

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

SHELDON PETER WOLFCHILD, et. al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 03-2684L
)	
THE UNITED STATES,)	Judge Charles Lettow
)	
Defendant.)	
)	
)	

**GROUP B PLAINTIFFS’ MEMORANDUM IN PARTIAL
OPPOSITION TO WOLFCHILD PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT REGARDING THE EXCLUSIVITY OF
THE “1886 MDEWAKANTON” AS BENEFICIARIES OF THE
UNITED STATES’ STATUTORY USE VIOLATIONS UNDER THE
APPROPRIATIONS ACTS AND FEBRUARY 16, 1863 ACT**

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 Randy V. Thompson (Abrahamson Plaintiffs)
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 ATTORNEYS FOR THE GROUP B
 LINEAL DESCENDANT PLAINTIFFS

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IN THE UNITED STATES COURT OF CLAIMS

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SHELDON PETERS WOLFCHILD, et al.,))	
))	
vs.))	Case No.: 03 – 2684L
))	
UNITED STATES,))	Hon. Charles F. Lettow
))	
Defendant.))	
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**GROUP B PLAINTIFFS’ MEMORANDUM IN PARTIAL
OPPOSITION TO WOLFCHILD PLAINTIFFS’ MOTION FOR
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Come Now, the Group B Plaintiffs in the captioned matter, jointly and severally, and, pursuant to RCFC 5.4.(a)(3-4), (b)(1), 7(b), 56(a) and (c)(3) and this Court’s January 21, 2011 Order (Doc. # 843), respectively, herewith submit their collective Brief opposing, in relevant part, the Wolfchild Plaintiffs’ Motion for Summary Judgment as the motion pertains to mixed-blood Mdewakanton eligibility for damages pursuant to 1890 Appropriations Act (26 Stat. 336) and the basis for Mdewakanton eligibility for February 16, 1863 Act (12 Stat. 652) damages. In all other respects, the Group B Plaintiffs join the Wolfchild Plaintiffs’ dispositive motion against the

Defendant, the United States of America, as more fully set forth in their respective motions for summary judgment on March 22, 2011. Further, the Group B Plaintiffs do not oppose any of Wolfchild Plaintiffs' Statements of Uncontroverted Facts (Doc. # 978-13). RCFC 56(c)(3). The Plaintiffs, pursuant to RCFC 5.4, incorporate herein by reference their separate Motions for Partial Summary Judgment, including the Exhibits submitted therewith and each Plaintiffs' Proposed Findings of Uncontroverted Facts submitted pursuant to RCFC 56(c)(2-3) contemporaneously herewith.

SUMMARY OF ARGUMENT

In this Court's January 21, 2011 Scheduling Order (Doc. # 843), it detailed three issues, two of which are addressed by the pending summary judgment motions and the other issue which is the subject of a submitted stipulation. The parties have stipulated to the amount of money delineated in the opinion and Order of December 21, 2011. See Doc. # 1030 (April 1, 2011). The Court identified two remaining issues, which are the subject of the collective Plaintiffs' motions for summary judgment filed on March 22, 2011: (1) the "persons who qualify as proper claimants" in the case and, (2) "the role, if any, of the 1863 Acts." *Id.* at 1.

The Group B Plaintiffs join with the Wolfchild Plaintiffs' Motion for summary judgment in all, but a few areas. The Group B Plaintiffs maintain

that their eligibility for benefits under the February 1863 Act and the 1888, 1889, and 1890 Appropriations Act are separate issues from the eligibility issues raised by the Wolfchild Plaintiffs. The Group B Plaintiffs do not foresee any dispute on that point. However, the Wolfchild Brief understandably does not go far enough to protect Group B Plaintiffs' eligibility rights under the 1890 Appropriations Act. Further, regarding the case of February 1863 Act eligibility, the Wolfchild Brief appears to over-extend the argument that Appropriation Acts eligibility retroactively equates to presumptive 1863 Act benefits. It would appear that February 1863 Act eligibility, although it shares some common element with a loyal Mdewakanton ancestor, analytically requires a different eligibility test.

Since the beginning of the intervening Plaintiffs' admission in the case, the Group has witnessed that the Wolfchild Plaintiffs have ably prosecuted this complex case. At all times, notwithstanding over 20,000 named individual Plaintiffs, the Group A and B Plaintiffs have co-existed and cooperated in all material matters. That cooperation will continue in the future. However, the Group B Plaintiffs wish to direct the Court's attention to several points that appear to be advanced by the Wolfchild Plaintiffs that may not be totally compatible with the respective litigation positions of the Group B Plaintiffs for obvious reasons.

As set forth more fully in the brief below, a position, if any, by the Wolfchild Plaintiffs that the 1886 Mdewakanton are the exclusive beneficiaries of damages arising from Appropriations Act is misplaced as a matter of law. The Group B Plaintiffs are lineal descendants of loyal Mdewakantons whom resided in Minnesota on May 20, 1886 and had severed their tribal relations. See *Wolfchild v. United States*, 62 Fed. Cl. 521, 526-29 (2004) (“*Wolfchild I*”). Despite the fact that the Group B loyal Mdewakantons do not appear on the presumptive 1886 McLeod or the 1889 Henton census, their absence from these rolls are not a bar to their eligibility for 1890 Appropriation Act damages. Consequently, Department letters and policies, other rolls (such as the 1899 McLaughlin census), scout lists, the admissions of the United States, and other documents contained in the Group B Plaintiffs’ summary judgment records are all authoritative sources for proving 1890 Appropriations Act eligibility. This Court is requested to issue its holding recognizing these non-1886/1889 materials as authoritative. The Group B Plaintiffs submit that they are entitled to share in the 1890 Appropriation Act damages.

The Group B Plaintiffs have provided new, substantive, and extant sources of proof in the summary judgment record that these loyal mixed-blood Mdewakanton, and their lineal descendants, are eligible for 1890

benefits. Some of these sources are derived, in part, from a historical record which heretofore had not been explored nor revealed. The Department, acting through Special Agent Henton, for at least two years following passage of the 1890 Appropriations Act added mixed-blood Mdewakanton beneficiaries who were not listed on the 1889 census.¹ The record supports that Henton no longer considered his 1889 census as an exclusive list for determining 1890 Act beneficiaries.

The Department of Interior engaged in a post-1890 Appropriation Act policy of continuously adding non-1886/1889 census mixed-blood Mdewakanton applicants for 1890 Act appropriations.² That practice was enhanced by McLaughlin in his 1899 roll and a liberal Departmental eligibility policy was implemented. The policy was liberal in the sense that

¹ See Ex. 212 - February 25, 1892, letter from Henton to Commissioner of Indian Affairs (Henton sends an estimate suggesting division of appropriations between full and mixed bloods); Ex. 215 - July 13, 1892 letter from Henton to the Commissioner of Indian Affairs (Henton states he added a “great many” to his previous estimate of mixed-blood Mdewakantons).

² November, 1891 (188 Mdewakanton Sioux in 66 families); January, 1893 (182 “full” blood Mdewakanton, 122 “mixed” blood Mdewakanton from 45 families – “304 souls”); July, 1895 and January, 1896 (201 “full” blood Mdewakanton and 512 “mixed” Mdewakanton Sioux); June 30, 1896 (identifying 761 Mdewakanton and their families, including “a good many names of individuals that have never participated in any of the distributions I have made.”); June, 1897 (202 “full” blood Mdewakanton Sioux and 743 “mixed” bloods); 1898 (Henton’s last census, identifying 945 Mdewakanton Sioux). Abrahamson Brief, pp. 17-19.

the 1886/1889 census was not the exclusive means of proving loyal Mdewakanton eligibility. Further, the Department approved non-1886/1889 census mixed-blood Mdewakantons for land certificates arising under the Appropriation Acts. These events support this Court's early judicial comment that the 1886 and 1889 censuses, while supplying a "presumptive starting point" for identifying the loyal Mdewakanton, "may not be definitive." *Wolfchild II*, 68 Fed. Cl. 779, 787 (2005), n. 10.

A second issue, in the event this Court holds the February 16, 1863 Act created a money-mandating obligation upon the United States, concerns the Group B Plaintiffs' request that this Court hold they are eligible to recover under the February 16, 1863 Act. The requested finding of eligibility would entitle each friendly Mdewakanton Sioux, whether full or mixed blood, to eighty acres in severalty for those who "exerted himself in rescuing the whites" from the 1862 Sioux uprising.

The Wolfchild Plaintiffs' brief appears to argue that the 1886 Mdewakanton are entitled to the benefits of the February 1863 Act merely by virtue of their role as presumptive beneficiaries of the Appropriation Acts. However, the Group B Plaintiffs maintain that there are material differences in the terms of qualifying for the February 1863 Act and the Appropriations Acts. These differences require that the Court establish

criteria for recovery under the 1863 Act. The criteria would necessarily include a showing by a friendly Mdewakanton Sioux beneficiary, whether full-blood or mixed-blood, that they “exerted” themselves to rescue white settlers during the 1862 uprising. The Group B Plaintiffs submit that eligibility for February 1863 Act benefits must be determined on a case-by-case basis in accordance with the express terms of the legislation – not on the exclusive basis that they are an 1886 Mdewakanton.

STATEMENT OF THE ISSUES

I. Eligibility Criteria for the February 16, 1863 Act. In February 1863, Congress enacted a law entitling each friendly Mdewakanton Sioux eighty acres in severalty for those who “exerted himself in rescuing the whites” from the 1862 Sioux uprising. Twenty-five years later, Congress passed the 1888, 1889 and 1890 Appropriations Acts for loyal Mdewakanton requiring residency in Minnesota on May 20, 1886 and severing of tribal relations. Does membership on the McLeod and Henton Mdewakanton rolls create a presumptive or exclusive entitlement to money damages arising under the February 1863 Act?

II. Appropriations Act Eligibility of Mixed-blood Loyal Mdewakantons Not on the 1886 or 1889 Census. Previously, this Court left open the issue whether mixed-blood Mdewakantons living in Minnesota and having severed tribal relations may prove eligibility for Appropriations Act benefits through means other than the McLeod 1886 and Henton 1889 census. The Department of the Interior and its agents took actions inconsistent with the exclusivity of the 1889 census for years afterward and allowed non-1886/1889 census Mdewakantons to receive land certificates. Should the Group B non-1886/1889 census Mdewakanton lineal descendants be entitled to Appropriations Act damages?

STATEMENT OF THE ARGUMENT

I. THE WOLFCHILD PLAINTIFFS' TRIBAL ASSERTION THAT THE "1886 MDEWAKANTON ARE THE SUCCESSORS IN INTEREST TO THE 1863 ACTS STATUTORY OBLIGATIONS" IS MISPLACED

The Wolfchild Plaintiffs assert that the "present-day 1886 Mdewakanton are the successors-in-interest to the 1863 Acts statutory obligations."³ The Group B Plaintiffs would not necessarily agree with our fellow Plaintiffs, if the Wolfchild Plaintiffs' position either: (1) attempts to maintain that the Wolfchild Plaintiffs are presumptively eligible for February 1863 Act benefits because of the presumptive eligibility status of the 1886 Mdewakanton regarding the 1888, 1889 and 1890 Appropriation Acts or, (2) by their argument, attempt to restrict the February 1863 beneficiaries to the only the 1886 Mdewakanton. For the reasons below, the Group B Plaintiffs answer the question presented in the negative, in favor of a fair case-by-case analysis of eligibility for February 1863 Act based upon the express language of the Act.

This Court has not had a prior opportunity to address the role of the February and March 1863 Acts as an avenue of recovery for the Plaintiffs. Although this brief addresses only part of the analysis necessary to rule on the 1863 Acts – eligibility under the February 1863 Act - the Court is better

³ Wolfchild Motion for Summary Judgment, (Doc. # 978), p. 2.

served by referring to the informative briefs of Group B Plaintiffs DuMarce,⁴ Zephier,⁵ Abrahamson,⁶ and others for substantive treatment of the February and March 1863 Acts. It is likewise true that the Wolfchild brief, in relevant part, provides insight into the history and legislative intent of the 1863 Acts.⁷ This brief will attempt to show that the February 1863 Act, while sharing some common foundations with the Appropriations Acts, analytically stands on its own express terms.

A. FEBRUARY 16, 1863 ACT ELIGIBILITY IS MUTUALLY EXCLUSIVE FROM THE 1888, 1889 AND 1890 APPROPRIATION ACTS.

The February 16, 1863 Act⁸ and the Appropriations Acts,⁹ while sharing limited common attributes, are analytically distinct. The Acts collectively benefitted friendly Sioux and the loyal Mdewakantons. The differences, however, in the Acts underscore the congressional rationale for passing the February 1863 and the Appropriations Acts a quarter-century apart.

Legislative History of the February 16, 1863 Act

⁴ Doc. # 998-1.

⁵ Doc. # 1004-1.

⁶ Doc. # 951-1.

⁷ Doc. # 978.

⁸ February 16, 1863, 12 Stat. 652-53.

⁹ Act of June 29, 1888, 25 Stat. 217 (1888 Act); Act of March 2, 1889, 25 Stat. 980 (1889 Act); Act of August 19, 1890, 26 Stat. 336 (1890).

The congressional debates underlying the February 16, 1863 Act are instructive in interpreting the language of the Act.¹⁰ In the original bill, the February 16, 1863 Act permitted those of the four bands of Sioux who exerted themselves during the uprising to receive a grant in land of 160 acres.¹¹ Objections were lodged against the bill on the basis that it took not only from the hostiles, but also what belonged to the “friendly Indians.”¹² Minnesota Senator Rice questioned the 160 acres in the bill, suggesting that 160 acres was too great and that 40 acres should be substituted.¹³ He later revised the bill to provide 80 acres in severalty.¹⁴

It was clear that the Senate was concerned about the plight of the friendly Sioux who remained in the state. One Senator argued, “[t]here are a portion of these tribes of Indians who have been faithful to the whites, have defended them and saved lives in Minnesota...We have got to make some provision for the Indians who have been faithful.”¹⁵ During the floor debate Senator Harlan explained why the friendly Sioux should be rewarded, stating,

¹⁰ *The Congressional Globe*, January 14, 1863, pp 302-303; January 22, 1863, pp. 440-445; January 26, 1863, pp. 509-512; January 28, 1863, pp. 513-516, 518.

¹¹ H.R. 582; *Id.* at 509; § 8.

¹² *Id.* at 511.

¹³ *Id.* at 513.

¹⁴ *Id.* at 515.

¹⁵ Senator Doolittle; *Id.* at 511.

“I think that we should reward Indians who, under the circumstances that surround this case, exerted themselves to protect the white inhabitants. This was the opinion of the Committee – or of several members of the committee...they ought to be rewarded, ought to be distinguished from other Indians, as an inducement to Indians hereafter, when the tribes should conclude to engage in war with the white people, to frustrate then designs and plans of the tribe, to give timely notice to the settlers.¹⁶

Ultimately, these Senators prevailed; resulting in the 80 acre parcels of land being awarded to those exerting themselves and their heirs.

The Senate debated the number of those friendly Sioux eligible for the land grant provision of 80 acres. Minnesota Senator Rice responded that he believed only “but five or six of the Indians were faithful.”¹⁷ Fellow Minnesota Senator Wilkinson argued that there were about thirty Indians “who have labored and exerted themselves to save some white people from massacre.”¹⁸ The remainder of the Senators, however, expressed reservation about unduly restricting the numbers of possible Indians of the four bands that exerted themselves to rescue the whites from the uprising. Senator Doolittle referenced a petition from U.S. Colonel Crooks¹⁹ regarding sixty Indians (besides their families) who were worthy of reward. He went on to advise that

¹⁶ *Id.* at 514.

¹⁷ *Id.*

¹⁸ *Id.* at 511.

¹⁹ See *Id.* at 514.

the Senate Committee suffered from “uncertainty as to how many of these friendly Indians are upon our hands.”²⁰ The same uncertainty holds true over one-hundred and forty years later. The statutory test for eligibility is defined in the express terms of the February 1863 Act.

It is left to this Court to determine those Mdewakanton ancestors who exerted himself to save whites during the uprising, utilizing sources of proof from among the sources and admissions provided by Plaintiffs’ counsel. The Wolfchild Plaintiffs’ apparent argument for broadly inclusive and exclusive eligibility for 1886 Mdewakanton lacks the support of the Act’s legislative history and the historical documents supporting the Act.

The Language of the February 1863 Act

The language of the Act of 1863, Feb. 16, § 9, 12 Stat. 652, 654, (herein referred to as "Act"), required that lands be set apart by the Department of Interior for those individuals in the four bands who exerted themselves to rescue the whites during the uprising.²¹ The Federal Circuit

²⁰ *Id.* at 514.

²¹ Sec. 9. And be it further enacted, [T]hat the Secretary of Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The

has characterized the rights granted by Congress under the February 1863 Act as “*an inheritable beneficial interest in the recipients of any land conveyed under the statute.*”²² History shows that the Department did set apart 12 sections of land in the state of Minnesota in 1865.²³ However, the land set apart was conveyed by presidential proclamation.²⁴ This conveyance violated the February 16, 1863 Act because Minnesota land had been set aside for the loyal Mdewakantons.²⁵

The Act has unique aspects in comparison with the Appropriations Acts. First, the February 1863 Act was for the express benefit of the “before named bands” (the Sisseton, Wahpeton, Mdewakanton and Wapakoota) of the Sioux, unlike the Appropriations Acts focus on the Mdewakanton Sioux. In other words, Congress, in the February 1863 Act, sought to reward any *individual* friendly member of the four Sioux bands whom acted to rescue

land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

²² *Wolfchild*, 559 F.3d 1228, 1241 (2009). (Emphasis added). See also *Wolfchild v. United States*, 2010 U.S. Claims LEXIS 949 (December 21, 2010), Slip. Op. 18-24.

²³ Hinman Ltr. To Whipple, March 23, 1865, *Wolfchild* App. 130.

²⁴ Hinman Ltr. To Whipple, circa 1886, *Wolfchild* App. 230.

²⁵ See *Karuk Tribe v. Ammon*, 209 F.3d 1366, 1373 (Fed. Cir. 2000) (“only an Act of Congress can grant a right of permanent occupancy as opposed to permissive occupancy”).

the imperiled whites, regardless of the membership in any one particular band or tribal affiliation of the Sioux.²⁶

The February 1863 Act did not distinguish between full-blood or mixed-blood individuals of the four bands for benefit eligibility, while the 1888, 1889 and 1890 Appropriation Acts distinguished eligibility for benefits based upon an imprecise quantum of Mdewakanton bloodline. The Appropriations Acts segregated and selectively denied benefits – by distinguishing between full-blood, family members of full-blood and non-full-blood family “mixed-blood” Mdewakantons. This is despite the fact that, at this time in American history, there was no reliable scientific test for full-blood or mixed-blood Indian heritage.

The Appropriations Act of June 29, 1888, 25 Stat. at 228-29 (the 1888 Act) was restricted by Congress to apply only to full-blood loyal Mdewakanton.²⁷ The Act of March 2, 1889, 25 Stat. at 992-93 (the 1889 Act) applied only to full-blood loyal Mdewakantons and their “families.”²⁸ Finally, the 1890 Appropriations Act, 26 Stat. at 349 (the 1890 Act), provided the smallest amount of appropriations of the three Acts, the sum of

²⁶ DuMarce Brief, Doc. # 998-1, p. 12.

²⁷ Abrahamson Brief, Doc. # 951-1, p. 12-13.

²⁸ *Id.*

\$8,000,²⁹ to be shared, for the first time, between the “full and [non-full blood family] mixed blood.”³⁰

The February 1863 Act is likewise distinguishable from the Appropriations Acts based upon Congress’ intent in the 1863 Act to award 80 acres of land “in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians.”³¹ The Appropriations Acts did not contain a similar provision. Instead, the 1888, 1889 and 1890 Acts required that the beneficiaries must belong to the “Medawakanton [sic] band of Sioux Indians, who have resided in said State since . . . [May 20, 1886] . . . and have severed their tribal relations.”³² In other words, the Appropriations Acts contained static requirements of: (1) being a loyal Mdewakanton; (2) residing in Minnesota on May 20, 1886; and (3) having severed tribal relations.

In the Appropriations Acts, there is no required showing of any affirmative act on behalf of the individual ancestor or the lineal descendant,

²⁹ The 1888 Act provided \$20,000 to the full-blood loyal Mdewakanton and the 1889 Act provided \$12,000 to the loyal full-bloods and their families.

³⁰ Abrahamson Brief, p. 13; see also *Wolfchild I*, at 128 (“The Appropriations Acts authorized the Secretary to expend the funds for the benefit of two classes of individuals: the loyal Mdewakanton and families of the loyal Mdewakanton. See 25 Stat. at 992-93; 26 Stat. at 349”).

³¹ See note 20, § 9., supra.

³² *Wolfchild II*, 68 Fed. Cl. 779, 781 (2005), n. 3.

like the “exerted” factor contained in the February 1863 Act.³³ Thus, it is inconsistent to attempt to make any claim that the 1886 Mdewakanton, who presumptively qualify for Appropriation Act benefits, may retroactively equate that status with eligibility for February 1863 Act benefits without the meeting the statutory prerequisites of the February 1863 Act. Rather, eligibility for the 1863 Act must necessarily be based upon a liberal standard, due to the imperfection of historical accounts as to the Mdewakantons who “exerted themselves to rescue whites.” However, the eligibility standards should be based upon the terms of the Act, but without regard to eligibility pursuant to other legislation enacted over 20 years later.

As a final point, the Plaintiffs’ briefs have addressed the issue of the “friendly Sioux” or “loyal Mdewakanton.”³⁴ Neither the February 1863 nor

³³ “Because of the administrative difficulty of determining which Mdewakanton Sioux were loyal during the Sioux outbreak, Congress decided that presence in Minnesota on May 20, 1886 was a proxy for “friendliness.” *Wolfchild I* at 527.

³⁴ DuMarce Brief, *Id.* at 13 (It can be legally concluded from the express language of these Acts, that Congress recognized the group of “friendly” Dakota Sioux who remained, as a separate and distinct classification of Dakota Sioux – from the categories of those who had been identified as having been removed to Dakota Territory.); Zephier Brief, *Id.* at 8-9 (“The definition of a “Friendly Sioux” for purposes of just the 1888, 1889 and 1890 Appropriations Acts was much narrower and more restrictive than the qualifying definition of “Loyal” or “Friendly Sioux” from the February 16, 1863 Act, Article 9, where it was only necessary to be an individual from the Four Bands of the Minnesota Sioux of 1862 and 1863 (Mdewakanton, Wapakute, Sisseton, Wahpeton), and to have exerted themselves in saving

the Appropriations Acts expressly uses those words or phrases, but their use is nonetheless important to statutory construction of each of the Acts. This Court in *Wolfchild I* held that the Appropriations Acts were essentially congressional direction to the Department of the Interior to expend funds to benefit “two classes of individuals: the loyal Mdewakanton and the families of the loyal Mdewakanton.”³⁵ This Court has previously held that the “loyal Mdewakanton” are an “identifiable group of American Indians” within the meaning of the [Indian Tucker] Act.³⁶ Furthermore, the Court consistently used the term “loyal Mdewakanton” throughout its December 21, 2010 opinion.

The Group B Plaintiffs, however, view use of the terms like “loyal Mdewakanton” or “friendly Sioux” as possibly problematic when trying to similarly equate eligibility under the February 1863 Act and the Appropriation Acts as apparently argued by the *Wolfchild* Plaintiffs.³⁷ This Court has yet to rule upon the eligibility requirements of the February 1863 Act. However, the Group B Plaintiffs submit that the requirements for

their white citizens in the 1862 Sioux Uprising. Therefore, the ancestor(s) needed to be a Minnesota Sioux person in Minnesota during the 1862 Uprising, in 1863 and immediately thereafter, and who helped or assisted in saving the whites.”) (“Loyals”, “Friendlies”, “Friendly Sioux”); see also *Wolfchild* Brief at p. 5.

³⁵ *Wolfchild v. United States*, 96 Fed. Cl. 302, 343 (2010)

³⁶ *Id.* at 338.

³⁷ See *Wolfchild* Brief, at pp. 21-29.

eligibility under the February 1863 Act and the receipt of 80 acres of land, based upon the express statutory language, should be that: (1) a “friendly Sioux”; (2) of the Mdewakanton, Wapakute, Sisseton, Wahpeton bands of Sioux Indians; (3) who exerted himself in rescuing the whites from the 1862 uprising.

B. ALTHOUGH APPROPRIATION ACTS ELIGIBILITY SHARES SOME COMMON CRITERIA WITH THE FEBRUARY 1863 ACT, THE 1886 MDEWAKANTON ARE NOT A PRESUMPTIVE OR EXCLUSIVE QUALIFIER FOR FEBRUARY 1863 ACT BENEFITS AS ADVOCATED BY THE WOLFCHILD PLAINTIFFS.

The February 1863 Act shares limited characteristics with the Appropriations Acts, however, those shared elements do not equate with presumptive eligibility of the 1886 Mdewakanton for the 1863 Act benefits in land or money damages. The Wolfchild Plaintiffs’ argument that the February 1863 Act “created a mandatory obligation upon the United States to the 1886 Mdewakanton”³⁸ is misplaced. The Group B Plaintiffs agree that eligibility for the 1863 Act is a mandatory obligation upon the government, however, any idea that such eligibility is based upon either the McLeod or the Henton census presumptively or exclusively is erroneous as a matter of law.

³⁸ Wolfchild Brief, Doc. # 978, p. 2.

The February 1863 Act and the Appropriations Act each were based upon a congressional desire to provide for those Mdewakanton who did not participate in the 1862 uprising. The 1863 Act specifically recognized meritorious “friendly” individual Indians who acted to save whites during the uprising by providing 80 acre land parcels in severalty which was to be for the individuals and their heirs forever. The Appropriations Acts sought to provide benefits to “loyal Mdewakantons” who resided in Minnesota in 1886 and had severed their tribal relations. It is likewise true that the failure of the February 1863 Act, in part, was impetus for the Appropriations Act a generation later. Regardless of the shared characteristics of the Acts, the February 1863 Act has distinct statutory elements from the Appropriation Acts. Consequently, 1886 Mdewakanton may not qualify presumptively or exclusively for February 1863 benefits.

Many of the 1886 Mdewakanton were either not born at the time of the 1862 uprising or they were minors under the age of eighteen.³⁹ For instance, it appears that 75 persons on the McLeod 1886 full-blood census were not even born at the time of the uprising – another 44 Mdewakantons were minors under the age of 18.⁴⁰ On the Henton 1889 census, it appears that 135 people were not born at the time of the uprising and 59

³⁹ Declaration of Kelly H. Stricherz, Ex. 204.

⁴⁰ Id. at ¶ 4 (a)-(b), p. 2.

Mdewakantons on the census were minors. It follows that the 1886 Mdewakanton may not, as a group, be eligible presumptively or exclusively to any damages awarded pursuant to the February 1863 Act.⁴¹

After the uprising, the Department of Interior recognized the contributions of those Mdewakanton who risked their lives and the lives of their families during the August 1862 uprising regardless of the quantum of bloodline. The Department of Interior found that a “number of the Mdewakanton band” remained “faithful” to the white settlers.⁴² Among those “faithful” Mdewakanton were mixed-bloods who particularly bore the brunt of attacks both from Mdewakantons who participated in the uprising on one hand, and, on the other hand, from relatives and friends of those who perished in the uprising, who unjustly viewed these Indians with the hostiles as the “objects of their vengeance.”⁴³ U.S. Special Agent James McLaughlin aptly described their plight.⁴⁴ McLaughlin saw the injustice of excluding

⁴¹ *Id.* at ¶ 4 (c)-(d), p. 2-3.

⁴² Wolfchild App. 000251, 255; Department of Interior – Commissioner of Indian Affairs Oberly October 20, 1888 letter to Robert B. Henton.

⁴³ *Id.* 254-255.

⁴⁴ See James McLaughlin March 11th, 1899 letter to the Secretary of the Interior. (Ex. 219):

“The mixed bloods of Minnesota suffered greatly through the action of their full-blood kinsmen in the Minnesota Massacre of 1862, as notwithstanding that nearly every mixed blood of Minnesota remained loyal to the government and aided the whites in suppressing that outbreak, they (the

enrollment of mixed-blood Mdewakantons whose ancestors had “proved their loyalty to the government and the white settlers” from Appropriation Act benefits.⁴⁵ McLaughlin attempted to remedy the injustice by enrolling mixed-blood Mdewakantons in increased numbers. The sense of injustice expressed by McLaughlin over a century ago would resurface anew if the Group B Plaintiffs are excluded in favor of solely the 1886 Mdewakanton.

C. THE GROUP B PLAINTIFFS AGREE WITH THE WOLFCHILD PLAINTIFFS THAT THE FEBRUARY 16, 1863 ACT MANDATED PUBLIC LAND TO FRIENDLY SIOUX MEMBERS OF THE MDEWAKANTON BANDS, BUT REJECT THE NOTION SUCH LANDS WERE FOR THE “HOSTILE OR THE FRIENDLY” SIOUX.

The Group B Plaintiffs note that the Wolfchild Plaintiffs appear to advance an argument that the “Congressional Acts of 1863,”⁴⁶ including the February 16, 1863 Act, “mandated public land to individual members of the

mixed bloods) were suspected and distrusted by the whites, and at the same time subject to the insults and despised by the Indians, whom they refused to join or aid in any way...”

⁴⁵ “those of them who were the more actively engaged in that massacre are now the most outspoken and active in objecting to the enrollment of mixed bloods, whose ancestors, or themselves, proved their loyalty to the government and white settlers during that crucial period, and from which it would seem that the protest of the Indians against the enrollment of the loyal mixed bloods should receive but little consideration from the Department, while the full blood Indians, who were hostile at that time, receive a gratuity from the government... *Id.*

⁴⁶ Act of Feb. 16, 1863, ch. 37, 12 Stat. 652; Act of March 3, 1863, ch. 119, 12 Stat. 819.

...Mdewakanton...bands, hostile or friendly.”⁴⁷ The Group B Plaintiffs would not support any claim that the February 1863 Act, in any way, required 80 acre land grants in fee simple to any “hostile” Mdewakanton ancestors. Such an interpretation, if actually made, would be clearly erroneous as being contrary to the express wording of the Act.

There is nothing in the February 1863 Act, its legislative history or in the Department’s administration of the mandate which would indicate that hostile Mdewakantons were eligible to receive land under the Act. Any Mdewakanton who “exerted himself to rescue whites,” which is a necessary prerequisite for February 1863 Act damages, could not be a “hostile.” It is noted that the Wolfchild Plaintiffs utilize the term “friendly Sioux” in their briefing.⁴⁸ However, the Group B Plaintiffs wish to make the record clear that no “hostiles” would be eligible for February 1863 damages by the express provisions of the Act and as made clear by the legislative history supporting the Act.

⁴⁷ Wolfchild Brief, Doc. # 978, § B, p. 4.

⁴⁸ Wolfchild Brief, Doc. # 978, p. 5 (“The government obligated itself to set aside a sufficient quantity of land for all of the *friendly Sioux*. Under the Act [February 16, 1863 Act], each *friendly Sioux* is entitled to 80 acres of land in Minnesota...”). (Emphasis added).

D. THERE IS NO SUPPORT FOR THE IDEA ADVANCED BY THE WOLFCHILD PLAINTIFFS THAT THE 1886 CENSUS WAS THE DEPARTMENT OF INTERIOR'S ATTEMPT TO ESTABLISH THE FRIENDLY SIOUX THAT "HELPED SAVE WHITES DURING THE 1862 OUTBREAK"

The Wolfchild Plaintiffs' Brief asserts that the 1886 McLeod census was the result of the Department of Interior's desire to identify those Mdewakantons that "helped save whites during the 1862 outbreak."⁴⁹ However, there is no support for any claim that the McLeod census was for the express purpose of identifying those who exerted themselves to save whites during the 1862 uprising. There are several reasons why the 1886 Mdewakanton's argument would be unsustainable.

The Group B Plaintiffs dispute any idea that the 1886 Mdewakanton are presumptively or exclusively eligible for February 1863 Act damages merely by their presence on the 1886 McLeod or 1889 Henton lists. There is no doubt that that many of the 1886 Mdewakanton may legitimately qualify for benefits under the February 1863 Act – as long as they can establish they exerted themselves to rescue whites under the express terms of the Act.

It is not enough to be a presumptive Appropriations Acts "loyal Mdewakanton" for eligibility under the February 1863 Act. February 1863

⁴⁹ Wolfchild Brief, Doc. # 978, p. 11 ("In 1886, to further its implementation of the 1863 Act's land grant provisions, Interior set out to establish with a greater degree of certainty which friendly Indians remained in Minnesota that helped save whites during the 1862 outbreak.").

Act eligibility requires a friendly Sioux who “exerted himself to rescue whites” – a congressionally mandated standard of conduct that is not met merely by a state of being, as in the Appropriations Acts. Of course, that referenced state of being in the Appropriations Acts is the loyal Mdewakanton’s presence in Minnesota on May 20, 1886 and their severing of tribal relations.

Congress’s intent in the February 1863 Act was to “reward Indians who, under the circumstances that surround this case, exerted themselves to protect the white inhabitants...they ought to be rewarded, ought to be distinguished from other Indians.”⁵⁰ The Group B Plaintiffs submit that the friendly Mdewakanton Sioux who exerted themselves may be found in the congressional records, Bishop Whipple and Rev. Hinman’s accounts of heroism during the uprising, various scout lists and other documentary evidence submitted to the Court by all of the Plaintiffs. However, the 1886 and the 1889 census are not a presumptive or even reliable indication that the “loyal Mdewakanton” are “friendly Sioux” who exerted themselves to save whites during the uprising; thereby failing to meet the requirements of the February 1863 Act.

⁵⁰ *The Congressional Globe*, January 28, 1863, p. 514.

II. THE 1886 MDEWAKANTON ARE NOT THE EXCLUSIVE STATUTORY BENEFICIARIES OF THE 1890 APPROPRIATIONS ACT, BUT THOSE OTHER ‘OFF 1886/1889-CENSUS’ MDEWAKANTON WHOM CAN PROVE, BY “OTHER ROLLS, INFORMATION AND MATERIALS”, THAT THEY ARE DESCENDANTS OF AN 1886 MDEWAKANTON RESIDENT OF MINNESOTA WHOM HAD SEVERED TRIBAL RELATIONS.

D. THE HISTORICAL RECORD DOES NOT SUPPORT THE WOLFCHILD PLAINTIFFS’ POSITION THAT THE 1889 HENTON SUPPLEMENTAL CENSUS WAS A COMPREHENSIVE LISTING OF ALL FULL AND MIXED BLOOD MDEWAKANTON RESIDING IN MINNESOTA ON MAY 20, 1886.

1. History Evidences that Mixed-Blood Mdewakanton Were Excluded From Appropriations Under the 1885, 1886, and 1888 Acts and non-family mixed blood under the 1889 Act, but a Department Policy Subsequently Evolved in Favor of Mixed-Blood Mdewakanton Participation in Governmental Appropriations After the 1890 Act.

The Wolfchild Plaintiffs argue that a “baseline assumption” is that “1886 Mdewakanton and their heirs” are entitled to over 20,000 acres of land, based upon the 264 people on the May 20, 1886 census.⁵¹ Group B Plaintiffs support their claim – if it is not intended to be presumptive or exclusive. The same holds true for the 1886 Mdewakantons’ claim to Appropriation Acts damages.

For the Group B Plaintiffs, they are equally entitled to Appropriation Acts damages as the 1886 Mdewakanton, despite not appearing on either the

⁵¹ Wolfchild Brief at 32.

1886 or 1889 census. As will be established below, Department policy favoring eligibility for non-1886/1889 census mixed-blood Mdewakantons was only developed in the years following the 1889 census and the 1890 Appropriation Act. Wolfchild Plaintiffs' expert, Dr. Barbara Buttes, admits in her Declaration⁵² that neither the Department of Interior nor the Bureau of Indian Affairs had any "documents or additional enrollments" on file other than the May 20, 1886 census and the 1889 list.⁵³ Consequently, the 1889 census predated the 1890 Act giving mixed-bloods unfettered access to Mdewakanton appropriations. Yet, new mixed-blood Mdewakanton enrollment was continually recognized well after the Henton census – by Henton (and thus the Government) himself. The Group B Plaintiffs submit that the historical record and subsequent Department policy compels this Court to recognize the eligibility of non-1886/1889 census Mdewakantons.⁵⁴

The historical record indicates that the mixed-blood Mdewakanton were largely shut out of appropriations during most of 1880's. It is apparent in the mid-1880's that there was a disagreement between Congress and the

⁵² Doc. # 978-2, p. 18-19.

⁵³ *Id.* at ¶ 33, pp. 18-19.

⁵⁴ Congress' consideration of the 1888 Appropriations Act included letters from Good Thunder, chief of scouts for General Sibley, Bishop Whipple and General Sibley himself. 19 Cong. Rec. 2976-77 (1888). Representative McDonald stated that a "few" of the friendly Sioux "remained friendly to the whites...and a number of them...protect[ed] our people". *Id.* at 2976.

Department of Interior over the issue of mixed-blood entitlement to Mdewakanton appropriations. It was an issue that would soon manifest itself to involve the full-blood Mdewakanton as well.

The basis underlying the objections to mixed-blood claims principally was based upon costs of locating and enrolling them and the diluting effect that their participation would have on appropriations to the full-bloods. In 1888, Indian Commissioner Oberly wrote to Special Agent Henton about a July 30, 1884 letter wherein McLeod objected to the ambiguous nature of a congressional appropriation; possibly allowing mixed-bloods to participate.⁵⁵ McLeod reportedly stated that allowing the mixed-bloods to participate would not leave enough “to buy a spelling book” for the full-bloods.⁵⁶

The Department heeded McLeod’s advice, amending the July 4, 1884 appropriation to confine its benefits solely full-bloods.⁵⁷ Such was the case until full-blood Mdewakanton families received 1889 Appropriation Act benefits, and mixed-bloods participated in the 1890 Appropriation Act and thereafter. In any case, these comments reflected McLeod’s attitude towards

⁵⁵ October 20, 1888 letter, p. 7, Wolfchild App. 000257; Ex. 207.

⁵⁶ *Id.*

⁵⁷ March 3, 1885, 23 Stat. 375; see October 20, 1888 letter (see note 55, supra), Wolfchild App. 000258.

the 1886 full-blood census and formed an undercurrent for the Appropriations Acts of 1888 and 1889.

Prior to the 1886 census and the Appropriations Acts, mixed-blood Mdewakantons were largely denied appropriations and, even where they received appropriations, it drew the scrutiny of Congress and the Department of Interior. During 1884, Minnesota Representative H.B. Strait of Shakopee “engineered an [congressional] appropriation” for the benefit of the Mdewakanton.⁵⁸ The Commissioner of Indian Affairs made a ruling that same year that mixed-blood Mdewakantons should share equally with full-bloods in the Mdewakanton appropriations.⁵⁹ Congressman Strait wrote to Indian Commissioner Price advising him that he had been “too liberal in your ruling as to the share by recipients of the appropriation – I do not think it should be given to mixed-bloods at all, neither does Mr. McLeod...”⁶⁰ The congressman went on to observe it would take “quite an amount to collect and make out a roll including half-bloods and would in effect make nugatory the act.”⁶¹

The congressman’s comment about McLeod’s objection to mixed-blood participation in the appropriations is ironic for several reasons. Strait

⁵⁸ Myers, p. 275.

⁵⁹ Letter from Strait to Price, September 5, 1884, SJ Ex. 206.

⁶⁰ *Id.*

⁶¹ *Id.*

“highly recommended” McLeod for the agent position.⁶² The irony lies in the fact that McLeod, the author of the 1886 census, was a mixed-blood Mdewakanton himself and he would ultimately be a mixed-blood claimant to the 1890 Act - a situation that troubled agent Henton in 1892.⁶³ McLeod’s mixed-blood claim was made to Henton in June, 1892,⁶⁴ causing Henton to complain in a letter to the Commissioner of Indian Affairs that McLeod was making an 1890 Act mixed-blood claim, although he was “worth at least \$100,000.”⁶⁵

However, McLeod and Strait were not alone in their objections to mixed-blood participation in Mdewakanton appropriations. Of course, the full-blood Mdewakanton objected to the participation of the mixed-bloods, unless they were family members. Henton advised the Commissioner that the mixed-blood sharing in the 1890 Appropriation forced him to “abandon building 9 of the houses previously asked for.”⁶⁶ The Commissioner of Indian Affairs wrote to Bishop Whipple, in response to Good Thunder’s complaint about the full and mixed-blood sharing the 1890 Appropriation,

⁶² October 20, 1888 letter from Oberly to Henton, p. 7, Wolfchild App. 000257, Ex. 207.

⁶³ Letter from Henton to Comm’r of Indian Affairs, June 3, 1892; SJ Ex. 214.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ February 25, 1892, Henton to Commissioner of Indian Affairs, p. 1; Ex. 212.

advising him that the agency was bound to follow the law.⁶⁷ In a January 13, 1898 letter to the Commissioner of Indian Affairs, Henton recounts that the full-bloods were still objecting to sharing appropriations with the mixed-bloods.⁶⁸ After the 1890 Appropriation Act, Myers states that the full-blood and the mixed-blood Sioux were “rent with factionalism”, which he observed was an “evil that has persisted ever since.”⁶⁹

In addition to the full-bloods, various members of Congress and the Department of Interior were opposed, at times, to the mixed-bloods sharing in Mdewakanton appropriations as well. Congressman Strait told Commissioner Price that the “universal opinion” of the congressmen he spoke with that “no mixed bloods should be the participants in this fund.”⁷⁰

The same anti-mixed-blood sentiment was shared by Henton. Myers observed that Henton “was always opposed to permitting the mixed-bloods to share” with the full-bloods.⁷¹ In a January 13, 1898 letter to the Commissioner of Indian Affairs, Henton stated his opinion that the 1890 Act Appropriations should be restricted to “full-bloods, half-bloods, and minor

⁶⁷ March 12, 1892, CIA Commissioner Morgan to Whipple, Ex. 213.

⁶⁸ *Id.*, citing letter from Henton to Commissioner William A. Jones, January 13, 1898, SJ Ex. 211.

⁶⁹ Myers, *History of the Santee Sioux*, p. 287.

⁷⁰ Letter from Strait to Price, September 5, 1884, SJ Ex. 206.

⁷¹ Myers, *History of the Santee Sioux*, pp. 286-287.

children of the latter.”⁷² Of course, this was in direct contradiction to the instructions Henton was given by Acting Commissioner Thomas P. Smith. Smith told Henton that, “In the opinion of this office, the mixed blood Mdewakanton Sioux are as much entitled to receive benefits under said appropriations as the full bloods.”⁷³

In 1892, Henton was becoming increasingly upset at the mixed-bloods. He advised the Commissioner that mixed-bloods “for the past several months” had been accusing him of having expended their money.⁷⁴ He complained of receiving “insolent” letters and that the mixed-bloods “have gone so far as to employ a lawyer to look into my affairs.”⁷⁵ His disenchantment was so complete over the mixed-blood issue that he asked the Commissioner “that I may be relieved of this office” upon the settling of accounts.⁷⁶ However, despite these issues, Henton remained in the position for years to come.

Then, it is not ironic to the present that the mixed-bloods felt, at one time, discriminated against regarding the distribution of benefits under the

⁷² Ex. 217, citing letter from Henton to Commissioner William A. Jones, January 13, 1898.

⁷³ Ex. 217, citing letter dated June 21, 1897 from Acting Commissioner Smith to Henton.

⁷⁴ *Id.*, \$8000 authorized in the 1890 Appropriation Act.

⁷⁵ *Id.*

⁷⁶ *Id.*

Appropriation Acts.⁷⁷ Even those mixed-bloods that qualified for benefits were complaining that they were required by the Department to move, from the cities and towns they had assimilated, back to one of the established settlements and the land which was purchased with funds from the Acts.⁷⁸ Myers stated that Henton “believed that pressure should be brought” on the mixed-bloods to move from the populated areas back to the settlements to receive the Appropriations.⁷⁹

In February 1890, full-blood Mdewakantons at Shakopee and Prairie Island complained, blaming Rev. Hinman and Henton, they were being excluded from 1888 Act benefits unless they moved from their homes to the Redwood Agency.⁸⁰ The Mdewakantons argued that such requirement would make them “huddle together as annuity or blanket Indians.”⁸¹ Even after the Appropriation Acts, Department policy towards the mixed-blood Mdewakantons seemed to be in disarray, with confusing and ambiguous results. However slow, during the 1890’s a mixed-blood government policy was beginning to develop and gather momentum.

⁷⁷ Myers, *History of the Santee Sioux*, p. 286.

⁷⁸ *Id.*

⁷⁹ *Id.*, citing letter Henton to Morgan, July 24, 1889, NARS, RG 75, LR.

⁸⁰ February 21, 1890 letter from Wells to Commissioner of Indian Affairs, Ex. 210; March 12, 1890 John Eastman to Commissioner of Indian Affairs, Ex. 211.

⁸¹ *Id.*

3. Henton's 1889 Supplemental Roll Did Not Capture The Totality Of Mixed Blood Mdewakanton Residing In Minnesota On May 20, 1886 Whom Had Severed Tribal Relations, As He Continuously Supplemented his 1889 Census By Adding Mixed-Blood Mdewakanton Applicants Throughout the 1890's for 1890 Appropriation Act Benefits.

The post-1890 Appropriations Act period was the dawn of a new age for the mixed-blood Mdewakanton Sioux. Although tensions continued to thrive, the Department began to assert and enforce the right of the mixed blood to governmental appropriations, if for no other reason that it was the express will of Congress in the 1890 Act.⁸² Although Henton did start listing mixed-bloods Mdewakantons in his first 1889 census, he advised the Commissioner of Indian Affairs in 1890 that he had been "extremely careful...Since I have been agent, I have added no new names to the census and rejected many who were unlawfully enrolled."⁸³

However, due to a policy change within the Department of Interior brought about by the recognition of mixed-blood Mdewakantons to the benefits of the 1890 Appropriation Act, the mixed-blood restrictions of the early to late 1880's gave way to the Department of Interior's "present

⁸² The Commissioner advised Bishop Whipple that the 1890 Act "specifically provides that the money is 'for support of the full and mixed blood Indians,' I have no authority to prevent the latter from sharing if they apply for assistance to the Special Agent." March 12, 1892 letter from CIA to Whipple. Ex. 213.

⁸³ February 10, 1890 letter from Henton to Comm'r of Indian Affairs; SJ Ex. 209.

system [1898] of enrolling any and all persons submitting proof of being Mdewakanton Sioux blood.”⁸⁴ The Department’s new policy of inclusiveness of mixed-bloods to Mdewakanton governmental benefits, including Indian land, persists to the present day.⁸⁵

The Henton 1889 census subsequently gave way to enrollment of Mdewakantons not listed on the Henton census for 1890 Appropriations Act benefits. In the summer of 1892, Henton told the Commissioner of Indian Affairs that “[s]ince I submitted my last estimate ...a great many mixed bloods have made application and been enrolled.”⁸⁶ He even suggested to the government that he “be allowed to use my own judgment in regard to equalizing the funds [between the full and mixed-bloods] which was approved by your office.”⁸⁷ Henton’s last census, in June 1898, showed 198 full-bloods and 722 mixed bloods were sharing the modest appropriations – compared to the 264 Mdewakantons listed in his first census.⁸⁸ In March 1899, James McLaughlin produced another Mdewakanton census that expanded even more the number of mixed-blood Mdewakanton.

⁸⁴ January 13, 1898, Henton to Commissioner of Indian Affairs

⁸⁵ See Department of Interior, August 17, 1971 letter; Ex. 219.

⁸⁶ July 13, 1892 letter from Henton to the Commissioner of Indian Affairs. Ex. 215; see also Ex. 221, a January 11, 1892 letter from Henton to the Comm’r of Indian Affairs telling the Government that he “overlooked” a Mdewakanton in taking his last census.

⁸⁷ *Id.*

⁸⁸ SJ Ex. 217; see also Myers, *Id.* at 287.

These historical events portray that the Department, for a time, largely ignored mixed-blood Mdewakantons in favor of the full-bloods. However, after the 1890 Act, departmental policy changed. Mixed-bloods were given equal rights with full-blood Mdewakanton and became “as much entitled to receive benefits under said appropriations as the full bloods.” In the years following the 1890 Act, the Department’s policy was inclusive for the mixed-blood. Henton, McLaughlin and an untold host of Department employees and policy-makers into the 20th century initiated the enrollment of so many other deserving mixed-blood Mdewakantons that were not tied to the 1886/1889 census, but who could prove their Mdewakanton heritage by various other reliable means.⁸⁹ The Group B Plaintiffs request is twofold: (1) hold that, as matter of law, the Group B Plaintiffs may prove eligibility to Appropriation Act benefits by means other than the 1886/1889 censuses, and (2) further hold that the Group B Plaintiffs have established eligibility by a preponderance of the evidence. The Group B Plaintiffs answer the question presented affirmatively, as the history underlying the act and its subsequent implementation, long-standing Agency policy and notions of

⁸⁹ See Zephier Brief (Doc. # 1004-1), p. 4; for instance, the McLaughlin 1899 census; 1850’s Mdewakanton annuity rolls, Federal Probate proceedings, land assignments; 1891-92 Elrod list of Sioux Scouts and Soldiers, the 1862 Ft. Snelling Camp Census, the 1862 Camp Release list of captives and half-breeds and the 1877 -82 Sanborn Sioux Scouts List.

justice compel this Court to uphold Group B Plaintiffs' legal right to share the damages with their fellow 1886 Mdewakanton.

E. THIS COURT HAS HELD THAT 'OFF-1886/1889 CENSUS' MDEWAKANTON MAY ESTABLISH ELIGIBILITY FOR APPROPRIATION ACT DAMAGES.

This Court has previously indicated in its opinions that it may consider the eligibility of loyal Mdewakantons that were not listed on the McLeod and Henton censuses for damages awarded under the Appropriations Acts. In *Wolfchild II*, this Court observed that the McLeod and Henton censuses "may not be definitive."⁹⁰ In that case, the Court likewise noted the Government's position that "neither [the 1886 nor the 1889] roll includes the mixed-bloods who were included in the 1890 Act."⁹¹ In *Wolfchild III*,⁹² this Court granted the intervening Plaintiffs motions for intervention of right; finding that the intervenors, "assert means of proving descendancy different from the 1886 and 1889 censuses [and] all make good-faith, non-frivolous claims that they are beneficiaries...under the criteria specified in the Appropriation Acts."⁹³

⁹⁰ *Wolfchild v. United States*, 68 Fed. Cl. 779, 787 (2005), n. 10

⁹¹ *Id.*

⁹² *Wolfchild v. United States*, 72 Fed. Cl. 511, 520

⁹³ *Id.*

F. SUBSEQUENT TO THE 1890 APPROPRIATION ACT, THE DEPARTMENT OF INTERIOR ESTABLISHED A POLICY OF PERMITTING NON-1886/1889 CENSUS MDEWAKANTON INDIVIDUALS TO QUALIFY FOR CONGRESSIONAL BENEFITS, THEREBY ENTITLING THE GROUP B PLAINTIFFS TO *SKIDMORE* DEFERENCE

1. The Department of Interior's Letter dated August 17, 1971 reaffirms its policy of use of the McLeod, Henton and McLaughlin rolls and "any other information or records" to prove Mdewakanton Appropriation Acts eligibility.

In addition to the Department of Interior's liberal mixed-blood eligibility policy created and implemented in the years after the passage of the 1890 Appropriations Act,⁹⁴ the Department has consistently applied the policy, through to the present. It is particularly noted with regards to the Department's conduct concerning the three communities. However, it is the Department's policy regarding the communities that generated an August 17, 1971 letter⁹⁵ which stands as a clear pronouncement of Interior's position. The letter supports the Group B Plaintiffs' position that Interior has interpreted the Appropriation Acts to permit non-1886/1889 census "rolls, materials [and] any other information or records" to prove eligibility.

⁹⁴ See § II. A., *supra*.

⁹⁵ August 17, 1971, Department of Interior, Acting Assistant Solicitor, William A. Gurshuny to the Field Solicitor of Twin Lakes, Minnesota, Ex. 219.

The letter resulted from “membership and land problems of the Shakopee Mdewakanton Sioux Community of Minnesota.”⁹⁶ The Associate Solicitor was asked “what roll or rolls should receive the official approval of the United States.”⁹⁷ The solicitor expressly approved: (1) the McLeod 1886 census;⁹⁸ (2) the Henton 1889 census;⁹⁹ (3) the McLaughlin 1917 roll;¹⁰⁰ and (4) “other rolls or materials if their contents sufficiently prove that the named individual is a descendant of an 1886 Mdewakanton resident of Minnesota.”¹⁰¹ The August 17, 1971 letter bears out the United States’ litigation position that the 1886 and 1889 censuses do not cover all eligible Mdewakantons.¹⁰²

⁹⁶ *Id.* at p. 1.

⁹⁷ *Id.*

⁹⁸ *Id.* at p. 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at p. 3.

¹⁰¹ *Id.*; In the Assistant Solicitor’s “Conclusion,” he further states, “we are of the opinion that any other information or records submitted by an individual who claims to trace back to an 1886 Mdewakanton, which sufficiently proves his claim, may be used...” *Id.* at 5.

¹⁰² See U.S. Response to Plaintiffs’ Proposed Notice (Doc. # 74, May 5, 2005) (reprinted in Abrahamson Brief (Doc. # 951-1) at 30-31 – “The rolls [the 1886 and 1889 censuses] do not cover all individuals who might be eligible...Correspondence from Robert Henton and others also indicates that some individuals who were not on the rolls should be eligible...”. See also 33; Zephier, *Id.* at 16.

2. The Department allowed non-census Mdewakanton descendants to possess Land Certificates issued pursuant to the Appropriation Acts.

As a policy, the Government has allowed non-1886/1889 census Mdewakantons to receive Indian Land Certificates.¹⁰³ The Indian Land Certificate contains a certification that the individual “has been established as an eligible Mdewakanton Sioux Indian by reason of being a descendant of a Mdewakanton Sioux Indian who resided in Minnesota on May 20, 1886...and who had severed his tribal relations.”¹⁰⁴ These Department of Interior actions are consistent with the Agency’s liberal eligibility policy of using non-1886 and 1889 documents.

CONCLUSION

The Group B Plaintiffs join the Wolfchild Group and the other Group A Plaintiffs in requesting this Court to find that the February 16, 1863 Act has an unfulfilled, money-mandating duty upon the United States. However, any idea that the 1886 Mdewakanton are presumptively or exclusively beneficiaries of the Act is misplaced as a matter of law. The Group B

¹⁰³ Abrahamson Group, Brief (Doc. # 951-1) at D., pp. 20-23 (advocating use of the 1899 McLaughlin Mdewakanton census and that non-1886/1889 Mdewakanton Abraham Robinette, Albert LeClair and John Cermak were not on either census, yet the Department issued Indian Land Certificates, p. 24). See also Brief at p. 30 (Harry Bluestone’s June 1, 1905 Indian Land Certificate).

¹⁰⁴ Indian Land Certificate, Ex. 220.

Plaintiffs further submit that they have submitted evidence, by a preponderance of evidence, of their eligibility to the February 1863 Act.

The Group B Plaintiffs further maintain that they are also eligible for the damages awarded by the Court for the United States' statutory use violations of the 1888, 1889 and 1890 Appropriations Acts. The Group B Plaintiffs reject any notion, if any, that the 1886 Mdewakanton are the exclusive beneficiaries of the Appropriations Acts. This Court is requested to hold that the Plaintiffs, otherwise meeting the requirements of the Acts, be allowed to prove their Appropriation Act eligibility as "loyal Mdewakantons" by other rolls, information and materials outside the 1886 McLeod and 1889 Henton censuses. Such a request is in line with the Department of Interior's practices, policies and procedures and otherwise meets the end of justice.

WHEREFORE, the Plaintiffs request judgment against the United States regarding the Defendant's liability for violation of the Act of February 16, 1863, the Defendant's statutory use violations of the Appropriations Acts and upon the other causes of actions against the United States as set forth in Plaintiffs' respective pleadings and motions for summary judgment for the reasons set forth herein and for such other and further reasons this Court deems just and equitable.

Respectfully Submitted,

s/ Gary J. Montana

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CERTIFICATE OF SERVICE

The Group B Plaintiffs, by and through their respective above-signed counsel, herewith certify that they transmitted the foregoing Memorandum in Partial Opposition to Wolfchild Plaintiffs' Motion and Memorandum in Support of Motion for Summary Judgment by ECF transmittal, this 20th day of April, 2011.

s/ R. Deryl Edwards, Jr.
R. Deryl Edwards, Jr.
For above listed Group B Counsel

SUMMARY JUDGMENT:

**SUPPLEMENTAL APPENDIX OF
SUMMARY JUDGMENT EXHIBITS¹⁰⁵**

Exhibit No. Document Description

204. Declaration of Kelly Stricherz
205. *The Congressional Globe*, January 14, 1863, pp 302-303;
January 22, 1863, pp. 440-445; January 26, 1863, pp. 509-512;
January 28, 1863, pp. 513-516, 518
206. September 5, 1884 Letter Strait to H. Price Commissioner of Indian Affairs
207. October 20, 1888 Commissioner of Indian Affairs Oberly to Robert B. Henton.
208. July 24, 1889 Henton to Morgan
209. February 10, 1890 letter from Henton to Comm'r of Indian Affairs
210. February 21, 1890 letter from Wells to Commissioner of Indian Affairs;
211. March 12, 1890 John Eastman to Commissioner of Indian Affairs.
212. February 25, 1892, Henton to Commissioner of Indian Affairs
213. March 12, 1892, CIA Commissioner Morgan to Whipple.
214. June 3, 1892 Henton to Commissioner of Indian Affairs
215. July 13, 1892 letter from Henton to the Commissioner of Indian Affairs
216. June 21, 1897 from Acting Commissioner Smith to Henton.

¹⁰⁵ The Robertson-Vadnais Plaintiffs join in the Wolfchild Appendix, in relevant part, as a Joint Appendix. These Plaintiffs set forth herein only those individual summary judgment exhibits which do not overlap with the Wolfchild Appendix for purposes of judicial economy and efficacy.

- 217. January 13, 1898 Henton to Commissioner William A. Jones
- 218. March 11th, 1899 James McLaughlin letter to the Secretary of the Interior.
- 219. August 17, 1971, Department of Interior, Acting Assistant Solicitor, William A. Gurshuny to the Field Solicitor
- 220. Indian Land Certificate
- 221. January 11, 1892, Henton to Comm'r of Indian Affairs