

# UNITED STATES COURT OF FEDERAL CLAIMS

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SHELDON PETERS WOLFCHILD, et )  
al., )  
 )  
Plaintiff, )  
 )  
v. ) Docket Nos. 03-2684L  
 ) 01-568L  
UNITED STATES, )  
 )  
Defendant. )

## Live Tape

(The following transcript was transcribed from a digital recording provided by the United States Court of Federal Claims to Heritage Reporting Corporation on May 17, 2010.)

Pages: 1 through 22

Place: Washington, D.C.

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v.	)	Docket Nos. 03-2684L
	)	01-568L
UNITED STATES,	)	
	)	
Defendant.	)	

Tuesday,  
May 11, 2010

Live Tape

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BEFORE: HONORABLE CHARLES F. LETTOW  
Judge

APPEARANCES:

For the Plaintiff:

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## APPEARANCES (CONT'D)

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JIM PORTER, Esquire  
U.S. Department of Interior

For the Intervening Plaintiffs:

GARY J. MONTANA, for the Julia DuMarce group  
JACK E. PIERCE, for the Stephens, R. Cermak,  
J. Cermak, Henderson, Klingberg, Alkire, Arnold,  
and Golody groups  
WOOD R. FOSTER, JR., for the Lafferty, Blaeser,  
Whipple, and Lowe groups  
SCOTT JOHNSON, for the Rocque group and Margaret  
Prescott group  
RANDY V. THOMPSON, for the Abrahamson group  
GARRETT J. HORN, for the Saul, Trudell, Taylor,  
Ferris, Henry, and Vassar groups  
ELIZABETH T. WALKER, for the Walker group  
NICOLE N. EMERSON, for the Garreau group  
BARRY P. HOGAN, for the Blair group  
ROBIN L. ZEPHIER, for the Zephier group  
KELLY H. STRICHERZ, for the Mozak group  
SAM S. KILLINGER, for the Enyard and Kitto groups  
FRANCES FELIX, pro se, for the Felix family  
ROYCE DERYL EDWARDS, JR., for the Vadnais group  
JAMES L. BLAIR, for the Blair group



1 P-I-E-R-C-E, on behalf of the Cermak group and four  
2 other groups.

3 THE COURT: Yes. Welcome, Mr. Pierce.

4 MR. PIERCE: Thank you, Your Honor.

5 MR. FOSTER: Wood Foster, on behalf of four  
6 intervenor groups, F-O-S-T-E-R.

7 THE COURT: Welcome, Mr. Foster.

8 MR. JOHNSON: Scott Johnson, of Johnson Law  
9 Group, on behalf of intervenors.

10 THE COURT: Welcome, Mr. Johnson.

11 MR. THOMPSON: Randy Thompson on behalf of  
12 the Abrahamson intervenor group.

13 THE COURT: Welcome, Mr. Thompson.

14 MR. HORN: Garrett Horn on behalf of seven  
15 intervenor groups.

16 THE COURT: Welcome, Mr. Horn.

17 MS. WALKER: Elizabeth Walker on behalf of  
18 the Walker intervenor group.

19 THE COURT: Thank you, Ms. Walker. Welcome.

20 MS. EMERSON: Nicole Emerson, on behalf of  
21 the Garreau intervenor group.

22 THE COURT: Welcome, Ms. Emerson.

23 MR. HOGAN: Barry Hogan, on behalf of the  
24 Renaud and for Blair John Doe Group.

25 OPERATOR: Excuse me. Robin Zephier has now

1 joined the conference.

2 THE COURT: All right. Just a moment.

3 Mr. Hogan, welcome. And who just joined, please?

4 OPERATOR: Robin Zephier.

5 THE COURT: All right, welcome.

6 MR. ZEPHIER: Thank you.

7 MS. STRICHERZ: Kelly Stricherz for the  
8 Mozak group.

9 THE COURT: I'm sorry. Could you say that  
10 again, please?

11 MS. STRICHERZ: Kelly Stricherz for the  
12 Mozak group.

13 THE COURT: All right. Welcome.

14 MR. KILLINGER: Sam Killinger on behalf of  
15 the Enyard and Kitto group.

16 THE COURT: I'm sorry. I didn't hear your  
17 name. I should recognize it, but it has been several  
18 years. Can you say it again, please?

19 MR. KILLINGER: Killinger, Sam Killinger.

20 THE COURT: All right. Thank you,  
21 Mr. Killinger.

22 MS. FELIX: And this is Frances Felix, pro  
23 se, for my immediate family.

24 THE COURT: All right. Ms. Felix, welcome.

25 MS. FELIX: Thank you.

1 THE COURT: Anyone else, please, who  
2 hasn't --

3 MR. EDWARDS: Yes. This is Royce Deryl  
4 Edwards, Jr.

5 THE COURT: All right, Mr. Edwards.

6 MR. BLAIR: James Blair, on behalf of the  
7 Renaud Blair intervenor group.

8 THE COURT: Welcome, Mr. Blair. Anyone  
9 else, please? Yes. Well, this is a somewhat unusual  
10 status conference. After the decision by the Federal  
11 Circuit and the remand and the petition -- I'm sorry.  
12 Did someone say something? And the petition for  
13 certiorari and the denial -- we have the task of  
14 addressing the money that was left and deposited with  
15 the Department of Treasury in a specified account.  
16 And I have about \$67,000. The Court of Appeals said  
17 about \$60,000.

18 It would seem we ought not to spend very  
19 long in proceedings addressing that amount.  
20 Mr. Kaardal, have you worked something out with  
21 Ms. Schwarz?

22 MR. KAARDAL: Procedurally?

23 THE COURT: Yes.

24 MR. KAARDAL: I have not.

25 THE COURT: Have you worked out a settlement

1 with Ms. Schwarz?

2 MR. KAARDAL: No, I have not.

3 THE COURT: Is there any prospect of that,  
4 Ms. Schwarz?

5 MS. SCHWARZ: At this moment, no. We  
6 believe that there is no longer jurisdiction for the  
7 matter, and that the Plaintiffs do not have standing.

8 MR. KAARDAL: Our view, Your Honor, is that  
9 we believe that the opinion confirms that there is a  
10 statutory duty from the appropriations acts, and that  
11 the 1980 act did not repeal the appropriations acts  
12 and the attendant statutory duty, causing economic  
13 injury, and that we have damages.

14 THE COURT: Well, Ms. Schwarz, your position  
15 is awkward because at least in this court, the Court  
16 of Appeals, and the Supreme Court, the argument was  
17 there was a use restriction that was attendant as a  
18 result of the appropriations act, or appropriations  
19 acts. And the money certainly was held under a use  
20 restriction, and it is still held under a use  
21 restriction. How can you argue there is no standing?

22 MS. SCHWARZ: Well, the courts in Reginald  
23 ruling on jurisdiction when it denied the government's  
24 motion to dismiss is that the appropriations act  
25 created a trust, and that the trust was under the

1 Mitchell II line of reasoning, that the trust was the  
2 money mandating statute. But the Federal Circuit has  
3 now held that the Appropriations Act did not create a  
4 trust; therefore there is no money mandating duty upon  
5 which the Plaintiffs have based their claim.

6 THE COURT: Well, that's not quite true  
7 because there are, as the Court of Appeals indicated,  
8 use restrictions. They might not amount to a trust,  
9 but they still give rise to a duty. Are we going to  
10 have to litigate this?

11 MS. SCHWARZ: Yes. We would like to have  
12 briefing on a motion to dismiss or a summary judgment  
13 on the jurisdiction issue.

14 THE COURT: Oh, dear. All right.  
15 Mr. Kaardal, have you talked this over with  
16 Ms. Schwarz or her colleagues?

17 MR. KAARDAL: No. I have talked to my  
18 fellow counsel on this.

19 THE COURT: Were you aware of the position  
20 that the government seems to be taking today?

21 MR. KAARDAL: Yes. I think it was somewhat  
22 anticipated by my colleagues, the Intervenor counsel,  
23 that this would be the position that would be taken.  
24 You know, although the Federal Circuit decision did  
25 indicate, at least for the moment, that I was wrong,

1 that the appropriation acts created a property or  
2 trust right, there still is the direction that  
3 Congress has given Interior -- and I understand there  
4 is an Interior representative here -- that this  
5 appropriation was to be used to roughly benefit the  
6 lineal descendants equally. And the Federal Circuit  
7 deeming of the 1980 act did not repeal the  
8 Appropriation Act. In our view, this direction from  
9 Congress still exists; not a property right, not a  
10 trust right, but certainly a statutory obligation of  
11 Interior, and where the intended beneficiaries of that  
12 obligation has clearly been violated, causing economic  
13 injury to lineal descendants.

14 But to the extent the Department of Interior  
15 and the Department of Justice want to continue arguing  
16 over that, that's fine. We've done this before at the  
17 beginning of the case. The Department of Interior  
18 said there was no obligation at all to my clients, and  
19 they moved to dismiss, and we filed a cross summary  
20 judgment motion, and ours was partially granted.  
21 Granted, it was on a trust theory, not on a statutory  
22 use restriction theory. But, you know, we can do that  
23 again.

24 My colleagues are interested in moving  
25 forward, and we can do a briefing schedule and get

1 those issues out on the table.

2 THE COURT: All right. Well, we do have a  
3 number of representations by the government that what  
4 was created was not a trust, but the statutory use  
5 restriction. Do you adhere to that position,  
6 Ms. Schwarz, or have you changed position now that  
7 you've won on the trust theory?

8 MS. SCHWARZ: I would have to confer with my  
9 colleagues on that issue. What happened at the very  
10 beginning of the case I can't speak personally.

11 THE COURT: No. I'm talking about what  
12 happened toward the end of the case before this court,  
13 before the Court of Appeals, and before the Supreme  
14 Court.

15 MS. SCHWARZ: Again, I would have to confer  
16 with my colleagues on that.

17 THE COURT: Are you prepared for the status  
18 conference this afternoon, Ms. Schwarz?

19 MS. SCHWARZ: Yes, I am, Your Honor.

20 THE COURT: And you have no position? I  
21 don't call that preparation.

22 MS. SCHWARZ: As far as what we've discussed  
23 in the discussions we had with the Department of  
24 Interior is that the issues that were taken up before  
25 the Federal Circuit and with the Supreme Court was

1 whether the appropriations act created a trust. It's  
2 the government's position that since the  
3 appropriations act did not create a trust, there is no  
4 jurisdiction upon which the Court's basis lies.

5 THE COURT: So the statutory use  
6 restrictions are not, in your view, money mandating?  
7 Am I reading too much into your position?

8 MS. SCHWARZ: No. You are reading that  
9 correctly, that they are not money mandating, that the  
10 riders are not -- the rider is not applicable in this  
11 act, to the appropriations act. Those were two  
12 appropriations acts that were passed for the year in  
13 which they were -- sorry. Let me backtrack. The  
14 appropriations act were just appropriations that were  
15 passed for that fiscal year and mandated that the  
16 Interior spend money in a certain way as designated by  
17 Congress. It was only for that particular year in  
18 which the appropriations were passed that that money  
19 was to be spent. There was no rider that continued  
20 those appropriations acts, with the exception of the  
21 first one, into subsequent years.

22 THE COURT: Well, there certainly was an  
23 exception. Okay. This is helpful in the sense that  
24 we now have the lay of the land. I'm not very  
25 sympathetic, I guess, because this should not be a

1 continuing controversy, in the Court's view.  
2 Nonetheless, let us see what we can do about a  
3 briefing schedule. You're prepared to go forward with  
4 a motion, Ms. Schwarz?

5 MS. SCHWARZ: Yes, we are, Your Honor.

6 THE COURT: When would you come forward with  
7 such a motion?

8 MS. SCHWARZ: We'd like 30 days, Your Honor,  
9 for time to have consultation -- time enough have it  
10 vetted by management.

11 THE COURT: Okay. Well, today is the 11th.  
12 June 11th is a Friday. That's actually 31 days. You  
13 get an extra day there, but it's Memorial Day. So do  
14 you want June 11, or do you want a different day?

15 MS. SCHWARZ: That's fine, Your Honor.

16 THE COURT: All right. We'll issue a  
17 scheduling order. The government preparing to come  
18 forward with a motion, a dispositive motion, I take it  
19 -- is that right?

20 MS. SCHWARZ: Yes, Your Honor.

21 THE COURT: Okay. On June 11th.  
22 Mr. Kaardal, do you have an idea when you and your  
23 colleagues would be prepared to come forward with a  
24 response, maybe cross motions?

25 MR. KAARDAL: I guess yes, Your Honor. We

1 discussed this. We had two teleconference calls. And  
2 we feel that it may be useful to have a motion to  
3 amend the complaint, due to the Federal Circuit  
4 opinion.

5 THE COURT: Yes.

6 MR. KAARDAL: As you recall, the original  
7 complaint had the trust claim, and then the second  
8 claim was a contract claim. The contract claim was  
9 dismissed. And even though we believe that embedded  
10 in the trust claim is the statutory use restriction  
11 claim, we'd like to extrapolate that out and make it a  
12 separate, more clear claim.

13 THE COURT: All right.

14 MR. KAARDAL: And so we've discussed that,  
15 and we'd be able to do that motion by the same  
16 deadline the United States is filing its motion. And  
17 then I think on the cross-motion for partial summary  
18 judgment, since we went through this before, I think  
19 like we did it before, let the United States give us  
20 their best shot, that the claim should be dismissed  
21 despite the Federal Circuit's ruling on the continuing  
22 statutory use restriction, and that we would cross-  
23 move for summary judgment. And I think that would  
24 take probably 45 days. The reason the additional time  
25 is necessary is the coordination among counsel here.

1 THE COURT: Yes.

2 MR. KAARDAL: We may end up having, you  
3 know, slightly different responses.

4 THE COURT: All right. We're talking about  
5 something in the range of Monday, July 26th, for a  
6 response.

7 MR. KAARDAL: That works for us.

8 THE COURT: All right. We'll do it. Now,  
9 Ms. Schwarz --

10 MS. SCHWARZ: Yes, Your Honor.

11 THE COURT: If we get, as advertised, a  
12 motion to amend the complaint on June 11th, the same  
13 time you'd be filing your dispositive motion, when  
14 could you respond?

15 MS. SCHWARZ: The one question I have, Your  
16 Honor, is if they are going to be filing a motion to  
17 amend the complaint, that is going to change whatever  
18 dispositive motion that we would file. So we would  
19 request that either briefing for a dispositive motion  
20 be put off until they file their amended complaint, or  
21 that we move to dismiss before the amended complaint,  
22 and just finish briefing on that issue. Otherwise,  
23 however they amend their complaint will obviously  
24 change or potentially moot some of the arguments that  
25 we would make.

1                   THE COURT: Given Mr. Kaardal's  
2 representations, the Court has a lot of difficulty  
3 seeing how that could be possible because Mr. Kaardal  
4 indicated that he was drawing on the decision of the  
5 Court of Appeals for the statutory use restriction  
6 approach, and that is set out in some detail in the  
7 opinion of the Court of Appeals. That opinion  
8 constitutes the law of the case. And as a consequence  
9 of that, there should be absolutely utterly no  
10 surprise. When could you respond to such a motion to  
11 amend?

12                   MS. SCHWARZ: We would like 45 days, Your  
13 Honor.

14                   THE COURT: All right. We'll say also on  
15 July 26th. Is that satisfactory?

16                   MS. SCHWARZ: Yes, Your Honor.

17                   THE COURT: All right. Now given the  
18 circumstances, we might get a cross-motion as well  
19 from Mr. Kaardal and his colleagues. If we get a  
20 cross-motion, then we would have a response and reply  
21 on your part, Ms. Schwarz, after July 26th, and then  
22 we'd have a reply from Mr. Kaardal on the motion to  
23 amend the complaint. Ordinarily, the Court would  
24 allow 40 days for a response or reply and response to  
25 a cross-motion. Let's just see. We're talking about

1 right at Labor Day, either just before or just after  
2 Labor day.

3 MS. SCHWARZ: I will be out on Labor Day.  
4 My son's day camp closes for two weeks.

5 THE COURT: Yes.

6 MS. SCHWARZ: During the week before and the  
7 week after Labor day.

8 THE COURT: Yes. Do you want to file this  
9 before or after?

10 MS. SCHWARZ: Given the fact that we have to  
11 have -- and then our management and other attorneys  
12 tend to go on vacation that time of year, we would  
13 prefer after, two weeks after Labor Day. That would  
14 just help with the coordination here because I know  
15 from experience that the briefing schedule and the  
16 different matter is -- this past year around Labor day  
17 it was very difficult to find people.

18 THE COURT: Well, that gives you almost two  
19 months. That would be a response and a reply on  
20 September 20. Is that satisfactory?

21 MS. SCHWARZ: That is. Thank you, Your  
22 Honor.

23 THE COURT: All right. Now, Mr. Kaardal, do  
24 you want until September 20 to reply to the motion to  
25 amend a complaint?

1           MR. KAARDAL: I think, Your Honor, that it  
2 makes sense to just have the one hearing, so, yes, I  
3 guess we'll take the time.

4           THE COURT: All right. Now we do have --  
5 you have a cross-motion. You are also due a reply,  
6 Mr. Kaardal, to anything the government might put  
7 forward on September 20. When would you care to file  
8 your reply, given that you've also got a coordination  
9 problem?

10           MR. KAARDAL: I guess if we could have 20  
11 days, that would be good.

12           THE COURT: All right. Well, that's right  
13 at the Columbus Day weekend. Where do you want it,  
14 just before or just after?

15           MR. KAARDAL: Just after, Your Honor.

16           THE COURT: All right. That would be the  
17 12th. Do you want on the 12th or do you want time  
18 until, say, the 14th?

19           MR. KAARDAL: The 14th, please.

20           THE COURT: Okay. October 14th for a reply.  
21 Now can we set a hearing date?

22           MR. KAARDAL: Yes, Your Honor.

23           THE COURT: Okay. Let's do that. We ought  
24 to set it toward the end -- obviously, it has to be  
25 after the 14th of October. It could be the week --

1 toward the end of the week of the 18th, in the range  
2 of 20, 21, 22 of October. But it really depends on  
3 you folks.

4 MR. KAARDAL: What days are they, Your  
5 Honor?

6 THE COURT: The 20th of October is a  
7 Wednesday, the 21st is obviously a Thursday, and the  
8 22nd is obviously a Friday. We could do it Monday or  
9 Tuesday of the next week, the 25th or 26th, as well.  
10 Do you have a preference?

11 MR. KAARDAL: I think I'd prefer the 22nd.

12 THE COURT: Okay. Ms. Schwarz, if we have a  
13 hearing on October 22nd, is that satisfactory?

14 MS. SCHWARZ: Yes, that works, Your Honor.

15 THE COURT: 10 o'clock in the morning, is  
16 that satisfactory, Mr. Kaardal?

17 MR. KAARDAL: Yes, Your Honor.

18 THE COURT: All right. Ms. Schwarz?

19 MS. SCHWARZ: Yes.

20 THE COURT: All right. Well, I'm  
21 disappointed, but not shocked. Let's put it that way.  
22 In any event, we'll carry this forward, and we'll see  
23 what happens. I'm not sure the Court of Appeals  
24 anticipated that this would happen, but it had to have  
25 at least cross their mind. In any event, Mr. Kaardal,

1 do you and your colleagues have anything else that we  
2 ought to be discussing while we're all together?

3 MR. KAARDAL: I don't know of anything, but  
4 I guess I'll just open it up to them if they want to  
5 comment.

6 MR. ZEPHIER: Your Honor, this is Robin  
7 Zephier. And, Your Honor, I am appearing on behalf of  
8 the Zephier group of intervenors.

9 THE COURT: Yes.

10 MR. ZEPHIER: At one point, the Court was  
11 interested in more fully developing the analysis  
12 concerning the 1863 act. I only point this out,  
13 Judge, because in the Federal Circuit opinion, the  
14 Court of Appeals made reference to the significance of  
15 the 1863 act. However, they never made a legal  
16 connection or nexus between the Appropriations Acts  
17 and the 1863 act. We have always taken a position, at  
18 least as far as my group and other groups, that the  
19 1863 act may actually be where the trust was created.  
20 And so I don't want to have the Court surprised that  
21 in the process of amending the complaint, there may be  
22 a more particular focus on what the Court had alluded  
23 to earlier before the interlocutory appeal in that  
24 regard.

25 THE COURT: Well, there is a line in the

1 Federal Circuit's decision that says the Secretary  
2 never exercised the authority granted by the 1863  
3 legislation. That's at 1232. And the Court was  
4 interested because it seemed that the appropriation  
5 acts were essentially the response to that failed -- I  
6 was going to say promise, but it almost was a  
7 legislative promise, as reflected in the 1863 act.

8           You can certainly raise that point. To some  
9 extent, it might be precluded by law of the case. It  
10 might be helpful to you, or it might not, in making  
11 your case regarding statutory use restrictions. I'll  
12 leave that to you, Mr. Zephier.

13           MR. ZEPHIER: Thank you, Your Honor.

14           THE COURT: Anyone else, please?

15           MR. KAARDAL: Your Honor, I just wanted to  
16 remind I guess all the counsel that on the motion to  
17 amend, that we're not going to be adding parties.

18           THE COURT: No.

19           MR. KAARDAL: We're just adding the  
20 statutory use restriction claim.

21           THE COURT: Yes.

22           MR. KAARDAL: I just wanted to mention that.

23           THE COURT: Right. Okay. Ms. Schwarz, do  
24 you and your colleagues have anything you want to add?

25           MS. SCHWARZ: No, we don't at this time,

1 Your Honor.

2 THE COURT: Okay. Well, I look forward to  
3 this. It's almost in a sense going to be a limited  
4 reprise of what we had when we started, and it will be  
5 interesting to see what counsel's view of these  
6 various permutations introduced by the Court of  
7 Appeals happen to be, and what the result is. Is  
8 there anything further, Mr. Kaardal?

9 MR. KAARDAL: No, Your Honor.

10 THE COURT: Ms. Schwarz?

11 MS. SCHWARZ: No, Your Honor.

12 THE COURT: All right. We're at an end.  
13 Thank you very much for attending.

14 MR. KAARDAL: Thank you, Your Honor.

15 MS. SCHWARZ: Thank you, Your Honor.

16 (Whereupon, at 2:15 p.m., the hearing in the  
17 above-entitled matter was adjourned.)

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CERTIFICATE

DOCKET NOS.: 03-2684L and 01-568L  
CASE TITLE: Sheldon Peters Wolfchild et al. v. U.S.  
HEARING DATE: May 11, 2010

I certify that the foregoing is a true and correct transcript made to the best of our ability from a copy of the official electronic digital recording provided by the United States Court of Federal Claims in the above-entitled matter.

Date: May 17, 2010

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