UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 08-1441

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

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

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

THE HONORABLE LAWRENCE L. PIERSOL
United States District Court Judge

BRIEF OF APPELLANTS M. MICHAEL ROUNDS, GOVERNOR OF SOUTH DAKOTA; LAWRENCE E. LONG, ATTORNEY GENERAL OF SOUTH DAKOTA; AND STATE OF SOUTH DAKOTA

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Prior decisions of the United States Supreme Court and of this Court in the fourteen years of litigation in this controversy left unresolved key issues as to the existence, nature, and extent of "reservation" in eastern Charles Mix County. In determining these issues, the District Court erred, and has fashioned a never before seen "reservation" of some 35,000 acres of various types of land. For example, the court below found that 1934 Act trust land was "reservation." This finding pivoted on the idea that the 1858 boundaries of the Yankton reservation still have an effect, an idea four times rejected by a Panel of this Court in 1999. This decision alone could have circuit wide and national impact.

Further, the court below adopted the 1999 Panel determinations that the reservation was not "disestablished" by the Act of 1894, and that "reserve land" was "reservation." These determinations may well have influenced the remainder of the decision, and, because of their nature and importance, the State requests that they be reviewed.

Because the questions presented are of great importance to the parties and to the development of Indian law in this Circuit, the State requests thirty minutes for oral argument.

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JURISDICTIONAL STATEMENT

Final Judgment for Plaintiffs was entered on December 19, 2007. SA 178.[*] A timely Notice of Appeal on behalf of all Defendants in *Yankton Sioux Tribe et al. v. Podhradsky et al.*, Civ. 98-4042 was filed on February 12, 2008. The Notice of Appeal specifically incorporated the case with which it had been consolidated, *Yankton Sioux Tribe v. Southern Missouri Waste Management District et al.*, Civ. 94-4217. SA 280.

STATUTORY PROVISIONS AT ISSUE

The text of the Act of 1894 is set out in the State's Appendix at SA 352.

18 U.S.C. § 1151 provides:

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

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[*] The term "SA" refers to "State's Appendix" which includes the relevant pleadings and selected exhibits from the two prior trials. Exhibits introduced at the 2007 trial have been forwarded to this Court. The term "Add." refers to the Addendum, which contains the opinion under review, the prior critical opinions of the Supreme Court, this Court, and the District Court, and a reproduction of the BIA map introduced at the 2007 trial. The term "2007 T.___" refers to the 2007 trial record, which has been forwarded to this Court.

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

25 U.S.C. § 465 provides:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

. . . .

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 467 provides:

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

STATEMENT OF LEGAL ISSUES

I. Whether all land taken into trust under 25 U.S.C. § 465 constitutes "reservation" under 18 U.S.C. § 1151(a), when the land is located within an area which has lost "reservation" status under 18 U.S.C. § 1151(a)?

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997)

II. Whether lands which the United States has never formally accepted into trust are legally in trust status and are, moreover, "reservation" under 18 U.S.C. § 1151(a)?

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)

III. Whether allotted lands in the area in dispute that are "Indian country" because they qualify as "allotments" under 18 U.S.C. § 1151(c), also qualify as "reservation" under 18 U.S.C. § 1151(a)?

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)

IV. Whether lands transferred to the Tribe at various times after the Act of 1929 are "reservation" under 18 U.S.C.

§ 1151(a) and whether the Act applied to lands not possessed by the United States in 1929?

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)

V. Whether the District Court erred by admitting certain pieces of evidence only for limited purposes?

General Electric Co. v. Joiner, 522 U.S. 136 (1997)

VI. Whether the Indian Reorganization Act of 1934 froze the boundaries of the Yankton Sioux Reservation?

Morton v. Mancari, 417 U.S. 535 (1974)

VII. Whether lands held continuously in fee status within the 1858 boundaries by Indians are "reservation" under 18 U.S.C. § 1151(a)?

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)

VIII. Whether the Yankton Sioux Reservation has been disestablished?

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

IX. Whether dictum of the court below which far exceeded the mandate should be repudiated by this Court?

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)

STATEMENT OF THE CASE

This case arises out of three rounds of litigation pursued over fourteen years.

1. *First Round—1994-1998*.

In 1994, the Yankton Sioux Tribe filed a Complaint in *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, Civ. 94-4217, in which it asserted that the 1858 boundaries of the reservation remained intact. SA 192. The District Court, after trial, determined that the "exterior boundaries of the reservation, as set out in the 1858 Treaty, remain intact," *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D. 1995) (Add. 33), and a divided panel of this Court affirmed. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1996). Add. 35.

The Supreme Court, without dissent, reversed, finding the interpretation of the United States and the Tribe to be "'absurd.'" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998). Add. 82. The Court held that the lands ceded by the 1894 Act "no longer constitute Indian country" but declined to determine whether Congress "disestablished the reservation altogether," and remanded the case for further proceedings. *Id.* at 358, Add. 88.

2. *Second Round—1998-1999.*

On remand, the Tribe filed a new Complaint. *Yankton Sioux Tribe v. Gaffey*, Civ. 98-4042. SA 45. The Tribe, joined by the United States as Intervenor, asserted "reservation" status over all lands originally allotted to tribal members, whether or not they had been taken out of allotted status or remained in Indian hands. The District Court, after the second trial of the matter, again followed the lead of the Tribe and the United States and found that all such lands constitute "reservation." *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135, 1159 (D.S.D. 1998). Add. 115.

This Court reversed. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999). Add. 118. This Court found the reservation had not been "disestablished," but that lands which had been allotted but which had passed out of Indian hands were neither "Reservation" nor "Indian country." 188 F.3d at 1030. Add. 140. The small acreage which had been ceded to the Federal Government in the 1894 Act and conveyed to the Tribe at various times after a 1929 Act of Congress was found to constitute "reservation." 188 F.3d at 1030, Add. 141. This

Court stressed, in an extraordinary four references, that the 1858 boundaries did not "continue to have effect," *id.* at 1013, Add. 123; "did not remain intact," *id.* at 1021, Add. 131; did not "serve to separate" state and federal jurisdiction, 188 F.3d at 1021, Add. 132, and had "not been maintained." *Id.* at 1030, Add. 140. The remand to the District Court stated: "we leave it to the district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust." 188 F.3d at 1030, Add. 141. Certiorari petitions were filed by the State, local governments and the Tribe, but all were denied. *South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

3. *Third Round—2000-2007.*

A third trial was held on November 13 and 14, 2007, and the District Court ultimately adopted wholesale the argument of the United States.

The District Court, following the suggestion of the United States, held that all lands purported to have been taken into trust under the 1934 Act were "reservation" simply because they were once within "the original exterior boundaries" of the

Yankton Reservation. *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040, 1054 (D.S.D. 2007). Add. 14.

The District Court also found that all allotted lands qualified as "Indian country" not only as "allotted lands" under 18 U.S.C. § 1151(c) but also as "reservation" under 18 U.S.C. § 1151(a). *Id.* at 1054, Add. 14. It declared 1929 Act "reserve" lands to be "reservation," but did not address the State's unrebutted showing that certain of the lands were owned by a church, not the United States, in 1929. 2007 T.126-27. Further, although none of the parties identified any such land, the court below declared that fee land held continuously by Indians constituted "reservation." 188 F.3d at 1056, Add. 16.

The District Court found, in what may have been either dictum or an alternative holding, that to the extent that any of the trust land at issue would be found by an appellate court not to be "reservation" under 18 U.S.C. § 1151(a), it would then be an "informal or de facto reservation." *Id.* at 1054-56, Add. 14-15. And failing that, the District Court found, in dictum, that all such trust lands would be a "dependent Indian

community" under 18 U.S.C. § 1151(b). *Id.* at 1057, Add. 16-17.

Essentially, the court created, or recognized, a "reservation" of some 35,000 scattered acres, stating that the tribal members were "entitled by law to their reservation, diminished as it is." *Id.* at 1058, Add. 17. This constitutes the third version of the Yankton Sioux Reservation advocated by the United States and declared by the District Court since 1995.

STATEMENT OF FACTS

1. *Reservation Era—1858 to 1895.*

In 1858, the Yankton Sioux Tribe and the United States entered into a treaty by which the Tribe ceded a substantial amount of land and in which the parties recognized a reservation of approximately 430,000 acres in eastern Charles Mix County. *Yankton Sioux Tribe*, 522 U.S. at 334, Add. 75. The United States promised payments to or on behalf of the Tribe of $1.6 million and also promised additional payments and benefits. *Id.*

Quickly, however, Congress began to "dismantle the territories that it had previously set aside as permanent and excusive homes for Indian tribes." *Id.* at 335, Add. 76. The Dawes Act, in particular, provided for allotment of lands and the opening, on tribal consent, of remaining land to non-Indians, promoting the idea that within a "generation or two . . . the tribes would dissolve, their reservations would disappear." *Id.* The 1894 Senate Report indicated that the Indians of the Yankton reservation were of such a character as to make rapid "'progress'" in this direction. *Id.* at 335-36, Add. 76. Accordingly, roughly 262,000 acres were allotted to individual Indians of the Yankton Reservation under the Dawes Act and an Act of 1891, leaving 168,000 acres of surplus lands. 188 F.3d at 336, Add. 76.

In accordance with the policy of the Dawes Act and with the Act of July 13, 1892, the Secretary of the Interior sent a three-member commission to the Yankton Reservation. *Id.* A series of negotiations ensued in which tribal members raised concern about the "suggested price per acre, the preservation of their annuities" and other outstanding claims, but in which

there was no discussion of "future boundaries of the reservation." *Id.* at 336-37, Add. 76.

Eventually, an agreement was offered to the Tribe which provided, in Article I, for cession of all of the allotted lands and, in Article II, for payment of a sum certain—$600,000—to the Tribe. *Id.* at 338, Add. 77. The Tribe did not reserve any lands for itself, 188 F.3d at 1023 (Add. 133-34), although the matter had been discussed during the negotiations (comment of John Omaha at SA 339: "unallotted lands along the Missouri River bottom" should be retained). Article VIII provided that all of the lands ceded to the United States would be "disposed of . . . to actual and bona fide settlers." SA 354. However, a small part of the ceded lands which were then used by the United States for "agency, school and other purposes" were required to be "reserved from sale to settlers until they are no longer required for such purposes." *Id.* At that time they would be sold to these "settlers." *Id.* The agreement also contained a "saving clause" in Article XVIII (SA 358), the meaning of which was resolved by the Supreme Court. 522 U.S. at 349, Add. 82.

The negotiators ultimately collected signatures from a "majority" of those eligible to sign the agreement. *Id.* at 339, Add. 78. Fraud allegations were made but not proven to the satisfaction of Congress. Thus, on August 15, 1894, Congress ratified the 1892 Agreement. *Id.* A few months later, on May 21, 1895, the President issued a "proclamation opening the ceded lands . . . and non-Indians rapidly acquired them." *Id.*

2. *Post-Reservation Era—1895 and Beyond.*

Local government officials reacted virtually immediately to the congressional action. The 1896 Charles Mix County Commissioner's Record reflects an increase in the number of townships "by the addition of what was formerly the Yankton Indian Reservation." SA 366-67. The 1896 County Commissioners likewise referred to the lands of the "former Yankton Indian Reservation" and the lands of "what was the Yankton Indian reservation." SA 368.

Tribal members were likewise promptly selected to be county election officials (SA 363-64) and were placed on county jury lists. SA 367-68. Just two years after the President's

Proclamation, William Bean, Jr., a tribal member, was selected to be "Constable" (SA 369), and in 1909 a signer of the Agreement, Joseph F. Estes, was selected Charles Mix County "Clerk of Courts." SA 442.

The ceded lands which the 1894 Act required to be sold to settlers were quickly purchased by non-Indians. 522 U.S. at 339, Add. 78. In addition, although the Dawes Act had provided for a 25-year term to the allotment, the land could be, and regularly was, sold sooner to non-Indians through the BIA upon the death of the allottee. The *Lake Andes Wave* featured a regular "List of Inherited Indian Land for Sale" beginning at least by August of 1907. *See* SA 408-21. As a result, in 1913, even before the end of the 25-year trust period, the federal supervisor, Albert Kneal, reported that Yankton Indians held "about 70,000 acres of land." SA 423.

In 1916, as the 25-year term of the allotments began to run, the President extended the term of many, but explicitly, by name, allowed the expiration of the trust period of some 150 allotments, and their lands were transferred to the allottees in fee. SA 425-26.

Simultaneously, in 1916, the Yankton Tribe became the "exemplary experimental tribe in forced allotment . . . and during that whole period, you discover that the disposition of the Interior Department was to get this done." 1995 T. 232; SA 448 (Prof. Hoover). Over 320 Yankton Indians received their fee patents under this policy, adopted under the Burke Act. 25 U.S.C. § 349. SA 436-39. (The policy was discontinued in 1921.) The cumulative result of the Department of Interior's successful implementation of the Inherited Land Act, the Burke Act, and other statutes and policies was that, by 1930, tribal members retained "43,358 acres" of land. SA 446.

Other mileposts must be considered. The 1894 Act had provided in Article VIII that about 1,000 acres of ceded lands would be transferred to "settlers" when no longer needed for "agency, school and other purposes" (SA 354), but in 1929, Congress enacted a statute which required Interior to transfer these lands to the Tribe when they were no longer needed for such purposes. SA 430. (Transfers have been made at various times and the effect of the Act is disputed here.) In 1934, Congress enacted the Indian Reorganization Act. The Act, in 25

U.S.C. § 465, specifically enabled the United States to acquire land in trust for Indians and Indian tribes whether on or off reservations and provided, in 25 U.S.C. § 467, a statutory basis for converting these new trust lands into "reservation" status. In 1948, Congress enacted the decisive codification of "Indian country" at 18 U.S.C. § 1151.

3. *Results of Act of 1894 and Subsequent Congressional Actions.*

a. *Status of Lands in Trust and Extent of Land in Each Status.*

This Court's remand directed proceedings on the "status of Indian lands which are held in trust." 188 F.3d at 1030, Add. 141. With the exceptions set forth below, the parties have agreed upon the acreage of land which does, in fact, carry the "status" identified. The *effect* of classifying lands as holding a particular "status" is hotly disputed and is the subject of the brief which follows.

(1) Reserve Land.

The Act of 1894 provided in Article VIII that certain land ceded to the United States would be transferred to "settlers" when no longer needed by the United States for "agency, school

or other purposes." SA 354. In 1929, Congress adopted an Act which provided that these same lands should be transferred to the "tribe" rather than to "settlers" when no longer needed for "agency, school or other purposes." SA 430.

The United States contended that, as of the date of trial, there were 913.83 acres of "reserve land" which had been transferred to the Tribe under the authority of the 1929 Act. Ex. 201. The State and the local governments disputed the classification of 120 acres of this land identified in Exs. 201c and 201d (*see* Doc. 397 at 1) because, as Exs. 201c and 201d demonstrate, those 120 acres were held in fee by the Calvary Cathedral on the date of the 1929 Act.

The District Court did not rule on the effect of the fact that 120 acres were not held by the United States on the date of the 1929 Act. *See* 2007 T.126-27 (Court reserves decision on Calvary Cathedral tracts).

In sum, it seems clear enough that the Court found that 793.83 acres could classified as "reserve land" but left unaddressed the question of whether the 120 acres of church land could be "reserve land" under the 1929 Act.

(2) Land Transferred From Fee Status to Trust Status.

The IRA of 1934 allowed the United States to acquire land in trust, within or without reservations, for tribes and tribal members. 25 U.S.C. § 465. The Court found, as of the date of trial, that 6,444.47 acres had been transferred from fee status to trust status under the authority of the 1934 Act.
Ex. 202/COR; 529 F.Supp.2d at 1052, Add. 12.

The State and the local governments dispute the classification of 3,120.98 of these acres as trust land because, as argued below, the United States failed to show any formal acceptance of these lands into trust. *See, e.g.*, Ex. 202a.

(3) Lands Transferred From Individual Allotted Status to Tribal Allotted or Trust Land.

Lands which were allotted to individual Indians may be transferred from individual allotted status to the tribe without loosing their allotted status. *United States v. Stands*, 105 F.3d 1565, 1573 n.5 (8th Cir. 1997).

The Court found, as of the date of trial, that 4,496.58 acres had been transferred from individual allotted land to tribal allotted land. Ex. 204/COR; 529 F.Supp.2d at 1052,

Add. 12. The parties do not dispute the classification of any of this land.

(4) Lands Which Have Remained in Allotted Status.

Certain lands which were allotted to individual Indians in the 1890s remain as "Allotted Trust Land." The Court found, as of the date of trial, 25,555.08 acres of land remained in individual allotted status. Ex. 211; 529 F.Supp.2d at 1052, Add. 12. The parties do not dispute the classification of any of this land.

(5) Pre-1934 Fee to Trust or Non-Reserve Secretarial Order Trust Land.

This is a "catch-all" category which includes the following 174 acres:

Two parcels which began as "allotted land," which were placed in fee status, and which were acquired in trust status, all before 1934.

Three parcels which began as "ceded land" and which were placed in "trust status" before 1934.

One parcel which began as ceded land, which attained fee status in 1920 but which was placed in trust by virtue of a Secretarial Order in 1977.

One parcel which began as "allotted land," which was placed in fee status, which was acquired by an individual in trust status in 1922, and which was sold to the Tribe in trust in 1937.

The parties do not dispute the classification of the land in this category. *See* Ex. 203/COR; 529 F.Supp.2d at 1052, Add. 12.

b. *Population*.

The United States Supreme Court found that "non-Indians constitute over two-thirds of the population within the 1858 boundaries." 522 U.S. at 356, Add. 87. The District Court in the present litigation refused to allow further demographic evidence. *Yankton Sioux Tribe v. Podhradsky*, Civ. 98-4042, Order (Nov. 8, 2007), at 2 (Doc. 399).

c. *Jurisdictional Arrangements*.

There is abundant evidence that state and local authorities have historically exercised jurisdiction over all

persons, Indian and non-Indian, on ceded land, and on former allotted and former trust land. *Yankton Sioux Tribe*, 522 U.S. at 357, Add. 88; *Gaffey*, 188 F.3d at 1029, Add. 139.

There is also abundant evidence that the United States and the Tribe have exercised "Indian country" jurisdiction over lands which remain in allotted status whether they were held by the allottee, or his descendents, or whether they have been transferred to the Tribe. *See, e.g., id.*

There is little, if any, evidence on actual exercise of jurisdiction with regard to any particular lands taken into trust under the 1934 Act. Nonetheless, it appears likely that certain 1934 Act trust lands have been treated as "dependent Indian communities" and thus have been regarded as within federal and tribal primary jurisdiction. Testimony of Charles Mix County State's Attorney Scott Podhradsky, 2007 T.62, lines 14-21; 2007 T.65, lines 19-25 to 2007 T.66, lines 1-18. Furthermore, three United States Attorneys testified by affidavit that they exercised jurisdiction only over lands "actually held in trust." *Gaffey*, 188 F.3d at 1029, Add. 140.

The two federal officials who testified, in effect, stated that they would not exercise federal jurisdiction over present day "agency" lands (also described as "reserve" lands) unless they were in "trust." Testimony of FBI Agent Miller, 2007 T.36, lines 21-25 to 2007 T.37, lines 1-4; Testimony of BIA Superintendent Warren LeBeau, 2007 T.54, lines 7-13.

SUMMARY OF ARGUMENT

This litigation was commenced in 1994 when the Tribe asserted that its 1858 reservation remained intact. The Supreme Court has heard this case once, this Court has heard it twice, and the District Court three times. The Tribe's thesis has been soundly rejected by this Court and the Supreme Court in the first two rounds of this litigation.

This appeal lies from the most recent District Court decision. Despite the prior decisions of this Court and the Supreme Court, the District Court has once again found the existence of a substantial "reservation." The "reservation" newly found to exist is fragmented, of several types of land, with separate theories supporting each category. As seen from the map, Ex. 209 (Add. 142), it consists of roughly 75 to 100

clusters of land—ranging from twenty acres to substantially larger. On the map, lands in colors other than light green, the predominant color (fee lands generally) and bright blue (tribal fee lands) were found, under various theories, to be "reservation."[1] Its odd configuration argues against its existence as a "reservation," because there is no precedent for it, and because it does not conform to any natural idea of "reservation."

In particular, the "reservation" contested here was found by the District Court to consist of all fee land in continuous Indian ownership, all land taken into trust since 1934, all present day allotted land, and all of the "reserve" land affected by the Act of 1929.

The State herein requests this Court to determine that none of the areas are in fact "reservation" under 18 U.S.C. § 1151(a); the State simultaneously acknowledges the existence of "Indian country" in the form of "allotments" under 18 U.S.C.

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[1] Some minor revisions in the map were found, *see* Order, December 6, 2007 (SA 149-50), but the map remains an accurate general indicator of what the Court found.

§ 1151(c) and the likely existence of "dependent Indian communities" under 18 U.S.C. § 1151(b), especially as acknowledged by the State's Attorney at trial. The Congress provided for "Indian country" to exist in forms other than "reservations" and that is what has occurred here, contrary to the ruling of the District Court.

The reason for rejecting the "reservation" status of each of the categories of land is, first, that none of the lands are "reservation" because of disestablishment, as argued below. Alternatively, the reasons vary with the land. The District Court held that any fee land held by Indians continuously since it left allotted status is "reservation." This holding is inconsistent with Supreme Court decisions finding that no "Indian country" status of any kind can exist unless the land in question is subject to a federal set-aside for Indians. Fee land is not federally "set aside."

The District Court also held that all lands taken into trust since 1934 constitute "reservation." This finding should be rejected because it is inconsistent with the text and structure of the IRA. It is also inconsistent with this Court's finding in

United States v. Stands, that when land is taken into trust off reservation it does not itself constitute any kind of "Indian country." The Distinct Court attempted to distance itself from *Stands* by arguing that the lands in this case were found within a diminished or disestablished reservation; that was precisely the case, however, with *Stands* where the lands were within Mellette County, which had once been part of the Rosebud Reservation. The further argument of the District Court, i.e., that the lands became "reservation" because they were taken into trust within the 1858 boundaries, runs directly contrary to the finding of the 1999 Panel of this Court (made four times) that the 1858 boundaries are without effect.

The District Court next found that all lands presently in "allotted" status under 18 U.S.C. § 1151(c) also had "reservation" status under 18 U.S.C. § 1151(a). This determination is incorrect for at least two reasons. First, the Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), has found that allotted lands within a former reservation were not themselves "reservation" but were "Indian country" simply because they were allotments.

Second, this Court has held that the very allotted land at issue here loses "Indian country" status when it is patented and conveyed to non-Indians. But a "reservation" by definition under 18 U.S.C. § 1151(a) remains "reservation" "notwithstanding the grant of any patent."

Finally, the District Court erred, albeit in this case understandably, by adopting the 1999 Panel's decision that the reservation had not been disestablished and that lands known as "reserve lands" constituted "reservation." We respectfully request this Court to re-examine these decisions. The first decision, as to disestablishment, is inconsistent with *DeCoteau v. District County Court*, 420 U.S. 425 (1975). There are at least seventeen points of identity, including the cession of all allotted land for a sum certain. Furthermore, the distinction found to exist—i.e., that based upon a newspaper article, evaporates in light of another look at the evidence. The United States urged the Supreme Court not to take certiorari in 1999 on the basis that the 1999 Panel decision was interlocutory. We agree and suggest that this further justifies further review of the disestablishment conclusion.

The second determination—that the reserve lands are "reservation"—may well have been based on the first, and is subject to revision because the evidence and legal argument now so clearly undermine it. It is notable that the legal and factual arguments were not put before the original Panel by any party, at least before the rehearing petitions. The argument that the reserve lands constituted a free-standing reservation was not even mentioned, for example, in either the federal or tribal briefs—indeed the reserve lands themselves do not seem to have been so mentioned.

The reserve lands determination is critical because these are the only lands which the Panel determined were "reservation." This determination was interpreted by the District Court, apparently, as license to find a much broader "reservation" made up a variety of lands.

In any event, the history of the reserve lands reveals that they should not be found to be "reservation." First, that status is precluded by the determination of the Supreme Court that lands "ceded" to the federal government in 1894 lost "reservation" status. The reserve lands were ceded, as this

Court so held, and so cannot be "reservation." Second, the reserve lands were intended, under Section VIII of the Agreement, to be sold to "settlers" when the federal government no longer needed them. This argues against the "reservation" determination. Third, when it was proposed that the Article VIII Agreement be overturned and that the lands be conveyed to the Tribe, instead of settlers, when no longer needed, the Department of the Interior objected because the conveyance would cause the federal government to lose jurisdiction. This claim is fatally inconsistent with the latter-day argument that the federal government somehow "created" a "reservation" by the transfer of the lands; the Department of the Interior should not be allowed to make a claim here so facially inconsistent with the claim it made to Congress in 1928.

STANDARD OF REVIEW

The lower 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). Its evidentiary rulings are subject to abuse of discretion review. *General Electric Co. v. Joiner*, 522 U.S. 136, 141 (1997). Finally,

this Court will determine whether the lower court "scrupulously and fully" carried out the mandate of this Court and that of the Supreme Court. *Jaramillo v. Burkhart*, 59 F.3d 78-80 (8th Cir. 1995).

ARGUMENT

A. *Lands taken into trust within the 1858 Yankton boundaries do not automatically become reservation under 18 U.S.C. § 1151(a).*

The United States claims, and the District Court found, that all 6,444 acres taken into trust under the Indian Reorganization Act of 1934 within the 1858 boundaries of the Yankton Reservation are "reservation" under 18 U.S.C. § 1151(a). 529 F.Supp.2d at 1054, Add. 14. In some cases, the lands seem to be surrounded by other tribal lands; in other cases they are not. *See* Map, Add. 142. Most of the lands at issue were taken into trust for the Tribe; some, however, were taken into trust for individuals. About one-half, or 3,120.96 acres, have never formally acquired trust status (a matter discussed separately below), but the court below treated them all the same.

1. *The text and structure of 18 U.S.C. § 1151(a) do not allow an interpretation that each piece of trust land becomes "reservation."*

18 U.S.C. § 1151 provides that there are three kinds of "Indian country":

(a) "all land within the limits of any Indian reservation";

(b) "all dependent Indian communities"; and

(c) "all Indian allotments, the Indian titles to which have not been extinguished."

The "Indian country" definition does not on its face include "trust lands." "Trust lands" are closest in the definition to "Indian allotments" under 18 U.S.C. § 1151(c). But trust land acquired under 25 U.S.C. § 465 does not qualify as a "trust allotment." The Supreme Court has explained that "trust allotments" are "individual lands tracts retained by members of [a tribe] when the rest of the reservation lands were sold to the United States." *DeCoteau,* 420 U.S. at 428. *See also United States v. Pelican,* 232 U.S. 442, 446 (1914).

When Congress enacted its "Indian country" definition in 1948, it had before it the opportunity to define trust land created under 25 U.S.C. § 465 (enacted thirteen years earlier)

as "Indian country." It did not do so. Under the well-settled canon of statutory instruction, "inclusio unius, exclusio alterius," because allotted trust lands have been included in the statute, it is not within the judiciary's cognizance to add statutory trust lands. *United States v. Darden*, 70 F.3d 1507, 1524-25 (8th Cir. 1995).

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), the Court considered a statute which specifically preempted certain state laws and considered whether additional provisions of state law were somehow preempted by that same federal law. The Supreme Court rejected that notion, finding that it would not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 84. No court-made rule should similarly expand the definition of Indian country, simultaneously preempting state law.

2. *The text and history of the IRA preclude a finding that Congress intended that lands taken into trust under 25 U.S.C. § 465 automatically become "reservation."*

(a) *The text of the IRA precludes a finding that "trust lands" acquired under 25 U.S.C. § 465 become "reservation."*

25 U.S.C. § 465, Section 5 of the IRA, allows the Secretary of the Interior to acquire land in trust "within or without" reservations "for the purpose of providing land for Indians" and provides that the land shall be "exempt from State and local taxation." The statute thus identifies the effect of the trust acquisition—tax exemption—but assuredly does not create lands into "reservation."

25 U.S.C. § 467, Section 7 of the IRA, adopted simultaneously with 25 U.S.C. § 465, Section 5, provides the mechanism for creation of "reservation" from lands acquired under Section 5, and other parts of the IRA. 25 U.S.C. § 467 provides:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations . . . .

25 U.S.C. § 467 thus allows the Secretary of the Interior to "proclaim" an "Indian reservation" on lands acquired pursuant to "any authority conferred in this Act, or to add such lands to

existing reservations." It is untenable to argue that land taken into trust under 25 U.S.C. § 465 is somehow turned into a "reservation" without the necessity of a "proclamation" under 25 U.S.C. § 467. (No "Proclamation" is argued to have been made here.)

This result follows from the necessity of avoiding an "interpretation of a statute that 'renders some words altogether redundant.'" *United States v. Alaska*, 521 U.S. 1, 59 (1997). In this case, a finding that an acquisition of land under 25 U.S.C. § 465 automatically creates "reservation" status would render the quoted language of 25 U.S.C. § 467 to be "redundant." Moreover, multiple other statutes[2] and regulations[3] distinguish

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[2] *See, e.g.*, 16 U.S.C. § 670k(4)(E) (defining public land to include "an area within an Indian reservation or land held in trust . . . ."); 23 U.S.C. § 101(a)(12) (regulations applicable to roads which provide access "to an Indian reservation or Indian trust land"); 25 U.S.C. § 1903(10) (defining "reservation" to be "Indian country as defined by section 1151 of Title 18" and adding "any lands, not covered under such section [1151], title to which is . . . held by the United States in trust"); 25 U.S.C. § 2703(4) (defining "Indian lands" to mean lands within any "reservation"; and "any lands title to which is . . . held in trust").

[3] For example, 25 C.F.R. 151.2(d) defines "trust land" as "land the title to which is held in trust" and 25 C.F.R. 152.2(f) defines

(continued...)

between the terms "reservation" and "trust land."

(b) *The legislative history of the IRA establishes a congressional intention that the mere acquisition of land in trust would not automatically create reservation status.*

Eldred v. Ashcroft, 537 U.S. 186, 209 n.16 (2003), found that the highest source of "legislative intent" is the committee reports. The relevant committee reports establish that Congress intended that land acquired under 25 U.S.C. § 465 would be freed of property taxes; only when, and if, the Secretary invoked 25 U.S.C. § 467 would "reservation" be created.

House Rep. No. 1804, 73d Cong., 2d Sess. (1934), Ex. 123,[4] carefully defines the different functions of Section 5 (25 U.S.C. § 465) and Section 7 (25 U.S.C. § 467). It states:

(...continued)
"Indian reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." *See also* 23 C.F.R. 661.5; 23 C.F.R. 973.104; 25 C.F.R. 140.5 (a)(1); 25 C.F.R. 170.5.

[4] The Court admitted Exhibit 123 along with several others (Ex. 118-22, 127) only for the purpose of contesting the Tribe's "frozen boundary" argument. 2007 T.82, lines 3-7. This constituted an abuse of discretion. *Joiner*, 522 U.S. at 141. It makes no sense to rule that Congressional Reports and

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> *Section 5* authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians.

Id. at 7 (emphasis added). It states, two paragraphs later:

> *Section 7* gives the Secretary authority to add newly acquired land to existing reservations and extends federal jurisdiction over such lands.

Id. (emphasis added).

The House Manager of the bill, Representative Howard, likewise distinguished between Section 5—which "sets up the land acquisition program," 78 Cong. Rec. 11730 (June 15, 1934), Ex. 119, and Section 7, stating, "Any lands acquired under this bill may be added to existing reservations." *Id.*

(c) *The BIA, in the person of Felix S. Cohen in 1942, and in its most recent official position, takes the view that placing lands into trust does not, ipso facto, make them "reservation."*

Felix S. Cohen, the more or less patron saint of the BIA, quite clearly perceived a separate function for Section 5 and Section 7 in his authoritative *Handbook of Federal Indian Law*

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testimony are relevant to the interpretation of one section of a statute (Section 2 of the IRA) and are not relevant with regard to other sections of the same statute (Sections 5 and 7 of the IRA).

(1942), at 84, stating that "Section 5 [of the IRA] authorizes the acquisition of lands for Indians and declares that such lands shall be tax exempt." He next states that "Section 7 gives the Secretary authority to add newly acquired land to existing reservations and extends federal jurisdiction over such lands." *Id.*

Similarly, the recently promulgated BIA *Guidelines for Proclamations*, Ex. 129, belie any theory that "trust land" is automatically "reservation land."[5] The *Guidelines* state that the Secretary can "proclaim trust land acquired for an Indian tribe" under the IRA "as a new reservation, or an addition to an existing reservation." *Id.*

Critically, the *Guidelines* declare that "*[o]nly those lands taken in trust pursuant to the IRA or Indian Land Consolidation Act may be proclaimed as additions to the reservation land*

[5] The District Court admitted Exhibit 129 but only "for the limited purposes of any post-1997 issues," 2007 T.82, lines 9-16, but this limitation constituted an abuse of discretion. *Joiner*, 522 U.S. at 141. As the main text demonstrates, the *Guidelines* are required to be accorded "substantial deference" as interpretations of the law, and there is nothing in the *Guidelines* indicating that the Department regards them as a departure from a previous legal interpretation.

base." *Id.* (emphasis added). An agency's interpretation of the "statutes . . . it administers" is accorded "substantial deference" *Tang v. I.N.S.*, 223 F.3d 713, 719 (8th Cir. 2000), which has not been overcome here.

The Court of Appeals for the District of Columbia, taking note of the *Guidelines for Proclamations*, adopts the same common sense approach to Sections 5 and 7. In *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 469 (D.C. Cir. 2007), the Court, citing the *Guidelines*, agreed with the position of the Secretary of the Interior that the "Sackrider property"—certain land already in trust—would not qualify as a "reservation" until the band applied for and obtained a reservation proclamation under Section 467. *Id.*

3. *The mere placement of land into trust does not make lands into "Indian Country" or" reservation" under Venetie.*

Podhradsky, 529 F. Supp. 2d at 1054-55, Add. 14-15, found all trust lands of any kind to be a de facto or informal reservation. This conclusion was incorrect.[6]

Venetie, 522 U.S. at 530, authoritatively establishes the baseline requisites for any kind of Indian country—"federal set aside" and "federal superintendence." Failing to meet these requisites, the lands cannot be defined as "Indian country" or necessarily a de facto or informal reservation, or any other kind of reservation. As *Venetie* establishes, 522 U.S. at 531 n.7, moreover, the question is not merely whether there is some indication of such set aside and superintendence, the issue goes to the "'*degree* of federal ownership and control'" and the "'*extent* to which the area was set aside.'" (Emphasis added.)

Venetie thus found that when "federal protection of the Tribe's land is essentially limited to a statutory declaration that the land is exempt from adverse possession claims, real

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[6] This argument thus likewise applies to the 174 acres listed Ex. 203/Cor, entitled "Pre-1934 Fee to Trust or Non-Reserve Secretarial Order Trust land" and to all other trust land or reserve land. The Government failed to demonstrate that the *Venetie* requisites were made with regard to any of these lands and they are not, therefore, informal or de facto reservations.

property taxes and certain judgments as long as it had not been sold" the level of superintendence was insufficient. *Id.* at 533. *Venetie* affirmed findings of prior cases that superintendence is sufficient when "the Federal Government actively controlled the lands in question, effectively acting as a guardian for the Indians." *Id.*

Similarly, the Pueblos were "Indian country" because their lands were under the "'absolute jurisdiction and control of the Congress of the United States.'" *United States v. Sandoval*, 231 U.S. 28, 37 n.1 (1913) *quoted at Venetie*, 522 U.S. at 533-34.

Lands taken into trust under 25 U.S.C. § 465, like the *Venetie* lands, simply do not qualify with regard to superintendence. As a statutory matter, they are more or less on the same par with the *Venetie* lands, with perhaps even less superintendence. 25 U.S.C. § 465 provides only for a tax exemption, not for exemption from adverse claims or judgments. Nor was there proof presented that the United States has "actively controlled the lands in question, effectively acting as a guardian." 522 U.S. at 533. As far as appears from the record, 25 U.S.C. § 465 simply does not create such "active

control" and places virtually no limits on the use of land by the Indian or the Indian tribe—land in trust might be used for ranching, farming, factories, or retail. It might be used providently or improvidently, with a short run interest or a long run interest or no interest at all. No "active control" at all is shown here.

The court below stated that it relied upon the "superintendence over these trust lands as testified to by Ms. Orozo and FBI agent Miller." 529 F.Supp.2d at 1057, Add. 17. But the testimony of Ms. Orozo was simply that the BIA had a hand in leasing certain lands. 2007 T.203-7. This testimony certainly does not evidence "absolute control by the United States." Moreover, many lands are not leased at all and there is, consequently, no evidence of any so-called "superintendence" by Ms. Orozo. 2007 T.206, lines 19-25 to 2007 T.207, lines 1-4; 2007 T.208, lines 23-25.

Even when the lands are leased, the United States appears to act more as an agent. According to Ms. Orozo, the tribe "authorizes" the Bureau to negotiate their leases. 2007 T.206, lines 4-5. A downtown realtor may lease one's land; that

does not give him "superintendence." The testimony of Agent Miller is, of course, irrelevant because it concerns, in no way, the "superintendence" of the land. *Venetie*, 522 U.S. at 533.

Finally, *Venetie*, 522 U.S. at 534, looked to the "primary purposes" of the Act at issue—"to effect Native self-determination and to end paternalism in federal Indian relations." These purposes argued against the finding that the government exercised the requisite "superintendence." The "primary purposes" of the IRA are quite similar—to "'develop the initiative destroyed by a century of oppression and paternalism.'" H.R. Rep. 1804, 73d Cong., 2d Sess. (1934) at 6, *quoted at Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). It would not serve the objectives of promoting initiative and destroying paternalism if it were found that the IRA imposed the active control and guardianship on tribal members and their land, simply because the land was taken into trust under 25 U.S.C. § 465.

4. *The decisions of this Court support the thesis that "reservation" status is not created simply by taking land into trust.*

The leading case of this Court on the issue of the status of "trust lands" is *Stands*, 105 F.3d at 1572, which explains that "for jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country."

Stands is directly on point and finds that the placement of land in trust for a tribe does not automatically make it "Indian country." It further elaborates, in a footnote, that in "some circumstances off reservation trust land *may* be considered Indian country." *Id.* at 1572 n.3 (emphasis added) (citing *United States v. Azure*, 801 F.2d 336, 338-39 (8th Cir. 1986)). The United States in the past has relied heavily on the notation of *Azure* to somehow implode *Stands*. It has neglected to note that *Azure* does not hold that any creation of trust land creates reservation but rather states only that the "actions of the federal government in its treatment of Indian land *can* create a de facto reservation." 801 F.2d at 338 (emphasis added). Further, *Azure* found that a "key factor" in the analysis was the expenditure of "funds and providing social services." *Id.* at 338-39. This proposition is expressly rejected in *Venetie*, 522 U.S. at 534.

In *Stands*, 105 F.3d at 1571, the reservation had been diminished such that "Mellette County, where the assault occurred, had been outside the limits of the Rosebud Reservation since 1910." In the present case, the reservation, under this Court's ruling in 1999, had been diminished or disestablished, such that the fee lands in question were outside the limits of any reservation at least since their transfer to non-Indians. *Gaffey,* 188 F.3d at 1030, Add. 140-41.

The District Court nonetheless found that the "acquisition of land not previously within the boundaries of an Indian reservation presents a different situation than acquiring land in trust within the original boundaries of a diminished reservation." 529 F.Supp.2d at 1054, Add. 14. This finding is directly contrary to the analysis of S*tands,* in which the land had once been within the boundaries of a reservation. *Stands*, 105 F.3d at 1571.

Moreover, the attempt to create this distinction gives effect to the 1858 boundaries despite this Court's repeated rejection of those boundaries in 1999: (1) "we reject the conclusion that the original exterior boundaries continue to have effect," 188

F.3d at 1013, Add. 123; (2) that "the 1858 reservation boundaries did not remain intact following passage of the 1894 Act," *id.* at 1021, Add. 131; (3) the "original exterior boundaries do not serve to separate Indian country from areas under primary state jurisdiction," 188 F.3d at 1021, Add. 132; (4) "we recognize that the original exterior boundaries of the reservation have not been maintained." *Id.* at 1030, Add. 140.

Finally, *Stands*' ruling is clearly a holding, for the analysis which followed was based on that language. *Stands* cites witnesses who identified the site as "tribal trust land" and "Indian trust land," 105 F.3d at 1573. *Stands* found, however, that neither this nor other "testimonial evidence" allowed a determination that the "assault took place on an allotment," *id.*, such that the parcel was "Indian country." *Id.* In other words, *Stands* necessarily found that mere "tribal trust land" was not "reservation" or "Indian country," a determination spurned by the District Court in this case. *See also South Dakota v. U.S. Department of Interior*, 487 F.3d 548, 553-54 (8th Cir. 2007) (Court on rehearing broadly hints, through citation of Interior

document, that lands become "reservation" only if separate process for proclaiming them as such is successfully invoked).

5. *The District Court opinion creates a serious doctrinal anomaly with potentially wide application.*

Another serious doctrinal anomaly is created by the District Court's finding that all trust land becomes "reservation." Under the explicit language of 18 U.S.C. § 1151(a), a "reservation" is "all land" within the reservation "notwithstanding the issuance of any patent." *See Seymour v. Superintendent*, 368 U.S. 351, 358 (1962). Thus, if a piece of trust land is a "reservation" and a patent is granted either to an Indian or a non-Indian, it *remains* "reservation." That, of course, is not the way such lands have been treated in the Yankton area. At trial, Tim Lake, the former Yankton BIA Superintendent, stated that land which had left trust status was no longer treated as "Indian country." 2007 T.24, lines 5-10. Lake testified that it had not made any difference as to whether it had originally been allotted trust land or land taken into trust under the 1934 Act. 2007 T.25, lines 3-7. Lake in effect affirmed that lands leaving trust status were not

"reservation" because, if they were "reservation," they would not lose "reservation" status simply because a patent had been issued.

Of course, the problem is much broader than Charles Mix County, for an enormous amount of land moves into and out of the two types of trust status each year. According to the GAO, in the calendar year 1997, the BIA acquired about 360,000 and disposed of about 260,000 acres of trust land. Government Accountability Office, *Indian Issues, BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications,* GAO 06-781 (July 2006) at 9 n.8, Ex. 130. Under the District Court's theory, trust land is "reservation" and, consequently, none of the 260,000 acres would lose "reservation" status when transferred to non-Indian fee status, even those far away from any present day reservation.

6. *Other serious policy reasons militate against the District Court's decision.*

There are other related and important policy reasons to find that an acquisition under 25 U.S.C. § 465 does not create

a reservation. Roughly nine million acres of on and off reservation land have already been taken into trust, C. Smith, Chief Editor, *American Indian Law Deskbook* 57-58 (3d ed. 2004), and there were 1,000 land in trust applications pending at the time of the 2006 GAO Report. *See* Ex. 130, at 3. In 1999, the BIA officially estimated that there would be nearly 7,000 annual requests for trust status. 64 Fed. Reg. 17574 (Apr. 12, 1999). And this was before the truly enormous explosion in funds available to the tribes from gaming. Nothing in 25 U.S.C. § 465 keeps the BIA from approving virtually any land into trust acquisition whether along Delman Boulevard in St. Louis, Missouri; in the middle of Sioux Falls, South Dakota; around the perimeter of Central Park in New York City; or in any location anywhere. It is but a small step from the District Court's holding to find such lands to be "reservation."

Moreover, the implementation of the land in trust statute has been haphazard and the BIA has simply failed to impose any real boundaries. The GAO Report, Ex. 130, at 18, criticized Interior's land in trust regulations in that they do not provide guidance on

(1) "the type of need to be considered and how the level of need should be evaluated";

(2) how the purpose criterion "applies to applications from individual Indians";

(3) "how the amount of land owned by an individual Indian should be weighted against their need for assistance in handling their business affairs";

(4) "what constitutes an acceptable level of tax loss";

(5) "what types of jurisdictional and land use concerns might warrant denial of the application"; and

(6) "how BIA should evaluate its ability to discharge additional duties."

Indeed, the GAO points out that the "responses to the criteria" do not even dictate the result: The BIA can decide one or more criteria against the tribe and still take the land into trust. *Id.* As this Court has noted, the regulations require only that the BIA "consider" one or another factor, *South Dakota v. Department of the Interior*, 423 F.3d 790, 800 (8th Cir. 2004), cold comfort to a non-Indian government confronting a Superintendent who may well be a member of the very tribe making the application. The "slam-dunk" nature of a land in trust application strongly argues against a finding that the

grant of such an application converts the land into "reservation" under 18 U.S.C. § 1151(a).

7. *Misinterpretation of Oklahoma Tax Commission*.

The United States has, in the past, argued that *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) requires a finding that all land taken into trust, in every place and at every time, under 25 U.S.C. § 465, becomes an "informal reservation" or a "reservation" at some unspecified time. The analysis is flawed in that *Citizen Band* did not even consider an acquisition under 25 U.S.C. § 465; rather, *Citizen Band* considered a special situation in which, in 88 Stat. 1922 (1975), "Congress specifically authorized the tribe to convey this land . . . to the United States in trust." *Citizen Band Indian Tribe v. Oklahoma Tax Commission*, 888 F.2d 1303, 1306 (10th Cir. 1989), *rev'd*, 498 U.S. 505 (1991). Furthermore, *Citizen Band* arose in Oklahoma, a state which has been recognized and treated as a separate entity in Indian law for many purposes, even in the determinedly pro-tribal treatises. *See, e.g.*, R. Strickland, Editor, *Felix S. Cohen's Handbook of Federal Indian Law* 770-97

(1982); Nell Newton, Editor, *Cohen's Handbook of Federal Indian Law 2005 Edition* 294-319 (2005).

8. *Lands never formally taken into trust are neither "trust lands" nor "reservation."*

As noted above, of the 6,444.47 acres of land claimed to be in trust, 3,120.98 acres were, in fact, never formally taken into trust. *See, e.g.*, Ex. 202a. These 3,120.98 acres contrast with the remaining 3,323.49 acres; as to the latter acreage, there is, in each case, a written acceptance of the land into trust status. *See, e.g.*, Ex. 202g (statement in writing that "the within deed is hereby approved," along with the identification of the delegated authority and the signature of "Assistant Area Director").

In contrast, the parcel at Ex. 202a does not contain such language. There is nothing on the face of the deed to indicate that the land was taken into trust; there is no signature of an Interior officer and the United States was not able to produce any other document which demonstrated that it had exercised authority under 25 U.S.C. § 465. The same argument applies to the parcels at Exs. 202 b, d, f, h, i, j, k, p, q, r, s, t, u, v, x, y,

aa, ee, ff, rr, ss, tt, vv, ww, xx, yy, zz, aaa. Their acreages, we submit, cannot be "trust land" or certainly "reservation."

The very assertion by the United States that low level administrators can create "trust land" and, even more remarkably, "reservation" with no formal action betrays the fallacy of the whole arrangement: the creation of reservations is for Congress, in a solemn act; it is not for a low level bureaucrat who bothers to take no action at all.

The deeds by which the United States claims make "reservation" are simple—they are deeds from a person to the United States in trust. It is easy enough to do. Mr. Jones, a non-Indian living in Wagner (in Charles Mix County within the former reservation) or in Platte (in Charles Mix County outside the former reservation) under this theory can simply make out a deed, file it with the Register of Deeds, and send it to the BIA which stamps it like all bureaucracies. It is absurd to argue that Jones thereafter does not have to pay local property taxes, but that is essentially what the United States argues here.

The United States has, in fact, admitted in the past that a "formal acceptance" is necessary for land to be in trust and

that, in the absence of such acceptance, the land does not attain trust status. On November 3, 1980, the Secretary of the Interior, in his Memorandum to "All Area Directors," Ex. 124, explained the new draft regulations. The Secretary found:

> In the past there have been instances where a party has caused deeds to be written stating that the land was transferred to "the United States in Trust for . . . ." *This section makes it clear that land is not in trust until there has been a formal acceptance.*

Id. at 4 (emphasis added).

Essential legal doctrines involve the principle that the United States acts only through its authorized agents and the principles of offer and acceptance. First, the United States can act only through agents authorized by it to act, *see, e.g.*, *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947). Second, there must actually have been an *acceptance* of the offer of the trust land by the authorized agent. In this case, there is no showing that an authorized agent of the United States accepted each of the deeds.

The general law is that "To constitute a contract, there must be an acceptance of the offer; until the offer is accepted, both parties have not assented, or, in the language often used

by the courts, their minds have not met." 17A Am. Jur. 2d *Contracts* § 66. Further, because this essentially involves a contract for the sale of land, the contract is required, as a matter of state law, to be in writing. SDCL 53-8-2.

There is no evidence here of a writing signed by an authorized agent of the United States—the "party to be charged."

B. *Whether allotted lands in the area in dispute that are "Indian country" because they qualify as "allotments" under 18 U.S.C. § 1151(c) also qualify as "reservation" under 18 U.S.C. § 1151(a).*

Of the original 262,000 acres of allotted land, 188 F.3d at 1017, there now remain 30,051.08 acres in allotted status. This includes 25,555.08 acres held by individuals, Ex. 211/COR, plus 4,496.58 acres of allotted lands which have been transferred to the Tribe. Ex. 204/COR. The latter category remains in allotted status as established in *Stands*, 105 F.3d at 1573-75 and as affirmed at *Gaffey*, 188 F.3d at 1022, Add. 132. These lands are "Indian country" under 18 U.S.C. § 1151(c) with all the benefits associated with that status.

The District Court found, however, that these "allotted" lands also constitute "reservation" as defined by Section 1151(a). 529 F.Supp.2d 1052-53, App. 12-13. This creates again a doctrinal impossibility. 18 U.S.C. § 1151(a) provides that lands constituting a "reservation" remain "reservation" "notwithstanding the issuance of any patent." *See Seymour*, 368 U.S. at 358. This Court in effect held, in *Gaffey*, that the "issuance of patents" to non-Indians for 230,000 acres of allotted lands in the disputed area did cause the lands to lose "Indian country" status. 188 F.3d at 1030, Add. 140. The "allotted lands" in the disputed area therefore could not, doctrinally, have been "reservation." The District Court's decision, in this way, defies this Court's 1999 decision.

The District Court's position is, moreover, contrary to well established diminishment law. As stated in *Stands*, "when Congress . . . diminished a reservation, as it did with the Rosebud Reservation . . . allotted lands outside the new reservation boundaries retained their allotment status, and they remain Indian country today, unless their Indian titles have been extinguished." 105 F.3d at 1572. Allotments, the

Supreme Court has stressed, remain "Indian country" because of their *allotted* status, not because they are reservation. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 n.48 (1977); *Venetie*, 522 U.S. at 528-29, states,

> Before § 1151 was enacted, we held in three cases that Indian lands *that were not reservations* could be Indian country . . . . we held that Indian allotments—parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians—were Indian country. . . . After the reservation's diminishment, the allotments continued to be Indian country.

(Emphasis added.)

Finally, there is little, if any, policy "downside" to a correct reading of the law. *See Rosebud*, 430 U.S. at 615 n.48. As with the Native Americans living on allotted lands "outside of the [Rosebud] reservation, they, too, are on Indian country . . . and hence subject to federal provisions and protections." *Id.* Federal "benefits and programs" are "available to tribal members living 'on or near' the reservation" a situation which "surely diminishes this specter of a 'sharp reduction in the federal aid available to members living off the reservation.'" *Id.*

The real question raised by the District Court's opinion is the status of lands in Bennett, Mellette, Tripp, Gregory, Codington, Roberts, Day, and Marshall counties—all counties within former or disestablished reservations—and similar lands circuit-wide and nationwide. Each certainly has present-day "allotted land" which has been considered to be "Indian country" under 18 U.S.C. § 1151(c) and not "reservation" under 1151(a). The District Court's theory would also apply to the 1868 Great Sioux Reservation. Thus, other counties, long considered off a reservation, might be affected, including Haakon, Lawrence, Meade, and Perkins counties. *See Department of Interior*, "Lands under the Jurisdiction of the BIA as of December 31, 1997," Ex. 117. "Allotted lands" under 18 U.S.C. § 1151(c) in such counties could then be classified as "reservation" under 1151(a) and in each case, under the plain wording of 18 U.S.C. § 1151(a), the "issuance of [a] patent" would not eliminate their "reservation" status, under the District Court decision.

C. *The agency or reserve lands which were ceded by the Tribe in 1894 to the United States are not "reservation" by virtue of a 1929 Act.*

In 1894, Congress enacted into law the Agreement between the Yankton Sioux Tribe and the United States. Articles I and II provided for a cession, for a sum certain, of "all of the unallotted land" of the Tribe. *See* 522 U.S. at 338, Add. 78. Article VIII of the Agreement provided that "such part of the surplus lands hereby ceded and sold to the United States . . . occupied . . . for agency, schools and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands . . . shall, immediately after the ratification . . . be offered for sale . . . to actual bona fide settlers[.]" SA 354.

In 1929, the Congress enacted 45 Stat. 1167 (1929) which declared that "title" to "certain lands . . . now reserved for agency, schools and other purposes" pursuant to the Act of August 15, 1894, would be "reinvested in the Yankton Sioux Tribe when they are no longer required for agency, school and other purposes . . . ." SA 430.

The unambiguous intent of the 1929 Act was to provide for conveyance of the agency lands which had been ceded to the

United States in 1894 to the "Tribe" instead of to "settlers" as had been earlier agreed to and ratified in the 1894 Act. The question is the effect, if any, on the "Indian country" status on these "ceded lands." The 1999 Panel decision found that the 1929 Act required recognition of these lands as "reservation." *See* 188 F.3d at 1029-30, Add. 139-41.

1. *The law of the case rule should not prevent the entry of a correct ruling.*

Because of the 1999 Panel decision, the question of the status of "agency lands" raises the meaning of the "law of the case" rule. *Id.*

The "law of the case" idea is an "amorphous concept." *Arizona v. California*, 460 U.S. 605, 618 (1983). It "directs a court's discretion, it does not limit the tribunal's power." *Id.* In general, the rule is that once a tribunal decides a question, that decision should continue to govern at subsequent stages of the same case. This Court has recognized and applied the doctrine, but has also found that it does not apply in the presence of "'substantially different evidence'" or when the "decision is

clearly erroneous and works manifest injustice." *Maxfield v. Cintas Corp.*, 487 F.3d 1132, 1135 (8th Cir. 2007).[7]

(a) *Substantially different evidence.*

The rule with regard to "law of the case" presumes that a legally significant quantum of evidence was set before the decision maker prior to the entry of a decision. In fact, virtually no evidence was set forth before the decision maker with regard to the agency or reserve lands. Because evidence is now available, it is necessarily "substantially different" than the virtual clean slate of the original decision.

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[7] There is a substantial question as to whether the "law of the case doctrine" should even apply, and we submit it should not, given the application by Southern Missouri to present additional facts to this Court about the nature of the "agency lands" *see* "Motion to Enlarge Record," filed October 29, 1999 (SA 282), together with the "Response of the United States," filed November 10, 1999 (SA 289), the tribal "Response to Motions to Enlarge Record, filed November 19, 1999 (SA 296), and this Court's response that such materials could be sought to be filed "on remand" "Order," December 9, 1999 (SA 300). Furthermore, the theory that the matter is closed is inconsistent with what the United States told the United States Supreme Court in its Brief to the United States in Opposition in *State of South Dakota v. Yankton Sioux Tribe*, Nos. 99-1490 and 99-1693 (Ex. 147). In that brief, even though the United States argued that this Court had made a decision with regard to the agency lands, it ultimately argued to the Supreme Court that this Court's decision was "interlocutory." *Id.* at 27.

First, important evidence is now available with regard to use and treatment. As the Tribe acknowledged in its "Response to Motions to Enlarge Record" filed November 19, 1999, in this Court, "The history of use is therefore material." *Id.* at 2, SA 297. Likewise, the history of treatment by various government officers is important. *See* 522 U.S. at 351, 356-57. Add. 84, 86-87.

The critical evidence now available to the Court is that, after the parties were directed to the matter, *no* witness testified that the present-day agency lands are treated as "reservation" *because* they are "reserve lands" or "agency lands." Rather, their only special treatment came because they had been placed in trust. FBI Agent Miller testified that he would exercise Indian country jurisdiction on agency lands only if they were in trust status. 2007 T.37, lines 1-4. Warren LaBeau, who served as Agency Superintendent until just before trial, testified that he would take jurisdiction over these "bright orange" lands only if they were in trust status. 2007 T.54, lines 7-13. *See* Add. 142 (map).

Additionally, the 1999 Panel had no information as to the location, extent, or contiguity of the "reserve" or "agency lands." The Panel seemed to have been under the false impression that the agency lands were in a single parcel—the "'mile square'" at Marty, which was referred to as the "'the tribal headquarters.'" *See* 188 F.3d at 1030, Add. 140-41. In fact, the "reserve" or "agency lands" are found in two areas, one at Greenwood and one near Lake Andes. Ex. 201. *See* Map at Add. 142 (bright orange areas). There are no agency lands at Marty. Nor were any lands actually transferred in 1929; two parcels were transferred in the 1930s, two in the 1940s, four in the 1950s, one in the '60s, and one in the '70s. Ex. 201. These potential misconceptions may have led the Panel to a conclusion which the facts did not justify, i.e., that the transfer of the agency lands was in an immediate "mile square" which somehow was connected with or constituted with a hypothetical tribal headquarters at Marty.

(b) *The decision was manifestly incorrect.*

The legal determination that these lands constituted "reservation" was, the State respectfully submits, manifestly

incorrect. Again, the problem is clear. The legal arguments for and against the Court's conclusion were not presented to the Panel; therefore, they were not addressed.

(1) *Binding language of Supreme Court.*

Most critically, the Court did not consider the argument that these "ceded lands" could not be "reservation" because such a determination was squarely precluded by *Yankton Sioux Tribe*, 522 U.S. at 342 (Add. 80), in which the Court unequivocally held that "unallotted lands ceded as a result of the 1894 Act did not retain reservation status." The Panel held that the "agency land," which is "unallotted land," was "ceded" to the United States. *Gaffey*, 188 F.3d at 1019, Add. 129. The agency land therefore falls precisely into the category of "unallotted land 'ceded' as a result of the 1894 Act" and which did not "retain reservation status" under the binding rule of *Yankton Sioux Tribe*, 522 U.S. at 342. Add. 80.

(2) *Plan of Congress—text of the 1894 Act in the context of the 1929 Act.*

The Court likewise was not presented argument on the origin of the lands, and how the 1894 Congress approached

those lands. As noted, the 1894 Agreement, as adopted by Congress, provided in Article VIII that a small part of the surplus lands ceded to the United States would be "reserved from sale to settlers" but only until the lands "are no longer needed" for agency, school and other purposes. SA 354. At that time, they would be sold to "settlers." *Id.* The lands were emphatically not "reserved" for the Tribe, but for "settlers" by the 1894 Act. This fact also reinforces the idea of disestablishment, not the continuity of a "reservation."

The 1929 Agreement did provide a different recipient for the lands—the Tribe. Critically, the lands were to be conveyed to the Tribe only after the same conditions precedent set out in the 1894 Act were satisfied, i.e., under the language of the 1929 Act, the lands could be transferred only "when they are no longer required for agency, school or other purposes." 45 Stat. 1167 (1929). SA 430.

(3) *Plan of Congress—BIA repudiation of responsibility upon transfer in 1929.*

The view that Congress did not intend to recognize a "reservation" is emphatically endorsed by the contemporaneous

submission of the Department of Interior to Congress. The Department, in Senate Rep. No. 1130, 78th Cong., 1st Sess. (1928), SA 427-28, objected to the then pending bill, stating the following: "It will be a step backward in that it would necessarily limit the jurisdiction of the Federal Government over the reserved area and bring about some undesirable conditions that could not be readily controlled." In other words, the Department of the Interior announced that it would lose certain jurisdiction over the lands if they were conveyed. This comprehends an apprehension, which was conveyed to and which was uncontradicted in Congress, that the transferred lands would *not* be under federal superintendence. As *Venetie*, 522 U.S. at 527, establishes, there are two baseline requirements which are necessary for any finding of "Indian country"—there must be an adequate federal set aside and sufficient federal superintendence.

It is incomprehensible that the Department of the Interior would tell Congress in 1928 that its proposed action would limit federal superintendence over the lands and yet in *this*

Court argue that the very same Act *created* federal superintendence necessary for "Indian country" status.

(4) *Inconsistency with DeCoteau.*

A finding that the "agency lands" are "reservation" is also inconsistent with *DeCoteau*, 420 U.S. at 435 n.16, 438 n.19, in which agency lands of the former Lake Traverse Reservation effectively were found not to be "reservation." *Id.* at 426 n.2 (only "allotments" would retain "Indian country" status if no "reservation" found).

(c) *Conclusion as to agency lands.*

The United States Department of Justice acknowledged, in its Opposition to Certiorari, that the 1999 Panel "did not articulate its rationale" for its determination with regard to agency lands. Ex. 147 at 20. This is not surprising, given the dearth of factual and legal information set forth for this Court. An examination of that material, moreover, provides satisfactory evidence that the law of the case rule should not apply, and that this Court should find that the agency lands were not, in fact, created as, or recognized as, "reservation" by the Act of 1929.

2. *Lands owned by religious congregations in 1929 and not by the government in 1929 were not intended to be included under the Act.*

The Act of 1929 refers to "lands now reserved for agency, schools or other purposes." 45 Stat. 1167 (1929). SA 430. The record demonstrates that eighty acres of lands the United States claims as "reserve lands" had actually been conveyed by fee patent to the Episcopal Church in 1897 and an additional twenty acres had been conveyed in 1920. Exs. 201c, 201d. It was only in 1944 and 1945 that these lands were transferred to the United States, in trust for the Tribe. Exs. 201c, 201d. They were not, therefore, in 1929 "now reserved" for any purpose by the United States. The District Court took the matter under consideration (2007 T.126-27), but did not determine whether these lands should be included as "reserve" lands.

This Court therefore should now determine that these lands, held in fee by the church in 1929, are not "reserve" lands within the meaning of the 1929 Act, regardless of how the remainder of the argument regarding "reserve lands" is resolved.

D. *The District Court erred in finding that Indian-owned fee land continuously held in Indian hands constituted "reservation."*

The District Court acknowledged that the Tribe had failed to show that Indians had held any land in fee status continuously (apparently since it had left allotted status), but nonetheless found that if any such land existed, it would be "reservation." *Podhradsky*, 529 F.Supp.2d at 1056-57, Add. 16. Such land, however, is not "reservation" under the rule of *Venetie*, which set out the ground floor for "Indian country." *Venetie*, 522 U.S. at 527, provides that, at a minimum, lands must be "set aside by the Federal Government for the use of Indians as Indian land; second, they must be under federal superintendence." Once the lands in question were conveyed in fee to Indians, they were no longer under "federal superintendence" and no longer "set aside" as "Indian land." There is no evidence whatsoever that any such lands exist, or that the United States exercised criminal jurisdiction over them. 2007 T.31, lines 1-4.

E. *The Yankton Sioux Reservation has been disestablished.*

1. *DeCoteau v. District County Court demonstrates that the Yankton Reservation has been disestablished.*

The 1999 Panel decision found that the Yankton Sioux Reservation was not disestablished. 188 F.3d at 1029-30, Add. 139-40. The law of the case analysis set forth above applies. In this case, the State again respectfully requests that the Court find that the decision is "clearly erroneous," will work "manifest injustice," and should be corrected.

There are compelling legal and historical reasons supporting this conclusion. The Supreme Court in *Yankton Sioux Tribe*, 522 U.S. at 344 (Add. 81), found that the terms of the Yankton agreement "parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*" and cited the language of the Lake Traverse agreement in which the tribe agreed to "cede" all of its "unallotted lands" for a sum certain. *Id.* That is precisely what happened in the Yankton agreement. SA 353. *DeCoteau*, 420 U.S. at 446, commented that in most cases the tribe reserved for itself a specific tract of land which would remain

"reservation." But that was not the case in *DeCoteau*, where the tribe provided for the "cession of all, rather than simply a major portion of, the affected tribe's unallotted lands." *Id.* The tribe and the government "were satisfied that the retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments." *Id.*

Precisely the same occurred here. Cession and sum certain of *all* allotted lands occurred on the model of *DeCoteau* and shortly following the events in *DeCoteau*. Not only do these similarities exist, but there are at least seventeen points of identity between the two agreements.[8]

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[8] The points of identity include:

1. *Time period equivalent.* Sisseton-Agreement (set out at *DeCoteau*, 420 U.S. at 450-60) approved 1891, 26 Stat. 1035 (1891); Yankton agreement approved 1894, 28 Stat. 286 (1894).

2. *Allotment under General Allotment Act.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

3. *Similar acreage allotted.* Sisseton-240,000 acres, *DeCoteau*, 420 U.S. at 438 n.19; Yankton-262,000 acres, *Yankton Sioux Tribe*, 522 U.S. at 336.

(continued...)

(...continued)

4. *Similar per capita acreage allotted.* Sisseton-158 acres per capita, *DeCoteau*, 420 U.S. at 438 n.19 and 1995 Exhibit 610; Yankton-152 acres per capita, *Yankton Sioux Tribe*, 522 U.S. at 336 and 1995 Exhibit 610.

5. *Preambles equivalent.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

6. *Cession language used in both.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

7. *All unallotted lands ceded in both.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

8. *Sum certain language used in both.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 315.

9. *Entry subject to homestead and town site laws in both.* Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 319.

10. *Missionaries allowed to purchase lands in both.* Sisseton, 26 Stat. 1035, 1037; Yankton, 28 Stat. 286, 316.

11. *School lands granted in both.* Sisseton, 26 Stat. 1035, 1039; Yankton, 28 Stat. 286, 319.

12. *United States retained an agency and schools in both.* Sisseton, 26 Stat. 1035, 1037; *DeCoteau*, 420 U.S. at 435 n.16, 438 n.19; Yankton, 28 Stat. 286, 316; *Yankton*, 522 U.S. at 336.

13. *Allotments were throughout the former reservation in both.* Sisseton, *DeCoteau*, 420 U.S. at 428; Yankton, *Yankton*, 522 U.S. at 326.

(continued...)

The 1999 decision, nonetheless, held that *DeCoteau* did not control, citing to specific distinctions between the Sisseton-Wahpeton and Yankton agreements and stating generally that the "circumstances surrounding the negotiation[s]" and the "content and wording of the agreements" were very different. 188 F.3d at 1020, Add. 130. But *Yankton Sioux Tribe*, 522 U.S. at 344 (Add. 81), had already found that Articles I and II of the agreements were virtually identical and that the "terms" of the agreements were "parallel." The only other support for the conclusion of the 1999 Panel is, with respect, insufficient. The distinction relied on is that the Lake Traverse agreement

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(...continued)

14. *Presidential proclamation opening the reservation referred to "cession language" in both.* Sisseton, 27 Stat. 1017; Yankton, *Yankton*, 522 U.S. at 354.

15. *Presidential proclamation opening the reservation referred to "Schedule of lands within . . . the Reservation. . . ." in both.* Sisseton, 27 Stat. 1017, 1018 (1892); Yankton, 29 Stat. 865, 866 (1895).

16. *State assumed virtually unquestioned jurisdiction in both.* Sisseton, *DeCoteau*, 420 U.S. at 442; Yankton, *Yankton*, 522 U.S. at 357.

17. *Two situations generally treated in parallel fashion on maps. See, e.g.*, Sisseton and Yankton. SA 407.

"negotiated allotments for each individual, including married women." 188 F.3d at 1020, App. 130. This factor has no identifiable, logical relationship to the question of disestablishment, and no court has ever distinguished cases on this factor. Furthermore, the actual statistics show that the per capita lands taken in allotted status at the Lake Traverse Reservation and at the Yankton Sioux Reservation were almost the same: 158 acres and 152 acres, respectively. *See* note 4, subpart (4), *supra*.

Gaffey also suggests that the "background" of the Sisseton-Wahpeton agreement was "very different . . . because tribal members there had expressed their clear desire to terminate their reservation." 188 F.3d at 1020, Add. 130. The support for this distinction is a press report quoted in *DeCoteau*, 420 U.S. at 432-33, in which Lake Traverse spokesmen are reported to have said, inter alia, that "[w]e never thought to keep this reservation for our lifetime."

This press report does not create a viable distinction between the agreements. *Yankton Sioux Tribe*, 522 U.S. at 353, Add. 85, found that the "Commissioner's report of the

negotiations signaled their understanding that cession of the surplus lands have dissolved governance of the 1858 reservation." The Supreme Court then held that the March 1894 letter of the Yankton chiefs and "members of the tribe" "indicated that they *concurred in* such an interpretation of the agreement's impact." *Id.* (emphasis added).

The chiefs and over 100 members of the tribe were thus found to have agreed that the "cession" of the lands "dissolved governance of the 1858 reservation." *Id.* This statement is certainly equivalent to the newspaper article in *DeCoteau*. Further, it is notable that both a tribal and federal negotiator referred to the Lake Traverse arrangement as if it were equivalent to the Yankton arrangement then under discussion. S. Doc. 27, 53d Cong., 2d Sess. (1894), at SA 328 (tribal member); SA 335, 336 (federal negotiator).

2. *The 1999 Panel decision sustains a conflict with the South Dakota Supreme Court.*

On the day after the Panel decision in 1999, the South Dakota Supreme Court issued its decision in *Bruguier v. Class*, 599 N.W.2d 364, 377 (S.D. 1999), in which the South Dakota

Supreme Court found that the "*DeCoteau* court perceived the circumstances to signal congressional intent to terminate the reservation and restore the land to the public domain. We believe the same intent is shown in the Yankton Reservation sale." The Court was unable to find a "jural distinction" between the Sisseton and Yankton Agreements in view of *DeCoteau*, *id.*, and held that the "Yankton Sioux Reservation was effectively terminated by the 1894 Act." *Id.* at 377-78. *See also State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) ("This court has ruled that the Yankton Reservation was disestablished."). Likewise in 1984, *State v. Thompson*, 355 N.W.2d 349, 350-51 (S.D. 1984) (court poses the question whether the Yankton Reservation was "disestablished" and answers in the affirmative).

3. *The 1934 IRA did not freeze the boundaries of the Yankton Reservation as they are purported to have existed in 1934.*

The District Court appeared to find that the "boundaries" of the Yankton Reservation were "frozen" by Section 2 of the IRA, 25 U.S.C. § 462, in 1934 and then unfrozen in 1948. *Podhradsky*, 529 F.Supp.2d at 1050-51, Add. 10-11. While the

State agrees that, if the boundaries were frozen in 1934, they were unfrozen in 1948, it is, nonetheless, necessary to address the question of whether or not they were frozen in the first place, in the event that the latter argument might fail.

The apparent theory is that 25 U.S.C. § 462 "froze" the boundaries of the reservation because, under the argument, the Secretary could not issue any patent in fee after the passage of 25 U.S.C. § 462.

A brief historical survey destroys the argument. In 1906, Congress enacted 25 U.S.C. § 349, which allowed the Secretary "in his discretion" to issue a competent "allottee a patent in fee simple." In 1910, Congress enacted what became 25 U.S.C. §§ 372 and 373, both of which provided power to the Secretary to issue patents in fee under specified circumstances. Prior to the IRA, therefore, the Secretary had ample power to issue patents in fee.

There was an attempt in 1934 to strip that power from the Secretary: the original Section 4 of the proposed IRA (which was to become Section 2 of the Act as passed) provided in part that the "authority of the Secretary . . . to issue patents in fee

. . . is hereby revoked." Ex. 121, Hearing Before the Committee on Indian Affairs, U.S. Senate, 73d Cong., 2d Sess., on S. 2755 (Feb. 27, 1934), at 9.

This attempt to revoke the power of the Secretary to issue patents in fee came under fierce attack. Senator Wheeler argued against the revocation, stating that "I think the Secretary . . . ought to have some discretion in the matter. . . . there are Indians in my State that are just as capable as handling their own private affairs as any white man this room." Ex. 122, Hearings Before the Committee on Indian Affairs, U.S. Senate, 73d Cong., 2d Sess., on S. 2755 and S. 3645, Part 2, April 26, 28, 30; May 3, 4, 17 (1934) at 151. *See also id.* at 150, 238-39; Ex. 119, 78 Cong. Rec. 9270 (May 22, 1934) (Representative Hasting).

Due to the opposition, the Congress deleted the language revoking the authority of the Secretary to issue patents in fee, *id.*, and the bill passed without it. 48 Stat. 984, 25 U.S.C. § 462. Congress thus rejected the effort to strip the Secretary of his preexisting power, under 25 U.S.C. § 349, 372, and 373, to issue patents in fee, and the claim that the judiciary should

do what Congress did not should be rejected. *See also Morton v. Mancari,* 417 U.S. 535, 550 (1974) (repeals by implication are "not favored").

Finally, it is worthy of note that the top BIA officers agreed that Section 2 did not affect their preexisting power to grant patents in fee. In Felix Cohen, *Handbook of Federal Indian Law* 109 (1942), Cohen pronounced that Section 2 "does not prohibit the termination of such [trust] period by mutual agreement between the Indian and the appropriate administrative official." *See also* John Collier, *Analysis and Explanation of the Wheeler Howard Act, No. 86949*. Ex. 120, at 1.

F. *The District Court's finding that all trust land is a "dependent Indian community" both goes beyond the mandate and is unsupported.*

The District Court recited that the State's Attorney had, based upon his predecessor's actions, regarded three discrete areas within Charles Mix County to be "dependent Indian communities." *Podhradsky*, 529 F.Supp.2d at 1057, Add. 16. The District Court then frankly acknowledged "Other than the above, the record does not contain evidence as to what, if any,

other areas might be dependent Indian communities." *Id.*, Add. 17. Nonetheless, the District Court declared every trust acre—including trust allotments and statutory trust lands—within the 1858 boundaries to be a "dependent Indian community." *Id.* There is no precedent for this finding.

"Allotted lands" as defined by 18 U.S.C. § 1151(c) have never, without more, been also defined as "dependent Indian communities" under 18 U.S.C. § 1151(b). Indeed, the theory should be rejected because, if all "allotted lands" are indeed "dependent Indian communities," the separate congressional categorization of the lands as "Indian country" in 18 U.S.C. § 1151(b) and (c) is superfluous. *See United States v. Stanko*, 491 F.3d 408, 413 (8th Cir. 2007).

Nor does simply placing land into trust under 25 U.S.C. § 465 make it a "dependent Indian community." There is no parcel-by-parcel analysis in this record demonstrating any "community," any "dependency" or any fact at all. Moreover, the requisites of any kind of "Indian country," i.e., a sufficient federal set aside and adequate federal superintendence have

not been shown to have been met. *Venetie*, 522 U.S. at 530. *See* Section A.3. *supra*.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed insofar as it declares lands in the disputed area to be "reservation" or "dependent Indian communities."

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14 point type. Appellee's Brief contains 13,906 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2002, and it is herewith submitted in PDF format.

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

Dated this 15th day of May, 2008.

_____

John P. Guhin
Assistant Attorney General

CERTIFICATE OF SERVICE

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

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