IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

DAVID L. BERNHARDT, in his official capacity as Secretary of the Interior, and TARA MACLEAN SWEENEY, in her official capacity as Assistant Secretary-Indian Affairs,

Federal Defendants.

Case No. 1:19-cv-0402-TJK

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Mdewakanton Band of Sioux in Minnesota (Mdewakanton Band or Band), Terri-Robertson-Torgerson, and Ross Torgerson seek to have the Mdewakanton Band added to the annual list of recognized Indian tribes with which the federal government maintains a government-to-government relationship and which are eligible for federal programs and services. *See* Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (1994) (List Act).

Federal Defendants moved for dismissal because the suit falls far outside the jurisdictional six-year time limit in 28 U.S.C. § 2401(a), the Mdewakanton Band has not exhausted the regulatory federal acknowledgment process, and Plaintiffs' demand that the Court determine the Band's tribal status raises a non-justiciable political question.

In response, Plaintiffs devote the majority of their brief to arguing that the Mdewakanton Band should be included on the Federal Register list because the Band was allegedly previously federally recognized as an Indian tribe and has never been terminated by Congress. *See* Pet'rs' Mem. of P. & A. in Opp'n to the Fed. Defs.' Mot. to Dismiss and in Supp. of Issuing the Writ of Mandamus Without Further Delay at 2-29, ECF No. 10 (Pls.' Resp.). But Plaintiffs have not met their burden to establish the Court's jurisdiction, *see Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994), and their claims against Federal Defendants should be dismissed.

Plaintiffs' claims accrued forty years ago when the Department of the Interior (Interior) first published a list of federally recognized tribes in the Federal Register, which did not include the Mdewakanton Band. The Mdewakanton Band also has not exhausted its administrative remedies. Despite Plaintiffs' claims, there is not now, nor has there ever been, a regulatory process by which the Mdewakanton Band may petition to simply "reaffirm" its tribal status. Finally, Plaintiffs' demand for the Band's federal recognition raises a political question that cannot be reviewed by this Court prior to the Band's completion of the federal acknowledgment process set out in 25 C.F.R. Part 83.

I. Plaintiffs' claims accrued in 1979, and are thus barred by the statute of limitations.

Federal Defendants' opening brief explained that Plaintiffs' claims are barred by the jurisdictional six-year statute of limitations in 28 U.S.C. § 2401(a). Mem. of P. & A. in Supp. of Fed. Defs.' Mot. to Dismiss at 9-13, ECF No. 8-1 (Fed. Defs.' Mot.). Federal Defendants established that the crux of Plaintiffs' complaint arises from Federal Defendants' alleged failure to include the Mdewakanton Band on the list of federally recognized tribes. *Id*. at 11. The complaint is dominated by such allegations and Plaintiffs' request for relief is aimed at securing the Mdewakanton Band's inclusion on the list. Pet. for a Writ of Mandamus at 1-2, ECF No. 1 (Compl.); *id*. ¶¶ 4-5, 155-76, 199, 202-15, 245-56; Prayer for Relief. And Plaintiffs' response brief concedes that the Band's alleged omission from the list forms the basis of their complaint. Pls.' Resp. at 1 (plaintiffs "seek[] to have the Band listed as a federally-recognized tribe"). But the Mdewakanton Band has never appeared

on any of the lists of recognized Indian tribes that have been published in the Federal Register since 1979. Fed. Defs.' Mot. at 6-7 n.2 (collecting citations); Pls.' Resp. at 34-35 (acknowledging that "the Band was not on the list of recognized tribes, prior to now"). Plaintiffs' claims thus accrued four decades ago and are barred.

Plaintiffs disagree that § 2401(a) is jurisdictional and argue, with little explanation, that they did not have notice of their claims until after 2014. But this is insufficient to save Plaintiffs' untimely claims. Hence, the Court should dismiss Plaintiffs' complaint.

A. Section 2401(a) is a jurisdictional statute of limitations.

Plaintiffs assert that 28 U.S.C. § 2401(a) is not a jurisdictional statute of limitations as applied to Administrative Procedure Act (APA) claims. Pls.' Resp. at 30-31. But the controlling D.C. Circuit law is that the statute of limitations in § 2401(a) is a jurisdictional predicate for suit. *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Security*, 892 F.3d 332, 342 n.4 (D.C. Cir. 2018); *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987); *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 36 (D.D.C. 2018) (for at least thirty-five years, the D.C. Circuit has held that § 2401(a) is jurisdictional).

Plaintiffs argue that the Supreme Court's ruling in *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015)—finding that a different section applicable to Federal Tort Claims Act suits, 28 U.S.C. § 2401(b), is not jurisdictional—should compel a finding that § 2401(a) is also not jurisdictional. Pls.' Resp. at 30. But they

acknowledge that the "D.C. Circuit has yet to apply the analysis of *Wong* to the limitations provision of 28 U.S.C. § 2401(a)." *Id*. Accordingly, the law of the D.C. Circuit is clear: § 2401(a) is a jurisdictional. This principle is illustrated in the case cited by Plaintiffs, *In re Navy Chaplaincy*, which held that the district court remained bound by the D.C. Circuit's explicit holding that § 2401(a) is jurisdictional. Pls.' Resp. at 30 n.39 (citing No. 1:07-mc-269 (GK), 2016 U.S. Dist. LEXIS 15294, at *8 (D.D.C. Feb. 9, 2016)).

District courts within this circuit have repeatedly reached the same conclusion. *See Burt Lake Band of Ottawa & Chippewa Indians v. Zinke*, 304 F. Supp. 3d 70, 75 (D.D.C. 2018) ("[N]either the Supreme Court nor the Court of Appeals has yet applied the reasoning of *Kwai Fun Wong* to section 2401(a)."); *Jafarzadeh*, 321 F. Supp. 3d at 36-37 ("As neither the Supreme Court nor the D.C. Circuit has explicitly abrogated those precedents, the Circuit's original conclusion remains binding on this Court . . . ."); *Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 130 n.21 (D.D.C. 2017) ("The Court follows the explicit holding of the D.C. Circuit that section 2401(a) creates a jurisdictional condition attached to the government's waiver of sovereign immunity." (internal quotation marks and citations omitted)).

B. No equitable extensions to the statute of limitations apply.

Because § 2401(a) is jurisdictional, it acts "as an absolute bar that cannot be overcome by the application of judicially recognized exceptions" such as equitable tolling. *W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 138

(D.D.C. 2008) (internal quotation marks and alternations omitted). *See also In re Navy Chaplaincy*, 2016 U.S. Dist. LEXIS 15294 at *6-7. But even if the statute of limitations is not a jurisdictional bar, Plaintiffs cannot establish that any equitable extensions would apply here.

Statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Scott v. Weinberger*, 416 F. Supp. 221, 224 (D.D.C. 1976) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)). "The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id*.

Even when a statute of limitations is not jurisdictional and may be tolled, courts will do so only "in extraordinary and carefully circumscribed instances." *Smith-Haynie v. Dist. of Columbia*, 155 F.3d 575, 580 (D.C. Cir. 1998) (citation omitted). Plaintiffs do not directly explain why they are entitled to equitable tolling or any other equitable exceptions to the statute of limitations. Instead, Plaintiffs emphasize the merits of their case. *See* Pls.' Resp. at 32-33. But equitable considerations must focus on the reason for the delay in filing suit, not the merits of a party's claims. For example, equitable tolling applies only if a party shows "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560

U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielm*o, 544 U.S. 408, 418 (2005)). Plaintiffs cannot meet this standard. They do not allege that they took any action at all to pursue their rights from 1979 to 2014, much less that they pursued them diligently. *See* Pls.' Resp. at 14-15 (alleging that Plaintiffs began to pursue their rights in 2014).

In addition, Plaintiffs' argument that their claims are not time-barred because there has been no congressional termination of Interior's alleged treaty and statutory obligations to the Mdewakanton Band, *id*. at 32-33, has been rejected in previous federal recognition cases. In *Muwekma Ohlone Tribe v. Salazar*, the plaintiff relied on the proposition that only Congress has the authority to terminate tribes and argued that Interior had wrongfully withdrawn the plaintiff's recognition. 813 F. Supp. 2d 170, 190 (D.D.C. 2011), *aff'd*, 708 F.3d 209 (D.C. Cir. 2013). The court declined to apply an equitable exception to the statute of limitations, explaining this "effectively would eradicate the statute of limitations" because the Indian group's complaint is based on lack of federal recognition, "so only formal recognition could bring an end to the continuing claim, thereby preserving the [group's] cause of action until it becomes moot." *Id*. at 191-92 (internal quotation marks and citation omitted). Similarly, in *Miami Nation of Indians of Indiana, Inc. v. Lujan*, the plaintiff alleged that Congress recognized its tribal status in an 1854 treaty and never terminated that status. 832 F. Supp. 253, 256 (N.D. Ind. 1993). The court concluded that the events that fixed the government's liability occurred in 1897 as a result of an agency decision and "the

continued omission of formal recognition" did not make the plaintiff's claim timely. *Id*. at 257.

And to the extent that Plaintiffs are attempting to rely upon the continuing violation doctrine by referencing Interior's "continual annual amendments to the List," Pls.' Resp. at 33, this too fails. *See* Fed. Defs.' Mot. at 12-13 (explaining why the doctrine does not preserve Plaintiffs' untimely claims). Interior's annual publication of the list of federally recognized tribes does not "restart the statute of limitations." *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014). These annual lists do not alter the status quo; rather, consistent with the Federal Register list first published in 1979, they simply confirm that the Mdewakanton Band is not a federally recognized tribe.

C. Plaintiffs' claims accrued in 1979, when the list of federally recognized tribes was published.

Plaintiffs also argue that the fact that the Mdewakanton Band was not included on the 1979 Federal Register list of recognized Indian tribes (or the subsequent lists) did not provide sufficient notice for Plaintiffs' claims to accrue. Pls.' Resp. at 34-35. As Federal Defendants pointed out in their opening brief, however, Federal Register publication constitutes notice for statute of limitations purposes. Fed. Defs.' Mot. at 11; 44 U.S.C. § 1507. Plaintiffs make no attempt to address 44 U.S.C. § 1507. And courts have found that a cause of action based on an agency decision published in the Federal Register accrues on the date of publication. *See*, *e.g.*, *Felter v. Norton*, 412 F. Supp. 2d 118, 125 (D.D.C. 2006) (claim accrued when Federal Register notice published); *Mishewal Wappo Tribe of*

Alexander Valley v. Jewell, 84 F. Supp. 3d 930, 938 (N.D. Cal. 2015) (finding claims barred by § 2401(a) because the 1961 Federal Register notice provided plaintiff with the critical facts necessary to institute a suit).

In addition, although Plaintiffs argue that the list is "not definitive" and that it remains "fluid," Pls.' Resp. at 34, a group's absence from the list of federally recognized tribes is dispositive evidence that the group is not recognized as an Indian tribe. *See W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993). *Cf. Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (inclusion of tribe on the list "would ordinarily suffice to establish that the group is a sovereign power entitled to immunity from suit"). Federal Defendants agree that additions may be made to the Federal Register list. This is because Indian groups that complete the federal acknowledgment process and meet the criteria to be acknowledged as federally recognized Indian tribes are added to the list, and Indian tribes can be added to the list via an Act of Congress.[1] But as Plaintiffs concede, the Mdewakanton Band was not included on the 1979 Federal Register list, nor has it been included on any of the subsequent lists. Pls.' Resp. at 34. The Band's absence from these lists means that it is not federally recognized.

So, by 1979, Plaintiffs knew or should have known that Interior did not consider the Mdewakanton Band to be a federally recognized tribe. Thus, Plaintiffs'

[1] *See*, *e.g.*, Shawnee Tribe Status Act of 2000, Pub. L. No. 106-568, 114 Stat. 2913.

claims accrued long before they filed the complaint.[2] *See Sprint Commc'ns Co., L.P. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) (claims accrue when the injured party discovers or "in the exercise of due diligence should have discovered" the injury); *Aftergood v. CIA*, 225 F. Supp. 2d 27, 29 (D.D.C. 2002) ("Generally, a cause of action accrues as soon as the claimant can institute and maintain a suit in court.").

D. Plaintiffs cannot tie the accrual of their claims to a later date.

Plaintiffs argue that their claims did not accrue until after the filing of the 2014 "petition for reaffirmation." *See* Pls.' Resp. at 33 ("Nothing previous to 2014 would have triggered the statute of limitations."); *id*. at 36 ("[T]he statute of limitations runs from when the Federal Defendants rejected the petitioners' 2014 petition."). Plaintiffs do not make a convincing case. They do not provide any information on why they only discovered in 2014 that the Mdewakanton Band was not a federally recognized tribe or why they could not have previously maintained a suit in court. *See id*. at 15 (alleging only that the 2014 petition "was not necessary" but "filed in an abundance of caution"); *id*. at 28, 35 (same). Plaintiffs' conclusory statements are not sufficient to carry their burden of demonstrating by a

[2] There have been almost four decades of published Federal Register notices where the Mdewakanton Band was not on the list and thus ineligible for federal programs and services. Plaintiffs claim that the failure to place the Band on the list and treat it as a federally-recognized tribe has caused harm. *See* Compl. ¶ 204; Pls.' Resp. at 29. It is incomprehensible that Plaintiffs have not had actual notice for forty years, given that the United States has no government-to-government relationship with the Band and that the Band and its alleged members are not eligible for the special programs and benefits associated with recognition.

preponderance of the evidence that the Court has jurisdiction over their claims. *See Kokkonen*, 511 U.S. at 377.

Plaintiffs also contend that *Mdewakanton Sioux Indians of Minnesota* supports their claim that the statute of limitations has not expired. Pls.' Resp. at 35-37. Plaintiffs are correct that the previous suit filed on behalf of the Mdewakanton Sioux Indians of Minnesota was dismissed because the group failed to exhaust its administrative remedies and complete the federal acknowledgment process, rather than on the basis of statute of limitations. *Mdewakanton Sioux Indians of Minn.*, 264 F. Supp. 3d at 128-30. But Plaintiffs ignore that the statute of limitations ruling in that case was based on the alleged failure of Interior to engage in formal tribal consultation with the Indian group in 2016. *Id*. at 130-31. The court concluded that the statute of limitations did not begin to run in 1979, because the record did not include sufficient evidence "demonstrating that inclusion on the list of federally recognized tribes is congruent with a tribe's right to be consulted." *Id*. at 131. Unlike in *Mdewakanton Sioux Indians of Minnesota*, the alleged injury here—the failure to include the Mdewakanton Band on the list of federally recognized tribes—is exactly aligned with the publishing of the 1979 list. So, Plaintiffs cannot rely on *Mdewakanton Sioux Indians of Minnesota* to evade the statute of limitations.

Finally, Plaintiffs complain that Interior "never engaged the Petitioners" or provided a response to the alleged "petition for reaffirmation." Pls.' Resp. at 36. As an initial matter, this "petition for reaffirmation" is not based on any law or

regulation and has no legal bearing. In any event, Plaintiffs cannot use this to show that their long-stale claims are timely. *See Sendra Corp. v. Magaw*, 111 F.3d 162, 166-67 (D.C. Cir. 1997) (the cause of action accrued when agency first made the decision, not when the agency declined to reconsider its earlier decision); *Alaska Cmty. Action on Toxics v. EPA*, 943 F. Supp. 2d 96, 109 (D.D.C. 2013) (holding that statute of limitations did not extend because the claims "are based solely on the agency's persistent inaction, about which nothing has changed since the claims first accrued"); *see also Tsi Akim Maidu of Taylorsville Rancheria v. United States*, No. 2:17-cv-01156-TLN-CKD, 2019 U.S. Dist. LEXIS 1271, at *13 (E.D. Cal. Jan. 3, 2019) (allowing plaintiff "to effectively restart a statute of limitations simply by inquiring about a past agency decision" that caused plaintiff to lose its status as a federally recognized tribe "would essentially eliminate section 2401's six-year statute of limitations requirement").

Plaintiffs' alleged injury has been clear since the Federal Register list of recognized tribes was first published forty years ago. As Plaintiffs acknowledge, the Mdewakanton Band was not on the 1979 list, nor has it been on any of the later lists. Pls.' Resp. at 34. Plaintiffs simply filed their suit several decades too late. Because this suit exceeds the six-year time limit in § 2401(a), the claims against Federal Defendants must be dismissed.

II. The complaint should be dismissed because the Mdewakanton Band has not exhausted its administrative remedies and completed the federal acknowledgment process.

Interior's Part 83 regulations establish a process for an unlisted Indian group to apply for federal recognition. 25 C.F.R. pt. 83. As discussed in Federal Defendants' opening brief, the federal acknowledgment process applies to Indian groups, like the Mdewakanton Band, that claim to have been previously recognized as an Indian tribe. Fed. Defs.' Mot. at 15-17. The D.C. Circuit does not allow such groups to bypass the federal acknowledgment process; rather, they must obtain a decision from Interior before seeking judicial review. *See Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016); *Muwekma Ohlone Tribe*, 708 F.3d at 218.

Although the Mdewakanton Band claims that it has satisfied the exhaustion of administrative remedies requirement, it has not completed the federal acknowledgment process. The Mdewakanton Band has not filed a documented petition starting the process, nor has it received a final determination from Interior on whether the Band is entitled to a government-to-government relationship with the United States. Plaintiffs argue that the court should excuse the Mdewakanton Band's failure to exhaust its administrative remedies. But no exception applies in this case that would allow the Mdewakanton Band to avoid complying with the Part 83 process. Thus, Plaintiffs' claims should also be dismissed for failure to exhaust administrative remedies.

A. The Mdewakanton Band has not completed the Part 83 process.

As Federal Defendants detailed in their opening brief, the Mdewakanton Band has not completed the federal acknowledgment process as set forth in the Part 83 regulations. Fed. Defs.' Mot. at 7, 17-18. Plaintiffs contend, however, that the Band exhausted its administrative remedies requirement by seeking "reaffirmation" of its tribal status. Pls.' Resp. at 39-40. Throughout their response, Plaintiffs repeatedly indicate that in 2014, they filed a "petition for reaffirmation," which they alternately argue was a "summary approval procedure [that] was outside the Part 83 process," *id*. at 39, and a process included in "previous Department regulations under 25 C.F.R. Part 83" until "regulatory revisions abandoned the ability for any tribe to seek reaffirmation under Part 83," *id*. 14-15. *See also* Pls.' Resp., Ex. 17, at 33 (May 5, 2014, petition stating that the Mdewakanton Band is not required to pursue the "Part 83 process because its tribal status and treaty rights are clearly established as a matter of law.").

Plaintiffs cannot use this self-styled "petition for reaffirmation" to show that the Mdewakanton Band has exhausted its administrative remedies under Part 83. At no point, have the federal acknowledgment regulations contained a separate "reaffirmation" process. *See* 59 Fed. Reg. 9280 (Feb. 25, 1994); 80 Fed. Reg. 37,862 (July 1, 2015). Tellingly, despite the many times Plaintiffs discuss the "petition for reaffirmation," they never identify any regulatory provisions that set out a process for "reaffirmation," because none exists. *See* Pls.' Resp. at 14-15, 28, 33, 35-37, 39-44.

In actuality, the relevant Part 83 regulations specify the precise manner in which an Indian group can initiate the acknowledgment process, which requires the filing of a letter of intent and submission of a formal documented petition. 25 C.F.R. §§ 83.4, 83.6(a)-(c) (1994). The Mdewakanton Band has not done this,[3] nor do Plaintiffs contend that the Mdewakanton Band received a proposed finding or final determination from Interior concluding whether the Mdewakanton Band met the criteria for federal recognition. Pls.' Resp. at 14-15; 25 C.F.R. § 83.10(h) (1994) (describing the proposed finding and evidentiary report that will be prepared by Interior); *id*. § 83.10(k)(2) (describing the final determination that will be made regarding a petitioner's status).[4]

Because the Mdewakanton Band has not exhausted its administrative remedies and completed the federal acknowledgement process, the complaint should be dismissed for failure to exhaust administrative remedies. *See Mdewakanton Sioux Indians of Minn.*, 264 F. Supp. 3d at 127 (exhaustion of the Part 83 process was required); *see also Mackinac Tribe*, 829 F.3d at 757-58 (affirming district court's finding that the plaintiff failed to exhaust its Part 83 administrative remedies);

[3] The Office of Federal Acknowledgment maintains a register of documented petitions. The Mdewakanton Band is not included within the petitioning groups that have filed documented petitions. *See* https://www.bia.gov/as-ia/ofa/register-of-documented-petitions (last visited Sept. 25, 2019).

[4] The 1994 version of the Part 83 regulations were in effect at the time Plaintiffs allege the petition seeking reaffirmation was submitted. But the revised regulations have similar requirements. *See* 25 C.F.R. § 83.21 (2015) (What must a documented petition include?); *id*. §§ 83.32-.34 (Proposed Finding); *id*. §§ 83.40-.46 (AS-IA Evaluation and Preparation of Final Determination).

Burt Lake Band of Ottawa & Chippewa Indians v. Norton, 217 F. Supp. 2d 76, 78-79 (D.D.C. 2002) (the court lacked jurisdiction because the plaintiff failed to exhaust available administrative remedies under Part 83).

B. Plaintiffs cannot show that the Mdewakanton Band's failure to exhaust its administrative remedies should be excused.

In limited circumstances, courts have discretion to excuse the exhaustion requirement. *See Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 159 (D.C. Cir. 2007) ("[E]xhaustion may be excused if delaying judicial review would cause irreparable injury, if the agency is not competent to address the issue or to grant effective relief, or if further pursuit of an administrative remedy would be futile."). Raising similar issues as those evaluated in *Mdewakanton Sioux Indians in Minnesota*, 264 F. Supp. 3d at 128-30, Plaintiffs argue that the Mdewakanton Band should be excused from completing the federal acknowledgement process. Pls.' Resp. at 37-43. As in the prior Mdewakanton Sioux case, none of these limited circumstances apply here.

Plaintiffs argue that the Mdewakanton Band should not be required to exhaust its administrative remedies because Interior has allegedly delayed in responding to the petition for reaffirmation. *Id.* at 37-39; 41. But Plaintiffs' failure to comply with the Part 83 regulations and its choice to instead seek "reaffirmation" of the Mdewakanton Band's tribal status outside of any statutory or regulatory process should preclude any waiver of the exhaustion requirement. "[T]he exhaustion rule does not contain an escape hatch for litigants who steer clear of established agency procedures altogether." *Ass'n of Flight Attendants-CWA*, 493

F.3d at 159. *See also Mdewakanton Sioux Indians of Minn.*, 264 F. Supp. 3d at 129 (citing *Ass'n of Flight Attendants-CWA*, 493 F.3d at 159 ("[H]aving largely disregarded agency procedures the [plaintiffs] are in no position to complain of agency delay")).

Similarly, Plaintiffs argue that exhaustion should not be required because there is "an unreasonable or indefinite timeframe for administrative action." Pls.' Resp. at 41. But if Plaintiffs actually engage in the Part 83 process, then the regulations provide specific timeframes for agency response. *See* 25 C.F.R. §§ 83.32; 83.40-.42, 83.45 (2015). Plaintiffs' cursory statement that the Mdewakanton Band will be injured by further delay also fails to show that the Band's failure to exhaust its administrative remedies should be excused. Pls.' Resp. at 41; *see also Mdewakanton Sioux Indians of Minn.*, 264 F. Supp. 3d at 128-30 (declining to "credit [plaintiffs'] bare statements that the delay introduced by exhausting administrating remedies would render those remedies illusory" or accept plaintiffs' unsupported argument that further delay would cause "irreparable harm"); *Burt Lake Band of Ottawa & Chippewa Indians,* 217 F. Supp. 2d at 79 (a party cannot "forego administrative remedies [under Part 83] simply because it believes the process is taking unreasonably long").

Contrary to Plaintiffs' assertions, exhaustion in this case also would not be legally inadequate or futile. Plaintiffs' argument focuses on its mistaken belief that Interior previously had a "reaffirmation" process for "Congressionally-recognized tribes to petition for recognition under Part 83," which was eliminated when

Interior revised the Part 83 regulations in 2015. Pls.' Resp. at 40; *see also id.* at 42. But this is not the case. The Part 83 regulations have never included a "reaffirmation" process. *See supra* pp. 13-14. And the 2015 revisions to the Part 83 regulations certainly did not eliminate such a process or relate to "reaffirmation" in any way. *See* 80 Fed. Reg. 37,862 (July 1, 2015).[5]

Plaintiffs also doubt whether Interior is empowered to grant relief to Indian groups that allege they have historically been recognized. Pls.' Resp. at 42. The "futility exception is . . . quite restricted" and only applied "when resort to administrative remedies is clearly useless." *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 157 (D.C. Cir. 2006) (internal quotation marks and citations omitted). That is not the case here. Plaintiffs argue that the Mdewakanton Band is barred from the Part 83 process "because 25 C.F.R. § 83.3 applies 'only to indigenous entities that are not federally recognized Indian tribes.'" Pls.' Resp. at 40. But Plaintiffs fail to address Federal Defendants' argument that the Mdewakanton Band is not precluded by § 83.3 from pursuing recognition under Part 83, because the Band is not on the recognized tribes list. Fed. Defs.' Mot. at 14-15 (explaining that the Part 83 regulations define "federally recognized tribe" as "an entity included on the recognized tribes list" under the List Act (25 C.F.R. § 83.1 (2015)). As part of the federal acknowledgment process, Interior regularly evaluates Indian groups that

[5] Only two substantive changes were made to the Part 83 criteria in the 2015 revisions. *Id.* at 37,863. First, contemporaneous self-identification can now be used to satisfy criterion 83.11(a). *Id.* The second change involved the way in which marriages are counted and considered as evidence of distinct community for criterion 83.11(b). *Id.*

claim to have been previously recognized through treaties or executive orders. *See*, *e.g.*, *Muwekma Ohlone Tribe*, 708 F.3d at 212 (evaluating petitioner that was previously recognized between 1914 and 1927); *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 350 (7th Cir. 2001) (evaluating a petitioner that had been recognized in 1854).

Interior is certainly capable of evaluating the Mdewakanton Band's claims of historical recognition and making the necessary legal determinations. "The Department has indisputable expertise in determining whether tribes meet the criteria for federal recognition, particularly through the Part 83 process." *Mdewakanton Sioux Indians of Minn.*, 264 F. Supp. 3d at 129. *See also N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine*, No. 09-683, 2010 U.S. Dist. LEXIS 66605, at *39-40 (D.N.J. June 30, 2010) ("[W]eighty considerations of institutional competence counsel this Court to defer to the BIA's historical, genealogical, and anthropological expertise before any adjudication on the merits would otherwise be appropriate.").

Finally, Plaintiffs cannot show that Interior is biased or has otherwise predetermined the outcome of the Part 83 process with regard to the Mdewakanton Band. Pls.' Resp. at 42-43. Plaintiffs rely on the same case that was cited by the plaintiffs in *Mdewakanton Sioux Indians in Minnesota*, 264 F. Supp. 3d at 129. As the court pointed out in that matter, the cited case, *Cherokee Nation of Oklahoma*, 117 F.3d at 1497, does "not involve exhaustion at all, but rather whether the

Department of the Interior could replace a tribe as a party for Rule 19 purposes." *Mdewakanton Sioux Indians of Minn.*, 264 F. Supp. 3d at 129.

Plaintiffs' argument also lacks merit. Interior's alleged past failure to take a position on whether the Mdewakanton Band needed to complete the Part 83 process does not demonstrate bias or pre-determination—at most, it shows that Interior did not specifically counsel Plaintiffs or the Band regarding the Part 83 process. As discussed above, Interior has long held the position that the Federal Register list provides evidence of whether a tribe is federally recognized and that Indian groups that do not appear on the list and are seeking federal recognition must complete the Part 83 process. Plaintiffs cannot meet the high bar of showing that it would be futile for the Mdewakanton Band to exhaust its administrative remedies. If the Mdewakanton Band completes the federal acknowledgment process and satisfies Part 83's mandatory criteria, then it will be acknowledged as a federally recognized Indian tribe.

The D.C. Circuit has endorsed the federal acknowledgment process as the legally appropriate avenue for seeking federal recognition. The Mdewakanton Band has not exhausted it administrative remedies and completed this process. And none of Plaintiffs' unsubstantiated complaints show that the Mdewakanton Band should be permitted to skip the Part 83 process and immediately obtain judicial review of its tribal status. Thus, Plaintiffs' claims should be dismissed.

III. The Court lacks jurisdiction because the decision to recognize Indian tribes is a non-justiciable political question.

In the opening brief, Federal Defendants explained that the question of whether to recognize an Indian tribe is a political question to be addressed by Interior—not the judiciary. Fed. Defs.' Mot. at 18-21. Because Plaintiffs' request that the Court order Interior to add the Mdewakanton Band to the list of federally recognized tribes raises a non-justiciable political question, the Court lacks jurisdiction over Plaintiffs' claims. *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) ("courts lack jurisdiction over political decisions").

In response, Plaintiffs make no attempt to address the D.C. Circuit or other precedent, discussed in the opening brief, finding that tribal recognition presents a non-justiciable political question. *See, e.g., Cherokee Nation of Okla.*, 117 F.3d at 1496 (the question of "[w]hether a group constitutes a 'tribe'" is committed to Congress and the Executive Branch); *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) (Interior should make decisions regarding tribal recognition "in the first instance."); *Miami Nation of Indians*, 255 F.3d at 347 ("recognition lies at the heart of the doctrine of 'political questions'"); *Burt Lake Band of Ottawa & Chippewa Indians*, 304 F. Supp. 3d at 81 ("The court does not have free-standing authority to by-pass the entire federal recognition process and order the agency to add" the plaintiff group to the list of federally recognized tribes.).

Instead, without explanation, Plaintiffs argue that the Court has jurisdiction because Interior "has made a final decision, pursuant to the Part 83 regulations,

rejecting the petitioners' reaffirmation petition." Pls.' Resp. at 44. But this is incorrect for multiple reasons—neither Plaintiffs nor the Mdewakanton Band ever filed a documented petition for acknowledgment under Part 83, no "reaffirmation petition process" has ever existed, the Part 83 revisions did not eliminate such a process, and there has been no final decision under Part 83 by Interior. Plaintiffs also claim that they have raised "legal APA-related issues" that are not political questions. *Id.* But Plaintiffs' claims for relief were based upon alleged violations of the List Act, and they seek declaratory and injunctive relief that the Court order Interior to add the Mdewakanton Band to the list of federally recognized tribes. *See* Compl. ¶¶ 155-209 (count I); *id.* ¶¶ 210-256 (count II); *id.* Prayer for Relief. Indeed, the heart of Plaintiffs' complaint is Federal Defendants' alleged failure to include the Mdewakanton Band on the list of federally recognized tribes, which raises a non-justiciable political question.

In sum, Plaintiffs have identified no court that concluded that it had jurisdiction to command Interior to add a tribe to the list of federally recognized tribes. Plaintiffs' complaint should also be dismissed because the decision to recognize Indian tribes is a non-justiciable political question.

IV. Plaintiffs' attempt to argue the merits of their case should be rejected.

Finally, before even attempting to establish jurisdiction for their claims, Plaintiffs argue the merits of their case. Pls.' Resp. at 18-29 (arguing that the List Act requires Interior to list a tribe, when Interior has current treaty and statutory obligations to the tribe). Contrary to several statements in Plaintiffs' response, the

allegations and legal conclusions in the complaint are not undisputed. *See*, *e.g.*, *id.* at 1 (claiming "[t]here are no genuinely-disputed issues of relevant facts").[6] Federal Defendants' motion to dismiss focuses on the Court's lack of jurisdiction, as result of the statute of limitations bar, the Band's failure to exhaust administrative remedies, and the political question doctrine. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (subject matter jurisdiction must be considered before evaluating the merits of a case). These threshold jurisdictional issues present a straightforward basis for dismissal of all Plaintiffs' claims. However, if the Court disagrees, Federal Defendants reserve the right to assert other legal and factual defenses to the claims in this suit.

Even if the Court were to consider Plaintiffs' argument, it provides no support for Plaintiffs' claims. Putting aside the numerous factual assumptions Plaintiffs make, nothing in the List Act requires Interior to list a tribe based on its historical recognition in treaties and statutes. The List Act states that: "[t]he Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indian because of their status as Indians." 25 U.S.C. § 5131(a). The statute defines "Indian tribe" to mean any "Indian or Alaska Native tribe, band,

[6] *See also id.* at 14 (discussing "a few key facts not addressed in the motion"); *id.* at 18-19 (alleging that Federal Defendants do not "directly respond to the gravamen of the petition: the Department must 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."); *id.* at 32 (stating that Federal Defendants have "not argued that the United States has no continuing obligation to the Petitioner Band").

nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." *Id.* § 5130. The List Act cannot be used to compel Interior to recognize the Mdewakanton Band. The statute requires Interior to the list those tribes that the Secretary recognizes as eligible for the benefits of federal recognition. Unless and until Interior determines that Mdewakanton Band is a tribe eligible for the benefits of federal recognition, the agency cannot, by the express terms of the List Act, include the Band on the list.

Plaintiffs make no attempt to show that they have a cause of action under the APA's 5 U.S.C. § 706(1), which provides judicial authority to "compel agency action unlawfully withheld or unreasonably delayed . . . ." *See* Pls.' Resp. at 29 (alleging that Interior's failure to list the Band is arbitrary and capricious and not in accordance with 5 U.S.C. § 706(2)). And there is no indication that Plaintiffs could meet the standard necessary to do so. A claim under this provision "can [only proceed] where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). To the extent Plaintiffs suggest that the List Act *requires* the Secretary to add them to the list, that claim is time-barred as well, having accrued when Congress enacted the List Act in 1994.

Similarly, Plaintiffs cannot show that they are entitled "to an immediate writ of mandamus to direct [Interior] . . . to list the Band as a federally recognized Indian tribe under 25 U.S.C. § 5131(a)." Pls.' Resp. at 29. Plaintiffs cannot point to any provision in the List Act or any other treaty, statute, or regulation that imposes

a specific duty on Federal Defendants to add the Mdewakanton Band to the list of federally recognized tribes. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."). Because Plaintiffs have failed to establish subject matter jurisdiction for their claims, it is not necessary for the Court to consider the merits of Plaintiffs' claims. Even so, Plaintiffs' arguments are unsupported and do not show that Plaintiffs are entitled to relief.

CONCLUSION

The Mdewakanton Band has a pathway to petition for federal recognition through the Part 83 federal acknowledgment regulations. This is the regulatory process that the D.C. Circuit has held that Indian groups, like the Mdewakanton Band, that claim to have been previously recognized and never congressionally terminated must use to seek federal acknowledgment. Indeed, every court of appeals to have considered the question since *James*, 824 F.2d at 1137, has reached the same conclusion. Courts have routinely declined to make determinations regarding federal recognition in the first instance.

This lawsuit does not present an opportunity for Plaintiffs to force Interior to federally recognize the Band. The Court lacks jurisdiction over Plaintiffs' claims because they are barred by the statute of limitations, Plaintiffs have not exhausted their administrative remedies, and the demand that the Court order Interior to recognize the Band raises a non-justiciable political question. Based on the

foregoing reasons and those set forth in Federal Defendants' motion, the complaint should be dismissed.

Respectfully submitted this 27th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2019, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Sara E. Costello
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