

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Case No. 03-2684L

and

Case No. 01-568L

Judge Charles F. Lettow

SHELDON PETERS WOLFCHILD, et al.,

Plaintiffs,

vs.

UNITED STATES.

***Wolfchild* Plaintiffs' Response and Reply Memorandum to
Defendant United States Motion to Dismiss and
Memorandum in Opposition to Plaintiffs Summary Judgment**

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STATEMENT OF CASE

The Plaintiffs' ancestors were entitled to 80 acres of land in Minnesota under the February and March 1863 Acts. The 1863 Acts have never been repealed; and, therefore, the government breached its obligations under the 1863 Acts having failed to provide this land to the Plaintiffs' ancestors. The government's sale and transfer of the former Sioux Reservation without reserving land for the friendly Sioux violated the Indian Nonintercourse Act (INIA). Because the government's statutory duties are money-mandating, the government is liable in money damages for post-1980 agricultural rents and the value of the land. Finally, the statute of limitations has not run on the Plaintiffs' claims.

A. The Government's Denial that the 12 Sections Were Set Aside in 1865 by the Secretary of the Interior for the Friendly Sioux Contradicts the Record.

The government denies that the Secretary of the Interior set aside 12 sections in 1865 for the friendly Sioux:

The Secretary of the Interior never exercised the authority vested in him by the 1863 Acts to set lands apart for meritorious individual Indians of the four bands.¹

This fact dispute is not genuine because the Secretary of the Interior J.D. Cox in his May 25, 1869 Order to the Commissioner of Indian Affairs confirmed that the 12 sections had been set aside for the friendly Sioux as he unlawfully ordered that the 12 sections set aside be re-stored to public sale:

Agreeable to the suggestion contained in your letter of the 18th instant in relation to the friendly Sioux Indians in Minnesota *for whom certain lands within the boundary of the Sioux Reservation were set apart and withdrawn from market, said lands will be restored to the public domain*, and the Commissioner of the General Land Office will be instructed to take appropriate action in the premises and you are hereby authorized in accordance with your recommendation to communicate with the Rev. H.B. Whipple on the sub-

¹ U.S. Memo. in Support of Mot. to Dismiss 7-8 (Apr. 20, 2011) ("U.S. Br.").

ject, requesting him to make and report new selections, not to exceed in area 12 sections, in a suitable locality, where the friendly Indians may occupy the land in security upon which hereby authorized to locate them, and to provide them with the necessary farm implements, seeds, etc.²

The government's brief contradicts what the Secretary of the Interior admitted, 12 sections of land were set aside in 1865 for the friendly Sioux. Therefore, the government's arguments challenging the validity of the Plaintiffs' claims is suspect at best because the Department's 1869 actions to restore the set-aside lands to public sale is the heart of the Plaintiffs' Indian Nonintercourse Act ("INIA") and 1863 Acts land claims.³

Under the February 1863 Act, lands set aside for the friendly Sioux could never be alienated without Presidential consent – Presidential consent Interior never obtained prior to Interior selling the lands to private parties. Further, the INIA barred Interior from selling or transferring the Indian set aside lands to any third party without Presidential consent or additional Congressional statutory authorization; however, Interior nonetheless sold and transferred the lands in violation of the INIA. Thus, the Department's post-1869 sales and transfers of the 12 set aside sections are null and void under the INIA and the government still owns title to these set aside 12 sections for the Plaintiffs – albeit with clouded title and trespassers.⁴

² App. 216 (emphasis added).

³ For example, the United States argues, "Although potential lands were identified, ultimately the Secretary did not set lands apart under the Act. Plaintiffs never had an interest in these lands. Therefore, there is no possibility of wrongful alienation of lands that would violate the INIA." U.S. Br. 51. Because the government is mistaken on the 12 section set-aside, its legal arguments are inapposite.

⁴ Under 28 U.S.C. § 2415 (c), there is no time bar on the United States or on the Plaintiffs suing the trespassers to quiet title and restore possession of the property to the Plaintiffs. *See Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 240 (1985) ("There is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights.")

B. The Government Fails to Account for the History of Interior Transferring the Former Sioux Reservation to Third Parties By Issuance of Land Patents, 1863 through 2002, Without Reserving Acreage for the 1886 Mdewakanton.

The government's brief fails to account for the history of Interior transferring the former 1858 Sioux Reservation to third parties by issuance of land patents.⁵ The government covered a few statutes, such as the 1863 Acts and the May 15, 1886 Appropriation, but not the 1863 through 2002 sale, transfer, and issuance of hundreds of land patents for the former Sioux Reservation to third parties.⁶

In fact, the government was in a position after the completion of the September 2, 1886 enrollment of the 1886 Mdewakanton to provide the full 21,120 acres to the 1886 Mdewakanton -- 80 acres to each of them.⁷ Bureau of Land Management records reveal that in the Minnesota counties of Brown, Redwood, Yellow Medicine and Lac Qui Parle alone, the United States transferred tens of thousands of acres to third parties after September 2, 1886.⁸ However, under the 1863 Acts, these lands ought to have been transferred to the 1886 Mdewakanton -- rather than to the white population in Minnesota. Notably, the government as recently as 2002 issued a land patent transferring former 1858 Sioux Reservation land in Brown County to a private individual -- well within the six year statute of limitations on Plaintiffs' claims.⁹

⁵See, e.g., Sup. App. 659-727 (U.S. Department of the Interior Bureau of Land Management Records for Brown, Redwood, Yellow Medicine and Lac Qui Parle Counties (Minn.) land patents from September 1, 1886 through current).

⁶ *Id.*

⁷ Supplemental Appendix ("Sup. App.") 666-727.

⁸ *Id.*

⁹ Sup. App. 659-660. The legal description of the 2002 Patent is within the legal description of the 1867 Presidential Proclamation, App. 178.

Instead of transferring land to the 1886 Mdewakanton, Interior provided a substitute using the funds appropriated under the 1888-1890 Appropriation Acts: purchasing the 1886 Lands (inside and outside the former Sioux Reservation) in 1889, 1890, and 1891 and subsequently issuing land assignments of the 1886 Lands to the 1886 Mdewakanton.¹⁰ But, no title to these lands passed to the 1886 Mdewakanton.¹¹ This federal land assignment system existed until the 1980 Act transferred the 1886 Lands into trust for the communities. Since 1980, Interior has failed to reserve the required 21,120 acres for the 1886 Mdewakanton. Because Interior is no longer providing a substitute land base for the 1886 Mdewakanton, even though it could,¹² Interior is in breach of its statutory obligations.

C. The 1886 Mdewakanton, Not the Communities, Are Successors in Interest -- and History Preceding the INIA Land Claims.

To harmonize the interpretation of the applicable statutes,¹³ the Plaintiffs in their Seventh Amended Complaint invoked – as a tribe – their Indian Nonintercourse Act and 1863 Acts land claims (collectively, “INIA land claims”). New Counts VII and VIII arise out of this Court’s December 21, 2010 opinion adopting the *United States*’ legal position on the legal status of the communities and the 1886 Lands after the 1980 Act. These new counts would have been unnecessary if the government had not chosen to align itself 100% with the Communities’ policies of excluding 100% of the Plaintiffs from 100% of the Com-

¹⁰ *Wolfchild*, 96 Fed.Cl. at 318.

¹¹ *Id.* at 315.

¹² Interior still controls hundreds of millions of acres of public lands – including a significant acreage in Minnesota. See <http://www.blm.gov/wo/st/en.html>.

¹³ “In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done.” *Sutherland Statutory Construction*, vol. 2B, § 53.1, 384 (7th ed. Thomson Reuters/West 2008) (citations omitted).

munities' benefits. The result of the government's choices are the communities are not successors in interest to the INIA land claims. The Plaintiffs are.

First, at the beginning of this case, the Court gave the government and the communities several opportunities to work with the 1886 Mdewakanton in Court to resolve matters short of the 1886 Mdewakanton's INIA land claims. After all, the United States Court of Federal Claims "is the only judicial forum for most non-tort requests for significant monetary relief against the United States."¹⁴

So, in the first instance, the Court suggested the appropriateness of a governmental summons under RCFC 14(a):

In light of the court's resolution of the dispositive motions, the government shall inform the court whether it seeks to request that summons be issued pursuant to RCFC 14(a). Such notice or motion shall be filed with the court on or before February 10, 2005.¹⁵

However, "the government raises no claims against the Objecting Communities, Def.'s Resp. at 1, even though it could pursue claims against them."¹⁶ Similarly, the Court issued summons for the participation of the Shakopee Mdewakanton Sioux Community and the Prairie Island Community in the case, but these were quashed by the Court, at the communities' request, for lack of Article III case or controversy.¹⁷

Second, the government had additional opportunities in 2005 and 2006 to work with the Lower Sioux Indian Community and the *Wolfchild* plaintiffs to resolve this matter and avoid the Plaintiffs' INIA land claims. These opportunities arose because a majority of the

¹⁴ *United States v. Tohono O'Odham Nation*, ___ S.Ct. ___, slip op. at 5 (U.S. Apr. 26, 2011) (citations omitted).

¹⁵ *Wolfchild v. United States*, 62 Fed.Cl. 521, 555 (2004) (footnote omitted).

¹⁶ *Wolfchild v. United States*, 77 Fed.Cl. 22, 29 (2007).

¹⁷ *Id.* at 29-31.

enrolled members at Lower Sioux Indian Community are *Wolfchild* plaintiffs and in 2005 they elected a majority of their own to the Community Council.¹⁸ In 2005, the lead plaintiff in this case, Sheldon Peters Wolfchild, was elected President of the Community and the Community filed to intervene as a party.¹⁹ But, instead of seizing the opportunity to avoid the Plaintiffs' INIA land claims, the government opposed the motion to intervene:

It appears, from the allegations in the Proposed Complaint and the fact that the Community filed it, that a majority of the Community Council has determined that it believes that all the lands at Lower Sioux must be managed for the exclusive benefit of the 1886 Lineal Descendants. In light of this position, it is difficult to see how the Community could also seek to protect the interests that non-descendant Community members have in the same land.²⁰

The government took the position that the communities are required to protect the interests of non-descendant community members and could not incorporate the 1886 Mdewakanton in any way because it would adversely affect the non-descendant community members.

It follows from the government's and communities' positions that the communities could not be successors in interest to the INIA land claims because community membership is not based on indigenous relationships – necessary for any INIA land claim. The Court adopted the government's position in its December 21, 2010 opinion:

The membership of these communities thus is not defined in terms of indigenous relationships; rather, the communities exercise discretion over who attains or keeps their membership.

¹⁸ The organization Minnesota Mdewakanton Dakota Oyate (“MMDO”) referenced in earlier briefs was instrumental in 2005 and 2006 in sparking this opportunity for the government to cooperate with Lower Sioux Indian Community and the Plaintiffs to avoid the INIA land claims now presented.

¹⁹ Notice of Motion and Motion to Intervene as Party Plaintiff; Memorandum of Points and Authorities (March 31, 2006).

²⁰ Defendant's Opposition to The Motion to Intervene of the Lower Sioux Indian Community at 11 (May 30, 2006).

The government could not both abide by the mandate that only eligible Mde-wakanton receive the Acts' benefits and perform its duties as trustee for the three communities by ensuring that the beneficiaries receive the benefits of the trust corpus. Thus, while funds derived prior to 1980 remain subject to the terms of the Appropriations Acts, the terms of the 1980 Act prevent the application of the statutory use restrictions to the 1886 lands and funds derived from those lands subsequent to the passage of the 1980 Act.²¹

After the Court clarified in this way that the Lower Sioux Indian Community, Shako-pee Mdewakanton Sioux Community, and Prairie Island Indian Community are not succes-sors in interest to the INIA claims, the Plaintiffs invoked their INIA land claims as succes-sors in interest. The 1886 Mdewakanton are successors in interest.²²

D. The 1886 Mdewakanton's Damages are \$174,527,232 Plus Applicable Pre-judgment Interest.

Contrary to the government's arguments, Interior has erred in its interpretation of the 1980 Act, causing a breach of its statutory obligations after 1980 to the 1886 Mdewakanton and causing damages. The Plaintiffs' calculated damages, apparently not contested by the government, are based on publicly-available information²³ and have two components: (1) agricultural land rents from January 1, 1980 through January 1, 2011 and (2) sale price of land on January 1, 2011. The damages total \$174,527,232 plus applicable pre-judgment in-terest.²⁴

E. The Department of the Interior Issued 80 Acre Allotments and 80 Acre or More Land Patents to Those Not on the 1886-1889 Enrollment of 1886 Mde-wakanton.

²¹ *Wolfchild v. United States*, 96 Fed.Cl. 302, 319, 349 (2010) (citations omitted).

²² Notably, the United States in their opposition do not argue that the communities are successors in interest to the INIA claims. Nor have the communities -- who have engaged in a vigorous amici curiae practice -- filed amici curiae briefs alleging that the communities are successors in interest to the INIA claims.

²³ Kaardal Decl. (Mar. 22, 2011).

²⁴ *Id.*

The Department of the Interior issued 80 acre allotments and 80 acre or more land patents to those not on the 1886-1889 enrollment of 1886 Mdewakanton. Under the 1863 Acts, the 1886 Mdewakanton as successors in interest were entitled to 80 acres each.²⁵ However, under the March 1863 Act, no Indian was to receive more than 80 acres, collectively under one or more acts.²⁶ Thus, those who resided at the Santee Reservation in Nebraska received 80 acres – and were entitled to no additional lands under the 1863 Acts.²⁷ Certain half-bloods living in Minnesota received 80 or more acres under other Acts – and were entitled to no additional lands under the 1863 Acts.²⁸ However, the 1886 Mdewakanton – who by definition had not received 80 acres elsewhere -- received only the land assignments which were discontinued in 1980. This government failure to provide acreage, similar to the Santee Reservation residents and the Minnesota half-bloods, to the 1886 Mdewakanton damaged the 1886 Mdewakanton.

ARGUMENT

I. The Government’s Legal Arguments Fail to Account for Canons of Statutory Construction Favoring Indian Wards.

The government’s brief fails to incorporate and rely on the canons of statutory construction favoring Indians wards.²⁹ The Supreme Court has long held that in determining Congressional intent, the federal courts follow “the general rule that [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the na-

²⁵ *Wolfchild*, 96 Fed.Cl. 314

²⁶ *Id.*

²⁷ See e.g., Act of 1863 Nebraska Land Allotment, Aug. 19, 1885 (granting 81.2 acres of land). *Wolfchild* App. 225.

²⁸ Sup. App. 661-665.

²⁹ U.S. Br. at 18-21.

tion, dependent upon its protection and good faith.”³⁰ Thus, Acts of Congress relating to Indians are construed in such a manner to give the greatest protection possible to Indians.³¹ Statutes concerning the rights of Indians are to be construed in their favor.³²

II. Plaintiffs Are Entitled to Summary Judgment on their INIA Land Claims Because the Government Wrongfully Sold Land to Third Parties Over the Mandatory Obligations to the Band of the 1886 Mdewakanton.

The Plaintiffs’ opening brief reconciled the government’s plenary power with its statutory obligations to the 1886 Mdewakanton under the 1863 Acts.³³ Yet, the government never acknowledges any historical obligations under the 1863 Acts to the 1886 Mdewakanton, contrary to the undisputed record and contrary to applicable law.³⁴

A. The Court Has Jurisdiction Over the Plaintiffs’ INIA Land Claims.

The Supreme Court on April 26, 2011 stated that the United States Court of Federal Claims “is the only judicial forum for most non-tort requests for significant monetary relief against the United States.”³⁵ Nonetheless, the government argues that Plaintiffs’ INIA land

³⁰ *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 174 (1973), quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); accord, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977).

³¹ *U.S. v. Drummond*, 42 F. Supp. 958 (W.D. Okla. 1941), *aff’d* 131 F.2d 568 (1942).

³² *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992), (“[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” (citation omitted)).

³³ “The juxtaposition of plenary power and fiduciary obligation may appear incongruous, but such incongruity is the keystone of Indian-government relations....” E. Dwyer, *Land Claims Under the Indian Nonintercourse Act*: 25 U.S.C. § 177, 7 B.C.Env. Affairs L.Rev. 259, 263 (1976), quoted in *Bear v. United States*, 611 F. Supp. 589, 597 n. 14 (1985).

³⁴ U.S. Br. at 44-53.

³⁵ *United States v. Tobono O’Odham Nation*, __ S.Ct. __, slip op. at 5 (U.S. Apr. 26, 2011) (citations omitted).

claims are outside the jurisdiction of the COFC because the INIA, a federal law dating back to 1797, does not apply to Interior's actions.³⁶

To begin, there is nothing in the text of the INIA to support the government's positions. The operative sentence of the INIA states, "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."³⁷ "[T]he Act renders invalid any purported alienation of tribal land covered by its terms unless the consent of the United States has been obtained... Proof of coverage by the Act also establishes the existence of a fiduciary relationship between the federal government as guardian and the covered Indian tribe as ward."³⁸ Thus, contrary to the government's argument, it matters not whether the seller or transferor of the land is an Indian tribe, an individual Indian or the Department of the Interior - the INIA nullifies every such transfer unless *Congress* consents to the sale or transfer by statute.

The consequence of INIA's application to the facts here is that the U.S. land patents transferring the former Sioux Reservation in violation of the 1863 Acts are of "no" "validity in law or equity." Without regard to its fiduciary obligations, Interior sold and transferred hundreds of thousands of acres of the former Sioux Reservation -- including the 10,000 acres set aside in 1865 and improperly restored to public sale in 1869 -- without reserving 21,120 acres for the Plaintiffs. The government still holds title to these lands -- title clouded

³⁶ U.S. Br. at 44-48.

³⁷ *Id.*

³⁸ *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 810 (D.C.R.I. 1976), *citing Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975), *aff'g*, 388 F.Supp. 649, 663 n.15 (D.Me.).

by land patents granted without Congressional consent – subject to its statutory obligation under the 1863 Acts to provide 21,120 acres to the Plaintiffs. Thus, the government as guardian has continuing statutory obligations to clear title on the 21,120 acres and deliver possession of the same 21,120 acres to the Plaintiffs.

The three cases the government cites actually supports the Plaintiffs’ arguments under the INIA. First, the government’s brief at pages 45 and 46 erroneously reads *Federal Power Commission v. Tuscarora Indian Nation*³⁹ to mean that under the INIA Interior can alienate, sell and convey Indian land without Congress’ statutory consent. However, *Tuscarora* actually held that “consent of the United States” under Indian Nonintercourse Act meant “consent of Congress” and did not refer to unilateral executive department actions:

The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, *without the consent of Congress*, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent.⁴⁰

While the Supreme Court in *Tuscarora* ultimately upheld the land transfers at issue in *Tuscarora*, the Supreme Court did so by finding that Congress gave consent to the transfers under section 21 of the Federal Power Act.⁴¹ Contrary to *Tuscarora*, Interior in this case has failed to identify any statute authorizing it to sell and convey all the former Sioux Reservation without reserving acreage for the friendly Sioux, as required under the 1863 Acts. As a result, the INIA controls and renders invalid the sale and transfer of land under the 1863 Acts.

³⁹ 362 U.S. 99 (1960).

⁴⁰ *Id.* at 119 (emphasis added).

⁴¹ *Bear*, 611 F.Supp. at 600-01.

Further, the District Court in *Bear v. United States*⁴² found that congressional approval was required for a tribe to convey tribal lands to the United States in the context of a condemnation proceeding. The Court in striking down a 1973 agreement between the tribe and United States as violative of the Nonintercourse Act stated:

Here the [governmental] defendants contend that counsel for the Tribe, by signing the stipulation in question, fulfilled the United States' fiduciary responsibility as trustee over the tribal lands. The defendants emphasize that the United States Attorney's Office, recognizing that it could not represent both the Corps of Engineers and the condemnees, retained impartial counsel for the Tribe. The defendants would have this Court hold that the requirements of the Non-Intercourse Act are satisfied when the sale, disposition, or taking of Indian land is endorsed by the Tribe's private counsel... Accordingly, this Court finds, as a matter of law, that the signature of counsel for the Tribe on the present stipulation does not satisfy the requirements of the Indian Non-Intercourse Act. Accordingly the stipulation in question is void.⁴³

Thus, once again, *Bear* supports Plaintiffs' position that no one, including Interior acting on its own, can alienate Indian lands without the consent of Congress. The consent of Congress is required for the alienation of Indian lands. The government's argument at pages 47 and 48 of its brief that Interior can, without the consent of Congress, alienate, sell and convey Indian lands –is unsupportable.

Finally, the government cites *United States v. Winnebago Tribe of Nebraska*, a case in which the Eighth Circuit held that the government, through the Corps of Engineers, did not have Congressional authority to take the tribal lands by eminent domain.⁴⁴ Thus, once again,

⁴² *Bear v. United States*, 611 F.Supp 589 (D. Neb. 1985), *aff'd*, 810F.2d 153 (8th Cir. 1987).

⁴³ *Id.* at 597.

⁴⁴ 542 F.2d 1002 (8th Cir. 1976).

Winnebago actually supports Plaintiffs' argument that "[n]othing in *Tuscarora* sanctions the taking of treaty lands without express congressional authorization."⁴⁵

In summary, the government's brief inexplicably argues that the INIA does not apply because the Plaintiffs are arguing that the government, as opposed to someone else, sold and transferred the former Sioux Reservation to third parties in violation of the INIA. To the contrary, similarly to *Tuscarora*, *Bear* and *Winnebago*, the Plaintiffs' INIA argument is the government-sponsored sale and transfer of the former Sioux Reservation without reserving 21,120 acres for the Plaintiffs is null and void in law and equity because it violated the 1863 Acts' land grant provisions – i.e. Interior violated Congress' intent in the 1863 Acts by selling the whole Sioux Reservation without reserving 21,120 acres for the Plaintiffs.

B. The INIA applies to the Government's Erroneous and Repeated Issuance of Numerous Land Patents Transferring All the Sioux Reservation to Third Parties Without Reserving Acreage for the Plaintiffs.

The government's INIA analysis fails to account for the history of Interior selling and transferring the former 1858 Sioux Reservation to third parties. Interior erroneously and repeatedly issued numerous land patents transferring all the 1858 Treaty Sioux Reservation to third parties without reserving 21,120 acres for the Plaintiffs or their ancestors. In lieu of conveying land to the 1886 Mdewakanton, Interior purchased the 1886 Lands and subsequently issued land assignments of the 1886 Lands to the 1886 Mdewakanton.⁴⁶ However, contrary to the 1863 Acts, the government never transferred title to these lands to the 1886 Mdewakanton.⁴⁷ The government's federal land assignment system continued from 1890

⁴⁵ *Id.* at 1006, citing *Lac Courte Oreilles Band, etc. v. Federal Power Com'n*, 510 F.2d 198, 212 (1975).

⁴⁶ *Wolfchild*, 96 Fed.Cl. at 318.

⁴⁷ *Id.* at 315.

until the 1980 Act transferred the 1886 Lands into trust for the communities. Since 1980, Interior has failed to reserve the required 21,120 acres for the 1886 Mdewakanton. Because Interior is no longer providing a substitute land base for the 1886 Mdewakanton, Interior is in breach of its continuing statutory obligations under the 1863 Acts.

C. The 1886 Mdewakanton is a Tribe for Purposes of the INIA Land Claims.

The government next argues that the 1886 Mdewakanton is not a “tribe” for purposes of the INIA. However, the 1886 Mdewakanton was a federally recognized group of Indians as a result of the 1886 enrollment and supplement prior to the recognition of the Lower Sioux and Prairie Island Communities in 1936 and recognition of the Shakopee community in 1969. After Interior discontinued issuing land assignments to the Plaintiffs in 1980, the tribe continued – but landless due to the government’s statutory violations. The fact that this fourth group of Indians have an INIA claim is a result of Interior’s statutory violations – it is not the fault of the Plaintiffs as the government suggests.

First, the numerous cases that the government cites – except for *Passamaquoddy* and *Naragansett* – are inapposite because the Indians in those cases did not have the support of many Congressional statutes recognizing the 1886 Mdewakanton as a tribe and did not have the support of thousands of pages of Department of the Interior documents over such a long period of time recognizing the 1886 Mdewakanton as a tribe.

Second, the government’s argument at pages 48 through 51 that the Plaintiffs are not a “tribe” for purposes of the INIA contradicts Congress’ intent in enacting the INIA. This Court has already held that the 1886 Mdewakanton are statutory beneficiaries of the Appropriation Acts’ statutory use restriction and that Interior had corresponding fiduciary duties to

the 1886 Mdewakanton for a period of over 90 years. This Court also held that the 1886 Mdewakanton is an identifiable group of Indians for the purposes of the Indian Tucker Act.⁴⁸ The 1886 Census and supplement and all three Appropriation Acts recognize the 1886 Mdewakanton as the new, surviving “Mdewakanton Band” in Minnesota – a “tribe” under the Nonintercourse Act. As the Court has recognized, the government completed the 1886 census (and 1889 supplement) to determine the identity of the 1886 Mdewakanton because of prior administrative difficulties in determining the identity of the “friendly Sioux.”⁴⁹ The 1888, 1889 and 1890 Appropriations Acts provided land to the surviving 1886 Mdewakanton.⁵⁰ And, each Appropriation Act identified the beneficiaries:

- In 1888: “For the support of the full-blood Indians in Minnesota, belonging to the *Mdewakanton band of Sioux Indians*, who have resided in said State since [May 20, 1886], and severed their tribal relations.”⁵¹
- In 1889: “For the support of the full-blood Indians in Minnesota heretofore belonging to the *Mdewakanton band of Sioux Indians*, who have resided in said State since [May 20, 1886], or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations.”⁵²
- In 1890: “For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the *Mdewakanton band of Sioux Indians*, who have resided in said State since [May 20, 1886], or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations.”⁵³

By this text, in three separate Acts, Congress identified the 1886 Mdewakanton as the new, surviving Mdewakanton band in Minnesota – a “tribe” for the purposes of the Noninter-

⁴⁸ *Wolfchild*, 96 Fed.Cl. at 338 n. 47.

⁴⁹ *Id.* at 316.

⁵⁰ Act of June 29, 1888, 25 Stat. at 228-29; Act of March 2, 1889, 25 Stat. at 992-93; Act of Aug. 19, 1890, 26 Stat. at 349.

⁵¹ Act of June 29, 1888, 25 Stat. at 228-29 (emphasis added).

⁵² Act of March 2, 1889, 25 Stat. at 992-93 (emphasis added).

⁵³ Act of Aug. 19, 1890, 26 Stat. at 349.

course Act.

Third, the government argues that Congressional recognition of a tribe is not enough. A group of Indians must also pass an “anthropological, political, geographical and cultural” tests – including having a political structure.⁵⁴ The 1886 Mdewakanton until 1980 received federal land assignments at three communities with federally-recognized governments. After 1980, the communities excluded the 1886 Mdewakanton in order to maximize casino per capita payments for their resident-members. The 1886 Mdewakanton – the Plaintiffs – are landless since 1980 because Interior violated the 1863 Acts’ land provisions for them. The Plaintiffs, under these facts, pass any reasonable anthropological, political, geographical and cultural test. For example, the Plaintiffs’ birth certificates collected by anthropologist Dr. Barbara Buttes, indicate anthropological, political, geographical and political ties. The creation and continuance of the Minnesota Mdewakanton Dakota Oyate (MMDO) plus the election of Sheldon Peters Wolfchild as President of Lower Sioux confirms a political structure for the 1886 Mdewakanton.

In fact, if, instead of the breach, Interior had provided the 21,120 acres to the Plaintiffs in 1980, the anthropological, political, geographical and cultural aspects of the tribe would be more visible today. Without the land, the tribe exists, but not as visible – as it would be with the land.

Fourth, the government completely sheds its role as guardian for the 1886 Mdewakanton ward in its analysis of the efforts of the 1886 Mdewakanton to organize the MMDO to secure the INIA land claims against the government. Rather than providing the MMDO

⁵⁴ U.S. Br. at 49-50. See *Passamaquoddy Tribe*, 388 F. Supp. 649; *Naragansett Tribe of Indians*, 418 F. Supp. 798; *Naragansett Tribe of Indians v. Murphy*, 426 F.Supp. 132 (D.R.I. 1976).

technical and regulatory assistance to obtain its statutory entitlement of 21,120 acres, the government critiques the 1886 Mdewakanton efforts to organize the MMDO as trivial and frivolous. In reality, the Department, at that time, was obligated as guardian for these Indian wards to help the MMDO get organized and get their acreage back.

Fifth, contrary to the government's assertions, the MMDO still exists. Kaardal Decl. (May 4, 2011). Whether incorporated or not, it would have the right to sue as an incorporated association under Minnesota law relating to unincorporated associations.⁵⁵ Of course, in this case, all the tribal members have sued the government – which is in essence the same as an association suing the government.⁵⁶

Sixth, the government has had opportunities to work with the 1886 Mdewakanton to resolve matters short of the 1886 Mdewakanton's INIA land claims. For example, the government could have worked with the Lower Sioux Indian Community and the *Wolfchild* plaintiffs in 2005 to resolve this matter and avoid the INIA land claims. The opportunity arose in 2005 because a majority of the enrolled members at Lower Sioux Indian Community are *Wolfchild* plaintiffs and in 2005 they elected a majority of their own to the Community Council. In 2005, the lead plaintiff in this case, Sheldon Peters Wolfchild, was elected President of the Community and the Community filed to intervene as a party.⁵⁷ However, instead of seizing the opportunity for compromise, the government opposed the motion to intervene. Accordingly, the government confirmed its alignment with the communities' ex-

⁵⁵ *American Civil Liberties Union v. Tarek ibn Ziyad Academy*, 2011 Westlaw 1496311 (Apr. 2011) (ACLU as dissolved non-profit corporation has capacity to sue as an unincorporated association under Minnesota law), citing *Minn. Assoc'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1049–50 (8th Cir.2002).

⁵⁶ *Id.*

⁵⁷ Notice of Motion and Motion to Intervene as Party Plaintiff; Memorandum of Points and Authorities (March 31, 2006).

clusionary policies. The result of the government's statutory violations is a fourth group of Indians – the 1886 Mdewakanton – with INIA land claims.

Finally, the government argues that this case has been brought on behalf of individual Indians – not a tribe. “On this basis alone, Plaintiffs’ INIA Count must be dismissed for lack of jurisdiction.”⁵⁸ To the contrary, the members of an association – a tribe in this case – suing is essentially the same as the association itself suing. Further, because the Court recognized this group of Indians as statutory beneficiaries, the Plaintiffs are, for all intents and purposes, a tribe. The case of *James v. Watt*,⁵⁹ where individual Indians were barred from an INIA claim, is distinguishable because Congress and the Department have recognized the 1886 Mdewakanton as a tribal group beneficiary many times over a long period of time. Congress has recognized them as a tribal group beneficiary for land purposes at least six times: 1863 Acts (2); Appropriation Acts (3) and 1980 Act. Accordingly, the Department recognized the 1886 Mdewakanton and their land rights from 1863 until the breach in 1980.

D. The Former Sioux Reservation is Tribal Land Under the INIA.

The government makes three erroneous arguments at pages 51 through 53 that the former Sioux Reservation is not tribal land under the INIA. First, as detailed above, the government's argument that the 12 sections were never set aside is not supported in the record and directly contradicts the only documents in the record addressing the issue. In fact, the government sold and transferred the whole Sioux Reservation from 1863 through 2002 without reserving 21,120 acres for the 1886 Mdewakanton and, more importantly, sold and transferred these lands without obtaining either Presidential consent or Congressional statu-

⁵⁸ Brief at 49.

⁵⁹ 716 F.2d 71, 72 (1st Cir. 1983), *cert denied*, 104 S.Ct. 2397 (1983).

tory authorization. Thus, these lands are still tribal lands because Congress in the 1863 Acts directed Interior to set aside – reserve – the acreage for the friendly Sioux.

Second, the government argues that it was not Congress' intent in the 1863 Acts to convey the property to the 1886 Mdewakanton as a tribe – but to a different group of meritorious individuals. On the contrary, this position contradicts the government's position taken in opposition to the Plaintiffs' petition for a writ of certiorari to the United States Supreme Court:

Congress permitted those Sioux – known as the “loyal Mdewakantons” because they were affiliated with the Mdewakanton band of the Sioux Tribe – to remain in Minnesota and it authorized the Secretary of the Interior to give 80 acres of land “to each individual *** who exerted himself in rescuing the whites from the late massacre of said Indians,” 1863 Act § 9, 12 Stat. 654. The Secretary did not exercise that authority, and the Sioux remaining in Minnesota sank into poverty.

In 1888, 1889 and 1890, Congress passed appropriations statutes...The appropriated funds included money for the Mdewakanton Sioux in Minnesota.⁶⁰

In the Response to the Petition, the government argued that the Appropriation Acts were intended to assist the “Sioux remaining in Minnesota [who] sank into poverty” who were the “Loyal Mdewakanton” remaining in Minnesota after 1862. These are the 1886 Mdewakanton who were identified by the 1886 census and supplement as entitled to land under the 1863 Acts.

Third, the government's argument suggests that any unfulfilled statutory obligation of the Department regarding Indian lands under the 1863 Acts resulted in the Indian land escheating to the government. On the contrary, Congress specifically enacted the INIA to en-

⁶⁰ Brief for the United States in Opposition at p. 2-3 (Mar. 2010) (citations omitted); Sup. App. 733-34.

sure that Indian land is not transferred to anyone, including escheating to the federal government, without Congress' statutory approval.

E. The 1980 Act Did Not Terminate the Plaintiffs' INIA Land Claims.

Contrary to the government's brief at pages 33 to 34, the 1980 Act⁶¹ did not terminate the 1886 Mdewakanton's INIA land claims. The 1980 Act, its text and legislative history do not indicate a Congressional intention to terminate or repeal the 1863 Acts' land grant provisions.⁶² The actual text of the 1980 Act does not address the 1863 Acts.⁶³ Specifically, the 1980 Act provided that the 1886 lands, which "were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians" under the Appropriations Acts, would henceforth be "held by the United States ... in trust for" the three communities.⁶⁴ The Act also contained a savings clause providing that the Act would not "alter" any rights then existing under "any contract, lease, or assignment entered into or issued prior to enactment of" the Act.⁶⁵ None of this text supports a Congressional intent to terminate the 1863 Acts' land grant provisions.⁶⁶ Further, the legislative history related to the 1980 Act is completely silent on the issue of the government's continuing obligations under the 1863 Acts.⁶⁷

III. The Government's Money-Mandating Duty Arguments are Without Merit.

The government's money-mandating duty arguments at pages 22 through 32 are contradictory and problematic. Many of the interpretative problems arise from a failure to rec-

⁶¹ Act of Dec. 19, 1980. *Wolfchild* App. 94.

⁶² Act of Dec. 19, 1980.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Cong. Debates; *Wolfchild* App. 47-93.

ognize that Interior in 1865 did, in fact, set aside the 12 sections for the friendly Sioux. For example, the government fails to analyze the text of INIA along with the 1863 Acts. The government also fails to apply its analysis to the Department's illegal sale and transfer of the 12 sections without Presidential consent in violation of the INIA and the 1863 Acts.

A. To Determine Whether the Government's Duties Are Money-Mandating Requires Interpretation of Both the INIA and the 1863 Acts.

To determine whether the government's duties are money-mandating requires interpretation of both the INIA and the 1863 Acts. As detailed above, the INIA applies to the Department of the Interior selling and transferring the former Sioux Reservation because the 1863 Acts required acreage to be set aside and distributed to the friendly Sioux. The Plaintiffs' claim is that both the INIA and 1863 Acts were violated when the Secretary of the Interior illegally restored the 12 set aside sections to public sale in 1869 without Presidential consent – required by the February 1863 Act:

[T]he Secretary of the 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 [by] said Indians. *The land so set apart ... 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.*⁶⁸

Interior's duties under the INIA with respect to Indian lands, including the 12 sections set aside in 1865, are non-discretionary:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.⁶⁹

⁶⁸ 12 Stat. at 654 § 9. *Wolfchild* App. 15 (emphasis added).

⁶⁹ *Id.*

Further, “[p]roof of coverage by the Act also establishes the existence of a fiduciary relationship between the federal government as guardian and the covered Indian tribe as ward.”⁷⁰ Thus, the obligations of the government to reserve the 12 sections of land for the friendly Sioux under the INIA and 1863 Acts were mandatory and, therefore, money-mandating.

B. The 1863 Acts Alone Establish Detailed Standards For Reserving Land for the friendly Sioux, Thereby Creating a Money-Mandating Duty Upon the Government.

Even if the government’s sales and transfers of the former Sioux Reservation do not fall under the INIA, the 1863 Acts alone establish detailed standards for reserving land for the friendly Sioux, thereby creating a money-mandating duty upon the government. The February and March Acts of 1863 provided a reward for “*each individual* of the before named bands who exerted himself in rescuing the whites from the late massacre...”⁷¹ and to “*any meritorious individual* Indian of said bands, who exerted himself to save the lives of the whites in the late massacre...”⁷² “eighty acres...”⁷³ And, while their contemporaries, both hostile and others who were forcefully removed from the State of Minnesota were provided with lands, albeit “outside of the limits of any state” (that became a reservation⁷⁴) but, “sufficient in extent to enable each member of said [Sisseton, Wahpaton, Mdewakanton, and Whapakoota Sioux] bands (who are willing to adopt the pursuit of agriculture) eighty acres of good

⁷⁰ *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 810 (D.C.R.I. 1976), *citing Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975), *aff’g*, 388 F.Supp. 649, 663 n.15 (D.Me.).

⁷¹ Section 9, Feb. 16, 1863 Act (emphasis added).

⁷² Section 4, Mar. 3, 1863 Act (emphasis added).

⁷³ Section 9, Feb. 16, 1863 Act and Section 4, Mar. 3, 1863 Act.

⁷⁴ Treaty of 1868.

agricultural lands...,”⁷⁵ the remaining band of friendly Sioux Indians in Minnesota would become landless then, and are landless now.

The 1863 Acts provided detailed standards — an Indian who exerted himself to save the lives of whites during the 1862 outbreak — that obligated the United States to provide 80 acres of land to any Indian meeting those standards. The statutory language articulated by Congress, nor the legislative history, render this reward wholly discretionary.

The Government seeks to support its predicate that the 1863 Acts are more akin to money-authorizing statutes than money-mandating statutes such as that cited in *Perri v. United States*⁷⁶ where the U.S. Court of Appeals for the Federal Circuit found the lack of detailed statutory standards prevented a finding of a money-mandating duty. But, the *Perri* decision supports the *Wolfchild* Plaintiffs’ position and contradicts the Government’s argument.

The Federal Circuit in *Perri* analyzed 28 U.S.C. § 524(c)(1)(B) which created the Department of Justice’s Assets Forfeiture Fund. The Appellant sought to recover twenty-five percent of the amount the government received upon the forfeiture of property owned by a criminal defendant, based upon the information and assistance he provided the government in developing the case.⁷⁷ The court determined the statute not money-mandating because the subsection at issue provided no standards for determining “payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States.”⁷⁸ In addition, the court found the provision did not specify the amount to be paid

⁷⁵ Section 1, Mar. 3, 1863 Act.

⁷⁶ *Perri v. United States*, 340 F.3d 1337 (Fed. Cir. 2003).

⁷⁷ *Id.* at 1339.

⁷⁸ *Id.* at 1342, quoting 28 U.S.C. § 524(c)(1)(B).

or the basis for determining that amount.⁷⁹ The language was too general, lacking any standards that as a result, “like the other payment provisions of [the statute] § 524, the determination whether to pay an award and its amount is within the discretion of the Attorney General.”⁸⁰

The Federal Circuit compared its analysis of the cited § 524 provision with another statute — the “moiety statute,” 19 U.S.C. § 1619, and the court’s decision in *Doe v. United States*.⁸¹ Under 19 U.S.C. § 1619, a person who provided information concerning a fraud upon a customs revenue or violation of a customs law that lead to among other things, the recovery of a fine, penalty, or forfeiture, the person may be awarded and paid by the Treasury Secretary an award of 25 percent of the net amount recovered but not exceed \$25,000.⁸² Congress would later change the statute to state that the Secretary “may” make and pay the reward.⁸³ The court determined that despite the amendment, the statute maintained its money-mandating character for three reasons: (1) the statute provided clear standards for paying an award; “the furnishing of information about fraud upon or violation of custom laws that led to the recovery of duties withheld or a fine penalty or forfeiture;”⁸⁴ (2) it stated the precise amount to be paid;⁸⁵ and (3) it required the Secretary to make payment to anyone who met those standards.⁸⁶

⁷⁹ *Id.* at 1342.

⁸⁰ *Id.* at 1343.

⁸¹ *Doe v. United States*, 100 F.23d 1576 (Fed. Cir. 1996).

⁸² *Perri*, 340 F.3d at 1342.

⁸³ *Id.*

⁸⁴ *Id.* at 1343.

⁸⁵ *Id.*

⁸⁶ *Id.*

Upon examination of the February and March 1863 Acts, “guidance” *is provided* as well as the “requirement on how the Secretary was to fulfill the Acts to the individual recipients.”⁸⁷ Like the Federal Circuit’s *Doe* analysis of 28 U.S.C. § 1619, the 1863 Acts provide clear standards: (1) to each individual Indian who “exerted himself in rescuing [or ‘save the lives of’] whites from the late [1862] massacre;”⁸⁸ (2) with a precise amount of a reward — “eighty acres”⁸⁹ of land; and (3) requiring the Secretary to make that acreage available for each individual Indian that met that criteria.⁹⁰ This is *not* a situation in which the determination to make the reward or its amount is within the Secretary’s discretion due to the lack of standards.⁹¹

Likewise, there is nothing in the legislative history of the 1863 Acts that would reflect that Congress indicated or intended to reject or alter a construction between February and March 1863 to suggest that the reward of 80 acres for the Indians who helped rescued or save the whites during the 1862 Outbreak as wholly discretionary.⁹²

That this Court must first look at the text of statutes to ascertain through a fair interpretation, as “mandating compensation by the Federal Government for damages sustained” to retain jurisdiction is axiomatic.⁹³ Although disputed, even if this Court determined that the text of the February and March 1863 Acts provides language to support the govern-

⁸⁷ U.S. Memo. In Support of Mot. to Dismiss, 28 (Apr. 20, 2011).

⁸⁸ Section 9, Feb. 16, 1863 Act and Section 4, Mar. 3, 1863 Act.

⁸⁹ *Id.*

⁹⁰ *Id.* See, *Perri*, 340 F.3d at 1343.

⁹¹ Compare *Perri*, at 1343 (“The lack of standards in [28 U.S.C. § 524(B)] governing the payment of such awards necessarily means that, like other payment provisions of § 524, the determination whether to pay an award and its amount is within the discretion of the Attorney General.”)

⁹² See, e.g., Cong. Globe, 511 (Jan. 26, 1863); *Perri*, 340 F.3d at 1343.

⁹³ See, e.g., *Hopi Tribe v. United States*, 55 Fed. Cl. 81, 87 (2002).

ment's superficial argument the statutes are discretionary,⁹⁴ the analysis does not end at this point as the government suggests.⁹⁵

Moreover, the government offers this Court's analysis in *Hopi Tribe v. United States*, as "akin to" the text of the 1863 Acts — "[t]he text simply authorizes the Secretary of Interior to set aside land for individuals, and does not establish any money-mandating duty on the part of the United States."⁹⁶ The government goes no further and cites to no record. However, this Court did go further. In *Hopi Tribe*, this Court required a rebuttable presumption to an otherwise discretionary statute using the intent of Congress to draw from the structure and purpose of the statutes at issue:

"[T]he use of the word 'may' does not, by itself, render a statute wholly discretionary, and thus not money-mandating ...". Instead, the court "must proceed to test that presumption against the intent of Congress and other inferences that we may rationally draw from the structure and purpose of the statute at hand."⁹⁷

Additionally, the government cites *Confederated Salish & Kootenai Tribes v. U.S. ex rel. Norton*⁹⁸ to argue that the word "authorize" in the 1863 Acts means that Interior had discretion as to whether to set aside and transfer 80 acres to the friendly Sioux. However, while the *Confederated Salish* found that the word "authorize" as used in the statute at issue in that case, there are numerous federal decisions finding that when Congress uses the word "au-

⁹⁴ U.S. Memo. in Support Mot. to Dismiss, 25-26.

⁹⁵ *Id.* 26.

⁹⁶ *Id.*

⁹⁷ *Hopi Tribe*, 55 Fed. Cl. at 87, quoting, *McBryde v. United States*, 299 F.3d 1357, 1362 (Fed. Cir. 2002)(citations omitted).

⁹⁸ 343 F.3d 1193, 1195 (9th Cir. 2003).

thorize” in a statute, the direction is mandatory as the concurrence noted — including Congressional statutes enacted much more contemporaneous in time to the 1863 Acts.⁹⁹

For instance, in *Chase v. United States*, the Eighth Circuit held in a case involving a statute which “authorized” the Secretary of the Interior “to sell and convey” certain Indian lands to members of the Omaha tribe, the court held that the word “authorize” as used by Congress is mandatory:

An examination of the legislation of Congress shows that in many of the acts of Congress the word ‘authorized’ is frequently used where a duty is imposed upon a public executive officer, and in no case are the duties imposed discretionary unless, after the word ‘authorized,’ the other words ‘in his discretion’ are added. As was said by the Supreme Court of the United States in *Mason et al. v. Fearson*, 9 How. 258, 13 L.Ed. 125:

‘Whenever it is provided that a corporation or officer ‘may’ act in a certain way, or it ‘shall be lawful’ for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons. * * * Without going into more details these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the Legislature, which is the test in these cases, seems under such circumstances to have been ‘to impose a positive and absolute duty.’¹⁰⁰

Nonetheless, even if the February and March 1863 Acts contain language otherwise deemed discretionary, such a finding “does not end the matter.”¹⁰¹ This Court “must examine whether the plain language is overcome by legislative intent to the contrary or by obvi-

⁹⁹ *U.S. Sugar Equalization Board v. P. De Ronde & Co.*, 7 F.2d 981, 986 (3d Cir.1925); *Catron v. Marron*, 19 N.M. 200, 142 P. 380, 382 (1914); *Chase v. United States*, 261 F. 833, 837 (8th Cir. 1919) *aff’d*, 256 U.S. 1, 41 S. Ct. 417, 65 L. Ed. 801 (1921).

¹⁰⁰ *Id.* at 837 (citations omitted); see also 3 *Sutherland Statutory Construction*, 46 (6th ed. Thomson/West 2001) (“Where statutes provide for performance of acts or the exercise of power or authority by public officers protecting private rights or the public interest, they are mandatory.”).

¹⁰¹ *Id.* at 87.

ous inferences from the structure and purpose of the statute....”¹⁰² And, although in *Hopi Tribe* this Court found nothing in the legislative history that espoused an intent contrary to the discretionary language of the statute the court examined, the same is not true here.

The legislative record confirms the structure and purpose of the February and March 1863 Acts as money-mandating:

- “I have referred to the last section of the bill simply to show in what way the committee [of Indian Affairs] propose to take care of these friendly Indians. They propose to direct the Secretary of the Interior to set apart for each of them one hundred and sixty acres of the public land....”¹⁰³
- “I think the provision is well enough as it is. I think we should reward Indians, who, under the circumstances that surrounded this case, exerted themselves to protect white inhabitants. This was the opinion of the committee ... that they ought to be rewarded, ought to be distinguished from other Indians....”¹⁰⁴

Despite the animosity toward Sioux Indians because of the 1862 Outbreak, the legislative history of the 1863 Acts reflects the obligations Congressional leaders imposed upon the United States to reward those who rescued or saved the whites. It is indicative of examples to other Indians and future policies between the races. As one Congressman stated, “they ought to be rewarded, ought to be distinguished from other Indians, as an inducement

¹⁰² *Hopi Tribe*, 55 Fed. Cl. at 88.

¹⁰³ Cong. Globe, 511 (Jan. 26, 1863)(statements of Mr. Fessenden). The statute would be later amended reducing the 160 acres to 80 acres. *See*, Cong. Globe, 515 (Jan. 26, 1863). Here, Mr. Fessenden, disagrees with providing \$50 as a system of pensioning that is eventually eliminated. *Id.* at 514-15.

¹⁰⁴ Cong. Globe, 514 (Jan. 26, 1863) (comments of Mr. Harlan). The Senatorial debate also identifies a reference that the proposed bill did not provide the awarded land be within Minnesota, but merely public lands where the location would be at the discretion of the Secretary. *Id.* at 515. This does not detract from the structure and purpose of the Acts. Congress intended the friendly Indians to be rewarded with land. It confirms the money-mandating duty of the statutes wherein Congress obligated and directed the Secretary to reward the Indians who rescued or saved the lives of whites with 80 acres of land. In addition, as the record reflects, the Government did set-aside 12 sections of land *in Minnesota* for the purposes of carrying out the mandates of the 1863 Acts.

to Indians hereafter, when the tribes should conclude to engage in war with white people, to frustrate the designs and plans of the tribe, to give timely notice to the settlers.”¹⁰⁵ Even if the language of the 1863 Acts appears discretionary, the legislative history reflects the necessary elements to conclude that the statutes are money mandating.

IV. The Government’s Statute of Limitations Defenses are Unavailing.

A. Plaintiffs’ Claim Did Not First Accrue Under 28 U.S.C. § 2501 Until the Department of the Interior Completed the Transfer of the Former Sioux Reservation to Third Parties in 2002.

The government’s analysis of the statute of limitations at pages 39 through 44 fails to account for the government completing the transfer of the former Sioux Reservation in 2002.¹⁰⁶ Because 2002 is only one year before the complaint in this action was filed, 28 U.S. § 2501 does not apply. 28 U.S. § 2501, in relevant part, states:

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

“[F]or the purposes of section 2501, it would appear more accurate to state that a cause of action against the government has ‘first accrued’ only when all the events which fix the government’s alleged liability have occurred *and* the plaintiff was or should have been aware of their existence.”¹⁰⁷ Here, all the events fixing the government’s alleged liability had not occurred until 2002 when the government transferred the last land patent of land set aside in

¹⁰⁵ Cong. Globe, 514 (Jan. 26, 1863) (statements of Mr. Harlan).

¹⁰⁶ On a preliminary matter, 28 U.S.C. § 2501 would not affect the INIA nullifying a transaction in violation of the INIA’s terms.

¹⁰⁷ *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis in original) (citations omitted).

1863. After all, the government could have issued the patent in 2002 to the Plaintiffs – as the government was statutory obligated to do.

The government’s arguments at pages 36 through 39 that the claims accrued between 1865 and 1889 are unpersuasive. As this Court has held, Interior identified the 1886 Mdewakaton in the 1886 census and the 1889 supplement. The 1886 Lands were provided as a substitute shortly thereafter. The breach occurred after the 1980 Act when the Department of the Interior’s policies rendered the Plaintiffs landless – resulting in the INIA land claims. The fact that Interior *in 2002* conveyed additional former Sioux Reservation land to third parties, and not the Plaintiffs, is an absolute bar on application of the 28 U.S. § 2501.

B. The Plaintiffs Seek the Benefit of the Accrual Suspension Rule

Plaintiffs seek the benefit of the “accrual suspension” rule. Under that rule, the accrual of a claim against the United States will in some situations be suspended when an accrual date has been ascertained, but the plaintiff does not know of the claim.¹⁰⁸ However, a plaintiff’s ignorance of a claim that he should have been aware of is not enough to suspend the accrual of a claim.¹⁰⁹ The accrual suspension rule is “strictly and narrowly applied,” and the accrual date of a cause of action will be suspended in only two circumstances: “[the plaintiff] must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was ‘inherently unknowable’ ” at the time the cause of action accrued.¹¹⁰

¹⁰⁸ *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct.Cl. 630, 373 F.2d 356, 358-59 (1967).

¹⁰⁹ *Id.* at 359; see *Braude v. United States*, 218 Ct.Cl. 270, 274, 585 F.2d 1049 (1978).

¹¹⁰ *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed.Cir.2003) (en banc), quoting *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed.Cir.1985); *Alliance of Descendants of Tex. Land Grants*, 37 F.3d 1478;

The Plaintiffs' situation meets both circumstances. First, the government, after the 1980 Act, concealed the wrongful transfer of the Plaintiffs' 1886 trust funds to the communities – which triggers the Accrual Suspension Rule. The Plaintiffs should have had a governmental accounting in 1980 of their trust funds – and they would have known their rights at that time if Interior had prepared a proper governmental accounting. However, the government concealed that information from the Plaintiffs.

Second, the Plaintiffs were unaware of the existence of the INIA claims in 1980. The injury arising from the INIA land claims was “inherently unknowable” in 1980 because the government's policies with respect to the Communities had not yet evolved to the point where the government conceded that the Communities were not based on “indigenous relationships” – meaning the communities are not successors in interest to the INIA land claims, the Plaintiffs are. The United States first made this position known in this litigation in 2005. But, the Court only adopted the government's reasoning on December 21, 2011. As a result, the INIA land claims only became known on December 21, 2011 – when the Plaintiffs first knew that the communities were not the successors in interest to the INIA land claims.

C. The Indian Trust Accounting Statute Applies to Rents from Trespassers.

The government errs in arguing that the Indian Trust Accounting Statute, Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003) (ITAS), does not apply to post-1980 rents from trespassers who hold U.S. land patents in the former Sioux Reservation. ITAS states:

(Fed.Cir. 1994), *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1571-72 (Fed.Cir.1993); *Japanese War Notes Claimants Ass'n*, 373 F.2d at 359.

[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

117 Stat. at 1263 (emphasis added). The Plaintiffs argue the ITAS covers the Plaintiffs' claims for post-1980 Act agricultural rents based upon "losses to ... trust" funds because the rents should have been collected and held in treasury account nos. 147436 and 147936 – the same treasury accounts the pre-1980 rent was held in.¹¹¹

The government's brief at pages 39 through 40 fails to account for cases involving the United States as guardian and their Indian wards suing for accounting and damages from trespassers in similar situations. The United States Supreme Court, in a case brought by the government as guardian of a tribal ward against trespassing railroad companies, held that Indians have a common-law right of action for an accounting of "all rents, issues and profits" against trespassers on their land.¹¹² Similarly, the United States as guardian of the 1886 Mdewakanton wards, is obligated to obtain an accounting from the trespassers and collect the post-1980 rents for the 1886 Mdewakanton. The government used a similar process prior to 1980 regarding the 1886 lands rents. The government already has two established

¹¹¹ The Court has previously found the ITAS applies to the same treasury accounts for the pre-1980 Act rents and other revenues collected there. *Wolfchild*, 2010 WL 5163376 at * 23-27.

¹¹² *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). See also *Fellows v. Blacksmith*, 19 How. 366, 15 L.Ed. 684 (1857) (upholding trespass action on Indian land); *Inupiat Community of the Arctic Slope v. United States*, 230 Ct.Cl. 647, 656-657, 680 F.2d 122, 128-129 (1982) (right to sue for trespass is one of rights of Indian title), cert. denied, 459 U.S. 969, 103 S.Ct. 299, 74 L.Ed.2d 281 (1982) (right to sue for trespass is one of rights of Indian title); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976) (damages available against railroad that failed to acquire lawful easement or right-of-way over Indian reservation); *Edwardsen v. Morton*, 369 F.Supp. 1359, 1371 (DC Alaska 1973) (upholding trespass action based on aboriginal title).

trust accounts for the 1886 Mdewakanton that could continue to be used to collect the post-1980 rents as they were used to collect the pre-1980 rents.

The government's brief at page 40 also errs in arguing that because the 21,120 acres are not identified, the ITAS does not apply. But, the government was and is under a duty to identify the 21,120 acres, contact the trespassers and collect the rents for the 1886 Mdewakanton.

The Federal Circuit Court in *Shoshone* specifically held that "losses to ... trust funds" includes failure to collect payments under gravel and sand contracts.¹¹³ Similarly, the post-1980 rent falls within the ITAS's use of the phrase "losses to ... trust funds" because the government failed to collect these rents. The cases the government cites are inapposite. Thus, the six-year statute of limitations in 28 U.S.C. § 2501 does not apply until the government provides a proper accounting to the 1886 Mdewakanton.

D. The Continuing Claims Doctrine Applies.

Contrary to the government's arguments at pages 40 through 41, the continuing claims doctrine applies to the post-1980 Act claim.¹¹⁴ The rationale underlying the "continuing claim" doctrine is that it prevents the defendant from escaping liability for its wrong and thus acquiring a right to continue its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress in 28 U.S.C. § 2501.¹¹⁵ The government fails in its argument to acknowledge that it had not completed transferring the reservation property until

¹¹³ *The Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1358 (Fed.Cir. 2004), *cert. denied*, 544 U.S. 973 (2005) (emphasis added).

¹¹⁴ *Rosebud Sioux Tribe v. U.S.*, 75 Fed Cl. 15, 24-25 (2007). See *Hopland Band of Pomo Indians v. U.S.*, 855 F.2d 1573, 1579-80 (Fed. Cir. 1988).

¹¹⁵ See *Mitchell v. U.S.*, 10 Cl.Ct. 787, 788, *modifying*, 10 Cl.Ct. 63 (1986).

2002. Interior's issuance of the 2002 land patent is a further breach of its statutory obligations within the six year period prior to the filing of the 2003 complaint.

E. The Claims of the Minors Are Preserved By 28 U.S.C. § 2501.

Similarly, it is difficult to understand how the government can argue the minors are excluded by 28 U.S.C. § 2501 when the government's 2002 transfer of property is within the six year statute of limitations.

V. The United States Footnote Arguments are Not Preserved.

The United States seeks to preserve an argument in footnote 9 of its brief¹¹⁶ that the March 1863 Act superceded the February 1863 Act. The government's arguments are not preserved. If not presented now, when? The argument is a summary statement at best, and because it is made in passing as a footnote, it is not sufficient to preserve the argument, just as appellate courts have concluded.¹¹⁷ "When a party includes no developed argumentation on a point ... we treat the argument as waived"¹¹⁸ Without the full development of the argument, it ties the hands of the Plaintiffs requiring them to guess as to how the United States would argue the issue. For that reason alone, the court should make a holding that the argument is waived.

CONCLUSION

The Plaintiffs respectfully request the Court to grant summary judgment and award the eligible Wolfchild Plaintiffs damages consistent with the arguments presented in this memorandum.

¹¹⁶ U.S. Br. 24.

¹¹⁷ See *ConcocoPhillips v. U.S.*, 501 F.3d 1374, 1381-82 (Fed. Cir. 2007) (citations omitted).

¹¹⁸ *Anderson v. City of Boston*, 375 F.3d. 71, 91 (1st Cir. 2004).

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