

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-1441; No. 08-1488

FILED

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MICHAEL GANS
CLERK OF COURT

YANKTON SIOUX TRIBE, and its Individual Members,

Plaintiffs-Appellees and Cross-Appellants,

and

UNITED STATES OF AMERICA, on its Own Behalf and for
the Benefit of the Yankton Sioux Tribe,
Plaintiffs-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 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

CONSOLIDATED BRIEF OF *AMICUS CURIAE* OF ROSEBUD SIOUX TRIBE IN
OPPOSITION TO COUNTY AND STATE APPELLANT PETITIONS FOR REHEARING
AND FOR REHEARING *EN BANC*

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I. STATEMENT OF IDENTITY AND INTEREST.

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 in Todd County, South Dakota. It is a federally recognized Indian Tribe organized under the provisions of the Indian Reorganization Act, 25 U.S.C §476 and 477, and exercises sovereign powers of self government over its land and people in the above areas. The United States through the Bureau of Indian Affairs maintains an agency on the Rosebud Indian Reservation, to 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.

II. ARGUMENT

A. The Podhradsky Decision is consistent with prior Supreme Court and Circuit Court Precedent.

The Podhradsky Panel decision does not conflict with the Supreme Court's rulings in Rosebud v. Kneip, 420 U.S. 425, 427 n. 2, DeCoteau v. District Court, 420 U.S. 425 (1975); United States ex rel Cook v. Parkinson, 525 F.2d 120 (8th

Cir. 1975), or United States v. Pelican, 232 U.S. 442, 449 (1913), as fully explained in Podhradsky, and in the Tribe's briefing. 577 F.3d 951, 965-967; T.Br. at 62-70. The Gaffey Court already ruled that Decoteau does not apply. 188 F.3d at 1020. Rosebud Sioux Tribe v. Kneip and United States ex rel Cook v. Parkinson already held that Tripp, Mellette, and Bennett counties are not located within an Indian Reservation because specific acts of Congress diminished the Rosebud and Pine Ridge reservations. 430 U.S. 584 (1977); 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). In contrast, United States Courts have declined to disestablish the Yankton Reservation five times.¹

Any ruling that trust lands are not Indian Country would affect the Rosebud Sioux Tribe and every Tribe in the United States. Further, a ruling that a Reservation is diminished without precise language in an Act of Congress would subject the Rosebud Sioux Tribe and other Tribes to further litigation by the State, who has attempted to disestablish every Reservation in South Dakota.

If this Court held as the State, County, and *Amici* request, it would conflict with the long line of precedent holding that the allotment of trust land, the

¹ Yankton Sioux Tribe v. Southern Missouri Waste Management District, 890 F. Supp. 878 (D.S.D. 1995); Yankton Sioux Tribe v. Southern Missouri Waste Management District, 99 F.3d 1439 (8th Cir. 1996); South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789 (1998); Yankton Sioux Tribe v. Gaffey, 14 F. Supp.2d 1135 (D.S.D. 1998); Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999); cert. denied, 530 U.S. 1261.

issuance of fee patents on allotted lands, and the sale of allotted lands to non-Indians do not diminish a Reservation. United States v. Celestine, 215 U.S. 278, 285 (1909); Seymour v. Superintendent, 368 U.S. 351, 357-58 (1962)(allotted lands retain reservation status after fee patenting under 18 U.S.C. 1151(a)); United States v. Webb, 219 F.3d 1127, 1133 (9th Cir. 2000); Southern Pacific Transportation Co. v. United States, 543 F.2d 676, 690 (9th Cir. 1976); Melby v. Grand Portage Band of Chippewa, 1998 WL 1769706 (D. Minn. 1998) (unpublished) at T.R.Add. 11-15; Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984).

The Podhradsky Panel decision does not allow a generic status to overrule the precise language in the 1894 Act. Am. Ctys.' Br. at 5. The Petitioners and *Amici* do not point to any 1894 Act language or legislative history supporting a diminishment of allotted lands from the Yankton Reservation, because it does not exist. Instead, there is precise language reserving allotted lands in Articles XIII and XIV of the 1894 Act. Tr. Br. at 31-35; Podhradsky, 577 F.3d 951, 966 (8th Cir. 2009). Allotted lands were transferred to non-Indians under authority of the generic Dawes Act, 1906 Burke Act, and 1948 Supervised Sales Act - not the 1894 Act. Id. at 956-57. The Podhradsky opinion explains this, and is in accord

with the Supreme Court's holdings on the effect of 18 U.S.C. 1151(a).² Id. at 964; Seymour v. Superintendent, 368 U.S. at 357-58 (1962) .

B. The Interests of *Amici* are not Implicated by this decision about Criminal Jurisdiction over Tribal members.

The interests of *Amici* are not implicated by this case, which is about criminal jurisdiction over Indians on fee lands on the Yankton Reservation - not civil jurisdiction over non-Indians. Podhradsky, 529 F.Supp.2d at 1042, n.1; T.R.Br. at 1. The Podhradsky decision does not change regulatory jurisdiction over trust and fee lands, or civil jurisdiction established under Montana v. United States.³ 450 U.S. 564 (1981); Plains Commerce Bank v. Long Family Cattle and Land Company, Inc., 128 S. Ct. 2709, 2722 (2009)("with only one minor exception, we have never upheld . . . the extension of tribal civil authority over nonmembers on non-Indian land.").

In County of Mille Lacs v. Benjamin, this Court rejected the same unfounded allegations *Amici* raise as "speculative harms based upon the assumed future intent of the [Tribe]." 361 F.3d 460, 464 (8th Cir. 2004), cert. denied, 543

²Likewise, Podhradsky does not hold that all trust land is "reservation land." The Podhradsky Panel specifically found that some trust lands are dependent indian communities under 18 U.S.C. §1151(b). Id. at 74.

³ The Charles Mix Electric Association, Inc. has always been subject to federal regulations for easements over trust lands under 25 C.F.R. Part 169. Charles Mix Electric Association concedes it has been granted an exemption from the Tribal taxation. Electrical Cooperative Am. Br. at 3.

U.S. 956 (2004). The mere assertion this opinion “subjects area businesses to an unmanageable and constantly changing regulatory checkerboard,” and some future financial impact, does not create a case or controversy. County of Mille Lacs v. Benjamin, 262 F. Supp.2d 990, 1000 (D.Minn. 2003); U.S.Br. at 43. Southern Missouri Management even concedes its only interest is in possible future tribal trust land acquisitions it has the right to contest under 25 C.F.R. §151.12(b). So. M.M. Am. Br. at 4; U.S.Br. at 43.⁴

Amici claims they represent other businesses and individual landowners should be disregarded as they do not have representational standing.⁵ *Amici* Charles Mix Electric Association, Inc. is a member-owned cooperative whose seven non-Indian Directors never consulted with their members, including the Tribe and tribal members, before filing an *Amicus* Brief, and does not represent other businesses or cooperatives. *Amici* Wagner Community School District serves more Indian than non-Indian students, receives over \$3 million annually in federal Impact Aid funds for serving students living on trust lands in Charles Mix County, and has a reserve fund of over \$12 million that in almost exclusively

⁴How Southern Missouri Management, a party in this litigation who never filed a Notice of Appeal, but was permitted by this Court to sign an Appeal Brief jointly with the County, and did not file a Petition for Rehearing, can file an *Amicus Brief* is a serious procedural question.

⁵Individual landowner *Amici* provide no basis to assert they represent all fee land owners, many of whom are tribal members.

Impact Aid funds. Wagner Sch. Am. Br. at 1; <http://wagner.k12.sd.us/education/components/docmgr/default.php?sectiondetailid=1044&linkid=nav-menu-container-4-55>. Pursuant to 34 C.F.R. §222.196(b), this School must already comply with Indian preference requirements for contracts funded with Impact Aid funds, and consult with Tribal families on how to spend the funds, because it receives the funds, “primarily for the benefit of Indians.” 34 C.F.R. §222.196(b). Further, Wagner Community School District entered a consent decree for violation of Section 5 of the Voters Rights Act. Weddell v. Wagner Community School District, Civ. No. 02-4056 (D.S.D. 2005). The *Amici* are non-Indians who reside in Charles Mix County, who have violated the Voting Rights Act twice.⁶ Black Moon v. Charles Mix County, 386 F.Supp.2d 1008 (D.S.D. 2005).

There is no surprise here, where *Amici* have had fourteen years to intervene, Southern Missouri Management participated as a litigant, and the *Amici* cities and counties participated as *Amici* in 1995.⁷ Mr. Tobin met with all

⁶ Most recently in 2008, an effort to add two more Commissioner seats to dilute the vote of the one Indian Commissioner resulted in a determination by the Department of Justice that the consent decree was violated. The Department of Justice found, “Charles Mix County and the State of South Dakota have a history of voting discrimination against Native Americans. Native Americans could not vote in the County until 1951. Even when Native Americans received the right to vote, they were discriminated against in registration and other parts of the voting process.” http://www.justice.gov/crt/voting/sec_5/ltr/l_021108.php.

⁷ Claimed surprise is surely without merit where the Attorneys representing the *Amici*, except Mr. Parkhurst, have represented parties to this litigation.

non-Indian land owners in 2006, actively excluding Indian owners of fee lands, as documented in the trial transcript. T.T. 235:17-25; 236-238; T.T. 248: 1-22. The District Court Transcript documents the fear generated in the non-Indian landowner meeting that reservation land is worth less, and reservation status creates a “cloud” on land title. Id.

_____The evidence in this case shows that checkerboarded land ownership has not harmed the working relationship between federal and local officials enforcing criminal laws.⁸ Podhradsky, 577 F.3d at 959. A checkerboard of land ownership and jurisdiction exists on every Reservation in South Dakota, and will always exist as a result of the 1887 Dawes Act and its progeny. Rosebud Am.Br. at 8.

The *Amici* argument that this ruling “upsets settled expectations of non-Indians,” has already been rejected by the Supreme Court, when it held that exercise of jurisdiction over Indians on reservation allotted lands that have gone into fee status, even for over 50 years, does not create a diminishment or disestablishment. City of New Town v. United States, 454 F.2d 121, 123 (8th Cir. 1972); Solem v. Bartlett, 465 U.S. 463, n 23. The Counties’ chart of what the Courts have ruled ignores the fact that the first Court ruling on the Yankton Reservation’s existence happened in 1995. Cty. Am. Br. at 7.

⁸Likewise, *Amici* City of Lake Andes fails to note that through cooperative efforts of the Tribe, it has received over \$400,000.00 in Indian Reservation Road funds from the Tribe for repair of an Indian Reservation road in Lake Andes.

C. *Amici* Newly Asserted Factual Claims Should be Disregarded.

The *Amici* and Petitions for Rehearing assert new factual claims to attempt to present the Court with a skewed view of the “Indian character” of the Yankton Reservation. The 1858 Yankton Reservation only includes the Southern half of Charles Mix County, yet it is the largest employer in the entire County, followed by the Bureau of Indian Affairs and Indian Health Service. The 2000 Census confirms that the population of the Northern half of the original 1858 Reservation is over forty-eight percent (48%) Native American and over 35% in the Southern half. T. Br. at 22; T. Br. Add. at 33. The portion of Charles Mix County outside the 1858 Treaty reservation is 0.4% Native American in contrast. Id. Land ownership within cities was introduced in District Court by the Tribe, but was objected to by the County, and cannot be presented now. T.T. 88:5-25; 89:1-14; Tr. Resp. Br. at 19.

The State Rehearing Petition Addendum adds nothing new to the case. Government Exhibit 210, listing all allotted lands that had gone into fee status from 1927 to 2007 was before the District Court and the Podhradsky Panel, and was not objected to, just as the State and County did not answer arguments on the effect of 18 U.S.C. §1151(a). ⁹ Tr.Br. 45-46; Tr.R.Br. at 18-20. Therefore, the

⁹ All of the *Amici* city’s arguments were made to the Podhradsky court and rejected. As *Amici* Rosebud pointed out at oral argument, five South Dakota county seats are located on Reservations without any ill effect.

Rehearing Petition Addenda should be stricken as new. Smith v. Armontrout, 865 F.2d 1502, 1504, n.5 (8th Cir. 1988)(new research not permissible on Rehearing).

D. *Amici* Claims Regarding Misapprehension of Land Status in 1894 were already rejected by the Gaffey Court.

The *Amici* cities contention that this Reservation would have been disestablished if the Supreme Court was provided with accurate information on agency lands were proffered by the State in Gaffey, and in this appeal, and rejected. St. Br. at 59-60. Gaffey, 188 F.3d at 1030, Podhradsky, 577 F.3d at 962-963. There is simply no basis to overrule the law of the case established in Gaffey that agency lands are part of the Yankton Reservation. Id.

E. The Law of The Case Doctrine Was Not Violated.

The “law of the case” doctrine has not been violated as held by the District Court during remand, and by this Court in denying a Petition for Writ of Mandamus and the Petition for initial hearing *en banc*. Yankton Sioux Tribe v. Gaffey, 2006 WL 3703274 at 3-4 (D.S.D. 2006); Doc. 276. Gaffey left open whether allotted lands were Reservation under 18 U.S.C. §1151(a), determining only two things: 1) The Yankton Indian Reservation was not disestablished; and 2) The Yankton Indian reservation includes agency lands. 188 F.3d at 1030.

III. CONCLUSION

The Petitioners and *Amici* offer nothing more than a seventh reiteration of the State, County, and some non-Indian residents' desire to disestablish the Yankton Reservation not based in law, but in the concept that might makes right. Not one of the *Amici* or Petitioners dispute the precise language of Article XIII and XIV of the 1894 Act reserving allotted lands from alienation by Congress and reserving "undisturbed use and possession. . . ." to the Tribe and its members. Podhradsky, 577 F.3d at 966. Under the law, there must be precise congressional language and Congressional intent to diminish or disestablish, which does not exist in this case. Podhradsky, 577 F.3d at 965-66. The repeated appeals "to compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members" should end here. Podhradsky, 577 F.3d at 963 (citations omitted). The Petitions for Rehearing should be denied.

Respectfully Submitted this 25th day of January 2010.

/s/ *Terry L. Pechota*

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CERTIFICATE OF SERVICE

I certify that on the 25th day of January, 2010, I caused to be served, via electronic filing, a true and correct copy of the *Motion for Leave of the Court to File Amicus Curiae Consolidated Brief in Opposition to the State and County Appellants' Petitions for Rehearing and Rehearing En Banc* to:

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