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PREVIEW

DISPOSSESSION TO DIMINISHMENT:
THE YANKTON SIOUX RESERVATION, 1858-1998

by

Beth R. Ritter

A DISSERTATION

Presented to the Faculty of

The Graduate College at the University of Nebraska

In Partial Fulfillment of Requirements

For the Degree of Doctor of Philosophy

Major: Geography

Under the Supervision of Professor David J. Wishart

Lincoln, Nebraska

April, 1999

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PREVIEW

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1858-1998

BY

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GRADUATE COLLEGE
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DISPOSSESSION TO DIMINISHMENT:
THE YANKTON SIOUX RESERVATION, 1858-1998

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University of Nebraska, 1999

Advisor: David J. Wishart

On January 26, 1998, the United States Supreme Court diminished the size of Yankton Sioux Reservation in South Dakota by roughly forty percent (*State of South Dakota v. Yankton Sioux Tribe*). The diminishment decision capped off more than one hundred and seventy years of dispossession of the Yanktons' land base and political sovereignty. The Yanktons' 430,405 acre Reservation was established in 1858 when they agreed to cede aboriginal title to more than eleven million acres in what is now eastern South Dakota. In return for their cession, the Yanktons were provided a reservation, annuities, and services. Consistent with the prevailing federal Indian policy of the day, the Reservation was allotted in severalty in the 1890s. After individual allotments were made, the remaining "surplus" lands were ceded back to the federal government (168,000 acres), resulting in a "checkerboarded" pattern of Indian and non-Indian land ownership. The 1998 Supreme Court decision held that the surplus lands (those ceded back to the government), no longer constituted Indian Country—under the meaning of the law.

This study analyzes the relationship of the historical dispossession of the Yankton Sioux land base to the subsequent diminishment of their Reservation. The current spatial patterns of land ownership and the previous checkerboarding of the Reservation are the

most important contributing factors to the current jurisdictional configuration on the Yankton Reservation. This study considers the entire span of Yankton dispossession in the nineteenth and twentieth centuries; with special emphasis on the process and impact of the alienation of the Yanktons' allotments, the jurisdictional consequences of reservation diminishment, and whether that diminishment has eroded the Yanktons' political sovereignty.

Finally, this study examines the precedent this case has established for the remainder of Indian Country and whether the actual composition of the Supreme Court is a salient factor in the diminishment of the Yankton Sioux Reservation.

PREVIEW

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CHAPTER ONE

INTRODUCTION:

Historical Geography and Jurisprudence on the Yankton Reservation

One's native land is the most important of all things on earth. Above all it is made holy through the ancestors who pass it on.

—Louis Riel (1885)

Land is the foundation on which the contemporary landscape of American Indian identity and tribal sovereignty are built. Tribal homelands are both a means to an end and an end unto themselves. In the current system, reservations provide shelter for American Indians from outright assimilation into the dominant culture. They provide a “place to be Indian”—a place to continue tribal traditions and to govern themselves in ways consistent with those values.

The alienation of tribal land through time has engendered a ripple effect which permeates all other areas of contemporary American Indian life. In particular, matters of tribal sovereignty, religious freedom (e.g., control of sacred sites), and economic development are inextricably tied to questions of ownership and jurisdiction over American Indian land. Of these, tribal sovereignty is the key. When tribal sovereignty is eroded all other factors in contemporary American Indian life suffer. The tragedy of the erosion of tribal sovereignty lies in the legacy handed down to subsequent generations who must endeavor to govern within an increasingly smaller “box.”

Tribal land has been alienated at an alarming rate since the founding of the United States.¹ The tide has turned in recent years, but the damage was done and is largely

irredeemable. Recently, the trend has turned towards eroding tribal sovereignty over lands originally granted as inalienable tribal enclaves (reservations). If this trend continues, it begs the questions of what place (if any) reservations have in this nation's future. The experience of the Yankton Sioux Tribe of South Dakota is illustrative.

On January 26, 1998, the United States Supreme Court handed down a decision that diminished the original boundaries of the Yankton Sioux Reservation in South Dakota.² The original boundaries, established by the Treaty of 1858, set aside 400,000 acres for the Yankton Reservation in southeastern South Dakota (Figure 1.1).³ This Reservation was granted when the Yanktons agreed to cede aboriginal title to more than eleven million acres to the United States. The recent *Yankton* decision effectively diminished the 1858 Treaty boundaries by nearly forty percent (168,000 acres). This portion of the Reservation had been ceded back to the government as "surplus land" after the Reservation was allotted in the 1890s.

Actual ownership of all but approximately 38,000 acres of the Reservation passed into non-Indian hands during the first half of the twentieth century when tribal members either sold or lost their allotments (Figure 1.2). Therefore, this case represents a diminishment of Yankton Sioux political jurisdiction over their Reservation, not an additional dispossession of their land, which was already substantially achieved.

The dispossession of the Indian land base and accompanying jurisdictional issues have been among the most litigious issues between American Indian tribes, states, and the United States.⁴ From the native perspective, the outcomes of such efforts have been cyclical; some important cases have been won, many have been lost.⁵

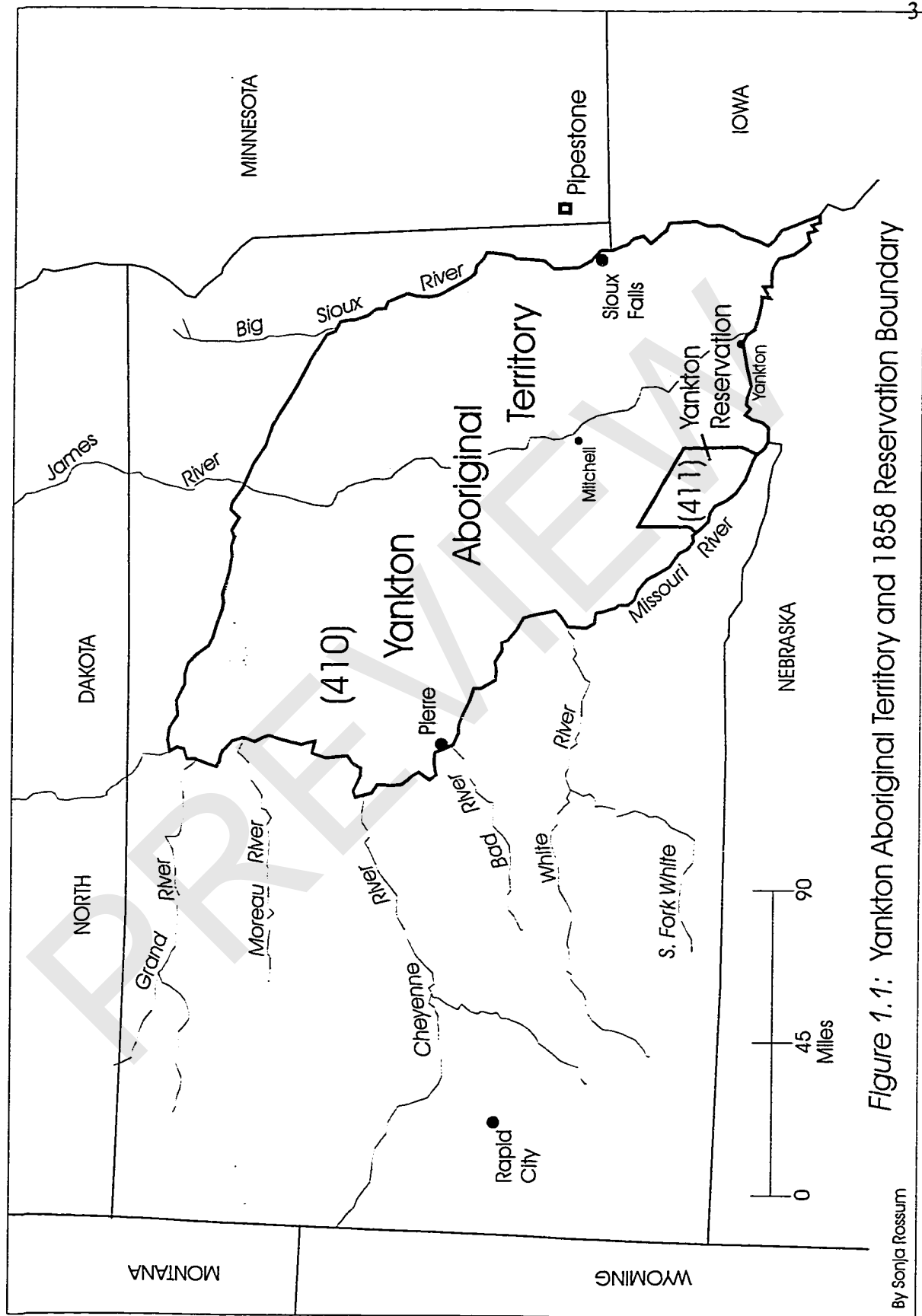
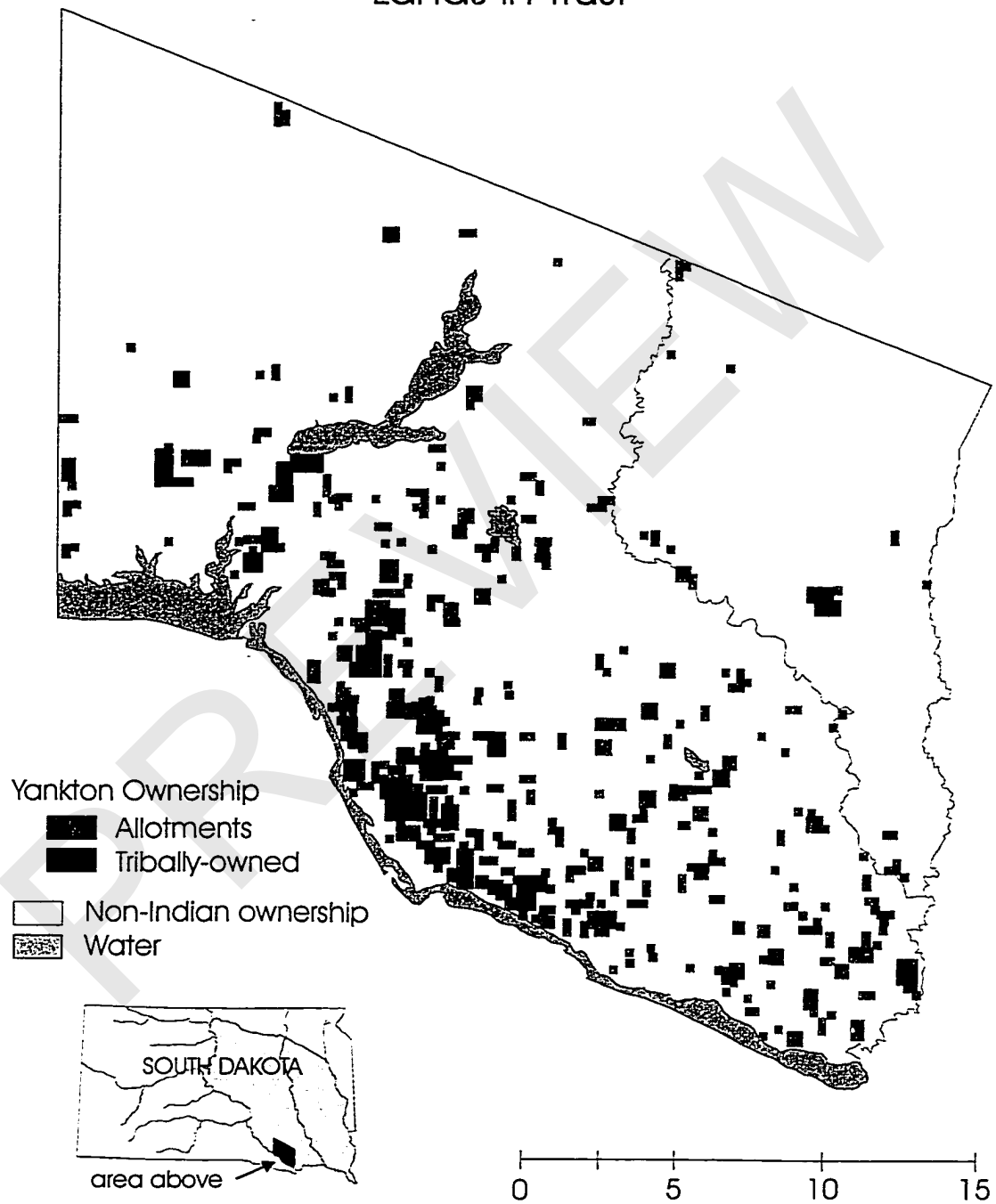


Figure 1.1: Yankton Aboriginal Territory and 1858 Reservation Boundary

By Sonja Rossum

Figure 1.2:
Yankton Reservation (1998)
Lands in Trust *



Source: BIA, Yankton Agency
(* or in the process of being placed in trust)

By Sonja Rossum

The United States Supreme Court, as the court of last resort, has emerged as a major player in defining the expression of tribal sovereignty and the continued territorial and jurisdictional integrity of the nation's reservations. Moreover, the composition of the Supreme Court, rather than the institution itself, has likely been the most important factor influencing these outcomes.⁶

The Supreme Court has exercised considerable influence over American Indians at the national, tribal and individual scales since Chief Justice John Marshall handed down landmark decisions in *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1830), and *Worcester v. Georgia* (1832).⁷ Known collectively as the "Marshall Trilogy", this set of cases established the legal framework of tribal/federal relations that persists today. The cases dealt, in part, with Indian title and focused on jurisdiction over Indian land. These cases set the precedent of disallowing state jurisdiction over reservations, in favor of exclusive federal jurisdiction. The significance of *Worcester* is that, "the Court recognized Indian tribes as separate political communities with geographical boundaries within which state laws held no power."⁸ This is one of the linchpins of modern tribal sovereignty.

When Chief Justice John Marshall christened Indian tribes "domestic dependent nations" (*Worcester v. Georgia*, 1832), the Court established the ward/guardian model that obligated federal fiduciary responsibility toward tribal members and tribal affairs—including tribal land. From a constitutional perspective, the Marshall Trilogy was an ingenious means to clarify Indian title (i.e., set up the means to extinguish Indian title) and simultaneously elevate federal supremacy over tribal affairs. From a tribal

perspective, the Court's decisions obliged American Indian tribes to recover, or maintain, their inherent sovereignty through the courts of their colonizers.

This study will examine the relationship of the historical dispossession of the Yankton Sioux land base to the subsequent diminishment of their Reservation. This study will also place the *Yankton* case within the context of previous reservation diminishment cases and examine the precedent this case has established for the remainder of Indian Country.

PURPOSE OF THE STUDY

The purpose of this study is to use the *Yankton* case to explore the geographic, politico-economic and social contexts of Supreme Court decisions affecting American Indian land and jurisdictional authority, specifically the corpus of Indian law known as "reservation diminishment." This study will synthesize and interpret the dispossession of the Yankton Reservation and reservation diminishment case law. The following specific questions will be addressed: 1) What were the processes and patterns of Yankton Sioux dispossession from 1858 to 1998; 2) What relevance, if any, does dispossession of the Yankton Sioux tribal land base have to reservation diminishment; 3) What are the jurisdictional consequences of reservation diminishment for the Yanktons; and, 4) How is the Yankton case similar/dissimilar to other diminishment cases and what precedent does the *Yankton* case set for future cases?

METHODOLOGY

This study is an exercise in historical geography informed by critical legal analysis. The primary methodology employed in this study is classic historical geography.⁹ The time period is 1858 (date of Reservation establishment) to 1998 (date of Reservation diminishment). A narrative synthesis has been constructed from primary historical sources. These documents will be used to reveal Yankton dispossession and general Reservation history. Archival documents pertaining to the Yanktons will be utilized, including government documents and agency records. Key sources for the dispossession portion include several primary sources, such as, the Annual Reports of the Yankton Agents and the Commissioner of Indian Affairs, allotment and other land records, the negotiation and legislative histories from the Yankton Agreement of 1892, and materials included in the Yanktons' Indian Claims Commission Docket 332. Secondary sources will be utilized to aid in interpretation of Yankton Reservation and dispossession history¹⁰ as well as federal Indian law.¹¹ The main sources on the diminishment issue are the actual decisions in the various cases and accompanying documents, as well as several law review articles analyzing the decisions.¹²

Until recently, Western society has viewed the law as "objective, discernible, and capable of being neutrally employed in human society."¹³ Traditionally, the order of law has been viewed as the bulwark of modern constitutional democracies. From this perspective, the law is typically viewed as an "institution" that embodies the normative ideals of Western society. Critical legal theory, the inspiration for critical legal geography, has challenged these assumptions.

Many geographers have studied the law from a geographic perspective.¹⁴

Recognizing the spatial components of the law is largely self-evident—particularly when the subject is as “mappable” as federal Indian law. As Blomley and Clark note, “law as an institution both helps create spatial structure and, in turn, is mediated and transformed within geographic contexts.”¹⁵ However, Blomley and Clark caution that “...to say that law *has* a geography and that geography is *shaped* by law, is not to say that law *is* geography.”¹⁶ Rather, the critical legal geography movement seeks to insert critical social theory into legal analysis, and ground that nexus in the geographical project.

Critical legal geography recognizes the territorial specificity inherent in the law as well as the social and political context of jurisprudence. It is a useful theoretical framework for the research questions examined in this study because the study assumes that political dimensions (federal Indian policy and the actual composition of the Court) as well as the social dimensions (the philosophical underpinnings and collective experiences of the Court) feature prominently in understanding why the Yankton Reservation was diminished. Critical “geojurisprudence”, seen in this light, is the nexus of geography and critical legal scholarship.¹⁷

Critical legal geography draws on “social theories to guide accounts of legal phenomena”.¹⁸ According to Chouinard,

...to study law critically is to grapple with how and why law works to perpetuate particular relations of social authority, power, exploitation and oppression...critical legal studies of law, by definition, are aimed at challenging the power of law to silence, marginalize and oppress.¹⁹

Increasingly, geographers have begun to challenge the law as a rational institution of

democracy. Proponents of this approach challenge geographers interested in jurisprudence to recognize not only the spatial components inherent in the law but to deconstruct legal discourse by stripping away the normative institution to reveal the underlying social and political bases of law and society in general.

Therefore, critical legal geography is a particularly useful framework for analyzing Supreme Court decisions regarding American Indian territorial sovereignty and the social and political nuances of reservation diminishment. This study will apply a “geographically informed critical legal analysis” to the dispossession of the Yankton Reservation and to reservation diminishment case and statutory law.²⁰

The temporal, spatial, and socio-political contextualization of legal discourse favors the use of a particularistic or case study approach. This study follows that logic because the case study approach is amenable to the nature of the individual relationships American Indian tribes have with the federal government. The formal legal and political relationships federally-recognized tribes have with the federal government are commonly characterized as “government to government” relationships.²¹ This “government to government” relationship is undergirded by the treaty relationship most tribes, including the Yanktons, have with the federal government. Further, the jurisprudence of Indian law is constructed on the merits of one case at a time—necessitating a careful case study approach to discern which elements of legal decisions are actually relevant.

Underlying the geojurisprudence of reservation diminishment is the larger milieu of federal Indian policy. In the time frame of the dispossession examined in this study, federal Indian policy has vacillated between favoring: (1) separatism—the establishment of