

Towns of
Ledyard North Stonington Preston
Connecticut

February 25, 2021

Bryan Newland
Principal Deputy Assistant Secretary for Indian Affairs
U.S. Department of the Interior
Bureau of Indian Affairs
1849 C Street, N.W., MS-3642-MIB
Washington, D.C. 20240

Dear Principal Deputy Assistant Secretary Newland:

The Towns of Ledyard, North Stonington, and Preston, Connecticut, submit these comments regarding the ban on re-petitioning by previously denied petitioners for federal acknowledgment as an Indian tribe under the 25 C.F.R. Part 83 acknowledgment regulations, which was recently vacated and remanded by two federal district courts.¹ The Towns previously asked you to temporarily suspend the review of any petitions for acknowledgment that may be submitted by previously denied petitioners.² We urge the Department of the Interior to repromulgate and defend the ban—which represents a continuation of the Department’s longstanding, existing policy—with a stronger legal and policy justification, and to revise the Part 83 regulations to address the significant weakening of the substantive criteria for acknowledgment that the courts identified. For the reasons set forth in these comments, the partially vacated 2015 regulations are now legally defective, and the Department must apply the 1994 regulations pending completion of the remands.³

In addition, we urge the Department to consult more broadly with all affected stakeholders—including State and local governments, as well as the public—regarding the necessary revisions to the Part 83 regulations. The Department’s current tribal consultation is narrowly limited to the remand of the re-petitioning ban, and by failing to consider the ban in the context of the overall rule in which it was included, it is improperly limited in scope and has denied interested parties the opportunity to comment in a meaningful way on a lasting solution.

¹ *Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-05668, 2020 WL 128563 (W.D. Wash., Jan. 10, 2020) (slip op.); *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, No. 17-0038, 2020 WL 1451566 (D.D.C., March 25, 2020) (slip op.).

² Letter from Towns to Acting Assistant Secretary for Indian Affairs (Jan. 19, 2021).

³ Pending petitions would be minimally affected, as no final determinations have yet been issued under the 2015 regulations. In addition, some petitioners elected to continue under the 1994 regulations, as provided for in the 2015 regulations.

Experience of the Towns in the Acknowledgment Process

Our Towns have extensive experience with the tribal acknowledgment process. We participated in good faith, and at considerable expense, as interested parties in the Part 83 reviews of the Eastern Pequot and Paucatuck Eastern Pequot petitioner groups, beginning in 1998 and continuing through the entire procedure until the Department properly denied Federal acknowledgment to the merged Historic Eastern Pequot (HEP) group in 2005. We also have commented on previous acknowledgment process revisions and reviews over the last 15 years and testified before Congress on this subject in person and by written testimony. Along with the State, the Towns litigated acknowledgment process violations against the Department in 2001, achieving concessions from the Department to ensure a more transparent process.

This extensive experience gives us very significant insights into the Part 83 regulations and a deep appreciation for the appropriate revisions to the acknowledgment process. Comments submitted by the Towns during the 2015 rulemaking are incorporated by reference, as they continue to be relevant to the concerns identified in this letter.⁴

Consultation

We understand that the Department is currently engaging in tribal consultation on this issue and, consistent with past practice, the Department accepts comments from other interested parties as part of that process. We urge the Department to solicit comments more broadly from all affected stakeholders—including State and local governments, as well as the public—regarding the necessary revisions to the Part 83 regulations. Other interested parties in Connecticut, including the State, local governments, and private land owners, have also participated extensively in acknowledgment proceedings and rulemakings to revise the acknowledgment regulations. These stakeholders also have relevant experience and interests that would inform the Department's consideration on remand. With the ban on re-petitioning vacated, previously-denied petitioners are positioned to pursue acknowledgment under the more lenient 2015 standards. The vacatur of the re-petitioning ban thus raises significant concerns for interested parties.

In addition, the Department's current tribal consultation is improperly limited to the remand of the re-petitioning ban. By failing to consider other necessary changes to the criteria, the consultation has unduly restricted public participation. We therefore urge you as well to solicit public comments on revisions to the full scope of the regulations.

Comments

We urge the Department to repromulgate and defend the ban with a stronger legal and policy justification. Retention in the 2015 regulations of the long-standing re-petition ban was intended to ensure that the less stringent/more flexible criteria would not disrupt previous acknowledgment decisions. But although the Department ultimately included the ban, it

⁴Comments were submitted by the Towns dated September 25, 2013, and September 30, 2014.

provided a notably weak justification for it, leaving it vulnerable to challenge. In particular, the Department denied that the criteria had been diluted and did not cite the interests of finality and settled expectations in justifying the ban.

The courts determined that the Department's explanation was inadequate. To repromulgate a defensible ban, the Department must, at a minimum, undertake a rulemaking that articulates a robust justification for the ban based on the interests of finality, *res judicata*, and the settled expectations and reliance interests of affected parties and stakeholders who participated in past acknowledgment proceedings. A more complete justification for the ban should also reflect that allowing re-petitioning could result in decisions that are inconsistent with past acknowledgment decisions and lead to inequitable outcomes.

In addition, the 2015 regulations were promulgated as an integrated whole that cannot be severed from the re-petitioning ban. The re-petitioning ban was the basis for dismissing numerous concerns raised by commenters and forestalling those commenters from seeking judicial review of the regulations.⁵ For example, *res judicata* and finality concerns raised by commenters were addressed by the ban, which mitigated the effects of the changes to the acknowledgment criteria, but are unavoidable now that the ban has been vacated. The Department's failure to consider the *res judicata*/finality concerns raised by commenters therefore renders promulgation of the remainder arbitrary and capricious. The Department similarly failed to consider commenters' numerous other objections to re-petitioning.

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.⁶ Full vacatur of the 2015 regulations is therefore the correct legal remedy if the re-petitioning ban is not reinstated.⁷ Accordingly, if the ban is not reinstated, the Department must reconsider the regulations as a whole if they are to withstand judicial review.

⁵ See, e.g., 80 Fed. Reg. at 37874 (listing objections to allowing re-petitioning).

⁶ See *American 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).

⁷ If the regulations are not severable, the 1994 regulations apply in full, and in the alternative, if the regulations are severable, the re-petition ban in the 1994 regulations applies: 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)

We urge the Department to revise the Part 83 regulations to address the significant weakening of the substantive criteria for acknowledgment that the courts identified and, in part, based their decisions on. In promulgating the 2015 regulations, the Department characterized the changes to the substantive criteria as minimal, a position the Towns disputed in our comments in 2013 and 2014, and which the courts ultimately rejected. As a result, the Department failed to explain or justify its changes to the substantive criteria in the final rule, leaving the regulations vulnerable to challenge. As a dramatic departure from prior policy, the 2015 criteria would be subject to a demanding standard if challenged.

In reinstating the ban, changes also should be made to restore the historic selection criteria/standards. Absent such a correction under the remands, the Department should include a non-severability clause in the regulations that would leave no room for doubt that, if the ban on re-petitions were again to be vacated by a court, reinstatement of the substantive criteria of the 1994 regulations would be self-executing.⁸ The rulemaking to promulgate such a non-severability clause should similarly include a robust legal, factual, and policy justification for the clause to ensure that it is upheld by the courts.⁹

Finally, at a minimum, the Department should revise the regulations to address the most egregious provisions of the 2015 regulations that primarily affect Connecticut. For those provisions to remain in place, without reinstating the re-petitioning ban or restoring the prior, more demanding substantive criteria, would be an unacceptable outcome.

- The new provision permitting state reservations to demonstrate the community and political influence and authority criteria is contrary to Departmental precedent and appears to be primarily targeted to petitioner groups in Connecticut. The State of Connecticut and other interested Connecticut parties successfully appealed the use of such evidence in previous decisions to the Interior Board of Indian Appeals, which found such evidence to be “unreliable or of little probative value.”¹⁰

In addition, all four of the previously denied petitioners that had State-reserved lands are based in Connecticut, and there are eight other known entities with possible claims to State reservations in Connecticut that have at least filed letters of intent to petition for federal acknowledgment.¹¹

- The regulations should also be revised to make clear that splinter groups of recognized tribes, or of current or previous petitioners, can be determined ineligible and screened

(quoting *Action on Smoking & Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983)). In either case, re-petitioning cannot proceed pending completion of the remands.

⁸ The 1994 regulations remain in place for those petitioners who elected not to proceed under the 2015 regulations.

⁹ See generally, Tyler & Elliott, *Administrative Severability Clauses*, 124 Yale L.J. 2286 (2015).

¹⁰ *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1, 21-23 (2005) (HEP); *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 34 (2005) (STN).

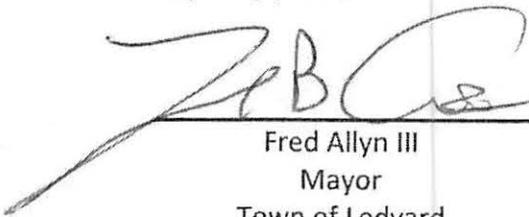
¹¹ Outside of Connecticut, only two other groups have State reserved lands, in New York and Virginia, but neither group has an active petition.

early in the process, during the Phase I technical assistance review stage. This clarification would save all parties a considerable amount of time, effort, and resources where petitioners are ineligible under the long-standing prohibition on the acknowledgment of splinter groups. Under the 2015 regulations, it is unclear whether a petition has to proceed to a Phase II Proposed Finding before the Department may determine ineligibility for acknowledgment. It can easily take years for a documented petition to reach that point in the evaluation process. A determination of ineligibility at an earlier stage could potentially apply to all four previously denied petitioners in Connecticut, as well as the eight pending petitioners noted above.

Conclusion

Given the recent federal district court decisions, specific revisions to the Department's 2015 tribal acknowledgment regulations are necessary to ensure their ability to survive judicial review and to protect the legitimate interests of third parties, including the Towns, the State of Connecticut and other interested parties in Connecticut. We urge the Department to solicit comments from all stakeholders regarding the necessary revisions to regulations in their entirety.

Very truly yours,



Fred Allyn III
Mayor
Town of Ledyard



Bob Carlson
Selectman
Town of North Stonington



Sandra Allyn-Gauthier
First Selectman
Town of Preston

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