In the

Supreme Court of the United States

Don R. Erickson, Warden

Petitioner,

v.

John Lee Feather, et al.,

Respondents.

No. 73-1500

Washington, D. C.
December 16, 1974

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Monday, December 16, 1974.

The above-entitled matter came on for argument at 2:17 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:

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

HARRY R. SACHSE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae.

LARRY R. GUSTAFSON, ESQ., Britton, South Dakota 57430; on behalf of the Respondents.

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'll hear arguments in 73-1500, Erickson against Feather.

Mr. Day, I think you may proceed whenever you're ready with this one.

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

ON BEHALF OF THE PETITIONER

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

Your Honors, this case involves the same alleged reservation, only this case originated out of the Eighth Circuit Court of Appeals on a writ of habeas corpus, and this is a petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

These ten Indian gentlemen -- I believe there are ten of them in here -- were all confined and convicted in the South Dakota Penitentiary for offenses for which they had been convicted within the original boundaries of the Sisseton-Wahpeton, former Indian Reservation.

QUESTION: These were for various offenses --

MR. DAY: Various offenses.

QUESTION: And all on --

MR. DAY: All on --

QUESTION: All took place on non-allotted land?

MR. DAY: All on fee land.

QUESTION: On fee land.

MR. DAY: Fee simple land, non-allotted land, yes, Your Honor.

QUESTION: And I guess none of these offenses was -- that would just complicate it further -- was under that Ten --

MR. DAY: Ten Major Crimes Act.

QUESTION: -- Major Crimes Act of the federal legislation?

MR. DAY: The Ten Major Crimes do not apply when we're not in Indian country.

QUESTION: Well, I know, but if you were, this --

MR. DAY: It would. Yes, it would apply, but it didn't --

QUESTION: Well, these -- none of these crimes may have been within the -- within that list of ten. Do you know?

MR. DAY: Right.

QUESTION: Do you know whether they were?

MR. DAY: Oh. None of these --

QUESTION: Those are the serious criminal offenses.

MR. DAY: None of these -- well, I think maybe -- I don't know.

QUESTION: All right.

MR. DAY: I don't know that.

QUESTION: But your point is that it doesn't make any

difference to the central issue, is that it?

MR. DAY: No, sir, not if the State of South Dakota has jurisdiction.

The law or the case law that really developed on the Sisseton-Wahpeton Indian Reservation were four DeMarrias Indian cases. Two of them were in the Supreme Court of -- I believe the Supreme Court of South Dakota, and the second one of those cases, this Court denied certiorari.

The first two cases all decided that the Sisseton-Wahpeton land area had been ceded by the Act of 1891.

The federal District Court, Judge Beck, also held that, and this case came into the Circuit Court of Appeals, either argued at St. Paul or St. Louis.

In 1963 the Circuit Court of Appeals of St. Louis upheld this very action and said that the lands had been ceded, and this was not Indian reservation.

In 1963, if I have my date correct, the Justice Department of the United States also argued that the land, the reservation had been terminated.

In 1973, they have had a change of policy, and they argued that the reservation was there, according to the boundaries back in 1867.

And so the Circuit Court of Appeals overruled a long line of cases, in fact overruled themselves on this area in South Dakota.

Our argument, our main thrust of why they did it is that they blanketly applied Mattz, Seymour, the New Town decisions to this reservation, former reservation. It gets confusing.

Our argument simply is this: the Mattz case and the Seymour case and this case can easily be distinguished. We are not asking this Court to overrule your case of Mattz or your case of Seymour.

Those cases evidently were decided on the rules set up by this Court; and, for ex ample, in Mattz, they had tried to open that reservation for a long time and couldn't get the job done, and your rulings are right there.

But those two cases were decided on the trustee homestead provision, wherein the government bartered for this land from the tribe, but they didn't guarantee the sale of it. They said, We'll put it up for sale for you, we'll have it homesteaded; when that's bid for, then the money will be in trust for you.

That was the fatal error of the Circuit Court of Appeals in this case. The Circuit Court of Appeals said, in this Feather case, that this was not a cession agreement. And it absolutely was.

It said it's like Mattz and Seymour, a trustee type deal.

Feather, I don't know why they decided that, but I

think just in the glare of Mattz and Seymour.

Now, all of the cases or all of the reservations in 1891, in this Indian Allotment Act, of which Sisseton-Wahpeton was a part, as far as we have been able to determine were restored to the public domain, and they were different. Some had public domain wording, some had wording like this, the Crow Act had a little different wording. But, by the legislative history, by the face of the Act, we could determine, and from what Senator Dawes says it was going to do, this seven or eight million acres went to the public domain. The Circuit Court of Appeals says that a cession isn't a cession.

And in the briefs sometimes we're arguing that public domain isn't public domain. "Cede, sell" doesn't mean "cede" and "sell". And it's down to the point, Your Honors, that this area in so far as can be possibly done should be decided. Because since New Town and Mattz and Seymour, this is breaking out, the litigation, all over; and I don't see any end in sight.

QUESTION: Did you apply for a rehearing in the Eighth Circuit?

MR. DAY: I believe that they applied for rehearing in the Eighth Circuit, in which I was not involved, sir, but I'm sure they did.

QUESTION: Did you get any votes?

MR. DAY: No.

QUESTION: As far as you know?

MR. DAY: I don't believe we did.

QUESTION: That's not always done publicly, but do they in the Eighth Circuit? I'm not familiar -- perhaps Justice Blackmun knows the practice; it's his Circuit.

MR. DAY: I'll have you ask Justice Blackmun! I think they do sometimes, Your Honor.

QUESTION: Well, it isn't important, anyway.

MR. DAY: No.

QUESTION: Except that the two panels in DeMarrias and this -- and here, were different, although all the judges are still alive, with one exception.

MR. DAY: Well, Judge Lay, in a dissenting opinion a few years ago, I think brought all of this, the Indian problems to light, and -- but --

QUESTION: What case was that?

MR. DAY: Miner v. Erickson, it was, Your Honor. And we think that if the State Court decisions are read on the law, and that the 1963 federal Circuit Court of Appeals DeMarrias is read in light of what we've argued here today, that we should go back to the DeMarrias.

And it's distinguishable, we're clear on the face, and I -- I think that's all I have to say, unless there are some questions.

MR. CHIEF JUSTICE BURGER: You may want to save a little time for rebuttal, then.

MR. DAY: I would like to, sir.

MR. CHIEF JUSTICE BURGER: You may.

MR. DAY: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Sachse.

ORAL ARGUMENT OF HARRY R. SACHSE, ESQ.,

FOR THE UNITED STATES AS AMICUS CURIAE

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

I want to say a word first about any Indian reservation, before talking about this one, because it seems to me that the discussion so far has been a bit confusing about that.

In almost every Indian reservation in the country there's land that has been allotted to Indians, there's land that has been sold in fee simple to people who are not Indians. There's often a large non-Indian population inside an Indian reservation.

One of the characteristics of this reservation is that there's such a large Indian population inside, and that there's a going tribe, with an organized government and an agency of the BIA, and a very alive and viable situation.

Basically, and without trying to get into all of the details of it, the State in which an Indian reservation is

situated has full jurisdiction over non-Indians who live inside an India reservation, both civil and criminal jurisdiction. This Court held so in a number of cases, starting in the Nineteenth Century with McBratney? and Draper which were criminal cases. And Justice Frankfurter laid this out in a good deal of detail in Cake vs. Egan and the Metlacotla? cases in about 380 --

QUESTION: Is that civil as well as criminal?

MR. SACHSE: Civil as well as criminal.

QUESTION: Cake v. Egan --

QUESTION: Irrespective of whether they live on allotted lands?

MR. SACHSE: Irrespective of where they live within the --

QUESTION: But in present actions with an Indian, they're going to be subject to federal law.

MR. SACHSE: Correct. If the transaction is with an Indian or affects the vital interests of the tribe, they're going to be subject to federal law. The exact extent of that is the kind of thing that's still debated before you, in a case such as the Maserie? case that's under advisement.

QUESTION: And it may be debated eventually in this case, I take it?

MR. SACHSE: And may eventually be debated here.

Now, I think I need to review some law concerning

this Treaty as well as -- this reservation, as well as the facts.

First, briefly to the facts:

A permanent reservation was established by Treaty in 1867, with surveyed boundaries. And it's this reservation, which is much smaller than the land the Indians had previously had. They had already had their big loss of land, and this was what was left to them, after great amounts of land had been taken away from them.

Then, by an agreement in 1889, made specifically under the General Allotment Act, and at a time when the Indians were in grest distress, that the moneys owed to them by the federal government had not been paid to them, it was the middle of winter.

The federal government negotiated with the tribe to do what's known as open its reservation. That is, to allow the sale of surplus land within the reservation. And in this agreement and then in the Act of Congress that ratified it, there are numerous references to the General Allotment Act. There is no such thing as was true with the north half of the Colville Reservation, where a particular part of the reservation was cut off and express language was used, saying that that has been removed from the reservation.

You've heard some talk about the public domain. What's important in this Act is there is no language saying

that this was returned to the public domain.

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession", that is correct.

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is no specific area ceded, what's ceded is what is not allotted --

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I -- I don't know what you mean by that.

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded, --

QUESTION: Yes?

MR. SACHSE: -- the government sold that land under --

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it --

QUESTION: Well, it was handled as part of the public domain,by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say -- and I'll try to get this in the -- I think I may do better to break it down into historical perspective.

But the Indians were paid for the land. How were they paid for it? It was put in the Treasury of the United States, to be used for their benefit. In other words, it's a bookkeeping entry from one government place to another. The money -- the Indian Agency was maintained, the money was appropriated by the government as needed for the Indians. The land was opened for homesteading, but only for homesteading, not for any purpose.

You have the exact same actual dynamics that occurred in the south half of the Colville Reservation, which this Court held in Seymour v. Superintendent, did not abolish that reservation.

The same dynamic that was done in Mattz vs. Arnett, as to that reservation; namely, the non-Indians got what they wanted, the Indians got what they could. The non-Indians got the right to settle that land. The Indians got the money from the settlement of that land, which was small enough.

The question remaining is: What happened to the federal jurisdiction? What happened to the jurisdiction of the tribe?

And I want to approach that problem now.

QUESTION: Would it be fair to say that the United States in those transactions was acting as the broker for the Indians, to announce publicly that settlers could come in and buy it for $2.50 an acre?

MR. SACHSE: It's exactly so, and we quote in our brief where one of the Senators objected to the cession idea, to the fact that the government would pay the money immediately.

And one of the other Senators explained to him, said: This doesn't mean anything, because this is just a bookkeeping transaction in the Treasury. We get right back the money that we're going to pay to the Indians, as we sell off the land.

Now, in some later Acts, the government decided to do it the other way, to not pay the Indians at first, to only pay the Indians as the land was sold.

But the practical effect of both kinds of Acts is identical, that the Indians kept, lived on the allotted land, the unallotted land was opened up for homesteading, because it was thought in this -- this was said to the Indians in the negotiations, and the Court talked about this in Mattz -- this Court talked about this in Mattz vs. Arnett.

The excuse for doing this kind of thing was that it was for the benefit of the Indians to do it, that it was better for them to live next to a high caliber of citizen who would be farming his land, and so forth. That's the kind of language that was used.

And that was the same whether the Indians said they ceded it first, or said -- or the government acted as agent, disposing of it.

And, by the way, this language "cession" in the Ash

Sheep case, which we discuss in our brief, is used in connection with an arrangement where the government only acted purely as agent, where they simply -- whenever someone wanted a piece of the land, would sell it to him then, and give the money to the Indians. The word "cede" was used.

But obviously with no technical --

QUESTION: What impact, if anything, did the cession have, followed by the sale for homesteading or the settlement for homesteading? What happened as a consequence, or what was the impact with respect to the jurisdiction of the State, if anything?

MR. SACHSE: Of the State? None. None.

The cession of the land or the selling in fee simple of land inside an Indian reservation, say, as in the reservation in Mattz -- in Seymour vs. Superintendent, the south half of the Colville. That then is land owned by a non-Indian inside an Indian reservation.

QUESTION: Well, yes, but you would apparently think the State has civil and criminal jurisdiction over non-Indians on that.

MR. SACHSE: Clearly.

QUESTION: How about the State's trespass law?

MR. SACHSE: The State's -- the State's trespass law would clearly apply to non-Indians, but that would be -- to the extent that it is applying --

QUESTION: Well, how about to the owner -- how about the owner of the deeded land, the ceded land, he now has a fee simple title to it --

MR. SACHSE: Okay.

QUESTION: -- and he wants to keep people off his land, and he does it in the name of the State's trespass law. May he do so?

MR. SACHSE: I don't think he could keep an Indian from --

QUESTION: Really?

MR. SACHSE: It seems to me that inside an Indian reservation --

QUESTION: Well, let me talk to then about --

MR. SACHSE: Yes?

QUESTION: -- a non-Indian. Can he keep a non-Indian off in the name of the State's trespass law?

MR. SACHSE: Clearly, yes.

QUESTION: So the State's law does apply there.

MR. SACHSE: What I'm saying is that in a transaction between an Indian and a non-Indian --

QUESTION: Well, I didn't ask you about transaction, Mr. Sachse, I asked you about the State's trespass law.

Does the State -- after the land is deeded, does the State's trespass law apply to that land?

Certainly it doesn't --

MR. SACHSE: It applies to that land as to non-Indians but not as to Indians.

QUESTION: So an Indian --

MR. SACHSE: The State's criminal law does not apply to Indians inside an Indian reservation.

QUESTION: And so it just -- so the State sovereignty just doesn't apply to that land, no matter who it's owned by, as far as keeping an Indian off of it is concerned?

Is that your thesis?

MR. SACHSE: I think that's correct. That would be under federal law or under tribal law, if it's a matter affecting an Indian inside an Indian reservation.

Now, the General Allotment Act left a lot of questions unresolved. And the early questions that were unresolved was whether a reservation existed at all after there had been allotments, and whether even allotted land was Indian land under federal jurisdiction.

And the Court first addressed that question in 1909, in U.S. vs. Celestine, in which it held that even though land had been allotted to an Indian and patented to the Indian, that the land remained inside the Indian reservation, that no land was removed from an Indian reservation until it specifically removed by Congress from the reservation.

That proposition was extended in 1916, in United

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federal jurisdiction, under 18 U.S.C. 1151. And it makes a good deal of sense for the federal --

QUESTION: Is that generally, or is -- that's true

of Indian reservations. And part of the problem has been that the federal government hasn't done its job, the State hasn't done their job, and the tribes have been too weak to do anything.

QUESTION: Well, what is the State's job? What does this State -- on an Indian reservation?

MR. SACHSE: In this -- in a reservation --

QUESTION: On an Indian reservation, what is the State's responsibility, if any?

MR. SACHSE: The State's responsibility in an Indian reservation is as to non-Indians, to maintain law and order in matters between non-Indians. The federal government and the tribe have responsibility of maintaining law and order in matters that affect Indians.

And neither one of them should have to look at the plat book to do it. It's a question of whether the person is Indian or non-Indian. That's a difficult enough problem, without having to figure out whether a policeman can go on this piece of ground or that piece of ground.

QUESTION: Does a non-Indian ever get in conflict with an Indian?

MR. SACHSE: Yes, and when that happens, that's federal jurisdiction, under 18 U.S.C. 1151. And it makes a good deal of sense for the federal --

QUESTION: Is that generally, or is -- that's true

if it's on a reservation.

MR. SACHSE: If it's on a reservation, that's right.

QUESTION: But not otherwise.

MR. SACHSE: If it's off the reservation, it would -- it would not, that's right; it would be State jurisdiction.

QUESTION: In a civil dispute --

MR. SACHSE: No. Excuse me, that's inaccurate. If it's not on Indian country, it would be State jurisdiction. There could be Indian country off a reservation.

QUESTION: Well, yes. Patented land is Indian country by statutory definition; correct?

MR. SACHSE: That's right.

QUESTION: In a civil dispute, under Williams v. Lee, isn't a federal question, it's a question for the tribal court, if it's on a reservation.

MR. SACHSE: That's correct. That within an Indian reservation, in a matter affecting Indians, the jurisdiction -- the original jurisdiction, the root of the jurisdiction was tribal jurisdiction. But the federal government, through numerous statutes, has preempted great parts of that jurisdiction. And for all major crimes, for instance, there's federal jurisdiction. But in a civil dispute between an Indian and a non-Indian on an Indian reservation, it's tribal jurisdiction.

That's Williams vs. Lee.

QUESTION: Laying aside the major crimes question, and you had a very simple statement that I understood thoroughly for a moment or two there -- when you said it doesn't depend on geography or plats, it depends on the racial origin.

Now, were you confining that to reservations, as you suggested first, or to Indian country?

MR. SACHSE: I'm -- that is true in Indian country. But if you -- Indian country is any land inside a reservation. If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in Mattz and in Seymour vs. Superintendent, and I think it would also undercut 18 U.S.C. 1151 seriously. At least for this reservation.

QUESTION: Yes, but go ahead. If the Court should hold --

MR. SACHSE: If the Court should hold that, then each one of these red spots is a little island of federal and tribal jurisdiction, and we're not in a time now when these --

QUESTION: That's the way it's been, isn't it, as my brother White suggested?

MR. SACHSE: The way it's been is that everyone has ignored both the Indian and federal rights there, and this --

I don't want to testify, but I don't think the Court should assume that the situation has been good, and that you can assume that because we haven't faced this issue before that it's perfectly all right to leave it another fifty years.

QUESTION: On the other hand, if the Court should decide that the statute, the cession statute didn't amount to a conveyance, --

MR. SACHSE: Yeah.

QUESTION: -- then the result would be that the State would no longer have any power to enforce its laws in any of these several counties, if any Indian was involved.

MR. SACHSE: That's correct. It would be a federal question, as in any other Indian reservation, --

QUESTION: Wherever it occurred.

MR. SACHSE: -- wherever it occurred, and this is something that Congress has decided is a proper way for the federal government to exercise its --

QUESTION: Well, if this is an Indian reservation.

MR. SACHSE: Yes. And whether this one is or not, it would be the same situation you're describing in other reservations of the State, that clearly are reservations.

We're speaking of the proposition that this, what we call a reservation, where a major tribe lives and where there's a major number of Indians, should be treated like the other Indian reservations in the State.

QUESTION: Well, I suppose the vast proportion -- this is something like, what, 27,000 non-Indians and a few, 3,000-plus Indians?

MR. SACHSE: That's right.

QUESTION: In this Lake Traverse area.

MR. SACHSE: That's correct.

But we're not trying to subject the non-Indians to federal or Indian jurisdiction except to the extent needed to fulfill the trust responsibilities --

QUESTION: Which means that whenever they're involved with an Indian --

MR. SACHSE: That's right.

QUESTION: -- the State does not have any jurisdiction --

MR. SACHSE: That's correct.

QUESTION: -- with respect to its civil, criminal or family or status law.

QUESTION: It was suggested that the tribe had recently passed an ordinance that asserted rather ex pansive jurisdiction within this area. Is that true or not?

Or do you know?

MR. SACHSE: I haven't seen it. I've heard that that's so. I suspect that it goes beyond the authority that the tribe has.

QUESTION: Because it reaches non-Indians?

MR. SACHSE: Yes.

QUESTION: Well, how do we know that the tribe doesn't have authority to reach non-Indians?

MR. SACHSE: Well, the McBratney case and the Draper case in criminal matters.

QUESTION: Well, all McBratney says is that the State has the right to try a white man for a crime that took place on an Indian reservation. It doesn't say the tribe couldn't try him.

MR. SACHSE: Well, I suppose I just have to answer that this has been the -- at least tacit holding of this Court, or assumption of the Court in a number of cases. And I refer to Cake v. Egan, where Justice Frankfurter tried to lay out the limits on tribal jurisdiction. And it's never been faced directly in the last ten years, perhaps, by this Court, but it has been faced before.

QUESTION: Well, --

MR. SACHSE: My time is up, and I'm feeling bad about taking all the time of my partner.

MR. CHIEF JUSTICE BURGER: We'll take care of that; you're on our time for a minute or two here.

Mr. Justice White, did you have a further question?

QUESTION: No, I didn't.

MR. CHIEF JUSTICE BURGER: We'll hear from your friend, then.

Mr. Gustafson.

ORAL ARGUMENT OF LARRY R. GUSTAFSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GUSTAFSON: Mr. Chief Justice, and if the Court please:

I'd like to try and answer a question or two possibly that has been proposed here before to some others on both sides.

I live rather close to this reservation, being twenty miles away from it. As far as this map here contains --

QUESTION: You mean this area?

MR. GUSTAFSON: In this area, that is correct. I don't live on the reservation now, but --

QUESTION: The question is whether there is one. Is there one?

QUESTION: Right.

MR. GUSTAFSON: Yes. I don't think there's any part or any confusion, even by the State, that there is a reservation on part of this land. I believe it is their -- what can we say? -- that they are admitting, they are conceding that all of the red area is reservation.

QUESTION: No, no. It's Indian country.

MR. GUSTAFSON: It's Indian country. It is --

QUESTION: But not a reservation.

MR. GUSTAFSON: But that the federal law does apply.

That the law for the tribe applies on minor crimes. And let's come back to 1151, if we may, there on the thing.

We think that 1151(a) is what applies; they are saying it's 1151(c).

QUESTION: Yes.

MR. GUSTAFSON: And as far as we are concerned here, at this time, it's under the Major Crimes Act that we are primarily thinking now.

Most of these ten defendants that was on here, on the thing -- and I'll grant you, I was the one that filed the writ of habeas corpus in the District Court in this, after we had gone through the post-conviction hearing in the State court, with more defendants; but they were no longer under sentence, so we didn't proceed with them.

But most of them were for the Major Crime Act. I don't know which of you Justices asked, but that was asked.

QUESTION: You're anxious to have your clients sentenced under the Major Crimes Act?

MR. GUSTAFSON: That is true, Your Honor. They feel that they get a very much better and very much fairer -- they resent State jurisdiction. They think that for the past number of years that they haven't had justice under State jurisdiction.

Out in our country there is a saying that, "a good Indian is a dead Indian", and that hurts very, very much most of these Indians.

QUESTION: Is there anything in the record in this case that would indicate that the State proceeded unfairly against them?

MR. GUSTAFSON: No, and I'm not trying to allege that the State did proceed unfairly. I think that in a lot of instances, Judge, that the -- when these fellows get behind bars, they begin to think these things. I'm not trying to allege that they did. But because of the sentiment involved and because it is white men applying that, they very much resent it: while they don't resent the federal law.

Now, there was one other individual that I did represent after this group here, that was not involved in this group, who happened to be a white man, who had killed an Indian, and he wanted to be sentenced under the Major Crime Act. And under his request we did go in and get him sentenced under the Major Crime Act.

Which was his request, on a post-conviction hearing. And we did do this. This was done last spring. The federal did assume jurisdiction.

QUESTION: How did you do that? Under the Eighth Circuit opinion?

MR. GUSTAFSON: Under the -- yes, under the Feather case, after the Feather case came out --

QUESTION: After the Feather case was decided --

MR. GUSTAFSON: Yes, after the Feather case came out,

why, the State Circuit Court --

QUESTION: I understand. This was then a reservation.

MR. GUSTAFSON: Right. And our State Circuit Court out there is a court, a trial court. In fact, on January 1st we're only going to have one court. It's all going to be the State Circuit Court there.

But that's what we did, is came back, the State in reality vacated the sentence on the thing, the feds came in and arrested him, and I pled him guilty to the same charge in federal court.

QUESTION: Unh-hunh.

MR. GUSTAFSON: Which was a murder charge, as far as that's concerned. But they were very dubious of this federal -- of this State jurisdiction, and the Indians, I think we can say, as a whole, very much dislike the State jurisdiction.

QUESTION: Well, most people don't like to be tried in a criminal court.

MR. GUSTAFSON: Well, they seemingly don't have near the objection, and they think that they get more justice in the federal courts. I'm not going to try and say they do, I have confidence in our State court.

But, neretheless, these Indians do not seem to feel that way. And I think that that is one factor that is very hard to control the people, when they feel that they aren't

getting justice; it is very, very difficult.

As far as this tribal resolution is concerned that has been brought up here, I have been advised that this was vacated very soon after it was enacted -- tried to be enacted. They could see the fallacy. It was explained by counsel where they were off on the wrong foot on the thing.

But the big thing that this Feather case has is not going onto the civil part of the questions that have been propounded, I realize that they can come in indirectly. But it is coming on to this federal jurisdiction, and this of course starts out a long ways back.

I think that one thing that comes onto this federal jurisdiction that hasn't been brought out here today -- we brought it out in our brief. And that is in 1901 the State ceded all federal criminal -- or ceded to the federal all State jurisdiction over federal offenses.

And in 1903 the federal assumed this jurisdiction. We have this in our brief. And it's a thing that the Circuit Court of Appeals didn't -- I argued this to them, when we did argue to the Circuit Court of Appeals there. In fact, I'll grant you, I argued in DeMarrias, I was the culprit on DeMarrias in the Circuit Court of Appeals as well, there, of it.

I wasn't able to do the chores that I should have, but I, nevertheless, was there.

But in the second time, in the Feather case, this was brought up, it wasn't a controlling factor by them, because they felt, as we can very well see their position, that this Mattz case, the New Town case, the Condon case, the Seymour case all came in and answered this question perhaps easier, perhaps in a different way, perhaps more definitely than it was handled or could be handled by this 1903 and this 1901 Act.

It is a little bit interesting to me, at least, --

QUESTION: I didn't -- I missed a little bit what your argument is, that happened in 1901 and 1903 --

MR. GUSTAFSON: 1901, our State Legislature ceded to the federal government all of the jurisdiction over all Indian country, and in 1903 the federal government assumed this jurisdiction.

So regardless --

QUESTION: Well, that's question-begging, it doesn't answer the question of what is Indian country, does it?

MR. GUSTAFSON: No, it does not. It does not.

QUESTION: Yeah.

MR. GUSTAFSON: And, as I say, we set forth that in the brief here on the thing.

QUESTION: Unh-hunh.

MR. GUSTAFSON: I believe that it comes back very directly here on all of these points here that we have before

us is: What is this jurisdiction?

We feel that the case that we have before us, as far as the criminal is concerned, is very, very much on a par with the Seymour case, that it's on a par with New Town case, which is of course up there in our federal District Court, with the Mattz case, that it definitely does reverse DeMarrias. There's no question about that, that has been spoken of here today.

But in order to reverse this and go back to DeMarrias, we believe that it would be necessary to reverse also the Seymour case.

In fact, after the Seymour case, our State Supreme Court, in Mattz -- or in Molash, came down with a very nice decision on another circuit. They reversed some other decisions there, I'll perhaps pick on them for a minute, that they did not in their decision say that they were reversing. They just went ahead with it. They came onto those different parts there of it.

But we believe that we have to go back to this original case of Celestine, which definitely has the principle that Congress is the only one that can diminish this reservation. That Congress has not diminished, has not seen fit to diminish this reservation, by 1151 in itself and 1151 especially with the footnotes, and 1153 with the footnotes, as is brought out in our brief here, on the thing,

definitely goes on the principle that Congress is and knowingly is assuming jurisdiction on all of the reservation not just the part that is trust land, as the State would have use believe.

And that's the only thing that makes sense. If we don't have such a situation as that, we have the thing that was brought up right here to start with, and that is a checkerboard. That is the thing that this Court, in Seymour, wanted to stray away from, wanted to keep away from on the thing, and they so ably set it out in Seymour on the thing.

And if we don't have federal jurisdiction of this whole reservation, we will come right back into this thing that you tried to guard against in the Seymour case. And that is a checkerboarded situation. Some want to call it a crazy quilt situation. I could --

QUESTION: Chief Justice Hughes, in his first tenure on this Court, way back, conceded that there was bound to be a checkerboard, as you call it, checkerboard situation with this hodgepodge of laws and treaties. I may have misread him.

MR. GUSTAFSON: I didn't get that idea, and definitly from Seymour that is what this Court attempted to avoid. In fact, they set it out, I think, very, very plainly. The State in that instance wanted to interpret this as notwithstanding the issuance of any patent, to mean notwithstanding

the issuance of any patent to an Indian.

But the State does not suggest, nor can we find any adequate justification for the interpretation. The issue has been squarely put to rest by congressional enactment of the recently prevailing definition of Indian country in 1151 to include all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Day, if you can finish in ten minutes, we'll finish today and let you get back to the Indian country; otherwise, we'll go over till tomorrow.

Do you think you can finish in ten minutes?

MR. DAY: Yes, I can, sir.

MR. CHIEF JUSTICE BURGER: All right.

REBUTTAL ARGUMENT OF WILLIAM F. DAY, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. DAY: Your Honors, my brother, Mr. Sachse, says that this is almost like the situation in Mattz, it's almost a trustee relationship. It really does the same thing, because you're putting it in one -- out of one till into the other. And that's the problem.

It isn't the same. It's clearly not the same, on the face of the Act.

It's a direct cession and sale. It's not the same money. The government doesn't do the same things. It's not the same wording.

If it's clearly plain, it should be left clearly plain.

Counsel, my brother, Mr. Gustafson, I am sure, has been State's Attorney in his area, as I have down close to my reservation. I don't know my brother Sachse's information. Plat book or checkerboard jurisdiction, for officers that grow up and live in that country, is no big problem. Because in most instances the land is leased by people, and most of the crimes are committed in the towns, where it's normally all -- mostly all fee patented, and there's no problem.

Speaking personally, if I can, for a moment, I was also a tribal judge for about five years out in the Rosebud Indian -- probably was the only white tribal judge in the United States. I think I know how it is on closed portions of reservations, on 1151(a) and also on 1151(c). That's not the issue in this case.

The issue in this case is: was this, the boundaries of this reservation, diminished? If they were on the face of the Act, this Court should say so. If they weren't on the face of the Act, but were by surrounding history, legislative intent, then the Court, under its own rules, should say so.

And I believe that if you -- I know you'll read them. I believe that it's clear, first on the face, and, if not, but both ways.

When you sum it all up, it comes up to about 98, anyway.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:01 o'clock, p.m., the case in the above-entitled matter was submitted.]

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