No. _____

In The
Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

Attorneys for Petitioners

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

QUESTIONS PRESENTED

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

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

QUESTIONS PRESENTED – Continued

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

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

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

LIST OF PARTIES

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

CORPORATE DISCLOSURE STATEMENT

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

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

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

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

STATEMENT OF THE CASE[1]

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

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

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

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

here, the Supreme Court has long held that the federal courts follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'"[3] Thus, Acts of Congress relating to Indians are construed in such a manner to give the greatest protection possible to Indians.[4] Statutes concerning the rights of Indians are to be construed in their favor.[5]

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

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[3] *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973) (*quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)); *accord, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] CA1079, 1087.

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

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

III. Status quo since 1980 Act.[18]

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

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

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

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

[18] 94 Stat. 3262.

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

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

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

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

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

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

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

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

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[22] CA3040, 3041-3043, 3046.

[23] CA3040.

[24] CA3047-3050.

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

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

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

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

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

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

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

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

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

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

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

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

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

[33] CA3243-3256.

[34] CA1209-1532.

[35] CA1210.

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

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

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

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

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

[39] CA3063-3073, 3078.

[40] CA3063-3073.

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

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

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[41] CA3079.

[42] Solicitor Opinions at 486-487.

[43] CA2951-2956.

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

[45] CA2914-2917, 2955-2956.

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

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

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

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[46] CA2924-2927.

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

[48] CA2951-2956.

[49] CA3019-3022.

[50] CA2215.

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

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

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

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

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

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

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

[54] CA3179.

[55] CA3180-81.

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

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

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

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

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

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[57] CA3089.

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

[59] CA2006-2209.

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

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

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

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

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

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

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[62] CA3041.

[63] CA2212-2214.

[64] *Id.*

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

[66] *See* CA1618-1871.

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

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

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

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

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

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

(Continued on following page)

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

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

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

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

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

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

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

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

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

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

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

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

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

[77] CA3453.

[78] CA2387.

[79] CA2424.

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

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

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

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

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

[81] *Id.*

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

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

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

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

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

[85] CA1124-1149 (Henton census).

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

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

[88] CA1595, 2567-2568, 2879.

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

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

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

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

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

[91] CA1622-1718.

taken in the United States, leaving the further conveyance thereof to the Indians subject to such further determination as may be authorized by law."[92] However, federal officials frequently referred to the 1886 lands as being in trust for the Mdewakanton Band.[93] As the February 16, 1863 Act declared, "The land so set apart . . . shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever."[94]

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

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

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[92] CA2598.

[93] CA1613-1614.

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

[95] CA1622-1718.

[96] *Id.*

[97] *Id.*

[98] CA2595.

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

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

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

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[99] CA1798.

[100] *Id.*

[101] *Id.*

[102] CA2813, 2821-2831.

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

[104] CA1596-1597, 2009.

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

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

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

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[106] *Id.*

[107] *Id. See* CA1798.

[108] CA2858.

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

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

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

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

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[111] *Id.*

[112] *Id.*

[113] CA2898-2899.

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

[115] *Id.*

[116] *Id. See also* CA2795.

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

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

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

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

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

[120] *Id.*

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

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

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[121] *Id.*

[122] *Id.*, § 16, 48 Stat. at 987.

[123] *Id.*

[124] *Id.*, § 19, 48 Stat. at 987.

[125] 555 U.S. at 391.

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

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

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

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

[127] *Id.*

[128] CA2812, 2889.

[129] *Id*.

[130] *Id*.

[131] *Id*.

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

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

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

1935, the 1886 Lands had been set apart under these statutes for the Mdewakanton Band.[135] The February 16, 1863 Act states that, "The land so set apart . . . shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever."[136]

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

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

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

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

[138] CA2832.

[139] CA2833.

[140] CA2840-2841.

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

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

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

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[141] *Id.*

[142] CA2840-2841.

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

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

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

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

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

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

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[146] CA2850.

[147] CA1161-1162.

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

[149] CA1079, 1087.

[150] CA2837.

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

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

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

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

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

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

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

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

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

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

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[155] CA2974.

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

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

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

[159] *Id.*

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

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

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[160] CA2210-2211.

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

REASONS FOR GRANTING PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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

Attorneys for Petitioners

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United States Court of Appeals,
Federal Circuit.

Sheldon Peters WOLFCHILD, Ernie Peters Longwalker, Scott Adolphson, Morris J. Pendleton, Barbara Feezor Buttes, Winifred St. Pierre Feezor, Autumn Weaver, Aries Bluestone Weaver, Elijah Bluestone Weaver, Ruby Minkel, Lavonne A. Swenson, Willis Swenson, Aaron Swenson, Beverly M. Scott, Lillian Wilson, Monique Wilson, Sandra Columbus Geshick, Cheryl K. Lorusso, Jennifer K. Lorusso, Cassandra Shevchuk, Jason Shevchuk, James Paul Wilson, Eva Grace Wilson, Benita M. Johnson, And Kevin Lorusso, Plaintiffs-Cross Appellants,
and
Anita D. Whipple et al., Descendants of Lucy Trudell, Bonnie Rae Lowe, et al., Descendants of Joseph Graham, et al., Lenor Ann Scheffler Blaeser et al., Descendants of John Moose, and Mary Beth Lafferty, et al., Plaintiffs,
and
Coursolle Descendants and Rocque and Taylor Descendants, Plaintiffs,
and
Deborah L. Saul, Laura Vassar, et al., Lydia Ferris et al., Daniel M. Trudell, et al., Robert Lee Taylor, et al., and Dawn Henry, Plaintiffs,
and
Raymond Cermak, Sr., (acting individually and under a power of attorney for Stanley F. Cermak, Sr.), Michael Stephens, et al., Jesse Cermak, et al., Denise Henderson, Delores Klingberg,

Sally Ella Alkire, Pierre Arnold, Jr., and
Getrude Godoy et al., Plaintiffs,
and
John Does 1-30, Winona C. Thomas Enyard,
and Kitto, et al., Plaintiffs,
and
Francine Garreau, et al., Plaintiffs,
and
Francis Elaine Felix, Plaintiff,
and
Ke Zephier, et al., Plaintiffs,
and
Lower Sioux Indian Community, Plaintiff,
and
Philip W. Morgan, Plaintiff,
and
Rebecca Elizabeth Felix, Plaintiff,
and
Vera A. Rooney, et al., Plaintiffs,
and
Danny Lee Mozak, Plaintiff-Cross Appellant,
and
Dawn Burley, et al. Plaintiffs-Cross Appellants,
and
Harley Zephier, Sr., Plaintiff-Cross Appellant,
and
John Does 1-433, Plaintiffs-Cross Appellants,
and
Julia Dumarce, et al., Plaintiffs-Cross Appellants,
and
Raymond Cournoyer, Sr., et al., Jerry Robinette,
et al., Sandra Kimbell, et al., Charlene Wanna,
et al., and Leslie Lee French, et al.,
Plaintiffs-Cross Appellants,

and
Kristine Abrahamson, Plaintiff-Cross-Appellant,
and
Victoria Robertson Vadnais,
Plaintiff-Cross Appellant,
v.
UNITED STATES, Defendant-Appellant.

Nos. 2012-5035, 2012-5036, 2012-5043. |
Sept. 27, 2013.

Attorneys and Law Firms

Erick G. Kaardal, Mohrman & Kaardal, P.A., of Minneapolis, MN, argued for plaintiffs-cross appellants, Sheldon Peters Wolfchild, et al.

Gary J. Montana, Montana & Associates, of Osseo, Wisconsin, argued for plaintiffs-cross appellants, Julia Dumarce Group, et al. and Robin L. Zephier, Abourezek & Zephier, of Rapid City, SD, argued for Plaintiff-Cross Appellant, Harley Zephier, Sr. With them on the brief was R. Deryl Edwards, JR., Attorney at Law, of Joplin, Missouri.

John L. Smeltzer, Attorney, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Ignacia S. Moreno, Assistant Attorney General, Aaron Avila and Jody Schwarz, Attorneys.

Philip Baker-Shenk, Holland & Knight, LLP, of Washington, DC, for amici curiae.

Before RADER, Chief Judge, REYNA, and TARANTO, Circuit Judges.

Opinion

Opinion for the court filed by Circuit Judge TARANTO.

Opinion concurring-in-part and dissenting-in-part filed by Circuit Judge REYNA.

TARANTO, Circuit Judge.

The United States currently holds certain tracts of land in Minnesota in trust for three Indian communities. It originally acquired some of that land in the late 1800s, using funds appropriated by Congress to help support a statutorily identified group of Indians, and held it for the benefit of those Indians and their descendants for decades. As time passed, that beneficiary group and the three present-day communities that grew on these lands overlapped but diverged: many of the beneficiary group were part of the communities, but many were not; and the communities included many outside the beneficiary group. In 1980, Congress addressed the resulting landuse problems by putting the lands into trust for the three communities that had long occupied them. Ever since, proceeds earned from the lands – including profits from gaming – have gone to the same three communities.

The discrepancy between the makeup of the three communities and the collection of descendants of the Indians designated in the original appropriations acts

underlies the present dispute, which was before this court once before. Claimants allege that they belong to the latter group and that they, rather than the communities, hold rights to the land at issue and any money generated from it. Four years ago, based on an extensive analysis of the relevant laws and history, we rejected what was then the only live claim, which got to the heart of their assertion: that the appropriations acts created a trust for the benefit of the statutorily designated Indians and their descendants. *Wolfchild v. United States,* 559 F.3d 1228 (Fed.Cir.2009). On remand, claimants advanced several new claims, some of which seek proceeds generated from the lands, others of which seek more. Again unable to find that claimants have stated a claim that meets the standards of governing law, we now reject these new claims, including the one that the Court of Federal Claims held valid in the judgment we review.

BACKGROUND

A

The Minnesota Sioux originally lived along a northern stretch of the Mississippi River. But in the middle of the nineteenth century, including in treaties of 1851 and 1858, the group ceded its aboriginal land to the United States. In return for territory and promises of peace, the Sioux received a reservation along the Minnesota River (a tributary of the Mississippi) and assurances of compensation.

This arrangement was short-lived. By 1862, many of the Sioux, whose grievances we need not detail, rebelled. The United States defeated the uprising, but not before many non-Indian settlers had been killed and their property damaged.

Congress responded to the rebellion with two statutes in early 1863. The first annulled all treaties with the Sioux and declared that much of the money still owing to the Indians would be paid to non-Indian Minnesota families harmed during the conflict. Act of Feb. 16, 1863, ch. 37, 12 Stat. 652. The second, passed the following month, focused on moving the rebellious Sioux out of Minnesota and redistributing their former reservation land. Act of Mar. 3, 1863, ch. 119, 12 Stat. 819.

Both statutes, however, also recognized that some individual Sioux had remained loyal to the United States during the revolt and were now left without benefits under the annulled treaties and without the tribal affiliation they had broken by siding with the United States. The February Act, therefore, authorized the Secretary of the Interior to "set apart . . . eighty acres in severalty to each individual . . . who exerted himself in rescuing the whites" and provided that any land "so set apart . . . shall be an inheritance to said Indians and their heirs forever." Act of Feb. 16, 1863, § 9, 12 Stat. at 654. The March Act similarly allowed the Secretary to locate any of the same "meritorious individual Indian[s]" on certain former reservation lands, "to be held by such

tenure as is or may be provided by law." Act of Mar. 3, 1863, § 4, 12 Stat. at 819.

Two years later, in 1865, the United States took additional steps to try to help the loyal Sioux. First, Congress appropriated $7,500 to "make . . . provision[s] for their welfare" because they were "entirely destitute." Act of Feb. 9, 1865, ch. 29, 13 Stat. 427. Shortly thereafter, the Secretary of the Interior approved the withdrawal from public sale of 12 sections of land (12 square miles, or 7,680 acres), invoking the land-allocating authority of the two 1863 Acts. But opposition from local residents developed, leading officials to abandon this effort to secure a more permanent settlement for the loyal Sioux. The 12 parcels were returned to public sale and sold.

Congress took no further action to assist the loyal Sioux until the 1880s. By that time, many of them had moved out of Minnesota, but a small number of Mdewakantons – the name of one of the bands of Minnesota Sioux – had remained in or returned to the state. Beginning in 1884, Congress appropriated funds that Interior paid directly to these Mdewakantons or used to buy land that was then transferred to them in fee. Many Mdewakantons failed to hold onto clean title in their land, however, and the federal government soon changed its approach.

In 1888, 1889, and 1890, Congress passed three statutes appropriating a total of $40,000 to support the Mdewakantons who had resided in (or been

moving to) Minnesota on May 20, 1886 and had "severed their tribal relations." Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349. The Acts authorized the Secretary to spend the funds on a number of items, including lands, cattle, horses, and agricultural implements. *Id.* With some of the money, the government purchased land in four Minnesota counties – Scott, Redwood, Goodhue, and Wabasha. This time, rather than transfer ownership rights directly to the Indians, the United States retained title in the land and assigned only rights of possession and use.

During the decades that followed, communities formed on the land in three of the four counties. Unsurprisingly, the communities consisted largely of Indians who had descended from the Mdewakantons identified in the 1888-1890 Acts and for whose benefit lands were purchased under those Acts. But the overlap between the communities and the class of statutory beneficiaries was not perfect: the communities included some people who were not descendants of these Mdewakantons, and not all of the descendants of these Mdweakantons were members of the three communities.

The 1934 enactment of the Indian Reorganization Act (IRA) had two significant consequences for the three communities. First, the Act granted Indians a right to "organize for [their] common welfare." Act of June 18, 1934, ch. 576, § 16, 48 Stat. 984, 987. The Secretary permitted the Minnesota communities to

organize as the Prairie Island Indian Community (on the land in Goodhue County), the Shakopee Mdewakanton Sioux Community (in Scott County), and the Lower Sioux Indian Community (in Redwood County). Second, the Act authorized the Secretary to purchase land for Indians and provided that title to any such land would be "taken in the name of the United States in trust" for the beneficiaries. *Id.* § 5, 48 Stat. at 985. After 1934, the government acquired additional territory for the Prairie Island and Lower Sioux communities under this statute and held those lands in trust for those two communities.

The three communities encountered difficulties in managing the land they occupied. A significant reason was that, while some of the land was held under the IRA for the communities as a whole, much of the land was held for the use and benefit of certain Mdewakantons, rather than the communities. In 1980, Congress set out to resolve the problem by declaring that "all right, title, and interest of the United States" in the land acquired under the 1888-1890 appropriations acts would "hereafter be held by the United States . . . in trust" for the three communities. Act of Dec. 19, 1980, Pub.L. No. 96-557, 94 Stat. 3262. That enactment equalized the status of the land acquired under the IRA and the land purchased under the 1888-1890 Acts: all the land was now held in trust for the benefit of those communities.

B

The varying rights to the land acquired in the aftermath of the 1862 rebellion have had significant consequences for the distribution of money related to that land. Over the years, the land has produced revenue in different ways. In 1944, for example, Congress generated $1,261.20 when it authorized the transfer to a wildlife refuge of land "no longer used by Indians" in Wabasha County – one of the four counties in which land was purchased under the 1888-1890 Acts. Act of June 13, 1944, Pub.L. No. 78-335, §§ 1-2, 58 Stat. 274. Later, but still before 1980, the Department of the Interior leased or licensed land bought under the 1888-1890 Acts when no eligible Mdewakanton was available for assignment, and it then either passed the proceeds to third parties or held them in accounts at the Treasury Department. After 1980, the introduction of casino gambling on the land generated substantial profits.

To date, the three communities and their members have received all of this money. In 1981 and 1982, Interior disbursed to the three communities funds derived from the Wabasha County land transfer and from the leasing of unused lands – amounting to $61,725.22 in 1975, over $130,000 at the time of disbursement, and about $675,000 today. The extensive gaming profits earned from casinos and other businesses have likewise gone to members of the communities for whom the lands are currently held in trust.

This lawsuit began as – and to a large extent continues to be – a dispute about those revenues. In 2003, a group claiming to be descendants of the Mdewakantons who were eligible for benefits under the 1888-1890 Acts brought suit against the government. The principal theory asserted was that the 1888-1890 Acts created a trust for their benefit and that the government had breached that trust by allowing proceeds from the lands purchased under those Acts to go to the three communities. In 2009, in an interlocutory appeal, we rejected that argument, holding that the 1888-1890 Acts did not create a trust for the statutorily designated beneficiaries or their descendants and that, even if there was such a trust, it was terminated by the 1980 Act. *Wolfchild v. United States,* 559 F.3d 1228 (Fed.Cir.2009).

On remand, several groups of claimants filed motions to amend their complaints to add a number of claims not previously asserted. They continued to pursue revenues derived from the land (now under new theories), and they also sought to add claims based on the government's alleged failure to provide them with more land in the 1800s. Claimants rooted their proposed causes of action in a variety of authorities, including the 1863 Acts, the 1888-1890 Acts, the Indian Non-Intercourse Act, and the Takings Clause of the Fifth Amendment.

The Court of Federal Claims addressed the motions to amend in two decisions. The first decision granted claimants leave to add one count, concerning the 1888-1890 Acts, and ruled favorably on that claim

in part: it found the government liable on a claim to pre-1980 revenues from the lands acquired under the 1888-1890 Acts, but rejected any claim to funds generated from the lands after the passage of the 1980 Act. *Wolfchild v. United States,* 96 Fed.Cl. 302 (2010). The next year, the Claims Court denied claimants' motions to add claims under the Indian Non-Intercourse Act, the 1863 Acts, and the Takings Clause because the proposed causes of action "would not withstand a motion to dismiss." *Wolfchild v. United States,* 101 Fed.Cl. 54, 76 (2011). The court also established a process for distribution of damages awarded in the judgment concerning the pre-1980 revenues from land bought under the 1888-1890 Acts. *Id.* at 86-92.

The parties have filed three separate appeals from those decisions. The government seeks reversal of the judgment regarding pre-1980 revenues (and challenges the distribution process), and two plaintiff groups challenge the rejection of various other claims they sought to add to their complaints. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

A

1

The first appeal before us, brought by the government, concerns claimants' alleged right to pre-1980 revenues generated from the lands purchased under the 1888-1890 Acts. The question is whether

the Acts create a "money-mandating" duty that extends to the claim made by these claimants, *i.e.,* applies to proceeds earned from land bought with the original appropriations and requires that such proceeds, if and when they accrue, be paid to descendants of the original beneficiaries identified in the statutes more than a century ago. We conclude that the 1888-1890 Acts do not impose such a money-mandating duty, which presents a question of law, *Ferreiro v. United States,* 501 F.3d 1349, 1351 (Fed.Cir.2007), and we therefore reverse the Claims Court's judgment against the United States.

A viable claim under the Indian Tucker Act, 28 U.S.C. § 1505, requires that the plaintiffs "'identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" *United States v. Navajo Nation,* 556 U.S. 287, 290, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009) (*Navajo II*). The court then must decide whether the identified source of law "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties . . . impose[d].'" *Id.* at 291, 129 S.Ct. 1547. Implicit in these requirements is the logical premise that the asserted source of a duty must apply to the particular plaintiffs' claim: plaintiffs "cannot invoke [a statute] as a source of money-mandating rights or duties" if the basis for *their* complaint "'falls outside' [the statute's] domain.'" *Id.* at 299-300, 129 S.Ct. 1547; *see United States v. Navajo Nation,* 537 U.S. 488, 509, 123 S.Ct. 1079, 155

L.Ed.2d 60 (2003) (*Navajo I*) (rejecting reliance on a statute that "does not establish standards governing" the particular type of conduct at issue); *id.* at 513, 123 S.Ct. 1079 (assertions "are not grounded in a specific statutory . . . provision that can fairly be interpreted as mandating money damages" if the provisions invoked do not "proscribe[ ] the [conduct] in th[at] case"). As this court has held, "[t]he statute must . . . be money-mandating as to the particular class of plaintiffs." *Greenlee Cnty., Ariz. v. United States,* 487 F.3d 871, 876 n. 2 (Fed.Cir.2007); *see Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.,* 525 F.3d 1299, 1308 (Fed.Cir.2008).

Those prerequisites control this appeal because, even if the 1888-1890 Acts were money-mandating as to some benefits for some people (say, the original appropriation for the original designated Indians), the claimants that are now here have not identified a money-mandating duty in the 1888-1890 Acts requiring that proceeds from certain lands be distributed to them as descendants of the designated Indians. To begin with, the text of the Acts contains no "specific rights-creating or duty-imposing statutory . . . prescriptions" that apply to the present claim and claimants. *Navajo I,* 537 U.S. at 506, 123 S.Ct. 1079. On the contrary, any prescriptions in the Acts – indicating, for example, who the beneficiaries are, and that each Indian "shall receive[ ], as nearly as practicable an equal amount in value of this appropriation," Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 993 – do not go beyond requiring that the original Indians designated

in the Acts benefit from the expenditure of the money appropriated. The statutes neither mention "descendants" of those designated Indians nor say anything about proceeds that may or may not accrue from what was bought with the appropriated funds. The only express mandates in the Acts, in other words, begin and end with the expenditure of money appropriated in those Acts, for the benefit of the Indians specified in those Acts.

With the statutory text silent about any "specific fiduciary or other duties" concerning future proceeds or descendants, *Navajo II,* 556 U.S. at 290, 129 S.Ct. 1547 (internal quotation marks omitted), claimants must be able to show that such a duty is properly inferred from the language. The Claims Court inferred the requisite duty by reasoning that, because the Secretary viewed the 1888-1890 Acts as providing the *authority* to generate leasing revenues for the benefit of descendants of the original Indians, all of the requirements in those Acts necessarily attached to direct the spending of revenues generated under that authority. *See Wolfchild,* 96 Fed.Cl. at 336-37. But that line of reasoning does not support the required inference of a money-mandating duty applicable here.

The Secretary's authority to act does not support inference of the asserted *duty* to act (enforceable by a suit for money damages). At the threshold, the mere authority to generate leasing revenues does not carry with it any obligation to do so. The Secretary would not have violated any provision of the Acts if he had

opted not to generate any leasing (or other) proceeds at all after the initial funds were spent.

That leaves only the argument that, once the government had collected land revenues that never had to be earned in the first place, the Acts imposed a duty that dictated how to spend those revenues – specifically, for descendants. Simply stating the argument, however, makes clear that it is, in substance, a claim that everything bought with the original appropriations, and proceeds from such purchases, were to be held in trust for the Indians and their descendants. Claimants recognized that this was their essential claim when they made just that argument under the 1888-1890 Acts throughout this case's initial stages. But this court rejected that trust claim in 2009, after full analysis of the statutory language, history, and implementation, an analysis we need not repeat here. *Wolfchild,* 559 F.3d 1228. Having reserved the present issue for later analysis "to the extent necessary," *id.* at 1260 n. 14, we now conclude that our rejection of the trust claim four years ago – a matter of substance, not labels – requires rejection of what amounts, at bottom, to the same substantive claim here.

Pragmatic considerations reinforce our conclusion. Specifically, adopting claimants' argument would present such substantial practical problems that, in the absence of much clearer language than exists, the statutes cannot fairly be read to impose the money-mandating duty that claimants assert. The funds at issue were first disbursed nearly 100

years after the original appropriations acts became law, by which time descendants had spread out geographically and numbered in the thousands. The particular Acts at issue applied to Indians that did not constitute an organized tribe or other easily identified and stable beneficiary group. If claimants' view about descendants and proceeds were right, simply sorting out who was owed money, as well as when they were to be paid and how (instructions absent from the statutes), would, by the early 1980s, have imposed a tremendous burden on the Department of the Interior and, then, on any court called on to review Interior's actions.[1] Given the inevitable exacerbation of such difficulties over time, a more explicit direction from Congress is needed to justify inferring not just a grant of discretionary authority but a mandate enforceable in court through damages.

For these reasons, we are persuaded that, for the claim at issue, there is "no warrant from any relevant statute or regulation to conclude that [Interior's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Navajo I,* 537 U.S. at 514, 123 S.Ct. 1079. That conclusion requires that we reverse the judgment of the Claims Court on this claim.

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[1] In addition to the revenues that the government held and ultimately paid to the communities, some money earned from leasing was apparently paid directly to third parties. There is no indication that claimants ever objected to this practice, yet their theory would seem to embrace those funds.

2

We would reverse in any event on an independent ground: claimants filed this claim too late. Claimants filed this suit in 2003, more than twenty years after the pre-1980 revenues were disbursed to the three communities in 1981 and 1982. The presentation of the claim was out of time under the six-year statute of limitations, 28 U.S.C. § 2501, unless, as the Claims Court concluded, it was rendered timely by the Indian Trust Accounting Statute (ITAS). *See Wolfchild,* 96 Fed.Cl. at 332-35. The ITAS, which has been included in appropriations acts since 1990, provides that "notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *E.g.,* Pub.L. No. 108-108, 117 Stat. 1241, 1263 (2003). Unlike the Claims Court, however, we conclude for at least two reasons that the ITAS does not apply to this claim – a question of law, *see Gillig v. Nike, Inc.,* 602 F.3d 1354, 1358 (Fed.Cir.2010).

First, the claim to pre-1980 revenues is not a "claim[ ] concerning . . . losses to or mismanagement of trust funds." The claim does not involve "trust funds" because no trust duty applied to this money, as we held in 2009. *Wolfchild,* 559 F.3d at 1255. The Claims Court ruled that the funds nevertheless fell within the purview of the ITAS because they were

deposited and held in Treasury accounts that were sometimes referred to as "trust" accounts and an Interior regulation, 25 C.F.R. § 115.002, defines "trust funds" to include "any . . . money that the Secretary must accept into trust." *Wolfchild,* 96 Fed.Cl. at 331-35. But "trust funds" under the statute naturally refers to funds subject to certain substantive duties, not to the labels on or handling of Treasury accounts. The funds at issue here were not subject to a trust duty. And the cited regulation undermines, rather than supports, claimants' position, because these were not funds that the Secretary "must" have accepted into trust. This claim does not concern "trust funds."

Second, even if the funds at issue were trust assets, the claim made here would not be the sort of claim for which a final accounting would be necessary to put a plaintiff on notice of a claim, because claimants knew or should have known that the money was publicly distributed in 1981 and 1982. The ITAS says that the statute of limitations does not commence to run for claims "concerning losses to or mismanagement of trust funds" until the beneficiary receives "an accounting . . . from which [it] can determine whether there has been a loss." Consistent with the reason for the enactment, as explained in *Shoshone Indian Tribe v. United States,* 364 F.3d 1339, 1346-48 (Fed.Cir.2004), the two quoted phrases are properly read together: the claims about "losses" or "mismanagement" that are protected by this provision are those for which an accounting matters in allowing a

claimant to identify and prove the harm-causing act at issue; otherwise, the ITAS would give claimants the right to wait for an accounting that they do not need. When a claim concerns an open repudiation of an alleged trust duty, "a 'final accounting' [i]s unnecessary to put the [claimants] on notice of the accrual of [their] claim." *San Carlos Apache Tribe v. United States,* 639 F.3d 1346, 1355 (Fed.Cir.2011) (relying on *Shoshone*). That description fits this case: claimants did not need an accounting in order to "determine whether there ha[d] been a loss" because the funds at issue were openly disbursed in 1981 and 1982. For that reason as well, the ITAS does not save this claim from untimeliness.

B

The two cross-appeals, filed by claimants, concern a series of proposed claims principally asserted under (1) the 1863 Acts, (2) the 1851 and 1858 treaties, and (3) the Indian Non-Intercourse Act. We affirm the Claims Court's determination that claimants have failed to establish a viable cause of action under any of these (or other) authorities.

1

We begin with the 1863 Acts. The full text of Section 9 of the February Act provides:

> [T]he Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in

> severalty to each individual of the beforenamed bands who exerted himself in rescuing the whites from the late massacre 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.

Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 652, 654.

Although repackaged in several proposed causes of action, claimants make two basic claims under this provision, separately premised on each of its two sentences. First, they argue that the opening sentence, which authorizes the Secretary to set aside 80 acres of land to each loyal Sioux, imposed a duty to set aside such lands – a duty that the Secretary breached by not doing so. Second, and in tension with the first point, claimants contend that certain actions taken in 1865 actually did set aside land for the loyal Sioux under the statute, thereby giving rise to the more concrete rights specified in the provision's second sentence. We conclude that claimants have failed to establish the viability of either claim.[2]

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[2] Apart from claims to damages, claimants also seek affirmative relief under 28 U.S.C. § 1491(a)(2) related to the land that they believe they are owed under the Acts. Putting aside what our analysis of the Act may imply about the merits of that contention, it fails because relief under subsection (a)(2) must be "an incident of and collateral to" any damages judgment, so that this contention falls with the damages claims.

The analysis of the first sentence's declaration that the Secretary "is hereby authorized to set apart" parcels of land for the loyal Sioux is straightforward. That declaration is simply too discretionary to support a viable claim for damages on its own. *See Wolfchild,* 101 Fed.Cl. at 70-73. We have long recognized that statutes granting officials "substantial discretion" are "not considered money-mandating," *Price v. Panetta,* 674 F.3d 1335, 1339 (Fed.Cir.2012), and this provision fits squarely within that rule. It does not impose any duty on the Secretary to make the land grants that it authorizes. It therefore cannot "'fairly be interpreted as mandating compensation for damages sustained'" from a failure to provide such lands. *Navajo II,* 556 U.S. at 291, 129 S.Ct. 1547.[3]

Claimants fare no better in their attempt to make out a claim based on the more absolute rights set forth in the statute's second sentence. Because those rights attach only to land that was "set apart" under the authority granted in the provision's first sentence, any such claim must be premised on affirmative actions taken under that authority. Act of Feb. 16, 1863, § 9, 12 Stat. at 654. Claimants contend that the Secretary did in fact take the necessary steps

[3] Neither claimant group seems to have argued to this court that the March 1863 Act independently creates an applicable money-mandating duty, but the same analysis would apply. Providing that it "shall be lawful" for the Secretary to locate loyal Sioux on certain lands, Act of Mar. 3, 1863, ch. 119, § 4, 12 Stat. 819, is just another way of saying that the Secretary is authorized to do so.

to set apart land under the Act, focusing our attention on certain events in 1865. Specifically, they contend that the Secretary identified 12 sections of land for the loyal Sioux and withdrew them from public sale, which sufficiently "set apart" those lands to make the section's second sentence applicable.

Those 1865 actions, however, cannot support a timely claim for relief, regardless of whether they could qualify as having "set apart" land under the Act. After it took the steps toward conveyance of the 12 sections to the designated Indians in 1865, the government terminated the process and sold the parcels to others. Claimants have not alleged error in the Claims Court's finding that all of the 12 sections were sold no later than 1895, which was apparently not disputed by any claimants in the Claims Court. *See Wolfchild,* 101 Fed.Cl. at 74. The six-year statute of limitations, therefore, has long since run.

Because claimants cannot state a claim under either sentence of Section 9 of the February 1863 Act, we affirm the Claims Court's conclusion that claimants "lack any claim grounded in the 1863 Acts." *Wolfchild,* 101 Fed.Cl. at 76.[4]

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[4] Based on statements in our 2009 opinion, *Wolfchild,* 559 F.3d at 1232, 1241, the parties and the Claims Court have disputed whether the March 1863 Act superseded Section 9 of the February 1863 Act. We find it unnecessary to resolve that dispute.

2

In addition to the claims brought directly under the 1863 Acts, some claimants also ask us to recognize a separate claim based on an alleged violation of rights granted in the 1851 and 1858 treaties. We decline to do so. First, it does not appear that claimants asserted an independent, treaty-based claim in the Claims Court. That court never addressed a separate cause of action for treaty rights in either of its extensive decisions, and claimants have not pointed to any proposed complaint attached to a motion to amend in which such a claim was asserted. The claim is therefore waived. *E.g., San Carlos Apache Tribe,* 639 F.3d at 1354-55.

In any event, claimants have not shown that any perceived third-party rights arising under the treaties survived the February 1863 Act. (Claimants seek to obtain property they say should have been, but was never, granted under the treaties; their claim does not concern property that was granted in fee under the treaties before the annulment, with vesting of rights then secured by state or other non-treaty law.) The February 1863 Act is categorical in pronouncing that "all treaties" entered into with the Minnesota Sioux "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," before going on to declare that "all lands and rights of occupancy" in Minnesota and "all annuities and claims heretofore accorded to said Indians" are "forfeited." Act of Feb. 16, 1863, ch. 37, 12 Stat. 652.

The provision makes no exemption for the loyal Sioux or any other individual Indians.

Claimants nevertheless contend that their claims survived the annulment. Their theory appears to be that, because Section 9 of the February 1863 Act was intended to provide the loyal Sioux a substitute for lost treaty rights and was not implemented, they may turn instead to the treaties as a source of actionable rights. But the annulment of the treaties was not conditional on Section 9, including any discretionary acts authorized by Section 9, and claimants must therefore assert rights under the statute, not the treaties. We can find no basis to hold that the asserted third-party treaty rights survived the February 1863 Act.

3

The final source of proposed claims that we address is the Indian Non-Intercourse Act (INIA), which provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. Claimants invoke this statute in support of two sets of claims: (1) "land" claims alleging that the government improperly sold lands to which claimants were entitled under the 1851 and 1858 treaties and the 1863 Acts and improperly transferred land to the

three communities that had been purchased for claimants under the 1888-1890 Acts and the 1934 IRA; and (2) "fund" claims alleging that INIA coverage imposes a fiduciary duty on the United States that requires disbursement of revenues to claimants rather than the three communities. We conclude that, even if the INIA imposes a money-mandating duty on the United States (which we need not decide), none of these theories supports a viable claim under the statute.[5]

First, it does not appear that there is anything left to sustain an INIA claim once the assertions of property rights under the 1888-1890 Acts, the 1863 Acts, and the 1851 and 1858 treaties are rejected. The INIA prohibits the improper disposition of Indian lands, which necessarily presumes that the complaining party holds "lands, or . . . any title or claim thereto." 25 U.S.C. § 177. Without a source of extant property rights in any lands, claimants no longer have a basis for alleging this essential prerequisite to claiming an actionable conveyance under the INIA.

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[5] To the extent that the claim to "funds" earned from the land rests in part on other authorities, our conclusion does not change. The 1888-1890 Acts and the 1863 Acts cannot support such a claim for the same reasons set forth in sections A.1 and B.1, *supra.* Nor do claimants have a viable claim to any revenue produced on the additional land purchased for the three communities under the IRA, because, as they acknowledge, the government bought that land and took it into trust for the three communities from the outset.

Second, even if claimants could identify a relevant property right, there is no sufficient basis for finding that claimants constitute a "tribe" within the meaning of the INIA. Specifically, claimants, whose defining characteristic is descent from Indians that broke their original tribal relations, have not shown error in the Claims Court's conclusion that, at all relevant times, they have lacked the unitary organization required to be a tribe. *See Wolfchild,* 101 Fed.Cl. at 65-69. Claimants attempt to overcome the court's finding by relying centrally on the contention that the beneficiaries of pre-1980 "reservation" lands qualify as a tribe. They point to those reservations as proof, for example, that the Indians occupied a sufficiently defined territory and had the requisite, unified political structure. But those arguments cannot help the claimants here because, even if the class of beneficiaries of the pre-1980 "reservation" lands qualified as one or more than one tribe under the INIA, that class simply is not coincident – though it overlaps – with the class of claimants in this case. Indeed, that is the whole reason for this lawsuit – the three communities that occupied and benefited from the pre-1980 reservations are not identical to this group of claimants. Accordingly, these claimants cannot look to those reservations in order to support a finding that they are a tribe under the INIA. We consequently affirm the Claims Court's judgment on these claims.

CONCLUSION

When this case began, it was more narrowly focused: claimants had one principal theory. Having lost on that theory in 2009, claimants developed a number of alternative theories rooted in a variety of authorities. We now conclude that none of the new theories breathes life into this case because none supports an actionable claim for relief under governing law. We therefore reverse the Claims Court's judgment against the United States on the claim to pre-1980 money and affirm its judgment against claimants on the remainder of the proposed claims.

COSTS

No costs.

AFFIRMED IN PART, REVERSED IN PART.

REYNA, Circuit Judge, concurring-in-part and dissenting-in-part.

This case is ingrained in the intertwined, inextricable relationship between the American Indian and the United States. The question we are called to resolve is whether promises made to a small group of American Indians created obligations on the part of the United States that remain in effect. The majority looks primarily at the law and determines that the United States created no such obligations. I look at the both history and the law and find that the United

States made certain promises of compensation that were memorialized by Congress in laws that it passed with the specific intent to create binding obligations to compensate the small band of American Indians. Because I believe those obligations remain in effect and provide a jurisdictional basis for appellants' lawsuit against the United States, I respectfully dissent. I concur with the majority on the remaining issues.

I. HISTORICAL BACKGROUND

The majority glosses over key historical circumstances that are critical to interpret the 1888-1890 Appropriations Acts. My review begins and ends with those historical circumstances.

A. Broken Treaties and the Sioux Uprising

On September 29, 1837, the Sioux and the United States entered into a treaty whereby the Sioux agreed to cede to the United States all of their lands east of the Mississippi. In consideration, the United States' agreed that it would invest $300,000 for the benefit of the Sioux. Under the Treaty, the United States was required to pay an annuity to the Sioux "forever." *Wolfchild v. United States,* 96 Fed.Cl. 302, 312 (Fed.Cl.2010) ("*Claims Court Remand Decision*") (quoting Treaty of Sept. 29, 1837, arts. I-II, 7 Stat. 538). Thereafter, in subsequent treaties, the Sioux ceded lands in the territories of Minnesota and Iowa in exchange for the United States' promise of

"perpetual" peace and friendship. *Id.* (quoting Treaty of Aug. 5, 1851, arts. I-II, 10 Stat. 954 and Treaty of July 23, 1851, arts. II-IV, 10 Stat. 949).

As relevant for our purposes, the Mdewakanton band was among the Sioux that entered into the treaties with the United States. By 1858, the Mdewakanton had agreed to occupy a reservation along the Minnesota River in south-central Minnesota. *Id.* (quoting Treaty of June 19, 1858, arts. I-III, 12 Stat. 1031).

In 1862, the Sioux revolted after the United States failed to furnish promised money and supplies under the terms of the treaties. The uprising resulted in the death of more than 500 white settlers and substantial property damage. Among other things, the United States viewed the revolt as a breach by the Sioux of the agreement to remain peaceful with the United States.

But not all Sioux broke the pledge to remain peaceful. Some of the Sioux, in particular a small number of the Mdewakanton (the "Loyal Mdewakanton"), actively defended white settlers and were later credited as having saved white settlers' lives.[1] The record

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[1] The Mdewakanton are known as a band of Minnesota Sioux. I refer to them as the "Loyal Mdewakanton" in recognition of their choice to sever their tribal relationship during the Sioux uprising and remain loyal to the United States by either not participating in the revolt or taking affirmative actions to save the white settlers on the Minnesota frontier. *See Wolfchild v. United States,* 101 Fed.Cl. 54, 59-60 (Fed.Cl.2011). The

(Continued on following page)

is undisputed that at the risk of their own safety, the Loyal Mdewakanton prevented greater bloodshed and property damage. But the courageous acts of the Loyal Mdewakanton came with a price. Siding with the white settlers meant breaking away and severing ties with the Sioux tribe, including the Mdewakanton band.

In response to the Sioux uprising, the United States annulled its treaties with the Sioux, confiscated Sioux lands in Minnesota, and moved the Sioux west, outside the limits of then existing states. As for the Loyal Mdewakanton, their lands were confiscated along with all the other Sioux lands in Minnesota, and their annuity valued at approximately $1,000,000 was terminated. In addition, the Loyal Mdewakanton "could not return to their tribe . . . or they would be slaughtered for the part they took in the outbreak." *Claims Court Remand Decision,* 96 Fed.Cl. at 313 (quoting Cong. Globe, 38th Cong., 1st Sess. 3516 (1864)). As a result, the Loyal Mdewakanton were left isolated, poverty-stricken and homeless.

B. Congressional Efforts to Compensate the Loyal Mdewakanton

In 1863, Congress took its first action intended to compensate and reward the Loyal Mdewakanton for

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plaintiffs, referred to herein as "the Wolfchild plaintiffs," are approximately 20,750 lineal descendants of the Loyal Mdewakanton. *Claims Court Remand Decision,* 96 Fed.Cl. at 310.

their loyalty during the Sioux uprising by enacting a statute that provided public lands to serve as "an inheritance to said Indians and their heirs forever." Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 652, 654. Two weeks later, Congress passed a second statute that authorized the President to set apart agricultural lands for the Sioux who exerted themselves in rescuing the whites from massacre. *See* Act of Mar. 3, 1863, ch. 119, § 1, 12 Stat. 819. White settlers refused to permit any Sioux from resettling in Minnesota and became opposed the authorized land purchases. The two 1863 acts were never repealed, yet the Loyal Mdewakanton never realized the land benefits conferred under those acts.

In 1886, after conducting a census to establish which individuals had remained loyal to the United States during the Sioux uprising, Congress again attempted to provide the Loyal Mdewakanton with viable long-term relief. Congress enacted Appropriations Acts in 1888, 1889 and 1890 that included specific provisions for land proceeds to benefit the Loyal Mdewakanton. In particular, the 1888-1890 Appropriations Acts memorialized Congress's renewed efforts to provide relief to the destitute Loyal Mdewakanton.

* * *

In 1888, Congress appropriated $20,000 for the Department of the Interior ("Interior") to purchase land, cattle, horses, and agricultural implements for the "fullblood" Loyal Mdewakanton. Act of June 29,

1888, ch. 503, 25 Stat. 217, 228-29 ("1888 Act"). In 1889, Congress appropriated an additional $12,000 for the Loyal Mdewakanton. It also enacted a second Act that was substantially similar to the 1888 Act, but additionally required the Secretary of the Interior to expend the money equally among the Loyal Mdewakanton and mandated that any money not expended in one fiscal year be expended in a future fiscal year. Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93 ("1889 Act").

The 1889 Act, like the 1888 Act, indicated that the appropriated funds should be used for the benefit of the Loyal Mdewakanton. *Id.* More specifically, the 1889 Act used the imperative word "shall" to establish Interior's duty with respect to specific appropriations and the Loyal Mdewakanton's right to the money set aside for "lands, cattle, horses, implements, seeds, food, or clothing." *Id.* The Act also established specific accounting procedures and eligibility requirements for the expenditure of funds. The 1889 Act reads in relevant part:

> For the *support* of the full-blood Indians in Minnesota heretofore belonging to the Mdewakanton band of Sioux Indians, who have resided in said State since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, twelve thousand dollars, to be expended by the Secretary of the Interior . . . Provided, That if the amount in this paragraph

> appropriated, or any portion of the sum appropriated for the benefit of these same Indians by said act of June twenty-ninth, eighteen hundred and eighty-eight, *shall* not be expended within the fiscal year for which either sum was appropriated, neither *shall* be covered into the Treasury, but *shall,* notwithstanding, be used and expended for the purposes for which the same amount was appropriated and *for the benefit of the above-named Indians:* And provided also, That the Secretary of the Interior may appoint a suitable person to make the above-mentioned expenditure under his direction; and all of said money which is to be expended for lands, cattle, horses, implements, seeds, food, or clothing *shall be so expended* that each of the Indians in this paragraph mentioned *shall receive,* as nearly as practicable an equal amount in value of this appropriation and that made by said act of June twenty-ninth, eighteen hundred and eighty-eight: And provided further, That as far as practicable lands for said Indians *shall* be purchased in such locality as each Indian desires, and none of said Indians *shall* be required to remove from where he now resides and to any locality against his will.

Id. (emphases added).

The Act enacted in 1890, appropriating $8,000, is substantially similar to the earlier Acts, but also recognizes that the designated funds are for the support of full and mixed blood Loyal Mdewakanton

who have "severed their tribal relations," and as such "shall receive" the appropriated funds in as close to "an equal amount" as practicable. Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349 ("1890 Act").

Interior used the appropriated funds to purchase lands in three distinct areas of Minnesota. As the majority notes, in the years that followed, these three parcels of land developed into the three distinct communities of the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and the Lower Sioux Community ("the three communities"). The United States now holds the lands in trust for the three communities, to which many descendants of the Loyal Mdewakanton do not belong.

II. THE PREVIOUS FEDERAL CIRCUIT PANEL DECISION

A panel of this Court previously held that the funds appropriated under the Appropriations Acts are subject to statutory use restrictions and did not create a trust or convey ownership rights in the lands purchased with those funds. *See Wolfchild v. United States,* 559 F.3d 1228, 1255 (Fed.Cir.2009) ("*Wolfchild I*"). The panel, however, did not address the money-mandating issue before us today. Specifically, the *Wolfchild I* panel explicitly declined to address whether it was lawful for Interior to transfer to the three communities the funds derived from the Mdewakanton lands:

> The parties devote some attention to the question whether it was lawful for the Interior Department, following the 1980 Act, to transfer to the three communities approximately $60,000 in funds that had been collected as proceeds from the sale, use, or leasing of certain of the 1886 lands, given that the 1980 Act was silent as to the disposition of those funds. *See Wolfchild I,* 62 Fed.Cl. at 549-50. That issue *does not affect our analysis* of the two certified questions, however, and *we leave that issue to be addressed, to the extent necessary, in further proceedings before the trial court.*

Wolfchild I, 559 F.3d at 1259 n. 14 (emphases added). On remand, consistent with the guidance of this Court, the Wolfchild plaintiffs amended their complaint to assert that the statutory use restrictions vested the class of plaintiffs with rights to pre-1980 revenues derived from the lands purchased for the benefit of the Loyal Mdewakanton.

The majority holds that the decision in *Wolfchild I* decided and foreclosed the issue presented to us in this case. *See* Maj. Op. 1289-90. I disagree. It is clear to me that the *Wolfchild I* panel explicitly decided not to reach the issue that is before us today and, indeed, cleared the way for the plaintiffs to amend the complaint to raise the issue. *Wolfchild I,* 559 F.3d at 1259 n. 14.

III. ANALYSIS OF MONEY-MANDATING DUTY

A. The Indian Tucker Act

The majority interprets the 1888-1890 Appropriations Acts as conferring the Secretary of the Interior with discretion on how to distribute the pre-1980 revenues derived from appropriated lands, a discretion that frees the United States from its promise to compensate the Loyal Mdewakanton and their descendants. *See* Maj. Op. 1289-90. In my view, the text of the Acts, purpose of the Acts, and judicial recognition of the relationship between the government and the Tribes support the conclusion that the Acts "can be fairly interpreted" or are "reasonably amenable" to the interpretation that they mandate compensation by the government. *See United States v. Navajo Nation,* 556 U.S. 287, 290, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009) (citations omitted); *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 473, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) (clarifying that "a fair inference will do"). Here, there exists more than a fair inference that the 1888-1890 Acts impose a money-mandating duty on the government.

1. Plain Reading of the Appropriations Acts

I disagree that the Appropriations Acts' grant of *authority* to the Secretary to generate leasing revenues cannot support a fair inference that, once revenues are generated, the Secretary had a *duty* to spend those revenues for the benefit of the Loyal

Mdewakanton. *See* Maj. Op. at 1289-90. In my view, because the lands were purchased for the benefit of the Loyal Mdewakanton, any revenues generated from those lands necessarily belonged to the Loyal Mdewakanton.

Jurisdiction under the Indian Tucker Act is not limited to statutory schemes that leave the government "no discretion over payment of claimed funds." *Samish Indian Nation v. United States,* 419 F.3d 1355, 1364 (Fed.Cir.2005). Certain discretionary schemes may support claims if they provide clear standards for paying money to recipients. *Id.* (citations omitted). Here, the Appropriations Acts provide clear standards by directing the Secretary to spend the appropriated funds in a way such that each of the Loyal Mdewakanton (who "have severed their tribal relations") receives "an equal amount in value." 1889 Act, 25 Stat. at 993; 1890 Act, 26 Stat at 349. The Acts also provide that, to the extent the appropriations were spent on land, the land "shall be purchased in such locality as each Indian desires." *Id.*

Congress's use of the word "shall" invokes a presumption that the provision is money mandating. *See Greenlee County, Ariz. v. U.S.,* 487 F.3d 871, 877 (Fed.Cir.2007) (citations omitted). The majority ignores that the Appropriations Acts repeatedly use the word "shall" to convey, for example, that the funds "shall be so expended" for the benefit of the Loyal Mdewakanton, and that the recipients "shall receive" the funds in "equal amount[s]." *See* 25 Stat. at 992-93. This drafting choice implies that once certain

condition precedents are met, the Secretary is expected to adhere to Congress's directive. *See Doe v. U.S.,* 463 F.3d 1314, 1325 (Fed.Cir.2006) (finding the source of law money-mandating where the statute used "shall").

The majority concludes that the use restrictions do not extend to land revenues by equating the result to a trust, and that the *Wolfchild I* panel held the 1888-1890 Appropriations Acts did not create such a trust. *See* Maj. Op. at 1289-90; *Wolfchild I,* 559 F.3d at 1255. I agree with the Claims Court that our previous decision cannot be read to foreclose the issue of whether the use restrictions, without being considered a trust, can serve as the basis for a legitimate claim by the plaintiffs, particularly in view of the previous panel's explicit warning that it was not deciding the issue. *Claims Court Remand Decision,* 96 Fed.Cl. at 328; *Wolfchild I,* 559 F.3d at 1259. "Only the issues actually decided – those within the scope of the judgment appealed from, minus those explicitly reserved or remanded by the court – are foreclosed from further consideration." *Engel Indus., Inc. v. Lockformer Co.,* 166 F.3d 1379, 1383 (Fed.Cir.1999) (citations omitted). Again, to be clear, the panel in *Wolfchild I* neither decided the issue of the applicability of the use restrictions to pre-1980 proceeds, nor foreclosed the issue, but expressly reserved it for consideration in later litigation involving the same parties.

Because the language of the Acts obligates the government to act for the benefit of the Loyal

Mdewakanton, and the Wolfchild plaintiffs have alleged facts showing that the government failed to act on behalf of the Loyal Mdewakanton, I would affirm the Claim Court's conclusion that the amended complaint states a viable claim for damages based on the statutory use restrictions on pre-1980 funds.[2]

2. Historical Context of the Appropriations Acts

The historical context of the 1888-1890 Appropriations Acts is useful in understanding the government's obligations to the Loyal Mdewakanton. My review of the legislative history, internal memoranda reflecting Interior's contemporaneous policy choices, and interpretive canons favoring protection for Native American claimants leads me to conclude that Congress intended the Appropriations Acts to provide a money-mandating duty. Where, as here, we have historical tools that illuminate Congress's true intent in alleviating the plight of a displaced Tribal group, we should interpret the statutes taking into account the structure and underlying values of the scheme at the time it was enacted. *See, e.g., Steelworkers v.*

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[2] In 1980, Congress enacted legislation declaring that the United States would thereafter hold the lands in trust for the three communities. Act of Dec. 19, 1980, Pub.L. No. 96-557, § 1, 94 Stat 3262 ("1980 Act"). There is nothing in the text or legislative history of the 1980 Act that repeals or otherwise overcomes the duty imposed on the United States by the 1888-1890 Appropriations Acts.

Weber, 443 U.S. 193, 201, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) (holding that the statute prohibiting racial discrimination must "be read against the background of the legislative history of Title VII and the historical context from which the Act arose"); *District of Columbia v. Heller,* 554 U.S. 570, 599-600, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (cautioning against ignoring the historical realities surrounding the right to bear arms at the time the Second Amendment was codified as a right).

First, the legislative history confirms that the overarching purpose of the 1888-1890 Appropriations Acts was to set aside resources that honor the sacrifices of the Loyal Mdewakanton following the Sioux uprising. For example, in 1888, 1889, and 1890, the proposed legislation was placed under the heading of "Fulfilling Treaty Stipulations with and Support of Indian Tribes," rather than a more general "Miscellaneous" or "Miscellaneous Supports" heading. *See Claims Court Remand Decision,* 96 Fed.Cl. at 340 (citing 25 Stat. at 219; 25 Stat. at 982; 26 Stat. at 338). The Loyal Mdewakanton and their descendants were afforded a specific set of rights that constituted "replacements" for the "annuities and other benefits" the government had not delivered even after the Loyal Mdewakanton maintained their treaty obligations through a period of acute violence. *See id.* (recognizing the Appropriations Acts as "a substitution for the treaty benefits of which the Loyal Mdewakanton had been deprived.").

Contemporaneous comments reveal that during the 1860s the Minnesota frontier had been so ablaze with negative sentiment following the Sioux uprising that no Tribal group – not even the steadfastly loyal – would collect their share of promised annuity funds.[3] Senator MacDonald, the sponsor of the 1888 Appropriation Act, aptly explained Congress's intent in passing the Acts:

> [A] few of . . . [the Sioux] remained friendly to the whites and became their trusted allies and defenders, and . . . a number of them did valuable service in protecting our people and their property, and in saving many lives. . . . They have ever since had claims upon not only our gratitude but that of the nation at large, which ought long ago to have been recognized and partially, at least, compensated for their invaluable services . . . I am almost ashamed to say it, but the fact is that no exception [to the Act of Feb. 16, 1863] was made, even in favor of these friendly Indians.

Claims Court Remand Decision, 96 Fed.Cl. at 340-41 (quoting 19 Cong. Rec. 2,976-77 (1888)). Senator MacDonald's statement of the bill's purpose confirms that Congress

[3] For example, in 1862, the Governor of Minnesota, gave a speech to the State Legislature calling for the extermination or total displacement of the Sioux. J.A. 3453 ("The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of the State."); see also J.A. 2387-88 (A New York Times editorial describing the scalping of "red devils" as a "state right" in Minnesota).

> passed the 1888-1890 Appropriations Acts because the rights of the Loyal Mdewakanton were abruptly annulled and subsequent legislative efforts to remedy their misfortune were inadequate.

Second, the determination that the 1888-1890 Appropriations Acts are not money-mandating is contrary to the government's own time-worn understanding that the land-use restrictions obliged the government to spend land proceeds for the benefit of the Loyal Mdewakanton. As the Claims Court pointed out, for the last 90 years, Interior has understood that if it were to assign the benefits of the lands to other Indians, there would be monetary repercussions for its breach in duties. *See Claims Court Remand Decision,* 96 Fed.Cl. at 341-42, 348.

For example, in 1933, Interior recognized that the land on which the three communities were situated "was land purchased for the Mdewakanton Sioux . . . *and their descendants. It has been and can be assigned only to such persons.*" *Id.* at 344 (quoting Mem. From Charlotte T. Westwood to Joe Jennings, Indian Reorganization (approximately dated Nov. 27, 1933)) (emphasis added).[4] Also, in 1950, an attorney

[4] Interior's recognition of its duty to the descendants of the Mdewakanton Sioux undermines the majority's contention that any duty to the Loyal Mdewakanton created by statute need not extend to future generations. Maj. Op. 1289 (concluding that the duty would only extend to future generations if Congress included the word "descendants"). Moreover, the language in the land use certificates granting "heirs" of the assignee "exclusive

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for Interior confirmed that the 1888-1890 Appropriations Acts excluded other Indian groups from monetary proceeds flowing from the restricted land:

> In view of the provisions of the [Appropriations] Acts . . . [the 1886 lands] may be assigned only to members of the Mdewakanton Band of Sioux Indians residing in Minnesota, and such assignee must have been a resident of Minnesota on May 20, 1886, or be a legal descendant of such resident Indian.
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> *Claims Court Remand Decision,* 96 Fed.Cl. at 344 (citing Mem. by Rex H. Barnes (July 24, 1950)); *see also* Mem. from Daniel S. Boos (Mar. 17, 1969) ("Based on independent research I have concluded that these remarks [the statements in the Barnes 1950 memorandum regarding the lineal descendants' entitlement] are correct.").

But the most telling statement – the one promulgated by Interior most recently – is a 1970 opinion by the Assistant Solicitor for Indian Legal Activities, who advised that the distributions that the government

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use and possession of said land" is in perfect alignment with the first 1863 Act instructing that the designated land should "be an inheritance to said Indians and their heirs *forever.*" Act of Feb. 16, 1863, § 9, 12 Stat. at 654. The land use certificates are also consistent with the actual language of the Appropriations Acts, reciting that "families" of the named Loyal Mdewakanton qualified as beneficiaries. 1889 Act, 25 Stat. at 992-93; 1890 Act, 26 Stat. at 349.

later made to the three communities would be unlawful:

> [T]he land in question remains available only for the use of qualified Mdewakanton Sioux Indians. If it appears desirable to use the land by assigning it to or for the benefit of other Indians, we suggest that Congress should be asked to permit such action by affirmative legislation. We know of no means of accomplishing this by administrative action, particularly over any objections of eligible Mdewakanton Sioux Indians.

Claims Court Remand Decision, 96 Fed.Cl. at 344 (citing Mem. by Charles M. Soller (Dec. 4, 1970)). In the 1970 memorandum, Interior considers whether the land-use restrictions can be set aside, and offers that the Loyal Mdewakanton are the proper beneficiaries of the land unless Congress acts through legislation. This conclusion of existing binding obligations created by the use restrictions further supports interpreting the use restrictions in the 1888-1890 Appropriations Acts as imposing a money-mandating duty on revenues derived from land purchases.

3. The Special Relationship Between the Government and the Tribes

In my view, recognizing a money-mandating duty in favor of the Loyal Mdewakanton is further commanded by the special relationship between the

United States and the Tribes, as well as by the application of canons of statutory interpretation that resolve language disputes in favor of Tribal groups who, having endured a history of rampant injustice, deserve the fullest protection under the law. *See U.S. v. Sioux Nation of Indians,* 448 U.S. 371, 423, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980) (supporting the Claims Court's analysis that the 1877 Act embodied an implied obligation of the government to compensate a taking of tribal property set aside for the exclusive use of the Sioux). The Supreme Court recognizes that the relationship between the United States and the Indian people is distinctive, "different from that existing between individuals whether dealing at arm's length, as trustees and beneficiaries, or otherwise." *U.S. v. Jicarilla Apache Nation,* ___ U.S. ___, 131 S.Ct. 2313, 2323, 180 L.Ed.2d 187 (2011) (quoting *Klamath and Moadoc Tribes v. United States,* 296 U.S. 244, 254, 56 S.Ct. 212, 80 L.Ed. 202 (1935)); *see also Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831) (Marshall, C.J.) (explaining that Indians' "relation to the United States resembles that of a ward to his guardian"). "Few conquered people in the history of mankind have paid so dearly for their defense of a way of life." *Sioux Nation of Indians,* 448 U.S. at 423, 100 S.Ct. 2716 (quoting R. Billington, Introduction, *in* SOLDIER AND BRAVE xiv (1963)).

I submit that the government's unique relationship with the Indian people obligates it to strictly honor the land-use restrictions in the 1888-1890

Appropriations Acts. *See Arctic Slope Native Ass'n, Ltd. v. Sebelius,* 699 F.3d 1289, 1298 (Fed.Cir.2012) (citing *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)). My view is supported by the entrenched expectation that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Blatchford v. Native Village of Noatak and Circle Village,* 501 U.S. 775, 795, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (internal citations omitted); *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). This canon of construction, dating back to the earliest years of our Nation's history, is rooted in the unique relationship between the federal government and the Indians, with the understanding that Indians did not wield equal bargaining power when earlier Treaties were negotiated and, as a consequence, doubtful statutory expressions should be resolved in their favor. *See Hagen v. Utah,* 510 U.S. 399, 423 n. 1, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (collecting cases). With these principles in mind, there is not just a "fair" inference that the 1888-1890 Appropriations Acts are money-mandating, but rather, an unassailable certainty that they are so. The majority resists this conclusion and demands "a more explicit direction from Congress," fearing that a viable claim under the Acts would impose "a tremendous burden" on Interior given the

number of Loyal Mdewakanton and their varied geographic locations. *See* Maj. Op. at 1289-90.[5] The standard to establish a waiver under the Indian Tucker Act, however, is not made higher when the case presents "pragmatic considerations." *Id.* The Wolfchild plaintiffs only needed to establish, and did establish, that the 1888-1890 Acts can be fairly interpreted to impose a duty on the United States. *See White Mountain,* 537 U.S. at 480, 123 S.Ct. 1126; *Samish,* 419 F.3d at 1365.

B. Statute of Limitations

Because I read the claims adjudicated today as falling within the terms of Indian Trust Accounting Statute, the general six-year statute of limitations period would not apply. *Shoshone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1346-47 (Fed.Cir.2004). I affirm the view of the Claims Court that the statute of limitations did not commence to run on the Wolfchild plaintiffs' claims until there was an accounting under which the beneficiary could determine whether there has been a loss.

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[5] While it may be true that resolution of this case may raise administrative burdens, such burdens should not relieve the government from its own treaty obligations, especially given that the burden has been made more difficult due to the passing of time, a circumstance that the government created and had the power to avoid. It is not in this Court's province to avoid an otherwise just and correct judgment on the grounds that its implementation would impose an administrative burden on the government.

Claims Court Remand Decision, 96 Fed.Cl. at 335. For the reasons stated in the Claims Court's opinion, I depart from the majority and would affirm the conclusion that the Wolfchild plaintiffs' pursuit of money damages for pre-1980 revenues derived from appropriated lands was timely.

IV. CONCLUSION

The plain meaning of the statutes, the historical context of the 1888-1890 Appropriations Acts, and the special relationship between the government and the Tribes all weigh against the majority's conclusion that the Appropriations Acts do not give rise to a money-mandating duty. In denying legitimate claims for compensation under the Indian Tucker Act, the majority loses sight of what the statutes were intended to accomplish at the time of their enactment. For the reasons stated above, I would affirm the Claims Court in finding that the Wolfchild plaintiffs are entitled to litigate and seek judgment against the government for the improper allocation of land revenues set aside for their benefit. Accordingly, I respectfully dissent-in-part.

101 Fed.Cl. 54
United States Court of Federal Claims.

Sheldon Peters WOLFCHILD, et al.,
Plaintiffs,

v.

UNITED STATES, Defendant.

Nos. 03-2684L, 01-568L. | Aug. 5, 2011. |
As Corrected Aug. 18, 2011.

Attorneys and Law Firms

Erick G. Kaardal, Mohrman & Kaardal, P.A., Minneapolis, MN, for Wolfchild plaintiffs. With him on the briefs were William F. Mohrman, Mohrman & Kaardal, P.A., Minneapolis, MN.

Jody H. Schwarz and Stephen Finn, Trial Attorneys, Natural Resources Section, Environment & Natural Resources Division, United States Department of Justice, Washington, D.C., for defendant. With them on the briefs were Ignacia S. Moreno, Assistant Attorney General, and Sam Costello, Daniel Steele, and J. Nathanael Watson, Trial Attorneys, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C. Of counsel were Kenneth Dalton and James Porter, Office of the Solicitor, Department of the Interior, Washington, D.C.

Jack E. Pierce, Pierce Law Firm, PA, Minneapolis, MN, for the Cermak plaintiffs and for the Stephens,

R. Cermak, J. Cermak, Henderson, Klingberg, Alkire, Arnold, and Godoy groups of intervening plaintiffs.

Kelly H. Stricherz, Vermillion, SD, for the Mozak group of intervening plaintiffs.

Garrett J. Horn, Horn Law Office, Yankton, SD, for the Saul, Trudell, Taylor, Ferris, Henry, and Vassar groups of intervening plaintiffs.

Creighton A. Thurman, Yankton, SD, for the Cournoyer, Robinette, Kimbell, French, and Wanna groups of intervening plaintiffs.

Elizabeth T. Walker, Walker Associates, Alexandria, VA, for the anonymous Walker, the Enyard, and the Kitto groups of intervening plaintiffs.

Robin L. Zephier, Abourezk & Zephier, PC, Rapid City, SD, for the Zephier group of intervening plaintiffs.

Larry Leventhal, St. Paul, MN, for the Burley group of intervening plaintiffs.

Wood R. Foster, Jr., Siegel, Brill, Greupner, Duffy & Foster, PA, Minneapolis, MN, for the Lafferty, Blaeser, Whipple, and Lowe groups of intervening plaintiffs.

Bernard J. Rooney, Amherst, WI, for the Rooney group of intervening plaintiffs.

Scott A. Johnson & Todd M. Johnson, Johnson Law Group, Minnetonka, MN, for the Rocque group of

intervening plaintiffs, the Descendants of Joseph Coursolle group of intervening plaintiffs.

James L. Blair, Renaud, Cook, Drury, Mesaros, PA, Phoenix, AZ, for the anonymous Blair group of intervening plaintiffs. With him on the briefs was Barry P. Hogan, Renaud Cook Drury Mesaros, PA, Phoenix, AZ.

Gary J. Montana, Montana & Associates, Osseo, WI, for the Julia DuMarce group of intervening plaintiffs.

Nicole N. Emerson, Lynn, Jackson, Shultz & Lebrun, PC, Sioux Falls, SD, for the Garreau group of intervening plaintiffs.

Douglas Kettering, Kettering Law Office, Yankton, SD, for the Ke Zephier group of intervening plaintiffs.

Randy V. Thompson, Nolan, MacGregor, Thompson & Leighton, St. Paul, MN, for the Abrahamson group of intervening plaintiffs.

Frances Felix, pro se, Minneapolis, MN, for herself and members of her immediate family as intervening plaintiffs.

Royce Deryl Edwards, Jr., Joplin, MO, for the Robertson-Vadnais group of intervening plaintiffs.

Rory King, Bantz, Gosch & Cremer, LLC, Aberdeen, SD, for the Marvel Jean DuMarce group and the Youngbear group.

Brian L. Radke, Radke Law Office, P.C., Sioux Falls, SD, for the Schroder group of intervening plaintiffs.

Opinion

OPINION AND ORDER

LETTOW, Judge.

On December 21, 2010, the court issued the seventh opinion in this long-pending litigation involving approximately 20,750 persons of Indian descent. *Wolfchild v. United States,* 96 Fed.Cl. 302, 310 (2010) ("*Wolfchild VII*"). In that decision, the court held that plaintiffs are entitled to certain funds derived from leasing and licensing lands that had been secured and reserved for eligible Indians pursuant to Appropriations Acts passed in 1888, 1889, and 1890. *Id.* at 352. The parties have since stipulated to the amount of funds at issue as of January 1, 2011. The case is now before the court on pending cross-motions for summary judgment respecting persons who qualify as proper claimants to those funds, and on the related matter of whether the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401-1408, applies to any judgment entered in this case. In addition, since the court's opinion of December 21 was rendered, plaintiffs and plaintiff-intervenors have filed numerous motions to amend complaints and motions for summary judgment on a variety of additional substantive claims.

FACTS[1]

As of 1862, the Minnesota Sioux consisted of four bands known as the Mdewakanton, the Wahpakoota (together comprising the "lower bands"), the Sisseton, and the Wahpeton (comprising the "upper bands"). *Wolfchild VII,* 96 Fed.Cl. at 311-12. At that time, the relationship between the Minnesota Sioux and the United States was defined and governed by a series of treaties, which provided generally for the supply of land and funds to the Sioux. *Id.* at 312-13. In August of 1862, individuals from each of the four bands revolted against the United States, killing settlers, destroying and damaging property, and breaching the treaties then held with the United States. *Id.* at 313. As a consequence, the United States annulled its treaties with the Sioux, which had the effect of, among other things, voiding the annuities that had been granted to the Sioux under those treaties. *Id.* Additionally, the United States confiscated the Sioux lands of Minnesota and later directed that the Sioux be removed to tracts of land outside the limits of the then-existing states. *Id.* These steps were accomplished by two legislative actions taken by Congress and signed by President Lincoln in 1863: the Act of February 16, 1863, ch. 37, 12 Stat. 652, and the Act of

[1] A brief recitation of the relevant facts is provided in this decision. A detailed account of the historical background of this case can be found in this court's prior opinions, including especially its most recent opinion, *Wolfchild VII,* 96 Fed.Cl. 302.

March 3, 1863, ch. 119, 12 Stat. 819 (together, "the 1863 Acts"). *Id.*

Some of the Sioux, however, remained loyal to the United States during the uprising by either not participating in the revolt or acting affirmatively to save the settlers. *Wolfchild VII,* 96 Fed.Cl. at 313. By their actions, those Sioux severed their tribal relationships. Although Congress voided all treaties with the Sioux, in the 1863 Acts it recognized the loyalty – and ensuing hardship – of those "friendly Sioux." *Id.* at 313-14. In Section 9 of the Act of February 16, 1863, Congress authorized the Department of the Interior to assign up to eighty acres of public land to each friendly Sioux:

> [T]he Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the beforenamed bands [the Sisseton, Wahpeton, Mdewakanton, and Wahpakoota of the Dakota or Sioux Indians] who exerted himself in rescuing the whites from the late massacre [by] said Indians. The land so set apart . . . shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

Act of February 16, 1863, ch. 37, § 9, 12 Stat. at 654.

Two weeks after enacting this statute, Congress passed a second act providing for the friendly Sioux. The second Act of 1863 supplemented the first Act in

important respects. Section 1 provided that the President was "authorized . . . and directed to assign to and set apart" "outside of the limits of any state" eighty acres of "good agricultural lands" for all of the Sioux, regardless of loyalty. Act of March 3, 1863, ch. 119, § 1, 12 Stat. at 819. This grant of land "appeared to be an attempt to address the fact that the first Act of 1863 confiscated all Sioux land, leaving the Sioux with no direction as to where they might make a new home." *Wolfchild VII,* 96 Fed.Cl. at 314. In Section 4 of the second 1863 Act, Congress provided for the friendly Sioux specifically:

> [I]t shall be lawful for [the] Secretary [of the Interior] to locate any meritorious individual Indian of [the four] bands, who exerted himself to save the lives of the whites in the late massacre, upon [the former Sioux reservation 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 . . . [provided] [t]hat no more than eighty acres shall be awarded to any one Indian, under this or any other act.

Act of March 3, 1863, ch. 119, § 4, 12 Stat. at 819.[2] Ultimately, no lands were provided to the friendly

[2] The relationship between the two Acts of 1863 was a point of dispute resolved in the court's prior opinion. *See Wolfchild VII,* 96 Fed.Cl. at 314-15. Ultimately, the court concluded that the text and legislative history of the Acts demonstrated that the second Act of 1863 did not supersede the first Act; rather, the

(Continued on following page)

Sioux pursuant to the 1863 Acts; however, neither act has been repealed. *Wolfchild VII,* 96 Fed.Cl. at 315.

After additional failed legislative attempts to provide for the friendly Sioux, in 1888, 1889, and 1890, Congress enacted Appropriations Acts which provided funds to the Secretary of the Interior with an accompanying mandate to purchase for those friendly Sioux who belonged to the Mdewakanton band specifically ("loyal Mdewakanton") land, agricultural implements, and livestock. *See Wolfchild VII,* 96 Fed.Cl. at 315-18; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93; Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29. Unlike the prior unsuccessful Acts of 1863, under the 1888, 1889, and 1890 Appropriations Acts, land and other goods were purchased for the loyal Mdewakanton. *Wolfchild VII,* 96 Fed.Cl. at 318. The land ("1886 lands") was conveyed to eligible Mdewakanton under an assignment system, pursuant to which title was retained in the United States' name, preventing alienation and sale to others. *Id.*

The text delineating the beneficiary class in each Appropriation Act varied in minute respects, but the essential thrust of the Acts was Congress' desire that loyal Mdewakanton would be identified as those Mdewakanton who had severed their tribal relations and who had either remained in, or were removing to,

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two had distinguishable scopes and were complementary in their application. *See id.*

Minnesota as of May 20, 1886.[3] To determine the persons who would be considered "loyal" Mdewakanton under Congress' definition and thus would receive the benefits of the Appropriations Acts, the Department of Interior relied upon two censuses: the McLeod listing and the Henton listing. *Wolfchild VII,* 96 Fed.Cl. at 316. The McLeod listing was generated in 1886 by U.S. Special Agent Walter McLeod and listed all of the full-blood Mdewakantons remaining in Minnesota at the time. *Id.* Under the Secretary's direction, on January 2, 1889, a supplementary census was taken by Robert B. Henton, Special Agent for the Bureau of Indian Affairs ("BIA"), of the Mdewakanton living in Minnesota since May 20, 1886. *Id.* That listing included some mixed bloods. Together, these listings were used to distribute the

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[3] *See* Act of Aug. 19, 1890, 26 Stat. at 349 (defining the beneficiary class as "full and mixed blood Indians in Minnesota heretofore belonging to the M[de]wakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations"); Act of Mar. 2, 1889, 25 Stat. at 992 (defining the beneficiary class as "full-blood Indians, in Minnesota heretofore belonging to the M[de]wakanton band of Sioux Indians, who have resided in said State since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations"); Act of June 29, 1888, 25 Stat. at 228 (defining the beneficiary class as "full-blood Indians in Minnesota, belonging to the M[de]wakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, A.D. eighteen hundred and eighty-six, and severed their tribal relations").

benefits of the Appropriations Acts to those persons whose names appeared on the lists, and subsequently, to lineal descendants of those listed persons. *Id.*[4]

Eventually, funds were generated by and derived from the 1886 lands, which monies were placed in Treasury trust fund accounts. *Wolfchild VII,* 96 Fed.Cl. at 319-21. Some of these funds were obtained from a transfer of a portion of the 1886 lands by the United States to the Upper Mississippi River Wild Life and Fish Refuge ("the Wabasha Land Transfer"). *Id.* at 319-20. The remaining portion of the money, however, stemmed from Interior's policy of leasing or licensing 1886 lands for fair market value where no eligible Mdewakanton or lineal descendant was available for a land assignment. *Id.* at 320. In 1975, the BIA performed a detailed accounting of all funds derived from the 1886 lands then held by the Treasury. *Id.* at 321.

Around the same time, Congress altered significantly the status of the 1886 lands. In 1980, Congress provided that the 1886 lands which "were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians," would henceforth be "held by the United States . . . in trust for" three Indian communities – the Shakopee

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[4] "Although not guaranteed under the assignment system, in practice, an assignee's land would pass directly to his children upon his death." *Wolfchild v. United States,* 62 Fed.Cl. 521, 529 (2004) ("*Wolfchild I*").

Mdewakanton Sioux Community, the lower Sioux Community, and the Prairie Indian Community – which had formed in the vicinity of the several 1886 land purchases. Act of 1980, Pub.L. No. 96-557, 94 Stat. 3262 ("1980 Act"). That legislation, however, did not address the funds derived from the 1886 lands then being held by the Treasury. Nevertheless, in 1981 and 1982 those funds were distributed to the three communities. *Wolfchild VII,* 96 Fed.Cl. at 323-24.[5]

PROCEDURAL HISTORY

Plaintiffs aver that they are lineal descendants of the loyal Mdewakanton. *See Wolfchild I,* 62 Fed.Cl. at 524. They filed their complaint in this case on November 18, 2003, and since that time the number of

[5] A detailed description of the historical genesis of the three communities and the role they played in the events of this case is provided in the court's immediately prior opinion. *See Wolfchild VII,* 96 Fed.Cl. at 318-19. In brief, the communities are organized as independent entities under the Indian Reorganization Act, Act of June 18, 1934, ch. 576, 48 Stat. 984 (also known as the Wheeler-Howard Act) (codified as amended at 25 U.S.C. §§ 461-79). *Id.* "Although [some] loyal Mdewakanton [and their descendants] resided in the three communities, the three communities were [not] and are not exclusively comprised of descendants of the loyal Mdewakanton, and many of the descendants of the 1886 Mdewakantons are not enrolled members of any of the three communities." *Wolfchild VII,* 96 Fed.Cl. at 319 (internal quotation marks omitted).

plaintiffs has grown to approximately 20,750 persons.[6]

On October 27, 2004, the court granted partial summary judgment for plaintiffs, holding that a trust for the benefit of the loyal Mdewakanton and their lineal descendants was created by the Appropriations Acts. *See Wolfchild I,* 62 Fed.Cl. at 555.[7] Approximately two and one half years after that decision, the government interposed a motion to certify the court's decisions in *Wolfchild I*, *Wolfchild II*, and *Wolfchild III* for interlocutory appeal under 28 U.S.C. § 1292(d). *See Wolfchild v. United States,* 78 Fed.Cl. 472 (2007) ("*Wolfchild V*"). The court granted the government's motion in part and certified the questions of whether the Appropriations Acts created a trust for the loyal Mdewakanton and their lineal descendants, and whether, if the Acts created such a trust, Congress terminated that trust with the 1980 Act. *Id.* at 485. The Federal Circuit granted interlocutory appeal of those two questions, and reversed this court's conclusions in both respects. *See Wolfchild v. United States,* 559 F.3d 1228, 1231 (Fed.Cir.2009) ("*Wolfchild VI*"),

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[6] Plaintiffs number about 7,500 persons, and 41 separate groups totaling about 13,250 people were granted leave to intervene as plaintiffs. *See Wolfchild v. United States,* 77 Fed.Cl. 22, 31-35 (2007) ("*Wolfchild IV*").

[7] The government's motion for reconsideration of this decision was denied in *Wolfchild v. United States,* 68 Fed.Cl. 779 (2005) ("*Wolfchild II*"). The court addressed procedural issues in *Wolfchild v. United States,* 72 Fed.Cl. 511 (2006) ("*Wolfchild III*"), and *Wolfchild IV,* 77 Fed.Cl. 22.

cert. denied, ___ U.S. ___, 130 S.Ct. 2090, 176 L.Ed.2d 755 (2010).

The court of appeals concluded that the Appropriations Acts did not create a trust for the benefit of the loyal Mdewakanton nor did they vest title, legal or otherwise, in that group, notwithstanding the language and usage reflected in the land assignments and certain historical legal memoranda. *Wolfchild VI,* 559 F.3d at 1240-41, 1249. It concluded instead that "the Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction." *Id.* at 1240. The court determined as well that the 1980 Act extinguished any trust that would have been created by the Appropriations Acts. *Id.* at 1259-60. The Federal Circuit remanded the case to this court to address one outstanding question: "whether it was lawful for the Interior Department, following the 1980 Act, to transfer to the three communities approximately $60,000 in funds that had been collected as proceeds from the sale, use, or leasing of certain of the 1886 lands, given that the 1980 Act was silent as to the disposition of those funds." *Id.* at 1259 n. 14.

On December 21, 2010, in *Wolfchild VII,* this court granted partial summary judgment to plaintiffs respecting entitlement to those funds derived from the 1886 lands and held in trust accounts prior to 1981 and 1982. 96 Fed.Cl. at 352. After rejecting both statute-of-limitations and jurisdictional challenges, the court concluded that the government acted without authority and in contravention of the Appropriations

Acts when it distributed the funds to the three communities as opposed to the lineal descendants of the loyal Mdewakanton. *See id.* at 331-48. The court concluded that plaintiffs' entitlement did not extend, however, to funds traceable to the Wabasha Land Transfer. *See id.* at 346. This was so because the 1944 Act dictating the transfer of those lands "provided that the . . . funds be paid to a broader set of beneficiaries and conferred upon the Secretary supplemental authority to distribute those funds, thus freeing the disbursement of the Wabasha funds from the statutory restrictions of the Appropriations Acts." *Id.*

The court determined as well that the 1980 Act did not terminate plaintiffs' entitlement to the funds accrued before that law took effect because "the 1980 legislation dealt only with the 1886 lands, and because such funds were collected and [were to be] disbursed pursuant to authority derived by the Secretary from the Appropriations Acts." *Wolfchild VII,* 96 Fed.Cl. at 349. However, because the 1980 Act created a trust for the three communities, with the 1886 lands constituting the trust corpus, the court concluded that after 1980, but not before, "the three communities, not the plaintiffs, would be entitled to any income derived from those lands because the communities have become the trust beneficiaries." *Id.* In sum, the court held that "as lineal descendants of the 1886 Mdewakanton, plaintiffs were entitled to the funds derived from leasing and licensing [of] the 1886 lands prior to the passage of the 1980 Act," excluding

those funds traceable to the Wabasha Land Transfer. *Wolfchild VII,* 96 Fed.Cl. at 351.

In that same opinion, the court addressed motions to amend complaints filed by the Julia DuMarce Group and the Harley D. Zephier Group of plaintiff-intervenors. *Wolfchild VII,* 96 Fed.Cl. at 335-36. Those motions sought to add claims based upon the Act of February 16, 1863. The court granted leave to amend such that the parties could address "the salient threshold question . . . [of] whether the first Act of 1863 can be read as giving rise to a money-mandating duty under controlling precedent," a question which, at that time, none of the parties had addressed. *Id.* at 336.

Following a status conference held January 21, 2011, the parties and the court identified the three remaining issues that were required to be resolved before the court could enter final judgment in this case. Those issues were: (1) the amount of money involved in the claim delineated in the *Wolfchild VII* opinion, (2) the persons who qualified as proper claimants in this case, and (3) the role, if any, of the 1863 Acts. *See* Scheduling Order, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. Jan. 21, 2011), ECF No. 843. On March 7, 2011, the parties stipulated that the funds to which plaintiffs are entitled pursuant to the court's opinion in *Wolfchild VII,* brought forward to January 1, 2011, are in the amount of $673,944.00. *See* Stipulation as to 1886 Funds, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed Apr. 1, 2011), ECF No. 1030. The latter two issues involving eligible

claimants and the role of the 1863 Acts remain, however, a source of significant dispute in this case.

Plaintiffs and many plaintiff-intervenors have filed motions to amend their respective complaints to incorporate claims based upon both Acts of 1863 and claims grounded in the Indian Non-Intercourse Act, 25 U.S.C. § 177 ("Non-Intercourse Act"). Plaintiffs have also filed a motion for summary judgment on the issue of claimant eligibility as to the stipulated funds, in which motion plaintiff-intervenors have also joined. Attendant to the issue of claimant eligibility, plaintiffs and plaintiff-intervenors have submitted extensive materials relating to their respective genealogies.

The government opposes plaintiffs' and plaintiff-intervenors' proposed amendments, arguing that such amendments would be futile. Def.'s Mem. in Support of Its Motion to Dismiss ("Def.'s Mem.") at 21. The government additionally has filed a motion to dismiss or, in the alternative, a cross-motion for summary judgment, as well as a motion to defer consideration of eligibility under Rule 56(f) of the Rules of the Court of Federal Claims ("RCFC"), which rule has recently been revised to become Rule 56(d). Among other things, the government has requested that the court defer consideration of the facts submitted by plaintiffs concerning their respective genealogies until the court resolves the outstanding issues of generic entitlement. A hearing was held on the pending motions on May 13, 2011.

After full briefing of the dispositive motions had been completed and the hearing was held, the government raised an entirely new and significant issue of law in a joint status report filed May 27, 2011. In that report, the government contended that the Indian Tribal Judgment Fund Use or Distribution Act, Pub.L. No. 93-134, § 1, 87 Stat. 466 (1973) (codified as amended at 25 U.S.C. §§ 1401-08) ("Indian Judgment Distribution Act"), applies to any distribution of funds that may occur as a result of a final judgment in this case. On June 3, 2011, the court requested that the parties file supplemental briefs addressing the potential applicability of the Indian Judgment Distribution Act to this case, and those briefs have been filed. The pending motions accordingly are ready for disposition.

I. MOTIONS TO AMEND COMPLAINTS

A. *Applicable Criteria*

Under RCFC 15(a)(2), "[t]he court should freely give leave [to amend pleadings] when justice so requires." So long as "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *see also Mitsui Foods, Inc. v. United States,* 867 F.2d 1401, 1403-04 (Fed.Cir.1989). Although a court ought to exercise liberally its discretion to grant leave to amend, "'undue delay, bad faith or dilatory motive on

the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment,' may justify the denial of a motion for leave to amend." *Mitsui Foods,* 867 F.2d at 1403-04 (quoting *Foman,* 371 U.S. at 182, 83 S.Ct. 227); *see also Henry E. & Nancy Horton Bartels Trust ex rel. Cornell Univ. v. United States,* 88 Fed.Cl. 105, 111 (2009), *aff'd,* 617 F.3d 1357 (Fed.Cir.2010). Where one of these adverse factors exists, denial of the request for leave to amend is appropriate. *See Te-Moak Bands of W. Shoshone Indians of Nev. v. United States,* 948 F.2d 1258, 1261 (Fed.Cir.1991) (affirming Claims Court's denial of motion to amend pleadings based on undue delay and failure to cure in an earlier-allowed amendment); *Mitsui Foods,* 867 F.2d at 1403-04 (Court of International Trade's denial of motion to amend justified upon "apparent futility"); *Rockwell Automation, Inc. v. United States,* 70 Fed.Cl. 114, 122-24 (2006) (denial of motion to amend pleadings due to decade-long delay and prior opportunities to seek amendment).

Regarding futility, "[a] motion to amend may be deemed futile if a claim added by the amendment would not withstand a motion to dismiss." *Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States,* 71 Fed.Cl. 172, 176 (2006) (citing *Slovacek v. United States,* 40 Fed.Cl. 828, 834 (1998)). In this regard, "[w]hen a party faces the possibility of being denied leave to amend on the ground of futility, that party must demonstrate that its pleading states

a claim on which relief could be granted, and it must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion." *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.,* 464 F.3d 1339, 1354-55 (Fed.Cir.2006); *see also Cultor Corp. v. A.E. Staley Mfg. Co.,* 224 F.3d 1328, 1333 (Fed.Cir.2000) ("[Plaintiff] has not made a colorable argument of possible success. . . . Futility was apparent, and is adequate grounds for the denial of leave to amend."); *Webster v. United States,* 74 Fed.Cl. 439, 444 (2006) (denying motion to amend where proposed claims were based upon statute that did not provide a predicate for jurisdiction).

At this juncture, the court must consider also the standard governing jurisdictional challenges, as those objections form the basis of the government's futility arguments. "'Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits.'" *Ultra-Precision Mfg. Ltd. v. Ford Motor Co.,* 338 F.3d 1353, 1356 (Fed.Cir.2003) (quoting *PIN/NIP, Inc. v. Platte Chem. Co.,* 304 F.3d 1235, 1241 (Fed.Cir.2002)); *see also Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 88-89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). When considering a jurisdictional dispute, the court draws all reasonable inferences in favor of the plaintiff and accepts as true the undisputed allegations in the complaint. *De Maio v. United States,* 93 Fed.Cl. 205, 209 (2010) (citing *Hamlet v. United States,* 873 F.2d 1414, 1415-16 (Fed.Cir.1989)).

Nonetheless, a plaintiff will not defeat a jurisdictional challenge by "rely[ing] merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction." *Murphy v. United States,* 69 Fed.Cl. 593, 600 (2006).

Ultimately, it is the plaintiff who bears the burden of establishing by a preponderance of the evidence the court's subject matter jurisdiction over its claim. *See McNutt v. General Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *M. Maropakis Carpentry, Inc. v. United States,* 609 F.3d 1323, 1327 (Fed.Cir.2010). "In establishing the predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits and deposition testimony." *Cedars-Sinai Med. Ctr. v. Watkins,* 11 F.3d 1573, 1584 (Fed.Cir.1993) (citing *Land v. Dollar,* 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Reynolds v. Army & Air Force Exchange Serv.,* 846 F.2d 746, 747 (Fed.Cir.1988)).

B. *Amendments Based on the Indian Non-Intercourse Act*

The Indian Non-Intercourse Act provides, in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, *from any Indian nation or tribe of Indians,* shall be of any validity in law or equity,

> unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177 (emphasis added).[8] The Non-Intercourse Act "bars conveyances by Indians to non-Indians unless made or ratified by Congress." *Seneca Nation of Indians v. New York,* 382 F.3d 245, 248 (2nd Cir.2004); *see also Catawba Indian Tribe of S. Car. v. United States,* 982 F.2d 1564, 1566 (Fed.Cir.1993) (Under the Non-Intercourse Act, "transfers of title to Native American lands [a]re prohibited unless [made] pursuant to a treaty approved by the United States."). Its purpose is to "prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress and to enable the [g]overnment, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent." *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 119, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960).

Plaintiffs contend that they have a viable claim under the Non-Intercourse Act on two grounds. First, plaintiffs aver that because Interior has "never fulfilled its obligations to set aside a land base for the

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[8] The current version of the Non-Intercourse Act was enacted as Section 12 of the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 730. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 242 n. 9, 105 S.Ct. 2587, 86 L.Ed.2d 168 (1985).

friendly Sioux from the former Sioux reservation," it has contravened the Non-Intercourse Act. Pls.' Mot. for Summ. Judgment ("Pls.' Mot.") at 17. Plaintiffs' second claim under the Non-Intercourse Act is less succinctly stated and reflects historical facts upon which the parties do not agree.

The parties concur that in 1865 Reverend Samuel D. Hinman identified twelve sections of land in Minnesota to set aside for the friendly Sioux pursuant to the 1863 Acts. *See* Def.'s Mem. at 8; Pls.' Mot. at 9.[9] Plaintiffs contend those twelve sections of land were identified at the request of the Secretary and were set aside for the friendly Sioux, but no transfers, assignments, nor allotments to individual Sioux were made due to hostility from white settlers in the area of those sections. Pls.' Mot. at 9; *see also* Pls.' Resp. at 1-2. Two years later, the twelve sections of land, along with all former Sioux reservation lands, were conveyed through public sale pursuant to a proclamation by President Andrew Johnson. Pls.' Mot. at 9. Plaintiffs aver that the twelve sections of land, once set aside, "remained their tribal, aboriginal lands." *Id.* at 23. They argue that the public sale of those twelve sections constituted a violation of the Non-Intercourse Act. *Id.* at 24.[10]

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[9] Reverend Hinman was a protégé of Bishop Henry B. Whipple, a man who had lobbied for benefits for the friendly Sioux after the uprising. Pls.' Mot. at 9.

[10] In related vein, plaintiffs contend that the public sale of the lands breached the first Act of 1863 because that Act dictated

(Continued on following page)

The government contends that although the Secretary approved Reverend Hinman's identification of the twelve sections as putative set asides for the loyal Sioux, those twelve sections were never actually set aside and no land grants under the 1863 Acts were ever made. Def.'s Mem. at 8.[11] It argues that the identification of land for future possible grants to the friendly Sioux is thus an insufficient basis for plaintiffs' claims because plaintiffs never obtained any vested interests in those lands. *Id.* at 51. The government responds as well that the Non-Intercourse Act does not apply to actions taken by the United States, that plaintiffs and plaintiff-intervenors are not a "tribe" within the meaning of the Act, that the twelve sections of land were not tribal lands, and that the Non-Intercourse Act is not a money-mandating statute upon which to base a claim in this court. Def.'s Mem. at 44-53. Additionally, the government asserts that any claims grounded in the 1863 Acts are barred by the statute of limitations. *Id.* at 35. The factual disputes over the twelve sections of land need

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that once the Secretary set aside the public lands for the friendly Sioux, the consent of the President was required to alienate or devise such land. Pls.' Mot. at 23. This argument fails under plaintiffs' own version of events because the sale of such land was premised upon a proclamation by President Johnson authorizing the sale of all former Sioux reservation land, of which the twelve sections were a part.

[11] The parties concur that sometime between 1868 and 1869, a further attempt to set aside land under the 1863 Acts was made but ultimately those lands were never set aside. Pls.' Mot. at 9-10; Def.'s Mem. 8-9.

not be resolved because plaintiffs' claim based upon the Non-Intercourse Act fails for other reasons.

In every case brought in federal court, the plaintiff must establish its standing to bring suit. *See Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). The Supreme Court's "standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-62 [112 S.Ct. 2130, 119 L.Ed.2d 351] (1992); and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove,* 542 U.S. at 11-12, 124 S.Ct. 2301 (quoting *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). Prudential standing looks to whether "the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *see also McKinney v. United States Dep't of Treasury,* 799 F.2d 1544, 1549-51 (Fed.Cir.1986). In other words, it asks "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *see also Valley Forge Christian Coll. v. Americans United for Separation of Church and*

State, Inc., 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

As made explicit by the text of the statute, a fundamental requisite to maintaining a claim based upon the Non-Intercourse Act is that the claimants constitute an Indian tribe (or nation). *See* 25 U.S.C. § 177 ("from any *Indian nation or tribe of Indians*") (emphasis added); *Seneca Nation,* 382 F.3d at 258 ("In order to establish a violation of the Non-Intercourse Act, [plaintiffs] are required to establish that: (1) *they are an Indian tribe*. . . .") (emphasis added); *Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 56 (2d Cir.1994) (same); *Mashpee Tribe v. Secretary of Interior,* 820 F.2d 480, 482 (1st Cir.1987) (same). Specifically, plaintiffs are required to demonstrate that they "represent entities that (1) were tribes at the time the land was alienated and (2) remain tribes at the time of suit." *Mashpee Tribe,* 820 F.2d at 482.

This element is required not only for substantive relief under the statute, but it is also a firmly-established requisite for standing to bring a claim under the Non-Intercourse Act. *See San Xavier Dev. Auth. v. Charles,* 237 F.3d 1149, 1152 (9th Cir.2001) ("Only Indian tribes may bring § 177 actions, and 'individual Indians do not even have standing to contest a transfer of tribal lands on the ground that the transfer violated that statute.'" (quoting *United States v. Dann,* 873 F.2d 1189, 1195 (9th Cir.1989))); *Epps v. Andrus,* 611 F.2d 915, 918 (1st Cir.1979) ("As the courts have stated repeatedly, claims on the part

of individual Indians or their representative are not cognizable in federal courts under the Indian Trade and Non-Intercourse Act. . . . In short, since plaintiffs are not suing as a tribe, they do not have standing to bring this claim. . . .") (citations omitted), *overruled on other grounds, James v. Watt,* 716 F.2d 71, 74 (1st Cir.1983); *Mashpee Tribe v. New Seabury Corp.,* 592 F.2d 575, 581 (1st Cir.1979) ("Plaintiff must prove that it meets the definition of 'tribe of Indians' as that phrase is used in the Non[-I]ntercourse Act both in order to establish any right to recovery and to establish standing to bring this suit."); *Nahno-Lopez v. Houser,* 627 F.Supp.2d 1269, 1277 (W.D.Okla.2009) ("Only tribes have standing to bring claims under [the Non-Intercourse Act]; individual Indians do not have standing under this Act."), *aff'd,* 625 F.3d 1279 (10th Cir.2010); *State of N.J. v. City of Wildwood,* 22 F.Supp.2d 395, 404 (D.N.J.1998) ("Only the Tribe has standing to vindicate its rights under the Non-Intercourse Act. . . ."); *Canadian St. Regis Band of Mohawk Indians v. State of N.Y.,* 573 F.Supp. 1530, 1534-37 (N.D.N.Y.1983) (discussing in detail tribal status as an element of standing under the Non-Intercourse Act).

Just as Article III standing is a "threshold jurisdictional issue," *Southern Calif. Fed. Sav. & Loan Ass'n v. United States,* 422 F.3d 1319, 1328 (Fed.Cir.2005), the "prudential standing doctrine[ ] represents the sort of 'threshold question' . . . [that] may be resolved before addressing jurisdiction." *Tenet v. Doe,* 544 U.S. 1, 6 n. 4, 125 S.Ct. 1230, 161 L.Ed.2d

82 (2005); *see also Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 584-85, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) ("While *Steele* [*Steel*] *Co.* reasoned that subject matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues. . . . It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits."); *Warth,* 422 U.S. at 517-18, 95 S.Ct. 2197 ("The rules of standing, whether as aspects of the Art[icle] III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of courts, are *threshold determinants of the propriety of judicial intervention.*") (emphasis added); *The Wilderness Soc. v. Kane Cnty., Utah,* 632 F.3d 1162, 1168 (10th Cir.2011) (en banc) ("Because [plaintiff] lacks prudential standing, we proceed directly to that issue without deciding whether [plaintiff] has constitutional standing or whether the case is moot.").

This case has proceeded for the past eight years on the foundational finding by this court that plaintiffs are not a tribe but that they could bring a suit under the Indian Tucker Act because they are an identifiable group of American Indians residing with the territorial limits of the United States. In its first opinion in this case, the court stated unequivocally: "The lineal descendants are unable to sue as a tribe because they necessarily had to sever their tribal relations prior to 1886 to qualify as beneficiaries of the 1888, 1889, and 1890 Acts, but they were and still remain an identifiable group of American Indians."

Wolfchild I, 62 Fed.Cl. at 540; *see also Wolfchild VII,* 96 Fed.Cl. at 338 ("The loyal Mdewakanton are an 'identifiable group of American Indians' within the meaning of the [Indian Tucker] Act."). Indeed, in their most recent filing, plaintiffs go even further and avow that "the [c]ourt's forthcoming final judgment will be *in favor of individuals – not in favor of a group.*" Pls.' Supplemental Br. at 2 (emphasis added).

Notwithstanding the long-established conclusions of this court and plaintiffs' own representations, plaintiffs contend that the Appropriations Acts' identification of loyal Mdewakanton as statutory beneficiaries recognized that group as a "tribe." Pls.' Mot. at 25. They further represent that the loyal Mdewakanton are "a federally[-]recognized group of Indians as a result of the 1886 enrollment and supplement." Pls.' Resp. and Reply at 14. Plaintiffs assert additionally that "the 'friendly Sioux' identified in the 1863 Acts were . . . a 'tribe' for the purposes of the Non[-]Intercourse Act," and that because plaintiffs are the beneficiaries of the Appropriations Acts, plaintiffs are the successors in interest to any claims the friendly Sioux would have under the Non-Intercourse Act. Pls.' Mot. at 21, 27-28.

The Non-Intercourse Act does not provide a definition of the term "tribe." In *United States v. Candelaria,* 271 U.S. 432, 442, 46 S.Ct. 561, 70 L.Ed. 1023 (1926), however, the Supreme Court interpreted "tribe" for purposes of the Non-Intercourse Act as being "'a body of Indians of the same or a similar race, united in a community under one leadership or

government, and inhabiting a particular, though sometimes ill-defined, territory.'" (quoting *Montoya v. United States,* 180 U.S. 261, 266, 21 S.Ct. 358, 45 L.Ed. 521 (1901)) (the "*Montoya/Candelaria* definition"); *see also Golden Hill,* 39 F.3d at 59 (adopting and applying the *Montoya/Candelaria* definition);[12] *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 377 n. 8 (1st Cir.1975) (same); *Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp.,* 418 F.Supp. 798, 807 n. 8 (D.R.I.1976) (same). Although a group of Indians may constitute a "tribe" for the purposes of the Non-Intercourse Act without being a tribe formally recognized by the federal government, *Golden Hill,* 39 F.3d at 59, courts have looked as well to the BIA regulations governing federal recognition for further guidance on the meaning of "tribe" within the Non-Intercourse Act. *See id.* (noting that BIA regulations require that: "(a) they have been identified since 1900 as 'American Indian' or 'aboriginal' on a substantially continuous basis, (b) a predominant portion of their group comprises a distinct community and has existed as such from historical times to the present, and, (c) they have maintained tribal political influence or authority over its members as an autonomous entity throughout

[12] Notably, in *Golden Hill,* the Second Circuit remanded the matter to the district court on the basis of the primary jurisdiction doctrine, concluding that a stay of plaintiff's action was appropriate to allow the Department of the Interior to rule on plaintiff's pending petition for tribal recognition. 39 F.3d at 58-61.

history until the present"). Importantly, "[t]he *Montoya/Candelaria* definition and the BIA criteria both have anthropological, political, geographical and cultural bases and *require, at a minimum, a community with a political structure.*" *Id.* (emphasis added).

There has been no evidence put forth that plaintiffs are a tribe within the meaning of this definition. The sole documents upon which plaintiffs rely to establish their status are the birth certificates which have been submitted in support of plaintiffs' eligibility as claimants under the Appropriations Acts. *See* Pls.' Resp. and Reply at 16 ("Plaintiffs' birth certificates collected by anthropologist Dr. Barbara Buttes[ ] indicate anthropological, political, [and] geographical . . . ties."). While those birth certificates demonstrate, as an incidental matter, that individual loyal Mdewakanton and their descendants share anthropological or geographical connections through familial unions, they are insufficient to show that plaintiffs constituted in the past or constitute now a united community, existing and living under one leadership or government and inhabiting a particular territory. Indeed, plaintiffs do not even allege those pertinent facts to be true; their claim is based upon severance, not continuation, of tribal ties.

Reference to a case in which a group of non-federally-recognized Indians was deemed a "tribe" in accord with the *Montoya/Candelaria* definition is instructive. In *New York v. Shinnecock Indian Nation,* 400 F.Supp.2d 486 (E.D.N.Y.2005), New York sued to enjoin the construction and operation of a gaming

casino by the Shinnecock. In determining whether the Shinnecock constituted a "tribe" and were thus entitled to invoke its sovereign immunity against such suit, the court employed the *Montoya*/*Candelaria* definition and concluded that the Shinnecock were a tribe. The court's determination was based upon, among other things, that: (1) the Shinnecock had been recognized as a tribe by New York for more than 200 years; (2) the tribe had offices and was located on a reservation, (3) tribal officials were the plaintiffs and were suing in their official capacity, and (4) the tribe had selected or elected tribal leaders in every year from 1792 through 2004. *Id.* at 487-90.[13]

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[13] In support of their contentions, plaintiffs cite to *Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 388 F.Supp. 649 (D.Me.1975), *aff'd,* 528 F.2d 370, and *Narragansett Tribe,* 418 F.Supp. 798, in which, according to plaintiffs, the court recognized as a "tribe" under the Non-Intercourse Act similarly placed "landless Indian groups [that had] enrolled people into their purported tribe via genealogical qualification per birth certificates and similar documents." Pls.' Mot. at 27. Yet, those cases did nothing of the sort. In *Passamaquoddy,* "it [wa]s stipulated that the Passamaquoddies are a 'tribe of Indians,'" 388 F.Supp. at 656, and in *Narragansett Tribe*, that issue was explicitly reserved for trial, 418 F.Supp. at 807 n. 8, 808. And far from being "landless Indian groups" that were then enrolling members via birth certificates, the named plaintiff in *Passamaquoddy* was "the official governing body of the Passamaquoddy Tribe, a tribe of Indians residing on two reservations in the State of Maine . . . [that] since at least 1776 . . . have constituted and continue to constitute a tribe of Indians in the racial and cultural sense." 388 F.Supp. at 651-52.

Plaintiffs' reliance on the formation of the Minnesota Mdewakanton Dakota Oyate ("Mdewakanton Oyate") is unavailing. Plaintiffs established the Mdewakanton Oyate on March 26, 2004, subsequent to the initiation of this lawsuit. Pls.' Mot. and Br. Regarding Notice to Lineal Descendants at 8, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed March 21, 2005). That association was formed as "a Minnesota non-profit corporation . . . for the purpose of organizing the trust beneficiaries for business purposes." *Id.* At a minimum, existence of the Mdewakanton Oyate fails to satisfy the requirement under the Non-Intercourse Act that plaintiffs constitute a tribe at the time of the allegedly unlawful sale of land and at the time of the initiation of suit. *See Mashpee Tribe,* 820 F.2d at 482; *see also Abraxis Bioscience, Inc. v. Navinta LLC,* 625 F.3d 1359, 1364 (Fed.Cir.2010) ("A court may exercise jurisdiction only if a plaintiff has standing to sue *on the date it files suit.*" (citing *Keene Corp. v. United States,* 508 U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993); *Minneapolis & St. Louis R.R. v. Peoria & Perkin Union Ry. Co.,* 270 U.S. 580, 586, 46 S.Ct. 402, 70 L.Ed. 743 (1926))). What is more, the Mdewakanton Oyate has never been and is not now a plaintiff in this lawsuit. *See* Wolfchild Pls.' Objections & Admissions to United States' Proposed Findings of Uncontroverted Fact at 2, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed May 4, 2011), ECF No. 1047.

In sum, the court concludes that plaintiffs are not a "tribe" within the meaning of the Non-Intercourse

Act. Plaintiffs thus lack standing to bring a suit grounded in that Act.[14]

C. *Amendments Based upon the 1863 Acts*

Plaintiffs seek to amend their complaints to allege that plaintiffs were statutorily entitled to the benefits of the 1863 Acts, and that the 1863 Acts created a "fiduciary (trust) relationship" between the government and plaintiffs under which the government was required "to provide land to the group of 'friendly Sioux' as statutory beneficiaries." Pls.' Proposed Seventh Am. Compl. ¶¶ 117, 119. This proposed amendment would echo the amendments previously made to the complaints of the Julia DuMarce and Harley Zephier groups of intervening plaintiffs. *See Wolfchild VII,* 96 Fed.Cl. at 335-36. Other groups of intervening plaintiffs now join plaintiffs in moving for comparable amendments. *See, e.g.,* Taylor Group's Proposed Third Am. Compl. ¶¶ 117-138, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed March 21, 2011), ECF No. 947. The government contends that

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[14] Plaintiffs' argument that the "friendly Sioux" identified in the 1863 Acts were a "tribe" and that plaintiffs have inherited those claims, Pls.' Mot. at 21, 22-28, is equally unavailing. No evidence before the court shows that the "friendly Sioux" constituted either in 1863 or now a distinct "tribe," and Congress' reference in the 1863 Acts to "each *individual* of the [four Bands of Sioux Indians] who exerted himself in rescuing the whites," *see, e.g.,* Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. at 654, demonstrates that Congress recognized in the 1863 Acts *individual Sioux Indians* – not a separate tribal entity.

plaintiffs' requests must be denied because the 1863 Acts are not money-mandating statutes upon which jurisdiction in this court can be founded nor do they impose fiduciary duties on the government. *See* Def.'s Mem. at 24-28. The government argues also that any such claims are barred by the statute of limitations. *Id.* at 35-39.

1. *Money-mandating duty.*

It is axiomatic that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) ("*Mitchell I*"). Congress has consented to suit by way of the Indian Tucker Act, 28 U.S.C. § 1505, which provides:

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

The Indian Tucker Act provides a jurisdictional platform for suit but does not itself "create[ ] a substantive right enforceable against the [g]overnment by a claim for money damages." *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003). As with the Tucker Act, a plaintiff grounding its claim in the Indian Tucker Act must demonstrate that some other source of law creates a money-mandating right or duty that falls within the ambit of the waiver of sovereign immunity. *See United States v. Navajo Nation,* 556 U.S. 287, 288-90, 129 S.Ct. 1547, 1551-52, 173 L.Ed.2d 429 (2009) ("*Navajo II*"); *see also Fisher v. United States,* 402 F.3d 1167, 1172 (Fed.Cir.2005) (en banc). Where plaintiff alleges that a statute provides such a right or duty, "the statute [must] be 'fairly interpreted' or 'reasonably amen[ ]able' to the interpretation that it 'mandates a right of recovery in damages.'" *Adair v. United States,* 497 F.3d 1244, 1250 (Fed.Cir.2007) (quoting *White Mountain Apache,* 537 U.S. at 472-73, 123 S.Ct. 1126). If the court determines that the statute upon which plaintiff relies does not impose upon the government a duty which gives rise to a claim for money damages, then the court lacks subject matter jurisdiction over the claim. *Adair,* 497 F.3d at 1251 (citing *Fisher,* 402 F.3d at 1173); *see also Greenlee Cnty., Ariz. v. United States,* 487 F.3d 871, 876 (Fed.Cir.2007); *Perri v. United States,* 340 F.3d 1337, 1340-41 (Fed.Cir.2003).

To determine whether the two Acts of 1863 provide the money-mandating duty needed to invoke

this court's jurisdiction, the court must look first to the text of the Acts. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999); *see also Sursely v. Peake,* 551 F.3d 1351, 1355 (Fed.Cir.2009). "[W]here the statutory text leaves the government no discretion over payment of claimed funds," Congress has provided a money-mandating source of law for jurisdiction in this court. *Samish Indian Nation v. United States,* 419 F.3d 1355, 1364 (Fed.Cir.2005). Where, however, the statute "gives the government complete discretion over the decision whether or not to pay an individual or group," the statute is not money-mandating. *Doe v. United States,* 463 F.3d 1314, 1324 (Fed.Cir.2006); *see also Hopi Tribe v. United States,* 55 Fed.Cl. 81, 86-87 (2002); *Lewis v. United States,* 32 Fed.Cl. 59, 63 (1994). In this regard, a distinction lies between those statutes which employ mandatory language such as "shall" and those that use permissive language such as "may" or similar terms. *Compare Greenlee Cnty.,* 487 F.3d at 877 (Payment in Lieu of Taxes Act, 31 U.S.C. §§ 6901-07, was money-mandating where pertinent provision stated that Secretary of Interior "shall make a payment" to the local government), *and Agwiak v. United States,* 347 F.3d 1375, 1380 (Fed.Cir.2003) (5 U.S.C. § 5942(a) was money-mandating where it provided that employees were "entitled" to certain pay and such funds "shall be paid under regulations prescribed by the President"), *with Perri,* 340 F.3d at 1341 (Fed.Cir.2003) (28 U.S.C. § 542 was "money-authorizing statute, not a money-mandating one," where statute established the

Department of Justice Assets Forfeiture Fund and provided that funds for the payment of certain awards "shall be available to the Attorney General"); *and Hopi Tribe,* 55 Fed.Cl. at 87-92 (25 U.S.C. § 640d-7(e) was not money-mandating where the pertinent provision stated "[t]he Secretary of Interior is authorized" to pay the legal fees of certain tribes).

The first Act of 1863 provided that the Secretary was "authorized" to set apart eighty acres of land to any friendly Sioux. Act of Feb. 16, 1863, § 9, 12 Stat. at 654. The statutory sentence which follows governs the disposition of such lands once they are set apart for an individual Indian. *Id.* Similarly, the relevant language of the second Act of 1863 stated that "[i]t shall be lawful for the Secretary" to assign to the individual friendly Sioux eighty acres of land. Act of March 3, 1963 § 4, 12 Stat. at 819. The plain language of the Acts reveals that the legislation only permits – not mandates – the Secretary to provide the lands to individual qualified Sioux. Merely "authorizing" or, in even more discretionary terms, making it "lawful" for the Secretary to commit certain lands to friendly Sioux is identical to or even more permissive in character than the legislation at issue in *Perri* and *Hopi Tribe.* Plaintiffs contend, however, that even if the statutory text is facially discretionary, that presumption is rebutted by the legislative history and the structure of the Acts. *See* Pls.' Mot. at 35-36; Pls.' Resp. and Reply at 22-25, 28.

The Federal Circuit has indeed acknowledged that "[c]ertain discretionary [statutory] schemes also

support claims within the Court of Federal Claims' jurisdiction." *Samish,* 419 F.3d at 1364. While discretionary terms may trigger the presumption that the statute is not money-mandating, that presumption can be overcome by "'the intent of Congress and other inferences that [the court] may rationally draw from the structure and purpose of the statute at hand.'" *Doe,* 463 F.3d at 1324 (quoting *McBryde v. United States,* 299 F.3d 1357, 1362 (Fed.Cir.2002)); *see also Doe v. United States,* 100 F.3d 1576, 1579-82 (Fed.Cir.1996). In this regard, the Federal Circuit has stated: "[A] statute is not wholly discretionary, even if it uses the word 'may' when an analysis of congressional intent or the structure and purpose of the statute reveal one of the following: (1) the statute has 'clear standards for paying' money to recipients, (2) the statute specifies 'precise amounts' to be paid, or (3) the statute compels payment once certain conditions precedent are met." *Doe,* 463 F.3d at 1324 (citing *Samish,* 419 F.3d at 1364-65).

Plaintiffs contend that the language of the 1863 Acts meets these requirements because the 1863 Acts specifically delineate the class of persons to whom the Secretary could grant the land, specify the precise amount of land (eighty acres), and require the Secretary to make that acreage available for each individual Indian who met the criterion of having exerted themselves to save the settlers during the revolt. Pls.' Resp. and Reply at 25. Plaintiffs' proffered analysis nonetheless fails to address the circumstance that the plain terms of the 1863 Acts do not "compel[ ]

payment once certain conditions are met." *Doe,* 463 F.3d at 1324. The strongly discretionary language of the Acts constitutes an impediment to plaintiffs' claims.

Plaintiffs argue also that the legislative history espouses a mandatory intent contrary to the discretionary language of the statute. Pls.' Resp. and Reply at 28. In this vein, plaintiffs point to two statements made by Senators prior to the passage of the first Act of 1863. The first statement, by Senator Fessenden, provides:

> I have referred to the last section of the bill simply to show in what way the committee [of Indian Affairs] propose[s] to take care of these friendly Indians. They propose to direct the Secretary of the Interior to set apart for each of them one hundred and sixty acres of the public land. . . .

Cong. Globe, 37th Cong., 3d Sess. 511 (1863). The second statement, by Senator Harlan, reads:

> I think the provision is well enough as it is. I think we should reward Indians, who, under the circumstances that surrounded this case, exerted themselves to protect white inhabitants. This was the opinion of the committee. This was the opinion of the committee – or of several members of the committee, I know –

> that they ought to be rewarded, ought to be distinguished from other Indians. . . . [15]

Cong. Globe, 37th Cong., 3d Sess. 514 (1863); *see* Pls.' Mot. at 28.

The first sentence of Senator Fessenden's statement establishes that the purpose of the pertinent section of the first Act of 1863 was indeed to care for the friendly Sioux but does not speak to the force of the direction to the Secretary of the Interior. His further observation that the relevant section "propose[s] to direct the Secretary" could touch on that issue, but it does not explicitly do so, and even if it did, one remark by one Senator is inadequate to overcome the unambiguous, plainly discretionary terms ultimately passed by the entire Congress. Senator Harlan's statement is even more equivocal, illuminating only his personal opinion that the Indians "*ought* to be rewarded" (emphasis added), but providing no evidence that Congress believed it was enacting a mandate rather than an authorization and direction to the Secretary to provide for the friendly Sioux. In this vein, the legislative history merely repeats the discretionary language of the statute. *See New England Tank Indus. of N.H. v. United States,* 861 F.2d 685, 694 (Fed.Cir.1988) ("Will" and "will not"

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[15] Senator Harlan's statement was made in response to another Senator's suggestion that the acreage of the potential land grants be reduced from one hundred sixty acres, as provided in the bill then under consideration, to forty acres. Cong. Globe, 37th Cong., 3d Sess. 513-14 (1863).

are "mandatory terms" as contrasted to "directory terms" such as "should."); *Cybertech Grp., Inc. v. United States,* 48 Fed.Cl. 638, 649 (2001) ("[I]n everyday discourse, 'shall' is used to denote an affirmative command or obligation whereas 'should,' by contrast, is used to denote a request or suggestion.").

In short, there is nothing within the legislative history or the structure of the statutes that demonstrates a congressional intent clearly and expressly contrary to the patently discretionary terms ultimately adopted in the text of the Acts. The court thus concludes that the 1863 Acts cannot be read as imposing a specific money-mandating duty upon the government.

2. *Fiduciary duty.*

Apart from plaintiffs' contention that the 1863 Acts impose upon the Secretary a money-mandating duty to provide eighty acres of land to plaintiffs, plaintiffs argue also that a "trust relationship [was] created under the . . . 1863 Acts . . . [which] continues to this day." Pls.' Mot. at 18. The government responds that "[t]he United States has no [f]iduciary [d]uty to [p]laintiffs because the 1863 Acts did not create a [t]rust." Def.'s Mem. at 28.

A statute, or confluence of statutes and regulations, can create a "fiduciary duty [on the part of the government which] can also give rise to a claim for damages within the Tucker Act or Indian Tucker Act." *Samish,* 419 F.3d at 1367 (citing *White Mountain*

Apache, 537 U.S. at 473-74, 123 S.Ct. 1126; *United States v. Mitchell,* 463 U.S. 206, 224-26, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*")). Recently, in *United States v. Jicarilla Apache Nation,* the Supreme Court explained further that "[i]n some cases, Congress establishe[s] only a limited trust relationship to serve a narrow purpose." ___ U.S. ___, ___, 131 S.Ct. 2313, 2324-25, 180 L.Ed.2d 187 (2011) (citing *Mitchell I,* 445 U.S. at 544, 100 S.Ct. 1349; *United States v. Navajo Nation,* 537 U.S. 488, 507-08, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) ("*Navajo I*")). In other circumstances, Congress can establish full fiduciary obligations on the part of the government. *Jicarilla Apache,* 131 S.Ct. at 2325 (citing *Mitchell II,* 463 U.S. at 226, 103 S.Ct. 2961; *White Mountain Apache,* 537 U.S. at 475, 123 S.Ct. 1126). Full fiduciary obligations, however, are applicable only "*[i]f* a plaintiff identifies . . . a [specific rights-creating or duty-imposing statutory or regulatory prescription], and *if* that prescription bears the hallmarks of a 'conventional fiduciary relationship.'" *Navajo II,* 129 S.Ct. at 1558 (internal quotation omitted).[16]

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[16] In *Navajo II,* the Court explained in more detail the requisites a plaintiff must satisfy to establish jurisdiction under the Indian Tucker Act. First, the plaintiff "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the [g]overnment has failed faithfully to perform those duties." 129 S.Ct. at 1552 (internal quotation marks and citation omitted). If the plaintiff overcomes that first hurdle, "the court must then determine whether the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a

(Continued on following page)

Thus, in *Mitchell II,* a fiduciary relationship was found where the Secretary held a "pervasive role in the sales of timber from Indian lands . . . [since] 1910," and numerous, detailed pieces of legislation had been passed and extensive regulations promulgated that governed the Secretary's duty to manage and protect the timber lands and imposed upon the Secretary "full responsibility to manage Indian resources and land for the benefit of the Indians." 463 U.S. at 219-24, 103 S.Ct. 2961. Similarly, in *White Mountain Apache,* the Secretary was required by law to hold the plaintiffs' property "in trust" and the government "ha[d] not merely exercised daily supervision but ha[d] enjoyed daily occupation, and so ha[d] obtained control at least as plenary as its authority over the timber in *Mitchell II*." 537 U.S. at 475, 123 S.Ct. 1126.

In this case, plaintiffs aver that two entirely discretionary statutes – which were never implemented – established a trust relationship between plaintiffs and the government. Far from the type of specific duty-imposing prescriptions and ongoing fiduciary relations present in *Mitchell II* and *White Mountain Apache,* the 1863 Acts are directory propositions to the Secretary which did not and do not impose upon the Secretary any specific fiduciary obligations that would create a trust relationship between the friendly Sioux and the government.

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breach of the duties [the governing law] impose[s]." *Id.* (internal quotation marks and citation omitted).

In sum, the court finds that the 1863 Acts do not establish a trust relationship or impose fiduciary duties upon the government.[17]

D. *Amendment Based upon an Alleged Taking*

The Robertson-Vadnais Group of plaintiff-intervenors seeks leave to amend its complaint to allege a taking in contravention of the Fifth Amendment. First, they contend that "the United States effected a 5th Amendment 'taking' by failing to provide 'eighty acres in severalty to each individual [Mdewakanton] . . . who exerted himself in rescuing the whites' from the 1862 [u]prising" pursuant to the first Act of 1863. Robertson-Vadnais Seventh Amend. Compl. ¶ 225 (ECF No. 929). Second, they allege that the United States effected a taking of their property interest in the twelve sections of land identified in 1865 through the public sale of that land in 1867. Robertson-Vadnais Mem. in Support of Partial Summ. J. ("Robertson-Vadnais Mem.") at 33 (ECF No. 1001). The government responds that any such alleged takings claims "first accrued more than six years before [plaintiff-intervenors] filed their complaint and the claim is thus [time-]barred." Def.'s

[17] For these reasons, the court finds unpersuasive the DuMarce Group of plaintiff-intervenors' contention that the 1863 Acts serve as enabling acts which create a trust relationship in conjunction with the Appropriations Acts. DuMarce Fourth Amend. Compl. ¶ 42 (ECF No. 930).

Mem. at 54. Additionally, the government avers that the plaintiff-intervenors do not "possess [a] compensable property interest arising from the February 1863 Act," and that the government's failure to provide land cannot form the basis of a legally cognizable takings claim. *Id.* at 58.

Fifth Amendment takings claims are within the jurisdiction of this court under the Tucker Act, 28 U.S.C. § 1491, *Boling v. United States,* 220 F.3d 1365, 1370 (Fed.Cir.2000), and thus also under the Indian Tucker Act. However, suits against the United States brought in this court under these Acts must be filed within six years after accrual of the cause of action. 28 U.S.C. § 2501. Because this statute of limitations circumscribes the scope of the government's waiver of sovereign immunity, it is "jurisdictional" in nature. *See John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 133-34, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008); *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1576-77 (Fed.Cir.1988). Accordingly, the limitations period is not subject to equitable tolling or implied exceptions. *See John R. Sand,* 552 U.S. at 133-34, 128 S.Ct. 750. Plaintiff-intervenors must meet this jurisdictional burden by demonstrating by a preponderance of the evidence that their claim was timely filed. *See Taylor v. United States,* 303 F.3d 1357, 1359 (Fed.Cir.2002).

"A claim accrues 'when all the events have occurred which fix the liability of the [g]overnment and entitle the claimant to institute an action.'" *Goodrich v. United States,* 434 F.3d 1329, 1333 (Fed.Cir.2006)

(quoting *Hopland Band,* 855 F.2d at 1577). In the context of the Fifth Amendment, "the key date for accrual purposes is the date on which the plaintiff's land has been clearly and permanently taken." *Boling,* 220 F.3d at 1370; *Goodrich,* 434 F.3d at 1333 (A Fifth Amendment claim accrues "'when th[e] taking action occurs.'" (quoting *Alliance of Descendants of Tex. Land Grants v. United States,* 37 F.3d 1478, 1481 (Fed.Cir.1994))). In this regard, the "proper focus, for statute of limitations purposes, 'is upon the time of the [government's] *acts,* not upon the time at which the *consequences* of the acts became most painful.'" *Fallini v. United States,* 56 F.3d 1378, 1383 (Fed.Cir.1995) (quoting *Delaware State Coll. v. Ricks,* 449 U.S. 250, 258, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980)). However, "the claim only accrues if the claimant 'knew or should have known' that the claim existed." *Goodrich,* 434 F.3d at 1333 (quoting *Kinsey v. United States,* 852 F.2d 556, 557 n. * (Fed.Cir.1988)).

Plaintiff-intervenors' contention based upon the government's failure to provide land matured in 1867 – the year in which plaintiff-intervenors contend the United States began to fail to provide lands under the Act. Robertson-Vadnais Mem. at 34 ("The United States, *since the 1867 original taking,* continues to hold the Mdewakanton 'inheritable beneficial interest,' constituting a continuing taking, by withholding Plaintiff[-Intervenors'] cognizable property interests under the February 1863 Act without just cause of reason.") (emphasis added).

Likewise, plaintiff-intervenors' second takings claim, based upon the twelve sections of land, accrued in 1867. It was in that year that the land was authorized to be publicly sold by President Johnson's proclamation. *See, e.g., Alliance of Descendants,* 37 F.3d at 1482 (takings claim, which alleged taking of a cause of action for land, accrued with passage of treaty releasing United States from all claims regarding such land). At the very latest, the takings claim would have accrued upon the government's actual sale of the land and issuance of land patents to the buyers of the twelve sections of land. *See Voisin v. United States,* 80 Fed.Cl. 164, 170-71 (2008) (government's issuance of land patents for plaintiffs' land and subsequent sale of land pursuant to legislation marked date of accrual of takings claim). Plaintiffs have provided evidence that those sales took place between 1871 and 1895. *See* Pls.' Mem. at 9 n. 31 (citing Pls.' App. 287-330 (Redwood and Renville City Land Patents, 1871-95)).

Thus, in 1867, or, construed most generously, by 1895, plaintiff-intervenors' alleged property interests in a land expectancy under the 1863 Acts had been taken. *See Fallini,* 56 F.3d at 1380 ("The question whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue."). Accordingly, the filing of the complaint in this case on November 18, 2003, falls far outside of the six-year statute of limitations.

Nevertheless, plaintiff-intervenors "join in the Wolfchild [p]laintiffs' . . . arguments in support of their claim that the . . . statute of limitations . . . is inapplicable." Robertson-Vadnais Mem. at 37.[18] Plaintiffs' statute-of-limitations arguments rely on: (1) the continuing claims doctrine; (2) the Indian Trust Accounting Statute, Pub.L. No. 108-108, 117 Stat. 1241, 1263 (2003); and (3) the provision of 28 U.S.C. § 2501 allowing for the tolling of the limitations period for persons under legal disability. Pls.' Mem. at 36-39.

The continuing claims doctrine applies "where a plaintiff's claim is 'inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages.'" *Tamerlane, Ltd. v. United States,* 550 F.3d 1135, 1145 (Fed.Cir.2008) (quoting *Brown Park Estates-Fairfield Dev. Co. v. United States,* 127 F.3d 1449, 1456 (Fed.Cir.1997)). The doctrine does not apply, however, where "a single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental breach." *Boling,* 220 F.3d at 1373.

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[18] Plaintiff-intervenors state also that the takings claim is not untimely under 28 U.S.C. § 2415 because "[p]laintiff[-intervenors] did not receive any notice or opportunity to be heard pursuant to th[at] statute." Robertson-Vadnais Mem. at 37. Section 2415 provides the statute of limitations for actions for money damages brought by the United States and has no bearing on this case.

Plaintiff-intervenors' takings claims do not fall within the ambit of the continuing claims doctrine. The purported takings were accomplished by governmental action – and, in plaintiff-intervenors' view, inaction – during the Nineteenth Century. Those alleged takings do not renew or replicate each day or with each physical incursion upon the twelve sections of land. *See, e.g., Boling,* 220 F.3d at 1373-74 (taking accrued on date erosion from waterway substantially encroached on plaintiffs' property and claims did not renew with each quantum of erosion damage to plaintiffs' property); *Fallini,* 56 F.3d at 1382-83 (taking via legislation that prevented plaintiffs from disallowing wild horses and burros to drink plaintiffs' water did not renew with "every drink by every wild horse"); *Voisin,* 80 Fed.Cl. at 172, 176-77 (refusing to apply continuing claims doctrine, in similar circumstances, where plaintiffs alleged that the United States' "continued and repeated refusal to recognize [plaintiffs] as the rightful owners of [the disputed parcel] should be considered a continuing wrong").

Nor does the Indian Trust Accounting Statute assist plaintiff-intervenors. The version of that statute in place at the time of the filing of plaintiffs' initial complaint provided:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the

> affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

117 Stat. at 1263. In *Shoshone Indian Tribe of the Wind River Reservation v. United States,* 364 F.3d 1339, 1348-50 (Fed.Cir.2004), the Federal Circuit emphasized that the Indian Trust Accounting Statute applies only to trust funds and does not toll claims for breach of fiduciary duties regarding trust assets. *See also Rosales v. United States,* 89 Fed.Cl. 565, 580 (2009) (Indian Trust Accounting Statute did not apply to claims of breach of fiduciary duty where plaintiffs claimed they were rightful beneficial owners of parcels of land held in trust by government for Indian tribe); *Simmons v. United States,* 71 Fed.Cl. 188, 193 (2006) (Indian Trust Accounting Statute did not apply to a claim for breach of fiduciary duty for government mismanagement of timber assets). Plaintiff-intervenors' reliance on the Indian Trust Accounting Statute is thus unavailing. Their claims center on parcels of land – not on trust *funds* – and the court has already found that the 1863 Acts did not create a trust relationship or impose upon the government fiduciary duties; thus, there is nothing held in trust under the 1863 Acts to which the Indian Trust Accounting Statute could apply.

Plaintiff-intervenors' final contention, that the claims should be tolled for minors, is dealt with much in the same way it was first rejected by this court in *Wolfchild I.* As the court noted, the pertinent statute

of limitations, 28 U.S.C. § 2501, "treats children as if they were legally unable to file suit and allows filing within three years after a child reaches majority status." 62 Fed.Cl. at 549. Eighteen years is the age of majority in Minnesota. *See* Minn.Stat. § 645.451. The alleged takings in this case accrued in the Nineteenth Century. The minors' takings claims are thus time-barred as well.

E. *Synopsis*

In sum, the court concludes that plaintiffs lack standing to bring a claim based upon the Non-Intercourse Act because they are not a "tribe" within the meaning of the Act. Plaintiffs also lack any claim grounded in the 1863 Acts because those Acts do not impose a money-mandating duty upon the government nor do they create specific fiduciary obligations giving rise to a trust relationship between plaintiffs and the government. The Robertson-Vadnais Group of plaintiff-intervenors' takings claim fails because it falls outside this court's statute of limitations.

These defects of the proposed amendments are jurisdictional in nature; the particular claims at issue would not withstand a motion to dismiss. Accordingly, plaintiffs and plaintiff-intervenors' motions to amend must be denied in relevant part for futility. *See Kemin Foods,* 464 F.3d at 1354-55; *Webster,* 74 Fed.Cl. at 444; *Shoshone Indian Tribe,* 71 Fed.Cl. at 176. In other respects the proposed amendments are allowed. The government's motion to dismiss claims based

upon the 1863 Acts is granted as to the Julia DuMarce Group and the Harley Zephier Group of plaintiff-intervenors, which groups were granted leave to amend their complaints to include claims based upon the 1863 Acts in the court's opinion in *Wolfchild VII*. *See* 96 Fed.Cl. at 335-36.

II. MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DEFER CONSIDERATION PURSUANT TO RULE 56(f)

The question of claimant eligibility has permeated this case from its inception. While identification of proper plaintiffs is expected to be a source of some contention in a case of this nature, the government's erratic positions as to this issue have exacerbated the matter.

At a status conference held on January 21, 2011, the parties agreed on a schedule for a final resolution of this case, which schedule included, among other things, the requirement that plaintiffs and plaintiff-intervenors submit documentation in support of their motions for summary judgment regarding claimant eligibility. *See* Scheduling Order, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. Jan. 21, 2011), ECF No. 843. As contemplated by the parties' discussions during the status conference and pursuant to that schedule, plaintiffs and plaintiff-intervenors have filed proposed findings of uncontroverted facts and motions for summary judgment regarding the determination of eligible claimants and have submitted

attendant to those motions almost 150,000 pages of documentary exhibits. *See* Def.'s Rule 56(d) Mot. at 3. Plaintiffs rely on these documents and a declaration submitted by Dr. Barbara Buttes to contend that they have satisfied the preponderance-of-the-evidence standard for eligibility and that "[t]here are no disputed material facts" precluding summary judgment in their favor. Pls.' Mot. at 32-33; *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (party moving for summary judgment must demonstrate the absence of any genuine issue of material fact); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (A material fact is one "that might affect the outcome of the suit under the governing law," and a genuine dispute is one that "may reasonably be resolved in favor of either party.").

In response to plaintiffs' motions, the government filed a motion to defer consideration under RCFC 56(d).[19] Rule 56(d) provides that "[i]f a nonmovant [for summary judgment] shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to obtain affidavits or declarations or to take discovery." RCFC 56(d)(2); *see also Brubaker Amusement Co. v. United States,* 304 F.3d 1349, 1361

[19] Prior to the court's amendments to the Rules of the Court of Federal Claims which became effective on July 15, 2011, similar language appeared in RCFC 56(f). The government's motion was filed prior to July 15, 2011, and refers to RCFC 56(f).

(Fed.Cir.2002). Such a motion must articulate "with particularity, what facts the movant hopes to obtain by discovery and how these facts will raise a genuine issue of fact." *Exigent Tech., Inc. v. Atrana Solutions, Inc.,* 442 F.3d 1301, 1310 (Fed.Cir.2006).

In its motion under Rule 56(d), the government resurrected its contention, which position was rejected by this court in *Wolfchild I,* that "[p]laintiffs are not a group of identifiable Indians." Def.'s Rule 56(d) Mot. at 1; *id.* at 5 ("This lawsuit is not in the name of an Indian Tribe or an identifiable group of Indians."). Concurrently, the government requested that the "[c]ourt determine that [the government] need not respond to [p]laintiffs' [p]roposed [f]indings of [u]ncontroverted [f]act until such time as the eligibility criteria for any claimants are established and [the government] has had time to conduct any additional and necessary discovery related to those criteria." *Id.* at 9. As cause for its motion, the government stated that "the [c]ourt has not yet defined the requirements and standards it intends to use to evaluate the [p]laintiffs' individual eligibility for any disbursement," *id.* at 1, and it "specifically aver[red] that it await[ed] the adjudication and a determination of which criteria define an eligible claimant." *Id.* at 8. It thus represented that "[a]ny additional factual discovery would directly relate to the eligibility criteria

set forth by the [c]ourt." *Id.*[20] In tension with these arguments, however, it contended that "[d]etermination of which individual [p]laintiffs or [i]ntervening-[p]laintiffs are eligible to participate in any distribution of funds as a result of the [c]ourt[']s December 21, 2010[ ] [o]rder . . . is not necessary for the entry of final judgment." *Id.* at 2 (citation omitted). Then, in its reply to plaintiffs' response in opposition to the 56(d) motion, the government again averred that "[t]he United States seeks relief pursuant to RCFC 56([d]) because it *requires additional time to determine which individual plaintiffs or intervening plaintiffs are eligible to participate in any distribution of funds as a result of the [c]ourt's December 21, 2010 [ ] [o]rder.*" Def.'s Rule 56(d) Reply at 1 (emphasis added).

In a Joint Status Report filed May 27, 2011, however, the government retreated entirely from its Rule 56(d) motion and, indeed, from nearly all of its prior positions regarding the appropriate procedure to determine claimant eligibility. In that report, the government asserted for the first time that the Indian Judgment Distribution Act, 25 U.S.C. §§ 1401-1408,

[20] In its Rule 56(d) motion, the government also urged the court to defer consideration of plaintiffs' and intervening-plaintiffs' claims of eligibility as to the 1863 Acts until the court determines "whether the 1863 Acts give rise to a money-mandating duty." Def.'s Rule 56(d) Mot. at 7. The court's determination that plaintiff and plaintiff-intervenors lack any viable claim grounded in the 1863 Acts renders moot this portion of the government's motion.

applies here because the court has determined that the plaintiffs are an identifiable group of American Indians, and "[c]onsistent with that finding, the [g]overnment believes that [p]laintiffs are, therefore, also a 'group' under the [Distribution Act]." Joint Status Report at 10, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed May 27, 2011), ECF No. 1076 ("Joint Status Report"). The government "request[ed] that the [c]ourt define those who may share in any award premised on the Appropriations Acts," and asked the court to "find the McLeod and Henton census rolls to be comprehensively and exclusively correct, such that a [plaintiff] must prove by a preponderance that they descend from a person . . . on those rolls." *Id.* at 8, 9; *see also* Def.'s Mot. at 61 ("The McLeod and Henton censuses were created for the purpose of identifying those Indians entitled to the benefits of the Appropriations Acts, and this [c]ourt should accept them as correct and dispositive."). It claimed, however, that any distribution following such a determination by the court "must be accomplished according to the requirements of the [Distribution Act]." Joint Status Report at 10.

At that point, the court requested that the parties submit supplemental briefs addressing the following three questions:

> 1) Does Chapter 16 of Title 25 of the United States Code, 25 U.S.C. §§ 1401-08, apply to a money judgment that is entered and subject to payment under 28 U.S.C. § 2517 and 31 U.S.C. § 1304?

2) If Chapter 16 of Title 26 does not apply to such a money judgment, can and should a distribution plan nonetheless follow and reflect the plan provisions set out in Chapter 16?

3) If Chapter 16 of Title 25 does apply to such a money judgment, what is the court's role in ensuring that the distribution plan accords with the judgment that is entered?

Order of June 3, 2011, ECF No. 1083.[21]

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[21] The manner and means of paying judgments of this court are provided by 28 U.S.C. § 2517, which states in pertinent part:

> (a) Except as provided by chapter 71 of title 41, every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefore, on presentation to the Secretary of the Treasury of a certification of the judgment by the clerk and chief judge of the court.

28 U.S.C. § 2517(a). In turn, appropriations to pay such judgments are provided via 31 U.S.C. § 1304, which states:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when –
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> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Secretary of the Treasury; and
>
> (3) the judgment, award, or settlement is payable –

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In response to the court's request for supplemental briefing, the government undertook a further *volte face* in its supplemental brief filed on June 17, 2011. Although the government reiterated its contention that the Distribution Act applies to any judgment that may be issued in this case, it altered once more its position as to this court's proper role in determining claimant eligibility. The government avers now that "even asking this [c]ourt to make a determination about the import or extent of certain census rolls is inappropriate" because "[t]o do so would operate to summarily exclude certain classes of potential participants before they could be heard in the exclusive forum and [pursuant to] processes provided by Congress to resolve such issues under the Act." Def.'s Supplemental Br. at 16. The court accordingly turns to the Indian Judgment Tribal Fund Use or Distribution Act before proceeding to address the eligible-claimant cross-motions.

(A) *under section* 2414, 2517, 2672, or 2677 of *title 28*;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

31 U.S.C. § 1304(a) (emphasis added).

A. *The Indian Judgment Tribal Fund Use or Distribution Act*

Enacted on October 19, 1973, the Indian Judgment Tribal Fund Use or Distribution Act, Pub.L. No. 93-134, 87 Stat. 466, 466-68 (codified as amended at 25 U.S.C. §§ 1401-08) provides, in relevant part:

> Within one year after appropriation of funds to pay a judgment of the Indian Claims Commission or the United States Court of Federal Claims to any Indian tribe, the Secretary of the Interior shall prepare and submit to Congress a plan for the use and distribution of the funds. Such plan shall include identification of the present-day beneficiaries, a formula for the division of the funds among two or more beneficiary entities if such is warranted, and a proposal for the use or distribution of the funds.

25 U.S.C. § 1402(a).[22] The impetus for the Act was described in the House Report attendant to the legislation:

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[22] The Act sets forth detailed guidelines for preparation of a distribution plan. It delineates factors the Secretary must consider in formulating the plan, mandates that the Secretary provide a hearing of record after public notice to the affected tribe or group, and requires Interior to make its "legal, financial, and other expertise . . . fully available in an advisory capacity to the [affected] Indian Tribe [or group] . . . to assist it [in] develop[ing] and communicat[ing] to the Secretary . . . its own suggested plan for the distribution and use of such funds." 25 U.S.C. §§ 1403(a), (b).

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Funds appropriated to satisfy judgments of the Indian Claims Commission or the Court of Claims on behalf of Indian plaintiffs are deposited in the United States Treasury to the credit of the plaintiff tribe. Prior to 1960, under an opinion of the Interior Solicitor, these funds were distributed by the Secretary of the Interior without further Congressional action.

> Since 1960, each Interior Department Appropriation Act has included the following proviso:
>
> *Provided further,* That nothing contained in this paragraph or in any other provision of law shall be construed to authorize the expenditure of funds derived from appropriations in satisfaction of awards of the Indian Claims Commission or the Court of Claims, . . . until after legislation has been enacted that sets forth the purposes for which said funds will be used. . . .

H.R.Rep. No. 93-377, at 4 (1973), 1973 U.S.C.C.A.N. 2311, 2313. The requirement of further legislative action to approve a distribution was "impos[ing] a severe burden upon the time and efforts of Members of the

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As addressed in detail, *infra,* at 89-91, a previously-existing requirement, codified at 25 U.S.C. §§ 1402(a), 1404, that the Secretary submit such a distribution plan to Congress for its review and potential disapproval has been superseded by subsequent law.

> Committee on Interior and Insular affairs" and distracting its attention from other issues. *Id.* at 4-5. Additionally, the process of enacting legislation for each distribution of funds "caused long delays, in some cases, over several years after judgments [had] been awarded until their distribution." S.Rep. No. 93-167, at 2 (1973). The purpose of the Distribution Act was to ameliorate this situation by "provid[ing] for the use or distribution of Indian judgment funds appropriated in satisfaction of awards of the Indian Claims Commission and the Court of Claims without further legislation." H.R.Rep. No. 93-377, at 3, 1973 U.S.C.C.A.N. 2311 at 2312.

Subsection 1401(a) of Title 25 defines the scope of the Indian Judgment Distribution Act and is the focal point of the court's inquiry. It provides:

> Notwithstanding any other law, all use or distribution of funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Court of Federal Claims in favor of any Indian tribe, band, group, pueblo, or community (hereinafter referred to as "Indian tribe") . . . shall be made pursuant to the provisions of this chapter.

25 U.S.C. § 1401(a). Plaintiffs and plaintiff-intervenors object to application of the Indian Judgment Distribution Act to this case. They contend that the Act "only applies if the party plaintiff is an entity and not specifically[-]named individuals." Pls.'

Supplemental Br. at 2-3. Because plaintiffs and plaintiffs-intervenors are named individuals, they argue the Act does not encompass this case. *Id.*; *see also* Pl.-Intervenors' Supplemental Br. at 6-7. Plaintiffs also aver that the Act "does not apply until Congress has actually appropriated funds to pay a [Court of Federal Claims] judgment separate and apart from funding via 28 U.S.C. § 2517 and 31 U.S.C. § 1304." Pls.' Supplemental Br. at 4. Plaintiffs thus urge that "because no separate, specific appropriation has been enacted satisfying a . . . judgment in . . . [p]laintiffs' favor," the Act does not apply. *Id.*

The government argues that the Act applies because the court has already determined that "[p]laintiffs [in this case] constitute an 'identifiable group of Indians' for purposes of exercising jurisdiction under 28 U.S.C. § 1505." Joint Status Report at 10 (quoting *Wolfchild I,* 62 Fed.Cl. at 539); *see also* Def.'s Supplemental Br. at 1. It contends also that the Act applies to any money judgment issued from this court, whether that judgment is satisfied pursuant 28 U.S.C. § 2517 and 31 U.S.C. § 1304 or by a separate appropriation from Congress. Def.'s Supplemental Br. at 7.

1. *An Indian "group."*

As noted, the court has determined and reaffirmed multiple times that plaintiffs are "an identifiable group of American Indians." *Wolfchild I,* 62 Fed.Cl. at 540; *see also id.* at 540 ("[P]laintiffs bring

their claims specifically and solely as members of a group."); *Wolfchild VII,* 96 Fed.Cl. at 338 ("The loyal Mdewakanton are an 'identifiable group of American Indians' within the meaning of the [Indian Tucker] Act."). Plaintiffs contend, however, that the court's classification of plaintiffs under the Indian Tucker Act does not mean that plaintiffs are a "group" within the meaning of the Indian Judgment Distribution Act because the latter "does not . . . mention the Indian Tucker Act" and because "group" as used in the Distribution Act encompasses only singular Indian entities, not judgments in favor of named individuals. Pls.' Supplemental Br. at 2-3.

The Indian Judgment Distribution Act does not define the term "group." The regulations implementing the Act provide, however, that "*Indian tribe or group means any* Indian tribe, nation, band, pueblo, community or *identifiable group of Indians,* or Alaska Native entity." 25 C.F.R. § 87.1(g) (emphasis added). Subsection (g) of this regulation indisputably encompasses the plaintiffs in this case. Importantly, the Department of the Interior's interpretation of the Distribution Act reflected in this regulation is amply supported by the statutory regime and history governing Indian claims in this court.

Where, as here, the text of a statute does not furnish a definitive answer, reference to context, legislative history, and canons of statutory construction is warranted. *See Bull v. United States,* 479 F.3d 1365, 1376 (Fed.Cir.2007); *Timex V.I. v. United States,* 157 F.3d 879, 882 (Fed.Cir.1998). Of particular

relevance in this case, the *in pari materia* canon of construction dictates that "statutes addressing the same subject matter generally should be read as if they were one law." *Wachovia Bank v. Schmidt,* 546 U.S. 303, 315-16, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006) (quoting *Erlenbaugh v. United States,* 409 U.S. 239, 243, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972)) (internal quotation marks omitted); *see also Strategic Housing Fin. Corp. of Travis Cnty. v. United States,* 608 F.3d 1317, 1330 (Fed.Cir.2010) ("Under [the *in pari materia*] canon, courts should interpret statutes with similar language that generally address the same subject matter together, as if they were one law.") (internal quotation marks omitted).

Although the Indian Tucker Act is a jurisdictional grant to the Court of Federal Claims, and the Distribution Act governs the administration of certain judgments from the Court of Federal Claims (and, formerly, the Indian Claims Commission), the relationship between the two statutes favors application of the *in pari materia* canon. As described below, presently, the Indian Tucker Act serves as the only jurisdictional avenue by which a judgment falling within the terms of the Distribution Act may be created. In this context, the court finds it improbable that Congress intended "group" as used in the Distribution Act to have a meaning entirely exclusive of the term "identifiable group" in the Indian Tucker Act.

The court is persuaded as well by the parallel structure of the jurisdictional grant to the Indian Claims Commission. The Indian Tucker Act, passed

in its original form in 1949, adopted language nearly identical to that used in the grant of jurisdiction to the Indian Claims Commission, created three years earlier. *Compare* Act of May 24, 1949, ch. 139, § 89(a), 63 Stat. 89, 102 (codified as amended at 28 U.S.C. § 1505) (granting jurisdiction to the Court of Claims over claims against the United States accruing after August 13, 1946 "in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska"), *with* Indian Claims Commission Act, Act of Aug. 13, 1946, § 2, 60 Stat. 1049, 1050 (granting jurisdiction to the Claims Commission over claims against the United States by "any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska"). Early on, the Court of Claims recognized that there was a distinction between the term "tribe" and "group" under the Indian Claims Commission Act. *See McGhee v. Creek Nation,* 122 Ct.Cl. 380 (1952). In this regard, the Court of Claims stated:

> To identify is to establish the identity of, and if a group presenting a claim under the Act is capable of being identified as a group of Indians consisting of the descendants of members of the tribes or bands which existed at the time the claim arose, the jurisdictional requirements of the status, in our opinion, have been met. It would . . . be a strained and unwarranted interpretation of the Act to say that Congress intended by the term

> 'identifiable group' that the group making the claim must be identical, as a distinct entity, with the tribe or band existing at the time the claim arose. Such interpretation would make the term 'identifiable group' mean nothing more than a recognized tribe or band.

Id. at 391-92; *see also Thompson v. United States,* 122 Ct.Cl. 348, 360 (1952) ("Congress intended to enlarge [beyond 'recognized tribes or bands'] the category of groups of Indians entitled to present claims for hearing and determination when it added the words 'or other identifiable groups,' not theretofore customarily used.").

The court's reading of the language within the Indian Claims Commission Act naturally carried over into the Indian Tucker Act as well, *see Tee-Hit-Ton Indians v. United States,* 120 F.Supp. 202, 204 (Ct.Cl.1954), *aff'd,* 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955),[23] and persists to the present day, *see Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States,* 69 Fed.Cl. 639, 670-71 (2006). In 1976, the Indian Claims Commission was abolished, at which point Congress instructed the Commission to

[23] Notably, although the Court of Claims' finding that plaintiffs constituted an "identifiable group" under 28 U.S.C. § 1505 was not a disputed issue on appeal to the Supreme Court, the Supreme Court observed that the claimants in *Tee-Hit-Ton* were "an identifiable group of American Indians of between 60 and 70 individuals residing in Alaska." *Tee-Hit-Ton,* 348 U.S. at 273, 75 S.Ct. 313.

"transfer [all cases] to the Court of Claims" and granted jurisdiction to the Court of Claims over those cases previously heard by the Commission. *See* Pub.L. No. 94-465, § 23, 90 Stat. 1990 (1976).

Thus, when the Indian Judgment Distribution Act was enacted in 1973, the only judgments that could have potentially fallen within the scope of the Distribution Act would have been those from the Court of Claims or the Indian Claims Commission in favor of a "tribe, band, or other identifiable group of American Indians," with the latter phrase carrying the precise meaning it does today, that is, an aggregation of identifiable American Indians but not necessarily a singular entity. The Distribution Act encompasses judgments in favor of "any Indian tribe, band, group, pueblo, or community." 25 U.S.C. § 1401(a). It would be strange indeed if the term "group" as used in that Act included only singular Indian entities besides those known as tribes and bands, when the two jurisdictional statutes which could produce judgments within the scope of the Distribution Act encompassed only judgments in favor of "identifiable group[s] of American Indians," besides those known as tribes and bands. 28 U.S.C. § 1505; 60 Stat. at 1050. The only reading of the Distribution Act which does not logically necessitate finding that an "identifiable group" under the Indian Tucker Act qualifies as a "group" under the Distribution Act is one which gives the term "group" as used in the Distribution Act a technical meaning amounting essentially to a federally-recognized entity; yet,

pertinent regulations governing Indian recognition defy such a reading.

The Department of the Interior's regulations governing federal acknowledgement of Indian associations define an "Indian group or group" as "any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe." 25 C.F.R. § 83.1. The regulations explicitly distinguish such a "group" from federally-acknowledged aggregations of Indians, which may be recognized as "tribes, organized bands, pueblos, Alaska Native villages, or communities." 25 C.F.R. § 83.3(b). The Department of the Interior's regulations thus show that to the extent the term Indian "group" may have a particular meaning within the legislative or regulatory context, the term does not equate to a recognized, singular Indian entity but rather encompasses aggregations of Indians.

Furthermore, the legislative history of the Indian Judgment Distribution Act disfavors plaintiffs' position. Section 4 of Senate Bill 1016, the legislative predecessor to the Act, provided:

> Within six months after the date of the appropriation of funds by the Congress to pay each Indian judgment, the Secretary of the Interior . . . shall prepare and submit to the Congress a recommended plan for the distribution of such funds . . . to *the Indian tribe, band, group, pueblo, or community in whose*

> *favor such judgment is rendered and such funds appropriated.*

Hearing Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs: First Session on S. 1016, 93d Cong. 5-6 (1973) ("Hearing on S. 1016") (S. 1016, 93d Cong. (1973)) (emphasis added). After Congress solicited the views of the Department of Interior on the proposed legislation, the Assistant Secretary of the Interior objected to the emphasized language, noting that "the beneficiaries of an award are *often individuals,* for example, *the persons listed on a given roll.*" *Id.* at 12, 14 (Letter from John H. Kyl, Assistant Secretary of the Interior, to Sen. Henry Jackson (Apr. 12, 1973)) (emphasis added). The Assistant Secretary recommended the deletion of any language insinuating judgments were rendered or funds appropriated in favor of Indian tribes, bands, groups, pueblos, or communities. *Id.* at 14. Congress obliged, and that portion of Section 4 of Senate Bill 1016, along with similar language, was struck from the bill. *See* 93 Cong. Rec. 33,180 (1973) (statement of Sen. Jackson) ("At the time this measure was considered before the full committee, all of the Department's clarifying amendments were approved. . . ."); 93 Cong. Rec. 16,375-76 (1973) (enacting relevant amendments to S. 1016).

Congress' alteration of the provision of the Distribution Act providing for public hearings of record on a proposed distribution plan is similarly instructive. Section 4(c)(2) of Senate Bill 1016 required the Secretary to "hold a hearing or hearings of record,

after appropriate public notice, to obtain the testimony of leaders and members of the Indian tribe, band, group, pueblo, or community and any individual who may receive any portion, or be affected by the distribution, of such funds." Hearing on S. 1016 at 7. Here also, the Assistant Secretary objected, noting that "[b]ecause of the fact that many judgments involve *entities which are comprised solely of individual descendants,* sometimes numbering in the thousands . . . to guarantee that all individuals' views be heard in public hearings, as section 4(c)(2) contemplates, would be impossible, even with respect to smaller, organized tribes. . . . Accordingly, we recommend that the words 'and any individual' . . . be deleted." *Id.* at 15. Those words were struck from the bill, and 25 U.S.C. § 1403(a)(2) instead requires the Secretary to hold a public hearing "to obtain the testimony of leaders and members of the Indian tribe which may receive any portion, or be affected by the use of distribution, of such funds."

This series of events demonstrates that Congress understood that the Indian Judgment Distribution Act was to encompass judgments in favor of aggregations of individual Indians, and not just singular entities. And indeed, other provisions of the Indian Judgment Distribution Act make sense only with this understanding of the Act. For example, 25 U.S.C. § 1403(a) requires that the Secretary "prepare a plan which shall best serve the interest of all those entities *and individuals* entitled to receive funds of each Indian judgment." (Emphasis added.) In this same

vein, 25 U.S.C. § 1403(b)(2) mandates that the Secretary assure that "the needs and desires of any groups *or individuals* who are in a minority position, but who are also entitled to receive such funds, have been fully ascertained and considered." (emphasis added); *see also* 25 U.S.C. § 1404(2) (requiring the Secretary to submit to Congress "a statement of the extent to which such plan reflects the desire of the Indian tribe *or individuals* which are entitled to such funds") (emphasis added).

Nevertheless, plaintiffs and plaintiff-intervenors rely on *Short v. United States,* 12 Cl.Ct. 36 (1987), in arguing that the Distribution Act does not apply. *See* Pls.' Supplemental Br. at 2. Plaintiffs contend that *Short* "held that 25 [U.S.C.] § 1401 did not apply because the judgment was issued in favor of individual Indian class beneficiaries." Pls.' Supplemental Br. at 3. *Short,* however, is inapposite to the present case.

In contrast to this case, in *Short* the Claims Court found jurisdiction under the Tucker Act, 28 U.S.C. § 1491, not the Indian Tucker Act, 28 U.S.C. § 1505. *See Short,* 12 Cl.Ct. at 40 ("[P]laintiffs are suing as individuals under 28 U.S.C. § 1491 (1982)."). Later, "[i]n 1989, the Claims Court *denied* the plaintiffs' claim for *group damages* under 28 U.S.C. § 1505." *Short v. United States,* 50 F.3d 994, 997 (Fed.Cir.1995) (emphasis added) (citing Order at 3-10, *Short v. United States,* No. 102-63 (Cl.Ct. July 25, 1989)). The court also refused the government's request to substitute a tribal entity for the individually-named plaintiffs and to apply the Distribution Act to

the judgment because "there [was] no functioning . . . tribal organization," and "substitution of such a nonfunctioning entity" would impair prompt resolution of the case. *Short v. United States,* 661 F.2d 150, 155 (Ct.Cl.1981).[24]

Although this case bears a similarity to *Short* in that plaintiffs are not suing as part of a federally-recognized entity, the plaintiffs are an identifiable group. At a minimum, the lineal descendants of the loyal Mdewakanton are identifiable under the terms of the Appropriations Acts and the two censuses. *See, e.g., Chippewa Cree Tribe,* 69 Fed.Cl. at 670-74 (holding that beneficiaries of judgment fund constituted an identifiable group where beneficiary class was defined by statute and rolls prepared by the

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[24] Decisions rendered in the *Short* litigation must be viewed in light of that case's particular and peculiar history. The *Short* litigation spanned nearly forty years, and eventually gave way to Congressional intervention, namely, the 1988 Hoopa-Yurok Settlement Act, 25 U.S.C. §§ 1300i to 1300i-11 (1994). That Act "nullified the *Short* rulings [*Short v. United States,* 486 F.2d 561 (Ct.Cl.1973); *Short v. United States,* 661 F.2d 150 (Ct.Cl.1981); *Short v. United States,* 719 F.2d 1133 (Fed.Cir.1983)], by establishing a new Hoopa Valley Reservation." *Karuk Tribe of Cal. v. Ammon,* 209 F.3d 1366, 1372 (Fed.Cir.2000).

> Additionally, avoidance of the Distribution Act did not turn out to provide the relatively rapid distribution of judgment funds that the *Short* court expected; a final order directing the entry of judgments was not filed until 1993, thirty years after the initial decision on liability was issued. *See* Final Order Directing Entry of Judgments, *Short v. United States,* No. 63-102 (Fed.Cl. July 29, 1993), ECF No. 3.

Secretary of Interior); *Peoria Tribe of Indians of Okla. v. United States,* 169 Ct.Cl. 1009, 1012-13 (1965) (finding that identification of two scattered families descended from an Indian nation was sufficient to support Claims Commission's determination that plaintiffs constituted an identifiable group); *Thompson v. United States,* 122 Ct.Cl. 348, 360 (1952) (holding that Indians of California could bring suit as identifiable group despite lack of formal tribal organization). What is more, plaintiffs assert a collective interest in the lands and funds resulting from the Appropriations Acts. *See, e.g., Tee-Hit-Ton Indians,* 120 F.Supp. at 204 (holding that individuals representing the plaintiff clan constituted an identifiable group where "land . . . was claimed by the plaintiff clan as a whole").

For these reasons, the court finds that plaintiffs and plaintiff-intervenors are indeed an "identifiable group" under the Indian Tucker Act, and thus, a "group" within the meaning of the Indian Judgment Distribution Act.

2. "*Funds appropriated in satisfaction of a judgment.*"

Plaintiffs aver that the Distribution Act "does not apply until Congress has actually appropriated funds to pay a [Court of Federal Claims] judgment separate and apart from funding via 28 U.S.C. § 2517 and 31 U.S.C. § 1304." Pls.' Supplemental Br. at 4. Plaintiffs contend that "the government's [position] is based on

a contingency – that Congress would actually enact, in the future, a specific claims distribution act for the [plaintiffs]." *Id.* The government responds that no separate appropriation is necessary to trigger application of the Distribution Act because 28 U.S.C. § 2517 and 31 U.S.C. § 1304 provide the exclusive statutory mechanism for Congressional funding of this court's judgments. *See* Def.'s Supplemental Br. at 7.

The Indian Judgment Distribution Act applies, "[n]otwithstanding any other law, [to] all use or distribution of funds appropriated in satisfaction of a judgment of the . . . United States Court of Federal Claims in favor of any Indian tribe, band, group, pueblo, or community." 25 U.S.C. § 1401(a). In isolation, the statutory text does not make obvious whether the Act applies only to funds specifically appropriated by separate legislation to satisfy Court of Federal Claims' judgments in favor of Indians, or whether it applies to funds derived from the general appropriation known as the Judgment Fund when those funds satisfy an Indian judgment. Although the text does not furnish a definitive answer, the statutory regime governing appropriations to satisfy judgments of this court and the legislative history of the Distribution Act provide interpretive guidance.

Two statutes govern payment of this court's judgments: 28 U.S.C. § 2517 and 31 U.S.C. § 1304, each quoted *supra,* at 78 n. 21. Prior to 1863, judgments rendered by this court's predecessor, the Court of Claims, were payable only by "specific legislative

enactment." *Slattery v. United States,* 635 F.3d 1298, 1301 (Fed.Cir.2011) (en banc). In the Amended Court of Claims Act of 1863, ch. 92, 12 Stat. 765, 766, Congress provided that judgments of the court were to "be paid out of any general appropriation made by law for the payment and satisfaction of private claims." *Slattery,* 635 F.3d at 1302. That provision "removed the need for a special congressional appropriation to pay each individual judgment" and is now codified as amended at 28 U.S.C. § 2517. *Id.* at 1302.

"Following the 1863 enactment, Congress made periodic general appropriations for payment of the judgments of the Court of Claims, initially on an annualized basis, *e.g.,* Act of June 25, 1864, ch. 147, 13 Stat. 145, 148, and then by a standing appropriation that created a Judgment Fund to pay all Court of Claims judgments for which a specific appropriation did not exist, *e.g.,* Supplemental Appropriation Act, 1957, Pub.L. No. 84-814, § 1302, 70 Stat. 678, 694-95 (1956)." *Slattery,* 635 F.3d at 1302-03. Now codified as amended at 31 U.S.C. § 1304, the Judgment Fund statute provides for payments of certain judgments against the United States, including those authorized by 28 U.S.C. § 2517.[25] The Judgment Fund was created

[25] As the Federal Circuit noted in *Slattery*, "[t]he Judgment Fund had been limited to payments up to $100,000, but Congress removed the cap, so that the Fund covers claims of any amount." 635 F.3d at 1303 (citing Supplemental Appropriations Act, 1977, Pub.L. No. 95-26, ch. 14, 91 Stat. 61, 96-97). It is likely that the original language of the Distribution Act in Senate Bill 1016 which spoke more specifically of funds being

(Continued on following page)

"to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims." *Slattery,* 635 F.3d at 1317; *see also Bell BCI Co. v. United States,* 91 Fed.Cl. 664, 668 (2010) ("Congress enacted the Judgment Fund in 1956 to eliminate the need for specific appropriations to satisfy judgments against federal agencies."). It is "a permanent, indefinite appropriation." 31 C.F.R. § 256.1.

Thus, pursuant to 28 U.S.C. § 2517 and 31 U.S.C. § 1304, unless provision for payment of a judgment is supplied by another statute, any final judgment issued by this court is satisfied by payment from the standing appropriation known as the Judgment Fund. *See Doe v. United States,* 16 Cl.Ct. 412, 423 (1989) ("Every final judgment of the United States Claims Court rendered against the United States is to be paid out of the judgment fund."). No additional appropriation by Congress is necessary; once the award is certified by the clerk and the chief judge of this court, it is presented to the Secretary of the Treasury. *See* 28 U.S.C. § 2517(a). Once the Secretary certifies the judgment, 31 U.S.C. § 1304(a)(2), the funds are deemed appropriated, and Treasury is charged with providing the funds to the payee. *See, e.g., United States v. Dann,* 470 U.S. 39, 42, 105 S.Ct. 1058, 84 L.Ed.2d 28 (1985) (noting that once Court of

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appropriated in favor of Indians was grounded in the reality that at the time the Distribution Act was passed in 1973, the $100,000 cap on the Judgment Fund would have necessitated a separate appropriation for nearly every Indian judgment.

Claims' judgment was certified to the General Accounting Office pursuant to 31 U.S.C. § 724a (1976 ed., Supp. V), the predecessor statute to 31 U.S.C. § 1304, "this certification automatically appropriated the amount of the award"); *see also* 31 C.F.R. §§ 256.0-.60 (Treasury regulations governing payments from the Judgment Fund); Treasury Financial Manual 6-3100, *Certifying Payments and Recording Corresponding Intragovernmental Receivables in the Federal Government's Judgment Fund* (Apr. 2009) (describing Treasury's process for administering payments under the Judgment Fund).

Notably, relevant judicial precedents also disfavor plaintiffs' position. In *Dann,* 470 U.S. 39, 105 S.Ct. 1058, individual plaintiffs alleged, in defense of an action in trespass brought by the United States, that they possessed aboriginal title to a portion of land that had been the subject of litigation before the Indian Claims Commission. 470 U.S. at 43, 105 S.Ct. 1058. The Claims Commission had awarded damages to the Western Shoshone tribe of Indians for the loss of aboriginal title to that land. *Id.* In *Dann,* the government contended that the plaintiffs' aboriginal-title defense was unavailing due to the collateral – estoppel effect of the Claims Commission's judgment. *Id.* The Court of Appeals for the Ninth Circuit rejected that contention, finding that the Claims Commission judgment did not yet have collateral-estoppel effect because "payment" to the Western Shoshone had not then occurred within the meaning of Section 22(a) of the Indian Claims Commission Act, which

section dictated that "payment" of any claim before the Commission effected a "full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." *United States v. Dann,* 706 F.2d 919, 924, 925-27 (9th Cir.1983). The court of appeals found dispositive the fact that although funds had been appropriated and credited to an interest-bearing Treasury account in the name of the Western Shoshone, no funds had actually been disbursed to or used for the benefit of the tribe, nor had Congress then passed legislation to provide a distribution plan for the funds. *Id.* at 925-26.[26]

The Supreme Court disagreed, concluding that "payment" occurred within the meaning of Section 22(a) when the judgment in favor of the Western Shoshone was certified pursuant to 31 U.S.C. § 724a (1976 ed., Supp. V), the Judgment Fund predecessor statute to 31 U.S.C. § 1304,[27] and funds to compensate the tribe were placed by the government into an account in the Treasury. *Dann,* 470 U.S. at 44-45, 105

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[26] In the *Western Shoshone* litigation, the Secretary failed timely to submit to Congress a distribution plan, and thus separate legislation for distribution of the funds was required. *Dann,* 706 F.2d at 926. Ultimately, Congress provided a plan for the use and distribution of the Western Shoshone funds. *See* Western Shoshone Claims Distribution Act, Pub.L. No. 108-270, 118 Stat. 805 (2004).

[27] *See United States v. General Elec. Corp.,* 727 F.2d 1567, 1571 (Fed.Cir.1984) ("Title 31 U.S.C. § 724a was reenacted and is now 31 U.S.C. § 1304.").

S.Ct. 1058. Importantly for the present case, the Court stated explicitly that the Indian Judgment Distribution Act applied to the Commission's judgment as affirmed by the Court of Claims, and "[u]nder 25 U.S.C. § 1402(a) and § 1403(a), the Secretary of the Interior [wa]s required, after consulting with the Tribe, to submit to Congress within a specified period of time a plan for the distribution of the fund." *Id.* at 42, 105 S.Ct. 1058. Although 31 U.S.C. § 724a (1976 ed., Supp. V) and 31 U.S.C. § 1304 differ in their details, their effect is the same, and there is nothing within 31 U.S.C. § 1304 that would lead to the conclusion that a judgment certified under its mandates is not subject to the Indian Judgment Distribution Act whereas one certified pursuant to its precursor was subject to the Distribution Act.

The Senate Report on the bill that became the Distribution Act is revealing in this regard, as well. As previously noted, contained within that report is a letter from the Assistant Secretary of the Interior commenting on the Distribution Act. In that letter, the Assistant Secretary objected also to a provision in Senate Bill 1016 that stated: "Within six months after the date of the appropriation of funds by the Congress to pay each Indian judgment, the Secretary of the Interior . . . shall prepare and submit to the Congress a recommended plan for the distribution of such funds . . . to *the Indian tribe, band, group, pueblo, or community in whose favor such judgment is rendered and such funds appropriated.*" *Hearing on S. 1016* at

5-6 (S. 1016, 93d Cong. § 4 (1973)) (emphasis added). The Secretary observed:

> [W]ith the exception of a few very early Indian Claims Commission awards, neither the Indian Claims Commission *nor the Court of Claims specifies the ultimate or present-day beneficiaries of an award. Furthermore, the appropriation acts covering the awards are silent on the subject of beneficiaries. The burden of identifying beneficiaries has fallen on the Secretary of the Interior,* a process that we feel should continue to be followed because of the fact that the identification of beneficiaries often demands intense research in the cultural and political history of the involved group or groups. *This is a task that neither the Indian Claims Commission nor the Court of Claims is equipped to handle.*

Id. at 14 (Letter from John H. Kyl, Assistant Secretary of the Interior, to Sen. Henry M. Jackson (Apr. 12, 1973)) (emphasis added). The Assistant Secretary thus recommended the deletion of the quoted language of Section 4 and all similar text. *Id.*; *see also id.* at 19 (Test. of Mr. Kyl). Congress agreed, and the quoted portion of Section 4 of Senate Bill 1016, along with similar language, was struck from the bill. *See* 93 Cong. Rec. 33,180; 93 Cong. Rec. 16,375-76.

While the Assistant Secretary's objection to Section 4 of Bill 1016 appeared to be based primarily on the fact that judgments in favor of Indians and appropriations to satisfy those judgments did not list individual beneficiaries, the language to which the

Secretary objected and which was ultimately struck from the bill actually spoke of funds being appropriated in favor of "the Indian tribe, band, group, pueblo, or community," not individual beneficiaries. Nevertheless, the affirmative elimination of that language is persuasive evidence that application of the Distribution Act is not dependent on a specific appropriation in the name of an Indian entity.[28]

In short, the statutory scheme governing payment of judgments by the Court of Federal Claims and the legislative history of the Indian Judgment Distribution Act convince the court that the Distribution Act applies to this case, regardless of whether the money is automatically appropriated pursuant to the Judgment Fund statute, 31 U.S.C. § 1304, or Congress enacts a specific appropriation to satisfy the judgment. Because the court concludes that the Distribution Act applies here, the court will abstain from identifying the specific individual persons who qualify as lineal descendants of the loyal Mdewakanton. Identification of beneficiaries of the final judgment is within the purview of the Secretary of Interior under the Indian Judgment Distribution Act. *See* 25 U.S.C. §§ 1402(a), 1403. The court will likewise refrain from articulation of what specific criteria claimants must

[28] Notably, the language found in 25 U.S.C. § 1401(a) that defines the scope of the Distribution Act was present in nearly identical form in Section 3 of the original Senate Bill 1016, *see Hearing on S.* 1016 at 5 (S. 1016, 93d Cong. § 3) (1973), but no objection to that text was raised by the Assistant Secretary.

satisfy to prove their status, as all facets of this determination make up the Secretary's responsibilities under the Act. *See id.*[29]

B. *Application of the Indian Judgment Distribution Act to this Case*

1. *Previously incurred costs associated with formulation of a distribution plan.*

Although the court concludes that the Distribution Act applies, it does so reluctantly. As noted, pursuant to the parties' representations at the status conference held on January 21, 2011, and the scheduling order issued on that same date, plaintiffs and

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[29] The Indian Judgment Distribution Act's delegation to the Secretary of Interior of sole authority to determine proper beneficiaries in Indian judgment cases is in keeping with a line of cases from this court that held, outside the context of the Distribution Act and prior to the lifting of the $100,000 cap on the Judgment Fund, that Congress was responsible for determining individual claimants through Congress' appropriation of funds to satisfy the Indian judgment. *See, e.g., Turtle Mountain Band of Chippewa Indians v. United States,* 490 F.2d 935, 951 (Ct.Cl.1974); *Cherokee Freedmen & Cherokee Freedmen's Assoc. v. United States,* 195 Ct.Cl. 39, 48 (1971); *Confederated Tribes of Warm Springs Reservation of Or. v. United States,* 177 Ct.Cl. 184, 210 (1966); *Peoria Tribe,* 169 Ct.Cl. at 1011-12; *McGhee,* 122 Ct.Cl. at 396; *see also Chippewa Cree Tribe of Rocky Boy's Reservation v. United States,* 85 Fed.Cl. 646, 657 (2009) ("composition of the particularly entity or group in whose favor an award is made" was "beyond the competence of" the court where Congress had enacted specific legislation creating distribution plans for judgments at issue).

plaintiff-intervenors prepared and filed 33 motions and numerous proposed findings of uncontroverted facts alleging that they are lineal descendants of the loyal Mdewakanton. Attendant to those motions, they have obtained, sorted through, organized, and submitted to the court and the government almost 150,000 pages of material to show individual genealogies that span more than a century. Def.'s Rule 56(d) Mot. at 3. This information includes family trees, family Bibles, newspapers, books, historical accounts, Excel spreadsheets, birth certificates, and death certificates. *Id.*; *see also* Def.'s Mem. at 62 (recounting plaintiffs' and plaintiff-intervenors' submissions). Indeed, the court can summarize no better than the government the Herculean task plaintiffs and plaintiff-intervenors undertook to prepare this case for a final resolution:

> [I]t took [p]laintiffs years to compile their own records. *See* Declaration Regarding Persons Who Qualify as Proper Claimants in this Case, March 8, 2011, at ¶ 7 (Dkt. 898) ("Since the filing of the instant matter, [plaintiffs' counsel] has endeavored to identify individuals, who through various means but mainly birth certificates and similar authentic records, can prove their lineal descendancy."); Declaration of Barbara Buttes, March 21, 2011, at ¶ 3 (Dkt. 978-2) ("Over the eight years of this lawsuit (2003-2011), Wičaŋpi [Buttes' research firm] has employed many people, full-time and part-time, to conduct the research on 1886 Mdewakanton descendancy.") (Dkt. 978-2). Indeed, merely

> to identify [p]laintiffs, the lead [p]laintiffs' attorney "went on a tour of the Sioux Reservation[s] in South Dakota and six states and two nations." Transcript, Attorney Erick Kaardal, p. 112 (June 10, 2005).

Def.'s Rule 56(d) Reply at 5.

Plaintiffs' and plaintiff-intervenors' efforts were accomplished at the insistence of the government, which has demanded from the inception of this case that all plaintiffs be individually named and identified as lineal descendants in this case. *See, e.g., Wolfchild IV,* 77 Fed.Cl. at 33 ("The government states that it and other parties to this action are 'entitled to certainty and closure respecting the number and identities of the persons' participating in this suit."); Def.'s Mot. to File Exs. under Seal at 2, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed Sept. 13, 2007) ("Names of minors and their ages are necessary to the determination of whether these individuals have previously been admitted as parties. . . ."); Def.'s Resp. to Mot. to Substitute Legal Counsel at 1, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed Feb. 23, 2007), ECF No. 430 ("The United States opposes the motion to the extent that it seeks to add as new plaintiffs any persons who have not already moved for, and been granted, intervention."); Def.'s Opp'n to Pls.' Mot. to Amend Third Amended Compl. at 2, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed Feb. 2, 2007), ECF No. 418 ("In a case in which such matters as lineage, tribal affiliation, and severance of tribal relations may play a

significant role, it is particularly important for the [d]efendant to know for certain who the [p]laintiffs (and [p]laintiff-[i]ntervenors) are."); Def.'s Opp'n to DuMarce Mot. to Intervene at 2, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed Nov. 8, 2006) ("As it has previously noted, the United States is entitled to have certainty and closure respecting the number and identities of the persons who are suing it in this action. . . ."); Def.'s Mot. for Disclosure of Names of John Doe Plaintiff-Intervenors at 1, 4, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed Oct. 24, 2006) ("Defendant . . . moves . . . for an [o]rder directing counsel . . . to provide . . . the United States with the identities of those John Doe plaintiffs. . . . Defendant is entitled to know who is suing it . . . This is particularly true in light of the fact that all claims in the case rest, in part, on allegations regarding the lineage of the persons who are suing . . . No litigant should be forced to defend itself against phantom plaintiffs, nor carry the logistical burden of keeping track of hundreds of 'John Does' who may or may not exist."); Def.'s Opp'n to DuMarce Mot. to Amend First Amended Compl. at 3, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed Oct. 23, 2006) ("As it has previously noted, [d]efendant is entitled to have certainty and closure respecting the number and identities of the persons who are suing it in this action. . . ."); Def.'s Opp'n to Rooney Mot. to Amend at 2, *Wolfchild v. United States,* No. 03-2684 (Fed.Cl. filed Oct. 10, 2006) (same). The government's position regarding claimants adopted at the outset and maintained until the very last submissions has driven the course of

this litigation and is directly opposed to the terms of the Distribution Act, which contemplate that the government was not entitled to such specific identification at any time prior to a judgment, given that development of a plan under the Distribution Act would follow entry of a judgment.

Not only was the government in error to demand identification of plaintiffs and proofs of descent throughout this case, under the Indian Judgment Distribution Act it is the Secretary of Interior, not plaintiffs' attorneys or the court, who must sort through the thousands of documents, compile the pertinent records, and undertake the historical research to determine the appropriate templates by which to adjudicate claimant eligibility. In short, it is the Department of the Interior that is charged with the task of determining whether each claimant's supporting documentation demonstrates lineal descendancy. The pertinent regulations provide:

> (a) *The Secretary shall cause to begin as early as possible the necessary research to determine the identity of the ultimate or present day beneficiaries of judgments. Such research shall be done under the direction of the Commissioner of Indian Affairs.* The affected tribes or groups shall be *encouraged* to submit pertinent date. *All pertinent data,* including cultural, political and historical material, and records, including membership, census and other roll *shall be considered*. . . .

> (b) *The results of all research shall be provided to the governing bodies of all affected tribes and groups.* The Area Director shall assist the affected tribe or group in arranging for preliminary sessions or meetings of the tribal governing body, or public meetings. *The Area Director shall make a presentation of the results of the research* and shall arrange for expertise of the Bureau of Indian Affairs to be available at these meetings to assist the tribe or group in developing a use or distribution proposal. . . .

25 C.F.R. § 87.3 (emphasis added). In the Joint Status Report of May 27, 2011, the government provided an illuminating example of the scope of the work required under the Distribution Act. The government explained that in the context of the *Western Shoshone* litigation, *see supra,* at 84-85 & n. 26:

> The Bureau received more than 9,000 applications to share in the judgment. The documents to which claimants had to show genealogical connections were census rolls generated from 1885 to 1940. The Bureau started accepting applications in October 2007. The first distribution was made in March 2011; the final distributions have not yet been made. *The Bureau hired a contractor to perform the voluminous research. The Bureau paid the contractor approximately $1.5 million for two years of work. The Bureau elected not to endorse the third year of the contract, assuming direct responsibility for the work to be done. To date, the Bureau*

> *has expended about one million dollars above what it paid the contractor.*
>
> The underlying documentation, i.e., census roles, birth certificates, etc. in Western Shoshone[,] is generally more recent, reducing the research by one or possibly two generations. Depending on the criteria to qualify for a distribution in this case, the number of Wolfchild applicants could be twice the size of the Western Shoshone claimant group.

Joint Status Report at 13 (emphasis added).

As demonstrated by the government's recitation of the work required in the Western Shoshone litigation, plaintiffs' and plaintiff-intervenors' assembly of the pertinent records into a readily analyzable format in effect will enable the government to avoid incurring a substantial part of the costs entailed in complying with the Indian Judgment Distribution Act. In light of these circumstances, the government shall reimburse plaintiffs and plaintiff-intervenors for the costs of preparing the materials that plaintiffs and plaintiff-intervenors submitted in support of their claims of eligibility as to the stipulated funds. The government's unjustified litigation posture has caused plaintiffs to expend resources that properly should have been borne by the government, and the plaintiffs deserve recompense for those efforts. Such reimbursement will also carry out the Department of the Interior's obligation to make financial resources available to the claimant group to aid in "develop[ing] and communicat[ing] to the Secretary . . . its own

suggested plan for the distribution and use of [the judgment] funds." 25 U.S.C. § 1403(b).

2. *Review and approval of a distribution plan.*

A final point regarding the administration of this case under the Indian Judgment Distribution Act must be addressed. The government contends that "[i]f the Act applies to any judgment entered in this case, this [c]ourt's role terminates after certification of the judgment to the Secretary of the Treasury and allocation of appropriated funds for the judgment." Def.'s Supplemental Br. at 5; *id.* at 13 ("The court[']s role in Indian tribal or group judgment actions is limited to rendering judgments and certifying those judgments to the Secretary of the Treasury for payment pursuant to 31 U.S.C. § 1304."). It avers that "[u]nder the Act, the Secretary of the Interior must create and Congress approves the plan for distribution and use of the appropriated funds." *Id.* at 6.

The Indian Judgment Distribution Act ostensibly provides that the Secretary must submit to Congress the distribution plan within one year of the appropriation of the funds to satisfy the judgment. *See* 25 U.S.C. § 1402(a).[30] The distribution plan becomes effective at the end of the sixty-day period beginning

[30] Amendments to the Distribution Act in 1983 extended the time to one year from one hundred eight days originally provided. *See* Pub.L. No. 97-458, § 1, 96 Stat. 2512 (Jan. 12, 1983).

on the day the plan is submitted to Congress, unless during that period "a joint resolution is enacted disapproving such plan [ ]." 25 U.S.C. § 1405(a). Upon enactment of a joint resolution, the Secretary must submit to Congress within thirty days proposed legislation authorizing distribution of the funds. 25 U.S.C. § 1405(b).

This aspect of the Indian Judgment Distribution Act reflects an amendment adopted in 1983 to cure a constitutional defect in the original terms of the Act. Initially the Distribution Act incorporated a legislative-veto provision identical in effect to that deemed unconstitutional in *Immigration & Naturalization Service v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).[31] *See* Pub.L. No. 93-134, § 5, 87

[31] In *Chadha,* the Supreme Court faced the question of the constitutionality of a one-House veto over executive action. Section 244(a)(1) of the Immigration and Nationality Act permitted the Attorney General to suspend the deportation of an alien if that alien met certain statutory prerequisites. 42 U.S.C. at 923-24. A separate provision of the Act, Section 244(c)(1), granted to Congress the power to override and veto the Attorney General's suspension of deportation via a resolution adopted by either the House of Representatives or the Senate. *Id.* at 925. The Supreme Court concluded that the legislative veto violated the Presentment Clauses of Article I, Section 7, Clauses 2 and 3, and the Bicameralism requirement of Article I, Sections 1 and 7. The Court determined that Congress' invocation of the veto power granted to it under the Act constituted legislative action because it "alter[ed] the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials, and [the alien subject to deportation], all outside the legislative branch." *Chadha,* 462 U.S. at 951-52, 103 S.Ct. 2764. Absent the veto provision in Section 244(c)(2), Congressional

(Continued on following page)

Stat. 466, 468 (1973) (Proposed distribution plans submitted to Congress would take effect unless "during such sixty-day period either House adopts a resolution disapproving such plans."). The curing amendment adopted in 1983 was enacted prior to the Supreme Court's decision in *Chadha* but subsequent to the decision of the United States Court of Appeals for the Ninth Circuit in *Chadha v. Immigration & Naturalization Service,* 634 F.2d 408 (9th Cir.1980) (op. by Kennedy, J.), which decision was affirmed by the Supreme Court in due course. The Congressional cure in the form of requiring a joint resolution to be enacted to disapprove a proposed distribution plan satisfied both the Bicameralism and Presentment Clauses of the Constitution.[32]

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overruling of the Attorney General's suspension determination could be achieved, if at all, only through legislation enacted pursuant to Article I. *Id.* at 953-54, 103 S.Ct. 2764. Because the veto was legislative action, "that action was subject to the standards prescribed in Article I" and could not be exercised outside of the careful process delineated in that part of the Constitution. *Id.* at 956-57, 103 S.Ct. 2764. Accordingly, the one-House veto was a violation of separation of powers and was thus unconstitutional. *Id.* at 959, 103 S.Ct. 2764.

> Notably, the legislative veto contained within the Indian Judgment Distribution Act was listed in an Appendix to Justice White's dissent in *Chadha* listing then-current legislative vetoes which Justice White believed were invalidated by the majority opinion in *Chadha,* 462 U.S. at 959-60, 1012, 103 S.Ct. 2764.

[32] *See Constitution, Jefferson's Manual, and Rules of the House of Representatives,* H.R. Doc. No. 108-241, 108th Cong., 2d Sess. § 397 (2005) ("A[ ] development of the modern practice is

(Continued on following page)

Although Congress cured a constitutional flaw in the statutory regime for developing and implementing a distribution plan for judgments in certain Indian cases, it introduced another equally significant defect by legislative action taken in 1995. The provisions cited by the government calling for the Secretary to submit a distribution plan to Congress have been repealed. In 1995, Congress enacted the Federal Reports Elimination and Sunset Act of 1995, Pub.L. No. 104-66, 109 Stat. 707. Intended to "alleviate the burden on the Executive Branch [and] to also allow the [g]overnment to focus its energy on more important issues, thereby better utilizing their time," H.R. Rep. No. 104-327 (1995), 1995 WL 683033, at *23, that Act dictated that certain provisions of law

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the joint resolution, which is a bill so far as the processes of the Congress in relation to it are concerned. With the exception of joint resolutions proposing amendments to the Constitution, all these resolutions are sent to the President for approval and have the full force of law. They are used for what may be called the incidental, unusual, or inferior purposes of legislating.") (citations omitted); *see also International Brotherhood of Elec. Workers v. Washington Terminal Co.,* 473 F.2d 1156, 1164 (D.C.Cir.1972) ("That a joint resolution was used [by Congress] to accomplish the intended result does not detract from the legislative character of the action.")

> Congress made similar changes to other laws to cure the constitutional infirmity identified in *Chadha. See United States v. Amirnazmi,* 645 F.3d 564, 581 n. 26 (3d Cir.2011) (discussing an amendment to the National Emergencies Act to replace a termination of an emergency by "concurrent resolution" of Congress with termination of an emergency by a "joint resolution.").

mandating the submission of reports to Congress were void as of the date of enactment or four years thereafter, *id.* at *25. Among the reporting requirements that were to be eliminated four years after the date of enactment of the law were those mandated by the Distribution Act under Sections 1402(a) and 1404 of Title 25. 109 Stat. at 734-35 (eliminating the reporting requirements listed in H.R. Doc. No. 103-7 (1993)); H.R. Doc. No. 103-7, at 113 (listing reporting requirements under 25 U.S.C. § 1402(a) and § 1404 as among those being abrogated). Thus, contrary to the government's contentions, the Secretary is no longer required or allowed to submit its proposed distribution plan to Congress.

To say the least, application of a repealed statutory provision will not do. The court is presented with a statute that has been decimated. The question arises whether means of filling the resulting very substantial gap are available. This court has judicial power to remit and remand "appropriate matters" to executive officials, *see* 28 U.S.C. § 1491(a)(2) ("In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."); *Mendoza v. United States,* 87 Fed.Cl. 331, 337-38 (2009) (partially remanding a claim for pay and benefits to the Office of Personnel Management, where that office had statutory authority over aspects of the claim), and the court has inherent power to effectuate its judgments. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 111

S.Ct. 2123, 115 L.Ed.2d 27 (1991) ("[C]ertain implied powers must necessarily result to . . . [c]ourts of justice from the nature of their institution. . . . These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" (quoting *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962))); *Riggs v. Johnson Cnty.,* 73 U.S. (6 Wall.) 166, 187, 18 L.Ed. 768 (1867) ("[T]he rule is universal, that if the power is conferred to render the judgment . . . , it also includes the power to issue proper process to enforce such judgment or decree."); *see also Pueblo of Laguna v. United States,* 60 Fed.Cl. 133, 135-38 (2004) (addressing various inherent powers); 28 U.S.C. § 2521(c) ("The United States Court of Federal Claims shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States."). Exercising those powers offers the best prospect of adhering to the terms of the Distribution Act insofar as it is legally possible to do so. Accordingly, the court will issue a remit, remand, and direction to the Secretary of the Interior to provide a report to the court within the time specified in 25 U.S.C. § 1402, submitting his or her "plan for the use and distribution of the funds" awarded to the lineal descendants of the loyal Mdewakanton, 25 U.S.C. § 1402(a). Upon receipt of the report, the court will entertain potential proceedings to review the report,

as provided in RCFC 52.2(f). This disposition will enable the court to take the "necessary steps to insure the[ ] speedy determination" of the case, at least to the extent that any such determination is possible. *Navajo Tribe of Indians v. United States,* 601 F.2d 536, 540 (Ct.Cl.1979).

C. *Summary Judgment*

Because the court has no direct role in specifying the individual persons entitled to share in a judgment in favor of the descendants of the loyal Mdewakanton as an identifiable group of Indians, and because the amount of the funds to which the descendants are entitled based upon plaintiffs' and intervening plaintiffs' use-restriction claims has been set by stipulation of the parties, there is no genuine dispute of any material fact regarding those claims. As a result, plaintiffs and intervening plaintiffs are granted summary judgment on their use-restriction claims for $673,944, measured as of January 1, 2011.

III. JUDGMENT UNDER RULE 54(b)

Pursuant to RCFC 54(b), this court is authorized to "direct entry of a final judgment as to one or more, but fewer than all claims," upon the finding that "there is no just reason for delay." RCFC 54(b). In this case there is no reason to delay further the final resolution of the claims regarding the restricted-use funds. The court will enter final judgment as to those claims.

Entry of a judgment under Rule 54(b) will allow the Secretary of the Interior to develop a roll of eligible claimants and prepare a distribution plan. Partial final judgments are expressly authorized under 28 U.S.C. § 2517(b), and 31 U.S.C. § 1304(a)(3)(A) provides for payment from the Judgment Fund of all those judgments payable under Section 2517. Once the judgment is certified and the money automatically appropriated, the Secretary shall begin the work necessary to create a distribution plan in accordance with the Indian Judgment Distribution Act.

IV. CONCLUSION

For the reasons stated, the court DENIES plaintiffs' and plaintiff-intervenors' motions to amend their respective complaints to include claims grounded in the Indian Non-Intercourse Act and the 1863 Acts. The Robertson-Vadnais group of plaintiff-intervenors' motion to amend to add a takings claim under the Fifth Amendment is likewise DENIED. The motions to allow the various other proffered amendments to plaintiffs' and plaintiff-intervenors' complaints are GRANTED. The government's motion to dismiss claims grounded in the 1863 Acts is GRANTED as to the Julia DuMarce Group and the Harley Zephier Group of plaintiff-intervenors. The government's motion to dismiss is otherwise DENIED, as is the government's motion to defer consideration under RCFC 56(d).

Plaintiffs' and plaintiff-intervenors' motions for summary judgment are GRANTED IN PART, *i.e.,* they are granted as to the claims based upon the use restrictions in the 1888, 1889, and 1890 Appropriation Acts. The government's cross-motion for summary judgment is DENIED. There being no just reason for delay, and because entry of a final judgment on the use-restriction claims will materially advance the ultimate resolution of this litigation, the court directs entry of final judgment as to the use-restriction claims pursuant to RCFC 54(b). The clerk is directed to enter a final judgment in favor of plaintiffs and plaintiff-intervenors against the United States on the use-restriction claims in the amount of $673,944, measured as of January 1, 2011. Distribution of the judgment shall be made pursuant to the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401-07.

To effectuate the Distribution Act given the repeal of the provisions providing for reports to Congress regarding a proposed distribution plan, the matters of developing a roll of eligible claimants and a plan for distribution of the funds awarded shall be and are remitted and remanded to the Secretary of the Interior pursuant to 28 U.S.C. § 1491(a)(2) and RCFC 52.2(a). In carrying forward with his or her responsibilities under the Distribution Act, the Secretary shall provide reimbursement pursuant to 25 U.S.C. § 1403(b) to plaintiffs and intervening plaintiffs for their costs in preparing and submitting to the court and the government, genealogies to establish

their status as eligible claimants. In accord with 28 U.S.C. § 1402, the Secretary shall complete preparation of such roll and plan satisfying the criteria specified in 25 U.S.C. § 1403 within one year from the date of this decision and judgment. Upon completion, the Secretary shall submit a report to the court setting out the proposed roll and plan.

Plaintiffs are awarded their costs of suit.

It is so ORDERED.

96 Fed.Cl. 302
United States Court of Federal Claims.

Sheldon Peters WOLFCHILD, et al.,
Plaintiffs,
v.
UNITED STATES, Defendant.

Nos. 03-2684L, 01-568L. | Dec. 21, 2010.

Attorneys and Law Firms

Erick G. Kaardal, Mohrman & Kaardal, PA, Minneapolis, MN, for Wolfchild plaintiffs. With him on the briefs were William F. Mohrman, Mohrman & Kaardal, P.A., Minneapolis, MN.

Jody H. Schwarz, Trial Attorney, Natural Resources Section, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C., for defendant. With her on the briefs were Ignacia S. Moreno, Assistant Attorney General, and Sam Costello and Daniel Steele, Trial Attorneys, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C. Of counsel was James Porter, Office of the Solicitor, Department of the Interior, Washington, D.C.

John Ernst Jacobson, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., St. Paul, MN, for intervening plaintiff Lower Sioux Indian Community.

Jack E. Pierce, Pierce Law Firm, PA, Minneapolis, MN, for the Cermak plaintiffs and for the Stephens, R. Cermak, J. Cermak, Henderson, Klingberg, Alkire, Arnold, and Godoy groups of intervening plaintiffs.

Kelly H. Stricherz, Vermillion, SD, for the Mozak group of intervening plaintiffs.

Garrett J. Horn, Horn Law Office, Yankton, SD, for the Saul, Trudell, Taylor, Ferris, Henry, and Vassar groups of intervening plaintiffs.

Creighton A. Thurman, Yankton, SD, for the Cournoyer, Robinette, Kimbell, French, and Wanna groups of intervening plaintiffs.

Elizabeth T. Walker, Walker Associates, Alexandria, VA, for the anonymous Walker group of intervening plaintiffs.

Robin L. Zephier, Abourezk & Zephier, PC, Rapid City, SD, for the Zephier group of intervening plaintiffs.

Larry Leventhal, St. Paul, MN, for the Burley group of intervening plaintiffs.

Wood R. Foster, Jr., Siegel, Brill, Greupner, Duffy & Foster, PA, Minneapolis, MN, for the Lafferty, Blaeser, Whipple, and Lowe groups of intervening plaintiffs.

Michael W. Ellwanger, Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, LLP, Sioux City, IA, for the Enyard and Kitto groups of intervening plaintiffs.

Bernard J. Rooney, Amherst, WI, for the Rooney group of intervening plaintiffs.

Scott A. Johnson, Johnson Law Group, Minnetonka, MN, for the Rocque group of intervening plaintiffs.

James L. Blair, Renaud, Cook, Drury, Mesaros, PA, Phoenix, AZ, for the anonymous Blair group of intervening plaintiffs. With him on the briefs was Barry P. Hogan, Renaud Cook Drury Mesaros, PA, Phoenix, AZ.

Gary J. Montana, Montana & Associates, Osseo, WI, for the Julia DuMarce group of intervening plaintiffs.

Nicole N. Emerson, Lynn, Jackson, Shultz & Lebrun, PC, Sioux Falls, SD, for the Garreau group of intervening plaintiffs.

Douglas Kettering, Kettering Law Office, Yankton, SD, for the Ke Zephier group of intervening plaintiffs.

Randy V. Thompson, Nolan, MacGregor, Thompson & Leighton, St. Paul, MN, for the Abrahamson group of intervening plaintiffs.

Frances Felix, pro se, Minneapolis, MN, for herself and members of her immediate family as intervening plaintiffs.

Royce Deryl Edwards, Jr., Joplin, MO, for the Vadnais group of intervening plaintiffs.

Rory King, Bantz, Gosch & Cremer, LLC, Aberdeen, SD, for the Marvel Jean DuMarce group and the Youngbear group.

Brian L. Radke, Radke Law Office, P.C., Sioux Falls, SD for the Schroder group of intervening plaintiffs.

Opinion

OPINION AND ORDER

LETTOW, Judge.

This case arises under the Indian Tucker Act, 28 U.S.C. § 1505, and comes before the court for proceedings on remand from the Court of Appeals for the Federal Circuit after that court's decision on an interlocutory appeal of questions certified by this court. *See Wolfchild v. United States,* 559 F.3d 1228 (Fed.Cir.2009) ("*Wolfchild VI*"), *cert. denied,* ___ U.S. ___, 130 S.Ct. 2090, 176 L.Ed.2d 722, 755 (2010). The issues on remand are complex, reflecting both the convoluted and lengthy history of the federal government's relationship with the group of Indians who are plaintiffs and the extensive prior proceedings in this litigation.

INTRODUCTION

Plaintiffs are lineal descendants of Mdewakanton Sioux Indians who were loyal to the United States and assisted white settlers in Minnesota during the 1862 Sioux uprising ("the loyal Mdewakanton" or "1886 Mdewakanton"). *See Wolfchild v. United States,* 62 Fed.Cl. 521, 524 (2004) ("*Wolfchild I*"). Approximately 20,750 persons have joined in this litigation as plaintiffs.[1] On October 27, 2004, the court granted

[1] The Wolfchild plaintiffs number about 7,500 persons, and 41 separate groups totaling about 13,250 people were granted

(Continued on following page)

partial summary judgment for the plaintiffs, holding that a trust for the benefit of the loyal Mdewakanton and their lineal descendants was created in connection with and as a consequence of appropriations statutes enacted in 1888, 1889, and 1890 ("Appropriation Acts"), providing money to the Department of the Interior ("the Department") for the benefit of the loyal Mdewakanton and their families. *See Wolfchild I,* 62 Fed.Cl. at 555.[2]

The court concluded that the relationship created pursuant to the Appropriations Acts contained the three traditional elements of a trust: a trustee (the United States), specific beneficiaries (the 1886 Mdewakanton and their lineal descendants), and trust property acquired by the Department using the appropriated funds (the 1886 lands, improvements to those lands, and funds derived from those lands). *See Wolfchild I,* 62 Fed.Cl. at 541. The court found additional evidence that a trust was created by looking to the arrangements made by the Department for the use of the 1886 lands by the loyal Mdewakanton and their lineal descendants over the years following acquisition of those lands. *See id.* at 541-43. Ninety years of detailed management of the 1886 lands by

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leave to intervene as plaintiffs. *See Wolfchild v. United States,* 77 Fed.Cl. 22, 31-35 (2007) ("*Wolfchild IV*").

[2] The three Appropriation Acts are: the Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29, the Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93, and the Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349.

the Department, including its assigning rights of use to particular loyal Mdewakanton, monitoring beneficiaries' use of the lands, and leasing non-assigned land to third parties, and the Department's own repeated characterization of the 1886 lands as being held "in trust" for the loyal Mdewakanton, further persuaded the court that a trust relationship was created as a consequence of the assignment system. *See id.*[3]

The court also held that the Act of December 19, 1980, Pub.L. No. 96-557, 94 Stat. 3262 ("1980 Act"), which provided that the government would thereafter hold the 1886 lands in trust for three Indian communities located in Minnesota ("the three communities")[4] did not alter or terminate the trust for the loyal Mdewakanton. *See Wolfchild I,* 62 Fed.Cl. at 543-44. Consequently, the court concluded that actions taken in December 1980 and thereafter, including the Department of Interior's disbursement of funds derived from the 1886 lands to the three communities, constituted a breach of that trust. *See id.* at 555.

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[3] The government's motion for reconsideration of the trust holding was denied in *Wolfchild v. United States,* 68 Fed.Cl. 779, 801 (2005) ("*Wolfchild II*"). The court addressed procedural issues in *Wolfchild v. United States,* 72 Fed.Cl. 511 (2006) ("*Wolfchild III*") and also in *Wolfchild IV.*

[4] The three Indian communities are the Lower Sioux Indian Community, the Shakopee Mdewakanton Sioux (Dakota) Community, and the Prairie Island Indian Community in Minnesota. *See* 94 Stat. 3262.

Approximately two and one half years after the court's ruling in *Wolfchild I,* the government interposed a motion to certify the court's decisions in *Wolfchild I, Wolfchild II,* and *Wolfchild III* for interlocutory appeal under 28 U.S.C. § 1292(d). *See Wolfchild v. United States,* 78 Fed.Cl. 472 (2007) ("*Wolfchild V*"). The court granted the government's motion in part and certified the following two questions for interlocutory review by the Court of Appeals for the Federal Circuit:

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.

The Court of Appeals granted interlocutory appeal of those two questions and in due course reversed this court's conclusion regarding both certified questions. *See Wolfchild VI,* 559 F.3d 1228, 1231. Although the Court of Appeals acknowledged that "Interior Department officials at times characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants[,]" *id.* at 1241, it decided that "the key question regarding the rights at issue in this case is not whether the 1886 lands were held 'in trust' for the 1886 Mdewakanton descendants to whom they

were assigned, but rather what rights were conferred in the assigned lands." *Id.* at 1248-49. The Court of Appeals held that that the Appropriations Acts did not create a trust for the benefit of the loyal Mdewakanton nor did they vest any title, legal or otherwise, in that group. *Id.* at 1240-41, 1249. Rather, it determined that "the Appropriations Acts are best interpreted as merely appropriating funds *subject to a statutory use restriction*." *Id.* at 1240 (emphasis added). Under that view of the Appropriations Acts, the Court of Appeals concluded that the 1886 lands "were being held by the Department of the Interior for use by the 1886 Mdewakantons and their descendants pending an ultimate legislative determination as to how the ownership interests in the lands should be allocated." *Id.* at 1255. Regarding the second certified question, the Court of Appeals found that the 1980 Act furnished that "ultimate legislative determination" by creating a trust for the benefit of the three communities, thereby terminating any trust that would have been created by the Appropriations Acts. *Id.* at 1255, 1259-60. The Court of Appeals remanded the case to this court to address the issue of "whether it was lawful for the Interior Department, following the 1980 Act, to transfer to the three communities approximately $60,000 in funds that had been collected as proceeds from the sale, use, or leasing of certain of the 1886 lands, given that the 1980 Act was silent as to the disposition of those funds." *Id.* at 1259 n. 14.

In light of the decision of the Court of Appeals and its remand to this court, plaintiffs and intervening plaintiffs have filed motions to amend their complaints. The government filed a motion to dismiss, arguing that this court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief may be granted. Plaintiffs responded with a cross-motion for partial summary judgment respecting their entitlement to the money previously held by Treasury and other monies derived from the 1886 lands.

For the reasons stated below, the government's motion to dismiss is denied, and plaintiffs' and intervening plaintiffs' motions to amend their complaints are granted. Plaintiffs' cross-motion for partial summary judgment is granted in part and denied in part.

FACTS[5]

The Mdewakanton Sioux

Prior to August 1851, the Minnesota Sioux lived along the Mississippi River, stretching from the Territory of Dakota to the Big Sioux River. *See*

[5] Thousands of pages of historical documents have been filed in connection with the pending motions and the prior motions dating back to 2004 in this litigation. The court has drawn upon that historical record in developing the recitation of facts which follows. Unless otherwise noted, the facts set out are undisputed. No authenticity objection has been raised to any of the historical documents. The arguments of the parties focus on the inferences to be drawn from the resulting record.

Medawakanton and Wahpakoota Bands of Sioux Indians v. United States, 57 Ct.Cl. 357, 359 (1922).[6] Originally, these Sioux were all Mdewakantons, but they later split into four bands, known as the Mdewakanton and the Wahpakoota (together comprising the "lower bands"), and the Sisseton and the Wahpeton (known as the "upper bands" or "Santee Sioux"). *Id.* On September 29, 1837, the Sioux entered a treaty with the United States by which they ceded "to the United States all their land, east of the Mississippi River, and all their islands in said river[,]" in consideration of the United States' investment of $300,000 for the benefit of the Sioux. Treaty of Sept. 29, 1837, arts. I-II, 7 Stat. 538 ("1837 Treaty").[7] Under the treaty, the United States was required to pay an annuity to the Sioux at a rate of not less than five percent interest, such annuity to be paid "forever." *Id.,* art. II, 7 Stat. at 538.

In 1851, the Mdewakanton and Wahpakoota bands entered another treaty with the United States under which they ceded "all their lands and all their right, title and claim to any lands whatever, in the Territory of Minnesota, or in the State of Iowa[,]" and bound themselves to "perpetual" peace and friendship

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[6] Some prior documents and decisions refer to the Mdewakanton Sioux as "Medawakanton." The court does not revise or correct the spelling in those instances.

[7] Although the 1837 treaty purports to bind the entire Sioux Nation, it appears that the treaty was signed only by leaders of the Mdewakanton band. *See* 7 Stat. 538.

with the United States. Treaty of Aug. 5, 1851, arts. I-II, 10 Stat. 954 ("1851 Treaty"). This treaty stated that the government would provide to the bands, among other compensation, a trust fund of $1,160,000, with interest set at five percent, to be paid annually for a period of fifty years. *See id,* art. IV, ¶ 2, 10 Stat. at 954. The Sisseton and Wahpeton Bands signed a similar treaty on July 23, 1851, ceding all of their lands in the Territory of Minnesota and the State of Iowa, and "all of the lands owned in common by the four bands by natural boundaries." *Medawakanton,* 57 Ct.Cl. at 360; Treaty of July 23, 1851, art. II, 10 Stat. 949. The Sisseton and Wahpeton Bands were to receive compensation comparable to that of the Mdewakanton and Wahpakoota bands, with a trust of $1,360,000 and interest at 5% to be paid out annually for fifty years. *See* Treaty of July 23, 1851, art. IV, ¶ 2, 10 Stat. at 949.

Article 3 of both 1851 treaties provided for the creation of a reservation for the Minnesota Sioux to run along the Minnesota River. *See Medawakanton,* 57 Ct.Cl. at 361. Based upon that Article, the Sioux were removed to the reservation delineated in the treaty. *See id.* at 360. The Senate, however, struck out the third article in its ratification of each of the treaties and instead agreed to pay the Sioux for the reservation lands at a rate of 10 cents per acre, the total sum to be added to the trust funds created by the treaties. *See id.* The Senate also authorized the President to set aside another reservation outside the limits of the ceded land. *See id.* The appropriate

compensation corresponding to the ten-cents-per-acre rate was thereafter added to the trust funds created by the treaties, but the President never established an alternative reservation for the Sioux. *See id.* at 362. The Sioux continued to live on the land originally intended to serve as their reservation under the 1851 treaties. *See id.*

In 1858, the United States entered into another treaty with the Sioux under which the Mdewakanton and Wahpakoota bands "agreed to cede that part of their reservation lying on the north side of the Minnesota River" in exchange for compensation, including money and goods, the exact amount of which would be determined by the Senate at a later time. *Medawakanton,* 57 Ct.Cl. at 365-66; Treaty of June 19, 1858, arts. I-III, 12 Stat. 1031 ("1858 Treaty").[8] The treaty created a new reservation for the Sioux consisting of the land then occupied by the bands along the Minnesota River in south-central

[8] Specifically, by the 1858 treaty the Mdewakanton and Wahpakoota bands agreed to cede part of their reservation, should the Senate determine they indeed had valid title to that land. *See* Treaty of June 19, 1858, art. II, 12 Stat. at 1031. The title was apparently in dispute because at least some portion of the land to be ceded under the 1858 treaty included that land originally granted to the Sioux by virtue of the 1851 treaty but removed in the Senate ratification process. Congress authorized the President to confirm the land to the Sioux in an 1854 Act, but it maintained that "the President ha[d] not directly confirmed said reserve to said Indians." *Id.*

Minnesota. *See* 1858 Treaty, art. I, 12 Stat. 1031.[9] By entering the treaty, the Mdewakanton and Wahpakoota bands of the Sioux Indians pledged "to preserve friendly relations with the citizens [of the United States], and to commit no injuries or depredations on their persons or property." *Id.,* art. VI, 12 Stat. at 1031.

The 1862 Sioux Uprising

In August of 1862, individuals from each of the four bands of the Minnesota Sioux revolted against the United States in response to the United States' failure to furnish the money and supplies promised in exchange for the Sioux lands under the aforementioned treaties. *See* Def.'s Mot. to Dismiss and Mem. in Support ("Def.'s Mot.") at 4.[10] In the course of that

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[9] The Sisseton and Wahpeton bands entered into a similar treaty in 1858 by which they also ceded their land north of the Minnesota River. *See* Treaty of June 19, 1858, 12 Stat. 1037.

[10] A statement made by the Episcopal Bishop of Minnesota and quoted by Senator Fessenden in the course of passing subsequent legislation in 1863 provides a more detailed explanation:

> Four years ago the Sioux sold the Government about eight hundred thousand acres of land, being a part of their reservation. The plea for this sale was the need of more funds to aid them in civilization. . . . Of $93,000 due to the Lower Sioux they have never received a cent.
>
> All has been absorbed in claims except $880.58, which is to their credit on the books in Washington. Of the

(Continued on following page)

uprising, the Sioux killed more than 500 settlers and damaged substantial property, *Wolfchild I,* 62 Fed.Cl. at 526, thereby breaching the 1851 and 1858 treaties. After defeating the Sioux, the United States annulled its treaties with them, which had the effect of, among other things, voiding the annuities that had been granted and were then being paid to the Sioux as part of the terms of the 1837 and 1851 treaties and eliminating any possibility of compensation under the 1858 treaty. *See* Act of Feb. 16, 1863, ch. 37, 12 Stat. 652. A portion of the remaining unexpended annuities was appropriated for payment to those settlers who had suffered damages as a result of the uprising. *Id.,* § 2, 12 Stat. at 652-53. The United States also confiscated the Sioux lands in Minnesota, *Id.,* § 1, 12 Stat. at 652, and later directed that the Sioux be removed to tracts of land outside the limits of the then-existing states. *See* Act of Mar. 3, 1863, ch. 119, § 1, 12 Stat. 819.

Some of the Sioux, however, had been loyal to the United States during the uprising by either not participating in the revolt or affirmatively acting to save the settlers. *See Wolfchild I,* 62 Fed.Cl. at 526. Nonetheless, Congress acted with a broad brush, declaring the Sioux's treaties void and annuities and

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portion belonging to the Upper Sioux, $88,351.62 was also taken for claims.

CONG. GLOBE, 37TH CONG., 3D SESS. 192 (1863). In short, "[b]y fraud somewhere, these Indians have had money withheld from them which was justly their due." *Id.*

allocation of land forfeited and failing to except from that termination the loyal Mdewakanton band of Sioux, whose annuity was valued at approximately $1,000,000. *See id.* at 527. Those Sioux who observed their pledge under the 1851 and 1858 treaties to maintain peaceful relations with the citizens of the United States were rendered "poverty-stricken and homeless." *Wolfchild VI,* 559 F.3d at 1232. Many of the loyal Sioux had lost their homes and property but could not "return to their tribe . . . or they would be slaughtered for the part they took in the outbreak." *Wolfchild I,* 62 Fed.Cl. at 526 (quoting CONG. GLOBE, 38TH CONG., 1ST SESS. 3516 (1864)).[11]

Congress's Initial Efforts to Compensate the Loyal Mdewakanton

Notwithstanding the broad termination of the Sioux treaties, Congress did attempt to provide for the loyal Mdewakanton by including a specific provision for them in the Act of February 16, 1863. After

[11] By an 1868 treaty with the Sioux, the United States resumed paying annuities and providing goods and land to the Sioux. *See* Treaty of Apr. 29, 1868, 15 Stat. 635. The loyal Mdewakanton, however, did not benefit under this treaty as they had severed all tribal relations, and were no longer considered "Sioux." *See* 21 CONG. REC. 7,585, 7,587 (1890) (statement of Sen. Dawes) ("The Sioux fund and the Sioux appropriation grow out of an arrangement made in 1868, not with these Sioux [the loyal Mdewakanton], but with the warlike Sioux, from whom this band separated themselves and whom the warlike Sioux never afterward recognized.").

confiscating the Sioux land, Congress authorized the Department to assign up to eighty acres of that land to each loyal Sioux:

> [T]he Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre [by] said Indians. The land so set apart . . . shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

Act of Feb. 16, 1863, § 9, 12 Stat. at 654. As the Court of Appeals noted, the provision that the land would be "an inheritance to said Indians and their heirs forever[,]" "clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute." *Wolfchild VI,* 559 F.3d at 1241.

Two weeks after enacting this statute Congress passed an additional act providing for the loyal Sioux. *See* Act of Mar. 3, 1863, ch. 119, 12 Stat. 819. The second Act of 1863 supplemented the first Act of 1863 in important respects. Under the second Act, the President was "authorized" and "directed" to set apart "outside of the limits of any state" eighty acres of "good agricultural lands" for the Sioux. *Id.,* § 1, 12

Stat. at 819.[12] This grant of land appeared to be an attempt to address the fact that the first Act of 1863 confiscated all Sioux land, leaving the Sioux with no direction as to where they might make a new home. *See* CONG. GLOBE, 37TH CONG., 3D SESS. 528 (1863) (statement of Sen. Harlan) ("It was supposed by the committee that this removal of the Indians could not take place immediately . . . [and] that a place must first be looked up for the Indians."). The second Act of 1863 also stated:

> [I]t shall be lawful for [the Secretary of Interior] to locate any [loyal Sioux] . . . upon said [reservation] 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.

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

The Court of Appeals concluded that the second Act of 1863 "superseded" the first Act of 1863, and "pointedly left open the nature of the interest that the

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[12] The Act also provided that the land that previously served as the reservation for the Sioux would be sold to "actual bona fide settler[s]" or "sold at public auction[,]" Act of Mar. 3, 1863, § 3, 12 Stat. at 819, and that proceeds from the sale of the lands that previously served as the Sioux's reservations were to be "invested by the Secretary of the Interior for the benefit of said Indians in their new homes, in the establishing [of] them in agricultural pursuits." *Id.,* § 4, 12 Stat. at 819.

assignees would have in the lands, stating that the lands would be 'held by such tenure as is or may be provided by law.'" *Wolfchild VI,* 559 F.3d at 1241-42. Because the Court of Appeals found that the second Act superseded the first Act of 1863, it concluded that "the failure of the 1863 Acts cannot be viewed as leading Congress to create permanent ownership interests in the 1886 lands along the same lines set forth in the first 1863 statute, because the second of the two 1863 Acts left the question of ownership open to later resolution." *Id.* at 1242.

The Federal Circuit's view of the relationship between the two Acts of 1863, however, misreads the second enactment. The original version of the bill that became the second Act of 1863 provided that the Secretary could assign one hundred and sixty acres to each loyal Sioux. *See* CONG. GLOBE, 37TH CONG., 3D SESS. 528 (1863). In the course of debating the bill, Senator Fessenden suggested that "the one hundred and sixty acres ought to be reduced to eighty, and there ought to be a reference to the former act to provide that but eighty shall be given under any act; otherwise it might be construed to give him eighty acres under that act and eighty under this." *Id.* The Senate concurred, and the provision that "no more than eighty acres shall be awarded to any one Indian, under this or any other act" was added. *Id.*

This history demonstrates that Congress was not "superseding" the first Act of 1863 by the second Act of 1863; to the contrary, it passed the second act with the specific understanding that the first Act of 1863

remained valid. The amendment to the second act to include a reference to "any other act" shows that the two acts of 1863 were intended to co-exist, with the Secretary of the Interior ("the Secretary") entitled to provide relief to the loyal Sioux under either act.[13] Where, as here, the legislature supplements or amends an act so as to specify that a beneficiary of the subsequent act may not receive relief under *both* the prior and subsequent act, there is certainly no conflict between the two statutes, and an implied repeal of the prior act cannot be inferred. *See National Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662-63, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) ("We will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary . . . in order that the words of the later statute shall have any meaning at all." (citation and internal quotations omitted)); *Miccosukee Tribe of Indians of Fla. v. United States Army Corps of Eng'rs,* 619 F.3d 1289, 1299 (11th Cir.2010) ("Congress's intent to effect an implied repeal can be inferred when a later statute conflicts with or is repugnant to an earlier statute; or when a newer statute covers the whole

[13] This relationship between the two Acts of 1863 accords with the fact that the first Act of 1863 allowed the Secretary to set apart unspecified public lands not otherwise appropriated, Act of Feb. 16, 1863, § 9, 12 Stat. at 654, while the second Act of 1863 provided that the Secretary could assign to the loyal Sioux lands that had previously served as reservation lands for the Sioux. Act of Mar. 3, 1863, § 4, 12 Stat. 819.

subject of the earlier one, and clearly is intended as a substitute[,] . . . [but] a conflict [between the two statutes] is a minimum requirement.") (citations omitted); *Cathedral Candle Co. v. United States Int'l Trade Comm'n,* 400 F.3d 1352, 1365 (Fed.Cir.2005) ("The Supreme Court has frequently explained that repeals by implication are not favored, and it has instructed that 'where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to be contrary, to regard each as effective.' ") (quoting *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1018, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984)).

The land-grant provisions of both 1863 Acts intended to benefit the loyal Sioux were not successfully implemented. *See Wolfchild I,* 62 Fed.Cl. at 526-27. The Secretary did not exercise the authority granted by either 1863 Act, and no lands were provided to the loyal Mdewakanton. *Wolfchild VI,* 559 F.3d at 1232.[14] Notably, however, neither act has been repealed.

Two years later, in 1865, Congress attempted once again to alleviate the continuing plight of the loyal Sioux by appropriating an additional $7,500 for their benefit. *See* Act of Feb. 9, 1865, ch. 29, 13 Stat.

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[14] The failure to purchase land for the loyal Sioux was apparently due to fervent opposition by whites to permitting any Sioux from resettling in the state. *See Wolfchild VI,* 559 F.3d at 1232-33.

427. In doing so, Congress acknowledged that the loyal Sioux, who "at the risk of their lives, aid[ed] in saving many white men, women, and children from being massacred," had as a result been forced to sever their relationships with the tribe and "were compelled to abandon their homes and property, and are now entirely destitute of means of support." *Id.*

Thereafter, additional efforts were made to address the failure to implement the 1863 Acts. Beginning in 1884, Congress began appropriating funds for the benefit of the Mdewakantons who had remained in Minnesota or had returned to the state. *See* Act of July 4, 1884, ch. 180, 23 Stat. 76, 87 (appropriating $10,000 for the purchase of stock and "other articles necessary for their civilization and education, and to enable them to become self-supporting"); Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 375 (amending the 1884 Act by allowing the Secretary to disburse funds to the full-blooded Mdewakanton "for agricultural implements, lands, or cash, as in his judgment may seem best for said Indians"); Act of May 15, 1886, ch. 333, 24 Stat. 29, 39-40 (appropriating $10,000 for the purchase of "such agricultural implements, cattle, lands, and in making improvements thereon, as in [the Secretary's] judgment may seem best for said Indians"). Pursuant to the 1884, 1885, and 1886 statutes, Interior Department officials purchased land for the Mdewakanton and distributed it to many of them in fee simple. *See Wolfchild VI,* 559 F.3d at 1233. This method of providing land to the Mdewakanton failed

to supply long-term relief to the group as most of the recipients sold the land, otherwise encumbered it, or abandoned it. *Id.* Consequently, "the Interior Department discontinued the practice of transferring land to the loyal Mdewakantons in fee." *Id.*

The 1886 Census and the 1888, 1889, and 1890 Appropriations Acts

In 1886, the Department of Interior set out to establish with a greater degree of certainty which Mdewakanton were loyal to the United States during the 1862 uprising. Because of the administrative difficulty of this task, Congress decided that presence in Minnesota as of May 20, 1886 would suffice to qualify an individual as a "loyal Mdewakanton." *Wolfchild I,* 62 Fed.Cl. at 527. To determine which Mdewakanton lived in Minnesota on May 20, 1886, U.S. Special Agent Walter McLeod took a census listing all of the full-blood Mdewakantons, which census was mailed to the Commissioner of Indian Affairs on September 2, 1886. *Id.* at 528.[15] At the behest of the Secretary, on January 2, 1889, a second supplemental census was taken by Robert B. Henton, Special Agent for the Bureau of Indian Affairs ("BIA"), of those Mdewakanton living in Minnesota

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

since May 20, 1886. *Id.* The McLeod and Henton listings (together, "the 1886 census") were used to determine who would receive the benefits of the later Appropriations Acts. *Id.*

Motivated by the failure of the 1863 Acts to provide viable long-term relief, in 1888, 1889, and 1890, Congress passed three Appropriations Acts that included provisions for the benefit of the loyal Mdewakanton. *See Wolfchild VI,* 559 F.3d at 1241; *Wolfchild I,* 62 Fed.Cl. at 524.[16] These Acts served as the foundation of the plaintiffs' breach-of-trust claims asserted in this litigation, and led to the approximately $60,000 in land proceeds that are at issue on remand. That $60,000, identified in a report prepared in 1975, had grown to $131,483 by 1980, and, with additional interest since 1980, would be a few times greater than that larger amount by today, thirty years later.

In 1888, Congress appropriated $20,000 "to be expended by the Secretary of the Interior" in purchasing land, cattle, horses, and agricultural implements for those "full-blood" loyal Mdewakanton who had severed their tribal relations. Act of June 29, 1888,

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[16] Notably, over thirty years later, the funds provided under the Appropriations Acts were deducted from a judgment for the Mdewakanton and Wahpakoota Bands, which judgment was rendered to compensate them for the annuities that were terminated by the 1863 Acts. *See Wolfchild VI,* 559 F.3d at 1254 (citing *Medawakanton,* 57 Ct.Cl. 357).

ch. 503, 25 Stat. 217, 228-29.[17] In 1889, Congress appropriated a further sum of $12,000 "to be expended by the Secretary of the Interior" for the "full-blood" loyal Mdewakanton. Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93.[18] The 1889 Act was substantially

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[17] The section of the statute pertaining to the loyal Mdewakanton provided 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 the twentieth day of May, A.D. eighteen hundred and eighty-six, 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: *Provided,* That of this amount the Secretary if he may deem it for the best interests of said Indians, may cause to be erected for the use of the said Indians at the most suitable location, a school house, at a cost not exceeding one thousand dollars: *And provided also,* That he may appoint a suitable person to make the above-mentioned expenditures under his direction, the expense of the same to be paid out of this appropriation.

25 Stat. at 228-29.

[18] The relevant portion of the 1889 appropriation act reads as follows:

> For the support of the full-blood Indians in Minnesota heretofore belonging to the Mdewakanton band of Sioux Indians, who have resided in said State since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, twelve thousand dollars, to be expended by the Secretary of the Interior as follows: Ten thousand dollars in the purchase, as in his

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similar to the 1888 Act but included three additional provisions not included in the 1888 Act. Unlike the

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judgment he may think best, of such lands, agricultural implements, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or family thereof; one thousand dollars, or so much thereof as may be necessary to defray the expenses of expending the money in this paragraph appropriated; and one thousand dollars for the completion and furnishing of the schoolhouse for said Indians authorized by the act of June twenty-ninth, eighteen hundred and eighty-eight: *Provided,* That if the amount in this paragraph appropriated, or any portion of the sum appropriated for the benefit of these same Indians by said act of June twenty-ninth, eighteen hundred and eighty-eight, shall not be expended within the fiscal year for which either sum was appropriated, neither shall be covered into the Treasury, but shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians: *And provided also,* That the Secretary of the Interior may appoint a suitable person to make the above-mentioned expenditure under his direction; and all of said money which is to be expended for lands, cattle, horses, implements, seeds, food, or clothing shall be so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable an equal amount in value of this appropriation and that made by said act of June twenty-ninth, eighteen hundred and eighty-eight: *And provided further,* That as far as practicable lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality against his will.

25 Stat. at 992-93.

1888 Act, the 1889 Act required the Secretary to expend the appropriated funds in a manner such that each loyal Mdewakanton received as close to an equal amount as practicable. *Id.* Additionally, the 1889 Act mandated that any money appropriated in the 1889 Act not expended within the fiscal year would not be recovered by Treasury, but rather would be carried over to the following years and expended for the benefit of the loyal Mdewakanton. *Id.* at 992. The 1889 Act made both of these additional provisions applicable to the money appropriated under the 1888 Act as well. *Id.* at 992-93. The 1889 Act differed from the 1888 Act in a third way by granting the Secretary discretion based on what "may be deemed best in the case of each of these Indians *or family thereof*." *Id.* at 992 (emphasis added). The 1888 Act, on the other hand, made no explicit mention of the loyal Mdewakantons' families as beneficiaries of the appropriations. *See* 25 Stat. at 228-29.

In 1890, Congress provided an additional $8,000 "to be expended by the Secretary of the Interior" for the loyal Mdewakanton. Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349.[19] The 1890 Act was substantially

[19] The full text of the 1890 appropriation provided as follows:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Mdewakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have

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similar to the 1889 Act, and included the requirement that the Secretary spend the money in a way that ensured each loyal Mdewakanton would receive as close to an equal amount as practicable. *Id.* There were, however, two unique aspects of the 1890 Act. First, the 1890 Act dictated that the amount was to support both "full and mixed blood" loyal Mdewakanton. *Id.* Additionally, the 1890 Act did not include the provision found in the 1889 Act specifying

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severed their tribal relations, eight thousand dollars, to be expended by the Secretary of the Interior, as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, good, or clothing as may be deemed best in the case of each of these Indians or families thereof: *Provided,* That two thousand dollars of the above eight thousand dollars shall be expended for the Prairie Island settlement of Indians in Goodhue County: *Provided further,* That the Secretary of the Interior may appoint a suitable person to make the above-mentioned expenditure under his direction whose compensation shall not exceed one thousand dollars; and all of said money which is to be expended for lands, cattle, horses, implements, seeds, food, or clothing shall be so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of the appropriation: *And provided further,* That, as far as practicable, lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality or land against his will.

26 Stat. at 349.

that any monies not expended in the fiscal year were to be carried over to the following years. *See id.*[20]

Land Assignments under the Appropriations Acts

Unlike the failed 1863 Acts, the funds provided by the three Appropriations Acts were used for the purchase of land, agricultural implements, livestock, and goods for the loyal Mdewakanton. *See Wolfchild I,* 62 Fed.Cl. at 528. The lands were purchased in three distinct areas of Minnesota, and by 1980 they consisted of: (1) approximately 260 acres in Scott County (the "Shakopee lands"), (2) approximately 575 acres in Redwood County (the "Lower Sioux" lands), and (3) approximately 120 acres in Goodhue County (the "Prairie Island" lands). *Id.* Collectively, these properties were known as the "1886 lands" to reflect the date by which the beneficiaries of the Appropriations Acts were defined. *Id.*

In 1904, the Secretary began conveying rights to use the purchased land to the loyal Mdewakanton. *See* Def.'s Mot. at 4. Rather than granting the land in

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[20] This provision was contained in the original version of the bill but was elided pursuant to an amendment proposed by Senator Cockrell who declared it a "remarkable provision." 21 CONG. REC. 7,586 (1890). Senator Dawes responded to Senator Cockrell by observing that "[t]his whole paragraph [the entire text of the 1890 appropriation to the loyal Mdewakanton] is [not] of the ordinary course of an Indian appropriation bill." *Id.* Senator Cockrell responded: "Or any other appropriation bill, is it not?" *Id.*

fee simple – a practice that had failed to provide long-term relief under the 1884, 1885, and 1886 appropriations – the Department chose to make the land available to the loyal Mdewakanton while retaining title in the United States' name. *See Wolfchild I,* 62 Fed.Cl. at 528; *see also* Pls.' App. in Support of Cross-Mot. for Summ. Judgment ("Pls.' App.") at 61 (Letter from Acting Comm'r of Dep't of Interior to James McLaughlin, U.S. Indian Inspector) (Feb. 20, 1899) ("As you are doubtless aware, the title to all the land purchased by late Agent Henton for said Indians [loyal Mdewakanton], is still vested in the United States – being held in trust for them."). To that end, the Department employed an assignment system under which a parcel of land would be assigned to a particular beneficiary who could use and occupy the land as long as he or she wanted; however, if the assignee did not use it for two years, the parcel would be reassigned. *See Wolfchild I,* 62 Fed.Cl. at 528.

Under the assignment system, the Department provided documents called Indian Land Certificates to assignees as evidence of their entitlement to the land. *See Wolfchild I,* 62 Fed.Cl. at 528. The Certificates stated that the assignee "and [his] heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said lands." Def.'s Mot., Ex. P (Indian Land

Certificate).[21] If an assignee abandoned the land for a period of time, usually two years, then the Department of Interior would reassign the land to another beneficiary; any sale, transfer, or encumbrance of the land other than to the United States was void. *Wolfchild I,* 62 Fed.Cl. at 529. "Although not guaranteed under the assignment system, in practice an assignee's land would pass directly to his children upon his death." *Id.* Other relatives, however, were required to follow procedures established by the Bureau of Indian Affairs to receive an assignment. *Id.*

Evolution of the Three Communities

In 1934, the Indian Reorganization Act ("Reorganization Act") fundamentally altered the way in which the federal government dealt with Indians and Indian tribes. *See* Act of June 18, 1934, ch. 576, 48 Stat. 984 (also known as the Wheeler-Howard Act) (codified

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[21] In accord with the representation in the Indian Land Certificates that the land was "held in trust . . . by the Secretary of the Interior" for the assignee and his heirs, Congress amended a bill that allowed the Secretary of Interior to sell an unfarmable parcel of 1886 lands to include a requirement that the loyal Mdewakanton had to consent to the sale. *See Wolfchild I,* 62 Fed.Cl. at 528-29; Act of Feb. 25, 1901, ch. 474, 31 Stat. 805, 806. In the course of debating that amendment, Senator Pettigrew remarked that "[the 1886 lands] were not an Indian reservation. These Indians own the homes, and they have a right there greater than that of reservation Indians. The land was purchased for their benefit, and the title is in them subject to a provision by which they can not convey it." *Wolfchild I,* 62 Fed.Cl. at 529 (citing 34 CONG. REC. 2,523 (1901)).

as amended at 25 U.S.C. §§ 461-79). The Reorganization Act permitted "[a]ny Indian tribe, or tribes, residing on the same reservation . . . to organize for its common welfare." *Id.,* § 16, 48 Stat. at 987. Pursuant to the Act, the Mdewakanton and others formed three communities: the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and the Lower Sioux Indian Community. *See Wolfchild I,* 62 Fed.Cl. at 529. Although loyal Mdewakanton resided in the three communities, the three communities were and are not exclusively comprised of descendants of the loyal Mdewakanton, and "many of the descendants of the 1886 Mdewakantons are not enrolled members of any of the three communities." *Wolfchild VI,* 559 F.3d at 1235. The membership of these communities thus is not defined in terms of indigenous relationships;[22] rather, the communities exercise discretion over who attains or keeps their membership. *See Wolfchild I,* 62 Fed.Cl. at 530; *see, e.g.,* Def.'s Mot., Ex. E, art. III (Constitution and Bylaws of the Lower Sioux Indian Community in Minnesota). As a result, "a lineal descendant of a loyal Mdewakanton might be denied admission to, or removed from, membership in a community even if

[22] Groups organized pursuant to and recognized by the Reorganization Act are not required to "correspond exactly to any tribe or band." FELIX COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 5 (David E. Wilkins ed., Univ. of Oklahoma Press 2006) (1934). Accordingly, "[a]ll the Indians of a given reservation may organize as a unit if they so desire, regardless of past tribal affiliations." *Id.*

the descendant lived on 1886 land encompassed by the community boundary." *Wolfchild I,* 62 Fed.Cl. at 530.

As a consequence of the fact that the communities were not equivalent to the loyal Mdewakanton, the communities did not have a collective claim to the 1886 lands. In 1978, a Field Solicitor for the Department of Interior addressed this issue: "[N]one of the three Community governments, organized under the [Reorganization Act] . . . has any right, title or interest in these lands. The land is held for the benefit of a specific class of people and their descendants." Joint App. ("J.A.") 00399-400 (Letter from Mariana R. Shulstad, Field Solicitor, to Edwin L. Demery, Area Dir. for Minneapolis Area Office of the Bureau of Indian Affairs (Nov. 8, 1978) ("Shulstad 1978 Letter")).

Nonetheless, after the passage of the Reorganization Act, the BIA consulted with the communities before granting assignments to 1886 lands. *See Wolfchild I,* 62 Fed.Cl. at 529-30. Although the Field Solicitor for the Department noted that the communities' recommendations were "a courtesy only" and not "a legal necessity, since the communities have no decision making authority concerning use of these lands[,]" the communities were provided an opportunity to influence the assignment of 1886 lands. J.A. 00400 (Shulstad 1978 Letter). Additionally, prior to the establishment of the three communities, the Department's policy was that any sand and gravel deposits located on the 1886 lands were the government's property and were not subject to sale by the

assignees. *See* Def.'s Mot., Ex. D (Letter from J.W. Balmer, Superintendent of the Pipestone Indian School to Earl Pendleton) (Nov. 22, 1930). After the passage of the Reorganization Act, however, the BIA adopted the view of the Lower Sioux Indian Community that sand and gravel on the 1886 lands within the reservation constituted a community resource and was not the government's property. *See* Def.'s Mot. at 8.

Funds Derived from the 1886 Lands

Eventually, money derived from 1886 lands began to be held in Treasury accounts. On June 13, 1944, Congress enacted a statute authorizing the Secretary to transfer approximately 110.24 acres of 1886 lands in Wabasha County to the Upper Mississippi River Wild Life and Fish Refuge ("the Wabasha Land Transfer"). *See* An Act to Add Certain Lands to the Upper Mississippi Wild Life and Fish Refuge, Pub.L. No. 78-335, ch. 243, 58 Stat. 274. The parcels had been acquired pursuant to the 1888 and 1889 Appropriations Acts "for Indian use, but [were] no longer [being] used by Indians." *Id.,* § 2, 58 Stat. at 274.

The Secretary of the Interior drafted a bill to authorize the land transfer and proposed it to Congress. *See* S.Rep. No. 78-809, at 1 (1944). In his proposal, the Secretary noted that "[t]hese lands cannot be acquired or transferred in the usual manner as their use has been fixed by Congress . . . [i]n

these circumstances it is recommended that the proposed legislation be placed before the Senate for appropriate action." *Id.* at 2. In the course of considering the Secretary's bill, Senator Mundt remarked, "I understand that it is a matter of transferring the title so that it can be used by the refuge." 90 CONG. REC. 5,325 (1944). The Act provided as follows:

> In order to carry out . . . [the transfer of the land], the sum of $1,261.20 . . . is hereby made available for transfer on the books of the Treasury of the United States to the credit of the Mdewakanton and Wahpakoota Bands of Sioux Indians pursuant to the provisions of the Act of May 17, 1926 (44 Stat. 560) . . . and shall be subject to disbursement under the direction of the Secretary of the Interior for the benefit of the Mdewakanton and Wahpakoota Bands of Sioux Indians. Where groups of such Indians are organized as tribes under the [Reorganization Act], the Secretary of the Interior may set apart and disburse for their benefit and upon their request a proportionate part of said sum, based on the number of Indians so organized.

Pub.L. No. 78-335, § 2, 58 Stat. 274.[23] The 1886 lands at Wabasha were transferred, and on October 6, 1944, $1,261.20 was credited to the United States Treasury

[23] The Act also provided that the $1,261.20 "when so transferred, shall operate as a full, complete, and perfect extinguishment of all their right, title, and interest in and to the lands above described." Pub.L. No. 78-335, § 2, 58 Stat. 274.

Account 147436, "Proceeds of Labor, Mdewakanton and Wahpakoota Bands of Sioux Indians, Minnesota." *See* Def.'s Mot. at 8, Ex. A (Letter from F.G. Hutchinson, Acting Chief, Branch of Realty, to E.M. Pryse, Area Director, Minneapolis, Minn. (Feb. 24, 1955)), Ex. B (Letter from C.B. Emery, Chief, Branch of Budget and Finance, to D.C. Foster, Area Director, Minneapolis, Minn. (June 8, 1951)).

Although the 1944 Act provided the funds to the Mdewakanton and Wahpakoota generally, not the loyal Mdewakanton specifically, the Act notably allowed funds from the Wabasha Land Transfer to be disbursed to tribes organized under the Reorganization Act only in proportion to the number of Mdewakanton and Wahpakoota contained within those tribes. *See* Pub.L. No. 78-335, § 2, 58 Stat. 274. The importance of the restriction contained in the last sentence was reiterated by the Chief of Budget and Finance for BIA, C.B. Emery, in a letter dated June 8, 1951, to the Area Director of BIA for Minneapolis, D.C. Foster, in response to Mr. Foster's inquiry as to the status of the Wabasha Land Transfer funds. *See* Def.'s Mot., Ex. B (In regards to the Wabasha Land Transfer funds, "[t]he last sentence of the Act of June 13, 1944 should be particularly noted.").[24]

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[24] The 1944 Act also made the Wabasha Land Transfer funds subject to the restrictions contained in the Act of May 17, 1926, ch. 309, 44 Stat. 560. *See* Pub.L. No. 78-335, § 2, 58 Stat. 274. The effect of that statute is discussed *infra,* at 333 n. 42.

Money was also derived from the 1886 lands by the Department's policy of leasing or licensing 1886 lands for fair market value where no eligible 1886 Mdewakanton was available for the land assignment. *See Wolfchild I,* 62 Fed.Cl. at 530. The Department sometimes licensed the unused parcels to non-Indians for a fixed compensation to be paid to a third party. *See, e.g.,* Def.'s Mot., Ex. R (License Agreement (Apr. 22, 1916)) (granting license to non-Indian in consideration of $25.00 per annum payment to Pipestone Indian School, Pipestone, Minn.). The Department also deposited some leasing funds derived from the 1886 lands in various Treasury accounts. *See* Def.'s Mot., Ex. C (Accountant's Report, Income to Mdewakanton Sioux Lands, Minneapolis Area Office, Minneapolis Minn. (Field work for report completed Feb. 5, 1975)) ("1975 Report").

In 1974, the Acting Associate Solicitor for Indian Affairs in the Department, Duard R. Barnes, wrote a detailed opinion explaining the Department's interpretation of the status of the 1886 lands and the funds derived from the land. J.A. 00392-97 (Mem. to Comm'r of Indian Affairs (Mar. 19, 1974)) ("Barnes 1974 Mem."). The opinion stated that legal title was taken in the United States' name, and tenancies at will or defeasible tenancies were granted to the 1886 Mdewakantons. J.A. 00394. The memorandum concluded that the 1886 lands were "held in trust by the United States with the Secretary possessing a special power of appointment among members of a definite class." *Id.* at 00396. The opinion also noted that

whereas lease income from the 1886 lands had been "expended through local tribal governments . . . for the benefit of reservation communities in which members of the beneficiary class reside or with which they are affiliated[,]" in the future "[p]roceeds from the leases should be kept separate and may be expended for the benefit of the class." *Id.* at 00394, 00397. The letter ended by proposing that the BIA "undertake to ascertain whether some legislative disposition of beneficial title to these lands consistent with the present situation is current and can be recommended to the Congress." *Id.* at 00397. Pursuant to the 1974 opinion letter, the BIA began to deposit lease income in suspense accounts, *see* Def.'s Mot., Ex. C, and ordered that all income from the 1886 lands be identified and maintained in a separate account. *Id.,* Ex. F (Mem. from Milton C. Boyd, Chief, Office of Audit, BIA, to Minneapolis Area Director (Mar. 21, 1975)).

In 1975, the BIA completed a report documenting all funds derived from the 1886 lands. *See* Def.'s Mot., Ex. C. The 1975 Report found no evidence of any income derived from the 1886 lands prior to 1950 with the exception of the Wabasha Land Transfer. *Id.*[25] The BIA accountants found a total of $61,725.22 in funds derived from the 1886 lands, including the $1,261.20 in Wabasha-Land-Transfer funds. The

[25] The 1975 Report did not provide an accounting of any income disbursed to the assignees or to the Pipestone Indian School.

Accounts were divided into three "Proceeds of Labor" Treasury accounts,[26] and four Individual Indian Money ("IIM") accounts. *Id.*[27] Of the remaining $60,464.02, $58,784.96 was deposited in four Lower Sioux Treasury and IIM accounts, and $1,679.06 was deposited in two Prairie Island Treasury and IIM accounts. *Id.* As is evident from the accounting described above, the majority of the income derived from the 1886 lands was allocated to accounts belonging to the Lower Sioux, and no money accounted for in the 1975 Report was attributed to the Shakopee Mdewakanton Sioux. *See id.* The entire $61,725.22 was subsequently placed in Treasury Account 147436 "Proceeds of Labor, Mdewakanton and Wahpakoota" and its associated interest account, 147936, thus, in the words of the BIA, "restor[ing] these funds to the proper accounts." *See id.*

On June 27, 1975, BIA officials met with representatives of the three communities to address the disbursement of the money gathered in Treasury

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[26] The "Proceeds of Labor" Treasury Accounts were: Account 147158, "Proceeds of Labor, Lower Sioux Indian Community," Account 147043, "Proceeds of Labor, Prairie Island Indian Community," and Account 147436, "Proceeds of Labor, Mdewakanton and Wahpakoota." *See id.*

[27] An IIM account is "an interest bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary. There are three types of IIM accounts: unrestricted, restricted, and estate accounts." 25 C.F.R. § 115.002. The Report does not specify in which types of IIM accounts the funds were placed. *See* Def.'s Mot., Ex. C.

Account 147436 and its associated interest account. *See* Def.'s Mot. at 10. The parties agreed that the three communities "would submit resolutions requesting distribution of the . . . funds" and "requesting a Congressional directive as to the 1886 lands." *Id.* The three communities submitted their proposals to the BIA, *see id.,* and by September 1980, the three communities had agreed that the funds should be divided equally and disbursed to the communities, and that any money earned after January 1, 1978 would be paid to the community whose reservation encompassed the 1886 lands from which the funds were derived. *See id.,* Ex. I (Mem. to Area Director of Minneapolis Area Office from Richard L. McLaughlin, BIA (Sept. 16, 1980)).

About the same time that some BIA officials were consulting the three communities as to the funds derived from the 1886 lands, other BIA officials realized that the three communities did not have a claim to the funds. In a response dated Nov. 6, 1975 to an inquiry by Minnesota Representative Richard Nolan regarding the 1886 lands and funds derived from the lands, the Acting Area Director for the Minnesota Field Office of the BIA stated that "the funds appropriated are to be used only for the benefit of a certain class of people identified by special census of that time [the 1886 Mdewakanton] [and] [t]he current Sioux Communities do not represent the special class of people referred to even though some of their members may qualify in the special class mentioned in the actions taken in 1888, 1889, and 1890."

J.A. 02548 ("Area Director's 1975 Mem."). In a subsequent memorandum dated June 3, 1976, to the Commissioner of Indian Affairs, the Office of the Area Director reiterated that the funds obtained by virtue of the 1886 lands could not be distributed to the three communities without legislative action. He stated,

> [W]e should not attempt to distribute such funds on the strength of the resolutions from the three communities at this time . . . The land was originally purchased for the Mdewakanton Sioux residing in Minnesota on May 20, 1886, and their descendants . . . A very small portion of the descendants reside on the three Minnesota Sioux Communities today. A question arises as to whether all descendants would be entitled to the income similar to an Indian Claims Commission judgment award distributed to descendants. . . .
>
> One suggestion to resolve this matter would be to incorporate the disposition of the funds with legislation converting the title. Another suggestion would be to develop a descendancy roll similar to a claim distribution, however, this would only dispose of funds accumulating up to the date of the payment and would have to be repeated in the future, or until title to the land is changed. We would appreciate your advice and authority for the disposition of subject funds.

J.A. 01115-16 ("Area Director's 1976 Mem.").

Nonetheless, on January 9, 1981, the BIA disbursed $37,835.88 to the Shakopee Mdewakanton, $36,210.01 coming from Treasury Account 147436 and $1,625.87 coming from the associated interest account 147936. *See* Def.'s Mot., Ex. K (Public Voucher (Dec. 30, 1980)). On March 3, 1981, the BIA disbursed $37,835.88 to the Lower Sioux, $27,601.78 coming from Treasury Account 147436 and $10,234.10 coming from a Lower Sioux "Proceeds of Labor" and interest account. *See id.,* Ex. L (Public Voucher (Feb. 23, 1981)). And on April 21, 1981, the BIA disbursed the final $37,835.88 to the Prairie Island community, $25,450.48 coming from accounts 147436 and 147936 and $12,385.40 from a Prairie Island "Proceeds of Labor" and interest account. *See id.,* Ex. M (Public Voucher (Apr. 21, 1981)).[28] The BIA made additional

[28] The "Proceeds of Labor" accounts from which disbursements were made to the Lower Sioux and Prairie Island Communities are the same accounts that the 1975 Report identified as containing money derived from the 1886 lands. *See* Def.'s Mot., Ex. C. Pursuant to that report, all money related to the 1886 lands then found in those accounts was transferred to Treasury Account 147436 and its associated interest account 147936. *Id.* However, it would appear from the source of the 1980 disbursements that subsequent to the 1975 transfer of $61,725.22, funds derived from the 1886 lands were once again placed in the "Proceeds of Labor" Treasury Accounts belonging to the Lower Sioux and the Prairie Island Communities. The BIA's decision to resume placing monies derived from the 1886 lands in accounts other than Account 147436 and its associated interest account 147936 is perplexing given the BIA's acknowledgement, in its 1975 Report, that transferring the funds to accounts 147436 and 147936 "restore[d] these funds to the proper accounts." *Id.*

disbursements from Treasury Account 147436 in 1981 and 1982, with the Shakopee Mdewakanton receiving $6,429.71, the Lower Sioux receiving $5,115.85, and the Prairie Island receiving $6,429.71. *See* Def.'s Mot. at 11; *id.,* Ex. N (Public Voucher (Mar. 22, 1983)).

Treatment of the 1886 Lands under the 1980 Act

After the passage of the Reorganization Act, "additional lands were acquired in trust for the benefit of" the three communities. *See* H.R.Rep. No. 96-1409, at 2 (1980). As a result, the three communities had "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." *Id.* The property interests possessed by the two classes of members of the three communities were interspersed and resulted in "a checkerboard pattern of land used that severely diminishe[d] the effectiveness of overall land management programs and community development." *See id.* at 6. In a lame-duck session following the 1980 elections, Congress statutorily addressed the disparate property interests of the members of the three communities in December 1980, approximately one month after the communities and the BIA signed the agreement for the disbursement of the funds to the communities. *See* Act of Dec. 19, 1980, Pub.L. No. 96-557, 94 Stat. 3262.

The 1980 Act provided that the 1886 lands, which "were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians" under the Appropriations Acts, would henceforth be "held by the United States . . . in trust for" the three communities. 94 Stat. 3262.[29] The Act also

[29] The Act provided, in material part:

> [A]ll right, title, and interest of the United States in those lands (including any structures or other improvement 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 Appropriations Acts], 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,

(Continued on following page)

contained a savings clause providing that the Act would not "alter" any rights then existing under "any contract, lease, or assignment entered into or issued prior to enactment of" the Act. *Id.* "Thus, all of the individuals then holding assignments to the 1886 lands retained their rights to use the land unaffected by the 1980 legislation." *Wolfchild VI,* 559 F.3d at 1235.

The United States continued to "oversee assignments that had been made before 1980 and were covered by Section 3 of the 1980 Act[,]" but no new assignments were made by the Department after the passage of the 1980 Act. Def.'s Mot. at 6-7. Upon the death of an assignee of the 1886 lands, the assignee's parcel of land was apparently shifted to the control of the community that possessed an interest in the surrounding land pursuant to the 1980 Act. *See id.* at 7 (citing *Gitchel v. Minneapolis Area Director,* 28 IBIA 46 (1995)). The three communities also assumed the responsibility of "managing . . . and issuing new assignments" for those 1886 lands not assigned to loyal Mdewakanton prior to the passage of the 1980 Act. *See* Def.'s Mot. at 6 (citing *Smith v. Haliburton,* 1982 U.S. Dist. Lexis 14243 – (D.Minn. Aug. 23, 1982)).

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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.

94 Stat. 3262.

Most importantly for the court's present purpose, the 1980 Act did not address the disposition of the funds that were derived from the 1886 lands then held by Treasury. *See* 94 Stat. 3262; *Wolfchild VI,* 559 F.3d at 1259 n. 14. Despite the silence of the 1980 Act as to the funds, the Department acted on the presumption that the funds derived from the 1886 lands "could be turned over to the communities without notice to the 1886 beneficiaries." *Wolfchild I,* 62 Fed.Cl. at 533. As described above, the disbursement of the funds was agreed prior to the passage of the 1980 Act, and the funds were given to the three communities beginning approximately one month after the passage of the 1980 Act.

STANDARDS FOR DECISION

Motion to Amend

"The court should freely give leave [to amend pleadings] when justice so requires." Rule 15(a)(2) of the Rules of the Court of Federal Claims ("RCFC"). The decision to grant or deny amendment of a complaint or answer is within the discretion of the trial court, but "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *see also Mitsui Foods, Inc. v. United States,* 867 F.2d 1401, 1403 (Fed.Cir.1989) (Under Rule 15(a), "discretion should be exercised liberally to permit such

amendments."). Absent a reason, such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment[, or] futility of amendment[,]" the motion to amend should be granted. *Foman,* 371 U.S. at 182, 83 S.Ct. 227; *Mitsui Foods, Inc.,* 867 F.2d at 1403-04; *see also Henry E. and Nancy Horton Bartels Trust ex rel. Cornell Univ. v. United States,* 88 Fed.Cl. 105, 111 (2009), *aff'd,* 617 F.3d 1357 (Fed.Cir.2010).

Motion to Dismiss

"Jurisdiction must be established as a threshold matter before the court may proceed with the merits of this or any other action." *OTI Am., Inc. v. United States,* 68 Fed.Cl. 108, 113 (2005) (citing *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 88-89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). Plaintiffs bear the burden of establishing the court's subject matter jurisdiction over their claim. *See McNutt v. General Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936). In undertaking an analysis of subject matter jurisdiction, the court must accept as true the facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiffs. *See Henke v. United States,* 60 F.3d 795, 797 (Fed.Cir.1995) (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236-37, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds as noted in Francis v. Giacomelli,* 588 F.3d 186, 192 n. 1 (4th Cir.2009));

Catawba Indian Tribe of S.C. v. United States, 982 F.2d 1564, 1568-69 (Fed.Cir.1993).

Jurisdiction over a claim against the United States requires a waiver of sovereign immunity combined with a cause of action falling within the terms of that waiver. *See United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) (citing *United States v. Mitchell,* 445 U.S. 535, 538-39, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) ("*Mitchell I*"); *United States v. Mitchell,* 463 U.S. 206, 216-17, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*")). Such a waiver must be "unequivocally expressed." *Mitchell I,* 445 U.S. 535 at 538, 100 S.Ct. 1349 (quoting *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)). The government has consented to suit through the Indian Tucker Act, 28 U.S.C. § 1505, which provides:

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

Claims that would "otherwise be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group" include those founded upon the Tucker Act, 28 U.S.C. § 1491(a)(1), which waives immunity for claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Although serving as a waiver of sovereign immunity, the Indian Tucker Act does not itself "create[ ] a substantive right enforceable against the Government by a claim for money damages." *White Mountain Apache,* 537 U.S. at 472, 123 S.Ct. 1126. As with the Tucker Act, a plaintiff grounding its claim on the Indian Tucker Act must demonstrate that some other source of law creates a money-mandating right or duty that falls within the ambit of the waiver of sovereign immunity. *See United States v. Navajo Nation,* 556 U.S. 287, ___, 129 S.Ct. 1547, 1551-52, 173 L.Ed.2d 429 (2009). "The other source of law need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it can be fairly interpreted as mandating compensation by the Federal Government." *Id.* at 1552 (internal quotations omitted).

"This 'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity." *White Mountain Apache,* 537 U.S. at 472, 123 S.Ct. 1126; *see also*

Mitchell II, 463 U.S. at 218-19, 103 S.Ct. 2961 ("Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity."). Accordingly, "[i]t is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain Apache,* 537 U.S. at 473, 123 S.Ct. 1126; *see Adair v. United States,* 497 F.3d 1244, 1250 (Fed.Cir.2007) ("Tucker Act jurisdiction requires merely that the statute be fairly interpreted or reasonably amenable to the interpretation that it mandates a right of recovery in damages.") (citations and internal quotations omitted). "[A] fair inference will do." *White Mountain Apache,* 537 U.S. at 473, 123 S.Ct. 1126. If the court determines that the source of law upon which plaintiffs rely is not money-mandating, the court must dismiss the claim for lack of subject matter jurisdiction under Rule 12(b)(1). *Adair,* 497 F.3d at 1251.

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A court ruling on a 12(b)(6) motion to dismiss must not only "accept as

true the complaint's undisputed factual allegations[,]" it must also "construe them in a light most favorable to the plaintiff." *Cambridge v. United States,* 558 F.3d 1331, 1335 (Fed.Cir.2009) (citing *Papasan v. Allain,* 478 U.S. 265, 283, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Gould, Inc. v. United States,* 935 F.2d 1271, 1274 (Fed.Cir.1991)).

A claim is facially plausible when the plaintiff pleads facts such that "the court [may] draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949 (citing *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955). The plaintiff need not show that it is probable that it will succeed on the merits of the case, but it must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S.Ct. at 1949. In the context of claims arising under the Tucker Act or the Indian Tucker Act, the standard applied under RCFC 12(b)(6) means that if "the court concludes that the facts as pled do not fit within the scope of a statute that is money-mandating, the court shall dismiss the claim on the merits under Rule 12(b)(6) for failing to state a claim upon which relief can be granted." *Adair,* 497 F.3d at 1251; *see Greenlee Cnty. Ariz. v. United States,* 487 F.3d 871, 876-77 (Fed.Cir.2007).

Motion for Summary Judgment

A grant of summary judgment is warranted when the pleadings, affidavits, and evidentiary materials filed in a case reveal that "there is no genuine issue

as to any material facts and that the movant is entitled to judgment as a matter of law." RCFC 56(c)(1); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."). A material fact is one "that might affect the outcome of the suit under the governing law." *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. Whether a fact is material will, of course, depend upon the substantive law of the case. *Id.* A genuine dispute is one that "may reasonably be resolved in favor of either party." *Id.* at 250, 106 S.Ct. 2505.

The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Consequently, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). If the moving party carries its burden of establishing that there is no genuine issue of material fact, the nonmoving party "may not rely merely on allegations or denials in its own pleadings; rather its response

must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." RCFC 56(e)(2); *see Long Island Sav. Bank, FSB v. United States,* 503 F.3d 1234, 1244 (Fed.Cir.2007) ("Once the moving party has satisfied its initial burden, the opposing party must establish a genuine issue of material fact and cannot rest on mere allegations, but must present actual evidence."). Where an examination of the record, "taken as a whole," could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial" and summary judgment is appropriate. *Matsushita,* 475 U.S. at 587, 106 S.Ct. 1348 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)).

ANALYSIS

Legally, this case is just as tangled and convoluted as the historical record of events.

A. *Amendment of Complaints*

Plaintiffs request leave of the court to amend their complaints to state counts asserting their right to the funds derived from the 1886 lands based upon the statutory use restrictions contained in the Appropriations Acts. *See* Pls.' Mot. to Am. Compl. ("Pls.' Mot. to Am."); Pls.' Sixth Am. Compl. ("Sixth Am. Compl."). Plaintiffs' proposed amendments rest on the same operative facts as those addressed in their prior complaints; the recasted claims simply reflect the

basis on which the Federal Circuit decided *Wolfchild VI* and the remand ordered by that decision. *See* 559 F.3d at 1259 n. 14.[30] The government will not suffer prejudice as a result of these amendments as it has long had notice of plaintiffs' demand for relief based upon the terms of the Appropriations Acts and of the factual history surrounding this case. *See Foman,* 371 U.S. at 182, 83 S.Ct. 227; *Mitsui Foods, Inc.,* 867 F.2d at 1403-04.[31]

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[30] Included in plaintiffs' proposed sixth amended complaint are other alleged counts that: (1) assert that the statutory use restrictions created a duty on the part of the government to collect lease and other revenue from the three communities and distribute gaming proceeds to the plaintiffs under the Indian Gaming Regulatory Act, Pub. Law No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. § 1166 and 25 U.S.C. §§ 2701-21) ("Indian Gaming Act"), Sixth Am. Compl. ¶¶ 83-98; (2) aver that the Department's adoption of a so-called "recognition test" for determining the identity of the loyal Mdewakanton violated the statutory use restrictions, Sixth Am. Compl. ¶¶ 99-106; and (3) ask the court to issue an order setting aside provisions in the three communities' constitutions, ordinances, resolutions, censuses, rolls, and tribal revenue-allocation plans "which are repugnant to the [s]tatutory [u]se [r]estriction[s]" and remanding the matter to the Department of Interior pursuant to 28 U.S.C. § 1491(a)(2), Sixth Am. Compl. ¶ 116. The court will not parse the individual paragraphs of plaintiffs' amended complaint in ruling on plaintiffs' motion to amend; rather, the merits of plaintiffs' particular claims will be addressed *infra,* after the court determines whether the motions to amend should be granted as a general matter.

[31] The government denigrates the plaintiffs' basis for the amendment by contending that it relies on "the appellate court's passing comments" regarding the Appropriations Acts. Def.'s Opp'n to Pl.'s Mots. to Am. Compls. ("Def.'s Opp'n") at 9. Yet,

(Continued on following page)

The government asserts, however, that such amendments would be "futile" and plaintiffs' claims also would be barred by the statute of limitations. *See* Def.'s Opp'n at 5, 15; Def.'s Mot. at 30-36. The plaintiffs respond that amendment is necessary in light of the Federal Circuit's remand order and that this court's prior ruling regarding the statute of limitations in *Wolfchild I,* 62 Fed.Cl. at 547-49, largely dispenses with the government's present statute-of-limitations argument. *See* Pls.' Reply to Def.'s Opp'n to Pls.' Mot. to Am. ("Pls.' Reply") at 4-7, 14-17.

1. *Futility.*

Where an amendment would be futile, a court should disallow the plaintiff's motion to modify its complaint. *See Foman,* 371 U.S. at 182, 83 S.Ct. 227; *Mitsui Foods, Inc.,* 867 F.2d at 1403-04. In assessing the "futility" of an amendment, the court should apply "the same standard of legal sufficiency as [it] applies under Rule 12(b)(6)." *Merck & Co., Inc. v. Apotex, Inc.,* 287 Fed.Appx. 884, 888 (Fed.Cir.2008) (quoting *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1434 (3d Cir.1997)); *see also Taylor*

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that disparagement ignores the remand order. The Federal Circuit remanded the case to this court address, to the extent necessary, the funds derived from the 1886 lands, *see Wolfchild VI,* 559 F.3d at 1259 n. 14; in these circumstances, justice would require that the plaintiffs be given leave to amend their complaints to take account of the Federal Circuit's remand. *See* RCFC 15(a)(2).

Consultants, Inc. v. United States, 90 Fed.Cl. 531, 546 (2009) (same). "Thus, an amendment to add a [ ] claim is futile if the amendment fails to state a claim upon which relief can be granted." *Merck,* 287 Fed.Appx. at 888.

The government argues that an amendment to plaintiffs' complaint would be "futile" because "the Federal Circuit did not recognize a viable claim for statutory use restriction[s] in its opinion holding that [p]laintiffs could not assert a claim for breach of trust" and that such a claim would be "directly contrary to the Federal Circuit's findings and cannot be a basis for a lawsuit against the United States." Def.'s Opp'n at 6, 9.[32] The government additionally asserts that "[t]o the extent that a[ny] statutory use restriction[s] w[ere] created by the Appropriations Acts, any interest [p]laintiffs may have had in the . . . funds w[ere] terminated by the 1980 Act." *Id.* at 14. Plaintiffs counter that the Federal Circuit's statement that "the Appropriations Acts are best interpreted as merely appropriating funds subject to . . . statutory use restriction[s], and not creating a trust relationship[,]" *Wolfchild VI,* 559 F.3d at 1240, must be read to mean that the Court of Appeals recognized

[32] In its opposition to plaintiffs' motion to amend, the government alleges that the amendment is futile also because the court lacks subject matter jurisdiction over the case. Def.'s Opp'n at 11-14. The court addresses this argument in its analysis of the government's motion to dismiss for lack of subject matter jurisdiction.

that plaintiffs had a viable claim predicated on the statutory use restrictions and that such recognition is "the law of the case." Pls.' Reply at 4-7.[33]

Both parties misapprehend the Federal Circuit's opinion. The Federal Circuit indeed held that the Appropriations Acts were subject to statutory use restrictions, *see Wolfchild VI,* 559 F.3d at 1240, but it quite explicitly abstained from addressing the merits of any claim that plaintiffs would have under such restrictions. The court stated:

> The parties devote some attention to the question whether it was lawful for the Interior Department, following the 1980 Act, to transfer to the three communities approximately $60,000 in funds that had been collected as proceeds from the sale, use, or leasing of certain of the 1886 lands, given that the 1980 Act was silent as to the disposition of those funds. *See Wolfchild I,* 62

[33] The "law of the case" doctrine provides that when a case has been once decided by a superior court and remanded to the lower court, whatever was before the superior court and disposed of by its decree, is considered finally settled. The lower court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. *See In re Sanford Fork & Tool Co.,* 160 U.S. 247, 255, 16 S.Ct. 291, 40 L.Ed. 414 (1895); *Gould, Inc. v. United States,* 67 F.3d 925, 930 (Fed.Cir.1995) (The law of the case doctrine "prevent[s] the relitigation of issues that have been decided and . . . ensure[s] that trial courts follow the decision of appellate courts.") (citation omitted); *see also Banks v. United States,* 76 Fed.Cl. 686, 689-90 (2007) (describing the law of the case doctrine).

> Fed.Cl. at 549-50. *That issue does not affect our analysis of the two certified questions, however, and we leave that issue to be addressed, to the extent necessary, in further proceedings before the trial court.*

Wolfchild VI, 559 F.3d at 1259 n. 14 (emphasis added). The Federal Circuit's ruling was thus limited to its answer to the two questions certified for interlocutory appeal – namely, that the Appropriations Acts did not create a trust for the loyal Mdewakanton and that any trust so created in land would have been terminated by the 1980 Act. *See id.* at 1255, 1260.[34] On the one hand, recognition that the Appropriations Acts were subject to statutory use restrictions cannot be construed to mean that it concluded that plaintiffs have a meritorious claim based on those restrictions. On the other hand, neither can the Federal Circuit's ruling be read to foreclose the possibility that the statutory use restrictions, which it recognized, could serve as the basis for a legitimate claim by the plaintiffs.

Thus, there is no "law of the case" as to the merits of plaintiffs' statutory-use-restrictions claim and as to the accompanying question of whether it was lawful for the Department to disburse the funds at issue to the communities. Accordingly, the court may, and, indeed, must – given the parties' contentions –

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[34] The Federal Circuit's conclusions as to these two issues certainly constitute "the law of the case." The court accordingly cannot revisit these matters.

examine the merits of plaintiffs' claims under the Federal Circuit's remand order. *See Engel Indus., Inc. v. Lockformer Co.,* 166 F.3d 1379, 1382 (Fed.Cir.1999) ("[W]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.") (quoting *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 168, 59 S.Ct. 777, 83 L.Ed. 1184 (1939)); *see also Laitram Corp. v. NEC Corp.,* 115 F.3d 947, 951 (Fed.Cir.1997) ("Upon return of its mandate, the district court cannot give relief beyond the scope of th[e] mandate, but it may act on 'matters left open by the mandate.' ") (quotation omitted).

Plaintiffs' proposed amendments could have legal viability. The statutory use restrictions reflect mandatory terms of the Appropriations Acts and may be sufficient to provide a "fair inference" that the government had a money-mandating duty to the loyal Mdewakanton and their lineal descendants that was contravened when the Department disbursed the funds held in Treasury trust accounts to the three communities. As the Federal Circuit has observed: "The court has found Congress provided such damage remedies where the statutory text leaves the government no discretion over payment of claimed funds." *Samish Indian Nation v. United States,* 419 F.3d 1355, 1364 (Fed.Cir.2005); *see also Hopi Tribe v. United States,* 55 Fed.Cl. 81, 86-87 (2002) ("If the language and effect of the statute is mandatory, then the court possesses jurisdiction.") (quoting *Lewis v. United States,* 32 Fed.Cl. 59, 64 (1994)). Further, plaintiffs' claims find support in *Reuben Quick Bear v.*

Leupp, 210 U.S. 50, 28 S.Ct. 690, 52 L.Ed. 954 (1908). Under *Quick Bear,* a court should trace the historical origins of the funds at issue and determine whether the funds can be characterized as mere gratuitous appropriations or whether the funds are in reality, or have been treated as though they are, "Indians' money." *See id.* at 77-82, 28 S.Ct. 690.

Any claim plaintiffs may have based on statutory use restrictions to pre-1980 funds is also unaffected by the 1980 Act.[35] When interpreting a statute, the court must look first to the statutory language. *See Strategic Hous. Fin. Corp. of Travis Cnty. v. United States,* 608 F.3d 1317, 1323 (Fed.Cir.2010) (citing *Jimenez v. Quarterman,* 555 U.S. 113, ___, 129 S.Ct. 681, 685, 172 L.Ed.2d 475 (2009); *Lamie v. United States Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004)); *see also Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary

[35] In support of its argument that the 1980 Act terminated any interest plaintiffs may have had in the funds, the government quotes the Federal Circuit's opinion in *Wolfchild VI* noting that "[t]he fact that the savings clause was regarded as necessary to protect the current assignees is a clear indication that the drafters viewed the Act as otherwise terminating any equitable interests of the 1886 Mdewakantons." Def.'s Opp'n at 15. The government fails to quote, however, the last three words of that sentence, which read: "*in those lands.*" *Wolfchild VI,* 559 F.3d at 1259 (emphasis added). Selective quotation such as this does little to aid the government's case.

meaning of that language accurately expresses the legislative purpose."). In this instance, however, the statute contains no text pertaining to the disposition of the funds. *See* 94 Stat. 3262; *Wolfchild VI,* 559 F.3d at 1259 n. 14 ("[T]he 1980 Act was silent as to the disposition of th[e] funds.").

The Department simply presumed that it could distribute the funds to the three communities on the basis of the 1980 Act, and memorialized that view in a letter from the Field Solicitor to the Area Director. J.A. 00878-80 (Letter from Elmer T. Nitzschke to Edwin Demery (Feb. 6, 1981) ("Nitzschke 1981 Letter")); *see Wolfchild I,* 62 Fed.Cl. at 532-33. Where the text of statute does not address a particular issue, an agency's interpretation of the statute as contained in informal opinion letters or otherwise not embodied in regulations is "entitled to respect" under *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), "but only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris Cnty.,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (quoting *Skidmore,* 323 U.S. at 140, 65 S.Ct. 161); *id.* ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.") (referring to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)); *see also United States v. Mead Corp.,* 533 U.S. 218, 227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)

("Interpretive choices" of agencies may be entitled to *Skidmore* deference).

In applying the "limited deference" of *Skidmore,* the court considers "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore,* 323 U.S. at 140, 65 S.Ct. 161; *see Mead,* 533 U.S. at 228, 121 S.Ct. 2164 (same); *see also Cathedral Candle,* 400 F.3d at 1366 (Under *Skidmore,* the court should "defer to an agency interpretation of the statute that it administers if the agency has conducted a careful analysis of the statutory issue, if the agency's position has been consistent and reflects agency-wide policy, and if the agency's position constitutes a reasonable conclusion as to the proper construction of the statute, even if we might not have adopted that construction without the benefit of the agency's analysis.").

The court also considers the extent to which the agency's interpretation relies upon its "specialized experience and broader investigations and information." *Mead,* 533 U.S. at 234, 121 S.Ct. 2164 (quoting *Skidmore,* 323 U.S. at 139, 65 S.Ct. 161); *see also Cathedral Candle,* 400 F.3d at 1367 (applying *Skidmore* deference, taking into account the International Trade Commission's "specialized expertise" and broader access to information in ruling on Commission's exclusion of plaintiffs from the list of potential affected domestic producers under the Byrd Amendment, 19 U.S.C. § 1675c); *Rubie's Costume Co. v.*

United States, 337 F.3d 1350, 1356-60 (Fed.Cir.2003) (considering the United States Customs Service's "specialized experience" and "expertise" in classifying goods in ruling on Customs Service's tariff classification for certain imported textile costumes).

The majority of the Field Solicitor's letter is devoted to interpreting the 1980 Act as it applied to the 1886 lands, *see* J.A. 00878-80 (Nitzschke 1981 Letter); however, in the final paragraph, the Field Solicitor addresses the funds:

> One further matter for consideration is the accumulated revenues currently held by the Bureau identifiable to the lands in question. It is my understanding that the apportioned share belonging to or identified for the Shakoppee Community has already been turned over to that group. Similar action should be taken as to the other two communities claiming an interest in these monies. As to how the respective communities can utilize these funds, it is interesting to note, as pointed out in the Secretary's letter to OMB that the cost of acquiring the land in question was offset against the recovery by the Mdewakanton and Wahpakoot[a] Bands of S[i]ou[ ]x Indians against the United States (57 Court of Claims 357 (1932 [– *sic* – 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 light of this bit of information it may be that tribal use of these impounded funds may include other than those

> persons previously identified as eligible Mdewakantons for purposes of occupying the land in question.

J.A. 00879 (Nitzschke 1981 Letter).

This singular paragraph appears to constitute the entirety of the "analysis" the Department devoted to considering the applicability of the 1980 Act to the funds.[36] The letter shows that the Department did not engage in a thorough consideration of the issue. In fact, it did not consider the issue at all; it simply assumed, without deliberation or analysis, that the Act applied.[37]

The Field Solicitor's opinion regarding the disposition of the funds also was issued after one third of the funds had already been distributed to the Shakoppee Community. J.A. 00879 (Nitzschke 1981 Letter) ("It is my understanding that the apportioned

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[36] The only additional contemporaneous document in the record that touches on the issue of income from the 1886 lands is a letter from the Acting Area Director of the BIA dated January 15, 1981 to the Chairman, Community Council, Lower Sioux Community. J.A. 00876 (Letter from David Granum to Leon Columbus). In that letter, the Director simply states that "income derived from the[ ] [1886] lands *in the future* will be utilized as other income from tribal land." *Id.* The letter does not include any opinion on the status of the income or funds derived from the 1886 lands prior to the 1980 Act. *Id.*

[37] The Field Solicitor's citation of the fact that the 1922 judgment in the *Medawakanton* case reflected an offset for funds provided by the Appropriations Acts was inapposite. The judgment in that case did not modify, and could not have modified, the statutory terms of the Appropriations Acts.

share belonging to or identified for the Shakopee Community has already been turned over to that group."); Def.'s Mot., Ex. K (Public Voucher (Dec. 30, 1980)) (documenting distribution of $37,835.88 to the Shakopee Mdewakanton). Thus, the Department's "consideration" of the issue, to the extent that the Field Solicitor's letter can be deemed as such, only factored into the agency's action after the distributions had begun.

Consequently, the court cannot conclude that the Department engaged in the sort of thoughtful analysis of the fund-disposition issue that warrants *Skidmore* deference. *See, e.g., Federal Nat'l Mortg. Ass'n v. United States,* 379 F.3d 1303, 1308-10 (Fed.Cir.2004) (concluding that Internal Revenue Service's interpretation of a statute was not entitled to *Skidmore* deference where it "set[ ] forth no reasoning in support of its conclusion" and was "unaccompanied by any supporting rationale," but allowing an agency interpretation to stand based upon the ground that a waiver of sovereign immunity must be strictly construed.).

Furthermore, the action by the Department after adoption of the 1980 Act was directly contrary to its conclusions respecting the status and proper ownership of the funds prior to 1980. *See supra,* at 320-22 (addressing BIA's positions from 1975-1980). This *volte face* by the Department as to the fundamental question of who was entitled to the pre-1980 funds disfavors deferring to the Department's actions after the 1980 Act was adopted. *See Cathedral Candle Co.,*

400 F.3d at 1367 (indicating that where the agency's current position is "inconsistent with positions the [agency] . . . has previously taken," it may counsel against *Skidmore* deference) (citing *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212-13, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)). In short, although the Department certainly possesses "specialized experience" in dealing with Native American matters, the Nitzschke 1981 Letter did not draw on any expertise or specialized information to interpret the scope of the 1980 Act.

Finally, the agency's position does not constitute "a reasonable conclusion as to the proper construction of the statute." *Cathedral Candle Co.,* 400 F.3d at 1366. At every possible point, the 1980 Act specifies that it only applied to the 1886 lands. The name of the Act is "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." 94 Stat. 3262 (emphasis added). Although the title of a statute cannot limit the plain meaning of the text, "statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of statute.'" *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.,* 554 U.S. 33, 47, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008) (quoting *Porter v. Nussle,* 534 U.S. 516, 528, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)). The 1980 Act states 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)* . . . are

hereby declared to hereafter be held by the United States [in trust for the three communities]." 1980 Act, § 1, 94 Stat. 3262 (emphasis added). It then describes the lands in detail down to the hundredths of an acre. *See id.* § 2. It finally requires the Secretary to publish notice in the Federal Register describing the lands being transferred and recites the so-called "savings clause" preserving any prior contract, lease, or assignment interests in the land. *Id.* §§ 2, 3.

Notably, the sponsor of the legislation in the House, Representative Richard Nolan of Minnesota, was aware of the funds' existence. *See* J.A. 02547-49 (Area Director's 1975 Mem.). In introducing the bill, Rep. Nolan defined its scope as "legislation which will change the legal status of *tracts of land* in Minnesota presently held by the United States for exclusive use by the descendants of the Mdewakanton Sioux who resided there on May 20, 1886." 26 CONG. REC. 8,897 (emphasis added). Rep. Nolan did not mention the funds in his introductory statement, *see id.* at 8,897 to 8,898, nor were the funds mentioned in any of the other legislative history materials surrounding the 1980 Act. The specific choice not to include a provision for disposition of the funds could not have been attributable to inadvertence particularly in light of the suggestion in the Area Director's 1976 Memorandum that the disposition of the funds needed to be included "with legislation converting the title" to enable the Department to distribute the funds to the three communities. *See* J.A. 01116 (Area Director's 1976 Mem.). Instead, this is yet another instance

where "[t]he best evidence of congressional intent is the plain meaning of the statutory language at the time Congress enacted the statute." *Strategic Hous. Fin. Corp. of Travis Cnty.,* 608 F.3d at 1323.

The silence of the 1980 Act as to the pre-1980 funds, particularly in light of the detailed nature of the statute and the legislative history, cannot be read to terminate any interest plaintiffs may have in those funds. The 1980 Act also did not constitute a repeal, "implied or otherwise," of the Appropriations Acts. *Wolfchild VI,* 559 F.3d at 1258 n. 13. Thus, the court will not defer to the Department's actions disposing of the pre-1980 funds after passage of the 1980 Act, and it instead concludes that the 1980 Act does not affect plaintiffs' claims in those funds.[38]

2. *Statute of limitations*.

Generally, suits against the United States filed in this court must be filed within six years after accrual of the cause of action. 28 U.S.C. § 2501. Because this statute of limitations circumscribes the scope of the government's waiver of sovereign immunity, it is "jurisdictional" in nature and must be construed strictly. *See John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 133-34, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008); *Hopland Band of Pomo Indians v. United*

[38] However, as explained *infra,* the 1980 Act does affect plaintiffs' claim that they are entitled to funds derived from the 1886 lands after the passage of the 1980 Act.

States, 855 F.2d 1573, 1576-77 (Fed.Cir.1988). The court may not consider whether a case warrants equitable tolling, *see John R. Sand & Gravel Co.,* 552 U.S. at 133-34, 128 S.Ct. 750, or imply exceptions to the limitations period. *See Hopland Band of Pomo Indians,* 855 F.2d at 1577. However, in this instance Congress has acted by statute to toll the limitations period.

In a series of appropriations acts for the Department of the Interior beginning in 1990, Congress began enacting "provisions which suspend accrual of the statute of limitations for certain tribal trust claims." *Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States,* 93 Fed.Cl. 449, 459 (2010).[39] At the time of the plaintiffs' filing of their initial complaint in this case, the version of that provision, referred to as "the Indian Trust Accounting Statute" or "ITAS," provided:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds

[39] A version of the 1990 provision has been adopted each year since, with minor changes. *See Shoshone,* 93 Fed.Cl. at 459 n. 9.

> from which the beneficiary can determine whether there has been a loss.

Pub.L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003). The Federal Circuit has held that the Indian Trust Accounting Statute displaces the six-year general statute of limitations for claims falling within its terms, and that it postpones the beginning of the limitations period until an accounting has been provided to the affected beneficiary. *Shoshone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1346-47 (Fed.Cir.2004).[40]

The government argues that the Indian Trust Accounting Statute or "Appropriations Rider," as it calls the provision, does not apply to plaintiffs' claims because those claims are "based upon funds and lands which were not held in trust by the United States for [p]laintiffs." Def.'s Mot. at 35; *see also* Def.'s Opp'n at 16-17. The government also argues that the plaintiffs assert "mismanagement-styled claims" not cognizable under the ITAS. Def.'s Mot. at 36. Plaintiffs respond that the Department's placement of funds derived from the 1886 lands into Treasury trust fund accounts places their claims squarely within the ambit of the ITAS. Pls.' Reply at 14-17; *see also* Pls.' Cross. Mot. at 47-48.

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[40] In *Shoshone,* the Federal Circuit was interpreting a prior version of the Indian Trust Accounting Statute, Pub.L. No. 108-7, 117 Stat. 11 (Feb. 20, 2003), which nonetheless was identical to the one applicable to this case. *See* 364 F.3d at 1344.

The government is mistaken in its view that the Federal Circuit's ruling regarding plaintiffs' trust claim dispenses with the statute-of-limitations issue. While the monies at issue were derived from lands said to be held under use restrictions and not in trust for the loyal Mdewakanton, *see Wolfchild VI,* 559 F.3d at 1255, it does not follow that funds stemming from those lands could not have been held in trust by the government.[41]

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[41] Where the government holds any Indian money, there is a strong presumption that those funds are held in trust. *See, e.g., Loudner v. United States,* 108 F.3d 896, 900 (8th Cir.1997) ("[T]here is a presumption that absent explicit language to the contrary, *all funds* held by the United States for Indian tribes are held in trust." (quoting *Rogers v. United States,* 697 F.2d 886, 890 (9th Cir.1983) (emphasis added))); *Moose v. United States,* 674 F.2d 1277, 1281 (9th Cir.1982) ("[W]here the United States holds funds for Indian tribes, a trust relationship exists unless there is explicit language to the contrary."); *American Indians Residing on Maricopa-Ak Chin Reservation v. United States,* 667 F.2d 980, 1002 (Ct.Cl.1981) ("Where the [g]overnment takes on or has control and supervision over tribal money or property, the normal relationship is fiduciary unless Congress expressly has provided otherwise. Defendant must account for all Indian money that is in its hands, both that classified as Indian Money Proceeds of Labor and deposited in the United States Treasury and that called Individual Indian Moneys and held outside the Treasury."). "This 'trust relationship extends not only to Indian Tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation.'" *Loudner,* 108 F.3d at 901 (quoting *Little Earth of United Tribes, Inc. v. Department of Housing and Urban Dev.,* 675 F.Supp. 497, 535 (D.Minn.1987), *amended,* 691 F.Supp. 1215 (D.Minn.1988), *aff'd,* 878 F.2d 236 (8th Cir.1989)); *cf. Morton v. Ruiz,* 415 U.S. 199, 236, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974)

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The Department of Interior has adopted guidelines that govern the management by the BIA of "Trust Funds for Tribes and Individual Indians." *See* 25 C.F.R. Chapter I, Part 115. Those guidelines define "trust funds" as "money derived from the sale or use of trust lands, *restricted fee lands,* or trust resources and *any other money that the Secretary must accept into trust.*" 25 C.F.R. § 115.002 (emphasis added). The monies at issue ostensibly would fit under the heading of money derived from "restricted fee lands." However, that term has been defined in the Department's regulations as having a restrictive meaning pertinent to allottees only. *Id.* ("Restricted fee land(s) means the land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to federal law.") The Federal Circuit's ruling that the Appropriations Act did not vest any form of title to the 1886 lands in the loyal Mdewakanton as a group or in the individual assignees forecloses classifying the funds at issue as money derived from "trust lands" or "restricted fee lands."

Nonetheless, "trust funds" are also defined as embracing "any other money that the Secretary must accept into trust." 25 C.F.R. § 115.002. At the time of

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("The overriding duty of our Federal Government to deal fairly with Indians wherever located [on or off reservation] has been recognized by this Court on many occasions.").

the 1975 Report by the BIA, the funds at issue were held in three Indian Money "Proceeds of Labor" Treasury Accounts (Account 147158, "Proceeds of Labor, Lower Sioux Indian Community," Account 147043, "Proceeds of Labor, Prairie Island Indian Community," and Account 147436, "Proceeds of Labor, Mdewakanton and Wahpakoota.")[42] and four IIM accounts. *See* Def.'s Mot., Ex. C. Pursuant to the 1975 Report, all of the funds were placed in Treasury Account 147436 "Proceeds of Labor, Mdewakanton and Wahpakoota" and its associated interest account, 147936. *See id.*

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[42] Proceeds-of-Labor accounts were created consequent upon adoption of the Act of March 3, 1883, ch. 141, 22 Stat. 582, 590, which provided, in pertinent part: "[T]he proceeds of all pasturage sales of timber, coal, or other product of any Indian reservation . . . and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe." In 1887, Congress authorized the Secretary of the Interior to use the money deposited into these accounts "for the benefit of several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best." Act of March 2, 1887, ch. 320, 24 Stat. 449, 463. The 1883 and 1887 acts were later amended in 1926 to provide that "all miscellaneous revenues derived from Indian reservations, agencies, and schools which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury . . . under the caption 'Indian moneys, proceeds of labor.'" Act of May 17, 1926, ch. 309, § 1, 44 Stat. 560 (now codified as 25 U.S.C. § 155). The 1926 Act also authorized the Secretary to expend the funds "for the benefit of the Indian tribes, agencies, and schools on whose behalf they are collected." *Id.* In 1982, Congress abolished the use of Proceeds-of-Labor funds effective September 30, 1982. *See* 25 U.S.C. § 155b.

Proceeds-of-Labor accounts are statutorily classified as "trust funds" accounts. *See* Permanent Appropriation Repeal Act of 1934, ch. 756, § 20, 48 Stat. 1224, 1233 (codified as amended at 31 U.S.C. § 1321(a)(20) (2004)) (classifying "Indian moneys, proceeds of labor, agencies, schools, and so forth" as "trust funds"); *see also Short v. United States,* 50 F.3d 994, 998 (Fed.Cir.1995) (subjecting Proceeds-of-Labor accounts to the statutory requirements applicable to "trust funds" and funds "held in trust" by the United States); *Red Lake Band of Chippewa Indians v. Barlow,* 834 F.2d 1393, 1395 n. 4 (8th Cir.1987) ("The Secretary apparently maintains four general trust accounts in the name of the Red Lake Band. The one of primary concern here is the 'Proceeds-of-Labor' account.").

That Proceeds-of-Labor accounts are "trust fund" accounts finds further support in the numbers designated for the accounts. In *Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States,* 69 Fed.Cl. 639, 653 (2006), the court examined the Treasury accounting system used "to account for trust and other moneys received by the United States government." Under that system, "all appropriated moneys and funds collected by the various departments of government are assigned account numbers that indicate the class of receipt or appropriation." *Id.* Treasury funds are given "master symbols" to designate the type of funds within the account. *Id.* (quoting

King v. United States, 107 Ct.Cl. 223, 234-35, 68 F.Supp. 206 (1946)).[43] Master symbols 0001 to 5999 designate "General Funds," and master symbols 6000 to 6999 designate "Special Funds." *Id.* (quoting *King,* 107 Ct.Cl. at 234-35, 68 F.Supp. 206). "Master symbols 7000 to 9999 designate 'Trust Funds,' which represent moneys received by the United States for the purposes specified in and for disbursement in accordance with the terms of the arrangements under which they are accepted." *Id.* at 653 (quoting *King,* 107 Ct.Cl. at 234-37, 68 F.Supp. 206)

The full account numbers assigned by Treasury to accounts that held the funds at issue were account nos. 14x7158, 14x7043, and 14x7436, with all of the funds ultimately being deposited in account 14x7436. *See* Def.'s Mot., Ex. C (1975 Report). "The numerical code '14' [placed before each account number] identifies the Department of Interior, while the letter 'x' denotes that the appropriation is ongoing and without a fiscal year limitation under the authority of the [Permanent Appropriation Repeal] Act[, codified as amended at 31 U.S.C. § 1321]." *Chippewa,* 69 Fed.Cl. at 653 (citing *King,* 107 Ct.Cl. at 236, 68 F.Supp. 206). The actual accounts numbers of 7158, 7043, and 7436

[43] The *King* decision is set out in full only in the Court of Claims reporter and on Lexis Nexis. A portion of the decision is also reported at 68 F.Supp. 206, and that portion is available on-line via Westlaw, but neither the report in the Federal Supplement nor in Westlaw on-line reproduces the portion of the *King* decision quoted and cited in *Chippewa* and relevant here.

thus fall within the range reserved for trust funds only.[44]

Similarly, according to the Department of Interior's guidelines, an IIM account is "an interest bearing account *for trust funds held by the Secretary* that belong to a person who has an *interest in trust assets.*" 25 C.F.R. § 115.002 (emphasis added). IIM accounts are "under the control and management of the Secretary." *Id.* As mentioned previously, there are three types of IIM accounts: unrestricted, restricted, and estate accounts, *id.,* but it is not readily apparent which type of IIM accounts held the funds at issue. Regardless, under the Department's own regulations, IIM accounts are trust fund accounts. *See also American Indians Residing on Maricopa-Ak Chin Reservation,* 667 F.2d at 1002 ("IIM funds are recognized as trust funds.").

The funds derived from the 1886 lands and placed in Proceeds-of-Labor and IIM accounts thus fall under the heading of "any other money that the Secretary must accept into trust." 25 C.F.R. § 115.002. Nonetheless, the conclusion that the funds derived from the 1886 lands were held "in trust" and come

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[44] *King's* recitation of the Treasury accounting system, which cited to general regulations of the Comptroller General promulgated in 1928 and amended in 1936, comports with regulations in effect during the time period in which the funds at issue were being deposited into the Treasury. *See* General Regulations No. 84-2d Revision, 30 Comp. Gen. 541, 543 (Nov. 20, 1950).

within the reach of the Indian Trust Accounting Statute does not end the court's inquiry as to the applicability of the ITAS. The ITAS requires that plaintiffs' claims not only concern "trust funds" but also that those claims fit within the scope of "losses to or mismanagement of" such trust funds. 117 Stat. at 1263.

The government argues that "any rights here [p]laintiffs assert to the [1886 monies] . . . on the basis of funds mismanagement-styled claims should be rejected for the same reasons th[e] [c]ourt rejected [p]laintiffs' breach of contract claim." Def.'s Mot. at 36. This contention appears to involve two separate arguments, *viz.,* (1) that the court's reasoning expressed in its conclusion that the Indian Trust Accounting Statute was inapplicable to plaintiffs' breach of contract claims is germane to the present question, and (2) that the court should dismiss the plaintiffs' arguments because they are mismanagement-style claims of the type rejected in *Shoshone,* 364 F.3d 1339.

In *Wolfchild I,* the court concluded that the Indian Trust Accounting Statute did not apply to plaintiffs' breach of contract claims because the ITAS only applies to "trust mismanagement and to specific kinds of losses[,]" not claims based on a breach of contract. 62 Fed.Cl. at 548. That reasoning, however, is inapposite regarding claims respecting the funds. Because the funds at issue were held "in trust" specifically by statute, the ITAS applies by its express terms.

The government's second argument recalls a contention that it made, and lost, in *Shoshone.* In *Shoshone,* the government argued that the ITAS would only encompass "mismanagement or loss of tribal funds that were actually collected and deposited into the tribal trusts by the [g]overnment." 364 F.3d at 1349. The Federal Circuit rejected "the [g]overnment's narrow reading of the [ITAS]" and accepted that some losses to trust funds could occur prior to collection. *Id.* at 1349-50.[45]

The plaintiffs assert a loss to and mismanagement of the funds derived from the 1886 lands caused by the government's disbursal of such funds to the three communities, and not to eligible Mdewakanton. *See* Pls.' Cross-Mot. at 47-48. Those funds were in the government's possession and deposited into trust funds by the government. The Federal Circuit has held that losses to trust funds within the government's possession fall under the ITAS, *see Shoshone,* 364 F.3d at 1349-50, and indeed, it is difficult to imagine what type of claim would fall under "losses to or mismanagement of trust funds" if

[45] In a related view, the Federal Circuit opined in *Shoshone* that claims pertaining to losses to trust *assets,* rather than trust *funds,* are outside the scope of the ITAS. *See* 364 F.3d at 1350; *id.* at 1351 (noting that the Federal Circuit's interpretation of "losses . . . to trust funds" limited that phrase to "accounts receivable due and owing to the Tribes"); *see also Rosales v. United States,* 89 Fed.Cl. 565, 580 (2009) (summarizing *Shoshone*).

the disbursement of the entire funds at issue to the wrong beneficiaries is not included.

It is also evident that plaintiffs' claims concern trust funds, not, as the government argues, trust assets. The funds may have been derived from various leases and licenses in and for the 1886 lands, but the issue at hand is the government's payment of the funds to the three communities. Plaintiffs' claims are thus distinguishable from claims the Federal Circuit and this court have concluded are not within the reach of ITAS because they concern trust assets. *See, e.g., Shoshone,* 364 F.3d at 1350 (claim concerned "mineral trust assets"); *Simmons v. United States,* 71 Fed.Cl. 188, 192-93 (2006) (claim concerned lumber harvested from plaintiff's land).

Accordingly, the court finds that the Indian Trust Accounting Statute is applicable to plaintiffs' claim that the government mismanaged and caused a loss to the monies derived from the 1886 lands, such monies being held in trust for the plaintiffs. The government does not assert nor is there any evidence before the court that the plaintiffs have been provided with an accounting of the funds. *See* 117 Stat. at 1263; *Shoshone,* 364 F.3d at 1347 ("The clear intent of the [ITAS] is that the statute of limitations will not begin to run on a tribe's claims until an accounting is completed."). Consequently, the ITAS resuscitates and preserves plaintiffs' claims, thereby displacing the general six-year statute of limitations, 28 U.S.C. § 2501.

3. *Plaintiff-Intervenors' motion to amend.*

The Julia DeMarce Group and the Harley D. Zephier Group of Plaintiff-Intervenors have filed motions and proposed complaints containing an additional count, which alleges that the government violated its obligation to set aside land under the Act of Feb. 16, 1863 § 7, 12 Stat. 652, 654. The government opposes the motion arguing that the Federal Circuit's conclusion that the second Act of 1863, 12 Stat. 819, superseded the first Act of 1863 means that plaintiff-intervenors cannot base a claim on the first Act of 1863. Def.'s Opp'n at 18. The government also alleges that this claim would be barred by the statute of limitations as "[p]laintiffs were on notice of their claim six years before filing their complaints, even as early as 1888, when the first of the Appropriations Acts were passed and the land designated under this particular statute was not acquired for the benefit of the loyal Mdewakanton." *Id.* at 18-19. Notwithstanding these arguments by the government, the salient threshold question realistically is whether the first Act of 1863 can be read as giving rise to a money-mandating duty under controlling precedent – a question that neither party has addressed. The court will grant intervenor-plaintiffs' motion to amend such that this threshold issue might be addressed.

B. ***Motion to Dismiss and Competing Motion for Partial Summary Judgment***

1. ***Entitlement to the funds obtained from the 1886 lands prior to the adoption of the 1980 Act.***

The government makes an overarching argument that the statutory mandates contained in the Appropriations Acts are essentially immaterial to plaintiffs' potential entitlement to the funds at issue. Specifically, the government argues that "the *only* thing 'restricted' by the statutory use restriction[s] is what the Secretary can do with the money appropriated – here, money appropriated in 1888, 1889, and 1890[,]" and that "[i]t is plainly impossible to violate such . . . restriction[s] once those funds have been expended." Def.'s Reply at 13-14. The court expressed some skepticism of that argument at the hearing held on the present motions, *see* Hr'g Tr. 30:10-30:19 (Oct. 22, 2010), and will now address the merits of the government's position in full.

"Every agency decision must be anchored in the language of one or more statutes the agency is charged to implement." 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 155 (5th ed. 2010). This fundamental precept of administrative law – that an agency may only act pursuant to and within the scope of a statutory delegation of authority granted by Congress – is embodied in the Administrative Procedure Act and judicial review of congressional delegations of power to administrative agencies. *See* 5 U.S.C. § 706(2)(c) (A "reviewing court shall . . .

hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."); *see, e.g., Federal Commc'n Comm'n v. Fox Television Stations, Inc.,* 556U.S. 502, ___, 129 S.Ct. 1800, 1823, 173 L.Ed.2d 738 (2009) (Kennedy, J., concurring); *Whitman v. American Trucking Ass'ns.,* 531 U.S. 457, 472-73, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001); *Mistretta v. United States,* 488 U.S. 361, 371-73, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *overruled on unrelated grounds by Califano v. Sanders,* 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

Moreover, "[u]nder the Appropriations Clause of the Constitution, funds from the Treasury cannot be used for purposes other than those permitted by the appropriating statute." *Marathon Oil Co. v. United States,* 374 F.3d 1123, 1133 (Fed.Cir.2004) (citing *Office of Pers. Mgmt. v. Richmond,* 496 U.S. 414, 424, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) ("Money may be paid out [of the Federal Treasury] only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute.")); *see also Reeside v. Walker,* 52 U.S. 272, 291, 11 How. 272, 13 L.Ed. 693 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned."). Of course, the funds at issue were derived

from the 1886 lands, which were properly purchased with appropriated funds; nonetheless, this basic principle regarding the expenditure of appropriations reinforces the conclusion that the Secretary was required to deal with the monies in a way that comported with the original appropriating statute.

The 1974 opinion letter from the Solicitor's office at the Department, which "sets forth the most definitive statement of the Department's position as to the legal status of the 1886 lands[,]" *Wolfchild VI,* 559 F.3d at 1248, explicitly makes the point that the Department must comply with the statutory use restrictions on a continuing basis. *See* J.A. 00392-97 (Barnes 1974 Mem.). That letter began by stating the Department's long-standing interpretation that the Appropriations Acts' benefits, including the 1886 lands, were to extend only to the loyal Mdewakanton and their lineal descendants. *Id.* at 00392. Because the benefits of the Acts could only be enjoyed by eligible Mdewakanton, the letter noted the predicament that unassigned lands might remain "idle and unproductive of income which might be used for the benefit of the Indians," as they could not be assigned to individuals who did not qualify as lineal descendants. *Id.* at 00393. The letter then analyzed whether the Secretary might find some source of authority under which it could lease the lands to non-eligible individuals. *Id.* at 00394.

After determining that the 1886 lands could not be classified as "tribal lands" susceptible to leasing under 25 U.S.C. § 15, the letter looked to the Appropriations

Acts as a possible source of the Secretary's leasing authority. J.A. 00395. As noted in the recitation of facts, the letter concluded that "[t]he lands are held in trust by the United States with the Secretary possessing a special power of appointment among members of a definite class." J.A. 00396. Relying on the determination that the Appropriations Acts conferred the powers of a trustee on the Secretary, the letter concluded that "the Secretary *in the exercise of powers of an ordinary trustee, in light of broad discretionary powers conferred by statute,* [and] in these unique circumstances may grant leasehold interests in the lands acquired under authority of the above-listed acts of Congress [the Appropriations Acts]." *Id.* at 00396 (emphasis added). The letter then recognized that because the Secretary was acting pursuant to authority conferred by the Appropriations Acts, the funds derived from the 1886 lands were equally subject to the restrictions contained in those statutes. It stated: "*Proceeds from the leases should be kept separate and may be expended for the benefit of the class* in such manner as the Secretary deems best consistent with his powers under the trust." J.A. 00397 (emphasis added).

In the 1978 letter from the Field Solicitor of the Department to the Area Director of the BIA, this understanding of the restrictions on the Secretary's power to lease the 1886 lands was reiterated. J.A. 00399-401 (Shulstad 1978 Letter). In that letter, the Field Solicitor repeated the conclusion set out in the 1974 memorandum that the 1886 lands "could be

leased, under certain specified circumstances, to non-Indians or to non-eligible Indians, *provided that fair rent payments are made in order to provide income for the benefit of eligible Mdewakantons.*" J.A. 00400 (emphasis added); *see* J.A. 00401 ("The rental would have to be paid to the Bureau of Indian Affairs for the benefit of Mdewakanton Sioux.").

Thus, when the Secretary leased the 1886 lands to non-eligible individuals and obtained money as a result, he plainly did so under authority conferred by the Appropriations Acts. Because the Secretary acted in these endeavors pursuant to a congressional delegation of power granted in the Appropriations Acts, he was statutorily required to handle the funds derived from the 1886 lands in a manner that accorded with the congressional mandates contained in those Acts – including the requirements that the benefits of the Appropriations Acts be distributed to the loyal Mdewakanton and families thereof and that such benefits be conferred in as equal an amount as practicable. *See Lincoln v. Vigil,* 508 U.S. 182, 193, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) ("Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."). The question remains, however, whether the requirements contained in the Appropriations Acts may be read as creating a money-mandating duty such that the Secretary's contravention of them may allow a

damages remedy for the lineal descendants of the loyal Mdewakanton.

(a.) *Jurisdiction.*

The government challenges the court's jurisdiction, arguing that the Appropriations Acts and subsequent Department actions do not create the money-mandating duty that plaintiffs must establish as a basis for their claims under the Indian Tucker Act, 28 U.S.C. § 1505.[46] *See* Def.'s Mot. at 18-25. Plaintiffs assert that the Appropriations Acts created a money-mandating duty on the part of the government for the benefit of the 1886 Mdewakanton and their lineal descendants, and that the government is liable in damages for its disbursement of the funds to the

[46] As part of its argument that the court lacks subject matter jurisdiction, the government contends also that any claim plaintiffs may have in the funds derived from the 1886 lands was extinguished by the 1980 Act and that such a claim would be barred by the statute of limitations as well. Def.'s Mot. at 25-26; 30-35. In granting plaintiffs' motion to amend, the court concluded that the 1980 Act does not affect a wholesale termination of plaintiffs' interest in the funds and the statute of limitations has been tolled. *See supra,* at 327-31. The court's conclusion as to these issues in its motion-to-amend analysis dispenses with these same arguments as presented in the government's motion to dismiss. *But see infra,* at 345-46 (reaching the opposite conclusion respecting funds derived from the Wabasha Land Transfer). Accordingly, the court rejects the government's arguments on these points and will not repeat its reasoning here.

three communities. *See* Pls.' Cross-Mot. at 26-29, 33-43.

The Indian Tucker Act was adopted in 1946 to avoid the need for Indians to present special jurisdictional bills to Congress. *See Mitchell II,* 463 U.S. at 214, 103 S.Ct. 2961. Where the plaintiffs are a "tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska," the Indian Tucker Act provides the court with the same juridical power it would have respecting traditional Tucker Act claims. 28 U.S.C. § 1505. The loyal Mdewakanton are an "identifiable group of American Indians" within the meaning of the Act, *see Wolfchild I,* 62 Fed.Cl. at 539-40,[47] and their claims are premised on laws of the United States, namely the Appropriations Acts. Thus, plaintiffs' claims fall within the terms of the Indian Tucker Act. As explained above, however, the source of law upon which plaintiffs rely must "be fairly interpreted or reasonably amenable to the interpretation that it mandates a right of recovery in damages." *Adair,* 497 F.3d at 1250 (quoting *White Mountain Apache,* 537

[47] In *Wolfchild I,* the government argued that lineal descendants of the loyal Mdewakanton do not have a right to sue under the Indian Tucker Act because they are not a tribe or otherwise identifiable group. *See* 62 Fed.Cl. at 539. The court rejected this argument, noting that the 1886 census and the Department's own dealings with the lineal descendants demonstrated that the plaintiffs are an identifiable group. *See id.* The government does not resuscitate this objection to plaintiffs' claim in the motions currently before the court.

U.S. at 472-73, 123 S.Ct. 1126) (internal quotations omitted).

"[W]here the statutory text leaves the government no discretion over payment of claimed funds[,]" Congress has provided a money-mandating source for jurisdiction in this court. *Samish,* 419 F.3d at 1364; *see Hopi Tribe,* 55 Fed.Cl. at 86-87. In this regard, the Federal Circuit has "repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating." *Greenlee Cnty.,* 487 F.3d at 877 (quoting *Agwiak v. United States,* 347 F.3d 1375, 1380 (Fed.Cir.2003)). "But Tucker Act jurisdiction is not limited to such narrow statutory entitlements[;] [c]ertain discretionary schemes also support claims within the Court of Federal Claims['] jurisdiction." *Samish,* 419 F.3d at 1364.

For example, the use of the word "may" in a statute leads to the presumption that the government has discretion over the payment of funds and does not owe a money-mandating duty to a plaintiff. *See Doe v. United States,* 463 F.3d 1314, 1324 (Fed.Cir.2006). Yet, "this presumption of discretion may be rebutted by 'the intent of Congress and other inferences that [the court] may rationally draw from the structure and purpose of the statute at hand.'" *Id.* (quoting *McBryde v. United States,* 299 F.3d 1357, 1362 (Fed.Cir.2002)); *see, e.g., Doe v. United States,* 100 F.3d 1576, 1579-82 (Fed.Cir.1996) (concluding that moiety statute, 19 U.S.C. § 1619(a), which provided that the Secretary of Treasury "may award and pay" to an informant a reward, was money-mandating in light of

legislative history and prior interpretation of statute). Thus, "a statute is not wholly discretionary, even if it uses the word 'may' when an analysis of congressional intent or the structure and purpose of the statute reveal one of the following: (1) the statute has 'clear standards for paying' money to recipients, (2) the statute specifies 'precise amounts' to be paid, or (3) the statute compels payment once certain conditions precedent are met." *Doe,* 463 F.3d at 1324 (citing *Samish,* 419 F.3d at 1364-65); *see also District of Columbia v. United States,* 67 Fed.Cl. 292, 305 (2005) ("Even statutory language such as 'may award and pay' has been found to be money-mandating, when the legislative intent and context of the statute indicate that the applicant is entitled to payment from the United States if certain conditions have been met." (*citing Doe,* 100 F.3d at 1580-82)).

To determine whether the Appropriations Acts created a mandatory form of benefits for plaintiffs, the court must first look to the text of the Acts. *See Samish,* 419 F.3d at 1365 ("The objective in interpreting [a statute] is to give effect to congressional intent. To determine [c]ongressional intent the court begins with the language of the statutes at issue." (citations omitted)). All of the Appropriations Acts provided that the money appropriated was "to be expended by the Secretary of the Interior." 25 Stat. at 229; 25 Stat. at 992; 26 Stat. at 349. In this respect, Congress used the word "shall." For example, the 1889 Act provided that the unspent funds "*shall* . . . be used and expended for the purposes for which the same amount

was appropriated and for the benefit of the above-named Indians." 25 Stat. at 992 (emphasis added). The 1889 and 1890 Acts provided "all of said money . . . *shall* be so expended that each of the [loyal Mdewakanton] . . . *shall* receive[ ]" an equal amount as practicable, and the 1889 Act made that provision applicable to the 1888 Act. 25 Stat. at 992-93; 26 Stat. at 349 (emphasis added). Both Acts also stated that, as far as practicable, lands for the loyal Mdewakanton "*shall* be purchased in such locality as each Indian desires." 25 Stat. at 993; 26 Stat. at 349 (emphasis added). The 1890 Act additionally provided that a certain sum of the money "*shall* be expended for the Prairie Island settlement." 26 Stat. at 349 (emphasis added).

The language of the Appropriations Acts exceeds the wholly discretionary language that may render a statute merely "money-authorizing," not "money-mandating." *See, e.g., Perri v. United States,* 340 F.3d 1337, 1341 (Fed.Cir.2003) (Section 524 of Title 28 is a "money-authorizing statute, not a money-mandating one" where the statute merely established the Department of Justice Assets Forfeiture Fund and dictated that funds for the payment of certain awards "shall be available to the Attorney General."); *Hopi Tribe,* 55 Fed.Cl. at 87-92 (concluding that a statutory provision was not money-mandating where the pertinent provision stated "[t]he Secretary of Interior was authorized" to pay the legal fees of certain tribes). Consistent use of the word "shall" throughout the statute favors the finding that the Appropriations

Acts are money-mandating. *See, e.g., Doe,* 463 F.3d at 1325; *Greenlee Cnty.,* 487 F.3d at 877; *Agwiak,* 347 F.3d at 1380.

The pertinent historical antecedents to the Appropriations Acts also have an important bearing on whether they are money mandating. *See Samish,* 419 F.3d at 1365 ("To fully understand the meaning of a statute . . . the court looks 'not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" (quoting *Crandon v. United States,* 494 U.S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990))). Notably, the Supreme Court's analytical position in *Quick Bear,* 210 U.S. 50, 28 S.Ct. 690, serves as an appropriate guide in this respect. In *Quick Bear,* the Supreme Court emphasized that when facing questions regarding appropriations to Indians, the inquiry is largely an historical one. The Supreme Court addressed in *Quick Bear* the question of whether funds appropriated to fulfill treaty obligations and income on Indian trust funds could be expended for the support of sectarian schools on an Indian reservation in the face of a statute disallowing Congress from appropriating funds for education in sectarian schools. *Id.* at 50-53, 28 S.Ct. 690. The Court distinguished between gratuitous appropriations "relate[d] to public moneys belonging to the government" and "moneys which belong to the Indians and which is administered for them by the government." *Id.* at 66, 28 S.Ct. 690. Noting that these two classes of appropriations are "essentially different in character[,]" the Court stated that money

appropriated pursuant to a treaty and listed under the heading of "Fulfilling Treaty Stipulations with, and Support of, Indian Tribes" "is not public money in this sense [but rather] [i]t is the Indians' money, or, at least, is dealt with by the government as if it belonged to them, as morally it does." *Id.* at 80, 28 S.Ct. 690. Similarly, "trust fund[s,] [which] ha[ve] been set aside for the Indians . . . and require[ ] no annual appropriation[,] [are] distributed in accordance with the discretion of the Secretary of the Interior, but really belong to the Indians." *Id.* at 80-81, 28 S.Ct. 690. Both types of funds, the Court concluded, are "moneys belonging really to the Indians [constituting] . . . the price of land ceded by the Indians to the government." *Id.* at 81, 28 S.Ct. 690. Thus, they are "not gratuitous appropriations of public moneys, but the payment . . . of a treaty debt in instal[l]ments." *Id.*[48]

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[48] *Quick Bear's* distinction between "gratuitous appropriations" and money more properly characterized as "belong[ing] to" the Indians has continued to serve as a reference point for courts facing similar questions of the government's obligations in relation to Indian monies. *See, e.g., Lincoln,* 508 U.S. at 194-95, 113 S.Ct. 2024 (citing *Quick Bear* as "distinguishing between money appropriated to fulfill treaty obligations, to which [a] trust relationship attaches, and 'gratuitous appropriations' "); *Sac and Fox Tribe of Indians of Okla. v. Apex Const. Co.,* 757 F.2d 221, 222-23 (10th Cir.1985) (noting in *Quick Bear* that "[t]he Supreme Court recognized the distinction between tribal funds and public monies"); *Scholder v. United States,* 428 F.2d 1123, 1129 (9th Cir.1970) (relying on *Quick Bear's* distinction between "gratuitous appropriations" and "treaty or tribal funds"); *Samish Indian Nation v. United States,* 90 Fed.Cl. 122, 148

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In this case, the historical antecedents to the Appropriations Acts are similarly informative to understanding the language used in the Acts.

(b.) *Purpose of the Appropriations Acts*.

To recapitulate the more detailed recitations in the statement of facts, the loyal Mdewakanton did not breach the 1851 and 1858 treaties that bound the Sioux to maintain peaceful relations with the settlers. A breach by other Sioux of those treaties served as the fundamental predicate for Congress' voiding of the United States' treaties with the Sioux and terminating all annuities to them. Congress did not except the loyal Mdewakanton from those measures, but, instead, afforded a different set of rights to the loyal Mdewakanton in the two 1863 Acts and subsequently, in the Appropriations Acts. In every practical sense then, the appropriated funds constituted replacements for the annuities and other benefits the loyal Mdewakanton had received under prior treaties in exchange for their concession of land. *See Quick Bear,* 210 U.S. at 80-81, 28 S.Ct. 690 (distinguishing "gratuitous appropriations of public moneys" from "the payment . . . of a treaty debt in installments [which are the] price of land ceded by the Indians to the government").

(2009) (citing *Quick Bear* as making a distinction between "gratuitous appropriations" and "moneys which belong to the Indians and which is administered for them by the government").

This interpretation is bolstered by the fact that all three of the Appropriations Acts were placed under the heading of "Fulfilling Treaty Stipulations with and Support of Indian Tribes," rather than the more general "Miscellaneous" or "Miscellaneous Supports" heading. *See* 25 Stat. at 219; 25 Stat. at 982; 26 Stat. at 338; *see also Quick Bear,* 210 U.S. at 80, 28 S.Ct. 690 (noting that the funds the Court classified as the "Indians' money" and not "gratuitous appropriations" were listed under the heading of "Fulfilling Treaty Stipulations with, and Support of, Indian Tribes"). While the placement of the funds under that heading "does not support the contention that the Appropriations Acts constituted a conveyance of trust property." *Wolfchild VI,* 559 F.3d at 1240, it supports the fact that Congress regarded the Appropriations Acts as substitute payments for the annuities that would have been received under the Sioux treaties.

The legislative history of the Appropriations Acts also reveals that the Acts were viewed as a substitution for the treaty benefits of which the loyal Mdewakanton had been deprived. Senator MacDonald, the sponsor of the 1888 Appropriation, described his purpose in proposing the Act:

> [A] few of . . . [the Sioux] remained friendly to the whites and became their trusted allies and defenders, and . . . a number of them did valuable service in protecting our people and their property, and in saving many lives. . . . They have ever since had claims upon not

> only our gratitude but that of the nation at large, which ought long ago to have been recognized and partially, at least, compensated for their invaluable services . . . I am almost ashamed to say it, but the fact is that no exception [to the Act of Feb. 16, 1863] was made, even in favor of these friendly Indians.

19 CONG. REC. 2,976-77 (1888). In the course of passing the 1890 Act, Senator Davis similarly stated:

> When the [1868] treaty was made it was made with the Indian nation that was at war with the United States, and not with [the loyal Mdewakanton] . . . and by reason of which severance all rights had fallen, so that they had no rights and interests in this country, and they were confiscated in common with all the annuities of the hostiles, and that worked a great injustice for which they have never been repaid.

21 CONG. REC. 7,589 (1890).[49]

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[49] In debating the terms of the 1890 Act, Senator Davis summarized the circumstances that generated the Appropriations Acts:

> Now, in regard to the act of February, 1863, what was it? The whole frontier of Minnesota had been swept with fire and massacre. The situation in that part of the country was not then fully understood and it was not known here to its full extent, nor was the extent of the service which these people had performed toward the Government fully known . . . [W]hen the law of 1863 was passed Congress did not stop to consider what the relations of this fragment of the band of

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Additionally, the Department's own implementation of the Acts and its treatment of the funds at issue is persuasive in ascertaining the purpose of the Appropriations Acts. *See Mead,* 533 U.S. at 227, 121 S.Ct. 2164 ("[T]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (quoting *Bragdon v. Abbott,* 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (internal quotations omitted))). With the exception of its unsupported decision to disburse the funds pursuant to the 1980 Act, *see* J.A. 00878-80 (Nitzschke 1981 Letter), time and again the Department reiterated its opinion that the appropriated funds, land, and leasing funds at issue were being held for the benefit of eligible Mdewakanton only. *See, e.g.,* J.A. 00397 (Barnes 1974 Mem.) ("Proceeds from the leases should be kept separate and may be expended for the benefit of the

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> Medawakantons had been to the white people; and accordingly, without discrimination, without any saving of rights, Congress annulled all the rights of all the Medawakantons to their share of annuity moneys. There was an instance where, if the relations of those people had been adequately known at that time, those rights would have been preserved. That they were not preserved is due partly to the effect of insufficient knowledge on the subject, but more largely to the fact that there was a spirit abroad then which demanded confiscation and annulment of all Indian rights of property.

21 CONG. REC. 7,590-91.

class."); J.A. 02548 (Area Director's 1975 Mem.) (concluding that the funds derived from the 1886 lands could not be distributed to the three communities because "the funds appropriated are to be used only for the benefit of a certain class of people identified by special census of that time [the 1886 Mdewakanton]."); J.A. 01115-16 (Area Director's 1976 Mem.) (reiterating that only lineal descendants of loyal Mdewakanton were entitled to the funds derived from the 1886 lands); J.A. 00400 (Shulstad 1978 Letter) ("[F]air rent payments [must be] made in order to provide income for the benefit of eligible Mdewakantons."). These recitations were found in reasoned opinions that demonstrate the type of careful deliberation that can guide the court in determining the persuasive weight that should be accorded to agency interpretations of statutes. *See Cathedral Candle Co.,* 400 F.3d at 1366.

In sum, Congress' purpose in passing the Appropriations Acts reveals that the provisions in the Acts are not merely "money-authorizing" legislation, as the government argues. Rather, Congress intended the Appropriations Acts to serve as substitutes for the obligations the government took upon itself in its prior treaties with the Sioux in consideration of the conveyance of Sioux rights to land and resources. Congress likewise intended that the restrictions in Acts, including the provision that the funds be expended only for the benefit of the loyal Mdewakanton,

serve as binding obligations on the part of the Secretary.[50] For ninety years, the Department recognized this obligation and treated the funds as belonging to eligible Mdewakanton, including the lineal descendants, by collecting income from rents and licenses from non-eligible lessees and licensees of the 1886 lands and holding such monies separately in trust accounts for the benefit of the Mdewakanton. The Department's administration of the monies obtained from the 1886 lands distinguishes them from "gratuitous appropriations," and aligns the monies with funds "which belong to the Indians and *which [are] administered for them by the government.*" *Quick Bear,* 210 U.S. at 77, 28 S.Ct. 690 (emphasis added). In sum, the factual record illustrates that the funds at issue were "dealt with by the government as if it belonged to" the loyal Mdewakanton, "as morally it does." *Id.* at 80, 28 S.Ct. 690.

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[50] As noted, Congress was aware at the time of the passage of the Acts that the Sioux had entered new treaties with the government under which they were provided with land and annuities, while the loyal Mdewakanton, who had severed tribal relations, were left destitute. *See supra* at 340-41 & n. 49 (quoting statements of Sen. Davis). The Appropriations Acts sought to compensate the latter group. Allowing the Secretary to distribute the funds to the three communities in lieu of the lineal descendants of the loyal Mdewakanton would defeat Congress' intent to provide for the loyal Mdewakanton and their families, who suffered precisely because they lacked tribal relations. *See Hopi Tribe,* 55 Fed.Cl. at 91 (considering whether interpreting the Navajo-Hopi Settlement Act of 1974 as failing to give rise to a money-mandating duty would "interfere with or defeat congressional intent").

(c.) ***Structure of the Appropriations Acts.***

Despite the differences between the three statutes, collectively the Appropriation Acts essentially contained five defining elements. First, each of the Acts stated that the appropriated funds were "to be expended" by the Secretary, and, at all other points, the Acts provided that the Secretary "shall" expend the funds according to the various restrictions set out in them. Although this language did not definitively render the Appropriations Acts money-mandating, the obligatory language used throughout the Acts favors finding that a money-mandating duty was created as a result of the Acts.

Second, the Appropriations Acts also all included the mandate that the money be spent for the benefit of a particular and identifiable class of beneficiaries – the loyal Mdewakanton. *See* 25 Stat. at 228-29; 25 Stat. at 992-93; 26 Stat. at 349; *Wolfchild VI,* 559 F.3d at 1243 (In granting land assignments to the loyal Mdewakanton and their lineal descendants, "the Secretary held the property for the use and benefit of individuals selected from *a defined class.*") (emphasis added). As the Federal Circuit recognized, "Congress intended the 1886 Mdewakantons to be the specific beneficiaries of the Appropriations Acts." *Wolfchild VI,* 559 F.3d at 1243; *id.* ("The Secretary of the Interior considered himself bound by the terms of the statutes to reserve the usage of the 1886 lands for members of the particular beneficiary class (the 264 individuals determined by a contemporaneous Interior Department census to constitute the 1886

Mdewakantons."). Because the Acts were intended to compensate the loyal Mdewakanton for the deprivation of their annuities and land under the first 1863 Act, they fit within the general characterization of money-mandating statutes as those that seek to "compensate a particular class of persons for past injuries or labors." *Bowen v. Massachusetts,* 487 U.S. 879, 907 n. 42, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988); *see also Black v. United States,* 56 Fed.Cl. 19, 22 (2003) (For a statute to be money-mandating, it must "compensate a particular class of persons for past injuries or labors."); *Kennedy Heights Apartments, Ltd. I v. United States,* 48 Fed.Cl. 574, 579 (2001) ("In order to be found money-mandating, a statute must 'compensate a particular class of persons for past injuries or labors.'" (quoting *Bowen,* 487 U.S. at 907 n. 42, 108 S.Ct. 2722)).

Third, the Appropriations Acts also included detailed directions requiring the Secretary to put the funds to particular uses, including purchases of agricultural stock and equipment and land. *See* 25 Stat. at 228-29; 25 Stat. at 992-93; 26 Stat. at 349. Fourth, the Acts required that the Secretary expend the money in a way that ensured each loyal Mdewakanton would receive as close to an equal amount as practicable. *Id.* Fifth, the Acts contained no time restrictions on the expenditure of the funds, and, in fact, the 1888 and 1889 Acts were both subject to the provision that any money appropriated not expended within the applicable fiscal year would be carried over to the following years and expended for

the benefit of the loyal Mdewakanton. *Id.* These requirements that the funds be expended for particular uses and for a narrowly defined class of beneficiaries distinguish the Acts from lump-sum appropriations, the expenditure of which is committed to agency discretion. *See Samish,* 419 F.3d at 1366 (noting that the Supreme Court, in *Lincoln,* 508 U.S. 182, 113 S.Ct. 2024, determined that "the Snyder Act[, 25 U.S.C. §§ 2, 13,] does not provide a damage remedy because it does not require the expenditure of general appropriations, on specific programs, for particular classes of Native Americans"); *Samish,* 90 Fed.Cl. at 139-40, 146-47 (concluding that various annual lump-sum appropriations to the Department of Interior that did not specify to whom or for what specific purposes the funds should be paid were not money-mandating).

(d.) ***The lineal descendants' entitlement.***

Nonetheless, under the government's view, whatever restrictions are contained in the Appropriations Acts cannot be read to benefit the lineal descendants of the loyal Mdewakanton. *See* Def.'s Opp'n at 12-13. This is so, the government argues, because "Congress did not include lineal descendants as a beneficiary of the acts and its use of the word 'family' did not create any vested ownership rights in the purchased land." *Id.* at 12 (citing *Wolfchild VI,* 559 F.3d at 1242). In regards to the inclusion of the loyal Mdewakantons' "family" or "families" as beneficiaries under the Appropriations Acts, the Federal Circuit concluded

that "the references to the Mdewakantons' families was not directed at creating rights of inheritance in the properties purchased, but instead was simply part of the directive to the Secretary as to the scope of his discretion in spending the appropriated funds." *Wolfchild VI,* 559 F.3d at 1242. While the language "makes clear that the authorization for expenditures extended to cover the needs of the families of the beneficiaries, not simply the needs of the beneficiaries themselves, [i]t does not speak to the nature of the interest created in any real property purchased with the funds." *Id.* Contrary to the government's argument, the Federal Circuit's conclusion that the lineal descendants did not obtain an inheritable property interest in the 1886 lands does not answer the question of whether the Secretary violated a money-mandating duty by distributing the funds derived from those lands to groups of individuals not intended to qualify as beneficiaries of the Appropriations Acts to the prejudice of the individuals who would have qualified as beneficiaries.

The Appropriations Acts authorized the Secretary to expend the funds for the benefit of two classes of individuals: the loyal Mdewakanton and families of the loyal Mdewakanton. *See* 25 Stat. at 992-93; 26 Stat. at 349.[51] Contemporaneous sources demonstrate

[51] The 1888 Appropriation did not include the provision that the funds were to be expended for the families of the loyal Mdewakanton. *See* 25 Stat. at 228-29. Because the appropriated funds were ultimately utilized in the same assignment system

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that at the time the Appropriations Acts were passed, the term "family" was understood to have both narrow and broad meanings. In the narrowest sense, a "family" was understood to include "a father, mother, and children." BLACK'S LAW DICTIONARY 477 (1891) ("BLACK'S"); BOUVIER, A LAW DICTIONARY 645 (15th ed. 1883) ("BOUVIER") ("Family" encompasses "[f]ather, mother, and children."). "Family" was also understood to include "all the relations who descend from a common ancestor, or who spring from a common root." BLACK'S 477; *see also* BOUVIER 645 ("Family" means "[a]ll the relations who descend from a common ancestor or who spring from a common root."); 5 OXFORD ENGLISH DICTIONARY 707 (2d. ed. 1989) (citing contemporaneous examples of usage and defining "family" as including "[t]hose descended or claiming descent from a common ancestor: a house, kindred, lineage" and "a people or group of peoples assumed to be descended from a common stock"). The legislative history does not reveal whether Congress contemplated the narrow or broad understanding of "family" when it passed the Appropriations Acts. Interpretive guidance, however, can be derived from the Federal Circuit's opinion and from the Department's interpretations of the Acts.

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and the Department did not distinguish between the 1888 Appropriation and the subsequent Acts in its legal opinions or in its administration of the funds, the court will not treat the funds traceable to the 1888 Appropriation differently.

In describing the Secretary's decision to assign lands to lineal descendants of the loyal Mdewakanton, the Federal Circuit stated:

> The Interior Department recognized, of course, that Congress intended the 1886 Mdewakantons to be the specific beneficiaries of the Appropriations Acts. The Secretary of the Interior accordingly sought to ensure that the funds appropriated under the Act would be spent for those individuals. With respect to funds that were used to purchase land (as opposed to personal property that was rapidly consumed), *the Secretary adopted a policy designed to promote Congress's intent by assigning the land to individuals from within the group of 1886 Mdewakantons and subsequently to individuals from within the class of the descendants of those Mdewakantons.*

559 F.3d at 1243 (emphasis added). Thus, under the Federal Circuit's interpretation of the Appropriations Acts, the Secretary was "promot[ing] Congress's intent by assigning the land to" lineal descendants of the loyal Mdewakanton. *Id.*

The Department's consistent practice over a ninety-year period of granting land assignments to lineal descendants and numerous internal memoranda of the Department reinforce this view. A 1933 memorandum from the Assistant Solicitor made the point when it stated: "Under present law, the land which is the basis of these communities was land purchased for the Mdewakanton Sioux residing in

Minnesota on May 20, 1886 *and their descendants. It has been and can be assigned only to such persons.*" J.A. 00587-88. (Mem. from Charlotte T. Westwood to Joe Jennings, Indian Reorganization (Undated, written sometime after Nov. 27, 1933)) (emphasis added). A 1950 memorandum prepared by the Area Land Officer for the Department once again stated the Department's interpretation of the lineal descendants' entitlement to the 1886 lands. *See* J.A. 00373-74 (Mem. by Rex. H. Barnes (July 24, 1950)) ("Barnes 1950 Mem."). That opinion stated that:

> In view of the provisions of the [Appropriations] Acts . . . [the 1886 lands] may be assigned only to members of the Mdewakanton Band of Sioux Indians residing in Minnesota, and such assignee must have been a resident of Minnesota on May 20, 1886, or be a legal descen[d]ant of such resident Indian.

J.A. 00374. In a 1969 memorandum from the Area Director of the BIA in Minneapolis to the Field Solicitor, the 1950 memorandum's interpretation of the Appropriations Acts was researched and endorsed once more. J.A. 00382 (Mem. from Daniel S. Boos (Mar. 17, 1969)) ("Based on independent research I have concluded that these remarks [the statements in the Barnes 1950 memorandum regarding the lineal descendants' entitlement] are correct.").

A 1970 memorandum from the Assistant Solicitor for Indian Legal Activities reiterated the Department's interpretation of the Appropriations Acts. J.A. 00386-87 (Mem. from Charles M. Soller to the Field

Solicitor, Minneapolis, Minn. (Dec. 4, 1970)) ("Soller 1970 Mem."). That memorandum stressed:

> [T]he land in question remains available only for the use of qualified Mdewakanton Sioux Indians. If it appears desirable to use the land by assigning it to or for the benefit or other Indians, we suggest that Congress should be asked to permit such action by affirmative legislation. We know of no means of accomplishing this by administrative action, particularly over any objections of eligible Mdewakanton Sioux Indians.

J.A. 00386.

A 1971 memorandum from the Acting Associate Solicitor of Indian Affairs restated the Department's interpretation that the Appropriations Acts entitled lineal descendants of the loyal Mdewakanton to its benefits. J.A. 00344-49 (Mem. from William A. Gersbury to the Field Solicitor for the Department, Twin Cities, Minn. (Aug. 19, 1971)) ("Gersbury 1971 Mem."). In response to the Field Solicitor's inquiry as to the Shakopee Mdewakanton Sioux Community's potential entitlement to the 1886 lands, the opinion cited the text of the Appropriations Acts that stated that the appropriated funds were for the benefit of the loyal Mdewakanton. J.A. 00344. It followed the citation by stating that "*only descendants of Mdewakantons who resided in Minnesota on May, 20, 1886, are eligible for land assignments at Shakopee.*" *Id.* (emphasis added). Later, the memorandum reiterated that, as of 1971,

lineal descendants were the only group entitled to the 1886 lands:

> [A]ny assignee who cannot meet the basic requirement for issuance of an assignment (that he is a legal descendant of a Mdewakanton Sioux resident of Minnesota on May 20, 1886) has no right to continued possession of the property, even if, the assignment was presumably valid when issued. *The wording in the aforementioned Acts of Congress* [the Appropriations Acts] *compels us to this conclusion.*

J.A. 00347 (emphasis added) (internal parenthetical included in original). The letter ended by repeating the conclusion in the Soller 1970 memorandum that congressional action would be required to allow anyone other than lineal descendants of the loyal Mdewakanton to benefit from the land. J.A. 00348-49.

The lineal descendants' entitlement to the benefits of the Appropriations Acts was stated once again in a 1978 letter from the Field Solicitor to the Area Director of the BIA. J.A. 00399-00401 (Shulstad 1978 Letter). That letter noted that "[t]he land is held for the benefit of a specific class of people and their descendants." J.A. 00400.

The above memoranda, particularly the detailed analysis contained in the Gersbury 1971 memorandum, manifestly demonstrates that the Department did not view its assignment of lands to the lineal descendants as a matter of administrative grace; rather, it considered itself "compel[led]" by the terms

of the Appropriations Acts to do so. J.A. 00347 (Gersbury 1971 Mem.). In light of the Department's decades-long interpretation that the Acts' benefits, including the leasing funds, extended to lineal descendants and only lineal descendants of the loyal Mdewakanton, the government's argument that "the Appropriations Acts cannot be interpreted as creating any duties as to the descendants of the loyal Mdewakanton" carries little or no persuasive weight. Although the Appropriations Acts do not specify how broadly "family" was to be interpreted, in light of the aforementioned facts, the court is persuaded that inclusion of the term "family" and "families" encompassed "lineal descendants" of the loyal Mdewakanton, such that plaintiffs may base their claims on the statutory use restrictions contained in the Appropriations Acts.[52]

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[52] The court's conclusion is bolstered by the long-standing canon of statutory interpretation that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985); *see Bryan v. Itasca Cnty., Minn.,* 426 U.S. 373, 392, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) ("[I]n construing . . . admittedly ambiguous statute[s] . . . [the court] must be guided by that eminently sound and vital canon . . . that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.") (internal quotations and citations omitted); *Shoshone,* 364 F.3d at 1352 (noting that the principle articulated in *Blackfeet* supported the court's interpretation that the government was obligated under 25 U.S.C. § 612 to credit prejudgment interest to plaintiffs); *Doyon, Ltd. v. United States,*

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(e.) *The Secretary's discretion.*

The government also argues that "[i]nsofar Congress has left to the Secretary's sole judgment the determination of the manner for providing assistance to the loyal Mdewakanton, the Secretary's distribution [of funds from the Treasury accounts] was permissible and the [c]ourt lacks jurisdiction to otherwise review his decision." Def.'s Mot. at 29 (*citing Milk Train, Inc. v. Veneman,* 310 F.3d 747 (D.C.Cir.2002)). For this proposition, the government relies on the fact that the Acts granted the Secretary the discretion to implement the Acts' mandates "in such manner as in his judgment he may deem best." *Id.* Besides this general argument, the government particularly avers that "[t]o the extent the funds in the account were traceable to the Wabasha land transfer[,] the Secretary's distribution was permissible because such distribution was left to his discretion and [p]laintiffs have no vested or beneficial interest in the funds." *Id.* The court will first address the government's specific argument regarding the Wabasha-Land-Transfer funds.

The 1944 Act authorizing the transfer of the 1886 Wabasha lands to the Upper Mississippi River Wild Life and Fish Refuge provided that:

> The sum of $1,261.20 . . . is hereby made available for transfer on the books of the

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214 F.3d 1309, 1314 (Fed.Cir.2000) (noting the *Blackfeet* principle).

> Treasury . . . to the credit of the Medawakanton and Wahpakoota Bands of Sioux . . . and shall be subject to disbursement under the direction of the Secretary of the Interior for the benefit of the Medawakanton and Wahpakoota Bands of Sioux Indians. Where groups of such Indians are organized as tribes under the [Reorganization Act], the Secretary of the Interior may set apart and disburse for their benefit and upon their request a proportionate part of said sum, based on the number of Indians so organized.

1944 Act, § 2, 58 Stat. 274. Subsequently, $1,261.20 was transferred to Treasury account 147436 "Proceeds of Labor, the Mdewakanton and Wahpakoota Bands of Sioux Indians." Def.'s Mot. at 8. That money was later distributed to the three communities when the Department disbursed the entirety of the funds derived from the 1886 lands. *Id.* at 10-11.

Under the terms of the 1944 Act, payment was made not to the loyal Mdewakanton or their descendants, *see Wolfchild VI,* 559 F.3d at 1251; rather, the funds were allocated to be paid for the benefit of the Mdewakanton and Wahpakoota Bands generally. Plaintiffs' entitlement to the funds derived from the 1886 lands in Wabasha, which would have been based on the restrictions contained in the Appropriations Acts, was consequently terminated upon passage of the 1944 Act. *See id.,* 559 F.3d at 1257-58 (noting that Congress had the power to change the identity of the class of individuals entitled to the

1886 lands). Additionally, when the Secretary distributed the Wabasha-Land-Transfer funds to the three communities, he acted pursuant to authority derived from the 1944 Act, which explicitly allowed him to disburse the funds to tribes organized under the Reorganization Act. *See* 1944 Act, § 2, 58 Stat. 274.

Accordingly, although the rest of the funds at issue remained controlled by the terms of the Appropriations Acts and unaffected by the 1980 Act, the 1944 Act provided that the Wabasha-Land-Transfer funds be paid to a broader set of beneficiaries and conferred upon the Secretary supplemental authority to distribute those funds, thus freeing the disbursement of the Wabasha funds from the statutory restrictions of the Appropriations Acts. Consequently, the government's motion to dismiss as to these specific funds is granted.

Respecting the Secretary's discretion as to the remaining pre-1980 funds, the Appropriations Acts provided that the Secretary could use his "judgment" in administering the benefits of the Appropriations Acts. *See* 25 Stat. at 228-29 ("For the support of [eligible Mdewakanton] . . . 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 992-93 ("For the support of [eligible Mdewakanton] . . . twelve thousand dollars, to be expended by the Secretary of the Interior as follows: ten thousand dollars in the purchase, as in his judgment he may think best, of such lands,

agricultural implements, seeds, cattle, horses, food or clothing as may be deemed best in the case of each [eligible Mdewakanton] or family thereof."); 26 Stat. at 349 ("For the support of [eligible Mdewakanton] . . . eight thousand dollars, to be expended by the Secretary of the Interior, as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each [eligible Mdewakanton] or families thereof.").

The clause granting discretion to the Secretary did not modify or abrogate the Appropriations Acts' other restrictions but rather simply allowed the Secretary to determine in what precise manner to implement the acts. That grant of restricted discretion can hardly be read to have provided the Secretary with the authority to override the specific mandates contained in the Acts. As the Federal Circuit noted, "[t]he language of the Appropriations Acts . . . makes clear that the references to the Mdewakantons' families[,]" while not creating rights of inheritance in the 1886 lands, constituted "*part of the directive to the Secretary as to the scope of his discretion in spending the appropriated funds.*" *Wolfchild VI,* 559 F.3d at 1242 (emphasis added). And as the extensive memoranda cited above demonstrate, the government's current interpretation directly contradicts the Department's long-standing position that the Department was statutorily bound to administer the funds for the benefit of the loyal Mdewakanton and their lineal descendants. *See also*

Wolfchild VI, 559 F.3d at 1248 ("To be sure, the Interior Department has consistently recognized that in the original legislation Congress intended for the appropriated funds to be expended for the benefit of the 1886 Mdewakantons.").

The government's interpretation of the breadth of the Secretary's discretion would render meaningless the provisions of the Appropriations Acts dictating that the funds were to benefit the eligible Mdewakanton only and that the funds were to be distributed as equally as possible. Such an interpretation would contravene the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (quoting *Duncan v. Walker,* 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)); *see Astoria Fed. Sav. and Loan Ass'n v. Solimino,* 501 U.S. 104, 112, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) (courts must "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."); *Inhabitants of Montclair Tp. v. Ramsdell,* 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute."); *Shoshone,* 364 F.3d at 1349 ("Accepted rules of statutory construction suggest that we should attribute meaning to all of the words in [a statute] if possible." (citation omitted)); *Splane v. West,* 216 F.3d 1058, 1068 (Fed.Cir.2000) ("We must

construe a statute, if at all possible, to give effect and meaning to all its terms." (citation omitted)). In this instance, the court need not strain to interpret the Appropriations Acts in a way that gives legal effect to all its terms. The terms of the Acts make explicit that although Congress provided discretion to the Secretary to determine what particular items to purchase for beneficiaries of the Acts, depending on what he "deemed best" in each case, the Acts did not provide the Secretary with such broad discretion so as to negate the specific statutory restrictions.

The government's citation to *Milk Train,* 310 F.3d 747, provides no added support for its position. In that case, Secretary of Agriculture had placed a 26,000 [hundredweight ("cwt")] per dairy operation cap on what could be considered "eligible production" for purposes of determining how much money a producer could receive in subsidies created for the Department to administer pursuant to its 2000 Appropriations Act, Pub.L. No. 106-78, § 805, 113 Stat. 1135, 1179 (1999). *See* 310 F.3d at 748-49. The 2000 Appropriations Act provided that the appropriated funds were to be used "to provide assistance directly to . . . dairy producers, in a manner determined appropriate by the Secretary." *Id.* at 751. The D.C. Circuit concluded that the district court lacked jurisdiction to review the plaintiffs' challenge to the cap because "Congress has left to the Secretary's sole judgment the determination of the manner for providing assistance to dairy farmers." *Id.* In so finding, the court noted that the statute provided "no relevant

statutory reference point for the court other than the decisionmaker's own views of what is an appropriate manner of distribution to compensate for 1999 losses." *Id.* (citation and internal quotation omitted).

This is not, however, a case where the court lacks any "meaningful standard[s] against which to judge the agency's exercise of discretion." *Milk Train,* 310 F.3d at 751 (quoting *Lincoln,* 508 U.S. at 191, 113 S.Ct. 2024). To the contrary, the Acts provide quite straightforward standards by which to judge the Secretary's conduct. While the Secretary was entitled to exercise discretion as to the exact manner of implementation, he was at all times bound by the explicit mandates that the Acts' benefits extend to eligible Mdewakanton only and that they be distributed in as equal amounts as practicable.[53] Accordingly, the Secretary was empowered and required to distribute the funds to the group of statutorily authorized beneficiaries under the Acts – the lineal descendants of the loyal Mdewakanton.

Fairly interpreted, in light of the historical record and ninety years of the Department's own legal opinions and actions, the Appropriations Acts are reasonably amenable to the reading that they created

[53] The decision in *Milk Train* would be a more instructive precedent if, for example, the court there had been reviewing the Secretary's decision to distribute the appropriated funds to grain producers, as opposed to dairy producers, in the face of statutory language mandating that the appropriated funds were to be used for the assistance of dairy producers.

a money-mandating duty on the part of the government to the lineal descendants of the loyal Mdewakanton.[54] Although the Secretary had significant discretion under the Appropriations Acts, in disbursing the leasing funds at issue, he was statutorily mandated to provide those funds to the lineal descendants of the loyal Mdewakanton. Plaintiffs fall within the class of plaintiffs entitled to recover under the Appropriations Acts as they are lineal descendants of the 1886 Mdewakanton.[55] Over plaintiffs' claims; the government's motion to dismiss on this ground is accordingly denied. Because plaintiffs assert that they were displaced from receiving any

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[54] The government argues that because the Acts do not provide a certain sum of money be paid to the loyal Mdewakanton, the Acts cannot be reasonably interpreted as giving rise to a money-mandating duty. However, a statute can be money-mandating without stating a precise amount to be paid. *See Doe,* 463 F.3d at 1324 ("[A] statute is not wholly discretionary, even if it uses the word 'may' when an analysis of congressional intent or the structure and purpose of the statute reveal *one of the following*: (1) the statute has 'clear standards for paying' money to recipients, (2) that statute specifies 'precise amounts' to be paid, *or* (3) the statute compels payment once certain conditions precedent are met.") (emphasis added). As described above, the Acts contain "clear standards for paying" the money to the lineal descendants of the loyal Mdewakanton.

[55] Plaintiffs and various intervening plaintiffs have submitted to the court thousands of pages of genealogical records demonstrating that most are lineal descendants of loyal Mdewakanton. *See* Pls.' Genealogy Affs., *e.g.,* Loretta Stensland Family Tree (establishing that numerous plaintiffs are lineal descendants of Mary Pay Pay (Pepe)); J.A. 00242 (May 20, 1886 census) (listing Mary Pepe as a loyal Mdewakanton).

portion of the funds derived from the 1886 lands as a result of the Secretary's distribution of the funds to the three communities, their particular claims fall within the scope of the Appropriations Acts and likewise survive the government's motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Adair,* 497 F.3d at 1251.

2. *Money obtained from the 1886 lands after adoption of the 1980 Act.*

Plaintiffs argue that "[a]fter the 1980 Act, under the [s]tatutory [u]se [r]estriction[s], the Department of the Interior should have continued to collect revenues from . . . [the three communities'] enterprises and leases" for eventual disbursement to the lineal descendants. Sixth Am. Compl. ¶ 83. In support of this proposition, plaintiffs also rely upon the Reorganization Act, 48 Stat. 984, and the Indian Gaming Act, Pub.L. No. 100-497, 102 Stat. 2467 (1988). Sixth Am. Compl. ¶¶ 74, 88-98. The government responds that the 1980 Act terminated any interest plaintiffs would have had in such funds and that neither the Reorganization Act nor the Indian Gaming Act provides additional support for plaintiffs' claim. Def.'s Reply at 18-19; Def.'s Mot. at 25-26.[56]

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[56] The government responds by arguing also that neither the Indian Gaming Act nor the Reorganization Act are independently money-mandating statutes. *See* Def.'s Reply at 7-11. The court does not read plaintiffs' complaint to assert that either statute independently gives rise to a money-mandating duty to

(Continued on following page)

The 1980 Act did not terminate plaintiffs' entitlement to funds collected prior to the passage of the Act because the terms of the 1980 legislation dealt only with the 1886 lands, and because such funds were collected and disbursed pursuant to authority derived by the Secretary from the Appropriations Acts. However, after the passage of the 1980 Act, the 1886 lands were and are now held by the United States in trust for the three communities. *See Wolfchild VI,* 559 F.3d at 1255. Consequently, the three communities, not the plaintiffs, would be entitled to any income derived from those lands because the communities have become the trust beneficiaries. *See, e.g.,* 1 GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT, AND AMY MORRIS HESS, THE LAW OF TRUSTS AND TRUSTEES § 1, at 11 (3d ed. 2000) ("A trustee holds trust property 'for the benefit of' the beneficiary. Advantages usually come to the beneficiary. . . . How the benefits are to come to the beneficiary is unimportant. The important trust concept is the beneficiary's right to obtain them."). Although the 1980 Act did not did not affect a blanket repeal of the Appropriations Acts, *see Wolfchild VI,* 559 F.3d at 1258 n. 13, the 1980 Act's "long-term disposition of the property purchased pursuant to the Appropriations Acts," *id.,* renders the statutory use

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the lineal descendants; rather plaintiffs argue that the statutory use restrictions contained in the Appropriations Acts should have controlled the government's administration of those statutes. *See* Sixth Am. Compl. ¶ 73-98.

restrictions contained in the Appropriations Acts inapplicable to any funds derived from those lands after such conversion was had. The government could not both abide by the mandate that only eligible Mdewakanton receive the Acts' benefits and perform its duties as trustee for the three communities by ensuring that the beneficiaries receive the benefits of the trust corpus. Thus, while funds derived prior to 1980 remain subject to the terms of the Appropriations Acts, the terms of the 1980 Act prevent the application of the statutory use restrictions to the 1886 lands and funds derived from those lands subsequent to the passage of the 1980 Act.

Nonetheless, plaintiffs argue that the Reorganization Act "made the Secretary of the Interior's duties perpetual until Congress directed otherwise." Sixth Am. Compl. ¶ 74. Specifically, plaintiffs argue that the restrictions contained in the Appropriations Acts were extended by the Reorganization Act by virtue of the following provision: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." 25 U.S.C. § 462 (quoted at Sixth Am. Compl. ¶ 74). The historical note to Section 462 indicates that the Section was applicable "to all Indian tribes, all lands held in trust by the United States for Indians, and all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of Indians in the lands." The government asserts that 25 U.S.C. § 462 is consequently inapplicable to the 1886

lands because such lands were neither held in trust nor was title held by the assignees in restricted fee. *See* Def.'s Reply at 8-9.

The Federal Circuit definitively held that the 1886 lands were not held in trust by the United States and that the eligible Mdewakanton did not hold title to the land. *See Wolfchild VI,* 559 F.3d at 1255 ("[W]e conclude that, as of the time of the 1980 Act, all indications were that neither Congress nor the Department of the Interior had conveyed any vested ownership rights in the 1886 lands, legal or equitable, to anyone."). Accordingly, 25 U.S.C. § 462 does not apply to the 1886 lands. What is more, however, 25 U.S.C. § 462 provides that the periods of trust or restriction on alienation extend "until otherwise directed by Congress." As noted, Congress disposed of any interest plaintiffs had in the 1886 lands by adopting the 1980 Act, thus explicitly excluding the 1886 lands from the scope of 25 U.S.C. § 462.

Likewise, the Indian Gaming Act does not salvage plaintiffs' claim as to funds, including gaming revenue, derived from the 1886 lands after the passage of the 1980 Act. Plaintiffs argue that the Department's administration of the Indian Gaming Act was subject to the restrictions contained in the Appropriations Acts. They also contend that in approving tribal ordinances, revenue allocation plans, constitutions, and other documents pertinent to tribal gaming under the Indian Gaming Act that did not "provide [that] distributions of revenue from economic enterprises created as a result of the [Indian Gaming

Act] [would] exclusively and equally benefit [all] the . . . 1886 Mdewakanton lineal descendants," the government contravened those restrictions. Sixth Am. Compl. ¶ 97. The Indian Gaming Act was adopted on October 17, 1988, 102 Stat. 2467; hence, any governmental approval of the three communities' tribal or gaming documents occurred after the passage of the 1980 Act. As noted, the 1980 Act rendered the restrictions contained in the Appropriations Acts inapplicable to the 1886 lands or to any funds derived from those lands subsequent to the passage of the 1980 Act. Thus, even if, in the absence of the 1980 Act, the government would have been theoretically bound to abide by the restrictions in its approval of the aforementioned documents, the 1980 Act eliminated those potential constraints on the government's actions.[57]

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[57] In ruling that the 1980 Act terminated any potential support for plaintiffs' claims that may have been found in the Indian Gaming Act and the Reorganization Act, the court does not mean to indicate that plaintiffs' claims would have been viable but for the 1980 Act. Because "tribal recognition remains a political question," *Samish,* 419 F.3d at 1373, and plaintiffs' claims as to the Reorganization Act and the Indian Gaming Act are essentially grounded in the contention that the government erred in approving tribal constitutions and various documents that did not comport with the Acts' restrictions, there is a distinct possibility that plaintiffs' claims would have been nonjusticiable, at least in this court which does not have juridical power under the federal-question jurisdictional statute, 28 U.S.C. § 1331, or the Administrative Procedure Act.

Accordingly, the government's motion to dismiss for lack of subject matter jurisdiction is granted respecting plaintiffs' claims that they are entitled to funds, gaming and otherwise, traceable to the 1886 lands after the passage of the 1980 Act.

3. *The method of identifying lineal descendants for purposes of the Appropriations Acts*.

Plaintiffs claim that the manner in which the government determined who constituted lineal descendants of the loyal Mdewakanton "result[ed] in the exclusion of certain 1886 Mdewakanton lineal descendants from the distribution of revenue" derived from the 1886 lands. Sixth Am. Compl. ¶ 104. As detailed in the recitation of facts, the Appropriations Acts defined its beneficiary class in terms of presence in Minnesota as of May 20, 1886, which in turn was determined by the McLeod and Henton listings (the 1886 census). The historical record before the court indicates that the Department followed the Acts' mandates in preparing the listings and granting land assignments to individuals listed on the 1886 census and their lineal descendants. *See Wolfchild I,* 62 Fed.Cl. at 529 (describing the Department's land assignment system).

Whether this manner of ascertaining the lineal descendants resulted in the exclusion of some individuals who may have otherwise qualified is not an issue properly before this court. "It is . . . well established that Congress can, within constitutional limits,

determine the terms and conditions under which an appropriation may be used." 1 U.S. Gen. Accountability Office, Office of the General Counsel, Principles of Federal Appropriations Law (3d ed.2004), 2004 WL 5661322 ("GAO Redbook"); *id.* ("Congress can decree, either in the appropriation itself or by separate statutory provisions, what will be required to make the appropriation 'legally available' for any expenditure."); *see also State of Okla. v. Schweiker,* 655 F.2d 401, 406 (D.C.Cir.1981) (noting Congress's broad discretion to set the terms of appropriations and listing cases to that effect). Congress was accordingly free to define the beneficiary class of the Appropriations Acts as it deemed appropriate.[58] The government's motion to dismiss this claim is accordingly granted.

4. *Review of community governing documents.*

In count V of plaintiffs' proposed sixth amended complaint, plaintiffs ask the court to issue an order setting aside provisions in the three communities' constitutions, ordinances, resolutions, censuses, rolls, and tribal revenue allocation plans "which are repugnant to the [s]tatutory [u]se [r]estriction[s]" and remanding the matter to the Department of Interior

[58] As noted previously, the court's finding that the appropriated funds conceptually served as a substitute for terminated treaty payments does not mean that Congress was in reality legally obligated to appropriate funds to particular persons among the loyal Mdewakanton.

with directions to cause the governing documents to be modified. Sixth Am. Compl. ¶ 116. The government asserts that the court does not have jurisdiction over that claim and, alternatively, that such a claim would be barred by the statute of limitations. Def.'s Opp'n at 17.

For purposes of the Indian Tucker Act, this court's power to order equitable relief is delineated in 28 U.S.C. § 1491(a)(2). That provision states that "[t]o provide an entire remedy and to complete the relief afforded by the [money] judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." Section 1491(a)(2) plainly does not convey the power to afford the equitable relief plaintiffs seek. *See Flowers v. United States,* 80 Fed.Cl. 201, 221-22 (2008), *aff'd,* 321 Fed.Appx. 928 (Fed.Cir.2008) (noting that 28 U.S.C. § 1491(a)(2) "enables the court to grant equitable relief under limited circumstances"). While "limited equitable relief sometimes is available in Tucker Act suits . . . that equitable relief must be 'an incident of and collateral to' a money judgment." *James v. Caldera,* 159 F.3d 573, 580 (Fed.Cir.1998) (quoting 28 U.S.C. § 1491(a)(2)); *id.* ("Stated another way, the Court of Federal Claims has no power [under Section 1491(a)] to grant affirmative non-monetary relief unless it is tied and subordinate to a money judgment." (internal quotation omitted)). Any money judgment the court issues in this case would not be

directly tied to the tribal governing documents plaintiffs seek to set aside; thus, an order requiring their alteration or modification could not be characterized as "an incident of and collateral to" a money judgment. Accordingly, defendant's motion to dismiss as it relates to count V is granted.

5. ***Breach-of-trust and breach-of-contract claims.***

Plaintiffs include counts relating to claims of trust mismanagement, breach of contract, the separately-pled claims of minors in the amended complaint, but they note that such claims have been dismissed or otherwise subsumed into count IV. Sixth Am. Compl. ¶¶ 8-10. The breach-of-contract claims and separately pled claims of minors were addressed and rejected in a prior opinion of this court, and the breach-of-trust claims were denied in the Federal Circuit's opinion. *See Wolfchild VI,* 559 F.3d at 1255, 1260 (disposing of plaintiffs' trust claims); *Wolfchild I,* 62 Fed.Cl. at 547-49 (dismissing plaintiffs' breach-of-contract claim and the separately-pled claims of minor plaintiffs). Accordingly, the court grants the government's motion to dismiss plaintiffs' count I (trust mismanagement), count II (breach of contract), and count III (separately-pled claims of minor plaintiffs).

6. ***Partial summary judgment.***

As the preceding analysis shows, as lineal descendants of the 1886 Mdewakanton, plaintiffs were entitled to the funds derived from leasing and

licensing the 1886 lands prior to the passage of the 1980 Act. The Indian Trust Accounting Statute serves to toll the accrual of the statute of limitations as to this claim, and the 1980 Act did not affect plaintiffs' entitlement to the leasing and licensing funds generated and obtained prior to the passage of the 1980 Act. The undisputed facts demonstrate that the government disbursed the funds to the three communities rather than to the lineal descendants, thereby contravening the provisions of the Appropriations Acts that dictated that only eligible Mdewakanton could receive the benefits of the Acts and that such benefits be conferred in as equal an amount as practicable. Consequently, the government is liable in damages in the amount of these funds. Based upon the text of the Acts and the extensive historical record, which was largely uncontroverted by the parties, the court can ascertain "no genuine issue as to any material facts." RCFC 56(c)(1); *see Matsushita,* 475 U.S. at 586-87, 106 S.Ct. 1348. Nor has the government come forward with specific facts demonstrating a genuine issue for trial. *See* RCFC 56(e)(2). Accordingly, plaintiffs' motion for summary judgment as to its entitlement to the funds derived from leasing and licensing the 1886 lands prior to the passage of the 1980 Act is granted. As explained *supra,* the Wabasha-Land-Transfer funds are excluded from this grant.

CONCLUSION

For the reasons stated, the court grants in part and denies in part the government's motions to dismiss this action. The government's motion to dismiss as it relates to plaintiffs' entitlement to the Wabasha-Land-Transfer funds and any revenue derived from the 1886 lands after the passage of the 1980 Act is granted. The government's motion to dismiss as it relates to plaintiffs' entitlement to funds derived from leasing and licensing the 1886 lands prior to the passage of the 1980 Act is denied. Accordingly, the court also denies the governments' motion respecting plaintiffs' claim for attorneys' fees. The court grants in full the government's motion to dismiss plaintiffs' count I (trust mismanagement), count II (breach of contract), count III (separately-pled claims of minor plaintiffs), and count V (community governing documents).

The court grants plaintiffs' cross-motion for partial summary judgment that: (1) with the exception of the Wabasha-Land-Transfer funds, the Secretary was bound to distribute funds derived from leasing and licensing the 1886 lands prior to the passage of the 1980 Act to the lineal descendants of the loyal Mdewakanton, (2) the 1980 Act did not extinguish plaintiffs' claims as to those particular funds, and (3) the Secretary's disbursal of those funds to the three communities in lieu of the lineal descendants as a group entitles plaintiffs to damages in the amount of the distributed funds. The court

otherwise denies the plaintiffs' motion for partial summary judgment.

Plaintiffs' motion for leave to file a Sixth Amended Complaint is granted, and the court will deem that complaint filed as of July 9, 2010, the date on which the court received plaintiffs' motion. Intervening plaintiffs' motions for leave to file their amended complaints are likewise granted.

The parties are requested to file a joint status report on or before January 19, 2011, addressing a means of, and arrangements for, entering a final judgment in this litigation. A status conference will be held January 21, 2011 at the National Courts Building in Washington, D.C., commencing at 10:00 a.m., EST.

It is so ORDERED.

559 F.3d 1228
United States Court of Appeals,
Federal Circuit.

Sheldon Peters WOLFCHILD, et al., Ernie Peters Longwalker, et al., Scott Adolphson, et al., Morris J. Pendleton, et al., Barbara Feezor Buttes, et al., Winifred St. Pierre Feezor, et al., Autumn Weaver, et al., Aries Bluestone Weaver, et al., Elijah Bluestone Weaver, et al., Ruby Minkel, et al., Lavonne A. Swenson, et al., Willis Swenson, et al., Aaron Swenson, et al., Beverly M. Scott, et al., Lillian Wilson, et al., Monique Wilson, et al., Sandra Columbus Geshick, et al., Cheryl K. Lorusso, et al., Jennifer K. Lorusso, et al., Cassandra Shevchuk, et al., Jason Shevchuk, et al., James Paul Wilson, et al., Eva Grace Wilson, et al., Benita M. Johnson, et al., and Kevin Lorusso, et al.,
Plaintiffs-Appellees,
and
Harley D. Zephier, Sr., et al.,
Plaintiffs-Appellees,
and
Elizabeth T. Walker, Walker Group, and John Does 1-30,
Plaintiffs-Appellees,
and
Gertrude Godoy, et al., Michael Stephens, et al., Jesse Cermak, et al., Delores Klingberg, et al., Sally Ella Alkire, et al., Pierre George Arnold, Jr., et al., and Denise Henderson, et al.,
Plaintiffs-Appellees,
and
Lower Sioux Indian Community,
Plaintiffs-Appellees,

and
Winona C. Thomas Enyard, et al.,
and Jeffrey Arnold Kitto, et al.,
Plaintiffs-Appellees,
and
Madaline Rocque, et al., Mary Taylor
(Tatewastewin), et al., Margaret (Dumarce)
Prescott, et al., and Joseph Coursolle, et al.,
Plaintiffs-Appellees,
and
Mary Beth Lafferty, et al., Anita D. Whipple, et al.,
Bonnie Rae Lowe, et al., and
Lenor A. Scheffler Blaeser, et al.,
Plaintiffs-Appellees,
and
Julia Dumarce, et al.,
Plaintiffs-Appellees,
and
Francine Garreau Hall, et al.,
Plaintiffs-Appellees,
and
Kristine Abrahamson, et al.,
Plaintiffs-Appellees,
and
Victoria Robertson Vadnais, et al.,
Plaintiffs-Appellees,
and
Marvel Jean Dumarce, et al., and Vivian Cordelia
Youngbear, et al.,
Plaintiffs-Appellees,
and
Danny Lee Mozak, et al.,
Plaintiffs-Appellees,
and

Dawn Burley, Raymond Cournoyer, Sr., Francis Elaine Felix, Rebecca Elizabeth Felix, Lydia Ferris, Leslie Lee French, Dawn Henry, Sandra Kimbell, Jerry Robinette, Vera A. Rooney, Deborah L. Saul, Robert Lee Taylor, Daniel M. Trudell, Laura Vassar, Charlene Wanna, Ke Zephier, and John Does 31-433,
Plaintiffs,
v.
UNITED STATES,
Defendant-Appellant.

No. 2008-5018. | March 10, 2009. |
Rehearing En Banc Denied June 11, 2009.

Attorneys and Law Firms

Erick G. Kaardal, Mohrman & Kaardal P.A., of Minneapolis, MN, argued for all plaintiffs-appellees Sheldon Peters Wolfchild, et al.

Robin L. Zephier, Abourezk & Zephier, PC, of Rapid City, SD, for plaintiffs-appellees Harley D. Zephier, Sr., et al.

Elizabeth T. Walker, Walker Law LLC, of Alexandria, VA, for plaintiffs-appellees Walker Group, et al.

Jack E. Pierce, Pierce Law Firm, P.A., of Minneapolis, MN, for plaintiffs-appellees Gertrude Godoy, et al.

Peter D. Gray, Halleland Lewis Nilan & Johnson PA, of Minneapolis, MN, for plaintiff-appellee Lower Sioux Indian Community. Of counsel was Eric J. Magnuson.

Sam S. Killinger, Rawlings, Nieland Law Firm, of Sioux City, IA, for plaintiffs-appellees Winona C. Thomas Enyard, et al.

Scott A. Johnson, Johnson Law Group, of Minnetonka, MN, for plaintiffs-appellees Madaline Rocque, et al.

Wood R. Foster, Jr., Siegel Brill Greupner Duffy & Foster P.A., of Minneapolis, MN, for plaintiffs-appellees Mary Beth Lafferty, et al.

Gary J. Montana, Montana & Associates, of Osseo, WI, for plaintiffs-appellees Julia DuMarce, et al.

Nicole Nachtigal Emerson, Lynn, Jackson, Shultz & Lebrun, PC, of Sioux Falls, SD, for plaintiffs-appellees Francine Garreau Hall, et al.

Randy V. Thompson, Nolan, MacGregor, Thompson & Leighton, of Saint Paul, MN, for plaintiffs-appellees Kristine Abrahamson, et al.

Royce D. Edwards, Jr., of Joplin, MO, for plaintiffs-appellees Victoria Robertson Vadnais, et al., of Britton, SD, for plaintiffs-appellees Marvel Jean DuMarce, et al.

Barry P. Hogan, Renaud Cook Drury Mesaros, PA, of Phoenix, AZ, for plaintiffs-appellees John Doe, 1-433, et al. Of counsel was Elizabeth T. Walker, Walker Law LLC, of Alexandria, VA.

Garrett J. Horn, Horn Law Office, of Yankton, SD, for plaintiffs-appellees Lydia Ferris, et al.

Steven D. Gordon, Holland & Knight, LLP, of Washington, DC, for amicus curiae Shakopee Mdewakanton Sioux (Dakota) Community and Prairie Island Indian Community. With him on the brief were Phillip M. Baker-Shenk, and Philip R. Mahowald, of Welch, MN. Of counsel on the brief were Kurt V. BlueDog, BlueDog, Paulson & Small, P.L.L.P., of Minneapolis, MN; and Brian B. O'Neill, Faegre & Benson LLP, of Minneapolis, MN.

Aaron P. Avila, Trial Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, for defendant-appellant. With him on the brief were Ron L. Tenpas, Assistant Attorney General and Laura Maroldy, Attorney.

Before RADER, BRYSON, and PROST, Circuit Judges.

Opinion

BRYSON, Circuit Judge.

This case comes to us on interlocutory appeal from the Court of Federal Claims. The plaintiffs in the underlying action claimed that the government breached its fiduciary obligations with respect to certain real property that the government was required to hold in trust for them. The order on appeal sets forth two questions of law as to which the trial court concluded that there is a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of

the litigation. *See* 28 U.S.C. § 1292(d)(2). We address those two questions of law in this opinion and reverse the trial court's ruling as to each question.

I

The trial court's opinions contain a thorough canvass of the complex factual and legal background of this case. *See Wolfchild v. United States,* 62 Fed.Cl. 521, 526-35 (2004) (*Wolfchild I*); *Wolfchild v. United States,* 68 Fed.Cl. 779, 782-83, 785-94 (2005) (*Wolfchild II*). We borrow heavily from the trial court's analysis of the facts and the governing legal principles, even though at the end of the day we disagree with the trial court's legal conclusions as to the two questions certified for appeal.

A

In 1862, the Minnesota Sioux, who were then living on a reservation in southern Minnesota, rebelled against the United States. After the uprising was quelled, Congress annulled the treaties that had established the reservation and that had provided for an annuity to be paid to the tribe. *See* Act of Feb. 16, 1863, ch. 37, 12 Stat. 652; Act of Mar. 3, 1863, ch. 119, 12 Stat. 819. The effect of that action was to confiscate all of the tribe's reservation lands in Minnesota and force the Sioux to relocate farther west.

During the uprising, some of the Sioux remained loyal to the United States. Many of those individuals

severed their ties to the tribe and remained in Minnesota. However, the government's confiscation of the Sioux lands and the termination of the annuities that were paid pursuant to the annulled treaties left those individuals poverty-stricken and homeless. In recognition of their situation, Congress took steps to assist those individuals. The group, which consisted of approximately 200 individuals, were known as the "loyal Mdewakantons," a reference to the Mdewakanton band of the Sioux tribe with which they had been affiliated.

In the 1863 statute that annulled the Sioux treaties, Congress authorized the Secretary of the Interior to set aside parcels of 80 acres of public land for any individual among the Minnesota Sioux "who exerted himself in rescuing the whites" during the 1862 revolt. Act of Feb. 16, 1863, § 9, 12 Stat. at 654. Congress further provided that the allotted land "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." *Id.* Two weeks after the enactment of that provision, however, Congress superseded it with another statute dealing with the same authorization. Unlike in the earlier statute, Congress did not attempt to define the property interest that the Indians would receive in lands that were to be set aside for them. Instead, the later statute provided that any lands that were assigned would be "held in such tenure as is or may be

provided by law." Act of Mar. 3, 1863, § 4, 12 Stat. at 819. Thus, in that statute (as was to be the case on several subsequent occasions), the issue of the ownership rights in the land that was to be set aside for the use of the loyal Mdewakantons was not resolved, but was left for later determination.

The Secretary never exercised the authority granted by the 1863 legislation, and no lands were provided to the loyal Mdewakantons at that time, apparently because of opposition by white settlers to allowing even the loyal Sioux to settle in the state. *See* H.R. Exec. Doc. No. 39-126, at 10 (1865) ("Congress . . . provided lands [for the loyal Mdewakantons] near their old homes, but [they] are not allowed by the whites to live upon and cultivate them"); H.R. Exec. Doc. No. 50-61, at 2 (1889) (the Secretary withdrew property from the public lands for the loyal Mdewakantons, "but such was the blind fury of the whites after the outbreak of 1862 and 1863 that these Indians were also removed").

Two years later, however, Congress recognized that those individuals, who "at the risk of their lives aid[ed] in saving many white men, women, and children from being massacred," had as a result been forced to sever their relationships with the tribe and "were compelled to abandon their homes and property, and are now entirely destitute of means of support." Act of Feb. 9, 1865, ch. 29, 13 Stat. 427; *see* H.R. Exec. Doc. No. 39-126, at 3. Congress at that time appropriated $7,500 to provide for the loyal Mdewakantons, but it took no further action to assist

them until the 1880s. In the intervening years, many of the loyal Mdewakantons, who were impoverished and faced continuing hostility from white settlers, left Minnesota. *See* Roy W. Meyer, *History of the Santee Sioux* 258-72 (1967).

On several occasions beginning in 1884, Congress appropriated funds to be used for the benefit of the Mdewakantons who had remained in Minnesota or had returned to the state. In 1884, Congress appropriated $10,000 to purchase stock "and other articles necessary for their civilization and education, and to enable them to become self-supporting." Act of July 4, 1884, ch. 180, 23 Stat. 76, 87. The following year, Congress amended that Act to allow the Secretary of the Interior to disburse funds to the Mdewakantons "for agricultural implements, lands, or cash, as in his judgment may seem best for said Indians." Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 375. And in the next year, Congress appropriated another $10,000 for the purchase of "such agricultural implements, cattle, lands, and in making improvements thereon, as in [the Secretary's] judgment may seem best for said Indians." Act of May 15, 1886, ch. 333, 24 Stat. 29, 39-40.

Under the authority of those statutes, Interior Department officials purchased land and distributed it to several of the loyal Mdewakantons, giving them fee simple ownership of the properties. *Sixtieth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 111 (1891). That effort failed to provide long-term relief for the Mdewakantons,

however, because as Interior Department officials later acknowledged, most of the recipients of the land grants sold, abandoned, or encumbered the properties. After that time, the Interior Department discontinued the practice of transferring land to the loyal Mdewakantons in fee.

In 1888, 1889, and 1890, Congress enacted the three pieces of legislation that are the central focus of this case. In each of those statutes, which are referred to in this litigation as "the Appropriations Acts," Congress appropriated funds for the support of a number of designated Indian tribes. Each Act contained, among the many designated appropriations for the support of particular groups of Indians, a paragraph allocating a small sum to be used for the benefit of the Mdewakantons who had remained in Minnesota after the 1862 revolt or had returned to Minnesota in the following years. *See* Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29 ($20,000); Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93 ($12,000); Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349 ($8,000). The Secretary of the Interior was authorized to spend those appropriated funds as he saw fit for the benefit of the qualifying Mdewakantons. The statutes authorized the purchase of agricultural implements, cattle, horses, food, clothing, buildings, seed, or land, at the discretion of the Secretary.

Although each of the Appropriations Acts used slightly different language, the operative provisions were largely similar. The 1890 Act, for example, provided as follows, in pertinent part:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medewakanton band of Sioux Indians, who . . . have severed their tribal relations, eight thousand dollars, to be expended by the Secretary of the Interior as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or families thereof. . . .

26 Stat. at 349. The 1889 and 1890 Acts also provided that the appropriated funds should be "so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of this appropriation." 25 Stat. at 992-93; 26 Stat. at 349. Although the 1888 Act contained no such proviso, the 1889 Act stipulated that the "equal amount" requirement should apply to the funds appropriated under the 1888 Act. 26 Stat. at 993. Two other differences among the three statutes are (1) the 1888 and 1889 Acts made provision for "full blood" Mdewakantons, while the 1890 Act made provision for "full and mixed blood" Mdewakantons, and (2) the 1889 and 1890 Acts gave the Secretary discretion to make spending decisions based on what he deemed best in the case of "each of these Indians or families thereof," while the 1888 Act made no reference to the beneficiaries' families.

The Interior Department used approximately $15,600 of the $40,000 appropriated under the three Appropriations Acts to purchase parcels of land in

various parts of southern Minnesota where the Mdewakantons had settled. Because of difficulties in determining which of the Mdewakantons qualified as "loyal" during the 1862 uprising, the Appropriations Acts provided that the appropriations would be designated for the benefit of all Mdewakantons who were living in Minnesota as of May 20, 1886. As a result, the lands purchased with funds from the three Appropriations Acts are known as "the 1886 lands," and the Mdewakantons who were statutorily eligible for benefits under the Acts are commonly referred to as "the 1886 Mdewakantons."[1] Title to those lands was taken in the name of the United States, and the deeds contained no trust designation or other limitation on title.

As of 1980, notwithstanding several intervening exchanges and sales, the 1886 lands remained largely intact. The lands consisted of a number of small plots, totaling approximately 950 acres. The tracts were located in three Minnesota counties: Scott County ("the Shakopee lands"); Redwood County ("the Lower Sioux lands"); and Goodhue County ("the Prairie

[1] In several years after the Appropriations Acts, Congress appropriated funds for the "support and civilization" of the Mdewakantons in Minnesota. *See, e.g.,* Act of Mar. 2, 1895, ch. 188, 28 Stat. 873, 892; Act of June 10, 1896, ch. 398, 29 Stat. 321, 338; Act of June 7, 1897, ch. 3, 30 Stat. 62, 78; Act of July 1, 1898, ch. 545, 30 Stat. 571, 586; Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 938. Those later statutes, however, did not specifically authorize purchases of land, and the parties have not put those statutes at issue in this case.

Island lands"). The Department of the Interior assigned individual plots from those lands to qualifying Mdewakantons for their use and occupancy as long as they resided on or otherwise used the land. After a particular assignee died or abandoned the property, the Department would re-assign the land to another qualifying Mdewakanton. The new assignment was often made to a descendant of the previous assignee. The Interior Department, however, did not regard the interest of the assignees in the property as rights that passed through inheritance.

Pursuant to the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, three Mdewakanton communities were formed in the three areas where the 1886 lands were located. The three communities are the Prairie Island Indian Community, the Shakopee Mdewakanton Sioux Community, and the Lower Sioux Indian Community. The enrolled membership of the three communities consists largely of lineal descendants of the Mdewakantons who were living in Minnesota in 1886, but some enrolled members are not descendants of the 1886 Mdewakantons, and many of the descendants of the 1886 Mdewakantons are not enrolled members of any of the three communities.[2] Over time, the government purchased an

[2] As of 1979, more than 95 percent of the enrolled members of the three communities were lineal descendants of the 1886 Mdewakantons. At that time, the Lower Sioux Indian Community had 152 members (139 of whom were lineal descendants of the 1886 Mdewakantons), the Prairie Island Indian Community had 109 members (106 of whom were lineal descendants

(Continued on following page)

additional 414 acres for the Prairie Island community and an additional 872.5 acres for the Lower Sioux community. Those lands were regarded as reservation lands and as such were held in trust for those two communities. Prior to 1980, those reservation lands were treated as having a legally distinct status from the 1886 lands, even though parcels of the two classes of property were intermingled in the same areas within the geographical boundaries of the Prairie Island and Lower Sioux communities.

In 1980, Congress enacted legislation designed to give the three communities political control over all the property within the communities that had been set aside for Indians, including the 1886 lands. In particular, the legislation sought to overcome the administrative problems that resulted from the communities having two different classes of members and two different classes of property interspersed in a "checkerboard pattern" within their geographical boundaries. *See* S.Rep. No. 96-1047, at 2 (1980). In order to solve that problem, the 1980 statute provided that the 1886 lands, which "were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians" under the Appropriations Acts, would henceforth be "held by the United States . . . in trust for" the three communities. Pub.L. No. 96-557, 94 Stat. 3262 (1980). The 1980 Act

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of the 1886 Mdewakantons), and the Shakopee Mdewakanton Sioux Community had 96 members (94 of whom were lineal descendants of the 1886 Mdewakantons).

contained a savings clause stating that the Act would not alter any rights under any contract, lease, or assignment entered into or issued prior to the Act. Thus, all of the individuals then holding assignments to the 1886 lands retained their rights to use the land unaffected by the 1980 legislation. The Interior Department, however, made no new assignments thereafter.

B

For more than a century after the purchase of the 1886 lands, those properties were used mainly for residential and agricultural purposes and were not particularly valuable.[3] However, following the introduction of casino gambling on Indian land in the mid-1990s, the situation changed dramatically. According to the complaint in this case, "profitable casinos, hotels, and other profit-making businesses have been established and developed" on the 1886 lands. As a result, the proceeds from certain of those lands and the nearby reservation lands have become extremely valuable.

Because of the position taken by the Department of the Interior that the disputed properties are held in trust for the three Mdewakanton communities, the descendants of the 1886 Mdewakantons who are not

[3] At the time of the 1980 Act, the Interior Department estimated that the 950 acres constituting the 1886 lands were worth a total of approximately $1,500,000.

members of those communities have not received any of the proceeds from the gambling casinos and related entertainment facilities. Instead, those proceeds have gone to the enrolled members of the three communities.

In 2003, a group of individuals who claimed to be lineal descendants of the 1886 Mdewakantons filed suit in the Court of Federal Claims seeking damages from the United States based in part on an asserted breach of fiduciary duty. Over time, more individuals have joined the suit as plaintiffs, and the plaintiffs now number more than 20,000.

The plaintiffs' theory of the case was that the Appropriations Acts created a trust for the 1886 Mdewakantons and their descendants that gives the plaintiffs rights to the proceeds of the trust corpus because of their status as owners of equitable title to those lands. *Wolfchild I,* 62 Fed.Cl. at 540. They contended that the 1980 statute did not terminate that trust and that it was improper for the government, following the enactment of the 1980 statute, to treat the 1886 lands as being held in trust for the benefit of the three communities. Instead, they asserted, the proceeds of the 1886 lands should have gone to the lineal descendants of the 1886 Mdewakantons, the intended beneficiaries of the lands that were purchased with the Appropriations Acts funds. According to the complaint, each of the plaintiffs was entitled to a prorated share of "the income, profits and proceeds from all reservation lands at Shakopee, Prairie Island, and Lower Sioux (including but not limited to

per-capita payments from casino profits and other revenues)." The complaint further alleged that the government has breached its fiduciary duties by failing "to ensure that the income, profits and proceeds from all reservation businesses – including per-capita payments from casino profits – are distributed as equally as practicable among all of the trust beneficiaries of the reservation lands."

The government responded that the Appropriations Acts did not create a trust for the 1886 Mdewakantons and did not give the 1886 Mdewakantons vested ownership rights in the lands purchased with those funds. Instead, according to the government, the Appropriations Acts simply gave the Secretary of the Interior the right to purchase land or other assets to be used, subject to the Secretary's discretion, for the benefit of the 1886 Mdewakantons and their families. In the government's view, the Secretary exercised his discretion to allow the 1886 Mdewakantons and their descendants to use and occupy the land, but neither the Appropriations Acts nor any action by the Secretary conveyed any greater interest, such as legal or equitable title, on any of the beneficiaries, either individually or as a class. In addition, the government argued that after Congress in 1980 enacted legislation providing that the 1886 lands would be held in trust for the three Mdewakanton communities, the lineal descendants of the 1886 Mdewakantons retained no rights in the lands except insofar as they were enrolled members of one of the three communities or were current

assignees whose rights were preserved under the 1980 Act's savings clause.

After considering submissions from the parties and the three Indian communities,[4] the trial court concluded that the plaintiffs were correct in their contention that the Appropriations Acts created a trust relationship between the government and the 1886 Mdewakantons, that the trust relationship extended to the descendants of the 1886 Mdewakantons, and that the trust had the effect of bestowing equitable title to the 1886 lands on the beneficiary class. *Wolfchild I,* 62 Fed.Cl. at 540-43, 551, 549, 551. The court also ruled that the 1980 statute that required the government to hold the 1886 lands in trust for the three Indian communities did not have the effect of altering or terminating the trust that was established by the Appropriations Acts. *Id.* at 543-44, 551. Accordingly, the court concluded,

[4] The three communities have not all taken the same position in this litigation. Two of the communities, the Shakopee Mdewakanton Sioux Community and the Prairie Island Indian Community, participating as amici curiae, are aligned against the plaintiffs. The third community, the Lower Sioux Indian Community, participating as an appellee, is aligned with the plaintiffs. The Lower Sioux Indian Community has explained that the most profitable casinos are on the properties of the other two communities. That may account for the decision of the Lower Sioux Indian Community, many of whose members claim to be lineal descendants of the 1886 Mdewakantons, to support the plaintiffs rather than advocating that each of the three communities is entitled to beneficial ownership of the portions of the 1886 lands allocated to it in 1980.

the 950 acres that were purchased with the funds appropriated under the three Appropriations Acts continued to be held in trust for the heirs of the 1886 Mdewakantons, and the government breached its fiduciary duties to the plaintiffs respecting that trust. *Id.* at 545, 551.

The court's rulings that the Appropriations Acts created a trust for the loyal Mdewakantons and their descendants and that the 1980 statute did not terminate that trust are central to the plaintiffs' breach-of-trust claim and are critical prerequisites to any further proceedings in the trial court, such as identifying which plaintiffs are entitled to relief and calculating the measure of damages due to various groups of plaintiffs. Accordingly, the trial court certified the following two questions for immediate review by this court pursuant to 28 U.S.C. § 1292(d)(2):

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.

We agreed to permit an appeal to be taken from the trial court's order, and we now undertake to answer the two certified questions.

II

Although the 1888, 1889, and 1890 Appropriations Acts make no reference to a trust, the trial court held that those statutes created a trust for the Mdewakantons who were living in Minnesota in 1886 and their descendants. The court ruled that all of the elements of a trust were present in the Appropriations Acts and that the absence of the term "trust" from the Acts was not fatal to interpreting them as imposing trust responsibilities on the government. The court regarded the corpus of the trust as the lands purchased with the funds appropriated pursuant to the Appropriations Acts. It found the beneficiaries to be sufficiently identified as the 1886 Mdewakantons and their families, including their descendants. It held that the trust obligations were sufficiently defined by the statutory requirements that the appropriated funds be expended for the benefit of the 1886 Mdewakantons and that they be expended, as nearly as practicable, so that each of the beneficiaries would receive a roughly equal amount in value from the expenditure of the appropriated funds. Finally, the court concluded that, as a consequence of the creation of the trust relationship, legal title to the 1886 lands remained in the United States, but the 1886 Mdewakantons and their descendants obtained equitable title to the lands. *Wolfchild I,* 62 Fed.Cl. at 540-43.

While it is true that a statute need not contain the word "trust" in order to create a trust relationship, the failure to use that term gives rise to

doubt that a trust relationship was intended. *See Cohen's Handbook of Federal Indian Law* § 5.05[1][b], at 429-30 (Nell Jessup Newton et al., eds., 2005) ("[W]hile the presence of the word 'trust' in a statute by itself is neither necessary nor sufficient to create a compensable claim, statutory or regulatory language using terms normally associated with trust or fiduciary law will be given great weight in the analysis."); *see also United States v. White Mountain Apache Tribe,* 537 U.S. 465, 480-81, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) (Ginsburg, J., concurring) (distinguishing between a statute that "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations" and a statute that contained no trust language and "lacked the characteristics that typify a genuine trust relationship"). That is particularly true where, as here, Congress used the term "trust" in other contemporaneous statutes dealing with the same subject matter, but did not use that term or any close proxy in the Appropriations Acts. *See, e.g.,* General Allotment Act of 1887, ch. 119, § 5, 24 Stat. 388, 389 (providing that United States will hold allotted land "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made"); Act of May 1, 1888, ch. 213, art. 6, 25 Stat. 113, 115 (United States to hold land "in trust"); Act of Mar. 2, 1889, ch. 405, § 11, 25 Stat. 888, 891 (same).

The Restatement of Trusts sets forth the general principle of trust law that a trust is created "only if the settlor properly manifests an intention to create a

trust relationship." *Restatement (Third) of Trusts* § 13 (2003). The Appropriations Acts manifest no such intention on the part of Congress. Although the Appropriations Acts impose some limited restrictions as to how the appropriated funds are to be spent, those restrictions are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose. The simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal relationship between the Secretary of the Interior and the 1886 Mdewakantons in which the Secretary was assigned particular duties as trustee and the Mdewakantons were given enforceable rights as trust beneficiaries. If the minimal directives given to the Secretary as to the expenditure of funds were sufficient to convert the Appropriations Acts into trust instruments, it would seem that other similar, contemporaneous appropriations for the support of other groups of Indians could also be characterized as creating trust responsibilities, even though in none of those instances is there any objective evidence of congressional intention to create a trust.

Each of the three provisions that authorized expenditures for the 1886 Mdewakantons was enacted as part of a much longer statute that contained appropriations for payment of the expenses of the Indian Department and for the support of certain Indian tribes. The provisions effecting an

appropriation for the Indian Department and those authorizing support for particular groups of Indians contained no language suggestive of a trust relationship. It is difficult to read the paragraphs relating to the 1886 Mdewakantons as creating a trust relationship when the surrounding paragraphs of the same statutes, which provide for the support of other groups of Indians, are clearly just appropriation provisions that do not create trust obligations. *See, e.g.,* Act of June 29, 1888, ch. 503, 25 Stat. at 230 ("For support and civilization of the Chippewas of Lake Superior, to be expended for agricultural and educational purposes, pay of employees, purchase of goods and provisions, and for such other purposes as may be deemed for the best interests of said Indians, five thousand dollars"); Act of Mar. 2, 1889, ch. 412, 25 Stat. at 995 ("To enable the Secretary of the Interior to purchase subsistence and other necessaries for the support of the Hualapais Indians in Arizona, seven thousand five hundred dollars"); Act of Aug. 19, 1890, ch. 807, 26 Stat. at 352 ("For support and education of the Seminole and Creek Indians in Florida, for the erection and furnishing of schoolhouses, for the employment of teachers, and for the purchase of seeds and agricultural implements and other necessary articles, six thousand dollars; this money, or any part of thereof, may be used, in the discretion of the Secretary of the Interior, for the purchase of land for homes of said Seminole Indians").

The only significant difference between the Appropriations Acts and the other Indian "support" appropriations that were part of the same legislation is that the latter two Appropriations Acts contained a requirement that each of the beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation." That clause, which the record materials suggest was added because of complaints that the funds from an earlier appropriation were disproportionately distributed, provides such minimal direction that it is plainly insufficient to convert what would otherwise be an appropriation into a trust.

The 1889 Act provided that any appropriated funds from that Act or the 1888 Act that were not spent during the current fiscal year "shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians." Act of Mar. 2, 1889, 25 Stat. at 992. Although the trial court concluded that the presence of that carry-over provision in the 1889 Act helped demonstrate Congress's intent to create a trust for the Mdewakantons, the contemporaneous history of the provision actually supports the contrary inference. The provision was included in the 1889 Act, apparently without comment, but when the same language was proposed to be included in the 1890 Act, it was removed after members of Congress objected that it would be "remarkable" to include such a provision in an appropriations bill. 21 Cong. Rec. 7586 (1890)

(remarks of Sen. Cockrell). The fact that Congress removed the carry-over provision from the 1890 Act because it was deemed to be inappropriate for an appropriations bill supports the government's argument that Congress viewed the Mdewakanton clauses of the Appropriations Acts as ordinary appropriations provisions.

The Lower Sioux Indian Community argues that the placement of the Appropriations Acts under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes" indicates that those appropriations conveyed equitable title to the 1886 lands to the loyal Mdewakantons and their descendants. *See Quick Bear v. Leupp,* 210 U.S. 50, 77, 80, 28 S.Ct. 690, 52 L.Ed. 954 (1908) (distinguishing between Indian funds appropriated under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes," which were administered on behalf of the Indians by the government, with funds appropriated under the subcategory "Support of Schools," which constituted a mere gratuitous appropriation of public monies). Unlike the appropriation at issue in *Quick Bear,* however, the Appropriations Acts were not enacted pursuant to any treaty with the Mdewakantons, and therefore cannot fairly be characterized as "payment . . . of a treaty debt in installments." *See id.* at 81, 28 S.Ct. 690. Furthermore, although the Appropriations Acts were not placed in the sections entitled "Miscellaneous Supports," each of the three expenditures was explicitly appropriated "[f]or the support of" loyal Mdewakantons. *See* 25 Stat. at 228; 25 Stat.

at 992; 26 Stat. at 349. That is not the language typically used in clauses directed at fulfilling treaty obligations, and it is in fact analogous to the language used in the expenditures deemed to be gratuitous appropriations in the *Quick Bear* case. *See Quick Bear,* 210 U.S. at 77, 28 S.Ct. 690. Thus, the placement of the Mdewakanton clauses in the Appropriations Acts does not support the contention that the Appropriations Acts constituted a conveyance of trust property.

Finally, nothing in the legislative history of the three provisions at issue in this case indicates that they were designed to create a trust relationship. Instead, the sponsors of the special provisions for the Mdewakantons referred to them as the intended "beneficiaries of this appropriation," 18 Cong. Rec. 2977 (1888) (remarks of Rep. McDonald), and characterized the payment as "a gratuity to these peaceable Indians, because they were peaceable and because they suffered at the hands of other Indians on account of their loyalty to the United States," 21 Cong. Rec. 7587 (remarks of Sen. Dawes), and "a gratuity to the amount stated in this bill to these Indians who have thus remained faithful to civilization and humanity in the most trying period which the people of my State were ever called upon to go through," 21 Cong. Rec. 7588 (1890) (remarks of Sen. Dawes). The language and context of the Appropriations Acts thus strongly support the view that those provisions constituted simple appropriations, and did not create a trust relationship.

Recognizing that the language and legislative history of the Appropriations Acts do not provide compelling evidence that the Acts created a trust, the trial court based its decision principally on the context in which the Acts were enacted and on the contemporaneous and subsequent treatment of the 1886 lands by the Department of the Interior and Congress. *Wolfchild I,* 62 Fed.Cl. at 541-43. We have examined all of the legislative and administrative materials referred to by the court and called to our attention by the parties. While the legal issue is a complex one and untangling the historical materials is difficult, we conclude that the Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction, and not creating a trust relationship through which the 1886 Mdewakantons and their descendants obtained beneficial ownership rights in the 1886 lands.[5]

The analysis of this issue is further complicated by the fact that, in the years between 1888 and 1980,

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[5] Because certain terms have been used inconsistently by different sources and at different times, we wish to make clear at the outset that when we use the terms "equitable" or "beneficial" title or ownership with respect to land that is held in trust, we refer to the trust beneficiary's ownership of all interests in the land except for legal title. The plaintiffs in their complaint use the term "equitable title" for that purpose, *see* Fifth Amended Complaint ¶ 8, and the trial court has used that term most of the time, *see Wolfchild I,* 62 Fed.Cl. at 534, 540, 543, 549, with some variation, *see Wolfchild v. United States,* 72 Fed.Cl. 511, 528 (2006) ("equitable interest"); *id.* at 532 ("beneficial owner").

Interior Department officials at times characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants. What is important, however, is not what terms were used to refer to the relationship between the government and the beneficiaries of the Appropriations Acts, but the substance of what Congress did through the Appropriations Act and what, if any, property interest the beneficiaries obtained in the 1886 lands as a result. On that issue, as we shall see, the Interior Department's policy remained unchanged from the 1890s until 1980. The Department's consistent position was that the United States owned those lands and that the 1886 Mdewakantons and their descendants who were assigned plots from the 1886 lands were limited to temporary use and occupancy of those plots. For the reasons discussed below, we conclude that the Interior Department's position is correct – that the 1886 Mdewakantons and their descendants never obtained vested rights in the 1886 lands. In short, nothing in the Appropriations Acts or the conduct of the Interior Department had the effect of conveying equitable title in the 1886 lands to the 1886 Mdewakantons and ultimately to their lineal descendants.

A

The trial court noted that in the 1863 statute that first acknowledged the contributions of the loyal Mdewakantons during the Sioux uprising, Congress authorized the conveyance of land for "each

individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians." Act of Feb. 16, 1863, 12 Stat. at 654. The 1863 statute provided that the property "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." *Id.* That language clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute. The trial court regarded the 1863 statute as relevant to the proper interpretation of the Appropriations Acts, which were enacted 25 years later, stating that the 1888 Act was "motivated in part by the fact that the 1863 Act was not successfully implemented." *Wolfchild I,* 62 Fed.Cl. at 542.

While Congress's motivation to assist the loyal Mdewakantons no doubt derived in part from the failure of earlier efforts at assistance, it is clear that Congress did not use the 1863 statute as a model for the Appropriations Acts. To begin with, there is a significant difference between the language used in the 1863 statute and the language used in the Appropriations Acts. The 1863 statute referred solely to allotments of land, while the Appropriations Acts referred to the purchase of a wide variety of assets within the discretion of the Secretary of the Interior. Moreover, the first of the two 1863 statutes expressly stated that the beneficiaries would obtain an inheritable interest in the allotted lands, while the Appropriations Acts say nothing about the nature of

the ownership interest in any of the purchased lands. Those differences strongly suggest that Congress intended an approach in the Appropriations Acts different from the approach used in the first 1863 statute.

Even more telling is that the second of the two 1863 statutes, which was enacted only two weeks after the first and superseded it, merely authorized the Secretary to assign land to those who had assisted the white settlers during the uprising; it did not prescribe any particular form of ownership interest in the properties. Instead, it pointedly left open the nature of the interest that the assignees would have in the lands, stating that the lands would be "held by such tenure as is or may be provided by law." Thus, the failure of the 1863 Acts cannot be viewed as leading Congress to create permanent ownership interests in the 1886 lands along the same lines set forth in the first 1863 statute, because the second of the two 1863 Acts left the question of ownership open to later resolution. That approach, of postponing resolution of the ownership question, is the same as the interpretation the Interior Department was later to accord to the Appropriations Acts with respect to the ownership of the 1886 lands.

The plaintiffs point to the references in two of the Appropriations Acts (the 1889 and 1890 Acts) to the "family" or "families" of the 1886 Mdewakantons as suggesting that the Appropriations Acts were intended to create vested ownership rights in the purchased land, as was explicitly proposed in the first

1863 statute. The language of the Appropriations Acts, however, makes clear that the references to the Mdewakantons' families was not directed at creating rights of inheritance in the properties purchased, but instead was simply part of the directive to the Secretary as to the scope of his discretion in spending the appropriated funds. The 1890 statute, for example, directed that the funds were to be spent on such items as lands, agricultural implements, buildings, cattle, horses, food, or clothing "as may be deemed best in the case of each of these Indians or families thereof." Act of Aug. 19, 1890, ch. 807, 26 Stat. at 349. That language makes clear that the authorization for expenditures extended to cover the needs of the families of the beneficiaries, not simply the needs of the beneficiaries themselves. It does not speak to the nature of the interest created in any real property purchased with the funds.

The events immediately preceding the Appropriations Acts shed light on the nature of the course Congress chose in the Appropriations Acts and the reasons for its choice. In the years shortly before the enactment of the Appropriations Acts, Congress had authorized the transfers of land to individual Indians in two different ways. In the General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress authorized the Interior Department to grant individual Indians permanent interests in land, with the proviso that the conveyances would be subject to a 25-year restriction on alienation during which time the United States would hold the land in trust for the recipients. At the

expiration of the trust period, the Act provided, "the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance [sic] whatsoever." 24 Stat. at 389. Significantly, even though the first of the Appropriations Acts was enacted only a year after the General Allotment Act, and with respect to the same subject matter as the first 1863 statute, the Appropriations Acts differed from those two predecessors in that it contained no reference to the creation of trust responsibilities or rights of inheritance in the purchased lands.

Also relevant to an assessment of Congress's intentions as to the interests to be conveyed under the Appropriations Acts are the immediately preceding 1884, 1885, and 1886 statutes that sought to make provision for the loyal Mdewakantons. Those statutes used language similar to the language used in the Appropriations Acts, and neither Congress nor the Interior Department gave any indication that they regarded that language as mandating the creation of a trust relationship. In fact, the Interior Department elected to convey the lands purchased with the 1884, 1885, and 1886 funds to the beneficiaries in fee, although it promptly became clear that the fee transfers failed of their purpose when the recipients sold or encumbered the property.

Thus, at the time of the Appropriations Acts, Congress had two recent models before it for conveying land rights to the 1886 Mdewakantons, one of which explicitly created a trust relationship and one

of which plainly did not. In drafting the Appropriations Acts, Congress chose the more flexible language that did not expressly create a trust relationship. In this context, the best reading of the Appropriations Acts is that Congress did not elect to create a trust relationship, but instead chose language simply authorizing the expenditure of funds for a particular purpose, with the Secretary of the Interior being given broad discretion to select not only which items to purchase but also, implicitly, what type of interest to convey in any lands that might be purchased with the appropriated funds.

The Interior Department recognized, of course, that Congress intended the 1886 Mdewakantons to be the specific beneficiaries of the Appropriations Acts. The Secretary of the Interior accordingly sought to ensure that the funds appropriated under the Act would be spent for the benefit of those individuals. With respect to funds that were used to purchase land (as opposed to personal property that was rapidly consumed), the Secretary adopted a policy designed to promote Congress's intent by assigning the land to individuals from within the group of 1886 Mdewakantons and subsequently to individuals from within the class of the descendants of those Mdewakantons.

Contemporaneous documents make clear that the Secretary of the Interior considered himself bound by the terms of the statutes to reserve the usage of the 1886 lands for members of the particular beneficiary class (the 264 individuals determined by

a contemporaneous Interior Department census to constitute the 1886 Mdewakantons), and that he did so by selecting assignees from within that group. Later, in the absence of any congressional direction as to the ultimate disposition of ownership interests in the lands, the Secretary selected successor assignees from the class of lineal descendants of those beneficiaries. In both instances, the Secretary held the property for the use and benefit of individuals selected from a defined class.

Nothing in the text of the Appropriations Acts effected or required the conveyance to any particular Mdewakanton of a permanent interest in the 1886 lands, such as equitable title. Nor did the Interior Department treat the Appropriations Acts as creating any such interest. Although the descendants of an assignee were typically awarded assignments of property after the death of the previous assignee, that practice was not universal, and the descendants were not regarded as having a legal right to that successor assignment. Indeed, to hold that each of the descendants of the 1886 Mdewakantons obtained a small, undivided ownership right in each of the properties purchased with the Appropriations Acts funds – the right that the plaintiffs' theory of this case suggests they are entitled to – would have defeated the purpose of the original legislation by making it difficult, if not impossible, to maintain the practice of assigning the relatively small plots of the 1886 lands by assigning the plots sequentially to successor assignees. The purpose of the legislation

was to provide plots large enough for residential and agricultural purposes, and the assignment practice was designed to keep those plots intact, not to continue subdividing them as the number of descendants grew or to force their sale in order to distribute the sale proceeds among numerous competing claimants.

The fact that the Secretary adopted a policy of assigning plots of the 1886 lands to the descendants of the 1886 Mdewakantons does not conflict with the government's position that the descendants of the 1886 Mdewakantons did not hold equitable title to the 1886 lands. To the contrary, as we discuss below, the evidence as to the policy and practice of the Interior Department with regard to the 1886 lands over the years demonstrates that the Department did not regard the 1886 Mdewakantons and their descendants as the beneficial owners of those lands.

B

In the years immediately following the Appropriations Acts, the Interior Department began assigning parcels of the 1886 lands to individual Mdewakantons. As early as 1889, the Secretary of the Interior set forth the Department's policy with respect to the beneficiaries' rights in the assigned properties. In a letter to the Commissioner of Indian Affairs, the Secretary instructed that after appropriate purchases of land had been made and the particular qualifying beneficiaries selected, the plots should be assigned "with a form certificate of

occupancy." The Secretary envisioned that the certificate would provide that the assignee was being awarded the use of the land with title being reserved in the United States. The Secretary added that a patent to the land might be issued "with such limitations as shall be required by law, at such time hereafter as shall be authorized by the statutes." Thus, the Secretary concluded that the issue of "further conveyance thereof to the Indians" would be left "subject to such further determination as may be authorized by law." By that means, the Secretary noted, "the Indians will not be able to dispose of or incumber [sic] said lands, and title can be withheld from those, if any, who fail to occupy and make proper use of the portion assigned to them." With the question of the ultimate ownership of the lands left subject to later legislative action, for the time being all that was to be conveyed to the 1886 Mdewakantons was a temporary right of occupancy.[6]

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[6] Based on an 1899 letter from the Acting Commissioner of the Office of Indian Affairs, which refers to the 1886 lands as being "held in trust for [the 1886 Mdewakantons]," the plaintiffs argue that the Interior Department recognized from the outset that the Appropriations Acts create a trust relationship with the 1886 Mdewakantons. The 1899 letter, however, is entirely consistent with the Secretary's earlier articulated policy and does not support the plaintiffs' contention that the 1886 Mdewakantons had obtained a vested interest in the 1886 lands. The letter does not suggest that the beneficiaries of the Appropriations Acts enjoyed equitable ownership of the lands or any interest other than the right of occupancy and use. To the contrary, the letter stated, in accordance with the Secretary's 1889

(Continued on following page)

That remained the policy of the Interior Department throughout the period between 1888 and 1980. According to a 1904 report, most of the purchased lands had already been assigned to individual qualifying Mdewakantons, although the early assignments were not documented by certificates as the Secretary had instructed. By the early part of the twentieth century the lands that had been purchased with the Appropriations Acts funds had been divided into 89 parcels and had been assigned to selected individuals from among the 1886 Mdewakantons.

Beginning in 1905, the Department formalized the assignments through documents known as Indian Land Certificates. Those documents authorized each assignee to reside on or use the land either for his lifetime or until he abandoned the land. When a particular assignment ended, either by the death of the assignee or when the assignee abandoned the land or otherwise violated the terms of the assignment, the Interior Department would select another assignee for the plot in question. Frequently, the Interior Department would assign a plot to the child of the previous assignee, but sometimes another descendant of the 1886 Mdewakantons would be

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letter, that "the title to all the land purchased [by an Interior Department agent under the Appropriations Acts] is still vested in the United States . . . and that in all probability steps will be taken at an early day looking to the allotment of said lands by the Department to such Indians as the late Agent has designated."

given the assignment. In some instances, the lands were leased to persons other than the descendants of the 1886 Mdewakantons, in which cases the lease proceeds were kept in an account for the 1886 Mdewakantons and their descendants.

The Indian Land Certificates that were issued to document the assignment of the 1886 lands stated that the property was held "in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land."[7] In the event that the beneficiary should abandon the land, the certificates provided that the land would be "subject to assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota May 20, 1886, or a legal descendant of such resident Indian." The trial court concluded that the language of those certificates supports the interpretation of the Appropriations Acts as dictating that the 1886 lands were to be held in trust for the 1886 Mdewakantons and their descendants as trust beneficiaries, and that the beneficiaries were accorded equitable ownership rights in the 1886 lands. *Wolfchild I,* 62 Fed.Cl. at 541-42; *Wolfchild II,* 68 Fed.Cl. at 791.

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[7] Some of the later-issued certificates, which are included in the record, omitted the use of the term "trust" and instead stated that the assignee "is entitled to immediate possession of the land for his or her lifetime, as long as he or she shall occupy and use the land," with the assignment being nontransferable and subject to cancellation if the assignee ceased to use and occupy the property as his or her principal place of residence.

We do not interpret the Indian Land Certificates in that manner. While it is true that the Indian Land Certificates used the term "trust" and referred to the assignee "and [his or her] heirs" as being "entitled to immediate possession of said land," the certificates did not state that they conveyed or reflected the conveyance of vested interests in the assigned lands. Instead, they referred to the conveyed interest as only the right of occupancy and use.

The interpretation of the Indian Land Certificates as conveying only the right of temporary occupancy and use is supported by this court's decision in *Cermak v. Babbitt,* 234 F.3d 1356 (Fed.Cir.2000), another case dealing with the rights of the 1886 Mdewakanton descendants in the 1886 lands. In *Cermak,* we stated that the record "reveals that the Secretary elected to convey only temporary use and occupancy rights to individual Indians and used Indian Land Certificates to effect the assignment of these rights." *Id.* at 1363. Although this court's specific holding in *Cermak* – that the Appropriations Acts did not result in allotments of the 1886 lands under the General Allotment Act – is not squarely dispositive of the argument made by the plaintiffs in this case, the court's conclusion that the 1886 Mdewakantons obtained "only temporary use and occupancy rights" in the 1886 lands provides support for the government's position that the Indian Land Certificates did not convey or document the conveyance of beneficial ownership of the 1886 lands.

The district court in *Cermak v. Norton,* 322 F.Supp.2d 1009 (D.Minn.2004), *aff'd,* 478 F.3d 953 (8th Cir.2007), reached the same conclusion. There, the same plaintiffs again challenged the Interior Department's decision that the assignment of two plots from the 1886 lands to their ancestor, John Cermak, conveyed only a life interest in that property and did not give them rights of inheritance with respect to those lands. The court concluded that the Interior Department's position – that the 1886 land assignees obtained no beneficial interest in the assigned lands – had been consistent and constituted a reasonable interpretation of the pertinent statutes. 322 F.Supp.2d at 1015. The Eighth Circuit affirmed, noting that the Interior Department's longstanding policy had been that the Indian Land Certificates bestowed only a temporary tenancy conditioned on personal occupancy and use, "rather than an ownership interest that the Certificate holder's heirs may inherit." 478 F.3d at 957.

Finally, in administrative adjudications, the Interior Department construed the Indian Land Certificates in the same way. *See Brewer v. Acting Deputy Assistant Sec'y – Indian Affairs,* 10 I.B.I.A. 110 (1982); *In re Estate of Gofas,* Indian Probate No. TC 389S-81, at 41-42 (Interior Office of Hearings and Appeals Oct. 26, 1990) ("despite the ambiguous language contained in the Indian Land Certificate form itself, the Bureau of Indian Affairs and the Department of the Interior have consistently interpreted this document as granting to the certificate holder

only a right of use and occupancy for life, subject to the conditions contained therein"). The Indian Land Certificates therefore do not establish that the assignees who held those certificates were trust beneficiaries who owned a beneficial interest in the 1866 lands.

C

In addition to relying on the text of the Indian Land Certificates, the plaintiffs point to various statements by Interior Department officials in which those officials referred to the relationship between the government and the 1886 Mdewakantons as having the character of a trust. It is true that there is some variation in the way that Interior Department officials have characterized that relationship over the years. As we have noted, however, the label given to the relationship is not as important as the substance of the respective parties' rights. And as to that issue, the Interior Department's position has been consistent: The 1886 Mdewakantons and their descendants were eligible for assignments conveying temporary use and occupancy rights in the land, but they did not obtain vested rights that reflected beneficial ownership interests in the property.

In 1915, the Interior Department was forced to address the issue of the nature of the rights attendant to the assignments of the 1886 lands. That issue came to a head as a result of several inquiries concerning whether the assignments of portions of

the 1886 lands gave rise to an inheritable interest in the assigned plots. In one case, the original assignee occupied a small plot until his death. If the assignment were deemed a vested and inheritable interest, the plot would be divided among his three heirs. After some internal debate, the Interior Department concluded that the assignments did not create vested inheritable rights, that both legal and equitable title are in the United States, and that the Secretary of the Interior could select a successor assignee rather than being bound to dispose of the property in accordance with the laws of inheritance.

The position taken by the Interior Department in 1915 as to the ownership status of the 1886 lands is reflected in two memorandums signed off on by the Assistant Secretary. The first memorandum set forth the Department's position that the assignees of the 1886 lands "possessed no other title than a right of occupation of the lands involved, and, therefore, possessed no interest in said lands which was of the nature of an estate of inheritance." Under the Indian Land Certificates, according to the memorandum, the right conferred on the assignees was not a vested right, but was merely a tenancy at will that terminated with the death of the occupant. With respect to the ownership interests in the land, the memorandum stated the following (emphasis added):

> The Secretary of the Interior has not been authorized to hold these lands in trust for the Mdewakanton Sioux. These lands may not be disposed as trust lands. They may not

> be sold with the approval of the Secretary of the Interior, and *both legal and equitable title are in the United States.*

Accordingly, the memorandum concluded, the Secretary was not required to split up a small assigned tract among multiple heirs, but had discretion to assign the tract and could, for example, assign it to the particular heir who had "improved and lived on the tract and is willing to continue to do so."

A second memorandum issued later that year after further internal debate set forth the Department's intention to adhere to its policy of reassigning "the vacant tract in each case to the Mdewakanton Sioux Indian who appears to be most equitably entitled to have the temporary use and occupancy of it." That memorandum concluded that the Appropriations Acts "did not intend to sanction any vesting of a legal interest in these lands by the occupants"; rather, according to the memorandum, Congress intended for the land to be "disposed of in a manner which was deemed best by the Secretary of the Interior, and that he deemed it best not to dispose of any permanent interest in these lands pending further legislation which has not yet been enacted." In light of the fact that many of the tracts were very small – from three to seven acres – the memorandum observed that if the property had to be shared with numerous heirs of the former occupant, "it would result in much confusion and hardship, and practically in an ejectment of the Indian who is most equitably entitled to live on the land, or who may be

actually in possession, living upon it as his only home, and cultivating it to his best advantage." The memorandum noted that in many instances heirs not already living on the property "are amply provided for elsewhere," and many of them had left the area and therefore were not good candidates to continue the occupancy and use of the property.

The second memorandum, like its predecessor, rejected the suggestion that the assignees of land purchased under the Appropriations Acts obtained equitable title to that land. It noted that the preferred approach of making reassignments on equitable grounds rather than as a matter of inheritance had been used for years and had elicited very few complaints. Accordingly, the Department decided to continue reassigning the 1886 lands for temporary use and occupancy "until such time as additional legislation is procured authorizing allotments in severalty on such lands."

In the years following the 1915 policy determination, the Interior Department adhered to its position with respect to the ownership interests in the 1886 lands. For example, in 1933 when a question was raised as to the ownership rights to two of the 1886 tracts, the Department advised that title to the tracts was in the United States, "assignees or their heirs possessing only the right of occupancy and use," and that the lands "are not of an inheritable status." Similarly, in a 1937 decision regarding the reassignment of a tract that was abandoned by the assignee, the Department noted that the 1886 lands "were

purchased for the Indians by the United States. No trust is created in the deeds."

To be sure, the Interior Department has consistently recognized that in the original legislation Congress intended for the appropriated funds to be expended for the benefit of the 1886 Mdewakantons. Consistent with the principle that there is 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), Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants, even though the 1886 Mdewakantons were not a tribe of Indians, but rather were viewed as a group of individuals who had severed their tribal relations and were in need of assistance. The Department made clear, however, that its treatment of the 1886 lands as held in trust status for the 1886 Mdewakanton descendants did not give those beneficiaries any interest other than a potential right of temporary occupancy and use of the lands. And the Department recognized that the lands had been acquired by the United States in fee with no formal trust designation. For example, a 1970 Interior Department memorandum stated that the original legislation authorized the purchase of lands to be used for the benefit of the 1886 Mdewakantons "without trust designation or other limitation in title." The memorandum concluded that in accordance with the original legislative purpose the lands should remain available only for the use of "qualified

Mdewakanton Sioux Indians." To change the status of the lands, it added, "Congress should be asked to permit such action by affirmative legislation."

A 1974 opinion letter from the Solicitor's office at the Interior Department sets forth the most definitive statement of the Department's position as to the legal status of the 1886 lands shortly before the enactment of the 1980 statute. The opinion letter noted that the legal title to the 1886 lands was taken by the United States, that tenancies at will, or defeasible tenancies, were granted in the form of land assignments to members of the beneficiary class (the 1886 Mdewakantons and their descendants), and that in some instances leasehold interests had been granted to non-members of the beneficiary class, with the income being expended for the benefit of reservation communities "in which members of the beneficiary class reside or with which they are affiliated." The opinion letter concluded that the lands were best viewed as being held by the United States in trust, with the Secretary "possessing a special power of appointment among members of a definite class," and having the authority to grant an interest in the form of either a tenancy at will or a defeasible interest in the land. The opinion letter makes clear that its conclusion that the lands were held in trust did not mean that the 1886 Mdewakantons and their descendants owned equitable title to the 1886 lands. To the contrary, the opinion letter stated, "[w]hen the present arrangement was established, indications are that it was intended as a temporary arrangement and

a permanent legislative solution was contemplated." The opinion letter recommended that the Bureau of Indian Affairs "undertake to ascertain whether some legislative disposition of beneficial title to these lands consistent with the present situation is practical and can be recommended to the Congress."

The 1974 memorandum highlighted the point that the key question regarding the rights at issue in this case is not whether the 1886 lands were held "in trust" for the 1886 Mdewakanton descendants to whom they were assigned, but rather what rights were conferred in the assigned lands. Plaintiffs' theory is that the class consisting of the 1886 Mdewakantons and their lineal descendants obtained equitable title to the 1886 lands, such that each of them was legally entitled to a share of the proceeds of those lands. The government's theory is that the 1886 Mdewakantons were merely the intended beneficiaries of a congressional appropriation, and their descendants were merely the beneficiaries of an interim Interior Department policy designed to approximate Congress's purpose in the Appropriations Acts pending legislation settling the ownership issue. We conclude that the latter is the better view in light of the purpose of the Appropriations Acts and the subsequent history pertaining to the administration of the 1886 lands. In so doing, we think it significant that throughout the period between the enactment of the Appropriations Acts and the passage of the 1980 Act that directed that the 1886 lands be held in trust for the three communities, the Interior

Department's consistent position was that the lands were meant to be held in small plots for a small number of individual Mdewakantons living on or near the lands, not collectively for the entire class of Mdewakanton descendants, wherever they might be found.

In sum, we find no persuasive support in the history of the Interior Department's policies with respect to the administration of the 1886 lands that supports the plaintiffs' theory that the Appropriations Acts created permanent beneficial rights in the descendants of the 1886 Mdewakantons. Consistent Interior Department practice was to assign plots of those lands to individuals chosen from among the 1886 Mdewakantons and their descendants, but there was no suggestion in the administrative practice that the beneficiaries obtained equitable title or any other vested rights in those lands.

D

The plaintiffs argue that several twentieth-century statutes show that Congress intended to create a trust relationship with respect to the 1886 lands through which the descendants of the 1886 Mdewakantons obtained an undivided equitable interest in those lands and their proceeds. We conclude that the statutes on which the plaintiffs rely do not support their position.

The plaintiffs first point to a 1901 statute in which Congress authorized the sale of a small parcel

of the 1886 lands in Redwood County, Minnesota, and provided for the purchase of another parcel in exchange. The significance of that legislation, according to the plaintiffs, is that it required "the written consent of the adult Indians residing in Redwood County" before the sale could be effected. *See* Act of Feb. 25, 1901, ch. 474, 31 Stat. 805, 806. Invoking general principles of trust law – in particular the requirement that in some circumstances the consent of the beneficiaries is required to terminate a trust – the plaintiffs contend that the requirement of consent suggests that the property was being held in trust for the Indians. The plaintiffs also rely on the remarks of Senator Pettigrew regarding the legislation, in which he stated that the 1886 Mdewakantons were not a "band of Indians," but "are occupying separate tracts and have the title." 34 Cong. Rec. 2523 (1901).

The statutory requirement to obtain consent for the sale from the adult Indians in Redwood County does not demonstrate the existence of a trust. Instead, it appears simply to reflect congressional recognition that the 1886 lands were intended for the use of the 1886 Mdewakantons and that it was therefore appropriate to afford them the right to object to any proposed disposition of those lands. Indeed, the Senate report on the bill refers to the consent requirement and does not in any way suggest that it is tied to any requirements of trust law. *See* S.Rep. No. 56-2186, at 2 (1901). As for Senator Pettigrew's comment, his statement that the Mdewakantons "have the title" is not supported by

any analysis and is contrary to the position taken by the Secretary of the Interior contemporaneously with the enactment of the Appropriations Acts, as noted above. Absent any other evidence that the Mdewakantons "ha[d] the title" to the 1886 lands, Senator Pettigrew's statement simply appears to be in error.

The plaintiffs argue that subsequent Acts of Congress provide further proof that Congress understood that those lands were held in trust for the Mdewakantons and their descendants. In our view, those statutes provide no support for the plaintiffs' argument, and in fact support the contrary inference.

In 1906, Congress authorized the sale of a small portion of the 1886 lands on the condition that the proceeds of the sale be paid to the current assignees or that the proceeds be used for the purchase of lieu lands elsewhere. Act of Mar. 19, 1906, ch. 962, 34 Stat. 78. Nothing in the text of the statute states or suggests that either the particular assignees who occupied the property at the time or the 1886 Mdewakantons and their descendants in general had an ownership interest in the property. The two reports accompanying the legislation both recited that the land "belongs to the United States," and both added that the land "was at one time intended that it should be allotted to certain Indians, but it has never been so allotted." S.Rep. No. 59-1636, at 1 (1906); H.R.Rep. No. 56-1576, at 1 (1906).

Unlike the 1901 statute, the 1906 statute did not require the consent of the assignees (or anyone else) before effecting the transaction. Thus, whatever force the plaintiffs' argument about the consent requirement might have with respect to the 1901 statute, that argument is not applicable to the 1906 statute. In fact, the absence of any provision for obtaining the consent of any of the 1886 Mdewakantons undermines the plaintiffs' argument that Congress regarded the 1886 Mdewakantons as the equitable owners of the land. Congress's decision to compensate the particular affected assignees by giving them the proceeds from the sale or obtaining lieu lands in exchange for the sold property thus appears to be an effort to minimize the burden of depriving the particular assignees of their temporary use and occupancy of the property, not an acknowledgement that the class of 1886 Mdewakantons and their descendants held an ownership interest in the land.

A statute enacted in 1923 provides further evidence that Congress did not regard the Appropriations Acts as having conferred any ownership rights on the 1886 Mdewakantons and their descendants. In that statute, Act of Feb. 14, 1923, ch. 76, 42 Stat. 1246, Congress extended the provisions of the General Allotment Act of 1887 to the properties purchased with the Appropriations Acts funds, which had the effect of authorizing the Secretary of the Interior to allot the properties to particular individuals from among the 1886 Mdewakantons and their descendants. Significantly, the legislative history of the 1923

Act indicates that the 1886 Mdewakantons were not regarded as having any ownership interest in the property. To the contrary, in the letter recommending enactment of the legislation, the Acting Secretary of the Interior explained that the Appropriations Acts did not specifically indicate the manner in which title would be held to the 1886 properties, and noted that the "United States now holds the title in fee to all those lands." H.R.Rep. No. 67-1379, at 1 (1923). The letter continued, "The legal title to all the above purchased lands, as herein indicated, is in the United States, the Indians having the use and occupancy only." *Id.; see also* S.Rep. No. 67-129, at 1 (1921).

Furthermore, if the 1923 statute had been implemented, the effect would have been to allot the 1886 lands to a small number of the 1886 Mdewakantons – presumably those with assignments at the time. Such a step would have deprived the other members of the class of 1886 Mdewakanton descendants of any present or future interests in the 1886 lands. Accordingly, Congress's decision in 1923 to authorize the allotment of the 1886 lands is contrary to the plaintiffs' contention that they obtained vested rights in those lands through the Appropriations Acts.

Although the 1923 statute authorized the Secretary to make individual allotments of the 1886 lands, the Secretary elected not to do so. In the years following that Act, federal Indian policy changed from favoring individual allotments to supporting tribal self-determination, a policy change that culminated

in the enactment of the Indian Reorganization Act of 1934. It was under the authority of that Act that the three Mdewakanton communities were organized and reservations granted for them.[8]

The effect of that change in policy was manifested in a 1944 statute that authorized the Department of the Interior to purchase two small tracts of the 1886 lands for a Wildlife Refuge. The 1944 statute, Act of June 13, 1944, ch. 243, 58 Stat. 274, stated that the subject properties, which had been acquired pursuant to the Appropriations Acts for Indian use, were "no longer used by Indians." It then provided that as part of the transaction, a total of $1,261.20 would be made available for transfer on the books of the Treasury Department "to the credit of the Medawakanton and Wahpakoota Bands of Sioux Indians" and that the payment "shall operate as a full, complete, and perfect extinguishment of all their right, title, and interest in and to the lands above described." *Id.*

The plaintiffs argue that the payment and the reference to the "right, title, and interest" in the two

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[8] The plaintiffs have called our attention to the Supreme Court's recent decision in *Carcieri v. Salazar,* ___ U.S. ___, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), which involved the construction of a provision of the 1934 Act. They contend that *Carcieri* supports their argument that the Appropriations Acts created a trust for the 1886 Mdewakantons and their descendants. We do not regard *Carcieri* as in any way relevant to that issue.

tracts of the 1886 lands indicates that Congress recognized an equitable interest in the 1886 lands. The problem with that argument is that the payment was made to a tribe, not to a group of individuals, and in particular not to the lineal descendants of the 1886 Mdewakantons. Thus, the 1944 statute demonstrates that Congress appreciated that the 1886 lands were purchased for the general purpose of benefiting the 1886 Mdewakantons, and that it was appropriate that some compensation be paid for the disposition of that property. But it is contrary to the conclusion that any particular individuals had obtained vested rights in that property as to which consent or compensation was legally required before the property was sold.

The most significant twentieth-century legislative action bearing on the status of the 1886 lands is, of course, the 1980 statute that terminated the assignment system and placed the 1886 lands in trust for the three communities. That statute and its legislative history make clear that Congress did not regard the Appropriations Acts as having conferred equitable title in the 1886 lands on the 1886 Mdewakantons and their descendants.

The committee reports on the 1980 legislation recognized that the 1886 lands were held by the United States for the use of the 1886 Mdewakantons and their descendants. *See* S.Rep. No. 96-1047, at 1-2 (1980); H.R.Rep. No. 96-1409, at 2 (1980). But the reports did not suggest that the 1886 Mdewakantons, either individually or collectively, held beneficial title to the 1886 lands. To the contrary, as the Senate

report noted, the lands were owned by the United States pursuant to an "unusual" arrangement under which the land was made available for assignment to eligible beneficiaries of the three Appropriations Acts. S.Rep. No. 96-1047, at 2. Because that arrangement did not give vested rights to the land to any of the descendants of the 1886 Mdewakantons, Congress was free to alter the ownership status of the land to create trusts for the three communities.[9] *See N. Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 656, 96 S.Ct. 1793, 48 L.Ed.2d 274 (1976); *United States v. Jim,* 409 U.S. 80, 82, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972); *LeBeau v. United States,* 474 F.3d 1334, 1342-43 (Fed.Cir.2007).

It was clear to those who proposed the 1980 legislation that despite the overlap among the descendants of the 1886 Mdewakantons and the membership of the three communities, some of the 1886 Mdewakanton descendants would cease to be beneficiaries under the new statute. An Interior Department memorandum describing the effect of the

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[9] The sponsor of the 1980 Act in the House, Rep. Richard Nolan, explained that under the Appropriations Acts, the 1886 lands were "held by the United States for exclusive use by descendants of the May 20, 1886, Mdewakanton Sioux," unlike the reservation land, which "belonged to all Mdewakanton residing on each reservation, according to membership requirements stipulated by the tribe." 126 Cong. Rec. 8897 (Apr. 23, 1980) (remarks of Rep. Nolan). The 1980 Act, he explained, "will put [the 1886 lands] on an equal status with [reservation] land," and the "change in the legal status of the 1886 Mdewakanton land will place all Mdewakanton lands on an equal basis." *Id.*

proposed transfer of the 1886 lands to be held in trust for the three communities specifically acknowledged that, because of the lack of complete overlap between the membership of the communities and the descendants of the 1886 Mdewakanton, some individuals could lose the opportunity for occupancy and use of those properties under the proposed legislation. The memorandum stated:

> [T]here are, potentially, a number of Indian people who are eligible descendants entitled to use rights in this property but who are not members of any of the three Indian communities and would, therefore, not acquire any rights (they may in fact lose rights) by the proposed change in the title to this property. There is no provision in the Bill to protect any such property rights there may be.

That acknowledgement makes clear that the Interior Department understood that the rights of the Mdewakanton descendants were limited to eligibility for use and occupancy of the 1886 lands, not equitable ownership.[10] In fact, the "savings clause" that preserved occupancy rights for all those then holding

[10] The plaintiffs argue that the quoted statement was in a document relating to a bill introduced in an earlier Congress. The earlier bill and the Act ultimately passed in 1980, however, were nearly identical. The process of obtaining the 1980 legislation was an ongoing one that simply spanned more than one Congress. The document is therefore properly viewed as part of the legislative history of the 1980 Act.

assignments to portions of the 1886 lands was added to the bill, perhaps in an effort to mitigate the effect of the new statute on those who were not members of the communities and would otherwise lose their current right of occupancy of the 1886 lands.

From our survey of the various statutes enacted in the aftermath of the Appropriations Acts, we see no evidence that Congress interpreted the Appropriations Acts as creating a trust relationship with the 1886 Mdewakantons. Nor do we see any indication that Congress wished, in the subsequent legislation, to convert the relationship between the government and the 1886 Mdewakanton descendants into a trust relationship in which the descendants would be treated as beneficial owners of the 1886 lands.

E

In addition to invoking subsequent legislation and administrative practice, the plaintiffs seek support for their position in several court decisions and in positions taken by government lawyers in previous cases involving the 1886 lands. None of those arguments is persuasive.

First, the plaintiffs and the Lower Sioux Indian Community rely heavily on the Court of Claims' decision in *Duncan v. United States,* 229 Ct.Cl. 120, 667 F.2d 36 (1981). That case involved a series of statutes that authorized the purchase of land for certain Indians in California. The first of those statutes authorized the Secretary of the Interior to

purchase lands and water rights for the use of the designated Indians, to construct suitable irrigation facilities on those lands, and to "fence, survey and mark the boundaries of such Indian Reservations." Act of June 21, 1906, Pub.L. No. 258, ch. 3504, 34 Stat. 325, 333 (1906). Subsequent statutes renewed the authorization in similar terms, and suitable property was purchased with the appropriated funds. In 1958, Congress enacted a statute that provided that the trust relationship with respect to the lands would be terminated under certain conditions and the land turned over to individual Indians. *See* Pub.L. No. 85-671, 72 Stat. 619 (1958). The Indians later filed an action for breach of trust, contending that the government had not satisfied the statutory requirements for termination of the trust. The Court of Claims ruled that the California lands were held in trust for the Indians and that the government was liable for breach of trust because of its unauthorized, premature termination of the trust.

The plaintiffs contend that the land purchases in this case and the purchase at issue in the *Duncan* case are very similar, and that the purchases in this case therefore must be treated as creating the same kind of trust relationship that was found to exist in *Duncan*. While there are some similarities between the two cases, there are important differences that make the *Duncan* case distinguishable. First, the initial statutes in *Duncan* expressly authorized the Secretary to procure land for the creation of "Reservations" for the Indians, a term that is typically

associated with the creation of a trust relationship between the government and the tribe or community of Indians for which the reservation is created. *See Cohen's Handbook of Federal Indian Law* §§ 3.04[2][c], at 191; 15.04[3][b], at 982; *see also N. Paiute Nation v. United States,* 8 Cl.Ct. 470, 485 (1985). Second, as the *Duncan* court pointed out, the "contemporaneous and continuing interpretation" of the authorizing statutes by the Interior Department was that those statutes created a trust relationship. In fact, the parties' agreed statement of facts contained a stipulation that from the time of the creation of the reservation until its termination, "the Secretary of the Interior recognized a federal trust relationship with the Robinson or East Lake Band, as a distinct Indian tribe or band of Indians." 667 F.2d at 41 n. 7. Third, in the 1958 statute that authorized the termination of the reservation, Congress clearly stated its understanding and intention that the reservation lands in question had been and would continue to be held in trust until final termination. *See* Pub.L. No. 85-671, § 9, 72 Stat. at 621 (providing for certain benefits to be conferred "[p]rior to the termination of the Federal trust relationship in accordance with the provisions of this Act").

None of those factors is present here. The Appropriations Acts did not create a reservation for the 1886 Mdewakantons; there was no consistent and longstanding position by the Interior Department that the Appropriations Acts created a trust giving the descendants of the 1886 Mdewakantons vested

rights in the 1886 lands; and the 1980 statute that terminated the relationship created by the Appropriations Acts not only did not refer to that relationship as a trust relationship, but created an entirely different, and inconsistent, trust relationship with the three Mdewakanton communities. *Duncan* therefore does not control this case.

The plaintiffs also rely on a 1922 decision by the Court of Claims, *Medawakanton and Wahpakoota Bands of Sioux Indians v. United States,* 57 Ct.Cl. 357 (1922). That case arose after Congress enacted a statute in 1917 directing that the Sioux be awarded a back payment for the annuities that had been revoked by the 1863 legislation. Act of Mar. 4, 1917, ch. 181, 39 Stat. 1195. The 1917 statute directed that the amount of the back payment be reduced by any amounts that had been paid to the tribe and tribal members for their support in the interim. Among the set-off payments were the payments made pursuant to the Appropriations Acts. Nothing in that legislation or the court's judgment indicates that the monies were paid as part of a trust; they were simply funds that were previously paid to the tribe and to former tribe members and, as such, fell within the scope of what Congress had directed to be set off from the overall judgment in that litigation.

Finally, the plaintiffs argue that the government is estopped from denying that the Appropriations Acts created a trust relationship with the 1886 Mdewakantons and their descendants because government attorneys have acknowledged the existence

of such a trust in earlier litigation. We have examined the statements relied on by the plaintiffs and do not find anything said by the government attorneys in the referenced cases that would support the plaintiffs' claims in this one. In one instance, the government noted that the Indian Land Certificates documenting the assignments held by particular descendants of the 1886 Mdewakantons referred to the assigned land as "held in trust." Government counsel then stated that the 1980 legislation "changed the status of property represented by Indian Land Certificates" by transferring "property that the United States had held in trust for individual Mdewakanton Sioux, to the Sioux Community." In other instances, again referring to the Indian Land Certificates, government counsel stated the assigned lands were held in trust for individual Mdewakanton Sioux. That characterization of the property relationship reflected by each assignment is consistent with the way the Interior Department frequently characterized the assignments, but it falls far short of endorsing the plaintiffs' position that the United States held the 1886 lands in trust for the class of the 1886 Mdewakanton descendants and that the trust relationship rendered the members of that class equitable owners of those lands.

In another instance cited by the plaintiffs, a government attorney stated that the 1980 law "said we're not changing anybody's existing rights." In context, it is clear that the attorney's statement referred to the effect of the savings clause of the 1980 Act in

preserving the rights of existing assignees, not to the overall effect of the Act in giving beneficial title to the three communities.

In sum, we conclude that, as of the time of the 1980 Act, all indications were that neither Congress nor the Department of the Interior had conveyed any vested ownership rights in the 1886 lands, legal or equitable, to anyone. Instead, those lands were being held by the Department of the Interior for use by the 1886 Mdewakantons and their descendants pending an ultimate legislative determination as to how the ownership interests in the lands should be allocated. That determination came in 1980, when Congress provided that legal title in the lands would be held by the United States, which would hold the lands in trust for the three communities. For that reason, we conclude that the answer to the first of the certified questions in this case – whether the Appropriations Acts created a trust for the benefit of the 1886 Mdewakantons and their descendants – is no.

III

The second certified question asks whether the 1980 Act terminated any trust created by the Appropriations Acts.

Congress's purpose in the 1980 statute was to alter the ownership status of the 1886 lands. What Congress plainly sought to achieve was to have the United States' interest in the lands converted into a trust for the three communities, whereby the United

States would hold legal title to the lands and each of the three communities would hold equitable title to the portions of the 1886 lands allocated to it. The operative language of the statute makes that purpose plain. It states, in pertinent part, as follows:

> That all right, title, and interest of the United States in [the 1886 lands] which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians [under the Appropriations Acts] 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.
>
> . . . .
>
> . . . 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.

94 Stat. at 3262.

The trial court construed that statute as creating a trust in favor of the three communities and in turn requiring the three communities to hold the 1886 lands in trust for the 1886 Mdewakantons. The court further held that as of the time of the 1980 Act, the United States held only legal title to the 1886 lands, and the descendants of the 1886 Mdewakantons held equitable title. Therefore, the court concluded, when the 1980 Act transferred all the United States' right, title, and interest in the land, it transferred only legal title to the lands, and the descendants of the 1886 Mdewakantons continued to hold equitable title. *Wolfchild I,* 62 Fed.Cl. at 543. The plaintiffs agree with that construction of the statute and contend that they all share beneficial ownership of the 1980 lands in the form of an undivided equitable interest in the disputed property.

The main problem with the plaintiffs' theory is that if their interpretation of the 1980 Act is correct, it is hard to understand what the 1980 Act accomplished. At the time the 1980 Act was enacted, the United States already held legal title to the 1886 lands. According to the plaintiffs, they enjoyed beneficial ownership of the 1886 lands both before and after the 1980 Act, so the Act did not affect their interests in the 1886 lands. Moreover, in the plaintiffs' view the Act did not give the three Mdewakanton communities equitable title to those lands or, so far as we can discern, any other interest in the property. The plaintiffs suggest that although the Act declared that the United States would

henceforth hold the 1886 lands in trust for the three communities, the intended effect of the Act was to require the communities in turn to hold that property in trust for the descendants of the 1886 Mdewakantons, who would therefore hold equitable title to those lands. As a result, the communities, although explicitly designated in the Act as trust beneficiaries, would instead become trustees with regard to the property, even though they held no legal or equitable interest in that property.

The plaintiffs argue that their construction would not render the 1980 Act meaningless, because the 1980 Act rendered the lands subject to the communities' political jurisdiction and eligible for encumbrance with long-term leases. But the plaintiffs do not explain what practical impact it would have on the communities for the lands to be "subject to the communities' political jurisdiction" if legal title remained in the United States and equitable title remained in the 1886 Mdewakanton descendants. Moreover, as was explained in contemporaneous Interior Department documents, the availability of the lands for leasing under pertinent regulations depended on the lands being tribally owned. The Interior Department regarded the current status of the lands as barring such leasing. The plaintiffs have not shown how, under their construction of the 1980 Act, the pre-1980 "unusual ownership status of the land," which interfered with issuing long-term leases, *see* S.Rep. No. 96-1047, at 6; H.R.Rep. No. 96-1409, at

6, would change in a fundamental way that would affect the eligibility of the land for leasing.[11]

The trial court recognized the awkwardness of the plaintiffs' construction of the 1980 Act, noting that under that construction the Act appeared "to create a trust on a trust." The court, however, concluded that the task of sorting out the precise interests of the parties following the 1980 Act "must be remitted to exploration in future proceedings." *Wolfchild I,* 62 Fed.Cl. at 544 n. 13.[12] The problem arose, according to the court, because the 1980 Act "is so poorly drafted that it is difficult to make sense of its provisions." *Id.* To the contrary, we conclude that the Act is difficult to understand only if it is viewed in the way the plaintiffs view it – as intended to

[11] The plaintiffs suggest in passing that the status of the lands as "reservation" lands under the 1980 Act could "possibly" qualify those lands for leasing under the pertinent regulations. Yet it is the 1980 Act's reference to the conversion of the lands to "reservation" status that is most problematic for the plaintiffs' theory that the 1980 Act left their interests in the 1886 lands unaffected.

[12] In a later opinion, the court characterized the 1980 Act as having "created an overlay on the earlier trust" and that the government's post-1980 transfer of lands, monies, and other property to the communities made those communities "agents of the federal government in administering the trust on behalf of the trust beneficiaries." *Wolfchild v. United States,* 72 Fed.Cl. 511, 528-29 (2006). While Congress could certainly devise such an arrangement, we see nothing in the 1980 Act that establishes it, and assigning the communities the role of fiduciary agents is at odds with the statutory language that designates them as trust beneficiaries.

preserve equitable title to the disputed lands in the 1886 Mdewakanton descendants. If the Act is viewed as creating a trust in which legal title is held by the United States and beneficial title is held by the three communities, the wording of the Act achieves that purpose clearly and simply.

Nothing in the very straightforward language of the statute (and nothing in any of the legislative history) suggests that Congress intended to create a "trust on a trust" or any other elaborate structure in which the three communities would assume some undefined role between the continuing holder of legal title (the United States) and what the plaintiffs see as the continuing holders of equitable title (the 1886 Mdewakanton descendants). Under the plaintiffs' construction of the statute, the three communities would be designated as trust beneficiaries, but would hold no beneficial interest as a result of the trust. Instead, according to the trial court, the three communities "have assumed a fiduciary role as agents of the United States . . . in administering the trust on behalf of the trust beneficiaries." *Wolfchild v. United States,* 72 Fed.Cl. 511, 529 (2006). Yet the statutory characterization of the land as being held "for the benefit of" the three communities is not consistent with the rights and obligations of the communities under the plaintiffs' theory or the court's construction. In addition, under the plaintiffs' theory the expressed purposes of the 1980 Act would not be served, as the problem of the two classes of property and the two classes of Mdewakantons would persist, even though

eliminating those two classes of property and holders of property rights was a principal objective of the statute.

A further problem with the trial court's interpretation of the 1980 Act is that it is in tension with the provision in the Act that declares the transferred 1886 lands to be "part of the reservations of the respective Indian communities." 94 Stat. at 3262. As previously noted, the term "reservation" typically denotes property for which legal title is in the United States and equitable title is in the tribe. Lands that the Secretary adds to existing reservations are designated by statute as reserved "for the exclusive use of Indians entitled to enrollment or by tribal membership to residence at such reservations." 25 U.S.C. § 467. In light of that statutory provision dedicating new reservation lands to the use of tribal members only, it would be anomalous to construe the 1980 Act, which made the 1886 lands part of the three communities' reservations, to mean that those lands would be held in trust for the class of 1886 Mdewakanton descendants, many of whom were not enrolled or eligible for enrollment in any of the three communities.

For the foregoing reasons, even if we construed the Appropriations Acts as creating a trust relationship by implication or by operation of law, we would hold that the 1980 Act terminated that trust. If the Appropriations Acts created a trust for a class consisting of the 1886 Mdewakantons and their descendants, the relationship between the government

and the beneficiary class would be akin to the relationship between the government and individual members of a tribe with respect to reservation lands. And as to that relationship, the Supreme Court has held that Congress can freely alter the terms of any provision relating to the distribution of Indian lands at any point prior to the time those interests are allotted or individuals otherwise obtain vested rights in the property. *See United States v. Jim,* 409 U.S. 80, 82, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972) (Congress may alter the distribution scheme of an earlier statute that created a trust relationship with a tribe); *Sizemore v. Brady,* 235 U.S. 441, 449, 35 S.Ct. 135, 59 L.Ed. 308 (1914); *Gritts v. Fisher,* 224 U.S. 640, 648, 32 S.Ct. 580, 56 L.Ed. 928 (1912). Congress's decision to give the three Mdewakanton communities beneficial ownership rights in the 1886 lands, rather than continuing to hold those lands for the use and benefit of the 1886 Mdewakanton descendants, would therefore be within Congress's power over such property, even if that action were taken over the objection of the original beneficiaries. Because a change in the identity of the beneficiaries does not constitute a taking of property from individuals who had an expectation of benefit but no vested rights in the property, there is no force to the plaintiffs' argument that if Congress had intended to confer beneficial title to the 1886 lands on the three communities, it would have provided compensation to the 1886 Mdewakanton descendants under the takings clause of the Fifth Amendment.

The trial court made two points in support of its conclusion that the 1980 Act did not terminate the trust created by the Appropriations Acts, but we do not find either of those points persuasive.

First, the court noted that the 1980 Act did not contain express language terminating a trust. Because the Appropriations Acts contained no express language creating a trust, however, it is not surprising that the 1980 Act contained no express language of termination. Even if the Appropriations Acts are regarded as having imposed sufficiently specific duties on the Secretary of the Interior to give rise to a trust relationship with the 1886 Mdewakantons, a trust was, at most, created only by operation of law. Under those circumstances, Congress's failure to include express language of trust termination cannot be regarded as indicative of an intention not to alter the previous legal relationship among the parties.[13]

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[13] A similar point applies to the trial court's conclusion that construing the 1980 Act to transfer the 1886 lands in trust to the three communities constitutes an implied repeal of the Appropriations Acts, and that the government's construction of the 1980 Act is therefore suspect in light of the doctrine that implied repeals are disfavored. *See Wolfchild I,* 62 Fed.Cl. at 543-44. We do not agree that the 1980 Act, as construed by the government, would effect a repeal of the Appropriations Acts, implied or otherwise. The 1980 Act simply provides for the long-term disposition of the property purchased pursuant to the Appropriations Acts, an issue left unresolved by Congress both in those Acts and during the ensuing 90 years.

Second, the court found significance in the savings clause of the 1980 Act, which stated that nothing in the Act shall "alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment." Those provisions, according to the court, indicated that the 1980 Act did not terminate the pre-existing trust. In fact, however, those provisions merely demonstrate that Congress did not intend for the new statute to undermine any current interests represented by existing assignments or contracts. *See Brewer v. Acting Deputy Assistant Sec'y – Indian Affairs,* 10 I.B.I.A. 110, 120 (1982) (acknowledging that assignees have a property interest protected by the savings clause).

Thus, assignees under existing Indian Land Certificates were allowed to remain in occupancy, but no further certificates were to be issued to successor assignees after the death of the assignees or other termination of the current assignments. Likewise, the 1980 Act did not terminate any rights associated with current leases on portions of the 1886 lands. But that does not demonstrate that the 1980 Act made no change that affected the interests of those who might have expected land assignments or other benefits in the future.

In fact, the presence of the savings clause in the 1980 Act provides affirmative evidence in favor of the government's interpretation of that statute. If the 1980 Act had no effect on the equitable rights of the 1886 Mdewakantons in the 1886 lands, as the plaintiffs contend, there would have been no need for a

savings clause to preserve the interests of the current assignment holders from the adverse effects of the 1980 legislation. The fact that the savings clause was regarded as necessary to protect the current assignees is a clear indication that the drafters viewed the Act as otherwise terminating any equitable interests of the 1886 Mdewakantons in those lands.

Significantly, the Department of the Interior, which had drafted the 1980 Act, made clear shortly after the date of enactment that it construed the Act as creating a trust in favor of the three communities and not granting or preserving beneficial ownership rights in the 1886 Mdewakanton descendants. A letter sent to the Lower Sioux Community Council by the Interior Department's Area Director within days of the enactment of the 1980 Act expressed the Department's position that the Act "gives jurisdiction to each Community Council on the same basis as other tribally-owned land," and that, as a result, "the income derived from these lands in the future will be utilized as other income from tribal land."

Similarly, in administrative proceedings following the 1980 Act, the Department made clear that, with the exception of those persons affected by the savings clause, it interpreted the 1980 Act as terminating any interest of the 1886 Mdewakanton descendants in the 1886 lands and instead created a trust relationship with the three communities. *See Gitchel v. Minneapolis Area Dir., Bureau of Indian Affairs,* 28 I.B.I.A. 46, 48 (1995) ("[T]here is simply no

question as to the intent of Congress in 1980 to convey the beneficial title to these lands to the Communit[ies].”); *Brewer,* 10 I.B.I.A. at 118-19 (“[t]he Department’s position concerning these lands has . . . consistently been that they were not made available by Congress for allotment, were never allotted, and were therefore available in 1980 to become tribal lands held by the Department in trust. Congress approved this position when it adopted the 1980 Act.”); *In re Estate of Gofas,* Indian Probate No. TC 389S-81, at 34 (Interior Office of Hearings and Appeals Oct. 29, 1990) (1980 Act declared title to Scott County lands to be vested in the United States “in trust for the Shakopee Mdewakanton Sioux community”).

The view of the agency as to the proper construction of the statute is particularly pertinent in a case such as this one, in which the agency drafted the legislation in question, was deeply involved in its enactment, and attached the pertinent construction to the statute roughly contemporaneously with its passage. *See Lindahl v. Office of Pers. Mgmt.,* 470 U.S. 768, 788, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985); *Sec. & Exch. Comm’n v. Sloan,* 436 U.S. 103, 120, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978); *Zuber v. Allen,* 396 U.S. 168, 192, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). The proper construction of the 1980 Act is thus confirmed by the clear interpretation of that statute

within the agency that proposed, drafted, and supported the legislation.[14]

For these reasons, we conclude that the answer to the second of the certified questions in this case –

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[14] The parties devote some attention to the question whether it was lawful for the Interior Department, following the 1980 Act, to transfer to the three communities approximately $60,000 in funds that had been collected as proceeds from the sale, use, or leasing of certain of the 1886 lands, given that the 1980 Act was silent as to the disposition of those funds. *See Wolfchild I,* 62 Fed.Cl. at 549-50. That issue does not affect our analysis of the two certified questions, however, and we leave that issue to be addressed, to the extent necessary, in further proceedings before the trial court.

> The parties also engage in a debate over whether the trial court ruled that Congress's enactment of the 1980 Act itself constituted a breach of trust. The suggestion that the court so ruled is based on a passing statement in a later opinion in which the court remarked that the "United States breached the trust engendered by the Appropriations Acts through the passage of the 1980 Act and other actions taken thereafter." *Wolfchild v. United States,* 78 Fed.Cl. 472, 475 (2007). The plaintiffs contend that the court's remark should not be understood as suggesting that the legislation itself constituted a breach of trust, but "is a reference to the passing of time prior to the 1980 Act and not to 'the passage' of the 1980 Act." Whatever may be the proper reading of that statement by the trial court, it was not part of the court's main opinion on this issue, and in any event it is clear that an Act of Congress cannot constitute a breach of trust for which relief can be obtained from the Court of Federal Claims. *See Menominee Tribe of Indians v. United States,* 221 Ct.Cl. 506, 607 F.2d 1335, 1339, 1344-45 (1979).

whether Congress, through the enactment of the 1980 Act, terminated any trust created by the Appropriations Acts – is yes.

In light of our disposition of the two certified questions, we reverse and remand for further proceedings in the trial court.

Each party shall bear its own costs for this appeal.

REVERSED and REMANDED.

Appropriation Act of June 29, 1888, 25 Stat. at 228

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, A.D. eighteen hundred and eighty-six, 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:

* * *

Appropriation Act of March 2, 1889, 25 Stat. at 992

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full-blood Indians in Minnesota, heretofore belonging to the Medawakanton band of Sioux Indians, who have *resided in said State* since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, twelve thousand dollars, to be expended by the Secretary of the Interior as follows: Ten thousand dollars in the purchase, as in his judgment he may think best, of such lands,

agricultural implements, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or family thereof; * * * shall be so expended that each of the Indians in this paragraph mentioned shall received [sic], as nearly as practicable, an equal amount in value of this appropriation * * * *And provided further*, That as far as practicable lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality or land against his will.

* * *

Appropriation Act of August 19, 1890, 26 Stat. at 340

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, eight thousand dollars, to be expended by the Secretary of the Interior, as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these

Indians or families thereof: * * * shall be so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of this appropriation: *And provided further*, That, as far as practicable, lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality or land against his will.

* * *

Act of December 19, 1980,
Pub.L. No. 96-557, 94 Stat. 3262

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 of 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 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.

1934 Indian Reorganization Act

* * *

25 U.S.C. § 462

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

25 U.S.C. § 463

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act . . .

* * *

25 U.S.C. § 465

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee

be living or deceased, for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. § 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * *

25 U.S.C. § 467 – New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * *

25 U.S.C. § 479

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more

Indian blood . . . The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

* * *

25 U.S.C. § 177 – Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

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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.

IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Marriage of Kenneth Jo Thomas, Petitioner, and Sheryl Rae Lightfoot Respondent.	Court File No. 778-13 **MEMORANDUM OPINION AND ORDER** (Filed Dec. 23, 2013)

* * *

1. <u>The Respondent's contentions with respect to the effect of the 1938 Opinion of the Solicitor of the United States Department of the Interior concerning the powers of "created" tribes.</u>

The argument that Respondent's counsel made to the Court for the first time during oral argument on December 10, 2013, was as follows:

> MR. KAARDAL: . . . if you're not a historical tribe, then you don't have, according to the Solicitor General's opinion, historical powers. And therefore the only powers that Shakopee has in the Constitution are delegated by [the United States Department of the] Interior. And so when we view the [Community's] Constitution from that vantage

> point, that the Shakopee Constitution only has the powers delegated by Interior, this whole notion, the notion of Shakopee exercising sovereign powers and then the government approving it, the federal government approving it, that's not quite what's going on. What's going on is the federal government is ensuring the powers are that delegated are used in a lawful way.
>
> Transcript of December 10, 2013 hearing, at 19, lines 7-20.

This argument – that a federally recognized Indian tribe's inherent jurisdiction and powers, its sovereign status, might be different than other tribes' depending upon such things as whether one tribe's members' ancestors did not originally occupy the territory where the tribe's reservation now is located, or upon whether one tribe's present-day membership might consist of persons who are descended from ancestors who, were members of different tribes – was put to rest by the United States Congress decades ago. But, given the fact that the argument has emerged here, the history of the issue should be set forth in some detail.

The so-called "historic tribe" question first arose after the passage, in 1934, of the Indian Reorganization Act, 25 U.S.C. 0§461-479 (2012) ("the IRA"). In 1936, the Office of the Interior Department's Solicitor was asked by the United States Commissioner of Indian Affairs whether tribal constitutions proposed, under section 16 of the IRA, 25 U.S.C. §476 (1934),

for two tribes the Lower Sioux Indian Community and the Prairie Island Indian Community in Minnesota – could properly give the governments of those Communities the powers to condemn property, to regulate inheritance, and to levy taxes on Community members. The Solicitor responded in the negative, saying –

> Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those, which may be delegated by the Secretary of the Interior.
>
> *Sioux – Elections on Constitutions,* 1 Op. Sol. On Indian Affairs 618 (U.S.D.I. 1979).

Two years later, the Interior Department's Solicitor reiterated and affirmed those views in *Powers of Indian Group Organized Under IRA But Not As*

Historical Tribe, 1 Op. Sol. On Indian Affairs 813 (U.S.D.I. 1979).

But whatever effect the Solicitor's views might have had on the manner in which the United States Department of the Interior and its agencies dealt with Indian tribes following the two opinions' issuance, those views are legal nullities now: the opinions have been intentionally and explicitly repudiated by the United States Congress.

On May 14, 1994, in response to their having been informed of some effects, or potential effects of the Interior Department's having drawn distinctions between "historic tribes" and "tribes organized on the basis of their residence upon reserved lands", two United States Senators. John McCain and Daniel Inouye, introduced legislation to amend the Indian Reorganization Act.

The two Senators' discussion, on the Senate floor of the amendment's purposes and the reasons that prompted them to introduce it, are instructive. Senator McCain began:

> Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the Federal Government.

140 Cong. Rec. S6146 (May 14, 1994).

He continued –

> . . . all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.

Id.

He noted instances where, he had been informed, the Interior Department had used "historic" and "created" classifications for tribes, and he said –

> . . . our amendment to Section 16 of the IRA is intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify or implement the categories or classifications.

Id. at S6147.

And he condemned the Interior Department's classification of tribes based upon history, the explicit intent of the amendment in question being to prohibit –

> . . . the Secretary [of Interior] or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law.

Id.

Senator Inouye then agreed, noting that Indian tribes stand on an "equal footing" with one another and with the Federal government –

> That is, each federally recognized Indian tribe has the same governmental status as

> other federally recognized tribes with a government-to-government relationship with the United States.

Id.

The legislation that the Senators introduced on May 14 1994 was adopted, as written, and now appears at 25 U.S.C. §§476(f) and 476(g) (2012), which provide:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations.**
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 [the Indian Reorganization Act] as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
>
> **(g) Privileges and immunities of Indian tribes; existing regulations.**
>
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1934, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally

recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

In short, there is nothing in federal law, or in tribal law, that supports a suggestion that the Shakopee Mdewakanton Sioux Community, or any other Indian tribe similarly situated, lacks the inherent sovereign authority to adopt positive law, or that the Community in any way depends, for the power to legislate, upon some delegation from the United States government.

* * *

Dated: December 23. 2013 /s/ John E. Jacobson
John E. Jacobson,
Chief Judge
Court of the Shakopee
Mdewakanton
Sioux Community