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Cc: [redacted]
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Attachments: COMMENT OF THE OGLALA SIOUX TRIBE ON BENNETT COUNTY (4-15-25).777.final.pdf

On behalf of the Oglala Sioux Tribe, I am submitting the Tribe's comments on the Northern Plains National Interest Electric Transmission Corridor.

Please let us know you received these comments.

Thank you.

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COMMENT OF THE OGLALA SIOUX TRIBE IN SUPPORT OF DESIGNATION OF THE PROPOSED NORTHERN PLAINS NATIONAL INTEREST ELECTRIC TRANSMISSION CORRIDOR

The Oglala Sioux Tribe strongly supports the Northern Plains NIETC, but the map depicting the Northern Plains NIETC must be changed to show the correct boundaries of the Pine Ridge Indian Reservation.

The proposal released by the U.S. Department of Energy's (DOE) Grid Deployment Office (GDO) on May 8, 2024, showing a Preliminary List of Proposed NIETCs, includes a series of maps that illustrate where the ten proposed NIETCs are located. The three maps that describe the proposed Northern Plains NIETC are found in Appendix F (pages 60-62). Those maps show the Northern Plains NIETC, details of the electrical infrastructure in the area and environmental information about the area, as well as the boundaries of Tribal reservations. All three maps show the area of the Oglala Sioux Tribe's Pine Ridge Indian Reservation, but without Bennett County, South Dakota – the southeast quarter of the Pine Ridge Reservation.

Similarly, in its latest NIETC map, GDO continues to depict Bennett County as other than the Oglala Sioux Tribe's Pine Ridge Indian Reservation. The map's key shows color coding that purports to reflect the jurisdiction of the land at issue – the Pine Ridge Indian Reservation is coded as "Tribal Land" but Bennett County is shown in a different color that erroneously identifies its jurisdiction as "Other."

Bennett County Was Part of the Pine Ridge Reservation Created by Congress in March 1889.

This depiction is wrong as a matter of fact and as a matter of law – the land that became Bennett County has been part of the Sioux Reservation since the Great Sioux Reservation was formed by the Fort Laramie Treaty of 1868, signed April 29, 1868, and was Lakota Sioux land long before that. The current boundaries of the Pine Ridge Reservation were formed by Congressional act in 1889, Act of March 2, 1889, Ch. 405, 25 Stat. 888, and the Pine Ridge Reservation so created contained Bennett County in its entirety.

The Act of 1889 created the Pine Ridge Reservation prior to the existence of the State of South Dakota, which was not added to the union until November 2, 1889.

The 1910 Opening of Bennett County to Settlement Only Affected Unallotted Lands.

In violation of the Treaties entered between the United States and the Sioux Tribes, Congress later set out to open the unallotted portions of the now five separate Sioux reservations in South Dakota and North Dakota. In 1904, 1907 and 1910, Congress opened up three counties on the Rosebud Reservation. In 1908, Congress opened a large portion of the Cheyenne River Reservation. And in 1910, Congress opened a portion of the Pine Ridge Reservation.

The operative language of Section 1 of the 1910 Pine Ridge Act reads as follows: "[ ]That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided,

to sell and dispose of all that portion of the Pine Ridge Indian Reservation, in the State of South Dakota, lying and being in Bennett County . . . [ ] *except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved*, and except lands classified as timber lands[.]" Act of May 27, 1910, ch. 257, § 1, 36 Stat. 440 (emphasis added). This exception is important because it meant the 1910 Pine Ridge Act only applied to certain tracts of land, mostly concentrated in the southern portion of Bennett County making up only about 22% of the entire county. This was the "unallotted" area that existed when the 1910 Pine Ridge Act was passed by Congress.

As required by Section 2 of the 1910 Pine Ridge Act, the surplus and unallotted lands in Bennett County on the Pine Ridge Reservation were to be officially opened by presidential proclamation. This did not occur until President Taft issued a proclamation on June 29, 1911, *see* SOUTH DAKOTA HISTORICAL COLLECTIONS VOLUME XI: OPENING OF PINE RIDGE AND ROSEBUD LANDS, 1911, A PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES at 548 (State Dep't of Hist. 1922), mostly to allow time to finish allotting lands to Indians within Bennett County.

In 1936, the Secretary of the Interior Approved the Tribe's Constitution Defining the Pine Ridge Reservation's Boundaries as Including Bennett County.

On January 15, 1936, as authorized by the Indian Reorganization Act (IRA), Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. § 463, the Secretary of Interior Harold Ickes approved and signed the Constitution and By-laws of the Oglala Sioux Tribe. CONST. AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION., S.D., https://thorpe.law.ou.edu/IRA/ogcons.html. Article I of the Tribe's Constitution includes a description of the boundaries of the Pine Ridge Reservation as defined by the Act of March 2, 1889, which includes the entirety of Bennett County. *See id.*, Article I: Territory ("The jurisdiction of the Oglala Sioux Tribe of Indians shall extend to the territory within the original confines of the Pine Ridge Indian Reservation boundaries, as defined by the act of March 2, 1889 (25 Stat. L. 888), and to such other lands as may be hereafter added thereto under any law of the United States except as may be otherwise provided by law for unrestricted lands."). Consistent with this, the Oglala Sioux Tribal Law and Order Code exerts territorial jurisdiction over Bennett County, stating, it has jurisdiction over "all territory within the **original Reservation boundaries**, including fee patent lands, roads, waters, bridges, and lands use for agency purposes[,]" which includes Bennett County. OGLALA SIOUX TRIBE: LAW AND ORDER CODE, ch. 1, § 1.3 (amended 1996) (emphasis added), https://narf.org/nill/codes/oglala_sioux/chapter01-courtproc.html.

The Secretary of the Interior's June 1936 Order of Restoration Restored Tribal Ownership of Unsold Surplus Lands in Bennett County.

On June 10, 1936, as authorized by Sections 3 and 7 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 463, 467, Secretary Harold Ickes issued an Order of Restoration, *see* INDIAN AFFAIRS: LAWS AND TREATIES at 1399 (Charles J. Kappler ed., U.S. Dep't of the Interior 1939-1971), for the opened area of Bennett County on the Pine Ridge Reservation which restored to tribal ownership the unsold surplus lands in the opened region, and also relinquished and canceled a number of homestead entries.

> Whereas, under authority contained in the Act of Congress approved May 27, 1910 (36 Stat. 440), providing for the classification and disposition of surplus unallotted lands in Bennett County, in the Pine Ridge Reservation, State of South Dakota, ***certain classes of said surplus lands were opened to settlement and entry*** under the general provisions of the homestead laws and of the said Act of Congress, by Presidential proclamation of June 29, 1911 (37 Stat. 1691), and Whereas, there are now remaining undisposed of on the opened portion of the Pine Ridge Reservation a number of tracts of said surplus lands which, while of little value for the original purpose of settlement and entry, upon thorough investigation have been found to be valuable to the Indians of the said reservation, and Whereas, by relinquishment and cancellation of homestead entries a small additional area of similar lands may be included within the class of undisposed of surplus lands, and Whereas, the Tribal Council, the Superintendent of the Pine Ridge Reservation, and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of all such undisposed-of lands in the said reservation. Now, therefore, by virtue of the authority vested in the Secretary of the Interior by Sections 3 and 7 of the Act of June 18, 1934 (48 Stat. 984), I hereby find that restoration to tribal ownership of all lands which are now, or may hereafter be, classified as undisposed-of surplus opened lands of the Pine Ridge Reservation, will be in the public interest, and the said lands are hereby restored to tribal ownership for the use and benefit of the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, and are added to and made a part of the existing reservation, subject to any valid existing rights.

Id. (emphasis added).

The current map of Bennett County demonstrates its contemporary demographics consist primarily of Indian allotments and Indian fee patents. Very little of the county is homestead patents, which are located mainly along the southern border of Bennett County.

The Conflicting Decisions of the Eighth Circuit

Three decisions of the Eighth Circuit Court of Appeals have addressed the status of Bennett County.

***Putnam v. United States* (1957).** In *Putnam v. United States*, 248 F.2d 292 (8th Cir. 1957), the Eighth Circuit held that a section of Bennett County remained part of the Pine Ridge Reservation. The case was brought by the United States to cancel certain deeds and leases of Indian trust lands located in Bennett County. The United States correctly argued that the lands in suit "were Indian allotments within the Pine Ridge Indian Reservation in South Dakota and were held in trust by the Government for Indian allottees and their heirs" and that defendants had induced the owners to execute invalid deeds and leases. 248 F.2d at 293. A key issue in the case was whether the lands in suit (which were in Bennett County) were "within the geographic boundaries" of the Pine Ridge Reservation. *Id.* at 294. Defendants argued that the lands were

placed within the public domain by virtue of the 1910 Pine Ridge Act, which, in Defendants' view, diminished the Pine Ridge Reservation and reduced its geographic boundaries. *Id.*

The Eighth Circuit in *Putnam* rejected this argument, holding that Congress intended to open unallotted land within Bennett County for settlement by non-Indigenous people through the 1910 Pine Ridge Act, but that the allotted land in question remained part of the Pine Ridge Reservation. *Id.* at 295 ("The allotted lands situated in Bennett County held by the United States in trust for Indian people have always been and still are a part of the Pine Ridge Indian Reservation and are within the geographic boundaries of such reservation.").

***Bennett County v. United States* (1968)**. In *Bennett County v. United States*, 394 F.2d 8 (8th Cir. 1968), the Eighth Circuit decided the issue of whether the Act of 1889, establishing the Pine Ridge Sioux Reservation, gave the county authority to construct a public highway along allotted Indian land without permission from the Secretary of Interior or acquisition by condemnation. Title to the allotted Indian land was "in the United States, in trust, for the use and benefit of Newton and Doyle Cummings, enrolled members of the Oglala Sioux Tribe of Indians, of the Pine Ridge Reservation." 394 F.2d at 8. While the Court did not address the 1910 Pine Ridge Act, or the question of diminishment, it described the land in question as "wholly within the Pine Ridge Reservation." *Id.* at 9.

***United States ex rel. Cook v. Parkinson* (1975).** In *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977), the Eighth Circuit held that "the Act of May 27, 1910, terminated the reservation status of Bennett County and that South Dakota state courts have jurisdiction over conduct occurring on non-Indian lands in Bennett County." 525 F.2d at 121. *Cook* was a criminal case in which the defendant challenged the state's jurisdiction to charge him for burglary for an offense in Bennett County—Indian Country—and sought to set aside his conviction. The crime did not occur within an Indian allotment in Bennett County, *id.* at 122 n.2, yet the court did not explicitly limit its analysis to the 1910 Pine Ridge Act's impact on unallotted land. Rather, it described the issue as "[w]hether Congress in passing the Act of May 27, 1910, 36 Stat. 440, intended to remove *Bennett County, South Dakota*, from the confines of the Pine Ridge Indian Reservation in South Dakota, thus diminishing the area and exterior boundaries of the reservation." *Id.* at 121-22 (emphasis added).

The Eighth Circuit agreed with the district court that the 1910 Pine Ridge Act "show[ed] a clear congressional intent on the face of the Act to diminish the Pine Ridge Reservation by authorizing the Secretary of the Interior to sell and dispose of the described tract of land to be ceded." *Id.* at 122. The Eighth Circuit rejected the arguments that other clear language in the Act, like the payment into trust provision, supported that the Act only opened the reservation for settlement, holding it is only one of many factors to be considered. *Id.* at 123.

Along with adopting the district court's extensive analysis of legislative history, and review of the extraneous evidence and subsequent treatment of Bennett County, the Eighth Circuit relied heavily on *Rosebud Sioux Tribe v. Kneip,* 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977), in which the circuit court found that the Acts of April 23, 1904, March 2, 1907 and May 30, 1910 diminished the Rosebud Reservation. That decision was later affirmed by the Supreme Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

The United States participated only as amicus curiae, but never formally intervened as a party in *Cook*, and argued that the issue was resolved by *Bennett County*. The Eighth Circuit rejected this argument given the *Bennett County* court's failure to analyze or consider the 1910 Pine Ridge Act. *Cook*, 525 F.2d at 124. Inexplicably, *Putnam v. United States* was not discussed.

Subsequent Supreme Court Decisions Cast Doubt on the Eighth Circuit's Holding in *Clark.*

***Solem v. Bartlett* (1984).** In *Solem v. Bartlett*, 465 U.S. 463 (1984), the Supreme Court held that the 1908 Cheyenne River Act did not diminish the Cheyenne River Sioux Reservation, but merely opened it for homesteading to non-Indigenous people. *Solem* clarified that, without clear evidence of Congressional intent to diminish a Reservation shown through the language of an Act, surrounding circumstances, or, to a lesser extent, subsequent treatment, a presumption against diminishment will survive. 465 U.S. at 476-81. Because the 1908 Cheyenne River Act reviewed in *Solem* includes provisions that are nearly identical to the 1910 Pine Ridge Act, the case provides strong support for the Tribe's position that *Cook* is no longer good law.

Solem was brought by an enrolled tribal member who argued South Dakota lacked jurisdiction over his crime because it occurred on the Cheyenne River Sioux Reservation. The tribal member asserted the 1908 Cheyenne River Act did not diminish the reservation but only opened it for settlement by non-Indigenous people. *Id.* at 465. As a threshold matter, the Supreme Court clarified that Congressional assumptions about the likely demise of the Reservation system, and its intent to facilitate that process through allotment acts cannot be used to extrapolate a purpose of diminishment with every surplus land act. Rather, "some surplus land acts diminished reservations" and "other surplus land acts did not[.]" *Id.* at 468-69. Thus, the "effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage." *Id.* at 468-69.

Examining the statute before it, the Court held that the 1908 Cheyenne River Act failed to include language indicating agreement to "cede, sell, relinquish and convey" the opened lands. *Id.* at 472-73. Instead, the 1908 Cheyenne River Act (like the 1910 Pine Ridge Act), simply authorized the Secretary to "sell and dispose" of certain lands, thus showing an intent to act as the Tribe's sales agent. *Id.* at 473. The Act's language was "in sharp contrast to the explicit language of cession employed in the Lake Traverse and 1904 Rosebud Acts" discussed in the Court's prior decisions in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Kneip*, respectively. *Id.*

The remaining provisions of the 1908 Cheyenne River Act were consistent with opening, rather than diminishment, including use of the opened lands for the benefit of the Tribe to establish schools, religious institutions, reservation of mineral rights, and the opportunity for Tribal members to obtain individual allotments before the land was opened to non-Indigenous people. *Id.* at 474.

The Court ultimately concluded that neither the plain language of the 1908 Cheyenne River Act, the surrounding circumstances, nor subsequent treatment of the lands in question "clearly

establish[ed]" diminishment, leaving intact the "presumption that Congress did not intend to diminish the Reservation" to stand. *Id.* 481.

McGirt v. Oklahoma* (2020).** In *McGirt v. Oklahoma*, 591 U.S. 824 (2020), relying on the statutory text of treaties with the Creek Nation, the Supreme Court held that Congress did not demonstrate a clear intent to disestablish the Creek Reservation. The *McGirt* court clarified that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." *Id.* at 916. Disestablishment does not require "any particular form of words," but "does*** require that Congress clearly express its intent to do so, '[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *Id.* at 904 (citation omitted). The treaties and congressional acts in question, however, left the Creek Nation with significant sovereign functions and "fell short of eliminating all tribal interests in the land." *Id.* at 910.

Having failed to show a Congressional intent to disestablish the Creek Reservation through the language of any Act or Treaty, Oklahoma nevertheless argued that *Solem v. Bartlett* required two additional steps: after examining the operative texts, the Court must, second, review contemporary events, and third, review even later events and modern demographics. *Id.* at 913. The Court disagreed: "[O]ur charge is usually to ascertain and follow the original meaning of the law before us. . . . That is the only 'step' proper for a court of law." *Id.* at 913-14. The Court explained that it is proper to look at extraneous sources only when there is ambiguity in the written text, but Oklahoma pointed to no "ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment." *Id.* at 914.

After *Solem* and *McGirt,* the proper way to determine diminishment is clear: First, the Court must analyze all relevant statutory text. If there is no language which could even plausibly suggest Congressional intent to diminish, the inquiry is at an end; the reservation remains intact. In contrast, if the text includes language that is ambiguous as to intent to diminish, the Court must consider historical evidence that may shed light on Congress's understandings at the time, and, to a lesser extent, later events and modern demographics. Such evidence, however, cannot *alone* evidence diminishment, it can only support that outcome to the extent it clearly and unequivocally evidences Congressional intent to diminish. The holdings and reasoning of *Solem* and *McGirt* strongly support the conclusion that the 1910 Pine Ridge Act merely opened Bennett County for settlement and did not remove the County from the reservation, and that *Cook* would have been decided differently had the Eighth Circuit had the benefit of the Supreme Court's more recent decisions in *Solem* and *McGirt*.

The 2003 USDOI Solicitor Opinion

In an opinion issued on April 8, 2003, the Solicitor for the United States Department of the Interior issued an opinion that indicated Bennett County is still part of the Pine Ridge Reservation, pointing out that "[b]y secretarial Order dated June 10, 1936, the undisposed of lands in Bennett County opened for settlement under the 1910 Act were 'restored to tribal ownership" and were "added to and made a part of the existing reservation . . .'" Solicitor's Opinion, p. 4. The 2003

Opinion further observed that "the United States participated only as amicus before the Eighth Circuit Court of Appeals in *Cook v. Parkinson*, 525 F.2d120 (8th Cir. 1975), a criminal case that discussed Bennett County as no longer being part of the Reservation," and hence "[t]he United States is not bound by that decision because it did not participate in the litigation." *Id.* Consequently, "[t]he United States has not litigated the status of Bennett County as part of the Reservation, and until it does, [the Solicitor's Office did not see a] need for GDSC [Geographic Data Service Center, an office within the Interior Department,] to change its maps, which include Bennett County as part of the Reservation." *Id.*

2015 Letter from the Regional Director of the Bureau of Indian Affairs

On December 3, 2015, the Regional Director of the Bureau of Indian Affairs for the Great Plains Office sent a letter to the Tribal President of the Oglala Sioux Tribe. The letter stated that "[w]e have reviewed the April 8, 2003 Solicitor Opinion mentioned in your letter and conclude that the Opinion still remains valid for purposes of our position toward Bennett County." Letter, p. 1. The letter further stated that "[g]iven the 2003 Solicitor Opinion, the federal regulations governing fee-to-trust acquisitions, the establishment of a Contract Health Service Delivery Area (including Bennett County), and the Interior Board of Indian Appeals' decisions affirming the Regional Director's authority to take land in to trust within Bennett County on behalf of the Tribe as part of the Reservation, *it is the position of the Bureau of Indian Affairs, Great Plains Region, that Bennett County remains part of the Pine Ridge Indian Reservation*." *Id.* at pp. 1-2 (emphasis added).

Conclusion

In view of the above information, the Oglala Sioux Tribe asks that the Grid Deployment Office reflect the correct borders of the Pine Ridge Reservation as including Bennett County, South Dakota, when it issues its final NIETC designation.