No. 13-795

In The
Supreme Court of the United States

HARLEY D. ZEPHIER, SR., ET AL.,

Petitioners,

v.

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

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QUESTIONS PRESENTED[1]

I. Whether the Federal Circuit's 2013 holding that a February 16, 1863 Act of Congress, providing that "the Secretary of Interior is hereby authorized to set apart of the public lands . . . eighty acres in severalty" to loyal Mdewakanton Indian individuals, is "too discretionary to support a viable claim," thereby conflicts with this Court's and other precedents holding that power given to public officers in permissive form statutory language, but involving individual property rights calling for its exercise, the language used is "in fact peremptory" and money-mandating?

II. Whether the Panel failed to recognize the trust nature of the February 1863 Act in rejecting Petitioners' "two basic claims" and thus issued a determination that conflicts with a previous authoritative decision in *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009), which found that the language of the Act of February 16, 1863, Section 9, ch. 37, 12 Stat. 652, "created an inheritable beneficial interest in the recipients of any land conveyed under the statute . . . [and] explicitly created a trust relationship" with the Federal Government?

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[1] The Petitioner Plaintiff-Intervenors likewise adopt the issues raised by the petitioning Wolfchild Plaintiffs in their separately docketed appeal except where noted previously and in Petitioner Plaintiff-Intervenors' Petition for Certiorari.

QUESTIONS PRESENTED – Continued

III. Whether the Secretary of Interior's 1865 actions "invoking the land-allocating authority of the two 1863 Acts" created an equitable estoppel against the Government, conflicting with the 2013 Panel's conclusion that "those 1865 actions . . . cannot support a timely claim for relief?"

IV. Whether the Panel erred in failing to find an actionable violation of the 1851 and 1858 treaties between the Government and the loyal Mdewakanton by the Government's failure to fully implement Section 9 of the Act of February 16, 1863?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of the parties to the proceedings, whom are all private individuals. The case involves "approximately 20,750 persons of Indian descent." *Wolfchild v. United States*, 96 Fed. Cl. 302, 310 (*Wolfchild VII*). The Petitioners will timely submit a complete listing of all individual Petitioners herein under separate cover.

The Petitioner Plaintiff-Intervenors[2] submit their Petition in conjunction with another petitioning group, the "Wolfchild" plaintiffs.[3] It is anticipated that the Wolfchild petitioners will address both the 2009 and 2013 Federal Circuit panel decisions, with particular emphasis on the 1888, 1889 and 1890 Appropriations Acts.[4] These Petitioners, however, address the Panels' interpretations of the February

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[2] *See Wolfchild v. United States*, 72 Fed. Cl. 511, 521 (2006) (discussing "intervening plaintiffs"); *Wolfchild v. United States*, 77 Fed. Cl. 22, 29-36 (2007); *see also Wolfchild v. United States*, 78 Fed. Cl. 472, 476-477 (Court of Federal Claims (CFC) noting the difference between Plaintiffs and Plaintiff-Intervenors or "intervening plaintiffs").

[3] *See Wolfchild V*, 78 Fed. Cl. 472, 476-477 (CFC noting the difference between Plaintiffs and Plaintiff-Intervenors or "intervening plaintiffs).

[4] Act of June 29, 1888, chap. 503, 25 Stat. 217 (text of the statute reprinted at App. 281); Act of March 2, 1889, chap. 412, 25 Stat. 980 (text of the statute reprinted at App. 281-282); Act of August 19, 1890, chap. 807, 26 Stat. 336 (text of the statute reprinted at App. 282-283).

PARTIES TO THE PROCEEDINGS – Continued

16, 1863 Act.[5] To the extent that the petitioning Wolfchilds' Petition for Certiorari is compatible with the Petitioners' Petition and their previous legal positions, it is adopted and approved herein.

[5] Act of February 16, 1863, ch. 37, 12 Stat. 652.

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OPINIONS BELOW

The most recent opinion of the Federal Circuit is reported at *Wolfchild v. United States*, 731 F.3d 1280 (Fed. Cir. 2013) (*Wolfchild X*) and is reprinted in the Appendix ("App.") to this Petition at 1-50. Two of the Court of Federal Claims cases decided after the initial 2009 panel decision, *Wolfchild v. United States*, 96 Fed. Cl. 302 (2010) (*Wolfchild VII*), is reprinted at App. 149-272, and *Wolfchild v. United States*, 101 Fed. Cl. 54 (2011) (*Wolfchild VIII*), is reprinted at App. 52-148. The referenced 2009 opinion of the Federal Circuit is reported at *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009) (*Wolfchild VI*), and is reprinted at App. 341-415.

JURISDICTIONAL STATEMENT

Petitioner Plaintiff-Intervenors seek a writ of certiorari in this Court for review of the United States Court of Appeals for the Federal Circuit opinions filed on March 10, 2009 (559 F.3d 1228) and September 27, 2013 (731 F.3d 1280). No petition for rehearing or for rehearing en banc was filed following issuance of the Court of Appeals' opinions. 28 U.S.C. § 1254(1) provides this Court jurisdiction to review final judgments of the United States Courts of Appeals on certiorari.

CITATIONS TO PREVIOUS OPINIONS AND ORDERS IN THE CASE

Wolfchild v. United States, 62 Fed. Cl. 521 (2004) (*Wolfchild I*)

Wolfchild v. United States, 68 Fed. Cl. 779 (2005) (*Wolfchild II*)

Wolfchild v. United States, 72 Fed. Cl. 511 (2006) (*Wolfchild III*)

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

Wolfchild v. United States, 78 Fed. Cl. 472 (2007) (*Wolfchild V*)

Wolfchild v. United States, 559 F.3d 1228 (Fed. Cir. 2009) (*Wolfchild VI*)

Harley D. Zephier, Sr. v. United States, 559 U.S. 1067, 130 S. Ct. 2090, 176 L. Ed. 2d 722 (April 19, 2010), certiorari denied

Sheldon Peters Wolfchild v. United States, 559 U.S. 1086, 130 S. Ct. 2090, 176 L. Ed. 2d 755 (April 19, 2010), motion granted, certiorari denied

Wolfchild v. United States, 96 Fed. Cl. 302 (2010) (*Wolfchild VII*)

Wolfchild v. United States, 101 Fed. Cl. 54 (2011) (*Wolfchild VIII*)

Wolfchild v. United States, 101 Fed. Cl. 92 (2011) (*Wolfchild IX*)

Wolfchild v. United States, 731 F.3d 1280 (Fed. Cir. 2013) (*Wolfchild X*)

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Treaty of Sept. 29, 1837, arts. I-II, 7 Stat. 538 ("1837 Treaty") is reprinted at App. 293-296.

Treaty of Aug. 5, 1851, arts. I-II, 10 Stat. 954 ("1851 Treaty") is reprinted at App. 296-305.

Treaty of June 19, 1858, arts. I-III, 12 Stat. 1031 ("1858 Treaty") is reprinted at App. 305-317.

Act of February 16, 1863, 12 Stat. 652 is reprinted at App. 273-278.

Act of June 29, 1888, 25 Stat. 217 is reprinted at App. 281.

Act of March 2, 1889, 25 Stat. 980 is reprinted at App. 281-282.

Act of August 19, 1890, 26 Stat. 336 is reprinted at App. 282-283.

28 U.S.C. § 1491(a)(1) (Tucker Act) is reprinted at App. 290-292.

> The United States Court of Federal Claims shall have jurisdiction of any claim against

> the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (Indian Tucker Act).

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, 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.

ITAS Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003).

28 U.S.C. § 2501 is reprinted at App. 288-289.

STATEMENT OF THE CASE

This appeal involves the unfortunate history of the loyal Mdewakanton Sioux Indians who assisted the United States and acted to save white settlers

during the tragic 1862 Sioux uprising in Minnesota ("the loyal Mdewakanton"). *See Wolfchild v. United States*, 62 Fed. Cl. 521, 524 (2004) (*Wolfchild I*).

The "reward" for the loyal Mdewakantons' heroism was the cancellation of their Treaty annuities, *Wolfchild v. United States*, 96 Fed. Cl. 302, 313 (2010) (*Wolfchild VII*) (citing Act of February 16, 1863, ch. 37, 12 Stat. 652), forfeiture of their ancestral home, February 16, 1863 at § 1, 12 Stat. at 652, rejection by their tribe and the white men they sacrificed to rescue, prolonged suffering through a failed governmental policy that rendered these deserving peoples "entirely destitute of means of support," deprived of the land set apart to them by Congress and a March 17, 1865 order of the Secretary of the Interior invoking the Act of February 16, 1863, and the Government admittedly paid funds belonging to the descendants of the individual loyal Mdewakanton over to three newly recognized Indian communities. *Wolfchild v. United States*, 96 Fed. Cl. 302, 331-348 (2010) ("court concluded that the Government acted without authority and in contravention of the Appropriations Acts when it distributed the funds to the three communities as opposed to the lineal descendants of the loyal Mdewakanton.").

I. THE UNITED STATES' RELATIONSHIP WITH THE MDEWAKANTON SIOUX AND THE "LOYAL" MDEWAKANTON

Prior to August 1851, the Minnesota Sioux[6] lived along the Mississippi River, stretching from the Territory of Dakota to the Big Sioux River. *Wolfchild VII*, 96 Fed. Cl. at 311 (citing *Medawakanton and Wahpakoota Bands of Sioux Indians v. United States*, 57 Ct. Cl. 357, 359 (1922)). The Mdewakantons entered into Treaties with the Government in 1837,[7] 1851,[8] and 1858,[9] ultimately restricting their territory to land along the Minnesota River in south-central Minnesota. *Id.* (see App. 338-340). In return for annuities and other benefits, the bands promised to "preserve friendly relations with the citizens of the United States and to commit no injuries or depredations on their persons or property." *Id.*

In August 1862, individuals from the four bands of the Minnesota Sioux revolted against the United States. More than 500 settlers were killed and

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[6] Upon western expansion of the United States, the Mdewakanton split into four bands: the Mdewakanton and Wahpakoota (the "lower bands") and the Sisseton and Wahpeton (the "upper bands" or the "Santee Sioux"); *Wolfchild VII*, 96 Fed. Cl. at 312.

[7] Treaty of Sept. 29, 1837, arts. I-II, 7 Stat. 538 (App. 293-296).

[8] Treaty of Aug. 5, 1851, arts. I-II, 10 Stat. 954 (App. 296-305).

[9] Treaty of June 19, 1858, arts. I-III, 12 Stat. 1031 (App. 305-317).

substantial property damage occurred. *96 Fed. Cl. at 313.* As a consequence, the United States annulled the Treaties with the bands, which also resulted in "voiding the annuities that had been granted and were then being paid to the Sioux as part of the terms of the 1837 and 1851 Treaties and eliminating any possibility of compensation under the 1858 Treaty." *Id.* The Government took three additional actions against the Sioux: (1) some of the "remaining unexpended annuities were appropriated for payment to those settlers who had suffered damages" from the uprising, Act of Feb. 16, 1863, § 2, 12 Stat. 652-653; (2) all Sioux lands in Minnesota were confiscated, *id.* § 1, 12 Stat. at 652; and (3) except for the loyal Mdewakanton, the Sioux people were removed to "tracts of land outside the limits of the then-existing states." *See* Act of March 3, 1863, ch. 119, § 1, 12 Stat. 819.

A portion of the Mdewakanton bands remained loyal to the United States during the uprising, by affirmatively assisting the Government in quelling the uprising and saving white settlers or by not participating in the revolt in the first instance. *Wolfchild I*, 62 Fed. Cl. at 526. The majority of the "Loyals" adhering to the 1851 and 1858 Treaties remained in Minnesota, but they were "rendered poverty-stricken and homeless." *Wolfchild v. United States*, 559 F.3d 1228, 1232 (Fed. Cir. 2009) (*Wolfchild VI*). In doing so, they were effectively ostracized by those Mdewakanton that were displaced to the territory outside of Minnesota. The loyal Mdewakantons

"lost their homes and property [but they] . . . could not 'return to their tribe . . . or they would be slaughtered for the part they took in the outbreak'" – effectively severing their tribal relations with those participating in the 1862 uprising.[10]

In February 1863, only six months after the 1862 uprising, Congress punished the bands by annulling the Treaties and confiscating their annuities. However, acting on Congress' desire directed to "take care of the friendly Indians," *Cong. Globe*, 37th Cong., 3d Sess. 511 (1863) (Sen. Fessenden) and acknowledgment that the loyal Mdewakanton "ought to be rewarded," *Id. at 514* (Sen. Harlan), Congress passed section 9 of the Act which stated, in relevant part:

> [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 beforenamed 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.

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[10] *Wolfchild VII*, 96 Fed. Cl. at 313, n. 11 ("The loyal Mdewakanton, however, did not benefit under this Treaty [Treaty of Apr. 29, 1868, 15 Stat. 635] as they had severed all tribal relation, and were no longer considered 'Sioux.'").

Act of Feb. 16, 1863, § 9, 12 Stat. at 654. The Act has never been repealed. *Wolfchild VII*, 96 Fed. Cl. at 315.

On March 17, 1865, at the request of Mdewakanton missionaries, the Secretary of the Interior issued an administrative order authorizing the setting apart of 12 sections of land, by metes and bounds description, in Minnesota for the loyal Mdewakanton.[11] Six days later, Commissioner of Indian Affairs Dole wrote a letter to the missionary advising him that "[t]he decision of the Secy [Secretary] of the Interior already in your hands will be sufficient to authorize you to proceed to collect and establish the friendly Sioux upon the lands designated by you in your letter of the 17th March, . . . [and] Supt. Thompson [Clark W. Thompson] has been authorized to expend a sum not exceeding eight hundred dollars for plowing lands and for the purchase of farming tools and seed for the Indians in question." The missionaries "collected at Faribault [Minnesota] as many Indians as he could preparatory to establishing them on their lands." Roy W. Meyer, *History of the Santee Sioux: United States Indian Policy on Trial*, 262 (1967). However, the missionary's efforts were "abruptly halted" by the United States military. *Id.*

Two weeks after passing the February 16, 1863 Act, Congress passed an Act dated March 3, 1863, ch. 119, 12 Stat. 819, which is not at issue in this appeal.

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[11] Handwritten document provided upon request.

II. THE FIRST ROUND OF LITIGATION

In the initial proceedings, the Plaintiffs advanced a theory that the "Government breached its fiduciary obligations with respect to certain real property that the Government was required to hold in trust" for the individual loyal Mdewakanton arising out of the 1888, 1889 and 1890 Appropriations Acts. *Wolfchild VI*, 559 F.3d at 1231. Since *Wolfchild I*, the Court of Federal Claims (CFC) had ruled that the "Appropriations Acts created a trust relationship between the Government . . . that the trust relationship extended to the descendants . . . and that the trust had the effect of bestowing equitable title to the 1886 lands on the beneficiary class." *Id. at 1237*. Two questions were certified to the Federal Circuit, which permitted an interlocutory appeal of the CFC's orders.

On appeal, the Federal Circuit concluded that the "answer to the first of the certified questions in this case – whether the Appropriations Acts created a trust for the benefit of the [loyal Mdewakantons] and their descendants – is no." *Id. at 1255*. The Panel answered the second certified question – "whether Congress, through the enactment of the 1980 Act, terminated any trust created by the Appropriations Act – is yes." *Id. at 1260*. The Panel reversed the CFC and remanded the case for further proceedings. The Petitioner Plaintiffs' and Petitioner

Plaintiff-Intervenors' Petitions for Certiorari were denied by this Court.[12]

III. THE SECOND ROUND OF LITIGATION

On remand, the Plaintiffs focused upon the Federal Circuit's recognition that the "Appropriations Acts are best interpreted as merely appropriating funds *subject to a statutory use restriction.*" *Wolfchild VI*, 559 F.3d at 1240 (emphasis supplied by CFC). In *Wolfchild VII*, the CFC granted the Petitioners' motions for partial summary judgment, as the "undisputed facts demonstrate that the Government disbursed the funds to the three communities rather than to the lineal descendants, thereby contravening the provisions of the Appropriations Acts." *96 Fed. Cl. at 351.*

In *Wolfchild VIII*,[13] the CFC found there was no reason to delay the final resolution of the claims regarding the "restricted use funds" pursuant to Court of Federal Claims Rule 54(b). On August 5, 2011, the CFC entered final judgment in the amount of $554,514. On August 18, 2011, the CFC entered a corrected judgment in the amount of $673,944.[14]

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[12] *Zephier v. United States*, 559 U.S. 1067, 130 S. Ct. 2090, 176 L. Ed. 2d 722 (2010); *Wolfchild v. United States*, 559 U.S. 1086, 130 S. Ct. 2090, 176 L. Ed. 2d 755 (2010).

[13] *101 Fed. Cl. 54, 91 (2011).*

[14] Doc. # 1098 (App. 51).

The Government appealed to the Federal Circuit Court of Appeals and the Petitioners filed cross-appeals. The 2013 panel reversed the CFC judgment, as corrected, and affirmed the CFC's conclusion that the Petitioners' claims arising under the February 1863 Act, the Treaties with the Mdewakanton and the Indian Non-Intercourse Act failed to constitute "actionable claims for relief under governing law." *731 F.3d at 1293-1294.*

This Petition for a Writ of Certiorari to the United States Court of Federal Appeals for the Federal Circuit followed.

REASONS FOR GRANTING THE PETITION

There are several compelling reasons why this Petition should be granted by Rule 10(c) of the Rules of the United States Supreme Court. First, the Federal Circuit Court of Appeals decided important questions of federal law which are in conflict with relevant decisions of this Court, including *Supervisors v. United States*, 71 U.S. (4 Wall.) 435, 446-447, 18 L. Ed. 419 (1867), *Chase v. United States*, 256 U.S. 1, 41 S. Ct. 417, 65 L. Ed. 80 (1921), and its own prior 2009 decision. Second, the decisions of the Federal Circuit involve several important questions of law that have not been, but should be, settled by this Court.

I. THE DECISIONS OF THE FEDERAL CIRCUIT IN 2009 AND 2013 ARE SQUARELY IN CONFLICT

The issue transcending all of these lengthy proceedings concerns whether the United States had trust duties inuring to the loyal Mdewakanton. The CFC twice interpreted the 1888, 1889 and 1890 Appropriations Acts as compelling implied trust duties upon the Government – each time the respective claims courts' holdings were reversed upon Federal Circuit review. In the 2009 Federal Circuit decision, the court found no implied trust arising from the Appropriations Acts.

The 2009 panel, however, found an express trust was created by the Act of February 16, 1863, which provided eighty acres in fee simple land to the loyal Mdewakantons – the court characterizing the statute as a "model . . . for conveying land rights . . . which explicitly created a trust relationship." Yet, in its most recent 2013 opinion, the Federal Circuit rejected the Petitioners' trust-based claim that the February 1863 Act established a "viable cause of action."

The appellate court, without discussion or analysis of the express trust relationship and the attendant trust and fiduciary duties imposed upon the Government created by the February 1863 law, held that Petitioners "lacked any claim grounded in the 1863 Acts." The 2013 Panel decision rejecting the February 1863 Act claim, wherein it failed to recognize the express trust created by the law and the significant

impact of a trust relationship upon its interpretations of the law, directly conflicts with its 2009 ruling.

The Federal Circuit's 2013 decision substantially conflicts with its 2009 opinion in four instances. First, the court held that Congress, by passing the March 3, 1863 Act, "superseded" the February 16, 1863 law, as the two laws were purportedly the "same authorization." *559 F.3d at 1232.* In *Wolfchild VII*, the CFC found that the Federal Circuit's view of the relationship between the Acts of 1863 was a misreading of the March 1863 Act. *96 Fed. Cl. at 314-315.* In its 2013 decision, the court did not address the CFC's ruling.[15] It continued to recognize the similarity of the two statutes, in terms of "both" statutes' recognition of the loyalty of the Sioux beneficiaries and further observed that the statutes "similarly allowed" the Secretary to provide land to meritorious individuals. *731 F.3d at 1285-1286.*

Second, in its 2009 opinion, the Federal Circuit found that the "Secretary never exercised the authority granted by the 1863 legislation." *559 F.3d at 1232.* Based upon the Federal Circuit's finding, the CFC subsequently relied upon the appeals court's finding to conclude that the Secretary did not exercise any authority granted under either 1863 Act. *96 Fed. Cl. at 315.* Contrary to both the 2009 Federal Circuit and CFC opinions, however, in the 2013 decision the court

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[15] The Court found that resolving the issue was "unnecessary." *731 F.3d at 1293, n. 4.*

found that, in 1865, "the Secretary of Interior approved the withdrawal from public sale of 12 sections of land (12 square miles, or 7,680 acres), *invoking* the land-allocating authority of the two Acts." *731 F.3d at 1286* (emphasis supplied). The Court later concluded that the Government "took steps toward conveyance of the 12 sections to the designated Indians in 1865." *731 F.3d at 1293*.

The third conflict concerns the 2013 opinion which obviously failed to properly analyze the equitable estoppel created by the actions and representations of the Secretary of Interior, Commissioner of Indian Affairs and Indian Superintendent towards the loyal Mdewakanton in 1865. This Court and other circuits have recognized that the Government and its agencies may be estopped to deny their actions because of misleading misrepresentations, which are detrimentally relied upon by their wards, and damage consequently results.

The final conflict created by the 2013 opinion concerns the court's 2009 opinion, which concluded that the February 1863 Act "explicitly created a trust relationship." *559 F.3d at 1243*. The 2009 opinion further referred to the February 1863 law as creating "trust responsibilities" on the Federal Government. *Id. at 1242*. The 2013 opinion, rejecting the viability of the Petitioners "two basic claims" under the February 1863 Act, did not mention the explicit trust relationship created by the Act on the merits of the claims, or in the application of the statute of

limitations, which the court found separately barred the claims.

Resolving these conflicts are essential to the Petitioner's case, thereby warranting this Court's granting their Petition. The inconsistency of the two Federal Circuit's decisions concern important questions of first impression regarding Indian property rights and the Government's trust obligations, thereby creating unresolved, material ambiguity.

II. THE DECISIONS OF THE FEDERAL CIRCUIT CONFLICT WITH INDIAN LAW JURISPRUDENCE

A. The 2013 Opinion Conflicts With Supreme Court Precedent Holding That An Officer "Authorized" Under A Statute Is An Officer "Commanded," Particularly When The Officer Exercises Discretion Pursuant To Statute, Thereby Creating Money-Mandating Duties Under The Act Of February 1863

The 2013 Panel conclusion that the first sentence of the February 16, 1863 Act, which declared the "Secretary 'is hereby authorized to set apart'" parcels of land for the loyal Sioux is "simply too discretionary," directly conflicts with "well settled" precedent. *713 F.3d at 1292.*

The presence of a money-mandating duty under the February 1863 Act is first "commanded by the special relationship between the United States and

the Tribes, as well as the application of canons of statutory interpretation that resolve language disputes in favor of tribal groups who have endured a history of rampant injustice, deserv[ing] the fullest protection under the law." *731 F.3d at 1302* (Judge Reyna's dissent, citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423, 100 S. Ct. 2716, 65 L. Ed. 2d 844 (1980)). Although speaking of the 1888, 1889 and 1890 Appropriations Acts,[16] Judge Reyna's observation that "the Government's unique relationship with the Indian people obligates it to strictly honor" the law, is equally applicable to the February 1863 Act. Both the Federal Circuit and the Court of Federal Claims failed to analyze the February 1863 Act utilizing these applicable standards of review for all statutes in the Petitioner Wolfchild and Petitioner Plaintiff-Intervenor respective appeals. Consequently, the Federal Circuit opinion conflicts with this Court's case precedent.

A second conflict occurs with this Court's case precedent which has long held that when power is given to public officers in "permissive" form statutory language, and individual rights call for its exercise, the language used is "in fact peremptory." *See Supervisors v. United States*, 71 U.S. (4 Wall.) 435, 446-447, 18 L. Ed. 419 (1867) (February 16, 1863 Illinois state statute that board "may, if deemed advisable" levy a

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[16] Act of June 29, 1888, chap. 503, 25 Stat. 217; Act of March 2, 1889, chap. 412, 25 Stat. 980; Act of August 19, 1890, chap 807, 26 Stat. 336.

tax, considered "in fact peremptory"); *Ralston v. Crittenden*, 13 F. 508, 512 (1882) (Missouri state statute using "authorize and require" permissive language "well settled . . . to be construed as mandatory," where "individual rights call for the exercise of power conferred"). It is notable that these decisions were contemporaneous authorities interpreting similar statutory language.

Historically, this Court and federal circuit courts of appeals have had numerous opportunities to pass on the "authorized" language such as that used in the first sentence of the February 1863 Act. In *Chase v. United States*, 216 F. 833 (1919), the Eighth Circuit considered whether two statutes concerning allotment of Indian land conflicted. In a 1912 statute, the Secretary of Interior was "authorized" to take certain actions. *216 F.3d at 835.* The *Chase* court, reasoning that the Secretary could not allot the unallotted lands and also sell them, found that Congress' use of the word "authorized" is "frequently used where 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.'" *Id. at 837* (emphasis added). *See also Maryland v. Miller*, 194 F. 775, 780 (4th Cir. 1911) (statutory language that city possessed "full power and authority" to act, the words "power" and "authority," when used in the public interest, "meant duty and obligation").

This Court squarely addressed the issue in *Chase v. United States*, 256 U.S. 1, 41 S. Ct. 417, 65 L. Ed.

80 (1921). In *Chase*, under two Indian Treaties and legislation made in 1892 and 1893, the Secretary of Interior was "authorized" to make allotments to individual Indians, with the remainder going to the tribe as a whole. A subsequent Act of 1912 "authorized" the Secretary to sell unallotted lands on the reservation.

The claimant argued that the 1912 Act was "neither directory nor mandatory; it is permissive only." *256 U.S. at 8.* This Court observed that, "[t]here are cases, however, that decide that an officer 'authorized' is an officer commanded in a matter of public concern. . . . But, if it may be assumed there is discretion in the Secretary, he has exercised it against the appellant." *Id. at 8-9.*

This Court and several circuit courts of appeals have made clear pronouncements concerning use of the word "authorized" in federal statutory language. These holdings are critical for several reasons. First, the February 1863 Act statutory language which "authorized" the Secretary of Interior to "set apart" eighty acres of land to the loyal Mdewakanton, involved their individual rights to fee simple land as a reward for their loyalty as intended by Congress. Second, Congress empowered the Secretary to act for the loyal Mdewakanton in exercise of those statutorily endowed individual, proprietary rights. As stated by this Court in *Supervisors*, the February 1863 Act's use of the word "authorized", "though permissive in form, is in fact peremptory." *71 U.S. at 447.* The Secretary of Interior had the mandatory duty to fulfill

the requirements of the statute in 1863 and that duty stands to the present. Third, the Secretary's duty to issue land, or to pay monies as damages for the sale of the 12 sections, must "meet the demands of right, and to prevent a failure of justice." *Id.* The Secretary's power, derived from the Act, was "given as a remedy to those entitled to invoke its aid, and would otherwise be remediless." *Id.* Finally, these conflicting authorities with the Panel's 2013 decision are irreconcilable, particularly given the intended beneficiaries of the 1863 Act. The text of the Act created an enforceable money-mandating duty.

However, the above points only address the language of the Act, and do not reflect upon the Secretary's actual conduct in 1865 to implement the Act. It is noteworthy that this Court, in *Chase*, additionally took notice that the Secretary of Interior "exercised" his authority under the statute under review. *Chase*, 256 U.S. at 9. In this appeal, it is undisputed that the Secretary likewise affirmatively acted for the loyal Mdewakantons, thereby "*invoking* the land-allocating authority of the two 1863 Acts." *731 F.3d at 1286*. The Secretary's actions set in action the other mandatory provisions of the February 1863 Act, thereby separately creating money-mandating duties.

The 2013 Panel's observation that "statutes granting officials 'substantial discretion' are not money-mandating'" is misplaced. *731 F.3d at 1292* (citing *Price v. Panetta*, 674 F.3d 1335 (Fed. Cir. 2012)). *Price* is readily distinguishable, both on its facts and the

law. The case did not address any specific statutory language used by Congress, much less use of the word "authorized" as found in the February 1863 Act. Furthermore, the Panel did not explore the impact of the Secretary's actual "exercise" of his purported discretion. The Federal Circuit opinion conflicted with this Court's *Supervisors* and *Chase*, 256 U.S. 1, case precedents, as well as constituting reversible error in its rulings concerning the February 1863 Act.

This Court requires, for a sustainable claim under the Indian Tucker Act, that an Indian claimant must, "invoke a rights-creating source of substantive law that 'can be fairly interpreted as mandating compensation by the Federal Government for the damages sustained.'" *United States v. Mitchell*, 463 U.S. 206, 218, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*"). The Petitioners argue that the February 1863 Act, which created an "inheritable, beneficial interest" in the loyal Mdewakanton, and "explicitly created a trust relationship" with the Government, serves as the requisite "substantive source of law," which can be fairly interpreted as mandating compensation for damages sustained as a result of the breach of duties by the Federal Government.

This Court should grant the Petition to prevent substantial injustice arising from the Federal Circuit and Court of Federal Claims decisions regarding the February 1863 Act.

B. The Federal Circuit's 2013 Opinion Rejecting Petitioner's Equitable Estoppel Argument Conflicts With Case Precedents

In the 2013 Opinion, the Federal Circuit found the claim that "the Secretary did in fact take the necessary steps to set apart land under the [February 1863] Act . . . cannot support a timely claim for relief." *731 F.3d at 1292*. This observation conflicts with the law in two respects. First, the appeals court decision conflicts with this Court and other circuits on the issue whether the Government may be estopped from actions of its agencies in invoking laws and denying accountability thereafter. The second issue, concerning whether the statute of limitations may be tolled by affirmative actions of the Secretary of Interior, was not addressed by the Federal Circuit, and appears to separately be in conflict with other authorities.

These Petitioners' claim, in part, is based upon the premise of equitable estoppel. "In the typical equitable estoppel case, the defendant had represented an existing or past fact to the plaintiff, who reasonably and ignorance of the truth relied upon the representation to his detriment." 4 Richard A. Lord, *Williston on Contracts* § 8:4, at 38 (4th ed. 1992). "[E]quitable estoppel is used to bar a party from raising a defense or objection it otherwise would have." *Jablon v. United States*, 657 F.2d 1064, 1068 (9th Cir. 1981). The doctrine is invoked to "avoid injustice." *Heckler v. Community Health Servs.*, 467 U.S. 51, 59, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984).

The elements of equitable estoppel, which is judicially viewed as a "shield" to bar a claim or defense, are: (1) the party to be estopped made a "definite misrepresentation of fact to another person having reason to believe the other would rely upon it"; (2) the party seeking estoppel relied upon the misrepresentation to its detriment; and (3) the "reliance [was] reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler*, *Id.* (quoting Restatement (Second) of Torts § 894(1)). The party seeking to assert estoppel against the Government must show the Government engaged in affirmative misconduct. *Dantran, Inc. v. United States*, 171 F.3d 58, 67 (1st Cir. 1999). There is no "settled test" for what constitutes "affirmative misconduct," but the claimant need not show that the "Government intend[ed] to mislead a party." *Ramirez-Carlo v. United States*, 496 F.3d 41, 49 (1st Cir. 2007).

In *Heckler*, this Court, while acknowledging that the Government may not be estopped "as any other litigant," observed that estoppel against the United States may be available where there is the "countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." This appeal squarely presents a justiciable issue of equitable estoppel against the United States, as these "minimum standards" have not been observed in a clear and convincing manner. *Id. at 60.* The case for equitable estoppel is further warranted, because the United States

failed as the loyal Mdewakantons' guardians, protectors, fiduciaries and trustees.

The Secretary of Interior has previously been subject to equitable estoppel for erroneous administrative actions. In *Brandt v. Hickel*, 427 F.2d 53, 56-57 (9th Cir. 1970), the Ninth Circuit reversed a summary judgment for the Government concerning the Secretary's decision over a Bureau of Land Management oil and gas lease offer. The case recognized the principle that "some forms of erroneous advice are so closely connected to the basic fairness of administrative decision making process that the Government may be estopped from disavowing the misstatement." *427 F.2d at 56*. In this appeal, the Secretary of Interior, Commissioner of Indian Affairs, and Indian Superintendent, each were directly involved in issuing materially erroneous orders, instructions and advice to the loyal Mdewakanton and their representatives. History evidences the material reliance of the Petitioners' descendants upon their administrative actions and the tragic consequences which resulted.

The 2013 opinion found that, in 1865, the "Secretary of Interior approved the withdrawal from public sale of twelve sections of land . . . *invoking* the land-allocating authority of the two 1863 Acts," *731 F.3d at 1286*, and, further, that the Government, "*took steps* towards conveyance of the 12 sections to the designated Indians in 1865." *Id. at 1293* (emphasis added).

It is undisputed that certain actions were taken by the Secretary of Interior, the Commissioner of

Indian Affairs and Indian Superintendent Clark Thompson in 1865 including: (1) a March 17, 1865 order from the Secretary of Interior to the Mdewakanton Indian missionary, S.D. Hinman, authorizing him to designate 12 sections of land; (2) Hinman replied back to the Secretary the same day designating 12 sections of land in Minnesota by metes and bounds description; (3) Commissioner Dole's March 23, 1865 letter to Hinman advised him that by means of "the decision of the Secretary of Interior already in your hands will be sufficient to authorize you to proceed to collect and establish the friendly Sioux upon the lands designated"; (4) the Commissioner further advised Hinman that the Government Indian Superintendent had been "authorized to expend" up to $800 for plowing lands, purchase of farming tools and seed for the loyal Mdewakanton; (5) Hinman advised fellow missionary Bishop Whipple of his success in obtaining the loyal Mdewakanton "80 acres each . . . in fee simple and unalienable [land]"; and (6) history confirms that these missionaries "collected at Faribault [Minnesota] as many Indians as [they] could preparatory to establishing them on their lands."[17]

The legal record establishes that three leading officials of the Department of Interior mislead the loyal Mdewakanton to believe that the United States

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[17] The copies of the underlying handwritten documents supporting the preceding facts are contained within the record below and available upon request.

officially "set apart" 12 sections of land to them, for the express purpose of providing eighty acres of fee simple land to them as an inheritance forever. These representations were materially relied upon as the loyal Mdewakantons gathered from various parts within and without the state of Minnesota to receive their promised property, plowed grounds, farm tools and seed. The loyal Mdewakantons were materially prejudiced as the Government stopped the process abruptly and the land was sold to the public. *731 F.3d at 1293*. The evidence is compelling that substantial injustice occurred to the Petitioners' descendants, and continues presently, as the February 1863 law remains viable, thereby invoking the doctrine of equitable estoppel against the United States to avoid the obvious injustice in the Government's actions and inaction.

C. The 2013 Opinion Conflicts With Indian Law Holding That Existence Of A Trust Relationship May Impose Rights-Creating Or Duty-Imposing Fiduciary Duties On The Federal Government

The Federal Circuit's 2013 decision conflicts with the law that generally holds a statute may create a "fiduciary duty [on the part of the Government which] can also give rise to a claim for damages within the Tucker Act or Indian Tucker Act." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1367 (Fed. Cir. 2005) (citing *White Mountain Apache Tribe v. United States*, 537 U.S. 465, 473-474, 103 S. Ct. 1126, 155 L. Ed. 2d 40 (2003); *United States v. Mitchell*, 463

U.S. 206, 224-226, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (*"Mitchell II"*)). The Federal Circuit overlooked its 2009 holding that the Act of February 1863 explicitly created a trust. It created conflict by forgoing any analysis of whether the Act imposed any rights-creating or duty-imposing fiduciary duties upon the Government in their 2013 opinion.

The 2009 Federal Circuit opinion held that the February 1863 Act explicitly created a trust relationship between the Government and the loyal Mdewakanton beneficiaries. The opinion stopped short of detailing the nature and extent of the trust responsibilities, including any fiduciary duties. The 2013 opinion failed to make any mention of the presence or impact of the trust duties it found in its earlier decision. It would appear that the 2009 panel, which erroneously found the March 1863 Act "superseded" the February Act, did not feel compelled to address the February 1863 law any further based upon its purported invalidity. The 2009 court indeed found clear trust duties under the February 1863 Act, which the 2013 court failed to address in its analysis.

In this appeal, the February 1863 Act, described by the Federal Circuit as creating a "trust relationship," *559 F.3d at 1243*, has been identified by the Petitioners as a "specific, applicable, trust-creating statute . . . that the Government violated." *United States v. Navajo Nation*, 556 U.S. 287, 302, 129 S. Ct. 1547, 173 L. Ed. 2d 429 (2009) (*"Navajo Nation II"*). It is "well established that the Government in its dealings with Indian tribal property acts in a fiduciary

capacity." *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987). The property in this appeal was not "tribal" property in the strict sense, but 12 sections of land were "set apart" for fee simple ownership by individual loyal Mdewakantons under the February 1863 Act – not unlike tribal property. The United States may not give "tribal lands to others, or appropriate them to its own purposes, without rendering, or assuming an obligation to render just compensation for them," *id.* (quoting *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S. Ct. 681, 79 L. Ed. 2d 1331 (1935)). The Government violated its fiduciary duties to the loyal Mdewakantons, arising under the February 1863 Act, by its continuing failure to provide these Indian individuals land by law and by selling the 12 specific sections of land "set aside" for them.

Consequently, this Court could undertake a review of the role of the common law regarding the Government's duties under the February 1863 Act, *Navajo Nation II*, 556 U.S. at 301, as well as interpret the Act and determine the scope of liability that Congress has imposed upon the Government. *See White Mountain Apache*, 537 U.S. at 475-476. The Court should grant the Petition for Certiorari.

D. The 2013 Opinion Conflicts With Indian Law Holding The Statute Of Limitations Does Not Apply Where The Indian Trust Accounting Statute Is Invoked Or In Cases Where Trust-Based Cause Of Action Has Not Accrued

In this appeal, there are three alternative scenarios under which the six-year statute of limitations is inapplicable, thereby rendering the Federal Circuit's 2013 decision in conflict with Indian law precedent. The Panel did not address any of these conflicts in its opinion.

Non-Accrual of Trust Action

First, while the limitations period in 28 U.S.C. § 2501 is jurisdictional, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136-139, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008), a claim arising out of an Indian-related trust, such as the trust recognized by the 2009 Panel arising out of the Act of February 16, 1863, may provide an exception to its bar. *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1031 (Fed. Cir. 2012).

In *Shoshone*, the Indian tribes alleged that oil and gas leases were unlawfully converted. The Federal Circuit vacated the CFC's judgment that their claim was time barred. The court addressed the accrual of a cause of action based upon the Government's breach of trust, finding that the cause of action only "accrues when the trustee 'repudiates' the

trust and the beneficiary has knowledge of that repudiation." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("*Shoshone II*") (citations omitted). The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as trustee or by express words. *Id.* (citing *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir. 1986)).

If this Court finds that the Government has separate trust duties, but has not violated any of these duties, then it is compelled to find that 28 U.S.C. § 2501 is inapplicable, on its face, as there has been no trust repudiation or knowledge of trust repudiation. In that case, the trust arising by terms of the Act of February 16, 1863 Act is still in place, as the statute has never been repealed by Congress. Further, the trust created by the law has never been formally repudiated as the United States has never provided written notice of repudiation to the loyal Mdewakanton. Conversely, the various *Wolfchild* Panel and CFC opinions recognize the Government continued after the 1863 Acts to attempt to provide for the "Loyals." *See 731 F.3d at 1286* ("Two years later, in 1865, the United States took additional steps to try and help the loyal Sioux.").

Following this argument, the Government took actions, solely by military command, to stop the 1865 activity of the Secretary of Interior setting aside the 12 sections of land due to concern that white settlers would oppose such a move. Neither the Secretary of Interior nor the Department ever took

any affirmative step to stop what they had put in motion, and neither stopped trying to assist the loyal Mdewakanton. The Government has never claimed their actions rose to any level of an action-based trust repudiation – they deny any trust altogether, but never took issue with the 2009 Panel's decision finding a trust from the February 1863 Act in the first instance. The action never accrued so as to invoke the statute of limitations.

Indian Trust Accounting Statute

The 2013 Panel did not review the Petitioners' claim that the Indian Trust Accounting Statute (ITAS) mooted the statute of limitations. The Petitioners argued that the Government's 1865 sale of the 12 sections of land "set apart" by the Secretary of Interior under the Act of February 1863 converted what were previously "trust assets," to "trust funds," for which the loyal Mdewakanton were never provided an accounting by the Government.

The sale of the 12 sections of land, which the 2013 Panel found was last sold in 1895, *713 F.3d at 1293*, created sale proceeds. The Secretary has never advised the loyal Mdewakantons what happened to the proceeds of the sale or accounted for them. The Government has never repudiated the trust created by the proceeds from land sales, much less communicated the repudiation of any trust to the Petitioners or their descendants. As for an "open repudiation" theory which may be advanced by the Government,

an accounting still lies for the sale proceeds, which were converted by the Government, thereby invoking the provisions of the ITAS.[18]

In the 2013 decision, the court concluded the six-year statute of limitations had "run," because the Government had "terminated the process and sold the parcel to others." *713 F.3d at 1293*. But the court stopped its analysis short of considering the impact of ITAS upon the statute. It also failed to discuss the nature of the sales proceeds from the sale of the 12 sections of the land "set apart" for the loyal Mdewakanton as "trust funds" under the ITAS. Acceptance of this appeal would permit this Court to answer these important questions of Indian law.

Equitable Estoppel

The Government's conduct supporting a claim for equitable estoppel likewise supports a claim that equitable estoppel is a defense tolling the statute of

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[18] The ITAS provided:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, 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.

Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003).

limitations against the Petitioners' underlying claims against the Government.

The doctrines of equitable estoppel and equitable tolling are distinct from each other. *Ramirez-Carlo v. United States*, 496 F.3d 41, 48 (1st Cir. 2007). Equitable estoppel "applies where a Plaintiff who knows of his cause of action reasonably relies on the defendant's conduct or statements in failing to bring suit." *Id.*

The pre-existing general rule was that equitable estoppel did not apply against the Government in the context of the statutes of limitation. *Berman v. United States*, 264 F.3d 16, 20 (1st Cir. 2001). This rule was altered in *Irwin v. Dep't of Veterans' Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). In *Irwin*, this Court held that there was a "rebuttable presumption" that equitable tolling is a defense to all statutes of limitations in suits against the Government, 498 U.S. at 95-96, but did not explicitly extend the *Irwin* holding to equitable estoppel. The First Circuit in *Ramirez* opined that this Court, in *Irwin*, "treated equitable estoppel as a form of equitable tolling." *Id. at 49.* The Seventh Circuit has agreed. *Goodhand v. United States*, 40 F.3d 209, 213-214 (7th Cir. 1994).

The issue becomes whether the *Irwin* "rebuttable presumption" applies to equitable estoppel as a defense to a statute of limitations, thereby overcoming the jurisdictional nature of 28 U.S.C. § 2501. Yet another issue is whether the loyal Mdewakantons, who were acknowledged "wards" of the Government

well into the 20th century and in a fiduciary relationship with it, are subject to the traditional equitable principles, including the requirement that "Loyals" bear the burden of establishing: (1) the diligent pursuit of their rights, *Credit Suisse Sec. v. Simmonds*, 132 S. Ct. 1414, 1419, 182 L. Ed. 2d 446 (2012) (citing *Pace v. Di Guglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)), and (2) that some extraordinary circumstances stood in their way. *Id.* These important questions should be addressed by this Court.

E. The Federal Circuit's 2013 Decision Denying Petitioners' Treaty-Based Cause Of Action Conflicts With Indian Treaty Law

As a preliminary matter, in its 2013 opinion, the Federal Circuit found that Petitioners did not present a Treaty-based claim in the CFC. *713 F.3d at 1293.* The Panel erred in the finding.[19] Petitioners presented claims to the CFC based upon the violation of the 1851 and 1858 Treaties.

With the Treaty cession to the United States in 1837 and 1851, the trust responsibilities of the United States and its agents to the Mdewakanton bands were clearly established in the form of rights, remedies, payments and annuities granted to the bands and to the individual members of said bands. *See*

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[19] CFC Doc. 930-1; Doc. 1082.

Medawakanton and Wahpakoota Bands of Sioux Indians v. United States, 57 Ct. Cl. 357, 359-361 (1922).

The 1851 and 1858 Treaty provisions recognize a self-executing right of the *individuals*, not just the band/tribe, that allows a protected individual within the Mdewakanton band, the right recognized by Congress, to pursue individual rights, remedies and privileges associated with the life, liberty and property as protected by each Treaty. The self-executing provisions of the Treaties of 1851 and 1858 allowed for any individual Mdewakanton Indian to assert their own property interests and to use the due process clause of the U.S. Constitution and the Treaty rights to preserve and protect their rights. *See Kolovrat v. Oregon*, 366 U.S. 187 (1961). The loyal Mdewakantons are also a recognized group of Indians.

The February 16, 1863 Act was intended to avoid the problem of the loyal Mdewakanton (the "Friendlies" or "Loyals") asking to have their 1851 and 1858 Treaty lands back. The granting of the eighty acre parcels pursuant to Section 9 was to compensate the Loyals and their heirs as a direct consequence of the abrogation of the prior Treaties by the United States. The breach of the Treaties by the United States as to the Loyals clearly occurred. There has never been any compensation paid to the individual beneficiaries of the non-breaching Loyals or their heirs, to the present day. *See* Art. VII of the 1851 Treaty and Art. V of the 1858 Treaty. There has been no adequate accounting accomplished by the Federal Government.

In 1865, the Secretary of the Interior, pursuant to Section 9 of the 1863 Act, in fact, purchased and set aside lands from the former 1851 and 1858 Treaty lands as direct compensation for breaching the Treaty rights of the friendly Sioux. However, when the Secretary released the 12 sections of land set apart for them, a trust violation occurred.

A Treaty is a contract between sovereign nations. Consequently, Indians must receive compensation whenever Congress abrogates their Treaty rights. Realistically, however, a monetary award usually provides little compensation to people who have lost their homes or sacred lands. *See United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). A Treaty becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can go behind an Act of Congress. *Fellows v. Blacksmith*, 60 U.S. 366, 372 (1857).

A cardinal rule in the interpretation of Indian Treaties is that they are to be interpreted in accordance with the meaning understood by the signatory Indians. *Jones v. Meehan*, 175 U.S. 1 (1899); *Tulee v. Washington*, 315 U.S. 681 (1942). In connection with such interpretation, all ambiguities are to be resolved in favor of the Indians. *Worcester v. Georgia*, 31 U.S. 515 (1832); *Winters v. United States*, 207 U.S. 564 (1908).

The eighty acre parcels from Section 9 have never been provided, nor has there ever been any accounting for the lost Treaty rights to those lands by the

Government. Although the CFC always linked the Treaty rights to the February 16, 1863 Act, in *Wolfchild VIII*, the CFC did not even address the alleged Treaty breach by the United States as to the Loyals. The CFC also erred in not recognizing this important legal basis.

The self-executing rights to individual lineal descendancy of the Mdewakanton Sioux continued to be recognized in the 1868 Treaty of Fort Laramie. The 1868 Treaty included Chief Wabasha III, a direct potentate lineal descendant of Chief Wabasha II, who signed the 1851 and 1858 Treaties as a recognized signatory. The Treaty of 1868 postdated the 1863 Act and is still good law, as evidenced in *Sioux Nation of Indians, Id.*; and *Elk v. United States*, 87 Fed. Cl. 70 (2009). Since Chief Wabasha III was an invited signatory on behalf of the Mdewakanton/Santee Sioux, this indicates that Congress continued to recognize that the Mdewakanton Sioux still held individual rights and interests including potentate lineal descendancy rights. If the Mdewakantons had no existing self-executing potentate rights after Congress passed the 1863 Act, Chief Wabasha III would not have been invited to sign the 1868 Treaty on their behalf.

The canons of construction must favor the rights of the individual Indian if any ambiguity exists as to Treaty or congressional statute interpretation, as in this present case. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-676 (1979); *Minnesota v. Mille Lacs Band of*

Chippewa Indians, 562 U.S. 172, 200 (1999); *United States v. Dion*, 476 U.S. 734, 740, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986).

The annulment of the Treaties is the genesis why the February 16, 1863 Act, Section 9 was enacted in the first instance, and the Act has never been repealed to this very day. The Treaties and the 1863 Act are each a money-mandating prerequisite fathomed by Federal Courts, since the Treaty-making policy period was intentionally ended by the United States. This Honorable Court should reverse and remand the case on the issues of the February 16, 1863 Act, Section 9 and the violation of the 1837, 1851 and 1858 Treaties. *See Sioux Nation. Id.*

III. THE ISSUES RAISED BY THIS CASE ARE IMPORTANT AND RECURRING

The Federal Circuit's 2013 decision below merits this Court's review because it conflicts with this Court's prior decisions, prior decisions of other circuit courts and its own decisions on critical Indian law issues. Moreover, the Federal Circuit's decision creates an untenable situation in that the Government is empowered to ignore trust responsibilities and fiduciary duties expressed in federal statutes and recognized in historic federal policy, specifically enacted for the protection and care of the loyal Mdewakantons and their descendants.

This appeal concerns important issues of Indian law – including several first impression matters

relative to Indian property rights. In essence, this appeal asks the question, when does action of the Government, taken for the express purpose of plainly fulfilling a congressional Indian–related authorization for their benefit, obligate the Government to respond in damages for failure to follow through and complete the initiated action? The answer to the question is critical. If the Government can take significant action for the benefit of Indians under congressional authorization, but can stop the process without accountability, its credibility is undermined, and the proprietary rights of Indian peoples everywhere would be violated, as well as the governmental rights of the United States. This latter point is noteworthy, for the United States has historically been the enforcement vehicle for wrongs perpetrated against Native Americans. But, what happens when the Government is the source of the injurious conduct, rather than serving as the trustee or fiduciary for a dependent people?

The irony in this appeal is that if a third party had done what the Government did to the loyal Mdewakanton regarding the February 1863 Act, the Federal Government, possessing the "requisite power to sue . . . [regarding] alienation of Indian allottee land", *see Heckman v. United States*, 224 U.S. 413, 438, 441-442, 32 S. Ct. 424, 56 L. Ed. 2d 820 (1912), would understandably be first to stand up for them. Rightly so. Why should the Government not be held accountable when they are the party at fault? Granting the Petition would allow this Court to

answer these and other important and recurring questions.

CONCLUSION

The Petitioners pray this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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