UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-1441

Yankton Sioux Tribe,

Plaintiff-Appellee

United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Intervenor Plaintiff-Appellee

v.

Scott J. Podhradsky, State's Attorney of Charles Mix County, et al.,

Appellants

Southern Missouri Waste Management District,

Interested Party-Appellant

No. 08-1488

Yankton Sioux Tribe, and its individual members,

Plaintiff-Appellant

United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Intervenor Plaintiff-Appellee

v.

Scott J. Podhradsky, State's Attorney of Charles Mix County, et al.,

Defendants-Appellees

Southern Missouri Waste Management District,

Interested Party-Appellee

Appeal from U.S. District Court for the District of South Dakota

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UNITED STATES' RESPONSE TO THE PETITIONS FOR PANEL REHEARING FILED BY THE STATE OF SOUTH DAKOTA AND CHARLES MIX COUNTY

PRELIMINARY STATEMENT

The rehearing petitions filed by the State of South Dakota ("the State") and Charles Mix County ("the County") and the views expressed by the various *amici* merely reiterate arguments previously rejected and plead for the Court to change the results in Podhradsky, and in Gaffey, solely to fit their own interests. Those arguments are insufficient to satisfy the standard for panel rehearing under Fed. R. App. P. 40(a)(2). The Podhradsky decision is consistent with the law of the case and decisional law which preserves the reservation status of lands set aside for Indian tribes. The decision is also consistent with the text and purpose of the Indian Reorganization Act of 1934 ("IRA") and the provisions of 18 U.S.C. § 1151. Accordingly, the petitions should be denied.[1]

INTRODUCTION

On August 25, 2009, this panel held that all Indian allotments currently held in trust, and any that passed in fee to non-Indians after the 1948 enactment of 18 U.S.C. § 1151(a), remain part of the diminished Yankton Sioux Reservation. Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951, 967 (8th Cir. 2009). This Court had held generally, in Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), that the

[1] Pursuant to the Court's instruction in letters dated November 9, 2009, this response is limited to issues concerning panel hearing. The United States would offer other additional arguments if it were also addressing the petitions for en banc review, which must meet the standard in Fed. R. App. P. 35(a).

Reservation had been incrementally diminished by the transfer of allotted trust lands to non-Indians. However, the Gaffey panel was faced with an undeveloped factual record and did not address the impact of § 1151 upon particular tracts of allotted trust land.

Following a remand, this Court returned to the issue of "incremental diminishment" in the context of determining the status of current and former allotted trust tracts. Applying well-established Supreme Court precedent, this panel determined that allotments which remain in trust are part of the diminished Yankton Sioux Reservation. It further held that allotments lost reservation status through the transfer in fee to non-Indians only during the period of time when Congress tied reservation status, and the exercise of federal jurisdiction, to Indian ownership. Although this connection between jurisdiction and ownership represented the prevailing view at the time the surplus land agreement between the Yankton Sioux Tribe and the United States was approved in 1894 ("the 1894 Act"), the Court held Congress' passage of § 1151 severed that link and constituted a different, broader view of Indian country. Gone was the identity between jurisdiction and Indian ownership, and in its place was a provision that preserved reservation status for allotted trust land "notwithstanding issuance of any patent." 18 U.S.C. § 1151(a). Accordingly, the panel held that Gaffey's incremental diminishment holding could not, consistent with § 1151, extend beyond the date of its enactment on June 25, 1948.

In a separate Podhradsky holding, this panel also determined that land taken into trust pursuant to the IRA became Indian country under 18 U.S.C. § 1151(a) when the land was located within the Reservation's original 1858 boundaries. Podhradsky, 577 F.3d at 970. This holding reflects a straightforward application of another post-1894 statute which impacted the Reservation. Designed specifically to ameliorate the devastating effects of the Government's allotment policy, the IRA is the statutory authority by which tribes can have land restored to its former status. The panel correctly applied § 1151 to the IRA trust land acquisitions at issue in this case – all of which are located within the original boundaries of the Reservation.

ARGUMENT

I. THE STATE AND THE COUNTY HAVE FAILED TO MEET THE STANDARD FOR REHEARING BY THE PANEL.

"The purpose of a petition for rehearing . . . is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." National Labor Relations Board v. Brown & Root, 206 F.2d 73, 74 (8th Cir. 1953); see also Fed. R. App. P. 40(2) (petition for panel rehearing must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . .").

In this case, the panel has already considered the legal arguments advanced by the State and the County. The decision in Podhradsky is consistent with the precedent of the Supreme Court and of this Court. Under the circumstances, the State and the County have failed to meet the standard for rehearing by the panel.[2]

II. REHEARING IS NOT NECESSARY BECAUSE THE PANEL CORRECTLY APPLIED GOVERNING LEGAL PRINCIPLES TO THE EXPANDED RECORD DEVELOPED DURING THE REMAND TRIAL.

A. The panel's decision in Podhradsky does not violate the law of the case.

The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Little Earth of the United Tribes, Inc. v. U.S. Dep't of Housing and Urban Dev., 807 F.2d 1433, 1440-1441 (8th Cir. 1986) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). The doctrine "prevents the relitigation of a settled

[2] The State and County have not identified any factual error that might merit panel rehearing, although they do make unfounded assertions regarding the potential impact of the panel opinion on their interests. The State and County's factual allegations regarding the acreage affected by the panel's decision are not based on record evidence. Thus, even if those alleged facts related to the legal issues before the Court (which they do not), they would not be appropriate for consideration by the court of appeals in the first instance, much less for initial consideration on panel rehearing. Similarly, the assertions regarding the impact of Podhradsky do not concern a factual issue addressed by the Court. Despite a decade of experience with a post-Gaffey checkerboard Reservation, this area of South Dakota has not experienced any of the problems described by the State, County or *amici*. See Yankton Sioux Tribe v. Podhradsky, 529 F. Supp. 2d 1040, 1057-1058 (D.S.D. 2007) (district court finding that respective law enforcement authorities have established a workable system "regarding the exercise of criminal jurisdiction").

issue[.]" United States v. Bartsh, 69 F.3d 864, 866 (8th Cir.1995) (citing Bethea v. Levi Strauss & Co., 916 F.2d 453, 456-457 (8th Cir. 1990)). However, it does not apply to discrete questions which have not been previously decided. See Ott v. City of Champlin, 80 F.3d 254, 257 (8th Cir. 1996) (appellate panel's previous determination of qualified immunity did not govern disposition on remanded claim of official immunity under state law where panel had "no occasion to decide" the issue earlier).

Here, the Gaffey panel did not consider the effect of § 1151 on incremental diminishment, because the issue was not necessary to the resolution of the issues before the Court. Given the paucity of information in the record, the panel was not faced with determining § 1151's applicability to various tracts and categories of allotted trust land. See Gaffey, 188 F.3d at 1016 ("The record is far from crystal clear about the specific lands remaining in trust . . ."); 1016-1017 (noting that much of the allotted land passed out of trust status in the period from 1894 to 1934 when the trust period for allotments was extended indefinitely by the IRA); 1030 (efforts to obtain "precise statements from the parties identifying what trust land remains were unsuccessful."). Therefore, the Gaffey Court held only that the Reservation had not been disestablished and that land returned to the Tribe by the federal government continues to be part of the Reservation. See id. at 1017 (the only questions presented in Gaffey were those left open by the Supreme Court – "whether the Yankton Sioux

Reservation was disestablished, and, if not, whether the reservation has been diminished beyond the ceded land."); id. at 1029 ("[T]he Yankton Sioux reservation was not completely disestablished in 1894.").

However, even within the context of an undeveloped factual record, the Gaffey panel described the principles the Court would eventually apply in Podhradsky to clarify its incremental diminishment holding for allotted parcels which passed into fee after the 1948 enactment of § 1151. In its discussion of congressional intent, for example, the Gaffey panel observed that Congress, in passing the 1894 Act, "operated on a set of assumptions which are in tension with the modern definitions of Indian country . . . . The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign." Id. at 1022. The Gaffey panel also noted that later, in enacting § 1151, Congress formally "uncoupled reservation status from *Indian ownership*." Id. at 1024 n.10 (quoting Solem v. Bartlett, 465 U.S. 463, 468 (1984) (emphasis supplied by Gaffey panel)).

What was missing in Gaffey was factual information about the various distinct categories of trust land, supplied by the record in the Podhradsky remand, and a more apparent need to resolve the impact of § 1151 upon the passage of allotted trust land into fee. As to the latter, the State's own § 1151(a) argument in Podhradsky may well have prompted the panel to analyze the statute's application to the Gaffey incremental diminishment holding. In its Podhradsky appellate brief, the State invoked § 1151(a)

in claiming that allotted land still held in trust should not be considered part of the Reservation. State's Brief at 53. Since § 1151(a) provides that trust land continues its reservation status "notwithstanding the issuance of any patent[,]" the State argued the incremental diminishment of allotted land passing in fee to non-Indians created a "doctrinal impossibility." Id. With the question squarely presented, the panel essentially agreed with the State and applied § 1151(a) to determine that the allotted trust land did not lose its reservation status by virtue of the issuance of a fee patent.[3]

The Court's holding in this case is simply the product of the particular interaction between § 1151(a) and the 1894 Act, as construed in Gaffey. Indeed, the Gaffey Court appears to have been keenly aware of the significance of § 1151(a) by specifically contrasting its provisions with the concepts of Indian country prevailing in 1894. Gaffey, 188 F.3d at 1021-1024. Further, the application of § 1151(a) may not lead to the same or similar results in cases involving different reservations and different surplus land agreements. The unique circumstances presented in this case

[3] That fact distinguishes this case from the decision in United States v. Provost, 237 F.3d 934 (8th Cir. 2001). In Provost, there was no live issue concerning the impact of § 1151 because the Government conceded that the allotted land was not Indian country. Provost, 237 F.3d at 937. Accordingly, the State's citation to Provost is inapposite. Beyond this, the opinion is best described as an uncomplicated application of Gaffey and cannot be read as a broader holding that former allotted parcels can never, under any circumstances, retain their reservation or Indian country status.

are unlikely to be replicated, minimizing the concern that the decision has broader implications beyond this case.

B. The Panel did not find that the enactment of 18 U.S.C. § 1151 impliedly repealed the 1894 Act.

"[R]epeals by implication are not favored." Nebraska Public Power Dist. v. 100.95 Acres of Land, 719 F.2d 956, 958 (8th Cir. 1983) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)). Accordingly, "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Id. (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)).

In this case, the 1894 Act and § 1151 can easily coexist, and the panel has given effect to both statutes. Section 1151 broadly defines Indian country for purposes of federal law and was largely a codification of existing Supreme Court precedent. See Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 528 (1998). The 1894 Act, by contrast, did not deal with jurisdiction, but rather dealt with the details associated with the sale of surplus lands by the Yankton Sioux Tribe. Although the Gaffey panel determined that the 1894 Congress believed the Reservation would be diminished with the sale of allotted land to non-Indians, the effect of the enactment of § 1151 upon that intent did not impliedly repeal the 1894 Act. Rather, it simply marked a shift in policy and a change in the consequence of a sale upon allotted lands.

See, e.g., Seymour v. Superintendent, 368 U.S. 351, 357 (1962) (Section 1151 "squarely put to rest" impact of sales on reservation boundaries).

Finally, the panel's opinion does not mention the topic of repeal – implied or otherwise. The State's effort to *imply* an implied repeal from the panel's opinion is simply too tenuous to sustain. Given the State's explicit claim that § 1151 applies to the Gaffey holding, it is in no position to now claim that the panel's reliance upon the statute effected an implicit repeal of the 1894 Act.[4]

C. The panel's decision does not conflict with Supreme Court precedent.

"After land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise." Gaffey, 188 F.3d at 1021 (citing Solem, 465 U.S. at 469). This Court's incremental diminishment holding in Gaffey was based upon the belief that the 1894 Congress would have "had no reason to distinguish between reservation land and other types of Indian country." Id.

However, by 1948, Congress saw Indian country much differently. Taking its lead from three principal Supreme Court decisions, Congress codified a definition of

[4] The State's reliance upon the historical notes accompanying the Indian Major Crimes Act, 18 U.S.C. § 1153, is misplaced. See State's Petition at 9. The note in question simply addresses the ability of the State to prosecute crimes "committed by non-Indians against non-Indians and to restore such jurisdiction to the courts of the State of South Dakota as in other States." 18 U.S.C. § 1153, historical and statutory notes. It does not in any way undermine the universal view that §1151 reflects a broad view of Indian country. See, e.g., Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) (describing broad nature of Indian country definition).

Indian country in § 1151 that includes land in which an individual Indian or a tribe has no property interest. See Venetie Tribal Gov't, 522 U.S. at 528 (citing cases and recounting the Supreme Court's interpretation of Indian country prior to the enactment of § 1151). Under that definition, when allotted land that is part of a reservation passes from trust status to fee, it does not lose its reservation status. The State's argument in Podhradsky acknowledges as much.

The State's more recent claim (Pet. 9) is that non-Indian fee land resulting from post-1948 conveyances of allotments cannot be considered part of the Reservation without federal set aside and superintendence or a single continuous reservation boundary. However, the argument overlooks the fact that the allotted land was validly set aside by treaty in 1858 as a reservation for the Yankton Sioux Tribe. Furthermore, the only intent found by the Gaffey panel to diminish the Reservation was inextricably tied to a view of Indian country which was expressly abandoned by Congress in 1948.[5]

[5] The State's citation (Pet. 9) to the 1942 Supreme Court decision in United States v. Pelican, 232 U.S. 442 (1914), adds little to the analysis. Although Pelican is regarded as the decisional basis for 18 U.S.C. § 1151(c), it cannot be interpreted as authority to skirt the unambiguous and subsequently enacted provisions of § 1151(a). See also Beardslee v. United States, 387 F.2d 280, 287 (8th Cir. 1967) ("Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of § 1151.").

III. THE PANEL CORRECTLY DETERMINED THAT LAND THAT LIES WITHIN THE ORIGINAL 1858 BOUNDARIES OF THE YANKTON SIOUX RESERVATION, AND WAS TAKEN INTO TRUST UNDER THE IRA, HAS RESERVATION STATUS.

The State's claim that the IRA land is not reservation land, or even Indian country, was presented in its briefs to the panel and correctly rejected. See State's Petition at 10-12. In this regard, the panel simply applied well-established decisional, statutory and regulatory authority to hold that IRA trust land located within the original boundaries of a diminished reservation qualifies as Indian country under § 1151(a).

The IRA was enacted, in part, to stabilize the nation's tribal land base which had been devastated during the allotment era. Nichols v. Rysavy, 809 F.2d 1317, 1323 (8th Cir. 1987). Toward this end, the IRA authorizes the Secretary of the Interior to add land to an existing reservation by taking the land into trust. See 25 U.S.C. §§ 465, 467. Indeed, the Supreme Court has recognized that "Section 465 provides the proper avenue for [an Indian tribe] to reestablish sovereignty over territory" it previously held. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005). In addition, the IRA and the regulations implementing it distinguish between trust land that is added to existing reservations and land that has never been part of an Indian reservation. See 25 U.S.C. § 467 (describing the Secretary of the Interior's authority to add land to existing reservations or proclaim new reservations);

25 C.F.R. § 151.10 (guidelines for "on reservation" trust acquisitions), § 151.11 (guidelines for "off reservations" trust acquisitions).

The State's argument rests uneasily upon a strained interpretation of § 467 that would require the Secretary of the Interior to proclaim a new reservation even where the trust land was simply added to an existing, diminished reservation. Such a construction would nullify Congress' expressed distinction between existing and new reservations and be inconsistent with the Secretary's regulatory implementation of the IRA, which specifically defines a reservation as the area of land bounded by previous borders "where there has been a final judicial determination that a reservation has been . . . diminished. . ." 25 C.F.R. § 151.2.

IV. THE STATE'S DISESTABLISHMENT ARGUMENT APPEARS TO BE LIMITED TO THE REQUEST FOR EN BANC CONSIDERATION AND IS FORECLOSED FROM PANEL CONSIDERATION BY THE LAW OF THE CASE.

In its present iteration, the State's "continuing challenge to [this Court] holding . . . that the Yankton Sioux Reservation has not been disestablished[]" appears to be directed to the plea for en banc review. See Podhradsky, 577 F.3d at 961-962 (discussing State's "continuing" post-Gaffey disestablishment arguments). Accordingly, it is beyond the scope of the Court's order seeking a response to the petition for rehearing by the panel.

Regardless, the issue is prohibited from consideration on panel rehearing under law of the case principles.[6] In Gaffey, this Court unequivocally "held that the Yankton Sioux Reservation was never disestablished . . ." Id., at 961. This holding was, therefore, "part of the law of the case remanded to the district court." Id. In the absence of a reason "to revisit" the holding, it continues to govern all subsequent stages of this case. Id. In this regard, the State's belated claim to be excepted from the operation the law of the case doctrine in Podhradsky features no new evidence or compelling argument for manifest injustice – only the same familiar arguments based upon a materially different surplus land agreement at issue in DeCoteau v. District County Court, 420 U.S. 425 (1975), and a selective reading of the opinion in South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).[7]

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[6] The State's additional argument that Podhradsky conflicts with the South Dakota Supreme Court's decision in Bruguier v. Class, 599 N.W.2d 364 (S.D. 1999), was already presented to this panel and addressed in the Podhradsky opinion. Podhradsky, 577 F.3d at 963 n.7. The State offers nothing further that would support panel rehearing. The same holds true for the State's continuing reliance upon dictum in United States v. Stands, 105 F.3d 1565 (8th Cir. 1997). See Podhradsky, 577 F.3d at 968 at n.13.

[7] For instance, the State continues to disregard the plain fact that the Supreme Court refused to hold that the Reservation had been disestablished. The State also fails to account for the Supreme Court's conclusion that the agency lands provision of Article VIII in the 1894 Act "counsels against finding the reservation terminated" since it would be "difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." Yankton Sioux, 522 U.S. at 350 (citing Solem, 465 U.S. at 474, for the latter conclusion). Finally, the County's reliance on Yankton Sioux, 522 U.S. at 344,

(continued...)

The disestablishment holding was part of the mandate and is not before this panel. See Omaha Indian Tribe v. Jackson, 854 F.2d 1089, 1094 n.5 (8th Cir. 1988) (subsequent appeal following remand "brings up nothing for revision but the proceedings subsequent to the mandate . . . ." (citation omitted)). A different rule would undermine the finality of this Court's judgments.[8]

V. CLAIMS THAT THE EFFECT OF THE PANEL'S DECISION ARE IMPRACTICAL OR INEQUITABLE CANNOT OVERCOME THE PANEL'S LEGAL ANALYSIS.

The State, County and *amici* ask this Court to grant relief to them based upon their own parochial views of practicality and equity. The arguments subvert the rule of law and carry with them the troubling, but unmistakable, implication that any holding declaring land owned by non-Indians to be part of the reservation is inherently

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[7](...continued)
as establishing a "presumption of diminishment" is misplaced. The "presumption of diminishment" described by the Supreme Court pertained exclusively to lands ceded under Article I of the 1894 Act, which included what the Court described as explicit language of cession and the total surrender of all tribal interests, in exchange for a "sum certain" under Article II of the 1894 Act. Id. It did not concern allotted lands retained by individual Tribal members, as to which no such provisions apply.

[8] The United States' position that the Gaffey decision was interlocutory as stated in its opposition to certiorari in Gaffey meant only that the entire litigation could be opened up to review by the Supreme Court following the remand. See Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) ("[L]aw of the case cannot bind [the Supreme Court] in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review.") (citation omitted).

inequitable. In the broader context of this case, however, the relative equities do not favor the State, the County, or the various *amici*.

During the course of this litigation, which commenced in 1994, the Yankton Sioux Tribe has seen the 430,405 acre Reservation established by its 1858 Treaty with the United States formally diminished by approximately 380,000 acres as a result of the decisions in Yankton Sioux (involving approximately 168,000 acres) and Gaffey and Podrahdsky (involving more than 215,000 acres). The State and County's assertion that approximately 8,900 acres[9] might be considered Indian country under the panel's decision in Podhradsky pales in comparison. This Court noted in Gaffey that "both sides have followed an all or nothing strategy (the State arguing disestablishment and the Tribe claiming maintenance of the 1858 boundaries)," Gaffey, 188 F.3d at 1030, but the outcome now lies between those poles, calling for adjustments by all. See Podhradsky, 577 F.3d at 959. ("While the fractured configuration of the Yankton Sioux Reservation may not seem ideal to various parties, it is a historic artifact resulting from shifting federal policy.").

[9] The United States has not verified the number of fee acres the State and County claim are impacted by Podhradsky, but their initial description of the difficulty associated with determining the identity and location of tracts transferred in fee after the enactment of § 1151 is undermined by the State's most recent submission indicating the affected lands have, in fact, been located and identified.

The owners of the land potentially affected by the decision will not be dispossessed of their fee title, and any claims that they will be subject to tribal taxation or regulation (and exempted from State and County taxation or regulation) involve issues not developed or presented in this appeal. Further, these landowners could, in any event, be affected only in accordance with the stringent standards the Supreme Court has held must be satisfied in order for a tribe to regulate and tax non-Indians on non-Indian fee land. See Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008); Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001); Montana v. United States, 450 U.S. 544 (1981). The Wagner Community School District's assiduous efforts to avoid Indian country status for its school facility are particularly difficult to understand given its acknowledgment that over half of its K-12 enrollment is comprised of Indian students and the additional fact that Indian preschoolers outnumber their non-Indian classmates by a 2-1 margin. School District Brief at 1.

The concerns of the county prosecutors in Tripp, Gregory, Mellette and Bennett Counties are also misplaced. As their amicus brief acknowledges, the means by which the Rosebud and Pine Ridge Reservations were diminished are different from "the particular fact situation found to exist in Yankton. . ." Brief of States Attorneys at 7. Unlike the particular circumstances concerning the Yankton Sioux Reservation, the

Rosebud and Pine Ridge Reservations were each diminished by acts of Congress that left a continuous exterior boundary in place.

Beyond this, the jurisdictional issues described by the county prosecutors and other *amici* are not new or novel. Indeed, the same concerns currently exist in each of these prosecutors' counties, all of which feature a checkerboard configuration of Indian country lands interspersed with lands under the primary jurisdiction of the State – apparently without significant problems.

CONCLUSION

Based upon the foregoing, the United States respectfully requests that the panel deny the petitions for panel rehearing in all respects.

Respectfully submitted this 25th day of January, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 25th day of January, 2010, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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