United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5484

58

SPECIAL CALENDAR.

AGNES LARSEN STOOKEY, ESTHER LARSEN EASTLUND, BERTHOLD LARSEN, ET AL., APPELLANTS,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 8, 1931.

PRINTED NOVEMBER 6, 1931.

Court of Appeals of the District of Columbia

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SPECIAL CALENDAR.

AGNES LARSEN STOOKEY, ESTHER LARSEN EASTLUND, BERTHOLD LARSEN, EDWARD LARSEN, MATILDIA LARSEN AND EMMA LARSEN EDELMAN, AND JOHN SANFORD LARSEN, RUTH LARSEN, MINNIE EASTLUND, WINNIFRED EASTLUND, AND FERN EASTLUND, BY THEIR NEXT FRIEND, ESTHER LARSEN EASTLUND, AND ESTHER LARSEN EASTLUND, AS THE HEIR AT LAW OF DIXIE EASTLUND, APPELLANTS,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1931.

Court of Appeals of the District of Columbia

No. 5484.

AGNES LARSEN STOOKEY ET AL., appellants,

vs.

RAY LYMAN WILBUR, Secretary of the Interior.

a Supreme Court of the District of Columbia.

At Law.

No. 78747.

UNITED STATES OF AMERICA EX REL. AGNES LARSEN STOOKEY, Esther Larsen Eastlund, Berthold Larsen, Matildia Larsen, and Emma Larsen Edelman, on Their Own Behalf, and John Sanford Larsen, Ruth Larsen, Minnie Eastlund, Winifred Eastlund, and Fern Eastlund, Minors, by Their Next Friend, Esther Larsen Eastlund, and Esther Larsen Eastlund, as Heir-at-Law of Dixie Eastlund, Deceased, Plaintiffs,

vs.

RAY LYMAN WILBUR, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Mandamus.*

Filed October 25, 1930.

In the Supreme Court of the District of Columbia, Holding a Law Court.

Law. No. 78747.

UNITED STATES OF AMERICA, EX REL. AGNES LARSEN STOOKEY, Esther Larsen Eastlund, Berthold Larsen, Edward Larsen, Matildia Larsen and Emma Larsen Edelman, on Their Own Behalf, and John Sanford Larsen, Ruth Larsen, Minnie Eastlund, Winifred Eastlund and Fern Eastlund, Minors, by Their Next Friend, Esther Larsen Eastlund, and Esther Larsen Eastlund, as Heir-at-Law of Dixie Eastlund, Deceased, Plaintiffs,

vs.

RAY LYMAN WILBUR, Secretary of the Interior, Defendant.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the District of Columbia:

The Petition of Plaintiffs respectfully shows:

I. That Agnes Larsen Stookey, Esther Larsen Eastlund, Berthold Larsen, Edward Larsen, Matildia Larsen, and Emma Larsen Edelman, are of full age; that John Sanford Larsen, Ruth Larsen, Minnie Eastlund, Winifred Eastlund and Fern Eastlund are minors, and bring this action by Esther Larsen Eastlund, mother of some and aunt by blood of the re-
2 mainder, as their next friend; that Esther Larsen Eastlund is the mother and heir-at-law of Dixie Eastlund, who died February 11, 1923, and as such heir-at-law brings this action; and that all of the Petitioners are citizens of the United States.

II. That the Defendant, Ray Lyman Wilbur, is the successor in office of Hubert Work, who was Secretary of the Interior at the times hereinafter mentioned, and the said Ray Lyman Wilbur occupies and holds the position of Secretary of the Interior under the Government of the United States, and as such is charged with the duty of supervising public business relating to Indians, including the enrollment and allotment of the Gros Ventre Indians of the Fort Belknap Indian Reservation in the State of Montana, and this action is brought against said Defendant in his official capacity.

III. That all of the relators are Gros Ventre Indians of the mixed blood, a fact never heretofore disputed or drawn in question by the Secretary of the Interior.

That Agnes Larsen Stookey, Esther, Larsen Eastlund, Berthold Larsen, Edward Larsen, Matildia Larsen, Emma Larsen Edelman, John Sanford Larsen and Ruth Larsen are children born of a lawful marriage duly solemnized in 1891 between Zack Larsen, a white man, and Mrs. Zack Larsen, a Gros Ventre Indian woman of one-half Indian blood, recognized by the Gros Ventre tribe as a member thereof by blood, and duly enrolled opposite roll Number 334 as a member of said tribe of Indians of the Fort Belknap Indian Reservation, in the State of Montana; that said Mrs. Zack Larsen, the mother of these relators, was born in 1875 near Fort Benton,
3 Montana, upon the then Reservation of the Gros Ventre tribe of Indians, and has at all times been affiliated with and recognized by said Indian tribe as a member thereof; that these relators were all born near Fort Benton, Montana, upon what, prior to the cession thereof to the United States, had been the old Gros Ventre Indian Reservation, and that they lived there with their mother, the said Mrs. Zack Larsen, and later with her near the Bear Paw Mountains, on the old Indian Reservation and immediately adjoining the present Fort Belknap Reservation, continuously until 1916 upon the assurances to their said mother by the respective superintendents of the Fort Belknap Indian Reservation that such residence would not in any way jeopardize her tribal rights or those of her children, these relators.

That the relators, Minnie Eastlund, Winifred Eastlund, Fern Eastlund and Dixie Eastlund (deceased), are all children born of a lawful marriage between Eric Eastlund, a white man, and said Esther Larsen Eastlund, one of the relators herein, a Gros Ventre woman of mixed blood, duly recognized by the Gros Ventre tribe of Indians as a member thereof by blood, and are grandchildren of said Mrs. Zack Larsen. Of these relators, Minnie Eastlund was born near Fort Benton, Montana, at or near the home of her said grandmother, upon what, prior to the cession thereof to the United States, had been the old Gros Ventre Indian Reservation, and the relators Winifred Eastlund, Fern Eastlund, and Dixie Eastlund were all born while their said mother was a *bona fide* resident of the Fort Belknap Indian Reservation, these relators, however, being born off the Reservation while their said mother was tempo-

rarily absent therefrom by permission of the Superintendent thereof.

4 That all of the relators herein have at all times maintained and asserted their said Indian citizenship and all their rights as members of the Gros Ventre Tribe of Indians and have never abandoned, renounced, or disclaimed the same.

That during the year 1916 all of the relators then in being removed to the Fort Belknap Indian Reservation, in the State of Montana, where they and those born after such removal continued to live and upon which they resided at the time the Act of Congress approved March 3, 1921 (41 Stat. L. 1355) was enacted, which provided for the enrollment and allotment of the Gros Ventre Indians of the Fort Belknap Indian Reservation. All of the relators herein were born prior to the passage of said enrollment and allotment Act of March 3, 1921.

IV. That on July 6, 1917, and again on March 30, 1918, your relators were by resolution of the Tribal Council of the Gros Ventre Tribe of Indians of the Fort Belknap Indian Revservation recognized as belonging by blood to said Gros Ventre Tribe and, as such, entitled to enrollment therein.

V. That your relators duly made application for enrollment as members of the Gros Ventre Tribe of Indians before the Enrollment Commission appointed by the Secretary of the Interior, under the provisions of the Act of Congress approved March 3, 1921 (41 Stat. L. 1355), and were duly enrolled by said Enrollment Commission and their names placed upon the complete and final roll of the Indians of the Fort Belknap Indian Reservation prepared by said Enrollment Commission. Said roll was approved by the then Secretary of the Interior on January 9, 1922, and, as so approved, the name of

5 each relator herein appeared thereon opposite his respective roll number as follows:

549—Agnes Larsen Stookey.
231—Esther Larsen Eastlund.
335—Berthold Larsen.
336—Edward Larsen.
337—Matildia Larsen.
338—Emma Larsen Edelman.
339—John Sanford Larsen.
340—Ruth Larsen.
232—Minnie Eastlund.
233—Winifred Eastlund.
234—Fern Eastlund.
235—Dixie Eastlund.

VI. That all the facts herein stated relating to the Indian blood of these petitioners, the place of their birth and residence, and full and complete evidence of their rights to enrollment as members of the said Gros Ventre Tribe of Indians were furnished by the relators to said Enrollment Commission and to the then Secretary of the Interior in support of their application for enrollment, prior to their final enrollment by said Enrollment Commission and the approval of said roll by the then Secretary of the Interior as aforesaid. All such evidence was fairly, honestly, and fully presented and no false or fraudulent statements were made, or false or fraudulent evidence was used by relators, or by any one for them, in securing their said enrollment as members of the said Indian Tribe.

That following their said enrollment, relators selected their respective allotments of land on the Fort Belknap Indian Reservation, which they improved by placing a portion thereof in cultivation, and constructing other valuable improvements thereon.

Thereafter, on April 3, 1923, and more than a year after the approval by the then Secretary of the Interior of said Gros Ventre Indian rolls by which your relators were duly en-
6 rolled as aforesaid, the Secretary of the Interior, without notice to your relators, without the opportunity by them to be heard, and without any charge, evidence or showing that they had used fraudulent, false, unfair, or illegal means to secure their said enrollment, struck the names of your relators from the said approved roll of the Gros Ventre Indians of the Fort Belknap Indian Reservation, upon the ground and for the sole reason that these relators had not been born on the present Fort Belknap Indian Reservation and had only lived thereon since 1916, and cancelled and held for nought their allotment selections of land on said Indian Reservation and has since denied and refused to your relators their rights as members of said Indian Tribe. That such action by the Secretary of the Interior was contrary to and in violation of the provisions of Section 1, of the Act of Congress approved March 3, 1921 (41 Stat. L. 1355), which provided, in part, as follows:

"That within one year from the date of approval of this Act the Secretary of the Interior shall appoint a commission of three persons, two of whom shall be members of the Gros Ventre and Assin*n*iboine Tribes of Indians and one member an employee of the Interior Department, who shall cause to be prepared, in such manner as they may deem advisable, a complete

and final roll, to contain the names of all Indians ascertained to have rights on the Fort Belknap Reservation, Montana. Immediately upon the approval of the said roll, which shall be the conclusive and final evidence of the right of any Indian of the reservation to an allotment of land, the Secretary of the Interior is hereby authorized and directed to allot pro rata, under rules and regulations and in such areas and classes of lands as may be prescribed by him, among such enrolled Indians all the unreserved and otherwise undisposed-of lands on the Fort Belknap Reservation, which trust patents shall be issued in the names of the said allottees: *Provided further*, That any names found to be on the said roll fraudulently may be stricken therefrom by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, at any time within one year from the approval thereof, after giving all persons interested a full opportunity to be heard; and the fraudulent allotment shall be cancelled and the lands thereof be subject to disposal under the provisions of this Act: *And provided further*, That the land allotted hereunder shall be
7 subject to any tribal leases existing at the date of approval of the said allotments."

And of the Act of Congress approved June 7, 1897 (30 Stat. L. 62, 90), which provided, in part, as follows:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right."

That said action of the Secretary of the Interior was also contrary to and in violation of the provisions of the Act of Congress approved February 8, 1887 (24 Stat. L. 390), which provides, among other things, that:

"every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the

rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The Defendant and his predecessors in office were wholly and entirely without jurisdiction or authority of law to strike the names of your relators from the approved rolls of said Gros Ventre Tribe of Indians, or to deny these relators their rights as members of said Gros Ventre Tribe of Indians.

Thereafter, on October 20, 1925, your relators duly filed their motion with the Secretary of the Interior, asking that said action by him in striking their names from said Tribal rolls be re-considered and their names restored to said rolls, and that they be held entitled to all the rights and benefits of membership in said Gros Ventre Tribe of Indians. On October 30, 1925, the said motion of these relators was denied
8 and refused by the Commissioner of Indian Affairs.

Thereafter, on July 16, 1926, these relators appealed from the decision of the Commissioner of Indian Affairs refusing to re-consider said case to the Secretary of the Interior. On October 12, 1926, the Secretary of the Interior affirmed the action of the Commissioner of Indian Affairs in refusing to re-consider the said action in striking their names from said Indian rolls and declined to reopen or re-consider the rights of your relators to enrollment as members of said Gros Ventre Tribe of Indians or to restore their names to the rolls of said Indian Tribe.

VII. Relators further state that the action of the Secretary of the Interior refusing them enrollment as members of the Gros Ventre Tribe of Indians, notwithstanding that they are Gros Ventre Indians by blood and are the children of a marriage solemnized between their mother, a Gros Ventre Indian woman by blood, and a white man, their said mother being duly recognized by the Tribe as a Gros Ventre Indian by blood, as aforesaid, is unwarranted, arbitrary, and without authority of law; that the action of the Secretary of the Interior, in striking the names of your relators from the approved rolls of said Gros Ventre Tribe of Indians more than one year after the approval of said rolls and without notice to them or opportunity to be heard and without any charge or evidence that they had used false, unfair, illegal, or fraudulent means to secure such en-

rollment, was unwarranted, arbitrary, and without authority of law; that said action by the said Secretary of the Interior deprived, and still deprives, your relators of their property without due process of law, and your relators have no other plain or adequate remedy by which their rights, privileges and property may be protected and preserved save that this Honorable Court interfere by the Writ of Mandamus.

Wherefore, your relators pray:

1. That summons issue in this cause directed to the Defendant, the Honorable Ray Lyman Wilbur, Secretary of the Interior.

2. That a rule be made and issue from this Honorable Court directed to the said Honorable Ray Lyman Wilbur, Secretary of the Interior, to show cause why a Writ of Mandamus should not be issued commanding him to restore the names of your relators to the Gros Ventre Indian Tribal rolls of the Fort Belknap Indian Reservation, in the State of Montana, and to accord to them all the rights and benefits of Gros Ventre Indians by blood of said Indian Reservation.

3. That a Writ of Mandamus issue from this Honorable Court directed to the said Honorable Ray Lyman Wilbur, Secretary of the Interior, directing and commanding him, the said Honorable Ray Lyman Wilbur, Secretary of the Interior, to restore the names of your relators to the Gros Ventre Indian Tribal rolls of the Fort Belknap Indian Reservation, in the State of Montana, and to accord to your relators all the rights and benefits of Gros Ventre Indians by blood of the Fort Belknap Indian Reservation; and if the Defendant shall not admit funds or lands available sufficient to presently restore either the lands or the value thereof in money, of which the relators have been deprived, that he cause same to be made in due course of administration.

4. And for such other and further relief in the premises as shall seem meet and proper.

AGNES LARSEN STOOKEY,
ESTHER LARSEN EASTLUND,
BERTHOLD LARSEN,
EDWARD LARSEN,
MATILDIA LARSEN,
EMMA LARSEN EDELMAN,
On Their Own Behalf, and

JOHN SANFORD LARSEN,
RUTH LARSEN,
MINNIE EASTLUND,
WINIFRED EASTLUND,
FERN EASTLUND,
Minors, by Their Next Friend,
ESTHER LARSEN EASTLUND, and
ESTHER LARSEN EASTLUND,
As Heir-at-law of Dixie Eastlund,
Deceased, Plaintiffs,

By A. R. SERVEN,
Of Their Attorneys.

DISTRICT OF COLUMBIA,
City of Washington, ss:

A. R. Serven, being duly sworn on his oath, says that he is Attorney for the petitioners above-named; that he has read the above and foregoing petition and knows the contents thereof, and that the statements therein contained are true and correct, as he verily believes.

A. R. SERVEN.

Subscribed and sworn to before me this 18th day of October, 1930.

[NOTARIAL SEAL.] OLIVE E. FITZGERALD,
Notary Public, D. C.

11 *Rule to Show Cause.*

Filed October 25, 1930.

* * * * * * *

A. R. Serven, of the City of Washington, District of Columbia, and Counsel for the petitioners in the above-entitled cause, having moved the Court for a rule to be granted, to be served on Ray Lyman Wilbur, Secretary of the Interior, the Defendant therein, commanding him to be and appear before the Court, either in person or by an attorney of this Court, within such time as the Court may deem proper, to-wit, the

24th day of November, 1930, to show cause, if any he may have, why a Mandamus should not be awarded directed to the said Ray Lyman Wilbur, Secretary of the Interior, commanding him to restore the names of the said petitioners in the above cause to the Gros Ventre Indian Tribal rolls of the Fort Belknap Indian Reservation, in the State of Montana, and to accord to them all the rights and benefits of Gros Ventre Indians by blood of the Fort Belknap Indian Reservation.

It is upon motion of counsel for the petitioners this 25th day of October, 1930, By The Court, Ordered that the rule prayed for be and the same is hereby granted, returnable to this Court on the 24th day of November, 1930, provided a copy of the rule be served upon the respondent within 10 days from the date hereof.

By order of the Court.

O. R. LUHRING,
Justice.

12 *Marshal's Return.*

Served a copy of the within rule on Ray Lyman Wilbur Sect of Interior by serving John H. Edwards 10-25-30 Personally.

EDGAR C. SNYDER,
U. S. Marshal in and for the Dist. of Columbia,
By C. G. ROWLEY,
Deputy U. S. Marshal.
B.

Amended Answer and Response to the Rule.

Filed December 15, 1930.

* * * * * * *

Comes now Ray Lyman Wilbur, Secretary of the Interior, and in response to the rule to show cause and for his amended answer to the allegations of the petition states:

1. On information and belief, he admits the allegations of Paragraph 1.

2. He admits the allegations of Paragraph 2.

3-4-5-6. The defendant is unable from personal knowledge either to affirm or deny the allegations of Paragraphs 3, 4, 5,

and 6. On information and belief obtained from the official records of the Department of the Interior, he denies each and every allegation of said paragraphs, singly and collectively, except such as are hereinafter specifically admitted.

For further response to the rule to show cause and for further answer to the allegations of paragraphs 3, 4, 5, and 6, he shows to the court:

That the mother of Mrs. Zack Larsen was a duly enrolled full-blood Gros Ventre Indian woman named Strike, who, sometime prior to the year 1875, married Moses Solo-
13 mon, a white man, abandoned the tribal relation and reservation, removing with her husband to Fort Benton, outside the reservation. In the said year, at Eagle Butte, Montana, not on the Gros Ventre Reservation, their daughter Emma was born. Mrs. Solomon (Strike) died in 1878, and at the time of her death she was recognized by said Tribe as a member thereof.

That in the year 1890 Emma Solomon, a Gros Ventre Indian of one-half blood, married Zack Larsen, a white man, lived in 1891 at Havre, Montana, away from the Gros Ventre Reservation, and in 1892, moved to Marias, or Loma, Montana, located on and surrounded by public domain.

That Congress, by act of May 1, 1888 (25 Stat. 113), ratified the agreement of December 28, 1886, with the Gros Ventre and other nearby Indian tribes, which diminished the former territory owned by said tribes, by ceding to the United States a large portion of their lands, including the lands surrounding and in the immediate vicinity of Loma, reserving as their Reservation, a much smaller tract known as the Fort Belknap Reservation. In 1892, Zack Larsen homesteaded a ranch about two miles west of Loma, on which the family resided until 1916. In 1896, Mrs. Larsen entered a homestead nearby which she relinquished in 1913. In March, 1916, after selling his ranch at Loma, Zack Larsen went onto the Fort Belknap Reservation, his family joining him there in August of the same year.

That the act of June 7, 1897 (30 Stat. 90), gives to children born of a marriage solemnized between a white man and an Indian woman, where the Indian woman at the time of her death, prior to the passage thereof, had been recognized by her tribe as a member thereof, all the rights and privileges in

the property of the tribe to which the mother belonged
14 at her death, as are enjoyed by the other tribal members. Thereby Mrs. Zack Larsen, the daughter of Mrs. Solomon (Strike) was entitled to be enrolled and to receive the benefits of said act.

That in the year 1916, for the first time a resident of the Reservation, of her tribe, Mrs. Zack Larsen applied to be enrolled upon the tribal roll of the Gros Ventre Indian Tribe. Her name was duly accepted by the Council of the Gros Ventre Tribe, and in December, 1921, the Secretary of the Interior authorized her enrollment and the name of Mrs. Zack Larsen was duly placed upon said roll by virtue of the provisions of the act of June 7, 1897, *supra*. Because Mrs. Larsen had been born outside the tribal relation, had lived away from the reservation of her tribe all her life, and her children were born away from the tribal relation, were reared and educated amidst and under the customs of civilized life, her said children were denied enrollment.

That by the act of March 3, 1921 (41 Stat. 1355), a Commission was authorized to make a complete and final roll of the members of said Gros Ventre Indian Tribe. The Commission enrolled the relators as alleged in the petition, and the roll containing their names was duly approved by the Secretary of the Interior on January 9, 1922. Thereafter, on June 10, 1922, the Secretary of the Interior vacated and set aside his approval thereof. Thereupon, upon due and proper showing, he added the names of 36 Northern Assiniboines who had been omitted by said Commission and 9 others including members of the O'Bryan family, all of whom were clearly omitted through error and mistake of both fact and law, denied three new applicants and deleted therefrom the names of 38 persons,
including the relators, and the youngest daughter of
15 Mrs. Zack Larsen, to wit, Reva Larsen, who was born on the Ft. Belknap Reservation in 1918, as persons not entitled to enrollment, and participation in the allotment of Gros Ventre tribal lands. Among said names deleted was the name of Mrs. Emma Larsen, enrolled opposite No. 608, for the reason that the accompanying data clearly indicated her to be the same person as Mrs. Zack Larsen, already enrolled by the Secretary of the Interior as aforesaid, and whose name appeared opposite No. 341 on said roll as prepared by the Commission, viz: A duplicate enrollment of the same individual.

That on April 3, 1923, said roll as corrected and amended by the Secretary of the Interior was duly approved. Thereafter, on May 24, 1923, upon discovery that the name of Reva Larsen, entitled to enrollment through her mother, Mrs. Zack Larsen, a duly enrolled and recognized member of the Gros Ventre Tribe, and by the further reason of her birth on the Indian Reservation of her mother, in the tribal relation, had been improperly stricken from the roll by him, the Secretary of the Interior, by order of that date, corrected the error, by restoring her name to said approved roll.

That the relators, Eastlund, children of a marriage between Esther Larsen and Eric Eastlund, a white man, and who are the grandchildren of Mrs. Zack Larsen, were denied enrollment for the reason that they are not entitled to be enrolled or allotted lands of the tribe in any event, or under any law. Their mother was born away from the reservation of the tribe, had no tribal affiliation or rights of her own, was reared and educated according to the customs of civilized life. They sought restoration to said rolls, and same was denied them,

16 after a full, fair and regular hearing by the Commissioner of Indian Affairs and the Secretary of the Interior, as alleged under the law as interpreted by the United States Court of Appeals for the Eighth Circuit in the decision of the *Oakes Case* (172 Fed. 305).

He especially denies that the action of the Secretary of the Interior at the dates aforesaid was contrary to law or in violation of any act of Congress, and denies that the defendant and his predecessors in office were without jurisdiction or authority of law in striking relators' names from said roll, as aforesaid. He alleges that he had full and complete authority of law, and that it was a part of his official duty towards the Gros Ventre Tribe, and its members, to see that said roll contained the names of all Indians who had lawful rights on and in the Ft. Belknap Reservation, and likewise his duty to see that said roll did not contain the names of individuals who were not lawfully entitled to enrollment and allotment of the lands belonging to said tribe.

7. He denies all and singular the allegations of paragraph 7, except such as are in this Answer specifically admitted and particularly denies that the action of the Secretary of the Interior therein complained of was unwarranted, arbitrary, or without authority of law, or that his said acts or any of them deprived them of any property, property rights or privileges, lawfully belonging to them or either of them.

8. For further response to the rule to show cause and for further answer to the allegations of the petition as a whole, the defendant alleges that no patent to any allotment of land on the Fort Belknap Reservation was made to any Indian enrolled upon said amended and approved Gros Ventre Tribal Roll until in March of 1927.

17 9. Further responding to the rule to show cause and further answering the allegations of the petition as a whole, defendant states that the petition shows on its face that all of the aforesaid action of the Secretary of the Interior was the result of the exercise of his official judgment and discretion in the decision of questions of law and fact within his administrative jurisdiction, and therefore the courts will not interfere therewith by mandamus.

10. Further responding to the rule to show cause and further answering the allegations of the petition as a whole, defendant states that this suit is prematurely brought because the administration of the act of 1921, *supra*, has not been finally closed in the Department of the Interior and no allegation to that effect appears in the petition.

11. Further responding to the rule to show cause and further answering the allegations of the petition as a whole, defendant states that parties are improperly joined as plaintiffs who have no community of interest in the subject of this action.

12. Further responding to the rule to show cause and further answering the allegations of the petition as a whole, defendant states that the petition does not contain a statement of facts sufficient to warrant the court in granting the relief sought by plaintiffs or any of them.

Wherefore defendant prays that the rule be discharged, the petition dismissed, and that plaintiffs take nothing herein; that defendant be permitted to go hence without day, with his costs.

RAY LYMAN WILBUR,
Secretary of the Interior.

18 DISTRICT OF COLUMBIA, *ss:*

Ray Lyman Wilbur, being first duly sworn, on his oath says that he has read the foregoing Answer and Response to the Rule by him subscribed, and knows the contents thereof, that the matters therein stated of his own knowledge are true, and those stated on information and belief, he believes to be true.

RAY LYMAN WILBUR.

Subscribed and sworn to before me this 11 day of December, 1930.

[NOTARIAL SEAL.] W. BERTRAND ACKER,
Notary Public in and for the
District of Columbia.

E. C. FINNEY,
Solicitor, Department of the Interior;
O. H. GRAVES,
Assistant to the Solicitor,
Attorneys for the Defendant.

19 EXHIBIT A.

Department of the Interior, Washington.

M. 6728.
Address only the Secretary of the Interior.

Oct. 12, 1926.

The Commissioner of Indian Affairs.

DEAR MR. COMMISSIONER:

You have submitted an appeal from the action of your office of October 30, 1925, declining to reopen the case involving the application of certain members of the Emma Larsen family for enrollment with the Gros Ventre Tribe of Indians of Fort Belknap Reservation, Montana.

The records show that the members of this family were during many years afforded the fullest opportunity to substantiate their claims. The facts of the case have been many times stated and the application for enrollment repeatedly denied. The entire record has been reviewed in connection with the alleged newly discovered and additional evidence now furnished and it is found to be for the most part but cumulative of evidence already in the record.

Upon careful consideration no valid reason is seen for disturbing the action heretofore taken in respect to this family. The appeal is accordingly hereby denied.

Very truly yours,
(Signed) JOHN H. EDWARDS,
Assistant Secretary.

20 EXHIBIT "B".

Department of the Interior, Office of the Solicitor, Washington.

M. 7599. Jun. 10, 1922.

The Honorable the Secretary of the Interior.

DEAR MR. SECRETARY:

There has been referred to me for opinion a question submitted by the Indian Office as to whether the Secretary of the Interior is authorized to make changes in the allotment roll of Indians of the Fort Belknap Reservation, Montana.

The roll approved by the Department January 9, 1922, was prepared by a commission appointed in pursuance of section 1 of the special act of March 3, 1921 (41 Stat., 1355), which provides in part:

That within one year from the date of approval of this Act the Secretary of the Interior shall appoint a commission of three persons, two of whom shall be members of the Gros Ventre and Assinniboine Tribes of Indians and one member an employee of the Interior Department, who shall cause to be prepared, in such manner as they may deem advisable, a complete and final roll, to contain the names of all Indians ascertained to have rights on the Fort Belknap Reservation, Montana. Immediately upon the approval of the said roll which shall be the conclusive and final evidence of the right of any Indian of the reservation to an allotment of land, the Secretary of the Interior is hereby authorized and directed to allot pro rata, under rules and regulations and in such areas and classes of lands as may be prescribed by him, among such enrolled Indians all the unreserved and otherwise undisposed of lands on the Fort Belknap Reservation. * * *

The act requires the appointment of an enrollment commission within one year from the date of its approval, but it does not prescribe any time limit within which the roll must be completed and it appears that the actual allotment of
21 the reservation has not as yet been made. The question submitted is apparently in view of that provision of the act which declares "immediately upon the approval of the said roll which shall be the conclusive and final evidence of the right of any Indian of the reservation to an allotment of land" etc.

The further provisions of the act show that the authority and jurisdiction of the Secretary of the Interior do not end with the preparation and approval of the roll. Allotments of land are to be made and trust patents issued to allottees. In other words the Secretary's jurisdiction continues until he has performed the final acts authorized by law.

In December, 1914, the Solicitor for this Department expressed opinion on legislation contained in the Indian appropriation act of that year (38 Stat., 582, 605), which provided:

That within ninety days after the approval of this Act a complete roll of the unallotted members of the LaPointe or Bad River Band of Chippewa Indians, of the State of Wisconsin, entitled to allotments under existing laws on the Bad River Reservation, shall be made and completed by the Secretary of the Interior with the assistance of a committee of members of said band duly appointed by a general council of the Bad River Band of Chippewa Indians called for that purpose.

It was held that so far as the roll of unallotted members of the band of Indians there in question was required to be made and completed "within 90 days after the approval of this act," the language was merely directory and time was not of the essence of the act to be performed. The Solicitor further stated in that connection:

It is well settled by departmental and court decisions that until fee patent has issued on an Indian allotment, the Secretary of the Interior retains jurisdiction and has authority to investigate and determine as to the legality and validity of such allotment. This undoubtedly is the proper rule, as when the time comes for making allotments and distributing moneys to the Indians of this particular band, if it should appear that any person was improperly enrolled, it would hardly be seriously contended that the Secretary is powerless to
22 interfere, but must perpetuate and make effective the mistake by awarding land and money to one known not to be entitled thereto.

An opinion of the Assistant Attorney General for this Department (12 L. D., 169), involved a case where after approval of allotment lists prepared in pursuance of an act of Congress which directed the Secretary of the Interior "within 90 days from and after the passage of this act" to make allot-

ments of land to certain Indian tribes "upon lists to be furnished him by the chiefs of said tribes, duly approved by them, and subject to the approval of the Secretary of the Interior," a member of one of the tribes applied for allotment alleging that her name had been inadvertently omitted from such lists. It was held in said opinion that "the inadvertent omission of a member of the tribe from the allotment list approved by the Secretary, may be corrected on due proof of the fact;" that if the applicant's allegation were true "it is such a mistake, or omission, as in my opinion the Secretary has a right and ought to correct by causing an allotment to be made to her."

It was held in the case of David Laughton (18 L. D., 283), that "the Department has the authority to correct rolls of Indian allottees whenever it is clearly shown that a mistake has been made."

The case of Lowe *v.* Fisher (223 U. S., 95), involved Indian legislation which directed lists to be prepared of those found by a commission to be entitled to enrollment; and it provided that "the lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the * * * tribe, upon which allotment of land and distribution of their property shall be made;" and further that "where there shall have been submitted to and
23 approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete." It was contended in that case that a roll made complete by legislation excludes the idea of correction by an Executive officer. But the court held that the Secretary of the Interior may correct rolls and decide questions of right and title as long as the legal title is in the United States and his jurisdiction involving the right to correct mistakes continues until a date which Congress has fixed as final.

As to the Secretary's power and authority in the premises the same principle applies whether a correction of rolls for mistake or inadvertence involves the adding to or striking names from the rolls. In my opinion of March 29, 1922, regarding the Stockbridge-Munsee roll, it was said:

It is equally well settled that the Secretary has power to correct errors in tribal rolls. If a mistake is made the Secretary has equal power in striking persons from the rolls as he had originally in placing their names thereon. The presence of the name of a person on the list who is not entitled to enroll-

be supplied, since it would come to pass that although the property was yet in the control of the United States to carry out the trust, there would be an absence of all power both in the administrative and judicial tribunals to correct an order once rendered, however complete might be the proof of the fraud which had procured it.

See also United States *v.* Wildcat (244 U. S., 111), Duncan Townsite Co. *v.* Lane (245 U. S. 308), Johnson *v.* Payne (253 U. S., 209).

The foregoing is sufficient to show the general rule as to the power of the Secretary of the Interior to correct mistakes that may be made in the administration of the laws relating to Indians. There is nothing in the act of March 3, 1891 (1921), *supra*, relating to Indians of the Fort Belknap Reservation that so distinguishes it as to render inapplicable the principles and decisions above referred to. While power exists in the Secretary of the Interior to make changes in rolls especially where as in this instance the actual allotment of the reservation has not as yet been made yet he would not be justified under the provisions of the particular act in question in reopening indiscriminately the roll prepared by the commission appointed for the purpose. Any change in said roll should be confined to individual cases clearly shown to require this action and it is not intended by this opinion to pass on the merits of any particular case or cases. So far as possible changes should only be made upon the recommendation of the commission which is cognizant of the facts and charged by law with the duty and responsibility of preparing the roll in the first instance.

Respectfully,

(Sgd.) EDWIN S. BOOTH,
Solicitor.

Approved Jun. 10, 1922.

(Sgd.) F. M. GOODWIN,
Assistant Secretary.

Replication.

Filed May 20, 1931.

* * * * * * *

Come now the plaintiffs in the above entitled action and in reply to defendant's answer to plaintiff's petition herein state:

ment is no more conclusive as to his rights than the absence from such list of the name of a person who is entitled. The Assistant Attorney General for this Department, on January 29, 1896 (12 Op. Asst. Atty. Gen., 38, 47), held in respect to enrollment under the act of March 3, 1893, *supra:*

'While the provisions of the act of March 2, 1895, above quoted, do not require a revision of the enrollment heretofore made under the provisions of the act of 1893, yet I see no reason why the Secretary may not, in the exercise of his supervisory power over such matters, cause any errors in the rolls to be corrected, and to this end he may order a new enrollment to be made.'

The Supreme Court in the case of Lane *v.* Mickadiet (241 U. S., 201), had occasion to construe the words "final and conclusive," employed in the act of June 25, 1910 (36 Stat., 855), authorizing the Secretary of the Interior to ascertain the heirs of deceased Indians and providing that "his decision thereon shall be final and conclusive." It was contended that under that provision the heirs of a deceased allottee being once determined, the Secretary was without
24 power to reopen and reconsider the finding. But the court held:

The words "final and conclusive" describing the power given to the Secretary must be taken as conferring and not as limiting or destroying that authority. In other words they must be treated as absolutely excluding the right to review in the courts, as had hitherto been the case under the act of 1887, the question of fact as to who were the heirs of an allottee, thereby causing that question to become one within the final and conclusive competency of the administrative authority. As it is obvious that the right to review on proper charges of newly discovered evidence or fraud a previous administrative order while the property to which it related was under administrative control, was of the very essence of administrative authority (*Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589), it must follow that the construction upheld would not only deprive the Secretary of the final and conclusive authority which the statute in its context contemplated he should have, but would indeed render the administrative power conferred wholly inadequate for the purpose intended by the statute. And it must be further apparent that the inadequacy of authority which the proposition if accepted would bring about could not

3-4-5-6. Plaintiffs admit that the mother of Mrs. Zack Larsen was a duly enrolled full-blood Gros Ventre Indian woman named Strike, who, some time prior to the year 1875, married Moses Solomon, a white man, and at the time of her death in 1878 was recognized by said Tribe as a member thereof. They admit that said Mrs. Zack Larsen (Emma Solomon), the mother of some and grandmother of the remainder of the plaintiffs, was born in 1875, at Eagle Butte, Montana, but they deny defendant's allegation that the said place of birth
26 was not on the Gros Ventre Indian Reservation and, instead thereof, aver that said Eagle Butte, Montana, was on the then Gros Ventre Indian Reservation.

Plaintiffs admit that said Gros Ventre Indian Reservation was diminished in territory by the Act of May 1, 1888 (25 Stat. 113), which ratified the agreement with the Gros Ventre Indians of December 28, 1886, and as a result *there* therefore the residence of said Mrs. Zack Larsen and her children, the plaintiffs herein, thereafter was off the diminished Reservation. Plaintiffs deny, however, that said Mrs. Zack Larsen was enrolled by the Secretary of the Interior or became entitled to be enrolled by virtue of the Act of June 7, 1897 (30 Stat. 90), as stated by defendant in his answer, but aver that she was enrolled and was entitled to be enrolled by reason of being a Gros Ventre Indian by blood, born into Tribal membership, among said Indians, and upon the then Gros Ventre Indian Reservation of Montana, all of which has been found and determined by the report of the Enrollment Commission through its Chairman, J. T. Marshall, appointed under the provisions of the Act of March 3, 1921, to prepare a complete and final roll of the Indians of the Gros Ventre Indian Reservation, attached hereto, marked Exhibit A, and made a part hereof; by the decision of the Secretary of the Interior approved December 28, 1921, attached hereto, marked Exhibit B, and made a part hereof; and as shown by map No. 879 of the records of the Department of the Interior, General Land Office, compiled as of 1883, which shows the location of the then Gros Ventre Indian Reservation and of said Eagle Butte thereon, and which is hereby referred to and of which the Court will take judicial notice.

Plaintiffs, the children of said Mrs. Zack Larsen, deny that they were denied enrollment by the Secretary of the
27 Interior upon the ground that their said mother was born outside the Tribal relation, but aver that they were

denied enrollment upon the ground that they were born away from the Tribal relation, the Secretary of the Interior, after finding that their said mother was born into Tribal membership, erroneously failing to grant them the rights of citizenship in said Tribe as provided by the Act of June 7, 1897 (30 Stat. 90). See Exhibits attached hereto and made a part hereof.

Plaintiffs further deny each and every allegation contained in defendant's answer inconsistent with the allegations contained in plaintiff's petition and not herein admitted.

7-8-9-10. Plaintiffs for their reply to Paragraphs 7-8-9-10 of defendant's answer say that the allegations therein do not constitute a sufficient answer to plaintiff's petition, nor to the rule issued in this cause.

11. Plaintiffs in reply to Paragraph 11 of defendant's answer say that the rights of all the plaintiffs in this cause are based upon the same questions of law and fact and they are joined as plaintiffs in this action in order to avoid a multiplicity of suits.

AGNES LARSEN STOOKEY,
ESTHER LARSEN EASTLUND,
BERTHOLD LARSEN,
EDWARD LARSEN,
MATILDIA LARSEN,
EMMA LARSEN EDELMAN,
On Their Own Behalf, and
JOHN SANFORD LARSEN,
RUTH LARSEN,
MINNIE EASTLUND,
WINIFRED EASTLUND,
FERN EASTLUND,
Minors, by Their Next Friend,
ESTHER LARSEN EASTLUND, *and*
ESTHER LARSEN EASTLUND,
As Heir-at-law of Dixie Eastlund, Deceased, Plaintiffs,

By GUY PATTEN,
Of Their Attorneys.

28 DISTRICT OF COLUMBIA, *ss*:

Guy Patten, being duly sworn, deposes and says that he is a member of the law firm of Serven & Patten, and that he has read the foregoing Replication subscribed by him as Attorney,

and knows the contents thereof, and that the allegations made therein on knowledge are true, and that the allegations made therein on information and belief he believes to be true.

GUY PATTEN.

Subscribed and sworn to before me this 15th day of May, 1931.

[NOTARIAL SEAL.] LEWIS H. FISHER,
Notary Public, D. C.

EXHIBIT A.

Copy.

Department of the Interior, United States Indian Service,
Fort Belknap Agency, Harlem, Montana.

Land Contract 49037–21, 89737–21.

November 21, 1921.

ERM.

Commissioner of Indian Affairs,
Washington, D. C.

SIR:

In reply to your letter of November 16th, Land Contract 49037–21, 89737–21, ERM, relative to the rights of Mrs. Emma Larson on this reservation I wish to report that the Enrolling Commission received the application of Mrs. Larson for enrollment but due to the fact that the Department had denied her application on May 23, 1918, and further advised that it could not recommend re-opening the case, Mrs. Larson's application was rejected by the Commission.

29 On investigating the case of Mrs. Larson the Commission finds that Mrs. Larson was born in 1875 at Eagle Butte south of the Bear Paw Mountains on the Missouri River. This territory was a part of the reservation at that time. Her father was Moses Solomon a white man, her mother Capture or Cheering a Gros Ventre, that the country where she was born, was at that time, a Gros Ventre country the Indians coming to this reservation in 1888. Mrs. Larson continued to live at that place until 1915 when she moved to the present reservation where she has since made her home. In 1916 and 1918 her case was brought before the Tribal Council which both times voted unanimously in favor of her

enrollment. So far as can be learned the Indians on this reservation regarded her as a member of this tribe and entitled to enrollment and allotments of land on this reservation.

After due consideration of the facts in Mrs. Larson's case, the Enrolling Commission recommends that Mrs. Larson and her children be enrolled.

I am enclosing for your information statements of Mrs. Larson made in her application for enrollment.

Respectfully,

J. T. MARSHALL,
Superintendent.

JTM:H.

EXHIBIT B.

Copy.

Address only the Commissioner of Indian Affairs.
Refer in reply to the following: 95547–21.

Department of the Interior, Office of Indian Affairs,
Washington.

Dec. 17, 1921.

The Honorable the Secretary of the Interior.

SIR:

There is submitted herewith the Office record regarding the rights of Mrs. Emma Larson and certain of her children with the Indians of the Fort Belknap Reservation, Montana.

The facts are that Mrs. Emma Larson was born in 1875 at Eagle Tail Butte south of Bear Paw Mountains among the Gros Ventre Tribe of Indians and in territory then occupied by said Indians, but which has since been ceded by them to the Government; that her father, Moses Solomon, was a white man and her mother was a full-blood Gros Ventre Indian woman; that in 1891 Mrs. Larson married a white man who is the father of her children, who were born at or near Fort Benton, Montana; that Mrs. Larson and her children removed to the present Fort Belknap Reservation in 1915, where they have since resided. The further facts are that the tribal council has on several occasions voted in favor of enrolling this family, and on April 29, 1918, this Office submitted the case for your consideration with the recommendation that the action of the council be approved and that these persons be enrolled by adoption of the tribe. On May 23,

1918, the case was rejected by the Department and it was said that "the members of the Larson family were born away from the reservation, have been educated among the whites, and never affiliated with the Indians."

It seems, therefore, that the conclusion reached was based largely on the belief that Mrs. Larson, as well as her children, was born apart from the tribe and had never been affiliated therewith, when in fact she was born on the reservation, now a ceded portion thereof, among the Indians and has lived on the present reservation since 1916.

The court, in the case of Oakes et al. v. United States (172 Fed. Rep. 305), held in effect that originally the test of the rights of individual Indians to share in tribal property was existing membership in the tribe, but that this rule had been so broadened by the Acts of March 3, 1875 (18 Stats. L. 420), and of February 8, 1887 (24 Stats. L. 388), as to entitle Indians who were once recognized as members of a tribe to share in the distribution of the property of the tribe.

Under this decision, it is believed that Mrs. Larson is entitled to enrollment, and that her children, who were born apart from the reservation and tribe and whose father was a white man, were not born to tribal membership and should not be enrolled.

It is respectively recommended that authority be granted to add the name of Mrs. Emma Larson to the Fort Belknap tribal rolls and that her children be denied enrollment.

Respectfully,

CHAS. H. BURKE,
Commissioner.

Approved Dec. 28, 1921.
F. M. GOODWIN,
Assistant Secretary.

31 Filed June 5, 1931.

United States Department of the Interior, Office of Indian Affairs, Washington.

September 3, 1931.

I, B. S. Garber, Acting Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this Office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed on the day and year first above written.

[Seal United States of America, Office of Indian Affairs, 1892.]

B. S. GARBER,
Acting Commissioner.

32 Office of Indian Affairs. Received Nov. 26, 1921.
95547.

5—1142.

Department of the Interior, United States Indian Service,
Fort Belknap Agency, Harlem, Montana.

Land Contract 49037–21, 89737–21.

ERM. November 21, 1921.

Commissioner of Indian Affairs,
Washington, D. C.

SIR:

In reply to your letter of November 16th, Land Contract 49037–16053, 88737–21, ERM, relative to the rights of Mrs. Emma Larson on this reservation I wish to report that the Enrolling Commission received the application of Mrs. Larson for enrollment but due to the fact that the Department had denied her application on May 23, 1918, and further advised that it could not recommend re-opening the case, Mrs. Larson's application was rejected by the Commission.

On investigating the case of Mrs. Larson the Commission finds that Mrs. Larson was born in 1875 at Eagle Butte south of the Bear Paw Mountains on the Missouri River. This territory was a part of the reservation at that time. Her father was Moses Solomon a white man, her mother Capture or Cheering a Gros Ventre, that the country where she was born, was at that time, a Gros Ventre country the Indians coming to this reservation in 1888. Mrs. Larson continued to live at that place until 1915 when she moved to the present reservation where she has since made her home. In 1916 and 1918 her case was brought before the Tribal Council which both times voted unanimously in favor of her enrollment. So far

as can be learned the Indians on this reservation regarded her as a member of this tribe and entitled to enrollment and allotments of land on this reservation.

After due consideration of the facts in Mrs. Larson's case, the Enrolling Commission recommends that Mrs. Larson and her children be enrolled.

I am enclosing for your information statements of Mrs. Larson made in her application for enrollment.

Respectfully,

J. T. MARSHALL,
Superintendent.

JTM*H.

33 5—1100.

Address only the Commissioner of Indian Affairs.
Refer in reply to the following: 95547–21.
Copy to Supt. Eec. D8, 1921.

Department of the Interior, Office of Indian Affairs,
Washington.

Dec. 17, 1921.

For File.

The Honorable the Secretary of the Interior.

SIR:

There is submitted herewith the Office record regarding the rights of Mrs. Emma Larson and certain of her children with the Indians of the Fort Belknap Reservation, Montana.

The facts are that Mrs. Emma Larson was born in 1875 at Eagle Tail Butte south of Bear Paw Mountains among the Gros Ventre tribe of Indians and in territory then occupied by said Indians, but which has since been ceded by them to the Government; that her father, Moses Solomon, was a white man and her mother was a full-blood Gros Ventre Indian woman; that in 1891 Mrs. Larson married a white man who is the father of her children, who were born at or near Fort Benton, Montana; that Mrs. Larson and her children removed to the present Fort Belknap Reservation in 1915, where they have since resided. The further facts are that the tribal council has on several occasions voted in favor of enrolling this family, and on April 29, 1918, this Office submitted the case for your consideration with the recommendation that the

action of the council be approved and that these persons be enrolled by adoption of the tribe. On May, 23, 1918, the case was rejected by the Department and it was said that "the members of the Larson family were born away from the reservation, have been educated among the whites, and never affiliated with the Indians."

It seems, therefore, that the conclusion reached was based largely on the belief that Mrs. Larson, as well as her children, was born apart from the tribe and had never been affiliated therewith, when in fact she was born on the reservation, now a ceded portion thereof, among the Indians and has lived on the present reservation since 1916.

34 The court, in the case of Oakes et al. v. United States (172 Fed. Rep. 305), held in effect that originally the test of the rights of individual Indians to share in tribal property was existing membership in the tribe, but that this rule had been so broadened by the Acts of March 3, 1875 (18 Stats. L. 420), and of February 8, 1887 (24 Stats., L. 388), as to entitle Indians who were once recognized as members of a tribe to share in the distribution of the property of the tribe.

Under this decision, it is believed that Mrs. Larson is entitled to enrollment, and that her children, who were born apart from the reservation and tribe and whose father was a white man, were not born to tribal membership and should not be enrolled.

It is respectively recommended that authority be granted to add the name of Mrs. Emma Larson to the Fort Belknap tribal rolls and that her children be denied enrollment.

Respectfully,

CHAS. H. BURKE,
Commissioner.

Approved Dec. 28, 1921.
F. M. GOODWIN,
Assistant Secretary.

35 The foregoing roll of the Gros Ventre tribe of Indians, Fort Belknap Reservation, Montana, prepared by the Enrollment Commission under the act of March 3, 1921 (41 Stat. L., 1355), is hereby approved to close as of November 30, 1921 — the date fixed therefor in Departmental instructions to the Enrollment Commission of May 24, 1921—with the following changes therein recommended in Indian Office letter (I. O. 92479–1922), approved this day; and the persons whose numbered names appear thereon are hereby declared

to be entitled to enrollment and allotment on the Fort Belknap Reservation.

Changes recommended and approved.

Add to the roll the *following numbers and names:*

609—William Minugh,
610—James R. Minugh,
611—Edward S. Minugh.
341—Reva Larsen,
Enrolled, see 38137–23.
608—James White Plume,
(See 46770–23)

The applications of the following are *denied:*

W. W. Wells,
Amy Wells Gump,
Maggie Wells Gump.

Restored to roll by Dept. Authy. Aug. 24, 1925. 40070–25.

Strike from the roll the *following numbers and names:*

335—Barthold Larsen,
336—Edward Larsen,
337—Matildia Larsen,
338—Emma Larsen,
339—John Sandford Larsen,
340—Ruth Larsen,
549—Agnes Larsen Stookey,
231—Esther Larsen Eastlund,
232—Minnie Eastlund,
233—Winifred Eastlund,
234—Fern Eastlund,
235—Dixie Eastlund.
608—Mrs. Emma Larsen (Dup. Enrollment).
401—Daniel O'Bryan,
402—Bessie O'Bryan,
403—Eva O'Bryan,
404—Richard O'Bryan,
405—Smith O'Bryan,
261—Lucy O'Bryan Fitzsimmons,
262—John Fitzsimmons,
263—Irene Fitzsimmons,
264—Theodore P. Fitzsimmons,
595—Kate O'Bryan Wernicke,
409—Thomas O'Bryan,
410—Barbara E. Obryan,
411—Gerald O'Bryan.
151—Sarah Bower,
333—Peter Morgan.

Approved: Apr. 3, 1923.
F. M. GOODWIN,
Assistant Secretary.

Added to roll by Dept. Authy.
61425/13 { 46432/26 Oct. 5/26. John F. O'Bryan.
5548/27 Feb. 6/27. Rose Ellen O'Bryan.

36 *Memorandum.*

On Submission After Hearing and on Briefs for Issuance of the Writ of Mandamus Against the Respondent.

Filed June 15, 1931.

* * * * * * *

The petition in this case in effect seeks a review of certain determinations made by the Respondent with respect to the claims alleged by the Relators. The petition alleges, among other things, that all of the Relators are Gros Ventre Indians of a mixed blood. Several of them are children born of a lawful marriage taking place in 1891 between one Zack Larsen, a white man, and a Gros Ventre Indian woman of one-half Indian blood recognized by this tribe as a member thereof b blood and enrolled as such as a member of the tribe of the Fort Belknap Indian Reservation, Montana. Three of the Relators are children born of a lawful marriage taking place between one Eric Eastlund, a white man, and the Relator, Esther Larsen, one of the children of the marriage of Zack Larsen mentioned above.

By the Act of Congress approved March 3, 1921 (41 Stat. 1355) provision was made for the making of a roll and an allotment to Gros Ventre Indians of the Fort Belknap Indian Reservation who were thus enrolled. All of the Relators were born prior to the passage of this Act. The Act provided for the setting up of an enrollment commission authorized in the first instance to prepare the roll already mentioned. This commission was to be appointed by the Secretary of the Interior, and this was done and a roll was prepared by the commission on which the names of the Relators were placed. This was approved by the then Secretary of the Interior on January 9, 1922. On April 3, 1923 the then Secretary of the Interior struck the names of the Relators from said
37 roll and cancelled and held for naught the allotment selections of land following the enrollment by the commission. It is further alleged in the petition that such action was in violation of the provisions of the Act of Congress of March 3, 1921, and of an Act approved June 7, 1897 (30 Stat. 62, 90), and it is alleged that it was also in violation of the provisions of an Act of Congress approved February 8, 1887 (24 Stat. 390).

On October 20, 1925, the Relators presented a motion to the Respondent asking that the said action by him in striking

their names from the roll be reconsidered and their names restored to it. On October 30, 1925, this motion was denied by the Commissioner of Indian Affairs, to whom in the first instance it was presented. From this action of the Commissioner, the Relators appealed to the Respondent, who on October 12, 1926, affirmed the action of the Commissioner in refusing to reconsider the action of striking the names of the Relators from the roll in question, and to restore their names to that roll. This action by the Respondent is alleged by the Relators to have been unwarranted, arbitrary and without authority of law, and they allege that having no other plain or adequate remedy by which their rights, privileges, and property may be protected and preserved except by a writ of mandamus, pray for its issuance.

The case turns upon whether or not there may be a construction of the Acts of Congress involved in keeping with the claim of the Relators and that no other construction can be made.

In the opinion of the Court it is clear that conflicting opinions on this question may arise. The view taken by the Respondent of the Acts in question, and after presumably an inquiry into and determination of the facts, was that the Acts did not give to the Relators the rights claimed by them.

The other and conflicting opinion is that held by the
38 Relators and in this case urged as the only opinion that could be arrived at in considering the legislation in question, and as we have seen, the Relators sought by their appeal to persuade the Respondent that he was in error in the construction that he made of the legislation, carrying with it the power to do what he did do in striking the Relators' names from the rolls. They failed to convince him and hence the pending application for the writ of mandamus.

Under the foregoing circumstances, the Supreme Court has held that the writ of mandamus can not be invoked. It is not a writ of error and ordinarily will only issue in a case like the present where all that remains to be done by the Respondent is a *mere ministerial act.* Cunningham v. Macon & B. R. Co., 109 U. S. 446; Ballinger v. United States ex rel. Frost, 216 U. S. 240. In this case his action was much more than being merely ministerial, it involved an inquiry by him into facts, a determination on what that inquiry revealed, and a construction of the legislation which he saw fit to give to it in conformity with the facts so found. Whether right or wrong in his conclusions, no review of them can be made in this Court through the medium of a writ of mandamus.

U. S. ex rel. Alaska Smokeless Coal Co. v. Lane, 250 U. S. 549.

The application for the writ must therefore be denied and the petition dismissed, and an order to this effect will be settled and signed on presentation and notice.

June 15, 1931.

F. L. SIDDONS,
Justice.

39 Supreme Court of the District of Columbia.

Thursday, June 18, 1931.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * * * *

This cause having been heard by the Court upon the pleadings and exhibits, and having been submitted for final determination and judgment after argument by counsel for the respective parties hereto; therefore, this 18th day of June, 1931, it is by the Court considered and adjudged that the plaintiffs' petition in this cause be dismissed, that the said plaintiffs take nothing by their suit, and that the defendant go thereof without day. And it is further considered that the said defendant do recover against the said plaintiffs his costs and charges by him about his defense in this behalf expended, to be taxed; and that the said defendant have execution thereof.

From the foregoing judgment the plaintiffs, Agnes Larsen Stookey, Esther Larsen Eastlund, Berthold Larsen, Edward Larsen, Matildia Larsen, and Emma Larsen Edelman; and John Sanford Larsen, Ruth Larsen, Minnie Eastlund, Winnifred Eastlund, and Fern Eastlund, by their next friend, Esther Larsen Eastlund; and Esther Larsen Eastlund as the heir at law of Dixie Eastlund, by their attorney of record, in open court and at the time of the rendition of the said judgment, note an appeal to the Court of Appeals of this District, and the same hereby is allowed. The amount of the bond to be given by the appellants, covering the costs of the case, hereby is fixed in the sum of $100, with leave granted to the appellants to deposit the sum of $50 with the clerk of this court in lieu of such bond.

40 *Memorandum.*

June 29, 1931.—$50.00 deposited by Serven in lieu of bond.

Assignment of Errors.

Filed June 29, 1931.

* * * * * * *

The relators in this action, in connection with their petition for a Writ of Error, make the following assignment of errors which they aver occurred upon the trial of the cause, to-wit:

First. Said court erred in dismissing the relators' petition for the writ of mandamus and in entering final judgment thereon.

Second. Said court erred in holding that the Act of June 7, 1897 (30 Stat. L. 62; 90), may be given a construction other than one in keeping with the claims of the relators, Agnes Larsen Stookey, Esther Larsen Eastlund, Berthold Larsen, Edward Larsen, Matildia Larsen, Emma Larsen Edelman, John Sanford Larsen and Ruth Larsen, and that conflicting opinions with reference to the construction of said Act may arise.

Third. Said court erred in holding, in effect, that the action of relators in presenting a motion to respondent that his said action in striking their names from the approved rolls of the Gros Ventre Tribe of Indians of the Fort Belknap Indian Reservation, in Montana, be reconsidered and their names restored to said rolls operated to constitute relators' petition for the writ of mandamus in this case, in effect, a writ of error, and preclude them from the relief herein sought.

41 Fourth. Said court erred in holding, in effect, that the action of respondent in striking the names of relators from the approved rolls of the Gros Ventre Indians of the Fort Belknap Indian Reservation, in Montana, more than a year after the approval of said rolls by the Secretary of the Interior, and without any charge or evidence that they had obtained such enrollment by fraud, was not in violation of the Act of Congress approved March 3, 1921 (41 Stat. L. 1355), and that such action by respondent was not unwarranted, arbitrary, and without authority of law.

Wherefore the relators pray that the judgment of the Supreme Court of the District of Columbia may be reversed.

A. R. SERVEN,
Attorney for Relators.

GUY PATTEN,
Of Counsel.

Designation of Record.

Filed June 29, 1931.

* * * * * * *

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the Court of Appeals of the District of Columbia, under the writ of error heretofore allowed by said court and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Petition of the plaintiffs.

Rule to show cause.

Respondent's answer and return.

42 Relator's reply.

Certified copy of report of the Enrollment Commission by its Chairman, J. T. Marshall, introduced in evidence.

Certified copy of the decision of the Secretary of the Interior, approved December 28, 1921, introduced in evidence.

Certified copy of the action of the Secretary of the Interior, approved April 3, 1923, introduced in evidence.

Opinion of the court.

Judgment.

Assignment of errors.

Bond on appeal (Memo. as to).

This designation of record.

Said transcript to be prepared as required by law and the rules of the Court of Appeals of the District of Columbia.

A. R. SERVEN,
Attorney for Relators.

43 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 42, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 78747 at Law, wherein United States of America, ex rel. Agnes Larsen Stookey, et al. are Plaintiffs and Ray Lyman Wilbur, Secretary of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I herunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of September, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
By CHAS. B. COFLIN,
Asst. Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5484. Agnes Larsen Stookey, et al., appellants, vs. Ray Lyman Wilbur, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Sep. 8, 1931. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC 5 - 1931

Henry W. Hodges
CLERK

IN THE

Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5484

SPECIAL CALENDAR

UNITED STATES OF AMERICA, EX. REL. AGNES LARSEN STOOKEY, ESTHER LARSEN EASTLUND, BERTHOLD LARSEN, EDWARD LARSEN, MATILDIA LARSEN, AND EMMA LARSEN EDELMAN, AND JOHN SANFORD LARSEN, RUTH LARSEN, MINNIE EASTLUND, WINNIFRED EASTLUND, AND FERN EASTLUND, BY THEIR NEXT FRIEND, ESTHER LARSEN EASTLUND, AND ESTHER LARSEN EASTLUND, AS THE HEIR AT LAW OF DIXIE EASTLUND,

Appellants,

Vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR,

Appellee.

BRIEF FOR APPELLANTS

A. R. SERVEN,
Attorney for Appellants.

GUY PATTEN,
Of Counsel.

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STATUTES

CASES

IN THE

Court of Appeals of the District of Columbia

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SPECIAL CALENDAR

UNITED STATES OF AMERICA, EX. REL. AGNES LARSEN STOOKEY, ESTHER LARSEN EASTLUND, BERTHOLD LARSEN, EDWARD LARSEN, MATILDIA LARSEN, AND EMMA LARSEN EDELMAN, AND JOHN SANFORD LARSEN, RUTH LARSEN, MINNIE EASTLUND, WINNIFRED EASTLUND, AND FERN EASTLUND, BY THEIR NEXT FRIEND, ESTHER LARSEN EASTLUND, AND ESTHER LARSEN EASTLUND, AS THE HEIR AT LAW OF DIXIE EASTLUND,
Appellants,

Vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR,
Appellee.

BRIEF FOR APPELLANTS

Statement of the Case

This is an appeal from a final judgment of the Supreme Court of the District of Columbia, dismissing plaintiffs' (Appellants here) petition in an action in Mandamus to require the Secretary of the Interior (Appellee) to restore their names to the Gros Ventre Tribal rolls of the Fort Belknap Indian Reservation in Montana.

The case was tried in the court below upon plaintiffs' petition (R. pp. 2–9), the amended answer of defendant

(R. pp. 10–20), plaintiffs' replication (R. pp. 20–33) and certified copies, introduced and filed by plaintiffs on June 5, 1931 (R. p. 25), at the time this case was heard by the Honorable Justice F. L. Siddons in the court below, of the findings of the Enrolling Commission (R. p. 23), the decision of the Secretary of the Interior (R. pp. 24–25) and the action of the Secretary of the Interior in striking the names of the appellants from the roll of the Gros Ventre Tribe of Indians (R. pp. 28–29). The transcript appears to contain these last named instruments in duplicate, but this is because of failure to distinguish between these instruments as exhibits to plaintiffs' replication and their formal introduction and filing at the time of the trial.

The undisputed facts disclosed by said pleadings and those found by the Secretary of the Interior are:

The appellants are all Gros Ventre Indians by blood; were all born off the present restricted Indian Reservation but were born in the country near by and adjoining the present Reservation and on what prior to the restriction of the Reservation by the Act of May 1, 1888 (25 Stat. 113) was the old Gros Ventre Indian Reservation (R. p. 3, R. p. Orig. 14, Print p. 12, R. p. 11). The first eight named appellants, Agnes Larsen Stookey, Esther Larsen Eastlund, Berthold Larsen, Edward Larsen, Matildia Larsen, Emma Larsen Edelman, John Sanford Larsen and Ruth Larsen, are the children of a lawful marriage contracted in 1890 or 1891 between Emma Solomon (Mrs. Zack Larsen or Emma Larsen), a Gros Ventre Indian woman of half blood, and Zack Larsen, a white man. (R. pp. 3, 11, 12.) Said Emma Larsen, or Mrs. Zack Larsen, was duly enrolled by the Secretary of the Interior as a member of the Gros Ventre Tribe of Indians. (R. p. 12.) The remainder of appellants are the grand-

children of said Emma Larsen (Mrs. Zack Larsen), being children of a marriage between Esther Larsen and Eric Eastlund a white man. (R. p. 13.) All the appellants were enrolled by the Enrollment Commission and the rolls as so made, with their names and respective roll numbers, were approved by the Secretary of the Interior January 9, 1922, in accordance with the Act of Congress approved March 3, 1921 (41 Stat. 1355). (R. p. 12.) Thereafter, on April 3, 1923, and more than a year after said rolls had been approved by the Secretary of the Interior, without notice and without any evidence or charge of fraud, the Secretary of the Interior struck their names from said approved rolls. (R. p. 13, 28, 29.)

All the appellants were living upon the present Gros Ventre Indian Reservation at the time of the passage of said enrollment act of March 3, 1921, and had been living thereon since 1916 and had twice been recognized as members of the tribe by resolution of the Gros Ventre Tribal Council. (R. p. 11; R. Orig. 29, Print 23; R. Orig. 3, Print 24.)

Said Emma Larsen (Mrs. Zack Larsen), the mother of the first eight named appellants and grandmother of the remainder, was born at Eagle Butte, Montana, in 1875. Defendant's answer alleges that Eagle Butte, the said place of her birth, was not on the then Gros Ventre Indian Reservation (R. p. 11; R. Orig. 13). Plaintiffs' reply denies this and alleges that Eagle Butte was on the then Reservation (R. p. 21). But the findings of the Enrollment Commission (R. p. 23) and the decision and findings of the Secretary of the Interior (R. p. 24) is that said Emma Larsen (Mrs. Zack Larsen) was born at Eagle Butte among the Gros Ventre Indians on the then Reservation, and the map of this country, compiled as of 1883, which is a part of the files of the Department of

the Interior, General Land Office, referred to in appellants' replication (R. p. 21), and of which the Court will take judicial notice, shows that Eagle Butte is north of the Missouri River and in territory which was a part of the Gros Ventre Indian Reservation and continued to be until the Act of May 1, 1888 (25 Stat. 113), by which the Indians ceded this portion of the Reservation to the United States.

Upon this record the appellants contend that said Emma Larsen (Mrs. Zack Larsen) was born into tribal membership, was a native born member of the tribe, that the Indians on the Reservation always regarded her as a member of the tribe (R. p. 24), was enrolled by the Secretary of the Interior upon the findings and the ground that she was born into tribal membership and that appellants were ultimately denied enrollment and their names stricken from the rolls by the Secretary of the Interior solely because they were not born into tribal membership.

Defendant's answer shows that Emma Solomon (Emma Larsen or Mrs. Zack Larsen) is a Gros Ventre Indian of the half blood, married Zack Larsen, a white man, in 1890, lived in 1891 at Havre, Montana, moved to Marias or Loma in 1892, and in 1916 became a resident of the present restricted Gros Ventre Reservation (R. p. 11). Havre, Montana, is north of the Bear Paw Mountains, and Marias or Loma is on the north side of the Marias River in Montana. The Act of April 15, 1874 (18 Stat. 28) made the southern bank of the Missouri and Marias rivers the southern boundary line of the then Reservation. This continued to be the southern boundary of the Reservation until the Act of May 1, 1888.

It is therefore apparent from the pleadings and said records of the Interior Department introduced that Emma

Fort Belknap Indian Reservation, in Montana, more than a year after the approval of said rolls by the Secretary of the Interior, and without any charge or evidence that they had obtained such enrollment by fraud, was not in violation of the Act of Congress approved March 3, 1921 (41 Stat. L. 1355), and that such action by respondent was not unwarranted, arbitrary, and without authority of law.

ARGUMENT

I. The trial court erred in dismissing appellants' petition and in holding that the Act of June 7, 1897 (30 Stat. L. 62; 90) may be given a construction other than one in keeping with the claims of the first eight named appellants, the children of Mrs. Larsen, and that conflicting opinions with reference to the construction of said Act may arise.

The foregoing is the substance of appellants' first and second Assignments of Error. Whether the first named eight relators, the children of Emma Larsen, are entitled to enrollment depends upon two questions:

(A) Was their said mother, who was married in 1890 or 1891, and who is still living, recognized by the Gros Ventre Indians as belonging to that tribe at the time of the passage of the Act of June 7, 1897, and

(B) Does the Act of June 7, 1897, so plainly prescribe the rights of these appellants as to be free from doubt and their right to enrollment so far an administrative act that its performance may be compelled by mandamus?

(A) Upon the first question the Enrolling Commission, appointed under the provisions of the Gros Ventre enrollment Act of March 3, 1921 (See appendix, p. 17) and charged under the Act with the preparation of a complete and final roll of all Indians ascertained to have rights on the Fort Belknap Reservation, found (R. p. 23) that

Larsen (Mrs. Zack Larsen), the mother of the said first eight named appellants, was born on the Gros Ventre Indian Reservation, among the Indians, and continued to live and rear her children in the same community in which she herself was born and reared and in territory adjoining the Reservation as restricted by the Act of May 1, 1888, until 1916, when she moved with her children and grandchildren and took up her residence on the present restricted Reservation.

ASSIGNMENT OF ERRORS

First. Said court erred in dismissing the relators' petition for the writ of mandamus and in entering final judgment thereon.

Second. Said court erred in holding that the Act of June 7, 1897 (30 Stat. L. 62; 90), may be given a construction other than one in keeping with the claims of the relators, Agnes Larsen Stookey, Esther Larsen Eastlund, Berthold Larsen, Edward Larsen, Matildia Larsen, Emma Larsen Edelman, John Sanford Larsen and Ruth Larsen, and that conflicting opinions with reference to the construction of said Act may arise.

Third. Said court erred in holding, in effect, that the action of relators in presenting a motion to respondent that his said action in striking their names from the approved rolls of the Gros Ventre Tribe of Indians of the Fort Belknap Indian Reservation, in Montana, be reconsidered and their names restored to said rolls operated to constitute relators' petition for the writ of mandamus in this case, in effect, a writ of error, and preclude them from the relief herein sought.

Fourth. Said court erred in holding, in effect, that the action of respondent in striking the names of relators from the approved rolls of the Gros Ventre Indians of the

Mrs. Larsen was born in 1875 at Eagle Butte, Montana, in what was then Gros Ventre country and which continued to be until 1888; that on the occasions when the question of her status was raised before the Tribal Council it voted both times unanimously in favor of her enrollment, and that so far as the Enrolling Commission could learn the Indians on the Reservation regarded her as a member of the tribe. The Secretary of the Interior, in his decision approved December 28, 1921 (R. pp. 24–25) likewise found that Mrs. Larsen was born in 1875 on the then Reservation, now a ceded portion thereof, among the Indians and has lived on the present Reservation since 1916.

Resting alone on the facts found by the Enrolling Commission and the Secretary of the Interior it must be undisputed that Mrs. Larsen was born into tribal membership and was still recognized as belonging to the tribe as late as 1918. The only question that might be raised is whether she still continued to be recognized by the Indians as a member of the tribe on June 7, 1897. The fact that the part of the Reservation on which she was born was ceded by the Indians to the United States in 1888, leaving her a non-resident of the then restricted Reservation, does not affect the question. It is not a question of her residence, but whether she was still regarded as belonging to the tribe. The decision of the Secretary of the Interior nowhere finds that Mrs. Larsen ever ceased to be regarded as a member of the tribe, but sustains her right to enrollment squarely on the fact that she was born into tribal membership and denies that of her children solely because they were not so born. Nowhere in this decision does the Secretary base the enrollment of Mrs. Larsen upon the provisions of the Act of June 7, 1897. The status of her mother, a full-

blood Gros Ventre Indian woman, who had married a white man, Zack Larsen, was not considered or treated by the Secretary of the Interior as the basis of the right of her daughter to enrollment. Mrs. Larsen was found by the Secretary of the Interior to be entitled to enrollment upon her own merits as a native born member of the tribe. Having been born a native citizen of any country (or, in this case, of an Indian tribe) it is not expected that one should be required to prove the continuance of his citizenship year by year. It is presumed to continue until the contrary is shown. The Indians evidently regarded her at all times as belonging to the tribe and the Secretary of the Interior found nothing to the contrary, but allowed her enrollment, notwithstanding her non-residence after 1888 until 1916 on the restricted Reservation, upon the authority, among others of a similar character, of the Act of February 8, 1887 (See appendix, p. 17). It is the same question that arose in this court in the case of *United States Ex Rel., Besaw* v. *Work* (6 Fed. (2nd) 694; 55 App. D. C. 391). In that case the mother of Besaw was a member of the tribe by birth. The question of whether she continued to be recognized by the tribe as a member thereof after she married a white man and left the tribe was rested by the court upon the presumption that such tribal membership and citizenship once shown to exist was presumed to continue until the contrary is shown, the court saying:

> "Her membership by birth and at the time of her marriage, is conceded. It is encumbent, therefore, upon one denying the right of relator to participate in the tribal property to establish by convincing proof the fact that the mother at the time of her death was not a recognized member of the tribe. This proof the record fails to disclose, leaving relator's case in the eyes of the law complete."

This court in the *Besaw* case likewise very clearly pointed out the distinction contended for here between membership in an Indian tribe and the severance of tribal relations. Likewise in the case of *Smith* v. *Bonifer* (154 Fed. 883; affirmed 156 Fed. 846), Mrs. Smith was born on the Reservation, removed therefrom when an infant, later married a white man, and continued to live off the Reservation until long after her marriage. She later moved back on the Reservation in 1888. The court pointed out in that case that there was no evidence that she ever renounced her allegiance; that when she moved on to the Reservation she was recognized by the Indians as a member of the tribe, and that although married to a white man was herself the head of a family. It was held that both she and her children were entitled to enrollment.

In *Vizina* v. *United States* (245 Fed. 541) the court held, in considering the question of abandonment of Indian citizenship, that the inference of such an abandonment should not be drawn from light and trivial circumstances, but a member temporarily absent from the Reservation did not forfeit the right of an Indian as a member of the tribe and that it should take especially strong evidence that an Indian woman has abandoned her tribe simply by living with her husband, which she ought to do under the laws of both God and man.

It is respectfully submitted that the findings of both the Enrolling Commission and the Secretary of the Interior is that Mrs. Larsen, the mother of the first named eight appellants, was born into tribal membership and continued at all times to be recognized by the Indians of her tribe as a member.

(B) The question whether the Act of June 7, 1897 (See appendix, p. 17), so plainly prescribes the rights of the children of Mrs. Larsen as to be free from doubt and

to make their right to enrollment so far a ministerial act that its performance may be compelled by mandamus, must be answered by the Act itself. The language of the Act is too plain to permit of any diversity of opinion with reference to its meaning. It plainly provides that the children of a marriage between an Indian woman by blood and a white man, contracted before the passage of the Act, where the Indian woman is at the time (as in this case) of the passage of the Act recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs by blood as any other member of the tribe. The Act recognizes the same distinction between membership in a tribe and the existence or severance of tribal relations as did this court in the *Besaw* case, when it said:

> "But membership in an Indian tribe is based upon the firm foundation of right by blood inherited from Indian ancestry."

After all, it is only a question of fact whether Mrs. Larsen, the Indian mother, continued at all times to be recognized by the Indians as belonging to the tribe. That fact, in this case, is founded upon and settled by the findings of the Enrolling Commission and the Secretary of the Interior.

In the case of *Oakes* v. *United States* (172 Fed. 305), the Indian mother not only left the tribe but ceased to be recognized by the tribe as belonging thereto, hence the denial of her children to enrollment, because they did not come within the provisions of the Act of June 7, 1897.

The fact of Mrs. Larsen's Indian membership in the tribe having been found by the Secretary of the Interior, and the statute under which her said children claim being plain and not susceptible to conflicting constructions, this case comes within the rule laid down in *Wilbur* v. *United*

States Ex Rel. Kadrie (281 U. S. 206), wherein the Supreme Court said:

> "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary."

II. **The action of appellee in striking the names of all the appellants from the approved rolls more than a year after his approval of said rolls and without any charge or evidence of fraud was in violation of the Act of March 3, 1921 (41 Stat. L. 1355); was without authority of law; and, therefore, such action was unwarranted and arbitrary.**

The Act of March 3, 1921 (See appendix, p. 17) provides that the Enrollment Commission to be appointed thereunder shall cause to be prepared a complete and final roll to contain the names of all Indians ascertained to have rights on the Fort Belknap Reservation and that such roll, upon its approval by the Secretary of the Interior, shall be conclusive and final evidence of the right of any Indian on the Reservation to an allotment of land. The only authority given the Secretary of the Interior under this Act to modify such roll after it is approved by him is that he may strike therefrom any names found to be on said roll fraudulently, and this authority is limited to one year from the date of his approval of such roll. The Secretary of the Interior struck the names of all the appellants from the approved rolls without any charge of fraud and more than a year after his approval of said rolls. The appellee seeks to meet this situation by pleading (R. p. 12) in the answer that after the due approval of the rolls by him on January 9, 1922, he vacated and set aside his approval thereof on June 10,

1922. The evidence of what he actually did in this matter is his Exhibit "B" attached to the answer (R. pp. 16 to 20). This does not purport to vacate or set aside his previous approval of the rolls but is an opinion approved by him, holding that he has authority to make changes in the rolls. That question of law is the issue here. In fact the conclusion of the opinion negatives any intent to set aside the approval of the rolls or in any manner generally to leave them open or in an unapproved condition. He concludes as follows (R. p. 20):

> "While power exists in the Secretary of the Interior to make changes in rolls especially where as in this instance the actual allotment of the reservation has not as yet been made yet he would not be justified under the provisions of the particular act in question in reopening indiscriminately the roll prepared by the commission appointed for the purpose. Any change in said roll should be confined to individual cases clearly shown to require this action and it is not intended by this opinion to pass on the merits of any particular case or cases. So far as possible changes should only be made upon the recommendation of the commission which is cognizant of the facts and charged by law with the duty and responsibility of preparing the roll in the first instance."

Appellants' motion to the Secretary of the Interior asking that his action in thus striking their names from the approved rolls be reconsidered and their names restored can amount to nothing more than an attempt by them to secure the correction of this alleged unwarranted act and to exhaust every means of having the error corrected by the Secretary before resorting to the courts. He declined to do so. The authority of the Secretary of the Interior under this act is not only plainly defined but the conditions and limitations on this authority to

strike names from the approved rolls is also plainly fixed by the Act. While it is true that all authority of the Secretary of the Interior does not end with the approval of the roll, this is because the Act charges him with other duties not limited by time, such as making allotments of the lands and issuing patents, all of which involve the determination of many questions that might arise in connection therewith. But these other duties charged under the Act in no way effect the issue here or extend his authority on the enrollment question, which the statute plainly fixes. The plain purport of the statute is that a final and conclusive roll shall first be made. This done, the Secretary shall then proceed to allot the lands of the tribe and issue trust patents therefor. On these latter acts, the statute fixes no limitation, as it does on the enrollment. Certainly Congress may impose such conditions and limitations upon the authority which it vests in an executive officer of the Government as it sees fit. This distinction is clearly apparent in the decisions of the Supreme Court in those cases where it has considered this question.

In *Garfield, Secretary of the Interior*, v. *United States Ex Rel. Goldsby* (211 U. S. 249), it must be remembered that the enrollment act contained no such limitation on the otherwise discretionary power of the Secretary of the Interior to reconsider his decisions on enrollment questions as does the Act involved in the case at bar. Yet the court held that mandamus would lie to restore relator's name to the approved rolls in a case where it had been arbitrarily stricken therefrom. In that case it was also contended that the court was without jurisdiction to entertain the suit, because the legal title to the lands had not yet passed from the Government. The court disposed of this contention by pointing out that the question

presented for adjudication did not involve the control of any matter committed to the Land Department for determination, and the question in issue was not one within the authority and control of the Secretary over lands, but involved an entirely different issue; that is, the relator's right to have his name restored to the approved tribal rolls and thus restored to the status he occupied prior to the arbitrary action of the Secretary in striking it therefrom. In that case the court clearly points out that the authority of the Secretary must be found in the Act or Acts which grants it. It directly pointed out:

> "We have therefore under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under any act of Congress.
>
> * * * * * * * * *
>
> "In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress."

United States Ex Rel. Lowe v. *Fisher, Secretary* (233 U. S. 365) was a mandamus case which involved the question whether the Secretary of the Interior, after due notice, could strike the name of the relator from the rolls of citizens of the Five Civilized Tribes. The court held that the Secretary had authority to do so in that case. The decision in the case, however, was based upon the various acts of Congress conferring authority on the Secretary. The relator had been enrolled upon the Kern-Clifton roll under the Act of June 10, 1896, and contended that because said roll had been approved by the Secretary he was thereafter without authority to strike his name therefrom. The court points out that this was only one of a number of acts which exhibit a connected scheme for the enrollment of the members of the Five Civilized

Tribes. The act was superseded by the Act of June 28, 1898 (the Curtis Act), the Act of July 1, 1902; the Act of April 26, 1906, all of which acts continued the authority of the Secretary of the Interior to reconsider, revise and correct the rolls of the Five Civilized Tribes. Therefore, mandamus would not lie in that case, because the Secretary was acting within the scope of the authority granted to him by said successive acts of Congress. In the case at bar, there has never been granted to the Secretary of the Interior any extension of authority beyond that contained in the Act of March 3, 1921.

So far as the merits of the claims of all the appellants go, it must be remembered that they are all, both the children and grandchildren of Mrs. Larsen, Gros Ventre Indians by blood, were all living on the Reservation at the time the enrollment act of March 3, 1921, was passed and had been living thereon since 1916, and were recognized as members of the tribe by the Gros Ventre Tribal Council.

CONCLUSION

It is respectfully submitted that the judgment of the lower court in dismissing appellants' petition should be reversed and this cause remanded with directions that the writ of mandamus issue to the appellee, requiring him to restore the names of the appellants to the approved rolls of the Indians of the Fort Belknap Indian Reservation, in Montana.

Respectfully submitted,

A. R. SERVEN,
Attorney for Appellants.

GUY PATTEN,
Of Counsel.

APPENDIX

Act of February 8, 1887 (24 Stat. L. 390).

"Every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Act of June 7, 1897 (30 Stat. L. 62; 90).

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right."

Act of March 3, 1921 (41 Stat. L. 1355).

"That within one year from the date of approval of this Act the Secretary of the Interior shall appoint a commission of three persons, two of whom shall be members of the Gros Ventre and Assinniboine Tribes of Indians and one member an employee of the Interior Department, who shall cause to be prepared, in such manner as they may deem advisable, a complete and final roll, to contain the names of all Indians ascertained to have rights on the Fort Belknap Reservation, Montana. Immediately upon the approval of the said roll, which shall be the conclusive and final evidence of the right of any Indian of the reservation to an allotment of land, the Secretary of the Interior is hereby authorized and directed to allot pro rata, under

rules and regulations and in such areas and classes of lands as may be prescribed by him, among such enrolled Indians all the unreserved and otherwise undisposed-of lands on the Fort Belknap Reservation, which trust patents shall be issued in the names of the said allottees; *Provided further*, That any names found to be on the said roll fraudulently may be stricken therefrom by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, at any time within one year from the approval thereof, after giving all persons interested a full opportunity to be heard; and the fraudulent allotment shall be canceled and the lands thereof be subject to disposal under the provisions of this Act; *And provided further*, That the land allotted hereunder shall be subject to any tribal leases existing at the date of approval of the said allotments."

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC 29 1931

Clerk

No. 5484

In the Court of Appeals of the District of Columbia

APRIL TERM, 1931, SPECIAL CALENDAR

UNITED STATES OF AMERICA EX REL. AGNES LARSEN STOOKEY, ESTHER LARSEN EASTLUND, BERTHOLD LARSEN, EDWARD LARSEN, MATILDIA LARSEN, AND EMMA LARSEN EDELMAN, AND JOHN SANFORD LARSEN, RUTH LARSEN, MINNIE EASTLUND, WINNIFRED EASTLUND, AND FERN EASTLUND, BY THEIR NEXT FRIEND, ESTHER LARSEN EASTLUND, AND ESTHER LARSEN EASTLUND, AS THE HEIR AT LAW OF DIXIE EASTLUND, APPELLANTS.

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, APPELLEE

BRIEF FOR APPELLEE

E. C. FINNEY,
Solicitor, Interior Department.
O. H. GRAVES,
Assistant to the Solicitor.
VICTOR H. WALLACE,
Attorney,

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APRIL TERM, 1931, SPECIAL CALENDAR

No. 5484

UNITED STATES OF AMERICA EX REL. AGNES LARSEN Stookey, Esther Larsen Eastlund, Berthold Larsen, Edward Larsen, Matildia Larsen, and Emma Larsen Edelman, and John Sanford Larsen, Ruth Larsen, Minnie Eastlund, Winnifred Eastlund, and Fern Eastlund, by their next friend, Esther Larsen Eastlund, and Esther Larsen Eastlund, as the heir at law of Dixie Eastlund, appellants

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, appellee

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

On October 25, 1930, the appellants, who are the relators in this case, filed a petition praying a writ of mandamus against Ray Lyman Wilbur, Secre-

tary of the Interior. (R. 2.) A rule to show cause was issued pursuant to the petition. (R. 9.)

On December 15, 1930, the respondent filed an amended answer, with exhibits, to the petition and to the rule to show cause. (R. 10.)

On May 20, 1931, the relators filed a replication to the answer, which was accompanied by two exhibits, A and B. (R. 20, 23, 24.)

It appears from the appellants' designation of the record (R. 34) that three other papers, printed at pages 26, 27, and 29 of the record, were introduced in evidence by the relators, although the record contains no bill of exceptions by which the papers in question could be brought into it. These papers also are referred to on page 3 of the appellants' brief.

The judgment of the lower court states that the case was heard upon the pleadings and exhibits, but makes no mention of any evidence. (R. 32.)

This apparent contradiction in the record has arisen through the somewhat informal manner in which the case was presented to the trial court for determination. Without further explanation, the appellee concedes that all papers printed in the record now are properly before this court, and he agrees that all of them may be considered by the court in determining the merits of the case.

THE FACTS

The facts in this case, as disclosed by the record, are that prior to 1875 a full-blood Gros Ventre In-

dian woman named Strike married a white man named Moses Solomon, and thereupon abandoned both her tribal relations and the reservation of her tribe, and removed with her husband to Fort Benton, Montana, outside the Gros Ventre Indian Reservation. (R. 11.)

In 1875 a child, Emma Solomon, was born of this marriage at Eagle Butte, Montana, a place which is conceded to be outside the Gros Ventre Indian Reservation at this time. There is a dispute, however, as to whether or not Eagle Butte was within the reservation as it existed at the date of Emma Solomon's birth. The appellee, the Secretary of the Interior, says in his answer to the appellants' petition for mandamus that Eagle Butte was not within the Gros Ventre Reservation at the date of Emma Solomon's birth. (R. 11.) The question, however, is immaterial to the decision of this case.

Mrs. Solomon (Strike) died in 1878. At that time she was recognized by the Gros Ventre Tribe as one of its members. (R. 11.)

Strike's child, Emma Solomon, continued to live with her white father until 1890, when she married a white man named Zack Larsen. (R. 11.) At the time of her marriage Emma Solomon was only 15 years of age, and therefore still was under the natural guardianship of her father.

Emma Solomon Larsen lived with her husband at Havre, Montana, among white people, during 1891. In 1892 she and her husband moved to Marias, or Loma, Montana. During that year Larsen

made homestead entry for a ranch located about two miles west of Loma, where he and his wife and children thereafter resided until 1916. (R. 11.) In 1896 Mrs. Larsen also made homestead entry for a tract of public land, but relinquished the same in 1913. (R. 11.)

In March, 1916, after selling his ranch near Loma, Larsen went to the Fort Belknap Reservation of the Gros Ventre Indians. In August of the same year he was joined upon the reservation by his wife, and their eight children who are the appellants in this case. (R. 11.) This was the first time Emma Solomon Larsen ever had resided on a Gros Ventre Indian Reservation. (R. 12.)

One of the Larsen children, Esther, had married a white man named Eric Eastlund. (R. 13.) Four children were born of this marriage. Three of them, Minnie, Winnifred, and Fern Eastlund, sued as relators in this case by their mother, Esther Larsen Eastlund, as their next friend, and they now are appellants before this court. The fourth child, Dixie Eastlund, died before the institution of this suit. None of these four children was born on a Gros Ventre Indian Reservation or among the Indians. (R. 3.)

On July 6, 1917, and again on March 30, 1918, the Council of the Gros Ventre Indians voted in favor of enrolling Mrs. Larsen and her children as members of the Tribe. (R. 4, 24.) They were to be enrolled, however, "by adoption of the tribe." (R. 24.)

On December 17, 1921, the Commissioner of Indian Affairs recommended to the Secretary of the Interior that Mrs. Larsen be enrolled as a Gros Ventre Indian, and that her name be added to the Fort Belknap Tribal rolls. He recommended, however, that her children be denied enrollment. The Commissioner's recommendation was approved by the Secretary on December 28, 1921 (R. 25), and thereafter Mrs. Larsen was enrolled as a member of the Gros Ventre Tribe of Indians, accordingly. (R. 12.)

Mrs. Larsen had been denied enrollment on May 23, 1918, by the Department of the Interior, on the ground that "the members of the Larsen family were born away from the reservation, have been educated among the whites, and never affiliated with the Indians." (R. 25.) The subsequent modification of this ruling in favor of Mrs. Larsen was made pursuant to and by virtue of the act of June 7, 1897 (30 Stat. 90). (R. 12.)

Subsequent to the removal of Larsen and his wife and children to the Gros Ventre Reservation, and by virtue of an act of Congress of March 3, 1921 (41 Stat. 1355), a commission was appointed, having authority to make a complete and final roll of the Gros Ventre Indian Tribe. Thereafter the commission enrolled all of the relators in this case as members of the Gros Ventre Indian Tribe, and the roll containing their names was approved by the Secretary of the Interior on January 9, 1922. (R. 12.)

On June 10, 1922, five months later, the Secretary vacated and set aside his approval of the roll. (R. 12.)

Thereafter, during 1922 (R. 28), the Indian Office recommended that the names of all the relators in this case be stricken from the roll of the Gros Ventre Indians. This recommendation was accepted by the Secretary of the Interior, and a roll of the Gros Ventre Indians, with the names of the relators deleted therefrom, was approved by the Secretary on April 3, 1923, effective as of November 30, 1921. (R. 28.)

On October 20, 1925, two and one-half years after the Secretary's action, as above, the relators filed a motion asking that their names be restored to the Gros Ventre Indian roll. On October 30, 1925, the motion was denied by the Commissioner of Indian Affairs. (R. 7.) The Commissioner's action was affirmed by the Assistant Secretary of the Interior. (R. 15.) In his decision, dated October 12, 1926, the Assistant Secretary said, "the facts of the case have been many times stated and the application for enrollment repeatedly denied."

On October 25, 1930, more than four years after the Assistant Secretary's adverse decision, as above, and more than six and one-half years after the final approval of the tribal roll by the Secretary of the Interior (R. 29), the relators in this case, who are the eight children and three grandchildren of Mrs. Larsen, filed a petition for mandamus to re-

quire the Secretary of the Interior to restore their names to the Gros Ventre Indian Tribal roll of the Fort Belknap Indian Reservation, and for incidental relief. (R. 2–8.) The petition was dismissed by the trial justice, and the relators thereupon appealed to this court. (R. 32.)

ARGUMENT

It should be needless to say that the Larsen children as a class, and the Eastlund children as a class, and Mrs. Eastlund as the heir at law of her deceased child, Dixie Eastlund, could not properly join as relators in a petition for mandamus, as their claims to the writ depended upon different states of fact. The respondent, however, waived this point and based his defense upon the merits of the case.

I

The appellee, the Secretary of the Interior, contends that the facts in the instant case, as stated, show clearly that the judgment of the trial court dismissing the petition for mandamus was right, and that it should be affirmed.

The Eastlund children, who are the grandchildren of Mrs. Larsen, have no right under any law to enrollment as Gros Ventre Indians. They are seven-eighths white by blood and were born subsequent to June 7, 1897, off the Gros Ventre Reservation and among white people, and of a mother who is three-fourths white by blood, and who was her-

self born off the Gros Ventre Reservation and outside of the tribal relations.

The eight relators who are the children of Mrs. Larsen are three-fourths white by blood, and all of them were born off the Gros Ventre Reservation, among white people and outside of any tribal relations. The children of Mrs. Larsen would be entitled to enrollment among the Gros Ventre Indians only in the event that their mother was at the time of the passage of the act of June 7, 1897, recognized by the Gros Ventre Indians. Whether Mrs. Larsen was so recognized was a question of fact to be determined by the Secretary of the Interior. The Secretary found that she was not so recognized, and his dermination in that respect can not be reviewed by mandamus, as mandamus does not serve the purpose of a writ of error.

> *United States ex rel. Anderson* v. *Simon et al.* (50 App. D. C. 199).
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> *Donner Steel Co.* v. *Interstate Commerce Commission* (52 App. D. C. 221, 224).

These considerations are sufficient to dispose of the case on appeal, unless the appellants' brief discloses a valid reason to the contrary.

II

The first contention of the appellants in their brief on appeal is based upon their allegation that Eagle Butte, Montana, the place of Mrs. Larsen's birth in 1875, was then within the limits of the Gros Ventre Indian Reservation. From this alleged

fact they draw the conclusion that Mrs. Larsen still was recognized as belonging to the Gros Ventre Tribe as late as 1918.

If this conclusion were well founded there would be no doubt that such of the relators in this case as are the children of Mrs. Larsen would be entitled to enrollment as Gros Ventre Indians under the provisions of the act of June 7, 1897 (30 Stat. 62, 90). But such right would not, even in that state of facts, extend to the relators, who are her grandchildren.

The relators' conclusion, however, begs the question at issue. Whether or not Mrs. Larsen, irrespective of her place of birth, was recognized by the Gros Ventre Indians at June 7, 1897, was a question of fact for the final determination of the Secretary of the Interior. The Secretary determined this question contrary to the contention of the appellants, and he thereby tolled any claim of right to enrollment as Gros Ventre Indians which the eight children of Mrs. Larsen otherwise might have had.

The cases cited by the appellants under heading "I" of their brief are not in point, except that case of *Wilbur* v. *United States ex rel. Kadrie* (281 U. S. 206) establishes the fact that the Secretary's action in this case is not subject to review or control by mandamus, while the case of *Oakes* v. *United States* (172 Fed. 305) directly supports the action of the Secretary of the Interior now under consideration.

If, in the instant case, we substitute Mrs. Solomon (Strike) for Mrs. Jane Oakes, and substitute Mrs. Larsen for Mrs. Jane B. Jones, the daughter of Mrs. Oakes, and substitute Mrs. Larsen's children and grandchildren, the appellants in this case, for Mrs. Jones's children, the *Oakes case* in point of law will be an exact prototype of the instant case as outlined by the Commissioner of Indian Affairs in his recommendation of December 17, 1921 (R. 24), and the adverse conclusion reached by Justice Van Devanter with respect to the claims of the two daughters of Mrs. Jones necessarily must be reached with reference to the claims of all of the appellants in the instant case.

III

At page 3 of their brief the appellants state that they all were enrolled among the Gros Ventre Indians pursuant to the act of March 3, 1921, and that the tribal roll bearing their names was approved by the Secretary of the Interior on January 9, 1922, in accordance with that act. They say that thereafter, on April 3, 1923, more than a year after the roll had been approved as aforesaid, the Secretary, without notice to them and without any charge or evidence of fraud, struck their names from the roll.

They then refer to the provision of the act of March 3, 1921, printed at page 18 of their brief, which reads as follows:

> *Provided further,* That any names found to be on the said roll fraudulently may be

> stricken therefrom by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, at any time within one year from the approval thereof, after giving all persons interested a full opportunity to be heard.

From these premises they argue, in substance, that the Secretary's action, as above, was without authority of law, and that they, therefore, are entitled to have their names restored to the Gros Ventre roll, irrespective of any other questions in the case.

The facts as disclosed by the record are, that subsequent to the Secretary's approval of the Gros Ventre roll, and at some time during 1922, the Indian Office recommended that certain changes be made in the roll. (R. 28.) Thereupon the Secretary sought the advice of the Solicitor of his Department as to his authority "to make changes in the allotment roll of Indians of the Fort Belknap Reservation, Montana," and the Solicitor rendered an opinion on that question under date of June 10, 1922. (R. 16–20.)

Pursuant to this opinion, and on the same day on which it was rendered, the Secretary set aside and vacated his approval of the entire Gros Ventre tribal roll. (R. 12.)

Thereafter, on April 3, 1923, the Secretary again approved the tribal roll of the Gros Ventre Indians, effective as of November 30, 1921, with the names

of the relators in this case deleted therefrom. (R. 28.)

The Secretary contends that it was his duty to protect the rights of the Gros Ventre Indians, and to see that unauthorized persons did not acquire an interest in the tribal property through the addition of their names to the tribal roll. He says that his action of June 10, 1922, setting aside his approval of the roll made five months prior to that date was a timely exercise of his authority in the premises. And he says that his action in deleting the names of the relators from the tribal roll was not taken pursuant to the provision of the act of March 3, 1921, quoted above, as there was no charge that their names had been placed upon the roll fraudulently, but that his action in that respect was taken because the relators were not, as a matter of fact, Gros Ventre Indians who were entitled to enrollment under the act.

The appellants cite the case of *Garfield* v. *United States ex rel. Goldsby* (211 U. S. 249) in support of their request for mandamus.

In that case Goldsby was enrolled as a member of the Chickasaw Indian Nation, and the roll of the nation bearing his name was approved by the Secretary of the Interior on April 26, 1906. Goldsby then selected his land as a member of the nation and received a certificate of allotment. On March 4, 1907, the Secretary of the Interior, without notice to Goldsby and without his knowledge, erased his name from the roll and opposite the

same caused the entry to be made, "canceled March 4, 1907." Thereupon Goldsby promptly brought an action in the Supreme Court of the District of Columbia for a writ of mandamus to require the Secretary of the Interior to restore his name to the roll. The writ was granted by the trial court, its judgment was affirmed by this court, and this court in turn was affirmed by the Supreme Court of the United States in an opinion dated November 30, 1908.

In the course of its opinion the Supreme Court said, at page 262 of the report:

> The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law.

Whether there is any distinction in law between the action of the Secretary of the Interior in striking the name of an Indian from an approved tribal roll, without notice to the Indian, as in the *Goldsby case,* and the action of the Secretary of the Interior in withdrawing his approval of an Indian tribal roll, without notice to Indians whose names appeared thereon, and thereafter again approving the roll with such Indians' names deleted therefrom, as in the instant case, is a question which need not be considered. The distinction between the *Goldsby case* and the instant case rests upon other grounds.

In the instant case the relators, after the final approval of the Gros Ventre tribal roll with their

names deleted therefrom, submitted themselves to the jurisdiction of the Indian Office and the Department of the Interior by filing a motion, on October 20, 1925, asking that the action of the Secretary, striking their names from the tribal roll, be reconsidered, and that their names be restored to the roll. When this motion was denied by the Commissioner of Indian Affairs the relators appealed to the Secretary of the Interior, who affirmed the adverse action of the Commissioner on October 12, 1926. (R. 7.)

In his decision, as above, the Assistant Secretary of the Interior said that during many years the relators had been afforded the fullest opportunity to substantiate their claims, and that the facts in the case had been many times stated. (R. 15.)

These hearings before the Indian Office and the Department of the Interior amounted to due process of law, and constituted a waiver by the relators of any cause of complaint before the courts that they otherwise might have had by reason of the fact that their names had been deleted from the Gros Ventre Indian roll without notice to them.

Furthermore, it would be a vain thing to now restore the names of the relators to the Gros Ventre Indian roll for a technical reason, only to have them again stricken therefrom after notice, because of the facts which appear from the record in the instant case. Nor does a technical right of restoration to the Gros Ventre Indian roll in favor of the appellants, if such there is, entitle them to a writ

of mandamus for the purpose of acquiring a tribal status and a share in tribal lands to which they are not entitled by law.

That mandamus will not issue to accomplish a vain thing, or to aid in the perpetration of a wrong, is elementary law.

United States ex rel. Holzendorf v. *Hay,* 20 App. D. C. 576, 580.

Dancy v. *Clark,* 24 App. D. C. 487, 499–500.

Garfield v. *United States ex rel. Turner,* 31 App. D. C. 332, 336.

Lane v. *Duncan Townsite Company,* 44 App. D. C. 63, 67.

Finally it is to be noted that the trial court in the *Goldsby case* had granted a writ of mandamus, while in the instant case the trial court has refused the writ, in the exercise of his discretion and for the reasons stated by him in his memorandum opinion. (R. 30.) The two cases, therefore, are not parallel.

For all of the reasons stated, and for the added reason that the appellants clearly have been guilty of laches in asserting their claims before the courts, the appellee respectfully submits that the judgment appealed from should be affirmed.

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U. S. GOVERNMENT PRINTING OFFICE: 1931