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Reflections of a Contemporary Minnesota Dakota Lawyer: Dakota Identity and its Impacts in 1862 and 2012

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**REFLECTIONS OF A CONTEMPORARY MINNESOTA
DAKOTA LAWYER: DAKOTA IDENTITY AND ITS
IMPACTS IN 1862 AND 2012**

Lenor A. Scheffler[†]

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I. INTRODUCTION

This article has three purposes. First, it permits a Dakota voice to speak about Dakota events and issues in 1862 and 2012, including observations and assessments based on life experience. Second, it illustrates that a Dakota person is not simply another Indian, and the Dakota people are not simply another Indian tribe.¹ The reader will be educated about the complexity of the Dakota in 1862 and Indians and tribes generally in 2012, including tribal membership and governance.

In 1862, we were not simply victims of the policies of the U.S. government and its system of Indian agents and traders. Rather, we were human beings whose life-ways, culture, kinship system (i.e., how we recognize and interact with each other), and spirituality were under such tremendous pressure that individuals and families had to make difficult and traumatic choices for the survival of their families and the Dakota Oyate.² In 2012, Dakota families across the northern plains and Canada also face similar challenges to their life-ways, driving them to participate in litigation with hopes that their lives might change for the better.

Finally, this article raises for consideration the subject of reconciliation and healing among our Dakota Oyate, which may be needed as much as reconciliation and healing with dominant society over these events in Minnesota’s history.

Part II of this article reviews the federal government’s historical involvement with the Dakota, its ultimate regulation of tribal relations, how these relationships created certain “categories” of Indians, and the impact these categories have had on the Dakota

1. The author uses the word Indian throughout the article as a term of art in the practice of Federal Indian law and Tribal law. Additionally, the U.S. government refers to the Sioux in the various treaties. Sioux consisted of the various bands of Dakota involved in the 1862 conflict. The treaties reflect the various Dakota Band names, and the spelling of the band names changed over the course of the various treaties as well. Dakota or Dakotah is the name of the people in their language, and the author will use Dakota in this article.

2. Oyate is the Dakota word for a people, nation, tribe, or band. STEPHEN RETURN RIGGS, A DAKOTA-ENGLISH DICTIONARY 397 (James Owen Dorsey ed., 1890).

since 1862.³ The U.S. government's administration of Indian affairs and interaction with the Dakota kinship system added significantly to the 1862 uprising. Part III discusses how intentional and unintentional acts strained the relationships between the U.S. government, its Indian agents, Indian traders, and the Dakota.⁴ These strained relationships contributed to the horrific events of 1862. Part IV concludes with my perspective on how these relationships have or have not changed over time, what Dakota categories or "membership" means today, and the need for reconciliation and healing among the Dakota Oyate.⁵

II. HISTORICAL BACKGROUND OF U.S.-INDIAN INTERACTIONS AND TRIBAL MEMBERSHIP: ADMINISTRATION OF INDIAN AFFAIRS IN THE UNITED STATES

Shortly after the American Revolution, the new Congress enacted legislation establishing the Superintendent of Indian Affairs and provided mechanisms by which Congress could administer Indian affairs. Among these authorities were the powers to make war, govern territories, ratify treaties, and spend money.⁶ From the late 1700s to roughly 1834, Congress passed a series of acts known as the Trade and Intercourse Acts.⁷ These acts largely sought to keep the peace between Indians and white settlers rather than administer and regulate the Indians themselves.⁸ However, the Trade and Intercourse Acts also "establish[ed] government trading houses under authority of the President."⁹ Previously, private enterprises had controlled the regulation of trade, other than licensing.¹⁰ In the Act of 1796, Congress authorized the President to create and operate trading posts in Indian Territory.¹¹ The purpose of these trading posts was to sell goods to the Indians at cost rather than for profit.¹² This system of government trading houses was administered by an agent ("factor")

3. See *infra* Part II.

4. See *infra* Part III.

5. See *infra* Part IV.

6. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[2], at 37 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN'S HANDBOOK].

7. *Id.* § 1.03[2], at 37-41; § 1.03[4][b], at 56.

8. *Id.* § 1.03[2], at 38.

9. *Id.* § 1.03[2], at 40.

10. *Id.*

11. *Id.*

12. *Id.*

of the U.S. government.¹³ By 1822, however, the “factor system” was abandoned and the government trading posts closed.¹⁴ The private sector regained control of the Indian trade and federal officials were in charge of regulating the traders.¹⁵

Over the ensuing decades, the federal government continued to alter policy regarding the administration of Indian affairs. In 1824, without congressional authority, Secretary of War John C. Calhoun created the Bureau of Indian Affairs to supervise federal Indian matters.¹⁶ This new office, however, lacked formal control over federal Indian agents.¹⁷ In 1832, Congress authorized the appointment of a Commissioner of Indian Affairs to supervise “all matters arising out of Indian relations.”¹⁸ In 1834, Congress created a more formal structure by authorizing the appointment of superintendents of Indian Affairs to whom Indian agents and subagents reported.¹⁹ The superintendents reported to the Commissioner of Indian Affairs, who in turn reported to the Secretary of War and, ultimately, the President of the United States.²⁰ In addition, the 1834 Act created a formal Indian preference system, providing that “in all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.”²¹ Because of their close proximity to the tribes, Indian agents, whether Indian themselves or not, became a vital source for determining who was part of the Indian community.

In 1849, Congress again changed the structure of federal administration of Indian affairs by creating the Department of the Interior and the position of the Secretary of the Interior.²² The Secretary’s role included the exercise of supervisory and appellate powers previously exercised by the Secretary of War “in relation to all the acts of the Commissioner of Indian Affairs.”²³

13. *Id.*

14. *Id.* § 1.03[4][b], at 55.

15. *Id.* § 1.03[4][b], at 56.

16. *Id.*

17. *Id.*

18. *Id.* (quoting Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564, 564).

19. *Id.*

20. *Id.*

21. *Id.* (quoting Act of June 30, 1834, ch. 162, § 9, 4 Stat. 735, 737).

22. *Id.* § 1.03[4][b], at 58 (quoting Act of Mar. 3, 1849, ch. 108, § 5, 9 Stat. 395, 395).

23. *Id.*

A. Dakota Treaties

Along with changes to the administration of Indian affairs, congressional policy concerning Indian treaties changed over time. Historically, the federal government often exchanged goods and services for vast amounts of Indian land.²⁴ These goods and services included cattle, hogs, iron, steel, wagons, plows, farming tools, medicine, and other health and educational services.²⁵ For example, the 1830 Treaty with the Sauk and Foxes provided domestic animals, a blacksmith, and other agricultural instruments.²⁶ Similarly, the 1851 Treaty with the Sioux provided manual labor, schools, mills, blacksmith shops, farms, and \$6000 for educational purposes.²⁷

Over time, the federal government increasingly relied on the payment of money and annuities in exchange for land.²⁸ For many years, treaties with the Indians “required the federal government to pay tribes out of the proceeds from the disposition of tribal lands.”²⁹ However, in 1837, Congress determined that proceeds from the sale of Indian lands would be deposited with the U.S. Treasury.³⁰ As a result, the tribes themselves were responsible for “an ever-increasing share of the costs of Indian services” through funds derived from the sale of Indian lands.³¹

Changes in Indian treaty provisions also affected the Sioux tribes. For example, both article 2 of the 1837 Treaty and article 4 of the 1851 Treaty clearly provide for annuities to be disbursed as cash payments or used for goods.³² The 1837 Treaty with the Sioux, which ceded land east of the Mississippi River and the islands in the Mississippi, provided that \$300,000 was to be invested and that the President of the United States would direct annual payments to the tribe.³³ The same treaty provided that the relatives and friends

24. *Id.* § 1.03[1], at 29.

25. *Id.*

26. Treaty with the Sauk and Foxes, etc. art. 4, July 15, 1830, 7 Stat. 328.

27. Treaty with the Sioux—Mdewakanton and Wahpakoota Bands, art. 4, Aug. 5, 1851, 10 Stat. 954.

28. COHEN’S HANDBOOK, *supra* note 6, § 1.03[1], at 29.

29. *Id.* § 1.03[4][b], at 59.

30. *Id.*

31. *Id.*

32. Treaty with the Sioux—Mdewakanton and Wahpakoota Bands, art. 4, Aug. 5, 1851, 10 Stat. 954; Treaty with the Sioux, U.S.-Sioux, art. 2, Sept. 29, 1837, 7 Stat. 538.

33. Treaty with the Sioux, U.S.-Sioux, art. 1–2, Sept. 29, 1837, 7 Stat. 538.

(who were no less than one-quarter Sioux) of the chiefs and braves who signed the Treaty were to receive \$110,000 by the authority of the tribe.³⁴ In contrast, the 1830 Treaty mentioned payments and annuities, but did not provide that investments or trusts would be held by the United States.³⁵ Thus, the treaties linked the disbursement of funds to blood quantum and distinguished who was Sioux “enough” to receive actual monetary benefit.

The 1858 Treaty with the Sioux required the bands to move to the south or southwestern side of the Minnesota River and provided that eighty acres would be provided to each family or single person over the age of twenty-one.³⁶ Further, the treaty required that the cost of surveying the allotments was to be paid from Indian money held by the United States.³⁷ The 1858 Treaty—in contrast to the 1830, 1837, and 1851 Treaties—put more responsibility upon the Indians to, in effect, assimilate. The Indians were expected to take advantage of the treaty provisions by engaging in farming, obtaining an education, and becoming Christian—that is, become more like a white person.

Additionally, the 1858 Treaty determined who could be on the lands of these bands. Specifically, residence was limited to members of the bands that were “ascertained and defined under such regulations as [prescribed by] the Secretary of the Interior,” those duly licensed to trade with the bands, those employed for the benefit of the bands, and family members of such persons.³⁸ Interestingly, article 4 grants the power to “ascertain and define” band membership to the Secretary of the Interior rather than to the bands themselves, who of course determine membership today.³⁹

B. *U.S. Government Methods to Identify Indians*

1. *Introduction*

In order for European sovereigns, and later the U.S. government, to treat with the indigenous peoples of this hemisphere for land and resources, they needed to know with

34. *Id.*

35. *See* Treaty with the Sauk and Foxes, etc. art. 4, July 15, 1830, 7 Stat. 328.

36. Treaty with the Sioux, art. 1, June 19, 1858, 12 Stat. 1031.

37. *Id.*

38. *Id.* art. 4.

39. *Id.*

whom they could negotiate and who could sign their documents. Their ignorance of tribal governance structure fostered incorrect assumptions about who had the authority to negotiate and sign documents; often, signatories had no such authority. The Dakota have a kinship system that requires one to know one's relatives and where they come from, which ensures the survival of the people. Specifically, if you know who your relatives are as a Dakota, you know who you have obligations to, responsibility for, and upon whom you may rely if you were in need or facing a crisis. This is true today, and I have been taught that it was true 150 years ago as well. Whether identifications of individuals or a group of people are made out of ignorance or out of a cultural system, there are impacts and consequences of such identifications.

In the United States, only Indian people are required to have a pedigree—that is, they know their Indian blood quantum. As a Dakota, I need to know my family lineage and, for various purposes in my life, I have had to show my familial lineage from as far back as 1886. For example, I have a Bureau of Indian Affairs number that identifies me as Indian for such things as educational programs when I applied for a tuition grant in college. I also have a tribal membership card issued by my tribe, evidencing my membership in the Lower Sioux Indian Community in Minnesota, which is the federally recognized name of the tribe. As I will discuss in this article, one's status as a Dakota Indian in 1862 meant something more than simply a category; it provided certain privileges and benefits to the Indian person. This continues to be true now in 2012. Defining who we are as Dakota, whether by formal constitution, census roll, or annuity roll, does not provide the entire picture of who we were in 1862 or who we are in 2012. We know who our people are notwithstanding these formally recognized government methods.

2. *Annuity Payments, Annuity Rolls, and Census Rolls*

In 1846, Congress passed a statute calling for an annual census of the Indians of the United States.⁴⁰ The intent of the census was to document the “history, current conditions, and prospects of the Indians.”⁴¹

40. Act of June 27, 1846, ch. 34, § 1, 9 Stat. 20, 34 (1846); S. JOURNAL, 29th Cong., 1st Sess. 491 (1846); H.R. JOURNAL, 29th Cong., 1st Sess. 1010 (1846).

41. Bethany R. Berger, “*Power over This Unfortunate Race*”: *Race, Politics and*

[I]t shall be the duty of the different agents and sub-agents to take a census, and to obtain such other statistical information of the several tribes of Indians among whom they respectively reside, as may be required by the Secretary of War, and in such form as he shall prescribe.⁴²

The annuity rolls listed our Dakota people, which meant that the identified people would receive annuity payments and other benefits from the U.S. government based upon various treaties. The early annuity rolls from just before 1862 simply listed the location where the roll was taken, an Indian name, and an “X” next to the name denoting that he had received his payment.⁴³ Those creating the rolls—including War Department officials, superintendents of Indian agencies, or Indian agents or sub-agents from the Commissioner of Indian Affairs or the Department of the Interior—did not necessarily understand the cultural aspects of identifying tribal people. Those who made the rolls did not always understand the Indian names or kinship system, or distinguish who was actually a member or affiliated with which tribe or village. Accordingly, the accuracy of these rolls and later census rolls have continued to be under a cloud of suspicion. The Dakota knew who their relatives and tribal members were regardless of whomever the U.S. government rolls identified as Dakota.

In 1884, Congress passed additional legislation requiring Indian superintendents and agents to take a census of the Indians and file their report with the Commissioner of Indian Affairs.⁴⁴ These census rolls listed the English or Indian names and: (a) a roll number, which may have been an allotment roll number, an annuity roll number, or a number assigned by the superintendent or agent; (b) age or date of birth; (c) sex; (d) head of the family; and (e) relationship to the head of the family.⁴⁵ In the 1930s, the

Indian Law in United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2010 (2004) (quoting Act of June 27, 1846, ch. 34, 9 Stat. 20).

42. Act of June 27, 1846, ch. 34, 9 Stat. at 34.

43. I have personally viewed these early rolls in the National Archives in Washington, D.C. The Dakota names were handwritten in beautiful script, and it was a moving experience to view the documents. I researched the documents to answer enrollment questions for my tribal employer. Upon my return to Minnesota, I recall wanting all tribal members to view such documents to see and feel a connection to our relatives who have gone before us.

44. Act of July 4, 1884, ch. 180, § 9, 23 Stat. 76, 98; *Indian Census Rolls, 1885–1940*, NATIONAL ARCHIVES, <http://www.archives.gov/research/census/native-americans/1885-1940.html> (last updated Mar. 25, 2008).

45. *Indian Census Rolls, 1885–1940*, *supra* note 44.

degree of Indian blood, marital status, and place of residence were added to the forms.⁴⁶ Supplemental rolls were also created that recorded births and deaths between the annual censuses.⁴⁷ The superintendents and agents were accustomed to allotment and annuity rolls over the years because they had to make land allotments and distribute goods and money.⁴⁸ Being human, the government personnel made errors periodically.

I have reviewed census rolls of our Dakota from at least 1886 to the 1930s and found the records of my family members and those of other families in our Minnesota Dakota communities. Various family oral histories document the flaws in the census rolls. For example, the roll may have listed someone as a half-blood when everyone knew each of her parents to be full-blood. This mistake would impact subsequent generations when descendants had to show sufficient blood quantum for membership. Or, someone did not appear on a census roll because she was not in the area when the census was taken. Her descendants may not then have qualified for membership because, even though they were known to be Dakota individuals, they could not trace their lineage. On its website, the National Archives provides notice that the census rolls have flaws as to accuracy due in part to the various historical directives to the superintendents and agents on Indian reservations and the census-takers' ability to follow the directives of their superiors about how to complete the census forms.⁴⁹

With the passage of the Indian Reorganization Act of 1934 ("IRA")⁵⁰ came formal constitutions for Indian tribes and formal membership criteria, which routinely referenced some type of government-created roll. The Constitution of the Lower Sioux Indian Community in Minnesota is typical in this respect:

(a) The bona fide Indian residents of the Lower Sioux Reservation whose names appear on, or are entitled to appear on the official census roll of the Minnesota Mdewakanton Sioux Indians as of April 1, 1934, with the official supplement thereto of January 1, 1935.

(b) The bona fide Indian residents of the Lower Sioux Reservation whose names appear on various other Sioux

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–76, 478–79 (2006 & Supp. 2011)).

Indian rolls, provided that such persons transfer their enrollment to the Minnesota Sioux rolls, with the approval of the Secretary of the Interior.

(c) All children of any member who is a resident of the Lower Sioux Reservation at the time of the birth of said children.⁵¹

My mother was a member of the Lower Sioux Indian Community and resided on the reservation when I was born. I can trace my lineage back to at least 1886 using government-created rolls. Family is important in Dakota culture, and we are expected to know who our relatives are and where we come from. I have been taught that I must be able to recite my matriarchal relatives as far back as I am able, which is three generations.

C. *Tribal Government Structure and Membership Criteria Since 1862*

1. *Tribal Constitutions*

Since the United States regarded any form of non-representative government as inferior, tribes were pressured to transform their traditional tribal governments.⁵² These pressures led tribes to adopt tribal constitutions, which were meant to reflect dominant society. A number of federal employees were directed to draft a model tribal constitution pursuant to the IRA. Felix Cohen was one of those drafters. According to Mr. Cohen,

[O]ne can say that a constitution is the formal structure of a reality that exists in human hearts. An Indian constitution[, therefore,] will exist as long as there remains in human hearts a community of interdependence, of common interests, aspirations, hopes, and fears, in realms of art and politics, work and play.⁵³

Traditionally, these Indian constitutions provided members with “certain rights of self-government, frequently rights of communal land ownership, often rights under special treaties or agreements made between their tribe and the Federal Government,

51. CONST. OF THE LOWER SIOUX INDIAN CMTY. IN MINN. art. 3, § 1 (as amended through Sept. 19, 2007), *available at* <http://www.lowersioux.com/pdffiles/Lower%20Sioux%20Indian%20Community%20Constitution.pdf>.

52. COHEN’S HANDBOOK, *supra* note 6, § 4.04[2], at 251.

53. FELIX S. COHEN, *How Long Will Indian Constitutions Last?*, in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 222, 229 (Lucy Kramer Cohen ed., 1960).

or under tribal constitutions and charters which have been approved by the Federal Government.”⁵⁴ However, there were also Indians and federal government employees who sought reform of these Indian constitutions by advocating for increased respect for native ways of life.⁵⁵ In response, Congress passed legislation “aimed at reestablishing tribal governance, reconstituting tribal land bases, and revitalizing tribal economies and cultures.”⁵⁶ The tribal constitutions adopted pursuant to the 1934 IRA were not and are not culturally appropriate for tribes. Since gaming and other economic endeavors have required more interactions with non-Indians and non-Indian businesses over the years, tribal economies have required a legal framework conducive to businesses in Indian country, thus giving tribal constitutions and tribal laws more relevancy and significance.

2. *Tribal Enrollment Laws: Membership/Citizenship*

Today, each individual tribe is a distinct political community, and therefore “has the power to determine its own tribal membership.”⁵⁷ Tribes determine membership in several ways, including written laws, traditional customs, intertribal agreement, treaties with the United States, or executive orders.⁵⁸

The Prairie Island Indian Community and the Lower Sioux Indian Community, both in Minnesota, have almost identical membership articles as set out in the preceding paragraphs.⁵⁹ These constitutions are based on the IRA model constitution and were ratified in the late 1930s. The ratification sections at the end of the constitutions include the dates on which the tribal membership voted and the Secretary of the Interior signed the document. The files of the government staff who drafted these model constitutions—some of which were translated into tribal languages—are in the National Archives.

54. FELIX S. COHEN, *Indians are Citizens!*, in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN, *supra* note 53, at 258.

55. COHEN’S HANDBOOK, *supra* note 6, § 4.04[2], at 252.

56. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–76, 478–79 (2006 & Supp. 2011)); COHEN’S HANDBOOK, *supra* note 6, § 4.04[3][a][i], at 252.

57. COHEN’S HANDBOOK, *supra* note 6, § 4.01[2][a], at 212 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978)).

58. *Id.*

59. See *supra* text accompanying note 51.

In the 1860s, Dakota were frequently identified by other terms. We know from various sources that, during 1862, the Dakota were referred to as mission Indians, farmer Indians, blanket Indians, half-breeds, and cut hairs.⁶⁰ From these names, one can see that some Dakota tried to assimilate or had generally assimilated by adopting the dominant white cultural accoutrements, including clothing, short hair, wooden housing, English language, and Christianity. Both full-blood and mixed-blood Dakota made these choices. I surmise some adopted changes with sincerity, while others did so for survival. Some Dakota tried to keep their cultural ways of life despite the pressure to assimilate. The benefits and privileges accorded to individual Dakota depended on one's degree of assimilation and the extent to which Dakota ways of life were maintained. As will be discussed later in this article, those who appeared to assimilate were favored by the Indian agents and had increased access to food and other materials.

Since half-breed Indians were compliant with our Dakota kinship system during the Dakota Treaty-making period from 1830 to 1858, they were remembered and their interests were looked after by their chiefs and head men. Their specific motives we do not know. However, at that time in our Dakota history, our kinship system was strong and would have guided such actions. For example:

The Sioux Bands in Council having earnestly solicited that they might have permission to bestow upon the half breeds of their Nation, the tract of land within the following limits, to wit: Beginning at a place called the barn, below and near the village of the Red Wing Chief, and running back fifteen miles; thence in a parallel line with Lake Pepin and the Mississippi, about thirty-two miles to a point opposite Beef or O-Boeuf River; thence fifteen miles to the Grand Encampment opposite the River aforesaid; The United States agree to suffer said half Breeds to occupy said tract of country; they holding by the

60. See, e.g., *The Indian Massacres and War of 1862*, HARPER'S NEW MONTHLY MAG., June 1863, at 1, 12, 20 ("Groups of the Farmer Indians would collect round the door or in the house and talk over what they had heard that the Blanket Indians had done at the Lower Agency A few among them—as the Mission and some of the Farmer Indians—were indeed innocent, and had even themselves suffered a degree of persecution for not having assisted in the outbreak.").

same title, and in the same manner that other Indian Titles are held.⁶¹

An 1854 report from the U.S. House of Representatives Committee on Indian Affairs addressed the issues resulting from the failure to carry out the preceding provision. The 300,000 acres set aside for the half-breeds included some of the most fertile land in Minnesota.⁶² The report further defined “half-breed”:

[A]s applied by some to them, [it] is a misnomer, for it was intended to include all those having an admixture of *white* and Indian blood in their veins, in whatsoever degree.

The actual title of those persons to the reservation in question is that of Indians, although many of them have a preponderance of white blood. The title of the Indians must be considered with reference to their mode or habit of life.

....

... [H]alf-breeds . . . designate that class of population which are of *Indian extraction*.⁶³

The report explains that this provision was not carried out for years despite efforts and advocacy from across the country that half-breeds should be provided for under the Treaty provisions. Although settlers began to encroach on the area known as the Lake Pepin reservation, the encroachment was not sufficient inducement to correct or address the situation.

Article Two of the 1837 Treaty with the Sioux provided that the relatives and friends, who had not less than one-fourth Sioux blood, of the chiefs and braves who signed the Treaty would be paid \$110,000 by proper authority of the tribe upon principles to be determined by Treaty signatories and the War Department.⁶⁴ The chiefs and braves knew these friends and relatives even though they had to identify them along with the War Department.

As part of the adoption of the IRA Constitutions, our Dakota tribes now have the authority to define citizenship. In 1862, some assimilated Dakota had access to goods and annuities, while others who followed their traditional ways of life did not. Today, Dakota

61. Treaty with the Sauk and Foxes, etc. art. 9, July 15, 1830, 7 Stat. 328.

62. H.R. REP. NO. 33-138, at 1 (1854).

63. *Id.* at 2, 6 (internal quotation marks omitted).

64. Treaty with the Sioux—Mdewakanton and Wahpakoota Bands, art. 2, Aug. 5, 1851, 10 Stat. 954.

communities in Minnesota can define their citizenship and determine for themselves who should have access to certain benefits and privileges. Specifically, membership privileges in my tribe include: “the privilege of voting . . . , the privilege of running for Community Council positions, the privilege of participating in Community programs, and the privilege of receiving per capita distributions from Community business enterprises”⁶⁵

I am an enrolled member of my tribe, but until I establish residency on the reservation I have no membership benefits or privileges. As a lawyer who represents tribes, I will defend the sovereign right of my tribe to make such a requirement or decision about membership criteria. However, I also see how such provisions divide our Dakota Oyate between those who live on the reservation and those who do not. These contemporary membership criteria can and do impact the kinship system today by dividing members into the haves and have-nots in our communities. As will be discussed later in the article, prior to the 1862 events, the kinship system provided certainties about unmet obligations and responsibilities.

The Dakota primarily depended on their relatives for protection and defense. The Dakota relied chiefly on those who were closely related to them, but they were also careful to acknowledge and respect their remotely related kindred. According to Samuel Pond:

They expected their brothers, cousins, uncles, and nephews, to stand by them in case of necessity, and this expectation was not often disappointed. Whatever differences these relatives might have among themselves, they were ready to support each other in case of need against all others. It was well understood that one who had many and powerful relatives, however weak he might be himself, could not be injured or insulted with impunity.

The Dakota method of reckoning kindred differs from ours Many who are called by us uncles and aunts, are called by them fathers and mothers; so that many who are cousins with us are brothers and sisters with them, and

65. Lower Sioux Indian Community Enrollment and Membership Privilege Ordinance § 4.2, Res. No. 10-143 (Sept. 8, 2010).

some whom we call nephews and nieces they call sons and daughters.⁶⁶

Today, our Dakota kinship survives, and I know my family relations as Samuel Pond described so many years ago. In my observation, the fortunes of gaming revenues have damaged or dramatically changed the kinship system in my tribe and in others around the country. Communities who had very little and relied on each other now receive per capita payments and focus on protecting the income stream (rather than sharing it) by restricting voting rights and/or access to other tribal general welfare programs. We forget how to be a relative or live among our relatives. Years of oppression and struggle as a minority people in a majority society also contribute to the damage to kinship systems and cultural life-ways. However, in 2012, as in 1862, individuals and families have to make choices for their survival. These choices can be more complex than the receipt of membership privileges and benefits.

III. OTHER FACTORS DISTINGUISHING TREATMENT OF FULL-BLOOD AND MIXED-BLOOD DAKOTA AND STRAINING DAKOTA TRIBAL AND FAMILY RELATIONSHIPS

A. *Economic Relationships*

Early European traders had varied levels of influence in Dakota communities depending on the kinship they developed with the Dakota. According to Gary Clayton Anderson:

Some stayed in Sioux lands only a short time and used kinship as an expedient to economic profit. Others returned again and again, raising families and even educating mixed-blood children in the east. Those who became fixtures and returned each fall with manufactured goods generally found that their influence grew. Understandably, those traders who were less attentive to the responsibilities that kinship bonds engendered, such as assisting relatives and providing them with European-made items, lost status.⁶⁷

66. SAMUEL W. POND, *THE DAKOTA OR SIOUX IN MINNESOTA AS THEY WERE IN 1834*, at 147 (1986).

67. GARY CLAYTON ANDERSON, *KINSMEN OF ANOTHER KIND: DAKOTA-WHITE RELATIONS IN THE UPPER MISSISSIPPI VALLEY, 1650-1862*, at 31 (1997).

At Fort Snelling, the commanding officer acted as a policeman and had a difficult time developing meaningful ties with the Dakota leaders.⁶⁸ The garrison at Fort Snelling had similar difficulties, as the position had limited social contact with the Dakota.⁶⁹ However, by using gifts, a few officers and other men successfully developed relationships with the Dakota and sometimes even took a Dakota wife.⁷⁰ Because an Indian agent remained at the fort for a much longer time than any other soldier, he was better positioned to develop kinship networks among the Dakota villages.⁷¹ A prime example was Indian agent Lawrence Taliaferro, who was an Indian agent at Fort Snelling from 1820 to 1839.⁷²

Through gift-giving, creation of kinship ties, and the employment of mixed-blood assistants, who also had strong bonds with the Sioux, Taliaferro became far and away the most influential government employee on the upper Mississippi. The use of such traditional cultural mechanisms by the agent caused many Sioux to believe the government had a genuine concern for their welfare. By the late 1820s Taliaferro had formed a small but effective sociopolitical faction in the Dakota community, most notably among the bands near the fort, that had striking similarities to those formed by traders decades before.⁷³

Dakota leaders, when negotiating the proposed treaty in 1837, undoubtedly considered the experiences and relationships between the Dakota and white settlers, traders, and leaders in Minnesota.⁷⁴ Many Dakota had come to trust Taliaferro and his advice.⁷⁵ In addition, many mixed-bloods were also in favor of negotiation, especially considering the large tract of land they had received along Lake Pepin in the 1830 accord.⁷⁶ Moreover, many traders supported a treaty because it offered them economic advantages

68. *Id.* at 104.

69. *Id.*

70. *Id.*

71. *Id.*

72. HELEN MCCANN WHITE, GUIDE TO A MICROFILM EDITION OF THE LAWRENCE TALIAFERRO PAPERS 6 (1966), available at <http://www.mnhs.org/library/findaids/m0035.pdf>.

73. ANDERSON, *supra* note 67, at 104.

74. *Id.* at 150.

75. *Id.*

76. *Id.*

and the possibility of recouping lost Indian credits.⁷⁷ Therefore, white kinsmen who had lived with the Dakota for many years had something to gain from the treaty negotiations.⁷⁸ As the negotiations approached, Taliaferro was concerned that traders might attempt to interfere in negotiations with the Mdewakanton.⁷⁹ His concerns were based in part on the fact that American Fur Company agents had acquired his confidential 1836 Treaty proposal.⁸⁰ Based on this information, the traders questioned Taliaferro's failure to include substantial sums for the payment of Indian debts and his recommendation for relatively small annuities.⁸¹ Previous payments made to traders and mixed-bloods set precedents for future negotiations and led these groups to expect payoffs when the government proposed to negotiate a new treaty with the Eastern Sioux.⁸² After the 1837 Treaty, many traders began planning for the next land sale, and many mixed-bloods found government employment as farmers and blacksmiths.⁸³ Because of these experiences, many mixed-bloods became more deeply entwined with the federal government's removal policies.⁸⁴ The U.S. government wanted to move tribal peoples to other areas of the country so non-Indians would have land to settle upon. Even though the mixed-blood community became a politically distinct group, it remained nearly as dependent on the traders and government assistance as the rest of the Dakota.⁸⁵

Henry Sibley also pushed for the sale of the "half-breed" tract.⁸⁶ Sibley's position carried favor with mixed-bloods interested in receiving a lucrative price for the sale of their Lake Pepin lands.⁸⁷ Officials assured the mixed-bloods that their land would be purchased by the government when the title to Sioux lands west of the Mississippi was extinguished.⁸⁸ This provided additional incentive for mixed-bloods to encourage their full-blood relatives to

77. *Id.*

78. *Id.*

79. *Id.* at 152.

80. *Id.*

81. *Id.*

82. *Id.* at 161.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 160–61.

87. *Id.* at 183.

88. *Id.*

sell.⁸⁹ Like other Indians not dependent on the traders, the “nonblanket faction” had little incentive to reinforce kinship ties with traders. This group’s livelihood was primarily based on farming or trading with small St. Paul merchants. Other missionary-trained Indians, who also did some farming, took the same attitude. “Men who were not dependent upon traders often acted in the best interests of their people. Wabasha and Sleepy Eyes clearly fell into this category.”⁹⁰

The increased use of annuities as a form of government payment also influenced social and political forces on the reservations. In the 1840s, government cash payments to individual heads of households affected the chief’s ability to maintain prestige and influence over the tribe.⁹¹ Without government assistance in the form of goods, the chief no longer had the ability to distribute supplies to the individuals of the tribe and therefore could not curry favor and influence with tribal members. The “capita system” of payment directly reduced the chief’s influence over his people. During the 1851 Treaties, “soldiers’ lodges” emerged with the intent of overruling tribal chiefs.⁹² Throughout the 1850s, this pattern continued to change tribal dynamics. Soldiers’ lodges became “select organizations that excluded fictive kin, such as white agents, and they appealed primarily to hunters rather than nonblanket Indians.”⁹³

The new system of economic dependency on the reservations in the 1850s also led to the abuse of marriage customs.⁹⁴ For example, Sibley and Taliaferro both left half-Sioux children behind.⁹⁵ In addition, a new generation of white traders took Sioux wives when they arrived but abandoned them when they returned east.⁹⁶ While Dakota leaders traditionally supported interracial marriage with white men because it brought wealth to the community, the unraveling of these marriage customs began to displease the chiefs.⁹⁷

89. *Id.* at 183–84.

90. *Id.* at 200.

91. *Id.* at 222–23.

92. *Id.* at 223.

93. *Id.*

94. *Id.* at 244–45.

95. *Id.*

96. *Id.*

97. *Id.*

Additional changes came in the spring of 1861 with the arrival of a new agent, Thomas J. Galbraith. Galbraith had extensive plans to enlist more native men in the farming program.⁹⁸ He promised more farming implements and advocated a policy by which “[f]unds can only be given as rewards for industry and economy.”⁹⁹ His promises “convinced another 175 men to cut their hair and join the farming bands.”¹⁰⁰ Galbraith’s favoritism to the farmer Indians further drove a wedge between the different Sioux factions.¹⁰¹ The Dakota hunters and blanket bands voiced strong disapproval for Galbraith’s policies.¹⁰² These bands could not understand why they were allowed access to supplies in the agency storehouses only once per year while the farmers had access at will.¹⁰³

The agents’ use of annuities and bribes to recruit farmers only enhanced the bitter civil discord that had been evident on the reservations since 1850. Dakota traditionalists could not understand how it was that the agents let farmers come and go at the warehouses, receiving goods periodically, and excluded them from such haphazard distributions. The Dakota had always based giving on need, and the warriors and hunters rightfully argued that they needed the annuities more than the farmers did. Many members of the soldiers’ lodges saw war as a way to end this unjust system and restore past bonds of reciprocal sharing and support. Once they decided to fight, the cry went up at Little Crow’s village: “Kill the whites and kill all those cuthairs [Dakota farmers] who will not join us.”¹⁰⁴

“[A]n obvious change had occurred in Indian–mixed-blood–white social relations by 1862.”¹⁰⁵ Although distrust existed between the mixed-blood Indians and full-blood Indians,¹⁰⁶ the mixed-blood Indians were practically immune from assaults by Dakota soldiers

98. *Id.* at 246–47.

99. *Id.* at 247.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 257 (quoting Return I. Holcombe, *Chief Big Eagle’s Story of the Sioux Outbreak of 1862*, in 6 MINNESOTA HISTORICAL SOCIETY COLLECTIONS 382, 389 (1894)).

105. *Id.*

106. GARY CLAYTON ANDERSON, *LITTLE CROW: SPOKESMAN FOR THE SIOUX* 142 (1986).

during the 1862 uprising because of their kinship ties.¹⁰⁷ Any killing of mixed-bloods risked retribution from their full-blood kinsmen.¹⁰⁸ This protection from attack was a benefit enjoyed by mixed-bloods, despite the fact that some had effectively assimilated to the white-based society.

B. 1862 Military Trials

After the 1862 uprising, both full-blood and mixed-blood Dakota were “summarily” tried by military commission.¹⁰⁹ Sibley gave the officers on the military commission a simple set of instructions: to pass judgment on those found guilty of “murder and other outrages.”¹¹⁰ “‘The degree of guilt,’ Sibley later wrote, ‘was not one of the objects to be attained.’”¹¹¹

Much of the evidence used in the trials to convict dozens of Dakota came from mixed-blood Indians who were themselves on trial. To begin building a foundation of evidence against the detained Dakota, Reverend Stephen Riggs, a missionary from the American Board of Commissioners for Foreign Missions who had worked with the Dakota since 1837, “assembled in a tent the mixed-bloods and ‘others possessed of means of knowledge’ of the war and had interrogated them to determine who was implicated in the fighting.”¹¹² The most notorious of these “witnesses” was a mixed-blood named Godfrey, who was the first prisoner to be tried and gave evidence in fifty-five cases.¹¹³ “[O]f the thirty-eight Dakota who were ultimately hanged, [Godfrey] testified in the trials of eleven.”¹¹⁴ As a result of this voluminous testimony, and perhaps

107. ANDERSON, *supra* note 67, at 265.

108. *Id.*

109. Maeve Herbert, *Explaining the Sioux Military Commission of 1862*, 40 COLUM. HUM. RTS. L. REV. 743, 771 (2009) (quoting Special Order No. 55 (Sept. 28, 1862), reprinted in NATHANIEL WEST, THE ANCESTRY, LIFE, AND TIMES OF HON. HENRY HASTINGS SIBLEY 279 (1889)).

110. *Id.*

111. *Id.* (quoting Letter from Henry H. Sibley, Brigadier Gen., to John P. Usher, U.S. Assistant Sec’y of the Interior (Dec. 19, 1862) (on file in the National Archives Record Group 393), microformed on, M 619, Roll 483 (1866, H 747-15) (Nat’l Archives and Records Admin.)).

112. Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 25 (1990) (quoting ISAAC V. D. HEARD, HISTORY OF THE SIOUX WAR AND MASSACRES OF 1862 AND 1863, at 251 (photo. reprint 1975) (1864)).

113. *Id.* at 50.

114. *Id.*

because of his mixed-blood background, Godfrey was provided favorable treatment.¹¹⁵ His trial was suspended for a length of time, and he was ultimately sentenced to ten years of imprisonment.¹¹⁶

The testimony of the mixed-blood witnesses was highly suspect, in many cases it was in their own self-interest in avoiding punishment.¹¹⁷ The trial transcripts do not reflect any concern by the commission relating to this issue.¹¹⁸ Indeed, experts opine that the commission “may have found these witnesses trustworthy precisely because they did cooperate and were therefore ‘good Indians’ or ‘friendlies.’”¹¹⁹ “Moreover, most of the regular witnesses were mixed-bloods, more likely to be believed than the full-blood defendants.”¹²⁰ Among others, Reverend Riggs complained that the commission would reduce the sentence of a mixed-blood who claimed he was forced to go into battle but would not accept such a defense from a non-mixed-blood (i.e., full-blood Indian).¹²¹ Undoubtedly, the use of mixed-bloods to convict dozens of Dakota further expanded the divide between mixed-blood and full-blood Dakota in 1862.

IV. 1862 TO 2012: DAKOTA RELATIONSHIPS, IDENTITY, AND RECONCILIATION

A. *Tribal Constitutional Reform*

In the last ten years, tribes around the country have looked at their existing constitutions and decided to amend or totally rewrite them (e.g., Osage Nation of Oklahoma and White Earth Nation of Minnesota). Some have completed the reform process and other constitutional projects are ongoing.

Over the last decade, I have discussed tribal constitutional reform regularly. The area of contention continues to be identifying a tribe’s citizens. What is our tribal identity? How do we define ourselves as tribal people? Do we have the courage to look at our citizenship criteria and address issues from flawed federal government rolls?

115. *Id.* at 50–51.

116. *Id.*

117. *Id.* at 52.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

In my experience there are no easy answers to these questions. Identifying our tribal citizens goes to the heart of who we are as tribal people and collectively as part of a tribe. Defining our citizens is an inherent power of sovereignty. Constitutional reform can be halted or stymied by citizenship provisions.

The citizenship issues go to our personhood. Additionally, in my observation, disenrollment is not uncommon with the advent of lucrative tribal gaming facilities, limited tribal land base, and growing reservation populations (through increased birth rates or returning members). Also, in my observation, recent amendments of tribal laws have made access to tribal member privileges and benefits more difficult to obtain in some tribes and easier to obtain in others. For example, in my tribe, members who wish to avail themselves of the privileges and benefits have a process to do so, including establishing residency on the reservation for at least five years.¹²² Previously, it had been two years. As a result, families were divided between those who remained on the reservation and those who left the reservation. Those remaining on the reservation receive an income stream, the right to vote, and access to tribal health and education programs. They may not want that revenue stream reduced by the addition of new recipients, an expansion of voting rights that may impact reservation elections, or a reduction of tribal program availability by increasing the number of participants.

With assimilation and intermarriage today, bloodlines in some tribes are becoming diluted; people no longer look like their ancestors and may not be tied to their culture as in past generations. Elected representatives and senators quietly question the heritage of an Indian who looks more white or black than brown. These circumstances add more challenges to tribal citizenship criteria. What do we do to maintain our tribal identity and culture? How do we define who we are as tribal people? I expect that my ancestors and fellow Dakota in 1862 did not have the luxury to consider such questions. They simply had to survive their changing world and contemplate how to stay safe, feed their families, and live among their relatives. The events leading up to and during 1862 show that Dakota, whether they were full-blood or mixed-blood, had to find their way through pressures to assimilate

122. Lower Sioux Indian Community Enrollment and Membership Privilege Ordinance § 7.1.A, Res. No. 10-143 (Sept. 8, 2010).

into the dominant culture by dress, appearance, housing, and work. This is not unlike the challenges faced by those of us who leave our reservations today. Those tribal people who look more like a white person can pass in dominant society without people knowing they have Indian blood or are enrolled in a tribe. Others of us who look like our Indian ancestors are still subject to the challenges of being a person of color, regardless of our social or economic status.

Today, we can determine our citizenship with our tribal constitutions. However, our world is still complex, though maybe not as dramatic as it was in 1862. We at least have more control over our lives today than in 1862. In my observation, some of today's tribes allow tribal members to vote by absentee ballots, in urban polling places, or on the reservation in tribal elections, vote on tribal laws, go to tribal court for recourse of some matters, and take advantage of tribal programs. We can move freely around the state and the world. We have education and employment opportunities both on and off the reservation. Unlike in 1862, being a farmer or tradesperson are not the only available options.

Additionally, as Dakota we continue to struggle with challenges to our life-ways and to our kinship system. Paramount to who we are as Dakota, I have been taught, are the concepts of "being a relative" and "living among our relatives." These concepts go to the root of who we are as Dakota Oyate. These are concepts that are part of our Dakota life-ways. We end our ceremonies and oratory with the statement "All My Relations" or "All My Relatives," which reflects who we are as Dakota, how we relate to others around us, and how we relate to creation. As I have discussed in this article, these concepts of relatedness and relatives were thrown into chaos leading up to and during the events of 1862. Which relatives could we rely upon and look to for assistance at that time? Relatives who were married to white settlers? Indian agents? Indian traders? Warriors who took up arms to redress the wrongs suffered by the Dakota Oyate?

Today, it can be challenging to learn the Dakota language if it was not one's first language, practice Dakota ceremonies if one does not have sufficient vacation time to be away from one's job, or practice life-ways when dominant society is so overwhelming. Our name has varying translations, but I understand that Dakota means "friends" or "allies." Various authors who wrote about the events of 1862 refer to Dakota as "blanket Indians," "nonblanket Indians,"

and “farmer Indians”; yet I cannot help but think that, based on our kinship system, we knew who our aunts, our uncles, our cousins, and other relatives were regardless of the labels the U.S. government, its Indian agents, and Indian traders put on us. So it is today. Despite constitutional reform or disenrollment, the Dakota know who their relatives are and can set forth the kinship relationships.

B. Tribal Enrollment Laws: Benefits and Privileges of Tribal Membership

In these 150 years, a lot has changed about the Dakota of Minnesota, including my tribe; and yet not so much has changed when looking at how we define our Dakota Oyate. We know each other and may or may not be an enrolled member of one of our communities. Yet, we do have kinship relationships that are hard to ignore, just as they were in 1862.

C. Wolfchild Litigation

In 2003, a group of Dakota—people enrolled in various Minnesota Dakota communities, eligible for enrollment, and who were descendants of Minnesota Dakota—filed litigation against the U.S. government in *Wolfchild v. United States*.¹²³ In *Wolfchild*, approximately 20,750 lineal descendants of the Mdewakanton Sioux who were “loyal” to the United States during the 1862 Sioux uprising in Minnesota sued the United States.¹²⁴ The plaintiffs alleged that the federal government breached its fiduciary duty in managing property originally provided by federal statute for the benefit of “loyal” Mdewakanton.¹²⁵

Notwithstanding the broad termination of the Sioux treaties, Congress did attempt to provide for the loyal Mdewakanton by including a specific provision for them in the Act of February 16, 1863. After confiscating the Sioux land, Congress authorized the Department to assign up to eighty acres of that land to each loyal Sioux

. . . .

The land-grant provisions of both 1863 Acts intended to benefit the loyal Sioux were not successfully implemented. The Secretary did not exercise the authority granted by

123. 96 Fed. Cl. 302 (2010).

124. *Id.* at 310.

125. *Id.*

either 1863 Act, and no lands were provided to the loyal Mdewakanton.

....

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

....

Unlike the failed 1863 Acts, the funds provided by the three Appropriations Acts were used for the purchase of land, agricultural implements, livestock, and goods for the loyal Mdewakanton. The lands were purchased in three distinct areas of Minnesota, and by 1980 they consisted of: (1) approximately 260 acres in Scott County (the “Shakopee lands”), (2) approximately 575 acres in Redwood County (the “Lower Sioux” lands), and (3) approximately 120 acres in Goodhue County (the “Prairie Island” lands). Collectively, these properties were known as the “1886 lands” to reflect the date by which the beneficiaries of the Appropriations Acts were defined.¹²⁶

In order to participate in the litigation, the *Wolfchild* case required plaintiffs to search their family genealogy to determine if they were descendants of the 1886 Mdewakanton Dakota or “friendlyes.” It was an interesting exercise to find the required documentation. The rush and pressure to find the information needed to prove lineage was stressful and time consuming on churches and on other institutions who may have had relevant

126. *Id.* at 313, 315–16, 318 (citations omitted).

documents showing births, deaths, baptisms, marriages, or news stories about the Dakota. In the process, some of our extended family members discovered information about family members and their lives that we did not previously know (e.g., that a great-grandfather was wealthy or that a grandmother was named after a deceased sibling that no one knew had existed).

I also talked with Dakota or their legal representatives from the surrounding states who misunderstood the litigation and thought that it meant they could quickly pack up and move to one of our Minnesota Dakota communities, get a house, and become members. Several of the Minnesota Dakota communities filed amicus curiae briefs opposing the litigation. For a period of time, rumors in our communities circulated that if you were a plaintiff in the lawsuit you may be disenrolled if the tribal government knew about your participation. There was a protective order for a while to keep plaintiffs' names confidential. Families were split as to who signed up as plaintiffs and who did not. Three of us in my immediate family reluctantly became plaintiffs and one of our immediate relatives chose not to join as a plaintiff. The experience of becoming plaintiffs brought our extended family together, and we learned more about our ancestors, which was a positive consequence of the litigation. Additionally, the meaning of the language on my mother's land assignment, which referenced 1886 land on the Lower Sioux Indian Community, became clearer. Specifically, only 1886 descendants and their heirs were to be on the specific land referenced in the land assignment. The 1886 lands were a central piece to the litigation.¹²⁷

Regardless of your position on the litigation, it was a fascinating and rewarding exercise to track down family documentation. I heard stories of Dakota who were full-bloods but went into exile during the 1862 War and never came forward again to be counted as a member in a Dakota community, or families of Dakota scouts who did not come forward to be counted in a tribe. There were Dakota who were already enrolled members in their communities and had no desire to have other Dakota from surrounding states and Canada become members and share resources. There was much in the litigation to make it feel like 1862 for our Dakota Oyate all over again. Those on impoverished

127. See generally *Wolfchild*, 96 Fed. Cl. 302.

reservations saw an opportunity to join their relatives on more economically successful Dakota reservations.

On October 1, 2012, the U.S. Department of the Interior published a notice titled the Preliminary Plan for Distribution of Judgment Funds to the Loyal Mdewakantons.¹²⁸ The notice in the Federal Register provides excellent background on the *Wolfchild* case and the cause of action.¹²⁹ According to the notice, there is \$673,944 in judgment funds to be distributed to 20,750 or more individuals.¹³⁰ Individuals will receive between \$20 and \$40.¹³¹ Part of the distribution plan involves criteria to identify the beneficiaries to receive the funds. Again, the Dakota must be lined up and separated by some criteria to establish categories of beneficiaries. Who will be the haves and who will be the have-nots in this process?

The notice explains that three communities, the Prairie Island Indian Community, the Shakopee Mdewakanton Dakota Community, and the Lower Sioux Indian Community, have members who are lineal descendants of 1886 Mdewakanton, but also have members who are not lineal descendants. There are also other 1886 Mdewakanton who are not enrolled in any of the three communities.¹³²

The notice mentions three concepts for determining the intended beneficiaries of the judgment funds:

Concept 1

- Individuals appearing on McLeod and Henton Census Rolls of 1886 and 1889, respectively.¹³³ However, these censuses only included full-blood Mdewakanton, while the 1890 Appropriations Act included both full- and mixed-blood Mdewakanton.¹³⁴

Concept 2

- Individuals appearing on McLeod and Henton Census Rolls;
- Individuals who were scouts;
- Individuals who rescued whites; or

128. Preliminary Plan for Distribution of Judgment Funds to the Loyal Mdewakantons, 77 Fed. Reg. 59,963 (Oct. 1, 2012).

129. *Id.* at 59,964–66.

130. *Id.* at 59,964.

131. *Id.*

132. *Id.* at 59,965.

133. *Id.* at 59,966.

134. *Id.*

- Individuals “who performed other meritorious services to aid the settlers during the uprising.”¹³⁵

Concept 3

- Mixed-blood Mdewakanton who did not appear in the McLeod and Henton Census Rolls; therefore, later census rolls that included them will be used;
- Those who may not have been present for the McLeod and Henton Census Rolls because they were “in the process of removing to Minnesota.”¹³⁶

The notice states that the Department of Interior will “adopt [certain] documents as probative of eligibility for 1886 Land Assignments and proxy for membership in the group of intended beneficiaries of the Appropriations Acts.”¹³⁷ Dakota will now have to “submit proof of descent from any individual listed on the documents adopted as probative above.”¹³⁸

V. CONCLUSION

In 2012, as we remember what happened in 1862, some of the Dakota communities across the northern plains and Canada are financially stronger because of gaming facilities or other resources. Other Dakota communities continue to struggle financially (e.g., because of their location). Culturally, we have survived 150 years thanks to the difficult and traumatic choices of our relatives and the strength, courage, and perseverance of our Dakota Oyate.

Some of our Dakota communities have the resources (economic, cultural, etc.) to be of assistance to other Dakota communities. However, there is room for more connection and communication among our Dakota communities to replace the divisions that led up to 1862 and to some extent still exist today.

In my observation, our survival continues to be challenged by dominant society and by ourselves at numerous turns. There are

135. *Id.*

136. *Id.*

137. *Id.* at 59,967. The documents previously sanctioned for this role include the 1886 McLeod Census, the 1889 Henton Supplemental Census, the 1917 McLaughlin Roll (with additional proof of Mdewakanton descent for persons appearing on that roll), certificates assigning 1886 lands, the Birch Cooley Censuses prepared by Robert Henton, and the 1899 roll prepared by Inspector McLaughlin. *Id.*

138. *Id.*

significant numbers of Minnesotans who do not understand the status and sovereignty of our four Dakota communities today. They see us as somehow being treated special and think that is not fair. Even though there are efforts to amend Minnesota educational curricula to include the events of 1862, there are still far too many Minnesotans that do not know the history. When I speak around Minnesota I am amazed how ignorant Minnesotans are about Indian tribes in Minnesota generally and the 1862 events specifically.

As I often say about tribal matters and tribal people: “It’s complicated.” Looking back at the events in 1862 and comparing the status quo, our Dakota people have a rich history and culture and a strong will to survive and be related to each other, to others, and to creation. In my opinion, our Dakota communities need reconciliation and healing, with each other and with dominant society, to get past the strong, difficult, and traumatic memories and feelings of 1862. We all need to take time to learn the history and learn who we were in 1862 and who we are today in 2012, so that we can become reconciled and healed from a horrible time in the history of the State of Minnesota and our Dakota Oyate. This is not easy to do for anyone, but I have faith in our Dakota Oyate from whom I come.