In the

Supreme Court of the United States

Rosebud Sioux Tribe,

Petitioner,

v.

Richard Kneip Et Al

No. 75-562

Washington, D. C.
January 12, 1977

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ROSEBUD SIOUX TRIBE,

Petitioner,

v. No. 75-562

RICHARD KNEIP ET AL

Washington, D. C.

Wednesday, January 12, 1977

The above-entitled matter came on for argument at 2:10 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MARVIN J. SONOSKY, ESQ., 2030 M Street, N.W., Washington, D. C. 20036
Attorney for Petitioner

H. BARTOW FARR, Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530
For U.S. as amicus curiae, pro hac vice

WILLIAM J. JANKLOW, Attorney General of South Dakota, Capitol Building, Pierre, South Dakota 57501
For Respondents

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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 No. 75-562, Rosebud Sioux Tribe v. Richard Kniep et al.

Mr. Sonosky, you may proceed whenever you are ready.

Mr. Sonosky, it may be futile, but I am going to undertake to suggest again that unless you want to be here until a great deal later than the ordinary schedule, that you might consider not using any compulsion to use all the time assigned.

MR. SONOSKY: I'll do my best, your Honor.

ORAL ARGUMENT OF MARVIN J. SONOSKY, ESQ.

ON BEHALF OF PETITIONER

MR. SONOSKY: Mr. Chief Justice, members of -- may it please the Court:

This case is here on writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The question before the Court is whether three-fourths of the Rosebud Sioux Indian Reservation in South Dakota has been terminated by three statutes adopted in 1904, 1907 and 1910. Each of those statutes opened a portion of the Reservation and provided for the sale of unreserved and unallotted land to settlers at prices fixed in the statute with the proceeds of the sales -- and this is important -- to be credited to the Tribe in the Treasury only as received from the settlers.

Rosebud Sioux Tribe is a part of the Great Sioux

Nation, one of the important American Indian Tribes. There is an on-resident population of about 7,000. Their history, the genesis of the Reservation goes back to the 1868 Treaty when the United States and the Sioux agreed to the establishment of the Great Sioux Reservation which embraces all of South Dakota west of the Missouri River, about 25 million acres.

The Treaty provided that this reservation would be secured to them and never any part of it would be taken from them without the written consent of at least three-fourths of the male adults.

In 1877, nine years later, the United States took 7 million acres of the Reservation. That left about 18 million acres.

In 1889, the United States enacted the statute of that year to which the Sioux agreed with the three-fourths majority and half the land, roughly, about 9 million acres, was explicitly restored to the public domain with the provision that it would be disposed of and the proceeds credited to the Tribe and -- this is important -- at the end of ten years, any of the land left, the United States would make a balloon payment and pay for all that was undisposed of.

As to the other nine million acres, that was divided into six reservations, all for the Sioux Tribe.

One of those six reservations was for the Rosebud Sioux Tribe.

The 1889 Act provided for allotment and the allotment process went forward shortly after the 1889 Act became effective.

In the back of the green brief, which is our opening brief, there is a map about the era of 1913 which shows the Reservation as established by the 1889 Act. It includes, starting from the eastern end, portions of Gregory and Lynan County. Then Tripp County. Then Mellette County and Todd County.

Now, these counties of course all came after the Reservation.

QUESTION: How many counties are there in South Dakota?

MR. SONOSKY: I don't know how many counties there are in South Dakota, your Honor. I am sure the Attorney General may be able to tell you.

QUESTION: All right. It is not important.

QUESTION: You mean, these came after 1889?

MR. SONOSKY: After the 1889 Act, they were organized.

The -- as I said, the allotment process went forward.

In 1901, the United States undertook to take a section, an outright purchase, to buy the eastern portion of the Reservation, parts of Gregory and Lynan Counties.

And an agreement was negotiated in that year which provided for the outright session, sale, conveyance and

surrender of the land, about 450,000 acres, as I recall, for a lump sum of one million, forty thousand dollars and the Indians consented to that, again, three-fourths majority.

And the agreement provided that it would not be effective until the Indians consented and until it was ratified by Congress. It went to Washington and it was sent to Congress for ratification.

The House was willing to adopt a simple ratification bill but the Senate insisted on two amendments, one of which was to grant the state all sections 16 and 36, the school lands and the other one was to open up the lands for free homsteads.

There was resistance to this on the ground that since we paid tax money for this Indian land, we ought not to be giving it away and it failed.

Ultimately, there was a compromise and the 1904 Act was enacted and the 1904 Act, which is set up in our brief, in the Appendix to the green brief, page 1-a -- the 1904 Act, the format of that Act is very interesting because the Act itself provides that the lands should be opened and disposed of at the statutory price and the proceeds credited to the Tribe only as received from the settlers.

But the Act opens by setting out in the Preamble, preceding the Enactment Clause, the 1901 agreement, just as it had been consented to by the Indians and then comes the

enactment clause and then follows the agreement again, except this time they leave out one article. It is amended.

They amend the agreement to strip it of the article that required the Indians' consent and the ratification by Congress and they make another amendment which was, "We aren't going to pay you one million forty thousand dollars for it. What we are going to do is open up this land and dispose of it and as it is sold, the proceeds will be credited to you only as received."

That was the 1904 Act. That took care of Gregory and Lynan on the eastern end. Incidentally, the best land, of course.

In 1907, before the Indians had received --

QUESTION: Mr. Sonosky, was the land under the 1904 Act ultimately sold?

QUESTION: To private people?

MR. SONOSKY: To practically -- my recollection is that practically all of it was sold.

QUESTION: And were the proceeds of those sales credited to the Tribe?

MR. SONOSKY: Yes, the proceeds of those sales were credited to the Tribe.

In 1907, before they had received any money from the sales of these lands, the 1907 Act was passed and opened up Tripp County in the same way, the same type of statute. We

refer to them as surplus land statutes on the theory that they were surplus to the Indians' needs and they were disposed of to the settlers and the proceeds credited as received.

In 1910 was a third statute which covered Mellette County and that left Todd County, which was never affected by a statute although efforts were made to obtain a similar statute for Todd County.

Now, each one of these three statutes provided, except for the 1904 Act, provided for allotment. In the 1904 Act, the allotments had already been made because it started out as a session. It provided for allotments to all Indians in the area to be opened before it was opened and each one of them provided for a grant to the state of the school sections 16 and 36. The United States paid for that land, $2.50 an acre.

And the statutes also provided other benefits but in order to make absolutely clear that the United States was not buying this land, that the Indians were not selling this land, that the United States was not paying for this land, each one of these statutes in the last section -- and you can take any one of them, the first one on page 6a -- provided that nothing in the statute shall in any manner bind the United States to buy the land.

The United States was not a purchaser.

It went on to say, and the United States doesn't

guarantee to find purchasers for this land and it went on to say it again, that the United States, all it is doing here is acting as a trustee to open up this land and dispose of it and credit the Tribe with the proceeds only as received.

QUESTION: Now, to pursue Mr. Justice Rehnquist's question, was that carried out? Did they from time to time find buyers? Did the buyers pay? Did the money go to the Tribe?

MR. SONOSKY: Yes, your Honor, the land was opened up and it was disposed of until 1934 when the Indian Reorganization Act was passed at which time Congress provided that any lands in this type of Reservation that were undisposed of should be restored to the Tribe and at that time there was restored to the Rosebud Tribe all undisposed-of land and there were undisposed-of lands in Tripp County and Mellette County.

I just don't remember if there were any in Gregory County. And at the same time that was restored to the Rosebud Tribe, it was also restored to some 20 other tribes who fall in the same category.

QUESTION: Does the state argue that those restored lands are outside the Reservation or does it concede that they are inside the Reservation?

MR. SONOSKY: I am sure the state would not argue they are outside the Reservation because they are within the exterior boundaries of the 1889 Act and the Indian

Reorganization Act limited the authority to restore only to reservations.

Now we are in 1910. As far as the Bureau of Indian Affairs was concerned and the Department of the Interior, this entire area as fixed by the 1889 Act was administered as an Indian Reservation and the Tribe itself regarded all the people who lived within those boundaries as living on the Reservation.

In 1953, Congress passed what to Indians is the infamous Public Law 280 which authorized the state to take jurisdiction, or Indians on a Reservation, without their consent and the State of South Dakota in 1962 undertook to do that by an Act of the Legislature but the people in the State of South Dakota within the Referendum repudiated that Act and set it aside by a vote, as I recall of almost four-to-one.

QUESTION: I understood in the brief that South Dakota is not a PL280 state.

MR. SONOSKY: South Dakota is not a 280 state because that failed.

QUESTION: Because of that Referendum.

MR. SONOSKY: Because of that referendum.

QUESTION: I see. I see.

MR. SONOSKY: Or otherwise, it would have been.

QUESTION: But it is not.

MR. SONOSKY: It is not.

QUESTION: They decided against it and it never has been ever since.

MR. SONOSKY: I mention it only because the same interests that were moving that law continued to feel the same way and there was harassment and the state and counties continued to enforce their laws against Indians living on the Reservation and finally, this suit was instituted in the United States District Court for the District of South Dakota and the complaint alleged -- and I mention this because it defines the only issue that is before the Court.

The complaint alleged that the state and counties were enforcing state laws against Indians on the open portions of the Reservation and that the state had no authority to ask for a declaratory judgment to that effect.

The state answered and admitted that it was enforcing the laws only on non-trust land within the open areas.

The District Court rendered a judgment which was very broad. The judgment appears on the red Appendix to the Petition page 114.

The District Court held that the three acts in question did excuse the Reservation or Indian land nature of the unallotted surplus lands in said counties by returning them to the public domain and did diminish the geographical location of the boundaries of the Reservation.

On appeal, the Court of Appeals after the case was

submitted in oral argument, held the case until this Court came down on this decision in DeCoteau v. County State Court [DeCoteau v. District County Court] and after DeCoteau came down the Court of Appeals rendered its opinion and it held that these three -- that first was the 1904 Act, that the 1904 Act ratified the 1901 agreement and that it was a cession, that the 1907 Act used the identical language of cession as did the 1904 Act. There is no language of cession in the 1907 Act.

And that the 1910 Act used identical words, whatever it was meant. It didn't say words of cession, but identical words.

And it held that the Reservation had been terminated.

How did the Court of Appeals come to the conclusion that there was a cession?

A cession is a sale. It is a high-class sale. It is a sale between sovereigns. To have a sale, you have to have a seller and you have to have a buyer. If you have a seller and a buyer, you have an agreed price. Then you have a sale and a cession.

Section six, the last section of these three surplus land acts, says in so many words that the United States is not buying this land. They are not even guaranteeing to find buyers for this land.

All we are doing here is agreeing to dispose of the land and credit the proceeds and there are reservations, if the

Court please and in particular, the Wind River Reservation where the same type of statute opened the land and only a little over 10 percent of the land was ever sold and the other 90 percent, after the Indian Reorganization Act, was restored to the Tribe.

How could the Court reach that?

The Court assumed there was a cession. That is the fundamental error of the Court Below. Nowhere in those opinions is there any explanation of how title got out of the Tribe into the United States and how do the courts below square their action with the language in the last section of these statutes? They don't.

QUESTION: Mr. Sonosky, can I interrupt you right there? You referred to the 1934 Indian Reorganization Act and I understood you to say that pursuant to that statute, the unsold lands were restored to the Tribe.

MR. SONOSKY: Yes, your Honor.

QUESTION: But if your theory is correct, why weren't those unsold lands already the property of the Tribe?

MR. SONOSKY: They were the property of the Tribe. They were the property of the Tribe.

QUESTION: Well, then --

MR. SONOSKY: Beneficial title to those lands never left the Tribe. All that happened is that those lands were subject to a statute that left them open for disposal but

until they were disposed of, the Tribe remained the beneficial owner. Proof of that is that this Court held in United States versus Creek Nation, which is cited in our brief, where there was a mistake made by the United States surveyor in the line of the Reservation and he put Reservation land out into the Public Domain and it was disposed of by the United States and when the Tribe sued to recover, for just compensation, the question arose as to when did title pass?

It didn't pass when the erroneous survey was made because that was the mistake of a federal officer. The United States is not responsible for that.

But when the patent was issued to the entrymen, title passed and values were determined as of the date of the issuance of the patent.

The same thing is true here. As a matter of fact, each one of these Acts provides that until that entryman does all that he is required to do in terms of residence and settlement and pays for the land, he has nothing. Thus when an entryman failed, his entry was cancelled and the statutes, each of them provides the land goes up again for sale.

Beneficial title never left the Tribe. If it had left the Tribe, instead of restoring the land to the Tribe, it would have taken an Act of Congress to convey the lands from the United States to the Tribe.

QUESTION: May I ask you this question, Mr. Sonosky?

If the agreement that had been reached between Inspector McLaughlin and three-quarters of the adult members of the Rosebud Sioux Tribe back in 1901 had been accepted in the form in which it was negotiated and written, would that have been a cession?

MR. SONOSKY: Yes, your Honor. That would have been a cession and we said that in our brief to the Court of Appeals before this Court came down with DeCoteau because there was an agreement.

QUESTION: And very clear words of cession, weren't they?

MR. SONOSKY: Unmistakeably clear words of cession.

QUESTION: In the agreement.

MR. SONOSKY: In the agreement and there was an agreed price. The Indians were transferring their land and the United States was giving them one million forty thousand dollars for it.

QUESTION: Right.

MR. SONOSKY: And that was DeCoteau and that is what DeCoteau stands for.

QUESTION: Right. And if that agreement had been effectuated you can say that that would have been a cession under DeCoteau or you say you concede then to the Court of Appeals before DeCoteau.

MR. SONOSKY: Before DeCoteau.

QUESTION: And in the 1904 Act, the Congress, the Senate and the House of Representatives purported to accept, ratify and confirm that agreement but then they said, "As herein amended and modified" and that is your case.

MR. SONOSKY: Yes, and the amendment was to strike the consent and ratification and to eliminate the -- well, they might as well have just thrown it out.

What they were really doing was to make sure that the opposition understood that they were not spending tax money for land and this is the format they adopted but in Mattz versus Arnett, in Seymour versus Superintendent, which is by contrast to DeCoteau, the situation that we have here, where there is no sale, there is no buyer, there is no agreed price, the land was never placed in the public domain, Indian title was never extinguished and the Reservation boundaries were never terminated or affected and that is the controlling principle for the Rosebud case.

QUESTION: May I ask you another question, Mr. Sonosky? Supposing we were persuaded, or the statute expressly provided that upon the sales over a period of time the individual private citizen who would buy the land through the government as trustee for the Indian, that as these parcels were sold, the Reservation would be diminished to that extent and that you therefore have a gradual diminution of the boundaries rather than the wholesale diminution that the lower

court found.

Would that be constitutionally permissible?

MR. SONOSKY: I have no doubt that it would be constitutionally permissible because the power of Congress over Indians is so broad.

QUESTION: The reason I ask you this, some of the legislative history, as I read it, would be consistent with the Congressional understanding of that being what was actually going to happen where they talk about diminished Reservation and changed boundaries and the like.

MR. SONOSKY: Yes.

QUESTION: But I realize that is not the theory of the court below or the government's theory.

MR. SONOSKY: No. And since then we have had a statutory definition of Indian country and it includes all land, trust or nontrust. That is 18 USC 11 --

QUESTION: Well, that is for purposes of criminal jurisdiction.

MR. SONOSKY: Except that this Court has applied it in all cases. It has not made the distinction. The Court has applied it in all cases.

The Court applied it in Mattz v. Arnett and Seymour versus Superintendent and the reason for it is that they just got sick and tired of having law officers running around with an abstract of title in their property to find out whether

they were or were not on trust land. It is pretty hard to figure that out even when you are living on the Reservation and in order to permit effective prosecution of the laws, that was done.

Thank you, your Honor.

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

Mr. Farr.

ORAL ARGUMENT OF H. BARTOW FARR, ESQ.

ON BEHALF OF U. S. AS AMICUS CURIAE

QUESTION: Mr. Farr, before you commence, will you help me understand the facts situation?

The main issue, as I understand it, is the boundary of the Reservation.

MR. FARR: That is right.

QUESTION: The location of the boundary. Who occupies the land within the disputed area? Do Indians still occupy part of it?

MR. FARR: There are Indians within the disputed area but I think the area is largely occupied by whites who purchased or successors of the people who purchased the open lands.

QUESTION: Right. And the principal interest of the Indian Tribe, as I understand it, is whether the Tribe or the state exercises jurisdiction within the disputed area.

MR. FARR: The Tribe and the Federal Government or

the state, yes.

QUESTION: Right. Well, who, in fact, has exercised jurisdiction legally? What laws have prevailed within the disputed area in recent years? How far back?

MR. FARR: Well, this is a question which I think the record is unclear on, Mr. Justice Powell. Essentially, the United States, as the United States understands the position -- of course, not having been the party to the suit throughout, there has been some exercise of jurisdiction by the state, they having taken the position that this is land outside of an Indian Reservation to which their jurisdiction applies.

QUESTION: Have state criminal laws been imposed or enforced within the disputed area?

MR. FARR: I believe that the state has, you know, gone ahead and imposed state criminal law as well as, though, I think the Federal Government and the U.S. Attorneys have also imposed some federal law but there has basically been a kind of working relationship in this area.

I am not sure how much of this is reflected by the record but I think as a practical matter that is generally what has been happening.

QUESTION: All right. Just one other question. We are not concerned with the individual title of any particular parcel of land, are we?

MR. FARR: We are not.

QUESTION: Just the boundary of the Reservation.

MR. FARR: That is right.

QUESTION: Right.

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

The United States is appearing this afternoon as amicus curiae is support of the position of the Rosebud Sioux Tribe that the decision of the Court of Appeals for the Eighth Circuit should be reversed.

We think that under the principles set forth by this Court in previous cases, particularly in Seymour, Mattz and DeCoteau, that it is clear that the acts of 1904, 1907 and 1910 did not disestablish the boundaries of the Rosebud Sioux Reservation in the areas to which they applied.

I would like to note briefly at the outset one important general point. In suggesting that Congress did not disestablish the boundaries of the Reservation in the early 1900's, we do not mean to imply that Congress expected that those boundaries and the boundaries of comparable reservations were going to continue indefinitely.

We agree that in the early 1900's, Congress contemplated at some period of time that the Reservation system would, in fact, come to an end but we believe that time was when the trust period on Indian allotments expired and the

assimilation of Indians and white settlers on the lands had been accomplished.

QUESTION: And in your view, it would have taken an Act of Congress later, then, to --

MR. FARR: That is correct. Congress at some point would have found that the assimilation had occurred and would have passed an Act abolishing the Reservation.

At that point, all of these lands and all of the people on it -- except if the Federal Government wished to retain jurisdiction over the Indians -- would have gone within state jurisdiction.

In 1934, however, as the Court is aware, Congress reversed that policy when it passed the Indian Reorganization Act and definitely extended the trust period on the Indian allotment.

I will discuss that more briefly in connection with the General Allotment Act of 1887.

Because this case involves an issue of statutory interpretation, the United States does not urge or perhaps even believe it is possible for this Court to lay down a binding fixed rule that would govern construction of acts in all similar cases.

However, we do believe it is appropriate for this Court to reaffirm the principle that except for the language of an act or the compelling legislative history, shows a clear

intention by Congress to contract Reservation boundaries and limit federal jurisdiction over certain areas of Indian reservations, that whenever Congress without a binding agreement opens lands to white settlers, it does not pay for them and does not guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians -- as they did in this case -- that act does not remove the lands from the boundaries of the Reservation.

As this Court said in Seymour, discussing an act with very, very similar terms, the purpose of the 1906 Act is neither to destroy the existence of the Reservation nor to lessen federal responsibility or jurisdiction over the Indians having tribal rights on that Reservation.

Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government has made up out of whole cloth. It is supported both by history and by the previous decisions of this Court.

To begin with, it is well-recognized that the Tribes are entitled to rely on certain rules of statutory construction. In particular, doubtful expressions are to be resolved for the benefit of the Indian.

More particularly, in cases of these types -- of this type, the intent to disestablish Reservation boundaries must be made clear, either from the Act or the legislative

history and as this Court said in Rice versus Olson, the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history. All of these rules of construction apply to the case at hand.

Equally important --

QUESTION: Mr. Farr, may I interrupt you?

MR. FARR: Certainly.

QUESTION: As I understand the geography, we really are not talking about very many Indians because all of the unsold land has been restored to the Indians and all the land which was sold was sold to whites. Isn't that right?

MR. FARR: Well, those facts are true, yes. But in terms of the area in which we are talking about, we are talking about a considerable area of land in which Indians will either be able to move within federal jurisdiction or will be moving within the state jurisdiction and of course, Indians do have allotments within those open areas.

QUESTION: Within the open areas.

MR. FARR: Yes. They do.

QUESTION: But could you clarify one thing? What percentage of the -- what portion of this total land was restored in 1934? How much of the original reservation is in dispute?

MR. FARR: I would love to answer that question but I have no idea.

QUESTION: The record does not tell us, I take it.

MR. FARR: No.

QUESTION: But these would be probably noncontiguous parcels, wouldn't they? They would be little islands.

MR. FARR: They are likely to be, right. I mean, depending on the settlement practices and who defaulted and who did not, the lands that would be left available would be likely to be individual tracts. That is correct.

QUESTION: One more last question. Does the record tell us how many Indians live on the lands in dispute?

MR. FARR: I believe that there is a figure stated in one of the opinions below that -- I think that the Reservation covers about 7,000. I think that the areas that we are talking about, the counties that we are talking about, the number of Indians is somewhere around 1,600 or 1,700. I think that is reflected in the record.

QUESTION: I see. And those would be Indians that reacquired lands or now occupy lands which were originally --

MR. FARR: Well, not necessarily. Again, they may be Indians who were allotted lands at the time that these areas were opened. When the areas were opened, Indians were first given an opportunity to select allotments within those areas.

QUESTION: Well, wouldn't, by virtue of those allotments, wouldn't that land be Indian country?

MR. FARR: That land is Indian country.

QUESTION: There is no dispute about that.

MR. FARR: No, I don't believe so.

QUESTION: How many Indians occupy land over which there is a dispute? Do we know that?

MR. FARR: I do not know.

QUESTION: And there would be very few, would there not?

MR. FARR: Well, I don't know how many there would be, but I think -- I might just say that the principle, I think, extends further than that because jurisdiction, if it only applies on allotments, the Indians, any time they step off their particular allotments onto territory that is owned by a white settler may at that point be subject to state jurisdiction and that is something that clearly the Indians do not want and which is an interest we feel that we ought to protect in this case.

Turning to the General Allotment Act of 1887 briefly --

QUESTION: In other words, the nonreservation land can be and is Indian country if it is owned by the individual Indians.

MR. FARR: That is correct. That applies in --

QUESTION: And by the same token, or the other side of the same coin, within a Reservation there can be fee simple and non-Indians.

MR. FARR: Well, there can be fee simple and

non-Indians in terms of land ownership.

QUESTION: That is what I mean.

MR. FARR: No question. However, for purposes of jurisdiction --

QUESTION: Well, we are talking now about the geographic boundaries of the Reservation.

MR. FARR: That is correct. Now, the definition of Indian country, just to make sure that I have answered your question properly, the definition of Indian country in 1151 includes all areas including patented lands within a Reservation within Indian country and also, Indian allotments outside the boundaries of a Reservation within Indian country.

QUESTION: So within a Reservation, land owned in fee simple by non-Indians is still Indian country.

MR. FARR: That is correct.

QUESTION: Do you know what the relative proportion of whites and Indians is in the area that is disputed?

MR. FARR: If my memory serves me correctly, Mr. Justice White, I think there are somewhere around 16,000 whites and 1,600 Indians.

QUESTION: 16,000 whites and 1,600 Indians.

MR. FARR: I believe that is correct.

We also believe, in addition to the presumptions that I discussed a minute ago, that the General Allotment Act of 1887 has -- that the policies and objectives of that are

consistent with the principle that an act such as this does not disestablish Reservation boundaries.

Although Respondents in their brief have continually turned the General Allotment Act on its head saying that it embodies the intent of Congress to disestablish Reservations, this Court has considered that precise question in several recent cases and found the opposite intent and we believe the Court correctly identified the intent of the General Allotment Act only last term in Moe versus Confederated Salish and Kootenai Tribes, in which you quoted from Mattz with approval the following language:

"Its policy, that of the General Allotment Act of 1887, was to continue the Reservation system and the trust status of Indian lands but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the Reservation could be abolished." And that is the Act of Congress that I said in answer to your question, Mr. Justice Rehnquist.

Unalloted lands were made available to non-Indians with a purpose in part of promoting interaction between the races and of encouraging Indians to adopt white ways.

QUESTION: When was that Act?

MR. FARR: That is 1887.

QUESTION: '87.

MR. FARR: Right.

And in fact, Respondents have said that this Sioux Act, in fact, followed along from that general plan.

We think that that indicates that the Court has recognized an intent to retain jurisdiction and control over those lands during the trust period with the consideration of whether to end the Reservation to be made at a later time when the assimilation had occurred and we think the Court has noted that even more specifically in the cases in which we very heavily rely on in our brief, Seymour and Mattz and also in DeCouteau, which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed.

In addition to these guiding principles, we also feel that the legislative history and the administrative treatment that we have set forth in our brief supports the position of the Tribe.

The remaining question then is, what is there sufficient to override this in the materials that the Court has before it?

Most importantly we call the Court's attention to the fact that there is nothing in the Act that says specifically that jurisdiction over these areas was to be given to the state.

In fact, I think, as a reading of the legislative history shows, Congress was really not concerned with the

jurisdiction at this point. The pressure on Congress was to open up lands for white settlers for two reasons, one, the settlers wanted the lands and two, the counties wanted a greater tax base.

Both of those objectives could be met perfectly comfortably by Congress by opening lands within the Reservation boundaries without sacrificing the principles of the General Allotment Act of 1887 which was to continue the Reservations during the period of assimilation.

QUESTION: Well, could the counties tax white-owned lands within the Reservation?

MR. FARR: Yes.

I don't believe that there is any dispute about that, but that was considered at that time and I believe, even now, would be considered land that is within the power of the state to tax.

In DeCoteau, in fact, discussing the -- this particular conflict of policy the Court said, in 1887, the General Allotment Act was enacted in an attempt to reconcile the government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon Reservation land and we submit in this case that the best way to reconcile those and the way that Congress did reconcile them throughout this period was to continue the Reservation system but open white lands so that they would have a taxable base for the county and

the whites would have the additional lands.

For those reasons, as my time is getting short, I will close and simply suggest that the decision of the Court of Appeals should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Farr.

General Janklow.

ORAL ARGUMENT OF WILLIAM J. JANKLOW, ESQ.

ON BEHALF OF RESPONDENTS

GEN. JANKLOW: Mr. Chief Justice and may it please the Court:

If I can, before beginning here, start out and refer again to the map that, frankly, is in the brief of the Tribe for the Appellant in this case because there were several questions by members of the Court concerning the areas.

This particular area where my left hand is over is Gregory County which is affected by the 1904 Act.

This particular area where my hand is now over is Tripp County, South Dakota which is affected by the 1907 Act and where you see these two counties stacked on top of each other, or I should say, one on the other, the top county is Mellette County which is affected by the 1910 Act.

There is absolutely no dispute in this case with respect to Todd County.

Both the State of South Dakota, the Tribe, the Federal Government -- I think it is the only time we have ever all agreed -- we clearly agree that that is an Indian Reservation even though there is fee-patented lands on it.

We feel that that is the type of situation that the Court was addressing in Moe when it construed the subsection 6 of the General Allotment Act and not subsection 5 of the General Allotment Act or subsection 12 of the Act of 1889 so when the Government a moment ago was responding that this is the situation in Moe, the Court construed subsection 6 and it is this type of Reservation, the Todd County area, which is abhorred as the checkerboard kind of problem that the Court has addressed itself to before.

That is not the situation with respect to Mellette, Tripp and Gregory. There has been some questions by members --

QUESTION: What about Lynan? Lynan was --

GEN. JANKLOW: I'm sorry. Lynan County is this small little area.

QUESTION: Part of Lynan went in the 1904 Act.

GEN. JANKLOW: That is correct, sir.

QUESTION: Included with Gregory.

GEN. JANKLOW: That is correct. Lynan County. I'm sorry, I missed. It is just a small little corner up there.

QUESTION: General, in Todd County, is fee-owned land subject to county taxation?

GEN. JANKLOW: Fee-owned lands in Todd County are subject to county taxation.

QUESTION: But is the fee-owned land subject to tribal jurisdiction?

GEN. JANKLOW: Well, the Rosebud Sioux Tribe, that is something that was frankly washed over by the government. The Rosebud Sioux Tribe has passed an ordinance which provides that they have jurisdiction, civil and criminal, over everybody within Todd County.

QUESTION: What about --

GEN. JANKLOW: Excuse me, within all four country areas. It is of recent vintage, this particular one is. As a matter of fact, it is about the time this lawsuit started but their law and order code now provides that they have civil and criminal jurisdiction over everybody within -- we call it the four-county area even though Lynan County would make it a fifth.

QUESTION: That includes taxation.

GEN. JANKLOW: That -- they don't say that. Their law and order code provides that they have jurisdiction over everyone within the Act of 1889, which is this area and it has been approved by the United States Department of Interior as a valid tribal ordinance of recent vintage also.

QUESTION: Let me ask you this. Do you concede the power of the tribe to exercise civil and criminal jurisdiction

over all of Todd County?

GEN. JANKLOW: Absolutely not with respect to non-Indians. But that is clearly not the issue in this case.

QUESTION: No, it isn't.

GEN. JANKLOW: We don't consider that at all.

QUESTION: So there is no additional issue by what you just told us in the rest of the case.

GEN. JANKLOW: No, sir.

Now, the question was also asked in the disputed area, and we will call that -- it is three and if I say three, I really mean three and a part of fourth or four, but in the disputed area the question was asked whether or not the Tribe has exercised jurisdiction.

The Government responded they believe everybody has been exercising jurisdiction.

I defy anybody any time since 1904 to show any case that the Federal Government has ever handled in the federal courts with respect to non-Indian land in Gregory County, that since the Act passed in 1907 with respect to Tripp County and with respect to 1910 with respect to Mellette County.

There is litigation with respect to the Indian lands because what we have in the old Reservation, there were Indian allotments that were taken and under 1151 subsection C of Title XVIII of the United States Code, there is no argument by the State of South Dakota that that is clearly federal

jurisdiction and for all we care, it is also the Rosebud Sioux Tribe's jurisdiction. Every place there is an Indian allotment in these three counties, this is what you call the "checkerboard." It is what you have insisted and what you have in some other places but the important thing, although this Court has repeatedly said that it abhors checkerboard jurisdiction, we have lived with it and we have lived with it comfortably in the State of South Dakota with respect to these three counties since the turn of the century and we have not had a problem.

It has never been up before this Court before. There has not been a prolific amount of litigation in the Court of Appeals or even in the Federal District Court. I think all of the cases that have ever been involved in a jurisdiction fight are cited in either the Government's brief, the Tribe's brief or our brief and there are very few of them, probably eight or nine in number.

And there has never been a dispute and we have worked comfortably with jurisdiction. Very little.

QUESTION: General Janklow, what percentage of the total area would you estimate is undisputed Indian country?

GEN. JANKLOW: In terms of three counties because I don't have figures for Todd.

QUESTION: Right. I am just talking about the three counties.

In terms of the perspective, Todd County is a little better than 25 miles wide and 50 miles long so -- and this would be a close facsimile of what the size is -- but it is approximately 10 percent of the land area in Mellette, Tripp and Gregory Counties are Indian trust lands and that is all.

And approximately 10 percent of the population in Mellette, Tripp and Gregory Counties are Indian people and it is split as to where they live.

Some of them live on trust lands and some of them live on deeded lands. The Tribe has never, until 1972, even attempted to exercise jurisdiction.

If for no other reason, I can tell you, I lived on that Reservation for six years as director of the OEO Legal Services. I was the chief of the Legal Services under the OEO Program down there.

QUESTION: General, what about deeded land that is lived on by an Indian?

GEN. JANKLOW: Deeded land in those three counties, the Tribe has never exercised jurisdiction.

QUESTION: Even though occupied by an Indian.

GEN. JANKLOW: Even though occupied by an Indian. There has never been anything in the Tribal Court. There are thousands of divorce cases that have been handled, adoptions, guardianships, probates --

QUESTION: And that land figure that you gave me is

allotment.

GEN. JANKLOW: It is allotted or I call it Indian Trust.

QUESTION: Indian Trust. All right.

GEN. JANKLOW: That would include allotments but also land that is not allotted that is in Indian name. I would include that in the total.

QUESTION: Was this where the Tribe was initially?

GEN. JANKLOW: The original agency was Rosebud Agency.

QUESTION: But I mean, were the Indians moved there from some other area or was this their ancestral home?

GEN. JANKLOW: The eastern end of the Rosebud Reservation consisted of Brule Sioux which was added to the Rosebud's Reservation with their consent and I do not know all that history. But I do know that they are not all Rosebudders although they are all Rosebudders now.

But the Tribe has never exercised jurisdiction and the Federal Government never has either in those areas so what we have in terms of -- if you want to just talk jurisdiction, 1151 takes care of it. It is subsection C with respect to those individual pieces of Indian land in the three-county area and it is subsection A I believe which is any land within the area of Todd County, whether it be deeded or on nondeeded land.

All right, so the Tribes filed a lawsuit and we are now here. A couple of important, not distinctions but characteristics of how we contrue these things.

There are three basic cases that I think everybody concedes lead the way. The first one is the decision in Seymour. The second one is the decision in Mattz and the third one is the decision last year involving our state also, DeCoteau.

In Mattz and Seymour, both of them, this Court handed down a rule of construction of these Indian treaties and these Indian statutes that are passed and it said, you look on the face of the Act and if it is not absolutely clear, if it is not expressly clear from the face of the Act, you go to the legislative history and surrounding circumstances and this Court did that in Mattz when it wrote the Mattz decision.

It found that the Act, there was some question about it, went behind the face of it. As a matter of fact they found that there was no question about it and still went behind the face of it and used legislative history and surrounding circumstances to support the decision.

They did exactly the same thing in DeCoteau and in the DeCoteau decision they also cited Seymour and Mattz again with approval.

Now, what we have with respect to the Rosebud Sioux Tribe case is not unlike the case that was up here last year

before you and that is the DeCoteau case.

The language is the same in the Act, "cede, sell, convey." That is exactly what Sisseton had. There is only one difference between DeCoteau and this case. Even the school lands are there. The only difference is that this is un-sum certain and there is a great distinction to be made about that.

In the DeCoteau case, the Tribe was told and knew exactly what they would be paid for their land and in this particular case the Tribe was told that they would be paid so much for the entry on the first so many days.

In other words, the best land would go first so it would be like $4, then $3 for everybody who came after that and then $2 for everybody that came after that and then no guarantee as to all of it being sold. That is this last paragraph.

QUESTION: But the entire area really wasn't sold, was it?

GEN. JANKLOW: The entire area? I think the figure was, it was asked of Mr. Sonosky, it is approximately 4,000 acres of this total huge mass was returned in around 1934, the 1930's.

QUESTION: Well, the 4,000 acres were not sold, apparently.

GEN. JANKLOW: I think it is approximately that.

Now, I don't know --

QUESTION: Those words you were referring to didn't -- certainly didn't mean that that entire area was sold and conveyed at that time.

GEN. JANKLOW: I don't follow your question, I'm sorry, Mr. Justice.

QUESTION: Where are you reading the words you just read to us?

GEN. JANKLOW: I didn't read anything.

QUESTION: Yes. "Sold and conveyed," did you say?

GEN. JANKLOW: Oh, "Cede, grant, sell." Is that what you mean?

QUESTION: Yes.

GEN: JANKLOW: That is the first Act, the 1901 Act.

QUESTION: No, what area did that refer to?

GEN. JANKLOW: That referred to Gregory County.

QUESTION: Well, was there ever any land that was not sold to somebody in Gregory County?

GEN. JANKLOW: To my knowledge, land was returned in Gregory County. Now, one thing that you have to remember is --

QUESTION: The point you are making, though, is that those words, you say that those words meant that there was sold to the United States the entire Gregory County at that time.

GEN. JANKLOW: There was --

QUESTION: At that time.

GEN. JANKLOW: No, not sold to the United States. We

are not alleging that it was sold, per se, to the United States.

QUESTION: Well, when was it sold? When was it sold, under those words?

GEN. JANKLOW: Under the agreement that was signed? It was as of the time the Congress passed the Act.

What we have in the Act, and it is really confusing, because they went out and they entered into an agreement with the Indian people in 1901 and that was the first part. That is the part that talks about cede, grant, sell.

The Indian people agreed and signed it by a three-fourths majority. They came back and Congress didn't buy it but the best thing I can do is draw your attention; there are three volumes of Appendices, Joint Appendices filed plus we have our own that is filed with the Court and it goes all through this exhaustively.

There is an incredible amount of legislative history that has been able to be dug up.

QUESTION: Are you suggesting that as of the time the Act was passed, that that entire area was, what? Ceded by the Indians?

GEN. JANKLOW: The Gregory County area, that is correct.

QUESTION: At that time.

GEN. JANKLOW: At that particular time but they --

QUESTION: The entire area.

GEN. JANKLOW: No, in Gregory County.

QUESTION: Well, all right, all of Gregory County.

GEN. JANKLOW: The entire area, sir? No, sir. All the surplus and unallotted lands are what they gave up but also replete in there is, there was a restoration to the domain and as a result, the only thing that the Indian people kept were a lingering beneficial interest and that is what is discussed, the Government has discussed that, what took place in 1934 and this Court has also addressed itself to that in the Ash Sheep case which this Court has previously handed down and in the Ash Sheep case they said that these kinds of things kept a lingering beneficial interest.

The one thing that has not yet been previously told to this Court, in 1938 the Solicitor has handed down an opinion which is set forth in document number 59 in the Appendices.

QUESTION: Well, to whom did the Indians cede Gregory County in 1904?

GEN. JANKLOW: They ceded it to -- see, if I can -- I don't want to back myself into a cession corner because that is not the key question.

Mr. Justice White, the key question is, whether or not the Reservation was disestablished and that is always what this Court poses.

QUESTION: But you are relying rather heavily on the language which you just read.

GEN. JANKLOW: Well, only because this Court said that language is precisely suited for cession in DeCoteau. I have taken that exactly from what this Court said a year ago in DeCoteau.

QUESTION: I can't find that language in the 1907 and the 1910 Acts.

GEN. JANKLOW: It is not in the 1907 and the 1910 Acts. It is only in the 1904 Act.

QUESTION: And it is in the 1904 Act, not by anything signed by the Indians but it is signed by Congress.

GEN. JANKLOW: There are two things I would like to say to that, sir.

QUESTION: Normally, when a grantor sells something, he signs it. There it says, "The said Indians do hereby cede, surrender, grant and convey to the United States all their claim, right, title and so on" and then that is enacted by Congress. That is not signed by the Indians.

GEN. JANKLOW: Right, there's --

QUESTION: There is quite a little difference between this and DeCoteau.

GEN. JANKLOW: There are two things I would like to draw your attention to, sir. The first thing is, on pages 41 of Petitioner's brief -- and we agree -- the 1904, the 1907 and the 1910 Acts may use different words but Congress was intending the same thing. They have the same force and effect.

We don't argue that Gregory, Tripp and Mellette or the 1904, 1907 and 1910 have the same effect. The words, I believe, used by Petitioners say they concede the format is different but not the substance.

The 1904 in legal effect of language is the same as the 1907 and 1910. We agree with that.

All right, now, specifically, to get onto the 1904 Act, I think it is really important that we understand what happened. In 1901 a Commissioner was sent out there. He made an agreement with the Indian people for Gregory County.

QUESTION: That was Inspector McLaughlin.

GEN. JANKLOW: That was Inspector McLaughlin. That is correct, Mr. Justice Stewart. He came back. When the bill was submitted to Congress for approval what happened was, there was a huge fight that erupted. Not a huge fight but there was a disagreement in the Congress.

The key thing was, several of the eastern Congressmen were tired of giving free land to the homesteaders. They wanted them to pay for it and they were tired of the Government paying the Indians for the land and then turning around and giving free homesteads so they got into this issue and this is where it all came to a head in America's history of free homestead versus paid homestead. It was over, unfortunately, the Rosebud Reservation.

And so the bill did not pass.

Then a bill passed which provided -- and I believe it was the next year or the year after -- no, they got into a discussion on the homesteads and they sent Inspector McLaughlin back out to the Rosebud again.

QUESTION: And he couldn't get three-quarters of them to sign.

GEN. JANKLOW: He could not get three-quarters, but he got a majority.

QUESTION: Right.

GEN. JANKLOW: At this particular time. Three-quarters was not required by Section 5 of the General Allotment Act --

QUESTION: Under a recent decision of this Court.

GEN. JANKLOW: But it was -- that is correct. But it was decided, it was required under the Act of 1889.

QUESTION: I mean a then-recent decision.

GEN: JANKLOW: All right. Then the Lone Wolf came down. The Lone Wolf decision came down in 1902, which came in right in between the time the Indian people first signed the Act and had the three-fourths signatures and the next time around when they signed it in 1903 or 1904.

In the Lone Wolf decision this Court very clearly took care of the problem of signatures being required for disestablishment of Reservations or anything else because what is involved in the Lone Wolf case was a place where they

required three-fourths also by previous agreement and the Government did not get it. They only got a majority and Congress passed an Act. They went to the Supreme Court and this Court held that Congress had that plenary power and that they didn't have to stick to the three-fourths.

QUESTION: Right.

GEN. JANKLOW: But they could use a majority.

QUESTION: Your hypothesis, under Lone Wolf, the fact that they got a majority here doesn't make any difference, either. If not one Indian had consented to it, Congress presumably still would have had the authority.

GEN. JANKLOW: That is correct, your Honor.

Now, that's --

QUESTION: Nobody did consent to the 1907 and 1910. Isn't that correct?

GEN. JANKLOW: Then Congress, at the time that that happened, in the Lone Wolf decision, they say that what you are dealing with is the plenary power of Congress.

QUESTION: Yes.

GEN. JANKLOW: So as a result, these people turned around and Lone Wolf said that Congress exercised this power that it had without using it in a wise way or a judicious way.

They sent McLaughlin back out there when they never had to. He had then obtained the majority of the signatures, fully explaining to the Indian people, and again, it is all in

the Appendices, the transcript, of just what Lone Wolf meant and the power of it and the Congressional Records and the House Reports and everything are replete with discussions of what Lone Wolf meant. So everybody knew what Lone Wolf meant.

He came back and then they passed it based on the majority thing.

All right, now, with respect to 1907 and 1910, there was no agreement in 1910 but there were meetings with the Tribal Council but at that point in time, nobody was ever again signing agreements because of the Lone Wolf decision.

Lone Wolf did away with that particular necessity.

And you can go through the legislative history, you know, and if you will examine the Government's brief and you will examine the Tribe's brief, you'll find criticisms of what went on in the Congress but you can't find any substantive legislative history and there are hundreds of documents that pertain to it that are both in the Joint Appendix as well as in the individual Appendix.

I draw your attention to the document at 629, I believe it is, page 629 of the Joint Appendix, which is a House Report, which just lays the whole thing out. There are about six pages there which just lay out in detail exactly what it was that was happening and it lays out that these reservations were being disestablished so, although I was asked the question before, the cession is not the key aspect.

Whether or not there was a cession, frankly, is not even relevant. The question is, what was Congress' intent? Did they intend to disestablish the Reservation?

Because if the answer is no, we have three new counties in South Dakota that don't belong to the state, that are part of the Rosebud Reservation which has been quadrupled in size.

If the answer is yes, that Congress intended to disestablish the Reservation, then the answer is no. We'll live with what we have lived with for the last 60 years and so that is the key issue.

That is the crux of it. That is what Mattz has taught us and, frankly, that is what DeCoteau has taught us.

They have laid down that particular criteria.

The uncertain sum in the sum argument that has been raised, there is a lot of issue that because the Indians did not know ultimately what they would get, that somehow this uncertain sum created -- completely substantively changed these types of arrangements.

It is not clear. All Congress was doing was changing the method on how people were going to be paid. That is the only thing that Congress was doing and they say that over and over and over again in these reports.

They were tired of using taxpayers' money. They wanted the settlers to use their own money.

QUESTION: In fact, isn't there still another difference? During the period between the passage of the statute, say the 1904 Act, and the actual conveyance of real estate to a settler, who owned the real estate?

GEN. JANKLOW: All right, under -- all I can do -- I can't tell you that there is any magical point in time.

QUESTION: The answer would have been perfectly clear under the contract that was negotiated in 1901. The United States would have owned it, wouldn't it?

GEN. JANKLOW: Under the contract in 1901?

QUESTION: Yes.

GEN. JANKLOW: It is not unclear at this point that the Federal Government -- I can't answer that because the Government obviously had a title to give away to settlers. They didn't get the title from an Indian. They did get it from the Federal Government.

That is the ones who gave them. And there are a lot of -- excuse me --

QUESTION: Pursuant to the 1904 Act, the United States was the grantor of its own interest in the land?

GEN. JANKLOW: That is the one that was handing them out. They were signed by the President and they were issued, they said, pursuant to the General Homestead Act. That is what every patent out there says.

And so I can't say whether or not but that -- if you

are familiar with the '38 -- I can't describe it any better than the 1938 Solicitor's opinion which does discuss this out of the Ash Sheep case where it talks about whether or not this lingering beneficial interest, because he didn't know if anybody was ever going to move on it and buy it; whether or not that is a crucial and important aspect.

And what they held is that that was not the determining factor. Whether or not there was a cession was not important and whether or not the Reservation was disestablished or not was not important, that if there was a lingering beneficial interest, that was not inconsistent with allowing the Tribe to restore that to the area so that it would be outside of a diminished or reduced Indian Reservation, restoring those lands out in an area like that and still going on with their business, like we had in the Rosebud case.

That 1938 Solicitor's opinion just lays that particular aspect out.

With respect to the Ash Sheep case, the same thing is true and I draw your attention to one thing in the Ash Sheep case. That involved a reservation which, although it had a lingering beneficial interest, also disestablished part of that reservation and created a new boundary, right on the face of the Act.

So there is an example of a place where we do have a situation where new boundaries were created on the face of the

Act and the Indians still kept their lingering beneficial interests in those lands like we had in Mellette, Tripp and Gregory Counties.

QUESTION: Well, when was the Reservation disestablished, in part, do you say?

GEN. JANKLOW: I don't know that there is a --it could be one of two times.

QUESTION: Well, which one do you say?

GEN. JANKLOW: I think it is at the time that the Act of Congress passed and that is the way it was explained to the Indian people and it was also explained to Congress, but the Indian people were allowed to continue to occupy it.

QUESTION: So you have three separate parcel disestablishments.

GEN. JANKLOW: That is correct.

QUESTION: You don't think the determining time was when the land was sold to the settlers?

GEN.JANKLOW: That was the other thing. It very well could be. I honestly can't say, which is the --

QUESTION: The Court of Appeals held what?

GEN. JANKLOW: The Court of Appeals held that it all happened at one time.

QUESTION: Well, three separate times.

GEN. JANKLOW: Right, but I mean, as to each Act.

QUESTION: 1904, 1907, 1910.

GEN. JANKLOW: It was instantaneous.

QUESTION: Three separate disestablishments.

GEN. JANKLOW: But I don't want to support that position because I just -- you can't tell whether the Sioux ever took it.

QUESTION: Let's suppose the very improbable that none of the land was ever sold and the 1934 Act was never passed and right now, there had never been any sales of land, nobody wanted it. Except the Indians wanted it. They were living on it.

Under your position the Reservation nevertheless would have been disestablished back in 1904.

GEN. JANKLOW: That is just exactly what Congress said over and over and over in its Congressional Record, over and over and over in the debates, over and over and over in the House Reports. There is just voluminous stuff and it is replete with just exactly that, that the only change -- that they were not even thinking about whether or not --

QUESTION: What was that document? Is that the first document there is? What one did you quote?

GEN. JANKLOW: I would say 629 of --

QUESTION: What document is it? Do you know?

GEN. JANKLOW: It is a House Report.

QUESTION: Oh, a House Report.

GEN. JANKLOW: A House Report that was sent over to

the Senate explaining what it was in the 1904 Act.

QUESTION: 609?

GEN. JANKLOW: 629.

QUESTION: All right. Go ahead. Sorry to interrupt you.

GEN. JANKLOW: We think this -- that, and the 1938 Solicitor's Opinion which is found as Docket Number 59 in our blue State's Appendices, which is on page 114. Those are the two ones that I think explain that whole area that we have been talking about for the last several minutes.

As far as what words are used for disestablishment, if you look at the cases, you see that we have everything from the words, "Cede, sell, convey, disestablish, restore to the public domain, dispose, diminish."

Unfortunately, Congress never used any one set of magical words and that is why every time that this Court has been faced with this particular kind of question, whether it was Seymour, whether it was Mattz, whether it was DeCoteau or now, that you have to go back and you have to look at the legislative history and the surrounding circumstances as well as the Act to figure it out.

QUESTION: What were the pages in the Appendix?

GEN. JANKLOW: Page 629 in the brown Appendix.

QUESTION: Yes. But I mean, 629 and you say that is a what?

GEN. JANKLOW: That is a House Report.

QUESTION: Committee Report?

GEN. JANKLOW: Yes, sir.

QUESTION: House Committee Report.

GEN. JANKLOW: I just remember reading House Report.

QUESTION: All right.

GEN. JANKLOW: I don't know if it is Committee or not. It is just House Report.

QUESTION: All right.

GEN. JANKLOW: And the other one is document --

QUESTION: Excuse me. Go ahead.

GEN. JANKLOW: Excuse me, sir.

QUESTION: I didn't mean to interrupt.

GEN. JANKLOW: The other one is Document Number 59 on page 114 of the blue Appendix.

QUESTION: Thank you.

GEN. JANKLOW: We would also draw the Court's attention to pages 99 through about 105 in the brief where when you look at what are known as the Todd County Documents, it really lays out what exactly all the understandings of the parties were. It lays out what -- because what happened was, under Congress' power to disestablish these Reservations, they could have always gone forward and disestablished the Reservation. They went back for 1907. They went back for 1910 and the record is replete with the Indian people saying, "Look,

you came once. We gave you Gregory County. Now you are back here for more land."

And this is in the meetings with the Council and there are transcripts on this that are all through the records that are before you.

Then he comes back in 1910 and they say, "Look, we gave you Gregory County and Tripp County. Now our Reservation is half the size it used to be." And he is telling them, "Look, when the Government wants it, they are going to get it and let's talk about it," and so they again agree and away it goes.

And then in 1910 he goes back and he tries to take Tripp County. He tries to open Tripp County and this is again the famous Inspector McLaughlin, the great land-grabber, because he is all over the western United States taking land from everybody, especially poor Indians and he is back there again negotiating and he happened to speak Sioux and this time the Tribe put its foot down and they said, "No more. We gave you almost all of our Reservation. We gave you three-fourths of it. We only have this small corner left."

All this is in the record.

"That is all we have left of our Reservation. Please don't take that from us."

And he went back, although he had been sent out to negotiate another agreement, he went back to Washington and told that to the Congress, told that to the Interior Department

and the Interior Department finally suggested to Congress they not open up and effect Todd County in any way so there was no change but as far as what the understanding of the parties were, there has never been a misunderstanding of the parties, be it the Federal Government, the Tribe or the State of South Dakota, until 1972.

After the decision, frankly, the New Town decision, which was an Eighth Circuit decision up in North Dakota, everything really changed in the jurisdiction in South Dakota.

We have had litigation after litigation with respect to every one of our Reservations. Dakota was first. This one is here. The Court hasn't decided whether or not it is going to take certiorari on Cook, which is the next Reservation over. Corsi County is working its way up through the courts. All of them based upon the fact of what went on with respect to the New Town decision in the Eighth Circuit. That is what started it all.

QUESTION: Did that case come here?

GEN. JANKLOW: Which one?

QUESTION: New Town.

GEN. JANKLOW: New Town did not come here. There have been other substantive decisions that have. This one has and the other one, Sissiton, has and Cook has been decided by the Eighth Circuit and a petition for cert has been requested and nothing -- no action has ever been taken on it.

Todd County has had other action taken. As Justice knows, we had the Beardslee decision where it talked about disestablishment in that particular case, where, I believe, the exact language is -- where it discusses the areas other than Todd County of the Rosebud and said "A disestablished portion of the Reservation, however that disestablishment may have been effected."

And this is the decision that goes way back into the '60's, into the middle '60's.

There has never been any argument, disagreement or misunderstanding by anybody until the policy changes.

Interestingly enough, we are here today against the United States of America. In 1973, with a Reservation that has got exactly the same language as one of these Acts, exactly the same Act -- I should say language -- United States ex rel. Condon versus Erickson which was another Eighth Circuit decision, they are in there amicus on our side, on the State of South Dakota's side and on the basis of the New Town decision, the Eighth Circuit turns around and says that Condon -- that the Government's position was wrong.

Now they are in here sounding like, since time immorial, they have taken the position that, our position of the State of South Dakota.

In the La Plante case that the Eighth Circuit Court of Appeals decided many, many years ago, 20, 30 years ago, I

can't even remember the date, many, many, many years ago, 20, 30 years ago, I can't even remember the date, again, the Federal Government came in and took the position that those Reservations had been disestablished but to come in and argue now in 1975 that this has always been the consistent policy of the Federal Government is nonsense.

Unfortunately, we have to look back and see what happened at the turn of the century because that is what controls. It is not what actions or who has been exercising jurisdiction since then and we know that.

What controls is what happened at the turn of the century. Unfortunately, it is people's lives that are affected. Ninety percent of those people out there are non-Indians and I am not imputing any bad motives to the Tribe and I don't suggest that it was the white people who don't like Indians or who want to harass Indians or, in the words of Mr. Sonosky when he started, harassment in these particular counties, these same forces that tried to take jurisdiction are behind anything.

Those have not been the problems that we have had.

What we need, frankly, from this Court, what we need from the Government, is a consistent policy because what happens here and what happens in the Congress affects us in our daily lives.

People have investments out there, both Indian and

non-Indian. People have their families out there, both Indian and non-Indian. We can't continuously be trading these counties back and forth or changing our positions every 10 or 15 or 20 years and expect there ever to be a lack of problems out there in that particular country.

They can talk all they want about the problems that we had but this is the same state that has set up an Indian State Indian Task Force that involves members of that Tribe, that hasn't -- believe it or not, we have our own negotiating committee on the state level, the only one in the Union to sit down with these tribes and try and negotiate these problems out but we can't do it if the policy of the Federal Government is always going to change.

The important thing is, let's see exactly what Congress intended at the turn of the century.

Sum certain is not an important aspect. It may be important, as it frankly looks like it might have been in DeCoteau. Until you get to look at the Rosebud documents, unfortunately, Rosebud lays it all out as to what the sum certain aspect was and all it was was a vehicle to facilitate the change and they say that over and over and over and not even the Indian people objected to that at the time that these conversations went on.

Everybody understood what happened.

I understand the Court wants to go home. I have got

time but I won't use it.

Unless there are any questions, that is all that I have.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, General.

Mr. Sonosky, do you have anything further?

You have a few minutes left.

REBUTTAL ARGUMENT OF MARVIN J. SONOSKY, ESQ.

MR. SONOSKY: I have listened to the Attorney General's conversation. Much of it is assertion and not supported by the record and not supported in fact and I would indulge the Court not to give heed to these wide statements that are being made.

We do have a principle established and it is DeCoteau and it is Mattz and it is Seymour. And if those principles don't control, then every one of these 20 Reservations that we have found with identical statutes to Rosebud is going to have to be decided on the basis of things that are extrinsic to the statute.

I didn't hear the Attorney General explain to the Court what that last section of our statutes meant where the United States said it was not a purchaser.

You cannot avoid -- you cannot give title if you don't buy it. Now, that includes the United States.

Nor did the Court of Appeals touch that statute. Nor

did it touch that section. Nor did the District Court.

When the Court looks -- the reference was made here -- to a 1903 agreement, they did go back and get an agreement from the Indians in 1903 and got a majority vote but significantly, Congress didn't put that in the 1904 Act. The one they put in the 1904 Act was the one where they got the three-fourths majority because that was the only one that was valid.

Lone Wolf simply says that Congress has a constitutional power -- power to do what it wants with Indian land without the Indians' consent.

Lone Wolf said to substitute a majority for a three-fourths.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:19 o'clock p.m., the case was submitted.]