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Of Surplus Lands and Landfills: The Case of the Yankton Sioux

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I. Introduction

In late 1993, the Southern Missouri Recycling and Waste Management District of South Dakota obtained a state permit for a solid waste landfill on land acquired from a non-Indian within the boundaries of the 1858 Yankton Sioux Reservation.[1] The Yankton Sioux Tribe objected to the landfill on environmental grounds. What happened next illustrates the extraordinary difficulties Indian tribes may face in attempting to protect their lands and environments.

First, the Tribe was denied regulatory authority over the landfill, although the court determined that federal rather than state regulations governed because the landfill was located in Indian country.[2] Next, the Environmental Protection Agency (EPA) granted the Waste District's request to waive the federal liner requirement for the landfill, and the EPA's action was upheld in federal court.[3] Finally, the United States Supreme Court essentially mooted the Tribe's governmental concerns by holding that the property on which the landfill was located was no longer a part of the Tribe's reservation.[4] In little more than four years after the state landfill permit was granted over the Tribe's objection, the Yankton Sioux Tribe has thus lost regulatory authority, federal protection, and the land itself. What the tribe got in return was a waste dump that it considers unsafe.

To understand how the Yankton Sioux came to this pass is to begin

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1. Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F. Supp. 878, 889 (D.S.D. 1995) [hereinafter *Yankton* I], *aff'd*, 99 F.3d 1439 (8th Cir. 1996) [hereinafter *Yankton* II], *rev'd sub nom.* South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789 (1998) [hereinafter *Yankton* III].

2. *Yankton* I, 890 F. Supp. at 888. Indian country is defined at 18 U.S.C. § 1151 as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patents, and including rights-of-way running through the reservation, (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. The Supreme Court has determined that Indian country is not confined to the formalistic categories of § 1151, but rather encompasses all lands set aside under federal protection for tribal use. *See* Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1991, 1993 (1993).

Although § 1151 is contained in the federal criminal code, the Supreme Court has stated that the definition "generally applies as well to questions of civil jurisdiction." DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); *see also* Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540-41 (10th Cir. 1995); Mustang Production Co. v. Harrison, 94 F.3d 1382, 1385 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997).

3. Yankton Sioux Tribe v. U.S. Environmental Protection Agency, 950 F. Supp. 1471, 1482 (D.S.D. 1996) [hereinafter *Yankton v. EPA*].

4. *See Yankton* III, 118 S. Ct. 789.

where so many tribes lost so much: with the allotment and assimilation policy of the late nineteenth and early twentieth centuries.[5] By the mid-1880's, the federal policy of ensuring a "measured separatism"[6] for the Indian tribes through the establishment of reservations had been replaced by one of assimilation of the Indians as Christianized yeoman farmers. The core of the assimilation policy was the allotment of communal tribal land into individual ownership.[7] Under the General Allotment or Dawes Act of 1887,[8] tribal members were to receive an allotment of land in severalty and the remaining "surplus" lands were to be opened to white settlement.[9]

To allow allottees time to assimilate, Congress provided that allotments would be held in trust for twenty-five years.[10] At the end of the trust period, the allottee would receive a patent in fee, after which the land could be freely alienated, encumbered, and taxed.[11] Once the fee patents were issued, thousands of allottees lost their lands, whether by voluntary transfer, by fraud, or by sheriffs' sales for nonpayment of taxes or other liens.[12] Non-Indians acquired two-thirds of all the lands allotted: some 27 million acres.[13]

Allotments were small, between 80 and 160 acres per person.[14] Because many reservations consisted of hundreds of thousands or even millions of acres, but the tribal populations were relatively sparse, vast numbers of acres were declared surplus under the allotment policy, and ceded or opened to homesteading. All told, Indian tribes lost title to some 60 million acres as a result of the surplus lands program.[15]

Congress formally repudiated the allotment policy in the Indian Reor-

5. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7-18 (1995) (describing the allotment process and its effects); John W. Ragsdale, Jr., *The Movement to Assimilate the American Indians: A Jurisprudential Study*, 57 UMKC L. REV. 399 (1989) (analyzing assimilationist policies and practices).

6. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 16 (1987). Professor Wilkinson noted that in treaty negotiations, both the tribes and the federal government pursued a common goal of separating Indian and white societies: "[t]he tribes wanted to be left to themselves, and the United States wanted to avoid violence between the Indians and the future settlers." *Id.*

7. DELOS S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 141 (Francis Paul Prucha, ed., 1973).

8. 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-381 (1994)).

9. Under the auspices of the General Allotment Act, 118 reservations were allotted and 44 of those had their surplus lands opened to settlement. 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 309 (1977).

10. General Allotment Act, ch. 119, § 5, 24 Stat. 389 (1887); *see* 25 U.S.C. § 348.

11. *Id.* Although § 5 of the Dawes Act speaks only of alienability and encumbrance, the Supreme Court determined that allotments patented in fee are also subject to taxation. County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992). For criticism of the *County of Yakima* decision, see Royster, *supra* note 5, at 20-27.

12. JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934, 100-01, 106-07 (1991).

13. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 138 (Rennard Strickland, ed., 1982 ed.).

14. The exact acreage allotted varied at times according to the status of the individual or the type of land. *See* Royster, *supra* note 5, at 10 n.34.

15. COHEN, *supra* note 13, at 138.

ganization Act (IRA) of 1934.[16] The IRA prohibited any further allotment of tribal land and provided that those allotments still in trust would continue in trust until Congress provided otherwise.[17] The IRA also authorized the Secretary of the Interior to restore any remaining surplus lands to tribal ownership,[18] although the Secretary interpreted that mandate narrowly.[19] However, the IRA did not restore fee patented, allotted, or homesteaded lands to tribal ownership. Nor has Congress done so subsequently, despite the modern federal Indian policy of promoting tribal self-determination and establishing government-to-government relations.[20]

The Yankton Sioux Reservation is a case study in allotment. In its 1858 treaty, the Yankton Sioux Tribe ceded its claims to its aboriginal territory in exchange for a reservation of 430,405 acres located in what is now the State of South Dakota.[21] The reservation lands were allotted under the authority of the General Allotment Act, although the exact acreage allotted is uncertain. According to the Supreme Court, 167,325 acres had been apportioned in 160-acre parcels by 1890, and an additional 95,000 acres were allotted in 1891;[22] according to the Court of Claims, about 230,000 acres were allotted to tribal members.[23] In 1892, the Tribe and the federal government entered into an agreement for the sale of the surplus lands.[24]

16. Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-495 (1994)).

17. Ch. 576, §§ 1-2, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-462 (1994)).

18. Ch. 576, § 3, 48 Stat. 984 (codified as amended at 25 U.S.C. § 463 (1994)).

19. *See* 54 Interior Dec. 559 (1934) (interpreting § 3 of the IRA to apply only to surplus lands that had not been disestablished from the reservations). On disestablishment, see *infra* Part IV.

20. *See* Special Message to the Congress on Indian Affairs, PUB. PAPERS 564 (1970) (President Nixon first proposed a federal emphasis on tribal self-determination and control over resources); Statement on Indian Policy, 1 PUB. PAPERS 96, 99 (1983) (President Reagan first instituted the government-to-government relationship); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, PUB. PAPERS 662 (1991) (President Bush); Memorandum of Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994) (President Clinton). *See also, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b) (1994); Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. No. 102-84, 105 Stat. 1278 (amending provisions of the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994)).

21. Treaty of Apr. 19, 1858, Art. I, 11 Stat. 743, 744. The treaty specified 400,000 acres, but a subsequent survey determined that the reservation consisted of 430,405 acres. *See Yankton* III, 118 S. Ct. at 793-94 (citing Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Dec. 9, 1893), reprinted in S. Exec. Doc. No. 27, 53d Cong., 2d Sess. 5 (1894)). The Court of Claims, however, found that as of 1892, the Yankton Sioux Reservation contained 431,110 acres. Yankton Sioux Tribe v. United States, 623 F.2d 159, 165 (Ct. Cl. 1980) [hereinafter *Yankton Claims*].

22. *Yankton* III, 118 S. Ct. at 794 (citing the Act of Feb. 28, 1891, 26 Stat. 795).

23. *Yankton Claims*, 623 F.2d at 167. The Claims Court noted "substantial evidence" of "inefficiency, favoritism, and fraud" in the administration of the Yankton allotment program, and concluded that only 230,000 acres were "properly allotted" on the Yankton Reservation. *Id.* at 168.

24. *Yankton* III, 118 S. Ct. at 794-95. Prior to the Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), the government's policy was to negotiate surplus lands agreements with the affected tribes. *See Yankton* II, 99 F.3d at 1443. In *Lone Wolf*, however, the Court held that Congress could unilaterally abrogate treaties and therefore did not need tribal consent to the loss of the surplus lands even if the tribe's treaty expressly provided for tribal agreement. *Lone Wolf*, 187 U.S. at 566.

Under that agreement, enacted into law in 1894,[25] the Tribe sold its unallotted lands[26] for the sum of $600,000.[27]

Most of the reservation lands subject to the allotment program are no longer in Yankton Sioux hands. Within five years of the 1895 presidential proclamation opening the surplus Yankton lands,[28] 90 percent of the opened lands had been settled by non-Indians.[29] Most of the Yankton allottees received fee patents,[30] and most of those fee lands were apparently sold or otherwise lost to non-Indians. Today, of the original 430,405 reservation acres, the Yankton Sioux Tribe holds 6000 acres in trust and individual members hold approximately 30,000 additional acres or so as trust allotments.[31] Thus, only about eight percent of the 1858 Yankton Sioux Reservation remains in trust status, a legacy of the allotment era that proved disastrous to the Tribe's attempts to control the construction and operation of the landfill.

The following sections trace those tribal attempts. Part II looks at the federal district court's determination that the Yankton Sioux Tribe could not assert regulatory authority over the landfill.[32] Part III examines the same court's subsequent decision that the EPA acted properly in granting the landfill a waiver of certain stringent federal regulatory requirements.[33] And Part IV analyzes the recent opinion of the United States Supreme Court, holding that the property on which the landfill is located has been disestablished from the Yankton Sioux Reservation and thus is no longer Indian country.[34]

II. Tribal Environmental Authority

In February 1992, several South Dakota counties created the Southern Missouri Recycling and Waste Management District.[35] Its purpose was to establish a solid waste landfill for approximately 25,000 residents in four

25. Act of Aug. 15, 1894, 28 Stat. 286 (1894).

26. The more than 33,000-acre discrepancy between the Supreme Court's and the Court of Claims' calculations of allotted lands also affects the calculations of the surplus lands. In *Yankton* III, as noted earlier, the Court found that the 1858 Reservation consisted of 430,405 acres, of which 262,325 acres were allotted. *Yankton* III, 118 S. Ct. at 793-94. That leaves 168,080 acres of surplus lands. By contrast, the Court of Claims determined that 201,110 acres were ceded as surplus lands. *Yankton Claims*, 623 F.2d at 174.

27. *Yankton* III, 118 S. Ct. at 795 (citing Article II of the 1892 agreement). The Court of Claims later determined that the sum of $600,000 was "unconscionable and grossly inadequate," and awarded the Tribe the difference between the price paid and the 1892 fair market value of $1,337,381.50. *Yankton Claims*, 623 F.2d at 178.

28. Proclamation of May 16, 1895, 29 Stat. 865 (1895).

29. *Yankton Claims*, 623 F.2d at 171.

30. *Yankton* III, 118 S. Ct. at 796.

31. *Id.* (citing INDIAN RESERVATIONS: A STATE AND FEDERAL HANDBOOK 260 (1986)). The Court's opinion does not indicate what acreage is held by the Tribe or its members in fee.

32. *Yankton* I, 890 F. Supp. at 888.

33. *Yankton v. EPA*, 950 F. Supp. 1471. Judge Piersol wrote both opinions.

34. *See Yankton* III, 118 S. Ct. 789.

35. *Id.* at 796.

counties, to replace unregulated town dumps.[36] The Waste District purchased land owned by a non-Indian within the 1858 boundaries of the Yankton Sioux Reservation, and applied for a state permit to construct and operate the landfill.[37] The Tribe objected on environmental grounds, primarily arguing that the proposed compacted clay liner was inadequate to protect groundwater resources,[38] and petitioned the State Board of Minerals and Environment for a contested case hearing. Following the hearing, the Board rejected the Tribe's contentions and permitted the landfill to proceed with the compacted clay liner.[39]

The Tribe filed suit in federal district court to enjoin the construction of the landfill, arguing that the State of South Dakota had no authority to issue the permit because the site was located within Indian country.[40] Accordingly, jurisdiction over the landfill would lie either in the Tribe under its inherent regulatory authority[41] or in the federal government. The federal district court held that although the landfill was located within Indian country, the Tribe had no authority to regulate it; that authority rested with the EPA.[42]

The district court disposed of the Tribe's claim to regulatory authority in a paragraph, holding that because the area containing the landfill had been broadly opened to non-Indians, the Tribe was divested of its right to regulate unless it could point to a congressional delegation of authority or demonstrate that it met one of the exceptions to the doctrine of divestment.[43] The court's approach was grounded in a series of three Supreme Court decisions between 1981 and 1993 — *Montana v. United States*,[44] *Brendale v. Yakima Indian Nation*,[45] and *South Dakota v. Bourland*[46] —

36. *Yankton I*, 890 F. Supp. at 889. A federal mandate required the closure of unregulated dumps by October 6, 1995. *Id.*

37. *Id.*

38. *Id.* The Tribe argued that a composite synthetic liner should be installed.

39. *Id.* The Board did impose design, construction, and monitoring conditions on the Waste District, including a requirement for soil tests during construction to assure that the compacted clay liner was sufficiently impermeable. *Id.* at 889-90. In addition to its rejection of the Tribe's environmental concerns, the Board also rejected the Tribe's request that an environmental impact statement be prepared. *Id.* at 889.

40. *Id.* at 890.

41. The Tribe's argument for tribal regulatory authority is not altogether clear from the district court's opinion. The court stated that: "Yankton Sioux Tribal Chairman Darrell Drapeau specifically testified that he seeks tribal solid waste regulation over Indians only, and not over non-Indians located on lands within the 1858 exterior boundaries of the Yankton Sioux Reservation." *Id.* at 888. Nonetheless, the district court then determined the extent of the Tribe's regulatory authority over the landfill, owned and operated by a non-Indian entity on fee lands. *Id.* The court's decision is puzzling if the Tribe was not asserting that authority.

42. *Id.* at 888-91. The state appealed the district court's ruling that the Yankton Sioux Reservation had not been diminished and therefore remained Indian country. The Eighth Circuit affirmed the district court, *Yankton* II, 99 F.3d 1439, but the Supreme Court reversed. *Yankton* III, 118 S. Ct. 789. The Tribe did not appeal the district court's holding that the Tribe lacked inherent regulatory authority. *See Yankton* II, 99 F.3d at 1443 n.5.

43. *Yankton* I, 890 F. Supp. at 888. The doctrine and its exceptions are discussed *infra* at text accompanying notes 48-53.

44. 450 U.S. 544 (1981).

45. 492 U.S. 408 (1989).

46. 508 U.S. 679 (1993). Subsequent to the decision in *Yankton* I, the Supreme Court issued

that created the "implicit divestiture" doctrine and the exceptions to it.[47]

In *Montana*, the Court established the basic parameters of its approach to tribal regulatory authority. Although the Court expressly recognized tribes' civil authority over their members and over Indian lands within Indian country,[48] the Court declared "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[49] Nonetheless, the Court also recognized that Congress may delegate that authority to the tribes,[50] and that even absent congressional delegation, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[51] That inherent authority exists, the Court held, in two broad sets of situations: either the nonmembers have entered into consensual relationships with the tribe or its members,[52] or the nonmember conduct has direct effects on core tribal governmental interests.[53] If a tribe meets either of these *Montana* exceptions, it retains its inherent authority to regulate nonmembers on fee lands.

The Court's subsequent decisions have tempered most aspects of the *Montana* approach, generally in ways that make it more difficult for tribes to assert regulatory authority. First, what was a "general proposition" that tribes lacked inherent authority over fee-patented lands in *Montana* has now hardened into a "rule" that tribes retain authority only under the exceptions or pursuant to congressional delegation.[54]

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a fourth decision in the series, extending the approach it had developed in the context of regulatory jurisdiction to tribal adjudicatory jurisdiction as well. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).

47. For more detailed analyses of these cases and the doctrine of implied divestiture of tribal governmental powers, see Royster, *supra* note 5, at 43-63; N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994).

48. *Montana,* 450 U.S. at 557; *see also Brendale*, 492 U.S. at 445 (Stevens, J.) and 460 (Blackmun, J., dissenting).

The term "Indian lands" refers to all lands owned by or held in trust for the tribes or their members. In contrast are "fee lands," which refers to lands within Indian country held in fee simple by nonmembers of the tribes. *See A-1*, 117 S. Ct. at 1409.

49. *Montana*, 450 U.S. at 565.

50. *Id.* at 564.

51. *Id.* at 565.

52. *Id.* This "consensual relationships" exception provides that: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Although the second *Montana* exception, see *infra* text accompanying note 53, has proved to be the more important in the environmental context, the consensual relationships test may provide a justification for tribal regulation of a landfill in Indian country if the landfill enters into commercial dealings with the tribe, tribal members, and tribal businesses to accept waste.

53. *Id.* at 566. This second *Montana* exception provides that: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

54. *A-1*, 117 S. Ct. at 1409. In *A-1*, the Court described *Montana* as having created "a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions[,]" namely, the consensual relationships and the direct effects tests. *Id.* at 1409-10.

Second, the Court broadened the types of fee lands to which the *Montana* doctrine applies. In *Montana* and *Brendale*, the Court focused on former allotments that had been transferred in fee to non-Indians. Because the purpose of the allotment policy was to break up the reservations and assimilate the tribes, the Court held that absent the exceptions, continued tribal jurisdiction over those lands was inconsistent with the reason for their alienation to non-Indians.[55] In *Bourland*, however, the Court stated that "[t]o focus on purpose is to misread *Montana*," and held that tribes were divested of regulatory authority over all fee lands, regardless of how or why title passed to non-Indians.[56] Most recently, the Court extended its *Montana* rule to state highway rights-of-way across Indian country, on the ground that tribes have no more right to exclusive use and occupation of highways than they do of fee lands.[57] Thus, what began as a proposition for former allotments in *Montana* transmuted into a rule for all fee lands in *Bourland*, and then expanded to lands, even those held in trust, over which the tribe cannot assert a right to exclude the non-Indian public.

Third, in *Brendale* the Court created an odd distinction between "open" and "closed" areas of Indian country. The Yakama Reservation[58] at issue in *Brendale* was roughly divided into an open area, consisting of about half fee lands and a predominantly non-Indian population, and a closed area which was almost all tribal trust land and virtually unpopulated and undeveloped.[59] At issue was which government, the tribe or the county, could zone fee lands within the reservation. Four justices believed that the county could zone all fee lands within the reservation, subject to a modified version of the *Montana* direct effects test,[60] and three justices argued that the Nation should generally have regulatory authority over all lands within the reservation, regardless of ownership.[61] Providing the crucial swing votes, Justice Stevens' opinion determined that tribal authority was exclusive within the closed area, but that in open areas, the county should have zoning authority for fee lands.[62] Although it is not entirely clear that the Court still subscribes to the open-versus-closed distinction, in *Bourland* the Court held that, at least within an area that has been "broadly opened to the public," the loss of Indian title means the loss of

55. *Montana*, 450 U.S. at 560 n.9; *see also Brendale*, 492 U.S. at 422-23 (White, J.).

56. *Bourland*, 508 U.S. at 691-92. Title to the lands at issue in *Bourland* had been ceded to the federal government for a reservoir and flood control project. *Id.* at 683-84.

57. *A-1*, 117 S. Ct. at 1414. This aspect of the Court's decision is particularly disturbing because land underlying state highways remains in trust for the tribes. In *Montana* and *Brendale*, the Court broadly confirmed tribal regulatory authority over trust lands, see *supra* note 48, and denied general tribal regulatory authority only over fee lands. The notion that tribal trust lands subject to state rights of way are the jurisdictional equivalent of fee lands undercuts the clear rule of exclusive tribal authority over all Indian lands.

58. In 1994, the Yakama Indian Nation changed the spelling of its name from "Yakima." *See Yakamas Alter Spelling of Tribe*, SEATTLE TIMES, Jan. 26, 1994, at B2.

59. *Brendale*, 492 U.S. at 447 (Stevens, J.) and 415 (White, J.).

60. *Id.* at 428 (White, J.). Justice White's suggested modifications to *Montana* are discussed *infra* at text accompanying note 64.

61. *Id.* at 448 (Blackmun, J., concurring in part, dissenting in part).

62. *Id.* at 433 (Stevens, J.). Justice Stevens was joined in this opinion by Justice O'Connor.

inherent tribal regulatory authority.[63]

Finally, *Brendale* appeared to modify the language of the *Montana* direct effects test to require a more stringent showing from the tribes. Justice White argued that tribal interests should prevail only if the impacts of nonmember activities are "demonstrably serious" and "imperil" core tribal governmental interests.[64] Although the EPA has incorporated this more stringent language into its regulatory approach to recognizing tribal regulatory authority,[65] the Court itself has not replicated Justice White's language. Instead, in its subsequent cases, the Court has simply quoted the *Montana* direct effects test, without modification.[66]

Building on the original formulation of the direct effects test in *Montana*, the Court has thus solidified it into a rule that tribes are generally divested of regulatory authority over fee lands, at least in areas that are broadly opened to non-Indian use, unless they can demonstrate that nonmember use of the fee lands will impact core tribal governmental functions.[67] This, then, was the approach the district court used in the case brought by the Yankton Sioux. It found that the Tribe was generally divested of inherent regulatory authority over the fee-land location of the landfill because the area in which the landfill was located had been broadly opened up to non-Indian use.[68] There was no evidence that Congress had delegated regulatory authority to the Tribe, and the Tribe itself "produced no evidence" of impacts on tribal governmental interests such as health and welfare.[69] Accordingly, the court held that the Tribe could not assert regulatory control over the proposed landfill.[70]

It is difficult to ascertain exactly what the federal courts are looking for in the way of evidence of impacts on core tribal governmental interests

63. *Bourland,* 508 U.S. at 689 & n.9. *See also A-1,* 117 S. Ct. at 1414 (relying in part on this statement from *Bourland* to find that a state highway was the jurisdictional equivalent of fee land).

64. *Brendale,* 492 U.S. at 431.

65. The EPA will authorize a tribe to take primacy under the federal pollution control acts on fee lands as well as Indian lands if the agency is satisfied that "the potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed. Reg. 64876, 64878 (1991). Tribal primacy and the EPA's approach are discussed *infra* at text accompanying notes 74-79.

66. The direct effects test provides that tribes retain inherent authority over fee lands if the nonmember activity on those lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566. This language is quoted verbatim in the Court's most recent cases. *See Bourland,* 508 U.S. at 695; *A-1,* 117 S. Ct. at 1415.

Nonetheless, in *A-1* the Court held that although "those who drive carelessly on a public highway running through a reservation endanger all in the vicinity," the *Montana* direct effects test requires "more." 117 S. Ct. at 1415. It requires an impact on "the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 1416 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)). Because a "commonplace state highway accident" between two non-Indians did not impact that right, the Court held the tribal court had no authority under the second *Montana* exception to adjudicate the resulting tort claims. *Id.*

67. Tribes, of course, also retain regulatory authority under the consensual relationships test as well as under congressional delegation.

68. *Yankton I,* 890 F. Supp. at 888. The landfill property is located on former surplus lands of the Yankton Sioux Reservation. *See Yankton III,* 118 S. Ct. at 796.

69. *Yankton I,* 890 F. Supp. at 888.

70. *Id.*

from nonmember activities on fee lands. In the Yankton case, for example, the Tribe's experts raised a number of environmental issues with respect to the proposed design, construction, and operation of the landfill.[71] Contrary to the district court's statement that the Tribe "produced no evidence regarding [the] impact of the proposed municipal solid waste landfill" on core tribal interests such as health and welfare,[72] the Tribe's experts raised six specific environmental concerns,[73] any one of which would seem to constitute at least some evidence of direct effects on tribal health and welfare. Nonetheless, the district court was clearly looking for something more. Although the court did not articulate what that might be, the EPA's approach to tribal regulatory authority may offer some guidance.

The EPA considers that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare."[74] The agency thus maintains that the federal environmental statutes represent Congress' determination that activities which affect the environment have significant direct effects on health and welfare.[75] Because of that nexus, the EPA believes that Indian tribes will ordinarily be able to make the required showing of "serious and substantial" impacts on tribal environments that the EPA demands in order to accord tribes primacy for the programs contained in the federal environmental statutes.[76] Against that backdrop, however, the EPA requires a

71. *Id.* at 889, 891.

72. *Id.* at 888.

73. The concerns were:

> (1) inadequacy of the proposed compacted clay liner; (2) location of major acquifers [sic] underlying the site; (3) potential groundwater mounding beneath the site; (4) inadequate drilling of test wells; (5) the presence of fissures or lineaments, as well as sand and gravel lenses, at the site that might assist the migration of leachate into ground water and acquifers [sic]; (6) and the inadequacy of the methane gas and leachate collection systems.

Id. at 889.

74. 56 Fed. Reg. 64876, 64878 (1991).

75. *Id.* (specifically referencing the Clean Water Act). Congress addresses solid waste landfills under Subtitle D of the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. §§ 6941-6949a (1994).

76. 56 Fed. Reg. at 64,877. Most of the major federal pollution control statutes authorize treatment as states (TAS) for Indian tribes that meet certain statutory criteria. *See, e.g.*, Clean Water Act Amendments of 1987, 33 U.S.C. § 1377 (1994); Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300j-11 (1994). A tribe which is granted TAS status is accorded primacy, or primary authority to operate the federal environmental program within its territory. The EPA has determined, however, that statutes such as the water acts authorize tribes to take primacy for federal programs only to the extent that the tribes would have inherent authority to regulate under the *Montana* direct effects test. 56 Fed. Reg. at 64,880. Tribes thus have automatic authority over Indian lands, but must demonstrate serious and substantial effects on tribal interests arising from nonmember activities on fee lands.

In Montana v. U.S. Environmental Protection Agency, 137 F.3d 1135 (9th Cir. 1998) [hereinafter *Montana v. EPA*], the court analyzed the EPA's interpretation of the federal environmental laws and its reconciliation of environmental policy and Indian law. The court concluded that the EPA's approach to the scope of inherent tribal regulatory authority was consistent with the *Montana* line of Supreme Court cases, and therefore, that the agency's regulations under which TAS status is granted were valid. *Id.* at 1141.

At the time of the district court's decision in *Yankton* I, the Tribe had an application pending with the EPA to take primacy for the municipal landfill permitting program under Subtitle D of RCRA, 42 U.S.C. § 6945(c); 40 C.F.R. pt. 258. *See Yankton* I, 890 F. Supp. at 890. Although the

specific showing of serious and substantial effects from fee-land activities,[77] although it "does not require a tribe to wait until a point source discharger located on non-Indian lands is actually polluting tribal waters."[78] Instead, the tribes must demonstrate only the potential for future pollution that would have serious and substantial impacts on core tribal interests.[79]

It thus appears that the EPA, and perhaps the federal courts as well, employ a bi-level approach. On the generalized level, the fact that non-Indians on fee lands engage in activities regulated under the federal environmental statutes is sufficient to raise the presumption that the activities will have serious and substantial impacts on core tribal governmental interests. On the specific level, however, the tribes must support that presumption with facts showing that the particular activities at issue have the potential to generate significant impacts on tribal health and welfare or other core governmental interests such as economic security or political integrity. Where tribes can make that specific showing, they meet the *Montana* direct effects test and retain inherent regulatory authority over the fee lands.[80] Where tribes do not produce any specific evidence, as the district court found in the case of the Yankton Sioux, tribal regulatory authority will not extend over the nonmember activities on fee lands.

Nonetheless, there are indications in the district court's opinion that it did not reject tribal regulatory authority solely on the basis of a lack of

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EPA believed at the time that tribes could be granted primacy for the Subtitle D program, the District of Columbia Circuit subsequently held that because RCRA does not define tribes as states, but only as municipalities for purposes of the act, the EPA could not treat tribes as states for RCRA programs. Backcountry Against Dumps v. Environmental Protection Agency, 100 F.3d 147 (D.C. Cir. 1996). Nonetheless, the *Backcountry* court indicated that tribes retained their inherent authority to regulate landfills through such mechanisms as environmental codes, agency enforcement, and judicial actions in tribal court. *Id.* at 151.

77. For example, in granting primacy to the Confederated Salish and Kootenai Tribes of the Flathead Reservation to establish water quality standards, the EPA took note of such nonmember activities as "discharges from an RV park and campground, discharges from sewage treatment plants, discharges from a town's storm drains, leakage from gasoline service stations, diesel fuel spills, and gas tank overflows." *Montana v. EPA*, 941 F. Supp at 958, *aff'd*, 137 F.3d 1135. The EPA also determined that the Tribes needed "clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons." *Id.* The EPA was thus able to conclude that the nonmember discharges had the potential for serious and substantial effects on the tribal need for clean water, and therefore on tribal health and welfare. *Id.*

78. *Id.* at 952.

79. *Id.*; *see also* 56 Fed. Reg. at 64,878.

80. For example, the Confederated Salish and Kootenai Tribes of the Flathead Reservation met this burden with respect to potential impacts on water quality from activities on nonmembers' lands. *See supra* note 77.

Similarly, a federal court relied on specific evidence to preliminarily enjoin the county-approved construction and operation of asphalt and cement or concrete plants on non-Indian fee land within the Pinoleville Rancheria. Governing Council of Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042 (N.D. Cal. 1988). Under the *Montana* analysis, the court found that operation of the plants would threaten "injury to the land, water, and air, as well as the health and welfare of the Indians of the Rancheria." *Id.* at 1047. More specifically, the court noted evidence of the following environmental effects: increased siltation and turbidity in waters used as a spawning ground for fish and as a water source for the rancheria; particulate and gaseous emissions that would violate state air quality standards; storage of oil and diesel fuel; "strong and offensive" odors that would be detectable throughout the rancheria; and increased traffic and noise levels. *Id.* at 1045.

evidence of direct effects. Specifically, the district court found that the Waste District's engineers "appropriately considered the concerns raised by the Tribe's experts . . . . All of these matters have been adequately addressed in the design of the facility."[81] If the district court's rejection of tribal regulatory authority depended in part on that finding, then the court's analysis appears to rest on a fundamental misinterpretation of the *Montana* direct effects test.

Nothing in *Montana* suggests that tribes may regulate to protect core governmental interests only if those interests are not adequately addressed by the states or the federal government. In fact, that interpretation would turn the direct effects test on its head. Under the direct effects test, tribes may regulate on nonmember lands if impacts on core governmental concerns exist or potentially exist; states may regulate only if substantial impacts are not present.[82] Under the approach arguably suggested by the district court's language, however, tribes could regulate if and only if the states did not do so adequately. That "vacuum" theory of tribal jurisdiction, however, has never been adopted by the Court,[83] and has been specifically rejected by the Ninth Circuit in *Montana v. EPA* as inconsistent with *Montana* and its progeny.[84]

To the extent that the district court's approach suggests the vacuum theory, the result is especially egregious in the case of the Yankton Sioux. The district court refused to allow tribal regulatory authority on the ground that the Tribe had proven no impacts. The no-impacts conclusion appears to have rested in part on the court's determination that the Waste District's design adequately protected tribal environmental interests. And that determination, in turn, was based in part on the Waste District's assurance that it would, and the court's holding that the Waste District must, con-

81. *Yankton* I, 890 F. Supp. at 891.

82. *See, e.g., Montana*, 450 U.S. at 566 (finding that the state could regulate non-Indian hunting and fishing on fee lands within Crow Reservation because those activities did not impact core tribal governmental interests); *A-1*, 117 S. Ct. at 1416 (finding that state court, rather than tribal court, was proper forum for lawsuit between two non-Indian parties because the tort action did not impact core governmental concerns).

83. In *Brendale*, Justice White would have required tribes to appear before county zoning boards to argue that county zoning decisions for fee lands had direct effects on tribal governmental interests; if the county failed to protect the tribal interests, the tribe could then sue in federal court. *Brendale,* 492 U.S. at 431-32. Justice White, writing for four justices, admitted that the "majority of this Court, however, disagrees with this conclusion." *Id.* at 432. Justice White's reading of the Court is borne out by the subsequent decisions in *Bourland* and *A-1*, which quote the *Montana* direct effects test verbatim without any suggestion that tribal regulatory authority is dependent upon a vacuum of other regulations. *See Bourland*, 508 U.S. at 695; *A-1*, 117 S. Ct. at 1415.

84. *Montana v. EPA,* 137 F.3d at 1140-41. The State of Montana argued the vacuum theory of jurisdiction before the Ninth Circuit. It proposed a two-part inquiry into tribal inherent jurisdiction. The first question is whether the tribe is regulating nonmembers in some way "already covered by state or federal law." If so, the tribe has no authority. If not, the tribe may regulate the nonmembers only if the tribe can show "demonstrably serious" impacts to core governmental interests. *See* Appellants' Opening Brief at 36, Montana v. U.S. Environmental Protection Agency, 137 F.3d 1135 (9th Cir. 1998) (No. 96-35508). This approach, of course, inserts a prerequisite step to the application of the *Montana* direct effects test that the Court has never sanctioned.

struct the landfill with a composite liner rather that one of compacted clay.[85] Although the Waste District offered at trial to install a composite liner and did not appeal the district court's order to install one, it immediately sought a waiver of the composite liner requirement from the EPA.[86] In June 1996, one year after the district court assured the Tribe that its concerns were "adequately addressed" by the landfill's design, the EPA granted the waiver and permitted a composite clay liner for the landfill.[87] Now that the vacuum exists, the Tribe is stuck with the ruling that it "may not assert civil jurisdiction" over the landfill.[88] There thus exists neither tribal regulatory authority nor, the Tribe contends, an environmentally sound landfill.

III. Federal Regulation in Indian Country

When the district court held that the landfill site was located within the Yankton Sioux Reservation,[89] it also held that federal, rather than state, criteria applied to the design and construction of the landfill.[90] Although the State of South Dakota had received a determination of adequacy for its federally-mandated solid waste permit program, the EPA had authorized state program jurisdiction over all lands within the state except for Indian country.[91] Specifically, the EPA denied state permit authority over the Indian country of the Yankton Sioux Reservation.[92]

85. *Yankton* I, 890 F. Supp. at 890.

86. *Yankton v. EPA*, 950 F. Supp. at 1474-75.

87. *Id.* at 1478. The circumstances and further ramifications of this waiver are explored *infra* in Part III.

88. *Yankton* I, 890 F. Supp. at 888. The Tribe did not appeal that ruling of the district court, see *Yankton* II, 99 F.3d at 1443 n.5, apparently because the district court ruled that federal regulations, including the requirement for a composite liner, governed the landfill. *See Yankton* I, 890 F. Supp. at 890-91. The Tribe was apparently satisfied that the federal liner requirement would protect its environmental concerns.

89. *Yankton* I, 890 F. Supp. at 888.

90. *Id.* at 890.

91. South Dakota; Final Determination of Adequacy of State/Tribal Municipal Solid Waste Permit Program, 58 Fed. Reg. 52,486, 52,488 (1993) (approving the state's program except as to Indian country, including the Yankton Sioux Reservation).

92. South Dakota; Final Determination of Adequacy of State's Municipal Solid Waste Permit Program over Non-Indian Lands for the Former Lands of the Yankton Sioux, Lake Traverse (Sisseton-Wahpeton) and Parts of the Rosebud Sioux Indian Reservation[s], 61 Fed. Reg. 48,683, 48,686 (1996).

Following the EPA's 1993 determination that the state had not demonstrated authority in Indian country, see *supra* note 91, the state applied for authority over the fee lands of the "former" Yankton Sioux Reservation. Based on an Eighth Circuit case, Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980) (which did not, according to the decision in *Yankton II*, determine the issue of diminishment; *see* 99 F.3d at 1450 n.18), the EPA determined that the Yankton Reservation had been disestablished. *See* 59 Fed. Reg. 16,647, 16,649 (1994). The EPA then issued a tentative determination that South Dakota could extend its landfill permit program to lands within the disestablished areas of the Reservation, but not to Indian country within those areas. *Id.* When the federal district court ruled in *Yankton* I that the Yankton Sioux Reservation had not been disestablished, that meant that all lands within the boundaries of the 1858 Yankton Reservation remained Indian country. *See Yankton* I, 890 F. Supp. at 878. Thus, the state at that point had no jurisdiction to issue permits for landfills anywhere within the boundaries of the 1858 Yankton Sioux Reservation. Accordingly, the EPA's final determination for South Dakota rejected a state permit program within the boundaries of the 1858 Yankton Sioux Reservation. 61 Fed. Reg. at 48,685.

The EPA's action in South Dakota was consistent with its general approach to determinations of state primacy in Indian country.[93] In order to promote sound environmental management, the EPA adopted an anti-checkerboarding policy:

> [T]he Agency will view Indian reservations as single administrative units for regulatory purposes. Hence, as a general rule, the Agency will authorize a tribal or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation.[94]

Thus, states wishing to assert primacy over Indian country must demonstrate their authority to regulate all sources within tribal territories, whether located on Indian lands or fee lands.

In order to do so, a state must show either a congressional delegation of jurisdiction or authority to regulate under principles of federal Indian law.[95] The federal environmental laws themselves do not operate as a congressional delegation of authority to the states,[96] and no state has pointed to any other statute delegating environmental jurisdiction to the states. Any state asserting environmental authority in Indian country, therefore, must demonstrate its jurisdiction under principles of federal Indian law. Absent congressional delegation, however, states may exercise jurisdiction over Indian lands within Indian country only in "exceptional circumstances,"[97] and the only exceptional circumstance ever recognized by the Supreme Court is state regulation of treaty hunting and fishing rights in

93. States do not automatically operate the federal environmental programs within their borders. Instead, the federal environmental statutes generally establish programs and provide minimum federal standards and criteria. States may then seek primacy from the EPA to operate the programs. *See, e.g.*, 42 U.S.C. §§ 6943, 6947 (1994) (approval of state plans for RCRA Subtitle D solid waste landfills); 33 U.S.C. § 1342(b) (1994) (state primacy for water pollution discharge permit program). A state seeking primacy over the Indian country within its borders must demonstrate jurisdiction. *See infra* text accompanying notes 94-98.

94. U.S. Environmental Protection Agency, *Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* 3 (1991) [hereinafter *EPA Concept Paper*].

95. *See, e.g.*, 45 Fed. Reg. 33,066, 33,378 (1980); U.S. Environmental Protection Agency, *Administration of Environmental Programs on Indian Lands: EPA Indian Work Group Discussion Paper* 9 (1983). This standard was reiterated in the determination of RCRA Subtitle D adequacy for South Dakota. *See* 58 Fed. Reg. at 52,488.

96. *See* Washington Dep't of Ecology v. U.S. Environmental Protection Agency, 752 F.2d 1465, 1467-68 (9th Cir. 1985) [hereinafter Washington DOE] (holding "that the EPA Regional Administrator properly refused to approve the proposed state program because RCRA does not authorize the states to regulate Indians on Indian lands"); Phillips Petroleum Co. v. U.S. Environmental Protection Agency, 803 F.2d 545, 552 (10th Cir. 1986) (noting that "[a]ll parties agree that the Oklahoma state government has no power to prescribe an underground injection control program [under the Safe Drinking Water Act] regulating the Osage Indian Reserve.").

The *Washington DOE* court expressly declined to decide whether a state could receive primacy in Indian country "when that reach is limited to non-Indians." *Washington DOE*, 752 F.2d at 1468. Based on that language, the State of Washington amended its RCRA petition to assert authority only over non-Indian hazardous waste activities on Indian lands. 51 Fed. Reg. 3782, 3783 (1986). The EPA rejected this approach, stating that absent independent state authority to regulate within Indian country, the EPA would retain jurisdiction "on Indian lands," which the EPA interpreted as synonymous with Indian country. *Id.*; *see also* 53 Fed. Reg. 43,080 (1988) (rejecting Washington State's asserted jurisdiction under the Safe Drinking Water Act over underground injection wells on Indian lands).

97. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983).

order to assure preservation of the species.[98] Consequently, no state has been able to demonstrate authority over Indian lands within Indian country. Without jurisdiction over Indian lands, however, a state cannot make the requisite showing of jurisdiction over all pollution sources within Indian country necessary for state primacy.

Based on that general analysis, the EPA concluded that South Dakota had not demonstrated authority to regulate Resource Conservation and Recovery Act (RCRA) solid waste landfills in Indian country.[99] Once the federal district court determined that the 1858 Yankton Sioux Reservation remained intact and had not been diminished by the surplus lands act,[100] the state thus had no authority to issue permits for landfills anywhere within the exterior boundaries of the 1858 reservation.

Because the states generally do not have environmental jurisdiction within Indian country, the EPA retains authority to administer the federal environmental programs unless or until the governing tribe is able to demonstrate authority to do so.[101] In most of the federal environmental laws, Congress has specified that tribes which meet certain statutory criteria may be treated as states and thus may apply for primacy to conduct the federal programs within their Indian country.[102] Unless or until a tribe seeks primacy, the EPA will implement the federal program within that tribe's reservation.

RCRA, however, is unusual in two respects. First, it alone among the major federal environmental laws does not treat tribes as states.[103] Instead,

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98. *Id.* at 332 n.25. For that proposition, the Court referenced Puyallup Tribe, Inc. v. Washington Game Dep't, 433 U.S. 165, 176-77 (1977). Even though *Puyallup* ostensibly permitted the state to regulate Indians within reservation borders, the Court refused to extend its reasoning in *Mescalero Apache* to allow general state regulation of on-reservation hunting and fishing. The *Mescalero Apache* Court carefully distinguished its holding in *Puyallup*:

> Like *Montana v. United States*, the decision in *Puyallup* rested in part on the fact that the dispute centered on lands which, although located within reservation boundaries, no longer belonged to the Tribe; all but 22 of the 18,000 acres had been alienated in fee simple. The Court also relied on a provision of the Indian treaty which qualified the Indians' fishing rights by requiring that they be exercised "in common with all citizens of the Territory," and on the State's interest in conserving a scarce, common resource.

Mescalero Apache, 462 U.S. at 332 n.15. The *Puyallup* exceptional circumstances may thus be confined to the facts of that case.

99. *See* 58 Fed. Reg. at 53,488; 61 Fed. Reg. at 48,685.

100. *Yankton* I, 890 F. Supp. 878, *aff'd*, *Yankton* II, 99 F.3d 1439, *rev'd*, *Yankton* III, 118 S. Ct. 789. Following the issuance of its decision in *Yankton* I, the district court granted a stay pending appeal, but vacated the stay in February, 1996, on the ground that Federal Rule of Civil Procedure 62(d) does not apply to nonmonetary declaratory judgments. Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 926 F. Supp. 888, 890 (D.S.D. 1996). The EPA issued its final determination that South Dakota could not extend its permit program to the Yankton Sioux Reservation in September, 1996. *See* 61 Fed. Reg. 48,683 (1996). The Eighth Circuit in *Yankton* II affirmed the district court's decision in October of that same year. *Yankton* II, 99 F.3d 1439, 1441.

101. *See Washington DOE*, 752 F.2d at 1472; *EPA Concept Paper, supra* note 94, at 3-4.

102. Beginning with the environmental law reauthorizations in 1986, most of the major federal environmental laws have been amended to include a tribes-as-states provision. *See* Clean Air Act Amendments of 1990, 42 U.S.C. § 7601(d) (1994); Clean Water Act Amendments of 1987, 33 U.S.C. § 1377(e) (1994); Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300j-11(b)(1) (1994).

103. The major environmental statutes, such as the Clean Air Act, Clean Water Act, and Safe

RCRA defines tribes only as municipalities for purposes of the act.[104] Because RCRA authorizes states to develop landfill permit programs, the EPA may not, therefore, grant tribes authorization to issue solid waste landfill permits within their reservations.[105] Second, there is no federal landfill permit program under RCRA. Instead, the statute prohibits open dumps,[106] requires the EPA to develop guidelines for state permit plans for sanitary landfills,[107] and provides that states shall develop and implement federally-approved permit programs.[108] Under RCRA, therefore, federal guidelines and regulations apply nationwide in the absence of an approved state program, but no federal permit program as such exists.

Thus, in the Yankton case, the federal district court held that the EPA's regulations applied to the landfill located on fee land within the 1858 Yankton Sioux Reservation.[109] The court further held that, because the federal regulations required a composite liner under the type of circumstances existing at the Yankton landfill, the Waste District was required to install a composite liner as well as a compacted clay liner.[110]

The Waste District did not appeal the district court's decision regarding the design and construction of the landfill. Instead, three months after the court's decision, with the assistance of South Dakota's congressional delegation, the Waste District and state officials lobbied EPA Administrator Carol Browner for a waiver of the composite liner requirement.[111] Browner indicated that the EPA might be willing to be flexible so long as environmental standards were maintained.[112] Both the Waste District and the state subsequently applied to EPA Region VIII in Denver for a waiver

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Drinking Water Act, include a tribes-as-states provision. *See supra* note 102. RCRA's lack of a tribes-as-states provision is likely because RCRA has not been reauthorized since the process of amending the environmental laws to include such a provision began.

104. 42 U.S.C. § 6903(13) (1994).

105. The D.C. Circuit noted that: "We think it significant that when Congress wants to treat Indian tribes as states, it does so in clear and precise language." *Id.* at 150. The TAS provisions of the Clean Air Act, Clean Water Act, and Safe Drinking Water Act "stand in marked contrast to RCRA's equally clear requirement that 'states' — not municipalities, and therefore not Indian tribes — must submit permitting plans for EPA's review." *Id.*

106. 42 U.S.C. §§ 6943(a)(2)-(3), 6944(b) (1994).

107. 42 U.S.C. §§ 6942-6944.

108. 42 U.S.C. §§ 6946-6948.

109. *Yankton* I, 890 F. Supp. at 890.

110. As the court noted, 40 C.F.R. § 258.28(a)(2) requires a composite liner "where noncontainerized leachate derived from the solid waste disposal facility will be recirculated into the cells, as is proposed in Southern Missouri's design and operation." *Yankton I*, 890 F. Supp. at 890.

111. *Yankton v. EPA*, 950 F. Supp. at 1474. Although the Waste District had offered at trial to install a composite liner, it now argued that a composite liner was too costly. *See Yankton I,* 890 F. Supp. at 890. The State of South Dakota urged Browner to delegate program authority over fee lands in Indian country to the state, and to revise the EPA's Indian policy. *Yankton v. EPA*, 950 F. Supp. at 1474. Senator Tom Daschle stated that if the Waste District could not be accommodated administratively, he was prepared to address the concerns through legislation. *Id.* at 1475.

The district court subsequently determined that there was "no evidence in the administrative record that the [EPA's final] decision was the product of political pressure, even though South Dakota's elected officials took an active interest in the EPA's process and decision." *Id.* at 1482.

112. *Id.* at 1475.

of the composite liner requirement.[113] Region VIII refused to accept the state's application because the state had no program authority over the landfill site,[114] but evaluated the waiver application submitted by the Waste District. Although normally the EPA's decision is based solely on information provided in the application, in this case the EPA itself conducted groundwater modeling[115] and consulted with a Colorado solid waste official on the engineering aspects of the proposal.[116]

On November 27, 1995, the EPA announced its tentative decision to grant the waiver in a conference call that included the offices of two South Dakota congressional members.[117] The Tribe immediately filed suit, contending that the EPA lacked authority to grant the waiver and that the EPA had been unduly influenced by political pressure.[118] A few days later the EPA released its technical review, concluding that the Waste District's proposed landfill design met federal performance standards.[119]

One day after that, on December 5, 1995, a memorandum was placed in the EPA file regarding the procedure used to seek a waiver. The memorandum provided:

> As discussed in 40 CFR 258.40(e), the State or Tribe is ordinarily responsible for making the initial decision that the alternative design meets the performance standard and for petitioning EPA Regional offices to review the State/Tribal determination. In this situation, where neither the State nor the Tribe have [sic] approved programs and where the question of jurisdiction has yet to be decided, EPA Region VIII has decided to entertain municipal solid waste landfill liner petitions for alternative design directly from the owner/operator of the landfill located on the disputed lands.[120]

The EPA held two public hearings on its tentative decision. The Tribe, some of its members, and its experts all objected to the waiver, as did environmental activists and some community members, although the district court noted that "by far the majority of comments submitted to the EPA supported the agency's tentative decision."[121] On June 26, 1996, one year after the district court's order that the landfill be constructed with a com-

113. *Id.*

114. *Id.* Federal regulations provided that owner/operators in unapproved states (which South Dakota was as to Yankton Sioux Indian country) could use alternative landfill designs if three criteria were met: (1) the state had to determine that the proposed design met certain federal standards; (2) the state had to petition EPA for review of that determination; and (3) the EPA had to approve. *See* 40 C.F.R. § 258.40(e). The district court determined that the EPA's refusal to accept the state's petition "is plainly erroneous and is inconsistent with the regulation." *Yankton v. EPA*, 950 F. Supp. at 1480.

115. *Id.* at 1476-77.

116. *Id.* at 1478.

117. *Id.* at 1477.

118. *Id.* As noted, the court found "no evidence" of undue political pressure. *Id.* at 1482.

119. *Id.* at 1477.

120. *Id.* at 1478 (quoting a memorandum to the file by Jack Hidinger, Program Director, EPA Region VIII Office of Pollution Prevention, State and Tribal, entitled "Modification of the Municipal Solid Waste Landfill Liner Petition Process").

121. *Id.*

posite liner in accordance with federal regulations,[122] the EPA issued its final decision waiving the composite liner requirement for the landfill.[123]

The Tribe's suit contesting the decision rested on two primary arguments.[124] First, the Tribe contended that the EPA's decision to accept a waiver petition from the Waste District was contrary to federal regulations. Second, the Tribe argued that the waiver decision itself was arbitrary and capricious.

The Tribe's first argument rested on the federal regulation governing approval of a landfill design that used only a compacted clay liner.[125] Section 258.40(e) provides that an owner/operator in an unapproved state may use a compacted clay liner if three conditions are met: the state determines that the proposed design meets federal performance standards for compacted clay liners; the state petitions the EPA for review of that determination; and the EPA approves the state's decision.[126] Under section 258.40(e), the Tribe argued, the EPA had expressly permitted only states, and not owner/operators of landfills, to petition the agency for a waiver.[127]

The Tribe's argument depended in part on the recent District of Columbia Circuit decision in *Backcountry Against Dumps v. EPA*.[128] In *Backcountry*, the court held that the EPA could not grant RCRA landfill permit authority to an Indian tribe because the plain language of RCRA referred to "state" permit programs, and RCRA defined tribes only as municipalities and not as states.[129] Thus, the EPA had exceeded its authority in approving a tribal permit program. In the Yankton Tribe's case, the court found the *Backcountry* decision "factually and legally distinguishable" because the Yankton situation did not involve the EPA's approval of a tribal permit program.[130]

The court's distinction may have missed the Yankton Tribe's point. In *Backcountry*, the court employed a strict reading of the term "state" as used in RCRA; because Indian tribes were not contained within that definition, the EPA could not expand the category of governments entitled to be treated as states.[131] The Yankton Tribe may have been arguing that the same interpretative approach should be applied to the federal regulations implementing RCRA: that because the regulation allowed only "states" to

122. *Yankton* I, 890 F. Supp. at 890.

123. *Yankton v. EPA*, 950 F. Supp. at 1478. Based on public comments and scientific and technical advice, the EPA placed six conditions on the waiver, including monitoring wells and leachate testing. *Id.* at 1478-79.

124. *Id.* at 1479-82.

125. 40 C.F.R. § 258.40(e).

126. *Id.*

127. *Yankton v. EPA*, 950 F. Supp. at 1479.

128. 100 F.3d 147 (D.C. Cir. 1996).

129. *Id.* at 150-51.

130. *Yankton v. EPA*, 950 F. Supp. at 1480.

131. *Backcountry*, 100 F.3d at 151. RCRA defines "state" as "any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands." 42 U.S.C. § 6903(31) (1994).

seek a waiver, the EPA could not expand the category to include owner/operators such as the Waste District.

The court, however, held that the EPA's action was consistent with both the language of RCRA and the purpose of the federal regulation. In RCRA, the court determined, Congress had expressly directed the EPA to fill certain statutory gaps regarding landfill criteria.[132] EPA did so in its "site-specific rule" allowing the Waste District to submit a petition for a waiver.[133] That rule, moreover, was consistent with the purpose of section 258.40(e), which is "to allow owner/operators to take advantage of the alternative landfill design if scientific investigation reveals that the composite liner is unnecessary at the specific landfill location."[134] Thus, the court determined that the EPA properly accepted the Waste District's petition for a waiver.

The Tribe's second argument, that the waiver itself was arbitrary and capricious, fared no better. The South Dakota Board of Minerals and Environment had initially determined that a compacted clay liner was sufficient, and the district court in a previous decision had generally agreed with the Board's findings.[135] In that prior decision, the district court required a composite liner under applicable federal regulations in order to address concerns about the adequacy of a compacted clay liner and the leachate collection system, but made "the same findings" as the Board with respect to other tribal environmental concerns.[136] In the appeal from the EPA's final decision, the court found that the EPA had addressed the concerns about the leachate by the conditions that the agency attached to the waiver.[137] Thus the court concluded that the EPA's decision to waive the composite liner requirement was not unlawful.[138]

The district court's decision followed standard principles of administrative law. Under the *Chevron* doctrine, when there are gaps in a statute for the implementing agency to fill, federal courts will defer to the agency's expertise unless the regulation is arbitrary or capricious or contrary to law.[139] In the Yankton case, the EPA interpreted section 258.40(e) to per-

132. *Yankton v. EPA*, 950 F. Supp. at 1481. The court relied on RCRA § 4004, 42 U.S.C. § 6944(a), which directed the EPA to "promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps," and RCRA § 4010, 42 U.S.C. § 6949a(c)(1) which directed the EPA to "promulgate revisions of the criteria [in § 6944(a)] for facilities that may receive hazardous household wastes." *Id.* at 1481.

133. *Id.* The court was referring to the December 5 memorandum placed in the Waste District's file. *See supra* text accompanying note 120.

134. *Yankton v. EPA*, 950 F. Supp. at 1481.

135. *Yankton* I, 890 F. Supp. at 891.

136. *Id.* at 890-91. The court agreed with the Board that a compacted clay liner would adequately address such concerns as "groundwater mounding, sand and gravel lenses, fissures, and lineaments, acquifers [sic], test borings, and methane gas collection." *Id.* at 891.

137. *Yankton v. EPA*, 950 F. Supp. at 1482.

138. *Id.*

139. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984) (discussed in *Yankton v. EPA*, 590 F. Supp. at 1480). Under *Chevron*, federal courts have generally deferred to the EPA's reconciliation of federal environmental statutes and federal In-

mit an owner/operator to seek a waiver, and the district court deferred to the agency's interpretation as reasonable. In cases involving Indian tribes, however, the standard principles of administrative law should not necessarily exhaust the court's inquiry into the agency's decision. Instead, the court should also determine whether the agency's decision was consistent with the federal trust responsibility to Indian tribes.[140]

The federal government generally has an obligation to act in the best interests of the Indian tribes,[141] an obligation that was expressly assumed by the EPA in its 1984 Indian policy.[142] The EPA policy provides that "[t]he agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments."[143] On March 14, 1996, three months before its final decision on the Waste District's waiver, EPA Region VIII promulgated its own Indian policy to implement the agency policies.[144] In its policy, Region VIII reiterated its responsibility to implement federal environmental programs in Indian country in the absence of an approved tribal or state program,[145] and provided as a general principle that "Region 8 [sic] will seek tribal government agreement before making decisions on environmental matters (other than certain enforcement actions) affecting tribal governments and/or tribal natural resources."[146]

Region VIII did consider the Yankton Sioux Tribe's environmental concerns about the proposed landfill,[147] and it attempted without success to mediate an agreement between the Tribe and the Waste District.[148] The

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dian law. *See, e.g.*, City of Albuquerque v. Browner, 97 F.3d 415, 422-23 (10th Cir. 1996) (deferring to EPA's interpretation of the Clean Water Act's "savings clause" as applied to Indian tribes), *cert. denied*, 118 S. Ct. 410 (1997); Washington Dep't of Ecology v. U.S. Environmental Protection Agency, 752 F.2d 1465, 1469 (9th Cir. 1985) (finding "[i]t is appropriate for us to defer to EPA's expertise and experience in reconciling these policies, gained through administration of similar environmental statutes on Indian lands."). *Cf.* Montana v. EPA, 137 F.3d at 1140-41 (deferring to the EPA's decision to adopt inherent tribal authority as the standard for granting tribal primacy, but refusing to defer to the EPA's interpretation of the scope of inherent tribal authority because that question "has nothing to do with [the EPA's] own expertise or with any need to fill interstitial gaps" in the Clean Water Act).

140. This argument was not considered by the district court, and apparently not raised by the Yankton Sioux Tribe.

141. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195, 232-33 (1984); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 113-33.

142. U.S. Environmental Protection Agency, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (1984) [hereinafter *EPA Indian Policy*]. The 1984 policy was expressly reaffirmed in 1991. *See EPA Concept Paper*, *supra* note 94, at 3.

143. *EPA Indian Policy*, *supra* note 142, at 3.

144. U.S. Envt'l Protection Agency, Region VIII, *EPA Region 8 Policy for Environmental Protection in Indian Country* (1996) [hereinafter *EPA Region VIII Policy*].

145. *Id.* at 11.

146. *Id.* at 2 (footnote omitted). The principle continued: "If no agreement can be reached, then a formal dispute resolution process can be invoked by either Region 8 [sic] or the tribal government." *Id.* (footnote omitted).

147. *Yankton v. EPA*, 950 F. Supp. at 1477-78.

148. *Id.* at 1478.

EPA thus appears to have complied with the letter of its Indian policy statements, particularly because the EPA concluded that the compacted clay liner, along with the conditions imposed by the EPA, would adequately protect the reservation environment.[149] The district court's decision that the EPA's grant of a waiver was reasonable thus seems supported by the evidence.

However, it may have been equally reasonable for the EPA to narrowly interpret section 258.40(e) to prohibit waiver applications by non-Indian owner/operators of landfills in Indian country in unapproved states,[150] or to find that the basic federal composite liner requirement should apply in this case. And where there are two reasonable alternative interpretations of a statute or its implementing regulations, the agency should be under a trust duty to choose the alternative that best protects tribal interests.

For example, the Indian Mineral Leasing Act of 1934[151] was designed in part to assure tribes "the greatest return" from their mineral interests.[152] The Secretary of the Interior has a trust obligation to safeguard and maximize tribal returns from mineral leasing.[153] Therefore, where the Secretary has a choice of two reasonable alternative methods of determining royalties

149. *Id.* at 1478-79.

150. The district court suggested that it would not be reasonable for the EPA to accept a tribe's petition for a waiver under § 258.40(e). *Yankton v. EPA*, 950 F. Supp. at 1480 n.11. The court relied on the opinion in *Backcountry*, 100 F.3d 147, which held that the EPA could not treat tribes as states under RCRA because RCRA defined tribes only as municipalities. The court's suggestion, however, seems plainly inconsistent with its approval of the EPA's site-specific rule allowing the owner/operator (which is not a state) to petition for a waiver, even though the plain language of § 258.40(e) does not permit it. *See Yankton v. EPA*, 950 F. Supp. at 1481-82.

Although the court indicated that tribes as governments could not seek waivers, tribes as owner/operators of landfills may take advantage of the EPA's use of site-specific waiver rules. Thus, for example, the EPA has proposed a site-specific rule to allow the Salt River Pima-Maricopa Indian Community a waiver of two federal requirements for the municipal landfill operated by the tribe. *See* Salt River Pima-Maricopa Indian Community; Tentative Approval of an Alternative Liner System Design and Use of Alternative Daily Cover Material for the Salt River Municipal Solid Waste Landfill, 63 Fed. Reg. 25,476 (1998).

Nonetheless, if the district court is correct in *Yankton v. EPA* that the EPA cannot permit tribes as governments to seek a waiver, then tribes are left in a very awkward position with respect to landfills on fee lands. The court approved the EPA's site-specific rule allowing the owner/operator of a landfill in Indian country to seek a waiver. The court also held that the EPA acted unlawfully in refusing to accept the state's waiver petition. *Id.* at 1480. In other words, because states do not have permit authority in Indian country, Indian country apparently qualifies as an "unapproved state" for purposes of § 258.40(e), allowing the state to seek a waiver. It thus appears, under the court's ruling, that the owner/operator can seek a waiver and the state government can seek a waiver, but the Indian tribe, the government in whose territory the landfill will be constructed, cannot. But that approach is contrary to the federal trust responsibility toward the tribes and the government-to-government relations that the EPA has promised in its policy statements, and should, therefore, be unreasonable.

151. 25 U.S.C. §§ 396a-396g (1994).

152. *See* S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938).

153. *See* Kenai Oil & Gas, Inc. v. Dep't of Interior of U.S., 671 F.2d 383, 386 (10th Cir. 1982) (finding that the Secretary "is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues"); Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1565 (10th Cir. 1980) (Seymour, Circuit Judge, concurring in part and dissenting in part) (holding that the Secretary must ensure tribes the maximum benefits from their mineral resources). In the *Supron* case, Judge Seymour's dissent on the breach of trust issue was subse-

from mineral leasing, the Secretary is obligated under the trust relationship to choose the method that results in the highest return for the tribes.[154]

If that standard is applied to the EPA, then it is not sufficient that the agency's decisions to accept the Waste District's petition and to grant the waiver were reasonable and not arbitrary or capricious. Instead, the question should be whether other proposed interpretations of RCRA and its implementing regulations were also reasonable. If so, the ultimate issue for the court would be which of the reasonable alternative interpretations would best protect the Tribe's interests. Under the trust relationship and the EPA's policy documents, the EPA's reasonable interpretation would be upheld only if it resulted in the greater protection of tribal environmental interests. Thus, for example, if it is reasonable to interpret section 258.40(e) to bar waiver applications from owner/operators in Indian country without the governing tribe's consent, and if that interpretation would better protect tribal environmental interests, then the rule adopted by the EPA permitting an owner/operator's petition would be contrary to the federal trust obligations and therefore unreasonable.

In the case of the Yankton landfill, it may well be that the EPA's decision to permit a compacted clay liner will fully protect the Tribe's environment. But the process by which that decision was reached is rife with problems. First, the Waste District offered to install a composite liner, and the district court relied on that offer in part in finding that the Tribe's environmental concerns had been addressed by the landfill design.[155] Next, the Waste District did not appeal the district court's ruling or seek a waiver from EPA Region VIII, but instead lobbied the EPA Administrator for a change in agency policy.[156] When that failed, EPA Region VIII crafted a rule that permitted the Waste District to seek a waiver of the composite liner requirement, and granted that waiver for a landfill in Indian country over the objections of the Yankton Sioux Tribe.[157] That process, even if it results in an environmentally sound landfill, is not one designed to engender confidence in Indian tribes that their environmental concerns are taken seriously by the federal trustee.

IV. Reservation Diminishment

Whatever barriers the Yankton Sioux Tribe had faced in attempting to protect its environment were dwarfed by comparison when the United States Supreme Court declared that the environment was not the Tribe's to protect.[158] In January 1998, the Court ruled that the landfill site had been

quently adopted by the majority of the circuit court. *See* Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855, 857 (10th Cir. 1986) (en banc).

154. *Supron*, 728 F.2d at 1567, 1569.

155. *Yankton* I, 890 F. Supp. at 890-91.

156. *Yankton v. EPA*, 950 F. Supp. at 1474-75.

157. *Id.* at 1477-78.

158. *Yankton* III, 118 S. Ct. 789.

diminished from the Yankton Sioux Reservation.[159] Because the site is no longer Indian country, the State of South Dakota "has primary jurisdiction over the waste site."[160]

The Court's determination rested on the fact that the landfill was located on former surplus lands of the Yankton Sioux Reservation. The property purchased by the Waste District for its landfill was deeded to a non-Indian in 1904 under the Homestead Act.[161] Because none of the land allotted to Yankton Sioux tribal members was alienable in 1904, the landfill site must have been part of the surplus lands to which the Tribe ceded title in 1892.[162] The issue, then, was whether the 1892 agreement and its 1894 implementing statute not only ceded tribal title to the surplus lands, but diminished those lands from the Yankton Sioux Reservation.[163]

To answer that question, the Court had to determine whether the intent of the Yankton Sioux surplus lands act was to terminate the reservation status of the surplus lands, or merely to give non-Indians "the opportunity to purchase land within established reservation boundaries."[164] To ascertain which approach Congress intended in the case of the Yankton Sioux, the Court turned to the analytical structure it has used in diminishment cases since 1984.[165] The primary issue, and "the most probative evidence" of diminishment, is the language of the surplus lands act itself.[166] In addition, the Court will consider other factors — the historical context of the act, the subsequent treatment and jurisdictional history of the area, and the modern demographics of the surplus lands[167] — although the Court has always found that those factors support its reading of the language of the statute.

Turning first to the language of the Yankton Sioux act, the Court noted that the Tribe was required to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unal-

159. *Id.* at 805. In *Yankton* I, the district court concluded that the 1858 Yankton Sioux Reservation had not been diminished, and the Eighth Circuit affirmed this ruling in October 1996. *Yankton* II, 99 F.3d at 1457.

One of the most troubling aspects of the decision in *Yankton* III was the fact that it was unanimous. In the Court's last diminishment case, Justice Souter joined Justice Blackmun in dissent. *See* Hagen v. Utah, 510 U.S. 399, 422 (1994). By 1998, however, Justice Blackmun had retired and Justice Souter was either worn down or won over by the other justices.

Professor Getches has noted the Court's increased subjectivism and departure from any foundationalist principles of Indian law. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996). He held out the hope, however, that one of the newly appointed justices would assume intellectual leadership in Indian law and restore at least some measure of principled decisionmaking. *Id.* at 1631. After *Yankton* III, that hope seems further away.

160. *Yankton* III, 118 S. Ct. at 805.

161. *Id.* at 796.

162. *Id.* at 796-97.

163. *Id.* at 793.

164. *Id.* at 798 (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)).

165. *Id.* at 798. The structure was announced in *Solem*, 465 U.S. at 470, in an only partially successful attempt to organize the Court's prior diminishment jurisprudence. *See* Royster, *supra* note 5, at 29-43.

166. *Yankton* III, 118 S. Ct. at 798 (quoting *Hagen*, 510 U.S. at 411).

167. *Id.* at 798.

lotted lands within the limits of the reservation" in exchange for a sum certain of $600,000.[168] This type of surplus lands statute, containing both an express reference to cession and a fixed-sum payment, constitutes "an almost insurmountable presumption" that Congress intended to diminish the surplus lands from the reservation.[169] Had the Yankton Sioux surplus lands act contained no other language than that quoted, then, the Court would likely have been justified, based on the past two decades of diminishment cases, in finding that the surplus lands had been terminated from the reservation.[170]

But the Yankton Sioux act did contain other, crucial language. Article XVIII of the act provided that:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.[171]

One of the provisions of the 1858 treaty, of course, was the establishment of the Yankton Sioux Reservation boundaries.[172] The Tribe, and its amicus the United States, thus argued that the surplus lands act ceded title to the lands without altering the reservation boundaries established in the 1858 treaty.[173]

The Court dismissed this argument as "an absurd conclusion" that would "eviscerate[ ] the agreement in which it appears."[174] Instead, the Court held, the savings clause applied only to the continuation of annuities promised under the 1858 treaty, and not to the continuation of the reserva-

168. *Id.* (quoting Article I of the 1894 Yankton Sioux surplus lands act).

169. *Solem*, 465 U.S. at 470-71; *see also Yankton* III, 118 S. Ct. at 798; *DeCoteau*, 420 U.S. at 445. Prior to *DeCoteau*, however, the Court required explicit language of termination before it would find the surplus lands disestablished from the reservation. *See* Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 354 (1962) (language that surplus lands were to be "vacated and restored to the public domain" was sufficient to terminate); Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973) (language that reservation "is hereby discontinued" and reservation boundaries "abolished" sufficient to terminate).

170. Justice Douglas, however, writing in dissent in *DeCoteau*, argued that not all cession-and-sum-certain surplus lands acts terminated the lands from the reservations. *See* 420 U.S. at 466 (Douglas, J., dissenting). He argued that the Court should avoid creating the kind of checkerboard that in fact results from the *Yankton* III and *DeCoteau* decisions. To avoid unnecessary checkerboarding, he distinguished between a surplus lands act that ceded all title to a described tract of land for a sum certain, and one that ceded all title for a sum certain to the scattered parcels remaining after allotment. Even if the former created a presumption that the tract of land was terminated from the reservation, the latter should not. The Court, however, has not adopted Justice Douglas' approach.

171. Act of Aug. 15, 1894, 28 Stat. 286, 318 (quoted in *Yankton* III, 118 S. Ct. at 795 n.1).

172. Treaty of Apr. 19, 1858, Art. I, 11 Stat. 743, 744.

173. *Yankton III*, 118 S. Ct. at 799.

174. *Id.* (quoting United States v. Granderson, 511 U.S. 39, 56 (1994)). The *Granderson* decision involved an interpretation of the United States Sentencing Guidelines in the case of a letter carrier who pleaded guilty to destruction of mail. Granderson, 511 U.S. at 56. The case had nothing to do with Indian law or the interpretation of Indian treaties.

tion borders.[175] In reaching that conclusion, the Court turned a blind eye to the ironic, the rule of statutory interpretation that language should not be read as redundant, and the Indian law canons of construction.

The Court found that "the most plausible interpretation" of Article XVIII was to preserve the Tribe's annuities of "cash, guns, ammunition, food, and clothing" guaranteed in the treaty of 1858.[176] That finding was based on what the Court described as "the Tribe's evident concern" with preserving the 1858 obligations.[177] With a remarkable lack of irony, the Court explained that it knew this because the government negotiator, Commissioner John J. Cole, had told the Yankton Sioux that they could either sign the surplus lands agreement or the government would see them starve.[178] The Court even quoted Cole's sign-or-starve ultimatum to support its statement that "members of the Tribe clearly perceived a threat to the annuities."[179]

Certainly when the federal government threatens to breach its treaty obligations to provide annuities as an inducement to a surplus lands agreement, the Indian tribe is right to be concerned and to bargain for an explicit statement that the government will abide by its existing treaty promises. And the Yankton Sioux did precisely that in the portion of Article XVIII that provides "and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858."[180] If that phrase constituted the full text of Article XVIII, then the Court's finding that the savings clause did not save the reservation boundaries might be reasonable.

Article XVIII, however, says much more. In addition to preserving the annuities under the 1858 treaty, the savings clause states that "*all provisions*" of the treaty "shall be in full force and effect, the same as though this agreement had not been made."[181] The Court, however, literally read this language out of the surplus lands act. It recognized that a standard rule of statutory construction calls for avoiding an interpretation that "renders some words altogether redundant," but then found that rule inapplicable

175. *Id.* at 800.
176. *Id.* at 799.
177. *Id.* at 800. The Court noted that the Yankton Sioux historian testified that the loss of rations would have been "disastrous" for the Tribe. *Id.* at 799.
178. *Id.* at 799-800. Cole told the Yankton Sioux:

> I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. . . . Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result! Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.

Id. (quoting Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. No. 27, at 74).
179. *Yankton* III, 118 S. Ct. at 799.
180. Act of Aug. 15, 1894, 28 Stat. 286, 318 (quoted in *Yankton* III, 118 S. Ct. at 795 n.1).
181. 28 Stat. at 318 (emphasis added).

because "it seems most likely" that the general savings language and the specific language regarding annuities were both intended to preserve the 1858 treaty payments.[182]

The Court supported this bizarre statement by noting that it could not identify any other provision of the 1858 treaty that the Tribe could have intended to preserve, "other than those plainly inconsistent with" the surplus lands act.[183] The Tribe, however, believed that it intended to preserve the provision of the 1858 treaty setting out the reservation boundaries.[184] And nothing in the preservation of the 1858 boundaries is inconsistent with the surplus lands act. The cession of the surplus lands for a sum certain may have created "an almost insurmountable presumption" of diminishment, but the presumption should have been surmounted by the express language of Article XVIII, continuing "all provisions" of the 1858 treaty in full force and effect.[185] That interpretation would have given effect to all the words of Article XVIII, without departing from the Court's diminishment jurisprudence.

Interpreting Article XVIII to save the reservation boundaries would also have given effect to the Indian law canons of construction. Traceable to the Marshall cases in the early 19th century,[186] the canons provide that treaties and statutes should be construed, and ambiguities should be resolved, in favor of the tribes.[187] In the case of the Yankton Sioux surplus lands act, the Court expressly recognized that the canons applied: "Throughout this inquiry, 'we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.'"[188] In theory, then, the Court interpreted the Yankton act in light of those canons.

In practice, it disposed of the canons with barely a mention.[189] Based

182. *Yankton* III, 118 S. Ct. at 800 (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995)). The *Gustafson* decision involved an interpretation of the Securities Act of 1933. *Gustafson,* 513 U.S. at 561. Whatever weight the redundancy rule has in the interpretation of statutes such as the Securities Act, it should have particular force in the construction of Indian treaties when the "redundant" language was intended to preserve tribal rights.

183. *Yankton* III, 118 S. Ct. at 800.

184. *Id.* at 799.

185. Because of the savings clause, the surplus lands act would have transferred only title to the surplus lands and not dominion over them. The lands would thus have been opened to homesteaders while the reservation boundaries remained intact. That reading of the savings clause is fully consistent with the language of cession.

186. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice John Marshall construed language in treaties with the Cherokees giving the federal government the right of "managing all their affairs." *Id.* at 553. Marshall found that it was "inconceivable" and not "credible" that the Cherokee Nation could have understood the treaty language to divest it of any rights of self-government not connected to external trade matters. *Id.* at 554. In concurrence, Justice McLean articulated the foundations of the modern canons of construction: "The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." *Id.* at 582 (McLean, J., concurring). *See also generally* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

187. *See* COHEN, *supra* note 13, at 221-24.

188. *Yankton* III, 118 S. Ct. at 798 (quoting *Hagen*, 510 U.S. at 411).

189. *Yankton* III is not the first diminishment case in which the Court has recited the canons and then refused to apply them. *See also DeCoteau*, 420 U.S. at 444; *Hagen*, 510 U.S. at 411.

on the "clear expressions" of intent in the cession and sum-certain language of the surplus lands act, and "a reasonable interpretation" of Article XVIII, the Court held the surplus lands diminished from the reservation.[190] The problem is that the canons do not call for *any* reasonable interpretation of statutory language, but for an interpretation which resolves ambiguities in favor of the tribes.

In order for the Court to interpret Article XVIII as it did, the Court necessarily found no ambiguity whatsoever in the language of the savings clause. But that defies common sense. The savings clause expressly preserves the Tribe's right to its 1858 annuities and, in addition, provides that "[n]othing in this agreement shall be construed to abrogate" the 1858 treaty and that "all provisions" of that treaty "shall be in full force and effect, the same as though this agreement had not been made."[191] That language is not clear on its face: the meaning of the language preserving "all provisions" of the existing treaty requires, in light of the cession of the surplus lands, judicial interpretation. The Court itself looked to the history of the 1892 negotiations in order to construe the language of Article XVIII in favor of diminishment.[192] And therein lies the rub. If it was necessary for the Court to examine the negotiations in order to discern the meaning of Article XVIII, then Article XVIII must be ambiguous.[193] And if the clause is ambiguous, then the canons of construction call for that ambiguity to be resolved in favor of the Yankton Sioux Tribe. This the Court refused to do.

The Yankton diminishment case is unfortunately typical of the Court's current approach to the canons of construction. The Court will recite the canons, state that they apply, and then interpret the treaty or statute at issue to find that no ambiguity exists.[194] Although the act of treaty or statutory interpretation itself should be subject to the canons, the Court will not employ them until after it has determined that "a reasonable interpretation" of the treaty or statute counsels against finding any ambiguity.[195] And in the absence of ambiguity, there is no need to interpret the treaty or statute in favor of the Indian tribes. Thus in the Yankton diminishment case, the Court found no reason to detect ambiguity in the language of Article XVIII or, consequently, to construe that language in favor of the Yankton Sioux Tribe.

Having thus found, contrary to the canons of construction, that the "plain terms" of the Yankton surplus lands act contemplated diminishment, the Court turned to the remaining factors of its diminishment jurisprudence: contemporaneous understanding, subsequent treatment, and mod-

190. *Yankton* III, 118 S. Ct. at 801.
191. 28 Stat. at 318.
192. *Yankton* III, 118 S. Ct. at 799-800.
193. If the clause was not ambiguous, the Court could have construed it by reference to the plain language alone, without resorting to extraneous sources.
194. *See generally* Royster, *supra* note 5. *See also* Getches, *supra* note 159, at 1620-22.
195. *See Yankton* III, 118 S. Ct. at 801.

ern demographics.[196] Although the Court found that none of those factors, taken alone, would compel a finding of diminishment, neither did any of the factors overcome the Court's interpretation of the surplus lands act.[197]

In its discussion of the additional diminishment factors, the Court first examined the contemporaneous understanding of the parties, relying primarily upon statements of Commissioner Cole, the government negotiator.[198] Cole told the Tribe that it "must break down the barriers and invite the white man with all the elements of civilization,"[199] words which the Court said "strongly suggest a reconception of the reservation."[200] Coupled with statements in the negotiator's report and by tribal members that the agreement would sever tribal relations,[201] and scattered congressional references that the surplus lands would become part of the public domain,[202] the Court found that Cole's remarks supported a contemporaneous understanding that the surplus lands agreement terminated those lands from the reservation. The subsequent treatment of the area by Congress and the Executive, the Court stated, was so "contradictory" and "inconsistent" that it offered no assistance on the diminishment question one way or the other.[203]

Finally, the Court turned to the modern demographics and the concept of "de facto" diminishment.[204] Although the idea of de facto diminishment is plainly inconsistent with the Court's repeated assertions that only Congress can diminish Indian country,[205] the Court has used the concept for two decades to support its reading of the language of the surplus lands acts.[206] The Court did so again in the Yankton case. It noted the state's

196. *Id.* at 802.

197. *Id.*

198. *Id.*

199. *Id.* (quoting Council of the Yankton Indians (Dec. 17, 1892), transcribed in S. Exec. Doc. No. 27, at 81).

200. *Id.* The ambiguity here is manifest. Language which at most "suggests" diminishment should not be construed to accomplish it.

201. *Id.* at 802-03.

202. *Id.* at 803. In the first of the Court's diminishment cases, it noted that language in a surplus lands act that "vacated and restored [the lands] to the public domain" was sufficient to terminate the lands from the reservation. *Seymour*, 368 U.S. at 354. Over a decade later, the Court relied in part on "public domain" language found not in the act, but in remarks by the sponsors of the legislation. *DeCoteau*, 420 U.S. at 441.

203. *Yankton* III, 118 S. Ct. at 803.

204. *Id.* at 804.

205. *See, e.g.*, *Yankton* III, 118 S. Ct. at 798 (finding that "only Congress can alter the terms of an Indian treaty by diminishing a reservation").

206. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); *Solem*, 465 U.S. 463; *Hagen*, 510 U.S. 399.

In *Rosebud*, the Court examined the "subsequent jurisdictional history" of the opened lands, finding that state jurisdiction both demonstrated the intent of the surplus lands act and created "justifiable expectations" on the part of non-Indians. *Rosebud*, 430 U.S. at 605. As part of that inquiry, the Court recited the demographics: that the surplus lands had become "over 90% non-Indian, both in population and in land use." *Id.* The Court thus found that the subsequent treatment of the area supported diminishment. *Id.*

By contrast, in *Solem*, 465 U.S. at 480, the Court concluded that the surplus lands retained their "Indian character" because of a "strong tribal presence" in the area. The population was about evenly split between tribal members and nonmembers, about two-thirds of the members

assumption of jurisdiction over the surplus lands, the "prompt[ ] and drastic[ ]" decline in tribal population, the small percentage of lands within the 1858 reservation boundaries that remain in Indian ownership, and the presence of several municipalities incorporated under South Dakota law.[207] These facts, the Court stated, constituted the "least compelling" evidence of diminishment, but nonetheless provided "one additional clue" of congressional intent to diminish the surplus lands.[208]

A considerably different picture of the demographics emerges, however, if all the facts are taken into account. The Eighth Circuit determined that demographic changes which occurred shortly after the surplus lands act took effect were more probative of congressional intentions than changes that took place over time.[209] It then noted that in 1900, "more than 53 percent of the land was allotted to tribal members who composed at least 40 percent of the population;" based on those demographics, the court concluded that the surplus lands retained their "Indian character" in the years following the surplus lands act.[210] In modern times, the court found that between 32 and 44 percent of the population within the 1858 reservation boundaries is Indian.[211] The court rejected property ownership as a reliable indicator because almost two-thirds of the Indian households within the 1858 reservation rented their homes.[212]

Both the Eighth Circuit and the Supreme Court noted the recent reversal of historic population trends, including a rapid increase in tribal population in recent years and a substantial tribal impact on the local economy from the 1991 opening of a tribal casino.[213] The two courts, however, differed markedly in the significance they attached to the post-1990 demographics. The Eighth Circuit concluded that tribal members comprised "a significant portion of the population of the treaty area, and their numbers and economic influence are increasing."[214] The Supreme Court, by contrast, focused on the fact that "the area remains 'predominantly populated by non-Indians with only a few surviving pockets of Indian allotments,' and *those* demographics signify a diminished reservation."[215] By concentrating on the snapshot factors of land ownership and relative population strength, rather than the evolving factors of tribal population size

lived in the surplus lands area, and the seat of tribal government was located there. The demographics, therefore, supported the Court's ruling that the reservation remained intact. *Id.*

In the Court's most recent diminishment case prior to *Yankton* III, the Court again relied on the demographics to support its finding of diminishment. In *Hagen*, 510 U.S. at 421, the Court noted that the population of the surplus lands was presently 85% non-Indian, and the population of the largest city in the area was over 90% non-Indian. Moreover, the tribal headquarters was not found in the area, but rather was located on trust lands. *Id.*

207. *Yankton* III, 118 S. Ct. at 804.
208. *Id.* (quoting *Solem*, 465 U.S. at 472).
209. *Yankton* II, 99 F.3d at 1457.
210. *Id.*
211. *Id.*
212. *Id.* n.25.
213. *Id. See also Yankton* III, 118 S. Ct. at 804.
214. *Yankton* II, 99 F.3d at 1457.
215. *Yankton* III, 118 S. Ct. at 804 (quoting *Solem*, 465 U.S. at 471 n.12) (emphasis added).

and economic activity, the Court was able to find that the demographics supported its finding of diminishment of the surplus lands.

Despite the Court's willingness to use modern demographics in determining congressional intent, it was not willing to use modern federal Indian policy to the same end. The Court recognized that the allotment policy which spawned the surplus lands acts has been long repudiated and replaced with a government-to-government relationship aimed at protecting and promoting tribal self-government.[216] Nonetheless, the Court stated, "we must give effect to Congress' intent in passing the 1894 Act."[217] The Court failed to explain, however, why it feels compelled to give continuing effect to the allotment era policies and statutes, when an interpretation of the surplus lands acts that is consistent with the canons of construction would also further the modern congressional and executive policy of tribal self-determination.[218]

Ultimately, then, the Court held that the surplus lands, but *only* the surplus lands ceded by the 1894 act, were diminished from the Yankton Sioux Reservation.[219] All other lands within the 1858 reservation boundaries — tribal trust lands, trust allotments, and former allotments held in fee — remain a part of the Yankton Sioux Reservation and, as such, Yankton Sioux Indian country.[220] Nonetheless, because the landfill was located on former surplus lands of the reservation, the landfill site was no longer Indian country, but subject to the "primary jurisdiction" of the State of South Dakota.[221]

The question now is what the Court's diminishment ruling means for environmental protection in Yankton Sioux Indian country. The Court's ruling does not sever a compact, clearly defined area from the 1858 Yankton Sioux Reservation. Allotments to Yankton tribal members were "scattered throughout the reservation,"[222] although many of the tracts were "clustered in the southern part, near the Missouri River."[223] Thus the surplus lands, now diminished, are also scattered throughout the 1858 reservation, although presumably clustered in the northern part. But the end result of the Court's ruling is necessarily a checkerboard of Indian country without clearly delineated borders.

The next step is likely for the State of South Dakota to seek a determination that its municipal landfill permit program under RCRA extends to

216. *Id.* at 805. *See also supra* note 20.
217. *Yankton* III, 118 S. Ct. at 805.
218. *See* Royster, *supra* note 5, at 66; Robert N. Clinton, *The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation*, 28 ARIZ. L. REV. 29, 43 (1986).
219. *Yankton* III, 118 S. Ct. at 805.
220. Indian country extends to "all land within the limits of any Indian reservation." *See* 18 U.S.C. § 1151(a) (1994). Because only the surplus lands were diminished, all other lands remain within the limits of the Yankton Sioux Reservation.
221. *Yankton* III, 118 S. Ct. at 805.
222. *Yankton* II, 99 F.3d at 1443.
223. *Yankton* III, 118 S. Ct. at 794.

the former surplus lands of the 1858 Yankton Sioux Reservation. Based on the EPA's response to the state's assertion of similar authority over the terminated lands on the Lake Traverse and Rosebud Sioux Reservations, the EPA will presumably grant the state's petition. The EPA determined that because the Supreme Court had found the Lake Traverse Reservation disestablished[224] and the Rosebud Reservation diminished,[225] the state was entitled to assume program authority over the disestablished or diminished lands.[226] Nonetheless, the EPA emphasized that the state's authorization extended only to the diminished or disestablished lands, and not to any lands within the original reservations that still qualified as Indian country.[227]

In the case of the Yankton Sioux, therefore, the EPA will undoubtedly grant program authority to the state over the former surplus lands, but retain federal authority over all lands within the 1858 reservation boundaries that still qualify as Indian country: tribal trust lands, trust allotments, and former allotments held in fee. As to those lands, which still comprise the Yankton Sioux Reservation, the EPA will not grant program authority to the state unless the state can demonstrate jurisdiction over all sources within the reservation.[228] Because the State of South Dakota has not been able to do so,[229] the EPA retains jurisdiction and federal regulations will govern landfills in Yankton Sioux Indian country.

The Court's ruling in the Yankton diminishment case should not affect the EPA's determination of South Dakota's jurisdiction. Nothing in the Court's decision alters the relevant principles of Indian law that the EPA employs to determine program authority in Indian country.[230] The diminishment of the surplus lands from the Yankton Sioux Reservation does not authorize the state to exercise jurisdiction over Indian lands within the Reservation.[231] And without regulatory jurisdiction over Indian lands, the state cannot demonstrate its authority to regulate all sources within Yankton Sioux Indian country.[232] Thus, although the state may now be granted authority over the former surplus lands, the EPA's determination that the state does not have jurisdiction within Yankton Sioux Indian country should remain intact.

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224. *See DeCoteau*, 420 U.S. 425.

225. *See Rosebud*, 430 U.S. 584.

226. South Dakota; Final Determination of Adequacy of State's Municipal Solid Waste Permit Program Over Non-Indian Lands for the Former Lands of the Yankton Sioux, Lake Traverse (Sisseton-Wahpeton) and Parts of the Rosebud Indian Reservation, 61 Fed. Reg. 48,683, 48,684 (1996).

227. *Id.*

228. *See supra* text accompanying note 94.

229. *See* South Dakota; Final Determination of Adequacy of State/Tribal Municipal Solid Waste Permit Program, 58 Fed. Reg. 52,486, 52,488 (1993); *see also* 61 Fed. Reg. at 48,685.

230. *See supra* text accompanying note 95. And certainly nothing in the ruling constitutes a congressional delegation of authority to the state. As noted previously, the EPA requires a state to prove jurisdiction over sources in Indian country under a congressional delegation or pursuant to principles of federal Indian law.

231. *See Yankton* III, 117 S. Ct. at 805.

232. *See supra* text accompanying note 95.

V. Conclusion

In 1892, government negotiator Cole warned the Yankton Sioux that they must "invite the white man with all the elements of civilization, that your young men may have the same opportunities under the new conditions that your fathers had under the old."[233] The irony is that Cole's words were prophetic more than a century later. Because of Congress' policy of allotment and assimilation, and because of the Court's insistence on giving modern effect to that repudiated policy,[234] today's generations of Yankton Sioux are facing the same conditions their ancestors did: the loss of land, the encroachment of the majority society, and the curtailment of tribal authority.

The Yankton landfill represents a microcosm of the effects and aftereffects of the allotment years. During the late nineteenth century, the Yankton Sioux Reservation was allotted and the surplus lands were sold and opened to homesteaders, who rushed to settle them. A century later, the Waste District purchased some of those surplus lands for the purpose of constructing a municipal landfill. Under the Court's *Montana* analysis, developed to restrict the modern governmental regulatory authority of those tribes subject to allotment, the district court held that the Yankton Sioux Tribe could not regulate the landfill even though it was located within the Tribe's territory. The EPA, although it had determined that the allotment-era legacy of fee lands did not entitle the state to regulate in Indian country, nonetheless authorized a waiver of federal regulations and permitted the landfill to proceed with a compacted clay liner. The Supreme Court itself went the final step, determining that the landfill site had been diminished from the Reservation altogether.

The Yankton Sioux Tribe is left with a landfill it does not want and cannot regulate, and a reservation that is comprised of checkerboarded parcels within the 1858 boundaries. Nonetheless, its environmental authority over its Indian country remains undisturbed. Those lands within the 1858 reservation boundaries that were not sold as surplus are still the Yankton Sioux Reservation. Within its reservation, the Tribe has full regulatory authority over Indian lands. It also has regulatory authority over fee lands if it can make the necessary factual showing that nonmember activities on those lands impact core tribal governmental interests. The State of South Dakota has demonstrated no jurisdiction to operate environmental programs on the Yankton Sioux Reservation, and until and unless the Tribe seeks jurisdiction, the EPA is responsible for environmental matters within the Reservation borders.

Professor Frank Pommersheim of the University of South Dakota has written eloquently of the reservation as place. The land, he explained, has

233. Council of the Yankton Indians (Dec. 17, 1892), transcribed in S. Exec. Doc. No. 27, at 81 (quoted in *Yankton* III, 118 S. Ct. at 802).

234. *See generally* Royster, *supra* note 5.

layers of meaning for Indian people. It is their "subsistence, it is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning . . . . [It is] also the complementary notion of a homeland where generations and generations of relatives have lived out their lives and destiny."[235] Less of the place now belongs to the Yankton Sioux. For the reservation that remains, however, the Tribe can work to counter the legacy of the allotment years and ensure that its environmental concerns are heeded.

235. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).