No. 10-932

In the Supreme Court of the United States

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, SOUTH DAKOTA; KEITH MUSHITZ, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; NEIL VONESCHEN, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; JACK SOULEK, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION,

Petitioners,

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 CHARLES MIX COUNTY

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STATEMENT

On remand from this Court's 1998 decision, the Eighth Circuit should have focused on whether the Tribe retained land in common after the 1894 cession. Contrary to the representations by the United States and the Yankton Sioux Tribe in oral argument before this Court, the Tribe did not retain any land in common, as the court of appeals finally acknowledged. However, on its own notion and without specific briefing, the court of appeals erroneously held that several hundred acres of noncontiguous "agency" land constituted an 18 USC 1151(a) reservation. To reach that result, the court of appeals necessarily had to find that Congress intended to do so in 1894.

In fact, the noncontiguous "agency" lands were *ceded* to the United States in 1894, the only proviso being that they be withheld from settlement until no longer needed. Even though *YST* held that *ceded* land did *not* retain reservation status, the court of appeals ignored that holding. It ruled instead that pursuant to an act passed thirty-five years later, the noncontiguous "agency" lands were to be given to the Tribe. Act of February 13, 1929, 45 Stat. 1167. The court of appeals failed to note that the 1929 Act was not implemented until *years* after that, and even then, only intermittently when isolated parcels of land were placed in trust by the United States.

> Tract T2081, Restored...1932, Tract TR2063, Restored...1938, Tract T2073, Restored...1955, Tract T2084, Restored...1955, Tract T2082, Restored...1955, Tract T2080 Restores...1955, and Tract T2054 Restores...1970.

Appendix of Appellee United States of America, Gov. Exhibit 201, *YST v. Podhradsky* (No. 08-1441 and 08-1488), at USA 120.

This sequence of events could not have resulted in an 18 USC §1151(a) reservation retroactive to 1894. Even the United States conceded that the court of appeals did not "articulate its rationale for that determination." Brief of U.S. at 20 in *YST v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (Nos. 99-1490 and 99-1683). Moreover, nothing in the 1929 documents even remotely suggests that such a possibility was ever considered. And the only documentation regarding the land transfer from the United States to the Yankton Sioux Tribe unequivocally points in the other direction.

In short, the "agency" reservation was a fanciful concept, useful as a foundation to which other isolated trust land could be linked to fashion an even larger "Yankton Reservation." The court of appeals left it to the district court to decide how much additional trust land should or could be added to the noncontiguous "agency" reservation, so as to constitute this even larger non-contiguous 18 USC §1151(a) reservation.

On remand, the district court held that all of the rest of the trust land (30,000 acres of original trust allotments and several thousand acres of land more recently placed in trust) should be designated as an 18 USC §1151(a) noncontiguous reservation under any one of several alternative theories. The court of appeals affirmed. No map of this purported reservation existed at the time of either decision.

In this entire process, the disestablishment decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), was only summarily referenced.

SUMMARY

Although procedurally complicated, the remands in this case can be summarized simply. When the issue regarding the status of the Yankton Sioux Reservation was before this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (*YST*), 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 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.

A. In the initial remand, the district court ignored that *YST* held that the 1858 boundaries were disestablished. The district court resurrected the 1858 reservation boundaries again (a fact that the United States and the Tribe carefully avoid mentioning, although they advocated that resurrection). The district court also held that all the land except the ceded lands was within those 1858 boundaries. As a result, 230,000 acres of formerly allotted non-Indian fee land was also within those 1858 boundaries, in further derogation of *YST*.

B. The court of appeals reversed the district court on the 1858 boundary question (a fact that the United States and the Tribe also avoid mentioning). The court

of appeals recognized that *YST* squarely held that the 1858 reservation boundaries were disestablished. County App. I, 248.

The court of appeals reversed the district court with respect to the reservation status of the 230,000 acres of formerly allotted non-Indian fee land. Formerly allotted non-Indian fee land was 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 Congress initially foresaw this result in 1894.

Significantly, the court of appeals then erroneously recognized some noncontiguous "agency" lands as an 18 USC §1151(a) reservation. As noted above, at the time, even the United States recognized that the court of appeals did not "articulate its rationale for that determination." As a result of this noncontiguous "agency" 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 noncontiguous trust land.

C. Not surprisingly, the district court held that all of the rest of the trust land (36,000 acres) should be designated as a noncontiguous 18 USC §1151(a) reservation under any one of several alternative theories.

D. 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, and without briefing, stated that thousands of acres of noncontiguous *fee* land should also be a part of this noncontiguous 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 land was within the limits of the reservation.

E. On rehearing, the offending language regarding the fee lands was deleted from the opinion of the court of appeals. A fifteen page explanation that danced around the deletion was set forth in a separate Order. Order, County App. I, 52-70.

F. This 37,000 acre reservation squarely conflicts with *Bruguier*, in which the South Dakota Supreme Court squarely held, consistent with all prior State and Federal precedent, including the decisions of this Court in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and *YST*, that the Yankton Reservation was disestablished in 1894.

ARGUMENT

A. The overall consideration of the arguments in this case should be informed by the fact that the slate in this case is not clean. Sixteen years of litigation cannot simply be ignored. For example, in the beginning, the district court concluded that but for Article XVIII, the nearly conclusive presumption of "*disestablishment*" would have been controlling. *YST v. SMWMD*, 890 F.Supp. 878, 884 (D.S.D. 1995) (emphasis added).

This Court disposed of the Article XVIII argument in short order in *YST*, 522 U.S. at 345-349. But nowhere in its several subsequent opinions does the district court even mention the "nearly conclusive

presumption" or the operative language of the 1894 Act that is precisely suited to "[the] purpose [of *disestablishment*]." *YST,* 890 F.Supp. at 884 (emphasis added). This is the light in which the conflicting variations of the Yankton Reservation, and the conflicting arguments in support of those variations, should be viewed.

B. There is no question that the disestablishment concession is the one thing the district court had right the first time. *DeCoteau* established the presumption of disestablishment, as this Court reiterated in *YST*. *YST*, 522 U.S. at 351. *DeCoteau* should have been controlling in the remands.

In *DeCoteau*, this Court noted five predominant factors.

1. "The negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." *DeCoteau,* 420 U.S. at 445.

2. "The Agreement's language, adopted by majority vote of the tribe, was precisely suited to this purpose." *Id.*

3. That "language is virtually indistinguishable from that used in other sum-certain cession agreements ratified by Congress in the same 1891 Act." *Id.* at 446.

4. The agreement was distinct from other agreements which the Court held had not changed reservation boundaries. *Id.* at 447-449.

5. "Until the Court of Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years." *Id.* at 449.

C. *YST* reviewed each of these factors. This Court noted that the terms of the 1894 Yankton Agreement "parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*...." *YST*, 522 U.S. at 344. As in *DeCoteau, "all"* the unallotted lands were ceded to the United States for a sum certain in the Yankton Agreement; the language of the Yankton Agreement has been found to be " 'precisely suited' " to termination, and was adopted by a majority of the tribe, *id.*; the language is "virtually indistinguishable" from other cession and sum certain agreements identified in *DeCoteau;* the Yankton Agreement has been held to be "readily distinguishable" from agreements which preserved reservation boundaries, *id.* at 345; and South Dakota had no doubt exercised jurisdiction over the unallotted lands for more than 80 years. *Id.* at 357.

D. The State initially described the similarities as "points of identity." There are eighteen points of identity between the two South Dakota agreements. Early on, the State made these arguments and noted a number of other points in the process. In a comparison of the two South Dakota statutes, the two acts are therefore strikingly similar. Nothing of substance submitted since that time detracts from this powerful analysis.

1. **Time period equivalent.** Sisseton-agreement approved 1891, 26 Stat. 1035 (1891); Yankton-agreement approved 1894, 28 Stat. 286 (1894).

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

3. **Similar acreage allotted.** Sisseton-256,000 acres, 1995 Exhibit 610; Yankton-262,000 acres, 1995 Exhibit 610.

4. **Similar per capita acreage allotted.** Sisseton-168 acres per capita, 1995 Exhibit 610; Yankton-152 acres per capita, 1995 Exhibit 610.

5. **Interior instructions to Commissioners equivalent.** Sisseton, letter from Commissioner of Indian Affairs of August 13, 1889; Yankton, letter from Commissioner of Indian Affairs of July 27, 1892.

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

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

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

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

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

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

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

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

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

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

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

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

18. **Two situations generally treated in parallel fashion on maps.** Sisseton and Yankton, Exhibit 620, JA 412 (1901); Exhibit 621, JA 413 (1910); Exhibit 44, JA 549 (1909).

E. In the last paragraph of the Brief for the United States in Opposition, the United States claims that "[t]he outcome now...essentially preserves the jurisdictional status quo as it has long existed." BUSO, *Daugaard, et al. v. YST, et al.* (Nos. 10-929, 10-931 and 10-932), at 31. Nothing could be further from the truth. The jurisdiction the court of appeals fashioned in this case is premised on a noncontiguous 18 USC §1151(a) reservation boundary around every tract of trust land in the County (all trust allotments and all other trust land as well). This is not the jurisdictional status quo in this County or any county—not for a "long" time or any other time. It is unprecedented in South Dakota and everywhere else.

In stark contrast, the actual jurisdictional history of the Yankton area does not support any reference to 18 USC §1151(a) reservation boundary jurisdiction. Rather, it precisely tracks the jurisdictional history of other areas in South Dakota affected by similar cessions that also include trust allotments. The decisions of this Court in *DeCoteau* and *Rosebud*, and the decisions of the South Dakota Supreme Court cited with approval by this Court in those same decisions, clearly document the application of 18 USC §1151(c) and refute the claim of the United States.

1. *DeCoteau* described in detail the effect of cessions on Indian reservations or portions thereof. Nothing in *DeCoteau* (or *YST* for that matter) supports the claim that the cession can be construed to affect only the land actually ceded, rather than the entire *area*. To the contrary, *DeCoteau* and *Rosebud Sioux Tribe* make clear that the entire *area* was affected.

When a cession extinguished reservation boundaries around an area, no 18 USC §1151(a) Indian country remains in that area. *DeCoteau* clearly held that 18 USC §1151(c) was the pertinent subsection that designated any Indian country remaining in such an area. *DeCoteau* described this result in the following manner.

> In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. § 1151 (c). See *United States v. Pelican*, 232 U.S. 442.

DeCoteau, 420 U.S. at 446-447.

Rosebud Sioux Tribe reached the same conclusion. In *Rosebud Sioux Tribe*, the Court applied the same analysis to reach the same result with reference to each area affected by each of the three Rosebud Acts.

> To the extent that members of the Rosebud Tribe are living on allotted land *outside* of the Reservation, they, too, are on "Indian country," within the definition of 18 U.S.C. § 1151, [18 USC §1151(c)] and hence subject to federal provisions and protections.

Rosebud Sioux Tribe, 430 U.S. at 615 n.48 (emphasis added).

The dissent of Justice Marshall in *Rosebud Sioux Tribe* repeatedly confirms this analysis. *Rosebud Sioux Tribe*, 430 U.S. at 616, 621 n.13 (Marshall, J., dissenting)(took from them...three quarters of their reservation)(remove the opened areas from the reservation). *See also* 628, 630, 631, 632.

As a result, this is the all or none situation repeatedly referred to in the briefs and the oral argument in *YST*. The parties agreed either the area was all Indian country under 18 USC §1151(a), or none of the area was Indian country under 18 USC §1151(a).

F. Like the United States, the district court and the court of appeals blur the distinction between ordinary checkerboard jurisdiction under 18 USC §1151(c), which is temporary and lasts only until Indian title is extinguished, and the permanent checkerboard jurisdiction fashioned by the courts in this case, which is unprecedented and permanent until Congress addresses the issue. Neither the district court nor court of appeals acknowledge this permanence or dependency on Congress. Nor did the courts acknowledge the fact that this arrangement will result in many non-Indians owning fee property within the limits of the Yankton Indian reservation.[1]

G. The United States concludes its brief in a consistent fashion—consistent in that it does not accurately discuss the previous Order of the Court in this case denying certiorari. Immediately before its conclusion, the United States suggests that this Court deny certiorari "just as it did" in the past. BUSO, *Daugaard, et al. v. YST, et al.* (Nos. 10-929, 10-931 and 10-932), at 31. In that last case, the United States

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[1] Initially, the district court quoted a 1969 Interior opinion that recognized 18 USC §1151(c) jurisdiction in the Yankton area. The 1969 opinion cited the *DeMarrias* decisions and previous State and Federal cases in South Dakota that recognize 18 USC §1151(c) jurisdiction. *YST*, 890 F.Supp. at 888. It also cited *Beardslee v. United States*, 387 F.2d 280, 287 (8th Cir. 1967), ("checkerboarding in non-reservation land"). *See Beardslee* excerpts in Petition and Reply of SMRWMD at 11-13, 2-5.

keyed on the interlocutory nature of the case in the second sentence in that argument and repeated that theme throughout the entire argument. "[T]he court's decision does not warrant this Court's review, at least not at this interlocutory stage." BUSO, *Gaffey*, 188 F.3d 1010, *cert. denied*, 530 U.S. 1261 (2000) (Nos. 99-1490 and 99-1683), at 8, 9, 19, 21 and 27.

The United States neglects to mention the interlocutory nature of the previous case. It was the central argument the United States submitted in support of that denial. In this case, no interlocutory argument of any substance has been submitted.[2]

CONCLUSION

Petitioner Charles Mix County respectfully requests the Court to grant its Petition.

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[2] The County focuses on the shifting arguments of the United States in the Petition at 3-4, 35-40. The County concludes that there is no basis to give any special credence to the position of the United States in cases of this nature. *See also* Brief of County, *amicus curiae*, submitted in *YST* and reproduced in County App. II, 460. Significantly, the BUSO does not respond to any of this.

Respectfully submitted,

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