SUMMARY AND REQUEST FOR ORAL ARGUMENT

The prior decisions of this Court firmly establish that the Yankton Sioux Indian Reservation has not been disestablished. On remand from this Court, the District Court correctly concluded that allotted trust lands, lands reserved by Article VIII of the 1894 Act, lands placed in trust pursuant to the 1934 Indian Reorganization Act, and all fee land continuously held by tribal members are part of the Yankton Sioux Reservation. In so holding, the District Court erred only in finding that neither the 1927 Act of Congress nor the 1934 Indian Reorganization Act halted further diminishment of the Reservation by Executive branch action, and that allotments sold without congressional authority in violation of Articles XI and XIV of the 1894 Act were not part of the Yankton Sioux Reservation.

The State of South Dakota urges disestablishment a third time before this Court. Their reiterative argument is barred by case mandate, collateral estoppel, and *res judicata*. South Dakota foreswore jurisdiction over Indian land and people in its Constitution, and again under Public Law 280 in a statewide referendum in the 1960's, has never exercised jurisdiction over trust lands and concedes it never can. This case is not about tribal jurisdiction over non-Indians. It is about State jurisdiction over reservation Indians in their retained homeland. The Yankton Sioux Tribe requests at least thirty minutes for oral argument.

TABLE OF CONTENTS

SUMMARY AND REQUEST FOR ORAL ARGUMENT..... i

TABLE OF AUTHORITIES..... vi

JURISDICTIONAL STATEMENT..... 1

TREATIES AT ISSUE 1

STATUTORY PROVISIONS AT ISSUE..... 1

STATEMENT OF LEGAL ISSUES..... 3

STATEMENT OF THE CASE..... 5

STATEMENT OF FACTS..... 8

SUMMARY OF ARGUMENT 22

STANDARD OF REVIEW..... 27

CANONS OF CONSTRUCTION 27

ARGUMENT..... 29

A. The Yankton Indian Reservation was established by Congress by the Treaty of 1858, as diminished by the Agreement between the Tribe and the United States in 1892 ratified by Congress in 1894. No subsequent Acts of Congress have further diminished the Reservation..... 29

1. The 1858 Treaty and 1894 Agreement between the Tribe and the United States define the Yankton Reservation. These agreements must be read in accordance with the canons of construction applicable to treaties. 29

2. Congress has only twice explicitly altered the language of

the 1894 Yankton Agreement. 36

3. Congress has never unilaterally abrogated the 1894 Agreement. 37

B. The Yankton Reservation has been altered by subsequent Acts of Congress to Halt diminishments Occurring as a Result of Executive Branch action..... 39

1. The 1927 Act halted changes in Reservation Boundaries made without Congressional authorization by the Executive Branch of government. 39

2. The 1934 Indian Reorganization Act Prevents further Diminishment of the Reservation by land sales 43

3. No Act of Congress since the 1934 Indian Reorganization Act grants the Secretary of Interior authority to Diminish the Reservation. 45

C. The 1934 Indian Reorganization Act granted the Secretary of Interior Authority to Expand Indian Reservations, but not to Diminish them... 46

1. 25 U.S.C. §465 and §467 authorize the Secretary to add lands to an existing reservation and to place lands within a reservation in trust. 46

2. A Proclamation is not required to place lands into trust on an existing reservation or to add lands to an existing reservation.. 49

3. Title to trust lands held by the United States cannot be challenged under the Quiet Title Act. 53

4. The expectations of the State, County, and Individual non-Indians are not Implicated by this Holding. 54

D. Lands originally constituting reserve lands under Article VIII of the 1894 Agreement now held in tribal trust status are part of the Yankton

Indian Reservation. 55

1. The State is Barred by Res Judicata, Collateral Estoppel, and the Case Mandate, from arguing that reserve lands are not part of the Reservation..... 55

2. The Reserve lands have always been under federal superintendence. 56

3. All original reserve lands currently held in tribal trust status are part of the Yankton Indian Reservation as established by the Act of 1929. 57

4. The interests of the State, County, and Individual Non-Indians are not Implicated by this Holding. 58

E. The Yankton Indian Reservation has Not Been Disestablished. 59

1. The State is barred by the case mandate, res judicata and collateral estoppel from arguing that the Yankton Indian Reservation has been disestablished. 59

a. The case mandate is clear. 60

b. Rehearing the disestablishment argument would prejudice the Tribe 61

2. Solem v. Bartlett, United States v. Southern Pacific Transporation Co., and United States v. Webb are the analogous cases - not DeCoteau v. District County Court. 62

3. There is no conflict between the Circuits created by the Eighth Circuits ruling on disestablishment. 68

4. South Dakota Supreme Court holdings should not to be accorded deference. 70

CONCLUSION 71

CERTIFICATE OF COMPLIANCE 73

CERTIFICATE OF SERVICE 74

ADDENDUM 01-35

TABLE OF AUTHORITIES

Federal Cases Cited

Alaska v. Babbitt, 182 F.3d 672 (9th Cir. 1999)	53
Alaska v. Native Village of Venetie, 522 U.S. 520, 118 S. Ct. 948 (1998)	25, 50, 51, 52
Allen v. Tobacco Superstores, Inc., 475 F.3d 931 (8th Cir. 2007)	27
Antoine v. Washington, 420 U.S. 194, 95 S. Ct. 944 (1975)	28
Ash Sheep Co. V. United States, 252 U.S. 159, 40 S. Ct. 241 (1920)	42
Banks v. Internat'l. Union Electronic, Electrical, Techical, Salaried and Machine Workers,390 F.3d 1049 (8th Cir. 2005)	56, 61
Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 122 S. Ct. 941 (2002)	40
Chase v. McMasters, 573 F.2d 1011, 1016 (8th Cir. 1978), cert. denied, 439 U.S. 965, 99 S. Ct. 453	3, 19, 44
Choctaw Nation v. U.S., 318 U.S. 423, 63 S. Ct. 672 (1943)	27-28, 35
Crichton v. Shelton, 33 I.D. 205, 208 (1904)	70
Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460 (D.C. Cir. 2007)	50
City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972)	64, 65, 68
Confederated Salish Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, 459 U.S. 977, 103 S. Ct. 314	36, 49, 62

Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334 (9th Cir. 1996), cert. denied, 529 U.S. 1168, 117 S. Ct. 1432 (1997) 28, 68

DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082 (1975) 62

Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1298 (8th Cir. 1994), cert. denied, 513 U.S. 1103, 115 S. Ct. 779 (1995) 68

Duncan v. Omaha & Council Bluffs St. Ry. Co., 106 F.2d 1 (2nd Cir. 1939), cert. denied, 309 U.S. 661, 60 S. Ct. 513 40

Fairport v. Meredith, 292 U.S. 589, 54 S. Ct. 826 (1934) 40

General Electric Co. v. Joiner, 522 U.S. 136, 188 S. Ct. 512 (1997) 27

Invention Submission Corp. v. Dudas, 413 F.3d 411 (4th Cir. 2005), cert. denied, 546 U.S. 1090, 126 S. Ct. 1024 56, 60

Kolb v. Scherer Brothers Financial Serv's., 6 F.3d 542 (8th Cir. 1993) 5, 56, 61

Mattz v. Arnett, 412 U.S. 481, 93 S. Ct. 2245 (1973) 3, 35,36,43, 65, 68, 70

Melby v. Grand Portage Band of Chippewa, 1998 Westlaw 1769706 (D. Minn. 1998) (unpublished) 26, 67, 68

Menominee Tribe v. U.S. 391 U.S. 404, 88 S. Ct. 1705 (1968) 27

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267 (1973) 4, 43

Proschold v. United States, 90 Fed.Appx. 516, 2004 WL 324717 (9th Cir. 2004) (unpublished) 53

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361 (1977) 55

Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990), cert. denied, 500 U.S. 915, 111 S. Ct. 2009 (1991) 51

Royal Indemnity Co. V. United States, 313 U.S. 289, 61 S. Ct. 995 (1941) 37

Seymour v. Superintendent, 368 U.S. 351, 82 S. Ct. 424 (1962) 68

Sioux Tribe of Indians v. United States, 316 U.S. 317, 62 S. Ct. 1095 (1942) 39

Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161 (1984) 4, 24, 28, 29, 43, 62, 64, 65

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998) 6, 7, 23, 48, 59

Spirit Lake Tribe v. North Dakota, 262 F.3d 732 (8th Cir. 2001), cert. denied, 353 U.S. 988, 122 S. Ct. 1541 (2002) 37

South Dakota v. Dep't. of Interior, 401 F. Supp. 2d 1000, 1010 (D.S.D. 2005) 55

South Dakota v. Dep't. of Interior, 423 F.3d 790 (8th Cir. 2000), cert. denied, 127 S. Ct. 67, 75 USLW 3020 (2006) 47

Stevens v. C.I.R., 452 F.2d 741 (9th Cir. 1971) 47, 52

Torbit v. Ryder System, Inc., 416 F.3d 898, 903-904 (8th Cir. 2005) 5, 38

United States v. Aramony, 166 F.3d 655 (4th Cir. 1999), cert. denied, 526 U.S. 1146, 119 S. Ct. 2022 60

United States v. Azure, 801 F.2d 336 (8th Cir. 1986) 4, 51

United States v. Caster, 271 F. 615 (8th Cir. 1921) 18

United States v. Celestine, 215 U.S. 278, 30 S. Ct. 93 (1909) 26,67,68, 69

United States v. Dion, 476 U.S. 734, 106 S. Ct. 221 (1986) 24, 27, 28

United States v. John, 437 U.S. 634, 98 S. Ct. 2541 (1978) 51, 52

United States v. Menasche, 348 U.S. 438, 122 S. Ct. 941 (2002) 40

United States v. Ortega, 150 F.3d 937, 945 (8th Cir. 1998), cert. denied, 525 U.S. 1087, 119 S. Ct. 837 5, 38

United States v. Papakee, 485 F. Supp. 2d 1032 (N.D. Ia. 2007) 51, 55

United States v. Pelican, 232 U.S. 492, 34 S. Ct. 396 (1914) 4, 26, 36, 65, 67

United States v. Sabri, 183 F. Supp. 2d 1145 (D. Minn. 2002), rev'd in part on other grounds, 326 F.3d 937 (8th Cir. 2003), aff'd and remanded, 541 U.S. 600, 124 S. Ct. 1941(2003) 41

United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976) 3, 4, 26, 43, 62, 63

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997), cert. denied, 522 U.S. 841, 118 S. Ct. 120 55

United States v. Webb, 219 F.3d 1127 (9th Cir. 2000), cert. denied, 522 U.S. 1107 (1998) 4, 26,36,62, 63, 64, 67

Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997), cert. denied, 522 U.S. 1107, 118 S. Ct. 1034 (1998) 51, 67

Wildman v. United States, 827 F.2d 1306 (9th Cir. 1987) 53

Winters v. U.S., 207 U.S. 564, 28 S. Ct. 207 (1908) 28

Yankton Sioux Tribe v. Gaffey, 14 F. Supp. 1135 (D.S.D. 1998) 6, 11, 59

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) passim

Yankton Sioux Tribe v. Podhrasky, 529 F. Supp. 2d 1040 (D.S.D. 2007) passim

Yankton Sioux Tribe v. Southern Missouri Waste Management, 890 F. Supp. 878 (D.S.D. 1995) 5, 59

Yankton Sioux Tribe v. Southern Missouri Waste Management, 99 F.3d 1439 (8th Cir. 1996) 5, 48, 59

Yankton Sioux Tribe v. Southern Missouri Waste Management, 141 F.3d 798 (8th Cir. 1998) 6

State Cases Cited

Brugier v. Class, 599 N.W.2d 364 (S.D. 1999) 70-71

State v. Greger, 559 N.W.2d 854 (S.D. 1996) 59

State v. Thompson, 355 N.W. 2d 349 (1984) 70

State v. Winckler, 260 N.W. 2d 364 (S.D. 1999) 70

Treaties Cited

Treaty of 1858 between United States and Yankton Sioux Tribe, 11 Stat. 743 1, 8, 10, 12, 29, 31, 42, 66, 69

Federal Statutes Cited

Act of March 3, 1891, s. 30, 26 Stat. 1017 et. seq.	62, 66
Act of August 15, 1894, 28 Stat. 314 et. seq.	passim
Act of February 26, 1896, 29 Stat. 16	15
Act of June 30, 1919, 41 Stat. 3 (1919)	39
Act of February 26, 1927, ch. 295, 44 Stat. 1247	17
Act of March 3, 1927, c.299 §4, 44 Stat. 1347 codified at 25 U.S.C. §398d	3, 17,18,23 26, 43,46,71
Act of March 3, 1928, 45 Stat. 162	58
Act of May 23, 1928, 45 Stat. 717	58
Act of February 11, 1929, 45 Stat. 1161	58
Act of February 13, 1929, ch. 183, 45 Stat. 1167	18, 36, 58
Act of June 11, 1932, ch. 242, 47 Stat. 300	17
Act of June 5, 1948, c. 645, 62 Stat. 236, codified at 25 U.S.C. §1151	20, 46, 52
Burke Act of 1906, 34 Stat. 182-183	15,16,37,38
Dawes Act of 1887, 24 Stat. 388 et. seq.	9, 16, 37, 44, 63
Indian Reorganization Act of 1934, 48 Stat. 984-988, codified at 25 U.S.C. §461 et. seq.	19,20,37,43, 45,46,47,49, 71
Supervised Sales Act of 1948, c. 293, 62 Stat. 236, codified at 25 U.S.C. §483	20, 45, 46

Yankton Sioux and Santee Sioux Tribes Equitable Compensation Act, Pub. L. 107-331, 116 Stat. 2834 et. seq. (2002) 21

Pub. L. 102-575 §2005(b) (1992) 21

41 Stat. 1468 (1920) 17, 36, 58

49 Stat. 1967 (1936) 45

28 U.S.C. §2409 et. seq. 53, 54

State Constitutions Cited

South Dakota Constitution, Article XXII 10

Federal Regulations Cited

25 C.F.R. §84.003 52

25 C.F.R. §84.004 52

25 C.F.R. §151.2(f) 49, 50

Other References

Exec. Order 2363 (1916) 16

Exec. Order 4406 (1926) 16

Exec. Order 5173 (1929) 18

Sen. Exec. Doc. 27, 53d Cong., 2d Sess. (1894) passim

Dep't of Interior Felix Cohen Solicitor's Opinion, August 7, 1941 58

Executive Orders Relating to Indian Reservations, Scholarly Resources, Inc. (1975) 39

JURISDICTIONAL STATEMENT

Final Judgment for the Plaintiffs was entered on December 19, 2007. SA 178.[1] One Notice of Appeal on behalf of all Defendants in Yankton Sioux Tribe et al. v. Podhrasky was filed on February 12, 2008. Plaintiff Yankton Sioux Tribe filed a Notice of Appeal on March 6, 2008.

TREATIES AT ISSUE

The Treaty of 1858 between the Yankton Sioux Tribe and the United States, set forth fully at TA 12-19, particularly Article I in part as follows:

> [t]he said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit - Beginning at the mouth of the Naw-izi-wa-koo-pah or Choteau River and extending up the Missouri river thirty miles; thence due north to a point; thence easterly to a point on the said Choteau River; thence down said river to the place of beginning.

STATUTORY PROVISIONS AT ISSUE

The 1887 Dawes Act, 24 Stat. 388 et. seq., set forth in part at TAdd. 30-32.

The Act of August 15, 1894 set forth fully at SA 352-358, and particularly:

---

[1]The term "SA" refers to State's Appendix. The term "SAdd." refers to the State's Addendum. The Term "TA" refers to the Tribe's Appendix in this matter. The term "TAdd.." refers to the Tribe's Addendum in this matter. The term "p." refers to page number of the document, and the term "par." refers to the paragraph on a page. The term "Doc." refers to the Docket number.

Preamble:

> Whereas the Yankton Tribe of Dacotah . . . is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty eight (1858), between said tribe and the United States . . . .

ARTICLE XI:

> If any member of the Yankton tribe of Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior, and the proceeds thereof shall be added to the fund provided for in Article V for schools and other purposes.

ARTICLE XIII:

> All persons who have been allotted lands on the reservation described in this agreement . . . shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians.

ARTICLE XIV:

> All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the government, shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.

The Burke Act of 1906 set forth fully at TAdd. 25-26, and particularly:

> That hereafter when an allotment of land is made to any Indian, and any such Indian does before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to such heirs and in their names, a patent in fee simple for said land, or he may cause the land

to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs . . . ."

The Act of March 3, 1927, c.299, §4, 44 Stat. 1347, codified at 25 U.S.C. 398d:

> Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress.

The Indian Reorganization Act of 1934, 48 Stat. 986 et. seq., codified at 25 U.S.C.§461 et. seq., set forth at TAdd. 30-32, including:

25 U.S.C. §465 as set forth at State's Br. at p. 2.

25 U.S.C. §467 as set forth at State's Br. at p. 3.

STATEMENT OF LEGAL ISSUES

I. Whether the 1927 Act halted diminishment of the Reservation from decisions made without Congressional authorization by the Executive Branch of government.

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 681 (9th Cir. 1976)

II. Whether the 1934 Indian Reorganization Act reaffirmed the end of Executive Branch authority to diminish reservation boundaries.

Chase v. McMasters, 573 F.2d 1011, 1016 (8th Cir. 1978), cert. denied, 439 U.S. 965, 99 S. Ct. 453

Mattz v. Arnett, 412 U.S. 481, 504, 93 S. Ct. 2245 (1973)

Solem v. Bartlett, 465 U.S. 463, 470, 104 S.Ct. 1161 (1984)

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-152, 93 S.Ct.

1267, 1271-72, 36 L.Ed.2d 114 (1973).

III. Whether lands taken into trust status under the authority of the Indian Reorganization Act are part of the Yankton Indian Reservation.

United States v. John, 437 U.S. 634, 652, 98 S.Ct. 2541, 2551 (1978)

Ute Indian Tribe v. Utah, 114 F.3d 1513, 1530 (10th Cir. 1997), cert. denied, 522 U.S. 1107, 118 S. Ct. 1034 (1998).

United States v. Azure, 801 F.2d 336, 339 (8th Cir. 1986).

United States v. Papakee, 485 F.Supp.2d 1032, 1037 (N.D. Ia. 2007)

IV. Whether allottments continuously held by Yankton Tribal members in trust and fee status are part of the Yankton Indian Reservation.

United States v. Webb, 219 F.3d 1127, 1130-1131(9th Cir. 2000), cert. denied, 522 U.S. 1107, 121 S.Ct. 1208.

United States v. Pelican, 232 U.S. 442, 447, 34 S.Ct. 396 (1914)

Ute Indian Tribe v. Utah, 114 F.3d 1513, 1530 (10th Cir. 1997), cert. denied, 522 U.S. 1107, 118 S. Ct. 1034 (1998)

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 681 (9th Cir. 1976)

V. Whether State and County are barred by the case mandate, res judicata, and collateral estoppel from arguing Article VIII reserved lands are not part of the Yankton Indian Reservation, and that the Reservation is disestablished.

Invention Submission Corp. V. Dudas, 413 F.3d 411, 415 (4th Cir. 2005).

Banks v. Internat'l. Union Electronic, Electrical, Technical, Salaried

and Machine Workers, 390 F.3d 1049 (8th Cir. 2005)

Kolb v. Scherer Brothers Financial Serv's., 6 F.3d 542 (8th Cir. 1993)

VI. Whether the District Court erred in not considering whether allottments illegally sold, including allotments of deceased tribal members with heirs prior to 1916, remain reservation under Articles XI, XIII, and XIV of the 1894 Agreement.

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir 1999)

Torbit v. Ryder System, Inc., 416 F.3d 898 (8th Cir. 2005)

United States v. Ortega, 150 F.3d 937, cert. denied (8th Cir. 1998), 525 U.S. 1087, 119 S.Ct. 837

STATEMENT OF THE CASE

The Yankton Sioux Tribe filed suit to halt the construction of a landfill on lands within the 1858 Reservation boundaries. The District Court held that the 1894 Act did not diminish the 1858 Reservation boundaries. Yankton Sioux Tribe v. Southern Missouri Waste Management et. al., 890 F. Supp. 878, 891 (D.S.D. 1995) SAdd. 33. That ruling was affirmed by this Court. Yankton Sioux Tribe v. Southern Missouri Waste Management, 99 F.3d 1439, 1457 (8th Cir. 1996) SAdd. 58. On review, the Supreme Court held that the Yankton Indian Reservation was diminished but not disestablished by lands ceded in Article I of the 1894 Act. South Dakota v. Yankton Sioux Tribe, 522 U.S.

329, 357, 118 S. Ct. 789 (1998) SA 88. This Court remanded the case back to the District Court for further proceedings. Yankton Sioux Tribe v. Southern Missouri Waste Management, 141 F.3d 798 (8th Cir. 1998).

In 1998 the State and County filed notice that they were asserting criminal jurisdiction over tribal members on allotted lands held in fee status. The Tribe commenced litigation to restrain the State and County. Yankton Sioux Tribe v. Gaffey, 14 F. Supp.2d 1135 (D.S.D. 1998) SAdd. 89. After consolidation with Southern Missouri Waste Management, the District Court held the Yankton Indian Reservation included all original allotments and enjoined the State and County. Id. at 1159-60, SAdd. 116.

The State and County appealed. The Eighth Circuit Court of Appeals affirmed in part and reversed in part, and remanded the case. Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1030 (1999), SAdd. 141. The Court determined the scope of the case was "the undetermined current status of the 262,000 acres originally allotted to tribal members . . . ." It further stated it would address "whether the Yankton Sioux Reservation was disestablished, and if not, whether the reservation has been diminished beyond the nonceded lands." Id. The Court concluded that the 1894 Act and its legislative history did not disestablish the Yankton

Reservation. Id. at 1027, SAdd. 138.

The Court concluded that the 1894 Act diminished the reservation by the ceded land and "the land which it foresaw would pass into the hands of white settlers and homesteaders." Id. at 1028, SAdd 138. Ultimately, the Court held that, "[t]he judgments of the district court are affirmed in so far as the court concluded that the Yankton Sioux Reservation has not been disestablished . . . ." Id. at 1030, SAdd. 141. The Supreme Court denied certiorari. South Dakota v. Yankton Sioux Tribe, 530 U.S. 1261, 120 S. Ct. 2717 (2000).

On remand, the District Court excluded from consideration the status of rights of way, subsurface estates, over 300 forced fee patents on allotted lands, lands held by the Corps of Engineers, and disestablishment arguments. Yankton Sioux Tribe v. Podhrasky, Slip Opinion, 2006 WL 3703274 at 2-3, (D.S.D. December 13, 2006). T Add. 2, 3.

The District Court held that the following lands remain part of the Yankton Reservation:

> (a) land reserved to the federal government in the Act of August 15, 1894, Ch. 290. 28 Stat. 286, 314-319, and then returned to the Yankton Sioux Tribe; (b) lands allotted to individual Indians that remain held in trust; © land taken into trust under the Indian Reorganization Act of 1934; and (d) Indian owned fee land that has continuously been held in Indian hands.

529 F. Supp. 2d 1040, 1042, T Add. 6. The District Court found that "the law of this case is that the Yankton Sioux Reservation has been diminished and not disestablished." Id. at 1044, TAdd. 9.

STATEMENT OF FACTS

1. The Treaty Era - 1858-1894.

The Treaty of 1858 between the Yankton Sioux Tribe and the United States government granted the United States over 11 million acres of Yankton Sioux tribal land on certain conditions set forth in the Treaty. 11 Stat. 743, TA 12-19. Article I specified that all lands in the Tribe's possession were to be ceded except four hundred thousand acres. TA 12. In return, the United States agreed to stipulations on the sale, including an agreement, "[t]o protect the said Yanctons in the quiet and peaceable possession of the said tract." Article 4, TA 14. Article 9 granted the United States, "the right to establish and maintain such military posts, roads, and Indian agencies as may be deemed necessary within the tract of country herein reserved for the use of the Yanctons." TA 17. Article 10 provided that non-Indians were not permitted to establish homesites within the Reservation, Indians were not allowed to sell lands within the Reservation,

and provided for allotment of the Reservation to tribal members. TA 18.

The 1887 Dawes Act authorized the President of the United States to allot 80 acres to each tribal member within established reservations. 24 Stat. 388, preamble, TAdd. 22. However, larger allotments were allowed, "where the treaty or act of Congress setting apart the reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided . . . ." Id. The Dawes Act also authorized allotments on public lands for Indians not residing on a reservation or "for whose tribe no reservation has been provided by treaty, act of Congress, or executive order . . . ." 24 Stat. 389, §4, TAdd. 23. Section 5 gave the President discretion to extend the trust period on such allotments beyond twenty-five years. Id. In addition, Section 5 authorized the Secretary of Interior

> to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of the reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians . . . .

Id.

The land in the 1858 Treaty was set apart for the Yankton Sioux Tribe prior to the existence of the State of South Dakota. Allotment of the

land started before South Dakota was a state under the Article 10 of the 1858 Treaty and the 1887 Dawes Act.

On November 2, 1889, South Dakota was admitted to the Union of the United States. As a condition of its admission, the South Dakota Constitution contains Article XXII - a "compact with the United States," pursuant to which the people of South Dakota:

> do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes . . . .

TAdd. 21.

In 1892, the United States appointed three Commissioners to negotiate with the Yankton Sioux Tribe for additional Yankton lands. Senate Exec. Doc. 27, 53d Congr., 2d Sess., SA 301 -351. The 1892 Agreement was enacted into law on August 15, 1894. 28 Stat. 314-319, SA 352.

This Commission was not the first to negotiate for sale of lands with the Yankton. In 1884, a Commission attempted to secure sale of "305,000 to 350,000 acres of their choicest lands in one solid body," but was unsuccessful. SA 307 (p. 12-13, par. 3 -4).

The Tribal Committee of 24 authorized to negotiate sale of lands did

not consent to sale. SA 337 (page 73).When the Tribe said no, the Commissioners informed the Tribe that, "[o]ur mission is to the Yankton tribe and it requires a majority of the adult male members of the tribe to decide this matter . . . We cannot recognize this action". SA 339 (page 76). There were ten meetings between the Tribe and the Commission over three months ending on December 31, 1892, but the required majority of signatures were not obtained until March 8, 1893. Yankton Sioux Tribe v. Gaffey, 14 F. Supp.2d at 1148, SAdd 104; SA 349. The Commissioners secured a bare majority of 254 out of 458 Yankton members signatures under allegations of fraud and duress. SA 303 (p. 5, par. 2); SA 318-320.

During the meetings, Commissioner Cole assured the Tribe,

> [you] not only have a home as a tribe, but every man, woman, and child among you each ***has a home which no one can take away from you*** and the Great White Father wants you to always keep these homes and live on them in peace and comfort like white men, and be citizens and have plenty.

SA 325 (p. 49, last par.) (Emphasis added). Henry Stricker, a tribal member replied, "if you will help we hope we will make a treaty that will be beneficial to us as a tribe." SA 326. In submitting the agreement to Congress, the Commissioners informed Congress,

> ***That the Indians were not selling their whole reservation,***

> ***but less than two-fifths of it, and that more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it . . .We think the value of these surplus lands per acre would be doubled if the whole reservation were being disposed of by the Indians***.

SA 307 (p. 12, par. 1) (emphasis added).

The Commissioners enlisted the support of Reverend Williamson to encourage tribal members to sign the Agreement, and read to the Tribe his opinion that, "there is no cause for apprehension that this agreement will in any way interfere with the Treaty of 1858." SA 343 (p. 84, par. 2).

Commissioner of Indian Affairs Armstrong reported to Congress with the submission of the Bill that "the treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." SA 303 (p. 4, par. 8). Significantly, Armstrong reported to Congress in 1893 that the Yankton had, "not signified their assent that such reservation might be embraced within the Territory of Dakota or State of South Dakota," and that the "United States exercises sole and exclusive jurisdiction over the reservation except in so far as it may see fit to grant the State the right to exercise jurisdiction." TA 24.

The 1894 Act preamble stated the Tribe "is ***willing to sell a portion of the land set apart and reserved*** to said tribe, by the first article of the

treaty of April (19th) nineteenth, eighteen hundred and fifty eight (1858) between said tribe and the United States . . . ." SA 352 (emphasis added). The sale of the unallotted lands under Article I of the 1894 Act was conditioned on the acceptance of nineteen additional articles, including Article VIII, requiring the reservation from sale to homesteaders of lands occupied "by the United States for agency, schools, and other purposes . . ."SA 354. Article XI provided for the sale of allotments of tribal members who "within twenty-five years die without heirs. . . ." SA. 355. Sale proceeds were to go to the tribal fund. Id. Under Article XIII, the United States agreed that

> [a]ll persons who have been allotted lands on the reservation described in this agreement . . . shall enjoy the undisturbed and peaceable possession of their allotted lands and shall be entitled to all rights and privileges of the tribe enjoyed by full-blood Indians.

SA 355. Article XIV reinforced this reservation of allotted lands from taking, stating, "Congress shall never pass any act alienating any part of these allotted lands from the Indians." SA 355. Finally, Article XVIII declared that, "Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton Tribe of Sioux Indians and the United States." SA 356. These clauses of the Agreement were

demanded by the Tribe. They were not part of the form Agreement the Commissioners started out with, which included six articles - none of which guaranteed the allotments would be undisturbed. TA 161-164.

On May 16, 1895, President Cleveland issued a Proclamation opening the unallotted ceded lands except agency reserves under Article VIII to settlement under the Agreement, "***subject to all the conditions , limitations, reservations, and restrictions contained in said agreement*** . . . ." TA 73 (Emphasis added).

2. Tribal and Federal Superintendence 1895-1933.

United States and Tribal superintendence over tribal lands continued when the allotments were completed and ceded lands were homesteaded. The Tribe continued to govern its affairs through a General Council and the United States maintained a Court of Indian Offenses and an Indian police force as it had done since before South Dakota became a state. TA 60-62. The Court of Indian offenses and the tribal police force were the only law enforcement and court presence on the Yankton Reservation - the state did not exercise jurisdiction over Indians. TA 53-68. Despite the State's claim that "tribal members were selected to be county election officials" in 1896, the State only references consisting of names with no designation of tribal

membership or non-membership. SA 363-364. Likewise, the handwritten notes do not specify that Indians on allotments had any participation in county affairs, or that the designation "former Yankton Indian reservation" in the notes included nonceded lands. SA 367. The Commissioner of Indian Affairs Report shows the County did not accept Indians on non-ceded lands as voters, TA 24 (p. 307, par. 3), and the State voted in 1902 not to exercise jurisdiction on Indian Reservations.; TA 69-71.

Congress reaffirmed its treatment of the Yankton Indian Reservation as intact despite the opening of lands to homesteading in 1895, when it passed an Act granting "all settlers who made settlement under the homestead laws ***upon lands in the Yankton Indian Reservation*** . . . leave of absence from such homestead for one year . . . ." Act of February 26, 1896, 29 Stat. 16 **(**emphasis added).

Allotments made under the 1894 Act remained in trust until 1906. The Burke Act amended section 6 of the 1887 Dawes Act, in relevant part, as follows:

> That hereafter, when an allotment of land is made to any Indian, and such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of Interior shall ascertain the legal heirs of such Indian, and shall cause to be

> issued to such heirs and in their name, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs...

TAdd. 25-26, 34 Stat. 182-183. Notably, the 1906 Burke Act did not amend Section 5 of the Dawes Act, which permitted specific conditions and terms of allotment in individual agreements with Tribes, including the 1894 Act. TAdd. 22-23. Further, the 1906 Burke Act specifically stated that it applied to allotments made post-enactment. TAdd. 26.

Despite the inapplicability of the Burke Act to the Yankton Reservation, the Yankton Agent ***illegally*** sold trust allotments upon the death of tribal members with heirs from 1907 until 1918. SA 408-421. The Tribe has filed these claims with the Department of Interior. SA 432, 435-36 (Yankton is number A08344). The statute of limitations only applies to monetary claims and does not affect land claims. SA 432.

In 1916, Executive Order 2363 extended the trust period on all but 150 allotments on the Yankton Reservation. SA 425. The trust period was extended again by Executive Order 4406 on March 30, 1926. TA 48.

Congress continued to refer to the Yankton Indian Reservation in its legislative enactments. In 1920, Congress directed the Secretary of Interior

to convey title to reserve lands set aside in Article VII of the 1894 Agreement to a church. Congress described the lands so conveyed as lands, "***situated within the Yankton Indian Reservation***." 41 Stat. 1468 (1920) (emphasis added)**.** The church conveyed title to the Tribe on January 12, 1945. TA 75-88 (Ex. 201, 201 c, and 201d).

When Congress created the four divisions of the United States District Court for South Dakota, it described the Southern District as including "[t]he territory embraced ... in the counties . . . Charles Mix, . . . Yankton, and ***in the Yankton Indian Reservation*** . . . ." Act of June 11, 1932, ch. 242, 47 Stat. 300 (emphasis added).

3. The Acts of 1927 and 1929.

In the period from 1927 to 1934, Congress curtailed Executive Branch discretion in Indian Affairs. In 1927, Congress passed a law authorizing the Secretary of Interior to cancel fee patents previously issued. Act of February 26, 1927, ch. 215, 44 Stat. 1247 (1927). This was enacted in response to complaints that allotments were being fraudulently obtained from allottees who were not competent. The Yankton tribal members filed such a claim, but this Court restrained the Secretary of Interior from cancelling the patents fraudulently issued. United States v. Caster, 271 F.

615 (8th Cir. 1921)

At the same time Congress expanded executive branch authority to retain trust lands, Congress completely removed Executive Branch authority to alter the boundaries of Indian Reservations in 1927 with the passage of the Act of March 3, 1927, c. 299, §4, 44 Stat. 1347, TAdd. 27. That Act stated, "***[c]hanges in boundaries of reservations created by Executive Order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress***." Id. (emphasis added).

The trust period on Yankton Reservation allotments was extended again by Executive Order 5173 on August 9, 1929. TA 49. In 1929, Congress also transferred exclusive use rights to lands reserved in Article VIII of the 1894 Act back to the Yankton Sioux Tribe, describing reserve lands as, "***on the Yankton Sioux Indian Reservation***." Act of February 13, 1929, ch. 183, 45 Stat. 1167, TAdd. 29. (emphasis added). This Act explicitly evinced Congress' 1929 understanding that the lands reserved in Article VIII of the 1894 Agreement were ***within*** the Yankton Sioux Reservation in 1929 - they were not the sum total of or outside the Reservation.

4. The Indian Reorganization Act of 1934.

The final blow to the Executive Branch's unregulated discretion in Indian affairs was the Wheeler-Howard Act (the Indian Reorganization Act of 1934 (IRA)). 48 Stat. 984-988 (1934), codified at 25 U.S.C. §461 et. seq., TAdd. 30-32. The purpose of the IRA was to halt the loss of Indian lands from the allotment and land sales acts. Chase v. McMasters, 573 F.2d 1011, 1016 (8th Cir. 1978), cert. denied, 439 U.S. 965, 99 S. Ct. 453. The preamble to the 1934 Act describes the IRA as "[a]n Act to conserve and develop Indian lands." 48 Stat 984, TAdd. 30. The IRA accomplished its stated purpose by eliminating Executive Branch authority to allot lands within a reservation and extending trust periods on existing allotments "until otherwise directed by Congress." Id.

The IRA authorized the Secretary of Interior, "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale . . ." Id. The means for such restoration were set forth in Sections 5 and 7 of the IRA, which authorized the Secretary to acquire any interests in land "within or without existing reservations . . .for the purpose of providing land for Indians." 48 Stat. 985, TAdd. 31. Section 7 granted the Secretary broad authority to either proclaim new Indian reservations, or to add lands acquired to existing

reservations. 48 Stat. 986, TAdd. 31. Pursuant to that authority, the Secretary of Interior has been placing lands into trust as part of the Yankton Reservation in the name of the Tribe and in the name of individual Indians since 1934. TA 106-116.

5. Post-1934 Congressional Treatment of Yankton Indian Reservation.

In 1948, Congress for the first time enacted a comprehensive definition of Indian Country, now codified at 18 U.S.C. §1151. Act of June 25, 1948, c. 645, 62 Stat. 757. All lands within Indian reservations were to be included as Indian Country irrespective of the issuance of fee patents on allotments. 18 U.S.C. §1151(a). Congress also enacted the Supervised Sale Act of 1948 granting the Secretary authority to issue fee patents to allottees. Supervised Sales Act of May 14, 1948, c. 293, 62 Stat. 236, codified at 25 U.S.C. §483.

In 1992, Congress funded a project to irrigate "not more than approximately three thousand acres ***of Indian owned land in the Yankton Sioux Indian Reservation*** . . . ." Pub. L. No. 102-575 §2005(b)(1992) (emphasis added)**.** In 2002, Congress established a compensation fund for the Yankton Sioux Tribe, and recognized that, "***the Fort Randall Project***

overlies the western boundary of the Yankton Sioux Indian Reservation."
Yankton Sioux and Santee Sioux Tribes Equitable Compensation Act, Pub. L. 107-331, 116 Stat. 2834, 2838, et. seq. (2002) (emphasis added).

The United States and the Tribe exercised criminal jurisdiction cooperatively over Indians on allotments held in fee from 1995 until the Court's ruling in 1999, just as they had in the late 1800's through the 1900's, and such exercise ran smoothly. TA 1-4; TA 24; TA 53-65; TA 70-71; SA 73-75. The State admits it has never asserted criminal jurisdiction over any lands held in trust status in Charles Mix County. TA 3-4. Exclusive Federal and tribal superintendence over all trust lands was firmly established and found to exist by the District Court on remand in this case. 529 F. Supp.2d 1040, 1055-1057, TAdd. 7.

6. Population

The District Court excluded new population evidence. Nov. 8, 2007 Order, Doc. 399. However, the BIA Labor Force Reports from 1992 through 1995 indicate that the population of Indians on unceded lands has been increasing at a high rate, TA 42-47. The 2000 Census, which is public record, demonstrates that within the main allotment area of the 1858

Yankton Reservation boundaries, 48.2 % of the population is Indian, and in the southwest region, 33.8% of the population is Indian. TAdd. 33. The northern portion of Charles Mix County outside the 1858 boundary is .4 % Indian by contrast. TAdd. 33. Further, land ownership is not synonymous with population. Twenty-eight percent (28%) of tribal members living within the 1858 boundaries rent their homes. TAdd. 34-35. The United States Census Bureau acknowledges that the Census undercounts the Indian population. TA 7-11. If this Court is going to make determinations about the Reservation's status based on the "Indian character" of the area, additional evidence should be taken.

SUMMARY OF THE ARGUMENT

This case commenced when the State and County asserted criminal jurisdiction over Indians on allotted lands now held in fee status by non-Indians. It is not about tribal jurisdiction over non-Indians. It is about the extent to which, and on what lands, the Tribal members have an expectation of federal supervision and superintendence and not State jurisdiction. The state continues to re-assert Missouri Waste Management, but the location of that dispute was on lands the Supreme Court held to be ceded lands under the Act of 1894. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 357,

118 S. Ct. 789 (1998), SAdd. 88. That case is no longer a live controversy.

On this latest remand, the District Court correctly concluded that the Yankton Sioux Tribe retains all lands in trust status as well as lands continuously held by tribal members in fee status. The District Court erred in declining to consider whether allotted lands retained under the 1894 Agreement between the Tribe and Congress, but illegally sold by the Department of Interior in violation of Articles XI, XIII, and XIV of the 1894 Agreement, are part of the Yankton Reservation. SA 352-358. The Court also erred in finding that the 1927 Act and the 1934 Indian Reorganization Act did not end Executive branch authority to diminish the Yankton Sioux Reservation by land sales.

If this Court rules in favor of the State and the County, it will have accomplished what one hundred years of attempts to eliminate Tribal Nations through the Department of War, the creation of the Reservation System, the Assimilationist Policies of the early 1900's and the Termination era of the 1950's could not accomplish. To hold that this Reservation has been disestablished would ignore one hundred and twenty years of case law in this Nation holding that treaties and Congressional acts are to be read strictly and interpreted as the Tribal nation affected would have understood

them; and that congressional intent to diminish or disestablish Reservations will not be implied - it must be express in the actual language of the Treaty or Congressional Act. Solem v. Bartlett, 465 U.S. 463, 470, 104 S. Ct. 1161 (1984); United States v. Dion, 476 U.S. 734, 738-40, 106 S. Ct. 2216 (1986); Washington v. Washington State Commercial Passengers Fishing Ass'n., 443 U.S. 658, 675-6676, 99 S. Ct. 3055 (1979).

The ensuing re-litigation of already well-settled jurisdiction of tribal lands held by over five hundred federally recognized tribes in this Nation will result in another hundred years of legal battles draining the resources of the already-overtaxed tribal governments struggling to provide for their people. The State of South Dakota has already evinced an intent to take advantage of each and every court ruling that would give them any traction to re-open the longstanding opinions of the courts regarding each of the present day Reservations in South Dakota. Each time a case in another state occurs, the State of South Dakota re-opens old wounds. The prime example is the State analogizing the Alaska Native Claims Settlement Act to the Dawes Act by continually referencing the case of Alaska Native Villages v. Venetie. 522 U.S. 520, 118 S. Ct. 948 (1998).

The State's failure to abide by its own Constitution and voter

referendum declining jurisdiction over Indian people and Indian lands, and seemed inability to look to a new day and a new future in which the terms "settlers" and "Indians" are replaced by the terms "citizens" should not be fueled by this Court adopting a novel new legal theory that the removal of allotted land from trust status without congressional authorization coupled with generic land sale acts disestablished the Yankton Sioux Indian Reservation. A rejection of the State's attempt to re-litigate the existence of the Yankton Sioux Indian Reservation would send a clear message to the State of South Dakota - no means no.

The Yankton Sioux Reservation is not unique. It is identical to reservations diminished by lands sales throughout this Nation that still retain allotments and tribal trust lands. The Yankton 1894 Act is more similar to the Acts and Agreements with the Nez Perce, Colville Tribe, Walker River Reservation, and Tulalip Tribe than it is to Sisseton's Agreement. See, United States v. Webb, 219 F.3d 1127, 1130-1131(9th Cir. 2000), cert. denied, 522 U.S. 1107, 121 S. Ct. 1208 (Nez Perce); United States v. Pelican, 232 U.S. 442, 447, 34 S. Ct. 396 (1914) (Colville); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 681 (9th Cir. 1976) (Walker River); United States v. Celestine, 215 U.S. 278, 285-286,

30 S. Ct. 93 (1909) (Tulalip allotments did not extinguish reservation). See also, Melby v. Grand Portage Band of Chippewa, 1998 WL 1769706 (D. Minn. 1998) (unpublished)(allotments not ceded are reservation lands). To rule in favor of the State and County would open all of the above cases to relitigation on a novel legal theory that Tribal Reservations can be disestablished ***de facto*** by executive actions selling lands ***unauthorized*** by Congress even where the tribe and its members have retained lands.

The termination and elimination policies of the Federal government ended in 1934. The 1927 Act and 1934 Indian Reorganization Act set a new course for restoration of Tribal land bases and jurisdiction, and halted the diminishment of reservations by executive branch lands sales. The persistent State machinery of diminishment must be ended in South Dakota so the Tribes of South Dakota may focus on poverty reduction, decent health care, and preservation of the irreplaceable cultural and linguistic diversity that are the Tribe's continuing legacy and a national treasure.

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). Evidentiary rulings are reviewed for abuse of discretion. General Electric Co. v. Joiner, 522 U.S. 136, 141, 188 S. Ct. 512 (1997).

CANONS OF CONSTRUCTION

Additional canons of constructions and standards of review required to interpret agreements with Indian tribes are set forth herein. Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. United States v. Dion, 476 U.S. at 738-40; Menominee Tribe v. United States, 391 U.S. 404, 413, 88 S. Ct. 1705 (1968). There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other 'and chose to resolve that conflict by abrogating the treaty.'" United States v. Dion, supra, at 740. Furthermore, "Indian treaties are to be interpreted liberally in favor of Indians." Washington State Commercial Passengers Fishing Vessel Assn., 443 U.S. at 675-676; Choctaw Nation v. United States, 318 U.S. 423, 432; 63 S. Ct. 672 (1943); Winters v. United States, 207 U.S. 564, 576-77; 28 S. Ct. 207 (1908). "A treaty was not a grant of rights to the Indians, but was a grant of rights from them - a reservation of those not granted.'" Washington State Commercial Passengers Fishing Vessel Assn., supra, at 680.

Likewise, in construing statutes ratifying agreements with Indian Tribes or unilateral actions of Congress, doubtful expressions are to be resolved in favor of Indian tribes. Confederated Tribes of the Chehalis Indian Reservation v. Washington, 96 F.3d 334, 342 (9th Cir. 1996), cert. denied, 520 U.S.1168, 117 S. Ct. 1432 (1997); Chaote v. Trapp, 224 U.S. 665, 675-76, 78, 32 S. Ct. 565 (1912); Antoine v. Washington, 420 U.S. 194, 199-200, 95 S. Ct. 944 (1975).

Finally, because this case involves the potential further diminishment of the Yankton Indian Reservation beyond the lands homesteaded under the 1894 Act, there are additional canons of construction applicable to this case.

> The first and governing principle is that ***only Congress can divest a reservation of its land*** and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until **Congress** explicitly indicates otherwise.

Solem v. Bartlett, 465 U.S. at 470 (emphasis added). "Congressional intent to diminish a reservation must be clear and plain." Dion, supra, at 738-739. Further,

> when both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

Solem, 465 U.S. at 473.

ARGUMENT

A. The Yankton Indian Reservation was established by the Treaty of 1858. It was diminished by the Agreement between the Tribe and the United States ratified by Congress in 1894. No subsequent Acts of Congress have further diminished the Reservation.

1. The 1858 Treaty and 1894 Agreement between the Tribe and the United States define the Yankton Reservation. These agreements must be read in accordance with the canons of construction applicable to treaties.

The 1858 Treaty entered into between the Yankton Sioux Tribe and the United States government became binding on both parties as of its ratification and subsequent Presidential Proclamation, under Article 17 of the Treaty. 11 Stat. 743, TA 19. It was ratified by the Senate on February 16, 1859 and by Presidential Proclamation on February 26, 1859. TA 19. Article I of the 1858 Treaty established the boundaries of the Reservation. TA 12-13. This treaty is to be construed not as a reservation of rights to the Tribe, but rather, a ***grant*** of certain rights to the United States. Washington State Commercial Passengers Fishing Vessel Assn., supra, at 680.

One of the reasons the Supreme Court has required a strict reading of treaties and agreements with Tribes in the 1800's is the relative weakness of Tribes in relation to the United States as contracting parties. The Supreme Court has held that "the United States, as the party with the presumptively superior negotiating

skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." Washington State Commercial Passenger Fishing Vessel Ass'n. 443 U.S. at 675-76.

Inequality was clearly present in 1892 when the negotiations for land sales happened. Both the Treaty Commission and the Yankton tribal members highlighted the advantages the United States had in the process: the Commissioners' mastery of English and the fact that ***they*** drafted the Agreement - not the Tribe, SA 330 (p.58, par. 1); the Commissioners' method of obtaining signatures by going house to house over the objections of the tribal negotiating committee, SA 343 (p. 85, par. 1); SA 348 (p. 95, John Noble letter), SA 338 (p. 75); and threats of starving out the tribal members if they did not sell a portion of their lands. SA 338-339 (p. 75-76). Commissioner Cole reported to Congress that "It is not exaggeration to say that some of these people suffer and even die for want of better care. They are not sufficiently housed, sufficiently clothed or sufficiently fed, and ample provision should be made for all these conditions." SA 310 (p. 18, par. 3).

Further reason to read this Agreement for the benefit of the Tribe is the Commission's failure to transcribe what they actually told tribal members when they explained the Agreement. The Senate Report shows the Commission

translated the Agreement in Dacotah, but the Senate Report never states what the tribal members were told. See, e.g., SA 342 (p. 82, 1st par.); SA 344 (p.86, par. 2); SA 346 (p.90, par. 3); SA 347 (p. 92-92, Jan 17, 1893 letter).

Articles XIII and XIV of the 1894 Act explicitly assured the Tribe that the allotted lands would not be forcibly alienated by any act of Congress, and that all tribal members would have the peaceable possession of their lands. SA 355. The Yankton people understood from the words of the 1892 Agreement, as translated into Dacotah from English, that they had the undisturbed use of lands they did not sell. Not having any experience with citizenship or with land "ownership," the 1894 Act's harkening to the 1858 Treaty language of "undisturbed and peaceable possession" signaled to the tribe that they retained the lands they did not sell. Cf. SA 355 and TA 14 (Article 4 of 1858 Agreement). [2]

This is bolstered by the Commission's report to Congress that the Yankton Tribe had not agreed to disposition of the whole reservation, but only a portion of it. SA 307 (p. 13). It is further bolstered by the Commissioner's report to Congress that "the ***inalienable*** allotted lands of the old people who will die during

[2]Likewise, Article XVIII would have been understood to preserve all of the provisions of the Treaty of 1858, a claim still supported to this day by members of the Yankton Sioux Tribe.

the next twenty-five years must of necessity be a valuable inheritance to their heirs living after them . . . ." SA 310 (p.18, par. 3)(emphasis added). These reports echo the actual language of the Treaty, which assured the Tribe that lands not sold remained their own. The Tribe only agreed to sale of allotments after the death of the allottee without heirs prior to 1916 under Article XI. SA 355.

Most notably, **the Commissioners *represented to Congress that the Tribe retained two-thirds of its Reservation when it signed the Agreement***. SA 307. Reverend Williamson, who was entrusted to keep the Tribe's copy of the Treaty, wrote a letter read to tribal members to convince them to sign that stated, "[a]nd further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." SA 343 (p. 84, par. 2).

The 1894 Act explicitly granted the United States only unallotted lands and allowed for further diminishment only by lands allotted to individual tribal members who died before 1919 without heirs under Article XI. SA 355. The grant of lands for homesteading was conditioned on Articles XII and XIV guaranteeing that "all persons who have been allotted lands on the reservation described in this agreement . . . shall enjoy the ***undisturbed and peaceable possession*** of their allotted lands, and shall be entitled to all of the rights and privileges ***of the tribe*** enjoyed by full-blood Indians." SA 355 (Emphasis added); and guaranteeing that

"***Congress shall never pass any act alienating any part of these allotted lands from the Indians***." SA 355. This was added at the Tribe's insistence. SA 329 (p. 57, par. 2), and was not part of the original form agreement the Commissioners started with. TA 161-164. It was further conditioned on the United States withholding from sale agency reserve lands under Article VIII as long as the land was needed for agency, school and other purposes. SA 354.

Further, the Commissioners assured the tribal members that the allotments they were reserving left plenty of land in the hands of the tribe for the future and for leasing to others, obviating the need for any further reserve of lands. SA 335 (p. 69, par.1-3). The Commissioners also assured the Tribe that they were getting the larger half of the lands if they agreed to sell, SA 335 (p. 68, par. 8), and that "the principle object of this treaty is to make all these lands valuable, both the allotted lands and the surplus lands." SA 335 (p.68, par.7). The Commissioners also represented to the Tribe that the "Great White Father"

> has told us to tell you that you will not be forced to part with your lands unless you want to. (How!) He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever. (How!) He only wants you to sell your surplus lands for which you have no use.

SA 325 (p. 49, par.4). Commissioner Cole stated that the Commission was

impartial and protecting the interests of the entire Tribe, stating "I think I can draw a treaty which will be equally satisfactory to the Government and to this tribe." SA 336 (p. 70). Commissioner Cole also told the Tribe:

> I have asked the Great Spirit to give me wisdom and show me how to make a treaty that will be fair for the Government and will be best for you - how to make a treaty that will benefit this tribe as long as you live, and make you a stronger and happier people.

SA 336 (p. 71).

Congress added terms that were not part of the 1892 agreement when they passed the 1894 Act. Notably, Congress reserved from sale the sixteenth and thirty-sixth sections in Congressional townships within the ceded lands for schools. SA 357. The Tribe would not have been aware of this as it was not added until Congress passed the 1894 Act. This did not affect the lands the Tribe did not cede. The provision reads,

> That the lands by said agreement **ceded**, to the United States shall . . . be opened to settlement, and shall be subject to disposal only under the homestead and town site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes. . . .

SA 357 (emphasis added). The school lands are located only in the northern half of the 1858 Reservation where most ceded lands are located. The only language

identifying allotted lands that both parties foresaw would pass into non-Indian control after the Agreement was signed is Article XI, which calls for the sale of the allotted lands of any tribal member who dies without heirs before the twenty-five year period of trust restriction is over. SA. 355.

Interpreting this Act, "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people," can result in only one conclusion: The Yankton Sioux Tribe did not ever agree to disestablishment, nor did Congress agree in passing the 1894 Act. Neither party agreed to alienation of allotments outside of Article XI. Choctaw Nation of Indians v. United States, 318 U.S. 423, 432, 63 S. Ct. 672, 678 (1943) (citations omitted). The courts have unanimously held that the existence of allotment provisions in an Agreement and the grant of citizenship do not evince termination of a Reservation. Mattz v. Arnett, 412 U.S. 481, 504, 93 S. Ct. 2245 (1973); United States v. Webb, 219 F.3d at 1135 (9th Cir. 2000). "A reservation was not necessarily terminated or diminished by the first step of allotment and sale of surplus land." United States v. Southern Pacific Transportation Co., 543 F.2d at 695 (9th Cir 1976); United States v. Pelican, 232 U.S. at 449; Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, 459 U.S. 977, 103 S. Ct. 314; United States v. Webb, 219 F.3d at 1135. Congress in 1894

knew how to expressly disestablish a reservation and did so in the 1890's numerous times. Mattz v. Arnett, 412 U.S. at 504; Confederated Salish and Kootenai Tribes, 665 F.2d at 955, fn. 4, fn. 7. ***There were no such express or overt acts regarding the Yankton Sioux Reservation.***

2. Congress has only twice explicitly altered the language of the Yankton Agreement.

Because Congress and the Yankton Sioux Tribe did not agree to sale of the entire reservation or even further diminishment by sale of allotments, except allotments for whom there were no heirs prior to 1916, the only source of further diminishment of the Yankton Reservation would be a unilateral Act of Congress after 1894. Congress has only passed two Acts specifically amending the terms of the 1894 Act. First, in 1920, Congress passed a law allowing acreage within the lands reserved to the United States under Article VIII to be devised to the "Yankton Agency Presbyterian Church, by patent in fee, the following described premises situate [sic] within the Yankton Indian Reservation . . . ." 41 Stat. 1468 (1920), SA 354. Second, in 1929, evincing the changing mood in Congress that led to the passage of the 1934 IRA, Congress restored exclusive beneficial use of Article VIII reserve lands to the Tribe, describing those lands as, "***on the Yankton Sioux Indian Reservation."*** 45 Stat. 1167, T. Add. 29 (emphasis added).

3. Congress has Never Unilaterally Abrogated the 1894 Agreement.

Executive branch officials have no authority to divest the United States of title to its lands unless such action is within the bounds of authority delegated by Congress. Royal Indemnity Co. v. United States, 313 U.S. 289, 204, 61 S. Ct. 995 (1941); Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 740(8th Cir. 2001), cert. denied, 353 U.S. 988, 122 S. Ct. 1541 (2002). Therefore, fee patenting and sale of allotments had to be done in accordance with applicable law. In the case of Yankton, the applicable law is the 1894 Act unless unequivocally modified by later Congressional act. The 1906 Burke Act did not modify the 1894 Act or provide any authority to alienate allotments made under the 1894 Act. The 1906 Burke Act amended Section 6 of the 1887 Dawes Act, by permitting sale of allotments made under the generic authority of the Dawes Act. TAdd. 23, 26. It did not, however, amend Section 5 of the Dawes Act, under which the 1892 Agreement with Yankton was made, and which authorized allotments of more than 80 acres with different restrictions than those allotments made under sections 1 and 5 of the Dawes Act. TAdd. 22-23. The 1894 Act conditioned allotment authority under Article XIV upon Congress' commitment not to pass any act alienating allotments under Article XIV. SA 355.

Thus, Congress did not alter the 1894 Agreement it made with Yankton pursuant to Section 5 of the Dawes Act by passing the Burke Act. The Yankton Agent's advertisement and sale of lands for which there were heirs from 1906 until 1918 was illegal, and therefore could not have diminished the Reservation. SA 408-421. The Tribe did not agree under the 1894 Act to allow the sale of heirship lands for which there were heirs. It only agreed to diminishment of its holdings by sale of allotments when there were no heirs under Article XI. SA 355.

The issue of the status of allotted lands taken by forced fee patents was not permitted to be argued on remand in this case. Yankton Sioux Tribe v. Gaffey, 2006 WL 3703274 (D.S.D. 2006) TAdd 3. This was error as it is impossible to determine which of the allotments now held in fee status were contemplated under the 1894 Act as "passing into the hands of white settlers . . ." without ruling on whether the Burke Act amended the 1894 Act. Yankton Sioux Tribe v. Gaffey, 188 F.3d at 1028, S Add. 138; Torbit v. Ryder System, Inc., 416 F.3d 898, 903-904 (8th Cir. 2005); United States v. Ortega, 150 F.3d 937, 945 (8th Cir. 1998), cert. denied (8th Cir. 1998), 525 U.S. 1087, 119 S. Ct. 837.

B. The Yankton Reservation has been altered by subsequent Acts of Congress to Halt Diminishments Occurring as a Result of Executive Branch action.

1. The 1927 Act halted changes in Reservation Boundaries made without Congressional authorization by the Executive Branch of government.

The 1927 Act was passed in a time when the Secretary of Interior used unfettered discretion to add and subtract land from Indian Reservations without regard for Acts of Congress passed prior to 1927. Examples are highlighted in the case of Sioux Tribe of Indians v. United States, 316 U.S. 317, 62 S. Ct. 1095 (1942). The Executive Branch reserved land to create new reservations and to add land to existing reservations. See, Executive Orders Relating to Indian Reservations 1855 - 1922, Scholarly Resources, Inc. (1975). This practice of adding land to or creating new reservations without an act of Congress was banned in 1919. Act of June 30, 1919, 41 Stat. 3 (1919). But the Executive branch was still ***removing*** lands from reservations by Executive actions. Sioux Tribe, 316 U.S. at 320-321. In 1927, Congress put an end to the Secretary's actions changing the boundaries of reservations. Section 4 of the 1927 Act provided,

> That hereafter changes in the boundaries of reservation created by Executive Order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the

Secretary of Interior.
TAdd. 27.

Relying upon the Title of this provision printed at 25 U.S.C. §398d, and one statement in the Congressional record, the District Court held this provision did not apply to Reservations created by Treaty. Podhrasky, 529 F. Supp.2d 1135,1049 (D.S.D. 2007), TAdd. 12-13.

Under the canons of statutory construction, courts look only to the words of the Act of Congress, unless there is some ambiguity in the words in the Act. Fairport v. Meredith, 54 S. Ct. 826, 828, 292 U.S. 589, 54 S. Ct. 826 (1934); Barnhart v. Sigmon Coal Company, Inc., 534 U.S. 438, 452, 122 S. Ct. 941 (2002). Each word in a statute is to be given effect. United States v. Menasche, 348 U.S. 528, 538-39, 75 S. Ct. 513 (1955). If the language of a statute is unambiguous, review of legislative history as an extrinsic aid is unnecessary, and statements in the Congressional record cannot be used to undermine the clear language of a statute. Barnhart, 534 U.S. at 452.

Other courts have held that the words "or otherwise" have a broadening effect, and mean "in any other manner." Duncan v. Omaha & Council Bluffs Street Ry. Co., 106 F.2d 1, 3 (2nd Cir. 1939), cert. denied, 309 U.S. 661, 60 S. Ct. 513 (1940). If treaty reservations are excluded, the word "otherwise" cannot take its

natural meaning of "in any other way." The words used in this enactment of Congress are clear. No changes in reservations will be made except by Act of Congress, irrespective of how that reservation was created.

Under the District Court's reading, only reservations created by Executive order or proclamation are protected. It would be odd for Congress to accord more protection to reservations created by executive branch action than it accords to reservations created by specific Act of Congress or by Treaty, particularly when reservations created by executive order or proclamation had been given no protection from executive action in the past unlike Treaty and congressionally created Reservation. The natural reading of the provision is that however a reservation was created, the executive branch has no authority to change the boundaries without an enactment of Congress authorizing those changes.

Reliance on the title of the act to limit its application to Executive Order reservations is not proper if the words of the statute are imminently clear. United States v. Sabri, 183 F. Supp. 2d 1145 (D. Minn. 2002), rev'd in part on other grounds, 326 F.3d 937 (8th Cir. 2003), aff'd and remanded, 541 U.S. 600, 124 S. Ct. 1941, 158 L.Ed.2d 891. This is particularly true in this case where the title of the section was not put in the 1927Act, but was added during printing in the United States Code. Cf. Act of March 3, 1927, c. 299, §4, 44 Stat. 1347, TAdd.

27 and 25 U.S.C. §398d. Reference to one statement in the Congressional record is likewise not clarifying. 529 F. Supp.2d at 1049, TAdd. 12. The statement of a member of Congress does not express any distinction between executive order reservations and treaty reservations, simply noting they are both usually established on lands originally held by tribes. Id.

The Yankton Indian Reservation of 1858 was only effective upon issuance of a presidential proclamation in 1859, as required by the 1858 Treaty, Article XVII. TA 19. Similarly, the diminishment of the 1858 Reservation did not happen until the Presidential Proclamation of 1895 and subsequent purchases by homesteaders. TA 73. See also, Ash Sheep Co. V. United States, 252 U.S. 159, 166, 40 S. Ct. 241 (1902) (holding Crow Tribe retains interest in lands until sold to homesteaders under land sale agreement with Congress). The 1894 Act allowed additional executive action to further diminish the Yankton Reservation by sale of lands of allottees who died without heirs prior to the expiration of twenty-five years under Article XI. SA 355. These are executive actions. Given that the Yankton Reservation existed only upon Presidential Proclamation, and diminishments were done by Secretarial actions to withdraw allotments, it makes no sense to exclude the Yankton Indian Reservation from the operation of this statute.

Congress had already halted executive branch creation of Reservations in 1919, so further action in 1927 was directed at diminishments. At least one other court has held this is the natural reading of the 1927 Act. United States v. Southern Pacific Transportation Co., 543 F.2d at 686 (9th Cir. 1976) (Noting "changes in the boundaries of existing reservations by executive order were prohibited by the Act of March 3, 1927, ch. 299, s 4, 44 Stat. 1347 . . . .") To hold that the 1927 Act only applies to Executive Order reservations will create a split in the Circuits on the effect of this act.

2. The 1934 Indian Reorganization Act Prevents further Diminishment of the Reservation by Land Sales.

The Court correctly concluded that the 1934 IRA had two effects. First, it abolished the 1887 Dawes Act authority to allot lands and sell allotments. Podhrasky, 529 F. Supp.2d at 1050, TAdd. 13. The 1934 IRA also reinvested the Secretary of Interior with authority to take land into trust, and to either add that land to existing Indian reservations, or proclaim new Indian Reservations. Id. at 1054, TAdd. 31. The Indian Reorganization Act drastically altered Congressional policy by completely repudiating the Dawes Act of 1887 and the 1906 Burke Act. See, Solem v. Bartlett, 465 U.S. at 471-72; Mattz v. Arnett, 412 U.S. at 492, fn. 18; Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-152, 93 S. Ct. 1267,

1271-72 (1973); Chase v. McMasters, 573 F.2d at 1016.

Specifically, Section 4 states that "[e]xcept as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved . . . ." 48 Stat. 985, ch. 576, Section 4, TAdd. 31. Section 4 only allows land sales to Indian tribes, tribal corporations, and tribal members, and the voluntary exchange of lands when it "is expedient or beneficial for or compatible with the proper consolidation of Indian lands . . . ." Id.

Sections 1 and 2 of the IRA abolished the 1887 Dawes Act allotment and patenting authority. Section 1 provided that "hereinafter no land of any Indian reservation, created or set apart by treaty or agreement with Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian." TAdd. 30, 48 Stat. 984, ch. 576, Section 1. Section 2 provided that, "The existing periods of trust placed upon any indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." Id. The IRA therefore extinguished the authority of the Executive Branch to dispose of Indian lands through forced fee patenting. That restriction is still in place to this day.

3. No Act of Congress since the 1934 Indian Reorganization Act grants the Secretary of Interior authority to Diminish the Reservation.

The District Court erroneously held that the 1948 Supervised Sales Act authorized the continued diminishment of the Yankton Indian Reservation when it authorized the Secretary of Interior to issue fee patents on allotted lands. Podhrasky, 529 F. Supp.2d at 1051, TAdd. 13. The 1948 Supervised Sales Act only authorized the Secretary of Interior to issue fee patents for lands that were taken into trust for individual tribal members under the 1934 or 1936 Acts - not for lands originally allotted under the 1894 Act or any other Act of Congress prior to 1934. The Act is very short, stating,

> That the Secretary of the Interior, or his duly authorized representative, is hereby authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in land held by individual Indians under the provisions of the Act of June 18, 1934 (48 Stat. 984), or the Act of June 26, 1936 (49 Stat. 1967).

Section 5 of the 1934 IRA permitted the Secretary to acquire lands "within or without existing reservations." TA 31; 48 Stat. 984, 985. The 1936 Act gave the Secretary preference in acquiring public lands sold under any act of Congress. 49 Stat. 1967 (1936). Allotted lands that were allotted under the 1894 Act to the

Yankton tribal members were not lands held by individual tribal members under the 1934 or 1936 Acts of Congress. The Reservation stopped being diminished with the passage of the 1927 Act and again with the 1934 IRA.

Further, by 1948, Congress' understanding of Indian land had changed, and the concepts of title to land and jurisdiction over land were separated with the passage of 18 U.S.C. §1151(a), which includes in the definition of Indian country, "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." Act of June 25, 1948, c. 645, 62 Stat. 757, codified at 18 U.S.C. §1151(a). See, Gaffey, 188 F.3d at 1022, SAdd 132.

While the 1934 IRA was a broad and sweeping statute clearly intended to reverse the effect of allotment, the 1948 Supervised Sales Act had no intention of reversing the 1934 IRA policy of preserving tribal land and tribal jurisdiction, particularly in light of the enactment of 18 U.S.C. §1151(a) at the same time.

C. The 1934 Indian Reorganization Act granted the Secretary of Interior to Expand Indian Reservations, but not to Diminish them.

1. 25 U.S.C. §465 and §467 authorize the Secretary to add lands to an existing reservation and to place lands within a reservation in trust.

The 1934 Indian Reorganization Act had another effect on the Yankton

Indian Reservation besides halting its diminishment. It authorized the Secretary of Interior to expand tribal land holdings within the Reservation and the Reservation itself. As other Courts have held, "a successful program of rebuilding this land base requires the Secretary of Interior have a large measure of flexibility in acquisition of additional land." Stevens v. C.I.R., 452 F.2d 741 (9th Cir. 1971)

In South Dakota v. Department of Interior, South Dakota was before this Court arguing the Secretary could not take any lands into trust under the IRA because the IRA provisions for placing land into trust are unconstitutional. 423 F.3d 790 (8th Cir. 2006), cert denied, 127 S. Ct. 67. Now South Dakota is trying to use that case to argue a proclamation is required to add land to an existing reservation under 25 U.S. §467. That case was about whether lands could be taken into trust at all - not the effect of 25 U.S.C. §467. Id. This Court has ruled that in passing the IRA, Congress' intent to provide "lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policies sufficiently narrow the discretionary authority granted to the Department." Id at 798 (8th Cir. 2006).

Congress has continued to recognize that the Yankton Indian Reservation exists, by specific language in 1920, 1921, 1929, 1931, 1999, and 2002. Neither Congress nor the Secretary of Interior has required a proclamation to take lands

into trust as part of the existing Yankton Indian Reservation. TA 112-156, Ex. 203, 204, 206, 210, 211. Many of the lands disputed have been held continuously by either the tribe or its members. TA 106-156, Exhibits 203, 204, 206, 210, 211.

The State and County would have this Court declare that each tract continuously held by members and the Tribe in trust, or in trust and fee, cannot be part of the Reservation because it was held in fee status at some point in time, and the Secretary did not issue a proclamation that he was adding it to the Yankton Indian Reservation. But these lands have always been part of the Reservation. Most were never acquired by non-Indian homesteaders. TA 106-117. Over 5,000 acres of tribal trust land were always held in trust, first for allottees, and then for the Tribe. TA 112-117.

In essence, the State is arguing the Secretary only had authority to diminish the Reservation and not to expand it. Essentially, what the State is arguing would disturb the land acquisitions made by the Secretary for over 500 Tribes nationwide, and throw the long-settled understandings of all other tribes and states into disarray.

The State has no criminal jurisdiction over these lands, so the issue is moot. Neither the facts in Gaffey or Southern Missouri Management District are implicated by the result. Southern Missouri Waste Management District was

about whether the Environmental Protection Agency's requirements for landfills applied to a landfill built on fee land ceded under the 1894 Agreement. 99 F.3d 1439. Once the Supreme Court ruled, there were no remaining controversies in the case. South Dakota v. Yankton Sioux Tribe, 522 U.S. at 357. In Podhrasky, the issue is whether the State has criminal jurisdiction over tribal members on lands originally allotted in trust under the 1894 Act now held in fee by tribal members and non-indians. It does not implicate lands now held in trust.

2. A Proclamation is not required to place lands into trust on an existing reservation and to place lands within a reservation into trust.

If the Court is going to look at the "justifiable expectations" of non-Indians as a factor in deciding this case, the Court should look at the equally well-settled expectation of tribal members and the United States that the lands now held in trust are part of the Yankton Indian Reservation, and the well settled expectations of all tribes that the Secretary's acquisition of lands in their homelands, which they have not abandoned, do not require a proclamation under 25 U.S.C. §467. See, Confederated Salish and Kootenai Tribes, 665 F.2d at 964, n.30 (justifiable expectations of Tribal members are relevant).

Section 7 of the IRA clearly requires a proclamation to establish a "new reservation," but not for adding land within or to an existing reservation. T. Add.

32. The Department of Interior's regulation at 25 C.F.R. §151.2 (f) support this conclusion, stating

> *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.

This definition clearly includes all Yankton lands allotted under the 1894 Act. The State attempts to argue that the BIA Guidelines prohibit adding lands to an existing reservation without a proclamation. St. Br. at 35. Under the State's interpretation, land cannot be taken into trust on any reservation without a proclamation. But 25 C.F.R. §151(f) defines what an Indian reservation is for land acquisition purposes and includes the former reservation after a diminishment has occurred. Citizens Exposing Truth About Casinos v. Kempthorne is inapplicable, because it is a case about lands not within the definition under 25 C.F.R. §151.2(f). 492 F.3d 460, 469 (D.C. Cir. 2007).

Perhaps even worse, the State attempts to equate the status of Yankton's trust lands and allotted lands with lands at issue in Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 118 S. Ct. 948 (1998). Venetie involved whether lands held in fee status by corporations under state law were still

Indian country under 25 U.S.C. §1151(b), after Congress had:

> revoked the Venetie Reservation and all but one of the other reserves set aside for Native use by legislative or Executive action, 43 U.S.C. §1618(a); completely extinguished all aboriginal claims to Alaska land, §1603 . . .

Id. at 520. In contrast to Venetie, the Yankton Sioux trust lands have been under federal superintendence continuously. Unlike Venetie, the State has not asserted any jurisdiction over the trust lands - ever. TA 1-4. Indeed, South Dakota cannot assert jurisdiction over trust lands - such an assertion is unconstitutional under their own State Constitution, pursuant to which they forever foreswore jurisdiction over all lands held by the United States for Indian tribes and United States public domain. TAdd. 21. Further, South Dakota voters rejected Public Law 280 jurisdiction on reservations in the 1960's. Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164, 1167 (8th Cir. 1990), cert. denied, 500 U.S. 915, 111 S. Ct. 2009 (1991). Finally, Venetie specifically recognized that lands held in trust are Indian country under 18 U.S.C. §1151 as well as Reservation fee lands under federal superintendence. 520 U.S. at 527-529.

The State is reduced to arguing that the Tribe and the United States haven't shown to what degree the United States exercises "active control." St. Br. at 38-39. But, the case law firmly establishes that lands held in trust are under federal

superintendence. United States v. Azure, 801 F.2d 336, 339 (8th Cir. 1986); Ute Indian Tribe v. Utah, 114 F.3d 1513, 1530 (10th Cir. 1997), cert. denied, 522 U.S. 1107, 118 S. Ct. 1034 (1998); United States v. Papakee, 485 F. Supp.2d 1032, 1037 (N.D. Ia. 2007). Even in United States v. John, where the federal government did not provide a formal reservation for decades, but provided programming and funds, the Supreme Court found federal superintendence defeated the assertion that there was inadequate federal superintendence and therefore the lands were not Indian Country under 25 U.S.C. §1151(a). 437 U.S. 634, 652, 98 S. Ct. 2541, 2551 (1978).

Trust lands cannot be leased or encumbered without BIA approval. See, e.g., 25 C.F.R. §84.004 and §84.003 (listing all the regulations and parts governing encumbrances of trust land requiring secretarial approval). The BIA has been superintending encumbrance of all Yankton trust lands. T. 203-207. The BIA is not like a "downtown realtor" - it is a trustee whose approval is required. St. Br. at 39. Stevens v. C.I.R., 452 F.2d 741, 747 (9th Cir. 1971) (DOI is trustee whose consent is required).

The argument of South Dakota is very similar to the argument of Missouri in John - Yankton tribal members were citizens, St. Br. at 12, one was a County Court Clerk, St. Br. at 13, and the federal government was not a good supervisor,

St. Br. at 39-40. This Court should no more grant credence to these arguments than the Supreme Court did in the John case. There is one connection between the John and this case: "This argument may seem to be a cruel joke to those familiar with the history of the execution of that treaty . . . ." 437 U.S. at 653.

John illustrates where a proclamation is required - for entirely new reservations where no reservation existed before. Id. at 646. In that case, the Court held that the lands the Secretary of Interior purchased for members of the Choctaw Nation, who had **no Reservation** in the State of Mississippi, when proclaimed as a new reservation by the Secretary of Interior, were clearly Indian Country for purposes of federal criminal jurisdiction. Id.

3. Title to trust lands held by the United States cannot be challenged under the Quiet Title Act.

The State challenges United States title to some of the trust lands and argues they are not part of the Reservation because the titles are not properly marked. St. Br. at 49. The State is prohibited from challenging United States title to these lands in trust because of sovereign immunity and the twelve year statute of limitations under the Quiet Title Act. 28 U.S.C. §2409 et. seq. See, Alaska v. Babbitt , 182 F.3d 672, 675 (9th Cir. 1999); Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987). In Proschold v. United States, 90 Fed. Appx. 516, 2004

WL 324717, (9th Cir. 2004) (unreported), a similar challenge was rejected where lands were held by United States, recorded in BIA title plant, and had been in trust for over 50 years. There, the deed did not state it was acquired "in trust." Here, the deeds do state they are granted to the "United States of America in trust for the Yankton Sioux Tribe." Ex. 202a - 202aaa. All of the lands in question have been in trust status for over fifty years, except for Exhibit 202ee, in 1969 and Exhibit 202ff in 1971. Ex. 202a - 202aaa. Finally, every piece of land disputed has been recorded in the Aberdeen Title Plant for the BIA, and has been leased with BIA approval since acquisition. Id. The Charles Mix County Board of Equalization has recognized their trust status as well. TA 118, Ex. 206.

The State argues a 1980 memorandum from the Secretary of Interior applies *ex post facto* to prior acquisitions. St. Br. at 50-51. The memorandum does not state it applies *ex post facto*, and cannot defeat the restrictions of the Quiet Title Act. 28 U.S.C. §2409. Further, the State and County offer no evidence they have taxed or exercised any jurisdiction over these lands whatsoever - because they have not. TA 3-4.

4. The expectations of the State, County, and Individual non-Indians are not Implicated by this Holding.

The State reaches for some way to disenfranchise the Yankton Sioux Tribe

and its members from any land holdings. But the fact remains that the State, County, and non-Indian land holders' interests are not implicated by the distinctions the state is attempting to make.

The state does not and cannot have jurisdiction over lands held in trust status. Not under its own Constitution, not under federal law, and not even under its attempted reading of United States v. Stands. 105 F.3d 1565 (8th Cir. 1997), cert. denied, 522 U.S. 841, 118 S. Ct. 120. The language cited is *dicta*, as the courts have recognized on three occasions. South Dakota v. United States Dep't. of Interior, 401 F. Supp.2d 1000, 1010 (D.S.D. 2005), Podhrasky, 529 F. Supp.2d at 1055, T. Add. 19, United States v. Papakee, 485 F. Supp. 2d 1032, 1037 (N.D. Ia. 2007). Additionally in Stands, the Court had already ruled that Congress diminished the Rosebud Reservation by all of Mellette County including allotments, in part because allottees in Mellette County were given the option to select other allotments within the remaining Rosebud Reservation. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 611-612, 97 S. Ct. 1361 (1977). Here, we are dealing with allotments **never** ceded or alienated by congressional acts.

D. Lands originally constituting United States reserve lands under Article VIII of the 1894 Agreement and now held in tribal trust status are part of the Yankton Indian Reservation.

1. **The State is Barred by Res Judicata, Collateral Estoppel, and the**

Case Mandate, from arguing that Reserve Lands are Not part of the Reservation.

The Court already ruled in Gaffey, that the reserve lands are part of the Yankton Sioux Reservation. 188 F.3d at 1030. The "mandate rule" prohibits argument on this issue. Invention Submission Corp. V. Dudas, 413 F.3d 411, 415 (4th Cir. 2005), cert. denied, 546 U.S. 1090, 126 S. Ct. 1024. These arguments are further barred by collateral estoppel and *res judicata*. Banks v. Internat'l. Union Electronic, Electrical, Technical, Salaried and Machine Workers, 390 F.3d 1049 (8th Cir. 2005) (dismissal on collateral estoppel and res judicata upheld - same claims and same parties); Kolb v. Scherer Brothers Financial Serv's., 6 F.3d 542 (8th Cir. 1993) (dismissed on res judicata - same claims).

2. **The Reserve lands have always been under federal superintendence.**

Despite the State's attempt to confuse witnesses at trial into stating reserve lands are not under federal jurisdiction, the evidence shows the reserve lands have always been under federal superintendence. The lands that were part of the original United States reserve are located at Greenwood, White Swan, and Lake Andes. SAdd. 142. The reserves were used over the years to house homeless tribal members, provide a base for agricultural endeavors, and for administrative agency buildings of the Yankton Agency. TA 23; Ex. 201g. The Eighth Circuit

understood this when they determined the reserve lands were part of the Reservation. 188 F.3d at 1029. All the remand added was plat records. TA 74-105, Ex. 201a-2-1(I); SA 282-294.

The County Deputy who claims familiarity with agency reserve lands stated there is nothing there - "with the exception of thirteen occupied residential homes, which includes approximately six trailer homes." SA 286. State officials see nothing because they don't superintend the area, and are apparently blind to important aspects of tribal life. The Yankton Superintendent, however, identified the Yankton Sioux Tribe buffalo herd, two churches, tribal homes, and a cemetery "used nearly exclusively by tribal members." SA 293. Other reserve lands at White Swan and North and South Rouse contain churches, cemeteries, tribal member housing and Pow-Wow grounds. SA 293.

3. All original reserve lands currently held in tribal trust status are part of the Yankton Indian Reservation as established by the Act of 1929.

The 1929 Act clearly stated that it restored lands "on the Yankton Sioux Indian Reservation" to tribal ownership, making it clear the Reservation is comprised of more than just the Agency reserves. TAdd. 29, 45 Stat. 1167. If Congress had disestablished the Yankton Reservation in 1894, then in 1929,

Congress would have been establishing a new reservation. At that time, Congress knew how to establish a new reservation when its prior acts had taken an entire reservation away from a Tribe. It did so in 1925, 1928 and 1929 when it created new reservations for the Acoma Pueblo, and Koosharem and Kanosh Bands of Utah. Act of May 23, 1928, 45 Stat. 717 (Acoma Pueblo); Act of March 3, 1928, 45 Stat. 162 (Koosharem Band); Act of February 11, 1929, 45 Stat. 1161 (Kanosh Band).

The Interior official's statement referred to by the State evinces only a concern over increasing tribal self-determination - not state jurisdiction and is therefore irrelevant. St. Br. At 63, SA 427-428. In 1941, Interior Solicitor Felix Cohen confirmed that unceded lands were within the Yankton Indian Reservation. TA 50-51.

The church lands identified by the State were properly included in the Reservation as some were granted in fee to the Church in 1920 by an act of Congress describing the lands as "within the Yankton Indian Reservation," and all were conveyed to the United States in trust for the Tribe in 1945. 41 Stat. 1468 (1920) ; TA 74-80; Ex. 201 listing of tracts; Ex. 201 c and d. The 1929 Act reaffirms Congress' understanding that the Yankton Indian Reservation always included more than Agency reserve lands in this Act.

4. The interests of the State, County, and Individual Non-Indians are not Implicated by this Holding.

Non-Indian land owner interests are not implicated by this Court's holding regarding reserve lands. The State never exercised jurisdiction over the reserve lands conveyed to the Tribe in 1929, nor did the State ever have the right to exercise jurisdiction over reserve lands prior to 1929.

E. The Yankton Indian Reservation has Not Been Disestablished.

1. The State is barred by the case mandate, res judicata and collateral estoppel from arguing that the Yankton Indian Reservation has been disestablished.

Five separate times, United States courts have declined to hold the Yankton Sioux Indian Reservation is disestablished, and the South Dakota Supreme Court similarly declined to hold the same once. Yankton Sioux Tribe v. Southern Missouri Waste Management District, 890 F. Supp. 878 (D.S.D. 1995); Yankton Sioux Tribe v. Southern Missouri Waste Management District, 99 F.3d 1439 (8th Cir. 1996); State v. Greger, 559 N.W.2d 854 (S.D. 1996); South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789 (1998); Gaffey, 14 F. Supp.2d at 1160, SAdd. 116; Yankton Sioux Tribe v. Gaffey, 188 F.3d at 1030, SAdd. 140.

Yet, once again, South Dakota raises this same argument, as if simple repetition of the claim coupled with efforts to add a few new administrative and

extraneous documents dug out of a box in the basement will change the result. At long last, the State should be compelled to adhere to the law of the case.

a. The case mandate is clear.

On remand, the District Court informed the parties no less than three times it would not reconsider disestablishment arguments. November 8, 2007 Order, Doc. 399; T. Add. 4. The "mandate rule" is a more powerful version of the law of the case doctrine. Invention Submission Corp. v. Dudas, 413 F.3d at 415. The only exceptions to the mandate rule are 1) when controlling legal authority has changed "dramatically; 2) when significant new evidence, not earlier obtainable in the exercise of due diligence comes to light; and 3) when a blatant error in a prior decision will result in serious injustice. United States v. Aramony, 166 F.3d 655, 662 (4th Cir. 1999). The state argues new evidence, but it is not significantly different from what the Eighth Circuit already knew. The Deputy Sheriff affidavit was already rejected by the Court. SA 300. The tract of church fee land is in trust status. TA 78 Further, this "evidence" could have been obtained with due diligence on the State and County's part in the past 14 years. There is no injustice to the State or County- they never exercised jurisdiction over the Agency Reserve. TA 3-4.

Collateral estoppel and *res judicata* apply to this issue as the Eighth Circuit has ruled, and certiorari was denied by the Supreme Court. 188 F.3d 1010, 1029; cert. denied, 530 U.S. 1261 (2000). The State tried to reopen this issue again on remand by requesting an interlocutory appeal and then filing for a Writ of Mandamus, both of which were denied. Feb. 15, 2007 Order Denying Appeal, Doc. 248. 8th Cir. Order Denying Writ, Doc. 276. The parties in all of these cases are identical, hearings have been held on this issue no less than twice in front of this Court, and the issue has been decided. Res judicata and collateral estoppel exist precisely to put an end to situations like this one. Banks v. Internat'l. Union Electronic, Electrical, Technical, Salaried and Machine Workers, 390 F.3d 1049 (8th Cir. 2005) (dismissal on collateral estoppel and res judicata upheld); Kolb v. Scherer Brothers Financial Serv's., 6 F.3d 542 (8th Cir. 1993) (dismissed on *res judicata* - same claims).

b. Rehearing the disestablishment argument would prejudice the Tribe.

To allow the State and County to reopen these arguments when there was no new evidence on these issues allowed in District Court, including it's exclusion of new population evidence and new historical evidence the Tribe did not offer evidence because the argument was barred by the District Court, works a great

prejudice to the Tribe. Pl. Ex. And Witness List, Doc. 413. A rehearing on disestablishment is not required - there is nothing remarkable about the claimed "new evidence."

2. **Solem v. Bartlett, United States v. Southern Pacific Transportation Co. and United States v. Webb are the analogous cases - not DeCoteau v. District County Court.**

This Court specifically addressed the dissimilarity between this case and DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082 (1975), stating,

> the tribal members there had expressed their clear desire to terminate their reservation. . . . The circumstances surrounding the negotiation of the 1892 agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation. Even more important, the content and wording of the agreements are very different . . . . Cf. 26 Stat. 1036-38, with 28 Stat. 314-18.

Id. at 1020. Now the State has found what it deems to be seventeen points of similarity. St. Br. at 68-69, fn. 8. The 1894 Act has more dissimilarities to the 1891 Sisseton Agreement than similarities. More importantly, all of these points were made in Gaffey. See, 1998 Hearing Transcript, p. 62-68, Doc. 114.

The State's first point is the Agreements were signed within three years of each other. There were eight other acts signed the same day as the Sisseton

Agreement, none of which resulted in disestablishment. 26 Stat. 1016-1044. See also, Confederated Salish and Kootenai Tribes, 665 F.2d at 957, n.12 (Three acts passed on same day are irrelevant). The second point is also immaterial. Hundreds of tribes had land allotted under the Dawes Act. The third point, the acreage ceded, also has no bearing on the intent of the Tribe or Congress. Even if it did, Yankton ceded less than two fifths of its Reservation and not the entire Reservation, as noted to Congress in 1894. SA 307 (p. 12, par. 1). See Solem v. Bartlett, 465 U.S. at 466, n. 6 (over half of Cheyenne River lands homesteaded, reservation not diminished). The fourth point, the size of the allotments, is also irrelevant. The average allotment size for allotments nationwide was under 500 acres. Id. The fifth point - the preambles, is not dispositive. The preambles mirror those used in numerous boilerplate agreements, and they are not identical. Cf. 26 Stat. 1036 and SA 357, TA 161.

The sixth and seventh points, that all unallotted lands were ceded in both, are the same as agreements with the Nez Perce tribe whose reservation was not disestablished. United States v. Webb, 219 F.3d at 1130. The eighth point, sum certain language, has not been held to disestablish other reservations. Id. at 1131(sold unallotted lands for $1,626,222.00); United States v. Southern Pacific Transportation Co., 543 F.2d at 681 (sold unallotted lands for sum certain - no

disestablishment). The ninth point, that entry was subject to homestead and town site laws, was a standard clause in all agreements pursuant to the Dawes Act. TAdd. 23-24, Section 5. The tenth point, that missionaries purchased land, was standard under the Dawes Act, and is dispositive of nothing. . Id.

The eleventh point, that school lands were granted in both, is false. The Yankton reserved lands from homesteading as United Stated reserve for their own schools under Article VIII. SA 354. Sisseton reserved no lands for their own schools. 26 Stat. 989, 1036-1038. See also, Pl. Br. in Suppt. of Summ. Judgmt, Doc. 48 at 10. Further, Congress unilaterally added the school lands clauses for state schools in 1894 - they were not agreed to by the Yankton Sioux Tribe and were never discussed with the Tribe in 1892. SA 357.

The twelfth point, that the United States retained agency lands in both is false. In Sisseton's agreement, religious societies were allowed to buy their land for educational purposes under Article II. 26 Stat 1037. In Yankton, Article VIII provided a reserve for agency, school and other purposes unlike Sisseton's Agreement. SA 355. The thirteenth point - that allotments were throughout the Reservation- is true in all diminishment cases heard by the courts. United States v. Southern Pacific Transportation, 543 F.2d at 681 (Walker River not diminished - allotments throughout); Solem v. Bartlett, 465 U.S. at 1168 (Cheyenne River not

diminished - allotments scattered); City of New Town v. United States, 454 F.2d 121, 122-123 (8th Cir. 1972) (Ft. Berthold not diminished, allotments scattered in opened area); United States v. Webb, 219 F.3d at 1130 (New Perce allotments spread throughout the reservation); Mattz v. Arnett, 412 U.S. at 496 (Klamath Reservation opened by all unallotted lands throughout reservation); United States v. Pelican, 232 U.S. at 446-447 (Colville Reservation not disestablished by allotments throughout reservation). Further, the map at Trial showed original allotment locations primarily in the Southern half of the reservation in primarily contiguous tracts as of 1894. SAdd. 142.

The fourteenth and fifteenth points refer to the Presidential proclamations issued, but fail to point out the dissimilarities in the proclamations, including the requirement that Sisseton be paid in full prior to homesteading, but not Yankton, Cf. 27 Stat. 1017 & TA. 72; and that Yankton included agency reserves. SA. 354 but Sisseton did not. 27 Stat. 1017.

The sixteenth point, that the State assumed unquestioned jurisdiction is completely false. The State has never exercised jurisdiction over trust lands or agency reserves, and the Tribe and United States have exercised criminal jurisdiction over Indians on allotments irrespective of non-Indian ownership through at least 1920 and from 1995 until 1998. TA 4, 53-64, 69-71. The Courts

have already held state exercise of jurisdiction over Indians on allotments now in fee status, even for extended periods of time, does not allow the court to diminish or disestablish a reservation. City of New Town v. United States, 454 F.2d at 123 (county exercise of criminal jurisdiction over indians for over 50 years not evidence of diminishment); Solem v. Bartlett, 465 U.S. at 1171, n.23 (63 years of county exercise of criminal jurisdiction but no diminishment).

The final point, that the Reservations were treated parallel on maps is also false. The State refers only to a General Land Office map produced by a Lake Andes non-Indian resident, that is illegible, to support this point. SA 407. This Court has already determined the evidence on the issue of maps is contradictory and does not support disestablishment. 188 F.3d at 1029, n. 11.

Not surprisingly, the State and County skip the marked dissimilarities between Sisseton and Yankton. The 1894 Act has numerous savings clauses not found in the Sisseton Agreement, including Article XIII guaranteeing the right to "undisturbed and peaceable possession of their allotted lands . . . .", SA 355; Article XIV guaranteeing Congress would never pass any act alienating any of the allotted lands, SA 355; Article VIII establishing a reserve from sale for "agency, school, and other purposes...", SA 354; and Article XVIII preserving the provisions of the 1858 Treaty. SA 356. Sisseton had agreed to complete

relinquishment of all annuities after 1901 in the 1891 Agreement as set forth in the 1851 Treaty and did not seek extension of annuities under Article III, while Yankton preserved annuities. Cf. 27 Stat. 1037 & Article XVII 1894 Act, SA 356.

The Yankton 1894 Act is more analagous to the Acts and Agreements with the Nez Perce, Colville Tribe, Walker River Reservation, and Tulalip Tribe than it is to Sisseton's Agreement. See, United States v. Webb, 219 F.3d at 1130-1131 (Nez Perce); United States v. Pelican, 232 U.S. at 447 (Colville); 543 F.2d at 681 (Walker River); United States v. Celestine, 215 U.S. at 285, 286 (Tulalip allotments did not extinguish reservation); Ute Indian Tribe v. Utah, 114 F.3d at 1530; Melby v. Grand Portage Band of Chippewa, 1998 WL 1769706 (D. Minn. 1998) (unpublished)(allotments not ceded are reservation lands - no disestablishment). In all of these cases, all unallotted lands and non-agency reserves were opened for homesteading. But, in none of them was the Reservation disestablished because neither the Tribe nor Congress evinced any intent to disestablish the entire Reservation just because unceded lands were allotted. Id.

The State's assertion that a tribal member and federal negotiator likened the Yankton Agreement to the Sisseton Agreement is false. St. Br. at 72. The Tribal member distinguished Yankton's treatment from Sisseton's SA 328 (p. 54, par. 4). Likewise, the federal negotiator told Yankton they were making an offer for

"surplus lands" that was more than they had paid for the entire "Sisseton Reservation." SA 336 (p. 71, par. 5).

3. There is no conflict between the Circuits created by the Eighth Circuits ruling there was no disestablishment.

The State and County argue this is a "one of a kind Indian reservation." Cty. Br. at 6. But it is not unique in the way the State and County argue. It is unique only in that in all prior cases, courts have declined to remove lands from a Reservation that the tribe never agreed to sell. Seymour v. Superintendent. 368 U.S. 351, 354-55, 82 S.Ct. 424 (1962) (allotment of remaining land with an agency reserve to the United States did not disestablish reservation); accord, Mattz v. Arnett, 412 U.S. at 497; United States v. Celestine, 215 U.S. at 286-87(finding Tulalip Reservation not disestablished by allotment of all its lands under specific treaty); Duncan Energy Co. V. Three Affiliated Tribes, 27 F.3d 1294, 1298 (8th Cir. 1994), cert. denied, 513 U.S. 1103, 115 S.Ct. 779 (1995) (holding reliance on population and fee ownership alone to create "quasi-diminishment" inappropriate); City of New Town v. United States, 454 F.2d 121, 123 (8th Cir. 1972) (holding neither criminal prosecution of tribal members by state from 1910 to 1970, nor references to "former Reservation" in administrative documents overcame language of 1910 Act); Melby v. Grand Portage Band of Chippewa, 1998 WL 1769706 (D. Minn. 1998) (unpublished) (non-indian fee land

originally allotted is part of Reservation); Confederated Tribes of Chehalis v. State of Washington, 96 F.3d 334, 344 (9th Cir. 1996) (lands restored to public domain and then allotted did not disestablish the reservation).

Here, the Court has removed lands from this Reservation that the tribe never sold, holding that the 1894 Act, "intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders." Gaffey, 188 F.3d at 1028. The only lands which the 1894 Act provided for sale beyond ceded lands were allotments of tribal members who died before 1919 without heirs under Article XI. SA 355.

Allottees were guaranteed their right to undisturbed and peaceable possession of allotments under Article XIII, and guaranteed that Congress would not pass any act to alienate "any part of these allotted lands from the Indians. SA 355. Many of the "allotments" were made under the 1858 Treaty Article 10. They were replaced later by allotments governed by the 1894 Act, but having had allotted lands under the 1858 Treaty, tribal members would not have thought in 1894 the existence of allotments was a threat to the tribe's very existence. TA 17.

The Tulalip Tribe's lands in dispute in United States v. Celestine were all allotted as well, but their Reservation was not disestablished. 215 U.S. at 286. Yankton did not agree to disposal of their entire Reservation. See, Statement of

Facts, infra. To hold that any Tribe whose lands have all been allotted by an agreement with Congress with a reserve for agency purposes retained has been disestablished upsets all of the above rulings that are the well settled law. As Justice Blackmun quoted in Mattz v. Arnett,

> 'In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and it was regularly set apart by constitutional authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to the right of occupation already in existence. It seems to me, something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intention of that body to deprive these Indians of their right of occupancy of said lands, without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of the act of 1864, which is supposed to be applicable.'

412 U.S. at 2251, fn. 13, (citing Crichton v. Shelton, 33 I.D., at 212-213).

4. South Dakota Supreme Court holdings should not to be accorded deference in this case.

The State and County continue to point to South Dakota Supreme Court cases. St. Br. 72-73. State v. Thompson is not applicable as it related to a conviction for an offense occurring on lands ceded in the 1894 Act. 355 N.W.2d 349, 349 (1984). In State v. Winckler, the Court was not looking at disestablishment, but rather whether the offense was committed within Indian

country based upon the location of the intended victim of a shooting on lands ceded under the 1894 Act. 260 N.W.2d 356, 360 (1977). Brugier v. Class is a criminal case in which neither the United States nor the Yankton Sioux Tribe - the parties to the 1894 Agreement itself - were represented. 599 N.W.2d 364 (S.D. 1999).

CONCLUSION

The entire premise of the State and Counties' arguments is that this Court should look to the desires of non-Indians for Indian land as evidenced by newspaper articles and other publications as its primary source of authority for disestablishment of the Yankton Sioux Indian Reservation, ignoring the language and legislative history of the 1894 Agreement. Such a *de facto* disestablishment would be the first of its kind in the Nation, turning every canon of construction applicable to Indian treaties and agreements on its head, and in essence suggests that ambiguities should be construed in favor of the powerful party. It would also overturn Congress' actions in 1927 and 1934 to halt further loss of Indian land.

The Tribe respectfully asks this Court to adhere to the long-standing canons of statutory construction and rule that the Yankton Sioux Tribe retains for its Reservation all lands it never agreed to sell, which includes allotments, United

States reserve now in trust for the Tribe, allotments continuously held in fee status by its tribal members, lands taken into trust under the authority of the 1934 IRA, and allotments held in fee status illegally sold in violation of the 1894 Agreement, excepting allotments of tribal members who died without heirs prior to 1916, and.

The question in this case is: In the future, when we look back in history and wonder how Indian tribes lost their homelands, after the overt machinery of colonization had ostensibly ceased to operate, will we look at the result urged by the State in this case and say "that is how it happened," or will we be able to say "that is when the slender thread of the law held fast in favor of our weakest and most politically powerless minority, against overwhelming majoritarian pressure?"

Dated this 28th day of June, 2008.

Respectfully submitted,

_____

Rebecca L. Kidder
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, South Dakota 57709
(605) 342-0097
(605) 342-5170 *facsimile*

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee/Cross-Appellant's Principal and Response Brief is within the limitation provided for in Rule 28.1(e)(2)(B)(I) using Times New Roman typeface in 14 point font. Appellee/Cross-Appellant's Principle and Response Brief contains 16, 498 words.
2. I certify that the word processing software used to produce this brief is Word Perfect X3, and it is herewith submitted in PDF format.
3. I certify that the disk submitted herein with the text of the brief is virus free.

Dated this 28th day of June, 2008.

_____

Rebecca L. Kidder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Appellee/ Cross-Appellants Principal and Response Brief and computer diskette containing said brief in the matter of Yankton Sioux Tribe, et al v. Scott Podhrasky, et al, along with Appellee/Cross-Appellants Appendix, 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 Rapid City, South Dakota, on this 28th day of June, 2008:

Jan Holmgren
Mark Salter
Katherine Wade Hazard
U.S. Attorney's Office
P.O. Box 2638
Sioux Falls, SD 57101

Tom D. Tobin
Tobin Law Offices
P.O. Box 730
422 Main St.
Winner, SD 57580

John Guhin
Meghan Dilges
South Dakota Attorney General's Office
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501

Mr. Kenneth Cotton, listed on the County Brief as Counsel to Southern Missouri Waste Management, was not served as he has not filed a Notice of Appearance, did not sign the Brief, and Mr. John Guhin is listed as Counsel of Record on behalf of Southern Missouri Waste Management.

_____
Rebecca L. Kidder