No. 26-_____

In the

Supreme Court of the United States

HAZEN HUNTER WINCKLER,
Petitioner,
v.
STATE OF SOUTH DAKOTA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Dakota

PETITIONER'S APPENDIX
VOLUME 2
APP. A-2 – App. A-3

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CHARLES MIX COUNTY CLERK OF COURTS
FIRST JUDICIAL CIRCUIT COURT OF SD

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
COUNTY OF CHARLES MIX) FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	*	11CRI23-172 11CRI23-297 11CRI24-60 11CRI24-85
vs.	*	**MEMORANDUM DECISION (JURISDICTION)**
HAZEN HUNTER WINCKLER, Defendant.	*	

This matter came before the Court on the defendant's motion to dismiss for lack of jurisdiction in 11CRI24-60 and 11CRI24-85 filed on June 19, 2024, as well as on subsequent motions to dismiss for lack of jurisdiction in 11CRI23-172 and 11CRI23-297. A judicial order of reassignment entered on August 22, 2024 permitted defendant's motions in all aforementioned cases to be brought on for a hearing on September 11, 2024. The hearing was held at the Charles Mix County Courthouse in Lake Andes, South Dakota, with the Honorable Bruce V. Anderson presiding. The State was represented by Charles Mix County state's attorney, Steven Cotton, Chelsea Wenzel, of the South Dakota Attorney General's Office. Hazen Hunter Winckler ("Defendant") was present and represented by Tucker J. Volesky.

Defendant, through his attorney, initially filed an Affidavit with Exhibits 1 through 23 on June 26, 2024 and a brief in support of their motions initially on July 10, 2024. The State, through its attorney's, initially filed a brief in response to the motion to suppress as well as an Affidavit with Exhibits A through G on August 9, 2024. Lastly, Defendant, through his attorney, filed a brief in response to the state's brief on September 10, 2024. The parties agree that the affidavits and exhibits submitted in support of or in opposition to the motion would constitute the factual record

upon which the issue would be decided and agreed that there would be no further testimony or evidence submitted on the motion. The Court, after reviewing the briefs and exhibits attached, now issues its decision.

Facts

On file 11CRI23-172 the defendant was charged by an information, alleging in Count 1, that on July 20, 2023, the defendant committed the offense of unauthorized distribution of a controlled substance, as to Count 2, on the same date, the state alleges the defendant committed the offense of unauthorized possession of a controlled substance, and that as to Count 3, on the same date, the state alleges that the defendant committed the offense of keeping place for use or sale of a controlled substance. These offenses allegedly occurred within the city of Lake Andes on a former Yankton Sioux allotment, the same allotment considered in State v Selwyn, 11CRI20-276.

As to file 11CRI23-297 the defendant was charged by indictment issued by the Charles Mix County grand jury, alleging in Count 1, that on November 8, 2023, the defendant committed the offense of failure to appear. This offense allegedly occurred at the Charles Mix County Courthouse in Lake Andes, on the same allotment. As to file 11CRI24-60 the defendant was charged by an information, alleging in Count 1 and 2, that on February 14, 2024, the defendant committed the offense of simple assault. These offenses also allegedly occurred at the Charles Mix County Courthouse in Lake Andes, on the same allotment. As to file 11CRI24-85 the defendant was charged by an information, alleging that on April 2, 2024, the defendant committed the offense of simple assault. This offense allegedly occurred at the Charles Mix County jail in Lake Andes, also on the same allotment.

The parties have agreed that the for the purposes of defendant's motions, defendant is an enrolled member of the Yankton Sioux tribe, and that all defendant's alleged crimes occurred on the same tract of land (a former allotment of the Yankton Sioux Reservation) discussed in great detail in this Court's decision in *State v. Selwyn* 11CRI20-276 (see attached) entered on April 7, 2022. Accordingly, the Court will rely on the classification and the chain of title of the property laid out in *Selwyn,* as supplemented by any additional materials submitted in this matter, for the purposes of ruling on the motions before the Court in this instance.

Analysis

Congress has defined Indian Country for purposes of jurisdiction in 18 U.S.C. 1151, which provides as follows:

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

Defendant argues that the location of all the alleged offenses qualifies as Indian country as defined under each subsection of, (a), (b), and (c), of § 1151. However, this Court finds that the defendant's arguments under subsection (a) and (c) are controlled by this Court's reasoning and decision in *Selwyn.* The relevant facts and the arguments advanced are essentially identical between the two cases for all constructive purposes. Consequently, this Court finds, based upon prior precedent and the reasoning laid out in *Selwyn*, that the location of the defendant's alleged crimes does not qualify as Indian country under subsection (a) or (c), of § 1151. Any additional or further novel arguments presented on those issues by the parties here are denied by this court.

The remaining question is whether the location of the alleged offenses qualifies as a dependent Indian community under §1151(b). The Supreme Court has held that qualification as Indian country as a "dependent Indian community" under subsection (b) of § 1151 "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 525 (1998).

A similar argument was made concerning the City of Wagner in *Weddell v Meierhenry*, 636 F.2d 211 (8th Cir. 1980) . In *Weddell*, the defendant argued that the State did not have jurisdiction over him for the burglary of a hardware store in Wagner, South Dakota. Wagner is also within the original boundaries of the Yankton Sioux reservation, is 15 miles Southeast of Lake Andes, and has similar and almost identical demographics and land title history, at least a portion of Wagner being a former tribal allotment. There are some important distinctions: 1) Wagner is currently the location of tribal headquarters; 2) Wagner is the location of the U.S. Department of Interior, Bureau of Indian Affairs office (BIA); 3) Wagner is the location of the Yankton Sioux Tribal Housing Authority (a federal agency operated in conjunction with the BIA and HUD); 4) Wagner is the location of the Indian Health Service hospital. Other than the change of the tribal headquarters, this court believes that all of the federal agencies listed above were present in Wagner in 1980 when Weddell was decided. By comparison, Lake Andes has much less federal agency presence and little, if any, formal agency location for the BIA or the Department of Interior.

In *Weddell* the 8th Circuit ruled that the City of Wagner was not a dependent Indian community. In doing so the Court stated:

> "In our opinion, the district court correctly determined that the crimes of grand larceny and burglary did not occur in "Indian Country" as defined in 18 U.S.C. s 1151(b), so as to preclude state court jurisdiction. A review of the Stipulation of Facts entered into by the parties convinces us that Wagner is not a dependent Indian community. Wagner, South Dakota, is located within the exterior boundaries of the original Yankton Sioux Indian Reservation. **However, as a municipal corporation, Wagner is independent from the Yankton Sioux Tribe.** Approximately 95 percent of all property within the town limits, including the lot on which the Coast-to-Coast store is located, is deeded. Only 16.3 percent of the population of Wagner is Indian. And although federal funds comprise 25 percent of the Wagner School District budget, the district court found that funding to be proportionate to the Indian student enrollment. As the petitioner points out, the Bureau of Indian Affairs office and a Public Health Service hospital located in Wagner administer various federal programs for members of the reservation. **We agree with the district court that it would be unwise to expand the definition of a dependent Indian community under section 1151 to include a locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance.** Although the community of Wagner is biracial in its composition and social structure, it is clearly not a dependent Indian community under any of the definitions set forth in the cases discussed above." *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980)

Weddell appears to remain good law and binding upon this Court in interpreting §1151(c).

The location of the alleged offenses in the present cases are on a former Yankton Sioux Tribe allotment that was owned by John Arthur. There has been no credible evidence presented here to support the assertion that following the conveyance of the subject property (allotment) in this case from John Arthur or Cetantanka to John W. Harding, a non-Native American, on June 20, 1907, that the property remains "set aside" for the use of Indians as Indian land as required under the first test required under §1151(c). The land was plotted into blocks, lots and streets and became the municipality of Lake Andes, which, as a municipality, and much the same as Wagner, is independent of the Yankton Sioux Tribe. *Weddell* at 212. There is no evidence that the federal government retains or asserts any ownership or control over the land, or that it was otherwise "set apart… for the protection of dependent Indian peoples". *Weddell* at p. 212. The land it is subject to county real property taxes, typical road/street maintenance, water and sewer service, as well as

other services are provided under South Dakota Law by a municipality. Law enforcement services are provided by the Charles Mix County Sheriff's office under an agreement with the City.

Similarly, this Court finds that there is insufficient evidence to establish that the subject property in this case is under federal superintendence. Like *Weddell,* this is due in part to the property being located within the municipality of Lake Andes, a municipal organization of the State which is independent of the tribe. As far as federal superintendence, most, if not all, of the federal agencies having jurisdiction over Indian affairs are located in City of Wagner, not Lake Andes. Wagner, with very similar demographics to Lake Andes, but with a with a much larger presence of federal agencies, was found not to be a dependent Indian community in *Weddell.* Neither party has presented any evidence showing that the United States has attempted to excersize its "authority to enact regulations and protective laws respecting this territory." *Weddell* @ 212. Accordingly, this Court finds that the locations of the defendant's alleged crimes do not qualify as a dependent Indian community and thus Indian country under subsection §1151(b) which deprives the State of jurisdiction. The motion to dismiss for lack of jurisdiction is denied on this issue.

In the present case Defendant argues that based upon the Supreme Court's ruling in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), that under the plain reading of the 1894 Act *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) was decided incorrectly. This Court disagrees.

In *McGirt*, the Court interpreted the treaties and congressional acts involving the Creek Nation of Indians in Oklahoma. In ruling that the reservation remained intact the majority focused their analysis on the language of the treaty and the various associated congressional acts. When the State of Oklahoma argued that the Court may reach a different interpretation of the various agreements and congressional acts by using "extratextual" tools adapted long ago to assist in determining congressional intent with respect to reservation status, the court refused the offer. The

Court ruled that the language in the various treaties and congressional acts were clear and unambiguous and that extratextual tools including historical practices, contemporary usage, customs, practices, demographics, and other extratextual evidence were not needed to interpret congressional intent or were otherwise insufficient to prove disestablishment of the Creek Reservation.

This Court acknowledged in *Selwyn* that the analysis utilized in *McGirt* was different than that used in resolving *Yankton Sioux Tribe* as well as the numerous other cases making determinations of Indian reservation jurisdictional issues discussed in *Selwyn*. However, this Court believes that the holdings in *Yankton Sioux Tribe* and various other cases on this matter are final and that it is highly unlikely that the Supreme Court or the Eighth Circuit would consider the matter again, and if they did, it is even less likely that they would come to a different result by applying the textual analysis used in *McGirt*. Nothing in *McGirt* indicates that prior rulings which used extratextual tools for interpretation purposes were improperly decided, that those rulings needed to be reviewed again or that the use of the *McGirt* analysis was to be retroactively applied to cases long ago decided. This Court is bound by the prior holdings of the cases laid out in great detail in *Selwyn* concerning State, Tribal and Federal jurisdiction on the Yankton Sioux Reservation. Accordingly, this Court cannot find that these jurisdictional issues are to be reopened based upon the analysis in *McGirt*. Consequently, the Defendant's motion to dismiss on this basis is denied.

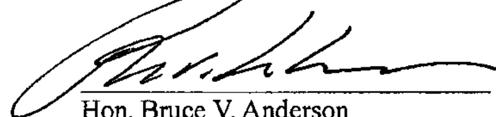
This Courts Memorandum Decision in *State v. Selwyn* 11CRI20-276 is attached hereto and its rulings, analysis and legal conclusions are incorporated herein by this reference.

Based upon all the above and foregoing, this Court determines that the State of South Dakota has criminal jurisdiction over both the Defendant as well as the locations and of the alleged offenses in these cases, and the defendant's motions to dismiss for lack of jurisdiction is denied.

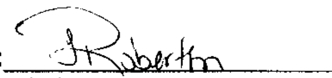
This Memorandum Decision shall constitute the Court's findings of fact and conclusions of law. The state of South Dakota is directed to submit the appropriate order denying the motion to dismiss so that proper notice of entry of that order can be served upon the defendant and his counsel of record.

Dated this 1st day of October, 2024.

BY THE COURT:



Hon. Bruce V. Anderson
First Circuit Judge

ATTEST: 
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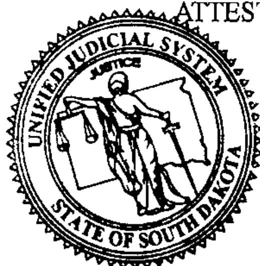

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF CHARLES MIX) FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,	*	11CRI20-276
Plaintiff,	*	
v.	*	**MEMORANDUM DECISION**
	*	**(JURISDICTION)**
SHELBOURNE SELWYN,	*	
Defendant.	*	

This matter came before the Court on the defendant's motion to dismiss for lack of jurisdiction. The motion was submitted on stipulated facts with a Stipulation submitted filed May 19, 2021. The stipulation also contained a briefing schedule and after some extensions were granted, the final brief was filed on September 10, 2021. The parties have waived hearing or oral argument on the motion. The state has appeared through the Charles Mix County state's attorney, Steven Cotton, and the Defendant appears through his attorneys, Kevin Loftus and Thomas Reynolds, of Yankton, South Dakota.

FACTS

The defendant was charged by an indictment issued by the Charles Mix County grand jury, alleging in Count 1, that on June 16, 2020, the defendant committed the offense of rape in the second degree, and that as to Count 2, on the same date, the state alleges the defendant committed the offense of aggravated incest.

As per the stipulation of facts presented, the defendant is an enrolled member of the Yankton Sioux Tribe. The parties also agree that the alleged victim is an enrolled member of the Yankton Sioux Tribe, and both of them are considered Indians under federal law.

The stipulation provides that the location of the alleged offense occurred at 445 Union Street, in Lake Andes, South Dakota. There is no dispute that this location is within the confines of the original boundaries of the Yankton Sioux Reservation as established by the Treaty with the Yankton Sioux in 1858. There is also no question that the location of the alleged offense was allotted to a Yankton Sioux tribal member, John Arthur or Cetantanka, by a trust patent issued by the United States government on May 8th, 1891. This trust patent granted the property to John Arthur as follows: The east half of the southwest quarter and the west half of the southwest quarter of Section 4, and the northeast quarter of the southeast quarter of Section 5 in Township 96 North, Range 65, west of the 5th Principal Meridian, Charles Mix County, South Dakota, containing 200 acres.

On March 3, 1903, a decree of distribution in the estate of John Arthur conveyed the property to his wife and daughter, who were also both members of the Yankton Sioux Tribe.

On June 20, 1907, the property was conveyed to John W. Harding, a non-Native American. Within that deed (Exhibit C-iii) there was a box for the "Department of the interior - Office of Indian Affairs". This box was filled out and completed on July 15, 1907, and provided that "the within deed is respectfully submitted to the secretary of interior with the recommendation that it is approved". This was signed by the acting commissioner of the Office of Indian Affairs. It appears that the department of interior was aware of this transaction and approved the same based upon the record provided.

Later, the property was platted as part of the city of Lake Andes, South Dakota. According to the parties' stipulation, the first plat was dated November 16, 1907. A second was plat was dated December 17, 1910. This second plat covered almost the identical area as the first plat.

John Harding, as the purchaser of the allotment, sold platted lots on the property to Joseph Pesicka. Mr. Pesicka originally acquired five lots in 1919.

The property remained in the Pesicka family name until December 29, 1977, when Norbert Pesicka conveyed the lot in question (445 Union Street) to Robert Krokaugger and Emma Krokaugger. Following the Krokaugger ownership of the property, it was conveyed by warranty deed on December 26, 2008, to Faith Spotted Eagle. Faith Spotted Eagle is an enrolled member of the Yankton Sioux Tribe. The land is located within the municipal boundaries of the City of Lake Andes and continues to be owned by Faith Spotted Eagle at the present time.

ANALYSIS

Prior to 1995, there was litigation concerning the jurisdiction over the Yankton Sioux Reservation. Both state and federal courts had previously ruled that some areas of the Yankton Sioux Reservation had lost its reservation status and that the State of South Dakota had criminal and civil jurisdiction, and that other areas maintained reservation status and the federal and tribal governments had civil and criminal jurisdiction. In 1995, the United States District Court in Sioux Falls, South Dakota, ruled that the original boundaries of the Yankton Sioux Tribe, as established in the 1858 treaty, remained intact and that the tribe had civil and criminal jurisdiction within those original boundaries. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D.1995), (concluding that the 1858 Reservation remained intact).

Yankton Sioux Tribe v. Southern Missouri Waste Management District was appealed and those appeals culminated in a partial resolution of jurisdictional issues on the Yankton Reservation by the United States Supreme Court in *Yankton Sioux Tribe v South Dakota*, 522 US 329 (1998). In *Yankton Sioux Tribe v. South Dakota*, the U.S. Supreme Court held that the Yankton Sioux Reservation was diminished when the tribe ceded and

relinquished its unallotted lands to the federal government in order to open the land to white settlors. The Court specifically rejected the state's argument that the reservation was disestablished or terminated, leaving civil and criminal jurisdiction exclusively to the state of South Dakota. Thus, the Supreme Court limited its holding only to the status of the ceded lands and found that the State had regulatory authority over the proposed landfil. This ruling reinforced prior rulings and historical understandings that the Yankton Sioux Reservation was a checkerboard jurisdiction where both the Tribe and the State shared jurisdiction depending on the history of each parcel of land involved. The remaining jurisdictional issues were remanded for development of a factual record.

Following *Yankton Sioux Tribe v. South Dakota*, a number of additional decisions followed, in both the State and federal courts. Those subsequent rulings are summarized below.

Gaffey I. *Yankton Sioux Tribe v Gaffey, et. al.*, 14 F.Supp2nd 1135, (1998). Upon remand from the Supreme Court the Federal District Court consolidated several pending cases, including a case where the Yankton Sioux Tribe sued various state officials seeking a declaratory ruling on the status of the reservation and seeking an injunction against the State prohibiting them from enforcing criminal or civil jurisdiction within the original boundaries of the Yankton Reservation as established in the treaty of 1858. The District Court ruled that the Reservation had not been disestablished and included all land within original exterior Reservation boundaries not ceded to United States in the treaty of 1892 which was ratified by an act of congress in 1894.

Gaffey II. *Yankton Sioux Tribe v Gaffey*, 188 F3d. 1010 (8th Cir. 1999), was the appeal of the District Court's first remand ruling. The Eighth Circuit Court of Appeals reversed and remanded, ruling that "the Yankton Sioux Reservation has not been disestablished but that it has been further diminished by the loss of those lands originally allotted to

tribal members which have passed out of Indian hands. These are not part of the Yankton Sioux Reservation and are no longer" Indian country or reservation. *Gaffey* II @ *1030*. The Court also ruled, that at a minimum, the reservation included at least certain reserved agency trust lands, but the Court noted that since both parties otherwise argued for all or nothing at the appellate and trial court level an inadequate record was presented for the court to make further rulings and the matter was remanded for further proceedings. The parties petitioned to the Supreme Court for certiorari which was denied.

Podhradsky I. In *Yankton Sioux Tribe v Podhradsky, et.al.,* 529 F.Supp.2d 1040, on remand from Gaffey II, the District Court ruled that certain trust land remained part of the reservation and that land continuously owned in fee by individual Indians also qualified as reservation.

Podhradsky II. In *Yankton Sioux Tribe v Podhradsky, et.al.,* 577 F.3d 951 (8th Cir. 2009) the Court of Appeals again reviewed the District Courts ruling. Now, with a more complete record before it, the 8th Circuit Court of appeals made more specific rulings as follows:

(1) two parcels of agency trust land were "reservation land" under the controlling law of the case;
(2) the decision of the Secretary of the Interior, to take former reservation land into trust for the Tribe pursuant to the Indian Reorganization Act (IRA), was sufficient to restore that land to its previous status as "reservation" land;
(3) miscellaneous lands that were acquired in trust for the Tribe other than under the IRA constituted "dependent Indian communities" within meaning of statute establishing federal jurisdiction over Indian country;
(4) statute freezing and prohibiting alterations to boundaries of Indian reservations except by act of Congress did not serve to establish that any lands alienated in fee to whites during effective period of such freeze should be considered part of the reservation; and
(5) remanded the issue as to whether fee lands (former Indian allotments where the trust period either expired or a patent was forced under federal law) continuously held in Indian ownership are reservation.

The case was once again remanded to resolve further issues. This case was also the subject of a petition for certiorari to the Supreme Court which was also denied.

Podhradsky III. *Yankton Sioux Tribe v Podhradsky, et.al*, 606 F.3d 985, (8th Cir. 2010) and amended opinion 606 F.3d 994 (8th Cir. 2010), the parties again argued all or nothing, the Tribe arguing that the original boundaries remained intact and the State arguing that the reservation was disestablished. The Court recognized several classifications of land in dispute.

"For ease of exposition, we have identified six general categories of land.

> (1) *Allotted Trust Lands*: lands allotted to members of the Tribe which have been continuously held in trust for the benefit of the Tribe or its members. This category includes allotments which were later transferred from individual to tribal control, so long as the trust status was maintained. The district court found 30,051.66 acres of land fit this description.[6]
> (2) *Agency Trust Lands:* lands ceded to the United States in the 1894 Act but reserved for "agency, schools, and other purposes" which then were returned to the Tribe according to the 1929 Act. The district court identified 913.83 acres of land within this category. The Court previously held this category of land to be part of the diminished Yankton Sioux Reservation in Gaffey II. 188 F.3d at 1030.
> (3) *IRA Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe pursuant to the IRA. The district court identified 6,444.47 acres of such land.
> (4) *Miscellaneous Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe other than pursuant to the IRA. Approximately 174.57 acres fit within this category.
> (5) *Indian Fee Lands:* allotted lands later transferred in fee to individual Indians and which have never passed out of Indian ownership. The record does not identify lands which may fit this description.
> (6) *Non Indian Fee Lands:* lands ceded to the United States in the 1894 Act and subsequently opened to white settlement which have not been reacquired in trust; and nonceded lands originally allotted to tribal members but later transferred in fee to non Indians and never reacquired in trust.

Of these six categories, the first four may be generically referred to as "trust lands" and the last two as "fee lands." *Id.* at 1001-1002.

In its decision in *Podhradsky III* the 8th Circuit ruled that the decision of the Secretary of the Interior to take former reservation land into trust for the tribe pursuant to the Indian Reorganization Act (IRA), was sufficient to restore those lands to its previous status as "reservation" land; that miscellaneous lands that were acquired in trust for the tribe other than under the IRA constituted "dependent Indian communities" within meaning of the statute establishing federal jurisdiction over Indian country; and a federal act, prohibiting alterations to boundaries of Indian reservations except by act of Congress, did not serve to

establish that any lands alienated in fee to whites during effective period of such freeze should be considered part of the reservation. The Supreme Court declined to review this decision making all the prior rulings the law of the case.

Podhradsky IV. In *Yankton Sioux Tribe v Podhradsky, et.al.*, 606 F.3d 985 (8th Cir. 2010) the Court was considering the State's petition for rehearing and rehearing en banc in *Podhradsky* III. The opinion resolved an issue which arose as to footnote 10 of *Podhradsky* III which considered the status of any allotments which may have been patented in fee since 1948 (after adoption of the IRA) and subsequently sold to white owners. In addition, the State once again made a claim that the reservation was disestablished and sought remand so that the District Court could consider the case again in light of the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217-21, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005) and , *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir.2010). The Court ruled that *City of Sherrill* an *Osage* were not applicable and denied the States renewed argument that the reservation had been disestablished, and lastly, ruled that the discussion in footnote 10 was dicta and ordered that an amended opinion would be issued without the footnote. Otherwise, the petition for rehearing was denied.

Bruguier. *Bruguier v Class*, 599 NW2d 364 (SD 1999) was decided while the federal litigation described above was pending. Bruguier was convicted of crimes in Pickstown, SD and alleged that the State lacked jurisdiction since Pickstown was within the original boundaries of the Yankton Reservation. Pickstown was located on a former allotment which was later transferred to a non-Indian. Later the allotment was taken by the U.S Corps of Engineers as part of its plans to construct the Ft. Randal Dam. When the property was no longer needed by the government the land was transferred to the City of Pickstown, a state municipal corporation. The *Bruguier* court went into detail regarding

the status of Indian allotments where Indian title had been extinguished by transfer to a non-Indian. The Court concluded that the location of Bruguier's crimes, being on a former allotment which was later sold to a non-Indian and then transferred to a municipal corporation within the original boundaries of the reservation as established in the treaty of 1858, was not reservation or Indian country, and that the State had jurisdiction over those offenses. The Court also ruled that the reservation was terminated. This broader ruling was later criticized and called into doubt by the 8th Circuit in Podhradsky III. (See *Podhradsky* III, footnote 7.)

Provost. *U.S. v Provost*, 237 F.3d 934 (8th Cir. 2001) involved a crime in the City of Lake Andes, SD, in the same community and nearby the location of the offense alleged in the present case. Provost was accused in federal court of burglary of Raymond Soulek's home in Lake Andes and attempted burglary of a business in Pickstown. The record in the present case does not show the location of the Soulek home but this Court assumes it was in a different part of the city of Lake Andes located upon a piece of ground different from the allotment to John Arthur or Cetantanka because the federal court determined it was on "unallotted" land. Prior to sentencing the Federal Court dismissed the charge in Count one as it found that Mr. Soulek's home was located on unallotted land ceded to the government as part of the 1892 treaty and that such unallotted ceded lands formerly located within the reservation was not Indian country and therefore came under the primary jurisdiction of the State of South Dakota. This issue was not appealed. With regard to the second count alleging attempted burglary of the business in Pickstown, the Court followed the ruling in Gaffey II and concluded that the offense occurred on land that was originally allotted to a member of the Yankton Sioux Tribe but has since "passed out of Indian hands" and that such lands are not Indian country within the meaning of 18 U.S.C. § 1151. The Court reiterated its ruling in Gaffey II that "the Yankton Sioux Reservation has not been

disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which has passed out of Indian hands.", and concluded that the federal government lacked authority and jurisdiction to prosecute Provost in federal court for the state law offense of attempted third degree burglary. *Provost* @ 937.

Yankton Sioux v. COE. In *Yankton Sioux Tribe v U.S. Corp of Engineers*, 606 F.3rd 895 (8th Cir. 2010), (cert denied) the Yankton Sioux Tribe sued for a declaratory ruling that the land taken by the government to build the Ft. Randal Dam remained reservation or Indian country. The controversy arose as part of the Janklow-Daschle plan (Title VI of the Water Resources Development Act of 1999) where the U.S. Corp of Engineers would transfer large amounts of land, previously taken by the government as part of the Pick-Sloan program to build dams along the Missouri river, to the State of South Dakota. The Act specifically excluded from transfer any lands within the "external boundaries of a reservation of any Indian Tribe". Some of the lands taken by the Pick-Sloan program were former Yankton Sioux allotments within the original boundaries of the diminished reservation. The tribe argued that since these lands were within the external boundaries of the reservation the transfer was prohibited. Once again, the State argued that the reservation was terminated and the Tribe again argued the reservation was not diminished and that they maintained jurisdiction over all lands within the original boarders of the 1858 treaty except those lands ceded to the government under the 1892 treaty. The 8th Circuit firmly stated that the rulings in *Gaffey* and *Podhradsky* are final. *Id* @ 898. The Court went on to conclude that the former allotments involved lost their status as reservation or Indian Country because some were subsequently allotted to individual members of the Tribe and most parcels were either fee patented to allottees or their heirs and assigns and sold to non-Indians before the government took the property, or that by

the government taking the existing allotments the Indian chain of title was broken thus depriving them of reservation status and making them eligible for transfer to the State of South Dakota.

Charles Mix County v U.S. Dept. of Interior, 674 F.3d 898 (8th Cir. 2012) involved the Yankton Sioux Tribes endeavor to have 39 acres of property it acquired that had lost its reservation status placed under trust supervision pursuant to § 5 of the Indian Reorganization Act (IGA). *Podhradsky* III ruled that such lands, if placed back under trust supervision under the IGA, would regain their reservation status. The county resisted this request during the agency proceedings in the Department of Interior and appealed when the agency granted the Tribes request. The 8th Circuit denied various constitutional claims raised by the county and affirmed the agency decision finding that the agency properly considered all relevant factors before placing the property under agency trust supervision.

Congress has defined Indian Country for purposes of jurisdiction in 18 U.S.C. 1151, which provides as follows:

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

In the present case the Defendant argues that the boundaries of the Yankton Reservation and jurisdiction therein, in the backdrop of the long litigious history resultng in the decisions resolving jurisdiction on the Yankton Reservation quoted above, need to be revisited in light of the Supreme Court's recent ruling in *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Once again, based upon the possibility that the door has cracked opened again, each side shoots for the moon with their all or nothing arguments

that have failed repeatedly before, the Defendant arguing that the Tribe has exclusive criminal jurisdiction on any land within the original 1858 boundaries of the reservation and the State arguing that the reservation has been disestablished and terminated.

In *McGirt* the Court interpreted the treaties and congressional acts involving the Creek Nation of Indians in Oklahoma. In ruling that the reservation remained intact (not diminished or disestablished) the majority focused their analysis on the language of the treaty and the various associated congressional acts. When the State of Oklahoma argued that the Court may reach a different interpretation of the various agreements and congressional acts by using "extratextual" tools adapted long ago to assist in determining congressional intent with respect to reservation status, the court refused the offer. The Court ruled that the language in the various treaties and congressional acts were clear and unambiguous and that extratextual tools including historical practices, contemporary usage, customs, practices demographics, and other extratextual evidence were not needed or were otherwise insufficient to prove disestablishment of the Creek Reservation.

This Court acknowledges that the analysis used in *McGirt* was different than prior analysis used by the Court in resolving *Yankton Sioux Tribe v. South Dakota* and other Indian reservation jurisdictional issues, with its primary focus on the text of the various treaties and associated congressional acts and ignoring extratextual interpretive tools. However, neither party has cited any authority to this Court in favor of or against the premise that the use of a different analysis by the Court in *McGirt* calls for a retroactive analysis of the treaties with the Yankton Sioux. In fact, this Court believes that the holdings in *Yankton Sioux Tribe v. South Dakota* and the various cases from the 8th Circuit cited above are the final say on the matter as to diminishment or disestablishment, and it is highly unlikely the matter would be revisited. The prior decisions of the federal courts on the issue are final and conclusive.

The state argues that the *McGirt* decision, when applied to the Yankton Sioux reservation and the 1892 treaty leads to the conclusion that the Yankton Sioux Reservation was completely disestablished and that the state has exclusive criminal and civil jurisdiction within the original boundaries established by the Treaty of 1858. This argument asks this Court to reconsider the prior holdings of the State and Federal Courts on the issue and to rule upon jurisdiction over property not involved in the present proceedings.

This Court is bound by the prior holdings laid out above consisting of both the state and federal courts concerning State, Tribal and Federal jurisdiction on the Yankton Sioux Reservation. This Court must decline the invitation to open up these jurisdiction issues once again based upon the analysis in *McGirt*. In almost every opinion summarized above the Courts have always carefully cast their primary focus on the language of the treaty and the various associated congressional acts involved. The language of the treaty of 1892 has been sliced and diced, flipped and turned, twisted and dissected, over the course of decades, by both sides involved, to reach a favorable resolution from their viewpoint. The primary focus of all of these cases was to determine the intent of the treaty of 1892, its companion act of congress in 1894 and associated federal acts. The fact that the various courts who have looked at the issue used "extratextual" tools to assist in that endeavor does not mean those decisions were wrongly decided or that those courts misconstrued the meaning and intent of the 1892 treaty. The 8th Circuit has said, in light of the denial of certiorari, that the decisions are final. *Yankton Sioux Tribe v U.S. Corp of Engineers* @ p. 898, and *Podhradsky IV*, @ 990. This issue of diminishment or disestablishment of the Yankton Reservation is resolved and final and this court will not revisit the issue based upon *McGirt*.

According to the 8th Circuit Court of Appeals and the South Dakota Supreme Court's decisions on the matter, as well as 18 U.S.C. 1151 the state of South Dakota has criminal and civil jurisdiction over any unallotted parcels of the former Yankton Sioux Reservation as well as any prior Indian allotments, where the Indian title has been extinguished. In this case the allotment was extinguished when the land was conveyed from the heirs of John Arthur or Cetantanka to John Harding, a non-Indian and the Department of Interior was notified of and approved such sale.

In the present case, the stipulated record shows that in 1907 the prior owners of 445 Union Street, who were tribal members, sold their prior trust allotment and the property was conveyed to John Harding, a nontribal member. This was an unreserved deed on a form entitled "DEED RECORD - Indian Deed - Inherited Lands" and was submitted to and approved by the US department of interior, Office of Indian Affairs. It is this Court's conclusion that this deed extinguished Indian title as of the time of that conveyance in 1907. Nothing in the deed anticipates continued trust supervision over the property. Because the Indian title was extinguished the property lost its status as reservation or Indian country as per §1151, leaving it to State jurisdiction.

Pursuant to the IRA an Indian tribe may petition the Department of Interior to place land back into trust. *Charles Mix County v U.S. Dept. of Interior*, supra. It is clear that since the land was transferred from tribal ownership in 1907 and the platting of the land and its inclusion into the municipality of Lake Andes, that the federal government has not exercised any trust or other federal supervision over the property for over 100 years. This is the case, despite the fact that the property is currently owned by Ms. Spotted Eagle, a member of the Yankton Sioux Tribe. Pursuant to the IRA, if the property was previously a part of an Indian reservation, the tribe may petition to have it included as part of the reservation trust as recognized through the United States Department of

Interior. The stipulation of the parties is silent on any efforts by Ms. Spotted Eagle or the Tribe to petition the Department of Interior to exercise federal trust superintendence over the property.

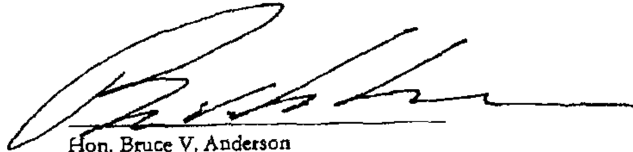
Consequently, this Court finds that despite the fact that the property is currently owned by a tribal member, Indian title to the property was extinguished when the deed was approved by the Department of Interior in 1907. To rule that the property had regained its status as a reservation or Indian country because it is now owned and occupied by a tribal member without further governmental or agency action would render §467 of the Indian Reorganization Act meaningless. Consequently, current ownership of the property by a tribal member does not restore the property to reservation or Indian country status.

Based upon all the above and foregoing, this Court determines that the State of South Dakota has criminal jurisdiction over both the location and of the alleged offense in this case, and the motion to dismiss based on jurisdictional grounds is denied.

This Memorandum Decision shall constitute the Court's findings of fact and conclusions of law. The state of South Dakota is directed to submit the appropriate order denying the motion to dismiss so that proper notice of entry of that order can be served upon the defendant and his counsel of record.

Dated this 7 day of April, 2022.

BY THE COURT:



Hon. Bruce V. Anderson
Circuit Court Judge

ATTEST:

Clerk of Court

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:ss
2 COUNTY OF CHARLES MIX) FIRST JUDICIAL CIRCUIT

3 *

STATE OF SOUTH DAKOTA, Plaintiff, -vs- HAZEN HUNTER WINCKLER, Defendant.	*	11CRI23-297 **TRANSCRIPT OF MOTIONS HEARING**
STATE OF SOUTH DAKOTA, Plaintiff, -vs- HAZEN HUNTER WINCKLER, Defendant.	*	11CRI23-172 **TRANSCRIPT OF MOTIONS HEARING**
STATE OF SOUTH DAKOTA, Plaintiff, -vs- HAZEN HUNTER WINCKLER, Defendant.	*	11CRI24-60 **TRANSCRIPT OF MOTIONS HEARING**
STATE OF SOUTH DAKOTA, Plaintiff, -vs- HAZEN HUNTER WINCKLER, Defendant.	*	11CRI24-85 **TRANSCRIPT OF MOTIONS HEARING**

21 *

22

B-E-F-O-R-E

23

The Honorable Bruce V. Anderson,
24 Circuit Court Judge,
at Lake Andes, South Dakota,
25 on September 11, 2024.

1 **A-P-P-E-A-R-A-N-C-E-S**

2 For the Plaintiff: Chelsea Wenzel
Assistant Attorney General
3 Pierre, South Dakota

4 Steven R. Cotton
Charles Mix County State's Attorney
5 Lake Andes, South Dakota

6 For the Defendant: Tucker J. Volesky
Attorney at Law
7 Mitchell, South Dakota

8

P-R-O-C-E-E-D-I-N-G-S

9

The following proceedings commenced on the 11th day of
10 September, 2024, at 2:18 p.m. in the courtroom of the
Charles Mix County Courthouse, Lake Andes, South Dakota.

11

12 * * *

13

I-N-D-E-X

14

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1 **P-R-O-C-E-E-D-I-N-G-S**

2 THE COURT REPORTER: All rise in honor of the Court.

3 (All comply.)

4 THE COURT: Thank you. Please be seated.

5 (All comply.)

6 THE COURT: We're on the record in various cases entitled

7 State of South Dakota versus Hazen Winckler.

8 And those include 11CRI23-172, that's a controlled

9 substance case. And 11CRI23-297, which is a failure to

10 appear. 11CRI24-60, which is a simple assault. Looks like

11 more than one count. And then 11CRI24-85, also a simple

12 assault.

13 Mr. Winckler is here today. He's present with his

14 attorney, Tucker Volesky. The State is represented by the

15 State, Steve Cotton, and Assistant Attorney General Chelsea

16 Wenzel.

17 So this is the time the Court set to hear arguments on the

18 motion to dismiss based on jurisdiction.

19 And I wanted a stipulation. I don't think I've ever seen a

20 stipulation.

21 But then Ms. Wenzel filed a 120-some page affidavit.

22 Mr. Volesky, have you had time to look at that affidavit?

23 MR. VOLESKY: I've reviewed it.

24 THE COURT: Okay. Are you objecting to any of those

25 contents?

1 MR. VOLESKY: I believe they're just public records, and
2 previous case filings, I won't object.
3 THE COURT: No objection?
4 MR. VOLESKY: No.
5 THE COURT: You never did a stipulation?
6 MR. VOLESKY: We didn't --
7 THE COURT: If you did, I haven't seen it.
8 MR. COTTON: We did do one, Your Honor, we just never
9 signed it and filed it. So Tucker had sent -- or,
10 Mr. Volesky had sent one to me. Ms. Wenzel and I have both
11 reviewed it. We have no issue with it.
12 THE COURT: So you know, in I think the first Gaffey case,
13 in federal court, they actually had a trial that went on
14 for weeks where they established, you know, historical
15 title.
16 I don't necessarily think we have to do that. Especially
17 when everybody's aware of my Selwyn decision, where we had
18 a stipulation about the historical title.
19 Are you all agreeing that those same facts in Selwyn apply
20 here?
21 MR. VOLESKY: I think the fundamental facts are undisputed,
22 Your Honor, and it comes down to legal determinations.
23 We've submitted 23 exhibits laying the foundation. The
24 State doesn't object. The State's also laid the
25 foundation. I think it just comes down out to how the

1 Court comes out on the legal conclusions.
2 THE COURT: Okay. On the legal questions?
3 MR. VOLESKY: Yes.
4 THE COURT: All right.
5 Ms. Wenzel, do you have any objection to Mr. Volesky's
6 exhibits?
7 MS. WENZEL: No, Your Honor.
8 THE COURT: All right.
9 Ms. Wenzel, your brief and affidavit were filed together.
10 And the problem with the way -- I know this might be your
11 staff, but the way you filed it, I have a brief and an
12 affidavit in one filing, and the clerk has to go through
13 some extra work, she pointed it out to me today, but you
14 can't file those as one. Your staff should file a brief
15 and then file the affidavit separately.
16 'Cause now when someone is rereading the record, they see
17 "brief."
18 And you don't know there's an affidavit in your file until
19 you click on that brief. And then it gives you two
20 subdirectories and, of course, the next one is the
21 affidavit.
22 MS. WENZEL: I apologize, Your Honor.
23 THE COURT: Okay.
24 MS. WENZEL: That's how the Sixth Circuit likes it, but I
25 am happy to do it differently in the First Circuit.

1 THE COURT: Yeah, and Sixth Circuit shouldn't be doing that
2 because it causes those pleadings to be hidden. And I can
3 scroll up and down, because I saw your email and I knew
4 there was an affidavit, but I scrolled up and down and I
5 didn't see one. And then finally I click on brief, and I'm
6 like, well there it is. It's hidden behind that label.
7 So I've instructed her to separate that out. Okay?
8 MS. WENZEL: I'm happy to refile too or whatever's easiest,
9 I'm happy to do.
10 THE COURT: What's easier?
11 THE CLERK: It's done.
12 THE COURT: You got it done already?
13 THE CLERK: It's already done.
14 THE COURT: You're done, all right.
15 Going forward, I don't know, maybe you want to talk to
16 Judge Klinger about that issue, that those things can be
17 hidden when they're filed in that manner, so I always like
18 mine all separate. And it's a lot easier to open them that
19 way too.
20 All right.
21 Mr. Volesky, do you feel you're ready for arguments today?
22 MR. VOLESKY: I am, Your Honor.
23 THE COURT: All right.
24 And, Ms. Wenzel, the same question?
25 MS. WENZEL: Yes, Your Honor.

1 THE COURT: All right.
2 Mr. Volesky, it's your motion; you go ahead. I'm going to
3 give you about 10 minutes.
4 MR. VOLESKY: Okay. Thank you, Your Honor.
5 May it please the Court, if I would be able to sit to look
6 at my notes, if that's okay?
7 THE COURT: At your pleasure. You can stand or sit.
8 MR. VOLESKY: Thank you, Your Honor.
9 This case is resolved by the fundamental proposition that
10 decisions about sovereign rights are for Congress to make,
11 and Congress makes those decisions by speaking clearly.
12 The Court should dismiss the cases against the Defendant
13 because the text makes clear that Congress never
14 disestablished the Yankton Sioux Reservation. And never
15 extinguished the Indian title to the allotted lands.
16 Four concise points this afternoon, Your Honor.
17 First, the Yankton Indian title was recognized with a
18 reservation established in the Treaty of 1858.
19 In the Act of 1894, Congress expressly confirmed allotments
20 that had been made on the reservation lands, guaranteed the
21 tribal rights, promised that Congress shall never alienate
22 any part of these lands from the Indians, describing the
23 lands as comprising reservations of the Yankton Sioux and
24 specifically reinforcing the 1858 Treaty promises.
25 The texts of the 1858 Treaty and the 1894 Act expressly

1 identify Yankton lands as reservation and Indian
2 allotments, recognizing and guaranteeing the title of the
3 Yankton Sioux Indians. The status of the lands was thus
4 established by Congress.
5 Second, Congress did not disestablish or extinguish the
6 Yankton Sioux Indian title described in treaty and statute.
7 In fact, Congress was keenly aware of the hallmark language
8 required to do so, and it was rejected in the 1894 Act.
9 Congress sought a session agreement. And precisely because
10 the Tribe negotiated to preserve and guarantee the
11 allotments in perpetuity as their continuing homelands,
12 Congress expressly did just that with the language used
13 under the Act. And it did so against the backdrop of
14 existing treaty rights, which were also expressly
15 reinforced. Those congressional judgments should be
16 respected.
17 Third, Congress did not transfer criminal jurisdiction over
18 Indians in Indian Country to South Dakota. The Tribe
19 acknowledged its dependence on the United States in the
20 1858 Treaty, stipulating that all matters would be disposed
21 of and decided federally.
22 At statehood, the General Crimes Act was in place,
23 extending federal jurisdiction to Indian Country. And the
24 Major Crimes Act established exclusive federal
25 jurisdiction.

1 When Congress overrides treaties and statute and transfers
2 jurisdiction to state, it does so expressly. And it has
3 not done so here.
4 Finally, retroactive -- retroactivity, or the parade of
5 horrible possibilities if the Court decides in favor of the
6 Defendant in this case.
7 Although not particularly advanced by the State, it was
8 noted as a current -- concern of this Court in Selwyn.
9 Presumably, there may be habeas petitions if the Court
10 decided in Defendant's favor.
11 However, the State would have those numbers, and it hasn't
12 suggested that there is anything like hundreds of cases
13 waiting in the wings to have their convictions overturned.
14 Even if there were, statute of limitations and other
15 procedural bars would need to be overcome.
16 And assuming those bars were overcome, the ultimate result
17 would be that the Defendant would likely be subject to
18 greater penalties in federal court.
19 In any event, the parade of horribles, or retroactivity,
20 provides no reason to disregard the plain text, as
21 discussed in McGirt. Because Congress is in the best place
22 to change the text and add text if it wants to, as it
23 routinely does in Indian Country, Congress knows how to do
24 this. And the job to fix any consequences, if the Court
25 perceives them, is with Congress.

1 The cases at bar, Your Honor, are governed by a plain text
2 requirement, which has everything to do with the fact that
3 these boundaries were set up by Congress. And so if you're
4 going to undo that, Congress needs to speak and Congress
5 needs to speak clearly.
6 You can call it a reservation, Indian allotment, dependent
7 Indian community, or Indian lands. The text would be the
8 same because we're talking about transfers of sovereign
9 rights. And that must be done clearly in the text by
10 Congress.
11 Thank you, Your Honor.
12 THE COURT: Ms. Wenzel.
13 MS. WENZEL: So I would break my argument down just a
14 little bit differently.
15 Um, Indian Country is defined in, um, federal, ah, statute
16 however refer to it as 1151. I think we're all familiar
17 with that. Under subsection (a), commonly known as the
18 reservation land, that's all land within the limits of
19 Indian -- any Indian reservation under the jurisdiction of
20 the United States government notwithstanding the issuance
21 of any patent, including rights-of-way running through the
22 reservation.
23 It is undisputed in the 8th Circuit -- well, it's
24 undisputed, according to the Supreme Court of the United
25 States, that any ceded lands are now -- any ceded lands

1 that were, um, sold to the United States diminished the
2 reservation and would not be reservation land under
3 subsection (a).
4 In the 8th Circuit under Gaffey, Podhradsky, Army Corps,
5 um, it is undisputed and well held -- or, I guess I
6 shouldn't say "undisputed," but it is conclusively held
7 that the reservation was further diminished by any
8 allotment, individual allotment that was patented in fee,
9 and that which afterwards passed out of Indian hands.
10 Now, that is derived from that language of the 1894 Act. I
11 understand that, um, the defense does not agree that that
12 was clear in plain language from Congress, but the 8th
13 Circuit has decided it was.
14 And this Court is bound both by the South Dakota Supreme
15 Court and because of the full faith and credit, um,
16 doctrine, also the federal court.
17 So that is -- that takes care of (a).
18 I would then like to go to subsection (c).
19 All Indian allotments, the Indian titles to which have not
20 been extinguished, including rights-of-way running through
21 the state. Again, the 8th Circuit has conclusively held
22 that the diminishment, um, of the lands through -- the
23 diminishment of the reservation, excuse me, through the
24 individual allotments that were patented in fee and that
25 have subsequently passed out of Indian hands also would not

1 be Indian Country under subsection (c).
2 And I think when we look at how an allotment is defined
3 that's a specific, um, term of art in Indian law. An
4 allotment is ordinarily -- according to Black's Law
5 Dictionary, ordinarily and commonly used to describe land
6 held by Indians, after allotment, and before the issuance
7 of the patent in fee that deprives the land of its
8 character as Indian Country.
9 You know, the defense talks about Indian title. Indian
10 title, according to Black's Law Dictionary, is not
11 necessarily ownership or a sovereign right, but it is
12 permissive right of occupancy granted by the federal
13 government to aboriginal possessors of the land. It is
14 possession, it is not ownership, and it can be extinguished
15 by the federal government.
16 Extinguish it means -- extinguishment, excuse me, means the
17 destruction or cancellation of a right. In this case, the
18 cancellation of the possessive rights.
19 When the fee patents -- when the land, excuse me, when the
20 allotments were patented in fee to individual Indians, that
21 fee -- fee simple, fee absolute, we all remember from
22 property, that's the whole bundle of sticks. That was
23 given to individual Indians.
24 And at that point, any possessory right for the Tribe is
25 gone. Because that land was passed in fee to an individual

1 person.
2 That --
3 THE COURT: So you're saying -- you're, you're focusing
4 there on the individual Native American's rights as opposed
5 to the Tribe's rights? The Tribe collectively?
6 MS. WENZEL: Yes. Because at the time that section 1151
7 was passed and before, because, as the 8th Circuit has
8 explained, the SCOTUS has explained, 1151 codified prior
9 caselaw having to do with Indian rights. The only thing
10 that really changed is the thought that -- or, excuse me.
11 Let me rephrase that.
12 What it codified, or at the time what was codified, was
13 that Indian title had to do with Indian ownership and that
14 meant communal title at the time. And when we're
15 interpreting a statute, we have to look at the meaning of
16 the words, the plain language, and their meaning at the
17 time.
18 So that was the meaning at the time. So what 1151 did
19 differently is saying that well, if it's a reservation,
20 we're going to say no matter who owns the land, whether it
21 was patented in fee or not, that is Indian Country if it is
22 reservation land.
23 Allotments are off the reservation. So they are not
24 reservation land, but an allotment by definition is a
25 specific, again, Indian term of art, meaning an area of

1 land held in trust or alienated by the federal government
2 but held in trust for the benefit of a specific person.
3 Once it's patented in fee to that individual, it's no
4 longer an allotment. It's a former allotment. So, under
5 subsection (c).
6 Now, I realize that for purposes -- and I don't mean to get
7 into the weeds, although I'm very, very good at it. But I
8 realize that for purposes of this case, it doesn't matter
9 whether you would agree with me on that part or whether,
10 um, when we talk about Indian title or extinguishment of
11 Indian title, that would mean the passing from Indian
12 hands, which is what the 8th Circuit has, um, conclusively
13 held. I think at this point, and according to Army Corps,
14 the 8th Circuit has just said, you know, we're actually not
15 going to speak on or haven't had the occasion to speak on
16 what happens if the land is just patented in fee but still
17 held, um, by -- or, in Indian ownership. So, again, for
18 purposes of this case, it doesn't matter, 'cause the 8th
19 Circuit has said once it passes out of Indian ownership,
20 for sure, it's no longer an allotment under subsection (c).
21 Um, I think that's all covered by this Court's Selwyn
22 decision. I think the Selwyn decision did a nice job of
23 saying what I'm trying to say but in a very concise manner,
24 so I appreciate that.
25 The only thing that really wasn't covered in Selwyn was

1 subsection (b).
2 So all dependent Indian communities within the borders of
3 the United States, whether within the original or
4 subsequently acquired territory thereof, and whether within
5 or without the limits of any state, that codified United
6 States v. Sandoval. And United States v. McGowan.
7 And according to, um, Alaska v. Native Village of Venetie,
8 a Supreme Court of the United States case, there are two
9 requirements to be a dependent Indian community. First,
10 federal set-aside.
11 That means that the land has to be held in trust or, um,
12 otherwise set-aside by the federal government.
13 Now in Sandoval, which was also brought up by the --
14 THE COURT: Let's go to the Treaty of 1858.
15 MS. WENZEL: Okay.
16 THE COURT: That was a set-aside.
17 MS. WENZEL: Yes. I would agree (nods head).
18 THE COURT: But that's, that's 1151(a)?
19 MS. WENZEL: Yes. So the federal set-aside requirement
20 because under subsection (b), it's not reservation and not
21 an allotment. So they are supposed to be --
22 THE COURT: It's an odd situation.
23 MS. WENZEL: -- I don't want to say mutually exclusive, but
24 they are, they have three different meanings, right? And I
25 think they are supposed to, for the most part, or be

1 separate or at least for purposes of understandability, be
2 separate. So yes, that is a federal set-aside, but like
3 you said, that would be under subsection (a).
4 So the examples of a federal set-aside is land, um,
5 held in trust by the United States for the benefit of the
6 Tribe. Or, um, I think the example in Sandoval was, um,
7 the Pueblos in New Mexico. And how the -- I don't think it
8 was technically qualified -- or classified as a
9 reservation. But they had noted that that was the Tribe's
10 land. And it was interesting 'cause in Sandoval, they
11 talked about it being held in fee. But then they also
12 said, but not really. Um, because there is still the
13 restriction on alienation. So that is what sets it apart
14 from an allotment.
15 And that federal set-aside is important because, um,
16 Congress has -- how it's explained in Venetie, Congress has
17 the plenary power over Indian affairs. And so there has to
18 be some move by Congress or some action. So that's, again,
19 the held in trust, um, otherwise set-aside, I think the
20 miscellaneous trust lands in Podhradsky are all examples.
21 Here, we don't have that. This is privately owned land.
22 It was a federal set-aside at one point, but it is no
23 longer now. And the 8th Circuit has conclusively held
24 that.
25 THE COURT: Well, the Supreme Court held that it was

1 diminished.
2 MS. WENZEL: Yes.
3 THE COURT: And you're saying the subsequent rulings in
4 Gaffey and Podhradsky further diminished that set-aside?
5 MS. WENZEL: Yes. Yes.
6 They further diminished the reservation, technically. Or
7 said that the Act of 1894 further diminished the
8 reservation, meaning anything that was diminished, so their
9 individual allotments that had passed out of Indian hands
10 were not longer a federal set-aside. Now that doesn't mean
11 they couldn't become a federal set-aside. As the Court in
12 Podhradsky explained, or the facts kind of had to do with,
13 I guess you could say, because the federal government can
14 acquire trust lands for the benefit of the Tribe.
15 But here, in this case, the land and question -- in
16 question in the City of Lake Andes has not been, um, I
17 guess, it has not been purchased by the federal government
18 and held in trust.
19 Both requirements are required. The State's position
20 obviously is that the first one is not.
21 The second one also is not fulfilled here. And that's
22 federal and super -- superintendence over the community.
23 Its important to focus on "community" in that meaning.
24 In Venetie, in note 5, um, the Tribes at issue argued that
25 in the term dependent Indian community referred to

1 political defendants -- or "political" -- excuse me,
2 dependents, meaning the Tribe is dependent on the federal
3 government. And the Court said no, that's not what we
4 mean.
5 That's why the fed -- again, why the federal set-aside
6 requirement is also -- 'cause we're looking at the land in
7 question. Is the land in question dependent on the federal
8 government?
9 Dependent on the federal government can mean obviously that
10 land held in trust, because at that point, um, and I -- I'm
11 forgetting which case it was in, but it was in my brief, so
12 I do apologize.
13 Um, it possibly was the Owen case.
14 Or no, the Owen case was not. So it was Podhradsky, I
15 apologize. The BIA handled, um, any leases on the land.
16 Any proceeds were handled by the federal government but
17 then went back to the Tribe. So that's the type of federal
18 superintendence.
19 Now, whether the Tribe is dependent on the federal
20 government or not, um, again, isn't necessarily at issue
21 here. Because the Tribe does not compose the grand
22 majority of the town. Right? Does the town benefit, as
23 Defendant alleges, from some federal programs indirectly?
24 Sure. Of course. But by that argument, every town in
25 South Dakota where a tribal member lives is, therefore, a

1 dependent Indian community. That's not the case.
2 Um, here, the school is, ah, Andes Central. The, um,
3 Charles Mix County provides the police services.
4 Charles -- Charles Mix County, um, or the City of Lake
5 Andes, excuse me, again, I forget, provides the fire
6 services.
7 The services are provided by the State or a political
8 subdivision of the state by and large, so the community of
9 Lake Andes is not dependent on the federal government. So
10 this is not a dependent Indian community under subsection
11 (b).
12 THE COURT: What about the fact that, when I was reading
13 your brief, I wondered for 100 and some years, there's been
14 a municipal government that runs this community, and they
15 assess taxes on all property within the community. How
16 does that play in the federal superintendence analysis?
17 Because there's a government. A non-Indian government that
18 assesses non-Native tax burdens on property.
19 MS. WENZEL: I think that goes in the way of not federal
20 superintendence because -- and I, I apologize for not
21 having a better answer for this, but my understanding is
22 that if it is federal land, it can't be taxed by the state.
23 THE COURT: Correct.
24 MS. WENZEL: If it is Indian land, it can't be taxed by of
25 the state. So if it is being taxed by the state, or the

1 municipal government, then it's not under federal
2 superintendence so that's just one more factor showing it's
3 not under federal superintendence. And those tax dollars
4 are what goes to support the community.
5 Um, so under those, those are the only three ways we can
6 have Indian Country. And none of those fit in this case.
7 So the State properly has jurisdiction over this case.
8 THE COURT: All right.
9 Anything else?
10 MS. WENZEL: Not at this point.
11 THE COURT: Mr. Volesky.
12 MR. VOLESKY: Thank you, Your Honor. Just briefly.
13 In another lens, that is constitutional law, we also start
14 with the text, history, precedent, policy. Federal laws
15 applied to Indians also starts with the text. And it
16 doesn't need to go any further.
17 As to what happened in Lake Andes over the last 120 years,
18 the State government encroaching upon tribal rights, that
19 doesn't make it right. The Court spoke to that very well,
20 I think, in McGirt.
21 And just because a state encroaches on federal rights over
22 a course of a hundred years, or on Native tribal rights
23 over the course of many years, doesn't make it right. And
24 the State wants this Court to again rely on, skip over the
25 text. Skip over the history, go straight to precedent or

1 rely on precedent. And it speaks of courts diminishing the
2 reservation.
3 Courts have no proper role in diminishing a reservation.
4 That's a job of Congress.
5 Again, we come back to the text. 1858 Treaty. Set-aside.
6 Recognizing Indian title.
7 Again, in the 1894 Act, set-aside specifically recognizing
8 the allotments, guaranteeing them to the Tribe in
9 perpetuity. The State has pointed to no language in
10 18 -- in the Act of 1894 that supports their proposition in
11 this case (nods head).
12 Yankton Sioux Indian title was recognized. The
13 allotments were established. Congress hasn't changed that.
14 Thank you, Your Honor.
15 THE COURT: Um, and I agree with your assessment that the
16 primary focus here is on two important documents. One is
17 the treaty itself, and then the congressional act that
18 adopts it.
19 And when this, when this reservation's issues went up to
20 the U.S. Supreme Court, um, that's what they were doing is
21 trying -- there was a disagreement on what the language
22 meant in the Act. The congressional act.
23 And don't they have the authority to interpret the language
24 of a congressional act? Isn't that what the U.S. Supreme
25 Court did?

1 MR. VOLESKY: Absolutely and that was specifically limited
2 to the ceded lands. That lands at issue in this case are
3 not ceded lands. The Supreme Court went no further than
4 that, and that, as a matter of fact, the Supreme Court
5 indicated that the 1894 Act is evidence -- the language, is
6 evidence of Congress's intention to maintain a continuing
7 reservation, continuing Tribe.
8 THE COURT: But diminished?
9 MR. VOLESKY: Diminished to the extent of the ceded lands.
10 And in the same Act, the allotments were specifically
11 recognized and promised in perpetuity.
12 THE COURT: The 8th Circuit can do the same thing?
13 MR. VOLESKY: Correct.
14 THE COURT: And they did on the allotments, and a number of
15 other issues in Gaffey and Podhradsky?
16 MR. VOLESKY: So in Gaffey II, the 8th Circuit did speak to
17 the subject. It cited Stands. And it recognized that the
18 Stands citation includes classic dicta. The supreme -- or
19 the 8th Circuit came back in Podhradsky, it was all in the
20 same case line, that applied to that case line. And the
21 Supreme Court specifically limited -- or the 8th Circuit
22 specifically limited its holding to trust lands only. And
23 it recognized that it relied on certain assumptions
24 including ditka -- dicta.
25 THE COURT: So, is part of your argument then -- and I, and

1 I addressed that head-on in, in Selwyn, um, when they
2 decided the Yankton Sioux case, in the Supreme Court and
3 the 8th Circuit, they interpreted the language and they
4 used these interpretive tools, history and, you know, how'd
5 the government treat it.
6 Do you think that after McGirt, because they use these
7 interpretive tools, that they -- if it went back, it would
8 come out with a different result?
9 MR. VOLESKY: Ah, I think it would be what issues are
10 raised and actually litigated and decided in that case.
11 Um, will it change the result in the previous cases? I, I
12 can't speak to that. I think in a new case that comes
13 before the Court, the Court should pay attention to what
14 the United States Supreme Court said in McGirt. And make a
15 decision from there based on the texts and applying Indian
16 law canons.
17 THE COURT: All right.
18 Anything else, Mr. Volesky?
19 MR. VOLESKY: No, Your Honor.
20 THE COURT: All right. The motion's submitted.
21 I'm going to take it under advisement. I'll get a decision
22 out to you within a couple weeks.
23 MS. WENZEL: Could I have a brief reply, Your Honor? A
24 response? I promise, it's brief.
25 THE COURT: The Supreme Court wouldn't let you do that, you

1 know?
2 MS. WENZEL: Yes.
3 THE COURT: He argues, you argue, and then he argues.
4 MS. WENZEL: And if --
5 THE COURT: I asked some questions that were a little bit
6 off the topic, so I'll give you a short moment, and then
7 Mr. Volesky gets the last word. It's his motion.
8 Go ahead.
9 MS. WENZEL: Absolutely fair, Your Honor.
10 I did just -- and I apologize for not bringing this up in
11 my initial response.
12 Um, the defense argues that through the 1894 Act, um, and
13 subsequent -- or not "subsequent" but, um, other contextual
14 things that occurred at the same time the Act was passed
15 and negotiated, that the land was guaranteed to the Indians
16 in perpetuity.
17 The State obviously disagrees with that. The specific
18 language says, um, the Article XIII in the 1894 Act says,
19 guarantees the undisturbed and peaceable possession of
20 allotted lands. And then Article XIV confirms the
21 allotments -- confirms the allotments and guarantees that
22 Congress shall never pass any act alienating these allotted
23 lands.
24 Now what the 8th Circuit has found -- or concluded, is that
25 Congress hadn't passed a subsequent act. Instead, when the

1 lands were patented in fee, or whether -- when they passed
2 out of Indian hands, that is what alienated the land, not
3 some act of Congress. The only thing that language served
4 to do was to say we're not going to come and take it from
5 you. And if you want to pass it on yourself, that's
6 obviously up to the person -- or, the owner in fee.
7 Also in Podhradsky, they talked about how, um, there's the
8 quote, um, about how the Great White Father has told us
9 that we -- you will not be forced to part with your land
10 unless you want to. He does not want you to sell your
11 homes. He wants you to keep them forever.
12 And when, when title was given to an allottee, under the
13 Dawes Act, in fee, that allowed the person to keep it
14 forever if they wanted to. That in no way guarantees an
15 individual allottee the right to that land in perpetuity.
16 And I think that's important because when we're -- if we
17 are going to relook at the different things in the Act, we
18 have to look at those words, um, themselves.
19 So it says nothing about "in perpetuity" or anything else,
20 instead it talks about "fee." Again, the whole bundle of
21 sticks.
22 Bruguier also had a, the Bruguier case from the South
23 Dakota Supreme Court also talked about why the land was
24 going to be patented in fee. And the understanding at the
25 time, that that was the only way to make sure that the

1 individual Indians could keep that land and that the
2 federal government wouldn't come back and take it. So that
3 is how, I guess, the State would advocate for that to be
4 interpreted.
5 And I think otherwise the Court hit on the fact of the 8th
6 Circuit used the language to interpret. I'm not asking the
7 Court just to go to precedent and do just what they say
8 because they said it. They interpreted the language. They
9 went through the different acts. They pointed out the
10 parts of the Act. Um, the plain language -- and I did put
11 in my brief where all of the different 8th Circuit and the
12 South Dakota Supreme Court looked at the plain language --
13 so McGirt did not change any of that.
14 Instead, it reaffirmed that. Yes, that is absolutely a
15 canon of construction. You start at the plain language.
16 The fact that they went on to other stuff doesn't matter
17 because, as the conclusions in all of the cases show, they
18 determined under the plain language that this is what this
19 meant and then they did go on to say this is either
20 supported by or not overcome by the other considerations.
21 And that's what I have.
22 THE COURT: Mr. Volesky?
23 MR. VOLESKY: Your Honor, the South Dakota Supreme Court in
24 Bruguier interpreted a very materially distinguishable Act
25 with respect to the Rosebud Tribe, which did specifically

1 provide for extinguishment and diminishment and they have
2 that language. The South Dakota Supreme Court did not
3 discuss Article XIII of the 1894 Act. They did not discuss
4 Article XIV of the 1894 Act. Article XIII guaranteed the
5 allotted lands and it specifically provided for all the
6 rights of the Tribe. Article XIV guaranteed that Congress
7 shall never alienate any of these lands from the Tribe.
8 Neither was article --
9 THE COURT: She said Congress won't, but that doesn't mean
10 an individual Native American couldn't do it on their own.
11 MR. VOLESKY: Yes, an individual -- no. No, Your Honor.
12 An individual Native American cannot on its own divest
13 sovereignty. That takes an act of a sovereign. That takes
14 an act of Congress.
15 I would also just finally note that in Gaffey II, Articles
16 XIII and Articles XIV, again, were not addressed
17 substantively. And that that was the issue in Gaffey II,
18 was reservation specifically under subsection (a). So, the
19 Court proceeded on assumption with respect to title in fee
20 and what happened to it.
21 Start with the text. The text is clear. Thank you, Your
22 Honor.
23 THE COURT: Thank you, counsel.
24 I'll get a decision out to you within a couple weeks.
25 That concludes this hearing.

1 MR. VOLESKY: Thank you, Your Honor.

2 MR. COTTON: Thank you, Judge.

3 THE COURT: You bet.

4 (The proceedings then conclude at 2:53 p.m. on

5 September 11, 2024.)

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10 STATE OF SOUTH DAKOTA)
:ss REPORTER'S CERTIFICATE
11 COUNTY OF DOUGLAS)

12 This is to certify that I, Melissa A. Odens, RPR,

13 Official Court Reporter and Notary Public in and for the

14 above-named county and state, do hereby certify that I

15 reported the proceedings of the foregoing case, and the 28

16 pages, inclusive, contain a full, true, and accurate record

17 of the proceedings so had.

18 Dated at Armour, South Dakota, this 6th day of

19 March, 2025.

20 My commission expires: April 4, 2026

21

22

23 /s/ Melissa A. Odens
Melissa A. Odens, RPR
Official Court Reporter
24 and Notary Public

25