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

No. 20-5173

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiffs - Appellants,

v.

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

Defendants - Appellees.

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

FINAL REPLY BRIEF FOR APPELLANTS

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Band	Mdewakanton Band of Sioux Indians in Minnesota
Department	Department of the Interior
List Act	Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, Section 103 (1994) (codified at 25 U.S.C. § 5130)
Part 83	Regulations adopted at 25 C.F.R. Part 83 "Procedures for Federal Acknowledgement of Indian Tribes," as revised 80 Fed. Reg. 37861 (July 31, 2015)
Secretary	Secretary of the Interior

INTRODUCTION AND SUMMARY OF ARGUMENT

"[A] once recognized tribe can fade away." *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013) (citing *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001)).

"In any event, the magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020) "[Where] Congress has not said otherwise, we hold the government to its word." *Id.* at 2459.

This Court articulated these stinging words that an American Indian tribe might just "fade away" in the context of a small California tribe's efforts to gain federal acknowledgement. However, no such notion can or should apply to the main stem of the Mdewakanton Band of Sioux in Minnesota, one of the principal bands of the Eastern Dakota Sioux people. The Band has not faded away.

In 1854, and again in 1865, Congress identified, acknowledged, and recognized the mixed-bloods of the Mdewakanton Band and their entitlement to a reservation. While the 1854 Act authorized the sale of lands within a reservation established for the tribe at Lake Pepin, the statutory boundary of the Lake Pepin Reservation still exists and is unrepealed. JA6-7. The government has failed to fulfill all its obligations with respect to the Reservation, but the Band is still here and did not fade away.

In their Brief, the Secretary of the Interior and Assistant Secretary of the Interior – Indian Affairs ("Appellees" or the "Secretary") fail to respond to Appellants' principal claim in this appeal – that the List Act of 1994[1] requires the Department of Interior ("Department" or "Interior") to publish a congressionally-recognized Indian tribe without application of the Part 83[2] administrative process statutory criteria. Instead, their answer is that the Secretary utilizes the Part 83 process to determine which tribes should be listed, and if the Department previously omitted a recognized tribe, it can no longer be listed without the Part 83 process. That is not an answer to Appellants' contention.

Further, the Secretary mistakenly believes Appellants are attempting to seek and gain acknowledgment as a federally-acknowledged tribe through an "exception" to the existing administrative regime. To the contrary, Appellants argued below and in the Opening Brief that the Mdewakanton Band of Sioux in Minnesota is a tribe *already recognized*

[1] All references to the "List Act" are to Public Law 103-454, 108 Stat. 4781 (Nov. 2, 1994), which requires the Secretary to publish a list of recognized tribes.

[2] All references to "Part 83" are to the regulations adopted at 25 C.F.R. Part 83 "Procedures for Federal Acknowledgement of Indian Tribes," as revised 80 Fed. Reg. 37,861 (July 31, 2015).

by Congress, has never been terminated by Congress, and, in response to Appellees' reference, has not "faded away." The List Act found that Indian tribes may be recognized by Acts of Congress, and the Secretary should list them. Accordingly, the real focus here is the failure of the Secretary to have included the congressionally-recognized Band on the original list of recognized tribes, not the obligation of an unrecognized tribe to follow administrative procedures in order to become recognized.

The Secretary also errs in asserting that the remnants of the Mdewakanton Sioux are already listed, referring to three communities in Minnesota. However, the Indians in those communities were given rights to settle on those lands having severed their tribal relations as tribal members of the Mdewakanton Band of Sioux. Those communities do not represent the Mdewakanton Band of Sioux in Minnesota.

Finally, Appellees engage in faulty circular reasoning when they argue they cannot list the Band because it is not a recognized tribe, and it is not a recognized tribe because it does not appear on the list. They erroneously assert only the Secretary can determine whether to publish a tribe on the list, notwithstanding the list was populated by tribes rec-

ognized by Congress, and Congress can recognize a tribal group as a federally-recognized tribe at any time. We can only assume the Secretary has no power to refuse to publish on the list a tribe recognized by Congress or a court. Notwithstanding this reasonable assumption, the Secretary has nonetheless enacted regulations to allow for the consideration of prior congressional recognition as but one element in the administrative acknowledgement process of a petitioning Indian group – further arrogating to himself administrative control even when Congress has spoken. This appears to reduce prior congressional recognition to no more than a secondary factor for the Secretary to consider in the administrative process. And it flies in the face of the List Act.

The Secretary was wrong to omit the Band as a congressionally-recognized tribe on the original list. He should not perpetuate the legal wrong, and the government should be held to its word.

ARGUMENT

I. The Mdewakanton Band of Sioux in Minnesota was recognized by Congress and should have been published on the list of recognized tribes under the List Act.

A. There is no requirement for exhaustion of administrative remedies for a tribe that is recognized by Congress or a court in order to be published under the List Act.

Citing *James v. U.S. Department of Health & Human Services*, 824 F.2d 1132 (D.C. Cir. 1987) and *Mackinac Tribe v. Jewell*, 829 F.3d 754 (D.C. Cir. 2016), Appellees argue the Band should have exhausted its administrative remedies by pursuing acknowledgement as a tribe through the Part 83 regulatory process. Appellees' Br., 16-18. The argument is unavailing. In *James*, the tribe in question, the Gay Head Tribe, argued it was already recognized "by the Executive Branch," and therefore, it should be listed under the List Act. *James*, 824 F.2d at 1137. The Gay Head Tribe did not assert congressional recognition. Similarly, the Mackinac Tribe did not assert it was recognized by Congress, but instead sought a secretarial election under the Indian Reorganization Act ("IRA"). *Mackinac Tribe*, 829 F.3d at 757. This Court, relying on *James*, rebuffed the tribe's efforts, requiring instead that it first exhaust its administrative remedies under Part 83. *Id.* Nowhere did the Mackinac

Tribe assert that Congress recognized the tribe as its basis for listing or entitlement to a secretarial election.

Appellees also rely on this Court's holding in *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013), notwithstanding the Muwekma tribal group relied on a theory that, as descendants of a once-recognized tribe, the Verona Band, it was entitled to recognition. The Muwekma group actually petitioned for recognition under Part 83, and then appealed the adverse decision. *Id.* at 213-14. In its appeal, the Muwekma group advanced an equal protection argument, as the Department had summarily recognized two other tribes. *Id.* at 214. This Court noted the two other tribes had more recent government-to-government relations and rejected the equal protection claim. Then this Court rejected Muwekma's claim that it was never terminated as a tribe, and that only Congress can do that. This Court treated the issues relating to this claim as part of the Part 83 factfinding and administrative process, and then rejected it on the merits, leading to the conclusion that "a once-recognized tribe can fade away." *Id.* at 219 (citing *Miami Nation of Indians of Ind., Inc.*, 255 F.3d at 346).

The *Muwekma* Court reached its conclusion about the tribe "fading away" solely in the context of the Part 83 process, not as a stand-alone claim that the tribe was never terminated. In fact, in holding the tribe could simply "fade away," the Court noted *Interior* did not terminate the tribe. *Id.* In other words, in a process where the Secretary was engaged in evaluating evidence of a continued government-to-government relationship, the measure of the termination claim rested solely with the Secretary's evaluative and administrative power, not that of Congress. In contrast, the Band here argues Congress recognized the Band and Congress never terminated its existence.

B. The Secretary does not have discretion to refuse to publish tribes under the List Act when Congress or a court has recognized the tribe.

Appellees waste ink refuting Appellants' claim that Part 83 procedures are legally inadequate and it would be futile to pursue them, all discussed in the context of Appellants' earlier efforts to seek "re-affirmation" as a federally-recognized tribe. Appellees' Br., at 21-22. These were arguments raised in the trial court and are not the subject of this appeal. Appellants raised these issues in their Opening Brief because they point

to the impossible quandary of using Part 83 administrative procedures to allow or deny a tribe that is already recognized.

Appellants have explained the quandary as follows: The current administrative process is inapplicable under 25 C.F.R. Part 83 because 25 C.F.R. § 83.3 applies "only to indigenous entities *that are not federally recognized Indian tribes*." (Emphasis added.) Under the trial court's reasoning, then, the Department's erroneous omission of a tribe that belongs on the list has no remedy other than the Part 83 process, which process, Appellants submit, *a fortiori* does not apply. Appellants' Br., at 17. Appellees, in turn, claim this point is "readily dismissed," but to readily dismiss it, their argument devolves on circular reasoning that proves the asserted futility. Appellees casually explain that a "federally recognized Indian tribe" is defined to mean a tribe that has been listed by Interior under the List Act, 25 C.F.R. § 83.1, and, if a tribe is not listed, it cannot be a federally-recognized tribe. Appellees' Br., at 22. This "of course is entirely circular, since it begins with the conclusion that is the question." *Martinez v United States*, 333 F.3d 1295 (Fed. Cir. 2003) (Plager, J., dissenting). The question is whether a congressionally-recognized tribe is a

federally-recognized tribe that must be listed without resort to the Part 83 process, and Appellees simply dodge the question with a nonanswer.

The answer lies in the statute. The List Act includes findings that guide the direction of the Secretary.

> The Congress finds that—
>
> > (1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
> >
> > . . .
> >
> > (3) Indian tribes presently may be recognized *by Act of Congress*; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated Procedures for Establishing that an American Indian Group Exists as an Indian Tribe; *or by a decision of a United States court*;

Pub. L. No. 103-454, 108 Stat. 4781 (Nov. 2, 1994), § 103 (emphasis added).

While the Secretary is directed to publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians," 25 U.S.C. § 5131, and an "Indian tribe" is defined as one of those entities that the Secretary "acknowledges to exist as an Indian

tribe," 25 U.S.C. § 5130(1), these statutory provisions presume the Secretary is also obligated to publish those Indian tribes that are "recognized by Act of Congress" and those recognized "by a decision of a United States court," as set forth by the statute. Indeed, the findings in the statute delineate three means of recognition, and the administrative procedures are but one of the three. It must be assumed that the other two means of recognition are not the subject of administrative procedures, and thus not the subject of the Secretary's discretion.

Where an administrative agency has a ministerial duty to act, mandamus may lie. *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930) ("Where the duty [of the Secretary] in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that the performance may be compelled by mandamus"); *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931). Here, the duty of the Secretary is to populate the list by all three means provided in the findings of the governing statute; only one of those means provides for discretion and administrative determinations on the part of the Secretary.

Appellees argue the direction of the statute expressly recognizes Interior's primary role and broad discretionary authority over Indian affairs, citing 25 U.S.C. § 2; 43 U.S.C. § 1457, and Appellants do not dispute that. However, Appellees concede that the Act contains no provisions specifying how Interior is to carry out its authority and that Interior has made recognition decisions in the past on an ad hoc basis. Appellees' Br., at 9. This no doubt reflects that the Secretary has had difficulty in the past in determining which Indian groups were sufficiently intact or functional to warrant recognition and eligibility for federal services and programs. As a consequence, the Secretary adopted regulations to guide the Department in determining which tribes are eligible. None of this, however, means that tribal recognitions by the Congress or the courts, as outlined in the statute, 108 Stat. 4781, are to be assigned to the Secretary's discretion.

Notwithstanding the plain text of the statute, Appellees argue that congressional recognition is but one factor to consider in the administrative procedures for tribal recognition. They note that the Secretary, in carrying out his discretionary duties in recognizing tribes, may look to proof of previous acknowledgment from evidence that the entity "had

been 'denominated a tribe by act of Congress or Executive Order.'" Appellees' Br., at 10 (quoting 25 C.F.R. § 83.12(a)). Appellants have not challenged the regulation here, and they certainly agree that evidence of previous executive orders may be relevant and helpful in the Secretary's exercise of discretion. However, in examining acts of Congress, the Secretary must be mindful that a recognition of a tribe by Congress requires publishing the tribe pursuant to the List Act, as discussed. Indeed, as the Ninth Circuit has noted:

> It is true that section 1362 speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress. If Congress has recognized the tribe, a fortiori the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior.

Native Vill. of Noatak v. Hoffman, 896 F.2d 1157, 1160 (9th Cir. 1990), *reversed on other grounds*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991).

Appellees appear to advance a contradictory argument in their brief. On the one hand, Appellees argue the findings in the List Act, Pub. L. No. 103-454, § 103, 108 Stat. at 4791, "are not directives to Interior, and they must be viewed in context." Appellees' Br., at 26. On the other hand, Appellees argue – given recent congressional acts recognizing

tribes in Montana and Virginia – that when Congress "expressly" acknowledges a particular tribe as a federally recognized Indian tribe, then Interior's "immediate obligations are clear and indisputable." *Id.* Either the statute's findings on recognition by Congress (or by a court) are not directives to Interior or else they are "clear and indisputable" directives to Interior. Instead, Appellees fall back on "context," and, presumably, how recent the recognitions are. Completely missing here is an acknowledgement that the 1979 and 1995 lists were populated by many tribes recognized in 19th century congressional acts, regardless of "context." The List Act did not mandate the application of a "context" standard to congressional acts.

Finally, Appellees assert the language of the List Act findings effectively disclaims historical congressional recognition of tribes in favor of prospective-only recognition by Congress. Appellees' Br., at 27. They refer to the language, as emphasized: "Indian tribes *presently* may be recognized by Act of Congress." Pub. L. No. 103-454, § 103(3), 108 Stat. at 4791 (emphasis added). While "presently" may mean "at once" or "at

the present time," *see* MIRIAM-WEBSTER.COM DICTIONARY,[3] it would be unreasonable to suggest the findings refer only to future recognitions, any more than the third element of section 103(3) would mean only *future* "decisions of a United States Court." Further, the word "presently" precedes the listing of all three sub-elements of the section, and thus would rationally apply to acts of Congress, determinations by the Secretary and decisions of a federal court. The duty of the Secretary at the time of the passage of the List Act was to list tribes on the basis of their historical standing, as well as the future determinations; the directive was not prospective-only. Accordingly, this argument has no merit.

II. The Mdewakanton Band of Sioux in Minnesota is the subject of continuing obligations by the United States and is not to be confused with other Mdewakanton communities that severed their tribal relations.

Appellees appear to understand that several groups of Indians in Minnesota who previously "belonged to the Mdewakanton Band" had "severed their tribal relations" and that these Indians settled on lands in

[3] https://www.merriam-webster.com/dictionary/presently?src=search-dict-box (last visited Mar. 4, 2021).

Minnesota acquired by purchase from funds Congress provided in appropriation acts in 1888, 1889 and 1890.[4] Appellees' Br., at 8. As Appellees note, these parcels served three Indian communities – the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and the Lower Sioux Community – all of which were later organized and published under the List Act. What Appellees sidestep here is the significance of that severance of tribal relations – the severance was a breakaway from *the existing tribal relations between the United States and the main stem of the Mdewakanton Band of Sioux*. Confoundingly, what Appellees appear to draw from this set of facts is the "survival" of Mdewakanton Sioux into these communities and the "fading away" of the main stem. Precisely to the contrary, the Appropriation Acts of 1888, 1889, and 1890 served to settle nontribal Indians in Minnesota. The acts were *not* directed toward the Mdewakanton Sioux who rescued the white settlers during the Minnesota 1862 Indian uprising and who *did not sever their tribal relations with the United States*. That Band had its tribal status and treaty rights confirmed and codified in the Acts of 1854,

[4] Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349; *see also* JA51-52 (¶¶ 139-41).

1863, and 1865, and thereafter retained its tribal relations, and did not "fade away."

The Mdewakanton Band of Sioux in Minnesota is the tribe recognized in the February 9, 1865 Act,[5] which was to provide the "friendly heroic Sioux" with moneys to purchase the seed and implements needed once they received the grant of eighty acres as identified in the Act of February 16, 1863, 12 Stat. 652. The latter act abrogated certain provisions of various treaties with the Mdewakanton, but in section 9 of the Act, Congress reaffirmed these lands and occupancy for members of the Mdewakanton Band who did not participate in the 1862 uprising.

Appellees also characterize the 1854 Act as one "to dissolve" the 1830-established Lake Pepin Reservation, citing *Colson v. Hickel*, 428 F.2d 1046, 1047 (5th Cir. 1970), and *Preston Nutter Corp. v. Morton*, 479 F.2d 696, 697 (10th Cir. 1973). Neither case, nor the 1854 Act, disestablished the reservation boundaries, however, and while that may be beyond the scope of this case, the argument is unavailing that because Con-

[5] An Act for Relief of Certain Friendly Indians of the Sioux Nation in Minnesota, Feb. 9, 1865, ch. 29.

gress moved to sell off the land at Lake Pepin, the Band somehow is similarly dissolved. Given the outstanding treaty and statutory obligations of the United States to the Mdewakanton Band of Sioux in Minnesota, all unfulfilled as of this date, the assertion the tribe has "faded away" is untenable.

CONCLUSION

Appellants respectfully request this Court reverse and remand the cause for consideration of the congressional recognition of the Mdewakanton Band of Sioux in Minnesota.

Dated: March 26, 2021

Respectfully submitted,

s/ Thomas F. Gede

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,285 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), according to the word count of Microsoft Word 2016.

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

Dated: March 26, 2021

s/ Thomas F. Gede
Thomas F. Gede

Counsel for Appellants

CERTIFICATE OF SERVICE

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

Dated: March 26, 2021

s/ Thomas F. Gede
Thomas F. Gede

Counsel for Appellants