No. 09-579

In The

Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

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

MOTION TO FILE *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* HISTORIC SHINGLE SPRINGS MIWOK IN SUPPORT OF PETITIONERS

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MOTION OF CESAR CABALLERO FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, Cesar Caballero respectfully requests leave to file the accompanying brief as *amicus curiae*. The Petitioners have consented to the Historic Shingle Springs Miwok Tribe participation in this matter. A letter attesting to their consent has been submitted to this Court.

The Historic Shingle Springs Miwok Tribe has similar experiences of breaches of trust committed by government as the *Wolfchild* Petitioners. Moreover, like in the *Wolfchild* case, the Secretary of the Interior failed to follow its own policy – namely the 1934 IRA to the detriment of the Historic Shingle Springs.

The Miwok, after executing the Consumnes River Valley Treaty, the United States Senate would never ratify it, and the Miwok labored for decades wandering the land without a reservation or an identified parcel to live. Eventually, during the 20th century, the federal government took action, yet disputes on how federal agencies have handled Miwok disputes, gives Miwok pause and concern considering the *Wolfchild v. U.S.* Federal Circuit Court decision, and the issues which were raised in the *Wolfchild* Petition now before this Court.

The issues raised go well beyond the minuscule or mundane political predominance, but to the

identity of Native Americans and the relationship supposedly established through Congressional Acts, regulations, and federal agency actions. As with the Mdewakanton, the Historic Shingle Springs Miwok have continuing legal claims and disputes that require judicial resolution. But, in light of the arguments and issues raised in the *Wolfchild* Petition, the Historic Shingle Springs Miwok fear a loss of federal court subject matter jurisdiction. The doctrinal shift in trust law establishes the death knoll to avenues to attain impartial dispositions of continuing Native American related disputes through the federal courts.

The interests of the Historic Shingle Springs Miwok are those of the Mdewakanton Petitioners, and therefore accordingly, respectfully submit this *amicus* brief.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE* AND STATEMENT OF IDENTITY[1]

The Historic Shingle Springs Miwok Tribe[2] has similar experiences of breaches of trust committed by government as the *Wolfchild* Petitioners. After executing the Consumnes River Valley Treaty, which was never ratified, the Miwok lived for decades without land or reservation. During the 20th century, the federal government acquired lands for the Miwok but a controversy still surrounds federal obligations to the Miwok. Thus, the *Wolfchild v. U.S.* Federal Circuit decision, in addition to the *Wolfchild* Petition, are of particular importance to the Miwok.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Petitioners have consented to the filing of this brief. The Respondent, United States, was inadvertently not contacted, but the docket does reflect its waiver to file a response.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The "Historic Shingle Springs Miwok Tribe" describes the group of families who are the lineal descendants of the Native Americans identified as the Miwok who lived within the area known as the Consumnes River Valley. These families had signed the Consumnes River Valley Treaty in 1852. There is present dispute between the Historic Shingle Springs Miwok Tribe and others (i.e., Verona Band of Homeless Indians) who are alleged to have usurped the identity of the Historic Shingle Springs Miwok descendants. This is an on-going dispute that illustrates the interests for the filing of the instant *amicus* brief.

The *Wolfchild* Petitioners raise similar concerns about adjudication, through federal courts, about legal claims that require judicial resolution. But, in light of the arguments and issues raised in the *Wolfchild* Petition, the Historic Shingle Springs Miwok fear a loss of federal court subject matter jurisdiction and the doctrinal shift in trust law establishes the death knoll to avenues to attain impartial dispositions of continuing Native American related disputes through the federal courts.

FACTUAL STATEMENT OF THE HISTORIC SHINGLE SPRINGS MIWOK

The Historic Shingle Springs Miwok Tribe is an aboriginal tribe of El Dorado County, California. They lived on lands of the Sierra Nevada Mountains, and in particular, the Consumnes River Valley, which became exploited during the 1849 Gold Rush era. With the Gold Rush and California's entry into the Union in 1850, Governor Peter Hardeman Burnett, declared "open season" on California Indians: "That a war of extermination will continue to be waged between the two races until the Indian race becomes extinct. . . ."[3] The devastation of violence, disease, and

[3] Burnett was elected California's first governor before statehood in 1850 and resigned in 1851.

death resulted in decimation of the California Indians from an estimated 1848 population of 150,000 to 30,000 by 1870.[4]

In 1852, the Historic Shingle Springs Miwok, seeking the protection of the federal government, entered into the Consumnes River Treaty. The treaty relinquished the Consumnes River Valley lands to the United States. It would also identify the Miwok through a census. The treaty was never ratified. California Senators successfully lobbied U.S. Senate to deny ratification of the Consumnes River Treaty and 17 other treaties affecting California Native Americans. The 18 treaties were referred to as the "Barbour Treaties." In fact, the Senate took steps to remove the Barbour Treaties from public record and precluded Senate hearings. Removing record left the California Indians without land, legal recognition, or protection, while subject to the discrimination of a California population.

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[4] Continued discrimination against California Indians during this same period was demonstrated through the 1850 California "Act for the Government and Protection of Indians." Despite its title, the Act prohibited, among other things, Indians from testifying against whites: "in no case [could] a white man be convicted of any offense upon the testimony of an Indian or Indians".

Between the Consumnes River Treaty in 1852 and 1916, the Miwok went without lands or a reservation for 53 years.[5] In 1916, the United States appropriated lands referred to as the El Dorado Rancheria and the Historic Shingle Springs Rancheria. The combined parcels were for the specific use of the Historic Shingle Springs Miwok, and to be used as a proposed reservation: "Shingle Springs Reservation." Similarly to the Mdewakanton, tribal identities were recorded in a census. Family members were recorded in an 1870 census and later in the 1890 El Dorado County census. The 30 or more surviving Miwok tribal families were detailed in C.E. Kelsey's "1905-06 Census of Non-reservation California Indians" and later in Census of the California Indians Jurisdiction Act of 1928.

At about the same time, a Bureau of Indians Affairs Field Agent, John Terrell, identified a group of homeless people over 75 miles away in Sutter County. He referred to them as "Sacramento-Verona Band of Homeless Indians." He noted these homeless people were mostly of Hawaiian and Maidu decent, but "looked Indian." Despite not being of Miwok descent, he invited them to live on the Historic Shingle Springs Miwok's land. They never did.

In 1928, as a result of the Senate's actions for failing to ratify, and "sealing" the Barbour Treaties, Congress passed an act allowing the California

[5] The Barbour Treaties would be "rediscovered" in 1905.

Attorney General to sue the United States in the Federal Court of Claims on behalf of all California Native Americans. In 1942, after a 14 year lull, the California Attorney General filed a complaint with the Court of Claims. In *The Indians of California v. The U.S.*, 98 Ct.Cl. 583 (1942), the court found that Congress failed to fulfill its promise to ratify the Barbour Treaties. In recognition of that failure, and the losses by California Indians, Congress sought to make restitutions by converting the loss into an equitable claim. The court eventually ascertained the monetary damages to the California Indians. *Id.*

In a subsequent judgment, the court awarded the Indians of California $17,053,941.98. Taking into account what the United States would have supplied to the Native Americans had the treaties been ratified, over the 25 year period "specific appropriations for the support, education, health, and civilization of Indians in California" and other general disbursements, a final net sum of $5,024,842.34 would be awarded. *The Indians of California v. The U.S.*, 102 Ct.Cl. 837 (1944). Nevertheless, the claims and agreement have not affected future disputes. Meanwhile, the United States passed the 1934 Indian Reorganization Act. Importantly, the Historic Shingle Springs Miwok Tribe was identified as a 1934 Indian Reorganization Act tribe.[6]

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[6] Published in Theodore Haas' 1947 "Ten Years of Tribal Government under the I.R.A."

For over 60 years the Historic Shingle Springs Miwok Tribe occupied their lands. In 1970, despite knowing of the existence of the Historic Shingle Springs Miwok, the Secretary of the Interior assisted another group purporting to be, the Sacramento-Verona Band, to file a constitution with the Bureau of Indian Affairs. Unlike the Historic Shingle Springs Miwok Tribe who were federally recognized as a tribe at the time of the 1934 IRA, the Sacramento-Verona Band were never identified as a tribe or otherwise verified as Californian Native Americans.

Nevertheless, according to BIA records, in 1976, during a "tribal" meeting, the Sacramento-Verona Band voted themselves "Miwok" and changed their name to the "Shingle Springs Band of Miwok Indians". Despite knowing of a dispute over who were true "Miwok" between the Historic Shingle Springs Miwok and the Sacramento-Verona Band, the BIA allowed and approved the Sacramento-Verona Band to take the name and heritage of the Historic Shingle Springs Miwok Tribe of El Dorado County to legally enter into gaming compacts.

The Historic Shingle Springs Miwok Tribe have repeatedly taken exception to the BIA's actions and that of the Sacramento-Verona Band, believing the Sacramento-Verona Band usurped the Historic Shingle Springs Miwok Tribe's identity, their aboriginal land appropriated by Congress, and thus, the cultural identity of the Historic Shingle Springs Miwok.

The original Historic Shingle Springs Miwok Tribe's interest in this case arises because of the similarities experienced by the 1886 Mdewakanton. The legal jurisprudential shift directly affects the future of both Native American cultures and likely many others. Although the underlying facts of the Historic Shingle Springs Miwok dispute may appear different, the similarities in the Federal Circuit's decision in *Wolfchild v. U.S.*, 559 F.3d 1228 (Fed. Cir. 2009) eviscerated any previous differences.

Thus, the *Wolfchild* Petitioners have focused upon issues that are not hypothetical situations, but issues with instant implications – to the Miwok and likely other Native Americans. The federal government had a duty to the Shingle Springs Miwok Indians under the principles expressed in *Mitchell II*. Moreover, similar to the *Wolfchild* case, the Secretary of the Interior breached his duty to the Shingle Springs Miwok by allowing another group of Indians to misappropriate the lands and the benefits that rightly belonged to the Shingle Springs Miwok Indians.

In addition, the legal uncertainties of trust law as depicted in the Federal Circuit decision will deter remediation efforts against the United States regarding allegations of the breach of federal obligations. *California Valley Miwok Tribe v. U.S.*, 515 F.3d 1262 (D.C.App. 2008) again presents a problem in court that the Historic Shingle Springs Miwok must face. Although the action arose in a different factual setting, the California Valley Miwok Tribe tried to

enforce the obligations of the United States upon the "rightful" tribe through means of a new constitution. The BIA described the issue as one related to membership. The Eighth Circuit Court of Appeals agreed.

Like the Eighth Circuit decision in *Smith v. Babbitt,* 100 F.3d 556 (8thCir.1996), the BIA asserted in *California Valley Miwok Tribe* that the issue related to "membership." But, the underlying issues in both cases went well beyond "membership." Thus, the Miwoks' claims were jettisoned like the Mdewakanton in *Smith*. The failure of those attempts, in conjunction with the recent Federal Circuit's *Wolfchild* decision, may result in a lack of forum for the original Historic Shingle Springs Miwok Tribe to raise their claims from their present dispute with the United States and the Sacramento-Verona Band of Homeless Indians. A jurisdictional conundrum presently faced by the *Wolfchild* Mdewakanton, compounded with the doctrinal shift of the Federal Circuit in trust law, results in the Historic Shingle Springs Miwok Tribe facing similar legal difficulties and consequences. And, if true for the Miwok and the Mdewakanton, it will be true for other Native Americans and tribes.

SUMMARY OF THE ARGUMENT

Like the Mdewakanton, the Historic Shingle Springs Miwok are on the horns of a dilemma. Each has claims and disputes to resolve, and each require an impartial forum for resolution. In particular, when it is believed the United States has violated its own policy to a specific group of Native Americans, the victims must be assured that they will not be turned away at the courthouse steps for lack of subject matter jurisdiction. Furthermore, it is equally important for Native Americans to know that the governing law of trusts and trust terminations will be followed by the lower courts. The concern of the Miwok, here, is that the Federal Circuit court did not apply trust law jurisprudence as set out in *Mitchell I* and its prodigy. This can affect the Miwok as they have similar complaints in regard to a breach of duty. With that said, what rights remain for Native Americans when Congress or federal agencies cause harm or breach obligations to Native Americans?

The Secretary of the Interior violated its own federal policy, and as a result, like the Mdewakanton, the Historic Shingle Springs Miwok, are left without their due appropriations intended by Congress. In the Mdewakanton case, land was wrongfully placed in trust to members of Indian tribes largely outside of the Mdewakantons. In fact, the Secretary of Interior did so with knowledge of the indiscretion by placing lands in trust for outside groups the Secretary violated the 1934 IRA and as a result of his violation the Mdewakanton have been deprived of their land.

Similarly, a chain of events of violation of federal policy by the Secretary has left the Historic Shingle Springs Miwok without their appropriated lands. Again we see this same pattern of failing to even allow for an Interior Appeal repeated in the story of the Historic Shingle Springs Miwok. From *Wolfchild* we see that the Secretary of Interior communicated such knowledge and his lack of efforts to correct the matter. In the case of the Historic Shingle Springs Miwok the Secretary simply refuses to address the matter though letters with evidence have been sent to the current administration, Secretary, Ken Salazar, Assistant Secretary, Larry Echohawk, and Director of the BIA, Jerry Gidner. As with the 1886 Mdewakantons the United States further breached its duty to the Historic Shingle Springs Miwok by violating its own policy outlined in the 1934 IRA. The Secretary of Interior failed to properly appropriate the land and appointed assignees that were not members of the Historic Shingle Springs Miwok. With nonmembers holding majority control over the intended beneficiaries, their needs took precedent to the detriment of the Miwok.

In addition to the adversity in the Circuit Court, the Supreme Court should reverse the prior court's decision in *Wolfchild* because the United States knowingly breached its fiduciary duty to the 1886 Mdewakanton under the care of the Secretary of Interior. This is an important matter of fiduciary responsibility at the federal level that also affects the

California Indians, specifically the Historic Shingle Springs Miwok.

Like the 1886 Mdewakanton, the United States government placed land reserved for the Historic Shingle Springs Miwok to an outside group of Indians whose 5 families excluded the 30 or more families of Historic Shingle Springs Miwok. *Mitchell II* asserts that the United States took requisite control over the 1886 Mdewakantons and with requisite control came fiduciary responsibility. By placing land, purchased with funding appropriated for the Historic Shingle Springs Miwok in trust to an outside band of Indians, the fiduciary duty resulting from requisite control was breached by the United States, similarly to the 1886 Mdewakantons.

ARGUMENT

I. THE FEDERAL CIRCUIT COURT OF APPEALS DECISION IN *WOLFCHILD V. U.S.* AND THE IDENTIFIED INDIAN TRUST LAW INTERPRETATIVE SHIFT AND FEDERAL COURT JURISDICTIONAL ISSUES RAISED BY THE *WOLFCHILD* AND *ZEPHIER* PETITIONERS HAVE IMMEDIATE REPERCUSSIONS TO SIMILARLY SITUATED TRIBES SUCH AS THE CALIFORNIA MIWOK TRIBE

A. The United States Supreme Court Should Grant Review Because The Secretary Of The Interior Violated The 1934 IRA When He Erroneously Allowed Non-1866 Mdewakanton Descendents To Qualify For Trust Land

The Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to acquire land and hold it in trust for the purpose of providing land for the Indians. Under IRA, "Indian" is defined as "all persons of Indian descent who are members of any recognized tribe" under federal jurisdiction at the time of the statute's enactment. *Carcieri v. Salazar,* 129 S.Ct. 1058 (2009). Thus, IRA "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* Furthermore, under IRA, "tribe" shall be construed to refer to any Indian tribe, organized band, pueblo, or other Indians *residing* on

one reservation. *Id.* at 1059. Thus, the Secretary of the Interior is limited to hold land in trust for those Indians that meet the IRA requirement – namely that they are federally recognized at the time of its enactment and therefore the Secretary is charged with the duty to ascertain which Indians meet this requirement. *Id.*

In the *Wolfchild* case, the 1866 lands were bought by funds provided by the Appropriation Acts. Thus, the 1866 lands were to be used exclusively by the 1886 Mdewakantons as conditioned by Congress' expressed intent. *Id.* By the time the 1934 IRA came along, the 1866 lands were still only available to the 1886 Mdewakantons under the Secretary's procedure of ascertaining 1866 Mdewakantons. However, three communities, which were made of largely non-lineal descendants, surfaced all of which were residing erroneously on the 1866 lands. The Secretary's letter made it clear that "the Department knew that many non-1886 Mdewakanton were part of the SMSC base roll used to determine voters to approve the 1969 SMSC Constitution and, consequently, were benefitting from SMSC membership to the exclusion of the 1886 Mdewakanton." *Wolfchild v. U.S.*, 559 F.3d 1228 (Fed. Cir. 2009).

The communities eventually sought land in trust under IRA. Despite predominance of non-members, the Secretary of the Interior approved their Constitutions. As a result of the Secretary's misappropriation and lack of intervention, land was put in trust for each community. Land that was put into

trust for the non-member communities was bought with appropriations intended to be used exclusively for the 1866 Mdewakantons. Thus, not only did the Secretary fail to protect his beneficiaries from misappropriation of their lands to unqualified Native Americans and in doing so allowed them to usurp benefits intended exclusively for the 1866 Mdewakantons, but the Secretary actually played a major role in placing land in trust for members of unqualified groups. Indeed, *Wolfchild* outlines the actions, or lack thereof, applied by the Secretary of Interior to the detriment of the 1886 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 instances, the Secretary held the property for the use and benefit of individuals selected from a defined class".

Wolfchild v. U.S., 559 F.3d 1228 (Fed. Cir. 2009).

Moreover, the Communities did not qualify for land under IRA as they did not meet the IRA

requirements namely; they were not a federally recognized tribe of Indians under the IRA because they were neither a tribe, nor an Indian residing on a reservation at the time outlined in the policies of the IRA. Since they were never entitled to be on the 1866 lands unless they were a lineal descendent of the 1886 lands their lack of descendancy prevented them from having a legitimate right to taking land in trust.

Therefore, the Secretary violated the Department of Interior's own policy set forth in the IRA. As a result of that violation, the 1866 Mdewakantons are left without the land that was bought with funds that were appropriated to their exclusive use.

Therefore, we ask this Court to address the IRA violation which has left the deserving 1866 Mdewakantons without their land purchased with their appropriations and set aside for their exclusive use.

1. The Federal Court Should Have Jurisdiction To Hear Causes Of Actions Arising Out Of IRA Violations Notwithstanding That There Is A Split In Authority As To Whether The Federal Courts Have Jurisdiction To Hear Such Cases

Federal court history provides a variety of cases in which federal jurisdiction has, and has not been found for cases arising under the IRA. Many courts have held that if there is a violation of federal policy

– namely the 1934 IRA, then there should be federal court jurisdiction. However, some courts had been reluctant to find federal court jurisdiction under IRA because they reasoned that IRA was enacted to bolster independent sovereignty in Indian Country.

One example of the wealth of cases holding that subject matter jurisdiction exists for violations of the IRA is *Oglala Sioux Tribe of Pine Ridge Reservation, S.D. v. Barta.* In that case, an action was brought by the tribe that was organized under the 1934 IRA to collect taxes levied by the tribe upon nonmembers leasing tribal land. *Oglala Sioux Tribe of Pine Ridge Reservation, S.D. v. Barta,* 146 F.Supp. 917 (1956). Notwithstanding the defendants' argument that the federal court did not have subject matter jurisdiction to hear the case, the federal court held that there was subject matter jurisdiction. *Id.* The court reasoned that the tribe "function[ed]" under the provision of the 1934 IRA and that the cause of action flowed directly from the implementation of IRA – a federal statutory scheme; and thus, the federal court had subject matter jurisdiction to hear the controversy in question. *Id.*

Another case where the federal court found subject matter jurisdiction is *City of Sault Ste. Marie, Michigan v. Andrus.* In that case an action was brought by the City when a group of Indians claiming to be a federally recognized tribe acquired land in the area surrounding the City and then conveyed that land in trust to the United States pursuant to the IRA. *City of Sault St. Marie, Michigan v. Andrus,*

458 F.Supp. 465 (1978). Defendants moved to dismiss arguing that there was no jurisdiction. *Id.* In holding that there was jurisdiction, the federal court reasoned that the cause of action arose under the IRA, which in turn meant that a resolution of the controversy would involve determining whether the federal defendants had violated the IRA; and therefore, the federal court had jurisdiction over the case. *Id.*

Although federal jurisdiction has been found in many cases, oddly enough there are many cases where the federal courts have dismissed cases for lack of jurisdiction based on similar facts.

In *Smith v. Babbitt*, the Mdewakantons had filed suit due to a misappropriation of gaming funds by the Secretary of Interior. *Smith v. Babbit,* 100 F.3d 556 (8thCir.1996). Jurisdiction appeared proper because the Secretary of Interior, an agent of the federal government, participated in the "scheme" preventing the proper allocation of gaming funds. *Id.* However, the court held that the federal court did not have subject matter jurisdiction. It reasoned that despite that the Secretary was a member of the federal government only violations of the tribal Constitution were committed. *Id.* The court explained that "The facts of this case further show that this dispute needs to be resolved at the tribal level" since it was the tribal Constitution that was the subject of violation; and thus, should be settled by tribal officials. *Id.* However, the court pointed out that "we find that these allegations are merely attempts to move this

dispute, over which this court would not otherwise have jurisdiction, into federal court," and thus really did not address whether there was an IRA violation; and, therefore failed to address whether the federal court would have jurisdiction if the IRA was violated. *Id.*

Another case where the federal court did not find subject matter jurisdiction is *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8thCir.1967). In that case, a suit was filed by tribal council in an effort to invalidate a tribal election. *Id.* The court held that it did not have jurisdiction to hear the case because the dispute was purely a tribal matter. *Id.* The court reasoned that the dispute should be handled by tribal officials according to their tribal constitution notwithstanding the Secretary's role in reviewing and ratifying decisions made by tribal elections under IRA. *Id.* The court explained, "we can think of no better example of a tribe's local governmental procedure than that of regulating a tribal election amending the tribe's constitution and bylaws, the very framework of the local government." *Id.*

Thus, in both *Babbit* and *Twin Cities,* the federal courts were presented with complaints under IRA and refused to hear the cases based on lack of subject matter jurisdiction. However, in *Oglala Sioux Tribe* and *City of Sault Ste. Marie* the federal courts were presented with causes of action flowing from the IRA and found subject matter jurisdiction did in fact exist. Therefore, we ask this Court to grant review in the

Wolfchild case so that it may settle the inconsistencies in the lower courts regarding whether federal courts have subject matter jurisdiction to hear causes of actions resulting from violations of the IRA.

B. The United States Supreme Court Should Grant Review Because The Circuit Court Erred When It Did Not Find That The United States Asserted The Requisite Control Over The 1886 Mdewakanton Under *Mitchell II* To Impose A Fiduciary Duty On The United States

A general trust relationship exists between the United States and the Indian people. *U.S. v. Mitchell*, 445 U.S. 535 (1980). This general trust relationship alone is not sufficient to impose special duties on the United States for the benefit of the Indian people. *U.S. v. Navajo Nation*, 537 U.S. 488 (2003). However, the United States will be held to a fiduciary duty where a relevant statute or regulation grants the United States with control over Indian resources or land. *U.S. v. Mitchell*, 463 U.S. 206 (1983).

The requisite control under *Mitchell II* has been found where the United States had full responsibility to manage Indian resources and land for the Indian benefit. *Id.* at 2972. Moreover, adequate control triggers fiduciary duties where the United States has exclusive control of a property held in trust for the Indian people. *U.S. v. White Mountain*, 249 F.3d 1364. Once the "duty-imposing statutory or regulatory

prescription" has been identified, and the duty has been breached, availability of money damages may be inferred. *U.S. v. Navajo Nation*, 537 U.S. 488 (2003).

In *Mitchell I*, the Quinault Tribe alleged that the United States had breached its fiduciary duty to the tribe under the Indian General Allotment Act of 1887 (hereafter GAA) by mismanaging the forest lands located within the land that was allotted to its tribal members. In holding that the GAA did not create private rights of action, this Court reasoned that the language, history, and purpose must be taken into consideration. It pointed out that Congress' goal in holding the land in trust was "not because it wished the Government to control use of the land . . . , but simply because it wished to prevent alienation of the land . . . " *U.S. v. Mitchell I*, 445 U.S. at 536.

In *Mitchell II*, however the Supreme Court did find a breach of a fiduciary duty owed to the same tribe, not under the GAA, but under a different set of statutes and regulations. Specifically, the timber management statutes and other statutes that "empowered the Secretary to sell timber on unallotted lands and apply them to the benefits of the Indians," as well as the government's detailed regulations regarding its responsibilities to "[manage] the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests" were held by this Court to give rise to a fiduciary duty to the tribe.

The Appropriation Acts in the *Wolfchild* case fall neatly into the holding of *Mitchell II*; and, thus are not like the general duty Acts analyzed in *Mitchell I*, because like the *Mitchell II* statutes and regulations, the Allotment Acts in the *Wolfchild* case required the government to make life altering choices for a very specific group of loyal Indians so they could receive the best use of the appropriated benefits. Indeed, the Secretary of the Interior had plenary power to expend the appropriated funds " . . . as in his judgment as he may think best, for such lands, agriculture implements, building seeds, cattle, horses, food, or clothing that may be deemed best, in the cases of each of the Indians or families thereof." 1890 Act, Stat. at 349. Moreover, Congress' goal in appropriating funds for the 1886 Mdewakanton Indians was to provide for a loyal group of impoverished Indians that were forced to sever their ties from their tribe. In other words, like the duties imposed on the Secretary in *Mitchell II*, Congress intended the Secretary to make important decisions on behalf of the 1886 Mdewakanton Indians – decisions that are normally left to a manager or a guardian. Thus, the Secretary owed the 1886 Mdewakanton a fiduciary duty under *Mitchell II*, and therefore, the Federal Circuit erred when it held that the Secretary did not owe the 1886 Mdewakanton such a duty.

Another case where this Court found that the Secretary owed a tribe of Indians a fiduciary duty is *U.S. v. White Mountain Apache Tribe*, 249 F.3d 1364 (2003). In *White Mountain Apache Tribe*, land was

held in trust by the United States for the tribe subject "to the right of the Secretary of the Interior to use any part of the land for improvements." Pub. L. No. 86-392, 74 Stat. 8 (1960 Act). The United States retained control over several buildings located on the trust land. *U.S. v. White Mountain Apache Tribe*, 249 F.3d at 1377. The tribe brought suit against the United States complaining that the United States failed to maintain the property it had physical control over, in breach of its fiduciary duty owed to the tribe. *Id.*

The lower court ruled that the statute in the *White Mountain Apache Tribe* case was like the Act in *Mitchell I* in that the statute created nothing more than a "bare trust" – a relationship that did not trigger fiduciary duties. *Id.* The Federal Circuit reversed and remanded, holding that the Act created an implied duty to act reasonably to ensure that the utilized property would be maintained, and thus created fiduciary duties. *Id.* This Court affirmed the Federal Circuit relying on its previous decisions in *Mitchell I* and *Mitchell II*. *Id.*

Applying the two *Mitchell* cases to the facts of the *White Mountain Apache Tribe* case, this Court explained that unlike the *Mitchell I* case, where the Act gave the government no functional obligation to manage an Indian resource, the Act in *White Mountain Apache Tribe* went beyond a bare trust and imposed fiduciary duties on the Secretary since the Act "invested the United States with discretionary

authority" to exclusively control portions of the trust land. *Id.* at 1378.

The *Wolfchild* case is similar to the *White Mountain Apache Tribe* case in that the United States enjoyed exclusive control over the tribe's resources. In *White Mountain Apache Tribe*, the United States had the right to exclusive physical control over the buildings in trust for the tribe. The exclusive control over the tribe's resources in the *Wolfchild* case (namely, appropriated funds for the use of the 1886 Mdewakanton) was not a physical control like it was in the *White Mountain Apache Tribe* case, but nevertheless was equally as exclusive since the appropriated funds were to be used as the Secretary saw fit. Thus, the Secretary had exclusive control over the funds – choosing how he would spend them and consequently, similar to the *White Mountain Apache Tribe* case should be bound to act reasonably and in the best interest of the tribe – the same utmost duty that is imposed on a fiduciary. Thus, the Court of Appeal erred in finding that the Secretary did not owe the 1886 Mdewakanton a fiduciary duty and thus should be reversed under *White Mountain Apache Tribe*.

Thus, both under the *Mitchell II* and *White Mountain Apache Tribe*, the Acts in the *Wolfchild* case impose a fiduciary duty on the United States for the benefit of the Mdewakanton; and thus, we respectfully ask that this Court grant review.

1. The United States Breached Its Fiduciary Duty To The 1886 Mdewakanton By Placing Land In Trust For A Tribe Of Indians Not Under Federal Jurisdiction During The Passage Of 1934 IRA To The Detriment Of The 1866 Mdewakanton

When a fiduciary relationship is found, the law forbids the fiduciary from acting in any manner adverse or contrary to the interests of the beneficiary. The beneficiary is entitled to the best efforts of the fiduciary on his behalf and the fiduciary must exercise all of the skill, care and diligence at his disposal when acting on behalf of the client. *Id.* Thus, "Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties." *Seminole Nation v. U.S.,* 316 U.S. 286 (1942). A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. *Id.*

In the *Wolfchild* case, the United States purchased lands with funds from the Appropriation Acts that were intended to be used exclusively for the benefit of a band of Indians that severed their ties to their tribe in order to help the United States in the 1862 Sioux uprising. These loyal Indians became recognized as the 1886 Mdewakanton – a loyal band of Indians that Congress respected as helping to rescue the whites and deserving of support. With this

goal in mind, Congress enacted the Appropriation Acts in 1888, 1889, and 1890 – with the expressed condition that the appropriations would exclusively benefit the 1886 Mdewakanton. As a result of the appropriations, the Secretary of the Interior purchased the land at issue in the *Wolfchild* case (hereafter "1886 lands") for the sole benefit of the 1886 Mdewakanton.

True to his duty, the Secretary of the Interior went through painstaking procedure to ascertain whether an individual Indian was a qualifying 1886 Mdewakanton before allowing him to reside on the 1866 Lands. *Wolfchild v. U.S.*, 559 F.3d at 1243. The Secretary's intricate care for his beneficiaries went on for over 90 years. However, with time, the Secretary's actions became knowingly less protective of the 1886 Mdewakantons' benefits. Indeed, in a senate resolution he initially stated "Land assignments on 1886 Mdewakanton lands will be issued only to persons who can prove descendency from the 1886 Mdewakanton residents and who are certified as eligible by the Branch of Tribal Operation." Yet he went on to say "However, no actions will be taken at this time to cancel or disturb any existing assignments as a result of this policy statement." *Id.*

Nevertheless, as a fiduciary, the Secretary was obligated to protect his beneficiary by taking the utmost care to look after the groups' benefits. Instead, the Secretary engaged in an indiscretion that by 1980 became fatal to the 1886 Mdewakantons' benefits. What was once land purchased for the sole use of the

1866 Mdewakantons, now has become trust land for a group of Native Americans that are comprised of less than the ten percent of the 1866 Mdewakanton. *Id.* Mind you, the Secretary had complete discretion of how to use the appropriations as long as they were being used for the sole benefit of the 1886 Mdewakanton. Thus, his mismanagement of the appropriations constitutes a fundamental breach that has left many of the 1886 Mdewakantons without the ability to reside on that land that was expressly set aside for their exclusive use.

Thus, we ask this Court to grant review of this case so that it can determine that the United States did owe the 1866 Mdewakantons a fiduciary duty that was breached when it failed to prevent nonlinear descendants to reside on the 1866 lands.

CONCLUSION

The Secretary of the Interior owed the 1866 Mdewakanton a fiduciary duty under controlling case law. The Secretary was responsible for maintaining and distributing lands, but instead of preserving them solely for the 1866 Mdewakanton, he put much of it in trust to people outside of the 1886 Mdewakanton. Thus, the Secretary breached its duty to the 1866 Mdewakanton. Further, the Secretary's actions violated the 1934 IRA. Therefore, we ask this Court to address both the Secretary's breach of duty to the Mdewakanton and violation of the 1934 IRA.

Respectfully submitted,

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