UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 08-1441

YANKTON SIOUX TRIBE, and its Individual Members,
UNITED STATES OF AMERICA,
Plaintiffs and Appellees,
v.

SCOTT PODHRADSKY, et al., and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT,

Defendants and Appellants.

No. 08-1488

YANKTON SIOUX TRIBE, ET AL., Plaintiffs-Appellants,
UNITED STATES OF AMERICA Intervenor Plaintiff-Appellee
v.
SCOTT PODHRADSKY, et al., Defendants-Appellee
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT
Interested Party-Appellee

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

REPLY BRIEF OF APPELLANTS SCOTT PODHRADSKY, et al., and SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT

Kenneth W. Cotton
Wipf & Cotton Law Offices
107 South Main
Wagner, SD 57380
(605)384-5471
Atty. for Southern Missouri Waste Management District

Tom D. Tobin
Tobin Law Offices
P.O. Box 730
Winner, SD 57580
(605)842-2500
Atty. for Appellants Scott Podhradsky et al.

ARGUMENT

I.

THE 30,000 ACRE FORMAL 18 U.S.C. § 1151 (a) INDIAN RESERVATION FASHIONED BY THE UNITED STATES IS UNPRECEDENTED.

In the court below, the United States parleyed a few hundred acres of 18 USC §1151(a) "Indian country" recognized by this Court in *Yankton II* (mistakenly), into an 30,000 acre formal 18 USC § 1151(a) Indian reservation. This "Yankton reservation" never appeared on any map until it was conjured up in this litigation. As such, the configuration of the 30,000 acre reservation is entirely without precedent *anywhere* in the United States.

In the process, as the County has documented *infra*, the United States simply ignores the prior testimony of its own witnesses and those of the Yankton Sioux Tribe in terms documented congressional intent and the Yankton reservation. Importantly, the United States cites only generic legislation without any specific reference to the Yankton reservation or any specific evidence of congressional intent directed to the Yankton

reservation.

Having said that, there are other several fundamental flaws in the argument of the United States, an argument once again accepted carte blanche by the District Court. The most obvious flaw is the complete disregard of nearly a *century* of state and federal precedent. Beyond question, the decision below clearly solidifies, for the *third* time, an express conflict with the Supreme Court of the State of South Dakota with specific reference to the status of the Yankton reservation. See *Bruguier v. Class* 599 N.W.2d 364,370-371, 376 (1999). The decision below also conflicts in principle with several decisions of this court and the United States Supreme Court.

In addition, the decision below also fails to adhere to the definition of Indian country codified by Congress in 1948 in 18 USC § 1151 in two respects. First, the general statutory authority advanced by the United State to support the new Yankton reservation (1934 Indian Reorganization Act) predates the 1948 definition of Indian country enacted by Congress, and yet there is no special mention of the 1934 Act in the Revision Notes and Legislative Reports of 18 USC §1151 to support the argument of

the United States. In fact, the absence of specific support in the Yankton documents from the Secretary of the Interior for the creation of 18 USC § 1151(a) Indian Country under the Indian Reorganization Act also undermines the Indian Reorganization Act argument of the United States. Moreover, the 1934 Indian Reorganization Act argument of the United States expressly conflicts with the codification of the case law in 18 USC § 1151.

The Revision Notes specifically mention the case law that Congress relied on in the enactment of the statute. Significantly, this is the same venerable case law that the United States and the District Court circumvented in fashioning the 30,000 acre Yankton reservation. [1]

The decision of this Court in *Kills Plenty v. United States,* 133 F.2d 292 (8th Cir. 1943), *cert. denied*, 319 U.S 759 (1943), clarifies the scope of § 1151 (a). *18 USC § 1151, Revision Notes and Legislative Reports*.

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[1] The argument of the United States also conflicts with the General Allotment Act of 1887, 24 stat. 367 (1887), as implemented in the *Yankton* legislation.

The primary holding of *Kills Plenty* applies only in areas where original boundaries exist ("with the boundaries"). *Kills Plenty* , 133 F.2d 292,293.

In areas where original reservation boundaries have been disestablished or distinguished, the codification of *Kills Plenty* by Congress also refutes the argument of the United States, an argument accepted by the District Court (any of the trust lands are somehow still Indian country under *18 USC § 1151(a)).*

This is especially so in light of the fact that neither the United States nor the District Court can point to any specific congressional intent with reference to the Yankton area to support their position. See *Beardslee v. United States,* 387 F.2d 280. (1967), *DeCoteau v. District County Court,* 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). Moreover, the 1934 Indian Reorganization Act argument of the United States expressly conflicts with the codification of *United States v. Pelican, 232 US 442 (1913).* 18 USC § 1151(c).

The decision of the United States Supreme Court in *United States v. Pelican, 232 US 442 (1913),* clarifies the scope of 18 USC § 1151(c)*18 USC § 1151, Revision Notes and Legislative Reports*.

The primary holding of *Pelican* applies to allotments. In areas where original reservation boundaries have been disestablished or extinguished, the codification of *Pelican* by Congress refutes the argument of the United States, an argument accepted by the District Court, that allotments are somehow still Indian country under 18 USC § 1151 (a). See also *Beardslee*, *DeCoteau* and *Rosebud Sioux Tribe.*

Kills Plenty and *Pelican* are the pathmarking cases in this area of Federal Indian Law in this circuit and every circuit. See also *Beardslee v. United States.* 387 F.2d 280. (1967). *Pelican* was cited repeatedly by the United States Supreme Court in *DeCoteau* and by the United States Supreme Court in *Rosebud.* Clearly, *Pelican,* as codified in 18 USC § 1151(c), controls in the areas where original boundaries have been disestablished or extinguished, as in *Yankton I,* where the disestablishment and extinguishment of the 1858 boundaries has been recognized by this Court in *Yankton II. See* the Briefs for the State that discuss the State precedent that focuses on *Pelican*.

II.

THE CONFLICTING ARGUMENTS OF THE UNITED STATES ARE A MATTER OF RECORD.

Early on in this litigation, the United States adopted a strategy of ignoring the Brief of the County and others that tracked the arguments previously submitted by the United States. According to the United States, they were simply "irrelevant" and did not merit a response.

With all due respect, the County would note that the sophisticated arguments of the United States regarding the existence of the original boundaries of the Yankton Sioux Reservation were not particularly persuasive---- rejected by the United States Supreme Court in *Yankton I* and again rejected by this Court in *Yankton II*. In fact, in *Yankton I*, for the first time in *decades*, the Solicitor General was not even invited by the United States Supreme Court to express the views of the United States on the question of certiorari. And, on the merits, in the United States Supreme Court and subsequently in this Court, the arguments of the United States were not only rejected, they were *unanimously* rejected.

The United States now attempts to summarily dismiss, for a different reason, similar arguments that again track the arguments of the United States, in yet another footnote:

> The County's brief is almost entirely devoted to commentary upon previous arguments against disestablishment made by the United States prior to this remand proceeding. The United States disagrees with the County's commentary, but since the disestablishment issue was not before the district court and is not currently before this Court, the United States will not respond further to the County's assertions in this brief.

BUS at 25 n.10. (emphasis as in original).

If the United States really believes this footnote is going to dissuade the County from once again recounting the inconsistent arguments previously submitted by the United States in this litigation, the United States is badly mistaken. The boundaries of the Yankton Reservation are still before this Court and the previous arguments of the United States are still significant because this case involves the extent of those boundaries and congressional intent.

In this respect, the local briefs in this litigation confirm the record of the United States and confirm that the United States is primarily responsible for the inconsistency, chaos and confusion

in this area of the law since 1962. Specifically, the arguments of the United States never have had much, if anything, to do with legitimate congressional intent. In general, any argument is submitted to support the tribal position, and the United States is still at it in this case. The County understands why the United States is reluctant to even attempt to explain or reconcile its arguments in this litigation. Nevertheless, the County would like to see a response sometime from the United States that addresses that track record.

Having said that, a brief review of the submissions in the *Yankton* litigation sheds light on the credibility of the conflicting arguments the United States now submits.

III.

THE PARTIES AND THE COURTS IN *YANKTON I* AGREED THE YANKTON HISTORICAL RECORD DID NOT CONTAIN ANY DISCUSSION DIRECTED TO CHANGED OR ALTERED RESERVATION BOUNDARIES TO SUPPORT A DIMINISHED RESERVATION.

In assessing the arguments of the parties submitted in support of their respective positions, it is very important to initially recognize that in this instance we are not writing on a clean slate. In *Yankton I, Yankton II* and *Yankton III,* the arguments are a matter of record.

Of course, the County readily acknowledges that a party can change a legal argument at any time. Credibility would depend upon the circumstances involved. In this case, however, there is an overriding historical argument that was previously submitted in each of the courts. It cannot be simply ignored or revised at will, at least in the absence of some new historical documentation supporting a different position. In *Yankton II*, nothing of substance surfaced in the District Court in this respect. Both witnesses expressly rejected changed or altered reservation boundaries. And in *Yankton III,* no witnesses or documentation was submitted to contradict this historical evidence.

Moreover, in *Yankton I* the parties, the United States as amicus curiae, and the courts, were unanimous on this crucial aspect of *Yankton I*: namely, that the Yankton historical record did not contain any discussion directed to changed or altered reservation boundaries. Because the parties and the courts also recognized the fundamental principle that only Congress can change or alter reservation boundaries, this historical concession was central to the decision in each court. A brief review of the arguments submitted should shed light on this concession.

A. THE COURTS.

In *Yankton I*, the Yankton Sioux Tribe argued that this fact regarding the historical record supported a conclusion that the 1858 reservation boundaries remained intact (to include the ceded land). On the other hand, the State maintained that the absence of any boundary discussion really indicated that when the 1858 reservation boundaries were necessarily extinguished by the cession, and boundaries were not changed or altered by Congress, only individual trust allotments remained as "Indian country" under 18 U.S.C. § 1151(c). *Pelican*, 232 US 442 (1913), *DeCoteau*, 420 U.S. 425, 427 (1975).

In each instance, concessions concerning the absence of any discussion on this crucial boundary point in the historical record were clearly stated by each court. For example, in the District Court this conclusion was described in the following fashion:

> [T]here is no discussion as to whether the Yankton Sioux or the negotiators believed the 1858 boundaries of the reservation would change.

Yankton I, 522 U.S. 329, 347 (1998) (emphasis added).

This Court made the point several times in several ways:

[N]o mention of reduction or elimination of boundaries or any surrender of jurisdiction.
[N]o statement that clearly indicates that Congress intended to change the reservation boundaries or remove tribal sovereignty over the opened areas. There are also no statements by members of the tribe that demonstrate an understanding that the reservation boundaries would change.

Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation....

The historical and demographic evidence does not show that Congress intended to change the 1858 boundaries. Only Congress can reduce or eliminate a reservation.

Yankton I, (emphasis added).

As a result, this was the context in which the United States Supreme Court in *Yankton I* viewed the question. The Court confirmed that preservation of the 1858 reservation boundaries was not an issue in the Yankton negotiations and simply noted:

> [T]he record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries....

Yankton I, 118 S.Ct. at 800 (emphasis added).

Moreover, nothing else in *Yankton I* addresses the issue.[3]

Generalized arguments can not undermine the merits of this aspect of the historical record.

The position of the United States Supreme Court regarding the extinguishment of the 1858 boundaries has been clearly stated. *Yankton III* makes clear that new historical documentation to contradict the conclusion of the parties and the courts in *Yankton I* on this critical point does not exist. The concession regarding the absence of any changed boundary discussion in the historical Yankton record now presents a substantial obstacle to any judicial recognition of a new Yankton reservation that would correspond with a sophisticated "diminished reservation" theory. In this instance, the historical record controls.

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[3]In this instance *Yankton I* tracks the opinion of the South Dakota Supreme Court:

Nevertheless, in the chronicles kept at the time, no mention is found respecting the preservation of reservation boundaries....

State v. Greger, 559 N.W.2d 854, 864 (S.D. 1997)(emphasis added) .

B. THE DISTRIC COURT INITIALLY IGNORED THE CONSESSION OF THE UNITED STATES REGARDING THE CONCLUSION OF THE UNITED STATES SUPREME COURT THAT THE 1858 RESERVATION BOUNDARIES WERE NOT MAINTAINED.

In *Yankton II,* the County initially assumed that the arguments of the United States and the Yankton Sioux Tribe regarding the existence if the 1858 reservation boundaries would correspond with the opinions expressed by their witnesses (in recent depositions and in the evidentiary hearing of May 20, 1998). The witnesses testified that the 1858 boundaries still exist. Accordingly, our first briefs in *Yankton II* established that an 1858 boundary argument would be contrary to the holding of the Court in *Yankton I.* Reply Br. of County Defs. In Supp. Of Mot. For Summ. J. at 1-15, *Yankton II.* With specific respect to the 1858 reservation boundaries, express language in *Yankton I* clearly refuted the notion that the Court recognized the viability of the 1858 boundaries subsequent to the passage of the 1894 Act.

The United States, however, did not support the views of their witnesses in this regard. Instead, the United States conceded in District Court that the Court in *Yankton I*

recognized that Congress did not intend to maintain the 1858 reservation boundaries. Summ. J. Br. for the United States at 2, 5, 6, 22 n.5

> ("While the United States Supreme Court found the savings clause insufficient to maintain the reservation boundaries of the 1858 Treaty here, and thus did not prevent diminishment of the Reservation...."), Summ. J. Br. for the United States at 2, *Yankton II* (emphasis added).

As a result, in *Yankton II*, the United States argued for the recognition of a diminished Yankton reservation with diminished reservation boundaries. *Id.* The position of the Yankton Sioux Tribe was somewhat unclear, in some instances appearing to agree with the witnesses that the 1858 boundaries remain intact, but in most others advancing arguments which coincided with the position of the United States.

Nevertheless, in *Yankton II* the District Court ultimately recognized the continuing existence of the 1858 reservation boundaries. The District Court did not address or even mention the conflict between the witnesses for the United States and the legal arguments. Nor did it address this aspect of the *Yankton I* decision (i.e. that the United States Supreme Court held that the 1858 boundaries were not "maintained").

In the final analysis, it really did not make any difference which argument the District Court ultimately decided to adopt. The Opinion of the United States Supreme Court and the contemporaneous historical record did not support the existence of either the 1858 Yankton Sioux reservation or a diminished reservation with convoluted boundaries that would include allotted fee lands. In *Yankton II*, with one exception, this Court agreed.

In *Yankton III*, United States and the Court below seized on this one exception and fashioned the 30,000 acre Indian reservation described above.

C. THE WITNESSES OF THE UNITED STATES REJECTED THE ANALYSIS OF THE UNITED STATES SUPREME COURT.

As noted, even after *Yankton I*, the witnesses for the United States maintained that the 1858 boundaries remained intact. As a result, the United States and the Yankton Sioux Tribe assumed a posture in *Yankton II* that placed them squarely on the proverbial horns of a dilemma. The County thought it was too late in the day for anyone to change positions again. The County was wrong.

We first address the position of the witnesses of the United States (the only witnesses to testify). As noted above, in the

evidentiary hearing of Wednesday, May 20, 1998, the witnesses confirmed their views that the 1858 boundaries remained intact.

1. Witness Superintendent Timothy C. Lake Supported the 1858 Boundaries.

The testimony of Yankton Superintendent Lake was direct and to the point:

> Q. And what are the boundaries of the Yankton Reservation?
> A. The boundaries of the Yankton Reservation are the map I showed you....
> A. Less -- less the approximately 160,000 ceded. I mean there's -- there's a boundary there, and inside that boundary there's 160,000 acres less that....

Testimony of Timothy C. Lake at 40, *Yankton II*. See also id. at 41, 42, 43.

In Superintendent Lake's deposition of Thursday, May 14, 1998:

> MR. GUHIN:...Can you — Well, tell me what the boundaries of this reservation are. You've been referring to it as a reservation. What are the boundaries?
> THE WITNESS: They're the exterior boundaries of this map.
> Q. Same as they were in 1858?
> A. Same as they were in 1858.

Deposition of Timothy C. Lake at 13, *Yankton II*.

The position of Mr. Lake was firm. Nothing in *Yankton I* altered

the 1858 boundaries of the Yankton reservation, in his opinion.

2. Witness Professor Herbert T. Hoover Supported the 1858 Boundaries.

(a) In his deposition of Monday, May 18, 1998, Professor Hoover confirmed that *Yankton I* had not convinced him to alter his 1995 opinion regarding the 1858 boundaries of the Yankton Sioux reservation. For example, Professor Hoover made clear the historical basis of his 1858 boundary opinion:

> MR. GUHIN:...Professor, can you tell me what you understand the configuration of any entity you would call the Yankton Indian Reservation to be as of today? THE WITNESS: Well, as of today, because I have no evidence to the contrary, it would be --MR. ABOUREZK: Wait just a minute here. This is going to call for a legal conclusion, too, and I'll object on those grounds.
>
> MS. ALLEN: I'll object on the same ground.
> MR. GUHIN: You can go ahead and answer, but the court will decide one way or the other.
> MR. ABOUREZK: You can answer, but it's objected to, Herb.
> THE WITNESS: Well, this is not a legal opinion. It's an opinion from history. I have never found any documentary evidence in the Interior Department or the congressional records to say that the boundaries diminished. And as consequence, I would have to assume that that's how it stands....
>
> Q. Okay. And am I to assume, then, that the decision of the United States Supreme Court on January 26, 1998,

> did not affect your opinion?...
> A. Many times I read the last paragraph, which said to me, as a nonattorney, that the August court was not going to tinker or tamper with the reservation boundary issue. At issue was something else.
> Q. So your answer is, the decision of the Supreme Court did not affect your opinion.
> A. Historically, no.
>
> Q. And do you remember reading, from that opinion, the court's discussion of Article XVIII?
> A. I don't remember that detail. I just remember the last paragraph, which indicated to me, as a nonattorney, that the court was not going to deal with the outer boundary.

Deposition of Herbert T. Hoover at 41, 42, 48, *Yankton II*, No. 98-4042 (D.S.D. May 18, 1998)(emphasis added).

Moreover, the discussion in Exhibit 16, prepared by Professor Hoover for *Yankton II*, the substance of the deposition of Thursday, May 14, 1998, and his testimony at the evidentiary hearing on Wednesday, May 20, 1998, are also consistent with this position, which has not changed materially since 1995. According to Professor Hoover, the 1858 reservation boundaries are still intact. *Yankton I* did not alter his opinion because the Court in *Yankton I* had no reason to "tinker" with the reservation boundary issue. Id. at 42. Tr. of Oral Argument at 71-72, *Yankton II*, 14 F.Supp.2d 1135 (No. 98-4042).

In *Yankton III,* BIA Superintendent Lake's has not materially changed his position. Witness Professor Herbert T. Hoover did not appear.

D. IN *YANKTON II*, THE 1894 YANKTON ACT, THE LEGISLATIVE HISTORY, AND THE HISTORICAL RECORD DID NOT SUPPORT A REVISED CLAIM TO A DIMINISHED RESERVATION BOUNDARY,

In *Yankton II*, the County did not think it needed to further address the 1858 boundaries for two reasons. First, the County established early on that the United States Supreme Court rejected the 1858 reservation boundaries in *Yankton I.* Second, the United States elected to disregard the opinion of its experts and abandon the 1858 boundary position (and the Yankton Sioux Tribe apparently adopted that position as well). Instead, the United States argued for a "diminished reservation boundary" and refused to support Mr. Lake's and Professor Hoover's 1858 boundary position. Summ. J. Br. for the United States at 2, 5, 6, 22 n. 5, *Yankton II.* Significantly, the testimony of Professor Hoover also undermined that argument.

1. Witness Professor Herbert T. Hoover Also Confirmed That Documentary Evidence to Support a Diminished Reservation Boundary Does Not Exist:

> I have never found any documentary evidence in the Interior Department or the congressional records to say that the boundaries diminished.

Deposition of Herbert T. Hoover at 41, *Yankton II* (emphasis added).

This aspect of the views of historian Hoover should still be especially troublesome for the United States (and the Yankton Sioux Tribe). With specific reference to diminished reservation boundaries, Professor Hoover also confirmed the lack of any documentary evidence in *Yankton II* to support that position. In this instance, Professor Hoover's views on this subject present a substantial obstacle that the County does not think any argument can overcome. After all, no one claims more expertise in the history of the Yankton Sioux Tribe and in the history of their reservation than Professor Hoover. Testimony of Herbert T. Hoover at 22, 135, *Yankton I*, 890 F.Supp. 878 (D.S.D. April 3, 1995).

Moreover, the United States and the Yankton Sioux Tribe endorsed this claim of expertise in the proceedings in *Yankton I* and throughout *Yankton II*. For example:

> Dr. Herbert Hoover, who has devoted twenty-five years of his life to studying the Yankton Sioux Tribe, testified to

> reviewing independently in "excess of 10,000" federal documents relating to the Yankton Reservation over the years....

Brief of Appellees at 52, *Yankton I*, 99 F.3d 1439 (8th Cir. 1996).

Professor Hoover's overriding conclusion regarding the complete lack of "any documentary evidence" to support a diminished reservation boundary argument is more than simply remarkable. It completely undermines any "diminished boundary" argument.

First, Professor Hoover reviewed the documents that the United States and the Yankton Sioux Tribe relied upon in *Yankton II*. At the evidentiary hearing in *Yankton II*, Professor Hoover was asked to briefly comment upon each and every Exhibit offered by the United States. In addition, for 27 years he has reviewed thousands of additional Yankton Sioux Tribe documents that are also within the purview of this observation. In "any" context, even a sophisticated argument can not overcome this almost insurmountable obstacle. Simply put, there is not any documentary evidence to support a diminished reservation boundary claim.

Moreover, as we said in *Yankton II* from the beginning, these arguments can not be viewed in just "any" context. Br. of County Defs. in Supp. of Mot. for Summ. J. at 18-22, *Yankton II*. In this

case, we are not starting with a clean slate. Id. at 18. That is the fact that makes the boundary obstacle in truly insurmountable. The context is a matter of record and it unequivocally confirms Professor Hoover's conclusion.

Until *Yankton II*, the United States and the Yankton Sioux Tribe repeatedly told every Court that the Yankton historical documentation did not contain any evidence of an altered or changed reservation boundary. Id. at 18-22. Without additional contemporaneous historical documentation (and their own experts acknowledge they have none) the admissions of the United States and the Yankton Sioux Tribe with respect to the record in *Yankton I* should ultimately control.

Clearly, no additional historical documentation was introduced in *Yankton II* or *Yankton III* to contradict these admissions.

The County has previously addressed the *Yankton I* record. But certain points bear repeating now, in light of the conflicting views among the United States, the Yankton Sioux Tribe and their witnesses with respect to diminished reservation boundaries. Other points also need to be added or simply reinforced. With that understanding, we return to the record in *Yankton I* and the views of

the parties regarding the same.

E. ALL PARTIES IN *YANKTON I* AGREED THE YANKTON HISTORICAL RECORD DID NOT CONTAIN ANY DISCUSSION DIRECTED TO CHANGED OR ALTERED RESERVATION BOUNDARIES.

As noted *supra*, in assessing the arguments the parties now submit in support of their respective positions, this is not a clean slate. The arguments are a matter of record in this Court, in the Court of Appeals and in the United States Supreme Court.

1. In this case, there is an overriding historical argument that was previously submitted. It cannot be simply ignored or revised at will (at least in the absence of some new historical documentation supporting a different position and Professor Hoover's conclusion closes the door on that argument). Nevertheless, this is precisely what the Yankton Sioux Tribe and the United States attempted to do in *Yankton II*.

In *Yankton I*, the parties, the United States as amicus curiae, and the Courts, were unanimous in agreement on this crucial aspect of *Yankton I*: namely, that the Yankton historical record did not contain any discussion directed to changed or altered reservation boundaries. Because the parties and the Courts also recognized the

fundamental principle that only Congress can change or alter reservation boundaries, this historical concession was central to the decision in each Court.

To Professor Hoover's credit, he recognized early in 1995 two important points regarding this aspect of the record. First, nothing in the congressional documentation or contemporaneous historical record supported a congressional intent to create a diminished reservation; secondly, nothing in the subsequent history indicated that a diminished reservation ever existed. In this respect, Professor Hoover simply reaffirmed these earlier conclusions. See Deposition of Herbert T. Hoover at 32, 58, 59, 65, 87, 88, 92, 99, 100; and Continuation of Deposition of Herbert T. Hoover at 12, 52, 99; *Yankton I*, 890 F.Supp. 878 (D.S.D. January 25, 1995) (emphasis added).

When Professor Hoover testified on April 3, 1995, he told the court that he could discern no intent by Congress to "alter the boundary" and that he had never seen a "shred of evidence" that the Yankton Sioux Tribe "boundary" had ever been "diminished." Id. at 31, 32, 62, 69, 70, 74, 86-87, 88, 97, 108.

In every brief the Yankton Sioux Tribe submitted in the District Court in 1995, page after page of argument stressed that the 1858 boundaries had never been "altered" or "diminished." The Yankton Sioux Tribe further claimed that Congress affirmatively indicated an intent to preserve the 1858 boundaries. The following citations, although obviously repetitive, indicate the scope of that

representation. Pl.'s Trial Br. at 8, 18, 20, 21, 22-23, 23, 25, 26, 27, 29, 30, 32, 33, 34, 35, 37, 38, 39, 42, 43, 45, 47, 49, 58, 59, *Yankton I*, 890 F.Supp. 878 (D.S.D. 1995) (No. 94-4217). Pl.'s Resp. to Third-Party Def.'s Trial Br. at 3, 5, 7, 9-10, 10, *11, 13, 14-15, 17, 18, 23, 33, *Yankton I*, (No. 94-4217). Pl.'s Post Trial Br. at 4, 7, 8, 12, 13, 16-17, 19-20, 21, 22, *Yankton I*, (No. 94-4217) .

Of course, in *Yankton I*, the parties disagreed on how the lack of evidence regarding any "changed" or "altered" boundary should be construed. The Yankton Sioux Tribe argued that this view of the historical record supported a conclusion that the original reservation boundaries remained intact. On the other hand, the State maintained that the absence of any boundary discussion really indicated that when the original reservation boundaries were necessarily extinguished by the cession, and the boundaries were not changed or altered by Congress, only individual trust allotments remained as "Indian country" under 18 U.S.C. § 1151(c). *DeCoteau*, 420 U.S. 425, 446-447 (1975). No one argued that anything in the record supported diminished reservation boundaries.

In each instance, the comments of the courts concerning the absence of any discussion on this crucial boundary point in the

Yankton historical record were clearly stated. For example, in the District Court this conclusion was described in the following fashion:

> [T]here is no discussion as to whether the Yankton Sioux or the negotiators believed the 1858 boundaries of the reservation would change.

Yankton I, 890 F.Supp. 878, 886 (D.S.D. 1995) (emphasis added). The holding of the District Court would also seem to reflect this conclusion. Id. at 888, 891.

2. In this Court, the Yankton Sioux Tribe emphatically reiterated this aspect of the historical record:

> The 1894 Agreement made no reference whatever to new or altered boundaries.

Br. of Appellees at 8, *Yankton I*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) (emphasis added). See also id. at 10, 11, 12, 15, 26, 28, 29, 31-32, 32, 34, 40, 42-43, 46, 47, 49, 51, 53, 54, 59-60.

At that point, the United States decided to also participate in the litigation, as amicus curiae, in support of the Yankton Sioux Tribe. Significantly, but not surprisingly, the views of the United States mirrored those of the Yankton Sioux Tribe with respect to the lack of any evidence to support changed, altered, or diminished reservation boundaries:

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

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

This Court made the point several times in several ways. First, the Court cited Professor Hoover and the conclusion of the District Court. *Yankton I*, 99 F.3d at 1142. The Court then proceeded to independently confirm its own view of this aspect of the historical record:

> [N]o mention of reduction or elimination of boundaries or any surrender of jurisdiction.
>
> [N]o statement that clearly indicates that Congress intended to change the reservation boundaries or remove tribal sovereignty over the opened areas. There are also no statements by members of the tribe that demonstrate an understanding that the reservation boundaries would change.
>
> *Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation....*

Yankton I, 99 F.3d 1439, 1452, 1453, 1455 (8th Cir. 1996) (emphasis added). See also id. at 1446, 1448, 1449, 1451, 1453, 1454.

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[4]The role of the United States as an original boundary advocate in this type of litigation is in the record in this case. The District Court…

In fact, this aspect of the record in *Yankton I* dominates the opinion of this Court in *Yankton I*.

3. Subsequent to the decision of this Court, the Yankton Sioux Tribe again confirmed its view of the historical record. In this instance, the Yankton Sioux Tribe, by analogy, noted no "new" boundaries and commented on the "stark difference between the 1858 Treaty and the 1894 statute":

> This is plain language which would have been understood by tribal members who wanted the terms of the 1858 Treaty to remain intact. The 1858 Treaty established new boundaries. The 1894 Agreement did not. . . . [There is no language in the 1894 Agreement that diminishes or disestablishes the Reservation....Article XVIII deliberately leaves the provisions of the 1858 Treaty intact, including the boundaries that were so carefully established by the Treaty...everything promised to them in 1858 remained promised in 1892, including the reservation's boundaries.

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in *Yankton II*, allowed the briefs filed in the United States Supreme Court in *Yankton I* to be made a part of the record in *Yankton II*. Tr. of Oral Argument at 92, *Yankton II*, No. 98-4042 (D.S.D. June 26, 1998). The brief of Charles Mix County, amicus curiae, that was filed in the United States Supreme Court in *Yankton I*, tracks the position of the United States for the past three decades. The nature of the advocacy it confirms is informative. Copies of the briefs filed in the United States Supreme Court have been lodged with the Office of the Clerk.

Br. of Appellee in Resp. to Appellant's Pet. for Rehearing and Suggestion for Reh'g En Banche at 7, *Yankton I*, 99 F.3d at 1439 (8th Cir. 1996) (No. 95-2647) (emphasis added). See also id. at 1, 3, 9, 10-11, 14.

4. In the United States Supreme Court, the Yankton Sioux Tribe clearly stated, time and time again:

> [T]he 1894 Act makes no reference to new or altered Reservation boundaries, nor does it describe any new boundaries of the Yankton Reservation.

Br. for the Resp'ts Yankton Sioux Tribe and Darrell E. Drapeau at 10. *Yankton I*, (No. 96-1581) (emphasis added). See also id. at 11. 16, 17, 22, 23, 23 n. 11, 29, 39.

Significantly, the United States, as amicus curiae, again agreed with this aspect of the historical record:

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

Br. for the United States as Amicus Curiae Supporting Resp'ts at 5, 25, *Yankton I*, (No. 96-1581) (emphasis added).

In this light, generalized arguments cannot now undermine the substance of the Yankton materials. Historical documentation to

contradict the conclusion of the parties and the courts in *Yankton I* on this critical point does not exist -- and the Yankton Sioux Tribe and the United States cannot maintain that it does. Professor Hoover has settled that point. This concession regarding the absence of any diminished boundary discussion in the historical Yankton record still presents a substantial obstacle to any judicial recognition of a new Yankton reservation that would correspond with any such sophisticated theory. In this instance, the historical record controls.

To the extent that practical considerations play a role in this process, the County would like to emphasize one final point. *In this Court in Yankton I, the United States candidly acknowledged that if a diminished reservation boundary did correspond with the lands originally allotted, the result would be "anomalous". And, as a practical matter, the jurisdictional maze would be further "complicated":*

> [T]he anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership.

Br. for United States as Amicus Curiae in Supp. of Plaintiffs-Appellees at 17 n. 6, *Yankton I*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

IV. *YANKTON I* DOES NOT SUPPORT ANY ALTERNATIVE ARGUMENT REGARDING DIMINISHED RESERVATION BOUNDARIES.

Any alternate argument regarding diminished reservation boundaries (that would conform to the convoluted configuration of all lands as originally allotted) has already been rejected in *Yankton II*. For all practical purposes, this should have been a foregone conclusion in any event. The historical documentation can not alternatively support 1858 boundaries and diminished boundaries at the same time, although the United States still makes this argument in *Yankton III*.

Three related points should be addressed in this regard.

A. The references in *Yankton I* to a "diminished reservation" and "diminished boundaries" must be considered in light of the Court's directions regarding the "disestablished altogether" issue. As we have discussed supra, in *Yankton I* the Court determined the threshold question that the boundaries of the 1858 Yankton reservation were not maintained or retained after the 1894 cession. In *Yankton II* this Court confirmed that holding. The question of whether the reservation was "disestablished altogether" was not resolved in *Yankton I*.

B. References to a "diminished reservation" in *Yankton I* cannot be said to imply that such a reservation actually exists because of the express admonition of the Court. In other words, "diminished reservation" references in the text of the Opinion cannot be said to support a resolution of the "disestablished altogether" question, one way or the other. Whether the reservation was disestablished altogether was not decided.

C. Nevertheless, all "diminished" references in *Yankton I* undermine rather than support 1858 boundary arguments.

V. THE UNRESOLVED ISSUE OF "WHETHER CONGRESS DISESTABLISHED THE RESERVATION ALTOGETHER" IN *YANKTON I*, WAS LIMITED TO THE STATUS OF THE TRUST LANDS IN *YANKTON II.*

A. THE ANALYSIS IN *YANKTON I* AND *YANKTON II* AND THE PRECEDENT RELIED UPON LIMITS THE UNRESOLVED ISSUE TO THE STATUS OF THE TRUST LANDS.

1. The issue the United States Supreme Court expressly declined to decide is no longer subject to two different interpretations. In *Yankton II*, this Court decided the issue was limited to the "status" of the 36,000 acres of trust land (individual and tribal) remaining in the area today. *Yankton I*, 522 U.S. 329, 358 (1998), *Yankton II.* Specifically, the question was whether the present trust lands can be

considered a "reservation," as well as "Indian country."

> The United States Supreme Court specifically identified these trust lands:
>
> Today, the total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,000 acres of tribal land.

Id. at 339. See also id. at 356 ("'few surviving pockets of Indian allotments'").

This discussion of the trust lands in *Yankton I* make sense only if the unresolved issue was limited to the status of these trust lands. Limiting the issue to trust land still makes sense because this is the manner in which the issue was presented to the Court: 1858 boundaries versus trust lands.

In other words, the United States Supreme Court simply declined to decide whether these trust lands are more than "Indian country" under 18 U.S.C. § 1151(c). Whether the trust lands also represent a "reservation" under 18 U.S.C. § 1151(a) (in whole or in part), was the question the Court reserved. See generally *United States v. John*, 437 U.S. 634 (1978). This Court decided that question at least on an interlocutory basis in *Yankton II*. Because 18 U.S.C. 1151(a) was mistakenly applied, the Yankton reservation

could not be said to be formally disestablished in every respect.

D. On the other hand, if the trust lands only remain "Indian country" under 18 U.S.C. § 1151(c), the "reservation" would be "disestablished" in the traditional sense. *DeCoteau*, *Rosebud*. [5]

We think the United States Supreme Court intended the unresolved issue to focus on the Indian country/reservation status of trust lands. Certainly this is the most simple issue to decide, irrespective of how it is eventually resolved. Whether "Indian country" or "reservation," the reserved question has been limited to the status of the trust lands. See also *United States v. Weddell*, 636 F.2d 221, 213 n. 2 (8th Cir. 1980).

The opinion of the Supreme Court of South Dakota in *Greger*, 559 N.W.2d 854, is consistent with the view that the formal status of the trust land was the issue left unresolved in *Yankton I*.

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[5] Amicus Curia Brief of the Rosebud Sioux Tribe is not in persuasive support for the Yankton Sioux Tribe in this case. The last word from the United States Supreme Court on the status…

of the Rosebud reservation is distinctly stated in Rosebud Sioux

Tribe v. Kneip. There is no support in Rosebud Sioux Tribe for allotments as 18 USC 1151 (a) Indian country except in the area of Rosebud where original boundaries still exist (Todd County). See Rosebud, 430 U.S. 584, 615 n. 48.

DeCoteau disestablishment:

> In *Greger*, "diminishment" was specifically equated with
>
> > Nearly identical language signaled diminishment in *DeCoteau v. District County Ct.*, where the Court noted that such language was "precisely suited" to diminishment.
> >
> > [T]he dispositive cession language which has been found to create diminishment in the past. See, e.g., *DeCoteau*....
>
> Id. at 861, 862 n. 8 (emphasis added).

In fact, as a result of longstanding disestablishment precedent, this is the manner in which the issue was submitted in both *Yankton I* and *Greger*, as noted *supra*: 1858 boundaries versus trust lands. See *Bruguier*, *supra.* Moreover, all other United States Supreme Court precedent supports this construction, and only this construction.

Finally, as the State has again pointed out, none of the arguments submitted in *Yankton I* or *Greger* support the proposition that the trust lands retain any "Indian country" status beyond that designated by 18 U.S.C. § 1151(c). Even though no one can assert

that this was a question that was directly briefed, in the United States Supreme Court all arguments were also consistent with this position.[8]

[8]See *DeCoteau*, 425 U.S. at 427 n. 2:

> If the [ceded] lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation." 18 U.S. C. § 1151(a). On the other hand, if the [ceded] lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished [trust lands], including rights-of-way running through the same." 18 U.S.C. § 1151(c).

CONCLUSION

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

Dated November ____, 2008 Respectfully submitted,

Ken Cotton
Wipf & Cotton Law Offices
P.O. Box 370
Wagner, SD 57380
(605) 384-5471
Atty. for Southern Missouri Waste Management District

Tom D. Tobin
Tobin Law Offices
P.O. Box 730
Winner, SD 57580
(605) 842-2500
Atty. for Appellants Scott Podhradsky et al.

CERTIFICATE OF COMPLIANCE

1. I certify that the Reply Brief of the Appellants is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14 point type. The Reply Brief of the Appellants contains _____words.

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

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

Dated this _____th day of November , 2008.

_____

Tom D. Tobin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the Reply Brief of the Appellants and computer diskette containing the Reply Brief of the Appellants in the matter of Yankton Sioux Tribe, et al. v. Scott Podhradsky, et al. were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Winner, South Dakota, on this 20th day of November, 2008:

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

Charles Abourezk
Rebecca L. Kidder
Abourezk Law Firm
P.O. Box 9460
Rapid City, SD 57709

John P. Guhin
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

_____
Tom D. Tobin