UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Sheldon Peters Wolfchild, et al.,

Plaintiffs,

vs.

Redwood County (Minnesota), et al.,

Defendants.

Civil File No. 14-CV-1597 (MJD/FLN)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

This class action arises out of Defendants' unlawful possession of 12 square miles of land in Redwood County, Renville County and Sibley County (Minnesota). These 12 square miles were set apart and title was transferred legally to the Mdewakanton Band of Sioux in Minnesota ("Mdewakanton Band"), on March 17, 1865, under authority given the Secretary of Interior under the Act of February 16, 1863. Although federal courts have acknowledged that the Act of February 16, 1863 gave "an inheritance to said Indians and their heirs forever," and that the February 16, 1863 Act was never repealed, Defendants remain unlawfully in possession of the 12 square miles of land and must now be ejected and required to make monetary payments to Plaintiffs for their trespass.

The Defendants' memoranda in support of their motions to dismiss essentially deny that Congress enacted laws with current effect to benefit the Mdewakanton Band. When Defendants deny such Congressional intent, as is the case here, the Supreme Court has long held that the federal courts follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'"[1] Acts of Congress relating to Indians are construed in such a manner to give the greatest protection possible to Indians.[2] Statutes concerning Indian rights are to be construed in their favor.[3] Collectively, these canons of construction, dating back to the earliest years of our

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[1] *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174 (1973) .

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

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

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Nation's history, are rooted in the unique relationship between the federal government and the Indians, with the understanding that Indians did not wield equal bargaining power when earlier treaties and statutes were negotiated and enacted and, as a consequence, doubtful statutory expressions should be resolved in their favor.[4]

The Defendants reject these canons of statutory construction. Instead, the Defendants attempt to persuade this Court to anthropologically simplify or ignore the Mdewakanton Band. But, these are tired and worn arguments that deny the American Indian fact that "[f]ew conquered people in the history of mankind have paid so dearly for their defense of a way of life."[5]

The only obstacle to the Mdewakanton Band's living in community on the 12 square mile reservation – the Mdewakanton Band's "way of life" -- is the Defendants' current possession of the reservation. But, the Court can remove this impediment by enforcing federal common law, by granting the relief requested in the First Amended Complaint and by restoring possession of the reservation to the Mdewakanton Band.

I. Present beliefs cannot be the basis for re-writing historical facts.

A. The United States' breach of its treaty obligations to the Minnesota Sioux precipitates the 1862 Sioux Uprising.

In August of 1862, individuals from each of the four bands of the Minnesota Sioux revolted against the United States in response to its failure to furnish the money and supplies promised in exchange for the Sioux lands under the previous treaties with the

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[4] *See Hagen v. Utah,* 510 U.S. 399, 423 n. 1 (1994) (collecting cases).
[5] *Sioux Nation of Indians,* 448 U.S. 371, 423 (1980) (quoting R. Billington, Introduction, *in* Soldier and Brave xiv (1963)).

Minnesota Sioux. In the course of that uprising, the Sioux killed more than 500 settlers and damaged substantial property, thereby breaching the 1851 and 1858 treaties.

B. The United States, in its response to the Sioux Uprising, failed to recognize the efforts of the Loyal Mdewakanton to uphold their treaty obligations, leaving them poverty-stricken and homeless.

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

Some of the Sioux, however, had been loyal to the United States during the uprising by either not participating in the revolt or affirmatively acting to save the settlers. Nonetheless, Congress acted with a broad brush, declaring the Sioux's treaties void and annuities and allocation of land forfeited and failing to except from that termination the loyal Mdewakanton band of Sioux, whose annuity was valued at approximately $1,000,000. Those Sioux who observed their pledge under the 1851 and 1858 treaties to maintain peaceful relations with the citizens of the United States were rendered "poverty-stricken and homeless." *Wolfchild* v. *U.S.,* 559 F.3d 1228, 1232 (2009)

(*Wolfchild VI*). Many of the loyal Sioux had lost their homes and property but could not "return to their tribe ... or they would be slaughtered for the part they took in the outbreak." Cong. Globe, 38th Cong., 1st Sess. 3516 (1864).

C. Congress realizes its error toward the Mdewakanton Band by setting aside the 12 square mile reservation.

Notwithstanding the broad termination of the Sioux treaties, Congress did later attempt to provide for the loyal Mdewakanton by including a specific provision for them in the Act of February 16, 1863. Specifically, after confiscating the Sioux land, Congress authorized the Department to create a reservation for them:

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

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

As the United States Court of Appeals for the Federal Circuit found in related litigation, the provision that the land would be "an inheritance to said Indians and their heirs forever[,]" "clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute." *Wolfchild,* 559 F.3d at 1241.

In 1865, the Secretary of the Interior followed this Congressional directive and, in fact, used his authority to set apart a 12-square-mile reservation[6] for the "Loyal

[6] Though called a "reservation" because of Plaintiffs' intent to live thereon in accordance with their way of life, Plaintiffs would possess the 12 square miles in "severalty"

Mdewakanton" who exerted themselves in rescuing the whites from the massacre by the hostile Mdewakanton. Five documents, Exhibits 1 through 5 to the Complaint, show that the Secretary of Interior conveyed the 12-square-mile (also 12 sections or 7,680 acres) reservation to the Mdewakanton Band on March 17, 1865.

Exhibit 1 to the Complaint, a letter dated Marcy 17, 1865, shows that the Secretary of Interior authorized "Revd. S.D. Hinman, Missionary … to designate twelve sections in a reasonably compact body and I will direct the local land offices to reserve the same from settlement or sale as soon as they are notified of Mr. Hinman's selection." In response, Reverend Hinman responded to the Secretary's directive by identifying 12 sections of land, and he wrote the 12 sections down on the same Secretary letter of March 17, 1865. The 12 sections Reverend Hinman wrote down were in Redwood, Renville and Sibley Counties (Minnesota): Sections 1, 2, 3, 11 and 12, T. 112 N., R. 35; Section 35, T. 113 N., R. 35; Section 5, 6, 7, 8 and 9, T. 112 N., R. 34; Section 31, T. 113 N., R. 31. *Id.*

The Secretary of Interior *initialed* Reverend Hinman's selection – thereby setting the 12 sections apart and conveying the 12 sections to the Mdewakanton Band – including exclusive title, use and occupancy and right to quiet enjoyment. *Id.* Six days later, on March 23, 1865 (Exhibit 2) the Commissioner of Indian Affairs wrote to Rev. Hinman confirming the "decision of the Secy of the Interior already in your hands will be sufficient to authorize you to proceed to collect and establish the friendly Sioux upon the lands designated by you in your letter of the 17th instant." The Commissioner also

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according to the Act of February 16, 1863. "Reservation" as it is used in the First Amended Complaint does not mean that title in the lands would be re-vested in the United States as trustee for the Mdewakanton Band.

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noted that "Supt. Thompson has been authorized to expend a sum not exceeding eight hundred dollars for plowing land and for the purchase of farming tools and seeds for the Indians in question." Ex. 2.

In a letter written on the same date, March 23, 1865 (Exhibit 3) Rev. Hinman wrote to Bishop Whipple that "upwards of 10,000 acres of land [are] set apart for Taopi & friendly Sioux located at Redwood and including our dear little church. The Indians are to have 80 acres each – i.e., heads of families – in fees simple and unalienable. Clark Thompson, Supt, has agreed to furnish seed & plough the land for me…"

D. White hostility stops the Mdewakanton Band from taking possession of their land.

Despite the aforementioned setting-apart and conveying of the lands in question, in an undated letter written by Rev. Hinman to Bishop Whipple, Rev. Hinman noted white resistance to the Mdewakanton Band:

> The Sec. of the Interior, at our request, withdrew from sale, by Ex. Order, 10,000 acres for this purpose & located it at & near the old Lower Sioux Agency. Gen. Pope refuse[d] to let these Indians locate there, but Gen. Grant overruled Pope and order Sibley to allow the settlement to be made as we attempted. This was however prevented by the feeling at New Ulm and on the border generally consequent upon a recent cold blooded murder by the renegade Indians near Mankato. This 10,000 acres was being withheld from sale for some years, but finally restored for sale.

Ex. 4.

The white hostility reached the Secretary of the Interior through a report dated April 29, 1866 (Exhibit 5), confirming Rev. Hinman's own assessment: "Action was taken by the department, about one year ago, to select for them eighty acres of land each upon the old reservation, but the feeling among the whites is such as to make it

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impossible for them to live there in safety." Then and now, hostility toward American Indians is a legally insufficient excuse for violating federal law.

II. The legal history of the Mdewakanton Band continues in Minnesota.

The Plaintiffs and proposed Plaintiff Class are the lineal descendants of the Loyal Mdewakanton[7] who have been federally identified as the "Mdewakanton Band of Sioux in Minnesota" ("Mdewakanton Band")[8] for their loyalty after the 1862 Sioux Uprising in many ways: by the 1863 Acts, by the 1888-1890 Acts, by the 1865 Department of the Interior's setting aside of a 12-square-mile reservation, by purchase of reservation lands in about 1890 and 1937, by the recognition of three subgroup communities under the 1934 Indian Reorganization Act (IRA), and by the creation and maintenance of pre-1980 tribal trust accounts.[9] The Mdewakanton Band voted on November 17, 1934 to accept the IRA.[10] The proposed Plaintiff Class is the Mdewakanton Band identified by Interior since the 1863 Acts.[11]

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

[8] The statutorily-identified group has gone by many names in previous litigation – including the "friendly Sioux," "Loyal Mdewakanton," the "1886 Mdewakanton" and the "Minnesota Mdewakanton Dakota Oyate." "Oyate" means people in the Dakota language. In an August 20, 2012 decision of Interior, the government referred to this group as the "Minnesota Band of Sioux in Minnesota." Kaardal Dec. Ex. A.

[9] *See Wolfchild VIII*, 101 Fed. Cl. at 92-93. PIIC and SMSC succeeded in quashing the CFC summons to each of them to participate as parties. *Wolfchild*, 77 Fed. Cl. 22, 29-30. LSIC was participating in the CFC at that time as a party, but later was voluntarily dismissed. *See, e.g., id.* at 1.

[10] Cross-Appellants' Joint Appendix ("CA") CA2812-2814, 2812; 2889-2892, 2889. The allegations of the complaint are based on the public record. As Defendants have submitted over 1,000 pages of documents that are part of the public record and have brought equitable doctrines to the Court's attention, Plaintiffs are compelled to make that

Recently, in order for the Department of the Interior (Interior) to comply with the U.S. Supreme Court's *Carcieri* land-into-trust transfer requirements, Interior in an August 20, 2012 Notice of Decision stated that "[p]rior to 1934, the tribe was officially known as the Mdewakanton Band of Sioux in Minnesota who entered into several treaties with the federal government. Departmental correspondence contemporaneous with the IRA shows irrefutably that the … Mdewakanton Band was under federal jurisdiction when the Act was passed."[12]

The Plaintiffs agree that it is "irrefutable" that the Mdewakanton Band is the only group of Dakota Indians with statutory property rights recognized at the time of the 1934 IRA. Consistently, because the Mdewakanton Band existed with property rights at the time of the 1934 IRA, Interior approved the three non-tribal communities – Lower Sioux Indian Community (LSIC), Prairie Island Indian Community (PIIC) and Shakopee Mdewakanton Sioux Community (SMSC) – based on "residence on reservation land," not as historical tribes and only with Interior-delegated powers. Accordingly, the April 15, 1938 Department Solicitor Opinion stated that "Neither of these two Indian groups [at Prairie Island and at Lower Sioux/Shakopee] constitutes a tribe but each is being organized on the basis of their residence upon reserved land…The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those

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public record more complete and demonstrate that equity is squarely in Plaintiffs' favor by submitting the prior *Wolfchild* Cross-Appellants' Joint Appendix as Kaardal Dec. Ex. F, which consists of documents submitted to the Federal Circuit (and thereby available as public records) and agreed upon by the Loyal Mdewakanton and the U.S. Department of Justice in the prior *Wolfchild* litigation.

[11] First Amended Complaint ¶6.

[12] Kaardal Dec. Ex. A, p. 2.

powers which are incidental to its ownership of property and to its carrying on of business and those which may be delegated by the Secretary of the Interior."[13]

A. Interior, in lobbying Congress for passage of the 1980 Act, had a "convoluted" communication approach which included misrepresenting the pre-enactment history of the Mdewakanton Band.

Prior to enactment of the 1980 Act, Interior misrepresented to Congress the pre-enactment history of the Mdewakanton Band. Interior used a "convoluted" communication approach to Congress including misrepresentations.[14] Interior's principal misrepresentation to Congress prior to enactment of the 1980 Act was that Interior had created in about 1937 with purchased "IRA Lands" new reservations for new historical tribes – when Interior actually had not done so.[15] Interior stated to Congress:

> These [1886] lands were acquired for the use of the members of the Mdewakanton Sioux who were living in Minnesota in 1886 and their descendants. After the enactment of the 1934 IRA, additional lands were acquired in trust for the benefit of the three Mdewakanton groups organized under that Act.[16]

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

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[13] CA1161-1162. Opinion of the Solicitor dated April 15, 1938, vol. 1, 813, 813-14. Kaardal Dec. Ex. B.
[14] *Wolfchild VII* at 309-10 ("The issues on remand are complex, reflecting both the convoluted and lengthy history of the federal government's relationship with the group of Indians who are plaintiffs and the extensive prior proceedings in this litigation.").
[15] CA1079, 1087.
[16] CA1079, 1087.

the Mdewakanton Band reservations.[17]

Specifically, by 1935, the Department had recognized that the Mdewakanton Band had reservation lands, totaling about 1,000 acres, set apart under the 1888-1890 Acts as reservations for the Mdewakanton Band. In about 1937, the Department purchased about 1,600 acres of additional lands which were set apart and added to the pre-existing reservation. Under the 1934 IRA, section 7, these so-called "IRA Lands" are subject to the same statutory use restrictions under the 1863 and 1888-1890 Acts in favor of the Mdewakanton Band as are the 1886 lands.[18] The IRA Lands were never set up to be new reservations for new sovereign historical tribes as Interior misrepresented to Congress prior to the 1980 Act.

Fortunately, Interior's misrepresentations of pre-enactment history to Congress that new reservations had been created for three new sovereign historical tribes to replace the Mdewakanton Band did not become law. "To give substantive effect to [the] flotsam and jetsam of the legislative process is to short-circuit the constitutional scheme for making law."[19]

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

The Mdewakanton Band remained in Minnesota after 1862 and pursued a land

[17] *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F. 2d 370, 380 (C.A. Me. 1975) (Any termination of statutory obligations toward Indian tribe would have to be made by Congress and be plain and unambiguous to be effective).
[18] Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984.
[19] A. Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 Suffolk U. L. Rev. 807, 813-14 (1998).

base.[20] In 1886, the Department set out to establish with a greater degree of certainty which Mdewakanton were loyal to the United States during the 1862 uprising. Because of the administrative difficulty of this task, Congress decided that presence in Minnesota as of May 20, 1886 would suffice to qualify an individual as a "loyal Mdewakanton."[21] To determine which Mdewakanton lived in Minnesota on May 20, 1886, U.S. Special Agent Walter McLeod took a census listing all of the full-blood Mdewakantons, which census was mailed to the Commissioner of Indian Affairs on September 2, 1886.[22] At the behest of the Secretary, on January 2, 1889, a second supplemental census was taken by Robert B. Henton, Special Agent for the Bureau of Indian Affairs ("BIA"), of those Mdewakanton living in Minnesota since May 20, 1886.[23] The McLeod and Henton listings (together, "the 1886 census") were used to determine who would receive the benefits of the later Appropriations Acts.[24]

In 1888, 1889 and 1890, motivated by the failure of the 1863 Acts to provide viable long-term relief, Congress passed three Appropriations Acts that included provisions for the benefit of the loyal Mdewakanton.[25] Notably, Santee Sioux, even those

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[20] *See, e.g.,* CA3327-3365, Mark Diedrich, Old Betsy: the Life and Times of a Famous Dakota Woman and Her Family (1995).
[21] *Wolfchild VII*, 96 Fed. Cl. at 316.
[22] *Id.* Although the census was not prepared as of May 20, 1886, "inclusion on the McLeod list has been deemed to create a rebuttable presumption that an individual met the requirements of the subsequent 1888, 1889, and 1890 Acts." *Wolfchild I,* 62 Fed.Cl. at 528. CA1100-1123 (McLeod census).
[23] CA1124-1149 (Henton census).
[24] *Wolfchild VII*, 96 Fed. Cl. at 316. CA1100-1149 (McLeod and Henton censuses).
[25] *See Wolfchild VI,* 559 F.3d at 1241; *Wolfchild VII*, 96 Fed. Cl. at 316-18. Notably, over thirty years later, the funds provided under the Appropriations Acts were deducted from a judgment for the Mdewakanton and Wahpakoota Bands, which judgment was

living at the Niobrara Reservation, would be ineligible for the 1886 land assignments.[26]

Although the text delineating the beneficiary class in each Appropriation Act varied in minute respects, the essential thrust of the Acts was Congress' desire that loyal Mdewakanton would be identified as those Mdewakanton who had severed their tribal relations and who had either remained in, or were removing to, Minnesota as of May 20, 1886.[27] To determine the persons who would be considered part of the "Mdewakanton Band" under Congress' definition and thus would receive the benefits of the Appropriations Acts, Interior relied upon the 1886 Censuses.[28]

Notably, in 2011, the Department of the Interior was ordered by CFC to establish a tribal "roll" of Mdewakanton Band claimants. *See Wolfchild v. United States*, 101 Fed. Cl. 54, 92 (Fed. Cl. 2011), as corrected (Aug. 18, 2011). The Department of the Interior administratively initiated that process which was later terminated after the Federal Circuit reversed the CFC decision.[29]

C. Interior Implementation of 1863 and 1888-1890 Acts: Private Lands Purchased, Lands Set Apart for the Mdewakanton Band as Reservations, Red Seal Certificates, Land Assignment System, Pipestone Census Rolls

After the enactment of the 1888-1890 Acts, Interior implemented the 1863 Acts and the 1888-1890 Acts by using the 1886 censuses, purchasing private land and setting

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rendered to compensate them for the annuities that were terminated by the 1863 Acts. *See Wolfchild VI,* 559 F.3d at 1254 (citing *Medawakanton,* 57 Ct.Cl. at 357).
[26] CA1595, 2567-2568, 2879.
[27] *See* Act of Aug. 19, 1890, 26 Stat. at 349; Act of Mar. 2, 1889, 25 Stat. at 992; Act of June 29, 1888, 25 Stat. at 228.
[28] *Wolfchild VII,* 96 Fed. Cl. at 316.
[29] Federal Register, Vol. 77, No. 190, p. 59963-59967 (October 1, 2012).

the lands apart for the Mdewakanton Band.[30] The Secretary instructed in 1889, "The title to the lands purchased should be taken in the United States, leaving the further conveyance thereof to the Indians subject to such further determination as may be authorized by law."[31] However, federal officials frequently referred to the 1886 lands as being in trust for the Mdewakanton Band.[32]

Interior purchased approximately 1,000 acres of private lands, spending 1888-1890 Acts appropriation dollars, and set those lands apart for the Mdewakanton Band.[33] The lands were purchased in three distinct areas of Minnesota.[34] Collectively, these reservations were known as the "1886 lands" to reflect the date by which the beneficiaries of the Appropriations Acts were defined.[35]

In about 1889, the Secretary began conveying rights to use the purchased land to the Mdewakanton Band which consisted of 80 families comprising 264 individuals.[36] Interior documents assigning lands during this period were called "Red Seal Certificates" because the certificates bore a seal in red.[37] Interior would issue a Red Seal Certificate to each eligible Mdewakanton Band family.[38]

Each family was assigned about 5 to 25 acres of land depending on the quality of

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[30] CA1622-1718
[31] CA2598.
[32] CA1613-1614.
[33] CA1622-1718.
[34] *Id.*
[35] *Id.*
[36] CA2595.
[37] CA1798.
[38] *Id.*

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land.[39] This "acreage is entirely too small to permit them to own teams, cows or for grazing purposes."[40]

In the early 1900's, as part of Interior's administration of the reservations, the "Red Seal" was discontinued.[41] In 1904, the Secretary initiated a more formal land assignment system to convey rights to use the purchased land to the Mdewakanton Band – and to reassign them when the land became available again.[42] Rather than granting the land in fee simple—a practice that had failed to provide long-term relief under the 1884, 1885, and 1886 appropriations—the Department chose to make the land available to the Mdewakanton Band while retaining title in the United States' name.[43] To that end, the Department employed an assignment system under which a parcel of land would be assigned to a particular beneficiary who could use and occupy the land as long as he or she wanted; however, if the assignee did not use it for two years, the parcel would be reassigned.[44]

Under the assignment system, the Department provided documents called Indian Land Certificates to assignees as evidence of their entitlement to the land.[45] Interior would make the land assignment at a reservation the Mdewakanton Band member requested and the subgroup community would include the Mdewakanton Band member

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[39] *Id.*
[40] CA2821-2831, 2813.
[41] *Id.*; *see, e.g.*, CA1615-1616 (examples of issued Indian Land Certificates).
[42] CA1596-1597, 2009.
[43] *See Wolfchild VII*, 96 Fed. Cl. at 318.
[44] *Id.*
[45] *Id. See* CA1798.

as a community member.[46] The Certificates stated that the assignee "and [his] heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said lands."[47] If an assignee abandoned the land for a period of time, usually two years, then the Department would reassign the land to another beneficiary; any sale, transfer, or encumbrance of the land other than to the United States was void.[48] "Although not guaranteed under the assignment system, in practice an assignee's land would pass directly to his children upon his death."[49] Other Mdewakanton Band relatives, however, were required to follow BIA procedures to receive an assignment.[50] Surviving spouses were ineligible for land assignments unless Mdewakanton Band members themselves.[51]

The Pipestone Indian School Superintendent was the responsible agent for the Mdewakanton Band.[52] Annually, the Superintendent would provide the Secretary a report and census regarding the Mdewakanton Band in Minnesota.[53] The annual censuses were admittedly inaccurate.[54] The Superintendent's censuses of the

[46] CA2857-2858, 2858.
[47] CA2009-2011 (Indian Land Certificate). In 1901, Congress amended a bill that allowed the Secretary of Interior to sell an unfarmable parcel of 1886 lands and included a requirement that the Mdewakanton Band had to consent to the sale. *See Wolfchild VII*, 96 Fed. Cl. at 318 n.21; Act of Feb. 25, 1901, ch. 474, 31 Stat. 805, 806.
[48] *Wolfchild VII*, 96 Fed. Cl. at 318.
[49] *Id.*
[50] *Id.*
[51] CA2898-2899.
[52] *See, e.g.*, CA2795, 2812-2814.
[53] *Id.*
[54] *Id. See also* CA2795.

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Mdewakanton Band were conducted as early as 1918 and continued through at least 1934.[55]

D. The Department did not allot the 1886 Lands under the 1887 Dawes Act (GAA) which was repealed by the 1934 Indian Reorganization Act.

The Department considered, but did not allot the 1886 Lands under the Dawes Act (GAA).[56] The 1934 Indian Reorganization Act (IRA) repealed the GAA.[57] After the 1934 IRA, the Department did not have statutory authority to allot the 1886 Lands.[58]

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

The 1934 IRA fundamentally altered the way in which the federal government dealt with Indian groups.[59] The IRA permitted "[a]ny Indian tribe, or tribes, residing on the same reservation . . . to organize for its common welfare . . . ."[60] It also preserved "all

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

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

[57] *See* Act of June 18, 1934, ch. 576, 48 Stat. 984 (also known as the Wheeler–Howard Act) (codified as amended at 25 U.S.C. §§ 461–79). Public Law 100-581, title I, Sec. 101, Nov. 1, 1988, 102 Stat. 2938 deleted from section 16 the "residing on same reservation" text, but had a savings clause at Sec. 103: "Nothing in this Act is intended to avoid, revoke or affect any tribal constitution, bylaw or amendment ratified and approved prior to this Act." *See generally* Cohen's Handbook of Federal Indian Law (2005 ed.) § 1.05 ("The crowning achievement and the legislation that gives the era its names was the Indian Reorganization Act of 1934 (the IRA or Wheeler-Howard Act)").

[58] *Id.*

[59] *Id.*

[60] *Id.*, § 16, 48 Stat. at 987.

powers vested in any Indian tribe or tribal council by existing law."[61] IRA section 19 stated, in part, "[t]he term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . ."[62] The Supreme Court in *Carcieri* interpreted the definition of Indian in section 19 to be restricted to "recognized Indian tribe now under Federal jurisdiction" with the "now" referring to the date of enactment of the IRA: June 18, 1934.[63] The Mdewakanton Band in this case was under federal jurisdiction on June 18, 1934.[64] But, the subgroup communities, Lower Sioux Indian Community (LIIC) and Prairie Island Indian Community (PIIC) approved by Interior in 1936 were not under federal jurisdiction on June 18, 1934.[65]

On November 17, 1934, the Mdewakanton Band gathered as one and voted 94-2 to accept the IRA.[66] At the time, there were 271 eligible Mdewakanton Band voters.[67] Voter eligibility did not depend on having an 1886 Lands assignment. In fact, less than one-half of the eligible voters had 1886 Land assignments.[68] The other one-half of eligible voters did not have land assignments.[69]

In response to the vote of the Mdewakanton Band, the Department deliberated on

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[61] *Id.*
[62] *Id.,* § 19, 48 Stat. at 987.
[63] 555 U.S. at 391.
[64] *See, e.g.*, CA2951-2954, 2951.
[65] *Id.*
[66] CA2812-2814, 2812; 2889-2892, 2889.
[67] *Id*.
[68] *Id*.
[69] *Id*.

the legal status of the Mdewakanton Band.[70] Department officials recognized that the "1886 Lands" was a legal "reservation" for the Mdewakanton Band.[71] The statutory bases in 1935 for a Mdewakanton Band reservation were the 1863 Acts and the 1888-1890 Acts.[72]

First, Felix Cohen[73] stated in November 23, 1935 correspondence that a "consensus" had been reached on Minnesota Mdewakanton organization between the Indian Office and the Solicitor's Office that the 1886 Lands had been set apart as a reservation for the Mdewakanton Band.[74] The November 23, 1935 memorandum recognized the 1886 Lands as a "reservation."[75] Four days later, Commissioner John Collier would confirm the reservation status of the 1886 Lands for the Mdewakanton Band.[76] His November 27, 1935 correspondence to Mr. Joe Jennings of the Pine Ridge Agency states the 1886 Lands are a "reservation" for the Mdewakanton Band.[77] Soon thereafter, Assistant Solicitor Charlotte T. Westwood and Chief J.R. Venning wrote a memorandum that the 1886 Lands were set apart for the Mdewakanton Band as a "reservation."[78] Finally, according to the April 15, 1938 Solicitor Opinion, the subgroup

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[70] CA2832-2837, 2840-2841, 2843-2845, 2855-2856.
[71] *Id.* *See* CA1613-1614 (federal officials have acknowledged trust or elements of trust).
[72] *See* Act of Feb. 16, 1863, § 9, 12 Stat. at 654.
[73] From 1933 through 1947, Felix Cohen served in the Solicitor's Office of the Department as an assistant solicitor, associate solicitor, and acting solicitor. Cohen was the original author of a continuing treatise on American Indian Law. *See* Cohen's Handbook of Federal Indian Law (2005 ed.) at 201-203 (contributions of Felix Cohen).
[74] CA2832.
[75] CA2833.
[76] CA2840-2841.
[77] *Id.*
[78] CA2840-2841.

communities organized on the Mdewakanton Band's reservations do not have the powers associated with historical sovereign tribes – but only temporarily delegated powers.[79]

The 1938 Solicitor's opinion confirms that the Communities do not have the inherent powers listed in the 1934 Solicitor's opinion. Consistently, the 1934 Solicitor's Opinion states that historical tribe's enrollment and property determinations must "be consistent with existing acts of Congress governing the enrollment and property rights of members."[80]

Accordingly, the Mdewakanton Band formed three temporary subgroup communities with Interior approval of the three constitutions: PIIC and LSIC in 1936 and Shakopee Mdewakanton Sioux Community (SMSC) in 1969.[81] During the period from 1936 through 1969, the year the SMSC was recognized, those reservation lands at Shakopee "were under the limited supervision of the Lower Sioux governing body."[82] The subgroup communities are not historical tribes.[83] The subgroup communities have only powers delegated by Interior, and even those powers must be exercised consistent with statutory obligations to the Mdewakanton Band.[84]

The subgroup communities evolved, but not the membership – and certainly not

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[79] CA1161-1162. Opinion of the Solicitor dated April 15, 1938, vol. 1, 813, 813-14. Kaardal Dec. Ex. E.
[80] *Id.* at 476-77.
[81] *Id.; see Wolfchild VII*, 96 Fed. Cl. at 319 (citing *Wolfchild I*, 62 Fed.Cl. 521, 529 (2004)).
[82] CA2850.
[83] CA1161-1162.
[84] *Wolfchild VII*, 96 Fed. Cl. at 319 (citing *Wolfchild I*, 62 Fed.Cl. at 529).

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into "two classes of members" as indicated in the 1980 Act Committee Reports.[85] As a 1935 Department memorandum indicated on the possible purchase of more reservation land, "in each community there are several families of Mdewakanton Sioux who are not entitled to land assignments on the present reservation as they do not come within the terms of the land purchase acts. Yet they have lived in the community all their lives, are considered members, and want to stay. Additional land would solve the problem of these Indians."[86]

The number of non-Mdewakanton Band members at the reservations by the year 1980 had not grown. "As of 1979, more than 95 percent of the enrolled members of the three communities were lineal descendants of the 1886 Mdewakantons. At that time, the Lower Sioux Indian Community had 152 members (139 of whom were lineal descendants of the 1886 Mdewakantons), the Prairie Island Indian Community had 109 members (106 of whom were lineal descendants of the 1886 Mdewakantons), and the SMSC had 96 members (94 of whom were lineal descendants of the 1886 Mdewakantons)."[87]

However, since Interior under the 1980 Act ended the federal 1886 Lands assignment system and Mdewakanton Band tribal trust account, the membership of these communities has not been defined in terms of indigenous relationships and these community members have been receiving 100% of the benefits of the land and

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[85] CA1079, 1087.
[86] CA2837.
[87] *Wolfchild VI*, 559 F.3d at 1235 n.2. CA1737-1738.

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community revenues – including per capita payments.[88] The communities exercise complete discretion over who attains or keeps their membership – regardless of 1886 Mdewakanton lineal descent or any other statutory criteria.[89]

F. IRA Lands added to existing reservations for Mdewakanton Band under IRA Section 7.

In about 1937, Interior, with funds appropriated under the IRA, purchased 1,170.4 acres at Lower Sioux and 414 acres at Prairie Island.[90] The deeds to the IRA lands, unlike the deeds to the 1886 Lands, were taken by the United States in trust for the respective communities.[91] Under the IRA, section 7, these IRA lands were added to the existing reservations for the Mdewakanton Band.[92] Under IRA, section 7, the IRA lands are subject to the same statutory use restrictions under the 1863 and 1888-1890 Acts as the 1886 lands.

G. The Mdewakanton Band reservations were not terminated in the Termination Era of Federal Policy (1943-1961).

The federal government adopted a policy of tribal termination from 1943 through 1961.[93] No termination plan for the Mdewakanton Band and its reservations in Minnesota was successfully implemented.[94]

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[88] *See Wolfchild I*, 62 Fed. Cl. at 530-32.
[89] *Wolfchild VII*, 96 Fed. Cl. at 319. CA2006-2209.
[90] CA2974.
[91] *See, e.g.*, CA1155-1156.
[92] Act of June 18, 1934, ch. 576, § 7, 48 Stat. 984.
[93] *See generally* Cohen's Handbook of Federal Indian Law (2005 ed.) § 1.06 (Termination (1943-1961)).
[94] *Id.*

H. Funds derived from reservation lands held in tribal trust accounts for Mdewakanton Band were erroneously distributed to Communities.

The BIA erroneously distributed the Mdewakanton Band's tribal trust account funds to the three subgroup communities.[95] The CFC found that Interior's distribution of these funds beginning in 1981 to the subgroup communities was a breach of Interior's statutory duties to the Mdewakanton Band. The $60,000, identified in an Interior report prepared in 1975, had grown to $131,483 by 1980, and, with additional interest since 1980, had grown to the amount of the CFC judgment of $673,944.[96] The court of appeals reversed this judgment for pre-1980 Act damages because the 1888-1890 Acts did not create a money-mandating duty for CFC jurisdiction and because of the six year statute of limitations.[97] The court of appeals also denied the plaintiffs' cross-appeals for post-1980 Act damages.[98]

I. Since 1980, only the three communities, not the Mdewakanton Band, have benefitted from the three reservations.

Since the 1980 Act, the Mdewakanton Band has not been entitled to any land or benefit from the three reservations. Only the communities and their members benefit from the three reservations:

> As time passed, that beneficiary group and the three present-day communities that grew on these lands overlapped but diverged: **many of the beneficiary group were part of the communities, but many were not; and the communities included many outside the beneficiary group.** In 1980, Congress addressed the resulting land-use problems by putting the lands into trust for the three

[95] CA2210-2211.
[96] *Wolfchild VIII*, 101 Fed. Cl. at 92-93.
[97] *Wolfchild v. United States*, 731 F.3d 1280, 1294-95 (Fed. Cir. 2013) (*Wolfchild IX*).
[98] *Id.*

> communities that had long occupied them. Ever since, proceeds earned from the lands—including profits from gaming—have gone to the same three communities.

Wolfchild IX, 731 F.3rd at 1292-94 (emphasis added).

J. Despite Mdewakanton Band statutory title to the 12 square mile reservation, the Defendants continue to occupy the Mdewakanton Band reservation in Redwood, Renville and Sibley Counties.

Despite the fact that the land is the reservation of the Mdewakanton Band, the Defendants continue to claim, possess and occupy the reservation land in Redwood, Renville and Sibley Counties (Minnesota), legally described as Sections 1, 2, 3, 11 and 12, T. 112 N., R. 35; Section 35, T. 113 N., R. 35; Section 5, 6, 7, 8 and 9, T. 112 N., R. 34; Section 31, T. 113 N., R. 31.

LEGAL ARGUMENT

I. Controlling principles regarding motions to dismiss.

Defendants have moved to dismiss under several provisions of the Federal Rules of Civil Procedure: Rule 12(b), sections (1), (2), (5), (6), and (7); Rule 12(c), Rule 12(h)(2); and Rule 19 (Rule 12(b)(7) refers to Rule 19). Plaintiffs will therefore set forth some general provisions regarding Defendants' motions here and elsewhere more specifically address Defendants' other arguments.

Under Rule 12(b)(1), a dismissal for lack of subject-matter jurisdiction is only proper "when the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous." *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974) (claim must be "so insubstantial,

implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy”)).

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss may only be granted if a complaint does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In other words, the complaint must satisfy Rule 8, which only requires that a plaintiff submit “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); Fed. R. Civ. P. 8(a)(2). “[T]he pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true.” *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

A “complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations.” *Twombly*, 550 U.S. at 555. In fact, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Twombly*, 550 U.S. at 556) (post-*Iqbal*). The Court should read the complaint “as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible.” *Braden*, 588 F.3d at 594.

At the same time, “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are

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true (even if doubtful in fact)." *Id.* A "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Finally, "[i]n addressing a motion to dismiss, '[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Illig v. Union Elec. Co.,* 652 F.3d 971, 976 (8th Cir. 2011) (citation omitted). Even after *Twombly,* the court must still "construe the complaint liberally in the light most favorable to the plaintiff." *Id.; Eckert v. Titan Corp.,* 514 F.3d 801,806 (8th Cir. 2008).

II. Defendants' specific legal arguments attempting to undermine the First Amended Complaint each fail under Rule 12 analysis.

Defendants raise the following legal issues in their papers, some of which overlap and some of which do not:

1. Whether the Court has subject-matter jurisdiction over this case;
2. Whether Plaintiffs have Article III standing;
3. Whether the Minnesota statute of limitations bars this claim;
4. Whether the Minnesota statute of frauds bars this claim;
5. Whether indispensable parties have not been joined;
6. Whether the doctrine of laches or equity bars this claim;
7. Whether the Lower Sioux Community has tribal immunity;
8. Whether service of process has been sufficient as to some Defendants.

A. The Court has subject-matter jurisdiction over this case.

Under Rule 12(b)(1), a dismissal for lack of subject-matter jurisdiction is only proper "when the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous." *Kehr Packages, Inc. v. Fidelcor, Inc*., 926 F.2d 1406, 1408-09 (3d Cir. 1991). This means that so long as the complaint states a claim arising under federal law that is not "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits," the Court has subject-matter jurisdiction. *Oneida Indian Nation of N. Y. State v. Oneida Cnty., New York*, 414 U.S. 661, 666-67 (1974) (*Oneida I*).

In *Oneida I*, the Supreme Court held that because the complaint asserted "a current right to possession conferred by federal law, wholly independent of state law," which assertion was based on a "right to possession," and because the claim was not implausible or foreclosed by the prior decisions of the Court, the claim arose under the Constitution, laws, or treaties of the United States. *Id.* at 666-67. Such is the case here. As alleged in the Complaint, federal question jurisdiction exists in this case under 28 U.S.C. § 1331 and federal common law, because the claim arises under the Act of February 16, 1863 and the federal government's subsequent acts and omissions. *First Am. Compl. ¶¶1-5*.

Furthermore, the Plaintiffs' claims are not foreclosed by any prior decisions in any tribunal. First, the Defendants agree that the Plaintiffs' claims, and the facts supporting them, are easily identifiable:

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> The February 16, 1863 Act authorized the Secretary of the Interior to set apart the lands specified in the First Amended Complaint, which would have created title – an inheritable beneficial interest – in Plaintiffs and their ancestors. *First Am. Compl. ¶¶36-38*; *Wolfchild v. United States*, 559 F.3d 1228, 1241 (Fed. Cir. 2009). Thereafter, Interior did in fact set apart lands within the 12-square miles at issue in March of 1865, which in fact established title in Plaintiffs. *First Am. Compl. ¶¶39-48*, *Defs.' Redwood Cnty., Paxton Twp., Sherman Twp., Honner Twp., Renville Cnty., Birch Cooley Twp., Sibley Cnty. and Moltke Twp.'s Mem. of Law in Supp. of Its Mot. to Dismiss* ("Gov't Defs."), Sept. 26, 2014, p. 18; *Wolfchild v. United States*, 731 F.3d 1280, 1292-94 (Fed. Cir. 2013). To confirm this fact, the Secretary of the Interior specifically stated that the setting-apart had already been accomplished and that Plaintiffs' ancestors could be "establish[ed]" on the set-apart lands.[99] *First Am. Compl. ¶¶44-48*.
>
> However, Plaintiffs' ancestors were not "establish[ed]" on those lands because of "local white hostility." *Id.* Yet, the February 16, 1863 Act has never been repealed. *Id. ¶83*. Furthermore, no Loyal Mdewakanton had sought the devise or alienation of his or her lands under the Act, *id. ¶37*, and therefore President Johnson's Proclamation in 1868 did not legally alter the title to the lands within the 12 square miles. Act of February 16, 1863 ("except by the *consent* of the President," meaning that the President would merely agree to an already-started attempt to devise the land, not act on his own initiative (emphasis added)). The Act of January 3, 1980 also did not negate Plaintiffs' right, title or interest to the lands in question because it was limited to the "right, title, and interest" owned by the United States, which did not include right, title or interest to lands to which *Plaintiffs* have rightful title. *First Am. Compl. ¶90*.

In the related litigation, the Federal Circuit only held that the claims made by the Wolfchild plaintiffs were barred by the statute of limitations under 28 U.S.C. §2501 in the CFC, and specifically did not answer the question as to whether title inured to the Mdewakanton Band as a result of the setting-apart. *Wolfchild IX*, 731 F.3d at 1292-93.

Defendants claim to possess and occupy the lands to which Plaintiffs have rightful title, *First Am. Compl. ¶¶49-66*, and therefore Defendants have trespassed and are

[99] It would be illogical for the Secretary to tell Reverend Hinman to "establish" Loyal Mdewakanton Sioux Indians on lands not rightfully owned or possessed by them.

trespassing on these lands and have damaged and are damaging Plaintiffs by their trespass and must consequently be ejected. *First Am. Compl. ¶¶105-122, 132-150.*

On the assumption that these facts are true, an assumption which the Court must make, Plaintiffs have stated a claim for declaratory relief and for trespass and ejectment under federal common law, "even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and 'that a recovery is very remote and unlikely.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Twombly*, 550 U.S. at 556) (post-*Iqbal*). Such specific allegations satisfy the *Iqbal-Twombly/Braden* standard for plausibility, as they set forth specific facts that entitle Plaintiffs to relief under those causes of action.

Second, contrary to Defendants' claims that the prior *Wolfchild* litigation forecloses Plaintiffs' claims, *see Gov't Defs.' Mem.* pp. 15-16; *Mem. in Supp. of Def. Lower Sioux Indian Community's Mot. for Dismissal of First Am. Compl. or Alternatively, Summ. J.* ("Lower Sioux Mem."), Sept. 26, 2014, pp. 16-21, the Federal Circuit declined to determine whether the setting-apart by the Secretary of the Interior established legal title, with an inheritable beneficial interest, to the lands in question in Plaintiffs' ancestors because that court dismissed the claim under a statute of limitations only applicable in the CFC, and not applicable in this Court. *Wolfchild IX*, 731 F.3d at 1292-94:

> Those **1865 actions, however, cannot support a timely claim for relief, regardless of whether they could qualify as having "set apart" land under the Act.** After it took the steps toward conveyance of the 12 sections to the designated Indians in 1865, the government terminated the process and sold the parcels to others. Claimants have not alleged error in the

> Claims Court's finding that all of the 12 sections were sold no later than 1895, which was apparently not disputed by any claimants in the Claims Court. *See Wolfchild,* 101 Fed.Cl. at 74. **The six-year statute of limitations, therefore, has long since run.**

Id. at 1292-93 (emphasis added).

The plain meaning of the Federal Circuit's reasoning is that the claims Plaintiffs bring in this case were time-barred in the CFC, but only because of its six-year statute of limitations. That statute of limitations does not apply here, and so this Court has jurisdiction to decide the matters alleged in the First Amended Complaint. In fact, "[t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights," and "the borrowing of a state limitations period in these cases would be inconsistent with federal policy." *Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226, 240-41 (1985) (*Oneida II*). This is because "Indian land claims [are] exclusively a matter of federal law." *Id.* Thus, the Federal Circuit's opinion does not foreclose this action, and the Court has subject-matter jurisdiction over this case.[100]

Moreover, to the extent that Defendants argue that the Court does not have subject-matter jurisdiction because the 1863 Act does not create a private right of action, Defendants miss the point of Plaintiffs' claims. *E.g., Gov't Defs.' Mem* pp. 14-16; *Def. Landowners' Joint Mem. of Law in Supp. of Mots. for Dismissal* ("Landowners' Mem."),

[100] There are several aspects of CFC jurisdiction which made Plaintiffs' claim in this case impossible to litigate there: (1) requirement for a statutory money-mandating duty; (2) only defendant is the United States; and (3) statutory jurisdictional six-year statute of limitations. Also, under the holding of *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 179 L. Ed. 2d 723 (2011), the Plaintiffs would not have been able to bring this lawsuit while the CFC case was pending.

Sept. 26, 2014, pp. 5-13. Plaintiffs have alleged federal common law causes of action for violation of their possessory rights to the lands in question, specifically sounding in trespass and ejectment, in addition to seeking a declaration that they hold legal title to the lands at issue under the Declaratory Judgment Act. Under *Oneida II*, these are valid causes of action. *Oneida II*, 470 U.S. at 236. In fact, not only are these causes of action valid under *Oneida II*, but they are actually stronger than the claims in *Oneida II* because they are based on the establishment of title through a Congressional statute, subsequent executive conduct, and subsequent unlawful possession of lands owned by the Mdewakanton Band. *See id.* at 236 ("Finally, the Court's opinion in *Oneida I* implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights. . . . [W]e noted that the Indians' right of occupancy need not be based on treaty, statute, or other Government action.").

In other words, Plaintiffs' declaratory judgment claim provides a *remedy* that the Court should award based on the legislative and executive branch's actions from 1863-1865 establishing title to the lands in question in the Mdewakanton Band, which is part and parcel of Plaintiffs' federal-common-law ejectment and trespass claims. In order to eject Defendants and award Plaintiffs trespass damages, the Court must declare that the lands were set apart and title is in the Mdewakanton Band.

Because Plaintiffs have alleged valid claims for relief based on recognized private rights of action in the First Amended Complaint under *Oneida II*, which have not been foreclosed by the prior *Wolfchild* litigation, the Court should deny Defendants' motions to dismiss.

B. Plaintiffs have Article III standing to sue.

Defendants' arguments regarding standing are premised on a legal fallacy that the Court does not have to accept as true the allegations in the First Amended Complaint in the context of their motions to dismiss. Instead of recognizing this bedrock principle, Defendants would have this Court decide the issues raised in the First Amended Complaint on the merits and in their favor without actually proving their case. However, accepting as true the allegations in the Complaint, Plaintiffs have demonstrated (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) that it is likely that the injury will be redressed by a favorable decision.

To put it simply, Plaintiffs have alleged that Defendants unlawfully possess their land and must be ejected and pay damages for their trespass. *First Am. Compl. ¶¶49-66, 97-150*. As a matter of course, the Court must declare that title was established in Plaintiffs' ancestors by the February 16, 1863 Act and subsequent executive conduct detailed above. Plaintiffs' injury is the unlawful possession of their land. Defendants are the persons who unlawfully occupy their land. Ejecting Defendants and awarding Plaintiffs trespass damages will remedy Plaintiffs' injury. Accepting as true the allegations in the First Amended Complaint, Plaintiffs have standing to bring these claims.

The Defendants ignore the Rule 12 standard and move beyond the Plaintiffs' allegations and go straight to the merits of this case.

For example, Defendants argue that Plaintiffs have suffered no injury because there was no conveyance of land. *Gov't Defs.' Mem.* p. 16; *Lower Sioux Mem.* pp. 12-14;

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Landowners' Mem. pp. 13-18. However, Plaintiffs have alleged that the setting-apart of the lands, which the prior *Wolfchild* court agreed would create an inheritable beneficial interest in the lands in question in Plaintiffs and their ancestors, *Wolfchild v. United States*, 559 F.3d 1228, 1241 (Fed. Cir. 2009), established title in Plaintiffs' ancestors and therefore Plaintiffs. *E.g., First Am. Compl. ¶43.* Under Rule 12, the Court is to accept as true Plaintiffs' allegations. Therefore, Plaintiffs have standing to sue because they have alleged that Defendants are possessing the land that Plaintiffs own and have demanded their removal and payment of damages based on federal common law claims.[101]

C. The Minnesota statute of limitations has no impact on the First Amended Complaint.

State statutes of limitation do not apply to Indian land claims based on the federal common law *unless* Congress has stated otherwise. *Oneida II*, 470 U.S. at 240-41. The Government Defendants and the Landowner Defendants argue that Minn. Stat. § 541.023 bars Plaintiffs' claim based on Minnesota's 40-year statute of limitations. *Gov't Defs.' Mem* pp. 17-19; *Landowners' Mem.* pp. 23-25. They attempt to distinguish *Oneida II* and argue that under *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986) and *Wardle v. Northwest Inv. Co.*, 830 F.2d 118 (8th Cir. 1987), the Minnesota statute of limitations applies. Their arguments fail.

Oneida II is not only applicable, but even has stronger application here because Plaintiffs rely not on aboriginal title but on an Act of Congress in claiming that Defendants unlawfully possess their land. As the *Oneida II* Court stated, "[f]inally, the

[101] To the extent Defendants alternatively seek judgment on the pleadings and/or summary judgment, Plaintiffs address those standards below.

Court's opinion in *Oneida I* implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights. . . . [W]e noted that the Indians' right of occupancy need not be based on treaty, statute, or other Government action." *Id.* at 236. If a statute is not *needed*, but is still *provided* -- as in this case -- then it follows that Plaintiffs stand on even stronger ground than the *Oneida II* plaintiffs.

In addition, contrary to the Government Defendants' argument, *Catawba* is completely inapplicable to this case. In *Catawba*, the Supreme Court held that the South Carolina statute of limitations applied to an Indian land claim, but specifically because Congress had passed a statute saying that, as the Court put it, "state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others. . . . [and w]ithout special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case." *Catawba*, 476 U.S. at 506-07. Defendants have not referenced any such Act of Congress relative to the Mdewakanton Band, and therefore there is no statute of limitations related to Plaintiffs' claim, pursuant to *Oneida II*.

Finally, *Wardle* does not undermine *Oneida II*'s application to this case. In *Wardle*, the Eighth Circuit found that, in an action brought pursuant to 25 U.S.C. § 347, the Minnesota statute of limitations applied to bar the claim. *Wardle*, 830 F.2d at 122. However, Plaintiffs' claims do not arise under 25 U.S.C. § 347. Rather, they arise under federal common law, like in *Oneida II*. Therefore, *Oneida II* is apposite, *Wardle* is inapposite, and Defendants' motion to dismiss must be denied.

D. The Minnesota statute of frauds has no impact on the First Amended Complaint.

In the same manner that the Minnesota statute of limitations is inapplicable to Plaintiffs' claims, so also is the Minnesota statute of frauds inapplicable. Under *Oneida II*, not only are state statutes of limitation inapplicable to Indian federal common law land claims, but Indian land claims are "exclusively a matter of federal law" arising in the federal common law. *Id.* at 240-41. Defendants cite to no case law that holds to the contrary. *Gov't Defs.' Mem.* at pp. 17-18. In fact, Defendants cite to several cases in which treaties, which are Congressional actions, effected land grants. *See Pickering v. Lomax*, 145 U.S. 310 (1892); *Schrimpscher v. Stockton*, 183 U.S. 290 (1902); *Lykins v. McGrath*, 184 U.S. 169 (1902). The Plaintiffs' federal claims are supported by the Act of February 16, 1863 and the subsequent executive actions evidencing the grant of the land in question to the Mdewakanton Band.

E. Neither the United States nor the State of Minnesota is an indispensable party in this case under Rule 19.

"The courts have generally held that the United States is not an indispensable party when an Indian tribe or individual sues a third party to establish title or recover possession of land. 3A *Moore's Federal Practice* ¶ 19.09[8]." *Red Lake Band of Chippewas v. City of Baudette, Minn.*, 730 F. Supp. 972, 978 (D. Minn. 1990). Furthermore, as the Ninth Circuit has held, "the rule is clear in this Circuit and elsewhere that, in a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensable party in

whose absence litigation cannot proceed under Rule 19(b)." *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983) (emphasis in original).

With regard to the United States, this is especially true in the context of a suit seeking to recover possession under a theory of ejectment because "an action of ejectment can be maintained only against the person in possession of the premises sought to be recovered—that is, against the person who withholds possession from the plaintiff." 55 Causes of Action 2d 65 (originally published in 2012).

The Seventh Circuit has analyzed a situation very similar to this case and found that it was reversible error for the district court to dismiss the case based on the argument that the United States was an indispensable party. *Sokaogon Chippewa Community v. State of Wisconsin, Oneida Cnty.*, 879 F.2d 300 (7th Cir. 1989) (Posner, J.). As the Seventh Circuit found, the factors under Rule 19(b) and explained in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-11 (1968) (which the Defendants practically ignore in this case), weighed in favor of reversing dismissal based on the indispensability of the United States. *Sokaogon,* 879 F.2d at 304.

Likewise, in this case, those factors heavily favor denying Defendants' motions to dismiss on Rule 19 or Rule 12(b)(7) grounds. Here, like in *Sokaogon*, Plaintiffs have no other route for establishing their rights to the 12 square miles at issue, as the statute of limitations has run regarding the United States, as set forth in *Wolfchild IX* and under the Quiet Title Act (which does not apply to this action). Moreover, the defendants do not face multiple liability if they lose this case; rather, they have claims against those who

warrantied their title. Further, the United States has taken no position in this case that its presence is indispensable, so it must not fear any consequences from this suit.

Finally, as in *Sokaogon*, the public interest heavily favors resolution of this case on its merits, and there is no statute of limitations relative to Indian land claims of this sort, consistent with the federal policy recognized under *Oneida II*. In this case, the Plaintiffs' dispute is with those in unlawful possession of the 12 square miles of land at issue, not the United States.

Defendants' arguments practically seek to force Plaintiffs to basically sue "back to King James or Lord Baltimore" in order to adjudicate this controversy over possession to the lands in question, thus threatening to impose the "parade of horribles" that the Seventh Circuit held should never take place. Defendants cite to several cases from the Eighth Circuit, Tenth Circuit, and this Court to support their position, but these cases are inapposite, and any analysis that does not examine the Rule 19(b) factors described in *Provident Tradesmens* would be contrary to mandatory Supreme Court authority. In fact, the Seventh Circuit in *Sokaogon* specifically reviewed those Eighth Circuit and District of Minnesota cases and found that they are inapplicable to cases like this case. *Sokaogon*, 879 F.2d at 304-05.

Most importantly from this analysis, Plaintiffs in no way desire to revest the United States with trustee responsibilities over the lands in question, as they were granted in severalty to the Plaintiffs' ancestors via the February 16, 1863 Act and the subsequent executive actions that established title in them. *Nichols* is especially not on point, and

under *Red Lake, Puyallup, and Sokaogon*, the United States is not an indispensable party. Defendants' motion should be denied.

Moreover, the State of Minnesota is not an indispensable party either. As the court in *Stewart v. Sidio*, 358 S.W.3d 524 (Mo. Ct. App. S.D. 2012), held, the Missouri Department of Conservation (MDC) was not a necessary party to an ejectment action seeking relief against landowners who had constructed a fence on a strip of land that they did not own. The court ruled that even if the MDC was the record owner of the strip, the plaintiff was nevertheless entitled to have the court decide whether he or the defendant landowners had better title, even if MDC held real title, and that the plaintiff could sue for mere possession without MDC's participation. 55 Causes of Action 2d 65 (originally published in 2012).

Further, Minnesota and its agencies own only a small fraction of the lands in the 12 square miles in question. Dismissal based on that for such a small portion of the land sought would be inequitable, as it would leave Plaintiffs without a forum in which to make its claims, as the court in *Sokaogon* held was unacceptable. For the same reasons stated above with respect to the United States, Minnesota is not an indispensable party and Defendants' motion should be denied.

F. Neither laches nor any other equitable doctrine bars the relief sought in the First Amended Complaint.

Defendants argue under *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) and *Stockbridge-Munsee Community v. New York*, 756 F.3d 163 (2d Cir. 2014) that laches and equity favors dismissal. *Gov't Defs.' Mem.* pp. 20-25; *Landowners'*

Mem. pp. 18-23; *Mem. Supp. Mot. by Def. Episocopal* [sic] *Diocese of Minn. to Dismiss*. However, accepting as true the allegations in the First Amended Complaint, equity is squarely in Plaintiffs' favor. Furthermore, "when the defense of laches depends on disputed facts, it is inappropriate to make a determination on a motion to dismiss." *Kaufhold v. Caiafa*, 872 F. Supp. 2d 374, 380 (D.N.J. 2012). "[T]he existence of prejudice" is a question of fact. *Fannie v. Chamberlain Mfg. Corp, Derry Div.*, 445 D. Supp. 65, 75 (W.D. Pa. 1977).

Therefore, although Defendants have attempted to simplify the prejudice issue with respect to laches by lumping the Defendants together as a group, laches cannot apply in that manner. Laches in a case like this requires a Defendant by Defendant analysis, because the Court cannot know at this motion-to-dismiss stage what the prejudice of ejectment and trespass damages would be to each Defendant – some might have obtained Mdewakanton land by putting 50 dollars down for a bank loan. Others might have paid cash for their defective deed.

As the court in *Fannie* said, the existence of prejudice with regard to a laches determination is a question of fact, and Plaintiffs dispute that the prejudice suffered by any Defendant is greater than Plaintiffs' for having been dispossessed of their land because of white hostility, as detailed above. That is why Plaintiffs filed the Complaint in the first place. The Court cannot grant a motion to dismiss on the ground of laches because the balance of prejudices in this case is ultimately fact-dependent, and in fact Plaintiffs have been prejudiced to a much greater degree than any Defendant, on top of the fact that exactly what prejudice each Defendant faces is unknown.

Furthermore, *Sherrill* and *Stockbridge* are inapplicable to this case. Simply put, *Sherrill* was a claim based on aboriginal title and the wrongful sale of lands under federal law, not an establishment of title in a group of Indians by Congress, such as the Act of February 16, 1863. 544 U.S. at 202. *Sherrill* does not apply because Plaintiffs seek to vindicate their federally created rights pursuant to that Act, not their aboriginal claim to the land before any action by Congress. There are no "embers of sovereignty" here; rather, there is a land grant by the federal government. *Stockbridge* is also inapplicable for the same reason: in *Stockbridge*, the plaintiffs sought to undo their own transactions which appeared to violate the Nonintercourse Act. 756 F.3d at 164. They too did not invoke a Congressional grant of land as the source of their rights. Importantly, these INIA-type cases involved the "selling" of Indian lands, so the courts applied laches because they did not want to review adequacy of consideration 100 years later. That is not an issue here.

Finally, laches cannot bar Plaintiffs' trespass damages claims because money damages for said trespasses is a legal remedy, not an equitable remedy, which would not cause any physical disruption pointed to by Defendants. *E.g., Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973-74 (2014) (quoting *Oneida II*, 470 U.S. at 244 n.16 ("application of the equitable defense of laches in an action at law would be novel indeed . . . the application of laches would appear to be inconsistent with established federal policy")); *Ewert v. Bluejacket*, 259 U.S. 129 (1922) ("[T]he equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly

have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions."). Laches does not apply, and Defendants' motion should be denied.

G. Tribal immunity does not shield the Lower Sioux.

The Lower Sioux Community seeks to use tribal immunity to shield it from suit, but the Lower Sioux Community is not a tribe. They point to no document stating that it is a tribe. Rather, as detailed above, the Mdewakanton Band, which, consistent with *Carcieri*, consisted of those Mdewakanton under federal jurisdiction as of the passage of the IRA in 1934, is a tribe. Plaintiffs are part of that group. As also stated above, the Lower Sioux Community was not recognized until 1936, two years later. As the April 15, 1938 Solicitor Opinion shows, the Lower Sioux, like the other subgroups organized on the Mdewakanton Band's reservations, do not have the powers associated with historical sovereign tribes – but only temporarily delegated powers. The LSIC point to the fact that they can receive services from the BIA, but this does nothing to change the fact that they are temporary subgroups with temporarily delegated powers, regardless of how long that temporary time lasts.

As such, the LSIC shows a desire to usurp the land and identity of the Mdewakanton Band. However, federal law from 1863 through the present, as detailed above, prohibits the LSIC from usurping the Mdewakanton Band. .*See Shenandoah v. United States Dept. of Interior,* 159 F.3d 708 (2nd Cir. 1998) (discussing usurpation defense); *Native American Mohegans v. U.S.*, 184 F.Supp.2d 198, 215-216 (D.Conn. 2002) (discussing usurpation defense).

Moreover, Congress has authorized Plaintiffs' suit against anyone besides Plaintiffs in possession of the lands in question by passing the Act of February 16, 1863, because that Act grants *exclusive* title and possession of the lands in question to the Mdewakanton Band. *See Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (holding that because the language of the RCRA allows suit against any person, tribal immunity was clearly abrogated). The February 16, 1863 Act therefore has abrogated any immunity that might be conferred on LSIC. Furthermore, United States sovereignty, in terms of the enforcement of federal obligations, overrides tribal sovereignty. *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986) ("a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction").

Additionally, reason should dictate that there can be no tribal immunity over actions putting tribal jurisdiction in question – if, after all, Plaintiffs own rightful possession of the lands in question, LSIC has no authority to assert ownership of those lands or immunity from suit regarding them. In other words, because Plaintiffs' suit would render LSIC's possession of the land void *ab initio*, LSIC cannot assert immunity.

H. Service of Process Issues.

The Plaintiffs contest assertions of the Defendant Landowners' memorandum, pages 26-28, that service of process has not been accomplished on the Defendant Francis Goelz and Mitchell Unruh. The contested issue is whether Mr. Goelz and Mr. Unruh were served under Federal Rule of Civil Procedure 4 (e)(2)(b) by leaving a copy of the complaint and summons with an adult at the defendant's "dwelling or usual place of

abode." Mr. Goelz and Mr. Unruh claim that it wasn't left with an adult at their "dwelling or usual place of abode." However, the properties where the deliveries occurred were identified on real estate tax documents as owned by Mr. Goelz and Mr. Unruh, identified these properties as homestead properties and gave Mr. Goelz's and Mr. Unruh's mailing address. Kaardal Dec. Ex. C, D. All these facts qualify the delivery as "personal service" on Mr. Goelz and Mr. Unruh under Rule of (e)(2)(b).

The Defendant Landowners' memorandum at page 27, notified the Plaintiffs that Mr. Lussenhop died on August 7, 2011. So, Plaintiffs can not claim that personal service occurred on Mr. Lussenhop. However, counsel did not notify the Court that during the pendency of this proceeding the Estate of Larry Lussenhop was probated. *See* Kaardal Dec. Ex. E. Under the circumstances, because of the good faith shown by the Plaintiffs, the Plaintiffs request under Rule 4(m) for additional time to personally serve the personal representative of the Estate of Larry Lussenhop or the successor owners, whichever may be appropriate, until January 1, 2015.

III. To the Extent Defendant LSIC Seeks Summary Judgment, Its Motion Must Be Denied.

For the same reasons applicable to the motion to dismiss, the Court should also deny summary judgment to Defendant LSIC.

IV. To the Extent the Defendant Landowners Seek Judgment on the Pleadings, Their Motion Must Be Denied.

For the same reasons applicable to the motion to dismiss, the Court should deny the Defendant Landowners' motion for judgment on the pleadings.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss, for judgment on the pleadings, and/or for summary judgment should be denied.

Dated: October 17, 2014.

/s/Erick G. Kaardal

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Sheldon Peters Wolfchild, et al.,

Plaintiffs,

vs.

Redwood County (Minnesota), et al.,

Defendants.

Civil File No. 14-CV-1597 (MJD/FLN)

LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE

I, Erick G. Kaardal, certify that the Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2007, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 11,988 words.

Dated: October 17, 2014

/s/Erick G. Kaardal

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