UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 08-1441

YANKTON SIOUX TRIBE, and its Individual Members,
and
UNITED STATES OF AMERICA, on its Own Behalf and for the Benefit of the Yankton Sioux Tribe,

Plaintiffs and Appellees,

v.

SCOTT PODHRADSKY, State's Attorney of Charles Mix County; C. RED ALLEN, Member of the Charles Mix, South Dakota, County Commission; KEITH MUSHITZ, Member of the Charles Mix, South Dakota, County Commission; SHARON DRAPEAU, Member of the Charles Mix, South Dakota, County Commission; M. MICHAEL ROUNDS, Governor of South Dakota; LAWRENCE E. LONG, Attorney General of South Dakota,
and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT,

Defendants and Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

THE HONORABLE LAWRENCE L. PIERSOL
United States District Court Judge

BRIEF OF APPELLANTS SCOTT PODHRADSKY, State's Attorney of Charles Mix County; C. RED ALLEN, Member of the Charles Mix, South Dakota, County Commission; KEITH MUSHITZ, Member of the Charles Mix, South Dakota, County Commission; SHARON DRAPEAU, Member of the Charles Mix, South Dakota, County Commission; and SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), the United States Supreme Court unanimously held that the original 1858 boundary of the Yankton Sioux Reservation was extinguished, disestablished, and not maintained. In such a situation, Indian Country is limited to the allotments still held in trust under 18 U.S.C. § 1151 (c). See *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In the absence of specific congressional intent to the contrary, none of this remaining land is within the limits of an Indian reservation so as to constitute Indian Country under 18 U.S.C. § 1151 (a). See *DeCoteau v. District County Court*, 420 U.S. 425, (1975). To avoid this result, the District Court seized on what the last panel of this Court erroneously recognized as a remnant of the Yankton Sioux Reservation, consisting of a couple of isolated tracts of agency and other federally occupied lands specifically ceded but reserved from sale to settlers in the Yankton cession (less than 800 acres) and then *fashioned a nearly thirty-six thousand (36,000) acre Indian reservation under 18 U.S.C. § 1151 (a)*. Although considerably smaller than the *two* previous versions of the Yankton Sioux Reservation created by the same District Court (later squarely rejected in appeals), this Indian reservation is nevertheless of considerable size.

In the fourteen years of prior *Yankton* litigation, no one in *Yankton I* or in *Yankton II* ever argued that an "Indian reservation" of this configuration even existed. No one cited any legislation, any case law, any expert, or any document or any map to support the ultimate conclusion of the District Court.

Due to the importance of the issues to the County, the County supports Appellants request for 30 minutes of oral argument.

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JURISDICTIONAL STATEMENT

Final Judgment for Plaintiffs was entered on December 19, 2007. A timely Notice of Appeal on behalf of all Defendants in *Yankton Sioux Tribe et al. v. Podhradsky et al.*, Civ. 98-4042 was filed on February 12, 2008; the Notice of Appeal specifically incorporated the case with which it has been consolidated, *Yankton Sioux Tribe v. Southern Missouri Waste Management District et al.*, Civ. 94-4217.

STATUTORY PROVISIONS AT ISSUE

The text of the Act of 1894 is set out in the State's Appendix.

25 U.S.C. § 465 provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> . . . .
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is

acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 467 provides:

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

18 U.S.C. § 1151 provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means

(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.

Scott Podhradsky, State's Attorney of Charles Mix Count; C. Red Allen, Member of the Charles Mix, South Dakota, County Commission; Keith Mushitz, Member of the Charles Mix, South Dakota, County Commission; Sharon Drapeau, Member of the Charles Mix, South Dakota, County Commission, hereinafter referred to as "County" adopts the "Statement of Legal Issues" "Statement of the Case" and "Statement of Facts" presented in the Brief of Appellants M. Michael Rounds, Governor of South Dakota, and Lawrence E. Long, Attorney General of South Dakota, hereinafter referred to as "State."

SUMMARY OF ARGUMENT

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), the United States Supreme Court unanimously held that the original 1858 boundary of the Yankton Sioux Reservation was extinguished, disestablished, and not maintained. In such a situation, Indian Country is limited to the allotments still held in trust under 18 U.S.C. § 1151 (c). See *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In the absence of specific congressional intent to the contrary,

none of this remaining land is within the limits of an Indian reservation so as to constitute Indian Country under 18 U.S.C. § 1151 (a). See *DeCoteau v. District County Court*, 420 U.S. 425, (1975). To avoid this result, the District Court seized on what the last panel of this Court erroneously recognized as a remnant of the Yankton Sioux Reservation, consisting of a couple of isolated tracts of agency and other federally occupied lands specifically ceded but reserved from sale to settlers in the Yankton cession (less than 800 acres) and then *fashioned a nearly thirty-six thousand (36,000) acre Indian reservation under 18 U.S.C. § 1151 (a).* Although considerably smaller than the *two* previous versions of the Yankton Sioux Reservation created by the same District Court (later squarely rejected in appeals), this Indian reservation is nevertheless of considerable size.

This latest version of the Yankton Sioux Reservation consists of the two noncontiguous tracts noted by the 1999 Panel (less than 800 acres), all other land held in trust, including allotments and all later acquired trust land and some undetermined amount of Indian fee lands-- all within formal Indian reservation boundaries so as to constitute Indian

Country under 18 U.S.C. § 1151(a) ("all land within the limits of any Indian reservation"). In short, after fourteen years, this litigation now truly represents an amazing process that has resulted in the fashioning of a truly amazing reservation.

Significantly, in the first place, there is absolutely no evidence of specific congressional intent to support this specific Indian reservation. In fact, none is even cited by the parties or the Court.

The County would have been totally surprised if the United States and Tribe could have produced a published map that even slightly resembled this so called Indian reservation. Clearly, no such map was submitted in the District Court. Rather, in this case, several maps have had to be prepared and then revised for this litigation to reflect the shifting arguments of the United States and the Yankton Sioux Tribe. The latest map is Ex. 209 (State Add. 142.)

Fortunately, reservation disestablishment case law makes clear that the limits of Indian reservations are not set by lines attorneys decide to draw on maps in a court room, or by a creative series of holdings and alternative holdings of a District

Court unrelated to any submission even arguably tied to congressional intent.

Moreover, in the fourteen years of prior *Yankton* litigation, no one in *Yankton I* or in *Yankton II* ever argued that an "Indian reservation" of this configuration even existed. No one cited any legislation, any case law, any expert, or any document or any map to support the ultimate conclusion of the District Court.

If these facts are not enough to make this latest version of the Yankton Reservation suspect, all previous submissions by the same parties, said to be founded on congressional intent, are flatly inconsistent with this Yankton Reservation. Again, this latest version of the Yankton Sioux Reservation is really a one of a kind "Indian reservation", completely without precedent and expressly in conflict with every case litigated in nearly a century of reservation status jurisprudence in the United States.

These are incontrovertible facts. These same facts strongly support the Petition of the State (that the County joined) that this case initially be heard en banc. In that

manner, this Court can authoritatively address the conflicts of the decision below, and the prior panel (essentially correct on all but one point), with the rest of the reservation status case law. Such attention is sorely needed in this instance.

In order to fully appreciate the context in which the arguments were submitted and the decisions were made in *Yankton Sioux Tribe*, a review of the pivotal role of the United States in this litigation and in related reservation status litigation is instructive.

STANDARD OF REVIEW

The District Court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Allen v. Tobacco Superstores, Inc.*, 475 F.3d 931, 937 (8th Cir. 2007). The evidentiary rulings of the District Court are subject to abuse of discretion review. *General Electric Co. v. Joiner*, 522 U.S. 136, 141 (1997). In addition, this Court will determine whether the lower court "scrupulously and fully" carried out the mandate of this Court and that of the Supreme Court. *Jaramillo v. Burkhart*, 59 F.3d 78-80 (8th Cir. 1995).

ARGUMENT

I.

THE SHIFTING ARGUMENTS OF THE UNITED STATES ARE WITHOUT MERIT.

A. Charles Mix County, South Dakota

The vital concern that prompts the filing of this County brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, a large portion of the area of the County, including, in whole or in part, the Cities of Dante, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue. Consequently, the approximately 6,000 people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation.

Here, ninety percent (90%) of the land is owned by non-members and over two-thirds (2/3) of the residents are non-members who reside on small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia, and Wagner. In all, there are forty-nine (49) political subdivisions within the County.

The expectations of the people in this area should not be lightly regarded or simply set aside. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 356-357 (1998). Nevertheless, the United States with one exception has consistently ignored this prudential consideration. For these reasons, the issue is of grave importance to the residents, the Cities, the other units of local government and Charles Mix County, South Dakota.

It is profoundly disturbing that reservation status is even a possibility after the United States Supreme Court unequivocally rejected the argument of the Yankton Sioux Tribe and United States in *Yankton I* that would have resurrected the 1858 reservation boundaries, and this Court confirmed that holding in *Yankton II*. This brief of the County will focus on the role that the relentless advocacy of the United States has played in this process in this case, and in other similar cases. Clearly, the arguments of the United States have contributed to confusion and misunderstanding regarding reservation status.

Importantly, the United States did not even file a Petition for Certiorari in *Yankton II* when it was due in May, 2000. This development is especially noteworthy in light of the fact that on remand, the United States was granted leave to intervene as a plaintiff in this litigation. The arguments the United States submitted thereafter caused additional conflict and confusion.

Clearly, the United States did not consider that the rejection of the 1858 boundary arguments submitted by the United States and the Yankton Sioux Tribe in *Yankton II*, presented the United States Supreme Court with a question that was certworthy. This is a significant concession by the United States even if the United States subsequently supports, in any fashion, another Petition filed by the Yankton Sioux Tribe.

Moreover, although the points in the argument that follows, for the most part, were made prior to the decision of the United States to not file a Petition in *Yankton II*, the argument is still significant because it summarizes the advocacy of the United States in cases of this kind and sheds light on the unprecedented nature of this decision of the United States. The argument also

provides a perspective from which subsequent submissions by the United States in this case should be viewed. All of this further supports Brief of Appellants Michael Rounds et al. filed by the State of South Dakota and the Petition for Hearing en banc filed by all Defendants and Appellants.

B. United States

The role of the United States in reservation status litigation cannot be overstated. Early on in the *Yankton Sioux Tribe* litigation, the County tracked the position of the United States in each of the significant cases. Brief of Charles Mix County, South Dakota, *Amicus Curiae*, in Support of Petitioner, *State of South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581). In addition, the County appended the merits briefs for the United States in the same cases.

In May, 2000, after the United States Supreme Court unanimously rejected the arguments of the United States in *Yankton I*, and after the 1999 decision of a unanimous panel in this Court in *Yankton II*, confirmed that the United States Supreme Court had held that the 1858 original reservation boundary was extinguished, disestablished, and not

maintained, the arguments of the County in this regard were refined and supplemented in another brief submitted on behalf of local jurisdictions in the United States Supreme Court. Brief of Cities, *Amici Curiae*, in Support of Petitioners, *Yankton Sioux Tribe v. Gaffey*, 530 U.S. 1261 (2000) (No. 99-1490). In that instance, the appendix to the brief set forth the briefs for the United States as well as the transcripts of oral argument for the cases, including the transcript of oral argument in *Yankton I*.

C. United States Supreme Court Precedent Clearly Undermines the Continuing Reservation Status of the Yankton Reservation

A fair reading of the reservation status litigation decided by the United States Supreme Court in *Seymour v. Superintendent,* 368 U.S. 351 (1962), *Mattz v. Arnett,* 412 U.S. 481 (1973), *DeCoteau v. District County Court,* 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), *Solem v. Bartlett,* 465 U.S. 463 (1984), *Hagen v. Utah,* 510 U.S. 399 (1994) and *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998), clearly undermines the continuing reservation status of the Yankton reservation. The State's brief in this litigation highlights these important principles and, for that reason, they

will not be repeated here. *See also*, Brief of Charles Mix County, South Dakota, *Amicus Curiae*, in Support of Petitioner, *State of South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581); Brief of Cities, *Amici Curiae*, in Support of Petitioners, *Yankton Sioux Tribe v. Gaffey*, 530 U.S. 1261 (2000) (No. 99-1490).

However, a proper perspective regarding the history of this disestablishment litigation is also important in order to accurately assess the arguments in conjunction with the principles set forth in these decisions. This County brief is intended to serve that purpose and provide that perspective.

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

1. In *Yankton I,* the County reviewed the primary arguments presented and rejected in each reservation boundary case decided by the United States Supreme Court, as well as the historic perspective available or established at the time. Brief of Charles Mix County, South Dakota, *Amicus Curiae*, in Support of Petitioner, *Yankton I,* 522 U.S. 329 (1998) (No. 96-1581). For the convenience of the Court, in *Yankton II* that brief was reproduced in additional appendices. To complete the

perspective, the County and the cities at that time reproduced every brief and oral argument that the United States submitted in the United States Supreme Court in these cases. Id.; Cities App. 34a-189a, 233a-272a, *Yankton II*.

The 1998 County brief recounts in summary fashion the case by case developments in this reservation status litigation. *See* County Brief, Cities App. 6a-20a, 27a-29a, *Yankton II*. A review of this chronology establishes three overriding themes. First, as one would expect, each time the United States Supreme Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions of the United States Supreme Court reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States has never failed to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United

States (for the most part repeatedly rejected by the United States Supreme Court) have mainly served to perpetuate the confusion and conflict in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are also closely examined for another reason. As will be seen, the United States has repeatedly made a number of important general concessions in the United States Supreme Court, subsequent to *DeCoteau,* regarding the *effect of cession agreements,* like this one, on Indian reservations. These *general cession concessions,* made in conjunction with submissions that urged the continued recognition of other original reservation boundaries, cannot be explained away. The views of the United States in this regard, submitted to the United States Supreme Court, merit continued consideration. *See* chronology summarized in County Brief, Cities App. 15a-20a, 27a-29a, *Yankton II*. *See also* Briefs of United States, Cities App. 88a-189a, Tr. of Oral Arguments, Cities App. 250a-266a, *Yankton II*.

The 1998 County brief also addresses in chronological order, the *specific cession concessions* of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux Cession Act. *See Id.;* Cities App. 20a-27a, *Yankton II.* For example, in 1984, the United States formally submitted this Yankton reservation disestablishment concession in this Circuit. *United States v. Dion,* 752 F.2d 1261 (8th Cir. 1985) *rev'd in part by, United States v. Dion,* 476 U.S. 734 (1986). *Id.* at 20a, 2la. The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Brief for the United States as *Amicus Curiae* Supporting Respondent, *Solem v. Bartlett,* 465 U.S. 463 (1984) (No. 82-1253).

Moreover, in other litigation also pending at the same time, and also dealing with the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux Cession Act, the United States acknowledged that the United States Supreme Court's decision in *DeCoteau* involved "a similar and contemporaneous cession

agreement" with "the same language" and "purpose." Brief for the United States, *Yankton Sioux Tribe v. South Dakota,* 796 F.2d 241 (8th Cir. 1986), *cert, denied,* 483 U.S. 1005 (1986), Cities App. 199a, County Brief, Cities App. 26a-27a. Significantly, Article XVIII of the 1894 act that the United States insisted was so important in *Yankton I,* was not mentioned in any of this. Act of August 15, 1894, 28 Stat. 286, 318.

To complete the perspective, the County reviews the briefs and oral argument the United States submitted in *Yankton I.* In *Yankton II,* the Cities appended the Briefs of the United States and excerpts from the transcripts of the oral argument of the United States in *Yankton I* that highlight the inconsistencies in the position of the United-States. Cities App. 202a-232a, 266a-272a. Further, the County reviews in some details the analysis the United States Supreme Court set forth in *Yankton I* that squarely rejected the position of the United States. Finally, the County tracks the argument of the United States since that time and the manner in which the courts have *mistakenly* relied upon the representations of the United States in the process of deciding this case. (Emphasis added.)

One thing is fairly certain. The United States has not honored the position advanced by the Office of the Solicitor General in the United States Supreme Court in *Yankton I* (i.e. that disestablishment was inevitable if the argument of the United States regarding Article XVIII was rejected and the 1858 Yankton boundaries were not recognized by this Court, because *nothing* in the Yankton documentation supported any other conclusion.) Brief for United States, Cities App. 202a-232a; Transcript of Oral Argument at 270a-271a, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), *Amici Curiae* App. 266a, *Yankton II*. The United States Supreme Court in *Yankton I* did reject the argument of the United States and the 1858 reservation boundaries were not recognized.

Nevertheless, within days of the *Yankton I* decision, the United States reneged on the inevitable disestablishment argument it presented to the United States Supreme Court, even before the case was remanded to the District Court. Since then, the United States adopted several other conflicting arguments

to continue supporting the position of the Yankton Sioux Tribe that the 1858 reservation boundaries should be resurrected.

At some point in time, the "litigating position" of the United States in this type of case should be subject to heightened scrutiny. *South Dakota v. Bourland,* 508 U.S. 679, 697 (1993). *See also Washington v. Yakima Indian Nation,* 439 U.S. 463, 477-478 n.20 (1979) ("[United States] recently changed its position diametrically").

In this regard, the fact that the United States Supreme Court did not extend an invitation to the United States to express the views of the United States at the petition stage in *Yankton I or Yankton II* is of some significance. The rejection of the position of the United States by the United States Supreme Court in *Yankton I* also merits special notation. And clearly, the conflicting arguments the United States has submitted since that time further substantiate the claim that no principled reason exists to give any special credence to the position of the United States in cases of this nature.

2. Nothing in the Yankton documents indicate that Article XVIII of the 1894 Act was intended to alter the fundamental attributes of the Yankton cession.

> MR. MANN: Well, the language in *DeCoteau* said that the Indians cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in the land in question, and the statute in *Rosebud* stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.
>
> *It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.*
>
> QUESTION: I think you're probably right. . . .

Transcript of Oral Argument at 25, *Hagen,* (No. 92-6281), Cities App. 263a-264a (emphasis added).

In 1975 in *DeCoteau v. District County Court,* 420 U.S. 425 (1975) the United States argued against cession disestablishment and lost. After the decision of the United States Supreme Court in *DeCoteau,* even the United States repeatedly acknowledged that Congress routinely intended cession statutes such as the Yankton cession to disestablish reservation areas. Brief of United States, Cities App. 88a-189a. Before *Yankton I,* the United States did not attempt to circumvent the holding in *DeCoteau* regarding this type of cession, openly acknowledging,

as in *Hagen*, that it would be "rather difficult" to support any other construction. *Id.* at 263a-264a.

In *Yankton I*, the United States ignored *DeCoteau* and that traditional cession analysis and advocated the "narrower" position ultimately rejected by the United States Supreme Court. *State of South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581).

Nothing of substance could be cited by the United States in *Yankton I* to support this anomalous and otherwise "rather difficult" construction. Brief for United States, Cities App. at 32a. Moreover, the prior views of the United States, summarized above, precluded this "narrower" view—at least in the absence of some *affirmative* evidence of congressional intent to the contrary. In this respect, generic arguments loosely tied to the Article XVIII savings clause should not have sufficed. Article XVIII was not intended to alter the fundamental attributes of the Yankton cession—and not a single word in any of the Yankton documentation supported the position of the United States.

The United States Supreme Court in *Yankton I* unanimously rejected the Article XVIII savings clause argument of the United States. First, the Court noted that the holding of this Court keyed on this circuitous argument:

> The court relied *primarily* on the saving clause in Article XVIII, reasoning that, given its "unusually expansive language," other sections of the 1894 Act "should be read narrowly to minimize any conflict with the 1858 treaty." *Id.,* at 1447.

Yankton I, 522 U.S. at 342 (emphasis added).

The United States Supreme Court then disposed of the argument of the United States in no uncertain terms:

> The United States urges a similarly "holistic" construction of the agreement, which would presume that the parties intended to modify the 1858 Treaty only insofar as necessary to open the surplus lands for settlement, without fundamentally altering the treaty's terms.
>
> Such a literal construction of the saving clause, as, the South Dakota Supreme Court noted in *State v. Greger,* 559 N.W. 2d 854, 863(1997), would "impugn the entire sale."....
>
> Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that *tribal* ownership was a critical component of reservation status. . . .
>
> Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it

> a "sensible construction" that avoids this "absurd conclusion.". . .

Yankton I, 522 U.S. at 345, 346.

The sensible construction adopted by the Court in *Yankton I* reflects the traditional cession analysis set forth in *DeCoteau.*

E. The Cession Concessions Of The United States In *Yankton I* With Reference To Disestablished Reservation Boundaries Are Significant And Controlling Here.

In the process of advancing the Article XVIII savings clause argument, *the United States conceded that but for the presence of Article XVIII, the 1894 Yankton act would have disestablished the 1858 Yankton reservation in the traditional sense recognized by the United States Supreme Court in DeCoteau.* (Emphasis added.) In oral argument, the United States, in response to direct questions from the United States Supreme Court, described that process in the following manner:

> QUESTION: Now this—this is a *totally* checker boarded situation?
>
> MS. MCDOWELL: That's correct, And this Court—....
>
> MS. MCDOWELL: Well, the Court in *DeCoteau*, found total diminishment. But that was a different case, in several respects, from this one. In the first place, of course, there was no savings clause preserving rights under an earlier treaty....

> QUESTION: But do you—do you agree with both counsel, it seemed to me, that the choice is either we accept your argument based on Article XVIII or there's a diminishment?
>
> MS. MCDOWELL: That's correct.
>
> QUESTION: That there is no such thing as diminishment applicable on these facts?
>
> MS. MCDOWELL: *That's correct*. Diminishment seems to be limited to cases such as Rosebud, where there was a selling or a ceding of a *part* of the reservation in so many words, as *opposed* to this sort of situation

Tr. Oral Argument, *Yankton I*, Cities App. 270a-271a. (emphasis added).

The totally checker boarded situation or "total diminishment" holding of the Court in *DeCoteau* (in the words of the United States), resulted from the extinguishment, and disestablishment of the reservation boundaries by the cession act at issue there. *DeCoteau,* 420 U.S. at 427 n.2, 446-447. Also, as the United States further conceded in response to the last question from the United States Supreme Court, the Yankton cession, like the *DeCoteau* cession, was not a diminishment where there was only a "ceding of a *part* of the reservation" ("as *opposed* to this sort of situation"). *Id.* (emphasis added). The Yankton cession, like the *DeCoteau* cession, was a cession of *all* of the reservation that was not allotted. On these facts,

diminishment in the sense of maintaining any portion of the 1858 reservation boundary was not possible, as the United States conceded at that time.

For this reason, the entire 1858 reservation boundary was within the scope of the cession in *Yankton I.* In this respect, the rejection of the Article XVIII savings clause argument of the United States by the United States Supreme Court resulted in the extinguishment of the 1858 reservation boundary, "total diminishment" of the 1858 Yankton reservation. The United States clearly conceded the point.

F. The 1858 Reservation Boundary Was Disestablished.

The United States and Yankton Sioux Tribe have both made it clear that in some point in this litigation they can ask the United States to revisit the issue of the status of the 1858 reservation boundary. For this reason, a summary of review of the process in which that issue was decided is appropriate.

The United States Supreme Court has made clear that the 1858 reservation boundary of the Yankton Reservation was not maintained.

> The 1894 Act is also readily *distinguishable* from surplus land Acts that the Court has interpreted as *maintaining reservation boundaries*. . . . The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the *existing reservation boundaries were maintained*. . . . [W]e *conclude* that the saving clause pertains to the *continuance* of annuities, *not the 1858 borders.*

Yankton I, 522 U.S. at 345-347 (emphasis added):

In 1999, the panel in this Court confirmed that conclusion. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999).

Obviously, the County does not disagree with the manner in which these Courts in *Yankton* treated the issue. In fact, as a practical matter, a fair reading of *Yankton I* and other precedent almost mandates this conclusion.

In order to summarily restate the issue, however, the County has approached the question of reservation disestablishment in this brief from a different perspective, although the end result is still the same. *The County focused directly on the United States Supreme Court's discussion of the 1858 reservation boundaries.* The County then specifically addresses the shifting position of the United States with

reference to that discussion. All of this clearly establishes that the decision is clearly correct.

1. As a preliminary matter, it is logical to focus on the 1858 reservation boundaries because that is the manner in which cession precedent has been traditionally understood. In other words, if a cession removed lands from a reservation, it did so by extinguishing the reservation boundaries around the area affected. *For decades, every court in every case, every federal Indian law text, every historian and every commentator that reviewed this precedent have agreed on this fundamental point.* Even after Yankton I, the United States expressly agreed with this point. Brief for the United States in Opposition, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (No. 99-1490 and 99-1683).

In this case, the United States can not cite a single example to the contrary. On the other hand, references to support this understanding are commonplace. As early as 1975, even the title of a note in the North Dakota Law Review reflected this understanding; INDIANS-RESERVATIONS-JURISDICTIONAL

EFFECT OF SURPLUS LAND STATUTE UPON *TRADITIONAL BOUNDARIES* OF AN INDIAN RESERVATION. James M. Bekken, Comment, *Indians-Reservations—Jurisdictional Effect of Surplus Land Statute Upon Traditional Boundaries of an Indian Reservation,* 52 N.D. L. Rev. 411, 417 (1975) (emphasis added).

In the text of the note, the analysis is directed to the effect of surplus land statutes on reservation boundaries. For example, in the discussion of *DeCoteau v. District County Court,* 420 U.S. 425 (1975) (the cession the United States Supreme Court in *Yankton I,* 522 U.S. at 344, described as "parallel" to the Yankton Act) the law student structured the statement of the issue in boundary terms:

> *DeCoteau* has clearly shown that to determine the effect a particular statute had on reservation *boundaries* the court must. . . .

Bekken, *supra* at 418 (emphasis added).

This concentration on the extinguishment of reservation boundaries is also routinely acknowledged even by tribal advocates who disagree with reservation disestablishment. For example, see the "boundaries" discussion throughout Susan D.

Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment,* 12 Am. Ind. L. Rev. 57, 58, 63, 64, 71, 75, 96 (1984).

2. With the extinguishment of reservation boundaries, it has also followed, *a fortiori,* that the Indian country remaining in the affected area, if any, would be either dependent Indian communities under 18 U.S.C. § 1151(b) or Indian trust allotments under 18 U.S.C. § 1151(c). *Every court in every case, every federal Indian law text, every historian and every commentator are also in agreement in this instance.*[1]

In 1914, the United States Supreme Court made this point clear in *United States v. Pelican,* 232 U.S. 442 (1914) with respect to Indian trust allotments. In this situation, allotments

[1] In this Court, even the United States, in the alternative, finally acknowledged the legitimacy of this analysis. Br. of Plaintiff-Intervenor/Appellee United States of America at 26 n. 3, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900).

subsequently held in fee (the primary issue here) are no longer "Indian country." *Pelican* was codified in 18 U.S.C. § 1151(c).[2]

Moreover, the recognition that the United States Supreme Court expressly held in *Yankton I* that the 1858 reservation boundaries were extinguished by this cession for a sum certain is not in any way inconsistent with the fact that the Court specifically reserved the question of whether the reservation was disestablished altogether. *Yankton I*, 522 U.S. at 358. That entirely distinct issue must still be decided, notwithstanding the erroneous conclusion of the 1999 panel regarding the effect of the 1929 Act.

For these reasons, the County respectfully submits that the United States Supreme Court intended that the subject of the remand would be limited to the status of only existing trust allotments, dependent Indian communities, and other trust lands. When reservation boundaries are extinguished, this

[2] The United States Supreme Court explained and reaffirmed the analysis and codification of *Pelican* in *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 528-529 (1998). *See also DeCoteau,* 420 U.S. at 427 n.2, 446-447, *Rosebud,* 430 U.S. at 586, 601 n.24, 613-615 n.47, 615-616 n.48.

would ordinarily be the case. We agree with the State that none of the lands within former Yankton Reservation are 18 U.S.C. § 1151(a) reservation lands. See the reference in *Yankton I* to "conflicting understandings about the status of the reservation" and the "fact that the tribe continues to own land in common." *Yankton I,* 522 U.S. at 358. These contentions do not directly implicate the status of fee lands, which are predominantly owned and populated by non-members. *See Yankton I*, 522 U.S. at 356-357.

In other words, *Yankton I* clearly resolved the status of the 1858 reservation boundaries. *See Yankton I*, 522 U.S. at 333, 343, 345, 345-346, 347, and 353. Because of the law of the case, the 1858 boundary issue should not have even been addressed in the remand in *Yankton II*.

All else aside, the United States Supreme Court made clear in *Yankton I* that the 1858 "reservation boundaries" were *not* "retained" or "maintained"—"we *conclude. . . continuance* of annuities, *not the 1858 borders." Id.* at 347 (emphasis added). At the very least, the Court decided that question. The Court

stated that the "case" presented the question of whether "Congress *diminished the boundaries"* of the Yankton Sioux Reservation. *Id.* at 333 (emphasis added). The unresolved issue, as the Court also clearly stated, was "whether Congress disestablished the reservation altogether." *Id.* at 358. That issue should not involve resurrecting the status of 1858 reservation boundaries.

3. In *Yankton Sioux Tribe v. Gaffey,* 14 F.Supp.2d 1135 (D.S.D. 1998) *rev'd* 188 F.3d 1010 (8th Cir. 1999) cert. denied (Mar. 7,2000) (No. 99-1490), *the District Court ignored all of the above and simply held that even after Yankton I, the 1858 reservation boundaries were still intact. Yankton II,* 14 F.Supp.2d at 1143. ("If the original exterior boundaries remain, as it appears they do from the Supreme Court's opinion"). *See also Yankton II,* No. 98-4042 (D.S.D. Oct. 5, 1998) (order denying motion for new trial at 3) ("The Court has now held that the remaining lands *within the 1858 boundaries* remain a part of the Yankton Sioux Reservation"). The District Court was clearly

mistaken regarding this 1858 reservation boundary issue (for the second time).

The strength of that conclusion is further supported by an express concession of the United States in the remand in June, 1998. At that time, the *United States conceded, in the District Court, that the United States Supreme Court in Yankton I recognized that Congress did not intend to maintain the 1858 reservation boundaries:*

> [T]he United States Supreme Court found the savings clause *insufficient to maintain the reservation boundaries of the 1858 Treaty* here, and thus did not prevent diminishment of the Reservation. . . .

Summ. J. Br. for the United States at 22 n. 5, *Yankton II,* 14 F.Supp.2d 1135 (D.S.D, 1998) (No. 98-4042) (emphasis added). *See also* Summ. J. Br. for the United States at 2, 5, 6. Instead, the United States made other arguments in support of the position of the Yankton Sioux Tribe.

After the District Court recognized the 1858 reservation boundaries in *Yankton II,* the United States never again mentioned this extinguished boundary concession or the manner in which the holding of the District Court conflicted

with the express language of the United States Supreme Court in *Yankton I.*

4. In *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000), in their brief to this Court, the United States avoided any discussion of the express conflict between the holding of the District Court and the conclusion of the United States Supreme Court in *Yankton I* regarding the 1858 reservation boundaries. As a result, the brief for the United States supported the tribal claim that the District Court was correct, but not with explicit reference to the 1858 reservation boundaries.

The only reference that even indirectly addresses this aspect of the 1858 boundaries issue appears in the conclusion of the brief of the United States. The United States concluded:

> The Yankton Sioux Reservation continues to exist in *diminished form,* encompassing the unceded lands under the 1894 Act. The language of the 1894 Act, the legislative and negotiation history, and other surrounding circumstances *support diminishment....*

Br. of Plaintiff-Intervenor/Appellee United States of America at 52, *Yankton II,* 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900) (emphasis added).

The United States never explained how the Yankton reservation could exist in this "diminished form" nor exactly what the United States meant by "diminishment" (except, of course, to claim the "diminished form" *encompasses all unceded land).* However, one thing is perfectly clear. This "diminished form" argument conflicts with *everything* the United States told the United States Supreme Court in *Yankton I.* *See* the "total diminishment" discussion *supra.*

According to the United States in *Yankton I*, nothing in the Yankton documentation supported diminishment in any form whatsoever. For example, in this Court in *Yankton I*, the views of the United States mirrored those of the Yankton Sioux Tribe with respect to the *lack of any evidence to support changed, altered, or diminished reservation boundaries:*

> The 1892 Agreement, the ratifying Act, and other legislative and historical evidence do *not* indicate an intent by Congress to diminish or disestablish the Reservation.

Br. for United States as *Amicus Curiae* in Supp. of Plaintiffs-Appellees at 3, *Yankton I, 99* F.3d 1439 (8th Cir. 1996) (No. 95-2647) (emphasis added). *See also id.* at 4, 5, 8-15.

Significantly, in the United States Supreme Court in *Yankton I,* the United States, as *amicus curiae,* again agreed with this aspect of the historical record:

> But there was *no discussion* of whether the Agreement, if ratified, would alter the boundaries of the Reservation.
>
> *Solicitor Cohen notes . . . Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation . . . .*

Br. for the United States as *Amicus Curiae* Supporting Resp'ts at 5, *25, Yankton* 7, 522 U.S. 329 (1998).

This Court in *Yankton II* viewed the argument to recognize the Yankton reservation in the form resurrected by the District Court in light of all of the above. In addition to the opinion of the United States Supreme Court, all *Yankton I* briefs and related documents were made part of the record in *Yankton II.* Moreover, in oral argument members of the 1999 Panel in *Yankton II* expressly referenced the transcript of oral argument in the United States Supreme Court in *Yankton I* directed to the scope of the cession.

In that instance, the United States could not convince this Court to affirm the holding of the District Court. *Instead, this Court expressly confirmed that the 1858 reservation boundaries*

were extinguished by the 1894 Yankton act. See Yankton II, 188 F.3d at 1020-1021, 1030.

5. The part of the conclusion of this Court regarding the disestablishment of the 1858 boundary is clearly correct. In one other respect, however, the holding of this Court is fundamentally flawed. With specific reference to the 1929 reservation, the holding of this Court is suspect for several reasons. First, as even the Yankton Sioux Tribe noted in its application for a stay, at that time, this Court adopted a "third" option in recognizing the old agency lands as an Indian reservation. Mot. for Stay Pending Pet. for Writ of Cert., *Yankton II,* 188 F.3d 1010 (8th Cir. 1999) (No. 98-3893, 3894, 3896, 3900). Importantly, no one, including the United States, argued that this third option was supported by anything in the *Yankton* documentation. Moreover, no one even suggested that the third option was a possibility in the District Court or this Court. As a result, the third option issue was not briefed or argued in either the District Court or this Court.

Importantly, the Yankton Sioux Tribe agreed that the "third option" holding of this Court appeared to be "inconsistent with all prior Supreme Court cases." *Id.* at 1-2.

> The parties to this appeal argued in their petitions for rehearing that prior Supreme court cases allowed for *two* possible resolutions to the captioned appeal [1858 reservation boundaries in tact or extinguished]. The circuit decision creates a third option, which appears to be *inconsistent with all prior Supreme Court cases.* Whether the Supreme Court will approve this third option is *clearly a substantial issue.*

Id. at 1-2 (emphasis added).

Although the County disagrees with the Tribe on the reason for the inconsistency, whether the United States Supreme Court eventually agrees with the Tribe (1858 reservation boundaries intact) or with the Appellants, State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District (1858 reservation boundaries extinguished), is really beside the point at this stage in the proceedings. The important fact is that the parties agreed that the "third option" holding of this Court is inconsistent with precedent; the parties further agreed that this inconsistency presents a substantial question.

Moreover, the "diminished form" of the 1929 old agency reservation recognized by this Court in *Yankton II,* also conflicts with the testimony of both of the expert witnesses for the United States in District Court in *Yankton II* (these were the *only* witnesses to testify). And the then recently adopted litigation position of the United States that boldly asserted that the Yankton legislation was truly "unique" adds nothing to the credibility of that position. Br. of PL-Intervenor/Appellee United States of America at 10, *Yankton II,* 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900). The Yankton documentation also squarely refutes this notion.[3]

[3] See also the discussion in the Southern Missouri Waste Management District brief under subheading I-A, "A SUMMARY OVERVIEW ESTABLISHES THAT THE CONGRESSIONAL PROCESS FOR THE YANKTON ACT FOLLOWED A STANDARD OPERATING PROCEDURE" at 7-12, Br. for Southern Missouri Waste Management Dist. at 7-12, *Yankton II,* 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900).

G. The Yankton Sioux "Indian Reservation" Fashioned By The District Court Was Not Supported By The Yankton Sioux Tribe

The District Court had to rely on generic acts of Congress, submitted by the United States and the Yankton Sioux Tribe, to fashion this latest version of the Yankton Sioux "Indian reservation." In this process, several inconsistencies and fundamental flaws are self-evident.

First, the end result does not reflect *any* of the several versions of the Yankton Sioux "Indian reservation" submitted by the Yankton Sioux Tribe. In this instance, all of the Tribal versions of the Yankton Sioux "Indian reservation" were rejected by the District Court. These Tribal versions included fee patented land tied to generic acts of Congress that the United States could not even support. Moreover, Defendants/ Appellants maintained that fee patented lands were beyond the scope of the mandate in any event.

As a result, the Yankton Sioux "Indian reservation" fashioned by the District Court was not supported by the Yankton Sioux Tribe— and probably will not be supported by the Yankton Sioux Tribe in this appeal. At the same time, this

latest version also lacks support in the jurisdictional history of the area.

The version of the Yankton Sioux "Indian reservation" submitted by the United States is similarly flawed. One part of this version relies entirely on a novel construction of the Indian Reorganization Act of 1934. Importantly, the Yankton Sioux Tribe or the Yankton Sioux Reservation is not mentioned in the 1934 Act or the legislative history of that Act. (In fact, it is arguable whether the Yankton Sioux Tribe accepted the 1934 Indian Reorganization Act.) And the United States and the District Court did not cite any specific evidence of Congressional intent that references the Yankton Sioux Tribe or the Yankton Sioux Reservation.

In spite of the fact that the 1934 Act is one of the two most well known Congressional acts involving Indian legislation, that Act has never been construed by any court or government agency to support the automatic resurrection of 18 U.S.C. § 1151(a) Indian country in the manner reflected in the Opinion of the District Court. Again, the District Court cites nothing in the 1934 Act that specifically supports its conclusion.

The same criticism can be directed at the balance of the 18 U.S.C. § 1151(a) Indian country the United States convinced the District Court to recognize: trust allotments under the General Allotment Act of 1887. In this instance, according to the District Court, each Indian allotment issued pursuant to the General Allotment Act of 1887, constitutes 18 U.S.C. § 1151(a) Indian country (encompassed by an Indian resurrection boundary). And these allotments are isolated and scattered throughout the entire four hundred thirty thousand (430,000) acres of the former 1858 Yankton Sioux Reservation.

Again, the General Allotment Act of 1887 has also never been construed by any court or government agency to support the automatic resurrection of 18 U.S.C. § 1151(a) Indian country in the manner reflected in the Opinion of the District Court. And again, the District Court cites nothing in the 1887 Act that specifically supports its conclusion.

Moreover, the 1934 Act and the 1887 Act have both been construed by courts and administrative agencies in a manner that is contrary to and in express conflict with the Opinion of the District Court.

At the end of this long day (approximately fourteen years to date), in the absence of any evidence of Congressional intent to the contrary, this Court should recognize that the Yankton cession is virtually indistinguishable from the Lake Traverse cession analyzed in *DeCoteau*, or any of the other cessions that have been similarly construed throughout the United States and throughout history.

CONCLUSION

For the foregoing reasons, and those stated in the Brief of Appellant Rounds et al., the decision of the District Court should be reversed.

Dated May 15, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14 point type. Appellee's Brief contains 7,777 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2003, and it is herewith submitted in PDF format.

3. I certify that the disk submitted herein with the text of the brief is, to the best of my knowledge and belief, virus free.

Dated this 15th day of May, 2008.

_____

Tom D. Tobin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Appellee's Brief and computer diskette containing Appellee's Brief in the matter of Yankton Sioux Tribe, et al. v. Scott Podhradsky, et al. were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Winner, South Dakota, on this 15th day of May, 2008:

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