

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

Mdewakanton Band of Sioux in Minnesota v. Debra Haaland

No. No. 20-5173, United States Court of Appeals for the District of Columbia Circuit (May 18, 2021)

SUMMARY

Tribal recognition; exhaustion of administrative remedies; Federally Recognized Indian Tribe List Act (25 U.S.C. §§ 5130 et seq.); mandamus. The D.C. Circuit affirmed dismissal of a mandamus action seeking to compel the Secretary of the Interior to add the Mdewakanton Band of Sioux to the list of federally recognized tribes, holding that the tribe must first exhaust the administrative petition process under 25 C.F.R. Part 83. Even claims of recognition based on nineteenth-century congressional enactments, treaties, or statutes require exhaustion before judicial review, as the List Act commits recognition decisions to the Secretary's expertise. The court rejected futility arguments, noting that the tribe was not listed and thus Part 83 applied, and that the Secretary had not predetermined the merits.

CASE DETAILS

COURT	United States Court of Appeals for the District of Columbia Circuit
WRITING FOR THE COURT	Tatel; Millett; Pillard
JURISDICTION	Federal
DECIDED	May 18, 2021
DOCKET	No. 20-5173
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from district court's dismissal under Rule 12(b)(6) for failure to exhaust administrative remedies.
STANDARD OF REVIEW	De novo for the legal question of exhaustion; mandamus standard requiring a 'clear and indisputable' right.
PRECEDENTIAL VALUE	Unpublished
PARTIES	Mdewakanton Band of Sioux in Minnesota v. Debra A. Haaland, Secretary of the Interior, and Tara Katuk Mac Lean Sweeny, Assistant Secretary-Indian Affairs

TOPICS

indian affairs

federal recognition of tribes

exhaustion of remedies

administrative law

appellate procedure

PRACTICE AREAS

Administrative Law

Indian Law

Federal Jurisdiction

QUESTIONS PRESENTED

1. Whether the appellants were required to exhaust the Part 83 administrative process before seeking judicial review to compel the Secretary to add the Mdewakanton Band to the list of federally recognized tribes.
2. Whether the futility or inadequacy exceptions to the exhaustion requirement apply.

HOLDINGS

1. Yes, principles of prudential exhaustion require any tribe claiming to be federally recognized to file a Part 83 petition before obtaining judicial review, regardless of the form of pre-List Act evidence (e.g., treaties, statutes, or agency action).
2. No, the futility exception does not apply because Part 83 applies to appellants (they are not listed) and there is no claim that Interior predetermined the merits of their recognition claim.

KEY QUOTATIONS

“Whatever evidence a tribe may have that the federal government recognized it before passage of the List Act, Part 83 exhaustion is procedurally required before the courts will evaluate the claim.”

“Appellants’ claim presents complex historical questions of tribal continuity akin to those in James, Mackinac Tribe, and Muwekma, and the same prudential exhaustion rationales apply.”

FACTUAL BACKGROUND

Under the Federally Recognized Indian Tribe List Act of 1994, the Secretary of the Interior annually publishes a list of recognized Indian tribes. The Department also has an administrative process under 25 C.F.R. Part 83 for tribes to petition for recognition. Two individual appellants claiming to represent the Mdewakanton Band of Sioux in Minnesota sought a writ of mandamus to compel the Secretary to add the Band to the list, arguing that the Band was already recognized via nineteenth-century statutes and treaties and thus did not need to file a Part 83 petition.

PROCEDURAL HISTORY

The district court dismissed the case under Rule 12(b)(6) for failure to exhaust administrative remedies, citing *Mdewakanton Band of Sioux in Minnesota v. Bernhardt*, 464 F. Supp. 3d 316 (D.D.C. 2020). The plaintiffs sought a writ of mandamus to require the Secretary to add the band to the list of federally recognized tribes.

DISPOSITION

affirmed

CASES CITED

- *James v. United States Department of Health & Human Services*, 824 F.2d 1133 (D.C. Cir. 1987)
- *Mackinac Tribe v. Jewell*, 829 F.3d 754 (D.C. Cir. 2016)
- *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013)
- *McCarthy v. Madigan*, 503 U.S. 140 (1992)
- *Woodford v. Ngo*, 548 U.S. 81 (2006)
- *Koch v. White*, 744 F.3d 162 (D.C. Cir. 2014)
- *Mdewakanton Band of Sioux in Minnesota v. Bernhardt*, 464 F. Supp. 3d 316 (D.D.C. 2020)

OPINION

PER CURIAM.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT No. 20-5173
September Term, 2020 FILED ON: MAY 18, 2021 MDEWAKANTON BAND OF SIOUX IN
MINNESOTA, ET AL., APPELLANTS v. DEBRA A. HAALAND, IN HER OFFICIAL
CAPACITY AS SECRETARY OF THE INTERIOR, OR HER SUCCESSOR AND TARA
KATUK MAC LEAN SWEENEY, IN HER OFFICIAL CAPACITY AS ASSISTANT
SECRETARY-INDIAN AFFAIRS, OR HER SUCCESSOR, APPELLEES Appeal from the United
States District Court for the District of Columbia (No.

1:19-cv-00402) Before: TATEL, MILLETT and PILLARD, Circuit Judges. JUDGMENT The
court considered this appeal on the record from the United States District Court and the briefs of
the parties. D.C. Cir. R. 34(j). The panel has accorded the issues full consideration and has
determined that they do not warrant a published opinion. See D.C. Cir. R. 36(d). It is hereby
ORDERED AND ADJUDGED that the judgment of the district court be AFFIRMED.

Under the Federally Recognized Indian Tribe List Act of 1994, the Secretary of Interior annually
publishes a current list of recognized Indian tribes eligible for benefits and special programs. 25
U.S.C. §§ 5130 et seq. Interior also runs an administrative process under 25 C.F.R. Part 83 through
which tribes may petition to be recognized and added to the list.

In this case, two individual appellants claiming to represent the Mdewakanton Band of Sioux in
Minnesota seek a writ of mandamus to require the Secretary to add the Band to her list. They did
not file a Part 83 petition, which they argue would be inapposite because they allege that the
United States already recognizes the Band via nineteenth-century statutes and treaties.

The district court dismissed the case under Rule 12(b)(6) for failure to exhaust administrative
remedies. *Mdewakanton Band of Sioux in Minnesota v. Bernhardt*, 464 F. Supp. 1 3d 316, 321-23
(D.D.C. 2020). We have jurisdiction over the district court's final order of dismissal under 28
U.S.C. § 1291.

We review the legal question whether Appellants were required to exhaust administrative remedies de novo. *Koch v. White*, 744 F.3d 162, 164 (D.C. Cir. 2014). We must affirm denial of mandamus unless Appellants' complaint shows they have "a 'clear and indisputable' right, and review by other means is not possible." *Mackinac Tribe v. Jewell*, 829 F.3d 754, 758 (D.C.

Cir. 2016) (citation omitted). The district court faithfully applied our precedent requiring any tribe claiming to be federally recognized to file a Part 83 petition before it can obtain judicial review. In *James v. United States Department of Health & Human Services*, we affirmed the district court's dismissal of a similar suit seeking to require Interior to add a tribe to its list.

824 F.2d 1133, 1139 (D.C. Cir. 1987). We held that principles of prudential exhaustion favored "requiring exhaustion of the Department of the Interior's procedures for tribal recognition, before permitting judicial involvement." *Id.* at 1138.

In light of Interior's significant expertise and experience in evaluating recognition claims, we stressed that the exhaustion requirement (1) respects Congress's choice to delegate the decision to the agency, (2) protects agency autonomy, (3) aids judicial review by allowing the agency to develop a record, and (4) promotes judicial economy. *Id.* at 1137-38.

We have followed *James* to require exhaustion under Part 83 even where tribes claimed prior federal recognition. In *Mackinac Tribe v. Jewell*, for example, we rejected a tribe's contention that it need not exhaust because it had been recognized by federal treaties in the nineteenth century. 829 F.3d at 755, 757.

In *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 213, 218-19 (D.C. Cir. 2013), we likewise required exhaustion despite the tribe's evidence that the Bureau of Indian Affairs had dealt with it as a tribe before 1927, see *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 176 (D.D.C. 2011). Whatever evidence a tribe may have that the federal government recognized it before passage of the List Act, Part 83 exhaustion is procedurally required before the courts will evaluate the claim.

Appellants point out that *James*, *Mackinac Tribe*, and *Muwekma* involved prior tribal recognition by treaty or agency action, whereas they root their claim in part in congressional enactments. They note that Congress announced in enacting the List Act that "Indian tribes presently may be recognized by Act of Congress" and that "a tribe which has been recognized in [that] manner[] may not be terminated except by an Act of Congress." Pub.

L. No. 103-454, 108 Stat. 4791, § 103(3), (4) (1994). But the Act does not thereby empower a court to rely on evidence of pre-Act congressional acknowledgement to mandate recognition of a tribe that has not completed the Part 83 process.

The List Act grants the Secretary a pivotal role in recognition decisions, calling on her to “publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. § 5131(a) (emphasis added). Congressional actions receive great weight in the Secretary’s merits determinations.

See 25 C.F.R. §§ 83.11(e)(1), 83.12(a)(2). But Appellants’ claim presents complex historical questions of tribal continuity akin to those in *James*, *Mackinac Tribe*, and *Muwekma*, and the same prudential exhaustion rationales apply. See *James*, 824 F.2d at 1137-38. Whatever the form of an unlisted tribe’s pre-List Act evidence in support of recognition, the tribe must petition through Part 83 before seeking judicial review.

2 Appellants also appear to claim that they are exempted from the exhaustion requirement because administrative remedies would be inadequate and futile. See *McCarthy v. Madigan*, 503 U.S. 140, 146-48 (1992), superseded on other grounds by statute, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), as recognized in *Woodford v. Ngo*, 548 U.S. 81, 84-85 (2006).

They contend that the very grounds on which they claim recognition render them ineligible for Part 83, which “applies only to indigenous entities that are not federally recognized Indian tribes.” 25 C.F.R. § 83.3. But Part 83 defines a “federally recognized Indian tribe” as “an entity listed on the Department of the Interior’s list under the Federally Recognized Indian Tribe List Act of 1994.” *Id.* § 83.1.

Appellants are not listed, so by its terms Part 83 applies to them. Appellants insist that Interior has “predetermined the issue,” *McCarthy*, 503 U.S. at 148, whether they must petition through Part 83. Appellants’ Br. 19-20. But the issue potentially excusing a failure to exhaust is whether Interior predetermined the tribe’s qualifications to be listed, not the process for doing so, and Appellants make no claim that Interior has already decided the merits of their listing claim.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. R. 41. Per Curiam FOR THE COURT: Mark J. Langer, Clerk BY: /s/ Daniel J. Reidy Deputy Clerk 3