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 AMICUS CURIAE ROSEBUD SIOUX TRIBE SUPPORTING POSITION OF UNITED STATES AND YANKTON SIOUX TRIBE FOR AFFIRMANCE

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CORPORATE DISCLOSURE

The Rosebud Sioux Tribe has no parent corporation and no publicly held corporation owns any stock of the Rosebud Sioux Tribe.

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AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amicus curiae is the Rosebud Sioux Tribe.

The Rosebud Sioux Tribe occupies the Rosebud Indian Reservation in south central South Dakota under the Act of March 2, 1889, 25 Stat. 888. The Rosebud Sioux Tribe and United States superintend trust lands in Gregory, Tripp, Lyman, Mellette, and all land located in Todd County, South Dakota. It borders the Yankton Indian Reservation on the east separated by the Missouri River. It is a federally recognized Indian Tribe organized under the provisions of the Indian Reorganization Act, 25 USC 476 and 477, and exercises sovereign powers of self government over its land and people in the above areas. The Rosebud Sioux Tribe has a long history of dealings with the United States. See Treaty of 1868, Act of April 29, 1868, 15 Stat. 635, and United States v. Sioux Nation, 448 U.S. 371 (1980). The United States through the Bureau of Indian Affairs maintains an agency on the Rosebud Indian Reservation, to superintend and administer the government's trust and other responsibilities to the Rosebud Sioux Tribe and its people. In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the United States Supreme Court dealt with the effect of certain legislative acts allowing non-Indian settlement on the Rosebud Indian Reservation and the Rosebud Sioux Tribe has an interest in the judicial decisions that may effect its governmental powers over its

lands.

This amicus curiae brief is submitted at the direction of the Rosebud Sioux Tribe and by the consent of all parties.

ARGUMENT

SUMMARY OF ARGUMENT

The Yankton Sioux Indian Reservation was established in 1858 by a treaty entered into between the United States and Yankton Sioux Tribe to provide a Reservation for tribal members to live and carry on their way of life. The Reservation has had a continuous existence in Charles Mix County, South Dakota, since the Treaty was made. Since 1858 and even after the Reservation was opened to non-Indian settlement in 1895, nearly all land owned by the Tribe or its members over the years has been held in trust by the United States government. Trust lands on the Yankton Indian Reservation have historically been under the jurisdiction of the United States and Yankton Sioux Tribe; South Dakota has never assumed criminal or civil jurisdiction over trust or reserve lands on the Reservation. The United States has always exercised superintendence over the Reservation and treated it as one of federal responsibility. The United States has always maintained and staffed an agency office and hospital to provide for the real estate, social service, and medical needs of tribal members; it has always made

available monies for schools to educate tribal children; it appropriates monies to build housing for tribal families and to maintain a tribal court system to resolve disputes between tribal members. To argue that current lands held in trust, including reserve lands returned to the Yankton Sioux Tribe, allotted lands, and land taken into trust under the Indian Reorganization Act of 1934, do not constitute an Indian reservation of the Yankton Sioux is to ignore over a century of contrary treatment by the United States and runs diametrically against the expectations of the Yankton Sioux people based on the historical treatment of the lands by the United States. [1]

I. INDIAN TRUST LANDS ARE RESERVATIONS UNDER 18 USC 1151 (a).

The State argues that the trust lands cannot be deemed to be Indian country under 18 USC 1151 (a) because they are not Indian reservations. The State's position is untenable.

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[1] In South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S.Ct.789 (1998), the Supreme Court held that the Yankton Sioux Indian Reservation had been diminished although not disestablished. 118 S.Ct. 805. This Court held in Yankton Sioux Tribe v. Gaffey, 188 F3d 1010,1013, 1030 (8th Cir. 1999), that "(t)he judgments of the district court are affirmed in so far as the court concluded that the Yankton Sioux Reservation has not been clearly disestablished." The State continues to posit its arguments to this Court on the erroneous legal conclusion that the Yankton Indian Reservation has been disestablished, contrary to the mandate of this Court.

In examining the text of 18 USC 1151 (a), it defines Indian country as "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." From a textual analysis, there is nothing on the face of 18 USC 1151 (a) preventing Indian trust land from being an Indian reservation. Trust land is under the jurisdiction of the United States Government. The State's argument centers around the phrase "notwithstanding the issuance of any patent," suggesting that trust land would not continue to be Indian country if it was ever in fee status. But, 18 USC 1151 (a) was drafted recognizing that Indian allottees had been granted fee patents within reservations. Pursuant to the 1934 Indian Reorganization Act's purpose of "halting the loss of Indian lands," Chase v. McMasters, 537 F2d 1011, 1016 (8th Cir. 1978), those fee lands did not lose their status as part of the reservation.

Felix Cohen, Handbook of Federal Indian Law (2005 edition) at 189 points out that the term "Indian reservation" originally meant any land reserved from an Indian cession to the federal government regardless of the form of tenure, including individual and unrestricted lands as well as tribal lands. During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless

of origin. In the 1850's, the federal government began frequently to reserve public lands from entry for Indian use. See also United States v. Midwest Oil Co., 236 U.S. 459 (1915). This use of the term "reservation" from the public domain law soon merged with the treaty use of the word to form a single definition, describing federally protected Indian tribal lands without depending on any particular source. Minnesota v. Hitchcock, 185 U.S. 373, 398-390 (1902). This definition of the term "reservation" has since been generally used and accepted and the Supreme Court has interpreted the term broadly. Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991). See also Cheyenne-Arapaho Tribes v. Oklahoma, 618 F2d 665, 668 (10th Cir. 1980).

The Supreme Court has held more than once that trust land is the equivalent of a reservation and thus Indian Country. [2] Oklahoma Tax Commission, supra at 511 ("we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes"); United States v. John, 437 U.S. 634, 648-649 (1978) ("The Mississippi lands in question here were declared by

[2] Congress in other instances has defined the term "reservation" as including Indian trust lands. For example, in the Indian Child Welfare Act, the term "reservation" is defined very broadly. In 25 USC 1903 (10), "reservation" means Indian country as defined in 18 USC 1151, and any lands not covered under that section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States.

Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a 'reservation', at least for the purposes of federal criminal jurisdiction at that particular time"). The State's position that trust lands cannot be Indian country under 1151 (a) is also significantly undermined by DeCoteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975), and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 n. 48 (1977), holding that trust lands, even within the context of a disestablishment or diminishment, still remain Indian country under 18 USC 1151.

The State suggests that Indian trust land could not be Indian country because it would result in an odd configuration and would not conform to "any natural idea of an Indian reservation." As to the odd configuration argument, there is no requirement cited by the State that says an Indian reservation has to be either a group of uncheckerboarded contiguous lands or of any certain configuration. Moreover, when South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789 (1998), determined the Reservation had been diminished to the extent of the ceded lands and this Court determined that nonceded land passing to non-Indian ownership was not part of the Yankton Sioux Indian Reservation, it was readily apparent that

the Reservation would be check boarded. Indeed, the Supreme Court cited evidence that the 1894 Act involved alteration of "the Reservation's character" and a "reconception of the Reservation." 118 S.Ct. 802. See Yankton Sioux Tribe v. Gaffey, 188 F3d 1010, 1017, 1028 (8th Cir. 1999) ("The 168,000 acres by which the Reservation was found diminished in Yankton are not contiguous, however, and no single boundary line can encompass them," and the Act did not "define new Reservation boundaries").

As to the natural idea argument, nothing could be more erroneous. The area in question was originally set aside in 1858 by the United States pursuant to its treaty with the Yankton Sioux Tribe so that Tribal members would have a place to live and carry on their way of life. Yankton Sioux Tribe v. Gaffey, 188 F3d 1010, 1029 ("The Great White Father wants you to keep your homes forever" and "the return of these lands to tribal control suggests that the reserved lands ere always intended to provide a property site for organized efforts to provide aid and education to tribal members so long as they were needed"). The Reservation has had a continuous existence since that time. The United States has always exercised superintendence and federal responsibility over the Reservation. The United States has always maintained and staffed a Bureau of Indian Affairs agency office and an Indian Health Service Hospital to provide for the real estate, social

service, and medical needs of Tribal members; it has always made available monies for schools to educate Tribal children; the government appropriates monies to build housing for Tribal families and to maintain a Tribal court system to resolve disputes concerning Tribal members. Yankton Sioux Tribe v. Gaffey, 188 F3d 1010, 1026, 1029 n. 12 ("Act's creation of a fund to support schools, courts, and other tribal institutions" and "(t)he Tribe has presented evidence indicting that it maintained a tribal police force and an independent judicial system following the passage of the 1894 Act"). The trust land in this case is owned or occupied by members the Yankton Sioux Tribe or its members. Nearly one half of Charles Mix County where the land is located is comprised of Indian people. Yankton Sioux Tribe v. Gaffey, 188 F3d 1010, 1017 n. 6. Contrary to the position of the State in this matter, the areas in question are not unlike federally recognized Indian reservations located all across South Dakota and the United States.

It seems to be undisputed and unquestioned that the United States and Yankton Sioux Tribe have exercised jurisdiction to the exclusion of the State over trust lands on the Yankton Indian Reservation since the inception of the Reservation over a century ago. The Yankton Sioux Tribe maintains a functioning Tribal Court that exercises criminal and civil jurisdiction over trust land on the Reservation. The United States has always exercised criminal jurisdiction over the

trust lands. The fact that the State has not sought to exercise or challenge jurisdiction of either the United States or Yankton Sioux Tribe over trust lands is a factor entitled to weight as part of the jurisdictional history. As in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-605 n. 27, 28 (1977), the long standing assumption of jurisdiction by the United States and Yankton Sioux Tribe in an area that is approximately 33% to 48% Indian not only demonstrates the parties' understanding but also has created "justifiable expectations" that should not be upset by a strained reading of federal laws. Yankton Sioux Tribe v. Gaffey, 188 F3d 1010, 1023 (1999).

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), does not provide any assistance to the State in its argument. The facts in Venetie are diametrically opposite to the facts in the present case. Venetie did not involve trust lands, but rather Indian reservation lands that had been transferred to private, state chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding "any permanent racially defined institutions, rights, privileges, or obligations". Congress contemplated that non-Natives could own the former Venetie Reservation and the Alaska native corporations were to use it for any purpose. In the present case, we have land held in trust by the United States even after the Reservation was opened to non-Indian

settlement and lands were ceded for homesteading.

There is no doubt that the lands in the present case could also satisfy the requirements of a dependent Indian community set out by the Supreme Court in Venetie because trust lands on the Yankton Reservation were set aside by the Federal Government for the use of the Indians as Indian lands and the lands are under federal superintendence. The lands in Venetie could not satisfy either criteria. Contrary to the State's argument at 24 of its brief, Venetie did not find that allotted lands within a former reservation "were Indian country simply because they were allotments," it held fee lands under applicable law were not a dependent Indian community.

The State urges the consideration of United States v. Stands, 105 F3d 1565 (8th Cir. 1997), to support its contention that placing land into trust for an Indian tribe does not make it Indian Country. In Stands, the Eighth Circuit panel decision commented, in addressing a question regarding an Indian trust allotment in Mellette County, that "for jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." Stands, 105 F3d 1572. For a number of reasons, Stands should not be considered. First, the trust lands here are within the boundaries of the Yankton Indian Reservation. Second, the comment was dicta. The holding of the panel was that an individual allotment

off the reservation was Indian country for purposes of federal jurisdiction. Stands, 105 F3d 1574. Third, one treatise has said the following concerning Stands:

> In United States v. Stands, 205 F3d 1565, 1572 (8th Cir. 1997), the court stated in dicta that "(f)or jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." The Stands court cited authority for the proposition, and the issue was not before the court. The issue before the court in Stands was whether a parcel of land was an allotment. Moreover the court's statement is inconsistent with the result in Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 511 (199l).

Felix Cohen, Handbook of Federal Indian Law (2005 edition) at 193 n. 426. Dicta from the Stands case that is inconsistent with Supreme Court precedent does not support the State's argument. Fourth, in State of South Dakota v. U.S. Department of Interior, 401 F.Supp.2d 1000,1010 (D.S.D. 2005), the court there in referring to the comment in Stands about tribal trust land described it as "dicta which does not overcome the wealth of legal authority establishing that trust land qualifies as Indian country" citing Citizen Band of Potawatomi Indian Tribe, supra at 511; State of South Dakota v. U.S. Department of Interior, 475 F3d 993, 999 (8th Cir. 2007); United States v. Roberts, 185 F3d 1125, 1131 (10th Cir. 1999); Buzzard v. Oklahoma Tax Commission, 992 F2d 1073, 1076 (10th Cir. 1993) cert. denied sub nom. United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Commission, 510 U.S. 994; and United States v. Azure, 801 F2d 336, 338 (8th Cir. 1986). Fifth,

the dicta in Stands is contrary to Rosebud Sioux Tribe v. Kneip, 430 U.S. 615 n. 4 ("To the extent that members of the Rosebud Sioux Tribe are living on allotted land outside of the Reservation, they, too, are on "Indian Country," within the definition of 18 USC 1151, and hence subject to federal provisions and protections.)" Sixth, the Stands dicta overlooks the provisions of the Isolated Tracts Act, infra at p. 12, authorizing purchase of lands in land consolidation areas, such as Mellette County, to be held in trust. The comment in Stands concerning tribal trust land beyond the boundaries of a reservation should be repudiated because it is confusing, inaccurate, and misleading to those practicing law in this area.

2. LANDS TAKEN INTO TRUST BY THE UNITED STATES UNDER 25 USC 465 ARE INDIAN COUNTRY UNDER 18 USC 1151.

The State argues that a proclamation must issue under 25 USC 467 before land accepted into trust under 25 USC 465 can be deemed Indian Country.

25 USC 465 provides that the Secretary of Interior is authorized, in his discretion, "to acquire through purchase, relinquishment, gift, exchange, or assignment, an 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 land taken into trust "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 or local taxation."

Under the regulations promulgated pursuant to 25 USC 465, 25 CFR 151.3 (a) (1) and 151.4 provide that land may be acquired in trust for a tribe or individual Indian "(w)hen the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area... ." Thus, the Secretary has authority under federal regulation to take land not only on an existing Indian reservation, but also adjacent to an existing Indian reservation or within a tribal consolidation area that often is established under separate federal statute. E.g., Act of December 11, 1963, Pub. L. 88-196, 77 Stat. 349 (Isolated Tracts Act) (Secretary of Interior authorized to mortgage tribal interests in isolated tracts, in lieu of selling or exchanging the lands, and proceeds of loan must be used exclusively for acquisition of land on reservation within land consolidation areas, including Mellette County, approved by the Secretary of Interior). See South Dakota and Mellette County, South Dakota v. Aberdeen Area Director, 35 IBIA 16 (2000). Moreover, under 25 CFR 151.2 (f), where an Indian reservation has been disestablished or diminished, the term "Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary."

25 USC 467 gives the Secretary of Interior authorization to proclaim new Indian reservations on lands acquired by the United States for Indians pursuant to a number of statutes, including 25 USC 465, or "to add such lands to existing reservations" as that term is defined above in the case of disestablished or diminished reservations.

Both 25 USC 465 and 467 deal with taking land in trust. Neither statute by its own terms dictates the Indian country status under 18 USC 1151 of the land taken into trust. The State's arguments on the purported failure of the Secretary to do something required by either 465 or 467 has no consequence as to the treatment of the land taken into trust under 18 USC 1151. In the latter regard, there can be no question that land held in trust is Indian country under 1151 (a). See United States v. McGowan, 302 U.S. 535, 539 (1938); United States v. John, 437 U.S. 634, 648-649 (1978); Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991); United States v. Roberts, 185 F3d 1125, 1131 (10th Cir. 1999); United States v. Driver, 755 F.Supp. 885 (D.S.D. 1991), aff'd 945 F2d 1410 (8th Cir. 1991); United States v. Azure, 801 F2d 336 (8th Cir. 1986) (defacto reservation); Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma, 618 F2d 665, 668 (10th Cir. 1980); and United States v. Brewer, 415 F.Supp. 807 (N.D. Iowa), aff'd 549 F2d 74 (8th Cir. 1976).

A fair reading of 25 USC 467 indicates, first, that there is no necessary requirement that it be read in tandem with or as a condition to 25 USC 465. Second, standing alone, 25 USC 467 simply confers authority on the Secretary of Interior rather than imposing any administrative requirement or condition upon the Secretary's authority under that statute. Third, 25 USC 467 authorizes the Secretary of Interior to create new reservations by taking lands into trust. There is nothing in 467 that compels the conclusion that the word "proclaim" has any other consequences other than to indicate, where the case may be, that the land held in trust would be deemed a new Indian reservation. Fourth, the statutes shows that a proclamation is required only when a new Indian reservation is established. No proclamation is required or would be logically necessary when land taken into trust is added to existing reservations.

The Yankton Indian Reservation has never been disestablished, although it was diminished. Any land taken into trust by the United States for either the Tribe or its members was on the Reservation. The State has not identified any lands that were taken into trust outside of the Yankton Indian Reservation. 25 USC 465 gives authority to take land into trust within existing Indian reservations. No formality of declaring land to be within the Reservation is required when the area is already an Indian Reservation such as the Yankton Indian Reservation. If this is

not the case, the illogical result would be that land taken into trust on any Indian reservation would not be Indian country.

CONCLUSION

For all above reasons, land held in trust on the diminished Yankton Indian Reservation is Indian County under 18 USC 1151.

Respectfully submitted this ____ day of July, 2008.

_____

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CERTIFICATE OF SERVICE

I hereby certify that I served a two (2) true and correct copy of the above and foregoing Amicus Curiae Brief upon the person next designated herein, by depositing a copy thereof in the United States mail, postage for first class mail prepaid, in an envelope addressed to said person at her last known address, to wit:

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COMPLIANCE CERTIFICATION

The undersigned hereby certifies pursuant to Rule 32(a), that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a) (7) (B) because this brief contains 3,715 words; and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X3 software in 14 size font Times New Roman. Pursuant to Eighth Circuit Rule 28A(d), I further certify that the computer diskettes provided to the Court and to counsel of record have been scanned for viruses using a commercial virus scanning program, which reports the diskettes are virus-free.

Dated this ____ day of July, 2008.

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CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that he mailed the original and nine (9) copies of the Amicus Curiae Brief in the above entitled matter, together with a virus-free computer diskette containing the full text of the brief as specified by Eighth Circuit Rule 28A(d), to the Clerk of the United States Court of Appeals for the Eighth Circuit by depositing the same in the United States Mail, first class postage pre-paid, at Rapid City, South Dakota, on the date next below appearing, addressed as follows:

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