IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Petitioners-Plaintiffs,

v.

Case No. 1:19-cv-0402

DAVID BERNHARDT, in his official capacity as acting Secretary of the Interior, TARA KATUK MAC LEAN SWEENY in her official capacity as Assistant Secretary-Indian Affairs,

Respondents-Defendants.

PETITIONERS' MEMORANDAM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF ISSUING THE WRIT OF MANDAMUS WITHOUT FURTHER DELAY

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Petitioners Mdewakanton Band of Sioux in Minnesota, Terri Robertson-Torgerson and Ross Torgerson (Band) served a petition for a writ of mandamus upon the Federal Defendants on February 22, 2019. The Petition seeks to have the Band listed as a federally-recognized tribe. The Secretary and Assistant Secretary omitted listing the Band under the Federally Recognized Indian Tribe List Act of 1994, Section 104(a), despite the Band being recognized and acknowledged by Congress through existing treaties and Congressional Acts since 1830. The Federal Defendants have filed a motion to dismiss. The petitioners file this memorandum in opposition to the motion to dismiss and in support of the Court issuing the writ of mandamus without further delay.

QUESTIONS PRESENTED

The Band was a party to treaties with the United States since 1830. Certain provisions of those treaties remain in effect. Further, the Band was never terminated as a tribe and Congressional statutes have recognized this Band. Under these statutes and treaties, the Department has legal obligations to the Band. Terri Robertson-Torgerson and Ross Torgerson are lineal descendants of the Band who petitioned the Department to list the Band as federally-recognized.

1. Whether the Department erred under the Federally Recognized Indian Tribe List Act of 1994 when it failed to list the Congressionally-recognized Mdewakanton Band of Sioux in Minnesota on the list of federally-recognized tribes.

2. Whether the Federally Recognized Indian Tribe List Act of 1994 requires the Department to list a petitioning tribe without application of the Department's Part 83 statutory criteria for federal recognition, when the Department has current treaty and statutory obligations which are specific to the petitioning tribe.

STATEMENT OF THE CASE

There are no genuinely-disputed issues of relevant facts. Evidence reflects; that the Mdewakanton Band of Sioux in Minnesota ("Band") was a party to treaties with the United States since 1830; that certain provisions of those treaties remain in effect; that the Band was never

terminated as a tribe; that acts of Congress have continued to recognize the Band as a tribe; and that Congress provided for a reservation for Band members in Minnesota. The Petitioners Terri Robertson-Torgerson and Ross Torgerson are Band members and are direct lineal descendants of Band members, notably, Mdewakanton Chief Wabasha.[1]

I. Through a series of treaties and acts, since 1830, Congress has recognized the Band as a tribe.

The Band is an American Indian group indigenous to the continental United States. Under treaties and statutes, the Department has legal obligations to the Band. The Band is not currently listed as a federally-recognized tribe by the Department. The Band, members of whom have not severed their tribal relations, is the main body entity of Mdewakanton Sioux Indians. And, no Congressional act has terminated a federal relationship with the Band.

A. No Congressional act has terminated the Mdewakanton Band of Sioux in Minnesota.

Prior to 1851, the Mdewakanton Sioux lived along the Mississippi River, in a homeland stretching westward to Dakota Territory and northward to above Mille Lacs Lake. To the east, their homeland covered western Wisconsin, and to the south, northern Iowa.

In 1830, 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." The four bands entered into treaty negotiations, as they were, with the United States. For instance, the Band entered into the Treaty of July 15, 1830, with the Sauk and Fox, Wahpeton, Sisseton, Yankton, and Santee, Sioux, Omaha, Iowa, and Oto and Missouri Indians (also known as

[1] Unless specifically stated otherwise, references to the Band are inclusive of Terri Robertson-Torgerson, and Ross Torgerson. *See* Kaardal Decl. Exs. 12–16 (redacted).

the Treaty of Prairie du Chien (fourth) (which ceded additional lands to those ceded in earlier, so-called Prairie du Chien treaties)).[2]

Seven years later, in September 1837, the Dakota Sioux, inclusive of the Mdewakanton, Wahpekute, Sisseton and Wahpeton tribes entered into the Treaty of September 29, 1837 (7 Stat. 538, Arts. I-II) which ceded to the United States all of their lands east of the Mississippi River, including the lands within the current state of Wisconsin. By the terms of the 1837 Treaty, the United States was to make annuity payments, with the last annuity to be paid in 1861. (*See* Treaty with the Sioux (September 29, 1837), 7 Stat. 538, Arts. I-II.)[3]

By 1851, the four Dakota Sioux Bands, which although related, were separate and distinct from each other and, as such, were essentially consolidated into two distinct pairs of tribes by the United States for purposes of treaty negotiations: the lower pair of tribes—the Mdewakanton and Wahpekute— and the upper pair of tribes—the Sisseton and Wahpeton. Hence, the lower pair and upper pair of Dakota Sioux tribes would sign separate paired treaties with the United States.

In 1851, the two pair of Sioux bands—upper Sisseton and Wahpeton Bands and the lower Mdewakanton and Wahpakoota Bands—ceded all of their lands in the Territory of Minnesota and the State of Iowa. Mdewakanton and Wahpakoota Bands, Treaty of August 5, 1851, 10 Stat. 954;[4] Sisseton and Wahpeton Bands, Treaty of July 23, 1851, 10 Stat. 949.[5] In other words, the Bands ceded all of their lands owned in common between them as identified by natural boundaries.

Specifically, the lower pair of tribes, the Mdewakanton and Wahpakoota Bands, by the Treaty of August 5, 1851, 10 Stat. 954, article 1, bound themselves to perpetual peace with the United States, and by article 2 of the same treaty, ceded to the United States all of their right, title, and claim to any

[2] Kaardal Decl., Ex. 8.
[3] *Id.,* Ex. 7.
[4] *Id.,* Ex. 5.
[5] *Id.,* Ex. 6.

lands whatsoever in the Territory of Minnesota and in the State of Iowa.[6] In return, under article 3 of the Treaty, a reservation was to have been set apart for all four Dakota Sioux tribes with an average width of ten miles on each side of the Minnesota River. The lower pair of tribes, the Mdewakanton and Wahpakoota Bands, where they had then resided, were to have a reservation established further southeast on the Minnesota River than the location of the upper pair of tribes. The upper pair of tribes, the Sisseton and Wahpeton Bands, would live on a reservation near the western border of the Minnesota Territory on the Minnesota River where they had also been residing at the time.

But, fate did not meet the treaty expectations of the Dakota Sioux. Unfortunately, the establishment of the two reservations identified in article 3 of the 1851 treaty did not occur. Nonetheless, the lower and upper bands of Dakota Sioux continued to live on their lands on the Minnesota River. Three years later, Congress, by the Act of July 31, 1854, 10 Stats. 326, confirmed some of those lands originally identified to be reservations along the Minnesota River as reservations for the two pairs of Bands.[7]

In addition, another group of Dakota Sioux Indians, referred to as "mixed-bloods," and principally Band members, would reside on the eastern border of the Minnesota Territory in the proximity of Lake Pepin, Minnesota. It is here that Congress established a reservation under the Act of July 17, 1854, 10 Stat. 304. The July 17, 1854 Act, which specifically referenced the Treaty of Prairie du Chien of July 15, 1830 (which identified the other tribes regarding the cessation of lands to the United States, including the Mdewakanton).[8] The Act set aside lands for the Mdewakanton Band mixed-blood members "of the Dacotah or Sioux nation of Indians." They were also later identified as the lineal descendants of the Dakota or Sioux bands: a "Register of the Names of Half Breeds or

[6] *Id.,* Ex. 5.
[7] *Id.,* Ex. 4.
[8] *Id.*

Mixed Bloods, now living, of the Medanwahkanton (sic), Wahpacouta, Wahpeton and Sisseton Bands of Sioux Indians…." (*See* A Roll of Sioux Mixed Bloods, 1855–56.)[9]

In June 19, 1858, the United States entered into yet another set of separate treaties with the lower and upper Sioux tribes essentially cutting the reservation lands affirmed by Congress in 1854 roughly in half in exchange for compensation, including money and goods. (Treaty with the Sioux (June 19, 1858), 12 Stat. 1031, Arts. I-III.)[10] Under Article 1 of the June 1858 Treaty, in exchange for the loss of their tribal lands, another promised reservation was to be established and specific acreage provided to each Sioux head of family or single person over 21 years old. The Department was to set aside 80 acres for each Sioux head of household from public lands:

> It is hereby agreed and stipulated that, as soon as practicable after the ratification of this agreement, so much of that part of the reservation or tract of land now held and possessed by the Mendawakanton (sic) and Wahpakoota bands of the Dakota or Sioux Indians, and which is described in the third article of the treaty made with them on the fifth day of August, one thousand eight hundred and fifty-one, which lies south or southwestwardly of the Minnesota River, shall constitute a reservation for said bands, and shall be surveyed, and *eighty acres thereof, as near as may be in conformity with the public surveys, be allotted in severalty to each head of a family, or single person* over the age of twenty-one years, in said band of Indians, said allotments to be so made as to include a proper proportion of timbered land, if the same be practicable, in each of said allotments....
>
> As the members of said bands become capable of managing their business and affairs, the President of the United States may, at his discretion, cause patents to be issued to them, for the tracts of land allotted to them, respectively, in conformity with this article; said tracts *to be exempt from levy, taxation, sale or forfeiture,* until otherwise provided for by the legislature of the State in which they are situated with the assent of Congress; *nor shall they be sold or alienated in fee, or be in any other manner disposed of* except to the United States or to members of said bands.

(Treaty with the Sioux (June 19, 1858), 12 Stat. 1031 (emphasis added).)[11]

[9] *Id.,* Ex. 9.
[10] *Id.,* Ex. 3.
[11] *Id.,* Ex. 3.

In exchange for the promised 80 acres of land noted above, the Sioux pledged "to preserve friendly relations with the citizens [of the United States], and to commit no injuries or depredations on their property":

> The Mendawakanton (sic) and Wahpakoota bands of Dakota or Sioux Indians acknowledge their dependence on the Government of the United States, and *do hereby pledge and bind themselves to preserve friendly relations* with the citizens thereof, and *to commit no injuries or depredations on* their persons or property, nor on those of the members of any other tribe. .. They also agree to deliver to the proper officers all persons belonging to their said bands who may become offenders against the treaties, laws, or regulation of the United States, or the laws of the State of Minnesota, and to assist in discovering, pursuing, and capturing all such offenders whenever required so to do by such officers, through the agent or other proper officer of the Indian Department.

(Treaty with the Sioux (June 19, 1858), 12 Stat. 1031 (emphasis added).)[12]

In every treaty since 1830, and every enacted congressional law since then, Congress specifically identified the Band. And, no Congressional act terminated the Band as a tribe:

Treaty	**Congressional Act**	**Date and Topic**
Treaty of September 29, 1837 (7 Stat. 538)		1837; Ceded to the United States all of their land east of the Mississippi River, including the lands within the current state of Wisconsin.
Treaty of August 5, 1851, 10 Stat. 954		1851; Bound Mdewakanton and other three tribes to perpetual peace with the United States; ceded to the United States all of tribes' right, title, and claim to lands in the Territory of Minnesota and in the State of Iowa; was to establish reservation for all four Dakota Sioux tribes
	Act of July 17, 1854, 10 Stat. 304.	1854; Set aside lands for the Mdewakanton Band mixed-blood members "of the Dacotah or Sioux nation of

[12] *Id.*

		Indians;" i.e., Lake Pepin Reservation
	Act of July 31, 1854, 10 Stats. 326	Affirmed and established reservations per Treaty of August 1851 which had not occurred
Treaty with the Sioux (June 19, 1858), 12 Stat. 1031		1858: Set aside 80 acres for each Sioux head of household from public lands in Minnesota The Mendawakanton (sic) and Wahpakoota bands of Dakota or Sioux Indians acknowledge their dependence on the Government of the United States, and *do hereby pledge and bind themselves to preserve friendly relations* with the citizens thereof, and *to commit no injuries or depredations on* their persons or property, nor on those of the members of any other tribe. .. They also agree to deliver to the proper officers all persons belonging to their said bands who may become offenders against the treaties, laws, or regulation of the United States, or the laws of the State of Minnesota, and to assist in discovering, pursuing, and capturing all such offenders whenever required so to do by such officers….

B. Following an 1862 Indian uprising in Minnesota involving the Band, Congress abrogated only *parts* of existing treaties, and did not terminate the existing recognized Mdewakanton tribe.

In August of 1862, certain Mdewakanton, led by Mdewakanton Chiefs Little Crow and Shakopee, revolted against the United States and the white settlers in Minnesota. Hundreds of white settlers and an untold number of Sioux Indians died in the conflict. During the course of the uprising, a number of Dakota Sioux risked their own lives, and assured ostracism by their own people, by

rescuing white settlers who had been captured and held hostage by the rebellious Sioux, saving the lives of almost 300, mostly women and children settlers, effectively ending the rebellion.

One of the "friendly heroic Sioux," included the direct lineal ancestor of Petitioners, Mdewakanton Band member Thomas A. Robertson. Thomas Robertson was selected by Mdewakanton Chief Little Crow to be a messenger between the Chief and General Sibley during the time of the rebellion. Thomas also secretly carried a letter from Mdewakanton Chief Taopi of the "friendly Sioux" as part of the efforts to save settler lives.

By November 5, 1862, nearly 400 Sioux were tried for crimes, 303 of which were convicted and initially sentenced to death. Those Sioux who were not of the nearly 400 fled Minnesota or were forced into the Dakota Territories and some eventually migrated to Canada. The "friendly heroic Sioux" included Thomas A. Robertson. Because they were not part of the rebellious group, but part of the heroic Mdewakanton who saved lives, they remained in Minnesota.

Six months after the 1862 uprising, through the Act of February 16, 1863, Congress annulled *only part* of the United States treaties with the Sioux tribes, including the Band. Congress provided that, with the exception of "each individual of the before mentioned bands who exerted himself in rescuing the whites from the late massacre..."[13] for whom the Secretary was authorized to "set apart of the public lands...eighty acres in severalty," certain provisions of the previous treaties between the tribes and the United States were "abrogated and annulled":[14]

> [A]ll treaties heretofore made...by the Sisseton, Wahpeton, Mdewakanton, and Wahpokoota bands...with the United States, are hereby declared to be abrogated and annulled, *so far as* said treaties or any of them purport to impose *any future obligation* on the United States, and *all lands and rights of occupancy*...and all annuities...forfeited to the United States."[15]

(Emphasis added).

[13] Act of February 16, 1863, § 9. Kaardal Decl. Ex. 1.
[14] *Id.*
[15] *Id.* § 1.

The statute refers to treaties—not Congressional Acts—in "so far as" the treaties impose "future obligation on the United States." The statute also refers only to "lands and rights of occupancy... and all annuities…" as being forfeited as identified in those treaties—not Congressional Acts. While certain land, rights of occupancy, and annuities were lost, not all treaty provisions were abrogated and annulled such as the obligations regarding the Band's "pledge [to the United States] and [to] bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries or depredations on their persons or property." Members of the Band did so— as referenced in Section 9 of the February 16, 1863 Act during the 1862 uprising by not participating in the hostilities. Furthermore, as later described, the Band members also assisted in bringing forward those tribal members who did participate in the uprising consistent with their obligations under the treaty provision of June 19, 1858 to deliver those offenders to agents of the United States:

> They also agree to deliver to the proper officers all persons belonging to their said bands who may become offenders against the treaties, laws, or regulation of the United States, or the laws of the State of Minnesota, and to assist in discovering, pursuing, and capturing all such offenders….[16]

Notably, the February 1863 Act, for the Mdewakanton tribal members who rescued whites from the massacre, reflected the same provisions as the Treaty of June 1858:

> [E]ighty acres thereof, as near as may be in conformity with the public surveys, be allotted in severalty to each head of a family, or single person over the age of twenty-one years, in said band of Indians…said tracts to be exempt from levy, taxation, sale or forfeiture, until otherwise provided for by the legislature of the State in which they are situated with the assent of Congress; nor shall they be sold or alienated in fee, or be in any other manner disposed of except to the United States or to members of said bands.[17]

[16] Kaardal Decl. Ex. 3.
[17] *Id.,* Ex. 1.

And, as one U.S. Senator astutely declared, to annul or abrogate entire treaties would require the cessation of lands in the possession of the United States *back* to the Sioux and Dakota tribes, including the Band:

> It does not seem to me desirable to abrogate the treaties which do thus secure to the United States tracts of land, and that we can arrive at the same end, which we desire by forfeiting the annuities for cause stated in the preamble, and letting the treaties stand.

Congressional Globe, 37th Congress, 3rd Session, January 26, 1863, 515 (U.S. Senator Daniel Clark).

Section 9 of the February 1863 Act identifies an exception to Section 1 regarding the abrogation of lands and rights of occupancy within Minnesota:

Section 1	**Section 9**
"[T]reaties heretofore entered into by the …*Medawakanton (sic)*…*bands* of Sioux or Dakota Indians, or any of them, with the United States…."	"[S]et apart of the public lands, not otherwise appropriated, eighty acres in severalty ot each individual of the *before-mentioned bands* who exerted himself in rescuing the whites from the late massacre of said Indians…."
"are hereby abrogated and annulled, so far as said treaties or any of them purport to impose any future obligations on the United States, and all lands and rights of occupancy with the State of Minnesota…."	"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 (Emphasis added)

The Band members who assisted in the rescue of whites retained the right to remain in Minnesota *and* to land. Nothing in the February Act terminated the Band—and in fact, the Act specifically identifies the Band. Notably, the provisions of the February Act of 1863 did not require any tribal member to sever their tribal relations.[18] Like the Act of July 17, 1854, in which Congress recognized the Band and its mixed-blood members through the specific reference and reliance of the Prairie du Chien Treaty of 1830, by the Act of February 16, 1863, Congress incorporated similar land

[18] *Compare,* Section 9 to later Congressional Appropriation Acts of 1888, 1889, and 1890 that ultimately created certain Minnesota Communities *because* members *severed* tribal relations as demanded by the Acts.

grant eligibility found within the Treaty of 1858 to provide certain Mdewakanton tribal members lands within the state of Minnesota.

Regardless, there is no language in the February Act of 1863 that terminated or required termination of individual tribal member relationships with their tribe—here, the Mdewakanton Band. Hence, in 1863, there remained within the boundaries of Minnesota a Mdewakanton Band of Sioux in Minnesota.

While most members of the Band and other tribes were removed from the State of Minnesota from their existing reservations along the Minnesota River under the Act of March 3, 1863, as stated, certain members of the Band as identified in the Act of February 16, 1863 and those mixed-blood Band members on the Lake Pepin Reservation remained in Minnesota. By the language of the March Act's splitting of the members into different localities—in state and out-of-state—as two groups of the same tribe ("good" versus "bad"), there is no congressional language that terminated the Mdewakanton tribe.

Further, there is no language in the February Act of 1863 that affected the Band interests in the Lake Pepin Reservation lands created under a Congressional act. There is no language in the February Act of 1863 that repealed all provisions of the July 17, 1854 Act.[19] There is no language in the February Act of 1863 that terminated the Band as a tribe. The February Act of 1863 did not repeal the Act of July 17, 1854. In fact, by the statute's identification of the Band, the statute recognized and acknowledged the Band's continued existence.[20]

The February Act of 1863 further affirmed the existence of the Band, to be sure, limited in this instance by Congressional statutory recognition and acknowledgment to the "friendly heroic Sioux," which consisted of any individual "who exerted himself in rescuing the whites from the late

[19] *Compare* Kaardal Decl. Exs. 1 with 4.
[20] *Id.,* Ex. 4.

massacre of said Indians." The "friendly heroic Sioux," which included Thomas A. Robertson, did not violate Article 1 of the 1858 Treaty regarding the agreement to maintain peaceful relations with the United States. He supported the United States during the uprising. Through his actions, he remained peaceful toward the United States. He did not participate in the August 1862 uprising. He did participate as a messenger to quell the uprising. He did participate in the rescue of white settlers from the offending Sioux.

Notably, the February Act of 1863 identified a continuing obligation to this particular Band—an eligibility for 80 acres for each individual who exerted themselves in rescuing whites during the 1862 uprising as an inheritance and for "their heirs forever." The obligation of the United States is continuing since there is no evidence of Section 9 of the February Act as being repealed.

Additionally, the February Act of 1863 did not diminish, repeal, or amend the statutory effect of the Act of July 1854 to the Band and its mixed-blood members because the February Act of 1863 only abrogated "treaties," and only in part, while leaving statutes, such as the Act of July 1854, unrepealed.

C. Congress in the 1888, 1889, and 1890 Appropriation Acts required the severance of tribal member relationships with their tribe to obtain the benefits of the Acts.

Congress passed three Appropriations Acts to assist destitute Indians residing in Minnesota: Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29 ($20,000); Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93 ($12,000); and Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349 ($8,000). Although each of the Appropriations Acts used slightly different language, the operative provisions were largely similar regarding the tribal relations. The 1890 Act, for example, provided:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medewakanton (sic) band of Sioux Indians, *who ... have severed their tribal relations*….

(Emphasis added.)

These Congressional Acts required the severance of tribal relations to obtain access to and reside upon lands obtained with government funds. By the very requirement of the severance of tribal relations, Congress was acknowledging and recognizing tribal bands then existing, here, the Band. Since the Appropriation Acts of 1888, 1889, and 1890, no Congressional Act has reversed the severance of those members who severed their tribal relations. Notably, those are not the Petitioners, nor the Petitioners' lineal ancestors and descendants.

For instance, the groups who benefitted from the 19th century Appropriation Acts that created communities on lands acquired under the Acts under the Indian Reorganization Act, are now known in Minnesota as the Prairie Island Indian Community and its members (organized under the Indian Reorganization Act-1936), the Lower Sioux Indian Community and its members (organized under the Indian Reorganization Act-1936) and the Shakopee Mdewakanton Sioux Community and its members (organized under the Indian Reorganization Act in 1969). The communities and their members are entities that consist of non-tribal members who are subject to the congressional acts that required them to sever their relationship with the Band.

By the very language of the Appropriation Acts, Congress had recognized and acknowledged the Band by the stated proviso "heretofore belonging to the Medewakanton (sic) band of Sioux Indians, who ... have severed their tribal relations…" "Heretofore" means "up to now; before this time."[21]

In other words, having severed their tribal relations with the recognized and existing Band, Indians who had done so are no longer members of that Band. Congress has not passed an Act to reverse the consequence of the severance of those members from their former tribe.

[21] *Black's Law Dictionary* 745 (Bryan A. Garner ed., 8th ed. West 2004).

Notably, Section 9 of the Act of February 1863 is in stark contrast and unlike the Congressional Appropriation Acts of 1888, 1889, and 1890. As mentioned above, the Appropriation Acts required Band members to *sever* tribal relations as mandated by the Appropriation Acts to receive the benefits of those Acts. Section 9 of the 1863 Act did not. The lands acquired under the Appropriation Acts eventually led to the creation of three Dakota Sioux communities in Minnesota—two in 1934 and the third in 1969. Meanwhile, section 9 land eligibility is limited to Band members who have not severed tribal relations.

The following statements summarized a few key facts not addressed in the motion to dismiss memorandum:

- The Petitioners Terri Robertson-Torgerson and Ross Torgerson are not members of those "non-tribal" communities.
- None of their ancestors are community members.
- None of their lineal descendants are community members.
- None of them severed their tribal relations from the Band.

Hence, the underlying petition addresses a different group of Mdewakanton Sioux than those situated within the boundaries of the three Minnesota communities known as the Prairie Island Indian Community, the Lower Sioux Indian Community and the Shakopee Mdewakanton Sioux Community.

D. The Petitioners sought administrative relief; however, the Department refused to participate in the administrative process.

In 2014, the Band filed with the Department a petition for reaffirmation as a federally-recognized Indian tribe under previous Department regulations under 25 C.F.R. Part 83 (2014).[22] For over five years, the Department held onto the petition and never engaged the Petitioners regarding the elements of the petition and never acted. It refused to address the Petition. As such, it was a complete petition since no communication was received to suggest supplementation was requested or needed.

[22] Kaardal Decl. Ex. 17.

Notably, although the Department may have changed its regulations while in possession of the Mdewakanton petition, the Petitioners were never contacted or provided notice of any changed regulations nor whether those regulations affected their existing petition. Hence, the Department has refused to participate in its own processes. Regardless, the regulatory revisions abandoned the ability for any tribe to seek reaffirmation under Part 83.

Although the 2014 petition was not necessary since the Band is a Congressionally-recognized tribe, the petition was filed in an abundance of caution regarding any issues related to the exhaustion of administrative remedies. But, the Department refused to engage in the administrative process.

E. The Petitioners Terri Robertson-Torgerson and Ross Torgerson are descendants of Sioux Chief Wabasha I of the Mdewakanton Band of Sioux who have never severed their tribal relations with the Band.

The Petitioners Terri Robertson-Torgerson and Ross Torgerson are half-blood Indians and lineal descendants of Mdewakanton Sioux Chief Wabasha I. [23]Chief Wabasha I had a daughter Mar-pi-ya-ro-to-win, also known as Grey Cloud Woman I. She married James Aird (a fur-trader from Scotland). They had one daughter, Margaret (Mar-pi-ya-ro-to-win) also known as Grey Cloud Woman II. Margaret would marry a British army officer, Captain James Anderson, and had a daughter named Jane Anderson.

Margaret (Grey Cloud Woman II) would later separate from James Anderson and would marry Hazen Mooers (becoming Margaret Aird-Mooers.) Margaret's daughter Jane Anderson would marry Andrew Robertson.

As a historic note, sometime between 1837 and 1847, Andrew Robertson gave the name "Grey Cloud Island" to an island located in Washington County, Minnesota, within the Mississippi River, in

[23] *Id.,* Exs. 12–16.

honor of his mother-in-law, Margaret Aird-Moors (Grey Cloud Woman II). Grey Cloud Island was also the birthplace of Thomas A. Robertson.

Jane Robertson and Thomas A. Robertson would later appear on the Mixed Blood List of Mdewakanton.[24] At no time did Jane Robertson sever her tribal relations with the Band and there is no evidence to the contrary. At no time did Thomas A. Robertson sever his tribal relations with the Band. There is no evidence to the contrary. Jane Robertson's son Thomas A. Robertson would marry Nancy Santee. Nancy was a member of the Band, as was her husband Thomas recognized as a member of the Band. Jane and Thomas were "mixed-blood" Band members.

Petitioners Terri Robertson-Torgerson and Ross Torgerson are the great-granddaughter and the great-great-grandson of Thomas A. Robertson. Thomas A. Robertson, at great risk of his own life, rescued white settlers from death during the Minnesota Sioux Uprising of 1862.[25] Notably, Mdewakanton Thomas A. Robertson participated as an interpreter and was a signatory to the Sioux Treaty of 1858 on behalf of the Band. (Treaty with the Sioux (June 19, 1858), 12 Stat. 1031). Thomas A. Robertson was part of and traveled with the Band's treaty delegation to Washington, D.C.[26]

Jane Robertson and Thomas A. Robertson, as mixed-blood members of the Mdewakanton Band, were entitled to and did receive land in 1858 within the boundaries of the Lake Pepin Reservation in Minnesota created through the Treaty of Prairie du Chien of July 15, 1830.

By the Congressional Act of July 17, 1854, 10 Stat. 304, which specifically referenced the Lake Pepin Reservation, Congress had identified, acknowledged, and recognized the mixed-bloods of the Band—hence, recognizing the Band.

[24] *Id.,* Ex. 9.
[25] *See, id.* Ex. 11.
[26] *See, e.g.,* Ex. 10.

Jane Robertson, in accordance with the Act of 1854, would eventually receive scrip of up to 480 acres. With the scrip, Jane Roberson sold *some* of her acreage, but *not all* of her acreage found within the Lake Pepin Reservation.

F. Terri Robertson-Torgerson and Ross Torgerson are lineal descendants and half-blood Mdewakanton Band Indians who never severed their tribal relations.

Petitioners Terri Robertson-Torgerson and Ross Torgerson are current members of the Petitioner Mdewakanton Band of Sioux in Minnesota.

Terri Robertson-Torgerson's mother was Doris King LaFontaine, daughter of Louise Dugan King and Mathew King, Sr. Doris was ¾ or 75% Indian blood.[27]

Melvin Robertson, Sr. is Terri Robertson-Torgerson's father. Melvin's father was Charles Robertson and his mother was Jane Adams. Melvin is a lineal descendant of Mdewakanton Sioux Chief Wabasha I. Melvin Robertson, Sr., a half-blood member of the Mdewakanton Band, was born in 1914 on an Indian reservation where he lived his entire life.

Notably, Melvin Robertson, Sr. lived on an Indian reservation in 1934. He died in 1986. He never severed his tribal relations with the Mdewakanton Band. Melvin was 25/32 or 78% Indian blood.

Terri Robertson-Torgerson was born in 1964. Terri Robertson-Torgerson is a mixed-blood Indian of the Mdewakanton Band (half-blood). She has lived on an Indian reservation her entire life. She is 49/64 or 77% Indian blood.

Ross Torgerson was born in 1985 and is the son of Terri Robertson-Torgerson.[28] Ross Torgerson is a mixed-blood Indian of the Mdewakanton Band (half-blood). Ross is 135/256 or 53%

[27] *See e.g.,* Ex. 14.
[28] *Id.,* Ex. 15.

Indian blood. He has lived on an Indian reservation his entire life. He was adopted at the age of twelve by Terri Robertson-Torgerson's present husband Les Torgerson.

The child of Ross Torgerson was born in 2017.[29] The child is a mixed-blood Indian of the Mdewakanton Band. He has lived on an Indian reservation his entire life.

At no time did Petitioner Terri Robertson-Torgerson sever her tribal relations with the Mdewakanton Band. And, at no time did Petitioner Ross Torgerson sever his tribal relations with the Mdewakanton Band nor has his child.

Notably, the named individual Petitioners are direct Mdewakanton descendants of the individuals identified on the 1866 list. The list contained 36 names (as submitted to and approved by then Interior Commissioner Coley in June 1866).[30] Among the 36 names included Other Day, Taopi, Lorenzo Lawrence, and Paul Mazakutemane.[31] The list also included the name Thomas Robertson.[32] For the people on this list, the Department set land aside and paid compensation for their heroic efforts and participation to save white settlers during the Minnesota 1862 uprising. The people on the list did not sever their tribal relations. Receiving the compensation from the February 9, 1865 Act (Act of Feb. 9, 1865, ch. 29, 13 Stat. 427) did not require them to sever their tribal relations as compared to the Appropriation Acts of 1888, 1889 and 1890.

ARGUMENT

I. The List Act requires the Department to list a tribe, upon petition, without application of the Part 83 statutory criteria, when the Department has current treaty and statutory obligations which are specific to the petitioning tribe.

The Department's memorandum to dismiss fails to directly respond to the gravamen of the petition: the Department must list a tribe upon petition without application of the Part 83 statutory

[29] *Id.,* Ex. 16.
[30] *Id.,* Ex. 11.
[31] *Id.*
[32] *Id.*

criteria, when the Department has current treaty and statutory obligations which are specific to the petitioning tribe. Under the Federally Recognized Indian Tribe List Act of 1994, Public Law 103–454, 103d Congress, 108 Stat. 4791 (Nov. 2, 1994) (List Act), the term "'Indian tribe' means any Indian…tribe, band…that the Secretary of the Interior acknowledges to exist as an Indian tribe." Sec. 101. Under this text of the List Act, the Secretary must acknowledge the existence of an Indian tribe, and list the tribe, when the Secretary has current treaty and statutory obligations specific to the applicant tribe—here the Band. The Department's Part 83 procedures do not apply when Congress has recognized the tribe by imposing specific treaty and statutory obligations on the Department to the tribe.

This interpretation is reinforced by other text of the List Act. The List Act, under Section 103, also states that "[t]he Congress finds that—… (3)Indian tribes presently may be recognized by Act of Congress…." Further, under Section 103 (4) states that "a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress…." So, if Congress by treaty or statute has imposed obligations on the Secretary to a specific tribe, the List Act requires the Secretary to list the tribe regardless of the Department's Part 83 recognition process.

To be sure, the Department's Part 83 process may in other cases provide even unbridled discretion for the Department to recognize a new tribe even if it has no treaty or statutory obligations to it. However, in the case of the Secretary having treaty and statutory obligations to an applicant tribe, the List Act requires the Secretary to list the applicant tribe. In this case, the Secretary has refused to list the Band despite the Secretary's treaty and statutory obligations to the Band.

A. The List Act requires the Department to list the Band because the Department has treaty and statutory obligations to the Band.

"The canons of statutory interpretation require the court to consider first the text of the Acts and any binding authority interpreting the text. *See* 2A Norman J. Singer, *Sutherland Statutory Construction*

§ 46.01, at 113–129 (6th ed. 2000) (Singer); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980) ('[T]he starting point for interpreting a statute is the language of the statute itself.'). The second step of statutory construction, which is to be employed only in the case of ambiguity in the text of the statute and in the absence of binding interpretive authority, is to consider whether guidance is afforded by relevant legislative history. *See* 2A Singer, *supra,* § 48.01 at 411–415. *Shoshone Indian Tribe of Wind River Reservation, Wyoming v. U.S.*, 51 Fed. Cl. 60, 63 (Fed. Cl. 2001), *aff'd sub nom. Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339 (Fed. Cir. 2004).

Lawful treaties made and ratified with any Indian nation or tribe prior to March 3, 1871 cannot be invalidated or impaired. 25 U.S. Code § 71, governing future treaties with Indian Tribes, mandates that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired…."

Six months after the 1862 uprising, through the Act of February 16, 1863, Congress annulled only part of the United States treaties with the Sioux tribes as described above. In fact, the marginal notes of the Act states that "Treaties with certain Sioux Indians [are] *annulled in part."* (Emphasis added).[33]

Under the February Act of 1863, Congress abrogated and annulled only future obligations of the United States to the affected tribes, including forfeitures of lands and occupancy, but did not reach

[33] We are not suggesting that marginal notes are definitive or controlling to the principles of statutory interpretation. However, if there is an ambiguity of the Act's provisions the marginal notes may give a hint toward Congress' intent. *See e.g., Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 730 (1989) ("[M]arginal notes to §§ 629(16) and 563(12), which appeared in the completed version of the Revised Statutes themselves [published in 1872], provide some clues as to Congress' intent in adopting the change [to the other remedial provisions of present day § 1983."])

back to obliterate treaty obligations of the tribes to the United States or cessation of lands in the possession of the United States by those treaties back to the affected tribes:

> [A]ll treaties heretofore made...by the Sisseton, Wahpeton, Mdewakanton, and Wahpokoota bands...with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy...and all annuities...forfeited to the United States.

By the language of the text of the Act itself, Congress identifies that the provisions of treaties entered into before 1863 were abrogated and annulled—so far as the treaties imposed *future* obligations on the United States. However, the language *did not* abrogate or annul Indian obligations to the United States. For instance, under the Treaty of June 19, 1858, 12 Stat. 1031, the Band pledged their dependence "on" the United States government *and* to bind themselves to friendly relations to U.S. citizens.[34] Hence, while the United States ended its future obligations, Band members did not and could not because of the treaty's text. In short, the Act did not annul or abrogate the Mdewakanton tribe's agreement to dependence on the United States or the tribe's obligations to U.S. citizens. And, to repeat, full annulment and abrogation of the treaties would have required the United States to return lands acquired by treaty.

Moreover, under Section 9 of the Act, the United States made an exception to Section 1 and obligated itself to the remaining Band and its members "who exerted himself in rescuing the whites from the late massacre of said Indians." In the Section 9 exception, these Band members were to receive certain lands:

> "set apart of the public lands...eighty acres in severalty…forever."

It must be stated so that there is no doubt about the underlying Petition: this action is *not* about any claim to land. This case is only about the issues as presented: that the Band is an existing

[34] Kaardal Decl., Ex. 3.

recognized tribe that was omitted from the List Act and must be listed as a matter of law. But, the language of the February Act of 1863 reveals that the Department has a continuing legal obligation to the Band as the underlying Petition reveals.[35] Moreover, this Band is different than those who had later severed their tribal relations to receive the benefits attributed to the Appropriation Acts of 1888, 1889, and 1890 and identified as Sioux communities located on lands provided under those Acts. Those community members are different than the Petitioners.

Further, the point of discussing Section 1 and identifying the exception of Section 9 to Section 1 of the February Act of 1863, is to show how the language of the Act did not nullify all of the provisions of existing treaties. To annul or abrogate all provisions of previous treaties would disavow tribal obligations to the United States. Further, the language of Section 9 identifies a continuing jurisdiction of the United States to the Band as it does so under the March 1863 Act wherein all other members of that Band were to be removed from Minnesota.[36]

Under the Federally Recognized Indian Tribe List Act of 1994, Public Law 103–454, 103d Congress, 108 Stat. 4791 (Nov. 2, 1994), the term "'Indian tribe' means any Indian…tribe, band…that the Secretary of the Interior acknowledges to exist as an Indian tribe." Sec. 101. The List Act, under Section 103, also states that "[t]he Congress finds that—… (3)Indian tribes presently may be recognized by Act of Congress…." Further, under Section 103 (4) states that "a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress…."

Nothing in the language of the statute indicates that it is removing from Congress and the courts their ability to recognize tribes; instead, the statute merely gives the Secretary the power to publish a list of such recognized tribes which must include Congressionally-recognized tribes. As such, several courts have indicated that a decision of a United States court can result in federal recognition

[35] *Id.*, Ex. 1.
[36] *Id., compare* Exs. 1 and 2.

of a tribe. *See Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1076 (10th Cir. 2004); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547-48 (10th Cir. 2001).

B. The Indian Reorganization Act (IRA)

The Indian Reorganization Act (IRA), 25 U.S.C. §§ 5101 *et seq.*, adopted in 1934, sought to change "a century of oppression and paternalism" in the relationship of the United States and its native Indian tribes. *See* H.R. Rep. No. 73-1804, at 6 (1934). Its purpose was to create the mechanisms whereby tribal governments could be reorganized and tribal corporate structures could be developed. *See* 25 U.S.C. §§ 5123 and 5124. The Secretary's authority under the IRA is cabined by whether a tribe meets the statute's definition of "Indian," found in Section 19 of the statute and codified at 25 U.S.C. § 5129:

> The term "Indian" as used in this Act shall include all persons of Indian descent [1] who are members of any recognized Indian tribe now under Federal jurisdiction and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.

25 U.S.C. § 5129.

First, the Petitioner Terri Robertson-Torgerson's father, Melvin Robertson, a lineal descendant of Mdewakanton Chief Wabasha I, never severed his tribal relationships from the Band and lived on an Indian reservation in 1934. Section 5129 specifically states "any Indian reservation" and hence, his residence in 1934 did not require "residing" on a defined Mdewakanton reservation. Melvin was also 25/32 or 78% Indian blood —over half Indian blood. Likewise, Terri, as Melvin's daughter and, hence, a lineal descendant, is 49/64 or 77% Indian blood.

Under clauses [2] and [3], Terri Robertson-Torgerson is an Indian under § 5129 of the IRA. The same is true for Petitioner Ross Torgerson, Terri's son, who is 135/256 or 53% Indian blood. They are also members of the Band who have never severed their tribal relations. As Indian tribal

members of the Band, they have a right to demand the Department to have their Band listed under the List Act.

Notably, unlike other Mdewakanton descendants who did sever tribal relations as mandated under the 1888, 1889 and 1890 Appropriation Acts and, under the IRA were allowed to form Indian "communities," the Petitioners come from the group of Mdewakanton descendants who have not severed their tribal relations. Despite the three Minnesota Indian communities being listed under the List Act, they are not "tribes" per se, but have the same authority as if they were tribes. Regardless, they are *not* the same group as the Petitioner Band. The acute distinction is that the Petitioners are those who had not severed tribal relations. Hence, the Petitioners Terri Robertson-Torgerson and Ross Torgerson are "Indians" under § 5129 of the IRA and the Band should be recognized.

As for § 5129, clause [1], regarding persons of lineal descent and "members of any recognized Indian tribe now under federal jurisdiction," the U.S. Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379, 381-82 (2009) analyzed the first of the definitions of "Indian" and held that the word "now" in the phrase "now under federal jurisdiction" referred to 1934 when the IRA passed. *Id.* at 382–83.

As previously outlined, the Band had entered into treaties with the United States, and although portions of the treaties were abrogated or annulled by the Act of February 1863, other provisions remained in effect. Thus, the Department may have believed it did not have federal jurisdiction over the Band in 1934, but the Department actually did. As stated, the Department had continuing treaty and statutory obligations for the Band.

Under the June 19, 1958 Treaty, for instance, the Band pledged "their dependence on the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof…." The United States accepted their dependence since this part of the 1858 treaty was not abrogated or annulled under the February Act of 1863, § 9. Thus, there remains a mutual "dependent" obligation between the parties. Granted, the word "dependence" is not defined

in the treaty, but it is nevertheless an obligation of the United States government to the Band under the February Act of 1863.

Whether the Department understood it or not, the Band remained under federal jurisdiction in 1934, as it members agreed to "acknowledge their dependence on the Government of the United States… and … pledge and bind themselves to preserve friendly relations with the citizens thereof…." June 19, 1858 Treaty with the Sioux. The evidence of a continuing obligation to the Band as eligible for land remains as expressed under the February Act of 1863, §9. Whether land was provided is not relevant. *The federal jurisdiction existed prior to 1934 and continues today.*

Notably, there is no evidence that the Band was terminated as a tribe by an Act of Congress. *See, e.g.,* Menominee Termination Act of 1954, Pub.L. No. 399, ch. 303, 68 Stat. 250, as amended, 25 U.S.C. ss 891-902 (1970).[37] It does not matter whether the United States met its reciprocal obligations, which would not be shocking. What does matter is the continuing existence of the government-to-government relationship between the entities as evidenced by the treaties and acts of Congress regarding the Band being the Band members who did not sever their tribal relations.

Under 25 U.S.C. § 5121, "nothing in this [Indian Reorganization] Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States." Under the Indian Reorganization Act, 25 U.S.C. § 5130 (2), "the term 'list' means the list of recognized tribes published

[37] In *Menominee Tribe of Indians v. U. S.,* 607 F.2d 1335, 1337 (Ct. Cl. 1979), the court describes how the Menominee Tribe was terminated: "Under the Treaty of Wolf River in 1854, 10 Stat. 1064, the Menominee Tribe received and occupied for over a century a reservation in Wisconsin. In 1953 Congress by concurrent resolution (H.Con.Res. 108, 67 Stat. B132) directed the Secretary of the Interior to recommend legislation for withdrawing federal supervision over certain American Indian tribes, including the Menominees. A year or so later, the Congress passed the Menominee Termination Act of 1954, amending it in 1956 (Pub.L. No. 715, ch. 601, Pub.L. No. 718, ch. 604, 70 Stat. 544, 549), 1958 (Pub.L. No. 85-488, 72 Stat. 290), and 1960 (Pub.L. No. 86-733, 74 Stat. 867). Actual termination came about on April 30, 1961. As summarized by the Supreme Court, 391 U.S. at 408-10, 88 S.Ct. at 1708, the purpose of the Termination Act was by its terms "to provide for orderly termination of Federal supervision over the property and members" of the tribe."

by the Secretary pursuant to section 5131 of this title." Under 25 U.S.C. § 5131(a), the Secretary is to publish "a list of all Indian tribes which the Secretary *recognizes* to be eligible for special programs and services provided by the United States to Indians because of their status as Indians." (Emphasis added.)

The Band has an indisputably right to be listed as a Congressionally-recognized tribe. Any Department 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."

Thus, Part 83 review by the Department is not possible because the Band is already Congressionally-recognized. Congressional statutes lack a statutory procedure to list Congressionally-recognized tribes omitted from the Department's annual list of recognized Indian tribes. The Department is expected to list them all and then correct its own omissions. Further, the Department's current rules lack an administrative procedure to list Congressionally-recognized tribes omitted from the list.

The Department's annual error of omitting the Band is ministerial. By the acts of Congress in 1854, 1863, and 1865, Congress codified its recognition and acknowledgement of the Band. Under the Federally Recognized Indian Tribe List Act of 1994, the Secretary has no discretion regarding the listing of the Band as a federally-recognized tribe because the Band is "presently recognized by an Act of Congress"—actually multiple Acts of Congress. These multiple treaties and Acts of Congress create legal duties on the Secretary to the Band which includes but is not limited to listing the Band under the List Act. Without the listing of the Band, the published list is not complete as required under the Federally Recognized Indian Tribe List Act of 1994, Section 103(6). Without the listing of the Band, the published list does not include all recognized Indian tribes eligible for "special programs and services provided by the United States to Indians because of their status as Indians" as required under the Federally Recognized Indian Tribe List Act of 1994, Section 104(a).

The Appropriation Acts of 1888, 1889, and 1890 were directed to different Mdewakanton Sioux who had resided in Minnesota since May 20, 1886, *and who severed their relations* with their tribe. The Appropriation Acts of 1888, 1889, 1890, that required Indians to sever tribal relations, is a termination act for those Indians who have done so to acquire the benefits bestowed upon them by the terms of those Acts.

The Appropriation Acts of 1888, 1889, and 1890 were not directed toward the Mdewakanton Sioux who rescued white settlers during the Minnesota 1862 Indian uprising who did not sever their tribal relations. This group and its tribal status, its treaty rights, and its statutory rights have been confirmed and codified in the earlier treaties (which were only partially abrogated by Congress in the February Act of 1863) and in the Acts of 1854, 1863, and 1865 (which have not been repealed).

The Petitioners Terri Robertson-Torgerson and Ross Torgerson and their ancestors who were members of the Band did not sever their tribal relations and were never terminated by an act of Congress. Because members of the Band did not sever their tribal relations, the Band is not a splinter group of any other Indian group or community of Indians that derived their existence from the Appropriation Acts of 1888, 1889 and 1890.

Further, the Act of 1854 established the Lake Pepin Reservation for members of the Band. The Act of 1854 established the Lake Pepin Reservation for members of the Band who were also of mixed-blood. The Act of 1854 confirmed that the Band was under the federal jurisdiction of the United States. The February Act of 1863 did recognize a specific group of "friendly heroic Sioux" within the Band resulting in the setting aside 12 sections of Minnesota lands for them. The Department did set aside 12 sections of Minnesota lands for the friendly heroic Sioux in 1865 as congressionally authorized under the February Act of 1863. The February Act of 1863 confirmed that the Band continued to be under the federal jurisdiction of the United States. The March Act of 1863

and Act of 1865 confirmed that the Band continued to be under the federal jurisdiction of the United States.

The Acts of February 1863 and March 1863 did not terminate the Band. The Acts of February 1863 and March 1863 did not repeal the federal recognition of the Band. The February Act of 1863 did not repeal the 1854 Act of Congress. The March Act of 1863 did not repeal the 1854 Act of Congress. Hence, Congress has continually recognized this tribe—as must the Department.

No intervening act of Congress terminated or repealed the Band to revoke its recognition as a tribe. No act of Congress has repealed the recognition and acknowledgement of the Band as a federally-recognized Indian tribe. No act of Congress has terminated the Band as an Indian tribe. No act of Congress has repealed the Department's treaty and statutory obligations to the Band.

Because of the previous Congressionally-codified recognition of the Band, such as the Act of 1854, and no subsequent intervening act terminating the tribe, the Band was an Indian tribe under federal jurisdiction in 1934. The Band, as a federally recognized tribe by Acts of Congress, has a clear and indisputable right to be listed as a federally recognized tribe under the List Act.

In 2014, the Band and Terri Robertson-Torgerson and Ross Torgerson filed a petition for reaffirmation with the Department under the then existing administrative rules. Although not a necessary action, the Petitioners took the step demonstrating an abundance of caution. Nevertheless, after over five years of the administrative process, the Department failed to render a decision, although it had opportunity to do so.

The Department also revised rules governing the administrative process under Part 83 of the Code of Federal Regulations. Under the revised Rules, the Band, and its members, Terri Robertson-Torgerson, Ross Torgerson, and his child, are expressly precluded from any administrative process, because the Band *is a federally recognized Indian tribe* as described throughout the instant petition.

The Department failed to list the Band under 25 U.S.C. § 5131(a) even though it was legally required to do so. The Department failed to list the Band under 25 U.S.C. § 5131(a) since the 2014 filing of the petition and has failed continuously to list the Petitioner as a federally recognized tribe each year of the lists' publication, including but not limited to 2014, 2015, 2016, 2017, 2018 and 2019.

The failure to place the Band on the list of federally-recognized tribes under 25 U.S.C. § 5131(a) has caused harm. The failure to place the Band on the list of federally recognized tribes under 25 U.S.C. § 5131(a) is a violation of the law, specifically the Department's legal duty to recognize the Band by placing it on the list of federally-recognized tribes and treat it, accordingly, as a federally-recognized Indian tribe.

The Department's failure to list the Band under 25 U.S.C. § 5131(a) is a violation of the Department's legal duty to the Band; thus, its decision not to do so is arbitrary, capricious, abuse of discretion, and not in accordance with the law, under 5 U.S.C. § 706(2)(A) and in excess the Department's statutory jurisdiction under 5 U.S.C. § 706(2)(C).

Because Part 83 (§ 83.3) of the Department's regulations "applies only to indigenous entities that are *not* federally recognized Indian tribes," administrative review by the Department is not possible. (Emphasis added.)

The Band is entitled to an immediate writ of mandamus to direct the Department through the Secretary and the Assistant Secretary of Indian Affairs, the named parties, or their respective successors, to list the Band as a federally recognized Indian tribe under 25 U.S.C. § 5131(a).

II. The 28 U.S.C. § 2401(a) statute of limitations is a non-jurisdictional affirmative defense as applied to APA claims and does not bar petitioners' claims.

The Department's memorandum claim that 28 U.S.C. § 2401(a) is jurisdictional as to Administrative Procedures Act (APA) claims and bars petitioners' claims is misplaced.[38] Instead, 28

[38] Interior Memo. 9–13.

U.S.C. § 2401(a) is a non-jurisdictional affirmative defense under the APA and does not bar petitioners' claims.

A. The 28 U.S.C. § 2401(a) statute of limitations is a non-jurisdictional affirmative defense as applied to APA claims.

First, the Department has not placed its argument in the context of the Petition before this Court. The Department fails to acknowledge that the initial list of recognized tribes in 1979 was not definitive. In fact, as the Department must admit, the list is fluid as Congress meant it to be, with annual updates.

Second, the Department must also admit that tribes are added without regard to statute of limitations; otherwise all applications submitted by tribes after 1985 would have been summarily dismissed and no subsequent amendments to the list would occur. Yet, new tribes are regularly added.

Meanwhile, the Department's statute of limitations claim is based on 28 U.S.C. § 2401(a) which states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." But, 28 U.S.C. § 2401(a) is a *generally applicable statute, not specific to APA claims*. A recent U.S. Supreme Court case has ruled that the statute of limitations in 28 U.S.C. § 2401(b) applicable to Federal Tort Claims Act suits, is not jurisdictional, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015). The D.C. Circuit has yet to apply the analysis of *Wong* to the limitations provision of 28 U.S.C. § 2401(a); but, it should.[39] Under the *Wong* analysis, 28 U.S.C. § 2401(a), similar to 28 U.S.C. § 2401(b), is not jurisdictional. Instead, it is a non-jurisdictional affirmative defense.

By way of comparison, the U.S. Supreme Court in *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130 (2008) resolved that Tucker Act claims under 28 U.S.C. § 2501 were jurisdictional only because it

[39] *In re Navy Chaplaincy*, 2016 U.S. Dist. LEXIS 15294, at *8 (D.D.C. Feb. 9, 2016).

was a precondition on the government's waiver of sovereign immunity for Tucker Act claims in the U.S. Court of Federal Claims. Under 28 U.S.C. § 2501, the court's "jurisdiction" is limited:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

The same limitation found under § 2501 cannot be said to be found under 28 U.S.C. § 2401(a):

> [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

Unlike 28 U.S.C. § 2501, the limitations period of section 2401(a) does not refer to the district court's jurisdiction nor any particular claims against the United States. Instead, section 2401(a), like section 2401(b), is a "run-of-the-mill statute of limitations."[40] Section 2401(a) is not a precondition on the waiver of sovereign immunity. Section 2401(a) is a non-jurisdictional affirmative defense. If Congress had intended the APA to have a jurisdictional statute of limitations, Congress would have included a statute of limitations within the APA as it did for Tucker Act claims brought in the U.S. Court of Federal Claims in 28 U.S.C. § 2501.

Finally, APA claims are different than Tucker Act and Federal Tort Claims Act claims in one important respect. Tucker Act and Federal Tort Act claims are generally about money. Whereas, APA claims are limited to only prospective and injunctive relief. APA claims do not threaten the U.S. Treasury like Tucker Act and Federal Tort Act claims do. So, as to the APA, Congress never intended Section 2401(a) to be a jurisdictional statute of limitations for the purpose of jurisdictionally limiting APA claims.

[40] *Wong,* 135 S. Ct. at 1633.

B. The Department's statute of limitations argument under 28 U.S.C. § 2401(a) fails because termination of the Department's treaty and statutory obligations to the Band must be by Congress's "plain and unambiguous" action—yet the Department makes no argument of tribal termination.

The Department has not argued that the United States has no continuing obligation to the Petitioner Band. The Department presents no Congressional action against the Band that is a "plain and unambiguous." The Department fails to identify (1) when the Department ended its treaty and statutory obligations to Band; (2) what statutory authority it had to do so; and (3) any Congressional acts terminating the tribe.

In fact, the termination of federal agency responsibility for an acknowledged Indian tribe requires Congress to take "plain and unambiguous" action evidencing Congress's clear and unequivocal intention to terminate its relationship with the tribe.[41] The Department points to no statute which terminates the Band. So, the Department commits legal error by not recognizing the Band consistent with the record before this Court.

There is nothing in any current Department regulation that requires the Band — as an existing acknowledged and recognized tribe since the early 1800's—to re-establish its existence as a tribe. The Department rules lack an administrative procedure to list existing Congressionally-recognized tribes which have been omitted. Any 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).

Moreover, no Department regulation requires an existing Congressionally-recognized tribe to become a "recognized" tribe. The so-called "recognition" merely means that a recognized tribe would be entitled to other federal benefits under generally-applicable law. It does not mean that failure to

[41] *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941); *United States v. Nice,* 241 U.S. 591, 599 (1916). *See also Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-413 (1968); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

become a "recognized tribe" terminates the existence of an existing Congressionally-recognized tribe. Under the facts of this case, the Department refused the reaffirmation petition, failing to participate in its own processes in 2014. By doing so, the Department simply refused to concede the Band as Congressionally-recognized when it is.

Hence, the Band's claim as a Congressionally-recognized tribe is not subject to dismissal under Rule 12(b)(6). Moreover, the reason that the Band's claim is timely is because all of the treaties and statutes that the Band relies upon are unrepealed and have current legal effect. And with the Department's continual annual amendments to the List, knowing the Band was recognized and omitting it from the List, the Band's 2014 administrative filing cannot be deemed untimely.

Nothing previous to 2014 would have triggered the statute of limitations. The Department has never given notice of termination to the Band because the Department does not have the power to terminate an existing Congressionally-recognized tribe. Only Congress has the power to terminate a tribe.

The Department's failure to put the Band on the list does not terminate the Band. Nor can the Federal Defendants' application of 28 U.S.C. § 2401(a) statute of limitations terminate the band.

Any reliance on the Federal Circuit opinion in *Wolfchild v. United States*, 731 F.3d at 1290–91 is misplaced. There, the Federal Circuit was applying the jurisdictional six-year statute of limitations applicable to the U.S. Court of Federal Claims, 28 U.S.C. § 2501, not the general statute of limitations found at 28 U.S.C. § 2401(a). The former is jurisdictional; the latter is not jurisdictional. Further, the Federal Circuit was not adjudicating whether the Department had failed in 2014 to place the Band on the list. Prior to 2014, the Department never gave notice of termination of the Band because the Department does not have the power to terminate a tribe and Congress has never terminated the tribe.

The Department cites to the principle that "[A] cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured."[42] Yet, the record reveals that the Band is currently recognized by several current treaties and statutes. And because Congress alone can terminate a recognized tribe, the Department stands on inadequate legal authority to give any notice of termination to the Band.

The Department's argument that omitting the Band from the 1979 published list is "notice" is without merit. The Department asserts that "Plaintiffs' claims thus accrued in 1979, when it was plain that the Department did not consider the Band to be a federally recognized tribe."[43] But, is that plain? Where are the Department's regulatory actions and documents determining that the Federal Defendants "did not consider" the Band "to be a federally recognized tribe" or "considered the tribe terminated by Congress"? Where is the Federal Register notice of termination to the Band and its members? There are none. Moreover, the List was not definitive; it was then and remains now, fluid.

The omission of the Band on the Department's list could have been legal error as much as it was that the Department did not consider the Band as a federally-recognized tribe. Further, the Act requires that the Department issue the list annually. So, there is nothing particular about the 1979 list. Each annual list is to include all the federally-recognized tribes. Every year the Department amends, supplements and modifies the list. The Department has never presented any single annual published list as definitive. The Department admits, as it must, that it is a process. Additionally, the 1979 and subsequent lists include only recognized tribes receiving federal benefits, not acknowledged tribes who have not applied for recognition for those federal benefits. So, the Band was not on the list of

[42] *Sprint Commc'ns Co., L.P. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) (citations omitted). Interior Memo. 11.
[43] Interior Memo. 11.

recognized tribes, prior to now, because the Band had never petitioned to be. But, although not necessary, in 2014, the Band petitioned the Department for reaffirmation to be on the list.

Finally, the statute of limitations period would not be triggered by the 1979 list publication because the Band's treaties and statutes are unrepealed laws with current effect. So, the actual effect of the judicial implementation of the Federal Defendant's 28 U.S.C. § 2401(a) statute of limitations argument against the Band's claim would result in an unconstitutional violation of Congress' Article I legislative prerogative to terminate Indian tribes.

C. An argument similar to the Federal Defendants' argument that the six-year statute of limitations period of 28 U.S.C. § 2401(a) runs from the 1979 list publication was rejected by the District Court in the 2017 Mdewakanton case.

The Federal Defendants' memorandum at pages 11 through 12 attempts a statute of limitations argument based on the 1979 list publication which was rejected in a similar case titled *Mdewakanton Sioux Indians of Minnesota v. Zinke*, 264 F.Supp.3d 116, 131 (D.D.C. 2017). That case involved Prairie Island Indian Community members (so not members of the Band) claiming that the Department violated its statutory duty of consultation to them as tribal members. The United States District Court for the District of Columbia stated:

> Defendants also argue that the statute of limitations would have begun to run in 1979, when the list of federally recognized tribes was first published, because Plaintiffs were then on notice that the Department did not recognize them. Defs.' MTD at 12 n.13. However, the Court lacks adequate information in the record to reach this question squarely. Defendants have not presented evidence demonstrating that inclusion on the list of federally recognized tribes is congruent with a tribe's right to be consulted. Nor have Defendants shown that Plaintiffs were ever informed that their requests for consultation—whether the 2016 request or other requests—were denied because they did not appear on the list of federally recognized tribes. In the absence of evidence on these points, the Court declines to dismiss Plaintiffs' claims on statute of limitations grounds.

Id. at 131-32.

Similarly, in this case, the Federal Defendants have failed to provide adequate information in the record to reach the matter squarely:

- Federal Defendants have not presented evidence demonstrating that exclusion on the list of federally recognized tribes is congruent with the ending of the Department's treaty and statutory obligations to the Band.
- Federal Defendants have not shown that petitioners were ever informed that their requests for recognition were denied because they did not appear on the list of federally-recognized tribes.

Nonetheless, the Federal Defendants claim that any tribe left off the 1979 list is barred from being on the list if their lawsuit was not brought by 1985.

So, the Department essentially claims a position that its decision to list a Congressionally-recognized tribe as a federally-recognized tribe determines whether the Department has any treaty and statutory obligations to the tribe. What a convenient position to be in! If the Department is violating its treaty and statutory obligations to a Congressionally-recognized tribe, then the Department doesn't list them as a federally-recognized tribe; then, according to the Department, there aren't any more treaty and statutory obligations to the tribe. But, prior to this matter, the Department has never taken this extreme position in any of its administrative proceedings. Nor has any court in any published decision adopted the Department's extreme position.

The statute of limitations does not run from the 1979 published list as the Federal Defendants argue; instead, in this case, the statute of limitations runs from when the Federal Defendants rejected the petitioners' 2014 petition for reaffirmation. In 2014, the Band, Terri Robertson-Torgerson, and Ross Torgerson filed with the Department a petition for reaffirmation as a federally recognized and acknowledged Indian tribe under previous Department regulations under 25 C.F.R. Part 83 (2014). For over five years, the Department held onto their petition and never engaged the Petitioners regarding the elements of the petition and never responded. The Department refused to address the petition. As such, it was a complete petition since no communication was received to suggest supplementation was requested or needed.

Notably, although the Department may have changed its regulations while in possession of the Band's petition, the petitioners were never contacted or provided notice of any changed regulations nor whether those regulations affected the existing petition. Hence, the Department has refused to participate in its own processes. Regardless, the subsequent regulatory revisions abandoned the ability for any tribe to seek reaffirmation under Part 83.

These are not the circumstances under which a motion to dismiss would be granted based on a "run-of-the-mill statute of limitations" affirmative defense.

III. Dismissal based on the failure to exhaust administrative remedies should not occur.

The Department claims that the petition should be dismissed for failure to exhaust administrative remedies.[44] The Department's arguments are unpersuasive. First, the petitioners in 2014 filed with the Department their petition for reaffirmation. So, the Department has had more than five years to make its decision; and, it refused to do so. The Department should not benefit from its own neglect. Second, the subsequent rule change, eliminating the reaffirmation petition process which the petitioners applied for, renders the Department's administrative remedies for Congressionally-recognized tribes to be legally inadequate and futile.

A. The Department's administrative delay of five years, under the circumstances, amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review.

In this case, the Department has had a petition from the Petitioners since 2014. But, as previously explained, the Department refused to engage in its own regulatory process whether or not necessary for the Congressionally-recognized Band. Hence, this Court has primary jurisdiction over the claims and demands for relief expressed in the underlying Writ of Mandamus. The wait of over five years is extraordinary. Here, when the administrative agency has refused to engage in any

[44] Interior Memo. 14–17.

established regulatory scheme—here—since 2014, the only recourse is the court. The D.C. Circuit has stated:

> Courts are certainly not without power to address the interests of a regulatory beneficiary (properly before the court) when unwarranted agency delay prejudices those interests. 'At some point administrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review.' *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093, 1100 (D.C.Cir.1970). In these situations—when delay is extremely lengthy or when 'exigent circumstances render it equivalent to a final denial of petitioners' request," *id.* at 1098—the court can undertake review as though the agency had denied the requested relief and can order an agency to either act or provide a reasoned explanation for its failure to act. When agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates. *Adams v. Richardson,* 480 F.2d 1159 (D.C.Cir.1973) *(en banc) (per curiam); Environmental Defense Fund, Inc. v. Ruckelshaus,* 439 F.2d 584, 594–595 (D.C.Cir.1971).

Pub. Citizen Health Research Group v. Commr., Food & Drug Admin., 740 F.2d 21, 32 (D.C. Cir. 1984).

Moreover, there is no need for this Court to evaluate the pace of the agency's decisional process. Five years is unreasonable on its face.[45] As the *Potomac Electric Power Co. v. ICC,* 702 F.2d 1026, 1034 (D.C.Cir.1983) court put it, "[T]here must be a 'rule of reason' to govern the time limit to administrative proceedings. Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision-making into future plans." 702 F.2d at 1034. *See Nader v. FCC,* 520 F.2d 182, 207 (D.C.Cir. 1975). "In sum, the law does provide means by which the interests of regulatory beneficiaries can be protected from the adverse effects of delays in agency action." *Id.*

[45] "And even when agency delay or recalcitrance does not rise to a level that justifies either of the above courses, APA empowers the court to evaluate the pace of the agency decisional process and to order expedition if the pace lags unreasonably. Section 555(b) of APA requires an agency to "proceed to conclude a matter presented to it" within "a reasonable time," 5 U.S.C. § 555(b), and Section 706(1) explicitly authorizes a court to "compel agency action * * * unreasonably delayed." *Id.* § 706(1). These provisions give courts authority to review ongoing agency proceedings to ensure that they resolve the questions in issue within a reasonable time. *Public Citizen Health Research Group v. Auchter,* 702 F.2d 1150, 1158 (D.C.Cir.1983); *Potomac Electric Power Co,* 702 F.2d at 1034; *MCI Telecommunications Corp. v. FCC,* 627 F.2d 322, 340 (D.C.Cir.1980).

Notably, under the List Act, under Section 103(6), "the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes..." and under 103(7) that the "list published by the Secretary should be accurate, regularly updated, and regularly published." The tribal list of the Secretary is published annually on or before January 30 of every calendar year.

The Secretary's 2019 tribal list does not include the Band as a federally-recognized tribe. The Secretary's exclusion or omission of the Band means that the list is not complete as required by law.

B. The Band has satisfied the exhaustion of administrative remedies requirement.

The petitioners agree with the Federal Defendants that administrative exhaustion serves three functions: giving agencies the opportunity to correct their own errors, affording parties and the courts the benefits of the agency's expertise, and compiling a record adequate for judicial review. *Avocados Plus, Inc. v. Veneman,* 370 F.3d 1243, 1247 (D.C. Cir. 2004)(citations omitted). However, in this case, the Department has had over five years to perform its administrative functions, but refuses to do so. The Department's persistent negligence has led to the situation it is in; the Department should not benefit from its own neglect.

The petitioners' administrative proceedings satisfy the doctrine of exhaustion of administrative remedies. In 2014, the Band, Terri Robertson-Torgerson, and Ross Torgerson filed with the Assistant Secretary of Indian Affairs, the Department's final decision-maker, a petition for reaffirmation as a federally-recognized Indian tribe. At the time, this summary approval procedure was outside the Part 83 process and had been successfully used for the Ione Band of Miwok, the Lower Lake Racheria of California and Tejon tribe. *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 214, 218 n. 9 (D.C. Cir. 2013). But, the Muwekma Ohlone Tribe unsuccessfully brought an Equal Protection claim that they were denied the summary approval procedure. Later, the Department eliminated the reaffirmation process.

Nonetheless, for over five years, the Department held onto the reaffirmation petition and never engaged the Petitioners regarding the elements of the petition and never responded. While the petition for reaffirmation was pending, the Department changed its regulations while in possession of the Mdewakanton petition. The subsequent regulatory revisions eliminated the reaffirmation petition process for tribes under Part 83. Thus, it also eliminated any right of administrative appeal. After eliminating the reaffirmation petition process, the Department's rules lack an administrative procedure to list Congressionally-recognized tribes which have been omitted. Any current administrative process is inapplicable under Part 83, because 25 C.F.R. § 83.3 applies "only to indigenous entities that are *not* federally recognized Indian tribes." (Emphasis added). Here, the Petitioners have satisfied the requirements for exhausting administrative remedies.

C. The Department's administrative remedies for Congressionally-recognized tribes are legally inadequate and futile.

The Band is not required to exhaust further administrative procedures because the Department's identified administrative procedures are legally inadequate and futile. In 2014, when the petitioners filed their reaffirmation petition, the Department had a process for Congressionally-recognized tribes to petition for recognition under Part 83. But, while the petitioners' reaffirmation petition was pending, the Department eliminated the reaffirmation petition process. After eliminating the reaffirmation petition process, the Department's rules lack an administrative procedure to list federally-acknowledged tribes which have been omitted. Any 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). So, the administrative remedies for the Band are legally inadequate and futile.

The Federal Defendants assert that the Band, even though previously recognized by treaties and statutes and not terminated by Congress, must still apply for the Department's recognition

regulations under Part 83. But, the remedies of Part 83 are legally inadequate to support the Department withholding listing from the Band since the Band is Congressionally-recognized.

The U.S. Supreme Court has recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. All three factors weigh in favor of not requiring the Band to engage in more administrative procedures. First, the Supreme Court has recognized that requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action.[46] Even where the administrative decision-making schedule is otherwise reasonable and definite, a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim.[47] Here, the Department has spent more than five years failing to respond to the petitioners' 2014 reaffirmation petition. In apparent response, the Department changed the rules altogether eliminating the reaffirmation petition process and leaving Congressionally-recognized tribes with no administrative process to correct omissions on the published list. The Band is irreparably injured by further delay because of the federal benefits that come from being listed including obtaining land and transferring it into trust.

[46] See *Gibson v. Berryhill,* 411 U.S. 564, 575, n. 14 (1973) (administrative remedy deemed inadequate "[m]ost often ... because of delay by the agency"). *See also Coit Independence Joint Venture v. FSLIC,* 489 U.S. at 587 ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Walker v. Southern R. Co.,* 385 U.S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary).

[47] *Bowen v. City of New York,* 476 U.S. at 483 (disability-benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them"); *Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752, 773 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required).

Second, an administrative remedy may be inadequate "because of some doubt as to whether the agency was empowered to grant effective relief."[48] For example, an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute.[49] In a similar vein, 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.'" [50]

Here, there is more than a doubt about the effectiveness of the Department's remedies for Congressionally-recognized tribes omitted from the list. The Department, while the petitioners' reaffirmation petition was pending, changed the rules to eliminate the reaffirmation petition process. The reaffirmation petition process was available to Congressionally-recognized tribes who were omitted from the list. The Department's revisions eliminated that remedy. In its wake, 25 C.F.R. § 83.3 states that Part 83 applies "only to indigenous entities that are *not* federally recognized Indian tribes." (Emphasis added). The Department takes the position that a tribe is not federally-recognized unless it's on the list. So, the Department has left no administrative remedy for a Congressionally-recognized tribe to petition to correct an omission.

Yet, as argued above, Congressionally-recognized tribes may be omitted from the list for a reason or by mistake. But, either way, the Department's revisions leave these tribes no administrative process to use to correct for the Department's omissions. So, the Department's remaining administrative remedies for the Band are legally inadequate and futile. The Court should adjudicate this issue even if it partially grants the motion to dismiss.

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[48] *Gibson v. Berryhill,* 411 U.S., at 575, n. 14.
[49] See, *e.g., Moore v. East Cleveland,* 431 U.S., at 497, n. 5; *Mathews v. Diaz,* 426 U.S. 67, 76 (1976).
[50] *Barry v. Barchi,* 443 U.S. 55, 63, n. 10, 99 (1979) (quoting *Gibson v. Berryhill,* 411 U.S., at 575).

Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.[51] For example, the D.C. Circuit in *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1497 (D.C. Cir. 1997) noted in a Rule 19 context that the Department would have a conflict of interest in representing two sides in an apparent intra-tribal dispute when the Department had already taken sides, "the Department cannot adequately represent the Delawares." *Id.* Similarly, the Department has shown bias in its conduct toward the Band's legal positions. In this matter, the Department took no position in the administrative proceedings for five years; however, in contradiction, the Department in this litigation through the U.S. Department of Justice has taken the position that the Band must comply with Part 83. The Department's position in this lawsuit is taken by higher authorities than would be answering the same Part 83 applicability question in the subsequent administrative proceeding. What is a chance that a lower-lever Department official would contradict the position a higher-ranking official took in this lawsuit? Slim to none.

Also, the Department, while the Band's reaffirmation petition was pending, changed the rules to eliminate the reaffirmation petition process. The Department's rule revisions eliminated all administrative remedies for Congressionally-recognized tribes to correct omissions—while the Band's petition was pending. The Department did not notify or follow up with the petitioners. The Department has done nothing administratively on the file for more than five years. The Department

[51] *Gibson v. Berryhill,* 411 U.S., at 575, n. 14;*Houghton v. Shafer,* 392 U.S. 639, 640 (1968) (in view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act"); *Association of National Advertisers, Inc. v. FTC,* 201 U.S.App.D.C. 165, 170–171, 627 F.2d 1151, 1156–1157 (1979) (bias of Federal Trade Commission chairman), cert. denied, 447 U.S. 921 (1980). See also *Patsy v. Florida International University,* 634 F.2d 900, 912–913 (5th Cir. 1981) (en banc) (administrative procedures must "not be used to harass or otherwise discourage those with legitimate claims"), *rev'd on other grounds*, *sub nom. Patsy v. Board of Regents of Florida,* 457 U.S. 496 (1982).

has not been fair to petitioners and has not attempted to be fair. The Department's bias is another reason for the court not to remand the case for further administrative proceedings.

IV. The Federal Defendants err in arguing that the decision to recognize Indian tribes is a non-justiciable political question.

The Department is also mistaken in claiming that the decision to recognize Indian tribes is a non-justiciable political question.[52] In fact, the Department concedes that a "final decision made by Interior, pursuant to the Part 83 regulations, on a group's petition for acknowledgement, is reviewable under the APA."[53] (Citations omitted.) The petitioners agree.

But, in this case, the Department has made a final decision, pursuant to the Part 83 regulations, rejecting the petitioners' reaffirmation petition. The Department's rule revision eliminated the reaffirmation petition process while the petitioner's reaffirmation petition was pending. The Department neglected the petition for over five years. The Department's legally-inadequate and futile remedies for Congressionally-recognized tribes is a rejection of the petitioners and all those similarly situated.

Meanwhile, the Federal Defendants fail to elaborate on the long list of legal APA-related issues raised by the Defendant's conduct. None of these are political questions of the type described by the Federal Defendants. *See Baker v. Carr,* 369 U.S. 186, 210 (1962). Here are some examples. First, the Petitioners claim that the Department violates the APA when it fails to list a tribe upon petition without application of the Part 83 statutory criteria, when the Department has current treaty and statutory obligations which are specific to the petitioning tribe. Second, the petitioners claim that the Department's more than five year delay is effectively a final decision breaching the APA. Third, the petitioners claim that the Department's rule change is an APA violation because the subsequent rule

[52] Interior Memo. 18–21.
[53] *Id.* 20.

change should not have affected their petition filed while the reaffirmation petition process was still in place; yet, the Department in violation of the APA has taken no action on the reaffirmation petition. And fourth, the Petitioners claim the APA is violated because Department's remaining administrative remedies are legally-inadequate and futile for Congressionally-recognized tribes omitted from the list.

The Petitioners brought their APA claims. The claims are legal questions relating to the Department's conduct which district courts regularly address under the APA. They are not non-justiciable political questions.

CONCLUSION

The Department's motion to dismiss should be denied. Further, this Court should not remand this matter back to the Department, but should issue a writ of mandamus directly to the Department to place the Mdewakanton Band of Sioux in Minnesota on the List.

DATED: September 6, 2019

/s/Erick G. Kaardal

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/Erick G. Kaardal