

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-5173

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MDEWAKANTON BAND OF SIOUX IN MINNESOTA, et al.,
Plaintiffs/Appellants,

v.

DAVID LONGLY BERNHARDT, Secretary of the Interior, et al.,
Defendants/Appellees.

Appeal from the United States District Court for the District of Columbia
No. 1:16-cv-02409 (Hon. Timothy J. Kelly)

BRIEF FOR APPELLEES

Of Counsel:

SAMUEL E. ENNIS
JAMES W. PORTER
Attorneys
Solicitor's Office
U.S. Department of the Interior

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
SARA COSTELLO
MARY GABRIELLE SPRAGUE
JOHN L. SMELTZER
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-0343
john.smeltzer@usdoj.gov

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**A. Parties and Amici**

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ John L. Smeltzer
JOHN L. SMELTZER

Counsel for Appellees

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GLOSSARY

APA	Administrative Procedure Act
Band	Mdewakanton Band of Sioux in Minnesota
IRA	Indian Reorganization Act
Interior	U.S. Department of the Interior
List Act	Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791
Part 83	25 C.F.R. Part 83
Secretary	Secretary of the Interior
Torgersons	Plaintiffs/Appellants Terri Robertson-Torgerson and Ross Torgerson

INTRODUCTION

Terry Robertson-Torgerson and her son Ross Torgerson (Torgersons) filed a petition for a writ of mandamus against the Secretary of the Interior (Interior) in the district court. That petition, styled in their own names and in the name of the “Mdewakanton Band of Sioux in Minnesota” (Mdewakanton Band or Band), sought to compel Interior to include the Band on the official list of federally recognized tribes, i.e., tribes recognized by Interior as being entitled to special programs and services under federal Indian law. But the Torgersons have never submitted a petition under Interior’s regulatory procedures for federal acknowledgment of Indian Tribes, 25 C.F.R. Part 83 (Part 83). Nor do they contend that they meet the regulatory criteria for federal acknowledgment set forth in Part 83. Rather, they contend that a federal statute, the Federally Recognized Indian Tribe List Act of 1994 (List Act), requires Interior to include the Mdewakanton Band on the list of federally recognized tribes, because Congress historically recognized the Band in legislation enacted in the mid-1800s.

As elaborated herein, the Torgersons’ claim is contrary to the terms of the List Act, and recognition of the Band is not otherwise compelled by any clear and unequivocal legal mandate. Therefore, the district court’s judgment dismissing the Torgersons’ complaint should be affirmed.

STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction over the Torgersons' petition for a writ of mandamus under 28 U.S.C. § 1331, because the Torgersons' claims arose under the List Act, 25 U.S.C. § 5132; and the Administrative Procedure Act (APA), 5 U.S.C. § 706(1). The court also had subject matter jurisdiction under 28 U.S.C. § 1361, because the Torgersons' petition was "in the nature of mandamus to compel an officer or employee of the United States . . . to perform a duty owed to the plaintiff[s]." *See* J.A. 18 (ECF 1:4).²

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment of dismissal. J.A. 4 (ECF 15).

(C) The district court's judgment was entered on May 30, 2020. J.A. 4 (ECF 15). The Torgersons timely filed their notice of appeal on June 18, 2020, or 19 days later. J.A. 194-95 (ECF 17); *cf.* Fed. R. App. P. 4(a)(1)(B)(ii).

(D) The appeal is from a final judgment that disposes of all parties' claims. J.A. 4 (ECF 15).

² The Torgersons also invoked 28 U.S.C. §§ 1362 and 1651. J.A. 18 (ECF 1:4). Section 1362 does not apply, as it grants jurisdiction over civil actions brought by "any Indian tribe or band with a *governing body duly recognized by the Secretary of the Interior*" (emphasis added). As set out herein, Interior does not recognize the Mdewakanton Band or the Torgersons as a governing body. Section 1651 (the All Writs Act) likewise does not apply, as it grants federal courts authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions." A writ issued under the All Writs Act is not "necessary" here because 28 U.S.C. §§ 1331 and 1361 are sufficient to confer jurisdiction, as set forth in the text.

STATEMENT OF THE ISSUE

Whether the district court properly denied the Torgersons' petition for a writ of mandamus to compel Interior to list the Mdewakanton Band as a federally recognized tribe, where the Torgersons failed to exhaust administrative remedies under 25 C.F.R. Part 83 and where the List Act does not clearly and indisputably compel Interior to list each and every tribe that has ever been recognized in an Act of Congress.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations not set forth in the Addendum for Brief for Appellants (filed separately together with their proof brief) are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

A. Course of proceedings

The Torgersons filed their petition for writ of mandamus in February 2019. J.A. 15-73 (ECF 1). The petition claims that the Secretary and the Assistant Secretary-Indian Affairs of the Department of the Interior (collectively, Interior) violated the List Act by omitting the Mdewakanton Band from the list of federally recognized tribes maintained by Interior. J.A. 55-63 (ECF 1:41-49). The petition seeks to compel Interior to “add” the Band to the list of federally recognized tribes and to “act accordingly under federal law.” J.A. 71-72 (ECF 1:57-58).

Interior moved to dismiss the petition on the grounds that (1) the petition was untimely and is barred by the statute of limitations; (2) the Torgersons have not exhausted administrative remedies under Part 83; and (3) the Torgersons' demand for the Band's recognition raises a "political question" not reviewable by the Courts unless and until Interior makes a final decision on acknowledgment under Part 83. *See* J.A. 8 (ECF 16:4) (describing motion).

The district court granted the motion to dismiss on May 30, 2020. J.A. 4 (ECF 15) (order); *see also* J.A. 5-14 (ECF 16) (memorandum opinion). The court disagreed with Interior on the applicability of the "political question" doctrine, observing that a final decision by Interior under the Part 83 procedures would be subject to review under the APA, 5 U.S.C. § 706(2). J.A. 9-10 (ECF 16:5-6). But the court agreed that the Torgersons' failure to exhaust administrative remedies under Part 83 is fatal to their petition. J.A. 10-14 (ECF 16:6-10). The court relied on multiple decisions of this Court holding that Indian groups seeking federal acknowledgment must avail themselves of the Part 83 administrative procedures before seeking judicial relief. J.A. 11-12 (ECF 16:7-8) (citing *Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016); *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013); *James v. U.S. Department of Health & Human Services*, 824 F.2d 1132, 1137–38 (D.C. Cir. 1987)). Having so held, the district court deemed it unnecessary to address the applicability of the governing statute

of limitations, 28 U.S.C. § 2401(a), which this Court has recently held to be non-jurisdictional. J.A. 10 (ECF 16:6 n.3) (citing *Jackson v. Modly*, 949 F.3d 763, 778 (D.C. Cir. 2020)).

B. Factual and legal background

The Torgersons’ petition for a writ of mandamus is predicated on the following factual allegations and law.

1. Minnesota Sioux Indians

Numerous bands of Sioux Indians occupied land in the upper Midwest and Great Plains in the 1800s. Four Sioux bands—the Mdewakanton, Wahpekute, Sisseton, and Wahpeton—occupied land in and surrounding Minnesota Territory. J.A. 34 (ECF 1:20, ¶¶ 68, 71). In a series of treaties in 1830, 1837, and 1851, the four bands gradually ceded all of their aboriginal lands to the federal government, in exchange for reservations and other consideration. J.A. 34-35, 38 (ECF 1:20-21, 24, ¶¶ 69-74, 80-82). Of relevance here, in the 1830 treaty, the government agreed to establish the “Lake Pepin Reservation” west of the Mississippi River for “mixed-blood” Sioux. J.A. 38 (ECF 1:24, ¶¶ 80-82); *see also Colson v. Hickel*, 428 F.2d 1046, 1047 (5th Cir. 1970). In the 1851 treaties, the government agreed to establish reservations for the four bands along the Minnesota River. J.A. 34-35 (ECF 1:20-21, ¶¶ 70-74).

In 1854, Congress acted to dissolve the Lake Pepin Reservation. *See Colson*, 428 F.2d at 1047; *Preston Nutter Corp. v. Morton*, 479 F.2d 696, 697 (10th Cir. 1973). The statute authorized the President “to exchange” with the “mixed-bloods” of the “Dacotah or Sioux nation of Indians” all of each person’s “right, title, and interest” in the reservation, for “scrip” entitling the bearer to a land claim on the reservation or elsewhere. Act of July 17, 1854, ch. 83, 10 Stat. 304 (Appellant’s Addendum at 1).

In 1862, led by two Mdewakanton chiefs, the Sioux on the Minnesota River reservations rebelled against the United States and non-Indian settlers, killing many non-Indians and damaging non-Indian property. J.A. 40 (ECF 1:26, ¶ 93); *see also Wolfchild v. United States*, 731 F.3d 1280, 1285 (Fed. Cir. 2013). Thereafter, hundreds of Sioux were captured and put on trial; others fled to the Dakota Territories or to Canada. J.A. 40-41 (ECF 1:26-27, ¶ 96).

In response to the uprising, Congress acted to abrogate the four bands’ treaty rights and to remove them from Minnesota. *Wolfchild*, 731 F.3d at 1285. Thus, in February 1863, Congress enacted a statute declaring “all treaties” with the four bands to be “abrogated and annulled, so far as any [they] purport to impose any future obligation on the United States,” and declaring “all lands and rights of occupancy within the State of Minnesota” to be “forfeited to the United States.” Act of Feb. 16, 1863, ch. 37, § 1, 12 Stat. 652, 652 (Appellants’ Addendum at 2).

In a March 1863 enactment, Congress approved the disposal of the bands' lands in Minnesota and authorized the President to "set apart" for the "Medawakanton" and the other three Minnesota bands "a tract of unoccupied land outside" of Minnesota. Act of Mar. 3, 1863, ch. 119, 12 Stat. 819 (Appellants' Addendum at 5).

In the same legislation, however, Congress made provisions for individuals from the bands, who had "risked their own lives" during the 1862 uprising to aid non-Indian settlers. J.A. 40 (ECF 1:26, ¶¶ 93-95). In Section 9 of the February 1863 Act, Congress authorized the Secretary to "set apart" from public lands "eighty acres in severalty to each individual" of the named bands "who exerted himself in rescuing whites from the late massacre of said Indians." 12 Stat. at 654 (Appellant's Addendum at 4). In 1865, Congress made funds available for the support of "certain Indians of the Sioux nation" who had aided non-Indian settlers during the uprising, but who had since become "entirely destitute." Act of Feb. 9, 1865, ch. 29, 13 Stat. 427 (Appellant's Addendum at 7). Interior subsequently approved the withdrawal of 12 square miles of public land for these loyal Sioux. J.A. 45-46 (ECF 1:31-32, ¶¶ 111-120). But Interior officials were unable to complete the withdrawal, and the designated lands were ultimately sold to the public. *Id.*; see also *Wolfchild*, 731 F.3d at 1286.

In the 1880s, Congress again enacted a series of statutes to aid Sioux who had remained in or returned to Minnesota. *Wolfchild*, 731 F.3d at 1286. Three

of these statutes (enacted in 1888, 1889, and 1890) provided appropriations for the support of “full-blood” or “half-blood” Indians in Minnesota who previously “belonged to the Mdewakanton Band” but had “severed their tribal relations.” Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349; *see also* J.A. 51-52 (ECF 1:37-38, ¶¶ 139-41). Interior used funds from these statutes to acquire lands in three different areas, which came to house three Indian communities: (1) the Shakopee Mdewakanton Sioux Community, (2) the Prairie Island Indian Community, and (3) the Lower Sioux Community. *Wolfchild*, 731 F.3d at 1287; J.A. 28-29 (ECF 1:14-15, ¶ 50). Each of these communities later organized under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 5101 et seq., and is now a federally recognized tribe. *Wolfchild*, 731 F.3d at 1287.

In addition, Minnesota Sioux who fled or were forced from Minnesota after the 1862 rebellion joined or formed communities outside the State. *See Sisseton & Wahpeton Bands v. United States*, 10 Ind. Cl. Comm. 137, 138 (1962). Most Mdewakanton moved to the Santee Sioux Reservation in Nebraska. *Id.* A large number of this group later left that reservation and settled in Flandreau, South Dakota. *Id.*; J.A. 98 (ECF 1-4:19). Both the Santee Sioux Nation, Nebraska and the Flandreau Santee Sioux Tribe of South Dakota are federally recognized tribes. *See* 85 Fed. Reg. 5462, 5464-65 (Jan. 30, 2020) (most recent list of such tribes).

2. Federal recognition of tribes

Under federal law, Indian tribes are vested with aspects of sovereignty and entitled to special programs and services. *California Valley Miwok Tribe v. Jewell*, 515 F.3d 1262, 1264-65 (D.C. Cir. 2008). To qualify for sovereign status and federal tribal benefits, however, a tribe must be federally recognized. *Id.* at 1263; *Muwerkma*, 708 F.3d at 211; *see also Agua Caliente Tribe of Cupeño Indians v. Sweeney*, 932 F.3d 1207, 1213 (9th Cir. 2019). When Congress adopted the IRA in 1934, it established procedures for tribal *organization*, *California Valley Miwok*, 515 F.3d at 1264-65, but not procedures for tribal *recognition*, *Muwerkma*, 708 F.3d at 211. For several decades thereafter, Interior made recognition decisions on an ad hoc basis. *Id.*; *Mackinac Tribe*, 829 F.3d at 756.

Congress has delegated to Interior broad authority for the “management of all Indian affairs and of all matters arising out of “Indian relations,” 25 U.S.C. § 2; *accord* 43 U.S.C. § 1457. Interior has been granted similarly broad authority to prescribe regulations for such purpose, 25 U.S.C. § 9. In 1978, Interior exercised these authorities to promulgate regulations establishing a formal acknowledgment process for Indian tribes. 43 Fed. Reg. 39,361 (Sept. 5, 1978); *Muwerkma*, 708 F.3d at 211. Interior updated these regulations—now codified at 25 C.F.R. Part 83—in 1994 and in 2015. *See* 80 Fed. Reg. 37,861 (July 1, 2015); 59 Fed. Reg. 9280 (Feb. 25, 1994).

The current Part 83 regulations establish seven criteria that “indigenous entities” generally must meet to qualify for recognition. 25 C.F.R. §§ 83.3, 83.10-83.12. Specifically, a petitioner must show, for the period from 1900 to the present, (a) that it has been “identified as an America Indian entity on a substantially continuous basis”; (b) that it “comprises” and “has existed” as a “distinct community”; and (c) that it has “maintained political authority over its members.” *Id.* § 83.11. A petitioner must additionally provide (d) a “governing document” or description of its “membership criteria and governing procedures”; (e) proof that its members “descend from a historical Indian tribe” or tribes that combined and functioned as a single autonomous entity; and (f) proof that its members are “unique” and not members of another federally recognized tribe. *Id.* Finally, Interior must verify (g) that the entity or its members are not subject to legislation that terminated the federal-tribal relationship. *Id.*

The Part 83 regulations also provide a more streamlined burden for any petitioning entity that was “previously acknowledged” by the United States. *Id.* § 83.12. Proof of previous acknowledgment may be shown by evidence that the entity (1) had treaty relations with the United States; (2) had been “denominated a tribe by act of Congress or Executive Order”; (3) had been treated by federal officials as having “collective rights in tribal lands or funds”; or (4) had land held for it or its collective ancestors by the United States.” *Id.* § 83.12(a).

When first adopting acknowledgement procedures in 1978, Interior specified that the procedures did not apply to tribes that were then “already acknowledged” by, and “receiving services” from, the Bureau of Indian Affairs. 43 Fed. Reg. at 39,362 (adopting 25 C.F.R. § 54.3(b)); *see also* 25 C.F.R. § 83.3 (similar provision in present regulations). In early 1979, Interior published its first list of recognized tribes, identifying tribes that already had a “government-to-government relationship with the United States” and therefore did not need to seek recognition through the regulatory process. 44 Fed. Reg. 7235 (Jan. 31, 1979). The regulations also called on Interior to publish the list on an annual basis. 43 Fed. Reg. at 39,362 (adopting 25 C.F.R. § 54.6(b)).

3. 1994 List Act

In 1994, Congress enacted the List Act, imposing the annual publication requirement by statute. Specifically, the Act provides that the Secretary “shall publish in the Federal Register a list of all 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.” 25 U.S.C. § 5131(a). The List Act included congressional findings that—

(1) the Constitution . . . invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, . . . and recognizes the sovereignty of those tribes;

(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations . . . , or by a decision of a United States court; [and]

(4) a tribe which has been recognized in one of these manners may not be terminated excepted by an Act of Congress;

Pub. L. No. 103-454, § 103, 108 Stat at 4791.

4. Torgersons' request for federal recognition of the Band by "reaffirmation"

Interior did not include the "Mdewakanton Band of Sioux in Minnesota" on its first list of recognized tribes published in 1979, 44 Fed. Reg. at 7235-37 (Appellants' Addendum at 48-50), or on its first list of recognized tribes published after the enactment of the List Act, 60 Fed. Reg. 9250, 9250-55 (Feb. 16, 1995). In May 2014, the Torgersons submitted a self-styled "Reaffirmation Petition" to Interior, demanding the "immediate addition" of the Mdewakanton Band to the list. J.A. 80-122 (ECF 1-4). The Torgersons did not submit the petition under Part 83 or contend that the Band satisfied the Part 83 criteria for recognition. Instead, they argued that the Band "is not required to pursue the 'Part 83' process because its tribal status and treaty rights are clearly established as a matter of law." J.A. 112 (ECF 1-4:33). In particular, because the February 1863 Act allegedly confirmed the treaty rights of individual Sioux Indians who did not participate in the 1862 uprising and because Congress did not subsequently terminate such treaty rights,

the Mdewakanton Band was already recognized by Congress and on such grounds entitled to present-day recognition. J.A. 121 (ECF 1-4:42).

Interior did not respond to the “Reaffirmation Petition.” But in July 2015—at the same time that Interior updated the Part 83 procedures—Interior published a notice explaining that it viewed the Part 83 procedures as the *exclusive* path to administrative acknowledgment. 80 Fed. Reg. 37,539 (July 1, 2015)

The Torgersons filed the present petition for writ of mandamus in 2019. J.A. 15-73 (ECF 1). The petition alleges that—

- the Torgersons are direct lineal descendants of certain named mixed-blood Mdewakanton who aided non-Indian settlers during the 1862 uprising. J.A. 24-28 (ECF 1:10-14, ¶¶ 24-46);
- these named ancestors were members of the Mdewakanton Band and never severed tribal relations, J.A. 24-25 (ECF 1:10-11, ¶¶ 27-29); and
- after the 1862 uprisings, the various individual Sioux who had aided non-Indian settlers effectively became the Band, J.A. 42 (ECF 1:28, ¶ 101).

Based on these allegations alone—without addressing any history of the Mdewakanton people between 1865 and the present and without identifying any other alleged tribal members—the Torgersons allege that they are “members” of a still extant Mdewakanton Band. J.A. 26 (ECF 1:12, ¶ 37); *see also* J.A. 80 (ECF 1:4:1 & n.1) (claiming membership “as a matter of law”). The Torgersons allege

that the Acts of 1854, 1863, and 1865 “recognized” the Mdewakanton Band, that no subsequent statute “repealed” such recognition, and so that the Band “has a clear and indisputable right” to be listed under the List Act. J.A. 61 (ECF 1:47, ¶ 199).

SUMMARY OF ARGUMENT

This Court has repeatedly held that Indian groups that are not included on the official list of federally recognized tribes must exhaust administrative remedies under 25 C.F.R. Part 83 before seeking judicial relief to attain federal recognition. The district court correctly followed that precedent in denying the Torgersons’ petition for a writ of mandamus. In their effort to avoid the requirement to exhaust remedies under Part 83, the Torgersons invoke the List Act. They argue (1) that the present case (unlike previous cases addressed by this Court) involves tribal recognition through *Acts of Congress*; and (2) that the List Act requires Interior to include on the list of federally recognized tribes any tribe that was ever recognized by an Act of Congress. But although the List Act contains a “finding” that “Indian tribes *presently may* be recognized by Act of Congress” (emphasis added), the Act contains no mandate that would support mandamus relief against Interior. To the contrary, nothing in the List Act compels (or even authorizes) Interior to add to the official list of federally recognized tribes any and all tribes that were previously recognized by Congress at any time in history, or any and all groups of Indians who claim descent from such historically recognized tribes.

In short, the Torgersons seek a federal court order compelling Interior to add the Mdewakanton Band to Interior's official list of federally recognized tribes. To the extent that the Torgersons seek such an order pursuant to the Part 83 process, they have failed to exhaust their administrative remedies. To the extent that the Torgersons seek such an order pursuant to the List Act, that statute affords them no relief. In either event, the district court's judgment dismissing the Torgersons' petition for a writ of mandamus should be affirmed.

STANDARDS OF REVIEW

Whether the law imposes a requirement to exhaust administrative remedies and whether a particular administrative pursuit satisfies this requirement are legal questions that this Court reviews de novo. *Koch v. White*, 744 F.3d 162, 164 (D.C. Cir. 2014); *Artis v. Bernanke*, 630 F.3d 1031, 1034 (D.C. Cir. 2011). A district court's decision to decline to "excuse a *failure* to exhaust" is reviewed for an abuse of discretion. *Koch*, 744 F.3d at 164 (emphasis in original).

A writ of mandamus is a "drastic" remedy available only in "extraordinary situations," where a petitioner has a "clear and indisputable" right to relief. *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc) (citations omitted). Even when that legal standard is met, the remedy is discretionary. *Id.*; *13th Regional Corp. v. U.S. Department of Interior*, 654 F.2d 758, 762-63 (D.C. Cir. 1980). Accordingly, although this Court considers de novo whether the legal prerequisites

for a writ of mandamus are present, a district court's denial of a petition for writ of mandamus is ultimately reviewed for abuse of discretion. *See Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995); *see also In re Medicare Reimbursement Litigation*, 414 F.3d 7, 12 (D.C. Cir. 2005).

ARGUMENT

The district court properly denied the Torgersons' petition for a writ of mandamus to compel Interior to list the Mdewakanton Band as a federally recognized tribe.

A. This Court has repeatedly held that exhaustion of remedies under Part 83 is required.

The Torgersons' petition for writ of mandamus to avoid the Part 83 process is foreclosed by Circuit precedent. On three separate occasions, this Court has held that Indian groups seeking to be placed on Interior's list of federally recognized tribes must avail themselves of the Part 83 procedures before seeking judicial relief. *Mackinac Tribe*, 829 F.3d at 757; *Muwekma*, 708 F.3d at 218; *James*, 824 F.2d at 1137-38. Those decisions are controlling.

First, in *James*, a group of 50 Wampanoag Indians of Gay Head, Massachusetts sought declaratory and injunctive relief to compel Interior to include the Gay Head Wampanoag Tribe on the list of federally recognized tribes. 824 F.2d at 1133-35. As in the present case, the plaintiffs sought to avoid the requirement to file a petition for federal acknowledgment under Part 83 on the grounds that the tribe was "already federally recognized." *Id.* at 1136-37. The

plaintiffs relied on three federal reports from the 1800s, including a report prepared under an 1847 statute that identified the presence of the Wampanoag Tribe. *Id.* at 1133-34, 1137. This Court held that judicial relief was inappropriate unless and until the plaintiffs exhausted their administrative remedies under Part 83. *Id.* at 1137-38. This Court observed that Congress had “specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations,” that requiring exhaustion would permit Interior to “apply its developed expertise,” and that the record developed during administrative review would assist the Court in the event judicial review became necessary. *Id.*

Second, in *Muwerkma*, the Muwerkma Ohlone Tribe, a group of Indians from the San Francisco Bay area, brought an action to compel Interior to place it on the list of federally recognized tribes. 708 F.3d at 210-12. The Muwerkma group claimed descent from the Verona Tribe, a tribe that was undisputedly federally recognized between 1914 and 1927. *Id.* at 212. Nonetheless, Interior denied the Muwerkma group’s acknowledgment petition on the grounds that it did not meet the Part 83 criteria. *Id.* at 213. In their judicial challenge, the Muwerkma group argued—like the Torgersons do here—that Interior could not precondition the group’s listing on the Part 83 criteria, because it had already been recognized and that only Congress could “terminate” such recognition. *Id.* at 218. This Court held that the tribe’s “termination” claim was “subject to administrative exhaustion” and

thus did not accrue until Interior issued a final decision under the Part 83 process. *Id.* at 218-19. And this Court affirmed Interior’s application of the Part 83 criteria to deny recognition. *Id.* at 219.

Third, in *Mackinac Tribe*, a group of plaintiffs who claimed to descend from Mackinac Indians in Michigan brought an action to compel Interior to hold an election for purposes of tribal organization under the IRA. 829 F.3d at 755-57. The plaintiffs argued that they were entitled to organize under the IRA because the Mackinac Tribe had signed a treaty with the United States in 1855 and thus was federally recognized, even though the tribe was not on the current list of federally recognized tribes. *Id.* This Court held that Interior could not be compelled to conduct an election for a tribe that Interior had not acknowledged under Part 83. *Id.* at 757. In so holding, this Court followed the “teach[ing]” of *James* and *Muwekma* that “the court should for prudential reasons refrain from deciding” whether a tribe is entitled to recognition (where disputed), “until the Department has received and evaluated a petition under Part 83.” *Id.* As this Court explained, requiring administrative exhaustion under Part 83 “honors” Congress’s delegation of the “regulation of Indian affairs and relations” to Interior, *id.* (citing 25 U.S.C. § 2); “protects the autonomy of the agency that has the expertise to make (and correct) such determinations”; and “better tees up disputes” in the event of later judicial review, *id.* See also *Agua Caliente Tribe*, 932 F.3d at 1218 (following

James in holding that Indian groups must exhaust administrative remedies under Part 83 before seeking judicial relief to compel federal recognition); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550 (10th Cir. 2001) (same).

The district court likewise properly followed the above-described precedent in denying the Torgersons' petition for a writ of mandamus. Similar to the plaintiff groups in each of the above cases, the Torgersons here seek to compel Interior to acknowledge them as a sovereign tribe outside the Part 83 process, based solely on their claimed descent from Indians who belonged to a tribe that was recognized by the United States through legislative acts in the mid-1800s. But as this Court observed in *Muwekma*, "a once recognized tribe can fade away." 708 F.3d at 219. As the Seventh Circuit has opined, moreover, it is "obvious that Indian nations, like foreign nations, can disappear over time . . . whether through conquest, or voluntary absorption into a larger entity, or fission, or dissolution, or movement of population." *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of Interior*, 255 F.3d 342, 346 (7th Cir.2001).

In their petition, the Torgersons acknowledge historical events that caused the Mdewakanton Band to splinter and caused the majority of its members to leave Minnesota. *See generally* J.A. 33-54 (ECF 1:19-40). In addition, there is no dispute that Mdewakanton and other Minnesota Sioux Indians have reorganized in and outside of Minnesota and have been federally recognized. *See supra* pp. 7-8.

These include the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and the Lower Sioux Indian Community (all in Minnesota), as well as the Santee Sioux Nation, Nebraska, the Flandreau Santee Sioux Tribe of South Dakota, the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation of South Dakota, and the Spirit Lake Tribe of North Dakota (formerly known as the Devil's Lake Sioux Tribe). *Id.*; *see also* 85 Fed. Reg. at 5464-65; *LeBeau v. United States*, 171 F. Supp. 2d 1009, 1020-21 & n.3 (D.S.D. 2001).

The Torgersons claim to be members of a present-day “Mdewakanton Band of Sioux in Minnesota”—as successor to the historic Mdewakanton Band—that is distinct from the above entities. But no court may appropriately assess whether there is such a band that has continuously existed to the present day, or whether the Torgersons are members of such a band, without the benefit of the administrative record that would be created pursuant to a Part 83 petition. *See Mackinac Tribe*, 829 F.3d at 757; *Muwekma*, 708 F.3d at 218; *James*, 824 F.2d at 1137-38; *see also Agua Caliente Tribe*, 932 F.3d at 1218-19; *United Tribe of Shawnee Indians*, 253 F.3d at 550-51.

B. The Torgersons identify no applicable exception to the exhaustion requirement.

The Torgersons argue that they should be excused from the obligation to exhaust administrative remedies under Part 83 because: (1) the Part 83 process is “inadequate to resolve” their demand for the Mdewakanton Band’s listing; and

(2) Interior has “predetermined” its decision, rendering the Part 83 Process futile. Opening Brief at 16-17, 19-21 (citing *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992)). Neither exception applies.

First, the Part 83 process plainly provides an adequate remedy. If the Torgersons submit a documented petition under Part 83, and if Interior finds that they have met the regulatory criteria, then Interior “will issue a final determination granting acknowledgment” to the Band. 25 C.F.R. § 83.43(a). The Torgersons do not show otherwise.

Instead, the Torgersons contend that, while their “Reaffirmation Petition” was pending, Interior “eliminated” an alternative to the Part 83 process, namely the supposed “reaffirmation petition process.” But Interior never had a “reaffirmation petition process” in Part 83 or otherwise. Rather, as this Court noted in *Muwekma*, Interior has exercised regulatory discretion to “waive” the Part 83 regulations, based on circumstances peculiar to certain Indian groups. 708 F.3d at 212, 214 (citing 25 C.F.R. § 1.2, in which Interior reserved discretionary authority to waive certain regulations, including Part 83, when not otherwise prohibited by law and when Interior determines that it is in the best interest of the affected Indians).

In their “Reaffirmation Petition,” the Torgersons asked Interior similarly to recognize the Mdewakanton Band outside of the Part 83 process. J.A. 110-13 (ECF 1-4:31-34). While that request was pending, Interior published a notice—

at the same time that it updated the Part 83 regulations—that Interior “intends to rely on the newly reformed Part 83 process as the sole administrative avenue” for acknowledging tribes not already on the list of federally recognized tribes. 80 Fed. Reg. 37,539 (July 1, 2015). That policy decision was not a change to Part 83; it was a notice to interested groups that Interior would no longer consider administrative acknowledgment outside of Part 83. In any event, Interior’s determination to rely exclusively on Part 83 for its administrative acknowledgment decisions does not render that process inadequate or unavailable.

The Torgersons also argue that the Part 83 process is unavailable to them, because it is limited to “indigenous entities that are not federally recognized Indian tribes.” Thus, they claim, Part 83 cannot be invoked by tribes like the Mdewakanton that were once “congressionally recognized.” Opening Brief at 17 (quoting 25 C.F.R. § 83.3). This argument is readily dismissed. The Part 83 regulations define “federally recognized Indian tribe” to mean a tribe that has been listed by Interior under the List Act. 25 C.F.R. § 83.1. Therefore, the reference in Section 83.3 to entities that are not “federally recognized Indian tribes” simply means any entity that is not already present on Interior’s list. *See* 25 C.F.R. §§ 83.1, 83.3. Because the Mdewakanton Band is not on the list, the Torgersons may—and must—pursue acknowledgment for the Band through Part 83. Indeed, as noted above (p. 10), the Part 83 regulations expressly address the special criteria that apply to a tribe, like

the Mdewakanton Band, that claims to have been previously “denominated a tribe” by Act of Congress. 25 C.F.R. § 83.12(a)(2); *see also Agua Caliente Tribe*, 932 F.3d at 1218 (noting that regulations account for evidence of prior recognition).

Second, the Torgersons also fail to show, for purposes of the “futility” exception, that Interior’s position on a Part 83 petition is “predetermined.” The Torgersons have not submitted a Part 83 petition addressing the relevant regulatory criteria. Thus, Interior has had no occasion to opine, and has not opined, on whether the Torgersons (alone or with other potential descendants of the Mdewakanton Band) satisfy the Part 83 criteria. In accordance with its regulations and policy, Interior has simply declined to recognize the Mdewakanton Band outside of the Part 83 process.

C. The List Act provides no basis for mandamus relief.

To the extent that the Torgersons argue that Interior has a clear statutory obligation—enforceable via writ of mandamus—to recognize the Mdewakanton Band *outside* of the Part 83 process, the Torgersons are in error. The district court’s jurisdiction to hear the Torgersons’ petition for a writ of mandamus rested either on 28 U.S.C. § 1361, which grants district courts “original jurisdiction” over “action[s] in the nature of mandamus”; or on the APA, 5 U.S.C. § 706(1), which authorizes judicial review to “compel agency action unlawfully withheld.” In either event, the court’s jurisdiction is limited to enforcing a clear and unequivocal

legal mandate. See *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (applying § 706(1)); *Ass’n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 156 (D.C. Cir. 2007) (applying § 1361); *In re Cheney*, 406 F.3d at 725-26, 729 (addressing both); see also *Agua Caliente Tribe*, 932 F.3d at 1216 (considering both together as providing essentially the same relief).

As explained above, this Court in *Mackinac Tribe*, *Muwekma*, and *James* held that Interior may not be compelled to include a tribe on the list of federally recognized tribes outside of the Part 83 process. See *Mackinac Tribe*, 829 F.3d at 757; *Muwekma*, 708 F.3d at 218; *James*, 824 F.2d at 1137-38. Although this Court in *Muwekma* acknowledged that Interior may “waive” the Part 83 requirements at its discretion, 708 F.3d at 212, 214, the Torgersons do not contend (and cannot show) that a writ of mandamus is available to compel Interior to invoke such a discretionary waiver. Cf. *Esquire, Inc. v. Ringer*, 591 F.2d 796, 806 n.28 (D.C. Cir. 1978) (“Traditionally, . . . the writ of mandamus is not available to review nonministerial, discretionary decisions.”) As this Court observed in *Mackinac Tribe*, “[m]andamus is only available in extraordinary circumstances when the Plaintiff has a ‘clear and indisputable’ right, and review by other means is not possible.” 829 F.3d at 758 (citing *Cheney v. U.S. District Court*, 542 U.S. 367, 380-81 (2004)).

Accordingly, the Torgersons attempt to distinguish *Mackinac Tribe*, *Muwekma*, and *James* by arguing (1) that those cases did not involve tribal recognition by statute; and (2) that the List Act compels Interior to list any tribe that has been recognized by an Act of Congress at any time. Opening Brief at 17-18 & n.3. But the List Act imposes no such duty. The List Act provides simply that the Secretary “shall publish . . . a list of all of the 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.” 25 U.S.C. § 5131(a) (emphasis added). This command expressly recognizes Interior’s primary role and broad discretionary authority over Indian affairs, *see* 25 U.S.C. § 2; 43 U.S.C. § 1457, and the Act otherwise contains no provisions specifying how Interior is to carry out its authority. *See* 25 U.S.C. § 5131 (operative provision); *see also id.* § 5130 (definitions). Rather, the List Act requires Interior simply to provide an annual administrative accounting of the federally recognized tribes with which the United States has a government-to-government relationship. *Id.* § 5131(a).

As the Torgersons observe, in enacting the List Act, Congress also made certain uncodified “findings.” Opening Brief at 18. These include findings that

(3) Indian tribes presently may be recognized by Act of Congress, by the [Part 83] administrative procedures . . . , or by a decision of a United States court;

and that

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress.

Pub. L. No. 103-454, § 103, 108 Stat. at 4791. But these findings are not directives to Interior, and they must be viewed in context. Congress enacted the List Act, *id.* §§ 101-104, 108 Stat at 4791-92, along with two sets of statutory provisions that specifically acknowledge and extend federal recognition to certain named Alaska tribes. *Id.* §§ 203, 303, 108 Stat. at 4792-94 (Appellants' Addendum at 9-11). In the past few decades, Congress has enacted similar recognition legislation for other tribes. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 2870, 133 Stat. 1198, 1907-09 (2019) (recognizing the Little Shell Tribe of Chippewa Indians of Montana); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40 (2018) (recognizing various Indian tribes in Virginia). In cases where Congress expressly "reaffirms and acknowledges" a particular tribe as "a federally recognized Indian tribe," Pub. L. No. 103-454, § 203, 108 Stat. at 4792, or where Congress expressly "extend[s]" "[f]ederal recognition" to a tribe, *id.* § 303(a), 108 Stat. at 4793, then Interior's immediate obligations are clear and indisputable.

This is not such a case. The Torgersons rely on acts of Congress from 1854 and 1863. Opening Brief at 7-10, 14-15. Since those 19th-century enactments, the Mdewakanton Sioux and related bands experienced extended periods of migration and upheaval. *See Wolfchild*, 731 F.3d at 1285-87. Since the mid-1800s and

throughout the period following the Indian Reorganization Act of 1934, there have been no government-to-government relations between the United States and any group professing to be the “Mdewakanton Band of Sioux in Minnesota.” Whether any such band has continuously existed as an Indian polity distinct from other federally recognized tribes—including other bands of Sioux that have reorganized under the IRA in Minnesota and elsewhere—and whether the Torgersons are members or representatives of such a band are open questions. In the List Act findings, Congress specifically endorsed the Part 83 regulations as an appropriate mechanism for resolving such questions. Pub. L. No. 103-454, § 103(3), 108 Stat. at 4791.

In the same finding, to be sure, Congress also observed that “Indian tribes *presently* may be recognized by Act of Congress.” *Id.* But this simply means that, in enacting the List Act, Congress found that it has the authority to make *legislative* determinations (akin to *administrative* determination under Part 83) that confer federal recognition on Indian tribes and affirm their entitlement to services and programs that Congress has otherwise made available to recognized tribes under federal law. Nothing in the List Act suggests that Interior may or must include on the current list of federally recognized tribes every tribe or band that Congress has *historically* recognized, e.g., in acts or treaties from the 19th century.

Contrary to the Torgersons' argument, such an obligation does not follow from Congress's finding that any tribe "recognized" in any one of the manners mentioned in the findings "may not be terminated except by an Act of Congress." See Pub. L. No. 103-454, § 103(3), 108 Stat. at 4791; see also Opening Brief at 18. Because Congress exercises "plenary" authority over Indian tribes, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014), Congress alone may, by "clearly expressed" statutory intent, terminate the rights of existing recognized tribes. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). Interior thus lacks such authority. But as this Court held in *Muwekma*, a decision by Interior to *deny acknowledgment* to a tribal group—e.g., because the group cannot show, under the Part 83 regulatory criteria, sufficient continuity as a tribe and sufficient relationship to a historically acknowledged tribe—is not a "termination of recognition." 708 F.3d at 219. Instead, it is merely a decision that a historic tribe has "in effect, faded away." *Id.*

At bottom, the List Act findings do not provide the Torgersons or any other descendants of the historic Mdewakanton Band a "clear and undisputable" right to present recognition as an Indian tribe eligible for the special programs and services under federal Indian law. Accordingly, the Torgersons stand in the same position as the plaintiff groups in *Mackinac Tribe* and *James* and must exhaust remedies under the Part 83 process before seeking judicial relief. *Mackinac Tribe*, 829 F.3d

at 757; *James*, 824 F.2d at 1137-38; *accord Agua Caliente Tribe*, 932 F.3d at 1216-19; *United Tribe of Shawnee Indians*, 253 F.3d at 550-51.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the Torgersons' petition for a writ of mandamus should be affirmed.

Respectfully submitted,

/s/ John L. Smeltzer

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
SARA COSTELLO
MARY GABRIELLE SPRAGUE
JOHN L. SMELTZER
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

SAMUEL E. ENNIS
JAMES W. PORTER
Attorneys
Solicitor's Office
U.S. Department of the Interior

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) this document contains **6,870** words.

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/s/ John L. Smeltzer
JOHN L. SMELTZER

Counsel for Appellees

ADDENDUM

Administrative Procedure Act, 5 U.S.C. § 706.....	1a
25 U.S.C. § 2.....	1a
25 U.S.C. § 9.....	2a
28 U.S.C. § 1361	2a
43 U.S.C. § 1457	2a

Administrative Procedure Act
5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

25 U.S.C. § 2. Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 9. Regulations by President

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

28 U.S.C. § 1361. Action to Compel an Officer of the United States to Perform His Duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

43 U.S.C. § 1457. Duties of Secretary

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

. . . .

4. Bureau of Land Management.

. . . .

10. Indians.

. . . .

13. Public lands, including mines.