Indian Country, Indian Reservations, and the Importance of History in Indian Law

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I have had the special privilege of representing Indian tribes for almost 30 years. At our firm, we view our Indian law practice, as well as our environmental work, as a form of public interest law. My firm began practicing Indian law long before the advent of Indian gaming, when tribes typically had very limited resources for legal services, and we have maintained our commitment to representing tribes at below-market rates ever since. We have often undertaken major projects on behalf of tribes or environmental organizations with little assurance of compensation because we were simply convinced it was the right thing to do. I am very pleased, therefore, that the law school's public interest law project is co-sponsoring tonight's program.

The field of Indian law is extraordinarily diverse. There are 564 federally recognized tribes as well as additional groups seeking recognition as tribes. Each tribe has its own unique history, organization, challenges, and opportunities.

As sovereigns, the tribes confront a wide array of issues from economic and industrial development to cultural preservation and environmental protection; from providing a 21st century education to their children to preserving and implementing 19th century treaty rights; from seeking redress for past wrongs at the hands of federal, state and local governments to developing new, cooperative working relationships with those governments, and from maintaining law and order in their communities and combating substance abuse and domestic violence to providing health care for their members.

Lawyers practicing Indian law may confront any one of these or many other issues. In order to address these issues, however, they must gain an understanding of and appreciation for unique Indian cultures. Students in the Indian Law Program who are able to learn about traditional dispute resolution processes will have a better understanding of how tribal courts operate and will be better positioned to assist their Indian clients, whether as prosecutors, defenders, or civil litigants. Similarly, economic development initiatives developed with an understanding of a tribe's traditional decision-making processes and views regarding the production,

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accumulation, and distribution of wealth are more likely to succeed than those patterned solely on western models.

Indian law practitioners must also gain an understanding of and appreciation for the history of the tribes. I want to talk tonight about one of the most basic elements of Indian law—the concept of Indian country. Like many aspects of Indian law, the concept of Indian country can only be understood if one has an understanding of its historical development.

If any of you are readers of "Indian Country Today," you have seen the two maps on the front page of every edition: one, labeled "Indian Country 1492," depicts the continental United States entirely in red; and the other, labeled "Indian Country Today," depicts the continental United States mostly in white, with a few red areas representing contemporary Indian reservations. The maps vividly portray the loss of Indian lands since the arrival of European explorers and settlers and the limited domain of Indian country today.

The term Indian country itself dates to the earliest years of the republic and continues to be used in common parlance today. It is not uncommon to hear Indian people speak about conditions in Indian country or how a particular issue is viewed in Indian country. I suspect that Indian people have a clear idea of what is, and what is not, Indian country, and that they know it when they see it.

However, as a legal matter, the term Indian country has been complicated and difficult to define, spawning a plethora of litigation as federal, state, and tribal governments and their constituents have disputed the Indian country status of particular lands throughout the United States. The modern cases often concern Indian reservation boundaries since, today, all lands within an Indian reservation have Indian country status.

However, this was not always the case, and the failure to appreciate the historical distinction between the legal meaning of Indian country and Indian reservations threatens to undermine the established framework for determining the current boundaries of Indian reservations. I'd like to explore some of that history with you, not only because of its importance to contemporary and future reservation boundary determinations, but also as an illustration of the importance of history in federal Indian law.

In a sense, all law is a product of and must be understood in its historical context—this is especially true of Indian law. In part, this is because the basic principles of Indian law have been developed by Congress, the Executive branch, the Courts, and the Tribes over time, and because federal policy towards the tribes has shifted over time, often in dramatic fashion. A very general summary of major federal policies includes the following:

— First, the policy of peace and friendship pursued in the aftermath of the revolution, which was designed to prevent non-Indian encroachments on Indian lands that could trigger hostilities the new republic could ill afford;

— Second, the removal policy of the early to mid 19th century, when the government sought the removal of the tribes from the eastern seaboard and the Ohio Valley to lands west of the Mississippi;

— Third, the reservation policy of the mid to late 19th century, when the United States sought to acquire tribal lands while concentrating the tribes on reservations within their aboriginal domain,

— Fourth, the allotment policy of the late 19th and early 20th century, when the government sought to allot some reservation lands to individual Indians and open the remainder of the reservations to non-Indians,

— Fifth, the Indian new deal of the 1930s, in which Congress sought to halt the loss of Indian lands that had resulted from the allotment policy and to reorganize and reinvigorate tribal governments;

— Sixth, the termination era of the 1950s, in which Congress sought to terminate tribes altogether;

— And, seventh, the Indian self-determination era commencing in the late 1960s and continuing today.

Laws enacted and judicial decisions rendered during each of these policy eras remain on the books, and are impossible to understand fully and reconcile without an understanding of the historical circumstances that gave rise to them.

The concept of Indian country is no exception—it has been defined by the Congress and the Courts in various ways at various times, and its meaning today is in large measure a product of that history. However, before turning to that history, I want to take a moment to discuss the importance of Indian country in Indian law. As a general proposition, the powers and immunities of tribes and their members are limited to Indian country—there is, the United States Supreme Court has said, a significant geographic component to tribal sovereignty—and the principles and doctrines of Indian law generally operate only in Indian country.

For example, among the inherent sovereign powers of Indian tribes are the powers to make and enforce criminal and civil laws governing their members and, in some instances, governing other Indians and non-Indians as well. However, for the most part, these powers can only be exercised within Indian country. Conversely, state governments generally have no power to make or enforce criminal or civil laws applicable to Indians or to tax Indians, but those limitations apply only to Indians while they are in Indian country. And, the Federal Government has enacted certain criminal statutes that, by their terms, apply only in Indian country, and it has provided for tribal—not state—implementation of federal environmental and other regulatory programs in Indian country.

Today, the term Indian country is defined in a federal criminal statute, which was enacted in 1948, and includes, among other things, all lands within the limits of any Indian reservation, notwithstanding the issuance of any patent.[1] The Supreme Court

1. 18 U.S.C. § 1151 (2006).

has held that this definition applies equally to issues of civil jurisdiction, so that tribal and state powers to tax, zone, regulate, and adjudicate disputes can turn on whether particular lands are within the statute's definition of Indian country.[2]

As a result, the statutory definition has given rise to extensive litigation over the status of Indian reservations that were established in the 19th century. If those reservations continue to exist, all lands within them—whether owned by Indians or non-Indians—are Indian country. Reservation lands held by Indians, including lands held in fee, would be governed by tribes subject to the sovereign authority of the governing tribes and only limited state authority. On the other hand, if the reservations have been disestablished or diminished, fee lands excluded from the reservation, with limited exceptions, are not Indian country and subject to full state jurisdiction.

The United States Supreme Court itself decided seven reservation boundary cases between 1962 and 1998, with the first of those decisions involving the Colville Indian Reservation.[3] Lower federal courts and state courts have decided dozens of other reservation boundary cases, including an important Ninth Circuit decision involving the Nez Perce reservation in 2000.[4]

This litigation shows no sign of abating. Within the last year, the Seventh Circuit, the Eighth Circuit, and the Wyoming Supreme Court have all decided reservation boundary cases,[5] and there are pending cases in the federal courts involving reservations in Michigan, Oklahoma, and elsewhere.[6]

These cases often turn on specific facts relating to the specific reservation involved. However, the proper resolution of these cases requires an understanding of the history of the terms Indian country and Indian reservation. As I will try to explain, these terms have not always been synonymous, and the failure to appreciate the historical distinctions between them has led to erroneous statements in both Supreme Court and lower court decisions, which in turn have led to erroneous outcomes in at least some cases. Moreover, the failure to appreciate the historical

2. *See, e.g.*, Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998) (tribal taxation); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998) (federal and state regulatory authority); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 125 (1993) (state taxation); DeCoteau v. District Court for the Tenth Judicial District, 420 U.S. 425, 427 n.2 (1975) (state child welfare jurisdiction).

3. Seymour v. Superintendent, 368 U.S. 351 (1962).

4. United States v. Webb, 219 F.3d 1127 (9th Cir. 2000).

5. Wisconsin v. Stockbridge-Munsee Cmty., 554 F.3d 657 (7th Cir. 2009); Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951 (8th Cir. 2009); Yellowbear v. Wyoming, 174 P.3d 1270 (Wyo. 2008).

6. Osage Nation v. Oklahoma *ex rel*. Oklahoma Tax Comm'n, 597 F. Supp. 2d 1250 (D. Ok. 2009), *appeal pending sub nom.* Osage Nation v. Kemp, No. 09-5050 (10th Cir.); Saginaw Chippewa Indian Tribe of Michigan v. Granholm, No. 05-10296-BC (E.D. Mich. 2008).

distinction between Indian country and Indian reservations threatens to upset the basic framework in which these reservation boundary cases are decided.

To begin, when Indian country was first defined by Congress, there were no Indian reservations. In 1802 Congress defined Indian country by describing a boundary that ran south from Lake Erie through Ohio, Kentucky, Tennessee, and Georgia, as established by treaties with various tribes.[7] In general, the lands on the west side of the boundary were Indian country: unceded Indian lands on which the Indians retained all of their aboriginal rights. Congress provided that the boundary could change in the future if new treaties of cession were negotiated. And, as part of the then prevailing policy of peace and friendship, Congress prohibited citizens of the United States from entering Indian country to hunt or engage in other activities, inflicted punishments on persons who engaged in acts of aggression within Indian country, and authorized the President to prevent the sale or distribution of liquor among the tribes.

In 1834, Congress enacted a new definition of Indian country as part of a comprehensive Indian Trade and Intercourse Act.[8] This definition was enacted during the height of the removal era; in 1830 Congress had embraced the policy of removing Indian people to the west of the Mississippi in the Indian Removal Act. The 1834 definition reflected this new policy, and the hostility of states such as Georgia to the presence of Indian country within their borders. The new definition again defined Indian country in terms of land to which aboriginal Indian title had not been extinguished. But it excluded from the definition all lands east of the Mississippi that were within the boundaries of a state and all lands west of the Mississippi within the states of Missouri or Louisiana or the Territory of Arkansas.

The 1834 Act also extended to Indian country certain federal criminal laws, but stated they would not apply to crimes committed by one Indian against the person or property of another Indian. This law remains on the books and is known as the Indian Country Crimes Act.[9] The exclusion of crimes involving only Indians recognized and preserved the tribes' inherent sovereignty to proscribe and punish offenses by Indians against Indians.

When Congress passed the 1834 Act, the term "Indian reservation" was still essentially unknown. Indian reservations were first established in regions where the government was unable to compel the Indians to remove, such as the upper Midwest, and became more widespread as the entire, horrific removal policy was abandoned around mid-century. As the term implies, Indian reservations were lands reserved by the tribes for their continued use and occupancy when they ceded other lands to the United States.

7. Act of March 30, 1802; 2 Stat. 139(1802); *see* Bates v. Clark, 95 U.S. 204, 206 (1877); American Fur Co. v. United States, 27 U.S. 358, 365-66 (1829).

8. Act of June 8, 1834, 4 Stat. 729 (1834); *see Bates* , 95 U.S. at 205-06.

9. 25 U.S.C. § 1152 (2006).

Initially, the lands within Indian reservations were held communally by the tribe or tribes occupying the reservation. However, beginning in the 1850s, Indian treaties began to include provisions for the allotment and patenting of reservation lands to individual Indians. The patents would be subject to restrictions on alienation or taxation for a period of years, but there were mechanisms for the eventual issuance of unrestricted fee patents to the allottees or their heirs. The allotment process was originally advanced as a process for aiding in the "civilization" of the Indians, but would later come into widespread use as a process for transferring Indian lands into non-Indian hands.

In the latter 19th century, Congress enacted a series of individual allotment acts and, in 1887, it enacted the General Allotment Act to promote the allotment of all Indian reservations.[10] In addition to providing for the allotment of reservation lands, the General Allotment Act provided that, with the consent of the tribes involved, any "surplus" lands within the reservation—that is, lands that were not needed for individual allotments—would be opened to entry and settlement by non-Indians. In later years, Congress also passed a number of acts providing for the opening of reservation lands to non-Indians without tribal consent.

The result of the allotment policy was the loss of millions of acres of Indian lands. Lands patented in fee to individual Indians, at times before the trust period should have expired, were sometimes sold, sometimes mortgaged and then lost through foreclosure, and often lost in tax foreclosure sales. And, "surplus" lands opened to non-Indian entry and settlement were transferred directly into non-Indian hands.

At the beginning of the allotment era in the 1880s, Indian landholdings nationwide totaled some 140 million acres. By the 1930s, there were about 50 million acres of land in Indian ownership. Indians had lost some 90 million acres of land in a period of about 50 years.

One of the questions that arose during the allotment era was whether reservation lands that were patented in fee to individual Indians or to non-Indians were Indian country. This question often arose in the context of federal prosecutions for the introduction of liquor into Indian country. However, during the allotment era, there was no statutory definition of Indian country to resolve the question.

This was because, in 1874, Congress had adopted the Revised Statutes, the first comprehensive codification of federal statutes. Laws previously enacted that were not included in the Revised Statutes were deemed repealed. The Revised Statutes included many of the provisions from the 1834 Indian Trade and Intercourse Act, including both the Indian Country Crimes Act and the prohibition on the introduction or sale of liquor into Indian country.

However, the Revised Statutes did not include the definition of Indian country itself, which left the meaning of the term up to the courts to decide. In a series of

10. Act of February 8, 1887, 24 Stat. 388 (1887).

decisions, the Supreme Court, relying in part on the earlier statutory definitions, held that Indian country did not include lands to which Indian title had been extinguished.[11] As a result, some lands, although within the boundaries of an Indian reservation, were not considered Indian country. For example, the Court found that lands within the Nez Perce Reservation that had been ceded under a surplus lands act were no longer Indian country, and lands within a Montana reservation that had been conveyed in fee to a railroad for a right-of-way through the reservation were not Indian country.[12]

On the other hand, expanding on the prior statutory definition, the Court held that the term Indian country was not limited to lands to which the Indians retained their original right of possession, but included lands set apart as an Indian reservation out of the public domain.[13] It also held that Indian country included lands held in fee by dependent Indian communities, Indian allotments, the Indian title to which had not been extinguished, and other lands validly set apart for the use of Indians and under the superintendence of the government.[14]

In all of these instances, there was a link between Indian country and Indian title to the land—whether that title was held directly by Indians or by the United States on their behalf. Where the Indians and the Government no longer had title, such as reservation lands that had been ceded and sold under the allotment policy or that had been conveyed for a right-of-way, the lands were not considered Indian country. These lands might be within the boundaries of an Indian reservation, but they were not Indian country as that term was defined by the Court in the allotment era.

This distinction was, I believe, clear to Congress in 1885, when it enacted what is known as the Major Crimes Act.[15] This legislation was passed in reaction to a Supreme Court decision in a case called *Ex Parte Crow Dog*.[16] In that case, an Indian was being prosecuted for the murder of another Indian on an Indian reservation in the Dakota Territory. In 1883, the Supreme Court held the offense had occurred within Indian country because it occurred on land to which the Indian title had not been extinguished, but it also held that Crow Dog could *not* be prosecuted under the Indian Country Crimes Act because the case involved a crime committed by one Indian against another Indian.

11. Clairmont v. United States, 225 U.S. 551, 557-60 (1912); Dick v. United States, 208 U.S. 340, 402-03 (1908); *Ex Parte* Crow Dog, 109 U.S. 556, 561-62 (1883); *Bates,* 95 U.S. at 208.

12. *Clairmont,* 225 U.S. at 557-60 (1912); *Dick*, 208 U.S. at 402-03.

13. Donnelly v. United States, 228 U.S. 243, 268-69 (1913).

14. United States v. McGowan, 302 U.S. 535, 537-39 (1938); United States v. Pelican, 232 U.S. 442, 449 (1914); United States v. Sandoval, 231 U.S. 28, 48 (1913).

15. Act of March 3, 1885, 23 Stat. 362, 385 (§ 9) (current version at 18 U.S.C. § 1153 (2006)).

16. 109 U.S. 556 (1883).

No longer willing to let the tribes themselves deal with crimes involving only Indians, Congress enacted the Major Crimes Act in response to the Crow Dog decision. However, in a departure from prior Indian legislation, Congress did not define the scope of the Act in terms of Indian country. Instead, it provided that Indians committing certain major crimes against the person or property of another Indian or other person would be subject to prosecution in Federal court if the offense occurred within the boundaries of any State and "within the limits of any Indian reservation."

This may have been the first time Congress enacted Indian legislation applicable within the limits of any Indian reservation, as opposed to within Indian country. Congress used the same language in a 1903 Act asserting jurisdiction over crimes committed by any person "within the limits of any Indian reservation in the State of South Dakota."[17]

It is likely, I think, that Congress's decision to extend the Major Crimes Act and the later South Dakota Act to crimes committed "within the limits of any Indian reservation"—as opposed to crimes committed in "Indian country"—was deliberate. The existence of Indian reservations was, by 1885, well established. Some of the land within the reservations was claimed by states under federal land grants. Other reservation lands had been conveyed out of Indian ownership for road and railroad rights-of-way. Still others had been allotted to individual Indians under allotment provisions in treaties or special legislation. The allotment policy was being actively pursued, and the General Allotment Act would be enacted two years later, in 1887. By extending the 1885 Major Crimes Act and the 1903 South Dakota Act to crimes within the limits of any Indian reservation, Congress covered all crimes within the limits of the reservations, not just those that happened to occur on lands to which the Indians still retained title.

Some of the cases involving the Major Crimes Act and the South Dakota Act recognized the significance of the fact that they applied to all lands within the limits of any Indian reservation and not just to Indian country. For example, in an 1894 case, the Supreme Court held an Indian could be prosecuted for a murder committed within a reservation under the Major Crimes Act, even though the State of Wisconsin claimed ownership of the lands on which the murder took place under a school lands grant.[18] The Court first found that the State's claim of title was subordinate to the Indians' right of occupancy, which had been reserved by treaty prior to statehood. However, it also held that title to the land, which was critical to a determination of Indian country status, was simply not relevant under the Major Crimes Act. The Court stated:

> But, *independently of any question of title*, we think the court below had

17. Act of February 2, 1903, 32 Stat. 793 (1903).

18. United States v. Thomas, 151 U.S. 577 (1894).

> jurisdiction of the case. The Indians of the country are considered as the wards of the nation, and whenever the United States set apart any land of their own as an Indian reservation, whether within a state or territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full protection in their persons and property, and to punish all offenses committed against them or by them within such reservations.[19]

In a 1909 case, which arose on the Tulalip Reservation in western Washington, the Court held expressly that there was a distinction between the term Indian country, which had been used in earlier federal legislation, and the term "reservation," which was used in the Major Crimes Act.[20] The Court explained that the term reservation:

> [I]s used in the land law to describe any body of land, large or small, which congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and, when Congress has once established a reservation, all tracts included within it remain part of the reservation until separated therefrom by Congress."[21]

In a 1922 case, the Federal District Court in South Dakota held the 1903 South Dakota Act applied to lands that had been *patented in fee* to an Indian allottee within the Rosebud Indian Reservation.[22] According to the Court, when the Act was passed it was a matter of common knowledge that Indian reservations in South Dakota contained isolated tracts that had been patented in fee to individual Indians, and there was no exception in the Act for such tracts.

In 1943, the Eighth Circuit affirmed and extended this decision, holding that the 1903 South Dakota Act applied to a town-site within the Rosebud Reservation, even though the Indian title to the land had been extinguished.[23] The court refused to read the phrase "within the limits of any Indian reservation" to mean "within the limits of any Indian reservation upon land therein the Indian title to which has not been extinguished." This decision made clear the distinction between the term Indian country—which was directly tied to Indian land ownership—and Indian reservations—which, as a result of the allotment and other policies, might contain lands to which the Indian title had been extinguished.

On the other hand, several state courts reached conflicting results, holding that the Major Crimes Act did not apply to fee-patented land within a reservation.

19. *Id.* at 585.
20. United States v. Celestine, 215 U.S. 278 (1909).
21. *Id.* at 285.
22. United States v. Frank Spotted Horse, 282 F. 349 (D.S.D. 1922).
23. Kills Plenty v. United States, 133 F.2d 292 (8th Cir. 1943).

Congress undertook to resolve this conflict in 1948. It revised the Major Crimes Act, so that it would apply to crimes committed in Indian country, but it then defined Indian country to include: (1) all lands within the limits of an Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (2) all dependent Indian communities; and (3) Indian allotments, the Indian titles to which had not been extinguished.[24]

By including all lands within the limits of any Indian reservation, notwithstanding the issuance of any patent, within its new definition of Indian country, the 1948 Act made it clear that the Major Crimes Act (as well as other federal criminal laws applicable in Indian country) applied to all lands within reservation boundaries, whether patented to Indians or non-Indians. This resolved the conflict between the Eighth Circuit interpretation of the South Dakota Act and the state court interpretations of the Major Crimes Act. In fact, the code reviser's note to the 1948 Act states that the statutory definition of Indian country was an attempt to "consolidate[] conflicting and inconsistent provisions of law" and was based, in part, on the Eighth Circuit's decision in the South Dakota case.[25]

However, while resolving the conflict over the meaning of the phrase "within the limits of any Indian reservation," the 1948 Act gave rise to an entirely new genre of litigation, today referred to as reservation boundary litigation. If Federal Indian country criminal laws now clearly applied to all lands within a reservation, regardless of who held title to them, the question arose whether particular lands were actually within the boundaries of a reservation. And, as I suggested earlier, this question took on even greater importance when the Supreme Court held that the 1948 definition of Indian country governed not only the scope of these Federal criminal statutes but the scope of federal, tribal, and state civil jurisdiction as well.[26]

The central issue in the reservation boundary cases has been whether the opening of a reservation during the allotment era: (1) disestablished the reservation altogether—so that there is no longer a reservation; (2) whether it diminished the reservation's boundaries, by removing the opened land from the reservation—so that there is still a reservation, but it is smaller than the original reservation; or (3) whether it left the reservation's original boundaries intact.

In its reservation boundary decisions, the Supreme Court has established a basic framework for making this determination. The Court has said that only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain. Further, relying on its decision in the case from the Tulalip reservation, the Court has said that the disestablishment or diminishment of a reservation does not result merely from the disposition of lands within its boundaries. According to the Court, once a block of land is set aside for an Indian reservation, and

24. 18 U.S.C. § 1151 (2006).

25. 18 U.S.C. § 1151 (2006) note.

26. *See supra* note 2.

no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

The Court has also said that this issue is complicated by the fact that, in opening Indian lands to non-Indian settlement in the late 19th and early 20th centuries, Congress "seldom detail[ed] whether opened lands retained reservation status or were divested of all Indian interests."[27] According to the Court—and this is where we come to the historical error—the primary reason for this was the "notion that reservation status of Indian lands might not be coextensive with the tribal ownership was unfamiliar at the turn of the century."[28] According to the Court, at the time, "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians."[29] The Court went on to say that it was not until 1948 that Congress statutorily defined "Indian country" to include lands held in fee by non-Indians within reservation boundaries, thereby "uncoupl[ing] reservation status from Indian ownership."[30]

As I hope I've indicated, I don't believe this historical account is quite right. The difficulty is that it uses the terms Indian country, Indian reservations, and Indian lands interchangeably. These terms, as I've suggested, came into use at different times and had distinct meanings until merged in the 1948 Act. Thus, while it is true that Indian country status was tied to tribal ownership both before and during the allotment era, and that Indian lands were lands in which Indians had some form of ownership interest, this was not the case for reservation status.

To the contrary, as I've suggested, it seems clear that Congress understood very well that Indian reservations might include lands to which the Indian title had been extinguished. Thus, when it enacted the Major Crimes Act in 1885 and the South Dakota Act in 1903, Congress did not limit the applicability of those acts to Indian country, but applied them more broadly to all lands within the limits of any Indian reservation. This indicates that, during the allotment era, Congress understood that Indian reservations might include lands to which the Indian title had been extinguished.

Indeed, according to the District Court in South Dakota, by the time the South Dakota Act was passed in 1903, it was common knowledge that the reservations contained fee patented lands, and that was why Congress extended the act to all lands within the limits of any Indian reservation in the state. Moreover, in the allotment-era case from the Tulalip Reservation, the Supreme Court itself recognized the distinction between the terms Indian country and Indian reservation, and that, regardless of title, all lands within a reservation have reservation status until Congress provides

27. Solem v. Bartlett, 465 U.S. 463, 468 (1984).
28. *Id.* at 468.
29. *Id.*
30. *Id.*

otherwise. In 1943, after the end of the allotment era but well before enactment of the 1948 Act, the Eighth Circuit also recognized that an Indian reservation could contain lands to which the Indian title had been extinguished.

I suspect there is other evidence suggesting that Congress and federal officials understood that reservations could include non-Indian lands during the allotment era. For example, in the Ninth Circuit decision concerning the Nez Perce Reservation in Idaho, the court discussed an 1894 letter from the Acting Commissioner of Indian Affairs stating that the Tribe's agreement to cede all right, title and interest to surplus lands within the Reservation would have no effect on the reservation boundaries.[31] It would appear that the Acting Commissioner understood that the reservation could embrace these ceded lands, notwithstanding their non-Indian ownership. Thus, it appears that, while Indian country status was tied to tribal ownership of the land in question, reservation status was not.

This is not simply a matter of historic interest. The failure to appreciate the historic distinctions between Indian country and Indian reservations has affected the outcome of particular cases and threatens to undermine the basic framework for on-going and future reservation boundary litigation. This is illustrated by a case involving the boundaries of the Yankton Sioux reservation in South Dakota. In 1998, the Supreme Court held that an 1892 agreement with the tribe, ratified by congress in 1894, removed from the reservation lands opened to non-Indian settlement.[32] However, the Court left open the question whether lands that were allotted to tribal members retained their reservation status.

On remand, the Eighth Circuit Court of Appeals held in two decisions that the allotted lands retained their reservation status unless they passed into non-Indian hands before enactment of the 1948 Act.[33] The Court's explanation for this holding rested heavily on the Supreme Court's equation of Indian country and reservation status during the allotment era. I want to read two passages from the Court's decision. As I do, note how the terms "Indian country" and "reservation status" are used interchangeably, without regard to the historical distinction between them. The Eighth Circuit explained:

> The 1948 [Act] introduced a new understanding of Indian country which for the first time separated Indian ownership from reservation status. . . . [T]his concept "would have . . . been quite foreign" to the parties who negotiated the 1892 agreement between the Tribe and the government, and it is their intentions and not the current statutory regime that "we must look to here."

31. United States v. Webb, 219 F.3d 1127, 1136 & n.13 (9th Cir. 2000).

32. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

33. Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951 (8th Cir. 2009); Yankton Siuox Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999).

The Court continued:

> [T]he 1892 agreement, and the 1894 Act which ratified it, expressed no clear congressional intent to divest allotted lands of their reservation status, and in the absence of such intent their reservation status was preserved. During that period, however – and continuing until . . . passage of [the 1948 Act] – prevailing law linked reservation status with Indian ownership. On this basis, we held . . . that allotments which passed into white hands lost their reservation status. [The 1948 Act] altered the old understanding and gave a previously unimagined durability to reservation land by separating jurisdiction from ownership. Thus, while prior to 1948 an allotment on reservation land would have ceased to be Indian country upon its sale to white owners, that is no longer the case today.[34]

Thus, the outcome in this case turned on the assertion that both prevailing law and common understandings linked reservation status to Indian ownership during the allotment era. If, as I have suggested, this was simply not the case, the outcome should have been different. Since federal officials and Congress understood during the allotment era that reservation lands allotted to Indians and then transferred into non-Indian hands would remain within reservation boundaries, all of the allotted Yankton Sioux lands should have retained their reservation status.

Moreover, the assertion that reservation status was believed to be coextensive with Indian ownership during the allotment era, so that any transfer of lands out of Indian hands would have been understood to terminate reservation status, threatens to undermine the basic framework in which reservation boundary cases are decided. Recall that one of the basic principles in such cases is that disestablishment or diminishment does not result merely from the disposition of lands within a reservation. As the Supreme Court has said, once a block of land is set aside for an Indian reservation, and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

If it is now to be assumed that *any* disposition of reservation lands out of Indian ownership was understood to terminate reservation status, this basic principle has been turned on its head. Simple allotment provisions, which have been held repeatedly to have no effect on reservation boundaries, could now be held to result in the piecemeal diminishment or disestablishment of reservations. That has never been the law, and the error in equating Indian country and Indian reservations during the allotment era should be corrected so that it does not become the law.

The Yankton Sioux decision illustrates how important the historical development of the term Indian country is to contemporary reservation boundary cases. Many

34. *Podhradsky*, 577 F.3d at 967.

tribes and their members have had the opportunity in recent years to re-acquire lands within their reservations that were lost during the allotment era. It would be unfortunate if the reservation status of those lands—and the tribes' sovereignty over them—was lost as a result of an erroneous understanding of allotment-era history.

I hope this also helps illustrate a larger point, which is the importance of historical context in Indian law generally, and the importance of getting the history right. History plays a central role in contemporary disputes over tribal sovereignty, Indian treaty rights, and other facets of Indian law, and a correct and thorough understanding of that history can be decisive in the outcome of such cases.