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Bryan Newland
Principal Deputy Assistant Secretary for Indian Affairs
U.S. Department of the Interior
Bureau of Indian Affairs
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Dear Principal Deputy Assistant Secretary Newland:

On behalf of the Towns of Ledyard, North Stonington, and Preston, Connecticut, we submit these comments regarding the recent vacatur by two federal district courts of the ban on re-petitioning by previously denied petitioners for federal acknowledgment as an Indian tribe under the 25 C.F.R. Part 83 tribal acknowledgment regulations. *Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-05668, 2020 WL 128563 (W.D. Wash., Jan. 10, 2020) (slip op.) (*Chinook Indian Nation*); *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, No. 17-0038, 2020 WL 1451566 (D.D.C., March 25, 2020) (slip op.) (*Burt Lake Band*). Pending completion of these remands, the Department must revert to the 1994 regulations to govern acknowledgment decisions because the 2015 regulation is now legally defective. Accordingly, repetitioning cannot proceed in the interim.

The *Chinook Indian Nation* and *Burt Lake Band* courts did not address full vacatur of the regulations because the plaintiffs in those cases only challenged the ban on re-petitioning, as they sought to re-petition under the new regulations. Nonetheless, the 2015 regulations are not severable and full vacatur is the correct legal remedy. When only a portion of a regulation is struck down, full vacatur is appropriate where there is "substantial doubt" that the agency would have promulgated the severed remainder by itself, where the agency intended for the rule to function as a single, interrelated and integral action, or when the remainder of the regulation would not function sensibly without the stricken provision. *See Am. Petroleum Institute v. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017), *decision modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018) ("We will sever and affirm a portion of an administrative regulation only when we can say without any substantial doubt that the agency would have adopted the severed portion on its own.") (quoting *New Jersey v. EPA*, 517 F.3d 574, 584 (D.C. Cir. 2008)) (quotation marks and brackets removed); *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008) (noting that severance depends on agency intent and holding that severance was improper where agency had treated rule as "one, integral action"), *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008);

Financial Planning Ass'n v. SEC, 482 F.3d 481, 493 (D.C. Cir. 2007) (refusing severance where text of rule indicated parts were interrelated); *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) ("Whether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision."). *See generally*, Wright & Miller, 33 Fed. Prac. & Proc. Judicial Review § 8381, n.14 (2d ed.) (Vacation and Remand of Agency Action).

Vacatur of the re-petitioning ban voids the entire 2015 regulations because the Department intended the re-petitioning ban to be an integral part of the regulations, the severed remainder suffers from a number of legal defects that render the remainder arbitrary and possibly unconstitutional, and there is therefore substantial doubt that the Department would have promulgated the remainder without the re-petition ban. *See generally*, Tyler & Elliott, *Administrative Severability Clauses*, 124 Yale L.J. 2286 (2015) (discussing severability of regulations generally and discussing examples of full vacatur where the remainder by itself is unconstitutional, ultra vires, or arbitrary and capricious).

First, as the Department stated in the Final Rule and argued in both cases, the Department's position has consistently been that it did not intend to change the substantive criteria in any significant way. Final Rule, 80 Fed. Reg. 37862, 37878 (July 1, 2015) ("Because the final rule does not make significant changes to the criteria, the Department's precedent stands."); *Chinook Indian Nation* at *15 ("DOI argues that allowing re-petitioning is unnecessary because the Final Rule merely codifies existing practices and does not alter the substantive criteria for recognition."); *Burt Lake Band* at *18 ("Defendants maintain in their summary judgment pleadings that the Final Rule serves this goal [to promote consistency with prior decisions] 'because the 2015 Final Rule did not substantially change the standards for acknowledgment;' … 'mak[ing] any re-petition inherently unnecessary.'") (citations omitted).

Two courts have now held that, despite the Department's stated intent, the 2015 rulemaking resulted in the significant weakening of the substantive criteria for acknowledgment. *Chinook Indian Nation* at *15 ("DOI 'entirely failed to consider an important aspect of the problem' when it did not explain why banning re-petitioning is appropriate in light of the Final Rule's amended standards.") (citation omitted); *id.* at *16 ("DOI also tries to gloss over other important changes to the substantive criteria, such as the new 1900-present consideration period for criteria (b) [community] and (c) [political influence or authority]"); *id.* at *17 ("the Court is skeptical that res judicata is applicable in a situation such as this where legal standards have changed between the 1994 and 2015 regulations"). The description by the *Burt Lake Band* court is especially telling:

> The agency's insistence that the Final Rule ushered in no substantive changes is belied by its own description of the amendments it implemented. The Rule itself states: 'The rule does not substantively change the Part 83 criteria, *except in two instances.*' [including changes allowing acceptance of all evidence of Indian identity, including self-identification, and expanding the definition of a Tribal marriage for purposes of meeting the "community" criterion] … These are not minor changes.

Id. at *18–19 (emphasis in original; citations omitted). Thus, the remainder of the rule actually contradicts the Department's stated intent.

Second, the re-petitioning ban was an integral part of the rule as a whole because its inclusion was the basis for dismissing numerous concerns raised by commenters. *See* 80 Fed. Reg. at 37874 (listing objections to allowing re-petitioning). For example, the *Chinook Indian Nation* court noted that commenters raised res judicata and finality concerns regarding re-petitioning, and also noted that the Department nowhere addressed these concerns in its justification for the ban. *Chinook Indian Nation* at *16–17. Res judicata and finality concerns raised by re-petitioning were avoided with the ban, but are unavoidable now that the ban has been vacated. The Department's failure to consider the concerns raised by commenters therefore renders promulgation of the remainder arbitrary and capricious because the Department "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Department similarly failed to consider commenters' numerous other objections to re-petitioning.

Third, because the Department did not believe it was weakening the criteria, the Department entirely failed to address the implications of such weakening, including the extent of inconsistency with Departmental and Supreme Court precedent, as well as the Constitution (as raised by commenters). *See* 80 Fed. Reg. at 37864–66 (comments regarding weakening of criteria), 37878–79 (Departmental precedent). For example, possibly the most controversial and significant weakening of the 1994 criteria was the change in the starting date for documenting continuous tribal existence, from 1789 or the date of first sustained contact with non-Indians, to 1900. Under Supreme Court precedent, however, continuous tribal existence throughout historical times is an essential element of tribal sovereignty. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (tribal sovereignty is retained from before formation of United States); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (tribes are "separate sovereigns pre-existing the Constitution"); *United States v. Wheeler*, 435 U.S. 313, 322–323 (1978) (a tribe is "a community of people who have continued as a body politic *without interruption since time immemorial* and retain powers of inherent authority.") (emphasis added). The Department

asserted that the 1900 starting date was a reliable proxy for continuous tribal existence before 1900, *see* 80 Fed. Reg. at 37863, but, contrary to the Supreme Court's precedent, the change in starting date clearly allows the acknowledgment of petitioner groups that lack a continuous tribal existence before 1900. The Department entirely failed to address this problem.

In the 2015 rulemaking, the Department largely discounted comments regarding this and other changes, and in both the *Chinook Indian Nation* and *Burt Lake Band* litigation, the Department argued that the 2015 rulemaking did not significantly alter the substantive criteria. Those courts, however, clearly held the opposite. As previously noted, the *Chinook Indian Nation* court stated, "DOI also tries to gloss over other important changed in the substantive criteria, such as the new 1900-present consideration period … [t]hese are significant revisions that could prove dispositive for some re-petitioners." *Chinook Indian Nation* at *16. The court also noted with interest that a prior draft of the Final Rule justified eliminating the re-petition ban on the grounds that "the criteria in the Final Rule remain substantively unchanged overall," but eliminated that language in the Final Rule, "suggesting that the agency concluded it was inaccurate." *Id.* at 16 n.7 (citation to the record omitted). Similarly, the *Burt Lake Band* court held that, "The agency's insistence that the Final Rule ushered in no substantive changes is belied by its own description of the amendments it implemented. … These are not minor changes." *Burt Lake Band* at *18–19. At a minimum, the Department's failure to consider these concerns at all (because of the mistaken belief that it was not changing the criteria) renders the remaining regulations arbitrary and capricious, if not ultra vires or even unconstitutional.

Importantly, even if the 2015 regulations were severable, re-petitioning would still be barred because the ban on re-petitioning in the 1994 regulation would apply instead. There is a presumption that the effect of invalidating a rule is "to reinstate the rules previously in force." *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (1987) (quoting *Action on Smoking & Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983)). Thus, partial vacatur of the ban in the 2015 rules has the effect of reinstating the ban in the 1994 rules.

Finally, we note that even with full vacatur, pending petitions are minimally affected, as no final determinations have yet been issued yet under the 2015 regulations. In addition, a number of petitioners chose to continue the process under the 1994 regulations, which remain in effect for that purpose, and would be unaffected. Under either full or partial vacatur, however, re-petitioning cannot proceed pending completion of the remands.

Sincerely,

Donald C. Baur
Odin A. Smith

cc: Senator Richard Blumenthal
Senator Chris Murphy
Representative Joe Courtney
Representative Rosa DeLauro
Representative Jahana Hayes
Representative James Himes
Representative John Larson
Governor Ned Lamont
Attorney General William Tong
Lee Fleming, Director, Office of Federal Acknowledgment