

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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

**RESPONSE TO PLAINTIFFS’  
NOTICE OF SUPPLEMENTAL AUTHORITY**

On November 3, 2010, the Wolfchild Plaintiffs (“Plaintiffs”) filed a Notice of Supplemental Authority RE: Tribal Court of the Lower Sioux Community in Minnesota, Scott Adolphson v. Lower Sioux Community Council, Case No. CIV-10-051 (“Supplemental Authority”) (Dkt. No. 828). The Supplemental Authority consists of a Declaration from Erick G. Kaardal, Plaintiffs’ attorney; an October 27, 2010, hearing summary of a proceeding before the Lower Sioux Tribal Court; and a November 1, 2010, Order issued by the Lower Sioux Tribal Court (“Tribal Court Order”). Through Mr. Kaardal’s Declaration, Plaintiffs argue that the Tribal Court order provides support for the assertion that the 1886 Mdewakanton have vested rights after passage of the 1980 Act. Plaintiffs provide no further explanation regarding the nature of the vested rights. At issue in this case have been Plaintiffs’ rights, if any, to the 1886 lands and their proceeds. Therefore, the United States responds to the Supplemental Authority under the assumption that Plaintiffs have filed the material to support a theory that the 1886 Mdewakanton have

vested rights in the 1886 lands after passage of the 1980 Act.

Plaintiffs' Supplemental Authority, however, provides no support that the 1886 Mdewakanton still have vested rights in the 1886 lands after passage of the 1980 Act. Although Mr. Kaardal states in his Declaration that "I bring these documents to the Court's attention because the government denies that the 1886 Mdewakanton have vested rights after the 1980 Act, while the Lower Sioux Tribal Court . . . acknowledged 1886 Mdewakanton have vested rights" (Supplemental Authority, ¶ 3) such a statement ignores the law of the case and misconstrues the Lower Sioux Tribal Court's findings.

First, as the Federal Circuit has held, the Appropriations Act did not vest the 1886 Mdewakanton and Plaintiffs with any rights in the 1886 lands, and that to the extent the Appropriations Acts did, the passage of the 1980 Act terminated whatever interest Plaintiffs may have had in the 1886 lands. *Wolfchild v. United States*, 559 F.3d 1228, 1255, 1257 (Fed. Cir. 2009) (*Wolfchild VI*). This is the law of the case. *See Engel Industries, Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999) (issues decided by the reviewing court are foreclosed from further action).

Second, Plaintiffs change the nature of the Tribal Court Order by inserting "[1886]," after "Minnesota" in the Tribal Court's discussion of the rights of Minnesota Mdewakanton Sioux Indians on page three of the Order. The Tribal Court did not include this specificity in its Order, which is important to note. The Tribal Court was not discussing the 1886 Mdewakanton as defined in this litigation but was discussing the general population of Minnesota Mdewakanton Sioux Indians, as discussed in the Lower Sioux Constitution. *See Exhibit 12, Plaintiffs' Exhibits in Support of Motions for Court to Issue Summonses to Communities and Their Members Pursuant to 41 U.S.C.A. 114(b) and*

Partial Summary Judgment. At various points in the Lower Sioux Constitution, the phrase “Minnesota Mdewakanton Sioux Indians” is referenced. Specifically, the Lower Sioux Constitution provides in part:

**PREAMBLE**

We, the *Minnesota Mdewakanton Sioux* residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota, in order to form a more perfect union, develop our natural resources, insure our domestic tranquility, promote the general welfare, to enjoy certain rights of home rule, to provide education in schools of higher learning including vocational, trade, high schools, and colleges for our people, and to secure the opportunities offered us under the Indian Reorganization Act, do hereby establish the following Constitution and Bylaws; and we solemnly affirm that it is our earnest intention faithfully to support, respect and promote the integrity of the Constitution of the United States and the Constitution of the State of Minnesota, together with all laws pertaining thereto which are the constituted authority of our commonwealth.

\* \* \*

**ARTICLE III - MEMBERSHIP**

SECTION 1. Membership in the Lower Sioux Indian Community in the State of Minnesota shall consist of the following:

(a) The bona fide Indian residents of the Lower Sioux Reservation whose names appear on, or are entitled to appear on the official census roll of the *Minnesota Mdewakanton Sioux Indians* as of April 1, 1934, with the official supplement thereto of January 1, 1935.

(b) The bona fide Indian residents of the Lower Sioux Reservation whose names appear on various other Sioux Indian rolls, provided that such persons transfer their enrollment to the Minnesota Sioux rolls, with the approval of the Secretary of the Interior.

\* \* \*

**ARTICLE V – Powers**

SECTION 1. Enumerated Powers. The Community Council shall exercise the following powers, subject to any limitations imposed by the constitution or statutes of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and Bylaws.

(m) To encourage and foster the arts, crafts, traditions, and culture of the *Mdewakanton Sioux Indians of Minnesota*.

(q) To select delegates to sit in the annual conference of the *Minnesota Mdewakanton Sioux Indians* and in the National Council of the entire Sioux Nation.

SEC. 4. Reserved Powers. Any rights and powers heretofore vested in the *Minnesota Mdewakanton Sioux Indians* in respect to any interests or affairs of the Lower Sioux Reservation, but not expressly referred to in this Constitution, shall not be abridged by this article, but may be exercised by the people of the Lower Sioux Indian Community of Minnesota, through the adoption of appropriate Bylaws and Constitutional amendments.

\* \* \*

#### ARTICLE IX- Land

SECTION 1. *Land Assignments*. The land within the territory of the Lower Sioux Indian Community which was purchased by the United States for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants, may be assigned to any Minnesota Mdewakanton Sioux entitled thereto, and may not be assigned to any other person although such person is a member of this Community. However, land purchased by or for the Lower Sioux Indian Community may be assigned to any member of the Community.

SEC. 2. All applications for the assignment of land shall be made to the Community Council. In the case of an application for an assignment of the land, above referred to, bought for *certain Mdewakanton Sioux of Minnesota*, the Council shall recommend to the Superintendent of the jurisdiction what action shall be taken. If the Superintendent, after consultation with the Council and the interested parties, disagrees with the final recommendation of the Council, he shall refer the case to the Commissioner of Indian Affairs. All assignments under this section shall be granted by or under the direction of the Secretary of the Interior, and evidenced by a Certificate of Assignment, which certificate shall be of

the same force and effect as certificates of assignment issued previous to the organization of this Community. Such an assignment shall be known as a “Minnesota Mdewakanton Sioux Assignment.”

Constitution of the Lower Sioux Indian Community (emphasis added). As is evidenced, the Lower Sioux Constitution, when referring to Minnesota Mdewakanton Sioux Indians, does not use the term to specifically refer to the 1886 Mdewakanton.

Finally, the Tribal Court did not adjudicate that the Minnesota Mdewakanton Sioux Indians have vested rights, only that the Lower Sioux Constitution does not affect “*any* vested right.” (Emphasis added). In arriving at its statement, the Tribal Court was ruling upon the claims of the petitioner, who was deemed by the Lower Sioux Community Council to not be a Qualified Member of the Community. Petitioner challenged the Community Council’s authority to rescind his membership privileges pursuant to Article III, Section 6 of the Lower Sioux Constitution. Tribal Court Order at 2. Article III, Section 6 provides, “[n]othing contained in this article shall be construed to deprive any Minnesota Mdewakanton Sioux Indian of any vested right.” Petitioner argued that the article relied upon to revoke his Community membership, Article III, Section 3, was in conflict with Article III, Section 6. The Tribal Court found that there was no conflict because:

Article III, Section 6 guarantees to Minnesota Mdewakanton Sioux Indians that the Lower Sioux Indian Community may not deprive a Minnesota Mdewakanton Sioux Indian of any vested right, such as the ability to identify himself or herself as a Minnesota Mdewakanton Sioux Indian or the right to participate in federal, tribal or state programs that provide benefits to Minnesota Mdewakanton Sioux Indians. Article III, Section 3 addresses the loss and reacquisition of membership benefits that are enjoyed by members of the Lower Sioux Indian Community, such as the privilege of voting or the privilege of sharing in the distribution of the profits of Community gaming.

Tribal Court Order at 3. The Tribal Court was referring to the rights possessed by people

claiming to be Minnesota Mdewakanton Sioux Indians and not the 1886 Mdewakanton specifically. The Tribal Court simply said that Article III, Section 6 does not interfere with Minnesota Mdewakanton Sioux Indians', as defined in the Lower Sioux Constitution, ability to participate in state, federal, and tribal programs that provide benefits to them, such as education or housing. There was no adjudication on what constitutes "vested rights." The Tribal Court did not hold that the 1886 Mdewakanton have vested rights to the 1886 lands.

Respectfully submitted this 17th day of November, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of November, 2010, a copy of the Response to Plaintiffs' Notice of Supplemental Authority 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: this 17th day of November, 2010.

/s/ Jody H. Schwarz  
Jody H. Schwarz