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In The

Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petition For A 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

A Court of Appeals for the Federal Circuit decision illuminates post-*Carcieri* conflicts with the Eighth Circuit, Ninth Circuit, the Federal Circuit itself and the Supreme Court regarding federal court subject matter jurisdiction over Indian claims of statutory violations against the United States. On the one hand, decisions such as *Carcieri v. Salazar,* ___ U.S. ___, 129 S.Ct. 1058 (Feb. 24, 2009) reflect that subject matter jurisdiction exists over federal government statutory violations on matters involving tribal governments recognized after the 1934 Indian Reorganization Act. *Carcieri* is in accord with Ninth Circuit decisions that an Indian tribe's sovereignty does not prevent the federal government from exercising superior federal sovereign powers. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986). On the other hand, the Federal Circuit and the Eighth Circuit deny federal court subject matter jurisdiction to enforce federal statutory obligations and legal rights to individual Native American beneficiaries when post-1934 IRA non-tribal community governments are involved. *Wolfchild v. United States,* 559 F.3d 1228 (Fed. Cir. 2009); *Smith v. Babbitt,* 100 F.3d 556 (8th Cir. 1996).

1. After *Carcieri,* whether federal court subject matter jurisdiction exists over Native American beneficiary claims of purported federal government violations of the 1934 IRA or other applicable federal statutes when post-1934 IRA non-tribal community governments are involved.

QUESTIONS PRESENTED – Continued

2. Whether the Federal Circuit's holding of "statutory use restrictions" in Congressional Appropriation Acts establishing statutory obligations on the United States, but no "trust," departs from applicable statutory interpretation and trust principles set forth in *United States v. Mitchell*, 463 U.S. 206 (1983) and its progeny.

3. Whether the Federal Circuit's holding that a 1980 Congressional Act terminated a trust impermissibly conflicts with the First Circuit's decision in *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1979) in that the Federal Circuit failed to consider the 1934 IRA's extension of all Native American trusts under 25 U.S.C. § 462 and failed to apply the "clear and unambiguous requirement" for a trust termination act.

LIST OF PARTIES

A list of parties has been provided to the Clerk of Court for the Supreme Court under a separate filing due to the numerous Petitioners represented (in excess of 10,790 individuals).

CORPORATE DISCLOSURE STATEMENT

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

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PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, sitting as a three-judge panel, is reported at 559 F.3d 1228 (Fed. Cir. 2009) and is reprinted in the Appendix to the petition at Appendix 1. The court reversed and remanded the decision of the United States Court of Federal Claims reported at 62 Fed. Cl. 521 (2004) at Appendix 161.

JURISDICTION

The date of the Court of Appeals for the Federal Circuit decision was March 10, 2009 at Appendix 1.

A timely petition for rehearing and en banc review was denied on the following date: June 11, 2009. A copy of the order denying rehearing and en banc review appears at Appendix 112-15.

An extension of time to file the petition for a writ of certiorari was granted to and including November 6, 2009 on August 20, 2009, in Application No. 09A192.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the 1888, 1889, and 1890 Appropriation Acts: Act of June 29, 1888, 25 Stat. 217 at 228; Act of Mar. 2, 1889, 25 Stat. 980 at 992; Act of Aug. 19, 1890, 26 Stat. 336 at 349. The Appropriation Acts are reprinted at Appendix 154-56. Relevant provisions of the original Indian Reorganization Act of 1934, as amended, 25 U.S.C. §§ 462, 463, 465, and 479 are reprinted at Appendix 159-60. The Act of Dec. 19, 1980, Pub. L. 9-557, 94 Stat. 3262 is reprinted at Appendix 157-58.

STATEMENT OF THE CASE

This petition places squarely before the Court several issues of national importance arising from a split in circuit court decisions. With the Federal Circuit's holding in *Wolfchild v. United States,*[1] this petition presents a confluence of conflicting court decisions from not only the United States Court of Appeals for the Federal Circuit, the Eighth Circuit, and Ninth Circuit,[2] but also with the Supreme Court.[3] In light of this Court's recent holding in *Carcieri v.*

[1] 559 F.3d 1228 (Fed. Cir. 2009), App. 1.

[2] U.S. Sup. Ct. Rule 10(a).

[3] U.S. Sup. Ct. Rule 10(c).

Salazar[4] and the circuit splits, the Federal Circuit's *Wolfchild* decision highlights an apparent fundamental legal and jurisdictional shift of federal court jurisdiction and Indian trust law.

First, the consequences of the Federal Circuit decision and resulting circuit splits dramatically change the legal framework in holding the United States accountable for legal violations and injustices regarding Native Americans. It places all Native Americans in the untenable position of losing federal court forums to litigate federal obligations to them and other statutory claims or abuses by post-1934 Indian Reorganization Act[5] communities. In short, if the purported governmental violations involve post-1934 IRA non-tribal community governments, when the lands are held in trust for those IRA communities, affected Native Americans have no federal court remedy.

Second, with the Federal Circuit's disregard of the Supreme Court's holding in *Carcieri*, the Circuit's decision affects Native American rights nationwide in matters involving federal holdings of trust lands. In the instant matter, the United States purchased lands and held them for the use of a statutorily-defined "band" of Native Americans – the 1886 Mdewakanton.

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[4] *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058 (Feb. 24, 2009).

[5] Pub. L. 73-383, 48 Stat. 984 (1934) ("1934 IRA").

The United States later abrogated those obligations and now holds the same lands *in trust* to another group of Native Americans – Indian communities created after the passage of the 1934 IRA. Those post-1934 IRA non-tribal community governments exclude the original Congressionally-intended beneficiaries from any benefits to or derived from the lands held in trust for them. The Federal Circuit decision suggests – in contradiction of the IRA, 25 U.S.C. § 462 – that the Department of Interior does not need express statutory authorization before replacing Native American beneficiaries on Indian trust lands.

Third, both the Federal Circuit and the Eighth Circuit suggest that, if the United States' obligations to a definitive class of Native Americans affect present-day post-1934 IRA non-tribal community governments, the federal courts have no subject matter jurisdiction to adjudicate the federal claims of the affected class because of the "Indian sovereignty" of the post-1934 non-tribal community governments.

In this case, the benefits derived from lands appropriated for an identified band of 1886 Mdewakanton Indians and their descendants presently go only to members of post-1934 IRA non-tribal community governments – to the exclusion of all other 1886 Mdewakanton who Congress originally intended. The Federal Circuit and Eighth Circuit decisions, as applied, leave these excluded Native American beneficiaries with no judiciable remedy for statutory claims or violations under the 1934 IRA because of the lack of federal subject matter jurisdiction.

Fourth, the Federal Circuit and Eighth Circuit suggest a judicial reluctance to assert subject matter jurisdiction, despite claims solely against the United States, if the judgment would require some redistribution of wealth of post-1934 IRA non-tribal communities to include the Congressionally-intended beneficiary class. To the contrary, federal courts should not rely on purported "Indian sovereignty" of post-1934 IRA non-tribal community governments to judicially excuse the United States from complying with and enforcing all applicable federal laws.

After *Carcieri,* do federal courts have subject matter jurisdiction over Indian claims against the United States for violations of the IRA, Congressional Acts, and other applicable federal statutes when post-1934 IRA non-tribal community governments are involved? *Carcieri* suggests the federal courts have such subject matter jurisdiction. The Eighth Circuit decision in *Smith v. Babbitt*[6] states the opposite. The Federal Circuit decision appears to fall in line with *Smith v. Babbitt.* But, the Ninth Circuit in two different types of cases, *United States v. Yakima Tribal Court*[7] and *United States v. White Mountain Apache Tribe,*[8] have found subject matter jurisdiction to enforce federal statutory obligations involving Native American tribes.

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

[7] 806 F.2d 853, 861 (9th Cir. 1986).

[8] 784 F.2d 917, 919 (9th Cir. 1986).

The Federal Circuit found, for the first time ever, Native American non-trust "statutory use restrictions" as possible substantive rights, but without providing a legal forum for adjudication as applied when post-1934 IRA non-tribal community governments are involved.

Fifth, the Federal Circuit's decision renounced settled principles of statutory interpretation governing Indian trust law creation. The Circuit required Congressional Acts to include explicit words such as "trust" or "reservation" to create trust obligations. The Federal Circuit's decision has now created a new restriction on Congress' ability to create trusts not acknowledged by this Court.

Sixth, the Federal Circuit also rejected settled principles of statutory interpretation governing Indian trust law termination. The court did not properly apply the Plain Meaning Rule to a Congressional Act passed in 1980, construing it as a trust termination Act. The Act did not contain the words expressing a purpose to terminate Indian trust beneficiary rights. The Federal Circuit decision did not consider and apply provisions of the IRA, specifically 25 U.S.C. § 462, which continues the terms of all Indian trusts in perpetuity unless Congress "directs" otherwise.

The Federal Circuit did not apply the "plain and unambiguous" requirement followed by the First Circuit when determining whether a Congressional Act terminates an Indian trust. In light of the Federal Circuit's decision, what statutory interpretative

principles now apply to interpreting Congressional acts purporting to terminate Indian trust beneficiary rights?

Finally, with the Federal Circuit's demand that Congressional Acts have specific language such as "trust" or "reservation" to create trust obligations between Native Americans or Native American tribes and the United States, has the statutory interpretative principles of the Supreme Court been eviscerated, undermined, or modified beyond *Mitchell II*[9] and its progeny, including this Court's most recent pronouncement under *Navajo II*?[10]

The implications of the doctrinal shift by the Federal Circuit's decision are far reaching. The federal jurisdictional conundrum for Native Americans, and the Circuit's restrictive framework and misapplication of Indian trust law interpretation represents the need for a definitive resolution by this Court.

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[9] *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*").

[10] *United States v. Navajo Nation*, ___ U.S. ___, 129 S.Ct. 1547, 1552 (Apr. 6, 2009) ("*Navajo II*").

A. The Underlying Facts[11]

1. An Indian conflict resulted in harsh Congressional reaction, but to those who remained loyal to the United States, promises of land.

After an 1862 Sioux uprising in Minnesota, Congress in 1863 passed an Act that "abrogated and annulled" all treaties between the federal government and Minnesota Sioux Indians and "forfeited to the United States" " . . . all lands and rights of occupancy within the State of Minnesota. . . ."[12] The federal government removed all Sioux from Minnesota with the exception of about 200 Mdewakanton Sioux who helped rescue whites during the 1862 uprising.

The reward for rescuing whites included "eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing whites from the late massacre of said Indians [as] an inheritance to said Indians and their heirs forever." The 80-acre parcels described in the 1863 Act were never set aside and the 200 or so loyal Mdewakanton remained without land in Minnesota for 25 years.

Finally, through Appropriation Acts in 1888, 1889, and 1890 ("Appropriation Acts"), Congress

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[11] The trial court's opinions contain a thorough canvass of the complex factual and legal background of this case. *See Wolfchild I,* 62 Fed. Cl. at 526-35, App. 161 and *Wolfchild v. United States,* 68 Fed. Cl. 779, 782-83, 785-94 (2005) ("*Wolfchild II*").

[12] Act of Feb. 16, 1863, 12 Stat. 652.

authorized the Secretary of the Interior to purchase land and other needed items for the loyal Mdewakanton in such a manner as the Secretary deemed best and to ensure that each Indian beneficiary receive "an equal amount in the value of the appropriation":

> [. . .] thousand dollars, to be expended by the Secretary of the Interior as follows . . . And all of said money which is to be expended for lands . . . shall be so expended that each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation.[13]

Interior used $15,529.22 of the $40,000.00 of appropriated moneys to purchase "lands" in Minnesota – "the 1886 lands."[14]

The lands are acknowledged by all parties to be currently *held in trust* by the United States.

The Acts identified the Mdewakanton Indians for whom "each Indian" would receive the benefit of the land purchased as the 1886 Mdewakanton:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton (sic) band of Sioux Indians, who have resided in said State since

[13] App. 154-55.

[14] The appropriated lands are "commonly called the '1886 lands' to reflect the effective date of the census that defined the beneficiaries." *Wolfchild I,* 62 Fed. Cl. at 528, App. 179.

> the twentieth day of May, eighteen hundred and eighty-six, or who were engaged in removing to said State, and have since resided therein, and have severed their tribal relations . . . as may be deemed best for these Indians or family thereof . . . [15]

A May 20, 1886 census published in September 1886 (prior to enactment of the Appropriation Acts), later supplemented in 1889, identified the Mdewakanton beneficiaries of the Appropriation Acts. The U.S. Court of Federal Claims found the 1886 census as the "presumptive starting point for indentifying the loyal Mdewakanton and their descendants"[16] – the "1886 Mdewakanton."

Interior purchased the 1886 lands in three different Minnesota locations and implemented a land assignment system for individual 1886 Mdewakanton. The assignments, made through land certificates, stated the 1886 lands as "held in trust by the Secretary of the Interior for the exclusive use and benefit of said Indian . . . [and] subject to [re]assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota on May 20, 1886 or a

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[15] App. 155; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336 at 349. The two previous Appropriation Acts, used the same date of May 20, 1886, but the language to identify the 1886 Mdewakanton differed slightly: The 1888 and 1889 Acts *identified the Mdewakanton as "full-blood."* Act of June 29, 1888, ch. 503, 25 Stat. 217 at 228; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980 at 992, App. 154-55.

[16] *Wolfchild II,* 68 Fed. Cl. at 787 n. 10.

legal descendant of such resident Indian."[17] Interior's land assignment system remained essentially in place for approximately 90 years until 1980 – being often referred to by Interior as an implementation of its "trust" obligations to the 1886 Mdewakanton.[18]

2. The 1934 IRA Preserved 1886 Mdewakanton Rights and Allowed the Creation of Post-1934 IRA Non-tribal Community Governments, But the Communities' Constitutions Subsequently Jeopardized 1886 Mdewakanton Rights to 1886 Lands.

(a) The 1936 post-1934 IRA non-tribal community governments.

When Congress enacted the Indian Reorganization Act in 1934, it preserved "existing periods of trust placed upon any Indian lands . . . until otherwise directed by Congress."[19] The IRA further provided that if the Secretary restores surplus lands to "tribal ownership" the pre-existing "rights or claims of any persons to [such] lands . . . shall not be affected by this Act."[20] Recognizing an opportunity, 1886 Mdewakanton leaders sought to bring all 1886 Mdewakanton under one political government, despite the

[17] *E.g.*, JA2011 ("JA" refers to Federal Circuit joint appendix submissions).

[18] *Wolfchild,* 559 F.3d at 1248, App. 45.

[19] 25 U.S.C. § 462.

[20] 25 U.S.C. § 463.

fact the Secretary of the Interior purchased the 1886 lands in three separate Minnesota locations.

Interior denied the suggested governance as impractical resulting in the creation of three separate non-tribal political governmental entities, two in 1936, and one in 1969 – the Prairie Island Indian Community (1936), the Lower Sioux Indian Community (1936), and the Shakopee Mdewakanton Sioux Community (1969) (the "Communities"). "Non-tribal" refers to the fact that the Mdewakanton could not be recognized as a "historical tribe" due to both 1863 Act and Appropriation Acts' requirements to sever tribal relations.[21]

IRA provisions, however, allowed non-tribal Native Americans to form political governments based on "residence on reservation land."[22] Here, the territorial provisions of the Lower Sioux and Prairie Island Constitutions find the 1886 lands, reserved for the exclusive use of the 1886 Mdewakanton, as the Communities' original land base.

Interior guided, drafted, and approved the Communities' constitutions' content. The two 1936 constitutions followed the IRA "trust" directives. The 1969 constitution did not.

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[21] App. 117-19; JA4656; JA4659-60.

[22] 25 U.S.C. § 476 (prior to amendments in Pub. L. 100-581, Stat. 2938-39 (1988) which contained relevant savings clause at § 103).

For instance, the 1936 community constitutions incorporated and continued Interior's land assignment system preserving the 1886 Mdewakanton descendants' right to "receive an equal amount in the value of" as the Appropriation Acts directed:

- "Nothing . . . [would]be construed to deprive any Minnesota Mdewakanton Sioux of any vested right;"[23]
- That land assignments be made only to "the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants"[24] whether residents or not within the geographic political boundaries of each Community;[25]

As highlighted by the Federal Circuit, an Interior Solicitor's 1974 opinion letter concluded that the 1886 lands were best viewed held by the United States in trust for 1886 Mdewakanton, with Interior's Secretary "possessing a special power of appointment among members of a definite class" and with the authority to grant an interest in the form of either a tenancy at will or a defeasible interest in the land.[26]

A 1978 Interior memorandum confirmed the 1886 Mdewakanton descendants as beneficiaries of the

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[23] JA1952-57; JA1989-97.

[24] JA1955; JA1995.

[25] *Id.* Act of Mar. 2, 1889, 25 Stat. at 992, and Act of Aug. 19, 1890, 26 Stat. at 349, App. 155.

[26] *Wolfchild,* 559 F.3d at 1248, App. 46.

1886 lands, not the post-1934 IRA non-tribal community governments:

> It should be stressed that none of the three Community governments, organized under the Indian Reorganization Act and operating under Constitution and bylaws, has any right, title or interest in these lands. The land is held for the benefit of a specific class of people and their descendants.[27]

(b) The 1969 post-1934 non-tribal IRA community.

In 1969, the Department of the Interior, at the center of organizing the Shakopee Community, allowed for the Community's malformation through the acceptance of both 1886 Mdewakanton and non-1886 Mdewakanton as charter and community members. Interior accepted the status of the non-1886 Mdewakanton, knowing the land base for the Community rested entirely on 1886 lands – lands that were for the exclusive use of 1886 Mdewakanton and their descendents. Consequently, the Shakopee constitution would have no provisions to protect the rights of the 1886 Mdewakanton and their descendants' rights to 1886 lands.

Eventually, all *three* Communities closed membership to other 1886 Mdewakanton depriving them

[27] JA399-400.

of receiving acquired benefits derived from the 1886 and other acquired lands.

Ironically, but for the 1886 Mdewakantons previously awarded lands and use thereof through the Appropriation Acts, and the subsequent 90-year Interior governance over land use to those people, the now recognized post-1934 IRA non-tribal community governments would not exist. Yet, over 90% of the original 1886 Mdewakanton Congressionally-intended beneficiaries are now excluded by the Communities because Interior refuses to comply with its statutory obligations under the Appropriation Acts.

3. The United States holds lands in trust for the post-1934 IRA non-tribal Communities.

In 1980, Congress passed an act requiring all right, title and interest in the United States in lands "which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the [Appropriations Acts], are hereby declared to hereafter *be held by the United States . . . in trust* for the [Communities]."[28]

After enactment of the 1980 Act, Interior stopped making land assignments to 1886 Mdewakanton. Simultaneously, the Communities excluded from

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[28] Pub. L. 9-557, 94 Stat. 3262 (1980) (emphasis added), App. 157.

membership and from the benefits derived from the 1886 lands,[29] all 1886 Mdewakanton who were not already community members. Thus, although the United States appropriated the 1886 lands for 1886 Mdewakanton for their use and benefit (now numbering over 10,700 people) the United States holds the lands in trust for three communities of about 5% of the intended beneficiaries who now exclusively receive all benefits from the 1886 lands. Adding insult to injury, the 1886 land benefits also go to non-1886 Mdewakanton whom Interior permits to be Community members.

Even Interior has asserted the illegitimacy of non-1886 Mdewakanton being members of the community governments and voting.[30] Despite Interior's stated knowledge of non-1886 Mdewakanton being impermissibly on 1886 Lands, Interior has done nothing in the last 12 years to remove the non-1886 Mdewakanton from the 1886 Lands.

The *Wolfchild* litigation is a result of Interior's intentional policies and actions.

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[29] As reported in 1976, Interior holds moneys derived from 1886 lands in an Interior trust account for eventual distribution to the 1886 Mdewakanton. The Federal Circuit remanded the case for further proceedings on that claim. App. 74-75.

[30] *See Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt,* 107 F.3d 667, 669-70 (8th Cir. 1997).

B. The U.S. Court of Federal Claims Proceedings

In *Wolfchild I,* the trial court finds Congressional Appropriation Acts created a trust and that the United States breached that trust.

In November 2003, the petitioners, the 1886 Mdewakanton lineal descendants, filed an action under the Tucker Act and Indian Tucker Act in the U.S. Court of Federal Claims. The petitioners alleged, in part, that the Appropriations Acts created a trust and that the government breached its fiduciary duties to them. The government moved to dismiss the complaint for lack of jurisdiction, asserting that the Appropriations Acts did not create money-mandating fiduciary duties, and even if they did, the post-1934 IRA non-tribal community governments had sovereign power to determine membership and benefits notwithstanding the Appropriation Acts and IRA. The Petitioners filed a cross-motion for partial summary judgment.

In 2004, the U.S. Court of Federal Claims denied the United States' motion to dismiss and granted the Petitioners' motion for partial summary judgment that the Appropriations Acts created a trust for the benefit of the 1886 Mdewakanton and that the United States breached that trust.[31] Relying upon *White*

[31] *Wolfchild I,* 62 Fed. Cl. at 526-35, App. 166-93.

Mountain Apache,[32] the court concluded that the "agreement between the loyal Mdewakanton and the government includes all the features of a trust."[33] The Court further found an Interior "uniformly consistent practice"[34] over 90 years reinforced the view that Mdewakanton residents in Minnesota or in the actual process of moving to Minnesota on May 20, 1886, and their descendants, are trust beneficiaries to lands acquired under the Appropriation Acts.[35]

The lower court also found the passage of a 1980 Act in which the government held lands in trust for the Communities merely gave greater control over the use of the lands and eliminated two classes of members established by the Communities' constitutions. The Court concluded the 1980 Act did not terminate the created trust: "[t]he 1980 Act does not state as its purpose that the trust for the Mdewakanton would be terminated."[36]

The government subsequently moved for reconsideration – later denied. The court in *Wolfchild II* affirmed its previous decision[37] noting "the government would [rather] introduce an element of confusion and

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[32] *White Mountain Apache,* 537 U.S. 465, 476 n. 3 (2003).

[33] *Wolfchild I,* 62 Fed. Cl. at 540-41, App. 206-07.

[34] *Id.* at 542, App. 214.

[35] *Id.*

[36] *Id.* at 543, App. 215-16.

[37] *Wolfchild II* at 794.

obfuscation where there was none in the contemporaneous actions of the Department [of the Interior]."[38]

Nevertheless, in 2007, the U.S. Court of Federal Claims granted the United States' motion for certification for interlocutory appeal on two issues:

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.[39]

C. Proceedings on Appeal

The Federal Circuit reverses the lower court.

The Federal Circuit, permitting the interlocutory appeal under 28 U.S.C. § 1292, reversed the lower court's decision and remanded for further proceedings. Without reference to U.S. Supreme Court Indian trust law doctrine, the Federal Circuit did not find

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[38] *Id.* at 787.

[39] *Wolfchild v. United States,* 78 Fed. Cl. 472, 480 (2007), App. 96.

the Appropriation Acts creating a "trust" per se, but "merely appropriating funds subject to a 'statutory use restriction.' "[40] The Circuit concluded that "even if we construed the Appropriation Acts as creating a trust relationship by implication or by operation of law, we would hold that the 1980 Act terminated that trust."[41]

The Federal Circuit described the 1980 Act as one that "simply provides for the long term disposition of the property purchased pursuant to the Appropriation Acts, an issue left unresolved by Congress both in those Acts and during the ensuing 90 years."[42] But, the Circuit dismissed the United States Supreme Court's limitation of the federal government's trust authority under the IRA's § 465 in *Carcieri* "to those members of tribes that were under federal jurisdiction at the time the IRA was enacted"[43] – disregarding the Petitioners' argument to *Carcieri*'s relevancy to the issues then before the Federal Circuit.[44]

[40] *Wolfchild,* 559 F.3d at 1240, App. 27.

[41] *Id.* at 1257, App. 68.

[42] *Id.* at 1258 n. 13, App. 70.

[43] *Carcieri,* 129 S.Ct. at 1065.

[44] *Wolfchild,* 559 F.3d at 1251 n. 8, App. 53.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's "Statutory Use Restriction" Derived from Appropriation Acts Creates a Substantive Enforceable Right, But Without a Legal Forum for Adjudication, Contrary to *Carcieri* and Ninth Circuit Decisions That Provide For Subject Matter Jurisdiction.

In the Federal Circuit's analysis of the first certified question before it – whether the 1888, 1889, and 1890 Appropriation Acts created a trust – the court added to the Supreme Court lexicon of trust law, a new sub-category – "statutory use restriction." Simultaneously, the Circuit held that the Appropriation Acts did not create a trust because the words "trust"[45] or "reservation" were not in the statutory text[46] – thereby avoiding *Mitchell I* and its progeny:

> "[w]hile the legal issue [regarding whether Congress created a trust] is complex and untangling the historical materials is difficult, we conclude that the [1888, 1889, and 1890] Appropriation Acts are best interpreted as merely appropriating funds subject to a statutory use restriction. . . ."[47]

The Circuit's decision means that Interior has apparent fiduciary obligations to the 1886 Mdewakanton

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[45] *Id.* at 1238, App. 20-21.

[46] *Id.* at 1253, App. 58-59.

[47] *Id.* at 1240, App. 27.

as to the statutory use restriction on the 1886 Lands, and thus any deprivation of benefits related to those lands vis-à-vis the Communities. But, the court refused to provide the petitioners with a legal forum for its legal arguments due to an apparent lack of subject matter jurisdiction. The Circuit's decision suggests that a Congressional 1980 Act[48] extinguished all of Petitioners' rights because the United States now holds the 1886 lands in trust exclusively for the post-1934 IRA non-tribal community governments.

Similarly, an Eighth Circuit decision in *Smith v. Babbitt*[49] found 1886 Mdewakanton descendants jurisdictionally barred from pursuing statutory remedies in federal court against the United States:

> Careful examination of the complaints and the record reveals that this action is an attempt by the plaintiffs to appeal the Tribe's membership determinations. It is true that appellants allege violations of IGRA, ICRA, IRA, RICO, and the Tribe's Constitution. However, upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.[50]

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[48] App. 157.

[49] 100 F.3d 556 (8th Cir. 1996).

[50] *Smith,* 100 F.3d at 559.

Because the Eighth Circuit decision conflated community political membership issues with claims of breached federal statutory obligations, the affected 1886 Mdewakanton were jurisdictionally barred from pursuing claims against Interior in the U.S. District Court to enforce statutory rights of beneficial interests derived from 1886 lands held in trust by the United States.

Meanwhile, the Federal Circuit's "statutory use restriction" means Interior has apparent fiduciary obligations to ensure benefits, which heretofore have gone to the Communities, now must go exclusively to 1886 Mdewakanton descendants. The Circuit, for instance, found Interior "recognized, of course, that Congress intended the 1886 Mdewakanton to be the specific beneficiaries of the Appropriation Acts . . . [and] . . . adopted a policy designed to promote Congress's intent by assigning lands to individuals from within the group of 1886 Mdewakantons and subsequently to individuals from within the class of the descendants of those Mdewakanton."[51]

The Federal Circuit further acknowledged Interior's role in fulfilling its obligation to the 1886 Mdewakanton: "[c]ontemporaneous 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 . . . [and] held the property for the use and benefit of individuals

[51] *Wolfchild,* 559 F.3d at 1243, App. 33.

selected from a defined class."[52] But the Circuit, without analysis to Supreme Court precedent of trust principles in *Mitchell* and its progeny,[53] later explained that: "[c]onsistent with the principle that there is a 'general trust relationship between the United States and the Indian people' . . . Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants, even though they 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."[54]

The Federal Circuit recognized cognizable and enforceable fiduciary obligations under the Appropriation Acts to allow the pursuit of remedies in the federal courts against the United States for violating those duties. But, like the Eighth Circuit, the Circuit found that if Interior's obligations to a definitive class of Indians affect present-day post-1934 IRA non-tribal community governments, the federal courts have no subject matter jurisdiction to adjudicate the affected beneficiary class's claims.

In other words, since the benefits derived from the 1886 lands presently go to only members of the post-1934 IRA non-tribal community governments, to the exclusion of all others who Congress intended, the

[52] *Id.* at 1243, App. 33.

[53] *Mitchell II,* 463 U.S. at 225.

[54] *Wolfchild,* 559 F.3d at 1248, App. 45.

excluded Indians have no judicable remedy because of the lack of federal subject matter jurisdiction.

On the other hand, the Ninth Circuit recognizes that when federal obligations are to be enforced, there exists federal subject matter jurisdiction. In *United States v. Yakima Tribal Court*[55] and *United States v. White Mountain Apache,*[56] the Ninth Circuit held that United States sovereignty – including federal court subject matter jurisdiction – overrides tribal sovereignty in matters involving federal statutory obligations. Therefore, if the Appropriation Acts create a federal obligation, the Petitioners are entitled to subject matter jurisdiction to adjudicate their claims against the United States even though the claims may implicate benefits from lands held in trust by the government for post-1934 IRA non-tribal community governments.

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[55] 806 F.2d 853 (9th Cir. 1986)

[56] 784 F.2d 917 (9th Cir. 1986).

II. The United States Initially Enforced Its Obligations to Individual 1886 Mdewakanton, But Later Abandoned Those Obligations in Lieu of Post-1934 IRA Communities and Excluded 1886 Mdewakanton From Benefits Derived From the 1886 Lands.

The IRA[57] was intended to standardize a process for historical land-owning tribes to formally organize federally-recognized governments. But, the 1886 Mdewakanton were not a "historical tribe" because of the 1863 Act's renouncement of the Mdewakanton as a tribe and the Appropriation Acts' requirement for severance of tribal relations. Thus, the 1886 Mdewakanton "were not privileged to organize as a tribe over various reservations. . . ."[58] However, under IRA, §§ 16 and 19, an additional process existed for a non-tribal group of Indians such as the 1886 Mdewakanton descendants to organize a government based on "residence on reservation land."[59]

Thus, the only basis of the 1886 Mdewakanton forming a political organization lay with the 1886 Mdewakanton "residing on reservation land" – which, in turn, rested on the 1886 Mdewakanton's legal rights to the 1886 lands. Hence, the names of the

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[57] Pub. L. 73-383, 48 Stat. 984 (1934) ("1934 IRA").

[58] JA4656; JA4659-60.

[59] 25 U.S.C. § 476 (prior to amendments in Pub. L. 100-581, Stat. 2938-39 (1988) which contained relevant savings clause at § 103).

organizations are "communities" – reflecting they are something less than historical land-owning tribes.[60]

Accordingly, in 1936, Interior recognized the Lower Sioux Indian Community and the Prairie Island Indian Community. These communities, however, did not have traditional tribal powers of assigning reservation land, condemning member's land or regulating the inheritance of land.[61] Further, the Lower Sioux and Prairie Island constitutions incorporated Interior's 1886 land assignment system to ensure the 1886 lands exclusively benefited the 1886 Mdewakanton:[62]

> The land within the territory of the Lower Sioux Community which was purchased by the United States for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants, may be assigned to any Minnesota Mdewakanton Sioux entitled thereto. . . .[63]

Interior, not Lower Sioux or Prairie Island, determined who would benefit from the 1886 lands and reside in the respective communities.

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[60] *See* Felix Cohen, *Basic Memorandum on the Drafting of Tribal Constitutions* 5 (David E. Wilkins, ed., Univ. of Okla. Press 2006).

[61] JA4660; JA1952; JA1990.

[62] JA1952; JA1990; JA4660.

[63] App. 129.

In 1969, 35 years after the enactment of the 1934 IRA, Interior again played *the* major role in the Shakopee Mdewakanton Sioux Community's constitution's adoption. Interior approved the Shakopee Constitution despite the absence of 1934 IRA prescriptions to preserve existing United States' obligations and trusts to a recognized band of Indians – the 1886 Mdewakanton. Among 1886 Mdewakanton who chartered the Shakopee Community and Constitution and became members were non-1886 Mdewakanton.

The Shakopee Constitution was diametrically opposite to the Prairie Island and Lower Sioux Communities' constitutions regarding membership, and, significantly, regarding the preservation of 1886 lands for the 1886 Mdewakanton. For years afterward, Interior reviewed land assignments at Shakopee and insisted on proof of lineal descendency of 1886 Mdewakanton; but, from the start, land assignments were controversial and difficult for Interior's Bureau of Indian Affairs regional office to manage:

> Land assignments on 1886 Mdewakanton lands will be issued only to persons who can prove descendency from the 1886 Mdewakanton residents . . . However, no action will be taken at this time to cancel or disturb any existing assignments as a result of this policy statement.[64]

[64] JA04719.

By the time of the 1980 Act's passage, in which the United States would then hold 1886 lands in trust for the three communities, Interior was well aware of the need to verify the 1886 descendancy for land assignments. Interior instead supported a policy that left the land assignments to the three post-1934 non-tribal community governments whose membership had been corrupted by the actions of Interior. Interior allowed land and the benefits derived from the 1886 Lands to be shared among those without 1886 Mdewakanton descendancy.

The United States knew of and approved the indiscretion of Shakopee to allow non-1886 Mdewakanton to enjoy benefits of and derived from the 1886 lands to the exclusion of others. Interior's complicity is affirmed in 1983: "[T]he [1983] Enrollment Ordinance contains the name of 33 individuals . . . These individuals are to be considered members of the Shakopee Mdewakanton Sioux Community regardless of their blood degree."[65]

Thus, Interior allowed and affirmed its approval of the inclusion of *non-lineal* Mdewakanton among lineal descendants of 1886 Mdewakanton.[66]

With Interior's complicity and approval, Communities' policies led to the complete exclusion of 1886 Mdewakanton denying them any benefits to or from

[65] JA04747.

[66] *See also*, *Babbitt*, 107 F.3d at 669-70.

1886 lands. By 1988, Shakopee closed its membership to the current members including the non-1886 Mdewakanton. Prairie Island and Lower Sioux followed Shakopee's example.

In conjunction with Interior's complicity, the Shakopee Community Court, created in about 1988, while admitting to genealogical controversies, it refused to assert jurisdiction to exclude the non-1886 Mdewakanton or to include the 1886 Mdewakanton:

> Suffice it to say that the files of the federal courts and federal agencies . . . are littered with records of disputes which had, at their base, understandable desires on the part of some to participate in the Community's resources, justifiable fears that such participation would be denied by others, and profound doubts that there was any forum which had jurisdiction to respond.[67]

Thus, even the Shakopee Community Court is in accord with the Federal Circuit and Eighth Circuit decisions denying Petitioners' jurisdiction to enforce federal obligations over 1886 lands. But, under *Carcieri* and the Ninth Circuit decisions, federal court subject matter jurisdiction exists over claims of statutory violations by Interior – presumably even those involving a post-1934 Act non-tribal community government.

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[67] *Ross v. SMS(D)C*, 1 Shak. 86, 87 (July 17, 1992), App. 144.

This Court should consider, after *Carcieri,* that federal courts have subject matter jurisdiction to hear Indian statutory violation claims against the United States. The Eighth Circuit decision in *Smith v. Babbitt* – and now the Federal Circuit decision – have raised substantial doubts if federal court subject matter jurisdiction exists.

III. The Federal Circuit's Statutory Interpretation of the Appropriation Acts Contradicts Supreme Court Precedent in *Mitchell I, Mitchell II, White Mountain Apache, Navajo I, Navajo II* and *Carcieri.*

The Federal Circuit reversed the trial court on the first certified question regarding the Appropriation Acts imposing a statutory duty on the Secretary of Interior regarding Mdewakanton beneficiaries:

> [. . .] And all of said money which is to be expended for lands [by the Interior Secretary] . . . shall be so expended that each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation.[68]

Lands were purchased under the Appropriation Acts that are currently held in trust by the United States. The Federal Circuit denied the Appropriation Acts created a "trust" and in its stead adopted a "statutory use restriction" as a substitute to statutory

[68] App. 154-55.

interpretative analysis regarding the application of Indian trust law – all in direct conflict with Supreme Court precedent regarding statutory interpretation.

The Federal Circuit provided a one-sentence, forty-two word textual analysis to shift the legal framework in determining the legal responsibilities and liabilities between the federal government and Native Americans:

> That clause, which the record materials suggest was added because of complaints that the funds from an earlier appropriation were *disproportionately distributed*, provides such minimal direction that it is plainly insufficient to convert what would otherwise be an appropriation into a trust.[69]

The Federal Circuit's one-sentence analysis violated Supreme Court statutory interpretative principles governing Native American trust cases:

- The "Substantive Source of Law" doctrine ("*Navajo I*")[70] and ("*Navajo II*");
- the "Plain Meaning Rule" (*Carcieri*);
- "The Word 'Trust' In the Law Is Not Necessary to Create an Indian Trust" doctrine ("*Mitchell I*") and ("*Mitchell II*"); and

[69] *Wolfchild,* 559 F.3d at 1239, App. 24.

[70] *United States v. Navajo Nation,* 537 U.S. 488 (2003).

- The Fair Inference Rule of *Mitchell II* (also applied in *United States v. White Mountain Apache.*)[71]

First, the Federal Circuit's decision contradicts with the principles of statutory construction expressed in *Navajo II:*

> In *Navajo I*, we reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U.S., at 506, 123 S.Ct. 1079. If a plaintiff identifies such a prescription, and if that prescription bears the hallmarks of a "conventional fiduciary relationship," *White Mountain,* 537 U.S., at 473, 123 S.Ct. 1126, then trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages," *id.,* at 477, 123 S.Ct. 1126. But that must be the second step of the analysis, not the starting point.[72]

The Federal Circuit found a "statutory use restriction" suggesting either a substantive right or duty-imposing prescription, but stopped its analysis there. The court avoided further trust analysis as it relates to a conventional fiduciary relationship although the

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[71] *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003); *See also, Duncan v. United States,* 667 F.2d 36 (Ct. Cl. 1981).

[72] *Navajo Nation II,* 129 S.Ct. at 1558.

Appropriation Acts contain specific Congressional directives: "each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation."[73] The Federal Circuit violated the statutory interpretative approach dictated by *Navajo II*.

Second, put another way, the Federal Circuit's one-sentence analysis ignored the Plain Meaning Rule most recently applied in *Carcieri*:

> This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. *United States v. Gonzales,* 520 U.S. 1, 4, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997). If it is, we must apply the statute according to its terms.[74]

The Circuit avoided interpreting the Appropriation Acts' plain language that the Secretary of the Interior was to ensure each Indian beneficiary "shall receive, as nearly as practicable, an equal amount in value of this appropriation." Without analyzing the text, the Federal Circuit concluded the statute provided "minimal direction" and there was no trust duty on the Secretary of the Interior to the Petitioners regarding the "lands" purchased.

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[73] App. 154-55.

[74] *Navajo Nation II,* 129 S.Ct. at 1558 (citations omitted).

Third, the Federal Circuit's decision contradicts *Mitchell II* and *White Mountain Apache.* The Supreme Court in *Mitchell II* held that the word "trust" is not necessary in a law to create statutory trust obligations on the United States.[75]

The Federal Circuit, to the contrary, required more than what *Mitchell II* demands. The Court required the word "reservation" or "trust" expressed within the Acts.

As the *Mitchell II* Court stated, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the government), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* at 225. But, the Federal Circuit failed to recognize that all the necessary elements of a common law trust are present in the *Wolfchild* case: a trustee (Secretary of the Interior), beneficiaries (petitioners) and a trust corpus (1886 lands).

The Federal Circuit's decision also contradicts *White Mountain Apache.* In *White Mountain Apache*, the Court held under the fair inference rule that a 1960 Congressional Act at issue created fiduciary duties on Interior:

> The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in

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[75] *Mitchell II,* 463 U.S. at 225-26; *see also, Carcieri,* at 129 S.Ct. at 1063-64.

> damages for breach. . . . [T]he fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. . . . "One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets."[76]

The Federal Circuit did not apply the fair inference rule.

In summary, because the Appropriation Acts place an express statutory duty on the Secretary of the Interior to ensure that 1886 Mdewakanton beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation" – there is more evidence of statutory intent of a trust obligation than the minimal requirements of *Mitchell II* and *White Mountain Apache* require and something more than a "statutory use restriction." Therefore, the Federal Circuit's analysis not only contradicts *Mitchell II* and *White Mountain Apache,* but represents a major shift in interpretation of statutes and in application of trust principles to Native American statutes.

The doctrinal shift is further evidenced by the Federal Circuit's decision not to apply its own presumption that "Congress is knowledgeable about

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[76] *White Mountain Apache Tribe,* 537 U.S. at 474-77 (footnotes and citations omitted).

existing law pertinent to legislation it enacts."[77] This presumption and deference to the common law governing the statutory enactments at the time of passage, requires the application of the then known trust law to ascertain whether Congress intended to create a trust. This presumption is consistent with trust law:

> In construing an inter vivos trust, the provisions of the trust are to be governed by the law existing *at the time of its creation*, not the law and public policy in effect at the time the construed words will take effect, absent a contrary intention within the instrument itself.[78]

This requires an analysis of Congress' presumption of knowledge. In this case, the Federal Circuit did not do the required analysis. The applicable trust law at the time of enactment is essential to statutory interpretative analysis in Indian trust law cases. For example, *A Practical Treatise on the Law of Trust,* vol. 1, 24 (Thomas Lewin, Frederick Lewin and James H. Flint, 1st Am. ed., Charles H. Edson 1888) finds in the creation of a trust that a person,

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[77] *See, e.g., Canadian Lumber Trade Alliance v. United States,* 517 F.3d 1319, 1343 (Fed. Cir. 2008), *quoting Bristol-Myers Squibb Co. v. Royce Lab.*, 69 F.3d 1130, 1136 (Fed. Cir. 1995) (internal quotation omitted).

[78] 76 Am. Jur. 2d Trusts § 36 (2008) (citations omitted) (emphasis added).

> [N]eed only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in limitation of legal estates . . . *provided words be used which thought not technical are yet popularly equivalent*, or the intention otherwise sufficiently appears upon the face of the instrument.[79]

Congress used the popular equivalent of "trust" language when it created an express statutory duty on the Secretary of the Interior that the Indian beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation." The Federal Circuit's absence of analysis regarding Congressional presumptive knowledge of trust law at the time of enactment reflects a lapse in statutory trust analysis.

The Federal Circuit decision further conflicts with the principles espoused in its predecessor United States Court of Claims in *Duncan v. United States.*[80] The *Duncan* court explained that: "it is difficult to see why Congress should have to do more to create an Indian trust than a private settlor would have to do to establish a private trust."[81] Under *Duncan,* if an

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[79] *Id.* at 147-48 (emphasis added). *See also, id.* at 70, 71 n. 1; *A Treatise on the Law of Trusts and Estates,* vol. 1, 68 (Jarias Ware Perry, 4th ed., Little Brown, 1889).

[80] *Duncan v. United States,* 229 Ct. Cl. 120, 667 F.2d 36 (1981).

[81] 667 F.2d at 42 n. 10.

appropriation act text would create a private trust, then the same text in public law creates a trust, too. Thus, if a private person who accepted an express duty to ensure that certain beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation" is a trustee, then the Secretary of the Interior is also a trustee by the same language found in the Appropriation Acts. The Federal Circuit's one-sentence analysis contradicts *Duncan's* principle that "Congress should not have to do more than a private settlor to create a trust."

Ultimately, the Federal Circuit's statutory interpretative approach towards Congressional Acts shifts away from 30 years of Supreme Court precedent in Native American trust cases: *Mitchell I, Mitchell II, Navajo Nation I, White Mountain Apache, Navajo Nation II* and *Carcieri.* The Supreme Court should grant review to ultimately determine whether the Federal Circuit's doctrinal shift espoused in *Wolfchild* has eviscerated, modified, or undermined this Court's interpretative analysis of Indian trust law.

IV. The Federal Circuit's Statutory Interpretative Approach on the Second Certified Question Contradicts the Plain Meaning Rule, *Carcieri,* 25 U.S.C. § 462, *Passamaquoddy's* "Plain and Unambiguous" Requirement and Established Congressional Practice Regarding Indian Trust Termination.

The *Wolfchild* Federal Circuit decision is contrary to *Carcieri,* 25 U.S.C. § 462, and ultimately as the decision pertains to trust terminations as found in *Passamaquoddy Tribe.*[82] In the first instance, the Circuit found *Carcieri* not relevant to the questions before it.[83] Simply, the Federal Circuit held that the post-1934 IRA non-tribal community governments are the exclusive beneficiaries of the lands purchased under the 1888, 1889 and 1890 Appropriation Acts. But, the Circuit's holding is contrary to *Carcieri* and therefore *Carcieri* is relevant.

Carcieri relates to the legal identity of the Prairie Island, Lower Sioux, and Shakopee Communities under the 1934 IRA. The legal basis under the 1934 IRA for the federally-recognized community governments was the 1886 Loyal Mdewakanton residing on

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[82] *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 380 (C.A. Me. 1975).

[83] The court did acknowledge Petitioners' notification of *Carcieri,* but dismissed its relevancy in a footnote. *Id.* at 1251, n. 8, App. 53. *Carcieri* was issued two weeks before the Circuit's issued decision.

reservation lands – the 1886 lands. Furthermore, this statutorily-defined class of beneficiaries is a "band" – not a "tribe" – of Loyal Mdewakanton. This "band" was found by Interior to be under federal jurisdiction in 1934.

Thus, if there were any "ownership interests" in the 1886 lands, it was those of the 1886 Mdewakanton and their descendants in 1934, not the political governments created 2 or 35 years later. The Federal Circuit concluded that:

> [A]s of the time of the 1980 Act, those lands were being held by the Department of the Interior for use by the 1886 Mdewakantons and their descendants pending an ultimate legislative determination as to how the ownership interests in the lands should be allocated. That determination came in 1980, when Congress provided that legal title in the lands would be held by the United States, which would hold the lands in trust for the three communities.[84]

The Federal Circuit's conclusion is antithetical to this Court's holding in *Carcieri.* The Circuit's decision, not to apply the *Carcieri* reasoning as it applies to the 1934 IRA, goes directly to whether the instant Petitioners or other Native Americans and Native American tribes will have federal courts to adjudicate their claims. As *Carcieri* explained:

[84] *Wolfchild,* 559 F.3d at 1255, App. 62.

> [F]or purposes of [IRA] § 479, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 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. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust.[85]

Thus, *Carcieri* suggests that the Minnesota Mdewakanton post-1934 IRA non-tribal community governments established in 1936 (two) and in 1969 (one) are not "Indian tribes" under § 476. Here, the Mdewakanton Communities do not have a legal identity independent, separate and apart from the 1886 Mdewakanton under the IRA. Consequently, there is nothing in the 1980 Act's references to each of the Mdewakanton Communities to suggest Congressional intent to exclude 95% of the 1886 Mdewakanton from the subject matter of the Appropriation Acts – the 1886 lands and benefits derived therefrom – to allow 5% of the 1886 Mdewakanton and non-1886 Mdewakanton to receive 100% of the 1886 lands and its benefits.

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[85] *Carcieri,* 129 S.Ct. at 1061.

Carcieri reinforces this point. The Federal Circuit was required, in light of *Carcieri,* to determine whether the Communities have a legal identity independent, separate and apart from the petitioners, who as original beneficiaries under the Appropriation Acts did in fact have a legal identity under the 1934 IRA. Instead, the Circuit found the 1980 Congressional Act as an alteration of the ownership status of 1886 lands:

> whereby the United States would hold legal title to the lands and each of the communities would hold equitable title to the portions of the 1886 lands allocated to it.[86]

But, *Carcieri* required the Federal Circuit to answer who is the ultimate beneficiary of the "lands" after the 1980 Act. The Federal Circuit refused to do so – finding *Carcieri* not relevant. The Federal Circuit's decision not to apply *Carcieri* and failure to answer this question – leaves a legal quagmire for the trial court to resolve.

Importantly, 25 U.S.C. § 462, part of the 1934 IRA, continued all Indian land beneficiary rights unless terminated by Congressional enactment:

> The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

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[86] *Wolfchild,* 559 F.3d at 1255, App. 62-63.

Another important question under 25 U.S.C. § 462 in this case is whether Congress is required to "plainly and unambiguously" terminate Indian beneficiary rights. The Federal Circuit did not apply a "plain and unambiguous" legal standard in determining whether the 1980 Act was a trust termination act.

The Federal Circuit's failure to apply the "plain and unambiguous" legal standard contradicts longstanding precedent of the U.S. Court of Appeals regarding statutory trust termination: "[A]ny *withdrawal of trust obligations* by Congress [with Indians] would have to have been 'plain and unambiguous' to be effective."[87] *Passamaquoddy's* legal standard is consistent with 25 U.S.C. § 462 which extends all Native American trust beneficiary rights in perpetuity and requires Congress to provide "directions" to terminate Indian trust beneficiary rights.

Moreover, *Passamaquoddy's* legal standard is consistent with the law of trusts which provides that any termination or modification of a trust must be done by "clear and convincing evidence."[88] The primary concern is that beneficiaries receive adequate notice of enactment of the trust termination act *before* enactment of the trust termination act – presumably so they can lobby against it.

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[87] *Joint Tribal Council of the Passamaquoddy Tribe,* 528 F.2d at 380 (emphasis added).

[88] Restatement (Third) of Trusts § 63(3) (2003).

As the U.S. Court of Federal Claims recognized, absent in the 1980 Act is Congressional use of the "plain and unambiguous" language to terminate the government's trust obligations to the Indian beneficiaries as found in earlier trust termination acts.[89]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[89] *See* 25 U.S.C. § 677 (Ute Tribe); 25 U.S.C. § 564 (Klamath Tribe); 25 U.S.C. § 741 (Paiute Tribe); 25 U.S.C. § 691 (certain tribes and bands of Indians located in western Oregon); 70 Stat. 893 (Wyandotte Tribe); 70 Stat. 937 (Peoria Tribe); 70 Stat. 963 (Ottawa Tribe); 65 Stat. 250 (Menominee Tribe); and 25 U.S.C. § 980 (Ponca Tribe).

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