

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SOUTH DAKOTA, Petitioners v. YANKTON SIOUX
TRIBE, ET AL.

CASE NO: No. 96-1581

PLACE: Washington, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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SOUTH DAKOTA, :

Petitioners :

v. : No. 96-1581

YANKTON SIOUX TRIBE, ET AL. :

- - - - -X

Washington, D.C.

Monday, December 8, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

MARK W. BARNETT, ESQ., Attorney General of South Dakota,
Pierre, South Dakota; on behalf of the Petitioners.

JAMES G. ABOUREZK, ESQ., Sioux Falls, South Dakota; on behalf of the Respondents.

BARBARA B. MCDOWELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 96-1581, South Dakota v. Yankton Sioux Tribe.
5 General Barnett.

6 ORAL ARGUMENT OF MARK W. BARNETT

7 ON BEHALF OF THE PETITIONERS

8 MR. BARNETT: Mr. Chief Justice, and may it
9 please the Court:

10 The case that is before the Court today involves
11 the question of whether an 1894 Act of Congress had the
12 intent and the effect of disestablishing the Yankton Sioux
13 Reservation. The State submits that the answer is
14 conclusively yes. And we base that "yes" on several
15 factors, the first and not least of which is the use of
16 "cession and sum certain" language in the operative -- or
17 terms -- in the operative section of the agreement and the
18 ratifying Act.

19 That particular "cession and sum certain," the
20 cession, sale, relinquishment and conveyance of all
21 interests in and to the unallotted land, together with the
22 sum certain, has been held by this Court to create an
23 almost insurmountable presumption, or a nearly conclusive
24 presumption. And we would submit to the Court that that,
25 in combination with the immediate uptake of jurisdiction

1 by the State of South Dakota in 1895, and continuously
2 uncontested State jurisdiction during the next 100 years,
3 and throwing that together with the fact that that
4 jurisdiction was exercised without objection by the Tribe
5 and without an attempt to exercise jurisdiction by the
6 Tribe or the Federal Government throughout those 100
7 years, and that's not merely our contention but that also
8 is the observation -- excuse me -- of both the Eighth
9 Circuit and the -- both the majority and dissenting
10 opinion, as well as the opinion of the unanimous State of
11 South Dakota Supreme Court. And then, add into that, as a
12 method of telling us what everybody understood at the time
13 that this Act was passed, pursuant to the agreement with
14 the Yankton Tribe, was what I will call the immediate
15 wholesale settlement of the area by homesteaders, or what
16 the District Court referred to as the rapid settlement and
17 the loss -- the quick loss of Indian character in this
18 area, which would suggest, at least to the State, that
19 that would suggest disestablishment.

20 We also would submit to you that additional --

21 QUESTION: May I ask you, General Barnett, you
22 use the word "disestablishment," but as I read
23 particularly Judge Magill's decision, his dissenting
24 opinion, he's very careful to speak always about
25 diminishing. And you seem to use those words as though

1 they mean the same thing.

2 MR. BARNETT: Your Honor, I believe that
3 diminishment probably should be read to suggest a case
4 more like Rosebud v. Kneip, where the Court said that as
5 to several counties, the reservation was disestablished,
6 but it still left one county with a compact square of
7 reservation. And so there was still actually 18 U.S.C.,
8 1151(a)-type reservation country out there, but it was
9 diminished in size.

10 The case that we have here today -- and I think
11 the parties would agree -- that the case we are doing
12 today is disestablishment, just like the DeCoteau case,
13 where the Lake Traverse Reservation was found by this
14 Court to be disestablished, meaning there was still no
15 1151-type -- 1151(a)-type reservation out there.

16 I -- I might add, Your Honor, that diminishment
17 and disestablishment at one time were probably not terms
18 of art. In our view, they are now. And we are, I think,
19 today here litigating disestablishment.

20 QUESTION: Even though Judge Magill said that he
21 thought that the District Court erred in holding that the
22 reservation had not been diminished?

23 MR. BARNETT: Yes. And I -- and I do not
24 believe, from reading all of Judge Magill's opinion, that
25 he's trying to suggest that some 1151(a)-type reservation

1 still existed after 1894. I think, to be honest, I would
2 suggest to you that -- that he was probably using
3 diminishment and disestablishment interchangeably, and
4 that has happened in the history of the -- of the court
5 system in other cases as well.

6 Returning for a moment, if I may, to the
7 settlement history that took place out there -- and the
8 reason I bring it up is because this Court, on other
9 occasions, has looked to the settlement history
10 immediately after the passage of the Opening Act to help
11 it determine what did everybody understand at the time.
12 And in this case, as was suggested by the Court of Claims
13 in 1980 -- or as was found by that Court -- within 3 years
14 of the opening of this reservation, more than 100,000 of
15 these opened acres had been sold. Within 5 years, 90
16 percent had been sold.

17 And as you will see at joint appendix 475, by
18 1913, in addition to the ceded lands which had been put up
19 for settlement by the homesteaders, more than two-thirds
20 of the allotted lands left to the Indians in 1894 had also
21 been sold. And so --

22 QUESTION: General Barnett, was the particular
23 tract of land that we're concerned with in this case part
24 of the land that was restored to the public domain by the
25 1892 agreement?

1 MR. BARNETT: Yes, Your Honor, we do contend
2 that it was restored to the public domain. And by way of
3 explanation, at the time of trial, 90 percent of all of
4 the land in what we call the disputed area, 90 percent of
5 that former reservation area was in non-Indian hands.
6 Which has been something that the Court has noted in its
7 prior cases. And more than two-thirds, or 68 percent, of
8 the population was non-Indian, as found by the Federal
9 census.

10 QUESTION: So this parcel was not allotted land
11 that was later alienated?

12 MR. BARNETT: 168,000 acres of the 430 --
13 168,000 were immediately ceded to the Federal Government,
14 and then, then, as I said, began a rapid process of sale.
15 And then the allotments, which were the balance of the
16 430, were, in large part, sold in the ensuing years. In
17 about the next 15 or 20 years, a great majority of the
18 allotments were sold.

19 QUESTION: Yeah, we were asking about this
20 particular tract of land.

21 QUESTION: Yes.

22 QUESTION: And its history. This -- this is the
23 site of a proposed waste site or something.

24 MR. BARNETT: Oh, okay. I'm sorry.

25 QUESTION: And we're talking about a particular

1 tract of land.

2 QUESTION: Correct.

3 MR. BARNETT: Excuse me, Your Honor.

4 QUESTION: Now, was that land that was directly
5 restored to the public domain? Was it allotted and then
6 later resold? What was the history of this tract?

7 MR. BARNETT: It was -- it was -- it is now and
8 was at the time of trial fee land. It was issued by a
9 government patent, issued by the Federal Government. I
10 don't know the exact year, but I'm going to suggest in the
11 late 1800's. And I can find that fact in time for
12 rebuttal. But it was issued in -- in fee patent by the
13 Federal Government, and used actually the words "public
14 domain" in that fee patent. And so --

15 QUESTION: What -- that was before the 1890 --
16 1892 agreement, then?

17 MR. BARNETT: That I cannot answer. I'd be
18 guessing, Your Honor. I do have that information, but I
19 don't have it at my fingertips.

20 QUESTION: The Respondents rely on a savings
21 clause in Article XVIII, is it?

22 MR. BARNETT: That's correct, Your Honor.

23 QUESTION: Are you going to address that?

24 MR. BARNETT: Yes, Your Honor.

25 QUESTION: Because it is language that is

1 different than that which we have seen in other treaties
2 or agreements.

3 MR. BARNETT: Yes, Your Honor.

4 The -- as we look at Article XVIII, it seems to
5 the State that the one thing that you cannot do with
6 Article XVIII is read it literally. Because if you read
7 it literally, in the strict literal interpretation, then
8 it says that nothing in this Act in effect -- or in
9 agreement -- in 1892 actually happened. The sale did not
10 happen. The white homesteaders could not move in.

11 Part of the 1858 treaty forbade settlers or
12 other whites from coming onto the reservation, with
13 certain narrow exceptions. And that was in 1858.

14 By contrast, in the 1892, and in the Act
15 ratifying it, the exact opposite purpose was there,
16 that -- that we are going to have whites come in and
17 settle this area. And -- and so, when we try to interpret
18 what Article XVIII says, I think, first, that the -- and I
19 suspect the parties would even agree -- it cannot be read
20 literally. Because then you get absurd results.

21 The second thing that I would observe about
22 Article XVIII is that if you read the first sentence of
23 Article XVIII, it says: Nothing in this treaty abrogates
24 the 1858 treaty -- or nothing in this agreement.

25 If that's true, all the rest of Article XVIII is

1 surplus. If you go to the first phrase in the second
2 sentence, it repeats that phrase, that -- that essential
3 statement. And if that's true, what came before and what
4 came after is surpluses.

5 And so it seems to me that it can't be read
6 literally. And -- and that takes us to the next point,
7 which is, how does the Federal Government propose to us
8 that it should -- or to you -- that it should be read?
9 And if I understand their argument in their briefs
10 correctly, they're suggesting that you need to read into
11 Article XVIII the phrase "not inconsistent."

12 And they go to Article I and II and suggest that
13 I and II is not really a cession and sum certain, contrary
14 to its express language, but is -- and, in fact, I would
15 submit to you they are asking you to read out cession and
16 sum certain. And take that out, and then construe what is
17 left.

18 And -- and I don't think that that is the
19 appropriate way to handle it. And, in fact, I would -- I
20 would suggest that the Klamath case had an analogous
21 situation, where there was a savings clause in that case,
22 which suggested that nothing in the -- in the more modern
23 agreement was to -- was to take away rights they had
24 preserved in the past. But as the Klamath court pointed
25 out, the later agreement constituted a cession and sum

1 certain, and that the Klamath Tribe could not silently
2 preserve hunting and fishing rights through a general --
3 the general language of a savings clause.

4 Now, I would also submit to the Court that when
5 we look at 18, at the tail end of this agreement, or when
6 you look at it -- excuse me -- I would suggest to you that
7 it is important that that is not the operative language of
8 the -- of the agreement or the Act. And, in fact, I
9 would -- I would call your attention to the Hagen case,
10 where the Court said that, in observing on the Solem case,
11 observed that the use of the words "public domain" in the
12 Solem case were not found in the operative language of the
13 Act. And since they were not found in the operative
14 language, they had, I think, secondary importance.

15 Or as the Court --

16 QUESTION: Why -- why isn't this in the
17 operative language?

18 MR. BARNETT: In the 1892?

19 QUESTION: Right.

20 MR. BARNETT: Because I don't think they
21 intended to disestablish -- excuse me -- I think they
22 intended to disestablish, and I don't think that -- that
23 they intended Article XVIII to -- to change what the terms
24 or the operative intent of the Act were.

25 I think that Article XVIII was there to reassure

1 the Tribe that they would receive the monies and the
2 claims that they felt were due them -- the annuities.

3 QUESTION: Then why didn't they just say that
4 and nothing else?

5 MR. BARNETT: Well, I think, as one justice
6 said -- or judge said -- at the Eighth Circuit, lawyers
7 repeat themselves. And I suspect that -- that probably
8 what was happening was the Indians were concerned that --
9 that the Federal Government was not going to live up to
10 its obligations, and particularly when they understood
11 they were selling the -- the remaining reservation that
12 they had received in the 1858 treaty, it seems to me that
13 a fair question that would have been in the Indians minds
14 was: Are you going to abrogate that portion of the 1858
15 treaty from which our annuities flow? And the answer
16 would be: No, we are not going to abrogate the 1858
17 treaty, and you will get your annuities.

18 And, indeed, if you look at the report that the
19 commissioner gave to the State of Interior, who then filed
20 with the Congress, in 1893, what you will see is a -- is a
21 lengthy description in the record about what all of the
22 Indians concerns were and how these were resolved in the
23 various articles of the agreement. And so there was a
24 long discussion about Pipestone Quarry and a long
25 discussion about scout claims for Indians who had served

1 as scouts and felt they still had money owing. A lot of
2 discussion about their concerns.

3 No discussion about preserving boundaries or
4 authority, in the first place. And in the second place,
5 when we come to -- to what the negotiator is telling
6 Congress the Indians feel about 18, it gets one sentence,
7 and one sentence only in the record. And what he says
8 is -- with regard to 18, his comment is: The Treaty of
9 1858 is not abrogated and the Indians shall get their
10 annuities.

11 And so that suggests to me that -- that if the
12 Tribe really did think and believe that they were going to
13 preserve their boundaries and their authority, number one,
14 that's a glaring conflict with the cession and sum certain
15 language; and, number two, is completely unsupported in
16 the congressional and in the negotiating record.

17 QUESTION: May I ask this question about Article
18 I and -- and also Justice Ginsburg's question of
19 distinction between dis -- disestablishment and -- and
20 diminishment. That when you say -- when the sentence says
21 they cede, and so forth and so on, their interest in and
22 all the unallotted lands within the limits of the
23 reservation -- set apart -- doesn't that kind of convey a
24 message -- I don't know -- if you don't know the
25 geography -- that there's some un -- unallotted lands

1 within the limits of the reservation to which this
2 agreement applies and there's additional land in the -- in
3 the reservation that's unaffected by this?

4 MR. BARNETT: Well, I read that reference as a
5 geographical reference.

6 QUESTION: Yes.

7 MR. BARNETT: And -- and -- and through -- and
8 the use of the phrase "within the reservation" --

9 QUESTION: Right.

10 MR. BARNETT: -- does not suggest to us -- given
11 the fact that it's right in a cession and sum certain does
12 not suggest to us that a reservation is going to continue.
13 It is simply a reference to what area it is that we are
14 ceding and disestablishing. And I would call your
15 attention to the DeCoteau case, with the Lake Traverse
16 Sissetons and Titowan Tribe, identical Article I and II,
17 word for word. And it used the same phrase, "within the
18 reservation." And yet this Court held, as you know, that
19 that reservation was disestablished.

20 And I would also submit to you, Your Honor,
21 that -- that this is consistent with what the Indians have
22 understood for the first 100 years, as evidenced by their
23 own constitutions, particularly the 1962 constitution,
24 which tells us something about what the Indians felt. In
25 1962, the territory that they claimed -- this is in your

1 joint appendix at 499 -- the only territory they claim
2 jurisdiction over in their own constitution was, quote,
3 tribal lands now owned by the tribe, end quote. Which we
4 think is a lot more consistent than what is --

5 QUESTION: But how do you -- but how do you --
6 what's your theory of how the reservation becomes
7 disestablished? That is, I take it they cede 200,000
8 acres of unallotted lands. And you're arguing those lands
9 are no longer within the reservation?

10 MR. BARNETT: Yes.

11 QUESTION: You're not -- all right. They're
12 subject to the jurisdiction of the State then?

13 MR. BARNETT: Correct.

14 QUESTION: All right. And the remaining 260,000
15 acres of allotted land?

16 MR. BARNETT: We are also arguing that --

17 QUESTION: Now, what is it that -- that changes
18 the status of the allotted land in your theory?

19 MR. BARNETT: I believe that we are adhering to
20 the teaching of the DeCoteau case, where the DeCoteau
21 case, at 420 U.S., 446, in footnote 2, talks about when
22 you cede the authority, the governmental authority, that
23 you have over an area -- and -- or, in this case, to use
24 the exact language -- cede all interest -- with that goes
25 the authority not just over the immediately ceded, but in

1 the entire region. And, indeed, in the DeCoteau case, the
2 Court said that what was intended to be left by Congress
3 was the allotted lands -- the allotted and trust lands.
4 And under the Pelican case and under 18 U.S.C., 1151(a),
5 (b) and (c), what we know today is that when there is a
6 cession and sum certain, the authority is lost.

7 QUESTION: See, the part that I'm having
8 difficulty with is imagine a big square, A, B, C, and D,
9 four subsquares within the big square.

10 MR. BARNETT: Yes.

11 QUESTION: Now, suppose that a particular treaty
12 said, "We cede subsquares C and D. We keep A and B."
13 Well, if that's what it said, wouldn't you think the
14 reservation then consisted of A and B?

15 MR. BARNETT: We subscribe to the DeCoteau
16 logic, that -- that, I think, suggested that Congress'
17 intent was that the cession means all authority --

18 QUESTION: So, if -- in your view, if -- if it's
19 A, B, C, and D, and they say, We cede -- we sell, cede,
20 get rid of and absolutely never want to hear again of
21 subsquares C and D, you're saying, when they did that,
22 they've also destroyed the reservation as to A and B
23 automatically. And I -- that's -- that's odd.

24 MR. BARNETT: What was lost at the time was
25 1151(a)-type jurisdiction. And to go back to the Solem

1 case, the common notion at that time, in those years, was
2 that tribal -- tribal ownership was synonymous with tribal
3 authority. And so, then, when lands went out of tribal
4 ownership, they lost that authority.

5 QUESTION: But I'm thinking of the part that was
6 left in tribal ownership.

7 MR. BARNETT: Yes. And -- and -- and my point,
8 Your Honor, is that then, as those allotted lands are
9 alienated, the Indian title becomes extinguished. To use
10 the exact language of 18 U.S.C., 1151(c), the Indian title
11 is extinguished. And at that time, under the DeCoteau
12 case and under a long line of cases in the lower Federal
13 courts, as well as, I think, the -- the cases from this
14 Court, then that is -- that also loses its status as --

15 QUESTION: But they keep their tribal status as
16 to the little bits that they keep, that they don't -- see,
17 what I'm driving at is I took -- take it that Felix Cohen
18 thought that they must have been left with at least some
19 jurisdiction in respect to little bits of territory that
20 they, for example, kept completely. And those are
21 scattered throughout the whole area. And, therefore, it
22 wouldn't be feasible to administer little scattered bits,
23 bit by bit. And, therefore, they must have intended to
24 keep the whole area.

25 MR. BARNETT: Well, I think -- and that's a

1 reference to the 1941 Cohen opinion -- but let me observe
2 that even Felix Cohen, as an advocate and as a, I believe,
3 Acting Solicitor, even he did not base his opinion on
4 Article XVIII when he -- when he reviewed this. Secondly,
5 the very next year, he offered the Perrin case as
6 authority for the proposition that the tribes -- that --
7 that this was now no longer reservation land. And so that
8 certainly was an indication.

9 But perhaps a better indication would be to --
10 to look at how did the Federal Government and the Tribe
11 view this very question. Because on all of those lands
12 which were allotted and then later alienated -- almost all
13 of them by 1913 -- we've been out since 1913 -- or in all
14 of those years -- exercising jurisdiction, without contest
15 or objection from the Tribe until about 3 years ago.

16 And then you look at Felix Cohen issued his
17 opinion in 1941. And if that was not a wake-up call to
18 the Federal Government and the Tribe that maybe you've got
19 more jurisdiction on those lands which once were allotted,
20 certainly Congress' enactment in 1948 -- if this was still
21 all reservation, both the original cession land and the
22 allotted lands that were alienated -- that should have
23 been a wake-up call. And still we did not see the Federal
24 Government.

25 And even as late as 1985, the Federal Government

1 was arguing in the Eighty Circuit Court of Appeals that --
2 or suggesting -- that this reservation in fact was
3 diminished. So --

4 QUESTION: Help -- help me out, will you, on --
5 on the -- on the -- the -- the relationship between the
6 cession language and the particular parcels involved. The
7 cession language clearly referred to the lands conveyed to
8 the United States, which were then later conveyed out by
9 the United States. Did the cession language refer to --
10 to lands which had already been allotted but which were
11 not at that point, in 1892, conveyed to the United States?

12 MR. BARNETT: It -- it used the words "all
13 unallotted land." Now, there are --

14 QUESTION: So, as to the allotted land, the
15 cession language did not apply?

16 MR. BARNETT: I think it has an effect. It
17 applies --

18 QUESTION: But it didn't apply. I -- I don't --
19 I just want to make sure that I understand the way the
20 terms were used. Then we get to the legal effect of it.
21 I take it that in terms of -- of the -- the literal
22 statement made, the language employing the term "cession"
23 did not, by its terms, apply to -- to lands which had
24 previously been allotted?

25 MR. BARNETT: I would agree.

1 QUESTION: So that your argument there is not
2 that the jurisdiction was lost by the cession language as
3 such, but by the application of some other rule -- and I
4 think it's the some other rule that I'm not clear about.

5 MR. BARNETT: Well, I think it's a reflection,
6 Your Honor, of when we look at 1151(a), (b) and (c), those
7 are a codification of law that had been developing ever
8 since the -- I believe the Bates v. Clark case back in the
9 1870's. And I think what the courts have said as they've
10 looked at this question is, is that, did Congress intend
11 to disestablish the reservation? And if it did intend to
12 disestablish the reservation, then the courts have been
13 uniform, they have been uniform in concluding that not
14 only is there a loss of authority or jurisdiction as to
15 the lands immediately ceded, but they are also taking the
16 position -- and this is consistent with the philosophy of
17 the Allotment Act, the -- in the Yakima v. Yakima Indian
18 Nation case -- the court has expressed, in Justice
19 Scalia's writings -- talks about the policy of the
20 Allotment Act.

21 QUESTION: Mmm-hmm.

22 MR. BARNETT: And the -- the -- and I think you
23 have to read that within -- or as a historical context
24 throughout the late 1800's and into the first decade of
25 the -- of the 1900's. And that is that the -- the -- the

1 goal and the purpose of these cession and sum certain
2 cases, the goal of Congress was to erase the boundaries --

3 QUESTION: Oh, I will grant you that. I don't
4 think there's any -- any doubt in -- at least in my mind
5 about that. But I take it that the -- the -- the
6 construction that you are arguing for would work this way:
7 Let's take Justice Breyer's example and -- and instead of
8 having the four quadrants, A, B, C, and D, let's assume
9 that there was 1 acre in quadrant D. And the Tribe had
10 made a -- an agreement with the United States, using the
11 same language here, ceding the 1 acre. I take it on your
12 argument the entire reservation would be disestablished as
13 a legal consequence of that; is that correct?

14 MR. BARNETT: I would -- that would certainly be
15 a more difficult case.

16 QUESTION: But that, theoretically, would be the
17 application of your rule?

18 MR. BARNETT: Theoretically -- yes,
19 theoretically, that's correct, if -- and I -- and I -- I
20 have to add an "if," based on the Hagen teaching -- which
21 is look at all of the circumstances. If, in the operative
22 language of the Act, which was the case here, "cession and
23 sum certain," if that language is used, and if from all of
24 the other circumstances that apply -- the rapid
25 settlement, the uptake of jurisdiction --

1 QUESTION: Yeah, but this would have been rapid
2 settlement of 1 acre.

3 MR. BARNETT: Okay. Well, and so yours is a
4 more difficult case, obviously. This was only --

5 QUESTION: Well, can -- can I ask about this
6 hypothetical.

7 I assume this 1 acre is the only acre that is --
8 is not previously allotted. All the rest is allotted
9 lands. Is that how you understood the hypothetical?

10 MR. BARNETT: Yes.

11 QUESTION: Okay. So -- so the Tribe has given
12 away all of its unallotted portion in the reservation?

13 MR. BARNETT: Yes. And -- and, to go back to
14 the --

15 QUESTION: But the allotted portions are to
16 members of the Tribe?

17 MR. BARNETT: Understood.

18 QUESTION: Yeah.

19 MR. BARNETT: Yes, Your Honor.

20 And -- and to go back to what DeCoteau tells us,
21 that that cession and sum certain is conveying
22 governmental authority, and it is eliminating the
23 boundaries in the entire quadrant. And what is left is
24 the allotments which -- and the dependent Indian
25 communities. And so we are not contesting today that we

1 have jurisdiction over that 9 percent. We're suggesting
2 we have 1151(a) jurisdiction over the 90 percent that is
3 not in Indian hands.

4 QUESTION: Well, I'm troubled by why we should
5 answer that broad question. We're dealing with one waste
6 site on some kind of tract of land. And you can't even
7 tell us the history of that particular tract. So, I mean,
8 why doesn't -- why don't we just answer the question as to
9 that and nothing else?

10 MR. BARNETT: To the best of my knowledge, Your
11 Honor, that tract has never been allotted lands. But to
12 say -- but I would have to respectfully disagree with the
13 Justice that we are not simply arguing over that one
14 tract. Because that part is -- whether or not there is
15 going to be a site there is not on appeal here. What's on
16 appeal is the District Judge's opinion that there is
17 still -- that -- that broad boundaries are out there which
18 create 1151(a) jurisdiction in the entire region,
19 including the 90 percent.

20 And -- and let me just close so I can reserve a
21 little bit of time. I would suggest to you this: If the
22 Federal Government and the Tribe read this Act the way
23 they do now, where have they been? If it could be easily
24 and reasonably read that way, why wasn't it?

25 Thank you.

1 QUESTION: Thank you, General Barnett.

2 Mr. Abourezk.

3 ORAL ARGUMENT OF JAMES G. ABOUREZK

4 ON BEHALF OF THE RESPONDENTS

5 MR. ABOUREZK: Mr. Chief Justice, and may it
6 please the Court:

7 In the 1858 treaty -- and I'd like to go back to
8 that, if I may -- the Tribe gave up 11 million acres of
9 land to the United States Government. These were enormous
10 property rights and sovereignty rights that they bargained
11 away in exchange for a 430,000-acre homeland, a
12 reservation that they believed was going to be their
13 permanent home in perpetuity. They -- they also got
14 annuities. They got some cash -- I think \$1.6 million.

15 But this 430,000 acres was their land that they
16 wanted to retain the Indian character. They wanted to
17 retain this land forever. And when the government came
18 along, after the allotments in 1892, and said we want to
19 buy what's left over from you, the surplus lands, the
20 Tribe held on so dearly to this 1858 treaty, to their
21 boundaries, to the reservation and their annuities that
22 they refused actually to sign the 1892 agreement until the
23 Federal Government said, okay, we're going to give you
24 Article XVIII, we'll give you school lands, we'll give you
25 the liquor provision that you've asked for.

1 These were things demanded by the Tribe. And
2 they got them. And, as you know, they were handed a form
3 agreement by the government, the Tribe was, that had
4 actually six -- six articles in it. And everything else
5 was tagged on -- in -- insisted upon by the Tribe.

6 Now, the State has been arguing disestablishment
7 and diminishment. And they use the terms interchangeably.
8 They have in their briefs. And what they're really asking
9 for is not just diminishment, which would be the case
10 Justice Breyer brought up, that would be carving out a
11 discrete portion or a discrete parcel of the reservation
12 and saying, okay, this is now no longer here, so the
13 reservation boundaries are diminished. No, what the State
14 is asking for -- and I think it's pretty clear in their --
15 in their writings -- is termination, total termination of
16 the reservation altogether.

17 QUESTION: As far as this parcel at issue here
18 is concerned, does it make any difference?

19 MR. ABOUREZK: In what -- in what regard,
20 Justice Scalia?

21 QUESTION: Even if it is only a diminishment
22 rather than a disestablishment, wouldn't the parcel here
23 be in the portion that was diminished -- that is, it was
24 taken away from the Tribe?

25 MR. ABOUREZK: Yes, it would be. Although the

1 reason you can't really argue diminishment in this
2 respect -- and that's why they don't really say
3 diminishment -- is that the parcels were checkerboarded
4 all the way -- the allotment parcels are checkerboarded
5 all the way through, as well as the ceded portions.
6 They're everywhere within the southern half of Charles Mix
7 County.

8 QUESTION: So then it has to be disestablishment
9 or nothing?

10 MR. ABOUREZK: Or nothing. That's what they're
11 asking for. Because you can't really diminish that
12 reservation.

13 QUESTION: Well, but then do you agree with the
14 theory that it has to be -- you would say nothing and they
15 would say disestablishment?

16 MR. ABOUREZK: Precisely.

17 QUESTION: Why -- why couldn't you, even if it
18 was a checkerboard?

19 MR. ABOUREZK: Well, it would --

20 QUESTION: Why do we have to reach that
21 question --

22 MR. ABOUREZK: I think it was one -- this Court
23 at one point said that if that were the case -- first of
24 all, it's looked upon with disfavor; but, secondly, they
25 would say law enforcement people would have to have a map

1 to decide who they can arrest and where. I think it would
2 be very difficult to leave a checkerboard reservation.

3 QUESTION: Do you -- do you think -- what is the
4 practical consequence of the -- of -- of this case, one
5 way or the other? That is, I take it there are a lot of
6 towns in this area that are not Indian towns. They're --
7 they're -- they're all the descendants of the settlers or
8 whatever. So there are quite -- there are several towns
9 in there, and people have been treating it as part of
10 South Dakota.

11 Now, if you win this case, what happens to those
12 towns? We're not talking about giving land back to the
13 Tribe. We're talking about jurisdiction and what laws
14 apply, is that right?

15 MR. ABOUREZK: Yes. Absolutely.

16 QUESTION: Yes. So how does it work? Do the
17 towns suddenly discover they don't have judges, that they
18 don't have -- how does this -- what -- what turns on this?

19 MR. ABOUREZK: Well, that would never happen.

20 QUESTION: Yeah.

21 MR. ABOUREZK: First of all, the Federal
22 Government and the Tribe have been exercising jurisdiction
23 ever since the Eighth Circuit opinion. And the State now
24 cannot arrest Indians on Indian land within the boundaries
25 of the reservation. If we were to win this -- if the

1 Tribe were to win the case, really nothing would change.

2 It would be such a minimal change that it wouldn't --

3 QUESTION: What is the jurisdiction in respect
4 to those who are not members of the Tribe who are in this
5 territory? Do they get to vote? I mean, who do they vote
6 for?

7 MR. ABOUREZK: Oh, of course, yes. Yes.

8 QUESTION: Do they have town councils?

9 MR. ABOUREZK: Yes.

10 QUESTION: What government runs --

11 MR. ABOUREZK: There's a county government.
12 There are -- there are city govern -- town governments in
13 each one of these towns.

14 QUESTION: Well, isn't this --

15 QUESTION: Under the --

16 QUESTION: -- if -- if you would win the case,
17 just continuing with Justice Breyer's line of examination,
18 would the Federal Government not then supplant the State
19 with reference --

20 MR. ABOUREZK: Only -- only within the
21 boundaries of the reservation and only with regard to
22 Indian defendants in criminal cases.

23 QUESTION: So in the non-Indian defendants, in
24 the -- in the ones -- people, I'm thinking, who are not
25 Indians, they have towns and there are some laws.

1 MR. ABOUREZK: Yes.

2 QUESTION: And rules. And -- and there -- there
3 are like judges and mayors and -- what rules apply to
4 elect all those people? Who -- who --

5 MR. ABOUREZK: The normal rules of South
6 Dakota --

7 QUESTION: Of South Dakota?

8 MR. ABOUREZK: South Dakota.

9 QUESTION: Why do South Dakota law apply if it's
10 within the bounds of a reservation? Is it that in
11 reservations normally the law of the State applies?

12 MR. ABOUREZK: Sorry, say that last word again?

13 QUESTION: Why do -- is it -- what -- I'm just
14 missing a very basic hornbook point probably. But in a
15 reservation, where there are groups of people who are not
16 members of the Tribe, what law applies to them?

17 MR. ABOUREZK: South Dakota law.

18 QUESTION: The State laws apply?

19 MR. ABOUREZK: That's right. The only
20 exception, Justice Breyer, is if a non-Indian were to
21 commit a crime against an Indian within the boundaries of
22 the reservation, the Federal courts would take
23 jurisdiction over that.

24 QUESTION: Well, what -- what about civil
25 jurisdiction, Mr. Abourezk? We had an A-1 Contracting

1 case here last year, where the -- there was debate as to
2 whether the tribal law and tribal courts would rule on
3 an -- on an automobile accident. Now, if -- if the Eighth
4 Circuit is upheld here, won't that same condition obtain
5 on the Yankton Sioux Reservation?

6 MR. ABOUREZK: Yes. The -- the non-Indians
7 would not be allowed to use the court unless they would
8 both submit to its jurisdic -- the tribal court -- unless
9 they submitted to its jurisdiction. And I think the only
10 difference --

11 QUESTION: That was as a result of the decision
12 that we made in that case. But I'm looking at the -- this
13 is a brief that was filed by a number of cities. And they
14 paint -- this is City of Dante, et cetera -- they paint,
15 at pages 8 to 12, a -- a picture of massive confusion.
16 And you are now standing here and saying it's not so;
17 State law will still apply and there won't -- won't be
18 anything different.

19 QUESTION: I thought we were arguing precisely
20 about whether tribal law or State law applies, and -- and,
21 hence, whether this land can be used for this purpose or
22 not. If it can under State law but can't under tribal
23 law. And you're telling us it doesn't make any
24 difference, State law applies anyway.

25 MR. ABOUREZK: No, it will make no difference --

1 minimal difference to the non-Indian population.

2 QUESTION: Well, then -- then why was this
3 permit denied?

4 MR. ABOUREZK: The permit -- the permit
5 wasn't --

6 QUESTION: And -- and why -- why would the
7 permit have been denied if -- if -- if you're correct?

8 MR. ABOUREZK: No, the permit wasn't denied. It
9 was -- first of all, they brought a -- it was an
10 administrative hearing in the State -- in the State
11 administrative procedures, asking for a permit from the
12 State of South Dakota.

13 QUESTION: Well, but you take the position that
14 the Tribe has authority to determine whether or not the
15 plant will be located here.

16 MR. ABOUREZK: No. No, we don't take that
17 position. The position we took was that because the State
18 could not permit on the reservation, that the EPA
19 regulations must be followed then instead of the State
20 regulations, which are weaker than EPA's regulations.
21 That was our --

22 QUESTION: So Federal law rather than State law
23 would govern?

24 MR. ABOUREZK: Yes. Because the Tribe had not
25 gotten any authority to -- to regulate landfills within

1 the reservation.

2 QUESTION: And is the reason that State law
3 would apply to the governance of the cities and towns in
4 Justice Breyer's example, is the reason for that that
5 there is no supplanting Federal law?

6 MR. ABOUREZK: No. The reason is decisions by
7 this Court, that provide for different kinds of
8 jurisdiction over different people, whether Indians or
9 non-Indians.

10 QUESTION: I see.

11 QUESTION: Could -- could I ask you how you --
12 how you respond to what I understand to be the -- what
13 should I say -- the philosophy of -- of -- of the
14 Petitioner here. As I understand it the claim is that --
15 that when all of the unallotted lands in a reservation are
16 ceded, and there is nothing left in the reservation but
17 allotted lands, it is to be understood that the
18 reservation is thereby closed down.

19 Now, it would be inconsistent with that, I
20 suppose, if there were indeed numerous reservations which
21 consisted of nothing but allotted lands, in which the
22 Tribe had no -- no communal land left at all. It had all
23 been allotted. Are there reservations like that?

24 MR. ABOUREZK: I don't know of any, if there
25 are. I think there is always --

1 QUESTION: So it -- it may -- it may be -- it
2 may be true that -- that the way people thought at the end
3 of the 19th century, if the Tribe, as a tribe, doesn't own
4 anything in this whole area, there can't be a reservation.
5 You can't have a reservation composed only of lands that
6 are owned by individual Indians.

7 MR. ABOUREZK: Well, Justice --

8 QUESTION: All of which can be -- can be
9 alienated to non-Indians. You have to have at least
10 some -- some basic component of -- of tribal land that's
11 owned by the community of the Tribe.

12 MR. ABOUREZK: Well, there is in this case.
13 Right now, the -- I think the Eighth Circuit did a little
14 research on its own, independent research, showing that
15 there were anywhere from 32 to 44 percent of Indian
16 population in the county within -- within that
17 reservation. So there's a substantial --

18 QUESTION: But that doesn't go to tribal lands?

19 MR. ABOUREZK: Pardon?

20 QUESTION: That doesn't go to whether or not
21 they are tribal lands, the fact that there may be Indians
22 living there. I mean, are there tribal lands?

23 MR. ABOUREZK: Oh, yes, Your Honor. Right now,
24 about 10 percent. As the Attorney General said, about 90
25 percent have been sold off -- of the ceded lands -- by --

1 and were purchased by other people that are not -- not any
2 longer tribal -- or Indian lands, yes.

3 QUESTION: But -- but are you taking the
4 position, to put it crudely, sort of the mirror image of
5 the one that -- that I was -- I was attributing to the
6 State? I said, you know, if they -- on the State's
7 theory, if they cede 1 acre, they have, in effect,
8 terminated the jurisdiction over everything. And -- and
9 you are saying, I guess, that as long as they retain 1
10 acre, the entire reservation, as a jurisdictional entity,
11 as opposed to a -- a property title --

12 MR. ABOUREZK: I would say something totally
13 different --

14 QUESTION: -- retains. Okay.

15 MR. ABOUREZK: -- Your Honor. What I would say
16 is that Congress intended, by virtue of leaving in Article
17 XVIII in the -- in the 1894 statute, by leaving that in,
18 they certainly intended to continue tribal governmental
19 authority within the boundaries of the reservation. And
20 if you read the entire agreement --

21 QUESTION: Why pick out that? Why pick out that
22 one element from the whole treaty as the one element
23 that -- that Article XVIII preserves? If you read it
24 literally, it -- it just takes away everything that the
25 whole treaty gives.

1 MR. ABOUREZK: No. It continues the treaty,
2 Justice Scalia. It doesn't take away any --

3 QUESTION: Oh, the 1858 Treaty, it continues.

4 MR. ABOUREZK: Yes.

5 QUESTION: I'm talking about the 1892 Treaty.
6 If you read Article XVIII literally, it says this Treaty
7 shall have no effect.

8 MR. ABOUREZK: Well, it doesn't really say that.
9 Well, I think -- I think a fair reading --

10 QUESTION: Can you tell me why it doesn't say
11 that? I mean, it -- it -- it says what?

12 MR. ABOUREZK: I think --

13 QUESTION: Nothing in this agreement shall be
14 construed to abrogate the 1858 Treaty.

15 MR. ABOUREZK: Yes.

16 QUESTION: And everything in the agreement
17 abrogated one thing or another in the 18 -- the whole
18 purpose of the agreement was to abrogate some elements of
19 the 1858 Treaty, wasn't it?

20 MR. ABOUREZK: Respectfully, there's only one
21 change made in the -- between the 1858 Treaty and the '94
22 agreement, where there was a conflict. That -- and
23 section 10 of the Treaty, in 1858, said that white
24 people -- they didn't use the word "non- Indian," they
25 just said white people in those days -- cannot enter this

1 reservation and cannot reside here. So that's the only
2 conflicting portion.

3 So if you re -- with statutory construction, you
4 passed a statute in 1894 --

5 QUESTION: But isn't that a rather major -- just
6 a whole change in the concept, from this is a reservation
7 reserved for the use of Indians to a concept of we want
8 the white men to come in and work side by side for -- one
9 is preserving a culture and the other is trying to break
10 it up and assimilate it into another culture. It seems to
11 me that these two documents are totally at odds.

12 MR. ABOUREZK: Oh, I don't -- I don't agree with
13 that, Justice Ginsburg. Because if -- if you read the
14 whole entire treaty and the whole entire 1894 statute, I
15 think it clearly shows that -- that the whites -- they
16 could sell land to the non-Indians and non-Indians could
17 come and settle.

18 In fact, if you read the legislative history and
19 the report of the commissioners who negotiated it, they
20 say -- they told the Indians that we would like whites to
21 come in and show you how to farm and their upstanding
22 character -- moral character, et cetera, et cetera. And
23 that's what we would like to do. And the Indians bought
24 that. And they said, but they still wanted to maintain
25 the Indian character of their reservation. Which is how I

1 read Article XVIII to mean. And that's -- of course,
2 that's how the two lower courts read it as well.

3 And you take the -- the cession and sum certain
4 language, which is -- in my view, it's just boilerplate in
5 all of those agreements --

6 QUESTION: But -- but this Court has said it's
7 nearly irrebuttable.

8 QUESTION: That's what Solem said.

9 MR. ABOUREZK: No, Solem said if you take those
10 two, they're almost -- or nearly -- Hagen said "nearly."
11 Solem said "almost irrebuttable presumption." But if you
12 read the entire agreement together, I say the presumption
13 falls upon -- the presumption is that the Indians retain
14 the reservation and it's up to the State to rebut --

15 QUESTION: But then you -- must -- mustn't
16 you -- mustn't you, if you're taking that position, say,
17 "Court, you were wrong; you should qualify or even
18 overturn your precedent"? Because the normal
19 understanding of an almost irrebuttable presumption is it
20 takes a whole lot -- not something that ambiguous --
21 ambiguous.

22 MR. ABOUREZK: Well, if it is ambiguous, it
23 should be decided in favor of the Tribe, in any event.
24 According to this Court --

25 QUESTION: But if you say -- if we're faced with

1 something ir -- almost irrebuttable and something that's
2 kind of weak, it could mean one thing, it could mean
3 another thing, why does the -- the part that's
4 uncertain --

5 MR. ABOUREZK: Well --

6 QUESTION: -- dominate what we have said is a
7 very strong presumption?

8 MR. ABOUREZK: Justice Ginsburg, if you read the
9 entire agreement and the statute of 1894, what my position
10 is -- our position is that the presumption is in favor of
11 maintaining the reservation boundaries because of what
12 Article XVIII, Article XVII, and the school --

13 QUESTION: Then the presumption that's created
14 by the cession and sum certain clause is rebutted in your
15 view?

16 MR. ABOUREZK: It's not only rebutted, but it
17 shifts -- the burden of proof then shifts to the State or
18 the people trying to abolish the reservation. And I don't
19 think they've met that burden.

20 QUESTION: But don't you agree that there are
21 various inferences that can be drawn, say, between Article
22 XVIII and Article I and II, that it isn't just crystal
23 clear? And it seems to me there, as Justice Ginsburg
24 says, if -- if you -- unless you're attacking what we said
25 was the test in Solem, that -- where you have a cession

1 for a sum certain, there's an almost insurmountable
2 presumption, you have to come up with something more than
3 just one way of reading a treaty as opposed to somebody
4 else's reading, either -- either of which is plausible.

5 MR. ABOUREZK: But you also said in Solem that
6 there must be substantial and compelling evidence in order
7 to disestablish or diminish a reservation. And what I'm
8 saying, Your Honor, is this: That the -- the evidence is
9 not there. The State has not met its burden to -- it
10 doesn't show any substantial -- it doesn't show any --

11 QUESTION: but the language in Solem suggests it
12 meets its burden of -- when it says there's a cession of
13 land for a sum certain. Which they're certainly is here.

14 MR. ABOUREZK: If that's all there were. But
15 there is more. And I mean more by Article XVIII.

16 QUESTION: Yes. But that more would then go to
17 rebutting the almost in -- insurmountable presumption.
18 I -- I just question whether you have that much more.

19 MR. ABOUREZK: Oh, I -- well, of course, our
20 position is that we have an awful lot more.

21 QUESTION: Right.

22 QUESTION: I'm -- I'm still curious, Counsel,
23 why you don't take the position that the 1894 Act might
24 have diminished the reservation but not disestablished it
25 entirely?

1 MR. ABOUREZK: Well, we take that position
2 simply because it's not practical to -- to diminish --

3 QUESTION: You don't take that position, do you?

4 MR. ABOUREZK: We don't really, because it's not
5 practical. You just can't do it because --

6 QUESTION: Although you said there are some
7 tribal lands left.

8 MR. ABOUREZK: Yes.

9 QUESTION: But they also are checkerboarded, I
10 take it?

11 MR. ABOUREZK: Yes, they are.

12 QUESTION: How -- how did they ever get there?
13 If -- if all of the unallotted land was ceded and all of
14 the land that was left is allotted to individual members
15 of the Tribe, how did it come about that there is still
16 some tribal lands?

17 MR. ABOUREZK: That there is still some?

18 QUESTION: Tribal lands.

19 MR. ABOUREZK: Well, they're owned by individual
20 Indians.

21 QUESTION: So these are all allotted lands, in
22 other words?

23 MR. ABOUREZK: Yes. Yeah. And there -- there
24 are some tribal lands, but mostly it's individual --

25 QUESTION: What other tribal lands? I mean,

1 that's crucial to me. I thought all the tribal lands, all
2 the communally owned lands were given to the United
3 States. That's -- that's certainly what this --

4 MR. ABOUREZK: No. No.

5 QUESTION: No?

6 MR. ABOUREZK: Your Honor, what -- what happened
7 was there were -- the allotments were over 200,000 acres
8 that were allotted out. What was left over was
9 160-some-thousand acres. That's what the government came
10 along and bought in 1892.

11 QUESTION: Right. All of the unallotted lands,
12 which was the only portion of the reservation that was
13 still held by the Tribe rather than individual Indians.
14 Right?

15 MR. ABOUREZK: Yes.

16 QUESTION: Okay.

17 QUESTION: So that there were -- there were no
18 tribal lands retained in 1892?

19 MR. ABOUREZK: Yes, there were. But --

20 QUESTION: Well, I thought -- then I don't
21 understand your answer to Justice Scalia.

22 MR. ABOUREZK: I must have misunderstood his
23 question. But there are -- there were tribal lands in
24 1894. But most of them are individual Indian allotments,
25 owned by Indians.

1 QUESTION: But --

2 QUESTION: But if -- if you distinguish between
3 individual Indian allotments and, quote, tribal lands,
4 are -- are you saying there are some tribe -- what you
5 call tribal lands that are not individual allotments?

6 MR. ABOUREZK: Yes, very -- not very many -- not
7 very many acres, but there are. Yes.

8 QUESTION: And some of them have been in the
9 Tribe's possession since before the 1892 Treaty?

10 MR. ABOUREZK: There were all in the Tribe's
11 possession prior to 1892. Then --

12 QUESTION: But the -- the -- the land -- the --
13 the communally owned tribal land was owned by the Indians
14 and so held before 1892 and have been held continuously to
15 the present day; is that correct?

16 MR. ABOUREZK: No. No. All of the lands -- all
17 of the 430,000 acres were communally owned until the
18 allotments --

19 QUESTION: Right.

20 MR. ABOUREZK: -- around -- and then -- then
21 what was left over, in 1892, the government purchased.
22 That was 160-some-thousand.

23 QUESTION: So when the government purchased,
24 there were no communally land -- owned lands, tribal
25 lands, retained by the Tribe as such? That's --

1 MR. ABOUREZK: Well, only a mile square. There
2 was a mile square they retained for their headquarters,
3 et cetera, et cetera.

4 QUESTION: Okay.

5 QUESTION: Thank you, Mr. Abourezk.

6 MR. ABOUREZK: Thank you.

7 QUESTION: Mr. -- who do we have here?
8 Ms. McDowell.

9 ORAL ARGUMENT OF BARBARA B. MCDOWELL

10 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

11 SUPPORTING THE RESPONDENTS

12 MS. MCDOWELL: Mr. Chief Justice, and may it
13 please the Court:

14 To start with last things first, we'd like to
15 deal with the jurisdiction over the reservation area
16 subsequent to 1894. One can find in the record annual
17 reports from the superintendent of the Yankton
18 Reservation, from 1895, 1896 and so forth, to 18 -- to
19 1906, which I believe is the last report in the record --
20 those reports consistently refer to the reservation as a
21 continuing entity. It's interesting that it doesn't
22 demonstrate any significant change at the time of the
23 opening. There's a notation that the reservation was
24 opened, but there is nothing to suggest that there was a
25 major change in the situation on the reservation at the

1 time.

2 QUESTION: But there's nothing in there, I take
3 it, to suggest that this kind of jurisdiction was being
4 exercised over either allotted lands or the lands that
5 were conveyed in 18 -- or under the -- under the 1892
6 agreement?

7 MS. MCDOWELL: The record is unclear as to
8 whether the State or the Tribe or the Federal Government
9 was exercising jurisdiction over the allotted lands at the
10 time. It appears that the only prosecution that is cited
11 from the early era, one in 1895, may well have been on
12 Indian allocated lands. It does not appear clear from my
13 reading of the record.

14 More significantly, however, the exercise of
15 criminal jurisdiction by the State was not inconsistent at
16 the time with continued reservation status, as the Court
17 noted in the Yakima case. At the time, it was thought
18 that Indian character of the land went with Indian
19 ownership. And it was also thought that once an Indian
20 received an allotment, under the Dawes Act, the Indian
21 immediately became a citizen of the State and subject to
22 its plenary jurisdiction. That was only changed in 1906,
23 which was some time after the Act at issue here.

24 QUESTION: A theory which is beautifully in
25 accord with the State's notion that everyone would have

1 assumed that if there's nothing left in a reservation but
2 allotted lands, there's no reservation left.

3 MS. MCDOWELL: Oh, that's a theory that this
4 Court has subsequently rejected over the last 35 years.

5 QUESTION: But it fits very nicely with what you
6 say to be the -- the -- the -- the understanding, that --
7 that you can't have a -- the reservation went with -- with
8 Indian ownership.

9 MS. MCDOWELL: Oh, the Court has acknowledged
10 that in a number of other cases, including Solem, that at
11 the time, the understanding was that Indian status was a
12 property status, but that Congress disabused everyone of
13 that notion in 1948, and that when we are deciding these
14 disestablishment and diminishment issues, we are looking
15 at reservations as they have been considered after '48,
16 and not as they may have been considered 100 years ago.

17 QUESTION: Well, how -- how -- what is the
18 normal now? I take it now differently from before 1906.
19 Imagine a reservation of 50 square miles. On one of those
20 square miles live a group of people who are not Indians,
21 who own their land in fee, and who bought it from the
22 Tribe. Now, what law governs? The law of the State
23 governs those people? I know the tribal land does not
24 govern them. So far, it seems to me from what I've looked
25 up, Federal law governs.

1 MS. MCDOWELL: State law governs them except in
2 some particular instances that this Court has spelled out.

3 QUESTION: Why does State law govern? Is it
4 that the Federal Government has somehow, through law,
5 statute or regulation, brought in State law?

6 MS. MCDOWELL: No. It's because the -- I
7 understand it's because the State has plenary jurisdiction
8 over its citizens, wherever they reside.

9 QUESTION: All right. So, in other words, these
10 towns that are upset -- I don't understand they're upset,
11 or maybe they shouldn't be upset, because nothing is going
12 to change for them?

13 MS. MCDOWELL: That's our position, that things
14 should not change --

15 QUESTION: Then why is it -- I'm back at Justice
16 Kennedy's point -- why is it that there's some argument
17 here about building a -- some kind of thing in this --
18 waste disposal or what it is -- if the State law governs
19 the same as it would if it were not within the
20 reservation?

21 MS. MCDOWELL: This was a -- a particular issue
22 of the EPA's authority to delegate primary supervision of
23 landfills to the State. And under that permitting
24 authority, the State excluded Indian reservations, as I
25 understand it.

1 But as a general matter --

2 QUESTION: What about -- what about taxation?

3 MS. MCDOWELL: As a general matter, the State
4 may tax its citizens on the reservation. Certainly, it
5 can tax the non-Indian citizens just as it would, whether
6 it was a reservation or not. It may also impose
7 significant taxes, such as property taxes, on the Indians.

8 QUESTION: So in the absence of a Federal
9 statute that explicitly distinguished between what happens
10 on the reservation or not, everything stays the same, but
11 for the Indians themselves, because they would have
12 certain rights under tribal land, et cetera, if it is a
13 reservation, throughout the reservation that they wouldn't
14 have if it isn't; is that right?

15 MS. MCDOWELL: With a few limited --

16 QUESTION: Is that right?

17 MS. MCDOWELL: -- exceptions, Justice Breyer.
18 If an Indian commits a crime -- if a -- a non-Indian
19 commits a crime against an Indian, if it's reservation
20 land, then Federal law rather than State law governs the
21 prosecution.

22 The State, in A-1 -- this Court, in A-1
23 Contractors --

24 QUESTION: Well, could -- could you enlighten us
25 on what lands continued to be owned by the Tribe as such,

1 as opposed to specific Indians by way of allotment --

2 MS. MCDOWELL: It's --

3 QUESTION: -- after 1892?

4 MS. MCDOWELL: It's my understanding that those
5 lands were, for the most part, allocated to individual
6 Indians. However, the Federal Government --

7 QUESTION: Well, I'm hearing a lot of "for the
8 most parts," and "no," and "there's this other land," and
9 "it's scattered." I mean, what is it? How are we to find
10 it?

11 MS. MCDOWELL: Well, it appears --

12 QUESTION: How do we know?

13 MS. MCDOWELL: -- from the record, which is not
14 entirely clear, that there were some lands that were
15 subject to allocation, but the actual allocations were not
16 made until some time after 1894. There's also the mile
17 square area --

18 QUESTION: But they've all been made -- is there
19 any land that was held continuously by the Tribe as such,
20 as opposed to tribal members, since 1892?

21 MS. MCDOWELL: It's my understanding that there
22 is this mile square area that's referred to --

23 QUESTION: A one square mile.

24 MS. MCDOWELL: But, other than that -- although
25 there are trust lands today that are held by the Tribe,

1 it's not clear that any of those lands were trust lands
2 earlier. Perhaps Mr. Abourezk could clarify that,
3 however.

4 QUESTION: Now, this -- this is a totally
5 checkerboarded situation?

6 MS. MCDOWELL: That's correct. And this
7 Court --

8 QUESTION: That was certainly a factor that
9 resulted in our thinking there was at least diminishment
10 in the DeCoteau case.

11 MS. MCDOWELL: Well, the Court, in DeCoteau,
12 found total diminishment. But that was a different case,
13 in several respects, from this one. In the first place,
14 of course, there was no savings clause preserving rights
15 under an earlier treaty. In addition, the Court placed a
16 lot of emphasis in DeCoteau on the negotiation history
17 with the Tribe. There were a number of statements of
18 tribal leaders, stating that we understand that the
19 reservation is going to disappear, essentially, that we
20 never understood that we would keep this reservation.
21 Here there are no statements like that suggesting any kind
22 of common understanding that the reservation was going to
23 be extinguished as a result of the Act.

24 It's interesting that --

25 QUESTION: But do you -- do you agree with both

1 counsel, it seemed to me, that the choice is either we
2 accept your argument based on Article XVIII or there's a
3 diminishment?

4 MS. MCDOWELL: That's correct.

5 QUESTION: That there is no such thing as
6 diminishment applicable on these facts?

7 MS. MCDOWELL: That's correct. Diminishment
8 seems to be limited to cases such as Rosebud, where there
9 was a selling or a ceding of a part of the reservation, in
10 so many words, as opposed to this sort of situation.

11 QUESTION: Didn't --

12 QUESTION: May I ask one --

13 QUESTION: Didn't Judge Murphy say she thought
14 that -- that the disestablishment was the rare thing and
15 the diminishment the usual thing? It's a very --

16 MS. MCDOWELL: Well, disestablishment is very
17 rare. This Court has only found it in one prior case,
18 DeCoteau. And subsequently, in Rosebud, the Court
19 suggested that disestablishment should be more difficult
20 to find.

21 QUESTION: But --

22 QUESTION: Ms. -- Ms. McDowell, can I go back?
23 You said -- you said Rosebud is different because there it
24 involved conveyance of only part of the reservation, in so
25 many words.

1 MS. MCDOWELL: Yes.

2 QUESTION: But this case involves a conveyance
3 of only part of the reservation, in so many words.
4 Namely, the part that was held in fee by the Tribe and not
5 the part that had been allotted. Do you mean that Rosebud
6 involved only a conveyance of part of the tribally owned
7 portion of the reservation, in so many words? Is that
8 what you mean?

9 MS. MCDOWELL: Well, the language of the statute
10 in Rosebud says "We cede a part of our reservation." That
11 kind of language wasn't used here. The language was, "We
12 cede our surplus lands." There was no reference to
13 selling off all or part of the reservation.

14 It should also be noted that the word "cede"
15 didn't have any single --

16 QUESTION: Well, isn't it true that the --

17 MS. MCDOWELL: -- settled meaning in the 19th
18 century; that it was --

19 QUESTION: Isn't it true, though, that apart
20 from the savings clause and the negotiating history, if
21 you just look at the text of the document, the DeCoteau
22 case is just like this, that if you have -- let me just
23 finish one question so you can comment -- if you assume
24 that if everything is allotted, you don't have a
25 reservation. And if you then assume that all that's left

1 is unallotted land, but then you cede your entire authority
2 over the unallotted lands, what can be left?

3 I have trouble getting your explanation to that.

4 MS. MCDOWELL: Several responses. There are
5 other differences between this case and DeCoteau.

6 QUESTION: I understand the differences:
7 because of the history primarily in the absence of the
8 savings clause.

9 MS. MCDOWELL: And there are other clauses that
10 are in our Act here that were not in the Act in DeCoteau,
11 such as the reservation of lands for Agency school and
12 other purposes. That was not present in DeCoteau; it is
13 present here.

14 QUESTION: Thank you, Ms. McDowell.

15 General Barnett, you have 2 minutes left.

16 REBUTTAL ARGUMENT OF MARK W. BARNETT

17 ON BEHALF OF THE PETITIONERS

18 QUESTION: General Barnett, could you quickly
19 advise us what the jurisdictional consequence of this --
20 of this case is?

21 MR. BARNETT: Well --

22 QUESTION: What does the State lose if -- if you
23 lose?

24 MR. BARNETT: I think we lose a vast amount of
25 clarity, as we are standing -- or, up until the District

1 Court opinion, jurisdiction in the 90 percent of this area
2 that has gone out of Indian hands was --

3 QUESTION: What -- what kinds of authority can
4 you not exercise if you lose that you're exercising now?

5 MR. BARNETT: Well, obviously, if you were to
6 hold that it is still a reservation in this entire area,
7 it would have a big effect on criminal jurisdiction. And
8 the best example I can give you is that if you were the
9 victim of a crime out there on that 90 percent of that
10 area, it's the difference between whether you call the
11 sheriff down the road or whether you call the FBI office
12 120 miles east of there, in Sioux Falls, and leave a
13 message on the machine.

14 Second --

15 QUESTION: It's criminal jurisdiction over
16 Indians?

17 MR. BARNETT: Pardon me?

18 QUESTION: Criminal jurisdiction over Indians.
19 Is there anything else? Is there anything with respect to
20 non-Indians that you'd lose?

21 MR. BARNETT: Yes, I think there would be.
22 You're on a reservation at that point, and I think there
23 would be criminal aspects, because of 18 --

24 QUESTION: No, no, no. Forget criminal. I
25 mean, is there any civil?

1 MR. BARNETT: Yes, there would be.

2 QUESTION: What?

3 MR. BARNETT: Well, I think there are a number
4 of holdings of this Court that suggest that -- that if
5 there is a reservation out there, the Tribe is going to
6 have some rights of civil jurisdiction. And, indeed, in
7 this case, when they first now started claiming that they
8 have civil jurisdiction, they're in trying to contest fee
9 land -- fee land landfill that isn't even on trust land.

10 QUESTION: That's our Brendle case. The Brendle
11 case.

12 MR. BARNETT: Suffice it to say, Your Honor,
13 with the -- and -- and I'm trying to be brief to stay
14 within my time -- but suffice it to say that this Court is
15 aware that there would be all sorts of ramifications that
16 the Court has seen in prior cases in disputes over civil
17 jurisdiction, A-1 being one place where we've had to
18 litigate who's in charge.

19 Let me just clarify something else. In this
20 Act, there was no tribal land base left. Yet there was a
21 little reserve of Federal land, for the 1 mile square, but
22 everything else was allotments. And so tribal communal
23 ownership was over.

24 Secondly, there were savings clauses in Montana,
25 in the Montana Crow agreements, and in the Rosebud

1 agreement. And it seems to me there is a hook in the
2 argument that they're suggesting that a non-operative
3 savings clause, with no specific language about preserving
4 some authority and no contemporary history -- my time is
5 up. Thank you.

6 CHIEF JUSTICE REHNQUIST: Yes. Thank you,
7 General Barnett. The case is submitted.

8 (Whereupon, at 2:00 p.m., the case in the
9 above-entitled matter was submitted.)
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CERTIFICATION

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SOUTH DAKOTA, Petitioners v. YANKTON SIOUX TRIBE, ET AL.
CASE NO: 96-1581

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BY Donna M. Fedirko-----

(REPORTER)