No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Circuit Court of Appeals erred in failing to recognize the existence of a trust corpus in property and beneficiary rights for and on behalf of the lineal descendants of the Loyal Mdewakantons, from the March 3, 1863 Act and that the existing trust corpus was intended to be implemented and enhanced by the subsequent legislation found in the Appropriations Acts of 1888, 1889, 1890 and 1980.

2. Whether the Federal Circuit Court of Appeals erred in not applying the doctrine of judicial estoppel as set forth in *New Hampshire v. Maine*, 532 U.S. 742 (2001) and thus allowed the United States to argue the existence of a trust and obtain a favorable result in the Eighth Circuit, *Cermak v. United States*, 478 F.3d 953 (8th Cir. 2007) and to argue the lack of a trust and obtain a favorable result in the Federal Circuit, *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009), thereby creating a split in the Circuits.

LIST OF PARTIES

The List of Parties is set out in a separate letter to the Court.

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OPINION BELOW

The three judge panel of the United States Court of Appeals for the Federal Circuit issued its Opinion and Order dated March 10, 2009, reversing the United States Court of Federal Claims decisions that a trust existed in the 1886 lands of the Loyal Mdewakanton Dakota Sioux in Minnesota, by virtue of Appropriations Acts in 1888, 1889 and 1890, and also reversed on the Court of Federal Claims Court's finding that the 1980 Act did not terminate the trust as it pertained to the Loyal Mdewakantons.

STATEMENT OF JURISDICTION

The three judges of the United States Court of Appeals for the Federal Circuit in *Wolfchild, et al. v. United States* reversed the trust rulings of the federal court of claims in its Opinion and Order dated March 10, 2009. The Petitioners filed for rehearing and reconsideration en banc, which was denied by the full panel of the United States Court of Appeals for the Federal Circuit on June 11, 2009. The United States Supreme Court has jurisdiction of this case pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Act of 1889, 25 Stat.980, 992-93 in pertinent part reads:

> For the support of the full-blood Indians in Minnesota heretofore belonging to the

Mdewakanton band 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; 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 1888 Act]: Provided, that if the amount in this paragraph appropriated ... 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 received [sic], 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 a 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.

Act of February 16, 1863, 12 Stat.654, Section One reads in pertinent part: abrogated and annulled all treaties, between said Indians and the United States, declared all lands and rights of occupancy with 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.

Act of March 3, 1863, 12 Stat.654. Section Nine reads in pertinent part:

> this statute authorized the Secretary of the Interior [t]o 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 whites from the late massacre [by] said Indians. The land so set apart ... shall be an inheritance to said Indians and their heirs forever.

25 U.S.C. §462 reads in pertinent part: ... [t]he existing periods of trust placed upon any Indian lands

and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

I. STATEMENT OF THE CASE

This is not a case merely about money. This is an important case about recognizing and correcting history concerning a group of honorable people, who have left human legacies of accomplishment, descendancy, heirship, pain, suffering, personal tragedy, loss, near genocide, and hope, for the future. The three judge panel of the United States Court of Appeals for the Federal Circuit, in reversing the Federal Court of Claim's decision recognizing an existing and continuing trust corpus for the lineal descendants of the Loyal Mdewakanton from 1863 through the 1980 Act, if allowed to stand, creates a gross and unjust inequity affecting thousands of justly deserving Native American people. The lineal descendants petition to have this Court correct the obvious conflict within the Federal Circuit Court of Appeals itself and with the Eighth Circuit Court of Appeals decision on the same issue, caused by this Federal Circuit decision. These Petitioners join arguments put forth in the other Petitioners' petition for certiorari.

II. STATEMENT OF FACTS

Thousands of years had passed while the Native peoples of North America lived upon their valued aboriginal homes. The aboriginal inhabitants of the continent viewed possession of material things as shared and communal. The spiritual and ecological

environment allowed for the existence of man, plant and beast, in a balanced ecosystem functioning consistent with the beliefs gained through the guidance of the Great Spirit.

A. HISTORICAL BACKGROUND

Petitioners claim to be lineal decedents of individual Loyal Mdewakantons referenced in the March 3, 1863 Act and the Appropriations Acts of 1888, 1889 and 1890.

Many Petitioners are lineal descendants of the Chiefs Wabasha, Little Crow and Red Wing; Chiefs of the Mdewakanton Dakota Sioux who exercised governance over the Mdewakanton peoples. Individual potentate rights existed as to the Chiefs' heirs and lineal descendants including individual rights, remedies and property interests as set forth in the Sioux treaties from 1825 through 1868. Many of the Plaintiffs are lineal descendants of original Mdewakanton Dakota Sioux listed on the Henton List (commonly known as the "1886 Census" of the Mdewakanton Sioux living in Minnesota since May 20th, 1886), and of the Loyal Mdewakantons (Loyals) derived from various other agency and governmental lists and resources such as the Sioux Scouts and Soldiers list of 1891 (Elrod List), the Renville Rangers, the Brown Scouts lists, the 1899 McLaughlin census, the Santee Sioux census of 1917, the Congressional Globe list of 1863-65, and the Loyal Mdewakanton lineal descendants who do not otherwise appear on any given

census or list, who also would qualify as Loyal Mdewakantons. APP8-20,31-43,58-67,95-96.

B. HISTORY AND THE TREATIES

The significance of the treaties between the Mdewakanton Sioux and the United States, France, Spain and Britain cannot be understated. The Louisiana Purchase in 1803, was an agreement between the French government and the new United States government transferring the right to lands beyond Ohio and Missouri. Predating the Louisiana Purchase, and the Northwest Ordinance of July 13, 1787, it was France through its representatives, that negotiated sovereign to sovereign agreements with the various bands of the Sioux, including the Mdewakanton Sioux, which were based upon recognition of sovereign and *individual* rights of use, enjoyment, occupation and peace, with the Sioux, by and through their headmen and Chiefs, for the benefit of the "bands" as well as the individual members. When a "sovereign" makes *treaties* with another sovereign, such as the French with the Sioux, United States law recognizes that no treaty can be abandoned or abrogated without an express intent to abrogate. A sovereign to sovereign treaty cannot be abrogated by implication, nor by solely executive order or executive act. *United States v. Dion*, 476 U.S. 734, 740 (1986). The same holds true for statutes. The genesis of federal Indian law only started with the onset of legal cases after 1790, in cases such as *Worcester v. Georgia*, 31 U.S. 515 (1832). *See Cohen's*

Handbook of Federal Indian Law, 2005 Ed., Ch.2, Sec. B.4, p. 60-72.

The Louisiana Purchase, however, never included the sovereign interests of the Sioux, nor the Mdewakanton Sioux. *Treaty Between the United States of America and the French Republic, April 30, 1803 in Treaties and Other International Acts of the United States of America*, v.2 (Hunter Miller ed.) (1931). The Louisiana Purchase, which allegedly formed the basis of the sovereign to sovereign relationship between the United States and the Sioux and its people, was not negotiated or agreed upon by any of the Sioux bands, tribes or individual chiefs. Article III recognizes:

> that "the inhabitants of the [Louisiana Territory] ceded territory shall be incorporated in the Union of the United States admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of liberty, property and the Religion which they profess."

Id.

Further, Article VI of the Treaty stated that "The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or

nations other suitable articles shall have been agreed upon." *Id.*

The Mdewakanton's aboriginal lands existed in the Minnesota and Dakota Territories. Only through the treaties of 1825, 1831, 1837, 1851, 1858 and 1868, have the United States and its agents dealt with the Mdewakatons and its individual Dakota Indians.

C. THE MINNESOTA SIOUX BEFORE AUGUST 1862

Before the formation of the United States, the Mdewakanton Dakota Sioux began seeing foreign visitors in their lands in Iowa, Wisconsin, Michigan and Minnesota. The territory of Minnesota prior to the 1851 Treaty of Traverse des Sioux, included only original counties called Wabashaw, Dahkotah, Mahkahta, Henton, Ramsey, Washington, Itasca, Pembina and Iowa. The County of Wabashaw alone, encompassed the *present day* southern portion of the present day state of Minnesota and beyond.

With the treaty cession to the United States in 1851, the trust responsibilities of the United States and its agents to the Mdewakanton Dakota Sioux bands, was clearly established in the form of rights, remedies, payments and annuities granted to the bands, and to the individual members of said bands. *See Mdewakanton & Wahpakoota Bands of Sioux Indians v. United States,* 57 Ct.Cl. 357, 359-61 (1922). App. 19.

The 1851 and 1858 treaty provisions recognize a "self-executing" right of the *individuals*, not just the band/tribe, that allows a protected individual within the Mdewakanton band, the clear right recognized by Congress, to pursue individual rights, remedies and privileges, associated with the life, liberty and property as protected by said Treaty. *Treaty between the United States and the Mdewakanton and Wahpakoota Bands of Dakota or Sioux Tribe of Indians*, Articles III and IV, March 31, 1859, 12 Stat.1031. The self-executing treaty provisions of the Treaties of 1851 and 1858, allowed for any individual Mdewakanton Indian to assert their own property and privacy interests and to use the (later) due process clause of the U.S. Constitution and the treaty rights to preserve and protect said rights. *See Kolovrat v. Oregon*, 366 U.S. 187 (1961) (recognizing a self-executing treaty right for lineal heirs).

D. 1862 SIOUX UPRISING

The following recorded firsthand accounts of the dealings with the United States, document the historical experiences of the Dakota Sioux leading up to the forced removal of the Dakota from Minnesota:

> Under the treaty of Traverse des Sioux [1851] the Indians had to pay a very large sum of money to the traders for old debts, some of which ran back fifteen years, and many of those who had got the goods were dead and others were not present, and the traders' books had to be received as to the

> amounts, and the money was taken from the tribe to pay them. Big Eagle's Account, *Through Dakota Eyes*, at 24 (Gary Clayton and Alan R. Woolworth, eds. 1988).
>
> As the summer advanced, there was great trouble among the Sioux – troubles among themselves, troubles with the whites, and one thing and another. The war with the South was going on then, and a great many men had left the state and gone down there to fight. A few weeks before the outbreak the president [Abraham Lincoln] called for many more men, and a great many of the white men of Minnesota and some half-breeds enlisted and went to Fort Snelling to be sent South....

Id. at 25.

> At last Maj. Galbraith went to work about the agencies and recruited a company of soldiers to go South. His men were nearly all half-breeds. This was the company called the Renville Rangers, for they were mostly from Renville county.

Id. at 25-26.

> At last the time for the payment came and the Indians came in to the agencies to get their money. But the paymaster did not come, and week after week went by and still he did not come. The payment was to be in gold. Somebody told the Indians that the payment would never be made. The government was in a great war, and gold was scarce,

> and paper money had taken its place, and it was said the gold could not be had to pay us. Then the trouble began again and the war talk started up. Many of the Indians who had gathered about the agencies were out of provisions and were easily made angry. Still, most of us thought the trouble would pass, and we said nothing about it. I thought there might be trouble, but I had no idea there would be such a war. Little Crow and other chiefs did not think so. But it seems some of the tribe were getting ready for it.

Id. at 24-27.

> Among the many people in the reservation community were the Franco- and Anglo-Dakotas.... Officials of the United States Office of Indian Affairs conducted a census in 1855-56 that showed about 650 mixed-bloods of Mdewakanton descent in Minnesota. [APP 97-102]. Some of the group had merged with the white population of eastern Minnesota, but most were living on the reservation. After 1856 the developing farm programs on the reservation provided an incentive for others to join them. Many also worked on the reservation being employed by the traders as clerks or the government as interpreters. Juggling two distinct cultures at the same time – occasionally serving one and then the other – repeatedly placed the Franco- and Anglo-Dakota people at the centers of controversies.

Id. at 12.

> In 1862 many Dakota Indians who continued to live by the hunt began feuding with traders over the issue of past payments for debt. Funds from the 1858 treaty, it was believed by the Dakotas, had paid all past debts owed by individual Indians. Traders, on the other hand, argued that Indians had received credit after the treaty. By the spring of 1862, traders and their Indian customers were on the verge of a violent break. Many of the mixed-bloods were caught squarely between two groups.

Id. at 12.

> The conflict over traders' debt was only one of several important issues creating unrest. Indian agents as early as 1860 had adopted the practice of handing out annuity money and food only to Indians who showed some inclination to become farmers.

Id.

The 1862 Uprising events began simply enough when four young Dakota Sioux men from Shakopee's village found themselves in Acton, Minnesota:

> The tension had escalated in early August 1862, and several small hunting and war parties left the reservations. These groups were dominated by young men, some of whom were angry over the way whites had treated their people and the failure of traders to assist the Indians.... One of these parties from Shakopee's village on Rice Creek met and quarreled with Robinson

> Jones, a settler after they had taken egg's from settler's hen's nest, near the small community of Acton. The impassioned warriors turned on Jones, killing him and several members of his family and creating the spark that ignited the war.

Id. at 34.

Another account was recorded by Cecelia Campbell Stay on the first day of the Outbreak, at the Redwood Agency where she lived with her Dakota mixed-blood family:

> Another incident I want to bring before my readers is that same day [Aug.18, 1862], [I] shall name our family first for we lived at that house, where some taken prisoners were congregated. There was Grandmother Mrs. Margaret Scott Campbell [Campbell], Uncle Hypolite [and his] wife Yuratwin (a cousin of Standing Buffalo) and two children John & Theresa, Uncle Baptiste, Uncle Scott, father, A.J. Campbell, mother, sister Emily 15 years old, myself (Celia), 13 and Mary 9, Joseph 7, Martha 5, Willie 2, Stella about 7 weeks old. All those who were fleeing fugitives [and were] brought back to us were Mrs. Antoine Findly and step-son Billy Findly, Louis Martin [and his] wife and three children. Mrs. Matilda Vanosse [with] one child on her back ... she would fall in a fit.... Uncle Scott went, met them and between them they got her to the house.... Mrs. Findly never left us during the seven weeks of our captivity until [she was] safe back to Traverse des Sioux

> [and] out of danger. Cecelia Campbell Stay's Account.

Id. at 51-52.

> One of the soldier band among the hostiles stood up and answered that they knew the white people were too strong for them, but their object was to make the white women and children stay with them and suffer with them when the whites drove them out of the country. Following this speech, the hostile warriors mounted and before riding away they said that all the half-breeds and friendly Indians must come to their camp and unite forces with them the next day, other-wise they would return and force them to join. Victor Renville's Account.

Id. at 193.

> After the hostiles left, an old man, Nach-pi-ya-wi-ca-xta [Cloud Man], got up and said that these hostiles, after breaking all treaties and causing the friendly Indians to lose their annuities, were now planning to make them all captives. He also said that they must send out messengers to call all the camps together and prepare to attack the hostiles.

Id. at 193-94.

> When word was received of the approach of more hostiles, the friendly Indians struck camp and went up the river, pitching camp on the west side. The hostiles followed and camped a mile away. The friendly Indians

> then held a council and sent General Sibley a letter written by Thomas Robertson, who had escaped from the hostile camp. He, with a comrade, carried the letter to Fort Ridgely. Robertson was allowed to enter the fort blindfolded and was able to explain to Sibley what the friendly Indians were trying to do. He also carried Sibley's letter back to the friendly camp with the message that the general was not fighting his friends among the Indians and half-breeds.

Id. at 94.

> Early in the morning the half-breeds and friendly Indians rode out ahead of the attacking hostiles and by showing themselves here and there, gave plenty of warning. When the attack began the soldiers were ready and by the unexpected use of cannon the enemy was driven off. The hostiles now rode back to their own camp and began to make ready to escape. This gave the friendly Indians and half-breeds an opportunity to ride into the hostile camp and snatch the women and children captives from the Indians who were about to carry them off. They carried these prisoners to their own camp which they defended with ditches and breastworks. Over the camp of the friendly Indians floated a white flag as a sign that they were not hostile to the whites.

Id. at 238. APP112.

Following the uprising, thousands of Dakota Sioux were taken captive regardless of whether they acted against or in assistance of the whites. These Dakota men, women and children, (including half breeds and mixed bloods), were held captive for many months at Camp Release, Fort Snelling and other sites. APP112. Sibley's forces scoured the country for hostile Indians and succeeded in taking more than four hundred. The troops then rushed in upon what remained of the hostile camp and took all the captives and supplies. They then established a military tribunal and tried their Dakota prisoners. Those found to have committed atrocities were imprisoned and many of them were sentenced to death.

> Two days before the departure of the prisoners, the rest of the captured Sioux were sent down the river to Fort Snelling. They, too, were attacked along the way. As they passed through Henderson, they were set upon by the enraged populace with guns, knives, clubs, and stones. Several were injured, and one infant was so badly hurt that it soon died. Those who survived this assault and the following winter remained in a dismal encampment on the flats below Fort Snelling for about six months, tormented by wild rumors concerning the fate of their menfolk and perpetually in danger of being killed by parties of whites who repeatedly threatened to break through the wooden fence erected for their protection. Roy W. Meyer, *History of the Santee Sioux*, at 128 (Revised ed. 1993). APP1,9-20.

> When the trials were completed, the general assumption was that all 303 of the men condemned to death would be speedily hanged. President Lincoln, however, intervened and ordered General Pope to send him the complete trial record.... Lincoln's action was, of course, displeasing to the people of Minnesota, whose spokesmen, Governor Ramsey and the congressional delegation, had been insisting that the Indians must all be executed or lynch law would prevail....

Id. at 128.

> A last-minute change of schedule was the removal of one name from the list of those to die. The remaining thirty-eight condemned mounted the scaffold chanting their death song, reluctantly allowed the white caps to be adjusted over their heads, and then attempted to grasp each other's hands in a final gesture of solidarity. The trap was sprung by William Duley, some of whose family had been killed at Lake Shetek. His personal desire for revenge and that of the spectators was satisfied as thirty-eight Sioux corpses dangled from the scaffold. [The largest mass execution in Unites States history]. When all had been pronounced dead, the bodies were buried in a shallow grave nearby, from which they were shortly exhumed for use as cadavers by local physicians. [including, by Dr. W.W. Mayo]

Id. at 129-30; *also see* Loren Dean Boutin, *Cut Nose: Who Stands on a Cloud*, at 93-110 (2006). APP5.

> Although the newspapers of Minnesota were calling for the expulsion of all Indians from the state, attention naturally centered early in 1863 about the Sioux who had been taken into custody at Camp Release. These people – the prisoners held at Mankato and the larger group at Fort Snelling – spent a miserable and anxious winter. The condemned men probably fared better than their families. Out of the 350 or more, only thirteen died during the winter, as against about 130 in the camp at Fort Snelling.

Id. at 136. APP1,9-20.

> Under such pressure from their constituents and their political opponents, both the Minnesota legislature and the congressional delegation moved rapidly to bring about the expulsion of the Sioux from the state. As early as Governor Ramsey's special message to the legislature on September 9, 1862, the idea was broached of abrogating all treaties with the Sioux and reimbursing victims of the uprising from the annuities still due under the treaties.

Id. at 139-40.

> The advocates of outright extermination, though noisy, were not numerous among people whose opinion carried much weight in the determination of policy. Even Galbraith, who confessed to "feelings of exasperation against these savages" and who was emotionally involved by the need for self-justification, conceded in his official report

> that "few will contend that the Sioux and all other Indians can be *'exterminated'* just now."

Id. at 141.

> [Rev. John] Williamson wrote his mother from St. Joseph that if all 1,300 were crowded onto one boat, it would be "nearly as bad as the Middle Passage for slaves." He later described conditions on board the *Florence*, saying that when 1,300 Indians were crowded like slaves on the boiler and hurricane decks of a single boat, and fed on musty hardtack and briny pork, which they had not half a chance to cook, diseases were bred which made fearful havoc during the hot months, and the 1,300 souls that were landed at Crow Creek June 1, 1863, decreased to one thousand.... So were the hills soon covered with graves. The very memory of Crow Creek became horrible to the Santees, who still hush their voices at the mention of the name.

Id. at 146.

For years following the Sioux Uprising in 1862 and the forced removal of the Dakota from Minnesota, the State led by the profiteer Alexander Ramsey as Governor, placed a bounty on any Sioux person found in Minnesota. The bounty was for $200.00 for each Sioux scalp that could be shown as proof of the killing. *New York Times*, August 18, 1863;APP120.

> Whatever the end of the Sioux Uprising may have meant to the white man – a chance to speculate in land or acquire a farm in lands previously unavailable, a demonstration of the Lord's saving power over men about to be executed, or something else for the Sioux it meant just one thing: catastrophe. It meant their expulsion from the land where they and their ancestors had lived since the immemorial past, and more than that, it meant the shattering of whatever unity the Santee bands had possessed. Never again were the Mdewakantons, Wahpekutes, Sissetons, and Wahpetons *one people, occupying a single* fairly well defined land area. Henceforth they were scattered over states and provinces, with hundreds of miles separating their dispersed settlement and the lands between rapidly filling up with white men, who learned eventually to tolerate the Indian, if only to exploit him, but never to accept him as an equal.

Meyer, supra at 132.

The Uprising itself, in August 1862, was partly precipitated upon a known policy of planned removal and/or genocide developed by the officials of United States, and with local counterparts such as Alexander Ramsey (Indian Agent and Governor of Minnesota Territory) and Henry Sibley (Governor and Army Colonel). *Marx Swanholm, Alexander Ramsey and the Politics of Survival*, 16-17 (1977). These two gentlemen ended up profiting handsomely from financial and land transactions immediately before

and following the 1862 uprising and the passage of the 1863 Act. *Id.* at 12-13. Federal executive branch officials continued to open up the valuable lands of the Mdewakanton, even after the 1858 treaty, to usurpation by settlers and land speculators in clear violation of all existing treaty rights with the Mdewakanton bands. The purposeful act of depriving the Mdewakantons of their annuity payments and treaty benefits between 1858 and 1862, created a dangerous and life threatening situation for the people. APP116-18.

E. THE IMMEDIATE AFTERMATH OF THE 1862 UPRISING

Some Minnesota Sioux had remained loyal to the United States during the uprising. When the February 16, 1863 Act was passed, allegedly abrogating all previous treaties and annuities between the Mdewakanton and the United States prior to the 1862 Uprising, the United States attempted to utilize a knee-jerk, across the board abrogation process, to divest any and all of the land, property, annuities, property interests, privileges, and future interest and lives of even the *loyal* Mdewakanton Sioux people, despite the fact that many Mdewakantons never warred against the white settlers or the U.S. Army. However, at the same time that Congress stripped the Minnesota Sioux of their Minnesota lands, it authorized the Department of Interior to allocate up to eighty acres of that land to each loyalist. Act of March 3, 1863. 12 Stat.652-54, Sections 1 and 9.

F. THE MARCH 1863 ACT AS AN ENABLING ACT

The March 3, 1863 Act (hereinafter "the 1863 Act") is an enabling statute with an enabling provision for present, future and subsequent legislation, including the Appropriations Acts of 1888, 1889 and 1890, and the 1980 Act.

> Enabling statute: Term applied to any statute enabling persons or corporations, or agencies to do what before they could not. It is applied to statutes which confer new powers.

Black's Law Dictionary, 526 (6th ed.1996).

> Enabling clause: That portion of the statute or constitution which gives to governmental officials the power and authority to put it into effect and to enforce such.

Id.

In moving to pass the abrogation of certain existing treaty rights of the Minnesota Dakota Sioux bands, to land and annuities, Congress was utilizing its political authority to pursue the goal espoused by many in the United States and local Minnesota government – to exterminate or eradicate the race of the Sioux from Minnesota. *Swanholm*, *supra* at 16. Even with the pressure and influence from power-brokers such as Alexander Ramsey, the sweeping move to wipe out all existing treaty rights did not succeed. *See* Debate over the 1863 Act, APP22-34.

Although the allocation of land to the loyal Mdewakantons provided for in Section 9 of the 1863 Act was not immediately implemented, it led Congress to further provide for the Loyal Mdewakanton in 1888, when it authorized the Department of Interior to expend additional funds on their behalf. Congress recognized that when it declared the Minnesota Sioux's treaties, annuities, and allocation of land forfeited in 1863, it intended to make an exception for the Loyal Mdewakanton, whose annuity was valued at approximately $1,000,000. *See* 19 Cong.Rec. H2976-77 (daily ed. Apr. 14, 1888) (Statement of Rep. MacDonald). As a result of a failure of executive branch officials to implement the 1863 Act, many loyal Mdewakanton were rendered homeless. *Id.* at 2977. The 1888 Act provided benefits for the full-blooded Mdewakanton. Because of the administrative difficulty of determining which Mdewakanton remained loyal during the 1862 uprising, Congress determined that presence in Minnesota on May 20, 1886, served as an adequate *proxy* for "friendliness." (JA0320). Therefore, the initial and most recognizable definition of "friendly" or "Loyal Mdewakanton," is if there is evidentiary proof of the individual Mdewakanton ancestor actually assisting in rescuing or protecting the white settlers during the 1862 uprising, as many were recognized in doing.[1]

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[1] Therefore, it is obvious that the other groups such as the Sioux Scouts and Soldiers (Elrod List), etc., also would qualify as

(Continued on following page)

An act in 1889 added a further benefit provision calling for each Loyal Mdewakanton to receive "as practicable, an equal amount in value of this appropriation...." *Act of 1889*, 25 Stat.980, 992-93. In a third appropriation act in 1890, Congress added $8,000 and adopted the same substantive provisions as the 1889 Act, except that it expressly stated that the further appropriated amount was to support Indians of both "full- and mixed-blood." *Act of Aug. 19, 1890*, 26 Stat.336, 349. The latter two acts called for funds to carry over if the Department of Interior did not spend them by the end of the fiscal year, ensuring that the Loyal Mdewakanton and their descendants and heirs would benefit from the appropriation into the future.

Utilizing the proxy determination of lineal descendancy to ascertain which Mdewakanton lived in Minnesota on May 20, 1886, Agent Walter McLeod took a census listing all of the full-blood Mdewakanton. (*See* JA0237-0247;JA0315). Inclusion on the McLeod list has been deemed by the Agency to create a rebuttable presumption that an individual met the eligibility requirements of the subsequent 1888, 1889, and 1890 Acts. (*See* JA0059;JA0320).

On January 2, 1889, Robert B. Henton, Special Agent for the Department of Indian Affairs, took a second census of those Mdewakanton living in

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Loyal Mdewakantons, along with the proxy definition ancestors. APP37-41,95-96.

Minnesota since May 20, 1886. (*See* JA0315;JA351-0363;JA0323). The McLeod and Henton censuses (together, "1886 census") were initially used to determine who would receive the benefits and in what amounts appropriated under the 1888, 1889, and 1890 Acts.

The task of determining those beneficiaries of the various Acts did not cease with these two censuses. Henton's duties included purchasing various items on behalf of the Mdewakanton, including land. *Wolfchild I*, 62 Fed.Cl. at 528 n.7. Later, James McLaughlin was given the authority to make an additional census. In a letter dated February 20, 1899, McLaughlin was instructed to make a "complete census of the Mdewakanton (sic) band of Sioux Indians in Minnesota...." APP62. Part of his task was to ensure any Indians who were improperly enrolled as members be prevented from receiving additional payments. *Id.* McLaughlin completed his task in March of 1899. APP65-67.

It is logical to recognize that the congressional acts concerning the Loyal Mdewakantons subsequent to the 1863 Act, were designed to implement the reserved and self-executing treaty rights of Loyal Mdewakanton as recognized in Section 9 of the 1863 Act. As an enabling act, Section 9 of the March 3, 1863 Act is self executing as to individual rights, privileges and remedies for the Loyal Mdewakantons and their heirs.

The self-executing rights to potentate lineal descendancy of the Mdewakanton Sioux continued to be recognized in the 1868 Treaty of Fort Laramie. The Ft. Laramie Treaty of 1868, included Chief Wabasha III, a direct potentate lineal descendant of Chief Wabasha who signed the 1851 and 1858 treaties as a recognized signatory. The Fort Laramie Treaty of 1868 also contained self-executing provisions affording rights to assert individual rights, remedies and privileges to preserve and protect property, property interests and other personal rights.

Article I of the Fort Laramie Treaty provides:

> If bad men among the whites, or among other people subject to the authority of the United States shall commit *any* wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the law of the United States, and also reimburse the injured person for the loss sustained (emphasis added).

Id.

The Fort Laramie Treaty of 1868 postdated the 1863 Act, and is still good law, as evidenced in *United States v. Sioux Nation of Indians*, 1448 U.S. 371 (1980); and *Elk v. United States*, 87 Fed.Cl. 70 (2009). Since Chief Wabasha III was an invited signatory on behalf of the Mdewakanton/Santee Dakota Sioux, this indicates that Congress continued to recognize the

Mdewakanton Sioux still held individual rights and interests including potentate lineal descendancy rights. If the Mdewakantons had no existing self-executing potentate rights after Congress passed Section 1 of the 1863 Act, Chief Wabasha III would not have been invited to sign the 1868 Treaty of Ft. Laramie on their behalf.

It is clear that the individual self-executing rights of the earlier treaties (1837, 1851 and 1858) were existent and preserved, particularly as to the Loyals, even following the 1863 Act of Congress. The 1868 Ft. Laramie Treaty recognized the important right of potentate lineal descendancy of the Mdewakanton Sioux. The canons of construction must favor the rights of the individual Indian if any ambiguity exists as to treaty or congressional statute interpretation, as here. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 562 U.S. 172, 200 (1999); *United States v. Dion*, 476 U.S. at 740.

The 1837, 1851 and 1858 Treaties predated the 1934 Indian Reorganization Act, as did the 1868 Fort Laramie Treaty. The individual, self-executing treaty rights continued to exist through lineage and heir-ship, and survived the passage of later acts of Congress not explicitly abrogating these rights, including the 1934 IRA, and the later acts leading to the formation of the Shakopee Mdewakanton Dakota Sioux Community, the Lower Sioux Indian Community and

the Prairie Island Indian Community. *See Elk v. United States*, 87 Fed.Ct. 70 (2009).

REASONS FOR GRANTING THE PETITION

III. TRUST EXISTED SINCE 1863

By recognizing the importance of Section 9 of the March 3, 1863 Act as confirmation of the existence of a trust corpus in land and rights in favor of the "Loyal Mdewakantons and their heirs, forever," the Federal Circuit Court of Appeals acknowledged that the 1863 Act in fact recognizes congressional intent to acknowledge the existence of the trust corpus for the Loyal Mdewakantons, prior to and at the time of the enactment of the Act of February 16, 1863, 12 Stat.654. The Panel emphasized the lower court's finding on the issue. *Wolfchild I*, 62 Fed.Cl. at 542; Order of March 10, 2009, p.20.[2]

The fact that the Panel recognizes this important trust finding of the Trial Court reemphasizes the fact that the trust corpus was still in existence in 1863, in 1888, 1889, 1890, 1934, 1969 and again in 1980. The trust cannot be terminated by anything but clear

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[2] In pertinent part, the March 3, 1863 Act, Section 8 states, the intent "[T]o 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 whites from the late massacre [by] said Indians. The land so set apart ... shall be an inheritance to said Indians and their heirs, *forever*. Act of March 3, 1863, 12 Stat. at 654." (Emphasis added).

congressional intent to do so. The trust corpus was never clearly terminated, but was only furthered by appropriation and the statutory enactments following the 1863 Act. (JA00455-459). The trust was intended to exist for *all* heirs of the Loyal Mdewakantons, *forever*. The attempts prior to 1863 to fully implement a policy of genocide and extermination of the Mdewakantons from Minnesota, regardless of their participation in the uprising, were halted by Congress in 1863 with the passage of Section 9 of the 1863 Act. The subsequent legislation attempted to expand the unimplemented rights and remedies of the trust, protected for the Loyal Mdewakanton beneficiaries over the years.

Despite the fact the evidentiary record before the Trial Court had not yet been fully developed or completed prior to the interlocutory appeal of the two certified "Trust" questions, the Federal Circuit made critical findings on genuine issues of material fact in dispute in the underlying litigation, to reach the Panel's March 10, 2009 decision.

This litigation concerns valuable past, present and future rights and remedies of over 22,000 potential beneficiaries, i.e., the actual lineal descendants of the Loyal Mdewakantons. With its Order of March 10, 2009, the Panel, with the single stroke of a pen, has wiped out and destroyed the viable and legitimate claims, remedies and rights of over 22,000 Native American citizens without a trial. The Panel voted to reverse the decisions of the Federal Court of Claims finding that a trust did in fact exist during

the time of the "1886 Lands" appropriation in 1888, 1889 and 1890. In reversing that decision, the Panel has made a glaring and critical mistake in determining, without a trial, that the three Minnesota Communities are largely comprised of only lineal descendants. March 10, 2009 Order, p.8.

The Panel ignores the fact that the beneficiaries and/or lineal descendants are a defined class, but not yet fully and factually determined by the Trial Court. Initially, the Panel misstates the legal reference to the beneficiaries/lineal descendants. The true beneficiaries/lineal descendants are descendants of the "Loyal Mdewakantons," and not just the "1886 Mdewakantons." This is a critical distinction, in that the Loyal Mdewakantons are defined as trust beneficiaries within Section 9 of the 1863 Act itself (enabling act). The language of the 1863 Act indicating an " ... inheritance to said Indians and their heirs, forever," is a strong, self-executing declaration of the intent of Congress to benefit the Loyals.

The Panel appears to follow its own distorted view of the recent and present day makeup of the enrollment of the three communities, based on the misinterpretation of statistics.[3] The present day membership of the three communities may be made up of a significant majority of true lineal descendants, but the Panel ignored the fact that there are

[3] Many of the Plaintiffs question whether all enrolled members are actual lineal descendants.

thousands additional, rightfully entitled, true lineal descendants of the Loyal Mdewakantons, that are *not* recent, past or present enrolled members of the three Minnesota communities, even though they may be as or more entitled to membership enrollment than many members that are or have been enrolled. The Panel's conclusion that 95% of all of the true lineal descendants were enrolled in the present communities is a factual finding on an issue in dispute in this case. This incorrect conclusion explains the Panel's lack of focus within the Opinion on interpreting the trust existence and 146 year agency "trust" treatment, management and handling of these lands and issues. The Panel likely believed that the number of persons likely affected is small rather than in excess of 22,000 living descendants Congress sought to benefit by enacting Section 9 of the 1863 Act.

The Panel ignores the fact that the 1863 Act is an enabling act and that the Appropriations Acts were clearly intended to be used to implement land and property interests, including trust corpus interests, for and on behalf of the lineal descendants of the Loyal Mdewakantons. The Panel never explained how it concluded that Section 9 of the 1863 Act and the Appropriations Act of 1888, 1889 and 1890 are unrelated.

The Appropriation Acts, in this context, must have a trust corpus in which to function as intended. These Acts of 1888, 1889 and 1890 did not create the trust – the trust existed from the 1851 and 1858

treaties, as preserved in Section 9 of the 1863 Act. Without the Appropriation Acts there would be no clear direction for the trustee. The certified questions from the Trial Court do not ask whether or not a trust was created by the 1888, 1889 or 1890 Acts. The question is "whether a trust was created *in connection with* and *as a consequence* of the 1888-1890 Acts...." The Appropriation Acts did not themselves *create* the trust. The enabling 1863 Act, as executed through the 1888-1890 Acts, clearly establish the existence of a trust. This creates a conflict of holdings within the Federal Circuit Court of Appeals, as stated below.

IV. JUDICIAL ESTOPPEL

"'Judicial estoppel' applies when a party takes a later position that is inconsistent with a former position in the same dispute, on which the party had been successful and had prevailed based on the former position." *Bonzel v. Pfizer, Inc.*, 439 F.3d 1358, 1362 (Fed.Cir.2006). This Court has listed three factors which are proper to consider in determining whether judicial estoppel applies: (1) a party's later position must be "clearly inconsistent" with its earlier position; (2) the party succeeded in persuading a court to accept that party's earlier position; and (3) whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine,* 532 U.S. 742, 750-51 (2001) (citations omitted). Each of these

factors are present here. In essence, the Federal Circuit Court of Appeals has sanctioned the use of a litigant taking different positions to achieve its intended result. This runs directly afoul of the principles enumerated in *New Hampshire*.

A. The Government has argued mutually exclusive provisions: a trust relationship existed; and its current position that one does not.

In this litigation the United States consistently argued there is not now, and there has never been a trust relationship. However, in the past the United States has argued just the opposite: that is, there was a trust. Despite this conflict, the United States not only was allowed to proceed with its new theory, its new theory was adopted. To apply judicial estoppel, this Court must compare the United States' latter position with its current position. The United States' petition for discretionary appeal in this case asserted that the "Appropriation Acts" did not create a trust relationship between the Plaintiffs and the United States. It further contended Congress terminated the trust with legislation enacted in 1980. Petition at 10-18. In earlier cases, the government argued the existence of a trust arising under the 1863 Act and/or the Appropriation Acts and that the 1980 Act continued rather than terminated the trust.

First, in *Cermak v. United States,* U.S. C.O.F.C. Case No. 01-568, the United States argued that the

1863 Act and/or the Appropriation Acts created a trust. (JA06045).

Second, the United States in *Cermak v. Babbitt,* U.S. Dist. Court (Minn.) Case No. 98-1248, filed a motion in 1999 to dismiss the plaintiffs' claims arguing that a *trust arose* under either the 1863 Act and/or the Appropriation Acts:

> ***The Department's position regarding Indian Land Certificates was consistent over the years.*** *See* Ex. G, Letter from Acting Assoc. Solicitor, Indian Affairs, to Commissioner of Indian Affairs at 3 (May [sic] 19, 1974) (describing the interest in Indian Land Certificates to be either a tenancy at will or defeasible interest) (emphasis added).

The government's cited 1974 letter concluded, "[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." (JA00396) (emphasis added).[4]

In *Cermak* the United States argued that the Indian Land Certificate scheme was the Department's reasonable interpretation of its trust obligations under the 1863 Act and/or the 1888, 1889 and

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[4] The United States earlier used this same argument in support of the Interior Board of Indian Appeals' position of the existence of a trust. "The lands are held in trust by the United States with the Secretary possessing a special power of appointment among members of a definite class." *Brewer v. Acting Deputy Assistant Sec'y,* 10 IBIA 110, 119, n.8 (1982).

1890 Acts. The United States even argued the Department's position under the 1863 and Appropriation Acts should receive *Chevron* deference. *Id.* at 22.[5]

As to the 1980 Act, the government argued that the rights of Plaintiffs were "grandfathered" and unaffected by the 1980 Act. *Id.* at 8-9, 16.

In its submission dated April 27, 1999, the government went further stating, "[a]s Congress contemplated, the named individual holders of Indian Land Certificates (such as John Cermak) would be safe in their use and possession until their death after the 1980 Act." *Id.* at 5.[6]

Third, the United States, in its February 29, 2008 brief in opposition to the Cermaks' appeal in the

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[5] Additionally, in order to avoid the reach of the Quiet Title Act, the government conceded the 1886 Lands were trust lands, "If the Plaintiffs wish to claim that the Certificates 64 and 65 were actually allotments issued to John Cermak under the GAA, then these lands would be trust or restricted Indian lands and fall under the QTA's exception." *Id.*

[6] As the United States knows or should know, not all the named individual holders of Indian Land Certificates are dead. For example, one plaintiff, the very much alive Morris Pendleton, received his Certificates in 1979 (Att. E). The United States in this matter failed to account for the "grandfathering" of Morris Pendleton's beneficiary rights – and all others similarly situated – and his concomitant claims for trust mismanagement. The limited purpose of showing the United States' earlier, inconsistent position on the 1980 Act here is to show the United States argued in 1999 that the 1980 Act *continued* the trust. This is in direct contradiction to its position now that the 1980 Act *terminated* the trust.

United States Court of Appeals for the Federal Circuit, again argued: that a trust arose under the 1863 Act and/or the Appropriation Acts; that the 1980 Act altered, rather than terminated, the legal status of the trust lands; and subsequent assignees were "grandfathered in." The United States argued:

> In 1980, however, Congress did enact legislation that *altered legal status of the land* subject to the Indian Land Certificate program and placed those lands in trust for the Shakopee Mdewakanton Sioux Community as a whole.... *Section 3 of the 1980 Act made clear that all existing assignments, issued under the Land Certificate Program, were "grandfathered in" and unaffected by the legislation....*
>
> The Department acquired the lands at issue here under the three aforementioned appropriation acts that authorized the Secretary to buy lands for the benefit of certain Indians who were, or who were once affiliated with, the Mdewakanton Sioux. *See* Act of December 19, 1980 (stating that "all right, title and interest of the United States in those lands ... *which were acquired and are now held by the United States for the use and benefit of certain Mdewakanton Sioux Indians under [appropriation statutes]* are hereby declared to hereafter be held by the United States ... for the [Shakopee Community]") (emphasis added).

The litigation waged by the Cermaks is not only a prime example of the applicability of judicial estoppel

but also the need of this Court to settle the question as to the proper forum for such a claim.

Once the matter made its way to the Federal Circuit, the United States' position that the 1863 Act created a trust did not change. *See Cermak v. Babbitt,* 234 F.3d 1356, 1358-59 (Fed.Cir.2000), *pet. for cert. denied, Cermak v. Norton,* 532 U.S. 1021 (2001).

It is respectfully suggested the Court grant the petition to rectify the perverse history of the manner in which these claims were addressed which allows the government to argue mutually exclusive positions.

B. The United States was successful in the earlier litigation.

The United States District Court and the United States Court of Federal Claims adopted the United States' earlier positions regarding the existence of a trust corpus to dismiss the Cermaks' claims. The Cermaks' claims started in the United States District Court for Minnesota. *See Cermak v. Babbitt,* 1999 U.S.Dist. LEXIS 22390, No. 98-1248 (D. Minn. July 12, 1999). The matter was transferred to the United States Court of Federal Claims. *Id.* The Cermaks appealed to the Eighth Circuit which transferred the appeal to the Federal Circuit. *Cermak v. Babbitt*, 234 F.3d 1356, 1358 (Fed.Cir.2000).

While *Babbitt* involved a jurisdictional question, the question hinged on the status of the land. The

United States argued jurisdiction was lacking because the land was "held in trust by the United States for the Community's benefit." *Id.* at 1359. The Federal Circuit accepted the government's argument and affirmed the transfer. *Id.* at 1364.

Thereafter, the Court of Federal Claims held the 1980 Act "transferred property that the United States held in trust for the individual Mdewakanton Sioux, to the Sioux Community." (JA06115). The court transferred the case to Minnesota. (JA06120).

Back in Minnesota, Judge Doty agreed with the government that "such lands were held in trust for the use of certain Indians" and cited the IBIA decision in *Brewer* as support:

> The AAD [BIA Acting Area Director] based his decision not to reissue certificates in favor of plaintiffs on the agency's interpretation of the Act of 1863, whereby land was to be set aside for assignment or allotment to certain Indians, and its ruling in *Gitchel.* (Cermak AR Ex. 9, TOC.) The agency has consistently asserted that certificate holders such as John Cermak did not receive allotments and were not beneficial owners of a possessory interest in allotted trust lands. *See Brewer v. Acting Deputy-Indian Affairs*, 10 IBIA 110 (1982). Rather, such lands were held in trust for the use of certain Indians. *See id.* at 116. The Secretary of the Interior did not grant any permanent interest in the lands, *pending*

> *further legislation. See id.* at 117 (emphasis added).

Cermak v. Norton, 322 F.Supp.2d 1009, 1015 (D.Minn. 2004), *aff'd, Cermak v. United States,* 478 F.3d 953 (8thCir.2007).

The Federal Circuit, after consolidating *Cermak* with *Wolfchild I*, affirmed the dismissal of the Cermaks' breach of duty claims. It held the "Department of the Interior as trustee had discretion over the assignment" of trust lands:

> With respect to the *Cermak* plaintiffs' claim for breach of legal duty (referred to originally as a "breach of trust" claim by the Cermaks), the government did not breach a legally cognizable duty by refusing to assign the Certificates to Raymond and Stanley Cermak because no such duty existed. *See Gitchel*, 28 I.B.I.A. at 48; *Brewer*, 10 I.B.I.A. at 116-19; *see also Wolfchild I*, 62 Fed.Cl. at 528-29. The custom of assigning a certificate to a deceased holder's heirs was not always followed and was not guaranteed because the BIA treated the certificates as only conveying a right to use the land, subject to significant restrictions. *See Wolfchild I*, 62 Fed.Cl. at 528-29; *Wolfchild II*, 68 Fed.Cl. at 791.... That discretion was limited in the sense that a certificate of assignment could be issued only to a lineal descendant of loyal Mdewakanton. Otherwise, the Department of the Interior had discretion that could be exercised in a reasonable, non-abusive manner. Accordingly, the dismissal of the

> plaintiffs' claims of breach of legal duty in *Cermak* related to the government's refusal to assign certificates to the heir of John Cermak was appropriate.

Wolfchild v. United States, 72 Fed.Cl. 511, 525 (2006).

Despite the United States' earlier position that a trust existed, it now argues there is no such trust. The Federal Circuit failed to adequately address the topic. Strangely, it relied on the decisions cited above in support of the contention there never was a trust. *Wolfchild v. United States*, 559 F.3d 1228, 1247 (Fed.Cir.2009). In addition, rather than pointing out the United States' position in the various *Cermak* litigation matters, it analyzed statements made by the Interior Department in 1915 to defeat the judicial estoppel argument. *Id.* at 1247-48.

The United States previously argued there was a trust. However, the only analysis provided by the Federal Circuit dealt with isolated statements rather than the specific positions set forth above. *Id.* at 1254-55. The government has successfully argued mutually exclusive positions, a result clearly at odds with *New Hampshire*.

C. The ability to use mutually exclusive arguments resulted in an unfair litigation advantage.

The United States obtained an unfair litigation advantage by arguing mutually exclusive positions. "[A]bsent any good explanation, a party should not be

allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4477, p.782 (1981).

> Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant.

28 Am. Jur.2d Estoppel and Waiver §74, at 498-99 (2000) (footnotes omitted).

The Federal Circuit failed to address the judicial estoppel argument permitting inconsistent decisions by different Circuits. The result is far reaching unless addressed by this Court. The United States, or any other litigant, will be allowed to seek an unfair advantage by adopting a position that is beneficial to one Circuit proceeding and then adopt an entirely opposite position in another Circuit proceeding. The courts in the history of dealing with the trust created by the 1863 Act and the Appropriations Acts were manipulated by the United States. Different positions have been taken to satisfy the particular need at the time. This Court should accept the petition to redress this wrong.

The Panel's decision to reverse on the issue of the existence of a trust prior to 1980, literally obliterates

the rights of the lineal descendant beneficiaries instead of following the intent of Congress to *enhance* those trust rights with the 1980 Act. The three communities had no preexisting trust rights by themselves without the lineal descendants, to enhance. This determination by the Panel is a clear error of law and a clear abuse of discretion, and should therefore be reversed.

CONCLUSION

Respectfully, Petitioners would like to share a story with the Court, that hopefully, may help the justices view things through an alternative lens. This is the story:

> Years ago, white settlers came to this area and built the first European-Style homes. When Indian people walked by these homes and saw see-through things in the walls, they looked through them to see what the strangers inside were doing. The settlers were shocked, but it makes sense when you think about it: windows are made to be looked through from both sides. Since then, our people have spent many years looking at the world through your window. We hope today we've given you a reason to look at it through ours.

This story ... the lineal descendants' story ... needs to be heard. This Honorable Court is the hope of justice for the Indian people.

Respectfully submitted this 6th day of November, 2009.

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