Nos. 09-579, 09-580

In The Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

HARLEY D. ZEPHIER, SENIOR, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONSE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ISSUES PRESENTED

These Respondents support the Petitions of *Sheldon Peters Wolfchild, et al. v. United States*, Docket No. 09-579 (the "Wolfchild Petition"), and *Harley D. Zephier, Senior, et al. v. United States*, Docket No. 09-580 (the "Zephier Petition") for Writs of Certiorari. Accordingly, the following statement of "Issues Presented" derives from the "Questions Presented" raised in the Wolfchild and Zephier Petitions.

1. Whether the Federal Circuit's declaration of a "statutory use restriction," rather than a trust having been created "in connection with and as a consequence of" the 1888, 1889 and 1890 Appropriation Acts, establishes dangerous precedent with far reaching inter-circuit implications by: (a) rejecting as irrelevant the analytical guidelines and substantive Indian trust law set forth in *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009); (b) ignoring the historical record of the United States' official statements acknowledging a trust; (c) ignoring Agency fiduciary treatment of the 1886 lands as the trust corpus; (d) allowing the United States to assert the opposite of its prior position in court that the trust at issue exists – which advocacy produced binding federal court holdings; and (e) departing from established principles of statutory interpretation and Indian trust law as established by *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and its progeny.

ISSUES PRESENTED – Continued

2. Whether the Federal Circuit's conclusion that the 1980 Act terminated any existing trust creates erroneous precedent for Indian trust law, by dropping the requirement that a trust terminating statute be "clear and unambiguous" and encouraging the United States to take litigation positions which contradict its own prior statutory interpretations and administrative practices, particularly where: (a) the 1980 Act recites that the subject lands were being "held for the use and benefit of the heirs of Loyal Mdewakantons"; (b) never states that those benefits are intended to be nullified; (c) provides no notice of termination; and (d) Congress' own statements in the 1980 Act and related House and Senate Reports pronouncing that the 1980 Act was intended to "enhance" the beneficiaries' rights, effect "no change in existing law," and only produce "a technical change in the status" of the 1886 trust corpus lands.

3. Whether the principle of law established in *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*") that "a general trust relationship between the United States and the Indian people exists" has been now overruled by the Federal Circuit opinion and replaced by a new standard strictly construing Native American statutes in favor of the government and against Indian beneficiaries.

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 Plaintiff-Respondents represented (in excess of 400 individuals).

CORPORATE DISCLOSURE STATEMENT

These Plaintiff-Respondents are not and do not represent a nongovernmental corporation.

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OPINION BELOW

This Responsive Brief is submitted by 424 plaintiff heirs of the Loyal Mdewakantons ("Plaintiff-Respondents" or "these Respondents") in support of the Petition for Writ of Certiorari of *Sheldon Peters Wolfchild, et al. v. United States*, Docket No. 09-579, and the Petition for Writ of Certiorari of *Harley D. Zephier, Sr., et al. v. United States*, Docket No. 09-580.

These Plaintiff-Respondents accept and support the statements of the "Opinion Below" as referenced in those Petitions.

STATEMENT OF JURISDICTION

These Respondents accept and support the "Statements of Jurisdiction" as set forth in the above-identified Petitions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the February 16, 1863 Act, 12 Stat. 654, Preamble in §§ 1 through 9; March 3, 1863 Act, 12 Stat. 819, Preamble in §§ 1 through 6; 1888, 1889 and 1890 Appropriation Acts: Act of June 29, 1888, 25 Stat. 217 at 228; Act of March 2, 1889, 25 Stat. 980 at 992; Act of August 19, 1890, 26 Stat. 336 at 349; relevant provisions of the original Indian Reorganization Act of 1934, as amended, 25 U.S.C.

§§ 462, 463, 465 and 479, Indian Reorganization Act of 1934 (as reprinted in Wolfchild Petition Appendix at 159-160); and the Act of December 1980, Pub. L. 9-557, 94 Stat. 3262.

STATEMENT OF THE CASE

INTRODUCTION

This case involves judicial revocation of a trust created by Congress a century and a half ago to protect and reward certain Native Americans for extraordinary acts of loyalty, compassion and courage in the Dakota Uprising of 1862. During that conflict, a group of Mdewakanton Sioux sacrificed their filial and tribal connections, relinquished their property, and risked their lives and families, to save the lives and property of neighboring settlers and their families. It was an honorable act of great sacrifice which severed these Native Americans from their prior tribal relations forever.

After the 1862 Dakota Uprising was defeated, Congress meted out punishment to the Dakota tribal members: taking away their reservation lands, their annuities, and banishing and executing many of their numbers – using language of outrage and retaliation. See Act of February 16, 1863.[1] Yet even in the passion of that legislative excoriation, Congress was moved to

[1] 12 Stat. 652, App. 1-6.

recognize and reward the extraordinary sacrifice of those Indians – the "Loyal Mdewakanton" – who risked so much in their refusal to participate in the "massacre." Acknowledging that sacrifice, Congress reserved to those Loyal Mdewakanton the benefits which they had previously enjoyed by treaty but which were now terminated in response to the Dakota Conflict. Those former treaty rights now reserved to the Loyal Mdewakanton consisted of land and support granted, in Congress' words, as an "*inheritance to said Indians and their heirs forever*."[2]

This was a good and proper thing to do. Thereafter, for 150 years, consistent with Congressional intent, the Department of the Interior held, referenced and administered these lands and support "in trust" for the benefit of the Loyal Mdewakanton – a trust which the Loyal Mdewakanton and their heirs understood and relied upon.

Now, with a decision which altered fundamental trust principles, ignored a century of Interior Department treatment of the trust corpus, misconstrued clear statutory language, and declared "irrelevant" precepts of this Court to guide analysis of such claims, the U.S. Court of Appeals for the Federal Circuit has declared that the Loyal Mdewakanton reliance upon this trust benefit was illusory. The result is that over twenty thousand surviving heirs of the Loyal

[2] Id. at § 9, App. 6.

Mdewakanton suddenly and forever lost the legacy of their ancestors' great sacrifice.

This Court should accept the Petitioners' Writs of Certiorari and correct this far reaching injustice. This is an injustice which not only divests tens of thousands of Native Americans of their trust inheritance, but also calls into question the trust worthiness of the United States.

FACTUAL BACKGROUND

This case is rooted in undisputed history[3] – that a group of Minnesota Native Americans elected to save white settlers from attack and death at the hands of their own tribal relations. As a result of that extraordinary event, Congress chose to create a trust of land and other assets for these "Loyal Mdewakanton" and their "heirs forever."

This historic underpinning cannot be set aside, leaving the emergent statutes to be parsed and dissected in legalistic isolation. Rather, the intent and meaning of the subject statutes can only be accurately gleaned with a full appreciation for their historical context. Once analyzed from a correct historical understanding, the conclusion is inescapable that grave errors of law were committed by the U.S.

[3] The Wolfchild and Zephier Petitions, and several District Court opinions below, cover the facts in detail. This response simply highlights critical points.

Court of Appeals for the Federal Circuit in this case, with serious negative implications for tens of thousands of surviving heirs of the Loyal Mdewakanton and other Indian trust beneficiaries.

During the Dakota Conflict of 1862 (the "Conflict" or "Dakota Conflict"), the Loyal Mdewakanton were not motivated by money, but compassion, when they risked their property, their lives and their tribal relationships to save white Minnesota settlers. Yet only when the Conflict ended did the full import of their sacrifice become clear. Many among the white population of Minnesota reviled the Loyals for their racial and tribal connection to the perpetrators of the violent uprising. At the same time, the tribes as a whole severed relations with the Loyals for their refusal to join the insurgency – and for their protection of the white settlers.

In an atmosphere of outrage and retribution following the Conflict, the United States Congress passed legislation on February 16, 1863 (the "February 1863 Act").[4] That Act's very title expressed the anger of the legislators at the mass killing of white settlers:

> "*An Act for the Relief of Persons for Damages sustained by Reason of the Depredations and Injuries by certain Bands of Sioux Indians.*"[5]

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[4] 12 Stat. at 652, App. 1-6.

[5] Id., App. 1.

The preamble of the Act expanded on this theme:

> "[D]uring the past year the aforesaid bands of Indians made an unprovoked, aggressive and most savage war upon the United States and massacred a large number of men, women and children within the State of Minnesota, and destroyed and damaged a large amount of property. . . ."[6]

The February 1863 Act gave full voice to Congress' indignation by annulling *any and all* treaty rights inuring to the benefit of the rebel Dakota bands. As a result, these bands lost their perpetual and term annuities; all property rights in reserved lands; and all claims against the United States derived from their treaties:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all treaties heretofore made and entered into by the . . . bands of Sioux or Dakota Indians . . . with the United States are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or

[6] Id., App. 1.

> any of them, to be forfeited to the United States."

(Emphasis added).[7]

Following this language of annulment and abrogation, the February 1863 Act went on, through eight sections, to establish a process for injured Minnesota settlers to obtain compensation for their losses from the terminated treaty annuities. The final Section 9 of the Act, while continuing the theme of compensation and restoration, took a decidedly different turn. Section 9 focused entirely upon honoring and providing for those loyal Indians who had "exerted [themselves] in rescuing the whites from the late massacre. . . ."[8]

The significance of this final section can only be understood in the dramatic context of the fury which led Congress to annul the Dakota treaties. Section 9 of the Act recognized the sacrifice of the Loyal Mdewakanton and effectively granted back to them

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[7] Id., App. 1-2. The volume of treaty rights annulled by this Act reflects the magnitude of Congressional anger. These included an 1837 treaty with the Mdewakanton and other Minnesota bands which created reservation lands and a perpetual annuity (7 Stat. 538); and an 1851 treaty with the Mdewakanton and Wahpekute Bands of Minnesota which created a supplemental fifty-year annuity (10 Stat. 954).

[8] Id., App. 6.

the treaty rights now otherwise abrogated for the warring bands:

> "Sec. 9. *And it be further enacted* That the Secretary of the Interior is hereby authorized to set apart of the public lands . . . eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and 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.*"[9]

(Emphasis added).

The trust created by this Act was not only intended to reward the Loyals for their courage, but also to protect those few Loyals who remained in Minnesota. The expulsion of rebel Dakota Indians from Minnesota following the Conflict ultimately caused the Minnesota Mdewakanton population to fall from between 6,000 and 10,000 people in 1862 to approximately 200 Loyal Mdewakanton in 1886. The remaining Loyals thus became subject to the desire for vengeance and the fears of many Minnesota surviving settlers.

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[9] 12 Stat. at 654, App. 1-6.

In its 2009 opinion, the Federal Circuit recognized the significance of the February 1863 Act as creating a trust for the Loyal Mdewakanton. In the words of the Federal Circuit, the February 1863 Act defined the property interest that the Indians were to receive in the lands set aside for them. The Federal Circuit acknowledged that the language of that Act "clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute."[10] The Federal Circuit mistakenly ruled, however, that this language was "superseded" by another statute passed by Congress two weeks later, on March 3, 1863 (the "March 1863 Act").[11]

The March 1863 Act was entitled "*An Act for the Removal of the Sisseton, Wahpaton, Medawakanton and Wahpakoota Bands of Sioux and Dakota Indians for the Disposition of their Lands in Minnesota and Dakota.*"[12] The March 1863 Act was not a nullification of the February 1863 Act, nor did it supersede the February Act. Rather, the March Act continued and expanded upon the February 1863 Act by

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[10] *Wolfchild, et al. v. United States*, 559 F.3d 1278, 1282 (Fed. Cir. 2009), Wolfchild Petition, App. 7.

[11] 12 Stat. 819, App. 7-10.

Notably, it does not appear the March 1863 Act was raised by the defendant United States in any of its moving papers or oral argument, nor in the lengthy and scholarly October 27, 2004 Opinion and Order of the Honorable Judge Charles Lettow which underlay the appeal to the Federal Circuit. Its first appearance in this case was in the Federal Circuit Judgment.

[12] 12 Stat. 819, App. 7-10.

extending to the Secretary of the Interior authority to use confiscated tribal lands as a potential source of the corpus of that trust. In summary, the March Act authorized and guided the President and the Secretary of the Interior: (a) to assign new lands outside Minnesota to the warring band members exiled from Minnesota after the Conflict (Section 1);[13] (b) to survey and prepare for sale the former reservation lands of the warring bands (Section 2);[14] (c) to permit entry and settlement of these reservation lands following auction (Section 3);[15] and (d) to apply the proceeds from such sale to the construction of new homes for the warring bands in their new reservation lands (Section 4).[16]

Of particular significance here, however, the March Act further provided that the Secretary was allowed to locate:

> " . . . any meritorious individual Indian of said bands, who exerted himself to save the lives of the whites in the late massacre, upon [the prior Dakota reservation lands] . . . *assigning* the same to him to the extent of eighty acres, to be *held* by such tenure as is or may be provided by law."[17]

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[13] 12 Stat. 819, App. 7.

[14] 12 Stat. 819, App. 7-8.

[15] 12 Stat. 819, App. 8.

[16] 12 Stat. 819, App. 9.

[17] 12 Stat. 819, Section 4, App. 9.

(Emphasis added). Coming only two weeks after the February 16 Act which directed creation of a trust of inalienable land to be held for the Loyal Mdewakantons and their heirs forever, the March Act permitted the Secretary of the Interior to use parcels of former reservation lands to achieve that purpose.[18]

Nowhere in the March 1863 Act was there any language stating or implying the Federal Circuit's contrary conclusion: that the March Act superseded the February 1863 Act. Nor is there any Congressional history in the record to suggest such a goal – a goal which makes no sense given the clearly expressed intent of Congress only weeks earlier to provide for the Loyal Mdewakanton and their heirs "forever."

While the record is sketchy of the Interior Department's initial efforts to provide land and support to the Loyal Mdewakanton in compliance with the 1863 Acts, it is clear that the February and March 1863 Acts' provisions for the Loyal Mdewakanton were ultimately funded in the Congressional Appropriation Acts of 1888, 1889 and 1890.[19] Thereafter, the land and other resources appropriated for the benefit of the Loyal Mdewakanton were held and

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[18] Notably, the assignment mechanism described in the February and March 1863 Acts for insuring that the Loyal Mdewakanton land remained inalienable "forever" was applied over the next century to the lands acquired in 1888 and thereafter "*held*" by the United States, "*set apart*" for individual Loyals, and "*assigned*" to them as life estates.

[19] Wolfchild Petition, App. 154-156.

administered by the Department of Interior toward that end.

The fiduciary relationship resulting from the February and March 1863 Acts and the funding Appropriation Acts of 1888, 1889 and 1890 was honored by the government for the next one hundred years. Hundreds of documents were officially recorded by Interior reciting the trust corpus lands as being "held in trust," and governmental actions consistently treated the lands and other resources as trust assets held exclusively for the benefit of the Loyal Mdewakanton heirs.

Examples of actions by the Department of the Interior and Congress consistent with recognition of a fiduciary obligation over the next century included, among other measures:

- Creating an assignment system by which legal title to the land remained in the United States' name, but land was assigned for beneficial use by the Loyal Mdewakanton and their heirs;
- Creating evidence of land assignments to the assignees which certified that the particular land recipient "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"[20] (Emphasis added);

- Requiring unanimous approval, in 1901, of all Loyal Mdewakanton for the proposed sale of a small section of the 1886 trust lands, "The land was purchased for . . . [the] benefit [of the Loyal Mdewakanton], and the title is in them subject to a provision by which they cannot convey it;"[21]
- Passage of the 1934 Indian Reorganization Act ("IRA") which provided for the continuation of all trust rights and benefits then existing and Interior's continuing practice of holding and administering the corpus lands consistent with the IRA; and
- Acknowledging, in the sale of a tract of the 1886 lands in 1944, that the transfer and sale of the tract operated as a "full, complete and perfect extinguishment" of all the "right, title and interest" that the Mdewakanton and Wahpakoota bands have had in the tract.[22]

Finally, in 1980, certain Indian communities which had been organized pursuant to the 1934

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[20] Indian Land Certificate of Harry Bluestone (June 1, 1905), Wolfchild Petition, App. 139-142.

[21] 34 Cong. Rec. 2523 (1901).

[22] Act of 1944, § 2, 58 Stat. at 274.

Indian Reorganization Act,[23] sought greater control over the lands acquired for the Loyal Mdewakanton. Those trust corpus lands were contiguous with additional non-trust lands controlled by those communities – creating a "checkerboard" pattern of ownership interests which impeded the development. A bill was proposed to eliminate the long standing recognition of distinctions between these Indian community lands acquired and held by the United States exclusively for over a century for those Native Americans "who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefit of the 1886 lands."[24] Congress ultimately passed the bill, and it was signed into law by President Carter on December 19, 1980.[25]

In the Senate Report of the 1980 Act, Congress emphasized the United States' continuing fiduciary obligations to honor the Loyal Mdewakanton beneficiaries' rights when it explained that the purpose of the 1980 Act was to "enhance the beneficial use of the land." The Report further clarified that the 1980 Act would make "no change to existing law" and would affect only a "technical change in status" of the land. Nowhere did Congress state or even suggest: (a) that those century-old rights were to be nullified; (b) that

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[23] See Act of 1934, 25 U.S.C. §§ 462, 463, 465 and 479, Indian Reorganization Act, *et seq*.

[24] H.R. Rep. No. 96-1409 (1980), App. 40-41.

[25] 126 Cong. Rec. 32,898 (1980), App. 40-41.

the trust relationship was to be abolished; or (c) that beneficiaries were to be forever barred from enjoyment of the benefits flowing from the 1886 lands.[26]

Only subsequent to the 1980 Act, despite the absence of any authorization to abolish the acknowledged rights of these beneficiaries, did the United States abandon the heirs of the Loyal Sioux. Rather than ensuring that the new Indian communities and the Interior Department coordinate and develop the community lands with those held for the Loyal Mdewakanton so as to benefit *both* the distinct communities and the Loyal Mdewakanton beneficiaries, the government suddenly allowed *all* benefits to flow only to the communities' own members to the exclusion of the thousands of Loyal Mdewakanton.

Since that time, the Loyals' trust corpus lands have been employed for the enrichment of the controlling communities and their narrowly enrolled members. Ninety-five percent of the Loyal beneficiaries have been excluded from membership in those communities. Yet the government has set aside nothing for the use and benefit of these Respondents or the Wolfchild and Zephier Petitioners.

This breach of the fiduciary duty of the government, established in the legislation of 1863 through 1896, continues to the present day.

[26] App. 40-41.

REASONS FOR GRANTING PETITIONS

As expressed in the Petitioners' arguments, and supported by the following Respondents' arguments, in order to reach its result the Federal Circuit Court of Appeals incorrectly:

(1) Adopted a conclusion and position contrary to government practice and pronouncements for over a hundred years, and never taken in prior litigation of these issues by the United States – that no legal trust ever existed;

(2) Focused on only the last step in the trust creation process – the Appropriation Acts funding the trust – and ignored the role of the 1863 Act in creation of the trust;

(3) Ignored the evolution of Indian treaty and trust law over a 120 year period by insisting upon an explicit declaration of a "trust" in the Appropriation Acts funding the trust corpus;

(4) Ignored clear Congressional intent, expressed in the 1863 Act, to establish a trust in perpetuity for the heirs of the Loyal Mdewakanton;

(5) Misconstrued the 1980 Act contrary to its language and history; and

(6) Disregarded the *Carcieri* decision, at 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009).

These Respondents therefore support Petitioners' prayer for review and reversal of the Federal Circuit's opinion, as argued more fully below.

I. The Federal Court of Appeals Opinion Shattered the Loyal Mdewakantons' "Trust" By Adopting a Conclusion Contrary to Government Practice and Pronouncements for Over a Hundred Years, and Never Taken By Any Party or Court Before This Litigation – That No Legal or Equitable Trust Ever Existed.

The sacred significance of a trust is highlighted by the word itself. Here, in 1863 through 1890, Congress set forth the historical foundation, legislative purpose and the means for establishing a trust relationship between the United States government and the Loyal Mdewakanton. Congress entrusted the executive branch with authority and responsibilities: to purchase and hold lands, and manage the resulting corpus for the use and benefit of the Loyal Mdewakanton and their heirs forever. In turn, the beneficiaries placed their "trust" in the good faith of the government to act consistent with its promises. For over one hundred years, that trust was honored and the beneficiaries' reliance on the government was affirmed.

Even in the Act of 1980, Congress once again recognized the long-standing existence and purpose of the trust corpus for the "use and benefit" of the Loyal Sioux. Both the House and Senate Report(s) to the

1980 Act stated unequivocally that the intent of that Act was to "enhance" the benefits owed to the Loyal Mdewakanton.[27] Thus from 1863 through 1980 and beyond, the trust between the federal government and the Loyal Sioux was maintained.

Only subsequent to these acknowledgments did the government begin to deviate from its fiduciary mandate by allowing trust corpus assets to be used to benefit exclusively Community members. Yet membership in the communities consists of less than five percent of the class of intended beneficiaries (heirs of the Loyal Mdewakanton) and includes a large percentage of non-beneficiaries (heirs of Sioux who were not among the Loyal Mdewakanton). Thereby the trust, in all of its meanings, was broken.

The District Court, with the benefit of years of briefings and hearings, understood this history, the statutory creation of the trust, and its breach. Unfortunately, the Federal Circuit panel did not. By adopting the United States' contention that no trust *ever* existed – a contention never previously claimed in any other litigation relating to these issues – the Federal Circuit rendered irreparable what was heretofore only broken.

What relationship has existed for the past century between the United States and the Loyal Mdewakanton, if not a trust? What does the current

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[27] App. 11-39.

opinion say to the thousands of heirs about the sanctity of their ancestral rights or their relationship with the federal government? What does this decision suggest to Native Americans across the century about the fragility of placing their trust in the government's promises? This case cries out for review.

II. The Federal Circuit Focused on Only the Last Step in the Trust Creation Process – the Appropriation Acts Funding the Trust – and Ignored the Role of the 1863 Act in Authorizing the Creation of the Trust.

In the Federal Circuit's analysis of the issues in this case, it ignored or misinterpreted the February 1863 Act and related legislation, reviewing the subsequent Appropriation Acts in isolation from their source.[28] This analysis was both legally and factually improper.

The Honorable Judge Charles Lettow of the United States Court of Federal Claims had the benefit of years of experience and lengthy hearings, briefs, and argument when he certified the questions for determination by the Federal Circuit. With the

[28] In fact, the Federal Circuit restated the carefully worded certified question to support this method of evaluating the issues, recasting the lower Court's certification of the issue from whether a trust was created "in connection with and as a consequence of" the Appropriation Acts, to whether the Appropriation Acts themselves, in isolation, created a trust.

benefit of this knowledge, Judge Lettow did not ask whether the Appropriations Acts of 1888, 1889, and 1890, in isolation, created a trust. The Court of Claims recognized the importance of the dramatic historical context and the *origin* of the trust in the authorizing language of the February 1863 Act. The Court of Claims further understood that the *trust corpus* at issue was ultimately acquired by the United States pursuant to the Appropriation Acts of the 1880's. These Appropriations Acts were necessary to establish the final trust corpus – but they drew authority from the February 1863 Act announcing the creation of the trust.

Accordingly, the certified question from the Court of Claims asked: "[W]hether a trust was created *in connection with* and *as a consequence* of the . . . Appropriation Acts. . . ." (Emphasis added). Thus, the issue was whether a trust was created not in isolation, but in conjunction with, the 1888-1890 legislation.

The Federal Circuit's analysis looked exclusively to the Appropriation Acts for what it deemed was essential language necessary for creation of the trust – i.e. the Appropriation Acts were required to stand alone in the creation of a trust.[29] With this

[29] As argued by the Wolfchild Petitioners, it was further error for the Federal Circuit to assert that *any* particular language was required in the statute to establish a trust, so long as the indices of a trust existed.

inexplicably myopic approach to the certified questions, the Federal Circuit reached the conclusion that the Appropriation Acts, standing alone, did not create a trust.

The Federal Circuit did recognize that the February 1863 Act could not be entirely ignored if it was to conclude that no trust was created for the Loyal Mdewakanton. The Federal Circuit acknowledged that:

> "[The February 1863 Act] language clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute."[30]

The Federal Circuit went on to conclude, however, that the subsequent March 1863 Act "superseded" the February 1863 Act, and therefore that the trust creating language of the February 1863 Act could be ignored in its analysis.

The Federal Circuit's conclusion that the March 1863 Act superseded the prior February Act was reached without reference to any language in the March Act which would support such a conclusion, nor with any citation to legal authority for this conclusion. In fact, in order to reach its result, the Federal Circuit ignored longstanding precedent of this Court that repeals of legislation by implication are disfavored and that, in the absence of an affirmative showing of a legislative intention to

[30] Wolfchild Petition, App. 29.

repeal, the only permissible justification for repeal by implication is irreconcilability.[31]

Consistent with this rule, the intention of the legislature to supersede a prior statute must be clear and manifest: it is not sufficient to establish such a repeal that a subsequent law covers some or all of the cases provided for by the prior act.[32] If, by any reasonable construction, two statutes on the same subject could stand together, they are required to so stand.[33]

In the face of this black letter law, there was no basis for the Federal Circuit to conclude that the March 1863 Act superseded the February Act. In fact, it was not even a close issue. As discussed above, there is no language whatsoever in the March 1863 Act even suggesting a statement of intent to supersede the legislature's two week old direction to the Secretary of the Interior to establish lands and support for the Loyal Mdewakanton and their "heirs forever." Neither was the March 1863 Act itself in any way irreconcilable with the February 1863 Act.

Accordingly, the Federal Circuit could only reach its erroneous decision by recasting the certified

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[31] See *State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439; 5 S.Ct. 716; 89 L.Ed. 1051 (1945).

[32] See *U.S. v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

[33] See *J.E.M. Ag Supply Inc.v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 122 S.Ct. 593, 151 L.Ed. 508 (2001); and *State of South Carolina v. Stoll*, 84 U.S. 425 (1873).

question presented to it; ignoring long standing precedent of this Court as to when subsequent legislation can be deemed to supersede prior Congressional Acts; and thereby conclude with a decision which negated the expressed will of Congress to create inheritable trust rights in the February 1863 Act.

This Court should correct this manifest error.

III. The Federal Circuit Opinion Ignored Long-Standing Indian Treaty and Trust Law By Declaring the Necessity of an Explicit Declaration of a Trust in the Appropriation Acts Funding the Trust Corpus.

As argued above, the standing opinion collapses because its critical assumption, that the March 1863 Act superseded the February 1863 Act, is incorrect as a matter of law. The Federal Circuit opinion rests on and requires the false conclusion that the 1863 Acts (authorizing the establishment of a land set aside, and assignments of a trust corpus of land) had no legal or equitable effect. Despite the absence of any legal or evidentiary support for such a conclusion, the Federal Circuit asserted: "Two weeks after the enactment of that provision [Feb. 16, 1863 Act, Sect.

9], . . . Congress superseded it with another statute dealing with the same authorization."[34]

Native Americans have long held a strained relationship of suspicion toward the federal government. That history need not be repeated in this brief. However, that relationship will not be improved by allowing the Federal Circuit's decision to stand. The lessons are stark. Despite sacrificing for the country and receiving protection and provision for that courage, Indians still cannot count on the government to keep its promises.

The ancestors of the Petitioners here sacrificed everything for their neighbors. To replace treaties annulled for no fault of theirs, these Indians were promised the benefit of lands to be held and managed by the government to honor their loyalty, courage and suffering. The government repeatedly reassured them by recognizing and maintaining the resulting trust for a century. Congress eventually promised the beneficiaries that it would "enhance" their benefits by legislating "technical changes in the status" of the trust lands that would "effect no change in existing law." The government even maintained in official court documents and established by federal court rulings that a trust exists.[35]

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[34] Wolfchild Petition, App. 7.

[35] See *Brewer v. Acting Deputy Assistant Secretary*, 10 IBIA 110, 119 Note 8 (1982); *Cermak v. Babbitt*, 234 F.3d 1356, 1358-59 (Fed. Cir. 2000); and *Cermak v. Norton*, 322 F.Supp.2d 1009,

(Continued on following page)

Nevertheless as it stands, the courts may eradicate these Native Americans' ancestral rights and benefits, using a 120-year retrospective insistence on an explicit declaration of a "trust" in appropriation acts funding the trust corpus. This is not consistent with the hard-fought evolution of Indian treaty and trust law.

IV. The Federal Circuit Ignored the Clearly Expressed Intent of Congress to Establish Perpetual Rights in the Loyal Mdewakanton and Their Heirs.

The congressional intent to honor the courage and sacrifice of the Loyals during a most trying period in American history consistently appears in the unique treatments specifically given to Loyals by the Department of the Interior through the next hundred years. This should be given great weight. Examples abound in the record.[36]

Nowhere does the 1980 Act notify, suggest, authorize or mention a termination of these rights and benefits of the vast majority of beneficiaries.

1015 (D. Minn. 2004), aff'd, *Cermak v. United States*, 478 F.3d 953 (8th Cir. 2007).

[36] See Interior Department practices with respect to holding of monies (JA0825, 1737, 2543 and 3573-78); holding of monies from gravel pit and quarry receipts (JA2539-45); and Land assignment certificates (JA0940-44, 1144, 1146, 1150-51, 1153 and 2009-23).

Instead, the 1980 Act recognizes and furthers the mandate of the 1863 Acts and the enabling acts of 1880-1890. The 1980 Act addresses barriers to the beneficiaries' ability to enjoy the most productive use of the 1886 lands due to the barriers created by a jurisdictional checkerboard ownership pattern. By allowing community development of a seamless pattern of land ownership, the referenced benefits to the Loyals were to be "*enhanced*" – not obliterated. One can only imagine the outcry in and to Congress had it understood – as the government now argues – that it was cancelling one hundred years of fiduciary obligations and cutting off rights and benefits of thousands of descendants of the Loyal Mdewakanton. Had the Federal Circuit's radical interpretation been predicted, not only would the Act have lacked any language supporting such a conclusion: the Act would have been replete with language insuring no such affect.

In addition to the bill itself, the 1980 Act's legislative history directly contradicts the claim that it terminated the Loyals' trust:

- The Senate Report concludes that the passage of the 1980 Act would effect "no change in existing law."[37] Yet, the Federal Circuit's interpretation would radically change over one hundred years of existing law.

[37] App. 39.

- The House and Senate Reports state that the bill is only a "technical change in the status" of the 1886 lands – not a radical shift in benefits, rights and ownership to the exclusion of ninety-five percent of the beneficiaries.[38]

- The House and Senate Reports reassure the legislature that the bill "protects the rights of all persons having a present interest in the lands."[39] The Loyals were the only persons with a present interest in the lands.

- The House and Senate Reports further state, "The purpose [of the 1980 Act] is to change and clarify the legal status of the lands . . . in order to *enhance the beneficial use* of the lands to be . . . " (Emphasis added).[40] "Enhance" whose beneficial use? Only the Loyals held any rights to beneficial use and only their rights could be "enhanced." The recently formed communities had no such beneficial use to enhance. But consistent with Petitioner's positions, the communities' ability to manage seamless reservation property *would* "enhance the beneficial use" of the Loyals – as well as

[38] App. 11-39.

[39] App. 11-39.

[40] App. 40-41.

provide some advantage to non-Loyals, as the 1980 Act recognizes.[41]

- The House and Senate Reports further state that there will be "no additional cost to the government." Why? Because the bill enhanced the rights of Loyals and also contributed to the ability of communities to better manage their entire reservation property to the benefit of the communities and beneficiaries alike. Thus, no one was damaged or harmed by the 1980 Act. Accordingly, there was no controversy and no anticipation of litigation for the loss of benefits to thousands of Loyals as would have been obvious had that been the bill's intent.[42]

- The House and Senate Reports make no mention, despite lengthy descriptions of the 1980 Act and its purposes, of annulling rights and benefits provided to Loyals for 100 years. Nor do the Reports suggest that there is any annulment of the Congressional intent emphatically expressed in the 1863 Act, the 1888-1890 Appropriation Acts and the many acts following that all recognized the rights of the Loyals.[43]

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[41] App. 40-41.

[42] App. 40-41.

[43] App. 11-39.

In summary, the seamless history of Congressional action and pronouncements toward the Loyal Mdewakanton from 1863 through 1980 all demonstrate consistent and unbroken Congressional intent to honor the Loyal Mdewakanton and their heirs forever.

V. The Federal Circuit's Opinion Rewrites the 1980 Act Contrary to its Language and History.

What the Federal Circuit opines as Congressional intent in 1980 was never presented in any of the House or Senate Reports or on the House floor, nor does it appear in the language of the statute itself. Moreover, this interpretation does not square with any of the history of the trust relationship between the government and the Loyals flowing seamlessly from 1863 on.

The Court's ignoring of that history is telling. As the 1980 Act makes clear, the history of the acquisition of the 1886 lands flows directly from the sacrifice and loss suffered by the Loyals in the 1862 uprising as recognized in the 1863 Act. Congress' concerns in 1980 that the "held" land was not receiving its highest and best use for the benefit of the Loyal heirs, due to practical problems of efficient investment and effective jurisdiction, is also clearly stated.

The Congressional concern expressed in the 1980 Act is for the Loyals – no one else. Yet the decision of

the Federal Circuit would reach a contrary end: completely strip the very ancestral rights of those beneficiaries which the Congress expressly recognized and sought to "enhance." It is entirely unreasonable to conclude that the Congress intended such a result without any notice of trust termination and without mention of any intent to abolish or reverse beneficial rights flowing from 1863 through the 1880-1890 Acts. Nor is there any expressed intention – unlikely in any event – that Congress sought to transfer these benefits to non-beneficiary members of newly formed communities.

The Federal Circuit reading inverted Congressional intent, rewrote American history, and adopted the United States' after-the-fact attempt to rationalize its failure to perform its fiduciary role as trustee of the Loyals' beneficial rights in the 1886 lands.

VI. The Federal Circuit Disregarded *Carcieri*.

Two weeks before the Federal Circuit panel issued its opinion here, this Court announced its decision in *Carcieri*, *supra.* That decision was brought to the attention of the panel. However, rather than applying its precepts, the Circuit dismissed it in a

footnote as not "in any way relevant" to the issues herein.[44]

This response was stunning. *Carcieri* dealt with the issues directly relevant to the present case. In *Carcieri*, the Court considered the proper interpretation of statutory authorizations related to Indian trusts (the 1934 Indian Reorganization Act); utilized extensive evidence of the Department of the Interior's own understanding and application of the statute; reversed the First Circuit's and District Court's holdings in favor of the federal government's granting extensive trust rights to certain newly formed Indian communities; and rejected the government's arguments that it was authorized by statute to do so.

Thus, this Court in *Carcieri* provided direction in Indian trust cases – direction dismissed by the panel as having any bearing on this case. In particular, the Court's historically detailed analysis of the precise meaning and intent of the IRA statute did not stop at only an internal examination of the rhetoric of the bill *in isolation*, but put substantial weight on the government's documented interpretation of that language and its management of the issue with the same party. Yet, the Federal Circuit dismissed that analysis in one footnote and ignored the hundreds of exhibits of documented evidence that established objectively the countless times that the 1886 lands

[44] Wolfchild Petition, App. 53.

were referenced as held in trust for the Loyal Mdewakanton's benefit. In short, the Federal Circuit panel did what the courts in *Carcieri* did – which subjected the latter courts to reversal.

The *Carcieri* decision was pointedly brought to the panel's attention, yet with no analysis, the panel waived aside the Supreme Court's guidelines for looking at how, when, and whether the government places assets in trust for the benefit of Native American groups – especially involving communities not recognized at the time of the 1934 IRA.

The Supreme Court should reestablish and enforce the guidelines it provided in *Carcieri*.

In addition, the Federal Circuit's opinion ignored not only the analytical guidelines, but the *holding* of *Carcieri*. As such, it created a quagmire of issues that could and should have been avoided.

As it stands, the instant opinion concludes that, despite 100 years of trust management and repeated reassurance of the trust's existence and benefit, no trust ever existed. Yet, the Court then views the 1980 Act as authorizing the Department of the Interior to abolish all beneficial rights to land purchased and held for a specific group of Indians recognized since 1863 and to transfer all rights and benefits exclusively to small Indian communities – communities which did not exist in 1934 at the time of the IRA's passage. Consistent with *Carcieri*, the government

had *no* authority under the IRA to establish this new trust. If, as Petitioners argue and the evidence proves, the land was *already* held in trust for the benefit of a distinct group of Indians (the Loyals), recognized since 1863, there is *no* contradiction with *Carcieri*'s holding a trust already existed and the denoted beneficiaries' rights were to be "enhanced" in 1980 to allow the land's highest and best use for the benefit of the Loyal heirs. That effort to enhance the benefits to the designated beneficiaries was exactly what a trustee exercising its fiduciary responsibilities should have done in any case. That the government later failed to follow that 1980 Congressional mandate and breached its fiduciary duty to the Loyals does not change the historical or legal fact that a trust relationship had existed with the Loyals for over one hundred years and was not extinguished by the 1980 Act's enhancement of beneficiary rights.

VII. The Federal Circuit Opinion Appears to Create a New Strict Construction Standard and Rejects the Principle of a "General Trust Relationship Between the United States and the Indian People."

There is no dispute that the 1886 lands have been acquired, held and managed for the use and benefits of Loyal Mdewakanton for over a century. Particularly in light of the unique history here, this relationship is consistent with the principle that

there exists a "general trust relationship between the United States and the Indian people," *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*").

Yet, disregarding the general trust principle of *Mitchell II*, the Federal Circuit adopted the opposite approach – one of strict *statutory* construction against the existence of a trust. Where does this leave the principle enumerated in the *Mitchell* decisions? Has that principle been now discarded?

All Native Americans have an interest in the resolution of this issue. It deserves careful and clear consideration by this Court.

CONCLUSION

The Wolfchild and Zephier Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

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* * *

CHAP. XXXVII. – *An Act for the Relief of Persons for Damages sustained by Reason of Depredations and Injuries by certain Bands of Sioux Indians.*

Whereas the United States heretofore became bound by treaty stipulations to the Sisseton, Wahpaton, Medawakanton, and Wa[h]pakoota bands of the Dakota or Sioux Indians to pay large sums of money and annuities, the greater portion of which remains unpaid according to the terms of said treaty stipulations; and whereas during the past year the aforesaid bands of Indians made an unprovoked, aggressive, and most savage war upon the United States, and massacred a large number of men, women, and children within the State of Minnesota, and destroyed and damaged a large amount of property, and thereby have forfeited all just claim to the said moneys and annuities to the United States; and whereas it is just and equitable that the persons whose property has been destroyed or damaged by the said Indians, or destroyed or damaged by the troops of the United States in said war, should be indemnified in whole or in part out of the indebtedness and annuities so forfeited as aforesaid: Therefore –

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all treaties heretofore made and entered into by the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux or Dakota Indians, or

any of them, with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States.

SEC. 2. *And be it further enacted*, That two thirds of the balance remaining unexpended of annuities due and payable to said Indians for the present fiscal year, not exceeding one hundred thousand dollars, being two thirds of the annuities becoming due and payable to said Indians during the next fiscal year, is hereby appropriated, and shall be paid from the Treasury of the United States, out of any moneys not otherwise appropriated, to the commissioners hereinafter provided for, to be apportioned by them among the heads of families, or, in case of their decease, among the surviving members of families of the State of Minnesota who suffered damage by the depredations of the Sisseton, Wahpaton, Medawakanton, and Wa[h]pakoota bands of Sioux or Dakota Indians, or by the troops of the United States in the late Indian war in the State of Minnesota, not exceeding the sum of two hundred dollars to any one family, nor the actual damages aforesaid, and no moneys shall be paid under this section except upon those claims which shall be presented to said commissioners on or before the first day of June next, for the payment of which the said commissioners shall

take and return to the Secretary of the Interior and to the Secretary of the Treasury duplicate vouchers therefor, certified by them.

SEC. 3. *And be it further enacted*, That, for the purpose of making the proper distribution of the moneys hereby appropriated for the present relief of such families, and for the purpose of ascertaining the whole amount of said damages and the persons who have suffered the same, it shall be lawful for the President, by and with the advice and consent of the Senate, to appoint three commissioners, not more than one of whom shall be a resident of Minnesota, who shall take an oath in the manner prescribed by the laws of the United States to faithfully discharge their duties; they shall entertain and hear the complaints (in writing, duly verified on oath) of all and every person aggrieved by the depredations of said Indians, and by the troops of the United States in said war; they shall have power to compel he attendance of witnesses, and to administer the proper oaths to them to testify the truth; they shall have power to compel the claimants to be examined and cross-examined on oath, to be administered by them, as to their said claim; they shall hold their sessions at such times and places as will give the persons complaining the fairest opportunity of verifying their claim with the least expense; they shall take care that no unjust or fictitious claim shall be established; and if they have any reason to suppose that any such claim is presented, they shall have power, and it shall be their duty, to procure any countervailing proof, to

their knowledge, that the same may be finally rejected. The testimony of the witnesses and the examination of the complainant shall be reduced to writing, signed and certified by them, respectively, and shall, with the petition and all the papers relating to each case, with the finding of the commission, be transmitted to the Secretary of the Interior for his approval, rejection, or modification, to be by him laid before the next Congress. A majority of the commission may select their presiding officer, and shall be competent to decide all questions arising before them.

SEC. 4. *And be it further enacted*, That said commissioner shall hold their first session at Saint Peter's, in the State of Minnesota, on or before the first day of April next, for the hearing of claimants, and that all claims must be presented to said commissioners on or before the first day of September next, or the same shall not be heard by them; and the said commissioners shall make and return their finding, and all the papers relating thereto, on or before the first day of December next.

SEC. 5. *And be it further enacted*, That said commissioners shall receive for their services and expenses the sum of two thousand five hundred dollars each. And they are authorized to depute a proper person to summon witnesses, who shall be entitled to receive his actual expenses, to be allowed by said commissioners, and the sum of three dollars per day for his services. Witnesses subpoenaed in behalf of the United States shall receive pay for

attendance, not to exceed the fees allowed by the laws of Minnesota for witnesses attending justices' courts. And, for paying the expenses of said commission, the further sum of ten thousand dollars is hereby appropriated out of the said annuities in the Treasury of the United States, or so much thereof as may be necessary to pay the same.

SEC. 6. *And be it further enacted*, That the Secretary of the Interior, immediately after the passage of this act, shall cause the same to be published in four of the newspapers of the State of Minnesota which, in his opinion, will give the most publicity to the same among the people who have suffered by said depredations, and give notice of the first meeting of said commissioners, the expenses to be paid out of the sum appropriated in the next preceding section.

SEC. 7. *And be it further enacted*, That if the complainant, or any witness testifying before said commissioners, shall be guilty of perjury, upon conviction thereof in the proper court of the United States, he shall suffer the pains and penalties prescribed by the laws of the United States for that offence.

SEC. 8. *And be it further enacted,* That the said commissioners may make rules, not inconsistent with this act, prescribing the order and mode of presenting, prosecuting, and proving said claims before them, which rules shall be published in one newspaper in the city of Saint Paul and one in Saint Peter

for at least two weeks prior to the first session of said commission, to be held at Saint Peter as directed in the fourth section of this act, and the expenses of each publication shall be paid out of the fund appropriated in the fifth section of this act.

SEC. 9. *And be it further enacted*, That the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and 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.

SEC. 10. *And be it further enacted,* That said commissioners, before entering upon the discharge of their duties as such, shall give bonds in the usual form to the United States, in the sum of twenty thousand dollars each, with good and sufficient security, to be approved by the Secretary of the Treasury, faithfully to discharge their duties as such, and to account for any money which may come into their hands.

APPROVED, February 16, 1863.

* * *

Chap. CXIX. – *An Act for the Removal of the Sisseton, Wahpaton, Medawakanton, and Wahpakoota Bands of Sioux or Dakota Indians, and for the Disposition of their Lands in Minnesota and Dakota.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized and hereby directed to assign to and set apart for the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux Indians a tract of unoccupied land outside of the limits of any state, sufficient in extent to enable him to assign to each member of said bands (who are willing to adopt the pursuit of agriculture) eighty acres of good agricultural lands, the same to be well adapted to agricultural purposes.

SEC. 2. *And be it further enacted*, That the several tracts of land within the reservations of the said Indians, shall be surveyed, under the direction of the commissioner of the general land-office, into legal subdivisions to conform to the surveys of the other public lands. And the Secretary of the Interior shall cause each legal subdivision of the said lands to be appraised by discreet persons to be appointed by him for that purpose. And in each instance where there are improvements upon any legal subdivision of said lands, the improvements shall be separately appraised. But no portion of the said lands shall be

subject to preemption, settlement, entry, or location, under any act of Congress, unless the party preempting, settling upon, or locating any portion of said lands shall pay therefor the full appraised value thereof, including the value of the said improvements, under such regulations as hereinafter provided.

SEC. 3. *And be it further enacted,* That after the survey of the said reservations the same shall be open to preemption, entry, and settlement in the same manner as other public lands: *Provided*, That before any person shall be entitled to enter any portion of the said lands by preemption or otherwise, previous to their exposure to sale to the highest bidder, at public outcry, he shall become an actual bona fide settler thereon, and shall conform to all the regulations now provided by law in cases of preemption; and shall pay, within the term of one year from the date of his settlement, the full appraised value of the land, and the improvements thereon, to the land officers of the district where the said lands are situated. And the portions of the said reservations which may not be settled upon, as aforesaid, may be sold at public auction, as other public lands are sold, after which they shall be subject to sale at private entry, as other public lands of the United States, but no portion thereof shall be sold for a sum less than their appraised value, before the first of January, Anno Domini eighteen hundred and sixty-five, nor for a less price than one dollar and twenty-five cents per acre, until otherwise provided for by law.

SEC. 4. *And be it further enacted,* That the money arising from said sale shall be invested by the Secretary of the Interior for the benefit of said Indians in their new homes, in the establishing them in agricultural pursuits: *Provided,* That it shall be lawful for said Secretary to locate any meritorious individual Indian of said bands, who exerted himself to save the lives of the whites in the late massacre, upon said lands on which the improvements are situated, assigning the same to him to the extent of eighty acres, to be held by such tenure as is or may be provided by law: *And provided, further,* That no more than eighty acres shall be awarded to any one Indian, under this or any other act.

SEC. 5. *And be it further enacted,* That the money to be annually appropriated for the benefit of the said Indians shall be expended in such manner as will, in the judgment of the Secretary of the Interior, best advance the said Indians in agricultural and mechanical pursuits, and enable them to sustain themselves without the aid of the government; but no portion of said appropriations shall be paid in money to said Indians. And in such expenditure, said Secretary may make reasonable discrimination in favor of the chiefs who shall be found faithful to the Government of the United States, and efficient in maintaining its authority and the peace of the Indians. Said Indians shall be subject to the laws of the United States, and to the criminal laws of the state or territory in which they may happen to reside. They shall also be subject to such rules and

regulations for their government as the Secretary of the Interior may prescribe; but they shall be incapable of making any valid civil contract with any person other than a native member of their tribe, without the consent of the President. The Secretary of the Interior shall also make reasonable provision for the education of said Indians, according to their capacity and the means at his command.

APPROVED, March 3, 1863.

96TH CONGRESS } HOUSE OF { REPORT
2d Session } REPRESENTATIVES { No. 96-1409

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

SEPTEMBER 26, 1980 – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs submitted the following

REPORT

[To accompany H.R. 7147]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, report favorably thereon with an amendment and recommend than the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); The Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter to be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres
of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall – (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

PURPOSE

The purpose of H.R. 7147, introduced by Mr. Nolan, is to provide that certain lands now held by the United States for the benefit of certain Mdewakanton Sioux Communities of Minnesota.

BACKGROUND

H.R. 7147 provides that the title of the United States to certain lands held for the benefit of certain Mdewakanton Sioux or their descendants will be held in trust for the three existing tribal entities of the Mdewakanton Sioux.

After the Great Sioux Uprising of 1856, Congress enacted legislation in 1888, 1889, and 1890, authorizing the appropriation of funds to acquire lands for members of the Mdewakanton Sioux tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups, who organized under that Act. In order to protect the rights of descendants of those Sioux for whom the 1886 lands were acquired, the constitution and bylaws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs.

H.R. 7147 would eliminate this distinction by providing that the 1886 lands will be held in trust by the United States for the benefit of the three Mdewakanton communities.

COMMITTEE AMENDMENT

The Committee adopted an amendment in the nature of a substitute proposed by the Department of the Interior. The only substantive changes that amendment makes is (1) to include a 40 acre tract of land which was inadvertently excluded from H.R. 7147 as introduced and (2) to provide that the Secretary of the Interior would publish in the Federal Register an accurate description of the lands to be transferred rather than setting out the legal description in the bill as introduced.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that all right, title and interest of the United States to certain lands which were acquired for the benefit of certain Mdewakanton Sioux pursuant to three Acts of Congress will be held by the United States in trust for the benefit of three Mdewakanton Sioux Communities in Minnesota.

Section 2 provides that the Secretary of the Interior shall cause an accurate description of such lands to be published in the Federal Register and that such lands will be a part of the reservation of the respective Sioux communities.

Section 3 provides that nothing in the Act shall affect any existing rights in the lands being transferred.

COST AND BUDGET ACT COMPLIANCE

Enactment of H.R. 7147 will result in no cost to the United States. The cost analysis prepared by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 11, 1980.

Hon. MORRIS K. UDALL,
Chairman Committee on Interior and Insular Affairs, U.S. House of Representatives, Longworth House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 7147, a bill to provide that certain land of the United States shall be held by the anited States in trust for certain communities of the Mdewakanton Sioux in Minnesota, as ordered reported by the House Committee on Interior and Insular Affairs, September 10, 1980.

The bill would change the legal status of certain parcels of land currently owned by the United States, to that of land specifically held in trust for the three Sioux communities identified in the bill. This technical change in the status is expected to facilitate community development on the reservations. Based on the review of this bill, it appears that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director*.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 7147 will result in no inflationary impact.

OVERSIGHT STATEMENT

No specific oversight activities were undertaken by the Committee with respect to this legislation and no recommendations were submitted to the Committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by voice vote, recommends approval of the bill, as amended.

DEPARTMENTAL REPORT

The favorable report of the Department of the Interior, dated September 9, 1980, follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 9, 1980.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
U.S. House of Representatives, Washington, D.C.

Dear MR. CHAIRMAN: This reports to your request for our views on H.R. 7147, a bill "To provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota."

We recommend the adoption of the enclosed amendment to H.R. 7147 in the nature of a substitute and the enactment of the bill as so amended.

H.R. 7147 would declare that all right, title, and interest of the United States in land in Minnesota held by the United States for the use of certain Mdewakanton Sioux Indians under the Acts of June 29 1888 (25 Stat. 217), March 2, 1889 (25 Stat. 980), and August 19, 1890 (26 Stat. 336), shall be held by the United States in trust as follows:

> (1) some 258.25 acres of land located in Scott County, all in township 115 north, range 22 west, would be held in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;
>
> (2) some 492.5 acres of land located in Redwood County all in township 112 north, range 35 west, would be held by the United States in trust for the Lower Sioux Indian Community of Minnesota; and
>
> (3) some 120 acres of land located in Goodhue County in township 114 north, range 15 west, would be held by the United States in trust

for the Prairie Island Indian Community of Minnesota.

Land held in trust for each community under the bill would be a part of the reservation of such community. The bill would not affect any contract, lease, or assignment with respect to the land involved which is in existence on the date of the enactment of the bill. We note that the bill fails to include in the description of the land located in Redwood County two 40-acre tracts in section 2 of township 112 north, range 35 west, which should be so included – (1) the southwest quarter northeast quarter and (2) the northwest quarter southeast quarter.

In 1888, the Department of the Interior requested the appropriation of "$20,000 for support of the Mdewakanton Band of Sioux Indians in Minnesota." House Ex. Doc. 228, 50th Cong., 1st Sess. The requested provision was added as a floor amendment, proposed by Rep. MacDonald of Minnesota, to an Indian affairs appropriations bill. The sponsor stated that during a Sioux uprising in Minnesota during August 1862, "a few of the [Sioux] remained friendly to the whites and became their trusted allies and defenders and . . . did valuable service in protecting our people and their property and, in saving many lives. . . ." However, under the Act of February 16, 1863, all treaties with the four Sioux Bands involved were "abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States" because of the uprising. "I am

almost ashamed to say it," the sponsor stated, "but the fact is that no exception was made, even in favor of these friendly Indians." Cong. Rec. 2976-2978 (50th Cong., 1st Sess.)

The resulting Act of June 29, 1888, included the provision as follows:

> For the support of the full-blood Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands. . . . (25 Stat. at 228-229)

A similar provision was included in the Act of March 2, 1889 (25 Stat. 980). It provided for a $12,000 appropriation, added to the Indian beneficiaries those "who were then [May 20, 1886] engaged in removing to said State and have since resided therein," and specified that $10,000 could be used in the purchase of such lands and items as "may be deemed best in the case of each of these Indians or family thereof." It also provided that if the amounts appropriated under that Act or Act of June 29, 1888, were not expended within the fiscal year for which they were appropriated, they were to remain available for the purposes for which they were appropriated.

The Act of August 19, 1890, included the appropriation of $8,000 for the Minnesota Sioux, utilizing essentially the same language (26 Stat. at 349) as the 1889 Act except that the 1890 Act applied to "mixed blood" as well as full blood Indians and did not contain the provision making the funds available beyond the fiscal year.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

The Shakopee Mdewakanton Sioux Community is organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and its governing body is the General Council of the members of the community. No lands are now held in trust by the United States for the community. The 258.25 acres which H.R. 7147 would declare held in trust for such community were acquired in three transactions in 1890 and 1891 at a total cost of $4,733. The land has a current value of approximately $774,750 ($3,000 per acre).

The Lower Sioux Indian Community is organized under the Indian Reorganization Act and governed by

its Community Council. Some 872.5 acres of land are now held by the United States in trust for the community. The 572.5 acres (if the bill is amended to include the 80 acres erroneously omitted) that the bill would declare held in trust for such community were acquired in five transactions in 1889 at a total cost of $8,357.22. Their current value is approximately $572,500 ($1,000 per acre).

The Prairie Island Indian Community is also organized under the Indian Reorganization Act and is governed by its Tribal Council. Some 414 acres of land are now held in trust by the United States for the community. The 120 acres which H.R. 7147 would declare held in trust for such community were acquired in a single transaction in 1889 at a cost of $1,560 and have a current value of approximately $180,000 ($1,500 per acre).

It should be noted the current membership of these three communities is not exclusively composed of the class of Mdewakanton Sioux individuals for whose benefit such land is now held by the United States. However, it should also be noted that the cost to the United States of lands purchased under the 1888, 1889, and 1890 Acts was set off against the recovery by the Mdewakanton and Wahpakoota Bands of Sioux Indians in their suit against the United States (57 Ct. Cl. 357 (1922)), the beneficiaries of which included many individuals other than those for whom such land was held by the United States.

In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which require long-term lease provisions with an encumberable document as loan security. However, such use is not now possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

We suggest, in order to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error, that

the enclosed amendment to H.R. 7147 in the nature of a substitute be adopted. The amendment would provide for the publication in the Federal Register of the legal description of the land involved, a method by which any error may be more easily corrected. It also makes minor technical changes in the language of H.R. 7147.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

THOMAS W. FREDERICK,
Assistant Secretary.

Enclosure.

AMENDMENT TO H.R. 7147
IN THE NATURE OF A SUBSTITUTE

Strike out all after the enacting clause and insert in lieu thereof the following:

That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are

hereby declared to hereafter be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota, and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall – (1) alter, or require the alteration of, any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Calendar No. 1178

96TH CONGRESS } SENATE { REPORT
2d Session } { No. 96-1047

PROVIDING THAT CERTAIN LAND OF THE UNITED STATES SHALL BE HELD BY THE UNITED STATES IN TRUST FOR CERTAIN COMMUNITIES OF THE MDEWAKANTON SIOUX IN MINNESOTA

DECEMBER 1 (legislative day, NOVEMBER 20), 1980. –
Order to be printed

Mr. MELCHER, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 7147]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 7147) to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

H.R. 7147 provides that three parcels of land totaling approximately 1,000 acres situated in the State of Minnesota which were acquired by the

United States for the use and benefit of the Mdewakanton Sioux Indians under three separate Acts of Congress in the late 1800's shall continue to be held by the United States but in trust for three separate Mdewakanton Sioux communities situated in that State.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were en route to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above, all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities. The rights of individuals whom an interest has already been assigned are protected under the provision of Section 3 of the bill.

BACKGROUND AND NEED

After the Great Sioux Uprising of 1856 Congress enacted legislation in 1888, 1889, and 1890 authorizing the appropriation of funds to acquire lands for members of the Mdewakanton Sioux Tribe who did not participate in such uprising. These lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota as of 1886 and their descendants.

After the enactment of the Indian Reorganization Act of 1934, additional lands were acquired in trust for the benefit of the three Mdewakanton groups who organized under that Act. In order to protect the rights of descendants of those Sioux, for whom the 1886 lands were acquired, the constitution and by-laws of the groups established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands.

This distinction has severely hampered the tribal efforts to achieve self-determination, as well as effectively barred the Mdewakanton from participation in several Federal programs. In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which require long-term lease provisions with an encumberable document as loan security. However, such use is not now, possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing

availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

LEGISLATIVE HISTORY

H.R. 7147 was introduced by Representative Nolan of Minnesota and was favorably reported by the House Committee on Interior and Insular Affairs on September 26, 1980. The bill passed the House and was referred to the Senate Select Committee November 19, 1980. There is no comparable Senate bill.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, by a poll of its members on December 1, 1980, by unanimous vote recommends that the Senate pass H.R. 7147 without amendment.

COMMITTEE AMENDMENTS

There are no Committee amendments.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that certain lands totaling approximately 1,000 acres situated in the State of Minnesota which were acquired by the United States under three separate Acts of Congress for the use or benefit of certain Mdewakanton Sioux Indians and their descendants are declared to hereafter be held by the United States in trust for three separate Sioux Indian communities. The purpose of this section is to change and clarify the legal status of the lands in question in order to enhance the beneficial use of the lands.

Section 2 provides that the Secretary of the Interior shall publish in the Federal Register a description of the lands involved and provides further that such lands shall be a part of the reservations of the communities for which they are held in trust.

Section 3 provides that noting in this Act shall alter, or require the alteration, of any rights under any contract, lease, or assignment of such lands entered into or issued prior to enactment of this legislation this protects the rights of all persons having a present interest in the lands.

COST AND BUDGETARY CONSIDERATION

The cost estimate for H.R. 7147, as provided by the Congressional Budget Office, is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., December 1, 1980.

Hon. JOHN MELCHER,
Chairman Select Committee on Indian Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 7147, a bill to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota, as ordered reported by the Senate Select Committee on Indian Affairs, December 1, 1980.

The bill would change the legal status of certain parcels of land, currently owned by the United States, to that of land specifically held in trust for the three Sioux communities indentified in the bill. This technical change in the status is expected to facilitate community development on the reservations. Based on the review of this bill, it appears that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director*.

REGULATORY IMPACT STATEMENT

Paragraph 6 of rule XXVII of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

The Committee believes that the bill H.R. 7147 will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATION

The Executive Communication of the Department of the Interior dated November 19, 1979, transmitting departmental views on H.R. 7147 to the House of Representatives, is as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 9, 1980.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: your request for our views on H.R. 7147, a bill "To provide that certain land, of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota."

We recommend the adoption of the enclosed amendment to H.R. 7147 in the nature of a substitute and the enactment of the bill as so amended.

H.R. 7147 would declare that all right, title, and interest of the United States in land in Minnesota held by the United States for the use of certain Mdewakanton Sioux Indians under the Acts of June 29 1888 (25 Stat. 217), March 2, 1889 (25 Stat. 980), and August 19, 1890 (26 Stat. 336), shall be held by the United States in trust as follows:

> (1) some 258.25 acres of land located in Scott County, all in township 115 north, range 22 west, would be held in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;
>
> (2) some 492.5 acres of land located in Redwood County all in township 112 north, range 35 west, would be held by the United States in trust for the Lower Sioux Indian Community of Minnesota; and
>
> (3) some 120 acres of land located in Goodhue County in township 114 north, range 15 west, would be held by the United States in trust for the Prairie Island Indian Community of Minnesota.

Land held in trust for each community under the bill would be a part of the reservation of such community. The bill would not affect any contract, lease, or assignment with respect to the lands involved which is in existence on the date of the enactment of the bill. We note that the bill fails to include in the description of the land located in Redwood County two 40-acre tracts in section 2 of township 112 north, range 35 west, which should be so included – (1) the southwest quarter northeast

quarter and (2) the northwest quarter southeast quarter.

In 1888, the Department of the Interior requested the appropriation of "$20,000 for support of the Mdewakanton Band of Sioux Indians in Minnesota." House Ex. Doc. 228, 50th Cong., 1st Sess. The requested provision was added as a floor amendment, proposed by Rep. MacDonald of Minnesota, to an Indian affairs appropriations bill. The sponsor stated that during a Sioux uprising in Minnesota during August 1862, "a few of the [Sioux] remained friendly to the whites and became their trusted allies and defenders and . . . did valuable service in protecting our people and their property, and in saving many lives. . . ." However, under the Act of February 16, 1863, all treaties with the four Sioux Bands involved were "abrogated and annulled, and all the lands, annuities, and claims previously accorded to said Indians were declared to be forfeited to the United States" because of the uprising. "I am almost ashamed to say it," the sponsor stated, "but the fact is that no exception was made, even in favor of these friendly Indians." Cong. Rec. 2976-2978 (50th Cong., 1st Sess.)

The resulting Act of June 29, 1888, included the provision as follows:

> "For the support of the full-blood Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations, twenty thousand dollars, to be

> expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands . . . " (25 Stat. at 228-229)

A similar provision was included in the Act of March 2, 1889 (25 Stat. 980). It provided for a $12,000 appropriation, added to the Indian beneficiaries those "who were then [May 20, 1886] engaged in removing to said State and have since resided therein," and specified that $10,000 could be used in the purchase of such lands and items as "may be deemed best in the case of each of these Indians or family thereof." It also provided that if the amounts appropriated under that Act or Act of June 29, 1888, were not expended within the fiscal year for which they were appropriated, they were to remain available for the purposes for which they were appropriated.

The Act of August 19, 1890, included the appropriation of 8,000 for the Minnesota Sioux, utilizing essentially the same language (26 Stat. at 349) as the 1889 Act except that the 1890 Act applied to "mixed blood" as well as full blood Indians and did not contain the provision making the funds available beyond the fiscal year.

The effect of H.R. 7147 would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided

in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the bill, as noted above all right title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

The Shakopee Mdewakanton Sioux Community is organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and its governing body is the General Council of the members of the community. No lands are now held in trust by the United States for the community. The 258.25 acres which H.R. 7147 would declare held in trust for such community were acquired in three transactions in 1890 and 1891 at a total cost of $4,733. The land has a current value of approximately $774,750 ($3,000 per acre).

The Lower Sioux Indian Community is organized under the Indian Reorganization Act and governed by its Community Council. Some 872.5 acres of land are now held by the United States in trust for the community. The 572.5 acres (if the bill is amended to include the 80 acres erroneously omitted) that the bill would declare held in trust for such community were acquired in five transactions in 1889 at a total cost of $8,357.22. Their current value is approximately $572,500 ($1.000 per acre).

The Prairie Island Indian Community is also organized under the Indian Reorganization Act and is governed by its Tribal Council. Some 414 acres of land are now held in trust by the United States for

the community. The 120 acres which H.R. 7147 would declare held in trust for such community were acquired in a single transaction in 1889 at a cost of $1,560 and have a current value of approximately $180,000 ($1,500 per acre).

It should be noted the current membership of these three communities is not exclusively composed of the class of Mdewakanton Sioux individuals for whose benefit such land is now held by the United States. However, it should also be noted that the cost to the United States of lands purchased under the 1888, 1889, and 1890 Acts was set off against the recovery by the Mdewakanton and Wahpakoota Bands of Sioux Indians in their suit against the United States (57 Ct. Cl. 357 (1922)), the beneficiaries of which included many individuals other than those for whom such land was held by the United States.

In the case of the Lower Sioux and Prairie Island Communities, the land acquired under the 1888, 1889, and 1890 Acts for individuals is interspersed among the land now held in trust for the communities. The result is a checkerboard pattern of land used that severely diminishes the effectiveness of overall land management programs and community development.

With respect to each of the three communities, much of the land that would be affected would be useful for residential or community purposes, which

require long-term lease provisions with an encumberable document as loan security. However, such use is not now possible because of the unusual ownership status of the land which, since it requires the Secretary of the Interior to assure the continuing availability of the land for assignment to eligible beneficiaries of the three Acts, effectively prohibits the issuance of long-term leases on it. Further, the land assignments made to those Mdewakanton Sioux individuals eligible under the Acts are not encumberable documents that can be used in securing loans from commercial institutions. The change in the lands' status contemplated by H.R. 7147, to lands held in trust for the three communities, would allow more productive use of the land by eliminating these problems and would enable the communities involved to manage all of their lands more efficiently.

We suggest, in order to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error, that the enclosed amendment to H.R. 7147 in the nature of a substitute be adopted. The amendment would provide for the publication in the Federal Register of the legal description of the land involved, a method by which any error may be more easily corrected. It also makes minor technical changes in the language of H.R. 7147.

The Office of Management and Budget has advised that there is no objection to the presentation of

this report from the standpoint of the administration's program.

THOMAS W. FREDERICK,
Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with subsection (7) of rule XXVII of the Standing Rules of the Senate, the Committee notes that there are no changes in existing law.

94 STAT. 3262

PUBLIC LAW 96-557 – DEC. 19, 1980

Public Law 96-557
96th Congress

An Act

To provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such land) which were acquired and are not held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Approved December 19, 1980.