No. 13-794

In The

Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

ERICK G. KAARDAL
Counsel of Record
WILLIAM F. MOHRMAN
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
(612) 341-1074
kaardal@mklaw.com

Attorneys for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW COCKLELEGALBRIEFS COM

QUESTIONS PRESENTED

This case is of nationwide importance because the claims allege historical governmental mistreatment of poor American Indians on a massive scale. The court of appeals majority and dissenting opinions disagree on whether and how the Mdewakanton Band in Minnesota ("Mdewakanton Band") legal history affects the legal analysis. The court of appeals opinions constitute yet another phase of courts essentially directing the Mdewakanton Band to litigate its federal claims elsewhere. The court of appeals opinions, by disregarding legal history, has created a precedential train wreck for American Indian law.

1. Whether the court of appeals interpretations of statutes specific to the Mdewakanton Band – 1863 Acts, 1888-1890 Acts and 1980 Act: (a) contradict *Tohono O'Odham Nation* because the court of appeals failed to appreciate that the U.S. Court of Federal Claims (CFC) is to provide a judicial forum for most non-tort requests for significant monetary relief against the United States; (b) contradict *Nevada v. Hicks*, because the court of appeals opinions, including the Eighth Circuit opinion in *Smith v. Babbitt,* essentially refer the Mdewakanton Band's federal claims to tribal courts which lack jurisdiction; (c) contradict *Mitchell I, Mitchell II, White Mountain Apache*, and *Navajo Nation* because the court of appeals misinterpreted statutory trust and other legal obligations and failed to properly apply the money-mandating duty requirement; (d) conflict with

QUESTIONS PRESENTED – Continued

the First Circuit opinion in *Passamaquoddy Tribe* because the court of appeals failed to apply the "plain and unambiguous" requirement to the 1980 Act for the purported termination of the Mdewakanton Band and its statutory property rights; and (e) contradict *Carcieri* because the court of appeals treated the three non-tribal communities as sovereign historical tribes when they are not.

2. Whether the court of appeals' interpretation of statutes general to American Indians: (a) contradict *Oneida I* and *Oneida II* and their progeny because the court of appeals failed to properly interpret the Indian Nonintercourse Act to require Congressional authorization prior to the purported termination of the Mdewakanton Band's tribal statutory property rights; (b) contradict *Carcieri* and the 1934 Indian Reorganization Act (IRA) because the court of appeals deemed the purchased IRA lands to be held exclusively in trust for the three post-1934 non-tribal communities; and (c) misinterpreted the six-year statute of limitations and the Indian Trust Accounting Statute (ITAS) to bar the Mdewakanton Band's monetary claims.

3. Whether summary judgment should have been granted to petitioners on the pre-1980 and post-1980 statutory fund claims and the statutory land claim.

LIST OF PARTIES

A list of parties has been provided to the Clerk of Court for the Supreme Court under a separate filing due to the numerous Petitioners represented.

CORPORATE DISCLOSURE STATEMENT

The Petitioners are not and do not represent a nongovernmental corporation.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinions below.

OPINIONS BELOW

The court of appeals opinions are reported at 559 F.3d 1228 (Fed. Cir. 2009) (interlocutory opinion), App. 275-349, and 731 F.3d 1280 (Fed. Cir. 2013), App. 1-49.

JURISDICTION

The date of the recent Federal Circuit decision was September 27, 2013. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Nonintercourse Act (INIA) is codified at 25 U.S.C. § 177. App. 357. Pertinent provisions of the "1863 Acts" are: Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 652, 654; and Act of Mar. 3, 1863, ch. 119, § 4, 12 Stat. 819. App. 358, 363; App. 364, 366. Pertinent provisions of the "1888-1890 Acts" are: Act of June 29, 1888, 25 Stat. 217 at 228; Act of Mar. 2, 1889, 25 Stat. 980 at 992; and Act of Aug. 19, 1890, 26 Stat. 336 at 349. App. 350-352. Pertinent provisions of the Indian Reorganization Act of 1934, as amended, are codified at 25 U.S.C. §§ 462, 463, 465, 467 and

479 (IRA). App. 355-357. The "1980 Act" is Act of Dec. 19, 1980 at Pub. L. No. 9-557, 94 Stat. 3262. App. 353-354.

STATEMENT OF THE CASE[1]

The petitioners seek reversal of the court of appeals opinions and instructions for entry of summary judgment on the pre-1980 and post-1980 statutory fund claims and on the statutory land claims.[2] The statutory fund claims would include damages for community per capita payments involving millions of dollars. The statutory land claim would include 7,680 acres plus the three Minnesota reservations.

The government denies that Congress enacted laws with current effect to compensate the Mdewakanton Band. When the government denies Congressional intent to compensate American Indians, as is the case

[1] As the U.S. Court of Federal Claims (CFC) noted, "Unless otherwise noted, the facts set out are undisputed. No authenticity objection has been raised to any of the historical documents. The arguments of the parties focus on the inferences to be drawn from the resulting record." 96 Fed. Cl. at 311 n.5. *See* Federal Circuit Wolfchild Cross-Appellants Appendix (CA) CA3483-3525 (Defendant's response to proposed uncontroverted facts). The petitioners also encourage the Court to adopt the Latin maxim "qui tacet consentire videtur ubi loqui debuit ac potuit" (thus, silence gives consent when he ought to have spoken when he was able to) to any government silence in responding to the document-supported Mdewakanton Band legal history.

[2] The claimants seek affirmative relief as to land pursuant to 28 U.S.C. § 1491(a)(2). *See* App. 21, n.2.

here, the Supreme Court has long held that 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 nation, dependent upon its protection and good faith.'"[3] Thus, Acts of Congress relating to Indians are construed in such a manner to give the greatest protection possible to Indians.[4] Statutes concerning the rights of Indians are to be construed in their favor.[5]

While disregarding these rules of statutory construction, the court of appeals opinions failed to properly consider the legal history. Consequently, the Federal Circuit in error: held no statutory property rights for the Mdewakanton Band as a tribe or otherwise; held, if there were statutory property rights for the Mdewakanton Band, they were terminated by the 1980 Act; held no jurisdictional money-mandating duty for the Mdewakanton Band; and held that the statute of limitations applied to bar the Mdewakanton Band's claims despite a 2002 governmental sale of reservation land and the Indian Trust Accounting Statute (ITAS).[6]

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[3] *McClanahan v. Arizona State Tax Comm'n*, 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).

[4] *U.S. v. Drummond*, 42 F. Supp. 958, 961 (W.D. Okla. 1941), *aff'd*, 131 F.2d 568 (10th Cir. 1942).

[5] *U.S. v. 2,005.32 Acres of Land, More or Less, Situate in Corson County, S.D.*, 160 F. Supp. 193, 201 (D. S.D. 1958).

[6] *E.g.*, Pub. L. No. 108-108, 117 Stat. 1241 (2003).

I. The Court of Appeals' opinions conflict with the "irrefutable" legal history.

The petitioners are the lineal descendants of the Loyal Mdewakanton[7] who have been federally identified as the "Mdewakanton Band of Sioux in Minnesota" ("Mdewakanton Band")[8] for their loyalty after the 1862 Sioux Uprising in many ways: in the 1863 Acts and the 1888-1890 Acts, by the purchase of reservation lands in about 1890 and 1937, by the recognition of three subgroup communities[9] under the 1934 IRA, and by the creation and maintenance of pre-1980 tribal trust accounts.[10] The Mdewakanton Band voted on November 17, 1934 to accept the 1934 IRA. The petitioners constitute the Mdewakanton Band identified by Interior since the 1863 Acts.

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[7] Interior was ordered by the CFC to establish a tribal "roll" of Mdewakanton Band claimants. *See Wolfchild*, 101 Fed. Cl. 54, 92 (Fed. Cl. 2011), as corrected (Aug. 18, 2011).

[8] The statutorily-identified group has gone by many names in this litigation – including the "friendly Sioux," "Loyal Mdewakanton," the "1886 Mdewakanton" and the "Minnesota Mdewakanton Dakota Oyate." "Oyate" means people in the Dakota language. In an August 20, 2012 decision of Interior, the government referred to this group as the "Minnesota Band of Sioux in Minnesota." That name for the group – and its shortened version "Mdewakanton Band" – is used in this petition.

[9] Prairie Island Indian Community (PIIC) and Shakopee Mdewakanton Sioux Community (SMSC) succeeded in quashing the CFC summons to each of them to participate as parties. *Wolfchild*, 77 Fed. Cl. 22, 29-30. Lower Sioux Indian Community (LSIC) was participating in the CFC at that time as a party, but later was voluntarily dismissed. *See, e.g., id.* at 1.

[10] *See Wolfchild*, 101 Fed. Cl. at 92-93.

The government's recent *Carcieri*[11] land-into-trust decision directly contradicts the court of appeals' opinions. In order for the Department of the Interior (Interior) to comply with this Court's *Carcieri* land-into-trust transfer requirements, Interior in its August 20, 2012 Notice of Decision admits that "[p]rior to 1934, the tribe was officially known as the Mdewakanton Band of Sioux in Minnesota who entered into several treaties with the federal government. Departmental correspondence contemporaneous with the IRA shows irrefutably that the Shakopee Mdewakanton Band was under federal jurisdiction when the Act was passed."[12]

The petitioners agree that it is "irrefutable" that the Mdewakanton Band is the only INIA tribe with statutory property rights recognized at the time of the IRA. Consistently, because the Mdewakanton Band was an INIA tribe with property rights in 1934 at the time of enactment of the IRA, Interior approved the three non-tribal communities based on "residence on reservation land," not as historical tribes and only with Interior-delegated powers. Accordingly, the April 15, 1938 Department Solicitor Opinion stated that "Neither of these two Indian groups [at Prairie Island and at Lower Sioux/Shakopee] constitutes a tribe but each is being organized on the basis of their residence upon reserved land. . . . The group may not have such

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[11] *Carcieri v. Salazar*, 555 U.S. 379 (2009).

[12] Fed. Cir. Erick G. Kaardal Dec. (Jan. 30, 2013), Ex. A. *See* Fed. Cir. Order Taking Judicial Notice (Sep. 27, 2013).

of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business and those which may be delegated by the Secretary of the Interior."[13]

Notably, the SMSC tribal court in a December 23, 2013 opinion in *In Re the Marriage of Kenneth Jo Thomas and Sheryl Lightfoot*, Shak. T.C. Court File No. 778-13 (2013), stated that the Solicitor's Opinion was "repudiated" in 1994 by 25 U.S.C. § 476(f) and 476(g). App. 368-374. First, the SMSC trial court is in error because the Mdewakanton Band is legally the ultimate tribe here. Second, the SMSC tribal court does not have jurisdiction to determine federal law under *Nevada v. Hicks*, 533 U.S. 353 (2001).

II. Interior, in lobbying Congress for passage of the 1980 Act, had a "convoluted" communication approach which included misrepresenting that Interior had created new reservations with new sovereign historical tribes in 1936 and 1969 – when it had not done so.

Prior to enactment of the 1980 Act, Interior misrepresented to Congress pre-enactment legal history. Interior used a "convoluted" communication approach

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[13] CA1161-1162. Opinion of the Solicitor dated April 15, 1938, vol. 1, 813, 813-14.

to Congress including misrepresentations.[14] Interior's principal misrepresentation to Congress prior to enactment of the 1980 Act was that Interior had created in about 1937 with purchased "IRA Lands" new reservations for new historical tribes – when Interior actually had not done so. Interior stated to Congress:

> These [1886] lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota in 1886 and their descendants. After the enactment of the 1934 IRA, additional lands were acquired in trust for the benefit of the three Mdewakanton groups organized under that Act.[15]

To the contrary, it is "irrefutable" that Interior in 1934 had already recognized that the Mdewakanton Band had reservation lands in Minnesota – not the communities which had not been recognized yet – and a termination act would be required to terminate the Mdewakanton Band reservations.

Specifically, by 1935, the Department had recognized that the Mdewakanton Band had reservation lands, totaling about 1,000 acres, set apart under the 1863 and 1888-1890 Acts as reservations for the

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[14] *Wolfchild*, 96 Fed. Cl. at 309-10 ("The issues on remand are complex, reflecting both the convoluted and lengthy history of the federal government's relationship with the group of Indians who are plaintiffs and the extensive prior proceedings in this litigation.").

[15] CA1079, 1087.

Mdewakanton Band. In about 1937, the Department purchased about 1,600 acres of additional lands which were set apart and added to the pre-existing reservation. Under the 1934 IRA, section 7, these so-called "IRA Lands" are subject to the same statutory use restrictions under the 1863 and 1888-1890 Acts in favor of the Mdewakanton Band as are the 1886 lands.[16] The IRA Lands were never set up to be new reservations for new sovereign historical tribes – as Interior misrepresented to Congress prior to the 1980 Act.

Fortunately, Interior's misrepresentations of pre-enactment history to Congress that new reservations had been created for three new sovereign historical tribes did not become law. "To give substantive effect to [the] flotsam and jetsam of the legislative process is to short-circuit the constitutional scheme for making law."[17]

III. Status quo since 1980 Act.[18]

A. In 2002, the Government completed sale of Minnesota Sioux Reservation under 1863 Acts without reserving 7,680 acres.

In 2002, Interior completed the sale of the 500,000 acre former Minnesota Sioux Reservation by

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[16] Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984.

[17] A. Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 Suffolk U. L. Rev. 807, 813-14 (1998).

[18] 94 Stat. 3262.

selling a remaining parcel.[19] The remaining parcel was a part of the former reservation, but not part of the 7,680 acres originally set aside and sold. The Petitioners claim that Interior had a statutory obligation under the 1863 Acts to reserve 7,680 acres of the former reservation, including the remaining parcel, for the Mdewakanton Band prior to completing the sale in 2002.[20] Interior claims that it had the statutory discretion under the 1863 Acts to sell the entire 500,000 acres without further Congressional direction. Petitioners disagree.

Notably, the governmental sale of the Mdewakanton Band reservation land in 2002 to a third party triggered the six-year statute of limitations under 28 U.S.C. § 2501 because it is hornbook law in the CFC that "[a] claim accrues 'when all the events have occurred which fix the liability of the [g]overnment and entitle the claimant to institute an action.'"[21] Additionally, the petitioners further claim that the ITAS applies to toll the statute of limitations – a point upon which the CFC and the court of appeals dissenting opinion agreed.

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[19] CA3391-3398, William J. Stewart, Settler, Politician and Speculator in the Sale of the Sioux Reserve, Minnesota History (Fall 1964), p. 85; CA667, 3615-3616. *See generally* CA1533-1594.

[20] Act of Feb. 16, 1863, § 9, 12 Stat. 652, 654.

[21] *Goodrich v. United States*, 434 F.3d 1329, 1333 (Fed. Cir. 2006) (*quoting Hopland Band*, 855 F.2d at 1577).

B. After the 1980 Act, Interior assumed that the Mdewakanton Band was entitled to no benefits, land nor money, from the three Minnesota reservations.

Since the 1980 Act, Interior has held that the Mdewakanton Band is entitled to no benefits and no land.[22] "This act now changes the administration of these tracts of lands to the same status as other trust lands acquired under the IRA, and gives jurisdiction to each Community Council in accordance with the Code of Federal Regulations."[23] In fact, it was the Department which rejected the Communities' proposed post-1980 Act Indian Land Certificate, stating that the Communities' proposal "retains the concept of eligible [1886 Mdewakanton] assignees, which was relevant prior to December of 1980 when the land status was changed, but is no longer relevant."[24]

Since 1980, Interior has approved adjudication of all membership/enrollment issues by the Communities and the Community Courts without reference to the 1863 and 1888-1890 Acts.[25] For example, in 1983,

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[22] CA3040, 3041-3043, 3046.

[23] CA3040.

[24] CA3047-3050.

[25] CA1895-2003, 3063-3073. *See, e.g.*, Shakopee Mdewakanton Sioux (Dakota) Community Digest System, CA2257, 2288-2292 (enrollment), 2312-2314 (per capita distributions); Lower Sioux Indian Community Tribal Court Digest of Opinions, CA2244, 2252-2253 (membership criteria, membership privilege and gaming revenue allocation ordinance and per *capita*).

Interior approved an Enrollment Ordinance and Reconstructed Base Roll of the SMSC dated April 16, 1983 – 14 years after the SMSC constitution was approved in 1969 – allowing non-1886 Mdewakanton as SMSC members and without regard to the 1863 and 1888-1890 Acts.[26] Accordingly, the SMSC court has opined that "It is up to the Community, not this Court, to decide who meets the requirements for membership."[27]

For example, the SMSC court in 1992 describes its Business Proceeds Distribution Ordinance No. 12-29-88-01, approved by Interior under the IGRA, not as rooted in statute, but as a compromise between competing claimants to per capita payments.[28] The Shakopee appellate court opined that the cited Business Proceeds Distribution Ordinance, No. 12-29-88-001, was adopted as a "compromise" to resolve nearly constant turmoil over membership rights.[29] Since 1980, "a lineal descendant of a loyal Mdewakanton might be denied admission to, or removed from, membership in a community even if the descendant lived

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[26] CA3106-3125, 3127-3173 (Interior approvals of community per capita plans).

[27] CA2288 (*citing Crooks v. SMS(D)C*, 1 Shak. A.C. 140 (1998) and 4 Shak. T.C. 92 (2000)).

[28] CA2356-2365, *Ross v. SMS(D)C*, 1 Shak. T.C. 86, 86-88 (1992).

[29] CA2347-2355, *Smith v. SMS(D)C*, 1 Shak. A.C. 62 (1997).

on 1886 land encompassed by the community boundary."[30]

But, the 1934 and 1938 Solicitor's Opinions[31] would require that the Communities' decisions – and it would even require a historical tribe's decisions – to comply with federal statutes.[32]

A former BIA Official in 1995 stated that he knew of federal legal violations regarding SMSC membership determinations and that he reported it to his BIA superior.[33] In 1995, Secretary Bruce Babbitt initiated an administrative process to determine membership at SMSC for 63 purported members.[34] The proceedings did not determine lineal descent from the May 20, 1886 Minnesota Mdewakanton censuses. Another genealogical standard was used; it was found in the SMSC Constitution, but was without a statutory basis in the 1863 and 1888-1890 Acts.[35] The legal standard used in the administrative

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[30] *Wolfchild*, 62 Fed. Cl. at 530. *See* CA2006-2205.

[31] 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974 ("Solicitor Opinions"), 445, 456-461, 476-477 (April 15, 1938) (historical tribe powers over enrollment must be consistent with federal law regarding enrollment) (*available at* thorpe.ou.edu/solicitor.html); CA1161-1162 (1938 Opinion of the Solicitor specific to the Lower Sioux and Prairie Island communities).

[32] Solicitor Opinions at 456 (citing 25 U.S.C. § 163).

[33] CA3243-3256.

[34] CA1209-1532.

[35] CA1210.

proceeding even contradicted the legal standard used to determine the 1969 voters on the 1969 Shakopee Constitution.[36] The administrative law judges determined Shakopee membership at times based on a member's "Sisseton-Wahpeton" blood being "Santee" blood being "Mdewakanton Sioux" blood.[37]

The current genealogical disputes at SMSC go back to Interior approval of the voters on the 1969 SMSC Constitution.[38] In fact, Interior, after the fact in 1983, approved non-1886 Mdewakanton voting on the Shakopee Constitution in 1969 when all of the reservation land in 1969 was 1886 lands.[39] On March 27, 1983, the Department approved a Reconstructed Base Roll affirming the 1969 voting status of the voters who approved the 1969 Constitution without reference to 1886 Mdewakanton lineal descendancy.[40] Specifically, Robert Jaeger, identified as "Officer-in-Charge," wrote to SMSC Chairman Norman Crooks

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[36] *Compare* CA1210, 1895-1898, 3063-3073 (Degree of Mdewakanton and Degree of Total Indian Blood) *with* CA1210 ("The membership of the Shakopee Mdewakanton Sioux Community shall consist of: . . . All persons of Mdewakanton Sioux Indian blood . . . whose names appear on the 1969 census roll of Mdewakanton Sioux residents of the Prior Lake Reservation. . . .").

[37] CA1227. The administrative law decisions and related documents are at CA1209-1532.

[38] *See generally* CA1209-1532, 1890-1894, 1895-1896, 2914-2950, 3063-3073, 3078, 3185-3222.

[39] CA3063-3073, 3078.

[40] CA3063-3073.

regarding the 1969 voters on the Constitution being qualified to vote on the Constitution although not 1886 Mdewakanton.[41] The 1983 Department memorandum and letter fail to note that (1) the December 13, 1934 Solicitor's Opinion laid out qualifications under the IRA for voting which made only 1886 Mdewakanton residents eligible to vote in 1969[42] and (2) the Department had concluded by 1969 that only 1886 Mdewakanton were eligible to reside and vote on the Shakopee Constitution.[43]

The SMSC constitution membership provisions, because the reservation consisted of all 1886 lands, should have referenced the statutory requirement for 1886 Mdewakanton residents as the Lower Sioux and Prairie Island Constitutions did.[44] But, the SMSC constitution did not – contradicting a March 17, 1969 Field Solicitor letter indicating only 1886 Mdewakanton residing at Shakopee could organize the reservation there and a June 11, 1971 Field Solicitor memorandum indicating that Shakopee could not exclude 1886 Mdewakanton.[45] An earlier version of the Constitution shows the voters searching for a standard other than the statutory standard to qualify

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[41] CA3079.

[42] Solicitor Opinions at 486-487.

[43] CA2951-2956.

[44] *Compare* CA1890-1894 (Shakopee) *with* 1872-1877 (Lower Sioux) *and* 1878-1889 (Prairie Island).

[45] CA2914-2917, 2955-2956.

members.[46] The non-1886 Mdewakanton at Shakopee succeeded in including non-1886 Mdewakanton in the founding of an IRA entity exclusively on 1886 Lands.[47]

The inclusion of non-1886 Mdewakanton members in the 1969 Shakopee membership immediately caused a legal issue answered by the Solicitor's Office, "the land in question remains available only for the use of qualified Mdewakanton Sioux Indians" – the Mdewakanton Band.[48] However, the Department in 1976 did not require compliance, but knowingly excused, in writing, non-compliance.[49]

In 1995, under pressure of administrative and legal action, Shakopee issued an "Official Position of the Shakopee Mdewakanton Sioux (Dakota) Community" stating that the Community, not Interior, will determine membership and enrollment issues.[50] This document was consistent with Shakopee's enrollment committee 1993 statement, "It was also determined by the charter members that the 1969 Census roll is

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[46] CA2924-2927.

[47] CA1210 ("The membership of the Shakopee Mdewakanton Sioux Community shall consist of: . . . All persons of Mdewakanton Sioux Indian blood . . . whose names appear on the 1969 census roll of Mdewakanton Sioux residents of the Prior Lake Reservation.").

[48] CA2951-2956.

[49] CA3019-3022.

[50] CA2215.

also the SMSC Membership Roll, which contained 33 names of adults and minors."[51]

The SMSC sued the Department in U.S. District Court regarding interference.[52] Eventually, under this pressure, Interior capitulated.[53]

In 2001, Cross-Appellant Fred T. Carroll, Jr. had a typical 1886 Mdewakanton experience with the Department. The Department by correspondence dated August 20, 2001 informed him that he was an 1886 Mdewakanton lineal descendent but not entitled to any benefits.[54] In turn, Carroll's application for membership at SMSC was denied – due to failing to prove eligibility for membership.[55]

Interior's position since the 1980 Act on community membership is "[i]n absence of legislation or express authority to the contrary, it is a tribal entity's responsibility to determine questions of membership."[56] "[T]here is no requirement in your

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[51] CA3126 (minutes of Shakopee enrollment committee, September 28, 1993).

[52] *Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Babbitt*, 906 F. Supp. 513 (D. Minn. 1995), *aff'd*, 107 F.3d 667 (8th Cir. 1997).

[53] *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

[54] CA3179.

[55] CA3180-81.

[56] CA3082; *see* CA3084-3089.

[SMSC] Constitution that she possess 1886-1889 Mdewakanton Sioux blood."[57]

Neither LSIC nor PIIC use the same genealogical standard that Interior used in Secretary Babbitt's administrative proceedings.[58] In 2009, LSIC purged dozens of Mdewakanton Band members – petitioners in this case – from its membership rolls.[59]

IV. The 1980 Act is unambiguous in that it does not repeal the 1863 Acts and the 1888-1890 Acts in favor of the Mdewakanton Band – nor does it terminate the Mdewakanton Band.

The 1980 Act is unambiguous in that it does not repeal the 1863 Acts and the 1888-1890 Acts – nor does it terminate the Mdewakanton Band.[60] All five Acts preceding the 1980 Act are in favor of the Mdewakanton Band, not the non-tribal communities. The 1980 Act did authorize the Department to file deeds with respect to the 1886 Lands which stated that the lands were held in trust for the respective communities.[61] Thus, legal title on the deeds was

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[57] CA3089.

[58] *Compare* CA1890-1894 *to* CA1872-1889 (community constitutions); *see* CA1895-2003 (community membership lists).

[59] CA2006-2209.

[60] *Wolfchild*, 559 F.3d at 1258 n.13; *Wolfchild*, 96 Fed. Cl. at 315 ("Notably, however, neither [1863] act has been repealed.").

[61] CA1155-1156 (distinguishing between title of 1886 lands and IRA lands), 1697-1718 (1888-1890 purchases).

stated precisely as it was with the IRA Lands.[62] Changing legal title is what the communities had requested, "convert title of all Mdewakanton Sioux lands located on the [ ] Reservation from the United States of America to the United States of America in trust for the [ ] Community."[63] None of the community resolutions supporting the 1980 Act called for the repeal of the 1863 and 1888-1890 Acts – nor termination of the Mdewakanton Band.[64] Nor did the 1980 Act address the disposition of the funds that were derived from the reservation lands then held by Treasury – nor subsequent reservation revenues.[65]

V. The legislative history of the 1980 Act omitted and mischaracterized facts concerning the Mdewakanton Band's statutory and administrative history.[66]

A. Congress' initial efforts to compensate the Mdewakanton Band by authorizing Interior to set apart a reservation from the former Minnesota Sioux Reservation.

Congress did attempt to provide for the loyal Mdewakanton including a specific provision for them in the Act of February 16, 1863. This provision was a

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[62] CA3041.

[63] CA2212-2214.

[64] *Id.*

[65] *See* 94 Stat. 3262; *Wolfchild*, 559 F.3d at 1259 n.14.

[66] *See* CA1618-1871.

statutory carry forward of the 1858 Treaty provision which provided each individual band member would receive 80 acres "allotted in severalty to each head of a family, or single person over the age of twenty-one years, in said bands of Indians." This provision applied to loyal Mdewakanton who would continue to reside in Minnesota.[67] As the Federal Circuit noted on interlocutory appeal, the provision that the land would be "an inheritance to said Indians and their heirs forever[,]" "clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute."[68]

Two weeks after enacting this statute Congress passed an additional act providing for the loyal Sioux.[69] The second Act of 1863 supplemented the first Act of 1863 in important respects. Under the second Act, the President was "authorized" and "directed" to set apart "outside of the limits of any state" eighty acres of "good agricultural lands" for the Sioux.[70] This grant of land appeared to be an attempt

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[67] 1858 Treaty, art. VI, 12 Stat. 1031.

[68] *Wolfchild*, 559 F.3d at 1241.

[69] *See* Act of Mar. 3, 1863, ch. 119, 12 Stat. 819.

[70] *Id.*, § 1, 12 Stat. at 819. The Act also provided that the land that previously served as the reservation for the Sioux would be sold to "actual bona fide settler[s]" or "sold at public auction[,]" Act of Mar. 3, 1863, § 3, 12 Stat. at 819, and that proceeds from the sale of the lands that previously served as the Sioux's reservations were to be "invested by the Secretary of the Interior for the benefit of said Indians in their new homes, in the

(Continued on following page)

to address the fact that the first Act of 1863 confiscated all Sioux land, leaving the Sioux with no direction as to where outside Minnesota they might make a new home.[71] The second Act of 1863 also provided for Minnesota land, with improvements, for the loyal Mdewakanton.[72]

B. Interior's initial efforts in 1865 to set apart a 7,680 acre reservation

In 1865, under the Department's supervision, Reverend Hinman identified twelve sections of mostly contiguous land in Minnesota to set aside for the friendly Sioux pursuant to the February 16, 1863 Act.[73] The twelve sections (7,680 acres) of land were identified at the request of the Secretary and were set apart for the loyal Sioux, but no transfers, assignments, nor allotments to individual Sioux were made due to hostility from white settlers in the area of those sections.[74] Two years later, the 7,680 acres, along with about 300,000 acres of other former Sioux

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establishing [of] them in agricultural pursuits." *Id.*, § 4, 12 Stat. at 819.

[71] *See* Cong. Globe, 37th Cong., 3d Sess. 528 (1863) (statement of Sen. Harlan) ("It was supposed by the committee that this removal of the Indians could not take place immediately . . . [and] that a place must first be looked up for the Indians."). CA1034.

[72] Act of Mar. 3, 1863, § 4, 12 Stat. at 819.

[73] CA2406-2410; *Wolfchild*, 101 Fed. Cl. 54, 65-66 (2011).

[74] CA2424, 2488; *Wolfchild*, 101 Fed. Cl. at 66.

reservation lands (leaving approximately 200,000 acres as remaining public lands) were offered through public sale pursuant to a proclamation by President Andrew Johnson.[75]

The Department had difficulty implementing the 1863 Acts and locating the loyal Sioux in Minnesota.[76] Governor Alexander Ramsey's speech to the Minnesota State Legislature on September 9, 1862 set the tone, "The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of the State."[77] The New York Times editorialized on August 18, 1863 about the "red devils" in Minnesota and supported Minnesota paying bounties for Sioux scalps calling it a "state right" that will not be given up.[78] In an April 20, 1866 Report of the Secretary of the Interior, the Secretary stated, "Action was taken by the department, about one year ago, to select for them 80 acres of land each upon the old reservation, but the feeling among the whites is such as to make it impossible for them to live there in safety."[79]

The parties concurred in the CFC that sometime between 1868 and 1869, a further attempt to set

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[75] CA2489-2491; *Wolfchild*, 101 Fed. Cl. at 66.

[76] *See, e.g.*, CA2424, 2488 (Interior correspondence identifying friendly Sioux remaining in Minnesota).

[77] CA3453.

[78] CA2387.

[79] CA2424.

aside land under the 1863 Acts was made but ultimately those lands were never set apart either.[80] Thus, no land was provided to the Mdewakanton Band under the 1863 Acts until the 1888-1890 Acts were enacted.[81]

C. Congress' subsequent efforts to compensate the Mdewakanton Band as determined by the 1886 census and the 1888-1890 Appropriations Acts

The Mdewakanton Band remained in Minnesota after 1862 and pursued a land base.[82]

In 1886, the Department set out to establish with a greater degree of certainty which Mdewakanton were loyal to the United States during the 1862 uprising. Because of the administrative difficulty of this task, Congress decided that presence in Minnesota as of May 20, 1886 would suffice to qualify an individual as a "loyal Mdewakanton."[83] To determine which Mdewakanton lived in Minnesota on May 20, 1886, U.S. Special Agent Walter McLeod took a census listing all of the full-blood Mdewakantons, which census was mailed to the Commissioner of Indian

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[80] *Wolfchild*, 101 Fed. Cl. at 66 n.11.

[81] *Id.*

[82] *See, e.g.*, CA3327-3365, Mark Diedrich, Old Betsy: the Life and Times of a Famous Dakota Woman and Her Family (1995).

[83] *Wolfchild*, 96 Fed. Cl. at 316.

Affairs on September 2, 1886.[84] At the behest of the Secretary, on January 2, 1889, a second supplemental census was taken by Robert B. Henton, Special Agent for the Bureau of Indian Affairs ("BIA"), of those Mdewakanton living in Minnesota since May 20, 1886.[85] The McLeod and Henton listings (together, "the 1886 census") were used to determine who would receive the benefits of the later Appropriations Acts.[86]

In 1888, 1889 and 1890, motivated by the failure of the 1863 Acts to provide viable long-term relief, Congress passed three Appropriations Acts that included provisions for the benefit of the loyal Mdewakanton.[87] Notably, Santee Sioux, even those living at the Niobrara Reservation, would be ineligible for the 1886 land in Minnesota.[88]

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[84] *Id.* Although the census was not prepared as of May 20, 1886, "inclusion on the McLeod list has been deemed to create a rebuttable presumption that an individual met the requirements of the subsequent 1888, 1889, and 1890 Acts." *Wolfchild*, 62 Fed. Cl. at 528. CA1100-1123 (McLeod census).

[85] CA1124-1149 (Henton census).

[86] *Wolfchild*, 96 Fed. Cl. at 316. CA1100-1149 (McLeod and Henton censuses).

[87] *See Wolfchild*, 559 F.3d at 1241; *Wolfchild*, 96 Fed. Cl. at 316-18. Notably, over thirty years later, the funds provided under the Appropriations Acts were deducted from a judgment for the Mdewakanton and Wahpakoota Bands, which judgment was rendered to compensate them for the annuities that were terminated by the 1863 Acts. *See Wolfchild*, 559 F.3d at 1254 (citing *Medawakanton and Wahpakoota Bands of Sioux Indians v. United States*, 57 Ct. Cl. 357 (1922)).

[88] CA1595, 2567-2568, 2879.

Although the text delineating the beneficiary class in each Appropriation Act varied in minute respects, the essential thrust of the Acts was Congress' desire that loyal Mdewakanton would be identified as those Mdewakanton who had severed their tribal relations and who had either remained in, or were removing to, Minnesota as of May 20, 1886.[89] To determine the persons who would be considered part of the "Mdewakanton Band" under Congress' definition and thus would receive the benefits of the Appropriations Acts, Interior relied upon the 1886 Censuses.[90]

D. Interior implementation of 1863 and 1888-1890 Acts: private lands purchased, lands set apart for Mdewakanton Band as reservations, red seal certificates, land assignment system, Pipestone census rolls

After the enactment of the 1888-1890 Acts, Interior implemented the 1863 Acts and the 1888-1890 Acts by using the 1886 censuses, purchasing private land and setting the lands apart for the Mdewakanton Band.[91] The Secretary instructed in 1889, "The title to the lands purchased should be

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[89] *See* Act of Aug. 19, 1890, 26 Stat. at 349; Act of Mar. 2, 1889, 25 Stat. at 992; Act of June 29, 1888, 25 Stat. at 228.

[90] *Wolfchild*, 96 Fed. Cl. at 316.

[91] CA1622-1718.

taken in the United States, leaving the further conveyance thereof to the Indians subject to such further determination as may be authorized by law."[92] However, federal officials frequently referred to the 1886 lands as being in trust for the Mdewakanton Band.[93] As the February 16, 1863 Act declared, "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."[94]

Interior purchased approximately 1,000 acres of private lands – spending 1888-1890 Acts appropriation dollars – and set those lands apart for the Mdewakanton Band.[95] The lands were purchased in three distinct areas of Minnesota.[96] Collectively, these reservations were known as the "1886 lands" to reflect the date by which the beneficiaries of the Appropriations Acts were defined.[97]

In about 1889, the Secretary began conveying rights to use the purchased land to the Mdewakanton Band which consisted of 80 families comprising 264 individuals.[98] Interior documents assigning lands

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[92] CA2598.

[93] CA1613-1614.

[94] Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. at 654.

[95] CA1622-1718.

[96] *Id.*

[97] *Id.*

[98] CA2595.

during this period were called "Red Seal Certificates" because the certificates bore a seal in red.[99] Interior would issue a Red Seal Certificate to each eligible Mdewakanton Band family.[100]

Each family was assigned about 5 to 25 acres of land depending on the quality of land.[101] This "acreage is entirely too small to permit them to own teams, cows or for grazing purposes."[102]

In the early 1900's, as part of Interior's administration of the reservations, the "Red Seal" was discontinued.[103] In 1904, the Secretary initiated a more formal land assignment system to convey rights to use the purchased land to the Mdewakanton Band – and to reassign them when the land became available again.[104] Rather than granting the land in fee simple – a practice that had failed to provide long-term relief under the 1884, 1885, and 1886 appropriations – the Department chose to make the land available to the Mdewakanton Band while retaining title in the United States' name.[105] To that end, the Department employed an assignment system under which a parcel

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[99] CA1798.

[100] *Id.*

[101] *Id.*

[102] CA2813, 2821-2831.

[103] *Id.*; *see, e.g.*, CA1615-1616 (examples of issued Indian Land Certificates).

[104] CA1596-1597, 2009.

[105] *See Wolfchild*, 96 Fed. Cl. at 318.

of land would be assigned to a particular beneficiary who could use and occupy the land as long as he or she wanted; however, if the assignee did not use it for two years, the parcel would be reassigned.[106]

Under the assignment system, the Department provided documents called Indian Land Certificates to assignees as evidence of their entitlement to the land.[107] Interior would make the land assignment at a reservation the 1886 Mdewakanton requested and the subgroup community would include the 1886 Mdewakanton resident as a member.[108] The Certificates stated that the assignee "and [his] heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said lands."[109] If an assignee abandoned the land for a period of time, usually two years, then the Department would reassign the land to another beneficiary; any sale, transfer, or encumbrance of the land other than to the United States was void.[110] "Although

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[106] *Id.*

[107] *Id. See* CA1798.

[108] CA2858.

[109] CA2009-2011 (Indian Land Certificate). In 1901, Congress amended a bill that allowed the Secretary of Interior to sell an unfarmable parcel of 1886 lands to include a requirement that the Mdewakanton Band had to consent to the sale. *See Wolfchild*, 96 Fed. Cl. at 318 n.21; Act of Feb. 25, 1901, ch. 474, 31 Stat. 805, 806.

[110] *Wolfchild*, 96 Fed. Cl. at 318.

not guaranteed under the assignment system, in practice an assignee's land would pass directly to his children upon his death."[111] Other Mdewakanton Band relatives, however, were required to follow BIA procedures to receive an assignment.[112] Surviving spouses were ineligible for land assignments unless Mdewakanton Band members themselves.[113]

The Pipestone Indian School Superintendent was the responsible agent for the Mdewakanton Band.[114] Annually, the Superintendent would provide the Secretary a report and census regarding the Mdewakanton Band in Minnesota.[115] The annual censuses were admittedly inaccurate.[116] The Superintendent's censuses of the Mdewakanton Band were conducted as early as 1918 and continued through at least 1934.[117]

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[111] *Id.*

[112] *Id.*

[113] CA2898-2899.

[114] *See, e.g.*, CA2795, 2812-2814.

[115] *Id.*

[116] *Id. See also* CA2795.

[117] CA1872, 1879, 2795, 2812-2814.

E. The department did not allot the 1886 lands under the 1887 General Allotment Act which was repealed by the 1934 IRA.

The Department considered, but did not allot the 1886 Lands under the General Allotment Act (GAA).[118] The 1934 IRA repealed the GAA.[119] After the 1934 IRA, the Department did not have statutory authority to allot the 1886 Lands.[120]

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[118] General Allotment Act (or Dawes Act, or Dawes Severalty Act of 1887), Feb. 8, 1887 (24 Stat. 388, ch. 119, 25 U.S.C. § 331), 49th Cong. Sess. II, ch. 119, p. 388-91; 25 U.S.C. § 461 (Allotment of Land on Indian Reservations). *See, e.g.*, CA2799.

[119] *See* Act of June 18, 1934, ch. 576, 48 Stat. 984 (also known as the Wheeler-Howard Act) (codified as amended at 25 U.S.C. §§ 461-79). Pub. L. No. 100-581, title I, Sec. 101, Nov. 1, 1988, 102 Stat. 2938 deleted from section 16 the "residing on same reservation" text, but had a savings clause at Sec. 103: "Nothing in this Act is intended to avoid, revoke or affect any tribal constitution, bylaw or amendment ratified and approved prior to this Act." *See generally* Cohen's Handbook of Federal Indian Law (2005 ed.) § 1.05 ("The crowning achievement and the legislation that gives the era its names was the Indian Reorganization Act of 1934 (the IRA or Wheeler-Howard Act)").

[120] *Id.*

F. Interior by 1935 recognizes the setting apart of the reservations for the Mdewakanton Band and the Mdewakanton Band's temporary subgroup communities are established with powers delegated to the communities by Interior under the 1934 IRA consistent with the 1863 Acts, the 1888-1890 Acts and IRA.

The 1934 IRA fundamentally altered the way in which the federal government dealt with Indian groups.[121] The IRA permitted "[a]ny Indian tribe, or tribes, residing on the same reservation . . . to organize for its common welfare. . . ."[122] It also preserved "all powers vested in any Indian tribe or tribal council by existing law."[123] IRA section 19 stated, in part, "[t]he term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction. . . ."[124] The Supreme Court in *Carcieri* interpreted the definition of Indian in section 19 to be restricted to "recognized Indian tribe now under Federal jurisdiction" with the "now" referring to the date of enactment of the IRA: June 18, 1934.[125] The Mdewakanton Band in this case was under federal

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[121] *Id.*

[122] *Id.*, § 16, 48 Stat. at 987.

[123] *Id.*

[124] *Id.*, § 19, 48 Stat. at 987.

[125] 555 U.S. at 391.

jurisdiction on June 18, 1934.[126] But, the subgroup communities LSIC and PIIC approved by Interior in 1936 were not under federal jurisdiction on June 18, 1934.[127]

On November 17, 1934, the Mdewakanton Band gathered as one and voted 94-2 to accept the IRA.[128] At the time, there were 271 eligible Mdewakanton Band voters.[129] Voter eligibility did not depend on having an 1886 Lands assignment. In fact, less than one-half of the eligible voters had 1886 Land assignments.[130] The other one-half of eligible voters did not have land assignments.[131]

In response to the vote of the Mdewakanton Band, the Department deliberated on the legal status of the Mdewakanton Band.[132] Department officials recognized that the "1886 Lands" was a legal "reservation" for the Mdewakanton Band.[133] The statutory bases in 1935 for a Mdewakanton Band reservation were the 1863 Acts and the 1888-1890 Acts.[134] By

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[126] *See, e.g.*, CA2951.

[127] *Id.*

[128] CA2812, 2889.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] CA2832-2837, 2840-2841, 2843-2845, 2855-2856.

[133] *Id. See* CA1613-1614 (federal officials have acknowledged trust or elements of trust).

[134] *See* Act of Feb. 16, 1863, § 9, 12 Stat. at 654.

1935, the 1886 Lands had been set apart under these statutes for the Mdewakanton Band.[135] The February 16, 1863 Act states that, "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."[136]

First, Felix Cohen[137] stated in November 23, 1935 correspondence that a "consensus" had been reached on Minnesota Mdewakanton organization between the Indian Office and the Solicitor's Office that the 1886 Lands had been set apart as a reservation for the Mdewakanton Band.[138] The November 23, 1935 memorandum recognized the 1886 Lands as a "reservation."[139] Four days later, Commissioner John Collier would confirm the reservation status of the 1886 Lands for the Mdewakanton Band.[140] His November 27, 1935 correspondence to Mr. Joe Jennings of the Pine Ridge Agency states the 1886 Lands are a

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[135] CA2832-2837, 2840-2841, 2843-2845, 2855-2856.

[136] Act of Feb. 16, 1863, § 9, 12 Stat. at 654.

[137] From 1933 through 1947, Felix Cohen served in the Solicitor's Office of the Department as an assistant solicitor, associate solicitor, and acting solicitor. Cohen was the original author of a continuing treatise on American Indian Law. *See* Cohen's Handbook of Federal Indian Law (2005 ed.) at 201-203 (contributions of Felix Cohen).

[138] CA2832.

[139] CA2833.

[140] CA2840-2841.

"reservation" for the Mdewakanton Band.[141] Soon thereafter, Assistant Solicitor Charlotte T. Westwood and Chief J.R. Venning wrote a memorandum that the 1886 Lands were set apart for the Mdewakanton Band as a "reservation."[142] Finally, according to the April 15, 1938 Solicitor Opinion, the subgroup communities organized on the Mdewakanton Band's reservations do not have the powers associated with historical sovereign tribes – but only temporarily delegated powers.[143]

The 1938 Solicitor's Opinion confirms that the communities do not have the inherent powers listed in the 1934 Solicitor's Opinion. Consistently, the 1934 Solicitor's Opinion states that historical tribe's enrollment and property determinations must "be consistent with existing acts of Congress governing the enrollment and property rights of members."[144]

Accordingly, the Mdewakanton Band formed three temporary subgroup communities with Interior approval of the three constitutions: PIIC and LSIC in 1936 and SMSC in 1969.[145] During the period from 1936 through 1969, the year the SMSC was recognized,

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[141] *Id.*

[142] CA2840-2841.

[143] CA1161-1162. Opinion of the Solicitor dated April 15, 1938, vol. 1, 813, 813-14.

[144] *Id.* at 476-77.

[145] *Id.*; *see Wolfchild*, 96 Fed. Cl. at 319 (citing *Wolfchild*, 62 Fed. Cl. at 529).

those reservation lands at the Shakopee reservation "were under the limited supervision of the Lower Sioux governing body."[146] The subgroup communities are not historical tribes.[147] The subgroup communities have only powers delegated by Interior, and even those powers must be exercised consistent with statutory obligations to the Mdewakanton Band.[148]

The subgroup communities evolved, but not the membership – and certainly not into "two classes of members" as indicated in the Committee Reports.[149] As a 1935 Department memorandum indicated on the possible purchase of more reservation land, "in each community there are several families of Mdewakanton Sioux who are not entitled to land assignments on the present reservation as they do not come within the terms of the land purchase acts. Yet they have lived in the community all their lives, are considered members, and want to stay. Additional land would solve the problem of these Indians."[150]

The number of non-Mdewakanton Band members at the reservations by the year 1979 had not grown. "As of 1979, more than 95 percent of the enrolled members of the three communities were lineal descendants

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[146] CA2850.

[147] CA1161-1162.

[148] *Wolfchild*, 96 Fed. Cl. at 319 (citing *Wolfchild*, 62 Fed. Cl. at 529).

[149] CA1079, 1087.

[150] CA2837.

of the 1886 Mdewakantons. At that time, the Lower Sioux Indian Community had 152 members (139 of whom were lineal descendants of the 1886 Mdewakantons), the Prairie Island Indian Community had 109 members (106 of whom were lineal descendants of the 1886 Mdewakantons), and the SMSC had 96 members (94 of whom were lineal descendants of the 1886 Mdewakantons)."[151]

However, since Interior under the 1980 Act ended the federal 1886 Lands assignment system and Mdewakanton Band tribal trust account, the membership of these communities has not been defined in terms of indigenous relationships and these community members have been receiving 100% of the benefits of the land and community revenues – including per capita payments.[152] The communities exercise complete discretion over who attains or keeps their membership – regardless of 1886 Mdewakanton lineal descent or any other statutory criteria.[153] After the 1980 Act, in a type of cultural genocide, the percentage of non-1886 Mdewakanton lineal descendants at SMSC has grown to be as high as 75%.[154] Consequently, the Mdewakanton Band's cultural identity on the reservation is threatened.

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[151] *Wolfchild*, 559 F.3d at 1235 n.2. CA1737-1738.

[152] *See Wolfchild*, 62 Fed. Cl. at 530-32.

[153] *Wolfchild*, 96 Fed. Cl. at 319. CA2006-2209.

[154] CA3240-3242. *See* CA3185-3222.

G. IRA lands added to existing reservations for Mdewakanton Band under IRA Section 7.

In about 1937, Interior, with funds appropriated under the IRA, purchased 1,170.4 acres at Lower Sioux and 414 acres at Prairie Island.[155] The deeds to the IRA lands, unlike the deeds to the 1886 Lands, were printed by the United States as in trust for the respective communities.[156] Under the IRA, section 7, these IRA lands were added to the existing reservations for the Mdewakanton Band.[157] Under IRA, section 7, the IRA lands are subject to the same statutory use restrictions under the 1863 Acts and 1888-1890 Acts as the 1886 lands.

H. The Mdewakanton Band reservations were not terminated in the termination era of federal policy (1943-1961).

The federal government adopted a policy of tribal termination from 1943 through 1961.[158] No termination plan for the Mdewakanton Band and its reservations in Minnesota was successfully implemented.[159]

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[155] CA2974.

[156] *See, e.g.*, CA1155-1156.

[157] Act of June 18, 1934, ch. 576, § 7, 48 Stat. 984.

[158] *See generally* Cohen's Handbook of Federal Indian Law (2005 ed.) § 1.06 (Termination (1943-1961)).

[159] *Id.*

I. Funds derived from reservation lands held in tribal trust accounts for Mdewakanton Band.

The BIA erroneously distributed the Mdewakanton Band's tribal trust account funds to the three subgroup communities.[160] The CFC found that Interior's distribution of these funds beginning in 1981 to the subgroup communities was a breach of Interior's statutory duties to the Mdewakanton Band. In this way, the Appropriation Acts served as the post-remand foundation of the Petitioners' breach-of-trust claims asserted in the CFC and led to the approximately $60,000 in land proceeds that were at issue. That $60,000, identified in an Interior report prepared in 1975, had grown to $131,483 by 1980, and, with additional interest since 1980, has grown to the amount of the CFC judgment of $673,944.[161] The court of appeals reversed this judgment for pre-1980 Act damages because the 1888-1890 Acts did not create a money-mandating duty for CFC jurisdiction and because of the six-year statute of limitations. The court of appeals also denied the petitioners' cross-appeals for post-1980 Act damages and for land.

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[160] CA2210-2211.

[161] *Wolfchild*, 101 Fed. Cl. at 92-93.

REASONS FOR GRANTING PETITION

Under Rule 10 of the Rules of the Supreme Court, this case is an excellent vehicle for this Court adjudicating, at one time and for all time, the historical legal claims of the Mdewakanton Band, resolving over twenty years of multiple lawsuits in multiple fora, and cleaning up a precedential train wreck.

I. This case is of nationwide importance because the claims allege historical governmental mistreatment of poor American Indians on a massive scale.

This case is of nationwide importance because the claims allege historical governmental mistreatment of poor American Indians on a massive scale. Because of the United States' historical mistreatment of the American Indians, it is of nationwide importance when poor American Indians' statutory property rights are alleged to be violated. Here, massive inequities are alleged. Petitioners' statutory fund claim would include damages for community per capita payments totaling in the millions of dollars. Petitioners' statutory land claim includes 7,680 acres plus the three existing reservations. As a result of the governmental misconduct, the community members receive 100% of the statutory benefits including the three reservations while the Mdewakanton Band members receive 0% and no land – and no 7,680 acres either. For example, the SMSC members have historically received per capita payments of over $1,000,000 per year and reservation land assignments – while

the entire Mdewakanton Band receives nothing. The government denies Congress intended by statute to compensate the Mdewakanton Band. The statutes and legal history, as detailed above, show otherwise. By granting the petition, this Court can determine this case of nationwide importance.

II. This Court can resolve a twenty-year quagmire of multiple lawsuits in multiple fora which the court of appeals failed to resolve.

The court of appeals opinions reflect just another phase of twenty years of continuing multiple lawsuits in multiple fora on essentially the same legal issues relating to the Mdewakanton Band.[162] Now, non-members are suing Interior in U.S. District Court raising the same issues that the three communities are not sovereign historical tribes, but temporary subgroup communities of the Mdewakanton Band with only Interior-delegated powers.[163] This Court should take the case to resolve a twenty-year quagmire of multiple lawsuits in multiple fora which the court of appeals failed to resolve.

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[162] *See, e.g.*, *Smith v. Babbitt*, 100 F.3d 556; *Maxam v. Lower Sioux Indian Cmty. of Minnesota*, 829 F. Supp. 277 (D. Minn. 1993); *In the Matter of the Estate of Mamie Bluestone Gofas*, DOI Indian Probate No. IP TC 389S-81, Order (1990); *Smith v. SMS(D)C*, 1 Shak. A.C. 62 (1997) (CA2347-2355).

[163] *See Lightfoot v. Jewell*, Case No. 13-CV-02985 (D. Minn. 2013); *Bathel v. Salazar*, Case No. 09-CV-03622 (D. Minn. 2010).

Granting the petition would be consistent with this Court's decisions. In *Tohono O'Odham Nation*, this Court stated that the CFC is the only judicial forum for most non-tort requests for significant monetary relief against the United States, unlike the district court.[164] Second, this Court stated in *Nevada v. Hicks* that tribal courts are not courts of general jurisdiction and cannot determine federal claims.[165] In contradiction, the court of appeals opinions and the Eighth Circuit opinion in *Smith v. Babbitt* collectively refer the Mdewakanton Band to the tribal courts for resolution of their federal claims. If the Court does not grant the petition, the twenty-year litigation quagmire will continue with more lawsuits – by Mdewakanton Band members and non-members – in District Court and in tribal courts as Interior's legal position that it created three new sovereign historical tribes in 1936 and 1969 – or in 1994 according to SMSC tribal court – becomes more absurd with the passage of time.

III. This Court can clean up the Federal Circuit's precedential train wreck.

The Court should grant the petition to clean up the precedential train wreck caused by the Federal Circuit disregarding legal history. The court of

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[164] *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011).

[165] *Nevada v. Hicks*, 533 U.S. 353 (2001).

appeals opinions contradict with prior precedents of this Court and other courts of appeal. First, this Court should hold under *Mitchell I, Mitchell II, White Mountain Apache*, and *Navajo Nation* that statutory trust and other legal obligations exist to the Mdewakanton Band and that the money-mandating duty requirement, if it applies at all, has been met.[166] Second, this Court should hold, by incorporating the First Circuit decision in *Passamaquoddy Tribe*, that the "plain and unambiguous" requirement for termination of American Indian property rights applies to interpretation of the 1980 Act – and the 1980 Act does not meet that requirement.[167] Third, this Court should hold under *Carcieri* that the proper interpretation of statutes specific to the Mdewakanton Band – the 1863 Acts, 1888-1890 Acts and 1980 Act – mean that the Mdewakanton Band is the statutory beneficiary with statutory property rights, not the three temporary subgroup communities. Fourth, this Court should hold, consistent with *Oneida I* and *Oneida II* and their progeny that under the INIA and related federal common law, that the Mdewakanton Band is a tribe with statutory property rights – 7,680 acres and three reservations – which have not been Congressionally

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[166] *United States v. Mitchell*, 445 U.S. 535 (1980) and 463 U.S. 206 (1983); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

[167] *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

terminated.[168] Fifth, this Court should hold under *Carcieri* and its interpretation of the 1934 IRA that the purchased 1937 IRA lands are Mdewakanton Band reservation lands, not reservation lands of the temporary subgroup communities. Sixth, this Court should interpret the six-year statute of limitations and the ITAS to allow for CFC jurisdiction of the Mdewakanton Band's monetary claims. The government's final 2002 sale of reservation land triggered the six-year statute of limitations for the Mdewakanton Band. Plus, the ITAS applies for the 1981 distribution of Mdewakanton Band tribal trust funds to the three communities because Interior did not distribute a proper accounting to the Mdewakanton Band for these tribal trust accounts at the time. In fact, Interior has never made a proper accounting for any of these transactions to the Mdewakanton Band. It is as if Interior wants to pretend that the Mdewakanton Band – over 20,000 claimants here – is not here.[169]

[168] *Oneida Indian Nation of N.Y. State v. Oneida County*, 414 U.S. 661 (1974) and 470 U.S. 226 (1985).

[169] *See* RCFC 17(a) (real party in interest).

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ERICK G. KAARDAL
Counsel of Record
WILLIAM F. MOHRMAN
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
(612) 341-1074
kaardal@mklaw.com

Attorneys for Petitioners