UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs, UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe, Plaintiff/Intervenor, v. SCOTT PODHRADSKY, State's Attorney of Charles Mix County, et al., Defendants.	CIV. 98-4042 STATE AND COUNTY BRIEF ON EXISTENCE OF BOUNDARIES AND STATUS OF VARIOUS CATEGORIES OF LAND

INTRODUCTION

This brief is submitted on behalf of the State and County pursuant to the direction of the Court to the parties to address the question of the existence, if any, of "reservation" boundaries in the area of the 1858 Yankton Sioux Reservation, and also to address the question of whether the particular categories of land which have been identified by the Court and by the parties constitute "reservation." The brief relies on the entire record of the case submitted since 1994.

The brief first concludes that there are no "reservation" boundaries as that term is defined under 18 U.S.C. § 1151(a) because the reservation has been disestablished and Congress has not created new boundaries. The brief

then establishes that none of the individual categories of land identified by the courts or the parties constitute "reservation" under the statutory definition.

The brief thus rejects the federal notion that each individual parcel of land taken into trust becomes a discrete "reservation" under 18 U.S.C. § 1151(a) with its own 40 or 80 acre boundaries or that each piece of allotted land has such "reservation boundaries." The tribal position on boundaries is still unclear—the Tribe has not yet presented a map to illustrate its position on boundaries and its recent assertion that the northern boundary is gone but that the southern boundary remains is untenable and contradicts the holdings of the Supreme Court and the Eighth Circuit.

I. *There Are No "Boundaries" Associated With A "Yankton Sioux Reservation."*

A. *No new "reservation boundaries" were created by Congress in 1894, and the courts lack the power to themselves create such boundaries.*

In *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999), the Court of Appeals ruled that the "original exterior boundaries of the reservation have not been maintained." The Court of Appeals ruled further that Congress did not, "in the Act of 1894, define new reservation boundaries." *Id.* at 1028. These rulings constitute the law of the case.

The question presented is whether the courts may, consistent with the "political question" doctrine, now create *new* boundaries. The answer is that they may not. In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court defined six independent tests regarding the existence of a political question.

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The first three factors together and individually indicate the existence of a "political question" which counsels the courts not to attempt to create new "reservation boundaries." First, it is unmistakable that there is a demonstrable "constitutional commitment" of the "issue" of the status of tribes to a "coordinate political department." Article I, Section 8 of the Constitution provides that "Congress shall have the power . . . to regulate commerce . . . with the Indian tribes." Certain power with regard to Indian affairs also adheres in the President. Article II, Section 2 allows the President to make, with the advice and consent of the Senate, "treaties." No such power is found in the courts. *See United States v. Lara*, 541 U.S. 193, 200 (2004).

Congress has, therefore, frequently exercised its power to create "reservations." *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). The Executive Branch, early on, exercised broad powers to create "hundreds of reservations" by way of executive order. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325 (1942). In 1919, however, Congress destroyed the power of the executive branch to create Indian reservations, 43 U.S.C. § 150, and in 1927 Congress added a provision that any further

changes in the "boundaries of Executive order reservations should be made by Congress alone." *Sioux Tribe*, 316 U.S. at 325 n.6. *See* 25 U.S.C. § 398d. In 1934, by way of 25 U.S.C. § 467, Congress delegated power to the Secretary of the Interior to "proclaim new reservations on lands acquired" pursuant to the other sections of the Act, including 25 U.S.C. § 465. *See* Ex. 15.

This is not to say, of course, that the courts lack the power to develop common law with regard to Indian matters. *Lara*, 541 U.S. at 205. But the courts do lack the power to create common law when Congress has acted. *Id.* Here, Congress, which has the constitutional power to create and define the boundaries of reservations, has, under the ruling of the Eighth Circuit, determined both to take down the boundaries of the reservation as set forth in the 1858 Treaty and has also determined not to create or define new boundaries. It is not for the courts to "correct" the action of Congress by taking action where the Congress declined to do so. The failure of Congress to create new boundaries simply indicates that there are no boundaries.

Furthermore, there is, under *Baker*, 369 U.S. at 217, a political question because there is a lack of a "judicially discoverable and manageable standard[ ]." The judicially discoverable standard would have to be found within the 1894 Act itself. But as the Eighth Circuit has established, Congress did not in the 1894 Act "define new reservation boundaries." *Gaffey*, 188 F.3d at 1028. Third, the question of creation of new reservation boundaries clearly involves an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Quite clearly, the Yankton Sioux Tribe is

requesting the courts to step in the place of Congress and the Executive Branch to create a new reservation. This is undoubtedly a political determination and is not the kind of question which is committed to the judiciary.

This case has similarities to *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 133 (1912), which addressed whether the courts could determine whether a state has "ceased to be republican in form, and to enforce the guaranty of the Constitution on that subject." The Supreme Court found that the enactment of a state initiative and referendum created a question which was not cognizable in the courts as to whether a state had ceased to be "republican" in form within the guaranty of Article IV, Section 4 of the United States Constitution. The Court suggested that there simply was no judicial power to determine the political question involved in "deciding whether a state government republican in form exists . . . ." 223 U.S. at 150. This was a political question. The question is similar here should the courts decide whether a "reservation" or "reservation boundaries" exist, in light of the holding of the courts that the 1894 Congress had not created or defined the boundaries of such a reservation.

B. *The South Dakota Supreme Court determination that the Yankton Sioux Reservation has been disestablished is correct.*

Defendants respectfully submit that the determination of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), that the 1894 Act disestablished the Yankton Sioux Reservation, should be given

credence. The determination was issued one day after the *Gaffey* determination, and the *Gaffey* court simply had no opportunity to properly analyze the strength of that determination.

Bruguier arose from the state court conviction of James Bruguier for committing burglary in a town lying within the original boundaries of the Yankton Reservation. Specifically, the offense occurred on allotted land to which Indian title had been extinguished. *Id.* at 366. Bruguier filed a state habeas corpus petition which asserted that the reservation remained intact and that the state therefore lacked jurisdiction over the crime. *Id.* The state habeas court denied the petition. *Id.* The South Dakota Supreme Court affirmed, concluding that the 1894 Act disestablished the reservation. *Id.* at 378.

The South Dakota Supreme Court found that the statutory language, the historical context, and later developments in the area all strongly support disestablishment. As to the former, the court stated that the cession and sum certain language of the Yankton Agreement "manifests an almost irrebuttable presumption of congressional intent" to disestablish. *Id.* at 372. This reading of the statutory language is supported, the court ruled, by late nineteenth century views of Indian ownership. At that time it was commonly understood that when tribal ownership was eliminated (for example, by allotting tribal land to individual Indians), a "'critical component of reservation status' was lost." *Id.* at 373 (quoting *Yankton Sioux Tribe*, 522 U.S. at 346). The court went on to find that, "[a]lthough there are inconsistencies in this sphere also, we find little

in the historical context or the Treaty negotiations to suggest that the reservation would continue." *Id.* at 374-75.

Following the lead of the United States Supreme Court in *Yankton Sioux Tribe*, the South Dakota Supreme Court also found a lack of a "jural distinction" between the 1890 Sisseton Agreement at issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and the 1892 Agreement at issue here. *Yankton Sioux Tribe*, 522 U.S. at 377. The Court noted the repeated references to the Sisseton Agreement during the Yankton negotiations and cited numerous similarities between the two situations: both Acts sold all unallotted lands; the Acts contained similar preamble language; opened lands on both reservations were subject to the federal homestead and town site laws; in both instances the United States retained an agency and schools; and "[m]ostly significantly no land in common was retained, no boundaries were redefined, and parcels allotted to Indians were in both instances spread randomly across the former reservations." *Id.* Accordingly, the Court concluded that the "intent behind" the language in the 1894 Yankton Act "is unmistakably the same" as that in the 1891 Act that disestablished the Lake Traverse Reservation. *Id.*[1]

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[1] Prior to *Bruguier*, the South Dakota Supreme Court had several times found that the Yankton Reservation was disestablished. *See, e.g., State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) ("this court has ruled that the Yankton Reservation was disestablished"); *State v. Thompson*, 355 N.W.2d 349, 350-351 (S.D. 1984) (in which the court posed the question whether the Yankton Reservation was "disestablished" and answered the question in the affirmative).

The South Dakota Supreme Court determination in *Bruguier* is persuasive and demonstrates that the reservation has been disestablished. Therefore, there could be no "external boundaries" and the Tribe's case must fail.

C. *DeCoteau v. District County Court demonstrates the weaknesses in the determination of the Eighth Circuit in Gaffey.*

In *DeCoteau v. District County Court*, the Court held that an agreement by which a tribe agrees to cede all its unallotted lands for a sum certain disestablishes the reservation. 420 U.S. at 445. The *Gaffey* determination to the contrary is, with all respect, flawed because it fails in its analysis of *DeCoteau*.

1. *The history of the Lake Traverse Reservation followed the same pattern as that of the Yankton Sioux Reservation.*

As described in *DeCoteau*, 420 U.S. at 431-32, the history of the former Lake Traverse and former Yankton Sioux Reservations has followed the same course. First, it is necessary to describe the history of the former Lake Traverse Reservation.

The Sisseton and Wahpeton bands of the Sioux Nation remained loyal to the United States when the Sioux Nation rebelled. This prompted the United States to enter into a treaty with the Sisseton-Wahpeton Tribe in 1867 which granted the Tribe a reservation in the Lake Traverse area. "But familiar forces soon began to work upon the Lake Traverse Reservation," *id.* at 431, forces which led to the Dawes Act and the allotment of more than 120,000 acres of the reservation. *Id.* at 438 n.19. In 1889, a series of negotiations took place

that resulted in an agreement through which the Sisseton-Wahpeton Tribe agreed to cede for a sum certain all the unallotted lands within its reservation. *Id.* at 437. Additional allotments of over 110,000 acres were also provided for. *Id.* at 438 n.19. Two years later, Congress enacted a statute reciting and ratifying the agreement. Act of March 3, 1891, c. 543, 26 Stat. 1035. In *DeCoteau*, the Court held that "'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." *Id.* at 445.

In particular, the Court in *DeCoteau* pointed to the following factors as critical to its decision. First, "[t]he negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." *Id.* Second, "[t]he Agreement's language, adopted by majority vote of the tribe, was precisely suited to this purpose." *Id.* Third, that "language is virtually indistinguishable from that used in other sum-certain cession agreements ratified by Congress in the same 1891 Act." *Id.* at 446. Fourth, the agreement was distinct from other agreements which the Court held had not changed reservation boundaries. *Id.* at 447-49. And fifth, "[u]ntil the Court of Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years." *Id.* at 449.

2. *Each of the critical DeCoteau factors is applicable to the Yankton Sioux Reservation.*

The critical moments and points of reference in the history of the former Lake Traverse Reservation are paralleled by equivalent moments and points of reference in the history of the former Yankton Sioux Reservation. Most importantly, the Supreme Court recognized in *Yankton Sioux Tribe* that the terms of the 1894 Yankton Agreement "parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*. . . ." 522 U.S. at 344. In addition, as in *DeCoteau*, "all" the unallotted lands were ceded to the United States for a sum certain in the Yankton Agreement, 28 Stat. 286, 314; the language of the Yankton Agreement has been found to be "'precisely suited'" to termination, and was adopted by a majority of the tribe, 522 U.S. at 344; the language is "virtually indistinguishable" from other cession and sum certain agreements identified in *DeCoteau*; the Yankton Agreement has been held to be "readily distinguishable" from agreements which preserved reservation boundaries, *id.* at 345; and South Dakota had no doubt exercised jurisdiction over the unallotted lands for more than 80 years. *Id.* at 357.[2]

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[2] There are, in fact, at least 17 points of identity between the two Agreements:

1. *Time period equivalent.* Sisseton-Agreement approved 1891, 26 State. 1035 (1891); Yankton agreement approved-1894, 28 Stat. 286 (1894).

2. *Allotment under General Allotment Act.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

3. *Similar acreage allotted.* Sisseton-240,000 acres, *DeCoteau*, 420 U.S. at 438 n.19; Yankton-262,000 acres, *Yankton Sioux Tribe*, 522 U.S. at 336.

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4. *Similar per capita acreage allotted.* Sisseton-158 acres per capita, *DeCoteau*, 420 U.S. at 438 n.19 and 1995 Exhibit 610; Yankton-152 acres per capita, *Yankton Sioux Tribe*, 522 U.S. at 336 and 1995 Exhibit 610.

5. *Preambles equivalent.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

6. *Cession language used in both.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

7. *All unallotted lands ceded in both.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

8. *Sum certain language used in both.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 315.

9. *Entry subject to homestead and town site laws in both.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 319.

10. *Missionaries allowed to purchase lands in both.* Sisseton, 26 Stat. 1035, 1037; Yankton, 28 Stat. 286, 316.

11. *School lands granted in both.* Sisseton, 26 Stat. 1035, 1039; Yankton, 28 Stat. 286, 319.

12. *United States retained an agency and schools in both.* Sisseton, 26 Stat. 1035, 1037; *DeCoteau*, 420 U.S. at 435 n.16, 438 n.19; Yankton, 28 Stat. 286, 316; *Yankton*, 522 U.S. at 336.

13. *Allotments were throughout the former reservation in both.* Sisseton, *DeCoteau*, 420 U.S. at 428; Yankton, *Yankton*, 522 U.S. at 326.

14. *Presidential proclamation opening the reservation referred to "cession language" in both.* Sisseton, 27 Stat. 1017; Yankton, *Yankton*, 522 U.S. at 354.

15. *Presidential proclamation opening the reservation referred to "Schedule of lands within . . . the Reservation. . . ." in both.* Sisseton, 27 Stat. 1017, 1018 (1892); Yankton, 29 Stat. 865, 866 (1895).

16. *State assumed virtually unquestioned jurisdiction in both.* Sisseton, *DeCoteau*, 420 U.S. at 442; Yankton, *Yankton*, 522 U.S. at 357.

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Gaffey nonetheless held that *DeCoteau* did not control, citing two specific distinctions between the Sisseton-Wahpeton and Yankton Agreements, and stating generally that the "circumstances surrounding the negotiation[s]" and "the content and wording of the agreements" were very different. 188 F.3d at 1020.

Gaffey, however, unfortunately does not give proper credence to the finding of the Supreme Court in *Yankton Sioux Tribe*, 522 U.S. at 344, that Articles I and II of the two Agreements were virtually identical and that the "terms" of the Agreements are "parallel." The support for the *Gaffey* conclusion is, with respect, insufficient, and is apparently only that the Sisseton-Wahpeton Agreement "negotiated agreements for each individual, including married women." *Id.* But this factor has no relation to the question of disestablishment and the actual statistics show, in any event, that the per capita lands taken in allotted status at the Lake Traverse Reservation and at the Yankton Sioux Reservation were approximately the same: 158 acres and 152 acres, respectively. *See* Note 2, subpart (4), *supra*. *Gaffey* suggests that the "background" of the Sisseton-Wahpeton Agreement was "very different . . . because tribal members there had expressed their clear desire to terminate their reservation." 188 F.3d at 1020. But the support for this is simply a single press report (quoted in *DeCoteau*, 420 U.S. at 432-33), in which the

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17. *Two situations generally treated in parallel fashion on maps.* Sisseton and Yankton, Exhibit 620, JA 412 (1901); Exhibit 621, JA 413 (1910).

Sisseton-Wahpeton tribal spokesmen are reported to have said that "[w]e never thought to keep this reservation for our lifetime."

The *Gaffey* distinction is insufficient to create a fundamental distinction between the Agreements, particularly in light of the letter written by three Yankton chiefs and more than 100 members of the Yankton tribe to Congress stating that they

> "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization."

Yankton, 522 U.S. at 353 (quoting S. Misc. Doc. No. 134, 53d Cong., 2d Sess. 1 (1894)). The State agrees, of course, with the Eighth Circuit "that similar treaty language does not *necessarily* have the same effect when dealing with separate agreements." 188 F.3d at 1020 (emphasis added). But this argument surely lacks validity when the Court has tied two agreements as closely together as *Yankton Sioux Tribe*, 522 U.S. at 344, tied the Yankton and Sisseton Agreements. Moreover, it is respectfully submitted that no factual or legal distinction warrants the conclusion that the "parallel language" of the Sisseton-Wahpeton and Yankton Agreements should not be given the same effect.

D. *25 U.S.C. § 398d, the "1927 Act" did not freeze the boundaries of the former Yankton Sioux Reservation.*

After a full decade of litigation, the Yankton Sioux Tribe raised, on May 12, 2004, for the first time, the claim that 25 U.S.C. § 398d or the "1927 Act" "froze the boundaries of the Yankton Sioux Reservation as of 1927."

Doc. 190, Brief of Yankton Sioux Tribe, at 5. The Tribe argues that the language of the statute effectively froze the boundaries of the reservation as of 1927 and would not, thereafter, allow diminishment. *Id.* Based on analysis of the Spreadsheet supplied to this Court by the United States, an estimated 132 parcels containing 8,015 acres left allotted status between 1927 and 1934, and 17 parcels containing 734 acres left allotted status from 1934 through 1948 in the area of the 1858 reservation. All of these are potentially affected by this argument.

1. *The 1927 Act claim is barred by the doctrine of waiver, and by the mandate of the Court of Appeals for the Eighth Circuit and the law of the case, as established in earlier briefs.*

This Court has provided in its Order of August 30, 2007, that the parties "need not restate arguments already made in response to the Court's previous Orders." Doc. 303. Therefore, the State will not again set forth its arguments that the Tribe has waived any right to argue that the Act of 1927 "froze" the boundaries of its reservation, or that the mandate of the Eighth Circuit and the doctrine of law of the case prevent the Tribe from raising that issue in this, the third round of this litigation. These arguments were set out at length in the *Supplemental South Dakota Brief on Issues Remaining After Remand*, Doc. 200, (June 28, 2004), at 2-7; *Brief in Support of Motion for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b),* Doc. 230 (Dec. 21, 2006), at 1-8; *Petition for Writ of Mandamus*, No. 07-1723, *In Re M. Michael Rounds, Governor of South Dakota, and Lawrence E. Long, Attorney General of South Dakota* (8th Cir. Mar. 22, 2007), at 4-11. *See also Brief of County Defendants Matt Gaffey, et al.*

on Issues That Remain to be Resolved on Remand (June 25, 2004); *County's Petition for Writ of Mandamus* (Mar. 30, 2007); and *Response of Charles Mix County to Briefs Submitted by the United States District Court, By the Yankton Sioux Tribe and By the United States* (May 29, 2007).

2. *The 1927 Act does not apply to the former Yankton Sioux Reservation.*

The title, text, legislative history, and interpretation of the 1927 Act all indicate that it was applicable only to executive order reservations, not to reservations created by treaty, as was the former Yankton Sioux Reservation.

a. *The Title applies only to executive order reservations.*

25 U.S.C. § 398d was enacted in 1927 as one of five sections of an act entitled "Act to authorize oil and gas mining leases upon unallotted lands within Executive Order Indian Reservations." Pub. L. No. 702, 44 Stat. 1347 (Mar. 3, 1927) (Ex. 1). Thus, the title refers only to "executive order" reservations. The former Yankton Sioux Reservation is not such a reservation created by executive order, but rather it was created by treaty, in particular, the Treaty of April 19, 1858, 11 Stat. 743 (ratified on Feb. 16, 1859). Indeed, decisions in the course of this case have held this reservation was created by "treaty." *Yankton Sioux Tribe*, 522 U.S. at 333; *Gaffey*, 188 F.3d at 1013.

In an attempt to avoid the obvious, the Tribe claims that because the 1858 Treaty creating the Yankton Sioux Reservation was *proclaimed* by the President of the United States on February 26, 1859, the 1927 Act applies to it. This claim is without merit. Under the Tribe's theory every treaty reservation

would be converted to an executive order reservation each time the passage of the treaty by the Senate was *proclaimed* by the President. There would be no "treaty" reservations. Moreover, the argument confuses the term "proclaimed" and "create." The words carry different meanings.

b. *The text of the 1927 Act applies only to executive order reservations.*

Section 4 of the 1927 Act, codified as 25 U.S.C. § 398d provided:

> That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided,* That this shall not apply to temporary withdrawals by the Secretary of the Interior.[3]

Again, the text refers to reservations "created by Executive order, proclamation, or otherwise." The text does not include reservations created by congressionally approved "treaty."

c. *The legislative history of the Act does not support its application to treaty reservations.*

The Tribe's "freezing" claim is at odds with the intent of the statute as found in its legislative history. 25 U.S.C. § 398d or Section 4 of the 1927 Act was a component of an act authorizing oil and gas mining leases on executive order reservations. The Act was passed after then Attorney General Stone rendered an opinion that the general leasing act did not apply to executive order reservations. 68 Cong. Rec. 2794 (1927), Ex. 2. If the sections of this

[3] The proviso relating to nonapplicability of provisions to temporary withdrawals by the Secretary of the Interior was struck in 1976. Pub. L. No. 94-579 § 704(A), 90 Stat. 2792 (Oct. 21, 1976).

Act were to apply to *all* reservations, whether treaty or executive order, the specific language of the statute specifying that it applied to executive order reservations only would not have been necessary. In fact, during the House debates comments were made distinguishing the difference between treaty and executive order reservations. 68 Cong. Rec. 4569-70 (1927), Ex. 3:

> Now let us go just a little into the history of the difference between a treaty reservation and an Executive-order reservation. A treaty reservation is one by which the Indians are placed on certain areas of land under an agreement with the Indians—land usually formerly occupied and owned by these same Indians under right of occupancy. An Executive-order reservation is that which is set aside for the tribe by Executive proclamation and this character of reservation is also usually composed of a portion of lands formerly occupied by such Indians.

Id. at 4571.

d. *The Supreme Court, and other authorities, have determined that the Act applies to executive order reservations.*

The United States Supreme Court has also made it clear that the 1927 Act applies only to executive order reservations. The Court found in *Sioux Tribe v. United States*, 316 U.S. 317, 325 (1942) that from 1855 to 1919 "hundreds of reservations for Indian occupancy and for other purpose were created by executive order." The immediately preceding footnote analyzed the 1919 Act as declaring that no public land would be withdrawn by "'Executive order, proclamation, or otherwise except by Act of Congress'" and added that in "1927 Congress added a provision that any future changes in the boundaries of *executive order reservations* should be made by Congress alone. § 4, 44 Stat. 1347, 25 U.S.C. 398d" (emphasis added). *Sioux Tribe,* 316 U.S. at 325 n.6.

The Court thus clearly recognized that the statute was directed at executive order reservations alone, and not at all reservations. *See City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) ("deliberated dicta" of United States Supreme Court almost as binding on court of appeals as actual holding).

The Department of Interior, in *Status of Ozette Reservation, Washington*, 64 Interior Decisions 435, 1957 WL 8759 (1957) likewise indicated that the 1927 statute applied to executive order reservations, commenting that Section 4 (which is the precise section on which the Tribe relies) "must be read in context, and the act as a whole relates to the leasing of Executive Order Indian reservations for oil and gas mining purposes." *Id.* at *5. The Decision continues that Section 4 "was intended merely to provide a limitation on the enlargement of such reservations in accord with the prior act of June 30, 1919 . . . which prohibited the further creation of extensive reservations except by act of Congress." *Id.* Far from stating that the Act was applicable to all reservations, and that its purpose was to keep all reservations from being diminished, Interior stated it was applicable to executive order reservations; its real purpose was to keep such reservations form being *enlarged*. *See also* Comment, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 Yale L.J. 627, 628 n.11 (1960).

3. *Even if the 1927 Act applies to treaty reservations, it does not affect this case.*

Finally, if this Court determines that the 1927 Act could apply to treaty reservations generally, it still did not "freeze" the boundaries of the former Yankton Sioux Reservation. The intent of the 1927 Act in Section 4 was simply to impose a congressional limit on the authority of the President to enlarge or contract reservation boundaries. *See* 68 Cong. Rec., at 4570 (1927), Ex. 3; *Sioux Nation*, 316 U.S. at 325 n.6; *Status of Ozette Reservation*, 64 I.D. 435 at *5. Nothing in the 1927 Congressional Act purports to displace acts of Congress already enacted.

The Court of Appeals has found that the 1894 Act embodied the congressional intent to "increase" the jurisdiction of the State as "white settlers came on to the opened lands," 188 F.3d at 1028, and it intended that the reservation be "diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Id.* at 1030. Because the language of the 1927 Act was specifically designed to limit the President's ability to alter the boundaries of executive order reservations, the 1927 Act cannot be read to limit the ability of Congress to continue the policy of former acts passed by Congress. Therefore, the 1927 Act did not freeze the boundaries of the former Yankton Sioux Reservation.

E. *25 U.S.C. §§ 462 and 464, the "1934 Act" did not freeze the boundaries of the former Yankton Sioux Reservation.*

Following the remand order of *Gaffey*, the Tribe claimed for the first time that 25 U.S.C. §§ 462 and 464, or the "1934 Act," froze "the boundaries of the Yankton Sioux Reservation." Doc. 190, Brief by Plaintiff Yankton Sioux Tribe,

at 4 n.1. The Tribe appears to argue that the language of Sections 462 and 464 barred diminishment by barring "the sale of allotments by tribal members to non-Indians." *Id.* at 9.

The Tribe's argument proposes that the bar was in effect from 1934 to 1948, when a new statute was enacted. From 1934 to 1948, the theory seems to go, the Secretary was entirely barred from issuing patents in fee to any Indian for any reason, even if the Indian person applied for the patent. Based on the Spreadsheet supplied to the Court by the United States, the State estimates that 17 parcels, containing approximately 734 acres, were converted from allotted to fee status between the effective dates of the 1934 and 1948 statutes.

1. *The 1934 Act claim is barred by the doctrine of waiver, and by the mandate of the Court of Appeals for the Eighth Circuit and the law of the case, as established in earlier briefs.*

The same arguments, as made above in Section D.1., with regard to waiver, the mandate, and law of the case apply here.

2. *The 1934 Act did not "freeze" the boundaries of the former Yankton Sioux Reservation.*

The complex history of the Indian Reorganization Act of 1934 need not be recounted here. Suffice it to say that goal of the BIA framers of the original version of the Act to vest the tribes with broad authority was decisively rejected by Congress. The BIA proposal was scrapped and the Congress essentially rewrote the bill. *See, e.g.*, 78 Cong. Rec. 11,123 (1934), Ex. 4 (comment of Chairman Wheeler: "The committee on Indian affairs eliminated all those

compulsory provisions and eliminated from the bills originally presented the right of Indians to make laws on the reservations."). This complex history has allowed misconceptions to arise regarding the actual content of the Act.

a. *The 1934 Act was optional for Indian tribes and thus the intent of Congress could not have been to "freeze" reservation boundaries.*

The 1934 Act contained nineteen sections that covered an array of things. *See* Ex. 15. In its brief, the Tribe claims that it adopted portions of the 1934 Act, namely Sections 2 and 4 (codified as 25 U.S.C. §§ 462 and 464) in an election held on October 27, 1934. Doc. 190, Brief by Tribe, at 5 n.2 (citing Theodore H. Haas, *Ten Years of Government under the IRA* 18 (1947)). The Tribe alleges that this adoption of portions of the 1934 Act effectively "froze" the boundaries of the Yankton Sioux Reservation as of October 27, 1934, the date the IRA was approved by 991 Yankton Sioux Indians.[4] *Id.*

Whatever the 1934 Act accomplished, "freezing" of reservation boundaries cannot be said to be one of them. The provisions of the 1934 Act were not mandatory on the Indian tribes. Rather, pursuant to Section 18, 25

[4] While the Tribe claims to have adopted certain provisions of the 1934 Act, namely Sections 2 and 4 during the election held in October of 1934, it is unclear whether this adoption actually took place. The Yankton Sioux Tribal Constitution states in Article I, Section 2, "It is specifically recognized by the Constitutional Committee and the Tribe at large that this Amended Constitution is not subject to the provisions of the Howard Wheeler Act of 1934, which is the Indian Reorganization Act Public Law No. 383, of the 73rd Congress of the United States of America S (3645)." *See* Ex. 652. Thus, while it seems an election was held, it is apparent from the Tribe's Constitution that it does not consider itself governed by any provisions of the Act. The language of the Constitution clearly states it is "not subject" to the provisions of the Act.

U.S.C. § 478, the 1934 Act "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." If Congress was intending to "freeze" reservation boundaries with the passage of the 1934 Act, it would have explicitly said so and it would have made the Act mandatory on all Indian tribes. If the intent of Congress was to "freeze" reservation boundaries, it would not have allowed individual tribes to either accept or reject the provisions of the 1934 Act in turn "freezing" some reservation boundaries and not others.

b. *The legislative history and text of the Act does not support the Tribe's claim of "freezing" reservation boundaries.*

The 1934 Act was misinterpreted at its inception and continues to be misinterpreted today. The Tribe's "freezing" claim is yet another misinterpretation of this Act, 70 years after its passage. As will be shown, the Tribe's "freezing" claim is at odds with the intent of the statute as found in its text and legislative history. Nowhere in the text of Sections 2 or 4 is "freezing," "reservation," or "reservation boundary" mentioned. Rather, Sections 2 and 4 make reference to periods of "trust" placed on Indian lands and transfer and exchange of "restricted" Indian lands.

Specifically, Section 2 of the 1934 Act, codified as 25 U.S.C. § 462, provided: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." After its passage, the 1934 Act was analyzed by the

Commission on Indian Affairs. Commissioner John Collier determined that Section 2 "does not change existing laws or regulations regarding Indian applications for fee patents. The policy of issuing such fee patents in exceptional cases, laid down in Order 402, will continue in force." John Collier, *Analysis and Explanation of the Wheeler-Howard Indian Act,* No. 86949, reproduced from the holdings of the National Archives and Records Administration, Pacific Region (hereinafter *Analysis and Explanation*), Ex. 5. According to Felix Cohen, Section 2 therefore "extends the period of such restriction indefinitely until Congress shall otherwise provide, *but does not* prohibit the termination of such period by mutual agreement between the Indian and the appropriate administrative official." Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* 109 (1942) (emphasis added). Thus, the reservation boundaries of the former Yankton Sioux Reservation could not have been "frozen" by Section 2 if the United States could continue to grant an end of allotted status if the allottee agreed on it.

The legislative history of the Act also indicates that the Tribe's "freezing" argument must fail. The original version of the Act contained the following language:

> *Section 4* (later to become Section 2 of the final bill):
> *The existing periods of trust placed upon Indian allotments and unallotted tribal land and any restriction of alienation thereof, are hereby extended and continued until otherwise directed by Congress. The authority of the Secretary of the Interior to issue Indians patents if fee or certificates of competency or otherwise to remove the restrictions on lands allotted to individual Indians under any law or treaty is hereby revoked.*

Hearing Before the Committee on Indian Affairs, United States Senate, 73d Cong., 2d Sess., on S. 2755, *To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise* 9 (Feb. 27, 1934). Ex. 6. This section came under attack in Committee Hearings. Commissioner Collier and Chairman Wheeler had frank discussion during the committee hearings that this provision, as written, was too harsh and that certain Indians who should be granted their land in fee would be tied up by the Government. *Id.* at Part 2 (Apr. 26, 28, 30; May 3, 4, 17 (1934), at 150). Ex. 7.

Specifically, Chairman Wheeler stated, "Now, if you are going to pass the bill in its present form, you are going to prevent these lands from ever being taken out from under the government supervision." *Id.* at 151. He further stated that

> I think the Secretary of the Interior ought to have some discretion in the matter, for the simple reason, as I have said, there are Indians in my State that are just as capable of handling their own private affairs as any white man in this room, and there are innumerable Indians in California of that kind.

Id. Similar discussion ensued later. *Id.* at 237-38.

The discussion did not end in Committee. On the floor of the House, on May 22, 1934, 78th Cong. Rec. 9270 (May 22, 1934), Ex. 8, Mr. Hastings protested this section (the old Section 4, enacted as Section 2), stating this section would

> take away from the Secretary of the Interior authority to remove the restrictions on lands allotted to individual Indians, although

> the Indian may thereafter become a college graduate and move off the land to a distant State. Are we through legislation to close the door of hope against every Indian's becoming competent to manage his affairs? Under these circumstances, no disposition could be made of the land.

Id. The section was further modified to state that the Secretary's authority to issue patents in fee was "revoked." H. Rpt. 1804, 73d Cong., 2d Sess., Readjustment of Indian Affairs, at 1. Ex. 9. This modification was short-lived. The "revoked" language was deleted by the Senate and a conference committee on the bill was called. The conference committee eliminated the language which would have "revoked" the power of the Secretary to issue fee patents and the current version of Section 2 was proposed and ultimately enacted into law. 78th Cong. Rec. 11724 (June 15, 1934), Ex. 10; Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 462.

The legislative history, and particularly the action of the conference committee, *California Dental Ass'n v. FTC,* 526 U.S. 756, 768-69 (1999), thus establishes that Congress did not intend to deprive the Secretary of his pre-existing authority to grant patents in fee. *See, e.g.*, Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. § 349; Act of June 25, 1910, 36 Stat. 855, 856, as amended by the Act of February 14, 1913, 25 U.S.C. §§ 372 and 373. Further, the rule of statutory construction that "repeals by implication are not favored" provides another reason for finding that the Tribal argument must fail. *See, e.g., Morton v. Mancari,* 417 U.S. 535, 550 (1974).

The BIA took notice of the legislative history and reflected that history in its policy. Nathan R. Margold, in a memorandum to Mr. Collier on August 14,

1934, specifically stated that the Wheeler-Howard Act does not forbid the granting of fee patents. Nathan R. Margold, Memorandum Wheeler—Howard Act—Fee Patent, August 14, 1934. Ex. 11. In fact, Mr. Margold stated that earlier drafts of the Act had specifically revoked the authority of the Secretary of the Interior to issue fee patents, but that the provision was struck and thus the Secretary still had the authority and discretion to release Indian land from restrictions on alienation. *Id.* This analysis was later confirmed by Collier in his *Analysis and Explanation* of the 1934 Act. Ex. 5. As noted above, Section 2 of the IRA did not change the existing law on fee patents. *Analysis and Explanation*, Ex. 5, at 1. This analysis also states, as to Section 4 of the IRA, Transfer of Restricted Land (25 U.S.C. § 464), that Section 4 does not apply to "unrestricted land owned by individual Indians in fee." *Id.* at 2. Therefore, after the passage of the 1934 Act, an individual Indian who owned his/her land in restricted status could request and receive a fee patent on his/her land. Once a fee patent was issued, the individual Indian could then sell his/her fee land to a non-Indian, all in accordance with the provisions of the 1934 Act. Based upon the forgoing, it cannot be said that the 1934 Act "froze" the reservation boundaries of the former Yankton Sioux Reservation, or any reservation.

II. *None of the Categories of Land Defined by the Courts or the Parties Constitute "Reservation" Under 18 U.S.C. § 1151(a).*

The next major question is whether any of the various categories of land are "reservation" as defined by 18 U.S.C. § 1151(a), which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) *all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,* (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(Emphasis added.)

The United States Supreme Court has indicated that the determination of whether lands are "within a continuing 'reservation'" is the central question in a case of this sort. *DeCoteau*, 420 U.S. at 427 n.2. The question of whether a particular piece of land therefore fits the definition of 18 U.S.C. § 1151(a) as a "continuing reservation" is therefore paramount. *Id.*

A. *Lands taken into trust pursuant to 25 U.S.C. § 465 are not "reservation" under 18 U.S.C. § 1151(a).*

One of the largest categories of land at issue is lands which have been taken into trust pursuant to the Indian Reorganization Act, § 5, codified at 25 U.S.C. § 465. Ex. 15. The United States claims roughly 6,000 acres of such land. The United States and the Tribe claim that any parcel land taken into trust under this section constitutes a discrete "reservation" under 18 U.S.C. § 1151(a). The issue is a critical one, for it has nationwide application to any land taken into trust under 25 U.S.C. § 465. The plain answer is that lands taken into trust under 25 U.S.C. § 465 are not "Indian country" under 18 U.S.C. § 1151(a). This is born out by the text of the statutes, by the legislative

history, by the early authoritative treatment, by case authority and even by admission of the federal government that simply placing lands into trust does not make them "reservation" or "Indian country." Moreover, there is no doctrinal "fit" which allows mere trust lands to be classified as "reservation" or "Indian country."

1. *The structure of the IRA precludes a finding that Section 5 "trust" lands are automatically Section 7 "reservation" lands.*

The text of Section 5 of the IRA, codified at of 25 U.S.C. § 465, in relevant part, states:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing lands for Indians. . . .
>
> Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such land or rights shall be exempt from State and local taxation.

Ex. 15. Thus, the statute in question allows the Secretary of the Interior to acquire lands in trust within or without reservations "for the purpose of providing lands for Indians" and provides that such lands shall be "exempt from State and local taxation." *Id.*

The next important statute was also enacted as part of the IRA. The text of Section 7 of the IRA, codified at 25 U.S.C. § 467, Ex. 15, states:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be

> designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C. § 467 thus allows the Secretary of the Interior to "proclaim" the existence of an "Indian reservation" on lands acquired pursuant to "any authority conferred by this Act, or to add such lands to existing reservations . . . ." It is thus untenable to argue that land taken into trust under Section 5 (25 U.S.C. § 465) is somehow created to be a "reservation" without the necessity of the "proclamation" pursuant to Section 7 (25 U.S.C. § 467).

In *Owasso Independent School District v. Falvo*, 534 U.S. 426, 434 (2002), the United States Supreme Court repeated the "'fundamental canon on statutory construction that the words of the statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). The Court engaged in an analysis of other sections of the statute to determine the meaning of the statute at issue. Here, referring to 25 U.S.C. § 465 and its function of creating nontaxable status and referring to 25 U.S.C. § 467 and its explicit function of creating "reservations" indicates that the two statutes have *different* functions.

In addition, the same result follows from the Court's approach avoiding an "interpretation of a statute that 'renders some words altogether redundant.'" *United States v. Alaska*, 521 U.S. 1, 59 (1997). In this case, a finding that 25 U.S.C. § 465 creates "reservation" status for any lands taken into trust would render the quoted language of 25 U.S.C. § 467 to be "redundant." If each

parcel of land taken into trust under Section 465 is its own discrete "reservation," then it was folly for the 1934 Congress to adopt both 25 U.S.C. § 465 and 25 U.S.C. § 467 as it did.

Moreover, it is notable that multiple other statutes distinguish between the terms "reservation" and "trust land" by using the terms side by side. If the use of the term "reservation" encompassed all "trust land," as the federal government argues, the Congress repeatedly enacted statutes with "redundant" language.[5] The same sorts of distinctions are found in the Code of Federal Regulations which nowhere declares that all lands taken into trust under 25 U.S.C. § 465 are "reservation" under 25 U.S.C. § 467.[6]

2. *The legislative history of the IRA indicates that the sections have separate functions and that the taking of land into trust does not create a "reservation."*

The legislative history of the 1934 Act also strongly supports this thesis. All of the evidence indicates that Congress intended that land acquired under

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[5] *See, e.g.*, 16 U.S.C. 670K(4)(E) (defining public land to include "an area within an Indian reservation or land held in trust . . . ."); 23 U.S.C. 101(a)(12) (regulations applicable to roads which provide access "to an Indian reservation or Indian trust land"); 25 U.S.C. 1903 (defining "reservation" to be "Indian country as defined by section 1151 of Title 18" and adding "any land, not covered under such section [1151], title to which is held by the United States in trust"); 25 U.S.C. 2703(4) (defining "Indian lands" to mean lands within any "reservation; and any lands title to which is . . . held in trust"). *See also* 7 U.S.C. 1895(e)(1)(A)(i); 18 U.S.C. 1855; 18 U.S.C. 1856.

[6] For example, 25 C.F.R. 151.2(d) defines "trust land" as "land the title to which is held in trust" and 25 C.F.R. 152.2(f) defines "Indian reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." *See also* 23 C.F.R. 661.5; 23 C.F.R. 973.104; 25 C.F.R. 140.5 (a)(1); 25 C.F.R. 170.5; 25 C.F.R. 900.97(a).

25 U.S.C. § 465 would be freed of taxes; only when, and *if*, the Secretary "proclaimed" a new reservation or added the land to a "reservation" would the land then become a "reservation" under 25 U.S.C. § 467.

Senate Rep. No. 1080, 73d Cong., 2d Sess. (1934) at 2, Ex. 12, carefully defines the different functions of Section 5 (25 U.S.C. § 465) and Section 7 (25 U.S.C. § 467). It states as follows:

> To meet the needs of landless Indians and of Indians and tribes whose land holdings are insufficient for self-support, *section 5* of the bill authorizes the purchase of lands by the Secretary of the Interior, title to be vested in the United States in trust for the Indian tribe for which the land is acquired.

Id. (emphasis added).

The section continues:

> The Secretary of the Interior is authorized by *section 7* of the bill to proclaim new Indian reservations on the lands acquired, pursuant to section 5 of the bill.

Id. (emphasis added).

House Rep. No. 1804, 73d Cong., 2d Sess. (1934), Ex. 9, makes the identical distinction. It states:

> *Section 5* authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians.

Id. at 7 (emphasis added). It states two paragraphs later:

> *Section 7* gives the Secretary authority to add newly acquired lands to an existing reservation and extends federal jurisdiction over such lands.

Id. (emphasis added).

In his explanation of the bill, Congressman Howard likewise clearly distinguished between the section allowing land to be taken into trust—Section 5—which he says "sets up a land acquisition program to provide lands for Indians . . . ." 78th Cong. Rec. 11730 (June 15, 1934). Ex. 13. He then states, several paragraphs below:

> Any lands acquired under this bill *may be added to existing reservations*, but no Indian who is not a member or enrolled on such a reservation or entitled to such enrollment may use such lands.

Id. (emphasis added).

Congressman Hastings similarly refers to acquisitions under Sections 4 and 5 in one section and then a paragraph later states:

> *Section 7* authorizes the Secretary of the Interior to add lands acquired under the Act to existing reservations.

78th Cong. Rec. 11739 (June 15, 1934) (emphasis added).

Authoritative congressional reports clearly distinguish between the ability of the Secretary to take land into trust—the authority exercised under Section 465—and the further authority to take that same land into "reservation" status under Section 467. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (authoritative source for congressional intent lies in the committee reports).

3. *The earliest authoritative interpretation indicates that there is no "reservation" status granted to lands simply by taking them into trust.*

The courts have frequently relied upon the writings of Felix S. Cohen to assist in the interpretation of the IRA. Cohen clearly indicates again that

Section 5 and Section 7 have separate functions, stating in *Felix S. Cohen's Handbook of Federal Indian Law* (1942) that

> Section 5 authorizes the acquisition of lands for Indians and declares that such lands shall be tax exempt.

Id. at 84.

In the paragraph below he states: "Section 7 give the Secretary authority to add newly acquired land to existing reservations and extends federal jurisdiction over such lands." *Id.*

Thus, Cohen clearly distinguishes between the creation of "trust land" and the creation of "reservations" and the extension of "federal jurisdiction." *See, e.g., Sioux Tribe*, 316 U.S. at 325 n.5; *Antoine v. United States*, 637 F.2d 1177, 1179 (8th Cir. 1981).

4. *Recognition of "reservation" status for mere trust land creates serious doctrinal anomalies.*

A finding that each acquisition of land in trust under Section 465 creates a discrete "reservation" pursuant to 18 U.S.C. § 1151(a) brings with it genuine doctrinal anomalies. Under well established law, lands in "reservation" status do not lose that status simply because they are conveyed from Indian to non-Indian ownership. *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962). If it is found that off reservation land going into trust under Section 465 becomes "reservation," then the question is raised as to what occurs if that land is then taken out of trust status. If it loses "reservation" status, it cannot be said to be in the same category as "reservation" lands of *Seymour* because "reservation" lands under *Seymour* do not lose that status by being conveyed to non-Indian

status. *Id.* It is evident that there is no doctrinal fit between the idea of placing a parcel of land in trust under Section 465 and creating a permanent "reservation" under 18 U.S.C. § 1151(a). In fact, the record will show that when lands are taken out of trust status within the former Yankton Sioux Reservation, they historically have not been treated as "reservation" or "Indian country."

5. *Circuit case authority indicates that "reservation" status is not created simply by taking land into trust.*

The leading case of the Court of Appeals for the Eighth Circuit is *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997). *Stands* engaged in a detailed analysis of the meaning of the terms used in 18 U.S.C. § 1151 which, as noted above, defines "Indian country." *Stands* treats "allotments," "fee land," and "trust land" separately. 105 F.3d at 1571-72. *Stands* explains that

> tribal trust land is land owned by the United States in trust for an Indian tribe. The Secretary of the Interior is authorized to purchase land in trust for Indian tribes pursuant to the Indian Reorganization Act, *see* 25 U.S.C. § 465 (1994), and has purchased off-reservation land in trust for tribes on a number of occasions. (Citation omitted.) *For jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country.*

Id. (emphasis added).

Stands is directly on point and finds that the placement of land into trust for a tribe does not make it "Indian country." The accompanying footnote strengthens the analysis. *Stands* adds that in "some circumstances off-reservation trust land may be considered Indian country." *Stands*, 105 F.3d at 1572 n.3 (citing *United States v. Azure*, 801 F.2d 336, 338-39 (8th Cir. 1986)).

The court further indicated that the off reservation land may become a "dependent Indian community" or a "de facto reservation." The critical finding of *Stands*, however, is that simply taking land into trust does not make it "Indian country" as a "reservation" or otherwise.

A recent decision of the Court of Appeals for the Eighth Circuit reinforces its holding in *Stands*, though the path was somewhat tangled. In fact, the court first seemed to abandon the stance that trust status itself was insufficient to create Indian country. *South Dakota v. United States*, 475 F.3d 993 (8th Cir. 2007). On rehearing, however, the panel vacated that opinion and substituted a new analysis which declared that it need not decide that issue. *South Dakota v. Department of Interior*, 487 F.3d 548 (8th Cir. 2007). In its new opinion, the Court of Appeals for the Eighth Circuit made it clear that simply taking land into trust was not enough: Only the imminent declaration of the Secretary under 25 U.S.C. § 467 would make the trust land into a "reservation." Thus, in *South Dakota*, 487 F.3d at 554, the Court of Appeals quoted the Secretary as follows:

> "Once this land is in trust status there will be no obvious jurisdictional problems which may arise. This land is adjacent to the existing reservation and will be under the Tribe's civil, regulatory and criminal jurisdiction as the Tribe plans to have this and proclaimed to be part of their reservation. Once the property is placed in trust status, the Tribe will make formal application to officially proclaim this property *reservation land* which should resolve the jurisdiction issues."

The Court of Appeals thus indicated that it was the forthcoming official "proclam[ation]" of "this trust property" as "reservation land" which would

answer the jurisdictional issues. The Court of Appeals thus referred to the precise order of events contemplated by the IRA. Land can be taken into trust under 25 U.S.C. § 465 and then, later, declared to be a "reservation" by the "proclamation" of the Secretary under 25 U.S.C. § 467.

The Court of Appeals for the District of Columbia takes the same common sense approach to the IRA and Sections 5 and 7. In *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007), the Court of Appeals decisively distinguished between simply taking land into trust and "reservation" status. *Citizens Exposing Truth* states that "Congress enacted IGRA against the backdrop of its prior authorization in the IRA to the Secretary to take lands in to trust and to proclaim them a 'reservation' for a tribe." 492 F.3d at 469. The Court stated that the opponents failed "to show that the Secretary treats the concepts of the 'reservation' and trust lands interchangeably." *Id.* The Court agreed with the position of the Secretary that "the Sackrider property" i.e., certain land already in trust, "would not qualify as a reservation until the Band applied for and obtained a reservation proclamation under 25 U.S.C. § 467. Appellee's Br. at 48." *Id.*

Thus, the Courts of Appeal for the Eighth Circuit and D.C. Circuit made clear their agreement that there is a two-step process—first taking land into trust and second, obtaining a "reservation proclamation under 25 U.S.C. § 467."

6. *Other case authority does not compel a different result.*

It is occasionally argued that certain cases, and especially *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), requires a finding that all land taken into trust under Section 465 becomes an "informal reservation" or a "reservation" of some unspecified kind. The analysis is flawed. *Citizen Band* did not find that the operation of Section 465 created a "reservation." Most importantly, *Citizen Band* did not even consider an acquisition under Section 465. Rather, *Citizen Band* dealt with a different case: In *Citizen Band* (1) "Congress specifically authorized the tribe to convey this land . . . to the United States in trust," (2) the United States apparently itself purchased the land, and (3) the land was "located within the original Pottawatomie Reservation boundaries, to the United States in trust." *Citizen Band Indian Tribe v. Oklahoma Tax Commission*, 88 F.2d 1303, 1306 (10th Cir. 1989), *aff'd*, 498 U.S. 505 (1991). Furthermore, *Citizen Band* arose, as did the other cases frequently relied upon, in the *State of Oklahoma*, a state which has been recognized and treated as a separate entity in Indian law for many purposes even in the pro-tribal treatises. *See, e.g.*, R. Strickland, editor, *Felix S. Cohen's Handbook of Federal Indian Law*, 770-97 (1982); Nell Newton, editor, *Cohen's Handbook of Federal Indian Law 2005 Edition* (2005), at 54.07[1].

The Oklahoma cases do indicate that the Supreme Court has recognized the limited category of "informal reservations." The Court has not, however, given substance to that term. C. Smith, editor, *American Indian Law Deskbook*, 54 (3d ed. 2004). The "informal reservation" concept "should be

addressed in light of the facts in which it has been applied—i.e., situations involving lands specifically set aside by statute or treaty for exclusive tribal occupancy with recognition that they would be subject to federal control." *Id.* To that requirement should be added the proviso that the statute or treaty should give a clear indication that actual "reservation" status is intended by Congress either in its language, or at least, in its clear history. These requirements are necessary to assure that 18 U.S.C. § 1151, 25 U.S.C. § 465, and 25 U.S.C. § 467 are not rendered superfluous. *See, e.g., United States v. Gomez-Hernandez*, 300 F.3d 974, 979 (8th Cir. 2002).

7. *The United States has acknowledged, in the Court of Appeals for the District of Columbia, in 2007, that land taken into trust under Section 465 does not automatically become "reservation" under Section 467.*

The United States, in the *Citizens Exposing Truth* case, successfully argued that land taken into trust under Section 465 does not become "reservation" automatically under Section 467. It only becomes a "reservation," according to the Department of Justice, if a proclamation is issued pursuant to Section 467.

In its Answering Brief of [Federal] Defendants-Appellees in No. 06-5354, 2007 WL 1590925 (2007), at *4, the United States carefully describes Section 5 of the IRA as authorizing the Secretary "to acquire lands for the purpose of providing land for Indians." It then explains

> In addition to providing authority to the Secretary to acquire land into trust, the IRA authorizes the Secretary to proclaim such lands as part of a tribe's reservation. *See* 25 U.S.C. § 467. Specifically, the Secretary can 'proclaim new Indian reservations on lands

> acquired' pursuant to the Secretary's authority under, among other provisions, 25 U.S.C. § 465 or 'add such lands to existing reservations.' *Id.* § 467.

2007 WL 1590925, at *6. The United States then explains the "guidelines for proclaiming a reservation" and, critically, states that "*before a reservation proclamation can be made, the land must have been granted trust status.*" *Id.* (emphasis added). It adds that the "guidelines explain that a reservation proclamation is 'an administrative function which is required before the tribe may take advantage of special federal assistance . . . [and] clarifies tribal jurisdiction over the trust property.'" *Id.*

It is noted that the accompanying footnote attempts to explain the general applicability of the very effective argument made by the United States and in fact argues that "a reservation proclamation pursuant to the IRA generally is not necessary for a tribe to assert jurisdiction over tribal trust land." *Id.* at *6 n.1. The United States, however, does not explain why this argument is not applicable to the successful main argument it launches in *Citizens Exposing Truth*. Indeed, its main argument in *Citizens Exposing Truth* carries the day.

B. *Lands claimed as trust land which have never been formally accepted into trust status are neither trust land nor are they reservation.*

According to the Spreadsheet supplied to this Court by the United States, approximately 6,035 acres of land are claimed to be in trust by virtue of Section 5 of the IRA. But the United States has ignored an important distinction among the lands it now claims are in trust: Of these, the BIA

claims that 3,201 acres, constituting thirty parcels, are in trust even though the BIA is unable to produce any written acceptance of these lands into trust status. (The remaining 2,833 acres have some notation by the BIA indicating its formal acceptance of the lands into trust status.)

In each of the cases in which the land was not accepted into trust (i.e., the 3,201 acres) there was an attempted conveyance: In these cases the grantor signed a deed "to the United States in trust for the Yankton Sioux Tribe" (or very similar language). But in none of these cases is there any evidence that the United States has, through an authorized agent, accepted the land in trust.

These lands are not trust lands. The principle is simple enough. Any person can make out a deed to the United States in trust and send it to an Agency Superintendent or a Regional Director. For example, Mr. Jones, a non-Indian living in Wagner, may make out a deed stating that he conveys his property to "the United States in trust for Mr. Jones," file it with the Register of Deeds and send it to the BIA. It is absurd to argue that Jones thereafter does not have to pay local property taxes, but that is essentially what the United States argues is valid here.

The United States has, in effect, admitted that a "formal acceptance" is necessary for land to be in trust and that, in the absence of such acceptance, the land does not attain trust status. On November 3, 1980, the Secretary of the Interior, in his Memorandum to "All Area Directors," Ex. 14, explained the new draft regulations. The Secretary found:

> In the past there have been instances where a party has caused deeds to be written stating that the land was transferred to "the United States in Trust for . . . ." *This section makes it clear that land is not in trust until there has been a formal acceptance.* The form of the acceptance is dictated by the circumstances of the transaction.

Id. at 4 (emphasis added). This 1980 Memorandum accurately describes the law and is precisely applicable to the situation confronted here.

The essential legal doctrines involve the principle that the United States acts only through its authorized agents and the principles of offer and acceptance. First, it is clear that the United States can act only through agents authorized by it to act. *See, e.g., Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947). The United States claims that the land is in trust, but cannot point to any of its agents who accepted the land into trust. Since only an authorized agent could have accepted the land into trust, the federal claims fail.

Second, there must actually have been an *acceptance* of the offer of the trust land by the authorized agent. In this case, it is known only that the deed was made out "in trust to the United States on behalf of the Yankton Sioux Tribe." It is not known whether the Tribe ever conveyed the deed to the United States nor whether the United States accepted the deed. It is known that the United States now has the deed in its possession. But that does not mean it was conveyed to the United States by the Tribe, nor does that mean it was accepted by the United States. For example, the BIA might have in its

possession a deed from the non-Indian Mr. Jones in Wagner, but that would not mean that the United States had accepted it.

The general law is that "To constitute a contract, there must be an acceptance of the offer; until the offer is accepted, both parties have not assented, or, in the language often used by the courts, their minds have not met." 17A Am. Jur. 2d *Contracts* § 66. Further, because this essentially involves a contract for the sale of land, the contract is generally required to be in writing. *See* SDCL 53-8-2:

> The following contracts are not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent, as authorized in writing:
> . . . .
> (3) An agreement for sale of real estate or an interest therein . . . .[T]his does not abridge the power of any court to compel specific performance of any agreement for sale of real estate in case of part performance thereof[.]

In these cases, there is no evidence of acceptance by the United States by an authorized agent, and certainly no evidence of a writing signed by an authorized agent of the United States—the "party to be charged." Thus, the lands in question are not "trust lands." It follows, therefore, that these lands cannot be "reservation," even if lands which are validly taken into trust can be (a matter disputed above).

C. *The remaining allotted lands within the 1858 boundaries are not "reservation."*

The question of whether "allotted lands" are "reservation" in the context of this case has, we submit, been answered by the actions of the Court of Appeals for the Eighth Circuit.

The United States Supreme Court has stated that "[a]llotment is a term of art in Indian law. U.S. Dept. of the Interior, Federal Indian Law 774 (1958). It means a selection of specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972). Roughly 260,000 acres were allotted to individual Indians prior to and at the time of the 1894 Act. *Gaffey*, 188 F.3d at 1014 n.3. The Court of Appeals has held that the "Yankton Sioux Reservation . . . has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151." 188 F.3d at 1030. This determination constitutes the "law of the case" and is not subject to further review.

"Allotments" were never intended to stand as disconnected "mini-reservations," as the Tribe seems to argue. The Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 528-529 (1998), establishes and confirms their origin and establishes that "allotments" remained "Indian country" and simultaneously emphasizes that the "allotments" were *not* "reservation":

> Before § 1151 was enacted, we held in three cases that Indian lands that *were not reservations* could be Indian country and that the Federal Government could therefore exercise jurisdiction over them. . . . In *United States v. Pelican* [232 U.S. 442 (1914)], we held that Indian allotments—parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians—were Indian country. . . . After the reservation's diminishment, the allotments continued to be

> Indian country, as the "lands remained Indian lands set apart for Indians under governmental care. . . ."

(Emphasis added.)

Similarly, in *DeCoteau*, 420 U.S. at 429 n.3, the Court found that 18 U.S.C. § 1151(c), which describes "allotments" indicates that the subsection "contemplates that isolated tracts of 'Indian country' may be scattered checkerboard fashion over a territory otherwise under state jurisdiction."

Finally, in *Beardslee v. United States*, 387 F.2d 280, 287 (8th Cir. 1967), Justice (then Judge) Blackmun, analyzed 18 U.S.C. § 1151(c) finding that the section applies to "allotted Indian lands in territory now open . . . . Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished." *See also* 18 U.S.C.A. 1151 (Historical and Revision Notes).

The lands at issue here fit precisely into the category described as "allotments" in *Venetie*, *DeCoteau*, and *Beardslee*. There is no legal basis to alter their status from "allotments" as defined by 18 U.S.C. § 1151(c) to the very different status of "reservation" as defined by 18 U.S.C. § 1151(a).

There is, however, a pressing legal basis *not* to alter their status from "allotments" to "reservation." As noted above, the Court has ruled, in *Seymour*, 368 U.S. at 357-58 that, under 18 U.S.C. § 1151(a), reservation land transferred to fee status does not lose its "Indian country" or "reservation status." This determination follows the wording of 18 U.S.C. § 1151(a) which defines "Indian country" to include "(a) *all land* within the limits of any Indian

reservation under the jurisdiction of the United States Government, notwithstanding the instruments of any patent, and, including rights-of-way running through the reservation . . . ." (Emphasis added.)

The determination has been regularly relied upon by both the state and federal courts. *See, e.g., Kain v. Wilson*, 161 N.W.2d 704, 705 (S.D. 1968); *Sigana v. Bailey*, 164 N.W.2d 886, 889 (Minn. 1969); *Cardinal v. United States*, 954 F.2d 359, 363 (6th Cir. 1992). The ruling of *Seymour*, therefore, is that allotted land leaving allotted status remains "Indian country" *only* if it is on a "reservation." The Court of Appeals for the Eighth Circuit has ruled that allotted land leaving Indian title within the 1858 boundaries does *not* remain "Indian country within the meaning of 18 U.S.C. § 1151." 188 F.3d at 1030.

In short, it is impossible to define "allotted lands" within the 1858 boundaries as "reservation" because the Eighth Circuit has definitely ruled that such lands lose "Indian country" status under Section 1151 when the allotted status is lost.

It is noted, of course, that the Court of Appeals at some points in its opinions did conflate the term "reservation" status and "allotted status." *See, e.g.*, 188 F.3d at 1028: "Treatment of the Yankton area in years following the passage of the Act provides further evidence that the nonceded lands retained their reservation status until they passed out of trust." These passages, however, cannot be taken as a determination of "reservation" status for two reasons. First, *Gaffey*, 188 F.3d at 1030, specifically reserves for remand the question of the status of "lands allotted to individual Indians that remains in

trust." If the Court of Appeals for the Eighth Circuit had found that these lands constituted "reservation," that would have been the end of it and the issue would not have been specifically remanded. Second, the practice of the Eight Circuit, and accordingly, of this Court, is to follow what the Court of Appeals "actually did," rather than what it failed to say or explain. *See Planned Parenthood v. Miller*, 63 F.3d 1452, 1457 (8th Cir. 1995). It has "actually" ruled that "allotted lands" lose "Indian country" status when conveyed to non-Indians, and that action means that these lands could not have been "reservation" under *Seymour*.

D. *The "agency lands" which were conveyed to the Tribe by virtue of congressional enactment and otherwise are not "reservation."*

The Court of Appeals issued conflicting signals about the land which was ceded to the federal government by the Tribe and reserved for agency purposes and later conveyed to the Yankton Sioux Tribe. The Court of Appeals almost simultaneously indicated, (1) that such lands were "reservation," 188 F.3d at 1030, and (2) included the topic in the portion of the brief referring to the ambiguous use of the term "trust land" as "the land reserved to the federal government in the 1894 Act and later returned to the Yankton tribe." *Id.*

Those portions of the *Gaffey* opinion which indicate or seem to indicate that the land is "reservation" are simply not persuasive. *Gaffey*, 188 F.3d at 1029, analyzed the Act of February 13, 1929, 45 Stat. 1167, which provided that the interest of the United States in certain lands "now reserved for agency

schools" is "reinvested in the Yankton Sioux Tribe of Indians when they are no longer required for agency, school or other purposes."

The *Gaffey* court analyzed the status of these lands but, unfortunately, had not been supplied with the evidence relating either to the 1929 Act or the use of the lands after the transfer. The question, moreover, had not been squarely raised to the parties. Therefore, the determination of the Court of Appeals was made without the benefit of an appropriate record.

The *Gaffey* court, for example, appeared to believe that the lands constituted a single unit at the tribal headquarters at Marty. *See Gaffey*, 188 F.3d at 1030, referring to *State v. Greger*, 559 N.W.2d 854, 859 (S.D. 1997). In fact, the lands are in at least two places: Around Greenwood and at the southwestern of the body of water known as Lake Andes. No lands around "Marty" were conveyed under the authority of the 1929 Act. Therefore, it seems clear that the Court of Appeals was not even certain as to what lands it was addressing.

The important question, however, is whether the land actually is a "reservation." *See* 188 F.3d at 1030. That question has been decided by the United States Supreme Court. In *Yankton Sioux Tribe*, 522 U.S. at 342, the Supreme Court unequivocally held that the "unallotted lands ceded as a result of the 1894 Act did not retain reservation status." This determination is binding on the lower courts.

It is, moreover, unavoidable that the "agency land" was "ceded" to the United States. *Gaffey*, 188 F.3d at 1019, acknowledges that "portions of the

ceded land currently occupied by the United States for 'agency, schools, and other purposes' will be reserved from sale to settlers." (Emphasis added.) The "agency land" therefore follows precisely into the category of "unallotted land ceded as a result of the 1890 Act" and which did "not retain reservation status." *Yankton Sioux Tribe*, 522 U.S. at 342. A finding that these lands actually did "retain reservation status" would directly contradict the unavoidable language of the United States Supreme Court.

Further examination of the origin of the lands and their place in the congressional plan is also of assistance. The initial identity of the agency lands follows from Article VIII of the agreement, which provided that the lands would be "reserved from sale to settlers until they are no longer required for [agency, schools or other purposes]." Article VIII, Act of 1894; *see also* 188 F.3d at 1019. The 1929 Act, which implemented this provision, provided that the lands should be disposed of to the Tribe rather than to settlers, but provided, the same as Article VIII, that the disposal could occur only "when they are no longer required for agency, schools or other purposes." 45 Stat. 1167.

Three points should be made. First, the 1894 Act did not reserve the lands for eventual use by the Tribe but rather reserved them for "sale to settlers." It is therefore without merit to argue that the lands ceded in 1894 to the United States as agent were reserved for the Tribe: The *opposite* is true; it was intended that they be ultimately sold "to settlers." Art. VIII, Act of 1894.

Second, *Venetie*, 522 U.S. at 527, identifies two "requirements" which are "necessary" for the finding of "Indian country" generally:

> [The lands] must have been set aside by the Federal Government for the use of Indians as Indian land; second, they must be under federal superintendence.

Neither requirement of *Venetie* is met. Under the Act of 1929, these ceded lands could be transferred *only* when the government no longer intended to use them for any purpose. Therefore, they cannot possibly be said to have been "set aside by the Federal Government for the use of Indians as Indian lands."

After the transfer from the federal government they most definitely could not be argued to be "under federal superintendence." This is further confirmed by S. Rep. No. 1130, 70th Cong., 1st Sess. (1928), Exhibit 522, in which the Department of the Interior objected to the then pending bill: "It would be a step backward in that it would necessarily limit the jurisdiction of the Federal Government over the reserved area and bring about some undesirable conditions that could not be readily controlled.

In other words, the Department of the Interior announced that it was losing jurisdiction over the lands by conveying them. This comprehends an appreciation, which was conveyed to Congress and which was uncontradicted in Congress, that the lands would not then be "under federal superintendence." *Venetie*, 522 U.S. at 527. Therefore, the lands could not be "Indian country" under the definitive interpretation of the United States Supreme Court in *Venetie*.

Third, neither agency personnel nor federal law enforcement recognize any special status for lands identified as "agency lands." Both the former

Superintendent and the present Superintendent, together with the FBI Agent with primary responsibility for the area, will testify that no lands within the 1858 boundaries have any special status simply because they are "agency lands." Testimony will show that the so-called agency lands are treated as "Indian country" only if they have trust status (itself a doubtful proposition, *see* Section II.A. *supra*).

Finally, the Government has identified certain lands as "Agency lands" even though they do not even qualify under the Act of 1929. The Act of 1929 refers to "lands *now reserved for agency, schools or other purposes.*" 45 Stat. 1167. As noted, these lands are to be "reinvested in the Yankton Sioux Tribe when they are no longer required for agency, school and other purposes."

This language clearly has potential to apply only to lands held in 1929 by the United States. Only lands then held by the United States could be said to be "now reserved" for the identified purposes and the United States had authority to "reinvest[ ]" only those lands. *Id.*

The 106 acres held by the Calvary Cathedral in 1929 were certainly not in the possession and ownership of the United States and the United States lacked any authority over them. It was well after 1929 that an attempt was made to transfer the lands from Calvary Cathedral to the United States. On December 19, 1944, the "Chapter of the Calvary Cathedral and W. Blair Roberts, Bishop" sold, at a price of $800, "eighty acres more or less" of its fee land to the "United States of America in trust for the Yankton Sioux Tribe." Doc. 346-1451, page 1. Shortly thereafter, on January 12, 1945, the "Chapter

of Calvary Cathedral (a corporation) and W. Blair Roberts, Bishop" sold, at a price of $260.00, "Twenty-six Acres" to the "United States of America in trust for the Yankton Sioux tribe."[7] Doc. 346-1468.

Congress in 1929 addressed only those lands over which it then had authority. It quite clearly lacked the authority in 1929 to "reinvest" the Calvary Cathedral lands in anybody. These lands therefore cannot be considered as "agency lands" within the meaning of the 1929 Act and the decision of the Court of Appeals at 188 F. 3d at 1029-1030.

CONCLUSION

For the foregoing reasons, this Court should find that the 1894 reservation has been "disestablished," that there are no remaining "boundaries," and that no lands within the former reservation constitute "reservation" under 18 U.S.C. § 1151(a).

Dated this 11th day of October, 2007.

Respectfully submitted,

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[7] (Note that in neither case was there an acceptance of the land into trust status by the United States. *See* Section II.B., *supra.*)

Dated this 11th day of October, 2007.

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