

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

|                                  |   |                   |
|----------------------------------|---|-------------------|
| <hr/>                            | ) |                   |
| SHELDON PETER WOLFCHILD, et al., | ) |                   |
|                                  | ) |                   |
|                                  | ) |                   |
| Plaintiffs,                      | ) |                   |
|                                  | ) | Case No. 03-2684L |
|                                  | ) | and               |
| v.                               | ) | Case No. 01-568L  |
|                                  | ) | (consolidated)    |
| THE UNITED STATES OF AMERICA,    | ) |                   |
|                                  | ) |                   |
| Defendant.                       | ) |                   |
|                                  | ) |                   |
| <hr/>                            | ) |                   |

PLAINTIFFS' SURREPLY MEMORANDUM ON CROSS-MOTIONS

Erick G. Kaardal  
William F. Mohrman  
Mohrman & Kaardal, P.A.  
33 South Sixth Street  
Suite 4100  
Minneapolis, Minnesota 55402

*Attorneys for Plaintiffs*

Dated: October 14, 2010

Dated: October 14, 2010

Sam S. Killinger  
Rawlings, Nieland, Probasco,  
Killinger, Ellwanger, Jacobs &  
Mohrhauser, LLP  
522 Fourth Street, Suite 300  
Sioux City, IA 51101  
Phone: 712-277-2373  
Fax: 712-277-3304

Jack E. Pierce  
Pierce Law Firm, P.A.  
6040 Earle Brown Drive, Suite 420  
Minneapolis, MN  
763-566-7200  
Fax 763-503-8300

Wood R. Foster, Jr.  
Siegel, Brill, Greupner, Duffy &  
Foster, P.A.  
1300 Washington Square  
100 Washington Avenue South  
Minneapolis, MN 55401  
Phone: 612-337-6100  
Fax: 612-339-6591

Kelly H. Stricherz  
213 Forest Avenue  
PO Box 187  
Vermillion, SD 57069  
Phone: 605-624-3333

Frances E. Felix  
Paul Felix  
Guy Felix  
Tyler Felix  
Logan Felix  
826 21<sup>st</sup> Ave SE  
Minneapolis, MN 55414  
612-378-5214

Dated: October 14, 2010

Creighton A. Thurman  
Thurman Law Office  
PO Box 897  
Yankton, SD 57078  
Phone: 605-260-0623  
Fax: 605-260-0624

Scott A. Johnson  
Johnson Law Group LLP  
10580 Wayzata Blvd., Suite 250  
Minnetonka, MN 55305  
Phone: 952-525-1224  
Fax: 952-525-1300

Elizabeth T. Walker  
Walker Law, LLC  
429 North St. Asaph Street  
Alexandria, VA 22314 (1-1-10)  
Phone: 703-838-6284  
Fax: 703-842-8458

Nicole N. Emerson  
Lynn, Jackson, Shultz & Lebrun  
PO Box 2700  
Sioux Falls, SD 57101-2700  
Phone: 605-322-5999  
Fax: 605-332-4249

Robin L. Zephier  
Abourezk & Zephier, P.C.  
PO Box 9460  
Rapid City, SD 57709  
Phone: 605-342-0097  
Fax: 605-342-5170

Barry P. Hogan  
Renaud Cook Drury Mesaros, P.A.  
One N Central Avenue, Suite 900  
Phoenix, AZ 85004  
Phone: 602-307-9900  
Fax: 602-307-5853

Dated: October 14, 2010

Garrett J. Horn  
Horn Law Office Prof. LLC  
PO Box 886  
Yankton, SD 57078  
Phone: 605-260-4676  
Fax: 605-260-9014

Rory King  
Bantz, Gosch & Cremer LLC  
305 Sixth Avenue SE, PO Box 970  
Aberdeen, SD 57402  
Phone: 605-225-2232  
Fax: 605-225-2497

Gary J. Montana  
Attorney at Law  
N 12923 N Prairie Road  
Osseo, WI 54758  
Phone: 715-597-6464  
Fax: 715-597-3508

Larry B. Leventhal  
Larry Leventhal & Associates  
319 Ramsey Street  
Saint Paul, MN 55102  
Phone: 612-333-5747

Royce Deryl Edwards, Jr.  
606 South Pearl  
Joplin, MO 64801  
Phone: 417-624-1962  
Fax: 417-624-1965

Bernard Rooney, Esq.  
84 Park Avenue  
Larchmont, NY 10538

Dated: October 14, 2010

Randy V. Thompson  
Nolan, MacGregor, Thompson &  
Leighton  
710 Lawson Commons  
380 St. Peter St.  
St. Paul, MN 55102

**TABLE OF CONTENTS**

|  | Page |
|--|------|
| TABLE OF AUTHORITIES.....  | ii   |
| INTRODUCTION.....  | 1    |
| I.    According to the Federal Circuit Opinion, the Plaintiffs<br>Have Beneficial Interests Under the Statutory Use<br>Restriction, But No Trust Beneficial Interests Under a<br>Trust Theory..... | 1    |
| II.   The Government’s Brief Fails to Identify the Statutory Basis<br>to Exclude the 1886 Mdewakanton Plaintiffs From Receiving<br>Benefits.....   | 5    |
| III.  This Court has Jurisdiction.....   | 10   |
| IV.  The Plaintiffs’ Claims are not Barred by the Statute of<br>Limitations.....   | 18   |

## TABLE OF AUTHORITIES

|  | <b>Page</b>     |
|--|-----------------|
| <b>Federal Statutes</b>  |                 |
| 5 U.S.C. § 702, Tucker Act .....                                       | 10              |
| 25 U.S.C. § 155.....   | 11, 12, 13, 16  |
| 25 U.S.C. §462.....  | 13, 17, 18      |
| 25 U.S.C. § 2701 .....   | 1               |
| 26 Stat. § 336 .....   | 13              |
| 28 U.S.C. § 1331.....  | 15              |
| 28 U.S.C. § 1360, Pub. Law 280 .....                                   | 6, 14           |
| 28 U.S.C. § 1505, Indian Tucker Act.....                               | 10, 13          |
| 28 U.S.C. § 2501.....  | 20              |
| Act of Feb. 16, 1863, 12 Stat. 652.....                                | 1, 7, 9, 15, 17 |
| Act of Dec. 19, 1980, Pub. L. 9-557, 94 Stat. 3262.....                | <i>passim</i>   |
| Act of June 29, 1888, ch. 503, 25 Stat. 217.....                       | 12, 13, 17      |
| Act of Mar. 2, 1889, ch. 412, 25 Stat. 980 .....                       | 12, 13, 17      |
| Act of Aug. 19, 1890, ch. 807, 26 Stat. 336 .....                      | 12, 13, 17      |
| Pub. L. 73-383, 48 Stat. 984 (1934)<br>Indian Reorganization Act ..... | 11, 13, 15, 17  |
| List Act, Pub. L. No. 103-454, § 103.....                              | 5               |
| Pub. L. No. 108-108, 117 Stat. 1241 (Nov. 10, 2003).....               | 18, 19          |
| <b>Federal Regulations</b>   |                 |
| 74 Fed. Reg. 40218 (Aug. 11, 2009).....                                | 5               |

**Cases**

*Carcieri v. Salazar*, U.S. 129 S.Ct. 1058 (2009) ..... 6, 7, 8, 17

*Chevron, U.S.A. Inc. v. NRD, Inc.* 467 U.S. 837 (1984)..... 10

*Franconia Associates v. United States*, 536 U.S. 1291 (2002) ..... 19

*Maxam v. Lower Sioux Indian Community of Minnesota*,  
829 F.Supp. 277 (1993) ..... 15

*Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) ..... 3

*Ross v. Flandreau Santee Sioux Tribe*,  
809 F.Supp.738 (S.D.S.D.1992) ..... 15, 16

*Smith v. Babbitt*, 100 F.3d 556 (8<sup>th</sup> Cir. 1996), *cert. denied*,  
522 U.S. 807 (1997)..... 8

*United States v. Mitchell* (“*Mitchell II*”) 455 U.S. 535 (1980) ..... 14

*United States v. Navajo Nation*, (“*Navajo Nation II*”),  
537 U.S. 488 (2003)..... 14

*United States v. White Mountain Apache*, 537 U.S. 465 (2003)..... 14

*Wolfchild v. United States* (“*Wolfchild I*”), 62 Fed. Cl. 521 (2004) ..... 2

*Wolfchild v. United States* (“*Wolfchild III*”), 72 Fed. Cl. 511 (2006)..... 2

*Wolfchild v. United States* (“*Wolfchild VI*”), 559 F.3d 1228  
(Fed. Cir. 2009) ..... *passim*

**Other Authorities**

Lower Sioux Indian Community Constitution (1936) ..... 14

Prairie Island Indian Community Constitution (1936) ..... 14

Shakopee Mdewakanton Sioux Community Constitution (1969)..... 14

## INTRODUCTION

The federal government refuses to recognize that the Federal Circuit identified the “statutory use restriction” as a restriction on Interior’s administrative powers. After the 1863 Act, Interior used its administrative powers to create, recognize and sustain the communities for the benefit of the 1886 Mdewakanton in the first place. However, since 1980, in contradiction, Interior has violated the statutory use restriction by allowing the communities a disproportionate share of the communities’ revenues at the expense of the 1886 Mdewakanton.

The 1980 Act, as the Federal Circuit indicated, does not explicitly or implicitly repeal the statutory use restriction. The 1980 Act was limited to making the United States trustee for all the reservation lands of the communities which are, in turn, subject to Interior’s statutory use restriction. Therefore, this case can now be brought to a final resolution with Interior applying its pre-1980 legal position that the 1886 Mdewakanton are beneficiaries of the Appropriation Acts’ statutory use restriction and, as such, are entitled to exclusive and equal shares of the 25 U.S.C. § 155 U.S. Treasury Funds and of the 25 U.S.C. § 2701, et seq. (IGRA) per capita payments (collectively, “Treasury Funds and Per Capita Payments”).

**I. According to the Federal Circuit Opinion, the Plaintiffs Have Beneficial Interests Under the Statutory Use Restriction, But No Trust Beneficial Interests Under a Trust Theory.**

The government's brief repeatedly errs in asserting that the Federal Circuit opinion means that the Plaintiffs have no "equitable" or "beneficial" interest in their statutory use restriction claims:

It is inconsistent to find that Plaintiffs have an interest because of this statutory use restriction, based on appropriations language the Federal Circuit rejected as creating a beneficial interest.<sup>1</sup>

For example, at pages 8 and 9, the government argues that Plaintiffs' citation to *Wolfchild VI*, 559 F.3d at 1241, 1249 for support of a statutory use restriction beneficial interest is contradictory.

But, all of these arguments by the government fail to account for the Federal Circuit's limited use of the defined terms "equitable" and "beneficial" as only relating to a trust claim – not a statutory use restriction claim. The Federal Circuit defined in footnote 5 the use of these terms:

Because certain terms have been used inconsistently by different sources and at different times, we wish to make clear at the outset that when we use the terms "equitable" or "beneficial" title or ownership with respect to land that is held in trust, we refer to the trust beneficiary's ownership of all interests in the land except for legal title. The plaintiffs in their complaint use the term "equitable title" for that purpose, *see* Fifth Amended Complaint ¶ 8, and the trial court has used that term most of the time, *see Wolfchild I*, 62 Fed.Cl. at 534, 540, 543, 549, with some variation, *see Wolfchild v. United States*, 72 Fed.Cl. 511, 528 (2006) ("equitable interest"); *id.* at 532 ("beneficial owner").

559 F.3d at 1240 n. 5. In light of these defined terms, the very quote from page 1249 that the government argues contradicts the Plaintiffs' assertion of a statutory use restriction beneficial interest, actually supports it:

---

<sup>1</sup> Br. at 14.

**[T]he 1886 Mdewakantons were merely the intended beneficiaries of a congressional appropriation**, and their descendants were merely the beneficiaries of an interim Interior Department policy designed to approximate Congress' purpose in the Appropriation Acts pending legislation settling the ownership issue.

*Id.* at 1249 (emphasis added).<sup>2</sup> The fact that the Federal Circuit stated that the 1886 Mdewakanton were Congress's "intended beneficiaries" of the Appropriation Acts gives them a "beneficial interest" under the Appropriation Acts.

The Federal Circuit repeatedly found that the 1886 Mdewakanton were "intended beneficiaries" of the Appropriation Acts' statutory use restriction:<sup>3</sup>

- "The Interior Department recognized, of course, that Congress intended the 1886 Mdewakanton to be specific beneficiaries of the Appropriation Acts."<sup>4</sup>
- Referring to the text "or families thereof" -- "[t]hat language makes clear that the authorization for expenditures extended to cover the needs of the families of the beneficiaries, not simply the needs of the beneficiaries themselves."<sup>5</sup>

And, Interior acted accordingly:

The Secretary of the Interior ... sought to ensure that the funds appropriated under the Act would be spent for the benefit of those individuals...The Secretary adopted a policy designed to promote Congress's intent by

---

<sup>2</sup> Page 1241 of the opinion also supports Plaintiffs' contention of a statutory use restriction, "The analysis of this issue is further complicated by the fact that, in the years between 1888 and 1980, Interior Department officials at times characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants." *Id.* at 1241. Although this was not enough for the Federal Circuit to find a trust relationship, it was clearly enough for the Federal Circuit to find Interior's statutory use restriction – the proposition for which Plaintiffs offered the cite. Of course, other pages of the opinion, including the Federal Circuit's holding itself support that a statutory use restriction exists.

<sup>3</sup> See e.g., *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (A statute providing benefits to a class of people should be interpreted in favor of the (Indian) beneficiaries).

<sup>4</sup> *Wolfchild*, 559 F.3d at 1243.

<sup>5</sup>*Id.* at 1242.

assigning the land to individuals from within the group or 1886 Mdewakantons (sic) and subsequently [to their] descendants....”<sup>6</sup>

The Federal Circuit noted that the contemporaneous documents “make clear that the Secretary of the Interior considered himself *bound by the terms of the statutes* to reserve the usage of the 1886 lands for members of the particular beneficiary class....”<sup>7</sup> Overall, these and other Federal Circuit statements in the opinion reflect that the 1886 Mdewakanton have a “beneficial interest” -- not a trust interest – but a beneficial interest under the statutory use restriction.

To completely refute the government’s position that the Plaintiffs do not have a beneficial interest under the statutory use restriction, consider the government’s argument applied to the Federal Circuit’s holding which footnote 5 modifies:

We have examined all of the legislative and administrative materials referred to by the court and called to our attention by the parties. While the legal issue is a complex one and untangling the historical materials is difficult, we conclude that the Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction, and not creating a trust relationship through which the 1886 Mdewakantons and their descendants obtained beneficial ownership rights in the 1886 lands.<sup>5</sup>

*Id.* at 1240. Here, the government’s argument tries to conflate the statutory use restriction claim with a trust claim despite the Federal Circuit’s clear distinction between the two. The Federal Circuit indicated in its holding and footnote 5 that denying Plaintiffs’ trust claim did not constitute a denial of Plaintiffs’ recognized claim for statutory use restriction. But, the government argues so anyway.

---

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1243 (emphasis added).

The government's brief at page 9 goes even one step further down this road of ignoring the text of the Federal Circuit opinion while conflating the Plaintiffs' statutory use restriction with an inapplicable trust theory:

Thus, any rights of Plaintiffs [under the statutory use restriction] were completely extinguished when Congress passed the 1980 Act, settling the ownership issue.

Br. at 9. However, the Federal Circuit indicated that the 1980 Act did not repeal the Appropriation Acts' statutory use restriction "implied or otherwise."<sup>8</sup> So, since the Federal Circuit indicated the 1980 Act didn't repeal the statutory use restriction – and that's the law of the case – then the government's argument in its brief that the 1980 Act "completely extinguished" Plaintiffs' beneficial rights under the statutory use restriction is barred by the law of the case.

## **II. The Government's Brief Fails to Identify the Statutory Basis to Exclude the 1886 Mdewakanton Plaintiffs From Receiving Benefits.**

The failure of the government to accept Plaintiffs' invitation to explain its view on the statutory basis and legal identity of the communities means Interior has conceded on that point.<sup>9</sup> Consequently, the government's brief does not attempt

---

<sup>8</sup> *Id.* at 1258.

<sup>9</sup> The fact that the communities closed their respective political borders to 1886 Mdewakanton lineal descendants does not in the first instance deprive lineal descendant Plaintiffs of their ancestry as 1886 Mdewakanton, and in the second instance, does not terminate Interior's statutory obligations to 1886 Mdewakanton — within or outside those political borders. As much as the communities believe they are "tribes" and as many times as they may say it, the federal government wiped out that distinction in 1863. While the List Act (Pub. L. No. 103-454, § 103 and 74 Fed. Reg. 40218 (Aug. 11, 2009) provides the communities "recognition" as other historic tribes, it did not repeal the federally imposed *limitations* on these communities. Interior, for instance, as the communities' Constitutions demand, requires that certain community resolutions be *approved* by Interior first before

nor achieve any semblance of an answer to the question of the Federal Circuit's determination of a statutory use restriction favoring the 1886 Mdewakanton Plaintiffs when there is no identical or kindred statute for the Communities. In other words, "on what statutory authority are the communities sustained by Interior to exclude the 1886 Mdewakanton Plaintiffs from all benefits?"

The government's brief does not attempt nor achieve any answer to this question. Only in subsection D relating to *Carciere* does the government attempt, albeit indirectly, to answer the question poised above. But, at page 19, the government omits critical information in its legal analysis and mischaracterizes the Federal Circuit opinion. The government correctly states the holding of *Carciere*:

Because the IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction," the Supreme Court concluded that the statute "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."

---

community enforcement. This is a limitation of power imposed by Congress (through the IRA and other statutes) enforced through Interior. Likewise, the statutory use restriction is another layer of Congressional limitations deliberately placed upon *these communities*. See also Public Law 280, 28 U.S.C. § 1360. Absent from any argument from the United States are references to other non-tribal communities similarly situated. It is not surprising since the 1862 Minnesota uprising involved the single largest number of white settlers killed in such an event in United States history. Thus, Congress's reaction to extinguish the Mdewakanton tribe was expected (note the forced exodus of approximately 6,000 Indians from Minnesota and the uprising occurring during the Civil War), but it went too far when it rendered innocent Mdewakanton homeless and defenseless. Certain provisions of the 1863 Act and the subsequent Appropriation Acts show the effort to assist innocent loyal Mdewakanton who, despite being the saviors of surviving white settlers were driven into poverty not by their own doing, but by Minnesotans lashing back due to racism and the fresh memories of that uprising.

Br. at. 19 (citations omitted). But, then the government omits the critical information that the three communities, recognized in 1936 (two) and 1969 (one), were not “under federal jurisdiction when the IRA was enacted in June 1934” (according to the government’s view that there are no 1886 Mdewakanton and there is no statutory use restriction). Thus, the legal effect of the *Carcieri* decision on the government’s stated legal argument is obvious: there is no properly federally-recognized community at all because the communities were not under federal jurisdiction in June of 1934.<sup>10</sup>

Next, the government mischaracterizes the Federal Circuit opinion on *Carcieri*. The government correctly quotes the Federal Circuit opinion:

The Federal Circuit found that: “The plaintiffs have called our attention to the Supreme Court’s recent decision in *Carcieri v. Salazar*, \_\_ U.S. \_\_, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), which involved the construction of the 1934 Act. They contend that *Carcieri* supports their argument **that the Appropriation Acts created a trust for the 1886 Mdewakantons and their descendants**. We do not regard *Carcieri* as in any way relevant to **that issue**.” *Wolfchild VI*, 559 F.3d at 1251, n. 8.

Br. at 19 n. 4 (emphasis added). But, then, it mischaracterizes the decision:

---

<sup>10</sup> The 1980 Act allowed the United States to hold lands in trust for the Communities and Interior continues to maintain authority over the Communities. But, *Carcieri* requires the prerequisite of a recognized tribe of whom “those members of tribes that were under federal jurisdiction at the time the IRA was enacted.” *Carcieri v. Salazar*, 129 S.Ct. 1058, 1065 (2009). The United States cannot rewrite history — the 1863 Act eviscerated the Mdewakanton Tribe. There was no Mdewakanton “tribe” in 1934. While members of a former tribe were under federal jurisdiction via the statutory use restriction, and as the Federal Circuit found, no trust existed — lands were not held in trust for any recognized tribe in 1934. The 1980 Act as interpreted by Interior and its failure to enforce the existing statutory use restrictions contravene the *Carcieri* holding.

As the Federal Circuit correctly concluded, the Secretary's authority under the IRA is not relevant to the questions raised in this case – **whether the Appropriation Acts created a “statutory use restriction” and whether, if they did, the 1980 Act terminated that restriction or the United States is in violation of that restriction.**

Br. at 19 (emphasis added). The Federal Circuit disclaimed *Carcieri*'s relevancy to the certified trust question; but, it never denied its relevancy to the communities' legal status vis-à-vis the 1886 Mdwakanton's statutory use restriction.

To the contrary, the Plaintiffs believe that the Federal Circuit left to this Court to interpret the IRA to determine whether (1) under *Carcieri* the communities are not properly federally recognized because they have no pre-June 1934 antecedent – as the government argues or (2) under *Carcieri* the communities are properly federally recognized because the 1886 Mdwakanton were under federal jurisdiction in June 1934 because of the Appropriation Acts' statutory use restriction – as the Plaintiffs argue? The Plaintiffs believe the latter position is more consistent with *Carcieri*, the statutes and legal history.

Regardless of how that question is resolved, Interior's legal position taken in *Smith v. Babbitt*<sup>11</sup> and elsewhere that the communities are “sovereign tribes” -- not subject to the 1886 Mdwakanton and the statutory use restriction -- is null and void after *Carcieri*. The only legal and logical position for Interior to take, to ensure the continued federal recognition of the communities, is to embrace the 1886 Mdwakanton and the statutory use restriction. Of course, Interior should have been done this long ago, if for no other reason, than to comply with the statutes.

---

<sup>11</sup> *Smith v. Babbitt*, 100 F.3d 556 (8<sup>th</sup> Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

The communities' legal identity also affects how the 1980 Act would be interpreted. Assuming that the communities' legal identities under the IRA are subject to Interior's statutory use restriction, then the Federal Circuit's opinion interpreting the 1980 Act as not repealing the statutory use restriction makes complete sense because Interior holds all the communities' reservation lands in trust for the communities which are subject to Interior's statutory use restriction.<sup>12</sup>

Moreover, as the government notes on page 20, the United States took additional land in trust for the communities after 1936 -- the so-called "IRA lands." The 1886 Mdewakanton benefitted from the IRA lands as well as the 1886 lands because they could receive land assignments on both. The 1980 Act removed this checkerboard pattern. Nothing in the 1980 Act's three references to the "communities" indicates that the communities would receive 100% of the Treasury Accounts and Per Capita Payments and the 1886 Mdewakanton would receive 0%. The 1980 Act, as a corrective measure to allow the attainment of loans for development in the checkerboard pattern of lands, caused *those lands* to be held in trust for three political post-IRA communities. The 1980 Act did not repeal the

---

<sup>12</sup> While the communities enjoy political control over the 1886 lands, the 1980 Act did not give them any additional unbridled "control" as a supreme sovereign as it affected 1886 Mdewakanton under the communities' jurisdiction and those outside the reservation boundaries. The statutory use restriction imposed upon the United States is an obligation that was to have ensured a federal protective measure through limitations of administrative power for the benefit of the 1886 Mdewakanton. As the Appropriation Acts sought to impose some social balance against deliberate prohibitions of land acquisitions for the loyal Mdewakanton after the passage of the 1863 Act, the statutory use restriction continues to impose a balance against social discrimination — even if now encouraged by or as a result of the politically polarizing communities.

statutory use restriction. If it had, the Federal Circuit decision would have said so. Instead, the Federal Circuit merely indicated, that if a trust existed, the 1980 Act terminated the trust -- while at the same time noting the 1980 Act did not repeal the Appropriation Acts' statutory use restriction. The Federal Circuit is correct that the 1980 Act did not terminate Interior's statutory use restriction. The 1980 Act did not eliminate Interior's statutory obligation to ensure that the Treasury Accounts and Per Capita Payments were exclusively and equally distributed to the 1886 Mdewakanton.<sup>13</sup> The text and legislative history of the 1980 Act do not even mention the then-existing Treasury Accounts and any Per Capita Payments.<sup>14</sup>

### **III. This Court has Jurisdiction.**

The government is in error. The Court should infer a money-mandating duty and assert jurisdiction under the Indian Tucker Act and Tucker Act.<sup>15</sup>

The Plaintiffs, as the government recognizes, have presented three consistent legal theories for this Court to recognize jurisdiction in this case. First, the

---

<sup>13</sup> Prior to 1980, Interior did meet with Lower Sioux and Prairie Island Community leaders regarding the distribution of Treasury Funds. Although the community leaders wanted those funds distributed among the communities, ultimately it was the Secretary's decision to make. Therefore, even if the communities wanted the money for themselves, the Secretary was still subject to the statutory use restriction obligations of the Appropriation Acts. Whether the communities recognized the legalities or not is irrelevant. The Secretary had the responsibility to properly disburse the funds.

<sup>14</sup> Since the Appropriation Acts reflect a discernable legislative intent, as the Federal Circuit found in a statutory use restriction, then any Interior action based on an incorrect interpretation cannot be upheld as a permissible construction of the statute Interior administers. *See Chevron, U.S.A. Inc. v. NRD, Inc.* 467 U.S. 837, 843 (1984).

<sup>15</sup> The legal standards applicable to this question are stated in the cross-motion and not repeated here.

Appropriation Acts' text itself makes the 1886 Mdewakanton specific beneficiaries of the statutory use restriction -- giving rise to a money-mandating duty. Second, the Appropriation Acts, in conjunction with the applicable laws of generally applicability -- 25 U.S.C. § 155, IRA and IGRA -- justifies an inference of a money mandating duty. Third, under these specific and general statutes, the fact that Interior created and assumed supervision and control over the communities supports an inference of a money-mandating duty.

Despite acknowledging Plaintiffs' point of view, the government organized its jurisdictional arguments topically: (1) IRA, (2) IGRA, (3) 25 U.S.C. §155 and (4) Appropriation Acts. The government's sequencing and isolation of the statutes, belies statutory interpretative principles well known to this Court.

The government's sequencing diminishes the paramount importance of the Appropriation Acts as the fundamental building blocks of the Federal Circuit's determined law of the case — a recognized statutory use restriction. Because these Acts are *specific* statutes making the 1886 Mdewakanton the *specific* beneficiaries of the statutory use restriction, they must be considered first. Then, the next statutes to consider are the laws of general applicability, that here, enhanced the benefits of the 1886 Mdewakanton as well as hundreds of Native American tribes: 25 U.S.C. § 155, IRA and IGRA. Finally, the administrative role of Interior, beginning in 1936, should be considered because Interior created and assumed supervision and control over the communities -- first to benefit the 1886 Mdewakanton and, since 1980, to deprive the 1886 Mdewakanton of all benefits.

The government's arguments at page 7 through 11 asserting that the general laws of applicability -- 25 U.S.C. § 155, IRA and IGRA -- are not in themselves money-mandating statutes have no consequences here. These laws, without a specific statute making a specific Indian tribe, band, group or person a specific beneficiary, would not be money-mandating. Thus, the supporting cases interpreting these laws of general applicability are inapposite.

Plaintiff has never argued that these laws of general applicability, taken individually, are each money-mandating statutes. Instead, the Plaintiffs have three consistent theories to support the Court finding a money-mandating duty and asserting jurisdiction. First, the Appropriation Acts -- that is the text itself making the 1886 Mdewakanton specific beneficiaries of the statutory use restriction -- gives rise to a money-mandating duty. Contrary to the government's arguments at pages 11 through 16, this Court can fairly infer the Plaintiffs' right to recover damages from specific provisions of the Appropriation Acts' statutory use restriction. Importantly, appropriation acts are about "federal money" -- making it possible for Congress to use an appropriation act to require Interior to buy "land" and, at the same time, impose a money-mandating duty on Interior. The Appropriation Acts' statutory use restriction expressly imposes specific money-mandating duties on Interior which ensures, among other things, that each 1886 Mdewakanton beneficiary "shall receive[ ], as nearly as practicable, an equal amount in the value of the appropriation."<sup>16</sup> Congress intended the 1886 Mdewakanton to receive the

---

<sup>16</sup> 26 Stat. 336.

“benefits” – not the communities. The Court can infer, particularly based on the historical circumstances and legislative history, that Congress wanted the 1886 Mdewakanton to get the “benefits” of the Appropriation Acts’ statutory use restriction, via a lawsuit if necessary, if Interior breached the statutory use restriction allowing the communities or anyone else to receive a disproportionate share at the expense of the 1886 Mdewakanton.<sup>17</sup>

Second, the Appropriation Acts, in conjunction with the applicable laws of generally applicability -- 25 U.S.C. § 155, IRA and IGRA – justifies an inference of a money mandating duty. The IRA, 25 U.S.C. § 462, expressly preserved and continued the statutory use restriction and allowed for the formation of the communities – because of and subject to the statutory use restriction. Under 25 U.S.C. § 155 and the IGRA, Interior was to ensure, pursuant to the statutory use restriction, that the U.S. Treasury Accounts and Per Capita Payments were to be distributed exclusively and equally to the 1886 Mdewakanton. Combined, the specific statutes and the general statutes here give rise to a money-mandating duty.

Third, under these specific and general statutes, the fact that Interior created and assumed supervision and control over the communities supports an inference of a money-mandating duty. Contrary to the government’s arguments at pages 17 through 19, Interior satisfies the money-mandating duty test by assuming a

---

<sup>17</sup> In the view of the undersigned counsel, it is difficult to imagine, based on the statutory text and legislative history, that the purpose of Congress in enacting the Indian Tucker Act, 28 U.S.C. § 1505, for post-1946 claims was not to cover the type of claim presented in this case. Without the Indian Tucker Act, the disenfranchised Plaintiffs would have to obtain a special jurisdictional act from Congress which Interior and the communities would surely legislatively oppose.

supervisory and controlling role over the communities, their constitutions, revenues and accounts.<sup>18</sup> After all, the 1863 Act terminated a Dakota tribal presence in Minnesota forever and only with Interior’s approval would there be any communities at all. Since 1936, Interior has controlled and supervised every stage of the legal development of the communities and their relationship to the 1886 Mdwakanton statutory use restriction – e.g., Interior approval of the communities’ land uses, constitutions, amendments, ordinances, resolutions, treasury account disbursements, revenue allocation plans, per capita payments as well as issuing land certificates and taking other actions.<sup>19</sup> Such Interior control and supervision over the communities is at least as comprehensive and precise as those addressing federal authority over the Quinault trust lands and its constituent timber in *Mitchell II*<sup>20</sup> and the Indian property in *Apache*. Interior’s supervision and control over the communities gives rise to money-mandating duties to the 1886 Mdwakanton under the standards established in *Mitchell II* and *Apache*.

At this point, it is appropriate to mention Interior’s and the communities’ final canard: the communities are historical tribes and Interior treats them no

---

<sup>18</sup> *United States v. Navajo Nation*, 537 U.S. 488, 504-07 (2003); *United States v. White Mountain Apache*, 537 U.S. 465, 473-75 (2003); *id.* at 480-81 (Ginsburg, J., concurring).

<sup>19</sup> *See, e.g.*, Federal Portfolio of Information (1979) (JA1829-2082), Lower Sioux Constitution (JA1952-57), Shakopee Constitution (JA1965-69) and Prairie Island Constitution (JA1989-97). The constitutions and applicable statutes require Interior approvals for the identified actions. Further, diminishing the communities’ purported “tribal” identity is 28 U.S.C. § 1360, so-called “Public Law 280,” which requires that the laws of Minnesota of general application to private persons and private property have the same force and effect in the communities as they have elsewhere in Minnesota.

<sup>20</sup> *United States v. Mitchell*, 463 U.S. 206 (1983).

differently. But, the difference between historical tribes and the communities is simple. Historical tribes have pre-1934 IRA treaties or statutes recognizing them as such. Historical tribes have IRA constitutions which reflect their pre-1934 IRA treaty and statutory rights. The communities have no pre-1934 treaty because the 1863 Act terminated all historical treaties and any historical tribal status. Instead, in 1936 and 1969, Interior recognized the communities based on the 1886 Mdwakanton's rights under the Appropriation Acts' statutory use restriction. Thus, Interior's foundational statutory basis for its supervision and control of the communities is the statutory use restriction – which Interior now openly and notoriously violates. This fact would not be true if an historical tribe was involved.

Additionally, the U.S. District Courts asserting 28 U.S.C. § 1331 jurisdiction in *Maxam*<sup>21</sup> and *Ross*<sup>22</sup> under the IGRA demonstrate that Indians do suffer financial harm, injury-in-fact, when Interior makes approvals under the IGRA that violate the law and leave those Indians off a community's or tribe's per capita payment list. In *Maxam*, some 1886 Mdwakanton brought a successful action against Interior to challenge exclusion from the Interior-approved Lower Sioux Indian Community Revenue Allocation Plan including its per capita payments. Specifically, the District Court found that the 1886 Mdwakanton's exclusion from an Interior-approved Revenue Allocation Plan and per capita payments was an injury-in-fact warranting preliminary injunctive relief under the IGRA. Similarly,

---

<sup>21</sup> *Maxam v. Lower Sioux Indian Community of Minnesota*, 829 F.Supp. 277 (D. Minn. 1993).

<sup>22</sup> *Ross v. Flandreau Santee Sioux Tribe*, 809 F.Supp. 738 (S.D.S.D.1992).

in *Ross*, the District Court held, in part, regarding the Flandreau Santee Sioux Tribe that: (1) the tribal gaming ordinance at issue did not meet the IGRA requirements ; (2) Interior’s approval of the tribal gaming ordinance did not constitute approval of the plan for per capita distribution of Indian gaming revenues as envisioned by IGRA; and (3) the Indian tribe's sovereignty was not violated by requiring that all casino profits subsequently accruing be deposited with clerk of court and held by the clerk pending approval of the tribal per capita payment plan by Interior. These cases suggest Indian Tucker Act jurisdiction may be appropriate for retroactive damages under certain facts and circumstances.

The government continually mischaracterizes Plaintiffs’ claims as “trust” or “beneficial” claims. *See, e.g.*, Brief at 11-16. Plaintiffs’ claims, shown in their proposed amended complaints, are based on Interior’s statutory duties -- specifically found in the Appropriation Acts’ statutory use restriction, 25 U.S.C. § 155, IRA and IGRA. Interior obfuscates Plaintiffs’ claims which can be easily summarized: Interior unequivocally holds the lands in trust for the communities and Interior is subject to the statutory use restriction. The Court should reject government attempts to conflate statutory use restriction claims which Plaintiffs are pursuing with trust based claims which Plaintiffs are not pursuing.

As stated before, Congress had the authority to direct Interior to ensure that the 1886 lands and any subsequent development, including the communities, benefited exclusively and equally the 1886 Mdewakanton. Congress did so in the Appropriation Acts and 25 U.S.C. § 462 – part of the IRA under which the non-

tribal communities were recognized by Interior. What Interior has done in creating and approving these communities to exclude the 1886 Mdewakanton is legally inexcusable, not because of what the Plaintiffs' counsel argues, but because of the plain meaning of the Appropriation Acts and the IRA.

On page 12, the government continues to refuse to acknowledge that the “statutory use restriction” is a restriction on Interior’s power:

Thus, the Federal Circuit has defined the use restriction as nothing more than limiting the uses for which the Secretary could expend the appropriated funds. When the Secretary directed that certain lands be purchased with the appropriations, he followed Congress’ limited restrictions on the use of funds. The Federal Circuit expressly rejected the notion that the Appropriation Acts – even with the use restriction – created any beneficial interest for Plaintiffs.

Interior argues, despite the 1863 Act, the Appropriation Acts’ severance of tribal relations and the holding of *Carcieri*, that it can create the communities and then treat the communities like “historical tribes” without reference to the 1863 Act and the statutory use restriction in favor of the 1886 Mdewakanton – which has all been identified by the Federal Circuit as federal law.

Furthermore, at page 8, the government erroneously argues that a “statutory use restriction” is not even a “restriction” for the purposes of 25 U.S.C. § 462<sup>23</sup> because the “1886 lands were neither held by the United States in trust nor was title held by Indians in restricted fee ...The land was always held in fee simple by

---

<sup>23</sup> 25 U.S.C. § 462 provides that “[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.” Plaintiffs assert that the “statutory use restriction” identified by the Federal Circuit is a “restriction” for the purposes of 25 U.S.C. § 462.

the United States.” But, this argument is a tautology. If the statutory use restriction applies, like the Federal Circuit held, then it applies even if the United States held the land in fee simple. So, the land would be “restricted” land for the purpose of 25 U.S.C. § 462 – i.e., Interior wasn’t free to sell the 1886 lands, let’s say, to the White Mountain Apache or General Motors.

#### IV. The Plaintiffs’ Claims are not Barred by the Statute of Limitations.

The government’s statute of limitations defense based on 28 U.S.C. § 2501 is unavailing.<sup>24</sup> First, the government admits it has held moneys in U.S. Treasury accounts for the 1886 Mdewakanton without notifying the 1886 Mdewakanton – but denies that such funds fall within the definition of “trust funds” for the purposes of the Indian Trust Accounting Statute, Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003) (ITAS):

[T]he statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of **trust funds**, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss . . .

<sup>25</sup>

The government’s argument is unpersuasive because Congress obviously intended that “trust funds” under the ITAS – by its plain meaning -- covered any U.S. Treasury account funds held for the benefit of Native Americans. Otherwise, Interior could avoid the ITAS entirely by re-labeling U.S. Treasury accounts held for Native Americans as non-trust accounts -- and adopt regulations accordingly.

---

<sup>24</sup> Def’s. Opp. Memo. to Amend (Aug. 9, 2010).

<sup>25</sup> 117 Stat. at 1263 (emphasis added).

Second, the government's argument on the continuing claims doctrine is unpersuasive. The government seems to argue that Interior's continued repudiation of the 1886 Mdewakanton claims as beneficiaries of a statutory use restriction applying to the Treasury Funds and Per Capita Payments since 1980 acts as a legislative repeal of the statutory use restriction. But, that cannot possibly be the case because Congress is the lawmaker and Interior is the agency. As long as Interior has a continuing statutory duty to the 1886 Mdewakanton and there are discrete, ongoing Per Capita Payments monthly, as is the case here, the Plaintiffs' claim for the past six years of damages is within the court's jurisdiction.

Third, the government argues that Interior repudiated the statutory use restriction – but that itself would not be a breach of fiduciary duty. The United States Supreme Court recognized in *Franconia Associates v. United States*<sup>26</sup> that, if there is a Congressional repudiation of a contract, the statute of limitations may commence when the breach occurs not when the earlier repudiation occurs. Similarly, even if Interior somehow without Congressional approval repudiated the statutory use restriction after 1980, the statute of limitations would only commence after each 1886 Mdewakanton attempted to benefit from the Treasury Funds and Per Capita Payments and was denied by Interior. In this case, virtually all Plaintiffs would have not attempted to benefit from the Treasury Funds and Per Capita Payments until after 1997 – within the six year statute of limitations.

---

<sup>26</sup> 536 U.S. 1291 (2002).

Fourth, as to the tolling of the claims for minors, the government fails to recognize that some of the minor plaintiffs would have been born during the six-year statutory period it claims from the 1981-1982 disbursement of the U.S. Treasury account. Under the government's theory, claims would apparently have to be filed by 1988 to satisfy the six-year statute of limitations for the disbursement of the Treasury Funds. Under the legal disability provision of 28 U.S.C. § 2501, these minors would not be required to bring their claims until three years after reaching the age of majority – 21 years of age. So, anyone who at the filing of the 2003 complaint was between about 15 and 24 years of age would satisfy the statute of limitations for the 1981-1982 disbursement of the Treasury Funds. A 15 year old Plaintiff in 2003 would satisfy 28 U.S.C. § 2501 because the child was born during the six-year statute of limitations but had not yet reached the age of majority plus three years. A 24-year old Plaintiff in 2003 would also satisfy 28 U.S.C. § 2501 because the adult was a child during the six-year statute of limitations and because the adult filed within the three year period prescribed by 28 U.S.C. § 2501. Similarly, as to the statute of limitations on the claim for Per Capita Payments, it would seem any Plaintiffs who were 24 years old or less at the time of the filing of the 2003 complaint would be eligible for the same tolling under 28 U.S.C. § 2501.

Dated: October 14, 2010

s/Erick G. Kaardal  
Erick G. Kaardal  
William F. Mohrman  
Mohrman & Kaardal, P.A.  
33 South Sixth Street, Suite 4100  
Minneapolis, Minnesota 55402  
Telephone: 612-341-1074  
Facsimile: 612-341-1076

*Counsel of Record for Plaintiffs*

Dated: October 14, 2010

s/Sam S. Killinger  
Sam S. Killinger  
Rawlings, Nieland, Probasco, Killinger,  
Ellwanger, Jacobs & Mohrhauser, LLP  
522 Fourth Street, Suite 300  
Sioux City, IA 51101  
Phone: 712-277-2373  
Fax: 712-277-3304

Dated: October 14, 2010

s/Jack E. Pierce  
Jack E. Pierce  
Pierce Law Firm, P.A.  
6040 Earle Brown Drive, Suite 420  
Minneapolis, MN  
763-566-7200  
Fax 763-503-8300

Dated: October 14, 2010

s/Wood R. Foster, Jr.  
Wood R. Foster, Jr.  
Siegel, Brill, Greupner, Duffy & Foster,  
P.A.  
1300 Washington Square  
100 Washington Avenue South  
Minneapolis, MN 55401  
Phone: 612-337-6100  
Fax: 612-339-6591

Dated: October 14, 2010

s/Kelly H. Stricherz  
Kelly H. Stricherz  
213 Forest Avenue  
PO Box 187  
Vermillion, SD 57069  
Phone: 605-624-3333

Dated: October 14, 2010

s/Frances E. Felix  
Frances E. Felix  
Paul Felix  
Guy Felix  
Tyler Felix  
Logan Felix  
826 21st Ave SE  
Minneapolis, MN 55414  
612-378-5214

Dated: October 14, 2010

s/Creighton A. Thurman  
Creighton A. Thurman  
Thurman Law Office  
PO Box 897  
Yankton, SD 57078  
Phone: 605-260-0623  
Fax: 605-260-0624

Dated: October 14, 2010

s/Scott A. Johnson  
Scott A. Johnson  
Johnson Law Group LLP  
10580 Wayzata Blvd., Suite 250  
Minnetonka, MN 55305  
Phone: 952-525-1224  
Fax: 952-525-1300

Dated: October 14, 2010

s/Elizabeth T. Walker  
Elizabeth T. Walker  
Walker Law, LLC  
429 North St. Asaph Street  
Alexandria, VA 22314 (1-1-10)  
Phone: 703-838-6284  
Fax: 703-842-8458

Dated: October 14, 2010

s/Nicole N. Emerson  
Nicole N. Emerson  
Lynn, Jackson, Shultz & Lebrun  
PO Box 2700  
Sioux Falls, SD 57101-2700  
Phone: 605-322-5999  
Fax: 605-332-4249

Dated: October 14, 2010

s/Robin L. Zephier  
Robin L. Zephier  
Abourezk & Zephier, P.C.  
PO Box 9460  
Rapid City, SD 57709  
Phone: 605-342-0097  
Fax: 605-342-5170

Dated: October 14, 2010

s/Barry P. Hogan  
Barry P. Hogan  
Renaud Cook Drury Mesaros, P.A.  
One N Central Avenue, Suite 900  
Phoenix, AZ 85004  
Phone: 602-307-9900  
Fax: 602-307-5853

Dated: October 14, 2010

s/Garrett J. Horn  
Garrett J. Horn  
Horn Law Office Prof. LLC  
PO Box 886  
Yankton, SD 57078  
Phone: 605-260-4676  
Fax: 605-260-9014

Dated: October 14, 2010

s/Rory King  
Rory King  
Bantz, Gosch & Cremer LLC  
305 Sixth Avenue SE, PO Box 970  
Aberdeen, SD 57402  
Phone: 605-225-2232  
Fax: 605-225-2497

Dated: October 14, 2010

s/Gary J. Montana  
Gary J. Montana  
Attorney at Law  
N 12923 N Prairie Road  
Osseo, WI 54758  
Phone: 715-597-6464  
Fax: 715-597-3508

Dated: October 14, 2010

s/Larry B. Leventhal  
Larry B. Leventhal  
Larry Leventhal & Associates  
319 Ramsey Street  
Saint Paul, MN 55102  
Phone: 612-333-5747

Dated: October 14, 2010

s/Royce Deryl Edwards, Jr.  
Royce Deryl Edwards, Jr.  
606 South Pearl  
Joplin, MO 64801  
Phone: 417-624-1962  
Fax: 417-624-1965

Dated: October 14, 2010

s/ Bernard Rooney  
Bernard Rooney, Esq.  
84 Park Avenue  
Larchmont, NY 10538  
Phone: 914-833-9104

Dated: October 14, 2010

s/Randy V. Thompson  
Randy V. Thompson  
Nolan, MacGregor, Thompson &  
Leighton  
710 Lawson Commons  
380 St. Peter St.  
St. Paul, MN 55102  
Phone: 651-227-6661  
Fax: 651-225-9215

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of October, 2010, a copy of the foregoing was filed electronically with the Clerk of the Court through its ECF System and electronic notice was delivered to the parties entitled to receive notice.

Dated: October 14, 2010.

s/Erick G. Kaardal  
Erick G. Kaardal