No. 09-579, 09-580

DEC 3 - 2009

In The
Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

HARLEY D. ZEPHIER, SENIOR, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* OGLALA SIOUX TRIBE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The interest of the Oglala Sioux Tribe ("the OST") in this litigation stems from the fact that approximately 2,000 members of the Tribe are also members of the plaintiff class of lineal descendants of the 1886 Mdewakantons, commonly known as the loyal Sioux (or the loyal Mdewakantons), in *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009), *rev'd*, 62 Fed. Cl. 521 (2004).

Thus, the Tribe has an interest in promoting the general welfare of these tribal members by having the Court grant the Petitioners' Petition for a Writ of Certiorari in the *Wolfchild* case, reverse the judgment of the Federal Circuit, and hold in accordance with the decision of the Court of Federal Claims that the Federal Government owed a fiduciary obligation to the lineal descendants of the 1886 Mdewakantons by virtue of the three Appropriations Acts of 1888, 1889, and 1890, which directed the expenditure of specified monies by the Secretary of the Interior ("the Secretary") for the benefit of these Indians – as well as their families – who had remained loyal to the

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.3(a). No counsel for any of the parties has authored this brief, and no person or entity other than *amicus curiae,* its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

white settlers during the Sioux conflict in Minnesota in 1862. *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 Federal Government breached this fiduciary obligation, thus making the Federal Government liable in money damages for breach of trust to the *Wolfchild* plaintiffs, including those plaintiffs who are also members of the OST.

The OST wishes to emphasize that it is taking no position on the efforts of the *Wolfchild* plaintiffs to seek relief other than money damages for breach of trust from the Federal Government under the Indian Tucker Act. However, the OST does not endorse the efforts of the *Wolfchild* plaintiffs to claim or take reservation and/or trust land from either the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community or the Lower Sioux Indian Community, or to claim or take "income, profits and proceeds from all [of these tribes'] reservation businesses," including "casino profits."

SUMMARY OF THE ARGUMENT

Aside from the conflict in the circuits that has been highlighted by the *Wolfchild* Petitioners, review should be granted because the Federal Circuit decided an important federal question concerning the creation of trust relationships in favor of groups of Indians in a way that conflicts with the fundamental

principles of law laid down by this Court in *United States v. Mitchell,* 463 U.S. 206 (1983) [*Mitchell II*] and *United States v. White Mountain Apache*, 537 U.S. 465 (2003). The Federal Circuit gave undue emphasis to the fact that the Appropriations Acts do not contain the word "trust", as well as to the context and legislative history of those Acts, even though the Acts presumptively created a trust by giving the Secretary, as trustee, control and supervision over the appropriated monies and the property purchased with those monies (the trust corpus) and by adequately defining a class of beneficiaries, namely the loyal 1886 Mdewakantons and their lineal descendants.

The Court should also grant the Petition for a Writ of Certiorari in order to address and decide an important question of federal law regarding whether Congress, in order to terminate a trust in favor of Indians, must use clear and explicit or plain and unambiguous language, especially since the Federal Circuit's decision of this question is in conflict with an earlier decision of the First Circuit.

ARGUMENT

I. Review By This Court Should Be Granted To Correct The Federal Circuit's Decision Of An Important Federal Question Regarding The Creation Of Trust Relationships In Favor Of Indians, As That Decision Conflicts With The Relevant Decisions Of This Court, Namely *Mitchell II* And *White Mountain Apache*.

The *Wolfchild* petitioners argue at length that their Petition for a Writ of Certiorari should be granted because the Federal Circuit's decision in *Wolfchild* conflicts with the Eighth Circuit's decision in *Smith v. Babbitt*, 100 F.3d 556 (1996), *cert. denied sub nom. Feezor v. Babbitt*, 522 U.S. 807 (1997). *See* U.S. Sup. Ct. Rule 10(a). Aside from the need to resolve this conflict in the circuits, the OST, as *amicus curiae*, urges that the Petition should also be granted because the Federal Circuit decided an important question of federal law in a way that conflicts with the relevant decisions of this Court. *See* U.S. Sup. Ct. Rule 10(c).

First, this Court has held that "a fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over . . . property belonging to Indians." *United States v. Mitchell,* 463 U.S. 206, 225 (1983) [*Mitchell II*]. In such cases, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees [or, as in this case, the loyal Mdewakanton Sioux and their lineal descendants,])

and a trust corpus (Indian timber, lands and money [or, as in this case, property, improvements to property, and money])." *Id.* Moreover,

> "[(w)here] the Federal Government takes on or has control or supervision over tribal [or Indian] monies or properties, *the fiduciary relationship normally exists* with respect to such monies or properties (unless Congress has provided otherwise) *even though nothing is said expressly* in the authorizing or underlying statute (or other fundamental document) *about a trust fund, or a trust or fiduciary connection.*"

Mitchell II, 463 U.S. at 225 (emphasis added), quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980).

In other words, the Court in *Mitchell II* recognized that the Federal Government's control or supervision of tribal or Indian properties is ordinarily sufficient to create a trust. *See White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1375 (Fed. Cir. 2001) ("[T]he language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship."), *aff'd*, 537 U.S. 465 (2003). The *Mitchell II* rule operates as a presumption that in such circumstances a fiduciary relationship exists despite the absence of an express mention of the word "trust". *See, e.g., Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) ("This rules operates as a presumption. . . . Therefore, courts correctly recognize a

trust relationship even where it is not specifically laid out by statute.") (citations omitted).

This presumption has been applied by the Federal Circuit in previous cases to recognize a trust obligation even where a statute did not mention the word "trust". *See, e.g., LeBeau v. United States*, 474 F.3d 1334, 1341 n. 5 (Fed. Cir.) (relying on *Mitchell II* in support of holding that terms of 1972 Distribution Act created a trust responsibility because the United States retained control over tribal monies while the tribes were preparing their rolls subject to the Secretary of the Interior's approval, and while the Secretary was preparing the roll of lineal descendants), *cert. denied*, 551 U.S. 1146 (2007). It has likewise been applied by the Federal Circuit to recognize fiduciary obligations to individual Indian allottees going beyond the limited or bare trust recognized by the Court in *Mitchell I*[2] under the General Allotment Act. *See Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996) ("Under *Mitchell II* then, as properly (and literally construed) the assumption by Congress and/or the Secretary, its delegatee, of control of allottee money or property beyond the limited trust embodied in the General Allotment Act imposes on the government a fiduciary duty to the allottees.").

The Federal Circuit's decision in *Wolfchild*, however, improperly turns the *Mitchell II* presumption on its head. The Federal Circuit reasoned that,

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[2] *United States v. Mitchell*, 445 U.S. 535 (1980) [*Mitchell I*].

"[w]hile 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.*" *Wolfchild*, 559 F.3d at 1238 (emphasis added and citations omitted). In other words, the Federal Circuit appeared to presume that a trust relationship was not intended absent an express mention of the term "trust," even though the Federal Government clearly had both control and supervision of the monies appropriated by Congress for the benefit of the 1886 Mdewakantons and their lineal descendants, and of the property purchased by the Secretary with such monies. Accordingly, the Federal Circuit gave great weight to the fact that the Appropriations Acts, instead of using the term "trust", contained "simple" or "minimal" statutory directives, which the appeals court reasoned were insufficient to "properly manifest" an intention on the part of Congress to create a trust relationship. *See id.*, quoting *Restatement (Third) of Trusts* § 13 (2003).

Thus, the reasoning of the Federal Circuit in this case is totally at odds with this Court's opinion in *Mitchell II*. Furthermore, its presumption that it is doubtful that a trust relationship is created absent the use of the term "trust" in the statute or regulation under review is not supported by the authorities cited by the appeals court. The Cohen treatise[3] actually

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[3] *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

(Continued on following page)

confirms the rule of *Mitchell II* that the use of the word "trust" in a statute is not "necessary" to create a compensable claim for breach of trust. As for the passages quoted from Justice Ginsburg's concurring opinion in *United States v. White Mountain Apache*, 537 U.S. 465, 480-481 (2003), Justice Ginsburg nowhere stated or indicated that the absence of the term "trust" from a statute automatically makes it doubtful that the statute creates a trust relationship. Rather, in discussing the Court's holding in the companion case of *United States v. Navajo Nation*, 537 U.S. 488 (2003), in which she wrote the opinion for the Court, Justice Ginsburg observed that the Indian Mineral Leasing Act of 1938 ("IMLA") and its implementing regulations, at issue in *Navajo Nation*, "lacked the characteristics that typify a genuine trust relationship: Those provisions assigned the Secretary of the Interior no managerial role over coal leasing; they did not even establish the 'limited trust relationship' that existed under the law at issue in *Mitchell I*." *White Mountain Apache*, 537 U.S. at 480-481.

By contrast, the Appropriations Acts specifically gave the Secretary discretionary control and supervision over the expenditure of the funds appropriated by Congress, and by implication, over the use and

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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."), cited at *Wolfchild*, 559 F.3d at 1238.

occupancy of the land and other property purchased with those funds, for the benefit of the loyal Mdewakantons and their families, *see, e.g.,* 1890 Act, 26 Stat. at 349 (" . . . 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"), and further directed the Secretary 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." *See* 1889 and 1890 Acts, 25 Stat. at 992-93; 26 Stat. at 349. Thus, unlike the IMLA in *Navajo Nation*, the Appropriations Acts clearly gave the Secretary a comprehensive "managerial role" over the appropriated monies and the property purchased with those monies.

Moreover, this Court in *Mitchell II* made it clear that its construction of the statutes and regulations at issue in that case as having created a trust and fiduciary obligation on the part of the Government was "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. The Court recognized that it had "previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.*, quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

By contrast, while recognizing that "[c]onsistent with the principle that there is a 'general trust relationship between the United States and the Indian people,' [quoting *Mitchell II*, 463 U.S. at 225], Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants," *Wolfchild*, 559 F.3d at 1248, the Federal Circuit ruled that the "general trust relationship" principle did not apply to the instant case because the 1886 Mdewakantons and their descendants were not a tribe of Indians. *See id.* ("[T]he 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 "general trust relationship" principle, however, applies to all "the Indian people," *Mitchell II*, 463 U.S. at 225, including individual Indians, not just tribes, and would certainly extend to the 1886 Mdewakantons and their descendants. Again, the Federal Circuit's refusal to recognize the applicability of the "general trust relationship" principle to all Indians, not just tribes, conflicts with *Mitchell II*.

The Federal Circuit's decision also conflicts with this Court's pronouncement in *White Mountain Apache* that "[w]here as in *Mitchell II*, 463 U.S. 206, 225 . . . (1983), the relevant sources of substantive law create 'all of the necessary elements of a common-law trust,' there is no need to look elsewhere for the source of a trust relationship." *White Mountain Apache*, 537 U.S. at 475 n. 3. The Court of Federal

Claims, after quoting this passage from *White Mountain Apache*, determined that "[t]he 1888, 1889, and 1890 Acts in combination have [the] three key features [of a common-law trust] that show the creation of a trust." *Wolfchild*, 62 Fed. Cl. at 540-541. First, the language of the Appropriation Acts "functionally appoints the Secretary of Interior to serve as the trustee to spend the funds on behalf of the beneficiaries, the loyal Mdewakanton." *Id.* at 541. Secondly, the Appropriations Acts designated the loyal Mdewakanton and their families (which the Secretary interpreted as including lineal descendants) as the beneficiaries of the trust. *See id.* at 541-542. Third, the Appropriations Acts created a trust corpus that included property, improvements to property, and monies. *Id.* at 541.

In reversing the Court of Federal Claims, the Federal Circuit did not follow the approach of *White Mountain Apache* in addressing whether the three fundamental elements of a common law trust were present. Instead, the appeals court focused on (1) the absence of any express use of the term "trust" in the Appropriations Acts themselves, *Wolfchild*, 559 F.3d at 1238; (2) the fact that each of the Appropriations Acts "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 . . . [which] contained no language suggestive of a trust relationship," *id.* at 1238-1239; and (3) the fact that "nothing in the legislative history of the three provisions at issue in this case

indicates that they were designed to create a trust relationship." *Id.* at 1240.

As already pointed out above, the Federal Circuit's reliance on the absence of the use of the term "trust" conflicts with this Court's decision in *Mitchell II*. As for the appearance of each of the three Appropriations Acts in "much longer" appropriations statutes and the lack of any legislative history that the Mdewakanton appropriations were designed to create a trust relationship, these matters are irrelevant under the approach outlined in *White Mountain Apache*. Since (as the Court of Federal Claims correctly determined) the "relevant sources of substantive law," namely the three Appropriations Acts themselves, "create all of the necessary elements for a common-law trust," namely a trustee, a class of beneficiaries, and a trust corpus, "there [was] no need [for the Federal Circuit] to look elsewhere[, such as context or legislative history,] for the source of a trust relationship." *See White Mountain Apache*, 537 U.S. at 475 n. 3.

In sum, the OST respectfully urges the Court to grant the *Wolfchild* Petitioners' Petition for a Writ of Certiorari, not only to resolve the conflict in the circuits pointed out by the Petitioners, but also to correct the Federal Circuit's serious deviation from the principles laid down by this Court in *Mitchell II* and *White Mountain Apache* in deciding an important question of federal law, by holding that the Appropriations Acts created a trust in favor of the loyal Mdewakantons and their lineal descendants.

II. Review Should Be Granted To Decide Whether A Trust In Favor Of Indians Can Be Terminated By Congress Without Either Express Or "Plain And Unambiguous" Language, Since The Federal Circuit's Decision Created A Conflict In The Circuits On This Question.

The OST also urges the Court to grant the *Wolfchild* Petition for a Writ of Certiorari in order to decide an important question of federal law, namely whether a trust whose beneficiaries are Indians can be terminated by Congress without either express or "plain and unambiguous" language to that effect, or the consent of the beneficiaries. In ruling that the 1980 Act, *see* Pub. L. No. 96-557, 94 Stat. 3262 (1980), did not terminate the trust in favor of the loyal 1886 Mdewakantons and their lineal descendants, the Court of Federal Claims pointed out that, while Congress "typically" uses explicit language in terminating trusts in favor of Indians, "the 1980 Act does not state as its purpose that the trust for the Mdewakanton would be terminated." *Wolfchild*, 62 Fed. Cl. at 543. The Federal Claims Court further pointed out that, while the consent of the beneficiaries is generally required in order to terminate a trust, such consent "was not received here." *Id.*, citing *Restatement (Third) of Trusts* § 65(1) (2003).

On appeal, the Federal Circuit nevertheless reversed the Court of Claims on this question also, concluding that "Congress's failure to include express language of trust termination [in the 1980 Act]

cannot be regarded as indicative of an intention not to alter the previous legal relationship among the parties." 559 F.3d at 1258 (footnote omitted).

This Court has long held that in determining congressional intent, 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.'" *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). The Court has applied this rule of construction to hold, with respect to the termination of Indian reservations, that the federal courts will not lightly conclude that a reservation has been terminated and will require a clear indication of that fact. *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 444 (1974); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation . . . , and its intent to do so must be 'clear and plain.'") (citations omitted); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (Congress must clearly evince an intent to change boundaries before diminishment will be found).

The Federal Circuit failed to adhere to this rule of construction in holding that the 1980 Act terminated the trust in favor of the loyal 1886 Mdewakantons and their lineal ancestors, despite the

absence of clear and express language to that effect or the consent of the beneficiaries.

The Federal Circuit's decision also conflicts with the decision of the First Circuit Court of Appeals in *Joint Tribal Council of the Passmaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), that "any withdrawal of trust obligations by Congress" would have to be made in "plain and unambiguous" language in order to be effective. 528 F.2d at 380. In so holding, the First Circuit analogized to this Court's holding in *DeCoteau* regarding the termination of Indian reservations. *Id.* at 380 n. 12.

The Court should therefore also grant the *Wolfchild* Petitioners' Petition for a Writ of Certiorari in order to resolve this conflict in the circuits and decide the important question of federal law, never before addressed by this Court, as to the need for clear and explicit or "plain and unambiguous" language in congressional enactments that purport to terminate a trust in favor of Indians, absent the consent of the beneficiaries of the trust.

CONCLUSION

For the reasons set forth above and in Petitioners' Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari requested in this case.

Respectfully submitted,

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