

ORAL ARGUMENT SCHEDULED FOR MAY 5, 2021 AT 9:30 A.M.

No. 20-5173

In the United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MDEWAKANTON BAND OF SIOUX IN MINNESOTA;
TERRI ROBERTSON-TORGERSON; ROSS TORGERSON,

Plaintiffs - Appellants,

v.

DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY
OF THE INTERIOR, OR HER SUCCESSOR; TARA KATUK MAC LEAN SWEENY,
IN HER OFFICIAL CAPACITY ASSISTANT SECRETARY-INDIAN AFFAIRS,
OR HER SUCCESSOR,

Defendants - Appellees.

On Appeal from the United States District Court for the District of Columbia

FINAL BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), Appellants Mdewakanton Band of Sioux in Minnesota, Terri Robertson-Torgerson, and Ross Torgerson certify as follows:

(A) Parties and Amici. The parties who appeared before the district court are Appellants Mdewakanton Band of Sioux in Minnesota, Terri Robertson-Torgerson, and Ross Torgerson.

In accordance with Circuit Rule 26.1(a), Appellant Mdewakanton Band of Sioux in Minnesota is not a corporation and hence, does not identify with any parent corporation or any publicly held corporation.

The Appellees are Debra A. Haaland, in her official capacity as Secretary of the Interior, and Tara Katuk Mac Lean Sweeny, Assistant Secretary-Indian Affairs (or their respective successors).

No amici appeared in the district court.

(B) Rulings under Review. Appellants seek review of the Order and Memorandum Opinion, dated May 30, 2020, granting the Defendants' Motion to Dismiss, which is a final, appealable Order. The Honorable Timothy J. Kelly, U.S. District Judge for the District of Columbia, issued the opinion and order.

(C) Related Cases. Appellants are not aware of any related cases presently on review before this Court or any other court.

Dated: March 26, 2021

s/ Thomas F. Gede

Thomas F. Gede

Counsel for Appellants

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GLOSSARY OF ABBREVIATIONS

Band	Mdewakanton Band of Sioux Indians
Department	Department of Interior
List Act	Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, Section 103 (1994) (codified at 25 U.S.C. § 5130)
Secretary	Secretary of the Interior

INTRODUCTION

The United States Congress has recognized the Mdewakanton Band of Sioux Indians (“Band”) as an Indian Tribe since 1854, authorizing land and benefits to the Band, promises that the United States Government failed to honor. Adding insult to injury, the Department of Interior (“Department”) has refused to list the Band, the main stem of one of the four principal Bands of the Dakota Sioux, as eligible for programs and services under the Federally Recognized Indian Tribe List Act of 1994¹ (“List Act”) that mandates listing tribes recognized by Acts of Congress. The Band is the remnant of those who rescued white settlers during the Great Sioux Uprising of 1862, called the “friendly heroic Sioux” in the congressional acts. As the main stem of the Mdewakanton Sioux who did not sever their tribal relations, they were promised money, land and benefits, most all of which was reneged on. While recognized in congressional acts in 1854, 1863 and 1865, the Secretary of the Interior (“Secretary”) has failed to list the Band under the List Act. Instead, the Department holds to an untenable position that reads prior congressional

¹ Pub. Law 103-454, 108 Stat. 4791 (1994).

recognition out of the List Act and instead requires administrative recognition for congressionally recognized Tribes under a procedure expressly established for *unrecognized* Indian groups. Because Congress made promises that should be honored, this Court should “hold the government to its word.” *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (Gorsuch, J.).

The trial court settles on the notion that because resort to administrative remedies is not “clearly useless,” the Band is expected to pursue and exhaust administrative remedies using the process permitted for “previously federally acknowledged” tribes, namely the process in 25 C.F.R. Part 83. This would make sense if the Band were a *previously* federally acknowledged tribe, but that would suggest the Band is no longer a federally acknowledged tribe. The trial court erred in requiring an exhaustion of administrative remedies under an administrative process neither required nor appropriate to the Band.

JURISDICTIONAL STATEMENT

In accordance with Rule 28(a)(5), Rules of the Court of Appeals, District of Columbia, appellant states that this appeal is from the final Order (USDC D.D.C. #1:19-cv-00402-TJK (JA4) and Memorandum Opinion

(JA5-14) of the U.S. District Court for the District of Columbia, in the case of the same name, Civil Action No. 19-402 (TJK), decided May 30, 2020. In the District Court, plaintiffs invoked jurisdiction based on 28 U.S.C. §§ 1331, 1343, 1362, 1651(a), 2201, and 5 U.S.C. §§ 701-708. This Court has jurisdiction under 28 U.S.C. § 1291, as an appeal from a final order that disposed of plaintiffs' claims. As the case was decided on the pleadings, relevant citations are to the pleadings in the court below.

STATEMENT OF ISSUES

This case presents the following questions:

1. Whether a congressionally recognized Indian Tribe is required to exhaust administrative remedies under 25 C.F.R. Part 83 when seeking to compel listing under the Federally Recognized Indian Tribe List Act of 1994 ("List Act")?
2. Whether a writ of mandamus is appropriate to compel the Department of Interior to list a congressionally recognized Indian Tribe, that has not been terminated, without application of 25 C.F.R. Part 83, which is the mechanism for *unrecognized* tribes to seek acknowledgment as a recognized Tribe.

STATUTES AND REGULATIONS

The applicable provisions are set forth in the addendum, separately bound and filed concurrently with this brief.

STATEMENT OF THE CASE

Appellants filed a petition for writ of mandamus on February 15, 2019, to compel the Secretary of Interior to add the Mdewakanton Band of Sioux in Minnesota (Band) to the list of acknowledged tribes maintained by the Secretary under the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, Section 103 (1994) (codified at 25 U.S.C. § 5130) (“List Act”). *Mdewakanton Band of Sioux in Minnesota, et al. v. Bernhardt, et al.*, USDC D.D.C. No. 1:19-cv-00402-TJK; JA15-131. Defendants moved to dismiss on multiple grounds, including failure to exhaust administrative remedies, JA191. Following briefing, the district court granted the Defendants’ Motion to Dismiss, JA4, and issued a Memorandum Opinion, denying all but one of Defendants’ grounds for dismissal, and finding Appellants, Plaintiffs below, failed to exhaust their administrative remedies, JA5-14. Appellants timely filed a Notice of Appeal to this Court on June 18, 2020. JA194-96.

The facts of the case are principally historical and include the actions of the United States Congress and various executive branch officials who entered into Treaties with the Mdewakanton Sioux Tribe and codified the treaties or took other direct congressional action.

The facts concerning the various treaties involving the Mdewakanton Sioux are set forth in detail in Exhibit 1 to the Petition for a Writ of Mandamus.² JA80-122.

Appellants are the descendants of those identified by the Department of Interior (Department) as Dakota Sioux, including Mdewakanton Band members, who received compensation as a “friendly” Sioux under the Act of February 9, 1865. JA139, JA145 (¶¶ 19, 46). The “friendly” Sioux included those who participated “in rescuing the white from the late massacre of said Indians,” referring to the Great Sioux Uprising of 1862, sometimes called the Dakota War of 1862. JA139 (¶19). Following

² References to Petition all refer to the underlying pleading Petition for a Writ of Mandamus, in *Mdewakanton Band of Sioux in Minnesota, et al. v. Bernhardt, et al.*, USDC D.D.C. No. 1:19-cv-00402-TJK. Docket No. 1 was the original filing of the writ, with the exhibits attached. JA15-131. Docket No. 3 is the same Petition for a Writ, with the caption corrected. JA132-90. All references to the Petition, other than the reference to its exhibits, are to Docket No. 3. Appellant will provide paragraph number and/or page number as reference.

the Uprising, the Act of February 16, 1863, ch. 37, 12 Stat. 652, abrogated certain Sioux lands and rights of occupancy in Minnesota. However, section 9 of the Act preserved the rights of the Mdewakanton Band, consisting of the individuals who rescued whites during the 1862 uprising, granted lands to the Mdewakanton Band and did not require Band members to sever tribal relations under the Act. JA159 (§101).

The beginning of the federal recognition history starts with treaty negotiations and agreements in 1837. In September 1837, the Dakota Sioux consisted of four separate bands, the Mdewakanton and Wahpekute together comprising the “lower bands,” and the Sisseton and Wahpeton known as the “upper bands.” JA151 (§68). In the Treaty of September 29, 1837 (7 Stat. 538, Arts. I-II), these Sioux bands ceded to the United States all of their land east of the Mississippi River, including all of the current state of Wisconsin, in return for various annuity payments. JA151 (§69). Subsequently, in 1851, more treaties ceded Sioux tribal lands to the United States. Relevant to the Mdewakanton, in the Treaty of August 5, 1851, 10 Stat. 954, article 1, the “lower bands” – the Mdewakanton and Wahpakoota Bands – bound themselves to perpetual peace with the United States. In article 2, they ceded to the United

States all of their right, title, and claim to any lands whatsoever in the Territory of Minnesota and in the State of Iowa. JA151-52 (§§71-72). By article 3, the Mdewakanton Band would reside on a reservation along the Minnesota River. JA152 (§73). Eventually, the United States would renege on those reservations. JA153 (§75).

However, by congressional action in 1854, a reservation at Lake Pepin was provided for the mixed-bloods of the Mdewakanton Band, along with other lands for other bands. Act of July 17, 1854, 10 Stat. 304; JA152, JA155 (§§74, 80). By this act, Congress had identified, acknowledged, and recognized the mixed-bloods of the Mdewakanton Band—recognizing the Band, its entitlement to land, and future interest regarding those reservation lands. The statutory boundary of the Lake Pepin Reservation still exists and is unrepealed. JA143, JA152 (§§33, 74).

Additionally, in 1858, the United States entered into yet another set of separate treaties with the lower and upper Sioux, essentially reducing the reservation lands affirmed by Congress in 1854 in exchange for money and goods, and a promise of another reservation. Treaty with the Sioux (June 19, 1858), 12 Stat. 1031, Arts. I-III. JA153-54 (§§77, 78).

In August 1862, certain Mdewakanton, led by Mdewakanton Chiefs Little Crow and Shakopee, revolted against the United States and the white settlers. Hundreds of white settlers and an untold number of Sioux Indians died in the conflict. JA157 (¶93). Certain Mdewakanton Sioux, however, risked their own lives by rescuing white settlers who had been captured and been held hostage by the rebellious Sioux, and saved the lives of almost 300 settlers, mostly women and children, effectively ending the rebellion. *Id.* (¶94). After the arrest and trial of nearly 400 Sioux, many Sioux fled to the northern Dakota Territories and Canada. JA157-58 (¶96). As noted above, Congress moved swiftly, through the Act of February 16, 1863, to annul part of the treaties with the Sioux, as to any *future* obligations of the United States under those treaties. JA158-59 (¶99). Section 9 of the Act specifically exempted the abrogation of lands and rights within Minnesota as to those individuals of the Mdewakanton Band who rescued whites during the 1862 uprising. Additionally, it authorized the grant of land to the Band, “land so set apart... shall be an inheritance to said Indians and their heirs forever.” Act of Feb. 16, 1863, 12 Stat. 652 App. 128. JA163 (¶120). Further, the Act of February 16,

1863, did not affect the Band's separate interests in the Lake Pepin Reservation granted under the Act of 1854. Nor did it terminate the Band. JA160 (§104-106). Appellants' ancestors included those who did not participate in the August 1862 uprising, and in fact were among those who rescued white settlers. JA161 (§109).

Pursuant to section 9 of the 1863 Act, the Secretary of Interior in March 1865 authorized the Commissioner of Indian Affairs to set apart a 12-square-mile reservation for the Mdewakanton Band in Minnesota. JA162 (§111). The Commissioner identified lands, which the Secretary confirmed to be set aside for the Mdewakaton Band. *Id.* (§113-115). The lands were finally set aside in 1869, but were later sold to the public before the Band could occupy them. JA163 (§118-119).

Concurrently, Congress enacted a new measure, the Act of March 3, 1863, which ordered the removal of all Sioux Indians – with the exception of the friendly heroic Mdewakanton Sioux – from the state of Minnesota, but did not terminate the Band or repeal the 1854 congressional act, nor did it affect the Lake Pepin Reservation. JA164 (§122-124).

Next, Congress enacted on February 9, 1865, An Act for Relief of Certain Friendly Indians of the Sioux Nation in Minnesota, providing for

the “friendly heroic Sioux,” who were left in otherwise deplorable conditions, with funds to purchase the seed and implements needed once they received the grant of eighty acres as identified in the February 16, 1863 Act. JA165 (§§126-127). While the effort to set aside the land came to naught, the congressional acts continued to recognize and acknowledge the Mdewakanton Band of Sioux Indians, the remnant band of “friendly Sioux” that rescued the white settlers in 1862.

The Band is not to be confused with three Indian communities that later resided on land acquired from appropriations made by Congress – the Prairie Island Indian Community, the Lower Sioux Indian Community, and the Shakopee Mdewakanton Sioux Community. These three communities were required, as a condition of benefitting from the appropriations and land set-asides, to sever their tribal relations with the Mdewakanton Band of Sioux Indians. JA145-46 (§§50). The Appropriation Acts of 1888, 1889 and 1890 required the severance of tribal relations to obtain access to and reside upon the lands. JA146-48 (§§52-55). The appropriation acts were directed to Mdewakanton Sioux who had resided in Minnesota since May 20, 1886, and who had severed their relations with their tribe. The acts were not directed at the Mdewakanton Sioux who

rescued white settlers and who did not sever their tribal relations, and whose tribal status and treaty rights had been confirmed and codified in the Acts of 1854, 1863, and 1865. JA170 (¶¶142-143).

SUMMARY OF ARGUMENT

Since 1994, Congress has required the Secretary of Interior to include on the “list of all federally recognized tribes” those tribes recognized by Congress; those acknowledged as such by administrative procedures set forth in 25 C.F.R. Part 83; or those recognized by a court order. Pub. L. No. 103-454, § 103(3). This case presents the issue when the Secretary has omitted, by error or neglect, a tribe recognized by multiple acts of Congress, and instead has insisted the tribe submit to the administrative acknowledgement process in 25 C.F.R. Part 83.

Here, Congress has, beginning in 1854, repeatedly recognized the Mdewakanton Band of Sioux Indians in Minnesota, authorizing land and benefits to the Band. The Band has not been terminated by any other act of Congress, treaty, administrative order or court order.

Out of an abundance of caution, the Band submitted a reaffirmation petition to be placed on the list, as required by law. While the reaffirmation petition was pending, the Department eliminated the reaffirmation

petition process. Consequently, the Band, a recognized but unlisted tribe, was faced with no adequate administrative procedure to be listed despite having been omitted from the list: the current administrative process under 25 C.F.R. Part 83 is inapplicable, because 25 C.F.R. § 83.3 applies “only to indigenous entities that are not federally recognized Indian tribes.”

Mandamus is an appropriate remedy when exhaustion of administrative remedies may be excused. Exhaustion may be excused under certain conditions, outlined in *McCarthy v. Madigan*, 503 U.S. 140 (1992), and included when there is doubt as to whether the administrative agency was empowered to grant effective relief, and when appealing through the administrative process would be futile because the agency has predetermined the issue. Here, on the one hand, the Department has no power to use Part 83 for a tribe already recognized, and on the other hand, has “predetermined” that any group not already listed must go through the Part 83 process. As the trial court erred in finding a requirement to exhaust administrative remedies, when that is inadequate and inappropriate here, the matter should be remanded with instructions to grant the remedy of mandamus to compel the listing of the Band.

ARGUMENT

I. Under the List Act, the Mdewakanton Band of Sioux Indians Must Be Listed as a Federally Recognized Tribe.

The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, Section 103 (1994) (codified at 25 U.S.C. § 5130) (“List Act”) contemplates that Indian Tribes “may be recognized by an Act of Congress,” by administrative procedures set forth in 25 C.F.R. Part 83; or by a court order. Pub. L. No. 103-454, § 103(3). Yet, here the trial court states “this Circuit’s precedent holds that exhaustion of the Part 83 process is a prerequisite to judicial review of historical recognition claims,” citing *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127 (D.D.C. 2015). JA12 n.5. The trial court’s observation runs squarely against the congressional finding that congressional recognition suffices for eligibility to list a tribe. Where, as here, Congress has recognized the Band, and the Band has not been terminated, the List Act requires the Secretary of Interior to include the Band on the “list of all federally recognized tribes,” 25 U.S.C. § 5131(a), as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

The facts of this case demonstrate Congress recognized the Band by congressional act as early as 1854. Act of July 17, 1854, 10 Stat. 304. In

that act, Congress identified, acknowledged, and recognized the mixed-bloods of the Mdewakanton Band—not only recognizing the Band, but also its entitlement to land at Lake Pepin and future interest regarding those reservation lands. The statutory boundary of the Lake Pepin Reservation still exists and is unrepealed.

Subsequently, Congress passed the Act of February 16, 1863, ch. 37, 12 Stat. 652, the so-called “Forfeiture Act,” which while abrogating earlier Dakota Sioux treaty provisions, also provided in Section 9 an exception for members of the Mdewakanton Band who did not participate in the 1862 uprising. Similarly, the Act of March 3, 1863, which ordered the removal of Sioux Indians from the State of Minnesota, included an exception for the friendly heroic Mdewakanton Sioux. The 1863 Acts did not terminate the Band nor repeal the 1854 congressional act, nor did it affect the Lake Pepin Reservation, and in fact, the Act of February 16, 1863 was the basis for Congress to authorize land for the Band in 1865. That action, where Congress again recognized the Band, was the Act of February 9, 1865, ch. 29, 13 Stat. 427, which authorized the Commissioner of Indian Affairs to set apart a 12-square-mile reservation for the

Mdewakanton Band in Minnesota. While the government ultimately reneged on setting aside the reservation, the congressional recognition and conferral of land and benefits is indisputable.

Notwithstanding the congressional recognition, the Department has taken the position that the Band must petition for recognition in the first instance through the procedures in 25 C.F.R. Part 83. In response to the Band's Petition for a Writ of Mandamus to have the Band listed, the government contended, and the trial court agreed, the Band must exhaust its administrative remedies, namely resort to Part 83.

In the trial court, the Band argued it is not required to exhaust administrative procedures under Part 83 because those procedures are legally inadequate and it would be futile to pursue them. The trial court rejected the futility claim, *see* JA12-13, but the court did not explain or rule on whether the procedures are legally inadequate for the Band's case. The Band's futility claim related to its submission – out of an abundance of caution – a reaffirmation petition at a time when the Department had restored to the list a number of tribes that were recognized, but not listed, due to the Department's erroneous omission. While the Band's

reaffirmation petition was pending, the Department eliminated the reaffirmation petition process. Consequently, a recognized but unlisted tribe was then faced with no adequate administrative procedure to be listed despite having been omitted from the list. Whether a matter of futility or simple frustration, the effort to have the Secretary list a congressionally recognized but unlisted tribe presented, and continues to present, an impossible quandary: The current administrative process is inapplicable under 25 C.F.R. Part 83, because 25 C.F.R. § 83.3 applies “only to indigenous entities *that are not federally recognized Indian tribes*.” (Emphasis added). Under the trial court’s reasoning, the Department’s erroneous omission of a tribe that belongs on the list has no remedy other than the Part 83 process, which *a fortiori* does not apply. Additionally, if the Department takes the position that no tribe is recognized unless it is listed, then a congressionally recognized tribe cannot be listed because it is not already on the list, circular reasoning that cannot stand.³ So, clearly the

³ Neither *James v. U.S. Dept. of Health Human Serv.*, 824 F.2d 1132 (D.C. Cir. 1987), nor *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013) support the argument that the Mdewakanton Band must (or even can) utilize Part 83, as those tribes did not present evidence that Congress recognized them. Similarly, *Mackinac Tribe v. Jewell*, 829 F.3d 754, decided by this Court in 2016, is inapposite, as it involved the claim

administrative remedies for the Band are legally inadequate and cannot be exhausted.

Nor has the Band been unrecognized or terminated. No act of Congress has terminated the Mdewakanton Band of Sioux Indians, nor has the Secretary issued any decree or ruling nullifying or negating any of the treaty or statutory obligations on the Secretary to the Band. Nor can the omitting of the Band from the list constitute a termination of the Band as a recognized tribe. In its Findings to the List Act, Congress stated: “(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress; (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated.” Pub. Law. No. 103-454, § 103(4)(5). The Secretary cannot terminate the Band. The Band should have been listed in 1979,⁴ when the Department first established a list, and without question by 1994, when Congress passed the List Act.

of a tribe that it was the historical successor to a tribe the federal government previously recognized via treaty.

⁴ In 1979, the Department of Interior first started listing federally recognized Indian tribes, *see* Indian Tribal Entities that Have a Government-

II. There Being No Adequate Administrative Remedy, Mandamus Is Appropriate to Compel the Secretary to List a Congressionally Recognized Tribe under the List Act.

For the reasons stated above, a tribe that is congressionally recognized and for which the Secretary has treaty and statutory obligations, cannot and should not be required to exhaust administrative remedies in order to be listed under the List Act. The Secretary takes the position no tribe is listed without going through Part 83 administrative procedures, yet has no mechanism or process to correct his or her own error of omission for a tribe that is already acknowledged and for which the Secretary has various treaty and statutory obligations.

Mandamus is an appropriate remedy when exhaustion of administrative remedies may be excused. As explained in *McCarthy v. Madigan*, 503 U.S. 140 (1992), exhaustion may be excused if: (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite time frame for administrative action; (2) “because of some doubt as to whether the agency was empowered to grant effective

to-Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 6, 1979).

relief” (see *Gibson v. Berryhill*, 411 U.S. 564, 575, n.14 (1973)); (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional questions are raised. *McCarthy*, 503 U.S. at 146-48. Here, the second and third factors apply to the Band’s claim that exhaustion of administrative remedies should be excused. As to the second factor, “exhaustion has not been required where the challenge is to the *adequacy of the agency procedure itself*, such that ‘the question of the adequacy of the administrative remedy ... [is] for all practical purposes identical with the merits of [the plaintiff’s] lawsuit.’ *Barry v. Barchi*, 443 U.S. 55, 63, n.10 (1979) (quoting *Gibson v. Berryhill*, 411 U. S., at 575).” *McCarthy*, 503 U.S. at 148 (emphasis added). Here, for the reasons stated, the administrative remedy is inadequate to resolve the Band’s demand to be listed under the List Act.

Similarly, the third factor in *McCarthy* relates to futility, but under futility the Supreme Court included that the agency may have “predetermined” the issue. Here, there is no adequate administrative remedy for an omitted federally recognized tribe because the Department has “predetermined” that any group not already listed must go through the Part

83 process, notwithstanding the merits of the error and omission claim. While *McCarthy* was a damages case, the factors to excuse exhaustion are set forth, and a writ of mandamus is the appropriate remedy. “Mandamus relief will be granted if the plaintiff can demonstrate that the three enumerated conditions are present: (1) a clear right to the relief sought; (2) that the defendant has a duty to do the act in question; and (3) no other adequate remedy is available.” *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016), citing *United States v. Monzel*, 641 F.3d 528, 534 (D.C. Cir. 2011). Here, the legal source of a mandatory duty owed by the Secretary derives from the congressional action that recognized the Band, and thus, is enforceable through mandamus.

CONCLUSION

Accordingly, this case should be remanded to the trial court with instructions to grant a writ of mandamus as the remedy sought by the Band to compel the Secretary to add the Mdewakanton Band of Sioux in Minnesota to the list of acknowledged Indian tribes.

Dated: March 26, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,035 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), according to the word count of Microsoft Word 2016.

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: March 26, 2021

s/ Thomas F. Gede

Thomas F. Gede

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on March 26, 2021, a copy of the foregoing Final Brief for Appellants was served upon all counsel of record by operation of the Court's CM/ECF system.

Dated: March 26, 2021

s/ Thomas F. Gede

Thomas F. Gede

Counsel for Appellants