UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 08-5133

OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,

Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.

Defendants-Appellees.

On Appeal From an Order of the
United States District Court for the District of Columbia

BRIEF OF APPELLANT

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LIST OF ALL PARTIES TO THE PROCEEDING

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; LES BROWNLEE, Acting Secretary of the Army; DOMINIC IZZO, Principal Deputy Assistant Secretary of the Army for Civil Works; ROBERT B. FLOWERS, Chief of Engineers; KURT F.UBBLOHDE, Omaha District Commander and District Engineer, Department of the Army, Corps of Engineers, Omaha District; and the UNITED STATES OF AMERICA,
Defendants-Appellees.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

The parties are: The Oglala Sioux Tribe of the Pine Ridge Indian Reservation; the United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the Army; Dominic Izzo, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert B. Flowers, Chief of Engineers; Kurt F. Ubblohde, Omaha District Commander and District Engineer, Department of the Army, Corps of Engineers, Omaha District; and the United States of America.

B. Rulings Under Review

To the best of counsel's knowledge, there are no related rulings under review.

C. Related Cases

To the best of counsel's knowledge, there are no related cases.

CORPORATE DISCLOSURE STATEMENT

The Olglala Sioux Tribe is a sovereign, unincorporated Indian Tribe.

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REQUEST FOR ORAL ARGUMENT

The Plaintiff-Appellant, Oglala Sioux Tribe, requests oral argument. This appeal involves issues of federal Indian law that are of such a unique nature and importance that oral discussion of the facts and applicable precedent would benefit the Court.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the instant case under the federal question jurisdiction statute, 28 U.S.C. § 1331(a), the mandamus statute, 28 U.S.C. § 1361, and the statute conferring jurisdiction over certain civil actions brought by Indian tribes, 28 U.S.C. § 1362. This Court has jurisdiction over this appeal, taken from the final Order of the District Court dismissing the action entered March 17, 2008, under 28 U.S.C. § 1292. On May 12, 2008, Plaintiff-Appellant timely filed its Notice of Appeal pursuant to Fed.R.App.P. 4(a)(1)(B).

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court erred in ruling that the Oglala Sioux Tribe lacks standing to raise the first three claims in its Second Amended Complaint because it does not have a legally protected interest in the recreational areas and other lands at issue, where the Tribe retains legally protected interests in such lands because the Act of March 2, 1889, ch. 405, 25 Stat. 888 ("1889 Act") never went into effect or was ratified, leaving the boundaries of the Great Sioux Reservation largely intact?

2. Whether the District Court erred in ruling that the Oglala Sioux Tribe did not suffer any injury to its legally protected rights to the cultural items and historic properties within the recreational areas and other lands at issue in its fourth claim for relief because the National Historic Preservation Act does not require the Corps to locate, inventory and nominate all of these items for inclusion in the National Register of Historic Places?

STATEMENT OF THE CASE

Plaintiff-Appellant Oglala Sioux Tribe filed the instant action against Defendants on December 28, 2001, and its Second Amended Complaint on September 15, 2003 (See Addendum pages 000010 - 000038).

On July 7, 2003, the District Court issued an Order to Show Cause directing Plaintiff "to show cause . . . why this case should not be dismissed for lack of subject matter jurisdiction.".

In an Opinion and Order dated March 15, 2008, and entered March 17, 2008, the District Court, the Honorable Gladys Kessler, U.S.D.J. presiding, dismissed the action "because (1) Plaintiff has failed to show that it has standing to bring its first three claims, and (2) mandamus is not the appropriate relief for its fourth claim." (See Addendum pages 000039 -000065). An Amended Memorandum Opinion was entered on March 18, 2008. (See Addendum pages 000001 – 000009)

STATEMENT OF FACTS

A. Oglala Sioux Tribe's governance.

The Oglala Sioux Tribe ("the Tribe") is a body politic comprised of approximately 41,000 citizens. The Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body recognized by the Secretary of the Interior. (Second Amended Complaint, ¶ 2).

The Tribe is the successor-in-interest to the Oglala Band of the Teton Division of

the Sioux Nation[2] and is a protectorate nation of the Defendant United States of America. In 1936, the Oglala Band reorganized as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" ("Oglala Sioux Tribe" or "the Tribe") under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. (Second Amended Complaint, ¶ 2.)

B. Oglala SiouxTribe's aboriginal title territories.

Since time immemorial and up to and through the time of some of the actions that form the basis of the Tribe's Complaint, the seven Teton bands (including what is now the Oglala Sioux Tribe), jointly and severally, have exclusively used and occupied the following described territory in the Missouri River basin:

> (a) West of the Missouri River, approximately sixty million acres of land in what are now the States of North Dakota, South Dakota, Nebraska, Montana and Wyoming;
>
> (b) East of the Missouri River, approximately 14 million acres of land in what are now the States of North Dakota and South Dakota.

(Second Amended Complaint, ¶ 14.)

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2 The Sioux Nation is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yanatonai; and (7) Teton. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970). The Teton Division is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Minnecounjou; (5) No Bows; (6) Oglala; and (7) Two Kettle. (Second Amended Complaint, ¶ 13.)

C. The 1825 Treaty.

On July 25, 1825, the United States and the Oglala Band entered into a treaty of friendship and protection, 7 Stat. 252, which treaty was duly ratified by the United States and proclaimed on February 8, 1826. (Second Amended Complaint, ¶ 17.) By Articles 2 of the 1825 Treaty,[3] the United States brought the Oglala Band and its members under its protection and the Oglala Band became a protectorate nation of the United States. (*Id.*)

By Article 3 of the 1825 Treaty,[4] Congress extended the Trade and Intercourse Acts to the Oglala Band and its aboriginal territory, including permanent successor provisions of section 12 of the Act of June 30, 1834, ch. 161, 4 Stat. 730, *currently codified at* Rev. Stat. § 2216, 25 U.S.C. § 177, which provides that "[n]o purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (Second Amended Complaint, ¶ 18.).

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3 Article 2 of the 1825 Treaty provides that "[t]he United States agree to receive and the Sioune and Ogallala bands of Sioux into their friendship, and under their protection, and to extend to them, from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States." 7 Stat. 252.

4 Article 3 of the 1825 Treaty provides that "[a]ll trade and intercourse with the Sioune and Ogallala bands shall be transacted at such place or places as may be designated and pointed out by the President of the United States, through his agents[.]" 7 Stat. 252.

D. The 1851 Fort Laramie Treaty.

On September 17, 1851, the United States, the seven bands of the Teton Division of the Sioux Nation, and others, entered into a treaty known as the 1851 Fort Laramie Treaty, 11 Stat. 749, which treaty was duly ratified by the United States. (Second Amended Complaint, ¶ 19.) Article 5 of the 1851 Fort Laramie Treaty defined the territory of the bands of the Teton Division ("1851 Treaty territory") as follows:

> commencing at the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

(*Id.*)

In *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965), the Indian Claims Commission ruled that the 1851 Treaty was a multi-lateral treaty by which the United States recognized the aboriginal territory of both the seven Teton bands and of the other signatory tribes. The Commission further ruled that Article 5 of the 1851 Treaty recognized the Teton bands' joint and several aboriginal Indian title to (1) the entire sixty million acre area west of the Missouri River and (2) the entire fourteen million acre area east of the Missouri River. (Second Amended Complaint, ¶¶ 20, 21.)

Unconsented encroachments on the 1851 Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States

and the Teton bands. Peace was concluded between the United States and the Teton bands by a treaty entered into on April 29, 1868, 15 Stat. 635, known as the 1868 Fort Laramie Treaty ("1868 Treaty"). The treaty was duly ratified by the United States on February 16, 1869 and proclaimed on February 24, 1869. (Second Amended Complaint, ¶ 22.)

E. <u>The 1868 Fort Laramie Treaty</u>.

The 1868 Treaty provided for a mutual demobilization without terms of surrender on either side. (Second Amended Complaint, ¶ 22.) Article 2 of the 1868 Treaty established a designated territory within the 1851 Treaty territory boundaries for the seven Teton bands and other Sioux tribes, a territory commonly referred to as the "Great Sioux Reservation." (Second Amended Complaint, ¶ 23.) Article 2 of the 1868 Treaty describes this territory as follows:

> Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of the beginning; and in addition thereto, all existing reservations on the east bank of the said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . .

(*Id.*) Article 2 of the 1868 Treaty again recognized the seven Teton bands' aboriginal Indian title to all the lands within the Great Sioux Reservation, including all lands west

of the low water mark of the east bank of the Missouri River, and again vested that title under the Constitution and laws of the United States. (*Id.*).

Article 12 of the 1868 Treaty further provided that no future cessions of territory within the Great Sioux Reservation would be "of any validity or force as against the said Indians, unless executed or signed by at least three-fourths of all the adult male Indians, occupying or interested in the same . . .." (Second Amended Complaint, ¶ 24.) Under Article 12, the United States and the Teton bands agreed to limit their sovereign powers to cede and to accept cessions of land for the protection and peace of both parties. (*Id.*)

F. The 1877 Act.

By the Act of February 28, 1877, ch. 72, 19 Stat. 254 ("1877 Act"), Congress purported to ratify and confirm an agreement between commissioners acting on behalf of the United States and the Teton and other bands of the Sioux Nation and the Northern Cheyenne and Arapaho tribes. (Second Amended Complaint, ¶ 25.) The purported agreement, which did not exist in fact or law, provided for the cession of over 7 million acres of land in the western part of the Great Sioux Reservation, including the Black Hills. (*Id.*) It was later determined that "the treaty was presented just to the Sioux chiefs and their leading men. It was signed by only 10% of the adult male Sioux population[,]" not by the three-fourths required by Article 12 of the 1868 Fort Laramie Treaty. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 381-382 (1980). In *United States v. Sioux Nation of Indians*, the Supreme Court held that the 1877 Act

amounted to confiscation by the United States of the western end of the Great Sioux Reservation, that such confiscation violated both Article 12 of the 1868 Treaty and the Fifth Amendment to the Constitution, and that the United States was required to pay interest for this unconstitutional taking of land.

G. The 1889 Act and 1890 Proclamation.

By the Act of March 2, 1889, ch. 405, 25 Stat. 888 ("1889 Act"), Congress conditionally provided for the creation of six smaller reservations within the balance of the Great Sioux Reservation, the release of title by Indian persons associated with each smaller reservation to each of the other five smaller reservations, and for the restoration to the public domain and the opening to settlement of the balance of the territory within the Great Sioux Reservation outside the boundaries of the six smaller reservations.[5] (Second Amended Complaint, ¶ 27.)

The effectiveness of the 1889 Act was expressly conditioned upon the acceptance and consent to its provisions in the manner required by Article 12 of the 1868 Fort Laramie Treaty, i.e., its execution and signature by three-fourths of the adult male members of bands and tribes signatory to the 1868 Treaty. (Second Amended Complaint, ¶ 27.) Section 28 of the 1889 Act provided as follows:

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5 The six smaller reservations are called the Pine Ridge Indian Reservation, the Rosebud Indian Reservation, the Standing Rock Indian Reservation, the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation, and Crow Creek Indian Reservation. (Second Amended Complaint, ¶ 27.)

> Sec. 28. That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians, concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required, by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void.

A three-member commission[6] appointed by the Secretary of the Interior (the "Crook Commission") was charged with obtaining the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty, as required by Section 28 of the 1889 Act in order for the 1889 Act to take effect. (Second Amended Complaint, ¶ 28.) The Crook Commission determined that it would seek to have the adult male members associated with each of the six agencies of the Interior Department within the Great Sioux Reservation ("Sioux agencies") sign a quit claim deed to evidence their consent under Article 12 of the 1868 Treaty in accordance with Section 28 of the 1889 Act. (*Id.*) The Commission scheduled meetings during the summer of 1889 at the six Sioux agencies to obtain the requisite number of signatures on quit claim deeds. (*Id.*)

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6 The three members of the commission were Charles Foster of Ohio, William Warner of Missouri, and General George Crook of the United States Army. (Message from the President of the United States, Sen. Exec. Doc. No. 51, 51st Cong., 1st Sess., p. 1 (1890).)

The Crook Commission failed to obtain the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty. (Second Amended Complaint, ¶ 29.) Five thousand six hundred and seventy-eight (5,678) adult male members were eligible to give consent under Article 12 of the 1868 Treaty and section 28 of the 1889 Act, and three-fourths of that number equals 4,259. The Crook Commission obtained 4,463 signatures on quit claim deeds, but at least 521 of those signatures were invalid. At least 185 signatures obtained by the Commission were from non-Indians, at least 183 signatures were from Indian persons of mixed blood (who were disqualified from signing by section 7 of the Act of February 28, 1877, c. 72, 19 Stat. 254), at least 104 signatures were from Indians who were not members of the bands and tribes signatory to the 1868 Treaty, at least 43 signatures were from underage (non-adult) Indian persons, at least 3 signatures were from Indians who were females, and at least 3 signatures were duplicates. The Crook Commission therefore obtained no more than 3,942 valid signatures on quit claim deeds. (*Id.*)

Furthermore, the majority of the signatures obtained by the Crook Commission were obtained through coercion, fraud and bribery, including but not limited to the following means: (a) False imprisonment, by keeping adult male Indians at the Sioux agencies and preventing them from returning to their homes until they signed the quit claim deeds; (b) Threats and intimidation, including but not limited to threatening adult male Indians: (i) that Congress would unilaterally take their reservation lands if they did

not sign, (ii) that their subsistence rations would be cut if they did not sign, and (iii) that the U.S. military would be brought in to deal with them if they did not sign; (c) Fraud, by getting adult male Indians drunk to secure their signatures; (d) Fraud, by failing to inform adult male Indians that their signatures were being sought in order to approve the cession of approximately nine million acres of territory within the Great Sioux Reservation to the United States; and (e) Bribery, including but not limited to, offering money, personal favors and issuing beef and other rations to certain individuals to secure signatures. (Second Amended Complaint, ¶ 30.)

On or about January 30, 1890, the Crook Commission submitted a report concerning its activities to President Benjamin Harrison entitled Report and Proceedings of the Sioux Commission, Sen. Exec. Doc. 51, 51st Cong. 1st Sess. (1890) ("1890 Commission Report"). Among other things, the 1890 Commission Report contained the name of each of the persons from whom the Commission had obtained signatures on quit claim deeds. *See* 1890 Commission Report, pp. 242-307. The census records contained in the 1890 Commission Report show *prima facie* that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to give consent under Article 12 of the 1868 Treaty and Section 28 of the 1889 Act. (Second Amended Complaint, ¶ 31.)

On February 10, 1890, President Harrison nevertheless issued a Proclamation, 26 Stat. 1554 ("1889 Proclamation"), declaring the 1889 Act "to be in full force and

effect."[7]

Since 1890 and up to and including the present, the Oglala Band and its successor, the Oglala Sioux Tribe, has protested the facts set forth above continuously, publicly, and notoriously and has continuously, publicly and notoriously maintained that the boundaries of the Great Sioux Reservation were never diminished nor otherwise altered by the 1889 Act. (Second Amended Complaint, ¶ 35.)

The Tribe likewise has continuously, publicly and notoriously maintained that it retains recognized aboriginal Indian title to all lands located in the Great Sioux Reservation and has never acquiesced in any claim or assertion that said boundaries have been diminished or otherwise altered or that such title has been relinquished or extinguished. (Second Amended Complaint, ¶ 35.)

Since 1890 and up to and including the present, the United States has disregarded these protests. For example, the United States has denied the Band, the Tribe and its members, by force and threat of criminal prosecution, their right to use and occupy any

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7 The Proclamation stated in relevant part:

> I, Benjamin Harrison, President of the United States, by virtue of the power in me vested, do hereby make known and proclaim the acceptance of said act by the different bands of the Sioux Nation of Indians, and the consent thereto by them as required by the act, and said act is hereby declared to be in full force and effect, subject to all the provisions, conditions, limitations and restrictions therein contained, and be governed accordingly.

26 Stat. 1554.

lands–except lands within the Pine Ridge Indian Reservation– within the balance of the Great Sioux Reservation, including all lands within the other five of the six smaller reservations conditionally created in §§ 2 through 6 of the 1889 Act and the nine million acres of land conditionally restored to the public domain and opened to settlement in § 21 of the Act. (Second Amended Complaint, ¶ 36.).

H. <u>The 1944 Flood Control Act</u>.

By the Flood Control Act of December 22, 1944, P.L. 534, ch. 665, 58 Stat. 887, Congress authorized the Missouri Pick-Sloan Program ("Pick-Sloan Program" or "Program") and charged the Army Corps of Engineers ("the Corps") with constructing six dam and reservoir projects on the main stem of the Missouri River under the Program. (Second Amended Complaint, ¶ 37.) Thereafter, the Corps acquired approximately two million acres of land ("Pick-Sloan Project Lands") for the six dam and reservoir projects and constructed the projects. (*Id.*). Four of the dams and reservoirs are located in South Dakota, within the Great Sioux Reservation: Oahe Dam and Lake Oahe; Big Bend Dam and Lake Sharpe; Fort Randall Dam and Lake Francis Case; and Lewis and Clark Dam and Lewis and Clark Lake ("South Dakota Pick-Sloan Projects"). (*Id.*)

In the case of Oahe Dam and Lake Oahe, the Corps acquired some of the land for this project by an agreement between the United States and the Cheyenne River Sioux Tribe enacted by the Act of September 4, 1954, P.L. 776, 68 Stat. 1191 ("1954

Agreement"). The balance of the land for the South Dakota Pick-Sloan Projects was acquired by the Corps through condemnation or mesne conveyances. The Oglala Sioux Tribe was not a party to the 1954 Agreement, nor was it a party to any condemnation proceeding relating to, or any mesne conveyance of, Pick-Sloan Project Lands within the Great Sioux Reservation. (Second Amended Complaint, ¶ 37.)

The Corps subsequently constructed, and operated and maintained, approximately 112 shoreline recreational areas in South Dakota around the shores of Lake Oahe, Lake Sharpe, Lake Francis Case, and Lewis and Clark Lake. Of these 112 recreational areas, approximately 105 are located within the aboriginal territory of the Oglala Band. (Second Amended Complaint, ¶ 38.)

I. <u>The Water Resources Development Act (WRDA)</u>.

By the Water Resources Development Act of August 17, 1999, P.L. 106-53, Title VI, §§ 601-609, 113 Stat. 269, 385, *as amended by* the Water Resources Development Act of December 11, 2000, P.L. 106-541, Title V, § 540, 114 Stat. 2572, 2664 ("WRDA"), Congress directed the Secretary of the Army to transfer title or grant perpetual leases to recreational areas and other lands around Lake Oahe, Lake Sharpe, Lake Francis Case, and Lewis and Clark Lake to the State of South Dakota, the Cheyenne River Sioux Tribe, and the Lower Brule Sioux Tribe on or before January 1, 2002. (Second Amended Complaint, ¶ 39.) WRDA was enacted by Congress without public hearings and over the objections of the Oglala Sioux Tribe. (*Id.*)

By § 605(a)(1)(A), (b), and (c) of the WRDA, Congress directed the Secretary of the Army to convey to the State of South Dakota by transfer or lease 91,178 acres of land around the four reservoirs, including 73 recreational areas: 30 areas by transfer and 4 by lease around Lake Oahe, 8 areas by transfer around Lake Sharpe, 21 areas by transfer and 3 areas by lease around Lake Francis Case, and 6 areas by transfer and 1 by lease around Lewis and Clark Lake. (Second Amended Complaint, ¶ 40.) Fifty-one recreational areas and other lands around Lake Oahe, Lake Sharpe and Lake Francis Case[8] are located within Oglala aboriginal territory. Eighteen of these areas and other lands are located west of the Missouri River within the Great Sioux Reservation and 33 of such areas and other lands are located outside that reservation but within the fourteen million acre area east of the Missouri River that is part of Oglala aboriginal territory.[9]

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8 The 7 recreational areas and other lands around Lewis and Clark Lake and 12 recreational areas and other lands on the east bank of Lake Francis Case were one time part of the aboriginal territory of the Oglala Band, but the Oglala Band and other bands of the Teton Division of the Sioux Nation voluntarily relinquished their right of exclusive use and occupancy of the area to the Yankton Division of the Sioux Nation more than a century prior to the 1825 Treaty. They are subject to the stewardship of the Yankton Sioux Tribe, and are not the subject of the instant action. (Second Amended Complaint, ¶ 41.)

9 By § 606(b) and (c) of the WRDA, Congress directed the Secretary of the Army to convey by transfer 6 recreational areas and other lands around Lake Oahe to the Cheyenne River Sioux Tribe, and 6 recreational areas and other lands by transfer and 3 recreational areas by lease around Lake Sharpe, and other lands around Lake Francis Case, to the Lower Brule Sioux Tribe. (Second Amended Complaint, ¶ 42.) These recreational areas and other lands are part of the aboriginal territory of the Oglala Band, but are within the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation or the Crow Creek Indian Reservation, and are subject to the stewardship of

(*Id.*) All of these recreational areas and other lands are the subject of this action. (*Id.*)

Section 607 of Title VI of the WRDA provides that

> [n]othing in this title diminishes or affects – (1) any water right of an Indian tribe; (2) any other right of an Indian tribe, except as specifically provided in another provision of this title; (3) any treaty right that is in effect on the date of enactment of this Act; (4) any external boundary of an Indian reservation of an Indian Tribe; (5) any authority of the State of South Dakota that relates to the protection, regulation, or management of fish, terrestrial wildlife, and cultural and archaeological resources, except as specifically provided in this title; or (6) any authority of the Secretary, the Secretary of the Interior, or the head of any other Federal agency under a law in effect on the date of enactment of this Act, including - - (A) the National Historic Preservation Act (16 U.S.C. 470 et seq.); (B) the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa et seq.); . . . (G) the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.); . . . .

Pub. L. No. 106-53, § 607(a).

On or about December 4, 2001, the Tribe notified the Corps pursuant to the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, 25 U.S.C. § 3002(a) ("NAGPRA") that it claims ownership and control of all Native American cultural items excavated or discovered, *inter alia*, at all of the recreational areas or other lands that are the subject of this action, including, but not limited to, those Native American cultural items classified by the Corps as "Teton," "Sioux," or "Arikara." (Second Amended Complaint, ¶ 44.)

The recreational areas and other lands that are the subject of this action also

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the Cheyenne River Sioux Tribe and the Lower Brule Sioux Tribe and are not the subject of this action. (*Id.*)

contain Native American cultural items and historic properties that are included or are eligible to be included in the National Register of Historic Places ("National Register") established by the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S.C. § 470 et seq. ("NHPA"), including human remains, associated and unassociated funerary objects, grave goods, sacred places and other items of cultural patrimony, prehistoric and historic village sites, ceremonial sites, structures, objects, artifacts, records and remains, and other properties, each of which is of traditional religious, cultural and historical importance to the Tribe and its members. (Second Amended Complaint, ¶ 47.) At least four of these properties are included in the National Register, and at least five of these properties have been determined by the Corps to be eligible for inclusion in the National Register but have not yet been nominated. (*Id.*) At least 43 other of these properties have been identified by the Corps as potentially eligible for inclusion in the National Register but have never been evaluated by the Corps or nominated for inclusion. (*Id.*)

In addition, at least five other of these properties have been identified by the South Dakota State Historic Preservation Officer ("SHPO") as potentially eligible for inclusion in the National Register but have never been evaluated by the Corps or nominated for inclusion. (Second Amended Complaint, ¶ 47.) These five other properties have been specifically characterized by the South Dakota SHPO as being "Sioux" or "Siouan." (*Id.*) The Corps has failed to perform any field assessment of these five properties. (*Id.*)

The Corps and the other Defendants have failed to conduct field surveys to ascertain the current condition of known historic properties included or eligible for inclusion in the National Register within the recreational areas and other lands that are the subject of this action. (Second Amended Complaint, ¶ 48.) As early as the period 1979 to 1983, the Corps was notified by its contract archaeologists that cultural resources were being damaged and removed by recreational users. (*Id.*) The Corps has taken inadequate or ineffective measures to protect these properties, and, as a result, many of the religious, cultural and historical resources described above have been damaged or removed during the time the properties were managed by the Corps, without the knowledge or consent of the Oglala Sioux Tribe. (*Id.*) For example, the Walth Bay Village[10] was reported in 1986 to be subject to continuing vandalism and disturbance from recreational visitors, and the largely unexcavated village site within the Spring-Cow Creek Recreational Area was already deteriorating in 1979 from erosion and recreational use. (*Id.*, ¶¶ 47, 48.)

J. <u>Tribal claims for relief in the instant action</u>.

On December 28, 2001, the Tribe instituted the instant action to enjoin the Corps from carrying out the transfers set forth in the WRDA. In its First Claim for Relief, the Tribe seeks a declaratory judgment that (1) the 1889 Act never became effective in

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10 Walth Bay Village, located within the Walth Bay Recreation Area, is a well-known and well-documented earth-lodge village. (Second Amended Complaint, ¶ 47.)

accordance with the conditions fixed by Section 28 of that Act; (2) that the 1889 Act therefore did not operate to diminish or otherwise alter the boundaries of the Great Sioux Reservation as defined by Article 2 of the 1868 Fort Laramie Treaty; (3) that no treaty or act of Congress subsequent to March 2, 1889 has ever diminished or otherwise altered the boundaries of the Great Sioux Reservation; and (4) that each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are subject to the provisions of Article 12 of the 1868 Fort Laramie Treaty. (Second Amended Complaint, ¶¶ 51-58 & ¶ 1 of Prayer for Relief.)

In its Second Claim for Relief, the Tribe seeks a declaratory judgment that the transfers and leases on or about February 8, 2002 by the Defendants to the State of South Dakota of recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation, are without force or effect, and an injunction prohibiting Defendants from transferring any recreational areas or other lands that are the subject of this action and within the Great Sioux Reservation to the State of South Dakota pursuant to WRDA, without the voluntary consent of each of the bands of the Sioux Nation that were signatory to the 1868 Fort Laramie Treaty, or their successors, including the Oglala Sioux Tribe, obtained in the manner and form specified in Article 12 of the 1868 Fort Laramie Treaty. (Second Amended Complaint, ¶¶ 57-62 & ¶¶ 2 & 3 of Prayer for Relief.)

In its Third Claim for Relief, the Tribe seeks a declaratory judgment that

Defendants are required to consult with and reasonably accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action and further seeks relief in the nature of mandamus to compel such consultation and reasonable accommodation. (Second Amended Complaint, ¶¶ 63-67 & ¶¶ 4 & 5.)

By its Fourth Claim for Relief, the Tribe seeks relief in the nature of mandamus requiring the Corps to locate, inventory and nominate for inclusion in the National Register all Native American cultural items and other historic properties within the recreation areas and other lands that are the subject of this action and that appear to qualify for inclusion in the National Register.

SUMMARY OF THE ARGUMENT

Though framed in terms of Article III standing, the principal issue presented by this appeal is whether the lower court erred in holding that, as a matter of law, the 1889 Act became effective and diminished the boundaries of the Great Sioux Reservation. Taking the allegations of the Complaint as true, as must be done for purposes of a motion to dismiss for lack of standing, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), the 1889 Act never went into legal operation or effect given that the express conditions fixed by Congress for its taking effect were never complied with. Specifically, the requisite consent and approval of the tribes in the manner prescribed by Article 12 of the 1868 Fort Laramie Treaty was

never obtained, and no "satisfactory proof" of such consent and approval was timely presented to the President before he issued his proclamation. Absent compliance with the conditions expressly imposed by Congress, the 1889 Act became a utter nullity that could not be ratified either by subsequent congressional legislation or by other actions of the Government. Because the 1889 Act never became legally effective, the boundaries of the Great Sioux Reservation remain largely intact, the Tribe has legal interests in the recreation areas and lands located within those boundaries that the Corps is seeking to transfer under Article VI of the WRDA, and thus the Tribe has standing to challenge the transfers.

This appeal further presents the issue as to whether the District Court erred in construing Section 110(a)(2)(A) of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470h-2(a)(2)(A), which provides that the Corps "shall ensure" that historic properties under its jurisdiction and control "are identified, evaluated, and nominated to the National Register," as not imposing a mandatory, affirmative duty that is enforceable by mandamus.

STANDARD OF REVIEW

Whether a party has standing to sue is a question of law that an appellate court reviews de novo. *Akzawa v. Link New Technology International, Inc.*, 520 F.3d 1354, 1355 (Fed. Cir. 2008). Moreover, the question whether a plaintiff has Article III standing to pursue its claim is a threshold question of subject matter jurisdiction, *Steel*

Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 (1998), which is likewise a question of law subject to *de novo* review. *Litecubes, LLC v. Northern Lights Products, Inc.*, 523 F.3d 1353, 1360 (Fed. Cir. 2008).

In deciding a motion to dismiss on the pleadings for want of subject matter jurisdiction "the allegations of the complaint should be construed favorably to the pleader." *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987) (citations and quotations omitted). As the district court did not make any factual findings on disputed issues, this Court "engage[s] in an independent review of the legal sufficiency of the District Court's views and of its application of the law to undisputed facts in the historical record." *Hohri*, 782 F.2d at 241 (citations and quotations ommited). In addition, this Court "construe[s] the allegations of the complaint most favorably to the appellants unless such allegations are contradicted by the undisputed historical documents on which the District Court based its judgment." *Id.* at 241.

ARGUMENT

I. The Tribe Has Standing Because The Post-1877 Boundaries Of The Great Sioux Reservation Remain Intact, The1889 Act Never Having Gone Into Effect.

The District Court concluded that "the Tribe cannot assert a valid legal interest to the lands at issue in this case because those interests were abrogated by the 1889 Act." *OST v. USACE*, 537 F. Supp. 2d 168, 170 (D.D.C. 2008). The court below further

concluded that "[t]hese lands were removed from what remained of the Great Sioux Reservation, and were thus taken out of the control and interest of the tribes, *once the 1889 Act went into effect*." *Id.* (emphasis added). Thus, according to the lower court, "the Oglala Tribe does not have a valid legal interest in the recreational areas and other lands at issue because any interest was extinguished by the 1889 Act, *once it became effective* . . .." *Id.* at 171 (emphasis added).

As will be shown below, however, the 1889 Act never became effective, because the conditions set by Congress for its becoming effective were never satisfied. In determining that the 1889 Act went into effect, the District Court erroneously overlooked certain basic principles of law governing the interpretation of congressional legislation affecting the boundaries of Indian reservations.

The federal courts "do[] not lightly conclude that an Indian reservation has been terminated." *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 444 (1974). "[When] Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.*, quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909); *see also Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots in the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). Only Congress can divest a reservation of its land and diminish its

boundaries, and Congress must clearly evince an intent to change boundaries before diminishment will be found. *Bartlett*, 465 U.S. at 470; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation . . . , and its intent to do so must be 'clear and plain.'") (citations omitted).

In determining whether the boundaries of the Great Sioux Reservation as delineated in the 1868 Fort Laramie Treaty "were subsequently diminished by congressional enactments" such as the 1889Act, the federal courts "are guided by well-established legal principles." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977). First, the fundamental "underlying premise is that congressional intent will control." *Id.* Secondly, in determining congressional intent, the federal courts follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *accord*, *Kneip*, 430 U.S. at 586. The mere fact that a reservation has been opened up to settlement does not necessarily mean that the opened area has lost its reservation status. . *Kneip*, 430 U.S. at 586-587; *see Mattz v. Arnett*, 412 U.S. 481, 504-505 (1973). "In all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." *Kneip*, 430 U.S. at 587,

quoting *Arnett*, 412 U.S. at 505.

In this case, the facial language of the 1889 Act, including in particular the wording of Section 28 of that Act, clearly expresses Congress' intent to make the Act conditional upon both (1) obtaining the acceptance and consent of three-fourths of the adult male members of the tribes in the "manner and form" prescribed by Article 12 of the 1868 Fort Laramie Treaty, and (2) the timely issuance of a presidential proclamation *after* the President was first presented with "satisfactory proof" of such acceptance and consent. In view of the allegations of the Second Amended Complaint, which must be taken as true for purposes of the Defendants' motion to dismiss, neither of these conditions was satisfied, and, thus, the District Court erred in ruling that as a matter of law the 1889 Act went into effect.

A. The 1889 Act Was Expressly Conditioned On The Happening Of A Future Event, Namely Obtaining The Acceptance And Consent Of Three-Fourths Of The Adult Male Members Of The Sioux Tribes, And, As That Event Never Happened, The Act Did Not Take Effect.

It is well established that "[a] valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. . . . *The legislature, in effect, declare[s] the law inexpedient if the event should not happen*, but expedient if it should happen."[1] *Lothrop v. Stedman*, 15 F. Cas. 922 (Cir Ct. D. Conn. 1875) (emphasis

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1"Expedient" means "[a]pt and suitable to [the] end in view" . . . '[w]hatever is suitable and appropriate for the accomplishment of a specified object." Black's Law Dictionary 686 (4th Ed. 1968).

added), quoting *Barto v. Himrod*, 8 N.Y. 483, 490 (1853); *see also Phoenix Ins. Co. v. Welch*, 29 Kan. 672, 676 (1883) ("Our laws abound in cases in which a statute is made dependent upon the action of some tribunal or body, or upon some other contingency, and is therefore practically dormant until such action takes place or contingency happens."); *People ex rel. Blanding v. Burr*, 13 Cal. 343, 357 (1859) ("Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the Legislature, in its wisdom, may impose. They may take effect only upon the happening of events which are future and uncertain; and, among others, the voluntary act of the parties upon whom they are designed to operate. They are not the less perfect and complete when passed by the Legislature, *though future and contingent events may determine whether or not they shall ever take effect.*") (emphasis added).

Section 28 of the 1889 Act expressly provides that "this act shall take effect, *only, upon* the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by [Article 12 of the Fort Laramie Treaty] . . .." (Emphasis added.) The word "only" has been defined as meaning "*[s]olely*; merely; for no other purpose; *at no other time*; *in no otherwise* . . .." BLACK'S LAW DICTIONARY (4th ed. 1968) (emphasis added). The term "upon" has further been defined as meaning "immediately following on: very soon after . . . on the occasion of: at the time of . . .." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976). The language of Section 28 therefore makes it quite clear that the 1889 Act was conditional

legislation that would take effect solely on the occasion of the acceptance of and consent to the Act by three-fourths of the adult male members of the Sioux tribes in the "manner and form" prescribed by Article 12 of the 1868 Fort Laramie Treaty and would take effect at no other time and in no other manner.

Thus, Congress made the 1889 Act's efficacy dependent upon the happening of an event that was future and uncertain, namely the acceptance of and consent to the Act by three-fourths of the adult male members of the affected Sioux tribes in the manner and form prescribed by Article 12 of the 1868 Fort Laramie Treaty. Because, as alleged by the Tribe, that event never happened, the 1889 Act never took effect.

B. The 1889 Act Was Also Expressly Conditioned On The Timely Presentation Of "Satisfactory Proof" To The President, Which Condition Was Not Timely Met, Rendering The Act Of No Effect And Null And Void.

Section 28 of the 1889 Act further provided that the required acceptance of and consent to the 1889 Act by three-fourths of the adult male members of the Sioux tribes, upon which event the Act was to "take effect," was to "be made known by proclamation by the President of the United States." Section 28, however, also required that, before the President could issue such a proclamation, he had to have been presented with "*satisfactory proof* . . . that the same has been obtained in the manner and form required, by said twelfth article of said treaty [, i.e., the 1868 Fort Laramie Treaty]." (Emphasis added.) Furthermore, Section 28 required that such satisfactory proof "shall be presented to him [, i.e., the President,] within one year from the passage of this act," and

that if satisfactory proof were not so timely presented to the President, "this act becomes of no effect and null and void."

Thus, the taking effect of the 1889 Act by presidential proclamation was made contingent on the President ascertaining that he had been timely presented with "satisfactory proof" of the requisite acceptance of and consent to the Act by the Sioux Tribes. The Supreme Court similarly recognized, in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), that the suspension of a congressional act could be made contingent upon the President ascertaining the existence of a fact and then issuing a proclamation:

> As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining the fact and issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law making department to ascertain and declare the event upon which its expressed will was to take effect.

143 U.S. at 693. Justice Lamar, in his opinion concurring in the judgment in *Field v. Clark*, likewise recognized, in discussing prior congressional legislation, that

> . . . The legislation was purely contingent. It provided for an ascertainment by the President of an event in the future, an event defined in the act and directed to be evidenced by his proclamation. It also prescribed the consequences which were to follow upon the proclamation. Such proclamation was wholly in the nature of an executive act, a prescribed mode of ascertainment, which involved no exercise by the President of what belonged to the law-making power. The supreme will of Congress would have been enforced whether the event provided for had or had not happened, either in the continuance of the restrictions, on the one hand, or on the other, in their suspension.

Id. at 699 (Lamar, J., concurring in the judgment).

The timely presentation of satisfactory proof to the President was thus a condition precedent to the President's ability to issue a proclamation. "The provisions of the act quoted are . . . conditions precedent to the issuance of a proclamation by the President under this section. It was very plainly the congressional intent that no proclamation should be issued by the legislative agent, the President, without some investigation by a body able to ascertain the facts [or, as in this case, without the presentation to the President of satisfactory proof of the requisite acceptance and consent]. Such an investigation [or, as in this case, such a presentation] insured greater accuracy in the findings of the President. . . . But when he acts, he must act within the limits defined by the law." *William A. Foster & Co. v. United States*, 20 C.C.P.A. 15, 22, T.D. 45673 (U.S.Ct.Cust.& Pat.Appeals 1932).

The term "satisfactory proof," like "satisfactory evidence," refers to "such evidence as is sufficient to produce a belief that the thing is true . . . such evidence as, in respect to its amount or weight, is adequate or sufficient to justify the court or jury in adopting the conclusion in support of which it is adduced." *Allied Tube & Conduit Corp. v. United States*, 24 C.I.T. 1357, 1371, 127 F. Supp. 2d 207, 220 (U.S. Ct. of Int'l Trade 2000), quoting BLACK'S LAW DICTIONARY (5th ed. 1979); *accord, Walker v. Collins*, 59 F. 70, 74 (8th Cir. 1893), *rev'd on other grounds*, 167 U.S. 57 (1897); *United States v. Detroit Timber & Lumber Co.*, 124 F. 393, 402 (Cir.Ct. W.D. Ark. 1903), *rev'd*

on other grounds, 131 F. 668 (8th Cir. 1904), *aff'd*, 200 U.S. 321 (1906). It is "evidence of sufficient weight and authority as to justify [the factfinder's] factual conclusions as the only reasonable outcome." *Allied Tube & Conduit* 24 C.I.T. at 1371, 127 F. Supp. 2d at 220. Thus, the Supreme Court has held that a statute requiring that a particular element be "established to the satisfaction of the Commissioner" means "that the additional element is not lightly to be inferred but to be established by proof *which convinces in the sense of inducing belief*." *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 398 (1934) (emphasis added).

Satisfactory proof "does not mean beyond a reasonable doubt, but it should not be ambiguous, equivocal, or contradictory; it should be perspicuous, and cause the mind to repose confidence in it." *State v. Brooks*, 101 Utah 584, 590, 126 P.2d 1044 (1942), citing *American Freehold Land Mfg.* v. *Pace*, 23 Tex. Civ. App. 222, 56 S.W. 377 (Tex. Civ. App. Austin 1900, writ ref'd). It should "cause a reasonable person under all the circumstances to believe in its sufficiency." *Brooks*, 101 Utah at 590. It requires stronger proof than by a preponderance of the evidence. *See Walker v. Collins*, 59 F. at 73.

It has also been held that "satisfactory evidence" requires "[p]roof of the circumstances and conditions, and a full and candid explanation thereof[.]" *B.K. Elliott Co. v. United States*, 44 C.C.P.A. 189, 192 (U.S.Ct.Cust.& Pat.Appeals 1957) (emphasis added), quoting *Linen Thread Co. v. United States*, 13 Ct. Cust. 301, T.D. 41220 (1925).

The allegations of the Second Amended Complaint show that the President was not presented with "satisfactory proof." The census records contained in the 1890 Commission Report show *prima facie* that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to give consent under Article 12 of the 1868 Treaty and Section 28 of the 1889 Act. (Second Amended Complaint, ¶ 31.) Furthermore, the 1890 Commission Report did not contain a full and candid explanation of the circumstances and conditions surrounding how the signatures were obtained, as it omitted any mention of the fact that most, if not all, of the signatures that were actually obtained were not voluntarily given, but rather were induced by coercion, inebriation, fraud and bribery. (Second Amended Complaint, ¶ 30.)

As the President was not presented with satisfactory proof of the requisite acceptance and consent of the Sioux Tribes to the 1889 Act within one year after the passage of the Act, the Act was rendered "of no effect and null and void." Additionally, while the 1889 Act established two separate and distinct pre-requisites, (1) obtaining the signatures of three-fourth of the adult males and (2) obtaining satisfactory proof of signatures and issuing the proclamation, the simple language of the 1889 Act makes it clear that the second pre-requisite does not and cannot stand alone. The Congressional requirements of the 1889 Act are clear. The Act does not go into effect in the absence of the three-fourths signatures. The signature verification and the Presidential proclamation, are merely the Congress' choosen method of announcing the results of the

vote to the public. Thus, without the required signatures, the proclamation and all of the actions taken in issuing it are irrelevant because the Act becomes null and void on the 366th day.

C. Because The Failure To Satisfy The Conditions Set Forth In Section 28 Of The 1889 Act Rendered The Act Utterly Void, Not Merely Voidable, It Could Not Be Subsequently Ratified By The Actions Of Either Congress Or The Government.

The District Court reasoned that, "[w]hile the Tribe argues that the 1889 Act was not properly ratified, given the Sioux Commission's failure to garner the consent of three-fourths of the adult tribal members, it is undisputed that the United States government acted upon the supposed ratification by creating six reservations for the various tribes, including the Oglala Tribe's Pine Ridge Reservation, and returning the other land to the public domain." *OST*, 537 F. Supp. 2d at 170. The lower court further stated that "regardless of whether the Crook Commission received the required authorization to cede tribal lands under Article 12 of the 1868 Fort Laramie Treaty, and thus Section 28 of the 1889 Act, the United States government took action to diminish Reservation boundaries at that time and Congress passed many acts 'to [further] change the boundaries of the original 1889 Rosebud Reservation.'" *Id.* at 171 (quoting *Kniepp*, 430 U.S. at 615). The court below therefore concluded that, even if the 1889 Act did not go into effect because "the Sioux Commission failed to legally collect the signatures required to make the 1889 Act legally effective," *Id.* at 169, the Act's provisions were nevertheless somehow ratified and the post-1877 remnant of the Great Sioux

Reservation was terminated by the actions of the Government in diminishing the Reservation and by "Congress' enactment of subsequent legislation." *Id.*at 171.

The District Court thereby erred, because (1) Congress specifically declared that a failure to satisfy the conditions for making the 1889 Act effective would render that Act absolutely and utterly "null and void," and (2) subsequent acts of the Government and Congress could therefore not serve to ratify such an utterly void piece of legislation.

It has been recognized that "Legislatures use the word 'void' in statutes [in two different senses, namely] in the sense of utterly void so as to be incapable of ratification, and in the sense of voidable by those alone whose rights are infringed without express discrimination, so that resort must be had to settled rules for the interpretation of statutes in each case to determine in which sense the Legislature intended to use it." *Doherty v. Bartlett*, 81 F.2d 920, 926 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936) (quoting *Westerlund v. Black Bear Mining Co.*, 203 F. 599, 611 (8th Cir. 1930)). "One of these rules is that *an act* or contract *so declared void by statute which is* malum in se or *against public policy is utterly void and incapable of ratification*, but an act or contract so declared void, which is neither wrong in itself nor against public policy, but which has been declared void for the protection of a certain party, or class of parties, is voidable only and is capable of ratification by the acts or silence of the beneficiary or beneficiaries." *Id.* (emphasis added). *See also Cecil B. De Mille Productions , Inc. v. Woolery*, 61 F.2d 45, 49 (9th Cir. 1932) ("The doctrines of estoppel by law and

ratification have no application to a contract which is void because it violates an express mandate of law or the dictates of public policy. Such a contract has no legal existence for any purpose and neither action nor inaction of a party to it can validate it and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity."), quoting *Tatterson v. Kehrlein*, 88 Cal. App. 34, 48, 49, 263 P. 285 (1927).

In this case, Congress used the term "null and void" in the sense of utterly void and thus incapable of ratification, since without (a) the requisite acceptance of and consent to the 1889 Act by the Sioux Tribes in the "manner and form" prescribed by Article 12 of the 1868 Fort Laramie Treaty as prescribed by Section 28, and (b) timely presentation to the President of "satisfactory proof" thereof, implementation of the provisions of the Act would be against the manifest public policy to protect the Sioux Indians. For example, in *American Surety Co. v. United States*, 112 F.2d 903 (10th Cir. 1940), the surety company argued that the United States was estopped to deny the validity of the assignment of a lease on coal bearing Indian lands. Applicable statutes and regulations made the assignment ineffectual without approval by the Secretary of the Interior. The Tenth Circuit held as follows:

> The public policy of the United States to thus afford protection to the Indians with respect to leases of coal land was clearly manifested. *To permit such prerequisite to validity to be rendered unnecessary by the application of the doctrines of estoppel, ratification, or laches would thwart that public policy.*

Id. at 906 (emphasis added).

Similarly, in *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971), Secretary of the Interior Ickes, in 1934, acting pursuant to authority granted by the then recently adopted Indian Reorganization Act, ordered a temporary withdrawal of certain Indian lands from entry and disposal under the federal land and mining laws, essentially restoring these lands to tribal ownership. The lands affected included certain remaining surplus lands on the Colville Reservation. Although the Ickes withdrawal was later frustrated by the vote of a majority of Colville Tribe rejecting the Indian Reorganization Act, Congress, by Act of July 24, 1956, 70 Stat. 626, overrode this rejection by restoring the surplus lands on the Colville Reservation to tribal ownership.

In a subsequent action by the United States to quiet title to certain lands on the Colville Reservation, Consolidated Mines & Smelting Company (Consolidated) argued that the Government was estopped from denying Consolidated's mining claims in view of certain actions of officials of the Department of the Interior. In denying this estoppel claim, the Ninth Circuit reasoned in pertinent part:

> [T]o allow an estoppel in this case would frustrate the public policy of protection of Indian lands and resources which lies behind the Ickes withdrawal, the Indian Reorganization Act, and the Act of July 24, 1956, 70 Stat. 626, restoring the Colville Reservation to tribal ownership. "For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest." *Scott Paper Co. v. Marcalus Manufacturing Co., Inc.*, 326 U.S. 249, 257 . . . (1945) (involving potential frustration of the patent laws).

455 F.2d at 446. After discussing the First Circuit's holding in *American Surety Co.*, the

Ninth Circuit concluded that "[t]he manifested public policy of the United States and the effect upon that policy were the doctrine of estoppel applied are similar in this case." *Id.* at 447. *See also Getty Oil Co. v. Department of Energy*, 581 F.2d 838, 843 (Temp. Emer. Ct. App. 1978), *cert. denied*, 439 U.S. 1070 (1979) (doctrine of estoppel "cannot be invoked to avoid duties lawfully imposed by Congress to protect the public interest"); *Oliver v. Oliver*, 185 F.2d 429, 433 (D.C. Cir. 1950) ("estoppel cannot be set up in opposition to a public policy laid down by the law-making power").

In this case, the 1889 Act, including especially Section 28 thereof, manifest a public policy of the United States to protect the interests of the Sioux Indians by imposing strict conditions on the Act's taking effect and thus on the cession of lands called for in the 1889 Act. To render these conditions nugatory by applying the doctrine of ratification (or, for that matter, the doctrines of estoppel or laches) would thwart that public policy.

Consequently, upon failure of the salutary conditions for its taking effect, the 1889 Act became utterly void and incapable of ratification. The District Court therefore erred in essentially determining that the Act was ratified by subsequent acts of the Government and/or by the subsequent passage of legislation by Congress.

D. The District Court's Reliance On The Supreme Court's Decision In *Kniepp* Was Misplaced.

The District Court, in ruling that the Tribe's legal interests in the lands at issue in this litigation were abrogated by the 1889 Act, quoted as follows from the Supreme

Court's decision in *Kniepp*:

> [I]n dealing with the validity of the cession of tribal lands enacted in contravention of a treaty requiring three-fourths Indian consent . . . "it was never doubted that the power to abrogate [the treaty] existed in Congress . . . [such that] the judiciary cannot question or inquire into the motives which promoted the enactment of [the cession] legislation." Although [the administrative commission] failed to garner the signature of three-quarters of the Indians in consent of the proposed changes, Congress understandably relied on this holding as authorizing it to diminish unilaterally the Reservation boundaries.

OST v. USACE, 537 F. Supp. 2d at 171, quoting *Kniepp*, 430 U.S. at 594 (quoting in turn *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556, 558 (1903)).

Kniepp, however, dealt with three pieces of legislation that were passed by Congress in 1904, 1907 and 1910. Prior to 1903, the question of whether Congress could unilaterally abrogate a treaty provision calling for the consent of tribal members to the diminishment of reservation boundaries was unsettled. In 1903, the Supreme Court in *Lone Wolf v. Hitchcock* held that Congress could so abrogate a treaty provision requiring three-fourths Indian consent, saying:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress.

187 U.S. at 556.

Thus, in adopting the 1904 and subsequent legislation at issue in *Kniepp*,

"Congress understood that it was not bound by the three-fourths-consent requirement of the 1868 Treaty with the Sioux Nation." 430 U.S. at 594. Indeed, the Supreme Court in *Kniepp* found that "Congress was explicitly aware that it was acting pursuant to the holding in *Lone Wolf v. Hitchcock*[.]" *Id.* at 598 n. 19 (citations to the legislative record omitted).

The 1904 Act, moreover, contained "language of immediate cession," *Id.* at 596-597, providing that "[t]he said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Reservation now remaining unallotted, situated within the boundaries of Gregory County[.]" *Id.* at 597, citing 33 Stat. 256.

The Supreme Court in *Kniepp* therefore concluded that Congress, in enacting the 1904 legislation

> was under no misapprehension that the required portion of the [Rosebud Sioux] Tribe had in fact approved the [1903] treaty [on which the 1904 legislation was premised]. It knew that while a majority of the Tribe had approved it, the required extraordinary [three-fourths] majority had not; *but it had determined nonetheless to go ahead and accomplish the same result unilaterally* as the [prior 1901] Agreement [for which the requisite three-fourths Indian consent had been obtained] would have accomplished bilaterally.

Id. at 598 (emphasis added and footnote omitted). The Court then went on to find "a continuity of intent [to disestablish the reservation] through the 1907 and 1910 Acts." *Id.* at 606.

By contrast to the 1904 Act, which was the "crucial" piece of congressional legislation at issue in *Kniepp*, *see id.* at 606 n. 30, the 1889 Act was passed well before the Supreme Court's 1903 decision in *Lone Wolf v. Hitchcock.* There is no historical evidence indicating that, at the time of the passage of the 1889 Act, Congress understood that it had the power to act unilaterally to abrogate the provisions of an Indian treaty calling for an extraordinary majority of tribal members to consent to and/or approve of any future cession of Indian lands.

More importantly, it is clear that Congress did not intend to act unilaterally in enacting the 1889 Act. Far from using language of immediate cession, Congress expressly made the effectiveness of the 1889 Act conditional upon compliance with the three-fourths Indian consent requirement of Article 12 of the 1868 Fort Laramie Treaty and upon the timely presentation of "satisfactory proof" of such compliance to the President. No such conditional language is to be found anywhere in the 1904, 1907 or 1910 congressional acts at issue in *Kniepp.*.

"[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), *quoting Pigeon River Improvement, Slide & Boom Co. v. Cox Co.*, 291 U.S. 138, 160 (1934). Generally, Congress will not be presumed to have intended to abrogate treaty rights unless it has made its intention "clear and plain." *See United States v. Dion*, 476 U.S. 734, 738 (1986), citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, p. 223

(1982 Ed.). "Absent explicit statutory language, [the Supreme Court has] been extremely reluctant to find congressional abrogation of treaty rights." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979). Because "Indian treaty rights are too fundamental to be easily cast aside,", the federal courts do not construe statutes as abrogating treaty rights in "a backhanded way." *United States v. Dion*, 476 U.S. at 739

Certainly, an intent to abrogate treaty rights cannot be imputed to Congress where it expressly conditioned the efficacy of the 1889 Act upon compliance with Section 12 of the 1868 Fort Laramie Treaty. Thus, even assuming that in 1889 Congress understood it had the power to act unilaterally to diminish the boundaries of the Great Sioux Reservation, it deliberately chose not do so in enacting the 1889 Act. Thus, the District Court's reliance upon *Kniepp* was entirely misplaced.

E. The WRDA Must Be Read In Pari Materia With The Mni Wiconi Project Act of 1988.

The District Court stated below that "Congress authorized the transfer of land at issue by passing the WRDA, which does not even mention the 1868 Fort Laramie Treaty or any rights the tribe might assert under it." *OST*, 537 F. Supp. 2d at 170. The lower court then noted:

> In particular, § 605 of the WRDA specifically addresses the interests of Plaintiff in the Corps' transfer of land to the State of South Dakota, stating that "[a]ll permits, rights-of-way, and easements granted by the Secretary to the Oglala Sioux Tribe for land on the west side of Missouri River between Oahe Dam and Highway 14, and all permits, rights-of-way, and easements

> on the other land administered by the Secretary and used by the Oglala Sioux Rural Water Supply system, are granted to the Oglala Sioux Tribe in perpetuity to be held in trust under section (3)(e) of the Mni Wiconi Project Act of 1988 (102 Stat. 2568." Pub. L. No. 106-53, § 605(a)(1)(B). If the Secretary previously had the power to grant permits, rights-of-way, and easements to the Tribe for the land at issue, that is further acknowledgment that the tribe did not possess the land prior to passage of the WRDA. See Black's Law Dictionary 527 (7th Ed. 1999) (defining easement, in part, as "the right to use" land "owned by another person").

Id. at 170 n. 4.

The District Court failed to realize that the quoted portion of § 605 of the WRDA constitutes an amendment to the Mni Wiconi Project Act of 1988 ("Mni Wiconi Act"), Public Law 101-516, 102 Stat. 2566 (Oct. 24, 1988). Section 3(a) of the Mni Wiconi Act authorized the construction of water system pipelines of the Oglala Sioux Rural Water Supply System across the Corps' lands. Public Law 101-516, 102 Stat. 2567 (Oct. 24, 1988). In construing § 605 of the WRDA, the District Court completely overlooked Section 11 of the Mni Wiconi Act, which provides as follows:

> Nothing in sections 1 through 12 [of the Mni Wiconi Act] shall be construed to –
>
> . . . .
>
> (5) Affect any water rights or claims thereto of the Oglala Sioux tribe, located within or without the external boundaries of the Pine Ridge Indian Reservation, based on treaty, Executive order, agreement, Act of Congress, aboriginal title, the Winter's doctrine (*Winters v. United States*, 207 U.S. 564 (1908)), or otherwise. Nothing contained in this section or in section 1 through 12, however, is intended to validate or invalidate any assertion of the existence, nonexistence or extinguishment of any water rights, or claims thereto, held by the Oglala Sioux Tribe, or any other Indian tribe or individual Indian under Federal or State law.

Public Law 100-516, § 11(5), 102 Stat. 2571 (Oct. 24, 1988).

Under the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read "as if they were one law." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-316 (2006), quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). Section 605 of the WRDA, which is an amendment to the Mni Wiconi Act and deals with the same subject matter, should therefore be read in pari materia with the Mni Wiconi Act itself, including Section 11 of that Act. So read, it can readily be seen that Congress intended to preserve and not to adversely affect the claims of the Oglala Sioux Tribe to interests in lands outside of the Pine Ridge Indian Reservation based on either treaty (including those based on the 1868 Fort Laramie Treaty) or aboriginal title. By construing the language of § 605 of the WRDA in isolation, and as cutting against the Tribe's assertion of legal rights to the lands at issue in this case, the District Court improperly thwarted the intent of Congress as clearly expressed in Section 11 of the Mni Wiconi Act.

F. Conclusion.

In sum, the District Court erred in failing to determine that the 1889 Act never went into effect, that Congress never passed subsequent legislation that in clear and plain language terminated the Great Sioux Reservation, that the recreational areas and other lands at issue in this case have never been ceded in accordance with Article 12 of the 1868 Fort Laramie Treaty, and that the Tribe therefore has a legal interest in the

recreational areas and other lands at issue in this case sufficient to accord it Article III standing to sue.

II. Defendants Owe The Tribe A Trust Responsibility To Consult Over The Transfer or Leasing Of The Corps Lands At Issue In This Case.

It has long been recognized that the Tribe, as well as the other tribes and bands who were parties to the Fort Laramie Treaty of 1851, have aboriginal interests in the lands set aside by that treaty for the occupancy and use of the various tribes and bands, a portion of which lands eventually became the Great Sioux Reservation. *See Cheyenne-Arapaho Tribes of Indians of Oklahoma, et al. v. United States*, 10 Ind. Cl. Comm. 64, 65-66 (1961) (finding that by the Fort Laramie Treaty of 1851, "the United States of America, immediately before and after the execution and ratification of said treaty, . . . accepted, acknowledged, ratified and confirmed petitioners' [and hence the other signatory tribes'] aboriginal Indian title and right of occupancy and use of the territory" set aside for such tribes); *see also Sioux Tribe v. United States*. 15 Ind. Cl. Com. 577 (1965) (ruling that Article 5 of the 1851Fort Laramie Treaty recognized the Teton bands' joint and several aboriginal title to lands described in ¶ 14 of the Second Amended Complaint). The District Court in fact recognized "possible injuries that could result from the Government's alleged failure to exercise its trust responsibility to the aboriginal interests of the Oglala and other tribes, in the lands held in the Great Sioux Reservation." *OST v. USACE*, 537 F. Supp. 2d at 169, citing *Haida Nation v.*

British Columbia (Minister of Forests) ["*Haida Nation*"], 2002 BCCA 147 (finding Canadian government officials had a responsibility to consult with and accommodate a tribe before granting a tree farm license, a duty that arose from the government's fiduciary duty and the tribe's aboriginal interests). The District Court further acknowledged that "the Tribe relies upon the *Haida Nation* case to support the assertion that the Defendants owe the Tribe a trust responsibility based upon [the Tribe's] aboriginal interest in the lands at issue[.]" *OST v. USACE*, 537 F. Supp. 2d at 171.

The District Court nevertheless concluded that "the facts of this case are not similar to *Haida Nation*," saying:

> Specifically, the *Haida Nation* court rested its findings, in part, on the fact that the tribe had never "surrendered their Aboriginal rights by treaty, and their Aboriginal rights ha[d] not been extinguished by federal legislation." 2002 BCCA 147 at ¶ 22 (internal quotations and citations omitted). . . .
>
> In this case, the Court has already determined that the Oglala Tribe's rights to the land at issue *had been extinguished by the 1889 Act, once it became effective, and other acts*. *See* discussion *supra*. . . . Thus, the Oglala Tribe cannot assert a valid aboriginal interest in the recreational and other lands at issue in this case [.]

Id. at 172 (emphasis added).

Again, for the reasons set forth under Heading I. of the Argument, the District Court erred in determining that the 1889 Act "became effective," since the express conditions imposed by Congress for the Act to take effect never were met. Moreover, as more fully argued under Heading I., the "other acts" referred to by the District Court (1) could not serve to ratify the 1889 Act, which was rendered absolutely void and

incapable of ratification by the failure to meet the conditions set by Congress, and (2) did not, in clear and plain language, either terminate the Great Sioux Reservation or diminish its borders. Consequently, the Tribe still retains and may assert a valid aboriginal interest in the recreational and other lands at issue in this case.

The District Court further pointed out in its opinion below that the Canadian court in *Haida Nation* determined that "the fiduciary duty of the [[Canadian] government] to the [Canadian] aboriginal peoples [was grounded in] a general guiding principle for s. 35(1) of the Constitution Act, 1982," which states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and confirmed." *See OST v. USACE*, 537 F. Supp. 2d at 171, citing *Haida Nation*, 2002 BCCA 147 at ¶¶ 36-37. The court below then reasoned, in further support of its conclusion that the Tribe cannot assert a "valid aboriginal interest" in the lands at issue in this case, that "the United States Constitution does not contain a similar acknowledgment of aboriginal tribal rights." *Id.* at 172.

While the federal Constitution does not contain an acknowledgment or guarantee of aboriginal tribal rights, those rights are recognized and guaranteed by the various treaties entered into between the United States and the various Native American tribes. *See, e.g., Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 10 Ind. Cl. Comm. 64. These treaties are the supreme law of the land under Article VI, Clause 2 of the U.S. Constitution. Thus, a fiduciary duty to consult on the transfer or leasing of

Corps lands under WADA owed by the federal Government to the Tribe, similar to that recognized by the Canadian court in *Haida Nation*, can and should be recognized from the the 1851 Fort Laramie Treaty and the 1868 Fort Laramie Treaty, as well as from federal statutory and common law. *See also* Executive Order 13175 promulgated by President Clinton on November 6, 2000, which requires federal agencies to consult and collaborate with tribal officials with respect to, inter alia, "actions that have substantial direct effects on one or more Indian tribes."

In short, as the Government owes a fiduciary duty or trust responsibility to the Tribe regarding the lands in question, the Tribe has a valid legal interest in those lands.

III. Given The Tribe's Valid Legal Interests In The Recreational Areas And Other Lands That Are The Subject Of This Litigation, The Tribe Has Standing To Sue To Remedy An Injury In Fact To Those Interests Caused By The Corps' Proposed Transfer Of Lands Under Article VI Of The WRDA.

In order to establish standing under Article III of the Constitution, a plaintiff such as the Tribe must demonstrate (1) a concrete and particularized injury that is actual or imminent, (2) caused by, or fairly traceable to, an act that the litigant challenges in the current litigation, and (3) redressable by the Court. *See OST*, 537 F. Supp. 2d at 169, citing *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d 562, 567 (D.C. Cir. 2007).

In this case, the Tribe has demonstrated actual and/or imminent, concrete and particularized injuries to valid legal interests that it holds in the lands in question.

Specifically, the transfers of land called for by Title VI of the WRDA have and/or will cause injuries in fact to (1) the Tribe's aboriginal and legal interests in the Great Sioux Reservation, and (2) the Tribe's rights as the beneficiary of the fiduciary duty and trust responsibility owed to it by the federal Government. The conclusion of the District Court to the contrary, *see OST v. USACE*, 537 F. Supp. 2d at 172, is premised on the District Court's erroneous conclusion that the Tribe's legal interests were "extinguished by the 1889 Act, once it became effective, and other acts," *id.*, a conclusion thoroughly refuted above under Heading I of the Argument.

The District Court further committed error in concluding that, "given that any injury to the Tribe occurred when the 1889 Act became effective and subsequent acts of Congress were enacted, and not by the transfer of land designated in Title VI of the WRDA, the second and third standing requirements cannot be met – any injury to the Tribe's interests is neither a result of the Corps' present WRDA actions nor redressable by ordering the Corps to stop the transfers." *Id.* at 172 n. 5. The lower court thereby entirely misapprehended the nature of the Tribe's claims. The Tribe is not seeking redress for an injury or injuries occurring as a result of the 1889 Act taking effect. Rather, the Tribe asserts that the 1889 Act was rendered void and *never took effect* for failure to fulfill conditions fixed by Congress, that no subsequent act of Congress could or did ratify such an utterly void enactment, and, hence, that the Tribe did not suffer any injury to its legal interests in the subject lands until the Corps sought to make the

disputed transfers those lands pursuant to Article VI of the WRDA. Hence, the second and third requirements for standing have been met, in that the injuries to the Tribe's interests have been, or will be, caused by the actions of the Corps in making the disputed transfers pursuant to Article VI of the WRDA and those injuries are fully redressable by enjoining the Corps from making the transfers.

In sum, as all three of the requirements for Article III standing have been met, the District Court erred in determining that the Tribe lacked standing to bring its first three claims.

IV. Section 110 of NHPA Creates Mandatory Obligations Regarding Historic Preservation.

It has been recognized that Section 110 of "[t]he NHPA requires agencies to 'assume responsibility for the preservation of historic properties' they control." *Wilderness Watch v. U.S. Dep't of the Interior*, 375 F.3d 1085, 1091 (11th Cir. 2004) (citing 16 U.S.C. § 470h-2(a)(1)); *accord*, *Save Sandy Hook Corp. v. United States Dep't of Interior*, 2007 U.S. Dist. LEXIS 67700, *4 (D.N.J Sept. 13, 2007) ("[T]he NHPA requires the heads of each federal agency to assume responsibility for the preservation of all historic properties owned or controlled by that agency," citing 16 U.S.C. § 470h-2(a)(1)). Thus, Section 110(a) of NHPA "affirmatively requires" that a federal agency "manage and maintain property it has jurisdiction over[.]" *Fein v. Peltier*, 949 F. Supp. 374, 378 (D.V.I. 1996). More specifically, Section 110 of the NHPA creates an affirmative mandatory obligation by requiring the establishment of a

preservation program that "*shall* ensure that historic properties under the jurisdiction or control of the agency, *are* identified, evaluated, and nominated to the National Register." 16 U.S.C. § 470h-2(a)(2)(A)(emphasis added); *see also Wyoming Sawmills, Inc. v. United States Forest Service*, 179 F. Supp. 2d 1279, 1287 (D. Wyo. 2001) (recognizing that Forest Service's obligations under NHPA include "identification, evaluation, and management of historic properties in a way that considers preservation of their historic, archeological, architectural, and cultural values"), *aff'd*, 383 F.3d 1241 (10th Cir. 2004), *cert. denied*, 546 U.S. 811 (2005).

The District Court concluded, however, that 16 U.S.C. § 470h-2(a)(2)(A) does not create an affirmative mandatory obligation that can be enforced by mandamus, relying on *National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999). *Blanck* is clearly distinguishable, however, in that the provision of the NHPA primarily at issue in *Blanck* was 16 U.S.C. § 470h-2(a)(2)(B), which requires that an agency's preservation program "shall ensure" that "properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register *are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 106* [16 U.S.C. § 470f] and gives special consideration to the preservation of such values in the case of properties designated as having National significance." (Emphasis added.) Given the use of the word "considers" and the

express reference to "compliance with section 106," the court in *Blanck* essentially concluded that the Army was not under any mandatory, affirmative obligation to expend funds to maintain and preserve historic structures in an historic district that had already been identified and/or listed, because Section 110(a)(2)(B) "did not require Walter Reed to undertake any preservation beyond what was necessary to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process and with its own Historic Preservation Plan." *Blanck*, 938 F. Supp. at 925.

Unlike Section 110(a)(2)(B), however, Section 110(a)(2)(A) does not use the word "considers" and makes no reference to Section 106. Rather, Section 110(a)(2)(A) unambiguously mandates ("shall ensure") that historic properties under an agency's jurisdiction or control "are identified, evaluated, and nominated to the National Register." 16 U.S.C. § 470h-2(a)(2)(A); *see Hewitt v. Helms*, 459 U.S. 460, 471 (1983) ("shall" is "language of an unmistakably mandatory character"), *overruled in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Her Majesty the Queen v. USEPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) ("shall" signals mandatory action); *Moon v. U.S. Dep't of Labor*, 727 F.2d 1315, 1319 (D.C. Cir. 1984) ("shall" is the language of command); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) (same). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Russello v. United States, 464 U.S. 16, 23 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

In short, the District Court erred in failing to interpret 16 U.S.C. § 470h-2(a)(2)(A) of the NHPA as imposing an affirmative, mandatory obligation that can be enforced by mandamus.

CONCLUSION

In view of the arguments made and authorities cited above, Appellant Oglala Sioux Tribe respectfully requests that the Order of the District Court dismissing the action, entered March 17, 2008, be reversed and that the case be remanded to the District Court for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mario Gonzalez, do hereby certify that two true and correct copies of the foregoing Brief of Appellants has been served, by depositing the copies, postage prepaid, in the United States mail on this 15th day of September, 2008, on each of the following counsel for Defendants:

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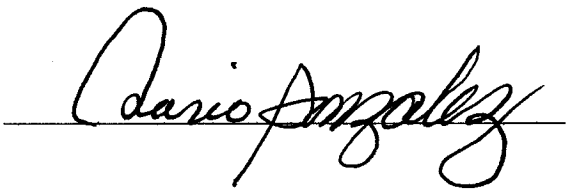

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 13,370 words (including footnotes).

Dated: September 15, 2008

Mario Gonzalez, Esq.