IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BURT LAKE BAND OF OTTAWA AND CHIPPEWA INDIANS, Plaintiff, v. DEBRA HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior, *et al*., Defendants.	Case No. 1:17-cv-00038-ABJ

FEDERAL DEFENDANTS' OPPOSITION TO MOTION TO ENFORCE JUDGMENT OR FIND DEFENDANTS IN CONTEMPT

I. INTRODUCTION

Plaintiff's Motion to Enforce Judgment or Find Defendants in Contempt (ECF No. 80) ("Plaintiff's Motion") asks the Court to order the Department of the Interior (the "Department") to complete by November 1, 2024, its rulemaking regarding re-petitioning for acknowledgement as a federally recognized Indian tribe. Mem. of P&A in Supp. of Pl.'s Mot. to Enforce J. or Find Defs. in Contempt ("Pl.'s Mem."), ECF No. 80-1 at 1. That rulemaking is in response to the Court's March 2020 order remanding the re-petitioning ban to the Department.

The Court should deny Plaintiff's Motion for several reasons. ***First***, the Court lacks jurisdiction to issue Plaintiff's requested relief. The Court remanded the ban to the agency for further consideration without retaining jurisdiction and did not impose any timeframe for that consideration. And the claim underlying this case does not involve a claim for undue delay or agency inaction.

Second, regardless of whether the Court has jurisdiction, there is no basis here for Plaintiff's claim that the Department has violated court orders or its demand that the Court order the Department to finalize a rule by November 1. The Department has complied with all Court orders, and the rulemaking process has progressed without any recent supervision from the Court. In compliance with this Court's August 21, 2023, order, the Department sent a new, draft Notice of Proposed Rulemaking ("Second Proposed Rule") to the Office of Information and Regulatory Affairs ("OIRA"), within the Office of Management and Budget ("OMB"), on October 30, 2023. Last month, without any prompting from the Court, the Department published the Second Proposed Rule in the Federal Register. The Second Proposed Rule, which is currently subject to public comment, would create a conditional, time-limited opportunity for denied petitioners to re-petition for federal acknowledgment as an Indian tribe. *See* Federal Acknowledgment of American Indian Tribes, 89 Fed. Reg. 57,097 (July 12, 2024). Because the Department has complied with all Court orders and the rulemaking is progressing, there is no basis for the Court to enforce its judgment or to find Federal Defendants in contempt.

Third, Plaintiff's Motion seeks to have the Court interfere in the Department's policymaking on one of the most important subjects entrusted to the Department. Plaintiff's arbitrary, unreasonable deadline would harm the Department's decision-making process, interfere with policy decisions within the Department's discretion, and injure the public by forcing the Department to finalize a policy decision in a matter of weeks. And as explained further below, the timeline Plaintiff suggests is unreasonable (and unrealistic) in light of steps necessary to complete the rulemaking process.

And ***fourth***, Plaintiff's purported injury does not justify imposition of a timeframe—particularly the arbitrary and unreasonable one Plaintiff suggests—for the Department's

rulemaking to conclude. The Court should deny Plaintiff's Motion and allow the Department to continue with its normal rulemaking process.

II. BACKGROUND

Since 1994, Department regulations located at 25 C.F.R. Part 83 ("Part 83 regulations" or "Part 83") have expressly prohibited re-petitioning for federal acknowledgement. Under the prohibition, entities that have sought federal recognition through the federal acknowledgment process and been found not to meet the criteria for federal acknowledgment have not been allowed to re-petition. In 2017, Plaintiff challenged the Department's decision to retain the re-petitioning prohibition in a 2015 Final Rule revising Part 83. The 2015 Final Rule resulted from a 2014 Proposed Rule, in which the Department had initially proposed allowing certain groups denied federal acknowledgment to re-petition.

On March 25, 2020, this Court entered a Memorandum Opinion, concluding that the re-petitioning ban was statutorily permissible but that the Department's justifications for retaining the ban in the 2015 Final Rule were arbitrary and capricious. Mem. Op., ECF No. 40. The Court found that the Department's decision was "neither well-reasoned nor rationally connected to the facts in the record." *Id.* at 23. The Court, therefore, remanded the re-petitioning ban to the Department for further consideration or action. *Id.* at 24; ECF No. 39 ("Remand Order"). The Court closed the case on April 3, 2020.

In December 2020, the Department announced its intent to begin reconsidering the re-petitioning ban and, in February 2021, held a tribal consultation session on the ban. ECF Nos. 45, 48. The Department also solicited written comments on the ban through March 2021. ECF No. 48. The Department received 19 comments, with some in favor of, and some opposed to, the ban. ECF No. 49. After reviewing the comments and engaging in internal deliberations, the Department published a Proposed Rule to retain the ban on April 27, 2022 ("2022 Proposed

Rule"), albeit based on revised justifications from the 2015 Final Rule meant to be responsive to the holdings of this Court and the Court in *Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-5668-RBL, 2020 WL 128563 (W.D. Wash. Jan. 10, 2020). ECF No. 57; *see also* ECF No. 72 (summarizing this background).

Following publication of the 2022 Proposed Rule, the Department solicited written comments through July 6, 2022, and received approximately 270 comments, again with some in favor of, and some opposed to, the ban. 89 Fed. Reg. at 57,100. The comments came from federally recognized Indian tribes and a wide range of stakeholders: non-federally recognized groups (including Plaintiff and other denied Part 83 petitioners), various state and local government representatives, individuals, and others. *Id.* Additionally, the Department held two tribal consultation sessions with federally recognized Indian tribes and a listening session with present, former, and prospective petitioners for federal acknowledgment. *Id.*

Since the Remand Order, the Court has required Federal Defendants, over their objection, to file periodic status reports. *See, e.g.*, ECF Nos. 58, 62, 64. On June 22, 2023, the Court set a status conference and required a "senior level official from the Department who can speak knowledgably about the anticipated timeline and the reasons for the delay to be present." Minute Order issued June 22, 2023. The Court denied Federal Defendants' motion to vacate the status conference, ECF No. 70, and the conference occurred on July 18, 2023.

On July 19, 2023, the Court issued an Order denying Plaintiffs' Motion to Rule upon Constitutional Claims and for Permanent Injunction, finding that the Court had no jurisdiction to review the 2022 Proposed Rule. ECF No. 71. In regard to Plaintiff's constitutional claims and related request for federal recognition by judicial fiat, the Court noted that "not only has the case in its entirety been remanded to the agency, raising serious questions about the Court's power to consider claims that were not ruled on at the time it was remanded and the case was terminated,

the claim asking the Court to order federal recognition was not even part of the case at that time." *Id.* at 2. Nevertheless, the Court granted the Band's request in the alternative that the Court establish a timetable for the completion of the renewed rulemaking and ordered the Department to "submit its finalized draft of the Final Rule to OIRA by August 31, 2023." *Id.* at 3.

The Department moved for reconsideration of the July 19, 2023, Order. ECF No. 72. The Court granted the motion for reconsideration and modified the Order to require the Department to submit either a new proposed rule or a final rule to OIRA by October 31, 2023. *See* Minute Order issued August 21, 2023. On October 30, 2023, the Department transmitted a new, draft Second Proposed Rule—addressing the availability of re-petitioning in Part 83—to OIRA. *See* Status Report, ECF No. 77 at 1.

On October 31, 2023, OIRA accepted the Second Proposed Rule for interagency review as a "significant regulatory action" under Executive Order 12,866 ("E.O. 12,866"), as amended by Executive Order 14,094. Because OIRA deemed the Second Proposed Rule "significant," it was subject to interagency review. Interagency review, which entailed multiple rounds of interagency comments and Departmental responses to comments, took place between November 2023 and May 2024 and concluded on May 22, 2024. *See* Decl. of Oliver Whaley (attached) ¶¶ 7–15. In each round of review, the Department diligently responded to OIRA and the interagency comments. *Id.*

On July 3, 2024, after final review and approval by senior Departmental leadership, the Department provided the Second Proposed Rule to the Office of the Federal Register for review and publication. *Id.* ¶ 16. On July 9, 2024, the Office of the Federal Register completed its preparation of the Second Proposed Rule and scheduled it for publication. *Id.* ¶ 17. The Second Proposed Rule was published on July 12, 2024. 89 Fed. Reg. 57,097.

The Second Proposed Rule proposes "to create a limited exception to the ban" on re-petitioning "through implementation of a re-petition authorization process." *Id.* at 57,098. This process would require a previously denied petitioner to "plausibly allege that the outcome of the previous, negative final determination would change to positive on reconsideration based on" a change in the Part 83 regulations (from an older version to the version revised by the 2015 Final Rule) or new evidence. *Id.* at 57,100. If granted authorized to re-petition, the previously denied petitioner would "proceed with a new documented petition through the Federal acknowledgment process." *Id*. The Second Proposed Rule would also temporally limit re-petitioning, giving petitioners denied prior to the effective date of the final rule implementing the re-petition authorization process five years to request to re-petition. *Id*.

The Department has requested written comments on the Second Proposed Rule through September 13, 2024. *Id.* at 57,097. Additionally, the Department held a consultation session with federally recognized Indian tribes on August 19, 2024, and another is scheduled for September 3, 2024. *Id.* The Department will also hold a listening session for present, former, and prospective petitioners on September 5, 2024. *Id*.

Once the comment period closes on the Second Proposed Rule, the Department will review comments and create an internal summary report. Whaley Decl. ¶ 19. There is no set timeframe for preparing the summary report. Rather, the necessary time is dictated by the number and substance of received comments, agency workload, and other factors. *Id.*, *see United Steelworkers of Am. v. Rubber Mfrs. Ass'n*., 783 F.2d 1117, 1120 (D.C. Cir. 1986) (declining to impose a timeframe on a rulemaking because "the agency must, of necessity, deal with a host of complex . . . issues" and the agency "obviously cannot know at present how many comments it will receive or the nature of those comments"). Once a summary report is prepared, the Department will deliberate on the comments, make any necessary revisions to the proposed rule,

and prepare for issuance of a final rule (assuming that the Department proceeds with a final rule). Whaley Decl. ¶ 20.

Any final rule must be approved by the Assistant Secretary – Indian Affairs and cleared through internal Department processes. Once internally cleared, the final rule would then be sent to OIRA for review. *Id.* ¶ 21. If OIRA determines that the final rule is significant, the final rule would be subject to up to ninety days of additional interagency review and comment, with the possibility of OIRA extending the review for an additional thirty days. *Id.* After OIRA completes its review, senior Department leadership would then review the rule and give it final approval before it is transmitted to the Office of the Federal Register publication. *Id.* ¶ 22.

III. ARGUMENT

The Court should deny Plaintiff's Motion for several reasons. First, the Court does not have jurisdiction over Plaintiff's request. Second, regardless of whether the Court has jurisdiction, there is no basis for imposing a deadline or finding the Department in contempt because the Department has complied with all Court orders and has been proceeding with its rulemaking at an appropriate pace. Third, Plaintiff's request would improperly involve the Court in the Department's discretionary policymaking. Fourth, Plaintiff has not shown that it will be injured if the rulemaking proceeds as is and not under an arbitrary, unreasonably tight deadline.

A. The Court lacks jurisdiction to order the Department to complete its rulemaking by November 1.

As an initial matter, the Court lacks jurisdiction to set a date by which the Department must finalize its rulemaking. Federal Defendants have repeatedly asserted that the Court lacks jurisdiction to require status reports, hold status conferences, or impose a deadline. *See, e.g.*, ECF Nos. 45, 58, 62, 64, 66, 70, 72. The Court has not, in any of its orders, explicitly analyzed this question or found that it has jurisdiction. It does not.

Federal courts have limited jurisdiction, and it is presumed that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Co.*, 511 U.S. 375, 377 (1994). And by "a final decision . . . a district court disassociates itself from a case." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995). "The norm is to vacate agency action that is held to be arbitrary and capricious and remand for further proceedings consistent with the judicial decision, without retaining oversight over the remand proceedings." *Baystate Med. Ctr. v. Leavitt*, 587 F. Supp. 2d 37, 41 (D.D.C. 2008); *Citrus HMA, LLC v. Becerra*, 597 F. Supp. 3d 450, 462–63 (D.D.C. 2022) (remanding case without retaining jurisdiction).

Here, the Court issued a "final appealable order" on summary judgment, Remand Order, ECF No. 39, and "terminated" the case. ECF No. 71 at 2. In doing so, the Court remanded the re-petitioning ban to the agency for further consideration or action in accordance with its order and did not retain jurisdiction for any purpose. ECF Nos. 39, 40.

Even assuming that the Court retained some general authority to enforce its Remand Order, the Court cannot "enforce" a judgment by imposing new obligations that the judgment itself did not impose. *See, e.g.*, *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005) (denying motion to enforce a judgment because "the only obligation [the court] expressly imposed on the agency was to consider the two alternatives suggested during the comment period" based on the parties' prior litigation, which the court found was "precisely what the agency did"); *Vikas WSP, Ltd. v. Econ. Mud Product Co.*, 23 F.4th 442, 453–54 (5th Cir. 2022) (because a party's fraud claim was not within the district court's power to enforce a settlement in a breach-of-contract case, "the fraud claim doesn't fall within that retained jurisdiction"); *Ricci v. Patrick*, 544 F.3d 8, 22 (1st Cir. 2008) (explaining that "a district court may possess 'inherent authority' to address violations of an order where it retains jurisdiction in a separate provision, but only when the order itself is violated" (quoting and discussing *Kokkonen*, 511 U.S. at 380–81)). The Remand Order did not

contain a deadline for agency action, and reasonably so, because this was not a case about the pace of the Department's rulemaking. The Court correctly recognized that the claims before it on summary judgment—addressing whether the re-petitioning ban was arbitrary and capricious under the Administrative Procedure Act—had nothing to do with agency inaction or delay in rulemaking. ECF No. 71; ECF No. 47. Nor did the operative complaint contain a claim alleging unreasonable delay in the Department's rulemaking efforts on the question of re-petitioning. ECF No. 11. In short, the Remand Order did not impose any kind of timeline for issuance of a new rule (or some other action) on remand that the Court could subsequently enforce.

Thus, Plaintiff has not demonstrated that the Court has jurisdiction here to impose a deadline in a closed case to "enforce" a remand that neither imposed nor suggested any timetable for future rulemaking. Additionally, Plaintiff has not requested a modification of the Court's Remand Order or sought to amend its complaint to assert an unreasonable delay claim. To the extent Plaintiff believes the Department has unreasonably delayed a final rule or other action, Plaintiff would have to bring suit under § 706(1) of the APA, which authorizes a court with jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Otherwise, a district court does not have freestanding discretion to compel agency action in general, or to require an agency to finalize a rule by a date certain. Plaintiff acknowledges that bringing such a suit could, in theory, provide the relief it seeks, *see* Pl.'s Mem. at 9 n.4, but it has not done so.

In sum, the Court lacks jurisdiction to enter a deadline by which the Department must conclude its rulemaking and should deny Plaintiff's Motion on that basis.

B. There is no basis for the Court to enforce the Court's Remand Order or find Federal Defendants in contempt given that the Department has complied with the Remand Order, as well as all subsequent orders.

Regardless of whether jurisdiction exists, Plaintiff has not demonstrated a basis on which the Court could enforce the Remand Order by imposing a deadline by which the Department must complete its rulemaking, much less a basis for finding Defendants in contempt. In short, the Department has complied with all Court orders, and Plaintiff's motion must therefore be denied.

Most recently, the Department complied with the Court's August 21, 2023, Order by submitting a draft Second Proposed Rule to OIRA by October 31, 2023. *See* Status Report, ECF No. 77. Plaintiff's argument that the Department should be held in contempt because it "is no closer to publishing a final rule than this time last year," ECF No. 80, amounts to a criticism of the Court's August 21, 2023, Order, which allowed the Department to transmit either a new proposed rule or a final rule to OIRA and proceed with a new proposed rule if the Department chose to do so. It also amounts to a claim that the Department should have finalized a new rule allowing re-petitioning for the first time—which would reverse course from the 2022 proposed rule and the Department's approach since at least 1994—without following notice-and-comment procedures. This would have been a litigation risk for the Department and not something that Plaintiff had a legal right to demand. The Court rightly allowed the Department to proceed with a new proposed rule and notice-and-comment procedures.

Moreover, there is nothing new in Plaintiff's argument. Plaintiff made the same argument last year, in its opposition to Federal Defendants' motion for reconsideration, prior to issuance of the August 21, 2023, Order. In that filing, Plaintiff asserted that "[i]f DOI submits a new proposed rule to OIRA by October 31, OIRA could sit on this draft proposed rule for months, then DOI publishes this new proposed rule, which will trigger a new round of public comments and deliberation, more draft reviewing by OIRA and many months (if not at least a year) before a final

rule is eventually published." *See* ECF No. 74 at 2. Thus, the Court already considered the concerns Plaintiff now expresses when it ruled that the Department could submit either a new proposed rule or a final rule to OIRA. Minute Order of August 21, 2023.

The Department has also complied with the Court's Remand Order. The Remand Order remanded the re-petitioning ban to the Department for further consideration or action. *See* Remand Order. There is no question that the Department has complied with that Order and continues to do so. After the Remand Order, the Department announced its intent to reconsider the ban, held a consultation session with federally recognized Indian tribes, and solicited written comments on the ban. *See* Federal Acknowledgment of American Indian Tribes, 87 Fed. Reg. 24,908, 24, 910 (April 27, 2022). The Department published two separate proposed rules addressing the re-petitioning ban. *Id.*; 89 Fed. Reg. 57,097. That the Department has not yet issued a final rule is not a violation of the Remand Order. As discussed above, neither the Remand Order nor the accompanying Opinion contemplated the timing of any subsequent administrative activity even in general terms. Instead, the Court simply remanded the case for additional analysis. And for good reason—the operative complaint did not (and still does not) raise a claim regarding agency inaction or delay and the summary judgment motions were not about the pace of the Department's rulemaking. ECF No. 71; ECF No. 47; ECF No. 11.

Plaintiff suggests that the fact four years have passed since the Remand Order is evidence in and of itself that the Department has violated the Remand Order. *See, e.g.*, Pl.'s Mem. at 5–6, 10–12. This is unreasonable. For one, it ignores all the Department's efforts toward a new rule. Rulemakings can take years to complete, with claims of noncompliance correspondingly evaluated only after many years of alleged inaction. *See Wellesley v. FERC*, 829 F.2d 275, 277–78 (1st Cir. 1987) (citing several cases in the D.C. Circuit for the proposition that "cases in which courts have afforded relief have involved delays of years") (citations omitted). And "agencies are not required

to promulgate proposed rules immediately or within a certain timeframe." *Sanofi-Aventis U.S., LLC v. HHS*, 570 F. Supp. 3d 129, 166 (D.N.J. 2021) (citing *Stringfellow Mem'l Hosp. v. Azar*, 317 F. Supp. 3d 168, 185 (D.D.C. 2018)). Plaintiff does not cite a single case in which a court has required a federal agency to finalize a rule only seven weeks after the close of a comment period on the rule, and the Department is not aware of any such cases.

The Department's actions also belie Plaintiff's accusation (without any evidence) that the Department does not intend to finalize a new re-petitioning rule. Without a Court order, the Department published the Second Proposed Rule in the Federal Register in July and is in the process of receiving public comments and holding meetings and consultations on the proposal. *See* 89 Fed. Reg. at 57,097. As noted in Mr. Whaley's declaration, the Department next intends to consider the comments received during this process and determine the path forward based on its analysis of those comments and policy determinations. Whaley Decl. ¶¶ 19–20. Plaintiff ignores all of this, instead asserting (again without evidence) that the Second Proposed Rule is part of a scheme spanning multiple Presidential administrations to indefinitely delay finalization of a rule. But that assertion does not comport with the Second Proposed Rule or the process leading to it. That is particularly true given that Second Proposed Rule is more favorable to Plaintiff's interests than the 2022 Proposed Rule and was consistent with the Court's Minute Order allowing the Department to submit a new proposed rule to OIRA.

Plaintiff also has not shown that the Court has authority to set a compliance schedule. Plaintiff relies on *Natural Resources Defense Council v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1974), but that case is distinguishable. As Plaintiff acknowledges, that case involved EPA's failure to meet a mandatory, nondiscretionary duty required by statute to be completed in one year. Pl.'s Mem. at 9; *Train*, 510 F.2d at 704. By contrast, no statutory duty or deadline exists here. In *Train*, as well, the court consulted with the parties to ensure that any timetable for the agency's action

was workable. 510 F.2d at 705. Notably, the case also concerned implementation of actions not subject to any statutory deadline and the court noted that the agency had greater discretion in the time it took to carry out those actions. *Id.* at 706.[1]

Plaintiff has also not shown that a contempt order would be appropriate here, particularly when the Court's August 2023 Order allowed the Department to proceed with a second proposed rule. "A party moving for a finding of civil contempt must show, by clear and convincing evidence, that: (1) there was a court order in place; (2) the order required certain conduct by the defendant; and (3) the defendant failed to comply with that order." *Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F. Supp. 2d 35, 38 (D.D.C. 2010). Plaintiff has not done so here. As discussed above, the Department is in compliance with the Court's August 2023 Order and the Remand Order, which remanded the case to the Department "for further consideration or action in accordance with" the order. *See* ECF No. 39. Plaintiff also bases its contempt request at least in part on speculative future behavior and delays outside the Department's control. *See* Pl.'s Mot. at 11 (speculating that the Second Proposed Rule is "almost certain to ping-pong back and forth with OIRA for an unknown period with the potential for future delays"). This is an insufficient basis for a finding of contempt.

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[1] Other cases also indicate that obtaining agency assurance is appropriate before imposing any deadline. *See, e.g.*, *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1148–50 (D.C. Cir. 1992) (imposing an August 31, 1992, deadline on OSHA only after OSHA clarified that it would need until then to complete its rulemaking); *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (ordering OSHA to comply with its own proposed timetable); *Wellesley v. FERC*, 829 F.2d at 277 (explaining that, "[i]n *T.R.A.C.*, delays of approximately five years and two years by the Federal Communications Commission, while not warranting mandamus, led the court *to order the F.C.C. to inform it* of the dates by which it anticipated resolving the issues before it" (emphasis added) (citing *TRAC*, 750 F.2d at 81)). Should the Court determine that it is appropriate to set a deadline, the Department submits that a November 1 deadline is unreasonable, particularly given that certain elements of the process (such as interagency review and the number and complexity of comments received) are outside the Department's control.

Further, Plaintiff has not even addressed the factors laid out by the D.C. Circuit for courts to consider in deciding "whether the agency's delay is so egregious as to warrant mandamus." *Telecomm'ns Research & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 79 (D.C. Cir. 1984). "Mandamus pursuant to *TRAC* is an extraordinary remedy, reserved only for extraordinary circumstances." *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000). Before imposing a deadline, the Court is required to assess the six factors set forth in *TRAC*, 750 F.2d at 80. Applying the *TRAC* factors to a "claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003). Plaintiff has made no effort to demonstrate that the *TRAC* factors would support the Court imposing a deadline here. In any event, in *TRAC* the D.C. Circuit has found mandamus appropriate where there was "a clear statutory mandate, a deadline nine-years ignored, and an agency that has admitted its continuing recalcitrance." *In re Bluewater Network*, 234 F.3d at 1316. The situation here bears none of those characteristics.

In sum, the Department's actions, including timely submission of a draft rule to OIRA and the recent publication of the Second Proposed Rule, reflect ongoing compliance with the Court's orders, not disregard of them. Plaintiff's complaints about the pace of the rulemaking are unconnected to the issue of whether the Department is complying with the Court's orders.

C. The Court should not unduly interfere in the Department's discretionary policymaking process.

Setting a deadline for the Department to complete its rulemaking—particularly the arbitrary and unreasonably tight deadline Plaintiff proposes—would interfere with policy decisions that are within the Department's discretion. The Department needs sufficient time to finalize a rule that is well-reasoned and defensible. Providing that time would ensure adequate Departmental deliberations and benefit the public interest.

Federal acknowledgment is one of the most consequential decisions the Department makes. *See* 87 Fed. Reg. at 24,914. It establishes a government-to-government relationship between the United States and the newly acknowledged tribe, which by itself is highly consequential as federally recognized Indian tribes have sovereign immunity. Among other benefits, federally recognized tribes also can exercise jurisdiction in Indian county, administer funds under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 5301–5332, and acquire new lands and establish gaming facilities under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721. Thus, the determination whether denied petitioners should be allowed to re-petition is extremely important to the Department and to other stakeholders. *See* 89 Fed. Reg. at 57,100 (noting that the Department "received approximately 270 comments from federally recognized Indian Tribes and a wide range of stakeholders, including former and prospective part 83 petitioners, various State and local government representatives, individuals, and others" on the 2022 Proposed Rule).

Imposition of a deadline that would force completion of the rulemaking process and publication of a final rule before normal and complete deliberations can occur would amount to judicial interference in a high-stakes process entrusted to the Executive Branch. This would both directly infringe on the Department's policy discretion and infringe on others' interests on this important issue. The deadline would also interfere with the interagency review process. *See* Whaley Decl. ¶ 21. Once a court has vacated and remanded an agency decision for further consideration, the court should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' and most likely to further some vague, undefined public good." *Sierra Club v. Costle*, 657 F.2d 298, 392 (D.C. Cir. 1981). If the Department is unable to finalize a rule that accords with its quality standards and policy preferences (and allows the Department to appropriately consider public comments) in the

coming months, the Court should not force the Department to do so. Rather, the Court should allow the Department to finalize the rule consistent with its policy preferences and at the pace needed for policy deliberations and compliance with the administrative steps necessary to complete a rulemaking.

Further, any impact that the upcoming turnover in the Presidential Administration might have is speculative and, in any event, does not provide a reason for a court to compel the Department to finalize a rule, let alone by November 1. *Accord Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) ("A change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations" and, "[a]s long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.") (citation omitted).

Additionally, as the Supreme Court has "repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts v. EPA,* 549 U.S. 497, 527 (2007). Here, Plaintiff explicitly asks the Court to override the Executive Branch's policy priorities. *See, e.g.*, Pl.'s Mem. at 7 ("As the presidential election approaches, the federal agencies have quickly published final rules on their policy priorities, to the detriment of non-priority rules."); 7–8 (noting that a new Administration may make a different policy determination and choose to either retain the ban on re-petitioning or opt for "another novel regulatory process."). Instead, the Court should give deference to the "timing and priorities of [the agency's] regulatory agenda," just as the court did following the Department's transmittal of a proposed rule to OIRA on October 31, 2023. *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014); *see also Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979) (holding that an agency "alone is cognizant of

the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands"). Discretionary policymaking should be left to the political branches, *see Loper Bright Enterpr. v. Raimando*, 144 S. Ct. 2244, 2268 (2024), and the Court should therefore decline Plaintiff's invitation to dictate the Department's priorities.

Plaintiff minimizes the benefit and intent of public comments on the Second Proposed Rule, arguing that the Department should be able to finalize the rule once the comment period concludes and that "the contents of the public comments should not be much of a surprise for DOI." Pl.'s Mem. at 11. The Department, however, takes comments seriously. Indeed, the written comments submitted on the 2022 Proposed Rule (which would have retained the re-petitioning ban) informed the Department's decision to propose a limited avenue for re-petitioning. 89 Fed. Reg. at 57,100. The comments that the Department considered included those submitted by Plaintiff in opposition to the 2022 Proposed Rule. Thus, contrary to what Plaintiff seems to believe, there is great value in notice-and-comment procedures, particularly in the context of Part 83 and where the Second Proposed Rule proposes a threshold review on which the Department has never received public comment. The Department's openness to public comments, and the possibility of making changes in light of them, accords with the D.C. Circuit's view that "[a]gencies, are free—indeed, they are encouraged—to modify proposed rules as a result of the comments they receive." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004); *see also Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C. Cir. 2000) (noting that "the Agency's change of heart . . . only demonstrates the value of the comments it received").

In sum, the Court should deny Plaintiff's request to accelerate the Department's rulemaking in a way that constricts the Department's consideration of comments or otherwise impacts the Department's deliberations and processes.

D. Any harm to Plaintiff does not justify Plaintiff's requested relief.

As an initial matter, Plaintiff has not demonstrated that their alleged harm is a relevant consideration for the Court. Plaintiff has not brought a claim for unreasonable delay, the Court's review of which would, under the well-established *TRAC* factors, consider any harm to Plaintiff. *See TRAC*, 750 F.2d at 79. Instead, Plaintiff seeks extreme remedies (judgment-enforcing mandamus and contempt) based on vague information unrelated to the timeframe of the rulemaking. The Court should deny Plaintiff's request.

Even if the Court considers harm to Plaintiff to be relevant, Plaintiff has not demonstrated that it will be harmed if the Department does not complete the rulemaking by November 1. Plaintiff makes an emotional plea that conflates alleged past injustices—including by parties other than the federal government—with alleged delay in the rulemaking. Pl.'s Mem. at 8. Plaintiff attributes its injuries to its lack of federal acknowledgment as an Indian tribe, *id.*, but this case is not about the Department's 2006 denial of Plaintiff's petition for federal acknowledgment. Plaintiff did not appeal the denial of its petition through the available administrative and judicial channels, and Plaintiff forfeited its right to do so long ago. *See Burt Lake Band of Ottawa & Chippewa Indians*, 304 F. Supp. 3d 70, 72 (D.D.C. 2018).

Plaintiff also suggests that, without a final rule allowing or disallowing re-petitioning, Plaintiff will "cease to exist." Pl.'s Mem. at 5. But there is no clear connection between Plaintiff's existence and the requested November 1st deadline, or any deadline, for completion of the rulemaking. Indeed, while Plaintiff might argue that a longer timeframe for finalization of the rule generally prejudices its interests, that argument is undermined by the fact that the alleged delay here stems from the Department's decision to publish a Second Proposed Rule that might benefit Plaintiff more than the 2022 Proposed Rule, which would have retained the re-petitioning ban. In other words, far from harming Plaintiff, the Department's issuance of a Second Proposed

Rule and efforts to ensure that it is subject to notice-and-comment and thorough deliberation might benefit Plaintiff.

IV. CONCLUSION

Plaintiff has not presented any basis for the extraordinary relief it seeks—a court-ordered deadline to complete an ongoing rulemaking process where the complaint does not include a claim for unreasonable delay. The Department has not violated any Court order and has been reasonable in its rulemaking process, as recognized by the Court's most recent order allowing a new proposed rule. Thus, even assuming the Court has jurisdiction to entertain Plaintiff's Motion, the Court should reject Plaintiff's effort to interject the judiciary into the Department's policymaking. Finally, Plaintiff has not shown that any harm would result from the rulemaking proceeding as is. Federal Defendants therefore respectfully request that the Court deny Plaintiff's Motion.

Respectfully submitted this 30th day of August, 2024.

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s/ Devon Lehman McCune
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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

s/ Devon Lehman McCune

Devon Lehman McCune
Senior Attorney