

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5018

SHELDON PETERS WOLFCHILD, ERNIE PETERS LONGWALKER,
SCOTT ADOLPHSON, MORRIS J PENDLETON,
BARBARA FEEZOR BUTTES, WINNIFRED ST PIERRE
FEEZOR, AUTUMN WEAVER, ARIES BLUESTONE
WEAVER, ELIJAH BLUESTONE WEAVER, RUBY MINKEL,
LAVONNE A SWENSON, WILLIS SWENSON, AARON SWENSON,
BEVERLY M SCOTT, LILLIAN WILSON, MONIQUE WILSON,
SANDRA COLUMBUS GESHICK, CHERYL K. LORUSSO,
JENNIFER K LORUSSO, CASSANDRA SHEVCHUK,
JASON SHEVCHUK, JAMES PAUL WILSON, EVA GRACE WILSON,
BENITA M JOHNSON, and KEVIN LORUSSO,

Plaintiffs-Appellees,

and

HARLEY ZEPHIER, SR ,

Plaintiff-Appellee,

and

REBECCA ELIZABETH FELIX,

Plaintiff,

and

ELIZABETH T WALKER and JOHN DOES 1-30,

Plaintiffs,

and

PHILIP W MORGAN,

Plaintiff,

and

RAYMOND CERMAK, SR., MICHAEL STEPHENS,
JESSE CERMAK, DENISE HENDERSON,
DELORES KLINGBERG, SALLY ELLA ALKIRE,
PIERRE ARNOLD, JR., and GERTRUDE GODOY,

Plaintiffs,

and

LOWER SIOUX INDIAN COMMUNITY,

Plaintiff,

and

JOHN DOES 1-30,

Plaintiff,

and

DANNY LEE MOZAK,

Plaintiff,

and

FRANCIS ELAINE FELIX,

Plaintiff,

and

DEBORAH L. SAUL, LAURA VASSAR, LYDIA FERRIS,
DANIEL M. TRUDELL, ROBERT LEE TAYLOR,
and DAWN HENRY,

Plaintiffs,

and

WINONA C THOMAS ENYARD, ET AL.

Plaintiffs-Appellees,

and

DAWN BURLEY,

Plaintiff,

and

VERA A. ROONEY

Plaintiff,

and

ROCQUE AND TAYLOR DESCENDANTS,

Plaintiffs,

and

MARY BETH LAFFERTY, ANITA D WHIPPLE,
Descendants of Lucy H. Trudell, BONNIE RAE LOWE, Descendants of Joseph
Graham, and LENOR ANN SCHEFFLER BLAESER, Descendants of
John Moose,

Plaintiffs,

and

JULIA DUMARCE,

Plaintiff,

and

RAYMOND COURNOYER, SR., JERRY ROBINETTE,
SANDRA KIMBELL, CHARLENE WANNA,
and LESLIE LEE FRENCH,

Plaintiffs,

and

JOHN DOES 1-433,

Plaintiffs,

and

FRANCINE GARREAU,

Plaintiff,

and

KE ZEPHIER,

Plaintiff,

and

KRISTINE ABRAHAMSON,

Plaintiff,

v.

UNITED STATES,

Defendant-Appellant

**WOLFCHILD RESPONDENTS' RESPONSE TO UNITED STATES MOTIONS
FOR DELAYED BRIEFING AND REQUEST FOR EXPEDITED SCHEDULING**

**Erick G. Kaardal
William F. Mohrman
Mohrman & Kaardal, P.A.
33 South Sixth Street, Suite 4100
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Attorneys for Plaintiffs-Appellees

This memorandum is *Wolfchild* Respondents' response to the United States' motion for suspension of briefing and motion for a 31 day stay on briefing. The Respondents disagree with the proposed delays. An expedited briefing schedule as Respondents suggest will not prejudice the United States regardless of the outcome of the Respondents motion on judicial estoppel. To delay briefing as the United States suggests, undermines the very purpose of this appeal in the first instance according to its' pronouncements to get this Court to accept the interlocutory appeal — to expedite the lower court proceedings. Further delay here, means further delay below.

Consequently, pursuant to Federal Circuit Rule 27(b), the Respondents request as a modification of the government's proposed order, that the Court adopt the following expedited briefing and oral argument schedule:

All parties' original brief deadline – March 13, 2008
All parties' response brief deadline (if any) – March 31, 2008
No additional briefs will be filed after March 31, 2008.

The Court should grant the modifications for three reasons. First, the United States should not be allowed to argue inconsistent positions on the appellate questions before this Court since it will create an unfair litigation advantage for the United States. Nevertheless, should the United States choose to take that position, it does so at its own risk. The Respondents should not be punished through prolonged delays in briefing because the United States refuses to acknowledge previous inconsistencies regarding the very questions on appeal.

Second, should this Court grant the Respondents' motion for judicial estoppel it would narrow the essential elements of underlying questions that the United States must present to this Court in its initial brief - the United States interpretation of the statutes at issue and the actions of the United States in the implementation of those statutes. Finally, the Respondents' proposed scheduling allows for simultaneous briefing to address any outstanding issues the merit panel declines to address or decide. Nevertheless, the ultimate outcome of the Respondents' proposed scheduling meets the goal of the United States and the Respondents to resolve the interlocutory appeal fairly and expeditiously.

I. THE RELIEF SOUGHT IN RESPONDENTS' JUDICIAL ESTOPPEL MOTION HAS GREATLY SIMPLIFIED THIS DISCRETIONARY APPEAL FOR ADJUDICATION OF QUESTIONS NOS. 1 AND 2 - SUGGESTING AN EXPEDITED, NOT DELAYED, BRIEFING AND ORAL ARGUMENT SCHEDULE.

The relief sought in Respondents' judicial estoppel motion has greatly simplified this discretionary appeal for adjudication of questions nos. 1 and 2. The relief sought in Respondents' judicial estoppel is:

Court's Certified Question No.1: Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus?

Respondents' Requested Relief from Court: The United States is required via judicial estoppel to take the position that a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus.

Court's Certified Question No.2: If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.

Respondents' Requested Relief from Court: The United States is required via judicial estoppel to take the position that the Appropriation Acts created such a trust and that Congress did not terminate the trust with enactment of the 1980 Act.

If the Court grants the motion, then the United States will be required to argue the same side of questions Nos 1 and 2 as the Respondents

If the Court grants the Respondents' judicial estoppel motion, the complexity of the appeal is greatly reduced for five reasons. First, many of the United States' self-contradictory arguments will mercifully be avoided. Second, in many instances, the Respondents and the Court will be able to save time and resources by relying on the United States' briefs filed in other federal courts and the lower court as derivative documents, rather than going to source documents, to prove where the United States stood and stands. Third, the United States' disassembling of approximately 90 years of unequivocal Department of Interior administrative history showing a pre-1980 trust will mercifully be avoided. Fourth, the United States' sophistry on the three Communities' sovereignty over membership decisions after the 1980 Act – i.e. to limit membership to a few hundred of the possibly 20,000 or more Loyal Mdwakanton lineal descendant trust beneficiaries -- will mercifully be avoided. Fifth, and importantly, the scope of disagreement (if any) between the Respondents and the United States on questions nos. 1 and 2 will be greatly reduced.

The Court granting Respondents' judicial estoppel motion simplifies, but does not terminate the appeal – as the United States suggests. In Respondents' judicial estoppel motion, the Respondents seek relief from the Court that binds the United States – not the Court or other parties – to the United States' prior positions. *See Matter of Cassidy*, 892

F 2d 637, 642 (7th Cir. 1990) (judicial estoppel does not eliminate a claim or defense, but only prohibits a particular party from asserting it) The Respondents want the United States to be bound to its prior positions and want this Court to affirm the lower court's decisions on certified questions nos. 1 and 2

In this vein, a simplified appeal suggests an expedited, not delayed, briefing and oral argument schedule Respondents argue, as further explained below, that the Court should move forward on this simplified appeal in an appropriate, expedited manner without any further delays.

II. IT IS AN UNFAIR LITIGATION ADVANTAGE FOR THE UNITED STATES TO ACT AS APPELLANT ON QUESTIONS NOS. 1 AND 2.

The United States in its motions apparently wants to proceed in this appeal on questions nos. 1 and 2 as an Appellant – e.g., filing an Appellant's brief and an Appellants' reply brief – arguing that there was no pre-1980 trust and the 1980 terminated the trust (if any?). Yet, as explained in Respondents' briefing on the judicial estoppel motion, the United States' prior position is that a 1980 trust existed and the 1980 Act continued, not terminated, the trust. It is an unfair litigation advantage over the Respondents for the United States to use egregiously inconsistent argumentation and then act as Appellant when its prior position would put the United States on the Respondents' side.

Instead, the Court should require that all parties file briefs simultaneously before the same deadline Respondents propose the same deadline that the United States has requested in its motion for a 31 day extension: March 13, 2008 Then, each party would

be entitled to file a response brief to any other parties' original brief before the proposed deadline of March 31, 2008 – providing the regular 14 days for a reply brief, plus the additional 3 days for mailing and the March 30th falls on a Sunday.

III. SUSPENDING THE BRIEFING SCHEDULE IS UNREASONABLE IN LIGHT OF THE UNITED STATES' EGREGIOUSLY INCONSISTENT ARGUMENTATION ON QUESTIONS NO. 1 AND 2.

The United States' motion to suspend the briefing schedule is unreasonable in light of the United States' egregiously inconsistent argumentation on interlocutory appeal questions nos 1 and 2. First, the "consistency-inconsistency" conundrum the United States finds itself in is of its own making. Second, provided the United States argues in its briefs consistently with previous positions regarding the 1888, 1889, and 1890 Appropriation Acts and the 1980 Act central to the underlying issues, the United States has nothing to fear from this Court granting the Respondents' judicial estoppel motion. Third, should the United States argue in the alternative, that is, argue inconsistently with its previous federal court positions, the worse possible result is for this Court to ignore the inconsistent portions of the United States' brief. Fourth, and importantly, the United States is not prejudiced with the proposed Respondents' briefing schedule. The United States must explain in a not inconsistent way to this Court and to the parties what actually happened in 1980 – that won't happen unless the Court requires that the United States file its brief. Fifth, any delay is prejudicial to Respondents; as the saying goes, justice delayed is justice denied.

IV. THIS APPEAL SHOULD BE EXPEDITED BECAUSE THE UNITED STATES' EGREGIOUSLY INCONSISTENT ARGUMENTATION HAS CAUSED DELAYS IN THE LOWER COURT PROCEEDING.

The Respondents' motion to expedite the briefing and oral argument schedule is also justified because the United States' egregiously inconsistent argumentation caused delays in the lower court proceeding. The lower court proceeding has been significantly delayed because of the United States' insistence (including a motion for reconsideration, this discretionary appeal and the concomitant stay on the lower court proceeding) that it was right on questions nos 1 and 2: the Appropriation Acts did not create a trust and the 1980 Act terminated the trust (if any?)

Now, Respondents have moved to stop the United States from further such egregiously inconsistent argumentation. If the Court grants the Respondents' judicial estoppel motion, the appeal should be expedited because any other result compounds the injustice the United States caused by delaying the lower court proceeding by insisting on its egregiously inconsistent argumentation. Justice requires expediting the appeal. *See* RCFC 1 ("[The Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.")

MOHRMAN & KAARDAL, P A

Dated: January 28, 2008



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STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE

Mary Gynild, of the City of Minneapolis, County of Hennepin, State of Minnesota, being duly sworn, says that on the 28th day of January 2008, she served a true and correct copy via U S. Mail:

**Wolfchild Respondents' Response to United States Motions for
Delayed Briefing and Request for Expedited Scheduling**

upon the following:

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Mary Gynifd

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Subscribed and sworn to before me this 28th
 day of January, 2008.

Heidi Shanklin

 Notary Public

