UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-1441

YANKTON SIOUX TRIBE, and its individual members, and UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe, Plaintiffs-Appellees,

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-Appellants,

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, Interested Party-Appellant.

No. 08-1488

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs-Appellants,

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

THE HONORABLE LAWRENCE L. PIERSOL
United States District Court Judge

STATE APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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INTRODUCTION

In 1999, this Court found, in an extraordinary four references, that the 1858 boundaries of the Yankton reservation do not remain intact. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1013, 1021, 1030 (8th Cir. 1999) (*Yankton V*). This Petition raises, inter alia, the issue of the status of non-Indian fee lands within those extinguished 1858 boundaries. *Yankton V*, 188 F.3d at 1030 "hold[s]" that, when land within the extinguished 1858 boundaries lost allotted status and "passed out of Indian hands," it also lost "reservation" or "Indian country" status under 18 USC 1151(a).

Ten years later, in 2009, the Panel opinion departed from this "law of the case" to declare that lands within the extinguished boundaries which lost allotted status after June 25, 1948, and which passed from Indian hands to a non-Indian in fee, retained "Indian country" or "reservation" status under 18 USC 1151(a). *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951, 967 (8th Cir. 2009) (*Yankton VII)*. The Panel thus abruptly transformed the status of at least 7,250 acres of land which left allotted status after June 25, 1948, and which are now owned in fee by individuals and local governments. Under *Yankton V,* these 7,250 acres of non-Indian fee lands were not "Indian country" or "reservation"; under the Panel opinion they are both. The effect of the Panel opinion decision is to create an "invisible reservation" of the 7,250 acres of non-Indian fee land scattered at

random throughout twenty-one townships of eastern Charles Mix County—these lands are "invisible" as "reservation" in that they are not evidenced by Indian ownership or by federal set-aside or supervision.[1] *See* Map A (attached hereto with Maps B-F).

The character of lands which left allotted status after June 25, 1948, to be acquired by non-Indians, contrasts sharply with that of lands which left allotted status prior to that date and which are owned by non-Indians. According to the Panel, these pre-1948 lands did lose "reservation" and "Indian country" status when they lost allotted status and when acquired by non-Indians. *Yankton VII*, 577 F.3d at 967.

The Panel opinion not only violates the "law of the case" as to the post-1948 former allotted lands but also conflicts with other precedent of this Court including *United States v. Provost,* 237 F.3d 934, 937 (8th Cir. 2001) (former Yankton allotted lands not reservation). Moreover, the Panel opinion conflicts with the decision of the South Dakota Supreme Court in *Bruguier v. Class,* 599 N.W.2d 364, 377-378 (S.D. 1999) ("allotted lands which have passed into non-Indian ownership" are "not Indian country"). The Panel adopts a similar series of errors

[1] An additional 750 acres of land left allotted status after June 25, 1948, and are now owned by the Tribe. The Panel holding is also incorrect as to these lands. Note, however, that 200-300 acres of these lands now appear to be in trust. *See* Argument B, *infra.*

with regard to statutory trust lands and so conflicts with the ruling of this Court in *United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997), in finding that statutory trust land within the extinguished borders of a reservation is "reservation." Both sets of errors ultimately flow, we respectfully submit, from the failure of the Panel to adhere to the "terminat[ion]" direction charted by *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 344 (1998) (*Yankton III*), and *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1978), as discussed in the final issue below.

The conflicts with the United States Supreme Court and this circuit identify the Panel opinion as one justifying en banc review pursuant to FRAP 35(b)(1)(A). Moreover, Panel opinion is one of exceptional importance to this unhappy area of eastern Charles Mix County, and potentially the nation, given its on-the-ground effects, its disruption of "law of the case" and the conflict it creates with decisions of the South Dakota Supreme Court. FRAP 35(b)(1)(B). In the alternative, Panel rehearing under FRAP 40 is warranted.

ISSUES PRESENTED

Whether lands within the extinguished 1858 Yankton boundaries which lost allotted status after June 25, 1948, should be classified as present day "reservation" under 18 USC 1151(a).

Whether lands taken into trust under 25 USC 465 within the extinguished boundaries are "reservation" under 18 USC 1151(a).

Whether the Yankton Sioux Reservation has been disestablished, leaving "Indian country" exclusively in the forms of "dependent Indian communities" pursuant to 18 USC 1151(b) and "Indian allotments, the Indian titles to which have not been extinguished" pursuant to 18 USC 1151(c).

STATEMENT OF THE CASE

The Yankton Sioux Reservation was created by Treaty in 1858. *Yankton III*, 522 U.S. at 333-34. Within a few years, individual members of the Tribe received allotments and the government and the Tribe entered an agreement, ratified by Congress in 1894, whereby the Tribe ceded, to the United States, "all" of its unallotted lands. *Id.* at 338. The 1858 boundaries were eliminated. *Id.* at 345-47. For the next century, the State, not the Tribe or the United States, exercised jurisdiction over 90 percent of lands within the extinguished boundaries. *Id.* at 357. The Yankton Reservation was regarded as disestablished. *See* Map B (1994-Former reservation area).

In 1995, however, the District Court determined that the 1858 Yankton Reservation remained entirely intact. Map C (1995 District Court Decision map). *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 890 F. Supp. 878 (D.S.D. 1995) (*Yankton I*). A divided Panel affirmed, with Judge Magill dissenting, detecting a "single-minded desire to avoid diminishment at all costs." *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 99 F.3d 1439, 1462 (8th Cir. 1996) (Magill, J., dissenting) (*Yankton II*).

Certiorari was granted to resolve a "number" of conflicts with the South Dakota Supreme Court, *Yankton III,* 522 U.S. at 342, and a unanimous United States Supreme Court reversed. The Court found that the "'cession' and 'sum certain' language" of the 1894 agreement was "'precisely suited' to terminating reservation status." *Id.* at 344. As noted, the 1858 boundaries were not maintained. *Id.* at 345, 347. "Ceded" or "unallotted" lands were expressly declared not to be "reservation," and the case was remanded. *Id.* at 358. The strong language of the Court gave great assurance to the beleaguered non-Indians of the area of restoration of the status quo.

The District Court, however, promptly created an entirely new reservation of all the lands which had ever been in allotted status, including over 220,000 acres which had lost allotted status and which were owned by non-Indians. *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135 (D.S.D. 1998) (*Yankton IV*). Map D (1998 District Court Decision map). Defying the Supreme Court, it found the 1858 boundaries to be intact. *Id.* at 1143. The practical implications of *Yankton IV* were highlighted in the town of Wagner, in which the main street was divided down the middle between non-reservation and newly discovered "reservation," consisting of former allotted land then held in fee by non-Indians.

This Court reversed. *Yankton V,* 188 F.3d at 1030, "hold[s]" that allotted lands which have passed out of Indian hands "are not part of the . . . Reservation

and are no longer Indian country within the meaning of 18 USC 1151." As noted, it four times declared the 1858 boundaries to be gone. *Id.* at 1013, 1021, 1030. The remand directed the lower court to make "findings relative to the status of Indian lands which are held in trust." *Id.* at 1030.

Yankton Sioux Tribe v. Podhradsky, 529 F. Supp. 2d 1040, 1058-59 (D.S.D. 2007) (*Yankton VI*), on remand, found that all present day allotted land and trust land constituted "reservation" under 18 USC 1151(a). Map E (2007 District Court Decision map). Following *Yankton V*, however, it declared that former allotted land now owned by non-Indians was not "reservation." *Id.* at 1052.

The Panel affirmed in part and vacated in part. The Panel declared that former allotted land held in fee by nontribal members remained "reservation" if it had lost allotted status after the effective date of 18 USC 1151—June 25, 1948. *Yankton VII*, 577 F.3d at 967. The Panel in 2009 thus created the fourth federal court configuration of a "reservation" since 1995, by the addition of over 7,000 acres of non-Indian fee land to the 2007 edition of the "reservation" created in *Yankton VI*. *See* Map F (2009 Panel Decision map).

ARGUMENT

This Petition analyzes two perceived layers of error in the Panel decision. Arguments A and B proceed on the assumption that the prior circuit court decision, *Yankton V,* was, in the main, correctly decided, and analyzes the current Panel

decision in that light. Argument C will take the argument to its fundamental basis, and conclude that the source of the inconsistent approach of the prior decisions is the failure of the courts to adhere to the prior Supreme Court decision in this case.

A. Lands which left allotted status after June 25, 1948, and passed out of Indian hands to non-Indians are no longer "reservation" or "Indian country" under 18 USC 1151.

Yankton V, 188 F.3d at 1030, found that "allotted" lands which "passed out of Indian hands . . . are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 USC § 1151." Although *Yankton V* cited 18 USC 1151 or its subsections over twenty times, it did not suggest that the statute excepted lands which left allotted status after it was enacted in 1948. Nonetheless, the Panel, ten years later, declared that the enactment of 18 USC 1151 in 1948 "introduced a new understanding of Indian country which for the first time separated Indian ownership from reservation status." *Yankton VII*, 577 F.3d at 967. This Act, it continued, "altered the old understanding, and gave a previously unimagined durability to reservation land by separating jurisdiction from ownership." *Id.*. After passage of 18 USC 1151, the Panel declared, allotted land remained "reservation" even when it lost allotted status and was acquired by non-Indians. *Id.* As a result, some 8,000 acres were declared "reservation" despite the fact that at least 7,250 acres of this land are owned by individual and governmental non-Indians. *See* Map A. Included are parcels of land transferred to

South Dakota under Title VI; these parcels have effectively been declared to be "reservation" and the Tribe has demanded that the Title VI case now before another panel of this Court be remanded to the District Court to be conformed to the new Panel decision. *See YST v. COE*, No. 08-2255.

Several legal principles support en banc review. First, the Panel clearly departed from the *Yankton V* "law of the case," when it declared that lands which left allotted status to be acquired by non-Indians after the effective date of 18 USC 1151 (June 25, 1948) did not lose "Indian country" or "reservation" status. *See Liberty Mutual Ins. Co. v. Elgin Warehouse and Equipment*, 4 F.3d 567, 571 (8th Cir. 1993). While "law of the case" may not apply when "intervening controlling authority" exists, *id.*, the Panel explained only that it relied upon a new analysis of 18 USC 1151. *Yankton VII,* 577 F.3d at 967.

Second, the basis for the Panel decision is its theory that the 1894 Yankton Act created a unique system whereby allotted lands initially retained "reservation" status but that this status was lost when the lands were patented in fee and transferred to non-Indians. *Yankton VII*, 577 F.3d at 965-67. The 1948 Act, the Panel essentially found, impliedly repealed that aspect of the 1894 Act which caused the allotted lands to lose reservation status when patented and transferred to non-Indians. *Id.* at 967. The Panel analysis fails to account for the "'cardinal rule . . . that repeals by implication are not favored,'" *Morton v. Mancari*, 417 U.S.

535, 549 (1974). Moreover, it violates the rule that a "specific provision applying to a very specific situation," here the 1894 Act, cannot be "nullified" by a statute of "general application," here 18 USC 1151, absent the "clear intention of Congress." *Morton*, 417 U.S. at 550. The congressional "intention" of Congress in 1948, however, was to expand, not contract, South Dakota's jurisdiction. *See Historical and Revision Notes* found at 18 USCA 1153, which was enacted, along with 18 USC 1151, as part of Pub. L. No. 772, 80th Cong., 2d Sess. (1948).

Third, under *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 530 (1998), the non-Indian fee lands at least cannot constitute "reservation" because the federal and state courts have effectively found a lack of "federal set-aside" and "federal superintendence" of any non-Indian fee lands within the extinguished boundaries. *Yankton III*, 522 U.S. at 357; *Yankton V*, 188 F.3d at 1029; *Bruguier*, 599 N.W.2d at 375-76.

Fourth, the Panel decision conflicts with *United States v. Pelican,* 232 US. 422, 449 (1942), which establishes that when reservation boundaries around an area are removed, the allotted lands remain "Indian country" but only "during the trust period." *Pelican* provided the case law basis for 18 USC 1151(c), *Venetie*, 522 U.S. at 530; the Panel decision undermines both *Pelican* and 18 USC 1151(c). *See also Beardslee v. United States*, 387 F.2d 280, 287 (8th Cir. 1967) (Blackmun, J.).

Finally, the Panel decision creates a conflict with the South Dakota Supreme Court which, in *Bruguier*, 599 N.W.2d at 365, determined that "allotted lands [] which have passed into non-Indian ownership" in the former Yankton reservation area "not Indian country." (Emphasis omitted.)

The scope and impact of the decision, beyond the 7,000-8,000 acres in eastern Charles Mix County, is uncertain but daunting. It will be argued to apply to at least nine former reservation counties in South Dakota and will likely be relied upon nationwide. Some 260,000 acres of allotted and trust land leave that status nationally in a single year, Ex. 130, at 9 n.8, and an indeterminate but substantial amount of that land across the nation could be affected.

B. Lands within the extinguished 1858 boundaries of the Yankton Reservation which are taken into trust under the IRA are not "reservation" under 18 USC 1151(a).

The Indian Reorganization Act (IRA) at 25 USC 465 allows the Secretary to take land into trust and, separately, in 25 USC 467, allows the Secretary to "proclaim" such land to constitute a "reservation." The Panel, however, declared that all lands which have been taken into trust under 25 USC 465 within the 1858 boundaries are "reservation" even when no Proclamation has been issued; the Panel thus stripped 25 USC 467 of its significance.

The Panel determined that the proclamation requirement did not apply to land to be added to a "preexisting reservation as that of the Yankton Sioux."

Yankton VII, 577 F.3d at 969. The legislative history of 25 USC 467, however, specifies that it was intended to be utilized to "add newly acquired land to existing reservations." H.R. 1804, 73d Cong., 2d Sess. (1934), at 7. Ex. 123. And the BIA's present *Guidelines for Proclamations* establish that the Secretary is to utilize the 25 USC 467 process to "proclaim trust land acquired for an Indian tribe" under the IRA "as a new reservation, or an addition to an existing reservation." Ex. 129. *See Nelson v. C.I.R.*, 568 F.3d 662, 664 (8th Cir. 2009) ("weight" to be given agency pronouncements).

The Panel opinion, moreover, requires a finding that the language of 25 USC 467 creating the authority in the Secretary to "add such lands to existing reservations" is "surplusage," contrary to the rule of *United States v. Talley*, 16 F.3d 972, 975-76 (8th Cir. 1994). This is so because, under the Panel opinion, lands within an extinguished "reservation" become "reservation" when they are taken into trust with no further action at all from the Secretary. *Yankton VII*, 577 F.3d at 969.

En banc review is also merited because the Panel opinion is contrary to *United States v. Stands*, 105 F.3d 1565, 1571 (8th Cir. 1997), which examined land, like the land at issue here, which had once been part of a reservation but had been "outside the limits of the . : . Reservation since 1910." *Stands* declared, as an integral part of its decision, that the mere declaration of trust status within

extinguished reservation boundaries did not create reservation status: "For jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." 105 F.3d at 1572. The Panel holding is to the contrary, declaring all trust land within extinguished boundaries to be "reservation."

One practical problem of the ruling arises after statutory trust status is terminated. As individual Indians ask for and are granted patents in fee for their trust lands, and as they transfer them to non-Indians, or as they trade trust lands for fee lands, the former trust lands, under the Panel opinion, retain "reservation" status; these will be added to the "invisible" reservation created by the Panel opinion, even though they lack Indian character. *See Yankton VII*, 577 F.3d at 968 (trust land is reservation "even if sold").

In sum, the Secretary has lacked the inclination or will to proclaim these lands "reservation"; the courts should not distort the constitutional separation of the powers by relieving him of the option to declare, or not declare, these lands as "reservation" pursuant to 25 USC 467.

C. The Yankton reservation has been disestablished.

Maps B-F illustrate the multiple inconsistent decisions to which this area has been subjected and suggest a need for the en banc court to establish the appropriate doctrinal guidelines. History provides one helpful guide. From 1895 through

1995, virtually all parties conceded that there was no Yankton Reservation: "as the years passed after the 1895 opening, no one *behaved* as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the State, not the homesteaders, not the townspeople." *Bruguier*, 599 N.W.2d at 375.

Instead, the area was treated precisely the same as the former "Lake Traverse Reservation," which was declared to be "terminated" in *DeCoteau*, 420 U.S. at 428. BIA Agency Superintendent Lake, who fortuitously had been moved from the Lake Traverse to the Yankton agency during the course of this litigation, testified that the areas were virtual jurisdictional clones: the exercise of "Indian country criminal jurisdiction" was the same, except that no "dependent Indian communities" had been identified in the Yankton area. T. 5/20/1998, at 34.

Supreme Court precedent in this case, moreover, should be given the deference to which it is entitled. *Yankton III*, 522 U.S. at 344, held that the "terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*." The direction of *Yankton III* could hardly be more clear but the lower courts have, from its rendition to today, consistently shortchanged this compelling language. As a result, the lower courts have repeatedly created new and inconsistent configurations of a "reservation." *See* Maps B-F.

The Panel decision in particular undermines the "'precisely suited'" to "terminat[ion]" analysis of *Yankton III*, 522 U.S. at 344, by creating an expanding and partially invisible reservation, far from the contemplation of the Court.[2]

A determination that the Yankton Reservation has been disestablished would honor history and precedent and return the area to the 1995 status quo, and the area would revert to organization on the familiar pattern of the former Lake Traverse Reservation. "Indian country" would exist in the form of "dependent Indian communities," 18 USC 1151(b), likely composed of certain lands taken into trust under 25 USC 465. (The state's attorney identified three likely candidates at trial.) Likewise, allotments, "the Indian titles to which have not been extinguished," would continue to be "Indian country" under 18 USC 1151(c) (over 30,000 acres). And no 18 USC 1151(a) areas would exist, permanently as "reservation," the same as at Lake Traverse.

En banc consideration is merited as to the disestablishment issue for the associated reason that the Panel opinion conflicts with a long series of decisions of the South Dakota Supreme Court, including *Bruguier*, 599 N.W.2d at 377 (congressional intent to "terminate" demonstrated) and *State v. Jameson*, 130

[2] To the extent, if any, that "law of the case" applies to the court en banc, that doctrine is overcome here in that the prior decisions are "clearly erroneous" in light of Supreme Court precedent and they, moreover, "work[] manifest injustice." *Little Earth of the United Tribes, Inc. v. U.S. Dept. of Housing and Urban Development*, 807 F.2d 1433, 1441 (8th Cir. 1986).

N.W.2d 95, 99 (S.D. 1964) ("it was the purpose of Congress to disestablish the [Yankton] reservation").

CONCLUSION

The Petition for rehearing en banc, or panel rehearing, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the State Appellants' Petition for Rehearing and Petition for Rehearing En Banc was served though the Court's electronic mail system on November 9, 2009, on the following persons:

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ADDENDUM

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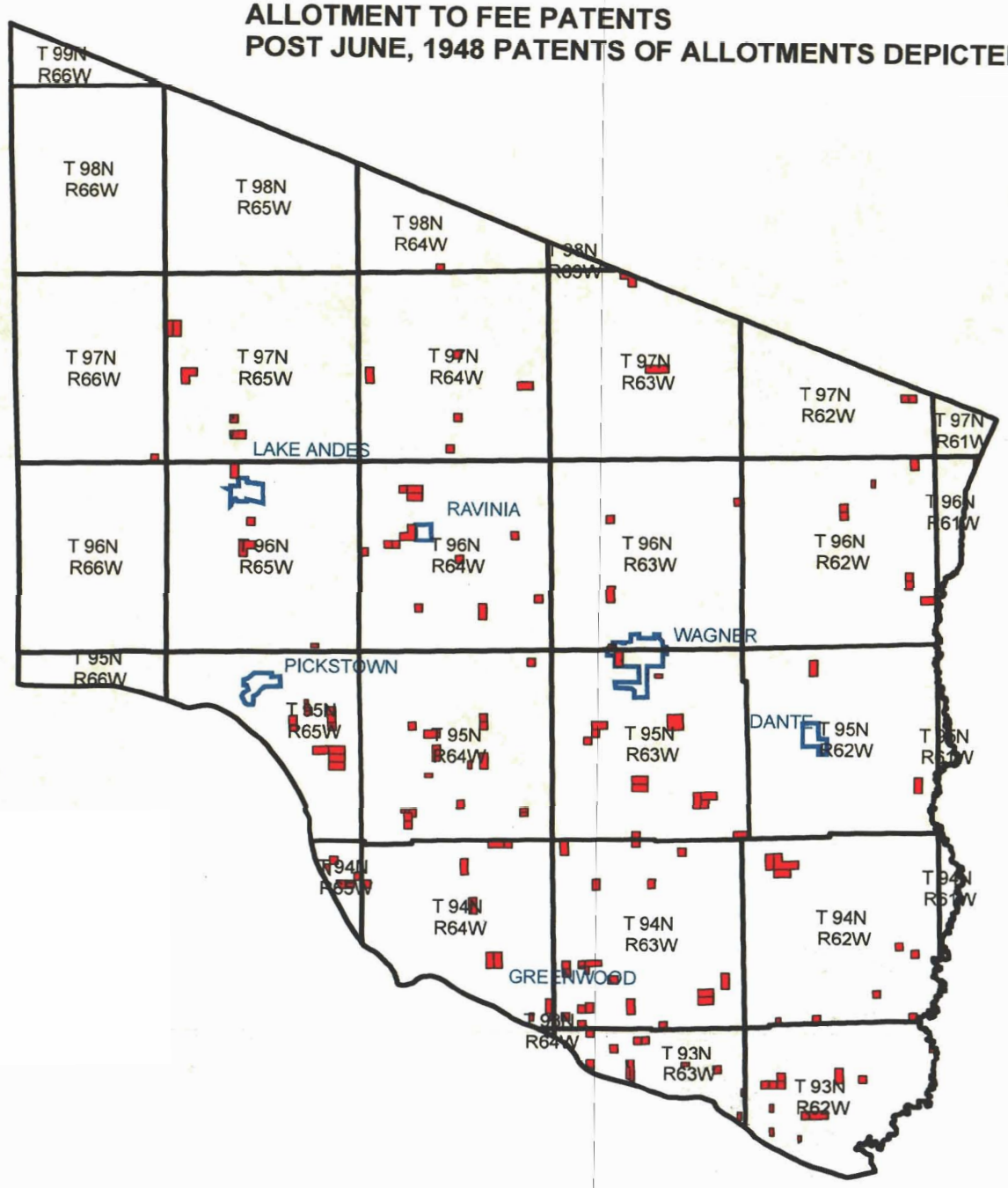
CHARLES MIX COUNTY, SOUTH DAKOTA
POST JUNE 1948
ALLOTMENT TO FEE PATENTS
POST JUNE, 1948 PATENTS OF ALLOTMENTS DEPICTED IN RED



City Limits

Patents Post June 1948

10/30/2009 nms Charles Mix County GIS Administrator

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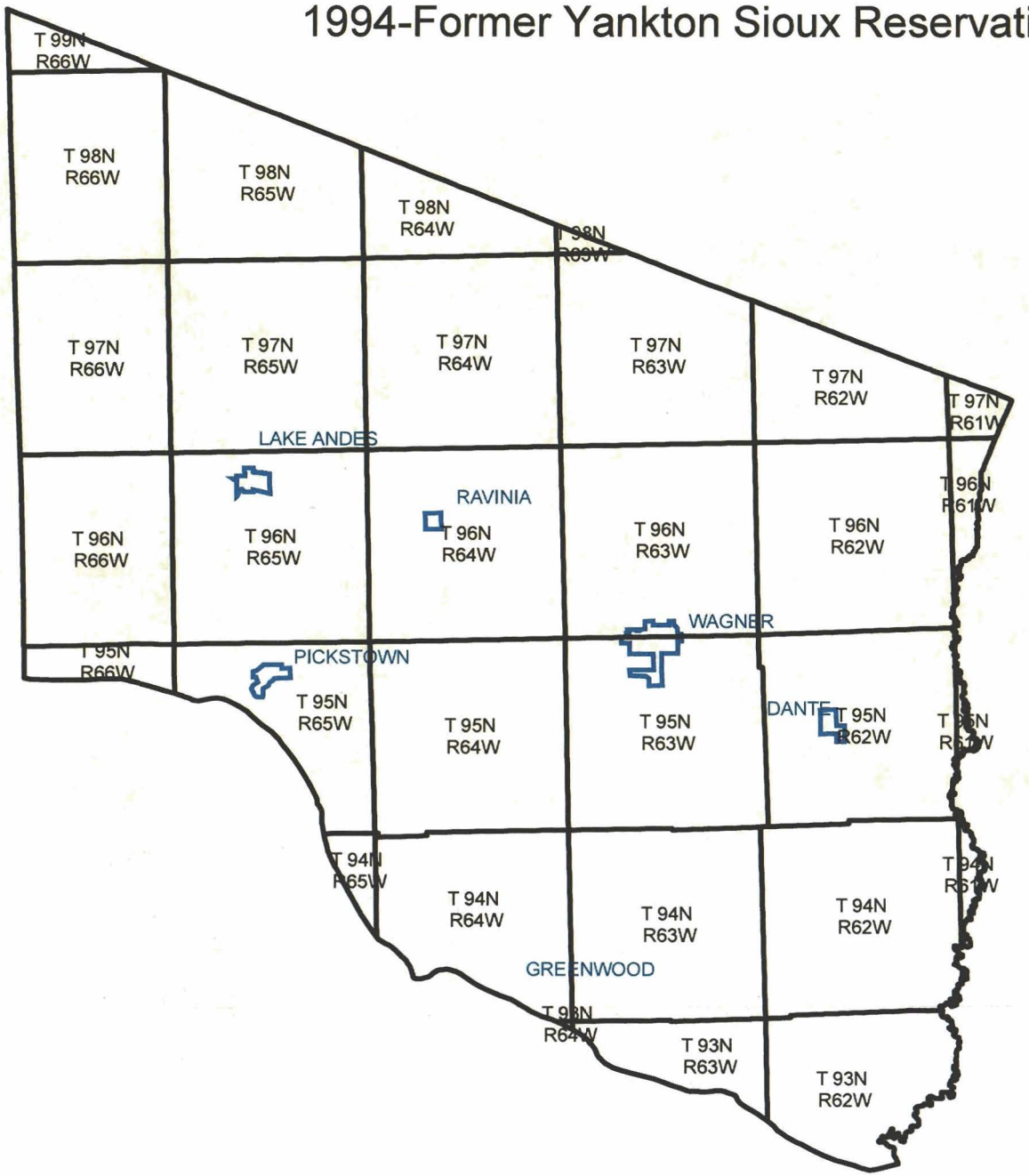
MAP A

1994-Former Yankton Sioux Reservation



City Limits
Townships

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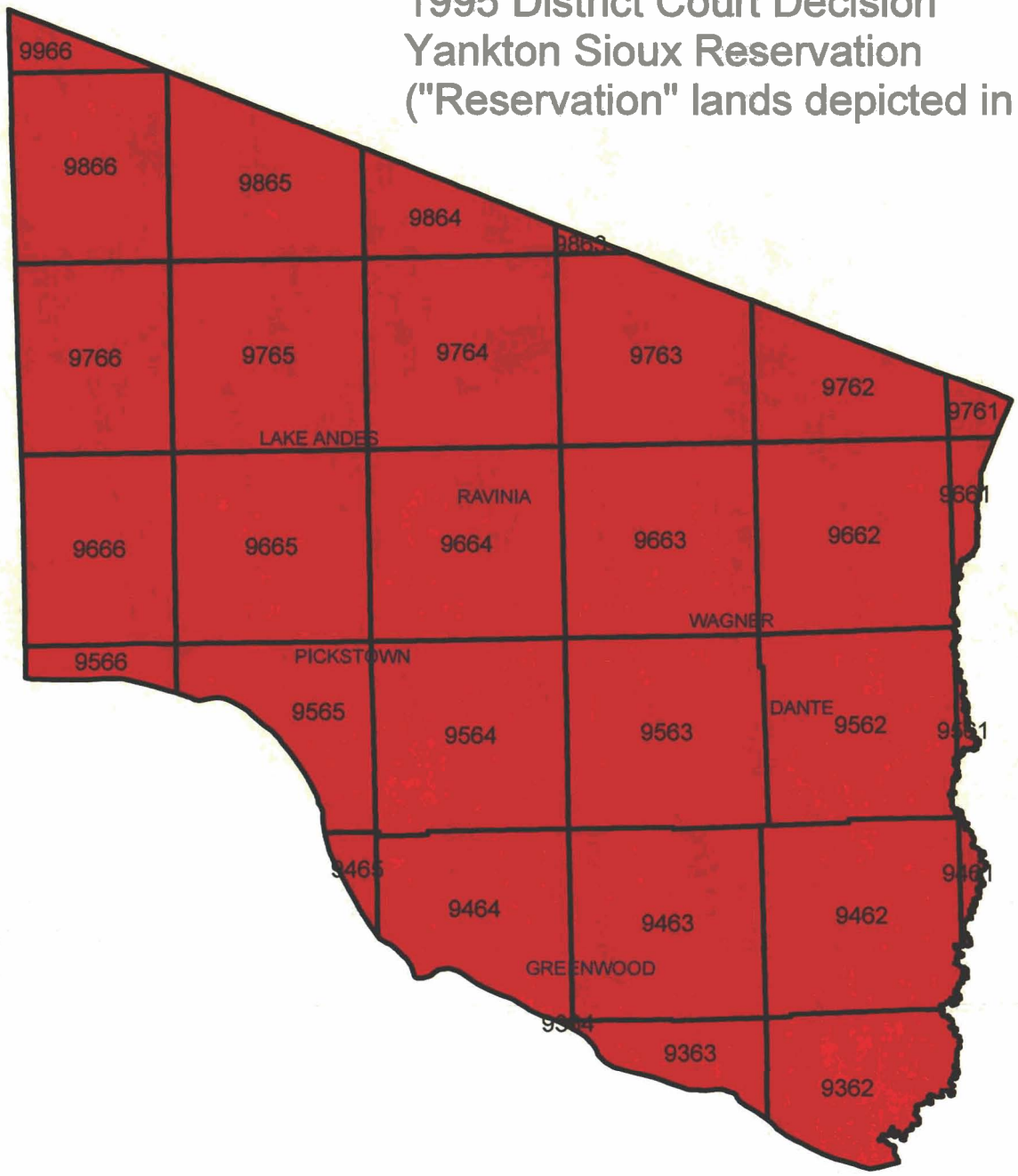
MAP B

1995 District Court Decision
Yankton Sioux Reservation
("Reservation" lands depicted in red)



Townships

10/30/2009 nms Charles Mix County
GIS Administrator

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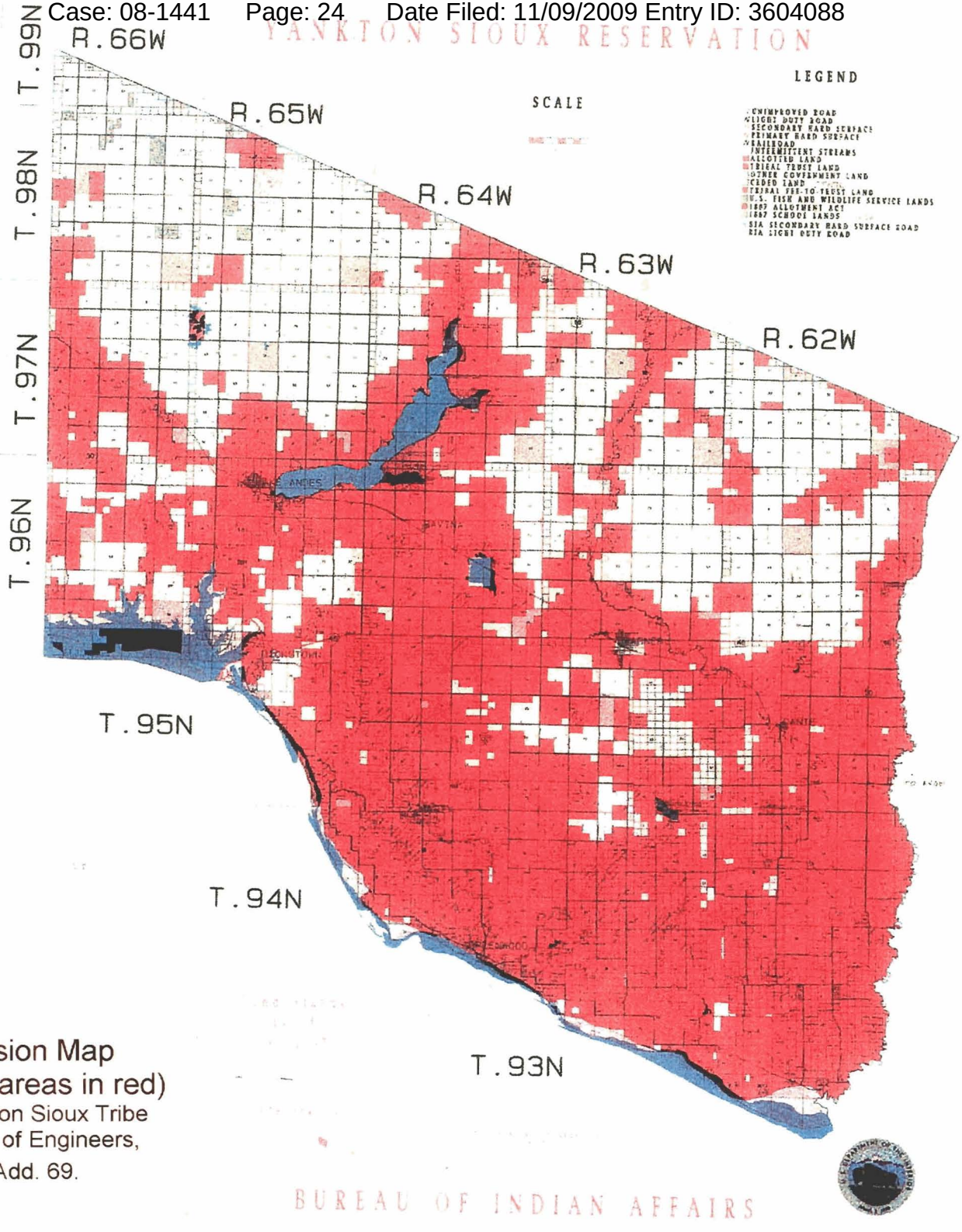
MAP C

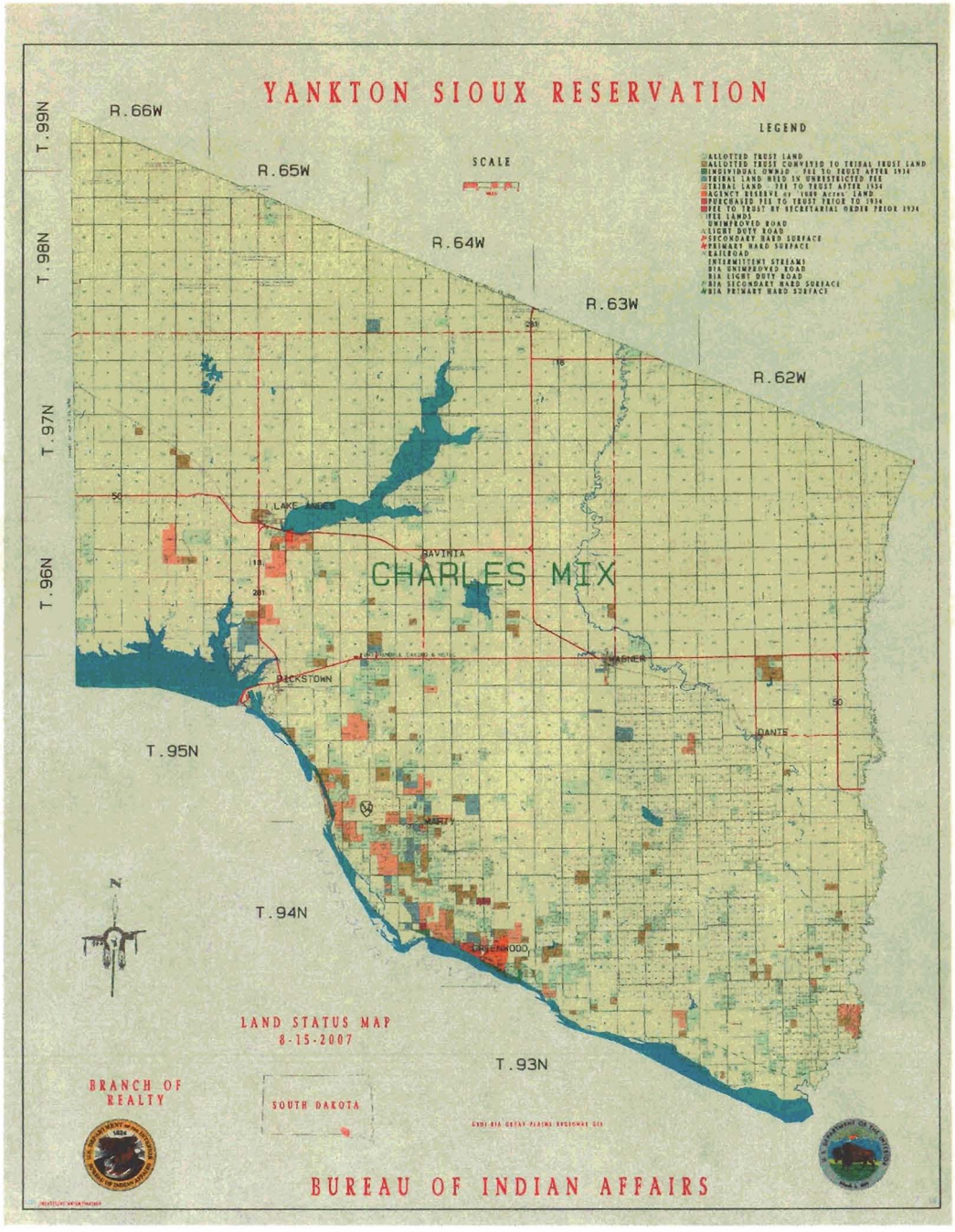


MAP D

1998 District Court Decision Map
'Reservation" includes all areas in red)
Source: Brief of Appellant Yankton Sioux Tribe
in Yankton Sioux Tribe v. Corps of Engineers,
No. 08-2252 (8th Cir.), at Add. 69.

2007 District Court Decision Map ("Reservation" includes all darker squares, except for the blue-grey squares)

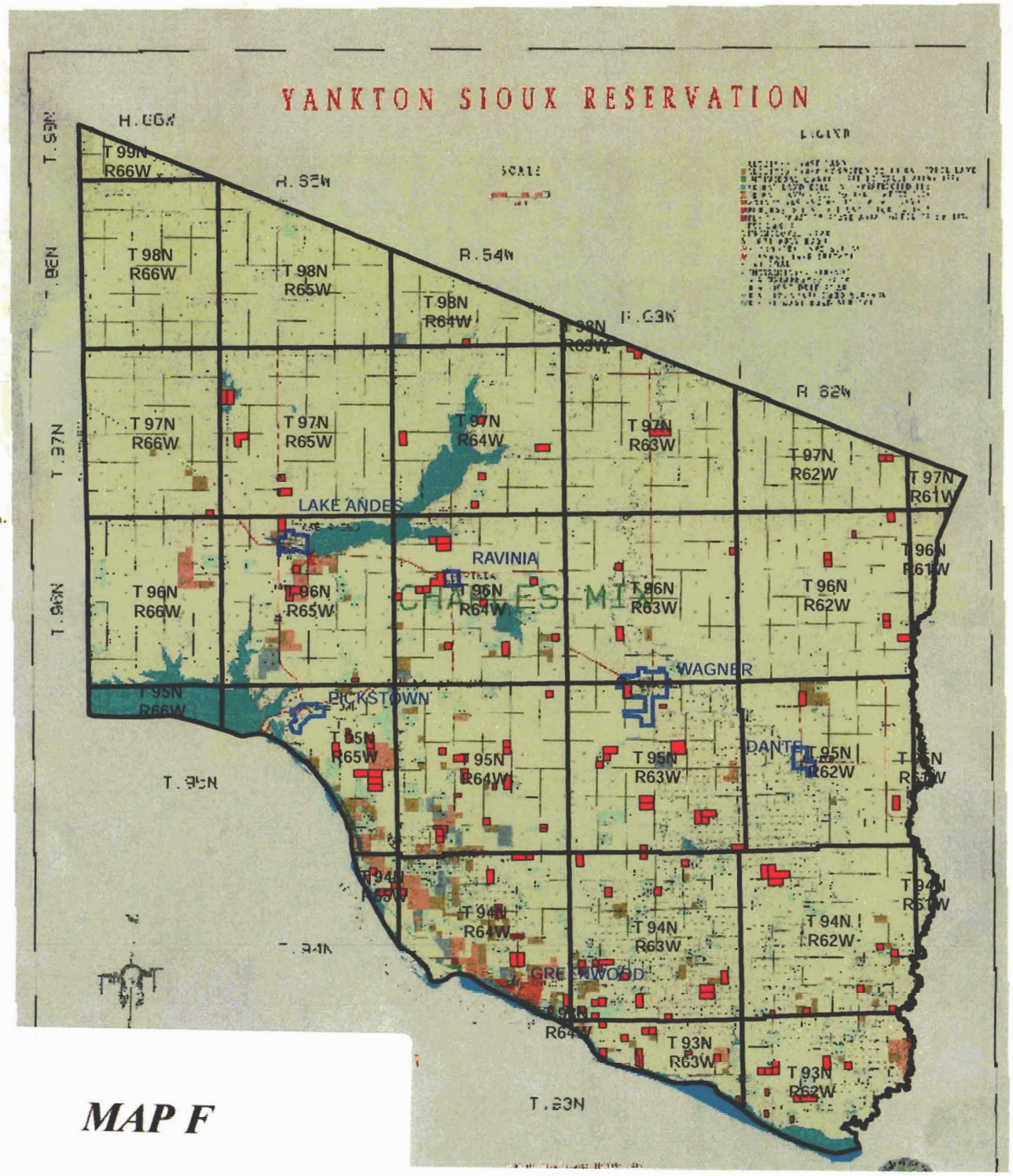
Source: Ex. 209 in Yankton Sioux Tribe v. Podhradsky, Civ. 98-4042



MAP E

2009 Panel Decision
Yankton Sioux Reservation
("Reservation" includes
bright red squares,
and all darker squares,
except those in blue-grey.)

Source: Ex. 209 in Yankton Sioux Tribe v. Podhradsky, Civ. 98-4042, plus the post June 25, 1948 ee patents as they are also shown on Map A. See County description below



10/30/2009 nms Charles Mix County GIS Administrator

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MAP F