

May 29 2013

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

## IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA-12-0719

IN RE THE ESTATE OF:  
DOROTHY McGILLIS GOPHER  
Deceased,

MELINDA GOPHER, BLAIR  
GOPHER, GLENN R. GOPHER,  
MIRANDA GOPHER, and MARY  
GOPHER-PARENTEAU,

Appellants,

vs.

MIKE GOPHER,  
Appellee.

## APPELLEE'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District Court,  
Cascade County, Cause No. ADP-10-0127

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**STATEMENT OF ISSUES PRESENTED**

1. Whether the district court was correct in determining it possessed subject matter jurisdiction over a probate matter regarding a resident of Cascade County and personal property which at all times relevant was located within Cascade County.

2. Whether the district court clearly erred in its findings which lead to instituting a constructive trust regarding property which had historically been held by its possessor for the benefit of an identifiable group of people, the Ah-On-Te-Ways Band of Indians.

**STATEMENT OF THE CASE**

Dorothy Gopher passed away on or about October 2, 2008, intestate. The only identifiable property which is subject to this probate is a thirteen star flag of great historical value to the Ah-On-Te-Ways Band of Indians. The parties in this

1 case are members of this Band, along with many other descendents of Chief Ah-  
2 On-Tc-Ways.

3 On July 22, 2010, Mike Gopher filed his *Application for Informal Probate*  
4 *and Appointment of Personal Representative* to Dorothy Gopher's Estate and was  
5 appointed as such on that same date. Mike's siblings contested his appointment  
6 and sought Glenn Gopher as an alternative to be appointed Personal  
7 Representative. The district court, after a hearing, removed Mike Gopher as  
8 Personal Representative and appointed the Cascade County Public Administrator,  
9 Gerald Boland, as Personal Representative.

10 On September 8, 2011, Mike Gopher filed a *Motion Requesting Declaration*  
11 *of Property as Non-Estate Property and Trust Establishment* which outlined his  
12 position that the thirteen star flag, the sole property in the Estate, did not actually  
13 belong to his deceased mother, Dorothy Gopher, at the time of her death, but  
14 rather, she held the flag as a "Keeper" or trustee for the benefit of the Ah-On-Tc-  
15 Ways Band of Indians. Mike's siblings, through Glenn and Melinda Gopher,  
16 argued to the contrary and purported the heirs of Dorothy Gopher had the right to  
17 exclusive and outright ownership of the flag. This dispute was the subject of the  
18 ultimate evidentiary hearing which occurred on August 16 – 17, 2012.

19 The Appellants filed a motion on August 15, 2012 and again on August 24,  
20 2012 with the district court requesting dismissal based on a theory the court lacked  
21 jurisdiction, purportedly because the district court's assumption of jurisdiction  
22 would somehow infringe upon tribal self-government regarding the Blackfeet  
23 Tribe. Appellants attempted to subvert two years of district court proceedings in  
24 this case by filing a probate action in the Blackfeet tribal court in August of 2012,  
25 just days before the final hearing and well after multiple court filings and hearings  
26 had been held before the district court. The district court issued its order denying  
27 Appellants' motion to dismiss on jurisdictional grounds on October 31, 2012. The  
28 Blackfeet Tribal Court issued an order February 26, 2013, which stated, in relevant

1 part, “[t]his Court does not assert subject matter jurisdiction over the thirteen star  
2 flag at this time as the dispute has never been within this court’s jurisdiction”.

3 The Appellants filed their opening appellate brief February 7, 2013, prior to  
4 preparation or filing of the Transcript on Appeal. Appellants have failed to cite to  
5 the district court record and have inserted facts which are not supported by the  
6 record. The Clerk of the Supreme Court issued a Notice of Filing pertaining to the  
7 district court record on March 25, 2013 which granted Appellants additional time  
8 to file a proper opening brief. The Appellants have failed to file a proper brief and  
9 are apparently relying upon their February 7, 2013 brief.

### 10 STATEMENT OF FACTS

11 This probate action is about the ownership of a thirteen star flag which was  
12 given to the Ah-On-Te-Ways Band of Indians long ago. (*See Findings of Fact,*  
13 *Conclusions of Law, and Order* dated Nov. 2, 2012, FOF ¶ 1). This flag was in the  
14 possession of Dorothy Gopher at the time of her death; locked away in a lock box  
15 at the Great Falls First Interstate Bank main branch. (*See Findings of Fact,*  
16 *Conclusions of Law, and Order* dated Nov. 2, 2012, FOF ¶ 10). Dorothy Gopher  
17 passed away on or about October 2, 2008, intestate. *Id.* It is undisputed that  
18 Dorothy Gopher was a resident of and domiciled in Cascade County, Montana at  
19 the time of her death. *Id.* The parties in this action are Dorothy Gopher’s  
20 surviving children, each of whom would benefit in the event the flag were to have  
21 been solely owned by Dorothy Gopher at the time of her death rather than  
22 possession by Dorothy in the capacity of a trustee on behalf of the Ah-On-Te-  
23 Ways Band. (Transcript, Vol. I, 29:22 – 30:15). It is Mike Gopher’s unselfish  
24 contention that his mother, father and other ancestors who have served as a Keeper  
25 of the flag never owned the flag, but rather held the flag in a trustee capacity on  
26 behalf of the Ah-On-Te-Ways Band.

27 The Ah-On-Te-Ways Band of Indians is named after an Indian Chief of the  
28 Ojibwa from the Great Lakes region. (Transcript Vol. II, 121:16-25). Chief Ah-

1 On-Tc-Ways was a peaceful leader who refused to have his people forced to live  
2 on a reservation. (Transcript Vol. II, 122:17-21). In recognition of his peaceful  
3 leadership and pledge not to fight against the United States, Chief Ah-On-Te-Ways  
4 was given a thirteen star flag by the United States military, which, when displayed,  
5 allowed Chief Ah-On-Te-Ways' Band safe passage. (Transcript, Vol I, 36:5-20;  
6 38:1-20). This flag became a symbol and identifier of the Ah-On-Te-Ways Band,  
7 and continues in this regard to this day.

8 In 1933, the thirteen star flag was in the possession of 81 year old O-Mis-  
9 Chi-Kos or "Frenchman", a son of Chief Ah-On-Te-Ways, who brought the flag  
10 from Canada to the Rocky Boy Reservation in Montana during a Sun Dance.  
11 (Transcript, Vol. II, 122:22 – 123:5; and Exhibit 1 attached hereto and admitted in  
12 evidence in the lower proceedings as Exhibit D). This historical event was  
13 documented by Montana author Frank Linderman in this article "Who Was This  
14 Soldier Chief". *Id.* It was at this 1933 Sun Dance that Frenchman passed on the  
15 duty of "Keeper" of the 13 star flag to his nephew, Jim "Loudthunder" Gopher. *Id.*

16 Jim "Loudthunder" Gopher brought the thirteen star flag to Hill 57, an  
17 Indian community which was located on the outskirts of Great Falls, Montana.  
18 (Transcript, Vol. II, 142:22 – 143:6). The flag remained in the Hill 57 community  
19 for many years, until the most recent "Keeper", Dorothy Gopher placed it in  
20 various safety deposit boxes at local banks in Great Falls, most recently a safety  
21 deposit box in the Great Falls First Interstate Bank main branch where it remains  
22 today. (Transcript, Vol. II, 143:7-20). There is no evidence the flag has been kept  
23 in any place other than Cascade County, Montana since it was brought to the  
24 county in 1933.

25 There is some dispute regarding which of Jim "Loudthunder" Gopher's  
26 children first possessed the flag as a successor Keeper, but it is undisputed that  
27 after Jim "Loudthunder" Gopher's death in 1946, his wife, Mary Chippewa kept  
28 the flag and ultimately, it ended up in the possession of Robert Gopher, Jim and



1 Mary's youngest son and the father of the parties to this action. Robert Gopher  
2 died October 2, 1998, failing to pass the responsibility of Keeper of the flag to any  
3 of his adult children. Robert Gopher had a Will which was never probated and  
4 which is not at issue in this case. His wife, Dorothy Gopher came into possession  
5 of the flag following Robert Gopher's death and, she too, failed to pass the  
6 responsibility of Keeper of the flag to any of her adult children. There is no doubt  
7 that, should she have determined any of her children were responsible enough in  
8 her judgment to keep the flag, she could have granted such an honor to one of  
9 them. There is no evidence presented as to her reason for not choosing a new  
10 Keeper prior to her death. It is now up to the Courts to determine a responsible  
11 successor Keeper, or trustee, to the flag.

12 The thirteen star flag has never been within the boundaries of the Blackfeet  
13 Indian Reservation. (Transcript, Vol. II, 177:7-14). Nor is there any indication the  
14 flag has any significance to the Blackfeet Nation whatsoever. (See Exhibit 2, p. 2,  
15 the Blackfeet Tribal Court's Feb. 26, 2013 Order regarding Dorothy Gopher's  
16 Estate, attached hereto). Although Appellants attempted to use the Blackfeet  
17 Tribal Court to get around the jurisdiction of the district court, the Blackfeet Tribal  
18 Court issued an order February 26, 2013, which stated, in relevant part, "[t]his  
19 Court does not assert subject matter jurisdiction over the thirteen star flag at this  
20 time as the dispute has never been within this court's jurisdiction". (See Exhibit 2,  
21 attached hereto). By Appellants' own admission, Dorothy Gopher did not reside  
22 on the Blackfeet Reservation at the time of her death and the flag is located "off  
23 reservation". (See Appellants' Opening Brief, p. 4).

24 Although the Appellants contend the flag is a "sacred bundle", they have not  
25 presented any evidence to this effect. Appellants did not present any evidence of  
26 any sort of religious significance or ceremonies at which the flag has been  
27 historically used. This claim is simply a red herring.

1 The parties' father, an undisputed Keeper of the flag, characterized the  
2 nature of his possession on several occasions. In a letter dated December 15, 1955  
3 and which was admitted as Exhibit A by the district court, Robert Gopher wrote to  
4 the Sub-committee on Indian Affairs, U.S. Congress, in part:

5 Only once did *our band* make talk with the government. It was the  
6 time *we received* the flag with 13 stars for giving a pledge that *we*  
7 would not fight against the United States. It was a flag with an  
8 American eagle sewn on with linen thread. The flag protected *our*  
9 *band* wherever it went to live and hunt. *We* always moved from the  
10 place where the sun rises and moved west. The flag is in the  
11 possession of Lout Thunder (Gopher) family on Hill 57. It is a proof  
12 that the U.S. Government recognized *us* once as an American Tribe.

12 (See Exhibit 3, attached hereto and admitted as Exhibit A in the district court  
13 record; and Transcript, Vol. I, 36:1-20) (Emphasis added).

14 In a letter dated January 19, 1961 from Robert Gopher to the "Honorable  
15 Mike Mansfield" at the U.S. Senate, the parties' father wrote, in part:

16 We are writing this letter in the interests of the Anantaays [sic] Band  
17 of Chippewa Tribe. ... *Our Band was given a peace flag*, which we  
18 still possess. This flag was a token of our friendship with the United  
19 States Government. We were to display this flag to the Union  
20 Soldiers to secure our safety and show our friendship.

20 (See Exhibit 4, attached hereto, admitted as Exhibit B in the district court record;  
21 and Transcript, Vol. I, 36:21 – 38:20) (Emphasis added).

22 The Appellants have not refuted their late father's characterization of  
23 ownership that the entire Band was given this flag. The Appellants only put on  
24 one witness, sibling and Co-Appellant Blair Gopher. Blair supported the  
25 contention that the flag is owned by the entire Band.

26 Cross Examination of Blair Gopher:

27 Q If your dad ever referred to the flag as belonging to the  
28 entire band, would you agree with him?

1           A     M-hm. Yes.

2           Q     Can you turn to - - I'm going to hand you Exhibit B.  
3 Now, this is a letter that's previously admitted, written from your  
4 father to Mike Mansfield. And it says in the middle of the first  
5 paragraph, I quote, "Our band was given a peace flag, which we still  
6 possess." Did I read that correctly?

7           A     Right.

8           Q     Do you agree with that statement that your father wrote?

9           A     Yes.

10          Q     Do you agree that our band refers to the Ah-On-Te-Ways  
11 Band?

12          A     Yes.

13  
14 (See Transcript Vol. II, 176:5-22). Blair Gopher's Cross Examination continues:

15          Q     Do you believe that your family has the right to sell the  
16 flag?

17          A     No one has that right.

18          Q     So if the court gives this flag to you and your brothers  
19 and sisters, you guys could not all collectively sell this flag?

20          A     No.

21  
22 (See Transcript Vol. II, 177:24 - 178:5).

23          Melinda Gopher never took the witness stand, nor was she ever sworn in to  
24 testify. The evidentiary hearing was filled with improper testimony by Melinda  
25 Gopher and she was admonished numerous times to "ask questions" rather than  
26 testify. The court invited Melinda Gopher to take the stand if she wished to testify.  
27 (See Transcript Vol. II, 170:2-6). Melinda Gopher went on with her attempt to  
28 insert testimony without taking the stand and without being subject to cross

1 examination, up to, and including, her closing argument where she turned her back  
2 to the district court and scolded the observers in attendance. Mike Gopher  
3 respectfully requests that any unsworn testimony by Melinda Gopher be  
4 disregarded.

### 5 SUMMARY OF ARGUMENT

6 The three factors which must be considered in a court's determination of  
7 subject matter jurisdiction when a court is presented with Indian law principles  
8 clearly favor, if not require, exclusive jurisdiction by the district court. District  
9 court jurisdiction is supported by the following facts: (1) Dorothy Gopher died a  
10 resident of and domiciled in Cascade County; (2) the only property subject to the  
11 probate proceedings was a thirteen star flag, personal property, which at all times  
12 relevant was kept in Cascade County and which had never been within the  
13 boundaries of the Blackfeet Reservation; (3) the flag is not "trust property" or  
14 property of any other nature which affects tribal self-government, in particular, the  
15 self-government of the Blackfeet Nation; and (4) the Blackfeet Tribe, through its  
16 tribal court, issued an order which clearly states the Tribe's position that the  
17 dispute regarding the flag "has never been within [the Blackfeet Tribal] court's  
18 jurisdiction". These facts leave no doubt the district court possessed subject matter  
19 jurisdiction in this case and, for that reason, Mike Gopher respectfully requests this  
20 Court affirm the district court's determination it properly exercised and possessed  
21 subject matter jurisdiction in this probate action.

22 The district court has broad discretion afforded by the principles of equity to  
23 impose a constructive trust. A constructive trust arises when a person holding title  
24 to property is subject to an equitable duty to convey it to another on the ground that  
25 the person holding title would be unjustly enriched if he were permitted to retain it.  
26 Dorothy Gopher, the decedent, was never the "owner" of the thirteen star flag, but  
27 rather, she held the flag as a "Keeper" on behalf and for the benefit of the Ah-On-  
28 Te-Ways Band of Indians. The testimony at the ultimate evidentiary hearing was

1 undisputed that the flag belonged to the entire Ah-On-Te-Ways Band. It was  
2 undisputed that the Keeper of the flag has no right to sell the flag. The parties'  
3 deceased father and former Keeper of the flag, Robert Gopher, by his own  
4 admission indicated on numerous occasions that the flag was given to the Ah-On-  
5 Te-Ways Band as whole. If the Estate of Dorothy Gopher possessed sole  
6 ownership of the flag, with the right to sell or otherwise keep the flag from Ah-On-  
7 Te-Ways Band members, the heirs of Dorothy Gopher would be unjustly enriched  
8 by allowing them paramount property right as opposed to the Band members' who  
9 are historically interested in the flag. Mike Gopher respectfully requests this court  
10 affirm the district court's order establishing a constructive trust in favor of the  
11 Band.

## 12 ARGUMENT

### 13 **I. THE DISTRICT COURT CORRECTLY DETERMINED IT** 14 **POSSESSED SUBJECT MATTER JURISDICTION BECAUSE** 15 **THE PROBATE INVOLVED A RESIDENT OF CASCADE** 16 **COUNTY AND PROPERTY WHICH WAS AT ALL TIMES** 17 **LOCATED WITHIN CASCADE COUNTY.**

18 The standard of review regarding a district court's decision on a motion to  
19 dismiss for lack of subject matter jurisdiction is de novo. *In Re Estate of Big*  
20 *Spring*, 2011 MT 109, ¶ 20, 360 Mont. 370; 255 P.3d 121. Three factors must be  
21 considered in a court's determination of subject matter jurisdiction when a court is  
22 presented with Indian law principles and issues: (1) the status of the parties, (2)  
23 the status of the property where the dispute arose or took place, and (3) whether the  
24 regulatory or adjudicatory state action is criminal or civil in nature. *In Re Estate of*  
25 *Big Spring*, ¶ 28 (citing Cohen's Handbook at §§ 6.01-6.03).

26 In *Big Spring*, the facts are inapposite to those presented here. In *Big*  
27 *Spring*, the decedent was an enrolled member of the Blackfeet Tribe who died  
28 domiciled on the Blackfeet Reservation and the property at issue was located  
wholly within the exterior boundaries of the Blackfeet Reservation. *In Re Estate of*

1 *Big Spring*, ¶ 4. The only similarity between *Big Spring* and this case is that  
2 Dorothy Gopher at the time of her death was an enrolled member of the Blackfeet  
3 Tribe. However, the differences between the cases are dispositive.

4 The Montana Probate Code applies to “the affairs and estate of decedents ...  
5 in this state.” § 72-1-201(1), MCA (2011). Further, the code confers subject  
6 matter jurisdiction upon the district court. “To the full extent permitted by the  
7 constitution, the court has jurisdiction over all subject matter relating to ... estates  
8 of decedents, including ... determination of heirs and successor of decedents.” §  
9 72-1-202(1)(a), MCA (2011).

10 The question as to whether the district court possessed and properly  
11 exercised subject matter jurisdiction in this matter can be quickly dispensed of.  
12 The facts in this case clearly show: (1) Dorothy Gopher died a resident of and was  
13 domiciled in Cascade County; (2) the only property subject to the probate  
14 proceedings was a thirteen star flag, personal property, which at all times relevant  
15 was kept in Cascade County and which had never been within the boundaries of  
16 the Blackfeet Reservation; (3) the flag is not “trust property” or property of any  
17 other nature which affects tribal self-government, in particular, the self-  
18 government of the Blackfeet Nation; and (4) the Blackfeet Tribe, through its tribal  
19 court, issued an order which clearly states the Tribe’s position that the dispute  
20 regarding the flag “has never been within [the Blackfeet Tribal] court’s  
21 jurisdiction”. (Exhibit 2, attached hereto).

22 There is no part of the three part test established by *Big Spring* which favors  
23 exclusive jurisdiction of the Blackfeet Tribal Court or the lack of jurisdiction of the  
24 district court. It is true that Dorothy Gopher was an enrolled member of the  
25 Blackfeet Tribe, but she was also a citizen of the State of Montana and resided  
26 outside the boundaries of the Blackfeet reservation, in Cascade County, Montana,  
27 at the time of her death. The status of the property at issue is personal property, a  
28 flag, which has been in Cascade County since 1933. The dispute arose in Cascade

1 County, Montana where Dorothy Gopher resided for many years and died intestate.  
2 The nature of the action is civil and has nothing to do with the Blackfeet Tribe's  
3 self-governance, which is supported by the Tribal Court's Order indicating it lacks  
4 jurisdiction over the dispute regarding the flag.

5 Appellants' contention that the district court lacked subject matter  
6 jurisdiction is completely without merit and essentially asks this Court to establish  
7 that enrolled members of an Indian Tribe have no right to have their property  
8 probated by a Montana state court, despite whether or not they resided on an Indian  
9 reservation or whether or not their property was even located within the boundaries  
10 of an Indian reservation.

11 There is absolutely no doubt the district court possessed subject matter  
12 jurisdiction in this case. Mike Gopher respectfully requests this Court affirm the  
13 district court's determination it properly exercised and possessed subject matter  
14 jurisdiction in this probate action.

15  
16 **II. THE DISTRICT COURT PROPERLY ORDERED THE**  
17 **ESTABLISHMENT OF A CONSTRUCTIVE TRUST AGAINST**  
18 **THE ESTATE AND IN FAVOR OF THE AH-ON-TE-WAYS BAND**  
19 **BECAUSE THE FLAG WAS ORIGINALLY GIVEN TO THE**  
20 **BAND AS A WHOLE AND HAS HISTORICALLY BEEN CARED**  
21 **FOR BY KEEPERS ON BEHALF AND FOR THE BENEFIT OF**  
22 **THE BAND.**

23 The standard of review governing proceedings in equity is codified at § 3-2-  
24 204(5), MCA (2011), which directs the appellate court to review and determine  
25 questions of fact as well as questions of law. *In re Estate of McDermott*, 2002 MT  
26 164, ¶ 22. The standard of review regarding the district court's findings of fact is  
27 clearly erroneous. *Id.* A finding is clearly erroneous if it is not supported by  
28 substantial evidence, if the trial court misapprehended the effect of the evidence, or  
if our review of the record convinces us that the district court made a mistake. *Id.*

1 Further, the Court reviews a district court's conclusions of law to determine  
2 whether they are correct. *Id.*

3 The Montana Supreme Court recently examined Montana law regarding  
4 constructive trusts in *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24,  
5 ¶ 39, 368 Mont. 330, 296 P.3d 450:

6 ¶ 30 A constructive trust instead arises when a person holding title  
7 to property "is subject to an equitable duty to convey it to another on  
8 the ground that the person holding title would be unjustly enriched if  
9 he were permitted to retain it." [*In re Estate of McDermott*], 2002 MT  
10 164, ¶ 25 (quoting Section 72-33-219, MCA (2011)). Title 72,  
11 Chapter 33 broadly defines property to include "anything that may be  
12 the subject of ownership." Section 72-33-108(3), MCA (2011).  
13 Section 72-33-219, MCA (2011), makes no mention of a requirement  
14 of wrongdoing by the defendant in order to impose a constructive  
15 trust. The legislature's enactment of the Trust Code in 1989  
16 eliminated the requirement that a showing of fraud or other wrongful  
17 acts constitutes a "prerequisite to imposing a constructive trust."  
18 *McDermott*, ¶ 25.

19  
20 \*\*\*

21 ¶ 32 This Court previously recognized the broad discretion  
22 afforded by the principles of equity to impose a constructive trust.  
23 *Eckart v. Hubbard*, 184 Mont. 320, 325, 602 P.2d 988, 991 (1979),  
24 affirmed that the principles of equity allowed a court simply to declare  
25 a constructive trust "shall be [declared] to exist. Nothing else is  
26 required." The statutory trust scheme in effect in 1979 still required  
27 some sort of misconduct or wrongdoing on the part of the defendant in  
28 order to establish a constructive trust. *Eckart*, 184 Mont. at 326, 602



1 P.2d at 991. The Court nevertheless recognized that constructive trusts  
2 "occur where the parties have expressed no intent to create a trust."  
3 *Eckart*, 184 Mont. at 326, 602 P.2d at 991. A court creates a  
4 constructive trust "to work an equitable result." *Eckart*, 184 Mont. at  
5 326, 602 P.2d at 991; see also *Lawrence v. Clepper*, 263 Mont. 45,  
6 52-53, 865 P.2d 1150, 1155-1156 (1993) (confirming that the 1989  
7 adoption of the Trust Code provides for imposition of a constructive  
8 trust when equity requires it).

9  
10 \*\*\*

11 ¶ 37 The creation of a constructive trust "need not be limited to the  
12 person who obtained property by fraud or deception from another."  
13 *Lawrence*, 263 Mont. at 53, 865 P.2d at 1156. Thus a party's proof of  
14 unjust enrichment entitles it to restitution from the other party—  
15 regardless of any wrongdoing on the part of the unjustly enriched  
16 party. *Lawrence*, 263 Mont. at 53, 865 P.2d at 1156.

17  
18 [38] The plaintiff, in the context of a constructive trust, need not  
19 necessarily have been deprived of something in order to recover—it is  
20 sufficient that the defendant gained something that it should not be  
21 allowed to retain. *McDermott*, ¶ 26; see also Restatement of  
22 Restitution § 1 com. e (1937) (where "a benefit has been received by  
23 the defendant but the plaintiff has not suffered a corresponding loss  
24 or, in some cases any loss, but nevertheless the enrichment of the  
25 defendant would be unjust . . . the defendant may be under a duty to  
26 give the plaintiff the amount [\*\*\*340] by which [the defendant] has  
27 been enriched").

28 *Id.*

1 The Court may impose an equitable type trust which benefits non-party  
2 beneficiaries, in this case the Ah-On-Te-Ways Band members, who are not parties  
3 to this action but are identifiable by blood lineage. *Textana, Inc. v. Klabzuba Oil*  
4 *& Gas*, 2009 MT 401, P41-P44. In the *Textana* case, the district court granted a  
5 12.5 percent property interest to a non-party in that action as part of its equitable  
6 division of the claims at issue. The party to the action which actually controlled  
7 the interest which was granted to a non-party argued that they lacked notice of the  
8 need to defend against this non-party claim at trial. The Montana Supreme Court  
9 upheld the district court's ruling and stated: "[e]quitable rulings of this type fall  
10 within the district court's discretion and we will sustain these rulings unless the  
11 district court abused its discretion." *Id.* (citing *Ruegsegger v. Welborn*, 237 Mont.  
12 317, 321, 773 P.2d 305, 308 (1989) and *Howard v. Dalio*, 249 Mont. 316, 318, 815  
13 P.2d 1150, 1151 (1991)).

14 The plaintiff in *Howard v. Dalio*, 249 Mont. 316, 318, 815 P.2d 1150, 1151  
15 (1991), alleged that her sister had breached her duty as trustee by cashing out  
16 certificates of deposit that had been left by their deceased sister's estate. The  
17 district court imposed a constructive trust against the defendant sister, for the  
18 benefit of the plaintiff sister, as well as for the benefit of a third sister, who  
19 remained a non-party to the lawsuit. *Howard*, 249 Mont. at 318, 815 P.2d at 1151.  
20 The defendant sister alleged that the court lacked jurisdiction to impose a valid  
21 judgment in favor of the non-party sister. *Howard*, 249 Mont. at 319, 815 P.2d at  
22 1152.

23 The Montana Supreme Court upheld the district court's imposition of a  
24 constructive trust that named the non-party sister as one of the beneficiaries. The  
25 Court recognized as "pivotal" the fact that it possessed jurisdiction over the person  
26 upon whom the trust had been imposed. The Court rejected the notion that all  
27 potential beneficiaries needed to be parties. *Howard*, 249 Mont. at 319-20, 815  
28 P.2d at 1152.

1 Here, the facts of this case, as supported by the record before the Court and  
2 the Appellants' sole witness, indicate that Dorothy Gopher was never the "owner"  
3 of the thirteen star flag, but rather, she held the flag as a "Keeper" on behalf of the  
4 Ah-On-Te-Ways Band of Indians. The testimony at the ultimate evidentiary  
5 hearing was undisputed that the flag belonged to the entire Ah-On-Te-Ways Band.  
6 It was undisputed that the Keeper of the flag has no right to sell the flag. This  
7 testimony was supported by Appellant Blair Gopher's testimony.

8 The parties' deceased father and former Keeper of the flag, Robert Gopher,  
9 by his own admission indicated on numerous occasions that the flag was given to  
10 the Ah-On-Te-Ways Band as whole. This is clear by his letters to the Indian  
11 Affairs Committee of the U.S. Congress and Senator Mike Mansfield. In those  
12 letters, as described above, there is no doubt that Robert Gopher contended that the  
13 Band was the owner of the flag and that he was communicating on behalf of the  
14 Band.

15 If the Estate of Dorothy Gopher possessed sole ownership of the flag, with  
16 the right to sell or otherwise keep the flag from Ah-On-Te-Ways Band members,  
17 the heirs of Dorothy Gopher would be unjustly enriched by allowing them  
18 paramount property right as opposed to the Band members' who are historically  
19 interested in the flag. The record before this Court is clear that from the time the  
20 flag was initially given to Chief Ah-On-Te-Ways, the flag has always been  
21 property of the entire Ah-On-Te-Ways Band and has never been owned by a single  
22 individual.

23 Here, what is clearly equitable is ensuring the preservation of the flag for the  
24 entire Ah-On-Te-Ways Band, rather than just the heirs of Dorothy Gopher. The  
25 historical and cultural value of this flag is too great to take a chance and release it  
26 to the heirs of Dorothy Gopher and risk losing the flag forever. The district court  
27 recognized that justice required the establishment of a constructive trust and  
28 appointed trustees to establish a trust with the purpose of preserving the flag. The

1 trust administration in accordance with the district court's order is well underway  
2 and the trustees have held several meetings.

3 This Court has recognized the district court's broad discretion in  
4 determinations regarding a constructive trust. The district court was in the best  
5 position to evaluate the facts presented at the evidentiary hearing and there has  
6 been no assertion that its findings in support of its institution of a constructive trust  
7 are clearly erroneous. Mike Gopher respectfully requests this Court affirm the  
8 district court's order establishing a constructive trust and ordering the Estate of  
9 Dorothy Gopher to transfer ownership of the flag to the newly established trust.

### 10 CONCLUSION

11 The issues in this case are not novel and can easily be resolved based on  
12 clear Montana precedent and the facts which have been presented to the Court.  
13 Unfortunately, the Appellants have entirely failed to cite to the evidentiary record  
14 and have inserted their unsupported version of the lower court proceedings.  
15 However, a review of the record presented will easily lead this Court to affirming  
16 the district court on all issues.

17 The Appellants' contention that the district court lacked subject matter  
18 jurisdiction is wholly without merit and is completely inapposite to *In Re the*  
19 *Estate of Big Springs*, the authority upon which the Appellants heavily rely. The  
20 Blackfeet Tribe on its own, through the Tribal Court, issued an order which  
21 indicated the Tribe actually lacks jurisdiction to hear the controversy regarding the  
22 flag at issue in this case. This issue was correctly resolved by the district court in  
23 its determination that its exercise of jurisdiction was proper. This Court should  
24 affirm the district court on this issue.

25 The facts before this Court clearly show the flag at issue in this case has  
26 always belonged to the Ah-On-Te-Ways Band members, who are identified as  
27 descendants of Chief Ah-On-Te-Ways. The parties' father, a former Keeper of the  
28 flag, wrote letters and otherwise indicated on numerous occasions that the flag

1 belonged to the entire band. The Appellants' sole witness, Blair Gopher, a Co-  
2 Appellant in this matter, testified under oath that the flag belonged to the entire  
3 Band and that no party has ever had the right to sell the flag. The Estate of  
4 Dorothy Gopher and, ultimately, the heirs of the Estate, would clearly be unjustly  
5 enriched if they were granted outright and exclusive ownership of the flag when  
6 historically, it has always been recognized as property belonging to the entire Ah-  
7 On-Te-Ways Band. The district court has broad discretion in determinations in  
8 equity regarding equitable trusts, and, in this case, correctly established a  
9 constructive trust and ultimately a just result. This Court should affirm the district  
10 court's establishment of a constructive trust and order requiring the Estate of  
11 Dorothy Gopher to transfer ownership of the flag to a trust established for the  
12 purpose of preserving the flag for the benefit of the Ah-On-Te-Ways Band.

13 Dated this 28<sup>th</sup> day of May, 2013.

14 SUTTON & DUBOIS, PLLC

15 By: 

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20 **CERTIFICATE OF MAILING**

21 I hereby certify under penalty of perjury that the foregoing was duly served  
22 upon the Appellants and Personal Representative by depositing a copy in the  
23 United States mails at Great Falls, Montana, enclosed in a sealed envelope with  
first class postage prepaid thereon and addressed as follows:

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7 Dated this 28<sup>th</sup> day of May, 2013.

8 By   
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10 **CERTIFICATE OF COMPLIANCE**

11 I, Neal P. DuBois, pursuant to Rule 11, M. R. App. Civ. P., hereby certify  
12 that the foregoing OPENING BRIEF OF APPELLEE meets the requirements  
13 contained in Rule 27, including the following:

- 14 1. Line Spacing: Double Spaced  
15 2. Typeface: Time New Roman, 14 pt.(proportionately spaced)  
16 3. Word Count: 5491 (Does not exceed 10,000 word limit.)  
17

18 Dated this 28<sup>th</sup> day of May, 2013.

19 By   
20 SUTTON & DUBOIS, PLLC  
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