American Indian Law Review

Volume 29 | Number 2

1-1-2005

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Recommended Citation

Angelique A. EagleWoman, *Re-establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries: Building a Legal Rationale from Current International Law*, 29 AM. INDIAN L. REV. 239 (2005), <https://digitalcommons.law.ou.edu/ailr/vol29/iss2/1>

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RE-ESTABLISHING THE SISSETON-WAHPETON OYATE'S RESERVATION BOUNDARIES: BUILDING A LEGAL RATIONALE FROM CURRENT INTERNATIONAL LAW

Angelique A. EagleWoman*
(Wambdi A. Wastewin)**

This article will examine one tribal nation as an example of the many land loss issues facing Tribes at present. Through the example of the Sisseton-Wahpeton Oyate history of treaties, agreements, land cessions, and finally a federal ruling of reservation disestablishment, the policies of the United States regarding Indian lands will be shown. To reestablish the territorial boundaries of the Sisseton-Wahpeton Oyate, federal recognition is necessary in the United States. International law from the United Nations, the International Labor Organization, and the Organization of American States may provide legal support for the re-recognition of the reservation boundaries.

I. Historical Overview of the Transfer of Territory between the Sisseton-Wahpeton Oyate and the United States

The Sisseton-Wahpeton Oyate¹ has a long and tangled history with the United States in regard to the Oyate's lands and territory. This history includes treaty agreements, federal laws, and numerous court cases. From the first agreement entered into in 1805 to the present, the Sisseton-Wahpeton Oyate has lost over 27 million acres. The Lake Traverse Reservation established as a permanent homeland in 1867 was ruled disestablished in 1975 by the United States Supreme Court. At present the Oyate's land base is confined to a few scattered individual allotments and whatever lands the Oyate is able to purchase and reclaim as tribal land. In addition, the Oyate's lands that have been retained are noted as some of the most fractionated parcels of land in all of Indian country.

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** Wambdi Awanwicake Wastewin translates to Good Eagle Woman Who Takes Care of the People, and this is the author's given Dakotah name.

1. "Oyate" translates to "nation" in the English language.

The original homeland of the Sisseton and Wahpeton Oyate (SWO) is in the territory now encompassed by the states of Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin, particularly the lands north from Manitoba, Canada reaching east from Lake Superior (in the Wisconsin Territory) down passed the headwaters of the Mississippi (the Minneapolis/St. Paul area) to the southern lands along the Iowa Territory and stretching west to the Big Stone Lake/Lake Traverse region. The Sisseton and the Wahpeton are indigenous peoples and part of the Dakota dialect of the Seven Council Fires (Oceti Sakowin).² The Seven Council Fires are: the Mdewakantonwan, Sissetonwan, Wahpetonwan, Wahpekute, Ihanktonwan, Ihanktonwanna, and Tetonwan. The first four speak the Dakota dialect and are referred to as a group as the Isanti (Knife) people. The Ihanktonwan are now commonly known as the Yankton and speak the Nakota dialect along with the Little Yankton or Ihanktonwanna. The Tetonwan or Teton speak the Lakota dialect.

Contact between the Europeans and the Dakota began when traders entered Dakota territory and engaged in commerce with the peoples. A major trade route circled from the Mississippi headwaters through the Minnesota River and up the Red River to the area now known as Canada. The first treaty signed with the Dakota³ occurred on September 23, 1805,⁴ and was initiated by Zebulon Pike to secure the United States a nine mile square region for Fort Snelling near present day Minneapolis/St. Paul, Minnesota. This first agreement did not have an amount designated at the signing for the value of the land. Rather it was left blank and filled in by the United States Senate on April 13, 1808, with the following amount: "two thousand dollars, or deliver the value thereof in such goods and merchandise as they shall choose."⁵ From the first negotiation with the United States, the Dakota were at a disadvantage

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2. See Ed Red Owl/HinHan Duta, *Brief Historical Overview of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation South/North Dakota*, at <http://www.earthskyweb.com/culture.htm> (Oct. 2000).

3. In this treaty and all subsequent, the Dakota are referred to as the "Sioux". This label was derived from the Chippewa who alluded to the Seven Council Fires as the Little Adder Snakes which was translated into the French language and shortened to "Sioux". The League of the Iroquois was nicknamed the Big Snakes by other Tribes. See ELIJAH BLACK THUNDER ET AL., *HISTORY AND CULTURE OF THE SISSETON-WAHPETON SIOUX TRIBE OF SOUTH DAKOTA* 2 (1975).

4. Treaty with the Sioux, Sept. 23, 1805, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 1031 (Charles J. Kappler ed., 1904) (Treaties) [hereinafter KAPPLER] (ratified Apr. 16, 1808, never proclaimed by the President).

5. *Id.* art. 2, *reprinted in* 2 KAPPLER, *supra* note 4, at 1031. Article 2 was inserted to fill the blank space left at the supposed negotiation.

through the negotiation of an open-ended payment agreement for the cession of lands to be valued by the buyer three years later.

The next effort by the United States in Dakota territory was to begin setting boundaries between the various tribal peoples enjoying the many wooded areas, lakes, and rivers. In 1825 the Treaty of Prairie du Chien⁶ was entered into at a big council meeting convened by the explorers Cass Lewis and William Clark with the Dakota,⁷ Chippewa, Sac and Fox, Menominee, Ioway, Winnebago, Ottawa, and Potawatomi peoples. The purpose of the Treaty as stated in the preamble was to cease the frequent skirmishes between the Dakota and all other Tribes by setting up boundary lines for territories and acknowledging the age-old tradition of seeking permission prior to entering for hunting.⁸ After this council, the Dakota agreed to live and hunt primarily in the southern regions of their territory.

In 1830, another gathering of tribal nations was held at Prairie du Chien in the Michigan territory where the Sisseton and Wahpeton were parties. The purpose of this Treaty⁹ was to "remove all causes which may hereafter create any unfriendly feeling between them, and also being anxious to provide other sources for supplying their wants besides those of hunting, which they are sensible must soon entirely fail them."¹⁰ Other signatories included the Sac and Fox, the Mdewakanton, the Wahpekute, the Omaha, the Iowa, the Ottoes and the Missourias. Under the cessions granted to the United States, the Sisseton and Wahpeton relinquished approximately two million acres from the Mississippi River to the Des Moines River.¹¹ Payment for this cession was set by the United States at two thousand dollars in Article IV of the Treaty.¹²

Seven years later in 1837, the Yankton were part of a treaty¹³ ceding all lands west of the Mississippi and territory in present day Wisconsin. In the

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6. 7 Stat. 272, Aug. 19, 1825 (proclamation Feb. 6, 1826), *reprinted in* 2 KAPPLER, *supra* note 4, at 250.

7. *Id.* art. 11, 7 Stat. at 275, *reprinted in* 2 KAPPLER, *supra* note 4, at 253 (stating that in 1826, the "Yancton band of the Sioux" shall have the treaty stipulations explained for the purpose of receiving their consent to the boundaries drawn).

8. *Id.* art. 13, 7 Stat. at 275, *reprinted in* 2 KAPPLER, *supra* note 4, at 253-54 (providing for reciprocity in hunting).

9. Treaty with the Sauk and Foxes, Etc., 7 Stat. 328, July 15, 1830 (proclamation Feb. 24, 1831), *reprinted in* 2 KAPPLER, *supra* note 4, at 305-10.

10. *Id.* pmbl., 7 Stat. at 328, *reprinted in* 2 KAPPLER, *supra* note 4, at 305-06.

11. *Id.* art. 3, 7 Stat. at 329, *reprinted in* 2 KAPPLER, *supra* note 4, at 306 (describing the land cession of the Dakota parties to the Treaty).

12. *Id.* art. 4.

13. Treaty with the Yankton Sioux, 7 Stat. 542, Oct. 21, 1837 (proclamation Feb. 21, 1838), *reprinted in* 2 KAPPLER, *supra* note 4, at 496-97.

first article of this Treaty, it refers to a prior land cession concluded on July 1830 as its primary purpose.

Article 1st. The Yankton tribe of Sioux Indians cede to the United States all the right and interest in the land ceded by the treaty, concluded with them and other tribes on the fifteenth of July 1830, which they might be entitled to claim, by virtue of the phraseology employed in the second article of said treaty.¹⁴

In consideration for this cession to lands that the Yankton “might be entitled to claim”, the United States paid the following:

Article 2d. In consideration of the cession contained in the preceding article, the United States stipulate to pay them four thousand dollars (\$4,000.) It is understood and agreed, that fifteen hundred dollars (\$1,500) of this sum shall be expended in the purchase of horses and presents, upon the arrival of the chiefs and delegates at St. Louis; two thousand dollars (\$2,000) delivered to them in goods, at the expense of the United States, at the time their annuities are delivered next year; and five hundred dollars (\$500) be applied to defray the expense of removing the agency building and blacksmith shop from their present site.¹⁵

In essence for ceding thousands and thousands of acres of land, the Yankton received ‘extra’ goods at their annual rations and ‘gifts’ when they arrived in St. Louis. In payment for these lands, the United States also managed to defray the expense of relocating two of their buildings.

In 1851, the United States entered a Treaty specifically with the Sisseton and Wahpeton Dakota.¹⁶ The Treaty of Traverse des Sioux was meant as a land cession of the southernmost Dakota territory into Iowa and all of the remaining territory in Minnesota except the lands along the Minnesota River where the Dakota camped at certain times of the year.¹⁷ The payment for this huge cession, approximately 25 million acres, was to be one million six hundred and sixty-five thousand dollars payable in a variety of ways designated by the United States. Some of these payment methods included:

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14. *Id.* art. 1, 7 Stat. at 542, *reprinted in* 2 KAPPLER, *supra* note 4, at 496.

15. *Id.* art. 2, 7 Stat. at 542, *reprinted in* 2 KAPPLER, *supra* note 4, at 496-97.

16. Treaty with the Sioux — Sisseton and Wahpeton Bands, 10 Stat. 949, July 23, 1851 (proclamation Feb. 24, 1853), *reprinted in* 2 KAPPLER, *supra* note 4, at 588-90.

17. *Id.* art. 2, 10 Stat. at 949, *reprinted in* 2 KAPPLER, *supra* note 4, at 588 (describing what lands are to be ceded).

\$275,000 after removal to the lands on the Minnesota River; \$12,000 for agricultural improvement and civilization; \$6,000 for educational purposes; \$10,000 for goods and provisions; \$40,000 for annuity; \$30,000 opening farms and "other beneficial objects as may be deemed most conducive to the prosperity and happiness of said Indians"; and finally the balance was to be put in a trust fund held by the United States for fifty years with five percent interest to be paid annually beginning in 1852.¹⁸

The lands left for the Sisseton and Wahpeton Dakota after the 1851 Treaty were two one-hundred fifty mile strips on either side of the Minnesota River. However, Article 3 of the Treaty was stricken out and replaced with language in a 'supplemental article' arranging for the payment by the United States of ten cents per acre for the lands included in this reservation originally agreed upon with the payment to be "added to the trust-fund provided for in the fourth article."¹⁹ The second part of the supplemental article stated that once the Sisseton and Wahpeton agreed to this sale, then the United States would set apart another tract of land for a future home.²⁰

One of the major problems in the treaty-making process was the failure of the United States representatives to appreciate that the Sisseton and Wahpeton were not sedentary and would not remain in one area for more than several years at a time. From the 1805 Treaty to the 1851 Treaty,²¹ the Sisseton and Wahpeton understood that peaceful relations were being entered into throughout the region with other tribal peoples and the European settlers, however, it is unclear at best that the Dakota meant to relinquish territorial rights or hunting grounds when going into council with the United States representatives.

By 1858, Dakota representatives traveled to Washington, D.C. and were told that they did not own their reservation lands. The 1858 Treaty²² was signed by only nine tribal representatives and purported to cede the northern strip of land along the Minnesota River and to divide the southern strip into

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18. *Id.* art. 4, 10 Stat. at 949-50, reprinted in 2 KAPPLER, *supra* note 4, at 588-89 (setting forth the payment provisions).

19. *Id.* art. 3, 10 Stat. at 949, 951, reprinted in 2 KAPPLER, *supra* note 4, at 590 (supplemental article) (purporting to buy all existing tribally owned land).

20. *Id.*

21. A similar Treaty was made for the Mdewakanton and Wahpekute, 10 Stat. 954, Aug. 5, 1851 (proclamation Feb. 24, 1853), including the ten cents per acre provisions in a supplemental article for the purpose of buying the reserved lands and replacing them at some point in the future.

22. Treaty with the Sioux, 12 Stat 1037, June 19, 1858 (ratified Mar. 9, 1859) (proclaimed Mar. 31, 1859), reprinted in 2 KAPPLER, *supra* note 4, at 785-789.

eighty-acre allotments.²³ This 1858 Treaty contained multiple provisions attempting to govern the actions, expenditures, and laws of the tribal members.²⁴ An article expressly stating that the Sisseton and Wahpeton were dependent on the United States was included for the first time in a negotiated instrument between these peoples.²⁵ As the Sisseton and Wahpeton entered into yet another treaty with open ended provisions on whether they were to remain along the Minnesota River or relocate elsewhere, tribal members lost faith in the treaty-making process.

After this treaty, the lives of the Sisseton and Wahpeton changed dramatically as they were declared hostile if they left the reservation lands to hunt and provide food for their families. The Indian agent sought to keep these Dakota dependent through the meting out of food rations and annuities. During the summer of 1862, the frustration and anger of the Dakota reached the breaking point. Various accounts exist as to the action that led to the Minnesota Uprising of the Dakota, but all accounts agree that the Dakota were starving and that their annuities and rations were late in arriving.²⁶

In an attempt to secure some food goods, a group of the Dakota approached Andrew Myrick, the local trader, with a request that he extend them credit until the annuities arrived.

In desperation, they appealed to their trader, Andrew Myrick, to extend them credit until the annuities were delivered. This man who always submitted his claim for the largest share of the annuities. No one ever questioned the legitimacy of those claims, which undoubtedly were greatly inflated.

The Rev. John P. Williamson, a Presbyterian minister who spoke the Dakota language fluently, was requested to translate

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23. *Id.* arts. 1-3, 12 Stat. at 1037-39, *reprinted in* 2 KAPPLER, *supra* note 4, 785-86 (containing the relevant language transferring the northern strip out of tribal ownership and allotting the southern strip).

24. *Id.* arts. 7-9, 12 Stat. at 1040, *reprinted in* 2 KAPPLER, *supra* note 4, at 787-89 (punishing any tribal members who drank intoxicating liquors or offered them to others by withholding annuities for a year as well as subjecting the offender to any punishment the Secretary of the Interior ordered; allowing a tribal member to renounce his/her tribal status without losing tribal annuities; and rewriting all former treaties to give the Secretary of the Interior unlimited discretion in expending tribal monies for previous land payments).

25. *Id.* art. 6, 12 Stat. at 1039, *reprinted in* 2 KAPPLER, *supra* note 4, at 787 (stating that "[t]he Sisseton and Wahpaton bands of Dakota or Sioux Indians acknowledge their dependence on the Government of the United States").

26. See GARY CLAYTON ANDERSON AND ALAN R. WOOLWORTH, *THROUGH DAKOTA EYES: NARRATIVE ACCOUNTS OF THE MINNESOTA INDIAN WAR OF 1862* (1988).

Myrick's response to the Dakota request. In a clear, loud voice he gave the trader's arrogant answer, "So far as I am concerned, if they are hungry, let them eat grass or their own dung."²⁷

Hostilities soon broke out and in the end 300 Minnesota settlers were dead and over 400 Dakota men were held for an impromptu military tribunal to establish guilt. "At these trials, the procedure consisted of presenting certain charges against each prisoner based on tenuous information provided by those who had been held captive by the Dakotas."²⁸ Of the 303 convicted defendants, President Abraham Lincoln reviewed the charges and sustained execution of forty men which was later reduced to a total of thirty-eight.²⁹ At the same time, two concentration camps had been established one at Mankato, Minn., holding 322 Dakotas including women and children and one at Fort Snelling (near St. Paul, Minn.) holding "approximately 1,961 MdeWakantonwans, 112 half-breeds with no tribal affiliation, 133 Wahpekutes, and 295 Sisseton and Wahpetons."³⁰ On December 26, 1862 before a crowd of 3000, the thirty-eight Dakota men were hung on a specially built platform in the largest mass execution in the history of the United States.³¹

Following the Minnesota Uprising, the Dakota were scattered from Canada to Nebraska to Montana, North Dakota, and South Dakota with some remaining in Minnesota. In 1863, the United States Congress passed An Act for the Relief of Persons for Damages sustained by Reasons of Depredations and Injuries by certain Bands of Sioux Indians.³² These federal laws put up for sale all of the tribally owned lands in Minnesota of the Sisseton and

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27. Sydney H. Byrd, *Dakota Perspective: Christmas Reflections*, IKCE WICASTA: COMMON PEOPLE J., Fall 1999, at 13.

It came as no surprise to anyone that one of the first victims of that war was the despised trader, Andrew Myrick. When his corpse was discovered, his mouth was stuffed with grass. This was a retaliatory act on the part of the Dakotas, who made him eat his own words.

Id. at 14.

28. Ed Red Owl/HinHan Duta, *Dakota Perspective: Traditional Man Gabriel "Ti Wakan" Renville*, IKCE WICASTA: COMMON PEOPLE J., Winter 1999, at 10.

29. *Id.* at 10-11.

30. *Id.* at 9.

31. See Dakota Exile Timeline, at <http://www.tpt.org/dakota/timeline.htm> (visited Apr. 13, 2005).

32. Act of Feb. 16, 1863, ch. 37, 12 Stat. 652 (describing itself as "[a]n Act for the Removal of the Sisseton, Wahpaton, Medawakanton and Wahpakoota Bands of Sioux or Dakota Indians" and "allowing for the Disposition of their Lands in Minnesota and Dakota"); Act of Mar. 3, 1863, ch. 119, 12 Stat. 819 (same).

Wahpeton. The latter act included a provision that the President of the United States set apart a "tract of unoccupied land outside the limits of any state"³³ for the Dakota.

In 1867, the Lake Traverse Reservation was established by treaty³⁴ as a Sisseton-Wahpeton Reservation.³⁵ This reservation was specifically set aside for the many Sisseton and Wahpeton who had served as scouts in gathering the remaining Dakota after the Minnesota Uprising. Article 9 of this treaty provided that "no person not a member of said bands, parties hereto whether white, mixed-blood, or Indian, except persons in the employ of the Government or located under its authority, shall be permitted to locate upon said lands, either for hunting, trapping, or agricultural purposes."³⁶ This reservation extended from Lake Kampeska in Dakota Territory to a northern line along the 1851 treaty line.³⁷ The 1867 Treaty included provisions for further land cessions in the second article for the area directly north and west of the Lake Traverse Reservation (in what is now much of northeast and central North Dakota).³⁸

To finalize the cessions of the 1867 Treaty, an agreement was written on September 20, 1872, providing that the United States shall pay to the Oyate a total of \$800,000 in ten annual installments of \$80,000 worth of the following as enumerated in article 2 of the agreement:

for goods and provisions, for the erection of manual-labor and public school-houses, and for the support of manual-labor and public schools, and in the erection of mills, blacksmiths-shops, and

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33. Act of Feb. 16, 1863 § 1, 12 Stat. at 652 (providing that each Indian willing to pursue an agricultural lifestyle would be entitled to eighty acres of this unoccupied area).

34. Treaty with the Sioux — Sisseton Wahpeton Bands, 15 Stat. 505, Feb. 19, 1867 (ratified Apr. 15, 1867), *reprinted in* 2 KAPPLER, *supra* note 4, at 956-59. Article 4 established the Devils Lake Reservation also. *Id.* art. 4, 15 Stat. at 506, *reprinted in* 2 KAPPLER, *supra* note 4, at 958-58.

35. After the Minnesota Uprising, the Sisseton and Wahpeton were no longer considered separate bands and merged.

36. *See id.* art. 9, 15 Stat. at 507, *reprinted in* 2 KAPPLER, *supra* note 4, at 959.

37. *Id.* art. 3, 15 Stat. at 506, *reprinted in* 2 KAPPLER, *supra* note 4, at 957.

38. *Id.* art. 2, 15 Stat. at 506, *reprinted in* 2 KAPPLER, *supra* note 4, at 957. Article 2 describes this land cession as follows:

[L]ands . . . being bounded on the south and east by the treaty-line of 1851, and the Red River of the North to the mouth of Goose River; on the north by the Goose River and a line running from the source thereof by the most westerly point of Devil's Lake to the Chief's Bluff at the head of James River, and on the west by the James River to the mouth of Mocasine River, and thence to Kampeska Lake.

Id.

other workshops, and to aid in opening farms, breaking land, and fencing the same, and in furnishing agricultural implements, oxen, and milch-cows, and such other beneficial objects as may be deemed most conducive to the prosperity and happiness of the Sisseton and Wahpeton bands of Dakota.³⁹

In essence, the SWO would receive payment only in items purchased by the Indian agent in his discretion and in his valuation. This agreement was ratified the next year in 1873 with articles three through nine stricken out containing allotment and patent provisions, anticipated sales of surplus lands, and prohibition of liquor in the ceded territory.⁴⁰

On Feb. 8, 1887, the United States Congress passed the General Allotment Act permitting the President of the United States to determine that allotting Indian reservations would be in the best interests of any Tribe and allowing for the sale of any lands not subject to allotment as surplus.⁴¹ Two years after the passage of the General Allotment Act local settlers near the Lake Traverse Reservation pressured the tribal members into an agreement to allot the reservation.⁴² The agreement was ratified by Congress in 1891 and would have far-reaching consequences for the SWO.⁴³ Within the 1891 Act, the General Allotment Act is referenced several times as providing the authority for the allotment and sale of the SWO reservation lands.⁴⁴ For the next eighty-four years, the SWO would continue life as a tribal community on the Lake

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39. Agreement with the Sisseton and Wahpeton Bands of Sioux Indians, Sept. 20, 1872 (unratified); Indian Office, Sisseton, S. 247 (1872), *reprinted in* 2 KAPPLER, *supra* note 4, at 1057.

40. Amended Agreement with Certain Sioux Indians, May 2, 1873 ratified by the Act of Feb. 14, 1873, ch. 138, 17 Stat. 437, 456, and the Act of June 24, 1874, ch. 389, 18 Stat. 146, 167, *reprinted in* 2 KAPPLER, *supra* note 4, at 1059-63.

41. FRANCIS PAUL PRUCHA, *DOCUMENTS OF UNITED STATES INDIAN POLICY* 170-73 (3d ed. 2000).

42. Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 989, 1035, *reprinted in* 1 KAPPLER, *supra* note 4, at 428 (containing the agreement to be ratified and beginning with a recitation from the General Allotment Act).

43. Acting as commissioners for the United States were: Secretary of the Board of Indian Commissioners Eliphalet Whittlesey, Chief of the Land Division of the Dept. of the Interior Charles A. Maxwell, and a local and highly motivated banker, D.W. Diggs, all three were motivated by self-interest to open the reservation and they were the ones who drafted the agreement in language that would become pivotal to the status of the reservation.

44. Included in this agreement were several core issues to the SWO such as the receipt of the scout's pay promised in 1862 and the ability of married women to have their own share of land. Act of Mar. 3, 1891, 26 Stat. at 1037, *reprinted in* 1 KAPPLER, *supra* note 4, at 428 (articles 3 and 4).

Traverse Reservation, asserting tribal jurisdiction within the reservation's boundaries and building new governmental infrastructure on the retained tribal lands.

II. SWO Reservation Disestablishment Ruling by the United States Supreme Court in 1975 and Land Fractionation of Remaining Allotments

In the early 1970s, the state of South Dakota aggressively asserted authority whenever possible over Indians and within Indian country. In the area of criminal jurisdiction, the state law enforcement officers arrested SWO tribal members within the Lake Traverse Reservation boundaries, charged those arrested in state court and sent those convicted to state prison. This situation led to the Eighth Circuit decision in *United States ex. rel. Feather v. Erickson*,⁴⁵ holding that the 1867 reservation boundaries encompassed Indian country thereby excluding state jurisdiction over tribal members on those lands and determining that the writs of habeas corpus requested should have been granted.⁴⁶

South Dakota social service workers also operated within the 1867 reservation boundaries and held child welfare proceedings in state court. A mother of two young boys, Cheryl Spider, challenged the removal of her children by the state and requested their release in a habeas corpus action in state court. The district county court upheld South Dakota's jurisdiction and this was affirmed by the state supreme court.⁴⁷

Both the Eighth Circuit *Feather* decision and the South Dakota *DeCoteau* decision were appealed to the United States Supreme Court and consolidated to determine whether the state had unlawfully acted within Indian country.⁴⁸ The case turned on whether the congressional act ratified in 1891 allotting and then selling the remaining 'surplus' reservation lands actually terminated the Lake Traverse Reservation or if the reservation continued to exist without express termination language in the agreement.⁴⁹ In its historical analysis, the U.S. Supreme Court quoted one of the acting U.S. Commissioners, D.W. Diggs, a banker from an adjacent town, stating that "[t]he Lake Traverse

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45. 489 F.2d 99 (8th Cir. 1974).

46. *Id.* at 103. The Eighth Circuit also reversed a previous decision finding that the reservation boundaries were terminated in *DeMarrias v. South Dakota*, 319 F.2d. 845 (8th Cir. 1963), in light of further developments by the federal courts the Eighth Circuit reached a contrary conclusion in 1974.

47. *DeCoteau v. District County Court*, 211 N.W.2d 843 (S.D. 1973).

48. *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

49. *Id.* at 426-27.

Reservation is a great detriment to our interests, as it blocks the progress of two or three lines of railroad that we are very anxious to see completed.”⁵⁰

In the *DeCoteau* decision, the Court explained that the United States had adopted a different policy towards Tribes in the late 1800s. “After 1871, the tribes were no longer regarded as sovereign nations, and the Government began to regulate their affairs through statute or through contractual agreements ratified by statute.”⁵¹ The Court then articulated the policy and provisions of the General Allotment Act of 1887. Turning to the SWO situation, the Court cited to a Minneapolis newspaper account of tribal members supposedly agreeing to the opening of the reservation.⁵² Excerpted portions of statements by two tribal members were quoted in footnotes to the Supreme Court opinion to bolster the proposition that the SWO would freely assent to terminating the Lake Traverse Reservation after the many years of agreements, warfare, and negotiations to establish a permanent homeland.⁵³

In the decisional analysis, the Court ruled that the specific language of the 1891 Act indicated the intent by Congress to terminate the Lake Traverse Reservation.⁵⁴ This language was written by the three commissioners sent to the reservation to negotiate a price for the surplus acres once the reservation was opened. In reviewing this language, the Court found that the agreement was unique in allowing a cession of all of the SWO’s unallotted lands rather than a portion.⁵⁵ Instead of acknowledging that the 1891 Act was not a result of the tribal members crafting the language to embody their intent, the Court read the Act as containing specific, particular phrasing resulting in a single conclusion that the tribal members meant to relinquish their hard-won reservation.⁵⁶ The Court rejected the usage of the canons of construction in construing ambiguities in favor of Indian tribes for the 1891 Act and rather reasoned that “[a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent.”⁵⁷

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50. *Id.* at 431 n.8.

51. *Id.*

52. *Id.* at 433-34.

53. *See id.* at 435 n.16 (quoting portions of statements made by Gabrielle and Michael Renville that convey their preoccupation with receiving the loyal scout payments promised from 1862).

54. *Id.* at 445.

55. *Id.* at 446.

56. *Id.* at 445 (stating that “[t]he Agreement’s language, adopted by majority vote of the tribe, was precisely suited to” the purpose of terminating the reservation).

57. *Id.* at 447.

Three dissenting Supreme Court Justices, led by Justice Douglas,⁵⁸ noted that in the 1891 Act “[t]here is not a word to suggest that the boundaries of the reservation was altered.”⁵⁹ The dissenting opinion further indicated that the recognition of the reservation boundaries as still intact was evidenced by “[f]ederal services to members of the tribe extend to those residing on land opened to settlement as well as those on trust allotments.”⁶⁰ Citing examples of the Tribal Constitution asserting jurisdiction within the reservation boundaries as set forth in the 1867 Treaty, the support of the United States for the SWO tribal government enforcing its laws within the reservation boundaries, and the SWO Law and Order Code asserting civil and criminal jurisdiction within the 1867 reservation boundaries, the dissent found ample evidence that “[t]he attitude of Congress, of the Department of the Interior (under which the Bureau of Indian Affairs functions), and of the tribe is that the jurisdiction of the tribe extends throughout, the territory of the reservation as described in the Treaty.”⁶¹

As of the Supreme Court’s ruling in 1975, the SWO has aggressively sought to reacquire individual tracts of land either from tribal members wishing to sell their allotments or from non-Indian settlers within the 1867 boundaries. The U.S. Congress passed the provisions of the Indian Land Consolidation Act⁶² to include funds for such reacquisition. The ILCA was intended to allow tribes to gain ownership when an individual’s interest “represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than \$100 in the preceding year before its due to escheat.”⁶³ However, the U.S. Supreme Court in *Hodel v. Irving*⁶⁴ held that this escheat provision was unconstitutional as constituting a taking without just compensation.

In *Hodel*, the Supreme Court highlighted the fractionation situation of the SWO as an example of the complexity of the current state of Indian land ownership.⁶⁵

The Sisseton-Wahpeton Sioux Tribe, appearing as amicus curiae
in support of the Secretary of the Interior, is a quintessential victim

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58. Justices Brennan and Marshall joined the dissent.

59. *Id.* at 461.

60. *Id.* at 464.

61. *Id.* at 465-66.

62. 25 U.S.C. § 2201 (2000).

63. *Id.*

64. 481 U.S. 704 (1987).

65. *Id.*

of fractionation. Forty- acre tracts on the Sisseton-Wahpeton Lake Traverse Reservation, leasing for about \$1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners and the average owner undivided interests in 14 tracts. The administrative headache this represents can be fathomed by examining Tract 1305, dubbed "one of the most fractionated parcels of land in the world." Lawson, *Heirship: The Indian Amoeba*, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 85 (1984). Tract 1305 is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1. The largest interest holder receives \$82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually. *Id.*, at 86, 87. See also Comment, *Too Little Land, Too Many Heirs--The Indian Heirship Land Problem*, 46 Wash.L.Rev. 709, 711-713 (1971).⁶⁶

Although the Supreme Court recognized the fractionation problem, the Court proceeded in *Hodel* to find the federal legislative solution unconstitutional and struck the escheat provision which would have allowed tribes to regain land interests representing less than two percent in any tract with a previous year's lease payment of \$100 or less. When Congress amended the ILCA section 207 with stricter controls on the escheat provision, the Supreme Court in *Babbitt v. Youpee*⁶⁷ once more struck the escheat provision as an unconstitutional taking. The Court held that Congress had missed the point because the issue was the extraordinary means of escheating land interests from citizens.⁶⁸

For the SWO, Congress specifically passed an Act similar to the ILCA including an escheat provision in section 5 of the Act: "Any interest less than

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66. *Id.* at 712-13.

67. 519 U.S. 234 (1997).

68. *Id.* at 244.

two and one-half acres of a devisee or intestate distributee of a decedent . . . shall escheat to the tribe and title to such escheated interest shall be taken in the name of the United States in trust for the tribe.”⁶⁹ In *DuMarce v. Norton*,⁷⁰ decided in May 2003, a federal court struck section 5 of the Act as an unconstitutional taking noting that “very little differs between [the Indian Land Consolidation Act’s] section 207, amended 207, and section 5 of the Sisseton-Wahpeton Sioux Act.”⁷¹

The U.S. Congress in 2000 revised its legislative directive regarding fractionation of Indian lands. The amendments to the ILCA require that devise of Indian land pass to an Indian spouse, other Indian, or the Tribe.⁷² If the devise passes to a non-Indian, the interest will be regarded as a life estate and at the expiration of the life estate the land will pass to the Indian spouse or other Indian heirs.⁷³ In the case of a lack of heirs, the land will pass to the Tribe.⁷⁴

Thus, the SWO has several pressing issues to contend with in terms of maintaining a tribal territory. First is the need to regain federal recognition of the reservation boundaries to restore full acknowledgement of tribal jurisdiction within those boundaries. Second is the adequate funding and aggressive implementation of a tribal land reacquisition plan within the original 1867 boundaries.⁷⁵ Third, is the need for a community solution to the

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69. Act of Oct. 19, 1984, § 5, Pub. L. No. 98-573, 98 Stat. 2411, 2413.

70. 277 F. Supp. 2d 1046 (D.S.D. 2003).

71. *Id.* at 1053.

72. Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 103, 114 Stat. 1991, 1995-96 (2000) (amended section 207 of the ILCA, “Descent and Distribution”).

73. *Id.*

74. *Id.*

75. One possible source of land acquisition funding will be the proceeds received by the SWO from the operation of the Mississippi Sioux Judgment Fund Distribution Act of 1998. This Act provided that the payments from the 1830 Prairie du Chien Treaty ceding over two million acres of land and the 1851 Treaty of Traverse des Sioux ceding over twenty-five million acres of land had not been distributed to SWO members. Those payments remained within the U.S. Treasury and had accrued interest. Under the Act, the lineal descendants who had not received the payment were to be determined to receive a portion of the payment and then based upon that determination, the SWO would receive a percentage share of the Judgment Fund with other amounts distributed to the Spirit Lake Tribe of North Dakota, and the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana. Lineal descendants of the SWO filed suit for lack of knowledge of the distribution in *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997). See also *Loudner v. United States*, 330 F. Supp. 2d 1074 (D. S.D. 2004) (granting defendant Tribes motion to dismiss plaintiff lineal descendants’ claims challenging the constitutionality and legality of the Distribution Act of 1998). Another group of lineal descendants were awarded damages against the U.S. for breach of fiduciary duties in the delay

ever-increasing minimization of interests in any one parcel of land leading to the inability of tribal members to determine land use and therefore, the perpetual assertion of control over the allotments by the Bureau of Indian Affairs.

III. Restoration of Federal Recognition of Reservation Boundaries

In the Law and Order Code of the Sisseton-Wahpeton Oyate, Chapter 20 Jurisdiction asserts tribal civil jurisdiction over any person or entity engaged in business or committing a tortious act on or within Indian country within the exterior boundaries of the Lake Traverse Reservation.⁷⁶ This chapter also provides criminal jurisdiction on or within Indian country within the exterior boundaries of the Lake Traverse Reservation over Indians⁷⁷ and the right to detain non-Indians until transferred to the appropriate state jurisdiction.⁷⁸ For all intents and purposes, the SWO continues to maintain that tribal territory includes all tribal lands as Indian country within the 1867 Treaty designated Lake Traverse Reservation boundaries.⁷⁹

However, after the 1975 *DeCoteau* decision, federal recognition has been limited to the remaining trust allotments and tribal lands as within the “former” SWO reservation. Hand-in-hand with federal recognition is state

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of ascertaining entitled lineal descendants for the distribution of the judgment funds in *LeBeau v. United States*, 215 F. Supp. 2d 1046 (D.S.D. 2002). See also *LeBeau v. United States*, 171 F. Supp. 2d 1009 (D.S.D. 2001); *LeBeau v. United States*, 115 F. Supp. 2d 1172 (D.S.D. 2000).

76. SISSETON-WAHPETON OYATE CODE § 20-01-02 (1996).

77. *Id.* § 20-02-02.

78. *Id.* § 20-02-07.

79. “Indian country” is defined for criminal purposes as: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. § 1151 (2000).

In *Oklahoma Tax Commission v. Sac & Fox Nation*, the Supreme Court stated that Indian country for civil jurisdiction, such as taxing, was the same as for criminal jurisdiction:

But our cases make clear that a tribal member need not live on a formal reservation to be outside the State’s taxing jurisdiction; it is enough that the member live in “Indian country.” Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. § 1151.

Okla. Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993).

recognition and the continued assertion of state jurisdiction within the exterior boundaries of the Lake Traverse Reservation. For the SWO to enjoy federal recognition of the 1867 original reservation boundaries, an act of Congress is needed. Recently, in *United States v. Lara*,⁸⁰ the U.S. Supreme Court acknowledged that “[o]ne can readily find examples in congressional decisions to recognize, or to terminate, the existence of individual tribes.”⁸¹ The existence of the SWO as a tribal government has never been questioned by the United States, rather the lesser federal action to reinstate federal recognition of the tribal homeland is well within the authority of Congress. The Court also stated that its decisions only reflect the tribal status at the time of its decisions and that Congress has the power to change the “relevant legal circumstances”, thus altering federal law towards tribes.⁸² Based upon this reasoning, the U.S. Supreme Court would uphold a federal law reinstating the SWO’s reservation boundaries as within the authority of Congress which would in practical terms override the decision in the *DeCoteau* case.

For the SWO to successfully persuade Congress to take action to reinstate the Lake Traverse Reservation 1867 boundaries, a comprehensive and well-grounded legal rationale must be presented. In this article, I submit that the principles of international law for indigenous peoples’ rights provides such a legal rationale.

IV. Application of International Law Concepts to the SWO Territory

International law is created in two ways; either by treaties, commonly called conventions, that are binding instruments on the parties who sign and ratify them or by the evolution of international customary law.⁸³ The role of customary international law is to encourage countries to follow the guidelines, declarations, resolutions, scholarly writings, international court decisions,⁸⁴

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80. 541 U.S. 193 (2004).

81. *Id.* at 1635.

82. *Id.* at 1636.

83. See PETER GLEICK, THE HUMAN RIGHT TO WATER (Pacific Inst. for Studies in Development, Environment, and Security 1999), available at http://www.pacinst.org/reports/basic_water_needs/human_right_to_water.pdf (also published in article form at 1 WATER POLICY 487 (1999)). “Strictly speaking, a declaration is a statement of basic principles of inalienable human rights and imposes only moral, not legal weight on Members.” *Id.* at 4.

84. See, e.g., Western Sahara, 1975 I.C.J. 12 (stating in the majority opinion that the doctrine of ‘terra nullis’ was not applicable to territories of nomadic indigenous peoples); see also Julie Cassidy, *Sovereignty of Aboriginal Peoples*, 9 IND. INT’L & COMP. L. REV. 65, 91-92 (1998) (“While the word ‘occupation’ was at times used to signify the acquisition of sovereignty from these peoples, the majority of the Court asserted that this use of the term was technically

etc. that shape the direction of international law. Unfortunately, the United States has not been willing to adhere to international human rights conventions and their enforcement by the International Court of Justice.⁸⁵ The customary law regarding indigenous peoples that bears directly on the United States' interaction with the SWO and other Tribes will be reviewed in the following order from these organizations: the United Nations, the International Labour Organization, and the Organization of American States.

A. United Nations

1. United Nations Resolution No.1514

The United Nations Charter entered into force on October 24, 1945 and has at present 185 countries bound by its principles.⁸⁶ In Article 1 of the U.N. Charter the purposes of the United Nations organization are set forth.⁸⁷ Article 1 Subsection 2 provides the purpose "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."⁸⁸ This subsection provides the basis for self-determination of indigenous peoples and the consequent demise of colonial exploitation of such peoples.

After World War II, the countries forming the United Nations reached a consensus that colonization should no longer be tolerated.⁸⁹ By passage of Resolution No. 1514 "Declaration on the Granting of Independence to

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improper. An original sovereign title could only be acquired by occupation of terra nullius. If land was not terra nullius, only a derivative title could be acquired and only through agreements with local rulers.").

85. For example, when the U.S. Senate ratified the International Convention on the Elimination of All Forms of Racial Discrimination, several reservations were made to the implementation of the convention. Included among these was the following: "That with reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case." See U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, DECLARATIONS, RESERVATIONS, WITHDRAWALS OF RESERVATIONS, AND DECLARATIONS RELATING TO THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION at 28, U.N. Doc. CERD/C/60/Rev.4, U.N. Sales No. GE.01-42247 E (2001), available at [http://www.unhchr.ch/tbs/doc.nsf/0/76c519db74361f2dc1256a8d0051d206/\\$FILE/G0142247.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/76c519db74361f2dc1256a8d0051d206/$FILE/G0142247.pdf).

86. U.N. CHARTER art. 1, available at <http://www.unhchr.ch/html/menu3/b/ch-chp1.htm>.

87. *Id.*

88. *Id.*

89. See *The United Nations and Decolonization*, at http://www.un.org/partners/civil_society/m-decol.htm (visited Apr. 14, 2005).

Colonial Countries and Peoples”, the United Nations began to form customary law, non-binding as a declaration, denouncing the exploitation of lands by Europeans forming colonies.⁹⁰ One of the foundations of the resolution is the following tenet from the preamble: “Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory.”⁹¹ The sixth declaration states that “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”⁹²

The United States government is and has been a colonial power to which this resolution applies. In addition to the occupation of mid-North America, the United States claims as its outlying territories: Puerto Rico,⁹³ Guam,⁹⁴ U.S. Virgin Islands,⁹⁵ American Samoa,⁹⁶ Northern Mariana Islands,⁹⁷ Midway

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90. Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. GAOR, 15th Sess., Supp. No. 16, at 66-67, U.N. Doc A/4684 (1960).

91. *Id.*

92. *Id.*

93. Infoplease: Puerto Rico, at <http://www.infoplease.com/ipa/A0113949.html> (visited Apr. 14, 2005) (“Under the Commonwealth formula, residents of Puerto Rico lack voting representation in Congress and do not participate in presidential elections. As U.S. citizens, Puerto Ricans are subject to military service and most federal laws. Residents of the Commonwealth pay no federal income tax on locally generated earnings, but Puerto Rico government income-tax rates are set at a level that closely parallels federal-plus-state levies on the mainland.”).

94. Infoplease: Guam, at <http://www.infoplease.com/ipa/A0113950.html> (visited Apr. 14, 2005) (“Today Guam is an unincorporated, organized territory of the United States. The people of Guam have been U.S. citizens since 1950. They have been represented in the U.S. Congress since 1973 by a nonvoting delegate, but do not participate in presidential elections.”).

95. Infoplease: Virgin Islands, at <http://www.infoplease.com/ipa/A0113951.html> (visited Apr. 14, 2005) (“Congress granted U.S. citizenship to Virgin Islanders in 1927. Universal suffrage was given in 1936 to all persons who could read and write English. The governor was elected by popular vote for the first time in 1970; previously he had been appointed by the U.S. President. . . [r]esidents of the islands substantially enjoy the same rights as those enjoyed by mainlanders, but they may not vote in presidential elections.”).

96. Infoplease: American Samoa, at <http://www.infoplease.com/ipa/A0113952.html> (visited Apr. 14, 2005) (“Until World War II the United States operated a coaling station and naval base in Pago Pago. During the war, the islands were an important U.S. Marines staging area. In 1960 American Samoa ratified its territorial constitution and has since developed a modern, self-governing political system. . . . The people of American Samoa are U.S. nationals, not U.S. citizens, but many have become naturalized American citizens.”).

97. Infoplease: Northern Mariana Islands, at <http://www.infoplease.com/ipa/A0113959.html> (visited Apr. 14, 2005) (“They were ruled successively by Spain, Germany, and Japan before they became a UN Trusteeship (administered by the U.S.) after World War II. The

Islands,⁹⁸ Wake Island,⁹⁹ Johnston Atoll,¹⁰⁰ Baker-Howland-Jarvis Islands,¹⁰¹ Kingman Reef,¹⁰² Navassa Island,¹⁰³ and Palmyra Atoll.¹⁰⁴ Generally, the interpretation of U.N. Resolution No. 1514 has been limited to territories that meet the definition of a colony by being separated across “blue water” or “salt water.” Only in recent years has customary international law recognized the oppression of indigenous peoples subsumed by an occupying nation as similar to colonialism.¹⁰⁵

Since its formation, the United States has imposed its laws, policies, and military on the indigenous peoples in mid North America.¹⁰⁶ The U.S. has

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Commonwealth of the Northern Mariana Islands (CNMI) became part of the United States in Nov. 1986.”).

98. Infoplease: Midway Islands, at <http://www.infoplease.com/ipa/A0113956.html> (visited Apr. 14, 2005) (“The atoll was declared a U.S. possession in 1867, and in 1903 Theodore Roosevelt made it a naval reservation.”).

99. Infoplease: Wake Island, at <http://www.infoplease.com/ipa/A0113957.html> (visited Apr. 14, 2005) (“They were discovered by the British in 1706 and annexed by the U.S. in 1899. . . . On Dec. 8, 1941, it was attacked by the Japanese, who finally took possession on Dec. 23. It was surrendered by the Japanese on Sept. 4, 1945.”).

100. Infoplease: Johnston Atoll, at <http://www.infoplease.com/ipa/A0113954.html> (visited Apr. 14, 2005) (“In 1858 it was claimed by Hawaii, and later became a U.S. possession. Johnston Atoll was used by the U.S. Air Force to conduct test launchings of nuclear missiles and contains a landfill of plutonium-contaminated waste. [In 2004, the military will depart] and the atoll will be turned into a wildlife refuge. However, the U.S. Fish and Wildlife Service, the atoll’s inheritor, is concerned about the possibility of eventual radioactive leakage.”).

101. Infoplease: Baker, Howland, and Jarvis Islands, at <http://www.infoplease.com/ipa/A0113953.html> (visited Apr. 14, 2005) (“These Pacific islands were claimed by the United States under the Guano Act of 1856. . . . Through the Guano Act the U.S. gained 79 tiny territories around the world; it still controls eight of them.”).

102. Infoplease: Kingman Reef, at <http://www.infoplease.com/ipa/A0113955.html> (visited Apr. 14, 2005) (“A U.S. possession since 1922, Kingman Reef is a Naval Defensive Sea Area and Airspace Reservation, and is closed to the public.”).

103. Infoplease: Navassa Island, at <http://www.infoplease.com/ipa/A0113960.html> (visited Apr. 14, 2005) (“It was claimed for the U.S. by the Guano Act in 1857. . . . The island is also claimed by Haiti.”).

104. Infoplease: Palmyra Atoll, at <http://www.infoplease.com/ipa/A0113961.html> (visited Apr. 14, 2005) (“Palmyra Atoll is an incorporated territory of the U.S. and privately owned.”).

105. See Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1300 (1995) (“Following World War II and the post-colonial period, nation-states insisted that indigenous people within their boundaries, not separated from state territory by a body of water, were citizens without distinctions.”).

106. See William Bradford, *With a Very Great Blame on Our Hearts: Reparations, Reconciliation, and an American Indian Plea for Peace and Justice*, 27 AM. INDIAN L. REV. 1, 20-72 (2002-2003) (detailing genocide, land theft, conquest by fiction, plenary power, allotment, ethnocide, cultural liquidation, eradication of Indian religion, suppression of Indian

acted as a colonial power by exploiting native resources, outlawing native practices, limiting native control of external affairs, and to some degree limiting internal affairs as well.¹⁰⁷ To legitimize this forceful occupation and take-over, the U.S. has patched together a theory of rule over the nations indigenous to this part of the world, beginning with *Johnson v. McIntosh*¹⁰⁸ in 1823. Although the United States Supreme Court recognizes that by international law territory may be claimed by conquest or by assimilation of a people as a colony, the Court finds that neither situation is applicable to Indians.¹⁰⁹

Rather, by expanding the doctrine of discovery from merely setting up boundary claims between European countries exploring other regions of the world, the Court finds a new category for Indian land ownership in North America.

They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it.

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self-government, legal imperialism, political domination, ethnodevelopmental suppression, termination, and relocation).

107. *Id.*

108. 21 U.S. (8 Wheat.) 543 (1823).

109. For a full discussion of the legal pretext for U.S. land ownership of tribal territory, see Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663, 673 (2002) ("The proposition that significant portions of Indian Country amounted to terra nullius, and were thus open to assertion of U.S. title without native agreement, was, however, contradicted by the country's policy of securing by treaty at least an appearance of indigenous consent to the relinquishment of each parcel brought under federal jurisdiction. The presumption of underlying native land title lodged in the Doctrine of Discovery thus remained the most vexing barrier to America's fulfillment of its territorial ambitions.").

All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.¹¹⁰

According to the author of the *Johnson* decision, Chief Justice John Marshall, Indian lands were simply occupied by Indians and the “discovering nation,” or its successor, held superior title to these lands over Indian ownership and as regarded any other purchaser. This was a significant departure from international law in 1823 and continues to be at present.

2. Human Rights Special Rapporteur Report of 2000

In June of 2000, the United Nations Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights submitted a final report examining the disenfranchisement of indigenous peoples.¹¹¹ In this submission, the policies of United States are examined in the treatment of tribal peoples and their lands.

The problem of extinguishment is related to the concept of aboriginal title. The central defect of so-called aboriginal title is that it is, by definition, title that can be taken at will by the Sovereign — that is, by the colonial Government, or nowadays, by the State. Like aboriginal title, the practice of involuntary extinguishment of indigenous land rights is a relic of the colonial period. It appears that, in modern times, the practice of involuntary extinguishment of land titles without compensation is applied only to indigenous peoples. As such, it is discriminatory and unjust, to say the least, and deserving of close examination.¹¹²

The Special Rapporteur continues on to highlight the United States Supreme Court case *Tee-Hit-Ton Indians v. United States*,¹¹³ where the federal policy of taking property held by aboriginal title was upheld without the protection of the United States Constitution available for any other property.¹¹⁴ Another

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110. *Johnson*, 21 U.S. (8 Wheat.) at 588.

111. Indigenous Peoples and Their Relationship to Land: Final Working Paper Prepared by the Special Rapporteur, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Annex P 11, U.N. Doc. E/CN.4.Sub.2/2000/25 (2000) [hereinafter Indigenous Peoples' Relation to Land]

112. *Id.* at 14.

113. 348 U.S. 272 (1995).

114. Indigenous Peoples' Relation to Land, *supra* note 111, at 14-15.

policy the Special Rapporteur takes issue with is the notion of “plenary power” as developed in the United States as a separate policy towards indigenous peoples.

Another discriminatory legal doctrine that appears to be widespread is the doctrine that States have practically unlimited power to control or regulate the use of indigenous lands, without regard for constitutional limits on governmental power that would otherwise be applicable. In the United States, this is known as the “plenary power doctrine” and it holds that the United States Congress may exercise virtually unlimited power over indigenous nations and tribes and their property. No other population or group is subject to such limitless and potentially abusive governmental power.¹¹⁵

In part IV of the report, the Special Rapporteur lists seven objectives to resolve indigenous land issues and problems, of special note is objective (ii): “[t]o correct in a just manner the wrongful taking of land and resources from indigenous peoples.”¹¹⁶

3. The Draft United Nations Declaration on the Rights of Indigenous Peoples

An increasingly progressive United Nations has under consideration the Draft Declaration on the Rights of Indigenous Peoples.¹¹⁷ Of particular importance to the re-recognition of the Lake Traverse Reservation boundaries is this statement in the Draft Declaration’s preamble: “Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.” Article 26 of the Draft Declaration on Indigenous Rights states that: “Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters,

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115. *Id.* at 16.

116. *Id.* at 26.

117. U.N. ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/SUB.2/1994/2/Add.1 (1994) [hereinafter Draft Declaration], available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument).

coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used.”

Thus, Article 26 establishes the complete property rights of indigenous peoples in their territories. Article 27 provides for remedying unjust taking of those lands: “Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent.” These two articles would form the final legal basis for the reestablishment of the Lake Traverse Reservation boundaries, the traditional homeland of the Sisseton-Wahpeton Oyate. Within the United Nations, the Permanent Forum on Indigenous Issues serves as an advisory group to the Economic and Social Council and would be a point of participation for the SWO to begin to present this legal basis in an international forum.¹¹⁸

Applying the customary law evolving from the United Nations to the situation that the SWO faces, the United States Supreme Court has ruled that the Lake Traverse Reservation has been disestablished over the Tribe’s objections. This unilateral divesture by the United States of tribal jurisdiction over tribal territory runs afoul of common ideas of tribal sovereignty and the ability of the Tribe to maintain its territorial integrity. The United States Supreme Court in that ruling was seeking to legitimize the actions of the United States Congress in passing legislation to break up the lands of the SWO, and many other indigenous nations, into allotments and then sell the ‘surplus’ to homesteaders.

Under the policies of the United States, the acts of Congress are shrouded in plenary authority over Indian affairs. Thus, the federal disestablishment of the Lake Traverse Reservation boundaries is a “wrongful taking of land and resources from indigenous peoples” and should be corrected “in a just manner” as stated in the objectives of the above-referenced Human Rights report. Furthermore, the UN Charter, Resolution No. 1514, and the Draft Declaration on the Rights of Indigenous Peoples provide a basis for the SWO, included as a group of indigenous peoples, to assert its rights of self-determination from the United States and the rights to restitution of its traditional lands, thereby refuting the unilateral actions of the United States Congress and Supreme Court in disenfranchising the SWO through disestablishment of the Lake Traverse Reservation.

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118. See United Nations Permanent Forum on Indigenous Issues, <http://www.un.org/esa/socdev/unpfii/> (visited Apr. 14, 2005).

B. The International Labour Organisation

In 1919, the International Labour Organisation (ILO) was created as a specialized agency of the League of Nations, predecessor of the United Nations.¹¹⁹ In 1946, the ILO became the first specialized agency of the United Nations and continued with its task for “promotion of social justice and internationally recognized human and labour rights.”¹²⁰ In 1957, the ILO adopted C107 Indigenous and Tribal Populations Convention that set standards for the treatment of indigenous peoples within nation-states.¹²¹ However, this instrument failed to identify self-determination as the priority for indigenous peoples and stressed assimilation and similar treatment of indigenous peoples under the law of nation-states.¹²² In 1989, the ILO revised this convention as C169 Indigenous and Tribal Peoples Convention with the view that

developments have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of earlier standards.”¹²³

In Part II Lands of the 1989 Convention, nation-states are to recognize the rights of tribal peoples to their lands. Article 14(1) expressly provides that “[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.”¹²⁴ This provision supports the SWO effort to restore federal recognition of its traditional homeland, the Lake Traverse Reservation.

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119. See International Labour Organization: About the ILO, <http://www.ilo.org/public/english/about/index.htm> (visited Apr. 14, 2005).

120. *Id.*

121. See International Labour Organization Convention C107, Indigenous and Tribal Populations Convention (1957), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>.

122. For example, the preamble to C107 states that a consideration of the convention is “the adoption of general international standards on the subject [that] will facilitate action to assure the protection of the populations concerned, their progressive integration into their respective national communities.” *Id.* at pmbl.

123. See International Labour Organization Convention C169, Indigenous and Tribal Peoples Convention (1989), available at http://www.ilo.org/public/english/employment/skills/recomm/instr/c_169.htm.

124. *Id.* art. 14.1.

C. The Organization of the American States

A third organization that influences the treatment of indigenous peoples such as the SWO is the regional Organization of American States (OAS).¹²⁵ Within the OAS is the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. On July 18, 1978, the American Convention on Human Rights entered into force, the primary human rights document of the OAS.¹²⁶ While the United States is a signatory to this convention, it has not ratified the convention or accepted the jurisdiction of the Inter-American Court of Human Rights.¹²⁷ Currently, the OAS Commission on Human Rights is developing a Declaration on the Rights of Indigenous Peoples.¹²⁸

The Proposed Declaration on the Rights of Indigenous Peoples contains in Article XVIII(1) protection for the land ownership of indigenous peoples. "Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property."¹²⁹ Although this Declaration is only in the proposal stage, it indicates the shift in thinking from earlier policies around the world to force indigenous populations into the society of their colonizers.

Additionally, the Rapporteur to the Working Group on the Declaration submitted a report November 7-8, 2002 detailing the land status of indigenous peoples in the Americas: "Traditional Forms of Ownership and Cultural Survival, Right to Land and Territories."¹³⁰ The report explains the loss of land and property rights in the following manner.

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125. See Organization of American States — OAS, at <http://www.oas.org> (visited Apr. 14, 2005).

126. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978), available at <http://www.cidh.oas.org/Basicos/basic3.htm>.

127. See Inter-American Comm'n on Human Rights, OAS, Signatures and Current Status of Ratifications, available at <http://www.cidh.oas.org/Basicos/basic4/htm>.

128. See Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American C.H.R., 1333d Sess. (Feb. 26, 1997), available at <http://www.cidh.oas.org/Indigenous.htm>.

129. *Id.* art. 28(1).

130. See Comm. on Juridical & Political Affairs, OAS, Report of the Rapporteur: Meeting of the Working Group on the Fifth Section of the Draft Declaration with a Special Emphasis on "Traditional Forms of Ownership and Cultural Survival. Right to Land and Territories," OAS Doc. GT/DADIN/doc.113/03 rev. 1 (Nov. 7-8, 2002), available at <http://www.oas.org/consejo/CAJP/docs/cp10830e04.doc>.

The process of dispossession of lands and territories from indigenous peoples took many forms, through legal disguise and direct use of force and dislodgement. Conquest wars, military campaigns to occupy and bring land into "productive uses" for the colonizers of the Empires, the use of institutions to subjugate the physical labor of Indians transforming them into forced servitude and overtaxing them in a way that had to surrender their territorial rights . . . .¹³¹

The substance of the report provided comparisons between Canada, the United States, and Latin America on the treatment of indigenous peoples. One of the conclusions of the report by the Rapporteur was that "the discussion showed that fears about the disintegration of States because of the recognition of Indigenous lands and territories has practically dissipated."¹³² In this report, the Rapporteur also draws attention to the Inter-American Commission on Human Rights decision regarding the on-going claim of the Western Shoshone that the U.S. unlawfully took their territorial lands.¹³³

Two women on behalf of the Western Shoshone filed a petition before the OAS Commission on Human Rights complaining that the U.S. has unlawfully taken tribal property by never extinguishing title and that the U.S. Indian Claims Commission failed to provide due process of law or a fair remedy.¹³⁴ The petition alleged that the U.S. actions were in violation of the American Declaration of the Rights and Duties of Man.¹³⁵ The Commission noted that the principles from the proposed American Declaration on the Rights of Indigenous Peoples were applicable to the claims of the Western Shoshone.

The development of these principles in the inter-American system has culminated in the drafting of Article XVIII of the Draft Declaration on the Rights of Indigenous Peoples, which provides for the protection of ownership and cultural survival and rights to land, territories and resources. While this provision, like the remainder of the Draft Declaration, has not yet been approved by the OAS General Assembly and therefore does not in itself have the effect of a final Declaration, the Commission considers that the basic principles reflected in many of the provisions of the

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131. *Id.* at 2.

132. *Id.* at 16.

133. *Id.* at 5-6.

134. Case 11.140, Inter-Am. C.H.R. Report No. 75/02, (Dec. 27, 2002).

135. *Id.*

Declaration, including aspects of Article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.¹³⁶

From this analysis, the Commission has determined that the proposed Declaration on Indigenous Rights will inform all Commission decisions for indigenous claims.

After a careful analysis of the petitioners' claims and the response of the United States, the Commission found in favor of the Western Shoshone and issued an advisory opinion.¹³⁷ The Commission held that the United States was in violation of the following American Declaration on the Rights of Man provisions: Article II Right to equality before law, Article XVIII Right to a fair trial, and Article XXIII Right to property.¹³⁸ This decision of the OAS Human Rights Commission, although an advisory opinion only, provides hope for the Tribes of mid-North America.¹³⁹

The Western Shoshone case was premised on facts common to many Tribes including unilateral extinguishment of aboriginal title to the tribal lands, lack of notice or a fair hearing before the Indian Claims Commission, and a resulting award of far less than fair market value for the lands.¹⁴⁰ For the SWO, the petition process before the OAS Commission on Human Rights would be an option to obtain an advisory opinion against the United States for the disestablishment of the Lake Traverse Reservation boundaries.

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136. *Id.* at #129.

137. *Id.* at #173 ("In accordance with the analysis and conclusions in the present report, The Inter-American Commission on Human Rights Reiterates the Following Recommendations to the United States: 1. Provide Mary and Carrie Dann with an effective remedy, which includes adopting the legislative or other measures necessary to ensure respect for the Danns' right to property in accordance with Articles II, XVIII, and XXII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands. 2. Review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII, and XXIII of the Declaration.").

138. *Id.*

139. See Kirsten M. Hetzel, *Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments*, 10 TUL. J. INT'L. & COMP. L. 307 (2002).

140. See also Indigenous Peoples' Relation to Land, *supra* note 111, at 20 (setting forth the facts and decision of the Western Shoshone case).

In conclusion, the Sisseton-Wahpeton Oyate has several options available in the international arena to form a legal rationale for the re-recognition of the Lake Traverse Reservation boundaries by the United States. In preparing such a rationale to encourage the U.S. Congress to remedy the situation, the SWO may draw upon many international instruments from the United Nations, the ILO, and the OAS. Indigenous rights documents are in the drafting stage for both the United Nations and the OAS, but the principles of those drafts may still be referenced. Additionally, the SWO may seek an audience in the Permanent Forum of Indigenous Issues and present the situation faced as tribal people in jeopardy of forever losing their traditional homeland. Another route would be for the SWO to file a petition seeking an advisory opinion from the OAS Human Rights Commission. After the *DeCoteau* decision, the SWO has exhausted judicial remedies in the United States and international law is the next logical step to regain its traditional territories as an indigenous nation.