No. 13-3773

In the United States Court of Appeals for the Eighth Circuit

Ramona Two Shields and Mary Louise Defender Wilson, individually and on behalf of others similarly situated,
Plaintiffs-Appellants

v.

Spencer Wilkinson, Jr. et al,
Defendant-Appellant

On Appeal from the United States District Court
For North Dakota

BRIEF OF *AMICUS CURIAE*
INDIGENOUS LAW AND POLICY CENTER
MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

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STATEMENT OF INTEREST OF AMICUS CURIAE[*]

Pursuant to Fed. R. App. P. 29, the Indigenous Law and Policy Center at Michigan State University College of Law respectfully files the accompanying amicus curiae brief in support of Petitioner/Appellant Ramona Two Shields and Mary Louise Defender Wilson. All parties have consented to the filing of this brief.

Amicus is the Indigenous Law and Policy Center at Michigan State University College of Law. Matthew L.M. Fletcher, Wenona T. Singel and Kathryn E. Fort, Director, Associate Director and Staff Attorney of the Indigenous Law and Policy Center, are professors whose scholarship and clinical practice focuses on the subject matter areas – federal jurisdiction, federal Indian law, and legal history – addressed by the district court's decision in this case. We submit this brief to highlight the extent to which the federal government has failed in its trust responsibility to the Mandan, Hidatsa, and Arikara Nation

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[*] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received timely notice of intent to file this brief and gave consent to its filing.

Amicus thanks Sarah Donnelly, Michigan State University College of Law third-year law student, for her research assistance.

historically and provide context for the suit against third parties who benefit from that failure.

The interest of the Center is in ensuring that cases in the field are decided in a uniform and coherent manner, consistent with the foundational principles of this area of law. The proposed brief describes the historical treatment of the Fort Berthold reservation land by third parties and the federal government, and the origins of the federal Indian law principles governing the trust relationship between tribes and the federal government.

ARGUMENT

I. Appellants' Reservation Land, Since Being Set Aside in an Executive Order, has Been Repeatedly Exploited by Third Parties with the United State Government's Cooperation and Aid.

The history of the exploitation of land and other assets by the federal government and its third party partners at the Fort Berthold Reservation is a dramatic story of the efforts of the United States government to transfer the value of Reservation assets from the citizens of the Three Affiliated Tribes to third parties without just compensation. The discovery of the Bakken oil formation under the tribe's reservation is but the most recent resource exploited for the enrichment of outsiders. Lauren Donovan, *Oil Boom Hits Fort Berthold Reservation Hard*, Bismarck Tribune, April 4, 2013. Commentators predict that thousands of "new wells will be drilled over the next several years." Raymond Cross, *Development's Victim or Its Beneficiary?: The Impact of Oil and Gas Development on the Fort Berthold Indian Reservation*, 87 N.D. L. Rev. 536, 538 (2011).

The Fort Berthold Reservation, set aside for the Three Affiliated Tribes of the Fort Berthold Reservation (hereinafter "Three Affiliated

Tribes" or "Tribes"), now known as the Mandan, Hidatsa, and Arikara Nation (hereinafter "MHA Nation" or "Nation") was part of land originally identified in the 1851 Treaty of Fort Laramie, which defined the territories of many of the Great Plains Nations. Treaty of Fort Laramie, 11 Stat. 749 (1851). Even from the start, the citizens of the MHA Nation complained to the United States government of non-Indians removing resources from their land for a profit. *Indians of Ft. Berthold Indian Reservation v. United States*, 71 Ct. Cl. 308, 317 (1930). The tribe complained that "'that whites came on their land at Berthold and cut wood for sale to steam-boats. They want this stopped. They are willing that boats should go and cut all they want, but do not want strangers to come and sell their wood while they are starving; they want to cut and sell it themselves.'" Letter from General Hancock to Bvt. Maj. Gen. George L. Hartsuff, July 21, 1869, I *Indian Affairs: Laws and Treaties* 881, 882 (Charles J. Kappler, ed. 1904). In 1870, through Executive Order, President Grant reduced the acreage and set the boundaries of the Ft. Berthold Reservation. 71 Ct. Cl. at 318. Even that, however, was limited by the expected passage of a railroad over part of the land the tribes wanted to include within the reservation.

Report from S.A. Wainwright, I *Indian Affairs: Laws and Treaties* 881 (Charles J. Kappler, ed. 1904) ("The Indians desired that the reservation should extend to the Mouse River, but in view of a railroad passing over that country I did not accede to their wish.").

A. The United States and the Northern Pacific Railroad Worked Together to Take More than 11 Million Acres of Land from the Tribes without Providing Just Compensation

Much like role of oil speculators today, the role of the railroads in Fort Berthold's past illustrate the partnership between the United States government and for-profit third parties interested in the land and resources of the Fort Berthold Reservation. The history of the Northern Pacific Railroad directly intersects with that of the Fort Berthold Reservation, and was the subject of the 1930 Court of Claims case. *Indians of Ft. Berthold Indian Reservation*, 71 Ct. Cl. 308; *see also* Dee Brown, *Hear That Lonesome Whistle Blow* 258 (1977) (discussing the collusion between the federal government and the Northern Pacific Railroad).

When Congress passed laws granting the Northern Pacific Railroad alternate sections of public land along the road, it also extinguished tribal title to the same lands. 71 Ct. Cl. at 320. In some

cases, the railroads received title to lands dependent on the extinguishment of tribal title. Alexandra Harmon, *Rich Indians: Native People and the Problem of Wealth in American History* 155 (2010). In the case of Fort Berthold, the executives of the Northern Pacific Railroad advised the Commissioner of Indian Affairs that the 1870 executive order reservation directly conflicted with the lands Congress gave to the Railroad. The Company asked that the reservation be changed, again by executive order, so it could build the railroad. 71 Ct. Cl. at 320. And in 1880, because of the request of an outside for-profit company, the lands of the MHA Nation were changed once again by executive order. *Id.* The executive orders of 1870 and 1880, and the 1868 order to establish a military reservation, took a total of 11,242,512 acres from the Fort Berthold Reservation without their knowledge or consent, 71 Ct. Cl. at 328, an action driven primarily by the wishes of the Northern Pacific Railroad Company. *See* Brown at 214, 259 (discussing the relationship between the Northern Pacific Railroad Company and the federal government Land Office); James B. Hedges, *The Colonization Work of the Northern Pacific Railroad*, 13 Miss. Valley Hist. Rev. 311, 328 (1926) ("Thus the policies employed by the Northern

Pacific in the administration of its land-grant had a most important influence upon one of the significant stages in the economic life of North Dakota."); Roy W. Meyer, *Fort Berthold and the Garrison Dam*, 35 N.D. Hist. 214, 224 (1968).

At the time, the Tribes complained that the 1880 Executive Order was arbitrary, and done without their consent or knowledge. 71 Ct. Cl. at 324. This taking was half of the entire reservation, an area of the reservation the tribes used extensively for hunting. 71 Ct. Cl. at 326. The Indian agent at the time wrote that the part of the land grant given to the Northern Pacific Railroad was used "habitually . . . for hunting, trapping, and other purposes," and that "any alteration or change in the present reservation would greatly militate against the interest of the Indians. . . . No compensation for this loss could be given to them by increasing the reservation east of the Missouri River, for the land is poor and barren and without water or timber." 71 Ct. Cl. at 326.

The introduction of the railroad boom, much like the current oil boom, brought in outsiders to the reservation, both railroad workers, and settlers. Angie Debo, *A History of the Indians in the United States* 170-71 (1970); Harmon, *supra*, at 138; Hedges, *supra*, at 328 ("During

the years 1875-78, the movement of population on to the railroad and government lands was unprecedented."). Mining began as early as 1874, with discovery of coal and lignite. 71 Ct. Cl. at 327-28. The land was used to range sheep and cattle. *Id.* at 327. While everyone appeared to agree the land was valuable—to the tribes, the railroad, the settlers, and the miners—the Court of Claims was unwilling to determine exactly how much the land was worth at any given time. *Id.* at 328.

The Court of Claims found that while the 1851 treaty-established reservation was diminished by 11.4 million acres, the Tribes were only due compensation for 9.8 million acres taken in the three executive orders. 71 Ct. Cl. at 339. When the Nation was able to bring a claim to the Court of Claims for this taking, the Court found that it was nearly impossible to value the land, and that "the record convinces us that the Indians themselves did not and would not have valued their lands at the time they were taken at a greater average value than fifty cents per acre." 71 Ct. Cl. at 340. After additional offsets, the Court awarded the Nation $2.1 million dollars for the taking of more than 9 million acres of land for the development of the Northern Pacific Railroad. The compensation still was dramatically lower than market value: land in

the Dakota Territories was sold by the Northern Pacific Land Commissioner for $3 per acre in stock in 1881, and for $5 acre in preferred stock in 1883. Hedges, *supra* at 334.

B. The United States Further Shrunk the Fort Berthold Reservation Landholdings Through Allotment and Uncompensated Takings, Including Coal Lands

Despite an 1886 solemn agreement the people of the MHA Nation regard as a treaty that "set aside this geographic area for the exclusive use and occupancy of the Three Affiliated Tribes," Cross, *supra*, at 541, the United States dispossessed the Fort Berthold Indians of hundreds of thousands of acres through allotment. Allotment and railroads were the two primary factors contributing to the dispossession of millions of acres of Indian lands *See* Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* 62 (2011).

While no tribe had the exact same experience with allotment, the policy of the federal government generally was to divide reservation land into allotments for individual tribal members and then sell the "surplus" land left after this division. Janet A. McDonnell, *The Dispossession of the American Indian 1887-1934* 6-8 (1991); *see also*

Cohen's Handbook on Federal Indian Law § 1.04, at 71-79 (2012 ed.) (describing the policy period of allotment and assimilation).

In 1900, the Fort Berthold Reservation had one of the largest number of allotments in the nation. McDonnell, *supra*, at 8 (noting that the top five were Colville, Fort Berthold, Klamath, Rosebud, and Yakima.). By 1907, there remained 884,780 acres of unallotted land at the Fort Berthold Reservation. *The Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 16 Ind. Cl. Comm. 341, 377 (Ind. Cl. Comm. 1965). Though an 1886 agreement between the Tribes and Congress ratified in 1891 preserved any "surplus" lands as a reservation for the Nation, *Three Affiliated Tribes of Ft. Berthold Reservation v. United States*, 390 F.2d 686, 689 (Ct. Cl. 1968); 26 Stat. 1032, 1036 (1891), Congress began selling the unallotted lands of the Fort Berthold in 1910. In accordance with the 1910 Act, 36 Stat. 455 (1910), the United States sold 205,000 unallotted acres. 16 Ind. Cl. Comm. at 379. The federal government took 40,000 more acres for the benefit of the state of North Dakota with no regard to the actual cost of the land. 390 F.2d at 699.

Even when allotting lands to Indians in accordance with the 1886 agreement, however, the government did not allot coal bearing lands to individual Indians or to the tribes. 36 Stat. 455, 462 ("[A]nd if there be found any lands bearing coal or other mineral, the Secretary of the Interior is hereby authorized to reserve them from allotment or other disposition until Congress shall provide for their disposal."). When it became apparent that there was a large amount of coal bearing land on the reservation, it took a Joint Resolution of Congress to both allow the allottees who had accidentally received coal bearing lands to retain them, and to allow allotment of additional coal lands to individual Indians. H.J. Res. 263, 37 Stat. 631 (Apr. 3, 1912); Allotment of Coal Lands to Indians, Fort Berthold Reservation, H.R. Rep. 62-399 (March 8, 1912) ("The Indians have expressed a willingness to accept their allotments within the coal-bearing areas subject to a reservation of the coal deposits rather than relinquish the selections heretofore made and take other noncoal-bearing lands . . . In this way they may have been influence by the fact that in many instances they have been living on and improving the lands selected and now found to be valuable for coal."). Though Congress reserved coal lands to the tribes in the 1910

Act, a 1914 Act released those for sale, resulting in the sale of 110,818 acres. 16 Ind. Cl. Comm. at 380. Additional smaller parcels of land were sold through 1920. 16 Ind. Cl. Comm. at 380-81 (finding that the government sold 6,848 acres in 1916; 9,006 acres in 1917; and possibly other lands sold under a 1920 Act).

The exploitation of coal lands continued through the 1970's with the cooperation and collaboration of the federal government and coal companies. Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development* 72-3 (1990) ("At the time industry knew more about Indian resources than either the federal government or the tribes did. Though the federal government would explore federal oil and gas lands before scheduling a sale, it did not routinely explore Indian lands before sales, which resulted in lower bids."). The federal government would not allow the tribal government to negotiate on behalf of, or attempt to protect, individual Indian allottees when leasing mineral rights contracts. Ambler, *supra*, at 205-6.

C. Without Tribal Consent, the Army Corps of Engineers Constructed the Garrison Dam, Resulting in the Destruction of 94% of the Tribe's Agricultural Lands, the Submersion of the Agency Headquarters, the Relocation of 325 Families, and Ultimately the Taking of 152,360 Acres

In 1953, the federal government flooded the Fort Berthold Reservation with no regard for the treaties guaranteeing the land and reserving hunting and fishing rights for the tribes. Ambler, *supra,* at 204. The building of the Garrison Dam led to the inundation of more than 150,000 acres of land, and caused irreparable damage to the MHA Nation and its citizens. Roy W. Meyer, The Village Indians of the Upper Missouri 234 (1977) ("The lands that the Fort Berthold people were forced to give up were not just some undesirable tracts assigned them by [the federal] government. . . . The river-valley environment of the Three Tribes had been their home for perhaps more than a millennium. . . . They had developed techniques of adjustment to this environment over a time-span nearly inconceivable to white Americans. Moreover, they had emotional and religious ties with it that no American descended from Old World immigrants can fully comprehend."); *see also* Ambler, *supra,* at 204-206. Started by the Army Corps of Engineers, by the time the arm of the federal government representing tribal interests

started paying attention, the Corps had spent $28 million on preliminary construction of the Missouri River dams, including the Garrison dam, and had convoys and earth moving equipment on the Fort Berthold Reservation. Michael L. Lawson, *Dammed Indians Revisited: The Continuing History of the Pick-Sloan Plan and the Missouri River Sioux* 45 (2009).

Because the Army Corps of Engineers believed it did not need the consent of the Three Affiliated Tribes to build the dam flooding their reservation, it entered the reservation and started surveying and building the dam without the knowledge or consent of the Tribes. S. Rep. No. 103-250 at 2 (1991); *see also* Lawson, *supra,* at 52; U.S. Senate Committee on Interior and Insular Affairs Hearing on S. 1830 and 2424 and to Hear Claims to Mineral Rights by Three Affiliated Tribes of North Dakota, 82nd Cong., 2nd sess. at 11 (April 9, 1952) (hereinafter Sen. Hearing) (Senator Ecton, "And I made the statement, I believe, at that time, that I disapproved of going ahead and building dams on Indian lands and then forcing them to move out and take subsequent adjustments and remunerations, that before these dams were built, there should be a settlement with the Indians ahead of time. . . .").

The project forced three hundred and twenty-five families, representing 80 percent of the total tribal membership, to move out of their ancestral, treaty-guaranteed homes. S. Rep. No. 102-250 at 2 (1991). Of the land flooded, 94 percent of it was considered prime agriculture land. S. Rep. 102-250 at 2. The inundation disturbed cemeteries, Sen. Hearing, *supra*, at 12, and destroyed an Indian Health Services hospital that was not replaced by the federal government until 2004. S. Rep. 102-250 at 3; Pub. L. 108-437, 118 Stat. 2623 (2004). The resulting reservoir destroyed tribal lumber resources, and easily mined coal and lignite. Sen. Hearing at 51; Ambler, *supra,* at 204. The MHA Nation was unable to reserve mineral interests, S. Rep. 102-255 at 3-4, nor was the Nation allowed any water rights regarding the reservoir, nor a block of reserved electricity generated by the dam, Lawson, *supra,* at 55. Individual allottees whose land was taken by the government were not paid directly, but instead the government essentially paid itself by putting the money into individual Indian money accounts controlled by the federal government. Pub. L. 81-437, §7, 63 Stat. 1026 (1949).

The Bureau of Indian Affairs was aware of the plan but did not inform the Tribes of the dam until it was essentially too late. S. Rep. 102-250 at 2. After the fact, the Army Corps negotiated a settlement agreement with the Nation, but when presented to Congress, the bill that would become Public Law 81-437 did not include any of the rights reserved by the Tribes in the negotiation, in further violation of the treaties. Sen. Hearing at 57-8, 68-9; *see* Meyer, *Fort Berthold supra*, 263 ("When it was presented to the Senate . . . on July 1, everything in the original contract except the legal description of the taking area, and all twelve sections of the House version had been struck out."); *id.* at 255-64 (providing a complete legislative history of the bill). A major user of the reservoir was a power company. Ambler, *supra* 211-2. The Commissioner of Indian Affairs opposed laws attempting to compensate the Nation in 1952, Sen. Hearing at 69-70, claiming all recompense should be considered after the inundation. In 1992, Congress passed Public Law 102-575 to compensate the Nation for the taking. The Bureau of Indian Affairs (and the Army Corps) still opposed the law. Sen. Rep. 102-250 at 6-7.

The United States' behavior toward the Indian people of the Fort Berthold Reservation during the 19th and 20th centuries is sadly consistent with federal view that tribal governments and reservation Indians were "wards" of the federal "guardian," a view now wholly rejected by Congress and the Supreme Court.

II. The Procedural Posture of the Government in this Matter Violates the General Trust Relationship between the United States and the Plaintiffs, Who are American Indians to Whom the Government Owes a Trust Duty.

The federal government's position in this case is inconsistent with its general trust obligation to Indians and Indian tribes, and this court should not reward the United States for attempting to annul the sacred trust relationship with American Indians and Indian tribes. The United States' efforts in this matter to prevent the plaintiffs from seeking relief from third party tortfeasors directly violate the government's general trust responsibility to American Indians and those efforts to shut the courthouse doors should not be rewarded by this court.

The Supreme Court long has acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

See also United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011) ("We do not question 'the undisputed existence of a general trust relationship between the United States and the Indian people.'") (quoting *Mitchell*); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (articulating "the distinctive obligation of a trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people").

While this circuit has suggested that the general trust obligation may mandate federal action to affirmatively act on behalf of tribal interest, *e.g.*, *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989) ("Our holding that [the Bureau of Indian Affairs and Indian Health Service] have a duty to clean up the dumps is buttressed by the existence of the general trust relationship between these agencies and the Tribe."), we do not intend to argue the general trust obligation is enforceable in this action. The government after all is not a party here. Instead, we argue that this court should recognize that the government's action recalls an atavistic period of federal Indian affairs where the government treated Indian tribes as a "ward" to the federal "guardian," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)

(Marshall, C.J., opinion), a position inconsistent with modern federal Indian law and policy. As such, the FRCP 19 equity analysis strongly favors the plaintiffs in this matter.

The origins of Congress's trust responsibility—Indian treaties and the protection promised by the federal government to American Indians and Indian tribes—support a trust model of Indian affairs, or what Chief Justice Marshall referred to as a "solemn compact[]." *Worcester v. Georgia*, 31 U.S. 515, 581 (1832) ("But it would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.").

The federal courts refused to review Congressional and Executive branch actions throughout the 19th and 20th centuries, leaving American Indians and Indian tribes under the vise of federal control. The disastrous outcomes of unreviewable federal power should have been predictable. Congress and the Executive branch broke up many Indian reservations utilizing allotment plans that the Supreme Court refused to review on the grounds that the federal government was merely acting as "guardian." *See Lone Wolf v. Hitchcock*, 187 U.S. 553,

565 (1903) ("Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."). By the mid-20th century, the Supreme Court held that the federal government as guardian was authorized to confiscate millions of dollars of assets classified by the government as aboriginal title without being required to pay just compensation under the Fifth Amendment. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290-91 (1955). During the same period, Felix S. Cohen wrote that the federal government routinely engaged in "disposing of Indian tribal lands without the consent of the Indians;" "compel[ing] … individual Indians … to pay for [tribal] property when they use it;" and forcing Indian allotment owners to "surrender power over these lands to the agency superintendent by signing a power of attorney." Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 Yale L. J. 348, 364, 365, 366 (1953). Cohen concluded, "In the eyes of many contemporary Indian Bureau administrators, Indian tribal property belongs to the Indian Bureau. . . ." *Id.* at 365.

Congress began its retreat from the guardianship model in 1934 when it enacted the Indian Reorganization Act, June 18, 1934. 25 U.S.C. § 461 et seq. The Act, for the first time in Indian affairs history, required tribal consent to the statute's operating provisions. 25 U.S.C. § 476(a)(1). While the United States continued to vacillate on Indian affairs through the middle part of the 20th century, by 1975 Congress recognized "the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities. . . ." 25 U.S.C. § 450a(a). *See also* 25 U.S.C. § 450a(b) ("The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy. . . ."). Congress repeatedly reaffirms the federal trust responsibility to Indian nations and individual Indians:

- Tribal Self-Governance Act, 25 U.S.C. § 458ff(b) ("Nothing in this subchapter shall be construed to diminish the Federal trust

responsibility to Indian tribes, individual Indians, or Indians with trust allotments.");

- National Indian Forest Resources Management Act, 25 U.S.C. § 3120 ("Nothing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands, or any legal obligation or remedy resulting therefrom.");

- American Indian Agricultural Resource Management Act, 25 U.S.C. § 3742 ("Nothing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian trust lands or natural resources, or any legal obligation or remedy resulting therefrom.");

- American Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 4041(1)-(3) ("The purposes of this subchapter are . . . (1) to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians . . . ; (2) to ensure . . . that reforms of the policies, practices, procedures and systems of the Bureau, Minerals Management Service, and Bureau of Land Management, which carry out such trust

responsibilities, are effective, consistent, and integrated; and (3) to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians.");

- Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101(3)-(4) ("The Congress finds that . . . (3) the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people; (4) the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition. . . .").

Similarly, the Supreme Court now acknowledges that the federal-tribal relationship is akin to a trust, in line with several Congressional waivers of immunity to allow tribal interests to raise breach of trust

claims. In *United States v. Sioux Nation*, 448 U.S. 371 (1980), the Supreme Court distinguished *Lone Wolf* in Indian property takings cases because Congress had expressly waived federal immunity from suit to allow the Sioux Nation to sue to recover damages for the taking of the Black Hills. *Sioux Nation*, 448 U.S. at 414 ("Unlike *Lone Wolf*, this case is one in which the Sioux have sought redress from Congress, and the Legislative Branch has responded by referring the matter to the courts for resolution. . . . Where Congress waives the Government's sovereign immunity, and expressly directs the courts to resolve a taking claim on the merits, there would appear to be far less reason to apply *Lone Wolf*'s principles of deference.").

The Court in *Sioux Nation* held that Congress's general trust duty is enhanced by Constitutional mandates in the Fifth Amendment. *See Sioux Nation*, 448 U.S. at 415 ("[W]here a taking [of vested tribal property] is alleged, a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that 'this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations

inhering in . . . a guardianship and to pertinent constitutional restrictions.'").

Since the 1970s, courts are consistent in recognizing the United States' obligations to Indians and tribes are more in the nature of a trust than a guardianship. *E.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 n.3 (2003) ("We have recognized a general trust relationship since 1831.") (emphasis added); *Wolfchild v. United States*, 559 F.3d 1228, 1248 (Fed. Cir. 2009) ("To be sure, the Interior Department has consistently recognized that in the original legislation Congress intended for the appropriated funds to be expended for the benefit of the 1886 Mdewakantons. Consistent with the principle that there is a 'general trust relationship between the United States and the Indian people,' … Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants, even though the 1886 Mdewakantons were not a tribe of Indians, but rather were viewed as a group of individuals who had severed their tribal relations and were in need of assistance."), *cert. denied*, 130 S. Ct. 2090 (2010); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d

1339, 1348 (Fed. Cir. 2004) ("In this case, the United States is the trustee for the Tribes, having assumed the relationship of trustee-beneficiary pursuant to treaties and statutes. That a general trustee relationship exists between the Government and tribal nations has long been recognized by the Supreme Court."), *cert. denied*, 544 U.S. 973 (2005); *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001) ("The trust nature of the federal government's . . . responsibilities was recognized long before passage of the 1994 Act."); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 794 (9th Cir. 1986) ("Taking into account these specific, congressionally-imposed duties, and the long-standing, general trust relationship between the government and the Indians, we conclude that a fiduciary relationship exists in the management of tribal mineral resources."); *Montana Bank of Circle, N.A. v. United States*, 7 Ct. Cl. 601 613 (1985) ("There is a general trust relationship that exists between the United States and the [Fort Belknap Indian Community], as a recognized group of Indians.").

The United States' obligations in this matter are to "assist the tribe in its efforts to protect its oil and gas resources from any unauthorized injury," Cross, *supra*, at 550 (citing *Seminole Nation*, 316 U.S. at 296-97), not to "protect its joint tortfeasors from ever having to face justice for their wrongful conduct," Opening Brief of Plaintiffs-Appellants 44. The government's efforts to block this suit under FRCP 19, Amicus Brief of the United States in Partial Support of Defendants' Motions to Dismiss, Two Shields v. Wilkinson, No. 4:12-cv-160-DLH-CSM (D.N.D.) (Doc. No. 78-1), should not be rewarded given the historic, sacred, moral, and legal obligations the United States has undertaken on behalf of the plaintiffs.

CONCLUSION

Amicus respectfully urge this Court to reverse the lower court's summary dismissal of the case.

Dated February 21, 2014 Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 21st of February, 2014, a true and correct copy of the foregoing was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system The undersigned also certifies that the following participant in this case is a registered CM/ECF user and that service of the Brief will be accomplished by the CM/ECF System:

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I further certify that the following participant is not a registered CM/ECF user. On February 21, 2014, one copy of the Amicus Brief of the Indigenous Law and Policy Center was sent via first-class mail, postage prepaid to the following:

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Dated: February 21, 2014

CERTIFICATE OF COMPLIANCE

I hereby certify on this 21st day of February 2014 that the accompanying brief of *amicus curiae* complies with the type-volume limitation specified in Federal Rule of Appellate Procedure 32. Specifically, according to the word and line count of Word, which was used to prepare this brief, this brief contains 5,004 words and 489 lines, excluding the table of contents and the table of authorities. In addition, this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32 and the type style requirements because it has been prepared in proportionally spaced typeface using Word in 14 point font Century.

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