

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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SHELDON PETER WOLFCHILD, et al.,	)	
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	)	
Plaintiffs,	)	
	)	Case No. 03-2684L
	)	and
v.	)	Case No. 01-568L
	)	(consolidated)
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
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WOLFCHILD PLAINTIFFS' REPLY TO RESPONSE TO PLAINTIFFS'  
NOTICE OF SUPPLEMENTAL AUTHORITIES

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Dated: December 6, 2010

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The government misconstrues the purpose of the Plaintiffs' submission to this Court<sup>1</sup> regarding the recent Lower Sioux Community Tribal Court decision ("Tribal Court decision").<sup>2</sup> The government cites the Tribal Court decision to suggest the existence of two different Mdewakanton people: community members who are the only true Mdewakanton Indians and those other non-community members who are not true Mdewakanton Indians.<sup>3</sup>

To the contrary, the Federal Circuit identified one group of Mdewakanton Indians as the Appropriation Acts' beneficiaries — as Interior understood for 90 years, the 1936 and 1969 community constitutions acknowledge, as Congress intended and the Tribal Court decision indicates.<sup>4</sup> The Tribal Court decision affirms again — as did

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<sup>1</sup> U.S. Resp. to Plts. Not. of Supp. Auth. (Nov. 17, 2010).

<sup>2</sup> *Scott Adolphson v. Lower Sioux Community*, Case No. Civ. 10-051 (Dkt. No. 828).

<sup>3</sup> *See, e.g.*, U.S. Resp. to Plts. Not. of Supp. Auth. at 2 and 5. Prior counsel for the government, over the years, have stated the same proposition in different ways.

<sup>4</sup> The Appropriation Acts identify Mdewakanton who were in Minnesota or in the process of entering Minnesota as of May 20, 1886 — the Federal Circuit Congressionally intended beneficiaries. The United States took umbrage to the Plaintiffs use of the bracketed "1886" as misrepresenting the Tribal Court decision. U.S. Resp. to Plts. Not. of Supp. Auth. at 2. This was not the case. The Appropriation Acts, like the Tribal Court decision, and the Federal Circuit decision,

the Federal Circuit opinion before it — the existence of one Mdewakanton people as beneficiaries with vested statutory interests and rights.<sup>5</sup>

Those protectable interests are superior to any protectable interests of the purported 1886 Mdewakanton people who happen to be community members -- governed by Interior-approved, non-tribal community entities. The protectable interests of 1886 Mdewakanton

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recognized the existence of the Mdewakanton people as one group of identifiable beneficiaries, and in the instant case, the presumptive starting point of indentifying beneficiaries of the statutory use restriction as specifically stated in the Appropriation Acts. Thus, the fact that Scott Adolphson (plaintiff in the Tribal Court decision) was a Lower Sioux Community member does not detract from his lineal descendency as a Mdewakanton and as a 1886 Mdewakanton lineal descendant beneficiary of the Appropriation Acts. Therefore, Plaintiffs' use of the bracketed "1886" was not only appropriate, but factually correct.

<sup>5</sup> The Tribal Court's decision also affirmed Plaintiffs' arguments regarding United States statutory obligations to 1886 Mdewakanton lineal descendants: "The Lower Sioux Indian Community may not deprive a Minnesota Sioux Indian of any vested rights, such as the ability to identify himself or herself as a Mdewakanton Sioux Indian or the right to participate in federal, tribal or state programs that provide benefits to Minnesota Mdewakanton Sioux Indians." *Scott Adolphson v. Lower Sioux Community*. As Plaintiffs' counsel has explained to this Court, "[t]he 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 without those political borders." Plts. Surreply Memo. 5 n.9 (Oct. 20, 2010).

are vested rights of participation in federal programs applicable to 1886 Mdewakanton.<sup>6</sup> The 1886 Mdewakanton have a vested right under the Appropriation Acts' statutory use restriction to participate in federal programs including 25 U.S.C. § 155 and the IGRA which are triggered by the generation of community revenues.<sup>7</sup>

The criterion for having the right of participate is *being* a lineal descendant of the Appropriation Acts' 1886 Mdewakanton beneficiary class. As a participant under the statutory use restriction, the 1886 Mdewakanton lineal descendant shall receive benefits from community revenues as equally as practicable whether a community member or not.

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<sup>6</sup> The land assignment system governed by Interior was in essence a federal program. It was administered by the United States, and the right of participation was reserved for in the Appropriation Acts through the statutory use restriction for identified 1886 Mdewakanton beneficiaries. The right of participation in federal programs such as the IGRA, embodied within the Appropriation Acts as the statutory use restriction, as the Federal Circuit indicated, has not been repealed.

<sup>7</sup> The United States repeatedly asserts that Plaintiffs' arguments are based upon vested rights in lands. U.S. Resp. to Plts. Not. of Supp. Auth. at 2, 6. This line of argument again misconstrues Plaintiffs' arguments before this Court. It is the Plaintiffs' contention that no *individual* 1886 Mdewakanton, community member or not, has a vested right to lands *held in trust by the United States for the individual communities* because title has not been transferred to any individual Native American.

The Wolfchild Plaintiffs' position is reasonable allowing for some unequal benefit to the community members without completely excluding the 1886 Mdewakanton from community per capita payments. Under the Wolfchild Plaintiffs' position, the community members receive more than an equal share of participation benefit because the Indian Gaming Regulatory Act, as a federal program,<sup>8</sup> requires the setting aside of moneys for economic development within the community boundaries to be spent according to the communities on behalf of each community's members.

However, because the right to participate in a federal program is vested, neither the community government nor Interior may unilaterally *exclude* 1886 Mdewakanton from any division of surplus revenue. The equal distribution of per capita payments must be among all 1886 Mdewakanton lineal descendants because of the existing and non-extinguished statutory use restriction recognized by the Federal Circuit.

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<sup>8</sup> *See, e.g.*, Plts. Surreply Memo. 14 (Oct. 20, 2010) (“Since 1936, Interior has controlled and supervised every stage of the legal development of the communities and their relationship to the 1886 Mdewakanton 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 ....”)

It is not without precedent that individual 1886 Mdewakanton have received remuneration from federal government programs regardless of their status as “community members.” For example, under the Act of March 4, 1917, 39 Stat. 1195, Congress sought the restoration of annuities to the Mdewakanton and Wahpakoota (Santee) Sioux Indians for lands forfeited by the Act of February 16, 1863. The disbursement of the federal remuneration was not to a Sioux “community” — i.e., a governmental entity — but rather to a specific historical Mdewakanton “band.” As this Court knows, the post-IRA Lower Sioux and Prairie Island governmental communities did not exist until 1936.<sup>9</sup> Here, the only identifiable recipients were Mdewakanton individuals who as a recognized band in 1851 entered into a treaty with the United States later forfeited under the 1863 Act. Those who benefited from the Act of 1917 included the Appropriation Acts’ 1886 Mdewakanton beneficiaries.<sup>10</sup>

In a similar gesture, albeit with more specificity, Congress passed the Act of October 25, 1972, 86 Stat. 1168, regarding judgment funds

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<sup>9</sup> The Shakopee government would be created in 1969.

<sup>10</sup> *Medawakanton and Wahpakoota Bands of Sioux Indians v. U.S.*, 57 Ct.Cl. 357, 367 (1922) (While expenditures under the Appropriation Acts were offset against the terms of the Act of 1917 the plaintiff Indians were entitled to the remaining balance).

referenced as “Docket 363.” Congress had previously appropriated money to satisfy a judgment entered by the Indian Claims Commission.<sup>11</sup> After the moneys were deposited with the United States Treasury, Congress implemented a plan for the distribution of the fund through the 1972 Act.<sup>12</sup> Here, the Act required the distribution to Mississippi Sioux Tribe lineal descendants<sup>13</sup> including persons not eligible for membership in tribes or communities, but who could trace their lineal ancestry to someone who once was a member to that historic tribe.<sup>14</sup> Again, participants were necessarily inclusive of the

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<sup>11</sup> Act of June 19, 1968, 82 Stat. 239.

<sup>12</sup> *See also*, 25 U.S.C. §§1300d, *et seq.*

<sup>13</sup> The referenced “Mississippi Sioux” prior to 1851 lived in Minnesota. *See Medawakanton and Wahpakoota Band of Sioux Indians v. U.S.*, 57 Ct.Cl. 357, 359 (1922).

<sup>14</sup> As this Court knows, the Mdewakanton lost their respective “historical tribal” status with the Act of 1863 as a direct result of the 1862 Minnesota outbreak. Thus, the existing post-IRA created Prairie Island Indian Community, the Lower Sioux Indian Community, and the Shakopee Mdewakanton Sioux Community are *not* historic tribes. The Act of 1972 is an example of acknowledging the distinction between tribal membership and non-tribal or non-community membership. In other words, here, the post-IRA communities may claim powers or treatment similar to other historic tribes, but they cannot lay claim to excluding the interests of historic descendant lineal individual Indians to original tribes — again, the Mdewakanton Tribe that existed prior to 1863. This position is acknowledged in the Lower Sioux Tribal Court decision. *See also e.g., Sisseton-Wahpeton Sioux Tribe of Lake Travers Indian Reservation, N. Dakota and S. Dakota v. U.S.*, 686 F. Supp. 831

Appropriation Acts' 1886 Mdewakanton beneficiaries who were not community members.

Further, the government's response suggests that produced revenues can only be distributed to community members, again, on the erroneous basis of there being two separate and distinct Mdewakanton people. In other words, if an individual is not a community member then that person cannot identify herself or himself as a member of the Mdewakanton Band. But, under the circumstances of *Wolfchild* and applicable legal precedents, this is not actually the case.

For example, in *Short v. United States*,<sup>15</sup> the United States collected timber revenues from land referred to as the Square and divided those revenues among only persons on the official roll of the Hoopa Valley Tribe, an organization recognized in 1950, whose membership rules limited enrollment to allottees within a particular boundary of land referred to as the Square.<sup>16</sup>

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(D.Mont.1988) *aff'd sub nom., Sisseton- Wahpeton Sioux Tribe of Lake Travers Indian Reservation, N. Dakota and S. Dakota v. U.S.*, 895 F.2d 588 (9<sup>th</sup> Cir. 1990). The government's efforts to affirm the existence of the Communities as *the Mdewakanton* people is disingenuous to the direct lineal descendants of the pre-1863 recognized Mdewakanton Tribe.

<sup>15</sup> 486 F.2d 561, 202 Ct.Cl. 870 (1973).

<sup>16</sup> *Id.* at 874.

Although the *Short* plaintiffs lived on another part of remote land, the Addition which became part of the enlarged reservation, they were not enrolled for the reasons previously stated.<sup>17</sup> The 1891 executive order allowing for the remote Addition<sup>18</sup> originated from a Congressional act in 1864, but neither the 1864 Act nor the executive order gave vested Indian rights in the Square.<sup>19</sup> Therefore, the *Short*

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<sup>17</sup> *Id.* at 875. This particular fact is of little consequence. As this Court knows, based on the historic record the *Wolfchild* Plaintiffs provided and argued from, the United States knew that the lands acquired were not adequate to accommodate all 1886 Mdewakanton at the time of acquisition. Further, historically, Minnesota whites resisted selling lands because of the “freshness” of the 1862 outbreak causing the failure of the United States to acquire the 80 acres per Mdewakanton demanded within the Act of 1863 (at a minimum 20,080 acres of suitable land or approximately 21 square miles (260 friendly Mdewakanton times 80 based in part of the 1886 census.) *Compare* Shakopee Mdewakanton Sioux Community, originally comprised of 250 acres in the 1880’s and today 2,800 acres; Lower Sioux Indian Community today 2,000 acres; and Prairie Island Indian Community, 2,500 acres plus 1,290 acres received in compensation in 2006 for flooding (<http://www.xenomedia.com/clients/IndiansofMidwest/map4/config/mapdata2.xml>) to Minneapolis’ 58.5 square miles of land, Saint Paul 52.8 square miles, Rochester, 39.8, and Apple Valley, Minnesota 17.3 square miles).

<sup>18</sup> The terrain in the Addition was also unable to sustain the type of resource resulting in the revenue gains from the Square. 202 Ct.Cl. at 884.

<sup>19</sup> *Id.* at 884. Likewise, no individual community member has a vested right to land held in trust for the community. Act of 1980.

plaintiffs were entitled to recover from the United States for the lost distributed revenue – the misallocated per capita payments -- since the Hoopas were found to be nonexclusive residents in the Square.<sup>20</sup>

Likewise, in *Wolfchild*, the members of each community are nonexclusive members of the historic 1886 Mdewakanton Band and nonexclusive members of the specifically identified beneficiaries of the Appropriation Acts — the 1886 Mdewakanton.

Therefore, since all 1886 Mdewakanton have rights to participation in federal programs — here, the 25 U.S.C. § 155 and the IGRA — one sub-group, by their Interior-approved enrollment rules, cannot exclude another group of the same beneficiaries even though they may not be community members. While 25 U.S.C. § 155 and the IGRA may appear to provide authority to Interior to approve a distribution plan that excludes certain 1886 Mdewakanton, Interior cannot ignore the limitations of the Appropriation Acts' statutory use restriction, nor allow the communities to discriminate or violate the Indian Civil Rights Act in that plan.<sup>21</sup> Thus, neither can Interior

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<sup>20</sup> *Id.* at 885. The Hoopas, Klamaths, and other tribes were entitled to rights on the reservation. *Id.*

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

distribute nor cause to distribute distributions to the communities while completely excluding the 1886 Mdewakanton — as occurred in 1981 and 1982 with Interior’s distribution of the 25 U.S.C. § 155 funds and as occurs now with the community’s distribution of IGRA-regulated and Interior-approved per capita payments to community members only.

In short, the lack of community membership is not a legal bar for a *Wolfchild* plaintiff to identify as a beneficiary-member of an historic Mdewakanton Band for a 1917 Act payment, a Docket 363 payment or an Appropriation Acts’ statutory use restriction per capita payment.

Moreover, the statutory use restriction is not restricted to non-community members, but is inclusive to community members as well *if and because they are or may be 1886 Mdewakanton lineal descendants*. However, Interior’s error is to divest the non-community members’ right to participate in the federal program by allowing community per capita payments to be exclusively distributed to community members.<sup>22</sup> A proper application of the statutory use restriction to 25 U.S.C. § 155

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<sup>22</sup> This would not interfere, however, with the self-determination of the community’s governance. Those within the community’s jurisdiction could be further restricted from receiving per capita payments such as through a Tribal Court order to fulfill a judgment.

and the IGRA would result in equal distributions to the 1886 Mdewakanton instead of distributions to community members only.

The Tribal Court decision's reference to the communities' deference to the 1886 Mdewakanton "vested rights" underscores Interior's misapplication of the applicable statutes. It also highlights that the 1886 Mdewakanton statutory rights precede, limit and are superior to the communities' and their members' rights.

Dated: December 6, 2010

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of December, 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: December 6, 2010.

s/Erick G. Kaardal  
Erick G. Kaardal