16-286

No. _____

In The

Supreme Court of the United States

SHELDON PETERS WOLFCHILD,
ERNIE PETERS LONGWALKER, SCOTT ADOLPHSON,
MORRIS PENDLETON, BARBARA BUTTES AND
THOMAS SMITH, ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

REDWOOD COUNTY, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Certain Mdewakanton Indians saved white settlers from slaughter during an 1862 Minnesota Sioux uprising. In response to the uprising, Congress enacted the February Act of 1863, neither repealed nor amended to date, to award a statutorily-identified group of loyal Mdewakanton with public land. The public land was set aside. Section 9 of the Act mandated that the public land set apart "shall be an inheritance to said Indians and their heirs forever." After the lands were set apart for permanent occupancy, white settlers physically, not legally, prevented the Indians from reaching their granted inheritance. Over 150 years later, lineal descendants of the loyal Mdewakanton filed federal common law claims of trespass and ejectment. The Eighth Circuit dismissed the claims because the American Indian group represented by the Petitioners had no federal common law causes of action under *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) because the lands set apart were not aboriginal title and the Petitioners were not a tribe. The question presented is:

> Whether federal common law claims of trespass and ejectment are available to American Indians when Congressional acts specifically identify the American Indian group to which land is awarded and when the public lands are actually set apart for their permanent occupancy.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners:

Sheldon Peters Wolfchild, Ernie Peters Longwalker, Scott Adolphson, Morris Pendleton, Barbara Buttes and Thomas Smith, on behalf of themselves and all others similarly situated.

Respondents:

Redwood County, Paxton Township, Sherman Township, Honner Township, Renville County, Birch Cooley Township, Sibley County, Moltke Township, John Goelz III, Gerald H. Hosek, et al., Allen J. and Jacalyn S. Kokesch, Paul W. and Karen J. Schroeder, Chad M. and Amy M. Lund, Rockford L. and Janie K. Crooks, UT School District, Episcopal Diocese of Minnesota, Michael R. Rasmussen, Lee H. Guggisberg Trust UWT, Patrick T. and Nancy S. Hansen, Kelly M. Lipinski, Cynthia Johnson, Mitchell H. Unruh, William and Norman Schmidt, Prouty Properties LLC, Robert D. and Lori A. Rebstock, Allan D. Eller, Elmer C. and Barbara L. Dahms, Marlene A. Platt RT, Eugene A. Engstrom, Enid Guggisberg, et al., Melvin W. and Kerry D. Maddock, Thomas J. Heiling, Keefe Family Farm LLC, Larry Lussenhop, Jon Lussenhop, TJ & CC Properties LLC, Dennis A. and Michelle D. Ausland, Dale R. and Nancy Hanna, Harold Guggisberg, Sandra Clarken, et al., Julie Anna Guggisberg, Steven R. and Dawn R. Helmer, George F. Schottenbauer, John and Alice and Francis Goeltz, et al., Edward J. Gaasch, Simmons Valley Trust, John C. and Mary J. Simmons, John (L.) Hogan, Timothy H. and Theresa J. Kerkhoff, Sherman

PARTIES TO THE PROCEEDINGS BELOW – Continued

Acres LLC, Kenneth Larsen, Henry G. and Judith A. O'Neil, Charles D. Neitzel, Scott A. and Kimberly A. Olafson, Kim M. Cunningham, John H. and Jeanne A. Reynolds, Douglas and Brenda Scherer, Willard and Eugenie Scherer, Bruce Robert Black, Lila L. Black, Neil and Donna Berger Family, Charles Case, Lyle Black Living Trust, Lower Sioux Indian Community, Defendant Does Nos. 1-500.

CORPORATE DISCLOSURE STATEMENT

The Petitioners do not represent a nongovernment corporation.

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PETITION FOR WRIT OF CERTIORARI

This case presents a matter of historical justice: whether Indians who are entitled to land under Congressional acts, neither repealed nor amended, have a private remedy to possession under federal common law. The corollary of federal common law has been established for aboriginal title as found in *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*.[1] But, according to the Eighth Circuit, the same federal common laws claims do not exist for public lands set apart by Congress for permanent occupancy for a specific group of individual Indians.

Certain lineal descendants of the loyal Mdewakanton started a legal action in U.S. District Court for the right to title and possession of 12 square miles of land in Minnesota set apart in 1865 pursuant to a February 1863 Act, neither repealed nor amended, asserting federal common law claims of ejectment and trespass. The Respondents moved to dismiss under Rule 12 of the Federal Rules of Civil Procedure. The district court granted the motion and dismissed the lawsuit. On appeal, the Eighth Circuit affirmed the district court decision, *on different grounds.* Writing 153 years later in 2016 on the 1863 Act at issue, the

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[1] *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234-235 (1985) ("From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, . . . and stated that the Indians' right of occupancy is 'as sacred as the fee simple of the whites.' ") (Citations omitted).

appellate court found that the Act did not provide for a private cause of action nor a private remedy. Yet, Congress explicitly expressed in the Act's legislative history to – "reward these men; we can give them a piece of land, as much as the Senate may deem advisable. . . . For rescuing the people of Minnesota and saving their wives and their daughters from massacre. . . . It is to do no more than what we ought to do; and . . . that the section, as proposed by the committee, ought to stand, giving to the individual Indian the one hundred and sixty acres. . . ."[2] The Secretary set apart 12 square miles of lands he determined sufficient,[3] triggering and giving effect to the Congressional statutory mandate that the lands "shall be an inheritance to said Indians and their heirs forever." But, access to those lands already set apart in 1865 was later blocked – physically, not legally – by white settlers as the loyal Mdewakanton moved to their existing promised inheritance.

The Eighth Circuit, while acknowledging the difficulty of interpreting 150-year-old statutes, regulations and legislative history in the background of the court's recognized past mistreatment of Indians by the United States, found the 1863 Act itself a "general command." However, there is no dispute that a certain group of

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[2] 27th Cong., 3d Sess., 515 The Cong. Globe (daily ed. Jan. 26, 1863) (Senator Fessenden).

[3] "[T]hey shall be entitled to so much of the public lands, and that discretion will of course be exercised by the Secretary of the Interior. . . ." 27th Cong., 3d Sess., 514 The Cong. Globe (daily ed. Jan. 26, 1863) (Senator Doolittle).

loyal Mdewakanton were to receive property for their loyalty for saving white settlers as an award for their humanity. But the Eighth Circuit's decision denying a remedy under the February 1863 Act extends the inhumanity and cultural mistreatment of Indians into the 21st century. The unrepealed February 1863 Act established a private remedy legally sufficient for federal common law claims by providing that "the land so set apart . . . shall be an inheritance to said Indians and their heirs forever."

Thus, should not federal common law causes of action established for tribes and aboriginal lands also be applicable to public lands set apart as an award to specific American Indians where a private remedy is established under federal statutory law? It is an important question that remains unanswered and relates to the status of American Indians in today's United States society juxtaposed against unfulfilled obligations of historically-unrepealed Congressional Acts granted to benefit and; as here, award American Indians.

Accordingly, the Petitioners respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals opinion is reported at *Wolfchild v. Redwood County*, ___ F.3d ___ (8th Cir. 2016).

The district court decision dismissing the complaint is reported at *Wolfchild v. Redwood County*, 91 F.Supp.3d 1093 (D. Minn. 2015).

JURISDICTION

The date of the Eighth Circuit decision was June 1, 2016. Jurisdiction is invoked under 28 U.S.C. § 1254(1). The petition is timely because it is filed within 90 days of June 1, 2016. The District Court had subject matter jurisdiction over the federal legal questions presented pursuant to 28 U.S.C. § 1331.

STATUTES INVOLVED

U.S. Const. art. IV, § 3:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 9 of the Act of Feb. 16, 1863 provides:

> [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 of said Indians.

> The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and 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, ch. 37, § 9, 12 Stat. 652, 654.

25 U.S.C. § 461 provides:

> On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984.

STATEMENT OF THE CASE

The decision of the Eighth Circuit, while important to the Mdewakanton Petitioners, affects other Indian land claims where Congress has awarded specifically identified Indians with permanent occupancy rights to public lands through historical Congressional acts. The legal question presented is whether they have federal common law claims of trespass and ejectment like the plaintiff-tribe in *Oneida*. Thus, this petition principally falls under factor (c) of Rule of Supreme Court 10 because the Eighth Circuit has been the first to decide an important question of federal law

regarding the application of the American Indian common law claims of *Oneida* to American Indians specifically identified in land statutes which create permanent occupancy for them.

The Eighth Circuit recognized a convoluted and complex history of loyal Mdewakanton land issues in Minnesota involving "over 150 year-old statutes, regulations, and legislative history, understanding of past mistreatment of Indian tribes by the United States, and a complicated area of the law" regarding the Congressional Act at issue – the Act of February 16, 1863.[4] Despite the Secretary of the Interior's actions triggering the vesting of lands by setting apart 12 square miles of public lands, the Eighth Circuit found the basic structure of the 1863 Act "did not intend to create a private remedy for the loyal Mdewakanton."[5] The appellate court did not find any "'rights creating language.'"[6] However, the causes of action in the underlying action were based upon federal common law claims of trespass and ejectment to enforce the right of permanent occupancy granted with the Act as Congress mandated specific acreage of public lands to a specifically identified group of loyal Mdewakanton who saved white settlers from massacre.

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[4] *Wolfchild v. Redwood County*, 824 F3. 761, 771 (8th Cir. 2016); App. 20.

[5] *Id.* at 769; App. 16.

[6] *Id.*

Due to broken treaty promises and other mistreatment, the Minnesota Mdewakanton Sioux[7] engaged in an uprising in 1862 during which a large number of white settlers were killed and a significant amount of property destroyed. In response, Congress through the February 1863 Act, annulled all treaties between the United States and the Sioux, eliminated the reservation, convicted and executed Sioux who allegedly engaged in the uprising, and ultimately, through a subsequent Act of March 3, 1863, would remove most Sioux from Minnesota.

During the uprising, however, some Sioux remained loyal to the United States, saving white settlers from massacre. Thus, despite the termination of treaties and forfeiture of all Sioux lands in Minnesota, Section 9 of the Act of February 16, 1863 permitted the Secretary of the Interior to "set apart . . . eighty acres in severalty to each individual [Sioux] . . . who exerted himself in rescuing the whites" and provided that any "land so set apart . . . shall be an inheritance to said Indians and their heirs forever."[8] The Secretary of the Interior set apart 12 square miles of land in 1865.[9]

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[7] Although made up of more than one band of Dakota Sioux Indians, for purposes of this Petition, the term "Mdewakanton" refers to all bands of the Sioux tribe in Minnesota at the time of the uprising. *See Wolfchild v. Redwood Cty.*, 824 F.3d at 766 n. 1; App. 7-8. *See also*, *Wolfchild v. Redwood Cty.*, 91 F.Supp.3d 1093, 1096 (D. Minn. 2015); App. 26-28.

[8] *Id.*, *quoting* Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 652, 654.

[9] *Wolfchild v. Redwood Cty.*, 91 F.Supp.3d at 1097; App. 29.

Certain lineal descendants of the loyal Mdewakanton started a legal action in U.S. District Court for the right to title and possession of the 12 square miles of land set apart under the February 1863 Act, neither repealed nor amended, asserting federal common law claims of ejectment and trespass. The Respondents moved to dismiss under Rule 12 of the Federal Rules of Civil Procedure. The district court granted the motion and dismissed the lawsuit.[10] On appeal, the Eighth Circuit affirmed the district court decision, *on different grounds.* Writing 153 years later in 2016 on the 1863 Act at issue, the appellate court found that the Act did not provide for a private cause of action nor a private remedy. Yet, Congress explicitly expressed as found in the Act's legislative history to – "reward these men; we can give them a piece of land, as much as the Senate may deem advisable. . . . For rescuing the people of Minnesota and saving their wives and their daughters from massacre. . . . It is to do no more than what we ought to do; and . . . that the section, as proposed by the committee, ought to stand,

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[10] Inexplicably, the district court also granted the Respondents' motion for sanctions against the Petitioner-Plaintiffs, their counsel, and his law firm in attorney fees of $281,906.34. The district court asserted the lawsuit "completely frivolous and without a factual or legal basis." But the appellate court, as noted above, while affirming the district court's dismissal on completely different grounds, never reached the merits of the Mdewakanton claims vindicated the Petitioners' legal action and dismissed the misguided imposition of sanctions as an abuse of the court's discretion acknowledging the complexity of Indian law, regulations, legislative history, and the interpretation of 150-year-old statutes within the context of the United States' storied history of its mistreatment of Indians. *Wolfchild*, 824 F.3d at 770-771; App. 18-21.

giving to the individual Indian the one hundred and sixty acres. . . ."[11]

The Petitioners filed federal common law claims of trespass and ejectment to enforce the right of permanent occupancy created under the February 1863 Act to public lands, consistent and analogous to federal common law claims against aboriginal lands as described in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).[12] Despite the fact that the Petitioners did not assert the lands set apart in 1865 were subject to "aboriginal title" (since the 1863 Act specifically set apart public lands) nor that the Petitioners were a "tribe" per se (since the 1863 Act identified a specific group of Mdewakanton – the loyal Mdewakanton), the appellate court found that common law claims asserted by American Indians arise only if a tribe asserts a present right of possession and has an aboriginal right of occupancy, not otherwise terminated by an act of Congress.[13]

The Eighth Circuit then found the February 1863 Act as not creating a private remedy because it did not include "rights creating" language nor its basic structure or legislative history.[14] While the legislative history does reveal that Minnesotans were opposed to

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[11] 27th Cong., 3d Sess., 515 The Cong. Globe (daily ed. Jan. 26, 1863) (Senator Fessenden).

[12] *Wolfchild*, 824 F.3d 761, 767; App. 12.

[13] *Id.* at 768; App. 13.

[14] *Id.* at 769; App. 16.

awarding Mdewakanton land – even if "loyal" – Congress sought to use the February 1863 Act to change Indian policy:

> The President, in his recent message to Congress, called the attention of Congress particularly to the subject of remodeling the Indian laws, and I have been wanting very patiently for the Committee of Indian Affairs to introduce a bill for that purpose. A vital change is absolutely necessary. So long as we in our treatment of the Indians violate a positive injunction of Holy Writ, or induce them to violate it, they will continue to die out. I believe the good book says that man shall earn his living by the sweat of his brow . . . Whenever Congress shall adopt such as system as will cause the Indian to depend upon the soil for his living, from that moment forward the Indian will improve. . . .[15]

In the February 1863 Act, Congress did use explicit language regarding the permanent occupancy rights of the specifically identified group of loyal Mdewakanton:

> The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and 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.

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[15] 27th Cong., 3d Sess., 514-515 The Cong. Globe (daily ed. Jan. 26, 1863) (Senator Rice).

However, the Eighth Circuit would never reach this second sentence of Section 9, finding that because Congress had granted the Secretary of the Interior the authority to set apart public lands for the loyal Mdewakanton "who exerted himself in rescuing whites from the late massacre of said Indians" the authorization was merely a "'general . . . command[] to a federal agency' . . . unlikely to give rise to a private remedy."[16] Hence, based on this premise, the court concluded that it is less likely that the statutory language of the February Act of 1863 would support a finding of a private remedy, even by implication.[17]

However, the lands were actually set apart for permanent occupancy.[18] As an outburst of continued historic mistreatment toward American Indians, and here, the loyal Mdewakanton, Minnesota white settlers physically, not legally, prevented the loyal Mdewakanton from reaching their inheritance:

> In a report to the Secretary of Interior in April 1866, it was reported that any attempts to provide for the friendly Sioux was found impracticable "on account of the hostility manifested by the white people of that region towards everything in the form of an Indian." (*Id.* ¶ 47; Ex. 5.)[19]

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[16] *Wolfchild*, 824 F.3d at 769 (citations omitted); App. 15.

[17] *Id.* (citations omitted).

[18] *Wolfchild*, 91 F.Supp.3d at 1098; App. 29.

[19] *Id.*; App. 30.

This Court has recognized that Congressional acts granting permanent rather than permissive occupancy must expressly create those property rights.[20] Here, the February 1863 Act provides for expressed rights of occupancy. Since, "only Congress can 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,'"[21] and did so through the Secretary of the Interior, once those lands were set apart, the Act vested permanent, rather than permissive, occupancy, as expressly created rights by the words of Section 9.[22] Further, "[t]here is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation."[23] "When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose."[24] The February 1863 Act has text which creates the type of permanent occupancy rights which are enforced through federal common claims of trespass and ejectment – as in *Oneida*.

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[20] *See Tee-Hit-Ton v. United States*, 348 U.S. 272, 278-279 (1955).

[21] U.S. Const. art. IV, § 3.

[22] *See Tee-Hit-Ton*, 348 U.S. at 278-279.

[23] *Id.* at 278-279.

[24] *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 104 (1949).

In addition, when an act or the legislative history does not include provisions for private judicial or administrative enforcement, it does not mean Congress foreclosed a private right of remedy under another vehicle, such as federal common law causes of action. Here, the inquiry is whether the 1863 Act created enforceable rights to permanent occupancy of the lands set apart. The mandated language of "shall" should have ended the inquiry in the appellate court and allowed the underlying complaint against the Respondents to be pursued under federal common law.[25] Federal common law causes of actions should be available to American Indians when Congressional acts specifically identify the American Indian party to which land is awarded and when the public lands are actually set apart vesting the right to enforce private remedies to obtain those lands.

REASONS FOR GRANTING THE WRIT

This petition principally falls under factor (c) of Rule of Supreme Court 10 because the Eighth Circuit is the first to decide an important question of federal law regarding the application of the American Indian common law claims of *Oneida* to American Indians specifically identified in land statutes which create permanent occupancy for them.

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[25] *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 517-523 (1990).

Specifically, federal common law causes of action established for tribes and their aboriginal land should also be applicable to public lands set apart statutorily as an award to specific American Indians. When Congress authorizes the Secretary of the Interior to set apart public lands for a specific identifiable group of Indians, and the Secretary does so, it vests the right of permanent occupancy to those lands when the Congressional act mandates the lands to those American Indians and their heirs forever as their award for their loyalty to the United States. This Court has protected the rights of tribes to aboriginal lands and the enforcement of those rights through federal common law as the *Oneida* progeny demonstrates. However, this Court has not established similar protections for Indians who were awarded public lands under Congressional mandates where there is no other administrative nor other remedy available and where the act itself provides no indication of continual governance over the American Indians identified to receive the award of property.

I. Congress intended to establish possessory rights to public lands to a specific identifiable group of Indians under the Act of February 1863.

A. Legislative history of the Act reveals a mandated award to loyal Mdewakanton who saved white settlers from massacre.

"The canons of construction applicable in Indian law are rooted in the unique trust relationship

between the United States and the Indians."[26] Thus, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[27] Likewise, if it is plain and unambiguous, the federal courts must apply Section 9 according to its terms.[28] These principles have been ignored as applied to an unrepealed Congressional Act passed in February 1863 for the benefit of loyal Mdewakanton for saving white settlers from slaughter during a Minnesota Indian uprising in the midst of this nation's civil war. Lands were set apart as Congress intended in 1865. But, in a tormented twist of history, Minnesota

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[26] *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

[27] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 423 (1980) (supporting the Claims Court's analysis that the 1877 Act embodied an implied obligation of the government to compensate a taking of tribal property set apart for the exclusive use of the Sioux). The Supreme Court recognizes that the relationship between the United States and the Indian people is distinctive, "different from that existing between individuals whether dealing at arm's length, as trustees and beneficiaries, or otherwise." *U.S. v. Jicarilla Apache Nation*, ___ U.S. ___, 131 S.Ct. 2313, 2323 (2011) (*quoting Klamath and Moadoc Tribes v. United States*, 296 U.S. 244, 254 (1935)); *see also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831) (Marshall, C.J.) (explaining that Indians' "relation to the United States resembles that of a ward to his guardian"). "Few conquered people in the history of mankind have paid so dearly for their defense of a way of life." *Sioux Nation of Indians*, 448 U.S. at 423 (*quoting* R. Billington, *Soldier and Brave*, Introduction, at xiv (1963)).

[28] *See, e.g., Dodd v. United States*, 545 U.S. 353, 359 (2005); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

white settlers physically prevented the loyal Mdewakanton from those lands, vested by the Secretary of the Interior's action, as an inheritance to the Mdewakanton heirs forever.

Here, the Eighth Circuit has continued, by its own recognition, a convoluted and complex history of loyal Mdewakanton land issues in Minnesota involving "over 150 year-old statutes, regulations, and legislative history, understanding of past mistreatment of Indian tribes by the United States, and a complicated area of the law."[29] Despite the Secretary of the Interior's actions triggering the vesting of lands by setting apart 12 square miles of public lands, the Eighth Circuit found the basic structure of the 1863 Act "did not intend to create a private remedy for the loyal Mdewakanton."[30] The appellate court did not find any "'rights creating language.'"[31] However, the pled causes of action in the amended complaint were based upon federal common claims of trespass and ejectment – recognized in *Oneida*.

Notably, the Eighth Circuit misconstrued the legislative history of the February Act as "emphasiz[ing] the strong opposition to providing any lands to the loyal Mdewakanton"[32]as supporting its conclusion that "Congress did not intend to provide an implied private

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[29] *Wolfchild*, 824 F.3d at 771; App.20.

[30] *Id.* at 769; App. 15.

[31] *Id.*

[32] *Id.*; App. 16.

remedy for the loyal Mdewakanton. . . ."[33] The actual Congressional Record which the appellate court cited reflects, on the whole, a different view during the Congressional debate. Senator Rice did note the opposition within the state of Minnesota: "Already there are petitions here against granting them land in the State of Minnesota. The citizens are opposed to it, and they have sent petition against it. Many papers in the State have objected to that provision of the bill allowing them lands." However, in the same breath, Senator Rice, speaking to the amount of land to be given to the loyal Mdewakanton countered the opposition: "I want the amount as large as will be necessary for the Indians, but not so large as to induce others to wrong the Indians for the purpose of driving them out."

The legislative record shows Congress *intended to award* the loyal Mdewakanton for protecting the white settlers from massacre and *did so* with the passage of the Act at issue:

- "I think we should reward Indians who, under the circumstances that surround this case, exerted themselves to protect the white inhabitants. This was the opinion of the committee . . . that they ought to be rewarded, ought to be distinguished from other Indians, as an inducement hereafter, when the tribes should conclude to engage in war with the white people, to frustrate the designs and plans

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[33] *Id.*

of the tribe, to give timely notice to the settlers."[34]

- "I think it would be good policy for us to offer to give these persons one hundred and sixty acres of land each . . . for rescuing the people of Minnesota and saving their wives and their daughters from massacre. . . . It is doing no more than what ought to be done . . . as proposed by the committee. . . ."[35]

- "A vital change is absolutely necessary [of remodeling Indian law]. So long as we in our treatment of the Indians violate a positive injunction of Holy Writ, or induce them to violate it, they will continue to die out. I believe the good book says that man shall earn his living by the sweat of his brow. . . . Whenever Congress shall adopt such as system as will cause the Indian to depend upon the soil for his living, from that moment forward the Indian will improve . . . he will go to work and raise his corn or his oats or his wheat . . . because the moment the Indian labors, as the American farmer, or the German, or the Irishman does, the objection to him is done away with. . . . If you wish to reward him, give him forty acres. . . ."[36]

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[34] 27th Cong., 3d Sess., 514 The Cong. Globe (daily ed. Jan. 26, 1863) (Senator Harlan).

[35] *Id.* (Senator Doolittle).

[36] *Id.* at 514-515 (Senator Rice).

- "We propose to make a present to those Indians who have distinguished themselves by their good conduct, to give them some land. . . ."[37]
- "But, at the same time, we can reward these men; we can give them a piece of land, as much as the Senate may deem advisable. . . ."[38]
- "The committee is of the opinion that no more money should be paid to the Indians; that whatever shall be paid to them hereafter should be paid in property."[39]
- "They shall be entitled to so much of the public lands, and that discretion will of course be exercised by the Secretary of the Interior. . . ."[40]

Consistent with Senator Rice's observation noted above, Congress would reduce the number of acres to the loyal Mdewakanton from 160 to 80 acres just prior to the passage of the February 1863 Act.[41] Then, in 1865, the Secretary of the Interior acted as Congress had intended by setting apart 12 square miles of land within Minnesota for permanent occupancy by the

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[37] 27th Cong., 3d Sess., 515 The Cong. Globe (daily ed. Jan. 26, 1863) (Senator Fessenden).

[38] *Id.*

[39] *Id.* (Senator Harlan).

[40] *Id.*

[41] *Id.* at 516.

loyal Mdewakanton and their descendant-heirs forever.

B. Federal common law claims are available for public lands set apart for statutorily identified American Indians as they are under *Oneida* for tribes and their aboriginal lands.

The federal common law claims of the loyal Mdewakanton for trespass and ejectment were not based on aboriginal rights to aboriginal land as this Court has held in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) and *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985). The corollary of federal common law has been established for tribes and their aboriginal title but not for public lands set apart for permanent occupancy for statutorily identified American Indians.[42] The Eighth

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[42] We note that the February Act of 1863 references the grant of public lands to "individual loyal Mdewakanton." However, the group of loyal Mdewakanton – recognized by Congress under the 1863 Act – were led by a number of chiefs, identified in the Congressional Record asking on behalf of the loyals for protection and relief from the United States:

> "We, chiefs and head men of the Mindewakanatons (sic) . . . make this book (petition) to our great Grandfather, the President of the United States:
>
> * * *
>
> We did no harm, and tried to do good. . . . We are farmers, and want that our great Father would allow us to farm again whenever he pleases, only we never want to go away with the wild blanket Indians again; for what we have done for the whites they would kill us . . . we

Circuit has stated that statutorily identified American Indians do not have federal common law claims of trespass and ejectment to public lands set apart for them as mandated and directed under a Congressional Act.[43]

Notably, the February Act of 1863 at issue did not seek to create a reservation nor grant land to Indians that would remain under the control of the United

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> . . . would like to go back on our farms, and there live as white men, or we would like to live among the white men, and farm as they do. . . ."
>
> WABASH-A, Chief
>
> * * *
>
> TA-OPA, Chief of Farmer Indians
>
> * * *
>
> AN-PE-TU-TOOE-CA, or OTHER DAY, Chief.

27th Cong., 3d Sess., The Cong. Globe 514 (daily ed. Jan. 26, 1863). The individual Petitioners initially sued as representatives of a class of descendants of the loyal Mdewakanton and did not, at that time, seek to substitute the identifiable group as an entity. *See Wolfchild v. United States*, 101 Fed. Cl. 54, 83 (2011), *as corrected* (Aug. 18, 2011), *aff'd in part, rev'd in part*, 731 F.3d 1280 (Fed. Cir. 2013) ("Although this case bears a similarity to *Short* that plaintiffs are not suing as part of a federally-recognized entity, the plaintiffs are an identifiable group."); *Short v. United States*, 661 F.2d 150, 155 (Ct. Cl. 1981).

[43] Notably, the Petitioners seeking relief under federal common law is consistent with present law. In other words, they did not and do not seek "allotments of land," "property allocated to individual Indians under congressional acts," and "title to property in individual Indians." Under 25 U.S.C. § 461, Congress has barred the Secretary of the Interior from issuing allotments in severally under the 1863 Act even if he wanted to. Regardless, the Interior's 1865 actions preserved the set apart 12 square miles of land for the specific identifiable group of Mdewakanton for their heirs "forever" as the 1863 Act mandated.

States or held in trust by the United States. Here, the Act gave *permanent occupancy*, not permissive occupancy, to public lands *expressly* stated under the Act. Thus, the Act created the private remedy sought by the Petitioners under existing available federal common law causes of action. Further, the Petitioners did not seek compensation from the United States, nor did they sue the United States. Hence, once the lands were set apart, the Act did not convey a continuing federal authority over the land, nor a continuing federal authority over the loyal Mdewakanton.

Indeed, the Eighth Circuit found no claim to aboriginal title to lands under the "*Oneida* progeny,"[44] which is understandable since the Act conveyed "public lands" to a specific identifiable group of loyal Mdewakanton. However, the legal logic found in the *Oneida* progeny is applicable to the instant interpretation of the February 1863 Act.

For instance, nothing in the February 1863 Act spoke to the private remedies available for dealing with violations of loyal Mdewakanton permanent occupancy rights.[45] There is no indication in the Act nor in the legislative history that Congress intended to preempt common law remedies.[46] The Act does not

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[44] *Wolfchild*, 824 F.3d at 768; App. 13.

[45] *See Oneida II*, 470 U.S. at 237.

[46] *Id.*

directly address the problem of restoring unlawfully possessed land to the loyal Mdewakanton.[47]

The February 1863 Act did, however, create permanent occupancy rights for the loyal Mdewakanton:

> [T]he Secretary of the Interior is hereby authorized to set apart of the public lands . . . to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. . . . The land so set apart . . . shall be an inheritance to said Indians and their heirs forever.[48]

The record reveals, and no one has contradicted, that the public lands were actually set apart. As the Eighth Circuit found, "A number of documents indicate the Secretary of the Interior, at a minimum, attempted to use his authority under the 1863 Act to set apart the twelve square miles for the loyal Mdewakanton in 1865."[49] The district court decision detailed the record:

> In a letter dated March 17, 1865, the Secretary delegated this authority to Reverend. S.D. Hinman, Missionary, to designate 12 square miles to the loyal Sioux. (*Id.* ¶¶ 40, 41, Ex. 1.) In response, Rev. Hinman identified 12 sections of land and wrote them down on the same letter from the Secretary of Interior. (*Id.* ¶ 42; Ex. 1.) Later, the Secretary initialed the Reverend's selections, which Plaintiffs assert

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[47] *Id.* at 238.

[48] Act of Feb. 16, 1863.

[49] *Wolfchild*, 824 F.3d at 766; App. 9.

> set apart and conveyed such sections to the loyal Sioux. (*Id.* ¶ 43.)
>
> On March 23, 1865, the Commissioner of Indian Affairs wrote to Rev. Hinman, confirming the decision of the Secretary and that it was sufficient to authorize the Reverend "to proceed to collect and establish the friendly Sioux upon the lands designated by you in your letter of the 17th instant." (*Id.* ¶ 44; Ex. 2.) In this letter, the Commissioner further noted that $800 had been authorized for plowing the land and for purchasing tools and seeds for the Indians in question. (*Id.*)[50]

While it was true white Minnesotans were opposed to granting land to the Indians,[51] that was not

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[50] *Wolfchild*, 91 F.Supp.3d at 1098; App. 29.

[51] *Id.* There is no dispute that whites in Minnesota physically – not legally – tried to keep the loyal Mdewakanton from the lands already set apart by the Secretary of the Interior as noted above:

> In an undated letter, Rev. Hinman informed the Bishop of white resistance to the Mdewakanton:
>
> > 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 ordered Sibley to allow the settlement to be made as we had attempted. This was however prevented by the feeling at New Ulm and on the border generally consequent upon a recent cold blood murder by the renegade Indians near Mankato. This 10,000 acres was being

true for Congress as it related to the loyal Mdewakanton. In fact, an act passed a couple of weeks later would actually remove the remaining hostile Mdewakanton from Minnesota, *but not the loyal Mdewakanton.*[52]

II. Congressional acts mandating permanent occupancy create rights for the American Indian party to pursue federal common law claims for the enforcement of unfulfilled obligations.

This Court has acknowledged that an Act granting permanent rather than permissive occupancy must expressly create those rights.[53] Notably, "only Congress can 'dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' U.S. Const. art. IV, § 3."[54]

> withheld from sale for some years, but finally restored for sale.

(*Id.* ¶ 46; Ex. 4.)

> In a report to the Secretary of Interior in April 1866, it was reported that any attempts to provide for the friendly Sioux was found impracticable "on account of the hostility manifested by the white people of that region towards everything in the form of an Indian." (*Id.* ¶ 47; Ex. 5.)

Wolfchild, 91 F.Supp.3d at 1097-1098; App. 30.

[52] *See* Act of Mar. 3, 1863, ch. 119, § 1, 12 Stat. 819.

[53] *See Tee-Hit-Ton*, 348 U.S. at 278-279.

[54] *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1373 (Fed. Cir. 2000).

An Act granting permanent, rather than permissive, occupancy, must expressly create those rights.[55] Notably, "[t]here is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation."[56] "When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose."[57] "Congressional silence does not delegate the right to create, or acquiesce in the creation of, permanent rights."[58] Thus, when an act or the legislative history does not include provisions for private judicial or administrative enforcement, it does not mean Congress foreclosed a private right of remedy under another vehicle, such as federal common law causes of action. Here, the inquiry is whether the February 1863 Act created an enforceable right to permanent occupancy of the lands set apart. The mandating language of "shall" in the February 1863 Act should have ended the inquiry in the loyal Mdewakantons favor in the appellate court.[59]

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[55] *See Tee-Hit-Ton*, 348 U.S. at 278-279.

[56] *Id.*

[57] *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 104 (1949).

[58] *Karuk Tribe of California*, 209 F.3d at 1374, *citing Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947).

[59] *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 517-523 (1990).

The Eighth Circuit opined that federal common law claims asserted by Indians arise *only* "when a *tribe* 'assert[s] a present right to possession based . . . on their *aboriginal* right of occupancy which was not terminable except by act of the United States.'"[60] From this premise, the appellate court concluded that the "district court correctly held Appellants failed to state a claim under the federal common law as set forth in the *Oneida* progeny."[61] However, the Eighth Circuit correctly identifies the Petitioner-Appellants' complaint *did not* assert the lands set apart in 1865 were subject to "aboriginal title":

> Thus, in contrast to a claim of *aboriginal* title, Appellants directly assert the twelve square miles vested in the loyal Mdewakanton pursuant to the 1863 Act.[62]

Then, the appellate court concluded that "the language of the 1863 Act directly contradicts any claim that the loyal Mdewakanton had aboriginal title to the twelve square miles."[63] Notably, the Petitioner-Appellants could not claim aboriginal title. First, the February 1863 Act forfeited all aboriginal titled lands to the United States. Second, the same Act specifically provided permanent occupancy rights to a specific identifiable group of loyal Mdewakanton in "public lands":

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[60] *Wolfchild*, 824 F.3d at 768; App. 12-13 (original emphasis) (citations omitted).

[61] *Id.*

[62] *Id.*; App. 13 (original emphasis).

[63] *Wolfchild*, 824 F.3d at 768; App. 13.

> [A]ll lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States."
>
> * * *
>
> "[T]he Secretary of the Interior is hereby authorized to set apart of the public lands . . . to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. . . . The land so set apart . . . shall be an inheritance to said Indians and their heirs forever.[64]

Here, the Eighth Circuit asserted that federal common law claims can *only* be asserted by tribes and *only* if the claims are directly related to their aboriginal lands.[65]

With the appellate court's dismissal of the federal common law claims of the loyal Mdewakanton, the court would also find that no private remedy arose from its statutory interpretation of the February Act of 1863:[66]

> Here, while Congress intended to benefit the loyal Mdewakanton when it passed Section 9 of the 1863 Act, the statute does not contain "rights-creating language." Section 9 provides

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[64] Act of Feb. 16, 1863.

[65] *Wolfchild*, 824 F.3d at 768; App. 13.

[66] *Id.* at 768-769; App. 14-16.

> that the Secretary of the Interior is "*authorized* to set apart . . . public lands." The statutory language focuses on steps the Secretary of the Interior could take to provide land to the loyal Mdewakanton, but does not create any specific rights for the loyal Mdewakanton.[67]

The appellate court's analysis is contrary to this Court's examination of the nature of rights to American Indians such as those granted by Congress to the loyal Mdewakanton under the 1863 Act:

> When Congress intends to delegate power to *turn over lands to the Indians permanently*, one would expect to and doubtless find definite indications of such a purpose.[68]

Here, the February Act of 1863 delegated power to the Secretary of the Interior to turn over lands to the loyal Mdewakanton permanently – in fee simple[69] – conferring permanent occupancy rights to the lands set apart. There is nothing in the record to conclude an intention of the United States to retain the land – in the sense of a reservation or to be held in trust – or otherwise assert its authority over the land or over the occupants of the land because Section 9 explicitly grants permanent occupancy – "the land so set apart

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[67] *Id.* at 769; App. 15 (original emphasis).

[68] *Hynes*, 337 U.S. at 104.

[69] *Hash v. United States*, 403 F.3d 1308, 1316 (Fed. Cir. 2005) ("Unless a property interest was expressly reserved by the government, whether in the patent grant or by statute or regulation then in effect, the disposition of the land was in fee simple.").

. . . shall be an inheritance to said Indians and their heirs forever."[70]

An analogy to Congress' conveyance of public lands and the effect on property rights as it relates to reservations versus individual Indians is found in *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000). There, Congress enacted an 1864 Act which delegated authority to the President, at his discretion, to set apart up to four tracts of land – retained by the United States – as reservations suitable to the accommodation of Indians. The appellate court first noted that the 1864 Act allowed the President to use his discretion to create or enlarge a reservation as may be necessary:

> [F]irst, that the situation of Indian affairs in that state in the year 1864 was such that Congress could not reasonably have supposed that the President would be able to accomplish the beneficent purposes of the enactment if he were obliged to act, once for all, with respect to the establishment of the several new reservations that were provided for, and were left powerless to alter and enlarge the reservations from time to time, in the light of experience. To mention but one obstacle that must have been within the contemplation of Congress: the Klamath and Hoopa or Trinity Indians were at war with the forces of the United States at the time of the passage of the act of 1864, and had been so for some years. Indian Report, 1864, pp. 123, 127, 130,

[70] Act of Feb. 16, 1863.

> 133-138. Secondly, beginning shortly after its passage, and continuing for a period of at least thirty years thereafter, Congress and the Executive practically construed the act of 1864 as conferring a continuing authority upon the latter, and a large discretion about exercising it.[71]

What the appellate court recognized was that the Act's express language retained the land for the United States and as such did not create "a vested interest in the Indians who would reside on the reservations created under the Act."[72] Two more Presidents would by Executive Order create and expand reservations under the same Act.[73] Likewise, the court would recognize, contrary to the arguments of the plaintiff-Indians, that "an intent to create a 'permanent peace' does not mean that the 1864 Act created any permanent occupancy rights."[74] " 'Congress and the Executive practically construed the act of 1864 as conferring a continuing authority upon the latter, and a large discretion about exercising it.' "[75]

The elements discussed in *Karuk Tribe of California* do not exist here under the February 1863 Act. Under the February 1863 Act, property interests were vested and the Act contains specific language creating

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[71] *Karuk Tribe of California*, 209 F.3d at 1375.

[72] *Id.*

[73] *Id.* at 1376.

[74] *Id.* at 1376.

[75] *Id.*, *quoting Donnelly v. United States*, 228 U.S. 243, 256 (1913).

the rights of permanent occupancy. Unlike where Congress can terminate a reservation it earlier established,[76] the vested property rights of permanent occupancy cannot be terminated without an act of Congress.[77]

Certainly, no Congressional termination act has occurred here since there is no dispute the February 1863 Act has neither been repealed nor amended.

The February Act of 1863 represents that:

- Congress gave the Secretary of the Interior authority to convey interests of the United States in public lands, "not otherwise appropriated";
- and "shall" provide to specific loyal Mdewakanton who exerted himself in rescuing the whites from the massacre of hostile Indians;
- specific property of 80 acres each; and
- "shall" remain with the loyal Mdewakanton and their heirs forever.

The identified group of loyal Mdewakanton is a "protected group," *not* a "regulated group." "Statutes

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[76] *Karuk Tribe of California*, 209 F.3d at 1376.

[77] Such a termination act by Congress of permanent occupancy triggers the Fifth Amendment's Just Compensation Clause – unlike Congressional termination of aboriginal title. The fact that the Just Compensation Clause applies to statutorily-awarded permanent occupancy and not to aboriginal title suggests that the federal common law claims of *Oneida* apply to American Indians who hold both.

that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'"[78] There is *nothing* in the 1863 Act, nor in its legislative history, to suggest that there is any continuing "regulating" of the loyal Mdewakanton. The set apart lands were their *award* for saving whites. Again, the statute *did not create a reservation* subject to continuing federal oversight nor federal discretionary expansion nor contracting of reservation boundaries. Congress has the authority under the U.S. Constitution, Article IV, Section 3, to convey and dispose of public lands. Here, Congress necessarily gave the Secretary authority to determine the amount of public lands and where the public lands – those "not otherwise appropriated"[79] – were to be occupied by the loyal Mdewakanton.

Further, from the language in the February 1863 Act, specifically, Section 9, and its legislative history, at a minimum, an inference can be drawn that the Secretary of the Interior had the power to convey permanent title or right to the individual loyal Mdewakanton in the public lands he set apart[80] since only Congress shall have the "power to dispose of and make all needful rules and regulations respecting the territory or

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[78] *California v. Sierra Club*, 451 U.S. 287, 294 (1981).

[79] Feb. Act of 1863, Section 9.

[80] *But cf. Hynes*, 337 U.S. at 102 ("There is no language in the various acts, in their legislative history, or in the Land Order 128, from which an inference can be drawn that the Secretary has or has claimed power to convey any permanent title or right to the Indians in the lands or waters of Karuk Reservation.").

other property belonging to the United States."[81] Here, Congress directed the Secretary of the Interior to dispose of public lands for the permanent occupancy of individual Mdewakanton and their heirs (fee simple property right) who helped save the white settlers from massacre during the 1862 Indian uprising. The language of Section 9 reflects mandatory obligations to the specified and identifiable group of American Indians – the loyal Mdewakanton. From the mandatory obligation found in the language of Section 9 and the legislative history arises the rights to private remedies which can be enforced through federal common law claims of trespass and ejectment.

For a statute to create private rights, its text must be phrased in terms of the persons benefited.[82] Certainly, if a court finds the statutory language of the February 1863 Act falling short of an explicit private remedy to enforce legal obligations to the loyal Mdewakanton through federal common law claims of trespass and ejectment, this Court can nevertheless identify that private remedies are implied:

> Courts . . . are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory

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[81] U.S. Const. art. IV, § 3.

[82] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 274 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) ("Congressional intent to create a federal private [remedy] is manifested by the inclusion of '"rights creating" language' – language that focuses on the individuals the statute is meant to protect, rather than those the statute seeks to regulate.").

> authorization for familiar remedies to enforce statutory obligations. . . . A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has 'left the matter at large for judicial determination,' our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. . . . If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized.[83]

At least one other appellate court, the U.S. Court of Appeals for the Federal Circuit, has identified such a right:

> The 1863 statute provided that the property "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." . . . *That language clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute.*[84]

As previously noted, this case presents a matter of historical justice: whether American Indians entitled to land under Congressional acts, neither repealed nor amended, had a judicial mechanism to protect those

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[83] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 376 (1982) (citations omitted).

[84] *Wolfchild v. United States*, 559 F.3d 1228, 1232 (2009) (emphasis added).

rights under federal common law. The corollary of federal common law has been established for tribes and aboriginal title as found in *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*,[85] but not for public lands set apart mandated by Congress for a specific group of individual Indians. The February 1863 Act gave a specific identifiable group of loyal Mdewakanton land for them and their heirs forever. The land set apart, an award for the loyal Mdewakanton's humanity by Congress, vested the right of permanent occupancy on that land. The federal common law of trespass and ejectment are causes of action that arise from the statutorily-awarded rights of permanent occupancy as a judicial mechanism to protect and safeguard those statutory rights of permanent occupancy.

Federal common law causes of action established for aboriginal land should also be applicable to public lands set apart as an award to specific American Indians where a private remedy is express or implied under the federal statute. It is an important question that remains unanswered by this Court. The question presented relates to the status of American Indians in today's United States society juxtaposed against unfulfilled obligations of historically unrepealed

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[85] *Oneida Cty., N.Y.*, 470 U.S. at 234-235 ("From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, . . . and stated that the Indians' right of occupancy is 'as sacred as the fee simple of the whites.' ") (citations omitted).

Congressional Acts granted to benefit and, as here, award specific American Indians.

CONCLUSION

The writ of certiorari should be granted.

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