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Land Ownership, Population, and Jurisdiction: The Case of the *Devils Lake Sioux Tribe v. North Dakota Public Service Commission*

DAVID J. WISHART AND OLIVER FROEHLING

On 29 August 1990 the Devils Lake Sioux tribe filed suit in federal court (District of North Dakota, Southwestern Division) challenging the asserted authority of the state of North Dakota and the North Dakota Public Service Commission to regulate public utilities within the boundaries of the Fort Totten (Devils Lake Sioux) Reservation.¹

The prologue to this case was a dispute between two electrical providers—the investor-owned Otter Tail Power Company and the consumer-owned Baker Electric Company, a North Dakota electrical cooperative—over the right to service the reservation, particularly the newly established Dakota Tribal Industries, a tribally owned manufacturing plant situated on tribally owned trust land. The tribe sought to continue to contract with Otter Tail, arguing that this was within their authority and also the most economical means of obtaining electricity. The North Dakota Public Service Commission disagreed, claiming that this contravened their right to regulate utilities within the entire state of

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North Dakota. On 21 August 1990 the commission, backed by a North Dakota Supreme Court ruling, issued an order directing Otter Tail to desist from supplying electricity to the reservation and to remove all equipment.² The 29 August complaint was in response to this order.

The "real issue," underpinning these disputes, as Judge Patrick A. Conway would later identify in his 1993 ruling on the case, was tribal sovereignty, the right (or otherwise) of the Devils Lake Sioux to make their own laws and exercise authority on the Fort Totten Reservation.³ As such, this case was only one example of the recent escalation of state intervention in Indian Country.⁴

In its reply to the 29 August complaint and in a subsequent motion, the state dismissed the tribe's "territorial theory" of sovereignty, namely its claim to have civil jurisdiction throughout the entire reservation.⁵ This "simple view of sovereignty," as the state put it, ignored the situation of reservation residents who were not tribal members. The state denied that the tribe's power over nonmembers (mainly non-Indians) who were "without a voice in tribal government" was the same as over members. During the ensuing three years of often-acrimonious litigation, the plaintiff (Devils Lake Sioux) and the defendant (North Dakota Public Service Commission) contended for the right to regulate electrical services and thus to exercise sovereignty on the beautiful and austere Fort Totten Reservation.

The most recent pertinent legal precedents were *Montana v. United States* (1981) and *Brendale v. Confederated Tribes and Bands of Yakima* (1989).⁶ In both cases tribal sovereignty was deemed to have been restricted by subsequent events, especially relating to allotment, which had increased the numbers of non-Indians on the reservations.

The *Montana* case involved the asserted right of the Crow tribe to regulate hunting and fishing by nonmembers on reservation land owned by nonmembers (in this case the Big Horn River, which was ruled to be state land). The court confirmed that the tribe does have the right to regulate nonmember hunting and fishing on tribal lands or on land held in trust by the United States for the tribe. But the court denied that the tribe has the inherent sovereign power to regulate nonmember hunting and fishing on lands no longer owned by, or held in trust for, the tribe. The only exceptions to this latter ruling are if the activity threatens tribal political integrity or economic welfare, or if specific consensual agreements have been entered into to regulate the activity be-

tween the tribe and nonmembers. The court found that no such threat was posed to the Crow by nonmember hunting and fishing and no consensual agreement existed.

In *Brendale* the dispute involved two incompatible plans for zoning the Yakima Reservation. The Yakima claimed that their zoning authority extended over the entire reservation; Yakima County argued that it had authority to zone all fee lands on the reservation. The complicated spatial pattern of land ownership added to the complexities of the case. About two-thirds of the reservation is not open to the general public. Ninety-seven percent of this "closed area" is held in trust by the United States for the Yakima Nation. The remainder of the reservation—the "open area"—is not similarly restricted. Its population is predominantly non-Indian, and about 50 percent of the land is held in fee by non-Indians.

The court, echoing *Montana*, ruled that the Yakima do not have the authority to zone fee land in the "open area" because no consensual agreements existed and the conduct of nonmembers on fee land posed no threat to tribal integrity. However, the court did confirm the tribe's authority to zone trust and fee lands in the "closed area" because the Yakima continued to define its "essential character," even to the extent of restricting access. In fact, all trust land on the reservation was held to fall under the tribe's zoning authority.

Significantly, the court was deeply divided in its decision, splitting three ways and reaching no clear majority or consensus. This left open to further scrutiny the dimensions of tribal regulatory authority within reservations and set the context for the Devils Lake Sioux case. As in the Crow and Yakima cases, the geography of land ownership and population composition would be a central issue.

The main purpose of this article is not to relate all the legal permutations of the case, although the relevance of the case to issues of sovereignty will be made clear, but to present the evidence that we used to buttress the plaintiff's argument that the reservation has retained its predominantly Indian character. The article is, at once, a historical geography of the changing spatial patterns of land ownership and population composition on Fort Totten Reservation and a demonstration of how traditional geographic research methods, involving field and archival research, and contemporary methods of geographic data retrieval and presentation can aid in the preparation of expert witness reports.⁷

First, however, we turn to the state's contention that the reservation had lost its predominantly Indian character.

LOSS OF INDIAN CHARACTER

The state's case here relied heavily on the facts of land ownership on the reservation. In particular, the state argued that the reservation, created in 1867 as a homeland for the Sisseton and Wahpeton Sioux, had been diminished through the Surplus Lands Act of 1904 and had lost its Indian character through subsequent alienation of allotments and fee lands. As the case developed, the diminishment issue was subordinated to the alternative Indian character issue involving the geography of land ownership on the reservation. Quoting from *Montana*, where it was ruled that the regulatory authority of a tribe extended only to land where it exercised "absolute and undisturbed use and occupancy," the state denied that the Devils Lake Sioux possessed reservationwide sovereignty.⁸

The most recent statistics, collected by the tribal realty office in 1992, do indeed reveal that land on the reservation is predominantly owned by non-Indians. Fully 75 percent of the reservation—184,457 acres out of a total of 245,141—is state or private (non-Indian) land. Of the remaining 60,342 acres, 34,026 acres are in trust allotments and 26,316 acres are held in trust by the tribe.⁹

The boundaries between Indian and non-Indian lands are rarely sharply differentiated, however. As shown on the latest (1986) set of land ownership maps (here amalgamated on figure 1), the trust lands are concentrated in the districts immediately south of Devils Lake. However, trust lands are present in every township, with a well-defined axis running north-south through the center of the reservation from boundary to boundary. On the southeastern and western fringes of the reservation and in blocks elsewhere, non-Indian-owned fee lands dominate.

Like many reservations on the Great Plains and elsewhere in the United States, the Fort Totten Reservation is no longer owned by the people for whom it was created. But does this necessarily mean that it has lost its predominantly Indian character?

RETENTION OF INDIAN CHARACTER

The argument for retention of the Indian character on the Fort Totten Reservation is supported primarily by a historical and contemporary demographic analysis that reveals a rapidly increas-

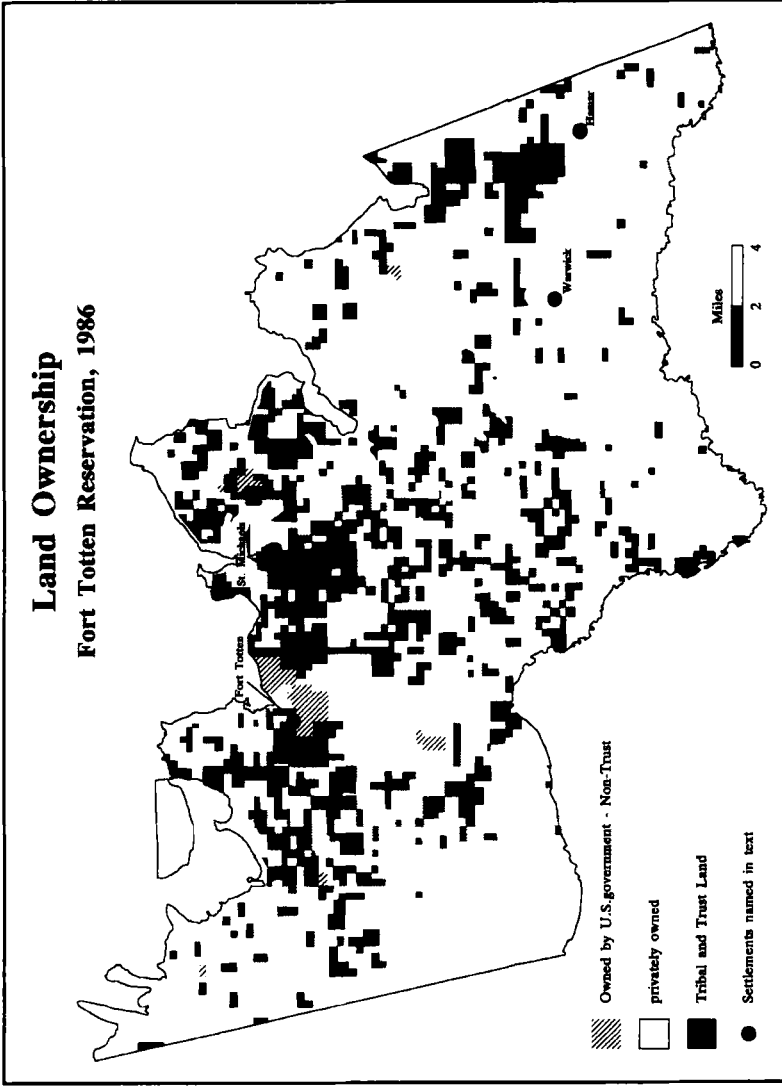


FIGURE 1. Land ownership, Fort Totten Reservation, 1986. Source: BIA, 1986.

ing Indian population and a rapidly decreasing non-Indian population within the reservation's historical boundaries. Moreover, the population momentum (inherent in the Indian and non-Indian population structures) indicates that these trends will continue into the foreseeable future, leaving the reservation overwhelmingly Indian in its demographic composition.

Population is surely a fundamental defining criterion for establishing the "character" of an area. Getches, Wilkinson, and Williams would probably agree because they include "persons, Indian and non-Indian" as well as "geographic area" as crucial factors in deciding the extent of state or tribal jurisdiction in Indian Country.¹⁰

A historical overview of Indian population totals on the Fort Totten Reservation, graphically displayed (figure 2), reveals two general periods of population change. The first period, extending from the establishment of the reservation in 1867 until about 1930, was characterized by Indian population stagnation and even gradual decline; the second period was marked by a hesitant

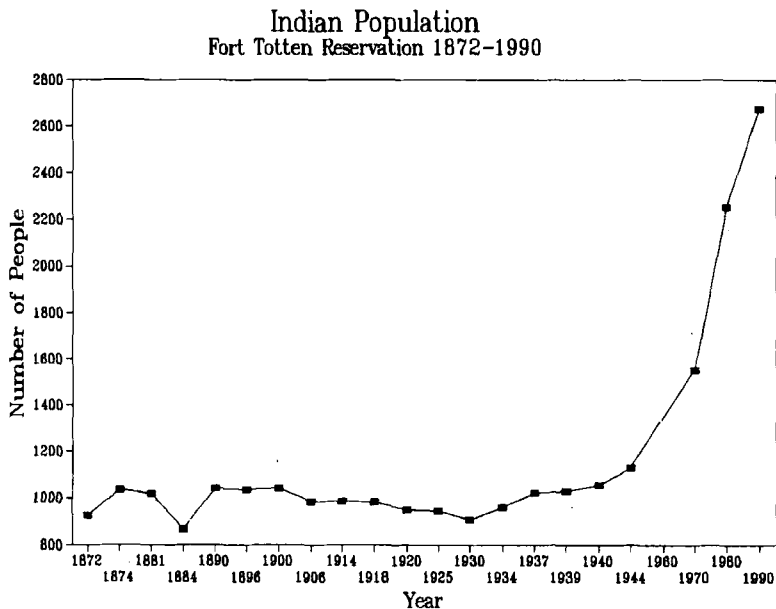


FIG. 2. Indian population, Fort Totten Reservation, 1872-1990. Source: *Annual Reports of the Commissioner of Indian Affairs, 1870-1910*; census rolls, 1910-1939; U.S. Bureau of the Census, 1940-1990.

recovery, beginning in the 1930s, followed by a dramatic explosion of Indian numbers that has continued in the 1990s. Each period merits a full explication here in order to demonstrate the reassertion of the Indian character of the Fort Totten Reservation.

The first sixty years on the reservation were a time of poverty, sickness, and death. Ineffectual agents, a coercive government policy that sought to transform communal Indians into individualized farmers, settlers who coveted the Indians' lands, and a physical environment defined by brutal winters and desiccating summers all contributed to the woes and high death rates of the Indian people. The Indian population total of 925 in 1872 (the first year of complete assembly on the reservation) was, in fact, higher than the total in 1930 (figure 2).¹¹

The decade of the 1890s was typical. The Devils Lake Sioux started and ended the decade with 1,041 people. Not a single good harvest was reaped during these years: drought, hail, gopher damage, early fall and late spring frosts, and misguided farming policies promoted by the agents ensured no progress in agriculture and no reliable food supply. The Devils Lake Sioux had no annuities from treaties to support them, and in most years the number of deaths exceeded the number of births. Tuberculosis was endemic. Their distress was so deep that, in their agent's opinion in 1895, the Devils Lake Sioux were "among the poorest and most unfortunately situated Indians" that could be encountered.¹²

Against this backdrop of poverty and death, the United States pushed ahead with its policy (initially stated in the 1867 treaty, Article 5) of placing the Devils Lake Sioux on 160-acre allotments, even though the Indians did not have the resources to effect this transition. Where, for example, would the money for fencing the allotments come from, or for building dispersed housing? Moreover, as early as 1910, average farm size in Benson and Eddy counties (neighboring and overlapping the reservation) was 436.9 acres and 510.5 acres, respectively. A 160-acre allotment was too small a tract to farm successfully.¹³

By 1904, over the objections of some of the Devils Lake Sioux, 135,824 acres had been allotted to 1,193 Indians, and 92,144 acres of "surplus lands" (the remaining unallotted lands, minus small tracts of government, state, and church lands) were opened to speculators and settlers.¹⁴

The distribution of the allotments and surplus lands is shown on a map that was published by the Department of the Interior in 1904 (figure 3).¹⁵ Allotments were present in every township on

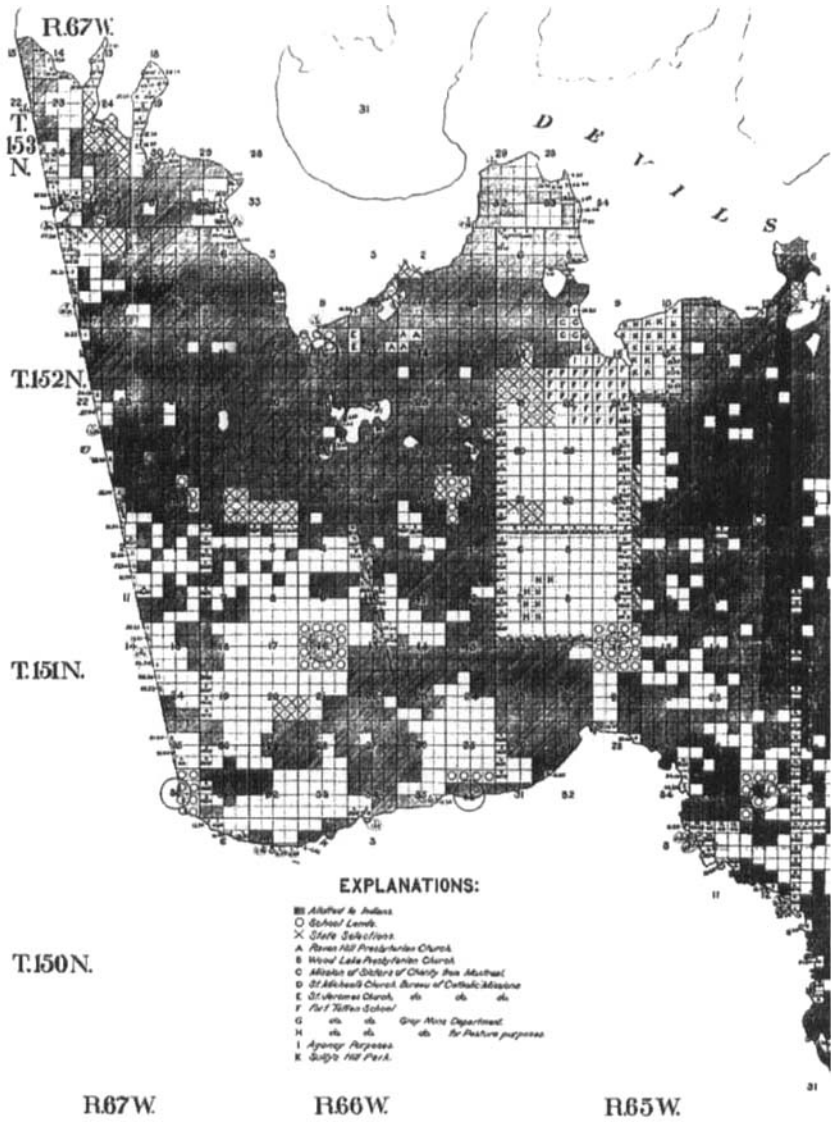
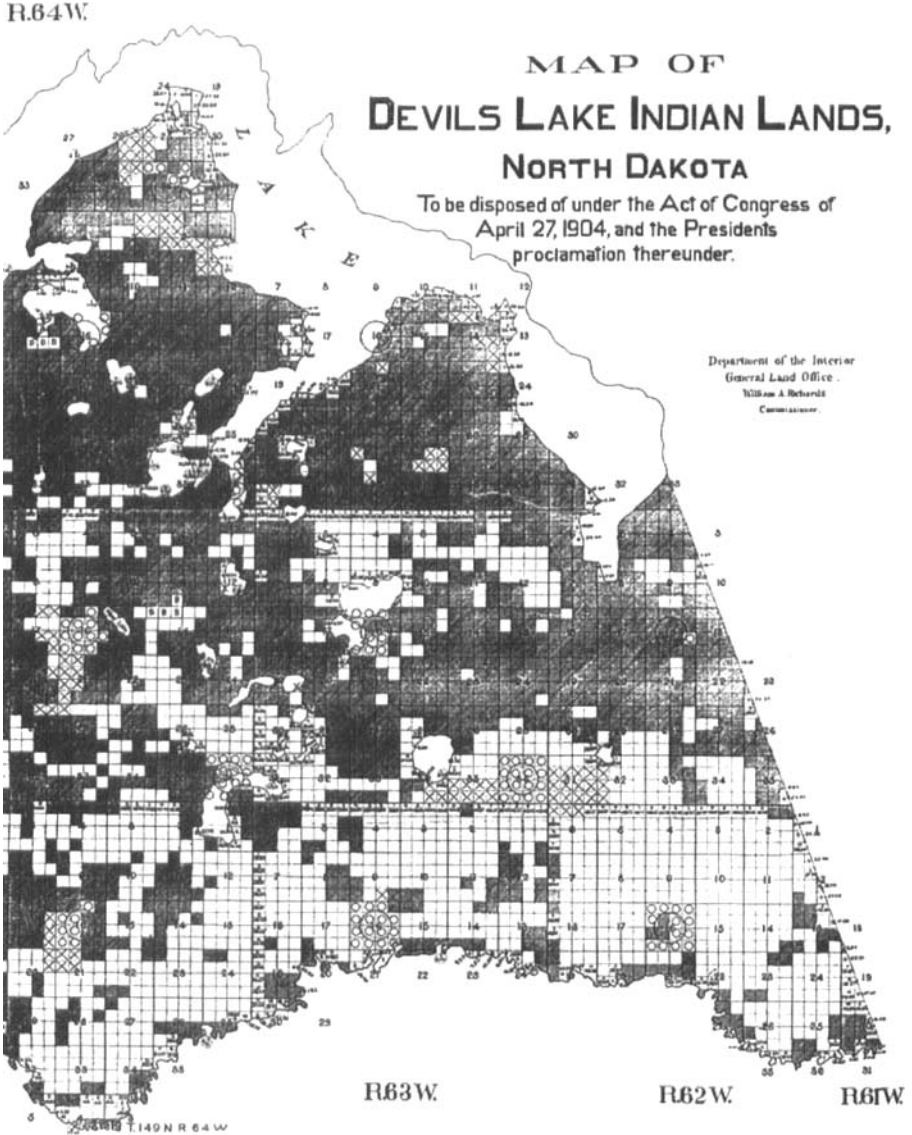


FIG. 3. Allotments and surplus lands, Fort Totten Reservation, 1904. Source: Central Map Files, National Archives, record group 75, no. 293.



the reservation but were least dense in the southwest corner, along the southern reaches, and in a band extending south from the Fort Totten Military Reservation.

State lands were predominantly school sections located in section 16 of each township (a process of selection later ruled by the Indian Claims Commission to be in violation of the Fifth Amendment). Indian allotments dominated elsewhere.

The 27 April 1904 Act (and the associated President's Proclamation of 2 June 1904) began the era of non-Indian domination on the reservation and of peak non-Indian population. It is difficult to assess the total number of non-Indians on the reservation during these years, because the information is not provided in the Bureau of Indian Affairs reports or specifically, for the reservation unit, in the Bureau of Census reports. With the reservation being divided among four counties, it is difficult to disaggregate the non-Indian population total. Nevertheless, there is corroborating evidence to show that non-Indian population increased during the early decades of the twentieth century, while at the same time the Indian population was kept low by high death rates, especially high infant mortality rates. First, the surplus lands were alienated to the non-Indians, a process substantially completed by 1910. Then the trust period of government supervision over the Indians' allotments was abridged by the Acts of 29 May 1908 and 25 June 1910, which permitted the sale of heirship and "incompetents" lands. By 1913, 200 allotments had been sold to non-Indians; by 1917, the figure had risen to 350; and by 1925, a total of 719 allotments had been lost to Indian ownership.¹⁶

This process of erosion of the land base of the Devils Lake Sioux continued until the late 1930s. In 1939, of the original 137,181 acres in Indian hands (four additional allotments had been made in 1905 subsequent to the 1904 Act), 83,674 acres had been alienated to non-Indians, leaving 54,707 acres in trust, mainly in Indian allotments (figure 4). Sales of allotments had occurred in every township. The solid blocks of trust allotments in the northern and central parts of the reservation had been broken into by sales to non-Indians. Throughout the southern reaches of the reservation, where relatively few allotments had been taken in 1904, the amount of trust land had been further reduced.¹⁷ Moreover, of the land still in Indian hands (and under the government's trusteeship), 22,346 acres were leased to non-Indian farmers and only 21,517 acres were used by the Indians. The remainder of the reservation was designated government land or classified as

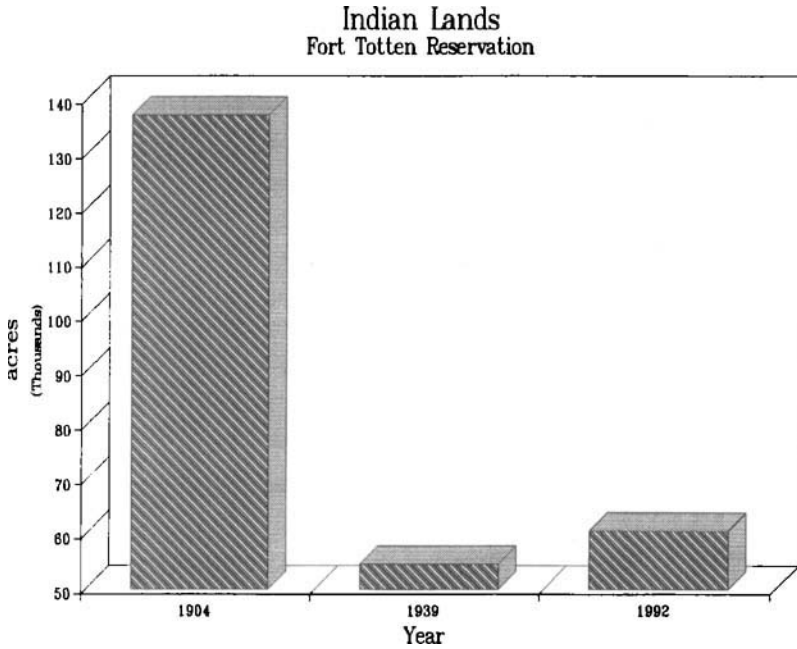


FIG. 4. Indian lands, Fort Totten Reservation, 1904, 1939, 1992. Source: Commissioner of Indian Affairs, 1904 and 1939; Bureau of Indian Affairs, 1992.

“idle.”¹⁸ Clearly, by the 1930s the balance of land ownership and population had swung to non-Indians.

But this swing was only temporary. Population in North Dakota as a whole, and in Benson and Eddy counties specifically, peaked in the decade of the 1920s. Thereafter, through to the present—and despite the resident Indian population, which grew rapidly—these counties have continued to lose people. For example, according to census figures, Benson County’s population declined every decade from its 1930 high of 13,327 to a low of 7,198 in 1990. This is a 45.9 percent decrease. Similarly, Eddy County has experienced an uninterrupted numerical decline from 6,493 in 1920 to 2,951 in 1990—a 54.6 percent loss (figure 5). The population of Warwick, in Benson County, the only incorporated town wholly on the reservation, dropped by 67.9 percent from 249 people in 1930 to only 80 in 1990 (figure 6).

The number of farms in these counties also peaked by 1930, and there has been a continuous decline ever since (figure 7). As the

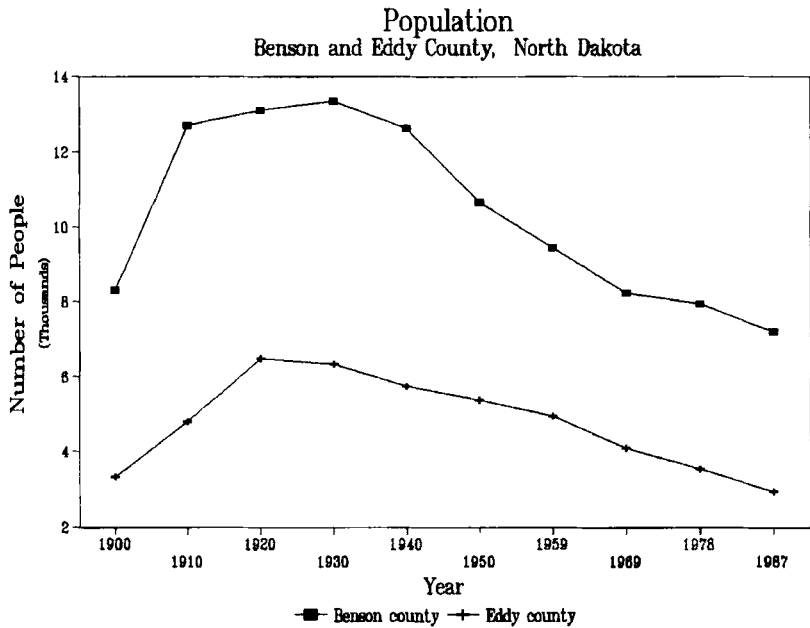


FIG. 5. Population, Benson and Eddy counties, 1900–1987. Source: U.S. Bureau of the Census.

number of farms declined and as the non-Indian population thinned, the size of the farms increased to about 1,100 acres (figure 8).¹⁹

Meanwhile the Devils Lake Sioux population began its revival. In 1941, there were 513 non-Indian households and 139 Indian households on the reservation.²⁰ Non-Indian households were prevalent on the rolling, loamy plains of the southern, eastern, and western regions of the reservation; Indian households predominated in the north, clustering particularly in the more dissected country near Devils Lake, around the settlements of Fort Totten and St. Michael. The Indian population of 1,069 at that time was already showing signs of the sustained growth that would carry through to the present (figure 2).

This reversal of trends—from stagnation to rapid growth for the Indians, and from increase to protracted decline for the non-Indians—is epitomized by comparing the 1941 household totals with data on households taken from the 1990 census (figures 9 and 10).²¹ By 1990 the number of non-Indian households had dwindled to 351, which represents a decline of 31.6 percent. Meanwhile,

from 1941 to 1990, the number of Indian households expanded to 627, an increase of 351.1 percent.

Regionally (by the 1990 census block units, the smallest enumeration units for demographic data) within the reservation, the following geographic changes have occurred. First, the number of non-Indian households declined in every unit, except for the Benson County unit next to the town of Devils Lake, which experienced a modest increase of forty-seven households from 1941 to 1990 (figure 9). Major declines of non-Indian households took place in all the other tracts, especially in the areas of the reservation where, as elsewhere in North Dakota, enlarged farm sizes, fewer farms, and smaller rural population numbers have been the trend.²² The total number of farms in Benson County dropped by more than 150 from 1978 to 1987, while the average size of farms increased from 999 acres to 1,138 acres over the same period.²³ The decline of non-Indian population has been so great that the settlement of Hamar, in Eddy County, has lost its post office.

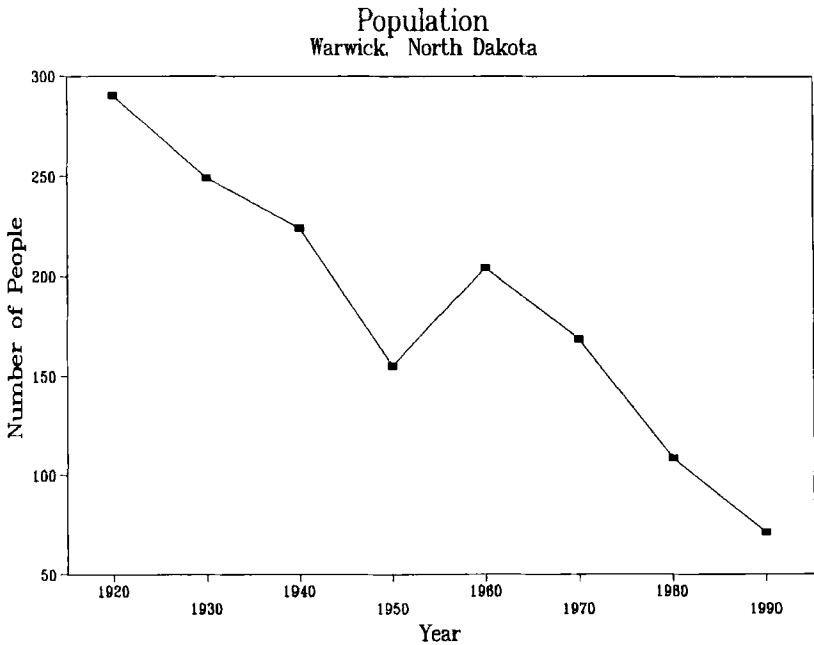


FIG. 6. *Population, Warwick, 1920–1990.* Source: U.S. Bureau of the Census.

The total number of Indian households significantly increased in the more populated northern reaches of the reservation from 1941 to 1990, including an increase of 241 (or 415 percent) in the Fort Totten area and 187 (or 567 percent) in the St. Michael area, the same tract where non-Indian households experienced their only—and much smaller—increase (figure 10). The only decreases in Indian households from 1941 to 1990 took place in the sparsely populated outer tracts of Benson and Eddy counties, but the numerical decreases were minor (5 and 4 in the two large census block units) compared to the plummeting number of white households in these same areas.

The prevailing trend towards Indian population domination of the reservation, as shown in the household data, is also apparent on the graph of total population change (figure 2). By 1970 the Indian population of the reservation had surpassed the non-Indian population in numbers (1,552 compared to 1,379), and the gap has since continued to widen. Total Indian population, according to the Bureau of the Census, increased 45.5 percent

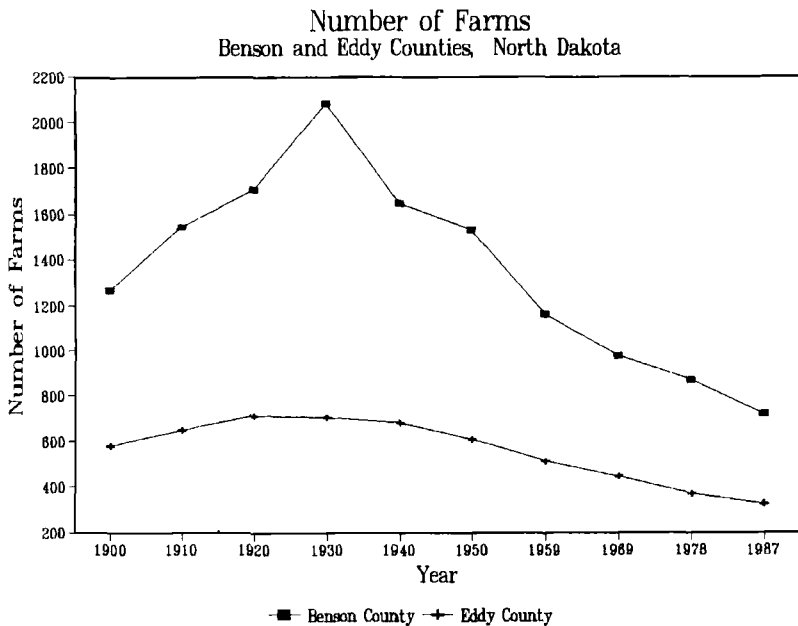


FIG. 7. Number of farms, Benson and Eddy counties, 1900–1987. Source: U.S. Bureau of the Census.

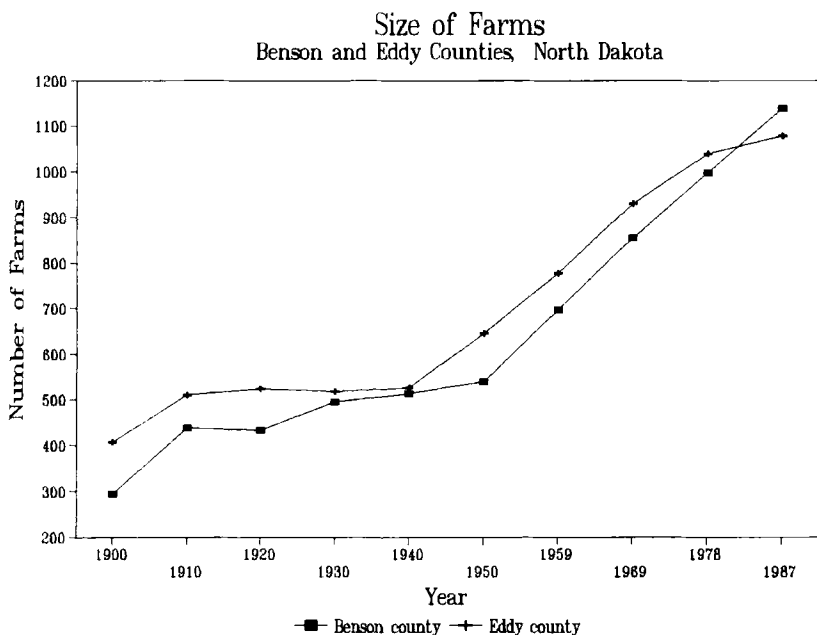


Fig. 8. Size of farms, Benson and Eddy counties, 1900–1987. Source: U.S. Bureau of the Census.

between 1970 and 1980 (to a total of 2,258), whereas non-Indian population continued to thin, falling by 23.7 percent to 1,052 during the same years. From 1980 to 1990 Indian population continued to grow, with an increase of 18.5 percent, to a total of 2,676. Non-Indian population, on the other hand, fell by 14.1 percent to 903, the lowest non-Indian total since 1910. In summary, over the last two decades, Indian population on the Fort Totten Reservation has increased by 1,124, or 72.4 percent, while the non-Indian population has declined by 476, or 34.5 percent. In 1994, the Fort Totten Reservation was once again predominantly Indian in its demographic composition.

The above Census Bureau estimates of the Indian population on the Fort Totten Reservation are conservative, being considerably smaller than the Bureau of Indian Affairs' figures. Take the most recent counts, for example. The Fort Totten Agency's Enrollment and Realty Office's figures for Indians resident on the reservation in 1990, 1991, and 1992 were 3,511, 3,528 and 3,855, respectively. Tribal enrollment figures for those years were 3,761,

Change in Non-Indian Households Fort Totten Reservation, 1941 - 1990

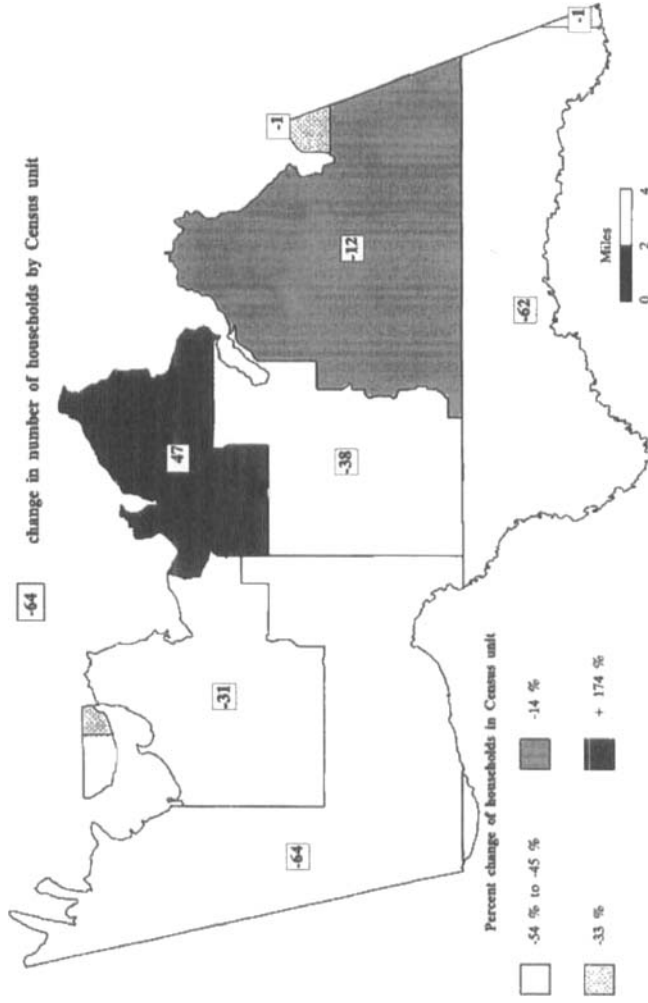


FIG. 9. Change in non-Indian households, Fort Totten Reservation, 1941-1990. Source: Realty Division, Fort Totten Reservation, 1941; U.S. Bureau of the Census, 1990.

Change in Indian Households Fort Totten Reservation, 1941 - 1990

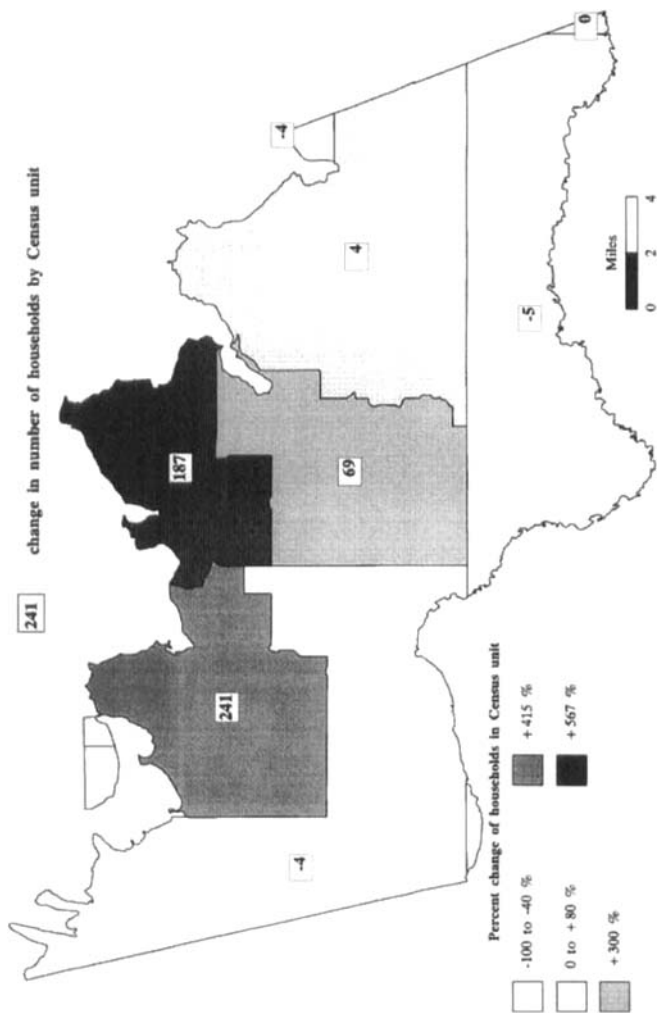


FIG. 10. Change in Indian households, Fort Totten Reservation, 1941-1990. Source: Realty Division, Fort Totten Reservation, 1941; U.S. Bureau of the Census, 1990.

3,858, and 4,300, with many applications pending. Each count was assessed for accuracy by the superintendent of the Bureau of Indian Affairs at the Fort Totten agency. The 1990 count was judged to be "reasonably accurate," and the 1991 and 1992 counts were confirmed to be "highly accurate." The discrepancies between the census estimates and the Bureau of Indian Affairs counts were so great that on 11 September 1990 the chairperson of the tribe officially questioned the census data and submitted a detailed Postcensus Local Review Response showing miscounts of the number of housing units.²⁴

Even accepting the more conservative census figures, it is evident that the reservation has a predominantly Indian character. Moreover, the age structures of the Indian and non-Indian populations indicate that this Indian character will continue to predominate in the future (figures 11 and 12). According to the 1990 census data, the Indians on the reservation are a young, rapidly growing population, with 53 percent of the people aged nineteen or younger. The broad base of the population pyramid is, in effect, built-in growth, involving young, future child-bearers (figure 11).

By contrast, the non-Indian population of the reservation is aging, and only 28 percent are aged nineteen or younger. This is the profile of a declining population: Like many rural areas of the

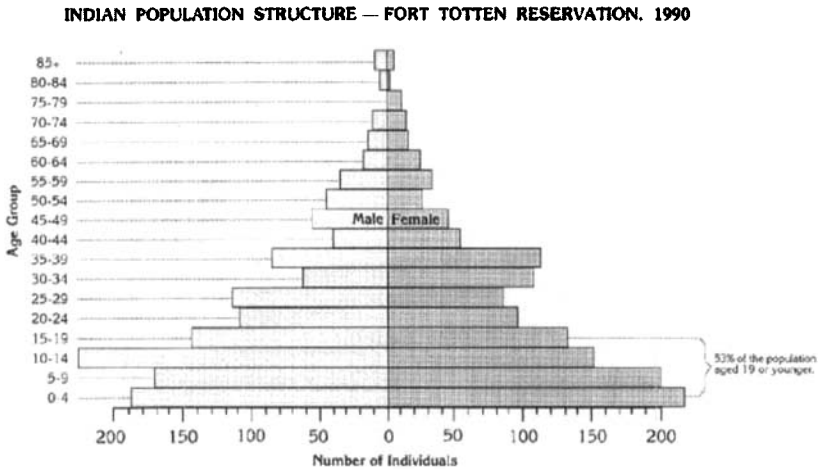


FIG. 11. Indian population structure, Fort Totten Reservation. Source: U.S. Bureau of the Census, 1990.

NON-INDIAN POPULATION STRUCTURE — FORT TOTTEN RESERVATION, 1990

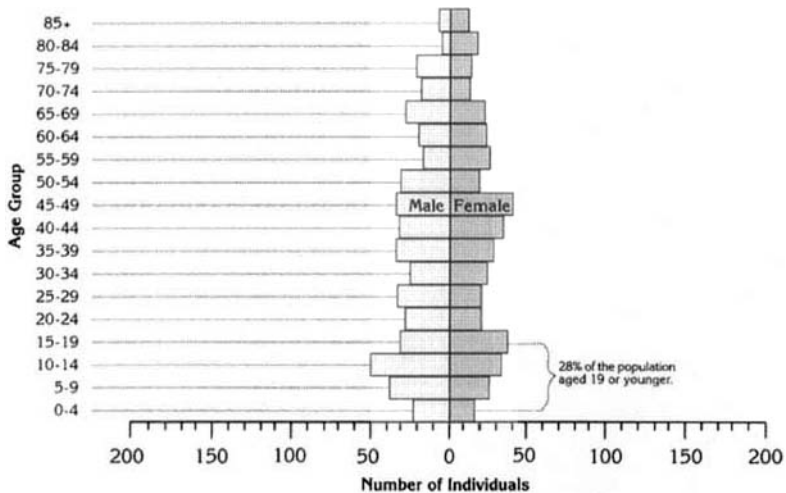


FIG. 12. *Non-Indian population structure, Fort Totten Reservation, 1990. Source: U.S. Bureau of the Census, 1990.*

Great Plains, the young leave, the population ages, and there are few births to replace those who die (figure 12).

The internal population geography of the reservation in 1990 is characterized by a relatively thickly settled inner core and a sparsely settled periphery (figure 13). In fact, the two census block areas that include the Fort Totten and St. Michael settlements contain fully 71 percent of the reservation’s people. This inner core is overwhelmingly Indian and is the scene of an ongoing Indian population explosion (figure 14). Fort Totten, for example, grew to a total population of 867 in 1990. Of this total, only 23 are non-Indian, a marked difference from 1941 when the town had distinct Indian and non-Indian sections.

By contrast, the peripheries of the reservation are inhabited largely by non-Indians—an area of intermittent large farms, seemingly empty landscapes of hay and sunflowers, and few people (figure 15). This is the part of the reservation that has been experiencing protracted population decline, a trend of diminishing rural population that will doubtless continue into the future.

The Devils Lake Sioux routinely exercise civil jurisdiction throughout the entire reservation, requiring, for example, that any contractor who wishes to work there does so only after

Total Population Distribution Fort Totten Reservation, 1990

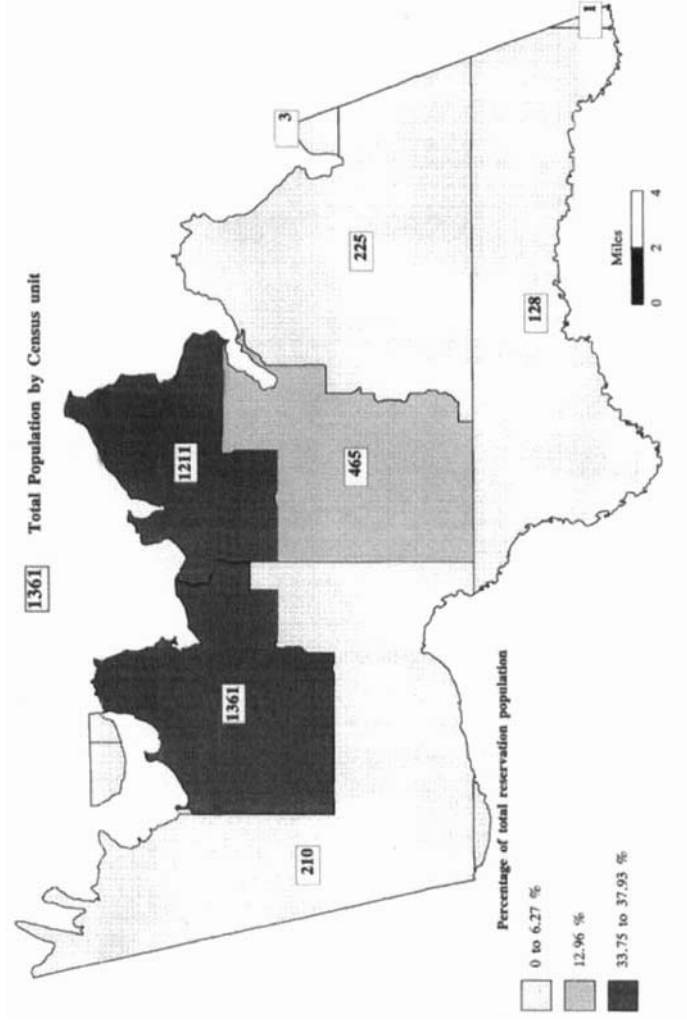


FIG. 13. Total population distribution, Fort Totten Reservation, 1990. Source: U.S. Bureau of the Census, 1990.

Indian Population Distribution Fort Totten Reservation, 1990

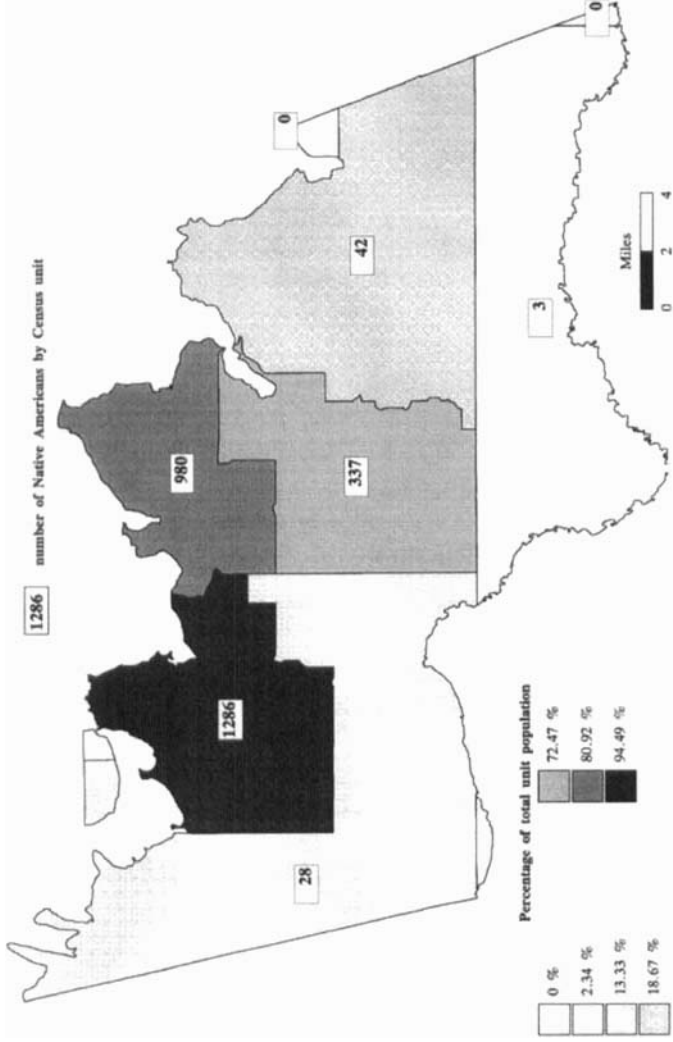


FIG. 14. Indian population distribution, Fort Totten Reservation, 1990. Source: U.S. Bureau of the Census, 1990.

signing an agreement with the tribe and paying a fee.²⁵ The entire reservation is also the continuing context for the Devils Lake Sioux's traditional activities and concerns. Burial places and other sacred sites are widely distributed over the land, testimony to the longevity of occupancy and to the spiritual connection between the people and the place. Ritual events such as recognition ceremonies, prayer meetings, memorial feasts, and powwows reaffirm ties among the members of the tribe and between the tribe and the reservation that, for more than one hundred years, has been their home. On 8 and 9 October 1992, for example, Devils Lake Sioux members of all ages carried the Sacred Hoop around the sixty-five-mile perimeter of the reservation on a healing journey that circled and confirmed their own portion of Indian Country. This is the same perimeter that the state of North Dakota recognizes on its own county road maps.

CONCLUSION: THE CIRCUMSCRIPTION OF TRIBAL SOVEREIGNTY

On 3 February 1993 Judge Conway, in an often caustic statement, gave his ruling. Using *Brendale* as a "partial road map," he attempted to negotiate the contorted terrain dividing state and tribal sovereignty on reservations. He argued that the "*Brendale* rationale" precluded the tribe's assertion of territorial sovereignty based solely on the 1867 treaty and the original boundaries of the reservation. But he also noted that state power—to tax, for example—had not historically been extended to reservation trust lands or tribally owned lands. Seeking a "balancing" of interests, Judge Conway argued that tribal sovereignty is present where its exercise affects mainly tribal members and not present where its impact falls mainly on nontribal members. Specifically he ruled that the Devils Lake Sioux tribe has the right to contract for electrical services (and other regulated services) on lands owned or held in trust by the tribe, or with industries operated by the tribe, without regard to the regulations of the North Dakota Public Service Commission. The judge left the contentious question of tribal sovereignty over non-Indian-owned lands on the reservation unanswered, but he suggested that the resolution of such issues was best left to Congress rather than the court.

The lawyers for the Devils Lake Sioux claimed that this was a "major victory"; but surely the victory was pyrrhic.²⁷ The right of the Devils Lake Sioux to wield authority within the boundaries of

Non-Indian Population Distribution Fort Totten Reservation, 1990

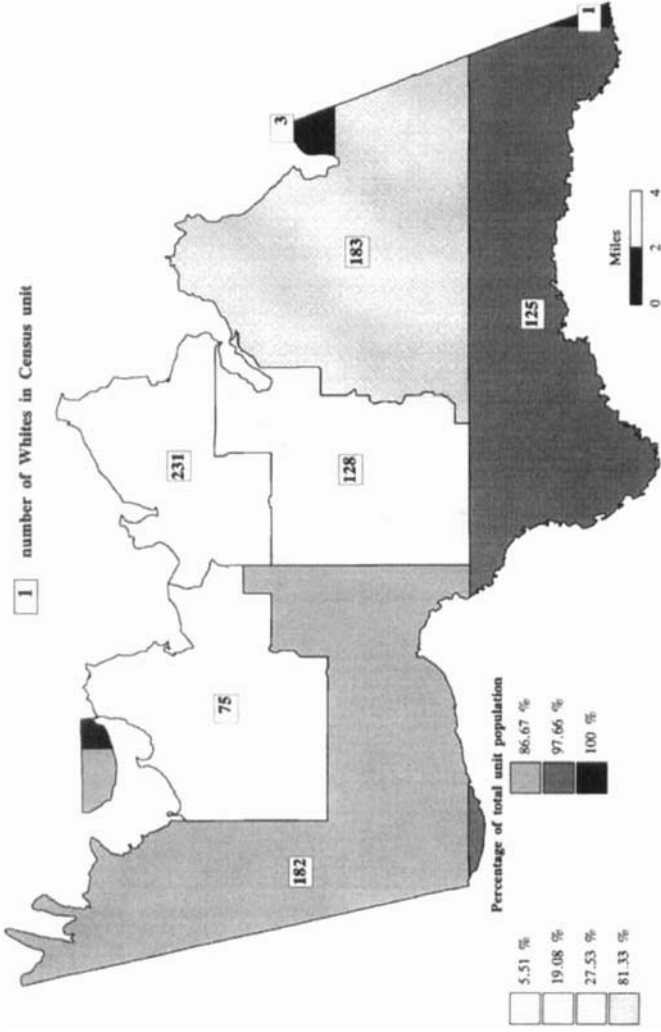


FIG. 15. Non-Indian population distribution, Fort Totten Reservation, 1990. Source: U.S. Bureau of the Census, 1990.

their reservation has been obscured, if not entirely circumscribed. Like the Yakima in the Brendale case, the Devils Lake Sioux's regulatory sovereignty has likely been moved from the exterior boundaries of the reservation to interior boundaries marking mainly those lands held in trust by the tribe or by members of the tribe.²⁸ The fact that the population of the reservation is overwhelmingly Indian is deemed less important than the fact that the reservation's land is predominantly owned by relatively few non-Indians. The fact that this land ownership pattern is the product of an allotment policy repudiated by the government that created it does not seem to be relevant either. Perhaps the best opportunity for the Devils Lake Sioux, and for Native Americans elsewhere, is to use the revenues from gaming and other economic ventures to buy back their lost land, thus extending the area of tribal sovereignty back out to the exterior boundaries of their reservation and reclaiming their rightful portion of Indian Country.

NOTES

1. *Devils Lake Sioux Tribe v. North Dakota PSC*, Complaint for Declaratory Judgment, Injunctive Relief and Damages, 29 August 1990, case no. A1-90-179.
2. Application of Otter Tail Power Co., No. Pu-401-88-326 (North Dakota 1990).
3. *Devils Lake Sioux Tribe v. North Dakota PSC*, U.S. District Court, District of North Dakota—Southwestern Division, 3 February 1993, case no. A1-90-179.
4. John Wunder, *"Retained by the People": A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994), 178–99.
5. *Devils Lake Sioux Tribe v. North Dakota PSC*, First Amended Answer to Complaint for Declaratory Judgment, Injunctive Relief and Damages, 30 September 1991, case no. A1-90-179.
6. *Montana v. United States*, 450 U.S. 544 (1981)., *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).
7. Strategic Mapping's ATLAS*GIS was used to prepare the figures. U.S. Census Tiger files were used to establish the reservation boundaries, which were then linked to data from a variety of sources including historical maps, reservation statistics, and U.S. census reports.
8. *Montana v. United States*, 450 U.S. 544 (1981).
9. Bureau of Indian Affairs, Fort Totten Agency, "Tribal Consolidation Since 1984 and Indians Holding Fee Title," 1992.
10. David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 3d ed. (St. Paul, MN: West, 1993), 459–60. See also Imre Sutton, "Preface to Indian Country: Geography and the Law," *American Indian Culture and Research Journal* 15:2 (1991): 15–24.

11. *Annual Report of the Commissioner of Indian Affairs, 1872*, 258, Census Rolls, 1910–1939 (National Archives, record group 75, microcopy No. 595), roll 164, 0055.

12. *Annual Reports of the Commissioner of Indian Affairs, 1890–1900*. Quote from Hall, “Report,” *Annual Report of the Commissioner of Indian Affairs, 1895*, 230. By the terms of the 1867 treaty, which established the Devils Lake and Lake Traverse reservations, the Indians were given nothing for their massive cession of land—nothing, that is, except the reservations. The terms of the treaty were amended through the agreements of 20 September 1872 and 2 May 1873, whereby an annual payment of \$80,000 was made for ten years for the 1867 cession of land. By the 1890s, therefore, the annuities had been exhausted. Nor had the Devils Lake Sioux been compensated for the 1875 surveying error that had left the reservation 64,000 acres smaller than the 1867 treaty had intended. This is the context for the poverty of the 1890s. For the treaty and agreements, see Charles J. Kappler, *Indian Affairs: Laws and Treaties*, vol. 2 (Washington, DC: U.S. Government Printing Office, 1903–38), 956–59, 1057–62.

13. Bureau of the Census, *The Tenth Census of the United States, 1910*, vol. 7, *Agriculture, 1909 and 1910*, table 1, 284–85.

14. Agreement of 27 April 1904 formalized the allotment process on the reservation. It replaced the more favorable terms that had been proposed by the United States government in the Agreement of 2 November 1891 (Kappler, *Indian Affairs*, vol. 3, pp. 83–87). Almost seventy years later, on 30 June 1973, the Indian Claims Commission ruled that, through the 1904 Agreement, the United States had disposed of the reservation’s surplus lands without the Indians’ consent. The commission ordered a belated payment of just compensation for this violation of Fifth Amendment rights, as well as for the 64,000 acre shortfall from the erroneous survey. See 30 ICC 463, 30 June 1973; also Russel Lawrence Barsh, “Indian Resources and the Natural Economy: Business Cycles and Policy Cycles,” *Policy Studies Journal* 16:4 (Summer 1988): 810.

15. Department of the Interior, General Land Office, Map of Devils Lake Indian Lands, North Dakota (Washington, DC: 1904). From Central Map Files, National Archives, record group 75, CA. 278.

16. The heirship and incompetents laws are in Kappler, *Indian Affairs*, vol. 3, pp. 356–57, 476–77. For an example of this system in action, see the letters that were sent by the superintendent of the school at the Fort Totten agency to the commissioner of Indian affairs on 17 May 1910, 13 April 1911, and 13 October 1922, from Copies of Letters Sent to the Commissioner of Indian Affairs, 1893–1938, box 8, book 7, p. 238; book 8, p. 496; and box 10, file 162 (National Archives, Central Plains Branch, Kansas City, Missouri, record group 75). Statistics on allotments are from Land Sale Cards (1913–25), also in National Archives, Central Plains Branch, record group 75.

17. Superintendent, Fort Totten agency, Fort Totten Indian Reservation, December 1938, Roads Division, National Archives, record group 75.

18. *Statistical Supplement to the Annual Report of the Commissioner of Indian Affairs, 1939*, Table 1, pp. 2–3.

19. Data from Bureau of the Census, *Fourteenth Census of the United States, 1920*, vol. 3, *Population*, 757–58; *Fifteenth Census of the United States, 1930*, vol. 1, *Agriculture: The Northern States*, 1084–86; and vol. 3, part 2, *Population*, 414–16, 419–21, 434–35; *Seventeenth Decennial Census of the United States, 1950*, vol. 1, *Number of Inhabitants*, 34–38; *Eighteenth Census of the United States, Census of Population, 1960*, vol. 1, *Characteristics of the Population, 1970*, part A, *Number of Inhabitants*, 36-12, *Census of Population, 1970*, vol. 1, *Characteristics of Population*, part 36, *North Dakota*, 36-14, 36-15; *Census of Population, 1980*, vol. 1, *Characteristics of the Population*, Chapter A, *Number of Inhabitants*, part 36, *North Dakota*, 36-68, 36-73; *Census of Population and Housing, 1990, Summary Population and Housing Characteristics, North Dakota*, 210–11, and *Summary Tape*, file 1A.
20. Fort Totten Indian Reservation, North Dakota 1941 (Realty Division, Fort Totten agency); United States Department of the Interior, *Indian Population in the Continental United States and Alaska*, 1 January 1941, table 3:8.
21. *Census of Population and Housing, 1990, Summary Tape*, file 1A.
22. See Clark Archer, "A Medium-Term Perspective on Demographic Change in the American Midlands, 1803–1990," in *Contemporary Rural Systems in Transition*, vol. 2, ed. I.R. Bowler, C.R. Bryant, and M.D. Nellis (Wallingford, England: C.A.B. International, 1992), 62–84.
23. *Census of Agriculture, 1987*, table 10, Benson County.
24. Reports on Service Population and Labor Force: 1990, 1991, 1992, Devils Lake Sioux tribe, including Postcensus Local Review Response Form (1-74B), 1990.
25. Tribal Employment Rights Office, Fort Totten Indian Reservation.
26. *Devils Lake Sioux Tribe v. North Dakota PSC*, 3 February 1993, 4.
27. Pirtle, Morisset, Schlosser, and Ayer, "Memorandum," 5 February 1993.
28. This trend is examined in detail in Allison M. Dussais, "Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision," *University of Pittsburgh Law Review* 55:1 (1993): 1–97.