columbia jurisdiction. "Our first step when interpreting a statute is to look at the language of the statute." *Jeffrey v. United States*, 878 A.2d 1189, 1193 (D.C. 2005). "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc) (citing *Varela v. Hi-Lo Powered Stirrups, Inc*., 424 A.2d 61, 64 (D.C. 1980) (en banc)). "It is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'" Id. (quoting

Davis v. United States, 397 A.2d 951, 956 (D.C. 1979). When interpreting the language of a statute, we must look to the plain meaning if the words are clear and unambiguous. *District of Columbia v. District of Columbia Office of Employee Appeals*, 883 A.2d 124, 127 (D.C. 2005) (citing *Jeffrey*, supra, 878 A.2d at 1193).

Usually "[w]hen the plain meaning of the statutory language is unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further*." District of Columbia v. Gallagher*, 734 A.2d 1087, 1091 (D.C. 1999) (citations omitted).

In questions of statutory interpretation, this Court must "begin, as always with the statute's text." *Pub. Inv'rs Arbitration Bar Ass'n v. SEC*, 771 F.3d 1,4 (D.C. Cir. 2014). When interpreting the language of a statute, "a literal reading of Congress' words is generally the only proper reading." *United States v. Locke,* 471 U.S. 84,93 (1985).

Here, the District Court erred eliminating the disjunctive phrase "or by decision of a U.S. Court," because that language is disjunctive from and is not connected to "Part 83." Each disjunctive phrase has separate meanings.

It is a fundamental rule of grammar that when a sentence has multiple disjunctive nouns and multiple disjunctive direct object gerunds, each noun is linked to each gerund as long as that noun-gerund combination has a

sensible meaning. See, e.g., *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise…."); *FCC v. Pacifica Found.,* 438 U.S. 726,739-40 (1978) ("The words … are written in the disjunctive, implying that each has a separate meaning.").

Subsection 3 of the Federally Indian Tribe List Act of 1994 reads in relevant part:

> (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court.

Accordingly, because the text above is written in the disjunctive, the words "or by a decision of a United States court" are disjunctive and have a separate meaning than "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in "Part 83" of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." Congress has not passed any subsequent legislation that has removed that "disjunctive" language "or by a decision of a United States court." Accordingly, he DOI "2015

guidelines" cannot usurp the authority of Congress, and would be ultra vires because it is repugnant to the text in the statute.

The courts have consistently ruled the words used in a legislative act are to be given force and meaning, otherwise they would be superfluous having been enough to have written the act without the words. "It is our duty 'to give effect, if possible, to every clause and word of a statute.' "*United States v Menasche,* 348 US 528, 538-539, 99 L Ed 615, 75 5 Ct 513 (1955) (quoting *Montclair v Ramsdell*, 107 US 147, 152, 27 L Ed 431, 2 S Ct 391 (1883); see also *Williams v Taylor*, 529 US 362, 404, 146 L Ed 2d 389, 120 S Ct 1495 (2000) (describing this rule as a "cardinal principle of statutory construct/on"); *Market Co. v. Hoffman*,. 101 US 112, 115, 25 L Ed 782 (1879) ("As early as in Bacon 's Abridgment, sect. 2, it is said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, n& clause, sentence, or word shall be superfluous, void, or insignificant' "). We are thus "reluctan[t] to treat statutory terms as surplusage" in any setting. *Babbitt v Sweet Home Chapter Communities for Great Ore*., 515 US 687, 698, 132 L Ed 2d 597, 115 5 Ct 2407(1995); see also *Ratzlaf v United States*, 510 US 135, 140, 126 L Ed 2d 615, 114 5 Ct 655 (1994). (*Duncan v. Walker*, 533 U.S. 167,174 (2001).

Here, the District Court erred rendering the language "by Act of Congress" and "or by decision of a U.S. Court" superfluous and treated those Congressional findings as surplusage rather than give effect to the plain meaning of all three disjunctive sections of the List Act. Essentially, the District Court abdicated DOI responsibilities to accept Judiciary rulings and converted those findings to an unauthorized administrative process in "Part 83" without any Act of Congress to support this absurd and ultra vires interpretation of the List Act.

Furthermore, Congress clearly intended that Congress itself would be the ultimate plenary authority not the DOI or the District Court when it did not repeal the List Act. If this was not the case, Congress would have repealed and removed the text in Subsection (4) which reads:

> (4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress."

The BIA et al has no discretion to ignore the Congressional or Judicial federal tribal recognition and refuse to perform ministerial duties and effectuate Judicial and Congressional findings, because subsection '(6), (7) and (8) in the List Act clearly assigns ministerial duties for the Secretary as shown below:

> (6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes.

As shown above, Congress and the Judiciary are not charged with the responsibility of keeping the List of all federal recognized tribes, the Secretary of Interior is given that ministerial duty. This is clearly the language meant for ministerial duty to list the Congressional and Judiciary tribal recognition because 25 U.S.C. § 2, and 25 U.S.C. § 9 does not give authority of all Indian affairs to Congress, it gives all authority to the Secretary. The BIA et al's legerdemain theory that the Judiciary branch can no longer recognize federal Indian tribes and that DOI can do ministerial duties only for tribes approved by Congress, but not the tribes approved by the Judiciary, is completely illusory when you review the statutes.

The statutes make it clear a ministerial duty clearly comes from the Congressional findings in the List Act. Congress clearly did not express or support a statutory interpretation that the DOI could keep and inaccurate list of federally recognized tribes. The text of the Congressional findings in the List Act clearly supports that reasoning as shown above in subsection (4) and below in subsection (7) shown below

> (7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States;

As shown above, if the BIA et al ignores the still co-existing Congressional and Judiciary branch federal tribal recognition process, the regularly published list would not be accurate and would be a violation of the ministerial duties under the statute and the Secretary would be in contempt of Congress. The same statutory guard rails to effectuate a ministerial duty exists in subsection (8) which reads:

> (8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.''

As shown above, if the BIA et al ignores the still co-existing Congressional and Judiciary branch federal tribal recognition process, the regularly published list would not reflect all of the federally recognized Indian tribes and would be a violation of the statute and be in contempt of Congress.

In addition, 25 U.S.C. § 2, and 25 U.S.C. § 9, contain no repealing sections for repealing the List Act and must work together with those statutes. This must be the case if Congress still has federal tribal recognition authority. Clearly BIA et al thinks 25 U.S.C. § 2, and 25 U.S.C. § 9 and the List Act are already working together to effectuate the federal tribal recognition by Congress. More than likely, they do this service

for Congress because they are given authority over "Management" as shown below.

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations. (25 U.S.C. § 2)

As shown above, Congress tasked the Commissioner of Indian Affairs under the direction of the Secretary of the Interior, with all management of all Indian affairs. This is clearly ministerial language to effectuate not only Congressional and Judicial branch findings but also for the Executive branch.

The U.S. Supreme Court and the D.C. Circuit have both held that statutes that can co-exist together are not repealed by implication and that courts must give regard to each.[16]

In the instant matter, BIA et al has argued that Congress can still federally recognized tribes even after Congress passed 25 U.S.C. § 2, and 25 U.S.C. § 9. [17] This admission to a co plenary authority with Congress can only mean the Congressional findings from the List Act have not been

[16] *In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir.), cert. denied, 139 S. Ct. 1378 (2019)

[17] APP. 41

repealed and are currently "co-existing" with 25 U.S.C. § 2, and 25 U.S.C. § 9.

BIA et al impermissibly wants to ignore the text in the Congressional findings that empower the Judiciary branch and wants to effectuate and provide ministerial duties for only a Congressional federal tribal recognition process, even though both Congressional branch authority and Judicial branch authority arise from the same Congressional findings.

However, the text of the statute shows the only role for DOI to perform after Congress federally recognizes a tribe is a ministerial one. It should be clear to the Panel that Congress intended for the Secretary of DOI to effectuate its Congressional findings through the List Act since 25 U.S.C. § 2, and 25 U.S.C. § 9, does not authorize any Congressional federal tribal recognition authority.

Here, because the text "or by a decision of a U.S. Court remains intact, Pilchuck et al has met the burden that the statutes unambiguously foreclose on the interpretation that the Congressional tribal recognition branch path can function but the Judiciary tribal recognition path cannot. "plaintiff must instead show," "that the statute unambiguously forecloses the [agency's] interpretation." *Vill. Of Harrington*, 636 F.3d at 661.

Accordingly, the Panel should require the same effectuation and ministerial duty BIA et al is using for tribes effectuating Congressional recognition for the Judiciary branch.

G. Pilchuck et al Have Standing.

Pilchuck et al have standing to challenge the DOI failure to act on its Petition for Publication, the "DOI "express policy" and the "Circuit Court" policy position**.** To have standing, a plaintiff must have:

> "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."

Comm. on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755, 763 (D.C. Cir. 2020) (en banc). Pilchuck et al satisfies each element.

Pilchuck et al respectfully argue they meet all criteria for any statute involving tribal rights because they met the injury criteria due to the failure to uphold a right established by Congress. 25 U.S.C. § 2, § 9, § 479 a, § 479 a –1, § 5131, Pub. L. 103-454 Sec. 103 (Nov. 2, 1994).

H. Pilchuck et al are Injured Because the DOI and the District Court Deprived them of Rights that Congress Conferred in the List Act.

Pilchuck et al have suffered a cognizable injury-in-fact because the alleged "express policy" position has deprived the tribe of rights that

Congress conferred by statute.[18] Pilchuck et al are legally entitled to seek judicial review of the DOI failure to act on their petitions for publication and the application of an alleged ultra vires DOI "express policy" and "Circuit Court" policy to conduct all federal tribal recognition under "Part 83", despite the disjunctive text of the statute that states otherwise. Pilchuck et al have cognizable standing even without the statute. "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975); cf. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992); id. at 580 (Kennedy, J., concurring in part and concurring in opinion).

There can be no doubt Pilchuck et al have met the threshold for injury standing because the District Court substituted DOI counsel's alleged "express policy" with its own "Circuit Court" policy to uphold "Part 83" only government action. "[w]hen a plaintiff is the 'object of [government] action (or forgone action) . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." Id. (quoting Lujan, 504 U.S. at 561-62)

[18] The List Act.

Although it is typical to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute. Such an injury is concrete because it is of 'a form traditionally capable of judicial resolution.'" Id. at 619 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974). That injury is likewise "particular because, as the violation of an individual right, it 'affect[s] the plaintiff in a personal and individual way.'" Id. (quoting *Lujan*, 504 U.S. at 560 n.1) (emphasis in original).

Here, Pilchuck et al have standing because Congress created a statutory right under the List Act, to obtain federal tribal recognition by a decision of a U.S. Court. When the District Court impermissibly substituted DOI counsel's alleged "express policy" with its own "Circuit Court" policy to uphold a "Part 83" only government action, that deprived Pilchuck et al of these statutory rights and thereby inflicted a concrete injury-in-fact.

In addition, the judicial review provisions of the APA are not jurisdictional *Califano v. Sanders*, 430 U.S. 99 (1977), so a defense based on exemption from the APA can be waived by the Government.

Here, whether it was injury in fact, in the zone of interest, adversely

affected or aggrieved, the BIA et al did not raise a challenge to the Pilchuck et al standing at the District Court and has thus waived standing challenges.

I. The District Court Erred Ruling the BIA et al Were Not Required to Exhaust Tribal Remedies.

Kanam argued he served the Karluk Tribal Court judgement on 79 Parties, including the U.S. Attorney's representing the United States including the U.S. Department of Interior in *United States v.* State of *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). Kanam also argued that none of the parties served challenged the jurisdiction of the Karluk Tribal Court and the validity of the Judgement.

The U.S. Supreme Court has held that a nonmember defendant in tribal court who believes the court lacks jurisdiction must first challenge the tribal court's jurisdiction in tribal court. (See *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) (federal question jurisdiction); *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (diversity jurisdiction).

A federal court will not review the case on its merits and will focus solely on the issue of tribal court jurisdiction and whether all tribal remedies have been exhausted. Federal law has long recognized a respect for comity and deference to the tribal court as the appropriate court of first impression to determine jurisdiction. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*

of Indians, 471 U.S. 845, 856–57 (1985); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15–16 (1987); *Burlington N. R.R. Co. v. Crow Tribal Council,* 940 F.2d 1239, 1244–47 (9th Cir. 1991). Courts have even held that exhaustion of tribal remedies is "mandatory." *Burlington N. R.R. Co*., 940 F.2d at 1245.

This exhaustion requirement will even include any appellate review by the tribal court. (if an appellate tribal court exists). As support for this premise, the Supreme Court cites: (1) Congress's commitment to "a policy of supporting tribal self-government and self-determination;" (2) a policy that allows "the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge;" and (3) judicial economy, which will best be served "by allowing a full record to be developed in the Tribal Court." *Nat'l Farmers*, 471 U.S. at 856. Courts have interpreted *National Farmers* as determining that tribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction. *Burlington* N. R.R. Co., 940 F.2d at 1245 n.3. "Therefore, under *National Farmers*, the federal courts should not even make a ruling on tribal court jurisdiction . . . until tribal remedies are exhausted." *Stock West,*

Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1228 (9th Cir. 1989).

The District Court erred failing to rule BIA et al had a duty to oppose the Pilchuck judgment in Karluk Tribal Court, prior to this proceeding.

Controlling case law has held DOI had a "duty to exhaust tribal remedies prior to proceeding in federal court." See *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir.), amended, 197 F.3d 1031 (9th Cir. 1999). (See also *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, (1985).

As shown above, the U.S. Supreme Court has determined that the lower courts must provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

In the instant matter, the BIA et al failed to give the Karluk Tribal Court the first opportunity to evaluate the factual and legal bases for the challenge of Karluk Tribal Court jurisdiction. Accordingly, now the federal courts must dismiss any jurisdictional challenges brought to the federal courts. "Federal courts will dismiss an action challenging the jurisdiction of a tribal court if the tribal court defendant has not challenged tribal court jurisdiction through the tribal court appellate process subject to four exceptions:

> "when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction"; and 4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay."

Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 847 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009), quoting *Nevada v. Hicks*, 533 U.S. at 369.

The District of Columbia has also upheld that standard. *Muscogee Creek Indian Freedmen Band, Inc. v. Bernhardt* 385 F. Supp. 3d 16 (D.D.C. 2019).

The case law history of non-tribal members claiming the exemptions above however shows that all the non-tribal members involved with the rulings responded within 30 days of being served the Tribal judgement.

Furthermore, the non-tribal members timely filed proceedings under 28 U.S.C. § 1331. The U.S. Supreme Court has held 28 U.S.C. § 1331 'encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaustion is required before such a claim may be entertained by a federal court," as shown below:

> Our conclusions that § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaustion is required before such a claim may be entertained by a federal court, require that we reverse the judgment of the Court of Appeals. Until petitioners have exhausted the remedies available to them in the Tribal Court system, n. 4, supra, it would be premature for a federal court to consider any relief. Whether the federal action should be dismissed, or merely held in abeyance pending the

> development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) at 858.

Here, DOI failed to allow the Karluk Tribal Court the first opportunity to evaluate the factual and legal bases for the BIA et al challenge to Karluk Tribal Court jurisdiction. Accordingly, the District Court ruling on the Karluck ruling must be reversed for lack of jurisdiction

J. The District Court Erred Ruling Docket #24 And Docket #25 Were Moot.

The District Court erred ruling the Motion for Expedited Hearing (Dkt#24), Motion for Leave to File Memorandum of Law in Support of Plaintiff's Expedited Complaint for Administrative Review, Declaratory, Injunctive and Mandamus Relief (Dkt #25) were moot. "Under the APA, this Court only can give meaningful review to the merits of a case only after the administrate record is produced." 5 U.S.C. § 706 ("[T]he court shall review the whole [administrative] record or those parts of it cited by a party . . ."); cf. *American Bioscience v. Thompson*, 243 F.3d 579, 582-83 (D.C. Cir. 2001) (concluding that when a District Court reviews an informal agency action on the merits, it should require the agency to file the administrative

record*); Collagenex Pharm., Inc v. Thompson*, 2003 WL 21697344 at *1 (D.D.C. 2003).

Here, the agency action was the conversion of the Judiciary branch federal tribal recognition to the "Part 83" process of the Executive Branch.

Therefore, the Motions for Leave to Amend should have been granted and the CR 57 Motion for Expedited Hearing, Motion for Leave to File Memorandum of Law in Support of Plaintiff's Expedited Complaint for Administrative Review, Declaratory, Injunctive and Mandamus Relief should have also been granted.

CONCLUSION

For the foregoing reasons, Pilchuck et al respectfully request reversal' and remand to the BIA et al for an official agency position so the District Court can follow local court rules, D.C. Circuit and U.S. Supreme Court precedent and then decide the proper form of relief.

Dated: January 24, 2023,

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation because it contains 12,997 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. R. 32(a)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: January 24, 2023,

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(c), that on January 24, 2023, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Respectfully submitted, this 24th day of January 2023.

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