In the process of fashioning a thirty-seven thousand (37,000) acre noncontiguous reservation out of whole cloth, the lower courts have once again ignored the very strong presumption of cession and diminishment or disestablishment set forth in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), confirmed in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and reiterated in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). A review of the Yankton Sioux Tribe's Conditional Cross-Petition for a writ of certiorari confirms that the Tribe has followed the lead of the lower courts in this respect. In addition, the Yankton Sioux Tribe further asserts that the 1858 reservation has only been reduced to the extent of the ceded lands. As a result, the Tribe disagrees with the court of appeals and claims another 230,000 acres of noncontiguous fee lands (former allotments), owned and populated by non-Indians, to constitute an 18 USC §1151(a) noncontiguous Yankton Reservation.

The Tribe is clearly mistaken on all counts. Nevertheless, the County joins the State in supporting the grant of the Tribe's Conditional Cross-Petition in the event that certiorari is granted in Nos. 10-929, 10-931, and 10-932.

Moreover, the County continues to believe that this case is particularly suited for some type of summary disposition. On this point, the County relies on the detailed rationale set forth by the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), which adhered fully to the principles set forth in *DeCoteau, Rosebud Sioux Tribe* and *Yankton*

Sioux Tribe to hold that Congress had disestablished the Yankton Reservation in 1894.

That was not an easy task in *Bruguier* in the face of consistent efforts in the federal courts to put every single acre of trust land in reservation status, at any cost. Nor is *Bruguier* fact bound in any respect. This Court should recognize the efforts of the South Dakota Supreme Court in *Bruguier*, as this Court did in *DeCoteau*, 420 U.S. at 428-431, *Rosebud Sioux Tribe*, 430 U.S. at 603 n.26, and *Yankton Sioux Tribe*, 522 U.S. at 342 n.4. In this case, however, that recognition could appropriately be in the form of a summary order that vacates the opinion of the court of appeals for further consideration.

SUMMARY

This case can be summarized simply. When the issue regarding the status of the Yankton Sioux Reservation was before this Court in *Yankton Sioux Tribe*, a unanimous Court provided the federal district court and the court of appeals with an opportunity. It was an opportunity to address a legitimate issue after having previously adopted an absurd result resurrecting 1858 reservation boundaries long deemed disestablished. The legitimate issue was whether the Yankton Sioux Reservation had been wholly disestablished. The decisions of the district court and the court of appeals since that time do not reflect an appreciation of that opportunity or a proper

respect for the principles reflected in the decisions of this Court.

In the remand, the district court simply ignored that *Yankton Sioux Tribe* held that the 1858 boundaries were disestablished. The district court resurrected the 1858 reservation boundaries again. The district court also held that all the land except the ceded lands was within those 1858 boundaries. As a result, two hundred thirty thousand (230,000) acres of formerly allotted non-Indian fee land was also within those boundaries.

The court of appeals reversed the district court on the 1858 boundary question. The court of appeals recognized that *Yankton Sioux Tribe* squarely held that the 1858 reservation boundaries were disestablished.

As a result, the court of appeals also reversed the district court with respect to the reservation status of the two hundred thirty thousand (230,000) acres of formerly allotted non-Indian fee land. Formerly allotted non-Indian fee lands were not within the limits of the 1858 reservation boundaries because this Court held the 1858 reservation boundaries were disestablished. As a result, the court of appeals held that Congress foresaw this result.

The court of appeals mistakenly recognized the agency lands as a "reservation." At the time, even the United States recognized that the court of appeals did not "articulate its rationale for that determination." Brief for the United States in Opposition, *Yankton*

Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (Nos. 99-1490 and 99-1683), at 20. As a result of this reservation, the court of appeals remanded the case back to the district court for a *third* time, to document the reservation status of the rest of the trust land.

Not surprisingly, the district court held that all of the trust land (37,000 acres) should be designated as a reservation under any one of several alternative theories.

The court of appeals affirmed the district court on every acre and every alternative reservation status theory. In addition, the court of appeals, on its own notion, thought thousands of acres of fee land should also be within the reservation, despite previously limiting the scope of the remands to trust land and despite previously holding that none of the formerly allotted non-Indian fee lands were within the limits of the reservation. On rehearing, the offending footnote regarding fee lands was deleted from the opinion. Order on Petitions for Rehearing of the United States Court of Appeals for the Eighth Circuit, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), County App. I, 52-70.

ARGUMENT

The County submits that *omissions* in the Tribe's Conditional Cross-Petition are more significant in

assessing the arguments of the Tribe than anything else in the Cross-Petition.

1. The fundamental omission centers around the failure of the Tribe to address the almost irrebuttable presumption of disestablishment that controls the manner in which the *Yankton* cession must be construed. The unanimous opinion in *Yankton Sioux Tribe* repeatedly references this "very strong" cession presumption. *Yankton Sioux Tribe* at County App. II, 343, Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 351 (1998) (No. 96-1581), County App. II, 842. Not surprisingly, the lower federal courts either erroneously restrict the scope of the presumption (limited to ceded land rather than area of reservation ceded) or fail to mention it altogether. *Yankton Sioux Tribe*, 522 U.S. at 338 n.2, County App. I, 333-334. Like the United States, the Yankton Sioux Tribe has also neglected the significance of the presumption.

2. A related significant omission in the Tribe's Conditional Cross-Petition is the failure to cite, let alone discuss, the leading precedent in cession and disestablishment cases: *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). Because of the time and effort this Court expended on extensive opinions in *DeCoteau*, 420 U.S. 425 (1975) (43 pages), and *Rosebud Sioux Tribe*, 430 U.S. 584 (1977) (49 pages), developing and clarifying this "very strong" cession presumption, it is truly remarkable that the Tribe's Conditional Cross-Petition fails to address or even

cite either the presumption or the cases. Transcript of Oral Argument, *Yankton Sioux Tribe* (No. 96-1581), County App. II, 842. This is especially so because the cases and the presumption were cited *repeatedly* by the Court in *Yankton Sioux Tribe*.

a. Several citations confirm this point and all conflict with the decision of the court of appeals and the arguments of the Yankton Sioux Tribe in the Cross-Petition. The brief submitted by the Native American Rights Fund in *Rosebud Sioux Tribe* on behalf of the National Congress of American Indians clearly confirms the Native American Rights Fund reliance on *DeCoteau*'s discussion of cessions like the Sisseton and Yankton cessions for the proposition that cessions disestablish reservations.

The Native American Rights Fund, signatory to the Conditional Cross-Petition, has, like the United States, substantially shifted its position. At one time the Native American Rights Fund clearly recognized that a cession and sum certain agreement terminated a reservation. In the *Rosebud Sioux Tribe* case, for example, it stated:

> In the *DeCoteau* case, the Court found that an outright sale of all unallotted lands for present consideration terminated the reservation.

Brief of *Amici Curiae* of the National Congress of American Indians, et al., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562), at 6-7.

The position of the Native American Rights Fund in *Rosebud* directly supports the position of the County today.

b. In *Rosebud Sioux Tribe,* all the Justices agreed with the Native American Rights Fund that cessions disestablished reservations. The majority and the dissent of Justice Marshall both reaffirmed *DeCoteau*. Justice Marshall clearly summarizes the arguments that cessions like the Yankton cession disestablish reservations. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 616-632 (1977) (Marshall, J., dissenting). And Justice Marshall specifically recognized that *DeCoteau* was the pathmarking cession disestablishment case.

> [T]he Court has found disestablishment when Congress ratified a treaty by which Indians agreed to sell all interest in part or all of a reservation, *DeCoteau v. District County Court, supra*

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 617 (1977) (Marshall, J., dissenting).

> In *DeCoteau*, the Court clearly distinguished the two situations, observing:
>
> > '[A purchase-and-sale Act] is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented. [It] does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain . . . in payment for the express cession and

> relinquishment of "all" of the tribe's "claim, right, title, and interest," in the unallotted lands. . . .'

Id. at 617-618.

> In *DeCoteau* we stated that this language, which contained in an agreement approved by the Indians and ratified by Congress, is "precisely suited," 420 U.S., at 445, to terminating a reservation. . . . Whereas in *DeCoteau* the key phrase expressed the Indians' understanding of what they were surrendering and the Government's understanding of what it was acquiring.

Id. at 619.

> Congress did not intend to remove the opened *areas* from the Reservation.

Id. at 621 (emphasis added).

> Significantly, the 1901 Agreement which, if ratified, would have partially terminated the Reservation

Id. at 621 n.6.

The key role that *DeCoteau* played in the *Rosebud Sioux Tribe* decision and the fact that the Native American Rights Fund argued *DeCoteau* cession disestablishment in *Rosebud Sioux Tribe* makes the omission of *Rosebud Sioux Tribe* in the Tribe's Cross-Petition, co-authored by the Native American Rights Fund, even more remarkable.

c. Moreover, the brief of the Native American Rights Fund in *Rosebud Sioux Tribe* and the dissent in *Rosebud Sioux Tribe* reference other materials that further support and confirm cession and disestablishment in the context of the cessions in *DeCoteau* and *Yankton Sioux Tribe*. The material conflicts with the holdings of the court of appeals and the arguments in the Tribe's cross petition. For example, in *Rosebud Sioux Tribe*, Justice Marshall cites the National Indian Law Library's compilation of Allotment/Cession Statutes compiled by the Native American Rights Fund in 1973, two years before *DeCoteau* was decided. National Indian Law Library, Allotment/Cession Statutes, Doc. No. 002279. Although the Marshall dissent cites the document for reasons unrelated to the issue here, the compilation clearly puts the *DeCoteau* cession and the *Yankton Sioux Tribe* cession in the same category, both recognized as reservation disestablishment statutes.

The County has appended excerpts from the National Indian Law Library, Allotment/Cession Statutes, Doc. No. 002279. Respondent County's App. at 37-38. As that text explains, the tables note "'outright cession' statutes have been . . . more prone in the past to find disestablishment." *Id.* at 38. Significantly, the "more liberal" case noted in the text that had just recently reached a contrary conclusion regarding cession and disestablishment was squarely reversed by this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). *See United States ex rel. Feather v. Erickson*, 489 F.2d 99 (8th Cir. 1973).

DeCoteau unequivocally resolved the issue of cession and disestablishment.

d. Other briefs filed by other tribes and tribal organizations in *Rosebud Sioux Tribe* contain more materials that also support and confirm this type of cession and disestablishment. The Brief Amici Curiae of Association on American Indian Affairs, Inc., et al. emphasizes the traditional position of the Department of Interior:

> Specifically, in a formal opinion published in 1934, the Solicitor of the Department of the Interior held as follows:
>
> > During the early years of our dealing with the Indians, the custom was to have individual or combined nations, tribes, or bands relinquish or cede to the United States large areas claimed by them for which there was usually a cash or other consideration, and also the setting apart or reserving of certain lands within such ceded areas or from lands belonging to the United States and located elsewhere. . . . *In this way the Indians lost all identity with the ceded areas and their rights and interests therein were recognized as having been completely extinguished.*
> >
> > In years following, for reasons varying on the different reservations, portions of these diminished or newly established reservations were also ceded to the

> United States. . . . *In this way the exterior boundaries of a reservation were further reduced. . . .*

Brief Amici Curiae of Association on American Indian Affairs, Inc., et al., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562), at 29-30.

The Solicitor of the Department of Interior goes on in this decision to conclude that land obtained by "outright cessions" would not be considered for restoration to tribal ownership. Interior Department Opinion, 54 I.D. 559, 560-561 (1934). However, lands for which the Indians receive the proceeds of the sale only as the tracts were sold would be included. Significantly, in South Dakota, the Lake Traverse Reservation, ceded and at issue in *DeCoteau*, and the Yankton Reservation, ceded and at issue in *Yankton Sioux Tribe*, were both excluded from restoration to tribal ownership.[1]

3. Another significant omission in the Conditional Cross-Petition of the Yankton Sioux Tribe centers around the failure of the Cross-Petition to discuss or even cite the conflicting opinion of the South Dakota Supreme Court in *Bruguier v. Class*,

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[1] Similarly, in *Rosebud Sioux Tribe*, the United States also repeatedly acknowledged that cessions disestablish reservations. The conflicting arguments of the United States are tracked in the Brief of Charles Mix County, South Dakota, Amicus Curiae, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), reproduced in County App. II, 460-502 (481-482).

599 N.W.2d 364 (S.D. 1999). Importantly, the Yankton Sioux Tribe does not claim that it lacked an opportunity to participate in *Bruguier*, it simply chose not to participate.

The County discusses *Bruguier* at length in the County's Petition for Certiorari in No. 10-932. Petition for Writ of Certiorari, *Hein, State's Attorney for Charles Mix County, et al. v. Yankton Sioux Tribe, et al.* (No. 10-932), at 16-33. The County appended the Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, in *Bruguier v. Class*, June 30, 1998, at County App. I, 396-406, the Findings of Fact and Conclusions of Law of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, in *Bruguier v. Class*, August 14, 1998, at County App. I, 407-430, and the Opinion of the Supreme Court of the State of South Dakota in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), County App. I, 164-198.

In addition, the *amici* Cities also discuss *Bruguier* at length. Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari, *Dennis Daugaard, Governor of South Dakota, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932), at 9-20. With reference to the memorandum opinion and order of the circuit court, the *amici* Cities quote the unequivocal manner in which the circuit court posed the question:

When *Bruguier* was presented in the circuit court, the circuit court framed the issue in that comprehensive manner:

> In order to determine whether this crime occurred on Indian country as defined in 18 USC § 1151, the Court must make *two* separate inquiries. First, the Court must determine whether land within the 1858 reservation area retains reservation status under *18 USC § 1151(a)*. If the Court finds this land is a reservation under 18 USC § 1151(a), there was no jurisdiction to try Bruguier in the South Dakota Courts. If, however, the Court finds this land was not a reservation under 18 USC § 1151(a), it must then determine whether the allotments in this case are Indian country under *18 USC § 1151(c)*.

Bruguier v. Class, County App. I, 398 (emphasis added). Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari, *Dennis Daugaard, Governor of South Dakota, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932), at 12.

The County also thinks that a careful consideration of the manner in which the circuit court decided *Bruguier* clearly undermines the "no conflict" position. Petition for Writ of Certiorari, *Hein, et al. v. Yankton Sioux Tribe, et al.* (No. 10-932), at 16-33. The County expected the United States and the Yankton

Sioux Tribe to disagree. And as of May 9, 2011, they have disagreed. For that reason, the County also specially emphasizes the way in which the circuit court carefully structured the *Bruguier* decision.

With respect to the first issue, the circuit court also specifically noted that:

> The Court's *first* inquiry is whether this land is within the limits of an Indian reservation under 18 USC § 1151(a). The State argues in *this* case that the Yankton Sioux Reservation was *disestablished* based upon both *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) and *Yankton Sioux Tribe*.

Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, in *Bruguier v. Class,* June 30, 1998, County App. I, at 399 (emphasis added).

Clearly, the circuit court was correct in concluding that two separate inquiries were *necessary* to decide the case.

The County also submitted a detailed discussion of the circuit court decision in *Bruguier* starting with the memorandum opinion and order. Petition for Writ of Certiorari, *Hein, et al. v. Yankton Sioux Tribe, et al.* (No. 10-932), at 28-29. Significantly, the memorandum opinion and order was not fact-bound in any respect. Rather, the circuit court relied upon the

decision of this Court in *Yankton Sioux Tribe* and other venerable decisions. *Id.* at 29. The County also addressed the definitive findings of fact and conclusions of law of the circuit court. *Id.* at 28-30. Again, the findings of fact and conclusions of law demonstrate that there is nothing in the circuit court opinion that can fairly be said to be fact bound.

The opinion of the State Supreme Court in *Bruguier* approaches the question in the same manner as the circuit court. As a result, the *Bruguier* opinion demonstrates the genuine conflict that exists in this case. The argument of the *Yankton Sioux Tribe* in the latest submission dated May 9, 2011, does not undermine this genuine conflict in any significant respect. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). *See also* County Petition at 8 pointing out that the United States and the Tribe both recognized that *Bruguier* did conclude that the Reservation was "wholly disestablished," as they told this Court at the time in Applications for an Extension of Time, 5 n.1, *United States v. Yankton Sioux Tribe*; 4 n.1, *Yankton Sioux Tribe v. Gaffey*; *South Dakota v. Yankton Sioux Tribe*, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683).

4. The status of the 1858 reservation boundary.

a. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135, 1148 (D.S.D. 1998). On a closely related point, the Yankton Sioux Tribe also fails to directly address the status of the 1858 reservation boundary. In the

initial remand, the United States and the Tribe teamed up in convincing the district court to again erroneously recognize the 1858 reservation boundary.[2] In this instance, the district court (the same court that originally resurrected the 1858 reservation boundary in the first instance in *Yankton Sioux Tribe*) again recognized the 1858 reservation boundary to somehow encompass a reservation that would consist of all lands except for those expressly ceded in the cession agreement construed in *Yankton Sioux Tribe*. Such a reservation would have, of course, included the 230,000 acres of former allotments now held fee by non-Indians with the 1858 reservation boundaries.

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[2] After *Yankton Sioux Tribe*, the court of appeals remanded this case to the district court. The district court consolidated the original action, *Yankton Sioux Tribe v. Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe v. Gaffey* (No. 98-4042). In the new action, the Yankton Sioux Tribe sought declaratory and injunctive relief precluding the State of South Dakota and Charles Mix County from exercising criminal jurisdiction over tribal members. In the new action, the tribe continued to rely on the 1858 boundaries contrary to the express language in this Court's opinion in *Yankton Sioux Tribe*.

> WHEREFORE, Plaintiff prays as follows: For judgment in favor of Plaintiff declaring that all lands *within the original boundary* of the Yankton Sioux Reservation not 'ceded' by the 1894 statute between the U.S. government and the Yankton Sioux Tribe comprise the Yankton Sioux Reservation

Complaint for Injunctive Relief and for Declaratory Judgment, *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) (No. 98-4042), at 7 (emphasis added).

The district court's resurrection of the 1858 reservation boundaries was in spite of the solid arguments presented by the State and the County. In those arguments, the State and the County pointed out that this Court in *Yankton Sioux Tribe* repeatedly acknowledged and relied on the fact that the 1858 reservation boundary had been disestablished. *Yankton Sioux Tribe*, 522 U.S. at 333, 343, 345-347, 353, set forth *infra* at 18-19.

The County discusses the disestablishment of the 1858 reservation boundaries in detail because original reservation boundaries are the cornerstone of any reservation disestablishment argument, as this Court recognized in *DeCoteau*, *Rosebud Sioux Tribe*, and *Yankton Sioux Tribe*.

b. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1013, 1020-1021 (8th Cir. 1999). On appeal to the court of appeals, the County squarely addressed the mistaken holding of the district court with reference to yet another resurrection of the 1858 reservation boundary. Brief for Matt Gaffey, et al., *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (Nos. 98-3893/3894/3896/3900SDSF), at 9-12. The County began by pointing out that this Court clearly resolved the status of these boundaries in *Yankton Sioux Tribe,* contrary to the argument presented to the district court by the United States and the Yankton Sioux Tribe and contrary to the conclusion of the district court.

With respect to reservation boundaries, the analysis of this Court in *DeCoteau* and *Rosebud Sioux Tribe* informed the Court in *Yankton Sioux Tribe.* Congress intended the Yankton cession to disestablish those boundaries in the same manner as *all* previous cessions disestablished original reservation boundaries. In *Yankton Sioux Tribe,* this Court recognized this basic principle. As a result, this Court held that the 1858 boundaries were not "maintained." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333, 343, 345-347, 353 (1998), set forth *infra* at 13-14.

The Yankton Sioux Tribe and the United States faced an almost insurmountable obstacle in the court of appeals: namely, how to overcome the lack of historical documentation to support their position and that of the district court that the "Yankton Sioux Reservation" could *somehow* still exist so as to include *all* lands originally allotted there (over 90% of which are now in fee status and are owned by non-Indians) (232,000 acres of noncontiguous fee lands of the total allotted 263,000 acres of noncontiguous land). *See Yankton Sioux Tribe*, 522 U.S. at 338-339.

In the court of appeals, the Yankton Sioux Tribe and the United States maintained that the conclusion of the federal district court recognizing the continuing existence of the 1858 reservation boundaries was sound. According to the federal district court, Congress intended to *maintain* the 1858 reservation boundaries intact, and at the same time, Congress also intended to somehow excise or remove only the ceded lands from the 1858 Reservation. *Yankton*

Sioux Tribe, 14 F.Supp.2d at 1143. In other circumstances, this approach could have provided the district court with some cover regarding the *lack* of historical documentation to support new reservation boundaries that, alternatively, could have encompassed all lands originally allotted. But, the 1858 boundary conclusion of the federal district court was fundamentally flawed in every significant respect and already rejected by this Court in *Yankton Sioux Tribe.*

The 1858 boundary conclusion of the district court ignored the holding of this Court in *Yankton Sioux Tribe.* With specific respect to the 1858 reservation boundaries, express language in *Yankton Sioux Tribe* clearly refutes the notion that this Court recognized the viability of the 1858 boundaries subsequent to the passage of the 1894 Yankton Act:

> This case presents the question *whether,* in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress *diminished the boundaries* of the Yankton Sioux Reservation . . .
>
> *States* acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land Act freed that land of its reservation status and *thereby diminished the reservation boundaries.*" . . . *In contrast,* if a surplus land Act "simply offered non-Indians the opportunity to purchase land *within* established reservation boundaries," *id.,* at 470, 104 S.Ct., at 1166, then the *entire opened area* remained *Indian country.* Our touchstone to determine whether a given

statute *diminished or retained reservation boundaries* is congressional purpose.

The 1894 Act is also readily *distinguishable* from surplus land Acts that the Court has interpreted as *maintaining reservation boundaries. . . . In contrast,* the 1894 Act at issue here . . .

The Yankton Tribe and the United States, appearing as *amicus* for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the *existing reservation boundaries were maintained.* The United States urges a similarly "holistic" construction of the agreement . . . Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status. . . .

[W]e *conclude* that the saving clause pertains to the *continuance* of annuities, not the 1858 *borders.*

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

[T]he Commissioners' report of the negotiations signaled their understanding that the

> cession of the surplus lands *dissolved* tribal governance of the 1858 reservation.

Yankton Sioux Tribe, 522 U.S. at 333, 343, 345-347, 353 (emphasis added).

All else aside, this Court has made clear that the 1858 "reservation boundaries" were not "retained" or "maintained" – "we *conclude* . . . *continuance* of annuities, not the 1858 *borders*." *Id.* at 347 (emphasis added). At the very least, this Court decided that question. This Court stated that the "case" presented the question of whether "Congress *diminished the boundaries*" of the Yankton Sioux Reservation and this Court decided that question. *Id.* at 333 (emphasis added). The unresolved issue, as this Court also clearly stated, was "whether Congress disestablished the reservation altogether." *Id.* at 358. The district court ignored all of this.

In the end, the court of appeals rejected the argument of the Yankton Sioux Tribe and the United States, and rejected the 1858 boundaries.

> [W]e reverse the conclusion that the original exterior boundaries of the reservation continue to have effect and that all nonceded lands remain part of the reservation. . . .
>
> The *Yankton* Court did make a number of explicit references to the status of the reservation boundaries. The Court found the 1894 Act distinguishable from those acts which it "has interpreted as maintaining reservation boundaries." *Yankton*, 118 S.Ct. at 799. The

> question before it was described as whether the 1894 Act "diminished the boundaries" of the reservation. *Id.* at 793. The Court distinguished situations in which states acquired primary jurisdiction over opened lands and "thereby diminished the reservation boundaries" from those in which the entire opened area remained Indian country even though non Indians were able to purchase land. *Id.* at 797-98 (citations omitted). In the Commission reports it found evidence that the 1894 Act involved alteration of "the reservation's character" and "a reconception of the reservation." *Id.* at 802. Some of the language was "reminiscent" of that used for the diminished Unitah reservation. *Id.* ("Congress would 'pull up the nails' holding down the outside boundary" of the reservation) (citation omitted). The Court went on to hold that the savings clause of Article XVIII "pertains to the continuance of annuities, *not the 1858 borders*." *Id.* at 800 (emphasis added). These references indicated the Court's understanding that the 1858 reservation boundaries did not remain intact following passage of the 1894 Act. . . .
>
> [W]e conclude that the original exterior boundaries of the Yankton Sioux Reservation do not serve to separate Indian country from areas under primary State jurisdiction.

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1013, 1020-1021 (8th Cir. 1999).

Incredibly, the Yankton Sioux Tribe mentions none of this in the submissions to this Court including the May 9, 2011, Brief in Opposition. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). Even more incredibly, the submissions of the United States are similarly silent with reference to the manner in which this Court decided the issue regarding the 1858 reservation boundary, the manner in which the district court, the United States and the Yankton Sioux Tribe subsequently ignored that decision, and the manner in which the court of appeals thought it put the issue to rest. Brief for the United States, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931, 10-932 and 10-1058). Brief for the Federal Respondents, *Yankton Sioux Tribe, et al. v. United States Army Corps of Engineers, et al.* (No. 10-1059).

c. In spite of the unanimous rejection of the 1858 boundary in this matter by the court of appeals, for the next decade the Yankton Sioux Tribe and the United States continued to insist that the 1858 reservation boundary was intact or could be used in some fashion to support some argument related to the existence of an 18 USC §1151(a) reservation. Even now, in the Conditional Cross-Petition the Tribe continues to avoid directly addressing the 1858 boundary issue, conceding only that this Court rejected the argument that would leave the "1858 *reservation* intact." Conditional Cross-Petition for a Writ of Certiorari, *Yankton Sioux Tribe v. Daugaard, et al.*

(No. 10-1058), at 11 (emphasis added). In other words, the Tribe concedes only that the ceded lands were somehow removed from the reservation, without actually acknowledging that this Court held that the 1858 boundaries were disestablished, or that the court of appeals expressly recognized and reaffirmed that holding.

As a result, any argument that the Tribe or the United States advances to support an 1151(a) Indian reservation with new reservation boundaries must be viewed in light of the fact that the 1858 reservation boundary was disestablished by Congress by the passage of the 1894 Act.

Moreover, the acknowledgement of the lower courts that "the Commission's reports do not describe any reservation boundaries" further undermines the claims of the Tribe and the United States that a thirty-seven thousand (37,000) acre 18 USC §1151(a) noncontiguous reservation exists, and makes even less likely that a two hundred sixty seven thousand (267,000) acre noncontiguous reservation exists, as the Tribe claims. *Yankton Sioux Tribe*, 188 F.3d at 1026. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135, 1148 (D.S.D. 1998).

5. In its May 9, 2011, Brief in Opposition of the Yankton Sioux Tribe, the Yankton Sioux Tribe focuses on the rehearing Order and the related footnote in the court of appeals initial decision that affected thousands of acres of non-Indian fee lands (former allotments). The State, County and Southern

Missouri Petitioners and additional *amici* supporters convinced the court of appeals to amend that opinion and delete the offending footnote. The Order of the court of appeals filed at the same time explains, from the court's perspective, the "facts" leading to the deletion. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932), at 28-30. The County disputes those facts.

The Yankton Sioux Tribe asserts at length that the County's treatment of the issue demonstrates that the County recognizes that this case lacks practical importance. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932), at 28-30. The Yankton Sioux Tribe is certainly mistaken. And, in fact, the opposite is true. This issue demonstrates that this case has a high degree of practical importance. This issue demonstrates that the decisions of the district court and the court of appeals, at the very least, lack principled support. For this reason, the County will address the amended footnote and related inaccuracies in detail. At the same time, this examination also reaffirms the legitimacy of the County's submission in this case.

From the very beginning, the remands in this case were expressly limited in scope to the *trust* lands by the court of appeals. At the time, even the United States acknowledged that that was the case.

> Because the court of appeals could not determine from the record or from counsel at oral argument what other trust lands remain

> within the original boundaries of the Yankton Sioux Reservation, the court remanded the matter to the district court "to make any necessary findings relative to the status of Indian lands which are held in *trust*."

Brief for the United States in Opposition, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (Nos. 99-1490 and 99-1683), at 21 (emphasis added).

Nevertheless, the district court and the court of appeals subsequently ignored the scope of the remand and considered arguments that would place fee land in reservation status.

In an attempt to discredit the County, the court of appeals conveniently neglects to mention that the district court did not initially pay any attention to the scope of the remand with reference to trust lands. When the district court ignored the scope of the remand and indicated that *fee* land could be at issue, the State and County pointed out that the issue was straightforward. The focus of the remand should have been on the status of the trust lands. In fact, the court of appeals had previously explicitly stated that the scope of the remand was strictly limited in this respect:

> On the record before the court, however, we cannot define the precise limits of the reservation which remains.

> The current amount of Indian *trust land* on the Yankton Sioux Reservation is unclear from the record. . . .
>
> References in the briefs in these cases and in judicial opinions are not always clear about what is meant by *trust land*. . . .
>
> [W]e 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*.

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

Moreover, the County pointed out that even the United States, who routinely supported *all* tribal claims throughout the years in this litigation (13 years), did *not* support the expansive claim of the Yankton Sioux Tribe regarding these fee lands. The tribal claim ignored the mandate and this trust land limitation in putting fee lands at issue. The United States recognized, as did the State and the County, that the focus of the remand was trust land. The status of fee lands, owned primarily by non-Indians, was not within the scope of the remand.

In a primary argument, the United States expressly stated that the remand issue before the district court should be limited to the Indian country status of trust lands. According to the United States:

> [T]he Eighth Circuit remanded this matter to the District Court *only* 'to make any

> necessary findings relative to the status of Indian lands which are held in *trust*'

Brief of United States, *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007) (No. 98-4042), at 5-6 (emphasis added).[3]

The district court *disagreed* and adopted the Tribe's position that the argument of the Tribe addressing fee land would be considered on the merits in the remand.

As such, the recognition by the United States of the limitations on the scope of the mandate that supported the position of the State and County, further supported a difference of opinion on an issue of law, that clearly supported a permissive appeal from the district court. When the district court refused to reconsider or allow a permissive appeal regarding the inclusion of fee land within the scope of the remand, the State and the County filed petitions for writ of mandamus.

The County's petition for writ of mandamus is reproduced in Respondent County's Appendix. Petition for Writ of Mandamus (County), *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007) (No. 07-1779), Respondent County's App. at 1-6.

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[3] The United States did make a number of other arguments regarding the scope of the mandate. Whether viewed individually or as a group, Petitioners found these other arguments of the United States unclear, internally inconsistent, confusing, and without substance.

The State's petition for writ of mandamus is also reproduced in Respondent County's Appendix. Petition for Writ of Mandamus (State), *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007) (No. 07-1779), Respondent County's App. at 7-36. Together, the petitions for the writs recount the details in the scope of the mandate controversy. *Id.*

The petitions were denied and the district court, after hundreds of hours of additional research, briefing and argument by the parties on the fee land question, ultimately rejected the Tribe's arguments to include fee land in reservation status. This rejection, however, was based on the merits, rather than on the scope of the remand. On appeal, the court of appeals summarily affirmed the district court's rejection on the merits regarding fee lands.

The next time fee lands were implicated in this remand was a complete surprise. Astoundingly, the panel, on its own notion, incorrectly added another 7,000 acres of noncontiguous *fee land* to this unique reservation because of a misreading of the generic Indian country statute, 18 USC §1151, that never mentioned the Yankton reservation and was passed in 1948, more than a half century after the Yankton Act. *Yankton Sioux Tribe v. Podhradsky,* 577 F.3d 951 (8th Cir. 2009), County App. I, 104.

In the process, no one was even given an opportunity to brief the 18 USC §1151(a) reservation status of this fee land: not the State, not the County, not the United States, not the Yankton Sioux Tribe, and most

importantly, not the landowners, with lives and fee property impacted ("within the limits" of a reservation), without *any* notice. Moreover, because the district court specifically recognized that the panel had previously held that allotted lands which had been transferred to non-Indian fee status were *not* within the limits of Yankton Sioux Reservation, the action of the panel was especially perplexing. *Yankton Sioux Tribe v. Podhradsky,* 529 F.Supp.2d 1040, 1052 (D.S.D. 2007). *See infra* at 30-32 (discussion regarding conflicts within the remands in this case).

To date, this fee land is known to include the Wagner Community School District, the Wagner Early Childhood, Inc., the Wagner Fire Protection District, and numerous non-Indian residential homes and farms. *See Amicus Curiae* Brief of Charles Mix Electric Association, Inc. and Rosebud Electric Cooperative, Inc. in Support of Petitions for Writ of Certiorari; Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari; *Amicus Curiae* Brief for Colin Soukup, Representing the Frank Soukup Family Limited Partnership, and Dan Cimpl in Support of Petitions for Writ of Certiorari; Brief of Randall Community Water District, *Amicus Curiae*, in Support of Petitions for Writ of Certiorari; and *Amicus Curiae* Brief of Wagner Community School District No. 11-4 in Support of Petitions for Writ of Certiorari, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). The State, County and Southern Missouri filed extensive

petitions for rehearing. The amended opinion on rehearing purportedly removed this fee land from the panel opinion.

The court of appeals intemperately chastised the County for overreacting and for not understanding that only trust land was really at issue in this case, ignoring the efforts of the County for reconsideration to limit the issue to trust land, for a permissive appeal to limit the issue to trust land and for a writ of mandamus to limit the issue to trust land, which the court of appeals finally conceded was correct when it removed the footnote that put fee lands at issue, taking fifteen pages to do so. Order on Petitions for Rehearing of the United States Court of Appeals for the Eighth Circuit, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), County App. I, 52-70.

In this light, the court of appeals had no basis whatsoever to claim that the County raised a virtual smokescreen by focusing on the footnote that squarely implicated these fee lands before it was deleted on rehearing. *Id.* at County App. I, 54. The explanation of the court of appeals in the Order with reference to the intentional action of the court in drafting the judgment completely lacks credibility. *Id.* at County App. I, 55. The Order referencing "textual asides touching on matters not litigated or decided, but which have possibly been misunderstood," is even less credible. *Id.* at County App. I, 56. And the court's final reference to "other extraneous language . . . in the nature of a hypothetical reflection stimulated by

study of shifting federal Indian policy" does nothing to rehabilitate these sorry excuses for alarming the State, the County, Southern Missouri Recycling and Waste Management District and the affected landowners, almost all of whom were non-Indians. *Id.* at County App. I, 60.

As this example attests, submissions that claim any holding in this case is somehow tied to specific evidence of congressional intent directed to the Yankton Reservation are truly wholly illusory. The conclusion regarding resurrecting 18 USC §1151(a) reservation boundaries around isolated trust allotments or other isolated trust lands is more than historical legerdemain. The conclusion of the panel regarding the post 1948 allotments that are now fee lands was worse than that. And to have arrived at these results in the face of *Yankton Sioux Tribe* is especially troublesome.

These facts add to the other compelling reasons in the Petitions to review this case. The court of appeals has so far departed from the accepted and usual course of judicial proceedings that an exercise of this Court's supervisory power is especially appropriate.

6. There is one redeeming point in this entire episode involving the two failed attempts to improperly include fee lands within the scope of this remand and within the limits of a Yankton Reservation. The fee land issue serves to highlight the internal conflicts and internal inconsistencies in the *holdings* of

the several remands that still persist. Namely, no effort has been made in this case to address the inexplicable fact that for some unstated reason allotments held in fee for decades prior to the decisions in this case are and will remain in *non-reservation status*, while allotments still in trust on the date of the decisions in this case, are now and will remain for some unstated reason, within the limits of a reservation boundary under 18 USC §1151(a). In other words, how do reservation boundaries suddenly appear to encompass these thirty thousand acres of noncontiguous trust allotments on the date of the decisions, when no reservation boundaries have encompassed the allotted fee lands at any time since the date of the Yankton Act, up to and including today?

The County would submit that the United States has recognized the problem that this conflict poses with respect to the legitimacy of the opinions below. That was the reason that the United States previously supported the claim of the Yankton Sioux Tribe that the Yankton Reservation should somehow encompass all of these fee lands and that the court of appeals decision to the contrary was mistaken. Significantly, the United States did not retreat from that position *until* their submission of May 9, 2011. Brief for the Federal Respondents, *Yankton Sioux Tribe, et al. v. United States Army Corps of Engineers, et al.* (No. 10-1059).

Surely, the United States must recognize that if one allotment is within the Yankton Reservation, all allotments must be similarly situated, whether in fee or trust. Of course, the reverse of this argument would also be true. If one allotment is not within the Yankton Reservation, then no allotments should be within the Yankton Reservation, whether in fee or trust. As a result, it is self-evident that the conflicts effectively undermine the decision of the court of appeals with respect to at least thirty two thousand (32,000) of the thirty-seven thousand (37,000) acre Yankton Reservation or otherwise another two hundred thirty thousand (230,000) acres of non-Indian fee land must be included within the Yankton Reservation (and the United States is clearly opposed to that alternative).

Moreover, the reluctance of the United States to support the Tribe's argument at this time could be triggered by the fact that the United States would then have to support the Tribe's claim with respect to the continuing existence of the 1858 reservation boundaries. That would seem to be an especially difficult claim to maintain in this Court in light of the decision of *Yankton Sioux Tribe,* especially for a former Solicitor General of the United States.

Given the generic nature of the conclusion and its applicability throughout similar areas across South Dakota and the Country, this internal conflict and internal inconsistency supports the practical importance of the case presented in the Petitions for Writ of Certiorari. It is noteworthy that the Yankton

Sioux Tribe takes comfort in the mischaracterization of the County's concern regarding fee lands and the scope of the trust land mandate in the order of the court of appeals. This is especially so in light of the fact that in the district court the arguments of the Yankton Sioux Tribe ignored the scope of the mandate regarding trust land and implicated other fee land in the same manner as the court of appeals. It is also noteworthy that the court of appeals found it necessary, in the final analysis, to issue a fifteen page Order to explain the deletion of the offending footnote, and that Order was not filed until after a delay of over twenty-five weeks.

CONCLUSION

When the issue regarding the status of the Yankton Sioux Reservation was before this Court in *Yankton Sioux Tribe*, a unanimous Court provided the federal district court and the court of appeals with an opportunity. It was an opportunity to address a legitimate issue after having previously adopted an absurd result. The legitimate issue was whether the Yankton Sioux Reservation had been disestablished. The decisions of the district court and the court of appeals since that time do not reflect an appreciation of that opportunity or proper respect for the principles reflected in the decisions of this Court. The Petitions for Writ of Certiorari in Nos. 10-929, 10-931,

and 10-932 should be granted and the Conditional Cross-Petition in this case should also be granted.

Respectfully submitted,

PAMELA HEIN
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

SCOTT GREGORY KNUDSON
BRIGGS AND MORGAN, P.A.
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

TOM D. TOBIN
Counsel of Record
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500
tobinlaw@gwtc.net

Attorneys for Cross-Respondent Charles Mix County