UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re: Chapter 7 Bankruptcy #: 09-36006
Cecil Ray Barth
Deanna Joan Barth,
Debtors.

Michael S. Dietz, Trustee, Adversary Proceeding #: 11-03233
Plaintiff,
vs.

Deanna Joan Barth and The Lower Sioux Indian
Community in the State of Minnesota,
Defendant.

In Re: Chapter 7 Bankruptcy #: 10-34267
Morris Jerome Pendleton, Sr.
Constance Louise Pendleton,
Debtors.

Paul W. Bucher, Trustee, Adversary Proceeding #: 11-03234

Plaintiff,
vs.

Morris Jerome Pendleton, Sr., and The Lower Sioux Indian
Community in the State of Minnesota,
Defendant.

In Re: Chapter 7 Bankruptcy #: 10-38674
Linda Rose Whitaker,
Debtor.

Paul W. Bucher, Trustee, Adversary Proceeding #: 11-03235

Plaintiff,
vs.

Linda Rose Whitaker and The Lower Sioux Indian
Community in the State of Minnesota,
Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIF'S MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS DEANNA JOAN BARTH, MORRIS JEROME PENDLETON, SR., AND LINDA ROSE WHITAKER

Defendants-Debtors Deanna Joan Barth, Morris Jerome Pendleton, Sr. and Linda Rose Whitaker (collectively, "Debtors") respectfully submit the following Joint Memorandum of Law in Support of their Cross Motion for Summary Judgment and otherwise in response t oPlaintiff's Motion for Summary Judgment.

INTRODUCTION

The Debtors are all enrolled members of the Lower Sioux Indian Community in the State of Minnesota. Their predominant source of income is the monthly per capita payments they receive from Lower Sioux.

In these three adversary proceedings, the Chapter 7 trustees are asking this Court to order turnover of property – per capita payments from the Lower Sioux Indian Community -- that, indisputably, the Debtors did not possess or receive prior to filing for bankruptcy. Turnover, however, applies only to property of the estate, which by the plain language of Section 541(a), includes only a debtor's property that existed at the timing of filing.

To evade the plain language of the statute, the Trustees attempts to cast the Debtors' future income as the proceeds of a property right they possessed prior to filing -- their ethnic heritage as qualified members of a federally recognized Indian tribe. According to the Trustees, these per capita payments are no different than contract rights, dividends, or other "general intangibles" recognized by the Minnesota Uniform Commercial Code. Therein lies the flaw in the Trustees' entire position.

The Trustees, like all of the courts on whose decisions they rely, simply assumed – without analysis or contemplation of any kind – that state law determines the legal character and extent of per capita payments. After all, state law **usually** determines the nature and extent of a debtor's interest in property. But this is not the usual case.

Per capita payments are not a state-law property right. Per capita payments do not exist but for the federal law that authorized their creation – the Indian Gaming Regulatory Act, and the law of the sovereign Indian nation that actually gave life to the property interest. Axiomatically, it is law of the tribe that determines the nature, character, and extent of property interests in per capita payments. Every court that has considered whether state law or tribal law governs the legal character of per capita payments in bankruptcy has held that tribal law controls. In this case, the law enacted by the Lower Sioux Indian Community expressly prescribes that members have no property right in per capita payments that they have not yet received.

Disregarding the unique context of the law of sovereign Indian nations for the sake of argument, the criteria for a tribe member to receive per capita payments leaves none of the members with an ongoing, assignable or attachable property interest that is vested into the future. There are several continuing criteria an individual must meet in order to qualify for the payments. Therefore, future payments are not property of the estate under a traditional bankruptcy analysis using state law, either. The numerous restrictions are addressed below and in the accompanying affidavit of Tribe President Denny Prescott.

Because the Debtors have no recognizable property interest in future per capita payments, those payments are not property of the estate. Those payments therefore are not subject to turn over under Section 542(a). The Trustees' complaints must be dismissed.

STATEMENT OF FACTS

I. THE DEBTORS

This combined motion arises in three separate but related adversary proceedings within three different Chapter 7 bankruptcy cases. The Chapter 7 trustee is the plaintiff in all three adversary proceedings. The defendants are debtors in the cases who are members of the Lower Sioux Indian Community ("Lower Sioux"):

Defendant-Debtor	Bankruptcy Case No.	Adversary Proceeding No.	Trustee
Cecil Ray Barth and Deanna Joan Barth	**09-36006**	**11-3233**	**Michael S. Dietz**
Morris Jerome Pendleton, Sr. and Constance Louise Pendleton	**10-34267**	**11-3234**	**Paul W. Bucher**
Linda Rose Whitaker	**10-38674**	**11-3235**	**Paul W. Bucher**

A. Cecil Ray Barth and Deanna Joan Barth

Deanna Joan Barth ("Barth") and her husband Cecil Ray Barth filed a joint Chapter 7 petition on August 26, 2009. At the time they filed their petition, Barth was 54 years old and her husband was 64. (*See* Affidavit of Scott J. Hoss dated November 7, 2012 ("Hoss Aff.") Ex. A at p. 5.) Barth was unemployed, and her husband was retired. (*Id.*) Barth's and her husband had just two sources of income of any kind -- Barth's per capita payments from Lower Sioux of $4,066.00 and her husband's Social Security benefits of $1,357.00. (*Id.*)

B. Morris Jerome Pendleton, Sr. and Constance Louise Pendleton

Morris Jerome Pendleton, Sr. ("Pendleton") and his wife Constance Louise Pendleton filed their joint Chapter 7 petition on June 10, 2010. At the timing of the filing, Pendleton was 75 years old and retired. (Hoss Aff. Ex. B at p 6.) He received monthly gross income of $4,391.00, of which amount $3,500.00 was Lower Sioux per capita payments. When they filed the petition over two years ago, Pendleton's wife was 63 and employed as a nurse, receiving gross monthly income of $2,915.38.

C. Linda Rose Whitaker

Linda Rose Whitaker ("Whitaker") filed an individual Chapter 7 petition on December 2, 2010. She was 60 years old at the time she filed her petition. She received just $250.00 per month from a sales job, as well as approximately $3,750.00 in monthly per capita payments from Lower Sioux. (Hoss Aff. Ex. C at p. 8.)

II. THE CONSTITUTION AND ORDINANCES OF THE LOWER SIOUX INDIAN COMMUNITY

The Lower Sioux Indian Community is a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Lower Sioux's source governing document is the Constitution of the Lower Sioux Indian Community in Minnesota. (*See* Affidavit of Denny Prescott dated December 12, 2012 ("Prescott Aff.") Ex. A). The Lower Sioux Constitution defines its "members" as those "bona fide Indian residents of the Lower Sioux Reservation[1] whose names appear" on certain historical rolls. (*Id.* Article III, Section 1.) Members are required to maintain their residence in proximity to Lower Sioux's reservation in order to remain members of the Community and to share in the beneficial privileges of the Community. (*Id.* Article II, Section 3; *see also* Lower Sioux Indian Community

[1] Lower Sioux's reservation is located in southwestern Minnesota. Geographically, it is very small – just 1,743 acres. (*See* Lower Sioux Indian Community *About Us, available at* http://www.lowersioux.com/about_us.html (last visited Dec. 10, 2012))

Enrollment and Membership Privilege Ordinance (Prescott Aff. Ex C), The Lower Sioux Constitution vests legislative and other governing powers in a body called the Community Council of the Lower Sioux Indian Reservation (the "Council"). (*See* Constitution of the Lower Sioux Indian Community in Minnesota, Article IV, Section 1.) The Lower Sioux Council is expressly empowered by the Constitution to, among other things,

- "manage all economic affairs and enterprises of the Community" (*Id*. Section 1(f)); and
- "appropriate for public purposes of the Lower Sioux Indian Community available funds within the exclusive control of the Community" (*Id*. Section 1(g)).

In the exercise of its legislative function, the Lower Sioux Council adopted the Lower Sioux Indian Community in Minnesota Gaming Revenue Allocation Ordinance (as amended, the "Revenue Ordinance." (*See* Hoss Aff. Ex. F.) The Council enacted the Revenue Ordinance pursuant to the authority of the Indian Gaming Regulatory Act.[2] (*See id*. § 101.) Generally speaking the Revenue Ordinance provides for the allocation of the Community's money received from the operation of gaming on the reservation, with a portion going to Community Welfare and Economic Development Fund and another portion to be paid to members on a per capita basis. (See *id*. §§ 301 and 302.)

In the Revenue Ordinance, the Lower Sioux Council expressly defined the legal nature of the per capita payments, prescribing that members had no recognizable property interest in the per capita payments created by the Revenue Ordinance until the member actually received the payment:

> The per capita payments made under this Ordinance are a personal benefit to the Community Members who qualify. The per capita payments are periodic payments, not a

[2] *See* legal discussion, *infra*.

> property right. The right to receive a per capita payment does not accrue or vest until the Community actually makes a payment to Community members who qualify. Additionally, no benefit, right or interest of any Community Member under [t]his Ordinance, including per capita payments, shall be subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge seizure, attachment or other legal, equitable, or other process.

(*Id*. § 302G.)

ARGUMENT

I. THE DEBTORS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE POST-PETITION PER CAPITA PAYMENTS ARE NOT PROPERTY OF THE ESTATE

A. Summary Judgment Standard.

Summary judgment is governed by Federal Rule of Civil Procedure 56, made applicable here by Federal Rule of Bankruptcy Procedure 7056. Fed. R. Civ. P. 56 reads in relevant part:

> A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56(a).

In this case, the parties agree on the state of undisputed facts. Thus, the outcome of the motions hinges on a pure question of law:[3] whether the per capita payments received or to be received by the Debtors are property of the estate. For the reasons described below, those payments are not property of the estate, and, consequently, the Trustees' actions for turn over fail as a matter of law.

B. Post-Petition Per Capita Payments Are Not Subject To Turn Over Because They Are Not Property Of The Estate.

[3] "Whether property is included in the bankruptcy estate is a question of law. *In re Vote*, 276 F.3d 1024, 1026 (8th Cir. 2002)

The Trustees' actions for turn over arise under Section 542, which provides in relevant part:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a).[4]

1. General principles of "property of the estate"

"By referring to § 363, a section which authorizes the trustee to 'use, sell, or lease ... property of the estate,' the drafters of § 542(a) made it clear that the turnover obligation applies to property of the estate." *In re Pyatt*, 486 F.3d 423, 427 (8th Cir. 2007). Property of the estate is defined by Section 541(a), which provides in relevant part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541.

By the express terms of Section 541(a), "[t]he question, then, is whether [the debtor] had a legal or equitable interest in the payments at the time he filed his petition." *In re Vote*, 276 F.3d 1024, 1026 (8th Cir. 2002). While property of the estate generally is broadly construed, "[h]owever, limitations on the term do grow out of other purposes of the Act; one purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future." *Segal v. Rochelle*, 382 U.S. 375, 379-80, 86 S.

[4] The Trustees correctly do not assert that the per capita payments are matured debts subject to turn over under Section 542(b).

Ct. 511, 515, 15 L. Ed. 2d 428 (1966). Put differently, property acquired post-petition is not property of the estate unless "it is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start." *Id*. Generally, property not owned at the time of petition but only subsequently acquired by the debtor does not become property of the bankruptcy estate. *See, e.g., Am. Bankers Ins. Co. of Florida v. Maness*, 101 F.3d 358, 362 (4th Cir. 1996).

2. <u>Under tribal law, the Debtors do not have a property interest in expected payments of per capita gaming revenue</u>

   a. *The existence and extent of per capita payments are matters of Federal and tribal law, not state law*.

While federal bankruptcy law determines whether property is included in the estate, the existence and extent of property rights is determined by non-bankruptcy law. In a normal case, this would require the application of state commercial law. This however, is not the normal case, so the trustees' analysis under Minnesota state law is inapposite.

State law does not govern property rights if "some federal interest requires a different result." *United States v. Landmark Park & Associates*, 795 F.2d 683, 684 (8th Cir. 1986) (citing *Butner v. United States,* 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)). "[S]tate law does not govern the determination of a property interest when the property 'falls outside of state commercial codes by virtue of the federal interest or the nature of the property.'" *In re Fess*, 408 B.R. 793, 798 (Bankr. W.D. Wis. 2009) (citing *Airadigm Communications, Inc. v. Federal Communications Commission*, 519 F.3d 640, 650 (7th Cir. 2008)).

In the case of tribal per capita payments of gaming revenue, the creation of the payments is authorized by federal law, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*., and the legal attributes of the payments are defined exclusively by the law of the Indian tribes that conduct gaming pursuant to IGRA. *See Fess*, 408 B.R. at 798. Broadly speaking,

IGRA establishes the framework for the operation of gaming on Indian reservations. Casino gaming (Class III gaming) is permissible only if the Indian tribe and a state enter into a compact. *See, generally, Fess*, 408 B.R. at 796 (citing 25 U.S.C. § 2710(d)(1)).

If the state and the tribe enter into such a compact, the tribe may conduct casino gaming on its reservation only if the gaming is

> (A) authorized by an ordinance or resolution that—
>
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of subsection (b) of this section, and
>
> (iii) is approved by the Chairman [of the National Indian Gaming Commission].

In order to be approved by the Chairman of the NIGC, the tribal resolution authorizing casino gaming must fulfill several requirements, including that "net revenues from any tribal gaming are not to be used for purposes other than—... (ii) to provide for the general welfare of the Indian tribe and its members." *Id*. (citing 25 U.S.C. § 2710(b)(2)(B)). Revenues from gaming activities "may be used to make per capita payments to members of the Indian tribe" if certain conditions are met. *Id.*

There are a total of eight reported decisions emanating from just three judicial districts – the Western District of Louisiana (one case); the District of Kansas (three cases); and the Western District of Wisconsin (four cases) -- that have examined the legal nature or extent of per capita payments in bankruptcy. Every court that has deliberately considered the application of federal and tribal law to per capita payments in bankruptcy proceedings has concluded that federal and tribal law are determinative of the property interest in those payments.

In *In re Decora*, 396 B.R. 222 (W.D. Wis. 2008) (*DeCora II*), the District Court reversed the Bankruptcy Court's determination that the Chapter 7 trustee could use his strong-arm powers

under Section 544(a) to avoid the security interest of an Indian tribe's wholly owned bank in a tribal debtor's per capita payments. The bankruptcy court had concluded that Wisconsin state law determined the bank's rights in the tribal per capita payments and prescribed what manner of perfection was necessary to preserve those rights in bankruptcy. *See In re DeCora*, 387 B.R. 230 (Bankr. W.D. Wis. 2008) (*DeCora I*).

The district court reversed the bankruptcy court, reasoning that "'applicable non-bankruptcy law' potentially includes not only state commercial codes, but also federal law and, in [that] case, tribal law." *DeCora II*, 396 B.R. at 224-25. The tribal law in question subordinated the claims of creditors to per capita payments, and under principles of federal preemption and tribal sovereignty over its affairs, state law could not alter that result. *Id*. at 225. "[T]he Nation's interest in controlling the distribution of its revenue far outweighs Wisconsin's interest in enforcing its commercial code. The right of the Nation to distribute its own assets as it sees fit it central to self-governance; Wisconsin's interest in uniform treatment of creditors is minimal by comparison." *Id*.

Shortly after the Western Wisconsin District Court corrected the bankruptcy court's error in *DeCora*, the Western Wisconsin Bankruptcy Court revisited the nature of tribal per capita payments in a case whose facts are strikingly similar to this case. In *Fess*, *supra*, the Chapter 7 trustee sought turnover of a debtor's per capita payments received post-petition. Following the District Court's reasoning in *DeCora II*, the *Fess* court conducted a thorough analysis of the law that applies to tribal per capita payments. The *Fess* court concluded that the federal interest established by IGRA -- that of the tribal nation "in creating and defining property interests in per capita distributions" -- was superior to the state's interest in regulating commercial activity. 408 B.R. at 798. In characterizing the nature of rights in tribal per capita payments, the *Fess* court

held that "[a]lthough federal law does not itself create the property rights, it specifically authorizes tribes to create a certain type of property; per capita distributions." *Id*. at 798.

To ascertain what interest, if any, the debtor had in future per capita payments, the *Fess* court then examined the applicable law – the ordinance enacted by the governing body of the Ho-Chunk Nation:

> Per Capita Distributions shall be made, when and as determined or declared in accordance with Per Capita Distribution Ordinance and any and all other applicable laws of the Nation, out of assets and earnings of the Nation, and *such assets and earnings shall retain their character as property of the Nation until Payment of Per Capita Shares is actually made therefrom.*
>
> ...
>
> No Tribal Member, nor any person claiming any right derived from a Tribal Member, including creditors of a Tribal Member, shall be entitled to compel the making of any Per Capita Distribution prior to the time of Payment thereof, and making each Per Capita Distribution, *and the amount and timing thereof, shall at all times prior to Payment be subject to elimination or modification pursuant to any amendment to the then effective Per Capita Distribution Ordinance adopted in accordance with the Constitution and laws of the Nation.*

Fess, 408 B.R. at 797(emphasis original in opinion).

b. *The Lower Sioux Revenue Ordinance expressly provides that the debtors, and therefore the estates, have no interest in future per capita payments.*

The plain language of the Lower Sioux Revenue Ordinance explicitly states that members have no property right in future per capita payments.

> The per capita payments made under this Ordinance are a personal benefit to the Community Members who qualify. <u>The per capita payments are periodic payments, not a property right. The right to receive a per capita payment does not accrue or vest until the Community actually makes a payment to Community Members who qualify</u>. Additionally, no benefit, right or interest of any Community member under his Ordinance, including per capita payments, shall be subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, seizure, attachment or other legal, equitable, or other process.

(Revenue Ordinance § 302G (emphasis added).)

Application of the plain language of the Lower Sioux Revenue Ordinance mandates the conclusions that a debtor has no interest in un-received per capita payments. Accordingly, those future payments are not property of the bankruptcy estate. This result is consistent with *Fess,* in which the court examined a Ho-Chunk ordinance that is similar, albeit less stringent, than Lower Sioux's ordinance: "No Tribal Member, nor any person claiming any right derived from a Tribal Member, including creditor of a Tribal Member, *shall have any right, title, interest or entitlements in any Per Capita Share unless and until Payment of Per Capital Distributions to which it related occurs*[.]" *Fess*, 408 B.R. at 797 (quoting Ho-Chunk Nation Code § 8,4) (emphasis added).

3. <u>The Trustees, like the decisions on which they rely, wrongly assume that state commercial law is applicable to Lower Sioux's per capita payments</u>.

In all of the reported cases wherein a court reached a contrary result concerning per capita payments, it was for one of two reasons: either the court erroneously applied state law or because the specific tribal law under examination did not define its members' interest in the same limited manner provided by Ho-Chunk and Lower Sioux law.

The bankruptcy court in *In re Kedrowski*, 284 B.R. 439 (Bankr.[5] W.D. Wis. 2002), despite beginning with a lengthy discussion of the purposes and effect of IGRA, nonetheless proceeded to apply Wisconsin state law in order to find that per capita payments are akin to distributions of partnership property. *See* 284 B.R. at 441-443, 445. Setting aside that the *Kedrowski* court was incorrect to apply state law in the first instance, any viability of *Kedrowksi*

[5] The Trustees incorrectly cite *Kedrowski* as a decision of the District Court for the Western District of Wisconsin. (*See* Trustees' Mem. at p. 10.) Normally, the Defendants would not concern themselves or the Court with something as picayune as case citations. Here, however, the distinction is essential because the District Court subsequently rejected the application of state law to per capita payments, as had been done by the Bankruptcy Court in *Kedrowski*.

as good law was extinguished by the District Court's subsequent decision in *DeCora II*, in which it held that tribal law was determinative of the legal nature of per capita payments.[6] *See* discussion, *supra*.

Importantly, the portion of the Ho-Chuck ordinance defining the nature and extent of per capita payments was substantially the same when the *Kedrowski* court examined it in 2002 as when the *Fess* court did so in 2009. The critical distinction is that the *Fess* court appropriately treated the ordinance as the enacted legislation of a sovereign, whereas the *Kedrowski* court in essence treated the Ho-Chunk tribe's ordinances as the mere bylaws of a corporation engaged in business in Wisconsin, to be subordinated to the laws of that state.[7]

It was that same wrongful application of state law, instead of Federal and Tribal law, that led the other, earlier courts to hold that per capita payments are property of the estate, as *Kedrowski* had erroneously done. *See Johnson v. Cottonport Bank*, 259 B.R. 125, 130-31 (W.D. La. 2000) ("Louisiana law recognizes intangible property, including an interest in the future income from a trust, a right to receive an annuity, and a share of ownership or the right to receive payments from an entity such as the Tribe."). The other two cases cited by the Trustees, both of which were decided on the same day by the same judge, lend little to the analysis. *See In re*

[6] Although the *DeCora II* does not specifically refer to it, *Kedrowski* was heavily relied upon by the bankruptcy court in *DeCora I*, which was reversed by *DeCora II*. *See* 387 B.R. at 232-33. Given that the application of state law was expressly rejected in *DeCora II*, the Trustees are stretching a bit to characterize *Kedrowski* as being on one end of a "split in authority" in Wisconsin. (*See* Trustees Mem. at p. 11.)

[7] In *Kedrowski*, the court extensively analyzed the various ways that per capita payments were a form of income, including that they were included in child-support calculations and that were subject to federal income tax. *See Kedrowski* 284 B.R. at 447-49. Wages and other income from services are also usually taxed and included in child-support qualifications, yet are expressly excluded from estate property by Section 541(a)(6). Given the lack of economic opportunities available on Indian reservations and the corresponding reliance on per capita payments for sustenance, and that members are under a continual obligation to reside on the reservation and otherwise be part of the community, per capita payments are more akin to wages than any of the other concepts recognized in state law.

McDonald, 353 B.R. 287 (Bankr. D. Kan. 2006) and *In re Hutchinson*, 354 B.R. 523 (Bankr. D. Kan. 2006). In both cases, the debtors never challenged that the per capita payments were property of the estate. Rather, the debtors merely attempted to claim inapplicable exemptions. *See McDonald*, 353 B.R. at 290-91; *Hutchinson*, 354 B.R. at 527-28. Moreover, the court's perfunctory determination that the debtors' per capita payments were property of the estate was based on *Kedrowski* and *Cottonport*, both of which applied state law to determine the debtor's interest in the per capita payments.

The final case cited by the Trustees is *In re Howley*, 446 B.R. 506 (Bankr. D. Kan. 2011). While that case is inapposite for the simple reason that it, too, applied the wrong law to the analysis, Howley's inconsistent reasoning highlights both the nuance of the issues at hand and the perils of viewing tribal property through the prism of state law.

In *Howley*, the bankruptcy court began by framing the analysis as a question of federal and tribal law:

> When answering the question of whether Debtor's interest in Per Capita Payments is property of the estate, the Court first examines the attributes of the Debtor's interest. What are Debtor's legal and equitable rights in the tribal distributions? This question is answered by examination of the federal law governing tribal gaming and the Potawatomi Per Capita Ordinance.

446 B.R. at 509.

Despite this acknowledgement that federal and tribal law are determinative of a debtor's interest in per capita payment, the *Howley* court then detoured into Kansas state law: "When defining property for purposes of § 541, courts are directed to analyze interests under state law." *Id*. at 510. Under Kansas law, the *Howley* court concluded, the debtor's per capita payments would be treated as post-petition payments received under a pre-petition annuity contract or from pre-petition renewals of insurance policies. *Id*. at 511.

After the zag into state law, the Howley court then zigged back into federal and tribal law. *Howley* considered *Fess* and characterized that case as holding "federal law and tribal law, not state law, applied to define property interests." *Howley*, 446 B.R. 513 (citing *Fess*, 408 B.R. 799). Despite correctly characterizing the relevant holding of *Fess*, the *Howley* court nonetheless stated that it would not follow *Fess* because "the difference in the outcomes of *Fess* and *Kedrowski* clearly rests upon differing interpretations of the Ho-Chuck Nation Code." *Id*. With due respect, that simply is not a correct contrast of *Fess* and *Kedrowski*. *Fess* and *Kedrowski* differ in result because *Fess* applied tribal law to determine the debtor's interest in the per capita payments, whereas *Kedrowski* applied Wisconsin state law. After the district court's decision in *DeCora II*, *Kedrowski* – and the cases that rely on it, including *Howley* – are irrelevant.[8]

Thus, while it may be technically true that the slim "majority of reported cases on this matter" have held that per capita payments are property of the estate, it is only because the courts in those cases applied the wrong law. None of those cases applied federal and tribal law; they simply assumed, as do the Trustees here, that state law must apply because that is the usual case. But this is not the usual case.

Only two cases, *DeCora II* and *Fess*, consciously weighed which body of law to apply, and they both concluded that federal and tribal law governs the nature and extent of per capita payments. Accordingly, *Fess* is the only decision to consider and apply the correct law to the question before this Court – whether post-petition per capita payments are property of the estate.

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[8] *Howley* concluded by noting that the result in that case would not change even if the court applied tribal law, instead of Kansas law. The Potawatomi law examined in *Howley* created property rights in per capita payments more expansive than the per capita payments created by the Ho-Chunk law in *Fess*. *See* 446 B.R. at 513.

Fess correctly determined that Ho-Chunk tribal law did not provide a property interest in expected per capita payments. Because Lower Sioux law defines the nature and extent of per capita payments in the same, limited way that Ho-Chunk law does, the result is the same in this case. Post-petition per capita payments are not property of the estate.

Per capita payments are not like partnership distributions (*Kedrowski*), annuities (*Howley*), or other intangible property recognized by state commercial codes. Those products of state law have a common attribute that is **not** shared by per capita payments – they are all "sufficiently rooted in the pre-bankruptcy past." *See Segal v. Rochelle*, 382 U.S. at 379-80, *supra*. With respect to each of these state-law modalities of property, there is a pre-petition property interest from which post-petition income flows -- a share of stock, property or services contributed to a partnership, or an annuity contract. The same cannot be said for per capita payments, unless one's heritage is a property right.

Finally, the Debtors feel compelled to address the Trustees' disrespectful characterization of the laws of the Lower Sioux Indian Community as the "bold," "creative," and "absurd" declarations of an "interested party." (*See* Trustees' Mem. at p. 12.) As the Court is aware, and the Trustees should be, from prior motion practice in these adversary proceedings, the Lower Sioux Indian Community is a sovereign Indian nation. Sovereigns are free to create and define legal rights as they deem necessary and appropriate. That the Trustees may not understand those laws or may not like them does not mean that those laws are anything other than binding laws. Lower Sioux's enactment of the Revenue Ordinance is no different than what occurred when the Minnesota Legislature enacted its version of the Uniform Commercial Code upon which the Trustees rely so heavily. In both cases, a governing body made a considered decision to create or recognize certain types of property interests.

For its part, Federal law contains several instances of property rights that are far less prosaic or conventional than those found in state commercial codes. Was it bold for the United States Congress to enact the National Labor Relations Act? As interpreted by the courts, that law provides that a debtor has no interest in post-petition awards of back-pay, even if the debtor's legal injury occurred pre-petition. *See, e.g., Wade v. Spaetti*, 1979 WL 1874 (Bankr. S.D. Ind. 1979) and cases cited therein. Was it absurd for Congress to enact the Internal Revenue Code, which, as interpreted by bankruptcy courts, provides that a debtor has a contingent interest in the pre-petition overpayment of taxes, but "there is no property interest in a debtor until the refund has been declared?" *See In re Pigott*, 330 B.R. 797, 802 (Bankr. S.D. Ala. 2005).

Like back-pay awards created by the NLRA or tax refunds created by the Internal Revenue Code, per capita payments exist only because the sovereign decided that they should. But for a tribe's enactment of a law creating the property in the first instance, there would be no property. Axiomatically, it is the law of the sovereign that must govern the extent and ownership of the property. In the case of the Lower Sioux Indian Community, the law is clear that no property interest exists until a qualified member receives the payment from Lower Sioux.

CONCLUSION

Per capita payments exist solely because they were authorized by federal law and then created by tribal law. Therefore, it is federal and tribal law, not Minnesota state law, which determines the nature, character, and extent of a debtor's interest in per capita payments. The law enacted by the Lower Sioux Indian Community expressly prescribes that members have no property right in per capita payments that they have not yet received. Members of Lower Sioux have only "an expectancy to which no legal rights attached." *See Fess*, 408 B.R. at 799. "Section 541(a)(1) simply is not broad enough to encompass [the debtors'] interest." *Id.*

Because the debtors have no recognizable property interest in future per capita payments, those payments are not property of the estate. Consequently, those payments are not subject to turn over under Section 542(a). The Plaintiff's Motion for Summary Judgment must be denied. The Plantiffs' Cross Motion for Summary Judgment must be granted. The Trustees' complaints must be dismissed.

Respectfully submitted, December 12, 2012

/e/ Mark C. Halverson
Mark C. Halverson (#124217)
Halverson Law Office
600 South Second Street
P.O. Box 3544
Mankato, MN 56002-3544
Telephone: 507-345-1535
Fax: 507-345-6407
Email: lawfirm@halverson.com

ATTORNEY FOR DEFENDANTS