In the

Supreme Court of the United States

Cheryl Spider DeCoteau,
natural mother and next friend
of Robert Lee Feather and
Herbert John Spider, ets.

Petitioner,

No. 73-1148

v.

The District County Court For
The Tenth Judicial District,

Respondent.

Washington, D. C.
December 16, 1974

Pages 1 thru 45

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IN THE SUPREME COURT OF THE UNITED STATES

CHERYL SPIDER DeCOTEAU, natural mother and next friend of ROBERT LEE FEATHER and HERBERT JOHN SPIDER, etc., Petitioner,	:	
v.	:	No. 73-1148
THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT, Respondent.	:	

Washington, D. C.,

Monday, December 16, 1974.

The above-entitled matter came on for argument at 1:17 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BERTRAM E. HIRSCH, ESQ., Association on American Indian Affairs, Inc., 600 New Hampshire Avenue, N.W., Washington, D. C. 20037; on behalf of the Petitioner.

WILLIAM F. DAY, JR., ESQ., Special Assistant Attorney General of South Dakota, 422 Main Street, Winner, South Dakota 57580; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1148, DeCoteau against District County Court.

Mr. Hirsch, you may proceed whenever you're ready.

ORAL ARGUMENT OF BERTRAM E. HIRSCH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HIRSCH: Mr. Chief Justice, and may it please the Court:

This case is here on a writ of certiorari to the Supreme Court of the State of South Dakota.

The issue presented is whether the Act of March 3, 1891, opening for non-Indian settlement the unallotted and unreserved lands in the Lake Traverse Reservation, thereby conferred jurisdiction over Indians on the State of South Dakota -- gave the State of South Dakota jurisdiction over Indians.

Since the State of South Dakota has never acquired jurisdiction in Indian country pursuant to either the 1953 Act of Congress, Public Law 280 that was mentioned here earlier, or under the more recent Indian Civil Rights Act, the Act of April 11, 1968, the issue here really is whether the 1891 Act in any changed the boundaries of the Lake Traverse Reservation, whether or not the open portions of the Reservation are still in Indian country.

The facts of the case are really rather simple,

with regard to Mrs. DeCoteau and her two children.

In December of 1971, the State of South Dakota started dependency and neglect proceedings against Mrs. DeCoteau, the aim of which was to terminate her parental rights to her two children, Herbert John Spider and Robert Lee Feather.

The State was seeking authority to post those children for adoption.

In August of 1972, the District County Court, before which this dependency and neglect proceeding was pending, issued a custody order that continued a foster care placement for Herbert John Spider and validated a foster care plasement that was then in existence for Robert Lee Feather.

At that time a motion was made to the District County Court judge that the case be dismissed for the sole reason that the acts, or many of the acts where the alleged dependent and neglect occurred, the places where the acts occurred were in the open portions of the Reservation.

QUESTION: Mr. Hirsch, enlighten me: why is that particularly relevant? I had thought that domicile in an adoption case was the standard, not where the acts occurred.

MR. HIRSCH: Well, this case never reached the point of adoption. In fact, the argument on the merits of whether or not there was in fact a dependency and neglect situation had never been completed. There was never an adjudication of

the pendency and neglect. It was in the midst of that proceeding on the merits that the jurisdictional objection was raised.

QUESTION: I still ask why -- why is the place where the act took place pertinent?

MR. HIRSCH: Well, it's pertinent in terms of whether we are talking here about State jurisdiction over the Indian mother and her two children, or whether we are talking about exclusive tribal jurisdiction.

QUESTION: Incidentally, does the record show where she was domiciled?

MR. HIRSCH: The record does not show where she was domiciled. The record shows that she is an enrolled member of the Sisseton-Wahpeton Sioux Tribe, that her two children are enrolled members, and that it was stipulated in the Circuit habeas corpus proceeding that 50 percent of the acts giving rise to the dependency and neglect proceeding occurred on federal trust lands, and approximately 50 percent occurred on lands that were open to settlement under the 1891 Act.

But I might add that that stipulation was made solely for the purpose of the habeas corpus proceeding in the Circuit Court and is not necessarily a statement by which I would be bound if we had to proceed once again on the merits in the District County Court.

The District County Court denied the motion and Mrs. DeCoteau then proceeded, by way of habeas corpus in the District County -- in the Circuit Court, alleging the exclusive ground of lack of jurisdiction in the District County Court to proceed with the dependency and neglect proceeding and to issue orders regarding the custody of her two children.

The Circuit Court found that the areas of land that were open to settlement by the 1891 Act were no longer part of the reservation, were not longer Indian country, and that therefore the State District Court had jurisdiction to issue the custody orders pertaining to these two children, and had jurisdiction to entertain the dependency and neglect proceeding.

The Supreme Court of South Dakota --

QUESTION: Mr. Hirsch, isn't the District Court the court of general jurisdiction in the South Dakota State court system?

MR. HIRSCH: The District Court is the court of jurisdiction in family matters. The Circuit Court also has general jurisdiction in other types of cases.

QUESTION: And is there appeal from the District Court to the Circuit Court?

MR. HIRSCH: I believe that it is possible to appeal from the District Court to the Circuit Court, but the statutes also allow, in some instances, for a direct appeal to the Supreme Court.

But we didn't choose to follow that route. We started a collateral attack on the District Court proceeding, by proceeding in Circuit Court with a habeas corpus. So we never did finish the trial on the merits of the dependency and neglect. That case, in fact, is pending resolution of this jurisdictional issue.

It was stayed pending resolution of this jurisdictional issue.

The Supreme Court of South Dakota, needless to say, affirmed the Circuit Court and held that the lands that were open for non-Indian settlement under the 1891 Act were no longer part of the Reservation.

The place to start, I believe, with this case is with the Treaty that estab lished the Lake Traverse Reservation. That Treaty is the Treaty of February 19, 1867. And in Article 3 of that Treaty, the Congress ratified an agreement with the tribe that gave the tribe a very clearly defined reservation. And it described the reservation in the Treaty as a permanent reservation.

The reservation is located in the northeast corner of South Dakota, with a small portion of it in the southeast corner of North Dakota. It's triangular in shape, basically.

Article 10 of the same 1867 Treaty reserved to the tribal chiefs and head-men the right to make rules and regulations for the security and safety of tribal members;

the right, basically, to tribal self-government.

There were -- from 1867 to 1891 there were no Acts or any agreement with the tribe that pertained to the boundaries of this reservation.

And then in 1891, after negotiating an agreement with the tribe, Congress ratified the agreement that opened for settlement the surplus lands on the reservation.

Now, the surplus lands are the lands that remain after allotment and after various other reservations are made, for example, for schools, religious purposes, for the BIA agency. It was not the BIA agency in those days, but the equivalent.

After 1891, it's agreed between the parties, I believe, that there is no other Act that could have reduced the Lake Traverse Reservation in size or disestablish the open portions of it.

So what we're talking about is whether or not the 1891 Act had that effect.

We, of course, maintain that it did not.

And I'd like to start by going into the express language of the Act.

This Court, in Mattz v. Arnett, at 412 U.S., has held that the test is whether -- the test for termination of a reservation or for disestablishment of any portion of it, is whether the language of the Act expressly terminates the

reservation or whether such termination can be inferred from a clear legislative history or surrounding circumstances.

The only two sections in the 1891 Act that are at all pertinent to the issues here are Sections 26 and Section 30.

Now, Section 26 is basically a straight-forward verbatim transcription or rendition of the agreement that was reached with the tribe in 1889. One of the -- Article 1 of that agreement, which is repeated in Section 26 of the Act, says that the tribe cedes, sells, relinquishes and conveys its title to these surplus lands to the United States.

QUESTION: That's pretty strong language, isn't it?

MR. HIRSCH: It is, Your Honor, but I think that we have to understand what the rest of that section says, and read that in context. And I'm going to do that in a second. And I think we'll see that the language is much less strong than it would on the face appear.

Section 30 of the Act, which is the only other Act affecting the issues here, says that the lands that are ceded and sold, relinquished and conveyed shall be opened for settlement under the homestead and townsite laws of the United States, except for land sections 16 and 36, which are reserved for school purposes and made subject to the laws of the State wherein located.

Now, the important thing, to answer your question,

Mr. Justice Blackmun, about Section 26 and the cession language, is that in Section 26 the section recites section 5 of the General Allotment Act. And it says that this entire agreement is entered into under the General Allotment Act. And this Court, in Mattz v. Arnett, gave a very, very careful analysis of the General Allotment Act and concluded, at 412 U.S. page 496, that -- and I'm quoting -- that the General Allotment Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system, and the trust status of Indian lands, but to allot tracts to individual Indians for agricultural and grazing -- agriculture and grazing. When all the lands --

QUESTION: What are you reading from? I'm looking at your Appendix --

MR. HIRSCH: I'm reading from the Mattz decision, at page 496.

QUESTION: Oh, you're reading from a --

MR. HIRSCH: From the actual decision of the Court. I'm not sure whether I have that in --

QUESTION: What, in Mattz?

MR. HIRSCH: I'm reading the Mattz decision of this Court.

QUESTION: I see.

MR. HIRSCH: A quote from the Mattz decision.

QUESTION: I thought you were reading from part of Section 26.

MR. HIRSCH: No, I'm not.

The Court said that when all the lands had been allotted and the trust expired, the reservation could then be abolished.

Now, with the Lake Traverse Reservation, the trust has not expired. In fact, the -- by two Executive Orders of the President, one in 1914 and one in 1924, the trust period within the boundaries of the Lake Traverse Reservation was expressly extended, and it's been extended until right at this very time.

So the fact that this is a special kind of session, it's not comparable to what might be referred to as an absolute session, where the tribe is very, very clearly giving up certain lands forever. This is a session under the General Allotment Act, and that's a very special kind of session.

In fact, in Seymour v. Superintendent, which affects the south half of the Colville Reservation, the language in the 1906 Colville Act, that this Court interpreted in that case, said the lands would be sold and disposed.

And this Court found that because it was an agreement that was reached under the -- or, rather, it wasn't an agreement in that case, but the fact that the lands were to

be sold and disposed under the General Allotment Act placed that in a different category. The same situation existed in Mattz, where Congress had an 1892 Act that disposed of certain lands within the Hooper Valley or Klamath River Reservation, under the General Allotment Act.

QUESTION: Mr. Hirsch.

MR. HIRSCH: Yes?

QUESTION: Does the record indicate the number of square miles that are involved in this claimed reservation?

MR. HIRSCH: The record of the case itself, I don't believe does, unless Exhibit No. 1 might refer to it. Exhibit No. 1 is a 1936 map of the -- an official map of the Department of the Interior, that shows -- and it's the map that's in use today by the Department of the Interior -- it shows the reservation, and with an identical description to the reservation that was established in 1867.

Now, I don't know whether the legend of that map contains an acreage total.

QUESTION: Is it this -- the same as this or not?

MR. HIRSCH: No, it's not.

QUESTION: This was given to us in a different case, but it is the United States Department of Interior, Bureau of Indian Affairs, Indian Land Areas, General.

MR. HIRSCH: Right.

That map is a map of the United States.

QUESTION: Right.

MR. HIRSCH: And imprinted on the map are the Indian land areas.

QUESTION: Right.

MR. HIRSCH: Exhibit No. 1 is a map only of the triangular section --

QUESTION: I see.

MR. HIRSCH: -- known as the Lake Traverse Reservation. And that's the map that the BIA uses today.

QUESTION: I see.

QUESTION: Does the record indicate the number of Indians living in the area now, or the number of non-Indians living in the area now?

MR. HIRSCH: No, it doesn't.

I know the information, if you want it.

QUESTION: Well, fine. Would you give it?

MR. HIRSCH: Yes. The reservation contains 918,000 acres, approximately; it's 918,300.

QUESTION: You mean as originally -- as originally?

MR. HIRSCH: That's right. That's right.

And the --

QUESTION: What's that? Roughly 150 square miles.

MR. HIRSCH: I -- it's 120 miles from north to south, and it's -- at the widest point from east to west it's about 40 miles, I believe.

The Indian population on the reservation today is approximately 3300 tribal members living on or adjacent to the reservation.

QUESTION: What's the total population?

MR. HIRSCH: Of the reservation area, Indian and non-Indian?

QUESTION: Yes.

MR. HIRSCH: It's approximately 30,000.

QUESTION: That would be --

MR. HIRSCH: Or a little less.

QUESTION: -- would be 27,000 difference,if you prevail here, be subject to tribal jurisdiction?

MR. HIRSCH: No. Not at all. This case only raises the issue of the tribe's right to have jurisdiction over its own membership.

QUESTION: Only enrolled membership?

MR. HIRSCH: Only -- that's correct.

QUESTION: Well, now, that must be -- that must follow from the 1891 Act, something happened in the 1891 Act, then, to the reservation?

MR. HIRSCH: That's right.

QUESTION: Because if this were a reservation -- if the reservation hadn't been disturbed in any way, the tribe's authority would extend to everybody on the reservation.

MR. HIRSCH: The tribe's authority would extend to

all the Indians.

QUESTION: And everybody else.

MR. HIRSCH: If the reservation had not been disturbed in any way.

QUESTION: Yes.

MR. HIRSCH: Well, --

QUESTION: Well, wouldn't it?

MR. HIRSCH: The issue of whether or not the tribe has jurisdiction over non-Indians on -- on --

QUESTION: On reservations.

MR. HIRSCH: -- what's generally an Indian country, is an issue that is presently being litigated in several courts and is not really clear. It's clear that the tribe has certain jurisdiction over non-Indians under certain circumstances.

QUESTION: Well, I'll put it to you a different way.

After the 1891 Act, the tribe's authority over ceded -- over the land that was ceded, was different than it was before; wasn't it?

MR. HIRSCH: What we are maintaining here is that --

QUESTION: I know what you're maintaining.

MR. HIRSCH: Yes.

QUESTION: I know you're maintaining you've got authority over Indians.

Did the 1891 Act change the tribe's authority in any way over the land and those living on it within the area of the reservation as you claim it to be?

MR. HIRSCH: I don't believe it did. I don't believe it did.

The tribe's authority was given to it by the 1867 Treaty, and I don't think that the 1891 Act in any way changed the 1867 Treaty.

QUESTION: Well, then, under Williams v. Lee, certainly the Indian authorities would have a great deal of authority over non-Indians within the reservation area, wouldn't they?

MR. HIRSCH: Williams v. Lee was a case, as I recall, where a non-Indian was suing an Indian for recovery of money that was owed for purchases at a store on the Navajo Reservation.

QUESTION: And they said he couldn't sue in the State courts?

MR. HIRSCH: They said he couldn't sue in the State court, because there was an Indian defendant in the case.

QUESTION: Well, would this be true here, too, that from now on the non-Indian couldn't sue in the South Dakota District Court, if he lived within this reservation area?

MR. HIRSCH: If non-Indians live within the reservation, and they have a civil action of the nature, as

was dealt with by this Court in Williams v. Lee, yes.

And they would have to sue in the tribal court, and there is a tribal court that has been exercising that jurisdiction since August of 1972.

QUESTION: And this reservation covers parts of five different counties in South Dakota, doesn't it?

MR. HIRSCH: That's correct. And it also has a little strip in North Dakota.

The Section 26 of the 1891 Act says that the reservation or --

QUESTION: Well, just to make sure that --

MR. HIRSCH: Yes.

QUESTION: You concede or you, whether you call it a concession or not, but you think the fact is that here the tribe on this land would have no authority over non-Indians?

MR. HIRSCH: No, I'm not saying that at all. I'm saying that --

QUESTION: On this, on the ceded land.

MR. HIRSCH: That on the ceded lands it's definitely clear, in terms of our position here today, it's definitely clear that the tribe has complete civil jurisdiction over non-Indians when an Indian is a defendant in a civil action, and perhaps even when a non-Indian is a defendant in a civil action.

QUESTION: So your answer to Mr. Justice Blackmun's

question a while ago was that, yes, this case does involve all those people, all those non-Indians living on the reservation.

MR. HIRSCH: But not necessarily to the all-inclusive extent of what Mr. Justice Blackmun was perhaps getting to; and that is, that where the action is between two non-Indians, then the tribe's jurisdiction --

QUESTION: What's the authority of the State over a non-Indian living on ceded land?

What if it's a -- what about the State's criminal laws? For example.

MR. HIRSCH: The State's --

QUESTION: Or its civil law or its child neglect law.

MR. HIRSCH: Right. Right.

QUESTION: With respect to a non-Indian in this ceded country?

QUESTION: Just take this case, if these had been non-Indians, in other words.

QUESTION: Exactly.

MR. HIRSCH: If he's a non-Indian, the State law applies to him, on the reservation.

QUESTION: Why, if this is a reservation?

MR. HIRSCH: The only way in which the tribe holds the reservation is to have jurisdiction over its own membership on the reserv ation and to have jurisdiction over non-Indians

where the actions of non-Indians affect essential tribal relations. That that's what the courts --

QUESTION: But they don't, in the cited cases, do they --

MR. HIRSCH: -- that's what the Court said in Williams v. Lee.

QUESTION: Beg pardon?

MR. HIRSCH: I say that's what this Court said in Williams v. Lee.

QUESTION: Well, Williams v. Lee said the -- if I have the case in mind properly -- said that the State courts did not have jurisdiction. And that was a case where a non-Indian plaintiff was suing an Indian defendant, as I remember it. Right?

MR. HIRSCH: A non-Indian plaintiff suing an Indian defendant; that's correct.

QUESTION: Said the State courts did not have jurisdiction.

MR. HIRSCH: That's right. They had to go to tribal court.

QUESTION: But there's a --

MR. HIRSCH: And I maintain the same situation would exist here, if that situation occurred on this reservation, on the ceded lands.

QUESTION: Yes, but the question is, as put by my

brother White, what if, in this very case, these people had been non-Indias, that this mother had been a non-Indian and her children had been non-Indians and the acts had occurred just as they did occur?

If this is a reservation, that would have given the tribal council and its courts jurisdiction, an exclusive jurisdiction, would it not?

QUESTION: This isn't a -- isn't a 280 law State either, is it?

MR. HIRSCH: No, it's not. No, it's not.

Now, the thing is that for the tribe to acquire jurisdiction over non-Indians, there would have to be an Act of Congress that conferred that jurisdiction on the tribe.

QUESTION: But they have it if it's an Indian reservation, don't they?

MR. HIRSCH: The Treaty that established this reservation specifically says, in Article 10, that the chiefs and head-men of the tribe can make rules and regulations for the government of its own membership, within the boundaries of the reservation.

Now, how far that extends is an issue that is, perhaps, an open issue.

QUESTION: Was that any different than in Williams v. Lee? I mean, was there a specific Act of Congress in Williams v. Lee that gave the Navajos the authority to regulate

non-Indians on the reservation?

MR. HIRSCH: No. The situation there is that there was an Indian defendant, and the law as it's come down, federal Indian law, does not give a tribe jurisdiction in a case where both parties are non-Indians. But where one of the parties is an Indian, then you have a different situation. And that's the essence of the holdings of this Court.

QUESTION: Well, what case particularly said that?

MR. HIRSCH: Well, you have --

QUESTION: Or any case.

MR. HIRSCH: Okay. Well, in Williams vs. Lee, that's one case that says that.

QUESTION: Which held that the State did not have jurisdiction?

MR. HIRSCH: That the State does not have jurisdiction.

QUESTION: Now, are there any --

MR. HIRSCH: Because there was an Indian defendant.

QUESTION: Yes. Now, I'm interested in any case or cases that you know of that say that the State does have jurisdiction over people living on an Indian reservation.

?

MR. HIRSCH: The cases of Draper and McBratney, they were criminal cases where non-Indians were involved. And the area of criminal jurisdiction is defined by 18 U.S.C. 1151, and that's the case that you have next in Feather, where

the Major Crimes Act applies to --

QUESTION: Well, that's federal jurisdiction.

MR. HIRSCH: That's right.

QUESTION: I'm talking about State. Well, just any case or cases that say that the State may exert its power of its law, criminal or civil, over people living on an Indian reservation.

MR. HIRSCH: For a State to get jurisdiction, be it civil or criminal, over Indians on an Indian reservation, --

QUESTION: No, no. No. I think -- I don't want to be repetitious, but perhaps -- let me just say it once more: over people living on an Indian reservation, non-Indians, let's assume they are. And this is not a Public Law 280 State.

MR. HIRSCH: I think that the answer is that a State has jurisdiction over all the people within the State, except as Congress otherwise states. And with regard to Indians, Congress has otherwise stated.

This particular case only, though, involves the issue of the tribe's right to control its own people, to make rules and regulations for its own people.

QUESTION: But I think the questions from the bench indicate that the significance of this case may go much further. That's the point of the questions, as I understood them.

MR. HIRSCH: Well, to be honest, I'm not exactly -- this is a very developing area of law, and I'm not exactly sure in what direction it's going to go in the next few years. There's a case pending in the Ninth Circuit now that raises these issues, and maybe it will reach this Court; I don't know.

This area of law has really not been litigated, and it's first coming to the fore now.

But with regard to this 1891 Act, I think that it's definitely clear that it did not reduce the size of this reservation, so as to take away from the tribe its jurisdiction over its own people.

Congress has passed three Acts in recent years that continue to recognize the boundaries of this reservation. In 1972 there was a Claims Distribution Award Act, and that Act, in the legislative history,specifically refers to the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, and the Act gave one million dollars in a lump sum to the tribe and the rest was distributed per capita.

In 1974 there were two Acts that were passed, one of which restored to tribal ownership ninety, approximately ninety acres of land that had been in federal ownership.

This Court, in Mattz, thought that it was significant that a 1958 Act had restored from federal ownership to tribal ownership certain lands within the Klamath River Reservation.

In 1974 also there was an Act that allowed the tribe

to consolidate its land-holdings within the reservation. And if you look at the -- if you look at the map of the reservation that the Solicitor General attached to his brief, you can see that the tribal land-holdings are scattered all across the reservation.

And if, in fact, the tribe has been given authority by Congress, which it has been this year, to consolidate its land-holdings, if it wanted to consolidate the land-holdings in the southern tip of the reservation with those to the north, it would have to buy up a considerable portion of land.

I think it's clear from the legislative history of these Acts, which refer to the reservation as a V-shaped reservation located in the northeastern corner of South Dakota and the southeastern corner of North Dakota, it's clear that Congress in 1974, in passing these laws, thought that the reservation continued to ex ist in the way it was established in 1867.

More than that, in 1892, and consistently from that time on, every annual report of the Commissioner of Indian Affairs and the Secretary of the Interior have recognized the reservation as undiminished.

The Proclamation of the President opening the reservation did the same, talked about lands embraced within the reservation. And the Secretary of the Interior, in 1895, in an opinion, said that -- he referred to ceded lands lying

within the reservation boundaries. That's the decision of Edward Parant.

I see that my time is up. Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hirsch.

Mr. Day.

ORAL ARGUMENT OF WILLIAM F. DAY, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DAY: Mr. Chief Justice, and may it please the Court:

Your Honors, if this land in question, the boundaries thereof, the perimeters, are an Indian reservation, the State of South Dakota doesn't have any jurisdiction. If this land, except for the allotments thereon, has been ceded, then the State of South Dakota does have jurisdiction.

QUESTION: If it has been ceded, Mr. Day, wouldn't you have an extraordinarily difficult problem of administering the laws; civil or criminal, if it would be on a patchwork basis of everything that's white there being under the jurisdiction of South Dakota, and everything that's red being under the jurisdiction of the tribe?

MR. DAY: No, sir.

QUESTION: Tell me why not.

MR. DAY: Not that difficult, no, sir.

QUESTION: I'd be interested in knowing, sometime during the course of your argument, why not.

MR. DAY: To illustrate --

QUESTION: The United States makes quite a point of that.

MR. DAY: Yes, they do, sir. And I will go into it. I can go into it now, if you would like.

QUESTION: At your convenience.

MR. DAY: I'd like to show the Court the position of the State of South Dakota on this map that is part of the government's amicus brief, in the back of it. And we can kind of -- we had the Colville case this morning. And the north half of the Colville Reservation was ceded, or it was restored to the public domain.

Now, in 1887, they started the General Allotment Act, and Senator Dawes started that, and that let the Secretary of the Interior, whenever he thought it for the best interest of the Indians, and there was surplus land, to allot these Indians or not allot them, as he saw fit, and sell off whatever portion of their surplus reservation that they wanted to.

So if the north half, for example, of the Colville Reservation was ceded, that would leave, and did leave, the south half. The north half boundaries would be no more, because when they ceded it, they would necessarily, by metes and bounds or something, strike a line across where it was ceded, and the north half was no more.

Now, this is, in effect, what happened in the Sisseton-Wahpeton Reservation. The Secretary of Interior appointed a commission to go out and treat with these Indians for the sale of their land, and they did. And under the agreement in the wording of the 1889 and 1891 Act, they ceded, sold, relinquished and conveyed all interest in all of their lands that had been -- except the ones that had been allotted, or were going to be allotted.

So, in effect, what that did, if we can show this Court that the cede is strong enough and the words are strong enough, the legislative history, that wiped out the boundaries of this reservation and left the allotments sitting there on the public domain.

Now, this gets into -- to further our position of the State -- as to what is Indian country. And in 1948 they defined, by statute, Indian country. 1151(a) and, for our purposes, 1151(c).

Now, 1151(a) defined Indian country is all land within an Indian reservation under the jurisdiction of the United States, except -- notwithstanding patents and including rights-of-way.

Now, that would be under the south half of the Colville Reservation; 1151(a). That had not been opened, or it had not been ceded, and that would be the south half of the Colville.

Now, 1151(c), Indian country is defined as all Indian allotments, the Indian title to which has not been extinguished.

And this is the north half of the Colville --

QUESTION: You're confusing me --

MR. DAY: Okay, sir.

QUESTION: The Colville case we argued this morning.

MR. DAY: Yes, sir. I'm giving that as --

QUESTION: This map is of something else in a different State.

MR. DAY: Yes. This is the Sisseton-Wahpeton map. I'm giving that as an example, the same thing had happened here; only in 1892 they had -- there's some argument made here about, you've got to have a boundary. And I'm saying in the Colville they had a boundary, because they only took away half of it.

QUESTION: And here we don't have that situation.

MR. DAY: No, sir.

QUESTION: All right.

MR. DAY: Here they took away all of it. Which left this under 1151(c) --

QUESTION: Under 1151(c), everything colored in red there is Indian country, as so defined.

MR. DAY: Yes, sir.

And consequently, the State of South Dakota is not

after any Indian reservation, because we don't -- we have Indian reservations in South Dakota, in the Rosebud and the Pine Ridge; but this ceased to be an Indian reservation, and I think under that theory.

Now, this leaves us, Your Honor, with some checkerboard jurisdiction, and 1151(c) was actually statuturized under the United States vs. Pelican case. And in Pelican -- in the Pelican case, they recognized that there was going to be some checkerboard jurisdiction.

If I may quote a moment, on page 399 of the Pelican decision --

QUESTION: What's the cite?

MR. DAY: 232 U.S. 442, sir.

And on page 399 there is a statement: It is said that it is not to be supposed that Congress has intended to maintain the federal jurisdiction over hundreds of allotments scattered through territory, other portions of which were open to white settlement. But Congress expressly so provided with respect to offenses committed in violation of the Act of 1897. Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for federal purposes.

And they contemplate that until -- and these Indian allotments, which are trust allotments, that's what they're called, trust patents. It's been historically that they go

away. Some of them are sold. There would be a lot less allotments here, in my guess, now than there would have been back in 1891, for example, because they are issued fees on them upon proper application, and they're sold.

QUESTION: From what you say, I take it there could be a 90-acre tract that would be subject to federal jurisdiction and all the surrounding, immediately surrounding, contiguous areas would be State jurisdiction.

MR. DAY: Yes, sir.

QUESTION: And there are some of them, ninety acres; are there not?

MR. DAY: I can't tell for sure how long the --

QUESTION: Well, there are some very small ones, anyway.

MR. DAY: There surely could be some. And if you look here, there's tracts of land together, and I don't know that if this map constitutes a section as one mile, because when I counted the squares on it the other day I didn't come up to 120 miles, I only come up to about 75; so I don't know for sure if that's -- if each one of the squares represents a mile or not.

But that is true under 1151(c), Your Honor, is exactly what you stated and --

QUESTION: This tribal jurisdiction on the checkerboard design would be as to allotted lands only, is

that your position?

MR. DAY: Tribal jurisdiction would be to Indian allotments only.

QUESTION: Only.

MR. DAY: Tribal and/or federal.

QUESTION: Is that without regard to whether those living on the allotted lands were Indians or non-Indians?

Non-Indians can live on allotted lands, can't they?

MR. DAY: Yes, they could.

QUESTION: And would jurisdiction in that instance be with the tribal court?

MR. DAY: It's my understanding, Your Honor, that recently the tribal council passed an ordinance assuming civil and criminal jurisdictions over non-Indian persons.

QUESTION: On their Indian lands?

MR. DAY: Yes.

Well, in this whole reservation, because of the Feather case. The Eighth Circuit Court of Appeals, in the next case we're having, said that this -- they reversed themselves and said, Now, we didn't cede this back in 1891, so they have jurisdiction --

QUESTION: Yes, I know, I understand that. But do you think -- did the Eighth Circuit decide that the tribe had -- under its decision would have authority over non-Indians?

MR. DAY: The Eighth Circuit didn't decide that.

QUESTION: No, but the tribe, you say, has now exerted authority within the entire area over non-Indians?

MR. DAY: They have passed an ordinance, I believe, yes.

QUESTION: Well now, how about South -- what's South Dakota's position? Is it your position that you would have authority over anybody who is living on allotted -- on ceded land? Indians or non-Indians?

MR. DAY: Yes, sir.

QUESTION: What is your position with respect to non-Indians living on allotted lands?

MR. DAY: The State of South Dakota does not have jurisdiction.

QUESTION: Criminal or civil?

MR. DAY: No, sir.

QUESTION: And you don't claim it?

MR. DAY: No, sir.

Another interesting --

QUESTION: Do you have a breakdown of these 30,000 non-Indians living on allotted lands? Does the record tell us anything about that?

MR. DAY: Well, I don't believe so, sir. There wouldn't be very many -- I live out near the Rosebud Reservation, and it's got to be about the same. There wouldn't be very many non-Indians living on allotted lands, but they

would at least --

QUESTION: Well, let's assume that -- let's assume that a non-Indian kills another non-Indian on allotted land.

MR. DAY: Yes, sir.

QUESTION: You're suggesting that South Dakota has never attempted to apply its criminal law to such situation?

MR. DAY: You say a non-Indian on a non-Indian on allotted land?

I believe that the State of South Dakota would have jurisdiction.

QUESTION: Well, that's what I thought. Then you just said a minute ago that you weren't claiming jurisdiction.

MR. DAY: Over Indians on allotted land.

QUESTION: Well, I'm saying non-Indians.

MR. DAY: Oh, sure, we could claim --

QUESTION: My question was: non-Indians living on allotted lands. You have a good many non-Indians living on allotted lands, don't you, on this reservation?

MR. DAY: Well, I wouldn't say too many. I'd say --

QUESTION: Well, you have some.

MR. DAY: We would have jurisdiction, in my opinion, over the non-Indians.

QUESTION: In other words, no matter what, whether civil or criminal --

MR. DAY: Yes.

QUESTION: -- even though they live on these allotted lands, if they're non-Indian, tribal courts have no jurisdiction.

MR. DAY: Well, they will have what jurisdiction they attempt to take, Your Honor, under the -- under their ordinance.

I'm saying the State has jurisdiction, but now they've passed an ordinance saying that they also have jurisdiction over all people within --

QUESTION: Well, let's just forget the Eighth Circuit decision, just for a moment.

MR. DAY: Okay.

QUESTION: South Dakota's position historically has been that it does have criminal jurisdiction, at least, over non-Indians wherever they are living.

MR. DAY: Yes, sir.

QUESTION: In -- within or without Indian reservations.

MR. DAY: Yes, sir.

QUESTION: Now, you may run -- with respect to civil jurisdiction, you may have a little -- if it's a business transaction with Indians, you may have a problem with that.

MR. DAY: Yes, sir.

QUESTION: Does South Dakota's position depend,

to a certain extent, on whether or not this is in fact an Indian reservation?

QUESTION: Yes.

MR. DAY: Well, yes. It does. It depends on it to the extent of all this original 1867 area. Otherwise, if we're correct, there is no area except Indian country on these red, red dots, which are trust patents or trust allotments, in Indian land.

QUESTION: Now, would there be any non-Indians living on those trust allotments; and, if so, how, or why would they?

MR. DAY: There could be through lease. Most of the land down in the Rosebud area is leased by ranchers and there could be some improvements there. It would be unusual, but it could be. It could happen.

QUESTION: Yes. They are -- excuse me.

QUESTION: A lot of non-Indians working on the -- on allotted lands that's leased; there might be people riding on them.

MR. DAY: Oh, yes.

QUESTION: Yes. Cattle on them?

MR. DAY: Right. Right.

Are there any other questions around, like that?

[Laughter.]

QUESTION: A great many of them.

MR. DAY: Excuse me, sir?

QUESTION: A great many of them.

MR. DAY: Okay.

QUESTION: Let me be very sure, because I share this confusion.

If Mr. Justice White's horseman is riding across allotted land, and he's a non-Indian and he is shot by a non-Indian, the State of South Dakota assumes criminal jurisdiction over that case?

MR. DAY: That would be my opinion, yes.

QUESTION: But if he is shot by an Indian?

MR. DAY: It would be federal -- it could be one of the ten major crimes, which would be exclusively in the federal court then.

QUESTION: Now, does your answer to Mr. Justice Blackmun's question there depend in any respect on whether or not this is an Indian reservation, or whether it was all ceded?

MR. DAY: On -- on white-on-white, it's not going to make any difference. But where -- sir, where you have problems or where you could have, since 1891, the State of South Dakota has assumed jurisdiction over all of this area, except on the allotments, over Indians and whites.

Now you have a situation, if Feather holds up, where if you have an Indian and a white in a fight, for

example, so the State court is going to have to go out and arrest the white man, the tribal court is going to have to go out and arrest the Indian. And it's --

QUESTION: But you suggested that the tribe now has an ordinance that would govern b oth sides of the transaction.

MR. DAY: It could. And then you would be forcing --

QUESTION: Or could it -- you say it has an ordinance like that.

MR. DAY: I don't think they could exercise that -- they've done it, but I don't know what they've done, how far they've gone.

QUESTION: They've been waiting on some litigation.

MR. DAY: Yes, probably.

QUESTION: Such as this, I suppose.

MR. DAY: But then, Your Honor, you're putting -- you're into another altogether different situation, where the State has been handling this and assuming it since 1891, up until the Feather decision in 1970, in 1972, I think that's the first time after that that the tribe has had a force up there.

But I'll get on with the balance of it.

We're saying, Your Honor, that cede, sell, relinquish and convey all right, title and interest, is strong enough, as in the case of Ellis v. Page, it's strong enough to grant cession just like the words "public domain" were used.

In the brief there are -- we've looked this up in the

Webster's Dictionary, and the word "cede" -- and in other dictionaries -- and the word "cede" is what generally is used when one country grants cession to another country.

They've made some statements, well, maybe you should have "cede absolutely", maybe that's all right; or maybe you should have "cede absolutely and forever" like in Ellis v. Page, but I think once you cede, convey, relinquish all right, title and interest --

QUESTION: You don't agree with Mr. Hirsch that it's a special kind of cession here?

MR. DAY: No, sir. This was a direct cession, wherein the State of South Dakota -- or when the federal government bought this land from this tribe for $2.50 an acre plus some other considerations, they bought it outright. In turn, they went back and sold it to the settlers for the same price. But it was not the same money, and it's not like the Mattz case, it's not like the Newtown case, or Seymour, which wasn't -- which was a trustee homestead type relationship. And this case is a cession agreement and it's different than that.

In those cases the government didn't guarantee to sell the land, the tribe didn't get paid until their land was sold and settled by the homesteaders; this was a direct cession. Even though in the -- which I'll get to in the other case -- even though the Eighth Circuit Court of Appeals said

it wasn't; but it absolutely is.

This bill, in the 1891 Act, when it was passed there were about seven other reservations, and this was tacked on to the Indian General Allotment Act.

Senator Dawes, who wrote the 1887 Dawes Act, or General Allotment Act, also was the main Senator on this bill. Senator Dawes, prior to the time the bill passed, made the statement that all this seven or eight million of acres of land going in there that day was going to be restored to the public domain.

The Commissioner of Indian Affairs, in 1890, prior to the passage of this bill, said this land is going to be restored to the public domain and specifically mentions Sisseton-Wahpeton, 660,000 acres, roughly -- and I imagine the reason he mentioned it was because it was sold for $2.50 an acre, and the rest was $1.50 an acre.

The Department of Interior reports also confirm this.

From that time on, from 1892, the official maps of the Commissioner of Indian Affairs, forseveral years, wiped it off. Everything then was referred to as "former", "former Sisseton-Wahpeton".

Then we get going down the road for several years, and then the maps change. They might get a circle around it, and say it's "former reservation" or might be later on shaded in. And I think a map that you have up here today

-- that I thought I saw -- shows the Indian reservation today as the "original Sisseton-Wahpeton Indian Reservation", as it was back in 1867.

And I'm suggesting, Your Honors, that in order to determine congressional intent, or legislative history, all that is needed to be done in this case is to go back to the Act, prior to the Act, after the Act, look at what Senator Dawes says, who was primarily responsible for the Act --

QUESTION: Do you know what State the Senator was from?

MR. DAY: He was from Massachusetts, I believe, sir.

QUESTION: Was he related to the later Vice President?

MR. DAY: I don't know.

QUESTION: Who was also very concerned in Indian affairs?

MR. DAY: I surely don't know.

We think, Your Honors, that the cession language, that you don't have to go any further than the face of the Act.

South Dakota came into being as a State in 1889. In the enabling Act, Congress stated that South Dakota, when it came and was to be a State, received Section 16 and 36 as school cessions. But it specifically said that if any of these sections or any of this land was in an Indian reservation, that the grant did not take effect until the reservation had been extinguished and the proper -- and the

reservation restored to the public domain.

That's in Section 10 of the enabling Act, which brought us into Statehood.

I'm suggesting that this is further intention to show that this, the intent of everyone at that time was to cede the reservation, except these allotments, extinguish the boundaries, and you'd have left what in 1948 is determined as Indian country, under 1151(c).

There was another another school land cession in the Act, and that might not be -- that's open to interpretation; they've argued about it.

In the brief, this provision was taken to the English Department at the University of South Dakota and they gave an opinion that the phrase modified not just the school land sections 16 and 36, but modified all of the land being open to the -- or subject to the laws of the State of South Dakota.

I'm suggesting, Your Honors, that if the Act is read, and the legislative history surrounding this Act is determined, that it's clear under the rules set forth in Mattz that this reservation in 1891 was terminated.

QUESTION: What is South Dakota's interest in exercising jurisdiction over Indians in ceded territory?

MR. DAY: Indians are citizens of the State of South Dakota, Your Honor, and we always have exercised juris-

diction over Indians and non-Indians alike in this area, for almost eighty years.

And now, when it appears thatthey're going to be under two or three different laws, it's really causing a lot of commotion.

QUESTION: Well, let's assume that the State's jurisdiction over non-Indians was not disturbed at all, and the only question is the jurisdiction over 3,000 Indians, within this area.

You're not going to be disturbed very much, are you?

If that were the result -- I understand that it may be that that wouldn't be the result, that the tribe or someone may claim that the Indian, the tribal authority is exclusive within the whole area, with respect to Indians and non-Indians alike. That may be what somebody will claim.

But let's just assume, for the moment, that the only impact of a holding that the reservation was not disestablished is that you wouldn't have jurisdiction over 3,000 Indians.

MR. DAY: The impact, Your Honor, might not be as great, when you have one class of people you wouldn't have to worry about.

QUESTION: Because you're historically -- your view --

MR. DAY: That's true.

QUESTION: -- historically your position has been that there has been dual sovereignty, anyway, in certain areas. You've always said that there was dual sovereignty in -- on allotted lands. That the State had authority over non-Indians and the tribe had authority over Indians.

MR. DAY: Yes.

QUESTION: That's been your historical position, hasn't it?

MR. DAY: I would say that, yes, Your Honor.

QUESTION: Is that true in parts of the State where there was --

MR. DAY: I think wherever --

QUESTION: We're speaking of allotted lands now.

MR. DAY: Wherever there is an allotted land, the State does not have jurisdiction over it, regardless if it's in the ceded portion or if it's in the open portion or closed portion.

QUESTION: But you would concede that the State has jurisdiction over non-Indians living on it?

MR. DAY: Yes, sir.

QUESTION: All right. So there is dual sovereignty, you would say?

MR. DAY: Yes, sir.

Excuse me for being slow, I --

QUESTION: I'm sorry, you're being hit from both sides here.

MR. DAY: No, that's all --

QUESTION: What happens, Mr. Day, in a reservation which is clearly and concededly a reservation -- let's take the Rosebud Reservation in your State.

MR. DAY: Okay.

QUESTION: Now, who has jurisdiction there over civil controversy between two non-Indians?

MR. DAY: The State of South --

QUESTION: Non-Indians.

MR. DAY: The State of South Dakota, Your Honor. I ran across one of those cases, I'm sure, the other day that said that, but the State does -- we exercise jurisdiction over non-Indians in Todd County, South Dakota, what we're claiming to be the Rosebud Indian Reservation.

QUESTION: And you recognize it clearly as a reservation?

MR. DAY: Yes, sir.

QUESTION: Everybody does?

MR. DAY: We do.

QUESTION: Unh-hunh.

QUESTION: Well, historically, there hasn't been much claim to the contrary, has there? No one has attempted to cut the States out of that, have they?

It's just been -- up to now it's been -- well, historically it's been that the government has been interested in tribal authority over Indians. That's been the --

MR. DAY: Yes; yes, sir.

I'll sit down. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Day.

I think your time is all consumed, Mr. Hirsch.

The case is submitted.

[Whereupon, at 2:16 o'clock, p.m., the case in the above-entitled matter was submitted.]

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