The Honorable Jamal N. Whitehead

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

THE DUWAMISH TRIBE, et al., Plaintiffs, v. DEB HAALAND, et al., Defendants.	No. 22-cv-0633 (JNW) FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND NOTE ON MOTION CALENDAR: FEBRUARY 2, 2024

Federal Defendants hereby move this Court for a voluntary remand to reevaluate Plaintiffs' petition for federal acknowledgment under the 2015 version of the federal acknowledgment regulations ("2015 regulations").[1] Plaintiffs Duwamish Tribe ("Duwamish") and Cecile Hansen filed this suit challenging Federal Defendants' Final Decision on Remand ("FDR") declining to acknowledge Duwamish as an Indian tribe under the federal acknowledgment regulations, set forth at 25 C.F.R. Part 83 ("Part 83" or "regulations"). Plaintiffs allege that the Department of the Interior ("Department") erred in evaluating Plaintiff

[1] As a general matter, the Department of the Interior refers to the Part 83 regulatory process as "acknowledgment," with tribes on the List of Indian tribes considered "recognized." Defendants use these terms interchangeably here.

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Duwamish Tribe's petition under the version of the regulations promulgated in 1994 ("1994 regulations") instead of under the 2015 regulations. The remand will provide the Department the opportunity to review its decision and apply the 2015 regulations as Plaintiffs request in this case. Thus, the remand would give Plaintiffs the complete relief they are entitled to under the Administrative Procedure Act ("APA") and may obviate the need for future litigation, or at least narrow issues before the Court. Given that the remand would result in a new agency decision, Federal Defendants also request that the Amended Complaint be dismissed or, in the alternative, that the case be stayed pending completion of further Departmental review and a new agency decision on remand. Federal Defendants therefore request that the Court grant this motion to remand the FDR to the agency for further consideration and dismiss the case without prejudice.

Counsel for Federal Defendants conferred with Plaintiffs' counsel regarding a remand on several occasions, including December 15, 2023. Plaintiffs oppose this motion.

I. BACKGROUND

Plaintiffs in this case seek to have the Department acknowledge Duwamish as an Indian tribe and place Duwamish on the list of federally recognized tribes published by the Secretary. The power to federally recognize Indian tribes lies with Congress and the Executive and is essentially committed to the political branches. *See United States v. Holliday*, 70 U.S. 407, 419 (1865) (noting that if "the [E]xecutive and other political departments of the government" recognize a group of Indians as a tribe, courts "must do the same"); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004) (stating that "the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review" (quoting *Miami Nation of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001))); *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985) (stating that "[i]n the absence of explicit governing statutes or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence" (citations omitted)); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) (stating that "[w]hether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion

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of Congress and the Executive Branch, and courts will defer to their judgment" (citations omitted)).

Historically, Indian tribes were federally recognized through treaties, congressional statutes, or *ad hoc* decisions within the Executive branch. In 1978, the Department established a comprehensive regulatory process for the review and evaluation of petitions for acknowledgment of Indian tribes. *See* 25 C.F.R. pt. 83; *see also* 43 Fed. Reg. 39,361 (Sept. 5, 1978). The Department revised the Part 83 regulations in 1994 and again in 2015. *See* Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9,280 (Feb. 25, 1994) (publishing the 1994 regulations); 80 Fed. Reg. 37,862 (July 1, 2015) (publishing the 2015 regulations).

Federal acknowledgment of groups as Indian tribes establishes a government-to-government relationship with the United States and is a prerequisite to nearly all of the protection, services, and benefits of the federal government available to Indian tribes. 25 C.F.R. § 83.2 (2015). There are seven mandatory criteria in Part 83 that a petitioner must meet to be acknowledged as a federally recognized Indian tribe.[2] The purpose of these criteria is to demonstrate continuous existence as a social and political entity. The Office of Federal Acknowledgment ("OFA") within the Department evaluates petitions for acknowledgment and is composed of experts in anthropology, genealogy, and history. Failure to meet any one of the criteria will result in a determination that the petitioner is not entitled to a government-to-government relationship with the United States. 25 C.F.R. § 83.43(b) (2015); *id.* § 83.10(m) (1994).

The Secretary of the Interior publishes annually in the Federal Register "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services

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[2] These seven criteria, delineated in 25 C.F.R. § 83.7 in the 1994 regulations and 25 C.F.R. § 83.11 in the 2015 regulations, require the petitioner to demonstrate that (a) the petitioner has been identified as an American Indian entity on a substantially continuous basis; (b) the petitioner comprises a distinct community and has existed as a community; (c) the petitioner has maintained political influence or authority over its members as an autonomous entity; (d) the petitioner has a governing document or written statement with membership criteria; (e) the petitioner's membership descends from a historical Indian tribe; (f) the petitioner's membership is composed principally of persons who are not members of any federally recognized tribe; and (g) the petitioner is not subject to congressional legislation that terminated or forbids a federal relationship.

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provided by the United States to Indians because of their status as Indians" under the Federally Recognized Indian Tribe List Act ("List Act"). Pub. L. No. 103-454, 108 Stat. 4791 (1994), 25 U.S.C. § 5131(a); *see also* 88 Fed. Reg. 2,112 (Jan. 12, 2023) (publishing the current list). The List Act defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 5130.

In 2001, the Department issued a Final Determination declining to acknowledge the Duwamish Tribal Organization as an Indian tribe under the original version of the regulations, promulgated in 1978 ("1978 regulations"). *See Hansen v. Salazar*, No. 08-0717 (JCC), 2013 WL 1192607, at *4 (W.D. Wash. Mar. 22, 2013). The Final Determination found that the Duwamish had not submitted sufficient evidence to meet criteria (a), (b), and (c). 66 Fed. Reg. 49,966 (Oct. 1, 2001) (summarizing the 2001 Final Determination). Plaintiffs challenged that decision in the *Hansen* litigation. In *Hansen*, the Court entered summary judgment in favor of Plaintiffs, finding that the Department did not satisfactorily explain why the Department evaluated Duwamish's petition under only the 1978 regulations even though the Department had evaluated the petition of an allegedly similarly situated petitioner, the Chinook Indian Nation, under both the 1978 and 1994 regulations. 2013 WL 1192607, at *11. The Court therefore remanded the case to the Department "to either consider the Duwamish petition under the 1994 acknowledgment regulations or explain why it declines to do so." *Id.*

On remand, the Department chose the first of the two Court-directed options, applied the 1994 regulations and, ultimately, denied Plaintiffs' petition under both the 1978 and 1994 regulations. The Department did not reopen the evidentiary record on remand. FDR at 2, found at www.bia.gov/as-ia/ofa/025-duwami-wa. On July 24, 2015, the Assistant Secretary – Indian Affairs ("Assistant Secretary") issued the FDR, which, like the 2001 Final Determination, concluded that Duwamish failed to satisfy criteria (a), (b), and (c). FDR at 16–17; FDR Against Federal Acknowledgment of the Duwamish Tribal Organization, 80 Fed. Reg. 39,142, 39,143 (July 8, 2015). The Department concluded that, "[b]ecause the petitioner was created only in late 1925 and is not a continuation of any earlier Duwamish entity, the various identifications of a

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Duwamish tribe before 1925 do not identify the petitioner," so Duwamish did not meet criterion (a) (Indian Entity Identification). 80 Fed. Reg. at 39,143. In regard to criterion (b) (Community), the Department concluded that, because Duwamish "has not maintained a community that is socially distinct from the general populations from historical contact to the present," Duwamish did not meet the criterion. *Id.* In regard to criterion (c) (Political Authority), the Department concluded that, "[b]ecause the petitioner formed in 1925 and has not maintained tribal political influence or authority over its members," Duwamish also did not meet that criterion. *Id.* The FDR further found that Duwamish did not demonstrate unambiguous previous federal acknowledgment as a tribe under 25 C.F.R. § 83.8 (1994). *Id.* at 39,144.

A Federal Register notice published after issuance of the FDR stated that the FDR was "final for the Department on publication of th[e] notice in the Federal Register." 80 Fed. Reg. 45,230 (July 29, 2015). Plaintiffs, however, sought review with the Interior Board of Indian Appeals, which concluded that the FDR was not final and was instead subject to review by the Board. *In re Fed. Acknowledgment of the Duwamish Tribal Org.*, 66 IBIA 149, 155, 2019 WL 1930741, at *166 (Apr. 17, 2019).[3] The Board affirmed the FDR on the issues over which it had jurisdiction, and referred several issues outside its jurisdiction to the Secretary. *Id.* at *194. The Secretary had discretion to request that the Assistant Secretary reconsider the FDR on the referred issues, but decided not to do so. Thus, the FDR became the Department's final agency action on July 17, 2019. *See* Secretary's Decision Document #2.

After the FRD—but before the 2019 Secretary decision—the Department revised Part 83, promulgating the 2015 regulations, which became effective on July 31, 2015. The revisions to the regulations sought, in part, "to make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency." 80 Fed. Reg. at 37,862. The 2015 regulations did "not substantively change the Part 83 criteria, except in two instances." *Id.* at 37,863. The first instance is that criterion 25 C.F.R. § 83.11(a), which requires identification of the petitioner as an Indian entity, now may be satisfied by contemporaneous self-

[3] This decision can be found at www.bia.gov/as-ia/ofa/025-duwami-wa, as can the Secretary's Decision Document #2.

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identification, rather than solely by external identification. *Id.* The second instance relates to how marriages are counted and considered as evidence of distinct community for the purpose of meeting the criterion contained in 25 C.F.R. § 83.11(b) (2015). *Id.*

The 2015 regulations gave petitioners that "ha[d] not yet received a final agency decision" the option to proceed under either the 2015 regulations or the 1994 regulations. 25 C.F.R. § 83.7(b) (2015). After the Department had published a draft version of the 2015 regulations in a 2014 proposed rule, Plaintiffs requested that the Department consider their petition under the then-forthcoming 2015 regulations. FDR at 3. However, the Department declined to do so, explaining that the Court had ordered the Department to apply the 1994 regulations to Duwamish's petition and that the 2015 regulations were not yet in effect when the Department issued the FDR. *Id*.

Plaintiffs filed their Complaint and Amended Complaint in this Court on May 11, 2022, challenging the FDR. Am. Compl. ¶ 2, ECF No. 2. Plaintiffs assert that the Department's refusal to acknowledge Duwamish as a federally recognized Indian tribe was arbitrary and capricious and violated the APA, the List Act, and the Fifth Amendment. *Id.* ¶ 3. Plaintiffs' Amended Complaint consists of five causes of action. Plaintiff's First Claim for Relief asks the Court to declare "that the Duwamish Tribe has been recognized by Congress and other federal authorities as an Indian tribe within the meaning of the List Act and as the successor in interest to the Tribe that signed the Treaty of Point Elliott." *Id.* ¶ 95. Plaintiffs' Second Claim for Relief is for mandamus and requests that the Court "compel[] Defendants to place the Duwamish Tribe on the list of federally recognized tribes, as required under the List Act, and to adhere to the unambiguous prior recognition of the Duwamish Tribe as conclusive evidence of federal acknowledgment of the Tribe." *Id.* ¶ 105. Plaintiffs' Third Claim for Relief asserts that Defendants violated the equal protection clause of the Fifth Amendment and requests that the Court compel the Department to place Duwamish on the list of federally recognized tribes or, in the alternative, to apply the regulatory criteria in a non-discriminatory manner. *Id.* ¶¶ 119–20. Plaintiffs' Fourth Claim for Relief asserts that Defendants violated their due process by not providing a formal hearing or allowing Plaintiffs to supplement the record on remand, and

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requests that the Court order Defendants to conduct an on-the-record hearing. *Id.* ¶¶ 131–32. Plaintiffs' Fifth Claim for Relief alleges that Defendants acted arbitrarily and capriciously or otherwise violated the APA by refusing to allow Plaintiffs to proceed under the 2015 regulations and by finding that Plaintiffs are not entitled to be federally recognized as an Indian tribe. Compl. ¶¶ 134–141.

II. STANDARD OF REVIEW

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Agencies may request a court issue a voluntary remand to allow the agency to reconsider a "decision because of intervening events outside the agency's control," or "may seek remand even absent any intervening events, without confessing error, to reconsider its previous position." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (approving *SKF* framework). Courts retain "broad discretion" in deciding whether to grant an agency's request for voluntary remand and "generally grant [it] unless the request is frivolous or made in bad faith." *NRDC v. EPA*, 38 F.4th 34, 60 (9th Cir. 2022) (citing *Cal. Cmtys. Against Toxics*, 688 F.3d at 992); *see also SKF*, 254 F.3d at 1029.

III. ARGUMENT

The Department seeks a voluntary remand here to reconsider the FDR. Specifically, on remand, the Department proposes to treat Duwamish like other Part 83 petitioners that had not yet received a final agency decision as of the effective date of the 2015 regulations. This would allow Plaintiffs to proceed under the 2015 regulations, as they previously requested, and to supplement their petition with new evidence, consistent with the treatment afforded to other petitioners under 25 C.F.R. § 83.7(b)–(c) (2015). Intervening events have made reconsideration appropriate, and the Department wishes to reconsider Duwamish's petition under the 2015

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regulations. This request is made in good faith, will not harm Plaintiffs, and will promote judicial economy.

A. Intervening events justify a voluntary remand.

"'[I]ntervening events outside of the agency's control, for example, a new legal decision or the passage of new legislation,' counsel in favor of granting such a remand request." *NRDC*, 38 F.4th at 60 (quoting *SKF*, 254 F.3d at 1028). After the FDR became final in 2019, two courts found the Department's explanation for not allowing re-petitioning by groups that had been denied federal acknowledgment, as articulated in the 2015 final rule revising Part 83, to be arbitrary and capricious under the APA. *Chinook Indian Nation v. Bernhardt*, No. 17-cv-05668-RBL, 2020 WL 128563 (W.D. Wash. Jan. 10, 2020); *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, 613 F. Supp. 3d 371 (D.D.C. 2020). Both courts remanded the re-petition ban in the 2015 regulations to the agency for further consideration.

On remand of the re-petition ban, the Department has been considering whether to amend the regulations to allow some form of re-petitioning. In 2022, the Department issued a proposed rule that would have retained the ban on re-petitioning, but later stated in court proceedings that it was "giving serious consideration to allowing at least some exceptions to the re-petitioning ban, contrary to the 2022 proposed rule." *See* Mot. for Recons. ("Defs.' Mot.") at 3, *Burt Lake Band of Ottawa and Chippewa Indians v. Haaland*, No. 17-38 (ABJ) (D.D.C. Aug. 9, 2023), ECF No. 72 (emphasis omitted). On October 30, 2023, the Department transmitted a new Notice of Proposed Rulemaking for Procedures for Federal Acknowledgment of Indian Tribes—addressing the availability of re-petitioning in Part 83— to the Office of Information and Regulatory Affairs, a federal office that is part of the Office of Management and Budget. *See* Status Rep. at 1, *Burt Lake,* No. 17-38 (ABJ), ECF No. 77. That proposed rule has not been published in the Federal Register, as it is undergoing interagency review. *Id.*

While the case at bar does not explicitly involve re-petitioning, these intervening events are relevant for two reasons. First, the Department denied Plaintiffs' requests to proceed under the 2015 regulations and to supplement their petition with new evidence based, at least in part, on the conclusion that doing so would be "tantamount to re-petitioning," which the federal

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acknowledgment regulations "explicitly prohibit." FDR at 2–3. That conclusion is in tension with *Chinook* and *Burt Lake*.

Second, while the Department has always taken the position that petitions for federal acknowledgment denied under the 1978 and 1994 regulations would also be denied if assessed under the 2015 regulations, the *Chinook* and *Burt Lake* courts questioned that position. *See, e.g.*, *Chinook*, 2020 WL 128563, at *8 (stating that the 2015 regulations constitute "significant revisions that could prove dispositive" for some previously denied petitioners); *Burt Lake*, 613 F. Supp. 3d at 383–84 (identifying changes in the 2015 regulations that the court deemed "not minor"). Given *Chinook* and *Burt Lake* and the Department's ongoing reconsideration on remand of the re-petition ban, the Department believes it would be appropriate to reconsider Duwamish's petition under the 2015 regulations, despite concluding in the FDR that Duwamish "would still face . . . fundamental problems under the [2015 regulations]." FDR at 3. In doing so, the Department would give Plaintiffs the opportunity to make arguments similar to those in their Complaint about why particular changes in the 2015 regulations would affect the outcome of the Department's previous, negative determination on Duwamish's petition. *See* Compl. ¶¶ 106–120 (alleging that the 1994 regulations contained a provision relating to the use of marriages as evidence of community that unlawfully discriminates against Duwamish on the basis of sex, but that the 2015 regulations changed that provision). Given these intervening events, the Department requests that the Court grant its motion for a voluntary remand.

B. Voluntary remand is warranted because the Department wants to revisit its previous position.

In addition, courts generally grant motions for a voluntary remand so that an agency can reconsider its decision, even absent intervening events. *Ctr. for Biological Diversity v. Haaland*, 641 F. Supp. 3d 835, 842 (N.D. Cal. 2022) (quoting *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1021 (N.D. Cal. 2021), *rev'd and remanded on other grounds,* 60 F.4th 583 (9th Cir. 2023)). The agency need not confess error to justify voluntary remand. *See In re Clean Water Act Rulemaking*, 568 F. Supp. 3d at 1021. Courts normally remand cases if the agency has a "substantial and legitimate" concern. *Pac. Coast Fed'n of Fishermen's Ass'ns v.*

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Raimondo, No. Civ. A. No. 20-0426 (DAD/EPG), 2022 WL 789122, at *11 (E.D. Cal. Mar. 11, 2022). In exercising its discretion over whether to remand, "a court should consider whether voluntary remand would conserve judicial and party resources, without unduly prejudicing the plaintiff." *Id.* (citing *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015) (internal citations omitted).

In this case, the Court should exercise its discretion and issue a voluntary remand for several reasons. First, the Department's request for a remand is made in good faith. Second, the remand would not prejudice Plaintiffs. Third, the remand would promote judicial economy.

1. The Department's request to reconsider Plaintiffs' petition is in good faith and would address "substantial and legitimate concerns."

Normally, when remand is requested and granted, "the agency intends to take further action with respect to the original agency decision on review." *Nat. Res. Def. Council v. EPA*, 38 F.4th 34, 60 (9th Cir. 2022) (citing *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017)). The legal decisions discussed above have generated "substantial and legitimate concern[s]" regarding portions of the FDR that compared Plaintiffs' request for consideration under the 2015 regulations to those regulations' ban on re-petitioning, and the Department intends to take further action. *Pac. Coast Fed'n of Fishermen's Ass'ns*, 2022 WL 789122, at *10.

As noted above, in response to *Chinook* and *Burt Lake*, the Department is currently "strongly considering an exception to the re-petition ban," which, if implemented, might include a process by which previously denied petitioners could seek to petition under the 2015 regulations or submit new evidence for the Department's consideration. Federal Defs.' Mot. for Recons., Garriott Decl. ¶ 12, *Burt Lake*, No. 17-0038 (ABJ) (filed Aug. 9, 2023), ECF No. 72-1. The Department's decision-making regarding the content of any new proposed rule is not yet complete, but in light of the FDR's analogy to the ban on re-petitioning in the 2015 regulation, the Department believes it appropriate to reconsider Duwamish's petition under the 2015 regulations. In addition, the Department has substantial and legitimate concerns about the

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Chinook and *Burt Lake* statements suggesting that application of the 2015 regulations might lead the Department to make a different determination on acknowledgment. For those reasons, the Department is willing to "commit[] to a changed approach" on remand. *Id.* at *39. Specifically, the Department is willing to apply the 2015 regulations to Plaintiffs' petition and allow Plaintiffs to supplement their evidence.

2. A remand would not unduly prejudice Plaintiffs.

The Department recognizes that Plaintiffs' petition for federal acknowledgment has already gone through a time- and resource-intensive process, including both administrative and judicial review. But even if Plaintiffs prevail on their claims, the only relief to which they are entitled under the APA is remand to the agency for further consideration. Thus, a remand may ultimately lead to a faster resolution of Plaintiffs' petition and would allow the Department to begin reevaluating Duwamish's petition sooner than it would if the case were litigated and the Duwamish prevailed in this litigation.

A remand would provide Plaintiffs with at least some of the relief they seek — consideration under the 2015 regulations and an opportunity to supplement their petition. For example, Plaintiffs' Third Claim for Relief alleges that the text of criterion (b) (Community), as it appears in the 1994 regulations, discriminates against Duwamish on the basis of sex because it "excluded matrilineal tribes that primarily descend from Indian women who married outside the tribe (and did not apply to tribes that primarily descend from Indian men who married outside the tribe)." Am. Compl. ¶ 110. Plaintiffs assert that the 2015 regulations changed the way that the Department treats these marriages, and if the Department had considered the petition under the 2015 regulations, "the Department would have considered the evidence of the Tribe's female ancestors' patterned out marriages in the late 1800s and early 1900s." *Id.* ¶ 111. A remand to reconsider the petition under the 2015 regulations would give the Plaintiffs the opportunity to develop that argument and give the Department the opportunity to consider it in a new final determination. Likewise, Plaintiffs' Fifth Claim asserts that the Department acted arbitrarily and capriciously by not allowing Duwamish to proceed under the 2015 regulations, which would obviously be remedied by the remand. *Id.* ¶ 134–35.

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Moreover, remand would be the proper remedy even if this Court found for Plaintiffs on the merits on their First and Second Claims for Relief, which request declaratory and mandamus relief. That is because "this case involves review of a final agency determination under the Administrative Procedure Act," and "resolution of this matter does not require fact finding on behalf of this court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994). Under the APA, "[i]f the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into the merits." *Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (stating that where "the record before the agency does not support the agency action, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Servs.*, No. 13-CV-00104-TMB, 2021 WL 5410890, at *4 (D. Alaska Nov. 18, 2021) (noting that "a district court's role when performing judicial review of administrative agency actions . . . is "to act as an appellate tribunal" whose usual course is "simply to identify a legal error and then remand to the agency.") (quoting *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012)).

Plaintiffs may argue that that if they prevail on their First and Second Claims, the Court could order the Department to acknowledge the Duwamish as a federally recognized Indian tribe, thus making remand and additional process before the Department unnecessary.[4] Am. Compl. ¶ 95 (asking the Court to declare "that the Duwamish Tribe has been recognized by Congress and other federal authorities as an Indian tribe within the meaning of the List Act and as the successor in interest to the Tribe that signed the Treaty of Point Elliott"), *id.* ¶ 105 (requesting that the Court use its mandamus powers to "compel[] Defendants to place the Duwamish Tribe on the list of federally recognized tribes."). However, all of Plaintiffs' claims stem from findings in the FDR with which Plaintiffs disagree. For example, Plaintiffs ask the Court to declare that

[4] The Department does not concede that federal courts can place entities directly on the List of tribes under applicable case law.

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the Duwamish Tribe was previously federally acknowledged. *See id*. ¶ 95. The Department found in the FDR that the evidence did not demonstrate previous federal acknowledgment because Duwamish is not a continuation of the historical Duwamish treaty tribe nor a group evolved from the historical tribe. FDR at 12–14. Plaintiff's claim, therefore, challenges the agency's determination and the proper remedy would be remand, not a declaration that the Duwamish Tribe was previously acknowledged. Thus, even if Plaintiffs were to prevail in litigation, the proper remedy would be a remand. *See Hansen*, 2013 WL 1192607, at *6 (citing *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)), for the proposition that, where a plaintiff seeks judicial review of a final administrative action under the APA, if the agency's decision cannot be sustained, then the court must remand to the agency for further consideration).

Plaintiffs inappropriately ask for the Court to substitute its judgment for that of the agency by claiming that the Court could order the Department to list Duwamish as a federally-recognized tribe. Congress granted the Department the authority to determine which groups should be federally recognized as tribes. *See, e.g.*, *Agua Caliente Tribe of Cupeño Indians of Pala Reservation v. Sweeney*, 932 F.3d 1207, 1216–18 (9th Cir. 2019) (stating that "the Part 83 process . . . is the prescribed remedy" for "[a] tribe seeking recognition—whether it has been previously recognized or not" and that a determination of previous federal recognition "should be made in the first instance by the Department of the Interior" (citing *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987))); *Mdewakanton Band of Sioux in Minn. v. Haaland*, 848 F. App'x 439, 440 (D.C. Cir. 2021) (finding that a tribe's claim of prior federal recognition "presents complex historical questions of tribal continuity" that should be resolved by the agency, not the court); *James*, 824 F.2d at 1138 (noting agency's expertise in "determin[ing] which tribes have previously obtained federal recognition" and requiring exhaustion of administrative remedies). The Department has "significant expertise and experience in evaluating recognition claims," and Congress chose to delegate authority to determine who is an Indian tribe to the Department. *Mdewakanton Band of Sioux*, 848 F. App'x at 440; *see also James*, 824 F.2d at 1138. In addition, "[t]he List Act grants the Secretary a pivotal role in recognition decisions, calling on her to 'publish in the Federal Register a list of all

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Indian tribes which *the Secretary recognizes* to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.'" *Mdewakanton Band of Sioux*, 848 F. App'x at 440 (quoting 25 U.S.C. § 5131(a) (emphasis added by court)).

Several district courts have found that they lack authority to unilaterally place tribes on the list of federally recognized tribes in similar situations, including another court in this district and both courts that held the Department's 2015 amendments to Part 83 violated the APA. *See Chinook Indian Tribe v. Zinke*, 326 F. Supp. 3d 1128, 1140 (W.D. Wash. 2018) ("Absent a clear delegation of authority from Congress, the Court cannot bypass the existing federal acknowledgment process and bestow federal recognition upon" a plaintiff); *Burt Lake Band of Burt Lake Band of Ottawa and Chippewa Indians v. Zinke*, 304 F. Supp. 3d 70 (D.D.C. 2018) (concluding that "[t]he Court does not have free-standing authority to by-pass the entire federal recognition process and order the agency to add plaintiff to the List."); *Shinnecock Indian Nation v. Kempthorne*, No. 06-5013 (JFB/ARL), 2008 WL 4455599 (E.D.N.Y. Sep. 30, 2008) (same).

In *Chinook*, the court held that "the issue of federal acknowledgment of Indian tribes is a quintessential political question that must be left to the political branches of government and not the courts." *See Chinook*, 326 F. Supp. 3d at 1139. While the List Act's findings section states in passing that Indian Tribe may be recognized by a court decision, the practice of courts issuing ad hoc determinations of tribal recognition stopped after the Department promulgated the Part 83 regulations in 1978. *See Chinook Indian Tribe*, 326 F. Supp. 3d at 1139 (citing *Shinnecock Indian Nation*, 2008 WL 4455599, at *17); *see also W. Shoshone Bus. Council For & on Behalf of W. Shoshone Tribe of Duck Valley Rsrv. v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993) (holding "that the limited circumstances under which ad hoc judicial determinations of recognition were appropriate have been eclipsed by federal regulation"); *Miami Nation of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d at 348 (explaining that the promulgation of the Part 83 regulations brought "the tribal recognition process within the scope of [judicial review under] the Administrative Procedure Act"). And as the *Chinook* court also noted, "Plaintiffs' argument that the List Act's Congressional findings authorize the courts to completely bypass the DOI's federal acknowledgment process is further undercut by the complete lack of intelligible principles by

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which federal courts would determine whether a petitioning group should be formally recognized." *Chinook*, 326 F. Supp. 3d at 1139; *see also Kanam v. Haaland*, 2023 WL 3063526, at *1 (D.C. Cir. Apr. 25, 2023) (denying plaintiffs' argument that the List Act finding authorizes direct placement on the List and noting that the "Court has long held that tribes seeking recognition 'must pursue the Part 83 process'").

In conclusion, Plaintiffs may argue that they would be entitled to relief other than a remand and thus would be harmed by a dismissal or stay of their first two claims during remand, but this argument is incorrect. The only remedy available for any of Plaintiffs' claims is remand to the agency for further consideration, and Plaintiffs therefore would not be harmed by a remand and a dismissal or stay.

3. A Voluntary Remand Would Promote Judicial Economy.

Consideration of Duwamish's petition under the 2015 regulations would address Plaintiffs' claim that the Department erred in previously declining to do so, while at the same time conserving judicial resources. As Plaintiffs recently noted in their motion to file overlength briefs on summary judgment, this is a complex case involving a voluminous administrative record, ECF No. 68, and it concerns three sets of regulations (the 1994 and 2015 versions of Part 83, as well as the initial version promulgated in 1978). Plaintiffs' claims concern some of the most complex provisions in Part 83, namely, those relating to unambiguous previous federal acknowledgment and criteria (a) (Indian Entity Identification), (b) (Community), and (c) (Political Authority). Resolution of this case would be time- and resource-intensive both for the Court and for the parties, especially given that the parties have yet to brief the merits issues. It would make little sense for the Court to expend significant time evaluating lengthy cross-motions for summary judgment given the Department's willingness to reevaluate Duwamish's petition and new evidence under the 2015 regulations, particularly when, as discussed above, remand is the proper remedy for Plaintiffs' claims in any event. Additionally, the value of a decision upholding or striking down the FDR might be limited if the Department ultimately adopted an exception to the re-petition ban that would allow Duwamish to seek to petition under the 2015 regulations, submit new evidence for the Department's consideration, and obtain a new

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final agency action subject to judicial review. And, of course, should the Department ultimately grant Plaintiffs' petition, the need for any judicial intervention would presumably become moot. A voluntary remand would thus serve the interests of judicial economy and conserve party resources by avoiding litigation over claims that may become moot. *See Rural Empowerment Ass'n for Cmty. Help v. EPA*, No. 18-2260 (TJK), 2022 WL 444095, at *2 (D.D.C. Feb. 14, 2022) ("Defendants' reconsideration may moot Plaintiffs' claims, providing their requested relief and saving the parties' and the Court's resources.").

C. The Court should dismiss the case without prejudice.

The Department requests that the Court dismiss the case without prejudice to allow the Department to consider Duwamish's petition under the 2015 regulations. Dismissal is appropriate given that the agency will issue a new decision and final agency action. Plaintiffs will have the opportunity to challenge the new agency action, if necessary. At the least, the Department requests that the Court stay all claims pending the Department's issuance of a new decision on Duwamish's petition.

IV. CONCLUSION

The Department requests a remand to reevaluate Plaintiffs' petition for acknowledgment under the 2015 regulations. Doing so is appropriate in light of intervening events, including the *Chinook* and *Burt Lake* decisions. The Department has substantial and legitimate concerns regarding the procedure applied to Plaintiffs' petition in the FDR and has committed to take further action. Furthermore, remand will not harm Plaintiffs and would conserve the Court's and the parties' resources. Consequently, Federal Defendants request that the Court grant this motion for a voluntary remand and dismiss the case without prejudice, or, at the least, stay all claims pending a new Department decision on remand.

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Respectfully submitted,

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