No. 10-931

In the Supreme Court of the United States

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, a political Subdivision of the State of South Dakota,
Petitioner,

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT

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INTRODUCTION

Petitioner, Southern Missouri Recycling and Waste Management District, formerly known as the Southern Missouri Waste Management Association, Inc., hereinafter SMRWMD, operates a Sub-Title "D" landfill located in Charles Mix County, South Dakota.

ARGUMENT

A. The Brief in Opposition of the Yankton Sioux Tribe does not address or even cite the Petition for Writ of Certiorari filed by SMRWMD in this case. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). The general arguments in the Brief in Opposition of the Yankton Sioux Tribe are not persuasive. Moreover, the United States agrees with SMRWMD that the holding of the court of appeals correctly confirms that allotted lands now in fee are not within any reservation. That confirmation by the United States further undermines the position of the Yankton Sioux Tribe. It also undermines the holding of the court of appeals.

The court of appeals cannot have it both ways. Either the allotted lands are all surrounded by a reservation boundary or none of the allotted lands are surrounded by a reservation boundary. The holding of the court of appeals that only the 30,000 acres of allotted lands still in trust are surrounded by a reservation boundary is internally inconsistent. The court of appeals never addresses or mentions this inconsistency.

B. The Brief for the United States in Opposition only cites the Petition filed by SMRWMD in one sentence and in the footnote to that same sentence. Brief for the United States in Opposition at 18 n.6.

1. In that one sentence, the United States notes that SMRWMD (and the State of South Dakota and the County of Charles Mix) contended in a previous joint petition for certiorari that the court of appeals decision, which then recognized an "agency" reservation, conflicted with *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). According to the United States, the petitioners are mistaken with reference to the *Bruguier* conflict because that petition for certiorari was denied. The contention of the United States is misleading and dead wrong.

The United States does not mention, as the County has pointed out, the role that the interlocutory nature of *Yankton Sioux Tribe* at that time played in support of the arguments for a denial of certiorari. *See* County Reply at 12-13. The United States should have at least acknowledged that the interlocutory nature of the case was the primary argument the United States submitted in the certiorari proceedings. In any event, this argument does nothing to undermine the genuine conflict in this case at this time.

2. In the footnote to the sentence in the Brief for the United States in Opposition that referenced the conflict between the court of appeals' "agency" reservation decision at that time and *Bruguier*, the United States makes special mention of the manner in which the pathmaking case of *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967) is discussed in the Petition of SMRWMD. Brief for the United States in

Opposition at 18 n.6. The United States specifically disputes the contention of SMRWMD with reference to the significance of the *Beardslee* conflict.

After sixteen years in this litigation, SMRWMD recognizes the point of the United States regarding conflicts between or among the decisions of various panels. *Beardslee*, however, represents much more than a conflict of that kind, as noted in the SMRWMD Petition. SMRWMD is pleased that the United States has given us another opportunity to emphasize this aspect of the *Beardslee* decision.

In the Petition for Certiorari, SMRWMD set forth at length the significance of *Beardslee*. Petition for Writ of Certiorari, *Southern Missouri Recycling and Waste Management District v. Yankton Sioux Tribe, et al.* (No. 10-931), at 11-13. The argument centers around the manner in which *Beardslee* recounted with clarity how the law had been understood and applied in this area of Charles Mix County with reference to 18 USC §1151. Then Judge Blackman detailed the court of appeals' understanding of the application of 18 USC §1151 in the original Rosebud Reservation at the time. This understanding undermines the opinion of the court of appeals in *Yankton Sioux Tribe*. Both the 1975 decision of this Court in *DeCoteau* and the 1977 decision of this Court in *Rosebud* reflect and reiterate that same understanding. Justice Blackman joined the majority opinions in both cases. The holding of the court of appeals with reference to the application of 18 USC §1151 conflicts with all of this.

DeCoteau v. District County Court, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) are the two leading cession cases from this

Court. The analysis of this Court tracks the earlier analysis of the court of appeals in *Beardslee*. A number of decisions of the South Dakota Supreme Court also track the analysis of *Beardslee*.

In *Beardslee*, the court analyzed 18 USC §1151 in terms of its specific application to the different areas of the original Rosebud Reservation. With reference to 18 USC §1151(c), the explanation is perfectly clear.

> ... Clause (c) came into the statute as the result of the holding in *United States v. Pelican,* 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 [(1914)], namely, that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement. See Reviser's Note following 18 U.S.C.A. § 1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of § 1151. *We regard clause (c) as applying to allotted Indian lands in territory now open [disestablished] and not as something which restricts the plain meaning of clause (a)'s phrase 'notwithstanding the issuance of any patent'. Although this result tends to produce some checker boarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear.*

Beardslee, 387 F.2d at 287 (emphasis added).

In both *DeCoteau* and *Rosebud*, this Court analyzed 18 USC §1151 in terms of its application to the areas under consideration in those cases in the exact same manner as *Beardslee*. *Beardslee* is important at this stage in the proceedings in assessing the nature and extent of the conflict between the court of appeals and the South Dakota Supreme Court in *Bruguier* in the application of 18 USC §1151 to "non-reservation" land.

C. Even in light of all of this, the United States maintains, incredibly, that the actual holding in the decision below and the holding in *Bruguier*, are "identical." Brief for the United States in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (No. 10-929, 10-931 and 10-932), at 18. Apart from the obvious fact that the court of appeals held that a 37,000 acre noncontiguous Yankton Reservation continues to exist in the area and the South Dakota Supreme Court in *Bruguier* held that the Yankton Reservation has been "terminated" and "disestablished," the manner in which the United States supports the "identical" argument is astonishing.

The primary point the United States makes is that both courts recognized that fee allotments are no longer within the Yankton Reservation—a point the

United States never accepted until now.[1] But even on that point, the holdings of the courts are not "identical" as the United States claims, in that the court of appeals holds that some allotments (trust allotments) are within the Yankton Reservation as Indian country under 18 USC §1151(a) (30,000 acres). *Bruguier* squarely rejected that argument. *Bruguier* specifically cited 18 USC §1151(c) as the Indian country designation applicable to Yankton allotments, not 18 USC §1151(a).

The Reply Brief of the State of South Dakota further undermines the "identical" argument of the United States. Reply Brief of Dennis Daugaard, Governor of South Dakota, and Marty J. Jackley, Attorney General of South Dakota, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (No. 10-929), at 2-4.

D. This portion of the court of appeals opinion regarding allotments also suggests that consideration by this Court is appropriate. The court of appeals recognizes 18 USC §1151(a) reservation boundaries around all Indian allotments still held in trust. This holding also conflicts with non-reservation fee

[1] Until the United States responded to the Tribe's Conditional Cross-Petition in No. 10-1058, the United States always maintained the court of appeals decision regarding the non-reservation status of fee allotments was *erroneous*. The County addressed the reason that might have prompted the decision of the United States. Brief of Charles Mix County in Response to Conditional Cross-Petition at 34 ("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"). SMRWMD agrees that would be a tough argument in this Court.

allotment holding in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000), and conflicts as well with the recent *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), case that expressly adopted this aspect of *Gaffey* as the holding in the *Corps* case. If the court of appeals is correct that all allotments now held in trust are encompassed 18 USC §1151(a) reservation boundaries, then *Gaffey* could not have been correct in holding that allotments, now in fee, are not also within 18 USC § 1151(a) reservation boundaries. In other words, 18 USC §1151(a) boundaries do not automatically disappear just because a fee patent is issued. And 18 USC §1151(a) reservation boundaries are not automatically resurrected because dicta regarding agency lands in an opinion is taken out of context and misapplied by a court to agency lands that were ceded. Congress has a role in this reservation boundary process that the panel has not respected. Felix Cohen made clear that Congress did not address reservation boundaries after the passage of the Yankton Act (which disestablished the 1858 reservation boundaries). *Yankton Sioux Tribe*, 522 U.S. 329, 355 n.5 (1998). (Cohen erroneously concluded 1858 reservation boundaries intact. *Id.*) If any allotments were within an 18 USC §1151(a) boundary at any time after the proclamation in the Yankton Act, *Gaffey* was wrongly decided. This conflict should be resolved in the process of deciding this case.

E. In conclusion, SMRWMD submits that this Court should also carefully consider the manner in which the holding of the court of appeals conflicts with the record in this case. Any claim by the lower courts or the United States and the Yankton Sioux Tribe that

the 18 USC §1151(a) noncontiguous reservation fashioned by the court of appeals is somehow supported by congressional intent is superficial at best.

In this case, there are overriding historical arguments that were *repeatedly* submitted in the lower courts. These arguments cannot be simply ignored or revised at will, at least in the absence of some new historical documentation supporting a different position. Nothing of substance surfaced in the remands in this respect.

The only witnesses for Respondents in this case expressly rejected changed or altered reservation boundaries. And no testimony or documentation was submitted in the district court or court of appeals to contradict this historical evidence.

In *Yankton Sioux Tribe,* the parties, the United States as *amicus curiae*, and the courts, were unanimous on this point. The Yankton historical record did not contain any discussion directed to altered reservation boundaries. Because the parties and the courts also recognized the fundamental principle that only Congress can change or alter reservation boundaries, this concession regarding the historical record was significant in each court.

In the district court this conclusion was initially 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 Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878, 886 (D.S.D. 1995) (emphasis added).

The court of appeals 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 Sioux Tribe, 99 F.3d at 1452, 1453, 1455, 1457 (emphasis added).

As a result, this was the context in which this Court in *Yankton Sioux Tribe* initially viewed the question. The Court confirmed that preservation of the 1858 reservation boundaries was not an issue in the Yankton negotiations and 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 Sioux Tribe, 522 U.S. at 347 (emphasis added).

Moreover, nothing else in *Yankton Sioux Tribe* addresses the issue.[2]

After *Yankton Sioux Tribe*, Respondents' witnesses again maintained that the 1858 boundaries remained intact. As a result, the United States and the Yankton Sioux Tribe assumed a posture that placed them squarely on the proverbial horns of a dilemma.

The witnesses confirmed their own views that the 1858 boundaries remained intact. Bureau of Indian Affairs witness Superintendent Timothy C. Lake supported the 1858 boundaries. The testimony of Yankton Superintendent Lake was direct and to the point:

> A. The boundaries of the Yankton Reservation are the map I showed you....

[2] In this respect, *Yankton Sioux Tribe* tracks the earlier 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).

> 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. *See also id.* at 41, 42, 43.

In Superintendent Lake's deposition:

> 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.

The position of Mr. Lake was firm. Nothing in *Yankton Sioux Tribe* altered the 1858 boundaries of the Yankton Reservation, in his opinion.

Historical witness Professor Herbert T. Hoover also supported the 1858 boundaries. Professor Hoover confirmed that *Yankton Sioux Tribe* had not convinced him to alter his 1995 opinion regarding the existing 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....

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

Moreover, the discussion in Exhibit 16, prepared by Professor Hoover for the remand, the substance of his deposition, and his testimony at the evidentiary hearing are also consistent with this position, which has not changed materially since 1995. According to Professor Hoover, the 1858 reservation boundaries are still intact.

Moreover, 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 (emphasis added).

This aspect of the views of historian Hoover should still be especially troublesome for the United States (and the Yankton Sioux Tribe).

Importantly, 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, 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 all prior proceedings.

> 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, 99 F.3d 1439 (8th Cir. 1996).

In the first remand, the district court ultimately recognized the continuing existence of the 1858

eservation boundaries. The district court did not ubstantially address or even mention this conflict in ne record. Nor did it address this aspect of *Yankton ioux Tribe* (i.e. that this Court held that the 1858 oundaries were not "maintained").

In the last remand, BIA Superintendent Lake did ot materially change his position. And witness rofessor Herbert T. Hoover did not appear.

In the final analysis, it really did not make any ifference. The contemporaneous historical record did ot support the existence of either the 1858 Yankton ioux reservation or a diminished reservation with oncontiguous boundaries.

The court of appeals should have addressed these onflicts in the record in this case.

CONCLUSION

The Petition for Writ of Certiorari should be ranted.

espectfully submitted,

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